

Market + Litigation
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Scott+Scott Prevails On Motion To Dismiss Against Nation's Largest Health Insurer

On August 11, 2011, the Honorable Philip Gutierrez of the U.S. District Court for the Central District of California (Los Angeles) issued an opinion denying, in large part, the motions to dismiss filed by defendants in *In re WellPoint, Inc., Out-of-Network "UCR" Rates Litigation*, No. 09-ml-02074. The case against defendants WellPoint, Inc., UnitedHealth Group Corp., and Ingenix, Inc., led by Scott+Scott and its co-counsel, concerns the manner in which defendant WellPoint reimburses for out-of-network medical claims. WellPoint is the largest health

insurer in the country, and is often known by its affiliation with Anthem, Empire, and Blue Cross/Blue Shield.

The case was brought on behalf of a variety of individuals and associations located throughout the United States who had opted to pay for "out-of-network" medical procedures within their WellPoint health insurance plans. Once insureds undergo out-

of-network procedures, they file claims with their insurer to obtain a reimbursement. Oftentimes, health insurance plans state that for out-of-network care, insureds are entitled to reimbursement of the "usual, customary, and reasonable" rate for that procedure.

Plaintiffs claimed, however, that many insureds were reimbursed at an amount far less than the

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Scott+Scott's Market + Litigation Monthly highlights current market and litigation trends and court filings that are of interest to all investors.

New U.S. Consumer Financial Protection Bureau Issues Rule Requiring Notice Of State Enforcement Actions

The U.S. Consumer Financial Protection Bureau ("CFPB"), which began operation on July 21, 2011, is a new federal agency that will hold primary responsibility for enforcing federal laws and regulating consumer protection. The CFPB resulted from the Dodd-Frank Wall Street Reform and Consumer Protection Act during the 111th United States Congress in response to the late-2000s recession and financial crisis. The Bureau func-

tions as an independent unit located inside, and funded by, the United States Federal Reserve, with interim affiliation with the U.S. Treasury Department and consolidates consumer-protection powers that had been spread across several different agencies.

The Bureau, according to the U.S. Treasury Department website, is tasked with the responsibility to "promote fairness and transparency for mortgages,

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Judge Grants Preliminary Approval Of Shareholder Derivative Action Settlement In Puerto Rico



The complaint filed by Scott+Scott focused on the claims that the officers and directors of the company allowed this to occur, to the detriment of the company and its shareholders.

Scott+Scott felt that settlement at this point was in the absolute best interest of the company and its shareholders, and that the settlement put significant remedial measures into place.

On July 8, 2011, a federal judge presiding in a derivative action in the U.S. District Court for the District of Puerto Rico issued an order granting preliminary approval to a proposed derivative settlement. In light of the court's preliminary approval, the parties may now move for final approval of the settlement. In that regard, the court scheduled a hearing for September 2011.

Scott+Scott had agreed on behalf of the plaintiffs, with counsel for the defendants, to settle the derivative case against officers and directors, as well as nominal defendant, Popular, Inc., better known as Banco Popular, a financial services company that has been operating in Puerto Rico for well over 100 years. The complaint, filed in 2009, alleged that the defendants engaged in breaches of fiduciary duty, gross mismanagement, and

waste of corporate assets, which led to the dissemination of false and misleading statements. The statements concerned the company's accounting for deferred tax assets that the company recorded, the benefit of which could only be realized if the company experienced sufficient U.S.-based gains within 20 years. The company should have taken a valuation allowance, which it put off doing. Once it took such an allowance, the company's share price fell substantially. The complaint filed by Scott+Scott focused on the claims that the officers and directors of the company allowed this to occur, to the detriment of the company and its shareholders.

After engaging in intense formal mediation with an esteemed retired judge in January 2011, negotiations between Scott+Scott and defense counsel continued for months. The parties, with the consent of the named plaintiffs, were ulti-

mately able to come to a resolution. In the settlement, the defendants have agreed to undertake substantial "corporate governance measures" via amendments to the company's charter, by-laws, policies, etc. Popular has further agreed to maintain those corporate governance measures for a period of three years, and to pay the plaintiffs' reasonable attorneys' fees and incentives for the named plaintiffs.

Scott+Scott recognized the expense and time required to prosecute the claims through trial and appeals, and that such time and expense would necessarily distract the company's officers and directors, and drain the company of resources to the detriment of the company and the shareholders. Thus, Scott+Scott felt that settlement at this point was in the absolute best interest of the company and its shareholders, and that the settlement put significant remedial measures into place.

New U.S. Consumer Financial Protection Bureau Issues Rule Requiring Notice Of State Enforcement Actions

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credit cards, and other consumer financial products and services.” The jurisdiction of the CFPB includes banks, credit unions, securities firms, payday lenders, mortgage-servicing operations, foreclosure relief services, debt collectors, and other financial companies, and, according to incoming enforcement chief, former Ohio Attorney General Richard Cordray, its most pressing concerns are mortgages, credit cards, and student loans. The CFPB will write and enforce bank rules, conduct bank examinations, monitor and report on markets, as well as collect and track consumer complaints.

While most of the CFPB’s tools are still in development, a few have already been deployed. Noteworthy is the Bureau’s new role in enforcement of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). Dodd-Frank, among other things, amended the National Bank Act to clarify the standards that apply to national banks. Dodd-Frank greatly increases the powers of states to make and enforce its own laws designed to protect consumers in financial transactions. The CFPB has the power to determine whether or not state laws are preempted by Dodd-Frank. This is of great importance as courts are likely to defer to the Bureau’s determinations as they would those of any administrative agency specifically empowered to interpret the law.

On July 28, 2011, interim rules went into effect regarding the process by which state officials are to notify the CFPB of actions or proceedings undertaken to enforce any requirements of Dodd-Frank. The accompanying release to the State Official Notification Rules, 12 C.F.R. Part 1082, states that the CFPB’s objective is to maintain “consistent application of the [Dodd-Frank] Act.” Under the rules, state officials are required to notify the CFPB prior to initiating any action or proceeding in any court or other administrative or regulatory proceeding to enforce any provision of Dodd-Frank or any regulation prescribed there under, including, but not limited to, the filing of a complaint, motion for relief, or other document which initiates an action or proceeding. In the notice submitted to the CFPB, state officials must summarize the nature of the action and relevant factual background, the court or other body in which it is to be initiated, the parties against whom the action is to be brought, and the state official’s determination as to whether there may be a need to coordinate the prosecution of the action to avoid interference with activities, including rulemakings, being undertaken by the CFPB or other federal agencies.

The rules further give the CFPB, upon initiation of proceedings, the authority to intervene and remove an action to a U.S. District Court, and, thereafter, proceed as a party for all purposes.

The State Official Notification Rules will play an important role in the implementation of the joint federal-state enforcement regimen established by

the Dodd-Frank Act. The Bureau’s right of intervention, and the circumstances and frequency of its exercise, could have a particularly strong impact on the direction and scope of early enforcement efforts under the Act.



Scott+Scott Attorney Mary Blasy Featured At A Securities Litigation Roundtable

On July 28, 2011, Mary Blasy was one of the roundtable participants at a seminar hosted by the Securities Litigation Section of the Bar Association of San Francisco entitled “Recent Developments in Securities Litigation: What’s New and What’s Next.”

Topics included the impact of recent U.S. Supreme Court decisions affecting investor recovery in securities class actions, including:

- + *Matrixx* – where the U.S. Supreme Court rejected the use of bright-line “statistical significance” metrics to determine materiality in federal securities class actions. This was an important win for investors and it ensures that knotty factual determinations, such as whether investors would have still purchased stock had they not been lied to, are made by juries rather than judges. More significantly, in so doing, it ensures the plaintiffs are provided access to formal discovery before these complex materiality determinations are made.
- + *Janus Capital* – where the U.S. Supreme Court rejected a “creator” theory of liability under the federal securities laws. Reversing the Fourth Circuit Court of Appeals, the Supreme Court held that only persons with absolute authority for making false statements may be held liable. In

this case, the parent corporation was inoculated from liability for its subsidiary’s false statements in offering documents, even though, as the Fourth Circuit had found, investors relied on the integrity of the parent corporation in purchasing the relevant securities.

- + *Halliburton* – where the U.S. Supreme Court held that securities class action plaintiffs are not required to demonstrate “loss causation” at the class certification stage. This was another important win for investors. The Supreme Court overruled draconian case law followed only in the Fifth Circuit that allowed defendants to defeat class certification by making factual challenges to plaintiffs’ loss causation allegations at the class certification stage before discovery was complete. Obtaining class certification is imperative in securities fraud class actions.

The SEC’s new rules providing for the payment of bounties to whistleblowers, as permitted by the Dodd-Frank Act, was also addressed. Only time will tell if the SEC’s payment of bounties to whistleblowers will increase the incidence of whistleblowers coming forward. However, to the extent the SEC’s new rules in fact encourage more whistleblowers to come forward, this helps investors’ efforts to recover when they have been defrauded.



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The court noted that the plaintiffs had alleged enough facts to show evidence of a price-fixing agreement among those insurers.

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usual, customary, and reasonable rate for that procedure. The complaint alleges that WellPoint used a variety of mechanisms, including a flawed database owned by Ingenix, a wholly-owned subsidiary of UnitedHealth, to determine usual, customary, and reasonable rates for out-of-network medical procedures. These mechanisms systematically calculate usual, customary, and reasonable rates at amounts far below the actual going rate for that service. This guarantees that the insured will have to pay at least part—if not a large part—of the actual bill, in addition to paying regular premiums for health insurance and applicable deductible, co-pay, or co-insurance amounts. For example, an out-of-network doctor may charge \$100.00 for a given service, while the patient has a mandatory \$20.00 co-pay. WellPoint may determine that the actual usual, customary, and reasonable amount for that service, though, is \$70.00. Therefore, the patient would be responsible for the \$30.00 difference, as well as the \$20.00 co-pay—a total of \$50.00, or *half* of the doctor's fee.

Furthermore, the plaintiffs contended that WellPoint did so in concert with most major health insurers—such as Aetna, CIGNA, and UnitedHealth—to ensure that reimbursements for out-of-network medical procedures remained low throughout the country. As stated in the complaint, this is a violation of federal and state antitrust laws, breach of contract, as well as a breach of duties owed to insureds by virtue of their health insurance plans.

Judge Gutierrez heard oral arguments from both sides on November 22, 2010. In August, the judge rejected defendants' arguments that plaintiffs had failed to plausibly allege their claims. In his written opinion, the judge outlined the claim, focusing on the question of how WellPoint determines what reimbursement rate would be usual, customary, and reasonable for a given medical procedure. He found that the allegations amounted to more than an "opportunity to conspire," but rather showed the plausible existence of a conspiracy among the defendants and other insurance

companies to use coordinated, low out-of-network reimbursements. In addition, the court noted that the plaintiffs had alleged enough facts to show evidence of a price-fixing agreement among those insurers. The court went on to find that plaintiffs plausibly alleged that WellPoint violated certain duties it owed to the plaintiffs under their health insurance plans and, even if plaintiffs had appealed any benefits decisions to WellPoint directly, that appeal would have proved useless.

Ultimately, the court allowed the vast majority of the claims against WellPoint to proceed. Therefore, the plaintiffs will proceed in filing their motion for class certification under Fed. R. Civ. P. 23. Currently, Scott+Scott and its co-counsel is taking discovery of WellPoint and its co-defendants in support of that motion with the ultimate goal of providing relief to those who were harmed by the defendants' scheme to under-reimburse insureds for out-of-network care.

On The Record...



John Marshall, U.S. Supreme Court Chief Justice, born September 24, 1755
“It is emphatically the province and duty of the judicial department to say what the law is ... If two laws conflict with each other, the courts must decide on the operation of each ... This is of the very essence of judicial duty.” — *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803)

U.S. Conferences And Educational Seminars

- + September 11-14, 2011
Texas Local Fire Fighters' Retirement Act Annual Pension Conference (TLFFRA)
Hilton Midland Plaza
Midland, TX
Through this annual conference, fund administrators and boards of trustees are provided training by qualified entities in the fields of investment management, administration, and fiduciary responsibility.
- + September 15-18, 2011
New England States Government Finance Officers' Association 64th Annual Fall Conference (NESGFOA)
Colony Hotel and Nonantum Resort
Kennebunkport, ME
NESGFOA is a regional professional association for government finance managers from the six New England states. The fall conference is held annually in September or October on a six-state rotating basis, and shall provide continuing education programs for public finance officials and employees.
- + September 19-23, 2011
International Brotherhood of Electrical Workers (IBEW) 38th International Convention
Vancouver Convention Center
Vancouver, BC
IBEW represents approximately 725,000 members working in a wide variety of fields, including utilities, construction, telecommunications, broadcasting, manufacturing, railroads, and government. The IBEW convention brings together 3,000 local union delegates, officers, staff, and guests every five years. The convention is where the IBEW

- conducts the heart of its business, setting broad policy goals to guide the union over the next five years in an open democratic forum.*
- + September 18-20, 2011
Louisiana Association of Public Employees' Retirement Systems (LAPERS) Annual Seminar
The Roosevelt Hotel
New Orleans, LA
By uniting Louisiana public retirement systems, LAPERS works for the common interests of individuals employed by state, statewide and local employees' pension plans. LAPERS monitors state and federal legislative activities, and enhances public pension fund management and administration by providing educational and informational services to its more than 347,000 employees and retirees with \$26 billion in assets.
 - + September 15-19, 2011
Michigan Association of Public Employee Retirement Systems (MAPERS) 2011 Fall Conference
DeVos Place Convention Center and Amway Grand Plaza Hotel
Grand Rapids, MI
MAPERS is recognized as the principal educational legislative forum for trustees, plan administrators, and other retirement and financial professionals in the State of Michigan. This outstanding conference is geared toward educating local pension board members and administrators.
 - + September 19-20, 2011
International Foundation of Employee Benefit Plans (IFEBP) Construction Industry Benefits Conference
The Greenbrier
White Sulphur Springs, WV

- The Construction Industry Benefits Conference is designed to provide a forum for examining the latest trends, sharing experiences and solutions, reviewing legislative and regulatory changes, and considering the most effective strategies for delivering benefits to participants in the construction industry.*
- + September 20-22, 2011
Georgia Association of Public Pension Trustees (GAPPT) Second Annual Conference
Macon Marriott City Center
Macon, GA
GAPPT is a nonprofit association formed solely to promote and support the education and development of the Trustees and Administrators of Georgia's Public Pension Plans in the areas of fiduciary responsibility and liability, board governance, investment acumen, and plan administration.
 - + September 21-23, 2011
Opal Financial Group's 13th Annual Endowment and Foundation Forum
Boston Marriott Long Wharf
Boston, MA
The Endowment & Foundation Forum will provide a forum for the free exchange of ideas concerning portfolio planning and investment strategies.
 - + September 25-27, 2011
Council of Institutional Investors (CII) 2011 Fall Meeting
The Westin Boston Waterfront
Boston, MA
CII is a nonprofit association of public, union, and corporate pension funds. The annual meeting will educate members, policymakers,

- and the public about good corporate governance, shareowner rights, and related investment issues.*
- + September 24-28, 2011
National Coordinating Committee for Multiemployer Plans (NCCMP) 2011 Annual Conference
The Diplomat Hotel
Hollywood, FL
The NCCMP is an organization of multiemployer pensions, health and welfare plans, international and local unions, national and local employer associations, individual local employers, and multiemployer fund professionals. For more than 30 years, NCCMP has been representing the interests of multiemployer plan participants in the halls of Congress, in regulatory arenas, and in the courts.
 - + September 25-27, 2011
Institutional Investor's Alpha Hedge 17th Annual Institutional Investment Conference
The Ritz-Carlton
San Francisco, CA
In this period of dynamic change, it is more important than ever to stay abreast of future investment opportunities and winning strategies, upcoming regulation, and asset allocation plans from leading allocators, outperforming managers and industry experts. More than 80 speakers from across the globe will present during the three-day conference.

Government Finance Officers Association Conferences

- + September 11-13, 2011
Illinois GFOA Annual Conference
Springfield Hilton
Springfield, IL
- + September 13-16, 2011
Washington Finance Officers Association 2011 Conference
Red Lion Hotel at the Park
Spokane, WA
- + September 15-16, 2011
Wisconsin GFOA Fall Conference
Grand Lodge by Stoney Creek
Rothschild, WI
- + September 21-23, 2011
New Jersey GFOA Fall Conference
Sheraton Hotel
Atlantic City, NJ
- + September 21-23, 2011
Idaho City Clerks, Treasurers & Finance Officers Association (ICCTFOA) Institute
Double Tree Riverside Hotel
Boise, ID
- + September 21-23, 2011
Ohio GFOA Annual Conference and Membership Meeting
Cleveland Renaissance
Cleveland, OH
- + September 22-24, 2011
North Dakota League of Cities (NDLC) 81st Annual Conference
Fargo Holiday Inn
Fargo, ND
- + September 28-30, 2011
League of Nebraska Municipalities (LNM) Annual Conference
Cornhusker Marriott Hotel
Lincoln, NE
- + September 28-30, 2011
Ohio Municipal Finance Officers Association (MFOA) Annual Conference
Columbus Renaissance Hotel
Columbus, OH



**SCOTT+SCOTT LLP'S
PORTFOLIO TRACKING +
LOSS RECOVERY SYSTEM™**

Scott+Scott's PT+SM System is the firm's proprietary investment portfolio tracking service. Carefully combining the firm's proprietary computer-based portfolio monitoring software with Scott+Scott's hands-on approach to client relations is a proven method for institutional investors and their trustees to successfully:

- + **Monitor** their investment portfolios
- + **Identify** losses arising from corporate fraud
- + **Consider** what level of participation any given situation requires
- + **Recover** funds obtained on their behalf through investor litigation action

To obtain more information about Scott+Scott's PT+SM services or to schedule a presentation to fund trustees, fund advisors or asset managers, please contact:

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