FTC Finds That North Texas Specialty Physicians Illegally Fixed Prices

(December 1, 2005) In a unanimous administrative opinion and order, the Federal Trade Commission ruled that North Texas Specialty Physicians (NTSP), an association of independent physicians in the Fort Worth, Texas area, illegally fixed prices in its negotiations with payors, including insurance companies and health plans. The FTC opinion affirmed a November 2004 ruling by an Administrative Law Judge, and issued an order that requires NTSP to cease and desist from the illegal conduct and to terminate pre-existing contracts with payors for physician services.

Background

The FTC opinion states that this case involves the question whether an independent physician association's contracting activities with payors amounts to unlawful horizontal price fixing. The FTC has accepted numerous consent orders over the last ten years involving conduct similar to this case.[1] The common theme of these cases has been coordinated bargaining by groups of competing physicians, in order to increase their reimbursement rates. In these cases, competing physicians have often joined together in independent practice associations (IPAs or networks) and agreed to boycott or refuse to deal with particular payors during contract negotiations. When the competing physicians are not financially or clinically integrated in a manner that is likely to produce efficiencies, the FTC has consistently maintained that this type of conduct amounts to illegal price fixing. (For a discussion of qualified financial risk sharing or clinically-integrated joint venture arrangements, see discussion below).

FTC's Factual Findings

NTSB is an organization of independent physicians and physician groups that was formed, and is managed and operated by physicians. At the time of trial in April 2004, it had approximately 480 physicians, including 100 primary care physicians, and specialty physicians

[1] See, e.g., *In the Matter of San Juan IPA, Inc*., Docket No. C-4142 (consent order issued June 30, 2005), http://www.ftc.gov/opa/2005/07/fyi0548.htm; *In the Matter of New Millennium Orthopaedics, LLC*, Docket No. C-4140 (consent order issued June 13, 2005), http://www.ftc.gov/opa/2005/06/fyi0543.htm; *In the Matter of White Sands Health Care System, L.L.C., Docket No. C-4130 (consent order issued Jan. 11, 2005),* http://www.ftc.gov/opa/2005/01/fyi0504.htm*; In the Matter of Piedmont Health Alliance, Inc.,* Docket No. 9314 (consent order issued Oct. 1, 2004), http://www.ftc.gov/opa2004/10/fyi0457.htm; *In the Matter of Southeastern New Mexico Physicians IPA, Inc.,* Docket No. C-4113 (consent order issued Aug. 5, 2004), http://www.ftc.gov/opa/2004/08/fyi0445.htm; *In the Matter of California Pacific Medical Group, Inc.,* Docket No. 9306 (consent order issued May 10, 2004), http://www.ftc.gov/opa/2004/05/fyi0431.htm.

in 26 medical specialties. The participant physicians have distinct economic interests reflecting their separate medical practices, and many members compete with one another.

NTSP's main functions are to negotiate and review contract proposals for member services that are submitted by payors, including insurance companies and health plans; to review payment issues; and to act as lobbyist for its members' interest. NTSP negotiates risk sharing or "risk contracts", and non-risk sharing or "non-risk contracts. Risk sharing contracts typically reimburse doctors on a dollar amount per patient basis, whereas non-risk contracts provide "fee-for-service" payment. The challenged conduct in this case solely involves the negotiation of non-risk contracts, which are far more common for NTSP.

NTSP's physicians enter into a Physician Participation Agreement (PPA) with NTSP that grants NTSP the right to receive all payor offers and imposes on the physicians a duty to forward payor offers to NTSP promptly. The physicians agree that they will not individually pursue a payor unless and until they are notified by NTSP that it has permanently discontinued negotiations with the payor. Each NTSP member's PPA provides that NTSP must promptly forward ("messenger") the fee reimbursement and other economic provisions of any non-risk offer to the member physicians. If more than 50 percent of the members accept those provisions, NTSP will then proceed to negotiate the contract. At times, NTSP has gathered powers of attorneys from its physicians, which give NTSP the legal authority to negotiate non-risk contracts on behalf of those physicians.

NTSP conducts annual polls of its physicians to determine minimum reimbursement rates for use in negotiation of health maintenance organization (HMO) and preferred provider organization (PPO) product contracts with payors. NTSP's polling form asks physician individually for the minimum payments that they would accept for the provision of medical services pursuant to a fee-for-service HMO or PPO agreement. NTSP uses the poll responses to calculate the mean, median, and mode (averages) of the minimum acceptable fees identified by its physicians, and then uses these measures to establish its minimum contract prices. NTSP then reports these measures back to its participating physicians. Although doctors do not consult with each other about their response to the poll, NTSP informs its members about the averages. NTSP's polling form explains to the participating physicians that "NTSP polls its affiliates and membership to establish Contracted Minimums. NTSP then utilizes these minimums when negotiating managed care contracts on behalf of its participants".

The FTC found that despite the requirements in the PPA, NTSP actually messengers to its members only those non-risk contract proposals in which reimbursement fees exceed NTSP's minimum reimbursement schedule developed from the annual poll of members.

Legal Issues

1) Is there unilateral or multilateral action? Is there any agreement?

In order for an antitrust violation to exist, there must be an agreement. NTSP argued that as a non-profit corporation under Texas law, it should be viewed as a sole actor. As the "sole" actor, NTSP argued that it could not be found guilty of "conspiring" with itself. The FTC stated

that when a single organization is controlled by a group of competitors, the antitrust laws treat the organization as the agent of the group. The FTC held that if an association negotiates prices for services that is members will provide, the organization's conduct is considered to be that of a combination or conspiracy of its members, not unilateral action.

"Substance prevails over form in antitrust law", stated the FTC, and the technical manner in which an organization is incorporated does not control. "We have to look beneath the surface", the FTC opinion stated. The basis of this jurisprudence is sound, stated the FTC, because, without it, any group of competitors could avoid antitrust liability for collective price fixing simply by acting through single organizations that they control.

2) Can there be a finding of an illegal agreement where the parties did not have direct communication with each other?

Yes, stated the FTC. In Arizona v. Maricopa County Medical Society 457 U.S. 332 (1982) the Supreme Court found an agreement among physicians without finding that the competing physicians agreed directly with each other. Also, in Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia 624 F. 2d 476, the court found collective action by a group that was controlled by its physician members without finding that the plan's individual physicians had met and agreed directly with each other.

3) NTSP's Use of a Poll

The FTC held that NTSP's use of a poll facilitated a price fixing agreement among its competing physician members. NTSP physicians were aware that NTSP would use individual member's poll responses to create group "averages" that would be used by their organization in the coming year's negotiations with payors. It was a way to communicate to their competitors what they would "like" to get in the future – not what they had gotten in the past, or what they might settle for individually, stated the FTC opinion. When they cast a vote on the desired minimum price for the group, they were not simply reporting past or current prices, they were telegraphing their intentions about future prices.

NTSP argued that its use of the poll was not concerted action because it did not divulge to any physician whether or how any other individual physician responded to the confidential poll conducted by NTSP staff. The FTC held, however, that this was of no consequence because liability in this case is not predicated on individual discussions among physicians themselves, but is predicated on an improper delegation of individual pricing authority to a common agent.

NTSP also argued that there was no concerted action because physicians were not bound by their poll responses and the poll did not require or induce a physician to contract in a particular manner. The FTC held, however, that the fact that NTSP decisions on payor offers were not binding and were often ignored by physicians does not absolve NTSP of liability because the law is clear that agreements can be illegal even though not all the price terms are specified or adhered to. The FTC stated that even if there is variability, NTSP's use of a minimum schedule (obtained from polling results), affects the level at which variability occurs.

4) NTSP's Physician Participation Agreement

NTSP's physicians enter into a PPA that grants NTSP the right to receive all payor offers and impose on the physicians a duty to promptly forward payor offers to NTSP. The physicians agree that they will refrain from pursuing offers from a payor until notified by NTSP that it permanently has discontinued negotiations with the payor. This, according to the FTC, renders NTSP as the sole bargaining agent of NTSP competing physicians and thus facilitates price fixing among NTSP physicians.

NTSP argued that NTSP had no authority to bind physicians, and that any non-risk contracts in which NTSP decides to join as a party must be messengered to the physicians for their own individual decisions on whether to join. NTSP also argued that the PPA's terms do not prevent a physician from negotiating with a payor directly or through another entity.

The FTC stated that although the PPA requires NTSP to deliver contracts to physicians, the evidence shows that NTSP rejects and does not deliver any contract that falls below its minimum reimbursement schedule. Other terms of the PPA are inconsistent with NTSP's assertion that any non-risk contract must be messengered. For example, the PPA includes provisions whereby 50 percent of NTSP's physicians must approve the reimbursement proposal of a payor before any offer is "messengered" by NTSP to its physicians for actual opt-in/opt-out of proposed contracts. This conduct has the potential to raise the level at which variability occurs, just as the use of polling data does, held the FTC.

The FTC further stated that each NTSP's physician's ability to opt-in or opt-out of a contract does not eliminate the existence of a price-fixing agreement when providers collectively negotiate with payors over what contract terms will be offered. It is not necessary that there be uniform adherence to specific prices by individual members stated the FTC, citing Maricopa. In Maricopa, the United States Supreme Court found the existence of a price fixing agreement even though the participating physicians were free to set their own prices. In this case, held the FTC, NTSP is able to exert collective bargaining power and hence fix prices, because NTSP did not messenger contracts that were below its minimum reimbursement schedule.

5) Powers of Attorney

In several instances, NTSP gathered powers of attorney from members whereby NTSP was appointed as their sole bargaining agent. The FTC held that NTSP used its powers of attorney in a manner similar to the way it used the PPA - - namely to solidify its power as a bargaining agent and thus facilitate its price fixing.

6) Concerted Withdrawals and Refusals to Deal Except on Collective Terms

The FTC held that in several instances NTSP used its agency powers to terminate its members' participation in a health plan or to refuse to deal with a payor because NTSP determined that the fee-for-service price paid by the payor was inadequate. For example, when NTSP was dissatisfied at one point during negotiations with United Healthcare Services, Inc., it terminated the United contracts of 101 physicians. On another occasion, when NTSP learned

that CIGNA sent contract letters to physicians in the Fort Worth area, in an attempt to contract with them without the involvement of NTSP, NTSP provided NTSP physicians with a sample letter refusing to contract with CIGNA and directing CIGNA to negotiate with NTSP as their agent. Thereafter, CIGNA received 40 letters on behalf of 52 physicians that were virtually identical to the sample letter provided by NTSP. According to the FTC these acts show that NTSP illegally used refusals to deal and termination of contracts to enhance the bargaining power of the participating physicians and command higher prices.

7) NTSP's Claim That it was Lawfully Acting as a Messenger

The FTC held that NTSP deviated from the accepted parameters of a lawful messenger model in a manner that amounts to horizontal price fixing.

The FTC stated that properly used, a messenger model is an arrangement designed to reduce transaction costs associated with negotiation of contracts between providers and payors. In a messenger model, a physician network uses the agent to convey to payors information obtained individually from the providers about the prices or price-related terms that the providers are willing to accept, but the agent does not negotiate on behalf of the providers. The agent may convey to the providers all contract offers made by purchasers, and each provider then makes an independent, unilateral decision to accept or reject the contract offers. Alternatively, the agent may receive authority from individual providers to accept contract offers that meet certain criteria as long as the agent does not negotiate on their behalf, according to the FTC opinion. The agent can also assist providers to understand the contracts offered, by supplying objective or empirical information about the terms of an offer. For example, the agent may provide a comparison of the offered terms with other contracts agreed to by network participants. The FTC warned, however, "On the other hand, it would be dangerous for the agent to express and opinion on the terms offered."

The FTC listed some activities that can tip the balance toward illegality: agent coordination of provider responses to a particular proposal, dissemination to network providers of the views or intentions of other network providers about the proposal, expression of an opinion on the adequacy of price terms offered, collective negotiation of price terms for the providers, or decisions not to convey an offer if the agent believes the price terms are inadequate.

The FTC listed the following activities as being inconsistent with a lawful messenger model:

- NTSP's refusal to messenger contracts where it determined that less than 50 percent of NTSP physician would join. The refusal eliminates the ability of NTSP physicians to decide unilaterally whether to accept the un-messengered contracts and hinders the ability of payors to contract individually with NTSP physicians.

- NTSP's PPA, use of powers of attorney and activities associated with the poll are inconsistent with an acceptable use of the messenger model. The PPA and powers of attorney allowed NTSP to negotiate on behalf of its physicians, which is expressly forbidden in a proper messenger model.

- NTSP went beyond the bounds of legitimate messenger activities when it expressed its opinion both to its physicians and to the payors themselves as to the adequacy of price terms on contract proposals.

The FTC stated that there is a wealth of guidance available on the subject of a lawful messenger model. This includes at least ten past FTC consent orders that describe conduct that deviated from a lawful messenger model.[2]

8) FTC Guidance – What Could NTSP Have Done?

The FTC stated that there are lawful ways that NTSP could have utilized some of the mechanisms:

Polls – the FTC stated that NTSP could have polled its members on future fees to give payors a sense of the fee levels that would be accepted by a majority of NTSP physicians provided that (1) the results of the poll were not communicated to the physicians in any manner, to avoid influencing their behavior; (2) all payor offers were messengered to the physicians regardless of how many physicians are deemed likely to accept the offer based on poll results; and (3) NTSP did not use the poll results to negotiate price.

Requirement to Messenger All Payor Offers

The FTC stated that NTSP could lawfully charge an administrative fee to payors to compensate for the burden of messengering contracts that were unlikely to be accepted. For example, if a contract contained rates that were below the rate a threshold percentage of physicians based on the polling data, NTSP could impose a reasonable transmittal fee – to reimburse the association for the administrative burden, not to signal disapproval. The FTC opined that if the payor refused to pay the administrative fee in these situations, NTSP could legally refuse to messenger the contract.

9) Guidance Regarding Financial or Clinical Integration

The FTC reminded that it does not wish to discourage physicians from developing innovative approaches to health care delivery in order to improve quality or contain costs. The FTC emphasized that physicians can join together and negotiate fees in ways that do not harm

[2] http://www.ftc.gov/os/caselist/0410100/0410100.htm; *In the Matter of San Juan IPA, Inc.*, Docket No. C-4142(Analysis of Agreement Containing Consent Order, issued May 19, 2005), http://www.ftc.gov/ops/2005/05/sanjuan.htm; *In the Matter of Preferred Health Servs., Inc.*, Docket No. C-4134 (Analysis of Agreement Containing Consent Order, issued Mar. 2, 2005), http://www.ftc.gov/opa/2005/03/scdoctors.htm; *In the Matter of White Sands Health Care System, L.L.C.*, docket No. C04130 (Analysis of Agreement Containing Consent Order, issued Sep. 28, 2004), http://www.ftc.gov/os/caselist/0310135/0310135.htm; *In the Matter of Southeastern New Mexico Physicians IPA, Inc.*, Docket No. C-4113 (Analysis of Agreement Containing Consent Order, issued June 7, 2004, http://www.ftc.gov/os/caselist/0310134/0310134.htm.

competition. The FTC stated that if an IPA can establish that its joint negotiation of price is reasonably related to efficiency enhancing integration of the participants' economic activity and is reasonably necessary to achieve the procompetitive benefits of that integration, the price-related activities may be lawful. An example of this is provided in an advisory opinion by FTC staff to MedSouth, Inc., a multi-specialty physician practice association in Denver Colorado, see http://www.ftc.gov/bc/adops/medsouth.htm. In the opinion letter, the FTC concluded that the integration attained by MedSouth produced sufficient pro-competitive effects to justify joint negotiation of fees. The conclusion was based on the extensive clinical resource management program that MedSouth developed for its participating physicians, which is described in detail in the advisory opinion letter. The FTC stated that NTSP was "not even close" to the efficiency-enhancing processes that MedSouth had committed to.

Among other prohibited conduct, the FTC Final Order requires that NTSP 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 physicians with respect to their provision of physician services:

   (i) To negotiate on behalf of any physician with any payor;

   (ii) To refuse to deal, or threaten to refuse to deal with any payor;

   (iii) Regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms;

   (iv) Not to deal individually with any payor, or not to deal with any payor through any arrangement other than NTSP.

B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal.

The FTC emphasized, however, that the Order does not prohibit any agreement involving or conduct by NTSP that is reasonably necessary to form or participate in any qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement.

The FTC order defines these terms as follows:

"Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which:

(i) all physicians who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who

participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and

(ii) any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.

"Qualified risk-sharing joint arrangement" means an arrangement to provide physician services in which:

A. All physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:

(i) the provision of physician services for a capitated rate;

(ii) the provision of physician services for a predetermined percentage of premium or revenue from payors;

(iii) the use of significant financial incentives (e.g., substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals; or

(iv) the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and

B. Any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.

Choice of Legal Standard: "Inherently Suspect"

The FTC stated that NTSP's activities could have been condemned as per se illegal. Generally, the FTC has used either the "Per Se" standard or the "Rule of Reason" standard to examine whether the questioned conduct violates the antitrust laws. Under "Rule of Reason", the plaintiff (or government) has the burden of establishing that a particular practice unreasonably restrained trade. The defendant does not have the initial burden of demonstrating that the challenged conduct is reasonable. The impact of the particular practice is evaluated in the context of the relevant market. The Rule of Reason requires a weighing of all the relevant facts or circumstances of a case to decide whether a practice constitutes an unreasonable restraint on competition. This requires a thorough investigation of the industry and a balancing of the conduct's positive and negative effects on competition. Under the Per Se rule, the particular type

of conduct is presumed to be illegal. The Per Se Rule involves a limited analysis as to whether or not the conduct occurred. If the conduct under review falls within Per Se analysis, the conduct is presumed to be illegal without any elaborate inquiry as to the precise harm it may have caused or the business justification for its use. Practices that have been condemned as per se illegal include price fixing arrangements and boycotts.

Although the FTC stated that it could have applied per se rules in this case, the FTC stated that in this case it preferred to follow an approach that it calls the "Inherently Suspect" analysis. The FTC stated that it did not want to follow a per se approach because since the Maricopa decision was decided in 1982, the FTC now has a better understanding of the potential integration benefits of IPAs. The FTC stated that it could have viewed NTSP's activities very differently if NTSP were able to demonstrate that the participating physicians were financially or clinically integrated in performing its non-risk contracts. The FTC stated that the "Inherently Suspect" standard does not involve the detailed examination that is applied under a Rule of Reason analysis, but enables a party to avoid summary condemnation if it can advance a legitimate justification for its practice. The proffered justifications, however, "must be both cognizable under the antitrust laws and at least facially plausible", said the FTC. If the defendant is able to provide a justification for its conduct, then the plaintiff must make a more detailed showing that the restraints are likely to harm competition.

North Texas Specialty Physicians is appealing the FTC ruling in the federal courts. This office will monitor this case for further developments.