

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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DISTRICT COURT
DISTRICT OF MASS

UNITED STATES OF AMERICA,

Plaintiff,

v.

MASSACHUSETTS ALLERGY SOCIETY, INC.;
WILFRED N. BEAUCHER;
JACK E. FARNHAM;
BERNARD A. BERMAN; and
IRVING W. BAILIT,

Defendants.

Civil Action No.:
92-10273-H

Entered: May 18, 1992

FINAL JUDGMENT

Plaintiff, United States of America, having filed its Complaint on February 3, 1992, and plaintiff and defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction over the subject matter of and parties to this action. The Complaint states a claim upon which relief may be granted against each defendant under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II.

DEFINITIONS

As used in this Final Judgment:

(A) "Fee" means any proposed, suggested, recommended, or actual charge, capitation rate, reimbursement rate, relative value conversion factor, relative value unit, or price term or condition for any allergy or allergy-related service or any methodology for determining or computing any of the foregoing;

(B) "Fee schedule" means any list of physician services showing a fee, range of fees, or methodology for determining or computing fees for such services;

(C) "Individual defendant" means each defendant other than MAS;

(D) "Integrated joint venture" means a joint arrangement to provide prepaid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services;

(E) "MAS" means Massachusetts Allergy Society, Inc.;

(F) "Peer review" means an examination of a physician's charges in a particular case and an assessment of whether those charges were excessive;

(G) "Physician" means a doctor of medicine or osteopathy;

(H) "Relative value scale" means any list or compilation of medical services or procedures that sets comparative values for such procedures or services whether or not those values are expressed in or convertible to monetary terms; and

(I) "Third party payer" means any person or entity that reimburses for, purchases, or pays for health care services provided to any other person and includes, but is not limited to, health maintenance organizations, preferred provider organizations, health insurance companies, prepaid hospital, medical, or other health service plans such as Blue Shield and Blue Cross plans, government health benefits programs, administrators of self-insured health benefits programs, and employers or other entities providing self-insured health benefits programs.

III.

APPLICABILITY

This Final Judgment shall apply to defendant MAS and to each of its officers, committee members, agents, employees, successors, and assigns, to each individual defendant until the retirement of his license to practice medicine or the assumption of inactive status as provided in 243 CMR 2.06(3).

and 243 CMR 2.07(7) and during any subsequent period of reinstatement of his license or resumption of active practice, and to each of their agents and employees, and to all other persons acting in concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

MAS PROHIBITED CONDUCT

Defendant MAS is enjoined from:

(A) Entering into, negotiating, or attempting to enter into any agreement or understanding concerning any fee, either on its own behalf or as a representative of any physician, with any third party payer;

(B) Providing recommendations to any physician on the desirability or appropriateness of any fee paid or to be paid by any third party payer, except that (1) nothing in this Section IV(B) shall prohibit MAS from engaging in the conduct permitted by Section IV(C), and (2) nothing in this Final Judgment shall prohibit MAS when requested by a third party payer or patient from participating in peer review of fees charged by individual physicians in individual cases;

(C) Developing, adopting or distributing any fee schedule or relative value scale for any use with any third party payer, including use in negotiating or attempting to enter an agreement or understanding with a third party payer, except that (1) nothing in this Final Judgment shall prohibit

MAS from suggesting or providing a fee schedule or relative value scale to a third party payer solely for informational purposes when (a) the third party payer initiates in writing a specific request to MAS for that information, and (b) MAS, at the time of transmitting the fee schedule or relative value scale to the third party payer, expressly states in writing that the payer is not required to accept or adopt the fee schedule or relative value scale; and (2) nothing in this Final Judgment shall prohibit MAS from considering or developing any other type of fee information for use by a third party payer, or from actually suggesting or providing such fee information to a third party payer provided MAS, at the time of the transmission, expressly states that the payer is not required to accept or adopt the information.

(D) Advocating or recommending that any physician withdraw from or refuse to enter into, or threaten to withdraw from or refuse to enter into, any actual or proposed agreement with any third party payer; and

(E) Communicating to any third party payer that any physician will or may withdraw from or refuse to enter into any actual or proposed agreement with any third party payer if any term or condition is not acceptable to MAS or to any physician.

V.

PROHIBITED CONDUCT OF INDIVIDUAL DEFENDANTS

Except as provided in Section VI below, each individual defendant is enjoined from:

(A) Discussing any fee with or submitting any fee to any third party payer on behalf of MAS or as an agent for any other physician;

(B) Agreeing or attempting to agree with defendant MAS or any other physician on any fee; and

(C) Agreeing or attempting to agree with defendant MAS or any other physician to withdraw from or refuse to enter into, or threaten to withdraw from or refuse to enter into, any actual or proposed agreement with any third party payer.

VI.

BONA FIDE GROUP PRACTICES AND
INTEGRATED JOINT VENTURES

Nothing in this Final Judgment shall prohibit an individual defendant from continuing to be or becoming a member or employee of a partnership, professional corporation, or other bona fide group practice or, on behalf of any such entity, from negotiating any fee or withdrawing from or refusing to enter into or stating an intention to withdraw from or refuse to enter into any actual or proposed agreement with any third party payer. Nor shall anything in this Final Judgment prohibit an individual defendant from continuing to be or becoming a member of an integrated joint venture before or after the entry of this Final Judgment so long as the integrated joint venture in no way discourages or prohibits any participating physician from negotiating or contracting independently with any third party payer. Each individual

defendant shall promptly inform plaintiff of the name and address of any integrated joint venture he joins after the entry of this Final Judgment.

VII.

FIRST AMENDMENT RIGHTS

Nothing in this Final Judgment shall prohibit any defendant acting either alone or with others from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency, legislative body or other governmental agency concerning legislation, rules, or procedures, or to participate in any federal or state administrative or judicial proceeding.

VIII.

BAR FROM OFFICE

Each individual defendant is further enjoined from holding any office in defendant MAS for the next five years or serving on any committee of defendant MAS that provides any information on fees to third party payers.

IX.

MAS COMPLIANCE PROGRAM

Defendant MAS is ordered to maintain an antitrust compliance program which shall include at a minimum:

(A) Establishing, adopting, and maintaining a written statement setting forth the policy of MAS regarding compliance with the antitrust laws and this Final Judgment;

(B) Distributing by certified mail, return receipt requested, within 60 days from the entry of this Final Judgment, a copy of this Final Judgment along with the Complaint and Competitive Impact Statement in this matter and the policy statement required by Section IX(A) to each member of MAS;

(C) Providing a copy of this Final Judgment along with the Complaint and Competitive Impact Statement in this matter and the policy statement required by Section IX(A) to each person joining MAS within 60 days of that person joining MAS;

(D) Holding a briefing annually at a general membership meeting on the meaning and requirements of this Final Judgment and the antitrust laws;

(E) Obtaining from each officer and Executive Committee member an annual written certification that he or she: (1) has read, understands, and agrees to abide by the terms of this Final Judgment; (2) has been advised and understands that noncompliance with this Final Judgment may result in his or her conviction for criminal contempt of court and imprisonment and/or fine and (3) is not aware of any violation of this Final Judgment;

(F) Maintaining for inspection by plaintiff a record of recipients to whom the Final Judgment has been distributed and from whom the certification required by Section IX(E) has been obtained; and

(G) Conducting an audit of its activities within 60 days from the entry of this Final Judgment and periodically thereafter while this Final Judgment remains in effect, to determine compliance with this Final Judgment.

X.

REQUIRED ACTION BY INDIVIDUAL DEFENDANTS

Each individual defendant shall distribute a copy of this Final Judgment to each physician in, and the business and office managers of, their respective practices within 10 days of the entry of this Final Judgment. Each individual defendant shall distribute a copy of this Final Judgment to any physician who joins their respective practices or to any person who becomes the business or office manager of their respective practices within 10 days of that person joining or becoming employed by that practice.

XI.

CERTIFICATIONS

(A) Within 75 days after the entry of this Final Judgment, defendant MAS shall certify to plaintiff that it has established and adopted a written antitrust compliance policy and provide a copy thereof to plaintiff; and that it has made the distribution of this Final Judgment, the Complaint and the Competitive Impact Statement in this matter and the policy statement as required by Sections IX(A)-(B) above;

(B) For 10 years after the entry of this Final Judgment, on or before its anniversary date, defendant MAS shall certify

annually to plaintiff whether defendant MAS has complied with the provisions of Sections IX(C)-(G) above; and

(C) For 10 years after the entry of this Final Judgment, on or before its anniversary date, each individual defendant shall certify annually using the form attached to this Final Judgment as Appendix A that defendant has read the Final Judgment and understands it and has complied with Section X of this Final Judgment.

XII.

SANCTIONS

If, after the entry of this Final Judgment, defendant MAS violates Section IV of this Final Judgment, the Court may, after notice and hearing, but without any showing of willfulness or intent, impose a civil fine upon defendant MAS in an amount reasonable in light of all surrounding circumstances. A fine may be levied upon defendant MAS for each separate violation of Section IV.

XIII.

PRESERVATION OF REMEDIES

Nothing in this Final Judgment shall bar the United States from seeking, or the Court from imposing, against any defendant or person any other relief available under any other applicable provision of law for violation of this Final Judgment, in addition to or in lieu of the civil penalties provided for in Section XII above.

XIV.

PLAINTIFF'S ACCESS

(A) For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, from time to time, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable written notice to the relevant defendant be permitted:

(1) access during office hours of such defendant to inspect and copy all records and documents in the possession or under the control of such defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers, employees and agents of such defendant, who may have counsel present, regarding any such matters.

(B) Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to any defendant, and subject to any legally recognized privilege, such defendant shall submit such written reports, under oath if requested, to plaintiff relating to any of the matters contained in this Final Judgment as may be requested.

(C) No information or documents obtained by the means provided in this Section XIV shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by an individual defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant is not a party.

XV.

JURISDICTION RETAINED

Jurisdiction is retained by this Court to enable any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or implementation

of this Final Judgment, for the enforcement or modification of any of its provisions, and for the punishment of any violation hereof.

XVI.

NOTIFICATIONS

Defendant MAS shall notify plaintiff at least 30 days before any proposed change in its legal structure such as dissolution, reorganization, or merger resulting in the creation of a successor corporation or association, or any other change which may affect compliance with this Final Judgment. Each individual defendant shall notify, in writing, plaintiff not later than 15 days after the retirement of his license to practice medicine or his assumption of inactive status, and shall provide plaintiff with evidence of such retirement or assumption of inactive status. In the event that the retiring or inactive individual defendant subsequently seeks reinstatement of his license or resumes active status, he shall notify plaintiff, in writing, not later than 15 days after such reinstatement or resumption of active status.

XVII.

EXPIRATION OF FINAL JUDGMENT

This Final Judgment shall expire ten (10) years from the date of entry.

XVIII.

PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest.

DATED:

May 18, 1992

Edward F. Harrington
United States District Judge



Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

v.

MASSACHUSETTS ALLERGY SOCIETY, INC.;

WILFRED N. BEAUCHER;

JACK E. FARNHAM;

BERNARD A. BERMAN; and

IRVING W. BAILIT,

Defendants.

ANNUAL CERTIFICATION

As required by Section XI(C) of the Final Judgment in this matter, I certify that I have read the Final Judgment in this case and understand it. I also certify that I have given a copy of the Final Judgment in this case to each physician, office manager, or business manager who has joined or become employed by my practice during the past year within 10 days of the person joining or becoming employed by the practice.

I understand that under 18 U.S.C. § 1001 the making of a false, fictitious or fraudulent statement or representation in any matter within the jurisdiction of any department or agency

of the United States is a felony punishable by a fine of not more than \$10,000 or imprisonment of not more than five years or both.
