

News

NYCOA Allows Appeal of Case Over Comptroller's Subpoena of Medical Records

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By **Dan M. Clark** | September 13, 2018 at 02:38 PM



Court of Appeals for New York, Albany. (Courtesy photo)

The Court of Appeals has agreed to hear a case on the subpoena power of the state comptroller's office when requesting a patient's medical records without their prior authorization.

The case was appealed from the Appellate Division, Third Department, which decided the comptroller did not need written permission from patients before seeking those records.

The appeal was brought by The Plastic Surgery Group, a medical provider in Albany. It is represented on appeal by Matthew Didora, a partner at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone in Nassau County. Zainab Chaudhry, from the state Attorney General's Office, represented the comptroller.

The case started when the comptroller's office, in 2016, started an audit of health insurance claims paid to The Plastic Surgery Group by UnitedHealthcare. United is a private insurance company that contracts with the state to process and pay medical claims for state employees, retirees, and others on the Empire Plan, the primary health insurance plan for government workers in New York.

The comptroller's office was trying to determine if United had overpaid The Plastic Surgery Group for claims submitted between 2011 and 2015. The provider did not respond or comply with the comptroller's requests to review a random sample of its records related to claims during that time, according to the Appellate Division's decision.

The comptroller's office then served the provider with a subpoena duces tecum for the records. The provider, again, did not comply with the subpoena and instead moved to quash it in Supreme Court. Didora said in an interview on Thursday that because neither request included approval from the patients whose records were sought, the provider did not respond.

"Our position was that since the comptroller didn't provide the required authorization, we didn't even have to respond," Didora said.

Albany Supreme Court Justice Christina Ryba granted their motion and quashed the subpoena, holding that the comptroller's office had to provide written authorization from the patients whose records they

sought for the audit. Ryba also denied a cross-motion from the comptroller's office to compel the provider to comply with the subpoena.

Her decision was based on CPLR 3122 (a), which says a request for such records "shall be accompanied by a certification, sworn in the form of an affidavit and subscribed by the custodian or other qualified witness charged with responsibility of maintaining the records."

The Appellate Division, in a unanimous decision, reversed Ryba's decision and denied the motion to quash the subpoena. The court also approved the cross-motion to compel compliance by the provider. Justice Robert Mulvey wrote [the opinion](#).

He said CPLR 3122 (a) only requires a patient's written authorization when records are sought during the discovery phase of an action that has already commenced. Since the comptroller's office had not yet started an action, Mulvey said its request was valid regardless of whether patient authorization was included.

"Since respondent's subpoenas are issued in accordance with its constitutional and statutory audit authority, and have no connection with discovery in an action or proceeding, the cited provisions of CPLR 3122 are not applicable," Mulvey wrote.

He also spoke to the comptroller's constitutional obligation to audit state payments to health insurance vendors, like United, as decided in previous cases, such as *Martin H. Handler, M.D., P.C. v. DiNapoli*.

"The [Court of Appeals] made clear that [the comptroller] is mandated to ensure proper billing and payments for the Empire Plan, and to prevent unauthorized payments and overpayments, and must audit the records of participating and nonparticipating providers alike as part of its responsibility to audit payments to medical providers," Mulvey wrote.

Didora's argument does not necessarily contradict that point. He argued that the comptroller should not have the power to request medical records for an audit without patient consent.

"Our argument is that if the comptroller wanted to subpoena us for these records, because the records the comptroller has sought contained [protected health information], they had to comply with CPLR 3122, which requires patient consent, patient authorization," Didora said.

The Court of Appeals usually has taken about 11 months between granting leave and hearing oral arguments on a case.

A spokesman from the state comptroller's office did not respond to a request for comment on Thursday.

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