

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FEDERATION OF PHYSICIANS AND
DENTISTS, INC.,

Defendant.

CA 98-475 JJF
FILED 10/22/01

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA”), 15 U.S.C. § 16(b)-(h), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

On August 12, 1998, the United States filed a civil antitrust Complaint alleging that the defendant, Federation of Physicians and Dentists, Inc. (“Federation”), restrained competition in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The Complaint alleged that the Federation coordinated an understanding among certain members--competing Delaware orthopedic surgeons in private practice--that they would seek to

negotiate exclusively through the Federation to oppose Blue Cross and Blue Shield of Delaware's ("Blue Cross") proposed reduction in fees and to inhibit other health care insurers in Delaware from reducing the fees paid to these surgeons.

The Complaint seeks injunctive relief to enjoin continuance and prevent recurrence of the violation. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce its provisions and to punish violations thereof.

II.

PRACTICES GIVING RISE TO THE ALLEGED VIOLATION

A. Background

During the period of the alleged violation, four major health care insurers operated in Delaware. Of these four, Blue Cross was the largest, covering nearly 200,000 Delaware residents. All of the insurers had formed "networks" of participating providers, contracting with hospitals and physicians to provide medical care to their subscribers. To increase or retain patient volume, participating providers agreed to accept the fees paid by an insurer as full payment (plus any applicable deductible amount or co-payment paid by the patient) for their services. To make their networks marketable to Delaware employers and their employees, insurers needed to include a number of the orthopedic surgeons who practiced in various areas in Delaware as participating providers.

From late 1996 through early 1998, approximately 47 orthopedic surgeons were actively engaged in private practice in Delaware; most belonged to competing independent practice

groups. Twenty-six practiced in New Castle County, including 20 who belonged to the County's three major orthopedic practice groups. The remaining surgeons practiced in "downstate" Delaware communities. Prior to the violation alleged in the Complaint, all 47 Delaware orthopedic surgeons were participating providers in Blue Cross's provider network.

The 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 law 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 many states to encourage these independent physicians to use the Federation in negotiating their fees and other terms in their contracts with health care insurers.

B. Illegal Agreement to Negotiate with Blue Cross Exclusively through the Federation

The Federation and its Delaware orthopedic surgeon members conspired to restrain competition in the sale of orthopedic physician services in various areas of Delaware. This 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 reached an understanding that Federation members would negotiate fees with Blue Cross solely through the Federation's executive director John "Jack" Seddon.

During the fall of 1997 and continuing through early 1998, the Federation and its Delaware orthopedic-surgeon members coordinated efforts to ensure a unified response to Blue Cross's proposed fee reduction. Acting on the advice of one member, nearly all Federation members designated Jack Seddon to represent them in fee negotiations with Blue Cross. Mr. Seddon subsequently recommended that Federation members should reject Blue Cross's fee reduction, and he informed Federation members that other Federation members were simultaneously receiving the same recommendation.

Thereafter, Mr. Seddon and others, acting on behalf of themselves and the Federation, instructed Federation members how to sustain their coordinated negotiating position with Blue Cross. In doing so, they impressed upon members the importance of jointly resisting Blue Cross's fee proposal by demanding that Blue Cross deal exclusively with them through the Federation. Federation members carried out Mr. Seddon's recommendations, ultimately submitting contract termination notices when Blue Cross refused to accede to their demand that it negotiate with them through Mr. Seddon. Confronted with this concerted resistance by Federation members, Blue Cross modified, but refused to rescind, its proposed fee reduction.

C. Improper Use of the “Messenger Model” by the Federation and Its Members

In establishing their illegal agreement, the Federation and its members claimed that they were acting as a legitimate “third-party messenger,” as described in Statements 8 and 9 of 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) (“Health Care Policy Statements”). The conduct of the Federation and its members, however, failed to conform to a legitimate messenger model, which may facilitate contracting between providers and payers. A legitimate messenger arrangement, however, may not collectively negotiate for providers, enhance their bargaining power, organize a refusal to deal, or facilitate the sharing of price and other competitively sensitive information among them.

D. Effect of the Agreement

As a result of the illegal agreement to negotiate with Blue Cross only through the Federation, virtually all Federation members had rejected Blue Cross’s proposed fee schedule and had given notice of their intent to terminate their Blue Cross contracts within 90 days. In further coordination with the Federation, members also notified patients and referring physicians of the impending termination of their participation with Blue Cross. These notices sought to prompt employers and patients to pressure Blue Cross to meet the Federation members’ price demands.

Although Blue Cross attempted to reopen negotiations with individual physicians in early 1998, Federation members uniformly rejected such efforts. Consequently, by the end of February 1998, Blue Cross had only a few participating orthopedic surgeons in its physician network,

impairing its ability to offer a provider network that included an adequate number of orthopedic surgeons.

The purpose of the Federation's and its members' 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.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment seeks to eliminate defendant and its members' illegal practices in Delaware, and elsewhere, and to prevent their renewal. As discussed in further detail below, it seeks to achieve these goals by prohibiting the Federation and its members from engaging in specified activities and by requiring the Federation to establish an antitrust compliance program. The proposed Final Judgment applies to defendant's conduct not only in Delaware but nationwide.

A. Prohibitions

In general, the proposed Final Judgment prohibits the Federation from participating, encouraging, or facilitating any agreement or understanding between competing physicians, or from negotiating, collectively or individually, on behalf of competing physicians, about any actual or proposed payer contract or contract term. In addition, defendant is prohibited from making any recommendation to competing physicians about any actual or proposed payer contract or contract term or about whether to accept or reject any such payer contract or contract term.

The proposed Final Judgment also enjoins the Federation from communicating any competitively sensitive information to, or in the presence of, competing physicians, and from communicating to competing physicians any subjective opinion or subjective analysis, evaluation, or assessment about competitively sensitive information. It enjoins the Federation from precluding or discouraging any competing physicians from exercising their independent business judgment in determining whether to negotiate, contract, or deal directly with any payers. It also enjoins the Federation from 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.

In addition to enjoining certain conduct by the Federation, the proposed Final Judgment also prohibits certain conduct by Federation member physicians who participate in any messenger or any other arrangement provided by defendant. Defendant's members are prohibited from participating in, encouraging, or facilitating any agreement or understanding among competing physicians about: (1) any competitively sensitive information; (2) using a messenger; or (3) requiring that a payer deal with them only through a messenger or other agent or representative. They are also prohibited from communicating or facilitating the communication of any competitively sensitive information to, or in the presence of, competing physicians.

B. Permitted Conduct

During the first five years that the Final Judgment is in effect, the proposed Final Judgment permits the Federation to act as a messenger for competing physicians only under

certain enumerated conditions.¹ For that five-year period, the Federation is enjoined from acting as a messenger for any competing physicians unless it informs the payer and participating physicians in writing that the payer may decline to communicate through the Federation and that the payer and participating physicians may communicate with each other without defendant's involvement. During that period, the Final Judgment also requires the Federation, when acting as a messenger, to inform payers and its member physicians in writing that it cannot negotiate, collectively or individually, for any such physician about any contract or contract term.

Subject to other provisions of the Final Judgment, at a participating physician's request, the Federation may communicate to the requesting physician accurate, factual, and objective information about a proposed payer contract offer or contract terms, including, if requested, objective comparisons with terms offered to that physician by other payers. If conducted appropriately, these activities will likely facilitate, rather than impair, competition.

The Federation may also engage in activities reasonably necessary to facilitate lawful activities by physician network joint ventures and multi-provider networks as those terms are used in Statements 8 and 9 of the Health Care Policy Statements and in activities involving physician participation in written fee surveys that are lawful under Statement 6 of the Health Care Policy Statements. In addition, Federation physician members may continue to engage independently, or

¹By Stipulation, defendant has agreed, until the end of 2001, not to act as a messenger, nor to negotiate any actual or proposed payer contract or contract term with any payer, on behalf of any orthopedic surgeons practicing in Delaware, except with a payer that has, in writing, authorized such activity and if the activity otherwise complies with the Final Judgment. In addition, defendant has agreed by stipulation to notify, in writing within 30 days from the filing of the Stipulation, each of its orthopedic surgeon members in Delaware and each payer doing business in Delaware with which defendant has communicated on behalf of any orthopedic surgeon, that defendant is prohibited during 2001 from acting as a messenger or negotiating on behalf of any orthopedic surgeons practicing in Delaware unless the payer has, in writing, authorized such activity, and the activity otherwise complies with the Final Judgment.

solely with other members or employees of such member's bona fide solo practice or practice groups, in activities otherwise prohibited by the Final Judgment, such as choosing the payer or payers with which to contract, and/or refusing to enter into discussion or negotiations with any payer.

Under the proposed Final Judgment, the Federation may also continue to engage in lawful union organizational efforts and activities. The proposed Final Judgment also does not limit the Federation's rights to petition in accordance with doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny.

C. Compliance Program

The proposed Final Judgment requires the Federation to maintain an antitrust compliance program to help prevent recurrence of the actions that facilitated the antitrust violation alleged in the Complaint. As part of the compliance program, the Federation must distribute a copy of the proposed Final Judgment and Competitive Impact Statement to all of its present and succeeding personnel, including officers, directors, employees, agents, and representatives who provide or supervise services to competing physicians and to all existing orthopedic-surgeon members practicing in Delaware. In addition, the Federation has agreed to distribute copies of the Final Judgment and Competitive Impact Statement to competing physicians and orthopedic surgeon members practicing in Connecticut; the greater Dayton, Ohio area, including Montgomery County; and the greater Tampa, Florida area, including Hillsborough, Pinellas, and Pasco Counties, areas where the United States has pending investigations involving the Federation. For all other present and future physician members, the Federation must distribute a copy of its

Protocols, which are a set of written guidelines developed and adopted by defendant for dissemination to its members that have been approved by plaintiff for the limited purpose of assuring that defendant's existing and future members who do not receive a copy of this Final Judgment receive adequate notice of its terms. The Federation must also obtain from each person who receives the proposed Final Judgment and Competitive Impact Statement a certification that he or she has been advised and understands that he or she must comply with the Final Judgment; and similarly, the Federation must obtain from each person who receives a copy of the Protocols, a certification that he or she has received, read, and understands the Protocols.

Further, the Federation must also hold an annual seminar explaining to its officers, directors, employees, agents, and representatives who provide or supervise services to competing physicians, the applicable antitrust principles, the restrictions contained in the Final Judgment, and the implications of violating the Final Judgment. The proposed Final Judgment further requires the Federation to maintain an internal mechanism whereby questions about the application of the antitrust laws to the representation of competing physicians can be answered by counsel.

To facilitate monitoring of compliance with the Final Judgment, the Federation must make available, upon request, records and documents in their possession, custody, or control relating to matters contained in the Final Judgment. The Federation must also make its personnel available for interviews regarding such matters. In addition, the Federation must prepare written reports relating to the Final Judgment upon request.

D. Anticipated Effects of the Proposed Final Judgment on Competition

The proposed Final Judgment prohibits the Federation from coordinating, and its members

from participating in, any joint action in regard to a payer contract or contract term, including any boycott of an insurer or other payer. Consequently, a payer's ability to maintain a comprehensive panel of competing physicians should no longer be hampered by the Federation and its members, and payers' subscribers should benefit from free and open competition in the purchase of physician services, including orthopedic surgical services, in Delaware and elsewhere.

By appropriate restrictions on the conduct of the Federation and its members, the relief imposed by the proposed Final Judgment will eliminate a substantial restraint on price competition among competing orthopedic surgeons in Delaware and elsewhere. It will do so by prohibiting the Federation from negotiating on behalf of its member physicians or acting anticompetitively in concert toward Blue Cross or any other insurer.

The proposed Final Judgment will thus restore the benefits of free and open competition to the provision of orthopedic physician services in Delaware and enjoin continuation or prevent replication of similar violations in areas outside Delaware. Unrestrained competition among orthopedic surgeons and other physicians who contract to participate in insurers' networks should benefit insurers and their subscribers.

IV.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendant Federation. The United States is satisfied, however, that the requirements and prohibitions contained in the proposed Final Judgment will restore and preserve

viable competition for the provision of physician services among competing Federation members. To this end, the United States expects that the proposed relief, once implemented by the Court, will likely prevent the Federation from engaging in conduct that has significant adverse competitive effects.

The Department also considered a final judgment that would have flatly prohibited the Federation from acting as a third-party messenger nationwide. Other prohibitions considered were limitations on the areas and specialties for which the Federation would be allowed to function as a third-party messenger. As part of the process of compromise by both parties during settlement discussions, the Department ultimately did not insist on these alternative forms of relief following consideration of litigation risk, the likelihood of obtaining such relief through litigation, and the effectiveness of the relief obtained.

V.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

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 suffered, as well as costs and reasonable attorney's fees.

Entry of the proposed Final Judgment will neither impair nor assist in the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Final Judgment has no *prima facie* effect in any subsequent lawsuits that may be brought against the Federation in this matter.

VI.

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.

As provided by Sections 2(b) and (d) of the APPA, 15 U.S.C. ¶ 16(b) and (d), 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 days of publication of this Competitive Impact Statement in the Federal Register.

The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Gail Kursh, Chief
Health Care Task Force
Antitrust Division
U.S. Department of Justice
325 Seventh St., N.W., Rm. 404
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for modification, interpretation, or enforcement of the Final Judgment. The proposed Final Judgment would expire ten (10) years from the date of its entry.

VII.

DETERMINATIVE DOCUMENTS

No materials and documents of the type described in Section 2(b) of the APPA were considered in formulating the proposed Final Judgment. Consequently, none are being filed with this Competitive Impact Statement.

DATED: October 22, 2001

Respectfully submitted,

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