

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 00-MD-1334-MORENO

IN RE MANAGED CARE LITIGATION

THIS DOCUMENT RELATES ONLY TO
PROVIDER TRACK CASES

CHARLES B. SHANE, M.D., *et al.*,

Plaintiffs,

vs.

HUMANA INC., *et al.*

Defendants

**REPORT AND RECOMMENDATION ON SETTLING
DEFENDANT WELLPOINT'S MOTION TO ENFORCE INJUNCTION**

This matter is before the Court on Settling Defendant WellPoint, Inc.'s Motion to Enforce Injunction Against Physician Plaintiffs¹ in *In re WellPoint, Inc. Out-of-Network "UCR" Rates Litigation* [D.E. 6053]. The Court has considered the motion, the response, the reply, the sur-reply and the pertinent portions of the record. For the reasons discussed below, this Court recommends that WellPoint's Motion be Granted.

¹ The "Physician Plaintiffs" include Drs. Stephen D. Henry, James G. Schwendig, Hooman M. Melamed, and Carmen Kavali. They also include the California Medical Association, the Medical Association of Georgia, the Connecticut State Medical Society, the North Carolina Medical Society, and the American Medical Association ("AMA").

I. BACKGROUND

On April 17, 2000, the Judicial Panel on Multidistrict Litigation (“MDL Panel”) ordered the creation of *In re Managed Care Litigation*, Case No. 1:00-MDL-1334. This MDL case concerned, among other things, reimbursement for health care services by managed care companies and was divided into two tracks: one involving broad claims by health care providers and the other involving broad claims by subscribers to health care plans. The provider track was a class action brought on behalf of all providers who submitted claims to health care companies, including WellPoint and its affiliates and subsidiaries, for the provision of medical services. This class included both physicians and non-physician health care providers, as well as providers with contracts with WellPoint and those without contracts.

The providers alleged that health insurance companies engaged in a conspiracy to inflate profits by systematically denying, delaying, and diminishing payments due to them. The HMOs allegedly effected this scheme through the manipulation of computerized billing programs. Throughout the pendency of this complex class-action litigation, settlements have been reached between numerous providers and several of the insurers. On July 11, 2005, WellPoint reached one such settlement agreement with the physician providers (“WellPoint Settlement Agreement”) [D.E. 4321], which the Court approved on December 22, 2005.² [D.E. 4671].

² On December 31, 2005, the Court issued an Amended Order Approving Settlement Among WellPoint, Inc. and Physicians, Physician Groups and Physician Organization, Certifying Class and Directing Entry of Final Judgment [D.E. 4684]. This Amended Order is collectively referred to herein with the December 22, 2005 Order as the “Final Approval Order.”

The Final Order enjoined class members from filing new lawsuits in which “Released Claims” are asserted against “Released Parties:”

The Releasing Parties are permanently enjoined from: (i) filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding or order in any jurisdiction based on any or all Released Claims against one or more Released Parties; (ii) instituting, organizing class members in, joining with class members in, amending a pleading in or soliciting the participation of class members in, any action or arbitration, including but not limited to a purported class action, in any jurisdiction against one or more Released Parties based on, involving, or incorporating, directly or indirectly, any or all Released Claims, and (iii) filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding or order in any jurisdiction based on an allegation that an action taken by Company, which is in compliance with the provisions of the Settlement Agreement, violates any legal rights of any member of the Class.

See Final Approval Order ¶ 9.³

In early 2009, a collection of physicians, non-physician health care providers, WellPoint subscribers, and medical associations filed multiple class action lawsuits against Wellpoint. In August 2009, these cases were consolidated as a federal multi-district litigation in the Central District of California before the Honorable Phillip S. Gutierrez (“UCR Litigation”).⁴

³ The Eleventh Circuit has affirmed our previous orders enforcing such settlement agreements as this one entered in the MDL. See, e.g., *Thomas v. Blue Cross and Blue Shield Ass’n*, No. 08-15395, 2009 WL 1483522 (11th Cir. May 28, 2009); *Klay v. All Defendants*, No. 08-12906, 2009 WL 179617 (11th Cir. Jan. 27, 2009).

⁴ The ten lawsuits consolidated in the UCR Litigation were: (1) *Roberts v. UnitedHealth Group, Inc., et al.*, No. 09-cv-1886 (C.D. Cal.); (2) *Am. Med. Ass’n, et al. v. WellPoint, Inc.*, No. 09-2039 (C.D. Cal.); (3) *J.B.W., etc. v. UnitedHealth Group, Inc., et al.*, No. 09-cv-2488 (C.D. Cal.); (4) *Higashi v. Blue Cross of California*, No. 09-cv-4223 (C.D. Cal.); (5) *N. Peninsula Surgical Ctr., L.P. v. WellPoint, Inc., et al.*, No. 09-cv-4510

Following the consolidation, Plaintiffs filed their First Consolidated Amended Complaint (“Complaint”) that asserts claims against various defendants, including WellPoint, on behalf many classes and subclasses of physicians. Specifically, the Physician Plaintiffs assert fifteen causes of action: (i) violation of Section 1 of the Sherman Antitrust Act 15 U.S.C. § 1; (ii) various violations of the Employee Retirement Income Security Act (“ERISA”) 29 U.S.C. § 1002, 1104 & 1132; (iii) violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) 18 U.S.C. § 1962; (iv) breach of contract claims; (v) breach of implied covenant of good faith and fair dealing; (vi) violations of California’s unfair and deceptive trade practices statutes; (vii) violations of New York’s General Business Law § 349; (viii) violations of California’s Cartwright Act; and (ix) civil conspiracy. *See* Complaint ¶¶ 359-483 [D.E. 6053-1].

All causes of action in the California UCR Complaint stem from WellPoint’s alleged failure to reimburse the non-participating providers the contractually obligated “usual, customary and reasonable” (“UCR”) amount for the services rendered by them. *See* Complaint ¶¶ 10-12. According to the Complaint, WellPoint allegedly utilized database called Ingenix in order to calculate the inaccurate and improper UCR amounts due to plaintiffs. The allegations further state that WellPoint used and continues to use the Ingenix database as the primary source of data upon which it

(C.D. Cal.); (6) *Pariser v. WellPoint, Inc.*, No. 09-cv-4783 (C.D. Cal.); (7) *Unmacht v. WellPoint, Inc.*, No. 09-cv-5863 (C.D. Cal.); (8) *Samsell, et al. v. WellPoint, Inc., et al.*, No. 09-cv-6079 (C.D. Cal.); (9) *Am. Podiatric Med. Ass’n, et al. v. WellPoint, Inc.*, No. 09-cv-6725 (C.D. Cal.); and (10) *Bernard, et al. v. WellPoint, Inc.*, No. 09-cv-6726 (C.D. Cal.).

bases its UCR determinations, even though WellPoint knows that it cannot and should not be used for that purpose. *See* Complaint ¶ 69. The Complaint also alleges that WellPoint committed, and conspired to commit with its direct competitors, numerous violations of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* These antitrust violations allegedly stem from WellPoint's price-fixing with regard to paying reasonable and customary rates for non-party transactions and from WellPoint's manipulation of the Data Market in order to create below-market UCRs. *See* Complaint ¶ 79.

In light of the Final Approval Order, and the undisputed fact that all named individual Provider Plaintiffs in the UCR Litigation did not opt out of the class,⁵ WellPoint moves this Court to enforce the settlement against these Provider Plaintiffs and compel the withdrawal of all of their claims in the UCR Litigation. WellPoint argues that all of the claims, including the RICO and antitrust causes of action, arose prior to the date of the Final Approval Order and are, therefore, barred by the settlement agreement.

Provider Plaintiffs responded to the pending motion opposing the enforcement of the judgment. Plaintiffs contend that their claims are not Released Claims because they arose after the WellPoint Settlement Agreement became final. Namely, Plaintiffs argue that: (i) because the Complaint alleges a series of new injuries occurring after the effective date of the Final Approval Order, the alleged antitrust, RICO, and ERISA

⁵ Although the American Medical Association is not a Signatory Medical Society, the Complaint states that it is asserting claims on behalf of its physician members who are Settlement Class members. *See* Complaint ¶ 35.

violations, as well as, contractual claims arose only after 2006 and were not released by the settlement and (ii) WellPoint's invocation of general release to prospectively bar a private antitrust action arising from post-release violations is against public policy. According to Plaintiffs, each and every time an individual physician is harmed by WellPoint's alleged under-reimbursement subsequent to the effective date of the settlement agreement, a new cause of action arose that is not subject to the release.

II. ANALYSIS

The language of the Court's Final Approval Order clearly prohibits Class members from initiating lawsuits against Released Parties for any claims released by the Settlement. This Court, therefore, must grant Settling Defendant's motion if three conditions exist: (i) the Provider Plaintiffs are class members; (ii) WellPoint is a Released Party under the Settlement; and (iii) the claims at issue in the UCR Litigation are Released Claims.

A. Provider Plaintiffs are Class Members

The Final Approval Order permanently certified a settlement class composed of the following members:

Any and all Physicians, Physicians Groups and Physicians Organizations who provided Covered Services to any Plan Member or any other individual enrolled in or covered by a plan offered or administered by any Person named as a defendant in the Complaints or by any of their respective current or former Subsidiaries or Affiliates, in each case from August 4, 1990 through the Preliminary Approval Date.

See Final Approval Order ¶ 2. It is undisputed that none of the Plaintiffs opted out of the settlement, and are therefore class members bound by the terms of the Final Approval Order. Furthermore, with the exception of the AMA, neither of the named

Provider Plaintiffs, both individual and associational, disputes that it is subject to the settlement agreement.⁶

B. Defendant is a Released Party

It is also undisputed that the Final Approval Order includes WellPoint as a Released Party.

C. All of Provider Plaintiffs' Claims are Released Claims

A litigation release of claims is a contract, thus it is construed according to the normal rules of contract interpretation. *See, e.g., V & M Erectors, Inc. v. Middlesex Corp.*, 867 So. 2d 1252, 1253-54 (Fla. 4th DCA 2004). When interpreting a contract under Florida law,⁷ the Court is guided first by the language of the documents itself. *See Dows v. Nike, Inc.*, 846 So. 2d 595, 601 (Fla. 4th DCA 2003). Where the terms of a contract are clear and unambiguous, the Court may not consider parol evidence but instead must determine the intent of the parties from the four corners of the document. *Id.* Furthermore, when the terms are unambiguous, the language itself is the best evidence of the parties' intent and its plain meaning controls. *Acceleration Nat'l Serv. Corp. v. Brickell Fin. Servs. Motor Club, Inc.*, 541 So. 2d 738, 739 (Fla. 3d DCA 1989).

The language of the Court's Final Approval Order and the Settlement Agreement clearly prohibits Class members from initiating claims against "Released

⁶ With regard to AMA's claims, WellPoint's motion only seeks to enforce the injunction against AMA's claims brought on behalf its members who were Released Parties under the Settlement Agreement. The motion does not, however, challenge AMA's claims brought on its own behalf that allege direct injury to AMA.

⁷ The Settlement Agreement contains a Florida Choice-of-Law provision. *See* Settlement Agreement at 85 [D.E. 4321].

Parties” which arise out of “or in any way [are] related to any of the facts, acts, events, transactions, occurrences, courses of conduct, representations, omissions, circumstances or other matters referred to in the Actions.” See Final Approval Order

¶ 5. The Settlement Agreement defines “Released Claims” as:

any and all causes of action, judgments, liens, indebtedness, costs, damages, obligations, attorneys’ fees, losses, claims, liabilities and demands of whatever kind or character, arising on or before the Effective Date, that are, were or could have been asserted against any of the Released Parties 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 Actions*, whether any such Claim was or could have been asserted by any Releasing Party on its own behalf or on behalf of other Persons, or to the business practices that are the subject of § 7. This includes, without limitation and as to Released Parties only, any aspect of any Fee for Service Claim submitted by any Class Member to Company [WellPoint], and any claims of any Class Member *related to or based upon a Capitation agreement between Company [WellPoint] and any Class Member or other person or entity, or the delay, nonpayment or amount of any Capitation payments by Company [WellPoint], and any allegations that other defendants in the Actions and/or Company [WellPoint] have conspired with, aided and abetted, or otherwise acted in concert with other managed care organizations, other health insurance companies, Delegated entities and/or other third parties with regard to any of the facts, acts, events, transactions, occurrences, courses of conduct, representations, omissions, circumstances or other matters referred to in the Actions*, or with regard to Company’s liability for any other demands for payment submitted by any Class member to such other managed care organizations, health insurance companies, Delegated Entities and/or third parties.

See WellPoint Settlement Agreement § 13.1(a) (emphasis added). Because the terms of the Settlement Agreement prohibit the Provider Plaintiffs from filing these “Released Claims,” we need to determine if the claims are “in any way related to any of the facts, acts, events, transactions, occurrences, courses of conduct, representations, omissions, circumstances or other matters” that were subject of the prior litigation.

As Defendant correctly points out, the Complaint asserts RICO and antitrust claims based on a purported conspiracy in which WellPoint allegedly agreed with other health insurers to use a third-party database to determine the UCRs. As in the MDL, Providers Plaintiffs allege in their Complaint that the conspiracy enabled WellPoint and its purported Co-Conspirators to systematically under-compensate non-participating providers for medical services they rendered. Namely, Plaintiffs claim that WellPoint and its Co-Conspirators rely on a database maintained by a third party, Ingenix, Inc., which Plaintiffs allege does not accurately or properly determine the UCRs:

105. In October 1998, the members of HIAA [Health Insurance Association of America] (including WellPoint) *agreed* to sell the PHCS to Ingenix for an undisclosed amount. This was part of a plan by Ingenix and its parent company, UnitedHealth, to acquire a dominant position in the market for the provision of data services used to calculate UCR that included over 50 acquisitions.

108. Ingenix, upon purchasing the PHCS, also entered into a Confidentiality Agreement mandating that it shield from disclosure the identity of entities (*i.e.*, Defendants and Insurer Conspirators in this action) that had submitted or would submit information for use in the database.

109. By and through the creation and eventual domination of the Data Market by Ingenix, Defendants and the Conspirators *conspired and agreed* to create, expand, continue, promote and use the Ingenix Database to control and set False UCRs among and between purported horizontal competitors in the health insurance market (including WellPoint and the Insurer Conspirators) with the ultimate aim of reimbursing ONS [Outside Network Services] below market levels.

133. WellPoint and the Insurers Conspirators' scheme to manipulate UCRs for the purpose of under-reimbursing for ONS is predicated, in part, on keeping the Ingenix Database, and its inherent flaws, a complete secret from the subscribers and providers. As a result, Defendants and its Insurer Conspirators actively conceal the true UCRs, knowing the success of the scheme will be jeopardized if true UCRs are known to the

healthcare-purchasing public.

279. The WellPoint-Ingenix Enterprise was formed in 1988, at the time of the sale of the PHCS database by HIAA to Ingenix.

283. The WellPoint-Ingenix Enterprise was at all relevant times a continuing unit involving WellPoint, UnitedHealth, and Ingenix functioning with a common purpose of reducing the price paid for ONS, and increasing the profits of Enterprise participants and the Insurer Conspirators. The Enterprise described above was utilized to create a mechanism or vehicle by which Defendants could reduce payments to Plaintiffs and the Classes for ONS through the use of flawed and invalid data that could not be challenged effectively. In particular, as described herein, the Enterprise was used to create and administer what appeared to be an appropriate and unassailable database which reported actual charge data; the Ingenix Database was designed to appear valid as a basis for UCR when, in fact, it is and was, invalid.

See Complaint ¶¶ 105, 108, 109, 133, 279 and 283.

Careful analysis of the allegations raised in the UCR Litigation Complaint shows that the RICO and antitrust claims clearly fall within the scope of Released Claims under the Final Approval Order because they all relate to WellPoint's conspiracy to systematically under-compensate the non-participating providers. Furthermore, all of Plaintiffs' RICO and antitrust claims are based on allegations that WellPoint "conspired with, aided and abetted, or otherwise acted in concert with other managed care organizations, other health insurance companies, and/or other third parties" to underpay reimbursements due to non-participating providers.

Plaintiffs essentially do not dispute that their claims are "related to" or "based on" the "facts, acts, events, transactions, occurrences" that were subject of the MDL. Plaintiffs, however, contend that the RICO and antitrust claims did not arise before the Final Approval Order was entered by the Court. According to Plaintiffs, because the Complaint alleges a continuing antitrust conspiracy, a separate cause of action

arises each time the plaintiff is injured. As Plaintiffs' claims are only for injuries that occurred after the Final Approval Date, those claims did not arise until after that Date, and no injunction is warranted. Likewise, under the "separate accrual" doctrine, a separate RICO claim accrues separately for each new and independent injury to his business or property caused by violation of RICO. In turn, because Plaintiffs did not suffer compensable injury from WellPoint's commission of the predicate acts alleged in the Complaint before the Final Approval Date, these RICO claims did not accrue until after the Final Approval Date. Therefore, these claims were not released by the settlement agreement in the MDL Litigation.

We, however, disagree and find these arguments to be totally misplaced as they ignore the material terms of the broad release language found in the MDL Settlement Agreement.

Plaintiffs do not dispute that they were aware well before entering into the Settlement Agreement about WellPoint's utilization of the Ingenix Database in order to allegedly engage in their industry-wide conspiracy to underpay providers. Instead of opting out of the Class and deciding to pursue their claims individually, the Provider Plaintiffs decided to agree to broadly release their claims. In exchange, Provider Plaintiffs received substantial payments from WellPoint and changes to its business practices on a prospective basis. These measures were expected to cost WellPoint over two hundred fifty million dollars. *See* WellPoint Settlement Agreement § 7.31.

Indeed, Section 7 of the Settlement Agreement expressly addresses WellPoint's business practice regarding the determination of the UCR rates. It states:

Company [WellPoint] agrees that, to the extent it uses Physician charge data to determine the *usual, reasonable and customary* amount to be paid for services performed by Non-Participating Physicians, it will not use any internal claims database that (i) systematically under-reports the number of claims paid for procedures in the geographic area used by Company [WellPoint] to determine such amount; (ii) eliminates or excludes the highest charges for paid claims for any procedures in the geographic area used by Company [WellPoint] to determine such fees, provided, however, that such charges may be excluded if Company [WellPoint] excludes an equivalent number or percentage of the lowest charges for such procedures, or reasonably determines that any such charges are the result of erroneous data; (iii) includes charges for procedures performed in a geographic area other than the one used by Company [WellPoint] to determine such amount, provided, however, that such charges may be considered where Company [WellPoint] determines there is an insufficient number of charges in the relevant geographic area to reasonably determine a usual, reasonable and customary amount; (iv) calculates the usual, reasonable and customary amount based upon fees paid under a discounted fee schedule rather than billed charges; and (v) lacks quality controls sufficient to reasonably test the validity of the data included in the database.

See WellPoint Settlement Agreement § 7.14(d) (emphasis added). Clearly, part of the settlement consideration on behalf of WellPoint included changes in its practices regarding the determination of the UCRs.

Moreover, the Settlement Agreement also contemplates and addresses Non-Participating Physicians' appeals of WellPoint's UCR rates:

At least until the Termination Date, if a Non-Participating Physician initiates a dispute using Company's [WellPoint's] internal dispute resolution procedures over how Company [WellPoint] has determined the usual, reasonable and customary amount for a given health care service or supply, and, consequently, over how Company [WellPoint] has computed the amount payable for that health care service or supply, Company [WellPoint] shall disclose to the Non-Participating Physician initiating the dispute the general methodology, including the percentile of included charge data on which the maximum allowable amount is based, and source of data used by Company [WellPoint] to determine the usual, reasonable and customary amount for that service or supply.

See WellPoint Settlement Agreement § 7.14(c).

If it is Plaintiffs' position that WellPoint has not complied with any of the terms of the Settlement Agreement, Plaintiffs have at their disposal the agreement's very detailed and specific enforcement mechanism. *See generally* WellPoint Settlement Agreement § 12. This mechanism provides that any Class Member, such as any of the Provider Plaintiffs in this case, "who contends that Company [WellPoint] has materially failed to perform specific obligations under § 7 of this Agreement, and that such Class Member is adversely affected by Company's failure to comply with such specific obligations under § 7" may file a complaint with the Compliance Dispute Facilitator. *See* WellPoint Settlement Agreement § 12.2(a). Plaintiffs may not, however, get another bite at a very devoured apple if they are not happy with consideration they received in exchange for their broad release.

The fact that the Complaint narrows the Provider Plaintiffs Class to only those that rendered services to WellPoint's members after the September 29, 2006 effective date of the Settlement Agreement does not alter our conclusion. Rather, taken as a whole, the allegations listed in the Complaint clearly relate to the alleged conspiracy of WellPoint and other managed care institutions to underpay providers for their services. Therefore, as we previously stated, claims based on such allegations fall within the scope of the Released Claims under the Settlement Agreement.

A recent antitrust case arising in a different factual context illustrates the point. In *Madison Square Garden, L.P. v. National Hockey League*, No. 07-CV-8455(LAP), 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008), the court barred antitrust claims that plaintiff argued arose from post-Release conduct. In that case, the owner of the New York Rangers professional hockey club claimed that the National Hockey League had

become an illegal cartel that prevented members clubs from competing for sponsors and fans. The court dismissed a large portion of plaintiff's case against the league because it found the claims to be barred by a 2005 consent agreement in which the company promised not to sue the NHL or related entities for antitrust violations. The Release in that case provided that MSG "forever releases and discharges" the league "from any and all claims . . . upon any legal or equitable theory" which "exist as of the date of execution . . . relating to, or arising from, any hockey operations or any NHL activity, including without limitation, the performance, presentation or exploitation of any hockey game" *Id.* at *6. The court found that although the MSG allegations characterized its claims as being based on post-Release conduct, the Complaint itself contained no allegations of post-2005 conduct apart from (1) the enforcement of pre-existing policies and (2) the 2006 extension of the licensing agreement that had been in place since 1994. *Id.* The court reasoned that "because this very antitrust 'claim' 'exist[ed]' at the time of the release, and because the only allegations in the Complaint demonstrate[d] that the League continued its enforcement of pre-existing policies," it had "little trouble concluding that the Release evidence[d] that the 'parties had in mind a general settlement of all accounts up to that time.'" *Id.*

Indeed, based on this very reasoning, in November 2009, we issued two Report and Recommendations in which we concluded that the RICO and antitrust claims were barred under the broad release of a similar *In re Managed Care* settlement agreement. See Report and Recommendation on Settling Defendant CIGNA's Motions to Enforce Injunctions (AMA, Dr. Shiring & Dr. Mullins), *In re Managed Care Litig.*, 00-MD-1334 (S.D. Fla. Nov. 5, 2009) [D.E. 6022] and Report and Recommendation on Settling

Defendant CIGNA's Motion to Enforce Injunction (Dr. Higashi), *In re Managed Care Litig.*, 00-MD-1334 (S.D. Fla. Nov. 5, 2009) [D.E. 6023]. Both R&Rs were adopted by Judge Moreno. [D.E. 6032 & D.E. 6033].

Subsequently, Plaintiffs appealed both Orders. The Eleventh Circuit, however, dismissed both appeals due to a lack of appellate jurisdiction. In doing so, the court of appeals stated that, aside from not being appealable as "final orders" pursuant to 28 U.S.C. § 1291, both orders were also "not appealable under 28 U.S.C. § 1292(a)(1) because the court did not so blatantly misinterpret the settlement injunctions as to constitute a modification of the injunctions." *Klay (AMA et al.) v. All Defendants*, No. 09-16261 (11th Cir. June 16, 2010) (per curiam) (Barkett, Hull, and Martin, Circuit Judges); *Klay (Higashi) v. All Defendants*, No. 09-16302-E (11th Cir. Apr. 21, 2010) (by the Court) (Tjoflat, Barkett, and Wilson, Circuit Judges); cf. *Doctors Health, Inc. v. Aetna*, 605 F.3d 1146, 1149 n.1 (11th Cir. 2010) (asserting appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) over a district court's injunctive order barring plaintiff from pursuing its contractual claim in the bankruptcy court because "[b]y its own terms, the order grant[ed] a new injunction against Doctors Health. And, even if the order is considered one clarifying the injunction issued by the district court . . . , it is a modification of that existing injunction.") (per curiam) (Tjoflat, Cox, Circuit Judges, and Korman, District Judge).

Next, Plaintiffs argue their ERISA and contractual claims are not barred because these claims, unlike RICO and antitrust claims, are not conspiracy-based. According to Plaintiffs, following the Effective Date of the Settlement Agreement, every time an individual physician was underpaid due to WellPoint's improper UCR

calculation a new cause of action arose that was not subject to the MDL settlement. Once again, however, Plaintiffs ignore the broad and sweeping nature of the Settlement Agreement's release. Plaintiffs' ERISA and contractual claims asserted in the UCR Litigation all pertain to WellPoint's practices regarding the fee-for-service claims and the calculation of the UCRs. The very same practices and WellPoint's alleged improper use of the Ingenix database were expressly addressed in the *In re Managed Care Complaints*:

120. During the past ten years the conspiracy was conducted through and implemented by:

...

(b) the development and utilization of automated and integrated claims processing and other systems such as those generated by McKesson HBOC, Ingenex [sic], and FACTS Services, Inc., and the configuration and use of such systems to similarly deny, diminish and delay payments to physicians.

127. Based upon Plaintiffs' current knowledge, the following persons constitute a union or group of individuals associated in fact that Plaintiffs refer to as the "Managed Care Enterprise" ("MCE"): (1) Defendants; (2) other health insurance companies not named as defendants herein, including Health Care Service Corporation and the Regence Group; (3) Milliam & Robertson and InterQual, third party entities which promulgate purported patient care guidelines; (4) HBOC McKesson, Ingenex [sic], Facts Services and other third party entities which develop claims processing systems or components; (5) Protocare, Inc. and other third party entities Defendants hire to review and wrongfully deny claims; (6) American Association of Health Plans and the Health Insurance Association of America, Defendants' trade association; (7) MedUnite, an entity created by Defendants and their trade association to facilitate claims processing; and (8) the Coalition for Affordable Quality Healthcare.

130. In order to successfully retain monies owed physicians in the manner set forth above, Defendants need a system that allows them to manipulate and control reimbursements to physicians and conceal the manner in which that is done. The MCE provides Defendants with that

system and ability, and their control of participation in it is necessary for the successful operation of their scheme. The Defendants control and operate the MCE as follows:

...

(c) By engaging and paying HBOC McKesson, Ingenex [sic] and Facts Services to develop automatic systems for editing and manipulating the claims information contained in the HCFA/CMS 1500 form.

See Providers Pls. 2d Amend. Consol. Class Action Compl. ¶¶ 120(b), 127, and 130(c) [D.E. 1607]. It is evident that Plaintiffs were well aware of WellPoint's practices when they entered into the Settlement Agreement in 2005. As previously noted, *changes to WellPoint's UCR and fee-for-service calculations were part and parcel of the settlement's consideration*. In other words, as indicated by the broad release language of the Settlement Agreement, Plaintiffs have released all of their claims based on WellPoint's alleged improper UCR calculations in exchange for detailed changes in WellPoint's business calculations outlined in Section 7. Agreement to such an extremely broad release using broadly inclusive language is clearly deliberate, and typical of class actions releases. *See, e.g., Wal-Mart Stores, Inc. v. Ivsu U.S.A. Inc.*, 396 F.3d 96, 106 (2d Cir. 2005).

Equally unpersuasive is Plaintiffs' reliance on the recent decision of *Doctors Health, Inc. v. Aetna*, 605 F.3d 1146 (11th Cir. 2010), which was briefly discussed earlier in this Report and Recommendation. In that case, Doctors Health, Inc., an HMO plan manager, entered into a three-year contract with NYLCare, a subsidiary of Aetna, to manage its Medicare HMO plan in Maryland, Virginia, and the District of Columbia. *Id.* at 1147. Shortly thereafter, NYLCare decided that it would discontinue the Medicare HMO plan in Doctors Health's geographic region and

informed Doctors Health that, as of January 1, 1999, there would be no Medicare HMO plan for it to manage. *Id.*

In November 1998, Doctors Health filed a Petition for Relief under Chapter 11 of the United States Bankruptcy Code. *Id.* NYLCare submitted a proof of claim in the bankruptcy case which Doctors Health refused to pay. *Id.* Instead, the trustee filed an adversary action against NYLCare, alleging that NYLCare had breached its Medicare HMO management contract with Doctors Health and had caused Doctors Health damages in excess of NYLCare's claim in the bankruptcy case. *Id.*

In May 2003, while the bankruptcy case was still pending, Aetna (along with its subsidiary NYLCare) entered into a settlement with the *Shane* provider plaintiff class in *In re Managed Care Litigation*, Case No. 1:00-MDL-1334, the same MDL that is the source of the WellPoint's motion currently before us. *Id.* at 1148. The language of Aetna's Settlement Agreement was almost identical to the one at issue here as it released the Defendant from all claims "arising on or before the Preliminary Approval Date, that are, were or could have been asserted against any of the Released Parties based on or arising from the factual allegations of the Complaint." *Id.*

In April 2005, the bankruptcy court issued its ruling in the adversary action awarding Doctors Health \$21.3 million in damages. *Id.* On June 20, 2008, Aetna filed a Motion to Show Cause in this Court seeking an order enforcing the release in the Agreement as a bar to the bankruptcy court's judgment. *Id.*; see also Aetna's Mot. for Contempt and Supp. Mem. for an Order Requiring Doctors Health and its Attorneys to Show Cause [D.E. 5877]. Having concluded that the claim that Doctors Health had

pursued against NYLCare in the bankruptcy proceeding was a released claim, we granted Aetna's motion. See Order Enjoining Doctors Health [D.E. 5960].

The Eleventh Circuit, however, vacated the injunction after finding that “[t]he claim pursued by Doctors Health in the adversary action share[d] no factual basis with the *Shane* complaint.” *Doctors Health, Inc.*, 605 F.3d at 1151. The court also pointed out that “[w]hile *Shane* alleged that the managed-care companies underpaid providers of medical services, the breach of contract claim resolved in the adversary action hinged on Doctors Health’s allegation that NYLCare breached its Medicare HMO management agreement with Doctors Health by failing to renew its Medicare agreements with the government and then prematurely terminating the Medicare HMO management agreement it had with Doctors Health.” *Id.*

Our Circuit also emphasized the “[t]he release language is clear; it concerns only claims that could have been asserted ‘based on or arising from the factual allegations of the [*Shane*] Complaint.’” *Id.* at 1152. Thus, the court concluded that “[t]he only reasonable reading of this clause is that the scope of claims released is limited to those claims that could have been asserted based on arising out of the factual allegations of the [Second Amended Consolidated Class Action Complaint in] *Shane*.” *Id.* Consistent with this language, we conclude here that the crux of Provider Plaintiffs’ allegations in the UCR Litigation is “based on” and “arise” out of the allegations listed in the *Shane* Complaint that is subject of the Settlement Agreement. Hence, *Doctors Health* fully supports our decision.

Significantly, in support of their argument, Provider Plaintiffs rely on numerous cases that concern the *res judicata* effect of an earlier judgment, rather than the *res*

judicata effect of a settlement agreement. This distinction, however, is significant. Unlike the doctrine of *res judicata* in situations involving a previously litigated case, the *res judicata* effect of a settlement agreement and a judgment entered pursuant to a settlement agreement “should not be determined by the claims specified in the original complaint, but instead by the terms of the Settlement Agreement, as interpreted according to traditional principles of contract law.” *Norfolk S. Corp. v. Chevron U.S.A., Inc.*, 371 F.3d 1285, 1289 (11th Cir. 2004). Here, the WellPoint Settlement Agreement expressly releases any and all claims that are “in any way related to . . . matters referenced [*In re Managed Care*] Actions,” as well as any allegations that WellPoint “conspired with . . . other health insurance companies . . . with regard to any of the . . . matters referred to in the [*In re Managed Care*] Actions.” See Final Approval Order ¶ 5. Because the Provider Plaintiffs’ claims fall squarely within this unambiguous release language, they are enjoined.

Moreover, another recent decision by the our Circuit also supports our broadly preclusive interpretation of the WellPoint Settlement. In *Health Care Serv. Corp. v. Kolbusz*, 594 F.3d 814 (11th Cir. 2010), the Eleventh Circuit considered almost identical release language in a settlement agreement that resolved claims against a number of WellPoint’s former co-defendants in the *Love v. Blue Cross and Blue Shield Ass’n* litigation. The court held that the “broad language” in the release encompassed the plaintiff’s claims even though those precise claims had not been asserted in *Love*. The court reasoned:

It is irrelevant that [the plaintiff’s] claims depend on a different legal theory than the claims asserted in the class action or require [the

plaintiff] to prove matters in addition to or different from the claims asserted in the class action.

Id. at 822. The court further explained:

Under the settlement agreement entered in the class action, the relevant inquiry for determining whether a claim is released is not whether the acts giving rise to the complaint occurred after the class action was filed or the settlement agreement was entered, but whether they occurred after the effective date of the settlement agreement.

Id. Finding that the plaintiff's claims in *Kolbusz* arose "from acts that occurred before the effective," the Eleventh Circuit held that the plaintiff's claims were barred by the *Love* Settlement Agreement and that the district court had abused its discretion in denying Health Care Service Corporation's motion to enforce the settlement agreement with respect to those claims. *Id.* Similarly here, all of the Physician Plaintiffs' claims arose "from acts that occurred before the effective date" of the Wellpoint Settlement and are, similarly, barred.

Lastly, Plaintiffs contend that WellPoint seeks to use a general release to bar prospectively a private antitrust action arising from subsequent antitrust violations. On its face, however, the Release does not attempt to release claims for future violations; it expressly discharges only the claims that Plaintiffs may have against WellPoint "or could have been asserted by or on behalf of any or all Class Members" against WellPoint "which arise prior to Final Approval" of the Settlement Agreement. In other words, the Release only applies to claims that relate to the course of conduct that originated before the date of Final Approval by the Court of the Settlement Agreement. In no way does the Release immunize WellPoint from liability against new RICO, antitrust or contractual violations that arise from a brand new set of events and

course of conduct than the one settled in the MDL Litigation. The Release in the present case is different, for example, from the release in *Lawlor v. Nat'l Chrysler-Plymouth, Inc.*, 349 U.S. 322 (1955), where the Supreme Court refused to give a previous settlement agreement *res judicata* effect when it would have forever extinguished the plaintiffs' future antitrust claims for *disparate types of anti-competitive conduct* that were not contemplated by the parties' settlement in the earlier antitrust litigation. *Id.* at 324-28; *see also Mktg. Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1021-23 (S.D. Tex. 1972) (release could "not bar the assertion . . . of any post-release causes of actions" challenging "renewed monopolistic activities by the defendants" but also noting that "[n]o one would reasonably expect the consequences of pre-release conduct to cease as of the day of the release, and such damages must certainly have been contemplated by the parties.").

The problem that Provider Plaintiffs have in this case is that the claims at issue being prosecuted in the UCR Litigation are based on conspiratorial conduct, practices and "chain of events" that took place long before the execution and approval of this Settlement Agreement. A different result must thus follow here. As Judge Preska points out in her *National Hockey League* decision, considerable caselaw stands for the proposition that public policy considerations differ when the only "prospective" application of the release in question is the continued adherence to a pre-release restraint on trade. *See also MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 161 F.3d 443, 448 (7th Cir. 1998) (taking a functional approach to the question of enforceability, the court found that the conduct "clearly based" on pre-release conduct and thus enforced the release, while acknowledging that "new, post-release agreement"

in restraint of trade may be actionable, but mere “continued adherence” to an alleged pre-released agreement” in restraint of trade could not give rise to a viable claim); *Hunter Douglas, Inc. v. Comfortex Corp.*, No. 98-CV-0479, U.S. Dist. LEXIS 10906, at *19-21 (N.D.N.Y. Mar. 11, 1999) (release barred a claim challenging ongoing practices that had “not been altered materially since the parties executed [a release]”); *Record Club of Am., Inc. v. United Artists Records, Inc.*, 611 F. Supp. 211, 217 n.8 (S.D.N.Y. 1985) (enforcing a release of an antitrust claim because “all of the harm alleged flows from and is related to the terms of conditions [of the release]” and was merely the “continuing effect” of pre-release conduct) (emphasis added).

Furthermore, public policy strongly favors the pretrial settlement of class action lawsuits. MDL complex class action litigation, like the *In re Managed Care Litig.*, “can occupy a court’s docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive.” *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). “The Southern District of Florida has made it clear that public policy strongly favors the enforcement of settlement agreement in all types of litigation.” *Baratta v. Homeland Housewares, LLC*, No. 05-cv-0187, 2007 WL 2668585, at *2-3 (S.D. Fla. June 14, 2007) (citing *Sea-Land Serv., Inc. v. Sellan*, 64 F. Supp. 2d 1255, 1259 (S.D. Fla. 1999)). Accordingly, any “consideration[] of a settlement agreement must commence with an understanding that compromise of disputed claims is favored by the Court and will be enforced if at all possible.” *Id.* (citing *Reed By & Reed Through Reed v. United States*, 717 F. Supp. 1511, 1515 (S.D. Fla. 1988); *Cia Anon Venezolana de Navegacion v. Harris*, 374 F.2d

33, 35 (5th Cir. 1967)).

Therefore, we conclude that, because Provider Plaintiffs' claims asserted in the UCR Litigation are related to claims settled by the Settlement Agreement that arose prior to the entry of this Court's Final Approval Order, they are Released Claims and Plaintiffs should be enjoined from prosecuting them in the California District Court.

III. CONCLUSION

Based on the foregoing, it is hereby **RECOMMENDED** that:

1. WellPoint's Motion to Enforce Injunction Against Physician Plaintiffs [D.E. 6053] should be **GRANTED**.

2. WellPoint's Motion to Enforce Injunction Against the American Medical Association [6053] from asserting claims on behalf of its physician members who are Settlement Class members should be **GRANTED**.

4. Plaintiffs Drs. Stephen D. Henry, James G. Schwendig, Hooman M. Melamed, Carmen Kavali, California Medical Association, Medical Association of Georgia, Connecticut State Medical Society, North Carolina Medical Society, and American Medical Association, should have twenty (20) days from the date of the Court's non-final Order to withdraw all their claims against Settling Defendant WellPoint asserted in *In re WellPoint, Inc. Out-of Network "UCR" Rates Litigation*, Master File No. MDL 09-2074, except as to those claims excepted herein. If the claims are not withdrawn and/or dismissed, the Court should then Order that Plaintiffs be deemed to be in contempt of court, at which point a hearing should be scheduled to determine the appropriate remedy before entry of a final order of contempt.

