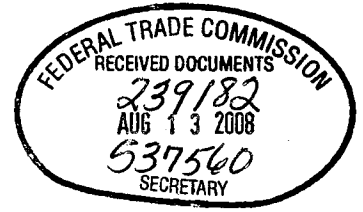


ORIGINAL

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



COMMISSIONERS: William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

In the Matter of _____
North Texas Specialty Physicians,
a corporation. _____

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) PUBLIC
) Docket No. 9312
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Complaint Counsel’s Proposal for Order Modification on Remand

The Court of Appeals for the Fifth Circuit has directed the Commission to modify Paragraph II.A.2 of the Commission’s Order against respondent North Texas Specialty Physicians (NTSP) “in a manner consistent with [the court’s] opinion.” *North Texas Specialty Physicians v. F.T.C.*, 528 F.3d 346, 372 (5th Cir. 2008). The court deemed Paragraph II.A.2 “overly broad and internally inconsistent.” *Id.* at 371. We believe a relatively simple revision to this provision, discussed below, will help clarify the intent of the current Order language and will address both of the court’s concerns.

Paragraph II of the Order contains the core prohibitions, and Paragraph II.A includes provisions that specifically address types of joint activity that the Commission and the court of appeals found NTSP used to carry out its unlawful conduct:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians with respect to their provision of physician services:
 - 1. to negotiate on behalf of any physician with any payor;
 - 2. to deal, refuse to deal, or threaten to refuse to deal with any payor;

3. 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
4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent;

We propose that Paragraph II.A.2 be revised to read:

2. to ~~deal~~, refuse to deal, or threaten to refuse to deal, with any payer, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;

The proposed modification removing agreements “to deal” with a payor from Paragraph II.A.2 addresses the court’s determination that the provision is internally inconsistent. *See* 528 F.3d at 371 (“It is . . . difficult to see how NTSP can both deal and refuse to deal with any payor”). The current prohibition in Paragraph II.A.2 against NTSP’s orchestrating agreements among physicians “to deal” with a payor concerning their provision of physician services (that is, their delivery of medical care to patients) is designed to make clear that the organization’s involvement in collective decisions by physician members on whether, or on what terms, to participate in a payor network is prohibited – regardless of whether such an agreement is implemented through acceptance or rejection of a payor offer. Agreements to deal on collectively-determined contract terms are, however, specifically prohibited by Paragraph II.A.3, which bars NTSP’s participation in agreements “regarding any term . . . upon which any physician deals or is willing to deal with any payor.” Thus, eliminating agreements “to deal” from Paragraph II.A.2 would not reduce the scope of the Order but would eliminate the potential confusion that troubled the court of appeals.

The other aspect of the proposed modification to Paragraph II.A.2, the addition of the underlined phrase, is designed to address the court’s concern that, in its current form, II.A.2 is

overly broad. The court agreed with the administrative law judge that the provision could be interpreted to require NTSP “to messenger contracts or become a party to contracts sent to it by payors, regardless of potential risks to Respondent, its member physicians, and its patients.” *Id.* (quoting Initial Decision of ALJ at 89). Although the Commission explained in its Decision (and in its brief to the court of appeals) that the Order does not impose a general obligation to “messenger” all offers or to contract with all payors,¹ the court nonetheless believed it could be interpreted to impose such an absolute and unqualified duty to deal.

The proposed addition to Paragraph II.A.2 would address the court’s concern by expressly linking the ban on refusals to deal to the conduct prohibited by the other provisions of Paragraph II. The court of appeals expressed no concerns about anything in Paragraph II (or any other aspects of the Order) except II.A.2, rejecting all of NTSP’s other objections. Incorporating language prohibiting only those refusals or threats that are undertaken in connection with conduct otherwise barred by Paragraph II would thus resolve the court’s objection that Paragraph II.A.2 is overly broad.

The proposed additional phrase would make it clear that Paragraph II.A.2 will prohibit, for example, refusals to deal (actual or threatened) to facilitate or advance an agreement between or among its physician members regarding the terms on which the physicians will provide their physician services under contracts with payors. We continue to believe that it is important to

¹ Commission Opinion at 39 & n.60; Brief for the Respondent Federal Trade Commission at 54, *North Texas Specialty Physicians v. F.T.C.*, 528 F.3d 346 (5th Cir. 2008) (Case No. 06-60023). Notwithstanding the discussion in the Commission’s opinion, NTSP argued to the court of appeals that the Commission was “belatedly” attempting to “carve out exceptions in its brief” from the language of the Order. Reply Brief of Petitioner North Texas Specialty Physicians at 23, *North Texas Specialty Physicians v. F.T.C.*, 528 F.3d 346 (5th Cir. 2008) (Case No. 06-60023).

include language in the Order that specifically addresses refusals to deal and threats to refuse to deal with payors, when undertaken in furtherance of otherwise prohibited agreements or conduct. Concerted refusals to deal and threats of refusals are a common and longstanding feature in price-fixing and collective negotiation cases,² and NTSP used such threats and refusals to reinforce its collective price demands. The proposed modification to Paragraph II.A.2 would clarify the intended scope of that provision with regard to orchestrated refusals to deal.

In addition to our proposed modification, we have also drafted an alternative revision to Paragraph II.A.2, in case the Commission wishes to consider a modification that directly refers to the two types of refusals to deal that the court of appeals addressed – that is, refusals to contract with a payor or to messenger payor offers:

to deal, refuse to deal, or threaten to refuse to deal, with any payor, *provided, however, that nothing in this Paragraph II.A.2 shall be construed to require Respondent to become a party to a contract offered by a payor, to convey a payor offer to Respondent's participating physicians, to convey a response to such offer from Respondent's participating physicians, or otherwise to deal with a payor who seeks Respondent's services, so long as any refusal or threatened refusal to deal by Respondent is not in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;*

We believe, however, that this approach, which necessitates a “proviso to a proviso” and is less straightforward than our proposed revision, may create more ambiguity, rather than less.

Accordingly, we offer the language but do not urge its adoption. If the Commission chooses to adopt this alternative language, we recommend that it emphasize in its accompanying Decision that the modification is intended to make clear that refusals to deal with payors that seek NTSP's services are not categorically barred, but are only permissible where they do not further a

² See, e.g., *F.T.C. v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 426 (1990); *Michigan State Medical Society*, 101 F.T.C. 191, 271-275, 287-289, 296 n.32 (1983).

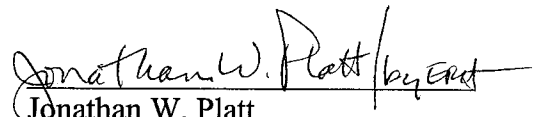
prohibited agreement or conduct among NTSP physicians with regard to the provision of the members' physician services.

We do not believe the Commission should seek in the Order to delineate safe harbors for future refusals to deal by NTSP. A refusal to deal with a payor, such as a refusal to messenger a payor offer, may or may not violate the Order depending on the surrounding circumstances. As the court of appeals stated in rejecting NTSP's contention that the Order is impermissibly vague, the Order "need not describe every combination of circumstances and behaviors that may or may not create a violation." 528 F.3d at 372. Indeed, the court noted that avoiding "legally or medically risky" contracts is a legitimate goal for NTSP, but rejected NTSP's attempt to defend its unlawful conduct on that basis. *Id.* at 369. The court found that concerns about risk were not behind NTSP's challenged conduct, which, the court observed, was aimed at securing higher fees for its physicians, rather than reducing such risk. *Id.* ("none of these concerns [about risk avoidance] had any bearing on the methods NTSP used in an attempt to obtain higher fees than its physicians might otherwise have been offered").

We therefore urge the Commission to avoid any modification to Paragraph II.A.2 that might create the same pretextual loophole concerning risk avoidance that the court recognized and rejected. If NTSP believes that complaint counsel's proposed modification to Paragraph II.A.2 would prevent refusals to deal that amount to no more than legitimate risk avoidance, its answering brief should provide the Commission with an explanation of the specific nature of the risk to NTSP, demonstrate how Paragraph II.A.2 would prevent legitimate conduct to avoid such risk, and offer language that would permit such legitimate risk avoidance without creating a loophole that would enable NTSP to evade the Order's prohibition on unlawful collective action.

In sum, we believe the proposed modification to Paragraph II.A.2, set forth on page two, articulates the straightforward principle that would be applied in evaluating whether the facts concerning a refusal or threatened refusal by NTSP to deal with a payor would amount to a violation of the Order. This modification fully addresses the concerns expressed by the court of appeals and is consistent with the intended scope of the current provision.

Respectfully Submitted,


Jonathan W. Platt
Complaint Counsel

Daniel P. Ducore
Assistant Director for Compliance

Markus H. Meier
Assistant Director for Health Care

Bureau of Competition

August 13, 2008

Certificate of Service

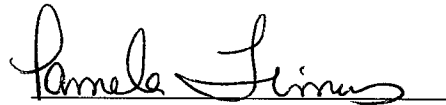
I, Pamela Timus, hereby certify that on August 13, 2008, I caused a copy of Complaint Counsel's Proposal for Order Modification on Remand to be filed with:

Office of the Secretary
Federal Trade Commission
Room H-135
600 Pennsylvania Ave., NW
Washington, DC 20580

and served by first-class mail and e-mail upon:

Gregory S. C. Huffman
Thompson & Knight
One Arts Plaza
1722 Routh Street
Suite 1500
Dallas, TX 75201

Gregory.Huffman@tklaw.com


Pamela Timus