
NEW YORK INSURANCE ASSOCIATION, INC., AMERICAN TRANSIT INSURANCE COMPANY, EVEREADY INSURANCE COMPANY, GREATER NEW YORK MUTUAL INSURANCE COMPANY, KINGSTONE INSURANCE COMPANY, MERCHANTS INSURANCE GROUP and UTICA MUTUAL INSURANCE COMPANY,

Plaintiffs,

-against-

STATE OF NEW YORK, ANDREW M. CUOMO, Governor of the State of New York, BENJAMIN M. LAWSKY, Superintendent of the New York State Department of Financial Services, and ROBERT L. MEGNA, as Director of Budget,

Defendants.

THE NEW YORK HEALTH PLAN ASSOCIATION, INC.; AETNA HEALTH INC.; AETNA HEALTH INSURANCE COMPANY OF NEW YORK; CDPHP UNIVERSAL BENEFITS, INC.; CAPITAL DISTRICT PHYSICIANS' HEALTH PLAN, INC.; HEALTH NET OF NEW YORK, INC.; HEALTH NET INSURANCE OF NEW YORK, INC.; HEALTHNOW NEW YORK INC.; INDEPENDENT HEALTH ASSOCIATION, INC.; INDEPENDENT HEALTH BENEFITS CORPORATION; MVP HEALTH PLAN, INC.; MVP HEALTH INSURANCE COMPANY; MVP HEALTH SERVICES CORP.; PREFERRED ASSURANCE COMPANY; OXFORD HEALTH INSURANCE, INC.; OXFORD HEALTH PLANS (NY), INC.; UNITEDHEALTHCARE INSURANCE COMPANY OF NEW YORK; and UNITEDHEALTHCARE OF NEW YORK, INC.

Intervenor-Plaintiffs,

-against-

STATE OF NEW YORK; ANDREW M. CUOMO, in his official capacity as Governor of the State of New York; BENJAMIN M. LAWSKY, in his official capacity as Superintendent of the New York State Department of Financial Services; and ROBERT L. MEGNA, in his official capacity as Budget Director of the State of New York,

Defendants.

**AFFIDAVIT IN SUPPORT OF INTERVENOR-PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

4. Each of the other Intervenor-Plaintiffs is or was a member of HPA that pays or has paid the assessments at issue in this action.

5. This action raises the question of whether Section 332 of the New York State Insurance Law (“Section 332”),¹ which authorizes assessments upon insurers to defray the operating expenses of the New York State Insurance Department (the “Insurance Department” or the “Department”),² may be used to force insurers to pay for expenses unrelated to the operation of the Department.

6. HPA and its member health plans, including the Intervenor-Plaintiff health plans, have a direct and substantial interest in this litigation. Like the NYIA Plaintiffs, the HPA health plans are subject to the Section 332 Assessments and will be forced to bear the extraordinary expense of improperly inflated assessments absent the relief sought herein.

NEW YORK STATE INSURANCE LAW SECTION 332

7. Section 332 of the New York State Insurance Law, which is the focus of this case, states in pertinent part that:

[t]he expenses of the department . . . for any fiscal year, including all direct and indirect costs, as approved by the director of the budget and audited by the comptroller . . . shall be assessed by the superintendent pro rata upon all domestic insurers and all licensed United States branches of alien insurers domiciled in this state . . . in proportion to the gross direct premiums and other considerations, written or received by them in this state during the calendar year ending December thirty-first immediately preceding the end of the fiscal year for which the assessment is made (less return premiums and considerations thereon) for

¹ Section 332 was repealed, effective April 1, 2012, and replaced by Financial Services Law § 206, which was effective October 3, 2011. References to Section 332 include Financial Services Law § 206.

² The New York State Insurance Department and the Insurance Division of the New York State Department of Financial Services are referred to as the “Insurance Department” or the “Department,” and reference to one incorporates reference to the other. The Insurance Department and the Banking Department merged to form the Department of Financial Services, effective October 3, 2011 (*see* Financial Services Law § 102; L. 2011, ch. 62, pt. A, § 1).

policies or contracts of insurance covering property or risks resident or located in this state the issuance of which policies or contracts requires a license from the superintendent; and the superintendent shall levy and collect such assessments and pay the same into the state treasury

N.Y. Ins. Law § 332(a).

8. Put simply, Section 332 provides a mechanism to fund the operating expenses of the Department through an industry-wide assessment (the “Section 332 Assessments” or “Assessments”).³

Recent Use of the Section 332 Assessments in the State Budget Process

9. Under the plain language of the statute, the Section 332 Assessment is explicitly limited to funding the “the expenses of the [Insurance] [D]epartment.” Since the statute was first enacted in 1940, the phrase “expenses of the [D]epartment” has been understood to include only employee salaries, office supplies, travel, leases, and similar types of expenses. Section 332 Assessments thus paid for only the actual operating expenses of the Department and annual expenditures were relatively flat.

10. Beginning in 2004, however, the Governor and the State Division of the Budget began expanding the meaning of the “expenses of the Department,” and the Assessments increased dramatically, despite the fact that such increases clearly exceed the statutory mandate that only the operating costs of the Department may be passed on to insurance companies.

11. The so-called “sub-allocations” from the Department’s budget are used to fund programs and services of other State agencies that have little or nothing to do with the operation of the Department. These sub-allocated programs were previously funded by the New York

³ For the purposes of this affidavit, all references to the term “insurers” or “insurance companies,” shall include health maintenance organizations (“HMO”) established under Article 44 of the New York Public Health Law, because all such HMOs are subject to the Section 332 assessments challenged herein.

State General Fund or other broad-based revenue sources, but have recently, and increasingly, been funded by the Section 332 Assessments.

12. The Intervenor-Plaintiffs do not question the legislative judgment underlying the programs funded by the Assessments. Rather, the Intervenor- Plaintiffs argue that such expenses should be funded from the General Fund or other broad-based funding sources, as an obligation of all taxpayers, rather than through the Section 332 Assessment, which was never intended to fund anything other than the operating expenses of the Department.

Effect of the Improper Section 332 Assessments

13. The impact on health insurers, as measured by the increase in unrelated expenses included in the Section 332 Assessments, has been significant. The funds appropriated for the actual operation of the Insurance Department increased from approximately \$98,000,000 in the 2003-2004 budget year to approximately \$145,000,000 for State Fiscal Year 2009-2010. During the same time period, however, the appropriation to the Insurance Department for non-operating expenses increased from approximately \$49,000,000 to approximately \$305,000,000.

14. For Fiscal Year 2011-12, the non-operating expenses of the Department totaled approximately \$304,000,000. In Fiscal Year 2003-04, non-operating expense items constituted only 33% of the total Insurance Department budget. By State Fiscal Year 2011-12, non-operating expense items constituted approximately 70% of the total Department budget. The non-operating expenses of the Department have thus increased by more than 600% during a period of six years, while the actual operating expenses increased by only approximately 150%. The allocation of such expenses to the Department budget increases the premiums paid by New York employers and consumers for health insurance.

Failed Amendment of Section 332

15. Facing an approximate \$1.6 billion shortfall for the 2008-2009 fiscal year, Governor Paterson proposed a Deficit Reduction Plan (“DRP”) in conjunction with his 2009-2010 Executive Budget Proposal. The final version of the DRP – which passed the Senate and the Assembly on February 3, 2009 and was then signed by the Governor (Chapters 1 and 2 of 2009) – included an increase in the Department’s appropriation of \$180 million, which was to be paid for through an increase in the 332 Assessments.

16. In addition, Governor Paterson’s initial DRP proposal for State Fiscal Year 2008-2009 included an amendment to Section 332. The Governor’s proposal would have amended the Insurance Law in order to change the intent of the Assessments and authority of the Superintendent.

17. Specifically, the title’s reference to the word “operating” would have been deleted, and the text of the statute would have been amended to state that the phrase “expenses of the department” includes “all appropriations whether administered by the department or suballocated to another state department, board, or agency.” *See* S.249/A.162 N.Y. 2009.

18. Upon information and belief, the Governor thus recognized that under current law the Superintendent lacked authority to assess insurance companies for programs that are suballocated to other departments or that otherwise do not relate specifically to the Department’s operation.

19. After negotiations with the Legislature, however, these proposed amendments were deleted from the DRP, and Section 332 continues to limit the use of Assessments to defray only the actual operating expenses of the Department.

Recent Legislation Has Authorized the Transfer of Assessment Overpayments, Which Were Previously Returned to Intervenor-Plaintiffs, to the New York State General Fund

20. Pursuant to Insurance Law Section 332(b), the Superintendent of Insurance estimates the expenses for the next fiscal year and issues a demand for payment of 25% of the estimated assessment by March 10th of the fiscal year in which the estimate is calculated. The remaining three quarterly estimated payments are required to be remitted by June 10th, September 10th, and December 10th of the next fiscal year. Pursuant to Section 332(b), after the final amount of the assessment is calculated, insurers are required to pay any balance due, while “[a]ny overpayment of annual assessment resulting from complying with the requirements of this subsection shall be refunded or at the option of the assessed applied as a credit against the assessment for the succeeding fiscal year.”

21. In 2009, the Legislature authorized transfer of Assessment overpayments to the General Fund, rather than returning them to the assessed insurance companies, as provided for in Section 332(b). Specifically, Part H of Chapter 2 of the Laws of 2009 authorized the Comptroller to transfer up to \$4.5 million from the Insurance Department assessment account to the General Fund in state fiscal year 2008-09. Subsequently, on February 17, 2009, \$4,500,000 was transferred to the General Fund pursuant to this section. L. 2009 Ch. 2 Pt. H § 1.

22. Similar transfers or “sweeps” of unused Section 332 Assessments to the General Fund were made in subsequent years. Such sweeps totaled nearly \$90,000,000.⁴

⁴ Chapter 56 of the Laws of 2009, Part PP, §2 provided that:

§ 2. Notwithstanding any law to the contrary, and in accordance with section 4 of the state finance law, the comptroller is hereby authorized and directed to transfer, upon request of the director of the budget, on or before March 31, 2010, up to the unencumbered balance or the following amounts:

...

**The Assessments Now Pay for Programs Previously Funded
by the General Fund or Other Broad-Based Funding Sources**

23. Defendants now routinely use the Assessments to pay for programs that were previously funded through broad-based funding sources such as the General Fund or Health Care Reform Act (“HCRA”). For example, Governor Paterson proposed, in his 2008-09 Deficit Reduction Plan, shifting programs such as Timothy’s Law, Early Intervention, and other public health care programs, which had previously been funded from the General Fund and/or

4. \$15,000,000 from the miscellaneous special revenue fund (339), insurance department account (B6), to the general fund.

L. 2009 Ch. 56 Pt. PP § 2.

On May 28, 2009, Defendants utilized this provision to transfer \$15,000,000 in unused Section 332 assessments into the General Fund. (November 22, 2013 Affirmation of Stephen M. Buhr (“Buhr Aff.”), Ex. O, Defendants’ Response to Plaintiffs’ Second Set of Interrogatories, 1(d).)

Chapter 503 of the Laws of 2009, Part E, §3, amended Part PP of Chapter 56 of the Laws of 2009 and expanded the amount the comptroller could sweep from special revenue funds, including Insurance Law § 332, from \$200 million to \$575 million. L. 2009 Ch. 503 Pt. E § 3. Subsequently, on February 8, 2010, Defendants utilized this provision to transfer \$50,000,000 in unused Section 332 assessments to the General Fund. (*Id.*)

Chapter 503 of the Laws of 2009, Part E, § 5 authorized an additional \$4,940,000 to be swept into the General Fund. L. 2009 Ch. 503 Pt. E § 5. Subsequently, on March 30, 2010, Defendants utilized this authorization to transfer \$4,940,000 in unused Section 332 assessments to the General Fund. (*Id.*)

Chapter 56 of the Laws of 2010, Part JJ, § 9, authorized the transfer of \$500,000,000 from special revenue funds, including Insurance Law § 332, into the General Fund. L. 2010 Ch. 56 Pt. JJ § 9. Subsequently, on March 11, 2011, Defendants utilized this authorization to transfer \$9,922,000 in unused Section 332 assessments to the General Fund. (*Id.*)

Finally, Chapter 56 of the Laws of 2010, Part JJ, § 14 authorized the transfer of any unused Section 332 assessments, regardless of the amount, into the General Fund. L. 2010 Ch. 56 Pt. JJ §14. Subsequently, on March 29, 2011, Defendants utilized this authorization to transfer \$5,000,000 in unused Section 332 assessments to the General Fund. (*Id.*)

assessments imposed by HCRA, to the Department's Special Revenue Regulation Account. *See* S.249/A.162 (N.Y. 2009).

24. Ultimately, the Deficit Reduction Plan enacted by the Legislature directed that the increased assessments pay for the Healthy New York Program, the HMO Direct Pay Market Program, and the Entertainment Employee Industry Pilot Program, and eliminated HCRA funding for these programs. *See* Chs. 1 and 2 of 2009.

25. Despite the fact that these programs had been administered historically by the Department of Health, they were, nevertheless, moved to the Insurance Department's budget. Chapter 1 of 2009 also adjusted the Department's budget to create an appropriation for each of these programs. *Id.*

26. Before the Healthy New York and HMO Direct Pay programs were shifted to the Department and funded by the Section 332 Assessments in fiscal year 2008-2009, these programs were funded under HCRA, a broad-based funding source that included, among other things, assessments on hospitals and cigarette taxes. The shift of these programs to the Department and the Section 332 Assessments, which is a very narrow funding source consisting solely of certain New York insurance companies, creates an absurd result. That is, the programs were created to subsidize insurance premiums from broad-based funding sources, so that health insurers could keep those premiums affordable for low-income individuals and small businesses.

27. With the switch, however, the health insurers subject to the Section 332 Assessments are now funding their own subsidies. As a result, premiums increase because the subsidies that were once supported by broad-based funding are now paid for solely by those companies paying the Section 332 Assessments. The subsidies are reduced and the whole point of the programs defeated.

28. Similarly, as part of the 2009-10 budget, the Governor proposed shifting the costs of the tobacco control program, various public health programs, the Early Intervention Program, and certain other HCRA programs, in addition to Healthy New York Program, the HMO Direct Pay Market Program, and the Entertainment Employee Industry Pilot Program, to the Department of Insurance Operating Account. Ultimately, the enacted budget shifted only the Healthy New York Program, the HMO Direct Pay Market Program, and the Entertainment Employee Industry Pilot Program to the Department, with the expectation that these programs would be funded by the 332 Assessment. *See* Chs. 54 and 58 of 2009. This resulted in a \$200 million increase to the 332 Assessment for the 2009-10 fiscal year. *Id.*

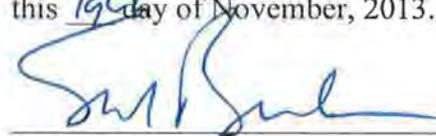
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I declare under penalty of perjury that the foregoing is true and correct.



PAUL MACIELAK

Sworn to and subscribed before me
this 19th day of November, 2013.



Notary Public

STEPHEN M. BUHR
Notary Public, State of New York
No. 02BUG050397
Qualified in Albany County
Commission Expires November 6, 20 14