No. 82687-5-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

THE EVERETT CLINIC, PLLC,

Appellant,

v.

PREMERA and PREMERAFIRST, INC.,

Respondents.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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A. INTRODUCTION

While both the Everett Clinic, PLLC ("TEC") and Premera have raised particular issues regarding the rates that TEC's newly-acquired Eastside Family Medicine Clinic ("EFMC") could charge Premera and/or PremeraFirst, Inc. ("Premera") for patient services, there is a tendency to lose sight of the public policies that form the backdrop for this dispute, and the impact of any decision here on the rates that patients pay for health care services that, in turn, affect the premiums those patients pay as insureds for health insurance.

Washington has long been in the vanguard in the United States in advancing the cause of universal access to health care. Cost containment for health care services is an essential component of the strategy for universal health care access. Health insurance, whether paid for publicly or privately, is necessary to accomplish such access. Our Legislature has clearly and specifically expressed its concerns about the anti-competitive consolidation of health care services that can readily

result in monopolistic price-setting by health care providers.

It is against this backdrop that United Policyholders ("UP") believes that this Court should analyze the particular aspects of the issues here, favoring an interpretation of the Premera/EFMC and Premera/TEC agreements that fosters competition and eschews monopolistic pricing of services in a health care market increasingly dominated by health care conglomerates. That is an interpretation consistent with Washington's public policy.

B. INTEREST OF *AMICUS CURIAE*

As recounted in detail in its motion for leave to submit this brief, UP is a § 501(c)(3) tax-exempt organization that provides information to, and serves as a voice for, insurance consumers in all 50 states. UP has worked with other non-profit and faith-based groups, as well as public officials like Washington's Insurance Commissioner, on insurance issues. UP has often been an *amicus curiae* before federal courts and Washington's Supreme Court. UP is aware of the arguments that the parties

have set forth, but it will offer a health insurance policyholder perspective on the parties' issues.

C. STATEMENT OF THE CASE

UP acknowledges the statements of the case in the parties' opening briefs. Several facts in those briefs bear emphasis:

- TEC is owned ultimately by the large health care conglomerate United Health Group;
- TEC has planned to develop a "road to essentiality" in the Washington health care services marketplace;
- TEC acquired EFMC, a Bellevue primary care group that had an existing service contract with Premera;
- The Premera/EFMC agreement barred assignment by EFMC of its obligations to others, and the Premera/EFMC contractual obligations, including rates, remained in place even if there was a change in EFMC's ownership or control;
- The Premera/TEC agreement had similar provisions;
- EFMC imposed a rate increase in excess of 50% on its patients once TEC's control became effective.

D. ARGUMENT

(1) <u>History of Health Care Reform and Health Care Cost Containment Policy in Washington</u>

In addition to existing public health insurance programs like Medicare and Medicaid that provide health insurance and access to health care for Washington citizens, Washington has long been in the vanguard of expanding health insurance availability for its citizens with the goal of making universal health care access possible.

In 1987, our Legislature enacted the Basic Health Plan ("BHP"). RCW 70.47. That program was designed to extend health insurance to Washingtonians not covered by Medicaid, Medicare, or private health insurance, by providing managed care for Washington citizens with incomes below 200 percent of the federal policy level. RCW 70.47.020(9)(a)(v). By the early 1990's, 24,000 previously uninsured persons who did not qualify for Medicaid were enrolled in the BHP. Peter Jacobsen, *Washington State Health Services Act: Implementing Comprehensive Health Care Reform*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4193508/.

The 1990 Legislature created the Washington Health Care

Commission to articulate a comprehensive reform strategy to address increasing health care costs, increasing health insurance premiums, and the increasing numbers of uninsured in Washington. *Id*.

The Commission's report to the Legislature in 1992 was the impetus for the enactment of Washington's landmark Health Services Act of 1993 ("HSA"), a comprehensive health care act that anticipated the federal Patient Protection and Affordable Care Act of 2010 (ACA)[1] legislation by a decade. Laws of 1993, ch. 492. The HSA provided for individual and employer insurance mandates, expansion of the BHP and Medicaid enrollments, and aggressive cost containment strategies to ensure provider and health insurer price competition. *Id*. Significant components of the HSA were revised in 1995. *See* Laws of 1995, ch. 265. Even in revising the 1993 HSA, the Legislature found that "the basic health plan has been an effective program in

[1] 124 Stat. 119.

providing health coverage for uninsured residents," and intended that enrollment be "expanded expeditiously." *Id*. § 1(1)-(2). The themes of the 1993 HSA echo in Washington public policy today.

Universal health care access remains Washington's goal. Again anticipating the ACA, in 2007 the Legislature charged the Office of Financial Management ("OFM") with the coordination of public and private efforts to promote health service availability and health care cost-effectiveness, and to gather health care data. RCW 43.370.020. OFM was to develop a statewide health resources strategy that evaluates availability, quality, and cost of services. RCW 43.370.030.

Indeed, the 2021 Legislature created the Universal Health Care Commission. RCW 41.05.840. That Commission was to implement the recommendations of the Health Care Cost Transparency Board created in 2020 to examine provider and insurer fees and charges. *See* RCW 70.390.020.

Recognizing that competition as to services was essential

to limiting health care costs, as did the HSA, the Legislature mandated that patients have a right under RCW 70.01.030 to information from providers regarding fees and charges to allow them to make price-based consumer choices.

In addition to its historic support of cost containment in health care provider services as a vital aspect of health care reform, Washington has been committed to provider cost containment in its regulation of the health care industry and health insurers. The Office of the Insurance Commissioner regulates numerous types of health insurance including group health insurance agreements, RCW 48.21; health insurance pools, RCW 48.41; managed care plans, RCW 48.43; health insurers, RCW 48.44; HMOs, RCW 48.46; health care service contractors, RCW 48.44.020; entities that contract with providers for prepayment of health care services, RCW 48.44.010(9); Medicare supplemental insurance, RCW 48.66; health savings accounts, RCW 48.68; and long term care insurance, RCW 48.84, 48.85.

The State regulates health services directly because the health care marketplace too often fails to restrain costs. As discussed in *National Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 101 S. Ct. 2415, 691 L. Ed. 2d 89 (1981), since at least 1974, Congress has endeavored to control health care costs by state and local health care planning and regulation of excessive facilities. *Id*. at 386 (Congress was concerned that "marketplace forces in the industry failed to produce efficient investment in facilities and to minimize the costs of health care."). Implementing the federal directives, the Legislature directed the Department of Health to administer a certificate of need program, RCW 70.38.015, whose purpose is to control provider costs by preventing over capacity of health care facilities, often by competing providers, that drive up the cost of health care services. *St. Joseph Hosp. v. Dep't of Health*, 125 Wn.2d 733, 735, 887 P.2d 891 (1995); *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010). The *St. Joseph Hospital* court unambiguously noted that

the central purpose of the certificate of need law was to control health care costs because the marketplace did not. 125 Wn.2d at 735-36.

Not to be overlooked, the State itself is a purchaser of health care and health insurance for public employees and persons in numerous public programs. It has a direct interest in cost containment. The Legislature directed the state's Health Care Authority to develop and implement a health care cost containment program for the state's own purchases of health care and health insurance. RCW 41.05.021; RCW 43.41.160.

The upshot of this historical discussion is that it has long been our state's goal to achieve universal health care access for its citizens through the provision of health insurance. But that goal is incapable of being implemented, absent effective cost control strategies, including health care provider competition, so that costs that are reimbursed or paid for by health insurance are kept as low as the market permits.

(2) Washington's Public Policy Disfavors Concentration of Health Provider Services and Favors Provider Competition to Keep Premiums for Health Care Policyholders Low

In addition to Washington's longstanding public policy commitment to price competition in the health care marketplace and in health insurance, it has manifested a specific interest in preventing concentration in the health care marketplace because such concentration adversely impacts the price competition policy noted herein.

There is little question that the health care market in the United States has experienced a dramatic increase in provider concentration.[2] The last two decades have witnessed "significant consolidation in healthcare," including a "notable increase" after passage of the ACA. Jacob Snow, Ronnie Solomon, Kyle

[2] As this *amicus* brief was being written, United Health announced yet another merger, buying the LHC Group that provides home health care services for $5.4 billion, combining that organization into United Health's Optum Health division. https://abcnews.go.com/Business/wireStory/unitedhealth-buy-lhc-group-54-billion-83737503.

Quackenbush, *The Efficiencies Defenestration: Are Regulators Throwing Valid Healthcare Efficiencies Out the Window?*, 27 Competition: J. Anti., UCL & Privacy Sec. Cal. L. Assoc. 73, 77 (2018). Economic literature going back to the 1990s indicates that, generally, consolidation results in higher prices. *Id*. at 79. In the hospital sector alone, a sector involving a third of U.S. health spending and 6% of gross domestic product, a recent study by professors from Yale and Carnegie Mellon Universities indicated that a majority of the geographical areas in the United States were dominated by only one to three hospital systems, and 80% of the American hospital market was "highly concentrated," within the meaning of joint Department of Justice/Federal Trade Commission guidelines. The attendant result of such concentration was that mergers or acquisition, like that of EFMC by TEC, result in higher prices, and actually result in lower clinical quality. Zack Cooper, Martin Gaynor, *Addressing Hospital Concentration and Rising Consolidation in the United States*, https://onepercentsteps.com/policy-briefs/addressing-

hospital-concentration-and-rising-consolidation-in-the-united-states/.

The same concentration phenomenon as to hospital services has occurred with regard to medical providers, particularly during the COVID epidemic. In 2016, for example, 65% of the metropolitan statistical areas were "highly concentrated" for specialists, and 39% for primary care providers. *See* Brent Fulton, *Health Care Market Concentration Trends in the United States: Evidence and Policy Responses*, https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0556; Karyn Schwartz, Eric Lopez, Matthew Rae, Tricia Neuman, *What We Know About Provider Concentration*, https://www.kff.org/health-costs/issue-brief/what-we-know-about-provider-consolidation/. The conclusion of these analyses is that health care provider concentration leads to higher prices for health care.

While Washington law has long recognized the application of antitrust principles to health care providers, *e.g.*,

Hubbard v. Medical Service Corp. of Spokane County, 59 Wn.2d 449, 367 P.2d 1003 (1962), in recent years, the Legislature has emphasized special vigilance for competitiveness among providers. In enacting legislation to provide special emphasis on competitiveness in the health care marketplace, the 2019 Legislature stated:

> It is the intent of the legislature to ensure that competition beneficial to consumers in health care markets across Washington remains vigorous and robust. The legislature supports that intent through this chapter, which provides the attorney general with notice of all material health care transactions in this state so that the attorney general has the information necessary to determine whether an investigation under the consumer protection act is warranted for potential anticompetitive conduct and consumer harm. This chapter is intended to supplement the federal Hart-Scott-Rodino antitrust improvements act, Title 15 U.S.C. Sec. 18a, by requiring notice of transactions not reportable under Hart-Scott-Rodino reporting thresholds and by providing the attorney general with a copy of any filings made pursuant to the Hart-Scott-Rodino act.

RCW 19.390.010. The Legislature directed parties to any material change by providers including merger, acquisition, or affiliation to give notice of same to the Attorney General. RCW

19.390.030. The Final Bill Report for SHB 1607, https://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bill%20Reports/House/1607-S%20HBR%20FBR%2019.pdf?q=20220406170614, indicated that this notice was intended to allow the Attorney General to fully utilize his/her antitrust powers under the Consumer Protection Act, RCW 19.86 ("CPA").[3] The Legislature may consider further refinements of that public policy.[4]

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[3] The Attorney General has utilized such powers to restrain efforts at concentration by the Franciscan Health conglomerate. *See State v. Franciscan Health System*, 388 F. Supp. 3d 1296 (W.D. Wash. 2019); 2019 WL 3756709 (consent decree).

[4] The 2022 session of the Legislature saw the introduction of additional legislation in both houses to strengthen state regulation of concentration in the health care provider market, legislation likely to re-emerge in the 2023 session. HB 1809/SB 6588 proposed to amend RCW 19.390 to give added dimension to the notice requirements in that chapter and to further monitor concentration. The intent section of that legislation observed in pertinent part:

> (3) Health entity mergers, acquisitions, and contracting affiliations impact cost, quality, and access to health care, and affect working conditions

The public policy of Washington is to restrain increases in health care costs, including by restricting provider concentration and encouraging provider competition. This policy is manifest, given Washington's longstanding commitment to universal health care access by broadening health insurance availability for its citizens in conjunction with strict cost containment.

(3) The Implications of Washington's Health Care Public Policy in This Case

(a) The Premera/EFMC Agreement Must Be Construed in Accordance with Washington Public Policy

For purposes of this case, the public policy referenced above is an essential factor in the interpretation of the

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and employee benefits.

(4) Health entity mergers, acquisitions, and contracting affiliations have been shown to result in anticompetitive consequences, including higher prices and a lack of any meaningful choice among health care providers within a community or geographic region. These negative outcomes are exacerbated for those in rural areas with few health care providers.

Premera/EFMC and Premera/TEC agreements and should animate this Court's interpretation of them. Washington courts will not enforce contractual provisions that violate public policy. *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 331 P.3d 1147 (2014) (agreement in violation of RPCs); *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 999 P.2d 29 (2000) (clause in insurance contract); *City of Seattle v. Seattle Police Officers Guild*, 17 Wn. App. 2d 21, 484 P.3d 485, *review denied*, 198 Wn.2d 1004 (2021) (arbitration award arising out of collective bargaining agreement).

To avoid an interpretation of the Premera/EFMC and Premera/TEC agreements that violates Washington public policy, this Court should construe the agreements in a fashion consistent with Washington public policy that disfavors health care provider concentration because of its ultimate impact on patient costs and health care premiums, and against the authorization for the significant rate increases that TEC and EFMC advocate.

(b) The Premera/EFMC Agreement Impacts the Public Interest in Washington for Purposes of a CPA Claim

Additionally, public policy is critical to an element of Premera's CPA claim. Both parties note that in order to establish a claim under the CPA, a claimant must establish a public interest impact of the defendant's anti-competitive behavior. Br. of Appellant at 46, Resp'ts Br. at 52. *See Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The public interest element may be satisfied by a legislative declaration of public policy, *id*. at 791, or by its impact on consumers or private parties, *id*. at 789-90.

Here, UP has documented the critical importance of cost containment in Washington's public policy on health care. TEC's and Premera's disagreement about the EFMC's contract is not purely a private dispute, but, rather, is emblematic of the public policy concerns about provider concentration and cost noted above. Increasing concentration of provider services, as is the case with regard to TEC's acquisition of EFMC, only results

in *increased* costs, as was true with respect to the more than 50% rate increase immediately felt by EFMC's patients upon its control by TEC.

Premera established the public impact element of its CPA claim as a matter of law, particularly where TEC did not contest that element at summary judgment. *Behnke v. Ahrens*, 172 Wn. App. 281, 293-96, 294 P.3d 729 (2012), *review denied*, 177 Wn.2d 1003 (2013).

E. CONCLUSION

As noted herein, Washington has been a leader in health care reform over the years. It has advanced the cause of universal health care through general access to health insurance. That health insurance can only be affordable, and available, where there is healthy competition in the health care marketplace and attendant costs are kept low.

This case illustrates how health care provider concentration can result in large increases in costs rendering health insurance premiums unaffordable, jeopardizing the goal

of universal health care.

Under the terms of the EFMC/Premera agreement, EFMC's 50% jump in rates created by TEC's exercise of its now anti-competitive market position, is unjustifiable. It is also symptomatic of a profound misperception of Washington's public policy.

UP believes the Court should affirm the trial court's decision.

This document contains 2,831 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 11th day of April, 2022.

Respectfully submitted,

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DECLARATION OF SERVICE

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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