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United States Department of Justice and Federal Trade Commission,
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available at <http://www.ftc.gov/reports/hlth3s.pdf> (Aug. 28, 1996) 4, 9

TABLE OF ABBREVIATIONS

The following abbreviations and citation forms are used:

CAD C-1110 P-1 DISCIPLINARY 15 2005

CX Complaint Counsel Exhibit

ID Initial Decision filed November 15, 2004

IDF Initial Decision Filed 11/15/04

Introduction

NTSP's response to Complaint Counsel's cross-appeal demonstrates the need for a strong order in this case. Confronted with the legal standards that apply to Commission orders, NTSP

appears that the Commission's order is "unlawful, arbitrary, and capricious."

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I. NTSP's Defense of the ALJ's Information-Dissemination Proviso Misconstrues the

Proviso

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The ALJ's information proviso (which states "nothing in this Order shall prohibit . . .") carves out the conduct described in the proviso from the scope of the order. The information proviso in *United States v. Federation of Physicians and Dentists, Inc.*, however, is qualified by introductory language that it is "[s]ubject to the provisions of Section IV of this Final

Judgment." Section IV of the order contains the substantive prohibitions. Thus, unlike the

ALJ's proviso, the proviso in the DOJ order does not carve out information dissemination from

the scope of the order. On the contrary, it expressly provides that such conduct remains subject

Aside from these orders, NTSP quotes a Department of Justice business review letter,

which disallows whether the requester's proposed conduct would likely be deemed to violate the

antitrust laws—not an order against a party who has already violated the law. NTSP also claims that the agencies' *Statements of Antitrust Enforcement Policy in Health Care*⁶ “recognize the wisdom of this type of proviso.” RRB 27. The *Statements*, however, do not discuss any such

proviso or even attempt to address what sort of remedies are appropriate in cases in which a

II. NTSP's Contention That the ALJ's Order Properly Recognizes Its "Right to Refuse to Deal" Rests on Its Erroneous Single Entity Defense

The ALJ's narrowing of proposed prohibitions on NTSP's conduct and his addition of the state law proviso rested on his mistaken belief that Complaint Counsel's proposed order would

have deprived NTSP of any ability to refuse to negotiate a contract or offer from competitors

NTSP's reply brief similarly offers no explanation of how the order would compel it to

appropriate law enforcement authorities. But NTSP has already invoked "payor misconduct" as a defense for its anticompetitive conduct, even though the record shows NTSP was perfectly willing to deal with those same payors if their price offers were sufficiently high. The AI P's

state law proviso is an invitation to abuse and continued anticompetitive actions.

the assertions in its reply brief. Its continued attempts to characterize its conduct as legitimate

confirms the need for a strong order. We provide a few examples below:

United

NTSP has said its collective conduct concerning United was a response to an effort by

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cases). Second, as a factual matter, NTSP's claim that it was merely attempting to get CIGNA to live up to its contractual obligations is simply implausible.

NTSP threatened to terminate its contract with CIGNA after CIGNA refused NTSP's demand that the payor allow primary care physicians (PCPs) to participate in a contract that expressly covered only NTSP "specialists." IDF 237-44. Not surprisingly, NTSP's own documents reflect the ordinary distinction between PCPs and "specialists." *See, e.g.*, CX 1117 at

Aetna

NTSP says “[t]he situation with Aetna involved a dispute and class action litigation”

subject Medical Select Management (MSM) in 1991. NTSP

RRB at 30.¹³ But NTSP’s contemporaneous documents state: “It is important to understand that this lawsuit is in no way directed towards Aetna as we believe Aetna is simply a third party regarding this matter.” PY 235 at 1. Aetna was not a party to NTSP’s suit against MSM (DV

IV. NTSP's "Policy" Objection to the Proposed Order Is Merely a Recycling of Its

Failed Spillover Defense

NTSP claims that the proposed order would prevent or discourage "physician teamwork"

that might occur outside the context of risk-sharing arrangements or clinically integrated

ventures. See e.g. RRR 24, 25-26, 31. Of course, the order would not prevent NTSP physicians

from engaging in teamwork. Indeed, as Complaint Counsel's expert, Dr. Lawrence Casalino,

31)—an assertion that is manifestly false. *See, e.g.*, CAB 40-41 (noting spillover benefits theoretically possible but finding a lack of any logical nexus between price fixing and the claimed efficiencies); IDF 380 (finding any spillover benefits that might occur do not require collective fee setting).

NTSB also notes its complaint that the ATC...

[REDACTED]

[REDACTED]

NTSP's vague assertions about "physician teamwork efforts" as a defense for price fixing would be far more likely to discourage physicians from undertaking true innovations that could help to

by the cost, quality and access challenges facing our health care system

Conclusion

For the reasons set forth above and in Complaint Counsel's Answering and Cross-Appeal Brief, the Commission should modify the ALJ's order as requested by Complaint Counsel.

Respectfully submitted,

CERTIFICATE OF SERVICE

I, Sarah Croake, hereby certify that on April 28, 2005, I caused a copy of Complaint Counsel's Reply Brief on Cross Appeal to be served upon the following persons:

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