

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

DOCKET NO. 9312

**COMPLAINT COUNSEL'S BENCH MEMORANDUM REGARDING
ADMISSABILITY OF STATEMENTS CONSTITUTING VERBAL ACTS**

The Federal Rules of Evidence permit admission of out-of-court statements that are relevant to the making of a contract. FED. R. EVID. 801(c), 803(3). Such statements are not hearsay because they constitute "verbal acts" that have independent legal significance and are not introduced to prove the truth of the matter asserted. *E.g., Mueller v. Abdnor*, 972 F.2d 931 (8th Cir. 1992). Alternately, such statements are admissible to show the state of mind of the declarants or the recipients. *E.g., KW Plastics v. U.S. Can Co.*, 130 F.Supp.2d 1297 (M.D. Ala. 2001). Accordingly, letters from physicians are admissible when those letters relate to a refusal to consent to an assignment of a contract.

DISCUSSION

Federal Rule of Evidence 801(c) permits admission of out-of-court statements that constitute "verbal acts." *E.g., Mueller v. Abdnor*, 972 F.2d 931 (8th Cir. 1992); *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Bd.*, 298 F.3d 201 (3d Cir. 2002). A verbal act is a statement that "itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights." *Mueller*, 972 F.2d at 937 (citing FED. R. EVID. 801(c), advisory committee's note). Verbal acts "are not hearsay because they are not assertions and not adduced to prove the truth of the matter." *Mueller*, 972 F.2d at 937 (citing John W. Strong et al, McCormick on Evidence, Sec. 249 at 101 (4th ed. 1992); 6 John H. Wigmore, Evidence, Sec.

1770 at 259 (James H. Chadbourn rev. ed. 1976)).

For these reasons, contracts and contractual language are not hearsay. In *Mueller*, for example, the Eighth Circuit upheld admission of a contract:

A contract, for example, is a form of verbal act to which the law attaches duties and liabilities and therefore is not hearsay. . . . In addition, various communications – e.g., conversations, letters, and telegrams – relevant to the making of the contract are also not hearsay.

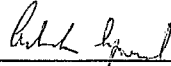
Id. Similarly, in *Cloverland-Green*, the Third Circuit held that a district court should have permitted admission of a contractual offer: “a statement offering to sell a product at a particular price is a ‘verbal act,’ not hearsay, because the statement itself has legal effect.” *Cloverland-Green*, 298 F.3d at 218.

Alternately, contractually-related statements are admissible to show the state of mind of the declarant or the recipient. *E.g.*, *KW Plastics v. U.S. Can Co.*, 130 F.Supp.2d 1297 (M.D. Ala. 2001). In *KW Plastics*, the court admitted statements by a paint can supplier's employee that a customer's officials told her that the supplier would receive a rings and plugs contract. The court held that the statement reflected upon the state of mind of the customer's decisionmakers and were admissible under the hearsay exception for evidence offered to show a declarant's then existing state of mind.

Here, Complaint Counsel has submitted for admission into evidence a number of similar letters from physicians that relate to their refusal to consent to the assignment of their Healthsource contracts to CIGNA. These letters expressly state that “I, the undersigned physician, DO NOT consent to such an assignment,” and further state that the physician has requested NTSP to represent him or her as an agent. *See, e.g.*, CX0760-001. Such letters constitute non-hearsay “verbal acts” because they had the legal effect of preventing the proposed assignment of the contracts. Alternately, these letters show the state of mind of both the

physicians and CIGNA personnel with respect to CIGNA's ability to contract directly with the
physicians.

Respectfully submitted,



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Dated: April 29, 2004

CERTIFICATE OF SERVICE

I, Carolyn R. Cleveland, hereby certify that on May 3, 2004, I caused a copy of Complaint Counsel's Bench Memorandum Regarding Admissability of Statements Constituting Verbal Acts to be served upon the following:

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