

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT**
In the Matter of Roaring Fork Valley Physicians I.P.A., Inc., File No. 0610172

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order (“proposed order”) with Roaring Fork Valley Physicians I.P.A., Inc., (“RFV”). The agreement settles charges by the Federal Trade Commission that RFV violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, among other things, orchestrating and implementing price-related agreements and concerted refusals to deal among competing physician members of RFV to maintain and raise the price at which RFV’s physician members contract with payers.

The proposed 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 will 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 order has been entered into for settlement purposes only and does not constitute an admission by the proposed respondent 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.

RFV is a type of organization commonly referred to in the health care industry as an “independent practice association” because its members consist of independent physicians in solo and small group practices. RFV is controlled by and organized in substantial part for the pecuniary benefit of its approximately 85 physician members. RFV is located in Garfield County, Colorado.

The complaint alleges that since at least 2003 RFV, although purporting to use a messenger model, negotiated price-related terms on behalf of its members for the purpose of increasing and maintaining the rates for services provided by RFV’s otherwise competing physician members. RFV increased rates by demanding that payers include automatic annual cost of living adjustments (COLAs) in their contracts. RFV held lengthy bargaining sessions with payers to pressure them into including COLAs and other terms in their contracts. To protect the automatic increases, RFV refused to messenger contracts with Medicare-based rates because of their potential to decline. RFV feared Medicare-based rates would decline over time.

The complaint also alleges that since at least 2003 RFV and its members engaged in concerted refusals to deal with payers except upon the collectively-agreed upon contract terms demanded during negotiations. RFV organized concerted refusals to deal by requiring payers

contracting with RFV to persuade 80 percent of all RFV members and 50 percent of each RFV specialty (“80/50 rule”) to accept their contracts. After a payer satisfied the 80/50 rule, RFV signed, administered and bound all the members to the payer’s contract. RFV refused to messenger the contract of a payer who failed to satisfy the 80/50 rule. RFV reinforced the 80/50 rule by refusing to provide unsuccessful payers with the identity of the members willing to accept their contracts. RFV’s refusal prevented the unsuccessful payers from contracting directly with individual physicians willing to accept the proposed contract terms. RFV also reinforced its concerted refusals to deal by encouraging members to only use the IPA for their contracting. RFV targeted its concerted refusals at national payers and warned members against contracting with them. Most national payers attempting to contract with RFV could not satisfy the 80/50 rule. RFV members did not engage in any efficiency-enhancing integration of their practices sufficient to justify the collectively negotiation or the concerted refusals to deal. Accordingly, the complaint alleges that RFV violated Section 5 of the FTC Act.

The Proposed 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 RFV from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician’s behalf; (2) to deal, refuse to deal, or threaten to refuse to deal with payers; (3) on any terms on which a physician is willing to deal with any payer; or (4) not to deal individually with any payer, or not to deal with any payer other than through RFV.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits RFV from facilitating exchanges of information between physicians concerning any physician’s willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes RFV from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing providers’ collective conduct with health-care purchasers, Paragraph II excludes certain kinds of agreements from its prohibitions. First, RFV is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a “qualified risk-sharing joint arrangement” or a “qualified clinically-integrated joint arrangement.” The arrangement, however, must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

As defined in the proposed order, a “qualified risk-sharing joint arrangement” possesses two characteristics. First, all physician participants must share substantial financial risks 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 RFV to notify the Commission before it enters into any arrangements to act as a messenger or an agent on behalf of any physicians, with payers regarding contracts. Paragraph IV sets out the information necessary to make the notification complete.

Paragraph V, for three years, requires RFV to notify the Commission before participating in contracting with health plans on behalf of either a qualified risk-sharing or a qualified clinically-integrated joint arrangement. Paragraph VI sets out the information necessary to satisfy the notification requirement.

Paragraph VII imposes other notification obligations on RFV and requires the termination of certain contracts that were entered into illegally. Paragraph VII.A requires RFV to distribute the complaint and order to (1) physicians who have participated in RFV since 2001; (2) to various past and current personnel of RFV; and (3) to payers with whom RFV has dealt since 2001. Paragraph VII.B requires RFV, at any payer’s request and without penalty, to terminate its existing contracts with the payer for the provision of physician services. Paragraph VII.B allows certain contracts currently in effect to be extended at the written request of the payer no longer than one year from the date that the order becomes final. Paragraph VII.C requires RFV to distribute payer requests for contract termination to physicians who participate in the contract. Paragraph VII.D requires RFV for three years, to provide new members, personnel, and payers not previously receiving a copy, a copy of the Order and the Complaint. Paragraph VII.D also requires RFV to publish annually a copy of the Order and the Complaint in its newsletter.

Paragraphs VIII, IX, and X impose various obligations on RFV to report or provide access to information to the Commission to facilitate the monitoring of compliance with the order. Finally, Paragraph XI provides that the order will expire in 20 years.