

ANALYSIS OF AGREEMENT CONTAINING

("PCPs") and specialists who practice in the Dallas area. Many of the PCPs and specialists who

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's members were unreasonably restrained; prices for physician services were increased; and health plans, employers, and individual consumers were deprived of the benefits of competition among physicians. Thus, Respondent's conduct has harmed patients and other purchasers of medical services by restricting choice of physicians and increasing the prices 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 Respondent and member-physicians to engage in legitimate joint conduct.

Paragraph II.A prohibits Respondent from entering into or facilitating agreements among physicians: (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term upon which any physicians deal, or are willing to deal, with any payor; and (4) not to deal individually with any payor or through any arrangement other than SPA.

Paragraph II.B prohibits Respondent from exchanging or facilitating the transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal.

Paragraph II.C prohibits Respondent from attempting to engage in any action prohibited by Paragraph II.A or II.B. Paragraph II.D prohibits Respondent from encouraging, pressuring, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C.

Paragraph II contains a proviso that allows Respondent to engage in conduct that is reasonably necessary to the formation or operation of a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement," so long as the arrangement does not restrict the ability, or facilitate the refusal, of participating physicians to deal with payors on an individual basis or through any other arrangement. To be a "qualified risk-sharing joint arrangement," an arrangement must satisfy two conditions. First, all participating physicians must share substantial financial risk through the arrangement and thereby create incentives for the participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement. To be a "qualified clinically-integrated joint arrangement," an arrangement must also satisfy two conditions. First, all participants must join in active and ongoing programs to evaluate and modify their clinical practice patterns, creating a high degree of interdependence and cooperation among physicians to control costs and ensure the quality of services

provided. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement. Both definitions reflect the analyses contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.

As explained previously, the order would bar SPA from encouraging or facilitating agreements among or on behalf of otherwise competing physicians as to the terms under which the physicians would provide medical services. SPA's negotiating with a third-party payor of contract terms applicable only to SPA's own proposed performance ordinarily would not encourage or facilitate an agreement among its participating physicians as to the terms under which the physicians would provide medical services. Therefore, a SPA-payor negotiation of terms applicable only to SPA's own proposed performance ordinarily would not be affected by the order. SPA's conduct in such a negotiation may not, however, encourage, facilitate, or conceal an agreement by or on behalf of participating physicians as to the terms upon which they would provide medical services. Thus, for example, the order would not ordinarily preclude SPA's negotiating with third-party payors as to whether, and on what terms, SPA itself would engage in delegated credentialing of physicians on behalf of the payor, undertake specified contract administration activities, maintain specified insurance coverages, or indemnify the payor.

Similarly, the order ordinarily would not affect SPA's communicating to its participating physicians accurate, factual, and objective analyses of proposed third-party payor contract terms, so long as such communication does not encourage, facilitate or conceal a prohibited agreement. SPA may not, however, do so in a manner that directly or by implication suggests that physicians should or should not accept the contract offers or particular terms thereof upon which they would provide medical services. Further, the order ordinarily would not preclude SPA's sharing with a third-party payor SPA's objective analysis of the proposed contract terms prior to communicating that analysis to its participating physicians, provided that SPA informs the payor that SPA will promptly messenger the contract proposal to its participating physicians upon the payor's request, that SPA promptly complies with each such request, and that any such communications by SPA to the payor do not directly or by implication encourage, facilitate, or conceal a prohibited agreement.

Paragraphs III.A and III. B require SPA to distribute the complaint and order to its members, payors with which it previously contracted, and specified others. Paragraph III.C requires SPA to terminate, without penalty, payor contracts that it had entered into during the collusive period, at any such payor's request. This provision is intended to eliminate the effects of Respondent's joint price setting. Paragraph III.C also contains a proviso to preserve payor contract provisions defining post-termination obligations relating to continuity of care during a previously begun course of treatment.

The remaining provisions of the proposed order impose complaint and order distribution, reporting, and other compliance-related provisions. For example, Paragraph III. D requires SPA to distribute copies of the complaint and order to incoming SPA physicians, payors that contract with