

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

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

**PLAINTIFF'S COMPETITIVE IMPACT STATEMENT
CONCERNING THE PROPOSED FINAL JUDGMENT AS TO
THE FEDERATION OF PHYSICIANS AND DENTISTS AND LYNDA ODENKIRK**

In this civil antitrust action, the United States of America, 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 concerning the proposed Final Judgment as to the Federation of Physicians and Dentists and Lynda Odenkirk ("Final Judgment") that the parties have submitted for entry.

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States 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 the Federation of Physicians and Dentists ("Federation") and Federation employee Lynda Odenkirk, along with physician co-defendants Drs. Warren Metherd, Michael Karram, and James Wendel, coordinated a conspiracy among about 120

obstetrician-gynecologist physicians (“OB-GYNs”) practicing in greater Cincinnati, Ohio, that 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, the conspiracy artificially raised fees paid by health care insurers to Federation members in the Cincinnati area, which are ultimately borne by employers and their employees. The physician defendants agreed to a judgment that was filed concurrently with the Complaint and eventually entered by this Court on November 14, 2005, after determining, under the APPA, that the decree was in the public interest. (Dkt. Entry # 36)

The plaintiff and the remaining defendants, the Federation and Ms. Odenkirk (the “Federation defendants”), have stipulated that the proposed Final Judgment may be entered after compliance with the APPA and upon the Court’s determination that it serves the public interest. Entry of the proposed Final Judgment would terminate this action, 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. The Federation is 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 has offered such member physicians assistance in negotiating fees and other terms in their contracts with health care insurers.

In spring 2002, several Cincinnati OB-GYNs became interested in joining the Federation to negotiate higher fees from health care insurers. The 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 assistance from the physician defendants and Ms. Odenkirk, 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, Ms. Odenkirk communicated with the physician defendants and other Cincinnati-area OB-GYN Federation members to coordinate their contract negotiations with health care insurers. Along with the physician defendants, Ms. Odenkirk developed a strategy to intensify Federation member physicians' pressure on health care insurers to renegotiate their contracts, including informing member physicians about the status of competing member groups' negotiations and taking steps to coordinate their negotiations.

The agreement coordinated by the Federation defendants forced Cincinnati-area health care insurers to raise fees paid to Federation member OB-GYNs above the levels that would likely have resulted if Federation members had negotiated competitively with those insurers. As a result of the 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. Federation member OB-GYNs' conduct, coordinated by the Federation defendants, also caused other insurers to raise the fees they paid to Federation members.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Relief to be Obtained

The proposed Final Judgment is designed to enjoin the Federation defendants from taking future actions that could facilitate private-practice physicians' coordination of their dealings with payers. The central objective of the injunctive provisions, therefore, is to prohibit the Federation from being involved anywhere in the country in its private-practice members' negotiating or contracting with health insurers or other payers for health care services.

The proposed Final Judgment prohibits the Federation defendants from providing any services to any physician in private practice regarding such physician's negotiation, contracting, or other dealings with any payer. The proposed Final Judgment also prohibits the Federation defendants from (1) representing (including as a messenger) any private-practice physician with any payer; (2) reviewing or analyzing, for any such physician, any proposed or actual contract or contract term between such physician and any payer; and (3) communicating with any independent physician about that physician's, or any other physician's, negotiating, contracting, or participating status with any payer. Communications by the Federation defendants about any

proposed or actual contract or contract term between any independent physician and any payer are also generally prohibited. In addition, the proposed Final Judgment enjoins the Federation defendants from responding to any question or request initiated by any payer, except to state that the Final Judgment prohibits such a response. Finally, the proposed Final Judgment generally prohibits the Federation defendants from training or educating, or attempting to train or educate, any independent physician in any aspect of contracting or negotiating with any payer.

The only exceptions to these broad prohibitions cover conduct that neither threatens competitive harm nor undermines the clarity of the prohibitions, which the Department will enforce aggressively. One exception limits the prohibition on the Federation defendants from training or educating, or attempting to train or educate, any independent physician in any aspect of contracting or negotiating with any payer, provided they do not violate the other injunctive provisions of the proposed Final Judgment, enabling defendants to (1) speak on general topics (including contracting), but only when invited to do so as part of a regularly scheduled medical educational seminar offering continuing medical education credit, advance written notice has been given to Plaintiff, and documents relating to what was said by the Federation Defendants are retained by them for possible inspection by the United States; (2) publish articles on general topics (including contracting) in a regularly disseminated newsletter; and (3) provide education to independent physicians regarding the regulatory structure (including legislative developments) of workers compensation, Medicaid, and Medicare, except Medicare Advantage.

In a section titled “permitted conduct,” the proposed decree permits the Federation defendants to engage in activities involving physician participation in written fee surveys that are covered by the “safety zone” under Statement 6 of the 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153, which addresses provider participation in exchanges of price and cost information. The proposed Final Judgment also clarifies that it does not prohibit the Federation defendants or Federation members from engaging in lawful union organizational efforts and activities. The proposed Final Judgment also allows the Federation defendants or Federation members to petition governmental entities in accordance with doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny. In addition, the decree permits Federation physician members to choose independently, or solely with other members or employees of such member’s bona fide solo practice or practice groups, health insurers with which to contract, and/or to refuse to enter into discussion or negotiations with any health care payer.

To promote compliance with the decree, the proposed Final Judgment also requires the Federation to provide Federation agents and members in private practice with copies of the Final Judgment and this Competitive Impact Statement and to institute mechanisms to facilitate Federation agents’ compliance. For a period of ten years following the date of entry of the Final Judgment, the Federation defendants separately must certify annually to the United States whether they have complied with the provisions of the Final Judgment.

The proposed Final Judgment clarifies that it does not alter the Federation's obligations under the decree entered by the district court in Delaware in a prior, similar case against the Federation, *United States v. Federation of Physicians and Dentists, Inc.*, CA 98-475 JJF (D. Del., judgment entered Nov. 6, 2002), and that, if there is any conflict between the injunctive provisions of the proposed Final Judgment and the injunctive provisions or conduct permitted by the Delaware decree, the proposed Final Judgment controls. The proposed Final Judgment embodies more stringent relief than that provided by the Delaware decree because it prohibits the Federation from, for example, representing physicians in their dealings with payers as a messenger and from reviewing and analyzing physician contracts with any payer, activities that the Delaware decree had permitted in limited circumstances.

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

The proposed Final Judgment attempts to prevent recurrence of the violation and restore lost competition, as alleged in the Complaint. The essential relief imposed by the proposed Final Judgment – prohibiting the Federation's involvement in its private-practice members' contracting with payers – will eliminate a substantial restraint on price competition among competing OB-GYNs in Cincinnati and elsewhere. Consequently, payers in the Cincinnati area and elsewhere seeking to develop or maintain a network of OB-GYNs will benefit from competition unimpeded by the collusive behavior of the Federation and its members. Employers arranging for delivery of physician services through insurer networks and members of such health care plans will similarly benefit

from the plans' ability to negotiate for OB-GYN services on competitive terms, rather than on the collusively inflated fees that resulted from the Federation's coordination of the negotiations conducted with payers by the majority of Cincinnati-area OB-GYN physicians.

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 court to recover three times the damages the person has suffered, as well as costs 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), the proposed Final Judgment also would have no *prima facie* effect in any subsequent private lawsuits that may be brought against the Federation 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 effective date 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 latter of the date of publication of this Competitive Impact Statement in the *Federal Register* or the last date of publication in a newspaper of notice of the filing of the proposed Final Judgment and this Competitive Impact Statement. 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:

Joseph Miller
Acting Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
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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 rejecting the Federation's proposal that the Final Judgment contain exceptions permitting the Federation to engage in certain educational and training activities, and thus continuing to litigate the claims in the Complaint. The exceptions, however, are narrow and do not undermine the effectiveness of the decree.

The United States decided, therefore, that the Final Judgment provides it with substantially all of the relief it could have expected to achieve in Court and did not warrant the delay, risks, and costs of further litigation.

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 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
- (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); *United States v. SBC Commc’ns, Inc.*, Nos. 05-2102 and 05-2103, 2007 WL 1020746, at *9 (D.D.C. Mar. 29, 2007) (confirming that 2004 amendments to the APPA “effected minimal changes[] and that th[e] Court’s scope of review remains sharply proscribed by precedent and the nature of [APPA] proceedings.”).

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 2, 2007

FOR PLAINTIFF UNITED STATES OF AMERICA:

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2007, I electronically filed the foregoing Plaintiff's Competitive Impact Statement Concerning the Proposed Final Judgment as to The Federation of Physicians and Dentists and Lynda Odenkirk with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

David M. Cook, Esq. of Cook, Portune & Logothetis (Cincinnati) (as Trial Attorney for Defendant Federation of Physicians and Dentists, and Trial Attorney for Defendant Lynda Odenkirk), and

Kimberly L. King, Esq. of Hayward & Grant, P.A. (Tallahassee, FL) (as Attorney for Defendant Federation of Physicians and Dentists, and Attorney for Defendant Lynda Odenkirk).

s/ Paul Torzilli
PAUL J. TORZILLI
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