IN THE SUPREME COURT OF IOWA
No. 22-0303

APPEAL FROM THE
POLK COUNTY DISTRICT COURT
HON. SARAH E. CRANE, JUDGE PRESIDING
Polk Co. Law No. CVCV050638

BRADLEY A. CHICOINE, D.C., DR. BRADLEY A. CHICOINE, D.C., P.C., MARK A. NILES, D.C., NILES CHIROPRACTICE, INC., and ROD R. REBARCAK, D.C., on behalf of themselves and those like situated, Plaintiffs/Appellants

and

STEVEN A. MUELLER, D.C., BRADLEY J. BROWN, D.C., MARK A. KRUSE, D.C., KEVIN D. MILLER, D.C. and LARRY E. PHIPPS, D.C., on behalf of themselves and those like situated, Plaintiffs/Appellants

vs.

WELLMARK, INC. d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA, an Iowa corporation, and WELLMARK HEALTH PLAN OF IOWA, INC., an Iowa corporation, Defendants/Appellees

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. THE DISTRICT COURT APPLIED INCORRECT LEGAL STANDARDS FOR ANTITRUST INJURY, ANTITRUST FACT OF DAMAGE AND MEASURE OF DAMAGES, AND PREDOMINANCE OF COMMON ISSUES

In essence, the district court order denying class certification holds and appellees' brief contend that plaintiffs have failed to show "antitrust injury" and the predominance of common elements of liability and fact of damage. Stated another way, the district court opinion holds and appellees' brief contends that a purported element of plaintiffs' damages – the speculative amount that each of 466 individual self-funded employers might pay each of 2,717 individual Iowa chiropractors for chiropractic services for its employees absent being a member of the conspiracy – makes this case one where individual damages issues predominate over common questions of law or fact within the meaning of Iowa R. Civ. P. 1.263(1)(e) and *Roland v. Annett Holdings, Inc.*, 940 N.W.2d 752, 759 (Iowa 2020).

There are two major errors of law in the district court's ruling. First, the order and appellees' brief use a theory and measure of damages that is not recognized in antitrust law. Second, most of facts cited by the district court and the appellees in their brief go to computation of amount of damages individual chiropractors might or might not recover in the damages phase of the trial, which many Iowa cases hold does not prevent class action certification. There are additional omission in the district court's order and appellees' brief, addressed in

following subsections, which contribute to the conclusion that the district court's order is clearly unreasonable.

A. The District Court Failed to Recognize the Well-Established, Long-Standing Measure for Determining Fact of Damage and Amount of Damage for Violations of the Antitrust Laws, And Instead Focused on the Irrelevant Matter of Whether or Not a Self-Funded Employer Member of the Conspiracy Would Purchase Chiropractic Services for Its Employees If It Were Not Part of the Conspiracy – Not a Recognized Element of an Antitrust Horizontal Conspiracy Case

The district court Order asserts: "The Plaintiffs' theory of antitrust injury is that, absent the unlawful Administrative Services Agreements between Wellmark[1] and the self-funded employers, those employers would operate as competitors in the insurance market and, therefore, negotiate and pay the chiropractors directly, resulting in higher rates than those set by Wellmark." (Non-Conf. App., Vol. I, p. 1761). This is not a theory of antitrust liability, antitrust injury, or antitrust damages. This is not the plaintiffs' theory of liability. This purported factual issue does not go to any recognized element of the cause of action for conspiracy to price fix. The antitrust injury is in the conspiracy to fix price and to do so in a manner which

[1] "Wellmark" and "Wellmark Defendants" refers to both Wellmark, Inc. ("Wellmark") and Wellmark Health Plan of Iowa, Inc. ("WHPI"). WHPI is Wellmark's HMO.

discriminates against chiropractic services. *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 104-05 (3rd Cir. 2010). This conspiracy detrimentally damages the business of all Iowa chiropractors who have dealt with patients covered by the price fixing conspiracy.

This case involves Wellmark defendants' expenditures for chiropractic care, the annual amount being 2.23% of Wellmark expenditures for all heath care provider expenses and 0.91% of all Wellmark expenditures for hospital and health care providers expenses. (Conf. App., Vol. II, pp. 35-38).

The seminal case on horizontal conspiracy antitrust damages is *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 27 S. Ct. 65 (1906). "The fact that the defendants and others had combined with the seller led to the excessive charge, which the seller made in the interest of the trust by arrangement with its members. . . The verdict was for the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions had the combination been out of the way." 203 U.S. at 395-96, 27 S. Ct. at 65-66.

As first stated by *Chattanooga Foundry*, the issue of damages resulting from a horizontal conspiracy to restrain trade has always focused on the overcharge (or underpayment) of the cartel made as the result of the conspiracy.

> "An 'overcharge' injury is the injury suffered by a customer who paid a monopoly price for a product purchased from an illegal monopolist or cartel. The term "overcharge injury" may also describe the injury suffered by a seller for whom the price was suppressed by a monopsonist or buyer's cartel, or the injury suffered by the purchaser of an illegally tied product. . . According to the classic formulation for antitrust damages, the plaintiff is entitled to treble the difference between the price he actually paid or received and the rice that would have prevailed in a competitive market."

Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 17.5a p. 724 (West, 4th ed.).

The two most recognized methods of proof of antitrust damages are the "before and after" method and the "yardstick" method. Both of these methods were discussed and approved in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 257-60, 66 S. Ct. 574, 577-78 (1946). *Bigelow* found the "yardstick" to be particularly appropriate to measure damages from a price fixing conspiracy. *Id.*

> "Under the yardstick method the plaintiff identifies some geographic market that is as similar as possible to the cartelized market, but for the conspiracy. . . . The ideal conspiracy for the yardstick approach is a local cartel where a nearby market can be found which has the same basic cost structure."

Hovenkamp, Federal Antitrust Policy § 17.5b p. 727.

Here, plaintiffs have established "antitrust impact" through the long-accepted "yardstick" measure of antitrust harm and damage to each class member and a common proof of the major factor in damages to class members – the percentage and actual amount of the gross underpayment for each category of chiropractic service

resulting from the conspiracy controlled by Wellmark. *See National Farmers's Org., Inc. v. Associated Milk Prod., Inc.*, 850 F.2d 1286, 1292-98 (8th Cir. 1988); *Greenhaw v. Lubbock County Beverage Ass'n*,, 721 F.2d 1019, 1026-29 (5th Cir. 1983). Plaintiffs' theory of liability has been presented to the district court several times, including Paragraphs 59 through 64 of the Third Amended Petition (Revised) (Non-Conf. App.[2], Vol. I, pp. 191-95), the ten exhibits filed on January 28, 2021, before the initial class certification hearing (Conf. App., Vol. II, pp. 2282-2301), the argument of Mr. Wandro in the hearing of January 29, 2021, before Judge Lauber. (Non-Conf. App., Vol. I, pp. 425:10 to 436:1) and particularly by visual slide seven shown and discussed at the hearing. (Non-Conf. App., Vol. I, pp. 425:18 to 429:2; Conf. App., Vol. II, p. 2302 (Slide 7)).

The ten exhibits show how CMS has consistently determined that the fee for chiropractic manipulation is approximately 90% of the fee for osteopathic manipulation, the difference being due to increased office and employee costs and malpractice insurance costs for osteopathic physicians. (Conf. App., Vol. II, pp. 770:13 to 775:1, 782:20 to 789:20 (Dr. Anthony Hamm, DC)). This theory of antitrust impact and damages proof is also discussed by Mr. Norris for the plaintiffs before Judge Lauber (Non-Conf. App., Vol. I, pp. 512:10 to

[2] "Non-Conf. App., Vol I" refers to Non-Confidential Appendix, Volume One filed with this court on January 23, 2023. "Conf. App., Vol. II" refers to Confidential Appendix, Volume Two filed on same date.

20:20) and also at pp. 529:4 to 530:10 (Non-Conf. App., Vol. I) shown in the January 29, 2021 class certification hearing transcript. The theory of the case was set forth again by Mr. Norris for plaintiffs in the hearing before Judge Crane of November 19, 2021 at transcript pages 1490:10 to 1498:10 and at pages 1510:5 to 1512:15 of the appendix. (Non-Conf. App., Vol. I).

The "yardstick" measure of the non-colluded competitive market for health care practitioner services nationally is the Resource Based Relative Value System (RBRVS) determinations made by the Center for Medicare and Medicaid Services (CMS). CMS has determined how the value of services of chiropractic physicians in the United States compare to medical and osteopathic physicians ("MD/DO"), physician assistants ("PA") and advanced registered nurse practitioners ("ARNP"). CMS has by rule pegged PA and ARNP compensation at 85% of the MD/DO compensation under all CPT codes and Wellmark and WHPI have adopted 85% as the maximum rate for PA and ARNP for all their policies, including their agreements with the self-funded Iowa employers. (Conf. App., Vol. II, pp. 137-38 (44:4 to 45:1), 141-42 (60:15 to 62:14), 147-48 (82:5 to 85:14), 173-74 (183:24-85:7) (Fay)). Mike Fay, Wellmark, knows that Iowa chiropractic physicians are held to the standard of a physician by Iowa statute. Iowa Code § 151.8(3) (2022); (Conf. App., Vol. II, p. 175 (Fay)).

Plaintiffs' theory of the case, which includes a "yardstick" measure of the non-collusive competitive market in conformity with the RBRVS system, is supported in the record by the testimony of Anthony Hamm, DC, who was the chiropractic representative on the AMA Relative Value Scale Update Committee (RUC) for many of the years at issue in this case. (Conf. App., Vol. II, pp. 770:13 to 789:20) Also in the record as a witness for Wellmark is the testimony of Barton McCann, MD, who was Chief Medical Officer, Health Care Financing Administration (now CMS), who oversaw medical aspects of research for and implementation of the RBRVS system from 1992 to 1998. (Non-Conf. App., Vol. I, pp. 982-85; Conf. App., Vol. II, pp. 552:16 to 555:7 (McCann)).

On September 25, 1998, Sheri Vohs, Wellmark's Vice President for Network Development, wrote a notice letter to all allied practitioners (which included Iowa chiropractors):

> You may be aware that [Wellmark Blue Cross and Blue Shield of Iowa (WBCBSI)] is adopting a nationally recognized payment methodology, the Resource Based Relative Value System (RBRVS), effective for all Wellmark product lines January 1, 1999. . . . Under the new RBRVS payment methodology, all providers will be reimbursed the lesser of charge or according to the allied RBRVS-based statewide fee schedule. Using RBRYS will provide you with a more uniform, consistent and predictable reimbursement level than UCR. . . . (Non-Conf. App., Vol. I, p. 628).

Also enclosed on September 25, 1998, was a notice "to all Iowa Chiropractors participating in Alliance Select and/or Preferred Blue and Blue Choice."

> Wellmark Blue Cross and Blue Shield of Iowa is adopting a nationally recognized payment methodology, Resource Based Relative Value System (RBRVS), effective January 1, 1999 for these products. Please see the enclosed letter which further describes RBRVS and the enclosed illustrative fee schedule which represents procedures most frequently billed by your specialty. (Non-Conf. App., Vol. I, p. 631-32).

The September 1998 Wellmark notice materials to Iowa chiropractors also included an Iowa chiropractor fee schedule purportedly based on RBRVS. (Non-Conf. App., Vol. I, p. 631). The fee schedule covers CPT code items commonly employed by chiropractors and shows that the chiropractic allowances were established in 1998 and continue in the same ratios to each other as do the "allowances" in effect from year to year to the present. (*Id.*; Conf. App., Vol. II, pp. 2306-57 (annual schedules)).

A letter to each allied practitioner (including Iowa chiropractors) from David N. Southwell, Wellmark Group Vice President and Financial Officer, dated May 28, 1999, thanked the practitioner for signing the First Amendment to the Participating Provider Agreement which "allowed for . . . the transition to the resource based relative value system payment methodology." (Non-Conf. App., Vol. I, p. 636).

Exhibit A to the 2001 Wellmark Practitioner Agreement reads in part:

> Provider agrees payment for Covered Services provided by Provider shall be the lesser of the providers billed charge or the maximum allowable fee established from time to time by Wellmark. The maximum allowable fee established by Wellmark from time to time will be based upon the Resource Based Relative Value System ("RBRVS") that includes Relative Value Units ("RVUs"); geographic adjustment and conversion factors; . . . . (Non-Conf. App., Vol. I, p. 652).

The substituted Practitioner Universal Agreement of July 2007 changed the previous agreement Exhibit A to include Wellmark Health Plan of Iowa, Inc. (WHPI), and makes clear that Wellmark establishes practitioner fees annually in the Wellmark fee schedules:

> "Maximum Allowable Fee" (MAF) for medical services and supplies means the fees established annually by Wellmark based upon any one or more of the following three (3) elements (as determined by Wellmark): (i) the Resource Based Relative Value System ("RBRVS") that includes Relative Value Units ("RVUs") times Wellmark-determined multipliers. . . (Non-Conf. App., Vol. I, p. 700).

The Practitioner Agreement July 2007 Exhibit A still applies today to the health care services of all providers, including MD/DOs, DCs, PAs, and ARNPs. PAs and ARNPs are structured at 85% of the MD/DO RVU fee which Medicare, Medicaid, and most major health insurers including Wellmark and WHPI employ.

Plaintiffs presented 10 exhibits and Slide 7 (Conf. App., Vol. II., pp. 2282-2301 (ten exhibits), 2302 (Slide 7)) to the district court

showing The Relative Value Scale Update Committee has consistently pegged chiropractic manipulation therapy (CMT) at approximately 90% of osteopathic manipulation therapy (OMT). Dr. Hamm testified that the 10% differential is because DOs have somewhat greater office practice expenses and malpractice expense. (Conf. App., Vol. II, pp. 770:13 to 789:20).

Wellmark admits that the RBRVS relative values are used by most major purchasers of medical services (health insurance and the like) in the United States. It is clearly the standard used universally to determine relative fee structure. (Conf. App., Vol. II, p. 562:25 to 563:15 (McCann))

The key to the accuracy and reliability of the RBRVS System is the Relative Value Scale Update Committee (RUC). (Conf. App., Vol. II, pp. 564:4 to 569:3 (McCann)); www.ama-assn.org/about/rvs-update-committee-ruc/rvs-update-committee-ruc .

> The American Medical Association/Specialty Society Relative Value Scale Update Committee (RUC) is an expert panel of physicians which makes recommendations to the federal government on the resources required to provide medical services. When making recommendations to the federal government, the RUC considers physician work (including the time and intensity associated with a service), clinical staff time, supplies and equipment, and professional liability insurance associated with performing a service. The RUC is comprised of a volunteer group of 32 physicians and over 300 medical advisors, other health care professionals, and experts that represent each sector of medicine, including primary care physicians and specialists.
>
> The RUC regularly reviews medical services to determine whether they are appropriate, undervalued, or overvalued, and

> volunteers its recommendations to the federal government through the Centers for Medicare & Medicaid Services (CMS) for the agency's consideration. CMS makes all final decisions about what payments should be for each service under the Medicare program.
>
> The result of this process is a balanced system in which physicians volunteer their highly technical and unique hands-on expertise regarding complex medical procedures while the government retains oversight and final decision-making authority.
>
> The RUC is comprised of a volunteer group of 32 physicians and over 300 medical advisors, other healthcare professionals and national specialty society experts that represent each sector of medicine, including primary care physicians and specialists. Tasked with evaluating thousands of individual services across the medical spectrum, the RUC relies on the expertise of over 100 specialty societies and health care professional organizations, ranging from anesthesiology to pediatric surgery to neurology. The Committee's relative value recommendations to CMS reflect the continued importance of services that all physicians, including primary care physicians, perform.

It is difficult to conceive of any proof of a competitive market price which is more factually based than that resulting from the discussion and negotiation between all sectors of the healthcare practitioner community nationwide with the approval of the CMS.

There is only one conversion factor amount specified by CMS in any given year. (Conf. App., Vol. II, pp. 351:19-21 (Fay), 616:8-25, 619:19 to 620:20, 624:3 to 625:22 (McCann)). Wellmark, however, employs five different conversion factors for chiropractic fees and ten different conversion factors for MD/DO fees, not a proper use of RBRVS. (Conf. App., Vol. II, p. 122 (Wellmark Ex. I), 461:2-6 (Fay)) Thus the discriminatory price fix at issue here is based upon

Wellmark using dramatically lower multiple conversion factors (from the MD/DO conversion factors) for chiropractors only.

B. *The District Court Erred in Holding that the Fact of Differentiating Issues in the Computation of Individual Damages Is a Valid Reason to Deny Class Certification*

The district court order and appellees' brief devote much space to detailing individual damage issues. The fact that a potential class action involves individual damage claims does not preclude certification when liability issues are common to the class. *Freeman v. Grain Processing Corp.*, 895 N.W.2d 105, 125 (Iowa 2017); *Luttenegger v. Conseco Financial Servicing Corp.*, 671 N.W.2d 425, 440 (Iowa 2003); *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 792 (Iowa 1994); *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 745 (Iowa 1985).

In *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364, 367-68 (Iowa 1989), defendant asserted that many class members have suffered no injuries from defects in their heat transfer modules. "The appropriate inquiry is not the strength of each class member's personal claim, but rather, whether they as a class, have common complaints."

Plaintiffs bring a horizontal price fixing claim alleging violation of an Iowa statute, Iowa Code § 553.4. "This claim involves an alleged statutory violation. This is clearly a legal question, which is a classic issue that is considered common to a class." *Luttenegger*, 671

N.W.2d at 440. As stated in *Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107 (2nd Cir. 2007): "There is only one type of injury alleged in the Complaint—overcharges paid to a horizontal price-fixing conspiracy. Because each class member allegedly suffered the same type of injury, the legal question of whether such an injury is 'of the type that the anti-trust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,' *Brunswick* [*Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690 (1977)], is a common one." In cases containing allegations of price-fixing, federal courts have consistently held that the nature of the antitrust conspiracy action compels a finding that common questions of fact and law exist. *See, e.g., In re Infant Formula*, 1992 WL 503465, at *4 (N.D. Fla. 1992). ("By the very nature of a conspiracy antitrust action, common questions of fact and law exist."); *In re Carbon Dioxide Antitrust Litig.*, 149 F.R.D. 229, 232 (M.D.Fla.1993) (same); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166, at *3 (N.D. Cal. 2006) ("[T]he very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.")

In *Comes v. Microsoft Corp.*, 696 N.W.2d 318, 323 (Iowa 2005) ("*Comes II*"), the court outlined the possible predominant issues, paraphrased as:

1. Whether defendant was a monopolist;
2. Whether defendant engaged in anticompetitive conduct to maintain its monopoly;
3. Whether defendant's conduct violated the Iowa Competition Law;
4. Whether defendant's conduct harmed the proposed class;
5. Whether plaintiffs and the putative class members are entitled to damages and the appropriate measure of such damages.

Comes II holds that findings on the first three issues are sufficient in themselves to justify a finding of predominate issues. *Id.* "These three issues involve alleged statutory violations, which are 'clearly . . . legal questions[s]' and are 'classic issue[s] that [are] considered common to the class.'" "[A]s a general rule in antitrust price-fixing cases, question common to the members of the class will predominate over questions affecting only individual members." *Id.*

Plaintiffs' proof of impact and fact of damage in common are also class wide. In the opening brief, plaintiffs set forth a long history of Wellmark discrimination against chiropractors including (1) refusing to ask the Iowa legislature to include chiropractors in Blue Shield coverage until 1986; (2) control of Iowa Blue Shield through M.D. domination of the board of directors of Iowa Blue Shield and bringing a lawsuit challenging legislation that eliminated M.D. control; (3) an M.D. lead boycott of chiropractic refusing to condone M.D. practice with chiropractors while in control of Iowa Blue Shield; (4) claiming to base practitioner pricing on the RBRVS system but paying Iowa chiropractors substantially less than the RBRVS relative values; (5)

radically foreclosing most Iowa chiropractors from coverage under WHPI, the Wellmark HMO while including all other health care diagnostic providers; and, (6) announcing a plan to make all and only chiropractic services subject to preauthorization in 2007. This proof of discrimination outlined in the Statement of Facts in plaintiffs' opening brief shows common fact of injury to plaintiffs' businesses. The outline of common basic damages to all chiropractors based upon a MD/DO payment of 100%, chiropractic payment of 90%, and PA/ARNP payment of 85% under the RBRVS system shows overwhelming predominance of common issues for class certification. *See Chicago Bd of Trade v. U.S.*, 246 U.S. 231, 238, 38 S. Ct. 242, 244 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Most of facts cited by the district court and the appellees in their brief go to computation of amount of damages individual chiropractors might or might not recover in the damages phase of the trial, which many Iowa and federal cases hold does not prevent class action certification. Indeed, the practice in this type of case is to try liability,

antitrust injury, fact of common injury, and even computation of common damages to the jury, with computation of individual damages bifurcated out of the main trial and ascertained by some form of arbitration or settlement proceeding stipulated by the parties and approved by the trial court.

C. The District Court Failed to Address the Ramifications of the Mueller I Holding that Rejected Wellmark's Defense that Plaintiffs Did Not Have "Antitrust Injury."

Plaintiffs have not named as defendants any of the 466 Iowa self-funded employers and, accordingly, are not claiming any damages from them in this lawsuit. The 466 Iowa self-funded employers are co-conspirators with the Wellmark defendants in explicit written agreements to fix the price of health care provider services in Iowa at prices established at the sole discretion of the Wellmark defendants.

Appellees' brief contends that this court "did not address whether Plaintiffs have suffered 'actual, cognizable injury proximately caused by the claimed violation,' which is the key question for class certification." Defendants further contend that plaintiffs have not carried their burden of proof that the antitrust injury can be proved by using class-wide evidence. (Appellees Brief, p. 57).

In *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 265 (Iowa 2012)("*Mueller I*"), this court held that "under a monopsony theory

(claims that Defendants conspired to restrain trade in their role as buyers) has stated in antitrust injury." (Non-Conf. App., Vol. I, p. 1756) *Mueller I* cites as its principal authority *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 104-05 (3rd Cir. 2010) ("holding that a hospital had alleged antitrust injury based on its receipt of artificially depressed reimbursement rates from a dominant insurer and noting that 'the defendants' argument reflects a basic misunderstanding of the antitrust laws'"). *Mueller I*, 818 N.W.2d at 265. An antitrust injury is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants acts unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697 (1971). West Penn argued that it sustained in antitrust injury in the form of artificially depressed reimbursement rates, the same type of injury that the chiropractors are alleging in this case. West Penn asserted that the amount of the underpayments – the difference between the reimbursements it would have received in a competitive market and those it actually received – constituted an antitrust injury. As did *Mueller I*, the *West Penn* case noted that a single firm is generally free to bargain aggressively when negotiating the price it will pay for goods and services. *West Penn*, 627 F.3d at 103.

> [W]when a firm exercises monopsony power pursuant to a conspiracy, its conduct is subject to more rigorous scrutiny, *see Am. Needle*, 130 S. Ct. at 2209, and will be condemned if it imposes an unreasonable restraint of trade, *see Standard Oil*, 221 U.S. at

> 58, 31 S. Ct. 502. "This is so because unlike independent action, 'concerted activity inherently is fraught with anticompetitive risk' insofar as it 'deprives the marketplace of independent centers of decisionmaking that competition assumes and demands.' " *Am. Needle*, 130 S. Ct. at 2209 (quoting *Copperweld*, 467 U.S. at 768–69, 104 S. Ct. 2731) (internal punctuation omitted).
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> In these circumstances, it is certainly plausible that paying West Penn depressed reimbursement rates unreasonably restrained trade. Such shortchanging poses competitive threats similar to those posed by conspiracies among buyers to fix prices, *see Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948), and other restraints that result in artificially depressed payments to suppliers—namely, suboptimal output, reduced quality, allocative inefficiencies, and (given the reductions in output) higher prices for consumers in the long run.

West Penn, 627 F.3d at 103-04. "Having concluded that paying West Penn artificially depressed reimbursement rates was an anticompetitive aspect of the alleged conspiracy, it follows that the underpayments constitute an antitrust injury." *Id.* at 105.

D. The District Court Failed to Recognize, Discuss and Follow the Definitive Iowa Case on Antitrust Injury, Southard v. Visa U.S.A., Inc., 734 N.W.2d 192 (Iowa 2007).

Neither the district court's ruling nor the appellees' brief mentions the definitive Iowa case on antitrust injury, *Southard v. Visa U.S.A., Inc.*, 734 N.W.2d 192 (Iowa 2007). As best as can be

ascertained, this is the holding of the district court (Non-Conf. App., Vol. I, p. 1766):

> This case is, therefore, governed by the analysis of *Roland*, as opposed to *Freeman*, because individualized mini-trials will be required to demonstrate antitrust injury. Plaintiffs have not identified any common analytical tool or model that could demonstrate Plaintiffs were in fact injured. Instead, the case is similar to those where class certification has been denied due to lack of common proof of injury.

In making this holding, the district court used a federal appeals court version[3] of the antitrust injury analysis discussed in *Associated General Contractors of California, Inc., v. California State Council of Carpenters*, 459 U.S. 519, 537-40, 103 S. Ct. 897, 908-09 (1983), which is inconsistent with the five-part test stated in *Southard*. The *Southard* test is:

> In *Associated General Contractors*, the Court focused on five factors to guide its examination: (1) whether the claim alleges a causal connection between the antitrust violation and the plaintiff's alleged harm; (2) whether the plaintiff's alleged injury is of a type sought to be redressed by the antitrust laws; (3) the directness or indirectness of the asserted injury; (4) whether denying a remedy is likely to leave a significant antitrust violation undetected or unremedied; and (5) whether the damages

[3] (Non-Conf. App., Vol. I, p. 1761) ("To establish an antitrust injury: (1) the court must identify the practice complained of and the reasons such a practice is or might be anticompetitive, (2) the court must identify the actual injury the plaintiff alleges, which requires us to look to the ways in which the plaintiff claims it is in a 'worse position' as a consequence of the defendant's conduct, and (3) the court compares the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges. *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 62-63 (2d Cir. 2019) (citations omitted).")

> claimed are highly speculative or abstract. *Id.* at 536–45, 103 S. Ct. at 908–12, 74 L. Ed. 2d at 737–43.

Southard, 734 N.W.2d at 198-99. Under *Southard*, the directness or indirectness of the asserted injury is determined by where in the chain of distribution (or in the case of a seller plaintiff, the chain of procurement) the plaintiff and defendant occupy. Someone not in the chain of distribution (or procurement) does not have an antitrust injury. *Id.* at 199. A direct or indirect seller does have an antitrust injury from a price fixing conspirator purchaser. *Id.* at 200.

The self-funded private and governmental entities are in the same level of the chain of procurement as Wellmark and other health insurers, because they are all purchasing Iowa provider health care services for employees of Iowa employers.[4] The Iowa chiropractors and other Iowa health care providers are directly providing health care services to employees of Iowa employers which are paid by co-conspirator price-fixing Wellmark defendants and the self-fundeds, all of whom are direct purchasers. The Iowa self-fundeds would not need an Administrative Services Agreement if they were not purchasers of health care services for their employees.

[4] *Accord, Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730, 108 S. Ct. 1515, 1522-23 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.")

Plaintiffs are not complaining of the illegality of an administrative services agreement as a general proposition, but they are complaining about discrimination against chiropractor services and price fixing in the separate agreement for separate network access fee in the Wellmark and WHPI Administrative Services Agreements[5] for the use of the provider networks of Wellmark and WHPI and the provider services contracts[6] Wellmark and WHPI have with Iowa health care providers, including Iowa chiropractors, which bind the provider to serve any Wellmark or WHPI member presenting a card and further bind the provider to limit fees to the annual provider schedules of Wellmark and WHPI and not to balance bill the employee member.[7] Under the five-part test stated in *Southard*, plaintiffs and the plaintiff class have shown antitrust injury.

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[5] These provisions are found in paragraphs 1.16 (1.21), 3.1, 4.1, 6.1 and 6.2 of the three Administrative Services Agreements. (Non-Conf. App., Vol. I, pp. 1027, 1030-35, 1047, 1051-57 & 1074, 1078-84)

[6] These provisions are found in paragraphs 8.1, 8.2, and Exhibit A to the Practitioner Services Agreement of July 2001(Non-Conf. App., Vol. I, pp. 661, 668) and Practitioner Services Agreement of June 2007 (Non-Conf. App., Vol. I, pp. 692-93, 700), the agreements in effect at all times pertinent to this case.

[7] This is a conscious commitment to an unlawful objective. The conscious commitment is in knowingly agreeing to a form contract containing a price fixing agreement with Wellmark and WHPI and an awareness that all other self-fundeds are signing the same form contract containing the same price fixing agreement. *See Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 171 (Iowa 2002).

E. The District Court Failed to Identify the Elements of Plaintiffs' Claim and Focused on Individual Matters of Computation of Damages Rather Than on Matters of Common Liability.

Examination of the elements of the cause of action is the appropriate inquiry for class certification. *Freeman v. Grain Processing Corp.*, 895 N.W.2d 105, 120 (Iowa 2017). "Courts have routinely found that class certification is inappropriate in such cases when the theory of liability cannot be established with generalized evidence by the representative on behalf of the entire class." *Roland v. Annett Holdings, Inc.*, 940 N.W.2d 752, 760 (Iowa 2020). *Roland* goes on to state why a case like *Freeman*, the elements for which liability is proven by objective, class wide standards, is a good case for establishing the major elements for the entire class. *Id.* This case is like *Freeman*.

The district court did not examine the actual elements of the cause of action for violation of Iowa Code § 553.4. The Model Jury Instructions in Civil Antitrust Cases (2016 ed.) produced by the ABA Section of Antitrust Law, Horizontal Price Fixing Instruction 1 – General Elements p. 25, states the elements of a price fixing violation of Section 1 of the Sherman Act:

(1) That an agreement to fix the prices of [product or service X] existed;
(2) That defendant knowingly – that is, voluntarily and intentionally – became a party to that agreement;

(3) That such agreement occurred in or affected interstate [or foreign] commerce; and
(4) That the agreement caused plaintiff to suffer an injury to its business or property.

With the deletion of the interstate commerce requirement and the addition of determining a relevant market (health care services in Iowa), these would be the elements of liability for violation of Iowa Code § 553.4 (1987).

The Eighth Circuit states the elements Sherman Act § 1 generally as: "(1) that the [defendants] violated the antitrust laws; (2) that the violation caused [plaintiff] injury; (3) that the injury was of a type sought to be prevented by the antitrust laws; and (4) the amount of its injury." *National Farmers' Org., Inc. v. Associated Milk Prod., Inc.*, 850 F.2d 1286, 1292 (8th Cir. 1988).

The district court erred in not examining the actual recognized elements of the cause of action for violation of Iowa Code § 553.4.

F. There Is No Agency Relationship Between Wellmark Defendants and the Self Fundeds

Appellees' Brief suggests (but does not appeal) that Wellmark is the agent of each and all of the self fundeds and therefore there can be no conspiracy under the single entity doctrine. (Appellees' Brief pp. 61-62). The district court denied Wellmark's Motion to Dismiss (Non-Conf. App., Vol. I, p. 201), which raised this issue, on March 9, 2020. (Non-Conf. App., Vol. I, p. 267).

Paragraph 10.9 of all Wellmark Administrative Services Agreements (ASA's) states:

> **Nature of Relationship; Authority of Parties.** Nothing contained in this Agreement and no action taken or omitted to be taken by Account or Wellmark pursuant hereto shall be deemed to constitute Account and Wellmark a partnership, an association, a joint venture or other entity whatsoever. Wellmark shall at all times be acting as an independent contractor under this Agreement. No party has the authority to bind the other in any respect whatsoever.

(Non-Conf. App. pp. 1042, 1069, 1096). The final two sentences of ¶ 10.9 establish that Wellmark Defendants are not agents of any of the self-funded employers. Restatement, Third, Agency § 1.01 (Am. Law Inst. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf *and subject to the principal's control*, and the agent manifest assent or otherwise consents so to act.) (emphasis added); *Deeds v. City of Marion*, 914 N.W.2d 330, 348-49 (Iowa 2018) ("no evidence that the City

'controlled' or had a right to control how Dr. McKinstry performed her physical examinations; rather, she exercised her own independent medical judgment. . . ."); *Mermigis v. Servicemaster Industries, Inc.*, 437 N.W.2d 242, 246 (Iowa 1989) ("The test of agency is the right to exercise control of the actions and conduct of another.").

Paragraph 10.9 makes explicitly clear that the relationship between Wellmark Defendants and any and all self-funded employers is not "a joint venture or other entity whatsoever." Even if there was a joint venture, "joint ventures have no immunity from antitrust laws" *National Collegiate Athletic Assn. v. Bord of Regents of Univ. of Okla.*, 468 U.S. 85, 113, 104 S. Ct. 2948 (1984).

> The key is whether the alleged "contract, combination ..., or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination ..., or conspiracy" amongst "separate economic actors pursuing separate economic interests . . . such that the agreement "deprives the marketplace of independent centers of decisionmaking" . . . and therefore of "diversity of entrepreneurial interests. . . ."

American Needle, Inc. v. National Football League, 560 U.S. 183, 195, 130 S. Ct. 2201, 2212 (2010). The antitrust laws were enacted for "the protection of competition not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 697 (1977); *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 447 (Iowa 2002) ("*Comes I*"), ("Our state antitrust law promotes the same consumer protection policies as does federal antitrust law by assur[ing]

customers the benefits of price competition."); *Next Generation Realty, Inc. v. Iowa Realty Co., Inc.* 686 N.W.2d 206, 208 (Iowa 2004) ("[A]ntitrust laws were not intended to deal with claimed wrongs inflicted on individual parties. Their function is only to foster the public's access to a freely competitive market."). The Iowa competition law protects sellers as well as buyers. *Mueller I*, 818 N.W.2d at 265. The competition in this case is the right of Iowa health care practitioners to sell their services into an Iowa procurement market free from price collusion. The Wellmark Defendants and the Iowa private and governmental self-funded employers are all purchasers of health care services for employees. Absent collusion, they would all be independent centers of decision-making. They are separate entities, separately controlled by independent managements.

> [U]nlike independent action, "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." *Id.*, at 768–769, 104 S. Ct. [at 2740].

Am. Needle, 560 U.S. at 190, 130 S. Ct. at 2209. "Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself." *Id.*, at 198, 130 S. Ct. at 2213-14.

II. THE NAMED PLAINTIFFS ARE NOT DISQUALIFIED BY THE DOCTRINE OF ISSUE PRECLUSION

Defendants contend that the named plaintiffs are barred from bringing this antitrust suit under Iowa Code § 553.4 by issue preclusion by reason of final decision on the merits by the Iowa Insurance Commissioner in *Abbas v. Iowa Ins. Div.*, 893 N.W.2d 879 (Iowa 2017). The District Court did not address or rule upon this issue in the Order Denying Class Certification filed January 18, 2022. (Non-Conf. App., Vol. I, pp. 1755-70). Plaintiffs' Motion for Class Certification was filed pursuant to the Scheduling Order on March 13, 2020. (Non-Conf. App., Vol. I, p. 275). Defendants did not file an Answer in this case until March 19, 2020. (Non-Conf. App., Vol. I, p. 347). In their affirmative defenses, Defendants assert generally: "1. Plaintiffs' claims are barred, in whole or in part, by the doctrines of issue preclusion, collateral estoppel, claim preclusion, or res judicata." (Non-Conf. App., Vol. I, p. 386). In their Resistance to Plaintiffs' Motion for Class Certification, filed October 23, 2020, Defendants make a brief argument that the representative plaintiffs are "inadequate" because of issue preclusion. (Conf. App., Vol. II, pp. 975-76. In Iowa, issue preclusion – whether offensive or defensive – must be pled and proved by the party asserting it. *Fischer v. City of Sioux City*, 654 N.W.2d 544, 548 (Iowa 2002). The notice in the answer must identify either the incident giving rise to the claim of issue preclusion or the

general nature of the claim. *Id.* at 550. Defendants' Answer does not do this.

Turning to the merits of the claim, however, the insurance commissioner found in a declaratory ruling in *Abbas* that if Iowa Code § 514F.2 (1987) regulates the reimbursement an insurer is required to pay a chiropractor, Wellmark does not base its payments for chiropractic care *solely* on licensure in violation of section 514F.2. Upon appeal of the insurance commissioner's ruling, the Iowa Supreme Court ruled:

> Although another fact-finder may come to a different conclusion, the record made at the hearing supports the commissioner's finding that the method Wellmark uses to set fees for its providers depends on a large number of complex factors concerning the healthcare system and that Wellmark does not base its reimbursement to chiropractors based solely on a chiropractor's licensure. Because substantial evidence supports the commissioner's finding that the lower fees Wellmark pays to chiropractors is not based solely on a chiropractor's licensure, we are required to affirm the commissioner's finding.

Abbas, 893 N.W.2d at 893. For issue preclusion to apply, the first two requirements are (1) the issue in the present case must be identical, and (2) the issue must have been raised and litigated in the prior action. *Fischer*, 654 N.W.2d at 547.

The issue in the *Abbas* case was whether the *lower fees* Wellmark pays for chiropractic care are based *solely* on licensure in violation of section 514F.2. The issue in this case is whether Wellmark

Defendants and 466 Iowa private and governmental self-funded employers conspired and agreed to fix the price of chiropractic services at an unreasonably low level and also restricted competition for health care services by reducing the output of chiropractic services in Iowa in violation of Iowa Code § 553.4 (1987). Violation of section 553.4 was not an issue and was not raised or litigated in *Abbas* and violation of section 514F.2 is not an issue and has not been raised or will be litigated in this case.

For the reasons stated above, the Court should permit the named plaintiffs to be class representatives.

III. Conclusion

For each and all of the above-stated reasons, this Court should reverse, for abuse of discretion, the District Court's Order Denying Class Certification filed January 19, 2022, and remand the matter back to the District Court for determination by the District Court under the correct legal principles governing commonality and predominance relating to common impact and fact of damages of the type that the antitrust statute was intended to forestall.

Dated: April 14, 2023.

Respectfully submitted,

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Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This Appellants' Opening Proof Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 6930 words, excluding the parts of the application/motion exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Appellants' Opening Proof Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 5.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using MS Word in Georgia Pro 14 pt.

/s/ Glenn L Norris Dated: April 14, 2023

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed on the 14th day of April, 2023 with the Clerk of Court using the EDMS system, which will send notification of such filing to the counsel below:

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