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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FMS

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

C95 1211

UNITED STATES OF AMERICA,

Plaintiff,

v.

OREGON DENTAL SERVICE,

Defendant.

Civil No.

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) - (h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment (or "the Judgment") submitted for entry against and with the consent of Oregon Dental Service ("ODS" or "the defendant") in this civil proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On April 10, 1995, the United States filed this single-count civil antitrust suit alleging that ODS, an Oregon non-profit corporation which does business in the Northern District of California, entered into a combination in unreasonable restraint of trade consisting of agreements to restrain price competition for dental services in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiff asked the Court to find that the defendant has violated Section 1 of the

Sherman Act and further asked the Court to enjoin the continuation of the combination.

Entry of the proposed Final Judgment will terminate the action, except that the Court will retain jurisdiction over the matter for any further proceedings required to interpret, enforce or modify the judgment or to punish violations of any of its provisions.

II.

PRACTICES GIVING RISE TO THE VIOLATION

ODS is an Oregon non-profit corporation. ODS' principal place of business is in Portland, Oregon. It was created by the Oregon Dental Association, a professional association of dentists. Dentists hold the majority of positions on ODS' Board of Directors. ODS contracts with businesses, governmental agencies, and other organizations to provide pre-paid dental care coverage to their employees. ODS contracts directly with dentists or groups of dentists to provide dental services to patients who are members of those covered groups.

ODS compensates its participating provider dentists for their services on the basis of a fee for service, determined in part through fee schedules submitted by each dentist. ODS sets its maximum allowable fee at the 90th percentile of all fees for a procedure submitted to it by participating dentists. That is, the maximum allowable fee is equal to or greater than the fees charged by 90% of participating dentists. If 10 or fewer of a dentist's filed fees are above this 90th percentile, ODS informs the dentist of the maximum amount that it will pay for the service. Most participating dentists file fee schedules proposing to charge above the maximum allowable fee for 10 or fewer procedures, so they are informed of exactly what fee they may charge and can avoid lowering their fees more than necessary to receive payment from ODS. If the dentist agrees to charge that amount, he or she signs the notification and returns it to ODS.

In excess of 90 percent of the dentists in the state of Oregon have provider contracts with ODS. For most of these dentists, payments from treatment of ODS patients are a significant part of their income. Most of these dentists are in independent, private practice and actually or

potentially compete with other participating ODS dentists to provide dental service to both ODS and non-ODS patients.

ODS' participating dentists agree to abide by ODS rules and policies, which contain what is called a "most favored nation" clause ("MFN"). The MFN requires that each dentist charge ODS the lowest price that dentist charges any other group. Accordingly, if a dentist reduces fees to a competing dental plan, the MFN requires that the dentist also reduce fees to ODS. The United States alleges that the effect of the MFN has been to require participating ODS dentists to charge other dental plans and non-ODS patients fees that are as high as or higher than the fees charged to ODS.

The Complaint alleges that, beginning at a time unknown to the plaintiff and continuing through at least September 1994, ODS and others engaged in a combination in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleges that the combination ended in September 1994, when ODS voluntarily terminated the MFN for business reasons.

To form and effectuate this combination, ODS adopted and enforced an MFN in its rules and policies which dentists were contractually obligated to adhere to, received and disseminated information on the maximum allowable fees for certain procedures, and obtained signed commitments from participating dentists to charge the maximum allowable fees.

Had this case proceeded to trial, the plaintiff was prepared to prove that the combination unreasonably restrained price competition among dentists and between other dental insurance plans and ODS, and stabilized prices for dental services.

ODS' adoption and enforcement of the MFN restrained price competition among Oregon dentists for the provision of dental services because it caused significant numbers of dentists to refuse to discount their fees. Before the MFN was enforced, certain Oregon dentists had reduced their fees to ODS competitors in order to participate in the competitors' managed-care plans. Others had indicated a willingness to do so.

After ODS began enforcing the MFN, however, most participating dentists refused to discount their fees to non-ODS patients or competing discount dental plans because, if they did, the MFN would require them to also lower all of their fees to ODS. Since most dentists in Oregon receive a significant portion of their income from treating ODS patients, the cost to those dentists of discounting their fees to non-ODS patients or competing dental care plans became too great to justify discounting. For the same reason, it was too costly for most dentists to drop their participation in ODS' plan in order to avoid the MFN and be able to discount their fees to competing discount dental plans. Consequently, the MFN substantially reduced discounting that was occurring and, had it continued in force, would have deterred future discounting.

The plaintiff was also prepared to prove that the combination unreasonably restrained competition between ODS and other dental insurance plans. Because of the MFN and its effect on the willingness of dentists to join discount dental plans, competing discount plans were unable to attract and keep a sufficiently large, qualified, and geographically varied panel of dentists to adequately serve their members and make their plans commercially marketable to employer and other groups. Some plans left the market or had their ability to attract and serve patient groups severely restricted, leading to a substantial reduction in their ability to compete with ODS.

The combination deprived Oregon consumers of price competition among dentists who stopped discounting their fees. Consumers were also deprived of choices of competing dental insurance plans offering different combinations of dentists, services, and prices.

Moreover, the plaintiff was prepared to prove that ODS' revealing the maximum acceptable fees to those dentists with 10 or fewer procedures over the maximum prevented those fees from falling below the maximum and effectively stabilized those fees at the maximum acceptable level -- a level higher than they might otherwise have been. As a result, consumers were further deprived of price competition among dentists.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The plaintiff and ODS have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) - (h). The proposed Final Judgment provides that its entry does not constitute any evidence against or admission of any party with respect to any issue of law or fact.

Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e), the proposed Final Judgment may not be entered unless the Court finds that entry is in the public interest. Section VIII of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is intended to ensure that ODS does not reinstate its MFN and ceases disclosing its maximum allowable fees to participating dentists. The proposed Final Judgment also prohibits ODS from taking any other action that may influence dentists' decisions regarding the discounting of fees.

A. Scope of the Proposed Final Judgment

Section III of the proposed Final Judgment provides that the Final Judgment shall apply to ODS and to ODS' officers, employees, members acting as corporate policy makers, directors, successors, assigns, subsidiaries, divisions and any other organizational units of any kind, and to all other persons in active concert or participation with any of them.

In the Stipulation to the proposed Final Judgment, ODS has agreed to be bound by the terms of the proposed Final Judgment, pending its approval by the Court.

B. Prohibitions and Obligations

Under Section IV of the proposed Final Judgment, ODS is enjoined and restrained for a period of five years from maintaining, adopting, or enforcing an MFN or similar provision in participating dentist agreements or by any other means or methods, or by taking any other action, directly or indirectly, to influence or attempt to influence any dentist to refrain from offering discount fees to any person or dental plan or to refrain from participating in any dental plan.

ODS is also enjoined and restrained for a period of five years from disclosing or in any way directly revealing to a dentist or dentists the maximum allowable or acceptable fee for a dental procedure or procedures.

The proposed Final Judgment also provides that the plaintiff will have access to information to enforce the judgment.

C. Effect of the Proposed Final Judgment on Competition

The relief required by the proposed Final Judgment will prohibit reinstatement of a substantial restraint on price competition among dentists and between ODS and other dental plans in Oregon, by ensuring that ODS will not adopt or enforce the limitations on dentists' abilities to discount created by the MFN. The proposed Final Judgment will also prohibit ODS from taking any other action which might discourage participating dentists from discounting or participating in competing discount plans. As a result, dentists will be free to discount or to join other discount plans, and discount dental plans will no longer be prevented by ODS' actions from attracting and maintaining viable panels of dentists to serve their members.

Finally, the relief required by the proposed Final Judgment will prohibit ODS' dissemination of the maximum fee amount for particular procedures. Without the information provided by ODS, dentists will have to determine independently the fees to charge for their services.

The prohibitions in the proposed Final Judgment will restore to dental consumers the benefits of free and open competition that were suppressed by ODS' adoption and enforcement of the MFN. The proposed Final Judgment prohibits ODS from reinstating the MFN during the term of the Final Judgment.

IV.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment is a full trial on the merits of the case. Such a trial would involve substantial cost to the United States and the defendant and is not

warranted because the proposed Final Judgment provides all the relief that is needed to remedy the violations of the Sherman Act alleged in the United States' complaint.

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 defendant in this matter.

VI.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided in the Antitrust Procedures and Penalties Act, any person believing that the proposed judgment should be modified may submit written comments to Christopher S Crook, Acting Chief, San Francisco Office, Department of Justice, Antitrust Division, 450 Golden Gate Avenue, San Francisco, California, 94102-3478, within the 60-day period provided by the Act. These comments, and the plaintiff's responses to them, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free, pursuant to the Stipulation, to withdraw its consent to the proposed Final Judgment at any time prior to its entry if the Department should determine that some modification of the Judgment is necessary to the public interest. The proposed Final Judgment provides that the Court will retain jurisdiction over this action, and that the parties may apply to the Court for such orders as may be necessary or appropriate for the modification, interpretation, or enforcement of the Judgment.

VII.

DETERMINATIVE DOCUMENTS

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were considered in formulating the proposed Judgment. Consequently, none are filed herewith.

Dated: April 10, 1995

Respectfully submitted,

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