

North Texas Specialty Physicians (NTSP) v. Federal Trade Commission(FTC)

CASE HISTORY

In September 2003, the FTC issued an administrative complaint charging NTSP with unlawfully restraining competition, resulting in increased health care costs for consumers in the Fort Worth area. The Commission charged the group with violating federal law by implementing agreements among its participating physicians on price and other terms, refusing to deal with payors except on collectively agreed-upon terms, and refusing to submit payor offers to participating doctors unless the offers' terms complied with NTSP's minimum-fee standards.

The Commission also alleged that NTSP's unlawful practices included, among other things, polling its participating physicians to determine the minimum fee they would accept for medical services provided under a group payor agreement and communicating the results back to members, reducing competition among participating doctors. Finally, the Commission charged the group with discouraging payors and participating physicians from negotiating directly with one another and that the arrangements resulted in no increase in clinical integration.

In an initial decision filed on November 8, 2004, Administrative Law Judge (ALJ) D. Michael Chappell upheld the Commission's complaint, finding that NTSP restrained trade by conspiring to fix prices in certain contracts its doctors entered into to provide medical services to health plan patients in Fort Worth. Chappell wrote in the decision that, "The government has proved its case . . .," and that, "the appropriate remedy [is] an order to cease and desist." NTSP subsequently appealed the decision to the full Commission, which issued its decision and order in December 2005.

The Commission's decision, issued in favor of complaint counsel, was authored by Commissioner Thomas B. Leary and announced on December 1, 2005. In it, the FTC affirmed the ALJ's initial decision that NTSP had illegally fixed prices in its negotiations with payors, including insurance companies and health plans. "This is not really a close case," the Commission wrote in its opinion. "NTSP's conduct is similar to conduct that has been found

per se unlawful and summarily condemned in other contexts...” In issuing its accompanying order, the FTC required NTSP to cease and desist from engaging in the anticompetitive price-fixing conduct alleged in the complaint. The defendants appealed the Commission’s decision to the U.S. Court of Appeals for the Fifth Circuit, which issued a unanimous opinion in favor of the FTC on May 14, 2008.

(May 14, 2008) The United States Court of Appeals for the Fifth Circuit unanimously affirmed the Federal Trade Commission decision and order that the so-called “messenger model” activities of NTSP violated Section 5 of the FTC Act and that NTSP participated in horizontal price-fixing that was not related to any procompetitive efficiencies.

FACTS

NTSP is an organization of independent physicians and physician groups principally located in Tarrant County, which includes Forth Worth Texas. In April 2004 it had approximately 480 member physicians, including primary care physicians and specialty physicians in 26 medical specialties. The FTC found, and NTSP did not dispute, that in Tarrant County NTSP specialists were a large percentage within a specialty, for example 80% in pulmonary disease, 59% in cardiovascular disease, and 69% in urology.

All physicians pay a fee upon joining NTSP and elect representatives from their ranks to serve on its Board of Directors. When it formed in 1995, NTSP’s original business model was to negotiate “risk” contracts between its physician members and payors. These contracts were “risk” contracts (also know as “capitation” contracts) because the physician groups bear 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 the contract. Beginning in 2001, the member physicians began to lose interest in risk contracts and NTSP 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 proceeding before the FTC, NTSP had approximately 20 non-risk contracts and only 1 risk contract. The FTC found that only about one half of NTSP’s physicians participated in the risk contract.

The FTC’s challenge related only to NTSP’s conduct with regard to non-risk contracts. The FTC did not challenge NTSP’s conduct with regard to risk contracts.

NTSP purported to operate a “messenger model” for its non-risk contracts. In practice, NTSP’s activities included the following:

- NTSP polled its physicians on an annual basis, asking the minimum rate each would accept in a non-risk contract. NTSP used the poll responses to calculate the mean, median, and mode of the minimum acceptable fees identified by its physicians. NTSP reported the mean, median, and mode from the polls to its participating physicians and explained to participating physicians that “NTSP polls its affiliates and membership to establish contracted minimums.” In conducting the poll each year, NTSP reminded physicians of the results of the previous year’s poll.

- NTSP only “messengered” non-risk contracts to its physicians that offered at least the minimum fee calculated from the polls.
- The written Physician Participation Agreement that NTSP had with each physician obligated the physician to refrain from individually pursuing an offer from a payor if NTSP was in negotiations with the payor. The Physician Participation Agreement contemplated that physicians would not individually pursue a payor’s offer unless and until notified by NTSP that it had permanently discontinued negotiations with the payor.
- NTSP obtained powers of attorney from its physicians. In negotiations with some health plans, physician members of NTSP executed powers of attorney to appoint NTSP as the bargaining agent for direct contracting with the health plan. Health plan officials testified that they understood the powers of attorney to mean that NTSP physicians would not negotiate directly, and there was no practical alternative then to negotiate with NTSP.
- The FTC concluded that NTSP had engaged in concerted withdrawals and refusals to deal except on collective terms.

In the petition for review by NTSP to the United States Court of Appeals for the Fifth Circuit, NTSP raised five issues:

- (1) NTSP claimed the FTC had no jurisdiction and claimed that its alleged anticompetitive conduct was not “in or affecting commerce”.
- (2) NTSP contended there was no collusion among affiliated physicians and that there was no concerted action.
- (3) NTSP contended that the FTC was required to conduct a more in-depth “rule of reason” analysis rather than the “inherently suspect” analysis.
- (4) NTSP maintained that its right to due process was violated because it was denied discovery that would have proven the procompetitive effects of its conduct.
- (5) NTSP claimed that the FTC’s order was overly broad.

1. Jurisdiction

NTSP claimed that the FTC had no jurisdiction because its alleged anticompetitive conduct only had a “de minimis” effect on interstate commerce. NTSP claimed that the alleged conduct was never shown to have more than a de minimis effect on any payor as a whole.

The Court held that the FTC had jurisdiction, and that the focus of the antitrust laws is on the illegal activity itself-rather than upon the actual consequences. The Court held that the FTC was no required to prove actual harm in order to establish jurisdiction, but that a violation of the antitrust laws could be established either by an unlawful purpose or an anticompetitive effect.

2. Concerted Activity

NTSP advanced a number of arguments that there was no concerted activity, and thus no illegal collusion among physicians. First, NTSP argued that NTSP was a single corporate entity, and as a single corporate entity it has a right to refuse to deal with payors without violating the antitrust laws. NTSP argued that its actions were the actions of a single corporate entity and not the actions of individual physicians. The Court agreed with the FTC that there was concerted action because the individual physicians controlled NTSP through their election of NTSP board members, and then used NTSP to engage in concerted action on behalf of the member physicians. The Court stated that NTSP's position was without merit because the antitrust laws would be easily evaded if illegal activity could be transformed into legal unilateral activity simply through the formation of a corporate entity.

Next, NTSP raised two issues to contend that there was no concerted activity. With regard to the first issue, NTSP argued that the individual physicians never directly communicated with each other concerning any payor's non-risk offer. NTSP argued that no physician agreed with another to reject a non-risk offer, there was no consultation among physician in responding to polls, and no physician knew how another would respond to a non-risk offer. With regard to the second issue, NTSP contended there was no concerted activity because individual physicians were not required to accept contract terms negotiated by NTSP.

The Court agreed with the FTC that illegal concerted activity could take place even though the individual physicians did not directly communicate with each other regarding the non-risk offers. Concerted action took place, according to the Court, by the fact that participating physicians individually authorized NTSP to take certain actions on their behalf, knowing that other participating physicians were doing the same thing. Additionally, according to the Court, concerted action took place by the fact that physicians granted NTSP the right to negotiate with payors and agreed not to deal with a payor individually 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.

The Court agreed with the FTC that the fact that physicians could reject offers negotiated by NTSP does not establish the fact that there was no concerted activity.

3. "Inherently Suspect" Analysis

NTSP contended that the FTC was required to conduct a more in-depth rule-of-reason analysis, which would entail a detailed analysis of the relevant market and a finding of anti-competitive effects before the conduct could be condemned. Historically, the government has analyzed alleged antitrust conduct under a rule-of-reason analysis or a per se analysis. The rule-of-reason approach requires detailed fact finding to determine whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition. Most activities are analyzed under the rule-of-reason approach, except certain categories of alleged violations have been analyzed under per se analysis. Under the per se rule, the conduct is presumptively determined to be unreasonable, and the analysis is limited to whether the defendant engaged in the type of conduct that is condemned as per se illegal. Practices that are per se illegal include price fixing, division of markets, group boycotts, and fixing arrangements. The defendant under a per se analysis has no opportunity to demonstrate procompetitive effects because the conduct is presumed to be unreasonable.

More recently, the FTC has undertaken a third category of analysis known as “inherently suspect” which falls in between rule-of-reason and per se analysis. Under the “inherently suspect” analysis, the practice is not ruled to be per se illegal, but a full blown rule of reason analysis is not followed. There is an abbreviated “quick look” into the nature of the conduct and the defendant is given the burden to show empirical evidence that the procompetitive effects of the challenged conduct outweigh the anti-competitive effects.

The Court agreed with the FTC that it was not necessary to determine whether the conduct was per se illegal, although the Court agreed with the FTC that some of NTSP’s practices “bear a very close resemblance to horizontal price-fixing, generally deemed a per se violation.” The Court agreed with the FTC and held that the quick look analysis was more appropriate than the rule-of-reason inquiry in this case because, “the likelihood of anti-competitive effect is . . . obvious”, meaning the quick look approach is appropriate “when the great likelihood of anti-competitive effects can be ascertained,” and “after assessing and rejecting [the] logic of proffered procompetitive justifications¹”.

The Court stated that the FTC demonstrated that the activities of NTSP, taken as a whole, constituted horizontal price fixing. The Court agreed with the following FTC findings:

The polls – Physicians were aware that NTSP would determine a minimum fee for its negotiations with payors from the poll responses. The fact that the poll results were disclosed to all NTSP physicians, regardless whether they responded to the poll, encouraged physicians to reject price offers below the minimum fees indicated. The record also showed that NTSP regularly actively encouraged physicians to reject offers below the minimum fees indicated in the polls.

Participating Physician Agreement – The FTC found that the Participating Physician Agreement required a physician to await notice from NTSP that negotiations with a payor had ceased before a physician could negotiate directly with a payor. The FTC found that this arrangement prevented payors from negotiating directly with physicians. Even though NTSP could not bind physicians to particular contracts, the arrangement interfered with the ability of payors to negotiate directly with physicians. The arrangement prevented, or least delayed, the ability of payors to negotiate contracts with physicians at fees that fell below the minimum poll results.

Powers of Attorney – The FTC concluded that NTSP used the powers of attorney to pursue contracts that met or exceeded the fee schedule minimums set by the membership polls. The FTC concluded that the powers of attorney were used to engage in concerted withdrawals and refusals to deal except on collective terms.

Taken as a whole, the Court agreed with the FTC that NTSP’s practices erected barriers between payors and physicians who would otherwise be willing to negotiate with payors, and also erected obstacles to price communication between payors and physicians.

After finding that NTSP’s practice had anticompetitive effects, the FTC proceeded to examine NTSP’s asserted procompetitive justification for the activities. NTSP argued that there were “spillover” effects from its and its physicians’ experience with risk contracts into its non-risk contracts that resulted in net procompetitive effects. NTSP argued that in risk contracts, NTSP had to train physicians to work together as more efficient teams and to be more efficient as

¹ Cal. Dental Ass’n v. FTC 526 U.S. 770-771

individual physicians and that these improvements would “spillover” to non-risk treatment if the same teams of key physicians could continue to work together.

The Court agreed with the FTC that NTSP’s claim of pro-competitive “spillover” efficiencies from risk contracts to non-risk contracts did not stand scrutiny. The Court agreed with the FTC conclusion that NTSP did not address how the “nebulous teamwork” efficiencies are dependent on its price-fixing activities. The Court stated that NTSP could explain no theory as to how its proffered pro-competitive effects, e.g. higher quality health care 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 NTSP physicians, (2) encouraging physicians to reject payor offers below the minimum fees NTSP calculated from polls, or (3) using collective bargaining power to demand higher fees for physicians who are already under contract with a payor.

4. **Lack of Discovery**

NTSP asserted that its right to due process was violated because it was denied discovery that would show the pro-competitive effects of its conduct. NTSP attempted to subpoena files from six insurance companies, but the Administrative Law Judge quashed the subpoenas. NTSP argued that from this data, it could show how its performance on non-risk contracts compared to other physicians. The Court agreed with the FTC that NTSP failed to demonstrate any logical link between the challenged conduct and the purported justification, and therefore, NTSP had no claim to any right to discovery of the data it sought from the insurance companies.

5. **Overbreadth of FTC Order**

The Court agreed that one paragraph of the FTC’s Cease and Desist Order was overbroad and internally inconsistent, and directed the FTC to revise the paragraph. In all other respects, the Court affirmed the Cease and Desist Order issued by the FTC.