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No. 14-554

IN THE
Supreme Court of the United States

IN RE: MANAGED CARE LITIGATION
MEDICAL ASSOCIATION OF GEORGIA,
CALIFORNIA MEDICAL ASSOCIATION,
CONNECTICUT STATE MEDICAL SOCIETY,
STEPHEN D. HENRY, M.D.,
JAMES G. SCHWENDIG, M.D.,
CARMEN KAVALI, M.D.

Petitioners,

v.

WELLPOINT, INC.

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**BRIEF OF THE AMERICAN MEDICAL
ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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INTERESTS OF *AMICUS CURIAE*

The American Medical Association (AMA), an Illinois non-profit corporation, is the largest professional association of physicians, residents and medical students in the United States. Additionally, substantially all physicians, residents and medical students in the United States are represented in the AMA's House of Delegates, its policy making arm, through state and specialty medical societies and other physician groups. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

The AMA, its members, and the medical profession generally have a strong interest in assuring that insurers comply with their contractual obligations to subscribers to pay for medical services. To that end, the Litigation Center of the AMA and State Medical Societies, has participated in litigation against insurers, including respondent WellPoint, to prevent the manipulation of computerized data to reduce physician compensation below contractual rates.¹

But for the threat of contempt sanctions, the AMA would be a petitioner in this case. The AMA

¹ All parties have consented to the submission of this brief. The AMA gave notice of its intention to file this brief on November 18, 2014. No party or counsel for a party authored the brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus*, its members, or its counsel, made such a monetary contribution. Funding for the AMA Litigation Center includes regular contributions from state medical society members which are among the petitioners.

relinquished antitrust (and other) claims in the face of the same injunction that petitioners had to violate to obtain appellate review. The AMA's experience, as set forth more fully below in the Statement, confirms that the question presented is exceptionally important and requires immediate action by the Court. If the Court fails to intervene, the proceedings below will serve as a template to prospectively immunize antitrust violations and other violations of federal law in one of the most important parts of the United States economy.

STATEMENT

The question presented arises from litigation between physicians and their medical associations and health insurers over various means by which insurers have shortchanged subscribers and physicians when reimbursing them for medical services, and the insurers' invocation of releases in one nationwide MDL settlement to immunize further violations of the antitrust and other federal laws accruing after that case settled.

A. Usual, Customary and Reasonable Rates for Medical Care

Insurers such as WellPoint which offer health insurance to cover services provided by physicians who have not agreed to accept insurer-negotiated rates (out-of-network services) have typically promised to the families and individuals who purchase such health insurance that the insurer will pay the usual, customary and reasonable (UCR) rate (or a percentage thereof) for services provided by out-

of-network physicians. UCR rates are generally calculated from charges submitted to insurers for medical procedures by physicians in a particular geographic area.²

Insurers have an economic incentive to reduce payments to physicians. One method is underestimating the actual UCR rates for medical services, thereby shifting the costs of medical care to their subscribers (if the physicians seek to collect the balance from them) or to the physicians (if the physicians accept the improperly discounted rates as payment in full).³ Other methods include improper bundling or “downcoding” of procedures and outright denial of claims. Regarding UCRs in particular, insurers also have an incentive to collaborate in underestimating UCR rates, lest physicians notice that a particular insurer is reducing payments and consequently decline assignments of benefits from

² See <http://www.bls.gov/ncs/ebs/sp/healthterms.pdf>, last visited Nov. 22, 2014 (defining UCR).

³ See generally, Hearings on Health Insurance Industry Practices—Are Consumers Getting What They Paid For? Before Senate Committee on Commerce, Science, and Transportation, 111th Cong. (March 26 and March 31, 2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg50466/html/CHRG-111shrg50466.htm>, and <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg50467/html/CHRG-111shrg50467.htm>, last visited Nov. 22, 2014; Underpayments to Consumers by the Health Insurance Industry, Staff Report, Senate Committee on Commerce, Science, and Transportation, June 24, 2009 (Underpayments to Consumers), available at http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=3498904d-6994-4e7d-a353-159261240d54 last visited Nov. 22, 2014.

subscribers to that insurer, forcing subscribers to choose between the insurer and their chosen physician. See *Underpayments to Consumers*, at 3.

B. Settlement of the *Managed Care* MDL

The *Managed Care* MDL litigation (*In re Managed Care Litigation*, No. 00-md-1334 (S.D. Fla.) referred to in the opinion below as MDL 1334) involved a broad challenge to insurer practices, including one-sided in-network capitation agreements (concerning lump sum payments per patient), delayed payments, improper “bundling” of services, automated rejection or deletion of procedure codes to reduce payments, and the manipulation of databases. See PA 9a n.3 (the *Managed Care* MDL “covered a broader range of conduct” than the *Wellpoint* “UCR MDL”). The allegations included, among seven specific means by which the insurers conspired to reduce physician payments, “the development and utilization of automated and integrated claims processing and other systems [including Ingenix] and the configuration and use of such systems to similarly deny, diminish and delay payments to physicians.” *Managed Care* MDL DE 1607 (Second Amended Complaint) ¶ 120(b); PA 9a n.3 (citing Third Amended Complaint after the WellPoint Settlement).

In settling the *Managed Care* MDL, WellPoint agreed (for a period of four years from the date of preliminary approval PA 89a) to change its business practices, including not to use an “internal claims database” that “systematically under-reports” UCRs,

“eliminates or excludes the highest charges” in an area to calculate UCRs; uses charges from other areas; uses discounted fees to compute UCRs; and “lacks quality controls” to determine the validity of the data. *Managed Care* MDL DE 4321, at 38 § 7.14(d).

The settlement agreement in the *Managed Care* MDL also included a release of claims, together with a corresponding covenant not to sue and injunctive enforcement of the release. *Id.*, at 73-76 § 13.1-13.3. The release covered claims “*arising on or before the Effective Date . . .* by reason of, arising out of, or in any way related to any of the facts, acts, events, transactions, occurrences, courses of conduct, representations, omissions, circumstances or other matters referenced in [the various complaints].” *Id.* § 13.1(a) (emphasis added); PA 87a.

When the district court preliminarily approved the settlement, it also approved a notice to class members advising recipients to “read this notice carefully:” “[i]f you are a physician who provided covered services . . . at any time between August 4, 1990 and July 15, 2005.” PA 6a (quoting *Managed Care* MDL DE 4608 at 62). The class notice described the claims against WellPoint released by the settlement as those “arising on or before the date that the Court’s order approving the settlement becomes final, that are, were or could have been asserted.” *Id.* at 7a. By contrast, the notice described the release as to another defendant as including “claims that exist now or that might arise in the future.” *Id.* On January 3, 2006, the district

court granted final approval. *Managed Care* MDL DE 4684. See PA 88a (defining Effective Date).

**C. Enforcement of the WellPoint
Managed Care Release to Compel
Dismissal of Post-Settlement Claims**

The contempt litigation now before this Court began after the AMA and others determined that insurers were involved in a conspiracy with Ingenix to manipulate UCR data. *Managed Care* MDL DE 6125, at 9-10.⁴ In 2009, the AMA, other medical associations, and individual physicians filed suit against WellPoint alleging that it had violated the antitrust laws, ERISA and RICO by conspiring with other insurers to manipulate the Ingenix database beginning in 1998 to reduce reported UCRs and thereby to reduce payments to physicians for their services to subscribers. The complaint was consolidated as part of the *WellPoint* MDL in the Central District of California (*In re Wellpoint Out-of-Network "UCR" Rates Litigation*, No. 09-ml-2074, referred to in the opinion below as the UCR MDL). The Third Consolidated Amended Complaint filed in

⁴ See *AMA v. United Healthcare Corp.*, 2006 WL 3833440 (S.D.N.Y. Dec. 29, 2006) (discussing amendment of AMA complaint against Ingenix's then-owner United Healthcare to add antitrust and other claims arising from manipulation of Ingenix database to reduce UCR rates). That litigation sparked an investigation by the New York Attorney General leading to an agreement to develop a new database, called Fair Health, to replace Ingenix. Danny Hakim and Reed Abelson, Big Health Insurer Agrees to Update Its Fee Data, *New York Times*, Jan. 13, 2009, available at <http://www.nytimes.com/2009/01/13/health/policy/13care.html?pagewanted=all> last visited Nov. 22, 2014.

2011 alleged particularly that insurers had discussed correcting a known inadequacy in the Ingenix database around 2005 because of “lawsuits challenging the UCRs” but decided not to do so. PA 113a, ¶ 114. Mindful of the WellPoint release, the complaints carved out any claims to relief accruing before the Effective Date for plaintiffs who were bound by the *Managed Care* MDL settlement. PA 110a-112a, ¶ 342; Pet. 4.

Although the AMA was not itself a signatory to the *Managed Care* MDL settlements, the insurers nonetheless claimed that the AMA was bound by the releases.⁵ Despite the *Wellpoint* MDL plaintiffs’ express disavowal of claims accruing prior to the Effective Date, WellPoint sought an injunction against the AMA and others on the basis of the

⁵ The insurers contended that the AMA was bound to the extent that it sued as an association on behalf of members who were themselves parties to the *Managed Care* MDL settlements as class members. In addition to WellPoint’s application for an injunction concerning the *WellPoint* MDL, Aetna obtained an injunction against the AMA, forcing it to dismiss claims about underpayments to physicians in MDL litigation in the District of New Jersey. Status Report, *Managed Care* MDL DE 6208; *id.* DE 6222, Ex. B (Order in MDL No. 2020 (D.N.J. April 27, 2011)). Likewise, the health insurer CIGNA obtained an injunction against the AMA for pursuing claims involving post-settlement billing in the New Jersey MDL on the ground that the claims had been released in the *Managed Care* MDL, *id.*, DE 6022 (magistrate judge’s R&R), 6032 (approving R&R). The AMA (and other parties) appealed the injunction to the Eleventh Circuit, which dismissed for lack of appellate jurisdiction. No. 09-16261 (June 16, 2010). CIGNA then moved to hold the AMA in contempt. *Managed Care* MDL DE 6092. CIGNA later withdrew the contempt motion after the New Jersey district court dismissed the claims on other grounds. *Managed Care* MDL DE 6290.

release in the *Managed Care* MDL. *Managed Care* MDL DE 6053. WellPoint argued that because the complaint alleged that the conspiracy to manipulate Ingenix data began in 1998, the claims arose before the Effective Date of the *Managed Care* MDL settlement, even though the claims were explicitly limited to those accruing after the Effective Date. *See id.* at 6-7. Thus, WellPoint took the position that it had a license to violate the antitrust laws and ERISA as to settlement class members in perpetuity as long as its future conduct continued to be sufficiently close to the claims settled in the *Managed Care* MDL—even for claims involving transactions after WellPoint’s obligations to change its practices under the *Managed Care* MDL settlement terminated in July 2009. The AMA argued that the WellPoint settlement did not release claims accruing after the Effective Date and that such a release would be void as against public policy. *Managed Care* MDL DE 6062.

D. Thwarted Attempts to Obtain Review Without Contempt

The magistrate judge in the *Managed Care* MDL recommended granting WellPoint’s request for an injunction. *Managed Care* MDL DE 6116, PA 48a-76a, 65a. The district court overruled the AMA’s objections, and ordered dismissal of the *Wellpoint* MDL claims. *Id.* DE 6125, 6190, PA 77a-78a. The Eleventh Circuit dismissed the appeal from that order for lack of jurisdiction because the district court had not yet imposed contempt sanctions. *Klay (Higashi) v. All Defendants*, No. 09-16302 (11th Cir. April 21, 2010). The district court also denied the

AMA's motion to certify the injunction for appeal under 28 U.S.C. § 1292(b) in order to permit review of the scope of the release notwithstanding the Eleventh Circuit's ruling that there was no final order. *Managed Care* MDL DE 6192, 6200. The AMA also filed a declaratory judgment action (as suggested in *Thomas v. Blue Cross and Blue Shield Ass'n*, 594 F.3d 823, 830 (11th Cir. 2010)) challenging WellPoint's interpretation of the release, and appealed the district court's order dismissing the action.⁶ The *Managed Care* MDL court also denied motions to stay the injunction and the order to show cause why the AMA should not be held in contempt pending appeal. *Managed Care* MDL DE 6194, 6202; 6197, 6203. The Eleventh Circuit later dismissed the declaratory judgment appeal. *Antell v. Aetna*, 469 Fed. Appx. 761 (March 26, 2012).

Faced with no path to appellate review of the district court's erroneous construction of the release other than an appeal of contempt sanctions, the AMA yielded and moved to "dismiss without prejudice the claims it has brought on behalf of physician members who were members of the class in the WellPoint Settlement." *Wellpoint* MDL DE 208 (March 28, 2011); *Managed Care* MDL DE 6206 at 2 n.1

⁶ See also *Melamed v. Blue Cross of California*, 470 Fed. Appx. 830 (11th Cir. 2012) (affirming dismissal of a declaratory judgment action concerning the scope of a release in an earlier case as duplicative, finding no abuse of discretion, despite having faulted the appellant in *Thomas* for having filed a motion seeking declaratory relief in the original action rather than a new (duplicative) declaratory judgment suit); *Gardner v. CIGNA*, 477 Fed. Appx. 542 (11th Cir. 2012).

(acknowledging AMA dismissal).⁷ WellPoint thereafter moved to hold the remaining physicians and medical associations in contempt, *id.* DE 6264, leading to the case now before the Court.

SUMMARY OF THE ARGUMENT

The petition shows that the lower courts' application of the WellPoint *Managed Care* MDL release to bar claims that had not yet accrued at the time of the settlement is against public policy and conflicts with this Court's decision in *Lawlor v. Nat'l Screen Svc. Corp.*, 349 U.S. 322 (1955), and decisions of other Circuits. That would be reason enough to grant review. But review would be warranted now even if there were no conflict because of the importance of the question. The Eleventh Circuit's decision restrains the nationwide enforcement of the antitrust laws to prevent health insurers from shortchanging physicians—that alone has a huge impact on the national economy. But beyond that, the decision provides a template for future settlements that strip absent class members of future claims without their knowledge. The Court cannot wait for this issue to percolate in the lower courts because, as the AMA's experience illustrates, the threat of contempt sanctions is likely to prevent further appellate court consideration of the issue.

⁷ The *Wellpoint* MDL court later dismissed the RICO and antitrust claims in that case with prejudice. PA 14a n.5.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION WHETHER A RELEASE IN A NATIONAL CLASS ACTION CAN IMMUNIZE FUTURE ANTITRUST VIOLATIONS (AND VIOLATIONS OF OTHER FEDERAL LAWS) IS EXCEPTIONALLY IMPORTANT.

As construed by the courts below, the WellPoint settlement in the *Managed Care* MDL released claims for antitrust and other federal statutory violations that had yet to occur (described as “new overt acts,” PA 26a) unlike more familiar releases of claims for future harm resulting from completed conduct. See, e.g., *Amchem v. Windsor*, 521 U.S. 591, 604 (1997) (settlement of claims for future injury from past asbestos exposure). Moreover, the releases in the *Managed Care* MDL have been invoked to stymie not only antitrust claims accruing after the *Managed Care* MDL settlement, but also claims that are completely unrelated to the original litigation. See Pet. 25. The end result has been to suspend nationwide private antitrust enforcement for physicians harmed by health insurers through the contempt power of a single district judge.

The petition fully explains why the Eleventh Circuit majority’s interpretation of the WellPoint release to include claims for post-settlement conduct is erroneous. Ordinarily, a claim “arises” when it accrues, not when the scheme or conspiracy of which

the claim may be a product was initiated.⁸ That ordinary usage is consistent with other parts of the WellPoint settlement agreement, including the limited (4-year) duration of WellPoint's business practice changes, the absence of language explicitly referring to future conduct found in the release of a different party in the same settlement agreement (see p. 5, *supra*; PA 5a), and the district court's approval of a class notice that conveyed to class members that the claims released were only for services rendered prior to the approval date. See PA 39a-47a (Martin, J., dissenting). Neither the text nor the context allows the release to be read to extinguish future claims—even if the conspiracy to shortchange physicians and insurance subscribers by manipulating UCR rates originally began before the Effective Date.

⁸ The antitrust accrual rule is that “each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.” *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (citation omitted). Moreover, the *Managed Care* MDL did not include damages for Wellpoint's future conduct. “[T]he general rule in private antitrust actions is that the plaintiff may not recover damages arising from acts committed after the filing of the complaint, even when those acts are alleged to be part of a continuing conspiracy or course of conduct.” *Reyn's Pasta Bella v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006) (citation omitted). Damages for the continued manipulation of UCR rates after WellPoint agreed in the *Managed Care* MDL settlement to change its business practices were too speculative to assert. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971).

The petition also shows that the decision below is contrary to public policy because it would allow parties to confer immunity from antitrust law by contract. Pet. 11-15. “[A] statutory right conferred on a private party but affecting the public interest, may not be waived or released if such waiver of release contravenes the statutory policy.” *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 704 (1945) (Fair Labor Standards Act). That principle was entrenched in the common law long before *Brooklyn Savings Bank*. See *Narramore v. Cleveland, C., C., & St. L. Ry. Co.*, 96 F. 298, 302 (6th Cir. 1899) (Taft, J.); Restatement (Second) of Contracts § 195(b) (1981); Restatement of Contracts §§ 574-75 (1932). Unlike the arbitration provision at issue in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2310-11 (2013), the WellPoint release, as interpreted, precludes class members from seeking any remedy for an antitrust violation, even in an individual suit. The lower courts’ interpretation of the WellPoint *Managed Care* MDL settlement “would in effect confer on [WellPoint] a partial immunity from civil liability for future violations.” *Lawlor*, 349 U.S. at 329. Like the argument based on the prior settlement rejected in *Lawlor*, “[s]uch a result” is not consistent with the antitrust laws. *Id.*

The question whether a class action settlement can, in effect, grant a license to commit future antitrust (or other federal statutory) violations is exceptionally important. The Eleventh Circuit’s decision not only obstructs antitrust enforcement in one of the largest and most important parts of the national economy, it also provides a template for future class action settlements. Defendants in class

actions now have an incentive to negotiate for extremely broad releases—especially in settlements like WellPoint’s that require them to change their conduct only for a limited term—because thereafter they can resume their conduct with impunity. One does not have to be a cynic to recognize that immediate monetary recoveries for past wrongdoing will loom larger for class counsel in settlement negotiations than the risk that future violations cannot be challenged.

Class members cannot protect themselves from overbroad releases in settlements. The Eleventh Circuit’s decision makes the reasonable understanding of class members about the scope of the release based on the wording of the class notice irrelevant to its enforcement against them.⁹ Members of a large national class may fail to object or opt-out of a settlement without knowing that their rights to enforce federal law in the future have been bargained away. For example, petitioner Kavali, had never billed for out-of-network care subject to UCR rates prior to the settlement, yet she found herself bound by the settlement with regard to later claims. See Pet. 19-20. Cf. *Amchem v. Windsor*, 521 U.S. at 628 (class action settlement was unfair to class members who had not suffered any harm prior to the

⁹ By contrast, the Third Circuit, recognizing that class members cannot be deemed to have waived claims without clear notice, ruled that “the preclusion language in the . . . class notice and settlement agreement must, in order to avoid due process concerns, be strictly construed against those who seek to restrict class members from pursuing individual claims.” *In re Diet Drugs Prods. Liability Litig.*, 369 F.3d 293, 308 (3d Cir. 2004).

settlement: "Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."); *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001) (permitting class members to sue for injuries that had not occurred prior to settlement because of inadequate representation), *aff'd in relevant part by an equally divided court and vac. in part on other grounds*, 539 U.S. 111 (2003).

The impact of broad release-based immunity for future antitrust violations and the like will be greatest in litigation involving groups with inherently opposing economic interests (like physicians and health insurers with regard to compensation for medical services) in a continuing series of transactions. The same would be true if similar releases in consumer or small business class action settlements were applied prospectively to ongoing relationships with suppliers and providers.

II. REVIEW IS NOW OR NEVER; THE THREAT OF CONTEMPT SANCTIONS IS LIKELY TO COERCE SUBMISSION TO SIMILAR RELEASE-BASED IMMUNITY CLAIMS IN THE FUTURE SO THAT THE PRACTICE WILL PROLIFERATE BEYOND REACH OF APPELLATE REVIEW OR REVIEW BY THIS COURT.

This Court cannot afford to wait for this issue to percolate in the lower courts; there may never be another opportunity to undo the damage caused by the Eleventh Circuit's opinion. WellPoint

successfully opposed and thwarted all of the plaintiffs' efforts to obtain appellate review of the district court's construction of the release save appeal of contempt sanctions. The Eleventh Circuit ruled that it did not have jurisdiction over an appeal from the district court's order construing the release to apply to later-accruing claims and enjoining them; the district court refused to certify the order for interlocutory review under 28 U.S.C. § 1292(b); and the district court dismissed a declaratory judgment action intended to produce an appealable final judgment on the scope of the release and refused to stay the injunction pending appeal. The only available path to review was to incur contempt sanctions, something few plaintiffs are willing to face.

In the case now before the Court, a few associations and individuals risked contempt in order to obtain review, but that calculus will be different from now on in the face of a recent court of appeals precedent expressly affirming the validity of a broad release of future claims. Although other Circuits are not bound by the Eleventh Circuit's divided opinion, and some of them have precedents rejecting prospective waivers of antitrust liability (see Pet. 11-14), few individuals or associations can withstand the coercive pressure of mounting contempt fines during the time required to obtain review. In consequence, district courts that adopt similarly broad constructions of releases, issue similar injunctions and deploy their contempt powers to enforce those release terms can do so without any likelihood of appellate review. Moreover, MDL settlements magnify the power of a single district judge over an

entire industry. To be sure, a district court may *permit* review without contempt, but the record of this case also shows that a court can *prevent* review. The next case may never come because the risks of incurring contempt sanctions are so great.

This Court should grant review now, before the practice enabled by the decision below proliferates. The Court may never have the opportunity again, and the cumulative effect in nationwide class actions including MDL cases on the private enforcement of federal statutory rights is likely to be severe.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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