IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 1:05-CV-431
vs.	)	
	)	Chief Judge Sandra S. Beckwith
FEDERATION OF PHYSICIANS AND	)	
DENTISTS, *et al.*,	)	Magistrate Judge Thomas S. Hogan
	)	
Defendants.	)	

PLAINTIFF'S COMPETITIVE IMPACT STATEMENT CONCERNING THE PROPOSED FINAL JUDGMENT AS TO SETTLING PHYSICIAN DEFENDANTS

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment as to Settling Physician Defendants ("Final Judgment"). The proposed Final Judgment was lodged with the Court on June 24, 2005, for eventual entry in this civil antitrust proceeding, following the parties' compliance with the APPA, and, if the Court determines, pursuant to the APPA, that the proposed Final Judgment is in the public interest.

I. NATURE AND PURPOSE OF THE PROCEEDING

The plaintiff filed this civil antitrust Complaint on June 24, 2005, in the United States District Court for the Southern District of Ohio, Western Division, alleging that Drs. Warren Metherd, Michael Karram, and James Wendel ("the Settling Physician Defendants"), obstetrician-gynecologist physicians ("OB-GYNs") practicing in Cincinnati, Ohio, participated in a conspiracy that has unreasonably restrained interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. As alleged in the Complaint, this agreement has

artificially raised fees paid by health insurers to OB-GYNs in the Cincinnati area that are ultimately borne by employers and their employees.

The plaintiff and the Settling Physician Defendants have stipulated that the proposed Final Judgment may be entered upon the Court's determinations that it serves the public interest and that there is no just reason to delay its entry while the litigation involving the two non-settling defendants proceeds. Entry of the proposed Final Judgment would terminate this action against the Settling Physician Defendants, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment, and to punish violations of it.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

The Complaint in this action includes the following allegations. In the spring of 2002, the Settling Physician Defendants joined the Federation of Physicians and Dentists ("Federation"), a membership organization of physicians and dentists, headquartered in Tallahassee, Florida. The Federation's membership includes economically independent physician groups in private practice in many states, including Ohio. The Federation offers such member physicians assistance in negotiating fees and other terms in their contracts with health care insurers.

Cincinnati OB-GYNs became interested in joining the Federation to negotiate higher fees from health care insurers. The Settling Physician Defendants assisted the Federation in recruiting other Cincinnati-area OB-GYNs as members. By June 2002, the membership of the Federation had grown to include a large majority of competing OB-GYN physicians in the Cincinnati area.

With substantial participation by the Settling Physician Defendants, the Federation coordinated and helped implement its members' concerted demands to insurers for higher fees and related terms, accompanied by threats of contract terminations. From September 2002, through the fall of 2003, the Settling Physician Defendants communicated with Federation employees, each other, and other Cincinnati-area OB-GYN Federation members to assist the Federation in coordinating members' contract negotiations with health care insurers. The Settling Physician Defendants' assisted the Federation in developing a strategy for the Federation to intensify members' pressure on health insurers to renegotiate their contracts, informed each other and other physicians about their own practice group's negotiations, worked primarily through the Federation to inform Federation members about steps to take to coordinate their negotiations, and led a campaign for Federation members to endorse insurers that agreed to meet all Federation members' contract demands.

The Settling Physician Defendants' and their conspirators' collusion caused Cincinnati-area health care insurers to raise fees paid to Federation members OB-GYNs above the levels that would likely have resulted if Federation members had negotiated competitively with those insurers. As a result of the Settling Physician Defendants' and their conspirators' conduct, the three largest Cincinnati-area health care insurers each were forced to increase fees paid to most Federation members OB-GYNs by approximately 15-20% starting July 1, 2003, followed by cumulative increases of approximately 20-25% starting January 1, 2004, and approximately 25-30% effective January 1, 2005. The Settling Physician Defendants' and their conspirators' conduct also caused other insurers to raise the fees they paid to Federation members OB-GYNs.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Relief to be Obtained

The proposed Final Judgment prohibits the Settling Physician Defendants from encouraging, facilitating, or participating in any agreement or understanding among competing physicians about any contract term, about the manner in which those physicians will negotiate or deal with any health care payer, or about the use of any person or organization that provides consulting, financial, legal, or negotiating services concerning any payer contract. The proposed Final Judgment also enjoins the Settling Physician Defendants from using Defendant Federation of Physicians and Dentists ("Federation") for any messenger, financial, legal, consulting, or negotiating service concerning any payer contract or contract.

The proposed Final Judgment also prohibits each Settling Physician Defendant from communicating with any competing physician about his or his practice group's view or position concerning the negotiation or acceptability of any proposed or existing payer contract or contract term, including his or his medical practice group's negotiating or contracting status with any payer. Each Settling Physician Defendant is also enjoined from communicating with any competing physician about (1) any proposed or existing term of any payer contract that affects the fees that the Settling Physician Defendant or his medical practice group contracts for, or accepts from (or considers contracting for, or accepting from) any payer; (2) the duration, amendment, or termination of the payer contract; (3) utilization review and pre-certification; or (4) the manner of resolving disputes between the participating physician or group and the payer.

Subject to the injunctive provisions of the proposed Final Judgment, the Settling Physician Defendants may discuss with any competing physician any medical issues relating to

the treatment of a specific patient and may participate in activities of any medical society. The proposed Final Judgment also does not limit the Settling Physician Defendants' advocacy or discussion concerning legislative, judicial, or regulatory actions in accordance with doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny. The proposed Final Judgment also allows the Settling Physician Defendants to respond to communications necessary to participate in lawful activities by clinically or financially integrated physician network joint ventures and multi-provider networks, as those terms are used in Statements 8 and 9 of the 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153 ("Health Care Policy Statements").

For a period of ten years following the date of entry of the Final Judgment, each Settling Physician Defendant must certify to the United States annually whether he and his agents have complied with the provisions of the Final Judgment.

B. Anticipated Effects on Competition of the Relief to be Obtained

The proposed Final Judgment helps restore lost competition, as alleged in the Complaint, and helps prevent recurrence of the alleged violation by enjoining the Settling Physician Defendants from conspiring to increase fees for their services and engaging in conduct that may facilitate such a conspiracy. The proposed Final Judgment seeks to achieve these objectives, in part, by prohibiting the Settling Physician Defendants from engaging in the types of concerted action that allegedly enabled Federation member OB-GYNs to coordinate their negotiations with health care payers. The prevention of coordinated negotiations should reestablish competition between many of the independent, participating Federation member OB-GYNs who coordinated their payer negotiations through the Federation. Such competition will allow purchasers of OB-

GYN physician services to negotiate competitive contract terms with Cincinnati-area OB-GYN physicians, instead of being forced to pay the higher rates that have allegedly resulted from the alleged coordination of payer negotiations by the majority of Cincinnati-area OB-GYN physicians, who were members of the Federation. To help avoid recurrence of the alleged violation, the proposed Final Judgment also prohibits the Settling Physician Defendants from using the Defendant Federation or any other person or organization to coordinate contract negotiations with payers and from communicating with competing physicians about competitively sensitive contract terms, contract negotiations, and contract status.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS DAMAGED BY THE ALLEGED VIOLATION IF THE PROPOSED FINAL JUDGMENT IS ENTERED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal district court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), entry of the proposed Final Judgment also would have no *prima facie* effect in any subsequent lawsuits that may be brought against the Settling Physician Defendants involving their alleged conduct in this action.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the proposed Final Judgment may be entered by this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon this Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the entry of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*. The United States will evaluate and respond to the comments received during this period, and it remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with this Court and published in the *Federal Register*. Written comments should be submitted to:

Mark J. Botti
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

The proposed Final Judgment provides that this Court retains jurisdiction over this action, and the parties may apply to this Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT ACTUALLY CONSIDERED BY THE UNITED STATES

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Settling Physician Defendants. The United States is satisfied, however, that the prohibitions contained in the proposed Final Judgment will more quickly help achieve the primary objective of a trial on the merits—helping to reestablish competition among Federation member OB-GYNs and to prevent recurrence of the alleged violation.

VII. STANDARD OF REVIEW UNDER THE APPA OF THE PROPOSED FINAL JUDGMENT

After the sixty (60)-day comment period and compliance with the provisions of the APPA, if the United States has not withdrawn its consent to the proposed Final Judgment, it will move for entry of the proposed Final Judgment in accordance with Fed. R. Civ. P. 54(b) and the APPA. Persons considering commenting on the proposed Final Judgment are advised that, in determining, under the APPA, whether entry of the proposed Final Judgment is "in the public interest," the Court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B).

As these statutory provisions suggest, the APPA requires the Court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995). In determining whether the proposed judgment is in the public interest, "[n]othing in [the APPA] shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene," 15 U.S.C. § 16(e)(2), "which might have the effect of vitiating the benefits of prompt

and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973)(statement of Senator Tunney). This caveat is also consistent with the deferential review of consent decrees under the APPA. See *United States v. Microsoft*, 56 F.3d at 1460-62; *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

Dated: July 22, 2005

FOR PLAINTIFF UNITED STATES OF AMERICA:

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2005, I electronically filed the foregoing Plaintiff's Competitive-Impact Statement Concerning the Final Judgement as to Settling Physician Defendants with the Clerk of the Court using CM/ECF system which will send notification of such filing to G. Jack Donson, Esq. (Attorney for Defendant Dr. Michael Karram), and Donald J. Mooney, Jr., Esq. (Attorney for Defendant Federation of Physicians and Dentists, and Defendant Lynda Odenkirk). I further certify that I have caused the document to be sent via facsimile and first-class U.S. Mail, postage prepaid, to the following non-CM/ECF participants:

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