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#### **Analysis of Agreement Containing Consent Order To Aid Public Comment**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Surgical Specialists of Yakima, P.L.L.C. (SSY), and two general surgery groups—Cascade Surgical Partners, Inc., P.S. (CSP) and Yakima Surgical Associates, Inc., P.S. (YSA)—that are members of SSY. The agreement settles charges that these parties violated section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by orchestrating and implementing agreements among members of SSY to fix prices and other terms on which they would deal with health plans, agreements enforced by SSY's members' refusal to deal with such purchasers except on collectively-determined terms. 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 any Respondent that said Respondent violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

#### **The Complaint**

The allegations of the complaint are summarized below.

SSY was organized in 1996 by several independent medical practices. Those medical practices, which became "members" of SSY, were and are separate and independent in all material respects, are not subject to the control of SSY, have not unified their economic interests and incentives through SSY, and are not significantly integrated

(either clinically or financially). SSY's activities on behalf of its members constitute the combined action of those members, and not unilateral action by SSY. SSY presently has 24 physician members that practice in five specialties, ENT, OB/GYN, Ophthalmology, Plastic Surgery, and General Surgery. SSY represents 90 percent of all physicians practicing general surgery in and around Yakima, Washington, which is located in south-central Washington.

According to the complaint, SSY members refuse to negotiate or contract with health plans on an individual basis. Instead, all negotiations are conducted by SSY, and SSY's members accept only those contracts deemed acceptable by SSY. In accordance with this model, Respondents have orchestrated collective agreements on fees and other terms of dealing with health plans, have carried out collective negotiations with several health plans, and have refused and threatened to refuse to deal with health plans who resisted Respondents' desired terms.

The complaint alleges that Respondents have succeeded in forcing health plans to raise fees paid to SSY members and thereby raised the cost of medical care in the Yakima area. As a result of the challenged actions of Respondents, SSY members receive the highest fees for surgical services in Washington. By orchestrating agreements among SSY members to deal only on collectively-determined price and other terms, Respondents have 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 prevent its recurrence. It is similar to many previous 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, but with one additional provision. In addition to the core prohibitions, the proposed order in this matter requires that SSY revoke the membership of either CSP or YSA. Such structural relief is not routinely imposed but is necessary in this case to reduce SSY's market power in general surgery.

The proposed order's specific provisions are as follows:

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, to refuse to deal, or to threaten to refuse to deal with payors; (3) regarding the terms of dealing with

any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the Respondent SSY.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to deal with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B; and 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. 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 physician participants jointly 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 among physicians. As with qualified risk sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph IV, which applies only to SSY, solves the market power issue by requiring SSY to revoke the membership of either CSP or YSA. It also requires