

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 215 EAL 2002
No. Misc.2002

MARK P. SOLOMON, M.D., and REGIONAL NEUROSURGICAL
ASSOCIATES, PC

Petitioners

v.

UNITED STATES HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC.
and AETNA, INC.

Respondents

**APPLICATION OF *AMICI CURIAE* THE AMERICAN MEDICAL
ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY FOR LEAVE TO
ADVISE THE COURT OF THEIR VIEWS REGARDING THE IMPORTANCE OF
THE ISSUES PRESENTED IN THE PETITION FOR ALLOWANCE OF APPEAL**

The American Medical Association (the “AMA”) and the Pennsylvania Medical Society (the “Medical Society”), *amici curiae* in support of Petitioners in the Superior Court, respectfully move, pursuant to Rules 123 and 531(a), Pa.R.A.P., that they be permitted to participate in the Court’s consideration of the Petition for Allowance of Appeal at No. 215 EAL 2002 to the limited extent of advising the Court of its views, as set forth at ¶¶6-15 below, regarding the importance of the issues the Petition presents. In support of this request, *amici* aver as follows:

**RULE 531(a), PA.R.APP.P. ALLOWS AN *AMICUS*, WITH LEAVE OF
COURT, TO PARTICIPATE IN A PETITION FOR ALLOWANCE OF APPEAL**

1. Rule 531(a) requires that an *amicus* must obtain leave of court to participate in a Petition for Allowance of Appeal.
2. Consistent with Rule 531(a), *amicus* applies for leave to advise the Court of its views as to the importance of the issues presented in the pending Petitions for Allowance of Appeal and to urge the Court to grant the Petition.
3. The *Amici* have participated broadly in this Court in matters of importance to physicians. In recent years, both *amici* participated in *Southard v. Temple University Hospital*, 781 A.2d 101 (Pa. 2001), while the Medical Society also participated in *Duttry v. Patterson*, 771

A.2d 1255 (Pa. 2001); *Witthoeft v. Kiskaddon*, 733 A.2d 623 (Pa. 1999) (a case important to the decision in this case); and *Emerich v. Phila. Ctr. for Human Dev., Inc.*, 720 A.2d 1032 (Pa. 1998).

4. *Amici* respectfully believe this is a case of substantial importance that warrants review by this Court. As reflected by *amici*'s participation here and in the Superior Court, this action has significance to persons beyond the caption of the case.

5. *Amici* do not seek leave to file a full brief but merely, as is done in the remainder of this Motion, to explain – briefly -- why *amici* have filed this Motion and why the Court should grant the Petition for Allowance of Appeal

THE PETITION PRESENTS ISSUES OF SUBSTANTIAL IMPORTANCE

6. The Petition arises from an HMO's repeated failure to pay participating physicians on a timely basis. This is a recurrent complaint of physicians throughout the Commonwealth and the country.

7. In response to this and other concerns about the operation of managed care plans, 47 states, including Pennsylvania, have either enacted statutes or promulgated regulations that impose time periods within which a managed care plan must pay physicians or pay interest. *See* §2166 of Pennsylvania's Quality Health Care Accountability and Protection Act, 40 P.S. §991.2166(a) (imposing requirement of payment within 45 days of submitting a "clean claim" and interest at an enhanced statutory rate of 10% for non-timely payments).

8. An important issue surrounding Act 68 and its counterpart statutes and regulations in other states is whether they provide physicians and other medical providers with a private right of action to enforce the prompt pay and interest mandates or instead only authorize administrative action and remedies by the State Insurance Department or other applicable state agency.

9. The Petition for Allowance of Appeal presents that issue.

10. The Superior Court held that there was no private cause of action.

11. *Amici* believe that the Superior Court, in determining that there was no private cause of action, misapplied the tests established in *Witthoeft v. Kiskaddon*, 733 A.2d 623 (Pa. 1999), for reasons more fully set forth in *amici's* Brief filed in Superior Court. To the contrary, *amici* believe that when, as in §2166, the Legislature has established standards that regulated entities must satisfy in their conduct with those with whom they contract, the courts, absent the clearest of contrary authority, should find a private right of action and enforce those standards even when they are not specified in the contract.

12. . As a practical matter, if §2166's entitlements to timely payment (and, in some instances, to any payment at all) and interest cannot be enforced by medical providers in court, they are wholly illusory absent an HMO's voluntary compliance. The state administrative agencies that enforce Act 68 have no authority to vindicate providers' rights to timely payment and, in the absence of timely payment, to enhanced interest; the Insurance and Health Departments can penalize a non-compliant HMO, can enjoin it, and can require it to submit a plan of correction, but they cannot order "make whole" relief to those medical providers whose rights to timely payment/interest the HMO has violated. See 40 P.S. §§991.2182(a, c, and e) (listing "[p]enalties and sanctions"). Confirming this limitation, in 2001 the Insurance Department imposed a substantial fine upon Aetna for its violations of §2166 but provided no make-whole relief to the medical providers whom Aetna's practices had harmed. This litigation seeks to do so.

13. Simply stated, a private cause of action is not merely consistent with the purpose of §2166, but is essential to vindicate the rights there established.

14. The Florida District Court of Appeal, ruling on this issue under an analogous "prompt payment" statute, recently held that the statute authorized a private right of action. *See Foundation Health v. Garcia*, 2002 WL 805029 (Fla. App. 3 Dist. 2002).

15. The Petition presents other issues of importance also warranting review, including the following:

A. Aetna's actions violate its duty of good faith and fair dealing, which, as the Superior Court correctly recognized, are implied into every Pennsylvania contract. The Superior Court incorrectly concluded that a corporate policy of "slow payment" did not violate that duty. Imposing this duty in a meaningful way into the HMO-provider contract is particularly important because these are adhesion contracts. The adhesion nature of the contracts arise from the parties' disparate market power. In 2000, Aetna insured nearly 50% of the HMO enrollment in Southeastern Pennsylvania; they thus control a physician's ability to continue to treat a substantial number of his or her patients. As a result, physicians have little practical freedom not to contract with HMOs and little ability, as this case demonstrates, to negotiate contract terms. Aetna's defense -- that it has habitually paid claims on a late basis, and that the plaintiff physicians have continued to participate -- demonstrate this point. Parties with the power to negotiate would require that course of conduct be altered.

B. The Superior Court's holding that Aetna's contract permits it to pay physicians whenever it wants to and to never pay interest violates "hornbook law" under the Restatement (Second) of Contracts, §204, and numerous Pennsylvania appellate decisions. When a contract specifies no time within which a contract obligation must be performed, that obligation must be performed in a "reasonable" time. *See, e.g., Field v. Golden Triangle Broadcasting*, 305 A.2d 689 (Pa. 1973), cert. denied, 414 U.S. 1158 (1974) (implying a closing date for an agreement when the agreement specified none); *Lefkowitz v. Hummel Furniture Co.*, 122 A.2d 802, 804 (Pa. 1956) (implying time for completion of construction terms and specifications); *ContiMortgage Corp. v. Mortgage America, Inc.*, 47 F.Supp.2d 575, 577 (E.D. Pa. 1999) (implying time limit for exercising contractual right to demand certain remedies).

The Court should grant review as to these two important issues.

For these reasons, *amici curiae* the American Medical Association and the Pennsylvania Medical Society respectfully request that the Court grant this Application and consider the views expressed in this Application, at ¶¶ 6-15, as the Court determines whether to grant the Petition for Allowance of Appeal in this matter.

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