

Public Comments of The Center for the Advancement of Capitalism

Pursuant to the United States' publication of a Proposed Final Judgment (PFJ) in the above-captioned action,¹ the Center for the Advancement of Capitalism (CAC)² files the following comments.

1. Material Facts

On June 13, 2003, the United States filed a complaint against the National Council on Problem Gambling, Inc. (NCPG), a nonprofit corporation headquartered in Washington, DC. According to NCPG, its mission is to "public awareness of pathological gambling, ensure the widespread availability of treatment for problem gamblers and their families, and to encourage research and programs for prevention and education."³ NCPG only provides limited services through its national office, and instead relies on 34 state affiliates to produce and provide "problem gambling services" to customers. NCPG's customers include state governments.⁴ NCPG's members adopted, through its board of directors, a series of internal agreements to coordinate the affiliates' work. Among these agreements, according to the United States, was a "territorial allocation" scheme that the Government considered a violation of section one of the Sherman Act, 15 U.S.C. 1.

The United States alleges that from 1995 to 2001, NCPG enforced a policy restricting individual state affiliates from offering problem gambling services—such as counseling and educational programs—in a state served by another NCPG affiliate. For example, the United States alleges NCPG "asked" its Minnesota affiliate to cease efforts to contract with the State of Nebraska, and instead support that the state's NCPG affiliate.⁵ The Government charges acts such as this violate the Sherman Act violation because customers are denied the "benefits of free and open competition" and that "innovations in problem gambling products and services [are] stifled."⁶

The United States further claims NCPG maintained ethical guidelines

designed to support the organization's illegal anticompetitive conduct. In 1996 and 1999, for instance, NCPG's directors and affiliates adopted an "ethics resolution" which codified the non-competition policy. According to the Government, NCPG could sanction a member internally, with "fines or revocation of NCPG membership," for offering services in a state served by another affiliate without the incumbent affiliate's permission.⁷

The PFJ now before the Court resolves the Government's concerns by restricting NCPG's future conduct. The PFJ prevents NCPG from "prohibiting or restraining" any state affiliate from selling problem gambling services to any customer in any state. The PFJ further prohibits NCPG from declaring such competition "unethical, unprofessional, or contrary to the policy of the NCPG." The PFJ will expire 10 years from the date of entry by the Court.

2. NCPG's Actions and Barriers to Entry

The major flaw in the Government's case is their complete failure to demonstrate, or even allege, that NCPG's actions created a barrier to competition in the market for "problem gambling services." The United States typically alleges in antitrust cases that the defendant's actions create a de facto barrier to entry because of the relative difficulty in entering the marketplace. Here there is no such allegation. All the United States argues is that NCPG restrained competition among its own membership. This is not a sufficient basis to find entry of the PFJ is in the public interest.

In the first place, the "problem gambling services" market does not possess any substantial natural barriers to entry. The United States itself defines the market in very general terms:

"Problem gambling services" means all services relating to the treatment or prevention of problem or compulsive gambling, including dissemination of information regarding problem gambling, telephonic hot-line or help-line services, training of problem gambling counselors, certification of various problem gambling training programs, and provision of any product or service aimed at assisting problem gamblers.⁸

It is unclear from the Government's definition how many or much of these services one must offer to be considered part of the market, but it is fairly clear that entry itself is not difficult. Any individual or organization could disseminate information on compulsive

gambling and operate a hotline for gambling addicts. NCPG is not a monopolist in this market, but rather a successful group of experienced problem gambling service providers.

The United States presents no evidence that NCPG created, or attempted to create, any barriers to prevent any interested party from entering the market. From all accounts, NCPG's policies and actions were limited to governing the voluntary association among its own affiliates. Furthermore, NCPG and its affiliates are all nonprofit organizations. They are not organized to compete with each other, but rather to provide beneficial services to the public without regard for maximizing profit or paying dividends to stockholders. For the United States to hold NCPG to the same antitrust standards as a for-profit corporation or association both misconstrues the intent of antitrust laws, and imposes an unreasonable burden on NCPG's operations.⁹

3. Free Speech and Free Assembly

The most disturbing aspect of the PFJ is the shackling of NCPG's future speech and assembly. Section IV(B) of the PFJ prohibits NCPG from adopting or making any statement that "states or implies" intrastate competition of the type at issue in this case is "unethical, unprofessional, or contrary to the policy of NCPG." This requirement does nothing to enhance competition, and in fact is overt censorship by the United States. The Government is not content to simply restrict NCPG's commercial conduct; they also seek to prevent NCPG from expressing, or even holding, ethical views that contrast those of the United States.

The First Amendment forbids the federal government from "abridging the freedom of speech." The PFJ's restrictions on NCPG's future speech plainly violate this constitutional commandment. The United States possesses no authority, under either the Constitution or the Sherman Act, to prevent private associations from declaring conduct "unethical" or "unprofessional". Indeed, if the Government had such power, it could easily prohibit individuals, under color of antitrust enforcement, from making

⁹ The United States argues that NCPG's policies did not "enhance economic efficiency" (Complaint at 5). Once again, nonprofit organizations are not generally designed to maximize economically efficiently. And even if this were the case, there's no evidence that lack of "efficiency" is itself anticompetitive. Under this standard, for example, one could hold an amateur sports association in violation of the Sherman Act for limiting the number of games member teams may schedule in a season.

¹ 68 FR 38,090–38,098 (June 23, 2003).

² CAC is a District of Columbia nonprofit corporation which regularly files public comments in Tunney Act proceedings. See, i.e., *United States v. Mountain Health Care*, 68 FR at 44,591 (July 29, 2003); *United States v. The MathWorks, Inc., et al.*, 68 FR at 3,270–3,272 (January 23, 2003).

³ <http://www.ncpgambling.org/about.htm>.

⁴ See Competitive Impact Statement at 8–9 (NCPG affiliates contracted with the State of Nebraska and the Arizona lottery.)

⁵ Id.

⁶ Complaint at 5.

⁷ Competitive Impact Statement at 7.

⁸ Proposed Final judgment at 3.