ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement

Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by third-party payors, competing physicians decide individually whether to enter into contracts with third-party payors to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

In order to be competitively marketable in the Dallas area, a payor's health insurance plan must include in its physician network a large number of primary care physicians (PCPs) and specialists who practice in the Dallas area. Many of the PCPs and specialists who practice in the Dallas area are members of GPG. In particular, GPG members include a large number of PCPs and specialists located near and associated with the two highly-regarded hospitals comprising the Presbyterian Health System. Accordingly, many payors concluded that they could not establish a viable physician network, particularly in areas in which GPG physicians are concentrated, without including a large number of GPG physicians in that network.

Sometimes a network of competing physicians uses an agent to convey to payors information obtained individually from the physicians about fees or other significant contract terms that the physicians are willing to accept. The agent also may convey all payor contract offers to the physicians, which the physicians then unilaterally decide whether to accept or reject. Such a "messenger model" arrangement, which is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice (see http://www.ftc.gov/reports/hlth3s.htm), can facilitate contracting between physicians and payors and minimize the costs involved, without fostering an agreement among competing physicians on fees or fee-related terms. Such a messenger may not, however, consistent with a competitive model, negotiate fees and other competitively significant terms on behalf of the participating physicians, or facilitate the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to the physicians based on the messenger's opinion on the appropriateness, or lack thereof, of the offer.

Rather than acting simply as a "messenger," SHP actively bargained with payors, often proposing and counter-proposing fee schedules to be applied, among other terms. To maintain its bargaining power, SHP discouraged GPG members from entering into unilateral agreements with payors. SHP communicated to GPG members the bargaining advantage gained by negotiating with payors collectively through SHP, in general, and SHP's determinations that specific fees and other contract terms being offered by payors were "not comparable to market standards" or otherwise were inadequate. Many GPG members have been unwilling to negotiate with payors apart from SHP, and communicated that fact to payors seeking to resist SHP's collective demands.

SHP had a practice – inconsistent with a messenger model arrangement – of not conveying to GPG members payor offers that SHP deemed deficient, including offers that provide for fees that do not satisfy criteria adopted by SHP's Contracting Committee, which was comprised of 21 GPG

members. SHP instead demanded, and often received, more favorable fee and other contract terms–terms that payors would not have offered to GPG's members had those members engaged in unilateral, rather than collective, negotiations with the payors. Only after the payor acceded to fee and other contract terms acceptable to SHP, would SHP convey the payor's proposed contract to GPG members for their consideration.

SHP refused to convey payors' proposed fee and other contract terms to GPG members even where the payor explicitly has requested that it do so. SHP's discouraging of physicians' contracting directly with payors and its unwillingness to convey payors' proposed contracts to GPG members unless and until those offers satisfy SHP's criteria have rendered it less likely and more costly for payors to establish competitive physician networks in the Dallas area without first coming to terms with SHP. As a result, payors often have offered or acceded to SHP demands for supracompetitive fees for all GPG members.

Since July of 1999, GPG, its members, and SHP have entered only into fee-for-service agreements with payors, pursuant to which GPG, its members, and SHP did not undertake financial risk-sharing. Further, GPG members have not integrated their practices to create significant potential efficiencies. Respondents' joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration. Instead, the Respondents' acts and practices have restrained trade unreasonably and hindered competition in the provision of physician services in the Dallas area in the following ways, among others: prices and other forms of competition among Respondent GPG's members were unreasonably restrained; prices for physician services were increased; and competition in the purchase of physician services was restrained to the detriment of health plans, employers, and individual consumers. Thus, Respondents' conduct has harmed patients and other purchasers of medical services by restricting choice of providers and increasing the price of medical services.

The Proposed Consent Order

The proposed consent order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint while allowing Respondents and member-Providers to engage in legitimate joint conduct.

and employees. Further, Paragraph III.F requires SHP to file periodic reports with the Commission detailing how SHP and GPG have complied with the Order. Paragraph V. authorizes Commission staff to obtain access to Respondents' records and officers, directors, and employees for the purpose of determining or securing compliance with the Order.

The proposed order will expire in 20 years.