

Complaint

117 F.T.C.

IN THE MATTER OF

MCLEAN COUNTY CHIROPRACTIC ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3491. Complaint, April 7, 1994--Decision, April 7, 1994*

This consent order prohibits, among other things, an association of Illinois chiropractors from entering into any agreement with any chiropractors to set fees for patients, or terms for third-party payor contracts, and requires the association to give members copies of the orders.

Appearances

For the Commission: *Mark J. Horoschak* and *Rendell A. Davis, Jr.*

For the respondent: *George R. Flynn*, Bloomington, IL.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent McLean County Chiropractic Association ("respondent MCCA") 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. For purposes of this complaint, the following definitions shall apply:

A. The term "*person*" refers to both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

B. "*Third-party payor*" means any person that engages in the process of reimbursing for, or purchasing or paying for, health care services provided to any other person.

PAR. 2. Respondent MCCA is an unincorporated association, with its principal offices and places of business in McLean County, Illinois. For purposes of this complaint, its address is as follows: McLean County Chiropractic Association, c/o George R. Flynn, Esq., P.O. Box 3574, Bloomington, IL.

PAR. 3. Respondent MCCA has thirteen members, all of whom are chiropractors engaged in the business of providing chiropractic services to patients for a fee. Those members all have their offices in McLean County, Illinois. Except to the extent that competition has been restrained as herein alleged, those members have been and are now in competition among themselves and with other chiropractors, with respect to the provision of chiropractic services in McLean County, Illinois, and its vicinity.

PAR. 4. The general business practices of MCCA's members, and the acts and practices described below, affect the interstate movement of patients, the interstate purchase of supplies and products, and the interstate flow of funds, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 5. Respondent MCCA has acted as a combination of its members, has conspired with at least some of its members, and has acted to implement an agreement among its members to restrain competition among chiropractors by, among other things, facilitating, entering into, and implementing an agreement, express or implied:

A. That respondent MCCA would set the maximum fees to be sought by its members from patients and third-party payors; and

B. That respondent MCCA would negotiate the terms and conditions of agreements between its members and third party payors, including the fees to be paid for the members, services.

PAR. 6. By engaging in the acts or practices described in paragraph five, respondent MCCA has acted as a combination of at least some of its members, and has combined or conspired with at least some of its members, to fix or affect the fees charged by, or otherwise to restrain competition among, chiropractors in McLean County, Illinois, and its vicinity.

PAR. 7. Respondent MCCA has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

A. Periodically voting to raise the maximum allowable charges that its members may charge patients and third party payors for the provision of chiropractic services; and

B. Attempting to negotiate collectively on behalf of its members the terms and conditions of agreements between its members and third-party payors, including the fees to be paid by those payors for the services of its members.

PAR. 8. Respondent MCCA's activities described in paragraphs five through seven have had, or have the tendency and capacity to have, the following effects, among others:

A. Restraining competition among chiropractors in McLean County, Illinois, and its vicinity;

B. Fixing or affecting the fees that chiropractors in McLean County, Illinois, and its vicinity charge for their services; and

C. Depriving consumers of chiropractic services and third-party payors of the benefits of competition among chiropractors in McLean County, Illinois, and its vicinity.

PAR. 9. The combination or conspiracy and the acts and practices described in paragraphs five through seven constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Respondent MCCA's combination or conspiracy, or the effects thereof, is continuing and will continue in the absence of the relief herein requested.

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 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 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 is an unincorporated association, with its principal offices and places of business in McLean County, Illinois. For purposes of this order, its address is as follows: McLean County Chiropractic Association, c/o George R. Flynn, Esq., P.O. Box 3574, Bloomington, IL.

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 following definitions shall apply:

A. "*Respondent MCCA*" means McLean County Chiropractic Association and its Board of Directors, committees, officers, representatives, agents, employees, successors, and assigns.

B. "*Payor*" means any person that purchases, reimburses for, or otherwise pays for health care services for themselves or for any other person -- including, but not limited to, health insurance companies; preferred provider organizations; prepaid hospital, medical, or other health service plans; health maintenance organizations; government health benefits programs; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

C. “*Integrated joint venture*” means a joint arrangement to provide health care services in which all chiropractors participating in the venture who would otherwise be competitors (1) pool their capital to finance the venture, by themselves or together with others, and (2) share a substantial risk of loss from their participation in the venture.

D. “*Case fee*” means the aggregate total of all fees charged to a patient for the full course of treatment for a medical condition or combination of medical conditions. “Case fee” does not mean a fee charged for a particular product or service.

II.

It is further ordered, That respondent MCCA directly or indirectly, or through any device, in connection with activities in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Entering into, attempting to enter into, organizing, continuing, or acting in furtherance of any agreement or combination, express or implied, with any chiropractors or among any chiropractors, to discuss or collectively determine the fees which chiropractors charge to payors; and

B. Entering into, attempting to enter into, organizing, continuing, or acting in furtherance of any agreement or combination, express or implied, with any chiropractors or among any chiropractors, to deal with payors on collectively determined terms.

Provided that, nothing in this order shall prevent chiropractors who practice together as partners or employees in the same professional corporation or partnership from collectively determining the fees to be charged for services provided by that professional corporation or partnership or from collectively determining other terms on which that professional corporation or partnership deals with payors.

Further provided that, nothing in this order shall prevent chiropractors who participate in the same integrated joint venture from collectively determining the fees to be charged for services provided by that integrated joint venture or from collectively determining other terms on which that integrated joint venture deals with payors.

Further provided that, nothing in this order shall prevent respondent MCCA from collecting historical data concerning case fees for the purpose of providing such data to payors.

III.

It is further ordered, That respondent MCCA:

A. File a written report with the Commission within ninety (90) days after the date when the order becomes final, and annually for three (3) years on the anniversary of the date when the order becomes final, and at such other times as the Commission may by written notice to respondent MCCA require, setting forth in detail the manner and form in which it has complied and is complying with the order.

B. For a period of five (5) years after the date when the order becomes final, maintain and make available to 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 parts II and III of this order, including, but not limited to, all documents generated by respondent MCCA or that come into its possession, custody, or control, regardless of source, that discuss, refer, or relate to any fee, term, or condition of any agreement, actual or proposed, with any payor.

C. Distribute by first-class mail a copy of this order to each of its members within thirty (30) days after the date when the order becomes final.

D. For a period of five (5) years after the date when the order becomes final, provide each new MCCA member with a copy of this order at the time the member is accepted into membership.

E. Notify the Commission, at least thirty (30) days prior to any proposed change to respondent MCCA which may affect compliance with this order -- including, but not limited to, dissolution or the emergence of a successor.

CONCURRING STATEMENT OF ROSCOE B. STAREK, III

I concur in the Commission's decision to issue the consent order in this matter. The conduct at issue seems to fall squarely within the Supreme Court's broad *per se* proscription against horizontal

agreements on maximum prices, set forth in *Arizona v. Maricopa County Medical Society*.¹

I am nonetheless somewhat skeptical about whether an inflexible pursuit of enforcement actions against such conduct is a beneficial use of the Commission's limited resources. The underlying logic of a *per se* ban on an activity is that the costs of the activity are so high, and the benefits so slight (and so costly to identify), that society's interests are best served through the application of a simple enforcement rule.

In the case of agreements on maximum prices, it is not obvious to me that this logic applies.² Agreements to set maximum prices may not restrict output in all contexts. Moreover, I am unpersuaded that the benefits from such agreements are necessarily negligible and difficult to assess in individual cases.³

I am confident that we can distinguish beneficial uses of these agreements from pernicious uses, particularly in health care markets. I think it unwise to issue blanket condemnations of arrangements that may merely represent socially desirable responses to the competitive pressures increasingly faced by health care providers to reduce costs.⁴ In the exercise of the Commission's prosecutorial discretion, application of the truncated rule of reason approach of Massachusetts Board of Registration in Optometry⁵ may yield substantial future benefits.

¹ 457 U.S. 332, 348 (1982) ("[H]orizontal agreements to fix maximum prices [are] on the same legal -- even if not economic -- footing as agreements to fix minimum or uniform prices.")

² See Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 887 (1981) ("[M]aximum price fixing is almost always beneficial to consumers and . . . the time has come to abandon any *per se* rule against the practice.").

³ It is not hard to identify plausible benefits from such agreements, particularly when used in health care markets. Publication of a maximum fee schedule could help consumers search for a practitioner on the basis of price -- a task that historically has been difficult in health care markets because of the paucity of price information. Similarly, the fee schedule may be a low-cost means by which signatory practitioners can market themselves to third-party payers. But see *Maricopa*, 457 U.S. at 354-55 (rejecting argument that the fixing of maximum reimbursable fees was procompetitive).

⁴ One unintended consequence of current policy may be to induce producers who wish to coordinate pricing behavior to integrate, even if the integration is not otherwise efficient and the less restrictive contractual alternative is procompetitive or competitively neutral. This seems analogous to one consequence of the historically unfavorable antitrust policy toward vertical restraints -- that producers integrate into distribution because integration enjoys more favorable treatment under the law than do less restrictive vertical agreements. In situations in which an agreement would have enhanced interbrand competition, forcing integration to obtain these benefits may be counterproductive.

⁵ 110 FTC 549, 604 (1988).

IN THE MATTER OF

ARCHER DANIELS MIDLAND COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3492. Complaint, April 12, 1994--Decision, April 12, 1994*

This consent order prohibits, among other things, an Illinois-based firm from making any claims, unless substantiated by competent and reliable scientific evidence, that any of its products or plastic product additives is degradable, biodegradable, or photodegradable when disposed of in sanitary landfills, or that such products or additives offer any environmental benefit compared to other products when disposed of as trash buried in a sanitary landfill or incinerated.

Appearances

For the Commission: *Michael Dershowitz* and *C. Lee Peeler*.

For the respondent: *Scott Roberts*, in-house counsel, Decatur, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Archer Daniels Midland Company, a corporation, hereinafter sometimes referred to as 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 Archer Daniels Midland Company ("ADM") is a Delaware corporation with its office and principal place of business located at 4666 Faries Parkway, Decatur, Illinois.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed its cornstarch plastic additive product for use in such consumer plastic products as grocery bags, lawn and trash bags, and disposable diapers, under the trade names "ADM Master Batch" and "Polyclean."

PAR. 3. The acts or practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.