

S.M. Oliva

2000 F Street, N.W., #315

Washington, DC 20580

(202) 223-0071

SkipOliva27@aol.com

September 6, 2002

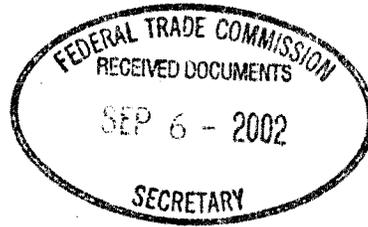
Mr. Donald S. Clark, Esq.

Office of the Secretary

Federal Trade Commission

600 Pennsylvania Ave., N.W., Room 159-H

Washington, DC 20580



**Re: *In re R. Todd Welter & Associates, Inc., et al.,* FTC File No. 011 0175.**

Dear Mr. Secretary:

Please accept these comments on behalf of myself on the above-captioned matter for inclusion in the public record.

This is the fourth case in 2002 where the Federal Trade Commission has initiated an antitrust prosecution against physicians for attempting to collectively bargain with insurance companies. Like the previous three cases, this current consent agreement is legally baseless and morally repugnant to a society which claims to protect individual rights and economic freedom. I ask that you consider these comments carefully-and publish them in the record for others to review-because the underlying principles I defend are fundamentally important to the American people and the healthcare system which is dying slowly at the hands of government officials.

The premise of this case is simple: Physicians do not have collective bargaining rights, and any attempt by them to act as a group to obtain higher compensation for their services is *per se* illegal under the antitrust laws. According to the FTC's official policy on healthcare-a document never approved by Congress or the American people-physicians may only collectively bargain if they integrate their clinical practices. If they choose to remain independent, then they cannot collectively bargain, but may employ a "messenger" to provide limited intermediary services. A messenger may obtain fee information from individual doctors and pass such requests on to the insurance company, which may then use the messenger to present a counter-offer. The messenger may not actually negotiate on behalf of the physicians as a group.

Under the FTC's "messenger model," physicians and their consultants do not enjoy basic constitutional rights, notably the freedom of speech guaranteed by the First Amendment. Todd Welter, the consultant named individually in the complaint, is barred under the consent agreement from "advising" the physician respondents to accept or reject any offer made by an insurance company to the physician respondents. In other words, the FTC is prohibiting the mere act of speech, offered in the form of voluntary advice. There is no other context in which this kind of prohibition would be acceptable as a matter of public policy, and the FTC offers no compelling argument why such a requirement is necessary here.

Furthermore, the physician respondents are prohibited from "exchanging or facilitating in any manner the exchange or transfer of information among physicians" regarding fees or negotiations with insurance companies. Again, this is a plain violation of the First Amendment. Individuals may freely exchange information without fear of government prohibition. The First Amendment guarantees both the right to speech and to assembly, which are precisely the rights that the respondents were exercising.

The FTC's justification for such extreme unconstitutional actions is protection of "consumer rights." The FTC bases their action here on the belief that permitting physician collective bargaining *may* increase the costs borne by healthcare consumers, and that this is *per se* anticompetitive under the FTC Act and the federal antitrust laws. But this premise is not just flawed, it's outright fraudulent. The FTC's standards are not grounded in objective reality, and this enforcement action is part of a larger scheme to conceal the real cause of increasing consumer health care costs.

Consumers do not have a right to health care. It's not clear whether the FTC disputes this claim. But there is no more right to health care than there is a right to housing, food, or a new car. A "right," properly defined, means the freedom to act according to one's interests and to benefit from one's own action. In a moral society, rights are reciprocal, meaning an individual must respect every other individual's freedom to act, and no person has a right to *forcibly* obtain property or services that are not their own. Voluntary exchange of goods and services thus form the basis of a moral economy—a system generally called *capitalism*.

In a capitalist system, a free market determines the distribution of all good and services. Producers create goods and services, and consumers bargain to obtain them on a voluntary basis. The government guarantees the integrity of this system-by providing police and objective courts of law-but makes no attempt to dictate the outcome of the marketplace. In other words, the government does not determine the distribution of resources. A capitalist economy is the *only* structure in which true market competition takes place.

The current U.S. health care system is not an example of capitalism. Instead, it is a patchwork of feudal kingdoms, each governed by a Health Maintenance Organization (HMO) or a government-run insurance program. Using the coercive power of government, these insurance groups compel physicians to subsist on below-market levels of compensation while providing minimal services to consumers. Doctors are not rewarded for providing higher-quality services to patients, but rather for supplying the lowest common denominator of service deemed necessary by the HMO. This is rationing. This is not "competition," as the FTC would have us believe. In a competitive market, consumer demand is matched with competent supply. With HMOs, consumer demand is ignored and supply is forcibly restrained. This is the system the FTC is fighting desperately to protect, and it explains the justification for the present case.

If you read the FTC's complaint carefully, you will notice one overriding theme. Physicians are not considered independent businessmen. They are considered public servants, really serfs of the feudal insurance kingdoms, whose highest calling is to sacrifice in the name of the "public interest." In paragraph eight, for example, the Commission speaks approvingly of traditional physician contracts with HMOs, saying, "physicians entering into such contracts *often agree to lower compensation*, in order to obtain access to additional patients made available by the payors@These contracts *may reduce payors' costs and enable payors to lower the cost of insurance* (italics added)." This statement makes two assumptions: First, physicians will want more patients at lower fees than fewer patients at higher fees; and second, that insurance companies which pay less to obtain physician services will automatically pass these savings on to the ultimate consumer.

The first assumption is completely unsupported by facts or evidence. It ignores the fact that there are physicians who would rather see fewer patients and take home more money on a per capita basis. The second assumption is equally unsupported, and it falsely assigns blame for high HMO costs to the physicians. HMO costs are primarily a function of administrative overhead (including government-mandated red tape) and second-guessing of physician services, not a result of higher fees paid directly to doctors.

So why does the FTC make these assumptions in the first place? On the question of physician preferences, the Commission is simply ignoring their needs. After all, if physicians have no right to collectively bargain or to even speak to one another, they certainly have no right to decide how many patients they want to see, or at what compensation level they see them. On the issue of insurance costs, the FTC is trying to confuse the public-it's not the cost of insurance the FTC wants to lower, but the costs of the HMOs in obtaining services. Whether the HMOs actually pass these savings on to consumers is irrelevant, as the FTC never investigates their operations or activities, only the purported "price fixing" arrangements of doctors.

The imbalance is obvious to even a monkey. Patients can collectively bargain through HMOs, yet physicians are prohibited from entering into similar arrangements to protect their interests. The only possible result of such a system is contracts where physicians are required to work below their proper compensation levels. But the joke is on consumers, or should I say individual consumers. They don't benefit from these arrangements either, since they're procuring *inferior* services on a per capita basis. Collectively their needs become unimportant. In the end only the collective itself—the insurance company—actually benefits.

HMOs would never survive in a capitalist system. No consumer would voluntarily seek less service for greater administrative cost. Certainly no physician would ever work for an HMO, since it would be economically and professionally self-defeating. The only thing that allows the HMO system to continue is, not surprisingly, the government, which uses a variety of policies to promote and compel the use of HMOs. There are three primary means by which the federal government does this: (1) Medicaid and Medicare, which directly contract with HMOs to provide services at taxpayer expense; (2) direct grants and loans to HMOs; and (3) laws requiring employers to offer HMOs to employees as a "benefit." All of these actions work to *destroy* the free market in health care. Nothing the respondents in this case are accused of doing even comes close to inflicting this level of damage on "competition."

This case came about for one reason and one reason only: insurance companies complained to the FTC when the respondent physicians didn't cave to their demands to work for less money. The FTC, being the good lap dogs that they are, immediately did the bidding of their HMO masters. This case was not brought in the "public interest," and it certainly wasn't pursuant to law or the Constitution of the United States. In every aspect, this prosecution was a violation of individual rights. Not only were the respondents presumed guilty by the FTC from the get-go, the entire administrative review process was stacked against them. Had this case been adjudicated, the respondents would have been denied their Seventh Amendment right to a jury trial, instead being given a hearing before an administrative judge appointed by the FTC; any appeal from that judge would be decided by the FTC itself; and only then would appeal to an Article III court be permitted, in a proceeding where the FTC's findings of fact would be presumed correct. It's no wonder that the majority of FTC complaints result in immediate consent agreements. There's no comparative advantage to adjudication, especially when you're a small group of doctors staring down a federal agency with unlimited resources.

It should also be noted that had this matter been adjudicated in favor of the FTC, the respondents would then be subject to potential liability in private suits brought by the HMOs, since a guilty finding by the Commission is *prima facie* evidence of guilt in a civil proceeding. This more than anything explains why so many respondents "consent" to these settlements.

But even had the FTC afforded the respondents constitutional due process, it would not justify this immoral and illegal prosecution. The FTC's case here is not that the respondents broke the law; the Commission's complaint is that insurance companies were inconvenienced, and their comfort and needs must trump even the most clearly defined individual right. Since the insurance company has no "right" to involuntarily obtain the services of the respondents, the FTC was forced to invent a legal privilege out of thin air to obtain the result most favorable to the insurers.

What the FTC ignores in all of this, at its own peril, is the simple fact that it's the *physicians* which create the services that the HMOs seek to control by force. Without doctors, there is no health care system. Consumers can demand all the health care they want. Congress can grant all of the privileges it wants to provide "free" health care to consumers. But ultimately, without physicians, none of these needs will be met. And this raises the following question: What will the FTC do when physicians simply stop negotiating with HMOs altogether and quit the medical profession? Some are already doing this and further FTC action will surely drive more to make this decision. Will the Commission then file antitrust suits against every retired and former physician to compel them to practice? When the producers go on strike-as Ayn Rand would put it, when Atlas shrugs-what level of force will the FTC then resort to?

If physicians are to practice medicine, they must do so out of self-interest. Any other motivation would be immoral and contrary to the principle of individual rights. Physicians cannot be condemned to a life of serfdom, where their specialized skills are a form of communal property to be dispensed at the whims of government bureaucrats. Not only such a system evil, it's also completely impractical. Without a profit motive-that is, without individuals acting out of self-interest-there is no incentive to achieve beyond a level of minimum subsistence. *That* is why the HMOs are failing. The government will continue to subsidize failure as long as they are in control of the system. In order to preserve their control, they must eliminate all viable competition from the marketplace, and that includes physicians who attempt to assert their own selfish goals. Physicians like the respondents in this case. This is why the FTC's premise is fraudulent. The Commission isn't protecting competition; it's destroying the last vestiges of the marketplace in order to ensure the dominance of its own failed HMO schemes.

In closing, the FTC should know that even after it approves this consent agreement (and none of us are under the illusion that you'll give rigorous consideration to my comments, or anyone's comments), the fight will continue. Anyone who takes even 30 seconds to look at the facts of this case, and the similar cases that came before it, know that what the FTC is doing is misguided and just plain wrong. The FTC should consider the consequences of its actions before bringing their next case against physicians. The FTC staff-themselves members of a union that collectively bargains to increase compensation-is restricting the ability of others to participate in these same activities. The FTC's actions cannot withstand any serious public or intellectual scrutiny, and from this point forward, it is my goal to see that such scrutiny is offered.

Wherefore, premises considered, I request the Federal Trade Commission reject entry of the consent agreement in this matter and dismiss the complaint with prejudice.

Submitted for your consideration,

A handwritten signature in cursive script that reads "S.M. Oliva". The ink is dark and the signature is written in a fluid, connected style.

S.M. Oliva

Washington, DC