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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VISION SERVICE PLAN,

Defendant.

Case No. 1:94CV02693

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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 submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On December 15, 1994, the United States filed a civil antitrust Complaint alleging that Vision Service Plan (VSP), in all or parts of many states in which VSP does business, entered into agreements with its panel doctors that unreasonably restrain competition by restraining discounting of fees for vision care services in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint seeks injunctive relief to enjoin continuance of the violation.

Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction over the matter for further proceedings that may be required to interpret,

enforce or modify the Judgment or to punish violations of any of its provisions.

II.

PRACTICES GIVING RISE TO THE ALLEGED VIOLATION

Defendant VSP is a California not-for-profit corporation headquartered in Rancho Cordova, California. It controls the operations of vision care insurance plans, operated under the name of Vision Service Plan, in 46 states and the District of Columbia. VSP contracts with businesses, government agencies, health care insurers, and other organizations to provide pre-paid vision care coverage to their employees or beneficiaries. In 1994, VSP plans covered about 15 million persons; VSP revenues in 1994 totalled about \$650 million.

VSP contracts directly with doctors--primarily optometrists but also with a relatively small number of ophthalmologists--in private practice, whom it refers to as panel doctors, to provide vision care services--consisting essentially of diagnostic and dispensing services and optical materials, such as corrective lenses and frames--to patients covered by VSP plans. VSP's agreements with its panel doctors (termed the Panel Doctor's Agreement) require its panel doctors to report to VSP periodically a listing of the doctor's usual and customary fees charged to non-VSP patients. VSP typically has paid panel doctors fees that are derived from those usual and customary

fees, subject to a discount and area-specific fee caps that VSP imposes.

During 1994, VSP contracted with about 17,000 panel doctors. In all or parts of many states in which VSP does business, it contracts with a high percentage of an area's optometrists. For example, in 1993, VSP reported that 98% of all optometrists licensed in Nevada were VSP panel doctors. In California, VSP contracts with approximately 4,000 panel doctors, constituting about 90% of California optometrists in independent private practice. Moreover, in all or parts of many states, VSP's payments to optometrists constitute a significant part of their professional income. In California, for example, VSP plans cover over 5.7 million members accounting for total annual revenue of approximately \$200 million.

Against this background, Defendant VSP's Panel Doctor's Agreement contains a so-called fee non-discrimination clause, which is similar, in substance, to clauses commonly characterized in the health care industry as most favored nation (MFN) clauses. VSP's MFN clause requires that each panel doctor charge VSP no more than the lowest price that the doctor charges any non-VSP patient or any other vision care group or insurance plan. Accordingly, if a VSP panel doctor wishes to reduce the fees that the doctor charges to any non-VSP plan or patient below the amounts that VSP pays the doctor, the MFN requires the doctor to reduce to that same level the fees the doctor charges to VSP.

For the reasons described below, however, VSP's MFN clause has actually caused many doctors not to reduce their fees to VSP, but instead to charge other vision care insurance plans and non-VSP patients fees that are at least as high as those paid to the doctor by VSP.

The Complaint alleges that, beginning at a time unknown to Plaintiff and continuing through at least November, 1994, in all or parts of many states in which VSP does business, VSP entered into agreements with its panel doctors that had the effect of unreasonably restraining optometrists' discounting of fees for vision care services to vision care insurance plans competing with VSP or to other purchasers of vision care services, in violation of Section 1 of the Sherman Act. The Complaint alleges that, for the purpose of forming and effectuating these agreements, 1) VSP required its panel doctors to agree to the MFN clause in VSP's Panel Doctor's Agreement, which had the effect of restricting the willingness of its panel doctors to discount fees for vision care services and substantially reducing discounted fees for vision care services; 2) VSP enforced the MFN clause; and 3) VSP coerced many panel doctors into dropping out of, or charging higher fees to, vision care insurance plans that compete with VSP.

The Complaint further alleges that, in all or parts of many states, the challenged agreements have had the effect of 1) unreasonably restraining price competition among vision care

insurance plans because many competing vision care insurance plans have been unable to obtain or retain a sufficient number of optometrists to provide services to their members at competitive prices because panel doctors have withdrawn from, refused to participate in, or insisted on higher fees from vision care insurance plans that seek to pay them less than the Defendant; and 2) raising prices for the provision of vision care services to non-VSP patients and plans in competition with VSP because, as a result of the MFN, many VSP panel doctors have opted not to discount their fees to competing vision care insurance plans or to uninsured patients.

VSP's adoption and enforcement of the MFN in its Panel Doctor's Agreement has reduced the willingness of many optometrists to discount their fees for the following reasons. Since many VSP panel doctors in all or parts of many states receive a significant portion of their professional income from treating VSP patients, they have found that discounting their fees below VSP payments to non-VSP patients or competing vision care programs, and consequently reducing their income from VSP by virtue of the MFN clause, is unprofitable. For the same reason, VSP panel doctors are unwilling to drop their participation in VSP to avoid the MFN and be able to discount their fees to competing discount vision care plans.

In a number of reported situations, optometrists had reduced their fees in a range of 20-40% below their usual fees to

participate in vision care insurance plans competing with VSP. Subsequently, fearing VSP's enforcement of the MFN clause, however, many VSP panel doctors resigned from such competing plans or insisted that the plans pay them fees that are at least as high as VSP's to avoid having to lower their fees charged to VSP. Consequently, VSP's MFN clause has substantially restrained both discounting arrangements that were already in place and potential discounting that otherwise would have occurred but for the MFN. Thus, VSP's MFN clause has severely hampered competing vision care insurance plans' efforts to attract or retain, at competitive prices, a sufficient, geographically dispersed panel of qualified optometrists to make their plans commercially marketable.

In all or parts of many states, VSP's MFN clause has effectively deprived vision care consumers of the benefits of free and open competition. VSP's MFN clause has deprived uninsured patients of price competition among optometrists who--because of the MFN clause--are unwilling to discount their fees below VSP levels. VSP's MFN clause has also reduced purchasers' opportunities to choose among competing vision care insurance plans offering different combinations of optometrists and prices. This reduction in the scope of vision care coverage alternatives, such as managed care and other discount plans, has substantially reduced the cost savings to consumers that such competing plans could provide if they were able to contract for optometrists'

services at fees below VSP levels. Indeed, claims data suggest generally that average claims, based on panel doctor's usual charges, filed with VSP for services rendered in all or parts of many states where VSP contracts with a substantial percentage of optometrists in private practice and does a substantial amount of business range between \$95-110, compared to \$70-80 in some other areas where VSP has less of a market presence.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The Plaintiff and VSP 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 concerning any issue of fact or law.

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 X(C) of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is intended to ensure that VSP eliminates its MFN clause and stops all similar practices that unreasonably restrain competition among optometrists and vision care insurance plans.

A. Scope of the Proposed Final Judgment

Section III (A) of the proposed Final Judgment provides that the Final Judgment shall apply to VSP 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 shall have received actual notice of the Final Judgment by personal service or otherwise. Section III(B) of the proposed Final Judgment limits application of the Judgment to VSP's MFN clause, as defined in Section II(C) of the Judgment, but to no other clause in the VSP Panel Doctor's Agreement, VSP policy, or VSP practice.

In the Stipulation to the proposed Final Judgment, VSP has agreed to be bound by the provisions of the proposed Final Judgment, pending its approval by the Court. VSP has also agreed to send, within 15 days of the filing of the proposed Final Judgment, a copy of the attached letter, which has been approved by the Antitrust Division, to every VSP panel doctor participating at any time since January 1, 1993.

B. Prohibitions and Obligations

Under Section IV(A) of the proposed Final Judgment, VSP is enjoined and restrained for a period of five years from maintaining, adopting, or enforcing an MFN clause in any VSP Panel Doctor's Agreement, or in its corporate by-laws, policies, rules, regulations, or by any other means or methods.

Subject to activities permitted in Section V of the proposed Final Judgment, other provisions of the Final Judgment seek to ensure that the MFN clause's anticompetitive effects cannot be achieved in other ways. Specifically, Section IV(B) enjoins VSP from 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; Section IV(C) enjoins VSP from 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; Section IV(D) enjoins VSP from 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; Section IV(E) enjoins VSP from monitoring or auditing the fees any VSP panel doctor charges to any non-VSP patient or any non-VSP plan; and Section IV(F) enjoins VSP from 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.

Section V of the Proposed Final Judgment describes several activities that VSP may elect to undertake in calculating the payments it makes in the future to its panel doctors that, if carried out consistently with the restrictions of Section V and

applicable injunctive provisions contained in Section IV, will not constitute a violation of the Judgment. Essentially, the restrictions of Section V seek to ensure that VSP does not discriminate against VSP panel doctors who choose to discount fees to non-VSP insurance plans or to uninsured patients, with the effect of discouraging such discounting. Section V(A) allows VSP to request annually sufficient information to enable VSP to calculate either a doctor's modal fee (the doctor's most frequently charged fee) or median fee (the fee above and below which the doctor charges other fees an equal number of times) for each service provided by all VSP panel doctors in a meaningful geographic area specified by zip codes; Section V(C) allows VSP to verify, through reasonable audit procedures, the information provided to it by its panel doctors pursuant to Section V(A) and to check into any reasonable suspicions VSP might have of excessive billings by panel doctors; and under Section V(F), VSP may impose penalties in a nondiscriminatory manner on panel doctors for billing misrepresentations.

Section V(D) permits VSP, if it chooses, to devise and use a new fee system for doctors who become VSP panel doctors after the entry of the Judgment, based on the average fees that VSP pays its existing panel doctors within a meaningful area specified by zip codes. Under Section V(E), VSP also may elect to maintain its current fee levels for its current panel doctors and base any

future fee increases on the Consumer Price Index, VSP's own financial growth or any other meaningful economic indicator.

Section VI of the Final Judgment declares that VSP's MFN clause, or any future clause, policy or practice having the same purpose or effect, null and void.

Section VII of the Final Judgment sets forth several compliance measures that VSP must fulfill. Section VII(A) requires that, within 60 days of entry of the Final Judgment, VSP provide a copy of the Final Judgment to all VSP officers and directors, VSP employees having responsibility for VSP Panel Doctor Agreements, and all present VSP panel doctors or former panel doctors whom VSP reasonably believes resigned from the VSP plan because of the MFN. Sections VII(B), (C) and (D) require VSP to provide a copy of the Final Judgment to future officers, directors and employees having responsibility for VSP Panel Doctor Agreements and to obtain and maintain records of such persons' written certifications that they have read, understand and will abide by the terms of the Final Judgment. Section VII(E) requires VSP to notify all former VSP panel doctors whom VSP reasonably believes resigned from a VSP plan because of the MFN and to reinstate them as panel doctors if they so desire; Section VII(F) obligates VSP to report to Plaintiff any violation of the Final Judgment.

The Final Judgment also contains provisions, in Section VIII, obligating VSP to certify its compliance with specified

obligations of Sections IV, V, VI and VII of the Final Judgment. In addition, Section IX of the Final Judgment sets forth a series of measures by which the Plaintiff may have access to information needed to determine or secure VSP's compliance with the Final Judgment.

C. Effect of the Proposed Final Judgment on Competition

By eliminating the MFN clause, the relief ordered by the proposed Final Judgment will enjoin and eliminate a substantial restraint on price competition between VSP and other vision care insurance plans and among optometrists, in all or parts of many states. It will do so by eliminating the disincentives created by the MFN clause that inhibit optometrists' willingness to discount their fees and to join non-VSP plans offering payments below VSP levels. The Judgment also prevents VSP from taking any other action to dissuade or discourage optometrists from discounting or participating in competing vision care insurance plans. Consequently, non-VSP plans' efforts to attract and maintain viable panels of optometrists to serve their members will no longer be hampered.

On the other hand, VSP will be able to compete on the same terms with other vision care insurance plans because it will not be restricted from seeking and obtaining lower fees through activities permitted in Section V of the Judgment or by other means, such as a fee schedule--an approach used by other vision care insurance plans--that are unlikely to have anticompetitive

effects. Though Section V does not allow VSP routinely to base its payments on the lowest fee charged by its panel doctors to any non-VSP plan or patient--as VSP has done through its MFN clause--Section V does permit VSP to base its payments to panel doctors on their median or modal fees charged to non-VSP plans and patients, two measures of usual and customary fees that are not linked directly to the lowest fee charged.

In view of the substantial percentage of vision care patients who are not covered by a vision care insurance plan, a VSP panel doctor's median or modal fee is not likely to be the lowest fee charged by the doctor to any non-VSP plan or patient. Thus, VSP's possible use of median or modal fees, to set payments to panel doctors, is unlikely to create disincentives to discount. The activities that Section V permits VSP to engage in are unlikely, therefore, to replicate the effects of VSP's MFN clause or consequently to perpetuate the competitive concerns raised by the MFN clause.

The proposed Final Judgment's elimination of VSP's MFN clause will restore to vision care insurance plans and consumers, in all or parts of many states, the benefits of free and open competition. Consequently, vision care insurance plans should be able to achieve cost savings that they can pass on to consumers, and consumers should have access to a more competitive selection of vision care insurance alternatives and optometrists.

IV.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment would be a full trial on the merits of the case. In the view of the Department of Justice, such a trial would involve substantial costs to both the United States and VSP and is not warranted because the proposed Final Judgment provides all of the relief that appears necessary to remedy the violations of the Sherman Act alleged in the 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 by the Antitrust Procedures and Penalties Act, any person believing that the proposed Judgment should be modified may submit written comments to Gail Kursh, Chief; Professions & Intellectual Property Section; Department of Justice; Antitrust Division; 600 E Street, N.W.; Room 9300; Washington, D.C. 20530, within the 60-day period provided by the Act. Comments received, and the Government'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 Paragraph 2 of the Stipulation, to withdraw its consent to the proposed Final Judgment at any time before its entry if the Department should determine that some modification of the Judgment is necessary to the public interest. The proposed Judgment itself 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: JAN 13 1995

Respectfully submitted,

Steven Kramer

Steven Kramer

Richard S. Martin

Richard S. Martin
Attorneys
Antitrust Division
U.S. Dept. of Justice
600 E Street, N.W.
Room 9420
Washington, D.C. 20530
(202) 307-0997

Attachment



VISION SERVICE PLAN

December 14, 1994

3333 QUALITY DRIVE
RANCHO CORDOVA, CA 95670-7985
(916) 851-5000 (800) 852-7600
Telefax (916) 851-4855

Dear VSP Doctor:

VSP has entered into an agreement with the United States Department of Justice which will require VSP to eliminate its fee non-discrimination (FND) policy. This is the policy which is sometimes called a most favored nations clause and prohibits a member doctor from charging VSP more for services than the doctor accepts from any other source for the same services. As you know, VSP has always contended it has consistently enforced the fee non-discrimination policy to ensure our groups are provided the most cost effective services that may be obtained from VSP member doctors. Without cost effectiveness, the groups have little incentive to buy from Vision Service Plan.

Effective immediately, VSP will no longer reduce a doctor's fee because that doctor accepts a lower fee for the same service from another source and, your Panel Doctor's Agreement with Vision Service Plan is amended to eliminate Paragraph 6. Please keep this letter with your VSP agreement and consider it as an addendum. The Justice Department has agreed that existing fees may stay at their current levels until a new fee payment mechanism can be put in place. In the future, VSP's payments will be based on the range of fees the doctor accepts, rather than the lowest fee.

We have agreed to eliminate the FND policy to avoid long and expensive litigation with the United States Department of Justice. We feel our resources need to be maintained to support our mission of providing our member doctors with more VSP patients and providing the best vision care in the nation. The vision care market is changing rapidly. Institutions like insurance companies, HMOs, Medicaid and the government in general are having a tremendous effect on health care and its costs. VSP is striving, more than any other organization, to look out for the interests of our member doctors and their patients. VSP is, and will continue to be, the best source of patients for our member doctors.

This policy change may have significant impact on some VSP member doctors. We will need to develop new fee-setting systems which will make VSP more competitive but are not based on the lowest fee which a doctor accepts.

We will be in further communication with you when a new fee system has been established. Our Board is confident we will be able to devise a system which will meet your needs and meet VSP's competitive needs for the future while satisfying the Justice Department's guidelines.

Thank you for your patience, understanding and continued support of VSP.

Denis Humphreys
Denis Humphreys, O.D.
Chairman of the Board

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No.
)	
vs.)	
)	
VISION SERVICE PLAN)	
)	
Defendant.)	
_____)	

CERTIFICATE OF SERVICE

I certify that I caused a copy of the United States' Competitive Impact Statement to be served on January 13, 1995, by Federal Express to:

Barclay L. Westerfeld
General Counsel
Vision Service Plan
3333 Quality Drive
Rancho Cordova, California 95670

and by courier to:

John J. Miles
Ober, Kaler, Grimes & Shriver
1401 H Street, N.W.
Fifth Floor
Washington, D.C. 20005-2110

DATED: JAN 13 1995

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