

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT**
In the Matter of White Sands Health Care System, L.L.C., et al., File No. 031 0135

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

contract provisions, including fees, on behalf of independently practicing non-physician health care providers, namely nurse anesthetists. Respondents have orchestrated collective agreements on fees and other terms of dealing with health plans, carried out collective negotiations with health plans, and orchestrated refusals to deal and threats to refuse to deal with health plans that resisted respondents' desired terms. Although White Sands purported to operate as a "messenger model," – that is, an arrangement that does not facilitate horizontal agreements on price – it engaged in various actions that demonstrated or orchestrated such agreements.¹

Respondents have repeatedly succeeded in forcing numerous health plans to raise fees paid to White Sands' members, and thereby raised the cost of medical care in the Alamogordo area. They have been successful in "leverag[ing] the collective power of the members in obtaining more favorable reimbursement rates than could be negotiated . . . individually."

White Sands engaged in no efficiency-enhancing integration sufficient to justify respondents' joint negotiation of fees. By orchestrating agreements among White Sands members to deal only on collectively-determined terms, and actual or threatened refusals to deal with health plans that would not meet those terms, respondents have violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed Order is designed to remedy the illegal conduct charged in the Complaint and prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans. Unlike recent consent orders, however, this Order also settles charges that non-physician health care providers engaged in unlawful price agreements as well. The Order also includes temporary "fencing-in" relief to ensure that the alleged unlawful conduct by respondents does not continue.

The proposed Order's specific provisions are as follows:

¹ Some arrangements can facilitate contracting between health care providers and payors without fostering an illegal agreement among competing physicians on fees or fee-related terms. One such approach, sometimes referred to as a "messenger model" arrangement, 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, at 125. *See* <http://www.ftc.gov/reports/hlth3s.htm#8>.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits

necessary to make the notification complete.

Paragraph V, which applies only to White Sands, requires White Sands to distribute the Complaint and Order to all health care providers who have participated in White Sands, and to payors that negotiated contracts with White Sands or indicated an interest in contracting with White Sands. Paragraph V.B requires White Sands, at any payor's request and without penalty, or within one year after the Order is made final, to terminate its cur7