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July 14, 2023

The Honorable Hector Gonzalez, U.S.D.J.
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Long Island Anesthesiologists PLLC v. UnitedHealthcare Insurance Company of New York et al.*, No. 2:22-cv-04040, Notice of Supplemental Authority

Dear Judge Gonzalez:

I represent UnitedHealthcare Insurance Company of New York in this litigation and write to notify the Court of a decision (attached as Exhibit 1) by the New York State Supreme Court for Albany County in *Wayne Joseph v. Rebecca Corso*, No. 902227-22 (N.Y. Sup. Ct.), a case in which Plaintiff Long Island Anesthesiologists PLLC (LIA) is also a party. As relevant to UnitedHealthcare's motion to dismiss (*see* Dkt. 31-1 at 8-13; Dkt. 45 at 1-3), the *Joseph* Court held that the New York Surprise Bill Law does not apply to the Empire Plan and that UnitedHealthcare does not control the Empire Plan's coverage or reimbursement decisions.

In this litigation, LIA complains that it began receiving lower reimbursements when the Empire Plan (the state-sponsored health plan for New York state employees) began applying the federal No Surprises Act instead of New York's Surprise Bill Law when reimbursing LIA for out-of-network anesthesiology services. LIA alleges that UnitedHealthcare is responsible for the Empire Plan's decision to apply the federal No Surprises Act. *See generally* Dkt. 1, Compl.

In the *Joseph* opinion, the New York state court rejected LIA's allegations, holding that "United cannot and does not, control the Empire Plan's coverage or reimbursement decisions" and that "the Surprise Bill Law is not an applicable insurance law to the Empire Plan." *See* Ex. 1 at 5-6. Those holdings foreclose LIA's claims; the Court should dismiss LIA's Complaint.

Respectfully,

/s/ Brian D. Boone

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Attorney for UnitedHealthcare Insurance Company of New York

Exhibit 1

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

WAYNE JOSEPH; THOMAS COTTONE, SONYA HWANG COTTONE: LORETTA POST; LONG ISLAND ANESTHESIOLOGISTS, PLLC; LONG ISLAND ANESTHESIA PHYSICIANS, LLP.; NEW YORK CARDIOVASCULAR ANESTHESIOLOGISTS, P.C.; SUFFOLK ANESTHESIOLOGY ASSOCIATES, P.C.; ADVANCED PLASTIC SURGERY OF LONG ISLAND PLLC., DA MEDICAL SERVICES PLLC; DA SILVA PLASTIC & RECONSTRUCTIVE SURGERY, P.C.; HAND ASSOCIATES OF LONG ISLAND, P.C.; ISLANDWIDE SURGICAL, P.C.; K. JACOB COHEN-KASHI, M.D. & LAWRENCE C. LIN, MD, PLLC; LISA CORRENTE, M.D., P.C.;LONG ISLAND NEUROLOGICAL & PAIN SPECIALISTS, PLLC; LONG ISLAND THORACIC SURGERY, P.C.; MONTAUK MEDICAL ASSOCIATES PLLC.; PERFORMANCE MEDICAL PRACTICE PLLC; SAGTIKOS MEDICAL SERVICES, P.C.; SPINE MEDICAL SERVICES, PLLC; AND UNITED MEDICAL MONITORING, P.C.,

Plaintiffs,

-against-

REBECCA CORSO, as Acting Commissioner, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; UNITED HEALTHCARE INSURANCE COMPANY OF NEW YORK INC., as Program Administrator, THE EMPIRE PLAN MEDICAL/SURGICAL PROGRAM; and ADRIENNE A. HARRIS, as Superintendent, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Defendants.

Supreme Court Albany County, Part IAS - All Purpose Term
Hon. Roger D. McDonough, Acting Supreme Court Justice Presiding
RJI # 01-22-141359 Index # 902227-22

Appearances:

HARRIS BEACH PLLC
Attorneys for Plaintiffs
(Roy W. Breitenbach, Esq., Jack M. Martins, Esq., and
Daniel S. Hallak, Esq., of Counsel)
The Omni
333 Earle Ovington Blvd, Suite 901
Uniondale, New York 11553
-and-
677 Broadway, Suite 1101
Albany, New York 12207

LETITIA JAMES
Attorney General of the State of New York
Attorney for Defendants Rebecca Corso as Acting Commissioner, New York State Department of Civil Services ("DCS"), The Empire Plan Medical/Surgical Program ("Empire Plan"), and Adrienne A. Harris, as Superintendent, New York State Department of Financial Services ("DFS") - collectively referred to as ("State defendants")
(William A Scott, Esq., A.A.G., of Counsel)
The Capitol
Albany, New York 12224-0341

ALSTON & BIRD LLP
Attorneys for Defendant UnitedHealthcare Insurance Company of New York("United")
(Karl Geercken, Esq., of Counsel)
90 Park Avenue
New York, NY 10016

DECISION AND ORDER

Roger D. McDonough, Justice

Plaintiffs seek declaratory and permanent injunctive relief in this proceeding. During the pendency of the proceeding, this Court[1] denied plaintiffs' motion for a preliminary injunction. The complaint sets forth two causes of action. Plaintiffs' first cause of action seeks an Order declaring that Civil Service Law § 162 requires the Empire Plan remain subject to New York

[1] Additionally, this Court (Justice Ryba) denied any temporary injunctive relief upon the execution of plaintiffs' proposed Order to Show Cause.

insurance law. The second cause of action seeks an Order permanently enjoining defendants from denying plaintiff physician practices, and others, from access to DFS complaint procedures and state IDR processes. United moves to dismiss the complaint, with prejudice, pursuant to CPLR § 3211. Similarly, the State defendants move to dismiss pursuant to CPLR § 3211(a)(7). Plaintiffs oppose the motions to dismiss. Alternatively, as to United, plaintiffs seeks leave to amend their complaint. United opposes the alternative relief requested. Finally, plaintiffs have cross-moved for summary judgment on their causes of action. Alternatively, they seek renewal of their prior motion for preliminary injunction.[2] All defendants oppose the cross-motion in its entirety.

Background/Discussion

The Empire Plan is a governmental self-funded insurance plan, subject to the Civil Service Law and specific provision of the Insurance Law. Several of the plaintiffs are individual enrollees of the Empire Plan. The remaining plaintiffs are physician practices. The practices are either out-of-network for the Empire Plan or have physicians as employees or equity owners who are out-of-network. United is the Program Administrator of the Empire Plan. DCS is the state agency responsible for overseeing the Empire Plan. DFS's authority extends to oversight of New York's independent dispute resolution process ("IDR"). The IDR is in place to resolve payment disputes between out-of-network providers and insurers.

Congress enacted the No Surprises Act in 2020, and made it effective as of January 1, 2022. The Act provides for a federal IDR process for out-of-network rates in certain circumstances where a "specified state law" does not apply. Plaintiffs maintain that New York has such a specified state law with the Surprise Bill Law. Said Law became effective in March of 2015. Under this Law, the IDR entity was required to consider the FAIR Health benchmarking database ("FAIR Health") when determining the reasonable fee for out-of-network providers. The No Surprises Act focuses on the Qualifying Payment Amount ("QPA"). Plaintiffs maintain that the QPA is biased and significantly less than the FAIR Health

[2] The Court notes that a claim for a permanent injunction is not a cognizable cause of action, but rather constitutes a remedy for an underlying wrong (*see*, Talking Capital Llc v Omanoff, 169 AD3d 423, 424 [1st Dept. 2019]).

reimbursement in virtually all circumstances.

According to plaintiffs, as of January 2022, the Empire Plan has taken the position that the federal No Surprises Act now exclusively applies to its out-of-network reimbursement procedures. Plaintiffs assert that this has resulted in cutting out-of-network reimbursements by more than 80%. The plaintiffs maintain that these actions are illegal and fail to comply with Civil Service Law § 162. Further, plaintiffs contend that the illegal actions have led to, or will lead to: (1) out-of-network physician practices going out of business or drastically reducing their services; (2) reductions in said practices' ability to continue to provide medically necessary surgical and specialty medical services to Empire Plan enrollees; (3) hampering the ability of the the out-of-network practices that do survive to recruit and retain physicians and acquire medical equipment and information systems; (3) severe impacts to the accessibility of quality medical care available to the Empire Plan enrollees; (4) the disruption of the out-of-network practices' relationships with their patients; and (5) the disruption of the availability of emergency medical services as hospitals throughout the State. Accordingly, plaintiffs brought the instant proceeding.

United's Motion to Dismiss

United raises two principal arguments in its motion to dismiss. The first is that it is an improper defendant because it does not provide the funding for out-of-network reimbursements under the Empire Plan. Secondly, United contends that it does not have the power or authority to provide the relief that plaintiffs' complaint seeks. Finally, United maintains that the federal No Surprises Act applies to the Empire Plan and that the Court should defer to the statutory interpretation advanced by DCS and DFS. On this issue, United has incorporated the State defendants' arguments by reference.

Plaintiffs maintain that United is a proper party based on United's level of control over the Empire Plan. Specifically, plaintiffs allege that United directed the Empire Plan to implement the significant change of following the federal No Surprises Act. Alternatively, plaintiffs request leave to amend their complaint. However, no detail on what the amended complaint would allege concerning United is set forth.

United has clearly established that the declaratory relief sought by plaintiffs would be of

no moment as United cannot, and does not, control the Empire Plan's coverage or reimbursement decisions. Accordingly, declaratory and/or injunctive relief against United would be pointless in the absence of United's power/authority to control the type of coverage and reimbursement decisions being sought by plaintiffs (*see*, Rice v Cayuga-Onondaga Healthcare Plan, 190 AD2d 330, 333 [4th Dept. 1993]). Specifically, the Court concludes that United's documentary evidence, in the form of documentation regarding its role in administering the Empire Plan, has adequately satisfied United's dismissal burden under CPLR § 3211(a)(1). The Court also finds insufficient grounds to grant the request for leave to amend based on: (1) the futility of any such amendment in light of United's clearly defined role; and (2) the absence of any proposed amended pleading or detail as to what said pleading would contain.

In any event, for the reasons stated below, even if United was a proper defendant to this action, the relief requested in plaintiffs' complaint must be denied in its entirety.

State defendants' Motion to Dismiss/Plaintiff's Cross-Motion for Summary Judgment

The State defendants move to dismiss pursuant to CPLR § 3211(a)(7). The Court finds that the plaintiffs' have adequately stated a cause of action for declaratory relief[3]. The Court must therefore deny the motion to dismiss and turn to the merits of the declaratory relief and declare the rights of the parties (*see*, St. Lawrence University v Trustees of Theological School of St. Lawrence University, 20 NY2d 317, 325 [1967]).

The State defendants argue that the Surprise Bill Law does not apply to the Empire Plan because the Empire Plan is a governmental self-funded health plan. Specifically, they point to the five clear definitions in the Surprise Bill Law of what plans constitute "health care plans". The State defendant notes that the Empire Plan does not remotely meet any of the five definitions. Accordingly, they maintain that the Surprise Bill Law does not constitute the type of State statute that would override the federal No Surprises Act. They also note that they are entitled to deference from this Court as they are interpreting a statute in their particular areas of expertise.

Plaintiffs maintain that Civil Service Law § 162 clearly governs here and mandates that

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[3] As noted above, this is the only cognizable cause of action stated by plaintiffs as their second cause of action sought a permanent injunction.

the Empire Plan is subject to the Surprise Bill Law. Accordingly, they argue that summary judgment in their favor is wholly warranted. In particular, plaintiffs rely upon the language in Civil Service Law § 162 subjecting the Empire Plan's actions to review for compliance with the applicable insurance laws and regulations. They also note that consideration of the language of the Surprise Bill Law is unnecessary in light of the plain language of Civil Service Law § 162.

In reply, the State defendants note that Civil Service Law § 162 clearly only subjects the Empire Plan to "applicable" insurance laws and regulations. They further note that nothing in § 162 requires the Empire Plan to subject itself to the Surprise Bill Law and that said Law's health plans definition clearly excludes the Empire Plan.

Regardless of the appropriate level of deference the Court is required to give the State defendants here in their interpretation and application of the relevant statutes, the Court finds that the interpretation and application is not unreasonable, irrational or contrary to the clear wording of the relevant statutes (*see*, Matter of Kennedy v Novello, 299 AD2d 605, 607 [3rd Dept. 2002]). Specifically, the Court finds that the Empire Plan does not fit any of the definitions of a health plan under the Surprise Bill Law. As such, the Surprise Bill Law is not an applicable insurance law to the Empire Plan under Civil Service Law § 162. Accordingly, the Surprise Bill Law, in terms of its applicability to the Empire Plan, does not constitute a "specified state law" as set forth in the federal No Surprises Act. As such, the Court finds that the State defendants usage of the federal No Surprises Act to resolve out-of-network reimbursement disputes is wholly rational and reasonable and not contrary to the clear wording of any applicable statutes and/or regulations. Accordingly, plaintiffs are not entitled to the declaratory relief they have requested and the Court must issue a declaratory judgment with its contrary findings.

In light of the Court's conclusion as to the appropriate declaratory relief and the merits of plaintiffs' theories, the request for permanent injunctive relief must be denied in its entirety.

The parties' remaining arguments and requests for relief have been considered and found to be without merit and/or unnecessary to reach in light of the Court's findings. Specifically, in light of the Court's findings on the merits of the complaint, the Court finds no basis to revisit its

denial of plaintiffs' requests for a preliminary injunction.

Based upon all of the foregoing, it is hereby

ORDERED that United's motion to dismiss is hereby granted and plaintiff's complaint and the relief requested therein is hereby denied in its entirety as to United; and it is further

ORDERED that plaintiffs' request for leave to amend their complaint is hereby denied; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment and/or renewal is hereby denied in its entirety ;and it is further

ORDERED that the State defendants' CPLR § 3211(a)(7) motion to dismiss for failure to state a cause of action is hereby denied as to the first cause of action; and it is further

ORDERED, ADJUDGED AND DECLARED that Civil Service Law § 162 does not require that the Empire Plan remain subject to New York Insurance Law in the manner proffered by plaintiffs; and it is further

ORDERED, ADJUDGED AND DECLARED, that Civil Service Law § 162 and the Surprise Bill Law do not require that New York's IDR process be available to resolve out-of-network disputes involving the Empire Plan; and it is further

ORDERED that plaintiffs' request for permanent injunctive relief is hereby denied.

SO ORDERED, ADJUDGED AND DECLARED.

This shall constitute the Decision, Order and Judgment of the Court. The original

Decision, Order and Judgment is being returned to the counsel for the State defendants who is directed to enter this Decision, Order and Judgment without notice and to serve all counsel of record with a copy of this Decision, Order and Judgment with notice of entry. The Court will transmit a copy of the Decision, Order and Judgment to the County Clerk. As this is a NYSCEF case, the Court will not forward any hard copies of the papers considered to the County Clerk. The signing of the decision and order and delivery of the Decision, Order and Judgment shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: Albany, New York
July 13, 2023

Roger D. McDonough
Acting Supreme Court Justice

Papers Considered[4]:

Summons, dated March 28, 2022;
Complaint, dated March 28, 2022, with annexed exhibits;
Amended Summons, dated March 29, 2022;
Affidavit of John Von Lintig, C.P.A., C.G.M.A., sworn to May 3, 2022, with annexed exhibit;
Affidavit of Wayne Joseph, sworn to May 3, 2022;
Affidavit of Loretta Post, sworn to May 3, 2022;
Affidavit of Steven Schulman, M.D., sworn to April 26, 2022, with annexed exhibit[5];
Affidavit of Daniel Yanulavich, sworn to June 3, 2022;
Affirmation of John Powell[6], Esq., sworn to June 3, 2022, with annexed exhibit;
Affidavit of Sandra Galain, sworn to June 2, 2022;
Affirmation of Roy W. Breitenbach, Esq., dated June 13, 2022, with annexed exhibits;

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[4] The parties also submitted memoranda of law in support of their requested relief

[5] NYSCEF Document # 16 was an unsigned version of this affidavit. Plaintiffs corrected this oversight with Document # 58.

[6] The Powell affirmation and Yanulavich affidavit were resubmitted in support of the State defendants' motion to dismiss after initially being submitted in opposition to plaintiffs' request for injunctive relief.

United's Notice of Motion, dated July 12, 2022;
Affirmation of Karl Geercken, dated July 12, 2022, with annexed exhibit;
State defendants' Notice of Motion, dated August 31, 2022,
Plaintiffs' Notice of Cross-Motion, dated October 14, 2022[7];
Affirmation of Roy W. Breitenbach, Esq., dated October 14, 2022;
Affidavit of Steven Schulman, M.D., sworn to October 7, 2022, with annexed exhibits;
Affidavit of John Von Lintig, C.P.A., C.G.M.A., sworn to October 7, 2022, with annexed exhibit;
Affidavit of Lawrence Lin, M.D., sworn to October 13, 2022, with annexed exhibits;
Affidavit of Wayne Joseph, sworn to October 11, 2022;
Affidavit of Daniel Yanulavich, sworn to October 20, 2022.

[7] Plaintiffs' supporting papers for the Cross-Motion were not uploaded to NYSCEF until April of 2023 due to the Court's consideration of the application and opposition to the request for confidentiality of said submissions.