

FTC would continually delay this, first promising the complaint in January 2002, then March, before finally delivering it in April, *after* Brauchler had agreed to a settlement.

The settlement itself was the product of coercion. The FTC simply presented a proposal and expected it to be accepted without discussion. Brauchler describes a January 2002 "negotiation" between her attorney and FTC staff attorney Paul Nolan as follows:

Paul was seeing red flags. Management was strongly behind the staff recommendation in this case, that there wasn't a long window for negotiations, and that the FTC would not accept much less than was in the initial settlement offer. The FTC staff, according to Mr. Nolan, was hearing some "noise" that they should start issuing subpoenas if they sensed that there was any "backsliding" on PISD's willingness to settle essentially on the terms set forth in the settlement offer. Mr. Nolan gave a short list of non-negotiable items * * * The FTC had no interest in setting up a regulatory framework that would allow PISD to continue in operation as it strove to achieve the necessary levels of integration to permit collective bargaining. Mr. Nolan said the FTC would be responsive to very narrow proposals of a technical nature, but not to significant substantive changes. Mr. Nolan offered that the FTC viewed the proposed settlement as a vanilla-type order.⁴⁴

Nolan added that should the FTC be required to conduct a full investigation, "there would be more incentive to pursue disgorgement of the profits derived from the antitrust violation." In other words, if Brauchler and PISD asserted their right to a trial, the FTC would seek to punish them by demanding "disgorgement" of profits in addition to the other proposed remedies. Keep in mind, the profits Brauchler allegedly earned from these "antitrust violations" amounted to little more than \$30,000 per year, while the alleged victim of her actions included some of the nation's largest health maintenance organizations.

The process Brauchler describes is not, we believe, atypical. At the same time her cases were being "settled," another Colorado-based physician consultant R. Todd Welter, was also facing the FTC's wrath. Like Brauchler, Welter is a self-employed management consultant. Like Brauchler, he was forced to sign a consent order "with a gun to my head."⁴⁵ Welter and Brauchler were both innocent victims of

an FTC witch-hunt designed to placate HMO complaints.

As a result of the consent order he signed, Welter lost substantial share of his business revenue. What's notable about the Welter case is that the FTC apparently fabricated key facts of its complaint. The FTC claimed that eight physician networks that were clients of Welter were organized by him into a negotiating bloc called "Professionals in Women's Care" or PIWC. In interviews with PIWC, however, Welter maintained that PIWC was nothing more than the name of a common folder he kept certain clients in; there was never any effort made to collectively bargain on behalf of the PIWC unit.

What all three Colorado cases have in common is the government's insistence that HMOs—multi-billion dollar corporate entities—were the victim of small physician consulting firms. This is patently absurd on its face. In reality, the government decided to punish these consultants and their physician clients for rejecting the HMOs proposed contracts, which the physicians viewed as reimbursing them far below the market value for their services. It was solely a policy question, not a legal one. The government used antitrust law to decide the outcome of a private negotiation, just as the DOJ is prosecuting Mountain now because the government would prefer to see HMOs expand their network within North Carolina.

CVT filed extensive public comments in the Welter case. The FTC barely acknowledged receipt of these comments, refusing to answer the substantive arguments raised by CVT. Consequently, CVT filed a follow-up letter with the FTC asking a series of specific questions about the Welter case and the government's general policy on health care. To date, CVT has received no reply.

C. System Health Providers

At around the same time Welter's case was settled, the FTC also announced a similar deal with a substantially larger group of physicians in Texas, System Health Providers. CVT's comment letter in this case described the situation as follows:

The facts of this case are fairly simple. Genesis Physicians Group consists of "approximately" 1,250 physicians practicing medicine in the "eastern part of the Dallas-Fort Worth metropolitan area." In 1995, GPG formed System Health Providers, a medical management company. Since 1998, GPG has been the sole owner of SHP stock.

From 1996 to 1999, GPG engaged in collective bargaining with insurance companies on behalf of its members. These

actions were taken under "risk-sharing arrangements" where, presumably, some clinical and financial integration of the member physicians' practices took place. These arrangements were consistent with Federal Trade Commission policy, which permits collective bargaining only under "risk-sharing" arrangements.

GPG's risk-sharing activities failed miserably. They resulted in "significant losses" to the physicians, and the risk-sharing entity formed by GPG was forced to file for bankruptcy protection in 1999. Thereafter, GPG and SHP began to engage in collective bargaining via non-risk-sharing arrangements. In other words, the physicians maintained their individual practices while using a common agent to negotiate with HMOs and other insurance companies. This practice is prohibited by the FTC, because it is considered per se illegal price fixing. Consequently, the FTC began its investigation of GPG and SHP, resulting in the consent agreement now before the public record.⁴⁶

Not only were SHP's physicians punished, they were punished for attempting to maintain the economic viability of their practices. Despite uncontroverted evidence that the business models outlined in Statements 8 and 9 of the FTC-DOJ policies failed, the government maintained they worked. Rather than face a grievous policy error, the government decided to continue blaming physicians.

One interesting note from the FTC's complaint against SHP was this explanation of how the marketplace for healthcare was supposed to work, at least in the government's opinion:

Medicare's Resource Based Relative Value System ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, it is the practice of payors in the Dallas area to make contract offers to individual physicians or groups at a fee level specified in the RBRVS, plus a markup based on some percentage of that fee (e.g., "110% of 2001 RBRVS").⁴⁷

This is a curious, but telling statement. If the goal of antitrust policy is to promote free competition, then it should not matter whether HMOs use RBRVS in negotiating their private contracts with physicians. It also shouldn't matter whether physicians adopt RBRVS as the baseline for their own reimbursement demands. After all, in a true market economy, prices are always set by the market actors, not an outside third-party. Yet here the third-party—the federal government—is

⁴⁴ E-mail interview with Marcia Brauchler (Jan. 23, 2003).

⁴⁵ CVT conducted multiple telephone interviews with Mr. Welter, and any statements of fact in this section should be attributed to these interviews.

⁴⁶ Comments of Citizens for Voluntary Trade 2-3 (Sept. 18, 2002) (FTC File No. 011-0196).

⁴⁷ Complaint, *In re System Health Providers, Inc., and Genesis Physicians Group, Inc.*, ¶ 10.