

**STATEMENT OF THOMAS E. BOYLE  
BUCHANAN INGERSOLL & ROONEY PC**

**AND**

**EDWARD V. WEISGERBER - KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS, LLP**

**BEFORE THE PENNSYLVANIA SENATE FINANCE COMMITTEE,  
PITTSBURGH, PENNSYLVANIA**

**August 30, 2007**

**THOMAS E. BOYLE**

Chairman Browne, my name is Tom Boyle. I am a healthcare attorney and shareholder with the law firm of Buchanan Ingersoll & Rooney PC. I am here to testify along my with colleague, Edward Weisgerber, a partner and healthcare attorney with the law firm of Kirkpatrick & Lockhart Preston Gates Ellis, LLP. We are pleased to have the opportunity to speak with your Committee about Act 55 of 1997 ("Act 55"), the Institutions of Purely Public Charity Act. Because Mr. Weisgerber and I both represent numerous non-profit healthcare providers, and in order to avoid redundancy, we have divided our testimony into two parts. I will be speaking about the history prior to Act 55 and the effect that Act 55 had on the relationship between taxing bodies and non-profit healthcare providers. Mr. Weisgerber will speak to your Committee regarding the proposed changes to the community benefit standard.

**Hospital Utilization Project Case**

In 1985, the Pennsylvania Supreme Court changed the landscape in Pennsylvania tax exemption law by deciding the Hospital Utilization Project case (also known as the HUP case). Our Supreme Court outlined a five pronged test that had to be satisfied in order for an institution to be considered for property and sales tax exemption. The key components of the test were that

the organization, to be classified as an "institution of purely public charity," must show that it: (1) advances a charitable purpose; (2) operates entirely free from private profit motive; (3) renders gratuitously or donates a substantial portion of its goods or services; (4) benefits a substantial and indefinite class of persons who are legitimate objects of charitable services; and (5) relieves the government of some of its burden.

Shortly after the HUP case was decided, creative attorneys working for governmental units seeking to raise tax revenue brought challenges against non-profit organizations which had long been viewed as exempt from real estate and sales tax. The City of Pittsburgh was one of the most aggressive and earliest governmental units to try to seize upon the relatively vague tests laid out in the HUP case.

#### A History of Litigation

Starting in the late 1980's through the passage of Act 55 in 1997, legal challenges raged across the Commonwealth. They arose primarily initially in the Pittsburgh, Erie and Lehigh Valley areas. The disputes soon spread to other areas across the Commonwealth, as school districts, counties and towns and cities all sought to raise additional sources of revenue. The arguments in support of the challenge to tax exemption then are the same as those being advanced now before this Committee by various taxing bodies and their trade associations.

After many years of litigation, much of which was expensive, time consuming, and very bitter, a group of attorneys in Pittsburgh sought to try to fashion a resolution to "stop the carnage." Mr. Weisgerber and I were joined by Seymour Schafer and Dan Mulholland, who are also attorneys here in Pittsburgh in our efforts to find a solution to this problem. We each gave substantial amounts of our time in an effort to fashion a first draft of legislation that might more clearly outline the Institutions of Purely Public Charity test laid out in the HUP case and

also be perceived both by taxing bodies and charities as a fair balance. We four attorneys engaged in this effort not solely as a pro bono matter, by donating our time, but in full recognition that it would lead to a loss of revenue to our firms and other law firms across the Commonwealth by hopefully stopping this very expensive litigation.

Ultimately, we came up with, somewhere around 1994, a draft piece of legislation which the Hospital Association of Pennsylvania ("HAP"), and other trade associations then spearheaded. Through the efforts of Jim Redmond, Senior Vice President of the Hospital Association of Pennsylvania and numerous other government relations experts and trade associations, a successful compromise was reached resulting in Act 55 of 1997.

What may seem most surprising about Act 55 is that it passed the House and Senate unanimously and was signed into law, apparently without any qualms, by then Governor Ridge.

Previous testimony, including that by Mr. Redmond of HAP, has laid out in great detail the key components of Act 55. Rather than repeat them here, however, what I would like to do is speak briefly to your Committee about the effect of Act 55.

#### Life After Act 55 of 1997

For hospitals and other traditional non-profit providers of healthcare services in the Commonwealth, Act 55 was like pouring oil on troubled waters. It had an immediate and soothing effect. Shortly after its passage, a number of our clients processed applications for sales tax exemption through the Pennsylvania Department of Revenue and also worked through local taxing bodies application of the various tests under Act 55 to their institution. The number of disputes over whether a healthcare provider was an "Institution of Purely Public Charity" dropped to virtually zero.

In addition to ending litigation on the exemption issue, the passage of Act 55 also seemed to provide "medicine" to the relationship between healthcare providers and their local governmental entities. The days of bitter public recriminations (the "executive of the health system is paid too much," the "taxing body is holding up our zoning request in order to get us to pay real estate taxes" and the like) came to an end. Our clients and the taxing body officials were sitting down having rational, calm discussions.

Although I cannot speak about confidential client matters, I can say generally that a number of clients entered into or renewed payment in lieu of taxes or "PILOT" agreements with taxing bodies after the passage of Act 55. Neither Mr. Weisgerber nor I are aware of any of our healthcare clients having existing disputes on real estate tax exemption issues. The disputes of which we are aware of are normal questions relating to assessed values and the like, which are extremely prevalent in the southwestern portion of our State.

After thirty years of assisting with healthcare providers and dealing regularly with governmental entities, I think two things will persist no matter what the legislature decides to do. One is that healthcare providers will continue to believe that they are underpaid by the government and by third-party payors. Second, governmental entities, whether they are counties, school districts or cities and towns, will feel that they do not have enough tax revenue. Nevertheless, Act 55 has worked well and, in my view, is covered by the old adage, "if it ain't broke, don't fix it."

It is important to note that Act 55 put in place relatively stringent and objective standards for many of the characteristics required to be satisfied by an "Institution of Purely Public Charity." The legislature should be proud of the fact that Pennsylvania is, in my judgment, much more advanced in this regard than virtually any other state and, in fact, is light years ahead of the

federal government. Interestingly, the United States Senate has just recently begun, through the efforts of Senator Grassley of Iowa, to focus on many of the same issues which are already addressed very capably by Act 55 of 1997.

**EDWARD V. WEISGERBER**

My name is Ed Weisgerber. I am a healthcare partner at Kirkpatrick & Lockhart Preston Gates Ellis LLP<sup>1</sup> in Pittsburgh. In conjunction with my friend and colleague, Tom Boyle, and several other lawyers (Dan Mulholland and Seymour Schafer), we prepared the initial drafts of what is now known as IPPCA, but which is also known as Act 55. I share Mr. Boyle's comments and observations with respect to how successful this statute has been and would encourage this Legislature not to allow tampering with what has proven over the last decade to be a very practical and useful piece of legislation and which has spared hospitals, school boards, county commissioners, and other taxing jurisdictions the expense and political trauma of having to attack local hospitals and other exempt organizations in a public way. Moreover, the statute has successfully encouraged hospitals to make contributions to their taxing local jurisdictions in the form of PILOTS. A number of my hospital clients have entered into and presently have PILOT agreements. These are working very well and in the ten years since the enactment of this statute, there has been very little concern raised by my clients with respect to the administration and/or continuation of these PILOTS.

I would like to focus on two current attempts to meddle with and, in my view, denigrate IPPCA. The first is House Bill 1661, which modifies the definition of "contribution" as this

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<sup>1</sup> The views expressed in this testimony are my own and do not reflect an official position of this firm or any of its clients.

word appears in IPPCA. The second is in §7207 in House Bill 700 (the Governor's Health Reform bill, which may have been moved to a piece of companion legislation), which relates to the definition and calculation of "uncompensated goods and services" under the hospital community benefit requirements. I will discuss each of these in greater detail in a moment, but the net effect of both is to undervalue the credit that can be claimed and the value that is added by tax exempt organizations for the work they do.

IPPCA is a very deliberately drafted statute. Mr. Boyle mentioned that it was passed unanimously, but only after several years of legislative work. It is striking that a piece of legislation that affects so many important public interests, and which was drafted as a means of settling numerous pieces of litigation across the state, could be passed with the unanimous support of all of the interested parties. As you know all too well, any bill, particularly a bill that represents a compromise of so many diverse interests, isn't going to be passed unanimously unless it *perfectly* balances the myriad of competing interests. IPPCA does this. The obligations and contributions of the charities described in one section of the Act, are tied to specific, quantitative performance levels in different sections of the Act. Upsetting the balance of this act by changing a word here, a phrase there, or worse, by adding new concepts, changing definitions, or changing the activities that underpin claims to exemption will destabilize and ultimately eviscerate the act. These piecemeal changes are no different than adding a 20-lb. weight to a perfectly balanced mobile. The end result is that it throws the entire statutory scheme, a scheme that was so carefully configured, out of balance.

#### HB 1661

HB 1661 is a perfect example of this destabilization. Although a seemingly minor adjustment, the bill would exclude from the definition of "contribution" anything that could be

considered to provide a “direct or indirect benefit” to the charity. There are a number of serious problems with this bill. First, it is difficult to understand what kind of “contribution” is being addressed because the concept of a “contribution” works both ways in IPPCA – in other words, it applies to gifts made to the charity, as well as gifts, undertakings, or expenditures made by the charity, most notably in the form of voluntary contributions (PILOT payments) made to taxing jurisdictions. For example, if a charity decides to make a PILOT contribution to its taxing jurisdictions, it is freed of any concerns over litigation or challenges during the life of that PILOT agreement. Arguably, this could be construed as the receipt of either a direct or an indirect benefit (e.g., no litigation) to the charity. Under §376 of IPPCA, a charity that makes a PILOT agreement is permitted to claim a percentage of this contribution toward its community benefit calculation. Does this mean that the value of the contribution would have to be excluded from the “additional credit” provisions of § 376(c) because the charity received an “indirect benefit” by having made the contribution?

Second, the definition, which requires an initial determination of whether some undertaking creates a “benefit”, is defective. To begin with, the definition is conceptual, not quantitative, and is hopelessly imprecise. Adding subjective and undefined terms that are capable of multiple definitions is anathema to the entire purpose of IPPCA. IPPCA was designed with very specific quantitative and qualitative tests so as to end the uncertainty and an ambiguity that was creating so much litigation. This definition does exactly the opposite because it doesn’t define “benefit” (one man’s burden may be another’s benefit), nor does define what “direct” or “indirect” means. There is probably no greater ambiguity in a statute than trying to determine whether something is “indirect”. Secondly, it adds a subjective, widely variable term to a definition which is otherwise very specific (e.g., a “contribution” is “[a] promise, [a] grant,

[a] pledge or gift”). These are very tangible and definitive nouns. The proposed addition is noticeably out of place in this section because as I mentioned, it is a concept, not a noun, and requires the reader to form a subjective conclusion as to whether something is a benefit (how?) (using what tests?) and if so, whether it is direct or indirect. This use of ambiguous terminology and subjective thinking is exactly what IPPCA was designed to prevent and re-opens the gateway to litigation that IPPCA so effectively discouraged.

### HB 700

Section 7207(b)(2) alters the categories of activities and expenditures that a hospital can include and value in the quantification of its community benefit calculation. Under §7207, a hospital would have to perform two community benefit calculations: one under IPPCA and a second using an altered definition that excludes many of the categories that are included in the IPPCA test. If the hospital comes up short, it must pay a fine to the Department of Health. Needless to say, there are a series of problems with this section. First, HB 700 only applies to hospitals; it does not apply to other medical service providers, universities, colleges, social welfare organizations, arts groups, etc. Why only hospitals? I’ll tell you why in a few minutes. Second, it does not permit an entity to value the real difference between what it costs to provide a service and what the hospital actually received from the payor for providing that service. Instead, it would set the artificial floor as the difference between its actual costs and what Medicare would have paid rather than what the actual payor paid. Third, it also negates and narrows the reasonable value of volunteer assistance and restricts a hospital’s ability to include its costs for conducting public health screening charges, or the use of its space that it makes available to the public. Fourth, it excludes bad debt, even though the bad debt of a charitable hospital is different from the bad debt of a for-profit hospital because a charitable hospital: (i)

accepts anyone regardless of ability to pay, (ii) has limited or no means of restricting future re-use of the facility by a “ bad debtor,” and (iii) cannot use common commercial debt collection modalities to the same extent as for-profit hospitals. I can tell you that none of this is new ground; all of these concepts were exhaustively considered and debated in the development of IPPCA and the final language reflects the ultimate consensus of charities and taxing jurisdictions.

Tampering with or omitting categories of expenditures that can be credited towards a calculation changes the logic behind the calculation. If the original balance designed into IPPCA is to be preserved, then a change to the categories of what is to be included in community service should produce a corresponding change to the percentage amounts that are included in other portions of the Act. For example, if the Governor wants to change the categories that are included in §375(d)(4), then he will have to change the percentages contained in §375(d)(1) – if he wants to preserve the balance agreed to among charities and taxing jurisdictions – because these percentages were premised upon the definitions of the included categories.

But that won’t happen because in my view, the real purpose behind this proposal is the levying of a hidden tax on hospitals to fund the Governor’s coverage plan. It is no accident that: (i) this section only applies to hospitals and not to other kinds of charities and (ii) the “deficit” payments to be made by hospitals are to be collected by a *state* agency (the Department of Health) and earmarked exclusively for the Governor’s coverage plan. IPPCA, which was designed to solve a local problem and which has created relative peace and tranquility among taxing jurisdictions and exempt entities at the *local* level, is being used as a template to fund a new, state driven health insurance coverage proposal.

A second major problem with this proposal is that it creates uncertainty and confusion at the local level, the exact problem incidentally, that IPPCA was designed to solve. Taxing jurisdictions (and the public) will learn that their local hospital has been fined by the State because it has “failed” the community benefit test, and they may conclude (mistakenly) that the hospital is no longer exempt. This will prompt local jurisdictions to push the issue, and the destructive court battles that marked the early and mid-90s will re-emerge.

But the biggest problem facing local taxing jurisdictions is that upon renewal of exiting PILOTs, hospitals will likely include a “set-off” provision, which would reduce the local PILOT amount to the taxing jurisdictions by the amount the charity has to remit to the state. This will mean less monies to the local jurisdictions at the hands of the state which should only exacerbate the pleas of taxing jurisdictions seeking state relief.

Finally, the logic for excluding these categories of costs is defective and unworkable. For instance, subsection (iii)(B) would eliminate amounts spent in public health screening and public health education *if* the program is “designed” to increase market share (whatever this means) or the hospital ultimately receives a referral from the health fair. Outreach, public education, early detection and screening are *exactly* what hospitals are supposed to be doing. Why in the world would the Legislature want to discourage outreach screenings? Take for example, a public mammography screening that sees 100 women. If 99 women are screened and are negative, and one is screened who is determined to have a lump and is referred to the hospital (or a physician on staff at the hospital), should 100% or 1% of the costs of this screening be excluded? Section 7207 provides no answer to this obvious question. What if the patient is referred to a doctor who ultimately refers the patient to the hospital, should the costs be excluded because she was first

seen at a screening? How would the hospital ever know if the woman was referred because of the health fair?

The “logic” for these ‘adjustments’ to IPPCA appears to be the same as the logic in HB 1661, which is if there is any “benefit” flowing back to the hospital from a certain action, that makes the action “impure” or non-charitable and means that it cannot be included in the ambit of charitable activities. This thinking is naïve, punitive, inconsistent with the reality of a charitable enterprise, and misapplies the constitutional principles governing the taxation of exempt entities. Pennsylvania jurisprudence has never required the absence of any sort of quid pro quo from a charity. If it did, charities could not charge for their services (because revenue is unquestionably a benefit). The Supreme Court, in HUP, has recognized that charities can receive a quid pro quo for their services and that, in fact, they can share as much as 80% of the same characteristics (4 of the 5 HUP tests) of a for-profit, and still be exempt. Attempts to whittle away at IPPCA on the basis of the notion that a charity cannot receive anything in return for its efforts are misguided and if they succeed, will weaken if not destroy IPPCA.

In conclusion, we want to congratulate the Legislature for so effectively solving a problem 10 years ago when it enacted IPPCA. We urge you to zealously guard your work product and to resist those who would seek to tamper with its features, lest you destroy the deliberate balance that underpins its success. The act took almost 5 years to pass and included countless legislative sessions, difficult negotiations *among* the numerous types of charities (hospitals, universities, arts associations, social welfare organizations, religious entities, fraternal organizations, etc.; incidentally, these discussions were often more rancorous than the negotiations with the taxing jurisdictions), as well as negotiations with the three different taxing jurisdictions.

IPPCA is a terrific product. It could be a model for the federal system. We urge that you preserve it in its existing form. Thank you.