

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 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 violated the rule of reason. See *In re N. Tex. Specialty Physicians*, 450 F.T.C. 715 (2005), *aff'd*, 528 F.3d 346 (5th Cir. 2008). Boulder Valley's underlying conduct,

Boulder Valley chose not to litigate these issues, instead electing to enter into a consent decree that names Boulder Valley alone and not 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 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 respondents, officers, and employees. Despite my doubts about whether liability based on the two species of conduct discussed above could be found, I found that it was "reason to believe" that Boulder Valley could be found to be a defendant-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 substantial expenses 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 Association, FTC File No. 051-0252 (Dec. 24, 2008), available at <http://www.ftc.gov/os/caselist/05252/081224bouldercompt.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 1; Greg Blesch, FTC's Not Done Yet; Calif., Colo. Doc partnerships latest to be scrutinized, MODERN HEALTHCARE 10 (Jan. 5, 2009).

consent, Anthem Blue Cross Blue Shield ~~could~~ ^{implied} that “the terms of the Consent Order may be interpreted to allow individuals associated with . . . BVIPA” to continue to attempt to facilitate collusive pricing.