The Federal Trade Commission Should Terminate the Coopharma Consent Order and Reconsider Its Approach to Horizontal Coordination Among Small Players

Introduction

The Open Markets Institute* submits this comment to support Coopharma's petition urging the Federal Trade Commission to terminate the 2012 consent order governing Coopharma.[1] The consent order bars Coopharma and its independent pharmacy members from collectively bargaining with powerful pharmacy benefit managers (PBMs) and payers on reimbursement rates and other contractual terms. It is unjust and should be set aside on legal and public interest grounds.

In enacting the antitrust laws, Congress understood the difference between coordination that concentrates power and coordination that disperses it. Our elected representatives affirmatively authorized coordination among several classes of actors, including farmers and ranchers, fishers, exporters, shipping companies, and workers. Congress deemed horizontal coordination among certain groups as socially virtuous and even worthy of legislative *promotion*.[2] Congress aimed to allow and support concerted activity that redistributes power downward and constitutes more democratic forms of market and firm governance.

As Coopharma's petition persuasively shows, the 2012 consent order perpetuates the profound inequality in power between independent pharmacists and PBMs. The FTC has studied and publicized the power of PBMs in the health care sector.[3] Across the country, the market might of the PBMs has driven many independent pharmacies out of business to the detriment of the patients and communities that they serve. The concerted action of Coopharma and its members, which is authorized by Puerto Rico law and would be supervised actively by the territorial government, would help to at least partially counter the overweening power of the PBMs. This collective action would promote the vitality of independent pharmacies and promote public access to affordable medicines, vaccines, and other essential health care.

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* The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. Open Markets regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

[1] Petition of Coopharma to Reopen and Set Aside or Modify Order, 89 Fed. Reg. 74,950 (Sep. 13, 2024).

[2] For instance, in the National Labor Relations Act, Congress sought to "encourag[e] the practice and procedure of collective bargaining."29 U.S.C. § 151.

[3] FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS: THE POWERFUL MIDDLEMEN INFLATING DRUG COSTS AND SQUEEZING MAIN STREET PHARMACIES, INTERIM STAFF REPORT 13 (2024).

Further, the Open Markets Institute encourages the FTC to use Coopharma's petition as an opportunity to reevaluate its broader approach to horizontal coordination among independent workers and small and medium-sized businesses. While the FTC under Chair Khan has generally avoided interfering with the concerted activity of small players,[4] the FTC should use this consent order to publicly commit to respecting the right of workers and small producers to organize and build power against dominant counterparties.

I. Correcting the Record on Horizontal Coordination

The law applying to coordination among competitors is complicated. Although the Supreme Court has held price fixing and other loose forms of coordination to be per se illegal since at least 1940,[5] court precedents are not the only applicable law. Congress, in a series of enactments, authorized and protected coordination among certain groups. In laws like the Capper-Volstead Act, Fishermen's Collective Marketing Act, and National Labor Relations Act, Congress protected the right of certain firms and workers to coordinate and build organizational muscle against powerful counterparties. In other words, Congress rejected the rigid prohibition reflected in antitrust law's per se rule.

In the 1940 decision *United States v. Socony-Vacuum Oil Co.*, the Supreme Court announced the modern per se rule against horizontal collusion. It stated: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[6] This judge-made rule has been affirmed repeatedly since then.[7] Given this body of precedent, the Supreme Court declared in 2004 that collusion is "the supreme evil of antitrust."[8] By contrast to its hostility to coordination among independent competitors, the Court has taken a much more permissive approach to tight forms of integration such as holding companies, mergers, and even corporate monopolies.[9]

While a memorable turn of phrase, the "supreme evil" characterization of horizontal coordination ignores a substantial body of statutory law. At most, it summarizes judge-made

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[4] *But see* Press Release, New Mexico Physician Association to Pay $263,000 Civil Penalty to Settle FTC Allegations That It Violated 2005 Order, Fed. Trade Comm'n (Sep. 30, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/new-mexico-physician-association-pay-263000-civil-penalty-settle-ftc-allegations-it-violated-2005.

[5] United States v. Socony-Vacuum Oil. Co., 310 U.S. 150 (1940).

[6] *Id.* at 223.

[7] Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 649 (1980); Arizona v. Maricopa County Medical Society, 457 U.S. 332. 348 (1982); FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411,435 (1990).

[8] *Trinko*, 540 U.S. at 408.

[9] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 776 (1984); Texaco Inc. v. Dagher, 547 U.S. 1, 7-8 (2006). *See also Trinko*, 540 U.S. at 407 ("The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth.").

law.[10] Contrary to the Court's unqualified declaration, however, Congress has protected and promoted coordination among certain economic groups. While the Court treats horizontal coordination with hostility, Congress believed otherwise and made that clear in several major laws. A few such examples are described below, though they are not the only ones. Congress also authorized certain forms of coordination among rival newspapers,[11] exporters,[12] professional sports teams,[13] and shipping companies.[14]

In two major statutes, Congress sought to promote horizontal cooperation among independent farmers and ranchers. It enacted the Clayton Act in 1914, which among other provisions protects the right of nonprofit agricultural and horticultural organizations to carry out "legitimate objects" free from antitrust interference.[15]

Congress went further and offered greater clarity in 1922 in the Capper-Volstead Act. The law states: "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."[16] Subject to supervision by the Secretary of Agriculture,[17] agricultural cooperatives can engage in collective marketing, distribution and processing.

Notably under the plain language of the Capper-Volstead Act, farmers and ranchers cannot legally coordinate as purchasers of goods and services. Agricultural cooperatives and their members cannot enter into wage-fixing or no-poach agreements to the detriment of their workers and claim legal immunity under the Capper-Volstead Act. The law only protects the collective marketing and processing of crops, livestock, and fruits and vegetables.[18] This circumscription is critical and does not allow farmers and ranchers to collusively exploit weaker parties like farmworkers. The law also empowers the Secretary of Agriculture to take legal action against cooperatives that use restraints of trade or monopolistic practices to unfairly raise the price of agricultural producers.[19]

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[10] During the Great Depression, the Supreme Court permitted concerted action among rivals as a way of stabilizing the distressed coal-mining industry. Appalachian Coals v. United States, 288 U.S. 344 (1933). In *Socony*, the Court did not overrule *Appalachian Coals* and instead distinguished the facts in the two cases. *Socony*, 310 U.S. at 216.

The Court has allowed rivals to jointly set prices when they have integrated some aspect of their businesses. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 23-24 (1979).

[11] 15 U.S.C. § 1803.

[12] 15 U.S.C. §§ 61-62

[13] 15 U.S.C. §§ 1291-96.

[14] 46 U.S.C.§ 40307.

[15] 15 U.S.C. § 17.

[16] 7 U.S.C. § 291.

[17] 7 U.S.C. § 292.

[18] 7 U.S.C. § 291.

[19] 7 U.S.C. § 292.

Drawing on the Capper-Volstead Act model, Congress granted similar cooperative authority to fishers. The Fishermen's Collective Marketing Act states "Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged."[20] Subject to supervision by the Secretary of Commerce,[21] fishers' cooperatives can engage in collective catching, distribution, and processing.

Congress authorized a wide range of concerted activity among workers in the National Labor Relations Act of 1935 (NLRA). Prior enactments like the Clayton Act and Norris-LaGuardia Act restricted judicial interference with workers' concerted activity.[22] Congress went further in the NLRA. Under the law, employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[23] Congress sought to affirmatively promote such concerted action. Workers cannot legally be dismissed for engaging in such action.[24]

II. Congressional Rationales

Congress recognized that coordination is unavoidable in economic life. Markets and firms cannot exist without collective action and binding rules. Coordination and rules can be supplied by, for example, a legislature through statute, agency through regulation, unions and employers through collective bargaining agreements, or firms through contracts of adhesion, but they are necessary for organizing an economy. Accordingly, in the antitrust laws and related measures, Congress did not seek to promote some textbook notion of atomistic competition. Rather, drafters of these laws sought to restrict certain forms of coordination and promote other forms. In general, the national legislature disfavored hierarchical forms of control and favored democratic cooperation.

In passing the Sherman Act, Congress's aim was the trust—proto-holding companies organized through contract law. Drafters of the first federal antitrust law contended that trusts concentrated power and control, both economic and political, in the hands of a few. Previously decentralized industries such as oil refining had been consolidated into large entities using the trust device. A careful examination of the Sherman Act's legislative history shows that Congress enacted the law *not* simply to promote more intense price competition but to disperse power and promote fair competition. This was the ideology informing the passage of the first federal antitrust law.

[20] 15 U.S.C. § 521.
[21] 15 U.S.C. § 522.
[22] 15 U.S.C. § 17; 29 U.S.C. § 101.
[23] 29 U.S.C. § 157.
[24] 29 U.S.C. § 158(a).

As one representative stated on the House floor debates over the Clayton Act, the antitrust laws aimed "at the dollars, and not at men."[25] The supporters of the law did not want to smash all forms of coordination and establish some utopia of perfect competition, but rather sought to limit top-down, centralized control embodied by figures like John D. Rockefeller and J.P. Morgan. On the Senate floor, Senator John Sherman asked, "The point for us is to consider whether . . . it is safe in this country to leave the production of property, the transportation of our whole country, to depend on the will of a few men sitting at their council board . . . ?"[26]

Accordingly, the drafters of the laws did not seek to interfere with more horizontal forms of market and firm governance such as farmer cooperatives and labor unions.[27] Indeed, this vision was harmonious with the aims of the political movement fighting for antimonopoly legislation. As Professor Sanjukta Paul writes, the coalition that fought for the passage of the Sherman Act "aimed both to cultivate cooperation among and between workers, farmers, and small producers, and to contain domination through a variety of legal reforms."[28]

Because of judicial interpretations of the Sherman Act restricting labor union and cooperative activity,[29] Congress passed measures clarifying and making express what was implicit in the Sherman Act. In the Clayton Act, Congress sought to protect labor unions and agricultural cooperatives from antitrust attack. It went further in the Capper-Volstead Act and National Labor Relations Act and expressly authorized coordination among farmers and ranchers and workers, respectively.

III. Existing Law and Policy Support Termination of the Consent Order Governing Coopharma

Two independent grounds support the termination of the consent order.[30] First, the legislature of Puerto Rico has authorized Coopharma's bargaining with PBMs and insurers on behalf of independent pharmacies and established active public supervision of this concerted activity. Accordingly, the state action doctrine protects Coopharma's action from federal antitrust interference. Second, the public interest informed by the structural features of the pharmacy and

[25] 51 CONG. REC. 9545 (statement of Rep. Konop).
[26] 21 CONG. REC. 2570.
[27] Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 210-11 (2021).
[28] *Id.* at 198.
[29] Anti-labor applications of the Sherman Act included the infamous Danbury Hatters case. Loewe v. Lawlor, 208 U.S. 274 (1908). For more on the early history of courts using the Sherman Act to restrict collective action by workers, see Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019).
[30] *See* 15 U.S.C. § 45(b) ("[T]he Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require.")

PBM markets and statutes like the National Labor Relations and Capper-Volstead Act strongly support termination of the order.

a. The State Action Doctrine Compels the FTC to Terminate the Order

Coopharma's collective bargaining with PBMs and other payors is protected by the state action doctrine. The Supreme Court held that private conduct is insulated from federal antitrust liability when two factors are met. First, the state legislature must affirmatively authorize the conduct at issue.[31] Second, this conduct must be actively supervised by a state actor.[32] The state action doctrine is rooted in federalism norms and protecting the ability of states to structure markets democratically,[33] and the Supreme Court reviewed the legislative history of the Sherman Act and concluded, "There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only business combinations."[34]

First, Coopharma's joint bargaining on behalf of members is authorized by Puerto Rico law. The legislature enacted a statute to promote cooperative activity across all sectors, including healthcare. Further, a specific law encourages collective bargaining by small players in the health care sector. Act 228 authorizes health services providers, who are individually and collectively non-dominant, to bargain jointly with payors like insurers and PBMs. This authorization, with its clear and affirmative approval for collective bargaining by parties like the members of Coopharma, satisfies the first part of the test for state action immunity as articulated by the Supreme Court.

Second, Coopharma's joint bargaining is actively supervised by the government of Puerto Rico. COSSEC, the relevant regulatory body, is responsible for actively supervising joint bargaining under the law. Regulation 9161 establishes a fee system that funds the regulatory oversight and established a public committee to supervise negotiation and approve each step of a reporting process on every joint negotiation. The supervisory committee has the power to report unreasonable conduct or regulatory violations to COSSEC or Puerto Rico's Department of Justice's Office of Monopolistic Affairs.

Because the Coopharma's joint bargaining is affirmatively authorized by legislation and actively supervised by the government of Puerto Rico, it is protected from antitrust interference. Accordingly, the FTC does not have the authority to second-guess the wisdom of the policy choice. Under the principles of the state action doctrine, that choice and possible revisions to it are left to the people of Puerto Rico and their elected representatives.

b. The Public Interest Supports Terminating the Order

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[31] California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).
[32] *Id.*
[33] Patrick v. Burget, 486 U.S. 94, 99-100 (1988).
[34] Parker v. Brown, 317 U.S. 341, 351 (1943) (internal quotations omitted).

Independent pharmacies participate in a market in which they are at a radical disadvantage. Countering the power of insurers and PBMs is necessary for the preservation of independent pharmacies and access to medicines for many Puerto Ricans and consistent with the spirit of the antitrust laws.

Pharmacies are paid for their services and medication, in substantial measure, by PBMs and insurance companies. The PBM and private insurance markets are highly concentrated. As the FTC recently report, the top three PBMs accounted for more than 80% of prescriptions in 2023, and this concentration is even higher in certain states and localities.[35]

The power of payors has been exercised to the detriment of independent pharmacies in Puerto Rico. PBMs and insurers have asserted their market muscle to steadily lower reimbursement rates to the pharmacies, renege on commitments to pay specified reimbursement rates, and impose unfavorable contractual terms. The result has been the failure and market of dozens of pharmacies on the island. Across the country, independent pharmacies are facing an existential crisis due to the power of PBMs and payors. Between 2016 and 2022, more than a quarter of pharmacies on the island failed and shut down, thanks, in part, to depressed reimbursement rates.

In less densely populated parts of the country including much of Puerto Rico, the loss of an independent pharmacy can mean the loss of convenient access to medications for residents. In other words, ensuring the viability and competitiveness of independent pharmacies is critical for the health and wellbeing of the community. The FTC recognized the essential character of independent pharmacies in its Interim Report on Pharmacy Benefit Managers: "In some rural and medically underserved areas, local community pharmacies are the main healthcare option for Americans, who depend on them to get a flu shot, an EpiPen, or other lifesaving medicines."[36] West Virginia administered the first shot of the Covid-19 vaccine more rapidly in 2021 than most states because it relied on independent pharmacies to do the work, instead of CVS or Walgreens as most other states did.[37]

Joint bargaining is one critical tool for independent pharmacies to level the radically unequal playing field. Through concerted action, individually powerless independent pharmacies can obtain more fair and equitable reimbursement rates. Independent pharmacies can ensure their viability through collective bargaining. Not only does joint bargaining help independent pharmacies raise reimbursement rates and stay afloat, preserving both local enterprises and jobs, it ensures that community members have convenient access to lifesaving and other essential medicines.

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[35] FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS, *supra* note 1, at 13.
[36] *Id.* at 1.
[37] Vassilios Papadopouls, *Opinion: West Virginia Is Vaccinating People Faster than California – Here's Why*, MARKETWATCH (Jan. 16, 2021), https://www.marketwatch.com/story/the-u-s-must-tap-this-powerful-tool-to-loosen-the-covid-19-vaccine-logjam-11610465036.

Although independent pharmacies, unlike workers, farmers, ranchers, and fishers, do not have federal authority to engage in concerted action, the FTC should consider the broader antitrust laws in reviewing Coopharma's petition and in the broader exercise of its prosecutorial discretion. Congress did not seek to somehow maximize competition across the American economy. Instead, the drafters of the Sherman, FTC, Capper-Volstead, and National Labor Relations Acts aimed to rebalance power away from a small clique of financiers and promoters and toward the millions who worked for a living, whether as employees or business proprietors. The FTC should permit the defensive coordination of entities like Coopharma against "the gigantic trusts and combinations of capital."[38]

IV. Conclusion: Next Steps for the FTC

The FTC should terminate in its entirety the consent order applying to Coopharma and its members. First, the joint bargaining of Coopharma is protected by the state action doctrine. The government of Puerto Rico authorized this conduct in Article 228 and established a comprehensive and rigorous regulatory scheme to oversee it. As such, the state action doctrine protects Coopharma's joint bargaining from federal antitrust interference. Second, the public interest supports termination of the consent order. PBMs and insurers wield unilateral and collective power over independent pharmacies and have exercised this power to the detriment of pharmacies and the communities they serve, contributing to the closure of thousands of such pharmacies across the United States. Collective bargaining is a critical tool for ensuring the continued survival of these important health services. Further, the public interest, as articulated by Congress through multiple statutes, reveals a national commitment to creating more balanced markets, both reducing the power of financier-controlled corporations and building up the power of workers and other producers through authorization of collective action.

But rather than treat the termination of the consent order as a one-off action, the FTC should use it as a starting point for rethinking its approach to coordination among small players. Congress made principled distinctions between cooperation among workers, farmers, ranchers, fishers, exporters, professional sports teams, and newspapers, on the one hand, and collusion among corporations, on the other. The FTC should build on the termination of the consent order to effectuate the text and spirit of the laws enacted by Congress. First, it should clarify, through a policy statement and amicus briefs, that the statutory labor exemption is not limited to workers classified as employees and covers at least some independent contractors as well. The text of the relevant statutes does not distinguish between employees and independent contractors, which the First Circuit recognized in a 2022 decision.[39] Second, as a matter of prosecutorial discretion, the FTC should commit publicly *not* to investigate the concerted activity of firms seeking to remedy deep imbalances in bargaining leverage with more powerful trading partners. While fast-food

[38] 51 CONG. REC. 9545 (statement of Rep. Konop).
[39] Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F. 4th 306, 314 (1st Cir. 2022).

franchisees and Amazon market sellers do not have statutory authorization to engage in collective bargaining or boycotts, the FTC has limited resources and should not be devoting staff time to stopping attempts by such weak actors to build power against dominant counterparties. Third, the FTC should call for legislation to authorize coordination among small players with respect to powerful counterparties. The Capper-Volstead Act is a good template for such legislation because it authorizes horizontal coordination among farmers and ranchers in their capacity as producers and protects the public interest through USDA oversight.[40]

Congress enacted the antitrust laws to disperse power and promote fair competition.[41] It sought to rebalance the economy, not advance an economistic notion of perfect competition. Accordingly, Congress passed measures to restrict mergers and acquisitions and outlaw monopolization and protect the ability of workers, farmers, ranchers, and fishers to organize, bargain collectively, and, in the case of agriculturalists and fishers, build cooperative enterprises. In its enforcement and policymaking, the FTC should be guided by the letter and spirit of the laws enacted by Congress and seek to build a fair and democratic economy.

[40] The history of group purchasing organizations (GPOs) in health care shows the importance of close public oversight. Mariah Blake, *Dirty Medicine*, WASH. MONTHLY (July/Aug. 2010), https://washingtonmonthly.com/2010/07/01/dirty-medicine-2/. GPOs were formed by hospitals to help them bargain with powerful medical supply manufacturers but have abused their power and colluded with the manufacturers. *See, e.g.*, Marion Healthcare, LLC v. Becton Dickinson & Co., 952 F.3d 832, 836-37 (7th Cir. 2020) (Wood, J.) ("The Providers allege that Becton, the GPOs, and the distributors. . . joined forces in a conspiracy and engaged in a variety of anticompetitive measures, including exclusive-dealing and penalty provisions.").

[41] Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 409 (2020).