IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, *Plaintiff*, v. OKLAHOMA STATE CHIROPRACTIC INDEPENDENT PHYSICIANS ASSOCIATION and LARRY BRIDGES, *Defendants.*	CASE NO. 13-CV-21-TCK-TLW

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States has filed a civil antitrust Complaint, alleging that the Oklahoma State Chiropractic Independent Physicians Association ("OSCIPA") and its executive director, Larry Bridges, violated Section 1 of the Sherman Act, 15 U.S.C. § 1. OSCIPA and Bridges negotiated at least seven contracts with payers[1] that set prices for chiropractic services on behalf of OSCIPA's members. This conduct caused consumers to pay higher fees for chiropractic services.

[1] A "payer" is a person or entity that purchases or pays for all or part of a physician's services for itself or any other person and includes, but is not limited to, individuals, health insurance companies, health maintenance organizations, preferred provider organizations, and employers.

At the same time the United States filed the Complaint, the United States filed a Stipulation and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the Defendants' conduct. Under the proposed Final Judgment, which is explained more fully below, Defendants are enjoined from contracting with payers on behalf of chiropractors and from facilitating joint contracting among chiropractors.

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. 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 Final Judgment and to punish violations thereof.

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

A. The Defendants

OSCIPA is an association of approximately 350 chiropractors many of whom compete with each other in the sale of chiropractic services. OSCIPA's members comprise approximately 45 percent of all chiropractors practicing in Oklahoma. Defendant Larry Bridges is the Executive Director of OSCIPA.

B. The Alleged Violations

OSCIPA and Bridges negotiated contracts with payers on behalf of competing chiropractors that raised prices to consumers. Indeed, OSCIPA stated that one of its purposes was to "concentrate[] the power of [its] state chiropractic physicians into one group. Through OSCIPA, a chiropractor can maintain an individual practice while associating with other chiropractors to increase contract-negotiating power."

From 2004 to 2011, OSCIPA and Bridges negotiated at least seven contracts with payers that set the prices and other terms for all of OSCIPA's members dealing with those payers. As executive director, Bridges negotiated these contracts with payers on behalf of OSCIPA's members, and Bridges signed several of those contracts on OSCIPA's behalf. Those payers are: Aetna, Ancillary Care Services, Community Care, Coventry, FirstHealth, Global Health, and Preferred Community Choice. In these negotiations, Defendants made proposals and counterproposals to payers, and accepted and rejected offers, without consulting OSCIPA's physician members regarding the prices that they would accept. Additionally, OSCIPA entered into contracts with payers on behalf of all members.

Since at least 2004, OSCIPA has required that each chiropractor joining the association enter into a membership agreement that specifies a reimbursement floor that the chiropractor must accept; prohibits the chiropractor from offering payers incentives or rebates such as waiving deductibles or co-pays; designates OSCIPA as the party who will contract with payers; and suspends any existing agreement with a payer to which the chiropractor is a party. Upon joining OSCIPA, therefore, a chiropractor explicitly gives contracting authority to OSCIPA and immediately charges the price set by the association for its several contracts, even if the chiropractor already had an individually negotiated contract with that payer. Defendants' practice of negotiating contracts on behalf of OSCIPA's members increased prices for chiropractic services in Oklahoma.

Antitrust law treats naked agreements among competitors that set prices as per se illegal.[2] Where competitors economically integrate in a joint venture, however, such agreements, if

[2] *See* Statement 8(B)(1) of the 1996 Statements of Antitrust Enforcement Policy in Health Care *available at* http://www.justice.gov/atr/public/guidelines/1791.htm.

reasonably necessary to accomplish the procompetitive benefits of the integration, are analyzed under the rule of reason.[3] Defendants' negotiation of contracts on behalf of OSCIPA's members was not ancillary to any procompetitive purpose of OSCIPA or reasonably necessary to achieve any efficiencies. Other than OSCIPA members who are part of the same practice groups, OSCIPA members do not share any financial risk in providing chiropractic services, do not significantly collaborate in a program to monitor and modify their clinical practice patterns to control costs or ensure quality, do not integrate their delivery of care to patients, and do not otherwise integrate their activities to produce significant efficiencies.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will prevent the recurrence of the violations alleged in the Complaint and restore competition in the sale of chiropractic services in Oklahoma. Section IV of the proposed Final Judgment would enjoin Defendants from:

(A) providing, or attempting to provide, any services to any physician regarding such physician's actual, possible, or contemplated negotiation or contracting with any payer, or other dealings with any payer, except that Defendants may provide credentialing services[4] and utilization review services[5];

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[3] *Id.* (further explaining that "In accord with general antitrust principles, physician network joint ventures will be analyzed under the rule of reason, and will not be viewed as per se illegal, if the physicians' integration through the network is likely to produce significant efficiencies that benefit consumers, and any price agreements (or other agreements that would otherwise be per se illegal) by the network physicians are reasonably necessary to realize those efficiencies."

[4] The proposed Final Judgment defines "credentialing services" to means a service that recognizes and attests that a physician is both qualified and competent, and that verifies that a physician meets standards as determined by an organization by reviewing such items as the individual's license, experience, certification, education, training, malpractice and adverse clinical occurrences, clinical judgment, and character by investigation and observation.

[5] The proposed Final Judgment defines "Utilization Review Services" to mean a service that a Defendant provides to a Payer that establishes mechanisms to monitor and control utilization of health care services and that is designed to control costs and assure quality of care by monitoring over-utilization of health care services, provided that such mechanisms are not used or designed to increase costs or utilization of health care services.

(B) acting, or attempting to act, in a representative capacity, including as a messenger or in dispute resolution (such as arbitration), for any physician with any payer, except that Defendants may provide credentialing services and utilization review services;

(C) communicating, reviewing, or analyzing, or attempting to communicate, review, or analyze with or for any physician, except as otherwise allowed, about (1) that physician's, or any other physician's, negotiating, contracting, or participating status with any payer; (2) that physician's, or any other physician's, fees or reimbursement rates; or (3) any proposed or actual contract or contract term between any physician and any payer;

(D) facilitating communication or attempting to facilitate communication, among or between physicians, regarding any proposed, contemplated, or actual contract or contractual term with any payer, including the acceptability of any proposed, contemplated, or actual contractual term, between such physicians and any payer;

(E) entering into or enforcing any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any payers or physicians to raise, stabilize, fix, set, or coordinate prices for physician services, or fixing, setting, or coordinating any term or condition relating to the provision of physician services;

(F) requiring that OSCIPA physician members negotiate with any payer through OSCIPA or otherwise restricting, influencing, or attempting to influence in any way how OSCIPA physician members negotiate with payers;

(G) coordinating or communicating, or attempting to coordinate or communicate, with any physician, about any refusal to contract, threatened refusal to contract, recommendation not to participate or contract with any payer, or recommendation to boycott, on any proposed or actual contract or contract term between such physician and any payer;

(H) responding, or attempting to respond, to any question or request initiated by any payer or physician relating to (1) a physician's negotiating, contracting, or participating status with any payer, except that Defendants may provide credentialing services and utilization review services; (2) a physician's fees or reimbursement rates; or (3) any proposed or actual contract or contract term between any physician and any payer, except to refer a payer to a third-party messenger[6] and otherwise to state that the Final Judgment prohibits any additional response; and

(I) training or educating, or attempting to train or educate, any physician in any aspect of contracting or negotiating with any payer, including, but not limited to, contractual language and interpretation thereof, methodologies of payment or reimbursement by any payer for such physician's services, and dispute resolution such as arbitration, except that the Defendants may, provided they do not violate other prohibitions of the Final Judgment, (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; (2) publish articles on general topics (including contracting) in a regularly disseminated newsletter; and (3) provide education to physicians regarding the regulatory structure (including legislative developments) of workers' compensation, Medicaid, and Medicare, except Medicare Advantage.

As noted above, Section IV of the Final Judgment would permit Defendants to provide credentialing services and utilization review services. Credentialing services can provide an efficient and cost-effective way to credential physicians. Utilization review services can provide

[6] A messenger is a person or entity that operates a messenger model, which is an arrangement designed to minimize the costs associated with the contracting process between payers and health-care providers. Messenger models can operate in a variety of ways. For example, network providers may use an agent or third party to convey to purchasers information obtained individually from providers about the prices or price-related terms that the providers are willing to accept. In some cases, the agent may convey to the providers all contract offers made by purchasers, and each provider then makes an independent, unilateral decision to accept or reject the contract offers. *See* Statement 9(C) of the 1996 Statements of Antitrust Enforcement Policy in Health Care *available at* http://www.justice.gov/atr/public/guidelines/1791.htm.

a mechanism to monitor and control utilization of health care services, control costs, and assure quality of care. Consequently, the provision of these services could potentially benefit consumers.

With limited exceptions, Section V of the proposed Final Judgment requires Defendants terminate all payer contracts at the earlier of (1) OSCIPA's receipt of a payer's written request to terminate its contract, (2) the earliest termination date, renewal date (including automatic renewal date), or the anniversary date of such payer contract, or (3) three months from the date the Final Judgment is entered. Furthermore, the Final Judgment immediately makes void any clause in a provider agreement that disallows a physician from contracting individually with a Payer.

Section VI of the proposed Final Judgment permits Defendants to engage in activities that fall within the safety zone set forth in Statement 6 of the 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CC) ¶ 13,153. Moreover, nothing in the proposed Final Judgment prohibits the Defendants or OSCIPA's members from advocating or discussing, in accordance with the doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and its progeny, legislative, judicial, or regulatory actions, or other governmental policies or actions.

To promote compliance with the decree, Section VII of the proposed Final Judgment requires that Defendants provide to their members, directors, officers, managers, agents, employees, and representatives, who provide or have provided, or supervise or have supervised the provision of services to physicians, copies of the Final Judgment and this Competitive Impact Statement and to institute mechanisms to facilitate compliance. For a period of ten years following the date of entry of the Final Judgment, the Defendants separately must certify

annually to the United States whether they have complied with the provisions of the Final Judgment.

IV. REMEDIES AVAILABLE TO POTENTIAL 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 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 has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least sixty 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 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed

Final Judgment at any time before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website, and, under certain circumstances, published in the Federal Register. Written comments should be submitted to:

Peter J. Mucchetti
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 4100
Washington, DC 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 the modification, interpretation, or enforcement of the Final Judgment.

VI. 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 Defendants. The United States is satisfied, however, that the relief in the proposed Final Judgment will prevent the recurrence of violations alleged in the Complaint and preserve competition for payers and consumers of chiropractic services in Oklahoma. Thus, the proposed Final Judgment would achieve all or substantially all of the relief that the United States would have obtained through litigation, while avoiding the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public

interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of 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). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.").[7]

As the United States Court of Appeals for the District of Columbia Circuit has held, a court considers under the APPA, among other things, the relationship between the remedy

[7] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[8] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C.

[8] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"); *see generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

2003) (noting that the court should grant due respect to the United States' "prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60. As the United States District Court for the District of Columbia

confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of using consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section 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). This language effectuates what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings 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). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[9]

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.

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[9] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298 at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

Dated: January 10, 2013

Respectfully submitted,

s/Richard Mosier

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