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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF HANDLER,

Appellant,

-against-

No. 69

DINAPOLI, et al.

Respondents.

MATTER OF SOUTH ISLAND ORTHOPAEDIC GROUP, P.C.,

Appellant,

-against-

No. 70

DINAPOLI, et al.

Respondents.

20 Eagle Street
Albany, New York 12207
March 25, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Appearances:

MATTHEW F. DIDORA, ESQ.
RUSKIN MOSCOU FALTISCHEK P.C.
Attorney for Appellants
1425 RXR Plaza
East Tower, 15th Floor
Uniondale, NY 11556

ZAINAB A. CHAUDHRY, ASG
NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorneys for Respondent DiNapoli
The Capitol
Albany, NY 12224

1 CHIEF JUDGE LIPPMAN: 69 and 70.

2 Counselor, do you want any rebuttal time?

3 MR. DIDORA: Yes, Your Honor, I would like
4 to reserve three minutes.

5 CHIEF JUDGE LIPPMAN: Three minutes, sure.
6 Go ahead.

7 MR. DIDORA: May it please the court.
8 Matthew Didora from Ruskin Moscou Faltischek for the
9 appellants in both cases.

10 The order of the Appellate Division must be
11 reversed, and the Comptroller's conduct declared
12 unconstitutional, based on the plain text of Article
13 V, Section 1 of the State Constitution because the
14 appellants never submitted a voucher for payment to
15 the State, nor did they ever maintain an account of
16 the State, and because there was no legislative
17 action in this case directing the - - -

18 JUDGE SMITH: If there was a direct
19 relationship between the State and your - - - and
20 your clients, you would agree that the Comptroller
21 could say let me - - - let me see your records?

22 MR. DIDORA: That would be a much different
23 case, Your Honor, but yes, in - - - in that instance,
24 I believe there would be if - - -

25 JUDGE SMITH: But suppose - - - suppose

1 from - - -

2 JUDGE SMITH: But isn't - - - in economic
3 reality, isn't this a self-insured plan, with United
4 Healthcare as the administrator?

5 MR. DIDORA: It appears that way, yes. But
6 United never pays the providers.

7 CHIEF JUDGE LIPPMAN: Yeah, but isn't just
8 a pass-through? Why does it matter whether they pay
9 them directly or they pay them through the member?

10 MR. DIDORA: It matters a great deal, Your
11 Honor - - -

12 CHIEF JUDGE LIPPMAN: Tell me why.

13 MR. DIDORA: - - - because they're no
14 longer State funds once the money transfers - - -

15 CHIEF JUDGE LIPPMAN: So once the member
16 touches it, it loses its - - -

17 MR. DIDORA: It really loses it before it
18 gets to the member. It loses its status as - - - as
19 State funds when it's paid to United.

20 JUDGE PIGOTT: But what difference does
21 that make? I mean, in almost any action, you can
22 subpoena anybody you want that's got information
23 that's material and necessary to the claim. So
24 unless United wants to complain about the Comptroller
25 looking up their - - - their accounts, all they're

1 doing to you is saying, you know, can you help us
2 prove that whatever United's doing they're doing?

3 MR. DIDORA: Well, that assumes that what
4 this Comptroller was doing was auditing United, and
5 the record belies that determination.

6 CHIEF JUDGE LIPPMAN: Why isn't it a post-
7 audit of United?

8 MR. DIDORA: Because the audit was
9 conducted at the request of United. United would
10 never have to ask the Comptroller to audit itself.
11 United asked the Comptroller to audit the practice,
12 because what the court - - - what United wanted to
13 know was whether out-of-pocket expenses were being
14 waived.

15 JUDGE SMITH: They wanted to know whether
16 they were being overbilled. Isn't it - - - isn't it
17 normal to ask your auditor to go to speak to one of
18 your vendors and see if you're being overbilled?

19 MR. DIDORA: But United was never billed by
20 the provider.

21 JUDGE SMITH: But is it - - - but I guess I
22 - - - I guess I have Judge Pigott's question - - - or
23 maybe it's not his question, but it's mine. Isn't
24 that just a matter a form? It was maybe the Chief's
25 question. Isn't - - - yeah, doesn't it seem that the

1 - - - the - - - the individual recipients would take
2 these checks and endorse them over to your people?

3 MR. DIDORA: It's more than just form, Your
4 Honor. It really - - - it - - - it's form, but it's
5 form that implicates the substance, because we have
6 an out-of-network provider that doesn't participate
7 in any State-sponsored program, that is - - -

8 CHIEF JUDGE LIPPMAN: Aside from the fact
9 that it costs the member a little more to be out-of-
10 network, isn't the judge right? Isn't it the same
11 thing? It's - - - it's the same thing. You're
12 getting healthcare. One is called participating and
13 one is not. It costs the member a little more to - -
14 - to do the nonparticipating. Why does it - - - why
15 does it go over into substance? Why isn't it just,
16 it's the same thing with a little different prices,
17 but in reality, the same person's paying, you know,
18 and - - - and the same person's getting services.

19 MR. DIDORA: I think for the same reason
20 that in *Dinallo v. DiNapoli*, where this court held
21 that the Superintendent of Insurance, when it's
22 acting in its role as the liquidator of a distressed
23 insurance company, is beyond the audit power - - -

24 JUDGE PIGOTT: Yeah, that's - - -

25 MR. DIDORA: - - - of the Comptroller.

1 JUDGE PIGOTT: - - - that's auditing,
2 though. But what struck me here - - - let's assume a
3 given physician has 500 patients, and of those, 400
4 of them are State employees, I suppose. They can
5 subpoena all 400 of the - - - of the - - - of the
6 patients, right, and say, what did you pay; give us
7 your bill. Or they could subpoena the doctor and get
8 the same records with respect to the same patients
9 all at once. Why wouldn't we make it - - - why
10 wouldn't that make sense?

11 MR. DIDORA: It's very possible that they
12 could have subpoenaed the providers, but the fact is
13 that they didn't.

14 JUDGE PIGOTT: No, no, the patients, I'm
15 saying; they could subpoena the patients.

16 MR. DIDORA: If they subpoena the patients,
17 they could do - - - they - - - they could certainly
18 do that and ask the patients to identify whether the
19 patient paid the out-of-pocket costs or what the
20 patient's responsibility, under the terms of the
21 insurance - - -

22 JUDGE SMITH: And then on inquiry, whether
23 it's by subpoena or not, would - - - or does it
24 matter whether - - - whether it's by subpoena?
25 That's within the Comptroller's statutory power or

1 Constitutional power?

2 MR. DIDORA: It's certainly a much
3 different inquiry when we de - - - when we're dealing
4 with a pro - - - a beneficiary of the Empire Plan,
5 who is participating in this State-sponsored plan, as
6 opposed to an out-of-network provider who has said I
7 - - - I don't participate.

8 JUDGE GRAFFEO: But the patient - - -

9 JUDGE RIVERA: No, but you know where the
10 money comes from. You understand, when you entered
11 this arrangement, that these patients are getting
12 money from the State. It's not like your clients are
13 unaware.

14 MR. DIDORA: That's probably correct, Your
15 Honor, that event - - - you know, several steps down
16 the road, the money originates from the State, but as
17 I - - - as I said - - -

18 CHIEF JUDGE LIPPMAN: And you agree to be
19 part of the plan. The nonparticipating doesn't have
20 to accept this insurance. Doesn't the fact that they
21 accept Empire Plan patients really sort of hook them
22 and get them into this where - - - where they may
23 expect to have an audit?

24 MR. DIDORA: I don't believe so, Your
25 Honor, and the reason for that is - - -

1 CHIEF JUDGE LIPPMAN: Why not? They could
2 say I don't want to be a part of - - - I didn't want
3 to - - - I'm not taking - - - and we've all had that
4 experience - - - we don't take Empire; we don't take
5 whatever the plan is.

6 MR. DIDORA: I think in that - - - they do
7 say that. And by saying that, what they're - - -
8 what the provider is telling the patient is we
9 haven't agreed to these set rates. There's - - -
10 there's going to be responsibility that you have
11 towards a certain portion of - - - of the bill.

12 CHIEF JUDGE LIPPMAN: Yeah, but they're
13 saying here we - - - we do agree; we're going to take
14 you, whether it's Empire or Oxford, whatever the plan
15 is; you make a conscious decision, I - - - I'm going
16 to take people who - - - you know - - - why - - - why
17 is that - - - why is that - - -

18 JUDGE ABDUS-SALAAM: That's not how it
19 works, right? When you go out - - - when a
20 beneficiary of an insurance plan goes out of network,
21 you have to come out of pocket. The member pays the
22 doctor and then waits to get reimbursed from the
23 insurance company. Isn't that really how it works?

24 MR. DIDORA: Not always, Your Honor. That
25 - - - in an ideal world, that would be how it would

1 always work and it - - - I think it would probably -
2 - -

3 JUDGE ABDUS-SALAAM: That's not how it
4 worked here?

5 MR. DIDORA: - - - we wouldn't - - - no,
6 the - - - the member is responsible for paying the
7 copay, which is usually a nominal fee, at the time of
8 presentment to the office. And then there's a bill
9 that's generated for whatever services - - -

10 JUDGE GRAFFEO: Well, that's - - -

11 MR. DIDORA: - - - are provi - - -

12 JUDGE GRAFFEO: That's going to be my
13 question - - -

14 MR. DIDORA: - - - are provided.

15 JUDGE GRAFFEO: - - - on the records. I
16 know your red light is on, but these billing records
17 that you have is what I presume the Comptroller
18 wanted to see to determine whether or not there had
19 been a waiver, right?

20 MR. DIDORA: That's correct. That was all
21 - - -

22 JUDGE GRAFFEO: So now - - -

23 MR. DIDORA: - - - the Comptroll - - -

24 JUDGE GRAFFEO: - - - did United have
25 copies of all of those billing records? Could the

1 Comptroller have gotten the same information from
2 United, or are you the only repository of those
3 billing records?

4 MR. DIDORA: The specific records are
5 unique to each practice, and United would not have
6 our private financial billing records that reflect
7 business determinations that are made between the
8 provider and the beneficiary - - -

9 JUDGE GRAFFEO: Well - - -

10 MR. DIDORA: - - - or its patient.

11 JUDGE GRAFFEO: But what the State funding
12 is paying for is related - - - I mean, they've got to
13 look at what the patient has been billed in order to
14 determine if the program is operating the way it's
15 supposed to operate. So if United didn't have those
16 billing statements, why is it so horrendous that
17 they're asking you for the billing statements?

18 MR. DIDORA: United would absolutely have
19 the billing statements. They would know what the
20 total bill was. United would not necessarily know -
21 - -

22 JUDGE GRAFFEO: They wouldn't know the
23 breakdown - - -

24 MR. DIDORA: - - - of what was eventua - -

25 JUDGE RIVERA: So - - -

1 MR. DIDORA: - - - was later paid by the
2 patient.

3 JUDGE RIVERA: So it sounds like what
4 you're saying is, in order for the Comptroller to get
5 the information they got from your clients, they
6 would have to get documents from United and documents
7 from the patient.

8 MR. DIDORA: Certainly from the patient,
9 yes.

10 JUDGE RIVERA: Well, but also from United,
11 no, to know what's billed?

12 MR. DIDORA: To know what was billed, yes,
13 or - - -

14 JUDGE RIVERA: So it's - - -

15 MR. DIDORA: But the patient should have
16 that as well.

17 JUDGE RIVERA: - - - at a minimum, a two-
18 step process.

19 MR. DIDORA: No, because I think the - - -
20 the patient would have the same records that United
21 would have. The patient would have their total bill,
22 and the patient would know - - -

23 JUDGE RIVERA: And you're assuming they
24 kept the bills. You're very optimistic about what
25 patients keep.

1 MR. DIDORA: That - - -

2 CHIEF JUDGE LIPPMAN: Counselor, one last
3 question, the form versus substance question. I
4 think what you were saying, in - - - in answer to
5 Judge Abdus-Salaam, is that often the - - - the check
6 that comes is just - - - to the member is passed on,
7 right? So there really - - - why isn't that just
8 form? Why doesn't it make it like the participating
9 provider, because here, in essence, the member often
10 - - - and I know sometimes it's not done, but often
11 takes the check and gives it - - - gives it to the
12 person who provided the service. Why doesn't it make
13 it only form?

14 MR. DIDORA: For the same reason that this
15 court held in Charter Schools that money that flows
16 from the State to the school districts no longer is
17 school - - -

18 JUDGE PIGOTT: But there they're - - -

19 MR. DIDORA: - - - is State money.

20 JUDGE PIGOTT: There they're auditing the
21 Charter - - - or they're auditing - - - they're not
22 auditing you; they're audering (sic) - - - they're
23 audering (sic) - - - auditing the - - - you know, the
24 - - - the insurance company. You just happen - - -

25 MR. DIDORA: I don't - - -

1 JUDGE PIGOTT: You're like the by - - -
2 you're like the bystander in an automobile accident.
3 You're going to get subpoenaed to testify; you had
4 nothing to do with the accident, but you sure have
5 information and they - - - they want it.

6 MR. DIDORA: I do not agr - - - I don't
7 agree with the - - -

8 JUDGE PIGOTT: You're suspicious.

9 MR. DIDORA: - - - the analysis that we
10 were auditing - - - that the Comptroller was auditing
11 United. I mean, if - - - if you look at the audit
12 report - - -

13 JUDGE GRAFFEO: Who was supposed to pay the
14 overpayment?

15 MR. DIDORA: Well, ultimately, the - - -
16 the Empire Plan and the certificate of insurance
17 reserves to United the ability to go after the
18 patient, in the event there's been any overpayment
19 because of the patient's failure to honor the
20 insurance certificate. The provider's not a party to
21 the insurance certificate.

22 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
23 - - - you'll have your rebuttal.

24 MR. DIDORA: Thank you, Your Honor.

25 CHIEF JUDGE LIPPMAN: Let's hear from your

1 adversary.

2 MS. CHAUDHRY: May it please the court.
3 Zainab Chaudhry for the State Comptroller.

4 Your Honors, the Comptroller was not
5 attempting to assert wide-ranging audit authority
6 over the activities of the providers based on any
7 receipt of public funds. What the Comptroller was
8 doing here, and what the Appellate Division
9 understood correctly, was that we were auditing the
10 propriety of payments of State money made to United.
11 He's simply doing what he's required to do - - -

12 CHIEF JUDGE LIPPMAN: But where's your - -
13 -

14 MS. CHAUDHRY: - - - under the mandatory -
15 - -

16 CHIEF JUDGE LIPPMAN: - - - authority over
17 them? Where does that come from?

18 MS. CHAUDHRY: The authority is - - -

19 CHIEF JUDGE LIPPMAN: But no, either the
20 Constitution, the Finance Law; where does your
21 authority come to, to audit them?

22 MS. CHAUDHRY: Your Honor, we're not
23 auditing them; we're auditing our State payments,
24 which the authority for that is in - - -

25 CHIEF JUDGE LIPPMAN: Yeah, but talk about

1 - - -

2 MS. CHAUDHRY: - - - Article V, Section 1.

3 CHIEF JUDGE LIPPMAN: - - - form over

4 substance. Aren't you really - - -

5 MS. CHAUDHRY: Well - - -

6 CHIEF JUDGE LIPPMAN: - - - auditing them?

7 MS. CHAUDHRY: No, Your Honor; we're not
8 auditing them. As Judge Pigott pointed out, the key
9 to this is our authority to obtain records in the
10 hands of third parties that are relevant and material
11 to Constitutionally permissible audits. Now of
12 course, we didn't need to issue subpoena here - - -
13 subpoenas here because they voluntarily complied and
14 opened their books.

15 CHIEF JUDGE LIPPMAN: Isn't that a slippery
16 slope that you're going to - - - you know, you could
17 audit anybody, under your theory.

18 MS. CHAUDHRY: Absolutely not, Your Honor.
19 We can audit State payments. We have a subpoena
20 power to get records that are relevant and material.
21 If the court is - - -

22 JUDGE SMITH: Your argument then really
23 depends on the theory that these petitioners are
24 vendors of the State, in substance?

25 MS. CHAUDHRY: No, Your Honor, they have

1 records that are relevant to us determining whether
2 overpayments have - - - are - - - have been made.

3 JUDGE SMITH: Well, so do I, probably, but
4 you can't au - - - you can't - - - you can't look at
5 everybody's records.

6 MS. CHAUDHRY: Well, we practically can't
7 look at these on a member-by-member, claim-by-claim
8 basis. United is processing twenty million claims
9 every year under the Empire Plan.

10 CHIEF JUDGE LIPPMAN: Are they vendors of
11 the State?

12 MS. CHAUDHRY: No, Your Honor. The
13 contract vendor here - - -

14 CHIEF JUDGE LIPPMAN: They're not - - -

15 MS. CHAUDHRY: - - - is United.

16 CHIEF JUDGE LIPPMAN: They're not vendors
17 of the State?

18 MS. CHAUDHRY: No, but - - -

19 CHIEF JUDGE LIPPMAN: That you acknowledge,
20 right?

21 MS. CHAUDHRY: Yes. But we are not limited
22 to obtaining records from third parties - - -

23 JUDGE ABDUS-SALAAM: But who are you
24 auditing?

25 MS. CHAUDHRY: - - - that also are contract

1 vendors or also have other relationships.

2 JUDGE ABDUS-SALAAM: I don't understand;
3 who are you auditing?

4 MS. CHAUDHRY: We are auditing the payment
5 of State monies to United. Under the Constitution we
6 are required - - -

7 JUDGE ABDUS-SALAAM: You're not auditing
8 United.

9 MS. CHAUDHRY: This is not a plenary audit
10 of United either. This is an audit of our payments
11 made to United.

12 JUDGE SMITH: Does it matter that United is
13 substantially a conduit for funds?

14 MS. CHAUDHRY: Well, what's important here
15 is that any overpayments made, as Your Honor
16 mentioned, are dollar-for-dollar overpayments made by
17 the State.

18 JUDGE SMITH: So yes, in substance, it does
19 matter.

20 JUDGE GRAFFEO: What were you looking for
21 that United wouldn't have in their records?

22 MS. CHAUDHRY: United, given the unique - -
23 -

24 JUDGE GRAFFEO: You said there must be
25 something that you needed to go to these practices.

1 MS. CHAUDHRY: Yes.

2 JUDGE GRAFFEO: What is it that you
3 couldn't get from United that you had to go to the
4 service providers?

5 MS. CHAUDHRY: Under the unique arrangement
6 for nonparticipating provider claims, United does not
7 have in its possession records that relate to the
8 actual amounts that were paid, the out-of-member
9 (sic) - - - excuse me, the out-of-pocket costs that
10 the members paid. Yes, there is initially an invoice
11 - - -

12 JUDGE GRAFFEO: And why is that important?
13 Is that not something that's supposed to be
14 reimbursable or - - -

15 MS. CHAUDHRY: Those - - - those expenses
16 are not reimbursable; those are the obligations of
17 the members to pay. They're required to be
18 collected. The reason they can't be known beforehand
19 is that once United receives a claim, it must
20 consider the allowable amount, it must consider what
21 deductibles are due, what coinsurance is due, has the
22 member reached their out-of-pocket maximum for the
23 year.

24 JUDGE RIVERA: So if we agree with them
25 that the Comptroller does not have this authority,

1 how else can you pursue this investigation, because I
2 understand the nature of your investigation. You're
3 - - - you're trying to make sure that the people are
4 not playing with the numbers and - - - and somehow
5 changing, really, what - - - what the fees are,
6 right? They're inflating the fees. So how else
7 could you pursue the investigation?

8 MS. CHAUDHRY: Well, Your Honor, nobody
9 else has the records that these providers have. The
10 patients don't have them; they generally just have
11 the invoices.

12 JUDGE READ: Could the Insurance Department
13 do it?

14 MS. CHAUDHRY: The Insurance Department has
15 jurisdiction over fraud, but it's the Comptroller's
16 unique, mandatory, Constitutional duty to investigate
17 overpayments of State funds. The Insurance
18 Department doesn't have jurisdiction over that.

19 JUDGE RIVERA: So you're saying United - -
20 -

21 MS. CHAUDHRY: The fact that - - -

22 JUDGE RIVERA: - - - if you took documents
23 that United had and documents that the patients had,
24 you still would not have - - -

25 MS. CHAUDHRY: That's correct.

1 JUDGE RIVERA: - - - the information to
2 pursue this investigation, because the information
3 that's missing is - - -

4 MS. CHAUDHRY: Is the actual amount paid by
5 the member, which is only in the hands of the
6 provider.

7 JUDGE RIVERA: Well, why doesn't the member
8 know that? I went to the out-of-network provider.
9 Don't I know whether or not I paid them a hundred
10 dollars or twenty dollars?

11 MS. CHAUDHRY: You might know that, but you
12 may not have records proving that. And there are
13 certain records that - - -

14 JUDGE SMITH: I guess you might have some
15 serious practical problem in getting every - - -
16 every member who dealt with these practices to come
17 up with - - -

18 MS. CHAUDHRY: Certainly.

19 JUDGE SMITH: - - - you know, with the
20 cancelled checks.

21 MS. CHAUDHRY: Certainly. You know,
22 whatever starts the ball rolling, Your Honor. I
23 understand the court's concern. You know, it may be
24 an audit in the ordinary course. And yes, in this
25 case we were tipped off to the fact that there may be

1 something going on that was creating and resulting in
2 overpayments. But whatever we might discover, or
3 whatever tips the Comptroller off, it doesn't impact
4 his mandatory duty to - - -

5 JUDGE SMITH: Could you audit how
6 efficiently these doctors were running their
7 practices, on the theory that they're inefficient,
8 they're probably - - - they're probably charging you
9 too much?

10 MS. CHAUDHRY: No, Your Honor. We're not
11 attempting to do that kind of - - -

12 JUDGE SMITH: But my question isn't are you
13 attempting to do it, but could you do it? Would it
14 be Constitutional?

15 MS. CHAUDHRY: No.

16 JUDGE SMITH: Why not? What's the
17 difference?

18 MS. CHAUDHRY: Well, we have no basis upon
19 which to do that. We are not directly providing them
20 State funds; we are just auditing the overpayments,
21 the payments made - - -

22 JUDGE RIVERA: You're doing dollar-to-
23 dollar checking.

24 MS. CHAUDHRY: Dollar-to-dollar checking.

25 JUDGE PIGOTT: What - - -

1 JUDGE RIVERA: Let me ask you this. If
2 they had a company that did their billing, could you
3 go to the company and ask for all of these documents?

4 MS. CHAUDHRY: Sure. If the records were
5 in the hands of the billing company - - -

6 JUDGE GRAFFEO: It doesn't matter who's got
7 the documents.

8 MS. CHAUDHRY: It doesn't matter who's got
9 - - - and if the court is concerned about the
10 Comptroller overreaching, in any particular case, we
11 have a remedy already, a solution already to that,
12 which is the party can deny access, which they did
13 not do, and then the subpoenas would be issued. They
14 can move to quash the subpoenas, and a judge can
15 determine whether, in a particular case, the
16 allegations of a Comptroller overreaching - - - you
17 know, that those documents - - -

18 CHIEF JUDGE LIPPMAN: So it doesn't - - -

19 MS. CHAUDHRY: - - - aren't relevant - - -

20 CHIEF JUDGE LIPPMAN: It doesn't matter at
21 all who ultimately has the documents? You can go
22 anywhere, under your authority, under the State
23 Constitution - - -

24 MS. CHAUDHRY: Your Honor - - -

25 CHIEF JUDGE LIPPMAN: - - - to get the

1 documents? As Judge Smith asked you before, you can
2 go to Judge Smith and get the document - - -

3 MS. CHAUDHRY: Yes, Your Honor - - -

4 CHIEF JUDGE LIPPMAN: - - - if he has it?

5 MS. CHAUDHRY: - - - State Finance Law, the
6 legislature has authorized the Comptroller to issue
7 subpoena or subpoenas requiring persons to be
8 examined or to produce documents, quote, "in
9 reference to any matter within the scope of the
10 inquiry or investigation being conducted".

11 JUDGE PIGOTT: When you do that, your point
12 with respect to subpoenas, and they can move to quash
13 - - -

14 MS. CHAUDHRY: Yes.

15 JUDGE PIGOTT: - - - one of the grounds
16 upon which they would move to quash, I assume, is
17 that it's not material and necessary to your audit.
18 And you would have to show that it is material and
19 that it is necessary.

20 MS. CHAUDHRY: Yes.

21 JUDGE PIGOTT: What's the purpose of this
22 audit? When it's all done, what - - - what happens?
23 What do you - - - what's your aim here? Where are
24 you going?

25 MS. CHAUDHRY: Well, once it's determined

1 that an overpayment has been made, which the
2 Comptroller did make those findings, and those
3 findings were confirmed by Supreme Court, United
4 would - - - then pretty much the Comptroller's role
5 is over. But the - - - United has the power, under
6 the Insurance Law, 3224-b, to recoup those payments,
7 and once those payments are recouped, they are
8 credited dollar-for-dollar to the State's account.

9 JUDGE PIGOTT: Well - - -

10 JUDGE READ: That's what happened here.
11 You went to United and said here's this information?
12 There's - - - and now it's up to you to - - - to do
13 with it whatever pursuing you - - -

14 MS. CHAUDHRY: Right, it's United that
15 would be pursuing that in conjunction with the
16 Insurance Department - - -

17 JUDGE RIVERA: And - - -

18 MS. CHAUDHRY: - - - given the allegations
19 of fraud.

20 JUDGE RIVERA: - - - is the overpayment to
21 the patient?

22 MS. CHAUDHRY: The overpayment - - -

23 JUDGE RIVERA: Sorry; who's the overpayment
24 to here?

25 MS. CHAUDHRY: The overpayment is made - -

1 - overpayment of State monies, we've overpaid United
2 for claims it pays out. It's a dollar-for-dollar - -
3 -

4 JUDGE SMITH: And United has, in turn - - -

5 MS. CHAUDHRY: - - - payment.

6 JUDGE SMITH: - - - overpaid the - - -

7 MS. CHAUDHRY: The provider.

8 JUDGE SMITH: - - - has overpaid the
9 client, who in turn, has - - -

10 MS. CHAUDHRY: Yes.

11 JUDGE SMITH: - - - has over - - -

12 JUDGE ABDUS-SALAAM: And you just said
13 something - - -

14 JUDGE SMITH: But the one who's getting
15 overpaid is the medical - - - is the provider at the
16 end?

17 MS. CHAUDHRY: Ultimately, yes.

18 JUDGE ABDUS-SALAAM: And you just said
19 something about allegations of fraud that United and
20 the Insurance Department would - - - would then go
21 after, I guess, the providers, if they don't collect
22 the money from the patients. So why couldn't the
23 Insurance Department do that in the first instance?

24 MS. CHAUDHRY: Well, certainly the
25 Insurance Department has jurisdiction to investigate

1 any allegations of fraud, if they are brought to
2 their attention. But what the Insurance Department
3 doesn't have jurisdiction over, and which is uniquely
4 the mandatory Constitutional duty of the Comptroller,
5 is to audit State payments, and whether there's been
6 accurate payments or overpayments made. And in the
7 course of doing so, whether it's by fraud or mistake,
8 or any other reason, you know, once the Comptroller's
9 audit is finished, if there's something for the
10 Insurance Department to do or fraudulently obtained
11 funds to be recouped, those are - - - that's done by
12 those agencies. The Department of Civil Service may
13 be involved at that point.

14 And Your Honors, I just want to point out
15 that - - -

16 JUDGE ABDUS-SALAAM: So United couldn't
17 have gone to the Insurance Department and said we
18 think that, you know, our - - - our members are - - -
19 are not paying their fair share, and so we think that
20 the providers who are providing those services are
21 overcharging us and would you investigate that?

22 MS. CHAUDHRY: They could have done that,
23 and done an investigation about the alleged fraud,
24 but they would not have been able to do the type of
25 audit that the Comptroller does with respect to State

1 overpayments, as mandated by the Constitution.

2 JUDGE ABDUS-SALAAM: That's the basis of
3 the alleged fraud, right, the State over - - - the
4 alleged overpayments.

5 MS. CHAUDHRY: Well, in this case, it is
6 the alleged overpayments that triggered this whole
7 thing, but it could have happened for any number of
8 reasons. It could be a mistake. It could be an
9 ordinary - - - audit in the ordinary course that
10 reveals something fraudulent.

11 JUDGE PIGOTT: It could be policy. It
12 would seem - - - I - - - I think of these doctors.
13 They could say, look, I'm charging 50,000 dollars for
14 this heart transplant, 50,000 dollars for this appen
15 - - - appendix. But in any event - - - and I don't
16 care what United does or anything else, I'm charging
17 fifty grand. Now, if you're only going to pay 10-,
18 and tell this lady that she's go to pay 2,000 of the
19 10-, I'm still charging her 50 grand and I'm going to
20 waive the 2-. It makes no difference to - - - to
21 them. That's not fraud; that's just they don't care
22 what United's doing; they don't care what the State's
23 doing, right? So that's not necessarily fraud.

24 MS. CHAUDHRY: Well, it's not necessarily
25 fraud in every case, but we have - - - we're talking

1 about, in these cases here, a ninety-three and a
2 ninety-five percent waiver rate. This wasn't just a
3 case-by-case, you know, business professional
4 courtesy; this was happening on a regular basis,
5 which can constitute insurance fraud.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.
7 Thank you, counselor.

8 MR. DIDORA: Two brief - - -

9 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

10 MR. DIDORA: Two brief points, Your Honors.
11 The Third Department and the Comptroller have argued
12 all along that these audits were justified under the
13 incidental authority that is created in Article V,
14 Section 1, but that authority can only be exercised
15 if the legislature doles it out. That's why we - - -
16 in the Blue Cross case, in Charter Schools, and
17 Dinallo, there was all a statute - - -

18 JUDGE READ: So you're saying if the
19 legislature hasn't doled it out, they can't dole it
20 out to themselves?

21 MR. DIDORA: That's correct. The - - - the
22 Comptroller cannot take upon itself the incidental
23 administrative authorities that's created in Article
24 V, Section 1. Only the legislature can direct the
25 Comptroller to use that power.

1 JUDGE GRAFFEO: So who provides the
2 oversight - - - and I'm not saying your client did
3 this intentionally, but if there are providers that
4 are mischarging, you know, they're - - - they're
5 billing what they shouldn't be billing, how is that -
6 - -

7 MR. DIDORA: There are at least four - - -

8 JUDGE GRAFFEO: - - - how is that going to
9 be determined?

10 MR. DIDORA: There are at least four
11 entities that have control over that. Number one, as
12 Judges Read - - - Read and Abdus-Salaam recognize,
13 the Insurance Department has long had jurisdiction
14 over the issue of out-of-network billing. And in
15 fact, just yesterday, the superintendent of insurance
16 sent a letter to the legislature telling the
17 legislature to adopt legislation that protects
18 consumers from out-of-network bills, because they had
19 gotten tens of thousands of complaints from around
20 the State from consumers who get these out-of-network
21 bills.

22 JUDGE GRAFFEO: That kind of shows that
23 maybe that's why the Comptroller did this, that it's
24 a pretty broad practice that they need to determine
25 overpayments.

1 but what the Comptroller says is, if you - - - all we
2 are concerned about is if you don't collect. They've
3 said in the record, we don't care if you send the
4 bills - - -

5 JUDGE SMITH: I - - - I mean, it's - - - I
6 can under - - - you're - - - you're showing me that
7 doctors have a tough life, because people are going
8 to scream at them whatever they do. But isn't the
9 Comptroller legitimately doing his job by saying, if
10 you're loading all the costs on me and not going
11 after the human beings of the world, then the State
12 is getting short-changed, and it is my - - - my job
13 as Comptroller is to see that that doesn't happen.

14 MR. DIDORA: It's an issue that the
15 Comptroller is meddling in the affairs of the
16 Department of Financial Services. Other entities
17 that have responsibility over this - - - if there
18 truly is insurance fraud going on, then the local
19 District Attorneys have responsibility for it.

20 JUDGE PIGOTT: Well, you don't have
21 standing to argue in favor of them. It just seems to
22 me this is fact gathering. What - - - what's the big
23 deal? I mean - - -

24 MR. DIDORA: It's much more than fact
25 gathering because - - -

1 JUDGE PIGOTT: You're worried that it's
2 much more - - -

3 MR. DIDORA: - - - it's - - -

4 JUDGE PIGOTT: - - - but the fact of the
5 matter is, all they're saying is send us some
6 documents.

7 MR. DIDORA: They've - - - they've said
8 much more than that, because they've released these
9 audit reports - - -

10 JUDGE PIGOTT: That's - - -

11 MR. DIDORA: - - - that have said, shame on
12 you, doctors, because you are committing insurance
13 fraud by not balanced billing. And the Department of
14 Financial Services, on the other hand, is saying,
15 doctors, shame on you for balanced billing, because
16 of this problem that's been created by insurance
17 companies, as the Attorney General has said in its
18 report, delaying, deceiving and denying.

19 JUDGE PIGOTT: Yeah, but that argument
20 would - - - you're trying to say the Comptroller
21 should not get this information that I have because
22 they're going to criticize me. And I'm not sure
23 that's enough of an argument to say they don't have
24 the Constitutional authority to find out where the
25 hell the money's going.

1 is the target of a search warrant - - -

2 JUDGE RIVERA: You took quite a while - - -

3 MR. DIDORA: - - - when the police knock on
4 the door.

5 JUDGE RIVERA: - - - to challenge it.

6 What's the other entity? I think that you missed one
7 or didn't get to one.

8 MR. DIDORA: There's the Office of
9 Professional Medical Conduct, which would have
10 responsibility if doctors were committing insurance
11 fraud. The local District Attorneys have
12 jurisdiction over insurance fraud. The Department of
13 Financial Services is supervising out-of-network
14 billing.

15 JUDGE RIVERA: Okay. But she argues that
16 we're also looking just for the dollar-to-dollar
17 trail, not always fraud.

18 MR. DIDORA: It's more than just dollar-
19 for-dollar - - -

20 JUDGE RIVERA: No, no, no, but let's assume
21 this is correct for one moment. Are these still the
22 entities?

23 MR. DIDORA: Yes. Yes. And - - - and
24 also, the - - - through the certificate of insurance,
25 United has the power to deal with the members, who

1 they have a contractual relationship with, to
2 determine whether the member has honored their
3 commitment under their - - -

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 MR. DIDORA: - - - under their certificate.

6 CHIEF JUDGE LIPPMAN: Thanks, counselor.

7 MR. DIDORA: Thank you.

8 CHIEF JUDGE LIPPMAN: Thank you both.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Matter Of Handler v. DiNapoli, et al. No. 69 and Matter Of South Island Orthopaedic Group v. DiNapoli, et al. No. 70 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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