concern over the relatively high price of gasoline on the West Coast, but people will be cruelly disappointed if they are led to believe that the export restriction would have a detectable effect on the situation. Moreover, it is not the Commission's mandate to use merger enforcement as a vehicle for imposing its own notions of how competition may be ''improved.'' Instead, Congress has directed the Commission only to prevent any harm to competition that is likely to flow from a merger. We believe that the planned divestitures already accomplish that goal.

We acknowledge that the parties are willing to sign an order with an export restriction. We need not speculate about whether they were induced to do so because of a compelling need to strike a deal promptly, or because they believe the restriction in unnecessary or unenforceable. Whatever the reason, in light of the structural relief the proposed order achieves, we see no need to bind the parties to an unnecessary behavioral provision.

For the reasons set forth above, we do not believe that the export restriction should be included in the proposed order.

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FEDERAL TRADE COMMISSION

[File No. 981 0124]

Texas Surgeons, P.A., et al.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before May 15, 2000.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Richard Feinstein or Alan Friedman, FTC/S–3115, 600 Pennsylvania Ave., NW., Washington, DC 20580. (202) 326–3688 or 326–2742.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for April 13, 2000), on the World Wide Web, at ''http://www.ftc.gov/ftc/formal.htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible, by a 3½ inch diskette containing an electronic copy of the comment. Such comment or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order by the Texas Surgeons, P.A. (''Texas Surgeons IPA'') and six medical practice groups comprised of Texas Surgeons IPA members—Austin Surgeons, P.L.L.C.; Austin Surgical Clinic Association, P.A.; Bruce McDonald & Associates, P.L.L.C.; Capital Surgeons Group, P.L.L.C.; Central Texas Surgical Associates, P.A.; and Surgical Associates of Austin, P.A. The agreement settles charges by the Federal Trade Commission that the Texas Surgeons IPA and the six medical practice groups (the ''respondents'') violated section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by fixing prices and other terms of dealing with third-party payers; collectively refusing to deal with third-party payers or threatening to do so; and agreeing to deal with third-party payers only on collectively determined terms. The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make it and 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 in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by any respondent that the law has been violated as alleged in the complaint.

The Complaint

Under the terms of the agreement, a complaint will be issued by the Commission along with the proposed consent order. The allegations in the Commission's proposed complaint are summarized below.

Respondent Texas Surgeons IPA is an association of general surgeons who practice in the Austin, Texas area. Members of the Texas Surgeons IPA are, and at all times relevant to the complaint have been, the majority of general surgeon private practitioners serving the adult population in the Austin area.

Nearly all of the members of the Texas Surgeons IPA belong to one of six general surgery practice groups, which are also respondents in this matter. At all times relevant to the complaint, the Texas Surgeons IPA has been governed by a board of directors composed of representatives from each of the respondent medical practice groups.

The Texas Surgeons IPA has served as a vehicle for the six respondent medical practice groups (and the few solo practitioner members) to engage in actual or threatened concerted refusals to deal, and to negotiate collectively, in order to obtain higher prices from Blue Cross Blue Shield of Texas (''Blue Cross'') and United HealthCare of Texas (''United''). The six respondent medical practice groups actively furthered the unlawful conduct through their collective control of the Texas Surgeons IPA board of directors, and through their direct participation in collective fee negotiations between United and the Texas Surgeons IPA.

In April 1997, Blue Cross changed its reimbursement system from one based on historical charges to one based on a

Resource Based Relative Value Scale, similar to the system used by the federal government in its Medicare program. The effect of this change was to increase rates paid to primary care physicians, and to reduce rates to all physician specialists, including general surgeons. Soon thereafter, respondents, through the Texas Surgeons IPA, began collectively negotiating higher rates.

Despite multiple attempts by Blue Cross to negotiate individually with the six respondent medical practice groups, those groups insisted on negotiating only through the Texas Surgeons IPA. In September 1997, the Texas Surgeons IPA sent Blue Cross a package of identically worded contract termination notices for each general surgeon member of the Texas Surgeons IPA, with a cover letter stating that the termination notices were due to Blue Cross's ''unacceptable'' rate reductions. In November 1997, the Texas Surgeons IPA asked Blue Cross to waive its right to bring a private antitrust action regarding the Texas Surgeons IPA's rate negotiations with Blue Cross, but Blue Cross refused to sign the waiver. In December 1997, 26 members of the Texas Surgeons IPA, dissatisfied with Blue Cross's payment offers, collectively effected their resignations from Blue Cross, and jointly announced that action in a prominent advertisement in Austin's major daily newspaper.

In early 1998, Blue Cross experienced difficulty in securing the services of a general surgeon for an emergency room patient. At about the same time, two more general surgeons resigned from Blue Cross. These two general surgeons had been advised by one of the respondent medical practice groups that their inclusion in an arrangement with that practice group regarding back-up surgical coverage would end if they continued to deal with Blue Cross.

After these events, Blue Cross concluded that it needed to reach a rate agreement with the respondents as soon as possible to avoid inadequate general surgery coverage for Blue Cross subscribers in the Austin area. The collective rate agreement between the six respondent medical practice groups and Blue Cross that resulted in early 1998 increased Blue Cross general surgery rates nearly 30% above the April 1997 levels.

Respondents began collective price negotiations with United soon after it announced fee reductions for general surgeons and other physicians in October 1997. The new fees went into effect on January 1, 1998 for surgical procedures not usually performed by general surgeons, but comparable proposed fee reductions for general surgeons never went into effect. Instead, respondents caused general surgery fees for United's various plans to increase at least 12% to 40% above the fees that United announced in October 1997.

In early November 1997, United received a written notice from the Texas Surgeons IPA that all of its members would be terminating their contracts with United effective January 1, 1998 due to the proposed fee reductions for 1998. The Texas Surgeons IPA indicated its desire to collectively negotiate higher fees and rejected United's request to negotiate with the six respondent medical practice groups on an individual basis. United explored the possibility of creating a panel of general surgeons that did not include general surgeons from the six respondent medical practice groups, but it concluded that such a panel would not provide adequate general surgery coverage and that it had no realistic alternative to beginning collective fee negotiations with the Texas Surgeons IPA.

Prior to the start of a collective fee negotiation session in November 1997, the Texas Surgeons IPA required United to sign a waiver of its right to bring a private antitrust action against the Texas Surgeons IPA or its members stemming from those fee negotiations. At that collective fee negotiation session, respondents demanded and received an agreement from United to pay higher fees in 1998 and 1999, as described above. Representatives from the six respondent medical practice groups assembled together and collectively participated in this collective fee negotiation session through frequent telephone and fax contact with the Texas Surgeons IPA's lead negotiator.

The Texas Surgeons IPA did not engage in any activity that might justify collective agreements on the prices they would accept for their services. Respondents' actions have restrained competition among general surgeons in the Austin area and thereby have harmed, or tended to harm, consumers (including third-party payers, subscribers, and their employers) by:

- Depriving consumers of the benefits of competition;
- Increasing by over one million dollars the amount that Blue Cross, United, their individual subscribers, and employers (including the State of Texas Employees Retirement System and other self-insured employers that utilize Blue Cross or United physician network) paid for the services of surgeons during the period from January 1, 1998 to December 31, 1999;
- Fixing the payments or co-payments that individual patients, their employers, and third-party payers make for the services of surgeons;
- Fixing the terms and conditions upon which general surgeons would deal with third-party payers; and
- Raising the prices that individuals and employers pay for health plan coverage offered by third-party payers.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint, while allowing respondents to engage in legitimate joint conduct. The Commission notes that in 1999, some time after the investigation of this matter began, the State of Texas enacted legislation that permits the State Attorney General to approve, under certain conditions, joint negotiations between health plans and groups of competing physicians. Texas Senate Bill 1468, 76th Leg., R.S. ch., 1586 (1999). That conduct that gave rise to the investigation and consent agreement predated enactment of the law, and thus was not approved under its terms. Moreover, the conduct described in the complaint would not necessarily have met the conditions for approval set forth in the Act.

Enactment of the statute does not eliminate the need for an order in this matter. The statute permits only collective negotiations that are approved by the Attorney General, imposes conditions under which that approval may be granted, and by its terms expires on September 1, 2003. As is discussed below, the Commission's order does not prohibit future conduct that is approved and supervised by the State of Texas pursuant to its statute and protected from federal antitrust liability under the state action doctrine. It is necessary and appropriate, however, to provide a remedy against future conduct by the respondents that is not approved and supervised by the State of Texas.

The core operative provisions of the proposed order are contained in Section II. Section II.A prohibits respondents from entering into or facilitating any agreement: (1) To negotiate physician services on behalf of any physicians with any payer or provider; (2) to deal, refuse to deal, or threaten to refuse to deal with any payer or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payer or provider; (4) to restrict the ability, or facilitate the refusal, of any physician to deal with any payer or provider on an individual basis or through any other arrangement; or (5) to convey to any payer or provider, through any Austin area physician, any information concerning

actual or potential dealings by any physician with any payer or provider.

The fifth provision listed above (section II.A.5 of the proposed order) ensures that communications between any respondent and any payer within a ''messenger model'' arrangement be conveyed by a neutral third party (someone other than a physician with an active practice in the Austin area). In a messenger model arrangement, physicians individually convey and receive, through a third party, information, offers, and responses from and to payers or providers. See Statements of Antitrust Enforcement Policy in Health Care. Issued jointly by the Federal Trade Commission and the U.S. Department of Justice (August 28, 1996) at 43–52, 89–92, 125–27, 138–40, 4 Trade Reg. Rep. (CCH) ¶ 13,153. In addition, section V.A.2 of the order ensures that any respondent intending to use a messenger model arrangement provide prior notification to the Commission.

Section II.B prohibits respondents from exchanging, transferring, or facilitating the exchange or transfer of information among Austin area physicians concerning: (1) Negotiation with any payer or provider regarding reimbursement terms; or (2) actual or contemplated intentions or decisions with respect to any terms, dealings or refusals to deal with any payer or provider. Section II.C prohibits respondents from encouraging, advising, or pressuring any person, other than the government, to engage in any action that would be prohibited if the person were subject to the order.

Section II contains three provisos. The first permits each respondent medical practice group to participate in arrangements for the provision of physician services that are limited to physicians from the same medical practice group. The second proviso, as noted above, permits respondents to engage in conduct that is approved and supervised by the State of Texas, so long as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine. The state action doctrine protects from federal antitrust liability any private conduct that is both: (1) in accordance with a clearly articulated and affirmatively expressed state policy to supplant competition; and (2) actively supervised by the state itself. *See, e.g., FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621 (1992); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The third proviso allows respondents to engage in conduct (including collectively determining reimbursement and other terms of contracts with payers) that is reasonably necessary to operate any ''qualified risk-sharing joint arrangement'' or ''qualified clinically-integrated joint arrangement,'' provided respondents comply with the prior notification requirements set forth in section V of the order. The prior notification mechanism will allow the Commission to evaluate a specific proposed arrangement and assess its likely competitive impact. This requirement will help guard against any recurrence of acts and practices that have restrained competition and injured consumers.

As defined in the order, a ''qualified risk-sharing joint arrangement'' must satisfy three conditions. First, all physicians participating in the arrangement must share substantial financial risk from their participation in the arrangement. The definition illustrates ways in which physicians might share financial risk, tracking the types of financial risk-sharing set forth in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. Second, any agreement on prices or terms of reimbursement entered into by the arrangement must be reasonably necessary to obtain significant efficiencies through the joint arrangement. Third, the arrangement must be non-exclusive—*i.e.,* it must not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement.

A ''qualified clinically-integrated joint arrangement'' pertains to arrangements in which the physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services, without necessarily sharing substantial financial risk. As with risk-sharing arrangements, the definition of clinically integrated joint arrangements reflects the analysis contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. According to the order's definition, the participating physicians must have a high degree of interdependence and cooperation through their use of programs to evaluate and modify their clinical practice patterns, in order to control costs and assure the quality of physician services provided through the arrangement. In addition, as with risk-sharing arrangements, the arrangement must be non-exclusive and any agreement on prices or terms of reimbursement entered into by the arrangement must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

Sections III.A and III.B require respondents to distribute the order and complaint to its members and other specified persons, including payers. Sections III.C and III.D require that each respondent, for the next five years: (2) Distribute copies of the order and complaint to new members and other specified persons; (2) publish annually to members and owners a copy of the order and complaint; and (3) brief members and owners annually on the meaning and requirements of the order and the antitrust laws.

Sections IV and VI consist of standard Commission reporting and compliance procedures. Section IV specifies that Texas Surgeons IPA must include in its annual reports information identifying each payer or provider that has communicated with Texas Surgeons IPA concerning a possible contract for physician services, the proposed terms of any such contract, and Texas Surgeons IPA's response to the payer or provider.

Finally, section VII of the proposed order contains a twenty year ''sunset'' provision under which the order terminates twenty years after the date the order was issued.

By direction of the Commission.

Donald S. Clark,

Secretary.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 00037]

Cancer Prevention and Control Activities; Notice of Availability of Funds

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 2000 funds for a sole source cooperative agreement program for Cancer Prevention and Control Activities. This program addresses the ''Healthy People 2010'' priority area(s) related to Cancer.

The purpose of the program is to assist with the following:

1. Developing and disseminating current national, state, and community-based comprehensive information on cancer prevention and early detection.

2. Developing and disseminating professional education programs.

3. Promoting the analysis and development of surveillance and