

# onpoint


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## INGENIX REGULATORY & CLASS ACTION LAW SUITS

The New Tidal Wave of Managed Care Litigation

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Just as the nation's health insurers were optimistically proclaiming the resolution of the *Shane* and *Thomas/Love* multidistrict provider class actions<sup>1</sup> and reforming their business practices to accommodate a new era of transparency, the industry finds itself besieged with another wave of regulatory and class action lawsuits filed by both providers and *patients*. At the heart of these lawsuits is the industry's use of allegedly flawed databases (licensed from Ingenix, Inc., a wholly-owned subsidiary of UnitedHealth) to unfairly discount the fair market reimbursement rates for medical services rendered by out of network ("ONET") providers.<sup>2</sup> This article provides an overview of: (1) the New York Attorney General's investigation and findings with respect to the health insurance industry's ONET reimbursement practices; (2) what impact the Ingenix regulatory investigation and settlements will have on managed care class action litigation; and (3) interim measures and alternative ONET reimbursement methodologies health insurers may adopt in the face of the ONET reimbursement legal challenges. Lastly, this article recommends that health insurers review with their insurance brokers the terms and conditions of their managed care errors and omissions liability



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Attorney General Andrew M. Cuomo




program to ascertain the covered and uncovered aspects of exposure emanating from the ONET reimbursement related litigation.

### **New York Attorney General's Investigation and Findings Concerning The Health Insurance Industry's Use of the Ingenix Databases**

During 2007 and 2008, Andrew M. Cuomo initiated an industry-wide investigation into allegations that health insurers unfairly saddle consumers with too much of the cost of ONET health care. According to the Attorney General, seventy percent (70%) of insured working Americans pay higher premiums for insurance plans that allow them to use out-of-network doctors.<sup>3</sup> In exchange, insurers pay up to eighty percent of the “usual, customary, and reasonable” (“UCR”) rate of the out-of-network expenses, and consumers are responsible for paying the balance of the bill. In order to determine the UCR rate, a number of insurers rely on the data and schedules provided by Ingenix to assess how much the same or similar medical services would typically cost, generally taking into account the type of service and geographical location.<sup>4</sup> Attorney General Cuomo’s investigation concerned allegations that the Ingenix Databases intentionally skewed UCR rates downward through faulty data collection, poor pooling procedures, and the lack of audits. In February 2008, the NY Attorney General served subpoenas to sixteen (16) health insurance companies, including some of the largest such as Aetna, UnitedHealth, CIGNA, and Wellpoint, requesting documents which reflect how each company computes UCR reimbursement rates for out of network care.<sup>5</sup>

After more than a year-long investigation, in January 2009, Attorney General Cuomo concluded that “The structure of the out-of-network reimbursement system is broken. The system that is meant to reimburse consumers fairly as a reflection of the market is instead wholly owned and operated by the industry.”<sup>6</sup> Specifically, the Attorney General found that “UnitedHealth has a conflict of interest in owning and operating the Ingenix Database in connection with determining reimbursement rates.”<sup>7</sup> Moreover, the Attorney General concluded that, “other health insurers have a financial incentive to manipulate the data they provide to the Ingenix database so that the pooled data will skew reimbursement rates downwards.”<sup>8</sup> According to the Attorney General, a health insurer cannot fairly determine market rates which the insurer knows it will be obliged to use as a basis for reimbursing consumers.<sup>9</sup> The investigation found the rate of underpayment by insurers ranged from 10-28% for various medical services across NY state.<sup>10</sup>



*The tide is turning on keeping consumers in the dark on rates for ONET physician services and reimbursement amounts.*

The Attorney General views the Ingenix Databases as a “black box” for consumers requiring them to write effectively a blank check for ONET physician services without any meaningful information about how insurers calculate the rates, or the extent of reimbursement that they should expect.<sup>11</sup> Under these circumstances, the Attorney General “found that consumers have no ability to shop intelligently for services in the out of network market and this problem must be remedied.”<sup>12</sup>


### **Industry Reform: Creation of A New Database Funded By Settlement Contributions from Nation's Health Insurers**

On January 13, 2009, UnitedHealth Group reached an agreement with New York Attorney General Andrew M. Cuomo, entitled *Assurance of Discontinuance Under Executive Law § 63(15)* (hereinafter “*Assurance*”) to shut down the Ingenix Databases and pay \$50 million toward establishing an independent body to set fair market reimbursement rates for out of network care. New York Attorney General Cuomo announced the creation of both an independent database to determine ONET reimbursement rates (“*New Database*”)<sup>13</sup> and a Healthcare Information Transparency Website (“*HIT Website*”) to inform and educate the public about reimbursement rates.<sup>14</sup>

According to Cuomo, “the ground breaking reforms established by this Assurance will revolutionize the antiquated, conflict riddled system used by hundreds of insurers across the country affecting millions of Americans. The new system will independently and rigorously determine the prevailing rate of health care services. And, for the first time, the public will be able to learn the prevailing rate of healthcare services before choosing a doctor.”

On February 17, 2009 Attorney General Cuomo said his office has a target date of having the New Database up and running in six months and he expects about \$100 million in total will be used to capitalize the nonprofit group to run the new database.<sup>15</sup> As of the date of this article’s publishing, the following insurers have settled out with the Attorney General by agreeing to pay the following sums to fund the database: UnitedHealth Group (\$50 mil); Aetna (\$20 mil); Wellpoint (\$10 mil); CIGNA (\$10 mil); MVP Health Care Inc. (\$535,000); Independent Health (\$475,000); and HealthNow (\$212,500).

Attorney General Cuomo’s investigation is on-going and he intends to target not only the largest for profit commercial health plans but local regional health plans for “continuing to defraud consumers and manipulate rates.”<sup>16</sup>



*How the UCR rates for out-of-network physician services have been calculated is beginning to come into focus after many years of litigation and hundreds of millions of dollars in settlements. But the total cost of liability has not yet surfaced.*

## Impact of Ingenix Regulatory Investigation and Settlements on Managed Care Class Action Litigation

The findings of the Attorney General regarding the Ingenix Databases closely mirror those allegations asserted by class members in a New Jersey subscriber class action suit entitled *McCoy v. Health Net, Inc., et. al.* filed earlier this decade challenging Health Net's use of the Ingenix Databases.<sup>17</sup> The class action plaintiffs in *McCoy* alleged that Ingenix's approach to calculating UCR was flawed because Ingenix: (1) does not audit the data to make sure that it is representative or accurate and that, as a result, there was no assurance that the charges properly reflect what providers actually charge in the market place; (2) uses statistically invalid edits to exclude a disproportionate amount of high charges from the UCR calculations; (3) lumps together the charges of certified specialists with years of training with all other, less qualified providers who may also bill for that particular medical procedure, but at a much lower rate such that the relatively higher charges of the experienced specialists often fall above the percentile cut-off and therefore exceed the calculated UCR rate. The *McCoy* plaintiffs alleged that Health Net violated the Employee Retirement Income Security Act ("ERISA") and the Racketeer Influenced Corrupt Organizations Act ("RICO") by conspiring to manipulate its data on UCR pricing in order to underpay the ONET providers and require members to pay more than their fair share of those services when the providers "balance billed" them.

After more than seven years of extraordinarily contentious litigation, in August 2007, Health Net agreed to: "establish a \$215 million fund out of which class members are entitled to make claims, cease using the Ingenix Databases for determining UCR charges for ONET services or supplies, and calculate reimbursement to ONET providers by reference to the current Ingenix database plus 14.5% (up to the billed charge) pending implementation of the new system to replace the Ingenix Databases."<sup>18</sup> In her August 2008 opinion setting forth the Court's rationale in support of its final Order approving the Health Net class action settlement, Judge Hochberg notes that the "Ingenix database suffers from numerous errors" and refers to an earlier Massachusetts appellate case which held there were numerous flaws contained in the Ingenix database.<sup>19</sup>

More recently, on January 15, 2009, UnitedHealth agreed to pay \$350 million to resolve a class action lawsuit filed by providers, subscribers, and the American Medical Association in 2000 challenging the health insurer's use of Ingenix and its system for reimbursing out of network claims.<sup>20</sup> The Agreement marks the largest monetary settlement of a class action lawsuit against

a single U.S. health insurer, according to the American Medical Association, which brought the lawsuit with the Medical Society of the State of New York. The settlement agreement was signed on January 14, 2009 and must be approved by the U.S. District Court for the Southern District of New York.

The extraordinary amounts paid by health insurers to resolve the UCR class action litigation, the sizable plaintiff attorney fee awards,<sup>21</sup> and the Attorney General's adverse findings regarding the flawed Ingenix Databases will undoubtedly embolden the plaintiffs' bar in their pursuit of other UCR class action defendants. For example, Aetna is now defending a subscriber UCR class action, entitled *Michele Cooper v. Aetna Health Inc. Pal Corp. et. al.* No. 07-3541, D. NJ, filed in April 2007. Another subscriber UCR class action suit is *Jeffrey M. Weintraub et al. v. Ingenix, Inc.*, Case No. 3:08CV654, filed with the U.S. District Court for the District of Connecticut in 2008. The *Weintraub* Complaint makes specific reference to Attorney General Cuomo's year long investigation and his finding that many consumers/members were forced to pay more than they should have for out of network services. The law firm of Pomerantz, Haudek, Block, Grossman and Gross, LLP is lead counsel on many of the UCR subscriber class actions. The firm of Whatley, Drake and Kallas LLC recently jumped on the bandwagon and filed a purported class action in February 2009 in New Jersey on behalf of medical associations and physicians against Aetna Health, Inc. and CIGNA Corporation, alleging that the companies used flawed data and other improper pricing methods to dramatically under-reimburse physicians for out-of-network services provided to plan enrollees.

### **In the Wake of the Ingenix Regulatory Investigations and UCR Class Actions, Health Insurers Ponder Their Options With Respect to ONET Reimbursement Practices that Will Withstand Regulatory and Judicial Scrutiny**

In the wake of intense media attention, regulatory investigations, and the influx of UCR class action litigation, health insurers are wrestling with the issue of how to calculate a "reasonable rate" of compensation for ONET services that will withstand regulatory and judicial scrutiny. Clearly, those health insurers that utilize the Ingenix Databases and contribute UCR data to Ingenix are on notice to revamp their ONET reimbursement practices. Pending the launch of the New Database, the Assurances of Discontinuance negotiated by Cuomo's office to date require health insurers utilizing the Ingenix Databases to: (1) disclose to members on their

► ***Do recent managed care UCR class action settlements provide a glimpse into the future?***

***\$350 million***

*In January 2009, UnitedHealth agreed to pay this amount to resolve AMA class action.*

***\$215 million***

*In August 2008, the United States District Court for the District of New Jersey approved Health Net's agreement to pay this amount to resolve McCoy class action.*

***\$69.7 million***

*Amount awarded to plaintiffs' attorneys as part of Health Net McCoy class action settlement*

website portal any transitional use of the Ingenix Databases, including the fact that Ingenix is owned by UnitedHealth; (2) revise their benefit plan documents to describe clearly their ONET reimbursement policies.

Health insurers that simply license the Ingenix Databases but have not contributed UCR data to Ingenix also face potential liability. Attorney General Cuomo has made clear that he “will not hesitate to bring legal action against anyone who was involved with Ingenix.”<sup>22</sup> Significantly, although Health Net was not an Ingenix contributor, it was the first to resolve its UCR class action litigation with a cash payment of \$215 million and significant business practice changes. Thus, health insurers should not rely on the fact that they did not provide any UCR data to Ingenix to insulate them from liability.

Pending the launch of the New UCR Database, it is imperative that health insurers utilizing the Ingenix or similar databases use current market rate reimbursement information to avoid liability. On February 3, 2009, Aetna reached an Agreement with the New York Attorney General’s office to pay more than \$5 million, plus interest and penalties to settle allegations that its Aetna Student Health division utilized outdated schedules from the Ingenix databases to reimburse students thus providing lower rates of reimbursement than those to which the students were entitled. Under the Agreement, Aetna will update the Aetna Student Health claims processing system within 30 days after receiving new market rate schedules and annually certify when that was done.

In light of the “inherent flaws” in the Ingenix Databases and pending launch of the New Database, some health insurers are pondering alternative approaches to reimbursing members for ONET services. Some providers argue that “billed charges” reflect reasonable value. But many health care insurers and some courts believe billed charges are arbitrary and overstate “reasonable value.”<sup>23</sup> As such, some health insurers may opt to use ONET provider rates calculated based on either the insurer’s own survey of prevailing provider rates, the Medicare equivalent rates or even pre-set negotiated rates. Also, some states have specific statutory/regulatory schemes pertaining to non-participating provider reimbursement to which health insurers must adhere. For example, Maryland requires that HMOs pay certain non-participating providers the greater of 125% of the rate a similarly licensed contracted physician receives for

*Health insurers that continue to process ONET claims by relying on scrubbed or outdated UCR data and/or fail to disclose to members how ONET reimbursement rates are calculated will find themselves the subject of increased regulatory scrutiny and the target of class action litigation.*



the same service in the same geographic region as published by the Centers for Medicare and Medicaid Services (“CMS”) or the rate that the HMO paid in the same geographic area as published by CMS to a similarly licensed non-contract physician.<sup>24</sup>

## Health Insurers Should Review the Scope of Coverage Afforded Under their Current Managed Care E&O Programs

In view of the recent spate of UCR regulatory investigations and class action litigation challenging the legality of ONET reimbursement and other business practices, health insurers should review with their brokers the scope of coverage afforded under their current managed care E&O program. In addition to substantial defense costs, other UCR litigation related exposures include: outstanding amounts owed to providers and/or patients to compensate them for any ONET services reimbursement shortfall, interest and penalties on these benefit amounts, treble damages, plaintiff attorney fee awards, and extra-contractual payments to fund new business practice initiatives or projects. Health insurers should understand which of these exposures are covered by their managed care E&O policy so they are able to quantify their net liability to any UCR/ONET litigation.

### Conclusion

No matter which ONET reimbursement methodology health insurers adopt, they should strive for transparency and clearly disclose in plan documents and on consumer accessible websites how reimbursement rates are calculated to avoid the “black box” scenario wherein patients are, in effect, asked to write a blank check without any meaningful information about the extent of reimbursement prior to receiving treatment from an ONET provider. Health insurers should make the ONET rate and pricing information available on a prospective basis so patients are able to make an informed decision regarding the financial impact of choosing to receive medical care and services from an ONET provider. Health insurers that continue to process ONET claims by relying on scrubbed or outdated UCR data and/or fail to disclose to members how ONET reimbursement rates are calculated will find themselves the subject of increased regulatory scrutiny and the target of class action litigation.

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<sup>1</sup> *Shane* refers to the *In Re Managed Care Litigation* MDL No 1334 (S.D. Florida) filed in 1999/2000 against the more than a dozen national for profit publicly traded health insurers while *Thomas/Love* refers to the *In re Managed Care Litigation* filed in 2003 against the Blue Cross Blue Shield Association and 47 other Blue Cross Blue Shield Plans. Both actions alleged the defendant health insurers violated federal and state law by systematically reducing, denying and delaying payments to providers for rendering medical care to patient/subscribers. The majority of the insurer defendants in these multi district class actions have either settled out with the plaintiffs or been dismissed by dispositive motion.

<sup>2</sup> Ingenix maintains the Prevailing Healthcare Charges System and Medical Data Research databases with data contributed by various insurers (hereinafter the "Ingenix Databases"). The Ingenix Databases generate the Ingenix schedules that are widely used by health insurers as benchmarks in determining reimbursement rates.

<sup>3</sup> See, *Attorney General Cuomo Announced Historic Nationwide Health Insurance Reform Ends Practice of Manipulating Rates to Overcharge Patients by Hundreds of Millions of Dollars*, January 13, 2009 Article at New York Attorney General Media Center website at [http://www.oag.state.ny.us/media\\_center/2009/jan/jan13a\\_09.html](http://www.oag.state.ny.us/media_center/2009/jan/jan13a_09.html).

<sup>4</sup> Under the Ingenix Data Contribution program, "some, but not all, of only those health insurers that are Ingenix clients submit information, on a purely voluntary basis, about the amounts they happen to have been billed by an undisclosed number of unidentified health care providers for specific CPT code services." See, *Davekos, P.C. v. Liberty Mut. Ins. Co.*, No. 10002, 2008 WL 241613, at \*2 (Mass.App.Div. Jan. 24, 2008). "Companies that submit data receive a discount based on the amount of usable data submitted. This arrangement can encourage insurers to remove high charges before submitting their data, in order to ensure "that a lot of it's not going to be knocked out" during the data scrubbing process." See, *McCoy v. Health Net, et. al.* 569 F. Supp.2d 448 (2008) at 465.

<sup>5</sup> Companies in receipt of a NY Attorney General subpoena include: Aetna; Atlantis; Capital District, CIGNA; Elderplan; Blue Cross Blue Shield; Excellus; GHI/HIP; Guardian Life Insurance Co; HealthFirst; HealthNow; Health Net; Humana; Independent Health; PreferredCare/MVP; Oxford; and UnitedHealth Group.

<sup>6</sup> See, ¶ 16 of the *Assurance of Discontinuance Under Executive Law § 63(15)* entered into between UnitedHealth Group and New York Attorney General at [http://www.oag.state.ny.us/bureaus/health\\_care/HIT2/pdfs/United%20Health.pdf](http://www.oag.state.ny.us/bureaus/health_care/HIT2/pdfs/United%20Health.pdf).

<sup>7</sup> *Id.* at ¶ 12.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at ¶ 14.

<sup>10</sup> See Health Care Report, *The Consumer Reimbursement System is Code Blue*, State of New York, Office of Attorney General dated January 13, 2009 at [http://www.oag.state.ny.us/bureaus/health\\_care/HIT2/pdfs/FINALHITIngenixReportJan.13,%202009.pdf](http://www.oag.state.ny.us/bureaus/health_care/HIT2/pdfs/FINALHITIngenixReportJan.13,%202009.pdf).

<sup>11</sup> *Id.* at ¶ 15.

<sup>12</sup> *Id.*

<sup>13</sup> A qualified, independent, university level school of public health will be selected to establish and operate an independent database for academic research and as a tool for determining reimbursement rates. The School will perform all functions through a New York Not-For-Profit Corporation which will collect the data from data contributors and convey rate information to the recipients for reimbursement rate purposes, and will publish rate information for industry users in a transparent way.

<sup>14</sup> The HIT Website will include a search function that permits users to select medical services and the zip codes for the areas where the services are sought. The search results will indicate clearly the prevailing charge amount at a stated percentile in a given geographic area, or range of charges, from the New Database.

<sup>15</sup> See, Wall Street Journal Article dated February 19, 2009 entitled: *Wellpoint Will Fund Database* by Chad Bray.

<sup>16</sup> See, February 17, 2009, New York Attorney General Press Release at <http://>



[www.oag.state.ny.us/media\\_center/2009/feb/feb17a\\_09.html](http://www.oag.state.ny.us/media_center/2009/feb/feb17a_09.html).

<sup>17</sup> Three separate actions, *McCoy* (Civil No. 03-1801 (FSH)), *Wachtel* (Civil No. 01-4183(FSH)), and *Scharfman* (Civil No. 05-0301 (FSH)), were consolidated before Judge Hochberg in the United State District Court, New Jersey. See, *McCoy v. Health Net*, 569 F.Supp.2d 448 (2008) (United States District Court, D. New Jersey)

<sup>18</sup> According to Health Net, the 14.5% add-on will result in 80% of ONET claims being covered at 90% or more of the billed charge.

<sup>19</sup> See, *McCoy v. Health Net, Inc., et. al* 569 F.Supp.2d 448 (2008). According to Judge Hochberg, "there are two serious flaws in Ingenix's data collection methods: one relates to Ingenix's data sources; the other relates to the number of data points collected for each medical procedure. The database is compiled from data submitted by several insurers pursuant to a purely voluntary data contribution program."

<sup>20</sup> See, *American Medical Ass'n v. United Healthcare Corp.*, S.D.N.Y., No. 00-2800 (Settlement Agreement executed 1/14/09).

<sup>21</sup> Health Net paid \$69,720,000 in plaintiffs' attorney fees as part of its UCR class action settlement. See, *McCoy v. Health Net, Inc., et. al* 569 F.Supp.2d 448 (2008)

<sup>22</sup> See, February 4, 2009, New York Attorney General Press Release, *Attorney General Cuomo Announces Expansion of HealthCare Reform Efforts to Upstate NY: Schenectady Based MVP Health to End Relationship with Ingenix*, at [http://www.oag.state.ny.us/media\\_center/2009/feb/feb4a\\_09.html](http://www.oag.state.ny.us/media_center/2009/feb/feb4a_09.html).

<sup>23</sup> In *Temple University Hospital v. Healthcare Management Alternatives*, 832 A.2d 501 (Pa. Super. Ct. 2003), a hospital brought an action and alleged it was underpaid for a specified time period during which it lacked a reimbursement contract with a particular health payor. The court rejected the hospital's claim for fully billed charges, holding that this hospital cannot "unilaterally set a price for its services that bears no relationship to the amount typically paid for those services." The court explained that, "in the absence of an express contract, the law requires the payment of reasonable value," which is normally what someone "receives for a given services . . . from the community that it serves." The relevant community in this case was comprised of "the Hospital's patients who are covered by insurance policies and federal programs."

<sup>24</sup> See, *Md. Code Ann. Health-Gen. §19-710.1*.

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