

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with SPA Health Organization, doing business as Southwest Physician Associates (“Respondent” or “SPA”). The agreement settles charges that Respondent violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating and implementing agreements among SPA members on price and other competitively significant terms; refusing to deal with payors except on collectively agreed-upon terms; and negotiating fees and other competitively significant terms in payor contracts and refusing to submit to members payor offers that do not conform to Respondent’s standards for contracts.

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 order final. The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed 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 Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true. The allegations in the Commission’s proposed complaint are summarized below.

The Complaint

Respondent SPA is a nonprofit corporation that contracts with third-party payors for the provision of medical services on behalf of its approximately 1,000 participating physicians. Respondent is organized and operated to further the pecuniary interests of those physicians, who are licensed to practice medicine in the State of Texas and who are engaged in the business of providing medical services to patients in the eastern part of the Dallas-Fort Worth metropolitan area (hereinafter “Dallas area”).

Physicians often contract with third-party payors, such as insurance companies and preferred provider organizations. The contracts typically establish the price and other terms under which the physicians will render services to the payors’ subscribers. Contracting physicians often agree to accept lower-than-customary compensation from these third-party payors to gain access to additional patients through the payor. Thus, these contracts may reduce payor costs, and may result in lower medical care costs to the payor’s subscribers.

Absent agreements among competing physicians, each competing physician decides for himself or herself whether, and on what price and other terms, the physician will contract with third-party payors to provide medical services to the payors’ subscribers. To be competitively marketable in the Dallas area, a payor must include in its physician network a large number of primary care physicians

("PCPs") and specialists who practice in the Dallas area. Many of the PCPs and specialists who practice in the Dallas area are members of SPA. Accordingly, many payors concluded that they could not establish a viable physician network in areas in which SPA physicians are concentrated, without including a large number of SPA physicians in that network.

Respondent actively bargained with third-party payors, often proposing and counter-proposing fee schedules to be applied, among other terms. To maintain its bargaining power, SPA has discouraged its participating physicians from entering into unilateral agreements with third-party payors, and it has communicated to its participating physicians SPA's determinations that specific fees and other contract terms offered by third-party payors may be inadequate. Many of SPA's participating physicians have been unwilling to negotiate with third-party payors apart from SPA, and have communicated that fact to third-party payors seeking to resist SPA's collective demands.

Sometimes a network of competing physicians uses an agent to convey to payors information, obtained from each of its participating physicians individually, about fees and other significant contract terms that the physicians are willing to accept. In other instances, the agent may convey all payor contract offers to network physicians, with each physician then unilaterally deciding whether to accept or reject each offer. These "messenger model" arrangements, which are described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice (see <http://www.ftc.gov/reports/hlth3s.htm>), can facilitate contracting between physicians and payors without fostering agreements among competing physicians on fees and other competitively sensitive terms. Such agreements are likely, however, if the messenger 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 the physicians based on the messenger's opinion of the acceptability or appropriateness of the offer.

Rather than acting simply as a "messenger," Respondent facilitated and implemented agreements among its members on price and other competitively significant contract terms. It actively sought higher prices for its members and often did not convey to its participating physicians third-party payor offers that SPA deemed deficient, including offers that provided for fees that did not satisfy SPA's Board of Directors. SPA instead demanded, and often received, more favorable fee and other contract terms – terms that third-party payors would not have offered to SPA's participating physicians had those physicians engaged in unilateral, rather than collective, negotiations with the payors. Only after the third-party payor acceded to fee and other contract terms acceptable to SPA, would SPA convey the payor's proposed contract to SPA's participating physicians for their consideration.

Since July of 1999, SPA and its members have entered only into fee-for-service agreements with payors, pursuant to which SPA and its members did not undertake financial risk-sharing. Further, SPA members have not integrated their practices to create significant potential efficiencies. Respondent's joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration. Instead, the Respondent's

acts and practices have restrained trade unreasonably and hindered competition in the provision of physician services in the Dallas area in the following ways, among others: prices and other forms of competition among Respondent's members were unreasonably restrained; prices for physician services were increased; and health plans, employers, and individual consumers were deprived of the benefits of competition among physicians. Thus, Respondent's conduct has harmed patients and other purchasers of medical services by restricting choice of physicians and increasing the prices of medical services.

The Proposed Consent Order

The proposed consent order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint while allowing Respondent and member-physicians to engage in legitimate joint conduct.

Paragraph II.A prohibits Respondent from entering into or facilitating agreements among physicians: (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 upon which any physicians deal, or are willing to deal, with any payor; and (4) not to deal individually with any payor or through any arrangement other than SPA.

Paragraph II.B prohibits Respondent from exchanging or facilitating the 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.

Paragraph II.C prohibits Respondent from attempting to engage in any action prohibited by Paragraph II.A or II.B. Paragraph II.D prohibits Respondent from encouraging, pressuring, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C.

Paragraph II contains a proviso that allows Respondent to engage in conduct that is reasonably necessary to the formation or operation of a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement," so long as the arrangement does not restrict the ability, or facilitate the refusal, of participating physicians to deal with payors on an individual basis or through any other arrangement. To be a "qualified risk-sharing joint arrangement," an arrangement must satisfy two conditions. First, all participating physicians must share substantial financial risk through the arrangement and thereby create incentives for the participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement. To be a "qualified clinically-integrated joint arrangement," an arrangement must also satisfy two conditions. First, all participants must join in active and ongoing programs to evaluate and modify their clinical practice patterns, creating a high degree of interdependence and cooperation among physicians to control costs and ensure the quality of services

provided. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement. Both definitions reflect the analyses contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.

As explained previously, the order would bar SPA from encouraging or facilitating agreements among or on behalf of otherwise competing physicians as to the terms under which the physicians would provide medical services. SPA's negotiating with a third-party payor of contract terms applicable only to SPA's own proposed performance ordinarily would not encourage or facilitate an agreement among its participating physicians as to the terms under which the physicians would provide medical services. Therefore, a SPA-payor negotiation of terms applicable only to SPA's own proposed performance ordinarily would not be affected by the order. SPA's conduct in such a negotiation may not, however, encourage, facilitate, or conceal an agreement by or on behalf of participating physicians as to the terms upon which they would provide medical services. Thus, for example, the order would not ordinarily preclude SPA's negotiating with third-party payors as to whether, and on what terms, SPA itself would engage in delegated credentialing of physicians on behalf of the payor, undertake specified contract administration activities, maintain specified insurance coverages, or indemnify the payor.

Similarly, the order ordinarily would not affect SPA's communicating to its participating physicians accurate, factual, and objective analyses of proposed third-party payor contract terms, so long as such communication does not encourage, facilitate or conceal a prohibited agreement. SPA may not, however, do so in a manner that directly or by implication suggests that physicians should or should not accept the contract offers or particular terms thereof upon which they would provide medical services. Further, the order ordinarily would not preclude SPA's sharing with a third-party payor SPA's objective analysis of the proposed contract terms prior to communicating that analysis to its participating physicians, provided that SPA informs the payor that SPA will promptly messenger the contract proposal to its participating physicians upon the payor's request, that SPA promptly complies with each such request, and that any such communications by SPA to the payor do not directly or by implication encourage, facilitate, or conceal a prohibited agreement.

Paragraphs III.A and III. B require SPA to distribute the complaint and order to its members, payors with which it previously contracted, and specified others. Paragraph III.C requires SPA to terminate, without penalty, payor contracts that it had entered into during the collusive period, at any such payor's request. This provision is intended to eliminate the effects of Respondent's joint price setting. Paragraph III.C also contains a proviso to preserve payor contract provisions defining post-termination obligations relating to continuity of care during a previously begun course of treatment.

The remaining provisions of the proposed order impose complaint and order distribution, reporting, and other compliance-related provisions. For example, Paragraph III. D requires SPA to distribute copies of the complaint and order to incoming SPA physicians, payors that contract with SPA for the provision of physician services, and incoming SPA officers, directors, and employees. Further, Paragraph III.F requires SPA to file periodic reports with the Commission detailing how SPA has complied with the order. Paragraph V. authorizes Commission staff to obtain access to Respondent's records and officers, directors, and employees for the purpose of determining or securing compliance with the order. The proposed order will expire in 20 years.