

# Client Alert

Antitrust & Litigation Practice Group

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## FTC Bars Texas Physician Group from Joint Price Negotiations

On May 10, the Federal Trade Commission (FTC) announced that an independent practice association representing 900 physicians in the Amarillo, Texas, area agreed to enter in to an FTC Consent Order barring it from jointly negotiating the rates it charges insurance companies. In a complaint filed with the order, the FTC alleged that Southwest Health Alliances, Inc. d/b/a/ BSA Provider Network (Southwest Health), has been in violation of federal antitrust law for over a decade by fixing the prices its member doctors charged insurers. In its complaint the FTC alleged that this conduct resulted in higher prices for consumers and businesses. The proposed Consent Order, which will become final after a 30 day public comment period, is available at <http://www.ftc.gov/os/caselist/0910013/110510southwestagree.pdf>.

Southwest Health is a non-exclusive, independent multi-specialty practice association comprised of multiple, independent medical practices with a total of approximately 900 physician members, of which approximately 300 are devoted to primary care, in the Amarillo, Texas, area. The FTC complaint alleges that, for over a decade, Southwest Health violated the antitrust laws by facilitating, entering into, and implementing agreements to fix the prices and other terms at which it would contract with health plans. Importantly, the FTC alleges that Southwest Health has not been clinically or financially integrated to create efficiencies sufficient to justify such joint negotiations, and the messenger model used by the network was inadequate because Southwest Health used the prices in its own fee schedule (Southwest Health had a fee schedule for self-insured employers) as a signaling device as to whether its members should accept or reject offers it “messengered.”

The complaint alleges that these violations of the antitrust laws restrained price and other forms of competition among physicians in the Amarillo, Texas, area and thereby harmed consumers (including health plans, employers, and individual consumers) by increasing the prices for physician services.

According to the FTC, the proposed Consent Order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the

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complaint while it allows Southwest Health to engage in “legitimate, joint conduct.” Specifically, the Consent Order bars Southwest Health from entering into or facilitating agreements among physicians: 1) to negotiate on behalf of any physician with any insurer; 2) to negotiate with any physician as an insurer; 3) to deal, refuse to deal, or threaten to refuse to deal with any insurer; 4) not to deal individually with any insurer, or not to deal with any insurer except through Southwest Health. In addition, the Consent Order prohibits Southwest Health from facilitating the exchange of information between physicians concerning the terms on which they will contract with insurers. These terms are similar to those found in other FTC provider combination cases.

According to the terms of the Consent Order, Southwest Health is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate “qualified risk-sharing” or “qualified clinically integrated” arrangements, as defined in the Consent Order. It also does not prohibit agreements that only involve doctors who are part of the same medical practice.

Finally, the Consent Order contains notification provisions that will allow the FTC to monitor Southwest Health’s compliance with its terms, and will allow insurers to terminate any contracts, without penalty, entered into with the network since its alleged restraint of trade began in 2000. The proposed order will expire in 20 years.

The Southwest Health Consent Order, one of several similar FTC enforcement actions over the past few years, serves as a reminder that the FTC aggressively investigates provider combinations, especially those involving collective negotiations with insurance companies. Indeed, the FTC continues to scrutinize claims by providers that collective negotiations are justified by clinical or financial integration, and takes a close look at any messenger model the providers create.

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