

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,

Plaintiff.

vs.

VISION SERVICE PLAN,

Defendant.

Case No. 1:94CV02693 TPJ

Entered: April 12, 1996

FILED

APR 12 1996

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

REVISED FINAL JUDGMENT

Plaintiff, United States of America, filed its Complaint on December 15, 1994. Plaintiff and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law. This Final Judgment shall not be evidence against or an admission by any party about any issue of fact or law or that any violation of law has occurred. Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, 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 this action and over each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against the Defendant under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II.

DEFINITIONS

As used herein, the term:

(A) "Defendant" or "VSP" means Vision Service Plan;

(B) "Panel Doctor's Agreement" means the VSP Panel Member Agreement by which Defendant contracts with optometrists or ophthalmologists, including all amendments and additions, in effect at any time since January 1, 1992, and during the term of this Final Judgment;

(C) "Most Favored Nation Clause" means:

(1) the clause characterized as a Fee Non-Discrimination Clause in paragraph 6 of the VSP Panel Doctor's Agreement, pursuant to which each VSP member doctor agrees:

(a) not to charge fees to VSP that are any higher than those charged to the doctor's non-VSP patients, nor those that the doctor accepts from any other non-governmental group, group plan, or panel;

(b) if a published VSP fee schedule would cause payment in excess of the doctor's usual and customary fee, to notify VSP and accept such lower fee as is consistent with the doctor's usual and customary fees;
and

(c) if VSP determines that the doctor is charging fees to VSP that are higher than those charged non-VSP patients, VSP shall reduce the doctor's fees accordingly; or

(2) any other existing or future clause in the VSP Panel Doctor's Agreement, VSP policy, or VSP practice having the same purpose or effect, in whole or in part;

(D) "Non-VSP patients" means patients who are not members of a plan insured or administered by VSP;

(E) "Non-VSP plan" means any plan (other than VSP) responsible for all or part of any expense for vision care services, provided to plan members, pursuant to contractual terms with providers of vision services limiting the fees that providers collect for serving the plan's members;

(F) "Usual and customary fees" means the fees for services and materials that are charged, before any discounting, by VSP panel doctors to their private patients (patients not covered by Medicare or Medicaid programs); and

(G) "VSP panel doctor" means any optometrist or ophthalmologist who has entered into, or who has applied to enter into, a VSP Panel Doctor's Agreement.

III.

APPLICABILITY

This Final Judgment applies to:

(A) the Defendant and to its successors and assigns, and to all other persons (including VSP panel doctors) in active concert or participation with any of them, who have received actual notice of the Final Judgment by personal service or otherwise; and

(B) the Most Favored Nation Clause, as defined in Section II(C) of this Final Judgment, but to no other clause of the VSP Panel Doctor's Agreement, VSP policy, or VSP practice.

IV.

PROHIBITED CONDUCT

Except as permitted in Section V, Defendant is enjoined and restrained from:

(A) maintaining, adopting, or enforcing a Most Favored Nation Clause in any VSP Panel Doctor's Agreement, corporate bylaws, policies, rules, regulations, or by any other means or methods;

(B) maintaining, adopting, or enforcing any policy or practice linking payments made by VSP to any VSP panel doctor to fees charged by the doctor to any non-VSP patient or any non-VSP plan;

(C) differentiating VSP's payments to, or other treatment of, any VSP panel doctor because the doctor charges any fee lower than that charged by the doctor to VSP, to any non-VSP patient or to any non-VSP plan;

(D) taking any action to discourage any VSP panel doctor from participating in any non-VSP plan or from offering or charging any fee lower than that paid to the doctor by VSP to any non-VSP patient or any non-VSP plan;

(E) monitoring or auditing the fees any VSP panel doctor charges any non-VSP patient or any non-VSP plan; and

(F) communicating in any fashion with any VSP panel doctor regarding the doctor's participation in any non-VSP plan or regarding the doctor's fees charged to any non-VSP patient or to any non-VSP plan.

V.

PERMITTED ACTIVITIES

Despite any prohibition contained in Section IV of this Final Judgment,

(A) for the purpose of calculating payments to be made to its panel doctors, Defendant may request annually that a VSP panel doctor report the doctor's usual and customary fee, for each applicable service, provided by the doctor during a preceding period of up to 12 months ending no later than 2 months before the information must be reported, provided that such information is requested uniformly from all panel doctors within a meaningful geographic area comprising zip codes;

(B) Defendant may calculate the fees that it pays to a VSP panel doctor for services rendered to VSP patients based on the panel doctor's usual and customary fees, provided that Defendant employs a uniform method of calculation at least within each meaningful geographic area, comprising zip codes, in which it does business;

(C) only for the purposes of verifying whether the information reported by a VSP panel doctor, pursuant to Section V(A), is accurate or of investigating a VSP panel doctor's suspected excessive billing to VSP, upon reasonable belief that

the reported fees may be inaccurate or excessive, and subject to the reasonable convenience of the VSP panel doctor, Defendant may audit the VSP panel doctor's charges to patients;

(D) consistently with Sections IV(C) and (D), Defendant may devise and utilize a fee system for doctors who apply for VSP panel membership after the date of this Final Judgment that is different from the system used to compensate current panel doctors, and that system may be based on the average fees VSP pays in a meaningful geographic area comprising zip codes;

(E) consistently with Sections IV(C) and (D), Defendant may elect to maintain current fees for panel doctors at their existing levels and may base any future fee increases on the Consumer Price Index, VSP's own financial growth, or any other meaningful economic indicator;

(F) consistently with Sections IV(C) and (D), Defendant may impose penalties on panel doctors who have misrepresented their usual and customary fees; and

(G) when acting as an agent of the Medicare program or any state Medicaid program, Defendant may administer the payment methodologies employed by such programs, provided that any fee information, that VSP is required to collect from its panel doctors in administering any such payment methodology, is not considered by VSP in determining the fees that it pays its panel doctors for services rendered to patients not covered by these programs.

VI.

NULLIFICATION

The Most Favored Nation Clause shall be null and void and Defendant shall impose no further obligation arising from it on any VSP panel doctor. Within 60 days of entry of this Final Judgment, Defendant shall disseminate to each present VSP panel doctor an addendum to the Panel Doctor's Agreement, nullifying the Most Favored Nation Clause, and Defendant shall eliminate the Most Favored Nation Clause from all Panel Doctor's Agreements entered into after entry of this Final Judgment.

VII.

COMPLIANCE MEASURES

The Defendant shall:

(A) distribute, within 60 days of the entry of this Final Judgment, a copy of this Final Judgment to: (1) all VSP officers and directors; (2) VSP employees who have any responsibility for approving, disapproving, monitoring, recommending, or implementing any provisions in agreements with VSP panel doctors; and (3) all present VSP panel doctors and all former VSP panel doctors whom VSP should reasonably know have resigned because of the Most Favored Nation Clause;

(B) distribute in a timely manner a copy of this Final Judgment to any officer, director, or employee who succeeds to a position described in Section VII(A)(1) or (2);

(C) obtain from each present or future officer, director, or employee designated in Section VII(A)(1) or (2), within 60

days of entry of this Final Judgment or of the person's succession to a designated position, a written certification that he or she: (1) has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

(D) maintain a record of persons to whom the Final Judgment has been distributed and from whom, pursuant to Section VII(C), the certification has been obtained;

(E) The Defendant shall notify all former VSP panel doctors whom it should reasonably know have resigned because of the Most Favored Nation Clause, that they are reinstated, on terms and conditions that VSP may establish consistently with this Final Judgment, unless they do not desire reinstatement; and

(F) report to the Plaintiff any violation of the Final Judgment.

VIII.

CERTIFICATION

(A) Within 75 days of the entry of this Final Judgment, the Defendant shall certify to the Plaintiff whether it has:

- (1) disseminated contractual addenda pursuant to Section VI,
- (2) distributed the Final Judgment in accordance with Section VII(A), and (3) obtained certifications in accordance with Section VII(C).

(B) For five years after the entry of this Final Judgment, on or before its anniversary date, the Defendant shall file with the Plaintiff an annual Declaration as to the fact and manner of its compliance with the provisions of Sections IV, V, VI, and VII.

IX.

PLAINTIFF'S ACCESS

(A) To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Plaintiff, upon written request of the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to the Defendant made to its principal office, shall be permitted, subject to any legally recognized privilege:

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

(2) subject to the reasonable convenience of the Defendant and without restraint or interference from it, to interview officers, employees or agents of the Defendant, who may have Defendant's counsel and/or their own counsel present, regarding such matters.

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

(C) No information or documents obtained by the means provided in Section IX shall be divulged by the 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, 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 the Defendant to Plaintiff, the 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 the 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 the Defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which the Defendant is not a party.

X.

FURTHER ELEMENTS OF THE FINAL JUDGMENT

(A) This Final Judgment shall expire five years from the date of its entry.

(B) Jurisdiction is retained by this Court for the purpose of enabling either of the parties 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.

(C) Entry of this Final Judgment is in the public interest.

DATED: 4/12/96


UNITED STATES DISTRICT JUDGE