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COURT OF APPEALS
STATE OF NEW YORK

GEICO,

Respondent,

-against-

NO. 83

MAYZENBERG,

Appellant.

20 Eagle Street
Albany, New York
October 14, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

MATTHEW J. CONROY, ESQ.
SCHWARTZ, CONROY & HACK, PC
Attorney for Appellant
666 Old Country Road
Ninth Floor
Garden City, NY 11530

ANTHONY R. RADUAZO, ESQ.
OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
Attorney for Amicus Curiae Department of Financial Services
28 Liberty Street
New York, New York 10005

BARRY I. LEVY, ESQ.
RIVKIN RADLER LLP
Attorney for Respondent
926 RXR Plaza
Uniondale, NY 11556

Joey Oliveros
Official Court Transcriber

1 CHIEF JUDGE WILSON: And the first case on the
2 calendar is number 83, GEICO v. Mayzenberg.

3 MR. CONROY: If it may please the court. Matthew
4 Conroy, Schwartz, Conroy & Hack, on behalf of the
5 appellants. Your Honor, I would respectfully request two
6 minutes rebuttal.

7 CHIEF JUDGE WILSON: Yes.

8 MR. CONROY: Okay. I would like to put some
9 temporal and historical context on this appeal. We are 52
10 years into the no-fault regime as we know it. And we are -
11 - - this year marks the 20th year since the Mallela
12 decision. This case, like Mallela, is a certified question
13 coming from the Second Circuit. And it marks the third
14 case that the Court of Appeals has addressed this
15 particular regulation.

16 In the prior two cases, the Department of
17 Financial Services in Carothers and its predecessor, the
18 insurance department, submitted amicus briefs in both of
19 those matters. And the court essentially adopted the
20 position of the department in both cases. The court should
21 do it again here.

22 The requirements, of course, from Peckham and New
23 York public interest simply require that the administrative
24 agency - - -

25 JUDGE RIVERA: Well, you're saying we should

1 defer to DFS, correct, their interpretation?

2 MR. CONROY: That's correct, Your Honor.

3 JUDGE RIVERA: So it has to be rational. Why is
4 it a rational interpretation of its own regulation?

5 MR. CONROY: It - - - the rational - - - the
6 rational portion of the opinion comes in the fact that the
7 department, A, it's their expertise, and part of that
8 expertise is balancing the interests involved in the no-
9 fault system and in the regs themselves. They don't just
10 deal with the provider side of no-fault, but they deal with
11 the insurance carrier side as well.

12 In DFS' brief, they discuss the issues related to
13 dilatory tactics on the insurance department's part, the
14 balancing of prompt payment, which was really, you know,
15 the cornerstone of no-fault being instituted in the first
16 place.

17 CHIEF JUDGE WILSON: But weren't those - - -
18 weren't those concerns - - - sorry, right in front of you.
19 Weren't those concerns also present in the prior two cases,
20 Mallela and Carothers? And didn't they brief those as
21 well?

22 MR. CONROY: They were. But the department said,
23 in both cases, we were looking to address a specific harm.
24 And what they said in both cases is that the corporate
25 practice of medicine had become such an issue with medical

1 mills in New York that they essentially enacted Regulation
2 68, and this particular regulation to address that
3 particular harm and only that particular harm.

4 When you look at the language of the regulation,
5 it is - - - it is spot on to this court's determinations in
6 both cases. In Carothers, you talk about the foundational
7 licensing requirements - - -

8 JUDGE GARCIA: But is it - - - "foundational" in
9 what sense, in - - - in the sense that they're required,
10 because it's not foundational only in the sense of when the
11 incorporation is made, right?

12 MR. CONROY: That's true. But the foundation
13 goes to the statute that's being violated. It's a
14 corporate structure rule. When you look at the brief - - -

15 JUDGE GARCIA: But you can violate that rule
16 later after incorporation, right?

17 MR. CONROY: Most certainly. Most certainly.
18 It's - - - and this goes back to the original Mallela
19 decision, where the words "fraudulently incorporated" snuck
20 into the decision essentially because it was in the
21 certified question itself.

22 JUDGE GARCIA: So if you lose ownership or
23 control, or you give away some portion of ownership or
24 control later, after incorporation - - -

25 MR. CONROY: Most - - - most certainly. In



1 Carothers, that - - - that - - -

2 JUDGE GARCIA: And why can't you - - -

3 MR. CONROY: - - - that's what's clarified.

4 JUDGE GARCIA: - - - do that by kicking money
5 back to a nonprofessional corporation?

6 MR. CONROY: Well, to the extent that that
7 satisfies the conditions of - - -

8 JUDGE GARCIA: But my question - - - I don't know
9 what that means. My question is, if I kick back enough
10 money to a party that's not a professional, why isn't that
11 the same as ceding ownership or control, at a certain
12 point?

13 MR. CONROY: Well, it theoretically could be, or
14 at least it could be part of that proof. But it's not
15 violative on its face of the Business Corporation Law as a
16 question.

17 CHIEF JUDGE WILSON: But isn't that sort of what
18 happened in Carothers? Isn't that the facts of Carothers?

19 MR. CONROY: Well, Carothers, first of all - - -
20 of course, Carothers went to trial and the jury
21 instructions involved some 12 or 13 factors that the jury
22 was to consider.

23 JUDGE GARCIA: So is this a fact issue, then?

24 MR. CONROY: But - - - but the factors in
25 Carothers were how much control Dr. Carothers had ceded to

1 the nonprofessionals.

2 CHIEF JUDGE WILSON: Oh, but the control was - -
3 - the control was - - -

4 MR. CONROY: There was financial control. There
5 was operational control.

6 CHIEF JUDGE WILSON: It was the control of the
7 money, essentially. It wasn't the control of the
8 examinations. Those weren't being done by - - -

9 MR. CONROY: It was control of the - - - of the
10 operation, of the practice itself. It wasn't simply taking
11 money that - - -

12 JUDGE RIVERA: So the violation in Carothers, did
13 that lead to automatic suspension of the license?

14 MR. CONROY: It could.

15 JUDGE RIVERA: Or revocation? In all cases, all
16 the time?

17 MR. CONROY: Definitely not. I mean, it would -
18 - - it would require - - -

19 JUDGE RIVERA: Uh-huh.

20 MR. CONROY: - - - an investigation by the state
21 licensing agency.

22 JUDGE RIVERA: Let's say they found that that is
23 indeed the - - - that they violated the corporate structure
24 - - -

25 MR. CONROY: If - - - if they

1 JUDGE RIVERA: - - - as required by the law, does
2 that automatically result in - - -

3 MR. CONROY: It's - - - I don't believe it's
4 automatic. I think it's discretionary within the agency
5 what the penalty for violating the particular rule is.

6 JUDGE RIVERA: And that's also true for the
7 misconduct alleged here?

8 MR. CONROY: It might be. But the the violative
9 conduct does not - - - does not go to the core essence of -
10 - - of corporate structure. And that's - - - that - - -

11 JUDGE GARCIA: But the core essence is control
12 and ownership. And if it rises to the level of loss of
13 control or ownership, why isn't it the same?

14 MR. CONROY: The disciplinary rules don't
15 specifically go to any corporate issues at all. You could
16 - - -

17 JUDGE GARCIA: But why can't the conduct go to
18 those issues?

19 MR. CONROY: The - - - some of the conduct might
20 overlap in speaking to the issues of corporate control.
21 But that's just one of 13 different factors. If we - - -
22 and DFS has spoken on this issue. And their explanation is
23 that, even though there might be some overlap, the result
24 of it is that you're usurping the power of the agency
25 because you risk inconsistent determinations of an

1 arbitration panel or of a civil court - - -

2 CHIEF JUDGE WILSON: But did we do that - - -

3 MR. CONROY: - - - or a district court - - -

4 CHIEF JUDGE WILSON: - - - did we do that in
5 Carothers?

6 MR. CONROY: You did not do that in Carothers.

7 CHIEF JUDGE WILSON: And why not? I mean - - -

8 MR. CONROY: Because - - - because Carothers - -
9 -

10 CHIEF JUDGE WILSON: - - - the agency could have
11 disciplined Carothers, and didn't.

12 MR. CONROY: The department gives and takes away
13 the tools that insurance companies have in order to verify
14 claims. Initially, the tools that they had, prior to
15 Mallela, were simply looking at medical care, assignments
16 of benefits, things of that nature, whether - - - whether
17 claims were submitted timely.

18 After Mallela, new tools were added where they
19 could investigate corporate structure, meaning ownership,
20 control, money, things of this nature. What's being put in
21 front of the court today would be expanding that to include
22 other unrelated issues. There may be overlap with money.
23 That might speak to some of the issues.

24 JUDGE GARCIA: So if they had alleged - - -

25 MR. CONROY: But there are different types of

1 rules.

2 JUDGE GARCIA: If they alleged this in terms of
3 money, if they had said, forget these disciplinary rules,
4 you've kicked back enough money, so - - - whatever it is -
5 - - 10 percent, 15 percent, you now no longer have
6 ownership or control, and therefore, it's fraudulent, and
7 therefore, Mallela and Carothers apply, that would be a
8 valid line.

9 MR. CONROY: I think I read that it would. It -
10 - - the tracing of money in these cases is always one of
11 the seminal and core functions of proving that you have
12 ceded excessive control to a layperson such that a carrier
13 or a court could conclude that the paper owner isn't the
14 true owner.

15 JUDGE RIVERA: Yes. Why does that even matter?
16 Isn't the point - - - going back to my first question - - -
17 whether or not DFS' interpretation is rational? There
18 might be other interpretations that make some sense. But
19 the question is, is their interpretation rational?

20 MR. CONROY: Exactly. Their - - - look, they
21 have said we are tasked with supervising this program. And
22 we enacted this legislation to - - - to address a very
23 specific harm within the industry. We have done that. We
24 have said this is what it was for. And we now have a for-
25 profit insurance company looking to expand it. We don't

1 want to give them that power. They are tasked with
2 tethering - - -

3 JUDGE RIVERA: Uh-huh.

4 MR. CONROY: - - - insurance companies from
5 having the ability to - - - to engage in excessive dilatory
6 tactics - - -

7 JUDGE HALLIGAN: But have they really - - -

8 MR. CONROY: - - - in the claims administration.

9 JUDGE HALLIGAN: - - - have they really done
10 that? I mean, there's an assertion that there have been
11 almost no decertifications over the past decade. So is
12 that a meaningful exercise of that power?

13 MR. CONROY: Well, I can't speak to how many
14 decertifications.

15 JUDGE HALLIGAN: Okay. But let's assume the
16 statement is correct and that there are 13, over, you know,
17 however many decades, with none being decertified since
18 2014. If that's correct, is that a meaningful exercise of
19 that authority in a way that actually constrains the
20 conduct of anybody who is looking to receive reimbursement?

21 MR. CONROY: It is conceivable that the reason
22 why there have not been decertifications is because the
23 insurance companies have been engaging in self-help on this
24 issue. There's a requirement the insurance companies - - -

25 JUDGE HALLIGAN: But doesn't it perhaps raise a

1 question about whether the regulation is rational, in fact?

2 MR. CONROY: I don't believe that it does. The -

3 - - the - - -

4 JUDGE HALLIGAN: Well, why not?

5 MR. CONROY: It is the position of DFS that has
6 to be not irrational and not unreasonable. And so if their
7 position is that we've balance the harm in giving them
8 tools versus ensuring prompt payment, that is the very
9 essence of no-fault. That is - - - to say that it's
10 rational, it is the - - - the very job they're tasked with,
11 balancing out what's fair. That - - - that - - -

12 JUDGE TROUTMAN: What would you say to the
13 argument - - - you said "self-help". What would you say to
14 the argument that people engage in self-help when they feel
15 that the apparatus that's supposed to do its job is not
16 doing it?

17 MR. CONROY: The system was designed to give
18 state agencies, both the licensing board, DFS itself,
19 powers to regulate this industry. DFS can - - - can give a
20 private party a private right of action to enforce.

21 JUDGE TROUTMAN: Uh-huh.

22 MR. CONROY: They haven't done that. That's
23 something that would have to be given to them.

24 JUDGE TROUTMAN: And so - - -

25 MR. CONROY: That's not - - -



1 JUDGE TROUTMAN: - - - if DFS or no other
2 regulatory agency does anything, even when it arguably is
3 not even contested that the conduct alleged occurred,
4 there's just - - - they just get away with it, even if
5 there is actual fraud?

6 MR. CONROY: The regulations put a burden on the
7 carrier to report instances of fraud to the appropriate
8 body. It is incumbent upon that body to do its job.

9 JUDGE TROUTMAN: So if they report it and nothing
10 is done, that's just it, too bad?

11 MR. CONROY: I - - - I don't think the system is
12 designed for billion-dollar for-profit entities - - -

13 JUDGE TROUTMAN: I understand what you're saying.

14 MR. CONROY: - - - to enforce the rules
15 themselves.

16 JUDGE TROUTMAN: But the argument is, when people
17 usually engage in self-help, it's usually that their cry
18 for assistance fell upon deaf ears. You're saying the
19 power exists within an entity, and it can choose to use
20 their powers or not?

21 MR. CONROY: The system is designed to give
22 certain rights in the investigation of claims and the
23 payment of claims.

24 JUDGE TROUTMAN: Uh-huh.

25 MR. CONROY: I - - - my time is - - -

1 CHIEF JUDGE WILSON: Finish your answer, please.
2 Yeah.

3 MR. CONROY: Am I okay?

4 CHIEF JUDGE WILSON: Finish your answer.

5 MR. CONROY: That power is specifically given or
6 taken away. If we - - - if within an insurance system, we
7 allow an insurance company, any insurance company, to
8 simply take rights that it wouldn't otherwise have because
9 some administrative agency chose not to act, you're
10 usurping the power of the agency completely. And how do
11 you police that? How do you - - - how do you tether that?
12 And I would submit that you can't.

13 CHIEF JUDGE WILSON: Thank you.

14 JUDGE TROUTMAN: Thank you.

15 MR. CONROY: Thank you, Your Honors.

16 MR. RADUAZO: Good afternoon. And may it please
17 this court. Anthony Raduazo on behalf of DFS.

18 JUDGE HALLIGAN: Counsel, can you address, for
19 starters, whether the assertion in the reply brief about
20 the incidents of decertification is accurate?

21 MR. RADUAZO: So that is an accurate number to my
22 understanding.

23 JUDGE HALLIGAN: Okay.

24 MR. RADUAZO: But it is misleading. And that's
25 because when the Board of Regents, who is assigned the

1 exclusive authority to handle matters of professional
2 misconduct, confirms that there is a serious incident of
3 professional misconduct, the consequence is normally
4 license revocation or license suspension. In that case,
5 there is no circumstance in which the healthcare provider
6 can continue to provide healthcare services, including
7 participate in the no-fault system. So - - -

8 JUDGE HALLIGAN: And is there a public source in
9 which that sort of information is available?

10 MR. RADUAZO: How many license revocations or
11 suspensions?

12 JUDGE HALLIGAN: Yeah.

13 MR. RADUAZO: So the Education Department does
14 maintain an active list of its recently resolved
15 enforcement matters. For 2025 alone, that list includes
16 over 300 resolved matters.

17 JUDGE HALLIGAN: And what about the assertions
18 regarding the, you know, admissions here and the license
19 and authorization here?

20 MR. RADUAZO: The license and - - - so you're
21 referring to what happened in this case?

22 JUDGE HALLIGAN: Yes. Uh-huh.

23 MR. RADUAZO: So I can't comment on the existence
24 or status of any pending investigation with respect to the
25 professional misconduct by the providers in this case.

1 JUDGE HALLIGAN: Is it fair to say the record
2 does not reveal one, even if - - -

3 MR. RADUAZO: Yes.

4 JUDGE HALLIGAN: - - - you can't comment on
5 anything that might or might not be pending?

6 MR. RADUAZO: That's correct.

7 JUDGE HALLIGAN: Okay.

8 JUDGE RIVERA: Can you - - -

9 CHIEF JUDGE WILSON: Counsel, is it - - -

10 JUDGE RIVERA: Can you - - - you mentioned 300?
11 Can you just finish that - - -

12 MR. RADUAZO: Certainly. I - - - all I wanted -
13 - -

14 JUDGE RIVERA: - - - point you were trying to
15 make?

16 MR. RADUAZO: Certainly. All I wanted to add
17 there is that that doesn't even include physicians,
18 physician's assistants, or specialist assistants, which are
19 treated separately. So it certainly is not true that the
20 state does not police matters of professional misconduct.

21 CHIEF JUDGE WILSON: I take - - -

22 JUDGE RIVERA: I'm sorry.

23 CHIEF JUDGE WILSON: Go ahead.

24 JUDGE RIVERA: I just want to be clear. What
25 does the 300 represent?

1 MR. RADUAZO: Oh, those are resolved enforcement
2 matters involving professional misconduct.

3 JUDGE RIVERA: And is the resolution that the
4 license is revoked or suspended or annulled?

5 MR. RADUAZO: I'm sorry. That is not - - - in
6 many of those cases - - -

7 JUDGE RIVERA: Yes.

8 MR. RADUAZO: - - - there have been revocation or
9 suspension, not all of them, by any means, but in many of
10 those cases.

11 JUDGE RIVERA: You don't know the percentage?

12 MR. RADUAZO: Correct.

13 CHIEF JUDGE WILSON: And are all of those cases
14 that involve no-fault providers, or no?

15 MR. RADUAZO: No.

16 CHIEF JUDGE WILSON: These are just - - - this
17 could be for anything? Could be - - -

18 MR. RADUAZO: Correct.

19 CHIEF JUDGE WILSON: - - - a surgeon, a brain
20 surgeon?

21 MR. RADUAZO: Correct. But the point is that the
22 state actively and vigorously enforces the professional
23 misconduct.

24 CHIEF JUDGE WILSON: So when the license is
25 revoked by the commissioner, what effect does that have or

1 should that have on the ability of an insurance company to
2 refuse to pay?

3 MR. RADUAZO: When the license is revoked - - -

4 CHIEF JUDGE WILSON: Not - - - not - - -

5 MR. RADUAZO: Oh, sorry.

6 CHIEF JUDGE WILSON: - - - prospectively, but
7 retrospectively?

8 MR. RADUAZO: Retrospectively, it would not
9 affect the retrospective payments. It would - - - this
10 regulation would be triggered, if for - - - in your
11 hypothetical - - -

12 CHIEF JUDGE WILSON: Uh-huh.

13 MR. RADUAZO: - - - where the Board of Regents
14 has revoked a license because - - -

15 CHIEF JUDGE WILSON: Uh-huh.

16 MR. RADUAZO: - - - in that incident, the
17 provider can no longer lawfully provide health care
18 services. They have not met - - -

19 CHIEF JUDGE WILSON: Right. And if - - -

20 MR. RADUAZO: - - - their licensing requirements.

21 CHIEF JUDGE WILSON: And if an insurance company
22 had withheld monies due to that provider for services
23 provided, let's say, during the period when the license
24 revocation had not yet occurred - - -

25 MR. RADUAZO: Uh-huh.



1 CHIEF JUDGE WILSON: - - - but perhaps while it
2 was pending, the insurance company could not, following the
3 determination that the license should be revoked, continue
4 to withhold that money.

5 MR. RADUAZO: No. That's not correct. And I
6 want to make - - - I want to make this clear. So an
7 insurer - - - insurers have separate statutory grounds for
8 denying reimbursements that have nothing to do with this
9 regulation. They can always deny a claim that they view as
10 illegitimate and fraudulent. They can also seek civil
11 remedies against the provider for damages, under common law
12 fraud, civil RICO, unjust enrichment theories.

13 In fact, GEICO pursued those theories in this
14 case. They pursued those grounds for seeking damages in
15 hundreds of cases filed in New York courts.

16 JUDGE HALLIGAN: You know, it's a little hard to
17 tell if it's comparing apples to oranges, right? But you
18 said there's more than 300 matters resolved in 2025. Some
19 of those, I presume, are license suspensions or
20 revocations. Not all of them are. 38 - - - nearly 39,000
21 reports in 2024, I mean, in looking at that, that's still a
22 small slice.

23 And again, without understanding what goes into
24 the underlying data, it's difficult to ascertain. But why
25 shouldn't that give us some question about whether the

1 regulation, which you say is rational because it leaves
2 responsibility with the Department of Ed - - -

3 MR. RADUAZO: Uh-huh.

4 JUDGE HALLIGAN: - - - why shouldn't that give us
5 some concern about that?

6 MR. RADUAZO: So there's multiple parts of your
7 question. Just to clarify on the 39,000 reports.

8 JUDGE HALLIGAN: Uh-huh.

9 MR. RADUAZO: There are only 4,500 confirmed
10 reports of fraud in the no-fault system, in 2024. Those
11 39,000 is for informational purposes only.

12 JUDGE HALLIGAN: Okay.

13 MR. RADUAZO: But it's still a lot. There's no
14 doubt. And there is no question that fraud and abuse are
15 persistent problems in this system.

16 Nothing in our construction of the regulation
17 today undermines the prophylactic function that this
18 regulation was intended to serve, which was to root out
19 fraudulently licensed medical providers and disqualify them
20 from participating in no-fault system - - -

21 JUDGE GARCIA: Going back to my question earlier.
22 Would there be - - - would it fit within your definition of
23 your regulation scope if at some point the kicks back - - -
24 kickbacks were of such a level as to qualify as control or
25 ownership. Would that be possible?

1 MR. RADUAZO: Yes. I think it would. So if the
2 facts were different than the facts here, if GEICO had
3 moved for summary judgment on the basis that this entity
4 was de facto controlled by these unlicensed laypersons, it
5 absolutely, they could bring a claim under Mallela and
6 Carothers and invoke this regulation and prospectively bar
7 reimbursements on that basis.

8 That isn't what the factual record is before this
9 court. They did not move for summary judgment - - -

10 JUDGE GARCIA: Uh-huh.

11 MR. RADUAZO: - - - on that issue. They could do
12 that on remand, I will add.

13 JUDGE GARCIA: Uh-huh. Is it your view that none
14 of the definitions within 6530 would ever support a
15 Mallela-type argument by a provider?

16 MR. RADUAZO: Unless the facts - - - excuse - - -

17 JUDGE GARCIA: I'm sorry. Go ahead.

18 MR. RADUAZO: I see my red light is on.

19 CHIEF JUDGE WILSON: Yeah. Please go ahead.

20 MR. RADUAZO: Unless, you know, under the
21 circumstances that you posited, Your Honor, where the facts
22 alleged would indicate a cessation of control. But
23 otherwise, professional misconduct itself independently is
24 not a basis to invoke this regulation.

25 JUDGE GARCIA: So in one of the briefs, it

1 provided a list of different things, kind of a parade of
2 horribles. And one is refusing to provide professional
3 services to a person because of such person's race, creed,
4 color, or national origin.

5 MR. RADUAZO: Uh-huh.

6 JUDGE GARCIA: So if you had a provider blatantly
7 violating that and GEICO, or whoever, came in and said,
8 we're not going to pay you, the view of your department
9 would be, no, you have to pay them.

10 MR. RADUAZO: No. They would not be able to
11 invoke this regulation. The - - - the appropriate course
12 of action in that instance - - -

13 JUDGE GARCIA: Is refer to investigation?

14 MR. RADUAZO: - - - refer the matter to the state
15 licensing authorities for investigation - - -

16 JUDGE GARCIA: And in the meantime - - -

17 MR. RADUAZO: - - - potentially for a criminal -
18 - -

19 JUDGE GARCIA: - - - as the Chief Judge was
20 saying, they would have to pay this provider who's
21 discriminating, let's say, on the basis of race with
22 premiums paid by people who wouldn't be able to use that
23 provider because they were being discriminated against?

24 MR. RADUAZO: That's correct. The course of
25 action - - -



1 JUDGE RIVERA: Well, I thought payments were
2 stayed. I thought during the course of some
3 investigations, payments are held in abeyance. Did I
4 misunderstand, then, the regulatory framework?

5 MR. RADUAZO: Perhaps there's some confusion.
6 But there is a process if a - - - an insurer is verifying
7 or investigating a claim, it does toll the period under
8 which the insurance provider has to pay out.

9 JUDGE HALLIGAN: So I'm clear, I think you
10 answered this - - -

11 MR. RADUAZO: Yes.

12 JUDGE HALLIGAN: - - - but I'm not sure I
13 understood the response. In the event that Judge Garcia,
14 and I believe, the Chief were outlining, could the
15 insurance company then claw that money back?

16 MR. RADUAZO: If they've determined that they
17 paid out illegitimate or fraudulent claims - - -

18 JUDGE HALLIGAN: Let's assume that there is a
19 finding by the Department of Education that there's some
20 sort of activities that warrant license revocation. Is the
21 insurer then permitted to claw that money back, which they
22 have had to - - - as I think you said, they've had to pay
23 out while some investigation is pending?

24 MR. RADUAZO: No. The license revocation or
25 suspension, it - - - it acts, you know, forward-looking.

1 However, again, if there is indication that there was some
2 sort of fraudulent conduct or claims they shouldn't have
3 paid out because the individual was not statutorily
4 entitled to no-fault reimbursements, again, civil remedies
5 are available to the insurer.

6 JUDGE HALLIGAN: But if, for - - - if, for
7 example, the individual or the entity was blatantly
8 discriminating, they would have to pay that out. And they
9 would or would not have an opportunity to recoup that if a
10 license was subsequently revoked based on - - -

11 MR. RADUAZO: They would not, Your Honor.

12 JUDGE RIVERA: I'm sorry. Can you just explain
13 the tolling point that you were making before? Because I
14 think I've misunderstood this regulatory framework, and I
15 just want to be crystal clear.

16 MR. RADUAZO: Yeah. No problem. When an - - -
17 insurer has a claim for no-fault reimbursements, it is
18 entitled to seek verifications of the claim to make sure
19 it's a valid claim. They're statutorily entitled to
20 reimbursement.

21 JUDGE RIVERA: Uh-huh.

22 MR. RADUAZO: When they do that, the time limits
23 to pay out that no-fault claim, which is usually 30 days -
24 - - it's a very - - -

25 JUDGE RIVERA: Right.

1 MR. RADUAZO: - - - quick turnaround - - - that's
2 tolled while the investigation or the verifications are
3 ongoing.

4 JUDGE RIVERA: So when - - - let's stay with the
5 hypothetical. If they make a complaint - - -

6 MR. RADUAZO: Uh-huh.

7 JUDGE RIVERA: - - - and say there's racial
8 discrimination, that's why I don't want to pay out to this
9 particular provider - - -

10 MR. RADUAZO: Right.

11 JUDGE RIVERA: - - - they're violating whatever
12 number of laws that are antidiscrimination laws, there's no
13 way that they can stay that payment until that
14 investigation is resolved?

15 MR. RADUAZO: In our view, that would not be a
16 valid basis for the insurer to investigate the claim
17 because they don't police matters of professional
18 misconduct. The legislature decided it was the
19 responsibility - - -

20 JUDGE RIVERA: Okay.

21 MR. RADUAZO: - - - of the Board of Regents, and
22 the Board of Regents alone, to investigate and determine
23 the consequences of that professional misconduct.

24 JUDGE RIVERA: And because they have these other
25 paths to - - -



1 MR. RADUAZO: Correct, they have these other
2 paths - - -

3 JUDGE RIVERA: - - - otherwise either get the
4 money back or remedy - - - have some remedy perhaps to get
5 - - - could they possibly get some kind of injunctive
6 relief?

7 MR. RADUAZO: In the scenario that we are
8 positing - - -

9 JUDGE RIVERA: Yes. This particular
10 hypothetical.

11 MR. RADUAZO: - - - no, the insurers would not
12 have relief, because again, unless there is some sort of
13 illegitimate or fraudulent claim where the insurer has been
14 directly harmed.

15 JUDGE RIVERA: Well, why isn't it illegitimate to
16 its core to deny someone services based on their race?

17 MR. RADUAZO: It may be in violation of
18 professional misconduct rules. But it is not a statutory
19 ground for - - -

20 JUDGE RIVERA: Why isn't it in violation of the
21 human rights laws?

22 MR. RADUAZO: Oh, I do not contest that there may
23 be other - - -

24 JUDGE RIVERA: No, no. I understand. I'm just
25 saying, why is - - - then I'm not understanding how broad

1 the term "illegitimate" is - - -

2 MR. RADUAZO: Right.

3 JUDGE RIVERA: - - - from the agency's
4 perspective.

5 MR. RADUAZO: Certainly. So this court explained
6 this a bit in the Presbyterian Hospital case. It derives
7 from Section 6506 and 6506(b) - - - (a) and (b) of the no-
8 fault law. That gives insurers - - - it basically says
9 that the strict time limits for payment and the penalties
10 for non-payment only apply when a verified and valid claim
11 is denied or overdue. That basically gives the insurers
12 the implicit authority to not pay a claim where the
13 statutory criteria for eligibility are not met.

14 JUDGE GARCIA: Thank you.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. RADUAZO: Thank you.

17 MR. LEVY: Good afternoon. May it please the
18 court. Barry Levy from Rivkin Radler for the respondent,
19 Government Employees Insurance Company.

20 I'd like to start by just discussing the context
21 in which this case comes to this court. This case doesn't
22 come as a result of some verification process. This
23 doesn't come as a result of some investigatory conduct on
24 the part of Department of Education or DFS. It comes to
25 this court as a result of a summary judgment based on a



1 full evidentiary record in which the facts in this case
2 were not only affirmed by the district court but by the
3 Second Circuit as well and for - - -

4 JUDGE GARCIA: Counsel, did you ever argue in
5 that proceeding that this type of conduct could rise to the
6 level of a loss of control or ownership?

7 MR. LEVY: We did, Your Honor. If you look at
8 the Second Circuit's opinion as it relates to the way that
9 it characterized the oral argument - - - and this was in
10 the briefs in the Second Circuit - - - we argue it as a
11 matter of public policy that - - - as you said, that the
12 kickbacks have the same effect that the corporate practice
13 of medicine do. They involve the same elements, which
14 fundamentally come down to control. And whether you label
15 it as a corporate practice of medicine violation or you
16 label it as a licensing violation - - -

17 JUDGE RIVERA: So the DFS takes a position that
18 you can proceed on that claim. Is this in dispute? Do
19 they say you are now barred from raising this claim?

20 MR. LEVY: Well, I don't think that they're
21 saying that we're barred. What they're trying to do is
22 they're trying to repackage or label the way that this was
23 argued to try to preserve some artificial distinction in
24 the regulation between the corporate practice of medicine
25 and the payment of kickbacks. When you look at them and

1 you look at the left hand and the right hand, there's
2 absolutely no fundamental difference from - - -

3 JUDGE TROUTMAN: So what is the rule that you
4 would like created? And how would it work in practice?

5 MR. LEVY: I think the rule is what we
6 articulated in our brief, is that we believe that the
7 Mallela and Carothers overlay on the conduct as it relates
8 to these types of behaviors is the way that you measure
9 these elements. So in other words, conduct on the part of
10 a licensed professional, that's willful, that's material,
11 and that's grave, okay, in the - - - in essence, that it
12 has - - -

13 JUDGE TROUTMAN: How do you determine - - - who
14 makes that determination?

15 MR. LEVY: Well, ultimately, in the context of
16 reimbursement, right? And it's important to distinguish
17 between what happens in the licensing capacity or in the
18 regulatory capacity in terms of what happens as far as
19 reimbursement is concerned. So ultimately, the insurance
20 company would look at the facts, would decide whether or
21 not to pay, and based upon that determination, it
22 ultimately would go to court.

23 JUDGE TROUTMAN: So is that usurping the
24 regulatory agency's job?

25 MR. LEVY: Not at all, because the regulator and

1 the insurance industry work on absolutely parallel paths.
2 They never intersect. And the fact of the matter is, is if
3 you look at the original Carothers decision, which was the
4 last case that came before this court, there was absolutely
5 no intersection. And in fact - - -

6 JUDGE SINGAS: You're making an intersection when
7 you decide that you're not going to pay and you're not
8 allowing them to do their investigation and come up with
9 their discretionary result.

10 MR. LEVY: But to the point that the DFS made, if
11 I - - - if I decide not to pay and I defer to them in terms
12 of their investigation, and ultimately, several years later
13 - - - however it is - - - they conclude that there was a
14 misconduct and there was a licensing violation, the - - -
15 the remedies that they can impose are only prospective.
16 They can only deal with the question of what's the impact
17 on the professional as far as the license on a going-
18 forward basis.

19 JUDGE CANNATARO: What situation would we be in
20 if they came to the conclusion years later that there
21 wasn't a licensing or other corporate misfeasance?

22 MR. LEVY: It wouldn't be in any particular
23 situation, Your Honor, because - - -

24 JUDGE CANNATARO: Well, what happens to all those
25 payments that hadn't been made?

1 MR. LEVY: Well, if you're in the context of a
2 court proceeding that's already ongoing, a judge, a jury, a
3 court of appeals would decide on whether the facts do or
4 don't - - -

5 JUDGE RIVERA: But isn't that part of his point,
6 that you would then be circumventing the legislature's
7 decision and the framework of how one would challenge any
8 determination from the Board of Regents as to whether or
9 not there has been professional misconduct. You only get
10 to do that in Article 78 with limited review.

11 MR. LEVY: But that's only - - -

12 JUDGE RIVERA: You're looking for plenary review.

13 MR. LEVY: But that plenary review is left only
14 as it relates to the license of the professional. If you
15 look at ultimately what the remedies are under the
16 Education Law - - -

17 JUDGE RIVERA: Yeah, but under your rule, it
18 means you could raise any professional misconduct, even one
19 that appears so peripheral that it would unlikely lead to
20 revocation of the license.

21 MR. LEVY: No. I don't believe that that - - -
22 that's what we're advocating, Your Honor. And I don't
23 think that's what we've stated in - - -

24 JUDGE RIVERA: Well, how could it not? Isn't
25 your position that this includes rules and standards of

1 professional conduct?

2 MR. LEVY: Well, if I go back - - -

3 JUDGE RIVERA: I mean, all of them.

4 MR. LEVY: If I go back to - - - to the same
5 analogy that was raised in Mallela, right, what was raised
6 in Mallela was this whole notion that we were going to - -
7 - we were going to raise technical violations of the
8 business corporation law.

9 JUDGE HALLIGAN: But you are suggesting, I take
10 it, that your definition of "willing, material, and grave"
11 goes beyond something that effectively allows for financial
12 control of the corporation, yes?

13 MR. LEVY: Well, I think - - - yes, Your Honor.

14 JUDGE HALLIGAN: Okay.

15 MR. LEVY: But I do - - -

16 JUDGE HALLIGAN: And so if that's - - - if that's
17 correct, won't there be some number of cases - - - let's
18 assume that you would say peripheral violations won't count
19 because they don't meet the material and grave standard.
20 But won't there still be some significant number of cases
21 where there will be a reasonable dispute about whether or
22 not that should mean that payment is not required? And
23 then that payment will be delayed for years during the
24 course of an adjudication, which seems to me in tension
25 with one of the primary goals of the regime.

1 MR. LEVY: Well, but the question is, what is the
2 goal of the regime in this context, right? So if the goal
3 of the regime in this context is for insurance companies to
4 be in a position to not have to pay claims, right, based on
5 healthcare providers who are engaged in what's clearly
6 unlawful and offensive behavior - - -

7 JUDGE HALLIGAN: But the "clearly unlawful", I
8 guess, I think is the question, right? It seems to me the
9 DFS is telling us that the goal is to err on the side of
10 timely payment and that there will be disputes about what
11 rises to the level you just articulated. And in those
12 circumstances, what should happen is that payment is made
13 because that's the primary goal that the legislature had in
14 mind. So why isn't that right?

15 MR. LEVY: Because under those circumstances,
16 based on the way that DFS operates and the Department of
17 Education operates, by the time that they come to a
18 conclusion, their determination, one, is only prospective;
19 number two, is not necessarily binding as far as the
20 insurance company has gone. And from a practical sense,
21 the money has gone - - -

22 JUDGE CANNATARO: But we were talking about
23 legislative policy priorities and I - - - I think Judge
24 Halligan is correct - - - that the stated clear legislative
25 priority is prompt payment of claims, not, you know,

1 protections for when insurers believe that the claims are
2 improper. There's a different mechanism provided for that.
3 It doesn't seem to really protect you in the context of
4 making those prompt payments, but it does provide a remedy
5 in due course.

6 MR. LEVY: The - - - but the remedy it provides,
7 Your Honor, doesn't have any impact as far as giving us the
8 ability to either claw the money back or for the purposes
9 of denying the claims because - - - let's just take this
10 particular case for example.

11 Here we are in 2025. Okay. We're talking about
12 a healthcare provider who engaged in behavior between 2015
13 and 2017 that was put into the public domain in 2018. The
14 claims have already been paid, what's been paid. There was
15 already a dispute. Absent the litigation that GEICO
16 brought, we would have already paid the money out. The
17 money's gone.

18 JUDGE CANNATARO: But where's the legislative
19 pronouncement that that interest is superior to the
20 interest in making sure that claims get paid promptly
21 because we assume many of them are completely legitimate?

22 MR. LEVY: Because the overlay of the
23 department's - - - in other words, what the - - - what the
24 department is doing is it's drawing an artificial
25 distinction here in contrast to what it did in Mallela. In

1 Mallela, we're talking about corporate licensing. Here,
2 we're talking about professional licensing.

3 The underlying rationale in Mallela was that the
4 insurance companies should have the ability to look beyond
5 the license, the facially valid license, to deal with that.
6 The only difference here is we're talking about a
7 professional license.

8 JUDGE HALLIGAN: But I think DFS - - - I took DFS
9 to be telling us that - - - that that is a distinction that
10 they're drawing and that that's reasonable in part because
11 there are many requirements that the licensed entity has to
12 comply with. Some of those may be - - - violations of some
13 may be more serious than others.

14 And so rather than create a window for drawing
15 lines and disputing, that it would proceed as you
16 essentially said that it would, that you would be required
17 to pay out even if you had an argument that perhaps you
18 shouldn't.

19 MR. LEVY: But if you go back and you look at the
20 text of the regulation - - -

21 JUDGE HALLIGAN: Uh-huh.

22 MR. LEVY: - - - which is where I think you have
23 to start - - -

24 JUDGE HALLIGAN: Yes.

25 MR. LEVY: - - - if that distinction truly



1 existed, the word "any" licensing requirement wouldn't
2 exist in the regulation.

3 JUDGE HALLIGAN: Okay. But DFS does argue that
4 that is the way it would have us read the regulation. And
5 I think our cases say that we owe some deference to that -
6 - - to that reading.

7 MR. LEVY: Unless the - - - unless the literal
8 language contradicts what that reading is. And when you
9 read the language in this case, what DFS is saying is that
10 the word "any", we're going to read that out, or what we're
11 going to do is we're going to replace that with the word
12 "corporate". And that's not what the regulation says.

13 And if the court goes back and it looks at its
14 decision in the Visiting Nurse Services case, it dealt with
15 this very issue, which is that the language that the
16 regulator in that particular case had written was
17 inconsistent with a later interpretation that it - - - it
18 came up with. And the interpretation here under (a)(12)
19 and it's corollary to the disciplinary rules has been in
20 the public domain for the better part of ten years. DFS
21 has never weighed in for the better part of ten years since
22 a case was decided in the district court called State Farm
23 v. Padilla, which is the first case that took this
24 position.

25 So here, we are dealing with really what we feel

1 is a completely different or a change in position. And - -
2 - and the DFS does this in a number of regards, not only
3 with respect to the text of the regulation, but - - -

4 JUDGE RIVERA: Why aren't the other remedies
5 that DFS has identified - - - and you've got other claims
6 that would give you remedies, why isn't that sufficient to
7 protect GEICO?

8 MR. LEVY: For two reasons. Number one, a lot of
9 the remedies that GEICO has fall within or outside of this
10 30-day rule.

11 JUDGE RIVERA: Uh-huh.

12 MR. LEVY: In other words, this 30-day rule was
13 enacted by virtue of trying to prompt payment. And what
14 health care providers say is, well, hold on a second, if
15 you're going to sit here and you're going to take the
16 position that I committed fraud - - -

17 JUDGE RIVERA: Uh-huh.

18 MR. LEVY: - - - then you should have discovered
19 that fraud within the 30 days. So the eligibility issue,
20 the question of whether under (a)(12), a healthcare
21 provider is or is not entitled to payment, falls outside of
22 that 30-day window. And so therefore, the insurance
23 companies aren't restrained by some artificial extension of
24 what exists in the no-fault system when it goes to either
25 seek declaratory relief or file for a clawback.

1 And - - - and that, in Mallela, the cases have
2 since decided that this is an eligibility issue, and the
3 30-day rule doesn't apply because the DFS modified the
4 regulation - - - I believe it was in 2008 - - - to say that
5 eligibility issues aren't borne out by that 30-day rule.

6 But from a public policy standpoint, if we look
7 at the behavior here and we look at the offensive nature of
8 what took place, why should we be relegated to those - - -
9 those supplemental remedies? Why shouldn't the court say,
10 as a matter of policy, we're not going to condone this type
11 of behavior?

12 JUDGE GARCIA: Counsel, if the insurer prevails
13 here, if the insurer prevails under the scheme here, the
14 provider takes the loss, right, not the patient? The
15 patient doesn't have to pay, right?

16 MR. LEVY: Well, the patient assigns its
17 benefits, Your Honor - - -

18 JUDGE GARCIA: Right.

19 MR. LEVY: - - - at the time of service. So the
20 patient is never on the hook for the money.

21 JUDGE GARCIA: So the effect of a ruling in favor
22 of the insurer in these types of cases is the provider
23 takes the loss?

24 MR. LEVY: The provider takes the loss because
25 the provider took the risk in engaging in the behavior at

1 the time that it was treating the patients. And that's
2 true in - - - as far - - - as far as fraud and abuse is
3 concerned in every payer system.

4 CHIEF JUDGE WILSON: That's one of the things - -
5 - or it gets to one of the things that I find a little
6 difficult to think about in this case, which is in Mallela
7 and Carothers, I think, would both say that there's a
8 strong prohibition policy against professionals splitting
9 their fees with nonprofessionals. That's sort of the
10 underlying principle that's being vindicated for good
11 policy and public policy reasons, I think.

12 In Mallela, we say it doesn't actually matter
13 that the services that were provided were all necessary
14 services and were provided competently and so on. That
15 doesn't actually affect what we think about this fee-
16 splitting prohibition. And here, we have, I think,
17 something that looks like fee splitting, and the, I think,
18 proof that some of these services were actually
19 unnecessary. So it seems a little hard to understand why -
20 - - how to reconcile this with Mallela?

21 MR. LEVY: Well, I think if you look at it - - -
22 I don't think you reconcile it with Mallela. I think these
23 cases line up absolutely the same. I think if you look at
24 all of the public policy issues and all of the factual
25 issues, Mallela, Carothers, and this case line up

1 identical.

2 The only difference is the label we're going to
3 put on it. Are we going to label this as being a
4 professional misconduct violation because the kickbacks
5 were paid in violation of section - - - subsection 18 of
6 the Insurance Law, or is it fundamentally just conduct - -
7 -

8 CHIEF JUDGE WILSON: I guess what I was trying to
9 get at is, here, there may actually be harm to the insurer
10 because some of these services were unnecessary; whereas in
11 Mallela, we assumed that they were all necessary services.

12 MR. LEVY: That would be true, Your Honor. This
13 case - - - and to that point, this case lines up with
14 Carothers the same way, because in Carothers, what we were
15 talking about were MRI services that were rendered to
16 patients, that were dangerous, that were medically
17 unnecessary, that gave false results. And the record of
18 this case proves - - -

19 JUDGE RIVERA: But why isn't that your fraud
20 claim, that - - - that DFS doesn't dispute that you can
21 proceed with?

22 MR. LEVY: Because that's one element of it, Your
23 Honor. And that shouldn't be the only element - - -

24 JUDGE RIVERA: Well, why shouldn't it - - -

25 MR. LEVY: - - - or the only basis.



1 JUDGE RIVERA: Why isn't that rational, that
2 you've got other claims that you could proceed on, but if
3 you want to challenge payment and the - - - excuse me, the
4 eligibility for reimbursement of a provider based on any
5 professional standard, that - - - that that you can't
6 proceed on because that's left to them specifically?

7 MR. LEVY: Because - - - because what Mr. Conroy
8 will argue, if this case is remanded on that basis, is that
9 GEICO is precluded or foreclosed by the - - - by virtue of
10 the 30-day rule and other artificial rules that exist in
11 the no-fault system from - - - from pursuing its
12 declaratory judgment action.

13 JUDGE RIVERA: I don't even understand that
14 argument.

15 MR. LEVY: Okay. So - - -

16 JUDGE RIVERA: I don't - - - I don't know what
17 you're talking about.

18 MR. LEVY: So - - - so because of the 30-day
19 rule, which is the prompt payment rule that exists in the
20 no-fault regulation with health - - -

21 JUDGE RIVERA: Yes, unless you raise that there's
22 fraud.

23 MR. LEVY: No.

24 JUDGE RIVERA: That's the way it works.

25 MR. LEVY: But fraud - - -



1 JUDGE RIVERA: If I misunderstood that, please
2 correct me.

3 MR. LEVY: But fraud in the sense - - -

4 JUDGE RIVERA: Yes.

5 MR. LEVY: - - - of treatment fraud or billing
6 fraud is not necessarily outside the rule - - - the 30-day
7 rule, Your Honor.

8 JUDGE RIVERA: And what case says that?

9 MR. LEVY: The - - -

10 JUDGE RIVERA: Or what reg or statute says that?

11 MR. LEVY: The - - - the - - - the DFS is - - -
12 it's been the - - - I can't think of the case off the top
13 of my head, but that's been the rule in New York for the
14 better part of 25 years, going back to, you know - - - and
15 so the, you know, as far as - - -

16 JUDGE RIVERA: Let's say that's not correct.
17 Let's say - - - let's say that that is not the rule. Does
18 that in any way undermine your argument?

19 MR. LEVY: We're - - - because then, what we're
20 doing is - - -

21 JUDGE RIVERA: Let's assume that the 30-day is
22 not a bar in the way you're articulating it.

23 MR. LEVY: But we're rewarding providers. We're
24 saying to providers - - -

25 JUDGE RIVERA: How have we rewarded you, to have

1 an action to try and prevent payment or try and have the
2 court agree with you that they're not eligible for
3 reimbursement?

4 MR. LEVY: But if a health care - - - under
5 Mallela - - -

6 JUDGE RIVERA: Yes.

7 MR. LEVY: - - - if a health care provider - - -
8 or under Carothers - - -

9 JUDGE RIVERA: Yes.

10 MR. LEVY: - - - the health care provider is not
11 eligible for payment - - -

12 JUDGE RIVERA: Right.

13 MR. LEVY: - - - okay, because they have engaged
14 in the corporate practice of medicine - - -

15 JUDGE RIVERA: Right.

16 MR. LEVY: - - - in which, to your point, Judge
17 Garcia, and yours, Judge Wilson - - - essentially they've
18 abdicated control.

19 JUDGE RIVERA: Right.

20 MR. LEVY: When you look at the record in this
21 case and the magnitude of the kickbacks that were given,
22 right, and the fact that, as the Second Circuit said, no
23 payment, no patients, this is just another form of
24 marionetting, all right? Why are - - - why should the
25 burden on the insurance company be greater?

1 JUDGE RIVERA: No. But I - - - but the DFS'
2 position is you can still make this argument. You can say
3 that it is essentially having given up ownership and
4 control.

5 MR. LEVY: And I don't disagree that necessarily
6 our positions, Your Honor, that the daylight between our
7 positions are materially different, okay? I really don't
8 disagree that the - - - that the daylight isn't that much
9 different. I just think that it's a too - - - it's too
10 restrictive of an approach because it ends up imputing into
11 - - -

12 JUDGE RIVERA: That's not the question. The
13 question is whether or not their interpretation is
14 rational.

15 MR. LEVY: No. I don't - - -

16 JUDGE RIVERA: Why is it irrational? Or why is
17 it not rational?

18 MR. LEVY: Well, a couple of things. Number one
19 is that if you look at the text, their interpretation of
20 the text is not consistent with the text. They argued,
21 which they appear to be backing off - - -

22 JUDGE RIVERA: Well, it says "licensing". It
23 doesn't say professional codes of conduct.

24 MR. LEVY: No, it says "licensing".

25 JUDGE RIVERA: Right.

1 MR. LEVY: But in order to - - -

2 JUDGE RIVERA: Do you agree licensing is
3 obviously broader?

4 MR. LEVY: Licensing has a much broader context
5 than that and should - - -

6 JUDGE RIVERA: At a minimum.

7 MR. LEVY: - - - include the conduct which is
8 necessary.

9 JUDGE RIVERA: Do you also agree that there are
10 parts of the Education Law that refer to standards of
11 conduct separately from licensing requirements?

12 MR. LEVY: I don't know that there are parts of
13 the Education Law - - - there are parts of the Education
14 Law, the way that it is written, that talk about what is or
15 is not misconduct. But whether it would be necessarily a
16 licensing - - -

17 JUDGE RIVERA: Do you have a section of the
18 Education Law that refers to a licensing requirement and
19 then cites a standard of conduct?

20 MR. LEVY: No. I don't believe that's the way
21 the Education Law is written. But I do think that when you
22 look at what the Education Law says, you have to abide by
23 these standards in order to maintain your license. And one
24 of the distinctions that - - -

25 JUDGE SINGAS: Is it to maintain your license or

1 just to obtain your license?

2 MR. LEVY: No. Both to obtain and maintain your
3 license.

4 JUDGE SINGAS: Where is that authority?

5 MR. LEVY: If you look at the - - - if you look
6 at the application process for physicians and you look at
7 the application process for other licensed medical
8 professionals, they have to recertify every number of
9 years.

10 JUDGE RIVERA: So then wouldn't the regulations
11 say provider and licensee?

12 MR. LEVY: No, because the provider is by
13 definition the licensee, because you can't be a provider in
14 New York without having a professional license. They're
15 one and the same, Your Honor.

16 But to the point I was making - - - I'm sorry,
17 Your Honor.

18 CHIEF JUDGE WILSON: Your time is up, but - - -

19 MR. LEVY: Oh, I'm sorry.

20 CHIEF JUDGE WILSON: - - - wrap up if you can.

21 MR. LEVY: Yeah. The point I was making is that
22 one of the distinctions that they make, that the DFS makes,
23 is that while a professional corporation has to recertify
24 its - - - its existence every so often, and so therefore,
25 in some way, shape, or form, that's like a reaffirmation or

1 reattestation, well, so do licensed physicians.

2 And in doing so, if you look at the application
3 process for recertification, it talks about having engaged
4 in disciplinary conduct, conduct that violates the
5 disciplinary rule. It's no different. That's why I say
6 these cases line up perfectly except for one very simple
7 fact, which is that they - - - they bring the issue of
8 professional license into the equation in the discussion.
9 Other than that, there is no distinction between this
10 court's rulings in Mallela and Carothers and this
11 particular case.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. LEVY: Thank you very much, Your Honors.

14 MR. CONROY: I have two brief points. This case
15 and Carothers do not line up at all. Carothers very
16 specifically talks about foundational core licensing
17 issues. I would point out that the - - - the question of
18 whether DFS has changed its position, its position is
19 exactly the same. It makes reference to its position in
20 both Mallela and Carothers.

21 The court, on the strength of the regulation,
22 which in its amicus brief, DFS said, we did this to combat
23 the corporate practice of medicine in the form of medical
24 mills. With Carothers, they write in their amicus brief,
25 we - - - the purpose here was for core - - - and they use

1 the word "core" - - - licensing violations. The court took
2 the word "core" and turned it into "foundational". There's
3 no view of the simple language of disciplinary rules to
4 call that a foundational corporate requirement.

5 The - - - secondly, the - - - and I'll be brief -
6 - - to suggest that there's no distinction or it's an
7 artificial distinction between kickbacks and the corporate
8 practice of medicine is simply not true. DFS lays out what
9 it seeks to prohibit by the corporate practice of medicine.
10 And that is constraints upon professional judgment,
11 invading professional integrity, and permitting business
12 corporations to make professional decisions.

13 In this case, what you see is the professional
14 paying money to essentially a marketer to generate work for
15 the practice. No involvement in the practice, no
16 involvement in medical decision-making. And - - -

17 JUDGE GARCIA: But you could have an owner - - -

18 MR. CONROY: - - - juxtapose that with - - - with
19 - - - with - - -

20 JUDGE GARCIA: - - - you could have an owner
21 that's not involved in any of that. They're just taking a
22 stream of income. And under your view, that would be okay?
23 That wouldn't violate their precepts on that practice?

24 MR. CONROY: It's just a different issue, that's
25 all. With Carothers, you had the laypeople, who would be

1 the equivalent of the Dovmans in this case. They operated
2 the office.

3 JUDGE GARCIA: Yeah, but what if they didn't, and
4 they were just receiving money, but they were owners? It
5 would - - -

6 MR. CONROY: But nothing - - -

7 JUDGE GARCIA: - - - still be a violation, right?

8 MR. CONROY: - - - they - - - well, the passage
9 of money would have to be so pervasive that they would deem
10 to be the true owners of the PC.

11 JUDGE GARCIA: So if there was a 25 percent
12 ownership stake, then under Carothers, that wouldn't be a
13 enough.

14 MR. CONROY: But it - - - it may or may not.
15 That might be a jury - - - that might be a - - - a question
16 of fact. But this goes to eligibility based on
17 foundational structural laws.

18 JUDGE GARCIA: Even if they incorporated - - -

19 MR. CONROY: It goes to the PC issue.

20 JUDGE GARCIA: - - - with a silent 25-percent
21 partner who is receiving 25 percent of the profits, and
22 that's undisputed, that would be a jury issue under
23 Carothers?

24 MR. CONROY: Yes.

25 CHIEF JUDGE WILSON: What would - - - what would

1 the jury - - -

2 MR. CONROY: They would have to be - - - I mean -

3 CHIEF JUDGE WILSON: Why wouldn't that be a
4 question of law? What would the jury be deciding?

5 MR. CONROY: There - - - it might be a question
6 of law in favor of the provider. I mean, there are
7 probably 12 or 13 factors enumerated by Carothers. And if
8 the only one was the passage of money, you know, I'm not
9 sure that's going - - - that's going to cut muster. But -
10 - - but the money portion - - -

11 JUDGE RIVERA: You don't disagree - - -

12 MR. CONROY: - - - still goes to control - - -

13 JUDGE RIVERA: You don't - - - you don't disagree
14 that if for some reason the answer to the certified
15 question allows them to proceed, that they can make this
16 argument, that the payments here essentially were turning
17 over ownership and control or control of the practice?

18 MR. CONROY: The - - - the factual argument - - -

19 JUDGE RIVERA: Yeah.

20 MR. CONROY: - - - that the lay owners are
21 financially benefiting from the practice is part and parcel
22 of every Mallela-based defense and RICO case. It's - - -
23 the money is always part of that - - -

24 JUDGE RIVERA: But is that a yes or no?

25 MR. CONROY: But it - - - but it's not based on a



1 violation of the disciplinary rule. It's based on - - -

2 JUDGE RIVERA: Okay. No, I know that.

3 MR. CONROY: - - - the issues enumerated in
4 Carothers.

5 JUDGE RIVERA: That was not my question. My
6 question is, do you disagree - - - because I thought that
7 was DFS' position. Do you disagree that they could make
8 this - - - if indeed we answer the certified question in a
9 way that they eventually are able to return to district
10 court - - -

11 MR. CONROY: In this case?

12 JUDGE RIVERA: Yes, in this case.

13 MR. CONROY: I think they would have to move - -
14 -

15 JUDGE RIVERA: Can they make this argument?

16 MR. CONROY: I think they would have to move to
17 amend the complaint to change the theory of eligibility,
18 but it would be based on Carothers and Mallela, not based
19 on a violation - - -

20 JUDGE RIVERA: You think they didn't make this
21 argument?

22 MR. CONROY: They did not make this argument.

23 JUDGE RIVERA: Okay.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. CONROY: Thank you.



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

I, Joey Oliveros, certify that the foregoing transcript of proceedings in the Court of Appeals of GEICO v. Mayzenberg, No. 83 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Joey Oliveros

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: October 19, 2025

