

THE CENTER FOR THE
**MORAL DEFENSE
OF CAPITALISM**

June 3, 2002

Mr. Donald C. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room 159-H
Washington, D.C. 20580

Re: Comments of the Center for the Moral Defense of Capitalism to the proposed consent agreements in *In re Aurora Associated Primary Care Physicians, L.L.C., et al.* and *In re Physician Integrated Services of Denver, Inc., et al.*, File Nos. 011-0174 and 011-0173.

Dear Mr. Secretary:

On May 10, 2002, the Federal Trade Commission (FTC) announced proposed consent agreements in the matters of *In re Aurora Associated Primary Care Physicians, L.L.C., et al.* (Aurora) and *In re Physician Integrated Services of Denver, Inc., et al.* (PISD). The Center for the Moral Defense of Capitalism (CMDC) files the following comments in response to both proposed agreements.

CMDC has previously filed comments in *In re Obstetrics and Gynecology Medical Corporation of Napa Valley, et al.*, File No. 011-4125, a case which dealt with similar issues to the ones raised in the present two actions. CMDC incorporates and reaffirms its comments in *Napa Valley* to the extent that they address the core philosophical and legal issues raised in these cases.

Additionally, CMDC would like to address a central issue in the Aurora and PISD cases, which is the FTC's use of the "messenger model" to analyze the conduct of the respondents here. As outlined in the 1996 DOJ-FTC *Statements of Antitrust Enforcement Policy in Health Care* (Statements), the messenger model allows the use of agents to "individually" gather fee and contract demands from physicians and present said demands to payors. The payors, in turn, can then use the agent to present a contract proposal to physicians, who must then accept or reject the proposal on an individual basis without cooperation among "competing" physicians. In other words, the agent is enjoined from acting as a labor union for physicians.

There can be no reason in justice, morality or the public interest that doctors should not enjoy the same rights as steelworkers.

CMDC rejects the FTC's use of this model for the following reasons: First, the model violates the physicians' First Amendment rights to free speech and peaceful assembly; second, the model destroys the free market that is a prerequisite for competition to exist; third, the model bears no rational relation to any legitimate government objective.

1. Violations of the First Amendment. Paragraph II.B of the Aurora and PISD consent agreements implement the Statements' policy which prohibits the physician-respondents from "facilitating exchanges of information" that serve to collectively express the terms by which physicians will reach agreements with payors. This requirement violates the First Amendment rights of physicians. Like all citizens of the 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 can only intervene in the realm of free speech rights in very narrow circumstances—such as libel laws—and the FTC has offered no justification which would rise to that level in these cases.

The underlying 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—as they are in these cases—does not diminish their right to 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 application of the "messenger model" is an attempt by the FTC 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 not the activities of consumers—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 Aurora and PISD constitutes a substantial harm to the “rights” of consumers, although the exact nature of such “rights” are never actually defined by the Commission’s mandate or proscribed by the Constitution. While the FTC may choose to believe non-existent “rights” are entitled to greater legal weight than clearly defined Constitutional protections, CMDC believes that such a position is contrary to the public interest.

2. Destruction of the free market. Competition can only exist in a capitalist economy where voluntary action forms the basis for commercial activity. The essence of competition, as Federal Reserve Chairman Alan Greenspan once observed, is, “taking action to affect the conditions of the market in one’s own favor.”¹ In order to affect the market, one must first understand it, and that in turn requires an unfettered exchange of information between economic actors. Physicians have a legitimate economic self-interest in exchanging information regarding fees and other contractual information with other physicians, even those they are nominally “competing” against. The FTC’s denial of this interest is arbitrary, capricious, and serves to undermine the very capitalist system that the agency is supposedly charged with protecting.

At no point has the FTC ever questioned or acted against payors—consumers, insurance companies, etc.—who choose to exchange information or act collectively in dealing with physicians. The Commission, in fact, goes to great length to strengthen the rights of payors by denying equal protection to physicians, who are expected to act “individually” at all times. But competition can not take place when one side is arbitrarily restricted in terms of how it may act to affect the market. After all, if consumers were told they could not collectively bargain via health insurance providers, they would rightly argue that they were being restrained from competing. The same reasoning applies to physicians, the FTC’s protestations to the contrary notwithstanding.

¹ Alan Greenspan, *Antitrust*, in CAPITALISM: THE UNKNOWN IDEAL 68 (Ayn Rand, 1966).

The FTC's model also conflicts with what the Commission has traditionally claimed as the authoritative framework for "protecting competition" under the antitrust regulatory scheme. It is generally understood that in the so-called "perfect competition" model—which the antitrust laws are based on—information about competitors is freely available to all actors within the market. In this way, it is claimed, no one producer can ever influence the price by possessing unequal information about his competitors. Here, the FTC is saying precisely the opposite, that competition depends on *preventing* the exchange of information relevant to the market.

Ultimately, neither of the FTC's contradicting theories regarding competition are accurate. Information is simply an expression of a party's property rights. The process by which an individual physician determines how much he would like to charge, for instance, is an extension of the property right he holds to his medical skills. When he exchanges that information with other physicians, for whatever purpose, he is doing so because he believes it advances the disposition of his property. "Consumers," as represented here by the FTC, have no more right to dictate the exchange of information between physicians than they do to demand what fees he must ultimately accept in exchange for his services.

Of course, that would seem to be precisely the point of the FTC's enforcement actions in these cases. The Commission's assault on the respondents' right to exchange information would appear but a pretext to directly regulating the fees of the physician-respondents by rigging the market process to favor "consumers," as represented by insurance companies and other third-party payors. If the FTC seriously maintains that physician collective bargaining is illegal and anticompetitive, then it should also prosecute and prevent consumers from collectively bargaining through third-party payors. That would at least provide some consistency in federal enforcement of antitrust laws, a system equally unjust to all. But as evidenced by the proposed consent decree, the FTC's persecution of physicians constitutes both a selective assault on physicians and a general attack on the free market; an attack which does not protect or promote the public interest of the people of the United States.

3. Lack of legitimate objective. Taken in connection with the FTC’s actions in other recent cases, such as *Napa Valley* and *In Re Alaska Healthcare Network, Inc.* (File No. 991-0103), CMDC believes that the Commission’s public-interest motivations are “paternalistic” in nature, a phrase first used by Justice Blackmun in *Virginia Pharmacy Board* to describe the efforts by a government agency to compel ignorance in order to manipulate market outcomes.² Adopting the viewpoint of Justice Clarence Thomas in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1995), CMDC believes that the use of such paternalism as a motivation for the FTC’s actions in these cases is ‘*per se* illegitimate, and can no more justify regulation of ‘commercial’ speech than it can justify regulation of ‘noncommercial’ speech.’³ The FTC’s actions are not based on an analysis of the relevant “public interest,” but rather an arbitrary and unwarranted imposition of the Commission’s policy agenda with respect to healthcare.

The DOJ-FTC Statements, in our view, provide no constitutional or legal basis to justify the remedy set forth in the consent agreements. The Commission is attempting to implement through administrative action what it cannot obtain from Congress and the American people, which is approval of a comprehensive nationalization of healthcare services under a federal regulatory regime. Just as Justice Thomas warned of “the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly” in *44 Liquormart*, in these cases CMDC must warn the public about the danger of permitting the FTC to continue their relentless persecution of physicians who have committed no crime against the United States, nor acted in any manner which can be objectively deemed as contrary to the public interest.

² 425 U.S. at 769-70.

³ 517 U.S. 484 (Thomas, J., concurring in part, and concurring in the judgment).

Conclusion. For the foregoing reasons, CMDC urges the FTC to reject the proposed consent agreements in the Aurora and PISD cases, and to dismiss both complaints. In addition, CMDC renews its call for the FTC to reconsider and rescind the DOJ-FTC *Statements of Antitrust Enforcement Policy in Health Care*.

Respectfully Submitted,

/s/

S.M. Oliva
The Center for the Moral Defense of Capitalism