To be Argued by:
RALPH J. CARTER
(Time Requested: 15 Minutes)

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

BRIEF FOR DEFENDANT-RESPONDENT

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Date Completed: July 2, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1 of the New York Rules of Appellate Procedure, Defendant-Respondent Nationwide Mutual Fire Insurance Company ("Nationwide") states that it is a wholly owned subsidiary of Nationwide Mutual Insurance Company, and discloses the following subsidiaries and affiliates:

- ALLIED General Agency Company
- ALLIED Group, Inc.
- ALLIED Property and Casualty Insurance Company
- ALLIED Texas Agency, Inc.
- AMCO Insurance Company
- Depositors Insurance Company
- Nationwide Insurance Company of America
- Nationwide Sales Solutions, Inc.
- Premier Agency, Inc.
- Farmland Mutual Insurance Company
- Nationwide Agribusiness Insurance Company
- DVM Insurance Agency, Inc.
- Freedom Specialty Insurance Company
- National Casualty Company
- National Casualty Company of America, Ltd.
- Scottsdale Indemnity Company
- Scottsdale Insurance Company
- Scottsdale Surplus Lines Insurance Company
- V.P.I. Services, Inc.
- Veterinary Pet Insurance Company
- Western Heritage Insurance Company
- ALLIED Insurance Company of America
- American Marine Underwriters, Inc.
- 1492 Capital, LLC
- Colonial County Mutual Insurance Company
- Crestbrook Insurance Company
- Harleysville Group Inc.
- Harleysville Insurance Company
- Harleysville Insurance Company of New Jersey
- Harleysville Insurance Company of New York

- Harleysville Lake States Insurance Company
- Harleysville Ltd.
- Harleysville Pennland Insurance Company
- Harleysville Preferred Insurance Company
- Harleysville Services, Inc.
- Harleysville Worcester Insurance Company
- Insurance Management Resources, L.P.
- Insurance Intermediaries, Inc.
- Lone Star General Agency, Inc.
- Nationwide Affinity Insurance Company of America
- Nationwide Assurance Company
- Nationwide Cash Management Company
- Nationwide General Insurance Company
- Nationwide Indemnity Company
- Nationwide Insurance Company of Florida
- Nationwide Lloyds
- Nationwide Mutual Fire Insurance Company
- Nationwide Mutual Insurance Company
- Nationwide Property and Casualty Insurance Company
- Nationwide Property Protection Services, LLC
- Nationwide Services Company, LLC
- Nationwide Realty Services, Ltd.
- Retention Alternatives Ltd.
- THI Holdings (Delaware), Inc.
- Titan Auto Insurance of New Mexico, Inc.
- Titan Indemnity Company
- Titan Insurance Company
- Titan Insurance Services, Inc.
- Victoria Automobile Insurance Company
- Victoria Fire & Casualty Company
- Victoria National Insurance Company
- Victoria Select Insurance Company
- Victoria Specialty Insurance Company
- Whitehall Holdings, Inc.
- W.I. of Florida (d.b.a. Titan Auto Insurance)
- AGMC Reinsurance, Ltd.
- Harleysville Life Insurance Company
- Life REO Holdings, LLC
- Nationwide Advantage Mortgage Company
- Nationwide Asset Management, LLC

- Nationwide Trust Company, FSB
- Nationwide Corporation
- Nationwide Emerging Managers, LLC
- Nationwide Exclusive Agent Risk Purchasing Group, LLC
- Nationwide Financial General Agency, Inc.
- Nationwide Financial Institution Distributors Agency, Inc.
- Nationwide Financial Services Capital Trust
- Nationwide Financial Services, Inc.
- Nationwide Financial Services, Inc.
- Nationwide Fund Advisors
- Nationwide Fund Distributors LLC
- Nationwide Fund Management LLC
- Nationwide Global Holdings, Inc.
- Nationwide Global Ventures, Inc.
- Nationwide Investment Advisors, LLC
- Nationwide Investment Services Corporation
- Nationwide Life and Annuity Insurance Company
- Nationwide Life Insurance Company
- Nationwide Private Equity Fund, LLC
- Nationwide Retirement Solutions, Inc.
- Nationwide Retirement Solutions, Inc. of Arizona
- Nationwide Retirements Solutions, Inc. of Ohio
- Nationwide Retirement Solutions, Inc. of Texas
- Nationwide Retirement Solutions Insurance Agency, Inc.
- Nationwide Securities, LLC
- Newhouse Capital Partners, LLC
- Newhouse Capital Partners II, LLC
- NFS Distributors, Inc.
- NWD Asset Management Holdings, Inc.
- NWD Investment Management, Inc.
- Olentangy Reinsurance Company
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CERTIFIED QUESTION ACCEPTED FOR REVIEW

1. The United States Court of Appeals 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?"

Suggested Answer: No. Medical licensees, who are regulated by the Medical Practices Act of 1977, are not intended beneficiaries of the Act. An implied right of action would not deter physician misconduct, the objective of the Act. Finally, a private remedy is inconsistent with administrative investigations of and penalties for licensee misconduct – the legislature's selected enforcement mechanism.

COUNTERSTATEMENT OF THE CASE

Introduction

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 Regulation 83, 11 N.Y.C.R.R. § 68.8.

Notably, the certified question is not whether a licensee ever may state a claim under New York law for malicious reporting. To be clear, the Plaintiff-Appellant Dr. Robert D. Haar, initially sued Nationwide both under § 230(11)(b) and for defamation and, unsurprisingly, the factual basis pleaded for both claims is essentially identical. He voluntarily withdrew his defamation claim because it was time-barred. A-111.

Dr. Haar's argument for an implied cause of action for malicious reporting is logically incongruent. He claims that § 230(11)(b) – which encourages reports of misconduct by immunizing good faith reporting – demonstrates the legislative intent for implying a right of action for bad faith reporting. Omitted from his argument is any explanation of why a new private remedy was needed, when an

essentially identical claim for defamatory reporting already existed under common law. The more logical explanation is that the legislature enacted § 230(11)(b) to extend immunity from private claims when the reports were made in good faith.

Although seemingly guided by *Mark G. v. Sabol*, 93 N.Y.2d 710 (1999), in which this Court concluded that the Social Services Law section immunizing good faith reporters of child abuse did not support an implied right of action, the Second Circuit sought certification due to a split in the New York Appellate Division Departments, with the Second Department finding no implied right of action. *Elkoulily v. N.Y.S. Catholic Healthplan Inc.*, 153 A.D.3d 768, 772 (2017); *See Lesesne v. Brimecome*, 918 F. Supp. 2d 221 (S.D.N.Y. 2013); *See also Fine v. State of New York*, 10 Misc. 3d 1075(A), 2005 WL 3700727 (N.Y. Ct. Cl. 2005)(no implied right of action under § 230's confidentiality provisions). By contrast, the First Department concluded, without analysis or findings, that § 230(11)(b) created an implied right of action. *Foong v. Empire Blue Cross & Blue Shield*, 305 A.D.2d 330 (2003).

As set forth below, not the slightest indicia of legislative intent exists to support an implied remedy. The legislature intended § 230 to be enforced <u>against</u>, not by, medical licensees. Put simply, § 230 creates no implied remedy against reporters.

Background of the Case

Dr. Haar is an orthopedic surgeon, licensed to practice medicine in New York. He practices at several locations, including Haar Orthopedics and Sports Medicine, P.C. A-32 ¶ 11. Defendant-Respondent Nationwide is a licensed insurer issuing automobile insurance policies in New York. A-32 ¶ 8.

On October 2, 2012, Nationwide reported Dr. Haar to the OPMC and the New York Insurance Frauds Bureau pursuant to its obligation to report patterns of overcharging, excessive treatment and other improper actions to the New York State Department of Financial Services and to the OPMC under N.Y. Insurance Law § 5108(c) and 11 N.Y.C.R.R. § 68.8. A-54-55.

On June 6, 2017 – almost five years later – Dr. Haar commenced this action by complaint against Nationwide in the New York Supreme Court, New York County. He titled Count I "Filing Complaints With OPMC Without Good Faith Basis," which alleged false complaints to the OPMC made in bad faith. A-46.[1] Count II asserted a claim for defamation predicated on similar facts. A-47. On

[1] Although not strictly related to the certified question, this Court's decision in *Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, No. 39, 2019 N.Y. LEXIS 1641 (N.Y. June 11, 2019) counsels against the merits of the claim that Nationwide lacked a good faith basis to report that professional corporations were fraudulently incorporated. *See* A-38 ¶ 53, A-43-45 ¶¶ 94-107. Similarly, the merits of reporting billing in excess of the No Fault fee schedule was in good faith, given Nationwide's obligation to report such billings. *See* Gen. Counsel Op. No. 1-7-86, 1986 WL 1155479 (Jan. 7, 1986) (insurer required to report billing in excess of No Fault fee schedule).

July 18, 2017, Nationwide removed the action to the United States District Court for the Southern District of New York.

On August 25, 2017, Nationwide moved to dismiss the Complaint. A-106. By Memorandum Endorsement dated November 30, 2017, the Honorable Lewis A. Kaplan dismissed Count I, reasoning that § 230(11)(b) provides no implied cause of action:

> [Dr. Haar's] first cause of action admittedly rests on the premise that [§ 230(11)(b)] creates a private right of action for bad faith reports of professional conduct to the [OPMC] [and that] [f]or the reasons stated by Judge Nathan in *Lesesne v. Brimecome*, 918 F. Supp. 2d 221, 228-230 (S.D.N.Y. 2013), reasons subsequently adopted by the Appellate Division, Second Department, in *Elkoulily v. N.Y.S. Catholic Healthplan, Inc.*, 153 A.D.3d 768, 771-72 (2017), this Court agrees that the New York Court of Appeals, were it faced with the question, would hold that this statute does not create a private right of action.

A-107.[2]

The district court then converted the motion to dismiss the defamation count into a motion for summary judgment because, "[w]hile the complaint alleges on information and belief that the so-called False Statements were made to OPMC in or about July 2016," A-107, which was within the one-year statute of limitations, *see* N.Y. C.P.L.R. 215(3), Nationwide "submitted a redacted copy of the complaint

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[2] Dr. Haar incorrectly asserts that the district court relied solely on *Lesesne*, App. Br. at 2, and that *Elkoulily* was decided while the Second Circuit appeal was pending. *Id.* at 3. Both points are conclusively rebutted by this passage in which the district court relied on *Elkoulily* in deciding that there was no implied right of action under § 230.

to OPMC and a declaration of its investigator stating that he submitted that complaint in 2012 and that Nationwide closed its investigation of the plaintiff in 2013." *Id.*, A-54-55. It cautioned that if Dr. Haar "ha[d] no good faith basis for adhering to his allegation that the OPMC complaint was made in or about July 2016, he would be well advised to withdraw that assertion. *See* Fed. R. Civ. P. 11(b)." A-108. In response to this admonition, Dr. Haar withdrew Count II. A-111. Because Dr. Haar did not clarify whether the withdrawal was with prejudice, the district court granted summary judgment, conclusively disposing of Count II as untimely. A-112.

On December 22, 2017, the district court entered final judgment. A-113-14. On January 16, 2018, Dr. Haar filed a Notice of Appeal to the Second Circuit. A-125. After briefing and argument, on March 13, 2019, the Second Circuit certified the legal question to this Court. A-3-14.

ARGUMENT

I.

THE STATUTORY STRUCTURE OF THE MEDICAL PRACTICES ACT AND NO FAULT LAW

Dr. Haar concedes that § 230(11)(b) contains no express private right of action for reporting licensee misconduct, but asserts nonetheless that this Court should imply such a right of action. However, "[i]n the absence of an express private right of action," a claim may be implied only if "'legislative intent to create

such a right of action is fairly implied in the statutory provisions and their legislative history.'" *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 70 (2013), quoting *Carrier v. Salvation Army,* 88 N.Y.2d 298, 302 (1996). The burden rests with Dr. Haar to establish that a private remedy may be implied from the Act's express provisions and legislative history. *See Gomariz v. Foote, Cone & Belding Comm., Inc.*, 228 A.D.2d 316, 316 (1996).

Because Dr. Haar contends that the source of his implied right of action is § 230 "taken as a whole," App. Br. at 7, it is tempting to look only to the Medical Practices Act. The No Fault Law, however, obligated Nationwide to report. And, the legislature is presumed to be familiar with all applicable statutes and common law, including the previously-enacted No Fault Law, its legislative history, and the existing common law and statutory remedies. *See Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 325 (1983). Accordingly, this Court should assess the purpose, structure and enforcement mechanisms of and interplay between § 230 and the No Fault Law, as both are critical to the certified question.

A. New York's No Fault Statutory Scheme

The New York legislature enacted the No Fault Law in 1973, prior to the Medical Practices Act. Its purpose was to "ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burdens on the courts and to provide substantial [insurance] premium savings to

New York motorists." *Medical Society of the State of New York v. Serio*, 100 N.Y.2d 854, 860 (2003).

Although the legislature intended the No Fault Law to reduce premiums, insurance costs actually rose in response to its enactment, in part due to abuses in health provider charges and other "costly abuses." Memorandum of State Executive Department, *reprinted in* [1977] N.Y. Laws 2445 (McKinney). Accordingly, in 1977 – the same year in which it enacted § 230 – the legislature amended the No Fault Law and implemented cost control measures.

The legislature adopted N.Y. Insurance Law § 678, which later became § 5108, to control abuses in health provider charges. Section 5108 delegated to the Superintendent of Insurance, the authority to promulgate regulations pertaining to no fault fee schedules. It also precluded provider charges in excess of the accepted provider charges. Finally, § 5108 mandated that "[e]very insurer shall report to the [Commissioner of Health] any patterns of overcharging, excessive treatment or other improper actions by a health provider within thirty days after such insurer has knowledge of such pattern." N.Y. Insurance Law § 5108(c) (emphasis added). The insurer's reporting obligation is an essential part of the No Fault enforcement scheme. *GEICO v. Avanguard Medical Group, PLLC*, 27 N.Y.3d 22, 27 (2016) (noting that fraud prevention enforcement is facilitated through required reporting by insurers).

The Superintendent promulgated Regulation 83 in response to § 5108's legislative mandate, and thereafter amended it several times. *See State Farm Mut. Auto Ins. Co. v. Mallela*, 372 F.3d 500, 502 (2d Cir. 2004). The current § 68.8 reiterates the affirmative obligation of insurers to "report any pattern of overcharging, excessive treatment or any other improper actions by a health provider, within 30 days after such insurer has knowledge of such pattern to the No Fault Unit . . . and," for complaints about physicians, to the OPMC. 11 N.Y.C.R.R. § 68.8.

B. Medical Practices Act of 1977

Four years following passage of the No Fault Law, the legislature enacted the Medical Practices Act. "The public policy at the root of the bill was to prevent a physician from causing, engaging in or maintaining a condition or activity which constitutes an imminent danger to the health of the people." *Atkins v. Guest*, 158 Misc. 2d 426, 431 (Sup. Ct. N.Y. Co. 1993), *aff'd*, 201 A.D.2d 411 (1st Dep't 1994); *see also id*. at 432 ("The overriding legislative intent of Public Health Law § 230 [is] to promote and protect public health.").

The New York Commissioner of Health administers the Medical Practices Act. The Commissioner's statutory duty is to "take cognizance of the interests of health and life of the people of [New York], and of all matters pertaining thereto and exercise the functions, powers and duties of the [Department of Health as]

prescribed by law." N.Y. Pub. Health Law § 206(1)(a). One such duty is to investigate and prosecute professional misconduct involving medical licensees. N.Y. Pub. Health Law § 230; *see Doe v. Axelrod*, 71 N.Y.2d 484, 488 (1988). The Commissioner selects a Board, composed of physicians and lay members, to address misconduct and disciplinary matters within the medical profession. *Id. citing* N.Y. Pub. Health Law §§ 230(1) & (7).

Just as insurer reporting is critical to the enforcement of the No Fault Law, reporting is the lynchpin of the Medical Practices Act. It is essential to the Act's purpose of protecting the public from physician misconduct. Originally, § 230(11)(a) required medical societies and physicians to report professional misconduct to the OPMC, while prescribing that "any other person may, report to the" OPMC. N.Y. Pub. Health Law § 230(11)(a) (emphasis added). Reporting was so central to § 230 that medical circles at the time dubbed the Act with its popular name: the "rat-fink law." Lawrence E. Becker, *New Treatment for Disabled Physicians: Proposed Amendments to the Medical Practices Act of 1977,* 42 Alb. L. Rev. 327, 329 n.13 (1978).

To encourage reporting, the Act immunized reporting in good faith. The original version of § 230(11)(b) provided: "[a]ny person, organization, institution, 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." A-89. Since then, the legislature amended this section only slightly to include insurance companies within its protective ambit. It now reads: "[a]ny 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." N.Y. Pub. Health Law § 230(11)(b) (emphasis added).

On the other hand, reporting is not a finding of misconduct. Rather, the Act instructs that reports are used to "begin investigations" and to "develop further information." *Id.* § 230(11)(a). Reports may be closed on preliminary review or may involve a more detailed investigation including an interview. *Id.* § 230(10). The Director reviews the results of the investigation, which may proceed to charges and a hearing. *Id.*

Because of their importance to enforcement, and because patients may be reporters, the Act prescribes that all reports "shall remain confidential" and are inadmissible in any administrative or judicial proceeding. *Id.* § 230(11)(a). The legislature designed this measure "to encourage disclosure of medical malpractice and physician misconduct and to alleviate complainants' fear of litigation resulting from doing so." *Axelrod v. Sobol*, 78 N.Y.2d 112, 115 (1991).

Contrary to providing a private right of action, § 230(11)(b) immunizes persons, including insurers, who in good faith report licensees to the OPMC. Put differently, it creates an affirmative defense to a defamation claim. *Elkoulily*, 153 A.D.3d at 772. Immunity for good faith reporting does not translate into the converse – an implied right of action for bad faith reporting. *Rhodes v. Herz*, 27 Misc. 3d 722, 732 (Sup. Ct. N.Y. Co. 2010), *aff'd*, 84 A.D.3d 1 (1st Dep't 2011).

II.

NO PRIVATE RIGHT OF ACTION CAN BE IMPLIED FROM THE MEDICAL PRACTICES ACT

Courts may imply a private right of action where the "legislative intent to create such a right of action is 'fairly implied' in the statutory provisions and their legislative history." *Brian Hoxie's Painting Co. v. Cato-Meridian Cent. Sch. Dist.*, 76 N.Y.2d 207, 211 (1990). The so-called three *Sheehy* factors are weighed to determine whether a private right of action should be implied, including whether: (1) the plaintiff was "one of the class for whose particular benefit the statute was enacted;" (2) a private right of action promotes the statute's legislative purpose; and (3) the creation of a private right of action is consistent with the legislative scheme, focusing on the prescribed enforcement mechanism. *Sheehy v. Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629, 633 (1989). The last element is the most important, and often is determinative of an implied cause of action. *Brian Hoxie's Painting*, 76 N.Y.2d at 212.

Dr. Haar claims that this Court should apply the *Sheehy* factors to the entirety of § 230,[3] rather than evaluating § 230(11)(b) in isolation. *See* App. Br. at 5, 6, 12, 13. Ultimately, this offers a distinction without a difference because, whether viewing the whole legislative scheme or § 230(11)(b) in insolation, there is no basis from which to imply a private remedy.

A. The Medical Practices Act was Not Enacted for the Especial Benefit of Licensees.

The first *Sheehy* factor assesses whether Dr. Haar falls within the class for whose "especial benefit" § 230 was enacted. *Burns Jackson,* 59 N.Y.2d at 329; *Sheehy*, 73 N.Y.2d at 633. Because the legislature enacted § 230 to curb licensee misconduct, as a licensee regulated by the Act, Dr. Haar is not in the class for whose especial benefit § 230 was enacted.

The Act's overarching purpose is to protect the health of New York citizens through oversight of the practice of medicine. *Selkin v. State Bd. for Prof'l Med. Conduct*, 63 F. Supp. 2d 397, 402 (S.D.N.Y. 1999) (The Act "implicate[s] an important state interest in protecting the health of [New York] citizens by regulating the practice of medicine . . ."); *Atkins v. Guest*, 158 Misc. 2d at 431-32 (§ 230's intent is to promote and protect the public health.).

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[3] Dr. Haar contends that *Lesesne* mistakenly failed to apply the *Sheehy* factors to the entirety of the Medical Practices Act. App. Br. at 2. He is wrong. *Lesesne* expressly addressed both "§ 230, as a general matter" and "[e]ven section 230(11)(b)." 918 F. Supp. 2d at 229.

This type of broad purpose – for the general protection of the citizenry – found the first *Sheehy* factor wanting in *Matter of Stray from the Heart, Inc. v. Dep't of Health - Mental Hygiene*, 20 N.Y.3d 946 (2012). In *Stray*, this Court concluded that "the Animal Shelters and Sterilization Act was enacted for the benefit of the general public in New York City and for the safety of unwanted dogs and cats," not for the benefit of a collateral "animal rescue organization" promoting the adoption of unwanted dogs and cats. *Id.* at 947. *See also Brian Hoxie's Painting*, 76 N.Y.2d at 212 (doubtful that a public bid contractor was beneficiary of law requiring that bid solicitations disclose that public works laborers must be paid prevailing wages); *O'Connor v. City of New York*, 58 N.Y.2d 184, 190 (1983) (legislation with purpose "of protecting all members of the general public similarly situated" does not create a "special relationship" for municipal liability). *Stray, Brian Hoxie's* and *O'Connor* suggest that legislation promoting generalized protection for citizens through the oversight of medical licensees is not enacted for the especial benefit of medical licensees. *See also Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (legislation focusing on the persons regulated as opposed to the persons protected is not enacted for the benefit of a particular class of persons).

Notably, the legislature premised § 230(11)(b) on certain American Medical Association's Ad Hoc Committee on Medical Discipline reports:

> [O]ne of the major problems for state regulating boards has been the reluctance of hospitals, medical societies, and physicians to provide information concerning erratic doctors, because of a fear of litigation. The purpose of this bill is to alleviate that concern and to increase the reports of unprofessional conduct to the State Board for Professional Medical Conduct. When Arizona enacted similar legislation, the number of complaints reported to the board quadrupled, and disciplinary action became more effective.

A-95 (emphasis added). *McBarnette v. Sobol*, 83 N.Y.2d 333, 339-40 (1994)("the Legislature's concern was primarily that of encouraging complaints by colleagues.").[4]

Tacitly, Dr. Haar admits that at a granular level § 230(11)(b) was not enacted for his especial benefit. *See* App. Br. at 7 ("[w]hen Section 230 is taken as a whole, it is clear that physicians are within the class of persons protected . . .") (emphasis added). The Act's legislative history, however, suggests that reporting was and remains essential to the purpose of the entirety of § 230. The legislature intended to enhance the oversight of medical licensees by immunizing reporters, not to negate that immunity by creating a new implied avenue for litigation against the parties reporting.

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[4] Simultaneously, the New York legislature amended the No Fault Law to require insurers to report licensees. This lawmaking coincidence was not pure happenstance. Surely, the legislature comprehended the importance of reporting physician misconduct, fraud and overbilling to the enforcement of both laws.

Dr. Haar contends that certain due process provisions, such as notice and an opportunity to be heard, prove that he falls into the class of persons especially benefitted by the Act. App. Br. at 7-8.[5] Notably, however, he does not base his claim against Nationwide on due process violations. Nor could he, since the OPMC allegedly "closed its investigation of him without taking any action or imposing any disciplinary findings." A-31 ¶ 3.

It goes without saying that the United States and New York constitutions require due process of law. Thus the Act's due process protections evince only the legislative intent to comply with constitutional guaranties. Their mere existence cannot mean that the Act was enacted for the especial benefit of reported medical professionals. If that were so, polluters would be the intended beneficiaries of environmental protection statutes. *See Brown v. Med. Coll. of Ohio*, 79 F. Supp. 2d 840, 843, 845 (N.D. Ohio 1999) (acknowledging that federal Health Care Quality Improvement Act ("HCQIA") "contains certain due process protections for physicians who are accused of professional misconduct," but concluding that physicians are not "a class for whose especial benefit the Act was passed"); *Simpkins v. Shalala*, 999 F. Supp. 106, 117 (D.D.C. 1998) ("[w]hatever protections

[5] Many of the due process sections cited by Dr. Haar became effective on March 31, 2018, well after: (1) the alleged reporting by Nationwide in October 2012 (A-54-55); (2) the investigation Dr. Haar alleges that OPMC notified him of in August 2016 (A-30 ¶ 2, A-40 ¶ 66); and (3) the conclusion of the OPMC investigation of Dr. Haar on January 27, 2017 (A-31 ¶ 3).

[HCQIA] may preserve for [physicians] . . . this statute was not intended to specifically protect [them]").

No court – federal or state – has concluded that § 230 was enacted for the especial benefit of the medical professionals it regulates. Even *Foong*, which mistakenly found an implied private cause of action, never made that pronouncement. Other courts have decided otherwise, ruling that, if anything, the Act protects reporters. *See, e.g.*, *Lesesne*, 918 F. Supp. 2d at 229 (legislature did not intend § 230 to benefit licensees, and § 230(11)(b) protects "individuals who have made complaints to the medical board."); *Elkoulily*, 153 A.D.3d at 772, (purpose of § 230(11)(b) is to protect individuals who have reported or filed complaints); *see also McBarnette*, 83 N.Y.2d at 338 (the Act protects persons reporting misconduct).

B. An Implied Private Cause of Action Would Not Promote the Legislative Purposes of the Medical Practices Act.

Given that the Medical Practices Act's purpose is to enhance oversight of licensees through increased confidential reporting, an implied civil remedy for licensees against reporters does not advance the Act's objectives.[6] As such, Dr. Haar fails to sustain his burden to elucidate this second *Sheehy* factor. His sole argument is that the legislature's desire to immunize good faith reporters from

[6] An implied caused of action also would not promote the objectives of the No Fault Law.

litigation, by negative implication, evinces its intent to create a new cause of action for bad faith reporting. App. Br. at 9.

The second *Sheehy* factor assesses the conduct the legislation is intended to deter, and whether "permitting civil damage suits for injuries arising from the same conduct would also further this deterrent goal." *Sheehy*, 73 N.Y.2d at 634; *cf. Burns Jackson,* 59 N.Y.2d at 329 (although declining a private remedy, noting that an implied action "would be a powerful deterrent to public employee strikes"); *Pelaez v. Seide*, 2 N.Y.3d 186 (2004) (finding no implied remedy, but opining that civil claims might reduce lead exposure, an objective of the Lead Paint Poisoning Prevention Act); *Uhr v. East Greenbush Cent. School Dist.*, 94 N.Y.2d 32 (1999) (no private remedy, but civil remedy might deter childhood scoliosis). Accordingly, the second *Sheehy* factor requires that the proposed implied claim be tightly aligned with the legislation's *raison d'être*. It specifically must deter the conduct the legislation is designed to deter or promote the conduct the legislation is intended to encourage.

The Medical Practices Act's purpose is to protect the public from licensee misconduct. That goal is effectuated through increased investigatory and disciplinary actions, initiated through reporting and complaints. In particular, § 230(11) was designed to "encourag[e] complaints" to the OPMC, and to overcome a reporter's reluctance to provide information about errant doctors by

immunizing the reporter from litigation. *McBarnette,* 83 N.Y.2d at 339-40 (statutory purpose "was that of mobilizing police efforts [against licensees] from within the profession"); *Axelrod*, 78 N.Y.2d at 115 (§ 230 intended to "encourage disclosure of medical malpractice and physician misconduct and to alleviate complainants' fear of litigation resulting from doing so"); *Elkoulily*, 153 A.D.3d at 772 (§ 230 "protect[s] individuals who have made complaints").

This case is not even close. Given the importance of reporting, it is inconceivable that a private right of action against reporters advances § 230's legislative purpose. To the contrary, implying a private right of action serves only to discourage reporting, thereby decreasing OPMC oversight. *See Axelrod*, 78 N.Y.2d at 115. It neither deters medical misconduct nor promotes the public's health and safety. In fact, an implied remedy serves only to increase the incidence of licensee misconduct – a consequence antithetical to the Act.

Dr. Haar confuses "absolute immunity for bad faith reports" and immunity for good faith reports with implying a private action for bad faith reporting. App. Br. at 10. The issues are entirely distinct. Section 230(11)(b) immunizes reporters from liability for all civil relief, provided the report is made in good faith – a qualified immunity. It thereby provides a defense to such common law claims as defamation. It does not create a new cause of action.

He also contends that, because the Act provides immunity to good faith reporters, by negative implication it creates an implied remedy for bad faith reporting. This "negative implication" syllogism fails because there is no evidence that the legislature intended either: 1) to encourage only good faith reporting; or 2) affirmatively to discourage bad faith reporting. *See* App. Br. at 9.

This Court rejected this very type of negative implication logic in *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61 (2013). In *Cruz*, this Court found that a safe harbor clause immunizing banks for the "inadvertent failure" to provide notices and forms did not create an implied remedy for statutory non-compliance. Refuting the negative implication argument, this Court explained:

> Plaintiffs contend that a private right of action can fairly be implied by negative implication from the safe harbor clause relating to banks under the doctrine 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. Plaintiffs theorize that, by explicitly saying that banks cannot be liable for inadvertently failing to provide the forms required . . . the legislature signaled that financial institutions could be liable for all other failures to comply with the statute . . . .

Id. at 72. After characterizing the use of *expressio unius* as "unusual," this Court reasoned that "[i]f the legislature intended to create new liability for banks, it is odd that it would choose to do so by expressly stating that banks are *not liable* in particular circumstances while, at the same time, remaining silent as to any

instances when banks *are liable* under the new statute." *Id.* So too here, had the legislature intended to create reporter liability, it "would have [just] said so" rather than instead hiding "'elephants in mouseholes.'" *Id.*

Declining to follow this negative implication syllogism does not invariably lead, as Dr. Haar suggests, to the "absurd" result of "encourage[ing] *bad faith* reports." App. Br. at 9. To the contrary, § 230 encourages all reporting, regardless of motive. It does not require any pre-report investigation. Any person may "report to the board any information which such person . . . has which reasonably appears to show . . . misconduct." N.Y. Pub. Health Law § 230(11)(a). The Act requires the OPMC to investigate all reports, suggesting that the legislature anticipated that many reports would fall short of misconduct. *See* New York State Dep't of Health, Bd. for Prof. Med. Conduct, *2017 Report* at 4, https://www.health.ny.gov/professionals/doctors/conduct/annual_reports/2017/docs/report.pdf (in 2017, only 43% of 9,699 complaints proceeded past the initial review phase for further investigation). *See also Axelrod*, 78 N.Y.2d at 115 (the OPMC investigates every complaint and "relies heavily on these complaints to discover misconduct"); *Hachamovitch v. DeBuono*, 159 F.3d 687, 690 (2d Cir. 1988) (noting the requirement "to investigate all complaints of professional misconduct") (emphasis added). Not only are all reports reviewed, OPMC

penalties must be premised on an investigation and examination,[7] not merely on reports.

As with the first *Sheehy* factor, no court has found that a private right of action promotes § 230's objectives or deters licensee misconduct. *Foong* is silent. Other courts have concluded – as Nationwide asserts – that an implied remedy undermines the Act's objectives. *See, e.g., Lesesne*, 918 F. Supp. 2d at 229 (finding that "an implied right of action in § 230(11)(b) would . . . be *counter* to the legislative purpose due to the likelihood that it would chill . . . complaints"); *See also Fine*, 2005 WL 3700727, at *6 (implied remedy does not advance statutory objectives).

C. An Implied Private Cause of Action is Inconsistent With the Legislative Scheme.

The critical third *Sheehy* factor asks whether an implied cause of action is inconsistent with the legislative scheme. The existence of an implied civil remedy often turns on the outcome of this factor. *Brian Hoxie's Painting*, 76 N.Y.2d at 212. *See also Cruz*, 22 N.Y.3d at 70.

[7] Notably, Dr. Haar received a notice and participated in an OPMC proceeding. Apparently, the OPMC viewed the reporting as sufficiently legitimate to proceed to a preliminary investigative hearing. A-69 ¶¶ 66, 69, 70.

1. An Implied Remedy is Not "Inconsistent" Only Where the Legislature Specifically Rejects the Remedy

Dr. Haar's contention that an implied remedy is inconsistent with legislation only where "the Legislature has created enforcement mechanisms for the specific provision[8] at issue but specifically excluded the remedy sought . . ." turns the jurisprudence of implied remedies on its head. App. Br. at 12 (emphasis added). The very reason that a plaintiff argues for implying a remedy is that the legislation is silent. To suggest that the legislature must speak up and expressly reject a remedy about which it was silent creates a presumption in favor of implied remedies – a notion that this Court has not embraced. *See Farrington v. Pinckney*, 1 N.Y.2d 74, 88 (1956) (the legislature is presumed to have investigated the subject, acted with reason and not from caprice).

In fact, the omission of a civil remedy from legislation – by itself – counsels that the legislature did not intend to create the remedy. *McLean v. City of New York*, 12 N.Y.3d 194, 200-01 (2009) (the legislature would have created a private right of action if it found it wise to do so). The legislature "has both the right and the authority to select the methods to be used in effectuating its goals" and thus no private action should be implied if it is "incompatible with the enforcement

[8] Dr. Haar's reference here to curtailing the analysis to a "specific provision" is at odds with his argument that § 230 "as a whole" should be analyzed. *See* App. Br. at 7.

mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme." *Sheehy*, 73 N.Y.2d at 634-35.

2. An Implied Cause of Action is Inconsistent with the Enforcement Mechanism of the Medical Practices Act

Sheehy and its progeny prescribe that an implied private right of action is inconsistent with a legislative scheme where "the statutes in question already contain[] substantial enforcement mechanisms, indicating that the legislature considered how best to effectuate its intent and provided the avenues for relief it deemed warranted." *Cruz*, 22 N.Y.3d at 71.

By way of example, in *Hammer v. American Kennel Club*, 1 N.Y.3d 294 (2003), this Court determined that an implied remedy against the American Kennel Club for penalizing a Brittany Spaniel with an undocked tail was inconsistent with the enforcement mechanism in animal protection statutes, which selected police officers and constables to enforce the law, and allowed animal cruelty societies to initiate criminal proceedings. In finding inconsistency, this Court relied on the "comprehensive statutory enforcement scheme," with which an implied remedy would be inconsistent. 1 N.Y.3d at 300. *See also City of New York v. Smokes-Spirits.com, Inc.*, 12 N.Y.3d 616 (2009) (public nuisance action is inconsistent with prescribed legislative enforcement mechanism).

In its considered wisdom, the New York legislature decided that it should protect citizens from medical misconduct through increased oversight and

disciplinary proceedings, initiated through reports of suspected medical misconduct. To encourage reporting – especially where reporters have no desire to report – the Act made reporting confidential and created qualified immunity in favor of reporters. The Act also prohibited the reports from being "admitted into evidence in any administrative or judicial proceeding." N.Y. Pub. Health Law § 230(11)(a). These provisions evince legislative intent to protect reporters from civil recourse; they do not portend any legislative desire to fling open the floodgates to lawsuits against reporters. Accordingly, penalizing reporters through an implied remedy is entirely inconsistent with the legislature's chosen enforcement scheme.

This Court's analysis in *Mark G. v. Sabol* is instructive. In *Mark G.*, plaintiffs asserted implied remedies under titles 4 and 6 of the Social Services Law. With title 6, plaintiffs argued by negative implication that the language of § 419 immunizing service providers and reporters acting in good faith[9] "support[ed] their contention that [an implied action for money damages under § 424] exists . . ." for

[9] The New York legislature has enacted numerous provisions that require or allow reporting and – in exchange – extend qualified immunity to reporters. *See, e.g.*, N.Y. Educ. Law § 6714 (immunizing veterinarians for reporting abuse of companion animals); N.Y. Educ. Law § 16 (immunity for reporting student bullying); N.Y. Educ. Law § 3028-d (immunity for reporting school financial improprieties); N.Y. Pub. Health Law § 2803-e (facilities reporting physician misconduct); N.Y. Educ. Law § 3028-c (immunity for reports of violence on school property).

willful misconduct or gross negligence.[10] 93 N.Y.2d at 722. This Court first addressed the legislative purpose for § 419 immunity, noting:

> In seeking to encourage early reporting of child abuse, the Legislature determined that immunity from civil and criminal liability was indispensable. Protection from liability would remove "the fear of an unjust lawsuit for attempting to help protect a child" (Report of Assembly Select Comm on Child Abuse, at 33 [1972]; *see also,* Budget Report on Bills, Bill Jacket, L 1973, ch 1039 ["Requires designated persons to report suspected cases of child abuse or maltreatment immediately . . . (and) permits any person to make such a report and provides immunity for all acting in good faith."]).

Id. at 721. Against the backdrop of plaintiffs' negative implication argument, this Court denied the implied right of action for damages as inconsistent with the enforcement scheme adopted by the legislature, which emphasized "funding mechanisms and the development of performance standards by the State . . . ." *Id.* at 722.

Dr. Haar ambitiously argues that the confidentiality and inadmissibility of reporting are of no moment, because "[t]he contents of allegations made against physicians in OPMC reports are disclosed to them in non-confidential notices issued by OPMC." App. Br. at 13. This argument misconstrues the nature of the

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[10] Beth A. Diebel, *Mark G. v. Sabol: Substantive Due Process Rights, a Possibility for Foster Care Children in New York*, 64 Alb. L. Rev. 823, 832 n.72 (2000) (noting plaintiffs' argument was based on *Van Emrik v. Chemung County Department of Social Services*, 632 N.Y.S.2d 712 (App. Div. 1995)).

confidentiality. The identity of the reporter is never disclosed, making litigation against the reporter fairly impractical. It is only when a reporter testifies in a hearing and is known to the accused physician that confidentiality is waived. *McBarnette*, 83 N.Y.2d at 341.[11]

The fact that § 230 created one cause of action but chose not to make another for bad faith reporting is telling. *See Sheehy*, 73 N.Y.2d at 636 "[w]here the Legislature has not been completely silent but has instead made express provision for civil remedy, albeit a narrower remedy than the plaintiff might wish, the courts should ordinarily not attempt to fashion a different remedy, with broader coverage"); *Cruz*, 22 N.Y.3d at 72. The Act created an express limited right of action when the Board fails to take action "within a specified period of time." N.Y. Pub. Health Law § 230(10)(j). It follows that, "[i]f the Legislature had intended for liability to attach for failures to comply with other provisions of [the statute], it would likely have arranged for it as well." *Mark G.*, 93 N.Y.2d at 722; *see also Varela v. Investors Ins. Holding Corp.*, 81 N.Y.2d 958, 961 (1993) ("Legislature did not intend to create a private cause of action" because it granted a private right in other sections).

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[11] Dr. Haar argues that these confidentiality provisions do not apply to National Insurance Crime Board reporting. App. Br. at 13-14. Even if true, the point is of no consequence. The issue is whether a private remedy conflicts with § 230's enforcement mechanism, not whether confidentiality ever may be waived through duplicative reporting.

No court expressly has found that private rights of action are consistent with the Act's enforcement mechanism. Once again, *Foong* was quiet. By contrast, the court in *Lesesne* concluded that an implied remedy is inconsistent with § 230, due to the cloak of confidentiality over both reporting and disciplinary proceedings, acknowledging § 230(11)(a)'s mandate that reporting "'remain confidential and shall not be admitted into evidence in any administrative or judicial proceeding.'" *Lesesne* added that "[a]n express provision that reports to the board may not be used in judicial proceedings runs directly contrary to an implied right of action based on such reports." 918 F. Supp. 2d at 229. *See also Galin v. Chassin*, 217 A.D. 446, 447 (1995) (allowing discovery on patient reporting would "have a chilling effect on the willingness of other patients to come forward . . .").

3. <u>An Implied Right of Action is Inconsistent with the No Fault Law</u>

Finally, Nationwide's reporting obligations under the No Fault Law further militate against an implied remedy. *See* N.Y. Insurance Law § 5108(c), 11 N.Y.C.R.R. § 68.8(c). In addition to frustrating enforcement of § 230, implying a private right of action conflicts with the No Fault Law's enforcement mechanism. As this Court has explained "[e]nforcement [of the No Fault Law] is, in part, facilitated by mandated self-regulation, which <u>requires an insurer to report to the Commissioner of Health, among other improper conduct, 'any patterns of overcharging, excessive treatment or other improper actions by a health</u>

provider' . . . ." *GEICO v. Avanguard Medical Group, PLLC*, 27 N.Y.3d 22, 27 (2016) (emphasis added); *see also Sheehy*, 73 N.Y.2d at 634-35 ("a private right of action should not be judicially sanctioned if it is incompatible with the . . . [enforcement] or with some other aspect of the over-all statutory scheme").[12]

New York-licensed insurers, including Nationwide, are subject to penalties for failing to report.[13] *See, e.g.*, New York State Ins. Dep't, *N.Y.S. Ins. Dep't Takes Disciplinary Actions Against Companies, Agents, Brokers & Adjusters* at 2 (Nov. 4, 2008) (reporting § 68.8 violations for which "insurers are required to report provider overcharging and excessive treatment by health providers and to designate a claims person in each No-Fault claims processing office to maintain a master file of each instance of inappropriate practice"). http://web.archive.org/web/20150922092543/https://www.dfs.ny.gov/insurance/da/2001_2010/da20081104.pdf. Implying a cause of action subjects an insurer to burns from both sides of the candle: potential administrative penalties for failure to report and potential damages from licensee litigation for reporting to the OPMC.

The New York legislature had all the tools at its disposal to create a private cause of action under § 230(11)(b), had it wanted to do so. But its legislative

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[12] Notably, N.Y. Financial Services Law § 405 also immunizes Nationwide for reports provided to the Insurance Frauds Bureau.

[13] Nationwide argued to the Second Circuit that its reporting under § 5108(c) and Regulation 83 was protected by the *Noerr-Pennington* doctrine.

purpose was not to punish reporters, it was to improve public health in New York through enhanced oversight of medical licensees. Dr. Haar fails to sustain his burden on the third *Sheehy* factor. Accordingly, this Court should answer the certified question by concluding that there is no implied right of action against reporters under § 230.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the negative – that there is no implied private right of action under § 230.

Dated: New York, New York
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, Ralph Carter, hereby certify that:

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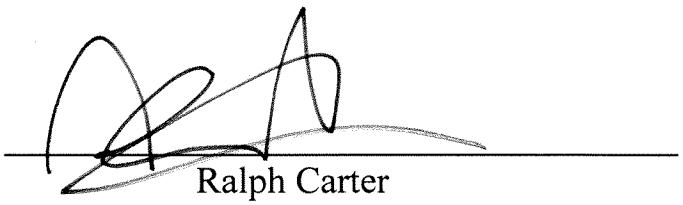

Ralph Carter