Touro Law Review

Volume 11 | Number 3 Article 54

1995

Public Relief

PUBLIC RELIEF

N.Y. CONST. art. XVII, § 1:

The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.

COURT OF APPEALS

Medical Society of New York v. State Department of Health[1]
(decided March 29, 1994)

Petitioners claimed that upon the enactment of Public Health Law section 19[2] certain amendments to the Medicare Act became

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1. 83 N.Y.2d 447, 633 N.E.2d 468, 611 N.Y.S.2d 114 (1994).

2. N.Y. PUB. HEALTH LAW § 19 (McKinney 1979). Section 19 provides in pertinent part:

> No physician licensed under article one hundred thirty-one of the education law shall charge from a beneficiary of health insurance under title XVIII of the federal social security act (medicare) any amount in excess of the following limitations:
>
> (a) Effective January first, nineteen hundred ninety-one, a physician's charge shall not exceed one hundred fifteen percent of the reasonable charge for that service as determined by the United States secretary for health and human services.
>
> (b) Beginning January first, nineteen hundred ninety-three, a physician's charge shall not exceed one hundred ten percent of the reasonable charge for that service as determined by the United States secretary for health and human services, provided however, that if the statewide percentage of medicare part B claims billed at or below the reasonable charge as determined by the United States secretary for health and human services for federal fiscal year nineteen hundred eighty-nine fails to increase by five percentage points for federal fiscal year nineteen hundred ninety-two, such physician's charge shall, thereafter, not exceed one hundred five percent of the reasonable charge as determined by the United

unenforceable. The Medicare Act, which became effective as of January 1, 1992, changed the methodology used to calculate Medicare rates, whereas, Public Health Law section 19 places a cap on the amount that physicians are allowed to charge Medicare beneficiaries under "balance billing."[3] Petitioners further contended that section 19 of the Public Health Law violates article III, section 16, of the New York State Constitution. Section 16 prohibits legislative incorporation by reference.[4] The court of appeals held that Public Health Law section 19 does not violate either the "letter [or] the spirit" of article III, section 16.[5] Thus, there was no unconstitutional incorporation by reference in Public Health Law section 19, because section 19 "simply caps the amount a physician licensed in New York may charge for a specific medical service to a fixed percentage above the patient's Medicare coverage."[6]

> States secretary for health and human services. If, in any subsequent federal fiscal year, such statewide percentage of medicare part B claims billed at or below such reasonable charge fails to maintain such five percentage point increase, physician's charge shall thereafter not exceed one hundred five percent of the reasonable charge as determined by the United States secretary for health and human services.

Id.

3. *Medical Soc'y of N.Y.*, 83 N.Y.2d at 450, 633 N.E.2d at 469, 611 N.Y.S.2d at 115. In deciding whether the Legislature, in using the term "reasonable charge," was referring to the specific methodology used or a recognized fee amount, the court found that the purpose of section 19 was to "prevent physicians who use balanced billing" from charging Medicare recipients excessive amounts. *Id.* at 452, 633 N.E.2d at 470, 611 N.Y.S.2d at 116. Thus, in relying upon the appellate division, the court rationalized that the term "reasonable charge" was used by the Legislature to "refer to Medicare's recognized, reasonable payment amount as determined by HHS, irrespective of the particular methodology employed to calculate that amount." *Id.*

4. N.Y. CONST. art. III, § 16. This section states that "[n]o act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act." *Id.*

5. *Medical Soc'y of N.Y.*, 83 N.Y.2d at 454, 633 N.E.2d at 471, 611 N.Y.S.2d at 117.

6. *Id.* at 453, 633 N.E.2d at 471, 611 N.Y.S.2d at 117.

On July 18, 1990, the Legislature enacted Public Health Law section 19, which provides, in pertinent part that a physician should not charge more than a "reasonable charge for [a] service as determined by the United States Secretary for Health and Human Services [hereinafter HHS]."[7] Effective January 1, 1992, the particular methodology used to determine the reasonable charge was replaced with a fee schedule based on a resource-based relative value scale [hereinafter RBRVS].[8] As a result, petitioners, two individuals, and a not-for-profit medical society, sought a declaratory ruling from respondents regarding the applicability of Public Health Law section 19 after January 1, 1992, "when HHS stopped using the 'reasonable charge' method and implemented the RBRVS fee schedule."[9]

The appellants argued that if Public Health Law section 19 is construed to apply to the RBRVS system, "then it must be struck down as unconstitutional for incorporating by reference a future amendment to the Medicare Act."[10] In essence, appellants' argument labels Public Health Law section 19 as violative of article III, section 16, merely because it places a cap on the amount which doctors may charge a Medicare beneficiary by "balance billing." However, the court did not agree with petitioners that the provision unconstitutionally incorporated by reference the definition of "reasonable value" established by federal law.

The court held that there was no unconstitutional incorporation by reference.[11] It noted, relying on *People ex rel. Everson v. Lorillard*,[12] *People ex rel. Board of Commissioners v. Banks*,[13]

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7. N.Y. PUB. HEALTH LAW § 19.

8. *See* 42 U.S.C. § 1395(u) (1992).

9. *Medical Soc'y of N.Y.*, 83 N.Y.2d at 451, 633 N.E.2d at 470, 611 N.Y.S.2d at 115.

10. *Id.* at 452, 633 N.E.2d at 470, 611 N.Y.S.2d at 116.

11. *Id.* at 453, 633 N.E.2d at 471, 611 N.Y.S.2d at 117.

12. 135 N.Y. 285, 31 N.E. 1011 (1892). In *Everson*, the court stated:

> When a statute, in itself and by its own language, grants some power, confers some right, imposes some duty, or creates some burden or obligation, it is not in conflict with [article III, section 16] because it refers to some other existing statute, general or local, for the purpose of pointing out the procedure, or some administrative detail, necessary for

and *North Shore Child Guidance Ass'n v. Incorporated Village of East Hills*,[14] that the purpose of constitutional prohibition against incorporation by reference is to "prevent the Legislature from incorporating into its acts the provisions of other statutes or regulations which affect public or private interests in ways not disclosed upon the face of the act, and which would not have received the sanction of the Legislature if fully understood by it."[15]

In *Brandt v. New York*,[16] the court held that the constitutional restraint of incorporation of existing laws by reference "does not require the incorporation in a statute of reference to every law

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the execution of the power, the enforcement of the right, the proper performance of the duty, or the discharge of the burden or obligation.

Id.

13. 67 N.Y. 568, 576 (1876). In holding that the challenged act was not violative of the Constitution, the court stated:

> There is no evil of . . . any nature to be apprehended by the mere reference to other acts and statutes for the forms of process and procedure, for giving effect to a statute otherwise perfect and complete. It would be a serious evil to compel the engrafting upon and embodying in every act of the legislature all forms and the details of practice which may be necessarily resorted to carry any one statute into effect, when the same proceedings are provided for by the general statutes of the State, and are applicable to hundreds of other cases, and with which the legislators may be supposed to be reasonably familiar.

Id.

14. 110 A.D.2d 826, 829, 487 N.Y.S.2d 867, 870 (2d Dep't 1985). In *North Shore Child Guidance Ass'n*, the court ruled on the constitutionality of an amendment to a village building zone ordinance which "incorporate[d] by reference parts of the building zoning ordinance of [another village] in violation of the New York State Constitution (art. III, §16)." *Id.* at 829, 487 N.Y.S.2d at 870. The court rejected this argument, finding that the reference "did not violate the spirit of the constitutional provision. It did not incorporate by reference any substantive obligations or requirements." *Id.*

15. *Medical Soc'y of N.Y.*, 83 N.Y.2d at 452-53, 633 N.E.2d at 471, 611 N.Y.S.2d at 117.

16. 172 Misc. 988, 989, 16 N.Y.S.2d 663, 665 (Sup. Ct. New York County 1940) (ruling on legislation that allowed the board of aldermen of New York City to fix the salary of persons paid out of the city treasury "[n]otwithstanding any general, special or local law, ordinance or referendum or the Greater New York charter . . . to the contrary . . ."), *aff'd*, 260 A.D. 911, 23 N.Y.S.2d 841 (1st Dep't 1940).

which it purports to amend or extend."[17] It only prohibits the enactment of "affirmative legislation, the nature of which is explained only by reference instead of actually set forth."[18] Therefore, as other courts have found, the constitutional proscription is not violated merely because provisions of one statute are referred to as a means of executing another.[19]

The court concluded that since the statute was complete and "contain[ed] all the information required for intelligent and discrete action by the Legislature," Public Health Law section 19 contained no incorporation by reference. Section 19 simply caps the amount above Medicare's recognized payment schedule a physician licensed in New York may charge Medicare beneficiaries for specific medical services.[20]

Public Health Law section 19 has survived the scrutiny of federal courts as well. In *Medical Society of New York v. Cuomo*,[21] the United States Court of Appeals for the Second Circuit deferred to the New York state courts and held that section 19 did not obstruct the purposes of the Medicare Act or impermissibly interfere with methods chosen by Congress for achieving regulatory objectives.[22] Thus, the statute was not required to be struck down.[23] Hence, New York and federal law are in compliance.

17. *Id.* at 990, 16 N.Y.S.2d at 666.

18. *Id.*

19. *See* People *ex rel.* Everson v. Lorillard, 135 N.Y. 285, 291, 31 N.E. 1011, 1013 (1892).

20. *Medical Soc'y of N.Y.*, 83 N.Y.2d at 453, 633 N.E.2d at 471, 611 N.Y.S.2d at 117.

21. 976 F.2d 812 (2d Cir. 1992).

22. *Id.* at 819.

23. *Id.*