

IN THE MATTER OF

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3454. Complaint, Aug. 6, 1993--Decision, Aug. 6, 1993

This consent order prohibits, among other things, a Virginia-based organization from restricting or limiting truthful and nondeceptive advertising claims by its members that refer to the quality of professional services or from encouraging or inducing any non-governmental person to engage in any practice that would violate the Commission's order. In addition, the respondent is required to remove from its Code of Ethics any provision that is inconsistent with the Commission's order.

Appearances

For the Commission: *Jonathan Banks* and *Randall Marks*.

For the respondent: *Arthur Schwartz* and *Donald Weinert*,
in-house counsel, Alexandria, VA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent National Society of Professional Engineers, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent National Society of Professional Engineers ("NSPE") is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its principal office and place of business located at

1420 King Street, Alexandria, Virginia. NSPE is a voluntary professional association of approximately 77,000 professional engineers, land surveyors, and other engineering professionals (“engineers”).

PAR. 2. NSPE’s members are state-licensed engineers. Except to the extent that NSPE has restrained competition as described herein, NSPE members have been and are in competition among themselves and with other engineers.

PAR. 3. NSPE engages in substantial activities that further its members’ pecuniary interests. By virtue of its purposes and activities, NSPE is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. NSPE’s acts and practices, including the acts and practices alleged herein, are in or affect commerce, as “commerce” is defined in the Federal Trade Commission Act.

PAR. 5. NSPE has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of engineering services in the United States by restricting advertising.

PAR. 6. In furtherance of this combination or conspiracy, NSPE has:

A. Adopted and maintained Section III.3.a of its Code of Ethics, which, in addition to stating that engineers should avoid misleading advertising, states that engineers should avoid “statements containing an opinion as to the quality of the Engineers’ services; or statements intended or likely to attract clients by the use of showmanship, puffery, or self-laudation, including the use of slogans, jingles, or sensational language or format”; and

B. Published interpretations that declared that certain truthful, nondeceptive advertising violated Section III.3.a of its Code of Ethics.

PAR. 7. The purposes and effects of the combination or conspiracy and NSPE’s acts or practices have been and are to restrain competition unreasonably and to injure consumers by:

A. Depriving consumers of truthful information pertinent to the selection of an engineer; and

B. Depriving consumers of the benefits of competition among engineers in the provision of engineering services.

PAR. 8. The acts and practices herein alleged were and are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief requested.

Commissioner Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further

conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent National Society of Professional Engineers is a corporation organized, existing, and doing business under and by virtue of the laws of the State of South Carolina, with its office and principal place of business located at 1420 King Street, Alexandria, Virginia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order, the terms "respondent" or "NSPE" mean the National Society of Professional Engineers, its directors, trustees, councils, committees, boards, divisions, officers, representatives, delegates, agents, employees, successors, and assigns.

II.

It is further ordered, That respondent, directly or indirectly, or through any person or any corporate or other device, in or in connection with its activities as a professional association in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against truthful, non-deceptive advertising, including, but not limited to, advertising using quality claims, showmanship, puffery, self-laudation, slogans, jingles, or sensational language or format; or

B. Inducing, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by respondent would violate this order;

Provided that nothing contained herein shall prohibit respondent from formulating, adopting, disseminating to its component societies and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to advertising, including unsubstantiated representations, that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date this order becomes final:

1. Remove from its Code of Ethics any part of Section III.3.a and any other provision thereof that is inconsistent with the provisions of part II of this order.

2. Revoke its Board of Ethical Review Cases 81-5 and 84-2 and any other interpretation or policy statement that is inconsistent with the provisions of part II of this order.

B. Within thirty (30) days after the date this order becomes final, distribute by first class mail an announcement in the form shown in Appendix A to this order (hereinafter "Appendix A") to each state society and local chapter and use its best efforts to encourage each state society and local chapter to publish Appendix A in its newsletter.

C. Within ninety (90) days after the date this order becomes final, publish in the NSPE News and the Private Practice News, or any successor publications, (1) this order, (2) the accompanying complaint, (3) Appendix A, (4) any Code of Ethics provision or

other document that NSPE revises pursuant to part III.A above, and (5) notice of the revocation of any interpretation or policy statement pursuant to part III.A above.

D. Within one hundred and twenty (120) days after the date this order becomes final, and annually for five (5) years thereafter on the anniversary date of this order, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order.

E. For a period of five (5) years after the date this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by this order.

F. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in respondent, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

Commissioner Starek dissenting.

APPENDIX A

ANNOUNCEMENT

The National Society of Professional Engineers ("NSPE") has entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued an order on [Date] that provides that NSPE may not prohibit or restrict its members from engaging in truthful, nondeceptive advertising.

As a result of the order, NSPE may not interfere if its members advertise truthfully and nondeceptively:

1. By making claims with respect to the quality of their services; and
2. Using showmanship, puffery, self-laudation, slogans, jingles, or sensational language or format.

The order does not prevent NSPE from adopting and enforcing reasonable ethical guidelines prohibiting advertising, including unsubstantiated representations, that NSPE reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

For more specific information, members should refer to the FTC order itself. NSPE will provide any member with a copy of the order and accompanying complaint upon request.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the decision of the Commission today to accord final approval to the consent order with the National Society of Professional Engineers ("NSPE" or "the Society"). Because of the absence of evidence indicating that NSPE's promulgation of the restrictions at issue is likely, absent an efficiency justification, to restrict competition and decrease output," I am unable to conclude that they are "inherently suspect" under the approach first enunciated in Massachusetts Board of Registration in Optometry ("Mass. Board").¹ Consequently, without a full rule-of-reason inquiry, I cannot conclude that NSPE's restrictions violate Section 5 of the Federal Trade Commission Act.

The Commission has been presented with almost no evidence suggesting that NSPE's restrictions are inherently suspect other than the written restrictions themselves.² Some restraints can be deemed inherently suspect based solely on evidence of agreement among competitors.³ When restraints are not just facially suspicious, but unambiguously anticompetitive, additional evidence of actual effects may not be required. Nor would extensive evidence of actual effects be required if the Commission could rely on the evidentiary record of previous cases involving substantially similar restrictions in substantially similar industries.⁴ But the restrictions here are not

¹ 110 FTC 549, 604 (1988).

² Moreover, the record contains substantial indications that the restrictions are unlikely to be anti-competitive.

³ For example, the output-restrictive effects of price fixing and market allocation among competitors are well-established theoretically and empirically. Thus, an ethics code restriction that establishes minimum prices for association members could be deemed inherently suspect on its face.

⁴ See, e.g., Mass. Board at 604-06.

unambiguously anticompetitive on their face, and previous cases provide little support for the proposition that these restrictions are likely to restrict competition and decrease output in this industry.

The challenged restrictions, in Section III.3.a of the Society's ethics code, state that members:

shall avoid use of . . . statements containing an opinion as to the quality of the Engineers' services [hereinafter, "opinion restriction"]; or statements intended or likely to attract clients by the use of showmanship, puffery, or self-laudation, including the use of slogans, jingles, or sensational language or format [hereinafter, "showmanship restriction"].

Advertising restrictions can be anticompetitive.⁵ By limiting customers' access to information about alternative suppliers, such restrictions can constrain customers' abilities to make informed choices. Accordingly, advertising restrictions can have the result of "insulating" competitors from each other thereby enabling them to act anticompetitively.

Although the advertising restrictions challenged here conceivably could be anticompetitive, there is no evidence to suggest that this effect is likely. These restrictions arguably are facially similar to restrictions the Commission has found to be inherently suspect in other industries.⁶ But the effect of advertising restrictions may well be quite different in the professional engineering industry than in other industries that we have examined previously.

We have been presented with no evidence that these restrictions have been enforced in any manner. Absent some evidence of enforcement, it is nevertheless possible that the restrictions might be interpreted by the Society's membership in a manner that leads some of them to refrain from certain advertising practices. But we have no evidence that any members have refrained from any advertising practice because of these restrictions. There is no evidence suggest-

⁵ Mass. Board at 604-05; *American Medical Association*, 94 FTC 701 (1979) (finding broad advertising prohibition unlawful under a rule of reason analysis), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

⁶ *Id.*

ing that the restrictions have influenced, or are likely to influence, any member's advertising.

The Society's opinion restriction troubles me most. This is a broad restriction that conceivably could restrain the dissemination of significant competitive information.⁷ This restriction is facially suspicious, and I would not require much evidence on its effect in order to conclude that such a restriction is inherently suspect. But we have no evidence suggesting that it has affected, or is likely to affect, any members' advertising practices.

The Society has published two "interpretations" of the showmanship restriction (along with many other interpretations of other ethics code provisions). These two interpretations give examples of advertising that would be considered to violate this restriction. While these interpretations serve to clarify the potential effect of the showmanship restriction, they do not suggest that the restriction is likely to have any effect.⁸ We are unaware of the extent to which these interpretations were distributed or whether these interpretations, or the showmanship restriction itself, have influenced the conduct of any of NSPE's members.

More generally, it is not clear that the advertising restrictions here affect a significant aspect of rivalry among engineers. Professional engineers apparently do very little advertising. They obtain customers primarily by responding to solicitations for bids. Prior to the Commission's condemnation of broad restrictions on advertising in American Medical Association, physicians did very little advertising. Now that they are free to advertise, medical advertising has flourished, arguably to the benefit of competition and consumers. But the evidence here does not suggest that we should expect a similar response, or even any response, to a Commission order.

⁷ The opinion restriction could be interpreted broadly to proscribe testimonial and comparative advertising.

⁸ It is possible that the advertisements noted in the interpretations reflect actual advertisements that resulted in disciplinary action by the Society or one of its constituent state societies. However, we have no evidence that this is the case. If the interpretations relate mere hypotheticals, then they are not evidence of enforcement and are, as an evidentiary matter, indistinguishable from the code provisions themselves.

It is the customer of the engineer, not the engineer, who does the bulk of the advertising in this industry. The customers of professional engineering firms solicit engineers' services primarily by advertising for their bids in publicly available publications.⁹ In response to bid solicitations, engineers submit proposals. The challenged ethics restrictions do not appear to affect the information that is communicated to customers in response to bid solicitations. This characteristic of the industry suggests that advertising restrictions are unlikely to affect the ability of engineers to communicate information to potential customers (or to affect the cost of communicating such information). Indeed, it suggests that advertising may not be a significant dimension of competition in this market.¹⁰

My conclusion that these restrictions are not inherently suspect does not imply that I condone such restrictions. But I am troubled by an evidentiary standard that condemns the restrictions of professional associations based almost solely on our reading of the written restrictions themselves without evidence of actual effect and without regard to specific market context. I cannot conclude that a restriction is likely to restrict competition when the record does not suggest a likelihood of any effects, be they anticompetitive, procompetitive, or competitively neutral. The Mass. Board standard requires that the anticompetitive effects of a restraint are "likely," not just "conceivable."¹¹

Because I do not consider these restrictions to be inherently suspect, a traditional rule-of-reason analysis must be performed in order to condemn these restrictions under Section 5.¹² It appears unlikely that these restrictions would be condemned at the completion of a rule-of-reason analysis in large part because of the limited

⁹ For example, construction companies and government agencies frequently place requests for engineering bids in the Dodge Report, which is widely disseminated.

¹⁰ It is possible that advertising may be a more effective, or less costly, means of communicating some types of information to customers in this industry than the submission of proposals to customers. We have not been presented with any evidence that this is the case.

¹¹ Mass. Board at 604.

¹² *Id.*

competitive significance of engineers' advertising and the obvious absence of market power on the part of NSPE.

My conclusion that the challenged restraints are not inherently suspect does not require that I reach the issue of market power. But it is worth noting that the membership of NSPE constitutes a small percentage of professional engineers.¹³ In the face of competition at least from the vast majority of professional engineers who are not members of NSPE, it appears unlikely that NSPE would be able to enforce anticompetitive restrictions against its members. Engineers wishing to utilize practices restricted by NSPE could simply disassociate themselves from NSPE. We have no evidence that the benefits of NSPE membership are unique among professional associations in the industry.¹⁴

Where it is obvious, without detailed inquiry, that the parties to a restraint lack the ability to restrict output, it may be appropriate to factor this lack of market power into the determination of whether the restraint is inherently suspect. It is well recognized that the parties to a restraint must have market power in order for the restraint to restrict competition and decrease output. Market power analysis is not explicitly incorporated into the truncated rule of reason because of judicial economy, not because it is deemed to be irrelevant. Therefore, it is perfectly consistent with the motivations of the truncated standard to factor clear evidence of a lack of market power into that analysis.¹⁵

To the extent that the restrictions here may have any effect on members' advertising, it is conceivable that some of that effect may be competitively beneficial. Since I do not deem the challenged

¹³ Further, it may be the case that "nonprofessional" engineers, *i.e.*, those who have not obtained state licenses, also are substantial competitors of professional engineers. It also may be the case that other types of "design professionals" (such as architects, interior designers, and surveyors) compete to some extent with engineers.

¹⁴ Among the many other professional associations in the engineering industry are the American Society of Civil Engineers, the Institute of Industrial Engineers, the American Consulting Engineers Council, and the American Society of Mechanical Engineers. Some of these associations have memberships as large or larger than NSPE's.

¹⁵ There may be few cases outside the context of professional associations in which it is obvious, without significant inquiry, that market power does not exist.

restrictions to be inherently suspect, I need not evaluate the plausibility and validity of any efficiencies before concluding that a full rule of reason analysis is required.¹⁶ Nevertheless, it is worth noting that, under certain circumstances, it may be an appropriate function of professional associations that lack market power (such as NSPE) to protect the “esteem” of members in order to enhance their ability to compete with nonmembers. While jingles and slogans may be effective (or at worst innocuous) in advertisements for products such as toothpaste and soft drinks, they may be considered to be unprofessional by customers of certain professional services. If so, then it may be defensible on efficiency grounds for an association that lacks market power to restrict advertising by its individual members that is demeaning to the membership as a whole.

The evidence presented does not establish that this is a valid justification for the challenged restrictions just as it does not suggest that the restrictions are likely to restrict competition and decrease output. I raise it as a possibility that suggests the need for a more thorough inquiry before challenging the restrictions of a private professional association with voluntary membership and no apparent market power.

Finally, as I have argued in the past,¹⁷ an overly broad definition of “inherently suspect” establishes precedent that siphons enforcement resources toward cases of dubious merit. I am concerned that the evidentiary standard implicit in a challenge of NSPE’s restrictions would justify summary condemnation of restraints in cases of increasingly questionable merit.

In conclusion, I do not find reason to believe that NSPE has violated Section 5 of the Federal Trade Commission Act. Therefore, I dissent from the Commission’s action today.

¹⁶ Mass. Board at 604.

¹⁷ Dissenting Statement of Commissioner Roscoe B. Starek, III, In the Matter of the National Association of Social Workers, Docket No. C-3416 (March 3, 1993).

IN THE MATTER OF

HEALTH MANAGEMENT RESOURCES CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3455. Complaint, Aug. 17, 1993--Decision, Aug. 17, 1993*

This consent order prohibits, among other things, a Massachusetts-based marketer of very-low-calorie diet programs (rapid weight loss, modified fasting diets of 800 or fewer calories per day) from making false or unsubstantiated claims about health risks, weight loss, weight loss maintenance, acceptance of its program by the medical profession, or low success rates of other diet programs; and requires certain disclosures in conjunction with safety and weight loss maintenance claims in the future, and scientific evidence to back up comparison studies or claims of acceptance by the medical profession.

Appearances

For the Commission: *Renate Kinscheck* and *Richard F. Kelly*.

For the respondent: *James Sneed, McDermitt, Will & Emery*,
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Health Management Resources Corporation, a corporation (hereinafter "respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Health Management Resources Corporation is a Nevada corporation, with its offices and principal place of business at 59 Temple Place, Boston, MA.

PAR. 2. Respondent is engaged, and has been engaged, in the sale and offering for sale of physician-supervised very-low-calorie