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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 the Carlsbad Physician Association (CPA), its executive director, and seven physicians. The agreement settles charges that these parties violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among members of CPA to fix prices and other terms on which they would deal with health plans, and to refuse to deal with such purchasers 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 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 any respondent that said respondent violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint Allegations

CPA was organized in 1998-1999 to be a vehicle for competing physicians to bargain collectively with health plans, in order to obtain "favorable reimbursement" for its members. Its 38 physician members represent 76 percent of all physicians and 83 percent of the primary care physicians practicing in the Carlsbad area, which is located in southeastern New Mexico.

CPA members have refused to deal with health plans on an individual basis. Instead, CPA's executive director (Glen Moore), its five-member Board of Directors, and a "Contract Committee" consisting of Board members and additional physician members of CPA negotiate with health plans that desire to contract with CPA members. Each of the named physician respondents is or has been a member of CPA's Board of Directors and Contract Committee and actively participated in negotiations with payors.

Contracts that the CPA leadership negotiates are presented to the general membership, and members vote on whether CPA should accept the contract. The Board signs contracts that a majority of CPA members vote to accept. In accordance with this model, respondents have orchestrated collective agreements on fees and other terms of dealing with health plans, have carried out collective negotiations with several health plans, and have orchestrated refusals to

deal and threats to refuse to deal with health plans that resisted respondents' desired terms. Although CPA purported to operate as a "messenger" -- that is, an arrangement that does not facilitate horizontal agreements on price -- it engaged in various actions that reflected or orchestrated such agreements.[1]

Since its inception, CPA has operated solely to exert the collective bargaining power of its members. It engages in no activities or functions other than health plan contracting. Further, in connection with health plan contracting, its members do not engage in any cooperative activities to benefit consumers.

Respondents have succeeded in forcing numerous health plans to raise fees paid to CPA members, and thereby raised the cost of medical care in the Carlsbad area. As a result of the challenged actions of respondents, CPA members receive the highest fees for physician services in New Mexico. By orchestrating agreements among CPA members to deal only on collectively-determined terms, together with actual or threatened refusals to deal with health plans that would not meet those terms, respondents have violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence. It is similar to many previous consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans, with two exceptions. First, in addition to the core prohibitions, the proposed order in this matter requires that CPA dissolve itself. Such structural relief is not routinely imposed, but has been used in physician price-fixing consent orders in the past when circumstances warrant.[2] Here, the organization is alleged to have had no function other than unlawful collective bargaining activities. Second, the order includes temporary "fencing-in" relief to ensure that the alleged unlawful conduct does not continue through other means. Thus, for three years, it bars the respondents from acting as a messenger or agent in health plan contracting and limits the ability of the individual physician respondents to use the same agent in connection with health plan contracting.

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[1] An appropriate "messenger model" arrangement that can facilitate and minimize the costs involved in contracting between physicians and payors, without fostering an agreement among competing physicians on fees or fee-related terms, is 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 .

[2] *See Obstetrics and Gynecology Medical Corporation of Napa Valley*, Docket No. C-4048 (May 14, 2002); *Physician Group, Inc*. 120 F.T.C. 567 (1995); *Southbank IPA, Inc*. 114 F.T.C. 783 (1991).

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits the respondents from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the respondents from facilitating exchanges of information among physicians 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. Paragraph II.D proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

Paragraph II.E contains certain additional, "fencing-in" relief, which is imposed for three years. Under this provision, respondents may not, in connection with physician health plan contracting, either (1) act as an agent for any physicians; or (2) use an agent who represents any other physician with respect to such contracting. Such relief, designed to assure that respondents do not seek to use other arrangements to continue the challenged conduct, is warranted in light of complaint charges that respondents engaged in overt price-fixing behavior and respondents' assertion that their conduct was legitimate "messengering" of health plan contract offers. The prohibition on using the same agent as any other physician in connection with health plan contracting would not apply where respondents are obtaining bona fide legal services (that is, activities undertaken by an attorney that constitute the practice of law as defined by New Mexico law).

As in other orders addressing providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations.

First, respondents would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, whether a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement."

As defined in the proposed order, a "qualified risk-sharing joint arrangement" possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the participants 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.

A "qualified clinically-integrated joint arrangement," on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Second, because the order is intended to reach agreements among horizontal competitors, Paragraph II would not bar agreements that only involve physicians who are part of the same medical group practice (defined in Paragraph I.E).

Paragraph III, which applies only to CPA, provides for the dissolution of the organization following the expiration or termination of all payor contracts, and in the interim requires that CPA cease all activities except those necessary to comply with the order and the winding down of its affairs. Further, Paragraph III.B requires CPA to distribute the complaint and order to all physicians who have participated in CPA, to payors that negotiated contracts with CPA or indicated an interest in contracting, and to the Carlsbad Medical Center. Paragraph III.C requires CPA, at any payor's request and without penalty, to terminate its current contracts with respect to providing physician services.

In the event that CPA fails to comply with the requirement to send out the notices set forth in Paragraph III.B, Paragraph IV requires Mr. Moore to do so.

Paragraphs V through IX of the proposed order impose various obligations on respondents to report or provide access to information to the Commission to facilitate monitoring respondents' compliance with the order.

The proposed order will expire in 20 years.