UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of CARLSBAD PHYSICIAN ASSOCIATION, INC., a corporation, and WILLIAM J. BAGGS, M.D., SRICHAND S. DARA, M.D., GLEN MOORE, JAMES J. PURPURA, D.O., DEOBRAH J. SCHENCK, M.D., CHARLES L. SECORA, M.D., MAJID A. SYED, M.D., and RICHARD L. ZIZZA, M.D., individually.	FTC File No. 031-0002 Before: Commissioners Muris, Anthony, Thompson, Swindle, and Leary

PUBLIC COMMENTS OF
THE CENTER FOR THE ADVANCEMENT OF CAPITALISM

Pursuant to the Federal Trade Commission's May 2, 2003, publication of a proposed consent order in the above-captioned matter, the Center for the Advancement of Capitalism (CAC)[1], respectfully submits the following public comments.

Material Facts

On May 2, the Federal Trade Commission (FTC) released a complaint and proposed consent order against Carlsbad Physician Association, Inc., (CPA) and eight individuals affiliated with that corporation. The complaint alleges CPA violated section 5 of the FTC Act,

[1] CAC is a nonprofit corporation organized under District of Columbia law.

15 U.S.C. § 45, which generally prohibits "unfair methods of competition." Specifically, the complaint charges CPA with collectively negotiating on behalf of physicians with health insurance plans. The FTC considers *any* physician collective bargaining to be a *per se* violation of section 5, despite the lack of congressional or constitutional authorization for such a position.

According to the complaint, CPA is composed of "approximately 38 physicians" who provide services in the Carlsbad, New Mexico area. The complaint states that CPA's members constitute "76% of all physicians who practice in the Carlsbad area."

CPA members authorized a Contract Committee to negotiate on the members' behalf with various health plans. The Committee's function was similar to that of a labor union. Health plans would present a contract offer to the Committee, and the Committee in turn would decide whether to submit the plan to the membership for approval. Individual members could decide to "opt out" of a particular contract, but according to the FTC, most of the terms were decided by CPA's membership collectively.

The complaint alleges that individual CPA members *voluntarily* refused to "entertain offers made to them individually," a practice the FTC claims thwarted health plans' "efforts to establish competitive physician networks" in Carlsbad. The complaint describes the negotiations of three large health plans—Blue Cross & Blue Shield, Presbyterian Health Plan, and United Health Care—with CPA. In each case, the FTC concluded the health plans were legally injured by CPA's decision to collectively negotiate. The FTC argues that health plans should not be forced to pay higher prices because physicians decide to exercise their right to collectively bargain.

The FTC settled its concerns with a consent order that enjoins CPA from taking any action to "negotiate on behalf of any physician" with any health plan. The order's ban extends to

the "exchange or transfer" of information between physicians regarding contract terms, and the respondents are further prohibited from sharing any "intermediary" to negotiate with a health plan for a period of three years. CPA must also cease all business operations and dissolve within 30 days of the consent order becoming final. The consent order itself will remain in effect for 20 years.

Comments

The FTC presents no evidence that CPA[2] violated section 5 of the FTC Act, or that the legal rights of any citizen was injured by the factual circumstances alleged in the complaint. The only thing the FTC can prove is that CPA acted to influence marketplace conditions in its favor. Such actions are consistent with the workings of the free market, where private property rights are respected and where government intervention in the marketplace is limited to protecting individuals from acts of overt force or fraud. The FTC presents no evidence that CPA's actions were fraudulent, or relied on force or coercion to achieve its ends.

Furthermore, the FTC's actions here violate the constitutional rights of CPA and the individual respondents, not only by denying them basic due process, but also by imposing a remedy that effectively denies First Amendment protections to the physician members of CPA. Even if the FTC could demonstrate some compelling interest for taking such radical action, the Commission has not demonstrated how preventing physicians from jointly negotiating with insurance companies would positively benefit the American people. In fact, the FTC's actions here do nothing more than perpetuate the anti-free market system which led to the rise in health

[2] Unless otherwise noted, any reference to CPA includes the individually named respondents as well.

care costs in the first place[3]. For these reasons, the FTC should reject entry of the proposed consent order.

1. CPA did not violate section 5 of the FTC Act.

The sole legal charge against CPA is that their collective negotiations on behalf of physicians with health insurers constitute a *per se* violation of section 5 of the FTC Act. Under existing FTC enforcement policy, physicians enjoy no fundamental right to act in their own economic self-interest when it conflicts with the wishes of health plans, such as HMOs, and other third-party payors. The FTC has repeatedly stated its view that physicians may act jointly if they can prove the benefits to their patients, but that they may not act simply to increase their own fees.[4]

This consumer-centered view of the free market is completely inconsistent with the codified principles of freedom in America and the free market which has allowed Americans to achieve a level of prosperity unprecedented in human history. In the American capitalist system, property is privately owned, and the government's function is limited to protecting individual rights and settling disputes which may arise between private parties. For such a system to operate, the government must acknowledge the fact that individuals—be they individual physicians or an incorporated group of them—enjoy the basic right to act in their self-interest. This means physicians have the right to seek profit the same as any other businessmen or worker in the American economy. Physicians do not require or benefit from a system where they may

[3] For a discussion of the government's role in increasing health care costs, see, generally, TERREE P. WASLEY, WHAT HAS GOVERNMENT DONE TO OUR HEALTH CARE? (1992); Leonard Peikoff, *Medicine: The Death of a Profession*, *in* THE VOICE OF REASON: ESSAYS IN OBJECTIVIST THOUGHT 290-310 (Ayn Rand, 1989); Nicholas Provenzo, Address before the Colorado Medical Society (May 4, 2003), *in The Businessman's Self-Defense Kit* (last modified May 6, 2003) <http://www.capitalismcenter.org/Philosophy/Essays/Self-Defense_Kit.htm>.

[4] *See DOJ-FTC Statements of Antitrust Enforcement Policy in Health Care* <http://www.ftc.gov/reports/hlth3s.htm>.

profit only by permission of the FTC, especially given the Commission's complete lack of medical expertise or actual experience in the health care market.

The FTC's best counter-argument is that it's not them, but CPA which threatens the marketplace by attempting to monopolize physician services in the Carlsbad geographical market. But this claim has no merit. Even if *every* physician currently practicing in Carlsbad belonged to CPA—and at least 24% of them don't—that still would not constitute a *monopoly* unless CPA had the power to forcibly exclude competitors from the market. The FTC presents no evidence that CPA every enjoyed the coercive *political* power necessary to erect such a barrier to entry, and indeed CPA could never enjoy (or at least maintain) such power absent some sanction from the federal or state government. For example, the State of New Mexico maintains a general barrier to entry by requiring all physicians in the state to be licensed through a state authority. The FTC, presumably, would not hold CPA responsible for these types of barriers.

In this case, CPA exercised *economic* power in the market, but this alone does not sustain the FTC's section 5 allegations. It is not a crime for physicians to leverage their combined productive capacities to obtain higher prices through voluntary negotiations. Even if such action is taken among a group of doctors that do not otherwise integrate their operations—a key sticking point with the FTC—this does not demonstrate the existence of a coercive, political monopoly. All the FTC can prove is that CPA asked insurance companies for more money. The fact that the insurers gave CPA price increases above what other physicians in New Mexico earned is a testament to CPA's superlative organizational ability, not evidence of illegal activity under the antitrust laws.

There's also a problem with the FTC's definition of the marketplace here, and by extension the Commission's jurisdiction over this matter. The FTC Act only grants the Commission authority over "interstate" commerce[5], and there is substantial reason to doubt whether CPA's conduct meets that standard. Every fact cited in the complaint leads to the conclusion that CPA's acts and effects were felt only within the State of New Mexico. This being the case, the FTC's involvement here is unnecessary and illegal. The regulation of physicians and health insurers is traditionally a state function, and in fact New Mexico maintains a substantial regime which governs the relationship between physicians, patients, and health insurers.[6] Since CPA's activities take place entirely within New Mexico, the state should be able to deal with any alleged injury located therein.

Even assuming that CPA's contracting with out-of-state based health plans constitutes interstate commerce for purposes of invoking the FTC Act, there is a substantial likelihood that *some* of CPA's contracts are wholly intrastate affairs, and thus beyond the FTC's reach. But given proposed order requires CPA to terminate *all* contracts and dissolve itself completely, the FTC's remedy would affect commercial activities that the Commission has no jurisdiction over. At a minimum, the FTC must narrowly tailor their allegations and proposed remedy to ensure intrastate commerce is not harmed by Commission officials who falsely assume their jurisdiction is universal.

The second, broader problem with the Commission's market definition is that it is unreasonably static: It fails to account for all possible market alternatives. The FTC arbitrarily assumes that the marketplace for physicians in Carlsbad, New Mexico, is wholly dependent on the doctors currently in practice there, and that there are no reasonably foreseeable circumstances

[5] *See* 15 U.S.C. § 44.
[6] *See generally* N.M. STAT. ANN. CH. 24.

where physicians might enter or leave the market. This assumption would be well founded, perhaps, if the FTC could prove CPA created barriers which prevent movement of physicians, but as noted above, the complaint does not even contain an allegation of such actions. Therefore, no further discussion—or more accurately, speculation—regarding the marketplace's ability to provide alternatives is necessary.

Finally, the FTC completely fails to define basic terms which are essential to comprehending the section 5 charge against CPA. For example, the complaint refers to CPA obtaining "supracompetitive fees" from health insurers without providing any concise, objective definition of "supracompetitive." The approximate understanding of "supracompetitive" is that it refers to actions the FTC believes fall outside the acceptable scope of competition. But this is akin to denouncing someone as an "extremist"; it's a pejorative word with no objective meaning. What the FTC may consider "supracompetitive fees" may, in fact, be objectively defensible and such is the case here. The complaint discusses CPA's fees in relation to the federal reimbursement rates for Medicare patients, a system known as RBRVS[7]. The complaint states, with disfavor, that CPA's collectively-negotiated fees were "160% to 200%" of RBRVS, a range substantially higher than what other physicians in New Mexico receive. The FTC's inference is that "supracompetitive" means any fee that is too far above Medicare rates, but this is hardly credible marketplace analysis. Medicare is a government program which sets its rates by fiat, without necessarily taking into account market realities. A negotiation between private parties, in contrast, must account for a host of external market factors, such as inflation, administrative costs, supply and anticipated demand. Tying the outcomes of CPA's negotiations with private insurers to Medicare's dictated fees is thus irrational and contrary to the free market principles the FTC claims to defend.

[7] RBRVS stands for "Resource Based Relative Value System." *See* Complaint at ¶ 10.

It is also unclear how CPA could have known *in advance* that the rates they were negotiating would be deemed illegal by the FTC. CAC's observation of the FTC antitrust enforcement leads us to conclude the FTC often picks cases based on nothing more than intuition and speculation. It's certainly unreasonable to assume that CPA would have been formed, much less negotiated contracts with health plans, if it believed its very existence would be wiped out after the fact by the FTC *per se*. It would be one thing if the FTC actually said: "Any private contracts which are more than 150% of RBRVS will be deemed illegal." While this would be a tyrannical abuse of power, at least then physicians would know what line they could not cross. Under the present regime, however, physicians are simply helpless before the FTC, since there are no publicly disseminated *objective* standards of conduct.

2. <u>The FTC violated CPA's constitutional rights.</u>

CAC is extremely concerned that the FTC failed to amply protect the constitutional rights of CPA and the individual respondents. Based on CAC's investigation into other recent FTC consent orders with physician groups, it is clear the present settlement continues a pattern of running roughshod over basic constitutional principles designed to protect the rights of all Americans, including the respondents in this case.

At the outset, the very nature of the FTC's consent order process is constitutionally suspect. Although dressed as a civil proceeding, the FTC operates as a criminal prosecutor. The FTC's goal is not to compensate the people for legal injuries suffered—private civil cases can take care of that—but to affirmatively punish producers in the name of "protecting competition." In this case, CPA is being denied its existence, while the individual respondents are being denied their basic liberty and property rights. Regardless of the merits of the FTC's charges, the fact

that an administrative proceeding is being used to deny American citizens their substantive rights is both appalling and unconstitutional.[8]

Article III of the Constitution requires a jury trial in any federal criminal proceeding, and the Seventh Amendment extends the jury right to civil cases. In any case, the government may not act to deny the rights of citizenship without presenting evidence to an impartial jury. This is not a cosmetic requirement. It is essential in a free society that the government does not enjoy unchecked power to punish its citizens at will. But that's precisely what's happening in this case. The FTC acted against CPA and the individual respondents knowing that they could impose whatever remedy they wanted without consequence. In every physician case CAC has reviewed, the respondents surrendered to the FTC without a fight because of the belief—which is pervasive throughout the antitrust community—that it would be too costly to fight the Commission despite the obvious injustice of the FTC's actions. This belief was only bolstered by the nature of FTC proceedings, which deny the right of jury trial and instead provide only for trial before an administrative law judge beholden to the FTC itself.

Beyond the due process issues, however, there is the larger problem of substantive First Amendment violations. The proposed order forbids the individual respondents from "[e]xchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal." This requirement violates the First Amendment rights of physicians and their consultants. Like all citizens of the

[8] CAC recognizes the FTC's position that they are acting constitutionally pursuant to its congressional authorization and related case law upholding its authority. While such arguments are persuasive, they do not ultimately absolve the FTC of its obligation to *independently* assess its conduct for constitutionality. The Executive Branch is a coordinate branch of the federal government, not a subservient one. Furthermore, nothing in the FTC Act explicitly directs the Commission to pursue any particular respondent or group of respondents. Indeed, the FTC's decision to prosecute CPA and other physician organizations is a policy decision made by them alone.

United States, doctors are constitutionally protected when they engage in political or commercial speech with one another, and they are equally entitled to assemble *collectively* to exercise those rights. The United States may only intervene in the realm of free speech rights in very narrow circumstances—such as libel—and the FTC has offered no justification in this case which rises to that.

The purpose of the First Amendment is to keep the individual's need to express ideas free of government infringement. That the ideas being expressed are commercial in nature does not diminish their protection under the First Amendment. Even if the FTC does not believe this, the U.S. Supreme Court does, as demonstrated by Justice Harry Blackmun's opinion for the Court in the controlling case of *Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976):

> "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is *a matter of public interest* that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." 425 U.S. at 765 (emphasis added).

The FTC's goal here is to replace "intelligent and well informed" market operation with a system employing ignorance as its primary facet. By keeping doctors ignorant of each other's activities—but placing no corresponding obligation on health plans—the Commission hopes to force outcomes in the healthcare industry to meet their policy expectations. The FTC expects us to believe that the exercise of free speech by CPA constitutes a substantial harm to the "rights" of the American people, although the exact nature of such "rights" are never defined by the Commission's mandate or proscribed by the Constitution, nor could they be.

3. **The American people will not benefit from the proposed order.**

The FTC's action against CPA is motivated by the belief that preventing physicians from collectively negotiating with health plans will benefit the American people in the form of lower prices. This belief is not simply false, but it reflects a basic misunderstanding as to the cause of rising health care costs in America.

It is not in dispute that healthcare costs in the United States have risen significantly. But the cause of increased costs is not physicians negotiating for greater compensation, but government intervention in the healthcare market. National healthcare costs only began to exponentially increase after the government created Medicare and Medicaid. As government intervention in the healthcare market increased, so too did costs. At every turn, however, the government has tried to deflect blame for its mistakes by casting aspersions on free-market ideas. This case is just part of that pattern.

There's no reason to believe the American people would directly benefit from lower physician compensation. In fact, the people will likely suffer. Consider the FTC's statement in paragraph 8 of the complaint:

> Physicians often contract with health insurance firms and other third-party payors, such as preferred provider organizations. Such contracts typically establish the terms and conditions, including price terms, under which the physicians will render services to the payors' subscribers. Physicians entering into such contracts often agree to lower compensation in order to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payor costs and enable payors to lower the price of insurance, and thereby result in lower medical care costs for subscribers to the payors' health insurance plans.

This is what the FTC wants to take place—physicians taking less money and seeing more patients. But is that what doctors want? More tellingly, is that what their patients want? If doctors are seeing more patients and being paid less for each, it would logically follow that their

motive to provide the best service to each individual patient would diminish, not increase. Not only does the physician lack the possibility of profit—since HMOs pay regardless of the services provided—but given the time constraints of seeing a greater number of patients, it's likely that individual care will be compromised. Yes, the people's direct costs might be lower in the short-term through myopic antitrust enforcement, but if the result of this enforcement is incomplete care, it will actually increase long-term costs.

All of this also assumes that the HMOs won't simply pocket the savings from reducing physician fees. The FTC provides no analysis of that issue, even though it's well known that HMO administrative costs are a more direct cause of higher insurance premiums.

This leads to the issue of competition. The FTC says the people benefit from competition. But what the FTC is protecting here is not "competition" in any recognizable form. The FTC is fixated solely on short-term pricing. While prices can serve as one indicator of competition, it is not the only element, nor often the most important. In this case, price competition is barely relevant at all. But under the *per se* rule used in cases like this one, the FTC does not performing any contextual analysis, and that leads to conclusions ultimately unsupported by facts.

Defining competition as a function of price is quite static. It presumes there's an ideal price level that exists. In this case, the FTC presumes that price level to be Medicare's RBRVS, which is a wholly subjective system, not answerable to capitalist supply-and-demand principles, but accountable only to officials administering the program. While RBRVS rates *might* occasionally reflect market pricing levels, this is purely coincidental. At its core, RBRVS is a government-imposed price control that reflects political power, not well-earned economic power.

If a health plan chooses to negotiate with physicians based on RBRVS rates, that is certainly its prerogative. But why must it be the practice of every health plan and physician in the United States? Can the FTC offer an *objective* justification for restricting price levels to government-mandated terms? No, it cannot. The respondents in this case are being punished, not for their failure to compete, but for the fact they competed at all. They asked for compensation without regard for RBRVS rates. If the HMO agreed to pay the higher prices, than the FTC should not intervene, because competition was being well served. If, on the other hand, the FTC is simply acting to preserve the artificial price levels imposed by RBRVS, it should say so, and stop trying to hide behind the principle of protecting competition.

Ultimately, the FTC's enforcement policies only benefit insurance companies, like HMOs, which already enjoy numerous government benefits and protections not available to other private businesses. Patients, the actual recipients of physician services, derive no tangible benefit from the harsh, arbitrary application of antitrust laws to physicians, a group far more likely to act in their patients' interests than the HMOs.

If the FTC were truly interested in helping the people, it would unshackle physicians and allow them to experiment with new business models. But under the policies applied to groups like CPA, physicians are forced to use FTC-approved business models which are proven failures in the marketplace. In its complaint, for example, the FTC chides CPA for not properly using the "messenger model," one of the FTC's approved forms of "competition." This model, however, is completely impractical because it forces physicians to negotiate at a decisive disadvantage, while placing no similar restrictions on the conduct of health plans. The "messenger model" is a one-way mechanism that allows health plans to impose their demands on physicians without giving doctors any leverage to negotiate fairly on their own behalf. While this model is certainly

consistent with the FTC's disregard for the First Amendment, it has little to do with advancing the people's interests or protecting the marketplace from anticompetitive behavior. In fact, the messenger model itself is anticompetitive behavior on the part of health plans which injure the rights of physicians.

The only proven, sustainable solution to rising health care costs is for the free market to operate unshackled. This means the *government* needs to remove *its* restraints on competition—such as the remedies imposed in the proposed consent order—and allow physicians to exercise their economic rights in the marketplace. Only then will the American people enjoy genuine benefits in the form of lower long-term costs and superior service.

Conclusion

The FTC's complaint fails to demonstrate any injury to the American people or any individual consumer. Beyond that, the proposed consent order constitutes a facial violation of the respondents' constitutional rights. If adopted, this consent order would do nothing to benefit the American people while expanding the government's distortion of the free market. The FTC should reject entry of the proposed consent order, withdraw its complaint against ISP, and dismiss this case without further action.

Respectfully Submitted,
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Dated: May 26, 2003