SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-FIRST DEPARTMENT

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| ANTHONY FOONG, M.D. and ANTHONY FOONG, M.D., P.C., | : | Index No. 602836/01 |
| Plaintiffs-Respondents, | : | |
| -against- | : | |
| EMPIRE BLUE CROSS AND BLUE SHIELD a/k/a EMPIRE HEALTH CHOICE and EMPIRE BLUE CROSS AND BLUE SHIELD HEALTHNET, INC., | : | |
| Defendants-Appellants. | : | |



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## PRELIMINARY STATEMENT

This *amici curiae* brief is respectfully submitted by the Medical Society of the State of New York ("MSSNY") and the American Medical Association ("AMA") specifically with respect to that much of the appeal by the Defendants-Appellants Empire Blue Cross and Blue Shield a/k/a Empire Health Choice and Empire Blue Cross and Blue Shield Healthnet, Inc. (collectively "Empire" or "Defendants") which seeks to reverse the decision and order of the Supreme Court of the State of New York, County of New York, dated September 25, 2002, denying Empire's motion to dismiss and for summary judgment as to Plaintiffs' second cause of action under New York Public Health Law § 4406-d.[1]

## INTERESTS OF THE AMICI CURIAE

MSSNY, a not-for-profit corporation, was founded in 1807 and has approximately 27,000 physician, medical resident, and medical student members located throughout the State of New York. It is the principal medical professional organization in the State, representing physicians in all specialties. A significant number of MSSNY members have entered into contracts with health plans such as Empire to provide medical services to New York residents.

The AMA is a private, voluntary non-profit organization of physicians. It was founded in 1846 to promote the science and art of medicine to improve public health and has approximately 260,000 members who practice medicine in all states and in all medical specialties. The AMA and MSSNY file this brief as members of the American Medical Association/State Medical Society Litigation Center ("The Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary non-profit state

[1] MSSNY and AMA support the affirmance of the decision and order in their entirety. The focus of their brief, however, is exclusively on whether a cause of action exists under Public Health Law § 4406-d.

medical societies to represent the views of organized medicine in the courts. Forty-nine state medical societies and the Medical Society of the District of Columbia participate with the AMA as members of the Litigation Center.

This case raises an important question of first impression that has profound implications for MSSNY and AMA members and their patients: Whether, under Public Health Law § 4406-d, health care professionals have an implied right of action against health plans that violate the due process protections afforded under that statute. Given the vital importance of due process rights to their members, AMA and MSSNY submit this brief to explain to this Court why the trial court's decision and order should be affirmed.

The legislative history of Section 4406-d makes clear that the purpose of the statute is: (1) to protect health care professionals against unexplained, arbitrary and capricious terminations by health plans; and (2) to ensure that the treatment by health care professionals of New York residents is not suddenly disrupted by such terminations. These goals will be promoted by recognizing an implied right of action under Section 4406-d because health plans will more likely follow the due process protections afforded under the statute. Moreover, as the trial court found, granting a private right of action under Section 4406-d is necessary to give substance to the statute's procedural protections.

## BACKGROUND

### A. Public Health Law § 4406-d

Section 4406-d of the Public Health Law provides health care professionals broad due process protections against arbitrary and capricious termination by health plans. Under the statute, health plans are required to advise health care professionals of the information and data used by the plans to evaluate the health care professionals' performance or practice. *See* N.Y.

Pub. Health Law § 4406-d(4) (McKinney 2002). The statute also requires that this information or data be:

> measured against stated criteria and an appropriate group of health care professionals using similar treatment modalities serving a comparable patient population. Upon presentation of such information or data, each health care professional shall be given the opportunity to discuss the unique nature of the health care professional's patient population which may have a bearing on the health care professional's profile and to work cooperatively with the health care plan to improve performance.

*Id.*

Section 4406-d requires further that before a health plan terminates its contract with a health care professional, it must provide the professional with "a written explanation of the reasons for the proposed contract termination and an opportunity for a review or hearing [of the termination decision] . . . ." *See* N.Y. Pub. Health Law § 4406-d(2)(a) (McKinney 2002). If a health care professional requests a hearing, the health plan must appoint a hearing panel of three people, one of whom must share the same discipline and specialty as the professional whose termination is to be reviewed. *See* N.Y. Pub. Health Law § 4406-d(2)(c) (McKinney 2002). Health plans are not required to provide professionals a written explanation of termination decisions or the right to review and/or a hearing in limited circumstances, such as if a professional poses a threat of imminent harm to patients. *See* N.Y. Pub. Health Law § 4406-d(2)(a) (McKinney 2002). Professionals are, however, always entitled to certain procedural protections under Section 4406-d, such as the right to receive the "profiling data" (discussed above) that is used by health plans to evaluate a professional's performance and/or practice. *See* N.Y. Pub. Health Law § 4406-d(4).

**B. Statutory History of Section 4406-d**

Section 4406-d, effective as of January 1, 1997, was passed in 1996 as part of amendments to the Public Health Law and Insurance Law regulating the delivery of managed care. *See* R. 225-232 (Governor's Program Bill No. 97, C. 705, 1996).[2] In support of Section 4406-d's enactment, the New York State Assembly issued a memorandum ("NYS Assembly Memorandum") identifying the purpose of the statute as the "establish[ment of] due process protections for health care providers participating in the network of an HMO or an insurer." R. at 319 (NYS Assembly Memorandum). The NYS Assembly Memorandum summarized the provisions of Section 4406-d as follows:

> Section three of the bill adds a new Section 4406-d to the PHL which establishes various protections for providers who are members of an HMO's provider network or panel. . . . . HMOs must give the provider notice of the reasons for an HMO's decision to terminate a contract with the provider, and allow the provider the opportunity to request a hearing or review of this decision. If the provider requests a hearing, the HMO must convene a hearing panel comprised of no less than three persons, appointed by the HMO, at least one of whom must be a clinical peer in the same discipline and the same or similar specialty as the provider being reviewed. In cases involving "imminent harm", fraud or final disciplinary action by a state licensing board or other agency that impairs the provider's ability to practice, the HMO would be permitted to terminate the provider immediately. . . . .
>
> Additionally, under this section, HMOs are required to develop policies to ensure that providers are regularly informed of any information maintained by the HMO to evaluate the provider's performance or practice. Profiling data used to evaluate the performance or practice of a provider would have to be measured against stated criteria and a comparable group of providers using similar treatment, and serving a comparable patient population. Providers presented with personal profiling data would be given the opportunity to discuss the unique nature of their patient population and to work cooperatively with the HMO to improve performance.

[2] References to the Record on Appeal are indicated by "R" followed by the page number.

*Id.* at 320.

The NYS Assembly Memorandum explained the "Justification" for the statute as follows:

> JUSTIFICATION:
>
> Managed care organizations, including HMOs, prepaid health services plans (PHSPs), and some indemnity insurers who are writing policies with managed care features are providing health care coverage to increasing numbers of New Yorkers. Managed care organizations provide access to primary and specialty care while controlling health care costs. This balance between cost effective care and quality of care requires statutory protections for consumers, and sometimes providers, while avoiding regulatory burdens.
>
> . . . .
>
> Currently, . . . . providers may be terminated without stated reason, without adequate time to arrange for the transition of patients currently under treatment to other providers, and without right to a hearing before peers. This bill provides a remedy for these situations, while continuing to allow plans the needed authority and flexibility to make network decisions based on internal plan standards and need.

R. at 323.

In a similar memorandum supporting the legislation, Governor Pataki stated that the purpose of the bill was "to establish due process protections for health care providers participating in the network of an HMO or an insurer." R. at 225 (Governor's Program Bill No. 97, C. 705, 1996). The Governor's summary of the due process protections required under Section 4406-d is substantially the same as the summary by the New York State Assembly quoted above. *See id*. at 226. In another memorandum dated October 9, 1996, the Governor described Section 4406-d and related legislation as a "landmark bill . . . [which] provides comprehensive protection for our State's health care consumers and health care providers." R. at 233 (Executive Chamber Memorandum dated October 9, 1996). Likewise, the Committee on

Insurance Law of The Association of the Bar of the City of New York, in a report announcing its approval of the statute, stated: "There are key provisions affecting the providers of health care who have lost some of their decision-making power in the practice of medicine under managed care. Providers will be able to know the minimum qualifications to be accepted by a plan; and those who are terminated from employment contracts will be entitled to due process." R. at 242-243 (Report on Legislation, Committee on Insurance, S. 7552).

**C. Empire's and Dr. Foong's Relationship**

In 1993, Empire and Dr. Foong entered into a contract under which Dr. Foong agreed to provide medical services to Empire's members. *See* R. at 365-78. As explained in detail by the trial court, a dispute arose in 1996 between Empire and Dr. Foong as to whether certain procedures performed by Dr. Foong were medically necessary. *See generally* R. at 11-17 (Decision at 4-10). Eventually, in June 1998, approximately one and a half years after Section 4406-d became effective, Empire -- which the trial court noted did not follow the procedures required under that statute -- advised Dr. Foong that it had terminated Dr. Foong's contract because he allegedly posed an imminent threat of harm to his patients. *See* R. at 74 (Empire's June 23, 1998 Letter to Dr. Foong); R. 33-35 (Decision at 26-27).

**D. Procedural History**

Plaintiffs commenced this action against Empire by verified complaint dated May 29, 2001. Plaintiffs asserted, among others, a claim against Empire for failing to provide Dr. Foong the due process protections required under Public Health Law § 4406-d. *See* R. at 154-56 (Verified Complaint at 14-16). On or about August 2, 2001, Empire filed a motion to dismiss and for summary judgment as to all of Plaintiffs' claims. *See* R. at 41-42 (Defendants' Notice of Motion). In support of its motion, Empire argued, *inter alia*, that Public Health Law § 4406-d

does not provide for a private right of action. *See* R. at 23, 35 (Decision at 16, 28). Empire also argued that Section 4406-d did not apply because Empire had found that Dr. Foong constituted an imminent threat of harm to his patients and that, in any event, Empire had given Dr. Foong the opportunity for a hearing. *See id.* at 35.

By order and decision dated September 25, 2002 (the "Decision"), the trial court denied Empire's motion to dismiss and for summary judgment. R. at 7-40 (Decision at 1-33). After a careful analysis of the Section 4406-d's legislative history, the court determined that a private right of action existed under the statute. *Id.* at 22-35.

## ARGUMENT

### THE TRIAL COURT CORRECTLY HELD THAT AN IMPLIED PRIVATE RIGHT OF ACTION EXISTS UNDER PUBLIC HEALTH LAW § 4406-d

### A. Governing Law

A private right of action for a statutory violation is available to a party if that statute confers an express or implied right of action. *See Sheehy v. Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629, 633 (1989). To imply a private of right of action, plaintiffs must meet the following three prong test: (1) they are members of the class for whose benefit the statute was enacted; (2) a private right of action would promote the purpose of the statute; and (3) the creation of such a right would be consistent with the legislative scheme. *Id.* (the "Three Prong Test" or "Test").

Section 4406-d does not expressly provide for a private right of action and there are no cases that address whether Section 4406-d provides an implied right of action. This case, therefore, presents an important question of first impression. For the reasons discussed below, it

is respectfully submitted that the trial court properly determined that a private cause of action exists under the statute.

**B. An Implied Right of Action Exists Under Section 4406-d**

There is no dispute that the first prong of the Three Prong Test is met in this case. Dr. Foong, as a health care professional, is a member of the class of persons the Legislature intended to benefit from the enactment of Section 4406-d. There can also be no serious doubt that the second prong of the Test is satisfied here. As noted, the legislative history reflects that Section 4406-d was enacted: (1) to provide health care professionals procedural protections against arbitrary and capricious terminations by health plans; and (2) to prevent such terminations from suddenly disrupting the treatment by health care professionals of their patients. *See* R. at 323 (NYS Assembly Memorandum) (stating that Section 4406-d remedied situations where health care providers could be terminated without reason, without adequate time to arrange for the transition of patients, and without a right to a hearing before peers); R. at 231 (Governor's Program Bill) (same). Implying a private cause of action under Section 4406-d is an effective way to promote the goals of the statute because it provides a strong incentive for health plans to follow Section 4406-d's required procedural protections when making termination decisions. *See Negrin v. Norwest Mortgage, Inc.*, 263 A.D.2d 39, 46-47 (2d Dep't 1999) (finding implied right of action under Real Property Law § 274-a and stating that "The basic purpose of the law is to compel lenders to provide mortgage documents expeditiously and at no charge. Certainly one very effective means of ensuring compliance is to permit borrowers to sue the lender for violations of the statute."); *see also Lewis v. Individual Practice Assoc. of Western New York, Inc.,* 187 Misc.2d 812, 816 (N.Y. Sup. Erie County 2001) (stating that in interpreting

Section 4406-d "the court must assume every provision of the statute was enacted to serve some useful purpose, and that an enforceable result was intended.").

As for the third prong of the Test, recognition of a private right of action under Section 4406-d is compatible with the statutory scheme. As noted by the trial court, the New York State Insurance and Health Departments regulate health plans such as Empire. *See* R. at 28 (Decision at 21) (citing N.Y. Ins. Law, Article 43, and N.Y. Pub. Health Law, Article 44). The enforcement of a private cause of action for violations of Section 4406-d would in no way disrupt or impair either Department's regulation of health plans. Moreover, as the trial court found, an implied right of action is necessary to "give substance" to the procedural protections afforded under Section 4406-d. R. at 34 (Decision at 27); *see Corcoran v. Frank B. Hall & Co.*, 149 A.D.2d 165, 177 (1st Dep't 1989) (stating that certain provisions of the Insurance Law "would lack substance if no private right of action were implied."). Without a private cause of action, "Section 4406-d will become meaningless [because a health plan will be] . . . able to strip away the due process protections given to health care providers terminated from its plan." R. at 34 (Decision at 27); s*ee Izzo v. Manhattan Med. Group, P.C.*, 164 A.D.2d 13, 18 (1st Dep't 1990) (finding implied right of action against pharmacy for accepting a prescription written in violation of Education Law § 6810 was consistent with "over-all legislative scheme for regulating pharmacies" because it "would serve to reinforce the Legislature's efforts to secure compliance with that statute."); *Doe v. Roe*, 190 A.D.2d 463, 471 (4th Dep't 1993) (stating that recognition of private right of action against physician for disclosing confidential HIV-related information in violation of Public Health Law § 2782 "would promote the legislative purpose of ensuring the confidentiality of that information and would not be inconsistent with the legislative scheme."); *see also Lewis*, 187 Misc.2d at 815 ("The court in construing a statute should consider

the mischief sought to be remedied by the statutory enactment and the court should construe the language in question so as to suppress the evil and advance the remedy." [citations omitted]).

### C. The Arguments of Empire and the New York Health Plan Association, Inc. ("NYHPA")[3] Should Be Rejected

In an effort to defeat Dr. Foong's claim, Empire argues that the Legislature's grant of a private right of action in another section of Article 44 of the Public Health Law, i.e., Section 4404(5), is conclusive evidence that the Legislature did not intend to create a right of action under Section 4406-d. Empire's argument, however, is meritless. Section 4404 of the N.Y. Public Health Law concerns health plans' receipt of a certificate of authority to operate from the Health Commissioner. *See* N. Y. Pub. Health Law § 4404(1)-(5) (McKinney 2002). Section 4404(5) provides that any certificate of authority determination made by the Commissioner "shall be subject to review as provided in article seventy-eight of the civil practice law and rules. Application for such review must be made within sixty days after service . . . of a copy of the . . . determination." N.Y. Pub. Health Law § 4404(5) (McKinney 2002). This provision does not, contrary to Empire's contention, create a private cause of action in favor of health plans. Rather, as correctly noted by the trial court, Section 4404(5) merely shortens the time to 60 days in which a health plan may bring an action against the Health Commissioner. Normally, a party has four months to challenge a decision by a governmental body under Article 78 of the CPLR. *See* CPLR § 217. Without Section 4404(5), health plans would still be entitled under Article 78 of the CPLR to bring an action against the Health Commissioner concerning any certificate of authority determination; they would, however, as noted, have four months rather than 60 days in which to bring it. Accordingly, the cases cited by Empire, e.g., *Mark G. v. Sabol*, 93 N.Y.2d 710

[3] By notice dated March 28, 2003, NYHPA moved this Court to file and serve an *amicus curiae* brief in support of Defendants' appeal.

(1999), and *Varela v. Investors Ins. Holding Corp.*, 81 N.Y.2d 958 (1993), in which the New York Court of Appeals refused to imply a private right of action because, in part, there were express causes of action in the same statute, are completely inapposite here.

Even assuming that Section 4404(5) can be construed to grant a cause of action -- which it cannot -- the cases cited by Empire would still not preclude a finding of an implied cause of action under Section 4406-d. In *Mark G. v. Sabol* and *Varela v. Investors Ins. Holding Corp.*, the Court of Appeals refused to find implied rights of action in favor of plaintiffs under certain sections of the Social Services Law and the General Business Law, respectively, because those statutes granted express causes of action in other sections of the statutes to the same or similar class of persons as the plaintiffs. *See* 93 N.Y.2d at 721-722; 81 N.Y.2d at 960. Thus, assuming *arguend*o that Section 4404(5) grants a private cause of action, that action would inure to the benefit of health plans, not to health care professionals such as Dr. Foong, the class who the Legislature deemed in need of protection under Section 4406-d. Accordingly, *Sabol* and *Varela* are inapplicable to this case and do not preclude an implied right of action under Section 4406-d.

Next, Empire and NYHPA argue that recognition of an implied right of action under Section 4406-d would contravene the legislative purpose and scheme because it "would take the termination review out of the hands of the plan's appointed panel and place it in the hands of the court. The Legislature did not intend to supplant the health plan's judgment as to whether a practitioner is a danger to his patients." Defendants' Brief at 20; *see also* NYPHA Brief at 5-6. This argument mischaracterizes what is at issue here. The question that this case presents is whether health care professionals have a right to enforce against health plans the due

process protections required under Section 4406-d. Recognition of such a right will hardly take the decision to terminate health care professionals out of the hands of health plans.

NYPHA argues that a private right of action under Section 4406-d is inconsistent with the legislative scheme of Article 44 of the Public Health Law because the "goals of [Article 44, including Section 4406-d] . . . are appropriately and effectively enforced through a pervasive scheme of regulatory oversight of the relationships between patients, providers and HMOs." NYHPA's Brief at 7. This argument also lacks merit. None of the Article 44 provisions cited by NYPHA specifically provides for the enforcement of the due process protections set forth in Section 4406-d. Implying a private right of action, therefore, is, as the trial court found, not only compatible with the statutory scheme, but, moreover, necessary to enforce the procedural protections provided in Section 4406-d.

The absence of a provision specifically enforcing the requirements of Section 4406-d contrasts sharply with the statute at issue in the Court of Appeals case, *Carrier v. Salvation Army*, 88 N.Y.2d 298 (1996), upon which NYHPA misguidedly relies. NYHPA Brief at 8. In *Carrier*, the plaintiffs sought to bring an implied right of action under Social Services Law § 460-d to appoint a temporary receiver of an adult care facility. The court, however, rejected plaintiffs' claim because Section 460-d "expressly vested only in the Department [of Health]," the right to appoint a receiver. *See Carrier*, 88 N.Y.2d at 303-04. Given this express "statutory enforcement authority" under Section 460-d, the court concluded that implying a private right of action under the same provision would be incompatible with the statutory scheme chosen by the Legislature. *Id.* Here, as noted, there is no express enforcement provision in Section 4406-d. *Carrier*, therefore, is entirely inapplicable.

Finally, Empire argues that even assuming a private right of action exists under Section 4406-d, the only remedy available to health care professionals like Dr. Foong would be to have a limited hearing before three persons appointed by the health plan. Defendants' Brief at 19, 22. It contends that money damages and reinstatement are not available under the statute. *Id.* Empire's argument, however, is based on the flawed premise that "the procedural due process afforded to health care providers under Section 4404-d (sic) is **simply** an opportunity to be heard by a panel of their peers . . . before a proposed termination." Defendants' Brief at 19 (emphasis added). A review of Section 4406-d and its legislative history reveals that the due process safeguards under the statute are much more comprehensive than characterized by Empire. For example, in addition to the right of a hearing, health care professionals are entitled to: (1) notice of the data used by a health plan to evaluate their performance and practice; (2) the opportunity to discuss the nature of their patient population with a health plan; (3) notice that sets forth the reasons for any proposed termination; and (4) a timely decision by a hearing panel. *See* N.Y. Pub. Health Law § 4406-d(2), (4) (McKinney 2002); R. at 320.

Moreover, Empire's remedy argument is contrary to precedent allowing plaintiffs monetary damages and injunctive relief for statutory violations. *See*, *e.g.*, *Izzo*, 164 A.D.2d at 18-19 (recognizing that monetary compensation is available for implied private right of action under Education Law § 6810); *Brad H. v. City of New York*, 185 Misc.2d 420 (N.Y. Sup. N.Y. Cty. 2000) (upholding implied private right of action for injunctive relief under Mental Hygiene Law); *see also Sabol*, 93 N.Y.2d at 719 ("In determining whether a private right of action for money damages exists for violation of a New York State statute, this Court has established [a] . . . three-part test . . . ."); *Sheehy*, 73 N.Y.2d at 633 ("Since the statute does not make express

provision for civil damages, recovery . . . may be had only if a private right of action may fairly be implied.").

Empire's argument is also inconsistent with the legislative purpose of Section 4406-d. If the only available remedy for health plans' disregard of the due process safeguards mandated under Section 4406-d is to force them to hold a hearing (only one of the steps that they should take in the first place), health plans will -- contrary to the legislative intent -- have little incentive to comply with the statute. The availability of monetary damages and injunctive relief under Section 4406-d will not only encourage health plans to follow the requirements of the statute, but will enable aggrieved parties to recover for the damages suffered as the result of health plans' failure to do so. *See Doe*, 190 A.D.2d at 471 (stating that recognition of private right of action would provide an "enforcement mechanism at hands of those persons affected by a violation of that law and those whom the Legislature has deemed in need of protection."). Because the risk of harm to the reputation and financial security of health care professionals posed by arbitrary and capricious terminations will grow as managed care becomes increasingly prevalent in New York, a private right of action under Section 4406-d should be recognized.[4] S*ee* R. at 323 (New York State Assembly Memorandum) (stating that managed care organizations are "providing health care coverage to increasing numbers of New Yorkers."); R. at 231 (Governor's Program Bill) (same).

[4] MSSNY and AMA also agree with the trial court that Plaintiffs should have legal recourse and should be entitled to civil damages and other appropriate relief under Public Health Law § 230(11) if Empire reported him to the Department of Health's Office of Professional Medial Conduct in bad faith and with malice. Public Health Law § 230(11) provides, "Any person, organization, institution, insurance company, osteopathic or medical society who reports or provides information to the board in good faith, and without malice shall not be subject to an action for civil damages or other relief as the result of such report. *Id.* Clearly, as a corollary, any person or entity who reports or provides information to the board in bad faith and with malice has no protection under the statute. The trial court therefore correctly held that Section 230(11) implies a private right of action if the reporting is in bad faith and with malice.

## CONCLUSION

For the reasons stated above, MSSNY and AMA respectfully request that this Court affirm the trial court's denial of Empire's motion seeking dismissal of and summary judgment on Plaintiffs' second cause of action under Public Health Law § 4406-d.

Respectfully submitted,

LEBOEUF, LAMB, GREENE, & MACRAE, L.L.P.

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