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FOLEY & LARDNER
ATTORNEYS AT LAW

September 18, 2002

VIA HAND DELIVERY

Ms. Cornelia Clark
Clerk of the Wisconsin Supreme Court
110 East Main Street, #215
Madison, WI 53701

Re: *Aurora Health Care Ventures, Inc. and Aurora Health Care, Inc. v. Touchpoint Health Plan, Inc.*, Appeal No: 01-3273

Dear Ms. Clark:

Enclosed for filing are the original and twelve copies of Response to Petition for Review of Plaintiffs-Appellants.

Please indicate your receipt of these items by file-stamping the enclosed two extra copies and returning the stamped copies to our messenger.

By copy of this letter, a copy of the response has been served on all parties.

Very truly yours,

G. Michael Halfenger

Enclosures

cc: Marshall J. Schmitt, w/enclosure
Gregory B. Conway, w/enclosure

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STATE OF WISCONSIN
IN THE SUPREME COURT

AURORA HEALTH CARE VENTURES, INC. and AURORA HEALTH CARE, INC.,

Plaintiffs-Appellants-Respondents,

vs. Appeal No. 01-3273

TOUCHPOINT HEALTH PLAN, INC.,

Defendant-Respondent-Petitioner.

Appeal From The Circuit Court Of Milwaukee County
Honorable Timothy G. Dugan Presiding
Trial Court Case No. 01-CV-009115

RESPONSE TO PETITION FOR REVIEW

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STATUTES

Respondents Aurora Health Care Ventures, Inc. and Aurora Health Care, Inc. (collectively "Aurora") submit this Response to the Petition for Review of Petitioner Touchpoint Health Plan, Inc. ("Touchpoint"). Because this case does not implicate any of the factors that would justify invoking this Court's power of discretionary review, the Court should deny the petition.

INTRODUCTION

Touchpoint's petition seeks review of a decision that does not end the parties' day in court on any claim. The decision is a quintessential interlocutory order—reversing the Circuit Court's dismissal of Aurora's breach of contract and breach of good faith claims and sending the case back for trial.

The Court of Appeals and the Circuit Court agreed on the applicable legal principles. They disagreed on how to apply those principles to the particular circumstances of this case. Because Touchpoint favors the Circuit Court's (erroneous) application of those principles to the parties' contract, it asks this Court to provide a "rubber match." That, however, is not this Court's proper role. *Cf.* Wis. Stat. §809.62(1)(c)3.

Even if this Court sat to entertain simple claims of error, this case would remain a poor candidate for review. Touchpoint does not seek review of all the decided issues: its petition does not address the Court of Appeals' holding that adjudication of Aurora's breach of good faith claim requires a trial. Instead, Touchpoint asks this Court to adjudicate two defenses to Aurora's separate contract claim that were not addressed by either court below. Neither reviewing one of two separate claims remanded for trial nor addressing issues for the first time is an efficient use of this Court's limited resources.

Furthermore, as explained in detail below, the petition fails to identify any "special" or "important" reason for this Court to review the Court of Appeals' decision. *See* Wis. Stat. §809.62(1) (a petition for review will be granted "only when special and important reasons are presented"). In that regard, the Court of Appeals did not recommend its decision for publication—presumably because, as Touchpoint itself suggested in its Court of Appeals brief, there is no need to publish the opinion because the case involves application of "well-settled legal precedent." (*See* Touchpoint Ct. App. Br. xiii.) Touchpoint's petition for review should be denied.

STATEMENT OF THE CASE

This case does not involve novel legal claims. Aurora sued Touchpoint for breach of contract and breach of the duty of good faith. The background of the parties' dispute is as follows:

A. The Parties and their Relationship.

Aurora Health Care, Inc. is a nonprofit provider of health care services. (R.39:Nestor Dep. 4, 5.)[1] From 1995 through July 2001, Aurora Health Care Ventures, Inc., a wholly-owned subsidiary of Aurora Health Care, Inc., was a shareholder in Touchpoint, a Wisconsin insurance corporation that provides managed care services in the Fox River Valley area. (*Id.* and R.19:Nestor Aff., ¶¶ 2, 9.) Aurora Health Care Ventures held its Touchpoint shares under the terms of a written Shareholder's Agreement dated September 29, 1995. (*Id.* ¶ 2, Ex. 1.)

In addition to being a Touchpoint shareholder, Aurora's affiliates had been health care providers in the Touchpoint network since at least 1995.[2] (R.19:Nestor Aff. ¶ 9.) During 2000 and 2001,

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1 Record citations state the record number, a description of the record number and any exhibit number, page or paragraph number ("R.__:¶ ___, Ex.__, p. __"). "Tr. Ct. Dec." refers to the Circuit Court's Order dated November 29, 2001. "Pet." refers to Petitioner's Petition for Review. "Pet. App." refers to the appendix attached to the Petitioner's Petition for Review.

2 For the sake of simplicity and so that each separate entity did not have to be named as a plaintiff in this case, each of the Aurora affiliates involved assigned
(Continued)

because of conflicts among Touchpoint's shareholders, Aurora entered into discussions with Blue Cross United of Wisconsin ("Blue Cross") about selling its shares in Touchpoint. (R.39:Nestor Dep. pp. 74-5.)

If Aurora were to sell its shares, however, it wanted to make sure that it would remain a provider in the Touchpoint network. (R.39: Nestor Aff. ¶ 8, 9.) Consequently, in negotiating a purchase agreement with Blue Cross, Aurora insisted on a provision that upon closing, the purchaser would be obligated to exercise its authority and good faith to keep Aurora Health Care providers in the Touchpoint provider network. (*Id.* ¶10, Ex. 3, p. 6.)

Because Touchpoint had expressed an interest in purchasing Aurora's shares and held a right of first refusal on those shares under the terms of the 1995 Shareholders Agreement, Aurora made Touchpoint aware of its negotiations with Blue Cross.

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their claims against Touchpoint to Aurora Health Care, Inc. (R.19:Nestor Aff. ¶ 19.)

(*Id.* ¶ 6.) Additionally, Aurora made it clear to Touchpoint, that if Touchpoint were either to buy Aurora's shares outright or exercise its right of first refusal, Touchpoint would have to keep Aurora as a provider in the Touchpoint network. (*Id.* ¶¶ 6-8.)

For example, on May 16, 2001, Aurora provided Touchpoint with a copy of an agreement relating to the purchase of Aurora's shares in Touchpoint that Blue Cross had previously proposed. (R.18:Geilfuss Aff. ¶ 2; Ex. 1.) In the May 16, 2001 letter, Aurora notified Touchpoint that key components from Aurora's standpoint with respect to any sale of Aurora's shares "are price, timing *and the contract commitments after the sale as set forth in paragraph 18 [of the proposed Blue Cross Purchase Agreement].*" (*Id.* (emphasis added).) The contract commitments referred to had to do with the commitments to include Aurora providers in the Touchpoint network. (*Id.*) Aurora specifically informed Touchpoint that if Touchpoint matched the previous Blue Cross offer, "[Touchpoint] *would be obligated to provide Aurora Health Network providers with contract access as described in paragraph 18*." (*Id.* (emphasis added).)

On June 29, 2001, Aurora and Blue Cross agreed upon a purchase agreement for the sale of Aurora's shares in Touchpoint ("the Stock Purchase Agreement"). (R.19:Nestor Aff. ¶ 10, Ex. 3.) This agreement had the same material provisions as the previous proposed Blue Cross transaction, *i.e.*, that as part of the purchase agreement, upon closing, the purchaser agreed to exercise its authority and good faith to keep Aurora providers in the Touchpoint network.[3] (*Id.*)

On July 2, 2001, Aurora informed Touchpoint of Aurora's intent to transfer all of its

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3 Those terms in Paragraph 18 had not changed since Aurora's earlier letter in May 2001, contrary to Touchpoint's contention, erroneously adopted by the trial court. (Compare R.18:Geilfuss Aff., Ex. 1 with R.19:Nestor Aff., Ex. 3, p. 6 and with R.38: Ex. 9, pp. 5-6.)

shares in Touchpoint to Blue Cross pursuant to the Stock Purchase Agreement. (R. 19:Nestor Aff. ¶ 11, Ex. 4.) On July 17, 2001, Aurora received a letter from Touchpoint purporting to exercise its right of first refusal. (*Id.* ¶ 12, Ex. 5.) Rather than matching the terms and conditions of the Stock Purchase Agreement, however, Touchpoint set forth its own terms and conditions for the sale. (*Id.*)

On July 24, 2001, Aurora notified Touchpoint that Touchpoint's July 17, 2001 letter was not an adequate election under the 1995 Shareholders Agreement because the July 17th letter did not exercise the right of first refusal "at the price and on the terms and conditions" specified in the Stock Purchase Agreement. (*Id.* ¶ 13, Ex. 6.) It was apparent to Aurora that Touchpoint was attempting to obtain Aurora's shares by matching the price contained in the Blue Cross Offer, but not the other provisions. (*Id.* ¶ 14.) Because the Stock Purchase Agreement had other important provisions, including other consideration (*i.e.*, Paragraph 18), this was unacceptable to Aurora. (*Id.* ¶¶ 8, 14.) Aurora specifically advised Touchpoint that it would only honor Touchpoint's election to exercise the right of first refusal, if Touchpoint purchased Aurora's shares at the price *and* on all of the other terms and conditions set forth in the Blue Cross offer. (*Id.* ¶¶ 13, 14, Ex. 6.)

On July 26, 2001, Aurora received another letter from Touchpoint purporting to exercise the right of first refusal contained in the Shareholders Agreement. (*Id.*) Touchpoint's July 26, 2001 letter again did not adequately or effectively exercise the right of first refusal under the Shareholders Agreement because its offer to purchase Aurora's shares did not specifically match *all* of the terms and conditions of the Blue Cross offer. (*Id.* ¶ 16, Ex. 8.) Aurora rejected Touchpoint's purported exercise because Touchpoint suggested it would only match Aurora's cover letter of July 2, 2001, which did not contain the terms and conditions of the Blue Cross offer. (*Id.*) Touchpoint's right of first refusal under the 1995 Shareholders Agreement was limited to *matching* the terms of a third-party offer. (*Id.* ¶ 2, Ex. 1, p. 9.)

On July 30, 2001, Aurora again notified Touchpoint that Aurora rejected the attempted exercise of the right of first refusal by Touchpoint and informed Touchpoint that Touchpoint's exercise of the right of first refusal must match exactly the Blue Cross offer or it would not be accepted by Aurora. (*Id.* ¶ 16; Ex. 8.) In Aurora's July 30, 2001 letter, Aurora told Touchpoint as follows:

> If you have a genuine interest in blocking the Blue Cross purchase and wish to purchase the shares, it must be a true match of their offer, not a modification of it. ***You must agree to become the purchaser in the offer instead of Blue Cross***.

(*Id.* (emphasis added).)

In response, on that same day, July 30, 2001, Touchpoint again wrote to Aurora and this time indicated to Aurora as follows:

> [W]e clarify that Touchpoint's offer is to purchase at the price ***and on the terms and conditions*** in the Agreement for Purchase of Stock Interest dated as of June 29, 2001 [the Blue Cross offer], and attached to your July 2, 2001 notice.

(*Id.* ¶ 17, Ex. 9 (emphasis added).) Only after receiving this assurance that Touchpoint was matching ***all*** of the terms and conditions of the Blue Cross offer, did Aurora acknowledge that Touchpoint had effectively exercised its right of first refusal. (*Id.* ¶ 18.) On that basis, Aurora transferred all of its shares to Touchpoint on July 31, 2001. (*Id.*)

Paragraph 18 of the Purchase Agreement, the terms and conditions of which Touchpoint agreed to honor, provides that the "Purchaser" shall "exercise its authority and good faith" to include Aurora in the Touchpoint network.

(*Id.* ¶ 10, Ex. 3, p. 6.) Paragraph 18 states, in relevant part, as follows:

> **Contracting**. Seller and Purchaser agree to cooperate and exercise good faith and diligence to complete the transaction as herein provided and to obtain a waiver of the rights of refusal under the Shareholders Agreement. In addition, as an owner of Touchpoint, **Purchaser agrees to exercise its authority and good faith** and vote all the stock it now or in the future owns (which the parties agree is not limited to shares acquired hereunder) **to include Aurora Health Care affiliated facilities** (including BayCare Clinic, L.L.P.) and Aurora Health Network providers (including BayCare Clinic) (together, "Aurora") **in Touchpoint's product offerings in any county in which Touchpoint's products or services are offered over a term of not less than ten years**. . . . the pricing shall be at a ten percent (10%) discount from charges for PPO products and at the same discount from charges for HMO products that Blue

> Cross receives from Aurora in its broad network agreement in the same geographic area.

(*Id.* (emphasis added).)

Under this provision, as the "Purchaser," Touchpoint was obligated to: (1) exercise its authority to include Aurora Health Care affiliated facilities in the Touchpoint network;[4] (2) exercise its good faith to include Aurora Health Care affiliated facilities in the Touchpoint network; and (3) vote all of the stock it now owns or in the future owns to include Aurora Health Care affiliated facilities in the Touchpoint network. (R. 54:Tr. Ct. Dec. at 4-5, Pet. App. 15-16.)

On August 10, 2001, Aurora wrote to Touchpoint requesting that Touchpoint honor the provisions contained in Paragraph 18 of the Purchase

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4 The "Aurora Health Care affiliated facilities" and "Aurora Health network providers" referred to in Paragraph 18 includes BayCare Clinic, L.L.P. and a number of Aurora subsidiaries and affiliates that are each health care providers. (R. 19:Nestor Aff. ¶ 19.) Each of them assigned their claims to Aurora Health Care, Inc. (*See, supra*, n.2.)

Agreement. (R. 19:Nestor Aff. ¶ 20, Ex. 10.)[5] On August 28, 2001, Touchpoint's counsel wrote to Aurora and rejected Aurora's request as set forth in the August 10, 2001 letter, stating, "Article 18 of the Agreement imposes no obligation upon Touchpoint." (*Id.* ¶ 21, Ex. 11.)

B. The Proceedings Below.

Aurora commenced this action alleging that Touchpoint's decision to exclude Aurora from the Touchpoint network constitutes a breach of the Purchase Agreement and that Touchpoint's conduct constitutes a breach of its duty of good faith. (R.1 ¶ 25.) If Touchpoint had informed Aurora during the negotiations and the exchange of correspondence in July 2001 that Touchpoint did not intend to include Aurora in the Touchpoint network, Aurora would

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5 Based upon Aurora's rights under Paragraph 18, Aurora later notified Touchpoint that Aurora was ending the HMO agreement because it was redundant to and inconsistent with the contracting provisions of Paragraph 18. (R.19:Nestor Aff. ¶ 24, Ex. 13.)

never have sold its shares to Touchpoint. (R.19:Nestor Aff. ¶ 22.)

Touchpoint moved to dismiss Aurora's complaint on the pleadings. (R.24.) Touchpoint argued that, as a matter of law, Paragraph 18 imposed no obligations on it. (R.25.)

The Circuit Court granted Touchpoint's motion. (R.54:Tr. Ct. Dec. p. 12, Pet. App. 23.) It held that Paragraph 18 unambiguously imposed no duties on Touchpoint and that Aurora's breach of the duty of good faith claim failed as a matter of law because both parties were "sophisticated," "represented by experienced attorneys," and were "playing their cards close to the vest." (*Id.* at 9-10, Pet. App. 20-21.)

The Court of Appeals unanimously reversed the decision of the Circuit Court and remanded for a trial on Aurora's claims. As the Court of Appeals explained, the evidence supporting Touchpoint's breach of good faith precludes dismissal of that claim without a full presentation of the evidence at trial. Decision ¶20.[6] As the Court of Appeals stated:

> The trial court pointed out that Touchpoint "was carefully trying not to state its opinion clearly to Aurora." The reverse, however, is not true. Aurora, repeatedly and explicitly, required that for Touchpoint to exercise the right of first refusal, it had to accept the exact terms of the Blue Cross offer, including paragraph 18. Aurora refused to consent to the sale unless Touchpoint assured Aurora that it would honor all the terms and conditions to which Blue Cross had agreed. Only after Aurora received this assurance from Touchpoint was the sale consummated.

Decision ¶19. Given the substantial evidence that Touchpoint deceived Aurora and never intended to abide by all of the obligations in the Blue Cross contract, the Court of Appeals, "reverse[d] and

6 "Decision" refers to the Court of Appeals' August 6, 2002 decision, a copy of which is at Pet. App. 1-11.

remand[ed] this matter to the trial court with directions to conduct a trial to ascertain the intent of the parties and to address issues related to bad faith." *Id.* ¶21.

Rather than return to the Circuit Court to try the merits of Aurora's claims, Touchpoint first filed a motion for reconsideration, which the Court of Appeals denied with a sanction of costs.[7] (Pet. App. 35.) Touchpoint then petitioned this Court for review.

ARGUMENT

The limited portion of the petition relating to the suitability of this case for review (see Pet. 3-7) relies on Wis. Stat. § 809.62(1)(c) and (d) as bases for accepting this appeal. Those provisions speak of petitions that demonstrate that the case

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7 In its petition, Touchpoint takes issues with portions of the Court of Appeals' statement of the case. (*See* Pet. 14 n.3, 27.) Touchpoint made these same contentions in its motion for reconsideration, which the Court of Appeals summarily denied as having been "already . . .
(Continued)

requires this Court to "develop, clarify, or harmonize the law" and that the decision below "is in conflict with controlling opinions" of this Court or the Court of Appeals. At this point, however, this case involves application of routine contract law principles. The issues currently presented by this case do not even begin to implicate the concerns described in § 809.62. Consequently, the petition should be denied.

I. The Court of Appeals' Construction of the Agreement Does Not Conflict with Wisconsin Law.

The Court of Appeals' decision is based on application of well-established principles of contract interpretation: (1) The ultimate aim of all contractual interpretation is to ascertain the intent of the parties; (2) if the language of the contract is ambiguous, a court should consider extrinsic evidence of the parties' intent; and (3) "[w]ords or phrases in a contract are ambiguous if they are 'reasonably or

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considered and rejected by the court." (Ct. App. Order, Aug. 26, 2002, Pet. App. 35.)

fairly susceptible of more than one construction' or meaning." Decision ¶9 (quoting *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990)).

There is nothing new here. These same principles were invoked by the Circuit Court. (*See* Tr. Ct. Dec. 5, Pet. App. 16.) Touchpoint does not take issue with any of them. Touchpoint instead suggests that the Court of Appeals erred in applying these principles to the case at hand.

But Touchpoint cites no "controlling authority" with which the Court of Appeals' application of the law conflicts: it does not present any factually analogous case in which the outcome was different. Instead, Touchpoint characterizes the Court of Appeals' decision as misapplying (1) "the Wisconsin Business Corporations Act and Well-established precedent" and (2) this Court's "precedent governing the parole evidence rule." Neither characterization, however, is accurate.

A. The Decision does not conflict with Wisconsin Corporations law.

Touchpoint suggests that the "decision will undermine a cornerstone of Wisconsin corporate law: a corporation and its shareholders are distinct." (Pet. 32.) This hyperbole is misplaced. The Court of Appeals applied the black letter contract interpretation principles set out above to Paragraph 18 of the parties' contract. Doing so, the Court of Appeals concluded that the language is ambiguous and the Circuit Court erred in not considering extrinsic evidence.

Corporate law is not at issue, except as a component of Touchpoint's argument, rejected by the Court of Appeals, that Touchpoint did not have to live up to the obligations in Paragraph 18 because "a corporation cannot be an owner of itself." (Pet. 33.) Paragraph 18 provides:

> Seller and Purchaser agree to cooperate and exercise good faith and diligence to complete the transaction as

> herein provided and to obtain a waiver of the rights of refusal under the Shareholders Agreement. In addition, as an owner of Touchpoint, **Purchaser** agrees to **exercise its authority** *and* **good faith** *and* **vote all the stock** it now or in the future owns (which the parties agree is not limited to shares acquired hereunder) to include Aurora . . . in Touchpoint's product offerings in any county in which Touchpoint's products or services are offered.

(R.19:Nestor Aff., Ex. 3, p. 6 (emphasis added).)

Touchpoint argues that the only way to read this provision is to apply the following poly-syllogism: (1) a corporation is owned by its shareholders; therefore, (2) a corporation cannot "own itself"; therefore, (3) Touchpoint cannot act "as an owner of Touchpoint"; therefore, (4) Touchpoint does not have to abide by any of the obligations that Paragraph 18 imposes on it as "Purchaser." (*See* Pet. 33-38.)

The Court of Appeals disagreed. It concluded that this "hypertechnical" analysis is not the only plausible reading of Paragraph 18 under the "very specific factual scenario" presented by this case. Decision ¶12. As the Court of Appeals explained, there is an equally plausible reading of Paragraph 18 that does impose obligations on Touchpoint. *Id.* ¶¶12-13.

In fact, as Aurora contended before the Circuit Court and before the Court of Appeals, the "as an owner of Touchpoint" language contained in the Stock Purchase Agreement served to make a temporal distinction. The first sentence of Paragraph 18 imposed pre-closing obligations on the "Purchaser." The second sentence of Paragraph 18 imposed post-closing obligations on the "Purchaser." Thus, the "as an owner" language was inserted to show that the obligations that followed were post-closing, *i.e.*, after the purchaser owned the shares.

Because Touchpoint exercised its option to be the "Purchaser" of Aurora's Touchpoint stock, Touchpoint can be viewed as wearing two hats. Or, as the Court of Appeals stated, *for purposes of the parties' contract*, Touchpoint can reasonably be viewed as "operating under a dual role—[as] the corporation *and* the purchaser/owner of the shares Aurora sold." Decision ¶12 (emphasis added).

Thus, the decision below does not undermine any tenet of corporate law or provision in Chapter 180. It simply concludes that there is more than one plausible construction of the specific contractual terms at issue. Review of that conclusion is unwarranted.

Nor does Touchpoint's next argument satisfy this Court's criteria for review. Proffering another syllogism, Touchpoint argues that the decision is wrong because (1) Paragraph 18 obligates the Purchaser to, among other things, vote all the stock it owns to keep Aurora in the network, (2) corporations cannot vote the shares of its stock that it owns as treasury shares; therefore, (3) Paragraph 18 cannot be applied to Touchpoint. (Pet. 38-41.)

The Court of Appeals also properly rejected this argument. As the Court of Appeals correctly reasoned, even if Touchpoint cannot vote its shares to keep Aurora in the network, Paragraph 18 imposes the separate duties to use its authority and good faith to keep Aurora in the network. Decision ¶16.[8] The Court concluded that "[t]he dual status of Touchpoint, particularly subsequent to the transaction, certainly creates ambiguity as to the terminology utilized in the second sentence and subsequent portions of paragraph 18." *Id.* Once again, the Court of Appeals explained, "the interpretations raise two possible outcomes which render the language ambiguous." *Id.* ¶17. This fact-specific conclusion does not merit review.

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8 Both the Court of Appeals and the Circuit Court agreed that Paragraph 18 imposed three separate obligations on the purchaser of Aurora's sock: (1) it must exercise its authority to include Aurora in Touchpoint's product offerings; (2) it must exercise its good faith to include Aurora in Touchpoint's product offerings; and (3) it must vote its stock that it now has, or may in the future own,
(Continued)

The Court of Appeals' opinion is also not "contrary to law." Touchpoint incorrectly contends that because Touchpoint cannot "lawfully" vote its shares, none of Paragraph 18's obligations can be enforced against it.

The law is clear, however, that contracts are generally not rendered invalid because one of their obligations cannot lawfully be enforced. Instead, the contract must be *illegal*—barred by statute or regulation. *See, e.g.*, *Chapman v. Zakzaska*, 273 Wis. 64, 66, 76 N.W.2d 537 (1956). The arguable inability of Touchpoint to vote the purchased shares did not, therefore, render the remainder of the obligations unenforceable.

In fact, even if Paragraph 18's obligation to vote shares to keep Aurora in the Touchpoint network was "unlawful," the remainder of the obligations would remain enforceable, since nothing

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to include Aurora in Touchpoint's product offerings." Decision ¶16; Tr. Ct. Dec. at 4-5 (Pet. App. 15-16).

suggests that the law intended to proscribe the rest of the bargain. Indeed, the parties' contract expressly provides that the unenforceability of one obligation does not render the remainder of the contract unenforceable:

> If any provision of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provisions to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

(R.19, Nestor Aff., ¶ 10, Ex. 3, p. 5.)

Thus, *Kryl v. Frank Holton & Co.*, 217 Wis. 628, 259 N.W. 828 (1935), on which Touchpoint relies, is wholly inapposite. *Kryl* involved a contract to engage in advertising that was subject to a statutory prohibition. There is no similar prohibition at issue.

Touchpoint's additional authority, *Chicago, Milw., St. Paul & Pac. R.R. v. Chicago & N.W. Transp.*, 82 Wis. 2d 514, 522, 263 N.W.2d 514 (1978), is also inapposite. It involves the wholly inapplicable frustration of purpose doctrine. Here, there was no frustration of purpose. It was undisputed, based upon the testimony of Touchpoint's own Chief Executive Officer, that Touchpoint had the authority to keep Aurora providers in the Touchpoint network. (R.32: Fulkerson Dep. 8, 45-6.) And, because Aurora was already a provider in the Touchpoint network, keeping Aurora in the network did not require Touchpoint to do anything. It simply had to refrain from removing the Aurora providers from the Touchpoint network, an act solely within its own control. Thus, there was no frustration of purpose or impossibility of performance.

Neither case relied on by Touchpoint remotely contradicts the Court of Appeals' decision.

That decision should not, therefore, be reviewed as "contrary to controlling" precedent.

II. The Decision does not Conflict with Established Parole Evidence Principles.

Touchpoint's argument that the Court of Appeals misapplied parole evidence principles simply mischaracterizes the opinion. Contrary to Touchpoint's suggestion, the Court of Appeals did not hold that the contract was ambiguous simply because the parties disagreed about whether Paragraph 18 applied to Touchpoint, nor did it rely on extrinsic evidence to "create an ambiguity." (Pet. 44.) Although the Court of Appeals noted that the parties put forward competing interpretations, it held that the provision was ambiguous, *i.e.*, subject to more than one reasonably interpretation, based on the particular circumstances at issue. *See* Decision ¶¶12-16.

The Court of Appeals determined that the ambiguity results from the fact that Touchpoint substituted itself as the "Purchaser" when it exercised its option to match Blue Cross's offer. *Id.* ¶¶12-13. In that context, the Court of Appeals held, the meaning and effect of "as an owner of Touchpoint" and the obligations of Touchpoint as "Purchaser" became unclear. *Id.* Only after so holding did the Court of Appeals refer to extrinsic evidence supporting Aurora's interpretation of the contract. *Id.* ¶18. And the Court did so in the context of explaining that it was remanding the case to the Circuit Court to conduct a trial regarding the "intent of the parties" and Aurora's claim that "Touchpoint's actions breached its duty of good faith and fair dealing." *Id.* The Court did not, contrary to the position Touchpoint takes in its petition, rely on extrinsic evidence to hold that the contract was ambiguous. The Court's opinion does not, therefore, conflict with any controlling authority on the proper application of the parol evidence rule.[9]

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[9] None of the cases on which Touchpoint relies are on point. *See, e.g.*, *Conrad Milwaukee Corp. v. Wasilewski*, (Continued)

III. The Court Should not Grant Review to Rule on Issues Addressed by Neither the Court of Appeals nor the Circuit Court.

Touchpoint also argues that this Court should grant review to consider two issues not addressed by the Court of Appeals or the Circuit Court: (1) that the contract's obligations relating to keeping Aurora in the network are unenforceable "poison pills," and (2) that the contract is unenforceable on antitrust grounds. Neither issue was addressed below. This fact alone makes review on these grounds ill advised, since it would be a remarkably inefficient use of this Court's resources to address these issues for the first time without the

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30 Wis. 2d 481, 141 N.W.2d 240 (1966) (term "June 1st, 1965" held unambiguous); *Batavian Nat'l Bank of LaCrosse v. S. & H. Inc.*, 3 Wis. 2d 565, 89 N.W.2d 309 (1958) (contract language so vague as to be unenforceable); *Cernohorsky v. Northern Liquid Gas Co.*, 268 Wis. 586, 68 N.W.2d 429 (1955) (term "no claim" could not be read to apply only to contract claims); *Schmitz v. Grudzinski*, 141 Wis. 2d 867, 416 N.W.2d 639 (Ct. App. 1987) (unambiguous dragnet clause applied in land contract foreclosure action).

benefit of a lower court decision based on a fully developed factual record.

What is more, a closer examination of these issues only clarifies that they are not well presented for review. Neither argument is premised on a violation of established Wisconsin precedent and both implicate factual issues that are properly developed before the Circuit Court on remand. Neither argument, moreover, is likely to succeed on the merits.

A. Touchpoint's "Poison Pill" argument implicates the factual disputes for which the case was remanded for trial.

Touchpoint's "poison pill" argument is simply an argument that Aurora allegedly breached a duty of good faith in contracting for the specific provisions of Paragraph 18.[10] This argument's merits

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10 *See* Pet. 49-50 (owner may impose conditions as long as "'commercially reasonable, imposed in good faith, and not specifically designed to defeat the preemptive rights,'" quoting *West Texas Transmission, L.P. v. Enron Corp.*, 907 F.2d 1554, 1563 (5th Cir. 1990)) and *id.* at 50 (Continued)

(or lack thereof) should first be addressed at the Circuit Court level where a record can be developed to determine whether it has any basis in law or fact.

This Court's consideration of this issue is also unwarranted because Touchpoint's argument, even if fully developed, has no such basis. Aurora, as the owner of stock subject to a right of first refusal, was entitled to strike its best deal and require Touchpoint to match the terms and conditions of that deal. *See, e.g., Seessel Holdings, Inc. v. Fleming Cos.*, 949 F. Supp. 572 (W.D. Tenn. 1996). Aurora was the master of the conditions under which Aurora would relinquish its interest in Touchpoint. *Id.* at 576. Paragraph 18 of the Stock Purchase Agreement was a bargained-for item of consideration to which Aurora was entitled as part of the sale of its shares–Aurora

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("'[D]efeat of the right of refusal should not be allowed by use of special, peculiar terms or conditions not made in good faith.' *Brownies Creek Collieries, Inc. v. Asher Coal Mininig Co.*, 417 S.W.2d 249, 252 (Ky. Ct. App. 1967)").

would not have sold its shares to Blue Cross or to Touchpoint if it did not receive this item of consideration. Touchpoint's limited right of first refusal was, therefore, to determine whether it was going to match the Blue Cross offer or not. Given that it made the decision to match that offer, Touchpoint was, and is, obligated to meet *all* of the same terms and conditions that Blue Cross would have been obligated to meet. Touchpoint has no viable legal argument to the contrary.

Tellingly, Touchpoint resorts to naked factual assertions in arguing that its good faith argument has merit. As support for the argument, it claims that Paragraph 18's conditions "made Touchpoint's cost of exercising the right of first refusal and purchasing the stock far more expensive than the cost to Blue Cross." (Pet. 49.) Touchpoint cites nothing in the record to support this claim, because there is nothing in the record to support it.

Once the record is complete on this issue, and the Circuit Court (and, if necessary, the Court of Appeals) has determined the legal merits of this argument, Aurora fully expects that Touchpoint's argument will be rejected. At that point, the issue would then be ripe to determine whether it satisfies the criteria for a petition for review to this Court. There is no basis for a petition for review on this issue at this time.

B. Touchpoint's Antitrust Claim is also not an appropriate issue for review.

Touchpoint also asks this Court to be the first to address its argument that Paragraph 18 violates federal and state antitrust laws. Again, the appropriate venue for this claim is the Circuit Court—a point driven home by the fact that Touchpoint proffered "expert" affidavit testimony of a lawyer with a "degree[] in economics" in presenting this defense in the Circuit Court. (*See* Touchpoint's Ct. App. Br. 57 n.15 and R.55.)

Because the Circuit Court ruled on other grounds, it never addressed Touchpoint's antitrust claims. Nor did the Court of Appeals address those claims. Given the Court of Appeals' decision to remand the case to the Circuit Court, there is no basis for Touchpoint's argument that this Court should be the first court to review and decide this issue.

Moreover, Touchpoint's antitrust argument misconstrues antitrust law. Touchpoint argues that Paragraph 18 constitutes *per se* unlawful "price fixing." (Pet. 51.) But not every agreement on price is "price fixing"—otherwise, every market transaction in which a seller agrees to sell its product to a buyer at an agreed upon price would be *per se* unlawful. Only when *competitors* agree to fix prices are those agreements *per se* unlawful. *See NCAA v. Board of Regents*, 468 U.S. 85, 99-100 (1984).

The contract at issue is not between competitors. Aurora is a competitor of neither Blue

Cross nor Touchpoint. Aurora is a healthcare provider. Blue Cross and Touchpoint are insurance companies. Contracts between health care providers and insurers are vertical agreements that cannot be held *per se* unlawful on price fixing grounds. *See Brillhart v. Mutual Med. Ins., Inc.*, 768 F.2d 196, 199 (7th Cir. 1985) ("The plaintiff cannot make out a cause of action for horizontal price-fixing since the alleged agreement between Blue Shield and participating doctors does not run between competitors in the medical services industry or between competitors in the insurance industry."). Nor does the fact that Aurora has agreed to give most-favored-nation pricing transform Paragraph 18 into price fixing between competitors.[11] *See Blue*

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11 Contrary to Touchpoint's contention that the most-favored-nation pricing controls for "the next ten years" (Pet. 54), the contract only provides for such pricing until Aurora and Touchpoint are able to "negotiate in good faith the terms of a definitive contract [to include Aurora's affiliates' providers in Touchpoint's product offerings]." (R:19, Nestor Aff., Ex. 3, p. 6.)

Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995) (calling attempt to equate most favored nations clause with price fixing "perverse").[12]

Touchpoint's suggestion that antitrust principles can be applied in a vacuum to bar Aurora's claim is, therefore, meritless. Any consideration of Touchpoint's antitrust claim based on the present state of the proceedings would be ill advised.

CONCLUSION

For all of the reasons stated above, the petition for review should be denied.

Dated: September 18, 2002.

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12 The antitrust authorities on which Touchpoint relies are wholly inapposite. (Pet. 55-6.) None involve a relationship between an insurance company and a health care provider; and none were decided on the pleadings, without development of a factual record, as Touchpoint apparently wants this Court to do.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Response to Petition for Review conforms to the rules contained in § 809.19(8)(b) and (c) for a response to a petition for review produced with a proportional serif font. The length of this response is 5,770 words.

Dated: September 18, 2002.

G. Michael Halfenger

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STATE OF WISCONSIN
IN THE SUPREME COURT

AURORA HEALTH CARE VENTURES, INC. and AURORA HEALTH CARE, INC.,

Plaintiffs-Appellants-Respondents,

vs. Appeal No. 01-3273

TOUCHPOINT HEALTH PLAN, INC.,

Defendant-Respondent-Petitioner.

Appeal From The Circuit Court Of Milwaukee County
Honorable Timothy G. Dugan Presiding
Trial Court Case No. 01-CV-009115

CERTIFICATE OF SERVICE

I certify that I caused one copy of Response to Petition for Review to be served on September 18, 2002 upon the following by first class United States mail, postage prepaid to:

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