

IN THE MATTER OF
MESA COUNTY PHYSICIANS
INDEPENDENT PRACTICE ASSOCIATION, INC.

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

Docket 9284. Amended Complaint, May 4, 1999--Decision, May 4, 1999*

This consent order, among other things, prohibits an organization of Colorado physicians from engaging in collective negotiations on behalf of its members; collectively refusing to contract with payers; acting as an exclusive bargaining agent for its members; restricting its members from dealing with third-party payers through an entity other than Mesa IPA; and exchanging information among physicians about the terms upon which physicians are willing to deal with third-party payers. In addition, the consent order prohibits the respondent from retaining any employee or any participating physician who Mesa IPA knows is participating in payer contract review.

Participants

For the Commission: *Markus Meier, Paul Nolan, Casey Triggs, Elizabeth Palmquist, David Pender, Robert Leibenluft, Rendell Davis, Daniel Ducore, William Baer, Louis Silvia, and Roger Boner.*

For the respondent: *Richard Raskin, Sidley & Austin, Chicago, IL. Mark Horoschak, Womble, Carlyle, Sandridge & Rice, Charlotte, N.C. and Thomas McMahon, Powers Phillips, Denver, CO.*

AMENDED 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 Mesa County Physicians Independent Practice Association, Inc. ("Mesa County IPA" and "respondent") has violated and is violating Section 5 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, hereby issues this amended complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mesa County IPA is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its address at 751 Horizon Court, Suite 256, Grand Junction, Mesa County, Colorado.

* Complaint issued May 12, 1997 (unpublished).

PAR. 2. Grand Junction (population exceeds 37,600) is the largest city in Mesa County (population exceeds 100,000), Colorado, and is located approximately 30 miles east of the Utah border. Grand Junction is the largest city between Salt Lake City, Utah to the west, and Denver, Colorado to the east, a distance of approximately 400 miles.

PAR. 3. Respondent Mesa County IPA's members include at least 85% of the physicians (medical doctors and doctors of osteopathic medicine) in private practice in Mesa County, as well as at least 90% of the primary care physicians (family practitioners, general practitioners, internists, and pediatricians). These physicians compete in the Mesa County area. All of respondent's members are engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as alleged herein, some or all of the physician members of respondent Mesa County IPA have been, and are now, in competition with each other for the provision of physician services.

PAR. 4. The general business practices of respondent Mesa County IPA and its members, including the acts and practices herein alleged, are in or affect "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. Respondent Mesa County IPA engages in substantial activities for the pecuniary benefit of its members. At all times relevant to this complaint, respondent is and has been organized in substantial part for the profit of its members, and is therefore a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. Respondent Mesa County IPA was formed in or about 1987 to promote the collective economic interests of Mesa County physicians. Respondent, acting as a combination of its members, and in conspiracy with at least some of its members, and others, has acted to restrain competition by, among other things, facilitating, entering into, and implementing agreements among its members, express or implied, to fix price and other competitively significant terms of dealing with payers, or by collectively refusing to deal with payers.

PAR. 7. Respondent Mesa County IPA has a multi-year contract with the Rocky Mountain Health Maintenance Organization ("Rocky Mountain HMO"). The alliance between respondent and Rocky Mountain HMO has created a substantial obstacle to the ability of

other payers to contract with a physician panel in Mesa County. Rocky Mountain HMO enrollees currently comprise at least 50% of the total patient volume of respondent's members.

PAR. 8. As early as 1993, respondent Mesa County IPA began negotiating collectively, on behalf of all of its members, with several third-party payers. Respondent Mesa County IPA's Board of Directors approved a set of guidelines and a fee schedule to be used by respondent's Contract Review Committee in reviewing contract offers from payers. Respondent's fee schedule resulted in significantly higher prices to several payers for physician services.

PAR. 9. Respondent Mesa County IPA, through its newsletters, documents, and other published media, has encouraged its physician members not to deal with new health plans or to do so only on terms that were approved by respondent, and has invited or contemplated concerted action by its members to avoid signing payer contracts. Respondent Mesa County IPA reviewed individual contract offerings to its members by third-party payers, and published adverse comments regarding such contracts. To facilitate its review of all contracts, respondent urged its members to forward all contracts to respondent's Contract Review Committee.

PAR. 10. A wide range of third-party payers of physician services, including preferred provider organizations, health maintenance organizations, and employer health care purchasing cooperatives, were excluded from doing business in Mesa County as a result of respondent's conduct. Although most payers sought alternatives to respondent, they were forced to contract with respondent to obtain the physician services they needed to market viable plans, or else abandon their efforts to enter Mesa County.

PAR. 11. In November 1997, respondent Mesa County IPA signed a proposed consent agreement which, if accepted by the Federal Trade Commission, would have required, *inter alia*, that respondent Mesa County IPA abolish its Contract Review Committee. In December 1997, the corporation Innovative Reviewers Inc. was incorporated in the State of Colorado by a group of individuals that included the Executive Director of respondent Mesa County IPA and the former Chairman of the Contract Review Committee of respondent Mesa County IPA. All but one of the fifteen shareholders of Innovative Reviewers Inc. had ties to respondent Mesa County IPA: twelve were physicians participating in respondent Mesa County IPA; one was the Executive Director of respondent

Mesa County IPA; and one was the husband of the Executive Director of respondent Mesa County IPA. After its formation, Innovative Reviewers Inc. engaged in conduct in which the Contract Review Committee of respondent Mesa County IPA had also engaged: reviewing payer contracts submitted by physicians, and advising those physicians whether particular terms and conditions of those contracts were acceptable.

PAR. 12. The physician members of respondent Mesa County IPA have not integrated their practices to create efficiencies sufficient to justify their acts and practices described in paragraphs six through eleven.

PAR. 13. The purpose, effects, tendency, or capacity of the conduct described in paragraphs six through eleven are and have been to restrain trade unreasonably and hinder competition in the provision of primary care physician services, as well as physician services generally, in the Mesa County area in the following ways, among others:

A. Price and other forms of competition among respondent Mesa County IPA's member physicians were unreasonably restrained;

B. Higher prices for physician services have resulted;

C. The development of alternative health care financing and delivery systems, including employer developed self-funded plans, was hindered;

D. Health plans, employers, and individual consumers were deprived of the benefits of competition in the purchase of physician services;

E. Health plans, employers, and individual consumers were deprived of the benefits of competition between health plans.

PAR. 14. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all of the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having thereafter determined to modify the order contained in that consent agreement by adding paragraphs I.J, I.K, I.L, and II.F, and to issue an amended complaint to accompany that modified order, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Mesa County Physicians Independent Practice Association, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 751 Horizon Court, Suite 256, Grand Junction, Colorado.

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. "*Mesa IPA*" means Mesa County Physicians I.P.A., Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Mesa IPA, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*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.

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

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

E. "*Participating physician*" means any physician (1) who is a stockholder, owner, or member of Mesa IPA; (2) who has agreed to provide services through Mesa IPA; or (3) whose services have been offered to any payer through Mesa IPA.

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

G. "*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.

H. "*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.

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

J. "*Payer contract*" means any contract, whether actual or proposed, offered by any payer to any physician.

K. "*Payer contract review*" means any activity, other than a qualified risk-sharing joint arrangement or a qualified clinically integrated joint arrangement, in which information concerning the terms or conditions of a payer contract is transmitted to a physician practicing in Mesa County and in which such activity

1. Facilitates collective decision-making among physicians,
2. Coordinates physicians' responses to a payer contract,
3. Disseminates to physicians the views or intentions of other physicians as to a payer contract,
4. Includes expressions of opinion as to whether the terms or conditions of a payer contract should be accepted by physicians,
5. Constitutes collective negotiation by physicians with a payer, or
6. Involves decisions as to whether to convey information concerning a payer contract to physicians based, at least in part, on

judgments about the attractiveness of the terms or conditions of the contract.

L. "*Conducting payer contract review*" means participating, or assisting, in the generation or transmission of information from payer contract review.

II.

It is further ordered, That Mesa IPA, 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;
3. Determine any terms, conditions, or requirements upon which participating physicians deal with any payer or provider, including, but not limited to, terms of reimbursement; or
4. Restrict the ability of participating physicians to deal with payers individually or through any arrangement outside Mesa IPA.

B. Coordinating terms of contracts with payers with any other group of physicians, including independent practice associations, located in Mesa County, Colorado, or any county contiguous to Mesa County, Colorado.

C. Exchanging, or facilitating the exchange of, information among physicians concerning the terms or conditions, including reimbursement, on which any physicians are willing to deal with payers.

D. 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.

E. For a period of five (5) years from the date this order becomes final, acting as an agent for participating physicians in dealings with any payer, including transmitting terms on which participating

physicians may wish to independently contract with payers, unless each of the following conditions is met:

1. Mesa IPA's role in the contracting process between payers and participating physicians is limited to:

a. Soliciting or receiving from any participating physician, and conveying to the payer, information relating to reimbursement, outcomes data, practice parameters, utilization patterns, credentials, and qualifications of such individual physician;

b. Conveying to a participating physician any contract offer made by the payer;

c. Soliciting or receiving from the payer, and conveying to a participating physician, clarifications of proposed contract terms;

d. Providing to a participating physician objective information about proposed contract terms, including comparisons with terms offered by other payers;

e. Conveying to a participating physician any response made by the payer to information conveyed, or clarifications sought, by Mesa IPA;

f. Conveying, in individual or aggregate form, to the payer, the acceptance or rejection by a participating physician of any contract offer made by the payer; and

g. At the request of the payer, providing the individual response, information, or views of each participating physician concerning any contract offer made by such payer;

2. Each participating physician makes an independent, unilateral decision to accept or reject each contract offer made by the payer;

3. Mesa IPA does not:

a. Disseminate to any physician information about another physician's proposed or actual reimbursement, or views or intentions as to possible terms of dealing with the payer;

b. Act as an agent for the collective negotiation or agreement by the participating physicians; or

c. Encourage or facilitate collusive behavior among participating physicians; and

4. Each participating physician remains free to deal individually with any payer.

F. For a period of five (5) years from the date this order becomes final, allowing a person to be a participating physician or an employee of Mesa IPA if any managerial or professional employee, or any director of Mesa IPA, has knowledge that such person

1. Is conducting payer contract review, either directly or through an agent,

2. Has requested, and is receiving, information from payer contract review conducted by a physician practicing in Mesa County, or

3. Has entered into an agreement, other than a qualified risk-sharing joint arrangement or a qualified clinically integrated joint arrangement, with another physician practicing in Mesa County to obtain, and is receiving, information from payer contract review conducted by any person.

Provided that nothing in this order shall be construed to prohibit any agreement or conduct by Mesa IPA 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 Mesa IPA 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 anti-competitive effects resulting from such agreement(s).

If, within the first waiting period, a representative of the Commission makes a written request for additional information, Mesa IPA 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 Mesa IPA shall:

A. Within thirty (30) days after the date on which this order becomes final:

1. Distribute by first-class mail a copy of this order and the complaint to each participating physician, officer, director, manager, and employee; and to each payer enumerated in Attachment A to this order;

2. Amend its "Physician Manual" to bring it into compliance with this order and the antitrust laws, and distribute the amended Physician Manual to participating physicians; and

3. Abolish its Contract Review Committee.

B. Terminate any agreement or contract with any payer for the provision of physician services that does not comply with paragraph II. of this order at the earlier of: (1) the termination or renewal date (including any automatic renewal date) of such agreement or contract; or (2) receipt of a written request from a payer to terminate such agreement or contract.

C. 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 complaint to each new participating physician, officer, director, manager, and employee within thirty (30) days of his or her admission, election, appointment, or employment;

2. Annually publish in an 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; and

3. Annually brief participating physicians on the meaning and requirements of this consent order and the antitrust laws, including penalties for the violation of this consent order.

IV.

It is further ordered, That Mesa IPA shall 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 becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which it has complied and is complying with the order. In addition to any other information that may be necessary to demonstrate compliance, Mesa IPA shall include in such reports: (1) information identifying each payer that has contacted Mesa IPA for the purpose of contracting for physician services, the terms of any contract the payer was seeking with Mesa IPA, and Mesa IPA's response to the payer; (2) information sufficient to describe the manner in which participating physicians share financial risk in each qualified non-exclusive risk-sharing arrangement in which it participates; (3) a copy of the roster of the participating physicians who have attended the annual briefings required in paragraph III.C.3., and the text of such briefings; and (4) copies of the minutes of Mesa IPA's annual meetings.

V.

It is further ordered, That Mesa IPA shall notify the Commission at least thirty (30) days prior to any proposed change in Mesa IPA such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in Mesa IPA 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, Mesa IPA 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 its control relating to any matter contained in this order; and

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

VII.

It is further ordered, That this order shall terminate on May 4, 2019.

ATTACHMENT A

ADMAR	HealthCare/Compare/
Aetna/U.S. Healthcare	Affordable/ OUCH
AllNet	Humana Health Care Plan
America's Health Plan	Kaiser Permanente
Antero Health Plan	Liberty Preferred Care
Blue Cross & Blue Shield of Colorado	MEDCO Behavioral Care Systems
Casualty Care Network	Medical Practice Associates
Colorado Access	MedView Services, Inc.
Colorado Health Care Network	Mountain Medical Associates
Colorado Health Care Purchasing Alliance, Inc.	Mutual of Omaha
Colorado Child Health Plan	Management Care/Exclusicare
Colorado Physician Networks	New York Life/Corporate Medical Management, Inc.
Community Health Networks	Preferred Physician Agreement
Community Health Plan of the Rockies	Primera-First Federal
Comprehensive Rehabilitation Associates, Inc.	Private Healthcare Systems, Inc.
Compusys	ProHealth, Inc.
Continental Medical Systems, Inc.	Prudential Health Care
CorVel Corporation	QMC3-CRA Managed Care
Educators Mutual	Rio Grande Employees Hospital Association
Foundation Health Corporation	Rocky Mountain HMO
FHP Health Care	Sierra Health & Life Insurance
Health Payors	Sloans Lake Managed Care
Organization Limited	State Farm of the Western Slope
HMO Colorado	The Healthcare Initiative, Inc.
Health Care Excellence	The Segal Company
Health Care Options	United HealthCare
	USA Health Network

IN THE MATTER OF
ELI LILLY AND COMPANY

SET ASIDE ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3594. Consent Order, July 28, 1995—Set Aside Order, May 13, 1999

This order reopens and sets aside a 1995 consent order that, among other things, required Eli Lilly and Company to ensure that the acquired company, PCS Health Systems, maintains an open formulary.

Participants

For the Commission: *Pamela Gill and Roberta Baruch.*

For the respondent: *Jack Kaufman, Dewey Ballantine, New York*

ORDER REOPENING AND SETTING ASIDE ORDER

On February 5, 1999, respondent Eli Lilly and Company ("Lilly") filed a Petition to Reopen and Set Aside July 28, 1995 Decision and Order ("Petition"), 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. In its Petition, Lilly requests that the Commission reopen the order in Docket No. C-3594 ("Order") to relieve Lilly of its compliance obligations under the Order.¹ The Petition was placed on the public record for thirty days pursuant to Section 2.51(c) of the Commission's Rules of Practice and Procedure. The Order requires that Lilly, a pharmaceuticals manufacturer, take measures to ensure that its drugs are not given unwarranted preference over those of its competitors in the "Pharmacy Benefits Management Services" ("PBM Services") that Lilly would provide after PCS Health Systems, Inc. ("PCS"), a subsidiary of McKesson Corporation ("McKesson"), became Lilly's subsidiary. Specifically, the Order requires Lilly to cause PCS to maintain an "Open Formulary."² The Open Formulary must include any drug approved by an independent "Pharmacy and Therapeutics Committee," as prescribed by the Order. In addition, Lilly is required to cause PCS to accept all discounts, rebates or other concessions

¹ 120 FTC 243 (1995). Paragraphs II.B.-II.E., and III-X are the only remaining operative paragraphs of the Order. See Order ¶¶ II.B.-II.E., III-X.

² A formulary is a list of drugs used as a guide in prescribing and dispensing pharmaceuticals to health plan beneficiaries.