

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

_____)
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)
In the Matter of)
) Docket No. C-4101
)
SURGICAL SPECIALISTS OF)
YAKIMA, P.L.L.C.,)
a limited liability company,)
)
CASCADE SURGICAL PARTNERS,)
INC., P.S.,)
a corporation, and)
)
YAKIMA SURGICAL ASSOCIATES,)
INC., P.S.)
a corporation.)
_____)

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (“FTC Act”), 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 Surgical Specialists of Yakima, P.L.L.C. (“SSY”), Cascade Surgical Partners, Inc., P.S. (“Cascade Surgical”), and Yakima Surgical Associates, Inc., P.S. (“Yakima Surgical”), hereinafter collectively referred to as “Respondents,” have violated Section 5 of the FTC 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:

NATURE OF THE CASE

1. This matter concerns horizontal agreements among competing physicians who constitute most of the physicians who specialize in general surgery in the Yakima, Washington, area, to fix price and other terms charged to health care plans and other third-party payors (“payors”). In furtherance of their agreements, the physicians formed SSY to negotiate and to enter into contracts with payors upon collectively agreed upon price and other contract terms.

The physicians further agreed to refuse to negotiate or to contract individually with any payor. This conduct raised the price of physician services for surgery in the Yakima, Washington, area.

RESPONDENTS

2. Respondent SSY is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal address at 307 South 12th Avenue, Yakima, WA 98902. SSY's Executive Committee ("Committee") consists of the organization's officers: the President, Vice President, Treasurer, Secretary, and three Members-at-Large. The Committee generally has negotiated and reviewed proposed payor contracts prior to submitting any information to SSY's physician members. Once a proposed contract has been submitted to the physician members, however, they have voted on whether to accept it. Once the terms of a payor's contract have been accepted by a majority of SSY's members, the Committee then has signed that contract on behalf of the members.

3. Respondent Cascade Surgical is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal address at 3003 Tieton Drive, Yakima, WA 98902. Its membership consists of four physicians who specialize in general surgery. Respondent Cascade Surgical is a member of Respondent SSY.

4. Respondent Yakima Surgical is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal address at 111 South 11th Avenue, Yakima, WA 98902. Its membership consists of five physicians who specialize in general surgery. Respondent Yakima Surgical is a member of Respondent SSY.

5. Except to the extent that competition has been restrained as alleged herein, Respondents Cascade Surgical and Yakima Surgical have been, and are now, in competition with each other for the provision of physician services.

THE FTC HAS JURISDICTION OVER RESPONDENTS

6. Respondents' general business practices, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the FTC Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

7. SSY has approximately 24 physician members, all of whom are licensed to practice medicine in the State of Washington, and are engaged in the business of providing physician services to patients in the Yakima, Washington area. SSY's physicians practice in the following specialties: ENT, OB/GYN, General Surgery, Ophthalmology, and Plastic Surgery. There are ten physicians who specialize in general surgery in the Yakima, Washington area – Yakima Surgical's five surgeons, Cascade Surgical's four surgeons, and one independent

surgeon who is not a member of SSY. Thus, SSY has 90% of the physicians who specialize in general surgery who practice in the Yakima, Washington area.

8. The area centers on the Yakima Valley and extends from the Cascade Mountain Range to the Columbia River. The area's largest city, Yakima, with a population of 72,000, is the processing and shipping hub for the produce grown in the Yakima Valley. Other communities in the Yakima, Washington area include Sunnyside and Toppenish, headquarters for the Yakima Indian Nation. To be competitively marketable in the Yakima, Washington area, a payor's health insurance plan must include in its physician network a large number of general surgery physicians who practice in the Yakima, Washington area.

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

10. Physicians organize their practices under several models, including, but not limited to, sole proprietorships, partnerships, and professional corporations (collectively "physician entities"). Absent agreements among competing physician entities on the terms, including price, on which they will provide services to enrollees in payors' health care plans, competing physician entities decide individually whether to enter into payor contracts to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

11. The Medicare Resource Based Relative Value Scale ("RBRVS") is a system used by the Centers for Medicare and Medicaid Services ("CMS") to determine the amount to pay physicians for the services they render to Medicare patients. Under RBRVS, the price for physician services is determined by multiplying a dollar conversion factor, set by CMS, by the Relative Value Unit ("RVU") assigned by CMS to each physician service (*e.g.*, under RBRVS, a Medicare conversion factor of \$35 x 2.34 RVU for a physician service = an \$82 fee). Payors in many areas of the country make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fee for a particular year (*e.g.*, "110% of 2003 RBRVS"). In the Yakima, Washington area, payors negotiate the conversion factor, rather than a percentage of the RBRVS fee, with physicians. For example, if a Yakima, Washington area payor offers a conversion factor of \$42, rather than the Medicare conversion factor of \$35, and the RVU that CMS assigns for a particular physician service is 2.34, then the physician's price for that service to the payor would be \$42 x 2.34, or \$98.28.

SSY WAS FORMED TO, AND DID, COLLECTIVELY NEGOTIATE HIGHER FEES

12. In an attempt to prevent payors from decreasing reimbursement rates, in late 1996

several competing physicians founded SSY to negotiate collectively their payor contracts. These physicians did not, however, want to combine or integrate their practices. To assure prospective members that joining SSY would not affect any doctor's ability to operate his or her individual practice, an SSY organizational document states, "[a]lthough your employees will be paid through the PLLC, you will retain management control of your own office including personnel, and all day to day operations as you currently control them." That same document goes on to assure, "[a]lthough collections will be done on a centralized basis the actual billing of your services will be done through your own office and under your own control to ensure that each speciality maintains the knowledge necessary to bill using the CPT codes for their individual speciality services." The cost of joining SSY was addressed in another organizational document, which states, "[n]et costs may well be insignificant if the organization enables us to improve our reimbursement rates by even a few points on the relative value scale."

13. SSY's operating agreement was drafted to create the appearance that SSY was operating as an integrated single entity, despite the reality that each member physician retained control of his or her individual practice. The operating agreement states, "all files of patients serviced or treated by or on behalf of the Company [SSY] shall remain the property of the Member which provides such services." It also says, "each Member which is a corporation or who employs physician employees shall have the sole responsibility for paying its physician employees who render professional medical services on behalf of the Company. No physician employee of a Member shall be permitted to look to the Company for payment for services rendered." The operating agreement's system allocated income and expenses so that each member's income was independent of the income earned by SSY or any of its individual members.

14. SSY's first task after its formation was to implement its plan to collectively negotiate contracts with payors. It solicited fee information from its members saying, "we need to know as much as we can about your fees."

15. SSY then provided its members with instructions on dealing with third party payers, telling them not to sign any new contracts or renew any existing contracts. In the summer of 1996, SSY instructed each individual physician or member of a medical group practice, including Respondents Cascade Surgical and Yakima Surgical, to send a form letter to payors, which states in part,

I have joined a group practice, Surgical Specialists of Yakima, PLLC, and will be practicing totally as a member of that group effective October 1, 1996. This will require negotiation of a new contract for covered services as of that date. This should be negotiated through the representatives of Surgical Specialists of Yakima, PLLC.

Please accept this letter as notification of my resignation from our current existing contract effective October 1, 1996.

16. Since its formation, SSY has acted as the exclusive negotiator for its members, including Respondents Cascade Surgical and Yakima Surgical. For example, in 1999, when a payor approached some of SSY's doctors individually, SSY's clinic coordinator "warned" that if it continued to approach member doctors individually, SSY and its members would terminate their dealings with it.

17. All SSY negotiations with payors have followed the same pattern: SSY demands price increases of as much as 50 percent, and, when a payor balks, SSY's members, including Respondents Cascade Surgical and Yakima Surgical, following instructions from SSY's executive committee, then send form letters to their patients. For example, a letter that was sent to patients in July 2001 states:

Your physician _____ is a member of a larger group, Surgical Specialists of Yakima, PLLC. In April 2001 we requested that Premera Blue Cross renegotiate the terms of our contract which have been in effect since August 1999. They have declined to negotiate with us and our contract with Premera Blue Cross will terminate August 1, 2001.

We encourage you to contact your employer or Premera Blue Cross for the specific details of your policy and whether or not Premera will continue to pay benefits to non-participating physicians. If they do, then your out of pocket expense may be higher because you will be responsible for the difference between Premera's payment and the billed amount.

Whether we are participants in their network or not we are always willing to provide medical care for you and your family.

Please call any of our offices with any questions or concerns.

18. When such a letter fails to change a payor's stance, SSY then follows through on its threat and deparicipates. In fact, during its existence SSY has, at least once, deparicipated from contracts with the three largest commercial payors in the Yakima, Washington area.

19. A large share of the physicians who specialize in general surgery in the Yakima, Washington area are members of SSY, giving it substantial bargaining power with payors, with the result that payors have repeatedly acceded to Respondent SSY's demands for higher fees for its members than those members individually could have negotiated.

20. Through Respondent SSY's negotiations with payors for physician services at collectively agreed-upon terms, Respondent SSY's physician members, including Respondents Cascade Surgical and Yakima Surgical, have successfully contracted for the highest prices in the state for surgical codes, with conversion factors for surgical codes that are substantially higher than the conversion factors other physicians in the Yakima, Washington area receive for surgical codes.

RESPONDENTS HAVE ENGAGED IN RESTRAINTS OF TRADE

21. Respondents have acted to restrain competition by, among other things:
- a. facilitating, negotiating, entering into, and implementing agreements among the members of SSY on price and other competitively significant terms;
 - b. refusing to deal with payors except on collectively agreed-upon terms; and
 - c. negotiating uniform prices and other competitively significant terms in payor contracts for SSY's members.

THERE ARE NO SIGNIFICANT EFFICIENCIES IN RESPONDENTS' CONDUCT

22. Respondents' joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

RESPONDENTS' ACTIONS HAVE HAD SUBSTANTIAL ANTICOMPETITIVE EFFECTS

23. Respondents' actions described in Paragraphs 12 through 20 of this Complaint have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Yakima, Washington area in the following ways, among others:

- a. price and other forms of competition among Respondents Cascade Surgical and Yakima Surgical and other members of SSY 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.

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, as amended, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of November, 2003, issues its Complaint against Respondents SSY, Cascade Surgical and Yakima Surgical.

By the Commission.

Donald S. Clark
Secretary

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