



## DEPARTMENT OF JUSTICE

Antitrust Division

**JOEL I. KLEIN**

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June 10, 1997

Diane Fisher, Esquire  
920 Lomas N.W.  
Albuquerque, New Mexico 87102

Dear Ms. Fisher:

This letter responds to your request, pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6, for a statement of the Department's enforcement intentions with respect to the formation of Southwest Orthopedic Specialists ("SOS"). SOS is a proposed physician network joint venture consisting of orthopedists and other related specialists serving the state of New Mexico. Based upon the representations in your letter, and subsequent information you provided, the Department has no present intention to take enforcement action against SOS if it is implemented as proposed.

As we understand from the information you submitted, SOS will be a not-for-profit, taxable corporation under the laws of New Mexico, with its principal place of business in Albuquerque. Members will be specialists in orthopedics and related fields who have been credentialed by SOS. The initial 10 members of the venture will be physicians specializing in orthopedics; each will pay an initial application fee of \$2,000 and annual fees thereafter as determined by the Board of Directors. After SOS is formed, it intends to recruit additional physician members to provide adequate access for beneficiaries of contracting health care plans. However, the total number of providers will never exceed 30% of the orthopedic specialists in any relevant geographic market.

SOS will market specialty physician services in the field of orthopedics to health benefit plans (HMOs, other health insurance carriers, large self-insured employers, and multi-physician primary care organizations) serving primarily New Mexico. SOS will also offer local businesses and employers the opportunity to access

"bundled" sets of medical and surgical services under a simplified and unified bill. SOS will negotiate and enter into contracts with these plans and organizations to provide all of its services on a regional and statewide basis.

SOS members will integrate and share financial risk by offering their services through SOS on either a capitated payment basis or a discounted fee-for-service basis with a risk pool withhold of 15%, to be distributed back to members only if the network as a whole meets efficiency and quality parameters established by SOS.

The network will employ safeguards to avoid the sharing of price information. SOS will hire independent health care consultants to gather and prepare information relating to utilization, quality standards, cost of purchased services, fees, charges, and clinical outcomes. The consultants will use this information to create a data base, prepare a statistical analysis and develop a proposed fee structure and minimum acceptable contract terms. If the SOS Board of Directors approves the proposed fee schedule and other contract terms, SOS will be authorized to enter into contracts that meet those requirements and bind its member physicians to those terms. No participating physician, including board members, will have access to any other member's fees, pricing or volume information, or any other individual physician's information collected by the consultants. In addition, SOS members will be expressly prohibited from disclosing any information regarding usual and customary charges or the charges he or she has agreed to accept under any other managed care arrangement to any other SOS physician.

SOS will develop utilization review, quality assurance standards, practice parameters, and other practice management information to assist member physicians in understanding and modifying, as appropriate, the manner and method of delivering service to assure quality, efficiency and cost-effectiveness. SOS will also develop training programs for referring primary care physicians.

The network may enter into contracts for group purchasing of medical supplies and equipment in order to facilitate the delivery of less costly health care services.

Orthopedic specialists will participate in SOS on a non-exclusive basis. Members will be able to affiliate and contract directly with competing networks, PHOs, HMOs, and other third party plans.

You contend that SOS's principal service delivery area would be the greater Albuquerque area. However, since Albuquerque is the only true tertiary service center in New Mexico, physician members of SOS actually serve a statewide population. SOS will initially include about 16% of the approximately 62 orthopedic specialists in the

Albuquerque metropolitan area. SOS believes that its market share is further diluted by the presence of other types of physicians, such as surgeons, podiatrists, neurologists, and family practitioners, who perform many of the same procedures as orthopedists, and also by other affiliated providers such as chiropractors and sports medicine therapists.

Your letter also notes that there is a dominant orthopedic group in Albuquerque consisting of 14 orthopedists and one sports medicine/family practice specialist. SOS believes that this group holds or manages contracts that control a significant percentage of managed care enrollees in the primary and secondary service areas. Thus, SOS views itself as a new option for managed care plans seeking group coverage for orthopedic services in Albuquerque and New Mexico.

### **Antitrust Analysis**

SOS appears to be a *bona fide* joint venture in which members share significant financial risk. SOS's current membership does not exceed 30% of the orthopedic specialists in Albuquerque, or in any other geographic area that reasonably might be defined as a relevant market. SOS has represented that future membership in any appropriately defined geographic market will not exceed this 30% threshold. The network's structure is non-exclusive. Its members participate in other provider panels and individual managed care contracts, and SOS anticipates that this participation will continue. These facts place SOS within the safety zone for non-exclusive physician network joint ventures described in the joint U.S. Department of Justice/Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, August 1996, at Statement 8. It appears that no extraordinary circumstances require an exception to the safety zone.

Therefore, the Department has no present intention of taking enforcement action against SOS if it is implemented as proposed. In accordance with our normal practice, however, the Department remains free to bring an enforcement action in the future should the operation of the network prove anticompetitive in purpose or effect.

Diane Fisher, Esquire  
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This statement is made in accordance with the Department's Business Review Procedures, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made available to the public immediately. Your supporting documents will be publicly available within 30 days of the date of this letter unless you request that any part of the material be withheld in accordance with paragraph 10(c) of the Business Review Procedure.

Sincerely,

Joel I. Klein