

Complaint

126 F.T.C.

IN THE MATTER OF

INSTITUTIONAL PHARMACY NETWORK, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3822. Complaint, Aug. 11, 1998—Decision, Aug. 11, 1998*

This consent order prohibits, among other things, the respondents, who are providers of institutional pharmacy services in Oregon, from entering into, maintaining, or enforcing any agreement with any pharmacy concerning fees or fixing, raising, stabilizing, maintaining, or tampering with any fees.

Participants

For the Commission: *Randall Marks, Steven Levy, Michael McNeely, William Baer, and Jonathan Baker.*

For the respondents: *Douglas Ross and Pat Morris*, in-house counsel, Portland, OR.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Institutional Pharmacy Network; Evergreen Pharmaceutical, Inc.; NCS Healthcare of Oregon, Inc.; NCS Healthcare of Washington, Inc.; United Professional Companies, Inc.; and White, Mack and Wart, Inc., hereinafter sometimes referred to as respondents, have violated and are violating the Federal Trade Commission Act and 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:

1. Respondent Institutional Pharmacy Network ("IPN") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 1300 SW 5th Avenue, Suite 2300, Portland, Oregon.

2. Respondent Evergreen Pharmaceutical, Inc. ("Evergreen"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington with its office and principal place of business located at 12220 113th Avenue, NE, Kirkland, Washington.

3. Respondent NCS Healthcare of Oregon, Inc. ("NCS of Oregon"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 2725 Columbia Blvd., Portland, Oregon.

4. Respondent NCS Healthcare of Washington, Inc. ("NCS of Washington"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio with its office and principal place of business located at 13035 Gateway Drive, Seattle, Washington.

5. Respondent United Professional Companies, Inc. ("UPC"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3724 West Wisconsin Avenue, Milwaukee, Wisconsin.

6. Respondent White, Mack & Wart, Inc., doing business as ProPac Pharmacy ("ProPac"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 11620 NE Ainsworth Circle, Portland, Oregon.

7. IPAC Pharmacy ("IPAC") was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon. On or about July 31, 1996, after the occurrence of the events alleged in paragraphs 18-20, respondent NCS of Oregon purchased the pharmacy business of IPAC.

8. Clinical Health Systems ("Clinical") was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington. On or about November 1, 1996, after the occurrence of the events alleged in paragraphs 18-20, respondent NCS of Washington purchased the pharmacy business of Clinical.

9. The respondents named in paragraphs two through six herein (sometimes referred to as "institutional pharmacy respondents") provide institutional pharmacy services in Oregon.

10. Clinical, Evergreen, IPAC, ProPac, and UPC formed IPN and have been its only members.

11. The institutional pharmacy respondents are engaged in the business of providing pharmacy services to institutional care facilities, such as nursing homes. Institutional pharmacies provide

specialized services, including providing medications in single dose packages, maintaining an "emergency box" at the client facility with drugs for use in emergency situations, and providing consulting and quality assurance services to institutional care facilities.

12. IPN engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, IPN is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

13. The general business practices of IPN and its members, including those practices herein alleged, are in or affect "commerce" within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

14. Except to the extent that IPN and its members have restrained competition as alleged herein, IPN's members have been, and are now, in competition among themselves and with other providers of institutional pharmacy services in Oregon. Absent agreements among competing pharmacies on the price and other terms on which they will provide services to third-party payers, competing pharmacies decide individually whether, and at what price, to enter into contracts with such payers.

15. The State of Oregon created the Oregon Health Plan ("OHP") in 1994 to provide health care to Medicaid recipients and other needy Oregonians. Under OHP, the state contracts with Fully Capitated Health Plans ("Plans"), which are managed care organizations that receive a fixed payment to care for OHP patients. The Plans in turn contract with providers, including hospitals, physicians, retail pharmacies, and institutional pharmacies. OHP covers about half of all institutional care patients in Oregon.

16. IPN neither provides new or efficient services, nor enables its members to provide new or efficient services. Moreover, IPN members do not share risk. Instead, IPN provides a vehicle for its members to reach collective decisions on the prices that the institutional pharmacies will seek from the Plans.

17. The institutional pharmacy members of IPN have agreed among themselves, and IPN has acted as a combination of those institutional pharmacies, and has combined with them, to engage in collective negotiations over price and other terms with the Plans and thereby to fix the fees they charge the Plans. In so doing, IPN and its institutional pharmacy members have fixed, stabilized, or increased

the price of institutional pharmacy services and otherwise restrained competition among institutional pharmacies in Oregon.

18. The institutional pharmacy members of IPN together provide pharmacy services for approximately 80 percent of the patients that receive institutional pharmacy services in Oregon. Their purpose in agreeing to negotiate collectively has been to maximize their resulting leverage in bargaining over reimbursement rates with the Plans. Indeed, even before forming IPN, they saw "an advantage to negotiate from strength for reimbursement" because they recognized that competition among themselves would drive down reimbursement rates.

19. IPN has contracted with three Plans. Pursuant to each of those contracts, each Plan pays IPN members a higher rate than it pays institutional pharmacies that are not IPN members and that did not negotiate collectively with that Plan.

20. IPN also attempted to contract with at least four other Plans. Clinical, Evergreen, IPAC, ProPac, and UPC agreed that, before conducting individual negotiations, each member would give IPN time to attempt to negotiate a contract. Pursuant to this agreement, the pharmacies negotiated separately with three of the Plans only after IPN failed to reach an agreement on behalf of the group. IPN also negotiated with a fourth Plan that is by far the largest purchaser of institutional pharmacy services for OHP patients. Although this Plan sought to deal with Clinical, Evergreen, IPAC, ProPac, and UPC individually, the pharmacies largely refused to respond and instead approached the Plan as a group. After months of attempting to negotiate individually with the institutional pharmacy members of IPN, and under pressure to implement pharmacy arrangements for institutional care patients under OHP, the Plan began negotiating with IPN. As a result of these negotiations, the Plan agreed to pay higher rates to IPN members than it had agreed to pay other institutional pharmacies.

21. Respondents' actions as alleged herein have had and have the purpose, tendency, and capacity, among other effects:

- a. To restrain competition among pharmacies providing institutional pharmacy services in Oregon;
- b. To fix or increase the prices that the Plans pay for institutional pharmacy services to OHP patients in Oregon; and

c. To deprive the State of Oregon, the Plans, nursing homes and other long-term care facilities, and OHP beneficiaries of the benefits of competition among providers of institutional pharmacy services in Oregon.

22. The combinations or agreements and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. 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 ("Commission"), having initiated an investigation of certain acts and practices of Institutional Pharmacy Network; Evergreen Pharmaceutical, Inc.; NCS Healthcare of Oregon, Inc.; NCS Healthcare of Washington, Inc.; United Professional Companies, Inc.; and White, Mack and Wart, Inc., hereinafter sometimes referred to as the respondents, and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 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 the 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 Acts, and that a 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 described 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 Institutional Pharmacy Network is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 1300 SW 5th Avenue, Suite 2300, Portland, Oregon.

2. Respondent Evergreen Pharmaceutical, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington with its office and principal place of business located at 12220 113th Avenue, NE, Kirkland, Washington.

3. Respondent NCS Healthcare of Oregon, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 2725 Columbia Blvd., Portland Oregon.

4. Respondent NCS Healthcare of Washington, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio with its office and principal place of business located at 13035 Gateway Drive, Seattle, Washington.

5. Respondent United Professional Companies, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3724 West Wisconsin Avenue, Milwaukee, Wisconsin.

6. Respondent White, Mack and Wart, Inc. (doing business as Propac Pharmacy), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 11620 NE Ainsworth Circle, Portland, Oregon.

7. 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, as used in this order, the following definitions shall apply:

A. Respondent *Institutional Pharmacy Network ("IPN")* means Institutional Pharmacy Network; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by IPN; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. Respondent *Evergreen Pharmaceutical, Inc.*, means Evergreen Pharmaceutical, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by Evergreen Pharmaceutical, Inc.; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. Respondent *NCS Healthcare of Oregon, Inc.*, means NCS Healthcare of Oregon, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by NCS Healthcare of Oregon; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

D. Respondent *NCS Healthcare of Washington, Inc.*, means NCS Healthcare of Washington, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by NCS Healthcare of Washington; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

E. Respondent *United Professional Companies, Inc.*, means United Professional Companies, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by United Professional Companies, Inc.; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

F. Respondent *White, Mack and Wart, Inc.*, means White, Mack and Wart, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by White, Mack and Wart, Inc.; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

G. "*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; managed care organizations; Fully Capitated Health Care Plans under the Oregon Health Program; pharmacy benefit managers; prepaid hospital, medical, or other health service 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.

H. "*Oregon Health Plan*" means the plan created by the State of Oregon in 1994 to provide health care to Medicaid recipients and other needy Oregonians.

I. "*Qualified risk-sharing joint arrangement*" means an arrangement to provide services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of pharmacy providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all pharmacy providers participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of services to payers at a capitated rate; (b) the provision of services for a predetermined percentage of premium or revenue from payers; (c) the use of significant financial incentives (*e.g.*, substantial withholds) for its participating providers, as a group, to achieve specified cost-containment goals; or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by different types of providers offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors.

J. "*Qualified clinically-integrated joint arrangement*" means an arrangement to provide services in which (1) the arrangement does

not restrict the ability, or facilitate the refusal, of pharmacy providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all pharmacy providers participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the providers participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement.

K. "*Subcontract*" means an agreement between two pharmacies that one will fulfill the contractual obligations of the other to provide pharmacy goods and services to the patients of an institutional care facility or third-party payer at a particular facility, when (1) the contracting pharmacy cannot reasonably fulfill its contract obligations at that facility or (2) a respondent is operating in its capacity as a network including that facility if, at the time of the agreement, that facility had a pre-existing contract with another pharmacy.

II.

It is further ordered, That each respondent, in connection with the provision of institutional pharmacy goods and services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist, directly or indirectly, or through any corporate or other device, 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 agreement with any pharmacy either (1) concerning fees or (2) setting, fixing, raising, stabilizing, establishing, maintaining, adjusting, or tampering with any fees.

Provided that nothing in this order shall be construed to prohibit any respondent from:

(1) Entering into any agreement or engaging in conduct that is reasonably necessary to form, facilitate, manage, operate, or participate in:

- (a) A qualified risk-sharing joint arrangement; or
- (b) A qualified clinically integrated joint arrangement, if the respondent has provided the prior notification(s) as required by this

paragraph (b). Such prior notification must be filed with the Secretary of the Commission at least thirty (30) days prior to forming, facilitating, managing, operating, participating in, or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the identity of each participant; the location or area of operation; a copy of the agreement and any supporting organizational documents; a description of its purpose or function; a description of the nature and extent of the integration expected to be achieved, and the anticipated resulting efficiencies; an explanation of the relationship of any agreement on reimbursement to furthering the integration and achieving the expected efficiencies; and a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from such agreement(s). If, within the first waiting period, a representative of the Commission makes a written request for additional information, respondent shall not form, facilitate, manage, operate, participate in, or take any action, other than planning, in furtherance of such joint arrangement until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition.

(2) Agreeing on the terms by which that respondent will provide pharmacy goods or services:

(a) With a prescription benefit manager or other third-party payer that is acting on behalf of an employer or other purchaser of pharmacy goods and services and (i) that is neither owned by nor operates any pharmacies providing institutional pharmacy services, or (ii) that owns or operates a pharmacy providing institutional pharmacy services as long as respondent notifies the Commission in writing at least forty-five (45) days prior to such agreement.

(b) To an institutional care facility that is acting as a purchaser of pharmacy goods or services, even if the facility also owns a pharmacy.

(c) With another pharmacy pursuant to a subcontract.

(3) Agreeing on the terms by which respondent will purchase pharmacy goods or services in its capacity as an institutional care facility.

(4) Contracting to operate or manage a pharmacy.

III.

It is further ordered, That each respondent shall:

A. Within thirty (30) days after the date on which this order becomes final, cause the distribution by first-class mail of this order and the complaint to (1) each of its corporate officers, directors, and managers, and the officers, directors, and managers with responsibility for operating pharmacies in the states of Oregon and Washington, and (2) each Fully Capitated Health Plan under the Oregon Health Plan;

B. For a period of two (2) years after the date this order becomes final, distribute by first-class mail a copy of this order and the complaint to each new member of IPN and each of respondent's corporate officers, directors, and managers, and officers, directors, and managers with responsibility for operating pharmacies in the states of Oregon and Washington, within (30) days of the member's admission or the election, appointment, or employment of the officer, director, or manager;

C. File a verified written report within sixty (60) days after the date this order becomes final setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, setting forth in detail the manner and form in which it has complied and is complying with paragraphs II and III of this order;

D. Notify the Commission at least thirty (30) days prior to (1) the respondent's dissolution, assignment, or sale resulting in the emergence of a successor corporation, or (2) the creation or dissolution of subsidiaries that may affect compliance obligations arising out of the order or any other change that may affect compliance obligations arising out of the order; and

E. For the purpose of determining or securing compliance with this order, permit any duly authorized representative of the Commission: (1) access, during office hours and in the presence of

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Decision and Order

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 (2) upon five days' notice to the respondent, and without restraint or interference from it, to interview its officers, directors, or employees.

IV.

It is further ordered, That this order will terminate on August 11, 2018.

Modifying Order

126 F.T.C.

IN THE MATTER OF

COLUMBIA/HCA HEALTHCARE, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3472. Consent Order, Nov. 19, 1993—Modifying Order, Aug. 14, 1998*

This order reopens a 1993 consent order – that prohibited the respondents from acquiring any acute care hospital in Osceola County, Florida, without prior Commission approval – and this order modifies paragraph IV of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on November 19, 1993, in Docket No. C-3472 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph IV, which currently requires Columbia/HCA to seek the prior approval of the Commission to acquire or to permit to be acquired certain acute care hospitals. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons discussed below, the

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.