

Complaint

123 F.T.C.

IN THE MATTER OF

MONTANA ASSOCIATED PHYSICIANS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3704. Complaint, Jan. 13, 1997--Decision, Jan. 13, 1997*

This consent order prohibits, among other things, two Montana-based organizations from entering or attempting to enter into any agreement with physicians to: negotiate or refuse to deal with any third-party payer; determine the terms on which physicians deal with such payers; or fix the fees charged for any physician's services. In addition, the consent order prohibits the respondents from advising physicians to raise, maintain or adjust the fees charged for their medical services, or encouraging adherence to any fee schedule for physician's services.

Appearances

For the Commission: *Robert Leibenluft, Steve Osnowitz and William Baer.*

For the respondents: *James Kirkland, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Washington, D.C. and James Sneed, McDermott, Will & Emery, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Montana Associated Physicians, Inc. ("MAPI") and the Billings Physician Hospital Alliance, Inc. ("BPHA"), hereinafter sometimes referred to as respondents, have violated and are violating the provisions of said Act, 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 in that respect as follows:

PARAGRAPH 1. Respondent MAPI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1242 North 28th Street, Suite 1A, Billings, Montana.

PAR. 2. There are approximately 115 shareholders of MAPI, all of whom are physicians, and they constitute the membership of MAPI. MAPI's members provide medical services in over 30 independent physician practices in Billings, Montana. MAPI's members constitute approximately 43 percent of all physicians in Billings, Montana, and primarily practice fee-for-service medicine. An approximately equal number of the other physicians in Billings are part of a single multispecialty physician practice. MAPI's members constitute over 80 percent of all "independent" Billings physicians, that is, those who are not part of the multispecialty physician practice or employed by a hospital. A significant portion of MAPI's activities furthers the pecuniary interests of its members.

PAR. 3. Respondent BPHA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1233 North 30th Street, Billings, Montana.

PAR. 4. BPHA is a physician-hospital organization, whose membership consists of Saint Vincent Hospital and Health Center ("Saint Vincent") of Billings, Montana, and a majority of the physicians on Saint Vincent's active medical staff. Almost all of MAPI's members are also physician members of BPHA. BPHA contracts with third-party payers on behalf of its members to provide services to third-party payers' subscribers and enrollees. There are approximately 126 physician members of BPHA, practicing in over 30 independent physician practices, located almost exclusively in Billings, Montana. Physician members of BPHA constitute approximately 45 percent of all physicians in Billings, Montana, and over 80 percent of all independent Billings physicians. The single multispecialty physician practice, referred to in paragraph two, was acquired by the only other hospital in Billings, and has approximately the same number of physicians as BPHA. A significant portion of BPHA's activities furthers the pecuniary interests of its members.

PAR. 5. The general business practices of MAPI, BPHA, and their members, including those herein alleged, are in or affect "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. Except to the extent that competition has been restrained as alleged herein, the physician members of MAPI and BPHA have been, and are now, in competition among themselves and with other providers of physician services in Billings, Montana.

PAR. 7. Physicians, including the physician members of MAPI and BPHA, are often paid directly or indirectly for their services by third-party payers. Third-party payers such as health insurance companies, preferred provider organizations ("PPOs"), and health maintenance organizations ("HMOs"), reimburse for, purchase, or pay for all or part of the health care services provided to their enrollees or subscribers. Third-party payers generally contract with physicians to become participating providers in plans such payers offer to consumers. These contracts establish the terms and conditions of the relationship between the physician and the third-party payer, including the fees to be paid the physician for treating subscribers or enrollees of the third-party payer. Through such contracts, third-party payers may obtain capitated payment systems or discounts from physicians' usual fees, and physicians may obtain access to additional patients.

PAR. 8. Third-party payers in Billings, Montana, compete with each other on the basis of price, coverage offered, physician and hospital quality and availability, and other factors that are important to consumers. Payments to physicians for services rendered to third-party payer subscribers are a large component of a third-party payer's costs, and, therefore, are significant to a third-party payer in determining the price to charge consumers for health care coverage.

PAR. 9. Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by third-party payers, competing physicians decide individually whether to enter into contracts with third-party payers to provide services to subscribers or enrollees, and what prices to charge pursuant to such contracts.

PAR. 10. In 1986, most of the independent physicians in Billings were members of an organization called Ultracare. At this time, there were no HMOs or PPOs operating in Billings. Ultracare concluded that such plans would soon attempt to contract with physicians in Billings, and that competitive pressure could force physicians to deal with such plans at reduced prices or on other than fee-for-service terms. Accordingly, in March 1987, physician members of Ultracare formed MAPI, in substantial part to be a vehicle for its members to deal collectively with managed care plans. The purpose of engaging in collective dealings was to obtain greater bargaining power with third-party payers by presenting a united front, and thereby to resist

competitive pressures to discount fees and to avoid accepting reimbursement on other than the traditional fee-for-service basis.

PAR. 11. Beginning in 1986, and continuing to the present, MAPI and MAPI's predecessor, Ultracare, have acted as a combination of their members, have combined with at least some of their members, and have acted to implement agreements among their members to restrain competition by, among other things, facilitating, entering into, and implementing agreements, express or implied, to delay entry of HMOs and PPOs into Billings, to engage in collective negotiations over terms and conditions of dealing with third-party payers, to have MAPI members refrain from negotiating directly with third-party payers or contracting on terms other than those endorsed by MAPI, and to resist cost containment measures of third-party payers.

PAR. 12. During 1987 and continuing into 1993, MAPI acted to prevent and delay HMO Montana, an HMO owned and operated by Blue Cross/Blue Shield of Montana, from successfully contracting with physicians in Billings. Beginning in 1987, Blue Cross/Blue Shield of Montana sought to enter into agreements with MAPI's members to participate in HMO Montana. MAPI, on behalf of its members collectively, negotiated with HMO Montana concerning the terms of physicians' contracts with HMO Montana, including price terms, and rejected all contracts proposed by HMO Montana. Members of MAPI told Blue Cross/Blue Shield of Montana that they would negotiate with HMO Montana only through MAPI, and no member of MAPI entered into a contract with HMO Montana.

PAR. 13. Beginning in 1987, MAPI gathered detailed fee information from individual competing MAPI physicians and their physician practices, which enabled MAPI to determine for most physician services the prevailing fees and the maximum reimbursement allowed by Blue Cross/Blue Shield of Montana. After collecting and analyzing this fee information, MAPI advised certain physicians to raise their fees, and some fees were increased in accordance with these recommendations.

PAR. 14. Beginning in 1988, MAPI acted to obstruct efforts by a health plan seeking to establish the first PPO program in Billings. The health plan entered into a PPO contract with Saint Vincent in November 1988 and then sought to contract with physicians on the hospital's medical staff. Some members of MAPI indicated to the plan that they would follow MAPI's recommendations in regard to dealings with the plan. MAPI, on behalf of its members collectively, offered its own proposed physician contract to the plan that provided

for physicians to be paid their usual fees with no discounts, represented to the plan that this was what MAPI's members would accept, and objected to any discounts in fees to be paid by MAPI members. After negotiating with MAPI for a year without MAPI ever agreeing to MAPI physicians charging less than their usual fees, the plan contacted individual physicians about signing a PPO contract. When the plan sought to collect current fee information from MAPI members in order to devise a proposed fee schedule to offer to physicians, MAPI urged its members to submit prices higher than they were currently charging in order to inflate the fee schedule. By June 1990, the plan had contracts with only about 30 percent of MAPI's members.

PAR. 15. MAPI was actively involved in the formation of BPHA, which was created in 1991 by Saint Vincent and physicians on its medical staff. A substantial majority of BPHA's physician members are also members of MAPI. Through BPHA's Physician Agreements, MAPI is designated as the agent of almost all MAPI physician members of BPHA with respect to their membership in BPHA. As a result, MAPI has the authority to elect and remove physician members of BPHA's Board of Directors. Until 1993, MAPI's agency authority extended to the acceptance or rejection of any contract negotiated by BPHA with any third-party payer.

PAR. 16. The physician members of BPHA, most of whom are MAPI members, concertedly control BPHA's pricing and other terms of contracts for physician services. BPHA's Bylaws designate that its Contracting Committee shall negotiate the terms and conditions of contracts for physician services with third-party payers, including price terms of those contracts, and recommend acceptance or rejection of said contracts to the members of BPHA. BPHA's Contracting Committee consists almost entirely of physicians and their employees and agents, including for a significant period of time the Executive Director of MAPI. No action of BPHA's Contracting Committee or BPHA's Board of Directors can be taken without the support of a majority of physician representatives on each body. BPHA did not enter into any contract for physician services until nearly two years after its creation.

PAR. 17. MAPI has combined and is combining with its physician members, and has acted and is acting to implement an agreement among them, to restrain competition among physicians, through an agreement, express or implied, that BPHA would negotiate the terms and conditions of agreements between BPHA

physician members and others, including the prices to be paid for their services.

PAR. 18. The physician members of MAPI and the physician members of BPHA have not integrated their practices in any economically significant way, nor have they created efficiencies sufficient to justify their acts or practices described in paragraphs ten through seventeen.

PAR. 19. By engaging in the acts or practices described above, both MAPI and BPHA have combined or conspired with their respective physician members to fix and/or increase the fees received from third-party payers for the provision of physician services, to conduct boycotts, or otherwise to restrain competition among physicians in Billings, Montana.

PAR. 20. The actions of the respondents described in this complaint have had and have the purpose, tendency, and capacity to result in the following effects, among others:

A. Restraining competition among physicians in Billings, Montana;

B. Fixing or increasing the prices that are paid for physician services in Billings, Montana; and

C. Depriving third-party payers, their subscribers, and patients of the benefits of competition among physicians in Billings, Montana.

PAR. 21. The combinations or conspiracies and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acts and practices, as herein alleged, are 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 the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of a 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 respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order,

an admission by the respondents of all of 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have 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 MAPI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1242 North 28th Street, Suite 1A, Billings, Montana.

2. Respondent BPHA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1233 North 30th Street, Billings, Montana.

3. 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, for purposes of this order, the following definitions shall apply:

- A. "*Montana Associated Physicians, Inc.*" or "*MAPI*" means Montana Associated Physicians, Inc., its subsidiaries, divisions, committees, and groups and affiliates controlled by MAPI; their directors, officers, representatives, agents, and employees; and their successors and assigns.

B. "*Billings Physician Hospital Alliance, Inc.*" or "*BPHA*" means Billings Physician Hospital Alliance, Inc., its subsidiaries, divisions, committees, and groups and affiliates controlled by BPHA; their directors, officers, representatives, agents, and employees; and their successors and assigns.

C. "*Third-party payer*" means any person or entity that reimburses for, purchases, or pays for all or any part of the 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.

D. "*Risk-sharing joint venture*" means a joint arrangement to provide health care services in which physicians who would otherwise be competitors share a substantial risk of loss from their participation in the venture.

E. "*Fees*" means any and all cash or non-cash charges, rates, prices, benefits, or other compensation received, to be received, or charged to a patient or third-party payer for the rendering of physician services.

II.

It is further ordered, That MAPI, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to facilitate, ratifying, or attempting to ratify any combination, contract, agreement, understanding, or conspiracy with or among any physician(s) to:

A. Negotiate, deal, or refuse to deal with any third-party payer, employer, hospital, or any other provider of health care services;

B. Determine the terms, conditions, requirements, or any other aspect of becoming or remaining a participating physician in any program or plan of any third-party payer; and

C. Fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services.

Provided that nothing in this order shall be construed to prohibit MAPI from forming, facilitating, or participating in the formation of a risk-sharing joint venture, which may deal with a third-party payer on collectively determined terms, as long as the physicians participating in the risk-sharing joint venture also remain free to deal individually with any third-party payer.

Further provided that nothing in this order shall be construed to prohibit MAPI from forming, facilitating, or participating in the formation of any other joint venture for which MAPI receives the prior approval of the Commission.

III.

It is further ordered, That MAPI, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from:

A. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any physician or physician's practice to fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services;

B. Creating, formulating, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees for physicians' services, including, but not limited to, suggested fees, proposed fees, fee guidelines, discounts, discounted fees, standard fees, or recommended fees;

C. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action prohibited by this order; and

IV.

It is further ordered, That BPHA, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to facilitate, ratifying, or attempting to ratify any combination, contract, agreement, understanding, or conspiracy with or among any physician(s) to:

A. Negotiate, deal, or refuse to deal with any third-party payer for physician services;

B. Determine the terms, conditions, requirements, or any other aspect of becoming or remaining a participating physician in any program or plan of any third-party payer; and

C. Fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services.

Provided that nothing in this order shall be construed to prohibit BPHA from forming, facilitating, or participating in the formation of a risk-sharing joint venture, which may deal with a third-party payer on collectively determined terms, as long as the physicians participating in the risk-sharing joint venture also remain free to deal individually with any third-party payer.

Further provided that nothing in this order shall be construed to prohibit BPHA from forming, facilitating, or participating in the formation of any other joint venture for which BPHA receives the prior approval of the Commission.

Further provided that nothing in this order shall be construed to prohibit BPHA from implementing, attempting to implement, continuing, or attempting to continue, for the express term thereof, contracts with third-party payers that were in effect on September 30, 1994.

Further provided that nothing in this order shall be construed to prohibit BPHA from continuing to function as a physician-hospital

organization that is not a risk-sharing or otherwise integrated entity, as long as each of the following conditions is met:

(a) Saint Vincent Hospital and Health Center is the only hospital in Yellowstone County, Montana, that participates in BPHA;

(b) BPHA's role in the contracting process between third-party payers and physician members of BPHA is limited to:

(i) Soliciting or receiving from an individual physician member of BPHA, and conveying to a third-party payer, information relating to fees or other aspects of reimbursement, outcomes data, practice parameters, utilization patterns, credentials, and qualifications;

(ii) Conveying to a physician member of BPHA any contract offer made by a third-party payer;

(iii) Soliciting or receiving from a third-party payer, and conveying to a physician member of BPHA, clarifications of proposed contract terms;

(iv) Providing to a physician member of BPHA objective information about proposed contract terms, including comparisons with terms offered by other third-party payers;

(v) Conveying to a physician member of BPHA any response made by a third-party payer to information conveyed, or clarifications sought, by BPHA;

(vi) Conveying, in individual or aggregate form, to a third-party payer, the acceptance or rejection by a physician member of BPHA of any contract offer made by such third-party payer; and

(vii) At the request of a third-party payer, providing the individual response, information, or views of each physician member of BPHA concerning any contract offer made by such third-party payer.

(c) Each physician member of BPHA makes an independent, unilateral decision to accept or reject each contract offer made by a third-party payer;

(d) BPHA does not: (i) disseminate to any physician another physician's fees, other aspects of reimbursement, or views or intentions as to possible terms of dealing with a third-party payer; (ii) act as an agent for the collective negotiation or agreement by the physician members of BPHA; or (iii) encourage or facilitate collusive behavior among physician members of BPHA; and

(e) Each physician member of BPHA remains free to deal individually with any third-party payer.

V.

It is further ordered, That MAPI and BPHA shall:

A. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each of their members, officers, directors, managers, and employees;

B. For a period of five (5) years after the date this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each new MAPI or BPHA member, officer, director, manager, and employee within thirty (30) days of their admission, election, appointment, or employment; and

C. For a period of five (5) years after the date this order becomes final, publish annually in an official annual report or newsletter sent to all members, a copy of this order and the accompanying complaint with such prominence therein as is given to regularly featured articles.

VI.

It is furthered ordered, That MAPI and BPHA shall each file a verified written report within sixty (60) days after the date this order becomes final, annually thereafter for five (5) years on the anniversary of the date this order became final, and at such other times as the Commission or its staff may by written notice require, setting forth in detail the manner and form in which they have complied and are complying with the order.

VII.

It is further ordered, That MAPI and BPHA shall:

A. Notify the Commission at least thirty (30) days prior to any proposed change in such corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in such corporation that may affect compliance obligations arising out of the order; and

B. For a period of five (5) years after the date this order becomes final, notify the Commission in writing forty-five (45) days prior to

forming or participating in the formation of, or joining or participating in, any risk-sharing joint venture.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, MAPI and BPHA shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of a respondent relating to any matters contained in this order; and

B. Upon five days' notice to a respondent and without restraint or interference from it, to interview officers, directors, or employees of a respondent.

IX.

It is further ordered, That this order shall terminate on January 13, 2017.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to issue the complaint and order and write separately to emphasize two points. First, the complaint and order do not directly challenge the organization and conduct of the Billings Physician Hospital Alliance, Inc., as a physician hospital organization ("PHO"), and in my view, this order should cast no shadow on the activities of PHO's. Second, although I concur in the unusual and complicated fencing-in relief in the particular circumstances of this case, in my view, this negotiated order is not, and should not be read as, a guide for what a PHO can and cannot do.

IN THE MATTER OF

COMPUTER BUSINESS SERVICES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3705. Complaint, Jan. 21, 1997--Decision, Jan. 21, 1997*

This consent order prohibits, among other things, an Indiana home-based computer business opportunity firm and three principals from misrepresenting the earnings or success rate of investors; the existence of a market for their products or services; the amount of time it would take investors to recoup their investments and from making any representation regarding the performance, benefits, efficacy or success rate of any product or service unless they possess reliable evidence to substantiate the claims. The consent order also prohibits the use of misleading testimonials or endorsements. In addition, the consent order requires that advertisements for automatic telephone dialing systems disclose federal restrictions on their use and requires the respondents to pay \$5 million in consumer redress.

Appearances

For the Commission: *C. Steven Baker, Catherine Fuller, Mary E. Tortorice and Evan Siegel.*

For the respondents: *Lewis Keiler, Sonnenschein, Nath & Rosenthal, Chicago, IL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Computer Business Services, Inc. ("CBSI"); Andrew L. Douglass, individually and as an officer of CBSI; Matthew R. Douglass, individually; and Peter B. Douglass, individually ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent CBSI is an Indiana Corporation with its principal place of business at CBSI Plaza, Sheridan, Indiana.
2. Respondent Andrew L. Douglass is an officer of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation,