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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF COUNTY OF CHEMUNG,

Respondent,

-against-

No. 136

SHAH,

Appellant.

MATTER OF COUNTY OF ST. LAWRENCE,

Appellant,

-against-

No. 137

SHAH,

Respondent.

MATTER OF COUNTY OF CHAUTAUQUA,

Appellant,

-against-

No. 138

SHAH,

Respondent.

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MATTER OF COUNTY OF JEFFERSON,

Appellant,

-against-

SHAH,

Respondent.

No. 139

MATTER OF COUNTY OF ONEIDA,

Appellant,

-against-

SHAH,

Respondent.

No. 140

MATTER OF COUNTY OF GENESEE,

Appellant,

-against-

SHAH,

Respondent.

No. 141

MATTER OF COUNTY OF CAYUGA,

Appellant,

-against-

SHAH,

Respondent.

No. 142

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MATTER OF COUNTY OF MONROE,

Appellant,

-against-

No. 143

SHAH,

Respondent.

20 Eagle Street
Albany, New York 12207
September 07, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Numbers 136 through
2 143, Matter of County of Chemung against Shah and
3 seven other related cases.

4 MR. PALADINO: Good afternoon, Your Honors.
5 I'd like to reserve three minutes for rebuttal.

6 CHIEF JUDGE DIFIORE: Three, sir?

7 MR. PALADINO: Yes, ma'am.

8 These cases concern the 2012 amendment to the
9 Medicaid cap statute, an amendment that was intended to
10 clarify that reimbursement for overburden expenditures
11 that arose before 2006 are not available under the new
12 cost-sharing system.

13 Now, there are several issues in the case, but
14 I'd like to begin by focusing on why this amendment treats
15 the counties fairly.

16 MR. PALADINO: This new - - -

17 JUDGE RIVERA: But before you go there,
18 counsel, does your interpretation or your argument
19 that the counties are not persons and therefore have
20 no due process protections eviscerate the exception
21 related to the proprietary interest?

22 MR. PALADINO: No, Your Honor, because if a
23 county can satisfy that exception, it can challenge a
24 state law under a variety of other constitutional
25 provisions.

1 JUDGE RIVERA: Well, what would those be?

2 MR. PALADINO: Home rule.

3 JUDGE RIVERA: No, but home rule is a
4 separate exception.

5 MR. PALADINO: No, well, that - - - yes,
6 that is - - -

7 JUDGE RIVERA: How else would - - - I guess
8 I'm asking, isn't the proprietary interest, in and of
9 itself, by its nature, about due process protections?
10 Isn't it so aligned that you cannot argue it the way
11 you're arguing it?

12 MR. PALADINO: No, Your Honor, because
13 you're talking about the issue of whether capacity
14 and personhood are the same thing. The case you
15 could look to is County of Rensselaer v. Reagan. The
16 counties, or the municipalities challenged the State
17 Law under Article 5 of the New York Constitution.

18 The comptroller was charged with sort of
19 seizing what was alleged to be county funds, the
20 county had capacity under the proprietary interest
21 exception, and it was successful in its challenge to
22 that law under Article 5 of the New York
23 Constitution.

24 That doesn't eviscerate the proprietary interest
25 exception. The county simply has to rely on a

1 constitutional provision other than the due process
2 clause. My argument there is - - -

3 JUDGE RIVERA: But I'm not really
4 understanding why that's - - - why that's so. I
5 mean, in this case, they're arguing that they have a
6 particular interest in this money that they gave to
7 the State, which everyone acknowledges they're not -
8 - - they're not chargeable for that money in the
9 sense that under the statute that is not money that
10 is part of their local share. They pay it with the
11 understanding that they will get reimbursed.

12 They're claiming, we gave that to you under
13 the statute with the understanding that that would be
14 reimbursed, and - - - and you refused to reimburse -
15 - - they claim, right, they claim that there are
16 monies that we paid that have not been reimbursed, we
17 have an interest in that, it went into a specific
18 fund, into a comptroller's fund, and we have a right
19 to that money.

20 Why - - - why doesn't that fit specifically
21 under the proprietary interest exception; why doesn't
22 that allow them to make a claim that if you don't
23 allow them to seek reimbursement, you're denying them
24 due process?

25 MR. PALADINO: Would that - - -

1 JUDGE RIVERA: And they have a right to do
2 that.

3 MR. PALADINO: That exception would come
4 into play while the old cost sharing system was in
5 effect while they had statutory rights. The
6 legislature comes along and changes the system - - -

7 JUDGE RIVERA: Um-hum.

8 MR. PALADINO: They don't have the right to
9 challenge that decision by their creator to
10 reallocate the cost of a governmental program. So
11 that - - -

12 JUDGE RIVERA: Prospectively, right? Their
13 argument is, but we paid over the money, so now it's
14 due. The challenge is not, the State can't make a
15 decision saying, moving forward this system is one
16 that we no longer wish to pursue; we want to change
17 the allocation.

18 No, that's not this challenge; this
19 challenge is, I gave you the money years ago, you owe
20 me the money, and I expect to be paid for the money,
21 and at a minimum, I have the right to make a claim
22 for this money.

23 MR. PALADINO: That fund - - - the error
24 behind that argument is that somehow there was a
25 dividing line, the old system governed - - -

1 JUDGE RIVERA: Um-hum.

2 MR. PALADINO: - - - expenditures that were
3 incurred - - -

4 JUDGE RIVERA: Um-hum.

5 MR. PALADINO: - - - before 2006, and that
6 the new system governs expenditures incurred after
7 2006, and that's simply false. The new system is a
8 cash-based system where you're required to pay a
9 fixed amount.

10 And the problem with paying this money is
11 that if the payment is made, the county is not
12 meeting its obligations under the current
13 reimbursement system. So in other words, if you're a
14 county and your current obligation is to pay ten
15 million dollars, there's a two-million-dollar claim
16 that you make from the year 2000 before the cap
17 system went into effect, you are submitting that
18 claim to the State today.

19 If the State pays that claim today, you're not
20 paying ten million dollars, your cap obligation; you're
21 paying eight million dollars, which is less.

22 And it is true - - -

23 JUDGE RIVERA: Well, they could pay the ten
24 million, you could reimburse them for the outstanding
25 money. I know you look at that as a deduction from

1 the eight million, but you didn't do that under the
2 old system; you never saw that as a deduction from
3 the local share because it's not money that they are
4 really being charged for. Right.

5 It's sort of a pass through, pay us the
6 entire - - - it sounded to me, you can correct me if
7 I'm wrong about this. It's an administrative
8 convenience, and you happen to make some interest off
9 of it.

10 You define the local share, right, the local
11 share, you tell them what the amount is, again, correct me
12 if I misunderstood this process, under the old system,
13 they pay it, and then the Department of Health determines
14 which of that money is in this reimbursement, right, the
15 overburden reimbursement, which is to say money that they
16 never really owed you, right, and you pay it back. And
17 once you identify that, State doesn't have the choice not
18 to pay it back, on the statute you have to pay it back.

19 My - - - did I misunderstood - - - stand the old
20 process? I understand your arguments about what Section
21 61 does and those other amendments, but have I
22 misunderstood that old process?

23 MR. PALADINO: That's correct. And it is
24 true that there was money that wasn't identified and
25 paid back to the counties. They lost that. I will

1 admit, they lost that when the new system came into
2 effect. But what they got in return was a new system
3 that saves them billions of dollars, far outweighing
4 whatever they are losing in these old reimbursement
5 plans.

6 JUDGE RIVERA: But they - - - but did they
7 only lose that because they were too late to send in
8 those claims, not because of the nature of the claims
9 themselves; isn't that what this boils down to?

10 MR. PALADINO: Yes. As it turns out, the
11 claims came in after the system changed. And you - -
12 - I'll accept for purposes of argument that they're -
13 - - they're not at fault, although they are at fault
14 for the delay in submission of the claims, but let's
15 just say they are not at fault for the fact that we
16 took their money and didn't give it back to them.

17 I readily acknowledge they're losing a
18 couple of hundred million dollars in money that would
19 have been paid to them if the system had remained in
20 place. But the system changed, and the change in the
21 system simultaneously did a number of things. It cut
22 off the right to this old reimbursement money - - -

23 JUDGE RIVERA: Um-hum.

24 MR. PALADINO: - - - but it protected them
25 from old liabilities. That's one of the tradeoffs.

1 And the big tradeoff is the new system saves them
2 billions of dollars - - -

3 JUDGE ABDUS-SALAAM: Well, according to - -
4 -

5 MR. PALADINO: - - - and their obligation
6 under the current system is to pay their cap amount,
7 it's not - - -

8 JUDGE ABDUS-SALAAM: Counsel, going back to
9 the old system, just so I understand, I think the
10 Third Department, in one of the cases or maybe both
11 of them, said that the State is obligated to - - - or
12 the Department of Health is obligated to review the
13 records of the counties and pay monies that the
14 counties are - - - are due that are owed to them, and
15 - - - and what I'm - - - what I'm concerned about is,
16 is that without having - - - the counties having to
17 make a claim for reimbursement, or is it, you know,
18 sort of sua sponte the State has to look at records
19 and decide that there is money owed and then pay it?

20 MR. PALADINO: Well, according to the Third
21 Department's tortured interpretation of the 2012
22 amendment, you're right that the - - - the court
23 seized on the fact that the 2012 amendment makes
24 reference to claims submitted by social services
25 districts.

1 And it reasoned that, well, the counties
2 didn't have any obligation to submit those claims,
3 these amendments didn't terminate the underlying
4 obligation, so not only are we going to extend the
5 grace period three years, but we're going to grant
6 mandamus relief. In other words - - -

7 JUDGE ABDUS-SALAAM: And what I'm really
8 asking though is, does the statute require
9 reimbursement without first a submission of a claim,
10 or does the State have to just look at some - - -
11 whatever the counties submit to them without making a
12 claim, whatever records, and I imagined the counties
13 submit a lot of records concerning Medicaid, and - -
14 - and the State has to look at those records and say,
15 well, this is - - - this is a overburden
16 reimbursement, and it's due to the county.

17 MR. PALADINO: Under the old system, the
18 Health - - - the Health Department did have this
19 obligation to make sure that the counties contributed
20 nothing to the overburden patients. The Health
21 Department met that obligation in two ways. It had
22 the quarterly reviews four times a year, it gave the
23 counties the money it thought it was due. It
24 realized because of the size and complexity of the
25 system it might have missed some of the

1 reimbursements, so it had a regulation, that has the
2 force and effect of law, that says, if you think we
3 missed some of the reimbursements to which you were
4 entitled under those quarterly reviews, submit a
5 claim.

6 So really the Third Department is wrong in
7 that if the counties wanted more money beyond what
8 they got in the quarterly reviews, they had to follow
9 the regulation and submit the claims. This goes to
10 the issue of whether the 2012 amendment terminated
11 the underlying obligation.

12 They've obviously did - - -

13 JUDGE RIVERA: So I just asked under - - -
14 under the - - - I'm sorry, under the regulation, was
15 there a time limit by when these claims had to be
16 submitted?

17 MR. PALADINO: Yes, but in prior
18 litigation, the Appellate Divisions rejected our
19 argument about that time limit, so there really winds
20 up being no time limit to submit the claims.

21 JUDGE RIVERA: But what - - - what was the
22 time limit?

23 MR. PALADINO: It was a year.

24 JUDGE RIVERA: It was one year from what -
25 - -

1 MR. PALADINO: From the - - -

2 JUDGE RIVERA: - - - accruing as of when?

3 MR. PALADINO: I believe it was from the
4 date of service. I might be mistaken on that, but
5 there was a time limit, we'd lost on that, so there
6 winds up being no time limit.

7 JUDGE RIVERA: Can I just clarify one other
8 thing - - -

9 MR. PALADINO: Sure.

10 JUDGE RIVERA: - - - I'm sorry, in your
11 explina - - - I'm just trying to make sure I really
12 understand this process. Based on what you've just
13 said, I - - - I had read the briefs and - - - and the
14 record to mean that the DOH and the State took the
15 position that they complied with the statute by
16 reviewing the documents, they paid what they believed
17 were accurate amounts in reimbursements, you created
18 this claim process in case they thought there was an
19 error; it was not that you acknowledged an error.

20 I understand your point when you're saying,
21 okay, maybe - - - anyone could miss something, I get
22 that point. But it was not that you were
23 affirmatively saying, our process, our initial review
24 process, we affirmatively reviewed this and cut a
25 check, or however you pay them, is riddled with

1 problems.

2 It's not that you took that position, it's that
3 you created a system by which if they thought you had made
4 an error, they had the opportunity, based on documents
5 that you provided and documents they had, to seek
6 additional funds.

7 MR. PALADINO: Precisely.

8 JUDGE RIVERA: But you always started from
9 the position, we complied with the statute, we've
10 paid you.

11 MR. PALADINO: Yes. But all of this goes
12 to why the statute is worded the way it is. It - - -
13 it makes reference to notwithstanding Section 368(a)
14 of the Social Services Law, the provision that
15 created the overburden obligation.

16 The obvious intent here was to terminate or
17 clarify the overburden reimbursement had been terminated
18 when the new cap system went into effect. The reason why
19 that's fair is because we can't submit any additional old
20 bills to them, they can't submit any additional claims to
21 us; they paid their fixed amount.

22 JUDGE PIGOTT: Before you lose your time,
23 as I understand the mas - - - one of the main
24 arguments here is that the counties are creatures of
25 the State, and that they have certain powers as

1 counties. But in situations like this, it's the
2 State that makes the determinations as to who, what,
3 when, and how all of these things are done.

4 Because if I remember right, when the
5 mainstreaming of psychiatric patients kicked in,
6 that's when the State felt that it had an obligation
7 to cover them and said, so if you've got these people
8 and they're costing you money, because they used to
9 be institutionalized, we'll reimburse you for that.

10 But they could have said - - - they could have
11 said nothing, and the counties would have just had to
12 handle this. And so each one of these things is the State
13 orchestrating how this - - - this thing is going, and your
14 point is that, at some point that one ended. Whether it
15 was a mess or whether, you know, whoever was doing what to
16 whom, we're starting new, this is it, you're - - - we're
17 holding you harmless on - - - on any future expenses, but
18 these are gone.

19 MR. PALADINO: That's exactly it, Your
20 Honor. I mean, we recognized that when the system
21 changed by switching to this system where they just
22 pay a fixed amount that covers expenditures,
23 regardless of when they accrued, there would be a
24 loss of entitlement to this old reimbursement.

25 But they got the billions of dollars in

1 savings, and they got protection from old
2 liabilities, that's the tradeoff. That's why this is
3 fair under - - - under a vested rights analysis,
4 assuming that you get there.

5 JUDGE GARCIA: I'm sorry, could I - - -
6 Chief - - -

7 CHIEF JUDGE DIFIORE: Yes, of course.

8 JUDGE GARCIA: But going to Judge Pigott's
9 point earlier on the counties and really what's a
10 capacity issue, right, didn't you waive that
11 argument?

12 MR. PALADINO: Oh sure, the capacity issue
13 is waived, but the issue is whether personhood and
14 capacity are different doctrines or concepts. And
15 capacity is a procedural requirement; you have to
16 have authority to sue. So under the proprietary
17 interest exception, they claim an entitlement to a
18 specific fund of money, if they could have sued when
19 - - -

20 JUDGE GARCIA: Right.

21 MR. PALADINO: - - - the old statute was in
22 effect, they have authority to get in the courthouse
23 door. Now, do you have entitlement under the
24 constitutional provision that you claim is violated -
25 - -

1 JUDGE GARCIA: That's the Fourth Department
2 reasoning, right? And I'm having trouble
3 distinguishing those two things in that decision.

4 MR. PALADINO: I don't know where the
5 confusion comes from. It's because they are related,
6 and that the rationale for why you don't treat a
7 municipality as a person for due process purposes is
8 very similar to the rationale behind capacity.

9 You're not a person because we created you,
10 you are an "it" to carry out governmental functions.
11 So that's why you will see citations in capacity
12 cases to these old personhood cases from the Supreme
13 Court.

14 It's undisputed that as a matter of Federal
15 Constitutional Law, municipalities aren't persons, most
16 states think that they're not persons, and this court, in
17 the Jeter case, reached that conclusion, because the court
18 said that the municipalities there lacked the substantive
19 right to sue, citing the old Supreme Court personhood
20 cases. They say that's a reference to capacity, but that
21 makes no sense.

22 JUDGE RIVERA: But it also made a reference
23 to an exception that fits under the capacity as we've
24 otherwise described it in our jurisprudence.

25 MR. PALADINO: Yes.

1 JUDGE RIVERA: So there they do have some
2 legs to this argument.

3 MR. PALADINO: I agree there is some
4 ambiguity in the decision. Like, you're not a person
5 so you can't sue under the due process clause, and in
6 addition, you are not alleging that the State is
7 forcing you to violate Federal Law. That - - -
8 that's why that sentence is found there.

9 JUDGE RIVERA: Um-hum.

10 MR. PALADINO: So, you know, the reason why
11 they're not persons under the rationale is, what's
12 the purpose of the due process clause? It's to
13 protect the government from abusing people and taking
14 their - - - their property. It's not to allow one
15 political subdivision created by the State
16 Legislature to go to court and say, we don't agree
17 with the new cost sharing responsibilities, or we
18 think that we should - - -

19 JUDGE RIVERA: Again, that's - - - I - - -
20 that's where I have the difficulty. That's not - - -
21 I don't see the claim that way; I see the claim as,
22 we paid money - - -

23 MR. PALADINO: Um-hum.

24 JUDGE RIVERA: - - - that under the statute
25 is not money the State is truly owed because it's an

1 overburden reimbursement. It should not have been;
2 it is not part of our local share. That's what we
3 want reimbursed.

4 You can change the allocation; we can't
5 challenge that, we can't dispute that, we agree with that,
6 but that's money that we've already turned over under the
7 existing - - - the prior regime, which ensured that we
8 would get paid. And that's where our interest is, and
9 that's where this court's jurisprudence has said, when
10 you've got a proprietary interest, yes, you are correct,
11 they acknowledge it, they concede it.

12 The general rule is they don't get to sue the
13 State; they don't get to lay this claim against the State.
14 But when there is that proprietary interest to a specific
15 fund, which it looks like what they have here, that's when
16 they get to come in the door. They may not win on the
17 merits. On the merits - - -

18 MR. PALADINO: Right - - -

19 JUDGE RIVERA: - - - you may be absolutely
20 right, not because of personhood, but because of the
21 merits.

22 MR. PALADINO: Yes.

23 JUDGE RIVERA: But they get to make their
24 claim; that's all they're saying.

25 MR. PALADINO: Yes, they can make the

1 claim, but the answer is, guess what, you're not a
2 creditor - - -

3 JUDGE RIVERA: Um-hum.

4 MR. PALADINO: - - - and we're a debtor.

5 You are our creation - - -

6 JUDGE RIVERA: Um-hum.

7 MR. PALADINO: - - - that we created to
8 carry out a governmental function. What you're
9 claiming to be is your money is tax revenue that we,
10 the State - - -

11 JUDGE RIVERA: But isn't that true - - -

12 MR. PALADINO: - - - authorized you to
13 collect.

14 JUDGE ABDUS-SALAAM: But isn't that true
15 under the proprietary interest exception?

16 MR. PALADINO: That will work in other
17 contexts.

18 JUDGE RIVERA: Um-hum.

19 MR. PALADINO: In this case, it might - - -
20 it gets them to the courthouse door - - -

21 JUDGE RIVERA: Um-hum.

22 MR. PALADINO: - - - the claim fails on the
23 merits because they're not a creditor who owes - - -
24 who has a claim to money. There is an ongoing
25 financial relationship, tomorrow we could raise the

1 cap to more than offset whatever we would pay them in
2 these old overburden claims, this is why this is also
3 silly. I mean, it is a reallocation of financial
4 responsibility; it's not a creditor trying to make a
5 debtor pay some money.

6 JUDGE RIVERA: So do you say their local
7 share was not county funds; it's always state funds?

8 MR. PALADINO: They're not a creditor in
9 the sense that you can bring a due process claim.

10 JUDGE RIVERA: No, no, but are they county
11 funds versus state funds?

12 MR. PALADINO: They are - - - they do not
13 have - - - I would dispute that - - - that there are
14 - - - this proprietary interest argument, but I've
15 waived this, so I don't want to burn up time on it.

16 What their claim - - - proprietary versus
17 governmental, this is the operation of a program to
18 provide medical care to poor people. The money that
19 they're paying is from tax revenue that they have no
20 power to collect unless we gave it to them. So
21 they're not, you know - - -

22 JUDGE ABDUS-SALAAM: But you seem to be - -
23 -

24 MR. PALADINO: - - - we didn't take their
25 money; we reallocated it.

1 JUDGE ABDUS-SALAAM: But you seem to be
2 saying, Mr. Paladino, earlier that they could get at
3 those funds in some other way, not under the due
4 process clause, but they could go under some other
5 article of the Constitution. I think you mentioned
6 Article 5.

7 MR. PALADINO: I don't think anything works
8 here. I'm just trying to rebut your argument - - -

9 JUDGE ABDUS-SALAAM: So there isn't any
10 other thing.

11 MR. PALADINO: - - - that the - - - the
12 exception is dead if somehow they're not persons. If
13 they had a violation - - - if we were using the
14 comptroller somehow, like in the Reagan case, to - -
15 - to do our bidding, and we were assigning him an
16 administrative function, it could be knocked out
17 under the Article 5.

18 Nothing works here because really, you know,
19 this is just the government reallocating the cost of
20 government, giving up or wiping out old liabilities - - -

21 JUDGE ABDUS-SALAAM: Well, while you waived
22 this exception, you're saying it doesn't matter
23 because they can't enforce this.

24 MR. PALADINO: It's an essen - - - it's an
25 essential element of a due process claim that you be

1 a person. And every federal court, in all the other
2 state courts go this way, and again, the rationale
3 is, you know, we are not protecting one part of the
4 government from trampling on another government; it's
5 there to protect people who actually do have a
6 property interest that would be recognized.

7 This isn't like Alliance of American Insurers,
8 where the insurers had an interest in a fund, and the
9 State took that - - - took that money away. This is the
10 government saying to the government, yeah, we would have
11 given you that money back, but guess what, instead of
12 giving you back a couple of hundred million dollars,
13 you're going to save billions of dollars.

14 JUDGE RIVERA: It said - - -

15 MR. PALADINO: They're trying to have it
16 both ways.

17 JUDGE RIVERA: It said that there was a
18 statute that specifically said you have to return
19 this money.

20 MR. PALADINO: And while - - -

21 JUDGE RIVERA: Isn't that what makes it
22 different here?

23 MR. PALADINO: And while that statute was
24 in effect - - -

25 JUDGE RIVERA: Yes.

1 MR. PALADINO: - - - that proprietary
2 interest exception could have been invoked if the
3 Health Department - - -

4 JUDGE RIVERA: I got it.

5 MR. PALADINO: Right.

6 JUDGE RIVERA: So then they have claims up
7 to 2006. Now, the question is, can they, a decade
8 later, seek these claims to be paid?

9 MR. PALADINO: Precisely. And on the
10 merits - - - I mean, you don't have to - - - I'll be
11 very happy if you don't go anywhere near this
12 personhood - - -

13 JUDGE RIVERA: Um-hum.

14 MR. PALADINO: - - - argument that's - - -
15 because it has some broad implications, and I can
16 understand why you would be concerned about them.

17 The path of least resistance here is to
18 hold that this amendment or this system treats the
19 counties fairly because they've lost a couple hundred
20 million, they saved a hell of a lot more, pardon my
21 language, a couple billion dollars - - -

22 JUDGE RIVERA: Um-hum.

23 MR. PALADINO: - - - in return. It far
24 outweighs what they gave up that's imminently fair
25 and reasonable. And that's the narrowest ground on

1 which you can resolve this case.

2 I see I've gone well beyond my time, but thank
3 you - - -

4 CHIEF JUDGE DIFIORE: Thank you, Mr.
5 Paladino.

6 MR. PALADINO: - - - for allowing me to
7 answer your questions.

8 CHIEF JUDGE DIFIORE: Thank you.
9 Counsel.

10 MR. BUCKEY: Thank you, Your Honor. May it
11 please the court.

12 Christopher Buckey from Whiteman, Osterman, &
13 Hanna for - - - on behalf of the counties.

14 Assume - - -

15 JUDGE RIVERA: If they can allocate funds
16 at any time, how do you have any existing claims?

17 MR. BUCKEY: If you could just give me one
18 moment, Your Honor, to the extent we have appellants
19 here, could I reserve rebuttal time, Your Honor?

20 CHIEF JUDGE DIFIORE: Yes.

21 MR. BUCKEY: Okay. Three minutes,
22 respectfully.

23 Your Honor, what we're talking about, and it
24 goes to, I believe, a number of the questions regarding
25 the capacity doctrine in the first place.

1 The capacity doctrine is actually a balanced
2 approach that looks at the municipality's claim. In other
3 words, the municipality's right is dependent upon its
4 claim. So as Your Honor just pointed out, if the
5 municipality's claim is based upon political power,
6 allocation of governmental functions, allocation of
7 resources in the future, the claim is not going to be
8 recognized; in absolutely won't and it'll be dismissed.

9 And that's manifested in the Jeter case, in the
10 City of New York case, and the Black River case, all of
11 which the State relies upon.

12 But it's different when we're talking about a
13 proprietary right. When there is a proprietary right, now
14 a municipality does have the ability to bring a
15 Constitutional claim.

16 JUDGE PIGOTT: They don't have to pay the
17 State. I remember from my county attorney days, you
18 know, when MMIS and IF - - - IFMIS came in, and up
19 until then the counties were collecting the money,
20 and they - - - some of them relied on the float, and
21 then would send the money down to Albany, after they
22 had been collected periodically.

23 The State ended up getting a different system
24 and said, from now on we're collecting the money.

25 MR. BUCKEY: On a weekly basis.

1 JUDGE PIGOTT: And we lost a ton - - -
2 speaking we, being Erie County, as a result - - - we
3 didn't have any - - - we sued them, and we - - - who
4 are you, you know. This is what they do.

5 This situation seems to me to be similar.
6 There's a kettle of soup that we're giving people who
7 are in need. And what they've said is, you know,
8 we've - - - we've added to the - - - to the problem
9 that you have because we're releasing these people
10 from the psych centers, and now they're in - - -
11 they're mainstreamed, and now they may end up on your
12 docket, and so we're going to reimburse you for that.

13 At some point they say, we're not doing
14 that; it's the same kettle of soup, but guess what,
15 we're not going to - - - we're not going to reimburse
16 you for that. And it's aggravating, but I don't know
17 that you have anything there is to say about it, do
18 you?

19 MR. BUCKEY: Absolutely. Going forward,
20 Your Honor, that's a political question. It goes
21 back to its allocation of political power.

22 JUDGE PIGOTT: But it's not proprietary.
23 My - - - my point is that it's a State obligation - -
24 - they could come in and say, because I think some
25 counties say, all of our real property taxes are

1 going to Medicaid, all of it; we're living on our
2 sales tax.

3 I think that's true, you know, in my - - -
4 in my neck of the woods. Paladino - - - Governor
5 Paladino can come in and say, from now on, we're
6 doing all the real property tax, you don't, because
7 we're taking it all. There's not a darn thing you
8 can do about it.

9 MR. BUCKEY: This is different, Your Honor,
10 because here, what we had with the Statute 368-a(h)
11 was a one hundred percent guarantee that we're going
12 to - - - the State is going to reimburse these
13 counties. We're going to take the money from you,
14 and then at some point in the future, we're going to
15 reimburse it.

16 JUDGE ABDUS-SALAAM: Counsel - - -

17 MR. BUCKEY: It's this county's money.

18 JUDGE ABDUS-SALAAM: - - - where do you
19 read that in the statute? That's - - - that's what I
20 was getting out with my question to Mr. Paladino.
21 Where in the statute does it say you have to be
22 reimbursed, and under what - - - what sort of
23 circumstances is it?

24 MR. BUCKEY: There are - - -

25 JUDGE ABDUS-SALAAM: Do you have to make a

1 claim?

2 MR. BUCKEY: - - - no circumstances. There
3 is no limitation, Your Honor, placed on the
4 obligation. All the statute says is that the munic -
5 - - the social service districts, is what they're
6 called, will be reimbursed one hundred percent for
7 payments made on behalf of these particular patients.
8 That's all it says.

9 And further, it doesn't say that the
10 counties have to submit claims in order to get this
11 money back. In the Third Department - - -

12 JUDGE PIGOTT: But that's kind of the
13 point. I mean, it was just this big - - - I don't
14 want to call it a morass, but I mean, it's just the
15 way government seems to work. And you raise a good
16 point when you call them social service districts,
17 because they're not even counties.

18 And if - - - and if they wanted to say,
19 we're dissolving all the social service districts,
20 then any money that was due and owing to them is no
21 longer due and owing; you'd be stuck.

22 MR. BUCKEY: Going forward, Your Honor, we
23 would not be stuck based upon transactions that are
24 already complete; and that's the problem. Because
25 what we're talking about is if - - - if - - - if the

1 State's construction of this statute is credited,
2 what we're talking about is a statute in - - - that
3 is baldly retroactive.

4 It's retroactive in the truest sense of the
5 word because it takes completed transactions,
6 completed transactions, and an obligation tied to
7 those completed transactions. And it doesn't just
8 impair them, Your Honor; it eliminates them.

9 And - - -

10 JUDGE GARCIA: But isn't the point there
11 that they eliminated them. One, I have some trouble
12 with the proprietary interest. Because this isn't
13 the Ameri - - - Alliance of American Insurers case,
14 which, one, was an insurance company's suing over a
15 fund that was specifically designated and kept
16 separate from the general fund with revenue from
17 these companies to cover certain liabilities, right.

18 So here, you have money that's just going into
19 the general fund of the State of New York, right, with a
20 promise from the State under the old statute that we will
21 reimburse you for certain things that you spend but that
22 we are ultimately on the hook for. You submit these, we
23 will pay you.

24 At some point, the State decides, we're not
25 going to do that anymore, and we're going to change that,

1 so this is your deal going forward, which takes into
2 account that we're no longer going to reimburse you for
3 these expenses, but provides you with this other benefit
4 which is equivalent or better financially for you than
5 what you would have been owed under the old system.

6 Why can't they do that?

7 MR. BUCKEY: Let's take a step back.

8 First, Your Honor, if we could address the
9 proprietary interest exception. I don't believe the
10 money is placed in a general fund. I think according
11 to the State's affidavits that are in this record,
12 the money is placed in a special bank account.
13 That's the hallmarks of the proprietary interest
14 exception; it's a very narrow situation based upon
15 the State's submission, that's what we have here.

16 Further, this issue was already addressed by the
17 Third Department in Krauskopf v. Perales, where the court
18 held the municipality, in fact, has a sufficient
19 proprietary interest in overburden funds in order to - - -

20 JUDGE GARCIA: We never held that.

21 MR. BUCKEY: - - - challenge it.

22 The court - - - I understand, the court - - -
23 this court did affirm that decision, the Third
24 Department's decision there. So I would argue that
25 there's no question that we satisfy the proprietary

1 interest exception, but even further, if what we're
2 talking about is capacity, and capacity as the State is
3 conceivably - - -

4 JUDGE PIGOTT: Can you - - - can you
5 straighten that out for me. You said there's a
6 special bank account. As I understand it, what you
7 were doing, what the counties were doing was paying
8 money out.

9 In other words, you've got an individual who was
10 formerly in a psych center, let's say, and now he is on
11 the street, and you've got to pay for him, and they say,
12 we will pay for this, we'll reimburse you for it, but
13 you're - - - you're paying it; that's why you have a bill.
14 That - - -

15 MR. BUCKEY: That's - - - that's not how it
16 works, Your Honor.

17 JUDGE PIGOTT: Well, wait a minute. Now -
18 - - because as I understand it, what you want - - -
19 you are going with what the State is saying, you owe
20 us money because we paid money out.

21 MR. BUCKEY: No. That's not how it works,
22 Your Honor, and actually, the Third Department's
23 decision in Saint - - - what we call St. Lawrence 1
24 has a good description of the process.

25 The way it works is just on a weekly basis,

1 the State took to local shares from all the social
2 service districts. Not just for overburden patients,
3 for all the Medicaid expenditures.

4 JUDGE PIGOTT: Oh, I see. Yeah, but isn't
5 this - - - the point the same? In other words, they
6 took it, but had they not, you would have been paying
7 money that you would then have said, you've got to
8 reimburse us.

9 MR. BUCKEY: Yes. But I think we would
10 have a much harder time showing the proprietary
11 interest exception - - -

12 JUDGE PIGOTT: Exactly, but it's the same
13 thing.

14 MR. BUCKEY: But they're taking our funds
15 and placing it in the State's accounts.

16 JUDGE RIVERA: I'm a little unclear. I
17 thought the State paid the providers directly. Did I
18 miss something here?

19 MR. BUCKEY: They did.

20 JUDGE RIVERA: Do you pay the bills?

21 MR. BUCKEY: No, we did not pay the bills.

22 JUDGE RIVERA: You never paid the bills.

23 MR. BUCKEY: No, we did not pay the bills;
24 the State pays the bills, takes the money from us,
25 and then says, trust us we're going to reimburse you

1 sometime in the future.

2 JUDGE RIVERA: They don't say trust us, the
3 statute actually says, pay us.

4 MR. BUCKEY: Pay us.

5 JUDGE RIVERA: So as I - - - you didn't
6 answer it before, but as I read 368-a (1), at least
7 three times it says shall.

8 MR. BUCKEY: Shall. It's mandatory, Your
9 Honor, and it's a one hundred percent guarantee.
10 It's not fifty percent, it's not ninety-eight
11 percent, it's not, the State gets credit for almost
12 getting it done. Because it states here, the
13 overarching argument in the brief says, well, we paid
14 a lot of the overburden but we just - - - it's okay
15 that we didn't pay just enough. And it goes to Your
16 Honor's point - - -

17 JUDGE RIVERA: Yes. Is it - - - I just
18 want to clarify your argument. Is your argument that
19 you have full due process rights, or is your argument
20 that perhaps you don't have full due process rights,
21 but you have the rights, because you have this
22 proprietary interest, to demand a claim against the
23 State because our jurisprudence carved out this
24 exception?

25 MR. BUCKEY: I would - - - I would respond

1 to that, Your Honor, by saying, because this court
2 has recognized the proprietary interest exception, it
3 has implicitly recognized the municipalities' due
4 process rights.

5 There's no - - -

6 JUDGE RIVERA: Well, for that purpose, is
7 there any way that you can protect that interest
8 without invoking the due process guarantees of the
9 Constitution?

10 MR. BUCKEY: Absolutely not, Your Honor;
11 there is no other. The home rule doesn't protect
12 this - - - these proprietary interests. There is no
13 other way. And that's what's dangerous about the
14 State's position today. Both with respect to the
15 personhood argument, the so-called personhood
16 argument, and with respect to the merits of the
17 claim. Because what the State is asking this court
18 to do today is radically alter the relationship
19 between states and local governments.

20 Because what we'll have if the State is
21 successful today, what we'll have is that the local
22 governments can no longer protect their proprietary - - -
23 their property interest.

24 JUDGE PIGOTT: The counties.

25 MR. BUCKEY: Any - - - any local

1 government.

2 JUDGE PIGOTT: No, because, I mean, the
3 State rolls over counties, and everybody else, and
4 DEP, and - - - and every other conceivable
5 administrative org - - - I mean, it's - - - it's - -
6 - I'm not - - - I'm not a fan of this, but I - - - if
7 you ever want to know how weak counties are, just
8 call up any one of these administrative agencies - -
9 -

10 MR. BUCKEY: I - - - I understand.

11 JUDGE PIGOTT: - - - and they're going to
12 tell you how to operate.

13 MR. BUCKEY: It'll be particularly felt by
14 the counties who were, as we all know, operating - -
15 - I think Your Honor pointed out, under dire
16 financial circumstances right now.

17 And so again, the State now, what it's saying
18 is, we can impose a financial obligation, and I don't
19 think anyone disputes that. And we can say, counties, you
20 front that obligation. But then, now, what the State
21 wants this court to do is endorse the following, which is,
22 even though there's a statutory guarantee, the State can
23 choose not to make its funding. Or worse, as the case
24 here, the State can just decide to say, we're not going to
25 reimburse at all.

1 And it can do it at any time, for any reason,
2 and the counties have no reason for it to - - -

3 JUDGE RIVERA: Well, they - - - they can
4 impose a statute of limitations - - -

5 MR. BUCKEY: And that's - - -

6 JUDGE RIVERA: - - - right?

7 MR. BUCKEY: They can.

8 JUDGE RIVERA: Okay. So - - - so let's say
9 the Third Department is persuasive, and we agree that
10 it's really - - - you can read this to be a statute
11 of limitation, I know you argued that also, there's a
12 statute of limitation. Why do you get the extra six
13 months? Why isn't it a statute of limitations that
14 applies effective April 1st, 2012?

15 MR. BUCKEY: Because, as this court
16 established in the Brothers v. Florence case - - -

17 JUDGE RIVERA: Um-hum.

18 MR. BUCKEY: - - - when you are
19 establishing a new limitations period or shortening
20 an existing limitations period, matter - - - as a
21 matter of procedural due process, a litigant is
22 entitled to some sort of grace period in connection
23 with the change in the - - -

24 JUDGE RIVERA: But you've known for over a
25 decade. I mean, their claims are going back twenty

1 years. So you've known for some time, what - - -
2 what - - - where is the procedural due process
3 violation in recognizing the effective date as April
4 1st?

5 MR. BUCKEY: Okay. Your Honor, it's - - -
6 I don't think it's - - -

7 JUDGE RIVERA: Unfortunately, being April
8 Fool's Day, but let's go beyond - - -

9 MR. BUCKEY: I don't think it's fair to say
10 that the counties all knew that they were owed money.
11 They still don't know - - - a number of them don't
12 know if, in fact, they are owed anything, and if so,
13 how much; they've never known.

14 And - - - there's a larger problem.

15 JUDGE RIVERA: Well, they're - - - how is
16 that? They're paid, right; the State sends a
17 reimbursement if it thinks you're owed a
18 reimbursement, and then you have a claims process.

19 MR. BUCKEY: The State didn't set up a
20 claims process. That's a fiction that's been
21 presented all the - - -

22 JUDGE RIVERA: It's in the regulation, no?

23 MR. BUCKEY: No. What happened - - - it's
24 in the regulation because the counties, the few
25 counties who realized what was going on, they said -

1 - - they had to figure out a way to get the State's
2 attention, so they submitted claims under that claim.

3 JUDGE RIVERA: Well, they didn't need to do
4 a claims process, right?

5 MR. BUCKEY: They absolutely did not, Your
6 Honor. And they all didn't know; they didn't have a
7 reason to know. Because the problem is the State
8 controls the information in the first place. It's
9 the State's computer system. Counties don't have any
10 say in this process whatsoever.

11 JUDGE RIVERA: Are you saying you never had
12 information?

13 MR. BUCKEY: Not - - - not until - - -
14 until a number of these counties actually retained
15 counsel and went and tried to obtain additional
16 records. And the problem is - - -

17 JUDGE RIVERA: Which is years ago, now. So
18 the counties know about this, right?

19 MR. BUCKEY: No, it's not - - -

20 JUDGE RIVERA: Years they've known about
21 this.

22 MR. BUCKEY: - - - it's not accurate, but
23 it's a further - - - there's a further issue, Judge,
24 it's because there's been no open window. And that's
25 what the problem is here today. We're only asking

1 for an open window. So if you want to run it from
2 2006 forward and say the counties knew - - -

3 JUDGE RIVERA: But they kept winning.

4 MR. BUCKEY: They kept winning - - -

5 JUDGE RIVERA: You sue and you keep
6 winning, and this is years ago, and you know about
7 these claims - - -

8 MR. BUCKEY: But, Your Honor, these - - -
9 the State is not saying, we're going to consider the
10 merits of your claims and we're going to determine
11 whether or not you're owed money; they're saying,
12 there's these statutory impediments. The counties
13 don't have the resource - - -

14 JUDGE RIVERA: But every time you won, they
15 paid the claims.

16 MR. BUCKEY: Only after they exhausted all
17 the appeals, after the counties incurred tremendous
18 litigation expense.

19 JUDGE RIVERA: Yes, but - - - I understand,
20 but they did pay the claims. And so the counties
21 know they can get reimbursed - - -

22 MR. BUCKEY: Right.

23 JUDGE RIVERA: - - - when you - - -
24 especially if you are in financial straits, would you
25 have not move to get reimbursed by submitting claims?

1 MR. BUCKEY: But - - -

2 JUDGE RIVERA: If you think any
3 reimbursement that they've given is - - - is an
4 undercount.

5 MR. BUCKEY: And it's still - - - it's a
6 long process to determine whether or not this
7 reimbursement is due and owing first. Because again,
8 the counties don't have those records. And as you
9 can see - - -

10 JUDGE ABDUS-SALAAM: If you - - - if you
11 paid out the money, what do you mean, you don't have
12 the records? Are we not cl - - - I thought we
13 cleared up that the county paid out the money and
14 expected to be reimbursed, right?

15 MR. BUCKEY: No - - -

16 JUDGE ABDUS-SALAAM: No.

17 MR. BUCKEY: - - - the State just takes the
18 money from the county, before 2006, on a weekly
19 basis, and then - - - there's no records at the time
20 - - -

21 JUDGE ABDUS-SALAAM: I see.

22 MR. BUCKEY: - - - the money is taken. And
23 again, it's because if - - - if the counties have
24 been paying the providers themselves, then certainly
25 they would have a record, but it's the State who is

1 providing - - - who is paying the record, so the
2 counties have no opportunity to - - -

3 JUDGE RIVERA: Well, they tell you your
4 share.

5 MR. BUCKEY: Pardon me?

6 JUDGE RIVERA: Right, they tell the - - -
7 the county their local share?

8 MR. BUCKEY: Well, they take it, yes.

9 JUDGE RIVERA: Um-hum.

10 MR. BUCKEY: And that's - - -

11 JUDGE RIVERA: Take it - - - I'm sorry,
12 excuse my ignorance, take it how? Tell me what the -
13 - -

14 MR. BUCKEY: It was electronic.

15 JUDGE RIVERA: It's an electronic - - -

16 MR. BUCKEY: It's a wire draft on a weekly
17 basis.

18 JUDGE RIVERA: Okay. Okay.

19 MR. BUCKEY: And at the time the money is
20 taken, there's no explanation where the money is
21 going, and there's clearly no explanation for - - -
22 for overburden.

23 JUDGE RIVERA: But the county knows it's
24 for the local share?

25 MR. BUCKEY: Yes. They know for cert - - -

1 JUDGE RIVERA: They know the amount because
2 they know it's taken - - -

3 MR. BUCKEY: It's for a local share of all
4 the Medicaid recipients - - -

5 JUDGE RIVERA: But I know - - -

6 MR. BUCKEY: - - - not just overburden.

7 JUDGE RIVERA: - - - but I'm saying they
8 know their local share because it's a set amount
9 that's taken from that county.

10 MR. BUCKEY: Well, it changes on a weekly -
11 - -

12 JUDGE RIVERA: No, no - - -

13 MR. BUCKEY: Back then, it changed on a
14 weekly basis.

15 JUDGE RIVERA: Yes, I understand that.

16 MR. BUCKEY: Yes. They know that the State
17 - - -

18 JUDGE RIVERA: It's like saying, this - - -
19 this week, the State took \$1,000.50. Next week, the
20 State took \$2,000.30. Right. You know the amount.

21 MR. BUCKEY: We know, yes, that there was a
22 local share.

23 JUDGE RIVERA: That's what I mean, the
24 amount is - - -

25 JUDGE ABDUS-SALAAM: Don't you have a

1 census of your overburdened population, or don't the
2 counties have a census of their overburdened
3 population?

4 MR. BUCKEY: No.

5 JUDGE ABDUS-SALAAM: They do not?

6 MR. BUCKEY: They do not have a census.
7 We're trill - - - still trying to figure that out to
8 this very day, Your Honor, we have no idea what the
9 overburdened population is, because the State has the
10 records because these patients came from State-run
11 facilities.

12 JUDGE RIVERA: Did you demand the records?

13 MR. BUCKEY: Oh yes. If you look in the
14 record, we had to bring FOIL proceedings, and even
15 then, we were only able to - - -

16 JUDGE RIVERA: And they refused to turn
17 over records that the counties need to be able to
18 determine a claim?

19 MR. BUCKEY: Yes, Your Honor, they have.
20 And that's what we've been trying to do - - - that's
21 what we were trying to do leading up to this
22 litigation. And that's what the point is with the
23 mandamus. It's because we want this to be a final
24 accounting. We understand that the State and the
25 courts, they all need to move on from the overburden

1 obligation.

2 That's what the point is here, it's to get
3 the State to finally identify in calcu - - - we'd be
4 happy to do it with them. We would do if
5 cooperatively.

6 CHIEF JUDGE DIFIORE: Thank you, Mr.
7 Buckey.

8 MR. BUCKEY: Okay. Thank you.

9 CHIEF JUDGE DIFIORE: Counsel.

10 MR. PALADINO: I'd refer Your Honors to
11 pages 170, 171 of the first Saint Lawrence record.

12 We gave them reports when we did the quarterly
13 reviews from which they could determine whether their
14 overburden reimbursement was missed.

15 It's all - - - using that information that
16 they've been submitting these claims after 2006, the same
17 information they had from 1984 to 2006, the FOIL request
18 and all the alleged misdeeds is us defending ourselves
19 after the system changed because the State is taking the
20 position that the new system doesn't allow us to pay these
21 old claims.

22 JUDGE PIGOTT: Well, what happened? Were
23 they - - - were they just not doing their job, were
24 they're recalcitrant? I mean, why would - - - why
25 wouldn't the - - - a particular social service

1 district say you owe us this money?

2 MR. PALADINO: I can't speak for - - - for
3 why the counties didn't wake up until 2006. They
4 hired Mr. Buckey and Ms. Rose Stormer, who realized
5 that the system might have missed claims. But we
6 gave them the information when the quarterly reviews
7 were done; that's the very same information that
8 they've been using to submit these claims.

9 So the legislature could rationally
10 determine so much time has gone by; it's time to
11 close the books on these old claims.

12 Mr. Buckey keeps saying - - -

13 JUDGE RIVERA: Cou - - -counsel, let's say
14 we - - - we approach this as in some way, the way the
15 Third Department that say it's a statute of
16 limitations, is - - - do we have to do the grace
17 period; is that what the jurisprudence requires?

18 MR. PALADINO: Well, no. That presupposes
19 that there's a due process problem. Again, that's
20 sort of why the path of least resistance here is to -
21 - - is to say this is reasonable under a vested
22 rights analysis; there's no reason to rewrite this
23 statute.

24 And it's not a statute of limitations because
25 the intent of the April 2012 effective date was to strike

1 a balance because there had been all this litigation - - -

2 JUDGE RIVERA: Um-hum.

3 MR. PALADINO: - - - there were these
4 judgements that had been entered directing the
5 payment of overburden claims that had been submitted
6 after 2006. The legislature was trying to clarify
7 that these claims shouldn't have been paid since
8 2006, but we're not going to reopen these judgments
9 and allow for the recoupment of the money.

10 So that's why they just cut it off right in
11 the effective date of the enactment; it wasn't
12 intended to be some limitations period. But even if
13 it were sort of looked at that way - - -

14 JUDGE RIVERA: A bar, it's a limitations
15 bar. This is it; you can't submit any more. Right?

16 MR. PALADINO: Well, no, because it was
17 saying, you couldn't - - - shouldn't have been able
18 to submit them since 2006, money of seventeen million
19 dollars was paid between 2006 and 2012 - - -

20 JUDGE RIVERA: Yes. And now, effective
21 April 1st, you can submit any more of these pre-2006
22 claims.

23 MR. PALADINO: Correct.

24 JUDGE RIVERA: So it stops the submission
25 process, which is of course the payment process,

1 right? So all I'm asking is, is there any way to
2 read or to interpret the cases based on this record
3 so that the effective date is April 1st as opposed to
4 requiring this additional grace period that the Third
5 Department imposed?

6 MR. PALADINO: Well, yes, because cutting
7 off the reimbursement at that point in time is
8 consistent with due process, either for lack of
9 personhood or because it's fair. There is no due
10 process concern, no basis on which to extend this
11 limitations period.

12 That's assuring - - - given the fact that by the
13 time April of 2012 came around, the youngest overburden
14 claim was seven years old, and the oldest claim was
15 twenty-eight years old. They had the information from
16 these two reports that are described at pages 170 to 171.

17 JUDGE RIVERA: And you - - - you've paid
18 off all the claims?

19 MR. PALADINO: Pursuant to - - -

20 JUDGE RIVERA: Are there any still
21 outstanding? Pursuant to - - - I'm sorry, what were
22 you - - -

23 MR. PALADINO: Pursuant to the judgments
24 that had been in effect from 2006 to 2012, we paid
25 those claims, roughly seventeen million dollars.

1 There's still pl - - - an unknown amount of
2 additional unreimbursed overburden expenditures from
3 before 2006. The only estimate in the record is 180
4 million dollars; it could be many times that.

5 JUDGE RIVERA: But all claims that were
6 submitted by the effective date of Section 61 you
7 have paid; is that correct?

8 MR. PALADINO: Yes, that's - - - that's
9 correct, Your Honor. And because we didn't want to
10 open up those judgments, the legislature didn't want
11 to disturb those judgments, that's why it made the
12 amendment effective April of 2012, and not January 1
13 of 2006.

14 That's why it really wasn't intended to be
15 a limitations period, it was simply clarifying that
16 those ad - - - those prior court decisions were
17 wrong, this money wasn't supposed to be paid since
18 2006, but we recognize that money has been paid, and
19 we're going to let the counties keep that, so that
20 was the reason for the effective date.

21 And the reason for the reference to the
22 claims in the statute was because that was the
23 process by which the counties got additional money
24 not captured in the quarterly reviews. It was
25 intended to terminate the obligation, because if it

1 doesn't terminate the obligation, the amendment
2 accomplishes nothing, because it's just, okay, the
3 counties don't have to submit claims anymore, but now
4 on our own, we have to, under the Third Department's
5 decision, go back to 1984 and unilaterally identify,
6 calculate, and pay. That doesn't end overburden
7 reimbursement; it continues, just under a different
8 process.

9 And we know from the legislative history
10 that that's not what the legislature intended.

11 CHIEF JUDGE DIFIORE: Thank you.

12 MR. PALADINO: Thank you, Your Honors.

13 CHIEF JUDGE DIFIORE: Counsel.

14 MR. BUCKEY: Just on the limitations
15 period. Actually, the State did in fact argue in
16 front of the Appellate Divisions in the Third and the
17 Fourth Department that Section 61 is a limitations
18 period; that's exactly what they said in the reply
19 brief at page 6.

20 So what the Third Department did is actually
21 what I would say is take the path of least resistance.

22 Didn't have to reach this issue about a
23 substantive property right, a substantive vested right.
24 What it did, it was take the State's argument and then
25 look at the text of Section 61. Section 61, both the text

1 and the history, talk about, in fact, claims; they don't
2 talk about the obligation.

3 So the Third Department rationally concluded
4 that this is, in fact, the limitations period credited the
5 State's argument to that effect.

6 JUDGE ABDUS-SALAAM: Counsel - - -

7 MR. BUCKEY: Again, this is - - - this is
8 the path to least resistance. And as far as starting
9 the grace period, well, let's take a step back. The
10 grace period is required; it is required under this
11 court's decision in Brothers v. Florence, because no
12 one is disputing that the State failed to provide the
13 grace period within Section 61; there's nothing in
14 there. It's - - - as soon as the law went into
15 effect, the remedy was extinguishing - - -

16 JUDGE RIVERA: Doesn't it have to be six
17 months?

18 MR. BUCKEY: Actually, I - - -

19 JUDGE RIVERA: Could it be days?

20 MR. BUCKEY: Your Honor, six months is not
21 enough.

22 JUDGE RIVERA: I understand.

23 MR. BUCKEY: But the problem is the State
24 hasn't challenged the substance of the grace period.

25 JUDGE RIVERA: What's - - - what - - -

1 MR. BUCKEY: Hasn't chose - - -

2 JUDGE RIVERA: - - - what's our review on
3 that grace period?

4 MR. BUCKEY: It's - - - it's abuse of
5 discretion, if it was challenged, Your Honor; it
6 hasn't been challenged.

7 The substance of the grace period, when it
8 started, the length of it, that has not been
9 challenged; it's been abandoned on appeal. That is
10 not in front of this court. And what we would take
11 the court back to is that the Third Department had to
12 construe this as a limitations period because that is
13 what the State argued in the first place.

14 CHIEF JUDGE DIFIORE: And as to these Third
15 Department's holding on mandamus, is that in
16 conflict?

17 MR. BUCKEY: Not - - - not at all, Your
18 Honor. It's consistent with what the Third
19 Department said. The Third Department didn't limit
20 the limitations to claims. What the Third Department
21 said is the counties - - - the limitation period
22 applies to the counties' remedies, all the remedies.
23 And it goes to this fiction that will - - - claims
24 was the only way the State established to get this
25 reimbursement in the first place; that's not true.

1 JUDGE RIVERA: But this is what I asked the
2 State before, what their position has been, the
3 State, the Department of Health. And their position
4 is, we paid it out. So what - - - what's - - - how
5 do you justify the extraordinary remedy of mandamus,
6 when the position is, we have paid, and now it's your
7 burden.

8 If you think that they haven't paid, if you
9 think they've shortchanged you, that's on you to show
10 that.

11 MR. BUCKEY: Okay. And yes - - -

12 JUDGE RIVERA: Why should they be doing a
13 review? Their position is, I've paid, I've complied
14 with the statute.

15 MR. BUCKEY: For the exact reason that Your
16 Honor pointed out to me. Because the statute says
17 shall. The statute says shall reimburse one hundred
18 percent.

19 JUDGE RIVERA: Well, that's what I'm
20 saying. To their knowledge, they have done that.

21 MR. BUCKEY: Okay. And so in each of the
22 instances for those counties that were granted
23 mandamus relief, they made an initial showing that,
24 in fact, there was some reimbursement missed. That's
25 the threshold; that's the predicate. We can't

1 presume that all the counties weren't paid. So those
2 counties make that showing.

3 It is not then a stretch for those courts -
4 - - those counties then to request the court to
5 require the State to identify, to calculate, and
6 ultimately, pay.

7 The Third Department is not telling the
8 Department of Health how to do this calculation; it's only
9 telling it that you have to do it. Okay.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. BUCKEY: Thank you.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of County of Chemung v. Shah (and 7 other related cases), No. 136-143 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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