

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT
*In the Matter of M. Catherine Higgins, File No. 0510252***

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with M. Catherine Higgins (“Ms. Higgins”), the executive director of the Boulder Valley Individual Practice Association (“BVIPA”). The agreement settles charges that Ms. Higgins violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, among other things, orchestrating and implementing agreements among competing physician members of BVIPA to fix the prices at which BVIPA physicians contract with health plans.

This matter relates to the Commission’s prior action against BVIPA. In December 2008, the Commission accepted for public comment a proposed consent order to settle charges that BVIPA orchestrated and carried out illegal agreements to set prices and other terms that BVIPA physicians would accept from health plans. The accompanying complaint against BVIPA alleged that the IPA’s executive director, Ms. Higgins, played a key role in the challenged conduct; the complaint did not, however, name her as a respondent. The order against BVIPA, by its terms, applies to Ms. Higgins’ conduct as the executive director of BVIPA but does not apply to her actions in her individual capacity.

Based on Ms. Higgins’ conduct after BVIPA signed its consent order, the Commission has reason to believe that Ms. Higgins may attempt to evade the order’s prohibitions by acting in her individual capacity. There is evidence that, shortly after BVIPA signed the consent agreement, Ms. Higgins represented physicians in her individual capacity. As alleged in today’s complaint (“Complaint”), Ms. Higgins told an insurer that she could continue to negotiate fees on behalf of BVIPA physicians, declaring:

I could do this as an individual, not with my BVIPA hat, but as an individual. I’m not named in the settlement. There’s nothing that precludes me from doing my own work. I could just do it outside.

Absent an order against Ms. Higgins in her individual capacity, there is a substantial danger that she will continue to orchestrate unlawful price fixing agreements among physicians in the Boulder County area and that consumers will continue to suffer the adverse effects of her conduct.¹

The proposed consent order (“Proposed Order”) has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period

¹The U.S. Supreme Court has clearly held that it is appropriate for the Commission to name individuals, as well as organizations, where evidence exists that an individual otherwise would be likely to “evade orders by the Commission.” Fed. Trade Comm’n v. Standard Education Soc., 302 U.S. 112, 119 (1937).

will become part of the public record. After 30 days, the Commission will review the agreement and the comments received and decide whether to withdraw from the agreement or make the Proposed Order final.

The purpose of this analysis is to facilitate public comment on the Proposed Order. The analysis is not intended to constitute an official interpretation of the agreement and Proposed Order or to modify their terms in any way. Further, the Proposed Order has been entered into for settlement purposes only and does not constitute an admission by Ms. Higgins that she violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the Complaint are summarized below.

Ms. Higgins is the executive director of BVIPA, an association of approximately 365 independent primary care and specialist physicians in solo or small group practices in the Boulder County area that contracts with payers on behalf of its physician members. As part of Ms. Higgins' duties, BVIPA's Board granted her blanket authority to negotiate contracts with payers on behalf of BVIPA and its physician members, including the authority to enter into contracts without obtaining approval from the BVIPA Board, Finance Committee, or any of its members.

The Complaint challenges Ms. Higgins' conduct starting in 2001, when she began negotiating the prices and other terms at which BVIPA's otherwise competing physicians would deal with payers. From approximately 2001 through 2006, Ms. Higgins negotiated with numerous payers on behalf of BVIPA physicians and successfully extracted higher fees from them. In order to maximize BVIPA's bargaining leverage, Ms. Higgins exhorted BVIPA members to contract jointly through BVIPA, rather than individually. For example, in a 2002 BVIPA newsletter, Ms. Higgins reminded BVIPA members that "our strength will lie in contracting together, not separately." In reporting that BVIPA had signed a new contract at a favorable rate, Ms. Higgins noted that "[t]his is due to your support of our efforts and [the payer's] inability to get providers to sign individual contracts. Thank you for your support!!"

Beginning in late in 2007 and continuing until early 2009, Ms. Higgins, as BVIPA's executive director, negotiated and consulted for some of BVIPA's physician members who sought to contract individually with a payer, thereby facilitating the exchange of rate information among them, and facilitating the coordination of rates during the individual negotiations.

As a result of Ms. Higgins' collective negotiations of physician fees for BVIPA members, payers contracted with and reimbursed BVIPA members for physician services in Boulder County at rates approximately 15 to 27 percentage points higher than those paid in individual contracts with non-member physicians in Boulder County.

In 2004, Ms. Higgins drafted and gave a "white paper" to payers at the start of a negotiation, which purported to offer three options for contracting with BVIPA members: a

single-signature contract that “delivered the entire BVIPA network”; a “modified messenger model” that “may or may not deliver our entire network”; and direct contracting with individual members outside the IPA. BVIPA’s contracting practices and Ms. Higgins’ conduct, however, did not change. BVIPA still sent proposals to BVIPA’s individual members for review only after Ms. Higgins deemed the prices acceptable. Further, many BVIPA physicians refused to discuss contracting on an individual basis, instead, referring the payers to BVIPA, and others offered to negotiate individual contracts with Ms. Higgins representing them in their individual capacity.

Ms. Higgins’ conduct had the effect of unreasonably restraining trade and hindering competition in the provision of physician services by unreasonably restraining price and other forms of competition among physicians; increasing prices for physician services; and depriving health plans, employers, and individual consumers of the benefits of competition among physicians. BVIPA members did not engage in any efficiency-enhancing integration of their practices sufficient to justify Ms. Higgins’ challenged conduct. Accordingly, the Complaint alleges that Ms. Higgins violated Section 5 of the FTC Act.

The Proposed Consent Order

The Proposed Order is designed to remedy the illegal conduct charged in the Complaint and to prevent its recurrence. To preserve the ability to engage in potentially procompetitive conduct while ensuring that physicians reach contracting decisions independently, the Proposed Order also includes certain “fencing-in” limitations on Ms. Higgins’ activities. The Proposed Order is otherwise similar to prior consent orders the Commission has issued to settle charges that individuals, as well as physician groups, engaged in unlawful agreements to raise the fees that physician groups receive from health plans.

The Proposed Order’s specific provisions are as follows:

Paragraph II.A prohibits Ms. Higgins from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician’s behalf; (2) to refuse to deal, or threaten to refuse to deal, with payers in furtherance of any conduct or agreement prohibited by any other provision of Paragraph II; (3) on any terms on which a physician is willing to deal with any payer; or, (4) not to deal individually with any payer, or not to deal with any payer other than through BVIPA.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Ms. Higgins from facilitating exchanges of information between physicians concerning any physician’s willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D. proscribes Ms. Higgins from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing collective bargaining on behalf of providers with health care purchasers, Paragraph II excludes certain kinds of agreements from its

prohibitions. Thus, Ms. Higgins is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a “Qualified Risk-Sharing Joint Arrangement” or a “Qualified Clinically-Integrated Joint Arrangement.” The arrangement, however, must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

As defined in the Proposed Order, a “Qualified Risk-Sharing Joint Arrangement” possesses two characteristics. First, all physician participants must share substantial financial risks through the arrangement, such that the arrangement creates incentives for the physician participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A “Qualified Clinically-Integrated Joint Arrangement,” on the other hand, need not involve any sharing of financial risk. Instead, as defined in the Proposed Order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning prices or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III, one of the fencing-in prohibitions, limits for one year Ms. Higgins’ activities as an agent or messenger with regard to payer contracts. Subject to the notification requirement of Paragraph V, Ms. Higgins may only receive and transmit offers and responses to those offers between payers and physicians. Paragraph VI sets out the information necessary to make the notification complete.

Paragraph IV, another fencing-in provision, prohibits Ms. Higgins for two years from negotiating on behalf of or advising any physician member of BVIPA with regard to any payer contract offer or term. Both Paragraphs III and Paragraph IV exclude from their prohibitions, however, information Ms. Higgins may provide regarding whether any contract for proposed physician services includes terms required by Colorado state law. Paragraph IV further excludes from its prohibition certain negotiations should Ms. Higgins cease to be employed by BVIPA.

Paragraph V requires Ms. Higgins to notify the Commission, for one year before acting as a limited messenger, and for an additional two years before acting as a messenger or agent, with payers regarding contracts. Paragraph VI sets out the information necessary to make the notification complete.

Paragraph VII requires Ms. Higgins for three years to notify the Commission before contracting with health plans on behalf of either a Qualified Risk-Sharing or a Qualified Clinically-Integrated Joint Arrangement. Paragraph VIII sets out the information necessary to satisfy the notification requirement.

Paragraphs IX, X, and XI impose various obligations on Ms. Higgins to report or provide access to information to the Commission to facilitate the monitoring of compliance with the Order. Finally, Paragraph XII provides that the Proposed Order will expire in 20 years.