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Bellingham medical providers must end illegal non-compete contracts, pay \$110K as a result of AG Ferguson consent decree



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Ending exclusive contracts with area medical clinics saves patients money

BELLINGHAM — Attorney General Bob Ferguson today announced that, as a result of his antitrust consent decree (https://agportal-s3bucket.s3.amazonaws.com/BAA_ConsentDecree_Conformed.pdf), Bellingham Anesthesia Associates (BAA) must end its illegal dominance of the local health care market and pay \$110,000 in costs and fees. BAA used unlawful non-compete clauses and exclusive contracts with area medical providers to take about 90 percent of the market share for physician-administered anesthesia services in Whatcom and Skagit counties. This legally enforceable agreement requires BAA to cease illegally requiring physicians to sign three-year non-compete contracts.

“Bellingham Anesthesia Associates’ illegal actions decreased competition and prevented lower cost options,” Ferguson said. “The firm did this at the expense of patients. Today’s agreement holds it accountable and ensures Whatcom and Skagit counties will have better options for local medical needs.”

Ferguson filed an antitrust consent decree in Whatcom County Superior Court, alleging BAA’s anticompetitive conduct violates the Washington Consumer Protection Act. The consent decree, if approved by the court, will resolve a lawsuit (https://agportal-s3bucket.s3.amazonaws.com/BAA_Complaint.pdf) by remedying the competitive harms alleged in the complaint.

BAA used exclusive contracts with hospitals and clinics over the course of at least the last two decades to make itself the de facto anesthesia provider in Whatcom and Skagit counties. BAA also forced all of its doctors to sign overly broad non-compete agreements. Many physicians are also shareholders in BAA; their non-competes barred them from practicing anesthesia in medical procedures in the area for three years. Doctors who do not own shares of the business had 18-month non-competes.

The non-competes allowed anesthesiologists to work during dental procedures, but those opportunities were limited.

The Attorney General’s Office alleged that because health care is highly localized and patients tend to seek local physicians and health care facilities, patients in Whatcom and Skagit counties preferred to receive medical procedures that require anesthesia close to their homes.

During the two decades BAA has operated with these exclusive contracts in Bellingham, its conduct made it the dominant provider of anesthesiologists in the area. Local patients and medical providers had no choice other than a doctor from BAA. BAA’s monopoly limited the choices medical facilities and surgeons could make and also limited the options available for local patients. By controlling the local health care market, BAA did not have to compete to provide enhanced services, offer more options or reduce its prices.

BAA prevented employees who left from establishing a competing practice, and providers from outside the area did not have a financially viable path to open a competing practice. BAA’s contracts also effectively prohibited certified registered nurse anesthetists from entering the market, which, in many cases, would have given medical providers an equally capable but far more affordable option.

The consent decree filed today resolving the case limits BAA’s current and future employees’ non-compete time to nine months and shareholder time to one year. Once signed by the judge, the court order will allow BAA to keep exclusive contracts with hospitals that need anesthesiologists on constant standby. However, the order will require BAA to cancel contracts with outpatient surgical centers, medical clinics and other medical providers who do not need daily and nightly emergency coverage. Further, BAA must pay the Attorney General’s Office \$110,000 to cover costs of the investigation and to fund future consumer protection actions.

Assistant Attorneys General Rahul Rao, Eric Newman and Travis Kennedy, economist Ryne Rohla and paralegal Kimberly Hitchcock are handling the case.

The Antitrust Division of the Attorney General’s Office is responsible for enforcing the antitrust provisions of Washington’s Unfair Business Practices-Consumer Protection Act, and investigates complaints about potential anti-competitive activity. For more information about filing a complaint, click here (<https://www.atg.wa.gov/antitrustunfair-trade-practices>).

Unfair and unreasonable non-compete clauses

The Attorney General’s Office’s lawsuit asserts BAA’s up to three-year non-compete agreements were an unreasonable way for BAA to develop and preserve its business.

Many of the doctors who signed BAA’s non-compete agreements did not know any trade secrets or have access to other BAA intellectual property. Many were unlikely to gain any such information during their employment. Even if a doctor had access to proprietary information, BAA could have protected those secrets through less restrictive contracts.

Former physicians were then limited to assisting with work like dental procedures because BAA did not restrict that area of the health care market. Unable to perform medical anesthesia for three years, these former physicians could not remain current with medical advancements or practice their skills. Just as the exclusive contracts locked BAA to medical providers around the area, these non-compete clauses locked former physicians into a virtual waiting room while their medical skills atrophied.

Exclusive agreements locked in local hospitals and medical clinics

BAA is the exclusive provider of anesthesia to the only hospital in Whatcom County, two of the three hospitals in Skagit County, one hospital in San Juan County and a hospital in northern Snohomish County.

In addition to those hospitals, BAA is the exclusive provider at a multi-specialty ambulatory surgical center and a single-specialty surgical center in Bellingham. BAA also provides services to a single-specialty center in Skagit County. At another surgery center in Bellingham, Pacific Rim Outpatient Surgery Center, it does not have an exclusive agreement but more than 90 percent of surgeries default to BAA's physicians.

Other antitrust work protecting health care access

In 2019, Tacoma-based non-profit CHI Franciscan paid \$2.5 million (<https://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-chi-franciscan-will-pay-25-million-over-anti>) to resolve an Attorney General's Office antitrust lawsuit. The health system also divested its controlling interest in an outpatient surgery center in Silverdale and ended an affiliation with The Doctors Clinic (TDC). This restored competition for medical services on the Kitsap Peninsula.

The Attorney General's Office distributed money from the lawsuit to local health clinics and organizations.

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Washington's Attorney General serves the people and the state of Washington. As the state's largest law firm, the Attorney General's Office provides legal representation to every state agency, board, and commission in Washington. Additionally, the Office serves the people directly by enforcing consumer protection, civil rights, and environmental protection laws. The Office also prosecutes elder abuse, Medicaid fraud, and handles sexually violent predator cases in 38 of Washington's 39 counties. Visit www.atg.wa.gov (<https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.atg.wa.gov%2F&data=04%7C01%7Cbrionna.aho%40atg.wa.gov%7Cca1de901495e4dbe44e808d938325a7e%7C2cc5baaf3b9742c9bcb8392cad34af3f%7C0%7C0%7C637279419610422508>) to learn more.

url=https%3A%2F%2Fwww.atg.wa.gov%2F&data=04%7C01%7Cbrionna.aho%40atg.wa.gov%7Cca1de901495e4dbe44e808d938325a7e%7C2cc5baaf3b9742c9bcb8392cad34af3f%7C0%7C0%7C637279419610422508

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