

character. Furthermore, it's also unclear whether the contracts Mountain entered into with businesses organized outside North Carolina actually involved overt acts of interstate commerce. If these contracts were between Mountain and subsidiary offices wholly operating within North Carolina, these contracts too might fall outside the reach of the Sherman Act.

In any case, there is a fundamental "public interest" question here as to whether the DOJ should be acting in a case where state authorities possess a more direct, not to mention more developed, interest in the alleged misconduct. Regulation of private health care networks remains largely a state affair, and the DOJ's actions here infringe upon the state's traditional sphere of influence. This should be a factor the Court takes notice of in reviewing the complaint and proposed Final Judgment.

C. Marketplace Description and Analysis

The complaint provides little useful information regarding the marketplace for health care services in western North Carolina. Instead, the government offers a highly generalized description of how physicians relate to managed care companies:

Physicians frequently contract with managed care purchasers. These contracts establish the terms and conditions, including price, under which physicians will render care to the enrollees of managed care purchasers. In negotiations with managed care purchasers, physicians frequently agree to charge rates lower than their customary rates, in order to gain access to the managed care purchaser's enrollees. As a result of this lower rate, such contracts often lower the managed care purchasers' cost, and therefore lower the cost of health care for their enrollees.¹⁷

There are two unproven statements in this claim. The first is that physicians always seek access to the greatest number of patients for the lowest compensation. The second is that lower physician costs equals lower costs for managed care customers. Both of these statements are possibly true, but in the absence of clear and convincing evidence, they cannot simply be taken as axiomatic. The complaint includes no supplemental information that would support either claim in the context of this case. There is no description of the actual market for health care services in western North Carolina; for example, the complaint tells us nothing of who Mountain is competing with, the structure of fees in the market before

and after Mountain's incorporation, or the structure of managed care contracts with individual consumers.

Additionally, the complaint makes no effort to assess whether physicians prefer to accept more patients at a lower per capita reimbursement, or whether they've individually expressed a preference to see fewer patients at a non-discounted rate.

The complaint states that Mountain's network provided "access to substantially all of the physicians in Asheville and the surrounding counties."¹⁸ While this is true, the access was apparently not exclusive. As noted above, Mountain denies they were ever an exclusive network: "[P]roviders are free to participate with any network or plan they choose. Your employer does not have to contract with Mountain Health Care in order for you to see those providers."¹⁹

The government believes Mountain acted as an exclusionary monopoly, unreasonably controlling the marketplace. But once again, Mountain denies this, arguing they faced more than ample competition: "Employers in the Western North Carolina market place are contracted with many different health plans. *Mountain Health Care members make up an average of only 8% of our providers patient base*, and the overwhelming majority of Mountain Health Care providers participate with other plans"²⁰ (emphasis added). Clearly, Mountain's operation did not leave consumers without other options.

There is simply no evidence which refutes Mountain's description of the marketplace as competitive, non-exclusionary, and otherwise free of coercive influence. In the absence of such proof, Mountain's denials should be taken at face value, since the government has the burden of establishing its case by a preponderance of the evidence, not the other way around. Having failed to meet this burden, the government's complaint is defective simply because they have not demonstrated the marketplace itself suffered from any anti-competitive effects arising from Mountain's activities.

D. Anti-Competitive Effects

Despite not proving any defects in the marketplace, the government nevertheless insists Mountain's actions harmed consumers in western North Carolina. The complaint alleges three specific harms: unreasonable restraint of

price competition, denying the "benefits of free and open competition" to managed care companies and their enrollees, and forcing consumers to pay higher prices for physician services.²¹ None of these allegations have merit.

As discussed above, the government never demonstrates that Mountain's fee schedule was exclusive. Mountain's own denial suggests the fee schedule was nothing more than a loose coordination of independent operators. The schedule did not cover office charges, and any patient was free to obtain services from a Mountain physician without going through the network.²² Thus, it is unreasonable for the government to define Mountain's fee schedule as a "restraint" on price competition, since no actual restraint existed.

Next, on the question of whether Mountain denied consumers the "benefits of free and open competition," it is unclear precisely what "benefits" are at issue. The government alludes to the fact that consumers faced higher prices for physician services as the result of Mountain's actions. But that statement appears to be false. Mountain's prices apparently varied little between 1994, when the network was incorporated, and 2002, when the government filed the complaint. Indeed, as Dr. Buie noted, "Managed care organizations have taken a hard line with payment to physicians, either decreasing payments or holding them steady during the last 10 years."²³ Mountain was in the same boat as every other physician network as this respect. While it is true that premiums paid by enrollees of managed care plans have increased substantially in the past decade, even the government attributes that primarily "on larger increases in the indices for prescription drugs and hospital services,"²⁴ not higher physician reimbursements.

Finally, on the issue of whether consumers paid unreasonably higher prices to Mountain physicians, there is once again a lack of evidence, or even a proper standard to judge evidence. The complaint does not reveal how much Mountain charged under its fee schedule, how much non-Mountain providers charged, or how much Mountain providers charged prior to joining the network. Furthermore, there's no indication of what the government's standard is for assessing price levels. We have no indication as to what price levels are acceptable,

¹⁸ Compl., ¶ 8.

¹⁹ "Myths and Facts about Mountain Health Care."

²⁰ *Id.*

²¹ Compl., ¶ 17.

²² "Myths and Facts about Mountain Health Care".

²³ *Id.*

²⁴ *Id.* (citing *Modern Healthcare*, Jan. 21, 2003).

¹⁷ Compl., ¶ 6.