

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

<p style="text-align: center;">In the Matter of</p> <p>NORTH TEXAS</p> <p>SPECIALTY PHYSICIANS,</p> <p style="text-align: center;">a corporation.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 9312</p>
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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that North Texas Specialty Physicians has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

RESPONDENT

PARAGRAPH 1: Respondent North Texas Specialty Physicians (hereinafter “NTSP”) is a non-profit corporation, organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal place of business at 1701 River Run Road, Suite 210, Fort Worth, Texas 76107.

JURISDICTION

PARAGRAPH 2: NTSP was formed by physicians to facilitate the physicians’ contracting with health insurance firms and other third-party payors (collectively, “payors”) for the provision of medical services. At all times relevant to this Complaint, participating physicians of NTSP have been engaged in the business of providing medical care for a fee. Except to the extent that

competition has been restrained as alleged herein, participating physicians of NTSP have been, and are now, in competition with each other for the provision of physician services.

PARAGRAPH 3: While NTSP is a memberless corporation under state law, it was founded by, is controlled by, and carries on business for the pecuniary benefit of its participating physicians. Accordingly, the participating physicians are “members” of NTSP, and NTSP therefore is a “corporation,” as those terms are used in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH 4: The general business practices of NTSP, including the acts and practices herein alleged, are in or affecting “commerce” as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

PARAGRAPH 5: NTSP has approximately 600 participating physicians licensed to practice medicine in the State of Texas who are engaged in the business of providing professional services to patients in the Dallas-Fort Worth metropolitan area, mostly in Fort Worth and the “Mid Cities” (collectively, the “Fort Worth area”).

PARAGRAPH 6: Physicians often contract with payors to establish the terms and conditions, including price terms, under which such physicians will render services to the payors’ subscribers. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payors’ relationship with insureds. These contracts may reduce payors’ costs, enable them to lower the price of insurance, and reduce out-of-pocket medical expenditures by subscribers to the payors’ health insurance plans.

PARAGRAPH 7: Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by payors, competing physicians decide individually whether to enter into contracts with payors to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

PARAGRAPH 8: Medicare’s Resource Based Relative Value Scale (“RBRVS”) is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, it is the practice of payors in the Fort Worth area to make contract offers to individual physicians or groups at a fee level specified in the RBRVS, plus a markup based on some percentage of that fee (*e.g.*, “110% of 2001 Tarrant County RBRVS”).

PARAGRAPH 9: To be competitively marketable in the Fort Worth area, a payor's health insurance plan must include in its physician network a large number of primary care physicians and specialists who practice in the Fort Worth area. Many of the primary care physicians and specialists who practice in the Fort Worth area are participating physicians of NTSP.

PARAGRAPH 10: Competing physicians sometimes use a "messenger" to facilitate the establishment of contracts between themselves and payors in ways that do not constitute or facilitate an unlawful agreement on fees and other competitively significant terms. Such an arrangement, however, will not avoid horizontal agreement if the "messenger" or another agent negotiates fees and other competitively significant terms on behalf of the participating physicians, or facilitates the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the agent's, or the participants', opinion on the appropriateness, or lack thereof, of the offer.

RESTRAINT OF TRADE

PARAGRAPH 11: NTSP's participating physicians, including the members of its Board of Directors, constitute numerous discrete economic interests. The conduct of NTSP constitutes combined or concerted action by its participating physicians.

PARAGRAPH 12: NTSP, acting as a combination of competing physicians, and in combination with physicians and other physician organizations, has restrained competition among its participating physicians by, among other things:

- A. facilitating, negotiating, entering into, and implementing agreements among its participating physicians on price and other competitively significant terms;
- B. refusing or threatening to refuse to deal with payors except on collectively agreed-upon terms; and
- C. negotiating fees and other competitively significant terms in payor contracts for NTSP's participating physicians, and refusing to submit payor offers to participating physicians unless and until price and other competitively significant terms conforming to NTSP's contract standards have been negotiated.

FORMATION AND OPERATION OF NTSP

PARAGRAPH 13: NTSP was organized in November 1995 as a nonprofit corporation. Its initial Board of Directors, composed of three participating physicians, was established in NTSP's Certificate of Incorporation. Pursuant to NTSP's By-Laws, successor Board members are elected from among the participating physicians for three-year terms by the members of each of NTSP's sections, which are organized by medical specialty. NTSP is funded through fees paid by physicians on first becoming participating physicians and through its receipt, pursuant to its physician participation agreements, of a stated percentage of the fees paid by payors to

participating physicians pursuant to certain NTSP-payor contracts. NTSP presently is composed of approximately 600 physicians, some 130 of whom are primary care physicians.

PARAGRAPH 14: Pursuant to a few of NTSP’s contracts with payors, some of the NTSP physicians who participate in the arrangement share financial risk, for example, through the provision of services at an agreed capitated rate. However, pursuant to the great majority of NTSP’s contracts with payors, those NTSP physicians who participate in the arrangement do not share any financial risk, each physician typically receiving a specified fee for each service provided. Whereas only about one-half of NTSP’s participating physicians—and few if any primary care providers—participate in any risk-sharing arrangements, substantially all of NTSP’s participating physicians participate in some non-risk contracts. With respect to these non-risk contracts, NTSP often has sought to negotiate for, and often has obtained, higher fees and other more advantageous terms than its individual physicians could obtain by negotiating individually with payors.

PARAGRAPH 15: Physicians seeking to participate in NTSP-payor contracts apply for participating physicianship. A physician becomes a participating physician by entering into a “North Texas Specialty Physicians Physician Participation Agreement” with NTSP, granting to NTSP authority to arrange for his or her services to be provided to persons covered by payors pursuant to agreements between NTSP and the payors. Each physician covenants that he or she will forward to NTSP for further handling payor offers the physician receives, and will refrain from pursuing any such offer until NTSP notifies the physician that it is permanently discontinuing negotiations with the payor. If, and only if, NTSP approves and enters into an agreement with a payor, NTSP then forwards the agreement to its participating physicians, who then may elect to participate (or not) in the payor’s offer.

NTSP’S ILLEGAL ACTS AND PRACTICES

PARAGRAPH 16: NTSP has engaged in various acts and practices, as more fully described subsequently, that unlawfully restrain competition among NTSP’s participating physicians. NTSP has undertaken these acts and practices with the knowledge of its Directors and other participating physicians, and often at their explicit instruction.

PARAGRAPH 17: NTSP periodically polls its participating physicians, asking each to disclose the minimum fee, typically stated in terms of a percentage of RBRVS, that he or she would accept in return for the provision of medical services pursuant to an NTSP-payor agreement. In conformity with its agreement with its participating physicians, NTSP then calculates the mean, median, and mode (“averages”) of minimum acceptable fees reported by its physicians. NTSP then reports these measures back to its participating physicians, confirming to the participating physicians that these averages will constitute the minimum fees that NTSP will entertain as the basis of any contract with a payor. Such interchanges of prospective price information among otherwise competing physicians reduce price competition among those physicians, and enable the participating physicians, acting through NTSP and otherwise, to price their services interdependently to achieve supra-competitive prices.

PARAGRAPH 18: Sometimes when NTSP begins discussions with a payor regarding a possible contract for the provision of services by NTSP's participating physicians, NTSP informs the payor that its physicians have established fee minimums for NTSP-payor agreements, identifies those fee minimums (the poll averages referred to in the preceding Paragraph), and states that NTSP will not enter into or otherwise forward to its participating physicians any payor offer that does not satisfy those fee minimums.

PARAGRAPH 19: In other instances, payors have proposed to NTSP agreements, or amendments to existing agreements, for the services of its participating physicians that included proposed fee schedules that did not satisfy the NTSP physicians' fee minimums. NTSP has then advised the payors of NTSP's established fee minimums and told the payors to resubmit their proposals with fee schedules that satisfy those minimums, or otherwise actively bargained with payors as to fees to be paid NTSP's participating physicians. As a result, payors sometimes have either submitted new offers with higher fees or accepted the higher fees pressed on them by NTSP on behalf of its physicians.

PARAGRAPH 20: In at least one instance, NTSP, at the explicit dictate of its Directors, sought instruction from its participating physicians as to the disposition of a payor offer that already had been made. NTSP wrote to its participating physicians, reminding them of their previously agreed-to minimums and noting that the specified payor's offer approximated those minimums as to some of its medical insurance plans, but fell materially below those minimums as to other plans. NTSP then asked each of its participating physicians to respond to a poll by indicating the minimum fees, again typically stated in terms of a percentage of RBRVS, that he or she would accept in return for the provision of medical services to the specific payor's subscribers. When NTSP calculated the average minimum fees that its participating physicians would accept to contract with that payor, it found that the participating physicians collectively would not accept fees lower than the previously established minimums. It then rejected the payor's offer and explicitly refused to forward the offer to any of its participating physicians, whether or not the proposed fees were above any given physicians' stated minimum acceptable fees. Following refusals by NTSP to forward the proposed contract to its participating physicians and several communications between NTSP and its participating physicians attacking the payor's fee proposal as "below market," the payor increased its proposed fees to the NTSP fee minimums. Only then did NTSP enter into a contract with the payor and forward the agreement to its participating physicians, affording them the option to participate (or not) in the payor's offer.

PARAGRAPH 21: In addition, while seeking to negotiate fees on behalf of its participating physicians, NTSP has discouraged and prevented payors and participating physicians from negotiating directly with one another. In at least one instance, after NTSP fee negotiations with a payor broke down, NTSP orchestrated the simultaneous withdrawal of NTSP physicians from an arrangement pursuant to which numerous NTSP participating physicians had provided medical services to the payor's subscribers through another physician organization with which NTSP had contracted. This increased the pressure on the payor to contract for the services of NTSP's participating physicians through NTSP, at higher proposed fees. The payor ultimately yielded to that pressure and contracted with NTSP and its physicians at increased fee levels.

LACK OF SIGNIFICANT EFFICIENCIES

PARAGRAPH 22: The acts and practices described in Paragraphs 16 through 21, including NTSP's negotiation of fees and other competitively significant terms of contracts under which each physician is paid on a fee-for-service basis, have not been, and are not, reasonably related to any efficiency-enhancing integration. With respect to these contracts, NTSP's participating physicians do not share substantial financial risk and are not otherwise integrated in ways that would create the potential for increased quality and reduced cost of medical care that the physicians provide to patients.

ANTICOMPETITIVE EFFECTS

PARAGRAPH 23: NTSP's acts and practices as described herein have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Fort Worth area in the following ways, among others:

- A. price and other forms of competition among NTSP's participating physicians were unreasonably restrained;
- B. prices for physician services were increased; and
- C. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

PARAGRAPH 24: The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

NOTICE

Notice is hereby given to the Respondent that the sixteenth day of January, 2004, at 10:00 a.m. o'clock, or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D. C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this Complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an Order should not be entered requiring you to cease and desist from the violations of law charged in this Complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this Complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the Complaint are contested shall contain a concise statement

of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the Complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the Complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the Complaint, and together with the Complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate Order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions under Section 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under Section 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the Complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the Complaint and to enter an initial decision containing such findings, appropriate conclusions, and Order.

The Administrative Law Judge will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by the Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D. C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that Respondent North Texas Specialty Physicians (“NTSP”) is in violation of Section 5 of the Federal Trade Commission Act as alleged in the Complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An Order to cease and desist from entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians: (a) to negotiate on behalf of any physician with any payor; (b) to deal, refuse to deal, or threaten to refuse to deal with any payor; (c) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (d) not to deal individually with any payor, or not to deal with any payor through any arrangement other than NTSP.
2. An Order to cease and desist from exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician’s willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal.
3. An Order to cease and desist from attempting to engage in any action prohibited by Paragraphs 1 or 2, above.
4. An Order to cease and desist from encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs 1-3, above.
5. A requirement that, for a period of five (5) years, NTSP notify the Commission prior to entering into any arrangement with any physicians under which NTSP would act as a messenger, or as an agent, on behalf of those physicians.
6. An Order requiring NTSP to terminate, without penalty or charge, and in compliance with any applicable laws, any contract that it has entered into with any payor since January 1, 1998.
7. An Order to cease and desist from engaging in, attempting to engage in, or encouraging others to engage in illegal horizontal agreements with competitors.
8. Any other provision appropriate to correct or remedy the anticompetitive practices engaged in by NTSP.

9. A requirement that NTSP distribute a copy of the Order and Complaint, within thirty (30) days after the Order becomes final, to: (a) each physician who is participating, or has participated, in NTSP since January 1, 1998; (b) each officer, director, or manager, and each employee who has or had any responsibility regarding NTSP's physician networks; and (c) each payor that NTSP has contacted, or been contacted by, since January 1, 1998, regarding contracting for the provision of physician services.
10. A requirement that for five (5) years after the Order becomes final, NTSP distribute a copy of the Order and Complaint, within thirty (30) days of the event triggering this requirement, to: (a) each newly participating physician in NTSP; (b) each person who becomes an officer, director, or manager, or an employee who has any responsibility regarding NTSP's physician networks; and (c) each payor that NTSP contacts, or is contacted by, regarding contracting for the provision of physician services.
11. A requirement that for five (5) years after the Order becomes final, NTSP annually publish a copy of the Order and the Complaint in an official report or newsletter sent to all physicians who participate in NTSP, and on any website maintained by or for NTSP, with such prominence as is given to regularly featured articles.
12. Requirements that NTSP file periodic compliance reports with the Commission, notify the Commission of any changes that may affect compliance obligations, and permit Commission representatives prompt access to NTSP documents and personnel for the purpose of determining or securing compliance with this Order.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this sixteenth day of September, 2003, issues its Complaint against NTSP.

By the Commission.

Donald S. Clark
Secretary

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