

88 A.D.3d 1187

Supreme Court, Appellate Division, Third Department, New York.

In the Matter of MARTIN H. HANDLER, M.D., P.C., Respondent,

v.

Thomas P. DiNAPOLI, as Comptroller of the State of New York, Appellant, et al., Respondent.

Oct. 27, 2011.

## Synopsis

**Background:** Non-participating provider under state health insurance program commenced combined proceeding under Article 78, and action for declaratory judgment, seeking to set aside Comptroller's audit of claims payments made to provider for services rendered under the plan. The Supreme Court, Albany County, [Lynch](#), J., partially granted provider's application. Comptroller appealed.

**Holding:** The Supreme Court, Appellate Division, [Mercure](#), J.P., held that passage of funds through claims processor's hands did not negate Comptroller's audit authority to confirm that processor's payments to provider were proper.

Affirmed as modified.

## Attorneys and Law Firms

**\*\*204** Eric T. Schneiderman, Attorney General, Albany (Zainab A. Chaudhry of counsel), for appellant. Ruskin, Moscou & Faltischek, P.C., Uniondale ([Matthew F. Didora](#) of counsel), for Martin H. Handler, M.D., P.C., respondent. Kern, Augustine, Conroy & Schoppmann, P.C., Garden City ( **\*\*205** [Donald R. Moy](#) of counsel), for Medical Society of the State of New York, amicus curiae.

Before: [MERCURE](#), J.P., [PETERS](#), [STEIN](#), GARRY and EGAN JR., JJ.

## Opinion

[MERCURE](#), J.P.

**\*1187** Appeal from an order and judgment of the **\*1188** Supreme Court ([Lynch](#), J.), entered June 30, 2010 in Albany County, which, among other things, partially granted petitioner's application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment to, among other things, set aside respondent Comptroller's audit of petitioner.

The New York State Health Insurance Program provides health insurance coverage to employees and retirees of various governmental entities, as well as their dependents. The Department of Civil Service contracts with respondent United Healthcare Insurance Company of New York to provide medical and surgical benefits under the Empire Plan, the program's primary insurance option (*see* [Civil Service Law §§ 162, 167](#)). United, in turn, processes and pays for insurance claims made under the Empire Plan, using premium payments made by the state (*see* [Civil Service Law § 167](#)[6], [7] ).

Empire Plan members may be treated by participating or non-participating providers. Participating providers accept a set allowance remitted directly to them by United and a nominal co-payment made by the member as payment in full. In contrast, members must submit a claim to United for services rendered by non-participating providers and must meet an annual deductible before any reimbursement will be made. United thereafter pays the member 80% of the actual fee or the “customary and reasonable charge” for the service provided, whichever is less. The member then directly pays the non-participating provider, which is responsible for collecting the remaining 20% of the fee from the member.

The non-participating provider, moreover, is obliged to seek collection of the remaining 20% of the fee as a general business practice. Indeed, a non-participating provider's failure to do so could subject it to civil and criminal penalties for insurance fraud (*see Insurance Law § 403[c]*; *Penal Law § 176.05[2]*) because routine waivers of out-of-pocket costs to members effectively lower the customary fee charged. The amount sought in the claim for services is, thus, artificially inflated when co-payments are routinely waived, causing overpayment by United and the state (*see Ops. Gen. Counsel N.Y. Ins. Dept. No. 05–04–07 [Apr.2005]*; *Ops. Gen. Counsel N.Y. Ins. Dept. No. 04–02–25 [Feb.2004]*; *Ops. Gen. Counsel N.Y. Ins. Dept. No. 03–04–09 [Apr.2003]*).

Petitioner, a medical practice specializing in cardiology, is one of the largest non-participating providers under the Empire Plan as measured by member out-of-pocket costs. In 2009, respondent Comptroller audited United's claim payments for petitioner's services to determine if petitioner had improperly waived Empire Plan members' out-of-pocket costs as a matter of course, **\*1189** thereby causing overpayments of state funds. In so doing, auditors reviewed approximately 75,000 of United's payment records and found 3,364 claims for petitioner's services for which United was the primary insurer and had made payments, with members remaining liable for out-of-pocket costs. The auditors generated a random sample of 178 claims from that subset and, in order to fully review them, obtained petitioner's billing records for those claims. After analyzing those records, the Comptroller determined that petitioner had routinely and improperly waived members' out-of-pocket costs, and **\*\*206** that United had overpaid approximately \$900,000 on claims from 2004 to 2008. The Comptroller advised United to attempt to recover the overpayments, request that petitioner become a participating provider and, if it did not, take steps to prevent similar overpayments in the future.

Petitioner then commenced this combined CPLR article 78 proceeding and declaratory judgment action arguing, among other things, that the Comptroller exceeded his constitutionally delegated authority in conducting the audit (*see N.Y. Const., art. V, § 1*). Supreme Court granted the petition to the extent of setting aside the audit, and otherwise dismissed. Upon the Comptroller's appeal, we modify by reversing so much of Supreme Court's order and judgment as partially granted the petition and complaint.

The Comptroller is the “independent auditing official for the affairs of the [s]tate” and superintends its fiscal concerns (*Patterson v. Carey*, 41 N.Y.2d 714, 723, 395 N.Y.S.2d 411, 363 N.E.2d 1146 [1977]; *accord Matter of Dinallo v. DiNapoli*, 9 N.Y.3d 94, 101, 846 N.Y.S.2d 593, 877 N.E.2d 643 [2007]; *see State Finance Law § 8[1]*). As such, the Comptroller is empowered to conduct audits where the disbursement of state funds is involved. As relevant here, both the N.Y. Constitution and applicable statutory authority specify that “[n]o moneys of the state, including moneys collected in its behalf, and no moneys in the possession, custody or control of any officer, agent, or agency of the state in his or its representative capacity, and no moneys in or belonging to any fund or depository, title to which is vested in the state, shall hereafter be paid, expended or refunded except upon audit by the [C]omptroller” (*State Finance Law § 111*; *see N.Y. Const., art. V, § 1*).

United is provided state monies “for premium or subscription charge payments [and] for payment of health benefits to plan participants” (*Civil Service Law § 167[6]*), and petitioner concedes that the Comptroller could conduct an audit of those monies prior to their disbursement to United (*see \*1190 Civil Service Law § 167[7]*). Nevertheless, it argues that the money at issue lost the character of state funds upon transfer to United, and that a post-audit of the funds' use therefore fell outside of the scope of the Comptroller's audit authority. We disagree.

The N.Y. Constitution directs the Comptroller “[t]o audit all vouchers before payment and all official accounts,” and “to prescribe such methods of accounting as are necessary for the performance of” that duty (*N.Y. Const., art. V, § 1*). State funds may not be paid out “except upon audit by the [C]omptroller,” and payments made without the Comptroller's imprimatur are expressly declared void (*N.Y. Const., art. V, § 1*; *see City of New York v. State of New York*, 40 N.Y.2d 659, 668, 389 N.Y.S.2d 332, 357 N.E.2d 988 [1976]). As such, the Comptroller has long been viewed as having authority to confirm that payments already made were proper or, in other words, to “perform such post-audit as necessary to enable him to do an effective pre-audit” (14 Report of Temporary State Commission on Constitutional Convention, State Government, at 179 [1967]; *see Matter of 3 Lafayette Ave. Corp. v. Comptroller of State of N.Y.*, 186 A.D.2d 301, 303, 587 N.Y.S.2d 456 [1992], *lv. denied* 81 N.Y.2d 705, 595 N.Y.S.2d 400, 611 N.E.2d 301 [1993]; *Matter of Carlton v. Regan*, 98 A.D.2d 544, 546, 471 N.Y.S.2d 896 [1984],

*affd. in relevant part* 63 N.Y.2d 1011, 484 N.Y.S.2d 506, 473 N.E.2d 734 [1984]; *Matter of Signature Health Ctr., LLC v. Hevesi*, 13 Misc.3d 1189, 1191–1193, 822 N.Y.S.2d 835 [2006] ).

Contrary to petitioner's argument, the fact that state funds passed through United's \*\*207 hands en route to petitioner did not negate the Comptroller's audit authority to confirm that the payments made by the state were proper. As the Empire Plan's insurer, United is reimbursed in full with state funds for all claims that it has paid (*see Civil Service Law § 167* [6], [7] ). To the extent that United overpays any claims, those overpayments are charged directly to the state. Thus, as petitioner concedes, the Comptroller is required to audit the payments made to United (*see Civil Service Law § 167*[7] ). In order to determine the propriety of those payments, an examination of non-participating providers' billing records regarding services provided to Empire Plan members is necessarily required (*see generally State Finance Law § 9*).

Unlike the situation presented in *Matter of New York Charter Schools Assn., Inc. v. DiNapoli*, 13 N.Y.3d 120, 886 N.Y.S.2d 74, 914 N.E.2d 991 (2009) where charter schools were not audited to examine the expenditure of public monies paid to them by school districts, but were subjected to uncircumscribed examinations of their management, operations and academic achievements (*id.* at 133, 886 N.Y.S.2d 74, 914 N.E.2d 991) the Comptroller does not seek to conduct a performance audit of \*1191 petitioner.<sup>1</sup> Rather, the parties are in agreement that the Comptroller conducted only a limited, cursory review of petitioner's records. In our view, then, the Comptroller correctly asserts that this limited examination of petitioner's billing records is incidental to his mandated audit of United and, accordingly, proper (*see Matter of New York Charter Schools Assn., Inc. v. DiNapoli*, 13 N.Y.3d at 132, 886 N.Y.S.2d 74, 914 N.E.2d 991).

- 1 Further distinguishing this case from *Matter of New York Charter Schools Assn., Inc. v. DiNapoli* (13 N.Y.3d at 133, 886 N.Y.S.2d 74, 914 N.E.2d 991), as well as *Blue Cross & Blue Shield of Cent. N.Y. v. McCall*, 89 N.Y.2d 160, 168–169, 652 N.Y.S.2d 218, 674 N.E.2d 1124 (1996), the parties point to no other entity that would retain oversight over its collection of the mandatory co-payments. United alone has the obligation to adjudicate claims in accordance with the design of the Empire Plan benefit structure. It is unclear that, absent oversight by the Comptroller of United's resolution of these claims, “[a]ccountability to the public is ... secured” (*Matter of New York Charter Schools Assn., Inc. v. DiNapoli*, 13 N.Y.3d at 133, 886 N.Y.S.2d 74, 914 N.E.2d 991).

While the Comptroller's remaining arguments are meritless, remittal is nonetheless required so that petitioner's challenges to the audit findings may be addressed.

ORDERED that the order and judgment is modified, on the law, without costs, by reversing so much thereof as partially granted the petition; matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

PETERS, STEIN, GARRY and EGAN JR., JJ., concur.

Parallel Citations

88 A.D.3d 1187, 932 N.Y.S.2d 204, 2011 N.Y. Slip Op. 07541

End of Document

© 2012 Thomson Reuters. No claim to original U.S. Government Works.