IN THE MATTER OF

INDIANA FEDERATION OF DENTISTS

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

Docket 9118. Complaint, Oct. 18, 1978—Final Order, Feb. 17, 1983

This Final Order, among other things, prohibits an Anderson, Ind. dental association ("IFD") from engaging in any action or course of conduct having the effect of requiring or organizing dentists to refuse to submit radiographs or other materials requested by third-party payers for use in benefit determinations or to deal with a third-party payer in a certain way. The order also forbids IFD from engaging in any action that compels a third-party payer to deal with or to operate in a certain way in connection with dental health care benefits programs; or whose purpose is to influence a consumer's choice of dentists based on the degree of non-cooperation between such dentists and a third-party payer. Additionally, the association is required to timely mail to each of its members a copy of the Commission order together with a letter advising that IFD has abandoned all policies and guidelines that fail to conform to the provisions of the order, and that members are free to deal with dental health care programs and payers as they see fit.

Appearances

For the Commission: *L. Barry Costilo, M. Elizabeth Gee, James McCarty* and *Laurel Brandt.*

For the respondent: *Ronald K. Fowler,* Anderson, Ind. and *Bruce W. Graham,* West Lafayette, Ind., intervenor for State of Indiana.

INITIAL DECISION BY

PAUL R. TEETOR, ADMINISTRATIVE LAW JUDGE

MARCH 24, 1980

I. SUMMARY OF PROCEEDINGS

On 10/18/78 the Commission issued its complaint against the Indiana Federation of Dentists (IFD), a small unincorporated association organized in 1976. The complaint was served on Indiana Federation of Dentists at its office at 2403 Raible Ave. in Anderson, Indiana on 11/13/78. The complaint charged the Federation and its members, in substance, with adopting and pursuing a conspiracy started some years earlier by the much larger Indiana Dental Associa-

tion (IDA), which was named here as a co-conspirator but not as a Respondent.[1] The conspiracy charged centers about an organized effort to keep Indiana dentists from turning over patients' dental radiographs (commonly called X-rays) to group dental health care insurers. The principal terms of the alleged conspiracy are described in Paragraph 9 as follows:

A. Promulgated and distributed to their members guidelines and principles for dealing with third-party payers, along with forms and information to facilitate adherence to such guidelines and principles;

B. Encouraged and induced their members to discontinue serving and/or to refuse to serve as dental consultants for third-party payers and to refuse to provide payers with other professional services such as, but not limited to, taking X-rays for use in benefits determination;

C. Conducted meetings, workshops, and pledge campaigns among their members to gain the agreement of individual members not to compete with other dentists in dealing with third-party payers;

D. Urged dental organizations in other states to pursue courses of conduct similar to that hereinabove described; and [2]

E. Urged payers, purchasers, and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that they find unacceptable.

Paragraph 11 of the Complaint added the following:

Since September 1976, respondent and its members, in concert and agreement among themselves, have acted in furtherance of the agreement and concert of action alleged in Paragraph Nine, and have otherwise engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation with dental health care benefits programs containing predetermination and least expensive course of treatment provisions by, *inter alia:*

A. Promulgating, adopting, publishing, and distributing to its members a purported "work rule" that details certain uniform courses of conduct for dentists in their dealings with third-party payers; and

B. Urging payers, purchasers and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that respondent finds unacceptable.

(The complaint regularly refers to "third-party payers" rather than "insurers" but we use the term "insurer" as following popular usage more closely.)[2]

The conspiracy is said to have adversely affected competition among Indiana dentists; tended to fix or tamper with the price of dental health care in Indiana; deprived consumers of the benefit of insurers' cost-containment efforts; deprived them, too, of the benefit of a second dentist's opinion on the adequacy of proposed dental treat-

[1] At the same time that the Commission issued this complaint it accepted a consent order from IDA in Docket No. C-2957. *See Federal Register,* Vol. 43, No. 223—Friday, November 7, 1978 [93 F.T.C. 392].

[2] Technically a cost-plus group insurer is probably not an "insurer" because the Supreme Court views the spreading and underwriting of risk as the "primary elements" of insurance. *See Group Life & Health Ins. Co.* v. *Royal Drug Co.,* 440 U.S. 205, 211 (1979).

ment; and limited their opportunity to select dentists who cooperate with [3] dental health care benefit plans. The relevant text (Par. 12) reads:

The acts, practices and methods of competition alleged in Paragraphs Nine through Eleven have had, or have the tendency or capacity to have, among others, the following effects:

A. Competition among dentists in Indiana has been hindered, restrained, foreclosed, and frustrated;

B. The cost of dental health care services in Indiana has been or may be stabilized, fixed, or otherwise tampered with;

C. Consumers have been or may be deprived of the benefit of third-party payers' cost-containing measures, including lower or potentially lower costs for dental health care services and dental health care benefits insurance;

D. Consumers have been or may be denied the benefits of a second dentist's opinion as to the adequacy of proposed dental treatment; and

E. Consumers have been limited in their opportunity to select dentists who cooperate with dental health care benefits programs.

The acts and practices described in the complaint are said to constitute both unfair methods of competition and unfair acts and practices and for both reasons to violate Section 5 of the Federal Trade Commission Act. The contemplated relief is an order for Respondent to cease and desist from the following:

1. to cease and desist from engaging in any activity that has the purpose or effect of causing or inducing dentists not to cooperate with any third-party payer;

2. to cease and desist from engaging in any activity which has the purpose or effect of causing or inducing consumers to [4] choose dentists who do not cooperate with third-party payers;

3. to cease and desist from engaging in any activity that compels or coerces any third-party payer to incorporate, delete, or modify any provision in any existing or proposed dental health care benefits program;

4. to cease and desist from all activities that have the purpose or effect of influencing the selection of dental consultants or the opinions rendered by such consultants; and

5. to notify their members and local chapters of the substantive relief provided by the order, including affirmative statements advising members that they are free to make their own decisions concerning cooperation with third-party payers.

On 10/20/78 the matter was assigned for trial to Paul R. Teetor, Administrative Law Judge, and he has since presided over all proceedings. A motion by Respondent for a more definite statement of the charges of the complaint was denied but Respondent's time to answer was extended to 12/22/78. In its Answer, Respondent admitted a few preliminary allegations of the complaint but denied all important substantive allegations and raised a number of affirmative defenses, including failure to state a claim, state action defense, no effect on

interstate commerce, non-profit association, commercial free speech, business of insurance, and complaint contrary to the public interest.

On 12/29/78 the State of Indiana moved to intervene in this proceeding to see that the so-called "state action" defense would be presented adequately. On 1/5/79, however, the Administrative Law Judge, while willing to grant *amicus curiae* status, denied the motion to intervene on the ground that the difficulties of trial would be increased without offsetting value, absent any showing that Respondent would not be able to present the "state action" defense properly.

On 1/9/79 a major prehearing conference was held in Washington at which both sides made opening statements of position, followed by arguments as to important legal questions involved. A substantial part of the conference was devoted to planning discovery, including Complaint Counsel's need for certain subpoenas and Respondent's demand for inspection and copying of Commission files and its applications for interrogatories to Complaint Counsel and [5] for third-party subpoenas. Complaint Counsel were ordered to turn all their evidence over to Respondent by 5/20/79 and Respondent to turn its evidence over to Complaint Counsel by 6/20/79. Trial was anticipated for the coming summer. Thereafter both sides worked actively and productively on discovery problems through the Spring of 1979.

At the prehearing conference of 1/9/79 Complaint Counsel's objection to searching Commission files as far back as 1961 had been overruled because the Complaint's allegations go that far back. On 2/1/79, however, Complaint Counsel gave notice of their willingness to limit their case to activities from 1970 on and Respondent accordingly agreed on 2/6/79 that the Government's file search might omit documents prepared, sent or received by the Commission prior to 1/1/70. This stipulation was approved by the Administrative Law Judge on 2/8/79.

On 2/5/79 the Commission denied a request for an appeal by the State of Indiana from the Administrative Law Judge's refusal to permit intervention as a party but confirmed that the State might have *amicus curiae* status. Unsatisfied, the State of Indiana on 5/23/79 filed a complaint (Civ. IP 79–453–C) in the U.S. District Court for Southern Indiana (Indianapolis Division) seeking an injunction against further prosecution of this matter unless and until the State of Indiana be permitted to intervene as a party or, alternatively, an injunction against further prosecution of this matter under any circumstances (because, the complaint averred, the "state action" doctrine is applicable here and operates to deprive this Commission of jurisdiction).

On 6/15/79 another prehearing conference was held in Washington, primarily to discuss the practical problems that were arising

because of a substitution of counsel for Respondent. A request by Respondent for an additional 90 days to prepare for trial was denied as unnecessary because Respondent's new counsel was its regular lawyer and quite familiar with the facts of the case. Respondent's scheduled turnover of its evidence on 7/20/79 was confirmed and trial was set for 8/6/79. By 7/17/79, however, counsel on both sides felt need for more time and trial was postponed until 9/17/79.

Meanwhile, on 7/19/79 the U.S. District Court for Southern Indiana, Holder, J., conducted a brief trial on affidavits in the State of Indiana's suit against the Commission and on 8/17/79 handed down a decision by mistake granting the State *both* of the alternative judgments it sought. The mistake was corrected almost immediately by the Court by leaving only the judgment of intervention standing but the supporting findings were never altered. **[6]**

In conformance with Judge Holder's intervention order[3] and in view of the need of the Indiana Attorney General's office for some time to prepare for participation in the trial, the holding of evidentiary hearings in this matter was again postponed. On 8/17/79 the Intervenor was given until 9/24/79 to turn its proposed evidence over to the other parties and trial was finally set to begin on 10/2/79 in the Federal Courthouse in Indianapolis, Indiana.

Early in the hearings (10/5/79) Complaint Counsel moved, on instructions from the Administrative Law Judge, to amend the complaint to conform to their proposed proof by including certain theories of interstate commerce not specifically referred to in the complaint, although literally covered by the words "among other things" in Paragraph 7 of the complaint. It appearing that Respondent and Intervenor had been on notice for several weeks before trial that Complaint Counsel proposed to add the evidence in question to their proof of interstate commerce, the Judge, while doubting need for the amendment, proceeded to grant it purely as a precautionary matter in open court on 10/9/79.[4]

Complaint Counsel's case-in-chief was presented by 17 witnesses, largely insurance company dentists and administrators, between 10/2/79 and 10/17/79. Respondent's defense was presented by 4 witnesses, largely Respondent's organizers and officials, on 10/30/79. Intervenor's case was presented by four witnesses, including two academic experts in dentistry, on 10/29/79 and 11/1/79. Complaint Counsel's sole rebuttal witness, an official of the Indiana Department of Insurance, was heard on 11/1/79. It was understood by all parties that if for any reason the State's status as an Intervenor were eventually disapproved, nonetheless the testimony adduced by it would re-

[3] The Commission's formal reversal of its 2/5/79 order did not occur until 10/16/79.

[4] Tr 1058.

main in the record and would be treated as if adduced by Respondent. A List of Witnesses follows. [7]

List of Witnesses

Witness	*Address*	*Sponsor*	*Dates/Testimony*	*Page References*
Anderson, Carlton	28 Park Avenue Cadwell, N.J. 07006	Complaint Counsel	October 16, 1979	1976–1991
Arvanitis, Ernest A.	25–11, 147 Flushing St. Flushing, N.Y.	Complaint Counsel	October 16, 1979	1930–1949
Chichester, David I.	14 Ridge Road Enfield, Conn.	Complaint Counsel	October 3–4, 1979	387–626
Christianson, Steven	1984 Stoneyhill Drive Hudson, Ohio	Complaint Counsel	October 12, 1979	1609–1648
Clegg, Robert L., III	Indiana State Insurance Department	Complaint Counsel	November 1, 1979	2762–2784
Dixie, Gene F	1235 Mission Street San Francisco, Cal.	Complaint Counsel	October 2, 1979	250–349
Downes, William G., DDS	Newington, Conn.	Complaint Counsel	October 10, 1979	1212–1394**[8]**
Hurwitz, Jacob	21760 Kenosha Oak Park, Michigan	Complaint Counsel	October 15, 1979	1757–1806
Janzarik, Richard V.	716 North Wood Anderson, Indiana	Respondent	October 30, 1979	2525–2554

List of Witnesses

Witness	*Address*	*Sponsor*	*Dates/Testimony*	*Page References*
Kasle, Myron J.	Indiana University School of Dentistry	Intervenor	November 1, 1979	2712–2742
Kos, John	The Equitable Life Assurance Society of the United States	Intervenor	October 29, 1979	2338–2375
MacKillop, Donald K.	63 Fox Den Road Glastonbury, Conn.	Complaint Counsel	October 15, 1979	1835–1858
Miele, Frank, Dr.	16 High Gate Court St. Charles, Ill.	Complaint Counsel	October 11, 1979	1414–1536
Mishler, Ernest	933 Briar Patch Lane Greenwood, Indiana	Complaint Counsel	October 5, 1979	908–954
Nelsen, Robert	271 East Bury Hill Rd.	Complaint Counsel	October 16, 1979	1950–1975**[9]**
Nolting, Charles	Indiana State Board of Dental Examiners	Intervenor	October 29, 1979	2197–2338
Oliver, Richard T.	Lafayette West Lafayette, Ind.	Respondent	October 31, 1979	2631–2656
Pierce, James G.	Anderson, Indiana	Respondent	October 31, 1979	2563–2619
Roberts, Fred	2910 Bodine Drive Wilmington, Delaware	Complaint Counsel	October 4–5, 1979	629–810

List of Witnesses

Witness	*Address*	*Sponsor*	*Dates/Testimony*	*Page References*
Rohn, Ralph Daniel	Alexandria, Indiana	Respondent	October 30, 1979	2381–2524
Schade, Gerhard Rudolph, Jr.	887 Goodale Hill Road Glastonbury, Conn.	Complaint Counsel	October 9, 1979	968–1171
Shafer, William	Indiana University School of Dentistry	Intervenor	November 1, 1979	2681–2708
Siegel, Henry	67 Park Terrace East New York City	Complaint Counsel	October 15, 1979	1826–1835**[10]**
Speziale, John E.	4457 Angie Way Lilburn, Georgia	Complaint Counsel	October 5, 1979	811–907
Trego, Sam	4321 Cardinal Drive Indianapolis, Ind.	Complaint Counsel	October 12, 1979	1656–1682
Winkworth, Roy	109 Chippewa Drive Alexandria, Va.	Complaint Counsel	October 11, 1979	1536–1604**[11]**

The demeanor and apparent credibility of all witnesses for both sides was generally quite impressive, with the sole exception of one of Respondent's witnesses, Dr. James Pierce, an organizer of Respondent, who consistently professed inability to remember important facts he might be expected to recall. It might further be noted that, surprisingly, Respondent's first President, Dr. David McClure, who has shared with Dr. Daniel Rohn the top leadership of virtually every Indiana effort to keep X-rays out of insurers' hands during the past decade, was never called to testify.

Approximately 440 exhibits were offered (90% by Complaint Counsel) and very generally received in evidence. This being in the nature of a conspiracy case, many of Complaint Counsel's exhibits were offered in evidence as acts and/or declarations of Respondent's co-conspirators but were challenged by Respondent and/or Intervenor as hearsay evidence and urged to be inadmissible unless and until a *prima facie* case of conspiracy be established. Such exhibits were typically admitted by the Judge only for non-hearsay use (*i.e.*, to prove the fact that a statement was made and any reasonable implication therefrom) but *not* for hearsay use (*i.e.*, to prove the truth of the statement) unless and until Complaint Counsel should establish a *prima facie* case of conspiracy which would make Respondent responsible for declarations by other members of the conspiracy made during and in furtherance of it.

In accordance with the usual practice in conspiracy cases, the Administrative Law Judge did not attempt to decide at the time of each evidentiary ruling whether or not a *prima facie* case of conspiracy had yet been made out but postponed that determination until after trial. When closing the record on 11/16/79 the Judge directed Complaint Counsel to "set out clearly in a special section of their proposed findings and conclusions the chief evidence on which they rely to establish the existence of the conspiracy alleged in the complaint." "Complaint Counsel's Brief Supporting Conclusions Of Law" contains a section entitled "Bases For Admission Of Third Party Dental Society Documents Against Respondent." (pp. 28–31 incl.)[5] Complaint Counsel rely principally on three kinds of evidence to make their *prima facie* case: **[12]**

(1) The testimony of Connecticut General's National Accounts Director Chichester[6] and former Indianapolis Regional Manager Roberts[7] to their personal experiences in dealing with IDA and its leaders when trying to set up and administer the General Motors/UAW dental health plan and likewise the testimony of Aetna's Group

[5] The problem arose mostly, although not entirely, with reference to documents of IDA, which was named as a co-conspirator but not a Respondent.

[6] *See* transcript references cited in CPF 112–13, 115–16, 120–22, 175.

[7] *See* transcript references cited in CPF 87, 112–13, 115–19, 121, 125–27.

Claims Director Downes[8] and Claims Program Director Schade[9] to their personal experiences in dealing with IDA and its leaders when trying to set up and administer the International Harvester/UAW dental health plan. Their stories establish clearly the IDA-organized concert of action with regard to submission of X-rays to insurers and the important roles therein played by the future leaders of IFD.

(2) Detail about the IFD phase of the conspiracy, such as pressure put on insurers not to request X-rays and to abide by "gentlemen's agreements" developed during the IDA phase of the conspiracy, is found in the testimony of Connecticut General's former Indianapolis Regional Manager Speziale,[10] who also told of his dealings in regard to submission of X-rays with such continuing IDA/IFD leaders as Drs. McClure and Rohn.[11] Evidence that IFD was dedicated to fighting submission of dental X-rays to insurers is found in the testimony of Brockaway Glass' Personnel Manager Christianson[12] and ITT-Hoffman's Personnel Manager Trego.[13]

(3) Hearsay found in Respondent's own minutes or other declarations (whose admissibility thus does not depend on prior establishment of a *prima facie* case of conspiracy) can be used to prove IDA's prior conduct opposing X-ray [13] submission;[14] the founding of IFD as a purported "union" to evade the antitrust laws against boycotts;[15] the deferral of IDA action against submission of X-rays to give newly-founded IFD a chance to work out an arrangement with insurers;[16] exchanges of reports on IFD and IDA actions regarding the X-ray question;[17] IFD members' conduct conforming to its "Work Rule" and refusal to submit X-rays;[18] and statements in newsletters of IFD's position on the "Work Rule" and the submission of X-rays.[19]

We agree with Complaint Counsel that the evidence cited makes out a rich *prima facie* case of conspiracy. Accordingly, we now rule that all hearsay evidence received conditionally (*i.e,* dependent on proof of a *prima facie* case of conspiracy) is hereby relieved of such condition and is now received in evidence unconditionally.

Many times during the trial of this matter Respondent and Intervenor objected to "double" or "multiple" hearsay, usually in documentary evidence. Rule 805 of the Federal Rules of Evidence provides:

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[8] *See* transcript references cited in CPF 94–99, 105, 108–110.
[9] *See* transcript references cited in CPF 107–110.
[10] *See* transcript references cited in CPF 180–82.
[11] *See* transcript references cited in CPF 134–35.
[12] *See* transcript references cited in CPF 151, 176–179.
[13] *See* transcript references cited in CPF 151, 183–187.
[14] CX 505A; CX 575A-C; CX 584A-E.
[15] *See* transcript references cited in CPF 140, 193.
[16] *See* transcript references cited in CPF 145, 157; *see also* CX 194K and CX 492A.
[17] *See* transcript references cited in CPF 145.
[18] *See* transcript references cited in CPF 147–164.
[19] *See* transcript references cited in CPF 150, 153, 162.

Hearsay within hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

In each case when a multiple hearsay objection was raised the Administrative Law Judge assured counsel that he did not propose to rule on the admissibility of each of the many instances of multiple hearsay often found in lengthy proposed exhibits but that even if the overall document was admitted, no weight would be attached to any part violative of Rule 805. We now make it clear that we have not intentionally relied on any multiple hearsay in any exhibit, if such part violates Rule 805. Any finding based [14] in part on multiple hearsay implies that the Judge thought that particular multiple hearsay fell within an exception to the hearsay rule as contemplated by Rule 805.

It proved necessary to admit certain exhibits after the last hearing day (11/1/79) but before the closing of the record. For the record, these exhibits are as follows.

IX 500–500C: a statement of one major insurer's policy regarding "Review of X-rays", offered by Intervenor and received *in camera* by written order on 11/2/79.

CX 852, CX 853, CX 854: certified copies of certain papers filed by the Federal Trade Commission in the suit against it by the State of Indiana in the U.S. District Court for the Southern District of Indiana (Civ. No. IP 79–462–C), offered by Complaint Counsel to supplement other papers from the same file offered by Intervenor and received on 11/1/79 as IX 1000–1000 GGG. The supplementary papers were received by written order dated 11/14/79.

[It should be noted that the progress of the State's injunction suit after Judge Holder's judgment of intervention on 8/17/79 is dealt with hereafter in connection with the State's contention that certain findings by the District Judge are now binding on the Administrative Law Judge here by operation of collateral estoppel.][20]

On 11/16/79 the record of this case was closed, subject to reopening for good cause shown any time before submission of the Initial Decision. On 12/21/79 Complaint Counsel submitted "Proposed Findings And Conclusions Of Counsel Supporting The Complaint" and "Complaint Counsel's Brief Supporting Conclusion Of Law." On the same date Intervenor served "Findings Of Fact And Conclusions Of Law." Some days later, pursuant to agreement of the parties and approval by the Administrative Law Judge, Respondent served "Respondent's

[20] *See* Pars. 187 to 209, below.

Submitted Findings Of Fact And Conclusions Of Law." On or about 1/10/80 all parties served responsive papers as follows: [15]

"Respondent's Response To Complaint Counsel's Findings Of Fact And Conclusions Of Law."

State of Indiana's "Response To Complaint Counsel's Proposed Findings Of Fact And Conclusions Of Law."

"Complaint Counsel's Reply To Proposed Findings Of Fact And Conclusions Of Law Of Respondent Indiana Federation Of Dentists And Intervenor State Of Indiana."

On 2/8/80 the Administrative Law Judge sought and on 2/14/80 the Commission granted an extension of time until 3/14/80 for the filing of the Initial Decision. A further extension of time to 2/24/80 was sought on 2/13/80 and on 3/18/80 was granted by the Commission.

II. Overview

This case explores the economic impact of mushrooming dental health care insurance on the practice of dentistry. Traditionally a dentist has been relatively unfettered in his diagnosis of a patient's needs.[21] The patient might or might not be able to afford what the dentist recommended but the recommendation itself was hardly ever questioned by anybody. The phenomenal growth of group dental health care insurance in recent years[22] has changed all that. Insurers, naturally anxious to contain dental health care costs, have not generally been prepared to pay for anything that a dentist recommends.[23] Their covenants to pay dental bills have commonly been limited to payment of a reasonable charge[24] for work reasonably [16] required.[25] That imports an objective standard of necessity. As a result, someone beside the dentist must now be involved in deciding (or at least confirming) a proper treatment plan on which the payment of insurance benefits can fairly be based.

The economic interest of dentists in not being "second-guessed" by their patients' insurers is too plain to need elaboration. The experience of dental health insurers—who, of course, have their own bias—

[21] CX 139 I.

[22] CX 804Z–18 (group dental expense health insurance benefit payments up from $140 million in 1970 to $951 million in 1976); By 1978 some 48 million Americans were receiving prepaid dental care through a contract with their employers or unions (CX 584A).

[23] Tr 394–95.

[24] The language commonly used is "usual and customary" charge. (CX 47H). However, the reasonableness of the fee is *not* an issue in this case.

[25] The phrase commonly used is "least expensive yet adequate treatment" (CX 47K). The implementation of this phrase goes to the heart of the case.

has been that correcting the treatment plans submitted by dentists in Indiana almost always means slimming them down rather than beefing them up.[26] Experience shows that an alternate benefits clause is a significant cost-containing mechanism.[27]

This is not to say that any large number of dentists deliberately set out to defraud whomever is paying the bill.[28] But where a range of opinion is possible it is [17] not surprising for dentists and bill-payers to have honest disagreements of opinion as to how much dental work is really required in a particular instance. That economic conflict constitutes the background of this case.

It is worthwhile noting that this essentially economic struggle has been embittered by something equally deep-seated. The record reveals many comments by dentists reflecting the professional man's inevitable indignation at being "second-guessed". Such revealing phrases as "degrading abuse,"[29] "subjugating his own professional judgment,"[30] "dictate to the doctor"[31] and "questioned as to my professional integrity"[32] give some indication of the strong emotional component involved in the struggle here. When Respondent's leaders complain about insurers' "interference with the dentist/patient relationship,"[33] they are referring not only to the possibility of losing money but to a loss of personal pride.

The wrath of the dentists of Indiana has most frequently been vented on two practices of insurers which, the dentists assert, justify them in refusing to turn over their patients' radiographs (commonly called "X-rays") to insurers who want to see what the X-rays show. The first reason usually given for such refusal is that insurers rely too heavily on the X-rays (*i.e.*, to the exclusion of oral examinations and other diagnostic aids). A second alleged reason is that insurers reportedly use lay personnel to read X-rays (under conditions discussed later). It is reasonable and indeed should be mandatory, they claim, for dentists to refuse X-rays to people who will only abuse them. The dentists do not usually refer to another possible reason but they must be presumed to intend the natural and probable consequence of refus-

[26] An Aetna survey in its Ft. Wayne office found 20 alternative course reductions in 21 referrals. Tr 1351–52. An Aetna witness claimed this was based on bad statistics but an official investigation by the Indiana Insurance Commissioner found that only 7 percent of all alternate treatments discussed by an insurer's dental consultant with the patient's dentist resulted in an "upgrade". CX 810H. We do not accept Complaint Counsel's claim in CCPF #54 that alternate benefits clauses yield higher benefits in up to 25 percent of all cases. Even Complaint Counsel concede that "it is more usual for dentists to overtreat than to undertreat" (citing Tr 332) and that "when alternate benefits are invoked it usually means that benefits will be paid for a less expensive treatment than that proposed" (citing Tr 619, 915, 1379–80, 1507).

[27] Tr 272, 276–77, 397, 527–28, 979, 980–81, 986, 1152, 1430.

[28] A top Connecticut General dentist/executive could recall no instance of intentional or fraudulent misrepresentation which that insurer had reported to any agency in the State of Indiana. Tr 562.

[29] CX 394G.

[30] CX 47K.

[31] CX 47J.

[32] Tr 2714.

[33] This is a frequent phrase in the record here. *See e.g.*, CX 397A.

ing the X-rays to insurers: to make it harder for insurers to second-guess dentists.

Be that as it may, insurers serving Indiana have found it much harder to get dentists to give up their patients' X- [18] rays there than elsewhere.[34] This complaint was brought by the Federal Trade Commission to find out why. If dentists' refusals to turn over X-rays to insurers have been based simply on dentists' individual decisions, there is probably no antitrust offense. Contra, however, if these refusals reflect even in part the influence of a concerted refusal to deal—a group boycott—one of the most heinous offenses known to the antitrust law. *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

In summary, what is in issue here is not whether dentists or insurers are right about what treatment is needed, either generally or in particular cases, nor even whether it is fair for dentists to individually withhold from insurers the X-rays which are so important in deciding on a proper treatment plan. The issue here is, rather, whether the Indiana dentists have unlawfully organized a *collective* effort—a *group* boycott—to try and keep those X-rays out of insurers' hands.

III. Findings of Fact

A. *Respondent*

1. The sole Respondent, Indiana Federation of Dentists ("IFD"), is an unincorporated association of Indiana dentists formed on August 24, 1976.[35] Article II, Section 2 of its constitution and by-laws makes membership open to any licensed Indiana dentist who endorses IFD's purposes and those of the American Federation of Physicians and Dentists, with which it is affiliated and to which each IFD member must belong.[36]

2. The "objectives" of IFD, as set forth in Article I, Section 2 of its constitution and by-laws, are essentially "to represent the economic interests of Indiana dentists as a [19] labor organization."[37] In pertinent part Section 2 reads:

Section 2. Objectives:

The Indiana Federation shall represent, protect, maintain, and advance, through activities accomplished by relevant techniques which may lawfully be engaged in by

[34] Tr 290–92, 1471, CX 563A. The American Dental Association, for example, has never opposed submission of X-rays to insurers (Tr 306, 1003–04)

[35] CX 477C; CX 22A.

[36] CX 13C. It further provides that an IFD member must not be affiliated with any other collective bargaining agent for dentists.

[37] CX 13A-B. Also quoted in Par. 105, below.

a labor organization, the interests of the dentists within its jurisdiction. The objectives of this Federation shall include, but not be limited to the following:

a.) To represent dentists in all socio-economic matters, negotiations and grievances with employers, third, and fourth parties or any group that is involved in financing or delivery of dental care. The ultimate purpose being to promote better patient care and to prevent abuses and correct inequities in the delivery of dental care to the public;

b.) To seek to insure adequate compensation and proper working conditions for dentists commensurate with their training and skill and the responsibility they bear for the life and health of their fellow human beings;

c.) The establishment or approval of appropriate utilization review or peer review procedures which do not interfere with the doctor-patient relationship and the maintenance of the highest quality of dental care;

d.) To associate together all dentists for their mutual benefit and protection;

e.) To unite the efforts of dentists in obtaining and preserving the individual freedom of action necessary for the success of their professional endeavors;

3. Although IFD is open to dentists throughout Indiana, its membership has been and is still largely concentrated in three localities of that state.[38] As of [20] June 1979 there were 46 members around Anderson (Madison County)[39] 27 members around Lafayette (Tippecanoe County)[40] and 19 members around Ft. Wayne (Allen County).[41] Obviously these are fairly small numbers in comparison with the 3,100 licensed dentists in Indiana[42] or the almost-as-large membership of the Indiana State Dental Society.[43] What IFD's members lack in numbers, however, they make up in the strength of their convictions. Immediately after issuance of this complaint each member was assessed a thousand dollars for litigation costs here (in addition to usual dues of two hundred dollars per year).[44]

4. Respondent has argued that the Commission has no jurisdiction over this unincorporated association because it is not organized to carry on business for its own profit.[45] However, the merest consideration of its objectives[46] makes it clear that IFD is not a charitable organization but is organized to carry on business in substantial part *for the profit of its members.* Accordingly, it falls within the definition of "corporation" as provided by Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44 (1976).

5. Numerous cases support this Commission's jurisdiction over purportedly non-profit organizations such as trade associations which,

[38] *See* RPF 2, IPF 116, 117.

[39] CX 811A (including 100 percent of all dental specialists in the area).

[40] CX 811B (including 67 percent of all dental specialists in the area).

[41] Statistics on specialists are not available for Ft. Wayne because this Chapter was not formed until 1978 (CX 566A-B).

[42] Tr 2261.

[43] The IDA mailing list is said to miss only 12–15% of all Indiana dentists (CX 303E).

[44] CX 12.

[45] Respondent's Answer to Complaint, Par. 17.

[46] *See* "objectives" set forth in Par. 2, above. Note also that IFD's application to the Internal Revenue Service for recognition of a federal income tax exemption was based on a claim that IFD is a labor organization rather than that it was a charitable association. CX 33A-B.

however, promote the economic interests of their members. *FTC* v. *Cement Institute,* 333 [21] U.S. 683, 690 (1948); *Fashion Originators' Guild of America* v. *Federal Trade Commission,* 312 U.S. 457 (1941); *National Commission on Egg Nutrition,* 88 F.T.C. 89, 175–177 (1976), *aff'd.,* 570 F.2d 157 (7th Cir., 1977), *cert. den.,* 439 U.S. 821 (1978); *FTC* v. *National Commission on Egg Nutrition,* 517 F.2d 485, 487–88 (7th Cir., 1975), *cert. den.,* 426 U.S. 919 (1976); *Chamber of Commerce* v. *FTC,* 13 F.2d 673, 684 (8th Cir., 1926); *National Harness Mfgrs. Assn.* v. *FTC,* 268 F. 705, 708–09 (6th Cir., 1920). Only one non-charitable purpose is necessary to give the Commission jurisdiction. *American Medical Association,* FTC Docket No. 9064, slip opinion of Commission issued 10/12/79, at page 5, fn.5 [94 F.T.C. 701 at 984].

6. Respondent IFD is not and never has been a labor union within the meaning of Section 6 and 20 of the Clayton Act (15 U.S.C. 17 and 29 U.S.C. 52) which exempt genuine labor unions from the provisions of the federal antitrust laws. Similar associations of independent businessmen, including private practice physicians, organized for the purpose of dealing with powerful customers have been held not entitled to the benefit of the Clayton Act exemption. *Columbia River Packers Assn.* v. *Hinton,* 315 U.S. 143 (1942); *American Medical Assn.* v. *United States,* 317 U.S. 519 (1943). Evidences of efforts to dress IFD up as a labor union thus have no significance here except as they may tend to show guilty consciousness by IFD's founders that their activities would probably be unlawful under the Federal antitrust laws.[47]

7. Respondent IFD is obviously not engaged in the business of insurance—however defined—within the meaning of the McCarran-Ferguson Act, 15 U.S.C. 1012, 1013(b), which makes the Federal antitrust laws inapplicable to the insurance business, except insofar as it is not regulated by State law. The insurers to whom Respondent's members have allegedly refused X-rays (thereby restraining their trade) are technically not engaged in the business of insurance either, because the Supreme Court has recently called risk-spreading and underwriting the essential elements of "insurance", *Group Life & Health Insurance Co.* v. *Royal Drug Co.,* 440 U.S. 205, 211 (1979) whereas the "insurers" involved here typically operate on a cost-plus basis, passing the risk back to the group covered (*e.g.,* all General Motors employees).[48] Even, however, if the kind of claims servicing functions performed by the "insurers" here be treated as "insurance" within the meaning of the McCarran-Ferguson Act, that Act expressly pro-

[47] *See* Par. 94, below.

[48] Under the Connecticut General/General Motors Plan the premium equals anticipated benefit payments during the coming year plus administration expense, share of overhead and profit (Tr 507–08). Under the Aetna/International Harvester Plan, Harvester transfers funds to Aetna to take care of claims up to a certain limit beyond which Aetna assumes the risk. "Premium" is defined in this contract to mean the sum of Aetna's administrative costs plus anticipated claims (Tr 1079–80).

vides that [22] nothing in it shall render the Federal antitrust laws inapplicable to any "agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." 15 U.S.C. 1013(b). Thus the same proof of participation in an organized boycott which would tend to establish a boycott in violation of the antitrust laws would at the same time lift the prohibition of the McCarran-Ferguson Act against action by this Commission to end such a boycott.

B. *Interstate Commerce*

9. Under the Magnuson-Moss Warranty-FTC Improvement Act of 1975 [Title II, Sec. 201(a)] amending 15 U.S.C. 45, unfair methods of competition and unfair trade practices are within the jurisdiction of the Commission if they are in or affect interstate commerce. The practice of dentistry in Indiana is obviously *not* in interstate commerce. However, much if not most of the business of dental health care insurance carried on in Indiana *is* in interstate commerce under the tests laid down in *United States* v. *Southeastern Underwriters Association,* 322 U.S. 533 (1944). The boycott alleged in the complaint is by its very nature designed to affect such interstate commerce in insurance adversely by depriving insurers of the X-rays they need in order to determine the least costly adequate treatment for their insureds.

10. The necessary effect on commerce must be substantial and "it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce." *McLain* v. *Real Estate Board of New Orleans,* 444 U.S. 232 (1980) (Docket No. 78–1501, slip opinion of 1/8/80, page 9). However, Federal jurisdiction for purposes of injunctive relief is not defeated by Complaint Counsel's "failure to quantify the adverse effect of respondent's conduct" or even by "inability to prove that concerted activity has resulted in (any) legally cognizable damages." *Ibid.,* page 10. The correct formula, as laid down [23] by the Supreme Court in *McLain* is that:

> To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents'... activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy . . . or by those other aspects of respondents' activity that are alleged to be unlawful. *Ibid.,* page 9.

11. In this case, while Complaint Counsel do not attempt to quantify the extent to which Respondent IFD's boycott campaign has in fact affected commerce in interstate insurance, the record is replete with evidence of the magnitude of business done by interstate insurers in Indiana under dental health insurance contracts with predetermina-

tion and alternate benefits provisions. For this purpose we adopt and attach hereto as Figure 1, a tabulation prepared by Complaint Counsel[49] from evidence specified in detail in Complaint Counsel's Proposed Findings of Fact #39 through #44, now incorporated herein by reference. Figure 1 shows that during 1976 and 1977 more than a half dozen well-known interstate insurers made benefit payments of almost $13 million into Indiana under dental plans with predetermination and alternate benefits features. An organized boycott attacking interstate business of this magnitude is a "substantial" restraint on such trade, whether or not the boycott ever succeeds.[50] **[24]**

[49] CCPF, page 20.

[50] "If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases." *Ibid,* pages 9–10. *See also Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 785 (1975): "The fact that there was no showing that . . . buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise the magnitude of the effect would control and our cases have shown that once an effect is shown, no specific magnitude need to be proved." [Citing *United States* v. *McKesson & Robins,* 351 U.S. 305, 310 (1956).]

Figure 1

45. Tabulation Of 1976-77 Data Contained In CPFs 39-44

Interstate Payments Into Indiana Under Dental Plans With Predetermination And Alternate Benefits Features

	Indiana		Anderson Area		Lafayette Area		Ft. Wayne Area	
	1976 */	1977 */	1976	1977	1976	1977	1976 */	1977 */
Aetna	$1,875,000	$2,250,000					$1,151,995	$1,453,751
CG	9,322,800	9,707,000	$2,141,100	$2,600,100				
Metropolitan	284,000	339,000						
Travelers	489,522 **/	2,365,887			$3,694 **/	$77,816		
Prudential	440,000	1,178,000						
Equitable	456,750	375,600						
Other Relevant Interstate Dental Benefit Payments								
Peter Paul Inc. (Frankfort, Ind.)					$3,870	$18,864		
Johns-Manville (Alexandria, Ind.)			$11,476	***/				
Totals	$12,868,072	$16,215,487	$2,152,576	$2,600,100	$7,564	$96,680	$1,151,995	$1,453,751

*/ Policy and calendar years, whichever the company uses to compute data.

**/ Statistics were available for only July - December of 1976 (see CPFs 39, 43).

***/ Data for 1977 unavailable. The amount for 1978 was $8,986 (see CPF 44).

[25] C. *The IDA Boycott*

12. The Supreme Court recently defined a "boycott" this way:

> The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold patronage or services from the target. *St. Paul Fire & Marine Ins. Co.* v. *Barry,* 438 U.S. 531, 541 (1978).

Unlike some legal definitions, this one conforms closely to the common understanding of the same word.[51] Our immediate task is to determine whether the record here fairly establishes a boycott and, if so, what if any role Respondent has played in organizing it and/or keeping it going.

13. The allegation of the complaint in Pars. 9–10 is that Respondent Indiana Federation of Dentists, when formed in late August 1976, simply took over a going conspiracy organized by IDA to keep dental X-rays out of insurers hands. When dawning consciousness of illegality led IDA to give up the fight, IFD was organized as a "labor union" by the old leaders to continue the same boycott in a new guise, Paragraph 11 of the complaint charges. A mass of evidence supports this allegation.

14. Indiana Dental Association (IDA) is a "constituent society" of the American Dental Association.[52] Its membership in 1974 encompassed about 85 to 88 percent[53] of the state's 3,100 licensed dentists.[54] Its members automatically belong to 14 affiliated "component" (*i.e.,* local) dental societies,[55] which elect representatives to [26] the state association's governing body, known as the House of Delegates.[56] IDA's top executives including a President, Secretary and Board of Trustees, are elected statewide annually.[57]

15. Sometime before 1970, in response to the appearance of industrial and other group dental insurance plans, IDA had set up a Council On Dental Care Programs (CDCP) composed of representatives from each of the 14 local societies.[58] It was its duty, among other things, to "formulate Association policies, standards and principles for evaluating group-funded dental care programs (public and private) subject to approval of the House of Delegates."[59] The three areas (Anderson, Lafayette and Ft. Wayne) where anti-insurer sentiment was strongest

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[51] "To combine against a landlord, tradesman, employer or other person, to withhold social or business intercourse from him and to deter others from holding such intercourse." Webster's New International Dictionary, *vide* "boycott".

[52] CX 798E; CX 799E.

[53] CX 303E.

[54] Tr 2261.

[55] CX 3B, CX 4B, CX 5B, CX 6B, CX 7C, CX 8B, CX 9B, CX 10B, CX 11B.

[56] CX 798G; CX 799G

[57] CX 798L; CX 799 I.

[58] CX 3D; CX 72C; CX 99D; CX 433.

[59] CX 798Q; CX 799M.

and which would eventually give birth to the three chapters of IFD were always well-represented on CDCP. Future officials of IFD who sat on IDA's Council On Dental Care Programs during the 70's are shown in Figure 2. [27]

Figure 2

Future IFD Officials Who Served On IDA Council On Dental Care Programs

			Evidentiary References	
Year	Name	Area	IFD Membership	CDC Positions
1970–71	Dr. Robert Gayle	Ft. Wayne	CX 21	CX 3D
	Dr. Richard Harrison	Anderson	CX 18A	CX 3D
1971–72	Dr. Robert Gayle	Ft. Wayne	CX 21	CX 4D
	Dr. Richard Oliver	Lafayette	CX 20B	CX 4D
	Dr. Paul Van Dorn	Anderson	CX 18B	CX 4D
1972–73	Dr. Robert Gayle	Ft. Wayne	CX 21	CX 6D
	Dr. Richard Oliver	Lafayette	CX 20B	CX 6E
	Dr. Paul Van Dorn	Anderson	CX 18B	CX 6D
1974–75	Dr. Robert Gayle	Ft. Wayne	CX 21	CX 7D
	Dr. Richard Oliver	Lafayette	CX 20B	CX 7E
	Dr. Dan Rohn	Anderson	CX 18B	CX 7D
	Dr. Paul Van Dorn	Anderson	CX 18B	CX 7D
1975–76	Dr. Richard Fontaine	Lafayette	CX 19A	CX 8E
	Dr. Karl Gossweiler	Anderson	CX 18A	CX 8D
	Dr. Dan Rohn	Anderson	CX 18B	CX 8D
	Dr. David Steele	Anderson	CX 18B	CX 8D
1976–77	Dr. Richard Fontaine	Lafayette	CX 19A, 20A	CX 9D
	Dr. David McClure	Anderson	CX 18A	CX 9D
	Dr. Dan Rohn	Anderson	CX 18B	CX 9D
	Dr. Charles Sabel	Lafayette	CX 19A, 20B	CX 9D
	Dr. David Steele	Anderson	CX 18B	CX 9D
1977–78	Dr. David McClure	Anderson	CX 18A	CX 10D
	Dr. Charles Sabel	Lafayette	CX 19A, 20B	CX 10D
	Dr. David Steele	Anderson	CX 18B	CX 10D
1978–79	Dr. David McClure	Anderson	CX 18A	CX 11D
	Dr. Charles Sabel	Lafayette	CX 19A, 20B	CX 11D
	Dr. David Steele	Anderson	CX 18B	CX 11D [28]

Attention should be called to the prominent roles played in the Council during much of the '70's—even after the formation of IFD—by Dr. Dan Rohn (Vice Chairman and then Chairman, 1974–1977) and Dr. David McClure (Consultant at Large, 1976–1979), the two principal figures in IFD.

16. These roles have been in *addition* to other significant positions in IDA held by these future IFD officials, all as shown in CX 2A-E. Dr. Rohn, for example, was President of the Indiana Dental Association for 1972–73 and Dr. McClure was Secretary of the Indiana Dental Association from 1970 until 1976 (the year that IFD was formed with McClure as President and Rohn as Vice President). Drs. Rohn, McClure and Oliver, along with Dr. James Frey of the Ft. Wayne area, another future IFD official, made up half of a special six-dentist "task force" on Dental Care Programs set up to supplement the work of CDCP during the critical 1976–77 period.[60] Dr. Rohn chaired *both* the Council and the task force.[61]

17. IDA's attitudes and policies toward dental health insurance plans have long been embodied in an official "Manual On Group Funded Dental Care Programs."[62] It first appeared in January 1968; a second edition was published in November 1969; and revisions were made thereafter in May 1972, May 1974 and May 1976.[63] The "Manual" is one of the most important pieces of evidence here because it lays out so clearly and completely the IDA policies on which the boycott was based. It begins with an introduction by CDCP:

> The purpose of this manual is to *give Indiana Dentists and their assisting staff an appropriate and useful guide to follow when providing dental care to patients having a group funded dental care plan* (public or private). By making this information readily available to Indiana dentists, *the Association policies and standing rules regarding group funded programs will be more* [29] *meaningful; followed more uniformly;* and result in better services to patients and dentists alike. (emphasis added)[64]

18. Part II of the "Manual" ("Policy and Information") covers "I.D.A. Policy Regarding Group Dental Care," reciting adoption by I.D.A.'s House of Delegates on 5/22/62 and amendments by the same authority dated 1965, 1966 and 1972.[65] [The last revision in this record (1976) also recites amendments adopted in 1970, 1973, 1974 and 1975.][66] It begins with a section on "I.D.A. Policy Regarding Group Dental Care," subtitled "Principles for Determining the Acceptability

[60] CX 106, CX 490B.
[61] CX 106.
[62] CX 47, CX 72, CX 99.
[63] CX 47A, CX 72A and CX 99B. This record contains no later editions or revisions.
[64] CX 47C.
[65] CX 47E.

of Plans for the Group Purchase of Dental Care" (more commonly called "the Principals of Acceptability").[67] These "principles" cover a number of matters such as IDA participation (but without contractual commitment) in the development of such plans; maintenance of a high standard of dental treatment and compliance with IDA's Code of Ethics; freedom of patients to choose their dentists and vice versa; eligibility of all licensed dentists to participate, etc.[68]

19. Of particular importance here is Principle Number 6, which reads as follows:

> 6. The areas of responsibility involved in the administration of the plan must be recognized and properly evaluated.
>
> a. The administration of the professional phases of the plan should be entirely within the control of professional personnel. Professional standards and treatment should not be controlled by non-dental administrators.
>
> b. The method of authorization of dental health care under pre-payment plans should be limited to determining the eligibility of the patient and **[30]** extent of liability of the plan and should prevent any interference with the dentist-patient relationship or with the judgment and decision of the dentist. The plan must not *require* the dentist to submit[69] radiographs (X-rays) to a third party. (emphasis in original)
>
> c. The submission of a total estimate is acceptable, *if requested by the patient.* (emphasis in original)[70]

20. Note well that while Principle Number 6 is clearly opposed to insurance contracts which compel production of a dentist's X-rays at the request of the insurer, this Principle does *not* take the next step: directing dentists to refuse to submit X-rays to third parties on request. However, a subsequent part of the "Manual" contains a form letter to be sent by dentists on I.D.A. stationary "To All My Patients," which does, indeed, take the next step. Paragraph Number 5 reads:

> Dental radiographs (X-rays) are a part of the dentist's legal health records. They are available for valid review by a qualified representative(s) of your insurance company in this office. *Radiographs (X-rays) will not be submitted to third parties for their use in determination of benefits* (*e.g.*, least expensive adequate procedure or optional course of treatment) because a determination of an adequate treatment plan can only be made after a knowledge of the following:
>
> A. Complete patient evaluation
> B. Radiographs
> C. Additional diagnostic procedures as required. (emphasis added)[71] **[31]**

21. Paragraph 5 of the form letter "To All My Patients" plainly directs Indiana dentists not to send X-rays to insurers for the only purpose insurers would want them: to determine insurance benefits.

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[67] CX 47E.
[68] CX 47E.
[69] Later revisions inserted here "either pre or post operative." *See* CX 99F.
[70] CX 47E.
[71] CX 47G. *See also* CX 72F and CX 99 I (same wording in later revisions of Manual).

It can be argued—that the provision permitting "qualified" insurance personnel to come to the dentist's office to study X-rays prevents the passage in question from amounting to a total blockage of access to the X-rays.[72] However, there is unchallenged testimony in this record to the effect that it is not economically feasible and in any event it would be a terrible waste of time to have insurers' professional dental consultants constantly travelling from office to office to talk to dentists (when available) and look at their X-rays.[73] As a practical matter, we find that Paragraph 5 of the Manual amounts to a plan by IDA for Indiana dentists to boycott insurers. Whether the boycott could be justified, as attempted in the suggested Paragraph 5, on a theory that working from X-rays alone without "complete patient evaluation" and "additional diagnostic procedures" is inadequate for proper determination of a treatment plan is, of course, a separate question, reserved for consideration hereafter.[74]

22. A subsequent section of the Manual is entitled "Uniform Method For Processing Group Funded Dental Care Plans,"[75] and goes into great detail on how a dentist should deal with his patients (including giving them copies of the "To All My Patients" letter described above). Under "Points to Discuss with Patients" occurs this enlightening advice from IDA to its dentist members:

1. Pre-authorization or predetermination is required by some group-funded dental care programs.[76] The dentist [32] will cooperate with this procedure by providing the patient with a treatment plan on the Uniform Report Form if—

a. The plan does not interfere with the dentist's professional judgment (*i.e.*, attempt to dictate to the doctor and his patient what and/or how the service should be performed).

b. It is *limited* to determining the extent of liability of the plan.

c. It does *not* require the submission of preoperative radiographs.

2. Some insurance plans provide for "alternate benefits". Usually, the wording for this in a plan is, "... *the least expensive yet adequate treatment.*" If this is the case, be sure the patient understands that the treatment plan the dentist has proposed may not be accepted by the insurance company. Instead, the company may pay for a *less expensive or optional* course of treatment which the third party determines to be adequate. In this event the dentist and patient have two options:

a. Continue with the original treatment plan with the patient understanding that he will be reimbursed for only part of the cost of treatment.

b. If the patient elects the alternate treatment as determined by the insurance company, the dentist should consider the fact that in proceeding with a treatment plan prescribed by a third party, he (the Dentist) is put in the [33] position of justifying, both

[72] The same invitation to check X-rays in the attending dentist's office appears in a "sample letter to (insurance) carrier if carrier requests X-rays. . . ." CX 47X; CX 72O; CX 99V.

[73] Tr 341–42, 924–25, 978, 1221, 1232, 1383–84, 1457; CX 303E; CX 316.

[74] *See* Pars. 120–148 below (re reasonableness of the restraint).

[75] CX 47I *et seq.*; CX 72H *et seq.*; CX 99K *et seq.*

[76] The testimony here was that predetermination is usually required for work expected to cost over $100, although inflation has recently been driving that figure up to $125. (Tr 393, 535–536, 980)

morally and legally, the results of this plan, which is not of his own making. And moreover, in subjugating his own professional judgment to a third party, he is negating his claim to a professional status and, in fact, has become merely a mechanic carrying out a treatment plan designed by someone who has never seen his patient and whose qualifications are unknown. Thirdly, by accepting such third party diagnosis, the dentist will be setting a dangerous precedent which could have far reaching implications, affecting the professionalism of dentistry."[77] (emphasis in original)

23. The strong *feeling* evident in this passage provides revealing background for the *action* called for by the next part of the Manual. This instruction is found in an "Attending Dentist's Statement" to be given by a patient to an insurer as a claim form.[78] The front and rear are shown here as Figures 3A and 3B respectively: [34]

[77] CX 47J-K.
[78] CX 47L-M; CX 72I-J; CX 99M-N.

ATTENDING DENTIST'S STATEMENT

CX ID-47-L

CHECK ONE: ☐ DENTIST'S PRE-TREATMENT ESTIMATE ☐ DENTIST'S STATEMENT OF ACTUAL SERVICES

Spaced for Typewriter - Marks for Tabulator Appear on this Line

1. EMPLOYEE NAME | 2. SOCIAL SECURITY NUMBER

3. ADDRESS | CITY | STATE OR PROVINCE | ZIP

4. PATIENT NAME (If a Dependent) | 5. RELATIONSHIP TO EMPLOYEE | 6. BIRTH DATE MO. DA. YR. | 7. DATE FIRST VISIT (Current Series)

8. EMPLOYER NAME | 9. DOES PATIENT HAVE OTHER HEALTH COVERAGE? YES ☐ NO ☐ IF "YES" PLEASE IDENTIFY.

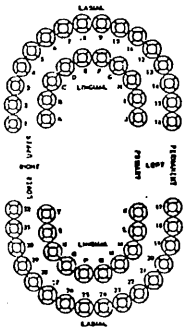
10. GROUP DENTAL PLAN NAME | 11. POLICY NUMBER | 12. UNION LOCAL NO.

13. DENTIST'S NAME (Print) | 14. LICENSE NO. | 15. INDIVIDUAL PRACTITIONERS - SS# ALL OTHERS - EMPLOYER I. D. #

16. ADDRESS CITY STATE OR PROVINCE ZIP | MUST BE FURNISHED UNDER AUTHORITY OF LAW

17. IS ANY OF THE TREATMENT FOR: (a) ORTHODONTIC PURPOSES? YES ☐ NO ☐ | (b) ACCIDENTAL INJURY? YES ☐ NO ☐ | (c) OCCUPATIONAL INJURY? YES ☐ NO ☐

18. IF PROSTHESIS, IS THIS INITIAL PLACEMENT? YES ☐ NO ☐ IF NO, REASON FOR REPLACEMENT? | 19. DATE OF PRIOR PLACEMENT? MO. DA. YR. | 20. ARE X-RAYS ENCLOSED? YES ☐ NO ☐ IF YES, HOW MANY?



INDICATE MISSING TEETH WITH AN "X"

REMARKS FOR UNUSUAL SERVICES

EXAMINATION AND TREATMENT RECORD - USE CHARTING SYSTEM SHOWN

TOOTH # OR LETTER	SURFACES	DESCRIPTION OF SERVICE (INCLUDING X-RAYS, PROPHYLAXIS MATERIALS USED, ETC.)	DATE SERVICE PERFORMED MO. DA. YR.	ADA PROCEDURE NUMBER	FEE	FOR CARRIER USE ONLY
		Initial Oral Examination	6 4 72	00110		
		Intra-Oral Complete Series	6 4 72	00210		
13	1	Amalgam-one surface-permanent:	6 4 72	02140		

SAMPLE

ORTHODONTICS: (give diagnosis, class of malocclusion and describe appliance(s) in above treatment section)

DATE FIRST APPLIANCE INSERTED

DATE LAST APPLIANCE REMOVED

TREATMENT PERIOD (Number Months)

TOTAL FEE $

TOTAL FEE ACTUALLY CHARGED | PATIENT PAYS | BALANCE | CARRIER % | CARRIER PAYS

I HAVE REVIEWED THE FOREGOING TREATMENT PLAN. I AUTHORIZE RELEASE OF ANY INFORMATION RELATING TO THIS CLAIM.

SIGNED (PATIENT, OR PARENT IF MINOR) DATE

I HEREBY CERTIFY THAT THE SERVICES LISTED ABOVE WILL BE ☐ HAVE BEEN ☐ PERFORMED

SIGNED (DENTIST) DATE

I HEREBY AUTHORIZE PAYMENT DIRECTLY TO THE ABOVE-NAMED DENTIST OF THE GROUP INSURANCE BENEFITS OTHERWISE PAYABLE TO ME, BUT NOT TO EXCEED THE CHARGES SHOWN. I UNDERSTAND THAT I AM FINANCIALLY RESPONSIBLE FOR ANY CHARGES NOT COVERED BY THIS AUTHORIZATION.

SIGNED (INSURED PERSON) DATE

Form Approved by the Council on Dental Care Programs of the A. D. A., June, 1971

Form Approved by the Council on Dental Care Programs of the A. D. A., Aug. 15, 1971

Figure 3-B

YOUR DENTIST wishes to cooperate with you as his patient in order that you may learn the extent of your dental care insurance coverage and how much will be paid to you.

In order to avoid any misunderstanding, we urge you to read the following information:

1. Our professional services are rendered on the basis that all costs of treatment will be paid by the patient.

2. In some plans, the dental insurance contract is written to provide for the least expensive, adequate procedure as determined by the insurance company. The carrier will request x-rays to make this determination. If your contract is written in these terms, please give special attention to the following:

   A. The Indiana Dental Association does not agree with such a contract.

   B. Trying to determine if a treatment plan is adequate based on x-rays alone is impossible without an in-office examination of the patient.

   C. X-RAYS WILL NOT BE SUBMITTED TO A THIRD PARTY FOR THIS PURPOSE.

   D. Your dental insurance contract is an agreement between you and/or your employer and their insurance carrier. Indiana dentists are not bound by any dental care insurance contract stipulation.

[36] 24. Figure 3–A is a critically important piece of evidence. It dispels any impression that IDA is merely expressing an academic disagreement or an academic belief. Paragraph 2–C of Figure 3–A is an action sentence. When it says, in standout type, that *"X-rays will not be submitted to a third party for this purpose,"* (emphasis added) ADA is now telling its dentists to tell their patients that this is the way it is going to be. As in Paragraph 5 of the "To All My Patients" form letter,[79] *IDA here again makes it clear that Indiana dentists are expected by ADA to join in a boycott of the insurers serving that state.*

25. Not only were these identical words still on the back of IDA's claim form in the latest record revision of IDA's "Manual" in 1976 (the year that IFD was founded),[80] but the rule had actually been tightened up in important respects.[81] Significantly, the 1976 revision of the "Manual" was systematically distributed to *all* members of the Indiana Dental Association by order of Dr. David McClure for IDA's Council on Dental Care Programs[82] during the same time that he was organizing and becoming the first President of the Indiana Federation of Dentists.

26. It is now well established that an organization of professionals whose members accept and follow anticompetitive organizational policy declarations may be found to have conspired with its members to that end. *United States* v. *National Society of Professional Engineers,* 389 F. Supp. 1193, 1201, 1216 (D.D.C., 1974), *vacated,* 422 U.S. 1031 (1975), *affd. on remand,* 404 F. Supp. 457 (D.D.C., 1975), *affd. and modified,* 555 F.2d 978 (D.C. Cir., 1977), *affd.,* 435 U.S. 679 (1978); *United States* v. *Texas State Board of Public Accountancy,* 464 F. Supp. 400, 403 (W.D. Tex., 1978), *affd. per curiam as modified,* 592 F.2d 919 (5th Cir., 1979), *cert. denied,* 48 U.S.L.W. 3283 (10/29/79); *American Medical Assn.,* FTC Docket #9064, slip opinion of 10/ [37] 12/79 at p. 21 [94 F.T.C. 701 at 998]; *appeal docketed,* Civ. No. 79–4214 (2d Cir., 12/3/79). Here there is abundant evidence that IDA's boycott policy was, in fact, accepted and followed by many if not most of its members. We now review that evidence.

D. *The Pledge Project (1973)*

27. Perhaps the most striking evidence of the backing which the membership of IDA has given such leaders as Drs. McClure and Rohn is found in a so-called "pledge project" which these two dentists co-

[79] *See* Pars. 20–21 above.

[80] CX 99N.

[81] In May 1976 IDA added to the form its opposition to the whole alternate treatment concept (CX 99G); affirmed that an insurer's inspector must be a duly Indiana licensed dentist (CX 99W); and insisted that an insurer must pay the treating dentist a "consultation fee" (CX 99W).

[82] Tr 2500–01; CX 104.

chaired in early 1973.[83] The pledge card itself is reproduced here as Figure 4.[84] [38]

Figure 4

Name _____
Address _____
Component _____
I.D.A. Member Yes _____ No _____
The above mentioned dentist was contacted on _____ by Dr. _____.
His reason for not signing the pledge card is as follows:

_____
_____
_____
_____

PLEDGE

As a member of the dental profession licensed to practice in the state of Indiana, I am obligated from a professional and legal point of view to provide my patients the best dental care I can deliver. This care is based on a mutual understanding between the patient and the dentist.

Certain group-funded dental plans can interfere with the principle of maintaining a high standard of dental treatment. Therefore, I will participate in all plans within the framework of the Principles of Acceptability approved by the Indiana Dental Association.

_____
(Signature)

_____
(Date)

[39] 27.1 In an invitation to certain dentists to attend a project orientation meeting and "leadership training session" the project was explained this way:

As you know, there is significant rapid growth of group-funded dental care programs in Indiana. *The I.D.A. has prepared to meet this challenge through the development and implementation of the "Indiana Plan". We know it will work because it has worked successfully for many on-going programs in Indiana.* True, there is a major program that is giving us trouble (Aetna-International Harvester-U.A.W.)[85] and this must be resolved.

[83] CX 124 and CX 125.
[84] CX 126C.
[85] Highlights of the Aetna-Harvester-U.A.W. struggle with I.D.A. are summarized in Par. 40 *et seq.*, below.

* * * * * * *

With the advent of many more programs—particularly the pending U.A.W. Auto Contract[86]—we must make sure the "Indiana Plan" continues to work and work well, or we stand the chance of being dictated to by some distant third party. With this in mind, the I.D.A. Board of Trustees has approved a statewide "Indiana Plan" pledge project program.

* * * * * * *

What we are asking is that you be one of our key representatives to take the pledge project to the (local) component societies; give them the "pitch"; and bring home the pledges. *Once this has been accomplished we can say, with proof, to any third party that Indiana dentists actively support the "Indiana Plan".* (emphasis added)[87] **[40]**

28. Attendees at the "pledge project" orientation meeting were each given a "training kit" containing various materials for canvassers to study in preparation for making their "pitch".[88] A list of "ideas for presentation" included a reaffirmation of IDA's position that "there are many factors that guide a dentist in his determination of a treatment plan" and that "proper dental treatment is predicated on a diagnosis from many types of examination and *not radiographs alone"* (emphasis added).[89] It warned that "if dentists allow third-party [insurer] intervention, we will soon find ourselves technicians rendering a service sold, priced and controlled entirely by a third party."[90] The "pitch" of most importance here was a final appeal for collective action:

The road ahead *depends upon the unity* that will be generated among Indiana dentists. It is time to close our ranks and look to the future. *Unity = Negotiating Power.*[91]

29. The same occasion brought forth numerous other references to the need for professional solidarity in dealing with the insurers:

Dr. Lloyd Phillips (IDA's Trustee in the American Dental Association)

We have assumed that Indiana's position was and is one of strength because the members of the Indiana Dental Association believed in the "Indiana Plan" and supported it with action. *We are here today to organize an evangelistic brigade to go out and preach the gospel;* to explain the principles; give the reasons why they should be supported; and then ask each member to indicate his support and his belief by signing

[86] Apparently refers to the Connecticut General - General Motors - U.A.W. contract which was to become effective the following year (1974). *See* Par. 53 *et seq.*, below.

[87] CX 125.

[88] CX 139A through CX 139-Z4.

[89] CX 139M.

[90] CX 139M.

[91] CX 139M.

a pledge. (emphasis added)[92] [41]

Dr. David McClure (Secretary of IDA)

Two weeks ago G.M. sent their top negotiator to Anderson to meet with Dr. Van Dorn and me. . . . They are very aware of us and would never have sent this type brass down if they weren't concerned. *It boils down to their respect for our unity and I do feel that we can influence our future.*[93]

* * * * * * *

A few weeks ago we met with officials from Equitable Life Assurance Society. . . . Here again *they respect unity.* (emphasis added)[94]

Dr. Dan Rohn (President-Elect of IDA)

In order to make a profit and be competitive, the (insurance) carrier must have some kind of cost control. The union doesn't want the traditional methods of cost control such as a table of allowances, a deductible plan, or any limitation on benefits. The (insurance) carrier then must control costs by controlling the dentist. A fee schedule is one way of doing this. Another is the most recent "gimmick"—a clause which states the least expensive adequate treatment *as determined by the carrier!* (emphasis in original)

What this really means is that the insurance company reserves the right to review the dentist's treatment plan, examine his X-rays, make a diagnosis of oral disease, and alter the treatment plan as they see fit to suit their economic considerations. We know this has been done by untrained, unqualified and unlicensed people. [42]

We know this has happened in the past; we know this is happening now; and we know it will continue to happen in the future unless *we assert ourselves.* (emphasis in original)

Just how do we think we can interject ourselves in these negotiations and effect (sic) the way a contract will be written? By showing *unquestionable solidarity!* (emphasis in original) *By obtaining a pledge from every practicing dentist in the State of Indiana stating that he will not provide his professional services with any group funded plan whose procedures and requirements do not meet the standards of the Indiana Dental Association.* (emphasis added)

If we can get a majority of the practicing dentists in the state to give us this pledge, we can assert ourselves as a fourth interested party. (emphasis added)

We can advise local labor and management groups of how much solid support we have for our principles. (emphasis added) They have already told us they will listen. . . . *They know that they cannot receive any dental benefits unless we are willing to service their agreement.* (emphasis added) To obtain these pledges *we must have your cooperation.* (emphasis added) We want to face every dentist in the state; explain our position as we have done here today; and ask him to sign a pledge to show support for these principles.[95]

30. The IDA party line during these years—with one eye on the

[92] CX 139C.
[93] CX 139G.
[94] CX 139H.
[95] CX 139J-K.

Justice Department and a possible charge of restraint of trade—seems to have been that IDA merely determines whether an insurer's plan "does not appear to be in the best interests of the doctor-patient relationship" and informs "the general membership" of "the general picture," leaving it to the dentists to "react as individuals".[96] However, the foregoing passages clearly [43] evidence a plan to mobilize Indiana's dentists into an "evangelistic brigade": brandishing a *collective,* not an *individual* refusal to deal with the insurers serving the state.[97]

31. IDA's well-organized "pledge project" to enlist added support for the work of IDA's Council On Dental Care Programs was, in fact, a "tremendous success", with several of the association's fourteen local component societies actually achieving 100 percent support for the IDA Principles of Acceptability.[98] Dr. Robert Gayle of Ft. Wayne, for example, reported to Co-Chairman Rohn that he had addressed 26 of the 48 members in the Richmond area, all of whom signed a pledge card and agreed to assist in getting the other men that were absent to sign a pledge card.[99] He further reported:

> I felt as though the subject was well received and from the comments made, the concept of unity would be worked for in that area. (emphasis added)[100]

Overall, CDCP's Chairman reported, more than 85 percent of IDA's membership responded that they would support the Principles of Acceptability.[101]

32. In IDA's house organ Co-Chairman Rohn, by then President-Elect of IDA, wrote:

> In the past year, as we have met with insurance carriers and different management representatives, they would often reply that we didn't speak for the IDA membership at large. So the pledge project was concerned with the idea that we must know if we are on the right track when advocating policy that the dentists of Indiana through their House of Delegates have approved. [44]
>
> * * * * * * *
>
> What does this overwhelming success mean? It means that we have *unity* (emphasis added) and your leadership can go to insurance carriers, unions and management with these pledge cards in our pocket. We can inform them that the dentists of Indiana do support their Association's Principles of Acceptability. Any contract that is written

[96] CX 74A.
[97] CX 138.
[98] CX 138.
[99] CX 133.
[100] CX 133.
[101] CX 74A.

without taking this into consideration will have problems in Indiana.[102]

It would be hard to imagine a more clear-cut acceptance of IDA's proposed concert of action. The only remaining question is whether the IDA boycott *proposed* by its leaders and *accepted* by "a vast majority"[103] of its members was, in fact, *followed.*

E. *The Post Card Survey (1975)*

33. Two years after the Pledge Project, IDA's Board of Trustees reaffirmed support for the IDA Principles of Acceptability[104] and had the IDA central office conduct an official survey by mail of the membership's thoughts and actions on X-rays and dental insurance programs.[105] No attempt was made to identify respondents.[106] The questions asked by the survey were as follows:

1. Are you in private practice in Indiana? (If 'No' you need not answer the other questions. Please return the card.)
2. Are you receiving requests from third parties (insurance companies) for X-rays?
3. Are you presently sending X-rays to [45] third parties?
4. If the answers to questions 2 and 3 are 'No', would you send X-rays if requested?"[107]

34. Of 2,000 surveys mailed to IDA's members, 1,342 or 67 percent were returned[108] and of the 1,342 returns 1,268 or 95 percent were from private dentists.[109] The results of the survey by component societies, as tabulated by IDA's central office for IDA's top leadership at the time, are shown in Figure 5.[110] They reveal that statewide, although 811 members were getting requests for X-rays from insurers only 133 members were sending X-rays to the insurers.[111] Of another 407 members who reported neither getting requests nor sending in X-rays, only 29 said they would do so if requested, while 378 said they would refuse.[112] **[46]**

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[102] CX 142A.
[103] CX 64B.
[104] CX 144.
[105] CX 145A.
[106] CX 144.
[107] CX 145A.
[108] CX 145A.
[109] CX 145A.
[110] CX 145C.
[111] CX 145C.
[112] CX 145C.

Results of post card survey on x-rays by Component Societies (Jan. 28, 1975)	1. Are you in private practice in Indiana?		2. Are you receiving requests from third parties for x-rays?		3. Are you presently sending x-rays to third parties?		4. If the answers to questions 2 and 3 are NO, would you send x-rays if requested?		TOTAL RESPONSES
COMPONENT SOCIETY	Yes	No	Yes	No	Yes	No	Yes	No	
Ben Hur	15	0	4	11	0	15	0	10	15
East Central	85	4	34	51	1	82	0	49	87
Eastern Indiana	26	2	18	8	1	25	1	7	28
First District	105	3	61	44	4	99	3	39	108
Greene District	16	1	12	5	1	15	0	5	17
Indianapolis District	318	34	217	93	55	253	8	74	352
Isaac Knapp	105	4	83	22	4	101	1	20	109
North Central	128	6	63	62	4	122	5	54	134
Northwest	169	11	134	30	31	133	7	20	180
South Central	84	1	53	32	14	69	0	28	85
Southeastern	38	2	23	13	4	32	0	12	40
Wabash Valley	62	3	42	18	7	53	0	18	65
West Central	63	1	36	27	4	59	2	24	64
Western Indiana	56	2	31	22	3	47	2	18	58
Grand Total	**1268**	**74**	**811**	**438**	**133**	**1105**	**29**	**378**	**1342**

Figure 5

[47] 35. The percentage of dissidents in the three areas which would later spawn IFD (Anderson, Lafayette and Ft. Wayne) was a little less (6%) than in the state as a whole (16%) but it seems plain that, even viewed statewide, most Indiana dentists were or at least claimed to be refusing insurers' requests for X-rays as of early 1975. The inference is inescapable and we accordingly find that most Indiana dentists were not only agreeing in theory but following in practice the plan to boycott insurers sponsored by IDA during most of the 1970's.

36. The existence of an IDA conspiracy to deprive dental health care insurers of X-rays needed to determine insurance benefits seems well-established by the evidence reviewed above and it would seem unnecessary to elaborate further on it. However, Complaint Counsel have asked for additional findings on the subject with which we agree and which we now cursorily adopt. These are as follows.

37. Complaint Counsel point out (in CPF #66) that IDA leaders believed they needed unity to implement the Indiana Plan and the Principles of Acceptability and members were repeatedly so instructed. The record citations[113] support this. They point out (in CPF #67) that IDA officials repeatedly urged IDA members to refrain from submitting X-rays to third-party payers (or even to dentists' patients) and to refrain from cooperating with any plan requiring predetermination of benefits or alternate benefits features, frequently advising IDA members as to which dental plans were (or were not) in compliance with IDA's Principles of Acceptability. This proposed finding, too, is well-supported by the cited evidence.[114]

38. CPF #68 recites how IDA contacted numerous insurers, managements and labor organizations, informing them of IDA's Indiana Plan and that its members did not submit X-rays to insurers. This proposed finding, too, is supported by the record[115] as are the proposed findings [48] that IDA's CDCP and officers attempted to assert as much input as possible into the dental plan of General Motors and the U.A.W. prior to that plan's 1974 implementation date[116] and that IDA's CDCP and Board of Trustees urged all members to get their patients to write the Indiana Insurance Commissioner when dental insurance companies paid benefits at a lower level when X-rays were not submitted.[117]

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[113] CX 39B; CX 62; CX 71B-C; CX 73; CX 104; CX 135; CX 139C-E; CX 459J.

[114] CX 38A; CX 39A-B; CX 43B, D; CX 55; CX 62; CX 64B; CX 71A; CX 75A; CX 82A; CX 99G, I, K, L, N; CX 108A, B; CX 144; CX 47-Z6.

[115] CX 63A-B; CX 64B; CX 74A-B; CX 84C-D; CX 101A-B; CX 327S-T.

[116] CX 71A.

[117] CX 82A, C, D. The Insurance Department apparently received several such patient complaints but announced in May 1975 that an insurer's reduction of benefits when X-rays were not submitted constituted neither a violation of Indiana insurance law nor an "unfair claims practice" (CX 841).

F. *Two Boycott Targets*

39. The actual operation of IDA's group boycott is perhaps best understood by tracing its struggles with two leading dental health care insurers, Aetna Life and Casualty Insurance Co. and Connecticut General Life Insurance, both of Hartford, Connecticut, and both substantial, well-known, nation-wide enterprises. Other, smaller insurers had generally gone along with the Indiana dentists' demands.[118] Not so these two. The result in each case has been was a running battle, with ups and downs, that has lasted several years. Each account is illuminating.

1. Aetna-International Harvester-United Auto Workers

40. Pursuant to a collective bargaining agreement between International Harvester and United Automobile Workers, on July 1, 1971, Harvester's employees in 23 states, including Indiana, came under the coverage of a dental health insurance plan.[119] Indiana locations affected were Indianapolis, Ft. Wayne and New Albany (on the Ohio River).[120] The Aetna-Harvester contract contained both predetermination and alternate benefits features[121] **[49]** and Aetna's practice was to implement the latter by requesting and using X-rays to review benefit claims as necessary.[122]

41. Trouble started immediately.[123] A few days before the plan took effect Aetna officials met with representatives of IDA and its Ft. Wayne area component (known as the Isaac Knapp District Dental Society)[124] to discuss how the plan would work[125] but were told by the dentists that the submission of X-rays would violate IDA's Principles of Acceptability.[126] Promptly thereafter (6/30/71) a letter to all Indiana dentists from IDA's Council on Dental Care Programs notified them that the Aetna-Harvester plan did not comply with the Association's Principles and urged all dentists treating Harvester patients not to turn over dental X-rays either to Aetna or the patient.[127] Aetna countered with a letter on 7/1/71 to Indianapolis and Ft. Wayne dentists explaining its position and pointing out that its sole purpose in requesting X-rays, when it did, was to determine benefits pay-

[118] CX 39B.

[119] Tr 987, 1221. And *see* CX 222C.

[120] Tr 987, 1221; CX 222C.

[121] Tr 987.

[122] Tr 975–76, 987, 1219, 1238.

[123] Tr 987–89, 1242–43.

[124] CX 4B.

[125] Tr 1222; CX 197A.

[126] Tr 989–991, 1225; CX 197A. Again, at another meeting with Aetna later in July, IDA representatives repeated that the plan was unacceptable and that X-rays would not be submitted. Tr 1228–30.

[127] Tr 1234–35; CX 38A.

able.[128] The response was not encouraging.

42. While some Indianapolis dentists did submit X-rays to Aetna,[129] strong resistance was encountered in the Ft. Wayne area, where only a small percentage of dentists would submit X-rays to Aetna.[130] In August the Chairman of IDA's CDCP complimented the Isaac Knapp dentists on their [50] "all-out support" of IDA's Principles[131] and the November issue of IDA's Journal reported that 90 percent to 95 percent of all Ft. Wayne dentists were *"cooperating with Isaac Knapp and IDA and not sending X-rays in."* (emphasis added)[132]

43. It should be noted, however, that this near-unanimity of action by the Ft. Wayne dentists cannot be attributed entirely to agreement on the desirability of IDA's boycott policy; some was undoubtedly the result of powerful peer pressure. An Aetna dentist/executive who made the rounds of Ft. Wayne dentists on a special mission late in 1972 or early in 1973[133] testified that when these dentists were requested in the privacy of their offices to submit X-rays to Aetna there were two general reactions: "dentists who said despite the fact that you seem fair, I will not send X-rays to you; and others who said I would like to but I don't dare to."[134] Asked to quantify this division of opinion, the witness estimated that "the reaction of those we visited was about fifty-fifty."[135] This estimate tends to confirm that to a substantial extent the conformity achieved by IDA was an unwilling product of peer pressure.

44. In the face of this widespread refusal by Ft. Wayne dentists to submit X-rays to Aetna, how did Aetna deal with such a difficult situation? In general it proceeded to pay benefits for those dental procedures which were covered by the plan in any event, such as radiographs, prophylaxes, [51] certain fillings, root canal procedures, etc.[136] However, without X-ray proof of loss and generally without any other information on which to base a judgment Aetna declined to pay for various other procedures such as fixed bridge work and certain crowns.[137] During the first year under the Aetna-Harvester contract there accumulated something like 600 questionable claims which Aetna would not pay either in whole or in part, for lack of X-ray

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[128] Tr 1238; CX 274A-C.

[129] CX 80A; CX 222C.

[130] CX 196B; CX 213H; CX 222C; CX 227B; Tr 1243–44.

[131] CX 39B.

[132] CX 196B. The Journal added: "We hope that all of Indiana dentists will follow suit with the IDA principals (principles?) when the situation arises in their area."

[133] Tr 1274.

[134] Tr 1275.

[135] Tr 1276. Note that a much larger percentage of the Ft. Wayne dentists (50%) were telling Aetna that they did not really sympathize with the boycott than would be suggested by the 1975 data for the Isaac Knapp Society as reported in Figure 5 above (only 4 out of 101 sending in X-rays and only one other dentist saying he would have sent in X-rays if requested).

[136] Tr 1243.

[137] Tr 1243.

evidence.[138] It was the consensus of Harvester, U.A.W. and Aetna that many of these 600 claims were probably meritorious and that they had to be taken care of in some way.

45. Since the summer of 1971 Aetna had tried in vain to hire licensed Indiana dentists to review X-rays in its Indianapolis and Ft. Wayne claims offices.[139] To this end it had supplied IDA with a statement of criteria for dental consultants and asked for nominations but never received any.[140] By mid-1972, however, it had found licensed dental consultants: a Dr. Stone for its Indianapolis office and a Dr. Bohnke for its Ft. Wayne office.[141] Dr. Stone seems to have had relatively little trouble, so far as this record shows, but Dr. Bohnke had a great deal.

46. Bohnke, who lived about 20 miles from Ft. Wayne but was a member of the Isaac Knapp Dental Society, took on both responsibility for counseling Aetna's current claims work and—to satisfy Harvester and U.A.W.—a special assignment to re-review all of the 600 questionable claims which we have seen had accumulated during the first year of Aetna's contract because requested X-rays had not been submitted for the claims.[142] To accomplish the latter "one-time" job it was arranged for him to go to the office of each dentist concerned and work with the relevant X-rays and any [52] other diagnostic aids in the dentist's files.[143] This *modus operandi,* of course, came quite close to meeting IDA's unrealistic terms for insurer access to X-rays: "qualified" personnel to come to the treating dentist's office.[144] However, Dr. Bohnke also appealed to his fellow dentists to submit their X-rays to Aetna on request in the future[145] and this predictably evoked bitter enmity among his brethren of the Isaac Knapp Society.

47. On 1/29/73 a Dr. Scheele reported to Dr. James Frey, the Isaac Knapp Society's President-Elect, Chairman of its "Censor" Committee, and a future official of IFD, that he (Scheele) had been approached by Aetna "with a deal to take all their X-rays" [presumably whenever attending dentists declined to turn over their X-rays to Aetna] and elaborated that "I even received a personal call from their head consultant" (Dr. Bohnke) whom Scheele immediately informed of his own decision not to cooperate with Aetna.[146]

48. On 2/19/73 Dr. Frey reported this approach by Dr. Bohnke to

[138] Tr 1267.
[139] Tr 1264–65.
[140] Tr 1264–65.
[141] Tr 1264–65.
[142] Tr 1267.
[143] Tr 1267, 1274.
[144] *See* Par. 21, above.
[145] Tr 1268.
[146] CX 218.

the Isaac Knapp Society's Board of Directors, which promptly voted, on motion duly made and seconded, to recommend that:

Harold Bohnke, D.D.S., be censored for encouraging another dentist, Ronald Scheele, D.D.S., through cohesion (sic) to participate in dental treatment of patients which directly violate the Indiana Dental Association's Principles of Acceptability. Specifically a deal to take all of Aetna Casualty (sic) Company's dental X-rays, for the purpose of submitting these X-rays to their company.[147] [53]

49. Thereafter, (apparently to be entirely sure of their legal position before attacking Dr. Bohnke), Isaac Knapp's members on 3/14/73 unanimously amended its "Local Code of Ethics" to read as follows:

It shall be considered unethical and not prudent for the legally practicing dentists in the Isaac Knapp District Dental Society to release radiographs from the patient's file records, no matter what the intent or purpose may dictate, unless these said radiographs are to be sent to another dentist or physician for referral reasons.[148]

50. On 3/27/73 Dr. Frey wrote Dr. Bohnke a warning letter (Figures 6A and B), reciting the new amendment to the "Local Code of Ethics" and charging that "on numerous occasions" Dr. Bohnke had contacted various members of the Society with "a deal to take all of Aetna Casualty Company's dental X-rays for the purpose of submitting these X-rays to their company."[149] Dr. Frey then sternly admonished his colleague:

I would strongly recommend that you do not continue this policy. You would place yourself in a position of being censored for encouraging another Isaac Knapp dentist through cohesion (sic) to participate in dental treatment of patients which directly violates the Code of Ethics of the Isaac Knapp District Dental Society and the Indiana Dental Association's Principles of Acceptability.[150] [54]

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[147] CX 215. *See also* CX 216A recommending the censorship of Dr. Bohnke and adding: "This applies to any other member of Isacc Knapp." For similar efforts by Isaac Knapp members to discipline a Ft. Wayne dentist named Dr. Don Lloyd who had allegedly "openly submitted" X-rays to third parties, *see* CX 214A-C and CX 216B. The complainants wrote Dr. Frey: "We . . . will not sit idly by and let one oral surgeon control the majority of oral surgery performed on Harvester employees and their families, especially when he is doing this by direct violation of the Principles of Acceptability of our Society." CX 214B.

[148] CX 220A.

[149] CX 220A.

[150] CX 220A.

INDIANA DENTAL ASSOCIATION
A Constituent of the American Dental Association
1013 HUME MANSUR BUILDING • 317-638-1341 • INDIANAPOLIS, INDIANA 46204

CxID-220-A

President-elect

March 27, 1973

Harold W. Bohnke, D.D.S.
224 North 12th Street
Box 461
Decatur, Indiana 46733

Harold:

This letter is to inform you of the recent amendment to the Local Code of Ethics of the Isaac Knapp District Dental Society passed unanimously at the March 14, 1973 business meeting. The amendment reads as follows:

> " It shall be considered unethical and not prudent for the legally practicing dentists in the Isaac Knapp District Dental Society to release radiographs from the patients' file records no matter what the intent or purpose may dictate, unless these said radiographs are to be sent to another dentist or physician for referral reasons."

It has been called to my attention that on numerous occasions you have contacted several Isaac Knapp dentists with:

> " a deal to take all of Aetna Casuality Company's dental x-rays for the purpose of submitting these x-rays to their company."

I would strongly recommend that you do not continue this policy. You would place yourself in a position of being censored for encouraging another Isaac Knapp dentist through cohesion to participate in dental treatment of patients which directly violates the Code of Ethics of the Isaac Knapp District Dental Society and the Indiana Dental Association's Principles of Acceptibility.

INDIANA DENTAL ASSOCIATION
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1013 HUME MANSUR BUILDING • 317-638-1341 • INDIANAPOLIS, INDIANA 46204

CXID-220-B

President-elect

Harold W. Bohnke, D.D.S.
224 North 12th Street
Box 461
Decatur, Indiana 46733

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I hope that the contents of this letter are completely clear to you as a member of the Isaac Knapp District Dental Society. If you have any questions regarding this matter, please feel free to contact me.

Cordially yours,

Dr. James D. Frey, D.D.S.
IKDDS Chairman of Censor
and Public Relations

JDF/jc

cc: Dr. James Dumas
Dr. David Bleeke
Dr. Don Lahrman
Dr. Ralph Merkel

[56] 51. This record does not indicate that Dr. Bohnke was, in fact, ever "censored" but Dr. Frey's stern warning (along, no doubt, with other peer pressure) plainly had its effect. During the rest of the year 1973, under pressure from Harvester and U.A.W.,[151] Aetna proceeded apace with the program referred to in the Scheele-Frey letter, even buying a portable X-ray machine for the Ft. Wayne office.[152] This program called for Aetna's local office to itself begin taking the necessary X-rays (with a copy to the attending dentist) whenever an attending dentist indicated that he would not submit his X-rays to Aetna.[153] (This was to be determined in advance; if the attending dentist had already taken X-rays Aetna did not duplicate the X-rays but did an in-mouth examination).[154]

52. This program did not, in fact, get under way until January 1974, largely because Aetna could not until then get a licensed Indiana dentist to act as a dental consultant in its Ft. Wayne office.[155] Dr. Bohnke understandably declined to take on the new job, giving as his reasons that he feared criticism of his objectivity and an ethics charge by his peers.[156] What Aetna ended up doing was to bring Dr. Stone up from Indianapolis one day a week to read X-rays and make in-mouth examinations.[157] At an estimated extra cost of $47,000 (4,700 examinations @ $10 per estimation)[158] Aetna managed to keep its Harvester business at Ft. Wayne alive until November 1978, when this Commission's order in *Indiana Dental Association,* Docket No. C-2957 [93 F.T.C. 392], considerably relieved the pressure of IDA's [57] X-ray boycott.[159]

2. Connecticut General-General Motors/United Auto Workers

53. A collective bargaining agreement between the automotive giant, General Motors Corporation, and United Automobile Workers, negotiated in 1973, provided for a dental health care insurance program for GM's employees and their families, to become effective 10/1/74.[160] Among GM's many plants throughout the United States are several in Indiana, including two in Anderson which employ a large part of that city's population.[161] The embattled IDA dentists exerted themselves to see that the administration of the GM/UAW dental

[151] Tr 1277.
[152] Tr 1276.
[153] Tr 1277.
[154] Tr 1276, 1278.
[155] Tr 1276.
[156] Tr 1279.
[157] Tr 1276. In 1975 Dr. Stone was succeeded by a Dr. Levy, who ran the operation until 1978, when it was apparently no longer needed.
[158] Tr 1278.
[159] Tr 1321; and *see* RPF #12 (citing Tr 919, 922, 1282).
[160] Tr 391, 1760–62; CX 483A-B.
[161] Tr 874–75; CX 254A; CX 477C; CX 486B. Dr. McClure estimated that 95 percent of his patients were connected with GM. CX 327F; CX 390B.

plan was not given to Aetna[162] and, in fact, Aetna was by-passed by GM in favor of Connecticut General Life Insurance Co.[163]

54. Anxious to avoid a repetition of the misfortunes which had befallen Aetna,[164] Connecticut General started as early as August 1973[165] to meet with IDA to work out a mutually satisfactory way of administering the GM/UAW plan, particularly the troublesome predetermination and alternate benefit provisions thereof.[166] After a January 1974 meeting to go over the plan's provisions together a CG representative reported:

> The main emphasis of our meeting was the reiteration of the fact that Connecticut General was willing to work with the Indiana State Dental Association and that we would, in fact, treat them differently than they had [58] been treated by other insurance carriers (Aetna). Our whole thrust, therefore, was to instill in them the feeling that we were an organization that could understand their problems and would respond to them so long as they met us half way. I think we again accomplished this objective.[167]

55. CG's euphoria was justified only to a slight extent. CG wanted IDA's cooperation in persuading competent dentists to serve as dental consultants[168] and the IDA representatives readily agreed to help select dental consultants.[169] CG at this time also contemplated referring contested alternate benefit questions to a local Peer Review Committee[170] and the IDA people agreed to provide information on their 14 district Peer Review capabilities.[171]

56. On the critical issue of submitting X-rays, however, there was definitely no meeting of the minds. The four IDA representatives, headed by Secretary McClure (future IFD President) reiterated the Association's position that if CG wanted to send a professional dental consultant into IDAers' offices they would be willing to let him examine the X-rays but the CG representatives protested that this would be a "tremendous waste" of a professional's time and "no real compromise at all."[172] CG's spokesmen thought the provision of X-rays when needed as part of the proof of a claim was "legitimate" and "efficient" and, moreover, that there had to be consistent treatment for GM

[162] Tr 224.
[163] Tr 391.
[164] CX 312A.
[165] CX 327D.
[166] Tr 392, 633, 1767, 1958.
[167] CX 303A. This and other citations to the GC minutes of the meeting of 1/9/74 (CX 303A-F) should be read in conjunction with the trial testimony of an attendant for CG (Chichester) concerning the same meeting, at Tr 401–11.
[168] Tr 402.
[169] CX 303C.
[170] CX 303D.
[171] CX 303D.
[172] CX 303E.

workers all over the country.[173] However, Dr. McClure remained "adamant", indicating that dentists in the Anderson/ [59] Muncie area were still unwilling to supply insurers with X-rays for pretreatment review[174] and could not be persuaded to release X-rays "even possibly to the Peer Review Committee, never mind a CG consultant."[175]

57. Despite CG efforts to maintain an aura of good feeling between IDA and CG,[176] Dr. McClure wrote CG's Director of National Accounts (Chernyka) on 2/21/74 that he felt they had "gotten off on the wrong footing" and that the dentists were now so "disillusioned" that it would be "virtually impossible to find the type of dental consultant you seek to help in the administration of the plan."[177] Without Chernyka's knowledge McClure sent a copy of this letter to UAW and GM who were much upset and told CG to get this straightened out immediately.[178] In a phone call to McClure, Chernyka greatly regretted that UAW and GM had been told of the problem; said he was telling McClure things he could not say in an open meeting and that the IDA people should not get upset over quality control (*i.e.,* the X-ray issue), as "it was just a lot of verbiage and it would be just what we as an association would want to make it."[179]

58. Another meeting was set up for March 19th,[180] at which the IDA representatives, headed by McClure, agreed to "put together a program of how we (IDA) believe you (CG) would obtain the most cooperation from Indiana dentists."[181] Such a program was outlined in a 4/19/74 letter on IDA stationery from McClure to Chernyka.[182] The first "good advice" by Dr. McClure was to remove all mention of radiographs from CG's claim form. He explained:

> We are certain you observed on March 19 that [60] Indiana dentists have a *definite and unified position* (emphasis added) with regard to use of radiographs. Indiana dentists are opposed to the improper use of radiographs by insurance carriers using them for diagnostic purposes as a base for determining alternate courses of treatment which are less costly.[183]

59. On the affirmative side, IDA was agreeable to supplying CG with a list of recommended consultants but wanted an opportunity to "review annually and submit recommendations regarding the con-

[173] Tr 407.
[174] CX 303E.
[175] CX 303F; Tr 408.
[176] CX 327E.
[177] CX 327F and G.
[178] CX 327H.
[179] CX 327 I-J.
[180] CX 327H.
[181] CX 327L.
[182] CX 327L.
[183] CX 327L.

sultants."[184] It proposed to replace the insurer's contingent of non-professional people screening incoming claims by programming norms such as utilization patterns, frequencies of occurrence, treatment patterns, etc. into a computer; the computer would then "red flag" particular claims for reference to a consultant to in turn consult with the treating dentists and, if still unresolved, then to be referred to IDA's peer review committee for adjudication—at a fee.[185] [IDA also suggested submission of any other problem cases for peer review.][186]

60. On 5/1/80 the McClure letter of 4/19/80 to Chernyka was answered by another CG official, Caffrey, whose attitude and approach seems to have been rather different from Chernyka's. Caffrey thought the proposed consultant program had "a lot of merit," gave "full support" to peer review and agreed to "look into" the possibility of computerized screening.[187] As for his policy on X-rays, however, it was the mailed fist in the silk glove. "We may have a problem on the question of radiographs," he wrote, in the understatement of the year.[188]

61. CG had "agreed" with GM and the UAW that radiographs would be reviewed as part of the basis for [61] determining benefits.[189] Caffrey was prepared to assure IDA that this would be done "in a proper manner," which turned out to mean only "by licensed dentists."[190] [It is not clear whether even this assurance covered "screening" as distinguished from full-scale "reviewing" of X-rays]. Nowhere did Caffrey explicitly raise an issue as to *whether* X-rays should be viewed in the attending office or the insurer's claims office; he quietly *assumed* the latter: "If the attending dentist would like, he can mail the claim form and radiographs to the attention of the dental consultant."[191]

62. Not surprisingly, Dr. McClure was furious. To the IDA members who had been meeting with Connecticut General and John Sparks of UAW he promptly sent copies of the Caffrey letter and his own reaction thereto:

> Caffrey's letter is contrary to everything that was promised or agreed to (at the 3/19/74 meeting). . . . I kept telling Chernyka that we couldn't see how they could promise us that there would be no X-rays when it was in black and white in the contract. He kept telling us that all the Union and Management wanted was results. So now we can see

[184] CX 327L.
[185] CX 327L.
[186] CX 327M.
[187] CX 327N-O.
[188] CX 327N.
[189] CX 327N.
[190] CX 327N.
[191] CX 327N.

that they are really in a bind and maybe they can't deliver on their promises.[192]

He further reported that on receiving the Caffrey letter he had immediately called CG headquarters in Hartford, conveyed IDA's feelings about being "misled", informed them that "there would be no way the Indiana dentists would agree to send X-rays to a consultant" and laid down the law: "I suggested that if CG wanted any cooperation from us they would send a telegram saying the letter was incorrect."[193] He further told Chernyka that IDA would not supply CG with a list of consultants if Chernyka expected them to diagnose from X-rays alone.[194] **[62]**

63. Although there were divided counsels within CG,[195] Chernyka caved in and agreed to send the wire Dr. McClure wanted. At first he worded it so that the X-ray question would be left up to the consultant and the treating dentist but McClure stonewalled and Chernyka thereupon agreed to say that any problems would be resolved before the Peer Review Committee.[196] The wire that was actually sent read:

Disregard ref. to radiographs and [in?] Caffrey's 5/1/74 letter. Question of radiographs to be resolved by Peer Review Committee if dental consultant and attending dentist cannot resolve whatever questions there may be.[197]

64. Dr. McClure was apparently satisfied with CG's promise that there would be no compulsory submission of X-rays. He recognized, however, that the apple cart might still be upset:

They will promise us anything to get (keep?) the Union (U.A.W.) from taking the contract away from them. I believe Sparks would take it away if he knew they had promised the no-X-ray bit. We must really zero in on our members and *educate them for the big confrontation we will have in the future. The only way we will whip it is by standing firm.* (emphasis added)[198]

65. On 5/23/74 Caffrey formalized CG's request for assistance in selecting dental consultants, specifically asking for two practicing general practitioners to work 6–12 hours a week in CG's Indianapolis claims office.[199] One of their duties was said to be to "advise on benefit determination on claims where there is a question on . . . **[63]** treatment"[200] but nothing was said about whether they would be reviewing

[192] CX 327P.
[193] CX 327P.
[194] CX 327P.
[195] CX 308A-B; CX 309A-B.
[196] CX 327P.
[197] CX 327R.
[198] CX 327Q.
[199] CX 313A.
[200] CX 313A.

X-rays at CG's office or at the offices of attending dentists.[201]

66. On 6/25/74 the Executive Director of IDA, writing for "the IDA Officers and Trustees representing the areas of Indiana having major GM plants" submitted to CGF's Caffrey three nominees from the Anderson/Muncie area, including Dr. James Pierce (of whom more later), one from the Kokomo area and one from the Indianapolis area.[202] Nothing in IDA's letter of nomination bore one way or the other on the submission of X-rays to CG.

67. All but one of the five nominees were hired.[203] On 8/7/74 CG asked Dr. McClure for more Indianapolis nominations[204] and on 8/16/74 McClure, writing on IDA stationery, nominated two more consultants, of whom one (Dr. Beavers of Indianapolis) was hired by CG.[205]

68. By late August IDA's Dr. McClure was hearing disturbing reports from CG's Indianapolis office manager that he was planning on using consultants to screen X-rays, that visits to dentists' offices were "prohibitive" in cost and that people high up in CG were already saying it was a "stupid idea" even to try to run the program without the X-rays.[206] Worried IDA leaders agreed among themselves to use the leverage of their consultant arrangements to try and **[64]** avoid submitting X-rays:

> [W]e will have to withdraw our support of the consultants if they (CG) try to use them to read radiographs in the claims office. I (Dr. McClure) have contacted the consultants in my area and alerted them to what is going to happen.[207]

69. The message went to CG's Indianapolis regional manager who testified "[t]hat if we persisted and proceeded along our normal lines and requested X-rays, that they (IDA) would in fact place pressure upon the dentists that were serving as consultants to resign."[208] When the manager discussed this threat with his consultants they explained:

> [t]hat they were members of the Indiana Dental Association and although they were reluctant and would not want to resign, that they felt an obligation and because of the pressure that would be placed on them to in fact resign.[209]

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[201] CG's Indianapolis Manager testified at trial that at this time Indianapolis consultants were expected to work in that office ("physically come into the office," Tr 654). If they could not work out any benefit problems from the diagnostic aids sent in with the claim form and by talking by phone with the claimant's dentist, the matter would be forwarded to the local dental consultant (*e.g.*, Pierce in Anderson) "for him to get involved in and to try to resolve." (Tr 654)

[202] CX 314A-B.

[203] Tr 651.

[204] CX 311.

[205] CX 378.

[206] CX 316.

[207] CX 316.

[208] Tr 669.

[209] Tr 671.

For whatever reason, the anticipated reversal of X-ray policy by CG did not then materialize.

70. Meanwhile, during the Summer and early Fall of 1974, with the GM plan set to start on 10/1/74, another source of difficulty between CG and IDA emerged. It concerned CG's GM claim form. As early as April Dr. McClure had advised CG to remove all mention of radiographs from its standard claim form.[210] The problem was that, contrary to IDA's advice, the form worked up by CG for use in GM plants throughout the country had a request for X-rays on the rear.[211] A CG Vice President on 5/13/74 explained that:

> We have desperately tried to avoid having to have separate claim forms and instructions for people receiving treatment in the State [65] of Indiana. We have tried very hard . . . to insist on uniform administration throughout the country.[212]

71. By September CG had apparently made a tentative decision to insert an IDA-approved clause in Indiana claim forms that would read: "The above section in regard to X-rays does not apply to IDA members."[213] Yet an internal CG memorandum of 9/11/74 reveals CG's continuing dilemma.[214] It was believed on one hand that to proceed with use of the standard claim form without some kind of Indiana exception (and to insist on uniform X-ray submission in Indiana) would probably entail dire consequences such as resignation of the consultants, no Peer Review mechanism, the end of communication with organized dentistry, instructions to all IDA members not to cooperate with CG and perhaps even a full fledged advertising campaign to discredit CG, etc.[215] On the other hand it was also recognized that the Union (*i.e.*, UAW) position would be decisive and the memorandum closed with a "hope" that CG could get a reaction from U.A.W. in order to properly evaluate the advisability of "reviewing our position in Indiana."[216]

72. A few days later Chernyka called Dr. McClure with a story that somehow word had "leaked out" about insertion of the Indiana exception in the GM claim form and that he had to go to Detroit to explain.[217] Gingerly, he asked what the reaction would be in Indiana if CG had to "back down" on this promise.[218] Dr. McClure replied immediately that the IDA membership would feel that they had been "lied to" and that it "certainly wouldn't help Connecticut General's

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[210] CX 327L.
[211] CX 316.
[212] CX 308A.
[213] CX 312B and CX 327B.
[214] CX 312A-B.
[215] CX 312A.
[216] CX 312B.
[217] CX 327V.
[218] CX 327V.

image in Indiana."[219] [66]

73. Two days later Chernyka was in Indianapolis, direct from his visit to Detroit, with word that General Motors would not countenance an Indiana exception to the X-ray clause on the back of the GM claim form.[220] Still trying to ride both horses at once, however, Chernyka assured Dr. McClure that, whatever the claim form said, CG would *not* demand that the dentists send in X-rays. McClure, for his part, decided to "let" CG keep its consultants but to recommend that IDA members use their own model claim form.[221]

74. On the strength of these mutual understandings (thereafter known as "the gentlemen's agreement") Dr. McClure assured IDA's membership that "Connecticut General has given us a verbal agreement on no X-rays and if they (CG) do request them, our (IDA) Central Office should be notified immediately."[222] This precarious arrangement went into effect on 10/1/74.

75. During the first year and a half of experience with the CG-GM dental health plan the situation with regard to X-rays was quite complex. GM and UAW continued to insist that CG must have the right to obtain X-rays from dentists on request but CG had made a "gentlemen's agreement" with IDA not to exercise this right but, in fact, many Indiana dentists began sending in X-rays, anyway. From the Fall of 1974 to the Spring of 1976 the X-ray submission rates gradually increased in those parts of the state where CG had much business, except for the three areas that would shortly spawn IFD.[223]

76. CG's Indianapolis office eventually found itself getting about 50 percent of the X-rays it needed,[224]—except for those coming from the Anderson area, where only a "very low percentage"—about 2 to 4 out out of 40 dentists—would ever submit X-rays when requested by CG.[225] By the Spring of 1976 CG was getting about 70 percent of needed [67] radiographs from parts of Indiana where it had plants other than Madison County as compared with less than 1 percent from Madison County.[226] Moreover, the handful of cooperative dentists in the Anderson area made their submissions only rarely and covertly, for fear of the reaction of the IDAers.[227] Indeed, some Anderson area dentists told CG's Indianapolis manager frankly that "there was really fear that pressure would be placed upon them by dentists

[219] CX 327V.
[220] CX 327W.
[221] CX 327W.
[222] CX 327W.
[223] Tr 630, 682–83, 688–89, 732–33.
[224] Tr 630, 682–83, 688–89, 732–33.
[225] Tr 689.
[226] Tr 812–14.
[227] Tr 812–13.

in the community" if they submitted X-rays.[228]

77. That CG really wanted the X-rays cannot be doubted. At various times during the first year and a half of the GM plan CG did raise the subject of requesting X-rays but on such occasions the IDA people would always suggest retaliation, as by withdrawal of IDA approval for CG's consultants.[229] In each case CG apparently backed away from such a prospect.

78. As a matter of fact, IDA seems to have held CG in such a vice that CG could not even discipline its consultants without raising a storm. Dr. James Pierce, CG's Anderson consultant, was reluctantly allowed to operate out of his own office in Anderson instead of CG's Indianapolis claims office,[230] even though this was a cumbersome, time-consuming, expensive, unsupervisable arrangement[231] which precluded valuable discussions with CG's Indianapolis claims personnel.[232] This was allowed because, in the absence of X-ray submissions, the only alternative offered by IDA was to send a consultant to each attending dentist's office at a professional hourly rate.[233]

79. Dr. Pierce was a member of the Madison County [68] Dental Society[234] and was unconditionally opposed to submitting X-rays to insurers.[235] On the stand he conceded that in five years as a dental consultant for CG he had "practically never" requested X-rays from treating dentists and had gone to a treating dentist's office to review X-rays on only one or two occasions.[236] CG could be pardoned for feeling it was getting something less than its money's worth from Dr. Pierce.[237]

80. Yet when CG stopped referring claims to Dr. Pierce and tried to process them through its Indianapolis office, using in-house consultants,[238] the Anderson area dentists were up in arms[239] and the Madison County Dental Society, sparked by Dr. McClure,[240] in March 1976 adopted a resolution that CG had not kept its "gentlemen's agreement" to use Pierce as a local consultant for that area.[241] Again CG bowed to this organized opposition; as of trial Dr. Pierce was still

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[228] Tr 684.
[229] Tr 671.
[230] Tr 432–33, 816.
[231] Tr 690–91, 816–17.
[232] Tr 433.
[233] Tr 434.
[234] Tr 2609.
[235] Tr 2598–2600; CX 160B.
[236] Tr 2565–72.
[237] A CG Vice President testified that CG could not have successfully conducted its dental insurance business in other states, using the same arrangements that it had with Dr. Pierce. (Tr 435–37)
[238] Tr 692–93.
[239] CX 327A-C; CX 319.
[240] CX 269; CX 270.
[241] CX 270.

handling CG claims in Anderson.[242]

[CPF #121 notes that Pierce had told CG's local manager frankly about experiencing "peer pressure" regarding the X-ray issue (Tr 817–18) but then denied this on the stand (Tr 2574). The Administrative Law Judge finds that the testimony of Dr. Pierce, who could remember hardly anything about anything, is entitled to little if any weight for any purpose.] **[69]**

G. *The Formation of IFD*

81. The earliest reference in this record to the possibility of organizing a union of Indiana dentists is a letter from an Anderson IDA member, Dr. Paul Van Dorn (later an IFD organizer), to the Chairman of IDA's Council on Dental Care Plans, dated 6/28/72.[243] In response to the Chairman's request Dr. Van Dorn reviewed his thoughts on how "federation or unionization" should be accomplished. He foresaw "nothing but trouble from the public if we involve the state association [IDA] directly in the dealing (sic) of this type" and suggested a separate entity (preferably a corporation) in which each IDA member would be given a "free subscription to the corporation" in the initial phase, "provided each member would sign a document similar to the document we had the people of Madison County sign, saying they would support the Indiana Plan and will stick together in adversity." (emphasis added)[244] He concluded his discussion with a plea for speed: "I think time is running out. The sooner we can get this accomplished the more likely we will not have trouble in the future. . . . If we have a strong union and our opponent understands this it will not be necessary for them to test our strength."[245]

82. Two months later, at an IDA Executive Committee meeting, attended, *inter alia,* by the Anderson area's Drs. Rohn and McClure,[246] reference was made to a pending proposal by a Dr. Robillard to form a labor union.[247] However, the group agreed that "the timing for such doesn't seem right" and a consensus called for a subcommittee of CDCP to *"develop the 'blueprint' for such an organization and have it ready when the time was right."* (emphasis **[70]** added)[248] Shortly thereafter (9/14/72) a "Robillard contact committee" was appointed, to be chaired by Dr. Van Dorn, who was also to

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[242] Tr 2565–67.
[243] CX 436A-C.
[244] CX 436A.
[245] CX 436B.
[246] CX 51A.
[247] CX 51C. It seems likely that the Robillard proposal had prompted the request for the Van Dorn letter of 6/28/72 just described.
[248] CX 51C.

begin investigating the possibility of forming a "guild".[249] The CDCP Chairman commented:

> Certain areas of Indiana which will feel the full thrust of overpowering third parties [e.g., General Motors] feel that they should be prepared when the action is not in their best interest.[250]

83. Writing on 9/27/72 for help from a Florida dentist experienced in such matters, Dr. Van Dorn recited his assignment to contact all people interested in *"unionizing or guilding dentists for more cohension [cohesion?] in bargaining with third parties"*[251] (emphasis added) and asked particularly for a mechanism of organization, membership requirements and "legal considerations".[252] The same emphasis on more effective bargaining with insurers through collective action may be noted in minutes of a 12/13/72 Isaac Knapp (Ft. Wayne) Dental Society meeting:[253]

> Dr. Robert Gayle [of Ft. Wayne, later an IFD official] announced that he is on an active, working committee on the state level that is looking into the feasibility of forming a dental union *that could deal effectively in collective bargaining with 3rd parties.* (emphasis added).[254]

84. On 3/15/73 Dr. Van Dorn reported to CDCP on the progress of the unionization study.[255] Despite [71] expressions of skepticism by others present as to the feasibility of unionization (*e.g.,* Can dentists use the ultimate weapon: the strike?), Dr. Van Dorn urged the importance of continuing to study the mechanics of forming a union "now" so that it could be implemented promptly "if needed."[256] CDCP thereupon voted for an "informational Fall Workshop to study the effects of unionization with regard to the dental profession."[257]

85. At the Fall Workshop (9/13/73) Dr. Richard Oliver of Lafayette, a member of CDCP and another future IFD organizer,[258] shared the podium with an American Dental Association Assistant Executive Director for Legal Affairs for a one hour program on "The Unionization Movement for Self-Employed Health Professionals."[259] Whether prepared for this program or for some other occasion, the record contains a statement made by Dr. Oliver about this time (sometime

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[249] CX 439A.
[250] CX439A.
[251] CX 439A.
[252] CX 440.
[253] CX 451B-C.
[254] CX 451C.
[255] CX 459F. *See also* CX 459N.
[256] CX 459F.
[257] CX 459F.
[258] CX 2B.
[259] CX 464B.

in 1972 or 1973)[260] entitled "Why Should A Dental Union Be A Separate Corporation And Not Part Of The Dental Association?"[261]

86. Dr. Oliver's ultimate conclusion was that while IDA could give a union its blessing and help it with initial financing and organization, nevertheless the union should be designed to operate as a separate corporate body.[262] In reaching a subordinate conclusion that professional societies make poor unions, he stressed, *inter alia,* the diversity of interests which subjects members to many pressures when confronted by "third party interference" and would, he thought, be "a *definite handicap in the cohesion necessary for a union to function properly.*"[263]

87. This record does not show what, if anything, came **[72]** of the Van Dorn Committee's work. During the next two years (1974–75) there was not much activity on the unionization front but the subject was not forgotten. On 9/18/74, during preparations for the GM contract to go into effect, Dr. McClure reassuring a GC Vice President that IDA dentists would not likely refuse to fill out pre-treatment forms for patients:

> I told them that I didn't think this would happen because *as an association we were cognizant of the antitrust line we have to walk.* Although I did explain to them that *certain very influential dentists had a contingency plan to immediately form a union to implement such a boycott if the screws get too tight.* (emphasis added)[264]

88. This is the earliest evidence in this record tying the reason for unionization to the antitrust problems inherent in a boycott by the state professional association. From contemporaneous evidence it appears that IDA was becoming sensitive to antitrust problems at this time because of its own experience.[265] Answering an out-of-state inquiry about the overall purpose of IDA's Principles of Acceptability the Chairman of IDA's CDCP wrote carefully:

> With recent involvement with the Sherman Antitrust Act, organizations such as the IDA must be very careful in determining what is unacceptable and the manner in which our members are informed of this. There is the potential that we could be charged by the Justice Dept. as being in restraint of trade. As it is now we determine which [dental health insurance] plan does not appear to be in the best interests of the dentist-patient relationship and the general membership is informed of the general picture. They have to react as individuals.[266] **[73]**

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[260] CX 1Z–37; Tr 2150–52.

[261] CX 455A-B.

[262] CX 455B.

[263] CX 455A.

[264] CX 327W.

[265] CX 74A.

[266] CX 74A. The IDA idea of what does not constitute a trade conspiracy is further illumined later in the same document: "We can't, as an organization, mandate anything binding on our members—we can only point out deficiencies in a situation." CX 74D.

89. During April 1975 IDA's Assistant Executive Director was writing to the American Federation of Physicians and Dentists (a medical "union") to obtain an update on AFPD's activities, certain written materials used at a collective bargaining seminar at Cornell University and "any suggested reading resources concerning the subject of professional unions."[267] Clearly the thought of unionizing IDA was still alive, if not robustly so, in the Spring of 1975.

90. Two months later, on 6/16/75, the U.S. Supreme Court handed down its epoch-making decision in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), which held, *inter alia,* that Congress did not intend any sweeping "learned profession" exclusion from the Sherman Act; tightened up the tests for a *Parker* v. *Brown* (state action) defense; and further liberalized the interstate commerce requirement in such cases. The shocking impact of *Goldfarb* on the thinking of IDA's leaders comes across clearly in an official review of events prepared 3 years later by IDA unionization advocate Dr. Oliver of Lafayette for Respondent IFD:[268]

> This *[Goldfarb]* decision by the Supreme Court, while not its main intent, lowered past barriers to antitrust scrutiny of the professions by the Federal Trade Commission.
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> * * * * * * *
>
> Before the ink was dry on *Goldfarb* the F.T.C. began an intensive, nonpublic examination of the health care area, increasingly turning its attention to activities of the professional organizations of the providers of care.[269]

91. Early in 1976 the Madison County dentists resurrected consideration of unionization for dentists.[270] A committee to study the possibility worked under Dr. McClure for several months, meeting twice in Anderson.[271] [74] On 5/24/76 Dr. Rohn, Chairman of IDA's CDCP, put an item entitled "Report of Madison County Investigation into a Dental Union" on the agenda for the next quarterly meeting of the Council (tentatively scheduled for 7/29/76 but actually held on 8/14/76). The minutes of the Council meeting show that after all other business was taken care of (and reported in some detail) the meeting was "adjourned to discuss the Union movement in the Anderson area," regarding which, however, the minutes are totally silent.[272] The minutes do state:

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[267] CX 467.
[268] CX 583.
[269] CX 584D.
[270] CX 22A.
[271] CX 468.
[272] CX 108H.

Several (Council Members) pointed out that for months, years we (IDA) have been discussing the radiograph problem and members have been calling for action. It is time some action was taken.[273]

Ten days later the Indiana Federation of Dentists was born.[274]

92. On 8/24/76, 47 dentists from the Anderson area met there; heard Dr. Rohn expound on the pros and cons of unionism; listened to a study committee's report and proposal (delivered by Dr. McClure) for Madison County dentists to form a "union" to be affiliated with the American Federation of Physicians and Dentists; and voted 40 to 7 in favor of Dr. Pierce's motion to form such a union.[275] A second chapter was thereafter (3/30/77) formed in Lafayette[276] and a third somewhat later (4/9/78) in Ft. Wayne.[277]

93. The Constitutions and By-laws of the State Federation and each of its three local chapters are of [**75**] record here,[278] as are 2/1/79 membership lists for each chapter: Anderson (46 members; about 39 "current"),[279] Lafayette (27 members; about 23 "current"),[280] and Ft. Wayne (19 members; "current" members not differentiated).[281] On 1/15/77 the American Federation of Physicians and Dentists granted IDF a charter which recited the national federation's credo that:

only in and through a *united effort* can we be assured of receiving full and just compensation and due appreciation for our services, do hereby *band together* and establish this national union.[282] (emphasis added)

94. The sequence of events just reviewed suggests that *it was primarily consciousness of the antitrust risk inherent in IDA's organized boycott of Indiana's dental health care insurers—much magnified by the Supreme Court's 1975 ruling in Goldfarb—which led to the 1976 Madison County study of unionization and the eventual implementation thereof by the organization of IFD on 8/24/80.* There is an abundance of evidence to confirm this inference.

95. IFD's first press release, on 8/25/76, quoted President McClure (in part):

Noting that unions are exempt from antitrust laws, he says that unionizing will enable dentists to be heard in negotiating with insurance companies on the quality of care and conditions of treatment. Long active in . . . the Indiana Dental Association, Dr. McClure

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[273] CX 108C.
[274] CX 22A-B.
[275] CX 22A-B.
[276] CX 534.
[277] CX 566B.
[278] CX 13A-Z2; CX 14A-Z; CX 15A-W; CX 16A-Y.
[279] CX 18A-B.
[280] CX 19A-B; *see also* CX 20A-C for past membership (similar).
[281] CX 21.
[282] CX 17.

stated that *such organizations are subject to antitrust laws and therefore without the bargaining power of a union.* (emphasis added)[283]

96. On 8/27/76 IFD's and IDA's joint public relations [**76**] counsel[284] wrote the Editor of "Dental Economics" in behalf of her client:

. . . *[U]nions are not governed by antitrust laws.* . . . The union leaders, I think, view the union as a *complement to the Indiana Dental Association,* with each having its separate function although *the general purpose of both is the same.* (emphasis added)[285]

97. Dr. David Yater, an Anderson area dentist and member of IDA's CDCP who had become IFD's first Secretary,[286] on 9/8/76 explained to the Chairman of CDCP why a union was thought "the most viable alternative":

Having attended the last two House of Delegates sessions and Council on Dental Care Programs meetings, *I have been aware that there is a prevailing sense of apprehension in respect to antitrust liability.* The association [IDA] has been *consistently warned by legal council (sic) to be very careful* in its actions and the wording of all official responses to third parties regarding our policies and positions. With the *very real spectre of antitrust violation* hanging over their head the Council is having increasing difficulty formulating a positive action in behalf of the membership, in view of the recent FTC suit and investigation, and the proposed and anticipated actions of the Justice Department in these areas. *One of the major advantages to unionization is the unquestioned immunity to [from?] antitrust liability.* (emphasis added)[287] [**77**]

98. In a "status report" to a Ft. Wayne dentist on 10/26/76, Dr. McClure described the labor union front quite colorfully:

We have always been very unified in the Anderson area but now we feel much more secure not having the antitrust albatros around our neck. (emphasis added)[288]

99. This is not to say that there was no other precipitating factor in the organization of IFD. Indeed, it appears that during this period there was a serious concern in the minds of IDA leaders, when CG installed a new manager in its Indianapolis claims office, as to whether CG was about to "welch" on its "gentlemen's agreement" not to request X-rays. (*See* particularly a 6/16/76 letter from Dr. McClure to a CG Vice President reporting these rumors): "I cannot believe you would shake my hand and look me straight in the face and tell me that

[283] CX 477A-C.

[284] A Ms. Barbara Rafferty of the Indianapolis public relations firm of Caldwell & Van Riper was the official IDA Public Relations Counsel" (CX 8L; Tr 769) and also serviced IFD when it was formed (CX 33G, CX 35A, CX 76A-C, CX 477A-C).

[285] CX 476B.

[286] CX 2C.

[287] CX 484A.

[288] CX 489B.

Connecticut General would work without X-rays in Indiana if you didn't mean it.... This was a firm commitment.... Have you changed your policy with regard to radiographs in Indiana?"[289]

101.* McClure simultaneously took his old papers to John Ruckelshaus, Legal Counsel to Madison County Dental Society,[290] to see what could be done about enforcing the "gentlemen's agreement".[291] [He eventually learned that there was not much that could be done].[292] At IDA's CDCP's Summer session (8/14/76) it was reported that CG had changed its position with regard to requesting radiographs while still using IDA-approved dental consultants but it was decided to "leave the situation as it is" for the present.[293] This confrontation between IDA and CG was still going on when IFD was organized[294] a month later and almost certainly contributed to the feeling that it was time for a union. [78]

102. Moreover, a union would no doubt be a good vehicle for IFD's purposes, even if there were no antitrust risks to consider. CDCP member and IFD Secretary Yater, for example, wrote CDCP's Chairman that IDA was "not designed nor intended to represent us in socio-economic or political areas" and

> [w]e feel that to ask the Indiana Dental Association to continue to expand the scope of involvement into areas it was never intended to enter will eventually force a reconciliation (resolution?) of the issues in a Court of Law with the strong possibility of our receiving an adverse ruling. It is our opinion that *a more suitable vehicle is needed* to present [*sic*] us in these areas and that a union is the most advantageous choice to satisfy the needs previously mentioned. (emphasis added)[295]

Dr. McClure put it more pungently in a report to IDA's Board of Trustees on IFD's recent organization:

> He noted that about 80–90% of dentist practices in the Anderson area is [*sic*] covered by one insurance carrier; therefore *the dentists there believe they need more muscle than organized dentistry can give them.* (emphasis added) They found that via a union they could go beyond dental association activities. In their opinion *the union movement will not weaken the IDA but will supplement it.*[296]

103. And finally, according to Secretary Yater, it was important:

> to give our members a new banner around which to rally and to forge new feelings of

[289] CX 323A-B.

* There is no finding numbered 100.

[290] CX 323B.

[291] CX 327A and C.

[292] CX 108C.

[293] CX 108E.

[294] CX 328A-B.

[295] CX 484A-C.

[296] CX 486B.

unity and purpose.[297] [79]

This last explanation is particularly revealing. It makes clear that the formal organization might be new but the fight and the fighters were the same: they needed only a new banner and rededication to the cause. As IDA's and IFD's public relations counsel put it, "each (has) its separate function" but *"the general purpose of both is the same."* (emphasis added)[298]

104. These contemporary expressions of the IFD leadership leave no doubt that this organization must be viewed realistically as a new facet of the same old conspiracy to keep dental X-rays out of insurers' hands which had been carried on by substantially the same dentists lo those many years. Stated conversely, the founders of IFD decided to grasp the banner which, in IDA's hands, seemed in danger of falling. Whether viewed as an "adoption" of IDA's conspiracy or a "continuation" thereof makes no practical difference: IFD had joined IDA in the fight.

105. The "objectives" of this new (IFD) facet of the old (IDA) conspiracy are expressed quite clearly in its state and local constitutions.[299] As noted earlier, IFD's most significant organizational purposes are as follows:

a.) To represent dentists in all socio-economic matters, negotiations and grievances with employees, third and fourth parties or any group that is involved in financing or delivery of dental care.

* * * * * * *

b.) To seek to insure adequate compensation and proper working conditions for dentists commensurate with their training and skill and the responsibility they bear for the life and health of their fellow human beings;

c.) The establishment or approval of [80] appropriate utilization review or peer review procedures which do not interfere with the doctor-patient relationship and the maintenance of the highest quality of dental care;

d.) To associate together all dentists for their mutual benefit and protection;

e.) To unite the efforts of dentists in obtaining and preserving the individual freedom of action necessary for the success of their professional endeavors.[300]

106. Among the methods of achieving these "objectives" which are "contemplated by IFD's Constitution are *"strikes, job actions, boycotts and other forms of economic pressure."*(emphasis added)[301] Telling the

[297] CX 484A.

[298] CX 476B.

[299] CX 13A-B (State federation); CX 14A-B (Anderson Chapter); CX 15A-B (LaFayette Chapter); and CX 16A-B (Ft. Wayne Chapter).

[300] CX 13A-B. Also quoted in Par. 2 above.

[301] CX 13Q; CX 14Q; CX 15P; CX 16Q.

IDA Board of Trustees on 10/1/76 about the recent formation of IFD, Dr. McClure confided that he "hoped they (IFD) would not have to resort to a strike or economic pressure" but that "if they were to be a true union this may become necessary."[302]

107. Membership in IFD is restricted to Indiana-licensed dentists who will "endorse" the above "objectives."[303] A constitutional provision for "discipline" of IFD members includes censure, fine, suspension or expulsion for "valid cause", expressly including, *inter alia,* "failure to conform to the Constitution and By-laws" or "any action detrimental to the welfare of the organization. . . ."[304]

108. The specific embodiment of IFD's policy with respect to X-rays was formally adopted by the membership after several months study and discussion, on 4/24/77.[305] Known as the "Work Rule," this counterpart of IDA's "Principles of Acceptability" reads as follows: [81]

> Proper diagnosis and treatment planning predicates the doctor correlating all diagnostic aids, with a history and with all clinical findings. No one facet of this process is now, or ever has been recognized by the profession as a substitute for the complete process. To represent otherwise would subject the patient to sub-standard care.
>
> The patient's dentist, therefore, has a *moral and legal responsibility to not allow a determination of his patient's condition to be made for any purpose, without the benefit of a complete examination* which takes into account all of the elements described.[306]

109. IFD's Work Rule does not, as Respondent now contends,[307] merely state a general principle of dental science. The underlined portion above clearly places on a member dentist a duty to *act* to prevent a diagnosis for *any* purpose (thus including a diagnosis for payment of insurance benefits) without a "complete examination" (thus excluding a determination based only on X-rays). This interpretation from the plain language of the Work Rule was confirmed by Dr. Rohn, the movant for adoption of the Work Rule,[308] in a 7/27/78 letter to an insurer that had requested X-rays:

> Counsel for the Indiana Federation of Dentists, of which I am a member, has advised me that by complying with your demands for diagnostic radiographs and pre-treatment plans for evaluation I could be in violation of the Indiana statutes that regulate the practice of dentistry. Also, Counsel has advised that such practice does contradict the Union Work Rule on such procedure.[309] [82]

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[302] CX 486B.
[303] CX 13C; CX 14C, CX 15C; CX 16C.
[304] CX 13T-U; CX 14S; CX 15Q; CX 16R-S.
[305] CX 537A.
[306] CX 537A.
[307] RPF, page 3.
[308] CX 537A.
[309] CX 698. *See also* CX 674; CX 696 and CX 705.

110. The application of formal sanctions against dissidents for violation of IFD's Work Rule has apparently been minimal largely because of lack of necessity for such sanctions. In the three areas of Indiana where anti-insurer feeling was strong enough to spawn IFD it is inferable that collective action has been largely voluntary and even enthusiatic on the part of many if not most dentists. Dr. Yater, the dentist who represented Anderson on IDA's Council on Dental Care Programs and became the first Secretary of IFD,[310] confided to the Council's Chairman on 9/8/76:

> We don't anticipate any holdouts and have kept the retaliatory and economic pressures we could apply to non-members very low key and tried not to threaten any of our members.[311]

111. Shortly thereafter (9/28/76) Dr. Yater nevertheless raised the question of "policy on possible retaliatory gestures and action that could be taken against dissident members."[312] A committee of four, not including Dr. Yater, was appointed to report and recommend upon the question of "such measures that could be taken against dissident members by the Indiana Federation of Dentists."[313]

112. Two weeks later (10/12/76) the IFD Executive Committee discussed "discipline or acts of reprisal against non-member dentists and dissident members."[314] The minutes read:

> After lengthy discussion the general consensus was that *lawful severe measures would be instituted only as a last resort,* but that the attorney for the organization should be asked to advise the Executive Committee [concerning] the lawful measures that could be taken in such [83] cases." (emphasis added)[315]

The leadership's silk glove/mailed fist policy to discipline dissidents "only as a last resort" could hardly have brought great cheer to any free spirits among the Anderson dentists. Moreover, that "unity" was to some extent enforced as well as inspired can be inferred from the fact that the few Madison County dentists who did occasionally submit X-rays to CG during 1976–1977 frequently followed up with a phone call asking CG to "make sure that nobody else knew they (X-rays) were in fact submitted. . . ."[316] [84]

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[310] CX 2C.
[311] CX 484B.
[312] CX 512A.
[313] CX 512A.
[314] CX 522.
[315] CX 522.
[316] Tr 813.
[317] Footnote omitted.

H. *Effectiveness Of The Boycott*

113. Whether voluntarily or to some extent involuntarily involved, the members of IFD stand committed to a concerted refusal to furnish their patients' X-rays to dental health insurers. Since the offense of trade conspiracy, unlike other kinds of conspiracy, is complete when agreement is reached, with or without commission of any overt acts in furtherance thereof, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 225 (1940), we might stop here. In this case, however, there is abundant evidence that IFD has actually carried out the IDA/IFD boycott scheme as planned. Accordingly, we now briefly review its unlawful activities pursuant to the conspiracy already established.

114. The primary evidence on this branch of the case is a number of written refusals by members to submit X-rays requested by insurers, most of them (at least after formal adoption of IFD's Work Rule) in a form recommended by IFD or otherwise linking the refusal to IDA/IFD policy[318] (An illustration of the IFD form is seen in Figure 8).[319] While such evidence is not as comprehensive as the earlier IDA compliance surveys *(see* Pars. 31 and 34), the written IFD refusals in evidence here are sufficient to show widespread compliance by members with the IDA/IFD boycott policy.

115. Other evidence in this record pictures the operation of the boycott since IFD's formation, from the viewpoint of various insurers, employees and labor unions. We cite two examples. [85]

[318] CX 622; CX 626; CX 628; CX 633 *(in camera);* CX 637 *(in camera);* CX 641; CX 656; CX 657; CX 658; CX 659; CX 660; CX 661; CX 662; CX 663; CX 664; CX 665; CX 666; CX 668; CX 669; CX 671; CX 672; CX 686; CX 687; CX 688; CX 689; CX 707; CX 709; CX 712; CX 716; CX 722; CX 724; CX 725.

[319] CX 683.

JAMES D. FREY, D.D.S.
PROFESSIONAL PARK WEST
4600 U. S. HIGHWAY 24 WEST
FORT WAYNE, INDIANA 46804

April 18, 1978
Insured: Ned J. Boylan
Patient: Patricia Boylan

Dear Sir:

Reference your request for x-rays for the above named patient. It is the policy of this office to provide all diagnostic aids to third parties on an in-office basis and with the consent of the patient. It is my belief that proper diagnosis and treatment planning predicates the doctor correlating all diagnostic aids with a history and all clinical findings. No one facet of this process is now, or ever has been, reconginized by the profession as a substitute for the complete process. To represent otherwise would subject the patient to substandard care.

If you will have your consultant contact my office to set up an appointment, I will furnish records and ask the patient to be present for an examination. If you do not feel this is possible, the Indiana Federation of Dentists, of which I am a member, will help you, if possible, to provide a local consultant.

Sincerely,

James D. Frey, D.D.S. JDF/jg

cc:

patient.

Mr. Ronald Fowler, attorney Indiana Federation of Dentists

Mr. Ronald Fowler
401 Citizens Bank Building
Anderson, In. 46016

[86] 116. *Connecticut General/General Motors.* It will be recalled that CG had a "gentlemens' agreement" with IDA (actually with the IDA dentists who later formed IFD) not to insist on dental X-rays for General Motors workers in Indiana.[319] At the time IFD was formed in August 1976 there was concern that CG might be about to breach that agreement[320] and, in fact, in January 1977 CG's Indianapolis office began "testing the waters" by asking for X-rays, to determine whether enthusiasm for the boycott might be waning.[321] It quickly found no diminution of enthusiasm.

117. Although not contacted by the IFD member from whom CG had requested the X-rays,[322] CG's manager was called shortly by Dr. Rohn (then Vice President of IFD) and Dr. Pierce, CG's consultant who also sat on IFD's Executive Committee,[323] both checking on whether CG's policy had changed.[324] Thereafter IFD also sent a 3 man delegation to determine whether CG was going to require submission of X-rays,[325] to which the manager responded that CG intended to do so on occasion.[326] The meeting was concluded on such a hostile note that CG's manager refrained from making any further requests for X-rays from Madison County (the Anderson area) for fear of a confrontation which would end all existing cooperation and snarl the payment of GM workers' claims.[327] When CG's manager left the area in November 1977, the submission of X-rays from Madison County was no greater than ever.[328] [87]

118. *Metropolitan/Brockway Glass.* Metropolitan Life Insurance Co. of New York is the group dental health insurer for Brockway Glass Co., a multi-state employer with 450–500 employees in its Madison County, Indiana plant.[329] X-rays are needed by Metropolitan to administer benefits under the alternate benefits feature of Brockway's group dental insurance plan.[330] However, from April 1976 thru at least January 1978 (when the witness left the area) local dentists refused to submit X-rays to Metropolitan and Metropolitan simply declined to pay on claims when X-ray requests were refused.[331] In view of the delay and hardship which this tug of war was causing for Brockway's employees, its Personnel Manager and the President of

[319] *See* Para. 74 above.
[320] *See* Para. 99 above
[321] Tr 870–872.
[322] Tr 871, 890–891.
[323] CX 2A; CX 22A-B; Tr 870–872.
[324] Tr 871.
[325] CX 528.
[326] Tr 873.
[327] Tr 877–878.
[328] Tr 879.
[329] Tr 1611–1612. Nationally, Brockway has 10,000 employees in 13 plants, all covered by the same (Metropolitan) dental care insurance plan. Tr 1611.
[330] Tr 1612–1613.
[331] Tr 1614–1615, 1635.

the local (Glassblowers) union made efforts to talk IFD's Dr. McClure into submitting X-rays but were unsuccessful.[332] When the Personnel Manager left the area in early 1978 the impasse had not been resolved.[333]

119. In summary, the record here abounds with convincing evidence that the IDA/IFD conspiracy to boycott the dental health care insurers serving Indiana has actually been carried out until recently. Continuation of the boycott must be presumed in the absence of proof to the contrary, which has not been made here.[334] [88]

I. *Restraint of Trade*

120. Under Section 1 of the Sherman Act, 15 U.S.C. 1, and so under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, it is *per se* an unlawful restraint of trade for two or more businessmen to *agree* not to deal with another businessman. *Klors Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1958). While one businessman may ordinarily decide *individually* that he does not desire to do business with another, *United States* v. *Colgate & Company,* 250 U.S. 300, 307 (1919),[335] "group boycotts or concerted refusals to deal clearly run afoul of Section 1 of the Sherman Act." *Times-Picayune* v. *United States,* 345 U.S. 594, 625 (1953). This is true even if the boycott is intended to serve what the boycotters conceive to be a laudatory social purpose, as in the noted case of a boycott against so-called "style pirates". *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission,* 312 U.S. 457 (1941). The rationale of the *per se* rule against such concerted refusals to deal is that society will not tolerate private rivals of governmental authority. Except for the statutory exception for labor unions, 15 U.S.C. 17 and 29 U.S.C. 52, individuals must generally exercise their economic power individually, not jointly.

121. We have hitherto reviewed in considerable detail the nature and history of the boycott charged here. The evidence has shown that for at least the past decade there has been a largely successful organized effort by IFD, IDA and the members of both, to keep Indiana dentists from submitting requested X-rays to dental health care insurers serving that state and particularly the Anderson, Lafayette and Ft. Wayne areas.

122. That neither IFD nor any dentist member stands in the rela-

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[332] Tr 1620 *et seq.*

[333] Tr 1638.

[334] "When the existence of an object, condition, quality or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period." 2 *Wigmore on Evidence,* 3rd Ed. (1940), § 437, p. 413.

[335] "In the absence of any purpose to create or maintain a monopoly, the (Sherman) Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal" (p. 307).

tion of competitor to any insurer—a point urged by Respondent[336]—is quite immaterial. The target of a boycott need not be a competitor of the boycotter:

As the labor-boycott cases illustrate, the boycotters and the ultimate target need not be in a competitive relationship with each other. This (U.S. Supreme) Court also has [89] held unlawful concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to a desired good or service because of a refusal to accede to particular terms set by some or all of the sellers." *St. Paul Fire & Marine Ins. Co.* v. *Barry,* 438 U.S. 531 (1978).

Here there is technically neither a competitor nor a buyer/seller relationship between boycotters and boycottees but there are similar economic relationships susceptible to abuse. The insurers broadly represent the economic interest of the dentists' patients and to that end need access to the patients' X-rays for cost-containment purposes. Group action to shut off[337] insurers' access to the X-rays is precisely the kind of organized economic squeeze play against which the boycott rule is aimed.

123. That would seem to be the end of this case but for a question which has recently evoked much argument and as to which the law is still in an unsettled state: *Do the same antitrust rules apply to professional services as to commodities?* In 1975 the Supreme Court in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 787 (1975) held that professionals are *not,* (as had long been widely believed)[338] entirely exempt from the antitrust laws just because they are professionals. On the other hand, the same opinion suggested that what would constitute a *per se* offense in a trade conspiracy case involving the sale of commodities might require a more extensive economic investigation (*i.e.,* the "rule of reason" should apply) if professional services are involved: [90]

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions concepts which originated in other areas. The public service aspect and other features of the professions may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context be treated differently. We inti-

[336] RPF, page 16.

[337] "Shut off" is not too strong a term under the circumstances here. It is true that most dentists have typically expressed their willingness to let insurers' "qualified" experts come to their (the dentists') offices to look at X-rays and other diagnostic aids (CX 99W). However, there is abundant testimony in this record that that is an empty offer because it is not economically feasible for the insurers to send experts around to each dentist's office (Tr 341–42, 924–25, 978, 1121, 1232, 1383–1384, 1457; CX 303E, CX 316).

[338] The point was expressly reserved by the Supreme Court in *American Medical Association* v. *United States,* 317 U.S. 519 (1943), but wishful thinking on the part of professionals long chose to assume there was no problem. *See,* for example, CX 584D.

mate no view on any other situation than the one with which we are confronted today. (pp. 788–89, fn. 17)

124. In *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 696 (1978), the Court warned that this passage from *Goldfarb* "cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions" but did "adhere" to *Goldfarb's* view that:

professional services may differ significantly from other business services, and accordingly, the nature of the competition in such may vary. *Ethical norms may serve to regulate and promote this competition and thus fall within the Rule of Reason.* (p. 696)

125. Assuming, merely for argument, that the Rule of Reason is applicable to the facts of this case, the central question here is *not* whether there are any *pro*-competitive factors to be weighed against the *anti*-competitive factors already established.[339] No showing of *any* pro-competitive factor has been made or even attempted by Respondent or the State. The question is rather whether a *non*-competitive factor (*i.e.,* one which affects competitive conditions neither beneficially nor adversely) may be weighed in the balance. Specifically, the claim here is that the boycott in question promotes the health and [**91**] safety of Indiana citizens by preventing insurers from reducing insurance benefits below proper levels, thereby, as a practical matter, it is alleged, probably preventing an unhealthy reduction in actual treatments, too.[340]

126. The law on whether health/safety factors may properly be weighed in the balance against evidence of anti-competitive tendency is still in process of development and no sure answer can be given. In *Professional Engineers* the Supreme Court seemed to emphasize that generally the *only* evidence admissible in an antitrust case to counter an anti-competitive showing is evidence of a pro-competitive effect:

Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions. (p. 688)

127. Yet, as just noted, in the same opinion the Court also quoted *Goldfarb's* teaching that: "Ethical norms may serve to regulate and promote this competition and thus fall within the Rule of Reason". (p. 696) This pronouncement was footnoted as follows:

[339] *See* discussion in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 687–692 (1978).

[340] For our skepticism concerning the alleged nexus between reduced payments and reduced treatment, *see* Par. 148 below.

Courts have, for instance, upheld marketing restraints related to the safety of a product, provided that they have no anticompetitive effect and that they are reasonably ancillary to the seller's main purpose of protecting public from harm or itself from product liability. *See, e.g., Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932 (CA3 1970) (en banc); *cf., Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. at 55, n.23. (emphasis added) (p. 696, fn.22)

128. Very recent consideration of the question is found in this Commission's decision in *American Medical Association,* D. 9064 (Slip opinion of 10/12/79 at pages 26 and 37) [94 F.T.C. 701 at 1003, 1012]. Announcing that the Commission was not yet prepared to view restraints on professional price advertising as a *per se* offense, Commissioner Clanton wrote: **[92]**

In addition, we recognize that professional services may differ in some respects from other businesses (citing *Professional Engineers* and *Goldfarb*). Arguments suggesting that competition is contrary to the public interest are not cognizable under the rule of reason, but other justifications for ethical norms, such as the facilitation of non-deceptive advertising, may be procompetitive and must be taken into account. (p. 26)

129. Later, after finding certain of AMA's activities to constitute unreasonable restraints of trade (and so unfair methods of competition) because they bore "little relation" to their professed ethical purpose to "prevent impairment of medical judgment and deterioration of medical care," Commissioner Clanton elaborated as follows:

Whatever the extent to which quality of care concerns are cognizable under the antitrust laws. . . . the restraints here go far beyond anything that might be reasonably related to the goal of preventing use of improper medical procedures. (p. 37)

130. It is apparent that the proper role of health/safety evidence in rule of reason restraint of trade cases has yet to be worked out. If, as we have concluded here, a "group boycott" is unlawful *per se,* the health/safety question need not be answered. If, however, this Commission and the courts continue Commissioner Clanton's preference to treat professional boycott cases under the rule of reason, a rule for health/safety evidence must be settled. Practical considerations point this Administrative Law Judge strongly to consideration of health/safety factors in such a balancing of equities, even if health and safety factors are really neither pro nor anticompetitive.

131. However, this assumes that the health and safety factors are real and not just the overly broad "ethical principles" which Commissioner Clanton eventually decided should properly be disregarded in AMA. In order to determine what, if any, genuine health/safety factors we should consider here under a rule of reason, we turn now to analysis of the deficiencies in Indiana insurers' medical practices

alleged by IDA/IFD to justify their members' continuing concerted refusal to submit requested X-rays to such insurers. [93]

J. *The Medical Issues*

132. IDA/IFD's campaign to keep Indiana dentists from turning patients' X-rays over to dental health care insurers has always been based principally on IDA/IFD's claim that the insurers rely largely or even solely on X-rays when making diagnoses that should not be made without recourse to *all* available diagnostic aids (including clinical oral examinations, narrative reports and all the bio-chemical tests now available from commercial laboratories). During the IDA stage of the conspiracy that Association's so-called "Principles of Acceptability," adopted by it to support development of "a unified position" regarding to all third party dental plans,[341] included the following provisions:

> 3. X-rays should *not* be provided to any patient or third party.
>
> a. X-rays are part of the dentist's legal health records of the patient.
> b. *X-rays alone cannot give a third party sufficient information for diagnosis or treatment planning.* (emphasis added)
> c. X-rays in the hands of a third party are another interference with the dentist-patient relationship and the dentist's professional judgment.[342]

133. In a "missionary" talk in early 1976, Dr. Dan Rohn, a leading figure during all stages of the boycott, explained the so-called "Indiana Plan" to the American Academy of Dental Practice Administration:

> The one principle that causes the most problem is our stand on non-submission of radiographs to a third party. . . . First of all we believe the reading of radiographs and making decisions which would alter a treatment is diagnosing dental disease. This is practicing dentistry. It should be done [94] only by the attending dentist and not from radiographs alone. I am sure none of you here would be presumptious enough to look at a set of radiographs alone and make or alter another doctor's treatment plan. You would want more information than just the radiographs. Any good, responsible dentist would.[343]

134. Following organization of IFD in 1976, a committee set out to draft its "work rules" and among those considered was one expressly opposing dentists' submission of X-rays to insurers. The single "work rule" ultimately adopted, in April 1977, however, referred to non-submission of X-rays only obliquely. It did so by proscribing diagnosis and treatment planning without the assistance of all diagnostic aids,

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[341] CX 39A.
[342] CX 39A.
[343] CX 394F-G.

a narrative history and all clinical findings. It then placed on each dentist "moral and legal responsibility" for making sure that his patient's condition not be determined "for any purpose" without just such a "complete examination":

> Proper diagnosis and treatment planning predicates the doctor correlating all diagnostic aids with a history and with all clinical findings. No one facet of this process is now, or ever has been, recognized by the profession as a substitute for the complete process. To represent otherwise would subject the patient to sub-standard care.
>
> The patient's dentist, therefore, has a moral and legal responsibility to not allow a determination of his patient's condition to be made for any purpose without the benefit of a complete examination which takes into account all the elements described (above).[344]

135. During this trial there was a great deal of expert testimony by practicing dentists, (mostly IFD leaders), insurance company executives (with dental [95] expertise) and two academic experts (from Indiana University) concerning what X-rays can and cannot be expected to reveal for dental diagnostic purposes. The testimony on this complex question is summarized for easy reference in Paragraphs 136 through 139.

136. Complaint Counsel adduced evidence of a good many things which a radiograph *can* reveal to a dentist and much of this went unchallenged by either Respondent or Intervenor. For example, there was no denial of expert testimony by Metropolitan's sometime Director of Dental Relations that an X-ray will show a dental consultant tooth decay, an abscess, bone loss around the teeth or pathology in the bone itself.[345] Nor was there any dissent from testimony by the same witness that an X-ray can even spot dental caries that may not be evidenced through clinical examination.[346] An X-ray will also show, he explained, if there are teeth in opposition to teeth that are present (so as to permit determination of whether the teeth have functioning counterparts).[347] He testified, too, that an X-ray will show such physiological attributes as bone structure around the teeth, affecting degree of mobility (backward and forward movement in the teeth) based on bone support.[348] [Another of Complaint Counsel's experts testified that an X-ray does not show a patient's physiological condition but added that this was of slight importance with respect to the mechani-

[344] CX 537A. *See also* CX 542B, the back of IFD's standard claim form for patients, with the "Work Rule" printed thereon.

[345] Tr 1436–37. But *cf.* Dr. Janzarik at Tr 2548 to the effect that an X-ray may not show decay which is masked by a large silver filling.

[346] Tr 1515.

[347] Tr 1514–15.

[348] Tr 1514.

cal restoration of teeth.][349]

137. One area in which there *was* some conflict of testimony concerns occlusion (the striking angle of the teeth). On one hand an Aetna expert asserted that an X-ray can demonstrate the incidence of traumatic occlusion, depending on the scope of the X-ray, the quality with which it is taken and the angle with which it is taken.[350] **[96]** However, Respondent's current President testified that an X-ray alone will *not* show an occlusion of the teeth and that a diagnosis of occlusion cannot be made from an X-ray, with or without a claim form.[351] Similarly, the Aetna expert testified that an X-ray can show the hardness of a patient's bite (*i.e.,* the pressure exerted) from the amount of wear in the occlusal surfaces[352] but another expert put it differently: an X-ray, he said, does *not* show the hardness of a person's bite, unless there is abrasion on the teeth (and even then X-rays may be indecisive about the wear of the cusps).[353] The same Aetna expert testified that such abnormal habits of a patient as pipe-smoking may be shown by an X-ray;[354] but pipe-smoking is *not* one of the conditions to which an X-ray will point, according to one of Respondent's leaders.[355]

138. There were certain areas where there seems to be no serious argument that an X-ray alone will *not* do the job. Respondent's current President asserted without challenge that even a trained dentist can *not* determine the choice of restorative material just by looking at an X-ray, because that choice varies with how well the patient takes care of his teeth, which, in turn, affects how long the restorative material will last.[356] Another of Respondent's leaders testified that he would refuse to try and determine from looking at an X-ray what choice of restorative material he should use in his treatment, because "there are so many extenuating conditions."[357]

139. Finally and not too surprisingly, there was general agreement that X-rays will *not* show the patient's mental condition,[358] which is said to have considerable **[97]** bearing on the treatment.[359] Respondent's current President elaborated on this as follows:

(A)s you are working with a patient, you are more aware of what they will tolerate and

[349] Tr 323.
[350] Tr 1322.
[351] Tr 2548–49. *Accord:* Tr 324.
[352] Tr 1322–23.
[353] Tr 325.
[354] Tr 11323–24.
[355] Tr 2448.
[356] Tr 2547.
[357] Tr 2447.
[358] Tr 326, 1324–25, 1514, 2549.
[359] Tr 1324–25.

what they will not tolerate and what they will take care of and what they will not take care of.

A typical example is a patient who is missing tooth [*sic*] on each side of one arch and what I would say is the best treatment is two unilateral bridges. All right. Cheaper but adequate is a partial. But if this patient is the type that does not really give a darn about his teeth and yet he does brush them—I mean he just doesn't take meticulous care—the partial is a food trap. . . . The least (costly?) adequate or alternate mode would be a partial and yet it would destroy the dentition of the patient's mouth.[360]

140. In addition to all the technical testimony about what a dental X-ray will or will not reveal, there was conclusionary testimony as to whether a dental diagnosis should ever be based solely on X-rays (or any other diagnostic aid). On this question the experts—on all sides—seemed to agree that an X-ray or other diagnostic aid alone is not enough for an accurate diagnosis.

141. Professor Kasle, for the Intervenor, testified that no one diagnostic aid is sufficient in and of itself for a proper diagnosis and more specifically that "a radiograph can't stand alone."[361] A Connecticut General dental consultant said he would have to have additional information beside X-rays before he would invoke alternate treatment: "I cannot make a complete determination from an [98] X-ray."[362] A top Aetna dentist/executive agreed: "I would say that diagnosis should not be made on the basis of X-rays alone."[363]

142. To say, however, that diagnoses should not rest on X-rays alone does not take the argument very far. How much else is required for a sound determination in the circumstances of a particular case? Respondent's current President not surprisingly would require the use of all diagnostic aids for all determinations:

. . . . [S]omeone who is to determine what is right and what is wrong in each particular case must see everything clinically [physically], health history, X-rays and the patient.[364]

143. Literally applied, such a rule, requiring physical examinations in all cases, would seem to put the insurers out of the dental health care insurance business in Indiana because it is "very, very costly" and "unpractical" to perform a physical examination on each patient[365] and examinations are "not a practical solution."[366]

144. More realistic was the opinion of the head of IU's Dentistry

[360] Tr 2549–50. But *cf.* the testimony of a California Dental Service expert who conceded that X-rays will not show a mental condition and agreed that oral hygiene is very important but "would not necessarily prescribe a different type of filling material because the oral hygiene of the patient was questionable." Tr 326–27.

[361] Tr 2716–17.

[362] Tr 947.

[363] Tr 1302.

[364] Tr 2546. The head of Indiana University's Radiology Department was even more expansive (Tr 2716).

[365] Tr 341–42, 924–925, 978, 1221, 1232, 1383–1384, 1457; CX 303E, CX 316.

[366] Tr 1220.

School, who would utilize every diagnostic aid available[367] but agreed that it would probably be "proper" to base a diagnosis on a claim form and an X-ray or a claim form and a narrative history, if necessary.[368]

145. An even more pragmatic approach is that of the pioneer California Dental Service, whose long-time head **[99]** testified here that in "the great majority" of California's more expensive cases[369] his organization makes its decision on the basis of X-rays but will make a physical examination if a question about the determination is raised by the attending dentist.[370] Only in less than 1 percent of its predetermination (more expensive) cases does California Dental Service find it necessary to supplement X-rays with physical examination.[371]

146. Unfortunately the record here is substantially deficient in evidence as to just what supplementation of X-rays for diagnoses is the usual practice of the dental health care insurers serving Indiana. That deficiency is plainly the fault of Respondent, which has the burden of establishing that its restraint of such insurers' trade is reasonable.

147. Not knowing how the public health and safety are being affected by the insurers practices here, we have no health/safety factor to weigh in the balance against the plain anticompetitive and anti-consumer tendencies of Respondent's "group boycott". Our condemnation of the second paragraph of Respondent's vigilante "Work Rule"[372] and Respondent's application thereof stands.

148. This disposition of the health/safety question makes it unnecessary to deal with Respondent's constant assumption that an insurer's change (generally downward)[373] in benefit payments translates automatically into a comparable change in treatment plan. The record contains no satisfactory evidence that this is usual. Even if it were, we would have difficulty tracing the change in treatment plan to the change in benefit payments. The patient is always free to make up the difference in cost **[100]** between what his own dentist recommends and what the insurer's consultant will approve. The patient is thus an independent, intervening force breaking the asserted chain of causation between disallowance of a claim and change in treatment plan.

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[367] Tr 2692.

[368] Tr 2690. This testimony was based on a rephrased question and it is not clear on which basis the question was answered.

[369] A $100 minimum predetermination guide is apparently usual, although inflation seems to be driving the minimum up to $125 (Tr 393, 534–36, 563–64, 980).

[370] Tr 339–41, 354.

[371] Tr 339–41.

[372] CX 537A.

[373] There is no argument that most changes are reductions. An Aetna survey in its Ft. Wayne regional office, r example, found 20 alternate course reductions in 21 referrals (Tr 1351–52).

K. *State Action*

149. Respondent's chief defense here (and the reason for the State of Indiana's intervention) concerns "state action". The tenth amendment to the Federal Constitution reserves to individual states all powers neither expressly nor impliedly[374] granted to the Federal government and the Supreme Court has recently interpreted the 10th Amendment quite favorably to the states.[375] Many years ago, in *Parker* v. *Brown,* 317 U.S. 341 (1943) the Supreme Court held that the Sherman Act was never intended by Congress to reach state action regulating intrastate commerce, even though such regulation be anti-competitive in character and thus would be in violation of the federal law against unreasonable restraints of trade if it had been undertaken by a private person (and had the requisite effect on inter-state commerce).

150. A recent trilogy of cases has tightened up the doctrine of *Parker* v. *Brown* in certain respects, notably by insistence on finding *real* action by a state or private action really required by a state before honoring such a defense.[376] While the basic rule of *Parker* v. *Brown* —that real state regulation of commerce is not a restraint of trade under the Sherman Act—remains intact, nonetheless the genuineness of the state action or state requirement of private action relied on has become a prime issue whenever such a defense is raised.

151. In this case Respondent and Intervenor rely on the "state action" doctrine to defend Respondent's boycott [**101**] of insurers as a way of enforcing the Indiana law against unlicensed practice of "dentistry". On this branch of the case no attack is made on alleged over-reliance by insurers' dental consultants on X-rays for diagnosis; the attack is rather entirely on the use of lay screening by X-rays. The theory seems to be that insurers break the Indiana law against unlicensed practice of dentistry when they employ unlicensed paraprofessionals to make "diagnoses" from radiographs, even if only for the limited preliminary purpose of "screening", to determine which, if any, X-rays need be sent to an insurance company dental expert for definitive review. That alleged offense, the argument goes, plus Indiana's law against aiding and abetting the commission of such an offense requires Respondent and its dental vigilantes to boycott the

[374] The *implication* of powers to the Federal government was one of the major advances of the Constitution over the Articles of Confederation, which, in a similar context, reserved to the states all powers not *expressly* granted to the Federal government. The tenth amendment uses neither the word "express" nor the word "implied". Corwin, E. S., *The Constitution of the United States of America,* 88th Cong., 1st Sess., Senate Document No. 39 (1964), page 1035.

[375] *National League of Cities* v. *Usery.,* 426 U.S. 833 (1976).

[376] *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *City of Lafayette, Louisiana* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1978).

insurers. We must accordingly review Indiana's "state action" on the subject.

152. In 1913 the Indiana Dental Law made it unlawful for any person to "practice dentistry" in Indiana who had not first obtained a license to do so, as provided in the same statute. Indiana Code 25–14–1–1 (in IX 4). The statute provided that the Governor appoint from a list of practicing dentists, submitted by the trustees of the Indiana Dental Association, a nine-man state board of dental examiners. I.C. 25–14–1–2 *et seq.* (in IX 4). This state board of dental examiners was charged by the same statute with "administering and enforcing the laws pertaining to the practice of dentistry and of dental hygiene" and it was given the power and authority "to make, promulgate, adopt and enforce rules and regulations for the administration and enforcement of this act, in the manner provided by the law regarding the adoption of rules and regulations by a state agency". I.C. 24–14–1–13 (in IX 4). The "manner provided by the law" etc. is now set forth in I.C. 4–22–2–2(a) of the Indiana Administrative Procedure Act as follows:

> All rules,[377] regulations and other documents containing a statement of policy, other than official opinions of the Attorney General, which the issuing agency[378] intends to have the effect or force of law [102] but which are not promulgated, approved and filed as rules in conformity with the provisions of this chapter, shall be invalid, void and of no force or effect after the first day of January, 1978.[379] (footnotes added).

153. Section 4–22–2–5 similarly provides, in pertinent part, that "[n]o such rule shall be effective until after compliance with the provisions of this act." The decisional law of Indiana has long been fully in accord. Thus, statements and bulletins issued by state agencies that are not properly promulgated as rules have no legal effect. *Indiana State Personnel Board* v. *Jackson,* 192 N.E.2d 740 (Ind. 1963); *State* v. *Edwards,* 89 N.E.2d 443 (Ind. 1950). The act requires that before any rule or regulation having the force of law is adopted, there be notice and a hearing in which interested persons can participate and that the rules be approved by the Governor and Attorney General

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[377] The statutory definition of a "rule" includes "any rule, regulation, standard, classification, procedure, or requirement of any agency . . . interpreting, supplementing or implementing any statute." Ind. Code Ann. § 4–22–2–3 (Supp. 1979) (Burns).

[378] The statutory definition of an "agency" includes any board or department of the State of Indiana. Ind. Code Ann. § 4–22–2–3 (Supp. 1979) (Burns).

[379] Ind. Code Ann. § 4–22–2–2(a) (Supp. 1979) (Burns), as set forth above, replaced the following language:

> All rules and regulations heretofore made, adopted or promulgated by any agency of the State of Indiana which were not promulgated, approved and filed in conformity with the provisions of chapter 213 of the Acts of 1943, shall be invalid, void and of no force or effect after the first day of January, 1946.

within a specified time period and filed with the Secretary of State.[380]

154. The Indiana Dental Law gives the State Board of Dental Examiners the right to place the holder of a license on probation or suspend or revoke his license for any of numerous specified causes, such as obtaining a license by fraud, conviction of a felony, "unprofessional conduct" (of many specified kinds) or failing, neglecting or refusing to obey and comply with any Indiana statute in regard to the practice of dentistry or using or employing in his practice the services of anyone who is violating any provisions of any Indiana statutes relating to dentistry. I.C. 24–14–1–19 (in IX 4).

155. In addition to possessing this power to suspend **[103]** or revoke existing licenses for specified causes the Board of Dental Examiners, along with the Attorney General, local prosecuting attorneys and citizens of the same county, is empowered by the Indiana Dental Law to obtain an injunction against the practice of dentistry "as herein defined" by anyone not possessing a valid license to do so. I.C. 25–14–1–14 (in IX 4). The definition of "practicing dentistry" within the meaning of the Dental Law appears in I.C. 25–14–1–23, which includes, among several other tests, the following:

> Any person . . . who . . . offers to diagnose or professes to diagnose or treats or professes to treat any of the lesions or diseases of the human oral cavity, teeth, gums, maxillary or mandibular structures. . . .

156. It is worth noting that this provision does not purport to deal with "diagnosis", as distinguished from an "offer" or "profession" to diagnose and a fairly good argument might, perhaps, be made that the statute was never intended to reach mere diagnosis, absent a holding out as a dentist. However, this section of the law also contains a proviso which does use the word "diagnosis" without qualification:

> Provided that this section shall not apply to those procedures which a legally licensed and practicing dentist may delegate to competent office personnel as to which procedures the dentist exercises direct supervision and full responsibility, which procedures shall in no event include either (1) those procedures which require professional judgment and skill such as diagnosis and treatment planning. . . . I.C. 25–14–1–23 (in IX 4).

Accordingly, we must conclude that the "practice of dentistry", as defined in I.C. 25–14–1–23, was meant to include the simple act of "diagnosis", whether or not accompanied by an offer or profession to diagnose.

157. On the other hand, the same proviso would seem to imply that diagnosis is a non-delegable function of dentistry *only* insofar as it is one of those procedures "which require professional judgment and

[380] I.C. 4–22–2–4, 5 (Burns Supp. 1979).

skill." That leaves open the question whether the very limited kind of "diagnosis" made by a paraprofessional in screening X-rays to determine whether or not to refer a particular radiograph to an expert should be deemed "diagnosis" within the meaning of the law against unlicensed practice of dentistry. **[104]**

158. Whatever the practice in former years, insurers serving Indiana now generally allow lay employees to view X-rays only for the limited purpose of deciding whether there is a problem that seems to call for expert judgment, *i.e.,* whether to rely on the attending dentist's opinion as a basis for payment or to send the X-rays to the insurer's own experts for a second opinion.

159. A paraprofessional may process a "simple form. . . . the more common procedures," which represent the overwhelming portion of claims.[381] Since, however, the paraprofessional can only allow—*i.e.,* cannot reduce or deny—the claim, it is hard to see how an insured can ever be prejudiced in such case.[382]

160. If, however, there is a question a paraprofessional cannot handle, he or she has no authority to deny or reduce the claim but must send it on to a company dentist for expert review.[383]

161. A concrete example of how another major insurer serving Indiana deals with this problem is found in a claims guide for internal company use.[384] It recognizes that "it requires a professional consultant to read and interpret X-rays for other than the most evident conditions" (specifying several)[385] and thereafter lays down the general rule as stated above:

> A lay processor or analyst, upon review of X-rays, can approve benefits BUT . . . . NO PERSON OTHER THAN A CONSULTANT CAN RECOMMEND THAT BENEFITS BE REDUCED OR DENIED.[386] **[105]**

Association et al v. *Commonwealth of Pennsylvania Insurance Department,* Pa. Cmwlth., 398 A.2d 729 (1979), the Commonwealth Court held that a dental health care insurer would not violate Pennsylvania's statute against unauthorized practice of dentistry by having a lay clerk make a "first review" (*i.e.,* a *screening*) of radiographs to determine whether they satisfy the insurer's standards. The applicable statute provided that "a person engages in the 'Practice of Dentistry' within the meaning of this act who diagnoses . . . any disease, pain or injury . . . of the human teeth, jaws or associated structures . . . (etc.)" 63 P.S. Section 121. The testimony was "clear" that if a clerk

[381] Tr 913-914, 1320.
[382] Tr 2704-05, 2725-26.
[383] Tr 1416.
[384] IX 500A-C.
[385] IX 500B (*in camera*).
[386] IX 500C (*in camera*).

decides that the radiographs do not satisfy Blue Shield standards, the radiographs are then forwarded to a dental examiner for a "final" determination. The Court concluded:

> Appellants have not indicated to us, and we are unable to ascertain for ourselves, any aspect of the practice of dentistry as defined in Section 2 (*i.e.*, 63 P.S. § 120) which is violated when a clerk makes the first review of radiographs to determine whether they satisfy Blue Shield standards. page 734.

The Supreme Court of Indiana seems no more likely than the Commonwealth Court of Pennsylvania to find that the word "diagnosis" applies to the mere screening of X-rays by paraprofessionals for subsequent analysis by experts who possess "professional judgment and skill." Accordingly on this record there is probably no violation of the law against unlicensed practice of dentistry to be "aided and abetted" by sending X-rays to insurers.

163. Even, however, if we were one hundred percent wrong about whether an insurer's paraprofessionals "practice dentistry" within the meaning of the Indiana Dental Act, merely by screening X-rays and even if Respondent's dentists were found to be aiding and abetting the insurer's offense *individually* just by sending them X-rays on request, nevertheless the result of this case would be the same. Nothing in the Dental Act suggests either expressly or by implication that dentists are permitted—much less *required*—to organize a group boycott to help enforce the law—the only offense with which Respondent is charged here.

164. The Act is quite clear about how and under what circumstances public force is to be mobilized to deal with the unlicensed practice of dentistry. We have already referred to the Dental Act's provision for obtaining an injunction against the unlicensed practice of dentistry. I.C. 25–14–1–14 (in IX 4). It is true that such an [106] injunction may be sought not only by the public prosecutors and the Board of Dental Examiners but by "any citizen of any county" where the unlicensed dentistry is alleged to be carried on. A citizen's injunction suit, however, is a horse of a different color from a privately organized vigilante movement.

165. The Indiana injunction statute specifically provides that such an action shall be maintained "in accordance with the laws of the State of Indiana governing injunctions," I.C. 25–14–1–14 (in IX 4) with all the fair-trial and rational-proof safeguards inherent in judicial procedure. In such an action the methods used by insurers must be proved by reliable evidence and a reviewable decision must be carefully reached as to whether the precise facts shown really amount to "practicing dentistry." It would be hard to believe that the Indiana legislature—after setting up such procedural safeguards for an ac-

cused—intended to allow a dental vigilante group to enforce the law on its own by way of an organized boycott, free from all the restraints that civilization has built into judicial injunction procedure.

166. The contrast between law enforcement and vigilantism is even more striking in the case of criminal proceedings against unlicensed practice of dentistry and/or "aiders and abettors" thereof, which is provided in the Indiana Dental Act, I.C. 25–14–1–25. Is it even conceivable that the organizers of a private boycott would or could apply the presumption of innocence, the reasonable doubt rule and the criminal law's many other refinements to the random mass of unsubstantiated facts and rumors on which vigilantes commonly act? Vigilantism may have played a useful role in the pioneer West when no other kind of law enforcement was yet available—but the lights of civilization are now presumably brighter than that. The Indiana Dental Law makes clear provision for *public* action to stop the unlicensed practice of dentistry. It does not contemplate and certainly does not *require* concerted private action of any kind.

167. When we look beyond Indiana's statutes on the subject of practicing dentistry without a license, we find a few purported administrative actions (by the Board of Dental Examiners and the Department of Insurance) to which Respondent and Intervenor point as filling the statutory gap. The effort of Respondent and Intervenor to find valid administrative action of this sort is strenuous but not convincing. We now review these efforts.

168. The first evidence on which Respondent and Intervenor rely is an "Unofficial Advisory Letter" dated 3/14/74 from then Deputy Attorney General C.C. Plopper to the [**107**] President of the Indiana Board of Dental Examiners.[387] It was written in response to a request from the Board to know whether unauthorized practice of dentistry is involved in "clerks employed by third party insurance companies, checking radiographs submitted by a dentist to determine if the proposed treatment by the dentist should be authorized." Plopper replied:

> No clerk, who would be a layman, could possess the knowledge required to make such a diagnosis from radiographs. Neither would such a clerk have the knowledge to determine whether a proposed treatment would be proper, so that it would fall within authorized bounds.
>
> It is my opinion that only a dentist should review radiographs and proposed treatments for third party insurance companies and the use of clerks to make such reviews would be improper and should be proscribed.[388]

169. The Plopper letter shortly thereafter became the basis for a

[387] IX 5.
[388] IX 5.

general statement of policy by the Board of Dental Examiners[389] and later in the year (10/9/74) the Board advised at least one dental health insurer (Aetna) that it was "taking this (the Plopper) position."[390] Some four years later, after the X-ray boycott had resulted in the bringing of this complaint, the Board sent a letter to all Indiana dentists reviewing I.C. 25–14–1–23's definition of "practicing dentistry", citing the relevant criminal law, including I.C. 25–14–1–25 (unlicensed dental practice a misdemeanor) and I.C. 335–41–2–4 (aiding and abetting commission of a crime), and reaffirming (almost verbatim) the gospel according to Plopper (with reference to submitting dental X-rays to dental health insurers).[391] There is no evidence, however, that the Attorney General of Indiana or anyone else has ever charged —let alone convicted—any layman of practicing dentistry without a [**108**] license on the ground that such person screened X-rays for a dental health care insurer.

170. Plopper himself recognized that "the views expressed herein [*i.e.,* in his 'unofficial advisory letter' of 3/14/74] are those of the writer and are not to be considered to be the opinion of the Attorney General of Indiana nor a precedent of the Attorney General's office."[392] Plainly Mr. Plopper's personal opinion has something less than binding force and constitutes something less than "state action".

171. The policy statements of the State Board of Dental Examiners that resulted from Plopper's letter fare little better. Such policy statements are "invalid, void and of no force or effect unless promulgated, approved and filed as rules" in conformity with the provisions of the State Administrative Procedure Act, I.C. 4–22–2–2(a). *See also* I.C. 4–22–2–5. That statute requires notice and hearing in which interested persons can participate; approval of the rules by the Governor and Attorney General; and filing with the Secretary of State. I.C. 4–22–2–4 and 5.

172. However, the Board of Dental Examiners never held any hearings, issued any rules or regulations, undertook any administrative proceedings or brought—or even recommended—any enforcement suits concerning submission of X-rays to and review of X-rays by insurers.[393] While it is perhaps understandable that Respondent's allies on the Board of Dental Examiners would prefer merely to issue policy statements rather than hold hearings where insurers, customers and customers' employees would all have to be heard, mere policy statements by individuals in public office are not "state action".

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[389] IX 6.

[390] IX 90A.

[391] IX 9, IX 9A, IX 9B.

[392] IX 5. Only "official" opinions of the Attorney General have the force of law under Section 4–22–2–2 of the Indiana Administrative Procedure Act.

[393] Tr 2229, 2281, 2291–93, 2778.

173. Neither Plopper's "unofficial advisory opinion" nor the Board of Dental Examiners' policy statements based thereon had any standing at law; until recently neither even had application to the factual situation that has emerged from the evidence here. Plopper expressly assumed a practice by insurers of having clerks check X-rays "to **[109]** determine if the proposed treatment[394] by the dentist should be authorized." This evidence here shows, however, that this is *not* the prevailing practice among insurers of dental health serving Indiana. Such insurers' paraprofessionals read X-rays only to screen out the large number which need not be referred to one of the insurer's "dental consultants" for expert examination and determination.[395] Even if Plopper's opinion had had legal standing insofar as applied to a lay diagnosis for treatment or payment, it had no application to a lay determination merely as to whether an expert opinion was called for. Both the Plopper letter and the Board's policy statements are thus immaterial here.

174. We turn now to the Indiana Department of Insurance, which has plenary authority over any unfair claim practices of insurance companies operating in that state.[396] State Insurance Commissioner H. P. Hudson, head of the Insurance Department during recent years, put in a good deal of time and effort trying to mediate between the IDA/IFD dentists and the dental health insurers serving Indiana. The high point of his efforts at mediation was reached during the first half of 1976, when he planned and promoted a nine-months pilot program for submission of X-rays by dentists to insurers under compromise conditions, the whole to be monitored by his office.[397] The insurers agreed to try the pilot program[398] and Hudson then made a personal appeal to the House of Delegates of IDA on 5/1/75[399] but the dentists refused to compromise.[400]

175. Mediation, however, is very different from state action. Indeed, since it merely encourages the parties to settle a dispute voluntarily it could well be thought of **[110]** as the opposite of state action. As for evidence of Hudson's participation in the dispute in a governmental capacity—hearing and deciding insurance claim practice cases or otherwise—such evidence is close to zero.

176. Typical is the Indiana Insurance Department's "Bulletin 37" on the subject of "Dental X-rays",[401] issued in early or mid-September

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[394] We trust that Plopper understood he was giving an opinion on authorization of payment, not authorization of treatment.

[395] *See* Pars. 158–162, above.

[396] CX 810E.

[397] CX 810B.

[398] CX 810C.

[399] *See* Hudson's speech to IDA outlining his proposal in CX 810 *et seq.*

[400] CX 425.

[401] IX 167.

1979[402] on the eve of hearings in this case. Bulletin 37 first recited previous advice to insurance companies offering dental insurance plans that the practice of allowing personnel not licensed as dentists to "evaluate" dental X-rays is a violation of the insurance laws of Indiana governing Unfair Trade Practices and the Indiana Dental Licensing Law (I.C. 25–14–1–1 *et seq.*) It further recited that "allegations are being made that certain insurance companies are currently utilizing personnel not licensed as dentists to evaluate dental X-rays. Over Commissioner Hudson's signature, Bulletin 37 then made this pronouncement:

> The Department reiterates and reaffirms its position opposing such practice. Evidence brought to my attention reflecting this conduct will result in an unfair trade practice hearing against the company so charged.[403]

177. It appears, however, that the Commissioner's bark is notably worse than his bite, as cross-examination of his assistant and legal adviser developed at the trial here:

> Q. (W)hat status does a bulletin issued by the Department of Insurance have?
>
> A. A bulletin is the Department's position on whatever the subject matter is of that bulletin and the Department takes the stance that that bulletin will be enforced by the Department. It does not carry the weight of either statute or regulation but [it] is an interpretation that the Department makes with regard to the subject matter. [111]
>
> Q. It has no force of law, is that correct?
>
> A. That's correct.
>
> Q. And this bulletin was not issued pursuant to—no notice to the public to comment on this bulletin or hearings were held prior to its issuance, was there?
>
> A. That's correct.[404]

178. One other Insurance Department/Dental Board policy statement deserves most careful consideration. Hearings in this matter began on 10/2/79. On that date, in response to an urgent request by the Attorney General's office and the Board of Dental Examiners to issue a strong pronouncement for the FTC proceeding.[405] Insurance Commissioner Hudson and Dr. Paul Stephens, long member of the IDA/IFD X-ray conspiracy and by 1979 President of the all-dentist Board of Dental Examiners, together signed a letter addressed to "all Indiana-Licensed Insurers" which was sent to all Indiana-licensed

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[402] Tr 2774–75.

[403] IX 167.

[404] Tr 2777.

[405] A Board member informed the Insurance Department: "The Attorney General's office is most anxious for these documents to be mailed before October 2 as they want to use them for exhibits in the FTC case" (CX 826A). He reported to the Attorney General's office: "Hopefully the Department of Insurance and the Board will get copies in the mail to their respective charges by October 2. At any rate the letter could be dated September 24" (CX 827).

dentists, too.[406] This policy statement re-hashed the Plopper opinion, recited that "the use of radiographs in any diagnostic capacity whatsoever requires judgment and skill reserved only for licensed dentists," explained how a dentist's submission of X-rays to insurers "aids and abets" the unlicensed practice of dentistry and warned of possible criminal prosecution for such a violation. Thus far there was nothing very new in the letter.

179. However, there was enclosed with the letter a [112] form affidavit[407] to be sent by dentists to insurers and returned with a sworn statement by the insurer that the dentist's X-rays have been *"screened, read, used for 'benefit determination' and/or any other diagnostic procedure"* only by specified licensed dentists. Obtaining such an affidavit was recommended to protect the dentist from criminal prosecution as an "aider and abettor" of the insurer.[408] The theory of this affidavit was expressly stated in the text, as follows:

> Should an insurance carrier be subsequently suspected of using unlicensed personnel to perform any but the clerical operations of identifying the source or disposition of films, that carrier will be subject to investigation and potential prosecution. *Operations termed "benefit determination", screening, reading, identifying teeth or any such procedures are deemed to be reserved for licensed dentists only.* (emphasis added)[409]

180. Note that this last-minute effort to aid and abet Respondent's "state action" defense for the first time sought to bring mere *screening* of X-rays within the target area of the Indiana Insurance Department/Board of Dental Examiners attack. That the letter went out in response to a plea by Intervenor's Counsel to help win this case[410] would alone cast grave doubt on its significance as evidence of "state action". Be that as it may, under cross-examination Commissioner Hudson's legal advisor conceded "that (the Hudson/Stephens joint letter) *does not have the force of law."* (emphasis added)[411] Under the provisions of Indiana's little APA cited above, he could hardly have said anything else for it is obvious that Respondent and its allies on the Dental Board and in the Insurance Department were hard pressed enough just to get out the purported evidence of "state action" wanted by Respondent's counsel for this hearing without going through [113] the lengthy hearings and public debate required to make a real rule in Indiana.

181. The testimony of the same official confirmed that the Insurance Department has never held hearings or promulgated formal

[406] IX 167 and IX 167A.
[407] IX 167B through IX 167D.
[408] IX 167C.
[409] IX 167A.
[410] CX 828.
[411] Tr 2778.

rules or regulations with respect to the question of submission of radiographs to insurance companies.[412] Indeed, he explained, the Department has never been engaged in any legal proceeding over the issue of radiographs[413] nor have any of the unfair trade practice actions it has brought against insurance companies in the past related to any matter pending here.[414]

182. As a matter of fact in August 1978 Respondent itself was so dissatisfied with what it then considered the substantial failure of the State of Indiana and its Board of Dental Examiners to employ the unauthorized practice provisions of the State's Dental Practice Act the Respondent wanted that it (IFD) brought suit against both the State and the Board in the U.S. District Court for the Southern District of Indiana (Civil No. IP 78–498–C) for $25 million damages.[415]

183. However, in December 1978 a deal was apparently made for Respondent to drop its suit if the State Board of Dental Examiners would agree to intervene in this (FTC) matter.[416] On 12/20/78 the District Court, Holder, J., granted Respondent's motion to dismiss its own suit and the following day the State filed its petition to intervene here.[417]

184. To summarize the "state action" question, the State of Indiana has long required dentists to be licensed but the Dental Practice Act specifies nothing as to whether paraprofessionals should be forbidden either to read X-rays or to screen them for reference to experts. [114]

185. Occasional assertions of some state-officials to the effect that X-rays should not be read by laymen for any purpose and, during trial here, to the effect that X-rays should not even be screened by laymen all turn out to lack official standing to define an offense. Without a primary offense of practicing dentistry without a license there can, of course, be no secondary offense of "aiding and abetting" the primary offense. Manifestly Indiana dental health care insurers are not required to conform their business practices to the mere personal opinions of Dr. Stephens or Commissioner Hudson any more than to the "unofficial advisory opinions" of Mr. Plopper.

L. *Collateral Estoppel*

187. A principal contention of Respondent and Intervenor is that we are not permitted to make our own assessment of the "state action" defense, as we have just done. Such consideration is foreclosed under the well-known doctrine of "collateral estoppel", the argument runs,

[412] Tr 2778.
[413] Tr 2778.
[414] Tr 2782.
[415] CX 508A, D, E, F.
[416] CX 824.
[417] *See* Summary of Proceeding above, pp. 4, 5, 6.

by the prior findings and conclusions of a U.S. District Judge in a suit brought by the State of Indiana and its Board of Dental Examiners to compel this Commission to permit them to intervene in this matter.

188. Under the traditional "mutuality" requirement of the collateral estoppel doctrine Respondent probably could not invoke that doctrine here because Respondent was not a party to the intervention suit.[418] In any event, however, the doctrine of collateral estoppel does not apply for another reason. The findings which Respondent and Intervenor urge us to carry over from the suit to compel allowance of intervention were not necessary or essential to the judgment of intervention, a universally accepted prerequisite to application of collateral estoppel.

189. The most recent restatement of the law by the **[115]** American Law Institute provides:

§ 68. *Issue preclusion—General Rule*

When an issue of fact or law is actually litigated and determined by a valid and final judgment, *and the determination is essential to the judgment* (emphasis added), the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[419]

Comment h thereto elaborates on the portion underlined above:

Determinations not essential to the judgment. If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded (emphasis added). Such determinations have the characteristics of dicta and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.[420]

190. The rule that a finding unnecessary to a judgment does not raise a collateral estoppel has been unquestioned federal law for over a century. The Supreme Court held in *Russell* v. *Place,* 94 U.S. 606, 608–09 (1876) **[116]** that:

to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined—*that is, that the verdict in the suit could not have been rendered without deciding that matter* (emphasis added) or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.

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[418] *Restatement of Judgments* (1942) § 93. But *cf. Restatement (2d) of Judgments,* § 88 (Tent. Draft No. 2, 1975) eliminating the mutuality requirement for application of collateral estoppel. *See Haize* v. *Hanover Ins. Co.,* 536 F.2d 576, 578, fn. 1 (1976).

[419] *Restatement of Judgments,* 2d (Tent. Draft No. 4, 4/15/77) § 68.

[420] *Ibid.*

191. In order to apply this law to the relevant facts it is necessary to review briefly the record here and the nature and history of the extraneous lawsuit where the findings in question were made. Following issuance of this complaint against Respondent Indiana Federation of Dentists in the Fall of 1978, the State of Indiana and its Board of Dental Examiners, by its Attorney General, on 12/29/78 petitioned to intervene here to insure an adequate presentation of Indiana's position on the "state action" question.

192. The Commission's rule concerning intervention (Section 3.14) provides little light on when intervention is justified. It provides:

> § 3.14 Intervention.—Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefor. Such application shall have attached to it a certificate showing service thereof upon each party to the proceeding in accordance with the provisions of § 4.4(b) of this chapter. A similar certificate shall be attached to the answer filed by any party, other than counsel in support of the complaint, showing service of such answer upon the applicant. The Administrative Law Judge or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper. [117]

193. The Administrative Law Judge, citing the tests laid down in *Firestone Tire & Rubber Company,* D. 8818, 77 F.T.C. 1666 (1970), on 1/5/79 denied the petition to intervene (although welcoming any *amicus curiae* briefs). He did so primarily because no showing had been made that Respondent would not adequately present the State's position and there was thus no countervailing consideration to weigh against the likely evil effects of complicating and lengthening the proceeding by permitting intervention.

194. On 1/19/79 the State of Indiana applied to the Commission for review of the Judge's order but on 2/5/79 the Commission, too, denied intervention, primarily for failure to demonstrate how the State would likely improve on the showing to be made by Respondent. On 3/12/79 the Commission denied a petition for reconsideration and soon thereafter the would-be intervenor turned to the Federal courts.

195. On 5/23/79 the State of Indiana and the Indiana State Board of Dental Examiners filed in the U.S. District Court for the Southern District of Indiana, Indianapolis Division, a complaint (with motion for preliminary injunction) against the United States of America and this Commission, which was then docketed as Civil No. IP–453–C.[421] Reciting the history of Indiana's unsuccessful attempts to intervene in this case and pleading various facts relative to the "state action" defense here, the State's complaint ended by asserting (Par. 46) that

[421] IX 1000Z–25 *et seq.*

the State of Indiana was "entitled to intervention as of right in FTC Docket 9118 pursuant to its sovereign right to regulate the dental profession within the State."

196. The prayer for relief which followed, however, did not limit itself to *intervention* but sought, alternatively, an order *dismissing the FTC Complaint for lack of jurisdiction:*

> Wherefore, the State of Indiana and the Indiana State Board of Dental Examiners respectfully request that the Court issue an Order:
>
> a) enjoining the F.T.C. from proceeding [118] further, in any way, with the prosecution of docket 9118 until the resolution of the instant complaint;
>
> b) finding that the F.T.C. lacks jurisdiction to proceed with docket 9118, and order that the cause be dismissed; or, in the alternative,
>
> c) declaring that the State of Indiana was wrongfully denied its intervention of right in docket 9118, and order that full intervention be granted immediately; and
>
> d) for all other just and proper relief.[422]

197. On 5/23/79 the United States and this Commission filed a motion (with supporting brief and proposed findings and conclusion) to dismiss this complaint or, in the alternative, for summary judgment on the grounds that (1) the District Court lacked jurisdiction over the subject matter; (2) that the complaint failed to state a claim; and (3) that there was no genuine issue of material fact and defendants were entitled to judgment as a matter of law.[423] On 7/10/79 the District Judge set 7/19/79 for a hearing and argument on the *State's* motion for a preliminary injunction but when counsel appeared the District Judge expressed distaste for preliminary injunctions and stated his preference to proceed immediately to trial on the merits under F.R.C.P. Rule 65, to which proposal all counsel agreed. The Judge had Commission counsel orally admit or deny each allegation of Indiana's complaint, then proceeded to hold an immediate hearing on the merits, which consisted of submission of a few affidavits and general agreement that a few others could be submitted within a few days. The case was thereupon submitted for decision. [The entire record of the hearing, which occupies only 57 pages, is in evidence here for easy reference.][424] **[119]**

199. What followed is complicated. The District Judge had no hesitation in denying without opinion the Commission's motion to dismiss Indiana's complaint or in the alternative for summary judgment and did so on 8/17/79.[425] On the same date the District Judge made find-

[422] IX 1000XX.
[423] IX 1000Z–11.
[424] *See* CX 855A through CX 855Z–35 (hearing transcript) and IX 1000G (Court's entry for 7/19/79).
[425] IX 1000Z–4.

ings and conclusions generally taken from Indiana's proposals,[426] and then by mistake entered *both* of the two judgments which had been proposed by Indiana as *alternatives*.[427]

200. One judgment signed by the District Judge ordered the Commission to "immediately grant plaintiff State of Indiana's petition for leave to intervene in the Federal Trade Commission proceeding."[428] The second judgment signed by the District Judge ordered the Commission to "immediately cease exercising jurisdiction and dismiss the Federal Trade Commission proceeding."[429] It is plain, as recognized in Indiana's original prayer for "alternative" relief,[430] that it would be inconsistent to order *both* the dismissal of the proceeding and the intervention of Indiana at the same time.

201. The mistake in entering both proposed judgments was promptly recognized and corrected *sua sponte* by the District Judge on 8/23/79 by adding the following entry concerning the 8/17/79 judgment of dismissal for lack of jurisdiction:

> The above Judgment is vacated as improvidently entered in the belief it was a copy of a Judgment entered the same date. The Judgment permitting intervention of August 17, 1979 is in full force and [120] effect.[431]

202. This left it that the only surviving *judgment* was the one compelling intervention. However, it also left a number of *findings and conclusions* proposed by Indiana and adopted by the District Judge which would tend to support a dismissal but would be unnecessary if not positively irrelevant to the intervention order. Accordingly, on 9/7/79 the Commission filed a motion to vacate certain findings and conclusions *nunc pro tunc* to conform to the modified judgment.[432]

203. The *findings of fact* by the District Judge which the Commission wanted vacated were specified to be as follows:

> (11) Indiana Code 25–14–1–23 and 25 define the criminal act of practicing dentistry without a license, which includes the diagnosing or reading of X-rays.[433]
>
> * * * * * * *
>
> (18) Under the mandate of Indiana Law, Indiana dentists are prohibited from submitting their dental X-rays to third party insurers who employ "dental consultants", who

[426] IX 1000Z–5 through IX 1000Z–10.
[427] IX 1000Y.
[428] IX 1000U.
[429] IX 1000V.
[430] IX 1000XX.
[431] IX 1000Y.
[432] IX 1000H–J.
[433] IX 1000Z–7.

are not licensed to practice dentistry to read or diagnose the X-rays.[434]

204. The *conclusions of law* by the District Judge which the Commission wanted vacated were specified to be as follows: [121]

(3) The order proposed by the Secretary of the F.T.C. would infringe on the State's right to regulate the practice of dentistry within the State under its police powers by the Tenth Amendment to the Constitution of the United States (citing cases).[435]

* * * * * * *

(6) The F.T.C. is proceeding beyond its jurisdiction in attempting to regulate the practice of dentistry in the State of Indiana and should be enjoined from doing so (citing cases).[436]

205. The merest reading of these particular findings and conclusions—all of them going to the merits of the case here—makes it plain that they were originally proposed to support the demanded dismissal of this case on "jurisdictional" grounds and are quite irrelevant or immaterial to the demand for intervention, which turns entirely on procedural considerations and which Judge Holder had already found supportable in his Conclusion of Law #5.[437] The rest of the District Judge's conclusions are clearly *unnecessary* to the only judgment (intervention) rendered by him and accordingly should have been vacated when the other (mistaken) judgment of dismissal was vacated.

206. However, the Commission's motion to vacate was *not* granted. In an entry on 10/18/79 the District Judge [122] made an explanatory statement, which is reproduced here as Figures 8A–B,[438] to the effect that the Commission "has jurisdiction over certain of the matters and of the Indiana licensed doctors before it" but asserted on the other hand that "that jurisdiction is limited by the exclusive rights of the State of Indiana under the police power to protect the health of the citizens of Indiana and oversee the dental profession." "It is this right," he explained, "that the defendants are enjoined from invading. . . ." (*See* Figures 8A and 8B).

207. The rest of the statement is difficult to follow and seems little more than a general expression of sympathy for the State's position on the merits here. While closing with an assurance that "the Federal Trade Commission is unhampered by this Court's ruling of August 17,

[434] IX 1000Z–9.

[435] IX 1000Z–10.

[436] IX 1000Z–10.

[437] "The State meets the requirements for intervention as established by the F.T.C. in the *Firestone Tire & Rubber Company*, Dkt. No. 8818, 77 F.T.C. 1666, 1669 (1970) in that the issues the State seeks to raise cannot be roperly raised and argued by the current parties to the proceeding and only minimal additional cost and time ill be required by its intervention." (Conclusion of Law #5).

[438] IX 1000E–F.

1979 in fulfilling its mission in Docket No. 9118" he nonetheless added: "The findings of fact as found and the conclusions of law thereon are necessary for the relief sought." How findings on the merits of this lawsuit could be necessary to a judgment in that lawsuit merely allowing intervention here the District Judge did not attempt to explain and we cannot convince ourselves that such could be the case.

208. Respondent and Intervenor now take the position that the District Judge's express statement that his findings were necessary to his judgment is dispositive. But this is contrary both to authority and common sense. Thus a judge's characterization of his judgment as made on the merits is not binding when objective analysis indicates otherwise:

> Although the court which renders the judgment states that it is "on the merits," this characterization is not always conclusive in the forum or on other courts which are required to give full faith and credit to the judgment. Nor for purposes of *Erie-Tompkins* is the characterization by the state courts of its judgment as procedural or jurisdictional binding upon the federal courts sitting in that state, which are required to determine independently what is [**123**] "substantive" for purposes of the *Erie* doctrine. 1B *Moore's Federal Practice*, ¶ 0.409[7] at 1041–1042 (2d Ed., 1974).

> It is well settled . . . that *what has been adjudicated is to be determined not from the opinion rendered but from a consideration of the judgment actually entered in reference to the issues* presented for decision. *Adams* v. *Pearson*, 411 Ill. 431, 104 NE 2d 267, 270 (1952) (emphasis added).

> The intention of the court to make a determination on the merits may be important *but if the judgment is clearly not on the merits, the court's intention to make it a bar is immaterial.* The words "with prejudice" add nothing to the effect of the judgment in such a case, no matter what light they throw on the intention of the court. *Goddard* v. *Security Title Ins. and Guarantee Co.*, 83 P.2d 24, 28 (Cal., 1938) (emphasis added).

209. Such cases merely reflect common sense: no judicial *ipse dixit* can make black white. There being no serious doubt that the District Judge's findings and conclusions about the merits of this case were not *necessary* to his only *judgment* (allowing intervention), the case is clearly governed by the rule of Section 68 of the Restatement of Judgments (2d) denying collateral estoppel where a determination is "not essential to the judgment." Our conclusions above with reference to the doctrine of "state action" and its inapplicability here thus correctly stand on their own two feet, unshackled by the District Judge's expressions of feeling about the merits here.

* * * * * * *

The findings of fact proposed by Complaint Counsel, Respondent and the State of Indiana are all granted insofar as consistent with this Initial Decision and denied insofar as inconsistent herewith. [124]

Figure 8A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA; and
INDIANA STATE BOARD OF DENTAL EXAMINERS
vs.
THE UNITED STATES OF AMERICA;
FEDERAL TRADE COMMISSION; and
MICHAEL PERTSCHUK, Chairman,
PAUL RAND DIXON,
ELIZABETH HANFORD DOLE,
DAVID A. CLANTON, and
ROBERT PITOFSKY,
Members of Federal Trade Commission
No. IP 79-453-C

ENTRY

The matters of the defendants' September 7, 1979 motion to vacate nunc pro tunc certain findings of fact and conclusions of law to conform to modified judgment as amended on October 9, 1979 to show belated service of motion on plaintiffs' counsel, and plaintiffs' motion to strike came on for the Court's ruling.

The Court, being duly advised in the premises, now finds that defendants' motion should be and is hereby DENIED and plaintiffs' motion to strike is MOOTED by such ruling.

Simultaneously herewith the Court if filing a CORRECTED judgment entry of August 17, 1979.

It is apparent that the Federal Trade Commission has jurisdiction over certain of the matters and of the Indiana licensed dentists before it. On the other hand that jurisdiction is limited by the exclusive rights of the State of Indiana under the police power to protect the health of the citizens of Indiana [illegible] It is this right that the defendants are enjoined from invading and impressing upon the

State of Indiana's citizens of an agreed course of conduct between a group of dentists and the Federal Trade Commission in which the State of Indiana had no input. The agreement between the Federal Trade Commission and one group of Indiana dentists no doubt will be in issue in the hearing of the complaint in Docket No. 9118. Indiana's ability to prosecute a dentist would be greatly hampered by such a course of agreed action. The power of the purse of the payers acting through unlicensed, incompetent personnel could be the ultimate deciding factor in the diagnosis of an Indiana citizen's need for dental care. It should be clear that the mission of the Federal Trade Commission is not limited to the complainant payers' and Indiana's licensed dentists points of view but also respect the rights of the sovereign State of Indiana and thus avoid complainant payers' and/or Indiana's licensed dentists use of the Federal Trade Commission proceeding to circumvent the State of Indiana's policing the dental profession in the interest of the health of its five million citizens. The Federal Trade Commission is unhampered by this Court's ruling of August 17, 1979 in fulfilling its mission in Docket No. 9118. The findings of facts as found and the conclusions of law thereon are necessary for the relief sought.

Dated this 18 day of October, 1979.

Cale J. Holder, Judge, United States District Court Southern District of Indiana

[126] IV. Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the subject matter of this complaint against unfair methods of competition and unfair acts and practices, by virtue of the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

2. The Commission has personal jurisdiction over Respondent unincorporated association and its members by virtue of the delivery of a copy of the complaint to its office at 2403 Raible Ave., Anderson, Indiana, on 11/13/78, pursuant to Rule § 4.4(a)(iii).

3. Although Respondent is an unincorporated association, for purposes of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, it is a "corporation" organized to carry on business for the profit of its members.

4. Respondent is not in the business of insurance and even if the targets of its organized boycott be deemed in the business of insurance, the McCarran-Ferguson Act's exemption of the insurance business from the antitrust laws expressly excludes application of the exemption to a boycott of the business. 15 U.S.C. 1012, 1013(b).

5. Respondent has billed itself as a labor union or labor organization and thus exempt from the strictures of the antitrust laws under Sections 6 and 20 of the Clayton Act, 15 U.S.C. 17, 29, but it is not such a labor organization and its activities are not exempt from antitrust scrutiny.

6. While the businesses of dentists that make up this association are not in interstate commerce, the practices charged in this complaint tend to have an adverse effect on the businesses of dental health care insurers serving Indiana, which are in interstate commerce.

7. Respondent was formed in 1976 to join and continue a concerted refusal by many dentists in Indiana to submit radiographs (X-rays) to dental health insurers either automatically or on request.

8. The concerted refusal of Respondent and its co-conspirators to supply X-rays to dental health care insurers on request is *per se* an unreasonable restraint of trade within the meaning of Section 1 of the Sherman Act, 15 U.S.C. 1, and an unfair method of competition and an unfair act and practice under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. [127]

9. Even if such a concerted refusal were not an unreasonable restraint of trade *per se,* there is no proof on this record of any procompetitive effect and no sufficient proof of any beneficial or effect on health/safety to outweigh the plainly anticompetitive and anti-consumer effects of the IDA/IFD group boycott of dental health care insurers.

10. Respondent and its co-conspirators have also threatened to pre-

vent and to some extent have prevented said insurers from getting access to the services of dentist members except on Respondent's terms, as an ancillary weapon in the struggle over submission of X-rays.

11. Respondent's continuing effort to organize refusals by dentists to supply X-rays requested by insurers is volunteered activity and has never been required by the State of Indiana. Respondent has no "state action" defense here.

12. The findings and conclusions of the U.S. District Court for the Southern District of Indiana, Holder, J., in *State of Indiana* v. *Pertschuk, et al.* (Civ. IP 79–453–C) raise no collateral estoppel here and do not operate to deprive this Commission of jurisdiction over this matter.

13. Respondent has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

14. The relief to be granted here will be in the public interest.

V. Relief

The relief contemplated in the notice attached to the complaint is recited verbatim in the Summary of Proceedings above.[439] However, Complaint Counsel, as is entirely proper, now recommend following the somewhat different IDA consent order (Attachment A to "Complaint Counsel's Brief Supporting Conclusions of Law") and point to testimony that "this (IDA) order has been effective against IDA."[440] Even Respondent concedes that "all (insurance) companies apparently experienced a substantial increase (in X-ray submissions) in late 1978 after a consent order was agreed [**128**] to between the IDA and the FTC and the IDA changed its (X-ray submission) policy."[441] However, Respondent's concession may be undue; the transcript references cited in support refer only to "an increase", not to "a substantial increase."[442] Whether the IDA consent order has really freed up Indiana X-rays significantly is not quite as clear as counsel on both sides would make out.

In any event it is our responsibility to decide what seems most likely to put an end to the violation found, *F.T.C.* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1962) with the least dislocation possible, *F.T.C.* v. *All-Luminum Products, Inc.,* 63 F.T.C. 1268, 1279 (1963) and to that purpose we have broad discretion, *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611 (1946), so long as the remedy is reasonably related to the offense, *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S.

[439] *See* Page 4 above.
[440] Tr 922; Tr 1282.
[441] RPF #12.
[442] Tr 919, 922, 1282.

470, 473 (1952). We shall now take up the several operative paragraphs of the IDA consent order one by one.

Paragraph IIA of the proposed order goes to the heart of the case, prohibiting IFD from intentionally organizing dentists to refuse to submit X-rays or other diagnostic aids to third-party insurers. Since the principal finding of this proceeding is that Respondent has done precisely what Paragraph IIA(1) would forbid, there can be no objection of substance to this proposal.

Paragraph IIA of Complaint Counsel's proposed order also contains a second sentence which would direct IFD to cease and desist from organizing dentists to "refuse to deal in any particular way with any one or more third-party payers (*i.e.,* insurers)". This concern to forestall other boycotts for other purposes by members of an association already found to be boycott-prone is entirely reasonable, although we have revised the wording somewhat in our own order.

The Administrative Law Judge has made one important change in Par. IIA. The proposed order assumes that IFD will remain in existence as an unincorporated association. The Judge sees no good reason for keeping this association in existence as such. Not an ordinary professional association carrying on the usual gamut of professional activities and services like IDA, IFD was conceived simply **[129]** as a "labor union" *front* for those IDA members (particularly those living in the Anderson, Lafayette and Ft. Wayne areas) who were most concerned with keeping IDA's boycott of dental health insurers alive, even after antitrust prosecution began to loom as a real threat. With our decision forbidding the members of IFD to continue their insurer-boycott, the reason for IFD's being ceases and its continued existence could serve only as a constant temptation to use the organizational shell for the old, meretricious purpose or something like it.

Dissolution of an *ad hoc* organization designed as a vehicle to carry on a venture unlawful under the antitrust laws is the oldest known form of antitrust divestiture. Dissolution of the holding company thru which a monopoly had been effected was the very heart of the relief in *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911). Accordingly, the very first provision of our order here will be to order dissolution of IFD within six months and a report to the Commission not more than a month later. In this situation our several cease and desist orders will be directed to the members of IFD rather than to the unincorporated association which has served as the vehicle for their unlawful activities and will therefore shortly cease to exist under our order. It is, of course, well established that the Commission can issue orders which are binding on unnamed officers, agents, representatives and employees. *Western Fruit Growers Sales Co.* v. *F.T.C.,* 322 F.2d 67 (9 Cir., 1963), *cert. denied,* 376 U.S. 907 (1964); *Mandel Bros.*

v. *F.T.C.*, 254 F.2d 18, 22 (7 Cir., 1958), *rev'd on other grounds*, 359 U.S. 385 (1959). *A fortiori* as to members of an unincorporated association sued in the association's name.

Paragraph IIB of Complaint Counsel's proposed order would forbid IFD to compel or coerce insurers to change any provision of a dental health care benefits program. This situation seems covered by the provision of our own order [(2–(2))] just discussed. Accordingly, we omit recommended Paragraph IIB.

Paragraph IIC would apparently prohibit activity by Respondent which has either of two purposes:

1. inducing patients to choose dentists who do *not* "cooperate" with dental health insurers; or
2. influencing patients to choose dentists on the basis of how such dentists do not "cooperate" with insurers.

The provision seems aimed at consumer-level boycotts but it [**130**] is abstruse and unclear. The key word "cooperate", which could mean many things, is not defined and its presence would make the provision quite difficult to enforce. Moreover, there would usually seem to be little need for this kind of auxiliary prohibition if the association be dissolved and the members be forbidden to pursue the insurer-boycott which is the gist of this case.

Moreover, the only[443] cited evidence in this record that IFD has ever tried to mount anything like a boycott at the consumer level is a single incident in the latter part of 1977 and early 1978 involving "Arnie's Pizza King" in Lafayette, Indiana.[444] When the Lafayette chapter heard that "Arnie" was posting a list of "accepted" and "non-accepted" dentists in Lafayette for its employees' reference, IFD's Dr. Fontaine either was deputized or volunteered (the record is not clear) to "discuss removing the list with the owner."[445] Some months later IFD's *Union News* reported with reference to an unidentified restaurant in Lafayette (which we assume to be "Arnie's") that "it was good to hear that a simple phone call from the IFD remedied the situation."[446] The record does not show whether Dr. Fontaine in his phone call engaged in any threats of economic or other pressure or simply relied on a personal friendship or took some other approach unrelated to a boycott threat; nor do we have any evidence of why "Arnie" took down his list.

It seems to the Administrative Law Judge that a broad prohibition

[443] We are at a loss to understand how Complaint Counsel's reference to the Anderson chapter's monopoly of orthodontists and oral surgeons in that area could bear on this particular provision and have accordingly disregarded Complaint Counsel's reference to that fact.

[444] CX 544A; CX 547.

[445] CX 544A; CX 547.

[446] CX 563B.

of consumer-level boycotts such as would be forbidden by recommended Par. IIC should not be based on a single, isolated minor incident (about which we really know very little.) Accordingly we exclude recommended Par. IIC or any equivalent from our order.

The last two provisions of Complaint Counsel's proposed order (Paragraphs II–D and II–E) might well be called the [131] "Pierce clauses" for both seem to be aimed at practices involving, among others, Dr. Pierce, the dentist nominated by IDA to be a consultant for CG but who always remained loyal to IDA and IFD. Paragraph II–D of Complaint Counsel's proposed order would prohibit IFD from trying to induce insurers to select certain dentists as dental consultants for any reason but their expertise, while Paragraph II–E would prohibit IFD from trying to influence dental consultants to render opinions which they do not really believe. Complaint Counsel find need for these provisions firstly because the evidence shows IFD "pressuring" CG to make reluctant use of their candidate (Dr. Pierce) to review claims in the Anderson area and secondly because Dr. Pierce was, as we have said, a strong IFD supporter who hardly ever requested other dentists' X-rays or even visited local dentists' offices to review X-rays there for CG.

The half dozen dental consultants involved here were the product of a compromise between IFD and CG when the GM-UAW plan started and the compromise somehow kept CG operating in Indiana despite the formidable opposition of the IDA/IFD conspiracy. For various reasons the idea of having IDA nominate these experts to CG (to decide difficult benefit questions) happened to serve the interests of both parties. This case was not brought to test Dr. Pierce's faithfulness or faithlessness. Efforts to deal with such minor, incidental matters in a Commission order dedicated to freeing up a substantial business beset by an unlawful boycott serve only to confuse the point of the exercise and, accordingly, we decline to be side-tracked into putting "Pierce clauses" in our own order.

Order

The Administrative Law Judge now finds that issuance of the following Order will serve the public interest:

1. All members of the unincorporated association and component chapters known as the Indiana Federation of Dentists shall henceforth cease and desist from associating themselves together in that organization and the officers of the association shall take all steps necessary to effect its complete dissolution within six months from

the date of this order, reporting the details of such dissolution to this [132] Commission in writing within one month thereafter.

2. All persons who have at any time since 8/24/76 been members of the Indiana Federation of Dentists shall henceforth cease and desist from expressly or impliedly agreeing among themselves or with other dentists to:

(1) refuse collectively to submit patients' dental radiographs (or any other diagnostic aids) to dental health insurers who, with the patients' consents, request such radiographs; or

(2) refuse collectively to deal with anyone in order to force their will on the target of such boycott.

3. Respondent will forthwith mail a copy of this decision and order by registered mail to every member of the association at his last known address.