concern over the relatively high price of gasoline on the West Coast, but people will be cruelly disappointed if they are led to believe that the export restriction would have a detectable effect on the situation. Moreover, it is not the Commission's mandate to use merger enforcement as a vehicle for imposing its own notions of how competition may be ''improved.'' Instead, Congress has directed the Commission only to prevent any harm to competition that is likely to flow from a merger. We believe that the planned divestitures already accomplish that goal.

We acknowledge that the parties are willing to sign an order with an export restriction. We need not speculate about whether they were induced to do so because of a compelling need to strike a deal promptly, or because they believe the restriction in unnecessary or unenforceable. Whatever the reason, in light of the structural relief the proposed order achieves, we see no need to bind the parties to an unnecessary behavioral provision.

For the reasons set forth above, we do not believe that the export restriction should be included in the proposed order.

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FEDERAL TRADE COMMISSION

Resource Based Relative Value Scale, similar to the system used by the federal government in its Medicare program. The effect of this change was to increase rates paid to primary care physicians, and to reduce rates to all physician specialists, including general surgeons. Soon thereafter, respondents, through the Texas Surgeons IPA, began collectively negotiating higher rates.

Despite multiple attempts by Blue Cross to negotiate individually with the six respondent medical practice groups, those groups insisted on negotiating only through the Texas Surgeons IPA. In September 1997, the Texas Surgeons IPA sent Blue Cross a package of identically worded contract termination notices for each general surgeon member of the Texas Surgeons IPA, with a cover letter stating that the termination notices were due to Blue Cross's ''unacceptable'' rate reductions. In November 1997, the Texas Surgeons IPA asked Blue Cross to waive its right to bring a private antitrust action regarding the Texas Surgeons IPA's rate negotiations with Blue Cross, but Blue Cross refused to sign the waiver. In December 1997, 26 members of the Texas Surgeons IPA, dissatisfied with Blue Cross's payment offers, collectively effected their resignations from Blue Cross, and jointly announced that action in a prominent advertisement in Austin's major daily newspaper.

In early 1998, Blue Cross experienced difficulty in securing the services of a general surgeon for an emergency room patient. At about the same time, two more general surgeons resigned from Blue Cross. These two general surgeons had been advised by one of the respondent medical practice groups that their inclusion in an arrangement with that practice group regarding back-up surgical coverage would end if they continued to deal with Blue Cross.

After these events, Blue Cross concluded that it needed to reach a rate agreement with the respondents as soon as possible to avoid inadequate general surgery coverage for Blue Cross subscribers in the Austin area. The collective rate agreement between the six respondent medical practice groups and Blue Cross that resulted in early 1998 increased Blue Cross general surgery rates nearly 30% above the April 1997 levels.

Respondents began collective price negotiations with United soon after it announced fee reductions for general surgeons and other physicians in October 1997. The new fees went into effect on January 1, 1998 for surgical procedures not usually performed by general surgeons, but comparable proposed fee reductions for general surgeons never went into effect. Instead, respondents caused general surgery fees for United's various plans to increase at least 12% to 40% above the fees that United announced in October 1997.

In early November 1997, United received a written notice from the Texas Surgeons IPA that all of its members would be terminating their contracts with United effective January 1, 1998 due to the proposed fee reductions for 1998. The Texas Surgeons IPA indicated its desire to collectively negotiate higher fees and rejected United's request to negotiate with the six respondent medical practice groups on an individual basis. United explored the possibility of creating a panel of general surgeons that did not include general surgeons from the six respondent medical practice groups, but it concluded that such a panel would not provide adequate general surgery coverage and that it had no realistic alternative to beginning collective fee negotiations with the Texas Surgeons IPA.

Prior to the start of a collective fee negotiation session in November 1997, the Texas Surgeons IPA required United to sign a waiver of its right to bring a private antitrust action against the Texas Surgeons IPA or its members stemming from those fee negotiations. At that collective fee negotiation session, respondents demanded and received an agreement from United to pay higher fees in 1998 and 1999, as described above. Representatives from the six respondent medical practice groups assembled together and collectively participated in this collective fee negotiation session through frequent telephone and fax contact with the Texas Surgeons IPA's lead negotiator.

The Texas Surgeons IPA did not engage in any activity that might justify collective agreements on the prices they would accept for their services. Respondents' actions have restrained competition among general surgeons in the Austin area and thereby have harmed, or tended to harm, consumers (including third-party payers, subscribers, and their employers) by:

- Depriving consumers of the benefits of competition;
- Increasing by over one million dollars the amount that Blue Cross, United, their individual subscribers, and employers (including the State of Texas Employees Retirement System and other self-insured employers that utilize Blue Cross or United physician network) paid for the services of surgeons during the period from January 1, 1998 to December 31, 1999;
- Fixing the payments or co-payments that individual patients, their employers, and third-party payers make for the services of surgeons;
- Fixing the terms and conditions upon which general surgeons would deal with third-party payers; and
- Raising the prices that individuals and employers pay for health plan coverage offered by third-party payers.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint, while allowing respondents to engage in legitimate joint conduct. The Commission notes that in 1999, some time after the investigation of this matter began, the State of Texas enacted legislation that permits the State Attorney General to approve, under certain conditions, joint negotiations between health plans and groups of competing physicians. Texas Senate Bill 1468, 76th Leg., R.S. ch., 1586 (1999). That conduct that gave rise to the investigation and consent agreement predated enactment of the law, and thus was not approved under its terms. Moreover, the conduct described in the complaint would not necessarily have met the conditions for approval set forth in the Act.

Enactment of the statute does not eliminate the need for an order in this matter. The statute permits only collective negotiations that are approved by the Attorney General, imposes conditions under which that approval may be granted, and by its terms expires on September 1, 2003. As is discussed below, the Commission's order does not prohibit future conduct that is approved and supervised by the State of Texas pursuant to its statute and protected from federal antitrust liability under the state action doctrine. It is necessary and appropriate, however, to provide a remedy against future conduct by the respondents that is not approved and supervised by the State of Texas.

The core operative provisions of the proposed order are contained in Section II. Section II.A prohibits respondents from entering into or facilitating any agreement: (1) To negotiate physician services on behalf of any physicians with any payer or provider; (2) to deal, refuse to deal, or threaten to refuse to deal with any payer or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payer or provider; (4) to restrict the ability, or facilitate the refusal, of any physician to deal with any payer or provider on an individual basis or through any other arrangement; or (5) to convey to any payer or provider, through any Austin area physician, any information concerning