

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOMAN'S HOSPITAL FOUNDATION
and WOMAN'S
PHYSICIAN HEALTH ORGANIZATION,

Defendants.

Civil Action

No: 96-389-BM2

FINAL JUDGMENT

Plaintiff, the United States of America, having filed its Complaint on April 23, 1996, and plaintiff and defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or an admission by any party regarding any issue of fact or law;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is hereby ORDERED, ADJUDGED, AND DECREED:

I.

JURISDICTION

This Court has jurisdiction over the subject matter and each of the parties to this action. The Complaint states claims upon which relief may be granted against the defendants under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

II.

DEFINITIONS

As used in this Final Judgment:

(A) "Competing physicians" means solo practitioners or separate physician practice groups in the same relevant physician market.

(B) "Consenting physician" means physicians who have agreed, through implementation of Section V(B), to be bound by this Final Judgment.

(C) "Messenger model" means the use of an agent or third party ("the messenger") to convey to payers any information obtained from participating physicians about the prices or other competitively sensitive terms and conditions each physician is willing to accept from any payer, and to convey to physicians any contract offer made by a payer, where:

(1) pursuant to Section V(B), participating physicians have received actual notice of this Final Judgment and agreed in writing to be bound by it;

(2) the messenger informs each payer at the outset of the messenger's involvement with the payer that the payer may refuse to respond to offers conveyed by the messenger or may terminate involvement with the messenger at any time and that participating physicians are free at all times to communicate, negotiate and contract on any terms with the payer independently from, and without consultation with, the messenger;

(3) the messenger informs each participating physician when the physician first authorizes the messenger to carry messages to and from the physician and annually thereafter that the physician is free at all times to communicate, negotiate and contract on any terms with any payer independently from, and without consultation with, the messenger;

(4) the messenger does not communicate to participating physicians regarding, or comment on, a payer's refusal to use or decision to discontinue using the messenger's services, other than to inform participating physicians that a payer has decided not to use the messenger's services;

(5) the messenger conveys to participating physicians each and every offer that a payer delivers to the messenger unless (a) the offer is the payer's first offer and lacks material terms such that it could not be considered a bona

vide offer, or (b) the messenger applies preexisting objective criteria, not involving prices or other competitively sensitive terms and conditions, in a nondiscriminatory manner (for example, refusing to convey offers of payers that refuse to pay a fee for conveying the offer, offers for plans that do not cover a certain minimum number of people, or offers made after the agent or messenger has conveyed a stated maximum number of offers for a given time period);

(6) all communications by the messenger to participating physicians (other than communications to physicians in their capacity as directors or officers of an organization employing the messenger model) regarding fees, payers and contracts are in writing or recorded, except that the messenger may communicate orally on these subjects when the communication pertains to ministerial matters or when an individual physician initiates the communication and a written record of the date of, participants to and subject matter of the conversation is kept by the messenger;

(7) each participating physician agrees with the messenger not to discuss with competing physicians information on fees, contract terms and conditions, contract offers, or reactions to contract offers;

(8) each competing, participating physician makes a separate, independent, and unilateral decision to accept or reject a payer's offer;

(9) information on prices or other terms and conditions conveyed to payers is obtained by the messenger separately from each competing, participating physician;

(10) the messenger does not negotiate collectively for participating physicians, disseminate to any physician the messenger's or any other physician's views or intentions as to an offer, or otherwise serve to facilitate any agreement among competing physicians on prices or other terms and conditions;

(11) the messenger does not enter into contracts with payers unless, in executing contracts on behalf of any competing, participating physician, it acts consistently with the foregoing requirements of this Section II(C), no contract grants it the authority to cancel the contract prior to the stated term of the contract, and each competing physician makes separate, independent and unilateral decisions whether to cancel or renew contracts; and,

(12) the messenger maintains all documents received or created by it, relating to contracting, fees or physician participation, other than invoices, receipts and personnel records, for the duration of this Final Judgment.

As long as the messenger acts consistently with the foregoing, it may:

- (1) convey to a participating physician objective information about proposed contract terms, including comparisons with terms offered by other payers;
- (2) solicit clarifications from a payer of proposed contract terms, or engage in discussions with a payer regarding contract terms other than prices and other competitively sensitive terms and conditions;
- (3) convey to a participating physician any response made by a payer to information conveyed or clarifications sought;
- (4) convey to a payer the acceptance or rejection by a participating physician of any contract offer made by the payer; and,
- (5) at the request of the payer, provide the individual response, information, or views of each participating provider concerning any contract offer made by such payer.

(D) "Participating physicians" means those physicians who own an interest in or authorize a qualified managed care plan to negotiate or contract on their behalf with payers, or who authorize a messenger to carry offers, acceptances and other messages between themselves and payers.

(E) "Person" means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institute, governmental unit, or other legal entity.

(F) "Pre-existing physician practice group" means a physician practice group existing as of the date of the filing of the Complaint in this action. A pre-existing physician practice group may add any physician to the group after the filing of the Complaint, without losing the status of "pre-existing" under this definition for any relevant physician market, provided the physician was not offering services in the relevant physician market before joining the group and would not have entered that market but for the group's efforts to recruit the physician.

(G) "Qualified managed care plan" means an organization that is owned, in whole or in part, by either or both of the defendants, offers a provider panel and satisfies each of the following criteria:

(1) its owners or not-for-profit members ("members") who compete with other owners or members or with subcontracting physicians participating in the plan, (a) share substantial financial risk for the payment of services provided pursuant to contracts negotiated or executed by it and (b) in combination with the owners and members of all other physician networks in which Woman's Hospital, WPHO or any of them own an interest constitute no more than 30% of the physicians in any relevant

physician market, except that it may include any single physician, or any single preexisting physician practice group for each relevant physician market, so long as Woman's Hospital or WPHO and they do not own an interest in another physician network;

(2) its participating physicians include no more than 30% of the physicians in any relevant physician market unless, for those subcontracting physicians whose participation increases the panel beyond 30%, (a) there is a sufficient divergence of economic interest between such subcontracting physicians and the plan's owners or members to cause the owners or members to bargain down the fees of the subcontracting physicians because the extent of the owners' or members' profits under each payer contract depends directly on the fees negotiated with the subcontracting physicians, (b) the contractual relationship between owners or members and such subcontracting physicians precludes a higher rate for subcontracting physicians resulting in the same or higher profits for owners or members, (c) the plan does not directly pass through to a payer liability for making payments to such subcontracting physicians, (d) a most-favored-nations clause or any similar term does not apply to the relationship between the plan and such subcontracting doctors, and (e) the plan does not compensate such subcontracting

physicians in a manner that substantially replicates ownership in the organization;

(3) it does not facilitate agreements between competing physicians concerning charges, or other terms and conditions, relating to payers not contracting with the organization;

(4) pursuant to Section V(B), its owners or members have received actual notice of this Final Judgment and agreed in writing to be bound by it; and

(5) it is not operated with the purpose or effect of maintaining or increasing physician fees.

The organization may at any given time exceed the 30% limitation as a result of any physician exiting any relevant physician market or the addition of any physician not previously offering services in a relevant physician market who would not have entered that market but for the organization's efforts to recruit the physician into the market; however, the organization may not exceed the 30% limitation by any greater degree than is directly caused by such exit or entry.

(H) "Relevant market" means, unless defendants obtain plaintiff's prior written approval of a different definition, physicians who regularly practice (a) in obstetrics or gynecology in the Baton Rouge area, or (b) services other than obstetric or gynecologic, in any other relevant market, as defined by federal antitrust principles.

(I) "Substantial financial risk" means financial risk achieved through capitation or the creation of significant financial incentives for the group to achieve specified cost-containment goals, such as withholding from all members a substantial amount of the compensation due to them, with distribution of that amount to the members or owners only if the cost-containment goals are met.

(J) "Woman's Hospital" means Woman's Hospital Foundation, each of its divisions, parents, subsidiaries, and affiliates, each other person directly or indirectly, wholly or in part, owned or controlled by it, and each partnership or joint venture to which any of them is a party, each of the foregoing person's successors, and all of their directors, officers, and employees.

(K) "WPHO" means Woman's Physician Health Organization, each of its successors, divisions, parents, subsidiaries, and affiliates, each other person directly or indirectly, wholly or in part, owned or controlled by it, and each partnership or joint venture to which any of them is a party, and all of their directors, officers, and employees.

III.

APPLICABILITY

This Final Judgment applies to Woman's Hospital and WPHO, to all consenting physicians, and to all other persons who receive actual notice of this Final Judgment by personal service or

otherwise and then act or participate in active concert with any or all of the defendants.

IV.

INJUNCTIVE RELIEF

(A) Woman's Hospital and WPHO are enjoined from:

(1) Directly or through any agent, organization or other third party, expressing views on, or conveying information on, competing physicians' prices or other terms and conditions, or negotiating on behalf of competing physicians;

(2) Owning an interest in, contracting with, or controlling one or more organizations, including WPHO, in which individually or cumulatively participating physicians constitute more than 30% of the physicians in any relevant market;

(3) Owning an interest or participating in any organization that directly, or through any agent, organization or other third party, sets, expresses views on, or conveys information on prices or other terms and conditions for competing physicians' services, or negotiates for competing physicians unless the organization complies with paragraphs (2) through (6) of this Section IV(A) as if those paragraphs applied to that organization;

(4) Precluding or discouraging any physician from negotiating or contracting with any payer;

(5) Providing disincentives for, or agreeing with, any physician not to deal with competitors of Woman's Hospital or WPHO, provided that nothing in this Final Judgment prohibits Woman's Hospital from entering into exclusive contracts for anesthesiology, radiology, pathology, neonatology, and perinatology services to the extent reasonably necessary to assure quality of care at the Hospital;

(6) Disclosing to any physician any financial or other competitively sensitive business information about any competing physician, except as is reasonably necessary for the operation of a qualified managed care plan for which defendants have received prior written approval from the Department of Justice, provided that nothing in this Final Judgment shall prohibit the disclosure of information already generally available to the medical community or the public.

(B) Each consenting physician is enjoined from:

(1) Owning an interest or participating in any organization, connected in any way with Woman's Hospital or WPHO, that directly, or through any agent, organization or other third party, sets, expresses views on, or conveys information on prices or other terms and conditions, or negotiates on behalf of competing physicians, unless the organization complies with Section IV(A) of this Final Judgment as if that Section applied to that organization; and

(2) participating in or facilitating any agreement among competing physicians on fees or other terms and conditions for physician services, including the willingness of physicians to contract on any terms with particular payers or to use facilities competing with Woman's Hospital's facilities, unless the competing physicians share substantial financial risk and the agreement is ancillary to the shared risk; provided that nothing in this paragraph IV(B)(2) applies to the participation of competing physicians in any managed care plan or network of such a plan not owned or controlled by Woman's Hospital or WPHO.

(C) Woman's Hospital is enjoined from agreeing with any person affiliated directly or indirectly with any potential or actual competing facility to allocate or divide the market for, or set the price for, any service, including offering lower rates for inpatient services to any payer on the condition that the payer or any person affiliated with the payer not offer inpatient obstetrical services.

(D) Nothing in this Final Judgment prohibits the defendants or the consenting physicians from

(1) forming, operating, owning an interest in, or participating in (a) a messenger model, or (b) a qualified managed care plan if defendants obtain prior written approval from the Department of Justice, which will not be withheld unreasonably; or

(2) engaging in activity delineated in the attached Safety Zones of Statements 5 and 6 of the 1994 Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust.

V.

ADDITIONAL PROVISIONS

Woman's Hospital and WPHO shall:

(A) Notify in writing each WPHO participating physician, within ten days of entry of this Final Judgment (unless such notification has already been given) and annually thereafter during the term of this Final Judgment, that the physician is free at all times to communicate, negotiate or contract on any terms with any payer independently from, and without consultation with, WPHO;

(B) While forming or employing a messenger model or forming a qualified managed care plan, (1) provide a copy of the Final Judgment to each owner or member of the organization forming the messenger or qualified managed care plan and to each physician applying for participation in the messenger model, and (2) require, as a condition precedent to the physician's ownership or membership in the organization, or participation in a messenger model, the physician to affirm in writing that the

physician has read and understands this Final Judgment and agrees to be bound by this Final Judgment;

(C) Notify in writing, within ten days of entry of this Final Judgment (unless such notification has already been given), each payer with which WPHO then has a contract that the payer may cancel the entire contract and that each physician who has participated in WPHO is free at all times to communicate, negotiate, and contract on any terms with such payer independently from, and without consultation with, WPHO;

(D) Notify in writing, within ten days of entry of this Final Judgment (unless such notification has already been given) each payer with which WPHO then has a contract, and during the term of this Final Judgment, each payer when it initially discusses using the services of a messenger subject to this Final Judgment or contracting with a qualified managed care plan subject to this Final Judgment, that each participating physician is free to communicate, negotiate or contract with such payer on any terms independently from, and without consultation with, the messenger or qualified managed care plan; and

(E) Notify, as applicable, the plaintiff at least 30 days prior to any proposed (1) dissolution of a defendant, (2) sale or assignment of claims or assets of a defendant resulting in a successor person, or (3) change in corporate structure of a

defendant that may affect compliance obligations arising out of this Final Judgment.

VI.

COMPLIANCE PROGRAM

Each defendant shall maintain a judgment compliance program, which shall include:

(A) Distributing within 60 days from the entry of this Final Judgment, a copy of the Final Judgment and Competitive Impact Statement to all directors and officers;

(B) Distributing in a timely manner a copy of the Final Judgment and Competitive Impact Statement to any person who succeeds to a position described in Paragraph VI(A);

(C) Briefing annually in writing or orally those persons designated in Paragraphs VI (A) and (B) on the meaning and requirements of this Final Judgment and the antitrust laws, including penalties for violation thereof;

(D) Obtaining from those persons designated in Paragraphs VI (A) and (B) annual written certifications that they (1) have read, understand, and agree to abide by this Final Judgment, (2) understand that their noncompliance with this Final Judgment may result in conviction for criminal contempt of court and imprisonment and/or fine, and (3) have reported violations, if any, of this Final Judgment of which they are aware to counsel for the respective defendant; and

(E) Maintaining for inspection by plaintiff a record of recipients to whom this Final Judgment and Competitive Impact Statement have been distributed and from whom annual written certifications regarding this Final Judgment have been received.

VII.

CERTIFICATIONS

(A) Within 75 days after entry of this Final Judgment, each defendant shall certify to plaintiff that it has given the notifications required by Section V and made the distribution of the Final Judgment and Competitive Impact Statement as required by Paragraph VI(A); and

(B) For 10 years after the entry of this Final Judgment, on or before its anniversary date, each defendant shall certify annually to plaintiff whether it has complied with the provisions of Sections V and VI applicable to it.

VIII.

PLAINTIFF'S ACCESS

For the sole purpose of determining or securing compliance with this Final Judgment, and subject to any recognized privilege, authorized representatives of the United States Department of Justice, upon written request of the Assistant Attorney General in charge of the Antitrust Division, shall on reasonable notice be permitted:

(A) Access during regular business hours of any defendant to inspect and copy all records and documents in the possession or under the control of that defendant relating to any matters contained in this Final Judgment;

(B) To interview officers, directors, employees, and agents of any defendant, who may have counsel present, concerning such matters; and

(C) To obtain written reports from any defendant, under oath if requested, relating to any matters contained in this Final Judgment.

IX.

JURISDICTION RETAINED

This Court retains jurisdiction to enable any of the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

X.

EXPIRATION OF FINAL JUDGMENT

This Final Judgment shall expire ten (10) years from the date of entry.

XI.

PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest.

Dated: September 11, 1996.

United States District Judge