

## Appellate Court Finds State Comptroller Has Authority To Audit Providers Under New York State Health Insurance Program

On October 27, 2011, the Appellate Division of the New York Supreme Court held in two separate but legally related cases that the New York Office of the State Comptroller ("OSC") was acting within the scope of its authority when it audited payments made to health care providers under the New York State Health Insurance Program's "Empire Plan". (The Empire Plan provides health insurance coverage for state and municipal employees through commercial health insurers, including United Healthcare.) The two cases are Handler v. DiNapoli, 2011 WL 5083946 (3d Dept., October 27, 2011) and South Island Orthopaedic Group, P.C. v. DiNapoli, (unpublished, 3d Dept., October 27, 2011).

The OSC has conducted a number of audits in recent years of costs incurred by the Empire Plan in connection with claims paid by Empire Blue Cross Blue Shield to hospitals and claims paid by United Healthcare to ASCs and physicians. These two court cases involved physicians and physician groups that did not participate with United Healthcare and involved OSC audits that focused on allegations of improper waiving of member cost-share obligations (*i.e.* coinsurance, and deductibles) as an inducement to members to use these non-participating providers rather than a participating provider. Since the fees paid to non-participating providers under the Empire Plan are typically higher than those paid to participating providers, the OSC claimed that the routine waiver of cost-sharing increased the Empire Plan's costs.

The lower courts' decisions in these cases had put into doubt the OSC's authority to conduct these audits since the non-participating providers did not have a contract with the State or with United. In each case, after reviewing claims going back several years, the OSC had determined that the physician and physician group had been improperly waiving member cost-share amounts, and sought recovery of significant overpayments. Each provider separately objected and challenged the OSC's authority to audit its records. The OSC asserted that it did have independent authority to audit these records because the premiums paid by the State to United Healthcare for Empire Plan coverage were "State" funds and further argued that since United Healthcare's payments to these non-participating providers related to "State" funds, the OSC had the responsibility to ensure that such payments were properly substantiated by the providers' records. The lower courts rejected this argument, and held that the OSC did not have the authority to conduct these audits under New York law.

However, the Appellate Division reversed both decisions and found that the OSC was permitted to conduct these audits. Unlike the lower courts, the Appellate Division determined that monies paid by the State to United Healthcare did not lose their character as State funds upon payment to the physician or physician group. This characterization is very broad and may pose concerns in other commercial contexts where a healthcare provider or other vendor is paid monies by a State contractor, but that vendor has no direct link to the State other than its receipt of funds from the State contractor.

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If you have any questions, please contact the GW attorney with whom you regularly consult.

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