

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of Cooperativa de Farmacias Puertorriqueñas (Coopharma)* *File No. 101-0079

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Cooperativa de Farmacias Puertorriqueñas (“Coopharma” or “Respondent”). The agreement settles charges that Coopharma violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by negotiating, entering into, and implementing agreements among its member pharmacy owners to fix the prices on which they contract with third-party payers in Puerto Rico.

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 will decide whether it should withdraw from the agreement or make the proposed consent order final.

The purpose of this analysis is to facilitate public comment on the proposed consent order. The analysis is not intended to constitute an official interpretation of the agreement and proposed consent 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 Respondent that it violated the law or that the facts alleged in the proposed complaint (other than jurisdictional facts) are true.

The Proposed Complaint

Coopharma is a not-for-profit corporation organized and doing business as a cooperative under the laws of Puerto Rico. Coopharma consists of approximately 300 pharmacy owners who own roughly 360 community pharmacies in Puerto Rico. Coopharma members control at least a third of the pharmacies in Puerto Rico and the organization has a particularly strong presence on the western side of the main island.

Coopharma was established with the principal purpose of negotiating on behalf of its members and entering into single-signature “master contracts” with payers that bind all Coopharma pharmacies. The proposed complaint alleges that Coopharma members negotiated collectively through Coopharma to obtain higher reimbursement rates than its members were receiving in their individual contracts with payers, including pharmacy benefits managers and insurers.

The proposed complaint alleges that Coopharma's member pharmacies restrained competition by jointly negotiating and entering into agreements with third-party payers. Coopharma achieved this result by encouraging its members: (1) to refuse to deal with third-party payers except through Coopharma; and (2) to threaten termination, or actually terminate, contracts with payers that refused to deal with Coopharma on the terms it demanded.

Coopharma collectively negotiated reimbursement rates with more than ten payers and has reached agreements on behalf of its members with seven of them. The mere threat of Coopharma members' collective action led two additional payers to pay higher rates. The proposed complaint alleges that Coopharma's actions caused payers to pay higher reimbursement rates to Coopharma members, and that this price increase ultimately may be passed along to consumers in the form of higher premium payments, diminished service, or reduced coverage. As a result, Coopharma's actions caused substantial harm to the consumers of Puerto Rico. Coopharma's conduct was unrelated to any efficiency-enhancing integration among its members.

Negotiations with CVS-Caremark

As a specific example of Coopharma's misconduct, the proposed complaint alleges that CVS-Caremark ("Caremark"), a pharmacy benefits manager operating in Puerto Rico, was forced to rescind a rate cut and to enter into a master contract at a higher rate because of the collective action of Coopharma members.

In 2008, Caremark notified pharmacies throughout the country that it was reducing reimbursement on its Medicare Part D contracts. Coopharma mobilized its members to collectively resist that rate change. Coopharma provided its members with a form letter, which many sent, rejecting the new Medicare Part D contracts and telling Caremark to negotiate rates through Coopharma. Coopharma then informed Caremark that its members would not accept Caremark's reimbursement offer and demanded higher rates. Coopharma also informed certain Caremark clients that Caremark was threatening to terminate pharmacies that did not accept Caremark's rate change. This pressure led Caremark to rescind the Part D rate change for the pharmacies that sent letters rejecting the change.

Coopharma continued to pressure Caremark to enter into a master contract on all lines of business, including Medicare Part D. Coopharma used the same basic tactics to accomplish this goal, by: (1) demanding that Caremark negotiate exclusively through Coopharma; (2) threatening that its members would terminate their Caremark contracts; and (3) contacting Caremark's clients. Indeed, Coopharma took the matter public by placing a newspaper advertisement stating that negotiations with Caremark had failed and that, as of May 28, 2009, "we will not continue providing services" to Caremark patients.

In August 2009, Caremark agreed to replace Coopharma's members' individual contracts with a master contract with Coopharma. The proposed complaint alleges that Caremark's price concessions cost it approximately \$640,000 in 2009 alone.

Other Coercive Conduct

In addition, the proposed complaint alleges that in at least two instances, the mere threat of collective terminations benefitted individual Coopharma pharmacies at a cost of millions of dollars to third-party payers. Coopharma pharmacies obtained higher reimbursement rates from third-party payers Medco and Medicare Mucho Mas even though negotiations with Coopharma did not result in a master contract. During its negotiations with Medco, Coopharma threatened to pull all Coopharma pharmacies out of Medco's network. In an attempt to prevent such a disruption of its network, Medco raised the reimbursement rates it paid to individual Coopharma pharmacies, a concession that cost Medco and its clients over \$2 million between 2007 and 2011. Medicare Mucho Mas, a large Medicare Advantage payer, also feared that Coopharma could cause a similar disruption in its pharmacy network. As a result, Medicare Mucho Mas' pharmacy benefits manager offered a higher reimbursement rate to Coopharma pharmacies.

Finally, the proposed complaint alleges that Coopharma attempted to use collective action to resist a reimbursement rate reduction by health insurer Humana. Coopharma attempted to coerce Humana into maintaining its reimbursement rates by threatening termination of the individual contracts and pressuring it into entering into a master contract. When Humana asserted that Coopharma lacked the legal authority to terminate its members' contracts, Coopharma encouraged its members to terminate their contracts individually.

Coopharma Cannot Qualify for State Action Immunity

The proposed complaint alleges that Coopharma's anticompetitive conduct cannot be shielded by the state action doctrine. The state action doctrine provides that states are not subject to federal antitrust liability, and that by extension certain subordinate state entities and private parties exercising state-granted powers may be immunized as well.¹ Private parties claiming the protection of this immunity must meet two elements. First, private parties must demonstrate that the challenged conduct was undertaken pursuant to a clearly articulated state policy to displace competition with regulation. Second, private parties must show that the challenged conduct has been actively supervised by the state.² The proposed complaint alleges that neither requirement is satisfied here.

Puerto Rico has not clearly articulated a policy to replace competition with the challenged conduct. Law 203 regulates "collective bargaining" between providers of health care services, including pharmacies, on the one hand, and payers, on the other.³ However, Law 203 limits collective bargaining to situations where the providers obtain a certificate verifying that they

¹ See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943).

² *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

³ 26 L.P.R.A. § 3101, *et seq.*

constitute less than 20 percent of providers in a particular area, do not engage in boycotts, submit to mandatory arbitration in the case of an impasse, and comply with certain other requirements.⁴ Coopharma has not – and cannot – satisfy these requirements.⁵

The proposed complaint also alleges that Puerto Rico has not actively supervised Coopharma's conduct because no Puerto Rican official has exercised the power to review, approve, or disapprove either the rates in Coopharma's contracts with payers or the coercive collective action it used to obtain them.⁶ Under Law 203, Coopharma has neither sought to comply with nor satisfied any of the law's requirements. Even under Law 239, the Puerto Rico agency charged with the general regulation of cooperatives, the Corporacion para la Supervision y Seguro de Cooperativas de Puerto Rico ("COSSEC"), has no process in place for reviewing cooperatives' negotiations with payers or for approving or disapproving prices and other terms that result from such negotiations.

The Proposed Consent Order

The proposed consent order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the proposed complaint, while allowing Coopharma to engage in legitimate joint conduct.

Paragraph II prevents Coopharma from continuing the challenged conduct. Paragraph II.A prohibits Respondent from entering into or facilitating agreements between or among any pharmacies: (1) to negotiate on behalf of any pharmacy with any payer; (2) to refuse to deal or threaten to refuse to deal with any payer; (3) to include any term, condition, or requirement upon which any pharmacy deals, or is willing to deal, with any payer, but not limited to, price terms; or (4) not to deal individually with any payer, or not to deal with any payer other than through Respondent.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Respondent from facilitating exchanges of information between pharmacies concerning whether, and on what terms, to contract with a payer. Paragraph II.C bars attempts to engage in

⁴ *E.g.*, 26 L.P.R.A. §§ 31.040; 31.050; 31.060.

⁵ The Commission is aware that Law 239, which regulates cooperatives generally, declared that cooperatives "shall not be considered conspiracies or cartels to restrict business." 5 L.P.R.A. § 4516 (Law 239, § 20.5). The Commission and the Puerto Rico Department of Justice interpret Law 203 (which was passed after Law 239) to supersede Law 239. At the very least, Law 203 imposes additional requirements on health care cooperatives, which Coopharma cannot meet.

⁶ *Cf. Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.").

any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C.

Paragraph III is designed to prevent the challenged conduct from reoccurring. Paragraph III.A requires Coopharma to send a copy of the complaint and consent order to its members, its management and staff, and any payers with whom Coopharma has contracted at any time since January 1, 2008. Paragraph III.B allows for contract termination if a payer voluntarily submits a request to Coopharma to terminate its contract. Pursuant to such a request, Paragraph III.B requires Coopharma to terminate, without penalty, any pre-existing payer contracts. Upon receiving such request, Paragraph III.C requires that Coopharma notify in writing each pharmacy that provides services through that contract to be terminated. Paragraph III.D requires Coopharma, for three years, to distribute a copy of the complaint and consent order to new members, officers, directors, and employees, and to payers who begin contracting with Coopharma and to post them on its website.

Paragraphs IV, V, and VI impose various obligations on Coopharma to report or to provide access to information to the Commission to facilitate its compliance with the consent order. Finally, Paragraph VII provides that the proposed consent order will expire 20 years from the date it is issued.