SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50E

In the Matter of the Application of the Medical Society of the State of New York; The Center for Justice and Democracy, Inc.; The Chiropractic Federation of New York,; The New York County Medical Society Inc.; The New York Physical Therapy Association, Inc.; New York Public Interest Research Group, Inc.; The New York State Podiatric Medical Association, Inc.; The New York State Trial Lawyers Association, Inc.; The Suffolk County Bar Association, Inc.; The Flatbush Surgical Supply Company, Inc.; Versatile Progressive Innovative, Inc., a/k/a VIP, Inc,; Joanna Fasulo, D.C; Frank Mandarino, D.C; Antonino Parisi, M.D.; Sudha Patel, M.D.; and Donna Dolan, Petitioners, For a Judgment pursuant to Article 78 and Section 3001 of the Civil Practice Law and Rules -against- Gregory Serio, as Superintendent of Insurance for the State of New York; and The State of New York Insurance Department Respondents.	DECISION AND JUDGMENT Index No.: 116519/01

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William A. Wetzel, J.:

This is a combined proceeding which seeks: 1) a judgment pursuant to CPLR §3001, declaring that the recent amendments to 11 NYCRR Part 65 which implement Article 51 of the Insurance Law (No-Fault Automobile Insurance Law) adopted and approved by the respondents with an effective date of September 1, 2001 (hereinafter referred to as "Regulation 68" or "The New Regulations"), are illegal, null and void; and 2) a judgment pursuant to CPLR Article 78 annulling the revised New Regulations on the grounds that the respondents have failed to perform a duty enjoined upon them by law, have acted in excess of their jurisdiction, and that the adoption and approval of the New Regulations was affected by errors of law and was arbitrary and capricious.

Petitioners have a myriad of complaints about these regulations, but they focus on the shortened time periods for filing claims. Under the New Regulations, the time within which a claimant must notify the No-Fault insurer of an accident has been reduced from 90 to 30 days, and

the time within which insurers must receive proof of claim for medical treatment has been reduced from 180 days to 45 days. This is the second time Petitioners have sued to invalidate such Regulations. In Medical Society v. Levin, 185 Misc.2d 536 (Sup. Ct. N.Y. County 2000) (hereinafter "Medical Society I"), Petitioners successfully challenged an earlier version of the New Regulations. In that decision, Justice Gangel-Jacob exhaustively reviewed the history and purpose of the no-fault insurance system. Familiarity with the content of that decision is assumed herein. She struck down the New Regulations, finding that they "were not promulgated in substantial compliance with the requirements of the Administrative Procedure Act." Id. at 544. Although Justice Gangel-Jacob specifically enumerated and analyzed five violations of the State Administrative Procedure Act (hereinafter "SAPA"), she carefully pointed out that the list was not exhaustive. She observed in dicta that "in promulgating the New Regulations respondents have placed an enormous new burden on accident victims and small health providers, ostensibly in an effort to prevent fraud, without first making an effort to determine which or how many of them are contributing to the problem." Id at 547.

Respondents went back to the drawing board. They revised the New Regulations in response to Medical Society I, and the regulations challenged here are a reincarnation of the New Regulations. After promulgation of these New Regulations, Medical Society I was affirmed. See Medical Society v. Levin, 280 AD2d 309 (1st Dept. 2001). While this procedural history is relevant to the present analysis, neither decision is res judicata as to the instant legal issues.

Petitioners now allege that the respondents have once again failed to comply with SAPA. They specify four alleged failures: first, respondents improperly delegated rule-making authority to insurance companies to establish standards, in violation of SAPA §§201 and 202, and the state

Constitution. Second, respondents failed to analyze alternative approaches raised in public comments, pursuant to SAPA §§202-a , 202-b and 202(5). Third, respondents failed to supply an adequate Regulatory Impact Statement ("RIS") and Regulatory Flexibility Analysis ("RFA") as required by SAPA §§202-a and 202-b. Fourth, respondents failed to amend the RIS and RFA as required by SAPA Section 202(5)(b).

Respondents assert in response that they made substantive revisions to the rules, guided by the decision in Medical Society I, and have addressed each and every one of the SAPA violations set forth by Justice Gangel-Jacob. See affidavit of Richard Lynde, Supervising Insurance Examiner, sworn to October 30, 2001; See also Respondents' Mem. at pp. 8-14, 48-57. These changes and revisions included substantive revisions to the proposed regulation, a Notice of Revised Rulemaking, a Revised Regulatory Impact Statement, a Revised Regulatory Flexibility Analysis for Small Businesses and Local Government, a Revised Job Impact Statement, and a Revised Rural Area Flexibility Analysis. A thirty-day period for public comment was scheduled and subsequently extended for an additional fifteen days, during which time the Department received one hundred and ninety-one comments in favor of the revisions and four hundred and fourteen against them. Respondents then caused the Notice of Adoption to be published and set September 1, 2001, as the effective date for the revised New Regulations.

It would be a vast understatement to say that Petitioners consider these revisions thoroughly inadequate. For practical reasons, the Court will refrain from addressing each and every argument and counter-argument raised by the parties. After thoroughly reviewing and analyzing the extensive record, this Court concludes that respondents have provided credible evidence of substantial compliance with SAPA.

As previously noted, Justice Gangel-Jacob's decision in Medical Society I turned on the finding that respondents' New Regulations were not promulgated in substantial compliance with the requirements of SAPA. See Matter of Industrial Liaison Committee v. Williams, 72 NY2d 137 (1988). Guided by Justice Gangel-Jacob's detailed objections to the first set of New Regulations, respondents addressed each one of the deficiencies in their second revision, and the record demonstrates that they did so. In particular, respondents paid careful attention to the finding in Medical Society I that the original New Regulations failed to assess the anticipated impact on entities other than insurers, such as claimants and health care service providers. They addressed the added burdens of increased administrative costs and paper-work. Further, respondents discussed the absence of statements of alternatives and why those statements were not incorporated into the regulations themselves. Finally, respondent submitted the Notice of Rulemaking, along with the supporting paperwork and the subsequent revisions, to the Governor's Office of Regulatory Reform to obtain an "advisory opinion" as to whether the newest revision passed muster pursuant to SAPA. While that Office's finding is of course not binding on this Court, its determination that the New Regulations were in substantial compliance with SAPA is further evidence of respondents' substantial compliance with the Act.

The scope of judicial review pursuant to Article 78 is extremely constricted. The questions appropriately raised in this proceeding are limited to whether respondents failed to perform a duty imposed upon them by law; whether the respondents acted in excess of their jurisdiction, or whether respondent's action in promulgating the New Regulations was affected by an error of law, was arbitrary and capricious, or an abuse of discretion. CPLR §7803.

When applying these standards to the respondent Superintendent of Insurance, we have

the benefit of a clear directive from the Court of Appeals that respondent is vested "with broad power to interpret, clarify, and implement (the State's) legislative policy." Ostrer v. Schenck, 41 NY2d 782, 785 (1977). Specifically, the Superintendent's broad powers to enact regulations must be upheld as long as the regulations "are not inconsistent with some specific statutory provision." Id. The Superintendent is charged by statute with the duty of regulating insurance policy forms for no-fault coverage. Insurance Law §5103(d). Judicial review of the no-fault regulations governing policy forms is "limited." Feggans v. Reliance Ins. Co of N.Y., 100 AD2d 570, 571 (2d Dept. 1984). The Court of Appeals so held in Matter of N.Y. Public Interest Research Group, Inc. v. Dept. of Ins., 66 NY2d 444 (1985), a previous case brought by one of the same petitioners:

> "The Superintendent of Insurance is vested by Insurance Law §301 with the power to prescribe regulations interpreting the provisions of the Insurance Law, provided only that his regulations are not inconsistent with some specific provision of the law (Ostrer v. Schenck, 41 NY2d 782, 785). By that section he is granted 'broad power to interpret, clarify, and implement the legislative policy' id., and his interpretation, if not irrational or unreasonable, will be upheld in deference to his special competence and expertise with respect to the insurance industry, unless it runs counter to the clear wording of a statutory provision (Kurcisca v. Merchants Mut. Ins. Co., 49 NY2d 451, 459; Matter of Howard v. Wyman, 28 NY2d 434, 438. . . ."

Petitioners argue that the respondents' promulgation of the regulations usurped legislative policy functions and went beyond respondents' legal authority. See Petitioner's Mem. at Point II. However, a review of the Petitioners' argument here suggests that it is directed more at the alleged substantive excesses in the New Regulations than at the issue of the scope of respondent's authority. Unfortunately, this argument conflates two distinct issues: first, the authority of the Superintendent to promulgate regulations consistent with Article 51, and second, whether the

New Regulations themselves substantively exceed the Superintendent's authority. These issues will be addressed seriatim.

The first issue is easily dispatched. There is no doubt that it is within the Superintendent's authority and jurisdiction to promulgate regulations which carry out the legislative purpose of Article 51 of the Insurance Law. Matter of N.Y. Public Interest Research Group, Inc. v. Dept. of Ins., supra at 448; Ostrer v. Schenck, supra at 785; Ins. Law §§ 201, 301. Indeed, the "status quo" regulations which Petitioners seek to maintain were promulgated by the Commissioner pursuant to that very authority.

The next inquiry is whether the Superintendent exceeded his authority when he promulgated the New Regulations. Petitioners cite Boreali v. Axlerod, 71 NY2d 1 (1988) in support of their position that the Superintendent did in fact reach beyond the scope of his authority in his zeal to combat insurance fraud. They argue that the Insurance Department, as an administrative agency, may not transgress "that difficult-to-define line between administrative rule-making and legislative policy-making." Id. at 11. Policy-making authority, they assert, is the sole province of the legislature. (Of course, this argument begs the question of whether the New Regulations substantively constitute "policy-making.") Petitioners' reliance on Boreali, however, is misplaced.

At issue in Boreali were Health Department rules governing tobacco smoking. At the time the Health Department promulgated these rules, the New York State Legislature was embroiled in debate over the complex matrix of social, economic, and political problems inherent in establishing a state-wide smoking policy. The Health Department leaped into that legislative breach with its own set of rules, writing on a "clean slate," "without benefit of legislative

guidance." Id at 13. The Court of Appeals struck down those regulations, holding that an administrative agency could not create rules out of whole cloth, "without benefit of legislative guidance." Such a promulgation, the Court held, was tantamount to legislating, not administering.

Here, unlike Boreali, the Superintendent has simply revised existing Regulations to better implement the clear legislative purpose of Article 51 of the Insurance Law. See Nicholas v. Kahn, 47 NY2d 24 (1979); Medical Society of the State of New York v. Dep't of Social Services, 148 AD2d 144, 147 (3rd Dept. 1989). Accordingly, this Court finds no impermissible policy-making in the promulgation of the New Regulations.

Petitioners' corollary argument, that the New Regulations embody changes which can only be made by legislative enactment, falls victim to the "hoisted by your own petard" syndrome. In a memorandum filed on June 9, 1997, in opposition to legislation proposing the very same reduction at issue here (Notice of Claim reduced from 90 to 30 days, Notice of Third Party Benefits reduced from 180 to 45 days), petitioner New York State Trial Lawyers Association, Inc. vehemently advocated a completely opposite legal position from that which they press in the instant case:

> "This proposed legislation would require all health care providers who render first-party benefits to a covered person to notify an insurer within thirty calendar days of the initial treatment of the claimant . . . The present regulation [Regulation 68] provides for notice to be given the insurer within 180 days of treatment . . .
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> This statute appears to unnecessarily usurp the authority vested in the Superintendent of Insurance to promulgate those regulations deemed to be necessary to implement the No-Fault Reparations Act . . . and in the absence of any proposed amendment to his regulation, the Legislature should refrain from substituting its judgment as to what the time limits for timely notice should be in this area."

June 9, 1997 NYSTLA Memorandum to the State Commission on Legislation (Lynde Affidavit ¶5. Resps' Exh. B)

This Court agrees with NYSTLA's 1997 position. It is the Superintendent of Insurance, not the legislature, who has the authority to promulgate and revise regulations to implement the provisions of the No-Fault insurance law.

Finally, this Court must determine whether the New Regulations are arbitrary, capricious, or illegal.

Respondents assert that the New Regulations are necessitated by a dramatic increase in fraudulent No-Fault insurance claims. See Lynde Aff. at ¶¶ 8-13. The statistics relating to fraudulent claims, compiled by the agency charged with the program's administration, are startling: reports of No-Fault fraud have skyrocketed from 489 reported cases in 1992 to 12,372 cases in the year 2000. Id.

Petitioners do not contest these alarming statistics. Rather, they assert that respondents have no authority to adopt regulations which contain "fraud fighting measures that would undermine the availability of benefits for tens of thousands of claimants." Alternatively, they suggest that the preferred remedy to escalating fraud is increased law enforcement efforts to identify and prosecute the perpetrators.

This Court cannot accept Petitioners' argument, which basically suggests that the Respondent is limited to treating the symptom but not the system. The No-Fault system is diseased by fraud of a dimension which threatens the economic viability of the program and carries enormous financial consequences for insurers and insureds throughout the state. It is well within the authority of respondent Superintendent to promulgate New Regulations to remedy this universally acknowledged

problem.

Ultimately, Petitioners fear that these provisions go too far and will frustrate the legislative purpose of the statute, which is to assure a quick, efficient method for covered persons to obtain first-party benefits after an automobile accident. Petitioner asserts that a thirty-day Notice of Claim provision would drastically increase the risk of lost benefits as a result of failure to meet notice requirements. The same argument is advanced regarding the forty-five day period for submission of medical claims.

Petitioners highlight the dicta in Judge Gangel-Jacob's decision suggesting that these New Regulations will have far-reaching effects and directly impact everyone involved in the No-Fault system. No one can refute that prognostication. Indeed, it is axiomatic that with any statute of limitations, the shorter the period the more likely there will be time-barred claimants. However, that is not the standard by which this Article 78 Court must review the New Regulations. Nor may this Court substitute its judgment for that of the respondent and determine de novo what would be appropriate time periods. It matters not whether this Court, or any other Court, or the Petitioners, for that matter, believes that a less "dramatic" reduction would have been better, e.g., sixty days for notice of claim and ninety for submission of medical statements. (The state of New Jersey, for example, in addressing similar problems, adopted a twenty-one day notice requirement to address this problem. See Notice of Adoption at p. C-24.) What this Court cannot conclude is that a thirty-day notice of claim period with the procedural safeguards and provisions contained in the New Regulations is irrational or unreasonable as a matter of law. See Matter of Pell v. Board of Education, 34 NY2d 222 (1974).

Likewise, this Court cannot conclude that the reduction from one hundred and eighty days

to forty-five days for submitting medical claims is irrational or unreasonable. We know from everyday experience that one would be hard-pressed to find an example of obtaining goods or services without being billed for one hundred and eighty days. While Petitioners argue that there is something "special" about third-party medical claims, this Court is unpersuaded that asking a supplier to bill within forty-five days rises to the level of "irrational or unreasonable," especially in light of the Court of Appeals' clear instruction to give "deference to [the Superintendent's] special confidence and expertise with respect to the insurance industry, unless it runs counter to the clear wording of a statutory provision." Matter of New York Public Interest Group, Inc., v. Department of Insurance, supra at 448.

This Court has reviewed the other arguments raised by Petitioners in challenging the New Regulations and finds them to be without merit.

For the foregoing reasons, this petition is in all respects denied. This constitutes the Decision and Judgment of this Court.

Dated: New York, NY
February 19, 2002

J.S.C.

HON. WILLIAM A. WETZEL