

STATE OF MISSOURI)
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CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

DWIGHT L. QUINN, et al.,)
)
Plaintiffs,)
) Cause No. 22052-0821A
vs.)
) Division No. 17
BJC HEALTH SYSTEM d/b/a BJC)
HEALTHCARE, et al.,)
)
Defendants.)

ORDER

The Court has before it Plaintiffs' Motion for Class Certification. The Court has reviewed the submissions of the parties, the relevant authorities, and the arguments of counsel, and now rules as follows.

Plaintiffs Dwight L. Quinn, Freida Eyster, David W. Kuneman, and Danny G. Jarvis brought their Second Amended Class Action Petition against BJC Health System d/b/a BJC Healthcare, Barnes-Jewish Hospital, and Barnes-Jewish St. Peters Hospital, Inc., alleging that Defendants set their charges for medical services, goods and drugs at highly inflated and unreasonable rates that bear no connection to the actual cost of providing those services, drugs, or goods. Plaintiffs allege that the charges are often two to three times higher than the amounts paid by the vast majority of Defendants' patients (those with medical

insurance¹). Plaintiffs allege that Defendants charge uninsured patients the full, unreasonable "chargemaster" rates and also utilize aggressive, abusive and humiliating collection practices to recover these inflated medical "debts" from Plaintiffs and the class.

Plaintiffs brought this action in four counts. Plaintiffs allege that Defendants breached their contracts with Plaintiffs (Count I); breached their covenant of good faith and fair dealing (Count II); committed violations of the Missouri Merchandising Practices Act (Count III); and were unjustly enriched at the expense of Plaintiffs (Count IV).

Plaintiffs seek certification of a class action on behalf of all persons from 1999 to the present: (1) who were charged for any form of medical treatment, goods, devices or drugs from any hospital or facility owned, operated or managed by BJC Health System, (2) who were uninsured at the time of treatment, and (3) who were charged the amount set forth on the applicable Chargemaster. The Court notes that it may need to redefine a class and certify a class narrower than that proposed after considering Defendants' objections to Plaintiffs' proposed class.

In order to clarify this class definition, certain words require specific defining. For purposes of this order, the following definitions shall apply:

¹ For purposes of this order, governmental programs providing payment for medical expenses, such as Medicare and Medicaid, are considered "medical insurance."

"Self-pay" means any patient who does not have medical insurance or is paying out-of-pocket for non-covered services.

"Patient" means any person who received medical services, treatment or any goods, products, devices or drugs that were given or administered to the patient for purposes of medical care; or necessitated by reason of in-patient care.

Plaintiffs seek certification of a class pursuant to Rule 52.08(b)(3), which provides for a class action where common issues of fact or law predominate over issues affecting individual class members and a class action is superior to other available methods for the resolution of the claims, or Rule 52.08(b)(2), which is available where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Defendants oppose class certification contending primarily that Rule 52.08(b)(3) is not met because individual issues predominate over common issues. Rule 52.08, the Missouri rule which governs the Court's determination as to whether an action is to be maintained as a class action, is identical to Federal Rule 23, and interpretations of the latter are considered in interpreting the Missouri rule. State ex rel. Byrd v. Chadwick, 956 S.W.2d 369, 377 (Mo.App. W.D. 1997). The testimony and evidence heard on the certification of a Rule 52.08 class go to the question of whether the prerequisites of a class action are

met. Reinhold v. Fee Fee Trunk Sewer, Inc., 664 S.W.2d 599 (Mo.App. E.D. 1984). In deciding whether the case should proceed as a class action, the Court does not inquire into the merits of the case. Rule 52.08 is merely procedural; the Court accepts all of the substantive allegations of the petition as true. However, the preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case. Craft v. Philip Morris Companies, Inc., 190 S.W.3d 368, 377 (Mo.App. E.D. 2005).

The Court has not ignored the many opinions by a variety of courts rejecting the certification of a class in cases factually similar to the present case. Defendants recently submitted the opinion of the Honorable Xollie Duncan, Circuit Judge, Benton County, Arkansas in Melissa Bennet, et al. v. St. Mary-Rogers Memorial Hospital, Inc., No. CV 2005, 94-5, decided on December 20, 2006. The Bennet case, described by Defendants as "remarkably similar" to the present case, included findings similar to those made by many courts that have determined the plaintiffs' claims unsuitable for class dispositions. These conclusions were specifically considered by this Court and found not to be persuasive for the following reasons.

"Reasonableness" does not depend on the nature and severity of the condition presented. The nature and severity of the condition, while different for each patient, only affects what medical care is provided or needed, not the amount that is

charged for each itemized charge. Similarly, an individual patient's ability to respond to treatment might affect the length of stay or course of treatment at a hospital but not the chargemaster cost, and thus the reasonableness of the cost. For example, a patient who needs ten doses of Heparin as opposed to a patient who needs five will have a higher total bill for Heparin, but each should be charged the same amount per dose of Heparin. Moreover, the fact of "vastly different" services is likewise not a bar to certification. While most or all members of the class may have received a "unique" set of services, the common use of certain tests, treatments, medicines, etc., will generally provide sufficient commonality to support class litigation.

Similarly, Defendants argue that an individual patient's needs prevents a determination of what is or is not unreasonable. In Defendants' view, "unreasonable," as it relates to hospital charges, is not subject to objective proof or, when looked at line item-by-line item, has so many variables that it is not possible to narrow the evidence enough for trial by jury. Moreover, Defendants suggest that pricing decisions are so affected by factors unique to each hospital that what might be a reasonable charge in one hospital would be unreasonable in the next. This "reasonableness is as reasonableness does" argument has succeeded in confounding the attempts of courts across the country to find a manageable way to litigate the merits of the plaintiffs' allegations in similar cases. To follow Defendants' logic to its final conclusion would require that hospital pricing

be essentially immune from exposure to litigation, leaving individual hospitals free to make their own determination of what is reasonable pricing and leaving consumers and payors with no realistic ability to challenge them. Thus, this Court will decline Defendants' invitation to essentially close the courthouse door to hospital patients by finding that the issues are too difficult to litigate.

The prerequisites of a class action are: (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law or fact common to the class exist, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. State ex rel. American Family Mutual Ins. Co. v. Clark, 106 S.W.3d 483, 486 (Mo. banc 2003) (citing Rule 52.08(a)).

To satisfy the numerosity requirement of Rule 52.08(a)(1), the plaintiffs need not specify an exact number of class members, but "must show only that joinder is impracticable through some evidence or reasonable estimate of the number of purported class members." Linguist v. Bowen, 633 F.Supp. 846, 858 (W.D.Mo. 1986). Impracticability means that the joinder of all class members would be difficult or inconvenient. Jackson v. Rapps, 132 F.R.D. 226, 230 (W.D.Mo. 1990). Plaintiffs argue that all uninsured patients of BJC Health System hospitals are billed, and have been billed during the entire proposed class period, the full Chargemaster rate for medical services, goods, devices and

drugs. Defendants have conceded that the number of such uninsured patients easily exceeds one thousand. Here, joinder of the uninsured patients would be impracticable. Therefore, the numerosity requirement is satisfied.

Rule 52.08(a)(2) requires the presence of common issues of law or fact. Commonality is not required on every question raised in a class action, and the requirement is met when the legal question "linking the class members is substantially related to the resolution of the litigation." Paxton v. Union National Bank, 688 F.2d 552, 561 (8th Cir. 1982); see also Bradford v. AGCO Corp., 187 F.R.D. 600 (W.D.Mo. 1999). Thus, commonality is satisfied where there is a single issue common to all class members. Rentschler v. Carnahan, 160 F.R.D. 114, 116 (E.D.Mo. 1995). The Court notes that a finding of commonality pursuant to Rule 52.08(a)(2) does not require a showing that the common issues predominate over individual issues. See Owner-Operator Indep. Drivers Ass'n v. New Prime, 213 F.R.D. 537, 543 (W.D. Mo. 2002).

Plaintiffs contend that multiple common issues of law and fact exist, including:

Whether the BJC Defendants have charged the Plaintiffs and the Class unreasonable charges for medical care, goods, and drugs in breach of the contracts with their patients under Missouri law;

Whether the alleged unreasonable pricing practices imposed by the BJC Defendants breached their duty of good faith and fair dealing to the Plaintiffs and the uninsured Class under Missouri law;

Whether the BJC Defendants' alleged unreasonable and deceptive pricing practices violated Missouri's Merchandising Practices Act, Chapter 407 RSMo;

Whether the BJC Defendants have been unjustly enriched at the expense of the Plaintiffs and the Class under Missouri law; and

Whether the BJC Defendants should be enjoined from continuing their alleged unreasonable, unfair and deceptive pricing practices.

The Court believes Plaintiffs have met the commonality requirement. This case involves allegations of the widespread practice of unreasonable pricing regarding uninsured patients. Issues of unfair practices will be common for the members of the class.

In addition to the numerosity and commonality requirements, Rule 52.08(a) also requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." A class representative must possess the same interest and suffer the same injury as the class members. Koger v. Hartford Life Ins. Co., 28 S.W.3d 405, 410 (Mo.App. W.D. 2000). Commonality and typicality requirements tend to merge, acting as "guideposts for determining whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). The burden of satisfying the typicality requirement is "fairly easily met so long as other class members have claims similar to the named plaintiff." DeBoer v. Mellon

Mortgage Co., 64 F.3d 1171, 1174 (8th Cir. 1995). Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory. Owner-Operator Indep. Drivers Ass'n, 213 F.R.D. at 543.

A putative class member is not considered "typical" of the class if he or she is subject to unique defenses that will be a major focus of the litigation. See, e.g., In re Milk Products Antitrust Lit., 195 F.3d 430, 437 (8th Cir. 1999). Defendants argue that each named Plaintiff is subject to unique defenses rendering them inappropriate as class representatives as follows:

1. Plaintiff Quinn's claims may be barred by res judicata, because he did not challenge the reasonableness of the hospital's charges in the collection suit that was brought to default judgment against him.
2. Plaintiff Kuneman was not a patient at a BJC hospital; he merely had a blood sample tested by a BJC laboratory. Defendants contend that "he was in a position to easily price-shop among labs," and may not have even signed the form contract that is the basis of Count I.
3. Plaintiff Eyster is eligible for a 100% discount of her bill based on her income, yet she has failed to apply for charity care.
4. Plaintiff Jarvis is unique in that he does not qualify for charity care and was uninsured because he

consciously chose to spend his money on items other than health insurance, which he can afford.

Inasmuch as the representatives each have claims of unreasonable charges that are covered by this cause of action, their claims are typical. Typicality is not defeated because each class member does not have the same charges or did not receive the same medical care. It is sufficient that the class representatives are litigating the same alleged unreasonable pricing or charges such that, taken together, the claims of the class representatives are typical of the class. Inasmuch as the representatives seek to litigate the reasonableness of the pricing practices of Defendants, the interests of the entire class will be protected.

The Court finds that the proposed class representatives were uninsured patients of BJC Health System who were charged the chargemaster rates for service, which are typical of the claims of the class. The Court does not find Defendants' arguments persuasive regarding the named Plaintiffs' unique defenses. Defendants' concerns about Quinn and Kuneman were addressed in this Court's earlier order. While there may be defenses unique to them, the Court does not feel that the defenses will be a major focus of the litigation. Plaintiffs allege that Eyster was denied charity care. As the pleadings stand, she is typical of the class. Under BJC's new policy, however, Defendants argue that she would qualify for charity care. If subsequent discovery and/or fact-finding reveals that Eyster qualifies for a 100%

discount in her bill, she may not be a member of the class and therefore will no longer represent the class (see discussion infra regarding charity care). Based on the current condition of the pleadings, however, this possible defense does not preclude Eyster from representing the class, as it will not be a major focus of the litigation. Jarvis is "atypical" of the class and of uninsured persons in general in that he can arguably afford health insurance and has chosen to be uninsured. However, indigency is not a requirement for the class. The Court finds that each of the named plaintiffs meet the requirements under Rule 52.08(a)(3).

Rule 52.08(a)(4) states that the representative parties must "fairly and adequately protect the interests of the class." This prerequisite applies both to the named class representatives and to class counsel. State ex rel. Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 735 (Mo. banc 2004). A proposed class representative satisfies the prerequisite if the following elements are met: (1) the plaintiff's attorney must be qualified, experienced, and able to competently and vigorously prosecute the suit, and (2) the interest of the class representative must not be antagonistic to or in conflict with other members of the class. Fielder v. Credit Acceptance Corp., 175 F.R.D. 313, 320 (W.D.Mo. 1997). Representation is adequate if the representatives have a sufficient interest in the class to ensure vigorous prosecution. Morgan v. United Parcel Service of America, 169 F.R.D. 349, 357 (E.D. Mo. 1996).

The Court believes Plaintiffs have demonstrated that they, in conjunction with their attorneys, are capable of fairly and adequately representing the interests of uninsured patients in this action.

Once a proposed class satisfies the four prerequisites of Rule 52.08(a), the Court must determine whether a class action is the appropriate method through which to resolve the litigation under Rule 52.08(b). Rule 52.08(b) states, in pertinent part:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

...

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Plaintiffs seek certification under Rule 52.08(b)(3).² Rule 52.08(b)(3) first requires that the common questions predominate over any individualized issues. This is a more stringent test than the commonality requirement of Rule 52.08(a)(2). See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 609, 138 L.Ed.2d 689, 117 S.Ct. 2231 (1997). A determination of superiority often

² Plaintiffs alternatively seek certification, without adequate explanation, under Rule 52.08(b)(2). Rule 52.08(b)(2) provides that a class action is maintainable where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Class certification under this rule is only appropriate where the primary relief sought is injunctive, and not where, as here, primarily money damages are sought. See In re St. Jude Med., Inc., 435 F.3d 1116, 1121 (8th Cir. 2005); Owner-Operator Independent Drivers Assn. v. New Prime, Inc., 339 F.3d 1001 (8th Cir. 2003). The Court finds the application of Rule 52.08(b)(2) inappropriate here.

turns on the manageability and the efficiency of the proposed class action, in contrast to other, alternative methods of suit. See In re American Medical Systems, Inc., 75 F.3d 1069, 1085 (6th Cir. 1996), in which the court found that the burden of making individualized determinations for class members was fatal to the superiority requirement.

The need for inquiry as to individual damages does not preclude a finding of predominance. Craft, 190 S.W.3d at 381. "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individualized question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question." Id., at 382.

The predominance issue is where Defendants argue class certification must be denied, because individual issues predominate over common issues. There are three major areas where Defendants argue that individual issues predominate. These areas are 1) BJC's charity care policies and each patient's financial status; 2) Each patient's knowledge of BJC's rates prior to obtaining services at a BJC facility; and 3) the reasonableness of each patient's charges must be determined according to the services each patient received and what each patient was charged. Plaintiffs counter that the common legal issues outweigh the difficulties and complexities of individual treatment of each class member's claims, and that the same

evidence will suffice to make a finding of unreasonableness of all class members' charges.

I. Charity Care

Previously, this Court determined that persons who did not pay their bill in full had nonetheless stated a claim because they were damaged by simply being "charged" an unreasonable amount, because Defendants' alleged aggressive, abusive, and harassing efforts to collect such debt through collection lawsuits, liens and garnishments, had caused economic injury to them, including bankruptcy and/or financial ruin. However, Plaintiffs' proposed class includes many persons who paid none of the hospital charges, and had no collection action taken against them. According to Defendants, these patients were simply never expected to pay because they either qualified for and received charity care or collection actions were deemed futile due to the patient's financial situation.

On January 1, 2005, BJC revised its financial assistance policy in order to grant charity or discounted care to more uninsured patients. The policy is retroactive and applies to patients who received medical care before the new policy was implemented. Under the new guidelines, if a patient's income is less than 200% of the annual federal poverty guidelines, the entire bill is written off. If the patient's income is between 200% and 400% of the federal poverty guidelines, the patient is entitled to a discount of 20% to 80%. And any time a patient's bill exceeds 30% of his annual gross income, regardless of

income, the amount in excess of 30% of his income is written off. In 2005, 95% of the patients at Barnes-Jewish St. Peters and over 90% of the patients at Barnes-Jewish Hospital who applied for financial assistance received it.

Defendants argue that Plaintiffs have failed to state a class-wide basis for liability, and individual determinations of each patient's financial situation will be necessary to assess whether an individual has a claim. However, this Court believes that persons who received financial assistance under the charity care policy can be excluded from the class from the onset, thereby negating the need to assess each class member's entitlement to charity care individually.³

It should be noted at this point that there may be patients of Defendants who are eligible for a charity care discount and who are still appropriate members of the class. Merely being eligible for charity care does not mean that there are no persons who struggled and sacrificed to pay their debt because they were not adequately or effectively informed of their eligibility. Persons who were uninsured and "charged" the chargemaster rates, but were not "expected" to pay the chargemaster rate because they qualified for a discount or charity care, may still be members of the class in that there is common liability with those patients

³ Defendants argue that excluding from the class patients who received a price adjustment will not work, practically speaking, because those who fail to respond to a survey to "opt out" will be automatically in the class. The Court believes this case could be handled as an "opt-in" class, which also remedies Defendants' privacy concerns in addition to solving this issue. It may also be possible to exclude such persons based on Defendants' records.

who did pay or had collection actions taken against them if they were unaware of their eligibility for charity care.

II. Knowledge of Charges

Similarly, Defendants argue that individual determinations must be made as to each patient's knowledge of the charges prior to receiving services. Plaintiffs allege that the proposed class signed contracts to pay for hospital services, but the price was not included when they signed the contracts. "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the courts." Restatement (Second) Contracts §204. When an agreement that a hospital patient signs that obligates the patient to pay the hospital's "charges" or "regular charges" fails to fix a price, courts have stated that a "reasonable price" would be implied. See Doe v. HCA Health Servs. Of Tenn., 46 S.W.3d 191 (Tenn. 2001); Payne v. Humana Hosp., 661 So.2d 1239 (Fla. 1995). Plaintiffs argue that the amounts subsequently charged by the hospital were not reasonable. This "open price term contract" is the basis for liability alleged in Count I.

Defendants point out that some patients, perhaps most of the self-pay patients who actually pay their bills, are often advised of the charges and may even pay the charges in advance. For example, often patients who are otherwise insured have elective cosmetic surgery at BJC facilities. In those cases, the patient

is charged the full chargemaster rate, but usually knows the price in advance and often works out payment arrangements in advance. Such a patient would not have a claim under Count I, because a "reasonable" charge is not required where the price is known in advance.

Defendants argue that an individual determination of each patient's knowledge of the charges is necessary to determine if they in fact have a claim for breach of contract. In order to have a claim for breach of contract due to the reasonableness requirement as stated in Restatement (Second) Contracts §204, there must be unspecified terms. The Court finds that this issue can also be remedied by further defining the parameters of the class, rendering an individualized investigation of each class member's knowledge unnecessary. Moreover, agreements for hospital services are based on consumers' ignorance of what is "reasonable." A patient who actually had knowledge of a chargemaster rate is still damaged if that rate is determined to be unreasonable. The certified class would only include such persons with open price term contracts or where there was unequal bargaining ability such that there was no true "negotiation," and not those who effectively negotiated and paid for elective procedures.

Defendants have suggested that defining the class in such a way will create a "hornet's nest." A class will be deemed sufficiently definite if it is administratively feasible to determine whether a given individual is a member of the class.

See In re Tetracycline Cases, 107 F.R.D. 719, 728 (W.D.Mo. 1985).

The parameters set by the Court require fairly simple determinations. The Court believes that through the use of surveys or other correspondence it is administratively feasible for the Plaintiffs to determine whether a given individual is a member of the class.

III. Reasonableness

The parties disagree whether an individual determination of reasonableness must be made for each member of the class. The proposed class definition includes (1) all persons who were charged for any form of medical treatment, goods, devices or drugs from any hospital or facility owned, operated or managed by BJC Health System, (2) who were uninsured at the time of treatment, and (3) who were charged the amount set forth on the applicable Chargemaster. Plaintiffs' theory for recovery is based on the allegation that the amounts set forth on the Chargemaster were "across-the-board" unreasonable. Defendants argue that this case cannot meet the class requirement of superiority, because each Plaintiff will have had a different condition and different treatment, requiring a different calculation of a "reasonable" charge for his or her services.

Defendants argue, "In particular, the fundamental inquiry at the heart of all plaintiffs' claims - whether an uninsured patient was charged a 'reasonable' amount for the medical services the patient received - requires a determination that can only be made on a patient-by-patient basis, based on the

particular medical treatment the patient needed, the specific charges the patient incurred for those services and, ultimately, how each of those charges compared to the charges of other hospitals for those same services." Defendants are concerned that the extensive inquiry required to determine the reasonableness of its charges on a class-wide basis make this class action unmanageable.

"Manageability" is a consideration that "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." Craft, 190 S.W.3d at 386. "[T]he issue of manageability of a proposed class action is always a matter of justifiable and serious concern for the trial court and peculiarly within its discretion." Id., at 386-387.

Defendants argue that "proof that a hospital charge is not reasonable requires a comparison of the charges in question to the charges of comparable hospitals for that same service." "The law is clear that a hospital's rates must be compared to rates of other hospitals, not to its own internal rates for an entirely different set of patients." They cite Children's Hospital v. Clardy, 833 S.W.2d 44, 45-46 (Mo.App. 1992) and Sherman Hosp. v. Wingren, 169 Ill.App.3d 161, 162 (Ill.App.Ct. 1988). A price is commercially reasonable and in good faith if it is within the range of prices charged by other sellers in the market. Shell Oil Co. v. HRN, Inc., 144 S.W.3d 429, 435 (Tex. 2004).

Upon this Court's request, Defendants compiled a comparison of the charges for the four named Plaintiffs to the charges for similar services at other area hospitals. Defendants argue that the task proved that determining the reasonableness of the charges makes this class unmanageable because of various concerns, including: 1. Each hospital has a different chargemaster. Some are more complex than others. Barnes-Jewish Hospital, for example, has 75,000 items in its chargemaster, whereas Barnes-Jewish St. Peters only has about 13,000 items. 2. Each hospital's chargemaster is confidential, and requesting the documents from non-parties will be difficult. 3. Hospitals offer different services and differing levels of care. Some may have different equipment. 4. Hospitals bill differently for certain services, making comparison difficult. 5. Not all hospitals are equal and should not be expected to charge the same rates even for the same services. Barnes-Jewish Hospital prides itself as being one of the finest hospitals in the country. Therefore, its target chargemaster rates are in the 90th percentile of hospital rates generally. Its rates can be expected to exceed the rates contained in the chargemasters of 90% of the other hospitals, but that does not make the rates unreasonable for the level of service one can expect at Barnes-Jewish Hospital.

Other courts have found the task of determining reasonable hospital charges unmanageable for a class action. In DiCarlo v. St. Mary's Hospital, No. CA-05-1665 (D.N.J. July 19, 2006), the court held, "A court could not possibly determine what a

'reasonable charge' for hospital services would be without wading into the entire structure of providing hospital care and the means of dealing with hospital solvency. These are subjects with which state and federal executives, legislatures, and regulatory agencies are wrestling and which are governed by numerous legislative acts and regulatory bodies. For a court to presume to address these problems would be rushing in where angels fear to tread." Id. at *8-9.

In DiCarlo, the plaintiff intended to explore the reasonableness of the hospital's charges during discovery, and intended to use as the measure of reasonableness "the hospital's costs, functions, and services, what the services are ordinarily worth in the community - i.e., what people ordinarily pay for the services, the hospital's internal factors and similar charges of other hospitals in the community, as well as the hospital's budgetary needs." The Court rejected the plaintiff's proposal, noting that the Court was "ill-equipped" to make such a determination.

Here, in contrast to the DiCarlo plaintiffs, Plaintiffs argue that a class action is not unmanageable because there is no need to determine the reasonableness of each individual chargemaster item in order to conclude that the rates charges by BJC to uninsured persons are unreasonable. A "reasonable" charge is "the price usually and customarily paid for such services or like services at the time and in the locality where the services were rendered." Kinetic Energy Development Corp. v. Trigen

Energy Corp., 22 S.W.3d 691, 697 (Mo.App. E.D. 1999). Plaintiffs argue that the "price usually and customarily paid" is the amount collected from the majority of the patients.

Plaintiffs do not propose that the chargemaster rates charged by other area hospitals would be "reasonable," so they do not propose proving unreasonableness by comparing the chargemaster rates of the BJC hospitals to other area hospitals. At the BJC hospitals, only about two percent of patients are "charged" the chargemaster rate, and Plaintiffs assume a similar percentage is charged the chargemaster rate at other institutions. Since only a few percent pay the chargemaster rate, that rate would never be considered the "price usually and customarily paid." Plaintiffs argue, "Contrary to the premise upon which BJC's entire argument against class certification is based, plaintiffs are not claiming that each of the rates on BJC's Chargemaster are unreasonable compared to the Chargemaster rates of other hospitals (although they are relatively very high); rather plaintiffs are challenging BJC's across-the-board decision to charge all of its uninsured patients rates 250% higher than the rates it effectively charges everyone else." According to Plaintiffs' theory, there is no need to inquire into the possibility that some individual line-item rates may be inflated, others may be right on target and still others may be low, because the rates charged to the uninsured are "across-the-board" inflated by a certain percentage.

A hospital charge can be a lot more complicated than looking at "price minus cost equals profit." In this case, however, Plaintiffs' cause of action arises more from a suggestion of a continuing pattern of unreasonable pricing across the range of medical goods and services, as opposed to specific goods or services. In that regard, Plaintiffs need only prove general bad faith and a pattern, policy or practice of unreasonableness in Defendants' pricing practices. To the extent Plaintiffs prove this, such a finding would appropriately apply to the entire class.

In determining reasonableness, Plaintiffs intend to use the rates for services as they appear in the applicable chargemaster and compare them to the "price usually and customarily paid." Plaintiffs define this usual and customary amount as that which is paid by the vast majority of the hospital's patients through insurance or government programs. Plaintiffs argue that 98% of the hospitals' billings and 99% of its revenues come from non-insured persons. Although the insured are also "charged" chargemaster rates, the hospital collects on average 42% of the chargemaster amount billed to these groups.

Plaintiffs argue that a jury should decide whether the rates on the chargemaster are "reasonable" considering that Defendants only collect or expect to collect on average 42% of the chargemaster amount. They suggest that anything in excess of 120% of the rates that most payors pay is unreasonable, citing a 2003 proposed rule by the Department of Health and Human Services

stating that anything in excess of 120% of the usual charge is "substantially in excess." Plaintiffs argue that taken as a whole, all of the chargemaster rates are "across-the-board" unreasonable, and an individual inquiry into each patient's care and services is unnecessary to conclude that the chargemaster rates are unreasonable.

It is not necessary to analyze every charge for every specific service, drug or product in determining a reasonable charge. If Plaintiffs' allegations are true, they can prove it by evidence of a sufficient sampling of charges to allow a jury to determine if Defendants have engaged in a practice of unreasonable pricing. If proven, the average percentage of overpricing becomes the measure of damages, class-wide.

Included as a part of this order is a Schedule of Relevant Drugs, Devices, and Medical Services, attached as Attachment A, that provides a representative sample of the diagnosis and treatment of most medical problems faced by hospital patients. By analyzing the reasonableness of the charges for these services and items, a determination of whether Defendants engaged in unreasonable pricing practices can be made. With regard to determining which charges to look at, the Court takes judicial notice that the Merck Manual of Medical Information provides the widely accepted standards for the diagnosis and course of treatment for nearly all medical problems faced by hospital patients. The Court notes that there are standard practices and courses of treatment and diagnosis that are sufficiently

universal in health care; for example, CT and MRI scans, laparoscopy, or common surgical procedures such as a "C-section" or appendectomy. For each symptom a patient has, the Manual describes the generally accepted course of treatment used to treat the patient after diagnosis. The Manual also covers procedures for treating trauma and other emergency cases. The Merck Manual, therefore, provides a useful source of information for determining the standard course of treatment for most symptoms and circumstances that cause a patient to receive hospital care, and is the basis for this Court's Schedule of Relevant Drugs, Devices and Medical Services.

Plaintiffs have the burden of proving their case. They propose to prove their case in a way which does not render this case impracticable or unmanageable. Defendants point out several reasons why Plaintiffs can not prove their case in this manner. First, Defendants claim their chargemaster rates are reasonable, because they are at or below their internal "target" rates and cover their costs for service. Second, Defendants argue that there is no "managed care rate" with which to compare the chargemaster rate. BJC contracts with approximately fifty different managed care companies, and each managed care company pays a different rate for services ranging from 33% to 94% of the chargemaster rates. Additionally, none of the managed care rates are "based" on the chargemaster or expressed as a set percentage of the chargemaster. Most managed care companies reimburse the hospitals based on a set amount for a certain condition,

regardless of the number or duration of services actually administered. Defendants further suggest that they would challenge a finding of unreasonableness by producing a barrage of proof that certain individual items were nonetheless priced reasonably. Finally, Defendants argue that finding a "reasonable" rate for services as a lower percentage of the chargemaster rate jeopardizes the relationships and contracts it has with managed care companies. These arguments go the merits of the case, which are not considered on a motion for class certification. Additionally, Defendants have suggested to the Court that should this class be certified, Defendants would have to file a counterclaim for debt collection against each Plaintiff who is delinquent or has defaulted on his or her debt with Defendants. The Court finds that such counterclaims do not defeat the manageability of the class as common issues will continue to predominate.

The Court believes that Plaintiffs will be able to submit evidence to a jury of an "average" managed care discount from which a jury could determine a reasonable charge for services. Is it within the competence of a reasonable juror to determine if a charge assessed is reasonable? With regard to medicines administered and supplies used by or for a patient, the Court believes the answer is yes. The potential jurors can consider whatever testimony they hear on the reasonableness of the rates charged and the rates collected for those drugs and supplies and reach a decision. With regard to services by hospital personnel,

labor costs for support staff may be factored into the per day rate for the room. Rooms assigned to intensive care or special needs patients would also have a rate based on the cost of labor for the staff assigned to such rooms. These costs, and the reasonableness of such costs, can be developed through testimony and records. A jury can decide if there are unjustified and unreasonably inflated labor costs factored into the charges billed to patients. Professional services that are billed directly to patients, which are often driven by the skill, experience, education and training of the individual service provider, may be harder for a jury to judge as reasonable or not. However, considering the Plaintiffs' proposal to compare such rates to the amount usually and customarily collected, the Court believes that a finding of reasonableness or unreasonableness is possible.

This Court does not now pass judgment on whether Plaintiffs will be able to prove their case in the manner in which they have selected. Much of the soundness of Plaintiffs' theory will depend upon expert testimony at trial. For the purposes of class certification, however, Plaintiffs have presented to the Court a method which is manageable and satisfies the prerequisites for a class action.

The Court finds that common questions do predominate over individual issues. The common issues involve whether Defendants breached their contracts with Plaintiffs by charging unreasonable rates, whether they breached the implied covenant of good faith

and fair dealing, violated the merchandising practices act, or were unjustly enriched. All of the common issues involve whether Defendants' rates charged to the uninsured were unreasonably high.

Class certification is appropriate when the proposed class is so large that joinder of all members is not feasible. It will be Defendants' records that will be the principal source of contact information for determining who is in the class and for giving class members the appropriate notice.

The Court notes that an order certifying a class action may be altered or amended pursuant to Rule 52.08(d) and the Court can always decertify the class in whole or in part as to particular claims. The Court may also divide the class into sub-classes as appropriate.

WHEREFORE, in accordance with the above findings and opinion, it is ORDERED, with respect to the Class Action Petition, as follows:

1. Plaintiffs' Motion for Class Certification is GRANTED.
2. The Court certifies a class herein defined as:

All persons from 1999 to the present:

- (1) who were charged for any form of medical treatment, goods, devices or drugs from any hospital or facility owned, operated or managed by BJC Health System, or against whom actions to collect on such charges were taken,
- (2) who, upon admission to a BJC hospital or facility entered into an express form

contract which required them to pay unspecified, undocumented, and undetermined charges as a condition of receiving medical treatment or services and who did not negotiate the amount of such charges prior to treatment or services, and

- (3) who were charged the amount set forth on the applicable Chargemaster, and who have not received any discount or waiver in fees under BJC's charitable policies.

3. The named Plaintiffs are appointed as class representatives for the above-named class.
4. Excluded from the class are those persons who BJC can establish were billed solely for medical services, treatment, goods, devices, or drugs that were uniformly not covered by at the time of treatment by medical insurance who negotiated a discount rate with BJC. Also excluded are all judges and court personnel in the Circuit Court for the City of St. Louis, the Missouri Court of Appeals and the Missouri Supreme Court and any self-pay patients who were eligible for and effectively informed of their eligibility for a reduced rate under BJC's charitable policies.
5. The Court finds, pursuant to Rule 52.08(c)(2), that the best notice practicable under the circumstances is individual notice to all members who can be identified through reasonable effort, and notice by publication to all other class members.
6. Within 60 days of the date of this order, class counsel and Defendants' counsel shall each submit to the Court

for its review and consideration their respective memorandums containing (a) a draft of the proposed Notice of Class Action, to be mailed directly to those class members who have been or can be identified within a reasonable time; (b) a draft of the proposed Published Notice of Class Action; (c) suggestions as to the appropriate timing and length of time period for publication of the Published Notice, and number and sources of publication; and (d) any other issues the parties deem relevant to the issue of proper and adequate Notice.

SO ORDERED:

DAVID C. MASON, Judge

Dated: _____

cc: Maurice B. Graham
John Michael Clear