

IN THE MATTER OF

M.D. PHYSICIANS OF SOUTHWEST LOUISIANA, INC.

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

Docket C-3824. Complaint, Aug. 31, 1998—Decision, Aug. 31, 1998

This consent order prohibits, among other things, a group of Louisiana physicians from engaging in collective negotiations on behalf of its members or fixing prices in the future.

Participants

For the Commission: *Rendell Davis, David Pender, Robert Leibenluft, William Baer, Seth Sacher, and Jonathan Baker.*

For the respondent: *Frank Massengale, Massengale & DeBruhe, New Orleans, LA.*

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 ("Commission"), having reason to believe that M.D. Physicians of Southwest Louisiana, Inc. ("respondent MDP") has violated 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 as follows:

PARAGRAPH 1. Respondent MDP is a business corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal place of business in Lake Charles, Louisiana, the parish seat of Calcasieu Parish, Louisiana. Respondent MDP's address is P.O. Box 1832, Lake Charles, Louisiana.

PAR. 2. All of the members of respondent MDP are physicians practicing in and around Calcasieu Parish, Louisiana. Much of the population of Calcasieu Parish resides in Lake Charles, Louisiana, and surrounding communities, which include Sulphur, Moss Bluff, and Westlake, Louisiana ("Lake Charles area"). The population of the Lake Charles area is approximately 150,000. Most of the members of

respondent MDP, as well as most of the physicians practicing in Calcasieu Parish, practice in the Lake Charles area.

PAR. 3. During most of the time period during which the acts and practices described in paragraphs ten through fifteen below took place ("the relevant time period"), the members of respondent MDP constituted a majority of all physicians practicing in Calcasieu Parish, Louisiana. In certain physician specialties, the members of respondent MDP constituted all or most of the physician specialists practicing in Calcasieu Parish. More than 200 physicians have been members of respondent MDP since it was formed in 1987. During the relevant time period, respondent MDP has had as many as 165 members at one time.

PAR. 4. Respondent MDP exists in substantial part for the pecuniary benefit of its members. By virtue of its purposes and activities, respondent MDP is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. The acts and practices of respondent MDP, including those herein alleged, are in or affect commerce within the meaning of Section 5 of 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, some or all of the members of respondent MDP have been, and are now, in competition among themselves and with other providers of physician services in Calcasieu Parish, Louisiana.

PAR. 7. Physicians often contract with health insurance firms and other third-party payers. Such contracts typically establish the terms and conditions under which the physicians will render services to the subscribers of the third-party payers, including terms and conditions of physician compensation and of cost containment. In many cases, physicians entering into such contracts agree to reductions in their compensation and to various cost containment procedures, including procedures for reviewing the utilization of medical resources by physicians and for dealing with physicians who have overutilized such resources. By lowering their costs in this manner, third-party payers are able to reduce the cost of medical care for their subscribers. The extensive use of such methods of lowering costs can be described as "managed care."

PAR. 8. Absent agreements among competing physicians on the terms upon which they will deal with third-party payers, competing physicians each decide individually whether to enter into contracts with third-party payers, and on the terms and conditions under which they are willing to enter into such contracts.

PAR. 9. In engaging in the acts and practices described in paragraphs ten through fifteen below, respondent MDP has acted as a combination of its members and has conspired with at least some of its members.

PAR. 10. Respondent MDP was formed in March 1987 as a vehicle for its members to deal concertedly with the impending entry, into Calcasieu Parish, Louisiana, of managed care. The members of respondent MDP agreed that respondent MDP would represent them in negotiations with third-party payers.

PAR. 11. Beginning in 1987, and continuing until at least 1994, respondent MDP conspired to fix the terms and conditions, including terms of financial compensation, under which its members deal with third-party payers and conspired to prevent or delay the entry into Calcasieu Parish, Louisiana, of managed care.

PAR. 12. Beginning in 1988, respondent MDP negotiated on behalf of its members with Blue Cross and Blue Shield of Louisiana ("Blue Cross") the terms and conditions of member participation in Blue Cross health insurance plans. In 1989, respondent MDP terminated those negotiations, when it failed to reach agreement with Blue Cross on the terms of physician compensation. Until 1994, when respondent MDP first learned that it was under investigation by the staff of the Commission, the members of respondent MDP uniformly refused to participate in any Blue Cross plan.

PAR. 13. Beginning in 1991, respondent MDP negotiated on behalf of its members with the Louisiana State Employees Group Benefits Program ("State Employees Program"), the health insurance plan for employees of the State of Louisiana, the terms and conditions of member participation in the State Employees Program. In 1993, those negotiations ended when respondent MDP and the State Employees Program failed to reach agreement on the terms of physician compensation. In 1994, the president of respondent MDP exhorted the members of respondent MDP not to deal with the State Employees Program, and none of the members did until 1995.

PAR. 14. Beginning in 1987 and continuing until at least 1994, respondent MDP conspired to refuse to deal with, and to fix the terms and conditions of dealing with, other third-party payers attempting to do business in Calcasieu Parish, Louisiana, including, but not limited to, Aetna Insurance Company and Healthcare Advantage, Inc.

PAR. 15. Respondent MDP functioned de facto as the exclusive representative of its members. Although respondent MDP did not contractually prevent its members from dealing with third-party payers directly, and although it issued statements that its members were free to deal with third-party payers directly, the members allowed MDP to function as their exclusive representative. Until 1994, when respondent MDP first learned that it was under investigation by the staff of the Commission, the members of respondent MDP dealt with third-party payers only through respondent MDP. Furthermore, the members of respondent MDP all refused to meet individually with, and listen to presentations by, representatives of some third-party payers. Respondent MDP facilitated the collective refusal of its members to deal directly with third-party payers when it repeatedly collected from, and disseminated to, its members information concerning the members' refusal to deal with third-party payers directly.

PAR. 16. The members of respondent MDP have not integrated their medical practices in any economically significant way, nor have they created any efficiencies that might justify the acts and practices described in paragraphs ten through fifteen.

PAR. 17. The purpose, tendency, effects, or capacity of respondent MDP's acts and practices as described in paragraphs ten through fifteen are and have been to restrain trade unreasonably and hinder competition in the provision of physician services in Calcasieu Parish, Louisiana, in the following ways, among others:

- A. To restrain competition among physicians;
- B. To deprive consumers of the benefits of competition among physicians;
- C. To fix or increase the prices that consumers pay for physician services;
- D. To fix the terms and conditions upon which physicians would deal with third-party payers, including terms of physician compensation, and thereby raising the price to consumers of medical insurance coverage issued by third-party payers; and

E. To deprive consumers of the benefits of managed care.

PAR. 18. The combination or conspiracy and the acts and practices of respondent MDP, as herein alleged, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation or the effects thereof, as herein alleged, will continue or recur 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 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 respondent with violation of the Federal Trade Commission Act; and

The respondent 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, 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 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 M.D. Physicians of Southwest Louisiana, Inc. is a business corporation organized, existing, and doing business under

and by virtue of the laws of the State of Louisiana, with its principal place of business located at P.O. Box 1832, Lake Charles, Louisiana.

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

ORDER

I.

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

A. "*MDP*" means M.D. Physicians of Southwest Louisiana, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates, controlled by MDP, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*Person*" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

C. "*Payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

D. "*Provider*" means any person that supplies health care services to any other person, including, but not limited to, physicians, hospitals, and clinics.

E. "*Reimbursement*" means any payment, whether cash or non-cash, or other benefit received for the provision of physician services.

F. "*Physician*" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

G. "*Participating physician*" means any physician (1) who is a stockholder, owner, or member of MDP; (2) who has agreed to

provide services through MDP; or (3) whose services have been offered to any payer through MDP.

H. "*Qualified risk-sharing joint arrangement*" means an arrangement to provide physician services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all physicians participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of physician services to payers at a capitated rate; (b) the provision of physician 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 physicians, 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 physicians in different specialties 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.

I. "*Qualified clinically-integrated joint arrangement*" means an arrangement to provide physician services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all physicians 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 physicians participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement.

II.

It is further ordered, That MDP, 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 Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding to:

1. Negotiate on behalf of any participating physicians with any payer or provider;
2. Deal, or refuse to deal, with any payer or provider; or
3. Determine any terms, conditions, or requirements upon which physicians deal with any payer or provider, including, but not limited to, terms of reimbursement.

B. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this order.

Provided that nothing in this order shall be construed to prohibit any agreement or conduct by MDP 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 MDP 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, MDP 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.

III.

It is further ordered, That MDP 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:

1. Each person who, at any time since January 1, 1993, has been an officer, director, manager, employee, or participating physician in MDP, and

2. Each payer or provider who, at any time since January 1, 1993, has communicated any desire, willingness, or interest in contracting for physician services with MDP.

B. For a period of five (5) years after the date this order becomes final:

1. Distribute by first-class mail a copy of this order and the accompanying complaint to each new MDP stockholder, manager, employee, and participating physician within thirty (30) days of his or her initial stock purchase, appointment, employment, or participation, and

2. Annually publish in any official annual report or newsletter sent to all participating physicians, a copy of this order and the complaint with such prominence as is given to regularly featured articles.

IV.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, MDP shall submit to the Commission a verified written report 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.

B. One (1) year from the date this order becomes final, annually for the next five (5) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, MDP shall file a verified written report with the Commission setting

forth in detail the manner and form in which it has complied and is complying with paragraphs II and III of this order.

V.

It is further ordered, That MDP shall notify the Commission at least thirty (30) days prior to any proposed change in MDP, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in MDP that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any recognizable privilege, MDP shall permit, upon written request, 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 MDP relating to any matter contained in this order; and

B. Upon five (5) business days' notice to MDP and without restraint or interference from it, to interview officers, directors, or employees of MDP.

VII.

It is further ordered, That this order shall terminate on August 31, 2018.

IN THE MATTER OF

AUTOMOTIVE BREAKTHROUGH SCIENCES, INC., ET AL.

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

Docket 9275. Complaint, Sept. 27, 1995—Final Order, Sept. 9, 1998

This final order prohibits, among other things, two New York-based corporations and an officer, that manufactures, advertises and distributes automotive products and devices, from making any claims that the aftermarket brakes they sell are as effective as factory installed antilock braking systems and prohibits the respondents from using the term "ABS" in its advertising and marketing. In addition, the order requires the respondents to notify all distributors and purchasers of the Commission's findings, and requires them to possess competent and reliable scientific evidence to substantiate any future claims regarding the attributes, efficacy, safety or benefits of any braking system or device designed to be used in any motor vehicle.

Participants

For the Commission: *Janet Evans, Theodore Hoppock, Sydney Knight, and Susan Braman.*

For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission having reason to believe that Automotive Breakthrough Sciences, Inc., a corporation, ABS Tech Sciences, Inc., a corporation, and Richard Schops, individually and as an officer and director of said corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Automotive Breakthrough Sciences, Inc., is a New York corporation, with its offices and principal place of business located at P.O. Box 474, Wheatley Heights, New York.

Respondent ABS Tech Sciences, Inc., is a New York corporation, with its offices and principal place of business located at P.O. Box 474, Wheatley Heights, New York.

Respondent Richard Schops is or was at relevant times herein an officer and director of the corporate respondents. Individually or in