

IN THE MATTER OF
PREFERRED PHYSICIANS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3222. Complaint, Feb. 26, 1988—Decision, Feb. 26, 1988

This consent order prohibits, among other things, an association of doctors in Tulsa, Okla., from conspiring to restrain competition and from fixing or increasing the prices they charge third-party payers for their services. In addition, the respondent is prohibited, for five years, from advising its members on the desirability or appropriateness of any price to be paid for physicians' services by any third-party payers.

Appearances

For the Commission: *Toby G. Singer.*

For the respondents: *Michael M. Eaton, Arent & Fox, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, Title 15, U.S.C. Section 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Preferred Physicians, Inc., a corporation, has violated the provisions of 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 its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Preferred Physicians, Inc. (hereinafter "respondent") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma. Respondent's principal office and place of business is located at 6161 South Yale Avenue, Tulsa, Oklahoma.

PAR. 2. Respondent's shareholders (sometimes referred to as its "members") are physicians licensed to practice in the State of Oklahoma, and are generally engaged in the business of providing medical services to patients for a fee. Except to the extent that competition has been restrained as herein alleged, respondent's members have been and are now in competition among themselves, and with other physi-

cians and health care providers, with respect to the provision of health care services in the Tulsa, Oklahoma area.

PAR. 3. In the conduct of their business of providing medical services, respondent's members treat patients from states other than Oklahoma, use supplies and equipment that are shipped across state lines, and receive substantial sums of money that flow across state lines for rendering medical services. Fees for medical services rendered by respondent's members are paid, at times, by the federal government, by patients or third-party payers in the states other than Oklahoma, and by patients or third-party payers in the State of Oklahoma with funds collected from third-party payers in states other than Oklahoma. The general business practices of respondent's members, and the acts and practices described below, affect the interstate movement of patients, the interstate purchase of medical supplies and products, and the interstate flow of funds, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 4. Respondent's members are often paid for the services they render by third-party payers, including health maintenance organizations ("HMOs"). HMOs generally invite health care providers, including physicians, to enter into agreements to provide services to the subscribers of the third-party payers. These agreements establish the terms and conditions of the relationship between the physicians and the third-party payers, including the prices to be paid for the physicians' services. Through such agreements, HMOs may obtain discounts from physicians' usual prices, and physicians may obtain access to additional patients.

PAR. 5. Respondent has over 250 members, all of whom have hospital privileges at St. Francis Hospital in Tulsa, Oklahoma. At least 174 out of 251 physicians with active staff privileges at St. Francis Hospital are members of respondent. Because only members of the hospital's staff may admit patients to St. Francis Hospital, respondent's members, if they act in concert, can effectively control access to that hospital.

PAR. 6. St. Francis Hospital is generally regarded as the leading hospital in the Tulsa area, in terms of its size, its reputation, and the price and quality of its services. Some large employers in Tulsa are hesitant to offer any health benefits plan that does not include preferred coverage for services received at St. Francis Hospital. Therefore, any physician group that controls access to St. Francis Hospital has substantial leverage with third party payers in the Tulsa area.

PAR. 7. Third party payers compete with each other to attract subscribers for their health benefit plans on the basis of prices, services covered and many other factors important to consumers. Therefore,

each third party payer seeks to minimize its costs, while also arranging for the participation of sufficient health care providers, in terms of quantity, quality and other relevant factors, to attract subscribers to its health benefits program. Accordingly, in the Tulsa area, prior to respondent's formation, third party payers offered to physicians fee schedules or other reimbursement mechanisms that the third party payers thought would minimize their costs while still attracting enough physicians in each specialty to make their health benefit programs attractive to consumers. Often, third party payers such as HMOs asked physicians to accept payments lower than the fees they usually charged, or to accept reimbursement on some basis other than fee-for-service. Physicians each decided independently whether to accept or reject any particular offer. If an offer were not accepted by a sufficient number of physicians, either in the aggregate or in particular specialties, the third-party payer either altered the terms of the proposal to make it more attractive or withdrew the offer.

PAR. 8. In or about 1984, many of the physicians in the Tulsa area who had hospital privileges at St. Francis Hospital decided and agreed not to compete with each other with respect to whether, and on what terms, to contract with third-party payers. To implement their agreement not to compete with one another, they formed respondent corporation to negotiate on their behalf with third-party payers. Their purpose was to resist competitive pressures to discount fees and to avoid accepting reimbursement on any basis other than the traditional fee-for-service method of payment for physicians' services.

PAR. 9. Respondent has acted as a combination of its members, has conspired with at least some of its members, and has acted to implement an agreement among its members, to restrain competition among physicians, by, among other things, facilitating, entering into, and implementing an agreement, express or implied:

A. That respondent would negotiate the terms and conditions of agreements between respondent's members and third-party payers, including the prices to be paid for the members' services, and that individual members would not negotiate directly with third-party payers;

B. That respondent's members would take a uniform position on the prices to be sought from third-party payers, and that the starting point for price negotiations with third-party payers would be the physician fee schedule used by the St. Francis Hospital preferred provider organization (the "Redbook").

PAR. 10. Several HMOs sought to enter into agreements with respondent's members. Some of these third-party payers attempted to negotiate the terms and conditions of the agreements, including the

prices to be paid for the members' services, with individual members, but in accordance with the agreement described in Paragraphs Eight and Nine, individual members would negotiate only through respondent and would not negotiate directly with these third-party payers. Other third-party payers agreed to, and did, negotiate the terms and conditions of the agreements, including the prices to be paid for the members' services, with respondent rather than with individual members. In its negotiations with these third-party payers, respondent sought to obtain agreements that the third-party payers would adopt the Redbook fee schedule. Inherent in these negotiations was a threat that if the third-party payers did not agree to the terms and conditions acceptable to respondent, the third-party payers would be unable to obtain agreements with respondent's members.

PAR. 11. Those third-party payers that did not negotiate with respondent were unable to obtain, or were hindered in obtaining, agreements with respondent's members to provide services to the subscribers of the third-party payers. The third-party payers that were unable to obtain agreements with respondent's members were unable to provide their subscribers with the option of treatment at St. Francis Hospital, the hospital in the area with the best reputation for high quality and low cost services. Those third-party payers that negotiated with respondent and succeeded in obtaining agreements with respondent's members to provide services to the subscribers of the third-party payers were denied the benefits of competition among physicians.

PAR. 12. By engaging in the acts or practices described in paragraphs eight through eleven, respondent has acted as a combination of at least some of its members, or has combined or conspired with at least some of its members, to fix or increase the prices charged by, or otherwise to restrain competition among, physicians in the Tulsa area.

PAR. 13. Respondent has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

A. Engaging in negotiations with third-party payers on behalf of its members, inherent in which were threats that if the third-party payers did not agree to terms and conditions, including prices, that were acceptable to respondent, respondent's members would refuse to enter into agreements to provide services to the subscribers of the third-party payers.

B. Recommending to its members that they enter into agreements, with third-party payers only when the agreements' terms and conditions, including prices, were acceptable to respondent.

PAR. 14. Respondent's actions described in paragraphs eight through thirteen have had, or have the tendency and capacity to have, the following effects, among others:

A. Restraining competition among physicians in the area of Tulsa, Oklahoma.

B. Fixing or increasing the prices that physicians in the Tulsa area charge for their services.

C. Depriving third-party payers and their subscribers of the benefits of competition among physicians in the Tulsa area.

PAR. 15. The combination or conspiracy and the acts and practices described in paragraphs eight through thirteen constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Respondent's combination or conspiracy, or the effects thereof, is continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent Preferred Physicians, Inc., 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 attorney, and counsel for the Commission having 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, 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 Preferred Physicians, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Oklahoma, with its office and principal place of business located at 6161 South Yale Avenue, in the City of Tulsa, State of Oklahoma.

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

ORDER

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. "*PPP*" means Preferred Physicians, Inc. and its Board of Directors, committees, officers, representatives, agents, employees, successors, and assigns.

B. "*Third-party payer*" means any person or entity that reimburses for, purchases, or pays for health care services provided to any other person, and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

C. "*Integrated joint venture*" means a joint arrangement to provide pre-paid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

II.

It is further ordered, That PPI, directly, indirectly, or through any corporate or other device, in connection with the provision of health care services by its members in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, shall forthwith cease and desist from:

A. Entering into, attempting to enter into, organizing, implementing, or continuing any agreement or understanding, express or implied, with any PPI member or among any PPI members, to deal with

any third-party payer on collectively determined terms by, for example:

1. acting on behalf of any PPI member or members to negotiate with any third-party payer; or
2. communicating that PPI members will refuse to enter into or withdraw from any agreement, actual or proposed, with any third-party payer if any term or condition is not acceptable to PPI or to PPI members collectively.

B. For a period of five (5) years after the date the order is served, providing comments or advice to any PPI member on the desirability or appropriateness of any price to be paid for physicians' services by any third party payer, including, but not limited to, advice that any PPI member refuse to enter into or withdraw from any agreement, actual or proposed, with any third-party payer because of the price to be paid for physicians' services.

Provided that, Nothing in this order shall prevent PPI from:

(1) forming or becoming an integrated joint venture and dealing with any third-party payer on collectively determined terms in that capacity, as long as the physicians participating in the joint venture remain free to deal with any third-party payer other than through the joint venture; or

(2) upon the request of a third-party payer, performing utilization review or credentialing activities in connection with the provision of services by PPI members to subscribers of the third-party payer.

III.

It is further ordered, That PPI:

A. Distribute by first-class mail a copy of this order to each of its members within thirty (30) days after the date the order is served.

B. For a period of five (5) years after the date the order is served, provide each new PPI member with a copy of this order at the time the member is accepted into membership.

IV.

It is further ordered, That PPI:

A. File a written report with the Commission within ninety (90) days after the date the order is served, and annually for three (3) years on the anniversary of the date the order was served, and at such other times as the Commission may be written notice to PPI require, setting

forth in detail the manner and form in which it has complied and is complying with the order.

B. For a period of five (5) years after the date the order is served, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by PPI or that come into PPI's possession, custody, or control, regardless of source, that discuss, refer, or relate to any price, term, or condition of any agreement, actual or proposed, with any third-party payer.

V.

It is further ordered, That PPI shall notify the Commission at least thirty (30) days prior to any proposed change to itself, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change which may affect compliance with this order.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted to accept the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years."¹ The Commission has determined that such provisions will in most cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."² For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

¹ *Hercules, Inc.*, 100 FTC 531 (1982) (modifying order); see also, e.g., *MidCon Corp.*, 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America*, 106 FTC 361, 524 (1985) (ten years), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, — U.S. —, No. 86-1492 (May 3, 1987); *Columbian Enterprises, Inc.*, 106 FTC 551, 554 (1985) (consent order) (five years).

² *Hercules, Inc.*, 100 FTC at 531.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9074. Consent Order, June 11, 1980—Modifying Order, March 4, 1988*

The Federal Trade Commission has modified a 1980 consent order (95 F.T.C. 825) with respondents by changing the accounting procedures for the sale of repossessed cars and light trucks. The Commission has replaced the repossession accounting procedure with a "repossession guide" which respondents must provide to its dealers.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On November 5, 1987, General Motors Corporation (GM) and General Motors Acceptance Corporation (GMAC) filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and Part VIII.B of the order in this matter, to reopen the proceeding and modify the order issued against GM and GMAC on June 11, 1980, in Docket No. 9074, 95 FTC 825.

This matter arose out of allegations that certain franchised General Motors dealerships and certain dealerships owned in whole or in part by GM were failing to account for and pay to defaulting customers surpluses generated by the sale of repossessed motor vehicles.¹ A complaint was issued against GM, [4] GMAC and a franchised GM dealer on February 10, 1976. Similar complaints were issued against Chrysler Corporation (D.9072), Ford Motor Company (D.9073), their respective credit subsidiaries, and a franchised dealer of each. GM and GMAC consented to the order that is the subject of this decision. Similar consent orders were issued against Chrysler and Ford and their respective credit subsidiaries.

A principal feature of each of these orders is a repossession accounting procedure that dealers of these automobile manufacturers were to use in conjunction with the disposition of repossessed motor vehicles returned to them under a recourse or repurchase agreement. The repossession accounting procedure was intended to bring about the uniform calculation of surpluses and deficiencies resulting from the

¹ The obligation of the secured creditor or his guarantor to account for and pay surpluses arises out of Article Nine of the Uniform Commercial Code (UCC), which has been adopted by 49 states and the District of Columbia. Under the UCC, a secured party, after repossession and disposition of the collateral, is required to account to the defaulting buyer for any surplus of proceeds from the sale or disposition of the collateral in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling, and the like, and allowable legal costs and fees. See U.C.C. § 9-504.