

RECENT PENNSYLVANIA DECISION REQUIRES DISCLOSURE OF MEDICAID MANAGED CARE RATES

Mark H. Gallant • 215.665.4136 • mgallant@cozen.com
Gregory M. Fliszar • 215.665.7276 • gfliszar@cozen.com

Commonwealth Court holds that provider agreements with Medicaid managed care plans, including the negotiated payment rates contained in those agreements, are subject to disclosure under the Pennsylvania Right to Know Law.

In *Denis Lukes and West Penn Allegheny Health System v. Department of Public Welfare* (No. 15 C.D. 2008; Filed June 3, 2009), the Commonwealth Court of Pennsylvania reversed an order of the Chief Administrative Law Judge of the Department of Public Welfare ("DPW") Bureau of Hearings and Appeals affirming a DPW decision that had denied Denis Lukes and West Penn Allegheny Health System's ("Petitioners") request for information under the Pennsylvania Right to Know Law. Petitioners had sought the production of provider agreements between the University of Pittsburgh Medical Center Health Plan, Inc. (the "Health Plan") and hospitals affiliated with the University of Pittsburgh Medical Center ("UPMC") entered into for the purpose of administering DPW's Medicaid managed care program known as HealthChoices. The Health Plan operates a Medicaid Health Maintenance Organization separately incorporated as UPMC for You, Inc. UPMC, the Health Plan and UPMC for You, Inc. were intervenors in the case.

Under Pennsylvania's Right to Know Law that existed at the time of the request, a party asserting a right to disclosure had to establish that the requested documents were "public records." Public records were defined as including "[a]ny account, voucher or contract dealing with the receipt or disbursement of funds by an agency..." Further, a "record" was defined as "[a]ny document maintained by an agency in any form, whether public or not." The Commonwealth Court held that the term "maintain" includes records that are within a public agency's

possession, custody or control and that the provider agreements sought by Petitioners, while not in the possession of DPW, were "maintained" by DPW because it had access to and could exert control over the agreements. Although the Court's decision was based upon the previous Right to Know Law, it stated that its conclusion was consistent with the new Pennsylvania Right to Know law that took effect on January 1, 2009. For example, Section 506(d)(1) of the new law specifically states that "[a] public record that is not in the possession of an agency, but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function, and is not exempt under this act, shall be considered a public record of the agency for the purposes of this act."

The Court next found that because the Health Plan was fulfilling DPW's duties to administer the Medicaid program, there was an agency relationship between DPW and the Health Plan. Further, the Court held that because the provider agreements at issue were the product of that agency relationship and the agreements reflected the disbursement of public funds in a public program, they constituted "public records." Finally, the Court ruled that the provider agreements were not trade secrets under the Pennsylvania Uniform Trade Secrets Act, stating that "a party that voluntarily participates in a public program and is receiving and disbursing public funds in furtherance of that program has no legitimate basis to assert that these activities are private and should be shielded from public scrutiny." The Court so ruled despite evidence that the terms of the provider agreements contained confidentiality provisions and were not known outside the Health Plan and UPMC.

On June 18, 2009 the Commonwealth Court stayed its Order in this case pending disposition of the Joint (DPW and intervenors) Application for Reargument filed on June 16, 2009 and the filing and disposition of the Joint Petition for Allowance of Appeal. Nevertheless, providers and health plans should be

cautioned that, if the decision stands, their Medicaid managed care provider agreements, including the negotiated rate terms, may not be protected by confidentiality clauses and could be subject to disclosure.

COZEN O'CONNOR HEALTH LAW PRACTICE GROUP

Mark H. Gallant, Co-Chair	.....215.665.4136	.....mgallant@cozen.com
John R. Washlick, Co-Chair	.....215.665.2134	.....jwashlick@cozen.com
Gregory M. Fliszar	.....215.665.7276	.....gfliszar@cozen.com
Katherine M. Layman	.....215.665.2746	.....klayman@cozen.com
Melanie K. Martin	.....215.665.2724	.....mmartin@cozen.com
E. Gerald Riesenbach	.....215.665.4159	.....griesenbach@cozen.com
Salvatore G. Rotella, Jr.215.665.3729 srotella@cozen.com
Judy C. Wang215.665.4737 jwang@cozen.com

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