

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

_____)
)
In the Matter of)
) Docket No. C-
SOUTHEASTERN NEW MEXICO)
PHYSICIANS IPA, INC.,)
a corporation,)
)
and)
)
BARBARA GOMEZ and)
LONNIE RAY,)
individually.)
_____)

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Southeastern New Mexico Physicians IPA, Inc. (“SENM”), Barbara Gomez, and Lonnie Ray, hereinafter referred to as “Respondents,” have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns horizontal agreements among competing physicians in the Roswell, New Mexico, area, to fix prices charged to health care plans and other third-party payors (“payors”), and to refuse to deal with payors except on collectively agreed upon terms. These physicians constitute most of the physicians in the Roswell area. They orchestrated these price-fixing agreements and refusals to deal through SENM and its non-physician employees, Barbara Gomez and Lonnie Ray, and their conduct raised the price of physician services in the Roswell area.

RESPONDENTS

2. SENM is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 500 North Main Street, Suite 618, Roswell, NM 88201.

3. Barbara Gomez and Lonnie Ray are individuals who negotiate payor contracts on behalf of SENM's physician members. Their principal address is 500 North Main Street, Suite 618, Roswell, NM 88201.

THE FTC HAS JURISDICTION OVER RESPONDENTS

4. At all times relevant to this Complaint, SENM has been engaged in the business of contracting with payors, on behalf of its physician members, for the provision of health care services to persons for a fee.

5. SENM was founded by, is controlled by, and carries on business for the pecuniary benefit of its physician members. Accordingly, SENM is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. Except to the extent that competition has been restrained as alleged herein, SENM physician members have been, and are now, in competition with each other for the provision of physician services in the Roswell area for a fee.

7. Respondents' general business practices, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

8. SENM is an independent practice association ("IPA") with approximately 68 physician members, all of whom are licensed to practice allopathic or osteopathic medicine in the State of New Mexico, and engaged in the business of providing physician services to patients in the Roswell area. Approximately 73% of the physicians who independently practice in the Roswell area are members of SENM. To be competitively marketable in the Roswell area, a payor's health insurance plan must include in its physician network a large number of primary care physicians and specialists who practice in that area.

9. Roswell is in southeastern New Mexico. The closest major cities to Roswell are El Paso, Texas, approximately 200 miles to the southwest; Lubbock, Texas, approximately 260 miles to the east; Albuquerque, the largest city in New Mexico, approximately 200 miles to the northwest; and Santa Fe, the state capital and second largest city in the state, approximately 190 miles to the northwest.

10. Physicians often contract with payors to establish the terms and conditions, including price terms, under which the physicians will render services to the payors' subscribers. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs and enable them to lower the price of insurance, and thereby result in lower medical care costs for subscribers to the payors' health insurance plans.

11. Absent agreements among competing physicians on the terms, including price, on which they will provide services to enrollees in payors' health care plans, competing physicians decide individually whether to enter into payor contracts to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

12. Medicare's Resource Based Relative Value System ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, payors in the Roswell area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fee for a particular year (*e.g.*, "110% of 2003 RBRVS").

13. Competing physicians sometimes use a "messenger" to facilitate the establishment of contracts between themselves and payors in ways that do not constitute or facilitate an unlawful agreement on prices and other competitively significant terms. Such a messenger may not, however, consistent with a competitive model, negotiate prices and other competitively significant terms on behalf of the participating physicians, or facilitate the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the messenger's opinion on the appropriateness, or lack thereof, of the offer.

RESPONDENTS NEGOTIATED PAYOR CONTRACTS FOR SENM PHYSICIAN MEMBERS

14. SENM's physician members each pay \$500 annual membership dues. A physician member becomes eligible to participate in SENM's contracts by entering into a "Physician Agreement" with the organization. SENM's representatives, Respondents Gomez and Ray, negotiate one single-signature contract with each payor, signed by SENM's president, on behalf of all of SENM's physician members. The contracts include a uniform fee schedule that applies to the entire general membership.

15. SENM's Managed Care Contract Committee ("Contract Committee") is responsible for evaluating, on behalf of SENM's physician members, contracts and contracting opportunities with payors. According to one SENM document, the Contract Committee's goal is to convince members "to agree . . . to handle managed care as a group." The Contract Committee reports to SENM's Board of Directors ("SENM Board").

16. Another Contract Committee function is to “arrange for external negotiation resources.” SENM has contracted with payors through Ms. Gomez and Ms. Ray. Ms. Gomez and Ms. Ray were once employees of a consulting firm that negotiated contracts for SENM. After that firm exited the business in 2001, Ms. Gomez and Ms. Ray became SENM employees and continued to negotiate payor contracts for SENM.

17. Ms. Gomez and Ms. Ray, with the assistance of the SENM Board and Contract Committee, developed and periodically updated an IPA fee schedule that, according to Contract Committee minutes, was “used to negotiate contracts” with payors. The IPA fee schedule – which the SENM Board must approve – lists the minimum prices at which SENM will accept a payor contract offer.

18. In developing the IPA fee schedule, SENM surveyed its members on the minimum price levels they would accept. To aid physicians in making this decision, SENM informed them of the prices they were paid for their most common medical procedures under preexisting, SENM-negotiated payor contracts. All such contracts contained prices that the physicians had fixed and jointly demanded through SENM. Many SENM physician members used these fixed prices to determine the minimum price levels they would accept through SENM negotiations with payors.

19. Ms. Ray reported to the Contract Committee that the SENM physicians “expected fees that were far beyond any amount that most payors would be willing to accept.” According to Contract Committee minutes, members nonetheless “agreed that she should make every effort to obtain the desired reimbursement or as close as possible.”

20. Ms. Gomez and Ms. Ray negotiate with payors on the prices and other contract terms pursuant to which SENM members will provide medical care to subscribers of payors’ health plans, and report to the SENM Board and Contract Committee on developments in payor negotiations. The Contract Committee must approve any negotiated contract, at which point it then submits the contract to the SENM Board for approval. The SENM Board, once it approves a contract, presents the contract to the individual members and recommends that they approve it. If a majority of the general membership approves the contract, then SENM’s president signs the contract on the organization’s behalf. Thereafter, SENM’s members decide whether to opt into or out of the contract. Members routinely opted into contracts jointly negotiated on their behalf in this manner.

21. SENM’s physician members agreed with each other and with SENM that they would not deal individually, or through any other organization, with any payor with which SENM was attempting to negotiate, or had signed, a contract jointly on behalf of SENM’s members. SENM’s members often refused payor offers made to them individually, hindering payors’ efforts to establish competitive physician networks in the Roswell area. Due to SENM’s large share of Roswell area physicians, payors have repeatedly acceded to Respondents’ price demands for all SENM members.

22. Reflecting SENM's mission as a contracting entity for its members' joint benefit, minutes from a SENM general membership meeting, under the heading "President's Report," state: "Solidarity of IPA – Reinforced the importance that the bargaining strength of the overall organization rests with the solidarity of its membership." When a payor attempted to negotiate individual contracts with SENM's physician members, it was repeatedly rebuffed.

23. In a November 1998 letter to one payor, a SENM representative stated that SENM members had agreed on prices they should receive for physician services, would forward that fee schedule to the payor the next day, and would not deal with that payor unless it "meets or exceeds" those prices. The letter added that SENM would not accept a contract offer "if any single fee is less than what has been approved by the general membership."

24. Prices for physician services in New Mexico typically range from approximately 120% to 140% of RBRVS, for most procedures. Through collective negotiations and threatened refusals to deal, Respondent SENM has contracted for much higher prices than the New Mexico average, including prices as high as 250% of RBRVS for some procedures.

HEALTHSMART PREFERRED CARE

25. Healthsmart Preferred Care, Inc. ("Healthsmart"), is a health plan doing business in the Roswell area. In July 1997, Healthsmart and SENM, on its members' collective behalf, first entered into a contract. In March 1998, SENM demanded to negotiate a new contract. During these negotiations, SENM, through Ms. Gomez and Ms. Ray, collectively demanded higher fees from Healthsmart. SENM insisted on fees that were, on average, more than 15% above Healthsmart's fee schedule with comparable IPAs in the region.

26. By April 1999, Healthsmart and SENM had not agreed on new price terms. Ms. Ray, on behalf of SENM, terminated contract discussions with Healthsmart. SENM's refusal to deal forced Healthsmart to stop doing business in the Roswell area, because it had no other alternatives for a viable physician network in the area.

27. In 2001, Healthsmart and SENM resumed contract negotiations. Healthsmart, in response to SENM's consistently high price demands, proposed prices well above 130% of RBRVS, but SENM responded that those rates still were not high enough. Healthsmart approached individual SENM physicians directly, to try to establish a provider network without including SENM, but the physicians repeatedly told the payor that they would deal only through SENM. In December 2001, Healthsmart, having no reasonable alternative for a marketable health plan in the Roswell area, came to terms with SENM by meeting its price demands. The contract's prices were, depending on procedure, as much as 50% or more above Healthsmart's offer, and believed to be the highest in the region.

PRESBYTERIAN HEALTH PLAN

28. Presbyterian Health Plan, Inc. ("Presbyterian"), is a payor doing business in the

Roswell area. In 1996, Presbyterian and SENM entered into the first contract between them. Under the contract, Presbyterian met SENM's call for prices that were substantially higher than New Mexico averages – reaching as high as 200% of current-year RBRVS for some procedures. In May 2001, SENM started to negotiate, collectively on its members' behalf, with Presbyterian over price and other terms in a new contract. Presbyterian proposed prices ranging from approximately 100% to 145% of 2001 RBRVS. In August of that year, Ms. Gomez, on behalf of SENM and its physician members, rejected Presbyterian's offer and told the payor that SENM insisted on prices in the range of 150% to 225% of RBRVS. In November 2001, Presbyterian agreed to prices that closely matched Ms. Gomez's and SENM's terms, and SENM signed a contract with the payor in December of that year.

BEECH STREET

29. Beech Street Corporation (“Beech Street”) is a health plan doing business in the Roswell area. In 1997, SENM entered into a contract with Beech Street, under which Beech Street agreed to pay SENM physician members according to the fee schedule that SENM developed on its members' behalf.

30. SENM and Beech Street most recently renegotiated their contract in 2001. In November 2001, Ms. Gomez transmitted to Beech Street what she characterized as SENM's “IPA fee requirement.” It contained prices for various medical procedures ranging from more than 150% to more than 220% of RBRVS. Beech Street responded that it “conducted an analysis and compared the rates to other rural areas and [felt] these rates are extremely high,” and sent a counteroffer more in line with prices in other rural areas.

31. In December 2001, Ms. Gomez rejected Beech Street's counteroffer without transmitting it to individual SENM members for their unilateral acceptance or rejection. She told Beech Street that its counteroffer was too low for many specialists, and that “[t]he IPA represents all of [its] members and [has] been known to reject a contract if a proposal is not good for the majority.” Ms. Gomez then sent to Beech Street what she called SENM's “final offer,” which contained prices nearly identical to those that Beech Street had found to be “extremely high” the previous month. In July 2002, having no reasonable alternative for a marketable health plan in the Roswell area, Beech Street agreed to contract terms containing prices closely reflecting SENM's demand, ranging from more than 140% to 200% of 2001 RBRVS.

OTHER PAYORS

32. SENM has orchestrated collective negotiations with other payors that do business, or attempted to do business, in the Roswell area, including Blue Cross and Blue Shield of New Mexico, Lovelace Sandia Health System, and Omni Networks, Inc. Ms. Gomez and Ms. Ray, with the assistance of the SENM Board and Contract Committee, negotiated with these payors on price, making proposals and counterproposals, as well as accepting or rejecting offers without transmitting them to physician members for their individual acceptance or rejection. SENM's members collectively accepted or rejected these payor contracts, and refused to deal

with these payors individually. Due to SENM's dominant market position in the Roswell area, such coercive tactics have been highly successful. SENM has been able to extract high prices from these payors relative to what the payors pay other physicians in New Mexico.

RESPONDENTS' PRICE-FIXING IS NOT JUSTIFIED

33. Respondents' joint negotiation of fees and other competitively significant contract terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

RESPONDENTS' ACTIONS HAVE HAD SUBSTANTIAL ANTICOMPETITIVE EFFECTS

34. Respondents' actions described in Paragraphs 14 through 32 of this Complaint have had, or have tended to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Roswell area in the following ways, among others:

1. price and other forms of competition among physician members of SENM were unreasonably restrained;
2. prices for physician services were increased; and
3. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

35. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this _____ day of _____, 2004, issues its Complaint against Respondents SENM, Barbara Gomez, and Lonnie Ray.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED