22-3054

In the
United States Court of Appeals
For the Second Circuit

DANIEL HALLER and LONG ISLAND SURGICAL PLLC,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES, U.S. OFFICE OF PERSONNEL MANAGEMENT, KIRAN AHUJA, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT, U.S. DEPARTMENT OF LABOR, JULIE SU, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF LABOR, U.S. DEPARTMENT OF THE TREASURY, JANET YELLEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK (CENTRAL ISLIP)

PETITION FOR PANEL REHEARING

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I

Introduction

This petition is submitted under Federal Rules of Appellate Procedure ("FRAP") 40- Petition for Panel Rehearing. On appeal from the District Court, on January 23, 2024, this Court issued its Summary Order, finding that the common law to sue insurers was forfeited. Thankfully, this Court remanded to District Court to dismiss it without prejudice to refile the claim in a new complaint.

On another note, this Court held that the appeal of the District Court's denial of the same challenge of the prohibition against billing and suing patients was "abandoned". Respectfully this is incorrect, and this Order reflects a misapprehension by the Court. Plaintiff-Appellants' bedrock brief fully sets forth an abundance of common law permitting medical providers to bill/sue patients, re-affirmed in our oral argument on January 3, 2024.

II

Brief Background

With the ***stated goal*** of improving access to affordable health care, and preventing "surprise bills", the United States Congress enacted the "No Surprises Act" (Pub. L. 116-260).The Act went into effect on January 1, 2022. The key provision are 42 U.S.C. § 300gg-111(c), and§ 300gg-131 and 300gg-132.

The Act absolutely prohibits any medical care providers from "balance billing" (or suing) any patients, whose lives they saved. Period. 42 U.S.C. § 300gg-131 and 300gg-132. The purported magical bullet is the Independent Dispute Resolution Entity ("IDR"). The IDR lacks any semblance to Article III. The process is done by online submission, and there is no argument. The "arbiters" are given brief training.

The process is effectively mandatory. Either party "may" initiate the process, but once initiated both must participate. "The independent dispute resolution process shall be initiated by a party …by submission to the other party" §300gg–111 (c)(1)(B). Moreover, if one elects to initiate and the other does nothing the other simply defaults, not unlike a lawsuit. A medical provider may not include a patient.

In the IDR, the first consideration listed as "General" is the Qualified Payment Amount ("QPA"), submitted by the insurer (The QPA is not analyzed or available to the medical provider or IDR). §300gg–111 (c)(5)(C)(i)(I). The QPA is a number that is calculated in secret by the insurer based on the insurer's own records with very limited disclosures. Any other factors are "Secondary". §300gg–111 (c)(5)(C)(i)(I). And the certified IDR entity … shall not consider the usual and customary charges of medical providers § 300gg-111(c)(5)(D).

The net effect of the IDR, is the considerations place a heavy thumb on the scale of the insurer. The result is chaos, medical providers losing enormous amounts of money and going out of business, a great harm to the public interest.

The NSA is also patently unconstitutional.

III

The Appeal and this Court's Summary Order

This appeal followed. On January 23, 2024, this Court issued its Summary Order. This Court observed that prior counsel did not assert a claim against insurers, and it is raised for the first time on appeal. It was deemed forfeited. "But neither should Appellants be prejudiced if they wish to replead and to advance such claims before the district court at a later date." *Haller et. al. v. U.S. Dep't of Health & Hum. Servs,* p.3 (2nd Cir, Summary Order 1-23-24). The Court held: "the extent the district court concluded that Appellants lacked a common-law cause of action against insurers, we vacate and remand with instructions to dismiss Appellants' Article III and Seventh Amendment claims without prejudice to allow Appellants to plead such a claim if they so choose." *Id* at 2. The Court also dismissed the Takings Claim, as being based only on predictions of profits. *Id* at 2-3.

Additionally, the Court held "We thus affirm the judgment of the District Court only insofar as it concludes that Appellants failed to state a claim under

Article III or the Seventh Amendment based on their right to bring common-law actions against patients – **a claim Appellants have abandoned on appeal**. *Id* at 2 (emphasis added).

Respectfully, the Appellants-Defendants in no way abandoned their common law actions against patients. Nor abandoned in any way appeal of the NSA's flat out prohibition of medical providers to ever balance bill/sue patients, a stark violation of their Article III, Seventh Amendment Rights. This is proven by the immovable bedrock of the brief on appeal, and the affirmations thereof memorialized during oral argument.

IV

The Point for the FRAP 40 Panel Rehearing: Plaintiffs-Appellants did Not Abandon the Constitutional Infirmity of the NSA's Prohibition of Billing Patients

Analysis of Plaintiffs-Appellants' brief demonstrates impenetrably that there was no abandonment of the appeal of the District Court's dismissal of the challenge to the NSA's unconstitutional prohibition of billing/suing patients. The appellate brief is immovable, and oral argument memorialized in the transcript.

In the most unlikely scenario that this Court continues to view this strand of the appeal abandoned, the erudite reasoning concerning the right to sue insurers deemed forfeited set forth in oral argument by the Court applies with equal force. This Court should not rest on a legal question deemed abandoned which may be

not be correct as a matter of law. See 1-3-24 Trans., P. 18, at 11-21*;* and see *Id* at p. 19, at 10-21. There is a serious Article III, Seventh Amendment argument concerning the NSA's prohibition of a medical provider's suing a patient, and the Court should not affirm on the basis of a (perceived) mistaken abandonment.

A. The Brief on Appeal

Plaintiffs-Defendants' appellate brief ("PD's br."), at p. **44-50**, sets forth in crystal clear terms our argument supporting the challenge to the constitutionality of the Act's prohibition against balance billing (suing) patients.

Plaintiffs-Appellants appellate brief argued extensively that there is an abundance of common law cases in New York wherein medical providers sued patients and prevailed. PD's br. 44-50. The entire section is dedicated in detail to the proposition that medical providers have an Article III, Seventh Amendment right to sue patients and that well-established common law prohibits the NSA from completely dispensing with the right to bill/sue patients. **The Constitutional right to bill/sue argument is clearly not abandoned.**

i. Common Law

Under constitutional jurisprudence, where there is an established body of common law, not derived or dependent on a new public right, it is a private right, and cannot be removed from Article III, and access to the Seventh Amendment.

The No Surprises Act does not even permit financial grievances against patients access to the IDR. PA-Br., 49

In Plaintiffs-Appellants' brief on appeal, we cite numerous common law cases permitting medical providers access to sue patients, whether in quasi contract and unjust enrichment or implied contract by quantum meruit, and therefore requiring access to Article III and the Seventh Amendment.

See the cases contained in Plaintiffs-Appellants' brief, repeated here, demonstrating the claim that medical providers have a common law right to sue patients was in no way abandoned. . See *Long Island Jewish Medical Center v. Budhu*, 20 Misc.3d 131(A), *1, 867 N.Y.S.2d 17 (App. Term 2008), PA Br., p.45 (Plaintiff medical provider rendered services to a patient, invoiced him, and he refused to pay. The Appellate Court reversed denial of plaintiff's motion for summary judgment on his claim for account stated, holding "The performance by plaintiff and acceptance of the services by defendant gave rise to an inference that an implied contract to pay for the reasonable value of such services existed")*;* *Huntington Hosp. v. Abrandt*, 4 Misc.3d 1, *3, 779 N.Y.S.2d 891, 892 (App. Term 2004)(affirming grant of summary judgment to medical provider who filed suit for payment of services, under account stated, where patient claims fees were 'not fair and reasonable'….The performance and acceptance of services can give rise to an inference of an implied contract to pay for the reasonable value of such services

(22A NY Jur 2d, Contracts § 591)", *Id* at 45*; Shapira v. United Med. Serv*., 15 NY2d 200, 220 (1965)("It is not necessary to such a medical relationship and its resulting mutual obligations that the undertaking to perform an operation be parsed out in words on one hand and an agreement to pay for it be parsed out in words on the other. That a fee is to be earned is overwhelmingly inferred and implied from the situation of medical examination and medical treatment. Indeed, in modern practice a patient may have little or no conscious contact with the surgeon who operates on him." (emphasis added); *Id* at 46; *Becker v. State of NY*, 104 Misc. 2d 588, FN 2 (Crt of Claims 1980) (Crt of Claims 1980)(quasi-contract has been used "to recover fees for medical services rendered to unconscious persons incapable of assenting to an express contract *Id*; *McQuire v. Hughes*, 27 NY 516, 521 (NY)(1913) ("it should be taken as the rule of law, too well settled upon authority to be now questioned" that where a physician is required to perform emergency services such as under EMTALA, 42 USC § 1395dd, and N.Y. Pub. Health Law § 2805-b(2)(b), she may recover from the patient under quantum meruit or implied contract. *Id.*

A medical provider must provide life-saving services, under penalty of imprisonment (N.Y. Pub. Health Law § 2805-b(2)(b), yet is forbidden from balance billing a patient, if needed.

See also *United Healthcare Servs., Inc. v. Aspirinio*, 16 N.Y.S.3d 139, 49 Misc. 3d 985, 991 (Sup. Ct. Westchester Cty. 2015) Scheinkman, J.S.C). Here the insurer sued defendants medical providers to enjoin them from balance billing. The Court denied the injunctive relief holding "absent presentation of an agreement with [the patient] whereby defendants agreed to limit the patient's obligation to the proceeds of insurance... there is no reason why defendants would not be free to seek the balance of their fees from the patient in question." **This case raises the same issues of the Act's requirement of the cryptic "QPA**":

> McLafferty also notes, United does not provide any of the underlying FAIR Health data to support its argument. In particular, McLafferty points out that, among other things, United has not set forth the codes it referenced in order to assess Asprinio's fee. If United is using codes relevant to a routine procedure, as opposed to complex surgery, United's conclusion would be invalid. McLafferty opines that, given the lack of disclosure as to the information that United used to make its decision, it is not possible to determine whether United's position is itself reasonable or unreasonable.

Id at 991 (emphasis added), *Id* at 48*;*

See *Northeast Remsco Constr. v. Picone*, 2012 NY Slip Op 51229 (Sup. Ct., Nassaut Cty., 2012)("an implied-in-law contract or quasi-contract is not a contract at all but instead is an obligation that the law imposes to prevent unjust enrichment (internal citations omitted). It is a restitutionary device, the classic example of which arises when a doctor treats an unconscious person. In that circumstance, the

law imposes a quasi-contract to compensate the doctor for rendering medical treatment").

B. **Oral Argument**

The Constitutional Right To Bill/Sue Argument Is Clearly Not Abandoned

The transcript of oral argument in Haller, et al. v. US Dept. of Health, et al, 22-3054, on January 3, 2024, is memorialized herein as "1-3-2024 Trans."

p. 8

17.MR. WILDER: So prior counsel was prior
18. counsel…
22...But the Court
23. itself spent six pages discussing, and I would
24. underscore, A, the joint appeal -- the Joint
25. Appendix, page 56 to 61, the Court spent six pages

17.MR. WILDER Continuing
p. 9
1. discussing this issue of arbitration versus --
2 discussing the constitutionality of having the
3 doctors have to go to arbitration to –

4 **THE COURT** [Circuit Judge Sarah A. L. Merriam **]** But because of a common law
5 right to sue patients, right? That's 56 to 61 –

6 **MR. WILDER:** ***Both of them. Both issues***
7 ***are presented, although the -- the Court did not***
8 ***discuss the common law right to sue patients almost***
9 ***at all, but I did include innumerable cases in which***
10 ***doctors, prior to the NSA, sued patients***
11 ***successfully***. And there are also innumerable cases
12 in which the doctors sued insurance companies

13 successfully, so –

1-3-2024 Trans, p.8, 24-25 and p. 9, 1-13

This exchange memorializes clearly that I was referring to the lower Court's Decision and Order at Joint Appendix p. 56-61, for "both issues" : suing insurers ***and patients***. Moreover, the statement "**but I did include innumerable cases in which doctors, prior to the NSA, *sued patients successfully*** " makes **100% clear that I was *not abandoning*** the argument concerning the unconstitutionality of the NSA's prohibition of billing/suing patients, and I was also following my appellate brief which I referenced. (Trans, *Id*)(emphasis added).

Just after that clear exchange the Court asked:

P. 9 continued

14 **THE COURT:** Are you pursuing the claim
15 that the aspect of this argument that is hinged on
16 whether there was a common law right to sue
17 patients, so the way I was reading this was below,
18 you focus solely on a common law right to sue
19 patients and conceded a lack of a common law right
20 to sue insurers. And now we've reversed that, that
21 you're no longer proceeding --

Reading this point from the Court, I most humbly and respectfully adduce the following: there is not any reason at all that the Court should believe I had switched from appealing both the right to sue patients ***to*** the right to sue insurers

only. Respectfully, the Plaintiff-Appellants made very clear in our brief on appeal we were appealing both the common law to sue patients and the common law to sue insurers. **P. 44-50 of our brief is dedicated entirely to the issue of patients and on p. 25-37 the issue of suing insurers.**

Respectfully, there is no basis to have wondered if our inclusion of suing insurers was to the exclusion of the patient argument: <u>we set forth arguments for both in the brief, and restated them during oral argument.</u> So "reversal of that" on oral argument here could only seem to mean "reversal" of prior counsel's focus on one to the exclusion of the other, since on appeal we <u>clearly including both.</u>

Please recall early in this oral argument I stated:

6 **MR. WILDER: ….** ***Both issues***
7 ***are presented, although the*** -- the [district]Court did not
8 discuss the common law right to sue patients almost
9 at all, ***but I did include innumerable cases in which***
10 ***doctors, prior to the NSA, sued patients***
11 ***successfully***. And there are also innumerable cases
12 in which the doctors sued insurance companies
13 successfully, so –
1-3-2024 Trans, p.8, 24-25 and p. 9, 1-13

continuing

22 **MR. WILDER:** And under -- under -- I
23 understand your question. Under Yee versus
24 Escandito and a plethora of other cases, the --
25 there -- these are United States Supreme Court

P. 10

1 cases. The arguments can change. As long as you're

2 --

Our reference to *Yee v. Escondito* was in support of the addition of a new argument (suing insurers) for the same claim: violation of Article III and seventh amendment. I was focusing on how to bring in the insurance argument, because it was being argued as forfeited

3 **THE COURT:** But just help me make sure --
4 am I right about what the arguments are? Before we
5 -- I understand that we –

6 **MR. WILDER:** Yeah. Yes, correct
7 correct.

8 **THE COURT:** Okay. All right.

Here again, when the Court asks, "am I right about what the arguments are?" and I interjected "Yeah. Yes, correct". I was here just affirming, as state above, given the clear arguments in Plaintiffs-Appellants brief arguing fervently on the issue of suing patients, at pages 44-51, and arguing fervently concerning suing insurers on pages 25-37, I was shifting to inclusion of **both arguments**. **Respectfully, <u>there is no basis to have wondered if our inclusion of suing insurers was to the exclusion of the suing patients: we set forth arguments for both</u>.**

9. **MR. WILDER:** So as long as your claim is
10 the same, for example, a Seventh Amendment

violation, you can change the argument, and this is repeated over and over and over and over again. And what we've changed -- the same argument, Seventh Amendment violation or the same claim, Seventh Amendment violation, but we've shifted to a -- a better argument that -- which was addressed extensively by this Court -- I mean -- excuse -- by the -- the Court below, and for six pages, that the denial -- that the doctors have a strong body of common law allowing them to sue insurance companies, including in federal court in New York.

Finally in this portion of the transcript, "shifting to a better argument" simply meant strengthening the ***claim***: violation of Article III, and the seventh amendment, by putting greater emphasis on the insurance argument, but not eliminating the patient claim. Why do that? It simply makes no sense at the last second during oral argument to "abandon" a perfectly strong claim. They are not mutually exclusive. And we did not abandon it.

Also, this required explaining why we can do this despite the "forfeiture". The insurance argument had been inexplicably renounced by plaintiffs' prior counsel at the district court. And it was extensively but erroneously discussed by the district judge, and dismissed by the district judge on the factually mistaken basis that there was no common law. This shift **to include** the insurance issue along with patients, and spend extra time explaining it (since it was deemed forfeited) made it a better argument.

The inclusion of the patient argument in **the brief** demonstrates as an anchor dispositively that it was not "abandoned". It would be senseless to present this strong argument in the appellate brief, and then suddenly during oral argument abandon it.

To the extent the there is still any doubt, I would direct the Court's attention to the following by Judge Park, concerning the forfeited insurance argument.

P. 18 [Circuit Judge Michael A. Park]
11 It -- it arguably raises a
12 different problem, though, which is that the
13 District Court's analysis was resting on something
14 that was conceded that may or may not be correct as
15 a matter of law. And are you asking us to affirm on
16 that basis just because it was a forfeited argument?
17 **MS. CLARK:** So I --
18 **THE COURT:** -- there may be a serious, you
19 know, Seventh Amendment argument here and to affirm
20 on the basis of a concession it may have been a
21 mistake seems problematic to me.

1-3-2024 Trans, p.18, 11-21.

This sagacious reasoning adopted by this Court in its January 23, 2024 Summary Order, to dismiss the forfeited argument, and remand to dismiss without prejudice, permitting Plaintiffs-Defendants to replead, may be applied with equal force concerning our constitutional challenge to the prohibition of billing/suing patients deemed abandoned. At the very least if the Court were to continue to deem it abandoned, "when the District Court's analysis was resting on something that

was conceded that may or may not be correct as a matter of law. And are you asking us to affirm on that basis just because it was an [abandoned] argument? There may be a serious.. Seventh Amendment argument here and to affirm on the basis of a concession it may have been a mistake seems problematic…"

V

Caselaw Makes Absolutely Clear that Simple Common Law Claims are the Provenance of Article III and the Seventh Amendment, and Cannot be Taken by Article I Legislative "Schemes"

It is simply undeniable that prohibiting medical providers from billing-suing patients is unconstitutional. It is a simple common law right, which is neither created by nor dependent upon Article I, neither derived from, nor depended upon the NSA. Nor is it abandoned.

In Stern v. Marshall, 564 US 462, (2011), the United States Supreme Court held:

> This case involves the most prototypical exercise of judicial power…a **common law cause** of action, when the action neither derives from nor depends upon any agency regulatory regime.
>
> *Id* at 467 (emphasis added).

The Court continued:

> If such an exercise of judicial power may nonetheless be taken from the **Article III** Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers the Court has long recognized into mere **wishful thinking.**

Id (emphasis added)

In the instant case, the District Court held:

> When Congress enacted the No Surprises Act, it permitted health care providers to recover payment directly from insurers for out-of-network services, which is a new public right. **Out-of-network providers' claims against insurers do not arise under state common law, but instead depend "upon the will of [C]ongress,"**

JA-48 at 12 (emphasis added)(citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856).

The District Court recognized that the salient factor permitting or prohibiting Article I to extricate rights from Article III Courts is whether they depend "upon the will of Congress" or **arise from common law**. As with the private right to sue insurers, **the simple right to bill and sue patients arises from common law.** The balance billing claim was fully submitted by prior counsel, but the District Court wrongfully ignored the of common law right to sue patients (and on appeal we included more common law cases).

In Thomas v. Union Carbide Agricultural Products Co., the United States Supreme Court emphasized that "Any right to compensation from follow-on registrants under § 3 (c)(1)(D)(ii) for EPA's use of data results from FIFRA and **does not depend on or replace a right to such compensation under state law [common law]**." *Id* at 594 (emphasis added].

During oral argument in the instant case, the judges too recognized that the essence is whether Congress created a new public right, or there is a common law, not derived from or depended upon Congress. For example:

p.19

10 **THE COURT:** But the District Court's
11 entire public rights analysis **rests on the absence**
12 of a common law right against insurers. So if
13 that's a mistake -- and -- and that was fairly
14 assumed by this Court in light of what happened
15 below, **but if that's not right, then it seems**
16 problematic to affirm

p. 19, 10-16 (emphasis added)(Judge Park)

The legal analysis concerning the NSA is uncomplicated. Congress, Article I, wished to create legislation to eliminate surprise bills and to lower premiums. So in one fell swoop they just purported to make the right of a medical provider to sue a patient disappear. This they cannot do. They purport to fix any issue by creating a Frankensteinian Independent Dispute Resolution Entity, which takes place entirely online, with no arguments, and insurance company's secret QPA's on top.

The common law right of a medical provider to sue a patient is simple, basic, and iron-clad. Where it exists, Article I cannot simply extinguish it, any more than they can extinguish Article III itself and the tripartite system of governance.

Plaintiff-Appellants did not and would not "abandon" this claim. The submission of the written brief is an immobile rock, it cannot blow away in the wind. The claims is further inscribed in the transcript of the oral arguments.

And no matter, the Court's holding that a *claim* of abrogation of the common law right to sue insurers in Article III with Seventh Amendment rights renders moving them into an Article I forum unconstitutional, but was *deemed forfeited* should be permitted at least remand to refile, applies with equal force to the identical argument concerning the prohibition of suing patients but *deemed abandoned* (respectfully, incorrectly). See 1-3-24 Trans., P. 18, at 11-21*;* and see *Id* at p. 19, at 10-21.

CONCLUSION

Petitioners respectfully request this Court grant out FRAP 40- Petition for Panel Rehearing, in accordance with the aforementioned facts and arguments, and for such other and further relief as is just, equitable, and proper.

New York, New York
March 15, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This petition complies with the type-volume limitation of Fed.R.App.P. 40(b)(2) because:

   This petition contains 3,883 words, excluding the parts of the brief exempted by Fed.R.App.32(f).

2. This brief complies with the typeface requirements of Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P32(a)(6) because:

   This brief has been prepared in Proportionally-Space typeface using Microsoft Word, in Times New Roman, Font Size 14.

Dated: March 15, 2024

SUMMARY ORDER, DATED JANUARY 23, 2024

22-3054
Haller v. U.S. Dep't of Health & Hum. Servs.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of January, two thousand twenty-four.

PRESENT:

MICHAEL H. PARK,
EUNICE C. LEE,
SARAH A. L. MERRIAM,
Circuit Judges.

Daniel Haller and Long Island Surgical PLLC,

Plaintiffs-Appellants,

v. **22-3054**

U.S. Department of Health and Human Services, Xavier Becerra, in his official capacity as Secretary of Health and Human Services, U.S. Office of Personnel Management, Kiran Ahuja, in her official capacity as Director of the U.S. Office of Personnel Management, U.S. Department of Labor, Julie Su, in her official capacity as Acting Secretary of Labor, U.S. Department of the Treasury, Janet Yellen, in her official capacity as Secretary of the Treasury,

Defendants-Appellees.[*]

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[*] The Clerk of Court is respectfully directed to amend the caption accordingly.

FOR PLAINTIFFS-APPELLANTS:	NICK WILDER, The Wilder Law Firm, New York, NY.
FOR DEFENDANTS-APPELLEES:	SARAH J. CLARK (Joshua M. Salzman, *on the brief*), U.S. Dep't of Justice, Washington, DC.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Donnelly, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED IN PART**, **VACATED IN PART**, and **REMANDED** for further proceedings consistent with this order.

Daniel Haller and his associates at Long Island Surgical PLLC are surgeons who challenge the constitutionality of the No Surprises Act. Pub. L. No. 116-260 (2020) (codified at 42 U.S.C. § 300gg-111 et seq.) (the "Act"). Appellants argue that the Act exceeds Congress's authority to assign adjudicatory functions to non-Article III tribunals, violates their right to a jury trial under the Seventh Amendment, and effects an unconstitutional taking of payments they would otherwise receive from patients. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a district court's grant of a motion to dismiss de novo, accepting all factual allegations as true and drawing all inferences in favor of the plaintiff. *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59 (2d Cir. 2016).

A. Article III and Seventh Amendment Claims

Appellants argued in the district court that Congress created no new public right when it enacted the No Surprises Act because the Act supplanted doctors' longstanding common-law

cause of action to sue *patients* for the reasonable value of emergency medical services. *See* Joint App'x at 128-29 ("Plaintiffs' common law claims are against the recipient of the medical treatment, not the insurer.").[1] Appellants did not argue that they had any particular right of action against *insurers*, and they expressly conceded before the district court that they had no such claims.

On appeal, Appellants assert for the first time that they may have held a cause of action against insurers before the No Surprises Act. We decline to consider that argument for the first time on appeal. But neither should Appellants be prejudiced if they wish to replead and to advance such claims before the district court at a later date. *See United States v. Gomez*, 877 F.3d 76, 94-96 (2d Cir. 2017) (noting our discretion in handling forfeited arguments). We thus affirm the judgment of the district court only insofar as it concludes that Appellants failed to state a claim under Article III or the Seventh Amendment based on their right to bring common-law actions against patients – a claim Appellants have abandoned on appeal. To the extent the district court concluded that Appellants lacked a common-law cause of action against insurers, we vacate and remand with instructions to dismiss Appellants' Article III and Seventh Amendment claims without prejudice to allow Appellants to plead such a claim if they so choose.[2]

B. Takings Clause Claims

We affirm the district court's judgment as to Appellants' takings claims. The Takings Clause provides that "private property [shall not] be taken for public use, without just

[1] The district court correctly concluded that the existence of a common-law cause of action against *patients* did not render providers' right to recover against *insurers* a "private" right that might (or might not) have been supplanted by the No Surprises Act.

[2] We express no opinion as to whether providers had a common-law cause of action against insurers before the No Surprises Act or, if so, whether the Act replaced such a cause of action.

compensation." U.S. Const. amend. V. Our precedents recognize two types of takings: physical and regulatory. *See Buffalo Tchrs. Fed'n v. Tobe*, 464 F.3d 362, 374 (2d. Cir. 2006). Only the regulatory variety is at issue here.

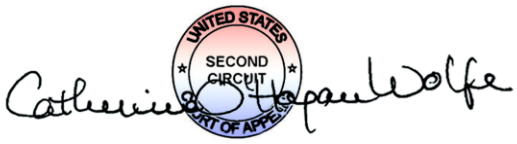
To determine whether "justice and fairness require that economic injuries caused by public action must be deemed a compensable taking," we employ an "ad hoc, factual" approach that considers "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984) (citation and quotation marks omitted); *Buffalo Tchrs. Fed'n*, 464 F.3d at 374, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980). Of course, not every alleged reduction in the value of property is sufficient to support a takings claim. *Andrus v. Allard*, 444 U.S. 51, 66 (1979). We have observed that "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." *Id.* We thus ask, for example, whether a regulation will "*unreasonably* impair the value or use of [plaintiff's] property." *See PruneYard Shopping Ctr.*, 447 U.S. at 83 (emphasis added).

Appellants here fail to allege a regulatory taking. They argue that what was "taken" from them was "the reasonable calculation of future income stream." Appellant's Br. at 56. Such vague and speculative allegations of an unspecified diminution in future income are insufficient to state a claim under the Takings Clause. We thus affirm the judgment of the district court as to Appellants' takings claim.

* * *

We have considered Appellants' remaining arguments and found them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED IN PART**, **VACATED IN PART**, and **REMANDED** for further proceedings consistent with this order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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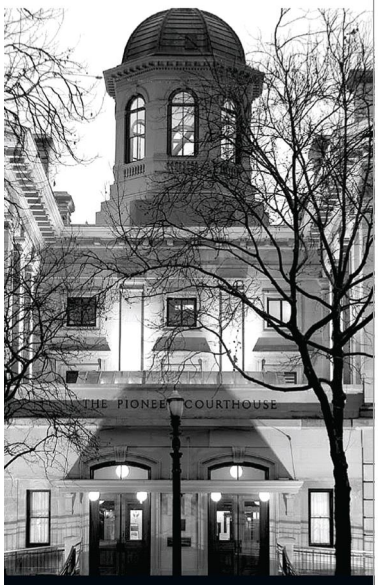
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

TRANSCRIPT OF ORAL ARGUMENT PROCEEDINGS, HELD ON JANUARY 3, 2024



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL HALLER and LONG ISLAND SURGICAL PLLC,

Plaintiffs-Appellants,

v. Case No. 22-3054

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, U.S. OFFICE OF PERSONNEL MANAGEMENT, KIRAN AHUJA, in her official capacity as Director of the U.S. Office of Personnel Management, U.S. DEPARTMENT OF LABOR, JULIE SU, in her official capacity as Acting Secretary of Labor, U.S. Department of the Treasury, JANET YELLEN, in her official capacity as Secretary of the Treasury,

Defendants-Appellees.

TRANSCRIPT OF PROCEEDINGS

HELD ON
WEDNESDAY, JANUARY 3, 2024

BEFORE THE HONORABLE
MICHAEL H. PARK, CIRCUIT COURT JUDGE
EUNICE C. LEE, CIRCUIT COURT JUDGE
SARAH A.L. MERRIAM, CIRCUIT COURT JUDGE

THURGOOD MARSHALL UNITED STATES COURTHOUSE
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NEW YORK, NEW YORK 10007

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U.S. Department of Justice

Civil Division

950 Pennsylvania Avenue NW

Washington, D.C. 20530

TRANSCRIPT OF PROCEEDINGS

HELD ON

WEDNESDAY, JANUARY 3, 2024

THE COURT: Case Number 22-3054, Haller versus United States Department of Health and Human Services.

MR. WILDER: Good afternoon, Your Honors. May it please the Court. My name is Nick Wilder of the Wilder Law Firm. I am representing Dr. Haller and his associates. They are a surgical practice in Great Neck.

And we are challenging the No Surprises Act, which is -- I won't go through all of it because I'm sure you've read it, and these kinds of legislation is not very fun to read. But, essentially, the No Surprises Act was enacted purportedly to eliminate any, quote, unquote, surprise bills to patients who had gone into, for example, the emergency room and were expecting their insurance company to pay for their medical treatment, and they were out of network, and they did not -- the insurance did not cover either -- did not cover all of what was expected in terms of costs were known, after which they would get a bill from

the doctor, which was a surprise, because they expected to be covered.

And it also provides for a -- what's known as the IDR, which is the Independent Resolution Board, for -- as a means of shifting any issue, bringing the patients out of the question and bringing the -- the doctors and insurance companies together for an arbitration during -- in which each side gives a number, and the arbitrator is simply to decide which one of those numbers they'll go with.

THE COURT: Is that IDR process mandatory or voluntary?

MR. WILDER: It is essentially -- it is mandatory, and the -- the defendant-appellants have agreed that it is mandatory. The language, essentially, in the --

THE COURT: I don't know that you can agree to what the statute says. The question -- I mean, the question is whether -- let me back up.

MR. WILDER: Okay.

THE COURT: The amicus brief of the -- I guess the brain surgeons and associations says that there's not a Seventh Amendment problem because this is a voluntary -- it's a permissive process and it points to the use of "may" in various places. And

if it's not compulsory, then it doesn't -- it doesn't preempt the common law rights, whatever they may have been --

MR. WILDER: Well, they -- it -- it does by -- by virtue of the fact that if any -- either of the parties choose, so they may -- either party may choose that process. And if they choose that process to go through the arbitration, the other party is bound to go along with it.

THE COURT: I see. So your clients will, as a practical matter, always be stuck with the process because --

MR. WILDER: Correct.

THE COURT: Okay.

MR. WILDER: So -- and -- and just to quote from the appellee's brief, they use the word "mandatory."

THE COURT: Well, right, but again, the appellee and the appellant --

MR. WILDER: And I'm --

THE COURT: -- here --

MR. WILDER: -- it's appellees.

THE COURT: -- undisputed that you two agree that it's mandatory.

MR. WILDER: Yeah.

THE COURT: Can you just -- to follow up on that, can you tell me what it is about the statute that leads you to believe that if one side says, hey, can we do the 30-day negotiation, and the other side says, no thanks, I'd like to sue you, that the other side is required to engage.

MR. WILDER: Yes.

THE COURT: I'm wondering where the --

MR. WILDER: Yes.

THE COURT: -- if that's just the implication of the statute, sort of otherwise, what would the point be?

MR. WILDER: Yes.

THE COURT: That, otherwise, the statute doesn't really have any effect, so that must be the purpose.

MR. WILDER: Yes. It -- correct. It makes -- there's no language in there that says this is a voluntary alternative for the parties to come together. It says, if one party elects to -- when they -- I wish I had the language in front of me, but the -- the process is initiated when one party chooses to do so. From that point on, the other party has to respond, go through the 30-day negotiation, and so forth.

The -- now, getting to -- so getting to the -- quickly, just some of the problems with -- we -- the first -- the first considerations for the -- which must be considered by the arbitration board is the QPA, which -- the Qualified Payment Amount, which is entirely determined by the insurance companies. And it is determined on very sketchy questionable grounds that are often not disclosed. They're based on, quote, "ghost rates," which they don't reveal, a combination of different kinds of procedures are averaged, and this is a number that they give. But I --

I'd like to get to the central point of my appeal -- of our appeal is that the -- the doctors being forced to go to arbitration is a violation of the Seventh Amendment because, of course, that violates their Seventh Amendment right to bring a case before an Article 3 forum and -- under a jury trial. And the Court --

THE COURT: Well, that depends on whether there was a preexisting common law right --

MR. WILDER: Right, exactly.

THE COURT: That's --

MR. WILDER: And there is --

THE COURT: -- not something the District

Court --

-

MR. WILDER: That's correct. And the -- the Court correctly stated that. The cases all state that. And it -- the Court erred in not recognizing there is an abundance of common law --

THE COURT: But how did the Court err when your client -- I understand it was different counsel, is my understanding --

MR. WILDER: Mm-hmm.

THE COURT: -- but conceded that there was no common law right. So then the Court said, thank you, and put that aside and focused on the right to see patients --

MR. WILDER: I understand.

THE COURT: -- right?

MR. WILDER: So prior counsel was prior counsel. The number one answer to that is that the -- well, the Court spent six pages devoted -- the other side has said, we forfeited, we forfeited, we forfeited because this was not in the -- what was discussed below by prior counsel. But the Court itself spent six pages discussing, and I would underscore, A, the joint appeal -- the Joint Appendix, page 56 to 61, the Court spent six pages

discussing this issue of arbitration versus -- discussing the constitutionality of having the doctors have to go to arbitration to --

THE COURT: But because of a common law right to sue patients, right? That's 56 to 61 --

MR. WILDER: Both of them. Both issues are presented, although the -- the Court did not discuss the common law right to sue patients almost at all, but I did include innumerable cases in which doctors, prior to the NSA, sued patients successfully. And there are also innumerable cases in which the doctors sued insurance companies successfully, so --

THE COURT: Are you pursuing the claim that the aspect of this argument that is hinged on whether there was a common law right to sue patients, so the way I was reading this was below, you focus solely on a common law right to sue patients and conceded a lack of a common law right to sue insurers. And now we've reversed that, that you're no longer proceeding --

MR. WILDER: And under -- under -- I understand your question. Under Yee versus Escandito and a plethora of other cases, the -- there -- these are United States Supreme Court

cases. The arguments can change. As long as you're --

THE COURT: But just help me make sure -- am I right about what the arguments are? Before we -- I understand that we --

MR. WILDER: Yeah. Yes, correct. Correct.

THE COURT: Okay. All right.

MR. WILDER: So as long as your claim is the same, for example, a Seventh Amendment violation, you can change the argument, and this is repeated over and over and over and over again. And what we've changed -- the same argument, Seventh Amendment violation or the same claim, Seventh Amendment violation, but we've shifted to a -- a better argument that -- which was addressed extensively by this Court -- I mean -- excuse -- by the -- the Court below, and for six pages, that the denial -- that the doctors have a strong body of common law allowing them to sue insurance companies, including in federal court in New York. There are several cases that permit this, especially under unjust enrichment if they'd not been paid.

There's a --

THE COURT: Are --

MR. WILDER: -- a number of those cases.

THE COURT: Are there -- do any of them indicate a right --

MR. WILDER: I'm sorry?

THE COURT: -- a common law right as to a jury trial? You framed it as the denial of your Seventh Amendment jury trial rights.

MR. WILDER: Yes.

THE COURT: There are cases you cite that -- that -- relating to the common law right to sue insurers --

MR. WILDER: Correct.

THE COURT: -- that involve jury trials?

MR. WILDER: There are -- yes, there are about seven or eight cases, a number of them federal cases in New York, which have allowed that. So there is a common law right already.

That being the case, the -- the Court cannot -- the -- the lower Court and any -- and the law cannot extricate those common law cases and input the -- and take them and put them into an Article 1 new-fangled arbitration process, number one.

And secondly -- or also -- in addition, the -- the case law, which at times, says, in New

York, that you cannot make -- that generally, we prefer not to have new arguments, say, however, when there are no new facts, only new -- but only matters of law in the -- in the, quote, new argument. No new facts. Only -- no new need for fact development. The only matters of law and where to -- to not address it would be to leave statutory law unaddressed, which needs to be addressed, which is pivotal to the decision and would lead to bad decisions.

THE COURT: Before you run out of -- well, I guess your time's out, but I -- I have a question about your taking this claim. What -- well, you filed suit before the Act became effective, isn't that right?

MR. WILDER: Correct.

THE COURT: So how could -- what was the taking and how could it have been a taking if before the statute was effective?

MR. WILDER: Because the language is so clear that -- and it's been proven over the past two years to have manifested itself that this is going to effectively demolish many doctors' practices as -- but what has happened is that the insurance companies, now that they have this arbitration that

--

THE COURT: Let me try to be more precise. Is the thing that you are alleged was -- has been taken --

MR. WILDER: At the time --

THE COURT: -- legal claims, common law legal claims, or is it dollars?

MR. WILDER: It's dollars is what it amounts to. It's amounted to that as a result of --

THE COURT: And -- and how do you -- how do you articulate that injury? What are you talking about?

MR. WILDER: As a result of the NSA, the insurance companies are not willing to negotiate anymore in in-network payment to doctors, and they -- the doctors -- there's been a widespread attrition of doctors practicing, which has harmed the public, and there would also need to be more time for it to develop.

The record hasn't been developed. This is a motion to dismiss. The claim was made --

THE COURT: Do you -- can I just -- I'm sorry, can I just -- you're saying that the record hasn't been developed. I mean, that is a problem. You're asserting an injury, but there's no support

for that injury in your -- in your filings. You're saying, well --

MR. WILDER: What -- I understand what you're saying.

THE COURT: -- this is what we believe is going to happen in the future.

MR. WILDER: I would suggest if you have a home which has been determined it's going to be demolished and they are telling you they'll pay you whatever they want, you -- you essentially already have an injury even though the home hasn't been demolished.

THE COURT: But that's not -- that's different. That's very specific because if someone says, we're going to demolish your home, okay. This -- what you're describing in terms of the effects of this law are -- it seems very speculative. It's like, well, we think it's going to drive doctors out of business, and we think this is going to happen, and it's not going to really help the general public --

MR. WILDER: Well, we -- we see from the language of the statute that there is a presumption that the -- the insurance companies' QPA is correct. And although it's similar language, it -- there's no

question that it was going to have a deleterious effect on doctors, and I think the purpose was to really -- was to take -- for that to happen, for more money to be -- for doctors to share an excessive amount of the money they make, which ends up bringing them out of business.

And if the Courts are willing, I would like to leave that argument for my brief and just go back to that - - the prior argument, if that's okay.

THE COURT: Why don't you wrap up.

MR. WILDER: Okay. I will.

THE COURT: You'll have a few minutes for rebuttal.

MR. WILDER: Okay. Thank you.

The -- the -- the law is very clear that when you have -- all of the cases that were cited by the Court -- and, again, this is not -- their argument that it's forfeited doesn't work because the -- the Court itself spent six pages talking about this, "this" being the doctors be able to sue insurance companies.

Northern Pipeline, Granfinanciera, Stern versus Marshall, Murray's Lessee, all of these cases and others that are cited in their cases and the court case in the decision -- in the lower Court's

case, they all mandate that common law cases cannot be taken into Article 1 forum, and for an Article 1 forum to be used to deposit a right, it has to be a new public right created by congress.

When you have a standard common law case, contract, tortious interference, that cannot be simply put into -- taken by the Article 1 and put into a case -- a forum for adjudication other than the Article 3 and Seventh Amendment, a traditional court. And there was some discussion about, well, if -- it's efficient. It's efficient, and so forth to use that -- the arbitration. Efficiency is not the standard. The Constitution -- constitutional rights cannot be abrogated based on the notion that it may be more efficient.

And I would like to add one more point, that the -- the idea that, well, there's also language, for example, that you can -- that this exception -- the public rights is an exception to Article 3. It's not sort of the rule. It's an exception. That exception can happen when the -- what -- the forum is derived from legislation, meaning it's a whole new right, where it's deemed essential. It's deemed essential to have this kind of specialized Court with experts.

And I would suggest on the -- the cases all suggest this would totally eviscerate Article 3. Look at a medical malpractice case and how complicated that is. That's a lot more complicated --

THE COURT: Mr. Wilder, I think we have your argument. You've reserved a few minutes for rebuttal.

MR. WILDER: Okay.

THE COURT: Thank you.

MR. WILDER: Thank you.

MS. CLARK: May it please the Court. Sarah Clark for the United States. I want to start with Plaintiffs' argument, what I take to be Plaintiffs' argument against their forfeiture.

So obviously, in District Court, Plaintiffs expressly disclaimed any common law claims against insurers, so that's at JA 174 and 175, their colloquy with the judge. And they say now that essentially they haven't forfeited because the District Court addressed it.

But that's not right, right? The District Court took as its premise -- as one of its premises Plaintiffs' concession and then went on to examine the case based on the premises that it was litigated

below, which is that the Seventh Amendment claim was based on Plaintiffs' asserted common law claims against patients.

So the fact that the Court, you know, went on to address this sort of Seventh Amendment doctrine and sort of didn't sort of carve out the insurer point doesn't mean that they addressed whether there are common law claims against insurers, and it doesn't detract from Plaintiffs' concession below. It's no argument for --

THE COURT: It -- it arguably raises a different problem, though, which is that the District Court's analysis was resting on something that was conceded that may or may not be correct as a matter of law. And are you asking us to affirm on that basis just because it was a forfeited argument?

MS. CLARK: So I --

THE COURT: -- there may be a serious, you know, Seventh Amendment argument here and to affirm on the basis of a concession it may have been a mistake seems problematic to me.

MS. CLARK: No, Your Honor, it's not problematic because the question is whether Plaintiffs have stated a claim here, so this is not an issue -- even a statutory interpretation where,

you know, we're asking the Court to go with one reading because Plaintiffs didn't make a certain argument.

They framed their entire Seventh Amendment challenge, which, of course, is about common law claims, based on the idea that they have claims against patients. So there's no problem with affirming the District Court's conclusion that, you know --

THE COURT: But the District Court's entire public rights analysis rests on the absence of a common law right against insurers. So if that's a mistake -- and -- and that was fairly assumed by this Court in light of what happened below, but if that's not right, then it seems problematic to affirm. I guess that's the concern that I have with your position.

MS. CLARK: I -- I disagree with that, Your Honor, because, again, the claim that Plaintiffs brought was premised on claims against patients. So it's not up to the District Court to say, you know, what if you had brought a different claim, one based on claims against insurers. That simply wasn't what was at issue. And so if this Court were to affirm the District Court here, it

wouldn't be, frankly, opining on whether there is or is not a claim against --

THE COURT: But the public rights framework doesn't make sense if there is a claim of common law against --

MS. CLARK: Well, it made sense for the District Court to discuss it because it was --

THE COURT: I agree. I'm not disputing what the District Court did here in light of what happened, but I'm concerned about what we should do in light of the forfeiture that you're talking about now.

MS. CLARK: I guess I would just add it additionally made sense for the District Court to discuss it because the District Court was explaining that, you know, Plaintiffs have brought this case based on claims against patients. The IDR system doesn't adjudicate disputes between patients and providers; therefore, there was no problem with the IDR system under the Seventh Amendment or Article 3.

So -- so again, I would just reiterate that it's -- it's not stating one way or the other anything about this legal issue that Plaintiffs conceded. And you know, again, I -- Plaintiffs haven't provided any reason for this Court to excuse

their forfeiture as we go outside of the traditional rules of party presentation and, you know, address a claim that they never brought in District Court.

THE COURT: How about the argument raised in the amicus brief, the brain surgeons, about the -- whether the idea or process is compulsory or we can avoid a Seventh Amendment problem by reading "may" to be permissive?

MS. CLARK: So --

THE COURT: Again, another thing the District Court didn't address because it wasn't raised at the time.

MS. CLARK: Right. So of course, we don't think this Court or the District Court would have needed to address this question of whether the IDR process is mandatory. As we note in our brief, we do think the best reading of the Act is that it is mandatory.

One, you know, provision that -- so it tells us that once a party has initiated IDR, it directs at -- I apologize for the long cite -- 300gg-111(c)(5)(b)(i), that the parties shall each submit to the arbitrator an offer for our payment amount. So clearly, I think the Act contemplates that both parties will participate.

But, again, of course, just to take a step back, we don't think that the Court needs to reach that here, and of course, if -- I think if the Court viewed that as something necessary to address, the best course would be to remand to the District Court so it could actually address that issue in the first instance. Of course, as you noted here, it's an odd -- Plaintiffs don't take the position that the amicus takes in this case either.

I'll just note one more point. So Plaintiffs have, I think, in this sort of vein of forfeiture, said, you know, this is just a new argument in support of the same claim, and, therefore, we're not really in the world of forfeiture. And that's not right for the reason that their entire premise of their claim has changed. So this isn't a question of statutory interpretation, again, where, you know, they've brought in a new dictionary definition or a new structural argument. They've fundamentally changed the nature of their challenge here, so we're not in the world of, you know, we thought of a new argument in support of the same claim.

If the Court has no further questions, we're happy to rest on our briefs and ask that the

Court affirm.

THE COURT: Thank you, counsel.

We'll hear rebuttal.

MR. WILDER: Thank you, Your Honor. I almost feel as if I don't need to, but I will -- I would like to continue to -- the --

THE COURT: I'm sorry, let me just -- before you get started on that, let me circle back to Judge Park's question about the takings claim.

It's now been almost exactly two years, I think, since this complaint was filed. Does Dr. Haller now have a specific -- because Judge Lee was trying to get you to say what is the dollar that was lost here. So your comments suggest that on a day-to-day basis, Dr. Haller and others are losing --

MR. WILDER: Yes.

THE COURT: -- payments. Has that happened and -

-

MR. WILDER: Yes.

THE COURT: -- are -- is he -- is there a new case now?

MR. WILDER: Well, we can't bring that case again now. It's already been brought. I don't know how I could bring --

THE COURT: Well, there'd be -- if there's a specific taking, does Dr. Haller have some --

MR. WILDER: Okay. Yes. I understand. I agree --

THE COURT: -- where he says, I treated Mr. --

MR. WILDER: Yes.

THE COURT: -- Jones, and --

MR. WILDER: Yes.

THE COURT: -- I -- I'm owed 10,000, and I got 2,000, and that's a taking.

MR. WILDER: Yes. There is on a daily basis hemorrhaging money. They can't even afford the overhead. And this is widespread among doctors.

THE COURT: So -- but at no point while this was under way, while this District Court action was open, did Dr. Haller -- did the Plaintiffs move to amend to --

MR. WILDER: Yes.

THE COURT: -- to add specific -- there's a proposed amended complaint, but I'll go look for it, but that says, here are the specific takings?

MR. WILDER: I don' know if they did -- if that happened with the law firm below, which -- but I do know that they did move to amend, but I don't

know what the subject of the amendment was.

THE COURT: Okay. Thank you.

MR. WILDER: Going back to -- or specifically addressing what opposing counsel stated, they said the claim was never brought. "The claim," meaning the claim that the doctors haven't been able to -- or the doctors have a common law right under Seventh Amendment to sue the insurers. The claim was brought. The claim is the violation -- the Supreme Court cases, Yee and its progeny, that it's -- the claim is the Seventh Amendment was violated.

That there was an Article 3 violation and a Seventh Amendment violation, that is the claim. The argument is that the -- that they are being denied -- the providers are being denied the ability to sue insurers even though there's an extensive body of common law which gave - - gives them just that and on the exact same relief we have here, which is unjust enrichment. There are a plethora of cases out there that provide that, and the Court below does not recognize that at all, but she does.

And I'll also respond to opposing counsel. She says that the Seventh Amendment discussion by the Court below gets into the issue of suing

patients. It doesn't. Ninety percent of what's in that section -- and I will again -- and I would respectfully direct the Courts to Joint Appendix, page 56 to 61. She discusses Seventh Amendment, and almost every word of it is about why -- why the doctors can't sue the insurers. And that reason she gives is there's no common law. And then --

THE COURT: I know you don't want to admit forfeiture, but what's -- what would be wrong with remanding and maybe with instructions for dismissal without prejudice, and you can start over, because your case has changed. It started out as having to do with claims about patients, and it was premature as to takings as far as I can tell. But if you could start over, then maybe you can state the arguments that you're stating now. How -- how would you feel about that?

MR. WILDER: Well, I would prefer the Court simply reverse, but if that were a course of action the Court takes, I think that that would be also a reasonable course of action. If we were actually to redraft -- if we're talking about actually redrafting, I think that would be, you know, quite suitable.

But just to continue briefly -- I don't

know if you want me to do this, but there -- the -- there's a lot of problems with the other side and with some of what is said. For example, that it's more efficient to just go to these panels. Again, efficiency and the numerous of the cases quoted -- cited by everybody say that efficiency is not and can never be a standard to circumvent Article 3 and -- and just create these arbitration panels. And again, many of the cases say if -- even --

THE COURT: I don't know about the policy, you know, the pros and cons of efficiency of either process, but I am interested and I've asked both sides about whether it's compulsory or not, and that's another thing --

MR. WILDER: I believe, as they do, that it is compulsory. At least, it's compulsory if one side or the other chooses it. That's what the language states. If one party submits the paperwork, then it is initiated, and that's it, and the other party has an answer.

And I would just like to briefly -- you stopped me before, so I don't know if you're interested in this but --

THE COURT: Why don't you wind up -- or wind down.

MR. WILDER: Okay. I would like to -- okay. Sure. Thank you.

I would like to briefly address that if this -- this paradigm were followed, it would eviscerate Article 3 completely, and many of the only -- some of these cases say that. That is, if you were to take something Article 1 creates a -- a new right -- well, which is the public, but if it somehow keeps borrowing from the common law and sticking it into this new paradigm or into their arbitration panels, saying, well, this is just a little bit. It will help a little bit.

If you keep doing that, you end up with no more Article 3 because you could do that with a medical malpractice case. What could be more complicated than chemistry and biology? You can do that with -- if a building collapses. What could be -- and when I say, "do that," a panel of, quote, "experts." Of -- where there's negligence by engineers and other people, you can do this with so many cases that you say, well, we need special experts. You don't need special experts to determine the - - whether a fee paid to a doctor is reasonable.

You have attorneys. You have experts.

And then you have a jury to decide, and that's what is the appropriate forum for this case. And the denial of that is a violation of the constitutional right to the Seventh Amendment right for a jury and Article 3. Thank you, Your Honors.

THE COURT: Thank you, counsel. Thank you, both. We'll take the case under advisement.

(WHEREUPON, the proceedings concluded.)

CERTIFICATE

I, Jodi Dean do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true, and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 29th day of February, 2024.

Jodi Dean