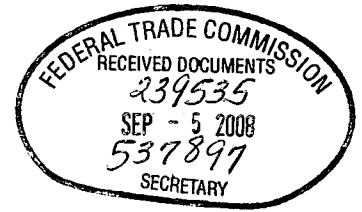


ORIGINAL



UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

In the Matter of _____
North Texas Specialty Physicians,
a corporation. _____

)
)
) PUBLIC
) Docket No. 9312
)
)

Complaint Counsel's Reply Regarding Order Modification on Remand

The central issue on remand is how to modify Paragraph II.A.2 of the remedial Order to address the court of appeals' determination that the provision is overly broad insofar as its language could require NTSP to "messenger" payor contracts or become a party to payor contracts regardless of the risk a contract might pose.¹ Complaint counsel have recommended adding language to Paragraph II.A.2 that would expressly limit the provision's prohibition on actual or threatened refusals to deal to those undertaken "in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II." In response, NTSP contends: (1) the "proper response" to the court's remand order is to delete – rather than modify – the provision; and (2) that the "in furtherance" clause complaint counsel proposes is "confusingly ambiguous" and "possibly in conflict" with the court's opinion. NTSP Resp. at 4. Neither argument has merit.

¹ The court also found the provision's ban on agreements to deal or refuse to deal with payors to be "internally inconsistent," but NTSP has not taken issue with complaint counsel's proposed modification to resolve this objection, which would simply delete agreements "to deal" from II.A.2. See Complaint Counsel's Proposal for Order Modification on Remand (August 13, 2008) at 2.

First, neither the remand language nor any other part of the opinion indicates that the court of appeals believed it necessary to delete Paragraph II.A.2 to cure the overbreadth concern. Although well aware that the same issue had prompted the administrative law judge to omit the provision from his recommended order, the court did not strike the provision or direct the Commission to do so. Instead, it ordered the case remanded “for modification of subsection II.A.2 of the remedial order in a manner consistent with this opinion.” *North Texas Specialty Physicians v. F.T.C.*, 528 F.3d 346, 372 (5th Cir. 2008).

Nothing in the court’s opinion suggests that the Commission is precluded from prohibiting NTSP’s participation in some concerted refusals to deal. The court’s stated concern is the potential breadth of the language of II.A.2, not the propriety of including a more narrowly framed prohibition. Indeed, the court’s analysis of NTSP’s unlawful conduct discusses the organization’s use of “concerted withdrawals and refusals to deal except on collective terms” to reinforce its collective price demands (*id.* at 366; *see generally id.* at 366-67 (discussing examples)), and rejects NTSP’s attempt to justify such refusals as mere avoidance of “risky situations.” *Id.* at 369 (finding that concerns about risk had no bearing on NTSP’s use of refusals to deal with payors to obtain higher fees for member physicians).

NTSP’s other claim – that the “in furtherance” clause that complaint counsel recommends be added to Paragraph II.A.2 is ambiguous and “possibly in conflict with the Fifth Circuit’s opinion” – is disingenuous at best.² NTSP professes to be uncertain whether complaint counsel’s proposal “is meant to have in some way the effect of compelling Respondent to

² In addition to its recommended modification, complaint counsel also offered, but did not endorse, an alternative that makes specific reference to the types of refusals to deal mentioned in the court of appeals opinion. NTSP expresses a mild preference for the alternative revision – but only if the key limiting language of the “in furtherance” clause were omitted.

messenger contracts or become a party to contracts sent to it by payors regardless of risks” NTSP Resp. at 3-4 (internal quotes omitted). In other words, NTSP asserts that complaint counsel has recommended a modification that may be “meant to” do precisely what the court of appeals found problematic in the current language. It makes this accusation without pointing to any evidence, and despite abundant evidence to the contrary. As page two of NTSP’s brief reflects, the Commission has made numerous statements explaining that the Order is not intended to impose a broad and unqualified duty to deal with payors. Complaint counsel’s modification would add language to the Order to reflect that intent, by limiting the ban on refusals to deal to only those undertaken to further conduct that is barred by Order provisions that the court approved. In sum, NTSP offers nothing more than a vague assertion of a “possible conflict” that has no basis in fact.


Moreover, there is nothing ambiguous or novel about barring concerted refusals to deal undertaken in furtherance of a prohibited agreement. Such conduct is a staple of antitrust enforcement. *See, e.g., F.T.C. v. Superior Court Trial Lawyers Assn*, 493 U.S. 411, 428 (1990) (“Respondents’ concerted action in refusing to accept further [assignments to represent indigent defendants] until their fees were raised was ... a plain violation of the antitrust laws.”).

NTSP also contends that, if not in conflict with the court of appeals opinion, then the proposed modification is unnecessary. But, as we noted in our opening brief (at 3-4), both NTSP’s past conduct, and the Commission’s experience with other cases of collective negotiation by competing professionals, demonstrate the need for the Order to specifically address the use of concerted refusals to deal, or threats to refuse to deal, in connection with efforts to impose collective contract terms on purchasers and other conduct the Order prohibits.

In the end, NTSP's brief is significant for what it does not say. Notably, NTSP has declined complaint counsel's invitation to provide some substance to its vague claims about risk avoidance justifications for refusals to deal with payors. Nor does it explain how complaint counsel's recommended modification would prevent it from taking legitimate action to protect itself from risky contracts. There is no dispute that, as the court of appeals observed, risk avoidance is a legitimate goal. But, as the court's opinion also reflects, it is not enough to merely assert a legitimate goal. 528 F.3d at 369 (rejecting risk avoidance justification).

In sum, NTSP has offered nothing that undermines the conclusion that the recommended modification to Paragraph II.A.2 set forth in our opening brief is a sound change that fully addresses the concerns expressed by the court of appeals.³

Respectfully Submitted,


Jonathan W. Platt
Complaint Counsel

Daniel P. Ducore
Assistant Director for Compliance

Markus H. Meier
Assistant Director for Health Care

September 5, 2008

Bureau of Competition

³ Although NTSP suggests that Federal Rule of Appellate Procedure 19, "Settlement of a Judgment Enforcing an Agency Order in Part," might apply here (NTSP Resp. at 4 n.11), that rule applies only when an agency brings a proceeding to enforce one of its orders. *See* 20 James Wm. Moore et al., *Moore's Federal Practice - Civil* § 319.10 (3d ed.) (noting that the rule does not apply in a proceeding to review an agency order). And, unlike the Ninth Circuit case that NTSP cites, the court of appeals in this case did not direct the Commission to follow the procedure set forth in Fed. R. App. P. 19.

Certificate of Service


I, Deborah Tucker, hereby certify that on September 5, 2008, I caused a copy of Complaint Counsel's Reply Regarding Order Modification on Remand to be filed with:

Office of the Secretary
Federal Trade Commission
Room H-135
600 Pennsylvania Ave., NW
Washington, DC 20580

and served by first-class mail and e-mail upon:

Gregory S. C. Huffman
Thompson & Knight
One Arts Plaza
1722 Routh Street
Suite 1500
Dallas, TX 75201

Gregory.Huffman@tklaw.com


Deborah Tucker