

Court of Appeals
STATE OF NEW YORK

STEVEN PLAVIN,

Plaintiff-Appellant,

-against-

GROUP HEALTH INCORPORATED,

Defendant-Respondent.

BRIEF OF *AMICUS CURIAE* MUNICIPAL LABOR COMMITTEE

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PRELIMINARY STATEMENT

Proposed *amicus curiae* New York City Municipal Labor Committee (“MLC”), the umbrella organization for some 390,000 active City civil servants grouped into well over 100 union-represented bargaining units, submits this brief because the issues raised in this appeal impact health benefits and related communications negotiated and administered by the MLC and the City of New York (“City”) for the benefit of some one million covered actives, retirees and their dependents.

The issue of whether the General Business Law applies to communications related to citywide health benefits and, if it does, whether some of those communications are misleading is of substantial import to the MLC’s constituent unions for the questions pertain to the very benefits offered to their members and retirees. Further, the parties’ briefing in this certified question appeal makes clear that the context in which those benefits are negotiated and administered is highly relevant to the Court’s determination of the legal questions, yet neither party is fully involved in that process. Thus, the MLC believes its perspective on this idiosyncratic process is an important addition to the analysis.

Accordingly, the MLC seeks *amicus* relief in order to provide the Court with a unique and helpful perspective on the full scope of how citywide health benefits are negotiated and administered by the MLC and the City.

INTEREST OF *AMICUS CURIAE*

The issues raised in this certified question are of significant concern to the City's public sector unions and their members. The MLC is an association of New York City municipal labor organizations comprised of some 102 bargaining units representing approximately 390,000 active City workers, dedicated collectively to addressing concerns common to its member unions and advocating on issues of labor relations relevant to City workers, of which, health benefits are central. See accompanying Affirmation of Alan M. Klinger, Esq., dated December 20, 2019, ¶3 ("Klinger Aff."). See also accompanying Affidavit of Arthur B. Pepper, sworn to October 30, 2019, ¶4 ("Pepper Aff.).

The MLC is organized pursuant to Sections 12-303 and 12-313 of the Administrative Code of the City of New York and is an association created pursuant to a Memorandum of Understanding dated March 31, 1966, signed by representatives of the City of New York and certain employee organizations. The public employees represented by the MLC serve the public welfare, health and safety on a daily basis. Klinger Aff., ¶3; Pepper Aff., ¶4.

Over the past half century, one of the MLC's central roles has been to negotiate and jointly administer with the City of New York a comprehensive citywide health benefit program. The provision of and composition of health benefits is a mandatory subject of bargaining, and may not be unilaterally altered

by the City of New York (or participating agencies) absent collective bargaining. See N.Y. Civil Service Law §§200, *et seq.*; New York City Administrative Code (“Admin. Code”) §§12-301, *et seq.* Accordingly, the MLC has both a statutory obligation to address citywide health benefits and a unique perspective regarding the process by which city health benefits are negotiated and administered. The MLC believes that placing the at-issue health benefits in practical context will provide the Court with special assistance and perspective on the issues presented in this case.

BACKGROUND

Plaintiff, Steven Plavin is a retired New York City Police officer who resides in Pennsylvania. Compl. ¶ 13 (A68). As an active employee and as a retiree, Mr. Plavin has been covered by medical and hospital benefits provided by the City of New York. The terms of those benefits are negotiated by the MLC and the City of New York. Defendant Group Health Incorporated (“GHI”) administers certain of the plans provided as part of the Citywide Health Program.

In August 2017, Plaintiff sued GHI in federal district court in the Middle district of Pennsylvania on behalf of himself and a putative class of “[a]ll who were members of [the GHI Plan] from 2011 to 2015.” Compl. ¶42 (A68). Plaintiff asserts claims pursuant to (i) N.Y. Gen. Bus. Law (“GBL”) §349; (ii) GBL §350; and (iii) New York Insurance Law §4226, as well as (iv) for unjust enrichment.

Upon GHI's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), the District Court dismissed the Complaint, in part relying on the nature of the negotiations for and the scope of the health benefits. See Plavin v. Grp. Health Inc., 323 F. Supp. 3d 684, 695-98 (M.D. Pa. 2018).

Plaintiff appealed the dismissal of the Complaint to the U.S. Court of Appeals for the Third Circuit. Following oral argument, the Third Circuit certified to this Court the question, in essence, of whether the conduct alleged is "consumer-oriented" for purposes of the GBL. See Plavin v. Grp. Health Inc., No. 18-2490, 2019 WL 1965741, (3d Cir. Apr. 04, 2019); A549. The question necessarily involves a consideration of the alleged plan terms and communications in the context of how such plans are negotiated and by whom. Further, a resolution of the question will effect the legal framework within which the City plans are administered.

THE MLC AND THE CITYWIDE HEALTH PROGRAM

The MLC is a statutory organization. It is governed by a Chair, two Co-Chairs and a Steering Committee. Agreements entered into by the MLC are voted on and approved by MLC member unions. The union leaders that participate in the MLC are themselves elected by each of their bargaining units, thus, the MLC answers directly to the workers, retirees and dependents that participate in the citywide health programs. Pepper Aff., ¶4.

Pursuant to State and City law, health benefits are a mandatory subject of bargaining for unionized public employees and their public employers. See N.Y. Civil Service Law §§200, *et seq.*; Admin. Code §§12-301, *et seq.*

Since the late 1960s, shortly after its creation, the MLC has consistently negotiated and, together with the City, administered health benefits on a citywide basis. This structure of negotiating citywide health benefits with the MLC at the helm permits all City unions to reap the benefits of healthcare improvements and savings in a way that simply would not be possible if negotiation were done on an individual union or bargaining unit basis. Pepper Aff., ¶6.

Indeed, the MLC's role in citywide health benefits is intertwined with the City's statutory obligation to pay for 100% of health insurance premiums for the HIP plan for City employees and retirees. See Admin. Code §12-126(b)(1) (requiring the City to provide "a fully paid choice" not to exceed the cost of "H.I.P.-H.M.O. on a category basis"). The same year – 1966 – that the City expanded its responsibility to pay the entire cost of health benefit premiums, the MLC was created. Pepper Aff., ¶7.

Currently (and historically), most covered employees enroll in the Comprehensive Benefits Plan ("CBP"), which consists of a PPO/indemnity plan for medical benefits provided by GHI and a PPO plan for hospital benefits provided by Empire Blue Cross and Blue Shield ("Empire"). Many of the

remaining employees enroll in the HIP-HMO plan. Both HIP and GHI are provided by EmblemHealth (“Emblem”). Some 95% of active employees (both pre-Medicare & Medicare-eligible) and pre-Medicare retirees are enrolled in one of these Emblem plans. Pepper Aff., ¶8.

There are three other plans offered by the City for active employees. One is a narrow network provided by the New York City Health and Hospitals Corporation (“H+H”), with a small enrollment consisting primarily of H+H employees. The remaining two programs require the payment of premiums and are typically limited to individuals who prefer to see a specific doctor or require a specific drug that they perceive to be more accessible through a paid plan. All in, the three additional plans enroll the remaining 5% of actives and pre-Medicare retirees. Pepper Aff., ¶9. The City also offers two Medicare wrap around programs for Medicare-eligible retirees as well as certain plan enhancements. Pepper Aff., ¶10.

For most covered individuals, the respective unions provide both active and retiree welfare fund benefits. Generally, the welfare funds are VEBAs (voluntary employees beneficiary association plan), that are administered by a union-selected board of trustees. The funds receive contributions from the public employers and provide a tailored set of prescription drug and supplemental benefits. Welfare fund contribution rates are negotiated both on a citywide basis by the MLC and on an

individual basis by specific unions. However, any agreements to centrally cover a drug or benefit that may or may not be covered by individual funds is negotiated on a citywide basis by the MLC. Pepper Aff., ¶11.

Unions typically provide one welfare fund for active employees and another, with its own benefit structure, for retirees. Some unions, depending on the benefits offered, opt to provide a single fund serving both actives and retirees. (Employees who do not obtain drug coverage from a welfare fund may purchase a pharmacy benefit as a rider to their health insurance plans, including the CBP and HIP-HMO.) Pepper Aff., ¶12.

This network of welfare funds works in coordination with the MLC to ensure that participating members receive appropriate benefits and information. The funds also serve as a conduit to bring issues with the program to the attention of union leaders, the MLC and the City. Pepper Aff., ¶13.

With regard to the CBP Plan, the MLC and City negotiate benefits design, including benefits covered, composition of the provider network, and the level of employee costs in the form of co-payments, co-insurance, deductibles and out-of-network benefits. The same is true of the HIP-HMO. For example, until 2009, the HIP program did not provide for employee co-payments. That change was collectively bargained by the MLC and City and then negotiated with the vendor. Pepper Aff., ¶14.

In the 1980's the City and the MLC negotiated the creation of the most significant piece of the City's healthcare plan – the Stabilization Fund. The Stabilization Fund arose out of the 1982-1984 Municipal and Uniformed Coalition Agreements which included a provision for the equalization of the premium rates charged for the HIP-HMO plans and those charged for the CBP plan, known as the Equalization Agreement. The same general vendor/plan structure is offered today, though the details of the plans have been modified over the years. Pepper Aff., ¶15.

To effectuate the Equalization Agreement and provide additional benefits to all unions when possible, the Stabilization Fund was created in the 1984 Municipal and Uniformed Coalition Agreements. Pursuant to those agreements, the City was, and still is, required to contribute to the Stabilization Fund. Pepper Aff., ¶16.

The result of the Equalization and Stabilization agreements was to make the choice between enrolment in the CBP and HIP-HMO plans cost neutral with regard to premiums. (The H+H plan also requires no premium.) Thus, at that time and continuing to today, employees are not required to make any premium contributions for access to either the CBP or HIM-HMO plans. Pepper Aff., ¶17. The MLC and City have worked hard over many decades to ensure the continuation of these no-cost options. Other aspects of these and other health

benefit offerings by the City are carefully negotiated and calibrated to balance this goal and other needs and practical realities. Id.

In this way, the Stabilization Fund has allowed enhanced choices for workers in the area of health benefits and became a valuable asset, jointly administered by the City and MLC, to provide needed flexibility to address changes in health policy, employee needs, availability of drugs and the need to close gaps or generate savings for other purposes. Throughout the late 1980s and into the early 1990s, the MLC and the City came together to negotiate and agree on various citywide changes to the CBP health insurance program and developed new programs. These citywide changes included increases in copays and modifications to health screenings, pre-surgical testing, enhanced hospice benefits, hospital coverage and psychiatric care. Pepper Aff., ¶18.

In fact, a 1992 letter agreement memorializes the MLC and City bargaining relationship, explicitly providing for joint MLC-City participation in “all aspects of the procurement process by which the choice of vendor of collectively bargained health benefits shall be made.” Pepper Aff., ¶19. This means, the MLC has been and continues to be intricately involved in negotiating both with the City and with vendors the detailed structure of citywide health plans. That same agreement was enforced by Justice Schweitzer of New York Supreme Court in response to a lawsuit filed in 2013 by the MLC for breach of the agreement when the Bloomberg

administration attempted to unilaterally issue a request for proposals for the provision of health benefits. Municipal Labor Committee v. New York, No. 652814/13, 2013 WL 5434005 (N.Y. Sup. Ct. Sep. 30, 2013).

Following the 1992 Procurement Agreement, the MLC continued its role, entering into health benefits agreements with the City in 1995, 1996 (coalition agreement), 2001, 2004, 2005, 2009, and more recently, in 2014 and 2018. Pepper Aff., ¶20.

The MLC's role, however, goes beyond the periodic negotiation of major agreements. During the intervening periods, the MLC and the City jointly oversee and administer the implementation of new program elements, monitor plan results and reach agreements on adjustments. Pepper Aff., ¶21.

THE MLC-CITY TECHNICAL COMMITTEES

The MLC has a standing committee of content experts from many of its constituent unions as well as outside consultants and counsel that is tasked with working with the City to administer and oversee the health benefit programs. The MLC Technical Committee meets as a committee and together with representatives of the City on a regular and as-needed basis to continuously monitor the existing programs, discuss and consider modifications and improvements to the existing programs as well as respond to changes in law and other circumstances. Any

material changes would then be brought to the attention of union leaders and for consideration by the MLC leadership and membership. Pepper Aff., ¶22.

The MLC Technical Committee has considered issues big and small, from analyzing the impact of the Affordable Care Act to responding to complaints regarding long call wait times when members attempted to reach a vendor. The MLC Technical Committee's job is to consider the impact of plan experiences on covered individuals and to assist MLC leaders in balancing the myriad needs of large workforces. Pepper Aff., ¶23.

Because of the coordination required between the union welfare funds and the citywide programs, many of the participants in the MLC Technical Committee are also involved in the operation of the respective welfare funds. Because the welfare funds (and the unions themselves) have direct lines of communication with members and are the most likely to hear complaints, the MLC Technical Committee treats such information as vital to its effective representation of the covered workforces. Pepper Aff., ¶24.

As an example, it would be common for a member to call a welfare fund to inquire about both fund benefits and general medical benefits. Many of the funds maintains a call center to better serve their participants. At, for example, the United Federation of Teachers Welfare Fund (one of the largest funds), at times as many as 150 representatives would be on the telephone each day answering

question about benefits, including out-of-network benefits, from both actives and retirees. Pepper Aff., ¶25. This Fund in particular has an active group of retirees who participate in union affairs, are eligible to vote for union leaders and take an active role in managing their retiree health and person benefits. Id.

Such calls would often involve answering questions and concerns raised by participants on a variety of issues, including questions regarding out-of-network benefits. Fund representatives would either answer the question, if they knew, or reached out to GHI to obtain needed information and facilitate the participant's understanding of his or her benefits. Pepper Aff., ¶26.

In terms of approach, it has long been a priority of the MLC Technical Committee and the MLC leadership to continue to maintain a robust in-network benefit to improve and simplify members experiences. To maximize utilization of these in-network benefits, the MLC Technical Committee has worked with the City and relevant vendors to improve communication and services. That this has proven effective is evident in the high rate of in-network utilization over the years. Pepper Aff., ¶27.

The Committee works closely with the City and the vendors to review all aspects of the programs, including out-of-network fees. Each component is carefully balanced based upon need, potential member displacement (such as when

a provider serving members becomes out-of-network) and the overall cost and stability of the program. Pepper Aff., ¶28.

Once set up, information regarding the scope of benefits is accessible by members in various ways. During enrollment periods, carriers appear at health fairs to answer questions. The City webpages provide additional information, as do many of the unions and their welfare funds, as well as the vendors themselves. In addition to calling vendors directly, members may call both the City's benefit office with questions, as well as their unions and welfare funds. And they do call, by the hundreds and thousands, to ask various questions. Pepper Aff., ¶29. If the unions and funds are receiving many common questions or complaints, those are raised by the MLC Technical Committee and are addressed either at the Committee level or, when appropriate, addressed by the MLC leadership in negotiation with the City.

CONCLUSION

Wherefore, proposed *amicus curiae* MLC respectfully submits that the Court take account of the process by which citywide health benefits are negotiated and administered in reaching its decision regarding the certified questions.

Dated: New York, New York
December 20, 2016

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WORD COUNT CERTIFICATION

I hereby certify pursuant to 22 NYCRR §500.13(c) that the foregoing brief was prepared on a computer using Microsoft Office Word, using typeface Times New Roman, 14.

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