Healthcare

Allergy ‘turf war’ plaintiffs in the right ballpark, but complaint is short on specifics — antitrust specialist — PaRR

• Case pits board-certified doctors v purportedly ‘less qualified’ providers
• Steps “highly plausible” but were they legal?
• Relevant market needs definition

A Texas “turf war” between primary care doctors and board-certified allergists over testing and treating allergies tells a great story, but insiders circling wagons to protect lucrative practices may not make for an antitrust conspiracy.

John Kirkwood, who analyzes antitrust cases and teaches antitrust law at Seattle University School of Law, said that he found the complaint impressive and compelling but is not sure how well it will stand up to rigorous analysis in court.

As PaRR reported, United Allergy Services and Academy of Allergy & Asthma in Primary Care filed the antitrust action on 13 January in federal court in San Antonio, Texas, against groups that represent board-certified allergists.

United Allergy Services, which provides allergy support services to primary care doctors, and Academy of Allergy & Asthma in Primary Care, which represents primary care doctors who offer testing and therapy for allergy patients, allege in their complaint that three national organizations which represent board-certified allergists engaged among themselves and with others in an illegal antitrust conspiracy to drive primary care doctors out of the allergy testing services market.

“It’s an interesting story…in which board-certified medical providers are concerned about encroachments on their business by less qualified providers,” said Kirkwood, citing past opposition from dentists to dental hygienists to applying fluoride to children’s teeth in schools.

The plaintiffs claim that defendants first filed false medical board complaints against their member doctors in an effort to harm their reputation within the community, and when that failed to work, they engaged in an illegal group boycott by contacting insurance companies
and managed care organizations to convince them to hold or restrict reimbursement payments for tests performed on patients by non-allergist primary care doctors.

They assert claims under Section 1 of the Sherman Act, the Texas Free Enterprise and Antitrust Act, and other common law torts under state law.

Kirkwood said he found “highly plausible” the plaintiffs’ claim that board-certified allergists would take steps to prevent non-board-certified medical doctors and technicians from testing for and treating patients with allergies. “So the question is whether the steps are legal,” he said.

Board-certified allergists are alleged to have presented information to insurance companies and managed care providers and, as a result of the information received, they were able to persuade several health-care insurers not to pay claims on treatment by non-board-certified medical providers, Kirkwood said. “So one of the questions here is: When is the provision of information anticompetitive?” he said.

Kirkwood pointed out that commercial speech is legally protected unless it is unlawfully deceptive, adding that sham litigation isn’t unlawful unless it is subjectively and objectively deceptive.

“The plaintiffs’ use of the words ‘false’ and ‘unfounded’ in their complaint put them in the right ballpark in terms of allegation, but what they don’t do is lay out the specifics, they don’t say what defendants said to the insurance companies that was false and deceptive,” Kirkwood said.

That they did not actually lay out the specifics could expose them to the heightened standard for surviving a motion to dismiss that the US Supreme Court (SCOTUS) established in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, he said.

Under that pair of SCOTUS rulings, plaintiffs are required to present detailed facts from the outset of the case, rather than acquiring them through pretrial discovery, in order to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Kirkwood compared the boycott alleged in this action with the alleged boycott PaRR earlier reported among steel distributors in Houston, noting that in this case there appears to be no coercion—certainly not as alleged in the steel distributor’s case.

Nor in this connection did he see any allegations that the defendants have market power. “What is the relevant market? This is something a lot of courts now want to see,” Kirkwood said.

He added that he found it interesting that the complaint notes that defendants never were able to get the Texas Medical Board to agree “that primary care physicians are not qualified to practice allergy testing and allergen immunotherapy or that self-administration of allergy shots is a violation of the standard of care.”
“They persuaded some but not all health insurance companies. Why did some accept and others not? The story turns on the fact that some insurance companies accepted their presentations,” Kirkwood said. “If the information was false and deceptive, why did the insurance companies accept them?”

“If the recipient accepts information and it hurts the plaintiff, why didn’t the recipient realize that the information was false? It’s a tricky area,” Kirkwood said.

Christine Westendorf, spokesperson for American College of Allergy, Asthma and Immunology, based in Arlington Heights, Illinois, said in an email statement that the organization found out about the antitrust action through a forwarded media release.

“ACAAI has not yet been served with a complaint and, obviously, has not yet had the opportunity to review the charges. However, based on the press release, we believe the charges have no merit and ACAAI intends to defend itself vigorously,” the statement said.

Messages seeking comment from defendants American Academy of Allergy, Asthma & Immunology and Joint Council of Allergy, Asthma & Immunology were not returned.

The three main defendants, American College of Allergy, Asthma and Immunology, American Academy of Allergy, Asthma & Immunology, and Joint Council of Allergy, Asthma & Immunology, are associations which represent doctors who specialize in allergy testing and therapy and maintain board certification in the allergy and immunology sub-specialty fields. The complaint also names Texas organizations, doctors and practices as defendants.

The plaintiffs argue in essence that “nothing prevents primary care physicians from providing allergy treatment and immunotherapy to their patients. A specialist certification is not required by the standard of care in Texas or in any other state in which plaintiffs operate. Yet, defendants suggest that primary care physicians are incapable of providing quality allergy care to their patients and are determined to shut primary care physicians and businesses like UAS out of the market.”

The plaintiffs claim that defendants' boycott actions allowed the defendants artificially to inflate prices for allergy testing services, thus harming consumers.

The plaintiffs seek a declaratory judgment that the defendants' actions were unlawful, injunctive relief to enjoin the defendants permanently from continuing the alleged anticompetitive conduct, compensatory and trebled damages, and attorneys' fees.

The plaintiffs are represented by Bracewell & Giuliani.

The case is: United Biologics et al. v. American Academy of Allergy, Asthma & Immunology, et al., case no., 14-35, US District Court for the
Western District of Texas.
by Peter Geier in Washington, DC