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Client Alert

Arbitrators Dismiss United Healthcare's Antitrust Claims against Chicago Health Care System

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Introduction

On November 18, 2005, a three-judge panel of the American Arbitration Association (the "Panel") concluded that Advocate Health Care ("Advocate"), a large Chicago health system that owns eight hospitals and either employs or is affiliated with over 2,500 physicians, did not violate Section One of the Sherman Act. Specifically, the Panel dismissed the claims of United Healthcare of Illinois ("United"), which had alleged that Advocate had unlawfully fixed prices, conducted a group boycott, engaged in a tying arrangement, and allocated markets. United had sought over $250,000,000 in trebled damages, arbitral imposition of a five-year hospital and physician services agreement between United and Advocate; and ongoing, third-party monitoring of Advocate's contracting conduct. However, as a result of the Panel's order, Advocate's hospitals and employed physicians continue to remain non-participants in United's provider network. Of note is the Panel's extension and application of the Equal Responsibility defense to a customer that complains of price fixing, but that is of relatively equal bargaining power and that desires the administrative efficiencies resulting from a joint agreement that covers the services of 2,500 physicians.

What Happened, as Determined by the Panel

Prior to and throughout 1999, Advocate's hospitals and physicians participated in United's HMO provider network. In 1999 and 2000, as the Chicago health insurance market transitioned away from capitation to fee-for-service reimbursement and as United accordingly "restructure[ed] its business model," United approached Advocate about two joint contracts – one that would include Advocate's hospitals and one that would include Advocate's 2,500 physicians in United's PPO provider network. The Panel found that United approached Advocate because "United desired the benefits of joint contracting in order to establish and stabilize its [PPO] network of physicians" and further that a "joint physician agreement with Advocate covering a large number of physicians was attractive to United in establishing and stabilizing its [PPO] network." United had executed 50 other joint physician agreements with Chicago-area IPAs and PHOs. Although Advocate claimed that it had operated a "messenger model" to execute the physician agreement at issue, the Panel determined that substantial evidence revealed that Advocate executives and contracting staff had directly and actually negotiated its price and other contractual terms. As a result, in early 2000, United and Advocate executed both a physician agreement (covering the 2,500 employed and affiliated physicians) and a hospital agreement (covering Advocate's eight hospitals).

These agreements, intermittently amended, were in effect at the time of the dispute, i.e., the summer and fall of 2003. Prior to the dispute, United had changed its business model once again and "embarked upon its policy to

seek direct individual contracts with physicians rather than joint contracts." When, in the late summer of 2003, United informed Advocate of its intent to contract directly with those physicians affiliated with (but not employed by) Advocate, Advocate terminated the physician agreement as to its employed physicians. Advocate insisted upon a joint agreement covering both its employed and affiliated physicians, which it characterized as a "clinically integrated" agreement. However, no new agreement was finalized, and United proceeded to contract directly with approximately 90 percent of Advocate's affiliated physicians.

Contemporaneously, United offered Advocate a new hospital agreement containing "lower reimbursement pricing and complicated coding provisions which were inconsistent with Advocate's systems." The Panel determined that for these reasons, along with United's refusal to negotiate a joint contract for the services of Advocate's affiliated physicians, Advocate terminated the hospital agreement.

Finally, the Panel determined that, prior to and simultaneously with its 2003 fallout with United, Advocate had begun developing a purported "clinically integrated" product for fee-for-service contracts, drawing on "a number of [clinical] protocols from its HMO capitated program together with a number of new [clinical] protocols" to be included in an 18-point "clinically integrated" product. Between 2003 and 2005, a number of other health insurers, including Blue Cross-Blue Shield of Illinois, CIGNA, Unicare, HFN, Aetna and Humana had entered into joint contracts with Advocate for the services of its affiliated physicians, on the basis that such physicians were "clinically integrated."

The Arbitration and Decision

On November 26, 2003, United filed a Demand for Arbitration under both the physician agreement and hospital agreement, claiming that Advocate's conduct from 1999 throughout 2003 violated the Sherman Act as an illegal price fixing arrangement, an illegal boycott, an illegal tying arrangement and an illegal market allocation. United claimed that Advocate's conduct constituted both a *per se* violation of the antitrust laws and a violation under the Rule of Reason. United claimed treble damages in the amount of $256,925,922; specific relief in the form of reinstatement of the hospital and physician agreements, for five years, on price terms equal to the average price terms that United achieves with other Chicago area providers; and an injunction whereby the Panel, the Federal Trade Commission (the "FTC") and a community-based compliance panel would monitor Advocate's future negotiating conduct. Prior to the hearings, United voluntarily dismissed its tying claim.

The Price Fixing Claim, as to Advocate's 1999-2003 Conduct

With respect to United's price fixing count, the Panel first segregated Advocate's conduct into two time periods: that occurring from 1999 to the summer of 2003, and that occurring from the summer of 2003 and onwards. With respect to the former, the Panel concluded that United could not successfully challenge as an unlawful price fixing arrangement the joint physician agreement executed in 2000 – despite the fact that Advocate executives and contracting staff directly and actually negotiated its price terms – because "United was equally responsible for the physician agreement." As stated, United desired and enjoyed efficiencies from the joint physician agreement. Specifically, the Panel concluded that witness and expert testimony established that a "joint contract provided United with substantial administrative efficiencies," namely "provid[ing] United and other payors benefits and efficiencies in quickly assembling a stable PPO network without the need to seek

individual contracts with thousands of physicians – even though United was free to individually contract and in some cases did so." Moreover, the Panel determined that "United was not coerced to enter the physician agreement"; that the parties were "relative equals in terms of bargaining power"; and that the physician agreement was negotiated at arms-length. Thus, the Panel determined that "United had no reason to enter the [2000] agreement at all unless it found that on balance the terms were to its benefit" and, therefore, that Advocate's "equal responsibility" defense applied. The Panel declined to adopt United's argument that the "equal responsibility" doctrine applies only in defense of antitrust claims brought by participants benefiting from the suspect arrangement, and does not apply in defense of antitrust claims brought by customers of the alleged violators. Because the Panel extended the applicability of the "equal responsibility" doctrine to defenses of claims brought by customers, the Panel was not, per Seventh Circuit precedent, required to consider whether Advocate's conduct should have been considered under either a *per se* or Rule of Reason standard.

Nonetheless, in *dicta*, the Panel concluded that the Rule of Reason applied because "potential benefits or efficiencies" from Advocate's price setting conduct existed and, moreover, "the Supreme Court's approach to evaluating a Section 1 claim has gone through a transition over the last twenty-five years, from a dichotomous categorical approach to a more nuanced and case specific inquiry." Despite the Panel's finding that Advocate did not operate a "messenger model" in compliance with the safety zone established in the 1996 Department of Justice and FTC Statements of Antitrust Enforcement Policy in Health Care, the Panel determined that Advocate "provided sufficient evidence that [its] joint contracting provided United and other payors competitive benefit sufficient to offset any potential harm to consumers." The Panel then concluded that the price fixing count would have failed under the Rule of Reason analysis – even in the absence of the "equal responsibility defense" – as United failed to demonstrate that Advocate had market power in any market for health care services.

The Price Fixing Claim, as to Advocate's 2003 Conduct

With respect to Advocate's conduct in the summer of 2003, the Panel concluded that "since no joint agreement was ever signed, at most these events could be alleged only to amount to an attempt by Advocate to enter into a joint agreement…. However, there is no cause of action available under Section 1 of the Sherman Act for attempted price fixing." Therefore, the Panel found it unnecessary to consider whether Advocate's detailed evidence of a "clinically integrated program" for 2004 was either 1) sufficient as a defense to Advocate's 2003 conduct; or 2) sufficient to demonstrate that joint negotiations were ancillary to the "clinical integration program." Nonetheless, the Panel stated that "the evidence established that Advocate was prepared as of January 1, 2004, the date a new contract with United would purportedly begin, to proceed with a 'clinically integrated' product." The Panel further stated that the "proposed benefits from such a program, as apparently recognized by other health insurers, sufficiently justify Advocate's conduct… though the ingredients appear to be the mid-level development of a fully integrated program."

The Group Boycott Claim

United claimed that Advocate's termination of the hospital agreement constituted a *per se* refusal to deal and group boycott in violation of Section 1 of the Sherman Act. However, the Panel found that Advocate made a unilateral decision to terminate that agreement and, thus, no horizontal agreement, combination or conspiracy

in restraint of trade existed. Even if the requisite conspiracy had existed, the Panel found the evidence to refute United's group boycott claim: namely evidence that United was able to directly contract with 90% of the affiliated physicians after Advocate terminated the hospital agreement. Notably, the Panel also stated that "contracts between health insurers and providers often require many months of notice of termination prior to the effective termination date, otherwise the contracts would automatically renew…. United's argument which relies on such contractual relationships does not support its refusal to deal/group boycott claim."

The Market Allocation Claim

United claimed that standard referral provisions in each of the physicians' participation agreements with Advocate required the physicians to "channel specialist referrals to other physicians in… Advocate… and to admit patients to the [Advocate] hospitals…," foreclosing the Advocate physicians from "using non-Advocate hospitals and specialists" and harming United. The Panel determined that these provisions were included "primarily to be utilized in connection with [Advocate's] HMO and capitated contracts," that United failed to prove that these provisions harmed United, and that United failed to prove that Advocate enforced these provisions in connection with PPO patients. The Panel "note[d] its belief that the terms of the referral provisions are somewhat internally inconsistent, and are more geared to the interests of Advocate than to the interests of its patients. However, this consideration alone, does not make them unlawful."

Conclusion

For the foregoing reasons, the Panel dismissed all of United's claims and requests for relief, and ordered the parties to pay their own attorneys' fees and share equally in the Panel's $750,000 of fees and expenses. Other state statutory and common law claims and counterclaims were dismissed either on similar grounds or for lack of evidence.

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