

proposed Final Judgment is in the public interest. The United States omitted key facts from the complaint, and failed to disclose relevant information that would assist the public in forming reasoned judgments about this case. The Tunney Act grants the Court ample power to ensure the government's full compliance, and this case warrants exercise of that power.

Accordingly, the Court should direct the United States to file a revised complaint and CIS, addressing the objections and concerns set forth in this brief. Additionally, the Court should extend the public comment period to allow third parties adequate time to review the revised disclosures so that they may provide appropriate comments to the Court.

Respectfully Submitted,

Dated: February 15, 2003.

S.M. Oliva,
2000 F Street, NW., #315, Washington, DC
20006-4217, Tel: (202) 223-0071, E-mail:
smoliva@voluntarytrade.org, Amicus Curiae.

The Center for the Advancement of Capitalism

March 10, 2003.

Mr. Mark J. Botti,
Chief, Litigation Section, Antitrust Division,
U.S. Department of Justice, 1401 H
Street, NW., Room 4000, Washington, DC
20530.

Re: Public comments in United States v.
Mountain Health Care

Dear Mr. Botti: Pursuant to the rights of the public under the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), I am writing to express the opposition of the Center for the Advancement of Capitalism (CAC)¹ to the proposed Final Judgment in the case of United States v. Mountain Health Care, now pending before the U.S. District Court for the Western District of North Carolina. CAC has reviewed the Competitive Impact Statement and the proposed Final Judgment and it finds that the proposed Final Judgment undermines the public interest and ought to be rejected by the Court.

1. The Proposed Final Judgment Ordering the Dissolution of Mountain Health Care Is Unjustified by the Facts

The proposed Final Judgment demands the complete dissolution of Mountain Health Care on the grounds that it illegally negotiated a uniform fee schedule with insurance companies. Such a draconian end to a company that has been in existence since 1994 and competently and caringly served the health needs of almost 70,000 North

Carolinians is shocking. It clearly implies that Mountain Health Care's mere existence as a physician-owned network of healthcare providers is outside the confines of legal behavior under the government's interpretation of the antitrust laws, whatever Mountain's actual behavior. CAC rejects this implication outright. In no way did the government adequately justify its dissolution of Mountain Health Care.

Under FTC-DOJ policy, doctors may collectively bargain with health insurance companies by using three methods: capitation, withholding, and the messenger model. Capitation requires physicians accept a fixed fee per patient regardless of the actual costs of treating that patient. Withholding allows the insurer to withhold a percentage (20-30% or more) of a physician's reimbursement unless some arbitrary goal is met, such as reducing the frequency of a particular procedure. The messenger model allows a third-party to serve as a one-way conduit from the insurer to the doctors.

Mountain Health Care maintains that in accordance with the above guidelines, it now uses the messenger model in its negotiations. Yet nowhere is this critical fact mentioned in the government's Competitive Impact Statement. CAC considers this to be a galling and relevant omission.

2. The Case Against Mountain Health Care Is an Attempt on the Part of the Government To Erode the Rights of Physicians in the Name of Serving an Improperly Defined Concept of the "public interest"

The "public interest" is properly defined by the principle of individual rights as expressed in the Declaration of Independence and animated by the Constitution. The principle of individuals rights is not mere claptrap to be ignored by DOJ lawyers, but the organizing principle of legitimate government.

Yet CAC's observations of the government's antitrust actions in health-care lead it to believe that the government is simply pursuing a policy of reflexively reducing healthcare costs, even at the price of squelching the rights of physicians to pursue their legitimate economic interests via institutions able to negotiate on-par with health insurance companies.

In effect, current government policies in healthcare uses antitrust to obtain the partial socialization of medicine absent clear congressional authority, violates the rights of physicians to profit from their work, and removes the financial incentive that brings most individuals to pursue careers in the healthcare industry.

Yet every attempt CAC has made thus far to point out these glaring contradictions in other Antitrust Procedures and Penalties Act proceedings has resulted in the government's evasion of CAC's core arguments. We hold that even under the nation's system of antitrust, the government can not make literal serfs of some of its citizens because they seek to pursue their legitimate economic interests. Consumers can not possibly benefit from denying physicians the right to collectively bargain their fees.

3. The Court Ought To Use Its Authority Under the Antitrust Procedures and Penalties Act To Check the Unrestrained Government Incursion Against the Rights of Physicians

CAC notes that the complexities of antitrust proceedings are such that few of the government's targets for enforcement can afford to offer a full defense of their actions, even as they maintain their complete innocence. Mountain Health Care claims that it only agreed to the settlement because it has limited assets that preclude it from fighting the requisite court battle with the government.² CAC's observations of the government's antitrust actions in healthcare lead it to believe that the government specifically targets those unlikely to offer a defense. While CAC recognizes the burden on the accused to defend themselves, we nevertheless consider this pattern to be relevant in observing how the government carries out its mission of defining and defending the public interest.

4. Mountain Health Care's Business Under Review Was Not Interstate Commerce

CAC also observes that Mountain Health Care's conduct as a preferred-provider organization took place wholly within North Carolina, as outlined in the Competitive Impact Statement. The Justice Department's assertion of jurisdiction here is tenuous at best.

Conclusion

Ultimately, CAC's observations of these facts lead it to question the appropriateness of the proposed Final Judgment. Considering the impact on both Mountain Health Care doctors and their patents, CAC believes a substantive review and ultimate rejection of the proposed Final Judgment is in order. If the Antitrust Procedures and Penalties Act protects the public interest from inadequate antitrust settlements, than it is incumbent upon the Court to use it to protect the public from excessive antitrust settlements. The "reaches of the public interest" apply to both producers and consumers, and gross injustice toward producers can not be held to be in the legitimate interest of consumers.

CAC believes the government's position is clear and direct: any attempt by physicians to advance their own economic rights collectively is inherently suspect, if not outright illegal. It would be refreshing to see the government's case stand the test of a trial, but in that absence, CAC believes the Court still has it within its power to challenge the government's brazenly erroneous conclusions by rejecting the proposed Final Judgment.

Respectfully Submitted,

Nicholas P. Provenzo,
Chairman.

February 25, 2003

Mr. Mark J. Botti (via facsimile 202-307-5802),
Chief, Litigation I Section, Antitrust Division,
U.S. Department of Justice, 1401 H
Street, NW., Room 4000, Washington, DC
20530.

² <http://www.mountainhealthcare.com/pressrelease.htm> on 4/10/03.

¹ The Center for the Advancement of Capitalism is a District of Columbia corporation organized in 1998, and exempt from income tax under Section 501(c)(4) of the Internal Revenue Code. CAC's mission is to present to policymakers, the judiciary and the public analyses to assist in the identification and protection of the individual rights of the American people. CAC applies Ayn Rand's philosophy of Objectivism to contemporary public policy issues, and provides empirical studies and theoretical commentaries on the impact of legal and regulatory institutions upon the rights of American citizens. CAC has no financial interest in the outcome of this case, nor has CAC received any compensation from the defendants in connection with these comments.