

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Tampa Division**

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 FEDERATION OF CERTIFIED)
 SURGEONS AND SPECIALISTS,)
 INC., and PERSHING YOAKLEY &)
 ASSOCIATES, P.C.,)
)
 Defendants.)
)
 _____)

Case No. 99-167-CIV-T-17F

Filed: January 26, 1999

COMPLAINT

The United States of America, by its attorneys and acting under the direction of the Attorney General of the United States, brings this civil antitrust action to enjoin defendants Federation of Certified Surgeons and Specialists, Inc., ("FCSSI") and Pershing Yoakley & Associates, P.C., ("PYA") from negotiating with Managed Care Plans ("MCPs") jointly on behalf of otherwise competing FCSSI member physicians to obtain higher fees for their services. The United States alleges as follows:

I.

JURISDICTION AND VENUE

1. The United States files this Complaint under Section 4 of the Sherman Act, 15 U.S.C. §4, as amended, to prevent and restrain defendants' continuing violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Each of the defendants maintains offices, transacts business, and is found within the Middle District of Florida within the meaning of 15 U.S.C. § 22.

II.

DEFENDANTS

3. Defendant FCSSI is a Florida corporation with its principal place of business in Tampa, Florida. FCSSI comprises 29 physician shareholders who practice general or vascular surgery in Tampa.

4. Defendant PYA is a Tennessee professional corporation with its principal place of business in Knoxville, Tennessee and with additional offices in Chattanooga and Nashville, Tennessee; Atlanta, Georgia; Washington, D.C.; and Clearwater, Florida. PYA is an accounting and consulting firm that offers a wide range of services, in Tampa and elsewhere, to clients in the health care sector and other industries.

5. Whenever this Complaint refers to any corporation's act, deed, or transaction, it means that such corporation engaged in the act, deed, or transaction by or through its members, shareholders, officers, directors, agents, employees, or other representatives while they actively were engaged in the management, direction, control, or transaction of its business or affairs.

III.

RESTRAINT OF TRADE

A. Overview of the General and Vascular Surgical Markets in Tampa

6. There are seven hospitals in Tampa that provide general and vascular surgery services. In 1996, FCSSI's general and vascular surgeons performed 87% of all general and vascular surgeries, and constituted over 83% of all general and vascular surgeons having operating privileges, at five

of these hospitals (the “**Primary Hospitals**”).

7. Tampa employers and other payers frequently use MCPs to provide cost-effective health care benefits to their employees and retirees and the families of those beneficiaries. An MCP contracts with doctors on competitive terms by inducing its members to obtain their care from doctors in its provider network. Doctors, for their part, compete to contract with MCPs by agreeing to lower prices, improve hospital utilization management, and provide care in less costly but medically appropriate settings, such as outpatient surgery facilities. An MCP typically contracts with a sufficient number of providers (doctors, hospitals, and other health care providers) to offer a marketable plan to employers and an attractive panel of conveniently located, reputable providers to its members and prospective members.

8. The MCPs operating in Tampa include some or all of the five Primary Hospitals in their provider networks, and a number of general and vascular surgeons who provide services at those hospitals, to effectively market their managed care products to employers in the Tampa area.

B. FCSSI's Formation

9. On or before May 21, 1997, several competing general and vascular surgeons in Tampa formed FCSSI to negotiate jointly on their behalf with MCPs. FCSSI was organized specifically to use the collective strength of its physician shareholders to improve “overall managed care reimbursement” to FCSSI surgeons. FCSSI’s objectives consequently included “[o]btain[ing] contract terms more favorable than if each physician contracted separately” and “[p]roactively us[ing] critical mass to obtain contracts at acceptable rates. . . .”

C. FCSSI and PYA: the Contracting Strategy

10. On July 8, 1997, FCSSI retained PYA to coordinate FCSSI surgeons' managed care contracting activities and assist in the renegotiation of existing physician contracts.

11. PYA would first attempt to negotiate a favorable contract for FCSSI surgeons with a particular MCP. If that failed, PYA would use a "contract-or-no-contract" negotiating strategy. The MCP could either contract through FCSSI and have all the general and vascular surgeons belonging to FCSSI in the MCP's provider network or not contract through FCSSI and have none of the FCSSI surgeons in the network. PYA would then recommend that FCSSI's board either approve a negotiated contract and recommend that FCSSI surgeons agree to it, or, if PYA was unable to negotiate acceptable terms, reject the contract offered by the MCP.

12. For these services, each FCSSI surgeon paid PYA \$75 per month as a retainer and a set amount per MCP contract negotiated by PYA. For contracts that set fees to FCSSI surgeons below 100% of Medicare's prevailing fee schedule, each FCSSI surgeon paid PYA \$200. For contracts setting fees from 100% to 119% of Medicare's prevailing fee schedule, each FCSSI surgeon paid PYA \$375. If payment levels exceeded 120% of Medicare, each FCSSI physician paid PYA \$500.

13. From July to October, 1997, PYA collected over \$40,000 in contract negotiation fees from FCSSI surgeons.

D. PYA's Negotiations with United HealthCare

14. PYA's first effort to negotiate with MCPs jointly on behalf of FCSSI surgeons occurred in July, 1997, when PYA contacted United HealthCare ("United"). FCSSI surgeons represented 75% of United's general and vascular surgical panel for Tampa and performed 87% of

the surgeries for United at the Primary Hospitals.

15. In an August 29, 1997 letter, PYA made clear to United that it was representing FCSSI surgeons "as a group" and that the surgeons were seeking a contract with United "that would provide value to their practices." Around that time, United made an offer to FCSSI surgeons through PYA.

16. On September 3, 1997, FCSSI's board of directors discussed United's contract offer and the possibility of all FCSSI surgeons resigning from United's network. On September 11, 1997, PYA recommended to FCSSI's board that it not accept United's contract offer and either make a counteroffer or "have all members terminate their [United contracts]." FCSSI's board instructed PYA to make a counteroffer to United. PYA then informed United that unless United agreed to its demands, it would recommend that FCSSI surgeons terminate their United contracts. United agreed to PYA's contract demands, and FCSSI's board of directors voted to accept the revised contract.

17. The jointly negotiated contracts paid FCSSI surgeons 30% more than United's first offer and represented an average annual increase in revenue of \$5,013 for each FCSSI physician.

E. PYA's Negotiations with Aetna

18. In September, 1997, PYA also attempted to renegotiate FCSSI surgeons' existing contracts with Aetna US Healthcare ("Aetna"). In a September 8, 1997 letter, PYA advised Aetna that "a few adjustments to your current fee schedule would allow us to recommend the surgical group [FCSSI] accept an agreement with Aetna." In closing, the letter indicated that, if Aetna met the proposed financial and contractual terms, PYA would recommend that FCSSI surgeons accept the Aetna contract.

19. Aetna subsequently offered FCSSI surgeons a contract that PYA viewed as "no improvement" and without "concessions." PYA informed FCSSI's board of directors that "Aetna was unwilling to make changes to their standard contract for FCSSI" and recommended that all FCSSI surgeons notify Aetna of their intent to terminate their contracts. This recommendation was made with the knowledge that, without an Aetna contract, individual FCSSI surgeons faced a "potential 30% decrease in market share . . . additional risk for bad debts . . . [and] unhappy patients." PYA advised the FCSSI board that the termination process would get Aetna's attention, allow PYA to negotiate better terms, and "better position FCSSI for future discussions."

20. On September 24, 1997, FCSSI's board of directors voted to accept PYA's recommendation that every FCSSI surgeon "send a Letter of Resignation, effective in 90 days, to terminate the contract with Aetna." On September 26, 1997, in an "Action Required" letter, PYA notified each FCSSI surgeon of the board's decision and directed the surgeon to write a termination letter to Aetna following an outlined format. Twenty-eight of the twenty-nine FCSSI surgeons wrote such a letter, and PYA sent the termination letters to Aetna on October 8, 1997. As a result of this group boycott, Aetna proposed increased payment levels for FCSSI surgeons.

F. Negotiations With Other Payers

21. By December 8, 1997, PYA had contacted four other MCPs on behalf of FCSSI surgeons. Upon learning of the Department of Justice's investigation of FCSSI's activities in December, 1997, however, FCSSI and PYA ceased negotiating contracts with those MCPs. Without the requested relief, these negotiations would likely resume.

G. Impact of PYA's Joint Negotiations

22. FCSSI's and PYA's joint negotiations and other collusive activities left MCPs with

a “Hobson’s choice”: inflated contract rates for FCSSI surgeons or an unmarketable network without FCSSI surgeons. The MCPs paid the higher rates.

23. In a September 26, 1997 letter, the FCSSI board of directors wrote to FCSSI surgeons: “We are pleased with the progress that FCSSI has made with managed care organizations. As you can see, FCSSI has been able to obtain concessions from managed care entities and set a precedent for future negotiations.”

24. On November 5, 1997, the President of FCSSI, Dr. Joseph Diaco, wrote to the other members of FCSSI that “[o]ur efforts with managed care organizations have produced extraordinary results” and that the financial benefit of FCSSI’s joint negotiating efforts had amounted to an increase in revenues of \$14,097 on average for each FCSSI surgeon, totaling \$433,010 for all FCSSI surgeons.

25. By contracting on behalf of all of its member surgeons or none at all, FCSSI forced some MCPs to pay FCSSI surgeons substantially higher fees and to contract with a greater number of general and vascular surgeons than the MCP had previously contracted with to service its members.

26. As a result of FCSSI’s and PYA’s concerted actions, MCPs faced significantly higher healthcare costs, which are ultimately born by employers and their employees through higher insurance premiums or co-payments. Increased insurance premiums and co-payments may even lead some employers and employees to forego health care insurance altogether.

H. FCSSI’s and PYA’s Improper Use of the “Messenger Model”

27. While engaging in the unlawful conduct outlined above, FCSSI and PYA representatives attempted to cloak their illegal activities as those of a legitimate “third-party

messenger,” which are described in the Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Healthcare, 4 Trade Reg. Rep. (CCH) ¶ 13,153 at 20,831 (August 28, 1996) (“Statements”).

28. During the fall of 1997, FCSSI representatives publicly claimed that they were in compliance with the “messenger model” described in the Statements. In an October 20, 1997 news report from the Tampa Bay Business Journal, FCSSI’s President Dr. Joseph Diaco claimed that PYA employed the “messenger model” on behalf of FCSSI surgeons. In a November 11, 1997 Medical Business article, Edward Dillabough, a PYA employee, while claiming to be implementing the “messenger model” on behalf of FCSSI surgeons, stated that FCSSI’s goal was to get the physicians used to working cooperatively on managed care contracts and noted that “[i]f you have the majority of physicians in a geographic area, you have clout.”

29. Contrary to defendants’ published claims, however, defendants’ illegal conduct is inconsonant with that of a legitimate messenger model, as described in the Statements. In a legitimate messenger model, the third party messenger acts merely as an efficient conduit for information and communications between MCPs and individual physicians or physician group practices. A legitimate messenger does not coordinate or engage in collective pricing activity for competing independent physicians, enhance their bargaining power, or facilitate the sharing of price and other competitively sensitive information among them.

IV.

INTERSTATE COMMERCE

30. Employers and insurers, including MCPs, remit substantial payments across state lines to FCSSI surgeons.

31. Many employers that directly or, through MCPs and other insurers, indirectly remit payments to FCSSI surgeons are businesses that sell products and services in interstate commerce, and the size of those payments affects the prices of the products and services those businesses sell.

32. Defendants' activities that are the subject of this Complaint are within the flow of, and substantially affect, interstate trade and commerce.

V.

VIOLATION

33. Beginning at least as early as May 21, 1997, organizers of FCSSI engaged in a contract, combination, or conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. By July 8, 1997, PYA joined FCSSI and FCSSI surgeons as an active participant in this conspiracy. This offense is likely to continue or recur unless the relief requested is granted.

34. This contract, combination, or conspiracy consisted of a continuous agreement, understanding, and concert of action among FCSSI's otherwise competing general and vascular surgeons, which was facilitated by PYA, to negotiate jointly with MCPs to obtain higher fees for their services.

35. For the purpose of forming and effectuating this contract, combination, or conspiracy, one or both defendants and FCSSI surgeons did the following things, among others:

- (a) formed and incorporated FCSSI;
- (b) invited competing general and vascular surgeons to become shareholders of FCSSI to jointly negotiate, through PYA, with MCPs;
- (c) obtained otherwise competing general and vascular surgeons' agreement to

designate PYA as the joint negotiating agent for all FCSSI surgeons;

- (d) jointly negotiated fees and other competitive contractual terms with MCPs on behalf of all FCSSI surgeons;
- (e) collectively rejected, and threatened to reject, contracts that did not provide payments for FCSSI surgeons at a level substantially higher than those provided in individually negotiated contracts and that did not include all FCSSI surgeons; and
- (f) arranged for FCSSI surgeons to enter into renegotiated or new contracts with MCPs that generally provided for substantially higher general and vascular surgical fees than those that FCSSI surgeons had been receiving under existing individual contracts or would have received if they had individually negotiated their contracts.

36. This contract, combination, or conspiracy had the following effects, among others:

- (a) it unreasonably restrained price and other competition among FCSSI surgeons;
- (b) it caused higher prices for general and vascular surgical services in Tampa; and
- (c) it deprived MCPs, employers, and individual consumers of the benefits of free and open competition among general and vascular surgeons in the purchase of their services in Tampa.

VI.

REQUEST FOR RELIEF

Plaintiff requests:

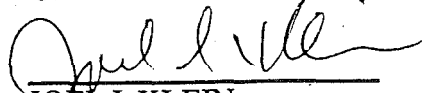
1. That the Court adjudge and decree that defendants entered into an unlawful contract, combination, or conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

2. That defendants, their shareholders, officers, directors, members, agents, employees, and successors, and all other persons acting or claiming to act of behalf of any of them, be enjoined, restrained, and prohibited for a period of ten years from, in any manner, directly or indirectly, continuing, maintaining, or renewing the conduct alleged herein or from engaging in any other conduct, combination, conspiracy, agreement, understanding, plan, program, or other arrangement having the same effect as the alleged violation or that otherwise violates Section 1 of the Sherman Act, 15 U.S.C. § 1, through price fixing of medical services or group boycotts of the purchasers of health care services; and

3. That the United States have such other relief as the nature of the case may require and the Court may deem just and proper.

DATED January 26, 1999

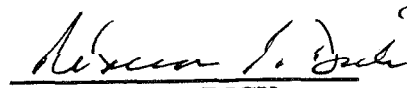
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