

containment goals, such as reducing particular procedures. Physician networks have no choice under Statement 8 but to employ one of these two methods, despite the fact that both capitation and withholds substantially increase physician risks without providing any actual benefit to physicians or health care consumers.

If physicians don't wish to share risk under Statement 8, but still want to negotiate with insurance companies through a network, the doctors must turn to Statement 9, which authorizes the "messenger model" described earlier. The messenger, as the name implies, is not supposed to be a negotiator, but a one-way courier of information from insurance companies to independent physicians. Or, put another way, "the messenger acts essentially as a mute and blindfolded delivery boy between the payer and each physician in the network."³⁶

Statements 8 and 9 create an unworkable marketplace where physicians possess no genuine bargaining power. The three tools at the physicians' disposal—capitation, withholding, and messengering—are insufficient in dealing with HMOs on a level playing field. The government is well aware of this, and maintains these options precisely for that reason. After all, HMOs are government-sponsored entities that would perish in a truly free market. The only way to maintain the HMO's viability is to eliminate the "threat" of concerted physician action. That's what Statements 8 and 9 are designed to accomplish, and they've done so quite effectively, albeit at the expense of the government's integrity in enforcing its own laws.

In the context of this case, it must be repeated that Mountain claimed to employ the messenger model system set forth in Statement 9. This claim is never addressed, because the government intentionally omitted this fact from its complaint. In past cases, however, the government claimed that even though a network employed a messenger model, it did so incorrectly. This means the government itself—which is composed of antitrust lawyers, not health care professionals—subjectively decided they didn't like the look of things. In most recent prosecutions of physician networks, the defendant argues they were following the best available legal advice in employing the messenger model. Yet in every case, this advice did not save them from the government, which changes the rules in mid-game when they don't like a particular result.

D. Constitutional Analysis of the DOJ's Antitrust Policies

At a fundamental level, the prosecution of Mountain represents the latest attack in a full-scale war against physicians and their basic individual rights. The government's legal premise is shaky at best, since they're arguing in favor of a nebulous concept of "consumer rights" despite the complete absence of evidence that any consumer was harmed in a legal sense. But beyond that, the government's moral premise is far more troubling. In order to accept the government's argument that Mountain violated the antitrust laws, this Court must also subscribe to the notion that Mountain's physician shareholders are serfs of the HMO's (and by extension the government), since these doctors possess no individual rights whatsoever when it comes to fulfilling their economic self-interest.

By dissolving Mountain, the government seeks to deprive the physician shareholders of any ability to negotiate fairly with insurance companies. This makes it for more likely the physicians will surrender greater amounts of their professional autonomy just to ensure a steady paycheck from week-to-week. In turn, this leads to an economic relationship not unlike ancient feudalism, where the procedures generate wealth which is unjustly appropriated by feudal lords whose only claim to the wealth is the benefit of political power and patronage. HMOs do not earn their wealth through production, but through the appropriate of wealth generated by physicians. The government serves to facilitate the HMOs through policies such as this antitrust prosecution. The goal isn't to protect consumers, but to deny wealth to its rightful owners.

This feudal model will only continue to escalate in the absence of judicial intervention. And such intervention is warranted on constitutional grounds, for one of several independent reasons. First, the government is using antitrust policy in a manner that denies basic rights to some citizens but not others. Physicians aren't just treated differently than HMOs; doctors are also treated differently than almost every other class of professional in this country. Labor unions enjoy exemptions from antitrust laws, not because their acts are less likely to violate the antitrust laws, but because unions are politically well-connected in a way that physicians are not. While one could argue this is simply the nature of a democracy, the Constitution prohibits the federal government from distinguishing rights among arbitrarily selected classes of

individuals. The Privileges and Immunities Clause of Article IV, the Due Process Clause of the Fifth Amendment, and the Ninth and Tenth amendments all provide ample support for the equality of physicians to every other class of American citizen.

Furthermore, Congress lacks any affirmative power to provide for the kind of professional destruction imposed by the DOJ in this case and others like it. The Commerce Clause of Article I extends only to interstate commercial acts. Mountain's actions, by the DOJ's own evidence, were wholly intrastate in their actual character, despite the alleged tangential effects on commerce outside of North Carolina. Beyond that, the Tenth Amendment recognizes North Carolina's sovereignty over the regulation of health care matters, a point not challenged by the DOJ in this case.

Ultimately, the government's case against physician networks like Mountain has more to do with moral values than legal judgments. The DOJ's position is that physicians enjoy no basic right to economically benefit from their skills—at least not when such benefits might hamper the government's efforts to ensure the triumph of HMOs in the private insurance market. This contradicts the very principles at the heart of the Constitution and the Declaration of Independence, which hold the individual right to life, liberty, property, and pursuit of happiness as paramount to any policies that force individuals—such as physicians—to sacrifice their rights for the sake of others.

Part III: Recent Cases

A. OGMC of Napa Valley

The Center for the Advancement of Capitalism (CAC)³⁷ first filed comments on behalf of a physician organization in May 2002, in the matter of Obstetrics & Gynecology Medical Corporation of Napa Valley (OGMC),³⁸ an FTC complaint against a six-physician network in California.³⁹ Like Mountain, OGMC was accused of injuring HMOs and health care consumers by attempting to collectively bargain for higher fees. And like the proposed settlement here, OGMC agreed to dissolve. Additionally, the individual OGMC physicians agreed to a variety of

³⁷ The Center for the Advancement of Capitalism is a nonprofit corporation that generally promotes the moral basis of capitalism. While CVT officials have discussed this case with CAC, this comment letter reflects only the viewpoints of CVT.

³⁸ FTC File No. 011-0153.

³⁹ The six physicians were named individually by the FTC in addition to their professional corporation.

³⁶ *Id.*