UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v.	)	Civil No.: 1:02cv288T
MOUNTAIN HEALTH CARE, P.A. Defendant.	)	Filed 12/19/02

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2 of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

The plaintiff filed a civil antitrust Complaint on December 13, 2002, in the United States District Court for the Western District of North Carolina, alleging that Mountain Health Care and its participating physicians have participated in an agreement which has unreasonably restrained interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. As alleged in the Complaint, this agreement has artificially raised the reimbursements paid to physicians in Western North Carolina by managed care companies, health insurance companies, third party administrators and employers (collectively "managed care purchasers") who provide health care benefits directly to their employees and enrollees. The Complaint requests that Mountain Health Care be ordered to promptly dissolve.

The proposed Final Judgment requires Mountain Health Care to dissolve within one hundred twenty (120) calendar days after the filing of the Final Judgment, or within ten (10) days after notice of entry of the Final Judgment by the Court, whichever is later, unless the United States grants an extension of time.

The plaintiff and the defendant have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment, and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. Background

Mountain Health Care, a physician network joint venture, is a professional corporation that incorporated in 1994 under the laws of North Carolina, and which is located in Asheville, North Carolina. Mountain Health Care is comprised of more than 1,200 participating physicians practicing in Western North Carolina, consisting of Buncombe, Burke, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Swain, Transylvania, and Yancey counties. It is entirely owned by its participating physicians, although not all participating physicians are owners; the shareholders and the majority of its board are physicians. Mountain Health Care sells its physician network to managed care purchasers, and its member physicians and medical practices offer health care services to consumers located in North Carolina.

Mountain Health Care's members constitute the vast majority of the physicians in private

practice in Asheville, North Carolina, and surrounding Buncombe County, representing virtually every medical specialty. In certain practice specialities, 100 percent of the Asheville area physicians are Mountain Health Care members. The group includes the majority of physicians with admitting privileges at Mission St. Joseph's Hospital, the only hospital available to the general public in Asheville, North Carolina, and surrounding Buncombe County.

Physicians frequently contract with managed care purchasers who provide health care benefits directly to their employees and enrollees. These contracts establish the terms and conditions, including price, under which physicians will provide care to the employees and enrollees of the health care plans offered by managed care purchasers. In order to gain access to managed care purchasers' enrollees, physicians often negotiate rates below their customary fees. As a result of these lower rates, contracts with managed care purchasers may lower the costs of health care for their enrollees. Independent physicians and medical practices compete against each other to offer health care services to managed care purchasers. Each physician or medical group decides whether or not to enter into a contract with a particular managed care purchaser, and independently negotiates the terms of such an agreement. Managed care purchasers are representatives of the ultimate consumers, and higher rates to managed care purchasers lead to higher health care costs for the ultimate consumers.

B. <u>The Violation</u>

The Mountain Health Care joint venture brought together a large group of physicians with the objective of increasing their bargaining power with managed care purchasers; indeed, Mountain Health Care was created by its participating physicians to maximize physician reimbursement in Western North Carolina. The participating physicians authorized Mountain

Health Care to represent them in negotiations with managed care purchasers, even though many of the independent physicians and medical practices that make up Mountain Health Care would have competed against each other. To facilitate such negotiations, Mountain Health Care and its participating physicians developed a uniform fee schedule for use in negotiations with managed care purchasers. The fee schedule was developed, in part, by comparing and blending the rates of multiple physicians. Mountain Health Care then adopted the uniform fee schedule that applied to all its members — nearly every physician in Asheville and the surrounding area.

For several years, using the uniform fee schedule, Mountain Health Care has negotiated for its participating physicians with managed care purchasers. Thus, it has acted as a vehicle for collective decisions by its participating physicians on price and other significant terms of dealing.

Mountain Health Care has incorporated the fee schedule into contracts with health plans, thereby setting reimbursement rates its various participating physicians would receive from managed care purchasers. Under such contracts that provide access to the Mountain Health Care network of physicians, each competing physician is paid the same amount for the same service.

Mountain Health Care did not engage in any activity that might justify collective agreements on the prices its members would charge for their services. Its participating physicians have not clinically or financially integrated their practices to create significant efficiencies to the benefit of managed care purchasers and their employees and enrollees.

C. The Competitive Effects of the Violation

The agreement on a uniform fee schedule has had anticompetitive results. Through use of the uniform fee schedule, Mountain Health Care has operated as a price-setting organization.

Without Mountain Health Care, the participating physicians normally would have competed against each other for managed care purchasers. Instead, the participating physicians authorized Mountain Health Care to negotiate and set common prices and other competitively significant terms with managed care purchasers. Through Mountain Health Care, its participating physicians collectively agreed on prices for services rendered under Mountain Health Care contracts, an agreement in violation of Section 1 of the Sherman Act.

Mountain Health Care's imposition of a uniform fee schedule increased physician reimbursement fees to managed care purchasers throughout Western North Carolina. The physician reimbursement rates that have resulted from Mountain Health Care's negotiations with managed care purchasers are higher than those which would have resulted from individual negotiations with each competing independent physician or medical practice that participates in Mountain Health Care. With the large majority of physicians in Asheville and the surrounding area as members of Mountain Health Care and adhering to its uniform fee schedule, few, if any, competitive alternatives remained for managed care purchasers. The agreement on a uniform fee schedule, implemented through Mountain Health Care, eliminated meaningful competition for health care services in Asheville and the surrounding area.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to end the illegal concerted action alleged in the Complaint by requiring the defendant to dissolve within 120 days. This time period will allow the defendant's customers adequate time to seek alternative means of procuring physician services. This dissolution will reestablish competition between many of the independent participating physicians and medical practices of Mountain Health Care. This competition will

benefit the purchasers of physician services by enabling them to negotiate with independent physicians and practice groups and enabling them to negotiate price independently, instead of being forced to pay the fees outlined in Mountain Health Care's uniform fee schedule.

Unless the United States grants an extension of time, Mountain Health Care's dissolution must be completed within one hundred twenty (120) calendar days after the filing of the Final Judgment, or ten (10) days after notice of entry of the Final Judgment by the Court, whichever is later. The Final Judgment imposes certain obligations on Mountain Health Care with respect to facilitating its dissolution, including providing notice to its members and customers.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal district court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the proposed Final Judgment may be entered by this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon this Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should

do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with this Court and published in the *Federal Register*. Written comments should be submitted to:

Mark J. Botti
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

The proposed Final Judgment provides that this Court retains jurisdiction over this action, and the parties may apply to this Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendant Mountain Health Care. The United States is satisfied, however, that the dissolution of Mountain Health Care proposed in the Final Judgment will more quickly achieve the primary objective of a trial on the merits — reestablishing competition in the relevant market.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment is "in the public interest." In making that determination, the court *may* consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia has held, the APPA 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 mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather,

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[1] 119 CONG. REC. 24,598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA.

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.[2]

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.,* 858 F.2d 456, 462-63 (9th Cir. 1988), *quoting United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft,* 56 F.3d at 1458. Precedent requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[3]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether

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Although the APPA authorizes the use of additional procedures, those procedures are discretionary (15 U.S.C. § 16(f)). A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

[2] *United States v. Mid-America Dairymen, Inc.,* 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); *see also United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

[3] *United States v. Bechtel Corp.,* 648 F.2d at 666 (citations omitted) (emphasis added); *see United States v. BNS, Inc.,* 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.,* 406 F. Supp. at 716. *See also United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied,* 465 U.S. 1101 (1984).

it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. A "proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[4]

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that 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." *Microsoft*, 56 F.3d at 1459. Since the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.*

VIII. DETERMINATIVE DOCUMENTS

[4] *United States v. American Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (*quoting Gillette,* 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978).

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 18, 2002.
Washington, D.C.

Respectfully submitted,

/s/

Mark J. Botti
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202-307-0001

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Competitive Impact Statement via First Class United States Mail, this 18th day of December, 2002, on:

FOR DEFENDANT MOUNTAIN HEALTH CARE

Jeri Kumar, Esq.
D.B. & T. Building
Suite 510
Asheville, NC 28801

I hereby certify that I personally served a copy of the foregoing Competitive Impact Statement, this 18th day of December, 2002, on:

FOR DEFENDANT MOUNTAIN HEALTH CARE

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_____/s/_____
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