

Complaint

IN THE MATTER OF
THE WISCONSIN CHIROPRACTIC
ASSOCIATION

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

Docket C-3943; File No. 9710117
Complaint, May 18, 2000--Decision, May 18, 2000

This consent order addresses practices used by Respondents, Wisconsin Chiropractic Association and Russell A. Leonard. The order prohibits Respondents from fixing prices for any chiropractic services or other health care goods or services. Respondents are also prohibited from creating, suggesting, or endorsing any proposed fees or conversion factors for any health care goods or services, from engaging in negotiations on behalf of any chiropractor or group of chiropractors or other health care providers, from urging or recommending that any chiropractor or any provider accept or not accept any term or condition of any participation agreement, or from organizing or participating in any meeting or discussion where they expect chiropractors will discuss intentions concerning participation in any health plans and terminating any meeting in which two or more persons make such communications. The order also bans Respondents from initiating, originating, developing, publishing, or circulating any fee survey for any health care goods or services for a period of two years and from conducting or distributing any fee survey unless (1) the data collection and analysis are managed by a third party; (2) the raw fee survey data is retained by the third party and not made available to the respondents; (3) any information that is shared among or is available to providers is more than three months old; and (4) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated that it would not allow respondents or any other recipients to identify the prices charged or compensation paid by any particular provider.

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Participants

For the Commission: *Nicholas J. Franczyk, David A. O'Toole, Evan Siegel, Daniel P. Ducore, Elizabeth Schneirov, and Gregory S. Vistnes.*

For the Respondents: *Roxane C. Busey, Gardner, Carton & Douglas, and Steven P. Hurley, Hurley, Burish & Milliken.*

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 the Wisconsin Chiropractic Association ("WCA") and Russell A. Leonard ("Leonard") have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

RESPONDENTS

PARAGRAPH ONE: Respondent WCA is a nonprofit corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 521 E. Washington Avenue, Madison, Wisconsin 53703.

PARAGRAPH TWO: Respondent Leonard is, and at all times relevant to this complaint was, the executive director of respondent WCA. His principal office or place of business is the same as that of respondent WCA.

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JURISDICTION

PARAGRAPH THREE: Respondent WCA exists and operates, and at all times relevant to this complaint existed and operated, in substantial part for the pecuniary benefit of its members. By virtue of its purposes and activities, respondent WCA is a “corporation” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH FOUR: The acts or practices of respondents WCA and Leonard, and WCA’s members, including those herein alleged, are in or affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WCA’S MEMBERSHIP

PARAGRAPH FIVE: Approximately 900 chiropractors are members of respondent WCA, constituting a substantial majority of the chiropractors licensed to practice in Wisconsin. Its members are generally engaged in the business of providing chiropractic services to patients for a fee.

PARAGRAPH SIX: Except to the extent that competition has been restrained as herein alleged, some or all of the members of respondent WCA have been, and are now, in competition among themselves and with other chiropractors in Wisconsin.

CHIROPRACTIC MANIPULATION SERVICES

PARAGRAPH SEVEN: Professional services performed by chiropractors include, among other things, spinal and extra spinal manipulations. Prior to January 1, 1997, chiropractors generally billed for these services using a single billing code (A2000 for Medicare and 97260 for most private insurance) regardless of the

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number of spinal or extra spinal regions adjusted. Beginning on January 1, 1997, the Health Care Financing Administration and many private insurance companies began accepting four new chiropractic manipulative treatment ("CMT") codes (98940, 98941, 98942, and 98943) in place of the old single billing code. The new CMT codes reflected more detailed or precise descriptions of the manipulation services: 98940 (adjustment of 1-2 regions); 98941 (adjustment of 3-4 regions); 98942 (adjustment of 5 regions); and 98943 (adjustment of at least one extra spinal region).

PARAGRAPH EIGHT: Wisconsin law provides that a health care insurer (other than a health maintenance organization) must provide a specific methodology, including but not limited to the usual, customary, and reasonable ("UCR") charges by which it will determine the eligible amount of a provider's charge. The methodology must be predicated on a database that, among other things, accurately reflects the amounts charged by providers for the procedure, is updated at least every six months, and contains no data that is more than 18 months old at the time of an update. Each health care insurer selects a certain percentile (*e.g.*, 80%) of the charges in the database as its UCR amount. In many instances, health care insurers will provide their insured members an explanation of benefits form notifying the insured members if their health care provider has charged more than the UCR amount for services.

ANTICOMPETITIVE CONDUCT

PARAGRAPH NINE: Respondent Leonard, acting in his capacity as executive director of respondent WCA, and respondent WCA, acting as a combination of its members, and in conspiracy with at least some of its members, and others, have acted to restrain competition by, among other things, encouraging, facilitating, entering into, and implementing agreements, express or implied, among WCA's members to fix and/or increase the prices paid for chiropractic services and to boycott third-party payers to obtain higher reimbursement for chiropractic services.

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PARAGRAPH TEN: Respondents WCA and Leonard have engaged in acts and practices in furtherance of the combination and conspiracy, including, among other things:

Training Seminars

A. Respondents WCA and Leonard have organized and conducted seminars at eight different locations throughout the State of Wisconsin to train chiropractors and their staffs on the new CMT codes (the “CMT Seminars ”), including how to price the codes, and have urged chiropractors to make no decisions on their fees for the new CMT codes before attending one of the training seminars.

B. During the CMT Seminars respondent Leonard, the principal or sole speaker at the seminars:

1. told the approximately 1300 attendees that the new CMT codes had the same values as osteopathic manipulative treatment (“OMT ”) codes;
2. represented that the marketplace expected the average prices for the new CMT codes to be about the same as the average prices for the OMT codes, which were significantly higher than the average prices then charged by chiropractors for manipulation services;
3. provided data which showed the average charges for the current chiropractic code (97260) were: \$30.28 (Northeast District); \$28.23 (Northcentral District); \$27.58 (Northwest District); \$31.03 (Southeast District); \$32.20 (Southcentral District); and \$28.96 (Southwest District);

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4. provided data which showed that the current average statewide charges for osteopathic manipulations were: \$40.30 (manipulation of 1-2 regions); \$57.40 (manipulation of 3-4 regions); and \$91.68 (manipulation of 5 or more regions);
5. suggested that the chiropractors call osteopaths in their own areas to determine their local charges;
6. urged chiropractors to question any third-party payer that reimbursed a lesser amount for the CMT codes than for the OMT codes;
7. during at least some of the seminars, represented that the WCA had surveyed numerous chiropractors and determined that private insurance companies were paying CMT code claims at the prices the chiropractors chose to charge;
8. told chiropractors that with the introduction of the new CMT codes, chiropractors could increase their fees without any risk that third-party payers would refuse to pay their new fees, because there was no current database from which to calculate UCR fees; and
9. told chiropractors to increase their fees because their new fees would determine the new UCRs.

Negotiations with Third-Party Payers

C. Respondent Leonard told third-party payers that as a result of the new CMT codes, chiropractors should be paid the same amount that osteopaths are paid by third-party payers for manipulation services; encouraged third-party payers to agree to pay specific sums certain and/or to calculate UCRs in a manner or using a methodology proposed by respondent WCA; and threatened to take legal action against third-party payers in the absence of such agreements.

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Fee Surveys

D. Respondents WCA and Leonard have frequently collected, analyzed, and provided to respondent WCA's members and others current charge data for the new CMT codes, including, but not limited to, the following:

1. Respondent Leonard, during a meeting of respondent WCA's board of directors in late March 1997, and during a series of WCA-sponsored seminars entitled, "Getting Paid For Your CMT Codes," held throughout the State of Wisconsin in early April 1997, provided data which showed current average charges for each of the new CMT codes within each of respondent WCA's six districts as follows:

	98940	98941	98942
<u>District</u>	<u>(1-2 Regions)</u>	<u>(3-4 Regions)</u>	<u>(5 Regions)</u>
Northeast	\$38.45	\$54.51	\$74.46
Northcentral	\$32.72	\$42.87	\$54.51
Northwest	\$33.63	\$46.55	\$62.17
Southeast	\$38.34	\$53.56	\$70.54
Southcentral	\$37.46	\$50.57	\$64.74
Southwest	\$37.25	\$50.77	\$65.56

The data was obtained from a statewide fee survey conducted by respondent WCA during the last week of February 1997.

2. In June 1997, respondent Leonard furnished to a board member of respondent WCA, and other members of respondent WCA's Southwest District, data from a survey which was conducted by respondent WCA less than one month earlier and listed actual current

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charges in nine digit zip code order for the entire Southwest District.

Review of Managed Care Contracts

E. Respondent Leonard reviewed individual contract offers to WCA's members by third-party payers and circulated to respondent WCA's membership memoranda containing adverse comments about the payers' proposed fee schedules for the new CMT codes, encouraged chiropractors to negotiate higher fees, and advised them to exchange and discuss all information they receive with other chiropractors in their area to improve their bargaining position with the third-party payers.

Boycott of Managed Care Plans

F. Respondents WCA and Leonard encouraged, recommended and assisted in the boycott of managed care plans by respondent WCA's members and others, including, but not necessarily limited to, MultiPlan and Gundersen Lutheran Health Plan, to obtain higher reimbursement for chiropractic services.

G. Respondent Leonard, during a meeting of respondent WCA's board of directors in late March 1997: (1) discussed MultiPlan's proposed contract terms, including the fee schedule and a provision that network chiropractors treat worker compensation and auto insurance patients on the same terms as they treat other patients covered by the network arrangement; (2) recommended that chiropractors reject the entire contract and disrupt the MultiPlan network; (3) recommended that chiropractors hold out for a fee schedule based on 85% of the market price; (4) provided data which showed current average charges for the new CMT codes; and (5) encouraged chiropractors to communicate this information to all the other chiropractors.

H. Respondent Leonard, during at least some of the WCA-sponsored seminars entitled, "Getting Paid For Your CMT Codes," held throughout the State of Wisconsin in April 1997: (1)

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discussed MultiPlan's proposed contract terms, including the fee schedule and a provision that network chiropractors treat worker compensation and auto insurance patients on the same terms as they treat other patients covered by the network arrangement; (2) recommended that chiropractors reject the workers compensation and personal injury provisions of the contract; (3) suggested that if enough chiropractors rejected the contract, MultiPlan would be forced to renegotiate the terms; and (4) encouraged chiropractors to discuss the MultiPlan contract with other chiropractors in their area.

I. In April 1997, after MultiPlan revised its fee schedule, respondent Leonard communicated to the chiropractors that the revised fee schedule reflected fair market prices for chiropractic services.

J. In June 1997, respondent Leonard furnished to a board member of respondent WCA, and other members of respondent WCA's Southwest District who were actively engaged in a collective effort to induce Gundersen Lutheran Health Plan to increase its reimbursement rates, a copy of respondent WCA's most current fee survey which was concluded on May 31, 1997, and listed actual current charges in nine digit zip code order for the entire Southwest District.

PARAGRAPH ELEVEN: The members of respondent WCA have not integrated their practices in any economically significant way, nor have they created any efficiencies that might justify the acts or practices described in Paragraphs Nine and Ten.

ANTICOMPETITIVE EFFECTS

PARAGRAPH TWELVE: The acts or practices of the respondents as described in this complaint have had the purpose, tendency, effects, and capacity to restrain trade unreasonably and

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hinder competition in the provision of chiropractic goods and services in Wisconsin in the following ways, among others:

- A. to restrain competition among chiropractors;
- B. to deprive consumers of the benefits of competition among chiropractors;
- C. to fix or increase the prices that consumers pay for chiropractic services;
- D. to fix the terms and conditions upon which chiropractors would deal with third-party payers, including terms of chiropractic compensation, thereby raising the price to consumers of medical insurance coverage issued by third-party payers; and
- E. to deprive consumers of the benefits of managed care.

PARAGRAPH THIRTEEN: The aforesaid acts and practices of the respondents 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, as amended, 15 U.S.C. § 45. The acts or practices of the respondents, as herein alleged, are continuing and will continue or recur in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of May, 2000, issues its complaint against said respondents.

By the Commission.

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DECISION AND ORDER

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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have 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 thirty (30) days, and having duly considered the comment filed thereafter by an interested person pursuant to §2.34 of its Rules, now in further conformity with the procedures prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Wisconsin Chiropractic Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its principal

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office and place of business located at 521 E. Washington Avenue, Madison, Wisconsin 53703.

2. Respondent Russell A. Leonard is the Executive Director of the WCA. His principal office or place of business is the same as that of respondent WCA.

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

ORDER

I.

IT IS ORDERED that, for the purposes of this order, the following definitions shall apply:

- A. "Wisconsin Chiropractic Association" or "WCA" means Wisconsin Chiropractic Association, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates, controlled by WCA, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.
- B. "Russell A. Leonard" or "Leonard" means Russell A. Leonard, his representatives, agents, and employees.
- C. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, partnerships, and governments.
- D. "Payer" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services, including, but not limited to, chiropractic services, for itself or for any other person. "Payer" includes, but is not limited to, any health insurance

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company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

- E. "Provider" means any person that supplies health care services to any other person, including, but not limited to, chiropractors, physicians, hospitals, and clinics.
- F. "Reimbursement" means any payment, whether cash or non-cash, or other benefit received for the provision of chiropractic goods and services.
- G. "Chiropractor" means a person licensed to engage in the practice of chiropractic.
- H. "Participation agreement" means any agreement between a payer and a provider in which the payer agrees to pay the provider for the provision of health care services, and in which the provider agrees to accept payment from the payer for the provision of health care services.

II.

IT IS FURTHER ORDERED that respondent WCA, directly or indirectly, or through any corporation or other device, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, forthwith cease and desist from:

- A. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any person to fix, establish, raise, stabilize, maintain, adjust, or

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tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term or condition of the fees charged or to be charged for any chiropractic goods or services.

- B. Creating, formulating, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees for any health care goods or services, including, but not limited to, suggested fees, proposed fees, fee guidelines, discounts, discounted fees, standard fees, recommended fees, or conversion factors.
- C. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding:
 - 1. To negotiate on behalf of any chiropractor or group of chiropractors regarding any term, condition, or requirement of dealing with any payer or provider; or
 - 2. To deal or refuse to deal with, boycott or threaten to boycott, any payer or provider.
- D. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any chiropractor to accept or not accept any aspect, term, or condition of any existing or proposed participation agreement, including, but not limited to, the price to be paid for chiropractic goods or services.
- E. Soliciting from, or communicating to, any chiropractor any information concerning any other chiropractor's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement.

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- F. 1. Organizing, sponsoring, facilitating or participating in any meeting or discussion that respondent WCA expects or reasonably should expect will facilitate communications concerning one or more chiropractors' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; or
 - 2. Continuing a meeting or discussion where respondent WCA knows or reasonably should know that a person makes communications concerning one or more chiropractors' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement, and respondent WCA fails to eject such person from the meeting or discussion; or
 - 3. Continuing a meeting or discussion where respondent WCA knows or reasonably should know that two or more persons make communications concerning one or more chiropractors' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement.
- G. For a period of two (2) years after the date that this order becomes final, or until December 31, 2001, whichever is earlier, initiating, originating, developing, publishing, or

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circulating the whole or any part of any proposed or existing fee survey for any health care goods or services.

- H. For a period of five (5) years beginning at the expiration of the period in Paragraph II G of this order, initiating, originating, developing, publishing, or circulating the whole or any part of any proposed or existing fee survey for any health care goods or services unless (1) the data collection and analysis are managed by a third party; (2) the raw fee survey data is retained by the third party and not made available to respondent WCA; (3) any information that is shared among or is available to providers is more than three months old; and (4) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow respondent or any other recipients to identify the prices charged or compensation paid by any particular provider.
- I. Inducing, suggesting, urging, encouraging, or assisting any person to take any action that, if taken by respondent WCA, would violate this order.

Provided, however, that nothing contained in this order shall be construed to prohibit respondent WCA from petitioning any federal or state government executive agency or legislative body concerning legislation, rules, or procedures, or to participate in any federal or state administrative or judicial proceeding, in so far as such activity is protected by the Noerr-Pennington doctrine.

III.

IT IS FURTHER ORDERED that respondent Leonard, directly or indirectly, or through any corporation or other device, in or affecting commerce, as "commerce" is defined in Section 4

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of the Federal Trade Commission Act, 15 U.S.C. § 44, forthwith cease and desist from:

- A. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any person to fix, establish, raise, stabilize, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term or condition of the fees charged or to be charged for any health care goods or services.
- B. Creating, formulating, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees for any health care goods or services, including, but not limited to, suggested fees, proposed fees, fee guidelines, discounts, discounted fees, standard fees, recommended fees or conversion factors.
- C. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding:
 - 1. To negotiate on behalf of any health care provider or group of health care providers regarding any term, condition, or requirement of dealing with any payer or provider; or
 - 2. To deal or refuse to deal with, boycott or threaten to boycott, any payer or provider.
- D. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any health care provider to accept or not accept any aspect, term, or condition of any existing or proposed

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participation agreement, including, but not limited to, the price to be paid for any health care goods or services.

- E. Soliciting from, or communicating to, any health care provider any information concerning any other health care provider's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement.
- F.
 - 1. Organizing, sponsoring, facilitating or participating in any meeting or discussion that respondent Leonard expects or reasonably should expect will facilitate communications concerning one or more health care providers' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; or
 - 2. Continuing a meeting or discussion where respondent Leonard knows or reasonably should know that a person makes communications concerning one or more health care providers' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement, and respondent Leonard fails to eject such person from the meeting or discussion; or
 - 3. Continuing a meeting or discussion where respondent Leonard knows or reasonably should know that two or more persons make communications concerning one or more health care providers' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in,

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threatening to withdraw from, or withdrawing from any existing or proposed participation agreement.

- G. For a period of two (2) years after the date that this order becomes final, or until December 31, 2001, whichever is earlier, initiating, originating, developing, publishing, or circulating the whole or any part of any proposed or existing fee survey for any health care goods or services.
- H. For a period of five (5) years beginning at the expiration of the period in Paragraph III G of this order, initiating, originating, developing, publishing, or circulating the whole or any part of any proposed or existing fee survey for any health care goods or services unless (1) the data collection and analysis are managed by a third party; (2) the raw fee survey data is retained by the third party and not made available to respondent Leonard; (3) any information that is shared among or is available to providers is more than three months old; and (4) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow respondent or any other recipients to identify the prices charged or compensation paid by any particular provider.
- I. Inducing, suggesting, urging, encouraging, or assisting any person to take any action that, if taken by respondent Leonard, would violate this order.

Provided, however, that nothing contained in this order shall be construed to prohibit respondent Leonard from petitioning any federal or state government executive agency or legislative body concerning legislation, rules, or procedures, or to participate in

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any federal or state administrative or judicial proceeding, in so far as such activity is protected by the Noerr-Pennington doctrine.

Provided further that nothing contained in Paragraph III of this order shall prohibit respondent Leonard, acting as an agent, employee or representative exclusively for a single provider or payer, from providing comments or advice on any matter to such single provider or payer, or determining or negotiating any terms, conditions, or requirements, including the price to be paid for any health care goods or services, upon which such single provider or payer will deal with any person.

IV.

IT IS FURTHER ORDERED that for a period of five (5) years from the date that this order becomes final, respondent WCA shall:

- A. Maintain a copy of each document distributed at each meeting of the WCA's board of directors, WCA district meeting, or seminar or training session sponsored in whole or in part by the WCA for a period of five (5) years from the date of distribution, along with records showing the date of the meeting or seminar at which the document was distributed.
- B. Maintain a copy of each fee survey, or part thereof, distributed to any WCA member or members for a period of five (5) years from the last date of its distribution, along with records showing the date(s) of distribution and each person to whom the fee survey, or part thereof, was distributed.
- C. Maintain a copy of each document relating to any subject that is covered by any provision of this order and which is distributed to any WCA member or members for a period of five (5) years from the last date of its distribution, along

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with records showing the date(s) of distribution and each person to whom the document was distributed.

V.

IT IS FURTHER ORDERED that respondent WCA shall:

- A. Within thirty (30) days after the date that this order becomes final, distribute a dated and signed notification letter in the form set forth in Appendix A of this order along with a copy of the complaint and order in this matter: (1) to each of its current officers and directors, and to each other agent, representative, or employee of the WCA whose activities are affected by this order, or who has responsibilities with respect to the subject matter of this order; (2) to each of its current members; and (3) to the designated registered agent on file with the Wisconsin Office of the Commissioner of Insurance for each payer set forth in Appendix B of this order. The notification letter, complaint and order shall be delivered in a format that does not include any additional communication from respondent WCA or any other person.
- B. For a period of five (5) years after the date that this order becomes final, and within thirty (30) days of the date that the person assumes such position, distribute a dated and signed notification letter in the form set forth in Appendix A of this order, along with a copy of the complaint and order in this matter, to each new officer and director of the WCA, and to each other new agent, representative, or employee of the WCA whose activities are affected by this order, or who has responsibilities with respect to the subject matter of this order. The notification letter, complaint and order shall be delivered in a format that

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does not include any additional communication from respondent WCA or any other person.

- C. For a period of five (5) years after the date that this order becomes final, provide each new member with a dated and signed notification letter in the form set forth in Appendix A of this order, along with a copy of the complaint and order in this matter, within thirty (30) days of the new member's admission to the WCA. The notification letter, complaint and order shall be delivered in a format that does not include any additional communication from respondent WCA or any other person.
- D. Publish a notification letter in the form set forth in Appendix A of this order, along with a copy of this order and the complaint, in an issue of *The Wisconsin Chiropractor* published no later than 60 days after the date that this order becomes final, and annually each year thereafter for a period of five (5) years. The notification letter, order and the complaint shall be published with such prominence as is given to regularly featured articles in *The Wisconsin Chiropractor*.

VI.

IT IS FURTHER ORDERED that respondent WCA shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the respondent that may affect compliance obligations arising under this order.

VII.

IT IS FURTHER ORDERED that respondent Leonard shall, for a period of five (5) years after the date that this order becomes final:

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- A. Notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment where the duties and responsibilities of such employment are subject to the provisions of this order. Each such notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.
- B. Provide a copy of the complaint and order in this matter to each new employer within seven (7) days of his employment where the duties and responsibilities of such employment are subject to the provisions of this order.

VIII.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date that this order becomes final, each respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the respondent intends to comply, is complying, and has complied with Paragraphs II through VII of this order.
- B. One (1) year from the date that this order becomes final, annually for the next five (5) years on the anniversary of the date that this order becomes final, and at other times as the Commission may require, each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which the respondent has

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complied and is complying with Paragraphs II through VII of this order.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon five business days' written notice, each respondent shall permit any duly authorized representative of the Commission:

- A. To obtain access, during normal office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of respondent relating to any matter contained in this order; and
- B. To interview that respondent or any employee or representative of that respondent in the presence of counsel and without restraint or interference from that respondent.

X.

IT IS FURTHER ORDERED that this order shall terminate on May 18, 2020.

By the Commission.

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APPENDIX A

[Wisconsin Chiropractic Association Letterhead]

Dear Officer, Director, Agent, Representative, Employee,
Member or Third Party Payer:

The Wisconsin Chiropractic Association (“WCA”) and its executive director, Russell A. Leonard, have entered into an agreement with the Federal Trade Commission to settle charges that the WCA, acting through its executive director, violated the antitrust laws by, among other things, conspiring with at least some of the WCA’s members and others to fix or to increase prices paid for chiropractic manipulation services and to boycott third-party payers to raise reimbursement rates for chiropractic manipulation services. As part of the settlement agreement, the WCA is required to send this notification letter and a copy of the complaint and order to each of its officers and directors, its agents, representatives, and employees who have responsibilities with respect to the subject matter of the order, its members, and third-party payers.

Under the terms of the order, the WCA and Russell A. Leonard are prohibited from:

Fixing prices or encouraging others to fix prices for any chiropractic good or service (or, in the case of Mr. Leonard, any health care goods or services);

Creating, suggesting, or endorsing any list or schedule of fees to be charged for any health care good or service;

Organizing, participating in, or enforcing any agreement (1) to negotiate on behalf of any chiropractor or group of chiropractors (or, in the case of Mr. Leonard, any health care provider or group

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of health care providers) regarding any term, condition, or requirement of dealing with any payer or provider; or (2) to deal or refuse to deal with, boycott or threaten to boycott, any payer or provider;

Advising, recommending, advocating, or attempting to persuade in any way any chiropractor (or, in the case of Mr. Leonard, any health care provider) to accept or not accept any aspect, term or condition of any existing or proposed participation agreement;

Soliciting or communicating any chiropractor's (or, in the case of Mr. Leonard, any health care provider's) views, decisions or intentions concerning any participation agreement;

Organizing, sponsoring, facilitating or participating in any meeting or discussion that the WCA or Mr. Leonard expects or reasonably should expect will facilitate communications concerning any chiropractor's intentions pertaining to any participation agreement;

Conducting or distributing any fee survey for any health care good or service for a period of two (2) years after the date the order becomes final, or before December 31, 2001, whichever is earlier. For an additional five (5) year period thereafter, the WCA and Mr. Leonard are permitted to conduct and distribute fee surveys, provided that (a) the data collection and analysis are managed by a third party; (b) the raw fee survey data is retained by the third party and not made available to the WCA or Mr. Leonard; (c) any information that is shared among or is available to providers is more than three months old; and (d) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated that it would not allow respondents or any other recipients to identify the prices charged or compensation paid by any particular provider; and

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Encouraging or assisting any person to take any action that, if taken by the WCA or Mr. Leonard, would violate the order.

In addition, the WCA is required, under the terms of the order, to maintain better records, including, but not limited to, retaining copies of all materials distributed at WCA meetings and seminars. The WCA must also maintain a copy of each fee survey distributed to any WCA member, along with a record of its distribution. Finally, the WCA is required to maintain a copy of each other document relating to any subject that is covered by any provision of the order, along with a record of its distribution.

Nothing in the order prohibits either the WCA or Mr. Leonard from petitioning any federal or state government executive agency or legislative body concerning legislation, rules, or procedures, or from participating in any federal or state administrative or judicial proceeding, in so far as such activity is protected by the Noerr-Pennington doctrine. In addition, the order does not prohibit Mr. Leonard, acting as an agent, employee or representative exclusively for a single provider or payer, from providing comments or advice on any matter to such single provider or payer, or from determining or negotiating any terms, conditions, or requirements, including prices to be paid for any health care goods or services, upon which such single provider or payer will deal with any person.

Copies of the complaint and order are enclosed.

/s/

Michael McMahon, D.C.

President

Wisconsin Chiropractic Association

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APPENDIX B

Aetna Insurance Company of America

American Medical Security

Atrium Health Plan, Inc.

Blue Cross & Blue Shield United of Wisconsin

CNA Insurance

Compcare Health Services Insurance Corp.

Coordinated Care Health Plan of WI

The Dean Health Plan, Inc.

EMPHEYSYS Wisconsin Insurance Company

Employers Health Insurance Company

Equitable Insurance

Family Health Plan Cooperative

Farmers Insurance Group

Federated Mutual Insurance

Greater La Crosse Health Plan, Inc

Group Health Cooperative of Eau Claire

Group Health Cooperative of South Central Wisconsin

Gundersen Lutheran Health Plan, Inc.

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Heritage Mutual Insurance Company

Humana Wisconsin Health Org. Ins. Corp.

Liberty Insurance Corporation

Lutheran Brotherhood

Managed Health Services Ins. Corp.

Medica Health Plans of Wisconsin

The Medical Associates Clinic Health Plan of WI

MercyCare Insurance Company

Mutual of Omaha Insurance Company

Nationwide Mutual Insurance Company

Network Health Plan of WI, Inc.

North Central Health Protection Plan

Physicians Plus Insurance Corp.

Prevea Health Insurance Plan, Inc.

Primerica Insurance Company

PrimeCare Health Plan, Inc.

Rural Mutual Insurance Company

Security Health Plan of WI, Inc.

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Sentry Insurance

Touchpoint Health Plan, Inc.

Travelers Insurance Company

Unity Health Plans Insurance Corp.

Valley Health Plan, Inc.

Wausau Insurance Company

Wisconsin Mutual Insurance Company

Wisconsin Physician Services Insurance Company

WPPN/MultiPlan

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement from the Wisconsin Chiropractic Association (“WCA”) and its executive director, Russell A. Leonard, to a proposed consent order. The agreement settles charges by the Federal Trade Commission that the WCA and Mr. Leonard have violated Section 5 of the Federal Trade Commission Act by conspiring with some of the WCA's members and others to fix prices for chiropractic services and to boycott third-party payers to obtain higher reimbursement rates for services. The proposed consent order has been placed on the public record for thirty days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the

Analysis to Aid Public Comment

agreement and the comments received, and will decide whether it should withdraw from the agreement or make the agreement and proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by the WCA or Mr. Leonard that the law has been violated as alleged in the complaint.

The Complaint

The WCA is a professional trade association of chiropractors with its principal place of business in Madison, Wisconsin. The WCA has approximately 900 chiropractor members. A substantial majority of the chiropractors licensed to practice in the state of Wisconsin are members of the WCA. The WCA exists and operates in substantial part for the pecuniary benefit of its members. Mr. Leonard is, and during the time period addressed by the allegations of the complaint was, the executive director of the WCA.

Professional services performed by chiropractors include, among other things, spinal and extra spinal manipulations. Prior to January 1, 1997, chiropractors generally billed for these services using a single billing code regardless of the number of regions adjusted. Osteopathic physicians performing manipulation treatments, by contrast, had been using multiple codes to bill based on the number of regions of the body adjusted. Beginning in January 1997, the federal government and private insurance companies began accepting four new codes for chiropractic manipulations. The new chiropractic manipulative treatment ("CMT") codes reflected more detailed or precise

Analysis to Aid Public Comment

descriptions of the manipulation services and allowed chiropractors, like osteopathic physicians, to bill based on the number of regions adjusted.

Beginning in late 1996, shortly after the new CMT codes were announced, the WCA, acting through its executive director Mr. Leonard, orchestrated an agreement among its members to raise fees for chiropractic manipulation services. In late 1996 and continuing into early 1997, the WCA conducted training seminars on the new codes for members in localities throughout the state. The WCA urged chiropractors not to make any decisions on their fees under the new codes before attending one of these meetings. During the meetings, Mr. Leonard told the chiropractors that the new CMT codes provided them with a unique opportunity to increase their fees. Mr. Leonard advised members that it was important that the new codes for chiropractic manipulation were priced properly, and that the WCA's view was that proper pricing was at the same level that osteopathic physicians billed for spinal manipulation services. He provided detailed data on current osteopathic pricing, and encouraged chiropractors to raise their prices to the osteopathic levels.

At the meetings Mr. Leonard assured members that if they all raised their rates, third-party payers would not reject or reduce these higher charges for the new codes. Under the "UCR" ("usual, customary, and reasonable rate") system of reimbursement that was in general use in Wisconsin's health care industry, price increases by a significant number of chiropractors would raise the UCR level and thereby result in higher reimbursement for chiropractic services. On the other hand, if other members did not raise their prices, UCR levels would not rise, the chiropractor would not receive higher reimbursement, and he or she would be identified to patients as an "outlier" whose fees were far higher than other chiropractors. Each chiropractor's action in conformity with the WCA's pronouncements would be aided by knowledge that other members were taking similar action. Many members left the WCA local meetings with the understanding that they and others at the meeting would raise their prices in accordance with

Analysis to Aid Public Comment

the WCA's request. After the new codes took effect, Mr. Leonard surveyed member pricing in certain localities, and reported back to members that chiropractors in these areas had succeeded in raising reimbursement levels.

As a result of these actions by the WCA and Mr. Leonard, many chiropractors raised their fees to the osteopathic levels. Other chiropractors increased their fees substantially more than they had in previous years. Overall, the effect of these actions was to raise the prices that consumers pay for chiropractic services.

In furtherance of the WCA's efforts to raise chiropractic fees, the WCA and Mr. Leonard regularly provided fee surveys to the WCA's members. At times, these fee surveys reflected insufficiently aggregated data, thus effectively identifying current prices by individual chiropractic offices. Fee survey data were also furnished in connection with boycotts of managed care plans.

In March 1997, the WCA and Mr. Leonard organized a boycott by WCA members of MultiPlan, a preferred provider network. At a board meeting, the WCA directors on Mr. Leonard's recommendation agreed to reject, and to encourage their fellow chiropractors to reject, MultiPlan's proposed contract amendments and new fee schedule. Mr. Leonard recommended that chiropractors demand a fee schedule reflecting 85% of market price, and provided survey data that showed current average charges throughout the state. At training seminars held in early April 1997, Mr. Leonard criticized MultiPlan's proposed amendments and fee schedule, encouraged chiropractors to discuss the contract with others in their area, and reminded them that if enough chiropractors rejected the contract, MultiPlan would be forced to renegotiate the terms. Soon thereafter many of the chiropractic members of the WCA submitted letters of termination to MultiPlan.

Analysis to Aid Public Comment

Mr. Leonard routinely reviewed managed care contract offers to the WCA's members and circulated to the WCA's membership memoranda containing adverse comments about these plans' fee schedules for the new CMT codes. In his comments, Mr. Leonard frequently encouraged chiropractors to negotiate higher fees with the plans, and advised them to exchange all information they received with other chiropractors in their area. In so doing, Mr. Leonard reminded the WCA's members that they would be more successful in their fee negotiations with third-party payers if the members continued to negotiate on a united front. In addition, Mr. Leonard, again acting in his capacity as executive director of the WCA, told third-party payers that they should be paying chiropractors the same amount that osteopaths are paid for manipulation services, encouraged third-party payers to agree to pay specific sums certain or to calculate fees in a manner proposed by the WCA, and called third-party payers to follow up on complaints of low reimbursement that he encouraged and received from individual WCA members.

The WCA's members have not integrated their practices in any economically significant way, nor have they created any efficiencies that might justify this conduct. The purpose of this conduct was to secure higher fees and reimbursement. The WCA's actions harmed consumers by increasing the prices for chiropractic services and depriving consumers of the benefits of competition among chiropractors.

The Proposed Consent Order

The proposed consent order is designed to prevent the illegal concerted action alleged in the complaint. Paragraphs II and III of the proposed order contain the key provisions. These two paragraphs are almost identical in their coverage, except that Paragraph II applies to the WCA and Paragraph III applies to Mr. Leonard. Paragraphs II.A and III.A prohibit the WCA and Mr. Leonard from fixing prices for any chiropractic goods or services (or, in the case of Mr. Leonard, any health care goods or services).

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The broader category including “any health care goods or services” is needed should Mr. Leonard obtain employment with another health care entity outside the chiropractic field.

Paragraphs II.B and III.B prohibit the WCA and Mr. Leonard from creating, suggesting, or endorsing any proposed fees or conversion factors for any health care goods or services. Here, the WCA is also subject to the broader category of “any health care goods or services” since the allegations in the complaint include the WCA’s endorsement of osteopathic fee schedules.

Paragraphs II.C and III.C prohibit the WCA and Mr. Leonard from engaging in negotiations on behalf of any chiropractor or group of chiropractors (or, in the case of Mr. Leonard, any provider or group of providers). In addition, this paragraph prohibits them from orchestrating concerted refusals to deal.

Paragraphs II.D and III.D prohibit the WCA and Mr. Leonard from urging or recommending that any chiropractor (or, in the case of Leonard, any provider) accept or not accept any term or condition of any participation agreement. Paragraphs II.E and III.E prohibit the WCA and Mr. Leonard from soliciting or communicating any chiropractor’s (or, in the case of Leonard, any provider’s) views, decisions or intentions concerning any participation agreement.

Pursuant to Paragraphs II.F and III.F, the WCA and Mr. Leonard are prohibited from organizing or participating in any meeting or discussion where they expect chiropractors (providers) will discuss intentions concerning participation in any health plans. In addition, these paragraphs prohibit the WCA and Mr. Leonard from continuing any meeting where any person makes such a communication unless the person is ejected from the meeting. Finally, this paragraph requires that the WCA and Mr.

Analysis to Aid Public Comment

Leonard terminate any meeting where two or more persons make such communications.

Paragraphs II.G and III.G ban the WCA and Mr. Leonard from initiating, originating, developing, publishing, or circulating any fee survey for any health care goods or services for a period of two years after the date that the order becomes final, or until December 31, 2001, whichever is earlier. The two-year ban on fee surveys is necessitated by the gross misuse of fee surveys alleged in the complaint. In addition, for five years thereafter, Paragraphs II.H and III.H prohibit the WCA and Mr. Leonard from conducting or distributing any fee survey unless (1) the data collection and analysis are managed by a third party; (2) the raw fee survey data is retained by the third party and not made available to the respondents; (3) any information that is shared among or is available to providers is more than three months old; and (4) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated that it would not allow respondents or any other recipients to identify the prices charged or compensation paid by any particular provider. These requirements are identical to the requirements found in the safe harbor provisions of the *Statements of Antitrust Enforcement Policy in Health Care, Statement 5 on Providers' Collective Provision of Fee-Related Information to Purchasers of Health Care Services*, issued jointly by the FTC and the Department of Justice on August 18, 1996 (4 *Trade Reg. Rep. (CCH)* ¶ 13,153 at 20,809).

Paragraphs II.I and III.I prohibit the WCA and Mr. Leonard from encouraging, advising or pressuring any person to engage in any action that would be prohibited if the person were subject to the order.

Analysis to Aid Public Comment

Paragraph II and III contain provisos allowing the WCA and Mr. Leonard to exercise their First Amendment petitioning rights and to solicit competition-restricting government action where protected under the Noerr-Pennington doctrine. In addition, Paragraph III contains a proviso allowing Mr. Leonard to engage in certain acts otherwise prohibited by the order providing he is acting as an agent, employee, or representative exclusively for a single provider or payer.

Paragraph IV. requires that the WCA maintain copies of (1) all documents distributed at meetings and seminars; (2) all fee surveys and a record of their distribution; and (3) all documents relating to any subject that is covered by any provision in the order. Paragraph V. requires that the WCA provide copies of the complaint and order: (1) to all current and future officers, directors, and members; (2) to all current and future agents, representatives, and employees whose activities are affected by the order, or who have responsibilities with respect to the subject matter of the order; and (3) to the third-party payers set forth in Appendix B to the order.

Paragraph VI. requires that the WCA notify the Commission of any change in its corporate structure that may affect compliance obligations. Similarly, Paragraph VII. requires that Mr. Leonard notify the Commission of any change in his employment and would require him to provide copies of the complaint and consent order to any new employer for which his new duties and responsibilities are subject to any provisions in the order.

Paragraphs VIII. and IX. consist of standard Commission reporting and compliance procedures. Finally, Paragraph X. contains a standard twenty-year “sunset” provision under which the terms of the order terminate twenty years after the date of issuance.

Complaint

IN THE MATTER OF

TEXAS SURGEONS, P.A., ET AL.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT**

Docket C-3944; File No. 9810124
Complaint, May 18, 2000--Decision, May 18, 2000

This consent order addresses practices by Respondents Texas Surgeons, P.A., Austin Surgeons, P.L.L.C., Austin Surgical Clinic Association, P.A., Bruce McDonald & Associates, P.L.L.C., Capital Surgeons Group, P.L.L.C., Central Texas Surgical Associates, P.A., Surgical Associates of Austin, P.A. The order prohibits respondents from entering into or facilitating any agreement: (1) to negotiate physician services on behalf of any physicians with any payer or provider; (2) to deal, refuse to deal, or threaten to refuse to deal with any payer or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payer or provider; (4) to restrict the ability, or facilitate the refusal, of any physician to deal with any payer or provider on an individual basis or through any other arrangement; or (5) to convey to any payer or provider, through any Austin area physician, any information concerning actual or potential dealings by any physician with any payer or provider. The order also prohibits respondents from exchanging, transferring, or facilitating the exchange or transfer of information among Austin area physicians concerning: (1) negotiation with any payer or provider regarding reimbursement terms; or (2) actual or contemplated intentions or decisions with respect to any terms, dealings or refusals to deal with any payer or provider. Respondents may participate in arrangements for the provision of physician services that are limited to physicians from the same medical practice group, engage in conduct that is approved and supervised by the State of Texas, so long as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine, and engage in conduct that is reasonably necessary to operate any "qualified risk-sharing joint arrangement" or "qualified clinically-integrated joint arrangement."

Participants

For the Commission: *Alan J. Friedman, George R. Bellack, Richard A. Feinstein, David R. Pender, Elizabeth A. Piotrowski, Geary A. Gessler, Louis Silvia, and Gregory S. Vistnes.*

For the Respondents: *David A. Ettinger, Honigman, Miller, Schwartz & Cohn, and David W. Hilgers, Hilgers & Watkins.*