

By order of the Commission.

Donna R. Koehnke,

Secretary.

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DEPARTMENT OF JUSTICE

Antitrust Division

[Civil Action No. 98-475-JJF]

United States of America v. Federation of Physicians and Dentists, Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. section 16(b) through (h), that a proposed Final Judgment and Competitive Impact Statement have been filed in a civil antitrust case, *United States of America v. Federation of Physicians and Dentists, Inc.*, Civil Action No. 98-475JJF, in the United States District Court for the District of Delaware.

The Complaint in the case alleges that the Federation of Physicians and Dentists, Inc. ("Federation") coordinated an understanding among its members, Delaware orthopedic surgeons in private practice, to negotiate exclusively through the Federation to oppose a proposed fee reduction by Blue Cross and Blue Shield of Delaware in violation of section 1 of the Sherman Act, 15 U.S.C. 1.

The proposed Final Judgment eliminates the Federation's illegal practices and prevents their renewal, enjoining the Federation from engaging in practices that would limit competition among Delaware orthopedic surgeons in the sale of orthopedic services.

Public comment on the proposed Final Judgment is invited within the statutory 60-day comment period. Such comments and responses thereto will be published in the **Federal Register** and filed with the Court. Comments should be directed to Gail Kursh, Chief, Health Care Task Force; Antitrust Division; United States Department of Justice; 325 Seventh St., NW.; Room 404; Washington, DC 20530 (Tel.: (202) 307-5799).

Mary Jean Moltenbrey,

Director of Civil Nonmerger Enforcement, Antitrust Division, United States Department of Justice.

Stipulation

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

1. The Court has jurisdiction over the subject matter of this action and over both of the parties, and venue of this action is proper in the District of Delaware.

2. The parties consent that a Final Judgment in the form attached may be filed and entered by the Court, upon the motion of either party or upon the Court's own action, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendant and by filing that notice with the Court.

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Final Judgment

Plaintiff, the United States of America, having filed its Complaint on August 12, 1998, and plaintiff and defendant Federation of Physicians and Dentists, 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 with respect to any issue of fact or law;

And Whereas defendant has agreed to be bound by the provisions of this Final Judgment.

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 plaintiff and defendant, it is hereby *Ordered, Adjudged, and Decreed*:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and over the plaintiff and defendant to, this action. The Complaint states a claim upon which relief may be granted against defendant under section 1 of the Sherman Act, 15 U.S.C. 1.

II. Definitions

As used in this Final Judgment:

(A) "Communicate" means to discuss, disclose, transfer, disseminate, or exchange information or opinion, formally or informally, in any manner;

(B) "Competing physicians" or "competing orthopedic surgeons" means two or more physicians (or two or more orthopedic surgeons, respectively) in separate, private medical practices in the same specialty in the same country;

(C) "Competitively sensitive information" means:

(1) Any participating physician's actual or possible view, intention, or position concerning the negotiation or acceptability of any proposed or existing payer contract or contract term, including the physician's negotiating or contracting status with any payer or the physician's response to any payer contract or contract term; or

(2) Any proposed or existing term of any payer contract that affects:

(a) The amount of fees or payment, however determined, that a participating physician charges, contracts for, or accepts from, or considers charging, contracting for, or accepting from any payer for providing physician services;

(b) The duration, amendment, or termination of the payer contract;

(c) Utilization review and pre-certification; or

(d) The manner of resolving disputes between the participating physician and the payer;

(D) "Defendant" means the Federation of Physicians and Dentists, its directors, officers, agents, representatives, and

employees; its successors and assigns; and each entity over which it has control;

(E) "Messenger" means a person, including defendant or an agent for defendant, that communicates to a payer any competitively sensitive information it obtains, individually, from a participating physician or communicates, individually, to a participating physician any competitively sensitive information it obtains from a payer;

(F) "Objective information" or "objective comparison" means empirical data that are capable of being verified or a comparison of such data;

(G) "Participating physician" means a physician who is either in solo practice or a group practice, and who participates in a messenger arrangement, and any employee of such physician or group practice acting on the physician's or group practice's behalf in connection with a messenger arrangement; for purposes of this Final Judgment, a "participating physician" does not include physicians or other medical professional employees who belong to a recognized or certified bargaining unit that is affiliated with the Federation of Physicians and Dentists;

(H) "Payer" means any person that purchases or pays for all or part of a physician's services for itself or any other person and includes but is not limited to independent practice associations, individuals, health insurance companies, health maintenance organizations, preferred provider organizations, and employers;

(I) "Payer contract" means a contract between a payer and a physician by which that physician agrees to provide physician services to persons designated by the payer;

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

(K) "Protocols" means a set of written guidelines, which have been adopted by defendant for dissemination to its members to assist in the implementation and administration of the terms of the Final Judgment and which have been approved by plaintiff for the limited purpose of assuring that defendant's existing and future members who do not receive a copy of this Final Judgment receive adequate notice of its terms. These Protocols shall not diminish defendant's and its member's obligation to comply with the terms of this Final Judgment and federal antitrust law, which are controlling in the event of any conflict or inconsistency; and

(L) "Recognized or certified bargaining unit" means a group of physicians that have been recognized or certified pursuant to state or federal law to bargain collectively with their common employer over wages, terms, and conditions or employment.

III. Applicability

(A) This Final Judgment applies to defendant and to those persons in active concert or participation with defendant, including defendant's member physicians in private practice who receive actual notice of the Final Judgment by personal service or otherwise.

(B) This Final Judgment shall not apply to the conduct of any physicians or other medical professional employees who belong to recognized or certified bargaining units that are affiliated with defendant to the extent such conduct is reasonably related to the lawful activities of the recognized or certified bargaining unit.

(C) Nothing contained in this Final Judgment is intended to suggest or imply that any provision herein is or has been created or intended for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV. Injunctive Relief

(A) The defendant and all other persons in active concert or participation with defendant who receive actual notice of the Final Judgment by personal service or otherwise are enjoined from directly or indirectly:

(1) Participating in, encouraging, or facilitating any agreement or understanding between competing physicians about any actual or proposed payer contract or contract term;

(2) Participating in, encouraging, or facilitating any agreement or understanding between competing physicians to deal with any payer exclusively through a messenger rather than individually or through other channels;

(3) Negotiating, collectively or individually, on behalf of competing physicians any actual or proposed payer contract or contract term with any payer;

(4) Making any recommendation to competing physicians about any actual or proposed payer contract or contract term or whether to accept or reject any such payer contract or contract term;

(5) Communicating any competitively sensitive information to or in the presence of, competing physicians;

(6) Communicating to competing physicians any subjective opinion or

subjective analysis, evaluation, or assessment about competitively sensitive information;

(7) Precluding or discouraging any competing physicians from exercising his, her, or their own independent business judgment in determining whether to negotiate, contract, or deal directly with any payer; and

(8) Acting as a messenger for any competing physicians unless:

(a) Defendant informs each participating physician of any payer's decision not to communicate or to discontinue communicating with that participating physician through defendant;

(b) Defendant communicates all competitively sensitive information that it receives from any payer separately to each participating physician designated by the payer;

(c) Defendant obtains individually from each participating physician any competitively sensitive information that it communicates to any payer;

(d) Defendant does not communicate any competitively sensitive information obtained from any participating physician to anyone other than to payers designated by the participating physician;

(e) Defendant does not violate any of the provisions of Paragraph IV(A)(1)–(7) of this Final Judgment;

(f) For five (5) years from the date of entry, at the outset of its involvement with any payer as a messenger (or within 30 days of the entry of this Final Judgment for any ongoing involvement, on behalf of a participating physician, with a payer), defendant informs the payer in writing that, at any time, (i) payer is free to decline to communicate with any participating through defendant, and (ii) any participating physician is free to communicate with the payer individually without defendant's involvement;

(g) For five (5) years from the date of entry, when first designated by any participating physician as a messenger (or within 30 days of the entry of this Final Judgment for any ongoing involvement on behalf of a participating physician, with a payer), defendant informs the participating physician in writing that he or she is free at any time to communicate with any payer individually without defendant's involvement;

(h) For five (5) years from the date of entry, when first designated by any participating physician as a messenger, and at the outset of its involvement with any payer as a messenger (or within 30 days of the entry of this Final Judgment for any ongoing involvement, on behalf of a participating physician, with a

payer), defendant informs the participating physician and any payer with whom it communicates as a messenger of behalf of the participating physician in writing that it cannot negotiate, collectively, for any participating physician any payer contract or contract term but can act only as a messenger; and

(i) For five (5) years from the date of entry, defendant ensures that (i) any oral communication between it and any payer or any participating physician is contemporaneously memorialized in writing or by recording sufficient to show the date, participants to, and substance of the communication and the person making the writing or recording; (ii) such memorialization or recording and any written communication between defendant and any payer or participating physician are preserved for two years; (iii) any correspondence containing competitively sensitive information is addressed individually to each participating physician; and (iv) no correspondence between defendant and a payer that includes the competitively sensitive information of a physician is sent to any other competing physician.

(B) The defendant's member physicians, who participate in any messenger or any other arrangement provided by defendant, are enjoined from directly or indirectly:

(1) Participating in, encouraging, or facilitating any agreement or understanding among competing physicians about any competitively sensitive information;

(2) Participating in, encouraging, or facilitating any agreement or understanding among competing physicians about using a messenger;

(3) Communicating or facilitating the communication of any competitively sensitive information to, or in the presence of, competing physicians; and

(4) Participating in, encouraging, or facilitating any agreement or understanding among any competing physicians that any of defendant's physician members will deal with a payer only through a messenger or other agent or representative.

V. Permitted Conduct

(A) Subject to the provisions of Section IV of this Final Judgment;

(1) At a participating physician's request, defendant may communicate to the participating physician accurate, factual, and objective information about a proposed payer contract offer or contract terms, including, if requested, objective comparisons with terms to that participating physician by other payer;

(2) Defendant may engage in activities reasonably necessary to facilitate lawful

activities by physician network joint ventures and multi-provider networks as those terms are used in Statements 8 and 9 of the 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13.153 ("Health Care Policy Statements") and in activities that are lawful under Statement 6 of the Health Care Policy Statement; and

(3) Defendant may objectively review and analyze terms and conditions of any proposed or actual payer contract that do not constitute competitively sensitive information and may convey or publish the results of such review and analysis to its members in a manner that does not constitute a recommendation or suggestion as to whether any term or condition of the payer contract should be accepted or rejected.

(B) Nothing in this Final Judgment shall prohibit defendant, or any one or more of its members from:

(1) Engaging or participating in lawful union organizational efforts and activities;

(2) Advocating or discussing, in accordance with the doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and their progeny, legislative, judicial, or regulatory actions, or other governmental policies or actions; and

(3) Exercising rights protected by the National Labor Relations Act or any state collective bargaining laws.

(C) Nothing in this Final Judgment shall prohibit

(1) Any of defendant's members from engaging solely with other members or employees of such member's bona fide solo practice or practice group in activities otherwise prohibited herein; and

(2) Any physician member of defendant (or the bona fide practice group that employs such physician), acting along in the exercise of his, her or its own independent business judgment, from choosing the payer or payers with which to contract, and/or refusing to enter into discussion or negotiations with any payer.

(D) Nothing in this Final Judgment shall prohibit or impair the right of defendant (or any affiliate thereof) as a labor organization from communicating with other labor organizations concerning the identity of payers who are considered pro- or anti-union, provided such activity is consistent with § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. 158(b)(4), and

to the extent it does not constitute a secondary boycott.

VI. Compliance Program

Defendant shall maintain an antitrust compliance program, which shall include:

(A) Distributing within 60 days from the entry of this Final Judgment.

(1) A copy of the Final Judgment and Competitive Impact Statement to all of the defendant's officers, directors, employees, agents, and representatives, who provide, or supervise the provision of, services to competing physicians, and to all existing orthopedic surgeon members practicing in Delaware; Connecticut; the greater Dayton, Ohio area, including Montgomery County; and the greater Tampa, Florida area, including Hillsborough, Pinellas, and Pasco Counties; and

(2) A copy of the Protocols to all of defendant's physician members who are in private practice and not part of a recognized or certified bargaining unit;

(B) Distributing in a timely manner, (1) A copy of the Final Judgment and Competitive Impact Statement to any person who succeeds to a position with the Federation, as described in Paragraph VI(A)(1);

(2) A copy of the Protocols to any physician who is in private practice and not part of a recognized or certified bargaining unit and who becomes a Federation member;

(C) Holding an annual seminar explaining to all of defendant's officers, directors, employees, agents, and representatives who provide, or supervise the provision of, services to competing physicians, the antitrust principles applicable to their work, the restrictions contained in this Final Judgment, and the implications of violating the Final Judgment;

(D) Maintaining an internal mechanism by which questions from any of defendant's officers, directors, employees, agents, and representatives about the application of the antitrust laws to the representation of competing physicians, whether as a messenger or as some other representative, can be answered by counsel as the need arises;

(E) Obtaining, within 120 days from the entry of this Final Judgment, and retaining for the duration of this Final Judgment, a certificate from:

(1) Each of defendant's officers, directors, employees, agents, and representatives, who provide, or supervise the provision of, services to competing physicians, and from each of defendant's physician members who receives, pursuant to Paragraph VI(A)(1), a copy of the Final Judgment and Competitive Impact Statement, that

he or she has received, read, and understands this Final Judgment, and that he or she has been advised and understands that he or she must comply with the Final Judgment and may be held in civil or criminal contempt for failing to do so;

(2) Each of defendant's physician members who is in private practice and not part of a recognized or certified bargaining unit and who receives, pursuant to Paragraph VI(A)(2), a copy of the Protocols, that he or she has received, read, and understands the Protocols;

(F) Obtaining, within 60 days following distribution, pursuant to Paragraph VI(B), and retaining for the duration of this Final Judgment, a certificate from:

(1) Each person who succeeds to a position with the Federation as described in Paragraph VI(A)(1), that he or she has received, read, and understands this Final Judgment, and that he or she has been advised and understands that he or she must comply with the Final Judgment and may be held in civil or criminal contempt for failing to do so; and

(2) Any physician who is in private practice and not part of a recognized or certified bargaining unit and who becomes a member, that he or she has received, read, and understands the Protocols; and

(G) Maintaining for inspection by plaintiff a record of recipients to whom the Final Judgment, Competitive Impact Statement, or Protocols have been distributed and from whom written certifications pursuant to Paragraph VI(E) or (F), have been received.

VII. Certification

(A) Within 75 days after entry of this Final Judgment defendant shall certify to plaintiff that it has distributed the Final Judgment Competitive Impact Statement and Protocols as required by Paragraph VI(A).

(B) For a period of ten years following the date of entry of this Final Judgment, defendant shall certify annually on the anniversary date of the entry of this Final Judgment to plaintiff that it has complied with the provisions of this Final Judgment.

VIII. Plaintiff's Access

(A) For the purposes of determining or securing compliance with this Final Judgment or determining whether this Final Judgment should be modified or terminated, and subject to any legally recognized privilege, authorized representatives of the Antitrust Division of the United States Department of Justice, shall upon written request of a

duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to defendant, be permitted.

(1) Access during regular business hours to inspect and copy all records and documents in the possession, custody, or control of defendant, which may have counsel present, relating to any matters contained in this Final Judgment;

(2) To interview defendant's officers, directors, employees, agents, and representatives, who may have individual counsel present, concerning such matters; and

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

(B) The defendant shall have the right to be represented by counsel in any proceeding under this Section.

(C) No information or documents obtained by the means provided in this Section shall be divulged by plaintiff to any person other than duly authorized representatives of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If, at the time information or documents are furnished by defendant to plaintiff, defendant represents and identifies, in writing, the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendant marks each pertinent page of such material, "subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days' notice shall be given by plaintiff to defendant prior to divulging such material in any legal proceeding (other than a grant jury proceeding) to which defendant is not a party.

(E) The provisions of Paragraph VIII(A) do not apply to any Federation member or to any member's group practice.

IX. Jurisdiction Retained

(A) This Court retains jurisdiction to enable any party to this Final Judgment, but no other person, 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.

(B) If federal or state legislation enacted after the entry of this Final Judgment permits conduct prohibited by this Final Judgment, defendant may move for and plaintiff will reasonably consider an appropriate modification of this Final Judgment.

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.

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

United States District Judge

Competitive Impact Statement

Pursuant to section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. 16(b)–(h), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On August 12, 1998, the United States filed a civil antitrust Complaint alleging that the defendant, Federation of Physicians and Dentists, Inc. ("Federation"), restrained competition in violation of section 1 of the Sherman Act, 15 U.S.C. 1.

The Complaint alleged that the Federation coordinated an understanding among certain members—competing Delaware orthopedic surgeons in private practice—that they would seek to negotiate exclusively through the Federation to oppose Blue Cross and Blue Shield of Delaware's ("Blue Cross") proposed reduction in fees and to inhibit other health care insurers in Delaware from reducing the fees paid to these surgeons.

The Complaint seeks injunctive relief to enjoin continuance and prevent recurrence of the violation. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce its provisions and to punish violations thereof.

II. Practices Giving Rise to the Alleged Violation

A. Background

During the period of the alleged violation, four major health care insurers operated in Delaware. Of these four, Blue Cross was the largest, covering nearly 200,000 Delaware residents. All of the insurers had formed

“networks” of participating providers, contracting with hospitals and physicians to provide medical care to their subscribers. To increase or retain patient volume, participating providers agreed to accept the fees paid by an insurer as full payment (plus any applicable deductible amount or co-payment paid by the patient) for their services. To make their networks marketable to Delaware employers and their employees, insurers needed to include a number of the orthopedic surgeons who practiced in various areas in Delaware as participating providers.

From late 1996 through early 1998, approximately 47 orthopedic surgeons were actively engaged in private practice in Delaware; most belonged to competing independent practice groups. Twenty-six practiced in New Castle County, including 20 who belonged to the County’s three major orthopedic practice groups. The remaining surgeons practiced in “downstate” Delaware communities. Prior to the violation alleged in the Complaint, all 47 Delaware orthopedic surgeons were participating providers in Blue Cross’s provider network.

The Federation is a labor organization with its headquarters in Tallahassee, Florida. The Federation has traditionally acted, in employment contract negotiations, as a collective bargaining agent under federal and state labor law for physicians who are employees of public hospitals or other health care entities. For several years, however, the Federation has recruited economically independent physicians in private practice in many states to encourage these independent physicians to use the Federation in negotiating their fees and other terms in their contracts with health care insurers.

B. Illegal Agreement To Negotiate With Blue Cross Exclusively Through the Federation

The Federation and its Delaware orthopedic surgeon members conspired to restrain competition in the sale of orthopedic physicians services in various areas of Delaware. This conspiracy developed in the fall of 1996 when the Federation began recruiting orthopedic surgeons in Delaware, touting itself as a vehicle for increasing their bargaining leverage with insurers in fee negotiations. During 1997, the Federation succeeded in recruiting nearly all of the orthopedic surgeons in private practice in Delaware.

In August 1997, Blue Cross notified all of its network physicians, including orthopedic physicians, of a planned fee reduction. By this action, Blue Cross sought to set the fees for Delaware

orthopedic surgeons at levels closer to those paid to orthopedic surgeons in nearby areas, such as metropolitan Philadelphia. To resist Blue Cross’s proposed fee reductions, the Federation and its orthopedic-surgeon members reached an understanding that Federation members would negotiate fees with Blue Cross solely through the Federation’s executive director John “Jack” Seddon.

During the fall of 1997 and continuing through early 1998, the Federation and its Delaware orthopedic-surgeon members coordinated efforts to ensure a unified response to Blue Cross’s proposed fee reduction. Acting on the advice of one member, nearly all Federation members designated Jack Seddon to represent them in fee negotiations with Blue Cross. Mr. Seddon subsequently recommended that Federation members should reject Blue Cross’s fee reduction, and he informed Federation members that other Federation members were simultaneously receiving the same recommendation.

Thereafter, Mr. Seddon and others, acting on behalf of themselves and the Federation, instructed Federation members how to sustain their coordinated negotiating position with Blue Cross. In doing so, they impressed upon members the importance of jointly resisting Blue Cross’s fee proposal by demanding that Blue Cross deal exclusively with them through the Federation. Federation members carried out Mr. Seddon’s recommendations, ultimately submitting contract termination notices when Blue Cross refused to accede to their demand that it negotiate with them through Mr. Seddon. Confronted with this concerted resistance by Federation members, Blue Cross modified, but refused to rescind, its proposed fee reduction.

C. Improper Use of the “Messenger Model” by the Federation and Its Members

In establishing their illegal agreement, the Federation and its members claimed that they were acting as a legitimate “third-party messenger,” as described in Statements 8 and 9 of the Department of Justice and Federal Trade Commission *Statements of Antitrust Enforcement Policy in Healthcare*, 4 Trade Reg. Rep. (CCH) ¶13,153 at 20.831 (August 28, 1996) (“Health Care Policy Statements”). The conduct of the Federation and its members, however, failed to conform to a legitimate messenger model, which may facilitate contracting between providers and payers. A legitimate messenger arrangement, however, may not

collectively negotiate for providers, enhance their bargaining power, organize a refusal to deal, or facilitate the sharing of price and other competitively sensitive information among them.

D. Effect of the Agreement

As a result of the illegal agreement to negotiate with Blue Cross only through the Federation, virtually all Federation members had rejected Blue Cross’s proposed fee schedule and had given notice of their intent to terminate their Blue Cross contracts within 90 days. In further coordination with the Federation, members also notified patients and referring physicians of the impending termination of their participation with Blue Cross. These notices sought to prompt employers and patients to pressure Blue Cross to meet the Federation members’ price demands.

Although Blue Cross attempted to reopen negotiations with individual physicians in early 1998, Federation members uniformly rejected such efforts. Consequently, by the end of February 1998, Blue Cross had only a few participating orthopedic surgeons in its physician network, impairing its ability to offer a provider network that included an adequate number of orthopedic surgeons.

The purpose of the Federation’s and its members’ agreement was to force Blue Cross to rescind the proposed fee reduction for orthopedic surgeons and to inhibit Blue Cross’s effort to contract with those surgeons at reduced fees. In some cases, Blue Cross subscribers who needed to receive orthopedic services either paid higher prices to receive care from their former physicians as non-participating providers or had to forego or delay receiving such care.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment seeks to eliminate defendant and its members’ illegal practices in Delaware, and elsewhere, and to prevent their renewal. As discussed in further detail below, it seeks to achieve these goals by prohibiting the Federation and its members from engaging in specified activities and by requiring the Federation to establish an antitrust compliance program. The proposed Final Judgment applies to defendant’s conduct not only in Delaware but nationwide.

A. Prohibitions

In general, the proposed Final Judgment prohibits the Federation from participating, encouraging, or

facilitating any agreement or understanding between competing physicians, or from negotiating, collectively or individually, on behalf of competing physicians, about any actual or proposed payer contract or contract term. In addition, defendant is prohibited from making any recommendation to competing physicians about any actual or proposed payer contract or contract term or about whether to accept or reject any such payer contract or contract term.

The proposed Final Judgment also enjoins the Federation from communicating any competitively sensitive information to, or in the presence of, competing physicians, and from communicating to competing physicians any subjective opinion or subjective analysis, evaluation, or assessment about competitively sensitive information. It enjoins the Federation from precluding or discouraging any competing physicians from exercising their independent business judgment in determining whether to negotiate, contract, or deal directly with any payers. It also enjoins the Federation from participating in, encouraging, or facilitating any agreement or understanding between competing physicians to deal with any payer exclusively through a messenger rather than individually or through other channels.

In addition to enjoining certain conduct by the Federation, the proposed Final Judgment also prohibits certain conduct by Federation member physicians who participate in any messenger or any other arrangement provided by defendant. Defendant's members are prohibited from participating in, encouraging, or facilitating any agreement or understanding among competing physicians about: (1) Any competitively sensitive information; (2) using a messenger; or (3) requiring that a payer deal with them only through a messenger or other agent or representative. They are also prohibited from communicating or facilitating the communication of any competitively sensitive information to, or in the presence of, competing physicians.

B. Permitted Conduct

During the first five years that the Final Judgment is in effect, the proposed Final Judgment permits the Federation to act as a messenger for competing physicians only under certain enumerated conditions.¹ For that five-

year period, the Federation is enjoined from acting as a messenger for any competing physicians unless it informs the payer and participating physicians in writing that the payer may decline to communicate through the Federation and that the payer and participating physicians may communicate with each other without defendant's involvement. During that period, the Final Judgment also requires the Federation, when acting as a messenger to inform payers and its member physicians in writing that it cannot negotiate, collectively or individually, for any such physician about any contract or contract term.

Subject to other provisions of the Final Judgment, at a participating physician's request, the Federation may communicate to the requesting physician accurate, factual, and objective information about a proposed payer contract offer or contract terms, including, if requested, objective comparisons with terms offered to that physician by other payers. If conducted appropriately, these activities will likely facilitate, rather than impair, competition.

The Federation may also engage in activities reasonably necessary to facilitate lawful activities by physician network joint ventures and multi-provider networks as those terms are used in Statements 8 and 9 of the Health Care Policy Statements and in activities involving physician participation in writing fee surveys that are lawful under Statement 6 of the Health Care Policy Statements. In addition, Federation physician members may continue to engage independently, or solely with other members or employees of such member's bona fide solo practice or practice groups, in activities otherwise prohibited by the Final Judgment, such as choosing the payer or payers with which to contract, and/or refusing to enter into discussion or negotiations with any payer.

Under the proposed Final Judgment, the Federation may also continue to engage in lawful union organizational efforts and activities. The proposed Final Judgment also does not limit the

contract term with any payer, on behalf of any orthopedic surgeons practicing in Delaware, except with a payer that has, in writing, authorized such activity and if the activity otherwise complies with the Final Judgment. In addition, defendant has agreed by stipulation to notify, in writing within 30 days from the filing of the Stipulation, each of its orthopedic surgeon members in Delaware and each payer doing business in Delaware with which defendant has communicated on behalf of any orthopedic surgeon, that defendant is prohibited during 2001 from acting as a messenger or negotiating on behalf of any orthopedic surgeons practicing in Delaware unless the payer has, in writing, authorized such activity, and the activity otherwise complies with the Final Judgment.

Federation's rights to petition in accordance with doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny.

C. Compliance Program

The proposed Final Judgment requires the Federation to maintain an antitrust compliance program to help prevent recurrence of the actions that facilitated the antitrust violation alleged in the Complaint. As part of the compliance program, the Federation must distribute a copy of the proposed Final Judgment and Competitive Impact Statement to all of its present and succeeding personnel, including officers, directors, employees, agents, representatives who provide or supervise services to competing physicians and to all existing orthopedic-surgeon members practicing in Delaware. In addition, the Federation has agreed to distribute copies of the Final Judgment and Competitive Impact Statement to competing physicians and orthopedic surgeon members practicing in Connecticut: the greater Dayton, Ohio area, including Montgomery County; and the greater Tampa, Florida area, including Hillsborough, Pinellas, and Pasco Counties, areas where the United States has pending investigations involving the Federation. For all other present and future physician members, the Federation must distribute a copy of its Protocols, which are a set of written guidelines developed and adopted by defendant for dissemination to its members that have been approved by plaintiff for the limited purpose of assuring that defendant's existing and future members who do not receive a copy of this Final Judgment receive adequate notice of its terms. The Federation must also obtain from each person who receives the proposed Final Judgment and Competitive Impact Statement a certification that he or she has been advised and understands that he or she must comply with the Final Judgment; and similarly, the Federation must obtain from each person who receives a copy of the Protocols, a certification that he or she has received, read, and understands the Protocols.

Further, the Federation must also hold an annual seminar explaining to its officers, directors, employees, agents, and representatives who provide or supervise services to competing physicians, the applicable antitrust principles, the restrictions contained in the Final Judgment, and the implications of violating the Final Judgment. The proposed Final Judgment further requires the Federation to maintain an internal mechanism whereby questions about the application

¹ By Stipulation, defendant has agreed, until the end of 2001, not to act as a messenger, nor to negotiate any actual or proposed payer contract or

of the antitrust laws to the representation of competing physicians can be answered by counsel.

To facilitate monitoring of compliance with the Final Judgment, the Federation must make available, upon request, records and documents in their possession, custody, or control relating to matters contained in the Final Judgment. The Federation must also make its personnel available for interviews regarding such matters. In addition, the Federation must prepare written reports relating to the Final Judgment upon request.

D. Anticipated Effects of the Proposed Final Judgment on Competition

The proposed Final Judgment prohibits the Federation from coordinating, and its members from participating in, any joint action in regard to a payer contract or contract term, including any boycott of an insurer or other payer. Consequently, a payer's ability to maintain a comprehensive panel of competing physicians should no longer be hampered by the Federation and its members, and payers' subscribers should benefit from free and open competition in the purchase of physician services, including orthopedic surgical services, in Delaware and elsewhere.

By appropriate restrictions on the conduct of the Federation and its members, the relief imposed by the proposed Final Judgment will eliminate a substantial restraint on price competition among competing orthopedic surgeons in Delaware and elsewhere. It will do so by prohibiting the Federation from negotiating on behalf of its member physicians or acting anticompetitively in concert toward Blue Cross or any other insurer.

The proposed Final Judgment will thus restore the benefits of free and open competition to the provision of orthopedic physician services in Delaware and enjoin continuation or prevent replication of similar violations in areas outside Delaware. Unrestrained competition among orthopedic surgeons and other physicians who contract to participate in insurers' networks should benefit insurers and their subscribers.

IV. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendant Federation. The United States is satisfied, however, that the requirements and prohibitions contained in the proposed Final Judgment will restore and preserve

viable competition for the provision of physician services among competing Federation members. To this end, the United States expects that the proposed relief, once implemented by the Court, will likely prevent the Federation from engaging in conduct that has significant adverse competitive effects.

The Department also considered a final judgment that would have flatly prohibited the Federation from acting as a third-party messenger nationwide. Other prohibitions considered were limitations on the areas and specialties for which the Federation would be allowed to function as a third-party messenger. As part of the process of compromise by both parties during settlement discussions, the Department ultimately did not insist on these alternative forms of relief following consideration of litigation risk, the likelihood of obtaining such relief through litigation, and the effectiveness of the relief obtained.

V. Remedies Available to Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees.

Entry of the proposed Final Judgment will neither impair nor assist in the bringing of such actions. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the Final Judgment has no prima facie effect in any subsequent lawsuits that may be brought against the Federation in this matter.

VI. Procedures Available for Modification of the Proposed Final Judgment

The parties have stipulated that the proposed Final Judgment may be entered by this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon this Court's determination that the proposed Final Judgment is in the public interest.

As provided by sections 2(b) and (d) of the APPA, 15 U.S.C. § 16(b) and (d), any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of publication of this Competitive Impact Statement in the **Federal Register**.

The United States will evaluate and respond to the comments. All comments

will be given due consideration by the Department of Justice, which remains free to withdrawn its consent to the Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Gail Kursh, Chief, Health Care Task Force, Antitrust Division, U.S. Department of Justice, 325 Seventh St., NW., Rm. 404, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for modification, interpretation, or enforcement of the Final Judgment. The proposed Final Judgment would expire ten (10) years from the date of its entry.

VII. Determinative Documents

No materials and documents of the type described in section 2(b) of the APPA were considered in formulating the proposed Final Judgment. Consequently, none are being filed with this Competitive Impact Statement.

Dated: October 22, 2001.

Respectfully submitted,

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

Agency Information Collection Activities: Comment Request

ACTION: Request OMB Emergency Approval; Application for T Nonimmigrant Status; Application for Immediate Family Member of T-1 Recipient; and Declaration of Law Enforcement Officer for Victim of Trafficking in Persons.

The Department of Justice, Immigration and Naturalization Service (INS) has submitted an emergency information collection request (ICR) utilizing emergency review procedures, to the Office of Management and Budget (OMB) for review and clearance in accordance with 5 CFR 1320. The INS