

Interlocutory Orders, Etc.

It is ordered that enforcement of and Respondent's obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order be, and they hereby are, stayed until the U.S. Court of Appeals for the Fifth Circuit issues a ruling disposing of the petition for review filed by Respondent; and

It is further ordered that Respondent's Motion for Stay be, and it hereby is, *denied* in all other respects.

By the Commission.

NORTH TEXAS SPECIALTY PHYSICIANS

Docket No. 9312 Order, January 20, 2006

Order modifying portions of the Commission's final opinion and order to clarify language relating to messenger model physician contracts.

ORDER MODIFYING OPINION OF THE COMMISSION

On November 29, 2005, the Commission issued a Final Order and Opinion holding that Respondent North Texas Specialty Physicians' (NTSP) contracting activities with payors constitute unlawful horizontal price fixing. In its Opinion, the Commission made it clear that these types of cases require case-by-case assessments, and based its conclusion that NTSP violated the law on a fact-intensive analysis.

On December 20, 2005, Complaint Counsel filed a Petition for Clarification of Certain Statements in the Commission Opinion, expressing concern that certain language in the Opinion – relating to the messenger model and describing the existence here of concerted action – may have created confusion as to the lawfulness of certain practices in contexts other than the factual circumstances present in this case. The Commission believes that the statements to which Complaint Counsel refers, properly read in context, are not

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reasonably subject to the misinterpretations described in the Petition for Clarification. In particular, nothing in the Commission Opinion is intended to suggest an invariable rule that a physician network always violates the antitrust laws whenever it fails to transmit all payor offers. The Commission Opinion makes it patently clear that the Commission determination that NTSP misused the messenger model was inextricably intertwined with and based upon a comprehensive assessment of NTSP's conduct considered in its entirety, including in particular its use of a prospective price poll of physician members. Commission Opinion pp. 25-26. The Commission Opinion also makes clear that when a single organization is controlled by a group of competitors and serves as their agent, the organization is viewed as a combination of its members, the actions of which will violate the antitrust laws if they constitute an unreasonable restraint of trade. Commission Opinion p. 15. However, in order to ensure that there is not even a remote possibility of confusion surrounding the language of the Opinion, the Commission has determined to modify its Opinion in minor respects.¹ Accordingly,

It is ordered that the Opinion of the Commission issued on November 29, 2005, in this matter be, and it hereby is, modified as follows:

¹ Section 5(b) of the Federal Trade Commission Act permits the Commission to modify its Opinion and Final Order in a given matter “[u]ntil the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, . . . ,” 15 U.S.C. § 45(b); *accord*, Commission Rule 3.72(a), 16 C.F.R. § 3.72(a) (during the period prescribed by Section 5(b), the Commission may modify any part of its “findings as to the facts, conclusions, rule, order, or opinion issued by the Commission...”).

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1. The third, fourth and fifth sentences of the second full paragraph on Page 15, beginning with the phrase “The matter is easy to decide . . .” are modified by striking the sentences in their entirety and inserting in their place the following:

“The matter is easy to decide when two or more separate legal entities overtly agree on a restraint that each will adopt. However, an action nominally taken by a single entity is also construed as the product of agreement for purposes of the antitrust laws when the entity is controlled by a group of competitors and is serving as the agent of the group.”

2. The first and second sentences of the second full paragraph on Page 26, beginning with the phrase “NTSP’s refusal to messenger contracts where it determined . . .” are modified by striking the sentences in their entirety and inserting in their place the following:

“NTSP's refusal to messenger contracts where it determined, based on the results of its prospective price poll, that less than 50 percent of NTSP physicians would join, eliminates the ability of NTSP physicians to decide unilaterally whether to accept the unmessengered contracts and hinders the ability of payors to contract individually with NTSP physicians. [footnote 40]”

3. The sixth and seventh lines of the second full paragraph on page 34 are modified by striking “(2) all payor offers were messengered to the physicians, regardless of how many physicians are deemed likely to accept the offer based on the poll results” and inserting in its place the following:

“(2) NTSP did not use the polling results as a basis for determining which payor offers it would elect to messenger to the physicians”.4. The third and fourth lines of the second full paragraph on page 35 are modified by striking “the key to a lawful messenger model is that the IPA must be willing to messenger *all* payor offers, and refrain” and inserting in its place the following: