

Dissenting Statement of Commissioner J. Thomas Rosch
In the Matter of M. Catherine Higgins, File No. 051 0252

Today's events represent a sad conclusion to an unnecessarily sordid tale. Four years ago, in October 2005, the Commission opened an investigation into whether the Boulder Valley Individual Practice Association ("Boulder Valley" or "BVIPA") and Mary Catherine Higgins (Boulder Valley's Executive Director) violated the antitrust laws by allowing competing physicians to jointly negotiate terms with payors. Boulder Valley ultimately agreed to enter into a consent decree. That consent decree, however, was not just a logical successor to other finalized decrees the Commission has entered against Individual Practice Associations ("IPAs") composed of competing physicians who have jointly negotiated rates with payors. The underlying conduct in those cases was horizontal price-fixing – which is per se illegal, or, to be charitable, conduct that violates the rule of reason. *See In re N. Tex. Specialty Physicians*, 140 F.T.C. 715 (2005), *aff'd*, 528 F.3d 346 (5th Cir. 2008). Boulder Valley's underlying conduct, however, consisted at least in part of joint negotiation of non-price terms – conduct that is not a per se violation. *See Internat'l Healthcare Mgmt. v. Haw. Coal. for Health*, 332 F.3d 600, 605 (9th Cir. 2003). Moreover, insofar as Boulder Valley's underlying conduct did consist of joint negotiation of rates, it consisted, in part, of alleged horizontal price-fixing in which some of the alleged "victims" were payors who agreed to the conduct, apparently believing joint negotiation of rates to be efficient and in the payors' self-interest. Joint negotiations by horizontal competitors with those who invite those joint negotiations are not a per se antitrust violation either. *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 410 (5th Cir. 2007). Thus, insofar as the consent decree against Boulder Valley bars either of these kinds of conduct, it can legitimately do so only by way of "fencing-in" or not at all.

Boulder Valley chose not to litigate these issues, instead electing to enter into a consent decree that names Boulder Valley alone and not Ms. Higgins as a respondent. This was consistent with Commission practice: when an individual is just an employee of the organizational respondent (as opposed to an owner of the organization or someone who is shown to control the organization's decisions), the Commission has rarely named the individual as a separate respondent; it has instead simply provided that the order will apply to the directors of the organizational respondent, its officers, and employees. Despite my doubts about whether liability based on the two species of conduct discussed above could be found, I found that there was "reason to believe" that Boulder Valley could be fenced-in in this fashion, and I voted for the decree.¹ One of the factors I considered, however, was that Ms. Higgins was not joined as a respondent.

Thereafter, it is undisputed that the following events occurred. First, Ms. Higgins denounced the consent decree in the press, asserting, among other things, that Boulder Valley had agreed to the consent decree only to avoid the substantial expense that litigation would entail.² Second, in response to the notice for public comment on Boulder Valley's proposed

¹ Complaint, *In the Matter of Boulder Valley Individual Practice Assoc.*, FTC File No. 051-0252 (Dec. 24, 2008), available at <http://www.ftc.gov/os/caselist/0510252/081224bouldercompt.pdf>.

² *See, e.g.,* John Aguilar, *Doctors Settle with FTC; Boulder County Physicians' Group: Feds Wrong with price-fixing claims*, DAILY CAMERA, Dec. 30, 2008, at A1; Greg Blesch, *FTC's Not Done Yet; Calif., Colo. Doc partnerships latest to be scrutinized*, 39 MODERN HEALTHCARE 10 (Jan. 5, 2009).

consent, Anthem Blue Cross Blue Shield complained that “the terms of the Consent Order may be interpreted to allow individuals associated with . . . BVIPA” to continue to attempt to facilitate collusive pricing.³ Third, following those complaints and conversations with Anthem, staff notified Ms. Higgins that it was evaluating whether to add her to the *Boulder Valley* complaint or name her separately. Fourth, Ms. Higgins then separately met with the Commissioners (with the exception of the undersigned) in an effort to persuade them not to pursue her individually. Fifth, following those meetings, staff offered Ms. Higgins a consent decree that restricts Ms. Higgins’s ability to participate in a pure “messenger system” in obtaining rates for those physicians that Boulder Valley represents. Sixth, Ms. Higgins rejected that consent decree, but rather than litigate, the Commission has since agree to a consent decree that (unlike the Commission’s consent decree with Boulder Valley) (1) restricts Ms. Higgins to a limited messenger model for one year and (2) prevents Ms. Higgins from negotiating with any payor on behalf of any physician that participates in the BVIPA for two years.

Under these circumstances, I cannot vote in support of the consent decree against Ms. Higgins. First, I do not believe that the Commission has adduced evidence that warrants switching its stance from not naming Ms. Higgins at all to requiring her to enter into a consent decree that restricts her ability to participate in a pure “messenger system.” There is a factual dispute as to whether when Ms. Higgins made her post-consent statements to Anthem, Ms. Higgins understood that she (or Boulder Valley) was subject to the binding consent decree in *Boulder Valley*, which had not yet been made final. I do not believe that such disputed facts supply a sufficient basis for the Commission to now proceed against Ms. Higgins separately and require that she engage in more restrictive conduct as a condition of settlement.

Second, in my view, the Commission’s decision today is unnecessarily punitive: Ms. Higgins cannot possibly do her job to the fullest extent for Boulder Valley if she is limited in her conduct as described. Moreover, I am gravely concerned that the Commission’s abrupt decision to change its tune can be viewed as retaliation for Ms. Higgins’s decision to exercise her First Amendment rights when she publicly criticized the Commission’s initial decision against Boulder Valley and for her ensuing decision to meet individual Commissioners in an effort to persuade them not to pursue her separately.

Third, I believe that by separately naming Ms. Higgins, the Commission has reneged on its deal. Such actions will inevitably undermine the Commission’s ability to effectively negotiate consent decrees in the future.

I greatly regret this chain of events, and I hope that it does not happen again.

³ Comment submitted by Wellpoint, Inc., *In re Boulder Valley Independent Practice Assoc.*, FTC File No. 051-0252 (Jan. 22, 2009), available at <http://www.ftc.gov/os/comments/bouldervalley%20ipa/539810-00002.pdf>.