

physicians separately, obtained independent fee requests, and passed that information along to the managed care companies and other payors. At no point, according to Wells, was there an agreement or conspiracy among Mountain physicians to create a "universal" schedule of fixed fees.<sup>5</sup>

Not only does this system not violate the Sherman Act, the United States expressly endorses this type of "messenger model" as a safe haven from the general prohibition on independent physicians collectively bargaining with payors. According to the 1996 revisions to the Department of Justice-Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care:

Some networks that are not substantially integrated use a variety of "messenger model" arrangements to facilitate contracting between providers and payers and avoid price-fixing agreements among competing network providers. Arrangements that are designed simply to minimize the costs associated with the contracting process, and that do not result in a collective determination by the competing network providers on prices or price-related terms, are not per se illegal price fixing.

If Mountain's claim, then, is true, and they are employing (or transitioning to) a messenger model, there is no need for the government's proposed remedy—dissolution of Mountain—because there is no illegal behavior taking place. Yet nowhere in the complaint or CIS does the United States discuss, or even acknowledge, Mountain's claim that they employed a messenger model. The government doesn't even offer evidence to refute the claim. Instead, the complaint and CIS present a carefully edited, limited recitation of the facts, omitting a key detail that might influence the public's analysis of the case. In the absence of these disclosures, the public is left to incorrectly conclude that Mountain was simply an illegal price-fixing arrangement among physicians, and that they made no good faith efforts to comply with the law.

### Insufficient Information

Congress acknowledged, in passing the Tunney Act, that the public has an interest in "the integrity of judicial proceedings" involving proposed antitrust settlements.<sup>6</sup> To that end, the United States has an obligation to disclose enough facts about a case to enable the public to form reasoned judgments about the terms of a proposed Final Judgment. Of key importance is information that details the government's analysis of the marketplace, the competitive problem arising thereto, and the selected remedy. Here, we have little to go by. The United States insists that "[t]here are no determinative materials or documents" within the Tunney Act's meaning that

warranted public disclosure.<sup>7</sup> *Amicus* disagrees.

The complaint and CIS repeatedly argue that Mountain's actions illegally "increased physician reimbursement fees."<sup>8</sup> The complaint argues that customers "have paid higher prices for physician services sold through managed care purchasers than they would have paid in the absence" of Mountain's actions.<sup>9</sup> The CIS further states that Mountain's physicians "have not clinically or financially integrated their practices" in such a way as to justify maintaining their uniform fee schedule.<sup>10</sup>

None of these arguments are supported by evidence, at least not evidence that's presented for public review in the complaint or CIS. For example, the public knows nothing, from the government's disclosures, of the exact nature of the market for physician services in western North Carolina. We don't know who Mountain was competing with, what prices they were charging, or even how consumer prices fared in comparison to neighboring marketplaces. We certainly don't know if Mountain's actions actually harmed any consumers. We simply don't know much of anything, beyond the government's mere allegation that there was a fee schedule, and that it was illegal.

Once again, *amicus* faces conflicting information. The United States claims that Mountain increased costs and harmed consumers. Mountain's Ellen Wells, in contrast, claims to *amicus* that Mountain's customers realized an average 14–20% savings over other service networks. Nothing in the complaint or CIS points this out.<sup>11</sup> Furthermore, there is not evidence in the public record that suggests any Mountain customer was dissatisfied with their services or costs. Even one consumer complaint would provide valuable information to the public on the exact nature of the alleged illegal actions. But once again, we're left only with the government's word, despite the existence of evidence that refutes key points of their argument.

It's worth noting that the government's lack of disclosure is hardly unusual in a Tunney Act proceeding. In the overwhelming majority of antitrust settlements, the CIS provides little useful information about a case. In one recent proceeding, Albert

Foer of the American Antitrust Institute noted: "The [Justice] Department has traditionally been reluctant to say a great deal in its CIS disclosures, presumably because it risks disclosure of confidential information, adds to the staff's workload, and opens up the door to additional inquiry."<sup>12</sup> All of these explanations may be applicable in this case, but none of them justify withholding relevant and material information from the public.

At an absolute minimum, the United States should provide the public with enough information to assess the state of the affected marketplace at the time the complaint is filed, and also empirical evidence demonstrating how the proposed remedy is likely to restore competition allegedly lost. The government may consider this an inconvenient burden, but the Tunney Act does not contain exceptions for official laziness.

This Court has clear authority to compel government disclosure of relevant information. Congress stated as much in the Tunney Act's legislative history, noting "the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest."<sup>13</sup> And in one of the few cases where a court actually employed its Tunney Act discretion, *United States, v. Central Contracting Co.*,<sup>14</sup> the district judge emphasized the importance of vigorous judicial enforcement of the public's right to information:

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.<sup>15</sup>

Similarly, this "run-of-the-mill" case runs the risk of escaping public attention and scrutiny completely. Without timely intervention by this Court to procure necessary additional information, it is likely the proposed Final Judgment will be entered without any serious examination of the government's arguments. This would render the Tunney Act effectively worthless in safeguarding the public interest.

### Conclusion

The public—and this Court—cannot rely on the complaint and CIS, in their present form, to make a proper determination under the Tunney Act on whether entry of the

<sup>7</sup> Competitive Impact Statement, 68 FR 1,478, 1,481 (Jan. 10, 2003).

<sup>8</sup> Compl. ¶ 14.

<sup>9</sup> Compl. ¶ 17(c).

<sup>10</sup> CIS, 68 FR at 1,480.

<sup>11</sup> Telephone Interview.

<sup>12</sup> Letter from Albert A. Foer to Roger W. Fones 2 (Dec. 27, 2002) (available at <http://antitrustinstitute.org/recent2/223a.pdf>).

<sup>13</sup> H.R. Rep. No. 93–1463, reprinted in 1974 U.S.C.A.N. at 6538 (citing S. Rep. 93–298).

<sup>14</sup> 537 F. Supp. 571 (E.D. Va. 1982).

<sup>15</sup> *Id.* at 575.

<sup>5</sup> Telephone Interview with Ellen Wells, President of Mountain Health Care, P.A. (Jan. 23, 2003).

<sup>6</sup> H.R. Rep. No. 93–1463 (1974), reprinted in 1974 U.S.C.A.N. 6536, 6539.