Recent Developments in the Litigation of Nursing Wages Antitrust Class Action Claims

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Overview

- In June of 2006, four class action suits were filed by registered nurses against hospital organizations in four cities: Albany, NY; Chicago, IL; Memphis, TN; and San Antonio, TX. The cases are:
  1. *Unger v. Albany Medical Center*, N.D.N.Y.;
  2. *Clarke v. Baptist Memorial Healthcare Corp.*, W.D. Tenn.;
  3. *Reed v. Advocate Health Care*, N.D. Ill.; and
  4. *Maderazo v. Vanguard Health Systems*, W.D. Tex.
- On December 15, 2006, nurses filed suit against a number of hospital organizations in the Detroit, MI metropolitan region:
  - This fifth case, *Cason-Merendo v. Detroit Medical Center*, is currently pending in the Eastern District of Michigan.

Core Allegations of the Five Suits

- The plaintiffs allege in each suit that the defendants **violated Section 1 of the Sherman Antitrust Act**.
- Plaintiffs' complaints allege that the defendants **conspired to fix wages at depressed rates**, and that the defendants restrained competition through **exchange of non-public, competitively-sensitive information** regarding nurses' wages and benefits.
- Plaintiffs seek trebled back compensation (to reflects the alleged difference between the wages that they were actually paid, and what they would have been paid, absent defendants' purported conspiracy), fees and costs, and post-judgment interest.
- The Plaintiffs have all alleged that the **relevant market** is the purchase of **hospital registered nurses' services**, not of registered nurses, generally.

Plaintiffs' Allegations: Alleged Nationwide Nurse Shortage and Stagnant Wage Increases

- Plaintiffs contend that despite increasing demand for nurses, "**wage increases… have been insignificant** during a decade-long nurses shortage."
- Plaintiffs conclude that the hospitals and their trade associations conspired to wage-fix below levels that the market would otherwise bear, contributing to a shortage of nurses.

Plaintiffs' Allegations: Information Exchanges – Surveys and Meetings

- Plaintiffs claim that the defendants **regularly exchange** wage and benefit **data via surveys and meetings** (including job fairs, professional association meetings, annual events, and others).
- Plaintiffs seek to infer conspiracy from evidence of some information sharing and what they claim are below market compensation levels.
- The pleadings do not discuss whether hospitals pay less than other employers of registered nurses.
- Plaintiffs' pleadings do not refer to the FTC and DOJ's joint *Statements of Antitrust Enforcement Policy in Health Care*, which designate "safety zones" for certain information activities with regard to federal agency law enforcement.

FTC/DOJ Information Exchange "Safety Zones"

- Absent extraordinary circumstances, the agencies will not challenge the **collection and dissemination of providers' fees, discounts or methods of reimbursement** if:
  1. (1) an outside third party collects the information (e.g., purchaser, government agency, consultant, academic institution, trade association);
  2. (2) the fee information exchanged among providers is more than three months old; and
  3. (3) the specific fee information is anonymous – and in order to ensure anonymity, no provider may represent more than 25% of the weighted basis of a statistic and the information must be aggregated.

FTC/DOJ Information Exchange "Safety Zones"

- **Surveys**: providers are permitted by the FTC/DOJ *Statements* to give answers to written surveys regarding prices for health care services, or wages, salaries or benefits of health care personnel. The same three safeguards outlined above apply to survey activities. If those three requirements are met, "[p]articipation by competing providers in surveys… can have ***significant benefits*** for health care consumers." *Statements* at 49.
- Conduct outside "safety zone" has no special protection from government enforcement but is not presumed wrongful on that basis.

Status of the Five Pending Class Actions

- The five suits are in various stages; in most, defendants have answered plaintiffs' complaints.
- A **Motion to Dismiss** has been filed in *Clarke v. Baptist Memorial Healthcare Corp*., W.D. Tenn. (filed Sept. 1, 2006). The motion is pending.
- In addition, a **Motion for Summary Judgment** Based Upon the Nonstatutory Labor Exemption has been filed in *Reed v. Advocate Health Care*, N.D. Ill. (Oct. 20, 2006). This motion is pending, as well.

Clarke Motion to Dismiss

- Defendants Baptist Memorial Healthcare and Methodist Healthcare filed their Motion to Dismiss on two grounds:

1. Plaintiffs misleadingly identify the wrong market for their Section 1 analysis – the true market is for registered nurses, not registered nurses employed by hospitals. The hospitals do not have the requisite market power in the actual relevant market – nursing jobs exist outside of hospitals, and those jobs are interchangeable (if not more desirable).
2. Plaintiffs' "cookie cutter" complaint falls short of the Fed. R. Civ. P. 8(a) pleading requirements – it is conclusory, and does not adequately allege antitrust claims or injuries.

Nonstatutory Labor Exemption to Federal Antitrust Laws – Collective Bargaining

- University of Chicago Hospitals ("UCH"), filed the Motion for Summary Judgment in the *Reed* matter on the basis that the nonstatutory labor exemption to the antitrust laws, discussed by the Supreme Court in *Brown v. Pro Football*, 518 U.S. 231, 243-248 (1996), applies to the collective bargaining processes of the UCH (including information sharing), as well as the collective agreements that UCH reached with its employees, the registered nurses.
- Apart from any argument with exemption's applicability in the Chicago case, plaintiffs would presumably claim in the other cases that no exemption would apply to a wage-fixing conspiracy among hospitals that are not part of a multi-employer bargaining agreement.

Discovery

- As discovery proceeds, it may be bifurcated into separate "class" related issues, separate from "merits" discovery.

Compliance

- Hospitals should be cognizant of antitrust risks not only in regard to their rates and dealings with managed care plans, but also with regard to their employee compensation activities.
- Apart from private lawsuits, the Department of Justice resolved by consent agreement in 1994 its allegations that 8 Utah hospitals, the Utah Hospital Association, and another association conspired to exchange wage information on registered nurses.