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INTRODUCTION

This is not a case that presents any constitutional question or an issue of public or great general interest. This case is about whether the Department of Insurance (“Department”) had jurisdiction to issue administrative cease and desist orders against Ohio Police and Fire Pension Fund (“OP&F”), the City of Akron (“Akron”), and Medical Mutual of Ohio (“Medical Mutual”) regarding coordination of benefits in the self-funded health care programs offered by OP&F and Akron. More specifically, this case involves a straightforward application of unambiguous statutes. Appellants Metcalfe and Biasella essentially seek to make Akron their primary health coverage through a number of court actions and this administrative proceeding. The Department has not appealed and has waived filing a memorandum regarding jurisdiction. This court should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

In 2005, Timothy Metcalfe and William Biasella filed a complaint in Summit County Common Pleas Court against the City of Akron, Medical Mutual of Ohio, and Ohio Police and Fire Pension Fund seeking declaratory judgment that R.C. 3902.13 (Ohio’s coordination of benefits law) was binding on those parties, that the City of Akron’s health care program is primary, and seeking damages. *Timothy Metcalfe, et al. v. City of Akron, et al.*, Summit County Court of Common Pleas, Case No. CV-2005-11-6527.

The City of Akron moved to dismiss the case asserting that there is no private right of action under Ohio’s insurance laws. *Id.* Medical Mutual moved to dismiss the case on the basis that the plain language of the statute in question provides that the exclusive remedy for a violation is an administrative action by the Superintendent of Insurance, that there is no private right of action under Ohio’s insurance laws, and that Metcalfe and Biasella failed to exhaust their

administrative remedies. *Id.* OP&F moved to dismiss asserting that Ohio Department of Insurance had primary administrative jurisdiction over the question about coordination of benefits. *Id.* The Summit County Common Pleas Court ordered that the case be stayed until the Ohio Department of Insurance rules on the questions presented in that case or declines jurisdiction.

Metcalf and Biasella then filed complaints with the Department of Insurance. The Department issued a Notice of Opportunity for Hearing advising the City of Akron and Medical Mutual that “the Superintendent intends to take any and all actions authorized pursuant to Section 3902.13, Section 3901.04 and Sections 3901.19, et seq. of the Revised Code and Chapter 119 of the Revised Code and Ohio Administrative Code Section 3901-1-56, including but not limited to, an order to return disputed payments, civil penalties and/or administrative costs.” OP&F was served with a copy of the Notice.

Despite the fact that the introductory paragraphs of the Notice did not notify OP&F of a hearing against it, the Department’s Notice alleged in Count One that the Department had jurisdiction over OP&F to determine whether OP&F had engaged in “an unfair or deceptive act or practice in the business of insurance under Revised Code Sections 3901.19-.26.” The Department’s Notice did not make any specific allegations with regard to OP&F in Counts Two, Three, or Four. The closing paragraph of the Notice advised OP&F that a hearing would be held.

The Department’s case continued through the administrative process under R.C. Chapter 119. Ultimately, the Department issued an adjudication order (1) ordering the City of Akron, OP&F, and Medical Mutual to cease and desist from further violations of Ohio’s coordination of benefits law, (2) ordering the City of Akron to cease and desist from further violations of R.C. 3902.13(K)(1)-(2), (3) ordering an accounting by the City of Akron to

determine the amount of complainants' past healthcare claims subject to coordination, and (4) that the Order be directed to the Summit County Court of Common Pleas for further application in that case.

OP&F appealed the Department's order to the Franklin County Court of Common Pleas under R.C. 119.12. *Ohio Police & Fire Pension Fund v. Ohio Department of Insurance*, Franklin County Court of Common Pleas, Case No. 10-CV-11426. The City of Akron and Medical Mutual also appealed and the administrative appeals were consolidated. *City of Akron v. Ohio Department of Insurance*, Franklin County Court of Common Pleas, Case No. 10-CV-11258 and *Medical Mutual of Ohio v. Ohio Department of Insurance*, Franklin County Court of Common Pleas, Case No. 10-CV-11513. The common pleas court ordered the Department to vacate the adjudication orders because the Department of Insurance lacked subject matter jurisdiction. The Tenth District Court of Appeals unanimously affirmed that ruling. The Tenth District held that the self-funded health care programs offered by Akron and OP&F are not insurance. The court also held that self-funded health care programs are not subject to the coordination of benefits law. The court found that ODI's cease and desist orders against Akron and OP&F were improper because (1) neither could have engaged in an unfair and deceptive act or practice in the business of insurance because they are not in the business of insurance and (2) neither is subject to the coordination of benefits law because they are not third-party payers. Finally, the court held that primary administrative jurisdiction could not create subject matter jurisdiction for ODI where it does not exist. Metcalfe and Biasella appealed to this court.

THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This appeal does not present any issues that require this court's attention. The Tenth District Court of Appeals applied well-established law to the specific facts of this case in holding

that the Department does not have jurisdiction over the self-funded programs of Ohio Police and Fire Pension Fund (“OP&F”) and the City of Akron (“Akron”). While a different result may be important to Appellants Metcalfe and Biasella, the appellate court’s straightforward application of unambiguous insurance statutes is not of general importance to the people of Ohio. This court has previously analyzed the outer limits of administrative agency jurisdiction and held that an agency has only the regulatory power expressly delegated to it by the General Assembly or that which can be reasonably implied from an express grant. *See D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-172, paragraph 2 of the syllabus (2002); *Burger Brewing Co. v. Thomas*, 42 Ohio St.2d 377, 379, 329 N.E.2d 693 (1975). Indeed, the Department has not appealed and waived its opportunity to file a memorandum regarding jurisdiction.

The court of appeals correctly held that the self-funded health care programs offered by OP&F and Akron are not subject to the coordination of benefits law. Recognizing that administrative agencies have only the power delegated to them by the General Assembly, the court of appeals analyzed R.C. 3902.13 and the definitions that apply to that section contained in R.C. 3902.11. *Akron v. Ohio Dept. of Ins.*, 10th Dist. No. 13AP-473, 2014-Ohio-96, ¶¶ 30-35. R.C. 3902.13(K)(1) prohibits a third-party payer from failing to comply with the order of benefits in R.C. 3902.13(A). R.C. 3902.11(A) defines third-party payer by incorporating the definition in R.C. 3901.38(F). The court of appeals concluded that OP&F and Akron were not third-party payers, and thus were not required to comply with the coordination of benefits law. *Id.* at ¶ 36. The court of appeals went on to explain that this conclusion “is further bolstered by the fact that other sections in the Revised Code which regulate insurance do expressly apply to self-insured entities.” *Id.* at ¶¶ 39-40. The court of appeals’ decision is a straightforward

application of unambiguous statutes. It simply went on to construe certain statutes *in pari materia* with the rest of the Insurance Code as further support of the conclusion reached in the application of the statutes to the specific facts of this case. This court should decline jurisdiction.

The court of appeals did not create a new private right of action under the insurance statutes. In explaining that Appellants were not left without a remedy, the court stated “it is true that [Metcalf and Biasella] do not have a cause of action to enforce Ohio's coordination of benefits laws against Akron and OP&F” and recognized that Appellants Metcalf and Biasella may have a grievance under their collective bargaining agreement. *Akron v. Ohio Dept. of Ins.*, 10th Dist. No. 13AP-473, 2014-Ohio-96, ¶ 19. The court of appeals decision does not create a private right of action under the insurance statutes; it merely points out that Metcalf and Biasella have a contract action, which they have attempted and lost because that court found that Akron did not breach the collective bargaining agreement. *Id.* at ¶ 3.

This case does not present any constitutional questions or issues of public or great general interest. This is not a case of first impression. The case involves a straightforward application of unambiguous statutes. This court should decline jurisdiction.

ARGUMENT

OP&F's Response to Appellants' Proposition of Law No. 1

The Department is a creature of statute and therefore has only that power delegated to it by the General Assembly.

The court of appeals correctly determined that the Department lacked jurisdiction to issue an adjudication order against Akron, Medical Mutual, and OP&F requiring them to cease and desist from violating the coordination of benefits law. The Department's cease and desist authority is found in R.C. 3901.221. That section provides “[i]f a violation of section 3901.20 of the Revised Code has caused, is causing, or is about to cause substantial and material harm, the

superintendent of insurance may issue an order that the person cease and desist from any activity violating such section.” R.C. 3901.221. The court of appeals correctly held that the Department “sought to impermissibly expand its authority, beyond what authority the General Assembly saw fit to provide it with.” *Akron v. Ohio Dept. of Ins.*, 10th Dist. No. 13AP-743, 2014-Ohio-96, ¶ 43. Having previously held that the self-funded programs offered by OP&F and Akron were not insurance, the court simply applied the unambiguous language of R.C. 3901.20, which provides that “[n]o person shall engage in this state in any trade practice which is defined in sections 3901.19 to 3901.23 of the Revised Code as, or determined pursuant to those sections to be, an unfair or deceptive act or practice in the business of insurance.” *Id.* at ¶ 26 and ¶ 42 quoting R.C. 3901.20. The court of appeals concluded “[b]ecause the self-funded plans at issue are fundamentally not insurance, ODI could not find that Akron or OP&F had committed an unfair or deceptive act in the business of insurance.” *Id.* at ¶ 42.

Even though the court of appeals held that the Department’s cease and desist order was improper because OP&F and Akron are not in the business of insurance, the court also analyzed whether the Department would have limited jurisdiction to enforce a coordination of benefits clause in the programs offered by OP&F and Akron. The court of appeals correctly determined that OP&F and Akron were not subject to the coordination of benefits law in R.C. 3902.13. That section provides that “[n]o third-party payer shall knowingly fail to comply with the order of benefits as set forth in division (A) of this section.” R.C. 3902.13(K)(1). The term “third-party payer” is defined in R.C. 3901.38(F). *See* R.C. 3902.11(A). The court of appeals correctly concluded that OP&F and Akron were not third-party payers because neither is a person. Akron is a political subdivision and OP&F is a pension fund. *Id.* at ¶ 36.

The court of appeals also stated that its conclusion that the coordination of benefits law does not apply to self-funded programs was “further bolstered by the fact that other sections in the Revised Code which regulate insurance do expressly apply to self-insured entities.” *Id.* at ¶ 39-41 citing R.C. 3901.40, 3901.45, 3901.50, 3923.38. The court of appeals explained that “[t]he General Assembly could have included a self-insured entity in the definition of third-party payer in R.C. 3901.38(F), or expressly made R.C. 3902.13 applicable to self-insured plans of health coverage.” *Id.* at ¶ 41.

Because the court of appeals correctly applied well-established law regarding the scope of an agency’s jurisdiction to the facts here and made a straightforward application of unambiguous statutes, this court should decline jurisdiction.

OP&F’s Response to Appellants’ Proposition of Law No. 2

There is no general definition of “person” that applies to the entirety of Title 39. R.C. 1.59 defines “person” for purposes of R.C. 3901.38.

Throughout Title 39, the General Assembly has provided different definitions of person. *See e.g.* R.C. 3901.19, 3901.32, 3905.01, 3955.01, 3961.01. The definition of “person” in R.C. 3901.04(A) applies only to that section, not all of Title 39. Additionally, R.C. 3901.19 provides that the definition of “person” in that section applies only to R.C. 3901.19 to 3901.26, not all of Title 39. If the General Assembly wanted any particular definition of person to apply to the entire title, it would have made that clear as it has in other contexts. *See e.g.* R.C. 701.01 (“In the interpretation of Title VII of the Revised Code, unless the context shows that another meaning was intended: (A) ‘Person’ includes a private corporation. ****”); R.C. 5701.01 (“As used in Title LVII of the Revised Code, ‘person’ includes individuals, firms, companies, business trusts, estates, trusts, partnerships, limited liability companies, associations, corporations, and any other business entities.”).

In this case, the definition of person arises in the context of determining whether OP&F and Akron are third-party payers under R.C. 3901.38(F)(8). Person is not defined for purposes of R.C. 3901.38; therefore, the definition provided in R.C. 1.59 supplies the definition. R.C. 1.59 defines “person” to include “an individual, corporation, business trust, estate, trust, partnership, and association.” OP&F is not any of those. OP&F is a pension fund. The court of appeals correctly applied unambiguous statutes to the facts of this case. This court should decline jurisdiction.

OP&F’s Response to Appellants’ Proposition of Law No. 3

OP&F is not a “third-party payer” as defined in R.C. 3901.38(F).

OP&F is not a “third-party payer” as defined in R.C. 3901.38(F). OP&F is not “(1) [a]n insurance company; (2) [a] health insuring corporation; (3) [a] labor organization; (4) [a]n employer; (5) [a]n intermediary organization, as defined in section 1751.01 of the Revised Code, that is not a health delivery network contracting solely with self-insured employers; (6) [a]n administrator subject to sections 3959.01 to 3959.16 of the Revised Code; [or] (7) [a] health delivery network, as defined in section 1751.01 of the Revised Code.” R.C. 3901.38(F). The only way that OP&F may be considered a “third-party payer” is if it is a “person that is obligated pursuant to a benefits contract to reimburse for covered health care services rendered to beneficiaries under such contract.” R.C. 3901.38(F)(8). This issue, however, was never litigated in the administrative proceeding before the Department because the Department never asserted that OP&F is a third-party payer. The Department’s notice of opportunity for hearing identified Medical Mutual as the third-party payer. Aside from the fact that the issue was not litigated, OP&F is not a person; it is a public pension fund. As mentioned above, person is not defined for purposes of R.C. 3901.38; therefore, the definition provided in R.C. 1.59 supplies the definition.

R.C. 1.59 defines “person” to include “an individual, corporation, business trust, estate, trust, partnership, and association.” OP&F is not any of those. OP&F is a pension fund. The court of appeals correctly applied unambiguous statutes to the facts of this case. This court should decline jurisdiction.

OP&F’s Response to Appellants’ Proposition of Law No. 4

R.C. 3901.38(F) unambiguously defines “third-party payer” and does not require interpretation.

In order to determine whether the coordination of benefits law in R.C. 3902.13 applied to the parties here, the court of appeals had to determine whether the parties were “third-party payers” as defined in R.C. 3901.38. The court of appeals did not find any ambiguity in any statute in this case including R.C. 3901.38 and R.C. 3901.19. The court addressed the Department’s assertion that OP&F and Akron are third-party payers under R.C. 3901.38(F)(8), which provides that a “third-party payer” is “[a]ny other person that is obligated pursuant to a benefits contract to reimburse for covered health care services rendered to beneficiaries under such contract.” *Akron v. Ohio Dept. of Ins.*, 10th Dist. No. 13AP-473, 2014-Ohio-96, ¶ 35. Applying that statute in this case required the court to determine whether OP&F and Akron could be considered a person as that term is used in the statute. Person is commonly a defined term, but there was no definition of person in R.C. 3901.38. The Department pointed to the definition of person in R.C. 3901.19. The court simply, and correctly stated, that “[a]lthough R.C. 3901.19 defines the term ‘person,’ the definitions therein are applicable only to section 3901.19 to 3901.26 of the Revised Code.” *Id.* at ¶ 36. Having found that person was not defined for purposes of R.C. 3901.38, the court properly looked to R.C. 1.59 for a definition. That section defines “person” to include “an individual, corporation, business trust, estate, trust,

partnership, and association.” R.C. 1.59. The court correctly held that OP&F is not any of those. This is a straightforward application of unambiguous statutes.

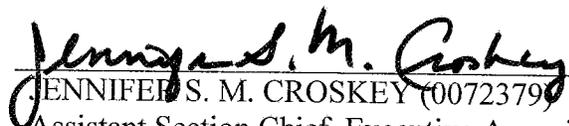
Additionally, as explained above in OP&F’s response to proposition of law number 2, the definition of person in R.C. 3901.04 does not apply to all of Title 39. R.C. 3901.04 provides “[a]s used in this section: *** ‘Person’ has the meaning defined in division (A) of section 3901.19 of the Revised Code.” R.C. 3901.04 (emphasis added). Further, if the General Assembly wanted any particular definition of person to apply to the entire title, it would have made that clear as it has in other contexts. *See e.g.* R.C. 701.01, R.C. 5701.01. The court of appeals correctly applied unambiguous statutes to the facts of this case. This court should decline jurisdiction.

CONCLUSION

Because this case does not present any constitutional questions or issues of public or great general interest, this court should decline jurisdiction.

Respectfully submitted,

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