

to mutually agreed upon terms. To do otherwise, as the government proposes here, would be to enslave producers to the whims of consumers. If that's how the DOJ defines "public interest," then its antitrust policies have more in common with Karl Marx and Benito Mussolini than they do Thomas Jefferson and Abraham Lincoln.

D. The Court's Powers and Duties

Finally, the government, through the CIS, asks this Court to take to adopt a very selective reading of the Tunney Act in determining its role in reviewing the proposed Final Judgment. The DOJ cites case law that dissuades the Court from taking an active role in assessing the government's case. Citing the D.C. Circuit in *United States v. Microsoft*,⁵³ the DOJ argues:

[T]he court's role * * * is limited to reviewing the remedy in relationship to the violations the United States alleges in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." * * * the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into to other matters that the United States might have but did not pursue.⁵⁴

This position essentially permits the government to present a complaint unchallenged without even minimal scrutiny, regardless of the actual merits of the government's case. This is not consistent with the letter or intent of the Tunney Act. The law gives the Court broad discretion to assess every aspect of an antitrust settlement, including the complaint, the government's good faith in bringing the case, and the impact of the proposed remedies on individual rights and welfare. If this Court finds the government's complaint or CIS is defective on key questions of fact or application of law, there is nothing in the Tunney Act which commands the Court to simply ignore that.

The legislative history of the Tunney Act supports an expansive interpretation. The House Judiciary Committee concluded "the public does have an interest in the integrity of judicial procedures incident to the filing of a proposed consent decree by the Justice Department." The House also concluded: "Nor is [the Tunney Act] intended to authorize techniques not otherwise authorized by law. The legislative language, however, is intended to isolate further and, thereby, to preclude factors identified as contributing to the rise of the so-called abuse of 'judicial rubber stamping.'" This hardly sounds like commanding

language foreclosing the Court's ability to examine the government's complaint to ensure that it conforms to actual facts and law.

It must also be pointed out that while the government cites a number of precedents in the CIS with respect to the Court's role in this proceeding, none of the cases cited emanate from the Supreme Court or the Fourth Circuit. Therefore, this Court is not bound to follow those decisions. Combined with the lack of any case law on the underlying constitutionality of the government's antitrust Statements on health care, this Court is well within its rights to act as a court of first impression on many of the issues raised in these comments.

Part V: Alternatives to the Proposed Final Judgment

For any of the numerous independent grounds cited in these comments, the Court should reject entry of the proposed Final Judgment as inconsistent with the public interest 15 U.S.C. 16(f). The Court should also dismiss the complaint with prejudice, given the government's failure to set forth any claims that would entitle them to relief under the Sherman Act, and because the government omitted material facts from the complaint in order to defraud the Court and the American people.

If the Court decides not to dismiss the complaint, then alternatively it should order a full trial on the merits. While Mountain signed the consent order in large part to avoid a trial, this action must be viewed in the context of an antitrust consent decree procedure. No actual "negotiation" took place, as the government obtained all the relief they would have sought at trial. Furthermore, Mountain's counsel advised them to settle immediately before even permitting some discovery or attempting to actually negotiate with the government. In retrospect, Mountain president Ellen Wells told CVT that Mountain now regrets signing the consent agreement, and considers the proposed Final Judgment a mistake. This Court is certainly not required to coddle a defendant's remorse in agreeing to a settlement, but given the enormous imbalance in Mountain's bargaining position relative to the government, the Court should take appropriate action to ensure the interests of justice are not comprised by the government's abuse of discretion.

If the Court were to order a full trial on the merits, the United States would likely withdraw the complaint or immediately negotiate a more equitable settlement with Mountain. The DOJ has

never tested the viability of its physician network policies at trial, and we believe they're not about to start here. Thus, ordering a trial would likely produce a result more conducive to the interests of Mountain and the public generally.

Finally, given the blatant and intentional misconduct of the government in prosecuting this case, CVT asks the Court to consider imposing sanctions on the United States under Federal Rule of Civil Procedure 11. The Court, on its own initiative, may impose sanctions against a party when they make representations to the Court which have no evidentiary support. In this case, the government made numerous allegations, described above, for which there is no evidentiary support or where material facts were omitted in order to mislead the Court into reaching an erroneous conclusion. Sanctions are certainly warranted, either in the form of monetary compensation to Mountain, or in such other manner as the Court deems appropriate.

Conclusion

The government's war on physicians must end. Every day the United States spends trying to blame doctors for the failure of three decades of government policies is a day that this country moves closer towards the complete socialization of health care under central control. While the Court is not in a position to make policy pronouncements, this case presents a compelling opportunity for the judiciary to defend its rightful place in the constitutional order from government manipulations. At every turn, in this case and dozens more, the DOJ has subverted the integrity of the judicial system by advancing fraudulent and unethical antitrust "settlements" that amount to nothing more than a web of deceit. This pattern simply cannot be allowed to continue.

Mountain Health Care is the innocent victim of the United States' failure to protect the individual rights of physicians and consumers. Sanctioning the proposed Final Judgment amounts to judicial coercion, a rubber-stamping of the government's mob assault on the freedoms and liberties of physicians to join together voluntarily to preserve and promote their economic self-interest. This is not a valid use of the antitrust laws, or any laws propagated by a republican society. Rejection of the proposed Final Judgment is the only possible outcome that would serve the public interest.

⁵³ 56 F.3d 1148 (D.C. Cir. 1995).

⁵⁴ CIS, 68 FR at 1,481.