

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
WASHINGTON UNIVERSITY PHYSICIAN NETWORK,
a corporation.

Docket No. C-4093

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 the Washington University Physician Network (“WUPN”) has violated and is violating Section 5 of the Federal Trade Commission Act, as amended, 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 its Complaint stating its charges in that respect as follows:

Nature of the Case

1. This matter concerns horizontal agreements among competing physicians in the greater St. Louis, Missouri, 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. The physicians orchestrated these price-fixing agreements and concerted refusals to deal through WUPN, and their conduct increased the prices of physician services in the greater St. Louis area.

Respondent WUPN

2. WUPN is organized under The General Not for Profit Corporation Law of Missouri, and is doing business under and by virtue of the laws of the State of Missouri. WUPN’s office and principal place of business is located at 7425 Forsyth Boulevard, Suite 307, Clayton, Missouri 63105.
3. Washington University and approximately 1,500 physicians are members of WUPN.

WUPN, among other things, negotiates on the physicians' behalf for contracts with payors. All of the WUPN physicians practice medicine in the greater St. Louis area. These physicians include not only approximately 900 members of the clinical faculty of the Washington University School of Medicine ("faculty physicians"), but also approximately 600 independent physicians, whom WUPN refers to as "community physicians."

4. At all times relevant to this Complaint, WUPN's community physicians have been engaged in the business of providing medical services to patients for a fee. WUPN's faculty physician members are full-time, salaried employees of the Washington University School of Medicine. Except to the extent that competition has been restrained as alleged herein, WUPN's community physicians compete with one another and with faculty physician members for the provision of physician services.

The Commission Has Jurisdiction over WUPN

5. WUPN's general business activities and those of its members, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 44.
6. WUPN is a corporation within the meaning of Section 4 of the FTC Act. Although WUPN's articles of incorporation and by-laws designate Washington University, a non-profit corporation, as its "sole member" for purposes of Missouri corporation law, WUPN's community physicians are "members" of the corporation within the meaning of Section 4 of the FTC Act. WUPN engages in substantial activities for the pecuniary benefit of its for-profit community physician members.
7. WUPN is governed by its Board of Directors, which includes 29 "Voting Directors," a majority of whom (16) are community physicians. These community physician board members are elected by WUPN's community physician membership. The board's remaining voting members are faculty physicians chosen by Washington University.
8. WUPN regularly and in the ordinary course of business classifies its community physicians as "members," and conducts its business affairs in a manner that demonstrates that the community physicians are "members" of WUPN. To participate in WUPN's network and utilize WUPN's contract negotiation and other services, a community physician must complete a WUPN "Membership Application." WUPN's "Membership and Credentialing Committee," a 12-member panel of board members and appointees, evaluates the physician's credentials and recommends to the board the physician's eligibility for membership. Once community physicians become members, they receive a "New Member Information Packet" and are required to pay annual WUPN membership dues.
9. Community physicians, through their elected representatives on the board, actively participate in WUPN's management and business operations. WUPN's activities

substantially advance its community physician members' economic interests, including providing discounted insurance rates, group purchasing, continuing medical education, and financial planning opportunities; and engaging in lobbying, marketing, and public relations on behalf of its community physicians.

Overview of Market and Physician Competition

10. WUPN's community physicians provide health care services to patients in St. Louis city and St. Louis County, Missouri; St. Charles and Jefferson Counties in Missouri; and Madison County, Illinois ("the greater St. Louis area").
11. Physicians often deal with payors through contracts that establish the terms and conditions, including prices and other competitively significant terms, pursuant to which the physicians provide medical services to patients who are enrollees in the payors' health insurance plans. Payors may also develop and sell access to networks of physicians to employers and other purchasers of health insurance benefits. Physicians entering into payor contracts often agree to reductions in their compensation to obtain access to additional patients made available by the payors' relationship with enrollees of their health insurance plans. Physician-payor contracts may reduce payors' costs, enable them to lower the price of health insurance, and reduce out-of-pocket medical care expenditures by subscribers to the payors' health insurance plans.
12. Absent agreements among them to the contrary, competing physicians decide unilaterally whether to enter into contracts with payors to provide services to enrollees of the payors' health insurance plans, and on the prices and other terms and conditions of dealing that they will accept under such contracts.
13. 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 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 2002 RBRVS").
14. In light of WUPN's large number of member physicians and the extensive geographic territory that they collectively cover in the greater St. Louis area, payors believe that, to be competitively marketable in that area, their health insurance plans must offer physician networks that include WUPN's physician members.

WUPN Negotiated Payor Contracts on the Physicians' Behalf

15. WUPN was established in 1993 to promote, among other things, the collective economic interests of its community physicians by increasing their negotiating leverage with payors. Among other things, WUPN, through its board, develops guidelines for negotiating, reviewing, approving, rejecting, terminating, and renewing payor contracts; approves price terms for dealing with payors; establishes procedures for credentialing WUPN's physicians; approves formulas for distributing revenues among the School of Medicine and community physicians from payor contracts; and establishes billing and payment procedures for the community physicians. WUPN has implemented agreements among its physician members to restrain competition by, among other things, engaging in collective negotiations over price and other terms and conditions of dealing with payors, and resisting payors' cost containment measures. In 2000, WUPN reported that it had "successfully negotiated 25 managed care fee-for-service contracts for its members, most of which have very favorable terms when compared to contracts entered into on an individual basis or through another organization."
16. WUPN negotiates payor contracts, including the price terms therein, on the collective behalf of its faculty physicians and community physicians. Representatives of WUPN's management committee, a 12-member panel consisting of physician board members and other board appointees, negotiate directly with payors and report on the progress of their negotiations to the board. This committee advises the board on which proposed payor price terms to accept or reject, and which payor contracts to terminate or continue. The board decides whether to accept or reject a payor contract, including the price terms contained therein, upon the approval of a majority of the community physician directors and of the faculty physician directors present at the board meeting, so long as a majority of the board is present.
17. WUPN's member physicians sign an agreement appointing WUPN as their agent in contract negotiations with payors. If a WUPN member physician participates in a payor's health plan through a contract that WUPN negotiated after the same physician contracted to participate in the same plan through another group contract, then WUPN informs that payor that the WUPN contract supersedes the payor's pre-existing contract with that physician.

Negotiations with Blue Cross Blue Shield of Missouri

18. Blue Cross Blue Shield of Missouri ("BCBS") is a payor doing business in the greater St. Louis area. At a November 2000 board meeting, WUPN's management committee reported that its representatives had begun negotiating on behalf of WUPN's member physicians for a new contract with BCBS. WUPN's then-current contract with BCBS was scheduled to expire on March 31, 2001. Pursuant to their agreement with each other and with WUPN, the community physicians and faculty physicians acted in concert concerning whether and on what terms, including price, to deal with BCBS.
19. On February 26, 2001, WUPN demanded in writing that BCBS pay specific, substantial

price increases before its member physicians would agree to participate in BCBS's several health plan products. For example, WUPN required that BCBS pay its member physicians 140% of 2001 RBRVS for their participation in BCBS's "BlueChoice" product. On March 19, 2001, BCBS counter proposed much smaller rate increases to WUPN. BCBS's proposed terms included, with respect to the BlueChoice product, payment levels of 85% to 110% of 2001 RBRVS, depending on the covered medical procedure. WUPN rejected this offer and, at an April 2001 board meeting, its management committee asked for and received the board's permission to issue a notice of termination to BCBS.

20. In May of 2001, shortly before the threatened termination, BCBS met WUPN's demands for substantial price increases. BCBS agreed to pay WUPN's physician members 140% of RBRVS for their participation in the BlueChoice plan. BCBS also agreed to meet WUPN's price demands for the other BCBS products.

Negotiations with CarePartners

21. CarePartners is a payor doing business in the greater St. Louis area. Pursuant to their agreement with each other and with WUPN, the community physicians and faculty physicians acted in concert concerning whether and on what terms, including price, to deal with CarePartners. On February 1, 2000, at a WUPN board meeting, the management committee reported on a meeting that it recently held with CarePartners to discuss payment levels under CarePartners' contract with the WUPN physicians. WUPN, through its management committee negotiators, demanded substantial price increases under the CarePartners contract. CarePartners counterproposed much smaller price increases, which WUPN rejected. WUPN insisted that CarePartners submit a revised price proposal by the end of February 2000 "that better addresses WUPN Member's [sic] expectations."
22. At a March 7, 2000, WUPN board meeting, the management committee reported that CarePartners submitted a revised proposal that was "equally as unacceptable as their first proposal," and the board rejected it. On April 4, the board voted to serve CarePartners with notice that WUPN was terminating its current contract, effective April 26. After receiving this notice, CarePartners – threatened with the community physicians' and faculty physicians' concerted refusal to deal – resumed contract negotiations with WUPN. On May 1, 2000, CarePartners agreed to pay the prices that WUPN demanded. The Board voted to accept these terms, which became effective December 1, 2000.

Negotiations with Other Payors

23. Pursuant to agreements with and among the community physicians and faculty physicians, and on their collective behalf, WUPN has negotiated price and other competitively significant contract terms with other payors as well, including CIGNA

Healthcare, UnitedHealth Group, and Healthlink. WUPN's coercive tactics, including threatened refusals to deal, have forced payors to pay higher prices to WUPN member physicians to obtain their participation in the health insurance plans available to patients in the greater St. Louis area.

WUPN Engaged in Restraints of Trade

24. The faculty physicians and community physicians, acting as a combination of competing physicians through and with WUPN, have restrained competition by, among other things:
 - a. facilitating, negotiating, entering into, and implementing agreements among themselves and WUPN on price;
 - b. refusing to deal with payors except on collectively agreed-upon terms; and
 - c. negotiating prices and other competitively significant terms in contracts with payors.

WUPN's Actions Are Not Justified by Any Efficiencies

25. WUPN's joint negotiation of price and other competitively significant contract terms has not been, and is not, reasonably related to any efficiency-enhancing integration among the community physicians themselves, or among the community physicians jointly with the faculty physicians.

WUPN's Conduct Resulted in Anticompetitive Effects

26. WUPN's actions as described in 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 greater St. Louis area in the following ways, among others:
 - a. price and other forms of competition among WUPN's member physicians were unreasonably restrained;
 - b. prices for physician services were increased; and
 - c. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.
27. The combinations, conspiracies, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combinations, conspiracies, acts, and practices, or the effects thereof, are continuing and will continue in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of August, 2003, issues its Complaint against WUPN.

By the Commission, Commissioner Harbour not participating.

Donald S. Clark
Secretary

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