

**ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER
TO AID PUBLIC COMMENT**

In the Matter of Alta Bates Medical Group, Inc., File No. 051 0260

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order with Alta Bates Medical Group, Inc., (“ABMG” or “Respondent”). The agreement settles charges that ABMG violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by fixing prices charged to those offering coverage for health care services (“payors”) in the Berkeley and Oakland, California, area and refusing to deal with payors except on a collectively determined basis. 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 Complaint (other than jurisdictional facts) are true.

Alta Bates Medical Group, Inc.

ABMG is a multi-specialty independent practice association (“IPA”) comprised of multiple, independent medical practices serving the Berkeley and Oakland, California area. It has a total of approximately 600 physician members, of which approximately 200 are devoted to primary care. Since its formation, ABMG has negotiated group contracts with payors under which it receives capitated (per member per month) payments. These contracts shift the risk of patient illness to the IPA by specifying that the health plan will pay the IPA a flat monthly fee for each enrollee, with almost no regard for patient utilization. This type of contracting is a form of financial integration, so for antitrust purposes, the IPA is treated as a single entity for purposes of these contract negotiations, and not as a group of competing physicians. The complaint does not challenge ABMG’s activities concerning these contracts.

ABMG, however, also contracts on behalf of its member physicians with health plans to provide fee-for-service medical care. Under these arrangements, the payor compensates physicians or group practices for services actually rendered pursuant to agreed-upon fee schedules. In the absence of financial risk-sharing or clinical integration on the part of providers, the IPA members are competitors for purposes of antitrust analysis. It is ABMG’s negotiation of fee-for-service contracts that is the subject of the allegations in the Commission’s Complaint.

The Complaint

Since at least 2001, ABMG, acting as a combination of its physician members, and in conspiracy with its members, has acted to restrain competition with respect to fee-for-service contracts by, among other things, facilitating, entering into, and implementing agreements, express or implied, to fix the prices and other terms at which they would contract with payors; to engage in collective negotiations over terms and conditions of dealing with payors; and to have ABMG members refrain from negotiating individually with payors or contracting on terms other than those approved by ABMG. This type of collective conduct by competitors is inherently suspect under the antitrust laws.

At times, however, IPAs will act as a conduit between physician members and health plans regarding fee-for-service contracts to facilitate the contracting process. Under this model, the IPA merely acts as a messenger and does not negotiate the terms of the contract.

Although claiming to employ a lawful messenger arrangement, ABMG, on behalf of its physician members, instead orchestrated collective negotiations for fee-for-service contracts. Specific acts by ABMG that are alleged in the complaint are: making proposals and counter-proposals, as well as accepting or rejecting offers, without consulting with its individual physician members regarding the prices they unilaterally would accept, and without transmitting the payors' offers to its individual physician members until ABMG had approved the negotiated prices.

The complaint also alleged a concerted refusal to deal intended to impede competition by one of ABMG's major competitors, the Permanente Medical Group, which provides physician services exclusively to Kaiser Foundation Health Plan, Inc. In 2006, Kaiser¹ was expanding a fee-for-service product, under which covered individuals could access physician services through a national third-party network that included ABMG physicians. This expansion by Kaiser threatened ultimately to reduce ABMG's business under its capitated contracts, by giving Kaiser the ability to offer employers both a capitated and fee-for-service health plan option. To impede this expansion, ABMG attempted a concerted refusal to serve Kaiser fee-for-service enrollees. Although ABMG's refusal to deal was ultimately unsuccessful, the sole purpose of this action was to impede competition in the provision of physician services in and around Berkeley and Oakland, California.

ABMG did not engage in any activity that might justify collective agreements on the prices its members would accept for their services. For example, the physicians in ABMG have not clinically or financially integrated their practices to create efficiencies sufficient to justify their acts and practices. As a consequence, the Respondent's actions have restrained price and other forms of competition among physicians in the Berkeley and Oakland, California, area and

¹ Kaiser is a trade name for an association of three entities: Kaiser Foundation Health Plan, Inc.; Kaiser Foundation Hospitals; and the Permanente Medical Groups.

thereby harmed consumers (including health plans, employers, and individual consumers) by increasing the prices for physician services.

The Proposed Consent Order

The proposed Consent Order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the complaint while it allows ABMG to engage in legitimate, joint conduct. The proposed Consent Order does not affect ABMG's activities in contracting with the payors on a capitated basis.

Paragraph II.A prohibits Respondent from entering into or facilitating any agreement between or among any health care providers: (1) to negotiate on behalf of any physician with any payor; (2) to 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 other than through ABMG.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondent from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in 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.

As in other Commission orders addressing health care providers' collective bargaining with health care payors, certain kinds of agreements are excluded from the general bar on joint negotiations. Paragraph II does not preclude ABMG from engaging in conduct that is reasonably necessary to form or participate in legitimate "qualified risk-sharing" or "qualified clinically-integrated" joint arrangements, as defined in the proposed Consent Order. Also, Paragraph II would not bar agreements that only involve physicians who are part of the same medical group practice, defined in Paragraph I.B, because it is intended to reach agreements between and among independent competitors.

Paragraphs III through VI require ABMG to notify the Commission before it initiates certain contacts regarding contracts with payors. Paragraphs III and IV apply to arrangements under which ABMG would be acting as a messenger on behalf of its member physicians. Paragraphs V and VI discuss arrangements under which ABMG plans to achieve financial or clinical integration.

Paragraph VII.A requires ABMG to send a copy of the Complaint and Consent Order to its physician members, its management and staff, and any payors who communicated with ABMG, or with whom ABMG communicated, with regard to any interest in contracting for physician services, at any time since January 1, 2001.

Paragraph VII.B requires ABMG to terminate, without penalty, pre-existing payer contracts that it had entered into since 2001, at the earlier of (1) receipt by ABMG of a written request for termination by the payer; or (2) the termination date, renewal date, or anniversary date of the contract. This provision is intended to eliminate the effects of ABMG's illegal collective behavior. The payer can delay the termination for up to one year by making a written request to ABMG.

Paragraph VII.D contains three-year notification provisions relating to future contact with physicians, payors, management and staff. This provision requires ABMG to distribute a copy of the Complaint and Consent Order to each physician who begins participating in ABMG; each payor who contacts ABMG regarding the provision of physician services; and each person who becomes an officer, director, manager, or employee for five years after the date on which the Consent Order becomes final. In addition, Paragraph VII.D requires ABMG to publish a copy of the Complaint and Consent Order, annually, in any official publication that it sends to its participating physicians.

Paragraphs VII.E and VIII-IX impose various obligations on ABMG to report or to provide access to information to the Commission to facilitate monitoring its compliance with the Consent Order.

Pursuant to Paragraph X, the proposed Consent Order will expire in 20 years from the date it is issued.