



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO  
Attorney General

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Counsel for Economic  
and Social Justice

**NOTICE OF PROPOSED LITIGATION UNDER  
SECTION 63(12) OF THE EXECUTIVE LAW, SECTIONS  
349 AND 350 OF ARTICLE 22-A OF THE GENERAL  
BUSINESS LAW, AND SECTION 2601(a) OF THE INSURANCE LAW**

February 17, 2009

**BY E-MAIL AND U.S. MAIL**

Stephen R. Sloan, Esq.  
Senior Vice President and General Counsel  
Excellus Health Plan, Inc.  
d/b/a Excellus BlueCrossBlueShield  
and Univera Healthcare  
The Lifetime Healthcare Companies  
165 Court Street  
Rochester, New York 14647

Dear Mr. Sloan:

You are hereby notified that the Attorney General intends to commence litigation against Excellus Health Plan, Inc., doing business as Excellus BlueCross BlueShield and Univera Healthcare, part of The Lifetime Healthcare Companies (“Excellus” or “the Company”), under Executive Law Section 63(12), Article 22-A of the General Business Law (“GBL”), Sections 349 and 350, Insurance Law Section 2601(a), and New York common law, to enjoin unlawful acts and practices that Excellus has engaged in and continues to engage in, and to obtain injunctive relief, restitution, damages, civil penalties, and such other relief as the Court may deem just and proper.

The unlawful acts and practices complained of consist of engaging in repeated and persistent fraudulent, deceptive, and illegal business practices in connection with Excellus’s reimbursement of consumers for out-of-network services, including but not limited to Excellus’s

use of the Ingenix databases (Prevailing Healthcare Charges System (“PHCS”) and Medical Data Research (“MDR”)).

### **Excellus’s Dominant Market Share**

Excellus is the dominant health insurer in the Rochester and Syracuse regions, which requires heightened scrutiny of the company’s consumer practices. Excellus is the largest not-for-profit insurer in upstate New York State, covering almost 2 million members. Of these, 872,000 members are in Rochester, 549,000 in Syracuse and Central New York, 289,000 in Utica, and 165,000 in Buffalo (through Univera Healthcare).

In fact, according to a 2007 market report by the American Medical Association, Excellus controls:

- 57 percent of the Rochester market for commercial health insurance and 66 percent of the PPO (“preferred provider organization”) market there;
- 42 percent of the Syracuse market for commercial health insurance and 97 percent of the HMO (“health maintenance organization”) market there;
- 27 percent of the Binghamton market for commercial health insurance and 80 percent of the HMO market there; and
- 15 percent of the Ithaca market for commercial health insurance and 100 percent of the HMO market there.

### **Consumer and Community Complaints**

The Attorney General has received countless complaints about the Company’s abusive consumer practices and is aware of community complaints about the Company’s market practices. Syracuse’s leading newspaper, the *Post-Standard*, has published numerous articles detailing complaints about Excellus, and published an editorial entitled “The Excellus Squeeze; High Premiums, Huge Reserves, Big Bonuses and Low Payments to Doctors and Providers” (July 26, 2006). The editorial remarked that Excellus collects higher premiums from members “while keeping what it pays to doctors and other medical providers unreasonably low.” These articles and the editorial are consistent with consumer complaints the Attorney General has received about Excellus.

### **The Industry-Wide Investigation**

This notice of intent to sue arises from the Attorney General's industry-wide investigation into consumer reimbursement for out-of-network health care. Consumers typically pay higher premiums for the right to seek out-of-network care. Excellus and other insurers frequently promise to reimburse members the lesser of either the actual amount of the charge or a specified percentage based on market rate, referred to in the industry as the "reasonable and customary" or "usual, customary and reasonable" ("UCR") rate.

The investigation has determined that most health insurers, including Excellus, use fee schedules compiled by Ingenix, Inc. ("Ingenix"), a subsidiary of UnitedHealth Group, Inc., the second largest insurer in the country, in determining reimbursement rates for out-of-network care. The Ingenix databases, constructed with data collected from insurers and licensed back to those same insurers, are riddled with conflicts of interest, yet the fee schedules are supposed to fairly reflect market rates. Excellus both contributes billing data to the Ingenix databases and uses those databases to determine out-of-network reimbursement rates, despite the conflicts of interest inherent in the Ingenix databases. As Excellus knows, these conflicts create incentives for Ingenix to skew reimbursement rates downward. The investigation has determined that in fact the Ingenix reimbursement rates lead to under-reimbursement of consumers for out-of-network care.

### **Excellus's Scheme to Defraud Consumers By Using Obsolete Fee Schedules**

During the investigation into the use of the Ingenix databases, the Attorney General has uncovered a trove of e-mails pointing to an egregious scheme by Excellus to defraud its members by using obsolete fee schedules to reimburse out-of-network care. The investigation has found that, for at least the past *fifteen years*, Excellus has used years-old fee schedules to reimburse consumers for out-of-network claims, saving itself huge sums that should have been paid to consumers. Because medical costs rise substantially every year, the use of old fee schedules hurts consumers by paying them substantially less than they are owed. For every year by which the fee schedule is outdated, the harm to the consumer is compounded. The use of current schedules would have required Excellus to pay substantially more money to consumers for out-of-network care.

The New York State Department of Insurance warned Excellus about the use of old fee schedules in 2001. Yet, as recently as six months ago, Excellus knew that it was using fee schedules that were at least *nine years old* and therefore did not reflect the then current cost of

medical services.<sup>1</sup> Despite the comprehensive document subpoenas served by the Office of the Attorney General, Excellus has produced no evidence that it has either fixed these problems or reimbursed its members for past underpayments pursuant to this scheme.

Set forth below are certain details of the scheme. The Attorney General intends to sue Excellus to put an end to this scheme and to obtain redress for consumers who have been cheated out of fair reimbursement.

### **A Newspaper Complains About UCR**

E-mail traffic reviewed during the course of this investigation reveals that, in 2006, the employee representative of the *Post-Standard* complained that some employees had been reimbursed at obviously low rates. In internal e-mails, company personnel admitted that the *Post-Standard*'s employees had been reimbursed using fee schedules that were at least nine years old. While the company was quick to pay the claims of the newspaper's employees so as to avoid negative publicity, there is no evidence that the company complied with its obligation to pay the claims of countless other Excellus members who had fallen prey to this deceptive practice but lacked the power of the press.

Excellus personnel discussed the newspaper's complaint in an e-mail dated July 14, 2006, which reads as follows:

[The *Post-Standard* employee representative] is especially concerned that her employees and their families (plus others in the community) do not have a choice necessarily about going to [the local hospital] if they were transported via ambulance (even if they knew that they were non-par [*i.e.* out-of-network] at the time of an emergency). She indicated that [she] has been researching this issue today and has made a number of phone calls. *Her sense is that Excellus is paying the provider at the Medicare level which is inadequate - "the bottom of the barrel"*. She is planning on getting specific information on each local ER group on their Medicare and Excellus reimbursement for comparison/analysis purposes. *She will be sharing this information with [an editor] from the newsroom [sic] is "jumping up and down upset" about this. [She] feels that our reimbursement schedule must be too low and it is unconscionable for our fee schedule allowance to be at such a low level forcing the doctors to de-par*

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<sup>1</sup> Based on disclosures by the Company, Excellus not only uses an Ingenix database to determine UCR, but other sources as well, including UCR schedules it developed itself. The issues raised by the Attorney General's investigation regarding lack of transparency in how reimbursements are calculated and Excellus's use of outdated rates involve both the company's use of its own schedules as well as those of Ingenix.

[go in network] and *unnecessarily negatively affecting the community with the balance billing.*

(Emphasis added.)

Several days later, on July 18, 2006, an Excellus employee wrote an internal e-mail noting that the newspaper's employee representative "appears irate enough where this could escalate into a [newspaper] article." Subsequently, Excellus personnel made the following admissions:

- In an e-mail dated July 19, 2006: "I have reviewed the claim below and have the following information: ... Note that the provider's UCR allowance has not been updated since 2000 [which itself involved years-old data], not sure if these are being maintained or not, it doesn't appear to be that they are."
- In another e-mail dated July 19, 2006, from the Director of Corporate Compliance: "[I]t looks like the UCR has not been updated since 2000? Who is responsible for that component?"
- In an e-mail dated July 19, 2006, "Prior to January 1, 2001, ... UCR had not been refreshed since 1992."
- In an e-mail dated July 20, 2006, from the Regional Director, Physician & Ancillary Service Networks, "I am also concerned that this complaint could be the *tip of the iceberg.*" (Emphasis added.)
- In an internal "Status Update" dated October 23, 2006, "It has been almost 9 years since the schedules were last updated."
- In an e-mail dated April 18, 2007, "At one point, years ago, early 90s (I'm dating myself) we used to update UCR pricing regularly. But now I believe it was decided by Finance, Marketing, and PR if and when pricing will be increased."
- In an e-mail dated September 19, 2007, "My good pal ... from corporate audit called me to check on when the last time was we updated both of these [fee schedules]. I confirmed that UCR was not updated since 1/2005 0- 2004 charge data & the last time HIAA was updated was 2004 (and she confirmed that this was correct.)"

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- In an e-mail dated September 2, 2008, from the Manager of Provider Contract Implementation: "The UCR pricing on this hasn't been updated in over 3 years and we are unable to determine the basis for the original UCR pricing."

### Summary

This and other evidence collected by the Office of the Attorney General established that Excellus has engaged in a fifteen-year-old scheme to defraud its members by using obsolete fee schedules for out-of-network claims reimbursement. Instead of keeping its promise to pay a fair rate to its members, Excellus deceived its members and cheated them of amounts they were owed, all the while reaping massive revenue (which it later paid as executive bonuses and posted to reserves of this not-for-profit company) based in part on the higher premiums paid for out-of-network care. This proposed litigation seeks to put an end to this scheme and obtain redress for victims of the scheme.

### Notice

Therefore, please be advised that, under Sections 349(c) and 350-c of the GBL, Excellus is hereby afforded the opportunity to show orally or in writing, within five business days after receipt of this notice, why such proceedings should not be instituted.

Very truly yours,



Linda A. Lacewell  
Counsel for Economic and Social Justice  
Healthcare Industry Taskforce

Of Counsel:

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cc: Sean Doolan, Esq. (by e-mail and U.S. mail)