

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No. 1:05-cv-431
)	
vs.)	Hon. Sandra S. Beckwith, C.J.
)	
FEDERATION OF PHYSICIANS AND)	Hon. Timothy S. Hogan, M.J.
DENTISTS, LYNDA ODENKIRK, <i>et al.</i>)	
)	
Defendants.)	

**[PROPOSED] FINAL JUDGMENT AS TO
THE FEDERATION OF PHYSICIANS AND DENTISTS AND LYNDA ODENKIRK**

WHEREAS, Plaintiff, the United States of America, filed its Complaint on June 24, 2005, alleging that Defendant Federation of Physicians and Dentists (“Defendant FPD”), and Defendant Lynda Odenkirk (“Defendant Odenkirk”) (collectively “the Federation Defendants”) participated in agreements in violation of Section 1 of the Sherman Act;

WHEREAS Plaintiff and the Federation Defendants, by their counsel, have consented to the Court’s 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 any admission by the Federation Defendants that the law has been violated as alleged in the Complaint, or that the facts alleged in such Complaint, other than the jurisdictional facts, and the allegations admitted in the Federation Defendants’ Answers, are true;

WHEREAS, the essence of this Final Judgment is to restore competition, as alleged in the Complaint, and to restrain the Federation Defendants from participating in any unlawful conspiracy to increase fees for physician services;

AND WHEREAS, Plaintiff United States requires the Federation Defendants to be enjoined from rendering services to, or representing, any independent physician pertaining to such physician's dealing with any payer, for the purpose of preventing future violations of Section 1 of the Sherman Act.

NOW THEREFORE, without trial or adjudication of any issue of law or fact, and upon consent of Plaintiff and the Federation Defendants, it is ORDERED, ADJUDGED AND DECREED:

I. JURISDICTION

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

II. DEFINITIONS

As used in this Final Judgment:

(A) "communicate" means to discuss, disclose, transfer, disseminate, or exchange information or opinion, formally or informally, in any manner;

(B) "Defendant FPD" means the Federation of Physicians and Dentists, its successors and assigns; its subsidiaries, divisions, groups, partnerships and joint

ventures; and each entity over which it has control; and their directors, officers, managers, agents, representatives, and employees.

(C) “Defendant Odenkirk” means Lynda Odenkirk, an employee of Defendant FPD;

(D) “Delaware Decree” means the final judgment entered in *United States v. Federation of Physicians and Dentists, Inc.*, CA 98-475 JJF (D. Del., judgment entered Nov. 6, 2002).

(E) “the Federation Defendants” means Defendant FPD and Defendant Odenkirk;

(F) “independent physician” means any physician or physicians in private solo or group medical practice, regardless of whether such person is a member of the Federation of Physicians and Dentists. For purposes of this Final Judgment, an “independent physician” does not include physicians or other medical professional employees not in private practice or who belong to a recognized or certified bargaining unit that is affiliated with the Federation of Physicians and Dentists;

(G) “messenger” means, in relation to the Federation Defendants, communicating to a payer any information the Federation Defendants have received from an independent physician, or communicating to any independent physician any information the Federation Defendants receive from any payer;

(H) “payer” means any person 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;

(I) “person” means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institute, governmental unit, or other legal entity;

(J) “recognized or certified bargaining unit” means a group of physicians that have been recognized or certified pursuant to state or federal law to bargain collectively with their common employer over wages, terms, and conditions of employment.

III. APPLICABILITY

(A) This Final Judgment applies to the Federation Defendants and to any person, including any independent physician, in active concert or participation with the Federation Defendants, who receives actual notice of this Final Judgment by personal service or otherwise.

(B) Defendant Odenkirk shall be bound by the provisions of Section IV of this Final Judgment only while she is an employee or agent of, or acting in active concert with, Defendant FPD.

(C) This Final Judgment shall not apply to the conduct of any physician or other medical professional employee who belongs to a recognized or certified bargaining unit affiliated with Defendant FPD, only to the extent such conduct reasonably relates to the lawful activities of the recognized or certified bargaining unit.

(D) Nothing contained in this Final Judgment is intended to suggest or imply that any provision herein is or has been created or intended for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

(E) Nothing contained in this Final Judgment is intended to suggest or imply that Defendant FPD's obligations under the Delaware Decree have been diminished, limited, curtailed, or otherwise modified.

(F) In the event of any conflict or inconsistency between Section IV of this Final Judgment, and Sections IV or V of the Delaware Decree, this Final Judgment controls.

IV. PROHIBITED CONDUCT

The Federation Defendants are enjoined from, in any manner, directly or indirectly:

(A) providing, or attempting to provide, any services to any independent physician regarding such physician's actual, possible, or contemplated negotiation, contracting, or other dealings with any payer;

(B) acting, or attempting to act, in a representative capacity, including as a messenger or in dispute resolution (such as arbitration), for any independent physician with any payer;

(C) reviewing or analyzing, or attempting to review or analyze, for any independent physician, any proposed or actual contract or contract term between such physician and any payer;

(D) communicating, or attempting to communicate, with any independent physician about that physician's, or any other physician's, negotiating, contracting, or participating status with any payer, or, except as consistent with Section V(A), about any proposed or actual contract or contract term between any independent physician and any payer;

(E) responding, or attempting to respond, to any question or request initiated by any payer, except to state that this Final Judgment prohibits such response; and

(F) training or educating, or attempting to train or educate, any independent 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 Federation Defendants may, provided they do not violate Sections IV(A) through IV(E) of this 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 and only if at least five-days advance written notice has been provided to Plaintiff and any handouts, outlines, presentation slides, notes or other documents relating to what was said by the Federation Defendants are retained by the Defendant FPD for possible inspection by Plaintiff; (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.

V. PERMITTED CONDUCT

(A) The Federation Defendants may 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. (CCH) ¶ 13,153.

(B) Nothing in this Final Judgment shall prohibit the Federation Defendants, or any one or more of Defendant FPD's members from:

- (1) engaging or participating in lawful union organizational efforts and activities;
- (2) advocating or discussing, in accordance with the doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and their progeny, legislative, judicial, or regulatory actions, or other governmental policies or actions; and
- (3) exercising rights protected by the National Labor Relations Act or any state collective bargaining laws.

(C) Nothing in this Final Judgment shall prohibit:

- (1) any independent physician to whom this Final Judgment applies from engaging solely with other members or employees of such physician's bona fide solo practice or practice group in activities otherwise prohibited herein;
- (2) any independent physician to whom this Final Judgment applies from acting alone in the exercise of his or her own independent business judgment, from choosing

the payer or payers with which to contract, and/or refusing to enter into discussions or negotiations with any payer.

(D) Nothing in this Final Judgment shall prohibit or impair the right of the Federation Defendants (or any affiliate thereof) as a labor organization from communicating with other labor organizations concerning the identity of payers who are considered pro- or anti-union, provided such activity is consistent with § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), and to the extent it does not constitute a secondary boycott.

VI. COMPLIANCE

To facilitate compliance with this Final Judgment, Defendant FPD shall:

(A) distribute within 60 days from the entry of this Final Judgment, a copy of this Final Judgment and the Competitive Impact Statement to:

- (1) all of Defendant FPD's directors, officers, managers, agents, employees, and representatives, who provide or have provided, or supervise or have supervised the provision of, services to independent physicians; and
- (2) all of Defendant FPD's members who are independent physicians.

(B) distribute as soon as practicable a copy of this Final Judgment and the Competitive Impact Statement to:

- (1) any person who succeeds to a position with Defendant FPD described in Section VI(A), in no event shall such distribution occur more than fifteen (15) days later than such person assumes such position; and

(2) any independent physician who becomes a member of Defendant FPD, in no event shall such distribution occur more than fifteen (15) days later than such physician becomes a member.

(C) conduct an annual seminar explaining to all of Defendant FPD's directors, officers, managers, agents, employees, and representatives, who provide or have provided, or supervise or have supervised the provision of, services to independent physicians, the antitrust principles applicable to their work, the restrictions contained in this Final Judgment, and the implications of violating the Final Judgment;

(D) maintain an internal mechanism by which questions about the application of the antitrust laws and this Final Judgment from any of Defendant FPD's directors, officers, managers, agents, employees, and representatives, who provide or have provided, or supervise or have supervised the provision of, services to independent physicians, can be answered by counsel as the need arises;

(E) obtain a certificate from each person to whom Defendant FPD must distribute this Final Judgment:

(1) pursuant to Section VI(A), within 120 days from the entry of this Final Judgment; and

(2) pursuant to Section VI(B), as soon as practicable but in no event more than 120 days from the date of such distribution;

The certificate shall state that such person has received, read, and understands this Final Judgment, and that such person has been advised and understands that such person

must comply with this Final Judgment and may be held in civil or criminal contempt for failing to do so. Defendant FPD shall retain each certificate for the duration of this Final Judgment; and

(F) maintain for inspection by Plaintiff a record of recipients to whom this Final Judgment, and Competitive Impact Statement have been distributed and from whom written certifications, pursuant to Section VI(E), have been received.

VII. CERTIFICATION

(A) Within 75 days after entry of this Final Judgment, Defendant FPD shall certify to Plaintiff that it has provided a copy of this Final Judgment to all persons described in VI(A) of this Final Judgment.

(B) For a period of ten (10) years following the date of entry of this Final Judgment, the Federation Defendants shall separately certify to Plaintiff annually on the anniversary date of the entry of this Final Judgment that each, respectively, and any agents if applicable, has complied with the provisions of this Final Judgment.

VIII. COMPLIANCE INSPECTION

(A) For the purposes of determining or securing compliance with this Final Judgment or determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the

Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to the Federation Defendants, be permitted:

(1) access during the Federation Defendants' regular business hours to inspect and copy, or, at the United States' option, to require that the Federation Defendants provide copies of all books, ledgers, accounts, records and documents in their possession, custody, or control, relating to any matters contained in this Final Judgment;

(2) to interview, either informally or on the record, Defendant Odenkirk or any of Defendant FPD's officers, directors, employees, agents, managers, and representatives, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by the Federation Defendants; and

(3) to obtain from the Federation Defendants written reports or responses to written interrogatories, under oath if requested, relating to any matters contained in this Final Judgment.

(B) The provisions of Section VIII(A) shall not apply to any member of Defendant FPD or to any such member's group practice.

(C) No information or documents obtained by the means provided in this Section shall be divulged by Plaintiff to any person other than authorized representatives of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at any time a Federation Defendant furnishes information or documents to the United States, the Federation 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 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 the United States shall give the Federation Defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which such Defendant is not a party.

(E) The Federation Defendants have the right to representation by counsel in any proceeding under this Section.

IX. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment, to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

X. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XI. PUBLIC INTEREST DETERMINATION

The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: _____, 2007

Sandra S. Beckwith, Chief Judge
United States District Court