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Chicago Nurses Denied Class Cert. In Wage Fight

By **Evan Weinberger**

Law360, New York (September 29, 2009) -- A federal judge has denied class certification to a group of nurses who had sued four separate hospital systems in the greater Chicago area on allegations that the institutions colluded to suppress their wages in violation of antitrust law.

In a ruling Monday, Judge John F. Grady of the U.S. District Court for the Northern District of Illinois said that testimony from an expert witness employed by the nurses to prove their case, University of California at Berkeley economist Dr. Gordon Rausser, was unreliable to the point of being inadmissible.

Using a class certification ruling from *In re Hydrogen Peroxide Antitrust Litigation* by the U.S. Court of Appeals for the Third Circuit from January as a guide, Judge Grady said that the nurses could not use Rausser's methods to prove their claims.

"There are fundamental problems with Dr. Rausser's analysis that go to the core of the predominance issue and persuade us that plaintiffs cannot meet their burden of demonstrating that they have a viable method of showing classwide injury with common proof," Judge Grady wrote.

The nurses launched their case against the University of Chicago Hospitals, Advocate Health Care, NorthShore University HealthSystem, Children's Memorial Hospital and Resurrection Health Care in June 2006, around the same time that similar lawsuits were launched in Albany, N.Y., San Antonio and Detroit.

According to the ruling, the nurses claimed that the five Chicago-area hospitals regularly exchanged detailed and nonpublic information about how much they paid, and planned to pay in the future, their registered nurses. Among the methods that was used by the hospitals was obtaining and participating in compensation surveys disseminated by the Metropolitan Chicago Healthcare Council.

The nurses argued that the survey was a violation of federal guidelines for the lawful sharing of compensation data in the health care industry issued by the U.S. Department of Justice and the Federal Trade Commission, the ruling said.

Because of the sharing of information, the Chicago hospitals have managed to pay low wages to nurses even as there is a national shortage of registered nurses, the nurses claimed. They were seeking certification of a class estimated at around 19,000 and including those employed at the hospitals between June 20, 2002, and the present, according to the ruling.

Lisa Reed and Cindy Digiannantonio were seeking to be the named, lead plaintiffs.

The central issue that developed during the class certification process involved the methods that Rausser used to determine the damages nurses were subject to as a result of the alleged collusion among the hospitals. The defense expert witness, Princeton University economist Dr. Robert D. Willig, contended that there were too many holes in the models developed by Rausser for them to be used as a reliable gauge of the damages.

In his ruling, Judge Grady noted that the Third Circuit's ruling in Hydrogen Peroxide required him to resolve the conflict between the experts at the class certification stage. In this case, the judge said, the defense expert's refutation of Rausser's models carried the day.

David L. Hanselman Jr., a partner at McDermott Will & Emery LLP who argued the case on behalf of Resurrection Health Care, said Judge Grady's ruling put the nurses in an almost impossible spot, saying that a denial of class certification essentially "constitutes the death knell" for the litigation.

"I can't say that this effectively ends the case because plaintiffs' lawyers can be creative, but it certainly is a significant blow to the plaintiffs' case, and we'll be anxious to see what they do from here," he said.

The decision could also have an effect on the class certification motions still pending in the Detroit and San Antonio, he added.

Class certification in the Albany case was partially granted and partially denied in May 2008.

Counsel for the plaintiffs could not be reached for comment.

The plaintiffs are represented by Gustafson Gluek PLLC, Miller Law LLC, James & Hoffman PC and Cohen Milstein Sellers & Toll PLLC.

Advocate Health Care Network is represented by Miller Shakman & Beem LLP. Resurrection Health Care is represented by McDermott Will & Emery LLP. University of

Chicago Hospitals are represented by Sonnenschein Nath & Rosenthal LLP. Children's Memorial Hospital is represented by Katten Muchin Rosenman LLP. NorthShore University HealthSystem is represented by Seyfarth Shaw LLP and Mayer Brown LLP.

The case is Reed v. Advocate Health Care et al., case number 06C-3337, in the U.S. District Court for the Northern District of Illinois.