IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60023

North Texas Speciality Physicians,

Petitioner,

v.

Federal Trade Commission,

Respondent.

American Medical Association; Texas Medical Association,

Amicus Curiae.

Petition for Review of a Final Order
of the U

[1] See N. Tex. Specialty Physicians, 2005-2 Trade Cas. (CCH) ¶ 75,032 (F.T.C. 2005), available at http://ftc.gov/os/adjpro/d9312/051201opinion.pdf.

Commission Act.[2] We conclude that the FTC's examination, although somewhat abbreviated, of the factual underpinnings of the conduct at issue, its anticompetitive effect, and the procompetitive effects that NTSP claims have occurred or will occur, was adequate, and the FTC's determinations are supported by substantial evidence. However, the remedial order entered by the FTC is overly broad in one respect, and we accordingly grant the petition for review and remand to the Commission so that it may modify its order.

I

NTSP is an organization of independent physicians and physician groups principally located in Tarrant County, which includes the city of Fort Worth, although physicians from seven other Texas counties are affiliated with NTSP. NTSP's size has varied. It had approximately 575 members in 2003 and 480 members in April 2004. As of 2003, NTSP was comprised of practitioners in 26 medical specialties but also included some primary care physicians. The ALJ found, and NTSP does not dispute, that in Tarrant County NTSP specialists were a large percentage of the practitioners within a specialty, for example 80 percent in pulmonary disease, 59 percent in cardiovascular disease, and 69 percent in urology. Many NTSP physicians compete with one another. All physicians pay a fee upon joining NTSP and elect representatives from their ranks to serve on its eight-member Board of Directors.

When it formed in 1995, NTSP's original business model was to assemble physician groups and negotiate contracts between these groups and "payors," such as insurance companies, health maintenance organizations (HMOs), preferred provider organizations (PPOs), and partially or fully self-insured

[2] 15 U.S.C. § 45.

employers. These contracts were on a flat fee-per-patient basis and were termed "risk" contracts (also known as "capitation" contracts) because the physician groups bore the risk of profit and loss, based on how efficiently they could provide medical care for the fixed fee per patient during the term of a contract. However, payors' interest in risk contracts declined, and by 2001, NTSP's board began to focus on assisting physicians in negotiating "non-risk" contracts. A non-risk contract is a fee-for-service arrangement between the payor and the physician. The non-risk model was more successful, and at the time of the proceedings before the FTC, NTSP had approximately twenty non-risk contracts and only one risk contract. The FTC found that about one-half of NTSP's physicians participate in the risk contract. Only NTSP's activities with regard to non-risk contracts a

[3] See 2005-2 Trade Cas. (CCH) at 103,460, slip op. at 4.

15 U.S.C. §

individual practitioners and that these improvements will "spill over" to non-risk

[5] 2005-2 Trade Cas. (CCH) at 103,466, slip op. at 16.

[6] Id. at 103,460, slip op. at 3.

[7] 5 Trade Reg. Rep. (CCH) ¶ 15,453 (F.T.C. 2003), available at http://ftc.gov/os/2003/07/polygramopinion.pdf.

[8] Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

[9] 15 U.S.C. § 45(c).

[10] Colonial Stores, Inc. v. FTC, 450 F.2d 733, 739 (5th Cir. 1971).

FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986

15 U.S.C. § 45 (declaring unlawful "unfair methods of competition in o

rather upon the potential harm that would ensue if the conspiracy were successful."[16] The Supreme Court elaborated:

> "If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. A violation may still be found in such circumstances because in a civil action under the Sherman Act, liability may be established by proof of either an unlawful purpose or an anticompetitive effect.
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> Thus, respondent need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction."[17]

The Supreme Court has also explained: "Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff's failure to quantify the adverse impact of defendant's conduct."[18] Similarly, the Court has said: "Nor was it necessary for petitioners to prove that the fee schedule raised fees. Petitioners clearly proved that the fee schedule fixed fees and thus 'deprive[d] purchasers or consumers of the advantages which they derive from . . . competition.'"[19]

The FTC reasoned that "NTSP's actions to maintain physician fee levels, if successful, could b00 0.00 0.00 rg BT 72.g.00.3600 0.0000 TD (T)Tj 13.6800 0.0000 TD (h)

[16] Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330 (1991) (internal citations omitted).

[17] Id. at 331 (quoting McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242-43 (1980) (internal citations omitted)).

[18] McLain, 444 U.S. at 243.

[19] Goldfarb v. Va. State Bar, 421 U.S. 773, 785 (1975) (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 501 (1940)).

of-state payors to NTSP physicians."[20] Payors also testified that they provide health-care coverage to national companies with employees in Texas, and that an increase in costs for health-care services in Fort Worth would affect the overall insurance costs of these national companies. If NTSP's efforts to maintain physicians' fees were successful, "as a matter of practical economics,"[21] the advantages of competition have been adversely affected for out-of-state employers and payors. The FTC had jurisdiction.

IV

The FTC found that "NTSP is controlled by competing physicians, and therefore is not a sole actor for purposes of the antitrust laws."[22] The Commission "agree[d] with the ALJ's conclusion that NTSP's participating physicians have taken collective action to obtain higher fees from payors."[23]

NTSP maintains that there was no collusion among affiliated physicians and that there was no concerted action. It advances a number of arguments in this regard. In analyzing them, we first note that NTSP has compartmentalized the FTC's findings and holdings. For example, NTSP argues that the FTC held that "a vote taken by a single entity's board of directors not to participate in a payor's offer to physicians satisfies the Sherman Act's conspiracy element." But the FTC's conclusion that there was horizontal price-fixing did not depend on the isolated fact that NTSP's board refused to messenger all offers from a payor to

[20] N. Tex. Specialty Physicians, 2005-2 Trade Cas. (CCH) ¶ 75,032, at 103,462, slip op. at 8 (F.T.C. 2005), available at http://ftc.gov/os/adjpro/d9312/051201opinion.pdf.

[21] Summit Health, Ltd., 500 U.S. at 331.

[22] 2005-2 Trade Cas. (CCH) at 103,466, slip op. at 16.

[23] Id.

affiliated physicians. The FTC concluded, as we will discuss more fully below, that certain aspects of NTSP's non-risk contract business, when considered on the whole, combined to result in horizontal price-fixing. These practices included the disclosure to all affiliated physicians of the median, mean, and mode results of polls to determine the minimum rates physicians would accept, the "reminder" to physicians of those results when subsequent polls were taken for the purpose of establishing a minimum price, and NTSP's use of that minimum price when it negotiated with payors on behalf of physicians.

NTSP maintains that it is a single entit

[24] 250 U.S. 300 (1919).

[25] See 2005-2 Trade Cas. (CCH) at 103,466, slip op. at 15.

directors and selecting the "outside" directors.[26] Here, the affiliated physicians control NTSP in a similar manner through their election of board members and additionally, through their responses to the polls regarding fees. When an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members.[27]

NTSP counters that the physicians on its board are from different medical specialties and do not compete with one another. As the Ninth Circuit observed in Hahn, the correct analysis is not whether the board members compete directly with one another but whether the organization is controlled by members with substantially similar economic interests.[28] Each member of NTSP's board competes with rank-and-file members of the same specialty, and within the rank-and-file, NTSP specialists compete with other practitioners in their specialty, and primary care providers compete with other primary care providers.

NTSP stresses that the ALJ found that no physician agreed with another to reject a non-risk contract offer, there was no consultation among physicians in responding to polls, and no physician knew how another physician would respond to a non-ri

[26] St. Bernard Gen. Hosp. v. Hosp. Serv. Ass'n of New Orleans, Inc., 712 F.2d 978, 981, 985 (5th Cir. 1983).

[27] See United States v. Sealy, Inc., 388 U.S. 350, 352-54 (1967).

[28] Hahn v. Or. Physicians' Serv., 868 F.2d 1022, 1029 (9th Cir. 1988).

concluded that in spite of these facts, the physicians had taken collective action in an attempt to obtain higher fees from payors.[29] The FTC reasoned that NTSP's arguments "conflate[] what really are two separate issues," those being "whether parties can enter into an agreement absent direct communication with each other,"[30] and "whether it is possible to find that there was an agreement on price even though individual physicians were not bound to adhere to contract terms negotiated by NTSP."[31]

With regard to the first issue, the FTC reasoned that "it is enough that participating physicians individually authorized NTSP to take certain actions on their behalf, knowing that others were doing the same thing,"[32] noting in particular that "NTSP would inform physicians who had not yet granted it contract negotiation authority but were considering it, the number of other member physicians who had already given NTSP that authority."[33] The record supports this conclusion. Additionally, as discussed above, the physicians granted NTSP the right to negotiate with payors and agreed not to deal with a payor until NTSP advised that negotiations had ended. The physicians knew that other physicians were doing likewise and that negotiations by NTSP were for the physicians' collective benefit on price and other material terms.

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[29] 2005-2 Trade Cas. (CCH) at 103,466, slip op. at 16.

[30] Id.

[31] Id. at 103,467, slip op. at 17.

[32] Id.

[33] Id. at 103,467 n.27, slip op. at 17 n.27.

We agree with the Commission that the fact that physicians could reject offers negotiated by NTSP does not establish that there was no agreement on price. We will consider the price-fixing issue in more detail below.

NTSP asserts that a trade or professional organization cannot be presumed to violate Section 1 of the Sherman Act, citing this court's decision in Viazis v. American Association of Orthodontists.[34] It contends that the FTC deemed NTSP a "walking conspiracy." However, the FTC's opinion explicitly recognized that a trade association is not necessarily "a 'walking conspiracy,'" citing Viazis, and that collective action by competitors must result in an unreasonable restraint of trade before there is an antitrust violation.[35]

NTSP cites this court's decision in Consolidated Metal Products, Inc. v. American Petroleum Institute,[36] arguing that because its physicians remained free to reject an offer messengered by NTSP, NTSP's board is acting unilaterally when it contracts with a payor. In Consolidated Metal Products, a trade association that set standards for oil field equipment delayed in certifying that the plaintiff's sucker rods met its standards. Sucker rods could be and were sold without the trade association's seal of certification. This court held that "a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not per se violate section 1 when, for

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[34] 314 F.3d 758, 764 (5th Cir. 2002) ("Despite the fact that 'a trade association by its nature involves collective action by competitors, it is not by its nature a walking conspiracy, its every denial of some benefit amounting to an unreasonable restraint of trade.'") (quoting Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 293-94 (5th Cir. 1988)).

[35] 2005-2 Trade Cas. (CCH) at 103,466, slip op. at 16.

[36] 846 F.2d 284 (5th Cir. 1988).

turns on whether there has been such a joint effort, a subject we consider below in Part VI.

V

NTSP assails the legal framework used by the FTC to determine whether NTSP's structure and activities amounted to an unlawful restraint of trade, notwithstanding the proffered procompetitive justifications. The FTC employed what it termed an "inherently suspect" analysis, citing its prior decision in Polygram Holding, Inc.[42] and the District of Columbia Circuit's opinion affirming the FTC.[43]

NTSP contends that the FTC was required to conduct a more in-depth rule-of-reason analysis, which NTSP asserts should entail defining a relevant market and finding anticompetitive effects before its conduct could be condemned. NTSP further asserts that the FTC "ignored" the procompetitive justifications it advanced and that the Commission did not permit NTSP to prove the procompetitive effects of its non-risk contracting practices.

As noted earlier, the FTC concluded that NTSP's "conduct could be characterized as per se unlawful under the antitrust laws, and thus subject to summary condemnation."[44] The FTC chose, however, to apply its "inherently

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[42] 5 Trade Reg. Rep. (CCH) ¶ 15,453 (F.T.C. 2003).

[43] Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

[44] N. Tex. Specialty Physicians, 2005-2 Trade Cas. (CCH) ¶ 75,032, at 103,460, slip op. at 3 (F.T.C. 2005), available at http://ftc.gov/os/adjpro/d9312/051201opinion.pdf; see also id. at 103,463, slip op. at 10 ("There is precedent for outright per se condemnation of conduct that parallels the conduct in issue here. . . . Although NTSP's activities could be characterized as per se illegal because they are closely analogous to conduct condemned per se in this and other industries, we will not apply that label here and now in this particular case.").

suspect" analysis, which it described as a "close neighbor[]" to a per se analysis.[45] It gave two reasons for pursuing that course. The first was that "the Supreme Court has urged caution in the application of the per se label to conduct in a professional setting," and "the Commission wants to encourage providers to engage in efficiency-enhancing collaborative activity."[46]

The Commission said that the beginning of its inquiry should be determining whether NTSP had engaged in "'behavior that past judicial experience and current economic learning have shown to warrant summary condemnation.'"[47] The Commission reasoned that "[a]t this [initial] stage, the focus of the inquiry is on the nature [of] the restraint rather than on the market effects in a particular case."[48] It concluded that "[a] defendant can avoid summary condemnation, however, if it can advance a legitimate justification for the practice."[49] The Commission further reasoned that "[t]he defendant need only articulate a legitimate justification, and is not obliged to prove the competitive benefits," explaining in a parenthetical: "[r]emember that the issue at this initial stage is simply whether the practice should be condemned summarily."[50] The FTC concluded that in its "inherently suspect" paradigm,

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[45] Id at 103,460, slip op. at 3.

[46] Id. at 103,464, slip op. at 11 (emphasis in original).

[47] Id. at 103,464, slip op. at 12 (quoting Polygram Holding, Inc., 5 Trade Reg. Rep. (CCH) ¶ 15,453 (F.T.C. 2003)).

[48] Id.

[49] Id.

[50] Id. at 103,464, slip op. at 12-13.

[56] Id. at 344.

[57] Id. at 344 n.15 (citing N. Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958)).

[58] Id. at 344.

[59] Id. at 351.

[60] See, e.g., Texaco, Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006) ("To be sure, we have applied the quick look doctrine to business activities that a

Id. (citing Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 (10th Cir.

is important, indeed paramount, because "quick-look analysis in effect requires" "shifting to a defendant the burden to show empirical evidence of procompetitive effects."[69] The Court made clear that "before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, . . . there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive."[70] The Supreme Court admonished that if "the circumstances of the restriction are somewhat complex, assumption alone will not do."[71] The Court emphasized in California Dental Association that "the [Court of Appeals'] adversion to empirical evidence at the moment of this implicit burden shifting underscores the leniency of its enquiry into evidence of the restrictions' anticompetitive effects."[72]

In the case before us, the FTC did not rely on empirical evidence in determining whether there was an "obvious anticompetitive effect that triggers abbreviated analysis."[73] It relied on the theoretical basis for the anticompetitive and procompetitive effects of NTSP's challenged practices and the similarity of those practices to conduct that would be a per se violation of the FTC Act. To some extent, the Commission also relied on evidence of the impact of NTSP's

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[69] Id.

[70] Id.

[71] Id.

[72] Id. at 776.

[73] Id. at 778.

[74] N. Tex. Specialty Physicians, 2005-2 Trade Cas. (CCH) ¶ 75,032, at 103,460, slip op. at 3 (F.T.C. 2005), available at http://ftc.gov/os/adjpro/d9312/051201opinion.pdf.

[75] Cal. Dental Ass'n, 526 U.S. at 770-71 (citing Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 (10th Cir. 1998); Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n

procompetitive justifications do not plausibly result in a net procompetitive effect or in no effect at all on competition. Accordingly, a quick-look analysis was appropriate in this case.

VI

The FTC's ultimate conclusion was that the "activities [of NTSP], taken as a whole, amount to horizontal price fixing which is unrelated to any procompeti

[79] 2005-2 Trade Cas. (CCH) at 103,460, slip op. at 3.

[80] Id. at 103,467, slip op. at 17.

[81] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 775 n.12 (1999).

[82] 2005-2 Trade Cas. (CCH) at 103,467, slip op. at 18.

that NTSP would determine a minimum fee f

[83] Id.

[84] Id.

[85] See id. at 103,468, slip op. at 20.

Id

[88] Subsection 2.6 provides:

> Payor Offers Rejected by NTSP. If NTSP rejects any Payor Offer and advises the Participating Physicians in writing that it is permanently discontinuing negotiations or if the Participating Physicians who approved and who are deemed to have approved a Non Risk Payor Offer constitute less than 50% of all Participating Physicians, then NTSP shall have no further responsibilities with respect thereto and any Participating Physician shall have the right to pursue such Payor Offer on its own behalf.

A "Payor Offer" is defined as "an offer made by a Payor to NTSP or Participating Physician that requires NTSP or one or more P

physicians declined to negotiate because they had designated NTSP as their bargaining agent.

NTSP points out that only 34 percent of its physicians responded to its polls. The FTC concluded, however, that the fact that poll results were disclosed to all NTSP physicians, regardless of whether they responded to the poll, encouraged physicians "to reject price offers below the minimum fees indicated."[91] It is not obvious that this is the case as to all physicians affiliated with NTSP. Physicians who had expressed an unwillingness to contract at fees below NTSP's minimum might not have been influenced by learning of NTSP's minimum negotiating fee. Those physicians may have rejected price offers below NTSP's minimum in any event. But it is obvious that the practice of reporting poll results encouraged other physicians to reject offers that equaled the fee they reported in the poll as the minimum they would have accepted if the offered fee was less than the minimum fee calculated by NTSP. Armed with knowledge from NTSP's polling, those physicians would also be encouraged to hold out for a fee equal to or even less than NTSP's minimum fee but greater than the fee they were willing to accept at the time they responded to the poll.

The FTC further found that "NTSP actively encouraged [physicians] to reject the offers" below the minimum fees indicated in the polls.[92] That finding is supported by the record and is evidence of concerted action to fix prices.

The record evidence supports the FTC's factual finding that NTSP "regularly informed payors that its physicians had established minimum fees for NTSP-payor agreements, identified the fee minimums, and stated that NTSP

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[91] 2005-2 Trade Cas. (CCH) at 103,468, slip op. at 20.

[92] Id.

would not enter into or forward to any of its physicians payor offers that were below the minimums."[93] There was evidence that after receiving this information, payors attempted to deal directly with individual physicians but were told by those physicians that they must negotiate with NTSP. The logical tendency of this practice, coupled with the physicians' agreement to refrain from negotiating with payors, was at a minimum to delay direct negotiations between payors and physicians, including physicians willing to accept fees lower than the minimum used by NTSP. This added significant transaction costs to offers below NTSP's minimum. A payor wishing to achieve a contract below that minimum would have to submit its offer to NTSP, negotiate with NTSP, and wait until NTSP communicated to physicians that negotiations were unsuccessful, before being able to negotiate with physicians directly. Accordingly, even though NTSP could not bind physicians to particular contracts, its practices interfered with payors seeking lower fees. NTSP's practices also narrowed patients' choices of physicians.

The FTC additionally found, based on the record evidence, that although the Participating Physician Agreements require NTSP to deliver certain payor offers to physicians,[94] NTSP in fact "rejects and does not deliver any contract that falls below its minimum reimbursement schedule."[95] This prevented or at least delayed offers less than NTSP's minimum fee from reaching physicians.

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[93] Id.

[94] Section 2.2 of the Participating Physician Agreements covers "Offers to be Accepted or Rejected by Physicians," a category of payor offers defined separately from other payor offers.

[95] 2005-2 Trade Cas. (CCH) at 103,469, slip op. at 21.

permitted to "participate" in this contract.[104] Cigna already had contracts with most of these primary care physicians at lower rates.[105] NTSP threatened contract termination if its demands were not met,[106] and to avoid losing the participation of NTSP's specialists, Cigna agreed to NTSP's demands.[107]

At several points in its briefing, NTSP stresses that the FTC and the ALJ found that NTSP did not receive higher rates than those that other physicians and physician groups were already receiving. The FTC addressed this fact, saying "[w]e agree that higher physician rates, by themselves, are of no antitrust significance," but the Commission concluded that "this case is about a concerted effort by NTSP's participating physicians to increase their bargaining power."[108] We agree that proof of higher fees for NTSP physicians is not necessary in this case. As the Supreme Court explained in FTC v. Indiana Federation of Dentists, if a practice "is likely enough to disrupt the proper functioning of the price-setting mechanism of the market . . . it may be condemned even absent proof that it resulted in higher prices."[109] In that case dentists had agreed not to send dental x-rays to their patients' insurance companies for use in benefits determinations. The Supreme Court held this was an unfair method of

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[104] Id. at 35.

[105] Id. at 35; Tr. at 718-19, 733-34.

[106] 2004 WL 3142857, slip op. at 36.

[107] Id.; Tr. 749-51.

[108] N. Tex. Specialty Physicians, 2005-2 Trade Cas. (CCH) ¶ 75,032, at 103,477, slip op. at 36-37 (F.T.C. 2005), available at http://ftc.gov/os/adjpro/d9312/051201opinion.pdf.

[109] 476 U.S. 447, 461-62 (1986).

competition in violation of section 5 of the Federal Trade Commission Act.[110] NTSP's challenged practices erect barriers between payors and physicians who would otherwise be willing to negotiate directly with those payors. It also erects obstacles to price communications between payors and physicians. The Commission concluded, and we agree, that NTSP engaged in concerted action to increase its bargaining power. The fact that there is no evidence in the record that NTSP obtained higher prices for its physicians than other physicians received does not foreclose a determination that NTSP's practices had anticompetitive effects.

The other side of the equation, however, is the procompetitive effects, if any, that NTSP's challenged business practices generated. We turn to those.

B

After concluding that NTSP's challenged conduct had anticompetitive effects, the FTC proceeded to examine NTSP's justifications. Although the general thrust of NTSP's arguments regarding "spillover" benefits has some facial plausibility, closer examination of the underpinnings of the justification reveals significant gaps in logic.

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[110] Id. at 448-49, 461-62 (explaining more fully that "[a] concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence. [E]ven if . . . the costs of evaluating the information were far greater than the cost savings resulting from its use [] the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information: presumably, if that were the case, the discipline of the market would itself soon result in the insurers' abandoning their requests for x rays. The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.").

> utilize on risk patients to any non-risk patients they may have. NTSP has not provided any financial incentive for them to do so, and it does nothing to promote compliance with whatever techniques have been learned under risk contracts. NTSP does not employ the processes it uses to monitor and control the quality and utilization of services provided under its risk contracts to patient care provided under non-risk contracts.[112]

NTSP argues that it did offer some empirical evidence but that the Commission "ignored" it. There is some evidence in the record of spillover effects from the risk contract to non-risk panels, and there is evidence that NTSP physicians perform as well or better than non- e p11 6.962427.120

[112] Id. (record citations omitted).

[113] Id. at 103,474 n.45, slip op. at 30 n.45.

quality healthcare provided by teamwork and shared experiences over time, result from or are in any way connected to (1) communicating the polling results regarding fees to all NTSP physicians, (2) encouraging NTSP physicians to reject payor offers below the minimum fees NTSP calculated from the polls, or (3) using collective bargaining power to demand higher fees for physicians who are already under contract with a payor.

We recognize that the Supreme Court has said that the "'public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.'"[114] But NTSP has not cogently articulated how "the quality of the professional service that [its] members provide is enhanced by the price restraint."[115]

NTSP offered three other "justifications" for its challenged conduct. The first is that it had "no legal obligation to participate in, messenger, or facilitate a payor's contract offer," and as "a collection of individuals" the group had the right to vote among themselves "not to involve" the group in a contract. NTSP argues that it did not have a significant market share and "that even a monopolist has a right to refuse to deal." This is re-argument of issues relating to an agreement and concerted action, which we have addressed earlier.

The second justification NTSP offers is that it "need[ed] to avoid expending scarce resources in analyzing, messengering, and participating in contracts of interest to relatively few of the physicians." We do not disagree that this is a

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[114] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687 (1978) (quoting Goldfarb v. Va. State Bar, 421 U.S. 773, 788-89 n.17 (1975)).

[115] Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 349 (1982).

permissible goal, but this does not justify the challenged methods NTSP used to achieve that goal.

The third justification was "the avoidance of legally or medically risky situations" and that NTSP was "surely justified in refusing to sign payor contracts that present these problems." These are certainly permissible goals. But again, none of these concerns had any bearing on the methods NTSP used in an attempt to obtain higher fees than its physicians might otherwise have been offered.

One of NTSP's chief complaints is that it was not permitted to develop a fuller record, based on additional empirical evidence. However, it does not assert that the additional empirical evidence it desired to develop would have shown a nexus between better or market-priced medical care and the need for NTSP to engage in the specific activities that we conclude are anticompetitive, which include (1) the communication of the mean, median, and mode results from the polling regarding fees, in combination with (2) foreclosing or delaying direct negotiations between payors and physicians; (3) urging physicians to reject fee offers from payors; and (4) using collective bargaining power to demand higher fees for physicians who were already under contract at a lower fee.

In sum, based on the record in this case, we conclude that "the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency"[116] of NTSP's challenged practices follows from the "look" the FTC conducted in this case, even though that "look" was less than a full blown market analysis. "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition

[116] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

or one that suppresses competition."[117] NTSP's proffered procompetitive effects do not meet the "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition" threshold.[118] The Commission's determination that NTSP's conduct, taken as a whole, amounted to horizontal price-fixing that is unrelated to procompetitive efficiencies is supported by the law and substantial evidence.

VII

NTSP maintains that its right to due process was violated because it was denied discovery that would have proven the procompetitive effects of its conduct. NTSP subpoenaed the "flat file data" from six insurance company payors, each of which objected to providing the information. NTSP explains that "flat file data" would reflect "medical expenses paid for each patient and can be analyzed to compare different physicians' expense 'per unique patient seen' by procedure, by diagnostic code, and numerous other factors." NTSP contends that from this data, it could prove how its performance on non-risk contracts "compares to that of other physicians." After conducting a hearing, the ALJ quashed the subpoenas.

In reviewing the ALJ's decision, FTC reasoned:

> In the absence of a specific link between the challenged restraints and the purported justification, it would not have mattered if [NTSP] had been able to obtain further discovery and demonstrate that its physicians performed well. There is no antitrust exemption for more efficient, higher quality market participants, absent a demonstration that the challenged practices made an essential

[117] Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 691.

[118] See Cal. Dental Ass'n, 526 U.S. at 771.

> contribution to these efficiencies. Evidence on the performance of NTSP physicians, standing alone, would not prove that nexus.[119]

NTSP contends that our review of this determination is de novo since NTSP is claiming a due process violation. Even assuming that is the correct standard of review, there was no due process violation. There is no logical nexus between better performance by NTSP physicians and NTSP's dissemination of polling results or its other challenged practices that we have discussed above.[120]

VIII

Finally, NTSP challenges the breadth of the Commission's remedial order. Once the FTC has established a violation of the FTC Act, it "has wide discretion in determining the type of order that is necessary to cope with the unfair practices found."[121] The FTC's order should not be disturbed "unless the remedy selected has no reasonable relation to the unlawful practices found to exist."[122] We are persuaded, however, that the remedy is overly

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[119] N. Tex. Specialty Physicians, 2005-2 Trade Cas. (CCH) ¶ 75,032, at 103,475, slip op. at 32-33 (F.T.C. 2005), available at http://ftc.gov/os/adjpro/d9312/051201opinion.pdf (citations omitted).

[120] See Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 693-94 ("The Society nonetheless invokes the Rule of Reason, arguing that its restraint on price competition ultimately inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior. As the preceding discussion of the Rule of Reason reveals, this Court has never accepted such an argument.").

[121] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965).

[122] Alterman Foods, Inc. v. FTC, 497 F.2d 993, 997 (5th Cir. 1974) (quotation marks omitted).

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services . . . cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians with respect to their provision of physician services:

1. to negotiate on behalf of any physician with any payor;
2.

[123] N. Tex. Specialty Physicians, 2004 WL 3142857, slip op. at 89 (F.T.C. Nov. 15, 2004) (ALJ's Initial Decision), available at http://ftc.gov/os/adjpro/d9312/041116initialdecision.pdf.

are to take place at the earlier of receipt of a written request from a payor to terminate or the earliest termination or renewal date, even though payors may elect to continue the contracts for up to one year. This latter provision eliminates NTSP's concern that health care delivery will be interrupted.

NTSP asserts that payors should be permitted to decide if they want to terminate their contracts. However, the FTC reasonably concluded that if the contract termination provisions were voluntary, payors might be unwilling to terminate, fearing reprisal.

NTSP also argues that its freedom of speech is being violated because it is limited in the information it can provide to payors and employers. In the commercial context, speech concerning unlawful activity is not protected.[124] In this case, NTSP's speech is limited only to the extent that it may not further illegal horizontal price-fixing conspiracies. The FTC's order does not unreasonably limit any protected speech by NTSP.

Finally, NTSP claims that the order is impermissibly vague. NTSP asserts that it cannot determine whether all individual components of its activity, such as polling and the Physician Participation Agreement, are prohibited permanently, or might properly be used in the future. We view such claims with skepticism.[125] As the Supreme Court stated, the FTC "must be allowed effectively to close all roads to the prohibited goal" of combinations that unreasonably restrain trade.[126] The FTC need not describe every combination

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[124] See Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 183 (1999).

[125] See Alterman Foods, 497 F.2d at 1001-02.

[126] See FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952).

of circumstances and behaviors that may or may not create a violation. The FTC's order is not unreasonably vague or overly broad.

* * *

For the reasons stated above, we GRANT petitioner's request for review and REMAND this proceeding to the FTC for modification of subsection II.A.2 of the remedial order in a manner consistent with this opinion.