



on behalf of physicians with Grossmont Hospital, a La Mesa, California, hospital that extends staff privileges to ASMG and GAS members. 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, ASMG is composed of “approximately 180 anesthesiologists,” while GAS consists of “approximately 10 anesthesiologists.” The complaint states that ASMG’s and GAS’s members constitute “approximately 75% of the anesthesiologists with active medical staff privileges at Grossmont Hospital and work on approximately 70% of the cases that require anesthesia services at the hospital.”

According to the complaint, ASMG and GAS jointly decided to seek “stipends” from Grossmont Hospital for providing services in unscheduled cases—a process known as “taking call”—and to compensate anesthesiologists for treating uninsured patients. While many hospitals provide such stipends, Grossmont did not, prompting the ASMG-GAS action. The two groups sought a \$1,000 daily stipend for unscheduled cases (the uninsured patient issue apparently was to be dealt with separately), and when the hospital declined, ASMG and GAS responded by collectively reducing the hours their members would take call. The groups also agreed to present a united front, and not enter separate negotiations with the hospital.

According to the FTC, ASMG and GAS continued their efforts, unsuccessfully, until the Commission opened an investigation, whereupon the two groups apparently ceased their activities. Despite this, the FTC insisted on filing complaints and obtaining consent orders to prevent ASMG and GAS from attempting any collective negotiations in the future. According to FTC Bureau of Competition Director Joseph Simons: “This was a naked agreement to fix prices without even a pretense of financial or clinical integration between the parties. Price-fixing is

inimical to competition and illegal under long-settled law. The fact that Grossmont Hospital, the victim of the conspiracy, did not give in to the respondents' demands before the FTC investigation halted these practices does not provide them with a defense.”

The proposed consent orders prevent ASMG and GAS from “[e]ntering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding” with each other or another medical group to discuss the terms for rendering compensation to any customer of anesthesia services. The consent orders will remain in effect for 20 years.

### **Comments**

The FTC presents no evidence that ASMG and GAS violated section 5 of the FTC Act, or that the legal rights of Grossmont Hospital was injured by the factual circumstances described in the complaints. All the FTC can prove is that ASMG and GAS acted to influence marketplace conditions in their 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 the respondents’ actions were fraudulent, or that they relied on force or coercion to achieve its ends.

Furthermore, the FTC’s actions here violate the constitutional rights of ASMG and GAS, not only by denying their First Amendment rights, but also by infringing on protected Ninth Amendment liberties. The FTC can demonstrate no compelling interest for taking such actions. The Commission has not demonstrated how preventing physicians from jointly negotiating with hospitals would positively benefit the American people. For these reasons, the FTC should reject entry of the proposed consent order.

## **1. ASMG and GAS did not violate the FTC Act.**

The sole legal charge against ASMG and GAS is that their collective negotiations on behalf of physicians with Grossmont Hospital constituted 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 consumers, such as insurance companies or hospitals. 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.<sup>1</sup>

Before addressing the merits of the FTC's position, however, it is first necessary to assess whether the Commission even possess the authority to prosecute ASMG and GAS. Based on the facts alleged in the complaint, there is no relevant act of "commerce" which would trigger the jurisdiction of the FTC Act. Section 4 of that act clearly limits the FTC's jurisdiction to "commerce *among* the several states" (emphasis added), yet this case only presents commercial acts limited to the state of California. Indeed, the acts appear to be limited to a single hospital within California. It is well beyond the FTC Act's mandate to enforce federal antitrust regulations to such local situations that obviously bear no relationship to interstate commerce.

Turning to the FTC's definition of the respondents' actions as "unfair competition," there is first the issue of what precisely constitutes "unfair." The FTC Act itself offers no objective definition of the word, and the Commission's internal policy is at best erratic. Based on the FTC's recent history of prosecuting physician groups, however, it can be inferred that the Commission considers an act "unfair competition" when individual producers takes deliberate actions to influence market conditions in their self-interest, usually in the form of soliciting

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<sup>1</sup> See DOJ-FTC Statements of Antitrust Enforcement Policy in Health Care <<http://www.ftc.gov/reports/hlth3s.htm>>.

higher prices. Former FTC Chairman Robert Pitofsky once offered the following hypothetical example to explain the Commission's view of physician collective negotiating:

All of the doctors in Elgin, Illinois, get together over lunch and say, "We are not making enough money, our kids are going to expensive colleges, and we are not driving the luxury car we prefer. Let's go to this one HMO that is committed to cost containment, and we will say we are going on strike. Unless you pay us twice as much money, we are going on strike. We are not going to take of people in your organization."<sup>2</sup>

The clear implication from this statement is that physicians are motivated by greed, and that this alone renders the collective actions of doctors injurious to consumers. But reducing a judgment on what constitutes "unfair competition" to the *motives* of one party is not simply illogical, but in and of itself unfair. In this case, the FTC is weighing the self-interested motives of producers and consumers, and deciding that one set of motives is entirely corrupt, while the other is entirely pure. This distorted view of morality clouds the FTC's thinking, and consent orders like the ones currently under consideration are the result of these faulty premises. In fact, both sides share the same basic rights and neither side has a blanket claim to the wealth or work of the other.

Rather than view the marketplace as a cosmic struggle between diametrically opposed forces, in reality a free market brings together individuals who engage in voluntary trade for their mutual benefit. In this case, Grossmont Hospital was free to reject the respondents' request for stipends, and in fact that's precisely what the hospital did. Far from being injured, the hospital was free to act upon its self-interest, just as the physicians were free to act upon theirs prior to the FTC's antitrust enforcement efforts. In a free market, this is precisely what's supposed to happen.

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<sup>2</sup> *The Quality Health-Care Coalition Act of 1998: Hearing before the House Comm. on the Judiciary, 105<sup>th</sup> Cong. (July 29, 1998)* (statement of Robert Pitofsky, Chairman of the Federal Trade Commission).

What the FTC seeks, in contrast, is a situation where only one side—the hospital—is legally able to pursue its self-interest, while the physicians are relegated to the status of a serf, forced to pursue their economic livelihoods according to the whims of a feudal lord, in this case the hospital in alliance with the FTC. As the recent pattern of FTC prosecutions demonstrate, the Commission is on a mission to demolish what little collective negotiating power physicians have in dealing with hospitals and monopsonies, such as HMOs and other health insurance plans. In the past year, the FTC has obtained consent orders from more than a half-dozen physician groups, in each case presenting a fact pattern essentially identical to the one presented here. Each group tried to act in its own self-interest by seeking greater compensation, and each group was subsequently prosecuted by the FTC for engaging in “unfair competition.” Some of these cases defy common decency. For example, in April 2002 the FTC went after an alleged cartel of *six* obstetricians that tried to “injure” two hospitals in Napa, California. Just after that case was settled, the FTC went after two Denver-area physician groups and their management consultant, Marcia Brauchler. The FTC claimed Brauchler was the ringleader of a massive conspiracy to violate the rights of several multi-billion dollar HMOs; this despite the fact Brauchler was working out of her home with one part-time employee and earning less than \$30,000 a year. The FTC nonetheless considered Brauchler and her physician clients to be dangerous monopolists committed to thwarting competition in the name of greed.

But none of these cases are about “greed.” The FTC’s efforts to cast aspersions on the physicians’ motives belie the Commission’s efforts to bury the true facts. And those facts are the particular concretes which motivate each individual physician to seek greater compensation. There are a plethora of reasons a physician may seek a price increase: the need to pay off student loans, increased costs, higher office rents, taxes, inflation, a second mortgage, and even, as

“Comrade” Pitofsky derisively notes, the ability to send one’s child to the best university or purchase a new luxury car. Physicians who collectively negotiate seek nothing more than a fair return on the value of their work. In the United States of America, we don’t punish the desire to seek honest profit through work and trade. We ought not to punish success or the ability of any individual, regardless of profession, to seek wealth in whatever form they derive the most pleasure from. The pursuit of happiness, a right set forth in America’s Declaration of Independence, is not a criminal act.

**2. The consent orders violate the respondents’ constitutional rights.**

Separate from the fact the respondents broke no law, the settlement imposed by the consent orders compounds the FTC’s malfeasance by blatantly failing to identify and protect the basic constitutional rights of ASMG and GAS. The restrictions imposed on the respondents’ conduct is an affront to the First and Ninth amendment rights of both ASMG and GAS, as well as their individual physician members and any individuals which may do business with them during the 20-year term of the consent order.

The proposed orders prevent the respondents from “[e]ncouraging, suggesting, advising, pressuring, inducing, or attempting to induce” any agreement between medical practices that might result in collective negotiations. This requirement violates the First Amendment rights of physicians and their customers. Like all citizens of the United States, doctors are constitutionally protected when they engage in political or commercial speech with one another, or with customers, 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 level.

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 operations with a system employing ignorance as its primary facet. By keeping doctors ignorant of each other's activities, 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 the respondents constitute a substantial harm to the collectivized “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.

In addition to First Amendment violations, the settlement's terms also infringe upon the unenumerated economic rights of physicians guaranteed by the Ninth Amendment. These unenumerated rights are not an incomprehensible abstraction, but rather a direct outgrowth of the basic rights of life, liberty, and the pursuit of happiness set forth in the Declaration of Independence and animated by the Constitution. Here, the physicians who comprise ASMG and

GAS engaged in *lawful* conduct designed to enhance their economic livelihoods and improve the quality of their lives. The Ninth Amendment protects this conduct, because there is no more fundamental economic liberty than the ability to engage in unshackled trade with others.

**3. The public will not benefit from the proposed orders.**

The FTC expects the proposed orders will benefit the public by restoring competition allegedly lost by the respondents' collective negotiating activity. If one takes certain facts out of context, this might appear to be true. Denying physicians their right to collectively negotiate will likely restrain growth in short-term prices for anesthesia services, since the doctors will be powerless to trade on an equal level with Grossmont Hospital. Such emphasis on short-term pricing is a hallmark of FTC enforcement, which myopically considers pricing to be the primary virtue of competition, to the exclusion of all other factors that might influence consumer or producer behavior. But such an emphasis carries with it severe long-term consequences which will hurt every actor in the marketplace—both physicians and their customers—and as a result, the proposed orders will yield no genuine benefits for any party to this action, save the FTC bureaucrats who will undoubtedly pad their resumes after this case is concluded.

The FTC's fixation on prices derives from its self-proclaimed mission to protect "consumers" from harm. By emphasizing consumer interests over all else, the Commission subscribed to the belief that demand, not supply, drives the marketplace, and that a consumer's every wish must be fulfilled as a matter of right.<sup>3</sup> When those wishes cannot be fulfilled on terms of the consumer's choosing, the FTC axiomatically concludes that it must be the fault of

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<sup>3</sup> For a discussion of the rights of producers and consumers, see, generally, 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](http://www.capitalismcenter.org/Philosophy/Essays/Self-Defense_Kit.htm)>.

some producer engaging in “unfair” competition. The case against ASMG and GAS derives from this flawed premise, and if carried to its logical conclusion, the FTC’s thinking will result in the destruction of the medical profession as it presently exists. Demand, after all, is a constant. Man has always had some need for medical attention, but prior to the development of modern medicine, many medical needs went unfulfilled. Indeed, man was unable to identify many of his medical needs until a group of men, over the years, developed the field of medicine and create a supply of physicians to provide medical services. The existence of this supply, not consumer demand, is what made the marketplace possible. The FTC, by prosecuting doctors, tries to deny this reality by acting as if the development of modern medicine was a mere historical accident which occurred spontaneously to fulfill the demands of consumers.

This is not an academic point. By attacking the basic rights of physicians to negotiate in their self-interest and treating the services physicians provide their patients as if they were an unquestioned right, the FTC is weakening the basic means of supplying physicians to the marketplace. If physicians are unable to profit in the market, they will simply withdraw their services, leaving hospitals without competent staff and patients without adequate care. While Grossmont Hospital may avoid a short-term rise in the costs of obtaining anesthesiologists by running to the FTC to punish ASMG and GAS, the Commission’s intervention will further erode the ability of physicians to pursue their economic self-interest, thus removing a key incentive in retaining and expanding the supply of available physicians. This may not be the intent of the FTC in pursuing these matters, but it is the undeniable effect. In the end, the freedom of the market to act upon its own initiative must be protected, rather than be destroyed by the shifting whims of FTC officials who possess little knowledge of how the healthcare market—and the free market in general—operates. Physicians, hospitals, and patients deserve nothing less.

## Conclusion

The FTC's fails to demonstrate any legal injury arising from the actions of ASMG and GAS. Beyond that, the proposed consent orders constitute a facial violation of the respondents' constitutional rights. If adopted, this consent order would do nothing to benefit the public interest while expanding the government's distortion of the health care market. The FTC should reject entry of the proposed consent orders, withdraw its complaints against ASMG and GAS, and dismiss both cases without further action.

Respectfully Submitted,  
THE CENTER FOR THE  
ADVANCEMENT OF CAPITALISM

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Dated: June 3, 2003