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**January 06, 2006**

## FTC Issues Physician Price-Fixing Decision

*By Clifton E. Johnson, Esq.\* and Neal A. Cooper, Esq.\*\**

The Federal Trade Commission (FTC) issued a unanimous decision dated November 29, 2005, finding that an independent physician organization (IPO) engaged in unlawful horizontal price-fixing.<sup>[1]</sup> In some respects, this opinion is another in a long line of FTC actions against physician networks for price-fixing activities.<sup>[2]</sup> In other respects, however, the opinion constitutes guidance to the industry regarding the FTC's demarcation of inappropriate conduct for physician networks,<sup>[3]</sup> and explains that a continuum of analysis lies between *per se* condemnation and full-blown rule of reason analysis.<sup>[4]</sup>

The *NTSP* opinion is more comprehensive than most other FTC resolutions of physician price-fixing cases. The FTC explains that this is largely because *NTSP* is the first physician network case in more than twenty years where the FTC had the benefit of a full administrative trial and record, developed by Administrative Law Judge (ALJ) D. Michael Chappell.<sup>[5]</sup> Based on this trial and record, the FTC opinion lays out a detailed background for the case.

### Background

The North Texas Specialty Physicians Corporation (NTSP) is an IPO with approximately 500 members in twenty-six medical specialties. NTSP's physicians practice primarily in Tarrant County, Texas, surrounding the City of Fort Worth. Many members of NTSP compete with one another.

NTSP's physicians executed a participation agreement (the Agreement) granting NTSP the right to receive all payor offers on behalf of its members, and requiring physicians to forward all offers received individually to NTSP. NTSP also reserved a right of first negotiation with payors that wished to contract with its physicians. Under the Agreement, physicians could not individually entertain payor offers until NTSP had permanently discontinued negotiations with that payor. NTSP agreed to forward all economic provisions of any non-risk offer to its members promptly. If more than 50% of NTSP's members accepted those economic terms, the Agreement empowered NTSP to negotiate the final contract with the payor. NTSP maintained powers of attorney for its physicians to conduct such negotiations.

NTSP periodically polled its members to determine minimum reimbursement rates its physicians would accept under fee-for-service HMO or PPO agreements. NTSP then calculated the mean, median, and mode of the minimum acceptable fees, using these calculations to establish minimum contract prices. NTSP reported these calculations to its members. In its polling form, NTSP expressly stated that it "utilizes these minimums when negotiating managed care contracts on behalf of its participants."<sup>[6]</sup>

The vast majority of contracts negotiated by NTSP were non-risk contracts. NTSP acknowledged that risk contracting "is a small part of the business."<sup>[7]</sup> Indeed, NTSP had only one risk contract outstanding, with roughly one-half of its physicians participating thereunder. Thus, the majority of NTSP's activities related to non-risk contracting.

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Through the administrative trial, the ALJ adduced a number of key facts illuminating NTSP's conduct relating to NTSP's market restraints:

- Despite the requirements in the Agreement, NTSP actually messengered only those non-risk contract proposals in which reimbursement fees exceeded NTSP's minimum reimbursement schedule based upon its poll of members.[\[8\]](#)
- NTSP notified payors that it would not forward offers that did not satisfy its minimum price requirements.[\[9\]](#)
- NTSP actively encouraged its members to reject offers less than the minimum fees developed through the poll.[\[10\]](#)
- NTSP furnished members with a sample letter refusing contract assignment and directing payors to negotiate with NTSP as their agent.[\[11\]](#)
- NTSP terminated or threatened to terminate its contracts with several payors, including United Healthcare, CIGNA, and Aetna.[\[12\]](#)
- NTSP claimed in a letter to its members that it achieved a victory over United Health Care after it lobbied the City of Fort Worth and terminated a group contract with United.[\[13\]](#)
- NTSP sent Aetna 180 physicians' powers of attorney appointing NTSP as their bargaining agent for any direct contracting with Aetna.[\[14\]](#)
- NTSP described itself as a "gorilla network" with 124 PCPs and 528 specialists.[\[15\]](#)
- NTSP cautioned members not to undermine its pricing consensus in letters to the members.[\[16\]](#)
- NTSP warned its physicians in writing that its fees would decline unless "NTSP or someone can provide a unifying voice for physicians."[\[17\]](#)
- NTSP was not financially integrated.[\[18\]](#)
- NTSP acknowledged that its contracting minimums were not necessary for NTSP to achieve clinical integration, but rather clinical integration was necessary to justify the minimums that the members authorized NTSP to negotiate.[\[19\]](#)

On review of the ALJ Decision, the FTC determined that these facts, in addition to the terms of the Agreement, demonstrated that NTSP fixed prices and enforced its price structure in restraint of trade.

### The Challenged Restraints

In its Opinion, the FTC challenged NTSP's use of a fee schedule to set prices for non-risk managed care payor contracts, and its enforcement of its fee schedule through refusals to deal and contract termination on behalf of NTSP's members. The FTC found that an agreement to fix prices existed among NTSP's members although there was no evidence of any direct communication between and among the members. The FTC cited *Arizona v. Maricopa County Medical Society*[\[20\]](#) to support its conclusion that an agreement among physicians to fix prices can exist without a finding that the competing physicians agreed directly with each other. Rather, the IPO itself acts as the physicians' collective agent, through which the physicians exert the bargaining leverage of their total numbers through a classic "hub-and-spoke" conspiracy theory. Because NTSP was controlled by competing physicians, and because NTSP negotiated prices for services that the members would provide, the FTC held that NTSP's conduct was that of a conspiracy or combination of its members, rather than unilateral action of NTSP itself.

The FTC expressly found that, even if NTSP failed to obtain its desired price, the starting point in fee negotiations was set artificially high by use of a collectively developed minimum schedule. Consequently, payors were required to begin negotiations at a higher level than they would have absent the collective bargaining. The use of a minimum fee schedule, coupled with NTSP's right of first negotiation under the Agreement, hindered payors' ability to contract directly with physicians.

The FTC also found that, because NTSP communicated the results of its fee polls back to its members, the polls were a means for physicians to communicate indirectly to their competitors what they would like to obtain for their services in the future, and not what they had received for their services in the past or what they might settle for individually. The FTC viewed the poll as the physicians "cast[ing] a vote on the desired minimum price" that NTSP would charge for all physician services, and by doing so the physicians were "telegraphing their intentions about future prices."[\[21\]](#)

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NTSP argued that the polls did not further a conspiracy to fix prices because each physician in its group had the individual right to opt out of the contract, and was not bound to his or her poll responses. Indeed, NTSP observed that the poll did not require physicians to act at all. Notably, only 34% of NTSP's physicians responded to the poll, and NTSP's actions with regard to poll results were non-binding on any individual physician.

Despite the low participation rate, the FTC held that NTSP's communication of poll results to all members influenced each physician's decisions regarding contracts, regardless whether they participated in the poll. The FTC noted that the challenged restraints were not dependent upon whether the physicians discussed price among one another, but rather that NTSP negotiated fees on their collective behalf. As noted above, the hub-and-spoke conspiracy does not require physicians to speak to one another about the prices they will charge, because they all speak to a common agent who negotiates on their collective behalf.

Although NTSP purported to operate a messenger model network, the FTC found that NTSP's approach deviated from the permissible conduct of a true messenger. For example, Healthcare Statement 9c condemns a messenger's refusal to forward contracts to its members based on price.<sup>[22]</sup> Although a messenger can charge a payor an administrative fee to messenger offers that fall below the majority of its members' minimum acceptable fees, NTSP refused to messenger those contracts at all. Moreover, NTSP's minimum price was not based upon an acceptable standing offer messenger model, but rather upon a fee schedule developed by collectively bargaining competitors. As the FTC noted, the antitrust laws would permit NTSP to gather minimum fees and to communicate information regarding those fees to payors, but would not allow the messenger to share such survey results with its members.

The FTC concluded that NTSP was able to exert collective bargaining power and fix prices because it did not messenger contracts below its minimum price requirements. Instead, NTSP rejected those contracts outright on behalf of all physicians in NTSP, exerting its negotiation leverage before any individual physician had the right to opt in or opt out of an offer.

#### Quick Look Analysis

The FTC declined to summarily label NTSP's activities as *per se* illegal for two reasons. First, the FTC reflected back to *Maricopa* and its progeny and noted that the Supreme Court has urged caution in applying the *per se* label to conduct in a professional setting where "the economic impact . . . is not immediately obvious."<sup>[23]</sup> Although the FTC noted that NTSP's restraints may be "immediately obvious" to some, it noted that it had an extensive record upon which to reach its conclusions about likely effects of NTSP's conduct, and thus declined to apply the *per se* label.<sup>[24]</sup>

Second, the FTC noted its growing body of knowledge regarding the operational efficiencies of integrated physician networks. The FTC noted that NTSP's conduct would not be deemed anticompetitive if the "integrated venture were likely to enhance efficiencies," and the network's conduct was reasonably related to the overall agreement and reasonably necessary to achieve the noted efficiencies.<sup>[25]</sup> To reach this conclusion, the FTC needed to go beyond the *per se* label and make some initial inquiries about whether there was integration, the likely effects of the integration, and the reasonableness of the specific restraints in this case.

The FTC also noted that it has taken a position to encourage healthcare providers to engage in efficiency-enhancing collaborative activity. Referencing the FTC's advisory opinion in the *MedSouth*<sup>[26]</sup> matter, the FTC noted that "we do not want to chill consideration of this activity by use of terminology that could be misunderstood."<sup>[27]</sup>

Instead of following the traditional *per se* analysis, the FTC concluded that it would follow the methodology laid out in *Polygram*, and with the benefit of the extensive record developed at trial, consider each of NTSP's justifications for its conduct in detail. Under the *Polygram* test, the tribunal must first decide whether the challenged restraints are "inherently suspect." "An offense can be described as 'inherently suspect' when there is a 'close family resemblance between the suspect practice and another practice that already stands convicted in the Court of Consumer Welfare.'"<sup>[28]</sup> If the restraint in question is inherently suspect, then the defendant is entitled to advance any procompetitive justification for the restraint.

If a defendant can advance a legitimate procompetitive justification for the restraint, then the tribunal should examine that justification. If the tribunal can reject that justification as a matter of law, then it can close the case with a determination that the restraint is *per se* unlawful.

On the other hand, if a defendant is able to show that its justification for its restraint is cognizable (i.e., admissible), then it must also show that the restraint would plausibly create or improve competition. Under *Polygram*, "a justification is plausible if it cannot be rejected without extensive factual inquiry. The defendant . . . must articulate the specific link between the challenged restraint and the purported justification to merit a more searching inquiry into whether the restraint may advance procompetitive goals, even though it facially appears to be of the type likely to suppress competition."<sup>[29]</sup> Such a justification is inadequate if it is argued that the prices set were reasonable, that competition itself is unreasonable or leads to socially undesirable results, or that price increases would attract new entries to the marketplace. Instead, the restraint must enable defendants to increase output, or improve product quality, service or innovation.

If a defendant is able to advance a cognizable and plausible justification, then the plaintiff must make a more detailed showing that the restraints at issue are likely to harm competition. The extent of this inquiry "is tailored to the suspect conduct in each particular case," which the FTC views as calling for a "spectrum" or "sliding scale" analysis of the facts and restraints in question.<sup>[30]</sup> In this way, a defendant charged with restraints challenged as *per se* unlawful may receive a more complete assessment of the surrounding facts before any conclusion is reached regarding the legality of the restraints.

### Conclusion

In its ultimate conclusion, the FTC found that NTSP's restraints constituted unlawful horizontal price-fixing. The FTC cited not only the collective agreement on a minimum fee, but also the specific enforcement of the participation agreement through powers of attorney and collective withdrawal from payor networks to coerce agreement from payors. According to the FTC, "this is not really a close case."<sup>[31]</sup> The FTC stated that the conduct NTSP exhibited was not significantly different from that it has seen in many other cases it has decided in recent years. Given the complete record in this case, however, the FTC found it worthwhile of a more complete analysis as an opportunity to provide guidance to the industry.

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\* Clifton E. Johnson is a shareholder of the law firm of Hall, Render, Killian, Heath & Lyman, P.S.C., and chairs the Health Economics practice group.

\*\* Neal A. Cooper is an associate of the law firm of Hall, Render, Killian, Heath & Lyman, P.S.C.

[1] *In the matter of North Texas Specialty Physicians, a corporation*, Docket No. 9312 (decision and order entered Nov. 29, 2005) (hereinafter, "Opinion"), available at <http://www.ftc.gov/os/adjpro/d9313/index.htm>.

[2] See [attached summary](#), *FTC Price-Fixing Actions Against Physician Networks, 2000-2005*.

[3] According to the FTC, "[T]his case thus presents an opportunity not only to resolve a specific controversy but also to provide some guidance to the healthcare community on the appropriate boundary between pro-competitive and anti-competitive activities." Opinion at 2.

[4] The FTC contrasts *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), with *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), concluding that the opinions in those cases "go beyond the simple dichotomy between categories like 'per se' or 'rule of reason,' and establish a continuum within which behavior can be analyzed." Opinion at 9.

[5] *In the Matter of North Texas Specialty Physicians*, Docket No. 9312 (Initial Decision of ALJ Chappell dated Nov. 15, 2004 (hereinafter, "ALJ Decision"), available at <http://www.ftc.gov/os/adjpro/d9313/index.htm>.

[6] Opinion at 4.

[7] *Id.*

[8] ALJ Decision at ¶68.

[9] *Id.* at ¶85.

[10] See Opinion at 20.

[11] ALJ Decision at ¶137.

[12] *Id.* at ¶¶163, 182, 234.

[13] ALJ Decision at ¶190.

[14] *Id.* at ¶304.

- [15] *Id.* at ¶32
- [16] *Id.* at ¶70.
- [17] *Id.*
- [18] *Id.* at ¶35.
- [19] See Opinion at 29.
- [20] 457 U.S. 332 (1982).
- [21] Opinion at 18.
- [22] U.S. Dep't of Justice and Fed. Trade Comm'n, *Statements of Antitrust Enforcement in Health Care* (1996).
- [23] Opinion at 11, citing *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).
- [24] Opinion at 11.
- [25] Opinion at 11.
- [26] Advisory Opinion Letter from Jeffery W. Brennan, Esq., FTC, to John J. Miles, Esq., Ober Kaler Grimes and Shriver (Feb. 19, 2002), *available at* [www.ftc.gov/bc/adops/medsouth.htm](http://www.ftc.gov/bc/adops/medsouth.htm).
- [27] Opinion at 11-12.
- [28] *Polygram*, 416 F.3d at 37.
- [29] *Polygram*, 416 F.3d at 31-32.
- [30] Opinion at 14.
- [31] Opinion at 41.

## FTC Price-Fixing Actions Against Physician Networks

2000 – 2005

### **Actions in 2005**

1. File No. 021 0075, in the matter of North Texas Specialty Physicians, Docket No. 9312, Decision and Order entered December 1, 2005 (<http://www.ftc.gov/os/caselist/d9312.htm>).
2. File No. 011 0234, in the matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc., Docket No. 9315, ALJ's Initial Decision and Order entered October 20, 2005 (<http://www.ftc.gov/os/adjpro/d9315/index.htm>).
3. File No. 041 0100, in the matter of Partners Health Network, Inc., Docket No. C4149, Decision and Order entered September 19, 2005 (<http://www.ftc.gov/os/caselist/0410100/0410100.htm>).
4. File No. 031 0135, in the matter of White Sands Healthcare System, LLC; Alamogordo Physicians' Cooperative, Inc.; Dacite, Inc.; and James R. Laurenza, individually, Decision and Order modified September 13, 2005 (<http://www.ftc.gov/os/caselist/0310135/0310135.htm>).
5. File No. 031 0181, in the matter of San Juan, IPA, Docket No. C4142, Decision and Order issued June 30, 2005 (<http://www.ftc.gov/os/caselist/0310181/0310181.htm>).
6. File No. 031 0087, in the matter of New Millennium Orthopaedics, LLC; Orthopaedic Consultants of Cincinnati, Inc., D/B/A as Wellington Orthopaedics & Sports Medicine; and Beacon Orthopaedics & Sports Medicine, LTD, Docket No. C4140, Decision and Order entered June 13, 2005 (<http://www.ftc.gov/os/caselist/0310087/0310087.htm>).
7. File No. 041 0099, in the matter of Preferred Health Services, Inc., Docket No. C4134, Decision and Order entered April 13, 2005 (<http://www.ftc.gov/os/caselist/0410099/0410099.htm>).

### **Actions in 2004**

1. File No. 021 0075, North Texas Specialty Physicians, Docket No. 9312, Final Order entered November 29, 2005 (<http://www.ftc.gov/os/adjpro/d9312/index.htm>).
2. File No. 021 0119, in the matter of Piedmont Health Alliance, Inc., et al., Docket No. 9314, Decision and Order entered October 1, 2004 (<http://www.ftc.gov/os/adjpro/d9314/index.htm>).

3. File No. 031 0134, Southeastern New Mexico Physicians IPA, Inc., and Barbara Gomez and Lonnie Ray, individually, Decision and Order entered August 5, 2004 (<http://www.ftc.gov/os/caselist/0310134/040806comp0310134.htm>).
4. In the Matter of California Pacific Medical Group, Inc., Docket No. 9306, Consent Order approved May 11, 2004 (<http://www.ftc.gov/os/adjpro/d9306/index.htm>).
5. File No. 021 0119 Tenet Healthcare Corporation and Frye Regional Medical Center, Inc., Decision entered February 3, 2004 (<http://www.ftc.gov/os/caselist/0210119/0210119tenet.htm>).
6. File No. 031 0001 Memorial Hermann Health Network Providers., Consent Order approved January 13, 2004 (<http://www.ftc.gov/os/caselist/0310001/0310001.htm>).

#### **Actions in 2003**

1. File No. 021 0119, Piedmont Health Alliance, Inc., et al., Docket No. 9314, Complaint issued December 24, 2003 (<http://www.ftc.gov/os/caselist/0210119/0210119piedmont.htm>).
2. File No. 021 0242, Surgical Specialists of Yakima, P.L.L.C.; Cascade Surgical Partners, Inc., P.S.; and Yakima Surgical Associates, Inc., P.S., Consent Order approved September 24, 2003 (<http://www.ftc.gov/os/caselist/0210242.htm>).
3. File No. 011 0222, South Georgia Health Partners, LLC; Coastal Plains Health Alliance, LLC; Colquitt County PHO, LLC; Colquitt County Physicians Association, LLC; Georgia/Florida Preferred, LLC, d/b/a Health Alliance of the South; Qualicare Physicians Association, LLC; Satilla Healthnet, Inc.; South Georgia PHO, LLC; and South Georgia Physician Network, LLC (<http://www.ftc.gov/os/caselist/0110222.htm>), Consent Order approved September 9, 2003.
4. File No. 021 0188, Washington University Physician Network, Docket No. C-4093, Consent Order issued September 3, 2003 (<http://www.ftc.gov/os/caselist/0210188.htm>).
5. File No. 021 0178, In the Matter of Physician Network Consulting, L.L.C.; Michael J. Taylor; Professional Orthopedic Services, Inc.; The Bone and Joint Clinic of Baton Rouge, Inc.; Baton Rouge Orthopaedic Clinic, L.L.C.; and Orthopaedic Surgery Associates of Baton Rouge, L.L.C., Docket No. C-4094 (<http://www.ftc.gov/os/caselist/0210178.htm>) Consent Orders approved August 29, 2003.
6. File No. 011 0197, SPA Health Organization, d/b/a Southwest Physician Associates. Docket No. C-4088, Consent Order approved July 25, 2003 (<http://www.ftc.gov/os/caselist/0110197.htm>).
7. File No. 021 0017, The Maine Health Alliance and William R. Diggins, Consent Order approved July 18, 2003 (<http://www.ftc.gov/os/caselist/0210017.htm>).
8. File No. 021 0006, Anesthesia Service Medical Group, Inc. Docket No. C-4085 (<http://www.ftc.gov/os/caselist/c4085.htm>), and Grossmont Anesthesia Services Medical Group, Inc. Docket No. C-4086, (<http://www.ftc.gov/os/caselist/0210006.htm>) Consent Orders approved July 15, 2003.
9. California Pacific Medical Group, Inc., d/b/a Brown & Toland Medical Group, Docket No. 9306, Complaint issued July 9, 2003 (<http://www.ftc.gov/os/caselist/d9306.htm>).
10. File No. 031 0002, Carlsbad Physician Association, Inc., et al., Docket No. C-4081, Consent Order approved June 20, 2003 (<http://www.ftc.gov/os/caselist/c4081.htm>).

#### **Actions in 2002**

1. File No. 011 0196, System Health Providers, Inc., and Genesis Physicians Group, Inc., Docket No. C-4064, Consent Order approved November 1, 2002 (<http://www.ftc.gov/os/caselist/c4064.htm>).

2. File No. 011 0175, Professionals in Women's Care, Consent Order issued August 20, 2002 (<http://www.ftc.gov/os/caselist/0110175.htm>).
3. File No. 011 0174, Aurora Associated Primary Care Physicians, L.L.C., Richard A. Patt, M.D., Gary L. Gaede, M.D., and Marcia L. Brauchler., Consent Order issued May 13, 2002(<http://www.ftc.gov/os/caselist/0110174.htm>).
4. File No. 011 0173, Physician Integrated Services of Denver, Inc., Michael J. Guese, M.D., and Marcia L. Brauchler., Consent Order issued May 13, 2002 (<http://www.ftc.gov/os/caselist/0110173.htm>).
5. File No. 011 0153, Obstetrics and Gynecology Medical Corporation of Napa Valley, a corporation; Bryan Henry, M.D., R. Bruce Scarborough, M.D., Anthony King, M.D., individually, and as officers of corp.; Dario Gambetta, M.D.; Jerome Solomon, M.D.; and Cheryl Henry, M.D., individually, Consent Order approved April 5, 2002 (<http://www.ftc.gov/os/caselist/0110153.htm>).

#### **Actions in 2001**

1. File No. 991 0103, In the Matter of Alaska Healthcare Network, Inc., Consent Order approved April 30, 2001 (<http://www.ftc.gov/opa/2000/09/alaskahealthnet.htm>).
2. Docket No. 9259, In the Matter of California Dental Association, Complaint dismissed February 15, 2001 (<http://www.ftc.gov/opa/2001/02/cdadismisspr.htm>).

#### **Actions in 2000**

1. File No. 981 0124, In the Matter of Texas Surgeons, P.A.; Austin Surgical Clinic Association, P.A.; Central Texas Surgical Associates, P.A.; Surgical Associates of Austin, P.A.; Austin Surgeons, P.L.L.C.; Bruce McDonald & Associates, P.L.L.C.; and Capital Surgeons Group, P.L.L.C., Consent Order issued April 13, 2000 (<http://www.ftc.gov/os/2000/04/index.htm#13>).
2. File No. 971 0038, In the Matter of Colegio de Cirujanos Dentistas de Puerto Rico, a professional association, Consent Order issued March 21, 2000 (<http://www.ftc.gov/os/2000/03/index.htm#21>).
3. File No. 971 0117, In the Matter of The Wisconsin Chiropractic Association, and Russell A. Leonard, Consent Order approved March 7, 2000 (<http://www.ftc.gov/os/2000/03/index.htm#7>).

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