

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. _____

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) PUBLIC
) Docket No. 9312
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Complaint Counsel’s Proposal for Order Modification on Remand

The Court of Appeals for the Fifth Circuit has directed the Commission to modify Paragraph II.A.2 of the Commission’s Order against respondent North Texas Specialty Physicians (NTSP) “in a manner consistent with [the court’s] opinion.” *North Texas Specialty Physicians v. F.T.C.*, 528 F.3d 346, 372 (5th Cir. 2008). The court deemed Paragraph II.A.2 “overly broad and internally inconsistent.” *Id.* at 371. We believe a relatively simple revision to this provision, discussed below, will help clarify the intent of the current Order language and will address both of the court’s concerns.

Paragraph II of the Order contains the core prohibitions, and Paragraph II.A includes provisions that specifically address types of joint activity that the Commission and the court of appeals found NTSP used to carry out its unlawful conduct:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians with respect to their provision of physician services:
 - 1. to negotiate on behalf of any physician with any payor;
 - 2. to deal, refuse to deal, or threaten to refuse to deal with any payor;

3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or
4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent;

We propose that Paragraph II.A.2 be revised to read:

2. to ~~deal~~, refuse to deal, or threaten to refuse to deal, with any payer, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;

The proposed modification removing agreements “to deal” with a payor from Paragraph II.A.2 addresses the court’s determination that the provision is internally inconsistent. *See* 528 F.3d at 371 (“It is . . . difficult to see how NTSP can both deal and refuse to deal with any payor”). The current prohibition in Paragraph II.A.2 against NTSP’s orchestrating agreements among physicians “to deal” with a payor concerning their provision of physician services (that is, their delivery of medical care to patients) is designed to make clear that the organization’s involvement in collective decisions by physician members on whether, or on what terms, to participate in a payor network is prohibited – regardless of whether such an agreement is implemented through acceptance or rejection of a payor offer. Agreements to deal on collectively-determined contract terms are, however, specifically prohibited by Paragraph II.A.3, which bars NTSP’s participation in agreements “regarding any term . . . upon which any physician deals or is willing to deal with any payor.” Thus, eliminating agreements “to deal” from Paragraph II.A.2 would not reduce the scope of the Order but would eliminate the potential confusion that troubled the court of appeals.

The other aspect of the proposed modification to Paragraph II.A.2, the addition of the underlined phrase, is designed to address the court’s concern that, in its current form, II.A.2 is

