

physicians who practice orthopedic medicine, its members physician practices, their negotiating agent, and the agent's managing director. The agreement settles charges that the respondents violated section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by orchestrating and implementing agreements to fix prices and other terms on which they would deal with a payor, and to refuse to deal with that payor except on collectively-determined terms. The respondents named in the complaint are the agent, Physician Network Consulting, L.L.C., and its managing director, Michael J. Taylor; the IPA, Professional Orthopedic Services, Inc.; and the three physician practices whose physicians are members of the IPA, The Bone & Joint Clinic of Baton Rouge, Inc., Baton Rouge Orthopaedic Clinic, L.L.C., and Orthopaedic Surgery Associates of Baton Rouge, L.L.C. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by respondents that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

### The Complaint Allegations

Professional Orthopedic Services consists of approximately 28 physicians who provide approximately 70 percent of the orthopedic medicine services in the Baton Rouge, Louisiana, area. To be competitively marketable in the Baton Rouge area, a payor's health insurance plan must include in its physician network members of Professional Orthopedic Services, including physicians from at least The Bone and Joint Clinic or Baton Rouge Orthopaedic Clinic.

Physician Network Consulting is an agent for Professional Orthopedic Services' members. It represents physicians in contract negotiations with health insurance firms and other third-party payors. Physician Network Consulting's client base includes

physicians in approximately seven states. Michael J. Taylor is the founder and managing director of Physician Network Consulting.

As the complaint alleges, this matter involves the fixing of price terms demanded from United HealthCare of Louisiana, Inc., by Professional Orthopedic Services' members. With and through Mr. Taylor, the members agreed to terminate their respective contracts with United. They authorized Physician Network Consulting to be their common agent to negotiate more lucrative price terms with United. Although Physician Network Consulting purported to operate as a "messenger"—that is, an arrangement that does not facilitate horizontal agreements on price—it engaged in various actions that reflected or orchestrated such agreements.<sup>1</sup>

According to the complaint, respondents succeeded in coercing United to accept their price demands, and thereby raised the cost of orthopedic services in the Baton Rouge area. Professional Orthopedic Services engaged in no efficiency-enhancing integration sufficient to justify respondents' agreement on price. By orchestrating agreements among Professional Orthopedic Services' members to deal only on collectively-determined terms, and by refusing to deal with United unless it would meet those terms, respondents violated section 5 of the FTC Act.

### The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and to prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans. The order also includes temporary "fencing-in" relief to ensure that the alleged unlawful conduct by respondents does not continue. Respondents Physician Network Consulting and Mr. Taylor conduct business in a number of states, and the order applies to their activities in all such states.

The proposed order's specific provisions are as follows:

<sup>1</sup> Some arrangements can facilitate contracting between physicians and payors without fostering an agreement among competing physicians on fees or fee-related terms. One such approach, sometimes referred to as a "messenger model" arrangement, is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice. See <http://www.ftc.gov/reports/hlth3s.htm>.

Paragraph II. contains the proposed order's core prohibitions against collectively negotiating prices or organizing group boycotts of payors. Paragraph II.A prohibits the respondents from entering into or facilitating any agreement between or among any physicians: (1) To negotiate with payors on any physician's behalf; (2) to deal, refuse to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than Professional Orthopedic Services.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the respondents from facilitating exchanges of information among physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraphs II.A or II.B. Paragraph II.D proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other orders addressing providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations.

First, respondents would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, whether a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement."

As defined in the proposed order, a "qualified risk-sharing joint arrangement" possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the participants to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A "qualified clinically-integrated joint arrangement," on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation