UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF SURGICAL SPECIALISTS OF YAKIMA, P.L.L.C., CASCADE SURGICAL PARTNERS, INC., P.S., AND YAKIMA SURGICAL ASSOCIATES, INC. P.S.

FTC File No. 021-0242

COMMENTS OF CITIZENS FOR VOLUNTARY TRADE

Proposed Consent Order Announced September 24, 2003
Comments Filed October 23, 2003

Pursuant to the FTC's publication of a proposed consent agreement in the above-captioned matter[1], Citizens for Voluntary Trade, a Virginia nonprofit corporation, files the following comments.

I

Yakima County, Washington, has an estimated population of 224,000.[2] The FTC defines the geographic market in this case to include only the city of Yakima and the surrounding valley, which the Commission claims encompasses a population of 72,000. Within this area, there are 13 physicians that specialize in general surgery, according to the American Medical Association.[3] Nine Yakima surgeons belong to one of two groups that compose Surgical Specialists of Yakima (SSY). A tenth, independent surgeon is not part of SSY, but the FTC claims this physician is part of SSY for purposes of this case, presumably because he or she participated in joint contracting activities.

[1] 68 Fed. Reg. 59,815 (Oct. 14, 2003).
[2] Estimate of 2001 population from U.S. Census Bureau.
[3] Search of AMA physician database at www.ama-assn.org.

The FTC alleges SSY was formed in 1996 "to prevent payors from decreasing reimbursement rates."[4] Payors in this case primarily refer to managed care organizations, such as HMOs, and other third parties that provide health coverage for the ultimate consumers. The Commission notes that third-party reimbursements are generally based on the rates set by the federal government for Medicaid and Medicare.[5] For example, an HMO might contract with a physician to provide services for 110% of the prevailing government rate.

The FTC claims SSY acted as an exclusive negotiating agent for its members, requesting price increases from payors, and refusing to sign contracts on terms deemed unfavorable. The Commission claims SSY "demands price increases of as much as 50 percent,"[6] and has refused to contract with three payors that did not agree to SSY's terms. As a result, the Commission contends, SSY members "have successfully contracted for the highest prices" in Washington State for its services.[7] The Commission claims these higher prices, coupled with SSY's decision to jointly contract on behalf of its members, constitute an unreasonable restraint of trade in violation of the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, because SSY has engaged in "unfair" competition.

The consent order reached between the FTC and SSY forbid SSY to jointly contract with any payer in the future. Physicians must contract individually with payors, and not discuss the price terms of such contracts with other physicians. Any contract negotiated by SSY may be cancelled upon the unilateral demand of the payer. SSY may continue to provide joint administrative services, but one of SSY's member groups must leave to end what the Commission considers the threat of SSY's market power. The consent order will expire in 20 years, or approximately October 2023.

II

[4] Complaint, para. 12.
[5] Id., para. 11.
[6] Id., para. 17.
[7] Id., para. 20.

The proposed consent order will not end SSY's antitrust problems. Prior to the filing of the FTC's complaint and proposed order, at least three other actions were initiated against SSY: a consent order was reached with the Washington State attorney general, a class-action lawsuit was filed on behalf of allegedly injured payers, and a Yakima physician sued SSY claiming retaliation for not participating in the alleged joint contracting scheme. The two private cases await trial, while the Washington attorney general's settlement largely mirrors the terms and conditions of the FTC's proposed order.

CVT fails to see the utility of the FTC spending thousands of dollars to achieve the same result as the Washington attorney general. While we recognize the FTC's view that all physician joint contracting is a subject of federal jurisdiction (a view we do not necessarily accept, only acknowledge), the Washington action coupled with the pending private litigation only serves to undermine the Commission's discretionary exercise of its authority. Given the substance of this case involves the actions of 10 physicians (24 if you include all SSY members), the Republic would certainly have endured leaving this matter to state authorities.

Unless, of course, the FTC's objective here was to encourage and facilitate the private litigation. While a consent order does not have precedental or estoppel effect on future litigation, the obvious effect of the federal and state settlements will be to legitimize the private antitrust claims. Since SSY never had a substantial opportunity to defend itself before this Commission—owing in large measure to the inherently abusive processes maintained by this agency—the FTC has essentially functioned as an agent of the private litigants. This is regrettable, especially in light of the well-documented abuses of the trial bar with respect to physician malpractice cases. Just as the nation's physicians—including, we presume, Washington State's—have started to emerge from the "malpractice crisis," this Commission in coordination with the trial bar seems hell-bent on manufacturing an "antitrust crisis" to replace it.

III

The FTC argues its presence in this matter is necessary to protect the "public interest," the general standard guiding all Commission actions. In this case, however, we fail to see what the public interest is, or even how the Commission defines it. Certainly the American public at-large has little interest in the *voluntary*, non-coercive negotiations of a handful of physicians in central Washington. But even limiting the "public" here only to include Yakima residents does little to explain just what interest the FTC is trying to protect here.

The FTC forbids joint contracting by physicians except when it involves "risk-sharing." Practically speaking, this means physicians must adopt one of two business models: capitation or withholds. Under the former, which forms the basis of managed care, a physician is paid a fixed fee based on the symptoms treated, regardless of the actual cost of treating the patient. The physician is responsible for any resulting loss. Under withholds, a group of physicians agree to have a share of their fees withheld (usually around 15%), to be refunded only if certain cost-containment goals are met. For example, a group of OB/GYNs might have their 15% withheld unless they reduce the number of Cesarean sections performed by a certain percent.

While the FTC favors these models, the ultimate consumers, patients, rarely benefit from them. A patient that requires surgery might cost the physician more to perform than the capitated reimbursement level. This presents the physician with a terrible choice: lose money on the patient or convince the patient to undergo a less expensive, but medically riskier, treatment. Withholds presents the same problem. A doctor must treat his patients as a statistical group rather than individual customers.

At the same time, all the cost savings realized by the payers—the insurance companies—by these schemes are not passed along to patients in the form of lower premiums. If anything, the decline in physician reimbursement levels has been matched by a corresponding rise in the expense of insurance. Just because service costs are lower, that does not mean an insurers' other costs will decline, nor does it mean insurers have any incentive to pass their savings on.

If the "public interest" implies some utilitarian, greatest-good-for-the-greatest-number test, the FTC clearly has its priorities backwards. Protecting insurers at the expense of physicians *and* patients does little to advance general welfare. A majority is being inconvenienced for the sake of a minority, hardly the outcome that prompted passage of the altruistic antitrust laws in the first place.

There's another group to consider as well: uninsured patients. Almost 14% of Washington state residents lack health insurance coverage.[8] Given Yakima's lower average income and higher poverty rate relative to the rest of Washington, it's reasonable to assume a slightly greater percentage of the city's residents lack insurance. These patients are charged higher prices than insured patients. On one level, this makes sense; the whole point of insurance is to lower out-of-pocket costs by pooling risk with other patients. But the widespread use of insurance to cover routine care, not just extraordinary expenses, creates a problematic side effect. Poorer individuals who cannot afford insurance are charged substantially higher prices.

The FTC's actions here only exacerbate this problem. If physicians are forced to pay lower prices at the unilateral demand of insurers, these doctors will have to look elsewhere to make up the lost revenue. One avenue is to increase the share paid by uninsured patients, so that as managed-care reimbursements continue to decline, uninsured patients will increasingly subsidize the care given to insured patients. This is a very odd conceptualization of "consumer welfare," supposedly the FTC's paramount objective. Turning one group of consumers against another is not the Commission's mission, yet that is precisely what is being done here in the "public interest."[9]

IV

[8] 13.6% average for 2000-2002. Figure from U.S. Census Bureau.

[9] Another option for physicians is to add medically unnecessary procedures to an insured patient's bill to negate the effects of reimbursement decreases. In other words, a physician previously getting $1,000 for a procedure who know gets $850 can add on enough extra tests to make up the $150 difference.

At the heart of this case is the FTC's argument that SSY deprived customers of "the benefits of competition among physicians."[10] The Commission has long viewed competition as a primary; that is, competition is the basis of our economy, and any action that reduces competition is inherently suspect. CVT, in contrast, views competition as one feature of a capitalist economy, which is based on the protection of *individual* rights, not a vague "public interest."

Competition does not require a capitalist economy, nor does it require the exercise of reason. In nature, competition is plentiful. Animals compete with one another for food and water. Even plants compete for soil nutrients. Competition only requires scarcity, a situation where two or more entities seek the same thing. Competition *qua* competition is thus not an organizing principle of society, but rather a quasi-corollary of Darwinian natural selection; those who compete the best survive, while the losers fade into history.

Human beings differ from common animals in that man possesses a rational faculty. Man can conceptualize and act without resorting to the naked force of jungle animals or the biological mechanics of plants. More importantly, men can work together towards common identified objectives; far from being a source of weakness or illegal "anticompetitive" behavior, man's voluntary social relationships form the foundation of technologically advanced society.

Social relationships among men provide two primary benefits: knowledge and trade. We do not expect each individual to recreate from scratch the intellectual achievements of his ancestors, and we do not limit his economic wealth to what he can produce on his own. In the absence of these voluntary, rational relationships, man is reduced to the level of a basic animal, relying on force and coercion to sustain and advance his life.

In this case, the FTC views knowledge and trade as anticompetitive. SSY's members possess valuable medical skills that customers wish to acquire. Similarly, SSY's members share a common customer base and might reasonably seek to share information on price-related terms with one another about that base. The FTC, conversely,

[10] Complaint, para. 23(c).

considers this trade and knowledge a violation of the consumer's "right" to obtain physician services. In the Commission's view, the consumer's demand alone justifies obtaining physician services, even if the owner of those services does not wish to part with them except on mutually agreeable terms.

Competition, in this view, amounts to little more than a cockfight between producers for the amusement and benefit of consumers. Producers have no inviolable rights, according to the FTC, because the existence of such rights might compromise the inviolable rights of consumers to, well, consume.

In the early days of antitrust, the FTC and other agencies adopted a "perfect competition" model to govern their view of the marketplace. In this model, there were numerous producers and consumers, none of whom possessed the "economic power" to unilaterally determine market prices. When this "perfect competition" was threatened by an alliance of consumers or producers, the antitrust laws would intervene and restore the market's original chaotic state. This model emphasizes prices, specifically short-term prices, to the exclusion of all other market factors, such as individual consumer preferences and government regulation.

But in the post-New Deal era, where government intervention in the economy is commonplace, perfect competition no longer explains the behavior of antitrust regulators. In the healthcare market, the perfect competition model has been extinct since the 1970s, when Congress passed legislation to expand the growth of managed care organizations. Now, consumers are permitted to violate perfect competition by forming cartels like HMOs to pool their purchasing power, while the producers, physicians, are expected by law to remain economically powerless. As a result, the market is deliberately skewered to emphasize consumption without regard to its effects on production.

This consumerist economic model divorces prices from the law of supply and demand. In a free market, a man's supply is his demand; he cannot obtain a good or service beyond his ability to pay for it. But in the consumerist market, the government will gladly intervene to provide a

consumer what he wants without regard to his means. That is what has happened here. SSY offered to sell their services to payors for a certain price. The payors were free to counter-offer or otherwise negotiate this price. Instead, the payors went running to the FTC, which declared SSY's actions "anticompetitive" *solely* because SSY would not immediately accede to the payors' demands.

The FTC argues that they only acted to prevent unreasonable pricing; SSY was seeking well-above "market" rates for their services. But how is the "market" rate determined? The Commission infers that the federal Medicare reimbursement levels are the benchmark to judge private contract prices. But the Medicare rates are not the product of a free market, but of government fiat. The Medicare rates can, and are, established without regard to economic reality. Using such rates as the basis for market negotiations is akin to deciding the Super Bowl winner on the basis of which team sells the most merchandise.

A true market rate is objective, and is based on the thousands of interactions between buyers and sellers free of coercion and force. The problem, from the FTC's perspective, is that such a market cannot be reduced to simplistic political concretes. It is far easier—that is, more politically expedient—to blame physicians from the nominally high cost of health care than it is to assess the market as a dynamic whole.

Competition is not, as the FTC believes, a static process of maintaining low prices, but rather a dynamic (and decentralized) process of experimentation, feedback, and reform. It is more akin to the scientific method than natural selection. Competition is the ability to discard a flawed economic model and to try a new one, even one that is nominally "anticompetitive" to a government regulator. Author Virginia Postrel, who calls this view of competition "the infinite series," notes that: "Competition provides not only useful criticism but a continuous source of experiments * * * By picking winners, stasist protectionism eliminates this

learning process, which includes learning what does *not* work."[11]

For years, the evidence has shown the FTC's chosen business models for physicians—capitation, withholds, and more recently messengering[12]—do not work. Physicians are going bankrupt while the Commission refuses to reconsider its narrow, concrete-bound view of the market. If allowed to experiment with new models, physicians, payors, and patients might come up with a better way of doing business that improves everyone's fortunes. But this experimentation is not simply discouraged by the FTC—it is forbidden under penalty of law.

At the core of the FTC's failure to control the healthcare market is the Commission's repeated refusal to acknowledge individual rights as the source of the government's authority. Most Americans can recite the Declaration of Independence's endorsement of "inalienable" rights to life, liberty, and the pursuit of happiness, as well as the statement that "all men are created equal," but these statements from our Founders have little relevance in the work of today's FTC. The inalienable rights are disregarded for political expediency, while certain men, as George Orwell once observed, are created more equal than others.

The ability of physicians to freely negotiate contracts for their services, whether independently or voluntarily as part of a group, goes to the core of what it means to be an American. A physician's work *is* his life, liberty, and happiness. Forcing physicians to surrender these rights for the sake of protecting customers from price increases is not simply a violation of the constitutional principles that govern this country; it is a violation of the *moral* principles that guide this nation and give it strength and prosperity.

If the FTC wants to protect genuine competition, it must protect individual rights. This means the Commission must stop trying to impose half-assed price controls on physicians, like SSY's members, via the antitrust laws. This also means

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[11] Virginia I. Postrel, *The Future and Its Enemies: The Growing Conflict Over Creativity, Enterprise, and Progress* at 77-78 (Touchstone 1998).

[12] Messengering is a one-way process where physicians designate a "messenger" to receive and relay offers from payers. The messenger may not, however, relay counter-offers from physicians or engage in joint negotiations on their behalf.

the Commission should use its bully pulpit to call upon Congress to repeal the Government's various intrusions into the marketplace—starting with Medicare and Medicaid.

Adopting the proposed order against SSY will do nothing to benefit consumers in the long-run, and indeed the FTC's continued persecution of physicians will likely force more physicians into financial insolvency. As noted above, the Commission seems intent on manufacturing an antitrust crisis in healthcare; the inevitable result of such a crisis will be the collapse of the healthcare market in many jurisdictions, at least those where physicians leave because they fear the consequences of staying and fighting for their rights. CVT hopes Yakima does not become one of those markets, though the signs in this proposed order unfortunately suggests otherwise.

V

For the reasons discussed above, Citizens for Voluntary Trade requests the FTC reject entry of the proposed order and dismiss the complaint against SSY.

Respectfully Submitted,
CITIZENS FOR VOLUNTARY TRADE

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