

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

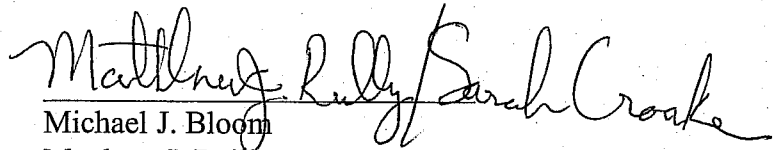
DOCKET NO. 9312

MOTION FOR LEAVE TO FILE MOTION *IN LIMINE* OUT OF TIME

Complaint Counsel requests leave to file the attached motion *in limine* on March 24, 2004, one day after the court-ordered cut-off for such motions. Complaint Counsel had filed this motion incorrectly with the Office of the Secretary on March 23, 2004. Because the motion *in limine* was marked "public" and the memorandum in support of the motion was marked "non-public," these documents should have been submitted as separate filings rather than submitted as a single filing. Also, Complaint Counsel did not provide the Office of the Secretary with an electronic version of the filing before the 5:00 PM March 23, 2004 deadline. As a result, the filing was not timely.

We request that the Court accept this motion *in limine* because it raises important evidentiary issues of concern. Moreover, there is no possibility that Respondent will suffer prejudice from Complaint Counsel's filing this motion one day late because this *identical* motion was served on Respondent on March 23, 2004, which was the court-ordered deadline for such motions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew J. Reilly / Sarah Crooke". The signature is written in a cursive style and is positioned above the typed names.

Michael J. Bloom
Matthew J. Reilly

Attorneys for Complaint Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004
(212) 607-2829
(212) 607-2822 (facsimile)

Dated: March 31, 2004

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

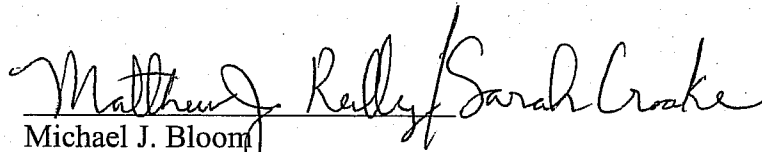
DOCKET NO. 9312

**COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE REPORT AND
TESTIMONY OF GAIL R. WILENSKY**

Respondent North Texas Specialty Physicians ("NTSP") has proffered Gail R. Wilensky to testify to the alleged efficiencies that NTSP achieves in its risk-sharing and non-risk sharing practices. Complaint Counsel respectfully submits this motion *in limine* to exclude the report and testimony of Dr. Wilensky.

As described more fully in the attached Memorandum in Support of this Motion, Dr. Wilensky's opinions are unreliable because she conducted no independent analysis and her opinions are based on insufficient data, unverified assumptions, and are little more than guesswork. Dr. Wilensky simply does not propose a method to evaluate whether efficiencies in NTSP's non-risk sharing practice exist, let alone provide any quantitative valuation of these efficiencies. Moreover, Dr. Wilensky's opinions are based on speculation regarding NTSP's future plans, which are wholly irrelevant to this matter. Because Dr. Wilensky's opinions are not based on any reliable principles or methods but rather on unsupported and conclusory opinions relating to uncertain future events which do not assist the court, her expert report and testimony should be excluded.

Respectfully submitted,


Michael J. Bloom
Matthew J. Reilly

Attorneys for Complaint Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004
(212) 607-2829
(212) 607-2822 (facsimile)

Dated: March 31, 2004

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

DOCKET NO. 9312

MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO PRECLUDE REPORT
AND TESTIMONY OF GAIL R. WILENSKY

Complaint Counsel moves *in limine* to bar in whole or in part Respondent North Texas Specialty Physicians (“NTSP”) from proffering testimony and making arguments at trial based upon the opinions of one of its experts, Gail R. Wilensky. Dr. Wilensky’s opinions have no factual basis, are inherently unreliable, and will not assist this Court’s review of the evidence. Thus, Dr. Wilensky’s opinion does not meet the standard set forth in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and Kumho Tire Co. V. Carmichael, 526 U.S. 137 (1999).

Your Honor should preclude NTSP from offering Dr. Wilensky’s testimony for a number of reasons. First, Dr. Wilensky’s opinions are unreliable because she conducted no independent analysis and her opinions are based on insufficient data and unverifiable assumptions. In essence, her opinions are impossible to test because they are not based on any science or methodology but instead are based upon her personal intuition and common sense. Second, her report and testimony will not help Your Honor to understand the evidence because her opinions are based on speculation regarding NTSP’s future plan to change one of its practices. Because Dr. Wilensky’s opinions are not based on any reliable principles or methods but rather on

unsupported and conclusory opinions relating to uncertain future events which do not assist the court, her expert report and testimony should be excluded.

ARGUMENT

I. Legal Standard

Although not strictly controlling in this proceeding, Rule 702 of the Federal Rules of Evidence and the case law applying it should inform this court's assessment of the admissibility of expert testimony in this proceeding. See In re Herbert R. Gibson, Jr., 1978 FTC LEXIS 375, at *2, n.1 (May 3, 1978) (Federal Rules of Evidence are "persuasive authority" in FTC adjudicative hearings). Rule 702 provides for the admissibility of expert testimony in federal court:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Under Rule 702, testimony is inadmissible unless it is likely to help the Court understand evidence or determine a fact at issue; and it is based on the special knowledge of the expert and is the product of reliable principles and methods. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-91 (1993); Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1211 (D.C. Cir. 1997); United States v. Jackson, 425 F.2d 574, 576 (D.C. Cir. 1970); Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 708 (2d Cir. 1989) ("For an expert's

testimony to be admissible . . . it must be directed to matters within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help.”). The party offering expert testimony bears the burden of demonstrating that the proffered testimony meets these requirements. ID Security Systems Canada, Inc. v. Checkpoint Systems, Inc., 198 F. Supp.2d 598, 602 (E.D. Pa. 2002).

II. Background

Dr. Wilensky is a senior fellow at Project HOPE, an international health education foundation. She has held a variety of positions in the public and private sectors relating to health policy and the various aspects of the economics of health care. Dr. Wilensky has been retained by NTSP to analyze the effects of its policies and procedures on the efficiency of its physicians' practices. In her report and testimony, Dr. Wilensky focuses largely on NTSP's risk-sharing practices and asserts that risk-sharing has resulted in significant efficiencies. Dr. Wilensky also attempts to demonstrate that NTSP achieved “spillover” efficiencies by linking efficiencies in the risk-sharing arrangements to the practices and performance of NTSP's non-risk-sharing physicians.

III. Dr. Wilensky's Opinions Regarding “Spillover” Efficiencies are Unreliable Because They are Based on Insufficient Data, Untested Facts, and Guesswork

- A. **Dr. Wilensky's opinions are unreliable and irrelevant because they are based on speculation regarding NTSP's future plans.**

An important issue in this matter is whether efficiencies from NTSP's risk-sharing arrangements impacted its non-risk-sharing practices. Dr. Wilensky's testimony on this matter is wholly speculative and irrelevant. Even assuming that NTSP is able to achieve efficiencies in its risk-sharing contracts, the absence of efficiencies in its non-risk-sharing physicians should foreclose Respondent from arguing that fixing prices for fee-for-service procedures is ancillary to the creation of cognizable efficiencies. In her expert report, Dr. Wilensky asserts that NTSP has achieved spillover effects by leveraging the efficiencies from NTSP's risk-sharing business to non-risk-sharing practices:

If the physicians in the risk contracts were only casual colleagues with physicians in a larger, loosely defined network that does not provide risk, there is some indication that there might have been small but favorable spillovers from the risk physicians to the non-risk physicians. However, this is not a relationship that exists in NTSP. The physicians who take risk in NTSP have been the dominant group of physicians in the network¹ and in the near future, all physicians in the network, who are eligible to take risk, will be doing so.

Expert Report of Gail R. Wilensky ("Report") at 14-15 (February 13, 2004), included in Appendix as Exhibit A.

As evidenced by her report and testimony, Dr. Wilensky is a strong proponent for physicians entering into risk-sharing contracts. In her report, she asserts that risk contracts reduce medical costs, improve quality, increase patient satisfaction, represent an "important way to promote the provision of cost-conscious health care." Report at 11-12, 9. She also espouses the benefits of risk-sharing arrangements by stating categorically that physicians do "the right thing" in risk-sharing arrangements because they have to report their risk procedures. Wilensky Deposition Transcript ("Tr") at 88 (March 4, 2004), a copy of which is included in Appendix as

¹ Approximately half of NTSP's members do not participate in risk-sharing contracts.

Exhibit B. Dr. Wilensky also testifies that, while a risk-sharing arrangement results in “a lot of desirable behavior,” an IPA can improve physician performance by moving all of its physicians to risk-based contracts. Tr. at 66-67.

For these reasons, Dr. Wilensky advocates policies and procedures that result in more physicians entering into risk-sharing arrangements. Thus, not surprisingly, Dr. Wilensky is a firm advocate for NTSP’s “excellent” policy in *January 2004* to require all members to express a willingness by 2005 to participate in a risk-sharing arrangement because “[i]t indicates -- both in a signal and in reality, it indicates the seriousness and importance with which NTSP as an organization regards the risk contracts. It is a signal to physicians that the kind of care management strategies that are part of the risk contract are strategies they want all of their physicians to be involved in.”² Tr. at 68-69.

It appears that her decision to support NTSP in this matter was made in part as a result of NTSP’s January 2004 resolution:

So it's a two-way decision, and either agree to participate in risk contracts or not be a part of NTSP, which I thought was -- this for me was part of the -- for me part of the decision making of my desire to be involved in what they were doing.

Tr. at 66-67.

Dr. Wilensky reiterates her opinion regarding the benefits and importance of this resolution at several points in the expert report and deposition. Report at 5, 10, 15. Tr at 61-62, 66, 68-70, 82, 113, 117-118.

Dr. Wilensky’s testimony regarding the January 2004 resolution is irrelevant and should

² The January 2004 resolution does not require members to participate in a risk-sharing contract by 2005 but instead requires members to only express a willingness to participate in a risk-sharing arrangement.

not be admitted. NTSP adopted the January 2004 resolution some four months after Complaint Counsel filed its complaint in this matter. Clearly, the basis for the Commission's action against NTSP's past conduct has nothing to do with policy and procedural changes that NTSP may, or may not, choose to implement after the complaint has been filed. NTSP's *ex post facto* policy changes, no matter how well-intentioned, have no bearing on the issue here – whether NTSP previously conspired to fix prices.³ To the extent relevant, which it is not, the Court is just as capable of assessing NTSP's future behavior. Accordingly, expert testimony on this matter would be irrelevant and a waste of the Court's time.⁴

While we have no reason to question Dr. Wilensky's sincere support for NTSP's resolution requiring all of its members to express a willingness to participate in risk-sharing contracts, her lengthy testimony on this matter is speculative and irrelevant. NTSP's intent to possibly enroll all of its physicians into risk-sharing contracts pertains directly to NTSP's state of mind and future intentions. Even if NTSP does in fact intend to require risk-sharing participation for all of its members, this will not occur until 2005 at the earliest. Furthermore, there is nothing in Dr. Wilensky's background or testimony that indicates that she has "knowledge, skill,

³ Moreover, if NTSP's recently enacted policy changes are deemed relevant in this matter, NTSP may have an incentive to adopt policies for purposes of litigation and thus Complaint Counsel would be required to respond to and litigate a "moving target."

⁴ Respondent may claim that the January 2004 resolution is relevant to the issue of remedy. That argument must fail. If Your Honor determines that NTSP conspired to fix prices, a non-binding promise by that same organization to "do better" in the future is not relevant to the issue of remedy. If it were, one could imagine every group faced with a price-fixing complaint to pass a similar promise to behave better in the future. See In re Zale Corp., 78 F.T.C. 1195, 1240 (1971); United States v. W.T. Grant Co., 345 U.S. 629, 632 n.5 (1953), In re Coca-Cola Co., 117 F.T.C. 795, 917 (1994).

experience, training, or education” necessary to provide “specialized knowledge” about NTSP’s state of mind. Fed. R. Evid. 702. Indeed, considering the subjective nature of guessing about the intentions or motivations of another, it is difficult to imagine credentials that would qualify her as an expert about this subject. See Taylor v. Evans, 1997 U.S. Dist Lexis 3907, at *5 (S.D.N.Y. Apr. 1, 1997) (“[M]usings as to defendants’ motivations would not be admissible if given by any witness – lay or expert”).

B. Dr. Wilensky performed no analysis and offers no specific evidence regarding spillover efficiencies and thus her opinions are not the product of “reliable principles and methods.”

Dr. Wilensky asserts that NTSP has achieved significant efficiencies in its risk-sharing practice. Complaint Counsel does not allege that NTSP engaged in inappropriate price-fixing in its risk-sharing contracts. Therefore, Dr. Wilensky’s efficiency arguments are irrelevant to this matter absent a showing that these risk-sharing efficiencies positively affected NTSP’s members who do not participate in the risk-sharing practice and to the issue of ancillarity.⁵ Dr. Wilensky, however, has failed to establish such relevance, however, because she has provided no specific evidence that NTSP has achieved spillover efficiencies.⁶ Thus, her opinions do not meet the standards set forth in Daubert and Kumho.

Dr. Wilensky admits that she did not attempt to empirically test whether the costs and outcomes from NTSP’s risk-sharing and non-risk-sharing contracts were comparable and

⁵ Again, approximately half of NTSP’s members do not participate in risk-sharing contracts.

⁶ In fact, none of the experts hired by the Respondents have been able to point to specific evidence in the record that supports NTSP’s spillover claims. Complaint Counsel’s experts also agree that NTSP’s claims have virtually no support in the record.

contributes no research of her own. Tr. at 40. Rather, she asserts that she has seen an empirical study, the XXXXXXXX cost analysis, to support her opinion. This study, conducted by another NTSP expert, Dr. Robert Maness, purportedly suggests comparable outcomes for NTSP's risk-sharing and non-risk-sharing practices.⁷ Tr. at 40. Because Dr. Wilensky neither prepared, assisted in, *nor relied on* the XXXXXXXX study to form her opinions, she should not be allowed to testify about it. Tr. at 58-59.

Dr. Wilensky's criticism of the methodology employed in the study demonstrates that the study is unreliable. Specifically, Dr. Wilensky cites additional steps that should have been undertaken by the study's author to improve the reliability of the study. Dr. Wilensky testified that she inquired whether the cost comparison attempted to adjust for differences in age, sex, or health status between the XXXXXX and XXXXXX population and she was told that there had been no adjustments. She admitted that it "would be better to make the adjustments." Tr. at 42. Dr. Wilensky also acknowledged that the differences in costs between the two health plans were not tested for statistical significance and that the study would have been "technically better" if a test of statistical significance was undertaken. Tr. at 43. According to Dr. Wilensky, there also was "no reason not to do a test of statistical significance." Tr. at 44.

In addition to the lack of any testable methodology, Dr. Wilensky has also failed to offer any facts or analysis demonstrating that NTSP has in fact obtained efficiencies in its non-risk-sharing practice. Under cross-examination, Dr. Wilensky admitted that the quality and cost

⁷ Complaint Counsel believes that Dr. Maness' cost study is fatally flawed for several reasons and should be excluded. The study's shortcomings are discussed in detail in Complaint Counsel's Motion *In Limine* to Exclude Certain Opinion Testimony of Dr. Robert Maness.

initiatives in NTSP's risk-sharing practice are either not available to NTSP's non-risk-sharing practice or she has no knowledge about their availability:

Q Are there any processes or formal programs for quality improvement that NTSP started in a risk context and is then brought over to apply to non-risk patients?

A Well, the main program that they started themselves that I am aware of has to do with the palliative care and trying to take seriously ill patients, perhaps end of life or not -- you know, palliative care is not only end of life, but usually associated more with end of life -- and finding ways that don't necessarily have the hospice word in them to bring some support ... It was regarded as an important way to try to improve care for their patients. *This is the kind of strategy that certainly could be attempted to be expanded to their non-risk patients.*

* * * *

Q Do you have any evidence that there are any fee for service patients in the palliative care program?

A I haven't asked the question; so I don't know. I am not aware of it, but I have not specifically asked the question. So I can just say, I don't know.

Tr. at 85- 87.

Dr. Wilensky also admitted that she has seen no evidence that a variety of other risk-sharing initiatives, such as mechanisms for identifying patients who need better management (Tr. at 75-76); informal and formal peer reviews (Tr. at 92, 94-95); triggers to identify frequently-hospitalized patients (Tr. at 100); reminder systems (Tr. at 108-109); and patient disease registries, are available to NTSP's non-risk-sharing practice. Furthermore, Dr. Wilensky admitted that she is unaware of *any* programs or processes for quality or cost improvement that were implemented in NTSP's risk-sharing contracts that have been used in the non-risk-sharing practice:

Q Other than the possibility of the palliative care program, are there any other processes or programs that NTSP has applied from the risk context to the non-risk context to improve the quality of care for patients?

A *Well, I don't know that I know what exactly they've applied and not applied.*

Tr. at 88 (emphasis added).

Responding to a question regarding the basis for her conclusion that NTSP has achieved spillover efficiencies, Dr. Wilensky made vague references to a few general studies showing slight spillover effects in a hospital and community:

Q And historically there have been some members of NTSP that have not been involved in the risk contracts at all; is that correct?

A That's correct.

Q Would we expect any of the change in practice pattern to affect these physicians?

A Yes, but not as much --

Q To what extent?

A Well, again, as I have read the -- several studies that have looked at spillover behavior, increasing the amount of at risk behavior in a community seems to indicate -- impact what is going on in the community. Now, not huge, the mechanism isn't exactly known, there is some speculation that to the extent that a significant number of the physicians in a particular hospital are part of a risk contract and it impacts how they practice, that there is some impact on how other physicians practicing in that same hospital who are not part of the risk practice behave. *One would assume it would be more likely to happen if you were part of the same group. The studies have not -- that I'm aware of have not attempted to look at this.* So there is some -- some indication of spillover to the community -- nearby community and the people who are in NTSP are in a slightly closer community than the ones who just are geographically similar. Again, it's not large. It's in a positive direction and helpful direction and the mechanism is not clearly understood.

Tr. at 95-96 (emphasis added).

Not only has Dr. Wilensky not offered any support for her opinion that NTSP has achieved spillover efficiencies, she has failed to offer any support for the proposition that IPAs *generally*

have achieved these efficiencies. As a result of having no tangible support for her opinion, Dr. Wilensky's only explanation for her conclusion that NTSP has achieved spillover efficiencies is the following: "One would assume it would be more likely to happen if you were part of the same group. The studies have not -- that I'm aware of have not attempted to look at this." Tr. at 95. Under Dr. Wilensky's faulty reasoning, one would conclude that the presence of a single risk-sharing group would justify price fixing by all other physicians.

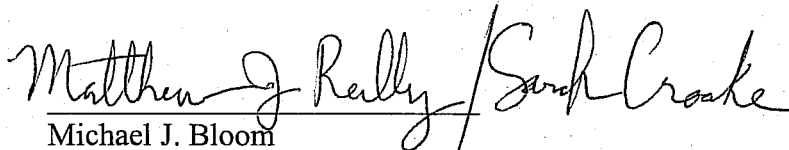
In sum, Dr. Wilensky simply does not propose a method to evaluate whether spillover efficiencies exist, let alone provide any quantitative valuation of these efficiencies.⁸ By citing only borrowed analyses and minimal facts regarding the critical issue of spillover efficiencies, Dr. Wilensky has failed to provide Your Honor with the factual or analytical basis required for admission under Rule 702. See IQ Product Co. v. Pennzoil Products Co., 305 F.3d 368, 376 (5th Cir. 2002) (excluding two experts when neither conducted any market or survey research or any data subject to testing and one of the opinions was based on common sense). Based on Dr. Wilensky's glaring inability to cite to any evidence or analysis to support this opinion, her opinion is inherently unreliable and thus offers little value to the Court. See Mitchell v. Gencorp. Inc., 165 F.3d 778, 781 (10th Cir. 1999) (rejecting expert testimony where conclusions were little more than guesswork).

⁸ Nor has Dr. Wilensky cited any evidence whatsoever that addresses the issue of whether NTSP's collective price negotiations and other conduct is "reasonably ancillary" to the collective price negotiations and other conduct is "reasonably ancillary" to cognizable spillover efficiencies.

CONCLUSION

The proffered expert testimony and report of Dr. Wilensky is inadmissible because her opinions are based upon unreliable assumptions and guesswork. In addition, Dr. Wilensky's common sense opinions about NTSP's future intentions are essentially lay testimony that requires no specialized knowledge. Accordingly, Your Honor should grant Complaint Counsel's motion to exclude Dr. Wilensky's report and prohibit Dr. Wilensky from testifying in this matter.

Respectfully submitted,


Michael J. Bloom
Matthew J. Reilly

Attorneys for Complaint Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004
(212) 607-2829
(212) 607-2822 (facsimile)

Dated: March 31, 2004

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of
NORTH TEXAS SPECIALITY PHYSICIANS,

a corporation.

Docket No. 9312

PROPOSED ORDER

Upon consideration of the Motion *In Limine* to Preclude Report and Testimony of Dr.

Gail R. Wilensky, dated March ___, 2003.

IT IS HEREBY ORDERED that Complaint Counsel's Motion is Granted.

D. Michael Chappell
Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I, Sarah Croake, hereby certify that on March 31, 2004, I caused a copy of Complaint Counsel's Motion for Leave to File Motion *In Limine* Out of Time, and Complaint Counsel's Motion for Leave to File Motion *In Limine* Out of Time, and Complaint Counsel's Motion *In Limine* To Preclude the Report and Testimony of Gail R. Wilensky and Supporting Memorandum to be served upon the following persons:

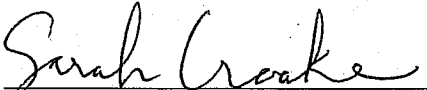
Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Gregory S. C. Huffman, Esq.
Thompson & Knight, LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693

and by email upon the following: Gregory S. C. Huffman (gregory.huffman@tklaw.com),

William Katz (William.Katz@tklaw.com), and Gregory Binns (gregory.binns@tklaw.com).


Sarah Croake