IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Sarahi Vasquez Gonzalez, as administrator of the estate of Rodolfo Chavez Lopez, a/k/a Juan Aguilar, deceased,	)	
Plaintiff,	)	
v.	)	
Union Health Services, Inc., Agnieszka Brukasz, M.D., Fakhruddin Adamji, M.D., Terrence Lerner, M.D., Michael Rossi, M.D., Hen Li-Hsiang, M.D., Blake Movitz, M.D., Julitalee Camba, R.N., Advocate North Side Health Network, d/b/a Advocate Illinois Masonic Medical Center, Advocate Illinois Masonic Health Partners d/b/a Advocate Illinois Masonic Physician Partners, Advocate Health and Hospitals Corporation d/b/a Advocate Medical Group,	)	16 L 10661
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The Illinois Constitution prohibits legislation conferring a special benefit or privilege on a person to the exclusion of others similarly situated. One of the Illinois Legislature's 1988 amendments to the Voluntary Health Services Plans Act rescinded absolute tort immunity for all but one voluntary plan operating at that time. The legislative history supporting the amendment and the evidentiary record provide no explicit or implied rational relationship between the amendment and the state's legitimate interest in the provision and management of healthcare either at the time of enactment or today. Without such a relationship supporting the amendment, the only conclusion is

that the amendment constitutes special legislation and is, therefore, unconstitutional.

Facts

From April 4 through October 29, 2014, Juan Aguilar received care from the medical staff at or associated with Union Health Service, Inc. (UHS). After an MRI revealed enlarged retroperitoneal lymph nodes, Aguilar underwent a CT-guided core biopsy at another healthcare facility. Several months later, Aguilar presented at UHS with a high fever and lower-left extremity swelling, redness, and pain. A physician recommended that Aguilar undergo a second biopsy the following week, again at a different facility. The day after the second biopsy, UHS physicians ordered that Aguilar be placed on heparin, given compression devices (although he was not walking), and discharged. Two days later, Aguilar died secondary to a deep-vein thrombosis (DVT) and pulmonary emboli.

On October 28, 2016, Sahari Vasquez Gonzalez, as administrator of Aguilar's estate, filed a 24-count complaint against various entities and individuals, including UHS and three of its physicians, Drs. Agnieszka Brukasz, Fakhruddin Adamji, and Terrence Lerner. Counts 15 and 16 are directed against UHS under the Survival and the Wrongful Death Acts for the alleged malpractice of its three physicians. Each count claims that the UHS physicians failed to recognize the signs and symptoms of DVT, permitted Aguilar to undergo a biopsy despite the DVT signs and symptoms, prescribed Lasix, and failed to appreciate the DVT risk factors.

On February 2, 2017, UHS filed a motion to dismiss counts 15 and 16 pursuant to the Code of Civil Procedure. *See* 735 ILCS 5/2-619(a)(9). UHS argues that it is immune from liability pursuant to the Voluntary Health Services Plans Act (VHSPA). *See* 215 ILCS 165/1 – 30. The statute defines such a voluntary health services plan as an entity:

> under which medical, hospital, nursing and related health services may be rendered to a subscriber or beneficiary at the expense of a health services plan corporation, or any contractual arrangement to provide, either directly or through arrangements with others, dental care services to subscribers and beneficiaries.

215 ILCS 165/2(b). Especially important here is the statute's immunity provision for such plans. As originally enacted, the immunity provision stated that:

> A health services plan corporation shall not be liable for injuries resulting from negligence, misfeasance, malfeasance, nonfeasance or malpractice on the part of any officer or employee of the corporation, or on the part of any person, organization, agency or corporation rendering health services to the health services plan corporation's subscribers or beneficiaries.

Ill. Rev. Stat. 1983, ch. 32, ¶ 620, eff. July 1, 1951.

In affidavits attached to the motion and reply brief, W. Joe Garrett, the UHS executive director, avers that on December 1, 1952, UHS received its statutory charter as a not-for-profit voluntary health services plan and that it has operated as such since that date. UHS primarily serves union workers and their families through union health care funds paid to the Service Employees International Union's Local 1 health fund and Local 25 welfare fund. Garrett explains that UHS is not owned or controlled by a hospital and operates independently from hospitals and other healthcare providers, although it contracts with them to provide care and treatment not available at UHS facilities. Garrett also averred that two other voluntary plans received their charters before 1965 – the Sidney Hillman Health Centre of Chicago and Midwest Regional Joint Board (November 24, 1953) and Union Medical Center (April 21, 1960).

Garrett avers that voluntary plans must operate on a not-for-profit basis in contrast to HMOs that frequently operate on a for-profit basis. According to Garrett, the VHSPA permits a voluntary plan to obtain a certificate of authority under the HMO Act, 215 ILCS 125/1-1 – 6-19, but does not require a voluntary plan to offer the same scope of services as an HMO. On January 3, 1977, UHS obtained an HMO certificate, thereby permitting UHS to transact business under both statutes. Verified discovery responses provided by UHS further indicate that, at the time of Lopez's injury, UHS had a $1-million/$3-million liability insurance policy through ISMIE Mutual Insurance Company.

Gonzalez responds to the motion with two arguments. First, Gonzalez contends that UHS is not statutorily immune because it purchased liability insurance that, according to Gonzalez, extinguishes a voluntary plan's immunity. Second, Gonzalez argues that the Illinois legislature's 1988 amendment to section 26 of the VHSPA is unconstitutional because it constitutes special legislation and is, therefore, unenforceable.[1]

Analysis

As a procedural matter, this court recognizes that a section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). The motion must be directed against an entire claim or demand. *Id.* If the basis for the motion does not appear on the face of the complaint, the motion must be supported by an affidavit. *See* 735 ILCS 5/2-619(a). A court considering a section 2-619 motion is to construe the pleadings and supporting documents in a light most favorable to the nonmoving party, *see Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008), and all well-pleaded facts contained in the

[1] On October 3, 2017, Gonzalez filed and served on the Illinois Attorney General, this court, and the parties her notice of claim pursuant to Illinois Supreme Court Rule 19. As of the date of this memorandum opinion and order, the Attorney General has not responded to the Rule 19 notice.

complaint and all inferences reasonably drawn from them are to be considered true. *See Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). One of the enumerated grounds for a section 2-619 motion to dismiss is that the claim is barred by affirmative matter that avoids the legal effect of or defeats a claim. *See* 735 ILCS 5/2-619(a)(9). For purposes of a section 2-619(a)(9) motion, "affirmative matter" is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *See Illinois Graphics*, 159 Ill. 2d at 485-86.

As to substantive matters, this court begins its analysis recognizing the admonition not to decide a legal question on constitutional grounds if it may be decided on other grounds. *See People v. E.H.*, 224 Ill. 2d 172, 178 (2006), *citing* cases. Although Gonzalez's challenge to the constitutionality of section 26 of the VHSPA is the weightier argument, she also argues that UHS is liable because it purchased insurance, effectively eliminating its statutory immunity. Since this argument is statutory and not constitutional in nature, it is the first one this court must address.

To determine whether the purchase of insurance waived the immunity UHS would otherwise enjoy under the VHSPA requires reading the text according to the rules of statutory construction. While there are many such rules, the basic ones will do in this instance. First and foremost, the purpose of statutory construction is to "ascertain and effectuate the legislature's intent . . . ." *McElwain v. Illinois Sec'y of State*, 2015 IL 117170, ¶ 12. The primary source from which to infer this intent is the statute's language. *See id.* "If the language of the statute is clear, the court should give effect to it and not look to extrinsic aids for construction." *Bogseth v. Emanuel*, 166 Ill. 2d 507, 513 (1995); *see also Bettis v. Marsaglia*, 2014 IL 117050, ¶ 13. It is also plain that a court may not, "depart from plain statutory language by reading into [a] statute exceptions, limitations, or conditions not expressed by the legislature." *McElwain*, 2015 IL 117170, ¶ 12.

This court acknowledges that the legislature has the inherent authority both to grant and limit a defendant's statutory immunity. *See Lacey v. Village of Palatine*, 232 Ill. 2d 349, 360 (2009). That principle is important for assessing legislative intent in general and the VHSPA's section 26 immunity in particular. First, the VHSPA does not explicitly prohibit a voluntary plan from purchasing insurance, and the statute contains no language from which such a prohibition could be inferred. Second, section 26 contains no language limiting the available immunity; for example, extending it only to simple negligence claims but not to willful and wanton claims. Had the legislature intended to limit the scope of section 26 immunity, the legislature certainly could have done so either with the original enactment in 1951 or the 1988 amendments. In short, the only conclusion to be drawn from a reading of the statute's plain language is that section 26 of the VHSPA provides a voluntary plan with absolute immunity regardless of whether it purchased insurance.

This conclusion is not altered by Gonzalez's reliance on extrinsic sources of statutory interpretation in the form of three cases allegedly supporting the opposite conclusion. Each of these cases is, however, inapplicable. In *Wendt v. Servite Fathers*, 332 Ill. App. 618 (1st Dist. 1947), for example, the court reached the unremarkable conclusion that the common law's charitable-trust-immunity doctrine does not extend to a charity's insurance proceeds.[2] Later, in *Moore v. Moyle*, 405 Ill. 555 (1950), the Supreme Court amplified the doctrine by permitting recovery against a charity's non-trust funds. Finally, in *Beach v. City of Springfield*, 32 Ill. App. 2d 256, 261 (3d Dist. 1961), the court held that an insurance company that accepted public money to insure a

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[2] The court's commonsense reasoning was that:

> if the [charitable] corporation wishes to waive immunity we know of no principle in law which would prevent it from doing so . . . . We hold that where insurance exists and provides a fund from which tort liability may be collected so as not to impair the trust fund, the defense of immunity is not available.

Wendt, 332 Ill. App. at 634.

local public entity may not claim the benefit of the entity's immunity, but must bear the risk of paying an insured's claims.

Wendt and *Moore* are unhelpful because they address a common-law immunity, not a statutory one, and not the VHSPA in particular. Further, the Third District decided *Beach* in the interregnum between the Supreme Court's abolition of sovereign immunity in *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11 (1959), and the legislature's 1965 enactment of the Local Governmental and Governmental Employees Tort Immunity Act (TIA). *See* 745 ILCS 10/1-101 – 10-101. It is important to note that the original TIA adopted *Beach*'s holding by eliminating tort immunity upon the purchase of insurance. *See* Ill. Rev. Stat. ch. 85, ¶ 9-103(c). In a 1986 amendment, however, the legislature eliminated the purchase-of-insurance exception, permitting local public entities to purchase insurance and still assert statutory immunity. *See Zimmerman v. Skokie*, 183 Ill. 2d 30, 51-52 (1998). This reference to the legislature's rescission of the TIA's purchase-of-insurance limitation to immunity two years before the VHSPA amendments supports the inference that the legislature recognized the effect of such a limitation and chose not to include it in the VHSPA. In sum, the purchase of insurance does not waive statutory immunity under the VHSPA.

Turning to the parties' constitutional arguments, this court recognizes that the history of the VHSPA is, in many ways, a history of managed healthcare in Illinois. To understand that history, it is incumbent to explain various legislative enactments and amendments as well as judicial decisions concerning and related to the VHSPA. Such an explication will place in context the parties' challenges to and defenses of the 1988 amendment to section 26 – the statute's immunity provision. This court's discussion must begin, therefore, with the original text.

The legislature approved the VHSPA on June 27, 1951. *See* Ill. Rev. Stat. ch. 32, ¶¶ 595 – 624. As originally defined, a voluntary plan was "a plan or system under which medical, hospital, dental, nursing and relating health services may be

rendered to a subscriber or beneficiary, at the expense of a health services plan corporation." *Id.* at ¶ 596. Five or more persons could incorporate a voluntary plan, *see id.* at ¶ 598, that would be overseen by a board of trustees consisting of not less than seven persons, at least 30% of whom had to be licensed physicians, *see id.* at ¶ 599. The statute authorized the Department of Insurance to issue charters to voluntary plans and subjected them to Insurance Code regulation. *See id.* at ¶¶ 602 – 607. Only not-for-profit corporations could operate as voluntary plans. *See id.* at ¶ 621. The statute further provided absolute immunity to the corporate entity. As stated:

> A health services plan corporation shall not be liable for injuries resulting from negligence, misfeasance, malfeasance, nonfeasance or malpractice on the part of any officer or employee of the corporation, or on the part of any person, organization, agency or corporation rendering health services to the health services plan corporation's subscribers and beneficiaries.

Id. at ¶ 620.

The creation of voluntary plans via the VHSPA presaged by more than 20 years the legislature's creation of similar delivery systems for managed healthcare, the most important of which was the 1974 passage of the Health Maintenance Organization (HMO) Act. *See* 215 ILCS 125/1-1 – 6-19. That statute originally defined an HMO as "any person who or which undertakes to provide or arrange for one or more health care plans. . . ." *See* Ill. Rev. Stat. ch. 111 1/2, ¶ 1402(7). In 1982, the legislature amended the statute, in part, by redefining "HMO" to exclude "persons" and permit only organizations, including not-for-profit voluntary plans organized under the VHSPA, to be certified as HMOs. *See* Ill. Rev. Stat. ch. 111 1/2, ¶ 1402(9); *see also Moshe v. Anchor Org. for Health Maint.*, 199 Ill. App. 3d 585, 595 (1st Dist. 1990), *citing* Ill. Rev. Stat. 1987, ch. 111 1/2, ¶¶ 1402(11) & 1403(a).

The similarity between voluntary plans and HMOs after 1974 may have been a motivation for a facial challenge to the VHSPA's immunity provision under the equal protection clauses of the United States and Illinois constitutions. *See Brown v. Michael Reese Health Plan, Inc.*, 150 Ill. App. 3d 959 (1st Dist. 1986).[3] In *Brown*, the court began by noting that voluntary plans are:

> medical care delivery systems through which medical, hospital, nursing, and related health services are rendered to a subscriber or beneficiary. Generally, the plans ensure the availability of health services for a subscriber population by utilizing a prepayment method of financing and a group-practice mode for delivery of services.

Id. at 961, *citing* Note, *The Role of Prepaid Group Practice in Relieving the Medical Care Crisis*, 84 Harv. L. Rev. 887 (1971). The court concluded that by creating voluntary plans, the legislature had:

> clearly carved out a separate and distinct classification of health care providers. The voluntary health services plan is distinguishable from other health care providers because they serve the unique function of both insurer and health care provider. The health services plan is regulated by the Department of Insurance and governed by specific legislative requirements, unlike other, unregulated health care providers. In our opinion, this unique organizational structure and regulation of the voluntary health services plan corporation provides a rational basis for immunizing the defendant corporation in the instant case, and the trial court properly dismissed Michael Reese Health Plan, Inc., as a party defendant.

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[3] It does not appear that Brown brought, and the court plainly did not consider, an as-applied constitutional challenge.

Id. at 961-62.

The expansion of HMO delivery systems eventually affected the existence of voluntary plans as originally organized under the VHSPA. In 1988, the legislature substantially altered the VHSPA in two ways. First, the legislature mandated that each voluntary plan organized under the statute also be certified as an HMO. *See* Ill. Rev. Stat. ch. 32, ¶ 602, amended by P.A. 85-1246, § 1, eff. Aug. 30, 1988, now 215 ILCS 165/8. Second, the legislature amended the VHSPA's immunity provision to read:

> A health services plan corporation incorporated prior to January 1, 1965, operated on a not for profit basis and neither owned or controlled by a hospital shall not be liable for injuries resulting from negligence, misfeasance, malfeasance, nonfeasance or malpractice on the party of any officer or employee of the corporation, or on the part of any person, organization, agency or corporation rendering health services to the health services plan corporation's subscribers and beneficiaries.

215 ILCS 165/26. With the amendment to section 26, the legislature effectively placed three limitations on the continued application of absolute immunity for voluntary plans: (1) incorporation before January 1, 1965; (2) operation on a not-for-profit basis; and (3) no hospital ownership or control. *See id.* It is this amendment to section 26 that is the focal point of this court's analysis.[4]

To discern what the legislature sought to achieve by amending section 26, it is necessary to review the amendment's legislative history. It is noted at the outset that the available

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[4] The legislature further amended the statute in 1989 to prohibit the issuance of any new charters to voluntary plans. *See* Ill. Rev. Stat. ch. 32, ¶ 597.1, amended by P.A. 86-600 (eff. Sept. 1, 1989), now 215 ILCS 165/3.1.

legislative history of the 1988 amendments in general and section 26 in particular is quite limited and provides little insight. Despite these shortcomings, it is known that the amendment to section 26 began as House Bill 3806, a bill introduced at first reading by Representative William Shaw as "a Bill for an Act to add Sections to the Health Maintenance Organizational [*sic*] Act." H.B. 3806, 85th Gen. Assembly, House Proceedings, Apr. 8, 1988, at 17. At the second reading, Shaw offered an amendment prohibiting HMOs from denying emergency treatment absent their prior approval, but soon withdrew the amendment. *Id.*, May 17, 1988, at 5-6 & 37. At the third reading, Shaw simply stated that the bill "provides [that] a person who solicit[s] the enrollment of Public Aid Recipients and Health Maintenance Organization[s] shall be licensed by the Department of Insurance." *Id.*, May 20, 1988, at 165. The House approved the measure. *Id.*

The bill then moved to the Senate, which had the first reading the following month. At that time, Senator Emil Jones offered Amendment No. 1, which he explained:

> prohibits the Department of Insurance from approving the charter of any organization seeking . . . to provide medical hospital services through health plans under this Act unless the organization also is approved for a certificate of authority under the HMO Act. It also require[s] HMO . . . representative[s] who solicit public aid recipients to obtain a . . . limited insurance representative license. . . .

H.B. 3806, 85 Gen. Assembly, Senate Proceedings, Jun. 15, 1988, at 34. The Senate approved the amendment. *Id.* At the second Reading of Amendment No. 1, Senator Jones explained further that:

> House Bill 3806 amend[s] the HMO Act and prohibit[s] the solicitation of public aid recipients for HMO plans unless that person . . . has a limited insurance license to sell HMO [*sic*]. Also the bill brings into conformity

> those not-for-profit health organization plans . . . with the HMO Act, and that's all the bill does. . . .

Id., Jun. 22, 1988, at 83. The Senate passed the amendment. *Id.*

The Senate sent Amendment No. 1 to the House, which voted not to concur with the amendment. H.B. 3806, 85th Gen. Assembly, House Proceedings, June 23, 1988, at 133. A few days later, it appears that the Senate refused to recede on Amendment No. 1. H.B. 3806, 85th Gen. Assembly, Senate Proceedings, June 28, 1988, at 93 (indicating "(Machine cutoff)").

After the Senate vote, the measure apparently went to a conference committee where legislators substantially altered the bill.[5] That conclusion is based on the next appearance of the bill in the House by which time the bill amended both the HMO Act as well as the VHSPA. At the bill's reappearance, Representative Shaw stated that:

> House Bill 3806, amends Section 26 of the Voluntary Health Service[s] Plan[s] Act . . . [w]hich currently renders voluntary health service plan[s] legally immune from any negligence or reckless conduct for their directors. . . . Also in this Bill it mandates that any person who solicits public aid recipients to enroll them in HMO's [*sic*] must be licensed. . . . I move for the adoption of the first Conference Report.

H.B. 3806, 85th Gen. Assembly, House Proceedings Jun. 30, 1988, at 188. The House then voted to approve the conference report. *Id.*

Finally, the Senate considered the conference report. At that time, the following colloquies occurred on the Senate floor:

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[5] This court attempted, but could not obtain, any audio recordings of the conference committee's hearings.

Senator Jones:
[The] First Conference Committee Report require[s] that medical service plan[s] organize[d] under the Voluntary Health Service[s] Plan[s] Act be approved for a certificate of authority under the HMO Act. It repeals the immunity for civil liability granted to the medical plans under the voluntary health service[s] plans. . . .

* * *

Senator Adeline Geo-Karis:
I understand that the exemption from liability that the Health Service Plan Corporation currently has for injuries resulting from negligence on the parts of officers or employees of the corporation is taken out. So they are . . . they do have liability, is that correct?

* * *

Senator Jones:
Right now, [there are] only three that fall[] under the particular Act and they are . . . immune from liability[;] this takes away that immunity.

* * *

Senator David Barkhausen:
[C]an you tell me how many HMO's [*sic*] there are that are now organized under the Statute providing for [ ] voluntarily health service plans and providing for some degree of immunity for those plans?

* * *

Senator Jones:
There are three.[6]

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[6] The Garrett affidavit confirms Senator Jones's apparent reference to the two other pre-1965 chartered voluntary plans – Sidney Hillman Health Centre (Nov. 24, 1953) and the Union Medical Center (Apr. 21, 1960). Other voluntary plans operated in 1988, but they had been chartered after 1965. References to that effect are made as to the Anchor Organization (Nov. 2, 1971) in *Moshe v. Anchor Org. for Health Maint.*, 199 Ill. App. 3d 585, 589 (1st Dist. 1990), and the Michael Reese Health Plan (Oct. 13, 1972) in *Jolly v. Michael Reese Health Plan Found.*, 225 Ill. App. 3d 126, 127 (1st Dist. 1992). The *McMichael* court was apparently uninformed when it wrote that as of

* * *

Senator Barkhausen:
Do you know the names of them?

* * *

My . . . question and concern is . . . is whether you can tell me whether this eliminates the immunity for all HMO's [*sic*] that previously were guaranteed statutory immunity from liability suits?

* * *

Senator Jones:
Yeah, the only group that . . . is exempt would be the Union Health Service but it does take away the immunity for all the others.

* * *

Senator Barkhausen:
Can you tell me why the provisions of this Conference Committee Report maintain the immunity for one HMO organized . . . as a voluntary health service plan and apparently not for the others?

* * *

Senator Jones:
Because it is a not-for-profit and it's not owned by a hospital.

* * *

Senator Barkhausen:
Well, . . . my concern, Mr. President and members, is that . . . in attempts to reach some sort of a political compromise, we've taken . . . two out of three. . . . [A]s I understand it, there are three HMO's [*sic*] that are organized as voluntary health service plans that have been provided with statutory immunity . . . for a very good reason under legislation dating back to 1951, and rather than changing the rules for all three of them

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1988 there were only three operating voluntary plans – UHS, Anchor, and Michael Reese. *See McMichael*, 259 Ill. App. 3d at 118, n.1.

> . . . we're only changing the rules for two of them. My concern is that this aspect of the Conference Committee Report represents a form . . . of special legislation that I suspect . . . if challenged, the courts might find . . . that that conclusion is correct.
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> * * *
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> Senator Jones:
> In response to . . . the last speaker on this subject matter, the hospital that this immunity . . . is being taken away from, they . . . the doctors that work for the hospital are employees as such. There would be one that you're speaking of that we did not take it away is just a service organization but the provisions in this piece of legislation . . . [are] good. It takes care of the problem that we have as it relate[s] to HMO's [*sic*], and I ask for a favorable vote on this Conference Committee Report.

H.B. 3806, 85th Gen. Assembly, Senate Proceedings June 30, 1988, at 154-55, 159-61. The Senate then passed the conference committee report, *id.* at 161, and the bill became law and effective as of August 30, 1988. *See* 215 ILCS 165/26.

The legislature's effective blurring of the lines between voluntary plans and HMOs became a factor in four subsequent Illinois appellate court decisions. In the 1990 case, *Moshe*, the court considered whether Anchor could claim immunity because it was a voluntary plan, but despite the additional fact that after 1988 it was a chartered HMO. *See* 199 Ill. App. 3d at 589. The court did not reach the dual-capacity argument because the 1988 amendment to section 26 was substantive and, therefore, prospective only in application; consequently, Anchor could claim the pre-1988 immunity since the alleged malpractice had occurred in 1982. *See id.* at 588, 600-01. Additionally, the amendment's express language did not call for it to be applied retrospectively, and the legislature did not manifest any intent to that end. *See id.* at 602.

One year later, in *American Nat'l Bk. & Trust Co. v. Anchor Organ. for Health Maint.*, the court reversed a circuit court's dismissal of Anchor based on its claim of section 26 immunity. 210 Ill. App. 3d 418, 427 (1st Dist. 1991). Unlike *Brown* or *Moshe*, the focus in *American National* was an as-applied challenge to Anchor's claim of section 26 immunity based on its "dual capacity as a State-certified and federally qualified HMO as well as a voluntary health service plan." *Id.* at 424. In addressing this challenge, the court carefully distinguished the limits to its prior two decisions:

> In *Brown* . . . there was no indication of whether the defendant, Michael Reese [ ], was, at the time of the alleged malpractice, acting in a dual capacity as both an HMO and a voluntary health services plan. Thus, there was no discussion of whether a health services plan corporation having such dual status should be denied the immunity it would ordinarily enjoy under its VHSPA charter. This court in *Moshe* did, however, partially address this issue, finding that Anchor's dual status did not "preclude the operation of the immunity provision, as originally enacted, to bar all malpractice claims against it as a matter of law." (*Moshe*, 199 Ill. App. 3d at 594.) However, this court did not go on, in *Moshe*, to consider the constitutionality of applying the immunity provision to a dual status corporation such as Anchor, since this issue was not raised.

210 Ill. App. 3d at 425.

The court in *American National* reiterated its conclusion that section 26 immunity was rationally related to a legitimate state purpose. *Id.* at 425. Yet, the court also acknowledged that over time,

> corporations such as Anchor began to deviate from their original function and purpose, while at the same time, the HMO Act was amended substantially . . .

> placing some of the same restrictions that were once unique to VHSPA corporations, upon HMOs. The "persona" of the voluntary health services plans began to dissipate, and the distinction between a health services plan and an HMO became less apparent.

Id. at 426 (citations omitted). Then, after 1986,

> Anchor's duties, obligations and requirements under the VHSPA merged with its duties, obligations and requirements as a State-certified and federally qualified HMO. We find that, under these circumstances, it would be fundamentally unfair and an unconstitutional unequal treatment to allow Anchor to rely upon its VHSPA charter to be insulated from liability. Consequently, we find that, at the time that this cause of action accrued in 1986, Anchor was acting in the same capacity as any other HMO and that despite its charter under the VHSPA, it was not eligible to take advantage of the immunity that the status allowed.

Id. at 426.

The third case came the next year in *Jolly v. Michael Reese Health Plan Found.*, 225 Ill. App. 3d 126 (1st Dist. 1992). *Jolly* is factually similar to *Moshe* in that the plaintiff's claims of alleged malpractice occurred before the 1988 amendment to section 26. *See id.* at 128. The *Jolly* court relied on *Moshe* and held consistently that the 1988 amendment was strictly prospective in effect and, therefore, did not eliminate Michael Reese's section 26 immunity. *See id.* at 130. Jolly argued alternatively that Michael Reese could not claim immunity under the 1951 version of section 26 since it amounted to special legislation. The court rejected this argument by looking to *Moshe* and *Brown*, both of which recognized the constitutionality of the 1951 version of section 26 because the unique dual-capacity of voluntary

plans was rationally related to a legitimate state interest. *See id.* at 132.

The last judicial declaration concerning the VHSPA came three years later in *McMichael*. The matter arrived before the court on a permissive appeal pursuant to Illinois Supreme Court Rule 308(a). The question provided the court the opportunity to accept Michael Reese's argument and declare the 1988 amendment to section 26 to be unconstitutional and to reinstate immunity for all voluntary plans according to the 1951 statute. As explained by the court:

> When reviewing this legislation as a whole, in conjunction with the comments made by the legislature when passing the 1988 amendment to the VHSPA, it is clear to this court that the legislature intended that no HMO, regardless of its organization pursuant to other statutes, be granted immunity. A single exception was made for Union [Health Service], a health service plan which the legislature felt still conformed to the original concept of the VHSPA and, thereby, was entitled to continued immunity.
>
> * * *
>
> A grant of immunity is not a fundamental right, it is a legislatively-created and statutorily-conferred benefit bestowed upon a class, the constitutionality of which is dependent upon a finding that such benefit advances a legitimate State purpose. If the purpose ceases to exist, the legislature is not only free to eliminate the gratuitously-conferred [*sic*] benefit, it may be constitutionally mandated to do so. Otherwise the statute may be invalid as "special legislation."
>
> With respect to the immunity provision of the VHSPA, it is clear that the legislature believed that there was no longer a need to confer the special benefit of immunity upon these health plans and, therefore, withdrew the benefit, which it is entirely entitled to do.

> However, the problem lies in the reservation of immunity for the single entity known as Union [Health Service]. Hence, if the 1998 amendment is constitutionally invalid at all, it is because of the exemption it creates. The question, then, is whether Union does, in fact, continue to adhere to the original concept of the VHSPA and whether there continues to be a legitimate State purpose for endowing Union [Health Service] with the benefit of immunity from liability.

McMichael, 259 Ill. App. 3d at 118-19.

The court's discussion certainly suggests that the 1988 amendment to section 26 is unconstitutional. Ultimately, however, the court chose not to reach that conclusion because:

> [w]hat MRHP fails to understand is that, whether Union and MRHP are identical in purpose and function will speak to the question of whether Union may continue to enjoy immunity, not to the question of whether MRHP's immunity should be reinstated. Therefore, the resolution of the certified question will not change MRHP's status or interest in the litigation and, for this reason, we do not feel it appropriate to answer the certified question at this time.

McMichael, 259 Ill. App. 3d at 119.

With this history of the VHSPA, it is plain that the problem Senator Barkhausen identified nearly 30 years ago and the *McMichael* court found unripe 20-plus years ago now forms Gonzalez's central argument for defeating UHS's motion to dismiss. Gonzalez argues that the 1988 amendment to VHSPA section 26 violates the equal protection clause of the United States and Illinois constitutions by authorizing disparate treatment to similarly situated groups. *See* U.S. Const., art. IV, § 1 & amd. XIV; Ill. Const., art. 1, § 2. Such disparate treatment, if true,

further violates the Illinois constitution's prohibition against "special legislation."

The term "special legislation" derives from another section of the Illinois constitution providing that:

> The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

Ill. Const. art. IV, § 13. Special legislation has come to be defined as legislation that "confers a special benefit or privilege on a person or group of persons to the exclusion of others similarly situated." *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 370 (1986), *citing Chicago Nat'l League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 367 (1985) & *Fireside Chrysler-Plymouth, Mazda, Inc. v. Edgar*, 102 Ill. 2d 1, 4 (1984). Special legislation is unconstitutional because it is "arbitrarily, and without a sound, reasonable basis, discriminates *in favor of* a select group." *Illinois Polygraph Soc., v. Pellicano*, 83 Ill. 2d 130, 137-38 (1980) (emphasis in original) (contrasting equal protection challenges that are based on discrimination *against* a person or a class of persons).

Our Supreme Court has determined that the standards employed to judge whether a law constitutes special legislation are the same used to judge equal-protection challenges. *See Jenkins v. Wu*, 102 Ill. 2d 468, 477 (1984). If a classification does not affect a fundamental right or discriminate against a suspect class, the proper standard is the rational-basis test. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997); *People v. Richardson*, 2015 IL 118255, ¶ 9 (2015). In short, "[t]he distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal." *McDonald v. Board of Election Comm'rs*,

394 U.S. 802, 809 (1969) *see also Cutinello v. Whitley*, 161 Ill. 2d 409, 420 (1994).

A presumption underlying any constitutional challenge is that "[c]lassifications drawn by the General Assembly are . . . constitutionally valid, and all doubts will be resolved in favor of upholding them." *In re Petition of the Village of Vernon Hills*, 168 Ill. 2d 117, 122-23 (1995). Equal protection within the ambit of the United States and Illinois constitutions requires equality between groups of persons similarly situated, yet neither constitution denies a state the power to treat different classes of persons differently. *See Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1972); *People v. Eckhardt*, 127 Ill. 2d 146, 151 (1989). Further, unless a fundamental right or a suspect classification is at issue, Congress or the Legislature may differentiate between similarly situated persons if there exists a rational basis for the distinction. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976); *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 578 (1978).

In this case, it is plain that before 1988, the three voluntary plans chartered before 1965 – UHS, the Hillman Health Centre, and the Union Medical Center – were subject to the identical statutory requirements as to incorporation, regulation, management, provision of care, oversight by the Department of Insurance, and not-for-profit status. *See, e.g.*, 215 ILCS 165/4 to 7. As noted in *Brown*, section 26 immunity accorded to voluntary plans could be justified because of their unique dual structure as insurer and healthcare provider. *See* 150 Ill. App. 3d at 961-62. Quite apart from any constitutional discussion, it is undeniable that voluntary plans are no longer structurally unique given that, as a matter of law, HMOs function in the same dual capacity. *See* 215 ILCS 125/1-2(7) ("'Health care plan' means any arrangement whereby any organization undertakes to provide or arrange for and pay for or reimburse the cost of basic health care services") & 1-2(9) ("'Health Maintenance Organization' means any organization formed under the laws of this or another state to provide or arrange for one or more health care plans under a

system which causes any part of the risk of health care delivery to be borne by the organization or its providers"). Indeed, the *McMichael* court came to that conclusion as far back as 1994, finding that Anchor could not claim section 26 immunity because "the legislature intended that no HMO, regardless of its organization pursuant to other statutes, be granted immunity." 259 Ill. App. 3d at 118.

For a variety of reasons it is equally plain that the presumptive validity accorded to legislative enactments runs up against the 1988 amendment to the VHSPA section 26 both facially and as applied to UHS. First, the amendment includes an arbitrary cutoff date. It is undeniable that cutoff dates may or may not be constitutional depending on the circumstances giving rise to the legislation. *See, e.g., Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 643 (1973) (cutoff dates in mandatory-leave rules have no rational relationship to state's interest of preserving continuity of instruction while not violating teachers' exercise of constitutionally protected freedom); *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 330-31 (1976) (Insurance Code amendment deregulating medical malpractice rates for policies written after June 10, 1975 constituted special legislation absent any justification based on the cutoff date). As the Illinois Supreme Court has explained:

> a law the legislature considers appropriately applied to a generic class presently existing, with attributes that are in no sense unique or unlikely of repetition in the future, cannot rationally, and hence constitutionally, be limited of application by a date restriction that closes the class as of the statute's effective date. Barring some viable rationale for doing so, it would, for example, violate the proscription of the constitution for the legislature to apply a law to a person or entity in existence on the effective date of enactment, but make it inapplicable to a person or entity who assumed those attributes or characteristics the day after the statute's

effective date.

Board of Ed. v. Peoria Fed'n of Support Staff, Security/ Policeman's Benevolent & Protective Ass'n Unit No. 114, 2013 IL 114853, ¶ 54, *citing Potwin v. Johnson*, 108 Ill. 70 (1883); *Pettibone v. West Chicago Pk. Comm'rs*, 215 Ill. 304, (1905); *Dawson Soap Co. v. City of Chicago*, 234 Ill. 314, (1908); *Mathews v. City of Chicago*, 342 Ill. 120 (1930), *People v. Madison Cty. Levee & San. Dist.*, 54 Ill. 2d 442 (1973), & *Wright*, 63 Ill. 2d 313. Here, the amendment's legislative history is devoid of any factual or legal reasoning justifying rescinding section 26 immunity to voluntary plans chartered after 1965. In contrast, no such temporal limitation applies to the requirement that all voluntary plans be HMOs.

Second, there is no rationale for limiting voluntary plans to those operated exclusively on a not-for-profit basis. Senator Jones states that the measure "takes care of *the problem* that we have as it relate[s] to HMO's [*sic*]" (emphasis added), but he does not identify "the problem." It may be that he was attempting to distinguish between not-for-profit voluntary plans and for-profit HMOs. This is a fair inference given that Senator Jones explains that the immunity remains intact for "*a* service organization" (emphasis added), *i.e.*, UHS. Drawing this inference is, however, problematic. It is not this court's place to infer from Senator Jones's cryptic statement "the problem" nearly 30 years after the fact. Additionally, there is no reasonable construction of the legislative history to support the inference that UHS was the only voluntary plan operating as a "service organization;" plainly, Sidney Hillman Health Centre and Union Medical Center also provided "services" in the form of healthcare and were "organizations" as chartered voluntary plans and HMOs. Those two organizations, in addition to UHS, had to be not-for-profit because, as Garrett avers in his affidavit, this is the means by which voluntary plans can offer services at lower costs than other healthcare providers.

Third, Senator Jones' apparent attempt to distinguish hospital-owned or -controlled voluntary plans from others is illusory. By operation of law, not-for-profit corporations are prohibited from issuing shares or dividends, *see* 805 ILCS 105/106.05, and, therefore, are not owned by anyone. *See, e.g., Better Gov't Ass'n v. Illinois High Sch. Ass'n*, 2016 IL App (1st) 151356, ¶ 30; *Smith v. Northeast Illinois Regional Commuter R.R.*, 210 Ill. App. 3d 223, 227 (1st Dist. 1991). In other words, UHS, Sidney Hillman Health Centre, and Union Medical Center may have operated in conjunction with medical providers employed by or associated with hospitals, but none was owned by a hospital. Senator Jones' distinction also fails because a voluntary plan must be controlled by a board of trustees. *See* 215 ILCS 165/5. Such a board must be comprised of "persons," defined as "a natural person, corporation, partnership or unincorporated association . . . ." 215 ILCS 165/2(j). While 30% of trustees must be licensed physicians, *see* 215 ILCS 165/5, it is possible that hospital representatives could comprise the other 70%. Such representation would, however, still meet the statutory requirements for the board of directors of a voluntary plan. Even with that possibility, the legislative record is devoid of any facts indicating that hospitals had taken over the boards of trustees of the Sidney Hillman Health Centre and Union Medical Center, leaving UHS as the only independently controlled voluntary plan.

Apart from the legal infirmities in the 1988 amendment to section 26, there are a variety of facts that lead to the inexorable conclusion that UHS today no longer functions as a voluntary plan as envisioned in 1951. First, UHS no longer fits the model of a voluntary plan that is jointly a healthcare provider and insurer. Discovery answers and Garrett's affidavit establish that UHS has for some time contracted with Advocate Illinois Masonic Medical Center, Mercy Hospital and Medical Center, Rush-Copley Medical Center, Rush-Oak Park Hospital, South Suburban Hospital, and University of Illinois Hospital and Health Sciences System for their professionals to provide healthcare services to UHS subscribers. Second, discovery answers also establish that UHS has purchased liability insurance. As noted above, this purchase

does not alter the application of section 26 immunity to UHS, yet, if UHS stills enjoys absolute immunity under section 26, there was no reason for UHS to have purchased insurance. It must be true, therefore, that UHS believes it either no longer enjoys absolute immunity or could be held liable for its healthcare providers' acts and omissions. To that end, if the goal of the charitable-fund doctrine was not to impair a trust but rely on purchased insurance, *Wendt*, 332 Ill. App. at 634, then it is only consistent to call on a voluntary plan's purchased insurance to cover potential claims against the plan based on its healthcare providers' acts and omissions.

In his affidavits, Garrett emphasizes the differences that remain between UHS and HMOs that could potentially justify the continued favorable treatment given only to UHS. These differences are, however, unremarkable. For example, this court assumes that Garrett is correct when he avers that a not-for-profit status permits UHS to offer healthcare through identical providers at lower costs than HMOs. Yet, the purpose of HMOs is also to provide healthcare at lower costs, *see, e.g., Petrovich v. Share Health Plan*, 188 Ill. 2d 17, 28-29 (1999), so UHS is not destined to provide a result that other organizations cannot or do not achieve. Even if UHS does provide lower cost healthcare than HMOs, Garrett fails to substantiate the difference so that this court could better determine if the cost savings available to one union's members is rationally related to the state's interest in the provision and management of healthcare to Illinois residents. Additionally, it is important to distinguish that UHS is merely a not-for-profit organization; it is not a charity. The Illinois Supreme Court long ago abolished charitable immunity as a means to insulate not-for-profit hospitals from the consequences of their negligence. *See Darling v. Charleston Mem. Hosp.*, 33 Ill. 2d 326, 337 (1965), *cert. denied*, 383 U.S. 946 (1966). Garrett's affidavit fails to explain why, if common-law immunity no longer shields charitable not-for-profits, section 26 immunity should continue to apply to non-charitable not-for-profits such as UHS that have purchased insurance.

Relatedly, Garrett explains that less than 3% of UHS business involves the exercise of its HMO authority. That statistic is of limited utility because Garrett admits that UHS focuses its efforts only on certain types of healthcare and does not offer the broader type of care required of HMOs. It is also likely that the 3% figure is partly the result of UHS subscribers having other insurance coverage that excludes the more limited healthcare options provided by UHS. Apart from that lack of information, Garrett makes a key admission in his affidavits – UHS is both chartered and operates as an HMO. That fact alone puts UHS in the same category as all other voluntary plans since the HMO Act requires that they also be chartered as HMOs.

Garrett further attempts to distinguish UHS by averring that it serves union members and their families. That fact is, again, not unique to UHS. Non-contributing Service Employees International Union members and members of all other trade unions are served by various other HMOs and preferred provider organizations. The subscriber served is, therefore, not a distinguishing factor; rather, the type of services provided and how they are provided are distinguishing factors, and these do not differ between voluntary plans and HMOs.

Finally, Garrett avers that UHS is controlled by a board of directors and is not and has never been controlled by a hospital. That distinction, again, has little currency and appears to be simply a vestige of time. Under the 1951 or 1988 versions of the VHSPA, a hospital could effectively control a voluntary plan's board of directors, yet that would not alter the type of services provided or how they were provided. This is another distinction without a difference.

Conclusion

The changed landscape of providing and managing healthcare in Illinois has changed substantially since 1951 and has, essentially, left voluntary plans in general, and UHS in particular, behind. What was a progressive concept of a dual-

capacity healthcare and insurance delivery systems in 1951 has been substantially and more effectively replicated. Likewise, the immunity available in 1951 to a small, but uniquely different type of delivery system was then rationally related to the state's legitimate interests, but not today. The 1988 amendment to VHSPA section 26 changed all that and purposefully protected and continues to protect a class of only one – UHS. Continuing to provide absolute statutory immunity to a class of one is simply not rationally related to any legitimate state interest. The 1988 amendment to section 26 is, therefore, unconstitutional because it violates the Illinois constitution's prohibition against special legislation.

For these reasons,

THIS COURT FINDS THAT,

pursuant to Illinois Supreme Court Rule 18, the 1988 amendment to VHSPA section 26 is unconstitutional in violation of U.S. Const., art. IV, § 1 & amd. XIV; Ill. Const., art. 1, § 2; & Ill. Const. art. IV, § 13; and

THIS COURT ORDERS THAT,

UHS's motion to dismiss counts 15 and 16 is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075