

Complaint

IN THE MATTER OF

**THE CONNECTICUT CHIROPRACTIC
ASSOCIATION,
THE CONNECTICUT CHIROPRACTIC
COUNCIL,
AND
ROBERT L. HIRTLE, ESQ.**

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

*Docket C-4217; File No. 071 0074
Complaint, April 14, 2008 – Decision, April 14, 2008*

This consent order concerns a series of agreements among competing chiropractors to boycott American Specialty Health (ASH), to preclude ASH from administering a chiropractic cost-savings benefits administration program on behalf of payors offering coverage for health care services in the State of Connecticut. The chiropractors engaged in this conduct with and through their respective trade associations, the Connecticut Chiropractic Association and the Connecticut Chiropractic Council. Respondent Robert L. Hirtle was legal counsel for the former association. The conduct in question had the purpose and effect of unreasonably restraining prices and other forms of competition among hundreds of otherwise independent chiropractors in Connecticut. The order prohibits the respondents from entering into or facilitating any agreement between or among any chiropractors to negotiate with payors on any chiropractor's behalf; to deal, not to deal, or threaten not to deal with payors; or on what terms to deal with any payor. More specifically, the order prohibits the respondents from engaging in, attempting to engage in, or inducing anyone to engage in the following actions: persuading a chiropractor to deal or not deal with a payor, or to accept or not accept the terms or conditions on which the chiropractor is willing to deal with a payor; facilitating exchanges of information between chiropractors concerning whether, or on what terms, to contract with a payor; or continuing a meeting of chiropractors after any person makes any statements regarding any chiropractor's intentions that if agreed to would violate the order, unless that person is ejected from the meeting. Certain kinds of agreements are excluded from the general bar on joint negotiations, and the associations are not prevented from exercising rights permitted under the First Amendment to the United States Constitution to petition the government. Other provisions relate to distributing the complaint and order to current and future members of the two associations and to certain payors, and impose various obligations on the respondents to report or provide access to

Complaint

information to the Commission to facilitate monitoring their compliance with the order.

Participants

For the Commission: *Gloria Armstead, Robert S. Canterman, Daniel P. Ducore, Mark Frankena, Melea Greenfeld, Markus H. Meier, Martha Oppenheim, Ronise Parker, and Louis Silvia.*

For the Respondents: *Michael Shea, Day Pitney; Eric Wiechmann, McCarter & English; and Robert Langer, Wiggin & Dana.*

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 (“Commission”), having reason to believe that the Connecticut Chiropractic Association (“CCA”), the Connecticut Chiropractic Council (“CCC”), and Robert L. Hirtle, Esq., hereinafter sometimes collectively referred to as “Respondents,” 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 in that respect as follows:

NATURE OF THE CASE

1. This matter concerns a series of agreements among competing chiropractors to boycott American Specialty Health (“ASH”) to preclude ASH from administering a chiropractic cost-savings benefits administration program on behalf of payors offering coverage for health care services in the State of Connecticut. The chiropractors engaged in this conduct with and through their respective trade associations, CCA and CCC, CCA’s legal counsel, Robert L. Hirtle, Esq., and through activities undertaken collectively among CCA, CCC, Mr. Hirtle, and other licensed chiropractors in the State of Connecticut.

Complaint

2. The Respondents' illegal conduct had the purpose and effect of unreasonably restraining prices and other forms of competition among hundreds of otherwise independent chiropractors in the State of Connecticut.

RESPONDENTS

3. CCA is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal address at 2257 Silas Deane Highway, Rocky Hill, Connecticut 06067. CCA is a voluntary trade association whose membership consists of approximately 375 chiropractors licensed to practice chiropractic in the State of Connecticut.

4. CCC is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal address located at 8 Tyler Avenue, Branford, Connecticut 06405. CCC is a voluntary trade association whose membership consists of approximately 150 chiropractors licensed to practice chiropractic in the State of Connecticut.

5. Mr. Hirtle was legal counsel for CCA at all times relevant herein. His principal address is 185 Asylum Street, Hartford, Connecticut 06103.

JURISDICTION

6. CCA is organized for the purpose, among others, of serving the interests of its members. CCA exists and operates, and at all times relevant to this Complaint has existed and operated, in substantial part for the pecuniary benefit of its members.

7. CCC is organized for the purpose, among others, of serving the interests of its members. CCC exists and operates, and at all

Complaint

times relevant to this Complaint has existed and operated, in substantial part for the pecuniary benefit of its members.

8. At all times relevant to this Complaint CCA chiropractors and CCC chiropractors have been engaged in the business of providing chiropractic services for a fee. Except to the extent competition has been restrained as alleged herein:

a. CCA chiropractors have been and are in competition with other CCA chiropractors for the provision of chiropractic services in areas throughout the State of Connecticut;

b. CCC chiropractors have been and are in competition with other CCC chiropractors for the provision of chiropractic services in areas throughout the State of Connecticut; and

c. CCA chiropractors and CCC chiropractors have been and are in competition with each other, and with other chiropractors, for the provision of chiropractic services in areas throughout the State of Connecticut.

9. All Respondents are “persons” or “corporations” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

10. The general business practices of Respondents, including the acts and practices alleged herein, affect the interstate movement of patients, the interstate purchase of supplies and products, and the interstate flow of funds, and are in or affect “commerce” as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF CHIROPRACTOR CONTRACTING WITH PAYORS

11. Individual chiropractors and chiropractic group practices contract with payors of health care services and benefits, including insurance companies, managed care organizations, health care benefits organizations, and others, to establish the terms and

Complaint

conditions, including price terms, under which the chiropractors will render their professional chiropractic services to the payors' enrollees. Chiropractors and chiropractic group practices entering into such contracts often agree to accept lower compensation from payors in order to obtain access to additional patients made available by the payors' relationship with the covered individuals. These contracts may reduce payors' costs and enable them to lower the price of insurance or of providing health benefits, thereby resulting in lower health care costs for covered individuals.

12. Absent anticompetitive agreements among them, otherwise competing chiropractors and chiropractic group practices unilaterally decide whether to enter into contracts with payors to provide services to individuals covered by a payor's programs, and what prices and other terms they will accept as payment for their services pursuant to such contracts.

ASH CHIROPRACTIC COST-SAVINGS PROGRAM

13. ASH is a health care benefits organization that offers a chiropractic cost-savings benefits administration program to payors nationwide, including payors in the State of Connecticut. The purpose of the program is to improve the efficiency, increase the quality, and reduce the cost of providing chiropractic care to the payors' enrollees.

14. Under the program, payors delegate the management of chiropractic services and benefits for their enrollees to ASH. ASH contracts with chiropractors to provide chiropractic services to the payors' enrollees under the cost-savings program. In addition to its chiropractor network, ASH administers chiropractic benefits, including utilization management, credentialing, claims processing, and other management services, for payors under the program.

ANTICOMPETITIVE CONDUCT

Complaint

15. CCA acted in conspiracy with its members, CCC acted in conspiracy with its members, and CCA, CCC, and their members acted in conspiracy with each other. Through their joint agreements, CCA, CCC, and their respective members, restrained competition by, among other things, collectively agreeing to boycott ASH. The purpose and effect of the boycott was to prevent ASH from providing its cost-savings chiropractic benefits administration program to Anthem Blue Cross and Blue Shield of Connecticut (“Anthem”), CIGNA HealthCare (“CIGNA”), Empire Blue Cross Blue Shield (“Empire”), and other payors.

16. Mr. Hirtle acted to restrain competition by, among other things, encouraging, facilitating, and implementing agreements, among competing CCA and CCC chiropractors, and other chiropractors licensed in the State of Connecticut, to boycott ASH to prevent ASH from providing its chiropractic cost-savings program to Anthem, CIGNA, Empire, and other payors.

17. In furtherance of the combinations and agreements, CCA, CCC, and Mr. Hirtle engaged in a campaign through meetings and other communications to encourage and assist chiropractors in the State of Connecticut to boycott ASH. CCA and CCC urged their respective members and other chiropractors licensed in the State of Connecticut to “take a stand and resign” from ASH. The communications conveyed the message, “united we stand, divided we fall.”

18. During these meetings and through other communications, CCA and CCC chiropractors discussed with each other their dissatisfaction with ASH’s price terms and utilization management requirements for chiropractic services. The chiropractors repeatedly incited each other to unite in their fight to defeat the ASH program through communications that included the following:

- a. “We all need to unite on this issue.”
- b. “We must band together.”

Complaint

- c. “Get [ASH] out of this state!”

**CCA AND CCC CHIROPRACTORS COLLECTIVELY
AGREE TO OPT OUT OF ASH’S CHIROPRACTIC
NETWORK FOR ANTHEM**

19. Anthem entered into an arrangement with ASH in early 2006 under which ASH agreed to provide a chiropractic provider network and administer chiropractic benefits for Anthem enrollees.

20. The arrangement required ASH to contract with a minimum of 80 percent of the chiropractors who were members of Anthem’s existing chiropractic provider network to ensure adequate coverage of chiropractic services for Anthem enrollees in the State of Connecticut. ASH’s existing chiropractic network included approximately 40 percent of the chiropractors in Anthem’s chiropractic network. Therefore, ASH needed to contract with an additional 40 percent of the chiropractors in Anthem’s network.

21. On July 28, 2006, ASH notified chiropractors that the arrangement with Anthem was effective November 1, 2006. ASH also provided applications and contracting materials to the chiropractors. The chiropractors who already were members of ASH’s network had the opportunity to “opt out” of the ASH network for Anthem.

22. In response, CCA, CCC, and Mr. Hirtle organized monthly meetings starting in August, 2006, for all licensed chiropractors in the State of Connecticut to discuss their concerns regarding the ASH program and provide instructions on how to opt out of the ASH program.

23. CCA and CCC distributed a model opt-out letter to the chiropractors to notify ASH that the chiropractors elected not to participate in the ASH chiropractic network for Anthem. CCA and CCC also instructed the chiropractors to send copies of the signed

Complaint

opt-out letters to Mr. Hirtle. The chiropractors sent opt-out letters to ASH using the model CCA and CCC had provided to them.

24. Mr. Hirtle regularly circulated written updates to the chiropractors informing them of how many chiropractors had opted out of the ASH network. He also advised them on how many more chiropractors needed to opt out to ensure that ASH would not meet the minimum number of chiropractors required to have a sufficient network under the ASH/Anthem arrangement.

25. Mr. Hirtle also encouraged the chiropractors to refuse to participate in the ASH/Anthem program. Throughout the fall of 2006, he told them:

- a. “There need to be 60 more resignations to cripple the ASH provider list.”
- b. “We need 50 more to destroy the panel.”
- c. “A little more effort and we will be there.”
- d. “The list is now 18 [chiropractors]. 5 Counties out 100%. A great victory for Chiropractic!”
- e. “It would be nice to get 100% out in Hartford and New Haven Counties tomorrow.”

26. During this time, CCA and CCC conveyed the concerns of their members regarding the ASH fee schedule and utilization management requirements to ASH. In September 2006, CCA and CCC informed ASH that the chiropractors were “grateful that everyone at ASH [was] critically re-thinking things such as the fee schedule.” Faced with numerous opt-outs and concerns about the program, ASH sent a revised offer to the chiropractors with an increase in the fee schedule on September 19, 2006.

27. Dissatisfied with ASH’s revised offer, CCA, CCC, and Mr. Hirtle continued their efforts to persuade the chiropractors not to

Complaint

contract with ASH or, if they were currently members of ASH's existing network, to opt out of ASH's network for Anthem. In response, the chiropractors continued sending their opt-out letters to ASH to reject the revised offer.

28. As a consequence of the boycott, all but four chiropractors opted out of ASH's chiropractic network for Anthem, and the network had no chiropractors in seven out of the eight counties in the State of Connecticut. The boycott succeeded in defeating the ASH network and forcing Anthem and ASH to cancel their arrangement as of December 1, 2006.

**CCA AND CCC CHIROPRACTORS COLLECTIVELY
TERMINATE THEIR PARTICIPATION FROM ASH'S
PROGRAM FOR CIGNA ENROLLEES**

29. ASH entered into an agreement with CIGNA in 2000 to provide a chiropractic provider network and administer chiropractic benefits for CIGNA enrollees in the State of Connecticut.

30. During the time CCA chiropractors and CCC chiropractors were opting out of the ASH chiropractic program for Anthem, they also collectively decided to terminate their existing relationship with the ASH chiropractic program for CIGNA.

31. Communications among the chiropractors included the warning that "[o]pting out of ASH/Anthem but staying with ASH/CIGNA sends a message of weakness and furthermore strengthens their position in our state. By not resigning completely we have to continue opting out of every new plan they try to pass Just Resign!!"

32. CCA and CCC echoed this rallying cry for action through their communications with the chiropractors. CCC told the chiropractors, "There is no option except for ASH to get out of Connecticut. No more negotiations. No more new contracts."

Complaint

33. Following these communications, the chiropractors sent letters to ASH terminating their participation in the ASH program for CIGNA.

34. In November 2006, Mr. Hirtle announced that the chiropractors had “voted overwhelmingly” to terminate their participation in the ASH program for CIGNA.

35. The terminations forced CIGNA to develop its own chiropractic network to continue to provide adequate chiropractic coverage to its enrollees.

**CCA AND CCC CHIROPRACTORS CONSPIRE TO
BOYCOTT EMPIRE**

36. ASH manages chiropractic benefits for Empire enrollees in the State of New York. Empire also has enrollees who reside in Connecticut, but obtain health coverage from their employers in New York. ASH attempted to contract with chiropractors in Connecticut to provide chiropractic services to Empire enrollees residing in Connecticut.

37. At a meeting in December 2006, CCA and CCC chiropractors discussed ASH’s offer to provide services to Empire enrollees. CCA and CCC advised their members that if they did not want to participate in the ASH program for Empire, they should send a letter to ASH declining the offer and provide a copy of the letter to Mr. Hirtle. Following the meeting, many CCA and CCC members sent opt-out letters to Empire.

38. In January 2007, CCA informed all chiropractors in Connecticut that an insufficient number of chiropractors agreed to join ASH’s chiropractic network for Empire enrollees residing in Connecticut. The collective conduct of the chiropractors forced ASH to abandon its efforts to contract with chiropractors in Connecticut.

Complaint

RESPONDENTS' CONDUCT IS NOT LEGALLY JUSTIFIED

39. Respondents have not identified any reason for the agreement among CCA and CCC chiropractors to boycott ASH, and Mr. Hirtle's activities to encourage, facilitate, and help implement the boycott, other than to prevent ASH from managing chiropractic benefits on behalf of payors and their enrollees in Connecticut.

40. Neither CCA nor CCC has undertaken any programs or activities that create any integration among their members in the delivery of chiropractic services. Members do not share any financial risk in providing chiropractic services, do not collaborate in a program to monitor and modify clinical practice patterns of their members to control costs and ensure quality, or otherwise integrate their delivery of care to patients.

41. Respondents' conduct described above has not been, and is not, reasonably related to any efficiency-enhancing integration among the chiropractor members of CCA and CCC, or between CCA and CCC and their respective members.

ANTICOMPETITIVE EFFECTS

42. Respondents' actions described in paragraphs 15 through 41 of this Complaint have had the effect of restraining trade unreasonably and hindering competition in the provision of chiropractic services in areas throughout the State of Connecticut in the following ways, among others:

- a. unreasonably restraining price and other forms of competition among chiropractors;
- b. increasing costs for chiropractic care;
- c. depriving payors and individual consumers access to chiropractic services cost-savings programs; and

Decision and Order

d. depriving payors and individual consumers of the benefits of competition among chiropractors.

43. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of April, 2008, issues its Complaint against Respondents Connecticut Chiropractic Association, Connecticut Chiropractic Council, and Robert L. Hirtle, Esq.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the Connecticut Chiropractic Association (“CCA”), the Connecticut Chiropractic Council (“CCC”), and Robert L. Hirtle, Esq. (hereinafter collectively referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order

Decision and Order

to Cease and Desist (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, 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 Respondents have violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. Respondent CCA is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 2257 Silas Deane Highway, Rocky Hill, Connecticut 06067.
2. Respondent CCC is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 8 Tyler Avenue, Branford, Connecticut 06405.
3. Respondent Robert L. Hirtle, Esq., an individual, and a member of the Connecticut bar, was CCA’s legal counsel at all times relevant to the facts alleged in the Complaint. His principal address is 185 Asylum Street, Hartford, Connecticut 06103.

Decision and Order

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

ORDER**I.**

IT IS ORDERED that, as used in this order the following definitions shall apply:

- A. “Respondent CCA” means the Connecticut Chiropractic Association, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Respondent CCC” means the Connecticut Chiropractic Council, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- C. “Respondent Hirtle” means Robert L. Hirtle, Esq.
- D. “Respondent Corporations” means Respondent CCA and Respondent CCC, each of which is a “Respondent Corporation.”
- E. “Respondents” means Respondent CCA, Respondent CCC, and Respondent Hirtle.
- F. “Chiropractic group practice” means a bona fide, integrated firm in which chiropractors practice chiropractic together as partners, shareholders, owners, members, or employees, or in which only one chiropractor practices chiropractic.

Decision and Order

- G. “Chiropractor” means a doctor of chiropractic (“D.C.”) or any other person licensed to engage in the practice of chiropractic.
- H. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services to a payor through such entity. This definition applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- I. “Payor” means any person that pays, or arranges for payment, for all or any part of any health care services, including, but not limited to, chiropractic services, for itself or for any other person, as well as any person that develops, leases, or sells access to networks of chiropractors.
- J. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- K. “Principal address” means either (1) primary business address, if there is a business, or (2) primary residential address, if there is not a business address.
- L. “Qualified clinically-integrated joint arrangement” means an arrangement to provide chiropractic services in which:
 - 1. all chiropractors who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the chiropractors who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and

Decision and Order

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.

M. “Qualified risk-sharing joint arrangement” means an arrangement to provide chiropractic services in which:

1. all chiropractors who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the chiropractors who participate jointly to control costs and improve quality by managing the provision of chiropractic services such as risk-sharing involving:
 - a. the provision of chiropractic services at a capitated rate,
 - b. the provision of chiropractic services for a predetermined percentage of premium or revenue from payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for chiropractors who participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by chiropractors in different specialties offering a complementary mix of services, for a fixed, predetermined price, when the costs of that course of treatment for any individual patient can vary greatly due to the individual patient’s condition, the choice, complexity, or length of treatment, or other factors; and

Decision and Order

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of chiropractic 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. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any chiropractors with respect to the provision of chiropractic services:
 1. to negotiate on behalf of any chiropractor with any payor;
 2. to deal, refuse to deal, or threaten to refuse to deal with any payor; or
 3. regarding any term, condition, or requirement upon which any chiropractor deals, or is willing to deal, with any payor, including, but not limited to, price terms;
- B. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any chiropractor to deal or not deal with a payor, or accept or not accept the terms or conditions, including, but not limited to, price terms, on which the chiropractor is willing to deal with a payor;

Decision and Order

- C. Exchanging or facilitating in any manner the exchange or transfer of information among chiropractors concerning any chiropractor's willingness to deal with a payor, or the terms or conditions, including price terms, on which the chiropractor is willing to deal with a payor;
- D. Continuing a formal or informal meeting of chiropractors after any person makes any statement concerning one or more chiropractors' intentions or decisions, that if agreed to would violate Paragraphs II.A through II.C above, unless Respondents immediately eject such person from the meeting;
- E. Attempting to engage in any action prohibited by Paragraphs II.A through II.D above; and
- F. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.E above.

Provided, however, that nothing in this Paragraph II. shall prohibit any agreement or conduct involving Respondent Hirtle: (a) that is reasonably necessary to form, participate in, or take any action in furtherance of, a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement; or (b) where such agreement or conduct solely involves chiropractors in the same chiropractic group practice.

III.

IT IS FURTHER ORDERED that nothing in this Order shall be construed to prevent Respondent Corporations from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal, state, commonwealth, or local government including any executive or legislative body, or to participate in any federal, state, commonwealth, or local administrative or judicial proceeding, or to engage in communications reasonably necessary to develop a position or

Decision and Order

communicate with chiropractors about positions presented to any federal, state, commonwealth, or local government including any executive or legislative body.

IV.

IT IS FURTHER ORDERED that for a period of five (5) years from the date that this Order becomes final, Respondent Corporations shall maintain a copy of any written communication distributed to any chiropractor relating to any subject that is covered by any provision of this Order.

V.

IT IS FURTHER ORDERED that each Respondent Corporation shall:

- A. Within thirty (30) days after the date on which this Order becomes final:
 - 1. send by first-class mail with delivery confirmation or electronic mail with return confirmation, a copy of this Order and the Complaint to:
 - a. every chiropractor who is or has been a member of Respondent Corporation at any time since January 1, 2005;
 - b. each current officer, director, manager, and employee of Respondent Corporation;
 - 2. send by first-class mail, return receipt requested, a copy of this Order and the Complaint to the chief executive officer of each payor set forth in Appendix A of this Order;
- B. For five (5) years from the date this Order becomes final:

Decision and Order

1. distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each chiropractor who becomes a member of Respondent Corporation, and who did not previously receive a copy of this Order and the Complaint from such Respondent Corporation, within thirty (30) days of the time such membership begins;
 - b. each person who becomes an officer, director, manager, or employee of Respondent Corporation, and who did not previously receive a copy of this Order and the Complaint from such Respondent Corporation, within thirty (30) days of the time that he or she assumes such position with such Respondent Corporation; and
 2. publish on the official website of Respondent Corporation, and, if Respondent Corporation sends an annual report or newsletter to all chiropractors who are members of Respondent Corporation, publish annually in such report or newsletter, a copy of this Order and the Complaint with such prominence as is given to regularly featured information.
- C. Notify the Commission at least thirty (30) days prior to any proposed:
1. dissolution of Respondent Corporation;
 2. acquisition, merger or consolidation of Respondent Corporation; or
 3. other change in Respondent Corporation that may affect compliance obligations arising out of this Order, including but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondent Corporation.

Decision and Order

- D. File verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include:
1. a detailed description of the manner and form in which Respondent Corporation has complied and is complying with this Order;
 2. the name, address, and telephone number of each payor with which such Respondent Corporation has had any contact; and
 3. copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph V.A.1, and copies of the signed return receipts required by Paragraphs V.A.2 and V.B.1.

VI.

IT IS FURTHER ORDERED that Respondent Hirtle shall file a verified written report within ninety (90) days from the date this Order becomes final, annually thereafter for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include a detailed description of the manner and form in which Respondent Hirtle has complied and is complying with this Order.

VII.

IT IS FURTHER ORDERED that, for five (5) years from the date this Order becomes final, each Respondent shall notify the Commission of any change in his or its respective principal address within twenty (20) days of such change in address.

Decision and Order

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request:

- A. Each Respondent shall permit any duly authorized representative of the Commission 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 such Respondent relating to any matter contained in this Order; and
- B. Upon five (5) days' notice:
 - 1. each Respondent Corporation shall, in the presence of counsel and without restraint or interference, permit any duly authorized representative of the Commission to interview its officers, directors, or employees;
 - 2. Respondent Hirtle shall, in the presence of counsel and without restraint or interference, permit any duly authorized representative of the Commission to interview him.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on April 14, 2028.

By the Commission.

Decision and Order

APPENDIX A

Aetna, Inc.
151 Farmington Avenue
Hartford, CT 06156

American Specialty Health
777 Front Street
San Diego, CA 92101

Anthem Blue Cross and Blue Shield
Operations Center and East Headquarters
370 Bassett Road
North Haven, CT 06473

CIGNA Corporate Headquarters
Two Liberty Place
1601 Chestnut Street
Philadelphia, PA 19192

ConnectiCare
175 Scott Swamp Road
P.O. Box 4050
Farmington, CT 06034-4050

Empire BlueCross BlueShield
One Liberty Plaza
New York, NY 10006

Health Net, Inc.
P.O. Box 10198
Van Nuys, CA 91410-0198

Oxford Health Plans, LLC
United Healthcare
450 Columbus Boulevard
Hartford, CT 06103

Unicare/WellPoint, Inc.
120 Monument Circle
Indianapolis, IN 46204

United Healthcare
450 Columbus Boulevard
Hartford, CT 06103

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with the Connecticut Chiropractic Association (“CCA”), the Connecticut Chiropractic Council (“CCC”), and CCA’s former legal counsel, Robert L. Hirtle, Esq. The agreement settles charges by the Federal Trade Commission that CCA, CCC, and Mr. Hirtle violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among competing chiropractors in Connecticut to boycott American Specialty Health (“ASH”) to preclude ASH from administering chiropractic services in Connecticut. This conduct is a naked boycott among competitors and a clear *per se* violation of the antitrust laws.

The Commission explored the possibility of seeking disgorgement in this case, given the egregious nature of the conduct. It ultimately concluded that disgorgement was inappropriate under the specific factual circumstances of this case. However, the Commission reserves the right to seek disgorgement in similar cases in the future.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the 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 their terms in any way. Further, the proposed order has been entered into for settlement purposes only and does not constitute an admission by any proposed respondent that said respondent violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

Analysis to Aid Public Comment

The Complaint

The allegations of the complaint are summarized below.

CCA is a voluntary trade association whose membership consists of approximately 375 chiropractors licensed to practice chiropractic in Connecticut. Mr. Hirtle was legal counsel for CCA at all times relevant to the conduct alleged in the complaint. CCC is a voluntary trade association whose membership consists of approximately 150 chiropractors licensed to practice chiropractic in Connecticut. Both CCA and CCC are organized for the purpose, among others, of serving the interests of their respective members, and operate in substantial part for the pecuniary benefit of their respective members.

ASH is a health care benefits organization that offers a chiropractic cost-savings benefits administration program to payors nationwide to improve the efficiency, increase the quality, and reduce the cost of providing chiropractic care. Under the program, ASH provides a network of chiropractors and administers chiropractic benefits, including utilization management, credentialing, and claims processing.

CCA acted in conspiracy with its members, CCC acted in conspiracy with its members, and CCA, CCC, and their members acted in conspiracy with each other. Through their joint agreements, CCA, CCC, and their respective members, restrained competition by, among other things, collectively agreeing to boycott ASH. Mr. Hirtle acted to restrain competition by, among other things, encouraging and facilitating the boycotts. The purpose and effect of the boycotts were to prevent ASH from providing its cost-savings chiropractic benefits administration program to Anthem Blue Cross and Blue Shield of Connecticut (“Anthem”), CIGNA HealthCare (“CIGNA”), Empire Blue Cross Blue Shield (“Empire”), and other payors.

Analysis to Aid Public Comment

ASH entered into an arrangement with Anthem in early 2006 to provide a chiropractic provider network and administer chiropractic benefits for Anthem enrollees. In July 2006, ASH notified CCA and CCC chiropractors that the arrangement was effective November 1, 2006. The chiropractors who already were members of ASH's network in Connecticut had the opportunity to "opt out" of the ASH network for Anthem.

CCA, CCC, and Mr. Hirtle organized monthly meetings starting in August 2006 for all licensed chiropractors in Connecticut to discuss their concerns with the ASH/Anthem arrangement. During these meetings and through other communications, CCA and CCC chiropractors discussed with each other their dissatisfaction with ASH's price terms and utilization management requirements for chiropractic services. The chiropractors incited each other to unite in their fight to defeat the ASH/Anthem program. They agreed to "band together" to defeat the ASH/Anthem arrangement.

CCA and CCC also distributed a model opt-out letter to the chiropractors to notify ASH that the chiropractors elected not to participate in the ASH/Anthem program. The chiropractors sent opt-out letters to ASH using the model letter and provided copies of the letters to Mr. Hirtle. Mr. Hirtle regularly circulated written updates to the chiropractors informing them of how many chiropractors had opted out of the network. Mr. Hirtle encouraged the chiropractors to refuse to participate in the ASH/Anthem program through communications telling the chiropractors how many more chiropractors needed to opt out to "destroy" the ASH chiropractor network.

During this time, CCA, CCC, and Mr. Hirtle also encouraged and assisted the chiropractors to terminate their existing relationship with the ASH chiropractic program for CIGNA and to refuse to participate in the ASH program for Empire. The boycotts succeeded in their efforts to preclude ASH from administering chiropractic services in Connecticut. ASH and Anthem were forced to cancel their arrangement, CIGNA had to abandon its program with ASH,

Analysis to Aid Public Comment

and ASH was unable to contract with chiropractors in Connecticut for the Empire network.

The proposed respondents have not identified any reason for the agreement among CCA and CCC chiropractors to boycott ASH, and Mr. Hirtle's activities to encourage, facilitate, and help implement the boycott, other than to prevent ASH from managing chiropractic benefits on behalf of payors and their enrollees in Connecticut. Neither CCA nor CCC has undertaken any programs or activities that create any integration among their members in the delivery of chiropractic services. Members do not share any financial risk in providing chiropractic services, do not collaborate in a program to monitor and modify clinical practice patterns of their members to control costs and ensure quality, or otherwise integrate their delivery of care to patients. By the acts set forth in the complaint, CCA, CCC, and Mr. Hirtle have violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence. It is similar to other consent orders that the Commission has issued to settle charges that health care providers engaged in unlawful refusals to deal with health plans. Unlike prior consent orders, however, this order also settles charges that an attorney participated in the unlawful refusals to deal with the providers.

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits CCA, CCC, and Mr. Hirtle from entering into or facilitating any agreement between or among any chiropractors: (1) to negotiate with payors on any chiropractor's behalf; (2) to deal, not to deal, or threaten not to deal with payors; or (3) on what terms to deal with any payor.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the proposed respondents from persuading

Analysis to Aid Public Comment

in any way a chiropractor to deal or not deal with a payor, or accept or not accept the terms or conditions on which the chiropractor is willing to deal with a payor. Paragraph II.C forbids the proposed respondents from facilitating exchanges of information between chiropractors concerning whether, or on what terms, to contract with a payor. Paragraph II.D prohibits proposed respondents from continuing a meeting of chiropractors after any person makes any statements regarding any chiropractor's intentions that if agreed to would violate Paragraphs II.A through II.C unless that person is ejected from the meeting. Paragraph E bars attempts to engage in any action prohibited by Paragraphs II.A through II.D, and Paragraph F proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.E.

As in other Commission orders addressing health care providers' concerted action against health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. Mr. Hirtle would not be precluded from engaging in conduct that is reasonably necessary to form legitimate joint contracting arrangements among competing chiropractors, whether a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement," or conduct that only involves chiropractors who are part of the same chiropractic group practice (defined in Paragraph I.F).

As defined in the proposed order, a "qualified risk-sharing joint arrangement" possesses two key characteristics. First, all chiropractor participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A "qualified clinically-integrated joint arrangement," on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, participants must participate in active

Analysis to Aid Public Comment

and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among chiropractors. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III provides that the order does not prevent CCA or CCC from exercising rights permitted under the First Amendment to the United States Constitution to petition the government.

Paragraph IV requires that CCA and CCC maintain copies of written communications distributed to any chiropractor relating to the order.

Paragraph V.A requires CCA and CCC to distribute the complaint and order to all chiropractors who have participated in CCA or CCC, and to payors identified in Appendix A. For five years, Paragraph V.B requires both CCA and CCC, respectively, to distribute the complaint and order to all chiropractors who become a member of CCA or CCC.

Paragraphs V.C, V.D, VI, VII, and VIII of the proposed order impose various obligations on proposed respondents to report or provide access to information to the Commission to facilitate monitoring their compliance with the order.

Paragraph IX provides that the proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

**LIFE IS GOOD, INC.,
AND
LIFE IS GOOD RETAIL, INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4218; File No. 072 3046
Complaint, April 16, 2008 – Decision, April 16, 2008*

This consent order addresses false or misleading representations Life is good made about the security it provided for personal information collected from consumers in connection with the sale of apparel and accessories through a retail website. Life is good engaged in a number of practices that failed to provide reasonable and appropriate security for the sensitive consumer information stored on its computer network. In fact, a hacker was able to export consumer information for thousands of customers. The order prohibits Life is good from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or integrity of personally identifiable information collected from or about consumers. The order requires Life is good to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. In addition, Life is good must obtain, on a biennial basis for 20 years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that it has in place a security program that provides protections that meet or exceed the protections required by the order; and its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information is protected. Additional provisions of the order relate to notifying the Commission of changes in corporate status and submitting compliance reports to the Commission.

Participants

For the Commission: *Laura Berger, Kristin Krause Cohen,
Marc Groman, Michael Ostheimer, Jessica Rich, and Joel Winston.*

For the Respondents: *John Banse, in-house counsel.*