

“determinative” documents, since in a case such as this one, the DOJ’s mere assertion that no such documents exist is insufficient. As noted by the district court in 1982:

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.⁵²

From a public standpoint, the case against Mountain is not a “big case,” at least not from a national perspective. And sadly, in the majority of antitrust settlements, there is “no independent scrutiny.” This seems part of the government’s design. By targeting small businesses which lack the resources to force the government to trial (or even discovery), the DOJ is able to build a track record of antitrust victories. This is not just important from a political standpoint—impressing congressional appropriators—but from a judicial one. The courts become far more perceptive towards antitrust prosecution once the government establishes “expertise” in a given field, such as physician networks. What few courts realize, however, is that this experience is built on a foundation of coercion and fraud. The government wins by never facing any serious scrutiny, and this is contrary to the intent and language of the Tunney Act.

B. The Proposed Remedy

Even if the government could prove its antitrust allegations against Mountain, the remedy contained in the proposed Final Judgment is completely inconsistent with antitrust law. The settlement requires “the complete and permanent dissolution of Mountain Health Care as an on-going business entity” and the termination of “all preexisting contracts with payers,” all within either 120 days of the filing of the DOJ’s complaint against Mountain, or 10 days after this Court enters the final judgment, whichever is later.

The function of the antitrust laws—at least in theory—is to restore competition lost, not to impose punitive remedies on antitrust offenders. In this case, the dissolution of Mountain and the termination of its contracts constitute a punishment, rather than a restoration of competition. For this reason alone, the proposed Final Judgment must be rejected.

In Napa Valley, the FTC required OGMC to dissolve. That case, however,

only involved a small network encompassing a single specialty, and OGMC was already planning to dissolve their cooperative arrangement prior to the FTC’s action. In this case, Mountain was not planning to dissolve, and its network provides far more comprehensive services to its customers.

In most of the prior antitrust cases discussed above, the government generally obtained remedies short of dissolution. These remedies took the forms of injunctions restricting the physicians’ ability to jointly negotiate with payers and insurers. While these remedies were equally illegal and unjustified, they do demonstrate the excessive nature of the required dissolution of Mountain. The DOJ could simply have adopted conduct restrictions similar to those in the Colorado cases or System Health Providers. This would have, in theory, satisfied the government’s antitrust concerns while not substantially disrupting the health care market in North Carolina.

Indeed, the government’s arrogant disregard for Mountain’s consumers is galling. By requiring Mountain to terminate their existing contracts, the DOJ manages to violate the rights of thousands of individuals, not just Mountain’s shareholders. Based on the documents presented by the government, it’s safe to assume these customers were never consulted as to what they wanted, or even if they had any problem with Mountain in the first place. Despite the government’s assertion that antitrust laws are about protecting consumers, there is not a single piece of evidence that demonstrates consumer interest was ever taken into account here.

Finally, there is nothing in the government’s filings that prove its main argument justifying this remedy—dissolving Mountain will lower consumer health care costs. The entire history of government-sponsored managed care tells us that higher costs are solely a function of government intervention and interference in the free market, and that collective bargaining action by physicians have no substantial impact on what ultimate consumers—patients—actually pay. According to the Congressional Budget Office, which studied the physician collective bargaining issue in 1999, allowing physicians the right to jointly negotiate with HMOs would only increase consumer premiums by about 1.9% annually. This is hardly a figure that justifies the massive government regulation imposed by this proposed Final Judgment. The government also

never takes into account the fact that Mountain’s physicians, like most doctors nationally, are facing continued reductions in HMO and federal insurance reimbursements. Indeed, Mountain argues their doctors have not experienced significant fee increases in more than 10 years. In no other marketplace would the government penalize individuals for seeking a pay raise once every decade. Of course, in no other industry does the government so blatantly tip the scales in favor of one side as they do with managed care providers.

C. Defining the “Public Interest”

The first principle of the Tunney Act is that a proposed settlement must be in the “public interest.” This term is never defined in the act, nor any other statute where it is employed. The Constitution certainly never speaks of a “public interest.” So we’re left to divine the phrase’s correct meaning.

The government’s definition is simple—the “public interest” is whatever we say it is. This is why they can impose a remedy, such as dissolving Mountain by force, that nobody asked for and that yields no particular benefit for anyone aside from the government’s lawyers. Obviously the Tunney Act rejects this thinking, since it requires the Court to actually scrutinize the government’s action, rather than simply acting as a rubber stamp. The failure of previous courts to scrutinize antitrust judgments has, in effect, misled the government into believing in their own omnipotence.

In an individual rights republic like the United States, the more appropriate definition of the “public interest” is nothing more than the aggregate of private interests. Protecting the public from violations of individual rights should be the government’s paramount aim in any case brought under the authority of the United States. In this case, as we’ve aptly demonstrated, the government is initiating a violation of Mountain’s individual rights rather than protecting the rights of Mountain’s consumers.

If every doctor now affiliated with Mountain were to cease practicing medicine tomorrow, the managed care companies and consumers in western North Carolina would have no recourse. Without any providers of medical service, the marketplace would no longer exist. Herein lays a fundamental truth that the government refuses to acknowledge—producers create and define the marketplace, not consumers. Consumers can demand all the services they want, but in the end somebody must provide those services according

⁵² *Id.* at 575.