

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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In the Matter of)	
)	
AURORA ASSOCIATED PRIMARY)	Docket No. C-4055
CARE PHYSICIANS, L.L.C.,)	
and)	
)	
RICHARD A. PATT, M.D.,)	
GARY L. GAEDE, M.D., and)	
MARCIA L. BRAUCHLER,)	
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, having reason to believe that Aurora Associated Primary Care Physicians, L.L.C. (“Respondent AAPCP”), Richard A. Patt, M.D. (“Respondent Patt”), Gary L. Gaede, M.D. (“Respondent Gaede”), and Marcia L. Brauchler (“Respondent Brauchler”) have violated and are violating 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:

RESPONDENTS

PARAGRAPH 1: Respondent AAPCP is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at P. O. Box 5183, Englewood, CO 80155.

PARAGRAPH 2: Respondent Patt is a physician licensed under the laws of the State of Colorado, with his office and principal place of business located at 1421 S. Potomac Street, Suite 320, Aurora, CO 80012. Respondent Patt is the Chairman of the Board of Managers (“Board”) of, and one of the principal negotiators for, Respondent AAPCP. The Board controls the operations of Respondent AAPCP.

PARAGRAPH 3: Respondent Gaede is a physician licensed under the laws of the State of Colorado,

with his office and principal place of business located at 14991 E. Hampden Avenue, Suite 210, Aurora, CO 80014. Respondent Gaede was a member, and is now an *ex officio* member, of the Board. Respondent Gaede is also one of the principal negotiators for Respondent AAPCP.

PARAGRAPH 4: Respondent Brauchler is a consultant to Respondent AAPCP. The address of her office and principal place of business is P.O. Box 260661, Littleton, CO 80163-0171.

JURISDICTION

PARAGRAPH 5: At all times relevant to this Complaint, all members of Respondent AAPCP were primary care physicians engaged in the business of providing health care services for a fee to patients. Except to the extent that competition has been restrained as alleged herein, members of Respondent AAPCP have been, and are now, in competition with each other for the provision of physician services.

PARAGRAPH 6: Respondents' general business practices, including the acts and practices alleged herein, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH 7: Respondent AAPCP has been organized in substantial part, and is engaged in substantial activities, for the pecuniary benefit of Respondent AAPCP's members and is therefore a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U. S. C. § 44.

OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

PARAGRAPH 8: Respondent AAPCP has approximately 45 members, all of whom are primary care physicians, licensed to practice medicine in the State of Colorado, and engaged in the business of providing primary care physician services to patients. The membership of Respondent AAPCP consists of internists, pediatricians, family physicians, and general practitioners with offices in the Aurora, Colorado area. Aurora is an eastern suburb of Denver, Colorado.

PARAGRAPH 9: Physicians often contract with health insurance firms and other third-party payors (hereinafter "payors"), such as preferred provider organizations. Such contracts typically establish the terms and conditions, including fees and other competitively significant terms, under which the physicians will render services to the payors' subscribers. Physicians entering into such contracts often agree to lower compensation, in order to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs and enable payors to lower the price of insurance, and thereby result in lower medical care cost for subscribers to the payors' health insurance plans.

PARAGRAPH 10: Absent agreements among competing physicians on the terms, including price, on

which they will provide services to subscribers or enrollees in health care plans offered or provided by third-party payors, competing physicians decide individually whether to enter into contracts with third-party payors to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

PARAGRAPH 11: Medicare’s Resource Based Relative Value System (“RBRVS”) is a system used by the 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. It is the practice of payors in the Aurora area to make contract offers to individual physicians at a fee level specified in the RBRVS for a particular year, plus a markup based on some percentage of that fee (*e.g.*, “110 percent of 2001 RBRVS”).

PARAGRAPH 12: In order to be competitively marketable in the Aurora area, a payor’s health insurance plan must include in its physician network a large number of primary care physicians who practice in the Aurora area. Many of the primary care physicians who practice in the Aurora area are members of Respondent AAPCP.

PARAGRAPH 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 fees and other competitively significant terms. Such a messenger may not, however, consistent with a competitive model, negotiate fees 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.

RESTRAINT OF TRADE

PARAGRAPH 14: Respondents AAPCP, Patt, and Gaede, acting as a combination of competing physicians, and Respondent Brauchler, in conspiracy with Respondent AAPCP and at least some of Respondent AAPCP’s members, respectively, have acted to restrain competition by, among other things:

- A. facilitating, negotiating, entering into, or implementing agreements among Respondent AAPCP’s members on fees and other competitively significant terms;
- B. refusing to deal with payors except on collectively agreed-upon terms; and
- C. negotiating uniform fees and other competitively significant terms in payor contracts for Respondent AAPCP’s members, and refusing to submit payor offers to members that do not conform to Respondent AAPCP’s standards for contracts.

FORMATION AND OPERATION OF RESPONDENT AAPCP

PARAGRAPH 15: According to its Operating Agreement, Respondent AAPCP was formed in approximately March 2000 to be a vehicle for physicians' collective contract negotiations with payors, in order to achieve contracts that contain higher fees and other, more advantageous terms than individual members could obtain by negotiating unilaterally with payors. Respondents sought to replace individual physician-payor contracts with a single AAPCP-payor contract that contained such higher fees and other terms for all members of Respondent AAPCP.

PARAGRAPH 16: In or about May 2000, Respondent AAPCP retained Respondent Brauchler as a consultant after she made a presentation to its Board on how AAPCP could collect fee information from members and use that information to reach a consensus on an initial fee level to demand from payors on the collective membership's behalf. The Board directed Respondent Brauchler to participate in Board meetings and to advise the Board, its committees, and Respondent AAPCP's members regarding terms of payor contracts and negotiations with payors. Thereafter, on behalf of Respondent AAPCP's collective membership, designated members of Respondent AAPCP and Respondent Brauchler negotiated with payors for higher fees and other, more economically advantageous contract terms.

PARAGRAPH 17: To join Respondent AAPCP, physicians sign an agreement that authorizes Respondent AAPCP to negotiate, on their behalf, fees and other contract terms with payors. Members authorize Respondent AAPCP to negotiate "non-risk" contracts, which are accepted only if first approved by a AAPCP's Board. Non-risk contracts do not involve sharing between physicians and payors of financial risk through arrangements such as capitation or fee withholds. Upon such approval, Respondent AAPCP executes a contract with a payor.

PARAGRAPH 18: Respondents have a practice – inconsistent with a messenger model arrangement – of refusing to convey to Respondent AAPCP's members the terms of payor offers that Respondents deem deficient. Respondents instead demand, and receive, from payors more favorable contract terms – terms that payors would not have offered to Respondent AAPCP's members had those members negotiated on a unilateral, rather than collective, basis. Only after payors accede to Respondents' demand for higher fees and other favorable terms do Respondents convey the contract in question to Respondent AAPCP's members for acceptance.

PARAGRAPH 19: Respondents Patt, Gaede, and Brauchler reported to Respondent AAPCP's members on the details of AAPCP's negotiations with payors, including on the status of fee negotiations and the specific fee levels that were discussed. Respondents Patt and Gaede also held general AAPCP membership meetings to discuss details of payor contract negotiations and overall contract strategy.

PARAGRAPH 20: In negotiations with payors, Respondent AAPCP's designated physician negotiators and Respondents Patt, Gaede and Brauchler used a "contract-or-no-contract" strategy,

through which the payor could either contract on AAPCP's terms and likely have all of the members of AAPCP in the provider network, or not contract on AAPCP's terms and have few or none of the AAPCP members in the network. Respondents Patt, Gaede and Brauchler would either recommend that the AAPCP Board approve a negotiated contract and recommend that individual AAPCP members accept it, or, if Respondents were unable to negotiate acceptable terms, refuse to convey the payor's offer to members.

PARAGRAPH 21: Drawing from her experiences in negotiating several Respondent AAPCP contracts, Respondent Brauchler compiled a "Confidential AAPCP Play Book." In the "Play Book," she advised Respondent AAPCP's designated physician negotiators on how they could leverage the collective strength of Respondent AAPCP's members to negotiate higher fees from payors. The "Play Book" encouraged Respondent AAPCP's designated physician negotiators to threaten payors with terminations by Respondent AAPCP's members who had individual contracts with them, unless the payors agreed to the fees that Respondent AAPCP demanded. The "Play Book" also encouraged Respondent AAPCP's designated physician negotiators to take an aggressive and hostile stance when meeting with payors, and to reject their initial fee offers as too low. The "Play Book" cited several instances in which Respondents and other members of Respondent AAPCP used such tactics to pressure and coerce payors into making more economically favorable contract proposals to Respondent AAPCP's members.

PARAGRAPH 22: Respondents Patt, Gaede, and Brauchler and AAPCP's designated physician negotiators told payors that Respondent AAPCP's members would deal with them only if the payor agreed to terms that the Board recommended. This assertion was demonstrated when payors attempted unsuccessfully to deal individually with members of Respondent AAPCP – only to be told by the members that they would contract for services only through Respondent AAPCP. Respondents' strategy of collective negotiations and concerted refusals to deal outside AAPCP left payors in the untenable position of having to pay higher fees to all members of Respondent AAPCP, or being denied such members' inclusion in their respective health insurance plan's provider networks – an outcome that would have substantially impaired payors' ability to compete effectively.

NEGOTIATIONS WITH PACIFICARE

PARAGRAPH 23: PacifiCare Health Systems of Colorado, Inc. ("PacifiCare"), is a payor doing business in the Aurora area. In February 2000, Respondents Patt and Brauchler started contract negotiations with PacifiCare on behalf of Respondent AAPCP's members. They negotiated fees and other competitively significant terms with PacifiCare that would benefit Respondent AAPCP's members as a group. As part of their collective demands, Respondents requested a fee-for-service contract at a specified percentage of RBRVS, and an automatic annual fee increase. They also told PacifiCare that any agreement with Respondent AAPCP's members must not include any financial risk through capitation or a fee withhold.

PARAGRAPH 24: Later in 2000, PacifiCare attempted to reach agreement with individual members of Respondent AAPCP on fee-for-service contracts. Upon learning that PacifiCare was contacting Respondent AAPCP's members on an individual rather than collective basis for contracting, Respondent Brauchler requested that all members of Respondent AAPCP not negotiate individually with PacifiCare, and allow Respondent AAPCP to continue to negotiate all agreements with PacifiCare on their collective behalf. Respondent AAPCP's members complied with this request. As a result, PacifiCare was forced to negotiate only through Respondent AAPCP.

PARAGRAPH 25: Concerned that it otherwise would have an unmarketable health insurance plan because of a limited primary care physician network in the Aurora area, PacifiCare entered a fee-for-service contract with Respondent AAPCP at the higher contract rate that the members, through Respondent AAPCP, collectively demanded. PacifiCare also agreed to Respondent AAPCP's demand for annual fee increases tied to the inflation rate, the potential for bonus incentives, administrative fees to Respondent AAPCP, and other miscellaneous fees, all of which were concessions that PacifiCare made in response to Respondent AAPCP's coercive tactics. Only after Respondent AAPCP's collectively determined terms were met did the Board accept the PacifiCare contract and mail it to members of Respondent AAPCP for their acceptance.

NEGOTIATIONS WITH CIGNA

PARAGRAPH 26: CIGNA Healthcare of Colorado, Inc. ("CIGNA"), is a payor doing business in the Aurora area. In March 2000, on behalf of Respondent AAPCP's members, Respondent Gaede and others started contract negotiations with CIGNA. When those negotiations reached an impasse, many of Respondent AAPCP's members attempted to coerce CIGNA into agreeing to Respondent AAPCP's terms by notifying CIGNA that they were terminating their individual contracts with CIGNA unless the payor dealt with Respondent AAPCP. Respondent Brauchler told CIGNA that Respondent AAPCP's members would agree to continue their participation with CIGNA only if it offered a contract that was acceptable to Respondents.

PARAGRAPH 27: Respondent Brauchler also told CIGNA that it would gain access to all Respondent AAPCP's members only if the Board endorsed the contract, and that the Board would not endorse a contract that did not meet Respondent AAPCP's collectively determined minimum fee levels. Respondents Brauchler and Gaede threatened that unless CIGNA agreed to contract on terms demanded by Respondent AAPCP, members would continue to terminate their individual contracts.

PARAGRAPH 28: Respondent AAPCP successfully forced CIGNA into agreeing to offer a contract that paid higher fees to Respondent AAPCP's members than it had previously agreed to pay individual primary care physicians in the Aurora area. Respondents also succeeded in forcing CIGNA to agree that fees in the future would not fall below the level established in the contract. The Board approved the CIGNA contract and mailed it to members, most of whom accepted it.

NEGOTIATIONS WITH ANTHEM

PARAGRAPH 29: Anthem Blue Cross and Blue Shield of Colorado (“Anthem”) is a payor doing business in the Aurora area. Commencing in February 2000 and for many months thereafter, Anthem attempted to contract with Respondent AAPCP’s members by providing Respondent AAPCP with a proposed contract to be transmitted to the individual members of Respondent AAPCP. In late 2000, the Board authorized Respondents Gaede and Brauchler to act as agents in contract negotiations with Anthem.

PARAGRAPH 30: At various times, Respondents Gaede and Brauchler met with Anthem’s representatives. Respondent AAPCP, however, repeatedly refused to transmit Anthem’s proposal to the members of Respondent AAPCP. Respondent Gaede told Anthem that its fee offer was too low and that the Board would not act on it. Respondent Gaede also told Anthem that the Board had voted to accept only a contract that contained a minimum level of fees, no requirement of financial risk to Respondent AAPCP’s members, and a management fee for Respondent AAPCP. Respondent Gaede informed Anthem that Respondent AAPCP had obtained these contract terms from other payors in the market, and that only if Anthem met Respondent AAPCP’s contract requirements would Respondent AAPCP’s members sign a contract. Respondent Gaede further informed Anthem that Respondent AAPCP limited the number of contracts that it would accept to the four payors that offered Respondent AAPCP’s members the highest fees. He threatened Anthem that it would not have a contract with any members of Respondent AAPCP unless Anthem promptly made an acceptable offer.

PARAGRAPH 31: Anthem increased its offer, but to a level that was still below Respondent AAPCP’s minimum fee requirements. Because the Anthem offer did not meet Respondent AAPCP’s requirements, Respondent AAPCP did not enter into a contract with Anthem.

NEGOTIATIONS WITH OTHER PAYORS

PARAGRAPH 32: Since the inception of Respondent AAPCP in 2000, Respondents Patt, Gaede, and Brauchler have informed other payors that Respondent AAPCP represented the collective interest of its members, and that Respondent AAPCP would negotiate and sign contracts on behalf of all its members. Respondents also informed these payors of the specific fees that Respondents demanded as a condition for signing a contract, emphasizing that Respondent AAPCP would likely refuse any fee lower than a specified percentage of Medicare RBRVS. To exert pressure on and coerce these payors into paying higher fees, Respondent AAPCP’s members sent termination letters to such payors, informing the payors that they would not negotiate individually, and told the payors to deal for members’ services only through Respondent AAPCP. Respondent AAPCP’s coercive tactics have been successful. It has obtained contracts with at least two other payors for fees matching or exceeding Respondent AAPCP’s desired percentage of RBRVS.

LACK OF SIGNIFICANT EFFICIENCIES

PARAGRAPH 33: In collectively negotiating and entering the contracts identified above, Respondent AAPCP and its members have not assumed any significant form of financial risk-sharing and have not integrated their practices to create sufficient potential efficiencies. Respondents' joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

ANTICOMPETITIVE EFFECTS

PARAGRAPH 34: Respondents' actions described above in Paragraphs 14 through 33 have had, or have the tendency to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Aurora area in the following ways, among others:

- A. fees and other forms of competition among Respondent AAPCP's members were unreasonably restrained;
- B. fees for physician services were increased; and
- C. competition in the purchase of physician services was restrained to the detriment of health plans, employers, and individual consumers.

PARAGRAPH 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 Sixteenth day of July, 2002, issues its Complaint against Respondents AAPCP, Patt, Gaede, and Brauchler.

By the Commission.

Donald S. Clark
Secretary