To be Argued by:
JOHN HOUSTON POPE
(Time Requested: 30 Minutes)

CTQ-2020-00004

Court of Appeals

of the

State of New York

HECTOR ORTIZ, in his capacity as Temporary Administrator of the Estate of VICKY ORTIZ, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

– against –

CIOX HEALTH LLC, as successor in interest to IOD Inc. and THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants-Respondents,

– and –

IOD INC. and COLUMBIA PRESBYTERIAN MEDICAL CENTER,

Defendants.

BRIEF FOR DEFENDANT-RESPONDENT THE NEW YORK AND PRESBYTERIAN HOSPITAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to New York Court of Appeals Rule 500.1(f), defendant-respondent The New York and Presbyterian Hospital states it is a New York not-for-profit corporation, that it has no publicly traded stock, and that it has no publicly held corporate parents, affiliates and/or subsidiaries.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

PRELIMINARY STATEMENT

Appellant Hector Ortiz, acting on behalf of the Estate of his late mother, Vicky Ortiz, prosecutes a grievance that should and could have been resolved with a phone call by the lawyer who was the (temporarily) aggrieved party. Respondent CIOX Health, LLC ("CIOX"), which was then the "release of information" ("ROI") company for Respondent The New York and Presbyterian Hospital ("the Hospital"), erroneously charged the rate applied to third-party requestors of medical records to Ms. Ortiz's attorney when he sought her records from a stay at the Hospital for use in a lawsuit against another party. The attorney did not protest the erroneous charges before he paid for the records (by credit card) and he did not call CIOX after he discovered the overcharge to obtain a refund. Instead, he filed this lawsuit. CIOX refunded the overcharge promptly, which was simple enough to accomplish on a credit card transaction.

Proceedings in the United States District Court for the Southern District of New York narrowed the case to a single claim purportedly based on an implied private right of action under Section 18(2)(e) of the Public Health Law. That court concluded, in a thorough opinion, that no such private right of action could be implied, under the principles enunciated by this Court. The United States Court of Appeals for the Second Circuit, less

sure of the state of New York law, has asked this Court to speak definitively. The Hospital respectfully submits that no implied private right of action should be recognized and the question certified should be answered in the negative.

ISSUE PRESENTED FOR REVIEW

The United States Court of Appeals stated, in its opinion (961 F.3d 155, 160), the question that it asks this Court to answer. Appellant accurately quotes that question in his brief. The federal appellate court also expressed that it would accept any modification of the question that this Court deemed appropriate, and this Court accepted the question without change (35 NY3d 1001).

STATEMENT OF THE CASE

The original Plaintiff in this case, Vicky Ortiz, now deceased, resided in a nursing home until January 28, 2016. On that day, her son, Hector Ortiz (now Plaintiff, as administrator of his mother's estate), removed her from the nursing home and took her to Columbia Presbyterian Medical Center,[1] where she received exemplary treatment for the ill health that she

[1] Plaintiff originally named Columbia Presbyterian as a defendant. It is not, however, a juridical entity distinct from the Hospital, so the District Court substituted the Hospital as the proper party. (A0034 n.1)

and her son attributed to negligent care by the nursing home. They subsequently sued that facility in the Supreme Court, New York County.[2]

In support of that lawsuit, their attorney, Lowell Sidney, Esq., propounded a medical records request to the Hospital, which in turn forwarded the request to its ROI, CIOX. (A0022, Am. Cmplt., ¶ 50) Mr. Sidney identified himself as Ms. Ortiz's attorney, information that apparently was lost in a shuffle of paperwork between his office and CIOX that was required to document the request properly. (A0023, Am. Cmplt., ¶ 51; A0065, Hosp. Answer, ¶ 51) As a result, when CIOX rendered an invoice to Mr. Sidney's office for the records, the charge reflected the rate for requesters other than the patient or her authorized representative. (A0023, ¶ 56; A312-15) Mr. Sidney's office paid the invoice, by credit card, without confirming the accuracy of the rate charged. (A0024, Am. Cmplt., ¶ 57) When the mistake was discovered, neither Plaintiff or counsel contacted CIOX or the Hospital to complain or request a refund. Instead,

[2] In that case, *Ortiz v. Fort Tryon Rehabilitation & Nursing Center*, Index No. 151667/2016, the Supreme Court dismissed all claims asserted by Hector Ortiz and the case proceeded on the claims of Vicky Ortiz, until her death required the substitution of Hector in his capacity as administrator of her estate. This Court, of course, may take judicial notice of official court records and filings from other state and federal actions and proceedings. *See, e.g., RGH Liquidating Trust v. Deloitte & Touche LLP*, 71 A.D.3d 198, 207-08 (1st Dep't 2009) (collecting cases), *rev'd on other grounds*, 17 N.Y.3d 397 (2011).

this lawsuit commenced, accompanied by an unflattering story in the *New York Post* about the very hospital that had nursed Ms. Ortiz back to health.[3]

The Hospital, aghast at the error, had counsel contact Mr. Sidney to rectify the situation. (A215, ¶ 4) Mr. Sidney informed the Hospital's counsel that CIOX already had refunded the overcharge on his credit card. (A215, ¶ 5) Nonetheless, the lawsuit would continue.

CIOX removed the case from the Supreme Court, New York County to the United States District Court for the Southern District of New York. Both the Hospital and CIOX moved to dismiss on various grounds. (A199, A134) The Hospital focused primarily on the absence of a live controversy, due to the refund of the overcharge. (A206-10) The federal district court overruled this standing/mootness objection but granted the motion to dismiss on a number of the claims. (A0033-48) Only a claim asserting that the overcharge violated Section 18 remained. After discussion at a court conference, and with express leave of the District Court (A326-27), the Hospital then moved for judgment on the pleadings, asserting that Section 18 did not contain any express provision authorizing suit and a private of action could not be fairly implied from it. (A367-89)

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[3] Julia Marsh & Khristina Narizhnaya, *Hospital illegally overcharged patients for medical records: suit*, N.Y. Post, Feb. 26, 2017 (available online at https://nypost.com/2017/02/26/hospital-illegally-overcharged-patients-for-medical-records-suit/).

The District Court granted the Hospital's motion and dismissed the case. (A0075-97) Plaintiff-Appellant appealed the U.S. Court of Appeals of the Second Circuit. (A0099) That court certified the question to this Court, which accepted the certification.

SUMMARY OF THE ARGUMENT

New York Public Health Law Section 18 does not contain an express right of action or impliedly authorize a private right of action on behalf of "qualified persons" (a statutorily defined term that includes the deceased predecessor-in-interest to the plaintiff below) who request medical records and are charged (in this case accidently) in excess of seventy-five cents per page. Under the controlling principles established by this Court, an implied private cause of action may be found only if the plaintiff is a member of the class for whose particular benefit the statute was enacted, recognition of a private right of action would promote the legislative purpose, and creation of such a right would be consistent with the legislative scheme. Here, none of the prongs provide any convincing basis in support of an implied right; the third prong of this test, moreover, determines the issue against an implied right. The statute's structure provides adequate remedies for the purpose of ensuring that patients obtain access to their medical records at a price that does not exceed the statutory maximum and an implied private

remedy to sue for alleged overcharges would conflict with other parts of the statute designed to protect and benefit the healthcare providers who possess those records.

ARGUMENT

I. PUBLIC HEALTH LAW SECTION 18 DOES NOT SUPPORT THE IMPLICATION OF A PRIVATE RIGHT OF ACTION

Appellant purports to bring suit under Section 18 of the New York Public Health Law ("PHL"). The statute lacks any express authorization to bring any claim to recover for charges that violate subsection 18(2)(e). Appellant argues for the implication of a remedy that the New York State Legislature did not deign to create. This Court articulated the standards for determining the existence of an implied right of action in *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 325 (1983), and synthesized them into a three-part test in *Sheehy v. Big Flats Cmty. Day*, 73 N.Y.2d 629 (1989). A careful examination of the statute and its fit with that test yields the conclusion that a private right of action may not be recognized.[4]

[4] Appellant places considerable reliance on the unpublished opinion dated November 30, 1999, of Justice Beverly Cohen in *Feder v. Staten Island University Hospital,* Index No. 601049/98, which the Appellate Division affirmed summarily, 304 A.D.2d 470 (1st Dep't 2000). By and large, the Hospital will not engage on the specifics of Justice Cohen's opinion in the analysis that followed. The twenty years of developments in this area of law since her opinion deserve more of the Court's attention.

The *Sheehy* factors focus on the statute – its terms and history. *See Brian Hoxie's Painting Co. v. Cato-Meridian Cent. School Dist.*, 76 N.Y.2d 207, 211 (1990). Thus, before applying the test, the statute's development and current structure should be recounted. Moreover, the examination must extend to the whole of Section 18, not merely a single sentence in subsection 18(2)(e), which is the approach that Appellant erroneously employs.

Section 18 appears as a provision within the "General Provisions" of the Public Health Law. It bears the title "Access to patient information." Cases often mention it together with Section 17, which conferred a right to have records transferred between healthcare providers. The Legislature passed Section 17 first. After this Court held that no common law right to access one's own health care records existed, *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 460 n.3 (1983), the Legislature acted (three years later) to create a statutory right in Section 18. 1986 N.Y. Sess. L., ch. 497, § 1; *see Wheeler v. Comm'r of Soc. Serv. of City of N.Y.*, 233 A.D.2d 4, 10-11 (2d Dep't 1997). Subsection 18(2) confers a right of access to patient medical records held by healthcare providers[5] (or simply

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Appellant's argument regarding "legal stability and consistency" is addressed in Point II, *infra*.

[5] The category covers facilities (such the Hospital) and practitioners in all settings. The pertinent definitions appear in subsection 18(1), subparts (b), (c) and (d).

"providers") upon a "qualified person" (defined in subsection 18(1)(g)), subject to limitations stated in subsection 18(3). Within subsection 18(2), subparts (a) through (c) and (f) through (i) establish the right to inspect patient records and the circumstances of such inspections; subparts (d) and (e) deal with the provision of copies and the costs associated therewith.

The original provision governing charges involved in record inspection and copies stated that "[t]he provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider . . . ." PHL § 18(2)(e). This broad rule covers all requesters. It, however, engendered substantial complaints and litigation from patients requesting their own records, as some providers charged what the patients perceived to be excessive amounts. The Legislature responded by amending the statute, in 1991, to add: "However, the reasonable charge for paper copies shall not exceed seventy-five cents per page." 1991 N.Y. Sess. L., ch. 165, § 49. Further, the statute guarantees that cost shall not be a barrier to receiving records by declaring that "[a] qualified person shall not be denied access to patient information solely because of inability to pay." Moreover, no charges may be imposed if the patient or her representative seeks records "for the purpose of supporting an application, claim or appeal for any government benefit or program."

The Public Health Law anticipates and provides for a procedure to enforce any rights conferred by Section 18(2). In an earlier codified section, it states: "The performance of any duty or the doing of any act enjoined, prescribed or required by this chapter, may be enforced by a proceeding pursuant to article seventy-eight of the civil practice law and rules at the instance of the department or of a local board of health, or of any citizen of full age resident of the municipality where the duty should be performed or the act done." PHL § 13. The statute also vests the Commissioner of Health with weighty enforcement powers. At the time at which this case arose,[6] Section 12 provided that "any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto for which a civil penalty is not otherwise expressly prescribed by law, shall be liable to the people of the state for a civil penalty of not to exceed two thousand dollars for every such violation." These powers augment the Commissioner's other tools to secure

[6] Section 12 contains a provision, cited by Appellant, stating that "the purpose of this section to provide additional and cumulative remedies, and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any provision of this section, nor any action done by virtue of this section, be construed as estopping the state, persons or municipalities in the exercising of their respective rights to suppress nuisances or to prevent or abate pollution." PHL § 12(6). As explained *infra*, it stretches credulity to construe this provision as somehow recognizing an implied right of action under Section 18(2). To the contrary, the Legislature's decision to amend the Public Health Law repeatedly, to clean up issues like who can request records, without adding an express remedy, would seem to say more.

compliance, such as Education Law § 6530(40) (defining violations of § 18 as professional misconduct) and Public Health Law § 230-a (penalties for professional misconduct).

Section 18, however, does not guarantee access to all patient records. Subsection 3, titled "Limitations on access," confers a right on providers to withhold some types of information or produce only summaries of that information. This subsection defines the types of information that may be withheld, establishes a pre-judicial procedure for reviewing the decision to withhold information, and confers a right to judicial review. Notably, the sole remedy permitted in judicial proceedings is the release of the withheld information, not damages. *See id.* ("The relief available pursuant to this section shall be limited to a judgement requiring the provider to make available to the qualified person the requested information for inspection or copying.").

Consistent with that procedure, subsection 11 of Section 18 contains the following exculpatory provision protecting providers, applicable to the whole Section: "No proceeding shall be brought or penalty assessed, except as provided for in this section, against a health care provider, who in good faith, denies access to patient information." Subsection 12 concomitantly provides immunity from civil liability to providers "arising solely from

granting or providing access to any patient information in accordance with this section."

All of this presupposes that the request to inspect or copy records comes from a "qualified person." The most immediately identifiable and obvious person fitting that description is the patient herself. The statute includes several categories of persons within that definition, but the relevant category for this matter, an attorney representing the patient whose records are sought, was not added until 1992. *See* 1992 N.Y. Sess. L., ch. 277; *Boltja v. Southside Hosp.*, 186 A.D.2d 774, 775 (2d Dep't 1992) (discussing amendment to include attorneys).

From this background, this Court may proceed to applying its framework to judge whether a private right of action may be implied. The *Sheehy* test asks: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private 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 at 633. "Critically, all three factors must be satisfied before an implied private right of action will be recognized." *Haar v. Nationwide Mutual Fire Ins. Co.*, 34 N.Y.3d 224, 229 (2019).

Appellant's attempt to use Section 18 as a vehicle for his suit flunks the application of the *Sheehy* three-part test. All three prongs present weak-to-no support; the third, sometimes called the "consistency" prong, strongly counsels against the conclusion. This "consistency" prong, according to this Court, stands as the most important one. *See Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 70 (2013).

A. The "Particular Benefit" Prong Does Not Favor A Private Right Because The Statute Serves Multiple Groups And Balanced Interests

Regarding the first prong, a group's status as the sole intended beneficiary of legislative grace must emerge with clarity. This Court recognizes a private right of action "only if a 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.*, 76 N.Y.2d at 211. At this first step, an intent cannot be inferred if the legislative scheme does not unambiguously favor the group to whom the plaintiff claims to belong.

The analysis for Section 18 depends upon how narrowly or broadly the Court turns its focus on the statute. Unquestionably, the Legislature conferred a benefit on patients (and other qualified persons) seeking access to their medical records by enacting Section 18. However, the statute as a whole addresses multiple concerns. Even on the narrow issue of the charge

that may be imposed for copies of records, the statute addresses more than one interest. By authorizing providers to impose reasonable charges for the records, the Legislature conferred a benefit on them. The further amendment of the provision to cap the charges at 75¢ per page should be seen as a rebalancing of the "reasonable cost" benefit. As one lower court observed:

> The Public Health Law of the State of New York is, beyond any doubt, a public interest law for the purpose of providing a health care and management system affording patients and health care providers a fast, fair and serviceable means of addressing individual and collective health care matters. The 75 cent maximum charge is simply another health measure.

Boltja v. Southside Hosp., 153 Misc. 2d 568, 572 (Sup. Ct. Nassau Cty. 1992), *aff'd*, 186 A.D.2d 774 (2d Dep't 1992).

The balanced approach embodied in the entirety of Section 18 thwarts the conclusion that Appellant can claim to belong to the *sole* class for whose *particular* benefit the provision was enacted. *See, e.g., Flagstar Bank, FSB v. State*, 114 A.D.3d 138, 146 (2d Dep't 2014). As this Court concluded in *Haar*, a statute that represents the culmination of a balancing of competing interests among various groups (in that case, PHL § 230) cannot pass muster on this prong. 34 N.Y.3d at 229-30. Each group might argue that a slice of the statutory scheme benefits them (as Appellant does here with his

focus on the per-page cap), but that simply demonstrates that no one group can claim the special status necessary to justify an implied private right of action on its behalf. *See, e.g., Davis v. Citibank, N.A.*, 116 A.D.3d 819, 822 (2d Dep't 2014) (financial benefit conferred on plaintiffs not sufficient to show "program was … promulgated solely for their particular benefit" when other, competing purposes discernible).

As in *Haar*, Appellant's failure on this first prong suffices to reject the proposed implied private right of action. Even if this Court assumes that this prong might favor Appellant,[7] a private right of action under Section 18 should not be implied because the other prongs of the *Sheehy* test argue against that result.

B. The "Promotion of Legislative Purpose" Prong Rejects An Implied Right Of Action Because Promotion Of Appellant's Interests Undermines Other Interests Protected By Section 18

"The second prong is itself a two-part inquiry. [The Court] must first discern what the Legislature was seeking to accomplish when it enacted the statute, and then determine whether a private right of action would promote that objective." *Uhr*, 94 N.Y.2d at 38. Like the first prong, the resolution of the second prong depends upon how narrowly the Court

[7] Both Justice Cohen in *Feder* and Judge Cote in this case concluded that the first prong would be satisfied. Neither of these respected jurists had the benefit of this Court's opinion in *Haar*.

focuses on the statute. If the focus is narrowed to the single sentence regarding the per-page charge cap, as Appellant does, it may seem that a private right of action to vindicate erroneous overcharges would promote the purpose of that sentence. A wider focus, however, either on the statute as a whole or on the legislative package of which the sentence was a part disputes that conclusion. Further, if the Court looks more broadly, at the other potential consequences of recognizing a private right of action under Section 18, it becomes clear that an implied right does not promote the broader purposes of the statute.

As Judge Cote recognized, "[t]he one-sentence amendment that was made to § 18 was a miniscule part of a massive overhaul to the Public Health Law that principally revised New York's Medicaid program." *Ortiz*, 386 F. Supp. 3d at 315 (citing 1991 N.Y. Sess. L., ch. 165). As she pointed out, the Senate Memorandum in the Bill Jacket discusses the goal of reducing the growth of medical costs, particularly in the Medicaid program. *Id.* Two submissions from other sources (the New York State Office for the Aging and the New York Public Interest Research Group) discussed the cost cap provision. *Id.* Appellant's brief quotes the PIRG submission and Judge Cote quoted, in her opinion, the State Office for Aging submission. Neither represents an actual statement of legislative purpose or intent, and they

should be used, if at all, cautiously. *See, e.g., Majewski v. Broadalbin-Perth Central School District*, 91 N.Y.2d 577, 585-86 (1998); *Knight-Ridder v. Greenberg*, 70 N.Y.2d 151, 159 (1987). Indeed, both organizations submitted their views *after* the Legislature had passed the bill, as matters to include in the Bill Jacket for the Governor's consideration.[8] As this Court has recognized, "little weight should be accorded to … post-passage opinions … concerning the reach of the legislation." *Majewski*, 91 N.Y.2d at 487 n.2; *id.* at 487 ("the reports and memoranda simply indicate that various people had various views").

In the bigger picture, when the Legislature enacted the per-page charge cap, patients were suing providers to challenge their charges as exceeding the "reasonable costs" incurred. The cap can be seen as another balanced approach to the controversy, providing patients with relief from higher charges and providers with a yardstick by which they could claim that they provided the records at a reasonable cost. *See Casillo v. St. John's Episcopal Hosp.*, 151 Misc. 2d 420, 429 (Sup. Ct. Suffolk Cty. 1992) (cap "enacted to create a unifying definition for the 'reasonable charge' standard and to stem the burgeoning costs being imposed on patients seeking to obtain their own medical records for whatever purpose"). This explains

[8] The State Office of Aging's letter suggests that the Governor's counsel called and solicited their comments.

why the court in *Casillo* felt comfortable pronouncing that the cap "was not intended to create a plethora of litigation where the courts would be forced to determine what is an allowable fee in this case or that case." *Id.*

Moreover, in assessing whether a private right of action promotes the statutory purposes, the Court should examine how that right might function. Two distinct types of lawsuits can be expected. One could rely on the theory pled here, that the plaintiff paid in excess of the statutory cap occurred – the ROI billed more than 75¢ per page to a qualified person who missed the fact of the overcharge, paid it, and seeks a refund (that presumably has been refused[9]). This seems like a potential evergreen litigation scheme, because perfection almost certainly will elude ROI venders. *Cf. Conkright v. Frommert*, 559 U.S. 506, 509 (2010) ("People make mistakes."). Simply aggregating even statistically insignificant vender errors over hundreds and thousands of providers that they serve will create an enticing class action pot of gold every few years. The other litigation theory challenges the calculation of the "reasonable charge" even when it is within the statutory per-page cap. The *Ruzhinskaya* case, which

9 Appellant did not experience this last step, asking for a refund and being refused. To the contrary, he complains of the injustice of CIOX's "unilateral refund" of the overcharge. One wonders why a private right of action would be needed if the ROI would readily refund the overcharge if that fact is simply brought to its attention.

may be headed to this Court as well,[10] represents an example of that theory. It, too, promises perpetual litigation, as class action lawyers second-guess the costs actually incurred by providers and assert that technological changes should have reduced those costs.

The Legislature surely did not envision that it would build a self-sustaining litigation machine by taking the steps of enacting a mechanism enabling patients to obtain their own medical records at a reasonable cost, then limiting the maximum per-page charge. "Because the threat of an additional enforcement mechanism — civil lawsuits against health care providers — would likely add to the growth in medical costs, it is debatable whether recognition of a private right of action would promote the legislative purpose, whether considered from the perspective of either § 18 alone or in the context of the 1991 revisions to the Public Health Law in their entirety." *Ortiz*, 386 F. Supp. 3d at 315.

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[10] In *Ruzhinskaya v. Healthport Technologies LLC*, a federal district court held that an ROI may not be sued under Section 18 because it is not a "provider" regulated by the statute. 291 F. Supp. 3d 484 (S.D.N.Y. 2018). The Second Circuit, in an opinion rendered prior to one certifying this case, indicated that it was inclined to certify the state law question to this Court, but it first remanded the case for important additional proceedings. 942 F.3d 69, 73 (2d Cir. 2019). On remand, the district court added the ROI's client (Beth Israel Medical Center) as a defendant and recently entered summary judgment in favor of both defendants. 2020 WL 3791881 (S.D.N.Y. July 7, 2020). That order expressly adopted, as persuasive, Judge Cote's reasoning in this case. *Id.* at *4. An appeal has been filed; the Second Circuit can be expected to send that case to this Court if this appeal does not resolve the issues.

This Court has rejected implying a private right of action when, although the right might promote one aspect of the legislative purpose, it also would upset the balance affecting other aspects. In *Burns Jackson*, for example, an implied right of action "would be a powerful deterrent" to the problem that the statute was passed to solve, but it would have done so by "impos[ing] a crushing burden" that would produce undesirable "overdeterrence." 59 N.Y.2d at 329. "The conclusion that some governmental oversight and regulation may be desirable ... does not necessarily lead to the further conclusion that a new tort cause of action should be established to address the problem." *Hall v. United Parcel Serv. of Am.*, 76 N.Y.2d 27, 34 (1990).

The multiple purposes undergirding Section 18 and the potentially destructive aspects of creating more litigation in this area foreclose any determination on this prong favorable to Appellant. This second prong does not favor an implied right of action.

C. The "Consistency" Prong Firmly Rejects Any Implication Of An Implied Private Right Of Action

The third prong stands as "the most important" in the *Sheely* analysis. *Cruz*, 22 N.Y.3d at 71. It frequently will be decisive in and of itself. *See id.* It differs substantially from the second prong albeit subtly.

"The two prongs may overlap and to that extent may resist pigeon-holing. A private right of action may at times further a legislative goal and coalesce smoothly with the existing statutory scheme. Conversely, a statute's goal may not necessarily be enhanced by adding a private enforcement mechanism." *Uhr*, 94 N.Y.2d at 40.

Any nascent consideration of the implication of a private right of action comes to end on this third prong. The Legislature created the enforcement mechanisms that it wanted. This Court's role does not allow it to decide to alter or add to that arrangement in order to facilitate the remedy that Appellant would prefer.

The Legislature provided two express enforcement remedies to address any difficulties in obtaining compliance by providers with the statutory cap for requests by qualified persons or the mandate to impose only reasonable charges for copies of medical records. First, the Public Health Law confers strong enforcement powers on the Commissioner of Health. Second, a party may bring a special proceeding under Article 78 of the CPLR to compel the release of medical records at a price not to exceed the statutory cap or, if the patient is indigent, for free. "This is not a case where the Legislature has simply prohibited or required certain conduct, and left the mechanism of enforcement to the courts." *McLean v. City of*

N.Y., 12 N.Y.3d 194, 201 (2009). These enforcement paths foreclose implication of a private right of action.

The Public Health Law confers enforcement powers on the Commissioner of Health that authorizes him to impose a civil penalty not to exceed $2,000 for any violation of the law, escalating to $5,000 for subsequent violations, with the option for injunctive relief prosecuted by the Attorney General. PHL §§ 12(1), 12(5). The penalty amounts surely exceed the copying overcharge in most individual instances, providing a potent deterrent to violations of Section 18. (The Commissioner possesses the discretion to release or compromise the penalty, allowing tailoring to the nature of an offense.) The injunctive relief provision buttresses the penalty provision. Additionally, the Commissioner can use and has used other of his powers to punish errant healthcare providers for violations of Section 18. *See, e.g., Weg v. De Buono*, 269 A.D.2d 683, 686-88 (3d Dep't 2000) (physician charged and suspended "for failure to provide, or timely provide, medical records to authorized representatives of four of his patients ..., and demanding unreasonable fees for providing the records," offenses which came to the Commissioner's attention after patient's authorized representative seeking records complained).

Notably, the Department of Health has provided guidance to providers from time-to-time on how to comply with Section 18. *See, e.g., Casillo*, 151 Misc. 2d at 426-27 (quoting DOH general counsel's guidance). Administrative regulation and enforcement possesses a superior quality in this respect, as it allows flexibility and responsiveness while balancing the burdens imposed on healthcare providers by the statutory mandates, nuance that an implied private right of enforcement cannot capture.[11] *See, e.g., Boykin v. 1 Prospect Park ALF, LLC*, 993 F. Supp. 2d 264, 275 (E.D.N.Y. 2014); *Signature Health Ctr., LLC v. State of N.Y.*, 92 A.D.3d 11, 17 (3d Dep't 2011); *Hudes v. Vytra Health Plans Long Island, Inc.*, 295 A.D.2d 788, 789-90 (3d Dep't 2002).

The Legislature, moreover, did not leave qualified persons without any private remedy of their own. Any party aggrieved under Section 18 may bring a special proceeding under Article 78 of the CPLR to compel the release of medical records at a price not to exceed the statutory cap or, if the patient is indigent, for free. *See, e.g., Smalls v. St. John's Episcopal Hosp.*, 152 A.D.3d 629, 630 (2d Dep't 2017) (further relief could not be obtained under Section 18 once "appellants had been provided with the requested information at no cost to them"). As discussed further in the next argument

[11] The *Ruzhinskaya* type of claim, challenging the precise amount of the reasonable costs incurred by providers, should be addressed in this manner, not through litigation.

point, most of the litigation over the scope of Section 18 either followed this route or arose in the context of a discovery dispute within another type of action.

Appellant objects to being relegated to an Article 78 proceeding because he believes it will not remedy fully his particular injury.[12] The test on the third *Sheehy* prong, however, does not ask if the statute provides the precise remedy desired by the plaintiff. If it did, that would be an express right of action, and a court would not need to imply one. On this third prong, the Court must focus on the compatibility of the proposed implied right of action with the Legislature's chosen scheme, even if the statutory scheme does not remedy fully the harm of which a particular plaintiff complains. *See, e.g., Hall*, 76 N.Y.2d at 35 (when Legislature chose to provide relief in some instances but not in others, "this court should stay its own hand and refrain from crafting additional remedial measures").

In any event, the Article 78 remedy effectively protects *diligent* qualified persons who request their own medical records. Providers or their ROIs routinely tender (and certainly would tender upon request)

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[12] Appellant contests whether an Article 78 proceeding would permit a refund of an overpayment. The Hospital takes no position on that issue because it does not control this prong. Diligent requesters will avoid overcharges by raising the issue when invoiced. Less diligent requesters can request a refund after the fact. If a ROI or provider refused the refund when it is due, a complaint to the Commissioner would be in order.

invoices before providing the records; those invoices reveal (either directly or indirectly[13]) the per-page charge. If that charge exceeds 75¢ per page, the requester demands application of the statutory maximum. If the provider refuses to honor the maximum, the requester files suit under Article 78 and a court will order production of the records pursuant to the capped price as relief.

Given that the likelihood of the type of error made here in responding to the request for Vicky Ortiz's records by her attorney would be highly unlikely to occur if the patient herself requested the records, the concern really shifts to requests by authorized representatives, such as Ms. Ortiz's attorney here.[14] This Court should not consider creating an implied private right of action solely to assist attorneys who lack diligence in pursuing copies of their clients' medical records.

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[13] While an invoice may not state the per-page charge as such, it should show the total charge and the total pages. The rest simply is math.

[14] The lawsuits that have developed asserting a private right of action under Section 18 all seem to be based on medical records requests made by the patient's attorneys. *See, e.g., Carter v. Healthport Tech., LLC*, 822 F.3d 47. 57-60 (2d Cir. 2016) (overruling standing objection based on this fact); *Shelton v. CIOX Health, LLC*, Case No. 1:17-cv-808, 2018 WL 4211447, at *1 (E.D.N.Y. July 20, 2018); *Moore v. IOD, Inc.*, Case No. 14-CV-8406, 2016 WL 8941200, at *2 (S.D.N.Y. Mar. 24, 2016), *refiled in state court after dismissal on subject matter jurisdiction grounds, Moore v. CIOX Health, LLC*, Index No. 655060-2016 (Sup. Ct. N.Y. Cty., filed Sept. 23, 2016); *McCracken v. Verisma Sys., Inc.*, Case No. 6:14-cv-6248, 2015 WL 2374544, at *4-5 (W.D.N.Y. May 18, 2015); *Spiro v. Healthport Techs., LLC*, 73 F. Supp. 3d 259, 265 (S.D.N.Y. 2014) (*Spiro* subsequently became known as *Ruzhinskaya*).

Appellant tries to find an express endorsement of an implied private right of action in a provision, PHL §12(6), which preserves "rights of actions or remedies now or hereafter existing," throughout the Public Health Law. As the Second Circuit noted, "[t]his revision does not resolve the issue of an implied cause of action." *Ortiz*, 961 F.3d at 157 n.1. To find that this provision preserved an implied right of action, the Court would have to presume that the implied right of action existed at the time the provision was placed in the statute. That particular provision, however, was added to the Public Health Law more than ten years before Section 18 was enacted, eviscerating any inference pertinent to the issue here. Moreover, Appellant commits the analytical error identified in *Cruz* of assuming that "unexpressed rights" may be recognized "by negative implication." *Cruz,* 22 N.Y.3d at 72. "Put another way, if the legislature had intended to impose new liability . . ., it would have said so in the statute."[15] *Id.*

The Legislature here unmistakably selected the methods to be used in effectuating its legislative goals. It indicated that it considered how best to

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[15] For example, in Section 19 of the Public Health Law, the Legislature expressly directed that the refund of overcharges, which lower courts have taken as approving of a private cause of action to compel the payment. *See Medicare Beneficiary Defense Fund v. Memorial Sloan-Kettering Cancer Ctr.*, 159 Misc. 2d 442, 445-49 (Sup. Ct. N.Y. Cty. 1993); *accord Sterling v. Ackerman*, 244 A.D.2d 170 (1st Dep't 1997). In fact, it may be an overreach by these courts to identify the right of action as one implied from the statute. Because Article 78 may be used to compel the performance of any duty under the Public Health Law, PHL § 13, a private actor could simply file such an action to compel the refund that Section 19 imposes a duty to make.

effectuate its intent and it provided the avenues for relief it deemed warranted. Many cases decided by this Court have rejected the implication of a private cause of action precisely for this reason. *See, e.g., Schlessinger*, 21 N.Y.3d at 171-72; *Matter of Stray from the Heart, Inc. v. N.Y.C. Dep't of Health & Mental Hygiene*, 20 N.Y.3d 946, 948 (2012); *Metz v. State of N.Y.*, 20 N.Y.3d 175, 180-81 (2012); *City of N.Y. v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 627-630 (2009); *Pelaez v. Seide*, 2 N.Y.3d 186, 200-02 (2004); *McLean*, 12 N.Y.3d at 200-01; *Hammer v. American Kennel Club*, 1 N.Y.3d 294, 300 (2003); *Sheehy*, 73 N.Y.2d at 633. The same outcome should be reached for Section 18(2)(e). "Any under-inclusiveness in Public Health Law § 18, ... whether intended or not, is a matter for the Legislature, not the courts, to address." *Mouginnis v. North Shore-Long Island Jewish Health Sys., Inc.*, 25 A.D.3d 230, 234 (2d Dep't 2005).

II. APPELLANT'S NONSTATUTORY REASONS FOR IMPLYING A PRIVATE RIGHT OF ACTION MERIT NO SERIOUS CONSIDERATION BY THIS COURT

Appellant remarkably does not lead with the *Sheehy* analysis in his arguments before this Court. Instead, he argues that failure to recognize an implied private right of action "would erode legal stability and consistency" and disrupt ongoing litigation. This nonstatutory basis for creating an implied right of action should be rejected out-of-hand. As the prior

argument demonstrates, the only controlling consideration in implying a private right of action is the Legislature's intent. *See, e.g., Haar*, 34 N.Y.3d at 228; *Cruz*, 22 N.Y.3d at 72-73. If prior cases have not properly ascertained that intent, those cases do not assist in the task at hand.

The underlying premise of the Appellant's argument appears to be that Justice Cohen's unpublished and unreported (even in computerized databases) opinion in *Feder v. Station Island University Hospital* over twenty years ago should be given some aura of precedential value for an issue never before considered by this Court.[16] That would be highly unusual. This Court reserves to itself the role of "the final arbiter of questions of state law." *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 334 (1988). Issues often percolate in the lower courts before this Court squarely addresses them. For example, this Court twice denied relief to

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[16] The fact that Justice Cohen's opinion did not obtain approval for publication, even after its affirmance, carries its own significance. New York law provides that the Law Reporting Bureau may report any lower court opinion which the "state reporter, with the approval of the court of appeals, considers worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest." N.Y. Jud. L. § 431; *see Murray v. Brancato*, 290 N.Y. 52, 56-57 (1942) ("Since only those opinions rendered in courts of first instance which might be useful as precedents or which have importance as a matter of public interest are published in the official reports, the judges and justices of these courts have, with almost complete unanimity, given to the statutory mandate a practical construction, and they deliver to the State Reporter copies of only those opinions which the Reporter requests or which the judge writing the opinion might deem 'worthy of being reported.'"). In some instances, lower court opinions may be published after summary affirmance by the Appellate Division, when the Law Reporting Bureau deems the opinion significant. *See, e.g., Kuwait Airways Corp. v. Ogden Allied Aviation Servs.*, 726 F. Supp. 1389, 1391 (E.D.N.Y. 1989) (discussing example).

plaintiffs on merits-related grounds for claims based on a purported implied right of action for damages under Insurance Law § 40-d, *see Hubell v. Trans World Life Ins. Co. of N.Y.*, 50 N.Y.2d 899 (1980); *Halpin v. Prudential Ins. Co. of Am.*, 48 N.Y.2d 906 (1979), thus apparently leaving "the door open to the possibility" to such actions, *Royal Globe Ins. Co. v. Chock Full O' Nuts Corp.*, 86 A.D.2d 315, 316 (1st Dep't 1982), before closing that door and holding no such implied right existed in *Rocanova v. Equitable Life Ins. Co.*, 83 N.Y.2d 603, 615 (1994). The passage of fifteen years of active litigation between *Halpin* (assuming the existence of a private right of action) and *Rocanova* (rejecting that assumption) did not destabilize the law or pending litigation and neither will a decision by the Court here rejecting an implied private right of action under Section 18.

The viability of a private right of action under Section 18, however, has not been bandied about in the lower courts for the past two decades. Although Appellant would have this Court believe that the unpublished *Feder* opinion is as readily available as sand on a beach, it is not. Appellant himself apparently did not know of it and did not bring the case to the attention of the federal district court; he alluded to its existence in his opening brief in the Second Circuit and provided a copy of it only after the filing of the answer briefs in that court, for use in his own reply brief. No

court has cited *Feder* as authority.[17] The opinion's obscurity distinguishes it from, for example, the published and widely cited thirty-five-year-old Appellate Division case (*Avena v Ford Motor Co.*, 85 A.D.2d 149 (1st Dep't 1982)) on a procedural question under CPLR 908 – which also had been the subject of unsuccessful lobbying efforts to supersede its holding with legislation – that a closely divided Court gave weight in *Desrosiers v. Perry Ellis LLC*, 30 N.Y.3d 488, 496-99 (2017). "[I]solated decisions … [are not] deserving of similar weight." *Anheuser-Busch*, 71 N.Y.2d at 334.

Indeed, the lengthy history of Section 18 cost-related litigation does not rely upon, or even mention, the existence of any private right of action until the recent federal class actions (with the exception of *Feder*). Most reported cases in the courts of this State discussing Section 18's per-page charge cap either have arisen from Article 78 proceedings to obtain records or in a discovery dispute context.[18] The Appellate Division cases have

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[17] In an early stage of *Ruzhinskaya* case in federal court, for example, the court simply assumed a cause of action existed, oblivious of *Feder*. *Spiro*, 73 F. Supp. 3d at 272 n.9. On appeal, the Second Circuit observed "an absence of authoritative state court interpretations of Section 18." *Ruzhinskaya*, 942 F.3d at 73.

[18] *See, e.g., Pratt v. Gourd*, 20 A.D.3d 827 (3d Dep't 2005) (Art. 78 petition seeking access to medical records); *Matter of Halio v. IOD, Inc.,* 32 Misc. 3d 593, 594 (Sup. Ct. Nassau Cty. 2011) (petition to compel records handler to provide medical records at no more than 75¢ per page); *Casillo*, 151 Misc. 2d at 420-21 (petition to forward records at 75¢ per page); *see also McCrossan v. Buffalo Heart Grp.*, 265 A.D.2d 875, 876 (4th Dep't 1999) (order limiting hospital's charges for records, entered before production, obtained by subpoena within malpractice action as part of discovery); *Davenport v. County of Nassau*, 245 A.D.2d 331 (2d Dep't 1997) (motion to quash subpoena duces tecum; *Boltja*, 153 Misc. 3d at 569 (class action to declare attorneys to be "qualified

described the remedies under the statute as limited. *See DeLaurenzo v. Nadler,* 8 A.D.3d 609, 610 (2d Dep't 2004) ("In the absence of a willful or bad faith refusal to provide access to medical records in accordance with Public Health Law § 18, the allegedly aggrieved patient's judicial recourse is 'limited to a judgment requiring [the physician] to make available to the qualified person the requested information for inspection or copying' (Public Health Law §18[3][f]; see Public Health Law §18[11]; cf. Education Law §6530[40]; Public Health Law §230-a [administrative penalties for professional misconduct]; Public Health Law §§12, 12-b)."); *accord Smalls*, 152 A.D.3d at 630 (further relief could not be obtained under Section 18 once "appellants had been provided with the requested information at no cost to them"); *Mele v. Travers*, 293 A.D.2d 950, 952 n.2 (3d Dep't 2002) (noting failure of plaintiff to "avail[] herself of the appropriate administrative and judicial remedies afforded under [the Public Health Law § 18] statutory scheme to address" denial of access to medical records).

Appellant accurately states that the federal courts have hosted class actions based on an implied private right of action under Section 18. Those cases, notably, pursue other causes of action as well. *See, e.g., Ruzhinskaya v. Healthport Tech., LLC*, 291 F. Supp. 3d 484, 502-03 (S.D.N.Y. 2018)

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persons" prior to amendment of statute including them); *Colon v. City of N.Y.*, 285 A.D.2d 523 (2d Dep't 2001) (discovery motion to fix per-page cost).

(considering and granting summary judgment on other claims); *Shelton*, 2018 WL 4211447, at *1 (noting claims asserted[19]); *Carter v. CIOX Health, LLC*, 260 F. Supp. 3d 277, 279 (W.D.N.Y. 2017) (noting other claims); *McCracken v. Verisma Sys., Inc.*, 131 F. Supp. 3d 38, 46-51 (W.D.N.Y. 2015) (refusing to dismiss other claims). None were asked to address the viability of an implied private right of action until recently, when the *Ruzhinskaya* court did and agreed with the opinion under review here that no such implied right of action exists.[20] *See* 2020 WL 3791881, at*4 (S.D.N.Y. July 7, 2020). Those actions that still remain pending (*Ruzhinskaya* and *Shelton* have been dismissed) have been stayed or are seeking stays awaiting the outcome of this appeal.[21] *See McCracken v. Verisma Sys., Inc.*, Case No. 6:14-cv-6248, 2018 WL 4233703 (W.D.N.Y. Sept. 6, 2018) (granting stay pending outcome of *Ruzhinskaya* appeal),

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[19] Although Appellant describes *Shelton* as asserting an implied right of action under Section 18, the opinion dismissing the suit identifies the claims asserted only as unjust enrichment and violation of General Business Law § 349.

[20] Appellant does not explain why the handful of lower federal courts that have assumed the existence of an implied right of action under section 18 would merit more consideration that the court that decided this case, which expressly addressed the issue. In any case, the courts of this State may accord respect to the interpretations of state law by the federal courts, but they are not bound by those interpretations. *See, e.g., Oneida Indian Nation of N.Y. v. Pifer*, 43 A.D.3d 579, 581 (3d Dep't 2007); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 208 A.D.2d 81, 83 (1st Dep't 1985); *Marsich v. Eastman Kodak Co.*, 244 App. Div. 295, 296 (2d Dep't 1935), *aff'd*, 269 N.Y. 621 (1936).

[21] A pending state court case also has been stayed on this basis. *Moore v. CIOX Health, LLC*, Index No. 655060-2016, 2018 WL 3733285 (Sup. Ct. N.Y. Cty. Aug. 1, 2018) (stayed pending *Ruzhinskaya* decision in 2d Cir.), *stay extended*, dkt. #86 (Sup. Ct. N.Y. Cty. July 31, 2020), #97 (Sup. Ct. N.Y. Cty. Aug. 27, 2020).

application for further stay pending, doc. nos. 169, 172, 175, 183, 195 (W.D.N.Y. argued July 23, 2020); *Carter v. CIOX Health, LLC*, Case No. 6:14-cv-6275, doc. no. 117 (W.D.N.Y. Dec. 21, 2018) (stayed pending decision in *Ruzhinskaya* in 2d Cir.), *stay reinstated*, doc no. 120 (W.D.N.Y. Apr. 14, 2020 (pending decision in this case in 2d Cir.), *stay extended*, doc nos. 120, 121, 122, *further order*,[22] doc. no. 123 (W.D.N.Y. Oct. 1, 2020).

It hardly can be thought to upset the stability and consistency of the law of this State to decide this issue for courts that have waited for clarification from authoritative sources, signaling their desire and willingness to wait for further guidance. To the contrary, the Second Circuit certified the question to this Court to settle the law properly and definitively. Following the *Sheehy* test, this Court should take that step and conclude that a private right of action may not be implied from Section 18.

[22] On October 1, 2020, the *Carter* court approved the parties' proposal to confer on a discovery plan, that might include a stay pending this appeal, and to either report back their agreement or seek a status conference at which the court would decide how to proceed.

CONCLUSION

For all the reasons stated in this brief, and any different and additional reasons offered by CIOX in its brief, the Hospital respectfully submits that this Court should answer the question certified by the United States Court of Appeals in the negative and declare that an implied private right of action does not exist under Public Health Law Section 18(2)(e).

Dated: October 21, 2020
New York, New York

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. I, John Houston Pope, certify that this brief contains approximately 8,140 words, excluding the parts of the brief exempted by New York Court of Appeals Rule of Practice 500.13(c)(3). I further certify that this brief complies with the typeface requirements of Rule 500.1(j) because it has been prepared using a proportionally-spaced typeface (Georgia font, 14-point in text, 12-point in footnotes) in Microsoft Office Word.

s/John Houston Pope