Patients File Class Action Suit Claiming Healthcare Merger Resulted in Unfair High Prices

The preponderance of research evidence demonstrates that a lack of meaningful healthcare market competition is bad for consumers – resulting in higher prices, and insurance premiums, without a commensurate increase in quality of care. New merger guidelines issued in 2023 by the Federal Trade Commission and Department of Justice are just one indication that the Federal government is more closely examining proposed health system mergers. Increased regulatory scrutiny, among other factors, appears to be causing a slow-down in healthcare merger activity. In addition to merger challenges by state and federal antitrust enforcers, private parties can also use antitrust law to sue for treble damages from mergers of behavior of dominant companies that unreasonably restrain trade.

On February 5, 2024, a group of Wisconsin citizens filed a class action suit in the United States District Court for the Eastern District of Wisconsin on behalf of Commercial Health Plan Members against Aurora Health Care and Advocate Aurora Health (AAH), claiming "AAH has engaged in anticompetitive methods to restrain trade and abuse its market dominance for the purpose of foreclosing competition and extracting unreasonably high prices from Wisconsin commercial health plans and their members."

PARTIES TO THE SUIT

Defendant Advocate Aurora Health was formed via a 2018 merger of Wisconsin-based Aurora Health and Illinois-based Advocate

Health, creating, at the time, a network of 27 regional hospitals and over 500 sites of care. In December 2022, Advocate Aurora merged with North Carolina-based Atrium Health, creating a systems with 67 hospitals called Advocate Health – the fifth-largest nonprofit health system in the U.S.

The plaintiffs (the Shaws) are Wisconsin residents who have received treatment through AAH that the suit describes as inadequate and expensive. Plaintiffs are bringing the suit "individually and on behalf of all others similarly situated."

DETAILS OF THE CLAIMS

The case is claiming that AAH has committed restraint of trade, monopolization, and attempted monopolization in violation of the Sherman Act and Wisconsin antitrust law. In addition to the supposed violations of the law, the plaintiffs are asking the court to certify the proposed class, and award damages and other relief.

Specifically, the suit claims AAH's market dominance allows them to engage in behaviors that drive up costs, including insisting on all or nothing, anti-steering and anti-tiering language in insurance contracts (preventing insurance companies from creating networks to achieve cost savings), as well as refusing to deal with plans that use reference-based pricing. The suit also claims that AAH engages in anticompetitive conduct with providers by using non-competes, referral restrictions, and gag clauses.

In addition to having a significant overall market share, the suit claims AAH's ability to engage in anticompetitive conduct is exacerbated by its ownership of "must-have" healthcare facilities, and a dominant ownership of many local specialty services in eastern Wisconsin.

Plaintiffs claim that the extreme prices AAH can charge to insurers due to their vast market power are passed on to the public through higher premiums, deductibles, and co-pays. With a competitive healthcare market, the suit contends that there would have been a savings of hundreds of millions of dollars in recent years for health plans and their members.

SIGNIFICANCE

This case is similar to Uriel Pharmacy Health and Welfare Plan v. Advocate Aurora Health, Inc., No. 22-CV- 610 (LA) (E.D. Wis.) filed on May 24, 2022. In that case, the plaintiff, a self-insured employer, is claiming that anticompetitive practices by AAH (including all-or-nothing, anti-steering/anti-tiering, and gag clauses) made possible by its monopoly power constitute a violation of federal and state antitrust laws, and have resulted in higher prices for its services compared to other providers.

If cases like *Shaw* and *Uriel* become part of a successful trend of employers and now patients bringing suits challenging high post M&A hospital prices, it would yet another disincentive for healthcare megamergers, and would represent a positive step towards more competitive healthcare markets.