

LITIGATION ALERT

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► Message From The Co-Chairs



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Welcome to the April 2010 edition of the *Litigation Alert*, which is published by the Litigation Department at Ruskin Moscou Faltischek, P.C. as a service to our fellow members of the Bar. We welcome your feedback on our publication as well as your topic ideas for future issues.

The RMF Litigation Department is the largest commercial litigation practice on Long Island. Ruskin Moscou Faltischek litigators regularly team with area practitioners, out-of-state lawyers and in-house counsel alike, covering all manner of business disputes. For more than 40 years, we have represented clients in federal and state courts throughout New York and the country and before all forums and tribunals, state and federal, international and domestic. Please contact us if we can be of assistance.

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RMF's Litigation Department Re-Shapes New York Law

By Matthew F. Didora



Matthew F. Didora

For several years, the New York State Comptroller has been auditing private, out-of-network medical providers who treat patients covered by New York's Empire Plan, the health insurance program available to state employees. For out-of-network providers, the Empire Plan reimburses up to 80% of the normal and customary rate. The patient is responsible for the balance. The purpose of the Comptroller's audit is to determine if the provider "routinely waives" patients' out-of-pocket costs and, therefore, accepts the insurance proceeds as payment in full. If so, the state considers the provider to have overstated the value of its services and recommends that

United Healthcare, the insurer and administrator of the Empire Plan, collect the overpayments from the provider. Based upon these audits, the state has collected millions of dollars from out-of-network providers.

An orthopedic group retained RMF to challenge a final audit report through an Article 78 proceeding. Despite the prevalence of the state's audits, there were surprisingly no reported decisions on point. RMF set out to create new legal precedent.

RMF's litigators and health law attorneys teamed together on the case. RMF argued that the state constitution does not empower the Comptroller to audit private, out-of-network providers. New York's Supreme Court agreed with us and held that the Comptroller's audit authority does not extend to out-of-network healthcare providers because they are not a political subdivision of the state and do not directly receive state money. In the process, the Court rejected the Comptroller's argument that the money received by the out-of-network practice constituted state funds. The Court reasoned that "the monies paid to United [by the state] lost the imprimatur of 'State funds' before that money reached" the practice. Therefore, contrary to the Comptroller's urging, the practice never received "state money."

Similarly unavailing was the Comptroller's effort to characterize its audit as a review of United, not the practice itself. The Court dismissed this argument as incredible and unsupported by the evidence. As we pointed out, both the original audit request letter and the final audit report clearly indicated the Comptroller's intention to audit the practice, not United.

The Supreme Court's decision, while likely to be appealed, is a significant victory for all out-of-network providers in what is likely to be an ongoing battle with the Comptroller and United. Providers that receive audit request letters from the Comptroller now have compelling authority to deny the state's auditors access to their records. In addition, the decision opens the door for providers that have already been audited to challenge the audit and seek recoupment of any monies that may have been paid back to the Empire Plan.

RMF's Litigation Department is uniquely equipped and experienced to assist in these complex matters. While other firms recommended that their clients capitulate to the state's demands, RMF spearheaded the successful and groundbreaking attack on the Comptroller's power to audit out-of-network practices.

Please contact **Matthew Didora**, RMF's lead litigator on this successful case, at (516) 663-6579 or mdidora@rmfpc.com with any inquiries.