

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of New Millennium Orthopaedics, LLC, et al., File No. 031 0087

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order with New Millennium Orthopaedics, LLC (“NMO”), Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine (“Wellington”), and Beacon Orthopaedics & Sports Medicine, Ltd. (“Beacon”) (collectively, “Respondents”). The agreement settles charges that Wellington and Beacon, through NMO, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements between competing orthopaedic physician groups to fix prices charged to health plans, and to refuse to deal with such health plans except on collectively-determined terms. The proposed Consent Order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed Consent Order final.

The purpose of this analysis is to facilitate public comment on the proposed Consent Order. The analysis is not intended to constitute an official interpretation of the agreement and proposed Consent Order or to modify their terms in any way. Further, the proposed Consent Order has been entered into for settlement purposes only and does not constitute an admission by any respondent that said respondent violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the Complaint are summarized below.

NMO is a single-specialty independent practice association consisting of two orthopaedic physician groups, Wellington and Beacon. Both Wellington, a twenty-two member orthopaedic physician group, and Beacon, a ten-member orthopaedic group, provide orthopaedic physician services, including surgical and non-surgical services, in the Cincinnati, Ohio area.

In 2002, Wellington and Beacon formed NMO to act as their negotiating agent with health plans. Through NMO, they agreed on the prices to propose to health plans in negotiating their reimbursement rates. Beginning in August, 2002, representatives of NMO sent letters to representatives of the four major health plans in the Cincinnati area. They proposed an arrangement that would implement a guaranteed base fee schedule and a bonus scheme. Under the bonus scheme, all NMO physicians would receive higher reimbursement rates for all services provided that NMO, as a whole, met established performance targets for increasing the percentage of surgical procedures performed at ambulatory surgery centers (“ASCs”).

The ASC bonus scheme solely targeted outpatient surgery, which was only one aspect of the practices of some NMO physicians. Under the ASC bonus scheme, the measured change in the physicians' behavior was limited to the movement of patients to ASCs. Non-surgeon members of NMO, who accounted for approximately 30% of NMO physicians, lacked the ability to change practice patterns related to ASCs. Thus, the ASC bonus scheme did not act as a substantial incentive for all of the NMO physicians to work together to achieve significant efficiencies for all of their services, which had jointly negotiated rates.

The Complaint alleges that NMO performed no role in enhancing the ability of the physicians to increase the number of procedures performed at ASCs instead of at hospitals. NMO did not implement any enforcement mechanisms to monitor and control the physicians' compliance with the bonus scheme. The bonus scheme, alone, did not affect the NMO physicians' ability to work together to control costs or to improve quality for all jointly negotiated services, including office-based, non-surgical procedures. To a large extent, the scheme was a reward for the physicians' pre-existing practice patterns. For example, prior to signing the agreement, Wellington physicians performed over 50% of their procedures at ASCs without the incentive of the bonus scheme.

Only one health plan agreed to NMO's terms. Nonetheless, NMO continued to attempt to negotiate agreements with the other health plans into 2004.

NMO also enforced its joint negotiation efforts with one health plan by a concerted refusal to deal in the absence of contract terms agreeable to NMO. In response to one health plan's refusal to negotiate with NMO during the original negotiations in 2002, NMO's Board agreed that both Wellington and Beacon should terminate their existing, separate agreements with the health plan in order to seek contracts with the health plan through NMO. Both groups subsequently jointly terminated their individual agreements with the health plan at the direction of NMO's Board.

Respondents' collective negotiation of fees and other competitively significant contract terms was not reasonably necessary to achieving any efficiency-enhancing integration. Thus, they violated Section 5 of the FTC Act by orchestrating agreements between competing orthopaedic physician groups to fix prices with health plans, and by refusing to deal with one of the health plans that would not meet those terms.

The Proposed Consent Order

The proposed Consent Order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the complaint while, allowing Wellington and Beacon to engage in legitimate, joint conduct.

The proposed Consent Order's specific provisions are summarized below.

Paragraph II.A prohibits Respondents from entering into or facilitating agreements

between or among any health care providers: (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 NMO.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondents from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A. through II.C.

As in other Commission orders addressing health care providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. Paragraph II does not preclude Wellington and Beacon from engaging in conduct that is reasonably necessary to form or participate in legitimate "qualified risk-sharing" or "qualified clinically-integrated" joint arrangements, as defined in the proposed Consent Order. Also, Paragraph II would not bar agreements that only involve physicians who are part of the same medical group practice, defined in Paragraph I.E, because it is intended to reach agreements among independent competitors.

Paragraph III requires the dissolution of NMO.

Paragraph IV contains filing and notification requirements related to the dissolution of NMO.

Paragraph V applies only to Wellington and Beacon. It contains notification requirements for Wellington and Beacon. Paragraph V.A requires Wellington and Beacon to send a copy of the Complaint and Consent Order to their physician members who participated in NMO, their management and staff who had any responsibility regarding NMO, and any payors who communicated with NMO, or with whom NMO communicated, with regard to any interest in contracting for physician services. Paragraph V.A.3 also requires Wellington and Beacon to send these payors notice of their right to terminate their agreements with Wellington and Beacon.

Paragraph V.B allows for contract termination if a payor voluntarily submits a request to Wellington and Beacon to terminate its contract. Pursuant to such a request, Paragraph V.B requires Wellington and Beacon to terminate, without penalty, any payor contracts that they had entered into during the collusive period. This provision is intended to eliminate the effects of NMO's joint, price setting behavior. Paragraph V.C requires that Wellington and Beacon each send a copy of any payor's request for termination to every physician who participates in each group.

Paragraph V.D contains notification provisions relating to future contact with physicians, payors, management and staff of each group. Paragraph V.D requires Wellington and Beacon to distribute a copy of the Complaint and Consent Order to each physician who begins participating in each group; each payor who contacts each group regarding the provision of physician services; and each person who becomes an officer, director, manager, or employee of each group for three years after the date on which the Consent Order becomes final.

Paragraph V.E requires Wellington and Beacon to publish a copy of the Complaint and Consent Order, for three years, in any official publication that they send to their participating physicians.

Paragraphs VI-VIII impose various obligations on Wellington and Beacon to report or provide access to information to the Commission to facilitate monitoring their compliance with the Consent Order.

The proposed Consent Order will expire in 20 years from the date it is issued.