

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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UNITED STATES OF AMERICA,)	CA 98-475 JJF
)	
Plaintiff,)	
)	
vs.)	
)	
FEDERATION OF PHYSICIANS AND)	
DENTISTS, INC.,)	
)	
Defendant.)	
)	
)	
)	

FINAL JUDGMENT

Plaintiff, the United States of America, having filed its Complaint on August 12, 1998, and plaintiff and defendant Federation of Physicians and Dentists, 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 issue of fact or law;

AND WHEREAS defendant has agreed to be bound by the provisions of this Final Judgment;

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 plaintiff and defendant, it is hereby ORDERED, ADJUDGED, AND DECREED:

I.

JURISDICTION

This Court has jurisdiction over the subject matter of, and over the plaintiff and defendant to, this action. The Complaint states a claim upon which relief may be granted against defendant 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) “competing physicians” or “competing orthopedic surgeons” means two or more physicians (or two or more orthopedic surgeons, respectively) in separate, private medical practices in the same specialty in the same county;
- (C) “competitively sensitive information” means:
 - (1) any participating physician’s actual or possible view, intention, or position concerning the negotiation or acceptability of any proposed or existing payer contract or contract term, including the physician’s negotiating or contracting status with any payer or the physician’s response to any payer contract or contract term; or
 - (2) any proposed or existing term of any payer contract that affects:
 - (a) the amount of fees or payment, however determined, that a participating physician charges, contracts for, or accepts from or considers charging, contracting for, or accepting from any payer for providing physician services;

(b) the duration, amendment, or termination of the payer contract;

(c) utilization review and pre-certification; or

(d) the manner of resolving disputes between the participating physician and the payer;

(D) “defendant” means the Federation of Physicians and Dentists, its directors, officers, agents, representatives, and employees; its successors and assigns; and each entity over which it has control;

(E) “messenger” means a person, including defendant or an agent for defendant, that communicates to a payer any competitively sensitive information it obtains, individually, from a participating physician or communicates, individually, to a participating physician any competitively sensitive information it obtains from a payer;

(F) “objective information” or “objective comparison” means empirical data that are capable of being verified or a comparison of such data;

(G) “participating physician” means a physician who is either in solo practice or a group practice, and who participates in a messenger arrangement, and any employee of such physician or group practice acting on the physician’s or group practice’s behalf in connection with a messenger arrangement; for purposes of this Final Judgment, a “participating physician” does not include physicians or other medical professional employees who belong to a recognized or certified bargaining unit that is affiliated with the Federation of Physicians and Dentists;

(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 independent practice associations, individuals, health insurance companies, health maintenance organizations, preferred provider organizations, and employers;

(I) “payer contract” means a contract between a payer and a physician by which that physician agrees to provide physician services to persons designated by the payer;

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

(K) “Protocols” means a set of written guidelines, which have been adopted by defendant for dissemination to its members to assist in the implementation and administration of the terms of the Final Judgment and which 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. These Protocols shall not diminish defendant’s and its members’ obligation to comply with the terms of this Final Judgment and federal antitrust law, which are controlling in the event of any conflict or inconsistency; and

(L) “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 defendant and to those persons in active concert or participation with defendant, including defendant's member physicians in private practice who receive actual notice of the Final Judgment by personal service or otherwise.

(B) This Final Judgment shall not apply to the conduct of any physicians or other medical professional employees who belong to recognized or certified bargaining units that are affiliated with defendant, to the extent such conduct is reasonably related to the lawful activities of the recognized or certified bargaining unit.

(C) 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.

IV.

INJUNCTIVE RELIEF

(A) The defendant and all other persons in active concert or participation with defendant who receive actual notice of the Final Judgment by personal service or otherwise are enjoined from directly or indirectly:

(1) participating in, encouraging, or facilitating any agreement or understanding between competing physicians about any actual or proposed payer contract or contract term;

(2) 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;

(3) negotiating, collectively or individually, on behalf of competing physicians any actual or proposed payer contract or contract term with any payer;

(4) making any recommendation to competing physicians about any actual or proposed payer contract or contract term or whether to accept or reject any such payer contract or contract term;

(5) communicating any competitively sensitive information to, or in the presence of, competing physicians;

(6) communicating to competing physicians any subjective opinion or subjective analysis, evaluation, or assessment about competitively sensitive information;

(7) precluding or discouraging any competing physicians from exercising his, her, or their own independent business judgment in determining whether to negotiate, contract, or deal directly with any payer; and

(8) acting as a messenger for any competing physicians unless:

(a) defendant informs each participating physician of any payer's decision not to communicate or to discontinue communicating with that participating physician through defendant;

(b) defendant communicates all competitively sensitive information that it receives from any payer separately to each participating physician designated by the payer;

(c) defendant obtains individually from each participating physician any competitively sensitive information that it communicates to any payer;

(d) defendant does not communicate any competitively sensitive information obtained from any participating physician to anyone other than to payers designated by the participating physician;

(e) defendant does not violate any of the provisions of Paragraph IV(A)(1)-(7) of this Final Judgment;

(f) for five (5) years from the date of entry, at the outset of its involvement with any payer as a messenger (or within 30 days of the entry of this Final Judgment for any ongoing involvement, on behalf of a participating physician, with a payer), defendant informs the payer in writing that, at any time, (i) the payer is free to decline to communicate with any participating physician through defendant, and (ii) any participating physician is free to communicate with the payer individually without defendant's involvement;

(g) for five (5) years from the date of entry, when first designated by any participating physician as a messenger (or within 30 days of the entry of this Final Judgment for any ongoing involvement, on behalf of a participating physician, with a payer), defendant informs the participating physician in writing that he or she is free at any time to communicate with any payer individually without defendant's involvement;

(h) for five (5) years from the date of entry, when first designated by any participating physician as a messenger, and at the outset of its involvement with any payer as a messenger (or within 30 days of the entry of this Final Judgment for any ongoing involvement, on behalf of a participating physician, with a

payer), defendant informs the participating physician and any payer with whom it communicates as a messenger on behalf of the participating physician in writing that it cannot negotiate, collectively or individually, for any participating physician any payer contract or contract term but can act only as a messenger; and

(i) for five (5) years from the date of entry, defendant ensures that (i) any oral communication between it and any payer or any participating physician is contemporaneously memorialized in writing or by recording sufficient to show the date, participants to, and substance of the communication and the person making the writing or recording; (ii) such memorialization or recording and any written communication between defendant and any payer or participating physician are preserved for two years; (iii) any correspondence containing competitively sensitive information is addressed individually to each participating physician; and (iv) no correspondence between defendant and a payer that includes the competitively sensitive information of a physician is sent to any other competing physician.

(B) The defendant's member physicians, who participate in any messenger or any other arrangement provided by defendant, are enjoined from directly or indirectly:

(1) participating in, encouraging, or facilitating any agreement or understanding among competing physicians about any competitively sensitive information;

(2) participating in, encouraging, or facilitating any agreement or understanding among competing physicians about using a messenger;

(3) communicating or facilitating the communication of any competitively sensitive information to, or in the presence of, competing physicians; and

(4) participating in, encouraging, or facilitating any agreement or understanding among any competing physicians that any of defendant's physician members will deal with a payer only through a messenger or other agent or representative.

V.

PERMITTED CONDUCT

(A) Subject to the provisions of Section IV of this Final Judgment:

(1) at a participating physician's request, defendant may communicate to the participating 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 participating physician by other payers;

(2) defendant may 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 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153 ("Health Care Policy Statements") and in activities that are lawful under Statement 6 of the Health Care Policy Statements; and

(3) defendant may objectively review and analyze terms and conditions of any proposed or actual payer contract that do not constitute competitively sensitive information and may convey or publish the results of such review and analysis to its members in a manner that does not constitute a recommendation or suggestion as to whether any term or condition of the payer contract should be accepted or rejected.

(B) Nothing in this Final Judgment shall prohibit defendant, or any one or more of its 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 of defendant's members from engaging solely with other members or employees of such member's bona fide solo practice or practice group in activities otherwise prohibited herein; and

(2) any physician member of defendant (or the bona fide practice group that employs such physician), acting alone in the exercise of his, her or its own independent business judgment, from choosing the payer or payers with which to contract, and/or refusing to enter into discussion or negotiations with any payer.

(D) Nothing in this Final Judgment shall prohibit or impair the right of defendant (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 PROGRAM

Defendant shall maintain an antitrust compliance program, which shall include:

(A) distributing within 60 days from the entry of this Final Judgment,

(1) a copy of the Final Judgment and Competitive Impact Statement to all of defendant's officers, directors, employees, agents, and representatives, who provide, or supervise the provision of, services to competing physicians, and to all existing orthopedic surgeon members practicing in Delaware; Connecticut; the greater Dayton, Ohio area, including Montgomery County; and the greater Tampa, Florida area, including Hillsborough, Pinellas, and Pasco Counties; and

(2) a copy of the Protocols to all of defendant's physician members who are in private practice and not part of a recognized or certified bargaining unit;

(B) distributing in a timely manner,

(1) a copy of the Final Judgment and Competitive Impact Statement to any person who succeeds to a position with the Federation, as described in Paragraph VI(A)(1);

(2) a copy of the Protocols to any physician who is in private practice and not part of a recognized or certified bargaining unit and who becomes a Federation member;

(C) holding an annual seminar explaining to all of defendant's officers, directors, employees, agents, and representatives who provide, or supervise the provision of, services to competing physicians, the antitrust principles applicable to their work, the restrictions contained in this Final Judgment, and the implications of violating the Final Judgment;

(D) maintaining an internal mechanism by which questions from any of defendant's officers, directors, employees, agents, and representatives about the application of the antitrust laws to the representation of competing physicians, whether as a messenger or as some other representative, can be answered by counsel as the need arises;

(E) obtaining, within 120 days from the entry of this Final Judgment, and retaining for the duration of this Final Judgment, a certificate from:

(1) each of defendant's officers, directors, employees, agents, and representatives, who provide, or supervise the provision of, services to competing physicians, and from each of defendant's physician members who receives, pursuant to Paragraph VI(A)(1), a copy of the Final Judgment and Competitive Impact Statement, that he or she has received, read, and understands this Final Judgment, and that he or she has been advised and understands that he or she must comply with the Final Judgment and may be held in civil or criminal contempt for failing to do so;

(2) each of defendant's physician members who is in private practice and not part of a recognized or certified bargaining unit and who receives, pursuant to Paragraph VI(A)(2), a copy of the Protocols, that he or she has received, read, and understands the Protocols;

(F) obtaining, within 60 days following distribution, pursuant to Paragraph VI(B), and retaining for the duration of this Final Judgment, a certificate from:

(1) each person who succeeds to a position with the Federation, as described in Paragraph VI(A)(1), that he or she has received, read, and understands this Final Judgment, and that he or she has been advised and understands that he or she must

comply with the Final Judgment and may be held in civil or criminal contempt for failing to do so; and

(2) any physician who is in private practice and not part of a recognized or certified bargaining unit and who becomes a member, that he or she has received, read, and understands the Protocols; and

(G) maintaining for inspection by plaintiff a record of recipients to whom the Final Judgment, Competitive Impact Statement, or Protocols have been distributed and from whom written certifications, pursuant to Paragraphs VI(E) or (F), have been received.

VII.

CERTIFICATION

(A) Within 75 days after entry of this Final Judgment, defendant shall certify to plaintiff that it has distributed the Final Judgment, Competitive Impact Statement, and Protocols as required by Paragraph VI(A).

(B) For a period of ten years following the date of entry of this Final Judgment, defendant shall certify annually on the anniversary date of the entry of this Final Judgment to plaintiff that it has complied with the provisions of this Final Judgment.

VIII.

PLAINTIFF'S ACCESS

(A) For the purposes of determining or securing compliance with this Final Judgment or determining whether this Final Judgment should be modified or terminated, and subject to any legally recognized privilege, authorized representatives of the Antitrust Division of the United States Department of Justice, shall upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to defendant, be permitted:

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

(2) to interview defendant's officers, directors, employees, agents, and representatives, who may have individual counsel present, concerning such matters; and

(3) to obtain written reports from defendant, under oath if requested, relating to any matters contained in this Final Judgment.

(B) The defendant shall have the right to be represented by counsel in any proceeding under this Section.

(C) No information or documents obtained by the means provided in this Section shall be divulged by plaintiff to any person other than duly 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 the time information or documents are furnished by defendant to plaintiff, 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 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 defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which defendant is not a party.

(E) The provisions of Paragraph VIII(A) do not apply to any Federation member or to any member’s group practice.

IX.

JURISDICTION RETAINED

(A) This Court retains jurisdiction to enable any party to this Final Judgment, but no other person, 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 or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

(B) If federal or state legislation enacted after the entry of this Final Judgment permits conduct prohibited by this Final Judgment, defendant may move for and plaintiff will reasonably consider an appropriate modification of this Final Judgment.

X.

EXPIRATION OF FINAL JUDGMENT

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

XI.

PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest.

Dated:

Court approval subject to procedures of
Antitrust Procedures and Penalties Act, 15
U.S.C. § 16.

United States District Judge