No. 1016832

THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 82687-5-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

King County Superior Court Case No. 19-2-24376-7 SEA

THE EVERETT CLINIC, PLLC,
Respondent,

v.

PREMERA and PREMERAFIRST, INC.,
Petitioners.

ANSWER TO MEMORANDUM OF AMICUS CURIAE UNITED POLICYHOLDERS

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I. INTRODUCTION

"The purpose of an amicus brief is to help the court with points of law" on issues that have been "raised by the parties" and are therefore within "the scope of the appeal." *Teamsters Loc. 839 v. Benton Cty.*, 15 Wash. App. 2d 335, 352, 475 P.3d 984, 993 (2020). United Policyholders ("UP")'s[1] memorandum, like that of the amici brief in *Teamsters*, "is not helpful to this court" because it makes no attempt to serve this purpose. *Id*.

Premera seeks review of the Court of Appeals' ruling on its Consumer Protection Act ("CPA") claim, RCW Chapter 19.86, that was premised on allegations of unlawful tying. Specifically, Premera assigns error to the ruling that Premera failed to establish, or create triable issues of fact regarding, two

[1] UP is not affiliated with either The Everett Clinic or any of its corporate affiliates, including United Health Group. UP does not claim to represent, or be affiliated with, health plan participants or health insurance policyholders.

required elements of a tying claim: (i) the existence of distinct tied and tying products or services and (ii) coercion.

Rather than assist the Court in its assessment of Premera's petition for review, UP repackages the amicus brief it filed in the Court of Appeals. It is even less relevant here than it was there.

Most of UP's amicus memorandum does not even pretend to be linked to what the Court of Appeals decided or what Premera seeks to have reviewed. While Premera does not seek review of the contract claims decided against it, UP addresses pricing under contracts that Premera unquestionably entered into and in fact wrote in material respects.

Similarly, UP focuses on Washington's interest in regulating monopolistic healthcare pricing even though monopolistic pricing has never been an issue in this case.

Thus, UP's arguments are properly ignored. *Cummins v. Lewis Cnty.*, 156 Wash. 2d 844, 850-51 n.4, 133 P.3d 458, 461

(2006) ("we address only claims made by a petitioner, and not those made solely by amici").

Only two sentences in UP's memorandum touch upon issues petitioner-Premera raises. UP asserts the Court of Appeals erred by supposedly failing to recognize that "separate geographic markets make separate product markets, especially in a service industry." UP perceives further error in the Court of Appeals' decision that Premera failed to establish the coercion required for a tying violation. This is so, as UP sees it, "because TEC forced higher rates, rather than the purchase of an additional product" and Premera chose "to defend this lawsuit and retain EFMC in its network." Am. Br. at 15. But UP does not provide either a whit of authority or helpful elaboration on its conclusory and misplaced observations. Nor does it tie its views to: its discussion of the history of Washington healthcare regulation; the language of the Court of Appeals decision; or any RAP 13.4(b) ground for review.

As explained in The Everett Clinic ("TEC")'s answer to Premera's petition for review, the Court of Appeals' ruling on the CPA claim blazes no legal trail. It does not even resolve a disputed question of law. It merely holds that the record developed by Premera in the trial court failed to establish two undisputed requirements for a tying law violation: distinct tied and tying products or services and that TEC coerced Premera into purchasing a product or service. The resulting application of settled law to this record presents no basis for review under RAP 13.4(b). UP's amicus memorandum provides no reason to conclude otherwise.

II. ARGUMENT

In this Court—like it did in the Court of Appeals—UP advocates lower prices without offering a framework for assessing this case, its record and applicable law. UP's sloganeering about prices provided the Court of Appeals with no useful analysis of this case, and it provides none for this Court to use in assessing Premera's petition for review.

A. UP's Discussion of Monopolistic Price-Setting is Irrelevant and Furnishes No Basis for Review

UP provides a lengthy history of: Washington's purported pursuit of universal health coverage; concentration in the healthcare provider market; and recent Washington efforts to regulate healthcare provider mergers and acquisitions. Amicus Br. at 4-13. From this, UP concludes that Washington has a public policy against "anti-competitive consolidation of health care services that can readily result in monopolistic price-setting by health care providers." Amicus Br. at 1-2. According to UP, TEC's acquisition of Eastside Family Medical Clinic (EFMC)'s assets transgressed this policy, which should have led the Court of Appeals to construe the Premera/EFMC and Premera/TEC agreements (the "Agreements") against "rate increases." Amicus Br. at 14. UP therefore asserts Court of Appeals error when it enforced the Agreements as written and required Premera to honor the Premera/TEC agreement rates it agreed to pay. Amicus Br. at 2, 13-14, 16.

As an initial matter, Washington public policy regarding competition in the health care industry is more complex than UP represents. As explained in a decision UP relies upon, *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, Washington's policy regarding health care providers, like the Bellevue clinic, is "to control health care costs to the public … by limiting competition within the health care industry" because Washington has determined that "competition had a tendency to drive health care costs **up** rather than down." 125 Wash. 2d 733, 741, 887 P.2d 891, 896 (1995) (emphasis added). Within that regulated market, however, Washington has expressed a policy against monopolistic consolidation. *See* RCW Chapter 19.390.010.[2]

[2] *See also* Const. art. 12 § 22 ("Monopolies and trusts shall never be allowed in this state"); *but see Morgan v. Microsoft* Corp., 107 Wash. App. 1001 (2001) (unpublished) ("It is not the possession of monopoly power, but the abuse of such power that violates federal and state antitrust laws.").

That said, Washington's complex policies regarding market concentration and monopolistic pricing are irrelevant here. Premera has never argued that any of its claims are premised on either a challenge to TEC's acquisition of EFMC's assets or alleged monopolization. The CPA claim, instead, is premised on distinct tying and price fixing theories[3] that are antithetical to a monopoly theory, which requires the defendant to independently possess the power to dictate supra-competitive prices and control output. *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 109 n.38 (1984).[4] And Premera's contract claims relied on standard interpretation principles, not any public policy against monopolies. *See* Court of Appeals Respondent's Brief ("RB") at 31-70 (summarizing contract, tying, and price fixing claims); Ans. to Pet. for Review at 5-12.

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[3] Premera has not pursued its price fixing theories in its petition for review.

[4] *See also Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 190 (3d Cir. 2017) (distinguishing Sherman § 2 monopolization claims from Sherman § 1 claims, like price-fixing and tying).

Consequently, UP's lengthy discussion of Washington's policies regarding monopolistic pricing is divorced from both Premera's petition for review and the arguments and claims in this case. It offers no help and should be ignored. *Cummins*, 156 Wash. 2d at 850-51 n.4 ("Under case law from this court, we address only claims made by a petitioner, and not those made solely by amici."); *Teamsters*, 15 Wn. App. 2d at 352, 475 P.3d at 993 (disregarding amicus brief because "it is improper for an amicus brief to raise" issues that "have not been raised by the parties").

B. UP's Contract Interpretation Arguments Are Irrelevant and Furnish No Basis for Review.

UP repeatedly argues that review should be granted because it thinks the Court of Appeals erred in ruling on the breach of contract claims. Amicus Br. at 2, 13-14. Premera, however, is not seeking review of these rulings, which are firmly grounded in contractual language and the parties' course of dealing. *See* Pet. for Review; Ans. to Pet. at 9-10. UP

cannot inject arguments for review not made by Premera in its petition. *Cummins*, 156 Wash. 2d at 850-51 n.4.

Additionally, UP's arguments are meritless. *First*, UP provides no explanation as to how the Court of Appeal's case-specific contractual ruling in an unpublished decision meets RAP 13.4(b)'s requirements for review. To the extent UP is asserting that a rate increase at one clinic in Bellevue will render "health insurance premiums unaffordable, thereby jeopardizing the State's goal of universal health care," Amicus Br. at 16, it provides no support for this ridiculous assertion. If, as appears, UP is concerned with future concentration in the healthcare provider market, this is no reason for review here. As UP recognizes, Washington has a process that facilitates Attorney General review of transactions, any of which could be challenged in the courts, if necessary. Amicus Br. at 12-13, n.3.

Second, UP identifies no error in the Court of Appeals' decision on the contract claims. While UP is correct that the Agreements should be construed in accord with Washington's

policy against monopolies,[5] UP does not explain or identify the term or terms of the Agreements that could potentially violate that policy. Nor could it, given that neither Agreement could be construed as creating or perpetuating a monopoly. Each merely establishes the relationship between the parties, including the rates to be charged, for services administered by different providers, namely, TEC and EFMC.[6] While Washington has a well-established policy against monopolies, it has no such policy against TEC charging more than EFMC for physician services.

C. UP's Conclusory Observations About the CPA Claim Furnishes No Basis for Review.

UP does not address the tying-based CPA claim that is the sole focus of Premera's petition for review until the very end of its memorandum. Amicus Br. at 15. There, it offers two

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[5] *See Mendoza v. Rivera-Chavez*, 140 Wash. 2d 659, 663, 999 P.2d 29, 31 (2000).

[6] Premera did not challenge the Asset Purchase Agreement, which memorializes the terms of TEC's acquisition of various EFMC assets. CP 2075, 2600, 2604.

short, conclusory observations. UP asserts that the Court of Appeals erroneously held: (1) "separate geographic markets cannot establish separate products"; and (2) that coercion cannot exist where the healthcare provider merely forces "higher rates," "rather than the purchase of an additional product" and the buyer does not remove the provider from "its network." *Id*.

Both observations are contrary to the Court of Appeals' actual holding. Neither is supported by any legal analysis or attempt to link back to the public policy and history discussion found in UP's memorandum.

The Court of Appeals "agree[d] with TEC that the **record** does not establish a question of **fact** regarding unlawful tying, so it is entitled to summary judgment dismissal of the CPA claim." Court of Appeals Opinion ("Op.") at 21 (emphasis added). That ruling decided no disputed issue of law. It applied settled law to the insufficient evidence Premera adduced in the trial court.

Starting with the need to establish distinct tying and tied products or services, the Court of Appeals recognized that Premera's evidence amounted to nothing more than the naked assertion that TEC's physician services in Snohomish County and Bellevue must be different products. Op. at 23. But establishing distinct products requires a robust market demand analysis. Op. at 23. Here, there was no demand analysis or evidence to establish why the same services being offered in two different locations constitute distinct products or services. Op. at 23-24.[7] Thus, while services offered in different locations *might* constitute distinct products, the record in this case provided no basis to classify them in that way.

The Court of Appeals reached a similar, fact-based conclusion regarding coercion. Op. at 24. A critical distinguishing characteristic between a lawful sale and unlawful tying is the seller's exploitation of market power to coerce the

[7] Indeed, the record does not contain evidence that these different locations constituted separate geographic markets.

buyer into an unwanted purchase of one product or service on terms it would not otherwise accept in order to obtain another product or service. Op. at 24. The Court of Appeals recognized the possibility that such coercion could be anticompetitively employed "to drive up prices," but the record in this case contains no evidence of such coercion. Op. at 24-25. This record shows a far simpler situation: Premera agreed to purchase TEC services bundled for all TEC locations; TEC acquired the EFMC clinic location; Premera then reneged, refusing to pay TEC Agreement rates for services provided at the acquired location because they were higher than the rates Premera used to pay a different provider at that location. Op. at 24.

While UP disagrees with these rulings, it offers this Court no assistance and fails to show how any of the Rule 13.4(b) grounds for review are satisfied.

III. CONCLUSION

Premera's petition for review should be denied.

This document contains 2,110 words. Excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 24th day of April, 2023.

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CERTIFICATE OF SERVICE

I, Malaika R. Thompson, hereby certify under penalty of perjury under the laws of the State of Washington that on April 24, 2023 I caused to be served a true and correct copy of the foregoing document via the Appellate Courts' Portal which will send notice to the following persons:

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April 24, 2023 - 12:08 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,683-2
Appellate Court Case Title:	The Everett Clinic v. Premera

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