

Complaint

IN THE MATTER OF

TEXAS SURGEONS, P.A., ET AL.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT**

Docket C-3944; File No. 9810124
Complaint, May 18, 2000--Decision, May 18, 2000

This consent order addresses practices by Respondents Texas Surgeons, P.A., Austin Surgeons, P.L.L.C., Austin Surgical Clinic Association, P.A., Bruce McDonald & Associates, P.L.L.C., Capital Surgeons Group, P.L.L.C., Central Texas Surgical Associates, P.A., Surgical Associates of Austin, P.A. The order prohibits respondents from entering into or facilitating any agreement: (1) to negotiate physician services on behalf of any physicians with any payer or provider; (2) to deal, refuse to deal, or threaten to refuse to deal with any payer or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payer or provider; (4) to restrict the ability, or facilitate the refusal, of any physician to deal with any payer or provider on an individual basis or through any other arrangement; or (5) to convey to any payer or provider, through any Austin area physician, any information concerning actual or potential dealings by any physician with any payer or provider. The order also prohibits respondents from exchanging, transferring, or facilitating the exchange or transfer of information among Austin area physicians concerning: (1) negotiation with any payer or provider regarding reimbursement terms; or (2) actual or contemplated intentions or decisions with respect to any terms, dealings or refusals to deal with any payer or provider. Respondents may participate in arrangements for the provision of physician services that are limited to physicians from the same medical practice group, engage in conduct that is approved and supervised by the State of Texas, so long as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine, and engage in conduct that is reasonably necessary to operate any "qualified risk-sharing joint arrangement" or "qualified clinically-integrated joint arrangement."

Participants

For the Commission: *Alan J. Friedman, George R. Bellack, Richard A. Feinstein, David R. Pender, Elizabeth A. Piotrowski, Geary A. Gessler, Louis Silvia, and Gregory S. Vistnes.*

For the Respondents: *David A. Ettinger, Honigman, Miller, Schwartz & Cohn, and David W. Hilgers, Hilgers & Watkins.*

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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 Texas Surgeons, P.A. ("Texas Surgeons"), Austin Surgeons, P.L.L.C. ("AS"), Austin Surgical Clinic Association, P.A. ("ASCA"), Bruce McDonald & Associates, P.L.L.C. ("BM&A"), Capital Surgeons Group, P.L.L.C. ("CSG"), Central Texas Surgical Associates, P.A. ("CTSA"), and Surgical Associates of Austin, P.A. ("SAA"), hereinafter sometimes referred to as "respondents," have violated 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 thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

RESPONDENTS

1. Respondent Texas Surgeons is a for-profit professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 4007 Marathon Blvd., Austin, Texas 78756. At all times relevant to this Complaint, the shareholders of respondent Texas Surgeons have included 26 or more general surgeons.

2. Respondent AS is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 3901 Medical Parkway, #200, Austin, Texas 78756. At all times relevant to this Complaint, respondent AS has included at least three general surgeon

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shareholders practicing general surgery in the Austin area through respondent AS.

3. Respondent ASCA is a for-profit professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 2911 Medical Arts Street, Austin, Texas 78705. At all times relevant to this Complaint, respondent ASCA has included at least four general surgeon shareholders practicing general surgery in the Austin area through respondent ASCA.

4. Respondent BM&A is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 4007 Marathon Blvd., Austin, Texas 78756. At all times relevant to this Complaint, respondent BM&A has included at least three general surgeon shareholders practicing general surgery in the Austin area through respondent BM&A.

5. Respondent CSG is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 3705 Medical Parkway, Austin, Texas 78705. At all times relevant to this Complaint, respondent CSG has included at least seven general surgeon shareholders practicing general surgery in the Austin area through respondent CSG.

6. Respondent CTSA is a for-profit professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 2300 Round Rock Avenue, Round Rock, Texas 78681. At all times relevant to this Complaint, respondent CTSA has included at least three general surgeon shareholders practicing general surgery in the Austin area through respondent CTSA.

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7. Respondent SAA is a for-profit professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 1015 East 32nd Street, Austin, Texas 78705. At all times relevant to this Complaint, respondent SAA has included at least four general surgeon shareholders practicing general surgery in the Austin area through respondent SAA.

8. At all times relevant to this Complaint, the general surgeon shareholders of respondents AS, ASCA, BM&A, CSG, CTSA, and SAA ("respondent medical practice groups") have collectively comprised at least 24 of the 26 or more general surgeon shareholders of respondent Texas Surgeons. The few general surgeon shareholders of respondent Texas Surgeons who do not practice within any of the six respondent medical practice groups are solo practitioners.

9. At all times relevant to this Complaint, the shareholders of respondent Texas Surgeons have constituted the majority of general surgeon private practitioners serving the adult population in the Austin area. All such shareholders practice within the counties of Travis and Williamson. For purposes of this Complaint, the "Austin area" is no larger than the counties of Travis, Williamson, Hays, Bastrop, and Caldwell, including about 1,105,000 residents.

10. Except to the extent that competition has been unreasonably restrained as alleged herein, the six respondent medical practice groups, as well as the solo practitioner general surgeons within respondent Texas Surgeons, have been, and are now, in competition with each other and with other general surgeons and medical practice groups that include general surgeons in the Austin area.

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JURISDICTION

11. Each respondent is a “corporation” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

12. The acts and practices of the respondents, including those alleged herein, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

COMPETITION AMONG PHYSICIANS

13. General surgeons and other physicians often enter into professional service contracts with third-party payers, including health maintenance organization and preferred provider organization plans, that are designed to lower the costs of medical care for subscribers. Such professional service contracts typically establish the terms and conditions under which the physicians will render services to the subscribers of the third-party payers’ health care plans, including terms and conditions of physician compensation. In order to gain contracts with third-party payers and thereby obtain access to their subscribers, physicians frequently agree to reductions in their compensation and to procedures for reviewing the utilization of medical resources. By lowering costs in this manner, third-party payers are able to reduce the cost of medical care for their subscribers.

14. Absent agreements among competing physicians or medical practice groups about the terms they will accept from third-party payers, and absent an arrangement where collective negotiations with third-party payers are reasonably necessary to obtain significant efficiencies through the arrangement, competing physicians and medical practice groups independently decide whether to enter into professional service contracts with third-party payers, and on the terms and conditions they will accept.

THE ACTS AND PRACTICES OF THE RESPONDENTS

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15. Respondent Texas Surgeons, acting as a combination of its general surgeon shareholders and the six respondent medical practice groups, and in conspiracy with such general surgeon shareholders and medical practice groups, has, among other things, facilitated, created, and implemented express or implied agreements among its general surgeon shareholders and the six respondent medical practice groups to: (a) fix prices and other terms of dealing with third-party payers; (b) collectively threaten to refuse to deal with third-party payers; (c) collectively refuse to deal with third-party payers; and (d) deal with third-party payers only on collectively determined terms.

16. In or around June 1995, ten solo practitioner general surgeons in the Austin area formed an independent practice association named Capital Surgeons, P.A. (a predecessor to respondent Texas Surgeons), and, in or around September 1996, seven of these general surgeons formed respondent CSG and the other three formed respondent AS. Capital Surgeons, P.A., changed its name to Texas Surgeons, P.A., soon after Blue Cross Blue Shield of Texas ("Blue Cross") announced general surgery rate reductions in February 1997 (to become effective April 1, 1997). Soon after Blue Cross implemented its general surgery rate reductions on April 1, 1997, all fifteen of the general surgeons practicing through respondents ASCA, BM&A, CTSA, and SAA joined respondent Texas Surgeons as shareholders (two solo practitioner general surgeons joined respondent Texas Surgeons later in 1997).

17. Since the expansion of respondent Texas Surgeons, representatives of the six respondent medical practice groups collectively have comprised respondent Texas Surgeons' board of directors. As described below, respondent Texas Surgeons, including its board of directors, has served as a vehicle for the six respondent medical practice groups (as well as the few solo

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practitioner shareholders of respondent Texas Surgeons) collectively to negotiate higher rates with two major third-party payers in the Austin area -- Blue Cross and United HealthCare of Texas.

18. The collective rate negotiations described below did not involve either significant financial risk sharing or the creation of other significant efficiencies through respondent Texas Surgeons, and therefore were not reasonably necessary to obtain any significant efficiencies.

RESPONDENTS' COLLECTIVE RATE NEGOTIATIONS
WITH BLUE CROSS

19. In February 1997, Blue Cross notified its Austin area physician network that it was converting to a new physician reimbursement system for certain of its health plans. Blue Cross explained in this notice that, as part of this conversion and in order to help it compete for subscribers, it was reducing payment rates for certain physician categories, including general surgeons, effective April 1, 1997, and that payment rates for primary care physicians would increase.

20. In the summer of 1997, respondent Texas Surgeons' president informed Blue Cross about its general surgeon shareholders' collective dissatisfaction with Blue Cross's general surgery rate reductions that went into effect April 1, 1997. Respondent Texas Surgeons' president identified himself as the authorized spokesperson for respondent Texas Surgeons and began negotiating higher rates on behalf of the general surgeon shareholders. During these rate negotiations, which extended to early 1998, respondent Texas Surgeons' president negotiated according to the collective decisions of the: (1) six respondent medical practice groups, made during Texas Surgeons' board of directors meetings or through other mechanisms; and (2) general surgeon shareholders of respondent Texas Surgeons, made during one or more shareholder meetings or through other mechanisms.

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21. Respondent Texas Surgeons' collective negotiations with Blue Cross ultimately led to a rate agreement in February 1998 that increased general surgery rates (on average) more than 29% over the pre-existing rates. At various times during the collective rate negotiations, Blue Cross attempted to negotiate on an individual basis with the six respondent medical practice groups or their shareholders. Each consistently rebuffed, refused, or did not respond to Blue Cross's multiple attempts to initiate individual rate negotiations and indicated that they would only negotiate through respondent Texas Surgeons.

22. Respondent Texas Surgeons sent Blue Cross in September 1997 a package containing contract termination notices for each general surgeon who was at that time a shareholder of respondent Texas Surgeons. Respondent Texas Surgeons' cover letter stated that the contract termination notices were due to Blue Cross's "unacceptable" fee schedule. All 26 of these contract termination notices were on Texas Surgeons' letterhead, had the same date of authorship, and contained identical wording.

23. In November 1997, aware of possible antitrust liability due to its ongoing collective rate negotiations, respondent Texas Surgeons requested that Blue Cross sign a letter waiving Blue Cross's right to file a private antitrust action against either respondent Texas Surgeons or any of its shareholders, regarding the Texas Surgeons-Blue Cross rate negotiations. Because Blue Cross refused to waive its antitrust rights, the six respondent medical practice groups decided to involve a third-party agent in an effort to continue their agreements to collectively negotiate rates and to deal with Blue Cross only on collectively determined terms. The six respondent medical practice groups agreed that their third-party agent would convey to Blue Cross only the highest of the various rate authorizations that he obtained from each of the six respondent medical practice groups, and the third-

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party agent did so. Blue Cross rejected that collective rate proposal.

24. On December 1, 1997, due to dissatisfaction with Blue Cross's rate offers and the perceived pace of collective rate negotiations, the general surgeon shareholders of respondent Texas Surgeons effected their contract terminations as originally noticed to Blue Cross in September 1997. To apply further pressure on Blue Cross, respondents announced the Blue Cross contract terminations of their general surgeon shareholders in a prominent advertisement in the major Austin daily newspaper on December 14, 1997.

25. Thereafter, respondent BM&A advised two solo practitioner general surgeons that the BM&A general surgeons would no longer provide back-up surgical coverage for any of their patients if they continued to deal with Blue Cross. Both had expanded their hours to cover Blue Cross general surgeries and were key performers within Blue Cross's small remaining panel of Austin area general surgeons. In or around early February 1998, both submitted contract resignation notices to Blue Cross in order to preserve their back-up coverage arrangements with respondent BM&A.

26. After Blue Cross's receipt of resignation notices from the two solo practitioners (as described in Paragraph 25), and after some difficulty in securing the timely services of a general surgeon for a Blue Cross emergency room patient, Blue Cross concluded that it needed to reach a rate agreement with respondent Texas Surgeons as soon as possible to avoid inadequate general surgery coverage for Blue Cross subscribers in the Austin area.

27. In or around early 1998, with full knowledge of antitrust prohibitions on competitors engaging in collective rate negotiations, respondent CSG negotiated and completed, on behalf of all six respondent medical practice groups, a collective rate agreement with Blue Cross. The respondent medical practice

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groups completed this collective rate agreement after respondent Texas Surgeons had received notice that its activities were subject to antitrust investigation. After Blue Cross agreed to increase its rates as demanded by the respondents, all of the general surgeon shareholders of respondent Texas Surgeons that had terminated their Blue Cross contracts rejoined the Blue Cross physician panel by early March 1998.

28. The collective rate increases extracted from Blue Cross by respondents caused Blue Cross to extend those increased rates to surgeries usually performed by Austin area physicians other than general surgeons. Blue Cross keeps all surgeons at the same rate levels to enhance provider relations.

RESPONDENTS' COLLECTIVE RATE NEGOTIATIONS
WITH UNITED

29. In October 1997, United HealthCare of Texas-Central Texas Region ("United") notified its participating physicians in the Austin area that, effective January 1, 1998, physician fees, including general surgery fees, would be reduced. Fee reductions for surgeries usually performed by physicians other than general surgeons went into effect and remain in effect in the Austin area, but the proposed (and comparable) fee reductions for surgeries usually or frequently performed by general surgeons never went into effect. Instead, as described below, Austin area general surgery fees for United's various plans increased at least 12% to 40% above the rates that United announced in October 1997.

30. In early November 1997, United received a letter from respondent Texas Surgeons stating that, due to United's "unacceptable" fee reductions for 1998, all of the general surgeon shareholders of respondent Texas Surgeons were terminating their individual contracts with United effective January 1, 1998. The

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letter listed the names of all 27 general surgeon shareholders of respondent Texas Surgeons at that time.

31. Also in early November 1997, respondent Texas Surgeons' president and acting vice president told United officials that the general surgeon shareholders of respondent Texas Surgeons would rescind their collective termination notices if United were to increase its general surgery fees at least 20% above United's then current 1997 fee schedule.

32. A United official responded that United preferred to negotiate with the general surgeon shareholders of respondent Texas Surgeons (or their six respondent medical practice groups) on an individual basis. The president and acting vice president of respondent Texas Surgeons rejected that option. When the United official retorted that the general surgeon shareholders were under individual contracts, the Texas Surgeons president responded that he would be willing to produce individual termination letters, if so desired by United.

33. Respondent Texas Surgeons' president further advised United that: (1) the general surgeon shareholders were very interested in announcing through a local newspaper advertisement the collective termination of their United contracts, but that they would hold off if United were to agree to engage in a speedy collective fee negotiation; and (2) he had already told some employees of a large Austin area employer under contract with United that the Texas Surgeons shareholders were planning to drop out of United's network effective January 1, 1998. The respondents knew that United would likely consider public awareness of respondents' collective termination notice as imperiling United's ability to renew the many employer contracts that were expiring beginning in January 1998, and that loss of these contracts would cause heavy subscriber enrollment losses for United.

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34. United explored the possibility of creating a panel of Austin area general surgeons that did not include any general surgeon shareholders of respondent Texas Surgeons. United concluded that: (1) general surgeon shareholders of respondent Texas Surgeons were needed to maintain adequate general surgery coverage; (2) any attempt to negotiate with them on an individual basis would likely fail; and (3) it had no realistic alternative other than to begin collective fee negotiations.

35. Prior to the start of collective fee negotiations on November 19, 1997, respondent Texas Surgeons required United to sign a letter waiving United's right to file a private antitrust action against respondent Texas Surgeons or any of its general surgeon shareholders, regarding the Texas Surgeons-United fee negotiations. Respondent Texas Surgeons' president, who attended and led the collective fee negotiations that day, was in frequent telephone and fax contact, and deliberated collectively, with representatives of the six respondent medical practice groups who were assembled together to facilitate collective fee negotiations with United.

36. At the November 19, 1997 collective fee negotiations, respondents demanded and received an agreement from United to pay substantially higher fees for 1998 and 1999. Thereafter, in December 1997, respondent Texas Surgeons sent United a letter on Texas Surgeons letterhead, on behalf of all of the general surgeon shareholders, revoking their November 1997 collective termination notice.

37. The 1998 fees that the respondents extracted from United under its various plans are at least 12% to 34% higher, and their 1999 fees are at least 27% to 40% higher, than United's originally proposed fee schedule that went into effect in 1998 for (and that continues to apply to) surgeries usually performed by physicians other than general surgeons.

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EFFECTS

38. The acts and practices of the respondents as described herein have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably in the provision of services by private general surgeon practitioners in the Austin area and to injure consumers in the following ways, among others:

- a. to deprive consumers, including individuals, employers (including the State of Texas Employees Retirement System), and third-party payers, of the benefits of competition;
- b. to fix or increase the payments or co-payments that individual patients, their employers, and third-party payers make for the services of general surgeons, and, in the case of Blue Cross managed care plans, for surgeries performed by physicians other than general surgeons;
- c. to fix the terms and conditions upon which general surgeons would deal with third-party payers, including terms of compensation, and thereby to raise the prices that individuals and employers pay for health plans offered by third-party payers; and
- d. to increase by over one million dollars the amount that Blue Cross, United, their individual subscribers, and employers paid from January 1, 1998 through December 31, 1999 to the six respondent medical practice groups, general surgeon shareholders of respondent Texas Surgeons, and other Austin area physicians.

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VIOLATIONS

39. The acts and practices of the respondents as described above are to the prejudice and injury of the public and constitute unfair methods of competition 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 described above, are continuing and will continue or recur in the absence of the relief requested.

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

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Texas Surgeons, P.A. ("Texas Surgeons"), Austin Surgeons, P.L.L.C. ("AS"), Austin Surgical Clinic Association, P.A. ("ASCA"), Bruce McDonald & Associates, P.L.L.C. ("BM&A"), Capital Surgeons Group, P.L.L.C. ("CSG"), Central Texas Surgical Associates, P.A. ("CTSA"), and Surgical Associates of Austin, P.A. ("SAA"), hereinafter sometimes referred to as "respondents," and 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 violation of Section

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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 Consent Order ("Consent Agreement"), containing an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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 respondents have violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Texas Surgeons is a professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 4007 Marathon Blvd., Austin, Texas 78756.

2. Respondent AS is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 3901 Medical Parkway, #200, Austin, Texas 78756.

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3. Respondent ASCA is a professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 2911 Medical Arts Street, Austin, Texas 78705.

4. Respondent BM&A is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 4007 Marathon Blvd., Austin, Texas 78756.

5. Respondent CSG is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 3705 Medical Parkway, Austin, Texas 78705.

6. Respondent CTSA is a professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 2300 Round Rock Avenue, Round Rock, Texas 78681.

7. Respondent SAA is a professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 1015 East 32nd Street, Austin, Texas 78705.

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

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ORDER

I.

IT IS ORDERED that, for the purposes of this Order, the following definitions shall apply:

- A. "Respondent Texas Surgeons" means Texas Surgeons, P.A., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Texas Surgeons, P.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Respondent medical practice groups" means Austin Surgeons, P.L.L.C., Austin Surgical Clinic Association, P.A., Bruce McDonald & Associates, P.L.L.C., Capital Surgeons Group, P.L.L.C., Central Texas Surgical Associates, P.A., and Surgical Associates of Austin, P.A., each of their directors, officers, employees, agents, representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups, and affiliates controlled by each respondent medical practice group, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Respondents" means respondent Texas Surgeons and respondent medical practice groups.
- D. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- E. "Payer" means any person that purchases, reimburses for, otherwise pays for all or part of, or arranges for the payment of, any health care services for itself or for any

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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.

- F. "Physician" means a doctor of allopathic medicine (M.D.) or a doctor of osteopathic medicine (D.O.).
- G. "Provider" means any person, including but not limited to any physician, hospital, or clinic, that supplies health care services to any other person.
- H. "Qualified risk-sharing joint arrangement" means an arrangement to provide physician services in which: (1) all participating physicians share substantial financial risk from their participation in the arrangement and thereby create incentives for the participating physicians to jointly control costs and improve quality by managing the provision of physician services, such as risk sharing involving (a) the provision of physician services to payers or providers at a capitated rate, (b) the provision of physician services for a predetermined percentage of premium or revenue from payers or providers, (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

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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 concerning reimbursement or other terms or conditions of dealing entered into by or within 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 or providers on an individual basis or through any other arrangement.

- I. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which: (1) all participating physicians 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 the quality of services provided through the arrangement; (2) any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within 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 or providers on an individual basis or through any other arrangement.
- J. "Reimbursement" means any payment, whether cash or non-cash, or other benefit received for the provision of physician services.
- K. "Austin area physician" means any physician who has active staff privileges at one or more hospitals within any of the Texas counties of Travis, Williamson, Hays, Caldwell, and Bastrop.

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II.

IT IS FURTHER ORDERED that each respondent, 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:
 - 1. To negotiate on behalf of any physicians with any payer or provider for physician services;
 - 2. To deal, refuse to deal, or threaten to refuse to deal with, or boycott or threaten to boycott, any payer or provider;
 - 3. Regarding any term, condition, or requirement upon which any physicians deal, or are willing to deal, with any payer or provider, including, but not limited to, terms of reimbursement;
 - 4. To restrict the ability, or facilitate the refusal, of any physician to negotiate or deal with any payer or provider on an individual basis or through an arrangement not involving one or more respondents; or
 - 5. To convey to any payer or provider through any Austin area physician any information (including, but not limited to, any actual or contemplated views,

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intentions, positions, terms, proposals, or decisions) on behalf of any physician concerning:

- a. negotiation of any actual or proposed term, condition, or requirement of dealing with any payer or provider;
 - b. any actual or contemplated intention or decision with respect to:
 - (1) entering into, refusing to enter into, threatening to refuse to enter into, withdrawing from, or threatening to withdraw from any actual or proposed agreement with any payer or provider; or
 - (2) agreeing to, refusing to agree to, or willingness to agree to any actual or proposed term, condition, or requirement of dealing with any payer or provider.
- B. Exchanging, transferring, or facilitating in any manner the exchange or transfer among any Austin area physicians of information (including, but not limited to, any views, intentions, positions, terms, proposals, or decisions) concerning:
1. negotiation with any payer or provider of actual or proposed terms, conditions, or requirements regarding reimbursement;
 2. any Austin area physician's actual or contemplated intention or decision with respect to:
 - a. entering into, refusing to enter into, threatening to refuse to enter into, withdrawing from, or threatening to withdraw from any actual or proposed agreement with any payer or provider; or

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- b. agreeing to, refusing to agree to, or willingness to agree to any actual or proposed term, condition, or requirement of dealing with any payer or provider.
- C. Encouraging, urging, suggesting, requesting, advising, pressuring, assisting, inducing, or attempting to induce any non-governmental 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 prohibit any respondent medical practice group from participating in or furthering any arrangement to provide physician services that is limited to physicians who practice medicine within such respondent as a shareholder, owner, or employee.

PROVIDED FURTHER that nothing in this Order shall prohibit conduct that is approved and supervised by the State of Texas insofar as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine.

PROVIDED FURTHER that nothing in this Order shall prohibit any agreement involving, or conduct by, any respondent that is reasonably necessary to form, participate in, or take any other action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, so long as the notification provisions contained in Paragraph V. of this Order have been satisfied.

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

- A. Within thirty (30) days after the date on which this Order becomes final, respondent Texas Surgeons shall distribute by first-class mail a copy of this Order, the accompanying complaint, and the Notice in Attachment A to this Order, to:
 1. Each payer or provider listed in Attachment B to this Order;
 2. Each person who, at any time on or after January 1, 1996, has been an officer, director, manager, participating physician, shareholder, or owner of respondent Texas Surgeons;
 3. Each other agent, representative, or employee of respondent Texas Surgeons.
- B. Within thirty (30) days after the date on which this Order becomes final, each respondent medical practice group shall distribute by first-class mail a copy of this Order, the accompanying complaint, and the Notice in Attachment A to this Order, to:
 1. Each officer, director, manager, participating physician, shareholder, or owner of such respondent who is not a shareholder of respondent Texas Surgeons;
 2. Each other agent, representative, or employee of such respondent;
 3. Each payer or provider not listed in Attachment B that, at any time from September 1, 1999 to December 31, 1999, has paid such respondent, or any participating

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physician of such respondent, for the provision of physician services under an executed contract.

- C. For a period of five (5) years after the date this Order becomes final, respondent Texas Surgeons shall:
1. Within thirty (30) days of the date the person assumes such position, distribute by first-class mail a copy of this Order and the accompanying complaint to each new officer, director, manager, participating physician, shareholder, or owner of respondent Texas Surgeons, and to each other new agent, representative, or employee of respondent Texas Surgeons;
 2. Annually publish, in an official annual report, newsletter, or memorandum sent to all shareholders, owners, and participating physicians, a copy of this Order and the accompanying complaint with such prominence as is given to official communications or regularly featured articles;
 3. Annually brief shareholders, owners, and participating physicians on the meaning and requirements of this Order and the antitrust laws, including penalties for the violation of this Order.
- D. For a period of five (5) years after the date this Order becomes final, each respondent medical practice group shall:
1. Within thirty (30) days of the date the person assumes such position, distribute by first-class mail a copy of this Order and the accompanying complaint to each new officer, director, manager, participating physician, shareholder, or owner of such respondent (unless such

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person is a shareholder of respondent Texas Surgeons), and to each other new agent, representative, or employee of such respondent;

2. Annually publish, in an official annual report, newsletter, or memorandum sent to all shareholders, owners, and participating physicians of such respondent, a copy of this Order and the accompanying complaint with such prominence as is given to official communications or regularly featured articles;
3. Annually brief shareholders, owners, and participating physicians of such respondent, who are not shareholders of respondent Texas Surgeons, on the meaning and requirements of this Order and the antitrust laws, including penalties for the violation of this Order.

IV.

IT IS FURTHER ORDERED that each respondent shall:

- A. File a verified written report with the Commission within sixty (60) days after this Order becomes final, annually thereafter for five (5) years on the anniversary of the date the 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 such respondent intends to comply, is complying, and has complied, with this Order. In addition to any other information that may be necessary to demonstrate compliance, respondent Texas Surgeons shall include in such reports information identifying each payer and provider that has communicated with respondent Texas Surgeons concerning a possible contract for physician services, the proposed terms and conditions of any such contract, and respondent Texas Surgeons' response to such payer or provider.

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

V.

IT IS FURTHER ORDERED that, for a period of ten (10) years after the date this Order is entered:

- A. Each respondent shall notify the Commission in writing at least thirty (30) days prior to forming, participating in, or taking any action, other than planning, in furtherance of any:
 - 1. Qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement involving two (2) or more Austin area physicians; or
 - 2. Other arrangement that, in dealing or negotiating with any payer or provider, is using, or intends to use, an agent that represents two (2) or more Austin area physicians.
- B. If a representative of the Commission makes a written request for information within thirty (30) days after receipt of a notice pursuant to Paragraph V.A.1. of this Order, respondents shall not form, participate in, or take any action, other than planning, in furtherance of the arrangement until thirty (30) days after substantially complying with such request for information or such

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

PROVIDED that no prior notification is required under this Paragraph for action by a respondent medical practice group in furtherance of any arrangement that is limited to physicians who practice medicine within such respondent as a shareholder, owner, or employee.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, each respondent 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, correspondences, memoranda, calendars, and other records and documents in the possession or under the control of such respondent relating to any matter contained in this Order; and
- B. Upon five (5) business days' notice, and without restraint or interference, to interview officers, directors, employees, agents, and other representatives of any respondent.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on May 18, 2020.

By the Commission.

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Attachment A**NOTICE**

The Order accompanying this Notice, among other provisions, prohibits Texas Surgeons, P.A. (an association of 26 general surgeons in the Austin, Texas, area) ("Texas Surgeons") and six named medical practice groups (whose physicians comprise almost all of the members of Texas Surgeons) from participating in or facilitating any agreement to:

- * negotiate on behalf of physicians with any health plan or any other purchaser of physician services;
- * deal, refuse to deal, or threaten to refuse to deal with, or boycott or threaten to boycott, any health plan or any other purchaser of physician services;
- * restrict the ability of any physician to negotiate or deal on an independent basis with any health plan or any other purchaser.

Another provision of the Order prohibits Texas Surgeons and the six practice groups from exchanging, or facilitating the exchange of, among any Austin area physicians, certain information relating to negotiations and dealings with health plans and other purchasers of physician services.

The Order permits an arrangement that sets collective price terms or other collective terms and conditions of dealing only if it is a "qualified risk-sharing joint arrangement" or "qualified clinically-integrated joint arrangement" (as defined in the Order). Nothing in the Order prohibits any of the six practice groups from furthering any arrangement to provide physician services that is limited to physicians within the practice group. Further, the Order

Decision and Order

does not prohibit any conduct that is approved and supervised by the State of Texas and is protected from liability under the federal antitrust laws by the state action doctrine.

The Texas Surgeons and the six practice groups may participate in an arrangement in which the individual practice groups or individual physicians convey and receive, through a third party, information, offers, and responses from and to health plans or other purchasers, so long as such negotiations remain individual and do not violate the Order. For additional information about how such negotiations can remain individual, see the August 1996 *Statements of Antitrust Enforcement Policy in Health Care* jointly issued by the Federal Trade Commission and the U.S. Department of Justice, including pages 43-52, 89-92, 125-27, and 138-40. A copy of that publication is available through the Commission's web site: www.ftc.gov.

Attachment B

Aetna U.S. Healthcare
10101 Reunion Place, Suite 200
San Antonio, TX 78216

AmeriHealth of Texas
10711 Burnet Road, Suite 312
Austin, TX 78758

Amil International, Inc.
9229 Waterford Centre Blvd., Suite 500
Austin, TX 78758

Blue Cross Blue Shield of Texas, Inc.
9020 Capital of Texas Hwy. North
Building II, Suite 400

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Austin, TX 78759

Foundation Health Systems, Inc.
9101 Burnet Road, Suite 104
Austin, TX 78758

Healthsource Texas, Inc.
1701 Directors Blvd., Suite 110
Austin, TX 78744

Humana Health Care Plans
8303 N. MoPac Expressway, Suite 450
Austin, TX 78759

NYLCare Health Plans of the Gulf Coast, Inc.
8701 N. MoPac Expressway, Suite 440
Austin, TX 78759

Prudential Health Care Plan, Inc.
7700 Chevy Chase Drive
Building I, Suite 500
Austin, TX 78752

Scott & White Health Plan
One Chisholm Trail, Suite 200
Round Rock, TX 78681

United HealthCare of Texas, Inc.
1250 S. Capital of Texas Highway
Building One, Suite 400
Austin, TX 78746

Vista Health Plan, Inc.
7801 North I-35
Austin, TX 78753

Analysis to Aid Public Comment

**Analysis of Agreement Containing Consent Order to Aid
Public Comment**

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order by the Texas Surgeons, P.A. ("Texas Surgeons IPA") and six medical practice groups comprised of Texas Surgeons IPA members – Austin Surgeons, P.L.L.C.; Austin Surgical Clinic Association, P.A.; Bruce McDonald & Associates, P.L.L.C.; Capital Surgeons Group, P.L.L.C.; Central Texas Surgical Associates, P.A.; and Surgical Associates of Austin, P.A. The agreement settles charges by the Federal Trade Commission that the Texas Surgeons IPA and the six medical practice groups (the "respondents") violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by fixing prices and other terms of dealing with third-party payers; collectively refusing to deal with third-party payers or threatening to do so; and agreeing to deal with third-party payers only on collectively determined terms. The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make it and the 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 any respondent that the law has been violated as alleged in the complaint.

Analysis to Aid Public Comment

The Complaint

Under the terms of the agreement, a complaint will be issued by the Commission along with the proposed consent order. The allegations in the Commission's proposed complaint are summarized below.

Respondent Texas Surgeons IPA is an association of general surgeons who practice in the Austin, Texas area. Members of the Texas Surgeons IPA are, and at all times relevant to the complaint have been, the majority of general surgeon private practitioners serving the adult population in the Austin area.

Nearly all of the members of the Texas Surgeons IPA belong to one of six general surgery practice groups, which are also respondents in this matter. At all times relevant to the complaint, the Texas Surgeons IPA has been governed by a board of directors composed of representatives from each of the respondent medical practice groups.

The Texas Surgeons IPA has served as a vehicle for the six respondent medical practice groups (and the few solo practitioner members) to engage in actual or threatened concerted refusals to deal, and to negotiate collectively, in order to obtain higher prices from Blue Cross Blue Shield of Texas ("Blue Cross") and United HealthCare of Texas ("United"). The six respondent medical practice groups actively furthered the unlawful conduct through their collective control of the Texas Surgeons IPA board of directors, and through their direct participation in collective fee negotiations between United and the Texas Surgeons IPA.

In April 1997, Blue Cross changed its reimbursement system from one based on historical charges to one based on a Resource Based Relative Value Scale, similar to the system used by the federal government in its Medicare program. The effect of this

Analysis to Aid Public Comment

change was to increase rates paid to primary care physicians, and to reduce rates to all physician specialists, including general surgeons. Soon thereafter, respondents, through the Texas Surgeons IPA, began collectively negotiating higher rates.

Despite multiple attempts by Blue Cross to negotiate individually with the six respondent medical practice groups, those groups insisted on negotiating only through the Texas Surgeons IPA. In September 1997, the Texas Surgeons IPA sent Blue Cross a package of identically worded contract termination notices for each general surgeon member of the Texas Surgeons IPA, with a cover letter stating that the termination notices were due to Blue Cross's "unacceptable" rate reductions. In November 1997, the Texas Surgeons IPA asked Blue Cross to waive its right to bring a private antitrust action regarding the Texas Surgeons IPA's rate negotiations with Blue Cross, but Blue Cross refused to sign the waiver. In December 1997, 26 members of the Texas Surgeons IPA, dissatisfied with Blue Cross's payment offers, collectively effected their resignations from Blue Cross, and jointly announced that action in a prominent advertisement in Austin's major daily newspaper.

In early 1998, Blue Cross experienced difficulty in securing the services of a general surgeon for an emergency room patient. At about the same time, two more general surgeons resigned from Blue Cross. These two general surgeons had been advised by one of the respondent medical practice groups that their inclusion in an arrangement with that practice group regarding back-up surgical coverage would end if they continued to deal with Blue Cross.

After these events, Blue Cross concluded that it needed to reach a rate agreement with the respondents as soon as possible to avoid inadequate general surgery coverage for Blue Cross subscribers in the Austin area. The collective rate agreement between the six respondent medical practice groups and Blue Cross that resulted in early 1998 increased Blue Cross general surgery rates nearly 30% above the April 1997 levels.

Analysis to Aid Public Comment

Respondents began collective price negotiations with United soon after it announced fee reductions for general surgeons and other physicians in October 1997. The new fees went into effect on January 1, 1998 for surgical procedures not usually performed by general surgeons, but comparable proposed fee reductions for general surgeons never went into effect. Instead, respondents caused general surgery fees for United's various plans to increase at least 12% to 40% above the fees that United announced in October 1997.

In early November 1997, United received a written notice from the Texas Surgeons IPA that all of its members would be terminating their contracts with United effective January 1, 1998, due to the proposed fee reductions for 1998. The Texas Surgeons IPA indicated its desire to collectively negotiate higher fees and rejected United's request to negotiate with the six respondent medical practice groups on an individual basis. United explored the possibility of creating a panel of general surgeons that did not include general surgeons from the six respondent medical practice groups, but it concluded that such a panel would not provide adequate general surgery coverage and that it had no realistic alternative to beginning collective fee negotiations with the Texas Surgeons IPA.

Prior to the start of a collective fee negotiation session in November 1997, the Texas Surgeons IPA required United to sign a waiver of its right to bring a private antitrust action against the Texas Surgeons IPA or its members stemming from those fee negotiations. At that collective fee negotiation session, respondents demanded and received an agreement from United to pay higher fees in 1998 and 1999, as described above. Representatives from the six respondent medical practice groups assembled together and collectively participated in this collective

fee negotiation session through frequent telephone and fax contact with the Texas Surgeons IPA's lead negotiator.

The Texas Surgeons IPA did not engage in any activity that might justify collective agreements on the prices they would accept for their services. Respondents' actions have restrained competition among general surgeons in the Austin area and thereby have harmed, or tended to harm, consumers (including third-party payers, subscribers, and their employers) by:

- * depriving consumers of the benefits of competition;
- * increasing by over one million dollars the amount that Blue Cross, United, their individual subscribers, and employers (including the State of Texas Employees Retirement System and other self-insured employers that utilize the Blue Cross or United physician network) paid for the services of surgeons during the period from January 1, 1998 to December 31, 1999;
- * fixing the payments or co-payments that individual patients, their employers, and third-party payers make for the services of surgeons;
- * fixing the terms and conditions upon which general surgeons would deal with third-party payers; and
- * raising the prices that individuals and employers pay for health plan coverage offered by third-party payers.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint, while allowing respondents to engage in legitimate joint conduct. The Commission notes that in 1999, some time after the investigation of this matter began, the State of Texas enacted legislation that permits the State Attorney General to approve, under certain

Analysis to Aid Public Comment

conditions, joint negotiations between health plans and groups of competing physicians. Texas Senate Bill 1468, 76th Leg., R.S. ch., 1586 (1999). The conduct that gave rise to the investigation and consent agreement predated enactment of the law, and thus was not approved under its terms. Moreover, the conduct described in the complaint would not necessarily have met the conditions for approval set forth in the Act.

Enactment of the statute does not eliminate the need for an order in this matter. The statute permits only collective negotiations that are approved by the Attorney General, imposes conditions under which that approval may be granted, and by its terms expires on September 1, 2003. As is discussed below, the Commission's order does not prohibit future conduct that is approved and supervised by the State of Texas pursuant to its statute and protected from federal antitrust liability under the state action doctrine. It is necessary and appropriate, however, to provide a remedy against future conduct by the respondents that is not approved and supervised by the State of Texas.

The core operative provisions of the proposed order are contained in Section II. Section II.A prohibits respondents from entering into or facilitating any agreement: (1) to negotiate physician services on behalf of any physicians with any payer or provider; (2) to deal, refuse to deal, or threaten to refuse to deal with any payer or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payer or provider; (4) to restrict the ability, or facilitate the refusal, of any physician to deal with any payer or provider on an individual basis or through any other arrangement; or (5) to convey to any payer or provider, through any Austin area physician, any information concerning actual or potential dealings by any physician with any payer or provider.

Analysis to Aid Public Comment

The fifth provision listed above (Section II.A.5 of the proposed order) ensures that communications between any respondent and any payer within a “messenger model” arrangement be conveyed by a neutral third party (someone other than a physician with an active practice in the Austin area). In a messenger model arrangement, physicians individually convey and receive, through a third party, information, offers, and responses from and to payers or providers. *See* Statements of Antitrust Enforcement Policy in Health Care, issued jointly by the Federal Trade Commission and the U.S. Department of Justice (August 28, 1996) at 43-52, 89-92, 125-27, 138-40, 4 *Trade Reg. Rep. (CCH)* ¶ 13,153. In addition, Section V.A.2 of the order ensures that any respondent intending to use a messenger model arrangement provide prior notification to the Commission.

Section II.B prohibits respondents from exchanging, transferring, or facilitating the exchange or transfer of information among Austin area physicians concerning: (1) negotiation with any payer or provider regarding reimbursement terms; or (2) actual or contemplated intentions or decisions with respect to any terms, dealings or refusals to deal with any payer or provider. Section II.C prohibits respondents from encouraging, advising, or pressuring any person, other than the government, to engage in any action that would be prohibited if the person were subject to the order.

Section II contains three provisos. The first permits each respondent medical practice group to participate in arrangements for the provision of physician services that are limited to physicians from the same medical practice group. The second proviso, as noted above, permits respondents to engage in conduct that is approved and supervised by the State of Texas, so long as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine. The state action doctrine protects from federal antitrust liability any private conduct that is both: (1) in accordance with a clearly articulated and affirmatively expressed state policy to supplant competition; and (2) actively supervised by the state itself. *See, e.g., FTC v.*

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Ticor Title Insurance Co., 504 U.S. 621 (1992); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The third proviso allows respondents to engage in conduct (including collectively determining reimbursement and other terms of contracts with payers) that is reasonably necessary to operate any “qualified risk-sharing joint arrangement” or “qualified clinically-integrated joint arrangement,” provided respondents comply with the prior notification requirements set forth in Section V of the order. 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 any recurrence of acts and practices that have restrained competition and injured consumers.

As defined in 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 definition illustrates ways in which physicians might share financial risk, tracking the types of financial risk-sharing set forth in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. Second, any agreement on prices or terms of reimbursement entered into by the arrangement must be reasonably necessary to obtain significant efficiencies through the joint arrangement. Third, the arrangement must be non-exclusive – *i.e.*, it must not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement.

A “qualified clinically-integrated joint arrangement” pertains to arrangements in which the physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services, without necessarily sharing substantial financial risk. As

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with risk-sharing arrangements, the definition of clinically integrated joint arrangements reflects the analysis contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. According to the order's definition, the participating physicians must have a high degree of interdependence and cooperation through their use of programs to evaluate and modify their clinical practice patterns, in order to control costs and assure the quality of physician services provided through the arrangement. In addition, as with risk-sharing arrangements, the arrangement must be non-exclusive and any agreement on prices or terms of reimbursement entered into by the arrangement must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

Sections III.A and III.B require respondents to distribute the order and complaint to its members and other specified persons, including payers. Sections III.C and III.D require that each respondent, for the next five years: (1) distribute copies of the order and complaint to new members and other specified persons; (2) publish annually to members and owners a copy of the order and complaint; and (3) brief members and owners annually on the meaning and requirements of the order and the antitrust laws.

Sections IV and VI consist of standard Commission reporting and compliance procedures. Section IV specifies that Texas Surgeons IPA must include in its annual reports information identifying each payer or provider that has communicated with Texas Surgeons IPA concerning a possible contract for physician services, the proposed terms of any such contract, and Texas Surgeons IPA's response to the payer or provider.

Finally, Section VII of the proposed order contains a twenty year "sunset" provision under which the order terminates twenty years after the date the order was issued.

Complaint

IN THE MATTER OF

ABBOTT LABORATORIES, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3945; File No. 9810395
Complaint, May 22, 2000--Decision, May 22, 2000*

This consent order prohibits Respondents Abbot Laboratories and Geneva Pharmaceuticals, Inc. from entering agreements in which the first company to file an ANDA agrees with the NDA holder not to relinquish its right to the 180-day exclusivity period established under the Hatch-Waxman Act, or agreements where the ANDA first filer from agrees not to develop or market a generic drug product that is not the subject of a patent infringement lawsuit. The order also prohibits agreements involving payments to keep a generic drug off the market during patent infringement litigation brought by an NDA holder, and respondents can only enter these arrangements if specific criteria are met. This prohibition includes agreements made in the context of an interim settlement of a patent infringement action, whereby the NDA holder pays the generic not to enter the market, unless the parties obtain court approval through a process that is designed to enhance the court's ability to assess the competitive implications of the agreement. In addition, the order requires that Respondents notify the Commission 30 days before entering into an agreement in which an ANDA first filer agrees with an NDA holder to refrain from going to market.

Participants

For the Commission: *Karen Bokat, Bradley S. Albert, Daniel Kotchen, Robin Moore, David Narrow, Martha Oppenheim, David Pender, Richard A. Feinstein, William K. Tom, Daniel Ducore, Alan A. Fisher, Roy B. Levy, and Gregory S. Vistnes.*

For the Respondents: *Jeffrey Weinberger, Munger Tolles & Olson, and Wayne Cross, Dewey Ballentine.*