

Complaint

IN THE MATTER OF

**MICHAEL T. BERKLEY, D.C., AND MARK A.
CASSELLIUS, D.C.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3936; File No. 9910278
Complaint, April 11, 2000--Decision, April 11, 2000

This consent order addresses practices used by Respondents Michael T. Berkley, D.S. and Mark A. Cassellius, two chiropractors with a principle practice in La Crosse, Wisconsin. The order prohibits Respondents from fixing prices for any chiropractic services. The order also prohibits Respondents from: (1) engaging in collective negotiations on behalf of any chiropractors; (2) orchestrating concerted refusals to deal; or (3) fixing prices, or any other terms, on which chiropractors deal. In addition, they are prohibited from encouraging, advising, or pressuring any person to engage in any action that would be prohibited if the person were subject to the order. Respondents may engage in conduct that is reasonably necessary to operate (a) any "qualified risk-sharing joint arrangement," or, (b) any "qualified clinically integrated joint arrangement

Participants

For the Commission: *Nicholas J. Franczyk, David A. O'Toole, Evan Siegel, Daniel P. Ducore, Elizabeth Schneirov, J. Elizabeth Callison, and Gregory S. Vistnes.*

For the Respondents: *Beth J. Kushner, von Briesen Purtell & Roper, S.C., Jon Axelrod, DeWitt, Ross & Stevens, and Joseph J. Connell, Parke O'Flaherty.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the individuals named above, hereinafter "Respondents," have violated and are violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect

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thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

RESPONDENTS

PARAGRAPH ONE: Respondent Michael T. Berkley, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business at 322 Cameron Avenue, La Crosse, Wisconsin 54601. At all times during which the acts and practices described in Paragraphs Ten through Thirteen below took place, respondent Berkley was a member of the board of directors of the Wisconsin Chiropractic Association ("WCA").

PARAGRAPH TWO: Respondent Mark A. Cassellius, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business at 2045 32nd Street South, La Crosse, Wisconsin 54601. At all times during which the acts and practices described in Paragraphs Ten through Thirteen below took place, respondent Cassellius was the president of the Southwest District of the WCA.

JURISDICTION

PARAGRAPH THREE: The acts and practices of respondents, 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.

THE MARKET FOR CHIROPRACTIC SERVICES

PARAGRAPH FOUR: Except to the extent that competition has been restrained as alleged herein, the respondents have been, and are now, in competition among themselves and with other

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providers of chiropractic goods and services in and around La Crosse, Wisconsin.

PARAGRAPH FIVE: Professional services performed by chiropractors include, among other things, spinal and extra spinal manipulations. Prior to January 1, 1997, chiropractors generally billed for these services using a single billing code (A2000 for Medicare and 97260 for most private insurance) regardless of the number of spinal or extra spinal regions adjusted. Beginning on January 1, 1997, the Health Care Financing Administration and many private insurance companies began accepting four new chiropractic manipulative treatment (“CMT”) codes (98940, 98941, 98942, and 98943) in place of the old single billing code. The new CMT codes reflected more detailed or precise descriptions of the manipulation services: 98940 (adjustment of 1-2 regions); 98941 (adjustment of 3-4 regions); 98942 (adjustment of 5 regions); and 98943 (adjustment of at least one extra spinal region).

PARAGRAPH SIX: Chiropractors often contract with health insurance firms and other third-party payers. Such contracts typically establish the terms and conditions under which the chiropractors will render services to the subscribers of the third-party payers, including terms and conditions of compensation and of cost containment. In many cases, chiropractors 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 chiropractors and for dealing with chiropractors 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.”

PARAGRAPH SEVEN: Absent agreements among competing chiropractors on the price and other terms upon which they will provide services to third-party payers, competing chiropractors decide individually whether to enter into contracts

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with third-party payers, and on the terms and conditions under which they are willing to enter into such contracts.

THE WCA TRAINING SEMINARS

PARAGRAPH EIGHT: The WCA organized and conducted seminars at eight different locations throughout the State of Wisconsin, including La Crosse, Wisconsin, to train chiropractors and their staffs on the new CMT codes (the "CMT Seminars "), including how to price the codes, and urged chiropractors not to make any decisions on their fees for the new CMT codes before attending one of the training seminars.

PARAGRAPH NINE: During the CMT Seminars, the WCA, through its Executive Director, Russell A. Leonard: (1) told the chiropractors that the new CMT codes had the same values as osteopathic manipulative treatment ("OMT ") codes; (2) represented that the market place expected the prices for the new CMT codes to be about the same as the prices for the OMT codes; (3) provided current statewide price data for the OMT codes and urged the chiropractors to call osteopaths in their own areas to determine their local charges; (4) urged chiropractors to question any third-party payer that reimbursed a lesser amount for the CMT codes than for the OMT codes and to notify the WCA; and (5) during at least some of the seminars, represented that it had surveyed numerous chiropractors and determined that private insurance companies were paying CMT code claims at the prices the chiropractors chose to charge.

ANTICOMPETITIVE CONDUCT

PARAGRAPH TEN: Beginning in late January 1997, and continuing until at least June 1997, respondents and other unnamed persons conspired to fix prices for chiropractic services and to conduct a boycott of the Gundersen Lutheran Health Plan

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("Gundersen"), a third-party payer doing business in and around La Crosse County, Wisconsin, to obtain higher reimbursement for chiropractic services.

PARAGRAPH ELEVEN: In furtherance of the conspiracy described in Paragraph Ten:

A. Respondents organized at least two meetings of La Crosse County area chiropractors on or about February 13, 1997 and May 15, 1997. During these meetings the chiropractors discussed their displeasure with Gundersen's reimbursement rates for chiropractic services and the fact that they had learned at the WCA seminars that the new CMT codes presented an opportunity to charge significantly more for their services. Respondents surveyed the attendees to determine their average billed charges for the new CMT codes. The chiropractors agreed to negotiate reimbursement rates equal to at least 85% of average billed charges for services provided to Gundersen, significantly more than Gundersen's reimbursement rates. The chiropractors voted and determined that the majority of them were willing to terminate their agreements with Gundersen if it did not address their demands.

B. Respondent Berkley, acting on behalf of the La Crosse County area chiropractors, notified Gundersen that the chiropractors had met to discuss their displeasure with Gundersen's reimbursement, determined that the majority of them were willing to terminate their agreements with Gundersen if it did not address their concerns, and proposed that Gundersen increase its reimbursement rates to reflect at least 85% of average billed charges. Inherent in these negotiations was the threat that if Gundersen did not agree to the terms and conditions acceptable to the area chiropractors, Gundersen would be unable to obtain agreements with them.

PARAGRAPH TWELVE: On or about June 17, 1997, Gundersen, fearing the loss of a significant number of its chiropractic providers, acceded to the chiropractors' demands and

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revised its fee schedule to reflect a 20% increase on all fee schedule procedures effective July 1, 1997.

PARAGRAPH THIRTEEN: The respondents have not integrated their businesses in any economically significant way, nor have they created any efficiencies that might justify the acts and practices described in Paragraphs Ten through Twelve.

ANTICOMPETITIVE EFFECTS

PARAGRAPH FOURTEEN: The acts and practices of the respondents as described in this complaint have had the purpose, tendency, effect, and capacity to restrain trade unreasonably and hinder competition in the provision of chiropractic goods and services in and around La Crosse County, Wisconsin, in the following ways, among others:

- A. to restrain competition among chiropractors;
- B. to deprive consumers of the benefits of competition among chiropractors;
- C. to fix or increase the prices that consumers pay for chiropractic services;
- D. to fix the terms and conditions upon which chiropractors would deal with third- party payers, including terms of chiropractic compensation, 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.

PARAGRAPH FIFTEEN: The aforesaid acts and practices of the respondents are to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce

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in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. The acts and practices of the respondents, as herein alleged, are continuing and will continue or recur in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of April, 2000 , issues its complaint against said respondents.

By the Commission.

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 complaint which the Midwest Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations 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 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, and waivers and other provisions as required by the Commission's Rules; and

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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 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 thirty (30) days, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Michael T. Berkley, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business located at 322 Cameron Avenue, La Crosse, Wisconsin 54601.

2. Respondent Mark A. Cassellius, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business located at 2045 32nd Street South, La Crosse, Wisconsin 54601.

3. The Federal Trade Commission has jurisdiction of the subject matter in this proceeding and of the respondents, 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. "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

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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.

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

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

D. "Reimbursement" means any payment, whether cash or non-cash, or other benefit received for the provision of chiropractic goods and services.

E. "Qualified risk-sharing joint arrangement" means an arrangement to provide physician services in which: (1) all physicians 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 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; (2) any agreement on prices or terms of reimbursement entered into by the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal,

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of physicians participating in the arrangement to deal with payers individually or through any other arrangement.

F. “Qualified clinically integrated joint arrangement” means an arrangement to provide physician services in which: (1) 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; (2) any agreement on prices or terms of reimbursement entered into by the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) 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.

II.

IT IS FURTHER ORDERED that each respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of chiropractic goods and services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, forthwith cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding, express or implied, with any person or among any persons, to fix, establish, raise, stabilize, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, or other aspect or term of

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the fees charged or to be charged for any chiropractic goods or services.

- B. 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 other chiropractor with any payer or provider;
 2. Deal or refuse to deal with, boycott or threaten to boycott, any payer or provider; or
 3. Determine any terms, conditions, or requirements upon which chiropractors deal with any payer or provider, including, but not limited to, terms of reimbursement.
- C. 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 any respondent 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 applicable 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

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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, the applicable 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 or shorter waiting period as may be granted by letter from the Bureau of Competition.

III.

IT IS FURTHER ORDERED that each respondent shall:

- A. Within thirty (30) days after the date this order becomes final, distribute a dated and signed notification letter in the form set forth in Appendix A to this order along with a copy of the complaint and order in this matter to each current agent, representative, or employee of the respondent whose activities are affected by this order, or who has responsibilities with respect to the subject matter of this order.

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- B. For a period of five (5) years after the date this order becomes final, and within thirty (30) days of the date the person assumes such position, distribute a dated and signed notification letter in the form set forth in Appendix A to this order along with a copy of the complaint and order in this matter to each new agent, representative, or employee of the respondent whose activities are affected by this order, or who has responsibilities with respect to the subject matter of this order.

IV.

IT IS FURTHER ORDERED that each respondent shall, for a period of ten (10) years after the date this order becomes final:

- A. Notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.
- B. Provide a copy of the complaint and order in this matter to each new employer within seven (7) days of his employment where the duties and responsibilities of such employment are subject to the provisions of this order.

V.

IT IS FURTHER ORDERED that each respondent shall, 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 payer or provider who, at any time since January 1, 1997, has communicated any desire, willingness, or interest in contracting for chiropractic goods and services with the respondent.

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VI.**IT IS FURTHER ORDERED** that:

A. Within sixty (60) days after the date this order becomes final, each respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which he intends to comply, is complying, and has complied with Paragraphs II, III and V 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, each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which he has complied and is complying with Paragraphs II through IV of this order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, each respondent shall permit any duly authorized representative of the Commission:

A. Access, during normal 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 respondent relating to any matter contained in this order.

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- B. Upon five business days' notice to a respondent, and without restraint or interference from that respondent, to interview that respondent or any employee or representative of that respondent.

VIII.

IT IS FURTHER ORDERED that this order shall terminate on April 11, 2020.

By the Commission.

Appendix A

[Michael T. Berkley, D.C./Mark A. Cassellius, D.C., Letterhead]

Dear Agent, Representative, Employee, or Third Party Payer:

[Michael T. Berkley, D.C./Mark A. Cassellius, D.C.] has entered into an agreement with the Federal Trade Commission to settle charges that he and other unnamed persons conspired to fix prices for chiropractic services and to conduct a boycott of the Gundersen Lutheran Health Plan to obtain higher reimbursement for chiropractic manipulation services. As part of the settlement agreement, Dr. [Berkley/Cassellius] is required to send this notification letter and a copy of the complaint and order to each of his agents, representatives, and employees who have responsibilities with respect to the subject matter of the order, and to each third-party payer who, at any time since January 1, 1997, has communicated any desire, willingness, or interest in contracting for chiropractic goods and services with Dr. [Berkley/Cassellius]. The agreement is for settlement purposes only and does not constitute an admission by Dr. [Berkley/Cassellius] that the law has been violated as alleged in

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the complaint, or that the facts as alleged in the complaint, other than jurisdictional facts, are true.

Under the terms of the order, Dr. [Berkley/Cassellius] is prohibited from:

- Fixing prices or encouraging others to fix prices for any chiropractic goods and services.
- Organizing, participating in, or enforcing any agreement (1) to negotiate on behalf of any chiropractor with any payer or provider; (2) to deal or refuse to deal with, boycott or threaten to boycott, any payer or provider; and (3) to determine the terms or conditions upon which chiropractors will deal with any payer or provider.
- Encouraging or assisting any person to take any action that, if taken by Dr. [Berkley/Cassellius], would violate the order.

A copy of the complaint and order is enclosed.

/s/

[Michael T. Berkley, D.C./Mark A.
Cassellius, D.C.]

Enclosures

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement from Michael T. Berkley, D.C., and Mark A. Cassellius, D.C., to a proposed consent order. The agreement settles charges by the Federal Trade Commission that Drs. Berkley and Cassellius have violated Section 5 of the Federal Trade Commission Act by conspiring between themselves and with other chiropractors to fix prices for chiropractic services and to boycott the Gundersen Lutheran Health Plan (“Gundersen”) to obtain higher reimbursement rates for services. The proposed consent order has been placed on the public record for thirty days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the agreement and proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Drs. Berkley and Cassellius that the law has been violated as alleged in the complaint.

The Complaint

Drs. Berkley and Cassellius are chiropractors with their principal places of business in La Crosse, Wisconsin. Except to the extent that competition has been restrained as alleged in the complaint, Drs. Berkley and Cassellius have been, and are now, in competition with each other and with other chiropractors in and around La Crosse, Wisconsin.

Analysis to Aid Public Comment

Since at least January 1997, and continuing until at least June 1997, Drs. Berkley and Cassellius conspired among themselves and with other chiropractors to fix prices for chiropractic services and to boycott Gundersen, a third-party payer doing business in and around La Crosse County, Wisconsin. The purpose of the boycott was, among other things, to obtain higher reimbursement from Gundersen for chiropractic services. Drs. Berkley and Cassellius organized at least two meetings of La Crosse area chiropractors to discuss their concerns about Gundersen. A central concern raised at these meetings was Gundersen's purportedly low reimbursement rates. During these meetings, the chiropractors agreed that Gundersen should increase its reimbursement rates and determined that a majority of the chiropractors were willing to leave the Gundersen network if it did not address their concerns. Dr. Berkley, acting on behalf of the group of chiropractors, communicated to Gundersen the chiropractors' concerns and the implicit threat of a boycott. The threatened boycott was successful: Gundersen, fearing the loss of a substantial number of chiropractic providers and the disruption of its network, acceded to the chiropractors' demands and increased its reimbursement rates by 20%.

Drs. Berkley and Cassellius and the other unnamed chiropractors have not integrated their practices in any economically significant way, nor have they created any efficiencies that might justify this conduct. Had they done either of these, under some circumstances, the agreement on price might not have been unlawful. Their actions have harmed consumers by increasing the prices that are paid for chiropractic services and by depriving consumers of the benefits of competition among chiropractors.

The Proposed Consent Order

The proposed consent order is designed to prevent the illegal concerted action alleged in the complaint. Paragraph II.A prohibits Drs. Berkley and Cassellius from fixing prices for any chiropractic goods or services. Paragraph II.B prohibits them from: (1) engaging in collective negotiations on behalf of any chiropractors; (2) orchestrating concerted refusals to deal; or (3) fixing prices, or any other terms, on which chiropractors deal. Paragraph II.C prohibits Drs. Berkley and Cassellius from encouraging, advising, or pressuring any person to engage in any action that would be prohibited if the person were subject to the order.

Paragraph II. includes a proviso allowing Drs. Berkley and Cassellius to engage in conduct (including collectively determining reimbursement and other terms of contracts with payers) that is reasonably necessary to operate (a) any “qualified risk-sharing joint arrangement,” or, provided Drs. Berkley and Cassellius have complied with the order’s prior notification requirements, (b) any “qualified clinically integrated joint arrangement.”

For the purposes of the order, a “qualified risk-sharing joint arrangement” must satisfy three conditions. First, all physicians participating in the arrangement must share substantial financial risk from their participation in the arrangement. The order lists ways in which physicians might share financial risk, tracking the types of financial risk sharing set forth in the *Statements of Antitrust Enforcement Policy in Health Care, Statement 8 on Physician Network Joint Ventures* issued jointly by the FTC and the Department of Justice on August 28, 1996 (4 Trade Reg. Rep. (CCH) ¶ 13,153 at 20,814). For example, physician participants can agree to provide services to a health plan at a “capitated” rate (a fixed payment per enrollee regardless of the amount of services provided to an enrollee). Second, any agreement on prices or terms of reimbursement entered into by the arrangement must be reasonably necessary to obtain significant efficiencies through the

Analysis to Aid Public Comment

joint arrangement. For example, a joint arrangement for billing services alone would not be sufficient, because the agreement on prices would not be necessary to achieve the benefits of the billing services. Third, the arrangement must be non-exclusive, i.e., physicians can also deal with payers individually or through other arrangements.

For purposes of the order, a “qualified clinically integrated joint arrangement” is one in which physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services without necessarily sharing substantial financial risk. The cooperation may include:

- (1) establishing mechanisms to monitor and control utilization of health care services that are designed to control costs and assure quality of care; (2) selectively choosing network physicians who are likely to further these efficiency objectives; and (3) the significant investment of capital, both monetary and human, in the necessary infrastructure and capability to realize the claimed efficiencies.

Id. at 20,817.

In order for a qualified clinically integrated joint arrangement formed by Drs. Berkley and Cassellius to fall within the proviso, they must comply with the order's requirements for prior notification. The prior notification mechanism will allow the Commission to evaluate a specific proposed arrangement and assess its likely competitive impact. This requirement will help guard against the recurrence of acts and practices that have restrained competition and consumer choice.

Paragraph III. requires that Drs. Berkley and Cassellius distribute a notification letter and copies of the complaint and order to all current and future agents, representatives, and

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employees whose activities are affected by the order, or who have responsibilities with respect to the subject matter of the order. Paragraph IV. requires that Drs. Berkley and Cassellius notify the Commission of any change in their employment and would require them to provide copies of the complaint and consent order to any new employer for which their new duties and responsibilities are subject to any provisions in the order.

Paragraph V. requires that Drs. Berkley and Cassellius distribute a copy of the complaint and order to each payer or provider who, at any time since January 1, 1997, has communicated any desire, willingness, or interest in contracting for chiropractic goods and services with either of them.

Paragraphs VI. and VII. consist of standard Commission reporting and compliance procedures. Finally, Paragraph VIII. contains a standard twenty year "sunset" provision under which the terms of the order terminate twenty years after the date of issuance.

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IN THE MATTER OF

RHODIA, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

Docket C-3930; File No. 9910237
Complaint, March 13, 2000--Decision, April 18, 2000

This consent order addresses the acquisition by Respondents Rhodia, of Albright & Wilson PLC, a wholly owned subsidiary of Donau Chemie AG. Respondent is required to divest to Potash Corporation of Saskatchewan A&W's United States pure phosphoric acid business, including A&W's interest in the Joint Venture, as well as joint venture manufacturing assets, including the Aurora pure phosphoric acid plant and the Cincinnati plant. The order also requires Respondents to provide PCS with technology A&W has developed for manufacturing pure phosphoric acid and for using it in certain applications. The order also requires respondents to divest other assets related to A&W's pure phosphoric acid business, including customer lists, contracts, and other intangible assets. The Order to Maintain Assets requires that respondents preserve the A&W assets they are required to divest as a viable and competitive operation until those assets are transferred, and to conduct the A&W pure phosphoric acid business in the ordinary course of business. Furthermore, the Order to Maintain Assets includes an obligation on respondents to build and maintain a sufficient inventory of pure phosphoric acid to ensure there is no shortage of supply during the period that the business is being transferred.

Participants

For the Commission: *Robert S. Tovsky, Randall Conner, Gorav Jindal, Jeanine Balbach, Steven Wilensky, Emily Byers, Morris A. Bloom, John O'Hara Horsley, Richard Liebeskind, Daniel P. Ducore, Thomas R. Isso, Louis Silva, and Gregory Vistnes.*