

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch**

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In the Matter of)	
)	
North Texas Specialty Physicians,)	Docket No. 9312
 a corporation)	
<hr/>)	PUBLIC

**ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT’S MOTION
FOR STAY OF FINAL ORDER PENDING JUDICIAL R**

¹ On January 10, 2006, NTSP filed a petition for review of the Commission’s Final Order and Decision in the U.S. Court of Appeals for the Fifth Circuit.

² The Commission has stated that “the necessary degree or level of possibility of success will generally vary according to an assessment of the other three factors” and that “the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury suffered absent the stay.” *In the Matter of California Dental Ass’n*, No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996), citing *Michigan Coalition of Radioactive Material Users*

526 U.S. 756 (1999), by synthesizing prior antitrust decisions. This analysis prescribes a flexible analytical approach that replaces a simple dichotomy between categories like “*per se*” and “rule of reason” with a far more legally and economically sophisticated continuum of conduct along which behavior can be analyzed. Applying this analysis in this case is neither controversial nor difficult, and the Commission consequently does not consider this case to be the type of “close case” that would justify a stay.

Irreparable Injury to NTSP Absent a Stay, Degree of Injury to Other Parties and the Public Interest

The Commission addresses these three factors together in this section because NTSP’s Motion for Stay examines all three factors together. To show irreparable injury, NTSP must demonstrate that denial of a stay would cause it irreparable harm. Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. NTSP must show that the irreparable injury alleged is both substantial and likely to occur absent a stay. *See Michigan Coalition of Radioactive Material Users v. Griepentrog, Inc.*, 945 F.2d 150, 154 (6th Cir. 1991). The Commission considers the third and fourth prongs (harm to others and the public interest) together because Complaint Counsel represents the public interest in effective law enforcement. *See California Dental*, 1996 FTC LEXIS 277, at *7-8.

NTSP argues that Paragraphs II, IV, and VI of the Commission’s Final Order should be stayed because they allegedly will cause NTSP and third parties irreparable injury and are not in the public interest. NTSP argues that the Order’s remaining provisions, which it characterizes as ancillary rather than substantive, should be stayed because they have no purpose or meaning if Paragraphs II, IV and VI of the Final Order are stayed. We discuss each relevant section of the Final Order below.

Paragraph II of the Final Order

Paragraph II of the Order, among other things, requires NTSP to cease and desist from negotiating any term, condition or requirement upon which any physician deof yor, TD(Ia72.0000micI600 ePara

NTSP also argues that third-party physicians, patients and health plans and the public interest will be harmed because the efficiencies created by NTSP's spillover business model, relating to patient care and quality of care, will allegedly be lost.

NTSP further argues that the restrictions on its policies and physician agreements potentially will prevent it from making lawful unilateral decisions, and from disseminating information to physicians and patients, regarding both health care in general and particular payors and contracts. NTSP also argues that if it cannot terminate payor contracts, regardless of payor breaches of contract or illegal conduct, it will be exposed to potential liability and deprived of a contract right.

In addition, NTSP argues that the messaging requirements of the order will block its spillover business model, and thus present a significant danger to NTSP's reputation and continued viability. Finally, NTSP argues that the Order infringes its First Amendment rights by limiting NTSP communications with its hundreds of participating physicians, as well as with every payor in the Dallas-Fort Worth Metroplex.

NTSP has not demonstrated either that irreparable substantial injury to itself or harm to others will occur.

⁶ NTSP's counsel admitted during oral argument before the Commission that risk-sharing contracts are out of favor in Fort Worth, Texas. Oral Argument at 23. Thus, it is

specifically allows NTSP to engage in conduct reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement. Thus, NTSP will be able to engage in efficiency-enhancing activities for which it demonstrates sufficient financial or clinical integration. The Final Order also allows NTSP to act as a proper messenger as long as it provides the Commission notice at least sixty days prior to doing so, for a period of three years. *See* Final Order, Paragraph III.

NTSP claims its viability may be harmed if Paragraph II of the Order is not stayed, but NTSP has not attempted to elaborate on this claim. Moreover, Paragraph II of the Order does not apply to NTSP's risk-sharing contract, which NTSP's counsel stated at oral argument was significant to NTSP and the source of 90 percent of NTSP's revenue. Oral Argument at 12, 23. The requirements of Paragraph II of the Order rather go to the core of NTSP's illegal conduct. Consequently, it is appropriate to consider the substantial injury to competition and consumers that would result from NTSP's continued unlawful conduct if Paragraph II were stay

difficult to see how third-party payors and health plans are irreparably harmed by the prohibitions in Paragraph II of the Order.

from a payor pursuant to Paragraph IV.B.(1) to each physician participating in NTSP as of the date NTSP receives the request.

Paragraph IV.D. requires NTSP, for three years after the Final Order becomes final, to send, by first-class mail, return receipt requested, copies of the Order and the Complaint to any new physicians, payors, officers, directors, managers, or employees of NTSP who did not previously receive copies of those documents. NTSP is also required to annually publish copies of the Order and the Complaint in an official annual report or newsletter. Paragraph IV.E. requires NTSP to file a written report with the Commission within sixty days after the Order becomes final, and annually thereafter for three years, describing the manner and form in which NTSP has complied and is complying with the Order, and to file with each such report copies of return receipts required by Paragraphs IV.A., IV.C. and IV.D. of the Order. Paragraph IV.F. requires NTSP to notify the Commission at least thirty days prior to any proposed change in NTSP that may affect compliance obligations arising out of the Final Order, including but not limited to dissolution, assignment or sale.

NTSP states that the Paragraph IV notification requirements would require NTSP to provide the specified notice to each of its hundreds of participating physicians and to every payor in the Dallas-Fort Worth Metroplex. NTSP argues that these requirements would impose unrecoverable costs and business losses on NTSP; would confuse physicians, patients, and payors; and would harm NTSP's reputation.

NTSP failed to demonstrate either that the Paragraph IV notification requirements would likely cause irreparable substantial injury to itself or harm to others or that a stay of these requirements would be in the public interest. While NTSP cites *California Dental*, 1996 FTC LEXIS 277, as support for its allegations, that reliance is misplaced, because in *California Dental* the respondent would have had to notify, and potentially renotify, up to 19,000 member dentists. By contrast, in this case, NTSP will have to notify, and potentially renotify, only approximately 400 member physicians, and a limited number of payors in a limited geographic region. Thus, the burden and expense involved in implementing the notice provisions in the two cases are not facially comparable. Moreover, NTSP has adduced no support for its bald assertions that it will suffer business losses, and that the requisite notification efforts will cause physician, patient and payor confusion. In fact, the Commission has required similar notification efforts in numerous consent orders against other physician IPAs.

NTSP also argues that the termination of the 13 contracts that Paragraph IV.B. requires will harm NTSP and non-party physicians, patients, health plans, and the public interest, by disrupting the spillover effects that NTSP has achieved, thereby in turn damaging NTSP's reputation and marketplace viability. In addition, NTSP argues that terminating those contracts will disrupt the medical practices of the non-party physicians, as well as the operation of health plans and patient care for over 200,000 lives covered by those contracts and will impose financial harm on the non-party physicians and payors. NTSP also argues that continuation of the

contracts would not be harmful because the only contracts concerning which complaints have been registered have been terminated or replaced, or are already terminable at will by the payors.

As explained above and in the Commission Opinion (*see* discussion above re: Paragraph II of the Order, and Commission Opinion at 28-30), the Commission has found no support for NTSP's claims that its non-risk contract activities produce spillover efficiencies. Accordingly, the Commission concludes that the Paragraph IV contract termination provisions will not disrupt any spillover benefit from NTSP's business model. Nevertheless, the Commission recognizes that – apart from any inconvenience to NTSP or its member physicians – the cancellation of existing contracts may well affect the thousands of patients who are covered by the health plans under contract. While Paragraph IV.B. allows payors to submit written requests to extend particular contracts with NTSP to a specific date, that date can be no later than one year after the date the Order becomes final. NTSP therefore might have to terminate some of its contracts at that point; such terminations might have disruptive effects on covered patients and it might be impossible to revive those contracts, once terminated. By staying Paragraphs IV.B. and C. of the Final Order pending appellate review, we ensure that the Court of Appeals will have the opportunity to give plenary consideration to NTSP's petition for review without concern for such disruptive effects from contract terminations in the interim. Moreover, the other core provisions of the Commission's Final Order will prevent NTSP from engaging in any further price-fixing conduct and thus protect the public interest. On balance, therefore, we find that the public interest favors staying of Paragraphs IV.B. and C. of the Final Order, allowing NTSP's contracts to continue in effect until the Court of Appeals disposes of NTSP's petition for review. The Commission undertakes this action without any intent to affect any preexisting rights that payors might hold.

Paragraph VI of the Final Order

Paragraph VI.A. of the Final Order requires NTSP to grant Commission representatives access to its records for the purpose of determining or securing its compliance with the Order. Paragraph VI.B. of the Order requires NTSP to permit Commission representatives to interview NTSP or its employees upon five days notice and in the presence of counsel.

NTSP argues this provision should be stayed because it is “fatally flawed and disregards federal and state law.” Motion for Stay at 17. NTSP also maintains that because attorney-client, physician-patient and other privileged and confidential documents and information are not exempt from coverage by the Final Order, the Order therefore infringes on the rights of patients, physicians and NTSP.

NTSP has not demonstrated an irreparable substantial injury to itself or harm to others that is likely to occur absent a stay as to the requirements of Paragraph VI of the Order, nor has it demonstrated that a stay of this provision is in the public interest. Paragraphs VI.A. and B. of the Order are necessary for the purpose of determining or securing NTSP's compliance with the Order. Similar monitoring provisions are routinely included in Commission orders. These

provisions typically do not expressly identify an exception for privileged and confidential information; however, this does not preclude the respondent from asserting any applicable privileges when – and if – the Commission subsequently invokes the monitoring provision.⁷ Moreover, NTSP’s argument ignores the Commission’s regulations and internal procedures for protecting confidential information. A more fundamental flaw in NTSP’s argument, however, is that its concerns regarding possible disclosures of privileged and confidential information are wholly premature and speculative. There is simply no indication that the Commission is likely to seek access to NTSP’s records between now and the time that NTSP’s petition for review is decided.⁸ For all these reasons, we find that a stay of Paragraph VI of the Order is not warranted.

Conclusion

For the foregoing reasons, the Commission has determined to stay enforcement of and ~~Respondent’s obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order until the~~ U.S. Court of Appeals for the Fifth Circuit issues a ruling disposing of the petition for review, and to deny Respondent’s motion for stay in all other respects. Accordingly,

IT IS ORDERED THAT enforce

⁷ This does not mean that we agree with NTSP’s conclusory argument – which it does not elaborate upon – that its compliance with this portion of the Order would violate federal and state law.

⁸ The cases NTSP cites that refer to a patient’s constitutional right to privacy and the Health Insurance Portability and Accountability Act are not applicable in the context of the monitoring provisions of the Commission’s Order.