UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. **MEDICAL MUTUAL OF OHIO**, Defendant.	Civil Action No. 1:98 CV 2172 Judge Oliver Magistrate Judge Perelman Filed: January 21, 1999

RESPONSE OF THE UNITED STATES TO PUBLIC COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (the "Tunney Act"), 15 U.S.C. §16 (b)-(h), the United States hereby responds to public comments received regarding the proposed Final Judgment.

On September 23, 1998, the United States filed a Complaint alleging that Medical Mutual of Ohio ("Medical Mutual") unlawfully reduced hospital discounting and price competition among hospitals in the Cleveland, Ohio area in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, by requiring hospitals wishing to do business with it to agree to a "Most Favorable Rates" ("MFR") provision. Simultaneously, the United States filed a proposed Final Judgment, a Stipulation signed by all parties agreeing to the entry of the proposed Final Judgment, and a Competitive Impact Statement ("CIS").

The proposed Final Judgment and CIS were published in the Federal Register on Thursday, October 1, 1998 at 63 Fed. Reg. 52,764 (1998). A summary of the terms of the proposed Final Judgment and the CIS and directions for the submission of written comments were published in the *Washington Post* for seven consecutive days from September 27 through October 3, 1998 and in the *Cleveland Plain Dealer* from September 27 through October 3, 1998. The 60-day period for public comment expired on December 1, 1998.

The United States received one comment on the proposed Final Judgment, from University Hospitals of Cleveland ("UHC"). Although UHC does not oppose the entry of the proposed Final Judgment, it requests that the Final Judgment be broadened to address certain of Medical Mutual's other contracting practices which, UHC believes, are as pernicious to competition as Medical Mutual's use of MFR provisions. After careful consideration of UHC's comment, a copy of which is attached to this Response, the United States has concluded that the additional relief suggested by UHC is unrelated to the violations investigated by the Department and alleged in the Complaint. For that reason, once the comment and the Response have been published in the Federal Register pursuant to 15 U.S.C. §16 (d), the United States will move the Court to enter the proposed Final Judgment.

I. BACKGROUND

As explained more fully in the Complaint and CIS, defendant Medical Mutual is the largest commercial health care insurer in the Cleveland Region. With more than 730,000 enrollees there, Medical Mutual covers approximately 36% of the commercially insured

population and accounts for approximately 25 to 30% of commercial payments to local hospitals. Nearly all of the Cleveland hospitals depend on Medical Mutual for the largest share of their commercial business.

The Complaint alleges that starting in 1986, Medical Mutual successfully imposed a MFR provision in all of its contracts with acute care hospitals in the Cleveland Region. Such provisions, sometimes referred to as "Most Favored Nations" or "MFN" provisions, typically require that a buyer health plan receive a rate at least as low as the lowest rate the medical provider charges any other plan. Medical Mutual's MFR provision, however, required hospitals to charge any smaller commercial health plan rates substantially higher -- 15 to 30% higher -- than it charged Medical Mutual. This buffer gave Medical Mutual a significant advantage over its rivals in the purchase of hospital services and insulated Medical Mutual's plans from price competition.

The Complaint also charges that Medical Mutual's enforcement of its MFR clause prevented Medical Mutual's competitors from lowering their hospital costs through more efficient or better management of hospital services, raised the cost of hospital services and health insurance for businesses and consumers in the Cleveland area, and suppressed innovation in the local health insurance industry. The United States believes that these actions, along with the other conduct alleged in the Complaint, violated Section 1 of the Sherman Act.

In September 1998, the parties stipulated that the proposed Final Judgment be entered by this Court to settle this action. The proposed Final Judgment, if entered, will enjoin and restrain Medical Mutual from adopting, maintaining, or enforcing in the Cleveland Region a Most Favorable Rates requirement or any policy, practice, rule, or contractual provision having the same purpose or effect. In addition, the proposed Final Judgment will prohibit Medical Mutual from directly or indirectly requiring hospitals participating in its panels to disclose the rates such hospitals charge any non-governmental payer except in extremely limited circumstances.

II. RESPONSE TO PUBLIC COMMENT

UHC submitted the only comment in response to the proposed Final Judgment, urging that the proposed Final Judgment be modified to address other allegedly anticompetitive contracting schemes by Medical Mutual, not just its use of the MFR provision. Specifically, UHC alleges that Medical Mutual has entered into a fourteen-year restrictive agreement with UHC's main competitor in the Cleveland area, the Cleveland Clinic Foundation ("CCF"), which explicitly provides that the rates CCF charges Medical Mutual will dramatically increase if Medical Mutual includes UHC or UHC's affiliate hospital in its "SuperMed" managed care panels. UHC believes that this provision violates the antitrust laws by reducing consumers' choice of health care providers, stifling competition, and raising UHC's costs of doing business.

The United States believes that UHC's comment provides no justification for reconsidering the merits of the proposed Final Judgment. First, selective or exclusionary contracting is not necessarily anticompetitive. See Smith v. Northern Michigan Hospitals, Inc.,

703 F.2d 942 (6th Cir. 1983)("not all exclusive dealing contracts even by a monopolist are illegal"). Indeed, selective or exclusive contracting by health plans and providers can in some circumstances be procompetitive; health plans and providers can use such provisions to direct patient volume to providers in exchange for lower prices and/or higher quality services, and any savings can be passed on to subscribers in the form of lower premiums. See Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 45 (1984); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 594 (1st Cir. 1993); Interface Group v. Massachusetts Port Auth., 816 F.2d 9, 11-12 (1st Cir. 1987).

Second, the agreement between Medical Mutual and CCF that UHC alleges is anticompetitive is far outside the scope of the Department's investigation, which was limited to Medical Mutual's use and enforcement of its MFR provision. The Department did not purport to investigate -- or remedy through the proposed Final Judgment -- all possible anticompetitive conduct by Medical Mutual. Nothing in the proposed Final Judgment limits the ability of the Department to look into other anticompetitive conduct by Medical Mutual in the future, or restricts the right of private parties, including UHC, to pursue the full range of remedies available under the antitrust laws.

III. THE LEGAL STANDARD GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION

Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e), requires that the Court's entry of the proposed Final Judgment be in the public interest. The Act permits a court to consider, among other things, the relationship between the remedy secured and the

specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement and compliance mechanisms are adequate, and whether the decree may harm third parties. See United States v. Microsoft Corp., 56 F.3d 1448, 1461-62 (D.C. Cir. 1995). Consistent with Congress' intent to use consent decrees as an effective tool of antitrust enforcement, the Court's function is "not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest." Id. at 1460 (internal quotations omitted); see also United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). As a result, a court should withhold approval of a proposed consent decree "only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power.'" Massachusetts School of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C. Cir. 1997) (quoting Microsoft, 56 F.3d at 1462). None of these conditions are present here. The proposed Final Judgment is closely related to the allegations of the Complaint, the terms are unambiguous, the enforcement mechanism adequate, and third parties will not be harmed by entry of this Judgment. The conduct investigated -- Medical Mutual's use of a MFR clause to inhibit competition -- is fully remedied in the proposed Final Judgment. The fact that Medical Mutual may be acting in other ways detrimental to competition is simply not the issue here, and can be addressed by means still available to UHC.

IV. CONCLUSION

The United States has concluded that the proposed Final Judgment reasonably, adequately, and appropriately addresses the harm alleged in the Complaint. As required by the Tunney Act, the United States will publish the public comment and this response in the Federal Register. After such publication, the United States will move this Court for entry of the proposed Final Judgment based on this Court's determination that the Decree is in the public interest.

Respectfully submitted,

_____/S/_____

Paul J. O'Donnell

_____/S/_____
Jean Lin

_____/S/_____
Frederick S. Young
Attorneys
Antitrust Division, Health Care Task Force
U.S. Dept. of Justice
325 7th Street, N.W., Suite 400
Washington, D.C. 20530
(202) 616-5933

CERTIFICATE OF SERVICE

I, Paul J. O'Donnell, hereby certify that copies of the United States' Response to Public Comments in U.S. v. Medical Mutual of Ohio, Civ. No. 1:98 CV 2172 were served on the 20th day of January 1999 by first class mail to counsel as follows:

Wayne C. Dabb, Jr.
BAKER & HOSTETLER LLP
1900 E. 9th Street
3200 National City Center
Cleveland, OH 44114
(216) 621-0200

Gerald A. Connell
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036-5304
(202) 861-1630

_____
Paul J. O'Donnell