

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
)
) CA 98-475 JJF
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) Plaintiff,)
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) vs.)
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) FEDERATION OF PHYSICIANS AND)
) DENTISTS, INC.,)
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) Defendant.)
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UNITED STATES' RESPONSE TO PUBLIC COMMENTS

Pursuant to Section 2 of the Antitrust Procedures and Penalties Act (the "APPA"), 15 U.S.C. § 16(b)-(h), the United States responds to public comments received regarding the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. PROCEDURAL HISTORY

On August 12, 1998, the United States filed a civil antitrust Complaint alleging that defendant, Federation of Physicians and Dentists, Inc. (the "Federation"), restrained competition in the sale of orthopedic surgical services, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleges that the Federation, in coordination with certain of its members--nearly all private practice orthopedic surgeons located in Delaware--organized and

became the hub of a conspiracy to oppose and prevent reductions in payments for orthopedic services by Blue Cross and Blue Shield of Delaware (“Blue Cross”).

On October 22, 2001, the United States filed a proposed Final Judgment (D.I. 228) and a Stipulation (D.I. 226) signed by both it and defendant, agreeing to entry of the Final Judgment following compliance with the APPA. Pursuant to the APPA, the Stipulation, proposed Final Judgment, and Competitive Impact Statement (“CIS”) (D.I. 227) were published in the *Federal Register* on November 20, 2001, at 66 Fed. Reg. 58,163-69 (2001). A summary of the terms of the proposed Final Judgment and CIS were published for seven consecutive days in the *Washington Post* from October 25 through October 31, 2001, and in *The News Journal* from November 15 through November 21, 2001. Pursuant to 15 U.S.C. § 16(b)-(d), the 60-day period for public comments on the proposed Final Judgment began on November 21, 2001 and expired on January 22, 2002. During that period, one comment was received.

II. SUMMARY OF THE COMPLAINT’S FACTUAL ALLEGATIONS

The defendant Federation is a labor organization with its headquarters in Tallahassee, Florida. The Federation has traditionally acted, in employment contract negotiations, as a collective bargaining agent under federal and state labor laws for physicians who are employees of public hospitals or other health care entities. For several years, however, the Federation has recruited economically independent physicians in private practice in several states to encourage these independent physicians to use the Federation in negotiating their fees and other terms in their contracts with health care insurers.

The Federation and its Delaware orthopedic surgeon members allegedly conspired to restrain competition in the sale of orthopedic surgical services in various areas of Delaware. This

alleged conspiracy developed in the fall of 1996 when the Federation began recruiting orthopedic surgeons in Delaware, touting itself as a vehicle for increasing their bargaining leverage with insurers in fee negotiations. During 1997, the Federation succeeded in recruiting nearly all of the orthopedic surgeons in private practice in Delaware.

In August 1997, Blue Cross notified all of its network physicians, including orthopedic physicians, of a planned fee reduction. By this action, Blue Cross sought to set the fees for Delaware orthopedic surgeons at levels closer to those paid to orthopedic surgeons in nearby areas, such as metropolitan Philadelphia. To resist Blue Cross's proposed fee reductions, the Federation and its orthopedic-surgeon members allegedly reached an understanding that Federation members would negotiate fees with Blue Cross solely through the Federation's executive director, John "Jack" Seddon.

The purpose of the Federation's and its members' alleged agreement was to force Blue Cross to rescind the proposed fee reduction for orthopedic surgeons and to inhibit Blue Cross's effort to contract with those surgeons at reduced fees. In some cases, Blue Cross subscribers who needed to receive orthopedic services either paid higher prices to receive care from their former physicians as non-participating providers or had to forego or delay receiving such care.

III. RESPONSE TO PUBLIC COMMENT

The only comment received (copy attached) recognizes that the decree contains "strict requirements" to prevent a reoccurrence of the challenged conduct and provides "significant protection" for payers that prefer not to engage in collective contractual negotiations with competing physicians. Comment at 4. Nevertheless, the comment argues that in "one particular area" the decree "could be strengthened to provide additional protection." *Id.* at 1. Specifically,

the comment asserts that the proposed Final Judgment does not expressly forbid the Federation from “orchestrating provider retaliation” or “assisting a member to ‘unilaterally’ terminate an existing contract with a payer that declines to deal through the Federation.” Id. at 3. The comment, therefore, proposes adding a provision that prohibits retaliation against payers that decline to communicate with providers through the Federation.¹

The comment’s proposed addition is unnecessary because the proposed Final Judgment already prohibits such activity. The proposed Final Judgment contains a prophylactic measure to preclude the Federation from influencing individual members’ contractual decisions. Section IV(A)(4) enjoins the Federation from directly or indirectly “making any recommendation to competing physicians about any actual or proposed payer contract or contract term or whether to accept or reject any such payer contract or contract term.” Moreover, Section IV(A)(2) of the proposed Final Judgment enjoins the Federation from directly or indirectly “participating in, encouraging, or facilitating any agreement or understanding between competing physicians to deal with any payer exclusively through a messenger rather than individually or through other channels.” Consequently, any Federation recommendation that competing providers terminate their contracts or any involvement by the Federation in competing providers’ concerted termination of their contracts in retaliation against payers’ declination to communicate with them through the Federation would violate the proposed Final Judgment.

¹ The comment suggests inserting a new subparagraph 9 in section IV(A), prohibiting the Federation from: encouraging, facilitating, assisting, or participating, in the termination of any existing contract or in any other action adverse to any payer after that payer has declined to communicate with a physician through defendant.

Comment at 3.

These injunctive provisions prevent the Federation from engaging in the sort of conduct addressed by the comment: retaliation against payers that refuse to deal with the Federation. Therefore, the proposed modification is not necessary to provide an effective and appropriate remedy for the antitrust violation alleged in the complaint.

IV. CONCLUSION

The United States has concluded that the proposed Final Judgment reasonably and appropriately addresses the harm alleged in the Complaint. Therefore, following publication of this response to comments, pursuant to the APPA, and submission of the United States' certification of compliance with the APPA, the United States intends to request entry of the proposed Final Judgment once the Court determines that entry is in the public interest.

DATED: January 31, 2002

Respectfully submitted,

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