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No. 66942-7-I

Snohomish County Superior Court Cause No. 09-2-03642-8

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

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PHYSICIAN ANESTHESIA ASSOCIATION, INC., P.S.,  
Plaintiff/Respondent/Cross-Appellant,

v.

MOLINA HEALTHCARE OF WASHINGTON, INC.,  
Defendant/Appellant/Cross-Respondent

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**Respondent/Cross-Appellant's Answer to Brief of Amicus Curiae  
Department of Social & Health Services**

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**ORIGINAL**

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## I. INTRODUCTION

The *amicus curiae* brief submitted by the Department of Social & Health Services (“DSHS”) is an amalgam of inaccurate, incomplete and, ultimately, unhelpful information. First, DSHS’s description of the impact of recent legislation<sup>1</sup> is inaccurate in terms of the required payment levels. DSHS’s description of ESSB 5927 is also materially incomplete, in that it fails to acknowledge other material terms or that the new law, which does not become effective until August 24, 2011, does not contain any retroactive provisions. DSHS also fails to acknowledge that Molina has not appealed the superior court’s ruling that, at the times relevant to PAA’s monetary claims, there was no federal or state law requiring non-contracted providers to accept DSHS rates. Instead, Molina’s appeal is confined to questions concerning whether PAA is entitled to recover under theories of account receivable, open account, or unjust enrichment. And, on those questions, DSHS takes no position.<sup>2</sup> Accordingly, the only relevant points in the DSHS brief are: (1) because the new law is not retroactive, it does not limit PAA’s recovery prior to its effective date; and (2) the state has no liability for additional payments to PAA for prior years, because its contracts allocated the entire risk to Molina.<sup>3</sup>

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<sup>1</sup> (ESSB 5927, enacted as c. 9, l. 2011, 1<sup>st</sup> spec. sess., hereinafter “ESSB 5927”)

<sup>2</sup> DSHS brief at 2, n.2.

<sup>3</sup> DSHS brief at 5.

## II. IMPACT OF ESSB 5927

DSHS asserts that ESSB 5927 establishes a state policy that non-contracted providers who serve Medicaid recipients should be paid “at a level commensurate with the fee-for-service rate, not the provider’s ‘usual and customary’ rate.”<sup>4</sup> But this is not an accurate statement of the new law’s principal requirement. The law actually says that managed care companies must pay non-contracted providers “the lowest amount paid for that service under the managed care health system’s contracts with similar providers in the state.”<sup>5</sup> Accordingly, how much plans must pay once ESSB 5927 becomes effective will vary by plan, type of service and the time when the service is delivered. The law does not contain a mandate that providers must accept Medicaid fee-for service rates. Furthermore, given that most plans assiduously protect the confidentiality of their contracting practices, it remains to be seen whether this requirement will be enforceable.

In addition, in order to prevent tactics like Molina used against PAA, ESSB 5927 added new network adequacy requirements for hospital-based physician services, such as PAA. Under these requirements, Healthy Options and Basic Health plans must demonstrate that they have

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<sup>4</sup> DSHS brief at 9.

<sup>5</sup> ESSB 5927, §§ 2(7) and 4(2).

contracted with enough hospital-based physicians to serve their members.<sup>6</sup> If this new requirement is enforced, managed care companies will no longer be able to avoid paying reasonable compensation to hospital-based physicians unless they want to risk being out-of-compliance with their state contracts.

Finally, and most importantly, ESSB 5927 has prospective effect only.<sup>7</sup> Although the Legislature referenced this case in its findings, it did not make the law retroactive, or even add an emergency clause. Indeed, all of its findings regarding adverse impacts on state-funded programs are phrased prospectively.<sup>8</sup> Given that ESSB 5927 specifically references this litigation<sup>9</sup> and the Legislature's demonstrated ability to pass laws terminating judicial relief in pending cases,<sup>10</sup> the absence of a retroactivity

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<sup>6</sup> *Id.*, §§ 2(9) and (4)(3).

<sup>7</sup> There is a presumption against retroactive application of a statute, which can be overcome only if the Legislature explicitly provides for retroactivity. *Unruh v. Cacchiotti*, --- Wn.2d ---, --- P.3d ---, 2011 WL 2999585 (July 21, 2011 Slip Op. at 21), quoting *State v. T.K.*, 139 Wn.2d 320, 987 P.2d 63 (1999). Here, there is no language requiring retroactive application. To the contrary, the wording is prospective. The statute also cannot be characterized as "curative," because, rather than clarifying ambiguous language, it adds new sections to the law. *State v. Smith*, 144 Wn.2d 665, 673, 30 P.3d 1245 (2001). It also is not remedial, because it relates to substance, not procedure. *Id.* And, even where retroactive intent is expressed, the authority of the Legislature to change contractual relationships is subject to constitutional limits. *Caritas Services, Inc. v. DSHS*, 123 Wn.2d 391, 869 P.2d 28 (1994).

<sup>8</sup> *E.g.*, ESSB 5927 § 1(d) ("Continued failure to resolve this dispute will have adverse impacts....") (emphasis supplied).

<sup>9</sup> *Id.* § 1(b).

<sup>10</sup> See *Pierce Ct'y v. State*, 144 Wn. App. 783, 185 P.2d 594 (2008) (upholding legislation requiring vacation of trial court judgment).

provision in ESSB 5927 must be interpreted as indicating its intent not to disturb the trial court's judgment in this case.

### III. CONCLUSION

Neither ESSB 5927 nor anything else in DSHS's brief speaks to the validity of the portions of the trial court's judgment that Molina has appealed.

Respectfully submitted this 3<sup>rd</sup> day of August 2011.

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## DECLARATION OF SERVICE

I, Gerri Downs, declare as follows: I am a resident of the State of Washington, residing or employed in Seattle, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 1700 7<sup>th</sup> Avenue, Suite 1900, Seattle, Washington 98101.

On Aug 5, 2011, 2011, I certify under penalty of perjury under the laws of the State of Washington that I caused service of the foregoing Respondent/Cross-Appellant's Answer to Brief of Amicus Curiae Department of Social and Health Services by causing a true and correct copy to be delivered via legal messenger in Seattle, via Federal Express outside Washington, as follows:

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