

ALERT

BEWARE OF THE COMPTROLLER'S AUDIT REQUEST

In a move that can cost a medical practice hundreds of thousands of dollars, the New York State Comptroller's Office (working with United Healthcare which administers the Empire Plan) has declared open war on practices providing out-of-network care to State employees covered by Empire. The Comptroller has dispatched its auditors across the State armed with audit letters to recoup what the Comptroller has characterized as "overpayments" resulting from the "routine waiver" of patient out-of-pocket costs.

Some background is necessary to put the Comptroller's actions in context. The Empire Plan is responsible for 80% of either the practice's actual charge or the usual and customary rate, whichever is lower, and the patient should pay the balance. In the Comptroller's view, a practice which "routinely waives" the patient's share is overpaid by 16%. For example, if the usual and customary charge is \$100, United should pay \$80. However, according to the Comptroller, if the practice routinely waives the patient's \$20 obligation, then the practice's actual charge is only \$80. Under this theory, United should only pay \$64, which is 80% of the actual charge. The Comptroller considers the \$16 differential to be an "overpayment" and subject to recoupment.

Following its standard audit procedures, the Comptroller examines the practice's financial ledgers for a small sample of all out-of-network Empire Plan patients. In some instances, the Comptroller has requested records going back eight years. The Comptroller then calculates the amount of "overpayments" for the sample and extrapolates that sum across the entire population of out-of-network patients treated by the practice for the relevant time period. In its audit report, the Comptroller recommends

that United pursue the practice for the full amount of all extrapolated "overpayments."

RMF's Healthcare and Litigation practice groups have teamed together to challenge the Comptroller's audits on various grounds, including jurisdictional infirmity, the sufficiency of the evidence reviewed, and the accuracy of the calculations. Most notably, our team has attacked the very foundation of these audits, arguing that the State Constitution does not extend the Comptroller's audit powers to private medical practices that do not have a contract with either United Healthcare or the State.

Practices that receive an audit letter from the Comptroller's office should immediately contact counsel who can advise the Comptroller's auditors that they are not permitted to commence an audit. In the instances where a practice has permitted the audit to take place, and later challenged the constitutionality of the audit, the Comptroller has responded that the practice waived its right to challenge the Comptroller's jurisdiction by allowing the audit to commence. Only by denying the Comptroller access to its records can a practice prevent the Comptroller from asserting this defense. Once access is denied, if the Comptroller persists in its efforts to audit, counsel may suggest seeking injunctive relief to prevent the audit.

RMF's multi-disciplinary legal team is uniquely experienced and equipped to assist practices that receive audit letters from the Comptroller and to advise them on best practices in order to insulate themselves from claims of "routine waiver."

Please contact **Alexander G. Bateman**, co-chair of RMF's Health Law Department, or **Matthew Didora**, RMF's lead litigator on this issue, at 516-663-6600.

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