

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

COMMONWEALTH OF VIRGINIA,
BY ITS ATTORNEY GENERAL,
JAMES S. GILMORE, III

Plaintiff,

v.

PHYSICIANS GROUP, INC.,
EDWIN J. HARVIE, JR., M.D.,
LAWRENCE G. FEHRENBAKER, M.D.,
ERIC N. DAVIDSON, M.D.,
MILTON GREENBERG, M.D.,
WILLIAM W. HENDERSON, IV, M.D.,
DOUGLAS W. SHIFLETT, M.D.,
and
NOAH F. GIBSON, IV, M.D.

Defendants.

Civil Action No. 95-____-D

COMPLAINT

Plaintiff, the Commonwealth of Virginia ("Commonwealth"), by its Attorney General, James S. Gilmore, III, alleges as follows:

JURISDICTION AND VENUE

1. Count I of this Complaint is a civil antitrust action arising under Section 1 of the Sherman Act, 15 U.S.C. § 1, for treble damages in accordance with Section 4 of the Clayton Act, 15 U.S.C. § 15, and for permanent injunctive relief in accordance with Section 16 of the Clayton Act, 15 U.S.C. § 26. This Court has jurisdiction of this action under 28 U.S.C. § 1337.

2. Count II of this Complaint is brought under § 59.1-9.5 of the Code of Virginia for treble damages in accordance with § 59.1-9.15(b) of the Code of Virginia, for permanent injunctive relief in

accordance with § 59.1-9.15(a) of the Code of Virginia, and for civil penalties in accordance with § 59.1-9.15(a) of the Code of Virginia.

3. This Court has jurisdiction of Count II of this action under the doctrine of pendent jurisdiction.

4. This action may be brought in the United States District Court of the Western District of Virginia under Section 12 of the Clayton Act, 15 U.S.C. § 22, and under 28 U.S.C. § 1391.

DEFINITIONS

5. (a) "Physician" means a doctor of medicine or osteopathy.

(b) "Participation agreement" means any agreement or contract, oral or written, directly between any physician and any third-party payor, that sets forth the terms, including compensation, under which a physician will provide covered services to covered persons.

(c) "Third-party payor" means any person or entity that reimburses for, purchases, or pays for health care services provided to any other person and includes, but is not limited to, health maintenance organizations, preferred provider organizations, health insurance companies, prepaid hospital, medical or other health service plans such as Blue Shield and Blue Cross plans, government health benefits programs, administrators of self-insured health benefits programs, and employers or other entities providing self-insured health benefits programs.

(d) "Key Advantage" means the Key Advantage health insurance plan for employees of the Commonwealth of Virginia and their dependents administered by Trigon Blue Cross and Blue Shield and its predecessor, Blue Cross and Blue Shield of Virginia.

PLAINTIFF

6. The Commonwealth of Virginia is one of the sovereign states of the United States.

DEFENDANTS

7. Defendant Physicians Group, Inc. ("PGI") is a non-profit association of physicians practicing in the Danville, Virginia area, and incorporated in the Commonwealth of Virginia. Throughout the time covered by this Complaint, PGI held general membership and board of directors meetings in the Western District of Virginia. PGI also committed conspiratorial acts in violation of the federal and Virginia antitrust laws in the Western District of Virginia and may be found in the Western District of Virginia.

8. Defendant Edwin J. Harvie, Jr., M.D., an individual, is engaged in the delivery of health care services to the general public through the practice of medicine. Dr. Harvie treats patients at his medical offices in Danville, Virginia. Throughout the time covered by this Complaint, Dr. Harvie was engaged in the practice of medicine in the Western District of Virginia. Dr. Harvie also committed conspiratorial acts in violation of the federal and Virginia antitrust laws in the Western District of

Virginia and may be found in the Western District of Virginia.

9. Defendant Lawrence G. Fehrenbaker, M.D., an individual, is engaged in the delivery of health care services to the general public through the practice of medicine. Dr. Fehrenbaker treats patients at his medical offices in Danville, Virginia. Throughout the time covered by this Complaint, Dr. Fehrenbaker was engaged in the practice of medicine in the Western District of Virginia. Dr. Fehrenbaker also committed conspiratorial acts in violation of the federal and Virginia antitrust laws in the Western District of Virginia and may be found in the Western District of Virginia.

10. Defendant Eric N. Davidson, M.D., an individual, is engaged in the delivery of health care services to the general public through the practice of medicine. Dr. Davidson treats patients at his medical offices in Danville, Virginia. Throughout the time covered by this Complaint, Dr. Davidson was engaged in the practice of medicine in the Western District of Virginia. Dr. Davidson also committed conspiratorial acts in violation of the federal and Virginia antitrust laws in the Western District of Virginia and may be found in the Western District of Virginia.

11. Defendant Milton Greenberg, M.D., an individual, is engaged in the delivery of health care services to the general public through the practice of medicine. Dr. Greenberg treats patients at his medical offices in Danville, Virginia. Throughout the time covered by this Complaint, Dr. Greenberg was engaged in the practice of medicine in the Western District of Virginia. Dr. Greenberg also committed conspiratorial acts in violation of the

federal and Virginia antitrust laws in the Western District of Virginia and may be found in the Western District of Virginia.

12. Defendant William W. Henderson, IV, M.D., an individual, is engaged in the delivery of health care services to the general public through the practice of medicine. Dr. Henderson treats patients at his medical offices in Danville, Virginia. Throughout the time covered by this Complaint, Dr. Henderson was engaged in the practice of medicine in the Western District of Virginia. Dr. Henderson also committed conspiratorial acts in violation of the federal and Virginia antitrust laws in the Western District of Virginia and may be found in the Western District of Virginia.

13. Defendant Douglas W. Shiflett, M.D., an individual, is engaged in the delivery of health care services to the general public through the practice of medicine. Dr. Shiflett treats patients at his medical offices in Danville, Virginia. Throughout the time covered by this Complaint, Dr. Shiflett was engaged in the practice of medicine in the Western District of Virginia. Dr. Shiflett also committed conspiratorial acts in violation of the federal and Virginia antitrust laws in the Western District of Virginia and may be found in the Western District of Virginia.

14. Defendant Noah F. Gibson, IV, M.D., an individual, is engaged in the delivery of health care services to the general public through the practice of medicine. Dr. Gibson treats patients at his medical offices in Danville, Virginia. Throughout the time covered by this Complaint, Dr. Gibson was engaged in the practice of medicine in the Western District of Virginia. Dr.

Gibson also committed conspiratorial acts in violation of the federal and Virginia antitrust laws in the Western District of Virginia and may be found in the Western District of Virginia.

NATURE OF TRADE AND COMMERCE

15. The activities of the Defendants are within the flow of interstate commerce and/or have an effect upon interstate commerce in that, among other things, the Defendants purchase and use medical supplies, equipment and other goods from out-of-state suppliers, and provide services to persons who cross state lines to receive such services.

COUNT I

16. Paragraphs 1 through 15 are incorporated herein as if set forth in full.

17. The General Assembly of Virginia, during its 1992 Session, enacted legislation directing the administration of then Governor Lawrence Douglas Wilder to implement a managed care health insurance plan for state employees and their dependents, which was to be developed by the Department of Personnel and Training ("DPT"), in consultation with an insurance benefits consulting firm. This managed care health insurance plan was intended to replace the Commonwealth's existing fee-for-service health insurance plans.

18. Pursuant to Item 61 of the 1991 Appropriation Act passed by the Virginia General Assembly, by or about May 1, 1991, DPT and

an Item 61 Task Force created a new managed care health insurance plan named Key Advantage, and subsequently selected Blue Cross and Blue Shield of Virginia ("Blue Cross"), now Trigon Blue Cross and Blue Shield, to administer Key Advantage. When DPT and the Task Force's plan was approved by the 1992 General Assembly, Key Advantage was to become effective July 1, 1992. The effective date was subsequently extended to October 1, 1992.

19. On or about August 15, 1991, Blue Cross began to solicit participation in Key Advantage from physicians throughout Virginia, including the Danville area. Key Advantage was met with widespread opposition from physicians across Virginia, including Danville. The physicians objected to several provisions in the original Key Advantage participation agreement, including the withholding of ten percent of fees paid to participating physicians and mandatory electronic filing of claims.

20. In response to physician opposition to Key Advantage, in the spring of 1992, a task force composed of physicians throughout the state, including defendant Edwin J. Harvie, Jr., M.D., representatives of the Medical Society of Virginia, DPT, and state employees was formed to make recommendations to the state regarding possible changes to Key Advantage. In May 1992, the task force recommended five major changes to Key Advantage, which the Commonwealth of Virginia immediately adopted. Blue Cross announced the changes to the Key Advantage plan to primary care physicians practicing in Virginia in a letter dated May 22, 1992. Those changes were:

- (1) Elimination of the 10 percent withhold and referral fund;
- (2) Elimination of the mandatory electronic claims filing requirement;
- (3) Elimination of the requirement that Key Advantage participating physicians must also participate in other Blue Cross insurance plans;
- (4) Waiver of the requirement that participating physicians accept a minimum of 500 Key Advantage patients; and
- (5) More generous payments to physicians in non-urban areas, including Danville, in accordance with the higher Blue Shield maximum allowable fee schedule.

21. Sometime before April 14, 1992, prior to the adoption of the changes to Key Advantage, the PGI Board of Directors met to consider the original Key Advantage participation agreement. The Board of Directors unanimously voted to urge members of PGI to boycott Key Advantage. On or about April 14, 1992, defendant Harvie wrote each PGI member advising them of the Board vote and reminding them that "the participation agreement which each of us signed [when they joined PGI] stipulates that we will act collectively in dealing with health care brokers. . . ."

22. Following the announcement of the changes to Key Advantage, on or about May 27, 1992, defendant Harvie wrote each PGI member describing the changes and advising each member to "sit tight and don't sign anything."

23. Members of the PGI Board of Directors met with representatives of Blue Cross and DPT on June 29, 1992, to discuss PGI's problems with Key Advantage. The Blue Cross and DPT officials attempted in vain to persuade the PGI board members to

recommend to the PGI membership that the physicians agree to participate in Key Advantage.

24. Defendant Harvie sent a letter to each PGI member dated August 4, 1992, stating that the revised Key Advantage participation agreement was "a lot worse than we thought. . . ." The letter further stated that the PGI Board of Directors had met the day before and agreed to advise the PGI membership to continue to refuse to sign the participation agreement.

25. Due to the continuing refusal by physicians in Danville and three other areas in Virginia, the Commonwealth was forced, on October 1, 1992, to implement an interim health insurance plan for state employees residing in those four areas. The interim plan, among other things, allowed state employees in those areas to see physicians who had refused to participate in Key Advantage without penalty.

26. The full membership of PGI met on or about October 6, 1992. The stated purpose of the meeting was to vote on whether PGI members would agree to sign Key Advantage participation agreements. After a lengthy discussion, a majority of the members voted not to participate in Key Advantage unless and until the Commonwealth agreed to their demand that all disputes between Blue Cross and any Key Advantage participating physician from the Danville area be resolved through binding arbitration. On or about October 14, 1992, defendant Harvie wrote Blue Cross proposing the insertion of a binding arbitration provision in the Key Advantage participation agreement for physicians in the Danville area.

27. The PGI Board of Directors met with officials from Blue Cross and DPT on January 4, 1993, to discuss PGI's binding arbitration demand. Following the meeting, DPT rejected PGI's binding arbitration demand, which Blue Cross communicated to defendant Harvie by a letter dated February 8, 1993.

28. The PGI Board of Directors met on or about March 23, 1993, and unanimously reaffirmed PGI's agreement to boycott Key Advantage unless and until the Commonwealth agreed to its binding arbitration demand. Defendant Harvie informed Blue Cross by a letter dated March 24, 1993, that the Board of Directors found the Key Advantage participation agreement to be unacceptable and that the Board would recommend to the PGI membership that they continue to refuse to participate in Key Advantage.

29. The above described activities, beginning at least as early as April 1992, and continuing through the present, constitute a combination and conspiracy in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

30. Defendants have engaged in a pattern and practice of antitrust violations, and it is therefore reasonably probable that their violations will recur unless the Defendants are permanently enjoined from their unlawful acts.

31. The aforesaid combination and conspiracy has had, and will have, the following adverse effects on competition, among others:

The cost to the Commonwealth of providing health insurance benefits to its employees and their dependents in the

Danville, Virginia area has increased.

COUNT II

32. Paragraphs 1 through 31 are incorporated herein as if set forth in full.

33. The above described activities, beginning at least as early as April 1992, and continuing through the present, constitute a combination and conspiracy in violation of the Virginia Antitrust Act, § 59.1-9.5 of the Code of Virginia.

34. The aforesaid conspiracy in violation of the Virginia Antitrust Act, § 59.1-9.5 of the Code of Virginia, was willful and flagrant.

35. Defendants have engaged in a pattern and practice of antitrust violations, and it is therefore reasonably probable that their violations will recur unless the Defendants are permanently enjoined from their unlawful acts.

WHEREFORE, Plaintiff requests:

A. That the unlawful combination and conspiracy alleged herein be adjudged and decreed to be per se unreasonable restraints of trade in willful violation of 15 U.S.C. § 1 (Sherman Act) and § 59.1-9.5 of the Code of Virginia (Virginia Antitrust Act);

B. That the Plaintiff recover threefold the damages determined to have been sustained by it, and that joint and several judgments in favor of Plaintiff be entered against Defendants, and each of them;

C. That Defendants be enjoined from continuing the unlawful combination and conspiracy alleged herein;

D. That Plaintiff recover its costs of this suit, including its reasonable attorney's fees, as provided by law;

E. That a civil penalty be assessed against each Defendant in the amount of One Hundred Thousand Dollars and Zero Cents (\$100,000.00) under Count II of this Complaint, pursuant to § 59.1-9.15(a) of the Code of Virginia, for the benefit of Plaintiff Commonwealth of Virginia; and

F. That Plaintiff be granted such other and further relief as the Court deems appropriate.

Dated this 25 day of April, 1995.

RESPECTFULLY SUBMITTED,

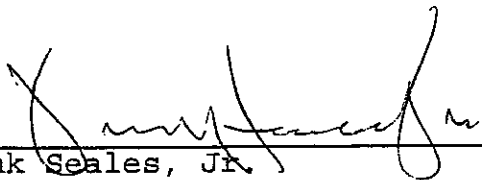
COMMONWEALTH OF VIRGINIA,
BY ITS ATTORNEY GENERAL,
JAMES S. GILMORE, III

James S. Gilmore, III
Attorney General

David E. Anderson
Chief Deputy Attorney General

Catherine C. Hammond
Deputy Attorney General

By:



Frank Seales, Jr.
(VSB No. 30808)
Senior Assistant Attorney
General and Chief
David B. Irvin
(VSB No. 23927)
Assistant Attorney General
Antitrust and Consumer
Litigation Section
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2116

A:\23-pgi.com