UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of White Sands Health Care, L.L.C.,
Alamogordo Physicians' Cooperative, Inc.,
and James R. Laurenza

FTC File No. 031-0135

COMMENTS OF CITIZENS FOR VOLUNTARY TRADE

Proposed Order announced September 28, 2004
Comments filed October 28, 2004

Citizens for Voluntary Trade files the following comments in response to the Federal Trade Commission's proposed decision and order in the above-captioned matter.

Introduction

White Sands Health Care, L.L.C., is a physician-hospital organization based in Alamogordo, New Mexico, and composed of Alamogordo Physicians' Cooperative, Inc., a 45-physician independent practice association, the Gerald Champion Regional Medical Center, and 31 non-physician health care providers. Dacite, Inc., a Louisville, Kentucky health care consulting firm, was hired to advise White Sands and manage its members contracts with various third-party payers, including managed care organizations. Dacite's president, James Laurenza, concurrently served as White Sands' general manager and principal contract negotiator.

The Federal Trade Commission accused White Sands, Dacite, and Laurenza individually of employing "unfair methods of competition," in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by fixing prices and refusing "to deal with payors except on collectively agreed-upon terms." In other words, FTC claims White Sands functioned as an illegal cartel, under Dacite and Laurenza's direction, which eliminated price competition among health care providers in the Alamogordo area with respect to third-party contracts.

Since 2001, when President Bush took office and appointed Timothy Muris FTC chairman (and later his successor, Deborah Majoras), the Commission has brought 21 cases—including this one—encompassing more than 11,000 physicians and other health care providers for alleged Section 5 violations similar to those described above.[1] All but one of these cases has been settled without any form of a trial. The last case remains pending before an FTC administrative law judge.[2]

As in 19 of the previous 20 cases, the respondents in this case chose to settle rather than contest FTC's accusations. The proposed order now before FTC would bar White Sands and its consultants from "entering into or facilitating any agreement between or among any health providers":

1. to negotiate with payors on any health care provider's behalf;
2. to deal, not deal, or threaten not to deal with payors;
3. on what terms to deal with any payor; or
4. not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents.[3]

The proposed order further prohibits any "exchanges of information" among health care providers regarding third-party

1 The Department of Justice, under the direction of President Bush's appointees, has brought one antitrust case against a physician group, a Sherman Act charge against the former Mountain Health Care, P.A., of Asheville, NC, which was composed of more than 1,200 physicians and other health care providers.

2 *In the Matter of North Texas Specialty Physicians*, FTC Docket No. 9312. An initial decision from the administrative law judge is expected on or before November 15, 2004.

3 Analysis of Agreement Containing Consent Order to Aid Public Comment, p. 2.

contract terms.

The proposed order claims to permit "joint negotiations" when certain conditions are met. For example, if health care providers "share substantial financial risk" with the intent of controlling costs, providers might be allowed to negotiate as a group with payers. In any case, Dacite, Inc., and Mr. Laurenza are prohibited from negotiating with any payor on behalf of any White Sands provider for a period of three years.

Comments

> *[I]n all we do to improve health care in America, we will make sure that health decisions are made by doctors and patients, not by bureaucrats in Washington, D.C.*
>
> - President George W. Bush

President Bush's words have long fallen on deaf ears at the Federal Trade Commission. Dating back to the presidency of Mr. Bush's father, FTC has used the antitrust laws as a proverbial "weapon of mass destruction" against health care providers who challenge the network of state-sponsored cartels that form the managed care industry. FTC claims it is only protecting the right of consumers to receive the "benefits of competition" among health care providers. But the truth has been long understood, if not always stated publicly: Antitrust prosecution of physicians is a protectionist tactic designed to insulate managed care organization from free market economic principles.

We must understand, from the outset, that the Federal Trade Commission is not a free market agency. It does not, contrary to its own protests, support the free market or its underlying economic principles. Indeed, were FTC to support a free market, it would embody a contradiction, because there can be no free market in America so long as FTC exists. There can be a free market or an unfree market with an FTC, but not both.

FTC does not provide services for a fee the way a free market organization would. FTC's revenue is acquired through force, primarily a tax on corporate mergers under the Hart-Scott-Rodino Act, and the remainder from general tax revenue or specific excises (such as the mandatory fees for use of the Do Not Call registry.) None of this revenue is contributed voluntarily to FTC, as its providers may not withhold payment without surrendering a preexisting liberty, such as the ability to merger two firms.

With its stolen funds, FTC proceeds to intervene in the operation of the market. *Intervention*, as economist Murray Rothbard eloquently defined the term, means "the intrusion of aggressive physical force into society; it means the substitution of coercion for voluntary actions."[4] Rothbard notes that it is government—the State—that performs most interventions, because it is "the only organization in society legally equipped to use violence."

Many people, including perhaps FTC officials, would argue that it is unfair to call government intervention "violent," as that term is more commonly applied to *direct physical* acts such as murder or assault. But violence is violence even when achieved by threats or mental coercion. As Mario Puzo famously noted in his Mafia novel, *The Godfather*, "[a] lawyer with a briefcase can steal more than a thousand men with guns." Cases such as this one aptly demonstrate Puzo's point.

The proposed order against White Sands and its co-respondents is an attempt to ratify FTC's violent intervention in the contractual relationship between White Sands and various third-party payers in the Alamogordo region. FTC justifies its violence on the grounds that White Sands is the actual aggressor, in that it "coerced" the payors into signing contracts without the benefit of competition among providers.

Paragraph 33 of FTC's complaint expressly refers to the "coercive tactics" of White Sands wherein the group used its

4 Murray N. Rothbard, *Man, Economy, and State with Power and Market*, p. 877 (Scholar's ed. 2004).

"dominant market position in the Alamogordo area" to obtain price increases beyond what FTC claims the market would have otherwise yielded. Paragraph 26 of the complaint offers one example of what FTC considers "coercive tactics":

> Mr. Laurenza also demanded substantial price increases from Blue Cross [& Blue Shield of New Mexico] for White Sands' nurse anesthetist members. . . . Mr. Laurenza called for an 11% increase in the anesthesia conversion factor, and a 20% increase in the price for pain management. Blue Cross met Mr. Laurenza's price demand on pain management but counter-offered a conversion factor for anesthesia below Mr. Laurenza's demand. Mr. Laurenza rejected the counter-offer. Having no viable alternatives for anesthesia specialists in the area, Blue Cross responded by increasing the conversion factor for anesthesia by 8% and Mr. Laurenza accepted that term.

A rational observer would describe what took place between Laurenza and Blue Cross as a *negotiation*. FTC argues, however, that is *coercion* because Blue Cross was "forced" to meet Mr. Laurenza's demand for a price increase—a price increase he could only demand, FTC says, because all five of the nurse anesthetists in Alamogordo joined together and negotiated as a block. Had they negotiated individually, FTC argues, Blue Cross would have been able to obtain a lower, "competitive"price.

Of course, there was nothing remotely coercive about Laurenza's actions towards Blue Cross. He did not—to use another reference to *The Godfather*—stick a gun to the head of Blue Cross' negotiator and state that either his brains or his signature would be on a contract for an 11% increase. Blue Cross was free at all times to simply walk away from the table.

FTC claims coercion still existed because Blue Cross had "no viable alternatives" to White Sands' nurse anesthetists. It is true, at least according to FTC's complaint, that White Sands' membership included all of the practicing nurse anesthetists in the Alamogordo area. In FTC's view, this gave White Sands "market power," which is inherently coercive, since the customer has no alternative but to deal with a "monopoly" supplier.

But there is nothing coercive or sinister about "market power." In order for coercion to exist, a supplier must have the ability and wherewithal to initiate physical force against all existing and potential competitors. Once again, *The Godfather* provides a frame of reference. Vito Corleone became the dominant olive oil supplier in New York City, not through free market competition, but by burning down his competitors' warehouses and intimidating their workers. White Sands and Laurenza, in contrast, never employed any physical force to prevent new competitors from entering or competing in the market.[5]

In fact, unlike labor unions—which are exempt from the antitrust laws—White Sands possessed no ability to force its own members to participate in any joint contracting endeavor. A union, in contrast, is given a state-sanctioned monopoly (another violent intervention in the market) to exclude non-union competitors and to compel an employer to collectively bargain. The hypocrisy is blatant. The state deems compelled unionization compatible with free markets, but voluntary arrangements of a similar nature are condemned as "coercive" and illegal.

FTC's position is further undermined by the fact that the principle victims of White Sands' "coercion" are themselves state-sanctioned cartels, managed care organizations. Blue Cross Blue Shield of New Mexico alone represents more than 245,000 individuals. How does this not constitute illegal "market power"? Why is it legal for 245,000 customers to jointly contract through a single entity, but illegal for *five* nurse anesthetists (or 45 physicians) to do the same?

5 There are, of course, barriers to entry in the markets for most health care services, namely licensing. Such barriers, however, are yet another product of state intervention, and while White Sands members benefit from this supply restriction, they are not the direct cause of it, and thus are not accountable for the subsequent impact on competition.

Unequal bargaining power is only a symptom of the root problem, however. The managed care system itself demonstrates the government's repudiation of free market principles with respect to health care. Managed care creates a third-party intervention between physicians and patients that exist in virtually no other market. When a customer purchases food, for instance, she does not pay a premium to a third party who then dictates what food she can and cannot consume. Instead, she goes to the store and buys the food. Health care largely operated the same way until the 1960s, when government intervention—in the form of Medicare and Medicaid—transferred the responsibility to pay for services from the consumer to a third-party entity.

Companies like Blue Cross Blue Shield are not true free market entities. They are byproducts of state intervention. When health care costs soared in the years following the creation of Medicare and Medicaid, Congress and the state legislatures repeatedly escalated their interventions in order to bring costs under control (indeed, cost containment is a stated motive of the FTC's prosecution of this case.) As physician Miguel Faria, Jr., explained, these interventions did not protect competition or free markets, but rather created the hybrid state-corporate known as managed care:

> The concept of managed care was not the marvelous creation of laissez faire capitalism and Adam Smith's invisible hand of supply and demand, or a derivation of the ancient and beneficent precepts of Hippocrates, but an invention of politicians and academicians acting as central planners, working under the auspices of Republican President Richard Nixon and Democratic Senator Ted Kennedy in the early 1970s.
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> First, under President Nixon's policy of wage and price controls, the revised Health Manpower Act of 1971 essentially adopted HMOs as state policy and favored by tax policy. Further legislation, the HMO

Act of 1973, mandated businesses with more than 25 employees to offer HMOs to their employees and provided for special government-backed grants and loans for federally qualified HMOs. Yet, despite all the favorable government legislation initiated then, this collectivist vision did not take hold until the 1990s.

Second, the McCarran Ferguson Law of 1946, a law that permits insurance companies to be the only industry given significant exemptions from antitrust laws (and therefore, of itself monopolistic), allows managed care/HMOs to set doctors' and hospital fees (including capitation), reimbursements, benefits, insurance premiums, etc. If two or more physicians were alleged to have discussed fees, in any way, shape or form, the hand of the Federal Trade Commission (FTC) would fall heavily on them, as has happened with a group of obstetricians here in Georgia.

Third, the ERISA laws (Employee Retirement Income Security Act) of 1974, which were set up to protect employee pension funds in employer-provided, self-insured plans, has until recently been used effectively by managed care and HMOs as a shield to protect themselves against medical liability lawsuits. In other words, in cases of medical malpractice, the HMOs are not liable; only the individual physicians involved are medically liable and accountable, so that when managed care bureaucrats deny the use of certain diagnostic procedures or therapeutic techniques for cost-containment (the hallmark of managed care), the plans and their administrators, are exempted from lawsuits of medical malpractice. The officials say they are not practicing medicine, only administering the fiduciary responsibility of their plans, and

> suggest physicians stand by the Hippocratic Oath. Yet, the fact is that the Oath has been trampled under the ethics of managed care with perverse incentives that reward doctors who are paid more to deliver less care to their patients.
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> And lastly, managed care and HMOs should not be considered free market medicine because, as a result of the discovery and deliberations of the landmark lawsuit, AAPS v. Clinton (1993), the public found that the managed care industry with representatives and/or employees from the largest insurance companies, as well as the Henry Kaiser Permanente and the Robert Wood Johnson Foundations, were working behind closed doors, alongside government employees in violation of the open-door requirements of the Federal Advisory Committee Act (FACA). This unholy cooperation of corporate entities and the government working in partnership setting public policy is referred to by the eminent Austrian economist, Ludwig von Mises, as corporatism, a form of socialism, which is perhaps more aptly named economic fascism, but certainly not free enterprise capitalism.[6]

FTC's case against White Sands and its co-respondents is based on the fallacy than *one more* intervention will somehow undo the damage caused by all of the previous interventions—none of which are the fault of the respondents. In every instance where the state's intervention has failed to produce the desired outcome, the response of government officials has not been to look at their own shortcomings, but to blame a private sector scapegoat. Here, White Sands' members and James Laurenza are the scapegoats for a managed care system that has failed its customers.

Nowhere in the complaint or other public case documents does

6 Miguel A. Faria, Jr., M.D., "Managed Care – Corporate Socialized Medicine," (available online at http://aapsonline.org/jpands/hacienda/article10.html).

FTC discuss the market conditions for health care services in Alamogordo, New Mexico. There is no explanation as to why physicians and anesthetists sought the price increases they did or the financial state of the practices of White Sands' members. For all the public knows, these price increases were necessary to protect some White Sands' members from financial insolvency or otherwise prevent them from leaving for a more profitable geographic market. From FTC's perspective, it is simply enough to cry "price fixing" and condemn White Sands *per se*, without attempting any genuine economic analysis.

The only economic factor FTC apparently considered in this case was the impact of White Sands' joint contracting on RBRVS, the formula used by the federal government to determine reimbursements to health care providers under Medicare and Medicaid. Paragraph 14 of the complaint notes that managed care payers use RBRVS as a benchmark for their own contract offers, for example offering reimbursements at "110% of 2003 RBRVS." FTC clearly views provider contract demands beyond a certain factor of RBRVS to be "anti-competitive," and thus subject to FTC scrutiny.

Again, we're faced with a contradiction. RBRVS cannot be a valid benchmark for *free market* prices, because RBRVS is a government-dictated price system. Although RBRVS might be based on "objective" economic analysis, it is fundamentally an arbitrary price control. As Dr. Faria noted, the original HMO Act was adopted as part of the Nixon administration's "wage and price controls."

True market prices convey information, in the aggregate, from seller to buyer. Most buyers are unaware of all the costs that an economic good acquires during its production. In the case of health care services, these costs include the provider's education and training, diagnostic equipment, office overhead, and staff, among many items. The price charged the buyer must reflect all of these factors while enabling the seller to earn a profit. This cannot happen when the state, employing violence, enforces arbitrary decrees about what prices are "competitive" or fair. Only the continuous, dynamic interaction between buyers and sellers on an open market can yield the highest-quality information via prices.

Ultimately, when FTC forbids White Sands' members from voluntarily joining together in contract negotiations—or even exchanging information with one another about contract terms—the free market is unable to function effectively. Health care providers will simply accept whatever contract is offered them, even one that is economically harmful, rather than risk violent retribution from FTC for alleged antitrust violations.

Finally, it is telling that this is the third prosecution brought against a physician group in the State of New Mexico since the Bush administration took office. FTC is clearly targeting physicians in the state for antitrust persecution. But is strains credibility to believe that New Mexico physicians are disproportionately disposed to "anti-competitive" behavior as compared to states like New York, where FTC has brought no prosecutions since 2001. The most likely explanation for New Mexico's rash of prosecutions is that managed care organizations in the state, such as Blue Cross, have been effective in lobbying FTC to target their physicians. As with most antitrust cases, the government's intervention serves to benefit specific competitors, rather than "competition" in the abstract.

Conclusion

For the numerous independent grounds discussed above, FTC should withdraw the proposed order from consideration and dismiss the complaint against all respondents.

Respectfully Submitted,

CITIZENS FOR VOLUNTARY TRADE
Post Office Box 66
Arlington, VA 22210
Tel/Fax: (703) 740-8309

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