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Government Settles Antitrust Suit Challenging Wage-Setting by Nurse Registry

Action: The Antitrust Division of the United States Department of Justice (DOJ) and the State of Arizona reached a settlement with the Arizona Hospital and Healthcare Association (AzHHA), and one of its subsidiaries (which offered its members nurse registry options) to end a lawsuit that challenged, on antitrust grounds, AzHHA's group purchasing organization for temporary nursing services.

Impact: The government's challenge of the AzHHA nurse registry program emphasizes the government's concern over anti-competitive practices associated with nurse wages as well as the potential anticompetitive aspects of group purchasing programs, particularly where a combination of purchasers possesses market power that enables it to depress prices to below competitive levels.

Effective Date: Immediately.

On May 22, 2007, the DOJ and the State of Arizona reached a settlement with AzHHA, and one of its subsidiaries, to end a lawsuit that challenged, on antitrust grounds, AzHHA's group purchasing organization for temporary nursing services.

The AzHHA Program

AzHHA operated a group purchasing program, the AzHHA Registry, for temporary nursing services. The program included a Per Diem Registry, which operated separate registries for per diem nursing personnel in Northern Arizona and Southern Arizona. The program also included a registry for travel nursing personnel throughout Arizona called the Travel Registry. The registries covered various types of nursing personnel, including RNs, LPNs, CNAs, operating room technicians, behavioral health technicians, and sitters.

The AzHHA Registry began in 1988 with a focus on quality and, thus, established standards for the staff and record-keeping procedures of participating temporary nurse staffing agencies, and conducted regular audits of the participating staffing agencies to ensure compliance with its quality standards. In addition to quality assurance, the program required each participating staffing agency to submit a schedule of standard billing rates. Each participating hospital would individually negotiate its own — discounted — rate from those schedules.

AzHHA's program was later modified to set uniform rates for per diem and travel nurses. Specifically, AzHHA required all participating staffing agencies to accept a uniform rate schedule set by its Registry for all participating hospitals. Although AzHHA compiled and distributed the average agency rates to each participating hospital, the rates for the uniform schedule were actually set through an average of the participating hospitals' desired rates as submitted to AzHHA by these hospitals.

In addition to the uniform rate schedules, the program required participating staffing agencies to accept competitively sensitive contractual provisions. Specifically, the agencies were required to agree to certain uniform payment, cancellation, and indemnification terms. AzHHA also gathered and shared competitively sensitive agency information such as the compensation and bonuses offered to temporary nursing personnel.

Participation by the hospitals in the Registry was closely monitored and enforced. AzHHA distributed reports of Registry usage by the participating hospitals. By agreement among the participating hospitals, any hospital using the participating agencies for less than 50 percent of its total per diem hours would be expelled from the program.

By 2005, 65 Arizona hospitals participated in at least one section of the Registry. The hospitals participating in the Per Diem Registry controlled approximately 80 percent of the hospital beds in the Phoenix area and 84 percent of the beds in the Tucson area. The hospitals participating in the Travel Registry controlled approximately 78 percent of all hospital beds in Arizona.

The Government Complaint

The complaint filed by the DOJ and the State of Arizona challenged the Registry program on the ground that it violated Section 1 of the federal Sherman Act and the Arizona antitrust statute. Specifically, the government alleged that the participating hospitals possessed market power in the purchase of per diem nursing services because they controlled approximately 80 percent of the hospital beds in the Phoenix area and 84 percent of the beds in the Tucson area. It was alleged that the hospitals possessed market power in the purchase of travel nursing services because they controlled approximately 78 percent of all hospital beds in the state of Arizona. According to the government, the hospitals, through the AzHHA Registry, exercised

their market power to depress the prevailing wages for temporary nursing personnel below competitive levels.

The government also claimed that the benefits of the program were outweighed by the harm to competition posed by setting temporary nursing wages below competitive levels. First, the government pointed to AzHHA's own literature, which attributed the hospitals' cost savings to the collective price setting and not to any administrative or transactional efficiencies. Furthermore, the government alleged that the program: (1) had not resulted in offsetting transactional efficiencies or appreciable economies of scale for the staffing agencies; (2) did not result in an increase in the supply of temporary nursing personnel; and (3) imposed uniform billing rates and contractual terms not reasonably necessary to achieve any efficiencies that may have resulted from the Registry's credentialing and quality assurance activities.

The Consent Decree

Filed simultaneously with the government's complaint, the consent decree ends the litigation and prohibits AzHHA from engaging in several aspects of its Registry program. AzHHA is prohibited from: (1) setting uniform rates to be paid by hospitals for temporary nursing services; (2) imposing uniform payment and cancellation terms for participating agencies; (3) sharing competitively sensitive information with participants; and (4) engaging in any activity that would encourage or result in boycotting or discriminating against hospitals or agencies that do not participate in its Registry.

The consent decree also outlines aspects of the Registry program that are acceptable. Specifically, AzHHA: (1) is permitted to continue its credentialing and quality assurance activities; and (2) may engage in activities that allow hospitals and participating agencies to individually negotiate and agree on rates and contractual terms.

Other Nursing Wage Litigation

The settlement is another example of government and private challenges to anticompetitive practices associated with nursing care and nurse wages. For example, last month a federal district court in Tennessee refused to dismiss a complaint by a class of nurses alleging that a Tennessee health system conspired to depress nurse wages below competitive levels. The complaint filed against Baptist Memorial Healthcare Corp. charged that the Memphis area hospital

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system agreed with other area hospitals to exchange detailed and nonpublic information about the wages each paid, or would pay, its registered nurses, and that there was agreement and understanding among the hospitals that the information was being shared for the purpose of containing nurse wages. Similar claims have been filed against hospitals in Chicago, Illinois; San Antonio, Texas; and Albany, New York.

Guidelines for Group Purchasing Arrangements

The government's challenge of AzHHA's temporary nurse registry program also emphasizes the government's concern over the potential anticompetitive aspects of group purchasing programs. In light of the settlement, those contemplating creation of, or participation in, a group purchasing plan should be mindful of the following:

- Joint purchasing arrangements among hospitals are unlikely to raise antitrust concerns unless (1) the arrangement accounts for so large a portion of the purchases of a product or service that a hospital can effectively exercise market power in the purchase of the product or service, or (2) the products or services being purchased jointly account for so large a proportion of the total cost of the services being sold by the participants that it may facilitate price fixing or otherwise reduce competition.
- A group purchasing plan should not impose restraints on the participants that are not reasonably required to achieve the efficiencies of the plan.
- Some precautions that may serve to mitigate competitive concerns associated with a group purchasing

plan include: (1) the absence of any requirement that participants use the arrangement for all purchases of a particular product or service; (2) the conduct of negotiations by an independent agent who is not an employee of a participant; and (3) maintenance of the confidentiality of competitively sensitive information of the program participants.