

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of San Juan IPA, Inc., File No. 0310181

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with San Juan IPA, Inc. (San Juan IPA). The agreement settles charges that San Juan IPA violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among physician members of San Juan IPA to fix prices and other terms on which they would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and decide whether it should 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 consent order has been entered into for settlement purposes only and does not constitute an admission by San Juan IPA that it 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.

San Juan IPA is an independent physician association (IPA) with approximately 120 physician members. San Juan IPA does business in the Farmington, New Mexico, area, which is located in the northwestern corner of New Mexico.

San Juan IPA's physician members account for approximately 80% of the physicians independently practicing (that is, those not employed by area hospitals) in and around the Farmington area. To be marketable in the Farmington area, a payor's health insurance plan must have access to a large number of physicians who are members of San Juan IPA.

Although San Juan IPA purported to operate as a "messenger model"¹-- that is, an arrangement that does not facilitate horizontal agreements on price -- it engaged in various actions that demonstrated or orchestrated such agreements. San Juan IPA coordinated joint

¹ Some arrangements can facilitate contracting between health care providers and payors without fostering an illegal agreement among competing physicians on fees or fee-related terms. One such approach, sometimes referred to as a "messenger model" arrangement, is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice, at 125. *See* <http://www.ftc.gov/reports/hlth3s.htm#9>.

pricing among its physician members in three ways. First, San Juan IPA was a party to contracts that a joint venture, in which San Juan IPA participated, collectively negotiated on behalf of San Juan IPA's members. Second, San Juan IPA, on behalf of its physician members, collectively negotiated contracts for payment of physician services at full billed charges less a 10% discount, made collective demands, and refused to deal with payors. Finally, San Juan IPA coordinated its members' responses to payor offers for fixed-price contracts, by not transmitting certain offers to its physician members and collectively demanding prices, on behalf of its physician members, from these payors.

San Juan IPA succeeded in forcing numerous health plans to raise the fees paid to its physician members, and thereby raised the cost of medical care in the Farmington area. San Juan IPA engaged in no efficiency-enhancing integration sufficient to justify joint negotiation of fees. By orchestrating agreements among its members to deal only on collectively-determined terms, and actual or threatened refusals to deal with health plans that would not agree to those terms, San Juan IPA 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 prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans.

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits San Juan IPA from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving San Juan IPA.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits San Juan IPA from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. San Juan IPA would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians in a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The arrangement, however, must not facilitate the refusal of, or restrict, physicians in contracting with payors outside of the arrangement.

As defined in the proposed order, a “qualified risk-sharing joint arrangement” possesses two key characteristics. First, all physician participants must share substantial financial risk 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 price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III, for three years, requires San Juan IPA to notify the Commission before participating in contracting with health plans on behalf of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement. Paragraph III also sets out the information necessary to make the notification complete.

Paragraph IV, for three years, requires San Juan IPA to notify the Commission before entering into any arrangement to act as a messenger, or as an agent on behalf of any physicians, with payors regarding contracts. Paragraph IV also sets out the information necessary to make the notification complete.

Paragraph V.A requires San Juan IPA to distribute the complaint and order to all physicians who have participated in San Juan IPA, and to payors that negotiated contracts with San Juan IPA or indicated an interest in contracting with San Juan IPA. Paragraph V.B requires San Juan IPA, at any payor’s request and without penalty, or, at the latest, within one year after the order is made final, to terminate its current contracts. Paragraph V.C requires San Juan IPA to distribute payor requests for contract termination to all physicians who participate in San Juan IPA. Paragraph V.D.1.b requires San Juan IPA to distribute the complaint and order to any payors that negotiate contracts with San Juan IPA in the next three years.

Paragraphs VI and VII of the proposed order impose various obligations on San Juan IPA to report or provide access to information to the Commission to facilitate monitoring San Juan IPA’s compliance with the order.

The proposed order will expire in 20 years.