

IN THE SUPREME COURT
OF PENNSYLVANIA

No. 223MAP2003

JULES CIAMAICHELO AND ROB STEVENS, INC.,
Plaintiffs-Appellants,

v.

INDEPENDENCE BLUE CROSS,
Defendant-Appellee.

From the Order of the Commonwealth Court of December 20, 2002
No. 1969 C.D. 2002
Reversing an Order of C.P. of Bucks County
No. 2001-04985, Denying Preliminary Objections

**BRIEF FOR AMICI CURIAE PHILADELPHIA CITIZENS FOR CHILDREN
AND YOUTH, PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS,
CONSUMER HEALTH COALITION, PHILADELPHIA UNEMPLOYMENT
PROJECT, ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER
PHILADELPHIA, MON VALLEY UNEMPLOYED COMMITTEE, SERVICES
EMPLOYEES INTERNATIONAL UNION, DISTRICT 1199P, PHILAPOSH,
PHILADELPHIA WELFARE RIGHTS ORGANIZATION, CITIZENS FOR
CONSUMER JUSTICE, WOMEN'S LAW PROJECT , IN SUPPORT OF
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CASES

Carlini v. Highmark,
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Ciamaichelo v. Independence Blue Cross,
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Clearfield Bituminous Coal Corporation v. Thomas et al.,
336 Pa. 572, 9 A.2d 727, (1939) 18

Hospital Utilization Project v. Commonwealth,
507 Pa. 1, 487 A.2d 1306 (1987) passim

St. Margaret Seneca Place v. Board of Property Assessment,
Appeals and Review, County of Allegheny,
536 Pa. 478, 640 A.2d 380 (1994) 18, 20

Constitutional Provisions

Pa. Const. Art. VIII, § 2(a) 17, 18

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10 Pa. Stat. Ann. § 385 18

40 Pa. Cons. Stat. Ann. § 6101 17

40 Pa. Cons. Stat. Ann. § 6103 17

40 Pa. Cons. Stat. Ann. § 6301 19

40 Pa. Cons. Stat. Ann. § 6303 passim

42 Pa. Cons. Stat. Ann. § 742(a) 6

35 Pa. Stat. § 5701.1302 23

35 Pa. Stat. § 5701.1303 passim

40 Pa. Stat. § 991.2311 12, 33

Insurance Department Act of May 17, 1921, P.L. 789 19, 30

Regulations

55 Pa. Code §140.1 12

55 Pa. Code §140.3 12

Other Authorities

“Access to Care For the Uninsured: An Update,”
Kaiser 2003 Commission on Medicaid and the Uninsured,
available at <http://www.kff.org/content/2003/4142/4142.pdf> 12

“Community Voices: Health, Wellness and Quality of Life In
Southeastern Pennsylvania,” Philadelphia Health Management
Corporation's Community Health Data Base 2002 Southeastern
Pennsylvania Household Health Survey passim

Editorial, “Blues Clues: Insurer’s Surplus Signals Health-care
Woes,” Philadelphia Inquirer, February 27, 2002 28

Editorial “Advocating for an Advocate,” The Philadelphia Daily
News, May 9, 2003 at 13 35

Editorial, “Consumer Voice,” The Patriot News,
February 28, 2003 at A10 35

“Fact Sheet: The Cost of The Uninsured,” available at
http://www.acponline.org/uninsured/cost_factsheet.pdf 13

“Facts About adultBasic,” Pennsylvania Insurance Department
Report to CHIP Advisory Committee, July 29, 2003 passim

“Health Insurance Coverage in the United States: 2002,”
U.S. Census Bureau, 2002, available
at: <http://www.census.gov/prod/2003pubs/p60-223.pdf> 12, 27

“IBC Personal Choice PPO – Creditable Coverage FAQ,” available at
[http://www.ibx.com/jsps/article.jsp?id=/plan_info/individual/
personal_choice_ppo/creditable_coverage_faq.html](http://www.ibx.com/jsps/article.jsp?id=/plan_info/individual/personal_choice_ppo/creditable_coverage_faq.html) 25

Independence Blue Cross, “Important Information Regarding
AdultBasic,” available at [http://www.ibx.com/htdocs/plan_info/
caring_foundation/adult_basic/cf_ab_important.html](http://www.ibx.com/htdocs/plan_info/caring_foundation/adult_basic/cf_ab_important.html) 24

Independence Blue Cross, “The Caring Foundation: Special Care,”
available at [http://www.ibx.com/jsps/article.jsp?id=/plan_info/
caring_foundation/special_care/cf_spcare.html](http://www.ibx.com/jsps/article.jsp?id=/plan_info/caring_foundation/special_care/cf_spcare.html) 26

Independence Blue Cross, "The Caring Foundation: adultBasic," available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/caring_foundation/adult_basic/cf_abasic.html	26
Independence Blue Cross, "The Caring Foundation: Special Care Rate Sheet," available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/caring_foundation/special_care/rate_sheet.html	26
Independence Blue Cross, "The Caring Foundation: Special Care Basic Eligibility Requirements," available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/caring_foundation/special_care/cf_spcare_eligibility.html	26
Independence Blue Cross, "The Caring Foundation: adultBasic Eligibility Requirements," available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/caring_foundation/adult_basic/cf_ab_eligibility.html	26
Independence Blue Cross, "Frequently Asked Questions Regarding Non-Group Pre-existing Condition Exclusions and Credible Coverage," available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/individual/traditional/credible_coverage_faq.html	27
Independence Blue Cross, 2002 Annual Report, available at http://www.ibx.com/htdocs/about_ibc/company_info/annual_report/pdf/2002_annual_report.pdf	27
Jeff Gelles, "Calling for Official Insurance-Consumer Advocate," The Philadelphia Inquirer, February 19, 2003 at D01	35
Jonathan Stein, "Message to Blues: Your Cheatin' Heart Will Tell On You," Philadelphia Daily News, March 25, 2002	28
Jonathon Stein, "Don't Forget the Allegheny Collapse," Philadelphia Daily News, February 28, 2002	28
"Kaiser Family Foundation 2001 State Health Facts Online," available at: http://www.statehealthfacts.kff.org/cgi-bin/healthfacts.cgi?	passim
Karl Stark, "Blue Cross no longer has charitable priority," The Philadelphia Inquirer, September 18, 2000	22, 25
Legislative Update to Blue Cross of NE Pennsylvania by ABC program director Patricia Stromberg, 5/9/03, available at, http://www.bcnepa.com/legislative_info/leg_update_5.9.03.htm	15, 16

Letter to Department of Insurance Commissioner, State Representative Phyllis Mundy, August 23, 2002	27
Letter to Philadelphia Councilman Frank DiCicco, Insurance Commissioner Diane Koken, April 21, 2003	35
Lucette Lagnado, "One Critical Appendectomy Later, Young Woman Has a \$19,000 Debt" Wall Street Journal On-Line, March 17, 2003	14, 15
Medical Assistance Eligibility Handbook §355.4	12
Pennsylvania Insurance Department, "adultBasic Contractor Service Areas," available at http://www.ins.state.pa.us/ins/cwp/view.asp?a=1278&q=527040	33
Pennsylvania Insurance Department, adultBasic Homepage, available at http://www.ins.state.pa.us/ins/cwp/view.asp?a=1278&Q=527054&insNav=	33
Pennsylvania Insurance Department, CHIP Contractors, available at http://www.ins.state.pa.us/ins/cwp/view.asp?A=1279&Q=527117	33
Pennsylvania Insurance Department, CHIP Homepage, available at http://www.ins.state.pa.us/ins/cwp/view.asp?A=1279&QUESTION_ID=527075	33
Pennsylvania Insurance Department, CHIP Contractors, available at http://www.ins.state.pa.us/ins/cwp/view.asp?A=1279&Q=527117	33
Pennsylvania Insurance Department, "Commonwealth of Pennsylvania, Request for Proposal for Adult Basic Coverage Insurance Programs Services," available at http://www.insurance.state.pa.us/abcrfp/download/abc_rfp.pdf	24
Pennsylvania Insurance Department, "Commonwealth of Pennsylvania, request for Proposal For Children's Health Insurance Program," available at http://www.insurance.state.pa.us/chiprfp/download/rfp_2002.pdf	22, 23
Pennsylvania Insurance Department, "Facts about adultBasic," available at http://www.ins.state.pa.us/ins/cwp/view.asp?a=1278&Q=527054&insNav= 	passim
Pennsylvania Insurance Department, "Facts About adultBasic," available at http://www.ins.state.pa.us/ins/cwp/view.asp?a=1278&q=527068	28
Pennsylvania Insurance Department, "Questions and Answers about Additional Funding," available at http://www.ins.state.pa.us/ins/cwp/view.asp?A=1278&Q=542664	passim

September 4, 2002 Public Hearing Information: Blue Cross/Blue Shield Reserves and Surplus, available at http://www.ins.state.pa.us/ins/cwp/view.asp?a=1286&q=542643	31
“Sicker and Poorer: The consequences of Being Uninsured,” Executive Summary, Kaiser Family Foundation 2003 Commission on Medicaid and the Uninsured, Kaiser Family Foundation, 2003, available at http://www.kff.org/content/2002/20020510/4051.pdf	13
Statement of Insurance Commissioner Diane Koken, September 4, 2002, Insurance Department Hearing on Surplus Levels, at 2, available at http://www.insurance.state.pa.us/bcheating/comments/bc_comm.pdf	35, 36
Statement of James M. Mead, President and CEO of Capital Blue Cross, Before the Insurance Commissioner, Commonwealth of Pennsylvania, September 4, 2002, at 21, available at http://www.insurance.state.pa.us/bcheating/comments/bc_ind_0018a.pdf	21
“Staying Covered: The Importance of Retaining Health Insurance For Low-Income Families,” Center on Budget & Policy Priorities, December 2002, p 8-9, available at http://www.cmwf.org/programs/insurance/ku_stayingcovered_586.pdf	15
Stuart Ditzen, “Cash-rich Insurers Sit on Billions In Surplus,” Philadelphia Inquirer, Sunday Edition, February 24, 2002	28
Testimony of Independence Blue Cross, September 4, 2002, Pennsylvania Insurance Department Hearing on Surplus Levels, at 11, available at http://www.insurance.state.pa.us/bcheating/comments/bc_ind_0024.pdf	21

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are eleven non-profit organizations and unions committed to improving the health of all Pennsylvanians and reducing mortality and morbidity in the Commonwealth by insuring access to needed health care and affordable health insurance for the hundreds of thousands of residents who are currently uninsured or underinsured. They share a common interest in having the considerable excess surplus of Independence Blue Cross, and other similar plans (these plans are generally referred to herein as “Blue Cross Plans” regardless of their full title or legal name), across the Commonwealth utilized to provide health insurance for the uninsured and related goals. They believe that the Supreme Court and lower courts have a responsibility to define and enforce the legally mandated charitable mission of the Blue Cross Plans by having this excess surplus directed to these charitable purposes.

Philadelphia Citizens for Children and Youth has worked for two decades on increasing the access and availability of health care and health insurance for children and families. Often, PCCY has found families with children covered by insurance programs, but their parents excluded from coverage, as well as families with incomes rendering both children and parents unable to afford coverage. Other families have had children with health needs exceeding services covered by the Children’s Health Insurance Program (CHIP). Blue Cross surplus funds could provide better and more affordable health insurance to children and adults in these families.

Pennsylvania Alliance for Retired Americans is comprised largely of labor union retirees, many of whom, under age 65, are not yet eligible for Medicare and are thus without coverage. The Alliance believes that Blue Cross surpluses could help union

members who have lost health benefits from retirement, layoffs and job closings and who cannot now secure health insurance.

Consumer Health Coalition, based in Pittsburgh, is a health policy and advocacy organization that for over four years has scrutinized the charitable status and contributions, and reserve policies of Highmark Blue Cross/Blue Shield in Western Pennsylvania. Highmark, this past year, amassed surplus of 788% of the state prescribed minimum, where the national association of insurers declared that 200% was sufficient. The Coalition believes that the Pennsylvania Insurance Department (PID) has failed to define and enforce the charitable obligations of Highmark and other Blue Cross organizations in the state, letting enormous surpluses be amassed that could be used to provide insurance to the uninsured.

Philadelphia Unemployment Project, established in 1975, is a membership organization of unemployed and low-wage workers that successfully advocated for the establishment of the new adultBasic Care (“ABC”) health insurance program funded by tobacco settlement money in state hands. In light of the tens of thousands of Pennsylvania uninsured now on the adultBasic waiting list, PUP maintains that it has fallen to this Court to enforce the charitable mandate of Independence Blue Cross (IBC) by ordering that excess surplus be directed for such measures as expanding the adultBasic program for these uninsured.

Action Alliance of Senior Citizens of Greater Philadelphia has struggled to find access to health care for retirees and others in the 55-64 age range who are too young to qualify for Medicare. Very few of these individuals are able to afford to pay premiums, even in those plans that would accept them. Moreover, even Medicare insured

senior citizens cannot pay for prescribed medications. IBC excess surplus could be spent on to extending medical and prescription coverage to these retirees and seniors.

Mon Valley Unemployed Committee of unemployed and underemployed workers in western Pennsylvania has found lack of access to affordable healthcare one of the most pressing problems facing its members, and often gets calls from those desperate for health care and with no health insurance. The Highmark Blue Cross "Special Care" insurance package for low income and unemployed is unaffordable, costing more than three times the premium set for adultBasic established with tobacco settlement monies. The Mon Valley Unemployed Committee testified at a ineffectual hearing on excess surplus held by the Insurance Department on Sept. 4, 2002, which no action, not even a report issuing since from the Insurance Commissioner. MVUC urges this Court to order that the excess funds be used to expand the "Special Care" program by reducing its premium to the adultBasic level and ending the prohibition on covering pre-existing conditions, and by expanding openings for adultBasic.

Services Employees International Union, District 1199P, Pennsylvania's largest union of health care workers, has a strong interest in ensuring all citizens enjoy access to quality, affordable health care. SEIU believes that the low staffing levels at many hospitals, especially of nurses, and the growing number of uninsured Pennsylvanians, raise significant public policy questions about the prudence of allowing the various Pennsylvania Blue Cross organizations to amass surpluses and fail to implement a charitable mission that could ameliorate these problems.

PHILAPOSH is a coalition of 100 unions in the greater Philadelphia area concerned with job safety and workers health matters, and assisting those injured on the

job. When worker's compensation claims are contested by insurance companies, workers and their dependents are often without health insurance or access to health care, creating a nightmare of anguish for the injured worker and his or her entire family. PHILAPOSH believes that in the absence of any remedial action by other branches of government, this Court has an obligation to establish the criteria for and enforcement of a Blue Cross charitable mission that would assure that excess surplus be used for coverage of injured workers and families without health insurance.

Philadelphia Welfare Rights Organization is the oldest such group in the nation, advocating for the basic income and health needs of the impoverished in Pennsylvania. The unavailability of private health insurance provided by Independence Blue Cross, and the rising number of uninsured in the Commonwealth, has put undue pressures on the Medical Assistance (Medicaid), CHIP and adultBasic programs. This has led to threatened or adopted cutbacks in services or eligibility in Pennsylvania, which could be avoided if the surplus funds of Blue Cross were directed to expanding health insurance for the uninsured and making it more affordable for employers and employees.

Citizens for Consumer Justice is the Pennsylvania affiliate of USAction that represents three million members in 23 states. CCJ has worked on many community health care and health access issues, including testifying before the Insurance Department on Blue Cross surplus, and working to expand the CHIP and adultBasic programs. CCJ maintains that this Court needs to assure that Blue Cross charitable health assets be used to expand access to health care, instead of their being allowed to accumulate as excess surplus, as if these were for-profit health organizations.

Women's Law Project, based in Philadelphia and Pittsburgh, is a non-profit public interest legal center dedicated to improving the legal and economic status of women and their families. Since its founding in 1974, it has made insurance equity and accessibility for women a high priority. WLP is concerned about the so-called "gender treatment gap" in which uninsured women receive markedly lower levels of treatment and fail to receive critical health screenings compared to those with insurance. Blue Cross surpluses could be directed to meet the health insurance needs of these women, if the Court were to define and enforce the charitable obligations of Blue Cross with regard to these surpluses.

STATEMENT OF JURISDICTION

Amici adopt the statement of Jurisdiction provided by appellants in their brief.

STATEMENT OF THE QUESTIONS INVOLVED

Amici adopt the statement of the questions involved provided by appellants in their brief.

SCOPE AND STANDARD OF REVIEW

Amici adopt the scope and standard of review provided by appellants in their brief.

STATEMENT OF THE CASE

Amici adopt the statement of the case provided by appellants.

SUMMARY OF THE ARGUMENT

Amici, eleven unions and non-profit organizations committed to making health care available to the hundreds of thousands currently uninsured, urge the Supreme Court to reverse the Commonwealth Court to assure that our courts address the breach of the charitable obligations of the Pennsylvania Blue Cross plans in their amassing excess surplus. Amici believe that such excess surpluses should be used to expand health coverage and care across the Commonwealth.

This appeal appears amidst a grave and mounting health care crisis of increasing proportion as large numbers of Pennsylvanians lose or cannot afford the health insurance premiums of the Blue Cross plans. The harsh reality of one out of every ten Pennsylvanians lacking health insurance means that they live with reduced health care and greater illness. They die earlier and often from preventable diseases. They are diagnosed at more advanced disease stages, and have much higher and costlier utilization of emergency services. Judicial assessment of the legality of the Independence Blue Cross excess surplus in this case could free up great sums of IBC excess funds to make insurance available to thousands of uninsured and underinsured adults and children.

The Blue Cross plans have a legal obligation to dedicate their resources to charitable purposes. In the absence, though, of the Pennsylvania Insurance Department definition and enforcement of the charitable obligations of the Blue Cross plans, this Court must step in as it similarly did in the Hospital Utilization Project case (to define what is a “purely public charity”) to make clear that excess surplus be utilized to expand health insurance to as many uninsured people as possible. Currently, the Blue Cross

plans use government funds to offer adultBasic (with a waiting list of 55,000 this past year) and the Children's Health Insurance Plan (CHIP). They do not use their excess surplus to expand health care coverage, reducing their charitable commitment of resources to a negligible level, and contributing to our Commonwealth's health care crisis.

ARGUMENT

I. THERE IS A HEALTH CARE COVERAGE CRISIS IN PENNSYLVANIA: THE UNINSURED GET SICKER AND DIE EARLIER.

Pennsylvania is in the midst of a health insurance coverage crisis. According to a 2001 statewide study, over one million Pennsylvanians lack any form of health insurance.¹ This is about 9% of the total state population.² This figure includes the elderly, who are almost all covered by Medicare.³ If the elderly are not included, the uninsured rate swells to about 10%.⁴ More recent regional data confirms the health crisis. A 2002 survey of IBC's coverage area, Southeastern Pennsylvania,⁵ which is home to some of Pennsylvania's wealthiest counties, found the uninsured rate for adults to be 8.9%.⁶ The number is as high as 3.9% for children,⁷ despite their eligibility for a wider variety of publicly funded programs.⁸ The data shows a consistent increase in the number and percent of uninsured since 2000, as IBC built its surplus to enormous levels.⁹

The implications for living without health insurance are serious and severe. The uninsured "receive less preventive care, are diagnosed at more advanced disease stages,

¹ "Kaiser Family Foundation 2001 State Health Facts Online," Kaiser Family Foundation, 2001, available at: <http://www.statehealthfacts.kff.org/cgi-bin/healthfacts.cgi>. ("Kaiser 2001"). Ex. 21.

² Kaiser 2001.

³ Less than 1% of the elderly were uninsured for the entire year in 2002. See "Health Insurance Coverage in the United States: 2002," U.S. Census Bureau, 2002, ("[Health Insurance Coverage](http://www.census.gov/prod/2003pubs/p60-223.pdf)") available at: <http://www.census.gov/prod/2003pubs/p60-223.pdf>. Ex. 8.

⁴ Kaiser 2001.

⁵ Southeastern Pennsylvania defined as Bucks, Chester, Delaware, Montgomery, and Philadelphia counties. "Community Voices: Health, Wellness and Quality of Life In Southeastern Pennsylvania," Philadelphia Health Management Corporation's Community Health Data Base 2002 Southeastern Pennsylvania Household Health Survey. ("[PHMC 2002](#)"). Ex. 2.

⁶ PHMC 2002.

⁷ PHMC 2002.

⁸ Medicaid provides coverage for all children from families under 100% of the Federal Poverty Income Guidelines, and covers young children from families up to 185% of the Federal Poverty Income Guideline depending upon age. 55 Pa. Code §§140.1(b), 140.3. Disabled children are covered by Medicaid regardless of their parental income. Medical Assistance Eligibility Handbook §355.4. Ex. 27. The CHIP program covers children from families up to 235% of the Federal Poverty Income Guideline. 40 Pa. Stat. Ann. § 991.2311(e)(1).

⁹ PHMC 2002.

and once diagnosed, tend to receive less therapeutic care (drugs and surgical interventions).”¹⁰ The uninsured get reduced access to care, poorer medical outcomes, tend to live sicker and die earlier, die from preventable diseases at higher rates, and have much higher utilization rates for Emergency services, according to The American College of Physicians.¹¹

Uninsured persons often do not get health care treatment. A 2003 national study showed that the uninsured are three times more likely to postpone seeking medical care because of cost, four times more likely to not get needed care, three times more likely to not get prescription coverage because of cost, and almost three times more likely to skip recommended treatment because of cost.¹² A 2002 survey indicates that uninsured children are 70% more likely to go untreated for common conditions, and 30% more likely to go untreated for injuries.¹³ The treatment the uninsured do receive is often late, meaning they are hospitalized for preventable conditions or detected with virulent diseases, such as cancer, at later stages.¹⁴

Data for IBC's coverage area, Southeast Pennsylvania, confirms the gap separating the uninsured from treatment. The uninsured are four times more likely to have no regular care, three times more likely to have no prescriptions or dental treatment, and over half of uninsured patients visited an Emergency Room instead of a doctor's

¹⁰ “Sicker and Poorer: The Consequences of Being Uninsured,” Executive Summary, Kaiser Family Foundation 2003 Commission on Medicaid and the Uninsured, Kaiser Family Foundation, 2003 (“Kaiser 2003”), available at: <http://www.kff.org/content/2002/20020510/4051.pdf>. Ex. 40.

¹¹ “Fact Sheet: The Cost of The Uninsured,” available at: http://www.acponline.org/uninsured/cost_factsheet.pdf. Ex. 6.

¹² “Access to Care For the Uninsured: An Update,” Kaiser 2003 Commission on Medicaid and the Uninsured. (“Kaiser Update 2003”) Available at <http://www.kff.org/content/2003/4142/4142.pdf>. Ex. 1.

¹³ Kaiser Update 2003.

¹⁴ Kaiser Update 2003.

office.¹⁵ The treatment gap is particularly pronounced for demographic subpopulations, such as women, who receive dramatically lower levels of treatment when uninsured. The percentage of women who did not receive critical health screenings is far greater for women without insurance than women with private insurance: 46.7% to 18.2% for mammograms, 47.9% to 22.1% for breast exams, and 50.8% to 24.9% for PAP tests.¹⁶

Not surprisingly, the gap in treatment translates into debilitated health status for the uninsured. Nationally, it is estimated that insuring the uninsured would reduce their mortality rate (i.e., the rate at which they die) by 10-15%.¹⁷ The non-elderly uninsured are 70% more likely to die from diagnosed colorectal cancer, 29% more likely to die in hospitals after heart attacks, and 115% more likely to die in hospitals after traumatic injuries.¹⁸ Most troubling is the dramatically increased rate of infant mortality for uninsured mothers: their babies are 60% more likely to die in the first month after birth, and 50% more likely to die in the remaining months before their first birthday.¹⁹

In Southeast Pennsylvania, the inferior health status of the uninsured is clear. Uninsured non-elderly adults are 34% more likely to suffer from fair or poor health (as opposed to good or excellent health) than their insured counterparts.²⁰ Uninsured children are 73% more likely to suffer from fair or poor health than insured children.²¹ Although the elderly are largely covered by Medicare, those elderly who are uninsured are 53% more likely to suffer from depression.²²

¹⁵ PHMC 2002, *supra* note 5.

¹⁶ PHMC 2002.

¹⁷ Kaiser Update 2003.

¹⁸ Kaiser Update 2003.

¹⁹ Kaiser Update 2003.

²⁰ Lucette Lagnado, "One Critical Appendectomy Later, Young Woman Has a \$19,000 Debt" Wall Street Journal On-Line, March 17, 2003, 25.3% for the uninsured compared to 18.9% for the insured. Ex. 26

²¹ 10.4% for the uninsured compared to 6.0% for the insured. PHMC 2002.

²² 19.3% for the uninsured compared to 12.6% for the insured. PHMC 2002.

Ironically, the uninsured overpay for the treatment they do receive. Insurance companies and programs negotiate with hospitals and doctors for reduced rates, and the hospitals make up at least part of the shortfall by raising rates on the uninsured.²³ Far from minimal, the differences can be staggering.²⁴

Lacking health insurance also leads to the cycling of the uninsured. First, virtually all insurance plans have exclusions (or prohibitive premiums) for pre-existing conditions, such that once a person becomes uninsured, it may be impossible to get back into an insured status.²⁵ Second, because insurance correlates to good health, the uninsured are more likely to have sickness that interferes with employment – which is the primary source of insurance. Finally, when an uninsured individual attempts to become insured, they face the highest level of expense, because studies have shown that cost reduces with enrollment time.²⁶ All of these factors pull the uninsured away from possible sources of coverage, and propagate the cyclical uninsured status.

The uninsured crisis has overwhelmed the under-funded programs run through the Pennsylvania Insurance Department (“PID”). In July of 2002, PID began the adultBasic program, which was contracted through IBC in many Pennsylvania counties with tobacco

²³ See *supra* note 20.

²⁴ A study of charges for routine mammogram service showed the price differences at several hospitals around the country. UCLA Medical Center in Los Angeles charges \$460 to individual payers, but only \$90-242 for HMOs, health plans, Medicaid, and Medicare. Jamaica Hospital in Queens, NY, charges \$351 for individual payers, but only \$40-96 for HMOs, health plans, Medicaid, and Medicare. Other hospitals showed similar trends: \$240 versus \$59-128 at Oregon Health and Science University in Portland, \$261 versus \$156-186 at Johns Hopkins Hospital and Health System in Baltimore, and \$285 versus \$73-190 at Grinnell Regional Medical Center in Grinnell, Iowa. *Supra* note 20.

²⁵ In its materials on Individual Health Plans, IBC notes that their only plans that are not subject to pre-existing conditions exclusions are two (federally-mandated) HIPAA plans, as well as the publically funded adultBasic and CHIP programs. See “IBC Personal Choice PPO – Creditable Coverage FAQ,” available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/individual/personal_choice_ppo/creditable_coverage_faq.html. Ex. 9.

²⁶ “Staying Covered: The Importance of Retaining Health Insurance For Low-Income Families,” Center on Budget and Policy Priorities, December 2002, p 8-9, available at http://www.cmwf.org/programs/insurance/ku_stayingcovered_586.pdf. Ex. 44.

settlement monies paying the cost, and which provides low-cost insurance to low-income eligible adults.²⁷ By February of 2003, only 8 months after adultBasic began, it had reached its maximum capacity of 50,258 enrollees, and lacked the budget to add more enrollee slots.²⁸ In fact, the number of enrollee slots has decreased since February 2003.²⁹ In March 2003 a waiting list was created, and by July 2003 the waiting list had grown to over 44,000 applicants.³⁰ The need for health care is so great that, in under a year, the adultBasic program more than double over-enrolled. In fact, PID has estimated that there are upwards of 350,000 Pennsylvanians eligible for adultBasic, although funding only exists for about 45,000 enrollee slots.³¹

It is imperative that the court evaluate the legality of the Blue Cross Plans' surplus in light of this health crisis and the below described failure of the Blue Cross Plans to meet their charitable obligation.

II. THE BLUE CROSS PLANS ARE NOT MEETING THEIR STATUTORY CHARITABLE OBLIGATION TO ASSURE ACCESS TO HEALTH INSURANCE TO THE GREATEST NUMBER OF PENNSYLVANIANS.

A. The Blue Cross Plans Have An Obligation to Dedicate Their Resources To Charitable Purposes.

²⁷ Legislative Update to Blue Cross of NE Pennsylvania by adultBasic program director Patricia Stromberg, 5/9/03. ("Legislative Update"), available at http://www.bcnepa.com/legislative_info/leg_update_5.9.03.htm. See also, "Facts About adultBasic," Pennsylvania Insurance Department Report to CHIP Advisory Committee, July 29, 2003. ("Facts About adultBasic"). Ex. 23.

²⁸ Legislative Update: Facts About adultBasic.

²⁹ Facts About adultBasic.

³⁰ Pennsylvania Insurance Department "Questions and Answers about Additional Funding," October 2, 2003 ("Questions and Answers") available at <http://www.ins.state.pa.us/ins/cwp/view.asp>. Legislative Update. Ex. 38.

³¹ Legislative Update.

Throughout their history, the Blue Cross and Blue Shield Plans have been created, sustained, and protected from state taxation in recognition of their status as the ‘insurers of last resort’ in Pennsylvania, with the understanding that health insurance coverage and other services were to be provided to individuals regardless of their medical condition, and at an affordable price. Indeed, Independence Blue Cross has been declared by the General Assembly to be a special charitable organization:

§ 6103. Exemptions applicable to certified hospital
plan corporations

* * *

(b) Tax laws.—Every hospital plan corporation holding a certificate of authority under this chapter is hereby declared to be a charitable and benevolent institution, and all its funds and investments shall be exempt from taxation by the Commonwealth and its political subdivisions.³²

40 Pa. Cons. Stat. Ann. § 6103(b) (West 2000).

Moreover, Independence and the other Blue Cross Plans are nonprofit insurers, which have been granted exemption from taxation by the General Assembly, pursuant to the authority granted by the Pennsylvania Constitution, Article VIII, §§ 2(a)(v). The Blue Cross Plans cannot qualify for this exemption unless they are “institutions of purely public charity,” because “the legislature is constitutionally limited to exempt only those charitable organizations which are institutions of purely public charity[.]” Hospital Utilization Project v. Commonwealth of Pennsylvania, 507 Pa. 1, 12, 487 A.2d 1306, 1312 (1987).³³ This Court has explained that a corporation cannot qualify as a purely

³²The Blue Cross Plans are not-for-profit corporations engaged in the business of maintaining and operating nonprofit hospital plans, i.e. plans whereby for prepayment, periodical or lump sum payment hospitalization or related health benefits may be provided to subscribers to such plans. Thus, they are hospital plan corporations within the meaning of 40 Pa. Cons. Stat. Ann. § 6101 *et seq.*. See Ciamachelo v. Independence Blue Cross, 814 A.2d 800, 802-803 (Pa.Cmwlth. 2002).

³³“It is, of course, well settled that when the Constitution enumerates the kind of property that may be exempted from taxation, it by implication excludes all other taxable property.” Clearfield Bituminous Coal Corporation v. Thomas et al., 336 Pa. 572, 577, 9 A.2d 727, 729 (1939). Aside from institutions of purely

public charity unless, at a minimum, it serves a charitable purpose and benefits a class of persons who are legitimate subjects of charity, and in so doing renders a substantial portion of its services freely or at a reduced, subsidized price, and relieves the government of some of its burden, see id. at 18, 487 A.2d at 1315; St. Margaret Seneca Place v. Board of Property Assessment, Appeals and Review, County of Allegheny, 536 Pa. 478, 483-486, 640 A.2d 380, 383-384 (1994). If a nonprofit corporation serves clients who are already receiving a government-subsidized benefit, such as adultBasic or CHIP, then in order to fulfill the requirements of the Hospital Utilization Project [“H.U.P.”] test and qualify as a purely public charity, the corporation must, at least, absorb part of the cost of caring for those receiving the public subsidy, using its own resources to subsidize part of the cost of providing services for those clients. See St. Margaret Seneca Place, 536 Pa. at 483-486, 640 A.2d at 383-394.³⁴ Hence, under the H.U.P. test, the General Assembly cannot constitutionally extend tax-exempt status to the Blue Cross Plans unless the plans relieve some of the Commonwealth’s burden of providing for the health and welfare of the uninsured, by rendering a substantial portion of their product freely or at a reduced price, subsidized with the plans’ own resources.

B. The Blue Cross Plans’ Obligation Is To Make Health Insurance Available to As Many Uninsured People As Possible.

The Insurance Department, pursuant to the Insurance Department Act of May 17, 1921, P.L. 789, is responsible for administering the laws of the Commonwealth as they pertain to the regulation of the insurance industry and the protection of the insurance

public charity, the only other types of private property which may be exempted are places of religious worship, burial grounds, and “that portion of the property owned and occupied by any branch, post or camp of honorably discharged servicemen or servicewomen which is actually and regularly used for benevolent, charitable or patriotic purposes.” Pa. Const. Art. VIII, § 2(a)(i), (ii), (iv).

³⁴The General Assembly has enacted the Institutions of Purely Public Charity Act to further define the constitution’s requirements for tax exemption, but the Act explicitly excludes hospital plan corporations such as the Blue Cross Plans, see 10 Pa. Stat. Ann. § 385(a).

consumer. The Insurance Department has not acted, however, to define the nature or extent of the Blue Cross Plans' nonprofit charitable obligations. Although the Blue Cross Plans are nonprofit insurers, with special tax-exempt status, and have been specifically declared to be 'charitable and benevolent institutions' by the Legislature, there are no Insurance Department regulations, and no publicly available policy statements, setting out the parameters or content of their obligations.

Nevertheless, the broad outlines of the Blue Cross Plans' obligations are clear. The General Assembly has expressed its concern for the priorities of charitable health care work, in a statement of legislative findings and policy which applies directly to Highmark Blue Cross Blue Shield,³⁵ and which implicitly sets out priorities for Highmark's counterparts:

- § 6303. Statement of legislative findings and policy
- (a) Declaration of necessity.—It is hereby declared that adequate professional health services are essential for the maintenance of the physical and mental health of the residents of this Commonwealth, and that it is necessary that provision be made for adequate professional health services to persons of low income who are unable to provide such services for themselves or their dependents without depriving themselves or their dependents of such necessities of life as food, clothing and shelter.
- (b) Construction of chapter.—It is hereby declared to be the purpose and intent of this chapter and the policy of the General Assembly to authorize qualified persons to provide adequate professional health services for residents of this Commonwealth who are unable to provide such services for themselves or their dependents at their own cost without depriving themselves or their dependents of such necessities of life as food, clothing and shelter, and provide persons of over-income with the limited professional health services benefits set forth in this chapter.

³⁵See Carlini v. Highmark, 756 A.2d 1182, 1187 and 1189 (Pellegrini, J., concurring) (Pa.Cmwltth.2000) (stating that the Professional Health Services Plan Corporation Act, 40 Pa. Cons. Stat. Ann. § 6301 *et seq.*, which includes § 6303, the statement of legislative findings and policy, applies to Highmark).

40 Pa. Cons. Stat. Ann. § 6303 (West 2000).

The Blue Cross Plans themselves have more precisely defined their legal obligations as a “social mission.” In their public statements, the Blue Cross Plans have acknowledged that their social mission should consist of efforts to achieve the aim that the General Assembly has declared necessary: to “provide adequate professional health services for residents of this Commonwealth who are unable to provide such services for themselves or their dependents at their own cost....”. 40 Pa. Cons. Stat. Ann. § 6303 (West 2000). For the Blue Cross Plans, given their role as health insurance providers, this can only mean one thing: making health insurance available and affordable to as many people as possible who would not otherwise be able to obtain health insurance. This definition of their social mission is also required by the terms of the tax status granted by the General Assembly: health insurance is the Blue Cross Plans’ product, and, under the H.U.P. test, in order to qualify for their tax exemption as a purely public charity, they must make that product available to a ‘substantial’ portion of their client base at a reduced price, subsidized by their own revenue.³⁶

As the Chief Executive Officer of Independence Blue Cross, G. Fred DiBona, Jr., articulated his understanding of IBC’s obligation in public testimony before the Insurance Commissioner: IBC receives a premium tax break for which it is “expected to fulfill a social mission.”³⁷ DiBona explained that IBC fulfills this mission by allowing “anyone in Southeastern Pennsylvania to come to us at any time, in any state of health, and buy

³⁶ See St. Margaret Seneca, 536 Pa. at 483-486, 640 A.2d at 383-394.

³⁷ Testimony of Independence Blue Cross, September 4, 2002, Pennsylvania Insurance Department Hearing on Surplus Levels, at 11, available at http://www.insurance.state.pa.us/bc hearing/comments/bc_ind_0024.pdf. Ex. 46.

health insurance.”³⁸ John Foos, Chief Financial Officer of IBC, asserted that IBC met its social mission by: using surplus funds to provide direct and indirect subsidies of \$18 million in 2003 to non-group products, which reduce premiums for those products; lending “significant” but unspecified financial support to the state’s Children’s Health Insurance Program [“CHIP”] and adultBasic program; offering Special Care, a health insurance package designed for low-income individuals; continuing to administer the Medicare+Choice program for 145,000 Medicare beneficiaries; and serving as insurer of last resort and providing open enrollment.³⁹ Neither diBona nor Foos was subject to critical cross-examination of these assertions.

At the same hearing, the President of Capital Blue Cross, James Mead, asserted that Capital administers CHIP and adultBasic at a price allegedly below its costs; offers Special Care insurance for individuals below 185% of the federal poverty level; helps maintain the nonprofit Caring Foundation to “assist uninsured children”; and serves as insurer of last resort, accepting all individuals regardless of their health status.⁴⁰ The value of these claims by Independence and Capital is highly dubious.

C. The Blue Cross Plans Have Not Met Their Charitable Obligations To Make Health Insurance Available To As Many Uninsured People As Possible.

The evidence suggests that the Plans have not been meeting their responsibilities but, rather, have been retreating from them. While IBC’s revenue has shifted from

³⁸Id.

³⁹See *id.* at 38.

⁴⁰See Statement of James M. Mead, President and CEO of Capital Blue Cross, Before the Insurance Commissioner, Commonwealth of Pennsylvania, September 4, 2002, at 21, available at http://www.insurance.state.pa.us/bchearing/comments/bc_ind_0018a.pdf. Ex. 42.

charitable work to lucrative for-profit subsidiaries,⁴¹ IBC's charitable missions have dwindled significantly. The Philadelphia Inquirer has reported that Independence Blue Cross' charitable activities declined from \$43 million in 1996 to \$15.6 million in 1999.⁴²

Independence Blue Cross, and other Blue Cross Plans in Pennsylvania, have cited their involvement in CHIP and adultBasic, their administration of Special Care and their pledge to allow "anyone in Southeastern Pennsylvania to come to us at any time, in any state of health, and buy health insurance"⁴³ as evidence of their commitment to their nonprofit charitable obligations. However, a closer examination of these programs reveals the failure, and not the commitment, of IBC, and the other Plans, to fulfill their charitable obligations.

i. The Blue Cross Plans Have Done Little to Sustain or Improve Either CHIP or AdultBasic.

Despite the claims of the Blue Cross Plans, the costs of the CHIP program are borne almost entirely by the Commonwealth of Pennsylvania. The Blue Cross Plans negotiated contracts with the PID in 2002, pursuant to a Request for Proposal ["RFP"] issued by the Department.⁴⁴ The RFP, which noted that its terms would be incorporated into final contracts,⁴⁵ provided that parties offering proposals to administer CHIP would propose reimbursement rates which would then be negotiated with the PID, and which would be designed to cover the offeror's expenses in administering the program.⁴⁶

⁴¹ The Philadelphia Inquirer reported that nonprofit business was 93% of IBC's revenue in 1990, and had decreased to 11% by 2000. Karl Stark, "Blue Cross No Longer Has Charitable Priority," Philadelphia Inquirer, September 18, 2000. Ex. 22.

⁴² See *id.*

⁴³ See *supra* note 37.

⁴⁴ See Pennsylvania Insurance Department, "Commonwealth of Pennsylvania, Request for Proposal For Children's Health Insurance Program" ("RFP") available at http://www.insurance.state.pa.us/chiprpf/download/rfp_2002.pdf. Ex. 34.

⁴⁵ See RFP at 18.

⁴⁶ See RFP at 35, 84.

Indeed, the RFP invited prospective administrators to “take full advantage of its position as a purchaser of health care for the Department to negotiate as favorable a rate as possible for its hospitals.”⁴⁷

Furthermore, amici believe that the reimbursement rate provided to IBC by the state approximates that charged the state by other, for-profit insurers for administering CHIP. As mentioned above, the Blue Cross Plans negotiated contracts with the Insurance Department in 2002, pursuant to a RFP issued by the Department.⁴⁸ In the five-county area served by Independence Blue Cross and its subsidiary Keystone Health Plan East, the entities that have contracted to administer CHIP include Keystone, Aetna Health, Inc., and Americhoice.⁴⁹ Aetna and Americhoice are for-profit companies,⁵⁰ with no social mission and no charitable obligations; indeed, their directors have a fiduciary duty to maximize their company’s value for the shareholders. Yet Aetna and Americhoice signed similar contracts pursuant to the same RFP as Keystone Health Plan East. The RFP, which noted that its terms would be incorporated into final contracts,⁵¹ provided that parties offering proposals to administer CHIP would propose reimbursement rates which would then be negotiated with the Department, and which would be designed to cover the offeror’s expenses in administering the program.⁵²

⁴⁷See RFP at 40.

⁴⁸See Pennsylvania Insurance Department, “Commonwealth of Pennsylvania, Request for Proposal For Children’s Health Insurance Program” available at http://www.insurance.state.pa.us/chiprpf/download/rfp_2002.pdf, October 9, 2003. Ex. 34.

⁴⁹See Insurance Department, “Chip Contractors by County,” available at http://www.ins.state.pa.us/ins/cwp/view.asp?A=1279&QUESTION_ID=527096, October 9, 2003. Ex. 32.

⁵⁰See Aetna Inc., “Amended and Restated Articles of Incorporation of Aetna Inc.,” available at http://www.aetna.com/governance/assets/articles_of_incorporation.pdf, October 9, 2003; Americhoice Corporation, “Americhoice: Mission, Vision and Values,” available at http://www.americhoice.com/asp/corporate/Corporate_Mission.asp, October 9, 2003.

⁵¹See RFP at 18.

⁵²See RFP at 35, 84.

The history of adultBasic likewise reveals that the Blue Cross Plans have not used it to fulfill their charitable obligations. As the Blue Cross Plans' eagerness to claim credit for it suggests, the adultBasic program is an obvious outlet for the Plans to fulfill their 'social mission,' since it offers a direct means of access to health insurance and health care for low-income, uninsured Pennsylvania adults. The eligibility requirements for enrollment in adultBasic include: having no other health insurance coverage, including Medicaid or Medicare, both currently and for at least 90 days prior to enrollment (except for people who have been laid off from work); being between the age of 19 through 64; and having family income below 200% of the Federal Poverty Income Guidelines.⁵³ Adults who enroll must pay \$30 per month, and, in return, receive coverage which includes preventive care, doctor's visits, lab tests and x-rays, in-patient and outpatient hospitalization and surgery; they do not receive coverage for dental care or prescription drugs.⁵⁴ The General Assembly left no doubt that it wanted adultBasic to be widely available: it directed that the PID "shall, to the greatest extent practicable, ensure that all eligible adults in this Commonwealth have access to the program....".⁵⁵

While the Blue Cross Plans claim to be the champions of adultBasic, the PID has made it clear that funding for adultBasic actually "comes from a portion of the Commonwealth's share of the Tobacco Settlement money," not from the entities that are contracted to administer the program.⁵⁶ Moreover, in the course of administering the program with state funds, the Plans have allowed adultBasic to build up a large waiting list. In fact, they have taken no action as the number of adults statewide enrolled in

⁵³ See 35 Pa. Stat. Ann. § 5701.1302.

⁵⁴ 35 Pa. Stat. Ann. §§ 5701.1303(b)(2), 1303(f)(2).

⁵⁵ 35 Pa. Stat. Ann. § 5701.1303(a).

⁵⁶ Pennsylvania Insurance Department, "Facts about adultBasic," available at http://www.ins.state.pa.us/ins/cwp/view.asp?A=1278&QUESTION_ID=527068, October 9, 2003. Ex. 36.

adultBasic has actually fallen in recent months, from 47,803 in April 2003 to 43,120 in September 2003, according to the PID.⁵⁷ Rather than applying their resources to reverse or alleviate this trend, which would be the most direct means of fulfilling their legal obligations, the Plans have allowed tens of thousands of Pennsylvanians to languish on a waiting list, waiting for more enrollment slots to open up or be created. In fact, the structure of adultBasic, as set out in the PID's Request for Proposal, reveals that the waiting list is due, not to a time lag while the administrating entity establishes more enrollment slots, but rather to "insufficient appropriations" from the state budget.⁵⁸

When Independence Blue Cross is trying to tamp down public expectations of access to adultBasic, rather than claim undue credit for good works before the Insurance Commissioner, the company readily confesses that "The Caring Foundation and Keystone Health Plan East [an Independence Blue Cross subsidiary] have no control over funding for adultBasic...".⁵⁹ As mentioned above, as of July 2003, there were over 44,000 people on the waiting list;⁶⁰ the Insurance Department announced that additional adultBasic slots would be opening up, but only because "additional money, an increase of \$12 million, has been made available from the Governor's budget for Fiscal Year 2003-2004."⁶¹

It is very difficult to obtain precise figures on the extent, if any, to which the Blue Cross Plans have made contributions towards adultBasic and CHIP, especially since the

⁵⁷ See Pennsylvania Insurance Department, "Enrollment by County," available at <http://www.ins.state.pa.us/ins/cwp/view.asp?a=1278&q=527061>, October 9, 2003. Ex. 57.

⁵⁸ Pennsylvania Insurance Department, "Commonwealth of Pennsylvania, Request for Proposal for Adult Basic Coverage Insurance Programs Services," at 42, available at http://www.insurance.state.pa.us/abc_rfp/download/abc_rfp.pdf. Ex. 33.

⁵⁹ Independence Blue Cross, "Important Information Regarding adultBasic," available at http://www.ibx.com/htdocs/plan_info/caring_foundation/adult_basic/cf_ab_important.html. Ex. 10.

⁶⁰ Facts About adultBasic, supra note 27.

⁶¹ Id.

Plans have not publicized their contributions other than to imply that they are due credit for the entire program. The parties might learn more about the degree, if any, to which the Blue Cross Plans have subsidized affordable health insurance, above and beyond the reimbursements that they contractually receive from the Commonwealth, if this case were to proceed to discovery and ultimately to trial. The Blue Cross Plans' alleged administrative subsidy for adultBasic, at least, cannot be very substantial, and, to the extent that it exists, will be reduced in the near future, since the act that created the program provides that, if their administrative expenses are too high after the program has been in operation for two years, "the Department may make an additional payment, not to exceed 1% of the amount of the contract, for future administrative expenses to the Contractor..."⁶²

The Philadelphia Inquirer reported in 2000 that Independence Blue Cross' subsidies to CHIP had fallen, at least in part, because government funding had increased - meaning that Independence deliberately chose not to maintain their own level of charitable subsidy (if any), even though continuing the subsidy would have allowed more uninsured children to obtain health coverage, rather than keeping enrollment numbers level.⁶³

ii. Other Programs Which the Blue Cross Plans Claim Fulfill Their Charitable Obligation Do Little to Limit the Effects of Pennsylvania's Health Crisis.

Any limited subsidy that has accrued to uninsured moderate-income adults through the Blue Cross Plans' "Special Care" programs will be, or has been, largely replaced by the emergence of adultBasic. Eligibility for Independence Blue Cross'

⁶²35 Pa. Stat. Ann. § 5701.1303(h)(3).

⁶³See Stark, *supra* note 41.

“Special Care” package is limited to adults having family income below 185 % of the Federal Poverty Income Guidelines, which is lower than the limit for adultBasic.⁶⁴ Also, “Special Care’s” benefits package is more limited than adultBasic’s: “Special Care” covers only twenty-one days per benefit period of in-patient hospital care; only \$1,000 per calendar year of diagnostic services; only four annual physician visits per person; and only one annual gynecological exam.⁶⁵ AdultBasic provides coverage of all of those benefits without any of those limitations.⁶⁶ In addition to providing less comprehensive coverage, “Special Care” has a preexisting conditions clause which denies coverage for any previously treated condition for the first 12 months that the consumer is in the program. Perhaps most importantly, Special Care, offered at a cost of \$107.55, is more far expensive to the potential consumer than adult Basic.⁶⁷ Since the eligibility requirements are otherwise nearly identical,⁶⁸ uninsured adults will obviously prefer to purchase adultBasic rather than “Special Care,” if possible.

Even the limited and highly indirect charitable value of allowing “open enrollment,” as the Blue Cross Plans claim to do, is severely tempered by the rates that the Blue Cross Plans charge and the preexisting condition exclusions that they impose. As Independence Blue Cross’ materials make plain, those who are unable to join a group

⁶⁴ See Independence Blue Cross “The Caring Foundation: Special Care,” available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/caring_foundation/special_care/cf_spcare.html. Ex. 11.

⁶⁵ Id.

⁶⁶ See Independence Blue Cross, “The Caring Foundation: adultBasic,” available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/caring_foundation/adult_basic/cf_abasic.html. Ex. 12.

⁶⁷ See Independence Blue Cross “The Caring Foundation: Special Care Rate Sheet,” available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/caring_foundation/special_care/rate_sheet.html. Ex. 13.

⁶⁸ See Independence Blue Cross, “The Caring Foundation: Special Care Basic Eligibility Requirements,” available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/caring_foundation/special_care/cf_spcare_eligibility.html, Ex. 14; Independence Blue Cross, “The Caring Foundation: adultBasic Eligibility Requirements,” available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/caring_foundation/adult_basic/cf_ab_eligibility.html. Ex. 15. The one significant difference is that Special Care does not require that the applicant have been without any health insurance for ninety days. See id.

insurance plan, through work or otherwise, and are forced to purchase a non-group policy from Independence will generally face a one-year exclusion of coverage for conditions that affected them within the five years prior to enrolling.⁶⁹ This severely undercuts the value of the Plans' claim that they cover 'everyone' regardless of health status, as part of their social mission; in fact, many uninsured people with illnesses or disability will find that the very health expenses for which they need coverage will not be covered.

III. WHILE IGNORING THEIR CHARITABLE OBLIGATIONS THE BLUE CROSS PLANS HAVE AMASSED AN EXCESSIVE SURPLUS.

While the state has struggled through a health insurance crisis, IBC has amassed an excess surplus of over \$300 million. The total state excess surplus of the Blue Cross Plans is over \$2.7 billion.⁷⁰ Yet, in the recent U.S. Census report on health insurance, Pennsylvania was listed as one of 18 states that had a "significant" increase in the two-year average uninsured rate, and only five states had higher rates of increase.⁷¹

As IBC amasses a surplus, and the uninsured population grows, IBC has also seen growth and expansion in its for-profit business activities, including lucrative health plan operations in New Jersey, Delaware, Puerto Rico and Jamaica.⁷² Numerous newspaper articles have noted the contradictions implied by the excess surplus, IBC's recent

⁶⁹See, e.g., Independence Blue Cross, "Frequently Asked Questions Regarding Non-Group Pre-existing Condition Exclusions and Credible Coverage," available at http://www.ibx.com/jsps/article.jsp?id=/plan_info/individual/traditional/credible_coverage_faq.html, 2, 2003. Ex. 16.

⁷⁰ State Representative Phyllis Mundy, Letter to Department of Insurance Commissioner, August 23, 2002. Ex. 24.

⁷¹ Health Insurance Coverage, *supra* note 3.

⁷² Independence Blue Cross, 2002 Annual Report. Available at: http://www.ibx.com/htdocs/about_ibc/company_info/annual_report/pdf/2002_annual_report.pdf. Ex. 17.

purchase of new subsidiaries, the uninsured crisis, and the IBC duty to be the insurer of last resort.⁷³

IBC defends its enormous surplus with doomsday scenarios that might require the sudden need for huge amounts of money.⁷⁴ The scenarios fail to establish a clear link to health spending that IBC would be liable for under such extreme circumstances. In the meantime, real people whom IBC is charged with protecting face their own doom and cannot purchase health insurance. One need not look beyond IBC's own contracts to find a better use for the funds.

As mentioned above, the adultBasic program, for which IBC is a contractor, now has a waiting list of at least 55,000 uninsured Pennsylvanians.⁷⁵ It costs the PID \$2520 per person, per year to enroll someone in adultBasic, and that figure drops to \$2160 when standard enrollee premiums are factored in.⁷⁶ It would therefore cost less than \$120 million – equivalent to only 4.3% of the statewide excess surplus – to fund the entire waiting list for a year. This would instantly provide much needed medical coverage to over 5% of Pennsylvania's uninsured population – quite in keeping with IBC's charitable mission.⁷⁷

⁷³ See Stuart Ditzen, "Cash-rich Insurers Sit on Billions In Surplus," Philadelphia Inquirer, Sunday Edition, February 24, 2002, Ex. 45; Editorial, "Blues Clues: Insurer's Surplus Signals Health-care Woes," Philadelphia Inquirer, February 27, 2002, Ex. 3; Jonathan Stein, "Message to Blues: Your Cheatin' Heart Will Tell On You," Philadelphia Daily News, March 25, 2002, Ex. 19; Jonathan Stein, "Don't Forget the Allegheny Collapse," Philadelphia Daily News, February 28, 2002. Ex. 20.

⁷⁴ Testimony of Independence Blue Cross, September 4, 2002, Pennsylvania Insurance Department Hearing on Surplus Levels, at 8, available at http://www.insurance.state.pa.us/bchearing/comments/bc_ind_0024.pdf. Ex. 46.

⁷⁵ Questions and Answers, *supra* note 30; Legislative Update, *supra* note 27.

⁷⁶ Monthly cost to buy-in to adultBasic is \$210.67. Independence Blue Cross, "Important Information Regarding adultBasic," available at

http://www.ibx.com/htdocs/plan_info/caring_foundation/adult_basic/cf_ab_important.html. Ex. 10.

The standard monthly premium charged individuals enrolled in adultBasic is \$30 per month. Pennsylvania Insurance Department, "Facts About adultBasic," available at

<http://www.ins.state.pa.us/ins/cwp/view.asp?a=1278&q=527068>. Ex. 36.

⁷⁷ 44,000 out of 1,083,250 uninsured. Kaiser 2001, *supra* note 1.

Another example of the significance of the excess surplus can be seen when children are considered. The Pennsylvania Partnerships for Children, similarly, has shown how a small percentage of the surplus could cover 94,000 uninsured children over 200% of the Poverty Level, convert 8,100 children enrolled in reduced CHIP to free CHIP benefits, and include Family Based Mental Health Services and Medically Necessary Orthodontia in the CHIP benefit package.⁷⁸

IBC's excess surplus is significant; not for any invisible or speculative "protection" it provides Pennsylvanians today, but for the incredible health relief it could provide them with tomorrow if IBC decided – or was ordered – to meet its charitable obligation.

Ultimately, IBC contends that this is simply a rate-setting case. Amici contend that this case is about an excess surplus, and more importantly, about whether in amassing it, IBC has redefined itself in contravention of Pennsylvania law. Amici urge the court to examine the legality of the surplus in the context of IBC's fuzzy and undefined commitment to its charitable function, in the face of a growing health insurance crisis.

IV. THE PENNSYLVANIA COURTS ARE APPROPRIATE ARBITERS OF THE ISSUE OF WHETHER IBC AND OTHER PENNSYLVANIA BLUE CROSS PLANS CAN LEGALLY RETAIN EXCESS SURPLUS.

The interest of amici in this litigation is in remedying Independence Blue Cross' ("IBC") continuing failure to fulfill its charitable mission. With regard to this issue, the Court has a responsibility to exercise its jurisdiction.

⁷⁸ See Statement of Joan L. Benso, President and CEO, Pennsylvania Partnerships for Children, September 4, 2002, Insurance Department Hearing on Surplus Levels, at 2, available at http://www.insurance.state.pa.us/bchearing/comments/bc_ind_0029.pdf. Ex. 43.

Amici hereby adopt Appellant's arguments that the court has subject matter jurisdiction over this action, that any action by the Pennsylvania Insurance Department regarding rates and surplus is legally irrelevant to this action, and that doctrines of primary jurisdiction and exhaustion of administrative remedies are inapplicable to this action. However, additional important factors not cited in Appellants' brief underscore the need for the courts to exercise that authority to determine if retention of excess surplus is consistent with the enabling legislation pursuant to which IBC exists.

The courts have jurisdiction because the issue of excess surplus brings into question whether IBC, an entity created pursuant to state statute to make health insurance available to as many uninsured persons as possible, can amass a tremendous surplus, especially in the face of a health insurance crisis. In light of the failure of the Insurance Department to define the obligation of the Blue Cross Plans to make health insurance available to uninsured Pennsylvanians or the permissible limits of excess surpluses, judicial review is appropriate. Judicial review is especially appropriate in this case because of the Insurance Department's dual role as a contracting party with and regulator of IBC creates a conflict of interest, which may prevent it from acting, and because the Insurance Department has not adequately allowed for public participation on the issue.

A. The Insurance Department Has Not Defined the Charitable Obligation of the Blue Cross Plans.

Pursuant to the Insurance Department Act of May 17, 1921, P.L. 789, the Pennsylvania Insurance Department is responsible for administering the laws of the Commonwealth as they pertain to the regulation of the insurance industry and the protection of the insurance consumer. However, PID has failed or refused to promulgate any rules, regulations or policy statements clarifying, defining or addressing in any way

the charitable obligation of IBC and the other Blue Cross Plans. As we have already discussed, the Blue Cross Plans were authorized by the Pennsylvania legislature in the depression era of the 1930s for the purpose of providing affordable health care to the residents of Pennsylvania – particularly low-income residents and others who have difficulty obtaining health insurance. 40 Pa. Cons. Stat. Ann. § 6303 (West 2000). However, the Department has not defined the obligation or taken steps to ensure that the Blue Cross Plans are complying with that purpose. Without any regulations, rules or policies issued by the PID, there is no standard for PID to apply or effective administrative process by which the intended beneficiaries of the legislation can assert their rights.

Indicative of the PID's unwillingness or inability to address the issue of the Blue Cross Plans' responsibility to the community is its lack of responsiveness to issues raised by the surplus. On September 4, 2002, the Department held a public hearing on the issue of the Blue Cross Plans' surplus and reserves.⁷⁹ The Department solicited comments from industry and consumers and listened to presentations from each of the Plans on the issue of the surplus. However, the hearing has not led to any action from the Department. Over thirteen months have passed since the date of the hearing and the Department has not released any report, findings or decision regarding the issue of the surplus.

In the face of the Department's inaction, the Court should exercise its authority over these issues, to ensure that consumers are protected and that IBC and other Blue Cross Plans live up to their charitable responsibilities. Pennsylvania courts are well equipped to perform the role of clarifying the charitable mission and evaluating whether

⁷⁹ See September 4, 2002 Public Hearing Information: Blue Cross/Blue Shield Reserves and Surplus, available at <http://www.ins.state.pa.us/ins/cwp/view.asp>. Ex. 39.

IBC and the other Blue Cross Plans have fulfilled that obligation. In Hospital Utilization Project v. Commonwealth of Pennsylvania, this Court defined the characteristics of a ‘purely public charity’ and determined that HUP was not a ‘purely public charity.’ 507 Pa. 1, 21-22, 487 A.2d 1306, 1317 (1987). In this case, the Court is asked to make a similar determination – define the characteristics of the Blue Cross Plans’ public obligation and determine whether IBC and the other Blue Cross Plans are meeting their obligation while amassing an unprecedented surplus.

B. The Insurance Department Has Not Taken Any Steps to Prevent Independence Blue Cross or the Other Blue Cross Plans From Accumulating Excessive Surplus Funds.

The Insurance Department, which administers the adultBasic program, has consistently dealt with funding problems for adultBasic,⁸⁰ and has needed supplemental funds merely to maintain the current, already-inadequate level of participation.⁸¹ The serious shortage of funding has led to a waiting list of over 55,000 uninsured persons.⁸² Meanwhile, PID has not outlined clear criteria for either the fulfillment of IBC’s charitable function or maximum limits to the excess surplus. PID’s on-going analysis has focused instead only on ensuring that the mandatory minimums are met for reserves. Ultimately, PID runs an under-funded in partnership with IBC, in the face of an uninsured crisis, but remains silent on the subject of IBC’s excess surplus and charitable obligations.

C. The Department’s Involvement in this Issue Raises a Conflict of Interest for the Insurance Commissioner.

⁸⁰ PID announced reductions in the adultBasic program enrollments slots over the summer of 2003. Legislative Update, *supra* note 27.

⁸¹ Facts About adultBasic, *supra* note 27.

⁸² Id.

The Department's unique relationship with IBC and the other Blue Cross Plans creates a conflict of interest within the Department that emphasizes the need for the courts to be involved in the question of the fulfillment of their public obligation. Pursuant to the Health Investment Insurance Act, 35 P.S. § 5701.1303(e), the Department of Insurance is obligated to administer the adultBasic health insurance program throughout the State. Pursuant to 40 P.S. § 991.2311(a), the Department is obligated to administer the Children's Health Insurance Program (CHIP). In order to fulfill these obligations, the Department contracts with IBC and the other Blue Cross Plans.⁸³ The Department currently has contracts with the Plans to insure 43,996 adults under the adultBasic program.⁸⁴ The Plans also operate five of the eight health insurance providers that contract with the Department to insure 133,462 children under CHIP.⁸⁵

As the size of these contracts indicates, the PID relies heavily on the administrative services provided by the Plans to fulfill its obligations under law. This reliance creates a conflict that draws into question the Department's ability to appropriately consider and represent the interests of consumers on the issue of the surplus and the plans' public obligation. Any action the Department takes that either decreases the surplus or demands that the Plans do more to meet their charitable obligation would affect the bargaining position of the Department vis-a-vis its contractors. By contrast, the courts provide an independent, neutral forum for consumers to raise such issues.

⁸³ Pennsylvania Insurance Department, "adultBasic Contractor Service Areas," available at <http://www.ins.state.pa.us/ins/cwp/view.asp?a=1278&q=527040>; Pennsylvania Insurance Department, CHIP Contractors, available at <http://www.ins.state.pa.us/ins/cwp/view.asp>. Ex. 28.

⁸⁴ Pennsylvania Insurance Department, adultBasic Homepage, available at <http://www.ins.state.pa.us/ins/cwp/view.asp>. Ex. 29.

⁸⁵ Pennsylvania Insurance Department, CHIP Homepage, available at <http://www.ins.state.pa.us/ins/cwp/view.asp>, Ex. 31, Pennsylvania Insurance Department, CHIP Contractors, available at <http://www.ins.state.pa.us/ins/cwp/view.asp>. Ex. 30.

D. The Court Must Exercise its Jurisdiction to Ensure that Consumer's Voices are Heard.

As we have already discussed, the legislative findings and policy issued with Blue Cross Plans' enabling legislation demonstrate, IBC and the other Blue Cross Plans were created to benefit the residents of Pennsylvania. 40 Pa. Cons. Stat. Ann. § 6303 (West 2000). The legislature intended to enable health professionals to serve residents of Pennsylvania – that is consumers of health insurance. Since the program was designed to serve the health needs of the public, it is essential that the public have a voice in determining whether and how those health needs are being met. The public must be given a forum for holding IBC and the other Blue Cross Plans accountable to the residents of Pennsylvania.

i. The PID Does Not Provide an Adequate Forum for Consumers to be Heard on the Issue of Charitable Mission.

The PID has not provided consumers with a permanent, independent voice within the Department, nor has it created adequate alternative procedures for eliciting and addressing consumer questions and concerns of this nature.

Unlike Insurance Departments in other states, the PID does not have a consumer advocate. The role of such an advocate would be to represent consumers in insurance issues. In doing so, the advocate would provide an independent check on a Department that is faced with the difficult task of protecting both the insurance industry and the

consumer. Despite wide ranging public support for such an advocate,⁸⁶ the PID has opposed the creation of an independent consumer advocate within the Department.⁸⁷

The lack of a consumer advocate, solely committed to representing the interests of the public, effectively prevents public participation in decisions of the Department on questions such as the one now before the court. Without such an advocate, and without a means for collecting information and raising issues before the PID, consumers have nowhere to turn but to the courts to hold IBC and other Blue Cross Plans accountable.

A review of how the PID has thus far handled the issue of the surplus, is further evidence of the need for the courts to provide a forum. At its public hearing on September 4, 2002, the format was “similar to that of an informal township or local council meeting,” according to the Insurance Commissioner.⁸⁸ Each of the Blue Cross Plans were allowed to give a presentation explaining or justifying their surplus.⁸⁹ After each plan had made its presentation, the Department asked each plan’s representative questions.⁹⁰ Consumers were not permitted to ask questions of the plans. Only after all four plans had given their lengthy presentations and answered all the Department’s questions, were individuals from the public permitted to speak.⁹¹ However, unlike the Plans, whose time was unlimited, each individual’s comments were limited to five

⁸⁶ See Jeff Gelles, “Calling for Official Insurance-Consumer Advocate,” *The Philadelphia Inquirer*, February 19, 2003 at D01, Ex. 18; Editorial “Advocating for an Advocate,” *The Philadelphia Daily News*, May 9, 2003 at 13, Ex.4; Editorial, “Consumer Voice,” *The Patriot News*, February 28, 2003 at A10. Ex. 5.

⁸⁷ See Letter from Insurance Commissioner Diane Koken to Philadelphia Councilman Frank DiCicco dated April 21, 2003, stating, “[w]e believe that we have the expertise and the resources to perform this important function and that a Public Advocate would be duplicative and not add value.” Ex. 25.

⁸⁸ Statement of Insurance Commissioner Diane Koken, September 4, 2002, Insurance Department Hearing on Surplus Levels, at 2, available at, http://www.insurance.state.pa.us/bchearing/comments/bc_comm.pdf. Ex 41.

⁸⁹ *Id.* at 2.

⁹⁰ *Id.* at 2.

⁹¹ *Id.* at 3.

minutes.⁹² Without previous access to detailed information about each plan's surplus, an opportunity to cross-examine the plans, or even to formulate an intelligent analysis in the allotted five minutes, or with any of the due process rights that are the cornerstone of the judicial process, the public was effectively excluded from meaningful participation in the hearing process.

E. Any Remedy that the Court Orders Must Be Tailored to Facilitate IBC's Obligation to Make Health Insurance Available to As Many Uninsured Pennsylvanians as Possible.

i. In Order to Reach the Uninsured, the Court Can Not Fashion a Remedy Which Only Benefits the Employers, Because Many Employees Do Not Receive Health Coverage.

In the United States, people who have health insurance generally get it either through their employers or through public benefits.⁹³ Pennsylvania is no exception. In Pennsylvania, 65% get health coverage through their employer, 22% through a public health program, and only 4% purchase health insurance individually.⁹⁴

However, among the employed, only 66% of Pennsylvania companies offer health coverage. That number drops to 54.7% for small businesses.⁹⁵ Health coverage is also closely correlated to high-wage employment.⁹⁶ Therefore, an immense portion of the state's employed, especially the low-wage or small business employed, would not benefit from a remedy which simply reduces rates of coverage offered to employers.

ii. To Improve the Uninsured Crisis, the Court Must Fashion a Comprehensive Remedy, Because the Existence of an Excess

⁹² Id. at 3.

⁹³ 58% of Americans get insurance through their employment, while 23% get insurance through public programs. Only 5% of the national population has an individual health plan. Kaiser 2001, supra note 1.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ The rate of non-elderly with employer-based coverage is 22% for workers under 100% of the Federal Poverty Income Guideline, 55% for workers between 100-199% of the guideline, and 89% for workers above 200%. Kaiser 2001.

Surplus is Not Merely the Result of the Blue Cross Plans' Rate-Setting Policies.

It is clear that while amassing a surplus, IBC has failed in its statutory obligation to the uninsured. IBC's insistence that this is a rate-setting case demonstrates its inability to understand the extent of their failure to meet its obligations. It should be beyond cavil that this is not simply a rate-setting case. This case is about the excess surplus itself, the complete autonomy and discretion IBC has enjoyed in amassing it, and the responsibilities it has left behind. The particular setting of IBC's rates do not necessarily imply an excess surplus. The excess surplus is a by-product of numerous factors, ranging from IBC's lack of commitment to its charitable duties, to rates, to claims payment policies, etc.

Fixing only one factor – such as rate-setting – certainly does not guarantee that there will be substantial change in the growth of the excess surplus. In addition, rate-setting changes will not directly address IBC's other failures, such as its inadequate efforts as provider of last resort. Rate-setting might help some people who already have health insurance (including those insured through IBC's for-profit subsidiaries), but it would be of little relief to the almost 50% of small business employees who do not get benefits through employment.⁹⁷ In a health care market where individual-based policies are the exception as opposed to the norm, only adjusting rate-setting might further the divide between the insurance “haves” and “have-nots.” This would be patently antithetical to IBC's special non-profit mission, and IBC's fixation with rate-setting arguments illustrates their failure to fulfill their role.

⁹⁷ Id.

V. CONCLUSION

IBC argues that this is a case about rate setting. IBC is wrong. This case is about a very important social role, and social *responsibility*, bestowed upon IBC during the Great Depression era. It may have an effect upon, or be affected by, a plethora of variables such as payment policies, corporate expansion, and rates. But it is fundamentally a case about grossly excessive surplus amassed under the guise of non-profit status, and generations of tax-exemption. This case is about a commitment IBC made to care for Pennsylvanians, and the ways it has failed to that responsibility. Finally, it is a case about how PID has failed to regulate or even guide that charitable responsibility, or place any limits on the astounding growth of IBC's excess surplus.

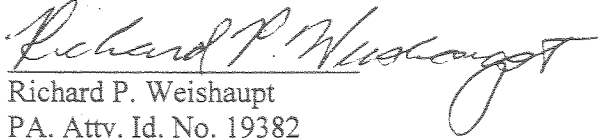
In the face of a crisis of uninsured citizens, IBC has amassed countless millions of dollars of excess surplus, and now asks the court to stay out of this matter because it is part of a "departmental regulatory function." Nothing could be more indicative of IBC's failure to understand the whole picture, or of PID's failure to foster or manage that understanding. This is a case about responsibilities unmet, and rights which have never been enforced. PID has failed to address the excess surplus growth, and now

Pennsylvanians ask that the Courts to protect their rights, especially in the absence of an alternate forum.

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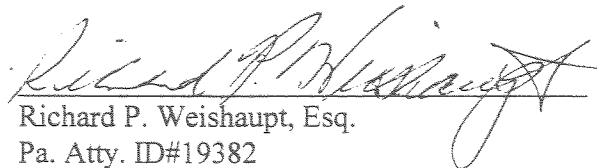
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