

STATEMENT OF THE COMMISSION

In the Matter of M. Catherine Higgins

File No. 051-0252

February 5, 2010

Today, the Commission issues for public comment a consent agreement and proposed Decision and Order against M. Catherine Higgins, the executive director of Boulder Valley Individual Practice Association (BVIPA). The Commission previously accepted for public comment a consent agreement and proposed Decision and Order against BVIPA, resolving charges that BVIPA orchestrated and carried out illegal agreements to set prices and other terms that BVIPA physician members would accept from health plans.¹ Based on events that occurred during the BVIPA public comment period, the Commission has reason to believe that an order naming Ms. Higgins is necessary. When an employee of an association, especially a senior one like Ms. Higgins, tries to evade an order against the association by acting in her individual capacity, the Commission has little choice but to seek additional relief to protect competition and health care consumers.

The proposed order against BVIPA, by its terms, covers Ms. Higgins' conduct as the executive director of BVIPA,² but does not apply to Ms. Higgins' actions in her individual capacity. There is evidence, however, that Ms. Higgins attempted to evade the BVIPA consent order shortly after it was signed by representing physicians in her individual capacity. As alleged in the draft complaint that accompanies the settlement announced today, 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.”³

¹ In the Matter of Boulder Valley Individual Practice Ass'n, FTC File No. 051-0252, *Analysis of Agreement Containing Consent Order to Aid Public Comment* (Dec. 24, 2008), available at <http://www2.ftc.gov/os/caselist/0510252/081224boulderanal.pdf>.

² See In the Matter of Boulder Valley Individual Practice Ass'n, *supra* note 1 (draft Decision and Order issued Dec. 24, 2008), ¶ I.A, available at <http://www2.ftc.gov/os/caselist/0510252/081224bouldedo.pdf> [hereinafter BVIPA Order].

³ In the Matter of M. Catherine Higgins, FTC File No. 051-0252 (draft complaint issued Feb. 5, 2010), ¶ 3, available at www.ftc.gov [hereinafter Higgins Complaint].

Based on this and other evidence discussed more fully below, we find reason to believe that, absent the Commission's order, Ms. Higgins is likely to continue to negotiate potentially unlawful agreements in her individual capacity, thus skirting an order prohibiting the same conduct by BVIPA. This alleged conduct, which likely would harm consumers and competition, requires the Commission to issue a complaint against Ms. Higgins, and also provides a sound basis for the Commission to accept a consent order against her.

In light of Commissioner Rosch's dissenting statement, we write to further explain the basis for today's Commission action.

The Commission's Decision to Issue a Complaint Against Ms. Higgins is Necessary

We respectfully disagree with Commissioner Rosch's view that the acts alleged do not justify a complaint against Ms. Higgins.

Ms. Higgins played a central role in BVIPA's negotiations with insurers. As alleged in the complaint, Ms. Higgins had "blanket authority" to negotiate and enter contracts on behalf of BVIPA's members.⁴ For a period of five years, according to the complaint, she "successfully extracted higher fees" from payers on behalf of individual competing physicians, often threatening to terminate contracts unless the insurer accepted a price increase, while reminding BVIPA members that "our strength will lie in contracting together, not separately."⁵ That conduct allegedly increased fees by 15 to 27 percentage points above the prices paid to other area doctors who negotiated individually.⁶

In December 2008, the Commission chose not to name Ms. Higgins in the BVIPA order because the order would, by its terms, cover conduct by officers, employees, and other representatives of BVIPA, including her actions as executive director.⁷ Based on Ms. Higgins' actions after the BVIPA proposed consent agreement was signed, however, the Commission has reason to believe that, absent injunctive relief against her in her individual capacity, Ms. Higgins is likely to engage in conduct that is prohibited by the BVIPA order.⁸

⁴ Higgins Complaint ¶ 19.

⁵ *Id.* ¶¶ 20, 21, 34-36.

⁶ *Id.* ¶ 25.

⁷ BVIPA Order ¶ I.A.

⁸ The 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 of the Commission." *Fed. Trade Comm'n v. Standard Education Soc.*, 302 U.S. 112, 119 (1937). Nor is today's action unprecedented. The Commission previously has named individuals and secured relief against them, including non-

There is no support for Commissioner Rosch's assertion that the Commission's decision to issue a separate complaint against Ms. Higgins is punitive. The order provisions are similar to those in other orders naming individuals. For a period of time, the respondent may act only as a limited messenger;⁹ in addition, the respondent may not represent both the IPA and, separately, individual doctors or practices.¹⁰ Especially given the evidence of Ms. Higgins' efforts to circumvent the order against BVIPA, the order against Ms. Higgins is a reasonable way to prevent future price fixing.

Nor is the Commission renegeing on any "deal" it made with BVIPA.¹¹ Rather, the proposed order announced today is a natural consequence of actions Ms. Higgins took after the BVIPA consent agreement was signed.¹² The Commission cannot – and did not – bargain away its right to secure adequate relief to protect consumers.

physician contracting agents in IPA consent orders. *See, e.g.*, White Sands Health Care System, LLC, FTC Dkt. No. C-4130 (consent order issued Jan. 11, 2005); Southeastern New Mexico Physicians IPA, Inc., FTC Dkt. No. C-4113 (consent order issued Aug. 5, 2004); The Maine Health Alliance, FTC Dkt. No. C-4095 (consent order issued Aug. 27, 2003).

⁹ Piedmont Health Alliance, Inc., FTC Dkt. No. 9314 (consent order issued Oct. 1, 2004).

¹⁰ New Century Health Quality Alliance, Inc., FTC Dkt. No. C-4169 (consent order issued Sep. 29, 2006); White Sands Health Care System, LLC, FTC Dkt. No. C-4130 (consent order issued Jan. 11, 2005); Physician Network Consulting, LLC, FTC Dkt. No. C-4094 (consent order issued Aug. 27, 2003).

¹¹ Commissioner Rosch's dissenting statement implies that the Commission's decision not to name Ms. Higgins back in December 2008 was a *quid pro quo* for BVIPA's acceptance of the proposed consent agreement. In the Matter of M. Catherine Higgins, *supra* note 3, Dissenting Statement of Commissioner J. Thomas Rosch, at 2, *available at* www.ftc.gov [hereinafter Rosch Dissent]. We disagree with Commissioner Rosch's interpretation of the facts. Moreover, BVIPA has not suggested that such an agreement ever existed. Nor has BVIPA argued that the Commission should not finalize the BVIPA consent order.

¹² Commissioner Rosch's dissenting statement suggests that Ms. Higgins may not have understood that the proposed consent agreement required immediate compliance from the time it was signed. Rosch Dissent at 2. Our decision is not based on whether Ms. Higgins thought the order was effective. Rather, the order against Ms. Higgins is justified by her belief that acting in her individual capacity would put her beyond the order's reach, even once the order was effective. Moreover, she knew or should have known, based on the action against BVIPA, that jointly negotiating on behalf of physicians was illegal.

The BVIPA Enforcement Action is Consistent with the Commission's Prior IPA Cases

Although Commissioner Rosch continues to support entering a final Decision and Order against BVIPA, he states that the BVIPA order is “not just a logical successor to other finalized decrees the Commission entered against” IPAs.¹³ We disagree; the order the Commission proposes to enter against BVIPA is no different than numerous orders the Commission has entered against other IPAs. As in a number of other cases, the Commission has alleged that BVIPA jointly negotiated prices with insurers. And, the BVIPA order, like all of the orders in those cases, bans joint negotiations except where reasonably necessary to the formation or operation of a clinically or financially integrated arrangement.¹⁴

Finally, we note three areas where we disagree, on factual and legal grounds, with the views expressed by Commissioner Rosch in his dissent. First, we disagree with Commissioner Rosch's interpretations of *International Healthcare Management* and *Tunica Web Advertising*. Neither the inclusion of non-price terms in negotiations among competitors, nor customer acquiescence to a *per se* illegal agreement among competitors, insulates such an agreement among competitors from *per se* treatment.

Second, we do not think this situation raises any legal issues surrounding non-price negotiations because BVIPA's negotiations were primarily focused on raising prices. At most, any discussion of non-price terms was tangential to joint negotiations of price terms.

Third, we reject any implication that if conduct is not a *per se* violation of the antitrust laws, it can be prohibited only by virtue of “fencing-in” relief.

Irrespective of whether facts such as those presented in this case ultimately could support a *per se* violation of the antitrust laws, we have reason to believe that the conduct in which BVIPA allegedly engaged would violate Section 5 of the Federal Trade Commission Act if allowed to continue. Further, in light of Ms. Higgins' alleged attempts to evade the order against BVIPA, we believe an order against her is proper and necessary.¹⁵

¹³ Rosch Dissent at 1.

¹⁴ *See especially* Independent Physician Associates Medical Group, Inc., d/b/a AllCare IPA, FTC Dkt. No. C-4245, (consent order issued Feb. 2, 2009) (unanimous Commission vote, including Commissioner Rosch); Colegio de Optometras, FTC Dkt. No. C-4199 (consent order issued Sept. 6, 2007) (same); Advocate Health Partners, FTC Dkt. No. C-4184 (consent order issued Dec. 29, 2007) (same); New Century Health Quality Alliance, Inc., FTC Dkt. No. C-4169 (consent order issued Sept. 29, 2006) (same).

¹⁵ Because this matter relates to the matter against BVIPA, the Commission will defer a decision to make final the order against BVIPA until after the close of the comment period for the proposed order against Ms. Higgins.