UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, vs. WOMAN'S HOSPITAL FOUNDATION and WOMAN'S PHYSICIAN HEALTH ORGANIZATION, Defendants.	Civil Action No: 96-389-B-M2 Filed: April 23, 1996

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On April 23, 1996, the United States filed a civil antitrust complaint alleging that defendant Woman's Health Foundation ("WHF"), which owns and operates Woman's Hospital, and defendant Woman's Physician Health Organization ("WPHO"), with others not named as defendants, entered into an agreement and took other actions, the purpose and effect of which were, among other things, to reduce competition among obstetrician/gynecologists ("OB/GYNs") and other doctors and prevent or delay the continued

development of managed care in Baton Rouge, Louisiana ("Baton Rouge"), and to maintain willfully Woman's Hospital's monopoly in inpatient obstetric care, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The Complaint seeks injunctive relief to enjoin continuance and recurrence of these violations.

The United States filed with the Complaint a proposed Final Judgment intended to resolve this matter. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction over the matter to interpret, enforce, or modify the Judgment, or punish violations of its provisions.

Plaintiff and both defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the APPA, unless prior to entry plaintiff has withdrawn its consent. The proposed Final Judgment provides that its entry does not constitute any evidence against, or admission by, any party concerning any issue of fact or law.

The present proceeding is designed to ensure full compliance with the public notice and other requirements of the APPA. In the Stipulation to the proposed Final Judgment, defendants have also agreed to be bound by the provisions of the proposed Final Judgment pending its entry by the Court and to take certain corrective actions.

II.

PRACTICES GIVING RISE TO THE ALLEGED VIOLATIONS

Woman's Hospital is the dominant provider of private inpatient obstetrical care in Baton Rouge. In the late-1980's,

competition among doctors for participation in managed care plans created the opportunity for the entry of other Baton Rouge area hospitals into the market for inpatient obstetrical care. In 1991, General Health, Inc. ("General Health") announced that it would build a hospital (the "Health Center") with 5 to 6 dedicated OB/GYN beds. Woman's Hospital was particularly threatened by General Health's Health Center because General Health also owned Gulf South Health Plans, Inc. ("Gulf South"), the largest managed care plan in Baton Rouge. Once General Health's new facility achieved full-service status, Gulf South would have substantially more negotiating leverage with Woman's Hospital because Gulf South could employ the Health Center as a preferred hospital over Woman's Hospital in Gulf South's network.

Woman's Hospital entered into negotiations with General Health and offered to continue contracting with Gulf South if General Health would agree to stay out of the obstetrical business in Baton Rouge for the next 5 to 7 years. Woman's Hospital eventually retreated from this attempt to foreclose the Health Center from offering inpatient obstetrical services and took alternative steps to achieve the same result.

Managed care plans could not use the Health Center's availability to obtain significant price concessions from Woman's Hospital, if Woman's Hospital could disrupt the competitive forces that would prompt the OB/GYNs on its medical staff to admit patients to the Health Center. Accordingly, in 1993, Woman's Hospital formed defendant WPHO, a

physician-hospital organization, whose purpose at the time of formation was to establish a minimum physician fee schedule and serve as a joint bargaining agent on behalf of Woman's Hospital and these OB/GYNs. Woman's Hospital hoped to assure the continued "loyalty" of its OB/GYNs through WPHO.

WPHO developed a minimum fee schedule that listed fees for OB/GYNs that were substantially higher than the fees managed care plans were then paying OB/GYNs under individual contracts. Approximately 90% of the OB/GYNs delivering privately insured babies in the Baton Rouge area committed to WPHO after reviewing this fee schedule.

WPHO then signed contracts with a number of managed care plans, two of which were attempting to set up operations in the Baton Rouge area. Each of these new plans first attempted to contract directly with OB/GYNs independently of WPHO but was unsuccessful. In addition, Gulf South was forced to accept OB/GYNs on its panel with whom it had not previously contracted and to accept the WPHO fee schedule for all OB/GYNs in WPHO, which was significantly higher than the fee schedule Gulf South had previously applied to its participating physicians.

Based on the facts described above and those set forth more fully in the Complaint, the Complaint alleges that the defendants (1) entered into a contract, combination, or conspiracy that eliminated competition among physicians and reduced or limited the development of managed care plans in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; and defendant Woman's Hospital

(2) attempted to maintain its monopoly in inpatient obstetrical services, with the specific intent to do so, and (3) willfully maintained its monopoly in inpatient obstetrical services in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is intended to restore to Baton Rouge consumers of obstetrical services the benefits of competition among obstetrical providers that defendants have eliminated or prevented. At the same time, the proposed Final Judgment takes into account any benefits to consumers that Woman's Hospital and Woman's medical staff may offer through collective marketing of their services by permitting such collective action that is unlikely to reduce competition among the physicians or prevent competition between Woman's Hospital and other hospitals.

A. SCOPE OF THE PROPOSED FINAL JUDGMENT

Section III of the proposed Final Judgment provides that the Final Judgment shall apply to defendants, to all "consenting physicians," and to all other persons who receive actual notice of the proposed Final Judgment by personal service or otherwise and then participate in active concert with any defendant. The proposed Final Judgment applies to Woman's Hospital, WPHO, and all "consenting physicians" defined as physicians who remain or become owners or participants in physician networks owned or operated by Woman's Hospital or WPHO.

B. PROHIBITIONS AND OBLIGATIONS

Sections IV and V of the proposed Final Judgment contain the substantive provisions of the Judgment.

In Section IV(A), Woman's Hospital and WPHO are enjoined from setting, negotiating, or expressing views on, prices or other competitive terms and conditions, for competing physicians. Woman's Hospital and WPHO are further enjoined from owning an interest in, contracting with, or controlling any organization in which participating physicians constitute more than 30% of the physicians in any relevant market. Section IV(D), however, permits Woman's Hospital and WPHO to use a messenger model, and, provided they obtain the prior written approval of the Department of Justice, to form and operate a Qualified Managed Care Plan ("QMCP") -- as defined in the proposed Final Judgment and discussed below. Section IV(A) also prohibits Woman's Hospital and WPHO from precluding or discouraging any physician from contracting with any payer, or providing incentives for, or agreeing with, any physician not to deal with competitors of Woman's Hospital or WPHO. Nothing in Section IV(A), however, prohibits Woman's Hospital from entering into exclusive contracts for anesthesiology, radiology, pathology, neonatalogy, and perinatalogy services to the extent reasonably necessary to assure quality of care at the Hospital.

In addition, Section IV(A) enjoins Woman's Hospital and WPHO from disclosing to any physician financial or other competitively sensitive business information about any competing physicians.

An exception permits disclosure of such information if reasonably necessary for the operation of an approved QMCP, or if the information is already generally available to the medical community or the public. Section IV(C) also permits the exchange of information pursuant to the Antitrust Safety Zones delineated in Statements 5 and 6 of the 1994 Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust ("Health Care Policy Statements").[1]

Section IV(B) enjoins each "consenting physician" from owning an interest or participating in any organization, connected in any way with Woman's Hospital or WPHO, that directly or through any agent, organization or other third party, sets, expresses views on, or conveys information on prices or other terms and conditions, or negotiates for competing physicians, unless that organization complies with Section IV(A). Section IV(B) further enjoins "consenting physicians" from participating in or facilitating any agreement among competing physicians on fees or other terms and conditions for physician services, including the willingness of physicians to contract on any terms with particular payers, or to use facilities competing with Woman's Hospital's facilities, unless the competing physicians share substantial financial risk and the agreement is ancillary to the shared risk. However, nothing in Section IV(B) applies to the participation of competing physicians in any managed care plan or network of such plan not owned or controlled by Woman's

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[1] 4 Trade Reg. Rep. (CCH) ¶ 13,152 at 20,782, 20,784.

Hospital or WPHO.

Section IV(C) enjoins Woman's Hospital from agreeing with any person affiliated directly or indirectly with any potential or actual competing facility to allocate or divide the market, or set the price, for any service, including offering lower rates for inpatient services to any payer on the condition that the payer or any person affiliated with the payer not offer inpatient obstetrical services.

Section V of the proposed Final Judgment contains additional provisions regarding Woman's Hospital and WPHO. Section V(A) requires Woman's Hospital and WPHO to notify in writing participating physicians annually that they are free to communicate, negotiate or contract on any terms with any payer independently from, and without consultation with, WPHO. Similarly, Sections V(C) and V(D) require Woman's Hospital and WPHO to notify in writing each payer with whom WPHO has a contract, and during the term of the Final Judgment, each payer when it initially discusses using the services of a messenger or contracting with a QMCP subject to this Final Judgment, that each participating physician is free to communicate, negotiate or contract with such payer on any terms independently from, and without consultation with, WPHO, the messenger, or the QMCP.

Under Section V(B), Woman's Hospital and WPHO are required to, while forming or employing a messenger model or forming a QMCP, (1) provide a copy of the Final Judgment to each owner or member of the organization forming the messenger or QMCP and to

each physician applying for participation in the messenger model, and (2) require, as a condition precedent to the physician's ownership or membership in the organization, or participation in a messenger model, the physician to affirm in writing that the physician has read and understands the Final Judgment and agrees to be bound by it.

Section V(E) provides that each defendant must notify the Antitrust Division of the United States Department of Justice of any proposed change in corporate structure at least 30 days before that change to the extent the change may affect compliance obligations arising out of the proposed Final Judgment.

Section VI of the proposed Final Judgment requires defendants to implement a judgment compliance program. Section VI(A) requires that within 60 days of entry of the Final Judgment, defendants must provide a copy of the proposed Final Judgment and the Competitive Impact Statement to all directors and officers. Sections VI(B) and (C) require defendants to provide a copy of the proposed Final Judgment and Competitive Impact Statement to persons who assume those positions in the future and to brief such persons annually on the meaning and requirements of the proposed Final Judgment and the antitrust laws, including penalties for violating them. Section VI(D) requires defendants to maintain records of such persons' annual written certifications indicating that they (1) have read, understand, and agree to abide by the terms of the proposed Final Judgment, (2) understand that their noncompliance with the

proposed Final Judgment may result in conviction for criminal contempt of court, and imprisonment, and/or fine, and (3) have reported any violation of the proposed Final Judgment of which they are aware to counsel for defendants. Section VI(E) requires defendants to maintain for inspection by the Antitrust Division a record of recipients to whom the proposed Final Judgment and Competitive Impact Statement have been distributed and from whom annual written certifications regarding the proposed Final Judgment have been received.

The proposed Final Judgment also contains provisions in Section VII requiring defendants to certify their compliance with specified obligations of Section VI(A) of the proposed Final Judgment. Section VIII of the proposed Final Judgment sets forth a series of measures by which the Antitrust Division may have access to information needed to determine or secure defendants' compliance with the proposed Final Judgment.

Finally, Section X states that the Judgment expires ten years from the date of entry.

C. EFFECT OF THE PROPOSED FINAL JUDGMENT ON COMPETITION

The proposed Final Judgment remedies, and prevents recurrence of, violations of Sections 1 and 2 of the Sherman Act. Defendant Woman's Hospital violated Section 2 by attempting to maintain and maintaining its monopoly in inpatient obstetrical services. Woman's Hospital and WPHO violated Section 1 by entering into an agreement with OB/GYNs on Woman's Hospital's medical staff that unreasonably restrained competition among the

OB/GYNs and prevented significant competition from developing in the market for inpatient obstetrical services.

1. Competition for Inpatient Obstetric Services

Woman's Hospital violated Section 2 by depriving Baton Rouge health care consumers of the significant benefits from competition for inpatient obstetric business between Woman's Hospital and General Health's Health Center. Some competition started to develop with the entry of General Health and another Baton Rouge hospital, causing Woman's Hospital to waive direct payments by women who expressed a desire to deliver at one of the competing facilities. Woman's Hospital, in the minutes of the first meeting of its Strategic Planning Committee in 1994, articulated its concern that competition from General Health might cause more significant competition in the form of "deep discounting" of the rates charged to managed care plans for deliveries.

In response to that concern, Woman's Hospital tried to prevent the development of competing obstetric facilities in Baton Rouge. Woman's Hospital attempted first to prevent General Health from entering the market by offering to continue contracting with Gulf South, General Health's wholly owned managed care plan, if General Health did not enter the market. Though General Health ultimately did not accept Woman's Hospital's offer, Woman's Hospital could realistically seek the same type of agreement in the future. Woman's Hospital and General Health have an ongoing relationship through Woman's

participation in the Gulf South provider network and both Woman's Hospital and General Health might find it in their mutual self interest to eliminate competition in inpatient obstetrics. Accordingly, Section IV(C) of the proposed Final Judgment prohibits Woman's Hospital from pursuing this type of anticompetitive conduct in the future.

Woman's Hospital succeeded in preventing the development of inpatient obstetrical competition through the formation of WPHO. By organizing WPHO, Woman's Hospital created a vehicle for the OB/GYNs on its medical staff to wield market power. Creation of market power for such a group of physicians would not normally further a hospital's interests and could, in some circumstances, work against its interests. Accordingly, Woman's Hospital would not have organized the physicians toward this end, absent Woman's interest in preventing the development of inpatient obstetrical competition.

Woman's Hospital's organization of WPHO furthered this interest of Woman's Hospital by substantially limiting the ability of managed care plans to steer patients to General Health's facility. Managed care plans had successfully selectively contracted with OB/GYNs in the competitive market that existed before the formation of WPHO. The formation of WPHO deprived plans of the opportunity to use competition among the OB/GYNs to induce the OB/GYNs to admit patients to General Health's facility. The proposed Final Judgment, as discussed in the next section, restores the competitive market by preventing

price fixing by physicians or their exercise of market power.

2. Competition Among OB/GYNs and Other Physicians

The agreement among Woman's Hospital, WPHO and the WPHO OB/GYNs unreasonably restrained competition among the OB/GYNs and competition among hospitals for inpatient obstetrical business. The agreement constitutes a *per se* violation of Section 1 because of its naked purpose and effect of reducing price competition among the OB/GYNs. The agreement's reduction of competition among the OB/GYNs and among hospitals, without any substantial offsetting benefit, establishes a violation of Section 1 under the rule of reason, as well.

a. The Contract, Combination or Conspiracy in Restraint of Trade

The full scope of the unlawful conspiracy charged in this case is not confined to the four corners of the documents incorporating WPHO or signed by Woman's Hospital and members of its medical staff. Rather, the facts alleged in the Complaint establish a broader understanding among competing OB/GYNs to restrain price competition among themselves by contracting either through WPHO at or above the minimum WPHO fee schedule or individually on the same basis.[2/]

Woman's Hospital orchestrated the formation of WPHO through a number of general meetings with its medical staff, including

[2] The existence of this agreement made it unnecessary for the Department to resolve whether physician representation on the board of WPHO, physician influence over Woman's Hospital, or other factors established that competing doctors controlled the establishment of their fees through WPHO and thus established an agreement among those competitors.

the OB/GYNs. The Hospital solicited the OB/GYNs' preliminary commitment to WPHO and their final agreement to the fee schedule through memoranda addressed to all members of the medical staff.

The proposal to form WPHO necessarily carried with it the understanding that a substantial percentage, if not all, of the OB/GYNs would present a united front to managed care plans and other payers on terms established through WPHO. Each OB/GYN's agreement to permit WPHO to negotiate on that doctor's behalf would have been useless at best, or actually harmful, to the doctor without an understanding that most would not contract independently of WPHO at rates below WPHO's minimum fee schedule. WPHO was proposing a broader panel and higher fees than managed care plans had already obtained through individual contracts with OB/GYNs. Neither Woman's Hospital nor the OB/GYNs could realistically have believed that the plans would have agreed with WPHO to increase fees to OB/GYNs and include additional OB/GYNs in their panels absent an understanding that the physicians would not continue to contract individually at competitive rates.

Participating OB/GYNs had substantial reasons to expect that WPHO would further their understanding to eliminate price competition. Their interest in not competing with each other was aligned with Woman's Hospital's interest in not competing with the Health Center. Woman's Hospital and the OB/GYNs appointed 12 of the 14 Directors to WPHO's Board of Directors, thus assuring that WPHO would pursue higher OB/GYN fees and resist contractual terms that could induce the OB/GYNs to make use of General

Health's new inpatient obstetric facility.

Knowing that concerted action was contemplated and invited, each OB/GYN gave adherence to WPHO and participated in it. Each OB/GYN was well aware that others were asked to participate; each knew that cooperation was essential to successful operation of WPHO; each knew that WPHO, if successful, would result in an elimination of competition among OB/GYNs; and knowing that, each committed to WPHO and authorized WPHO to contract on their behalf.[3] In short, an agreement among OB/GYNs to restrain price competition among themselves is shown by the nature of the market for OB/GYNs' services existing before formation of WPHO, the purposes for which WPHO was formed, and the manner in which it was formed. See Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939); In re Chain Pharmacy Ass'n of New York, Inc., No. 9227, slip op. at 70-71 (FTC Initial Decision, filed May 17, 1991).

The agreement among Woman's Hospital, WPHO, and the WPHO OB/GYNs to limit price competition among OB/GYNs was per se

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[3] WPHO strengthened the ability of the OB/GYNs to police the agreement among themselves. There was little likelihood that any substantial number of the approximately 45 OB/GYNs who joined WPHO could secretly break ranks. Woman's Hospital's monopoly in inpatient obstetrics assured Woman's Hospital knowledge of the identity of managed care plans operating in Baton Rouge and of the OB/GYNs in the networks of those plans. WPHO would thus readily detect any OB/GYN who contracted outside of WPHO at lower rates. Under these circumstances, the agreement of the OB/GYNs did, and was likely to, lead to real anticompetitive harm.

unlawful.[4] WPHO did not develop utilization review standards, and the agreement to limit price competition was not reasonably necessary to further any efforts by WPHO to encourage physicians to practice more cost-effectively. No legitimate argument exists, in this case, therefore, that the collective pricing of OB/GYNs' services here was ancillary to any procompetitive activity.

Defendants and WPHO physicians collectively obtained higher fees for OB/GYNs, deprived managed care plans of the ability to selectively contract with OB/GYNs, and prevented the development of competition for inpatient obstetrical services. These anticompetitive effects were not offset by any procompetitive effect. Thus, even under a rule of reason analysis, defendants violated Section 1 of the Sherman Act.

As discussed above, Sections IV(A) and (B) of the proposed Final Judgment prevent the continuation or recurrence of defendants' price fixing activity and exercise of market power by enjoining Woman's Hospital and WPHO from, directly or indirectly, negotiating or setting prices or other competitive terms and conditions for competing physicians and from disclosing financial or other competitively sensitive information about competing

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[4] The agreement does not escape condemnation simply because WPHO appointed a consultant and a committee of nonphysicians to determine the fee schedule. The procedure employed by WPHO here is sharply distinguishable from a properly structured messenger model, discussed infra and permitted under the proposed Final Judgment. Here, a single agent was used precisely to fix fees to be charged to managed care plans by all of WPHO's member doctors, not simply to convey information.

physicians. The requirements of the proposed Final Judgment should restore and protect competition among physicians and permit the development of competition for inpatient obstetrical services in Baton Rouge.

b. Permitted Conduct

Section IV(D) of the Judgment describes two circumstances in which WPHO or similar organizations subject to the Judgment may participate in the contracting activities of competing physicians: first, by using a "messenger model," a term defined in the proposed Final Judgment; second, by obtaining approval from the Department of Justice to own and operate a QMCP.

i. The Messenger Model

The proposed Final Judgment permits WPHO to use an agent or third party to facilitate the transfer of information concerning prices and other competitively sensitive information between individual physicians and purchasers of physician services.[5] Appropriately designed and administered, such messenger models rarely present substantial competitive concerns and indeed have the potential to reduce the transaction costs of negotiations between health plans and numerous physicians.

The proposed Final Judgment makes clear that the critical feature of a properly devised and operated messenger model is that individual providers make their own separate decisions about whether to accept or reject a purchaser's proposal, independent

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[5] "Other competitively sensitive terms and conditions" includes, for example, contractual terms concerning utilization review and quality assurance issues.

of other physicians' decisions and without any influence by the messenger. (Section II(C)) The messenger may not, under the proposed Judgment, coordinate individual providers' responses to a particular proposal, disseminate to physicians the messenger's or other physicians' views or intentions concerning the proposal, act as an agent for collective negotiation and agreement, or otherwise serve to facilitate collusive behavior.[6] The proper role of the messenger is simply to facilitate the transfer of information between purchasers of physician services and individual physicians or physician group practices and not to coordinate or otherwise influence the physicians' decision-making processes.[7]

ii. The Qualified Managed Care Plan

The proposed Final Judgment provides defendants with the

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[6] For example, it would be a violation of the proposed Final Judgment if the messenger were to select a fee for a particular procedure from a range of fees previously authorized by the individual physician, or if the messenger were to convey collective price offers from physicians to purchasers or negotiate collective agreements with purchasers on behalf of physicians. This would be so even if individual physicians were given the opportunity to "opt in " or to "opt out" of any agreement. In each instance, it would in fact be the messenger, not the individual physician, who would be making the critical decision, and the purchaser would be faced with the prospect of a collective response.

[7] For example, the messenger may convey to a physician objective or empirical information about proposed contract terms, convey to a purchaser any individual physician's acceptance or rejection of a contract offer, canvass member physicians for the rates at which each would be willing to contract even before a purchaser's offer is made, and charge a reasonable, non-discriminatory fee for messenger services. The proposed Final Judgment gives guidelines for these and other activities that a messenger may undertake without violating the Final Judgment. (Section II(C))

opportunity to seek approval from the Department of Justice to operate a QMCP. The requirement of prior approval by the Department was necessary for several reasons. First, because a QMCP, in contrast with a messenger model, allows for some collective decision-making among competitors, the Department must look carefully at the potential for a QMCP to result in anticompetitive behavior. In this case, the Department was particularly concerned that past behavior indicated a potential for physician boycott of new entrants into the inpatient obstetrics market. Indeed, managed care plans have been deprived of the benefits of competition in the market for inpatient obstetrical services because OB/GYNs have refused to deliver at the Health Center. In addition, the Department perceived there to be a greater potential for abuse of a QMCP operated by a single specialty with very closely aligned interests. Finally, there was no indication that the operation of a QMCP by defendants in this case would have any pro-competitive benefits. Specifically, Woman's Hospital and WPHO did not indicate that their motivation for operating a QMCP was to offer their community a locally owned and operated managed care plan, a factor that has been an important consideration for the Department in permitting the operation of QMCPs in other communities.[8] In reviewing a request from defendants for

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[8] See United States v. Health care Partners, Inc., 60 Fed. Reg. 52014 (October 4, 1995) (Competitive Impact Statement); United States v. Health Choice of Missouri, Inc., 60 Fed. Reg. 51808 (October 3, 1995) (Competitive Impact Statement).

approval to operate a QMCP, the Department will consider the totality of circumstances in light of the concerns discussed above. The proposed Final Judgment provides that the Department's approval will not be withheld unreasonably. (Section IV(D)(I))

To comply with the requirements of a QMCP set forth in the proposed Final Judgment, (1) the owners or members of WPHO (to the extent they compete with other owners or members or compete with physicians on their provider panels) must share substantial financial risk, and constitute no more than 30% of the physicians in any relevant market;[9] and (2) to the extent WPHO has a provider panel that exceeds this limit in any relevant market, there must be a divergence of economic interest between the owners and the subcontracting physicians, such that the owners have the incentive to bargain down the fees of the subcontracting physicians.[10] (Section II (G)(1) and (2)) In addition, a QMCP

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[9] The financial risk-sharing requirement of a QMCP ensures that the physician owners in the venture share a clear economic incentive to achieve substantial cost savings and provide better services at lower prices to consumers. The 30% limitation is designed to ensure that there are available sufficient remaining physicians in the market with the incentive to contract with competing managed care plans or to form their own plans. These limitations are particularly critical in this case in view of defendants' prior conduct in forming negotiating groups with nearly every OB/GYN practicing at private hospitals in Baton Rouge and obtaining higher prices for these doctors.

[10] The QMCP's subcontracting requirements are designed to permit physician panels above the 30% limit, but with sufficient safeguards to avoid the risk of competitive harm. Specifically, the owners of a QMCP must bear significant financial risk for the payments to, and utilization practices of, the panel physicians in excess of the 30% limitation. In this way, a QMCP must operate with the same incentives as a nonprovider-controlled plan

cannot facilitate agreements between competing physicians concerning charges, or other terms and conditions relating to payers not contracting with the organization, and cannot be operated with the purpose or effect of maintaining or increasing physician fees. (Section II (G)(3) and (5)) The requirements of a QMCP are necessary to avoid the creation of a physician cartel while at the same time allowing payers access to provider-controlled plans.

3. Applicability to Consenting Physicians

The proposed Final Judgment applies not only to named defendants Woman's Hospital and WPHO, but also to all "consenting physicians" defined as physicians who continue as owners or participants in physician networks owned or operated by Woman's Hospital or WPHO. Consenting physicians are required to affirm in writing that the physician has read and understands the Final Judgment and agrees to be bound by it. (Section IV(B))

Application of the proposed Final Judgment to consenting physicians will help prevent recurrence of the violations alleged in the Complaint. Those violations could not have occurred without the willing participation of physicians who, in addition to Woman's Hospital, were the intended beneficiaries of those violations. Physicians could abuse the messenger model and the QMCP in ways that might not violate the Final Judgment but would

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to bargain down the fees of the subcontracting physicians, and the risk of it using the subcontracts as a mechanism for increasing fees for physician services is substantially reduced.

at the same time achieve the anticompetitive results addressed by the Final Judgment. The "consenting physicians" provisions should reduce this risk.

IV.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment would be a full trial on the merits of the case. In the view of the Department of Justice, such a trial would involve substantial costs to the United States and defendants and is not warranted because the proposed Final Judgment provides all of the relief necessary to remedy the violations of the Sherman Act alleged in the Complaint.

V.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and a reasonable attorney's fee. Entry of the proposed Final Judgment will neither impair nor assist in the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent lawsuits that may be brought against one or more defendants in this matter.

VI.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by Sections 2(b) and (d) of the APPA, 15 U.S.C. § 16(b) and (d), any person believing that the proposed Final Judgment should be modified may submit written comments to Gail Kursh, Chief; Health Care Task Force; United States Department of Justice; Antitrust Division; 325 7th Street, N.W., Room 400; Washington, D.C. 20530, within the 60-day period provided by the Act. Comments received, and the Government's responses to them, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free, pursuant to Paragraph 2 of the Stipulation, to withdraw its consent to the proposed Final Judgment at any time before its entry, if the Department should determine that some modification of the Final Judgment is necessary for the public interest. Moreover, the proposed Final Judgment provides in Section X that the Court will retain jurisdiction over this action, and that the parties may apply to the Court for such orders as may be necessary or appropriate for the modification, interpretation, or enforcement of the proposed Final Judgment.

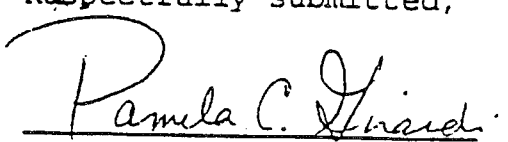
VII.

DETERMINATIVE DOCUMENTS

No materials and documents of the type described in Section 2(b) of the APPA, 15 U.S.C. § 16(b), were considered in formulating the proposed Final Judgment. Consequently, none are filed herewith.

Dated: April 23, 1996

Respectfully submitted,



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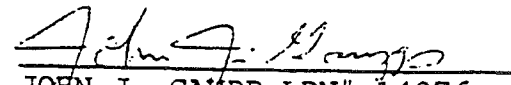
By: 
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