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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, and STATE OF ARIZONA, by and through its Attorney General Grant Woods, Plaintiffs, vs. DELTA DENTAL PLAN OF ARIZONA, INC., AN ARIZONA CORPORATION, Defendant.	)	Civil No. 94-1793 PHX PGR Filed: August 30, 1994

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) - (h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment (or "the Judgment") submitted for entry against and with the consent of Delta Dental Plan of Arizona, Inc., an Arizona Corporation, in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On , 1994, the United States and the State of Arizona, acting under the direction of their respective Attorneys General, filed this civil antitrust suit. Count One of the Complaint, brought by both the United States and the State of Arizona, alleges that Delta Dental Plan of Arizona, Inc. ("Delta"), an Arizona corporation, and its co-conspirators conspired to unreasonably restrain competition by restraining or eliminating discounting of fees for dental services in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Count One of the Complaint asks the Court to find that Delta has violated Section 1 of the Sherman Act, and further requests the Court to enjoin the continuance of the conspiracy. Count Two of the Complaint is brought solely by the State of Arizona and alleges a violation of the Uniform Arizona Antitrust Act, A.R.S. §44-1402, by the same conduct. This Competitive Impact Statement addresses only the Count advanced by the United States, Count One.

Entry of the proposed Final Judgment will terminate the entire action, except that the Court will retain jurisdiction over the matter for further proceedings which may be required to interpret, enforce or modify the Judgment or to punish violations of any of its provisions.

II.

PRACTICES GIVING RISE TO THE ALLEGED VIOLATION

Defendant Delta is an Arizona corporation with its principal place of business in Phoenix, Arizona. The majority of the Board

of Directors of Delta is made up of dentists. Delta contracts with businesses, government agencies, and other organizations to provide pre-paid dental care coverage to their employees. Delta contracts directly with dentists or groups of dentists to provide dental services to patients who are members of these covered groups. Delta compensates its participating provider dentists for their services on the basis of a fee for service determined by Delta in part using fee schedules submitted by each dentist.

Approximately 85 percent of the dentists in the state of Arizona have provider contracts with Delta. For most of these dentists, payments received from Delta for treating Delta member patients are a significant part of their income. Most of these dentists are in independent, private practice and actually or potentially compete with other participating Delta dentists to provide dental services to both Delta and non-Delta patients.

Defendant Delta's participating dentist agreements and confidential fee listings with dentists participating in its dental plan each contain what is called a "most favored nation" clause ("MFN"). These clauses on their face require that each dentist charge Delta the lowest price that dentist charges any patient or competing dental care plan. If dentists wish to reduce their fees for dental services to any other plan or patient, the MFN requires them to also reduce their fees to Delta to the same level. For the reasons described below, however, the actual effect of the MFN clauses has been to require participating Delta dentists to charge other dental plans and non-Delta patients fees that are as high as or higher than the fees the dentists charge to Delta.

Count One of the Complaint alleges that, beginning at a time unknown to the Plaintiffs and continuing through at least July 1994, Delta and its co-conspirators agreed, combined and conspired to unreasonably restrain or eliminate the discounting of fees for dental services to competing dental plans or to other consumers of dental services, in violation of Section 1 of the Sherman Act. The Complaint alleges that, for the purpose and with the effect of forming and carrying out this conspiracy, Delta and its co-conspirators agreed to adopt and enforce an MFN in Delta's participating dentist agreements and confidential fee listings with participating dentists for the purpose of restraining or eliminating discount fees for dental services and restricting the ability of dentists to discount their fees, then enforced the MFN, and coerced dentists into dropping out of discount dental plans that were attempting to compete with Delta.

Had this case proceeded to trial, the Plaintiffs were prepared to prove that the conspiracy has unreasonably restrained price competition among dentists and between other dental insurance plans and Delta.

Delta's adoption and enforcement of the MFN in its agreements with participating dentists has restrained price competition among Arizona dentists for the provision of dental services because it has caused large numbers of dentists to refuse to discount their fees. Before the MFN was enforced, many Arizona dentists chose to reduce their fees to participate in various competing managed-care and other discount plans. For example, at one point a competing discount plan claimed to have contracts with over 1000 participating dentists.

After Delta began enforcing the MFN clauses, however, most participating dentists refused to discount their fees to non-Delta patients or competing discount dental plans because, if they did, the MFN would require them to also lower all of their fees to Delta. Since most dentists in Arizona who participate with Delta receive a significant portion of their income from treating Delta patients, the cost to those dentists of discounting their fees to non-Delta patients or competing dental care programs would be too great to justify discounting. For the same reason, it would be too costly for most dentists to drop their participation in Delta's plan in order to avoid the MFN and be able to discount their fees to competing discount dental plans. Consequently, the MFN clauses have substantially restrained both the discounting that previously was occurring and future discounting that otherwise would have occurred.

The Plaintiffs were also prepared to prove that the conspiracy has unreasonably restrained competition between other dental insurance plans and Delta. Delta's vigorous enforcement of the MFN has forced large numbers of dentists who had previously been discounting their fees to resign from competing discount dental plans. The MFN has also prevented those and other dentists from joining competing discount plans. As a result, the competing discount plans have not been able to attract and/or keep a sufficiently large, qualified, and geographically varied panel of dentists necessary to adequately serve their members and make their plans commercially marketable to employers and other potential patient groups. Many competing plans were about to be

forced out of business or had in fact seen their ability to attract and serve patient groups severely restricted, leading to a substantial reduction in competition with Delta.

The conspiracy has deprived Arizona dental consumers of the benefits of free and open competition. Delta's activities have deprived consumers of price competition among dentists who are no longer discounting their fees. The conspiracy has also denied patients the opportunity to choose among competing dental insurance plans offering different combinations of dentists, services, and price. This reduction in the availability of dental coverage alternatives, such as managed care and other discount plans, has substantially reduced the cost savings to consumers that such competing plans could provide if they were able to contract for dentists' services at discounted fees. In fact, in some smaller Arizona communities, all of the dentists providing services to patients under competing discount plans have resigned from those plans as a result of Delta's enforcement of the MFN, leaving consumers there without any access to lower-cost dental services.

The anticompetitive effects of the Delta MFN would not be mitigated by any willingness or ability of competing plans to raise their payments to participating dentists up to the level of the Delta payments. If other plans did so, they would no longer be achieving the same cost savings to pass on to dental care consumers. The MFN would still cause increased costs to consumers and would not result in Delta obtaining any reduction in its fees or costs.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The Plaintiffs and Delta have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) - (h). The proposed Final Judgment provides that its entry does not constitute any evidence against or admission of any party with respect to any issue of fact or law.

Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e), the proposed Final Judgment may not be entered unless the Court finds that entry is in the public interest. Section VIII of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is accompanied by a Settlement Agreement between Plaintiffs and Delta. Section IV.(E) of the Final Judgment requires Delta to comply with all the terms of this Settlement Agreement. Paragraph 3 of the Settlement Agreement sets forth the parties' stipulation that the proposed Final Judgment may be entered when appropriate.

The proposed Final Judgment is intended to ensure that Delta eliminates its MFN and stops all similar practices that unreasonably restrain competition among dentists and dental care plans in the state of Arizona.

A. Scope of the Proposed Final Judgment

Section III of the proposed Final Judgment provides that the Final Judgment shall apply to Delta and to its officers, employees, members acting as corporate policy makers, directors, successors, assigns, subsidiaries, divisions and other organizational units, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personal service or otherwise.

B. Prohibitions and Obligations

Under Section IV of the proposed Final Judgment, Delta is enjoined and restrained for a period of five years from maintaining, enforcing, or adopting an MFN or similar provision in its participating dentist agreements, in its corporate by-laws, in rules or regulations, or by any other means or methods. Other provisions of the Final Judgment ensure that the MFN's anticompetitive purpose or effects cannot be achieved in other ways. Specifically, Delta is further enjoined and restrained from: (1) demanding information from dentists about their participation with any person or other dental plan; (2) examining, auditing, or monitoring the fees a dentist charges to any person or to any other dental plan; (3) sending any written communication to dentists regarding the fees dentists charge to persons or dental plans other than the Defendant's; (4) requiring any dentist to identify the dental plans with which he or she participates; (5) seeking any vote of dentists on the levels of reimbursement that the Defendant is to pay to its dentists; (6) terminating, or

discriminating or retaliating against, any dentist because he or she offers discounted fees to any person or dental plan; (7) differentiating between dentists in payment or other treatment based on a dentist's discounting of fees; and (8) taking any other action, directly or indirectly, to coerce any dentist to refrain from offering discount fees to any person or dental plan within the State of Arizona or to refrain from participating in any dental plan, or to discourage any dentist from offering discount fees or participating in any dental plan.

Section IV.(B) of the Final Judgment declares that specified portions of Delta's Confidential Fee Listing and Participating Dentist Agreement which constitute the MFN provisions, or any similar provisions, are null and void.

The Final Judgment excepts from its terms, and does not prohibit, Delta's auditing of dentists' fees for the purpose of determining compliance with A.R.S. § 32-1201.11, an Arizona state law relating to fraudulent billing.

The Final Judgment requires that, within 60 days of entry of the Final Judgment, Delta provide a copy of the Final Judgment to all dentists who were Delta members on January 1, 1993. (Section III.(A)).

Section IV.(C) of the Final Judgment obligates Delta to mail to all participating dentists, within 15 days of the date of the Settlement Agreement, a letter containing specific language set forth in Paragraph 9 of the Settlement Agreement. That language advises dentists, among other things, that the MFN pricing provisions in the Delta provider agreements are void; that the

dentists are free to offer discounts to and to associate with, and to offer any price they want, to any person or dental plan in Arizona; and that Delta will not discriminate or retaliate against any dentist based on that dentist's participation with a discount dental plan. The language of the letter also advises dentists that, if they have been terminated as Delta members because of failure to honor the MFN provision, they will be reinstated if they so choose.

The Judgment also provides that the United States and Arizona will have access to information to enforce the judgment. (Section VI).

C. Effect of the Proposed Final Judgment on Competition

The relief required by the proposed Final Judgment will enjoin and eliminate a substantial restraint on price competition among dentists and between Delta and other dental plans in Arizona, by removing the limitations imposed by the MFN on dentists' abilities to discount their fees and to join discount dental coverage plans if they so choose. The Judgment will stop the conspiracy between Delta and its co-conspirators by eliminating the anticompetitive MFN, and by preventing Delta and its co-conspirators from taking any other action to dissuade or discourage dentists from discounting or participating in competing dental plans. As a result, the conspiracy will no longer hamper discount dental plans' efforts to attract and maintain viable panels of dentists to serve their members. At the same time, Delta will still be able to compete with other dental plans because it will not be restricted from seeking and achieving lower-cost fees through other, legitimate means.

Significant discounting and price competition was occurring before enforcement of the MFN. Because the MFN is the mechanism that has been used to restrain or eliminate that discounting and to prevent discount plans from retaining participating dentists, eliminating the MFN and similar restrictions will restore the competition lost as a result of the conspiracy. Additional relief, such as requiring changes in the dentist control of Delta's board, is not warranted since the Department of Justice discovered no evidence in this case that competition was suppressed by circumstances other than Delta's adoption and enforcement of the MFN.

The prohibitions and obligations in the proposed Final Judgment will restore to dental consumers in Arizona the benefits of free and open competition that were suppressed by Delta's adoption and enforcement of the MFN. Without the Delta MFN, consumers should have access to a greater and more meaningful selection of dental insurance alternatives. Discount dental plans should be able to achieve cost savings which they can pass on to consumers.

IV.

ALTERNATIVES 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 cost to the United States and is not warranted because the proposed Final Judgment provides all the relief that is needed to remedy the violations of the Sherman Act alleged in the United States' 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 reasonable attorney's fees. 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 Final Judgment has no *prima facie* effect in any subsequent lawsuits that may be brought against the Defendant in this matter.

VI.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed judgment should be modified may submit written comments to Gary R. Spratling, Chief, San Francisco Office, Department of Justice, Antitrust Division, 450 Golden Gate Avenue, San Francisco, California 94102, within the 60-day period provided by the Act. These comments, 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 3 of the Settlement Agreement, to withdraw its consent to the proposed judgment at any time prior to its entry if the Department should determine that some modification of the judgment is necessary to the public interest. The proposed Judgment itself

provides 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 Judgment.

VII.

DETERMINATIVE DOCUMENTS

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

Dated: August 25, 1994

Respectfully submitted,

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