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In Ruling That Physicians Engaged In Horizontal Price Fixing, The FTC Provides Guidance For All Competitor Associations

In a November 29, 2005 opinion, the Federal Trade Commission ("FTC" or "Commission") unanimously held that North Texas Specialty Physicians ("NTSP"), an association of approximately 480 independent physicians in the Fort Worth, Texas area, illegally fixed prices in negotiations for certain contracts with insurance companies, health plans and other payors.[1] The FTC opinion, written by soon-departing Commissioner Thomas B. Leary, affirmed a November 2004 ruling by Administrative Law Judge D. Michael Chappell, with some modifications. The FTC ordered that NTSP cease and desist its illegal conduct and terminate pre-existing contracts with payors for physician services. However, the Commission went out of its way to provide guidance for physician associations ("IPAs") concerned with possible antitrust liability.[2] We believe that the FTC's mode of analysis and conclusions also give important insights into how the current Commission will evaluate competitor collaborations in other industries.

Alleged Misconduct

According to the Commission, NTSP engaged in conduct designed to enhance the collective bargaining power of its members in a way that affected payment levels in certain contracts in which the members did not share financial risk with each other. For example, NTSP polled its individual members regarding the minimum price each would accept from a private payor and then shared the results of these polls with its members. The Commission also found that NTSP's agreement with its members gave NTSP the right of first negotiation with payors and inhibited independent negotiations by individual physicians. In addition, NTSP refused to accept and to forward to its member physicians payor offers that NTSP's management deemed unacceptable. The Commission further found that the evidence "shows not only negotiation activity in aid of a collective agreement on a minimum fee schedule, but also specific enforcement mechanisms-such as the powers of attorney and collective withdrawal from payor networks-in order to coerce agreement from payors."

The FTC Could, But Did Not, Apply the Per Se Rule to the Conduct

According to the Commission, through the mechanisms described above NTSP orchestrated price agreements among its physician members. Viewed as a whole, the Commission concluded, these actions "leave no doubt that the overriding purpose behind NTSP's conduct was to fix prices."

The FTC rejected NTSP's argument that NTSP is a "sole actor" unable to conspire with itself when it negotiates on behalf of the competing physicians who control it. In a portion of the opinion that plainly applies to competitors in any industry, the Commission held that when an association, controlled by a group of competitors, "negotiates prices for services that the *members* will provide, the organization's conduct is

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[1] The FTC's full, 41-page opinion is available at http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf. The FTC's order can be found at http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf.

[2] The FTC and the Department of Justice previously issued detailed guidance for how IPAs can avoid running afoul of the antitrust laws. See U.S. Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (1996), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153 and *available at* http://www.ftc.gov/reports/hlth3s.htm#5.

considered to be that of a combination or conspiracy of its members, not unilateral action." In addition, applying the "hub-and-spoke" conspiracy analysis of *Toys "R" Us*,[3] the FTC held that the member physicians conspired to fix prices through NTSP even though they did not communicate directly with one another.

Despite statements that suggest that it seriously considered doing so, the Commission did *not* decide that NTSP engaged in *per se* illegal conduct. The FTC examined NTSP's conduct instead under the "inherently suspect" analysis of *Polygram Holding, Inc. v. FTC*,[4] which dispenses with an elaborate inquiry into market definition and market power but, unlike the *per se* rule, allows for consideration of legitimate justifications for inherently suspect practices. Nevertheless, the Commission concluded that NTSP's activities, taken as a whole, "amount to unlawful horizontal price fixing" unrelated to any procompetitive efficiencies.

However, the FTC emphasized that it wants to "encourage providers to engage in efficiency-enhancing collaborative activity." Accordingly, the FTC used the case as an opportunity to provide guidance to the health care community on the proper bounds on collective negotiation by physicians. Recognizing the "frustration of many physicians over their perceived lack of bargaining power in negotiations with large health care payors," the Commission dedicated part of its opinion to giving guidance on what conduct by IPAs would *not* run afoul of the antitrust laws. As the FTC explained: "We would view NTSP's activities very differently if NTSP were able to demonstrate that the participating physicians were financially or clinically integrated in performing its numerous non-risk contracts, and thus driven by incentives similar to those present in its single remaining risk contract." According to the FTC, NTSP "could have prevailed if the integrated venture were likely to enhance efficiencies and NTSP's conduct were reasonably related to the overall agreement and reasonably necessary for achieving those efficiencies." The FTC also identified various lawful ways an IPA like NTSP could actively operate as a contracting network, even without clinical or financial integration, in accordance with the FTC/DOJ's *Health Care Statements.*

When Is Conduct Per Se Illegal?

To evaluate the impact of this decision on competitor collaborations outside of healthcare provider networks, it is important to understand why the FTC did not apply the *per se* rule to the IPA's conduct even though it said that it could have done so. First, the Commission noted that the Supreme Court has urged caution in the application of the *per se* label to conduct in a professional setting where "the economic impact . . . is not immediately obvious." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).[5] Second, the FTC's decision explained that over time, having reviewed many cases involving such organizations, the Commission has gained an understanding of the potential integration efficiencies of physician networks. Clearly, the Commission wanted to avoid setting a precedent that might discourage physician networks from conduct that is reasonably necessary to achieve efficiencies even if there is some chance of competitive restraints. The Commission stated that "These considerations might not deter us when we are persuaded by experience and economic logic that the potential for harm is overwhelming and the possible justifications are attenuated and uniformly rejected by courts. We would simply apply the *per se* label. In the health care sector, however, the Commission wants to encourage providers to engage in efficiency-enhancing collaborative activity." The Commission concluded that the framework of the "inherently suspect" analysis outlined in *Polygram* "more accurately describes the actual analysis of the case."

Thus, competitors in industries other than health care that use an existing trade association or form a "network" to enhance their bargaining power with purchasers should not take comfort from the FTC's decision not to apply the *per se* rule to NTSP's conduct. Health care remains different, to a degree.[6] While the *Polygram* analysis itself concerned competitors outside the health care industry (recorded music producers), we believe that the kinds of conduct challenged by the FTC in *NTSP* are more likely to be challenged as *per se* illegal when engaged in by non-health care firms and in the absence of factors that suggest the real possibility of procompetitive effects.

Conclusion

The Commission's decision that NTSP engaged in price fixing is not surprising, given the history of enforcement actions that the FTC has consistently brought against physician groups in similar circumstances. For health care industry participants, what is most important about the decision is what the Commission said would *not* run afoul of the antitrust laws. The FTC has stated that it wants to encourage providers to engage in efficiency-enhancing collaborative activity when they intend to negotiate contracts that do not incorporate risk-sharing or significant clinical

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[1] *See Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 934-36 (7th Cir. 2000).

[4] 416 F.3d 29 (D.C. Cir. 2005).

[5] The FTC stated, "Some might claim that the likely economic impact of the restraints in issue here is 'immediately obvious' enough to satisfy this standard, but we do not need to reach that question because we have available in this case an extensive record on which to buttress our conclusions about the likely effects of Respondent's conduct."

[6] However, there may come a point when the FTC decides that it has analyzed the line between procompetitive and anticompetitive conduct by health care networks in sufficient detail to justify applying the *per se* rule to negotiation conduct by an IPA that largely repeats the errors identified in past cases.

integration among the providers. To that end, the FTC's decision in *NTSP* gives IPAs a roadmap for how to engage in such activity without engaging in price fixing. For firms in other industries, what is most important about this decision is that the Commission's emphasis on exercising great caution in the application of the *per se* rule is based on the continued need to accommodate the particular circumstances of the health care industry.

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