State of New York
Court of Appeals

OPINION

No. 26
Hector Ortiz, &c.,
Appellant,
v.
Ciox Health LLC, &c. et al.,
Respondents.

Sue J. Nam, for appellant.
Jay P. Lefkowitz, for respondent Ciox Health LLC.
John Houston Pope, for respondent New York and Presbyterian Hospital.
Greater New York Hospital Association et al.; Association of Health Information Outsourcing Services; Chamber of Commerce of the United States of America, amici curiae.

SINGAS, J.:

The United States Court of Appeals for the Second Circuit has asked this Court whether an implied private right of action for damages exists for violations of Public Health Law § 18 (2) (e), which limits the reasonable charge for paper copies of medical records to

$0.75 per page. Applying our well-settled test for evaluating implied rights of action, we conclude that there is no such private remedy, and answer that question in the negative.

I.

In October 2016, original plaintiff Vicky Ortiz (Ortiz)[1] made a written request to defendant The New York and Presbyterian Hospital (NYPH) for paper copies of her medical records. The request stated that, pursuant to Public Health Law § 18 (2) (e), NYPH was required to provide these records at a reasonable charge not to exceed $0.75 per page. Nonetheless, NYPH's contractor, defendant Ciox Health LLC's predecessor in interest, billed Ortiz $1.50 per page for the medical records, which she allegedly paid under protest.

Ortiz subsequently filed a complaint in New York state court alleging, as relevant here, violations of section 18 (2) (e). After defendants removed the action to the United States District Court for the Southern District of New York, they ultimately moved for judgment on the pleadings. They argued, among other things, that there is no express private right of action under Public Health Law § 18 (2) (e), and that implying a right of action would be improper. The District Court agreed that no private right of action existed and granted defendants' motions to dismiss (386 F Supp 3d 308, 319 [SD NY 2019]).

On plaintiff's appeal, the Second Circuit concluded that, as to the private right of action issue, there was "insufficient precedent from other New York courts to predict how the Court of Appeals would resolve the issue" (961 F3d 155, 159 [2d Cir 2020]). The court additionally found that the plain language of section 18 did not resolve the issue and that

[1] Ortiz passed away while this litigation was pending and was substituted by the temporary administrator of her estate.

the result turned on a "policy determination that the Court of Appeals is best suited to make" (*id.*). The court accordingly certified the following question: "Does Section 18(2)(e) of the New York Public Health Law provide a private right of action for damages when a medical provider violates the provision limiting the reasonable charge for paper copies of medical records to $0.75 per page?" (*id.* at 160). We accepted the certification (35 NY3d 1001 [2020]).

II.

Public Health Law § 18 was enacted in 1986 and governs "[a]ccess to patient information" (L 1986, ch 497). Before 1986, "most physicians, hospitals and other health care facilities [did] not permit a patient to inspect or obtain copies of records" because these records were "treated as the exclusive property of the provider" (Assembly Introducer's Mem in Support, Bill Jacket, L 1986, ch 497 at 12). The 1986 bill was intended to end this practice, giving "qualified persons" broad, but not unlimited, access to their medical records.[2] Section 18 accordingly gave patients the legal right to examine and obtain copies of their medical records, tempered by the medical provider's right to refuse access if it would cause substantial harm or if the requested material consisted of the provider's personal notes (*id.*; *see* Public Health Law § 18 [2]-[3]). Section 18 (2) (e) required medical providers to impose only a *reasonable* charge for paper copies of medical records but did

[2] Though the original section 18 did not specify who was a "qualified person," the statute was amended in 1992 to define "qualified person" to include various parties who were the subject of the requested medical records or their representatives including "an attorney representing or acting on behalf of the subject" (*see* L 1992, ch 277, § 8; *see also* Public Health Law § 18 [1] [g]).

not dictate a statutory maximum. The allowance of a reasonable charge "mitigate[d] the burden of patient access to provider records" (Mem of NY Dept of Social Servs, Bill Jacket, L 1986, ch 497 at 27) by imposing "[t]he cost of providing copies of documents [on] the patient" (Assembly Introducer's Mem in Support, Bill Jacket, L 1986, ch 497 at 13).

The $0.75 per page maximum charge was added in 1991, and that provision remains in the statute's current form (*see* L 1991, ch 165, § 48; *see also* Public Health Law § 18 [2] [e]). As a minor amendment in an extensive package of bills designed "to save the State money through structural reform of Medicaid" and other state programs, the $0.75 ceiling passed without specific legislative commentary beyond the stated purpose of "limit[ing] to seventy-five cents per page the charge that physicians, hospitals, or mental health facilities may impose for copying medical records" (Senate Introducer's Mem in Support, Bill Jacket, L 1991, ch 165 at 15-16, 18). Neither the 1986 nor the 1991 bill provided any express specific remedy for violations of the reasonable charge requirement.

The Public Health Law does, however, contain overarching enforcement mechanisms for its provisions. Section 12 provides that "[a]ny person who violates . . . any term or provision of this chapter . . . for which a civil penalty is not otherwise expressly prescribed by law, shall be liable to the people of the state for a civil penalty of not to exceed two thousand dollars for every such violation" (Public Health Law § 12 [1] [a]).[3]

[3] At the time Public Health Law § 18 was enacted, the $2,000 fine was the only available penalty under this subdivision (*see* former Public Health Law § 12 [1]). It was amended in 2008 to provide for increased fines for repeated violations and violations resulting in serious physical harm to a patient (*see* L 2008, ch 58, part A, § 16), and is otherwise unchanged.

This penalty can be "recovered by the [Commissioner of Health] in any court of competent jurisdiction" (*id.* § 12 [2]). A matter can also be referred to the Attorney General who may impose the fines detailed in subdivision (1) and, "upon the request of the commissioner," must "bring an action for an injunction against any person who violates . . . any term or provision of" the Public Health Law (*id.* § 12 [5]). Finally, the Department of Health, a local board of health, or an individual may file a CPLR article 78 proceeding to enforce "[t]he performance of any duty or the doing of any act enjoined, prescribed or required by" the Public Health Law (*id.* § 13).

In addition to these enforcement mechanisms, the legislature has created tailored remedial schemes throughout the Public Health Law. Section 18 itself provides for special proceedings to resolve disputes regarding whether a valid basis exists for a medical provider to deny access to a patient's medical records (*see id.* § 18 [3] [f]; *see also id.* § 18 [3] [d]-[e]). Moreover, in another provision enacted the year before the $0.75 limit, the legislature specifically required providers who overcharged Medicaid patients to refund "the amount collected in excess of the limitations" (*see id.* § 19 [4]; L 1990, ch 572).

III.

As both the District Court and the Second Circuit observed, the Public Health Law contains no express private plenary action for violations of section 18 (2) (e). In New York, where a statute does not make express provision for a private remedy, such a remedy may be had "only if a legislative intent to create such a right of action is 'fairly implied' in the statutory provisions and their legislative history" (*Brian Hoxie's Painting Co. v Cato-Meridian Cent. School Dist.*, 76 NY2d 207, 211 [1990]). To evaluate whether the

legislative intent favors such implied private rights of action, we have identified three relevant factors: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (*Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 [1989], citing *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 276-277 [1987], and *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 329-331 [1983]). "Critically, all three factors must be satisfied before an implied private right of action will be recognized" (*Haar v Nationwide Mut. Fire Ins. Co.*, 34 NY3d 224, 229 [2019]).

The third factor is the most important and typically turns on the legislature's choice to provide one particular enforcement mechanism to the exclusion of others—a choice that should be respected by the courts (*see Cruz v TD Bank, N.A.*, 22 NY3d 61, 70-71 [2013]; *Sheehy*, 73 NY2d at 629). In that vein, we have held that "public and private avenues of enforcement do not always harmonize with one another. . . . Both may ultimately, at least in theory, promote statutory compliance, but they are born of different motivations and may produce a different allocation of benefits owing to differences in approach" (*Uhr v East Greenbush Cent. School Dist.*, 94 NY2d 32, 40 [1999]).

Indeed, the presence of alternative enforcement mechanisms is frequently determinative. In *CPC Intl. v McKesson Corp.*, we considered whether General Business Law § 352-c, which criminalizes fraudulent and deceptive practices in connection with the distribution and sale of securities, contained an implied right of action (*see* 70 NY2d 268). Citing the Attorney General's broad authority to enforce the General Business Law's

provisions on behalf of the state by investigating, obtaining civil damages and injunctive relief, creating a receivership, subpoenaing witnesses, and instituting criminal prosecution (*see* former General Business Law §§ 352, 353, 353-a, 354, 358) we held that "the specific purpose of the statute was to create a statutory mechanism in which the Attorney-General would have broad regulatory and remedial powers to prevent fraudulent securities practices" (*CPC Intl.*, 70 NY2d at 277). Accordingly, even though we agreed that a private right of action could "act as a further deterrent" by "reducing the expectancy of reaping illicit profits from fraudulent securities practices," we concluded that a private right of action was "not consistent with the legislative scheme" (*id.* at 276-277).

In *Sheehy v Big Flats Community Day*, at issue was a putative implied private right of action for violating the Penal Law provisions prohibiting the sale of alcohol to minors (*see* 73 NY2d at 631). We concluded that the first two factors were satisfied. As to the third, however, we explained that a related statute provided for civil liability in many cases of injury caused by the negligent or unlawful dispensation of alcohol. Noting that this latter provision had been long held not to authorize recovery in favor of the individual whose intoxication resulted from the unlawful sale, we explained that when the legislature has "made express provision for civil remedy, albeit a narrower remedy than the plaintiff might wish, the courts should ordinarily not attempt to fashion a different remedy, with broader coverage, on the basis of a different statute . . . address[ing] the same wrong" (*id.* at 636). Therefore, we concluded that no private right of action on behalf of the intoxicated individual could be implied.

More recently, in *Cruz v TD Bank, N.A.*, we considered whether a law limiting the restraint of private bank account funds contained an implied private right of action (*see* 22 NY3d at 65-68). The parties in *Cruz* agreed that the first two *Sheehy* factors were satisfied (*id.* at 71-72). Nonetheless, we concluded that the existence of other remedies, namely that the account holder could bring a special summary proceeding to adjudicate disputes over the ownership of property, demonstrated that "there is no basis to suppose that the legislature expected that injured judgment debtors would commence complicated and lengthy plenary proceedings to vindicate their rights" (*id.* at 77). Relying on the third factor, we thus held that the statute did not create a private right of action (*see id.* at 78-79).

We have consistently reached the same conclusion in cases presenting similar circumstances: where a statutory scheme contains private or public enforcement mechanisms, this demonstrates that the legislature considered and decided what avenues of relief were appropriate (*see e.g. Schlessinger v Valspar Corp.*, 21 NY3d 166, 171 [2013] [concluding that the legislature intended to leave enforcement of law limiting termination of maintenance agreements to the government where provision provided for civil penalties recoverable by the Attorney General]; *Metz v State of New York*, 20 NY3d 175, 180-181 [2012] [law providing for criminal penalties and fines on vessel owners demonstrated intent not to impose private right of action]; *McLean v City of New York*, 12 NY3d 194, 200-201 [2009] [statute governing child care licensing requirements did not create private right of action where statute provided for suspension of licenses and registrations for violations and imposed civil penalties for such violations]).

IV.

Applying the *Sheehy* factors here, we conclude that no private cause of action exists for violations of Public Health Law § 18 (2) (e). The first factor is satisfied. Ortiz is clearly part of a class that section 18 was designed to protect. The original law and its subsequent amendment were intended to increase patient access to medical records, and prevent medical providers from overcharging patients for copies of their medical records (*see* Assembly Introducer's Mem in Support, Bill Jacket, L 1986, ch 497 at 12; Senate Introducer's Mem in Support, Bill Jacket, L 1991, ch 165 at 18). NYPH's argument that section 18 balances protections for both medical providers and patients alike does not change that the $0.75 cap, at issue here, was meant to limit costs to patients for paper copies of their medical records.

Turning to the second factor, it is unclear whether a private right of action would promote the legislative purpose. "The second prong is itself a two-part inquiry. We must first discern what the Legislature was seeking to accomplish when it enacted the statute, and then determine whether a private right of action would promote that objective" (*Uhr*, 94 NY2d at 38, citing *Burns Jackson*, 59 NY2d at 330). As the legislative history reveals, the purpose of section 18 was to increase patient access to medical records (Assembly Introducer's Mem in Support, Bill Jacket, L 1986, ch 497 at 12). On one hand, an individual plenary right of action would not directly advance this legislative goal because such an action would only arise when a patient has already overpaid and obtained access to the medical records. Indeed, where an overcharge actually prevents a patient from obtaining their medical records, the patient may bring an article 78 proceeding to enforce

the Public Health Law's mandate (*see* Public Health Law § 13; *see also e.g. Matter of Halio v IOD Inc.*, 32 Misc 3d 593 [Sup Ct, Nassau County 2011] [petition to compel medical records at no more than $0.75 per page]). On the other hand, the threat of private litigation could indirectly serve the legislative goal by acting as a deterrent to medical providers and vendors from overcharging in the first instance, thereby increasing access without the need to bring an article 78 proceeding to enforce a reasonable charge (*cf. Sheehy*, 73 NY2d at 634). But given the substantial fines the Commissioner and the Attorney General can impose, the additional deterrent effect of a private right of action is difficult to ascertain.[4]

Even assuming the second factor is satisfied, though, the final factor—consistency with the legislative scheme—is clearly not. As in *CPC Intl.*, *Sheehy*, and *Cruz*, enforcement mechanisms already exist for section 18. First, the Commissioner and Attorney General's ability to impose substantial fines against providers that overcharge for copies of records acts as a deterrent (*see Uhr*, 94 NY2d at 40; *see also Mark G. v Sabol*, 93 NY2d 710, 720 [1999]). Second, the Attorney General's duty to seek injunctive relief

[4] The concurrence's proposed inquiry—whether the legislature intended to create or deny the argued-for remedy (concurring op at 5)—is the ultimate question that each factor in the three-prong test seeks to evaluate and would therefore subsume the other factors, each of which examines a distinct "indication[] of the legislature's intent" (concurring op at 7; *see Brian Hoxie's Painting Co.*, 76 NY2d at 211). Moreover, the concurrence cites (concurring op at 5-6) but disregards decades of this Court's jurisprudence consistently analyzing the second factor (*see e.g. Haar*, 34 NY3d at 231 [second factor not satisfied because it "would likely undermine the statutory purpose of (encouraging reporting of unprofessional conduct) by increasing reporters' exposure to liability"]; *Uhr*, 94 NY2d at 39-40 [second factor satisfied because "risk of liability for failure to screen" students for scoliosis would promote early detection of that condition]; *Sheehy*, 73 NY2d at 634 [second factor satisfied because "permitting civil damage suits . . . would further (the statute's) deterrent goal"]).

upon the request of the Commissioner provides a legal mechanism for ending any widespread practices violating section 18. Finally, an individual patient's ability to commence an article 78 proceeding to enforce the law's provisions provides recourse for individual patients who are unable to access their records due to illegally high costs.

Additionally, the legislature affirmatively provided mechanisms for enforcing other related provisions of the Public Health Law, but did not here. For example, to ensure access to medical records pursuant to section 18, the legislature detailed a robust enforcement mechanism involving an appeal to a special panel from a provider's denial of access to records, and a subsequent article 78 proceeding to dispute the panel's determination (Public Health Law § 18 [3] [f]). Furthermore, in section 19, which imposed reasonable limits for charges for services to Medicare patients and was enacted almost contemporaneously with the $0.75 cap, the legislature explicitly provided for a refund in the case of an overcharge (*id.* § 19 [4]). That the legislature chose not to provide a similar remedy for overcharging in section 18 is further evidence that it believed that the Public Health Law's existing remedies would be adequate.

A plenary private right of action would be inconsistent with the statutory scheme surrounding the $0.75 cap (*cf. CPC Intl.*, 70 NY2d at 276-277). Therefore, the third *Sheehy* factor is not satisfied, and the requisite legislative intent for an implied private right of action is not present.

We thus conclude that no private right of action lies for violations of Public Health Law § 18 (2) (e). Accordingly, the certified question should be answered in the negative.

WILSON, J. (concurring):

I concur in the majority's answer to the certified question and in most of the majority's analysis, but write separately to clarify the proper analysis under the second factor—"whether recognition of a private right of action would promote the legislative

purpose"—in the three-factor test we use to consider whether a statute contains an implied private right of action (*Sheehy v Big Flats Community Day, Inc.*, 73 NY2d 629, 633 [1989]). In our case law, "promote the legislative purpose" is shorthand for "what indications there are in the statute or its legislative history of an intent to create (or conversely to deny) such a remedy" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 325 [1983]; *CPC Intern. Inc. v McKesson Corp.*, 70 NY2d 268 [1987]). The majority's analysis creates slippage in the meaning of the second factor, which, although not meaningful for resolving this appeal, will be in some case, someday. We must "be very careful to guard against" legal analysis "so loosely applied . . . as to threaten the integrity of the rule itself" (*Stowell v Greenwich Ins. Co. of City of New York*, 163 NY 298, 305 [1900]).

I

A brief review of the history of the three-factor test in our jurisprudence reveals that an inquiry into "what indications there are in the statute or its legislative history of an intent to create (or conversely to deny) such a remedy" is the proper analysis under the second *Sheehy* factor.

Our three-factor test was derived from the seminal case of *Cort v Ash* (22 US 66 [1975]). In that case, the Court announced that four factors are relevant for "determining whether a private remedy is implicit in a [federal] statute not expressly providing one":

> "First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? *Second, is there*

> *any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?* Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

(*id.* at 78 [citations omitted] [emphasis added]). When conducting the analysis under the second factor, the Court looked to the "legislative history" for whether there was any "indication" of an "intention to create a private cause of action," noting that "an explicit purpose to deny such cause of action would be controlling" (*id*. at 82).

Although the "legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question," the inquiry under the second factor is to search for "an intention to create a private cause of action" (*Cannon v University of Chicago*, 441 US 677, 694 [1979] [quoting *Cort*, 22 US at 82]; *see also* 13A Wright & Miller, Federal Practice and Procedure, § 3531.6 (3d ed) ["Under that former view, courts thought they must provide any remedies necessary to make effective a statute's purpose. *Cort v. Ash*, however, abandoned that view"]).

In 1983, we adopted the first three factors from *Cort v Ash* in a case called in *Burns Jackson Miller Summit & Spitzer v Lindner* (59 NY2d 314 [1983]). (The fourth *Cort* factor—whether the issue is one relegated to state law—is irrelevant to a state court's decision about a state statute.) Citing *Cort v Ash* for each of the three factors, we wrote:

> "Whether a private cause of action was intended will turn in the first instance on whether the plaintiff is 'one of the class for whose especial benefit the statute was enacted' (*Motyka v City*

> *of Amsterdam*, 15 NY2d 134, 139; *Cort v Ash*, 422 US 66, 78; *Texas & Pacific Ry. Co. v Rigsby*, 241 US 33, 39). But the inquiry does not, as plaintiffs suggest, end there, for to do so would consider but one of the factors involved in the Legislature's determination. Important also *are what indications there are in the statute or its legislative history of an intent to create (or conversely to deny) such a remedy* and, most importantly, the consistency of doing so with the purposes underlying the legislative scheme (*Cort v Ash*, *supra*, at p 78)"

(*id.* at 325 [some citations omitted] [emphasis added]). At issue in *Burns Jackson* was whether the Taylor Law contained a private right of action for damage actions brought by persons injured by strikes by public employees (*id*. at 324). When analyzing the Taylor Law under the second factor, we considered Taylor Committee reports and found that the legislature had "explicitly directed" that, when assessing penalties, the Public Employment Relations Board and the courts must "consider the union's ability to pay" and "refused to enact" a deterrent provision that would have allowed for the decertification of unions as a penalty (*id*. at 330). Given this legislative history, we determined that "the Legislature must be deemed to have negated the unlimited liability, not only to third parties but to public employers as well, and the consequent demise of public employee unions, that would result from recognition of a new statutory cause of action" (*id*. at 330-331).

Four years later, in *CPC International Inc. v McKesson Corp*., we again analyzed whether to find an implied right of action—this time, in a provision of a federal statute, section 17(a) of the Securities Act of 1933 (70 NY2d 268 [1987]). We considered the "difficult analytical problem . . . presented by the second *Cort v. Ash* inquiry: whether there is 'any indication of legislative intent, explicit or implicit, either to create such a remedy

or to deny one' under section 17(a)" (*id*. at 281). Based on the legislative history—which contained "explicit indications that it was not intended to create a private cause of action"—and the structure of the Securities Act of 1933—which "contains express civil remedies . . . in specific sections"—we concluded that Congress had not intended to create a private right of action (*id*. at 281-282).

Then, two years later in *Sheehy v Big Flats Community Day, Inc.* (73 NY2d 629 [1989]), we summarized our prior decisions in *Burns Jackson* and *CPC International* as follows:

> "Of central importance in this inquiry is the test set forth in *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 NY2d 314; see also, *CPC Intl. v. McKesson Corp.*, 70 NY2d 268. Under that test, the essential factors to be considered are: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) *whether recognition of a private right of action would promote the legislative purpose*; and (3) whether creation of such a right would be consistent with the legislative scheme (*CPC Intl. v. McKesson Corp., supra*, at 276-277; *Burns Jackson Miller Summit & Spitzer v. Lindner, supra*, 59 NY2d at 329-331)"

(73 NY2d at 633-634). Although we used the shorthand of "promote the legislative purpose," we did not purport to overrule our prior precedents or alter them in any way. The analysis remained the same. Under that factor, we considered the legislature's intention to create or deny the argued-for remedy: "in making the provision of alcohol to individuals under the legal purchase age a crime, the Legislature plainly *intended* to create a deterrent for those who might, intentionally or carelessly, engage in the proscribed conduct. Obviously, permitting civil damage suits for injuries arising from the same conduct would also further this deterrent goal" (*id*. at 634).

II

The *Sheehy* formulation of the language we use to describe the second factor has carried through to today, but the analysis has always remained that originally announced in *Burns Jackson* and *CPC International* (*e.g., Uhr ex rel. Uhr v E. Greenbush Cent. School Dist.*, 94 NY2d 32, 38 [1999] ["The second prong is itself a two-part inquiry. We must first discern what the Legislature was seeking to accomplish when it enacted the statute, and then determine whether a private right of action would promote that objective" (citing *Burns Jackson*)]; *Haar v Nationwide Mut. Fire Ins. Co.*, 34 NY3d 224, 230-231 [2019] ["Regarding the second factor . . . nothing in either the text or legislative history evinces legislative concern that OPMC was receiving too many reports"]). Both *Cort v Ash* and our subsequent caselaw embracing *Cort* expressly state that the analysis under the second *Cort*/*Sheehy* factor is to search the legislative history for an explicit or implicit indication as to whether the legislature intended to create a private right of action (*Cort,* 22 US at 78; *CPC*, 70 NY2d at 281). An intention to create a private cause of action may be explicit in the legislative history, even if it is not explicit in the statutory text itself (*see, e.g., Cannon v University of Chicago*, 441 US 677, 699-701 [1979] ["The language of this provision explicitly presumes the availability of private suits to enforce Title VI in the education context. For many such suits, no express cause of action was then available; hence Congress must have assumed that one could be implied under Title VI itself. That assumption was made explicit during the debates on § 718" (footnotes omitted)]). An intention to deny a private right of action could also be explicit (*see, e.g., Middlesex County*

Sewerage Auth. v Natl. Sea Clammers Ass'n, 453 US 1, 18 [1981] ["(T)he Reports and debates provide affirmative support for the view that Congress intended the limitations imposed on citizen suits to apply to all private suits under these Acts. . . . Where, as here, Congress has made clear that implied private actions are not contemplated, the courts are not authorized to ignore this legislative judgment"]).

The majority, however, rather than examining the legislative history and text for specific indications of the legislature's intent, conducts a high-level discussion of the legislature's goal of increasing patient access to medical records in enacting of Public Health Law § 18 (2) (e) and whether "an individual plenary right of action" would advance that goal (majority op at 9). That analysis is problematic for two reasons. First, the majority's new formulation of the analysis under factor two blends with the analysis under factor three—"whether creation of such a right would be consistent with the legislative scheme" (*Sheehy*, 73 NY2d at 633)—so as to render factor three redundant. Second, the majority discards our well-settled analysis under factor two without explanation, but "we do not overrule important authorities sub silentio" (*Pratt Inst. v City of New York*, 183 NY 151, 161 [1905]). The majority's complaint that my approach to the second factor would "subsume the other factors" (majority op at 10 n 4) is puzzling, because that approach is precisely the test from *Cort v Ash*, adopted unchanged by our court, and intelligible to the more than 2000 federal decisions that have managed to understand it (*see* Wright & Miller, *supra*, at § 3531.6).

III

In this case, it is unclear whether a private right of action would "promote the legislative purpose" (*Sheehy*, 73 NY2d at 633). Neither the statute itself nor the legislative history contains an "explicit statement as to either exclusivity or intent to create a private cause of action" (*Burns Jackson*, 59 NY2d at 325). Likewise, the legislative history contains no indication that the legislature intended to create a private right of action or that claims based on the statute could or could not be brought under existing common or statutory law. Absent a clearer demonstration of a legislative intent, I would conclude that the second factor does not cut either way (which is where the majority winds up, albeit via a different analysis). Given that even a proper analysis under factor two is not dispositive, the majority's misstatement of the law does not affect the outcome here. Nevertheless, I write separately to emphasize the correct understanding of the second factor as announced in *Cort*, *Burns Jackson* and *CPC International* and to note the slippage in today's opinion, so that the proper test, not the loose shorthand, will be outcome determinative when material to a future case.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.27 of this Court's Rules of Practice, and after hearing argument by counsel for the parties and consideration of the briefs and record submitted, certified question answered in the negative. Opinion by Judge Singas. Judges Rivera, Fahey and Cannataro concur. Judge Wilson concurs in result in an opinion. Chief Judge DiFiore and Judge Garcia took no part.

Decided November 18, 2021