No. 02-215

IN THE
Supreme Court of the United States

IN RE HUMANA INC. MANAGED CARE LITIGATION

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
Petitioners,

v.

JEFFREY BOOK, D.O., *et al.*,
Respondents.

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

REPLY BRIEF

JAMES W. QUINN, ESQ.
JEFFREY S. KLEIN, ESQ.
WEIL, GOTSHAL & MANGES, LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

EDWARD SOTO, ESQ.
WEIL GOTSHAL & MANGES, LLP
701 Brickell Avenue
Suite 2100
Miami, Florida 33132
(305) 577-3100

Attorneys for Petitioners UnitedHealthcare, Inc. and UnitedHealth Group Incorporated

WILLIAM E. GRAUER
(*Counsel of Record*)
CHRISTOPHER R.J. PACE
COOLEY GODWARD LLP
4401 Eastgate Mall
San Diego, California 92121
(858) 550-6000

Attorneys for Petitioners PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

TABLE OF CITED AUTHORITIES
(CONTINUED)

REPLY BRIEF

Petitioners PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. (collectively, "PacifiCare") and petitioners UnitedHealthcare, Inc. and UnitedHealth Group Incorporated (collectively, "United") respectfully file this reply brief on their petition for a writ of certiorari to have this Court review the judgment of the United States Court of Appeals for the Eleventh Circuit in *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002).

I. REASONS FOR GRANTING PETITION.

Plaintiffs Dennis Breen, Jeffrey Book, Manual Porth and Glenn Kelly ("Plaintiffs") advance several arguments as to why this Court should deny PacifiCare and United's certiorari petition, but none of those arguments should deter this Court from reviewing the significant, and erroneous, decision of the Court of Appeals. In fact, since PacifiCare and United filed their petition, the conflict among the Circuits over the issue presented here has only become more stark with the First Circuit's August 20, 2002 decision in *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88 (1st Cir. 2002), adopting the analytical approach set forth in *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001).

A. The "Question Presented" In The Certiorari Petition Was Presented To And Resolved By The Court Of Appeals And The District Court.

Plaintiffs' principal argument against this Court issuing a writ of certiorari – an argument that has nothing to do with the merits of the pending petition – is that the question presented in the petition was "never properly before the

courts below, and was neither addressed nor resolved by them." Opp. at 4. This argument is fatally flawed.

The core of PacifiCare and United's "question presented" is simple: Must a District Court compel arbitration of a plaintiffs' RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages? PacifiCare and United repeatedly argued in the lower courts that this question must be answered in the affirmative, yet the lower courts repeatedly – and erroneously – rejected these arguments. The question PacifiCare and United present to this Court, therefore, was "properly before the courts below," was "addressed" by both courts, and was "resolved" (erroneously) by both courts. Opp. at 4.

Plaintiffs' criticism of PacifiCare and United's efforts (to have the District Court or the Court of Appeals hold that RICO claims must be arbitrated under an agreement that prohibits punitive damage awards) is surprising given that they never attacked PacifiCare and United's punitive damages limitations in their initial arbitration briefing in the District Court. To the contrary, their opposition to PacifiCare's first arbitration motion never raised an objection to the punitive damages exclusion in the PacifiCare arbitration agreements, and their opposition to United's first arbitration motion was based on their position that United's arbitration agreements "preclud[ed] an award of extracontractual damages," and thereby "eliminate[d] any chance for recovery under RICO." District Court Docket Entry ("D.E.") No. 388 at 76.

The first time Plaintiffs even suggested that arbitration agreements containing punitive damages limitations were

unenforceable was at oral argument before the District Court, and they fleshed out this position in a brief filed with the District Court after oral argument. During and after that oral argument, however, PacifiCare and United's constant refrain to the District Court and the Court of Appeals was that a federal court could not refuse to send RICO claims to arbitration simply because the relevant arbitration agreement barred punitive damages. *See* PacifiCare's Opening Br. (Appeal No. 01-10247) at 14-16; PacifiCare's Reply Br. (Appeal No. 01-10247) at 6-8; United's Opening Br. (Appeal No. 01-10247) at 16-17 & 20-39; United's Reply Br. (Appeal No. 01-10247) at 1-8; PacifiCare's Opening Br. (Appeal No. 01-12596) at 18-20; PacifiCare Reply Br. (Appeal No. 01-12596) at 7-11; D.E. No. 421 at 7; D.E. No. 583 at 13-16; D.E. No. 694 at 1-2; D.E. No. 848 at 46; D.E. No. 965 at 3.[1] The District Court and the Court of Appeals resolved this dispute by holding that a court should not send RICO claims to arbitration under an arbitration agreement that does not authorize punitive damages. *See* 285 F.3d at 973-74 & n.3; 143 F.Supp.2d 1371, 1374 (S.D. Fla. 2001); 132 F. Supp.2d 989, 1001 & 1005 (S.D. Fla. 2001). The question presented in PacifiCare and United's petition, therefore, was properly raised before the Courts below, was

---

[1] Additionally, several defendants, including United, explained to the District Court that "unconscionability" should be decided by an arbitrator. *See* D.E. No. 583 at 18. The defendants argued that Plaintiffs' objections to defendants' agreements (which included the remedies limitations) sounded in substantive unconscionability, *see id.* at 11-12, making them issues to be decided by the arbitrator. The District Court bypassed this argument. *See* 132 F.Supp.2d at 1001.

resolved by those Courts, and is ripe for resolution by this Court.[2]

Finally, even if the Court were to harbor some reservations about how well the question before the Court was presented to the District Court and Court of Appeals, any reservations should be erased by the recognition that the question presented here raises a pure issue of law concerning the proper interpretation of RICO and the Federal Arbitration Act ("FAA"), and there are no facts in dispute relevant to that issue. The question therefore is "'appropriate for [this Court's] immediate resolution'" regardless of whether it was "addressed by the Court of Appeals." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982)). *See also United States v. Locke*, 471 U.S. 84, 93 (1985) ("Although the District Court did not address this argument, the argument raises a question sufficiently legal in nature that we choose to address it even in the absence of lower court analysis"). This is all the more true given that the question has so clearly split the United States Courts of Appeals. *See, e.g., Investment Partners v. Glamour Shots Lic., Inc.*, 298 F.3d 314, 318 (5th Cir. 2002);

---

[2] The focus of PacifiCare and United's arguments in the District Court and Court of Appeals was that, under the Federal Arbitration Act, their arbitration agreements were enforceable and the District Court could not refuse to send Plaintiffs' RICO claims to arbitration based on the agreements' punitive damages limitation; the focus was not on how, once the District Court ordered arbitration, an arbitrator might treat the agreements' punitive damages limitation on contract grounds. Plaintiffs now criticize this focus, but the simple fact is that the only question before the District Court was whether PacifiCare and United's arbitration agreements were enforceable, not what an arbitrator should or could do after the District Court compelled arbitration.

In re Humana, 285 F.3d at 973-74 & n.3; *Werries*, 253 F.3d at 1086.[3]

B. The Circuit Split Identified In The Certiorari Petition Is Real And Can Only Be Eliminated By This Court.

Plaintiffs also contend that the Circuit split identified in PacifiCare and United's certiorari petition is illusory, but this contention cannot withstand even basic scrutiny.

To start, Plaintiffs do not, and cannot, explain how *In re Humana*, *Werries* and *Investment Partners* can be reconciled. In a case where a defendant moves to compel a plaintiff to arbitrate a federal statutory cause of action that provides for trebled damages under an arbitration agreement that does not allow an arbitrator to impose "punitive damages," *In re Humana* would require a court to deny the defendant's motion while *Werries* and *Investment Partners* would require the same court to grant the motion. *Compare In re Humana*, 285 F.3d at 973-74 & n.3 *with Investment*

---

[3] To the extent Plaintiffs' "waiver"-type argument is based on the fact that neither PacifiCare nor United cited *Werries* to the Court of Appeals or the District Court until the reply brief was filed in Eleventh Circuit Appeal No. 01-12596, *see* Opp. at 5, the argument is meritless. *Werries* was not decided until June 13, 2001, days before the first brief was filed in Appeal No. 01-12596. Nothing in this Court's precedents required either PacifiCare or United to cite *Werries* to the District Court and Court of Appeals in order to preserve their argument that the District Court erred in refusing to compel arbitration based on a punitive damages limitation in an arbitration agreement. Indeed, it would be impossible to comply with such a rule since it would force PacifiCare and United to cite to cases before they are even published and publicly available. Of course, after *Werries* was decided, that case was presented to the Court of Appeals both in the Appeal No. 01-12596 reply brief and by counsel for PacifiCare and United at oral argument.

Partners, 298 F.3d at 318 *and Werries*, 253 F.3d at 1086. This is the definition of a real and concrete conflict.

Furthermore, Plaintiffs' argument that this Court has already decided the question presented by PacifiCare and United (Opp. at 6-10) is bizarre, to say the least. To support this argument, Plaintiffs cite to, among other cases, *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987), but that case squarely holds that nothing in either the FAA or RICO prohibits the arbitration of "civil RICO claims brought against legitimate enterprises," and that there was no conflict, either expressed or implied, between arbitration and the policies that animate RICO. *Id.* at 242. If *McMahon* has already decided the question presented in this case, then it has decided the question in favor of PacifiCare and United, and this Court should summarily reverse the Court of Appeals' decision. No other outcome could stand against this Court's precedents, which have consistently held that statutory causes of action brought by private parties are fully arbitrable. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28, 35 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-483 (1989); *McMahon*, 482 U.S. at 242; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).[4]

Finally, Plaintiffs fare no better when they argue that, with the exception of *Werries*, "all of the seven Circuit Courts of Appeals that have considered motions to compel arbitration of federal statutory claims have followed the

---

[4] The Court did once hold that federal securities claims were inarbitrable, *see Wilko v. Swan*, 346 U.S. 427 (1953), but the Court overruled *Wilko* in *Rodriguez de Quijas*, 490 U.S. at 485.

Court's teachings in *Mitsubishi*, *McMahon*, *Gilmer* and *Green Tree* by deciding the enforceability question themselves." Opp. at 10. All parties agree that the question of whether Congress intended a given federal statutory cause of action to be inarbitrable is a question for a court, not an arbitrator, to decide.[5] As noted above, however, that question has already been settled for RICO causes of action when the Court held in *McMahon* that RICO actions are fully arbitrable. *See* 482 U.S. at 242. The question implicated in this case is markedly different: It is whether a District Court can refuse to send an otherwise arbitrable cause of action to arbitration simply because the parties agreed to limit the remedies they can obtain in arbitration. Over that question, the Courts of Appeals are hopelessly divided. *Compare Thompson*, 300 F.3d at 91-92[6] *and Werries*, 253 F.3d at 1086 *and MCI Telecomm. Corp. v.*

---

[5] PacifiCare and United, however, do not agree that the cases cited by Plaintiffs on page 10 of their Opposition all support the quote set out in the text above. *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677 (7th Cir. 2002), for example, has no majority opinion, so it does not support Plaintiffs' point. Additionally, *Investment Partners* does not resolve the question of whether antitrust causes of action are arbitrable; that was resolved seventeen years earlier by this Court in *Mitsubishi*. Instead, *Investment Partners* addresses the issue presented in this certiorari petition – whether a court can refuse to send a cause of action to arbitration because the parties voluntarily agreed to limit their remedies in arbitration.

[6] The First Circuit decided *Thompson* fourteen days after PacifiCare and United filed their certiorari petition. In *Thompson*, the Court of Appeals affirmed the district court's order to compel arbitration, despite the plaintiffs' argument that the subject arbitration clause deprived them of their statutory rights under the Truth In Lending Act. Recognizing a split among the Circuits, the Court of Appeals in *Thompson* decided to follow *Werries* and held that a District Court cannot refuse to compel arbitration because the arbitration agreement at issue limited federal statutory remedies. *See* 300 F.3d at 91-92.

Matrix Commun. Corp., 135 F.3d 27, 33 n.12 (1st Cir. 1998) *and Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-232 (3rd Cir. 1997) *with Investment Partners*, 298 F.3d at 318 *and In re Humana*, 285 F.3d at 973-74 (adopting *In re Managed Care*, 132 F. Supp.2d at 1000-01 & 1005) *and Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247-49 (9th Cir. 1995). *See also Metro East Center for Conditioning & Health v. Qwest Commun. Int'l, Inc.*, 294 F.3d 924, 929 (7th Cir. 2002) (recognizing that *Werries*, *MCI* and *Great Western* "have held that ... the arbitrator determines whether contractual limitations on remedies [in arbitration agreements] are valid"); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1356-58 (2nd Cir. 1993) (plaintiffs must submit to arbitration in England as required by their contracts even though English arbitrator could not award them RICO trebled damages).[7]

---

[7] Plaintiffs seek to distinguish *MCI* and *Great Western* on the basis that neither involved federal statutory rights. *See* Opp. at 12. As to *MCI*, Plaintiffs are inventing this distinction out of whole cloth because the *MCI* Court never asserts that the only causes of action before it were based on State law. In any event, the same Circuit that decided *MCI* (the First Circuit) later decided *Thompson*, which clearly involved federal statutory rights. *See* 300 F.3d at 89. As to *Great Western*, that case did involve only State law causes of action, but the *Great Western* Court never suggested that its analytical approach would have been any different if it were confronted with federal causes of action. Indeed, both *Thompson* and *Werries* viewed the *Great Western* analytical approach as equally available to federal actions. *See Thompson*, 300 F.3d at 91-92; *Werries*, 253 F.3d at 1085-1086.

C. Howsam v. Dean Witter Reynolds, Inc. Will Likely Impact The Question Presented In This Certiorari Petition.

Plaintiffs contend that there is no reason for the Court to hold this case in light of *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, because the resolution of *Howsam* "will have no impact on the question [PacifiCare and United] present or the judgment below." Opp. at 13. Plaintiffs thereafter spend a page of text summarizing *Howsam*, but notably absent from that page is any effort to show that the Court's *Howsam* decision "will have no impact" on the instant case. This failure is not an oversight, but a recognition of what PacifiCare and United noted in their certiorari petition: In all likelihood, the Court's *Howsam* decision will address the proper allocation of authority between a court asked to compel arbitration versus an arbitrator selected by the parties to arbitrate their substantive disputes. That allocation of authority is central to the issue in *Howsam* – whether a District Court can refuse to compel arbitration of an otherwise arbitrable cause of action because the action might be time-barred – and to the issue here – whether a District Court can refuse to compel arbitration of an otherwise arbitrable cause of action because the parties agreed to limit their remedies in arbitration.

II. CONCLUSION.

For the foregoing reasons, Petitioners PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., United HealthCare, Inc. and UnitedHealth Group Incorporated respectfully requests that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its judgment in *In*

re Humana Inc. Managed Care Litigation. Alternatively, Petitioners respectfully request that this Court hold this petition pending its decision in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, and, after that decision is issued, grant this petition, vacate the Court of Appeals' judgment, and remand this matter to the Court of Appeals for further proceedings consistent with *Howsam.*

DATED: September 26, 2002.

Respectfully Submitted,

William E. Grauer
(*counsel of record*)
Christopher R.J. Pace
COOLEY GODWARD LLP
4401 Eastgate Mall
San Diego, California 92121
Telephone: 858.550.6000
Facsimile: 858.550.6420

Attorneys for Petitioners
PACIFICARE HEALTH SYSTEMS, INC.
and PACIFICARE OPERATIONS, INC.

James W. Quinn, Esq.
Jeffrey S. Klein, Esq.
WEIL, GOTSHAL & MANGES, LLP
767 Fifth Avenue
New York, New York 10153
Telephone: 212.310.8000
Facsimile: 212.310.8007

Edward Soto, Esq.
WEIL, GOTSHAL & MANGES, LLP
701 Brickell Avenue, Suite 2100
Miami, Florida 33132
Telephone: 305.577.3100
Facsimile: 305.374.7159

Attorneys for Petitioners
UNITEDHEALTHCARE, INC. and
UNITEDHEALTH GROUP
INCORPORATED