To be Argued by:
GREGORY ZIMMER
(Time Requested: 15 Minutes)

New York County Clerk's Index No. CTQ-2019-00001

Court of Appeals

of the

State of New York

DR. ROBERT D. HAAR, M.D.,

Plaintiff-Appellant,

– against –

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Defendant-Respondent,

– and –

JOHN and JANE DOE CORPS., 1-10, JOHN and JANE DOE 1-10,

Defendants.

ON APPEAL FROM THE QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 18-128

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Date Completed: July 18, 2019

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PRELIMINARY STATEMENT

In his Brief for Plaintiff-Appellant (the "Opening Brief") Plaintiff-Appellant Dr. Robert D. Haar, M.D. ("Dr. Haar") demonstrated that each of the criteria used by this Court to determine whether a right of action is implied in New York legislation is satisfied with respect to the implied right of action for bad faith reporting to New York's Office of Professional Medical Conduct ("OPMC") pursuant to New York Public Health Law § 230(11)(b) ("Section 230(11)(b)"). Section 230(11)(b) provides that "[a]ny person, organization, institution, insurance company, osteopathic or medical society who reports or provides information to [OPMC] *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." (emphasis added.) The First Department, in *Foong v. Empire Blue Cross & Blue Shield*, 762 N.Y.S.2d 348 (1st Dep't 2003), held that an implied right of action exists under Section 230(11)(b).

In its Brief for Defendant-Respondent (the "Opposition Brief") Defendant-Respondent Nationwide Mutual Fire Ins. Co. ("Nationwide") misstates the question presented to the Court on this appeal. Specifically, in the "Introduction" of its Opposition Brief, Nationwide asserts that:

> The certified question presented by the United States Court of Appeals for the Second Circuit asks whether an implied private right of action exists under N.Y. Pub. Health Law § 230(11)(b) for New York-Licensed physicians regulated by the New York Office of Professional Medical Conduct ("OPMC") against insurers reporting to the OPMC as required by the Comprehensive Motor Vehicle

> Insurance Reparations Act (the "No Fault Law") and Regulations 83, 11 N.Y.C.R.R. § 68.8.

Opposition Brief at 1.

In fact, the United States Court of Appeals for the Second Circuit (the "Second Circuit") certified the following question to this Court:

> Does New York Public Health Law Section 230(11)(b) create a private right of action for bad faith and malicious reporting to the Office of Professional Medical Conduct?

Appendix at 13, 15. The straight-forward question certified by the Second Circuit and accepted by this Court does not mention or implicate the No Fault Law or any specific type of reporter to OPMC.

Nationwide proceeds to invoke irrelevant provisions of the No Fault Law, misconstrue precedent applying the three-part test created by this Court for determining whether an implied right of action is implied in a New York Statute, and makes unsubstantiated assertions about the dangers of an implied right of action pursuant to Section 230(11)(b) which, in fact, are contrary to empirical facts.

Nationwide argues that Dr, Haar is not one of the class that the overall statutory scheme of New York Public Health Law § 230 ("Section 230") was intended to benefit. However, Section 230 has always contained significant benefits and protections for physicians, this Court has expressly recognized that physicians are and were intended to be protected by Section 230 and the legislature

has amended Section 230 periodically to provide even greater benefits and protections for physicians.

Nationwide strains to argue that an implied right of action for bad faith reporting to OPMC would not promote the purpose of Section 230, which provides a mechanism to report, investigate and address professional misconduct by physicians, and strikes a deliberate balance between encouraging reports to OPMC and participation in OPMC proceedings in good faith, and discouraging and penalizing bad faith reports and participation. Section 230(11)(b) shields good faith reports from liability while specifically recognizing that bad faith reporting to OPMC should be subject to civil liability. Nationwide's arguments completely read the "in good faith" language out of Section 230(11)(b) and ignore the balance struck by the legislature in both Section 230 and Section 230(11)(b) specifically.

Nationwide also misconstrues this Court's precedent regarding when an implied right of action is inconsistent with a statutory scheme, citing cases where the legislature has created express remedies for the specific conduct the implied right of action sought to redress while failing to create the requested remedy. In fact, Section 230 does not provide any means of deterring bad faith reporting to OPMC and Nationwide does not point to any. Nationwide's effort to obfuscate this fact by references to irrelevant provisions of the No Fault Law and unrelated potential causes of action are of no avail.

Finally, Nationwide argues that an implied right of action would result in a flood of litigation against reporters to OPMC and would deter reporting to OPMC, thereby frustrating OPMC's ability to address physician misconduct. However, leaving aside that this argument assumes that Section 230 was intended to promote *bad faith reports* to OPMC, it is demonstrably false. There have been only a handful of claims made since *Foong* established the implied right of action for bad faith reporting to OPMC. Reports published by OPMC empirically demonstrate that in the years after the First Department's *Foong* decision reports to OPMC steadily and significantly increased every year.

At bottom, Nationwide either cannot, or is feigning an inability to comprehend that Section 230(11)(b)'s protection of good faith reports and the implied right of action for bad faith reporting are not only logically consistent, they are complementary, and the implied right of action for bad faith reporting pursuant to Section 230(11)(b) is consistent with and furthers the balance struck by the legislature in Section 230.

ARGUMENT

In his Opening Brief, Dr. Haar demonstrated that each of the factors considered by this Court when determining whether an implied right of action exists to enforce a New York Statute militate in favor of the implied right of action for bad faith reporting to OPMC recognized by the *Foong* decision. The arguments raised

by Nationwide in opposition are misguided and do not address this Court's precedent or negate the points made in the Opening Brief.

I. THIS COURT SHOULD AFFIRM THE IMPLIED RIGHT OF ACTION FOR BAD FAITH REPORTING PURSUANT TO SECTION 230

In his Opening Brief Dr. Haar demonstrated that Section 230 creates a broad legislative scheme for the regulation of physician conduct in New York. In doing so, the legislature deliberately and expressly struck a careful balance between encouraging good faith reporting of suspected misconduct and participation in OPMC proceedings in good faith without malice and protecting physicians from bad faith, malicious or otherwise improper conduct of those participating in those proceedings. The implied right of action for bad faith reporting to OPMC is a means of deterring bad faith reporting to OPMC.

As set forth more fully in Dr. Haar's Opening Brief, application of each of the factors set forth by this Court in *Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629 (1989)[1] to Section 230 and Section 230(11)(b) confirm that the implied

[1] To determine whether an implied right of action is implied in a New York State statute, this Court applies a three-part test: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of an implied right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme. *Sheehy*, 73 N.Y.2d 629.

right of action for bad faith reporting to OPMC recognized by the First Department in *Foong*, 762 N.Y.S.2d 348 is consistent with each of the *Sheehy* factors.

Nationwide's arguments to the contrary in its Opposition Brief are misguided and rely on a reading of Section 230 that seeks to write the "in good faith, and without malice" language out of the statute. Nationwide also misstates the holdings and relevance of precedent from this Court and others, and touts a parade of horribles it argues will result from the implied right of action which empirical evidence conclusively refutes.

A. Physicians Are One Of The Classes Of Persons Section 230 Was Intended To Benefit

In his Opening Brief, Dr. Haar demonstrated that Section 230 contains myriad provisions benefitting physicians by making clear that the legislature intended bad faith reporters to OPMC and bad faith participants in the OPMC investigative process to face civil liability for their misconduct. (*See* Opening Brief at 7-9). He also demonstrated that Section 230 expressly provides significant protections for physicians accused of misconduct before the OPMC. (*Id.*) This Court has recognized that even the confidentiality provisions of Section 230(11)(a) relied upon in *Lesesne v. Brimecome*, 918 F. Supp. 2d 221 (S.D.N.Y. 2013), *Elkoulily v. New York State Catholic Healthplan, Inc.*, 153 A.D.3d 768 (N.Y. 2d Dep't 2017) and the District Court in this case were intended to benefit *both* reporters to OPMC *and* physicians alleged to have engaged in misconduct. *See*

McBarnette v. Sobol, 83 N.Y.2d 333, 338 (1994) ("[Section 230(11)(a)] was also intended to preclude the indiscriminate use of these reports, whether to reveal sources of information which led to investigations . . . *or to reveal unsubstantiated complaints against a physician*.") (emphasis added)).

It is undisputed that Section 230 provides extensive benefits and protections for physicians accused of misconduct and the legislature has consistently added more benefits and protections for physicians through the amendment process. (*See* Opening Brief at 7-9; Opposition Brief at 16). Nationwide correctly points out that even if the legislature had not expressly provided specific protections for physicians in Section 230 and increased those protections over time through amendments, physicians would be entitled to some minimum level of due process protection in OPMC proceedings under the United States and New York Constitutions. However, the fact that the legislature specifically included significant benefits and protections for physicians in Section 230 evidences that the legislature intended physicians to be one of the classes that would benefit from Section 230's provisions, rather than relegating physicians to default due process protections under the federal and state constitutions. Physicians clearly were

intended by the legislature to benefit from each of these many provisions of Section 230.[2]

Nationwide cites a number of cases in its argument section addressing the first *Sheehy* factor. (*See* Opposition Brief at 13-17). However, they do not provide any support for Nationwide's argument that physicians were not intended to benefit from Section 230. In fact, of the three cases cited, one assumed that the plaintiff had standing to enforce the statute, one noted that there was a question whether the plaintiff was intended to benefit from the statute and assumed it was, and the third did not even involve the assertion of an implied right of action. In addition, each of the cases sought to assert claims for damages against municipalities or public entities (a school district) which implicated fiscal and public policy issues that are not present in this case.

Matter of Stray from the Heart, Inc. v. Dept of Health – Mental Hygiene, 20 N.Y.3d 946 (2012), is a single-page decision in which the plaintiff, an "animal rescue organization," sought damages from the City of New York claiming that it

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[2] The cases Nationwide cites to support its proposition that statutes providing "due process" protections to physicians are not intended to benefit them do not suggest that the statute at issue in those cases (the federal Health Care Quality Improvement Act of 1986) included anything approaching the significant benefits and protections afforded physicians in Section 230. *See Brown v. Medical College of Ohio*, 79 F. Supp. 2d 840, 843 (N.D. Ohio 1999) (passing reference to "due process protections" for physicians); *Simpkins v. Shalala*, 999 F. Supp. 106 (D.D.C. 1998) ("[w]hatever protections the law may preserve for individuals such as plaintiff . . ..").

provided services to stray animals that the City should have provided pursuant to the Animal Shelters and Sterilization Act. Although this Court recited the *Sheehy* factors and found that the plaintiff was not among the class the statute was intended to benefit, there is no discussion of any facts giving rise to this holding. Notably, there is no indication that, like physicians in the context of Section 230, the plaintiff was a subject of or was provided any benefits or protections in the statute.

In *Brian Hoxie's Painting Co. v. Cato-Meridian Cent. Sch. Dist.*, 76 N.Y.2d 207 (1990), a contractor who won a painting contract from a school sought an implied right of action for damages against the school to recover additional wages it was required to pay its employees above those provided for in the contract because the school failed to advertise the prevailing wage that was required to be paid by contractors submitting bids for the project. There is no indication that the statute provided benefits or protections for contractors similar to those provided to physicians in Section 230. Yet, this Court found that even the inclusion of a single form of protection for contractors – the requirement that they be informed of the prevailing wage by the entity seeking bids – raised a question whether the statute was specifically intended to benefit contractors. *Id.* at 211-12. In fact, in its

holding, this Court assumed that contractors were within the class intended to benefit from the statute.[3] *Id.*

O'Connor v. City of New York, 58 N.Y.2d 184 (1983), does not discuss or apply the *Sheehy* factors and the plaintiff did not seek to assert an implied right of action. Rather, the plaintiff sought to bring a negligence claim against the City of New York for its failure to properly inspect a construction project, leading to a gas explosion that destroyed the building that was under construction. The plaintiff argued that the statute requiring the city building inspector to inspect construction projects created a "special relationship" between the City and the plaintiff that imposed a duty on the City giving rise to a negligence claim. The Court did find that the statute was intended to benefit the plaintiff, but found that the strict rules governing when municipalities can be subject to tort liability for failing to perform a government service had not been met. *Id.* at 190.

Alexander v. Sandoval, 532 U.S. 275 (2001), considered whether federal regulations, rather than a statute, implied a right of action under a completely

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[3] This Court ultimately held that no implied right of action existed based on the third *Sheehy* factor because the statute at issue contained express enforcement provisions *for the specific conduct the implied right of action sought to redress* – the failure to pay prevailing wages – and the "unmistakable aim of the entire enforcement scheme [was] to place all liability for violating the prevailing wage requirements upon the noncomplying contractor" whereas the requested implied right of action would shift that burden to the entity seeking bids. *Id.* at 214.

different, far more complex federal analysis than the one applied by this Court when considering implied rights of action. And Justice Scalia specifically recognized that federal courts are far more constrained in recognizing implied rights of action in federal statutes and regulations than state courts are with respect to state laws. *Id.* at 287.

Contrary to Nationwide's assertion, Dr. Haar does not admit "admit[] that at a granular level § 230(11)(b) was not enacted for his especial benefit" when he points to the myriad protections for physicians contained in Section 230.[4] This Court has never focused on a single provision of a statutory scheme in applying the first *Sheehy* factor. Dr. Haar's recognition of this fact not only respects this Court's precedents, but also makes clear that physicians are among those intended to benefit from Section 230. However, even when Section 230(11)(b) is considered independently it is clear that physicians were intended to benefit from its recognition that bad faith reporters to OPMC should be subject to civil liability. While conserving the limited resources of OPMC which are improperly diverted

[4] Nationwide suggests that because some of these protections took effect after Nationwide made its report to OPMC they are not relevant to the legislature's intent include physicians as one class intended to benefit from Section 230. (Opposition Brief at 16, n. 5). Nationwide does not cite any authority for this assertion for reasons that are obvious. (*Id.*) What better evidence could there be of the legislative intent with respect to Section 230 than a continuing and even accelerating trend toward providing even greater benefits and protections to physicians through amendments to the statutory scheme?

by bad faith reporting, physicians are the clear beneficiaries of Section 230(11)(b)'s prohibition against bad faith reporting. Conversely, if Nationwide's view of Section 230(11)(b) prevails, insurers and others could make false, bad faith reports against physicians with impunity.

B. The Implied Right Of Action Promotes The Legislative Purpose Of Section 230

In the Opening Brief, Dr. Haar demonstrated that while one aspect of Section 230's overall scheme is the promotion of good faith reports of misconduct, another is the protection of physicians from the damage that can be caused by false or bad faith reports of misconduct. Section 230(11)(b) mirrors these dual purposes and strikes the exact balance present in Section 230 as a whole. (Opening Brief at 9-11.) It strains credulity to suggest that an implied right for bad faith reporting to OPMC (which would deter bad faith reporting) would not promote the legislative purpose of Section 230, which is the investigation of good faith reports of potential misconduct while simultaneously protecting doctors from bad faith, malicious reports and proceedings.

Many of the cases cited by Nationwide in its discussion of the second *Sheehy* factor (Opposition Brief at 18-22) found that the implied rights of action sought *would* promote the legislative purpose of the statute at issue (one case did not discuss the second *Sheehy* factor at all). In *Sheehy* this Court stated "it cannot be denied that recognition of an implied right of action for civil damages would, as

a general matter, advance the legislative purpose." 73 N.Y.2d 634. In *Uhr v. East Greenbush Cent. School Dist.*, 94 N.Y.2d 32 (1999), this Court held that "we conclude that a private right of action would promote the legislative purpose and, therefore, the second [*Sheehy*] prong is satisfied." 94 N.Y.2d at 40; *see also Pelaez v. Seide*, 2 N.Y.3d 186, 200 (2004) ("In *Uhr* . . . we noted that the first two *Sheehy* prongs were satisfied, but dismissed the claim based on the plaintiff's failure to satisfy the third prong") (internal citations omitted). In *Pelaez* this Court did not make any reference to the second *Sheehy* factor.

After discussing *Sheehy, Uhr* and *Pelaez*, Nationwide states that "[a]ccrodingly" a proposed implied right of action must be "tightly aligned with the legislation's *raison d'être*" and "specifically must deter the conduct the legislation is designed to deter or promote the conduct the legislation is intended to encourage." (Opposition Brief at 18). However, none of the cases makes any such statement or imposes any such standard. And in any event, the implied right of action for bad faith reporting to OPMC does (and is the only mechanism to "deter the conduct the legislation is designed to deter [*i.e.*, bad faith, malicious reporting to OPMC] . . .."[5] As set forth more fully in the Opening Brief, deterring bad faith

[5] When considering whether an implied right of action exists this Court generally does not consider potential causes of action unrelated to the statute in applying the third *Sheehy* factor. Thus, Nationwide's suggestion (without any support) that the existence of a defamation or other action based on bad faith reporting to OPMC precludes the need for or prevents the Court form recognizing

reporting to OPMC promotes and facilitates every other aspect of Section 230's legislative purpose.

Nationwide cites *Axelrod v. Sobol*, 78 N.Y.2d 112 (1991), and purports to quote it when it argues that "Section 230(11) was enacted to 'encourage[e] complaints' to OPMC, and to overcome a reporter's reluctance to provide information about errant doctors by immunizing the reporter from litigation." (Opposition Brief at 18-19 (citing and quoting *Axelrod*)). In fact, *Axelrod* was discussing *only* the confidentiality provision contained in Section 230(11)(a) when it stated that its purpose was to encourage reporting. *See Axelrod*, 78 N.Y.2d at 115. The purpose of Section 230 as a whole (or of Section 230(11)(b)) was never discussed in *Axelrod*. Moreover, any citation to *Axelrod's* language concerning Section 230(11)(a)'s confidentiality provision being intended only to encourage reporting is misleading because this Court in the follow-on decision in *McBarnette* specifically held that Section 230(11)(a) was intended to protect *both* reporters *and* physicians accused of misconduct. *See McBarnette*, 83 N.Y.2d at 338 ("[Section 230(11)(a)] was also intended to preclude the indiscriminate use of these reports,

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the implied right of action is misguided and contrary to this Court's precedents. In fact, courts have found that the existence of alternate remedies for similar conduct actually renders an implied right appropriate. *See*, *e.g.*, *Doe*, 190 A.D.2d at 471, 599 N.Y.S.2d 350, 354, (4th Dep't 1993) ("a private cause of action for a disclosure in violation of Public Health Law § 2782 would be consistent with the common law . . . it would merely provide an additional enforcement mechanism . . .").

whether to reveal sources of information which led to investigations . . . *or to reveal unsubstantiated complaints against a physician*.") (emphasis added)).[6]

Nationwide also cites to *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61 (2013), in its argument section regarding the second *Sheehy* factor. However, in *Cruz* the Court specifically noted that "the [defendant] banks do not dispute that the first two *Sheehy* factors are satisfied . . .." *Id.* at 71-72.

The *Cruz* plaintiffs sought to invoke the statutory construction cannon of "*expressio unius est exclusio alterius* – the interpretive maxim that the inclusion of a particular thing in a statute implies an intent to exclude other things not included" to argue that "by explicitly saying that banks cannot be liable for inadvertently failing to provide the forms required by CPLR 5222-a, the legislature signaled that financial institutions could be liable for *all other failures* to comply with the statute, *whether inadvertent or otherwise*." *Id.* at 72 (emphasis added). The Court rejected this theory (which is not asserted here by Dr. Haar) and Cruz's proposed implied right of action primarily because the statute at issue contained extensive enforcement provisions *for the specific conduct the implied right of action sought to redress* – failure to provide notice to garnishees, but permitted suits by judgment debtors only against judgment creditors and not against banks. *Id.* at 72-75. The

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[6] A Shepard's report for *Axelrod* immediately returns this Court's follow-on decision in *McBarnette*, which held that reports to OPMC may be disclosed to physicians under certain circumstances when necessary to protect them.

Court also noted that the statute was patterned after a Connecticut statute containing an express right of action against banks, but the New York legislature omitted that provision when adopting the statute at issue. *Id.* at 72-73.

As it has throughout the life of this case, Nationwide's argument regarding the second *Sheehy* factor completely ignores the balance struck by the legislature in Section 230 between encouraging good faith reporting and investigation of potential misconduct and protecting physicians from bad faith or malicious reporting and proceedings. Instead, Nationwide seeks to completely write the "good faith, and without malice" language out of Section 230(11)(b). Only by doing so can Nationwide argue (though not convincingly) that "[g]iven the importance of reporting it is inconceivable that a private right of action against reporters advances Section 230's legislative purpose." (Opposition Brief at 19.)

Only if one assumes that (contrary to the express language of Section 230(11)(b)) the legislature intended to encourage *bad faith reporting* to OPMC could one conceive that an implied right of action deterring bad faith reporting would not promote Sectoin 230's legislative purpose. Nationwide does exactly that when it claims that "there is no evidence that the legislature intended either: 1) to encourage only good faith reporting; or 2) affirmatively to discourage bad faith reporting." (Opposition Brief at 20.) In fact, Nationwide actually argues that "[t]o the contrary, § 230 encourages *all* reporting, *regardless of motive*." (Opposition

Brief at 21 (emphasis added)). Nationwide then purports to support this notion by citing to language in Section 230(11)(a) providing that any person may "report to the board any information which such person . . . has which *reasonably appears to show* . . . misconduct." (*Id.*) Nationwide feigns ignorance that the right to report information that "reasonably appears to show" misconduct invites only good faith reporting. It is exactly this approach to reporting that calls out for the implied right of action to deter the bad faith reporting that the legislature clearly did not want to occur. *See Doe v. Roe*, 599 N.Y.S.2d 350, 353 (4th Dep't 1993) ("That grant of immunity has meaning only if a cause of action for damages exists for a violation of article 27-F.").

Nationwide wraps up its argument with respect to the second *Sheehy* factor by citing statistics noting that in 2017 only 43% of reports to OPMC were deemed credible enough to proceed past the initial review phase for further investigation and argues this somehow demonstrates that there is no benefit to deterring bad faith reporting to OPMC. (*See* Opposition Brief at 21-22). The fact that a specific report does not proceed to investigation does not necessarily indicate it was made in bad faith. However, the implied right of action for bad faith reporting to OPMC deters bad faith, baseless reports and undisputedly helps OPMC focus its limited resources on reports that genuinely implicate public health.

C. The Implied Right Of Action Is Consistent With Section 230's Legislative Scheme

In the Opening Brief Dr. Haar demonstrated that the implied right of action for bad faith reporting to OPMC is consistent with Section 230's legislative scheme because the entire legislative scheme is designed to encourage good faith reporting and investigation of physician conduct while protecting physicians from bad faith reports or bad faith conduct during the investigation process. Moreover, unlike the cases cited by Nationwide where this Court declined to recognize an implied right of action, Section 230 does not have any enforcement provision addressing bad faith, malicious reporting to OPMC. In another situation where a statute protected persons disclosing information "in good faith, and without malice" an implied right of action for bad faith disclosure was found necessary and appropriate to give meaning to the statutory scheme. *See Doe*, 599 N.Y.S.2d at 353 ("That grant of immunity has meaning only if a cause of action for damages exists for a violation of article 27-F.").

Nationwide misrepresents Dr. Haar's position when it claims Dr. Haar is arguing that an implied right of action can only be inconsistent with a legislative scheme where the legislature specifically rejected the remedy. (*See* Opposition Brief at 23-24.) Rather, what Dr. Haar demonstrated in the Opening Brief is that this Court generally has found implied rights of action inconsistent with legislative schemes only where the legislature has expressly created enforcement mechanisms

for the specific conduct the implied right of action sought to redress but did not include the remedy sought to be implied in the statute. (Opening Brief at 11-16.)

The cases Nationwide cites in opposition to Dr. Haar's position with respect to the third *Sheehy* factor are inapplicable or actually confirm his position.[7]

Cruz, 22 N.Y.3d 61, rejected an implied right of action against banks for failure to provide notice to account holders who's accounts were garnished because the legislature created an express right of action against judgment creditors for the specific conduct the implied right of action sought to redress – failure to provide notice to account holders, but did not provide a right of action against banks.

Hammer v. American Kennel Club, 1 N.Y.3d 294 (2003), rejected an implied right of action against the American Kennel Club for animal cruelty based on its requirement that certain dog breeds have their tails docked because the statute created criminal liability for the specific conduct the implied right of action

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[7] Nationwide cites *Rhodes v. Herz*, 27 Misc. 3d 732 (Sup. Ct. N.Y. Co. 2010), *aff'd* 84 A.D.3d 1 (1st Dep't 2011) for the proposition that "[i]mmunity for good faith reporting does not translate into the converse – an implied right of action for bad faith reporting." (Opposition Brief at 12). In *Rhodes* the court was considering whether an individual who engaged an unlicensed employment agency had an implied right of action for damages against the agency for operating without a license. Consistent with *Sheehy* and its progeny, the First Department held that an implied right of action for individuals would be inconsistent with the overall statutory scheme because the statute already enforcement provisions that imposed both civil and criminal penalties *for the specific conduct the implied right of action sought to redress* – operating an unlicensed employment agency. 84 A.D.3d at 5-6.

sought to redress – animal cruelty, and expressly authorized only police officers, constables and animal cruelty societies to enforce the criminal penalties.

City of New York v. Smokes-Spirits.com, Inc., 12 N.Y.3d 616 (2009), rejected an implied right of action by the City of New York against out-of-state cigarette sellers who did not comply with reporting requirements designed to allow the City to collect taxes from City residents who purchased cigarettes from those sellers because the statute imposing the reporting requirements expressly imposed penalties for the specific conduct the implied right of action sought to redress – evasion of cigarette taxes, "[b]ut enforcement of those penalties has been entrusted only to local district attorneys and the Commissioner of Health," *Id.* at 629.

Mark G. v. Sabol, 93 N.Y.2d 710 (1999), rejected implied rights of action based on two separate statutes by children who were dependent on New York's child welfare system against certain state officials who allegedly negligently oversaw the child welfare program. The first statute contained enforcement provisions for the specific conduct the implied right of action sought to redress – failure to properly oversee child welfare, which imposed cuts in funding if local child welfare agencies did not meet certain reporting requirements or provide necessary services. The second statute expressly provided a civil remedy for the specific conduct the implied right of action sought to redress – failure to properly oversee child welfare, but only for "willful" failure to provide services.

Where the legislature has not provided an enforcement mechanism, an implied right of action is consistent with the legislative scheme. *See*, *e.g.*, *Lino v City of New York*, 958 N.Y.S.2d 11, 16 (1st Dep't 2012) (finding implied right of action and noting "that the legislature did not establish other penalties for violation of the statute or provide any enforcement mechanism").

None of the cases cited by Nationwide involved situations like the one presented here, where there is no enforcement mechanism in the statutory scheme for the conduct addressed by the implied right of action – bad faith reporting to OPMC. Moreover, courts have found that even where statutes contain enforcement mechanisms, an implied right of action is appropriate so long as the implied right is not inconsistent. *See*, *e.g.*, *Gerel Corp. v. Prime Eastside Holdings, LLC*, 783 N.Y.S.2d 355 (1st Dep't 2004) (recognizing implied right of action despite grant of enforcement powers to Attorney General in statute); *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 684 N.Y.S.2d 344 (3d Dep't 1999) (recognizing implied right of action despite existence of other statutory remedies for defendant's conduct); *Earsing v. Nelson*, 629 N.Y.S.2d 563 (4th Dep't 1995) (recognizing implied right of action despite existence of criminal penalties for defendant's conduct).

Nationwide argues that the legislature chose to protect citizens from medical misconduct through reports of suspected misconduct and "made reporting

confidential and created qualified immunity in favor of reporters" to encourage reporting. (Opposition Brief at 25.) Once again, Nationwide ignores that this Court has expressly held that the confidentiality provisions of Section 230(11)(a) were intended to protect both reporters and physicians, and the "immunity" contained in Section 230(11)(b) protects only good faith reporters while recognizing that bad faith reporters should be subject to civil liability.

Nationwide states that Section 230(11) "do[es] not portend any legislative desire to open the floodgates to lawsuits against reporters. Accordingly, penalizing reporters through an implied remedy is entirely inconsistent with the legislature's chosen enforcement scheme." (Opposition Brief at 25 (emphasis added).) The problem with this formulation is that it does not identify *any* enforcement mechanism (the critical fact this Court looks to with respect to the third *Sheehy* factor), because there is none. Far from the circumstances in *Sheehy*, *Cruz*, *Hammer* or *Smokes-Spirits.com* where the statutes contained express enforcement mechanisms *for the specific conduct the implied right of action sought to redress* but did not contain the specific remedy the plaintiff sought to imply, there is no enforcement mechanism for bad faith reporting contained in Section 230 and Nationwide does not point to any. While Nationwide may like (and seek to benefit from) this situation, it does not render the implied right of action for bad faith reporting to OPMC inconsistent with Section 230's legislative scheme.

Nationwide also argues because Section 230(10)(j) provides protection for physicians from impermissibly delayed proceedings (or, as Nationwide puts it, "create[s] an express limited right of action when the Board fails to take action 'within a specified period of time'") it somehow brings this case within the ambit of cases like *Sheehy*, *Cruz*, *Mark G* or the other cases cited by Nationwide in which the legislature created express enforcement mechanisms *for the specific conduct the implied right of action sought to redress*.[8] This obviously is not the case. The implied right of action is to enforce Section 230's recognition that bad faith reporters to OPMC should be subject to civil liability. There is no enforcement mechanism for this. *See Doe*, 599 N.Y.S.2d at 353 ("That grant of immunity has meaning only if a cause of action for damages exists for a violation of article 27-F."). In any event, courts have recognized that even where a statutory scheme gives certain express rights of action the implication of others necessary to give effect to specific provisions of the statute are not inconsistent. *See*, *e.g.*, *Negrin v. Norwest Mortg., Inc.*, 263 A.D.2d 39, 700 N.Y.S.2d 184 (2d Dep't 1999) (implied

[8] *Varela v. Investors Ins. Holding Corp.*, 81 N.Y.2d 958 (1993), rejected an implied right of action to enforce consumer protection law because the statute contained an enforcement mechanism *for the specific conduct the implied right of action sought to redress* – improper practices with respect to debt collection, but authorized the New York State Attorney General or a District Attorney to commence a civil action to enforce the statute.

right of action for mortgage holders consistent with legislative scheme even though statute granted certain express rights to mortgage holders).

Nationwide's argument that Section 230(11)(a)'s confidentiality provisions render the implied cause of action difficult for plaintiffs to pursue is not persuasive. While it may be true that many physicians who are the subject of bad faith reports to OPMC will not know the name of the reporter, that is not Nationwide's concern or a basis to reject the implied right of action. Nationwide cites no authority to support such an approach. In fact, that circumstance further mitigates any concern that the implied right of action would "fling open the floodgates to lawsuits against reporters." (Opposition Brief at 25.) Indeed, a search using only the term "230(11)(b)" in the New York state and federal databases on Lexis returns approximately ten (10) cases involving claims for bad faith reporting to OPMC since *Foong* recognized the implied right of action. Moreover, between 2003 (when *Foong* first recognized the implied right of action for bad faith reporting) and 2009 the number reports received by OPMC steadily increased to an "all time high" in 2009 as reported by OPMC in its annual report. *See* Board for Professional Medical Conduct 2002-2004 Annual Report;[9] Board for

[9] Available at https://www.health.ny.gov/professionals/doctors/conduct/annual_reports/2002-2004/ (last accessed July 17, 2019).

Professional Medical Conduct 2008-2009 Annual Report.[10] Thus, the argument that the implied right of action has a "chilling effect" on reporting is empirically false. (*See* Opposition Brief at 22 (citing *Lesesne*).)

II. THE NO FAULT LAW HAS NO RELEVANCE TO THIS APPEAL

Throughout the Opposition Brief, Nationwide refers to and makes arguments based on the No Fault Law. However, other than as a vehicle to cast unjustified aspersions on the medical profession,[11] it is unclear why Nationwide does so. Nationwide does not articulate any connection between the No Fault Law and Section 230.

Nationwide notes that the No Fault Law requires insurers to report patterns of overcharging, excessive treatment or other improper actions by physicians to OPMC. (Opposition Brief at 8, 28). This is neither surprising nor of any consequence here. Nationwide does not argue that the No Fault Law requires insurers to make bad faith reports to OPMC, or that it immunizes them from liability for doing so. Section 230(11)(b) specifically references and protects "[a]ny person, organization, institution, *insurance company*, osteopathic or medical

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[10] Available at https://www.health.ny.gov/professionals/doctors/conduct/annual_reports/2008-2009/report.htm (last accessed July 17, 2019).

[11] For example, while acknowledging that it is not relevant to this appeal, Nationwide gratuitously references a recent decision of this Court, *Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, No 39, 2019 N.Y. LEXIS 1641 (N.Y. June 11, 2019). (*See* Opposition Brief at 4, n. 1).

society who reports or provides information to the board in good faith, and without malice" and makes no distinction between mandatory reporters and permissive reporters.[12] Section 230(11)(b) (emphasis added). Accordingly, while Nationwide is required to report to OPMC circumstances it believes in good faith reasonably constitute overcharging, excessive treatment or other improper conduct, that reporting is protected by Section 230(11)(b). Nationwide does not (nor could it) argue that mandatory reporting requires or entitles it to make bad faith reports to OPMC. Not does it – or could it – argue that it is subject to any lower standard of good faith in determining whether a set of facts and circumstances triggers its mandatory reporting obligations. And Nationwide certainly cannot argue credibly that the "threat" of litigation for bad faith reporting would deter reporting by mandatory reporters.

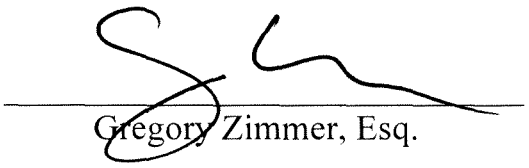
CONCLUSION

For the foregoing reasons, and as set forth more fully in the Opening Brief, Dr. Haar respectfully requests that the Court answer the certified question in the affirmative, affirm that an implied right of action for bad faith reporting to OPMC

[12] Section 230(11)(a) mandates reporting by a number of classes of persons and entities and these mandatory reporters are in no different position than Nationwide or some other reporter which may be required to make reports to OPMC under some other statute or regulation. However, Section 230(11)(b) provides the same protection for good faith reports and the same civil liability for bad faith reports for both mandatory and permissive reporters.

exists pursuant to Section 230(11)(b), and grant Dr. Haar such other and further relief as the Court deems just and proper.

Dated: Westchester, New York
July 18, 2019



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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: Westchester, New York
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