

they made no good faith efforts to comply with the law.

Insufficient Information

Congress acknowledged, in passing the Tunney Act, that the public has an interest in “the integrity of judicial proceedings” involving proposed antitrust settlements.⁶ To that end, the United States has an obligation to disclose enough facts about a case to enable the public to form reasoned judgments about the terms of a proposed Final Judgment. Of key importance is information that details the government’s analysis of the marketplace, the competitive problem arising thereto, and the selected remedy. Here, we have little to go by. The United States insists that “[t]here are no determinative materials or documents” within the Tunney Act’s meaning that warranted public disclosure.⁷ *Amicus* disagrees.

The complaint and CIS repeatedly argue that Mountain’s actions illegally “increased physician reimbursement fees.”⁸ The complaint argues that customers “have paid higher prices for physician services sold through managed care purchasers than they would have paid in the absence” of Mountain’s actions.⁹ The CIS further states that Mountain’s physicians “have not clinically or financially integrated their practices” in such a way as to justify maintaining their uniform fee schedule.¹⁰

None of these arguments are supported by evidence, at least not evidence that’s presented for public review in the complaint or CIS. For example, the public knows nothing, from the government’s disclosures, of the exact nature of the market for physician services in western North Carolina. We don’t know who Mountain was competing with, what prices they were charging, or even how consumer prices fared in comparison to neighboring marketplaces. We certainly don’t know if Mountain’s action actually harmed any consumers. We simply don’t know much of anything, beyond the government’s mere allegation that there was a fee schedule, and that it was illegal.

Once again, *amicus* faces conflicting information. The United States claims that Mountain increased costs and harmed consumers. Mountain’s Ellen Wells, in contrast, claims to *amicus* that

Mountain’s customers realized an average 14–20% savings over other service networks. Nothing in the complaint or CIS points this out.¹¹ Furthermore, there is no evidence in the public record that suggests any Mountain customer was dissatisfied with their services or costs. Even one customer complaint would provide valuable information to the public on the exact nature of the alleged illegal actions. But once again, we’re left only with the government’s word, despite the existence of evidence that refutes key points of their argument.

It’s worth noting that the government’s lack of disclosure is hardly unusual in a Tunney Act proceeding. In the overwhelming majority of antitrust settlements, the CIS provides little useful information about a case. In one recent proceeding, Albert Foer of the American Antitrust Institute noted: “The [Justice] Department has traditionally been reluctant to say a great deal in its CIS disclosures, presumably because it risks disclosure of confidential information, adds to the staff’s workload, and opens up the door to additional inquiry.”¹² All of these explanations may be applicable in this case, but none of them justify withholding relevant and material information from the public.

At an absolute minimum, the United States should provide the public with enough information to assess the state of the affected marketplace at the time the complaint is filed, and also empirical evidence demonstrating how the proposed remedy is likely to restore competition allegedly lost. The government may consider this an inconvenient burden, but the Tunney Act does not contain exceptions for official laziness.

This Court has clear authority to compel government disclosure of relevant information. Congress stated as much in the Tunney Act’s legislative history, noting “the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest.”¹³ And in one of the few cases where a court actually employed its Tunney Act discretion, *United States v. Central Contracting Co.*,¹⁴ the district judge emphasized the importance of vigorous

judicial enforcement of the public’s right to information:

The need for scrutiny is important in any case, but judicial scrutiny is perhaps more important in a run-of-the-mill case on which public attention is not focused and where abuse may escape unnoticed than in a “big case” where public interest supplements the court’s scrutiny. If the Court in this case doesn’t scrutinize there will be no independent scrutiny.¹⁵

Similarly, this “run-of-the-mill” case runs the risk of escaping public attention and scrutiny completely. Without timely intervention by this Court to procure necessary additional information, it is likely the proposed Final Judgment will be entered without any serious examination of the government’s arguments. This would render the Tunney Act effectively worthless in safeguarding the public interest.

Conclusion

The public—and this Court—cannot rely on the complaint and CIS, in their present form, to make a proper determination under the Tunney Act on whether entry of the proposed Final Judgment is in the public interest. The United States omitted key facts from the complaint, and failed to disclose relevant information that would assist the public in forming reasoned judgments about this case. The Tunney Act grants the Court ample power to ensure the government’s full compliance, and this case warrants exercise of that power.

Accordingly, the Court should direct the United States to file a revised complaint and CIS, addressing the objections and concerns set forth in this brief. Additionally, the Court should extend the public comment period to allow third parties adequate time to review the revised disclosures so that they may provide appropriate comments to the Court.

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Respectfully Submitted,

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Certificate of Service

I hereby certify that on this 15th day of February, 2003, I caused a true and correct copy of the foregoing Motion for Leave to File and Brief of *Amicus Curiae* to be mailed by First Class United States Mail to:

For Plaintiff United States of America:

⁶ H.R. Rep. No. 93-1463 (1974), reprinted in 1974 U.S.C.A.N. 6536, 6539.

⁷ Competitive Impact Statement, 68 FR 1478, 1481 (Jan. 10, 2003).

⁸ Compl. ¶14.

⁹ Compl. ¶17(c).

¹⁰ CIS, 68 FR at 1480.

¹¹ Telephone interview.

¹² Letter from Albert A. Foer to Roger W. Fones 2 (Dec. 27, 2002) (available at <http://antitrustinstitute.org/recent2/223a.pdf>).

¹³ H.R. Rep. No. 93-1463, reprinted in 1974 U.S.C.A.N. at 6538 (citing S. Rep. 93-298).

¹⁴ 537 F. Sup. 571 (E.D. Va. 1982).

¹⁵ *Id.* at 575.