

group that was higher than the minimum rate that some PHO Respondent's Boards were willing to accept. Ten days after United failed to agree to AHP's benchmark price for physician services, AHP terminated United's contracts not only with the AHP physicians, but also with the AHCN hospitals. After United attempted to enter into direct contracts with AHP physicians, AHP threatened that United would be unable to contract for AHCN hospital services unless United agreed to a group contract for AHP physician services. United ultimately agreed to a group contract containing fees for physician services that were 20 to 30 percent higher than United's direct contracts with individual physicians in the Chicago area.

As the complaint alleges, the respondents engaged in no efficiency-enhancing integration sufficient to justify the conduct challenged in the complaint. Accordingly, the complaint alleges that they 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.

The proposed order's specific provisions are as follows:

Paragraph II.A. prohibits the respondents from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents.

Other parts of Paragraph II. reinforce these general prohibitions. Paragraph II.B. prohibits the respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C. bars attempts to engage in any action prohibited by Paragraph II.A. or II.B., and Paragraph II.D. proscribes the respondents from inducing anyone to engage in any action prohibited by Paragraphs II.A. through II.C.

As in other Commission orders addressing providers' collective bargaining with health-care purchasers, Paragraph II excludes certain kinds of agreements from its prohibitions. First, the respondents are not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians in a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The arrangement, however, must not, for three years, restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payors outside of the arrangement.

As defined in the proposed order, a “qualified risk-sharing joint arrangement” possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the physician 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.

A “qualified clinically-integrated joint arrangement,” on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Second, the respondents are not precluded by Paragraph II. from engaging in conduct that solely involves the Advocate System Respondents, which are subsidiaries of the AHCN hospital system, and other physicians employed by AHCN because they are all part of a single entity.

Finally, the order does not prohibit the respondents from engaging in conduct solely related to their participation in a program that AHP refers to as its “Clinic

Paragraph V. imposes certain notification obligations on AHP and requires the termination of contracts that were entered into illegally. Paragraphs V.A. and V.D. require AHP to distribute the complaint and order to (1) physicians who have participated in AHP and the PHO Respondents in the past or who do so within the next three years; (2) to various past and future personnel of the respondents and AHCN subsidiaries that offer physician services to payors; and (3) to payors with whom the respondents have dealt in the past or deal with in the next three years. Paragraph V.B. requires AHP, at any payor's request and without penalty, or, at the latest, within one year after the order is made final, to terminate its existing contracts for the provision of physician services to payors, other than those contracts covering the program which AHP refers to as its Clinical Integration Program. Paragraph V.B. also allows any such contract currently in effect to be extended, upon mutual consent of AHP and the contracted payor, to any date no later than one year from when the order became final. This extension allows both parties to negotiate a termination date that would equitably enable them to prepare for the impending contract termination. Paragraph V.C. requires AHP to distribute payor requests for contract termination to physicians who participate in the respondents. Paragraph V.E. requires AHP to notify the Commission of certain organizational changes to any respondent or other changes that may affect compliance with the order.

Paragraphs VI., VIII., and IX. impose various obligations on the respondents to report or provide access to information to the Commission to facilitate the monitoring of compliance with the order. Because Paragraphs V. and VI. impose on AHP, in the first instance, obligations to provide notice and reporting on behalf of all respondents, Paragraph VII. requires that any respondents for which AHP has not acted fulfill those obligations.

Finally, Paragraph X. provides that the order will expire in 20 years.