

Complaint

IN THE MATTER OF
COLEGIO DE CIRUJANOS DENTISTAS
DE PUERTO RICO

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

Docket C-3953; File No. 9710038
Complaint, June 12, 2000--Decision, June 12, 2000

This consent order prohibits Respondent Colegio de Cirujanos Dentistas de Puerto Rico from endorsing or approving, refusing to endorse or approve, or prohibiting or declaring unethical a dentist's participation in a health plan based on the amount, manner of calculating, or other terms relating to reimbursement for dental services, or on whether the plan is open to participation by all Colegio members. The Colegio also is prohibited from 1) negotiating on behalf of any dentists with any payer or provider; 2) refusing to deal, boycotting, or threatening to boycott any payer or provider; or 3) determining any terms, conditions, or requirements upon which dentists will deal with any provider, including terms of reimbursement, and whether the plan is open to participation by all Colegio members. The order also prohibits respondent from communicating to any payer or provider any term, condition, or requirement on which Colegio members are willing or unwilling to deal with a payer or provider, and from communicating with any member concerning the desirability or appropriateness of any term or condition of a payer relating to dental services, or whether the plan is open to participation by all Colegio members, or facilitating in any manner, or transfer the exchange of, information concerning dentists' intentions to contract with any payer, or under what terms. Respondent also may not limit truthful advertising of dental services and the solicitation of costumers, though it may generate ethical rules and guidelines for it members to limit representations that would be deemed false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or in person solicitations to people who may be vulnerable to undue influence.

Complaint

Participants

For the Commission: *Steven J. Osnowitz, Gary H. Schorr, Patricia A. Allen, Meleah A. Geertsma, Christopher S. Thurber, David R. Pender, Richard A. Feinstein, Peter D. Guly, Louis Silvia, and Gregory Vistnes.*

For the Respondents: *Rebeca Rojas and Hector Reichard de Cardona, Richard & Escalera, and Julio Fontanet-Maldonado.*

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 Colegio de Cirujanos Dentistas de Puerto Rico ("Colegio"), hereinafter sometimes referred to as "respondent," has 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:

PARAGRAPH ONE: The Colegio is a nonprofit incorporated professional association of dentists in Puerto Rico, and is organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business located at Calle Manuel V. Domenech #200, Hato Rey, Puerto Rico 00918.

PARAGRAPH TWO: The Colegio 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, the Colegio is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Complaint

PARAGRAPH THREE: The acts and practices of the Colegio and its members, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

PARAGRAPH FOUR: Approximately 1800 dentists are members of the Colegio, constituting almost all of the dentists licensed to practice in Puerto Rico. Membership in the Colegio is required by statute in order to practice dentistry in Puerto Rico, excepting only certain dental faculty and dentists in the United States Armed Forces.

PARAGRAPH FIVE: Colegio members are generally engaged in the business of providing dental services to patients for a fee. Absent agreements among competing dentists on the price and other terms upon which they will provide services to third-party payers and patients, competing dentists decide individually whether to enter into contracts with third-party payers and treat patients, and on the terms and conditions under which they are willing to enter into such contracts and treat patients.

PARAGRAPH SIX: Puerto Rico has created a program to provide medical, pharmaceutical, and dental services to the indigent ("the Reform"), established pursuant to the Puerto Rico Health Insurance Administration Act of 1993, Act No. 72, Article II. The Reform was intended to create a health insurance system to give high quality health care, including dental services, to indigent residents of Puerto Rico. The Reform is financed by the Commonwealth of Puerto Rico, federal Medicaid funds, and income from privatization funds (such as leases and sales of government owned health care facilities). The Administracion de Seguros de Salud ("ASES"), a public corporation, implements and administers the Reform. ASES has divided Puerto Rico into regions, soliciting for each region bids from payers to organize

Complaint

and provide services for beneficiaries. ASES selects payers for the regions, and each payer then contracts with providers, including hospitals, physicians, pharmacies, and dentists.

PARAGRAPH SEVEN: The Colegio, acting as a combination of its members, and in conspiracy with at least some of its members, has acted to restrain competition by, among other things, encouraging, facilitating, entering into, and implementing agreements among the Colegio's members, express or implied, to raise the fees paid by payers and patients to dentists, to conduct boycotts or threaten boycotts of payers to obtain higher reimbursement, and to restrain truthful, nondeceptive advertising by dentists.

PARAGRAPH EIGHT: The Colegio has promulgated a Code of Ethics that states that any dentist contracting with a plan not endorsed by the Colegio is in "serious" violation of the Code of Ethics. The Code provides that serious violations may be punished, at the discretion of the Ethics Committee, by penalties that can include suspension or expulsion from the Colegio. The Code also sets forth certain minimum requirements that plans must satisfy for dentists' participation to be acceptable, including requirements that plans be open to all Colegio members, and that the plans pay fees that are at an appropriate level. The Code of Ethics has been widely distributed to Colegio members, and Colegio officials have acted to promote adherence to the Code.

PARAGRAPH NINE: The Colegio established a Committee on Prepaid Dental Services to act as the collective bargaining agent for its members. Through this Committee, and in other ways, the Colegio has engaged in discussions with numerous payers about fees and other terms its members would accept as reimbursement from these payers. The Colegio has refused to give its endorsement or approval of health insurance plans ("plans") unless they meet certain conditions: the plans must reimburse dentists on a fee-for-service basis, and must not pay dentists on the basis of capitation; the plans must be open to the

Complaint

participation of all dentists ("free selection"); and the plans must be responsive to raising fees at the Colegio's request.

PARAGRAPH TEN: Many third-party payers seek endorsement or approval of their plans from the Colegio, in order to secure a sufficient number of participating dentists. When well-established third-party payers have been able to successfully market their plans to dentists without the formal endorsement or approval of the Colegio, it is because these plans have been consistent with the requirements of the Colegio: these plans are open to all dentists, pay relatively high levels of fee-for-service reimbursement, and do not include capitation as a form of payment to dentists.

PARAGRAPH ELEVEN: In furtherance of its anticompetitive agreements, combinations, and conspiracies to set the prices and other terms under which its member dentists would deal with payers, and raise the fees paid by payers and patients to dentists, the Colegio's conduct included, but was not limited to, the following with regard to contracts with payers not under the Reform:

A. Conducted negotiations with Island Health Care in 1989 over the terms and conditions of dental contracts for Colegio members, including the amount of fees and which procedures would be covered.

B. Conducted negotiations with payer representatives in 1993 and 1994 to achieve higher fees for Colegio members, while urging Colegio members to give the Colegio support and solidarity during these dealings. During 1993, when CIGNA attempted to establish a new PPO, the Colegio's President urged the membership to not sign the CIGNA contract until the Colegio and CIGNA reached an agreement that would insure periodic rate increases for Colegio members.

Complaint

C. Conducted negotiations with Atlantic Southern Insurance Co. ("Atlantic") during 1993 and 1994, including negotiation of price terms, as a condition for giving Atlantic the Colegio's endorsement. Atlantic had difficulty signing up dentists absent the Colegio's endorsement, which the Colegio provided after Atlantic agreed to added reimbursement by expanding coverage for high-priced procedures, and Atlantic committed to meet annually with Colegio representatives to review and adjust fees.

D. Conducted negotiations for many years with the two largest payers for dental coverage in Puerto Rico, Triple S and La Cruz Azul, concerning the fees they would reimburse for dental services. From 1992 through 1994, the President of the Colegio and other Colegio officials successfully negotiated fee increases from both payers for a variety of procedures.

E. During 1994, Triple S attempted to form a managed care plan under which dentists would be paid by capitation. The Colegio helped organize dentists to refuse to deal with this proposed plan, and Triple S was compelled to cancel its capitated plan.

PARAGRAPH TWELVE: In furtherance of its anticompetitive agreements, combinations, and conspiracies to set the prices and other terms under which its member dentists would deal with payers, and raise the fees paid by payers to dentists, the Colegio's conduct included, but was not limited to, the following with regard to contracts with payers under the Reform:

A. During 1995, the Colegio successfully resisted Triple S attempts to implement a system of capitation for the payment of dentists in the North Region of the Reform, resisted Triple S attempts to implement a 10% discount for dental fees, and negotiated a limited discount of 5% off of regular dental fees. During 1996, the Colegio successfully imposed the same terms and conditions of payment on Triple S for the Northwest region of the Reform.

Complaint

B. During 1995, the Colegio negotiated with PCA, a payer, the terms under which its member dentists would participate in the Central Region of Reform. In return for obtaining the Colegio's endorsement, the Colegio required PCA to agree that payments to dentists would be based on fee for service, with dental panels open to all Colegio members. During 1996, when PCA attempted to revise its dental contracts for the Central Region to provide for utilization and quality audits, the Colegio withheld its endorsement. When PCA attempted to bypass the Colegio and approached dentists in the Central Region of the Reform individually, only 60 of 450 dentists contracted with it, an insufficient number under ASES regulations. In return for most dentists agreeing to deal with PCA, the Colegio was able to limit utilization review.

C. During 1995 after another payer, United, contacted individual dentists about their willingness to participate in capitation, United was informed by the Colegio that its members would refuse to participate in any capitation plan. As a result, United was forced to implement its Reform plans in the Southwest and East Regions without capitation.

D. During 1998, the Colegio succeeded in forcing Triple S to raise its fees for dentists in the North Region of the Reform. During these efforts to raise fees, the President of the Colegio wrote to Triple S that when members of the Colegio's Board of Directors, Executive Committee, or Committee on Prepaid Dental Services meet with Triple S, these dentists do so as representatives of the membership of the Colegio, and not as individual dentists.

PARAGRAPH THIRTEEN: The Colegio maintains, distributes to its members, and enforces a Code of Ethics that prohibits truthful, nondeceptive advertising and solicitation.

Complaint

Among other things, the Colegio's rules ban advertising that is not professionally acceptable, use of most illustrations, advertisements deemed not in good taste, and all personal solicitations. The Ethics Committee and other Colegio officials have acted to ensure that Colegio members adhere to the Code of Ethics.

PARAGRAPH FOURTEEN: During December 1995 and January 1996, dentists from Juana Diaz, Coamo, and Santa Isabel, Puerto Rico, in an effort to secure higher fees and other terms as a condition for participating in the Reform, concertedly refused to treat patients under the Reform. Dentists from Ponce truthfully advertised their willingness to accept Reform patients from Juana Diaz, Coamo, and Santa Isabel. In response to complaints by boycotting dentists about this advertising, the Colegio found three Ponce dentists to be in violation of the Code of Ethics for engaging in newspaper advertising not professionally acceptable. In addition, one of the dentists from Ponce was found to be in violation of the Code of Ethics rules on advertising on the ground that signs and banners containing his advertisements were placed too close to the offices of the dentists conducting a boycott of the Reform. In response to the Colegio's inquiries and actions, the Ponce dentists stopped advertising that was targeted to residents of Juana Diaz, Coamo, and Santa Isabel.

PARAGRAPH FIFTEEN: The Colegio has not integrated the practices of its members in any economically significant way, nor has it created any efficiencies that might justify the acts and practices described in paragraphs seven through fourteen.

PARAGRAPH SIXTEEN: The acts and practices of the respondent as described in this complaint have had the purpose, tendency, effects, and capacity to restrain trade unreasonably and hinder competition in the provision of dental goods and services in Puerto Rico in the following ways, among others:

- A. to restrain competition among dentists;

Complaint

B. to deprive consumers of the benefits of competition among dentists;

C. to fix or increase the prices that consumers and third-party payers pay for dental services;

D. to fix the terms and conditions upon which dentists would deal with third-party payers, including terms of compensation for dental services, thereby raising the price to consumers of insurance coverage issued by third-party payers;

E. to raise prices paid by ASES and delay the offering of dental services under the Reform;

F. to deprive consumers of the benefits of new health care delivery systems; and

E. to deprive consumers of the benefits of truthful information contained in advertising.

PARAGRAPH SEVENTEEN: The aforesaid acts and practices of the respondent 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 and practices of the respondent, 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 twelfth day of June, 2000, issues its complaint against said respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent, named in the caption above, and the respondent having been furnished thereafter with a copy of the draft 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 of 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, or that the facts as alleged in such complaint other than jurisdictional facts, are true, and waivers and other provisions as required by 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 the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed it on the public record for a period of sixty (60) days, now in further conformity with the procedure 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 is a nonprofit incorporated professional association of dentists in Puerto Rico, and is organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business located at Calle Manuel V. Domenech #200, Hato Rey, Puerto Rico 00918.

Decision and Order

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 the purposes of this Order, the following definitions shall apply:

- A. "Respondent" or "Colegio" means Colegio de Cirujanos Dentistas de Puerto Rico, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, chapters, and affiliates controlled by Colegio de Cirujanos Dentistas de Puerto Rico, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Dentist" means a provider of dental services as defined by the laws of Puerto Rico, with a degree of D.M.D. or D.D.S.
- C. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- D. "Payer" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization;

Decision and Order

government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care or dental services for themselves.

- E. "Provider" means any person, including but not limited to any dentist, physician, hospital, or clinic, that supplies health care services to any other person.
- F. "Reimbursement" means any payment, whether cash or non-cash, or other benefit received for the provision of dental services.

II.

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

- A. Endorsing or approving, refusing to endorse or approve, or prohibiting or declaring unethical participation in, any health plan based on the amount of, manner of calculating, or other terms relating to reimbursement for dental services, or on whether the plan is open to participation by all Colegio members.
- B. 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 dentists with any payer or provider;
 - 2. To deal, refuse to deal, or threaten to refuse to deal with any payer or provider;

Decision and Order

3. Regarding any term, condition, or requirement upon which any dentists deal, or are willing to deal, with any payer or provider, including, but not limited to, terms of reimbursement and whether the health plan is open to participation by all Colegio members.
- C. Communicating to any payer or provider any term, condition, or requirement, on which Colegio members are willing or unwilling to deal with any payer or provider, including, but not limited to, terms of reimbursement and whether the health plan is open to participation by all Colegio members.
 - D. Communicating with any member regarding the desirability or appropriateness of any term or condition of dealing with any payer or provider that relates to the amount of, manner of calculating, or other terms relating to reimbursement for dental services, or to whether the plan is open to participation by all Colegio members.
 - E. Exchanging, transferring, or facilitating in any manner the exchange or transfer among dentists of information (including, but not limited to, any actual or possible views, intentions, or positions) concerning any dentist's intention or decision with respect to:
 1. entering into, refusing to enter into, threatening to refuse to enter into, or withdrawing from any existing or proposed agreement with any payer; or
 2. agreeing to, or refusing to agree to, any term, condition, or requirement upon which any dentist deals, or is likely willing to deal, with any payer or provider.

Decision and Order

- F. Encouraging, urging, suggesting, requesting, advising, pressuring, inducing, or attempting to induce any nongovernmental person or organization to engage in any action that would be prohibited if the person were subject to Part II. of this Order.

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

III.

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

- A. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the advertising or publishing by any person of the prices, terms or conditions of sale of dentists' services, or of information about dentists' services, facilities or equipment which are offered for sale or made available by dentists or by any organization with which dentists are affiliated.
- B. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the solicitation of patients, patronage, or contracts to supply dentists' services by any dentist or by any organization with which dentists are affiliated, through advertising or by any other means.

Decision and Order

- C. Encouraging, urging, suggesting, requesting, advising, pressuring, inducing, or attempting to induce any nongovernmental person or organization to engage in any action that would be prohibited if the person were subject to Part III. of this Order.

PROVIDED, HOWEVER, that nothing contained in this Order shall prohibit respondent from formulating, adopting, disseminating, and enforcing, reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or with respect to uninvited in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

IV.

IT IS FURTHER ORDERED that respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final, distribute by first-class mail a copy of this Order and the accompanying complaint, as well as certified Spanish translations thereof, to:
 - 1. Each person who, at the time this Order becomes final, is an employee or member of the Colegio;
 - 2. Each payer or provider with whom, at any time since January 1, 1995, the Colegio has had communications regarding a possible or executed contract for the provision of dental services.
- B. For a period of five (5) years after the date this Order becomes final:

Decision and Order

1. Within thirty (30) days of the date the person assumes such position, distribute by first-class mail a copy of this Order and the accompanying complaint, as well as certified Spanish translations thereof, to each new officer, director, manager, agent, representative, employee, committee member, or member of the Colegio;
 2. Annually publish, in an official annual report, newsletter, or memorandum sent to all members of the Colegio, a copy of this Order and the accompanying complaint, as well as certified Spanish translations thereof, with such prominence as is given to official communications or regularly featured articles;
 3. Annually provide a briefing, class, or seminar for members of the Colegio, available and open to all members of the Colegio and in conjunction with a meeting open to the full Colegio membership, on the meaning and requirements of this Order and the antitrust laws, including penalties for the violation of this Order.
- C. For a period of ten (10) years after the date this Order becomes final:
1. Maintain complete files and records of all correspondence and other communications concerning advertising and solicitation by dentists;
 2. Create and maintain records of nonwritten communications, in which the Colegio participates, concerning advertising and solicitation by dentists, including in such records the names and positions of all participants, the dates and locations of the meetings or other communications, a summary or description of

Decision and Order

any advice or information given or stated by the Colegio, and the nature of such information or advice;

3. Maintain complete files and records of all ethical codes, bylaws, rules, and regulations of the Colegio, or amendments or proposed amendments thereto, which concern advertising or solicitation by dentists;
4. Retain and make available to any authorized representative of the Commission on request the complete files and records required by subparagraphs 1, 2, and 3 of IV. C of this Order.

PROVIDED, HOWEVER, that nothing contained in the requirements of IV.C. of this Order shall require respondent to retain any individual document or record responsive to IV.C. that is over five years old.

V.

IT IS FURTHER ORDERED that the Colegio shall file a verified written report with the Commission within sixty (60) days after this Order becomes final, annually thereafter for five (5) years on the anniversary of the date the Order becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which the respondent intends to comply, is complying, and has complied, with this Order. In addition to any other information that may be necessary to demonstrate compliance, the Colegio shall include in such reports information identifying each payer and provider that has communicated with the Colegio concerning a possible contract for dental services, the proposed terms and conditions of any such contract, and the Colegio's response to such payer or provider.

Decision and Order

VI.

IT IS FURTHER ORDERED that the Colegio shall notify the Commission at least thirty (30) days prior to any proposed change in the Colegio, such as dissolution, assignment, sale, or other event resulting in the emergence of a successor corporation or association, the creation or dissolution of subsidiaries or constituent societies or associations, changes in the requirements for membership in the Colegio, or any other change in the Colegio that may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, the Colegio shall permit any duly authorized representative of the Commission:

- A. Access, during 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 the Colegio relating to any matter contained in this Order; and
- B. Upon five (5) business days' notice to the respondent, and without restraint or interference from it, to interview the Colegio's officers, directors, employees, agents, and other representatives.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on June 12, 2020.

By the Commission.

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, a proposed consent order settling charges that the Colegio de Cirujanos Dentistas de Puerto Rico ("Colegio"), an association of dentists in Puerto Rico: (1) organized boycotts and refusals to deal, and engaged in other anticompetitive conduct, designed to raise prices for dental services; and (2) prohibited its members from engaging in certain types of truthful, nondeceptive advertising. The proposed consent order has been placed on the public record for sixty (60) days to receive comments by interested persons. The proposed consent order has been entered into for settlement purposes only and does not constitute an admission by the Colegio that it violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

The Complaint

The Colegio is an association of approximately 1800 dentists licensed to practice dentistry in Puerto Rico. Puerto Rico law requires, with certain limited exceptions, that dentists maintain membership in the Colegio to practice in Puerto Rico. Accordingly, the Colegio's members constitute the vast majority of dentists practicing in Puerto Rico.

The complaint charges that the Colegio restrained competition among dentists in Puerto Rico by, among other things, fixing the terms under which individual dentists would deal with health insurers and other payers of health care services, and orchestrating or threatening boycotts of payers by its members to obtain higher reimbursement. According to the proposed complaint, the Colegio promulgated a Code of Ethics that bars dentists from contracting with any health insurance plan ("plan") that is not endorsed by the Colegio. The Colegio refused to approve plans

unless they: reimbursed dentists on a fee-for-service basis rather than capitation; were open to participation by all dentists; and were “responsive” to raising fees at the Colegio’s request. Plans sought the Colegio’s endorsement or approval in order to secure a sufficient number of participating dentists.

The complaint also alleges that the Colegio acted as the collective bargaining agent for its members. Through its Committee on Prepaid Dental Services, and in other ways, the Colegio engaged in discussions with numerous payers about fees and other terms its members would accept from these payers. For example, from 1992 through 1994, the Colegio successfully negotiated on behalf of its members to obtain fee increases from the two largest payers for dental coverage in Puerto Rico, Triple S and La Cruz Azul. In another instance, the complaint charges, the Colegio organized dentists to refuse to deal with a new plan proposed by Triple S that would have paid dentists a set amount per enrollee rather than the traditional fee for service, and Triple S was compelled to cancel the plan.

The complaint further alleges that the Colegio set the prices and other terms under which its member dentists would deal with plans operating under Puerto Rico’s Health Insurance Act of 1993 (the “Reform”), a program to provide health care services to the indigent. During 1995, for example, the Colegio successfully blocked Triple S attempts to implement a new plan in the North Region of the Reform, and defeated Triple S plans to implement a 10% discount for dental fees. In the Central Region of the Reform, the Colegio succeeded in forcing PCA to agree that payments to dentists would be based on fee for service, and that its dental panels would be open to all Colegio members. When PCA attempted in 1996 to revise its dental contracts for the Central Region, in order to provide for utilization and quality audits, the Colegio withheld its endorsement, and PCA was unable to secure contracts with a sufficient number of dentists to offer the plan.

Analysis to Aid Public Comment

The complaint charges that the Colegio has acted to prevent certain forms of truthful, nondeceptive advertising. Its Code of Ethics bans advertising that is not “professionally acceptable,” use of most illustrations, advertisements deemed not in good taste, and all personal solicitations. The complaint further alleges that the Colegio applied its ban on unprofessional advertising against dentists from Ponce, Puerto Rico, who truthfully advertised their willingness to accept Reform patients from neighboring areas where dentists were conducting a boycott of the Reform.

According to the complaint, the Colegio has not integrated the practices of its members in any economically significant way, nor has it created any efficiencies that might justify the acts and practices alleged in the complaint. Rather, the complaint charges that the Colegio's conduct has had the purpose and effect of restraining competition among dentists and injuring consumers by, among other things, fixing or increasing prices for dental services; fixing the terms and conditions upon which dentists would deal with payers, thereby raising the price to consumers of insurance coverage; raising prices paid by the Reform and delaying the offering of dental services under the Reform; and depriving consumers of truthful information about dental services.

The Proposed Consent Order

The proposed consent order prohibits the Colegio from continuing the illegal conduct described in the complaint. Specifically, Part II of the order prohibits the Colegio from endorsing or approving, refusing to endorse or approve, or prohibiting or declaring unethical a dentist's participation in a health plan based on the amount, manner of calculating, or other terms relating to reimbursement for dental services, or on whether the plan is open to participation by all Colegio members. The Colegio also is prohibited from 1) negotiating on behalf of any dentists with any payer or provider; 2) refusing to deal,

Analysis to Aid Public Comment

boycotting, or threatening to boycott any payer or provider; or 3) determining any terms, conditions, or requirements upon which dentists will deal with any provider, including terms of reimbursement, and whether the plan is open to participation by all Colegio members.

Further, the Colegio is prohibited from communicating to any payer or provider any term, condition, or requirement on which Colegio members are willing or unwilling to deal with a payer or provider, and from communicating with any member concerning the desirability or appropriateness of any term or condition of a payer relating to dental services, or whether the plan is open to participation by all Colegio members. The Colegio cannot facilitate in any manner, or transfer the exchange of, information concerning dentists' intentions to contract with any payer, or under what terms.

The proposed order does not restrict legitimate communications between the Colegio and payers. Health care practitioners' provision of certain kinds of information to payers is not likely to raise antitrust concerns, but instead may serve to promote competition and benefit consumers. For example, the DOJ/FTC *Statements of Enforcement Policy in Health Care* (1996) define two "antitrust safety zones" dealing with the provision of information to payers, and state that conduct falling within these safety zones will not be challenged by the enforcement agencies absent extraordinary circumstances.¹ The

¹ Statement 5 provides a safety zone for providers' collective provision of "factual information concerning the providers' current or historical fees or other aspects of reimbursement, such as discounts or alternative reimbursement methods accepted . . . ," so long as collection of the information meets certain requirements designed to ensure that the exchange of price or cost data is not used by competing providers to discuss or coordinate costs or prices. Statements at 44-45. The safety zone in Statement 4 covers the provision of "underlying medical data that may improve purchasers' resolution of issues relating to the mode, quality, or efficiency of treatment," as well as providers' "development of suggested practice parameters – standards for patient management developed to assist providers in clinical decisionmaking – that

Analysis to Aid Public Comment

proposed order does not prohibit the Colegio from engaging in activities encompassed in these safety zones, or from communicating with payers about other matters, unless the communication is part of an agreement or course of conduct specifically prohibited by the order.

The proposed order likewise does not restrict the right of the Colegio to provide government bodies with information and opinions in an effort to influence legislation or regulatory action. A proviso states explicitly that the order does not prohibit the Colegio from petitioning any federal, state, or Commonwealth government executive agency or legislative body concerning legislation, rules, or procedures, or from participating in any federal, state, or Commonwealth administrative or judicial proceeding, insofar as the activity is protected from antitrust scrutiny by the Noerr-Pennington doctrine.² That doctrine does not, however, protect price-fixing agreements, refusals to deal, or similar conduct designed to obtain higher prices from government purchasers.³

Part III of the proposed order prohibits the Colegio from restricting truthful advertising of dental services or solicitation of patients. The Colegio, however, can formulate, adopt, disseminate, and enforce reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within

also may provide useful information to patients, providers, and purchasers.” Statements at 41.

² See, e.g., *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

³ *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. at 424-425.

Analysis to Aid Public Comment

the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

Part IV of the proposed order requires the Colegio to distribute copies of the order and accompanying complaint to its employees and members, and to payers or providers who since January 1, 1995, communicated a desire or interest in contracting for dentists' services. Part IV also requires the Colegio to maintain certain records pertaining to advertising for a period of ten years, while other order provisions will remain in effect for twenty years. Parts V and VI of the proposed order impose certain reporting requirements, while Part VII of the proposed order provides for access to the Colegio's documents and personnel. Parts V, VI, and VII are to assist the Commission in monitoring compliance with the proposed order.

Opportunity for Public Comment

The proposed order has been placed on the public record for sixty (60) days in order to receive public comments from interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to facilitate public comment on the agreement. The analysis is not intended to constitute an official interpretation of the agreement, the proposed complaint, or the proposed consent order, or to modify their terms in any way.

Complaint

IN THE MATTER OF
BUMBLE BEE SEAFOODS, INC.

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

Docket C-3954; File No. 9823560
Complaint, June 12, 2000--Decision, June 12, 2000

This consent order prohibits Respondent Bumble Bee Seafoods, Inc. From making representation of the terms or conditions of any rebate offer and requires the company to display prominently the amount of items required for purchase to receive any rebate. The consent order defines "rebate" as cash, merchandise, credit towards future purchases, or any other consideration offered to consumers who purchase products from the respondent, which is provided subsequent to purchase. The consent order also requires that Respondent commence a coupon program that includes the distribution of seven million, five hundred eighty-six thousand, two hundred and eight tearpad coupons that clearly offer 75¢ off any two or multi-pack Bumble Bee Solid White Albacore Tuna which an expiration date of at least six months after distribution.

Participants

For the Commission: *Don D'Amato, Rhonda Joy McLean, and BE.*

For the Respondents: *John F. Kroeger, International Home Foods, Inc.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Bumble Bee Seafoods, Inc., a corporation, (hereinafter "Bumble Bee" or "respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges: