

IN THE MATTER OF
STATE VOLUNTEER MUTUAL INSURANCE COMPANY, INC.
CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3115. Complaint, Sept. 28, 1983—Decision, Sept. 28, 1983

This consent order requires a Brentwood, Tenn. physician-owned medical malpractice insurance company, among other things, to cease failing to apply the same underwriting criteria to both physicians affiliated with self-employed nurse midwives as supervisors or otherwise, and those physicians who employ nurse midwives; and refrain from adopting any underwriting criterion, or taking any other action that would discriminate between those physicians who are affiliated with nurse midwives and those who are not, absent a reasonable underwriting basis for doing so. For a period of ten years from the effective date of the order, respondent is required to supply rejected physicians having affiliations with nurse midwives with written notice of specific reasons for the rejection; afford them a reasonable opportunity to respond; provide them with reasons for any final adverse determination; and maintain records of all relevant data. The insurer is further required to alter its Underwriting Manual so as to conform with requirements of the order; make its best efforts to have an announcement published in the *Journal of Tennessee Medical Association* in the form specified; and mail a copy of the announcements to its members, and to others upon request.

Appearances

For the Commission: *Toby Singer.*

For the respondent: *Jack R. Bierig, Sidley & Austin, Chicago, Ill.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent State Volunteer Mutual Insurance Company, Inc. has violated and is violating Section 5 of the Federal Trade Commission 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 as follows:

1. Respondent State Volunteer Mutual Insurance Company, Inc. ("SVMIC") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee. SVMIC's

principal office and place of business is at 5200 Maryland Way, Suite 100, Brentwood, Tennessee.

2. SVMIC is now, and has been since 1976, a mutual insurance company, engaged in the offering for sale and sale of medical malpractice insurance to Tennessee physicians. In 1980 SVMIC had premium income of about \$13 million.

3. SVMIC is now, and at all times relevant herein has been, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. The physicians whom SVMIC insures are its members and elect its Board of Directors. Members of SVMIC are now and have been in competition among themselves and with other health care practitioners in the provision of health care services in Tennessee.

5. Malpractice insurance protecting physicians against certain types of loss is a valuable business service, essential for most physicians to be able to practice. For various reasons, SVMIC has substantial market power as the dominant malpractice insurer in Tennessee. In 1980, SVMIC insured about 80 percent of the Tennessee physicians with malpractice insurance.

6. In Spring 1980, two nurse-midwives licensed by the State of Tennessee and certified by the American College of Nurse-Midwives established Nurse-Midwifery Associates ("Nurse-Midwifery") in Nashville, to provide their services as self-employed nurse-midwives to women whose incomes were too high for them to be eligible for government-subsidized gynecological and obstetrical care. Nurse-Midwifery was in competition with obstetricians, gynecologists and other physicians in Tennessee who were members of SVMIC.

7. As required by Tennessee law, a licensed physician was Nurse-Midwifery's medical consultant and back-up physician under a written protocol for medical supervision setting forth the relationship and responsibilities of the nurse-midwives and the physician in the care of patients.

8. The physician who contracted to provide medical supervision for Nurse-Midwifery was board-certified by the American Board of Obstetricians and Gynecologists and was a SVMIC policyholder and member.

9. Nurse-Midwifery was established and operated in conformity with the policy statement on maternal health approved by the American College of Obstetricians and Gynecologists and the American College of Nurse-Midwives.

10. Nurse-Midwifery and its supervising physician received and treated a substantial number of patients from other states; received

substantial sums of money from private insurance companies for rendering health care services, which money flowed across state lines; and utilized or prescribed substantial quantities of drugs, medicines, supplies, equipment and other products which were shipped in interstate commerce.

11. SVMIC refused to continue insuring Nurse-Midwifery's supervising physician effective January 1, 1981, manifesting a policy against insuring physicians who agree to provide ongoing medical supervision to self-employed nurse-midwives, in contrast, for example, to those physicians, whom it continues to insure, who employ nurse-midwives. Certain of SVMIC's member physicians and officials who participated in this decision were actual or potential competitors of Nurse-Midwifery in the provision of obstetric or gynecological care.

12. SVMIC did not review the medical supervision protocol or policy statement on maternal health described in paragraphs 7 and 9, did not consult physicians familiar with the practice of nurse-midwifery, did not consult other insurers to discover if practices such as Nurse-Midwifery's have resulted in malpractice claims, and did not compare the actual operation of Nurse-Midwifery to those situations where nurse-midwives are employed by physicians or where physicians supervise other nonphysician practitioners. SVMIC based its decision on the purported ground that undue risk would be an inherent result of the economic relationship created by the consulting contract between the nurse-midwives and the supervising physician. Pursuant to its standard policy, SVMIC did not provide Nurse-Midwifery's supervising physician with any explanation of the reasons or basis for its refusal to continue to insure his practice, beyond stating that his practice presented an undue risk, and did not allow a record to be kept of the informal hearing it held on his termination.

13. SVMIC has no reasonable justification or substantial basis for the actions described in paragraph 11.

14. In adopting the policies and engaging in the acts and practices described in paragraphs 11 through 13, SVMIC has acted as a combination of its physician members or in conspiracy with some of them or others.

15. The policies, acts or practices of SVMIC and its member physicians described in paragraphs 11 through 13 constitute a boycott of or concerted refusal to deal with self-employed nurse-midwives and physicians who supervise them.

16. The purposes or effects and the tendency and capacity of the policies, acts and practices described in paragraphs 11 through 15 are and have been unreasonably to restrain trade and hinder competition in the provision of health care services in Tennessee, and to deprive

consumers, including pregnant women, of the benefits of competition in the following ways, among others:

- a) physician members of SVMIC who wish to compete through supervision or affiliation with independent nurse-midwives are hindered from doing so;

- b) nurse-midwives in Tennessee who wish to engage in independent practices are restrained in their ability to do so, because they have great difficulty finding physicians to supervise their practices, as required by state law;

- c) patients are unreasonably limited in their ability to choose among a variety of alternative providers of health care services competing on the basis of price, service and quality;

- d) Nurse-Midwifery lost its supervising physician and has been driven out of business; and its founders, as well as other nurse-midwives who could establish independent practices, are deterred and prevented from treating patients in competition with physicians on the basis of price, service and quality;

- e) barriers to entry in the delivery of health care services have been raised; and

- f) the development of a competitive, efficient, cost-effective, and innovative form of health care delivery has been hindered.

17. The policies, acts and practices described in paragraphs 11 through 16 are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

18. The policies, acts and practices and combination or conspiracy described in paragraphs 11 through 16 constitute a group boycott or agreement to boycott, or other unreasonable restraint of trade, within the meaning of Section 1 of the Sherman Act, 15 U.S.C. 1, and unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct is continuing in nature and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission hav-

ing thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent State Volunteer Mutual Insurance Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at 5200 Maryland Way, Suite 100, in the City of Brentwood, State of Tennessee.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent State Volunteer Mutual Insurance Company, Inc., and its committees, officers, representatives, agents, employees, successors, and assigns, shall cease and desist from, directly or indirectly:

1. failing to apply the same underwriting criteria to all physicians who employ, supervise, or are affiliated in any manner with one or more nurse midwives;

2. adopting any underwriting criterion or taking any other action that has the purpose or effect of discriminating between physicians who supervise or are affiliated in any manner with one or more self-employed or otherwise economically independent nurse midwives and physicians who employ nurse midwives;

3. adopting any underwriting criterion or taking any other action that has the purpose or effect of discriminating between physicians who employ, supervise, or are affiliated in any manner with one or more nurse midwives and physicians who do not employ or supervise or are not affiliated in any manner with nurse midwives, without a reasonable underwriting basis at the time the action is taken; and

4. for a period of ten (10) years after this Order becomes final, if respondent determines not to insure a physician who employs, supervises, or is affiliated in any manner with one or more nurse midwives, failing to:

- a. provide to the physician clear written notice of the reasons for the determination, specifying the underwriting criteria not met by the physician and explaining in what manner the criteria are not met;
- b. provide to the physician a reasonable opportunity to respond;
- c. provide to the physician a written statement of the reasons and bases for the final decision; and
- d. keep written records of the reasons provided to the physician, the physician's response thereto, if any, and the reasons and bases for the final decision.

II

It is further ordered, That respondent State Volunteer Mutual Insurance Company, Inc. shall:

1. incorporate the requirements of this Order into its Underwriting Manual and make such other changes in its Underwriting Manual as are necessary to make it consistent with the provisions of this Order;
2. within thirty (30) days after this Order becomes final make its best efforts to have an announcement in the form shown in Appendix A published in the *Journal of the Tennessee Medical Association*; and
3. disseminate the announcement promptly by mail to its members and to anyone else upon request.

III

It is further ordered, That respondent State Volunteer Mutual Insurance Company, Inc. shall:

1. within sixty (60) days after this Order becomes final submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which the respondent has complied with this Order;
2. for a period of five (5) years after this Order becomes final main-

tain in a separate file and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, the records required to be kept by Part I of this Order and all documents that discuss, refer or relate to the decisions reflected in those records; and

3. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

APPENDIX A

Announcement

Pursuant to the provisions of a Federal Trade Commission consent order, State Volunteer Mutual Insurance Company makes the following announcement:

State Volunteer Mutual Insurance Company will insure any otherwise insurable physician at non-discriminatory rates regardless of whether he or she has a contractual or other particular financial arrangement with nurse-midwives. It will evaluate each physician's insurability on an individual basis based on sound, non-discriminatory underwriting criteria. SVMIC will apply the same underwriting criteria to all physicians who are affiliated with nurse-midwives, regardless of the particular form of the arrangement between the physician and the nurse-midwives.

If SVMIC determines not to insure a physician who is affiliated with nurse-midwives, it will notify the physician in writing of the reasons for the determination. The notice will specify the underwriting criteria not met by the physician and explain in what manner the criteria were not met. It will advise that upon written request, SVMIC will provide a hearing at which the physician will have an opportunity to respond to the preliminary determination. SVMIC will also notify the physician in writing of its final determination and, if a decision not to insure the physician has been made, the specific reasons for the determination.

IN THE MATTER OF

FLAGG INDUSTRIES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-2903. Consent Order, Sept. 27, 1977—Modifying Order, Sept. 29, 1983

This order modifies the Commission's order issued on Sept. 27, 1977 (90 F.T.C. 226), by eliminating Flagg Industries, Inc. as a respondent in this proceeding at such time as it contributes \$3,500,000 to the capital of Queen Creek Land and Cattle Corp., who would then be responsible for compliance with the terms of the 1977 order.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On June 3, 1983, Flagg Industries, Inc. and Queen Creek Land and Cattle Corporation, respondents in the above captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the Consent Order that was issued on September 27, 1977. By letter, dated August 25, 1983, petitioners agreed to modify their original proposal.

The petition asked that the Commission reopen the proceeding in this matter and modify the Consent Order that was issued in 1977 so that Flagg Industries, Inc. (Flagg) would no longer be a respondent under that Order. The purpose of this change would be to permit a sale of those portions of the business of Flagg that are not related to the land sales operation of its subsidiary Queen Creek Land and Cattle Corporation (Queen Creek). In return for releasing Flagg from further obligations under the 1977 Order, Flagg would make a contribution of \$3,500,000 to the capital of Queen Creek and certain obligations would be placed on Queen Creek to assure compliance with the essential terms of the 1977 Order. The petition was on the public record for thirty (30) days and no comments were received.

After reviewing the petition, the Commission has concluded that the public interest warrants reopening and modifying the Order in the manner requested by the petitioners.

The modification shall take effect at such time as Flagg makes its contribution of \$3,500,000 to the capital of Queen Creek. The Commission's approval is expressly conditioned on the petitioners' representations that the sum received by Queen Creek will be invested promptly in government securities, qualified corporate securities, certificates of deposit, and savings and other bank accounts, so as to