

insurers.³ The DOJ claims this fee schedule violated Section 1 of the Sherman Act by “unreasonably” retraining competition among physicians in western North Carolina,⁴ approximately 400 of whom were Mountain shareholders.

Mountain’s alleged crimes seem to have begun at the time of their incorporation in 1994, eight years before the DOJ took action.⁵ In essence, Mountain’s very existence is considered by the government as *prima facie* evidence of antitrust violations simply because its provider network includes “the vast majority of private practice physicians in the greater Asheville area.”⁶ Of particular interest is the DOJ’s belief that Mountain “has not clinically or financially integrated its physicians to create efficiencies” that would justify setting a uniform fee schedule.⁷

The government objects to Mountain’s alleged fee schedule because Mountain relied “exclusively” on this schedule in contract negotiations with managed care companies, which the DOJ believes resulted in unfairly higher prices in the marketplace.⁸ Since the DOJ considers this a legal injury to consumers, they allege Mountain violated Section 1 of the Sherman Act.

The nexus of the government’s argument is that Mountain’s fee schedule equaled a price-fixing scheme; that is, Mountain’s participating physicians agreed to abide by the schedule exclusively in setting prices for their individual practices. Mountain publicly denied this was the case. Mountain claims they are not an exclusive network, and member physicians set their own office charges and may even join other provider networks and health plans not affiliated with Mountain.

Mountain does not deny that they’ve used non-exclusive fee schedules in the past. But as they note, such fee schedules are common to the majority of health plans operating in North Carolina. Mountain further contends that “[i]n response to existing antitrust guidelines, Mountain Health Care has transitioned to a messenger model where each payer negotiates directly with each physician.”⁹ The messenger model is an exception to the DOJ’s

general prohibition on physician collective bargaining arrangements. Under the model, a group of doctors may pass along fee information to an insurance company through a third-party “messenger,” but the doctors may not speak with one another about fees or otherwise jointly discuss contract terms.

Dr. Stephan Buie, a psychiatrist and a member of the Mountain network, offered this description of Mountain’s operations:

[Mountain Health Care] works through a blind messenger system, whereby MHC negotiates a rate for services with an employer and then sends those rates to each member practice. Each practice independently decides whether to accept the rate or to counter propose a different rate. All members have been informed that it is not legal to consult with other practices about their participation or their rates. Employers were free to negotiate with other managed care organizations.¹⁰

Curiously, the complaint makes no mention of Mountain’s messenger model claims. This omission changes the entire character of the government’s case. If Mountain’s claim is true, then the DOJ intentionally withheld a material fact from its complaint. Consequently, the government’s view that Mountain was nothing more than a “price-setting organization”¹¹ would be erroneous, since the price-setting behavior itself is no longer taking place. At the very least, the DOJ should explain why Mountain’s “messenger model” claim is false, why Mountain’s actions still warrant the charges and remedy set forth in the complaint.

B. Jurisdictional Issues

The next problem with the complaint is the government’s assertion of jurisdiction. On the one hand, the complaint’s description of Mountain’s actual business activities described commerce occurring exclusively within North Carolina.¹² But on the other hand, the government forcefully claims that Mountain’s actions fall under interstate commerce, which is a predicate for the DOJ to bring action under the Sherman Act.¹³ It is unclear whether the alleged misconduct fell within the sphere of interstate commerce. Thus, it is possible the DOJ has not met its burden to

establish federal jurisdiction in this case.

Mountain is a professional corporation organized under North Carolina law. It is registered with North Carolina’s commissioner of insurance as a “preferred provider organization,” a tightly regulated form of physician network. Generally, regulation of health care and health insurance providers occur at the state level. If Mountain were to operate in another state, it would be subject to that jurisdiction’s separate rules for health care and health insurance regulation. Since Mountain only operates in counties comprising western North Carolina¹⁴, it is only subject to North Carolina regulation. This raises the question of whether state officials would be more competent to assess the legality of Mountain’s operations than the DOJ, but we will address that point later. For purposes of assessing this Court’s jurisdiction, it is only relevant to determine whether the alleged crimes involved interstate commerce.

The government claims Mountain’s contract—the products of the illegal fee schedule—included arrangements with “business located outside North Carolina.”¹⁵ What is unclear is the precise identity and nature of these businesses. The government admits Mountain’s doctors only render services within North Carolina boundaries.¹⁶ The businesses receiving these services only do so within North Carolina. At all times, these intrastate transactions are conducted under the careful regulatory eye of North Carolina officials. Thus, the DOJ is asserting jurisdiction here solely because some of the businesses—and we don’t know how many—Mountain provides services to may be organized outside of North Carolina.

At a minimum, some of the contracts Mountain entered into were wholly intrastate affairs; that is, Mountain provided services to businesses organized and doing business *only* in North Carolina. These arrangements are not the proper subject of a federal antitrust proceeding, but may be actionable under state law. In any case, the DOJ’s complaint may not cover such acts, at least not under the Sherman Act. The complaint fails to distinguish and identify the character of Mountain’s clients, however, and we are thus left with an incomplete picture.

The DOJ is overextending its reach here, at least so far as the complaint covers all contracts Mountain entered into, whether intrastate or interstate in

³ Compl., ¶ 1.

⁴ *Id.*

⁵ Compl. ¶ 15.

⁶ Compl. ¶ 8.

⁷ Compl. ¶ 11.

⁸ Compl. ¶ 14.

⁹ “Myths and Facts about Mountain Health Care,” *Asheville Citizen-Times* (Jan. 6, 2003) (accessed online at <http://www.mountainhealthcare.com/pressrelease.htm>).

¹⁰ Stephan Buie, “Competition needs to grow between insurance companies,” *Asheville Citizen-Times* (Dec. 30, 2002) (accessed online at <http://www.mountainhealthcare.com/pressrelease.htm>).

¹¹ Compl. ¶ 14.

¹² Compl. ¶ 2.

¹³ Section 1 of the Sherman Act, 15 U.S.C. 1, only applies to “trade or commerce among the several States, or with foreign nations.”

¹⁴ See Compl. ¶ 5.

¹⁵ *Id.*

¹⁶ Compl. ¶ 2.