

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.*

OPINION OF THE COMMISSION

BY PERTSCHUK, *Commissioner*:

The practice of dentistry is not the selling of salt, aluminum, or tobacco. Dentists provide personal health services, not fungible goods. Moreover, the activities of professional associations contribute to the high level of health care in this country, just as trade associations help improve the quality of goods in many industries. But dentistry is a business, and the business practices of dentists are subject to the same antitrust laws as are the business practices of manufacturers, jobbers, and retailers. Conspiracies and boycotts which substantially limit competition are methods of self-regulation that violate the very essence of our antitrust law. In this case, respondent joined and assumed leadership of a conspiracy of Indiana dentists to withhold patient x-rays from dental insurers, thereby frustrating their cost-containment programs. We conclude that its methods were unacceptable and must be forsaken. [2]

I. SUMMARY

The complaint in this case was issued on October 18, 1978, charging that the Indiana Federation of Dentists ("IFD") violated Section 5 of the Federal Trade Commission Act¹ by engaging in a concerted course of conduct with its members to eliminate or hinder competition among dentists with respect to their cooperation with the implementation of certain kinds of dental insurance programs. The complaint alleged that the conduct of IFD and its members was a continuation

¹ 15 U.S.C. 45(a)(1)(1976).

of the concerted action engaged in by the Indiana Dental Association ("IDA"), its members, and its component societies since at least 1961.²

Respondent IFD is an unincorporated association of Indiana dentists formed in August 1976. (CX 477B-C; CX 22A)³ Membership in IFD is open to any licensed dentist who endorses IFD's purposes and those of the American Federation of Physicians and Dentists, with which IFD is affiliated and to which each IFD [3] member must belong. (CX 13C) IFD's membership is concentrated in and around the three localities of its chapters: Madison County, Daleville, and Middletown (Chapter #1) (CX 14A); Tippecanoe, Clinton, White, and Carroll Counties (Chapter #2) (CX 15A); and Allen County (Chapter #3) (CX 16A). As of February 1979, IFD had 84 dues paying members and 8 former members. (CX 12; ID 3) Its affairs are conducted by an eight-member executive committee, which includes a president, vice-president, secretary, and treasurer. (CX 13G-H-I) IDA is a "constituent society" of the American Dental Association; most Indiana dentists belong to IDA. (ID 14)

The gravamen of the complaint is that IDA, its component societies, and their members in agreement among themselves and with IFD and its members, through the distribution of guidelines, the conduct of meetings, workshops, pledge campaigns and other actions, engaged in a course of conduct to eliminate, prevent, or hinder competition among Indiana dentists with respect to their cooperation with third party payers administering dental health care insurance programs containing "predetermination" and "least expensive adequate course of treatment" provisions.⁴ The [4] complaint alleges that IFD has

² IDA was named as a co-conspirator but not as a respondent. At the time the Commission issued the complaint against IFD, it accepted provisionally a consent order from IDA. 43 Fed. Reg. 53767 (1978). That order was finally accepted in 1979. 93 F.T.C. 392.

³ The following abbreviations will be used in this opinion:

ID	- Initial Decision, Finding Number
ID, p.	- Initial Decision, Page Number
Tr	- Transcript of Testimony, Page Number
CAB	- Complaint Counsel's Answering Brief, Page Number
RAB	- Respondent's Appeal Brief, Page Number
IAB	- Intervenor's Brief, Page Number
CX	- Complaint Counsel's Exhibit Number
RX	- Respondent's Exhibit Number
IX	- Intervenor's Exhibit Number

⁴ "Least expensive adequate course of treatment" provisions limit coverage to the least expensive treatment that is commonly accepted as providing good dental care. The more widely used name in recent years for this dental program feature is "alternative benefits" coverage. Programs that offer alternative benefits coverage usually allow dentists to submit treatment plans for approval before the treatment is provided, if it will cost more than a given minimum. Insurance companies encourage dentists to submit non-emergency expensive treatments for "predetermination," so that the treatment can be discussed and, ideally, disagreement between the dentist and the company as to what would constitute good care for the patient can be resolved before the treatment is provided. Whether or not agreement is reached, predetermination of benefits at least advises the patient and dentist—before treatment is provided—how much the insurance company will pay for treatment. While predetermination of benefits is encouraged, it is not required by either Connecticut General or Aetna (Tr 779, 1106) or, as far as we can discern from the record, by any other company offering a dental plan in Indiana.

(footnote cont'd)

sought to hinder competition among dentists by encouraging its members to adopt a uniform course of conduct in dealing with such third-party payers and by urging payers, purchasers, and beneficiaries of dental health care plans to eliminate provisions of such plans that it finds unacceptable. Such conduct allegedly restrained competition among dentists, affected the cost of dental health care services in Indiana, deprived consumers of the benefits of cost-containment programs and second opinions, and limited the opportunity of consumers to select dentists who cooperate with dental health care benefits programs. At least, it is alleged, the conduct had the tendency or capacity to have such effects. The complaint alleges that these activities constitute unfair methods of competition and unfair acts or practices in violation of Section 5. [5]

Following the trial⁵ the Administrative Law Judge ("ALJ") concluded that the Commission had jurisdiction over the respondent's practices since: (1) the respondent is a "corporation" within the meaning of Section 4 of the FTC Act (ID 4,5); (2) it is not a labor organization within the meaning of the exemptions of Sections 6 and 20 of the Clayton Act (15 U.S.C. 17 and 29 U.S.C. 52) (ID 6); (3) neither it nor the "insurers" with whom its members have refused to cooperate are engaged in the business of insurance within the meaning of the McCarran-Ferguson Act (15 U.S.C. 1012, 1013(b)) and, in any event, that Act does not exempt from the federal antitrust laws agreements to boycott (ID 7); and (4) respondent's conduct was a "substantial" restraint on interstate commerce. (ID 9-11) With respect to the merits, the ALJ found that respondent IFD was formed for the purpose of adopting or continuing IDA's conspiracy to keep Indiana dentists from submitting x-rays to dental insurers (ID 104) and that widespread compliance by IFD members with the IDA-IFD boycott policy was achieved. (ID 114) Additionally, the ALJ found that IFD and its co-conspirators threatened to prevent and to some extent prevented dental insurers from obtaining access to the services of dentists as dental consultants⁶ except on [6] respondent's terms (ID, p. 5), *i.e.*, dental insurers encountered difficulty in hiring licensed Indiana dentists to review dental claims and those hired encountered heavy resistance. (*See, e.g.*, ID 45) The ALJ rejected respondent's state action defense (ID 149-185) and held that IFD's conduct constituted an unfair method of competition and an unfair practice in or affecting

Dental insurers commonly request copies of pretreatment (*i.e.*, diagnostic) patient x-rays to use in evaluating dental treatments under alternative benefits coverage, particularly in evaluating more expensive treatments. If the dentist refuses to provide such x-rays, a claim for reimbursement may be denied entirely. (*See, e.g.*, ID 44)

⁵ The trial began on October 2, 1979, and continued through November 1. The record, which includes approximately 440 exhibits and 2,785 pages of transcript from the hearings, was closed on November 16, 1979.

⁶ "Dental consultants" refers to those dentists hired by dental insurers for the specific purpose of reviewing dental claims where there is a question as to the least expensive adequate course of treatment.

commerce in violation of Section 5 of the FTC Act. (ID 120-148; ID, p. 127)

The ALJ issued an order that, *inter alia*, provides for the dissolution of respondent within six months from entry of a final order and prohibits all dentists who have been members of IFD from agreeing to refuse collectively to submit consenting patients' x-rays to dental insurers.

Respondent argues on appeal that its alleged conduct did not have a substantial effect on interstate commerce and is also exempt from Commission scrutiny by virtue of the state action doctrine and collateral estoppel. Respondent claims further that its actions do not support a finding of liability under either a *per se* or rule of reason analysis, that no conspiracy was established, and that the proceeding is not in the public interest. Finally, with respect to the ALJ's order for dissolution, IFD maintains that the order is overly broad and not reasonably related to the alleged offense. [7]

II. COMMERCE

Respondent's sole challenge to the Commission's jurisdiction is its argument that: (1) there is insufficient evidence to establish the required nexus between IFD's conduct to prevent the submission of x-rays to dental care insurers and the interstate commerce of the insurers, and (2) the record does not show that the alleged conduct of IFD had an effect on the interstate commerce of the insurers. (RAB 56-57) Contrary to respondent's assertions, the ALJ concluded, as do we, that there is ample evidence to support the Commission's assertion of jurisdiction in this case.⁷

There is no serious question that the businesses of dental health care insurers, such as Aetna Life and Casualty Insurance Company and Connecticut General Life Insurance, that have been the target of IFD and IDA's activities are in interstate commerce. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Even the insurance contracts themselves that gave rise to IFD and IDA's challenged conduct were interstate in character, as they were not mere personal contracts but agreements between national employers (e.g., International Harvester and General Motors) and national insurance companies. Moreover, it is clear that the volume of business conducted by the companies in Indiana was substantial. (See ID 11 and ID, p. 24.) Thus, the only real issue is whether respondent's [8] conduct has had the necessary connection with and effect on such interstate commerce.

⁷ Since only the interstate commerce challenge to jurisdiction was raised in respondent's post-trial brief, we regard its other jurisdictional defenses to have been abandoned.

Assuming *arguendo* that the provision of dental care services is wholly intrastate in character, it is nevertheless an integral element in the implementation of dental health care insurance plans. Moreover, unlike the restraint on title search services in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that only indirectly affected the interstate financing of mortgages, any restraint on the cooperation of dental care providers with dental health care insurers can *directly* affect the business of those insurers. Indeed, respondent's conduct was purposely directed toward those businesses.

The ALJ concluded, based upon his reading of *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), that the Commission's jurisdiction was sufficiently established by the fact that respondent's boycott was *designed* to affect adversely interstate commerce.⁸ While such a finding alone may be [9] adequate, the record in this case shows that respondent's activities did in fact "substantially and adversely" affect interstate commerce. *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976).⁹ [10]

Since, as we will discuss below, IFD continued a conspiracy initiated by IDA, we begin by examining the effect of IDA's activities. A May 1972 edition of IDA's Manual on Group Funded Dental Care Programs declares in its "Principles for Determining the Acceptability of Plans for the Group Purchase of Dental Care" that group dental care plans "must not *require* the dentist to submit radiographs to a third party." (CX 47E) The Manual's model "To All My Patients" letter includes the following:

⁸ The *McLain* decision dealt with an alleged conspiracy to fix commission rates for real estate brokers. The ALJ relied on the following language in that opinion:

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' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. The validity of this approach is confirmed by an examination of the case law. 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.

444 U.S. at 242-43. He apparently read this passage to support the conclusion that if the legitimate dental practices of respondent's individual members affected interstate commerce, it was unnecessary to show that the IDA-IFD conspiracy itself affected interstate commerce.

The ALJ is not alone in concluding that the holding of *McLain* was that "it was not necessary for the alleged antitrust violations complained of to have affected interstate commerce as long as defendants' business activities, independent of the violation, affected interstate commerce." *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980). Also, *Bain v. Henderson*, 621 F.2d 959, 961 (9th Cir. 1980); *Classen v. Weller*, 516 F. Supp. 1243, 1244 (N.D. Cal. 1981). *Contra*, *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1981). However, it is unnecessary for us to decide here whether this is the correct reading of *McLain*, or whether the rule set forth in that case is applicable here, since the more stringent jurisdictional standards of *Goldfarb* and *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976), discussed above, can be satisfied.

⁹ This and other cases decided under Section 1 of the Sherman Act have analyzed that Act to cover practices that "substantially and adversely" affect interstate commerce. Since Section 5 of the FTC Act governs practices "in or affecting commerce," practices within the Sherman Act's jurisdiction are necessarily also subject to the FTC Act. However, practices that do not meet the test for Sherman Act jurisdiction may nevertheless be subject to the FTC Act.

Dental radiographs 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 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.

(CX 47G) (emphasis added)

In 1973 IDA sought written pledges of support for its Principles of Acceptability from its members throughout Indiana. (Its membership in 1974 included about 85 to 88 percent of the state's dentists. (CX 303E)) The organization found the project to be a "tremendous success," with 100 percent support in some local societies. (CX 138; ID 27-32) In 1975, a survey of the actual practices of 2,000 of IDA's members, with 1,342 responding, showed that of 811 members receiving requests for x-rays from insurers, only 133 were providing them. (ID 33-34) [11]

With respect to two particular dental insurers, Aetna and Connecticut General ("CG"), the record shows that: (1) at IDA's urging, many of its members, particularly in areas where IDA's organization was strongest, refused to provide x-rays for review; (2) through its leadership IDA as an organization pressured the companies not to request x-rays; and (3) the companies were forced to modify their normal practices in processing insurance claims in response to this concerted action in Indiana. This resulted in some cases in claims not being paid to insured patients or in their being delayed, and it also increased the companies' costs in administering their programs. (ID 39-80)

At its first annual meeting on April 24, 1977, IFD adopted a "Work Rule" declaring that a dentist "has a moral and legal responsibility to not allow a determination of his patients [sic] condition to be made *for any purpose*, without the benefit of a *complete examination* * * * ." (CX 537A) (emphasis added) The new organization designed and distributed to its members a form letter for denying requests from insurers for x-rays (CX 586A-B; CX 556A-B, F; CX 563C-D), which was widely used. (ID 114) (See ID, p. 85 for an illustrative letter.) After seeking x-rays from one Madison County member in early 1977, the manager of the CG office in Indianapolis concluded, on the basis of the reaction he received from IFD's representatives, that CG would have to continue its policy of excepting Madison County dentists from its normal procedures in processing dental claims. (ID 116, 117; Tr 870-878) The representative of another insurer, Metropolitan Life Insurance Company of New York, testified that his company [12] continued

to request x-rays from IFD members and, when refused, did not pay benefits to the insured patient. (Tr 1614-15)

From this and other evidence reviewed in the Initial Decision, the Commission concludes that respondent's activities have had a substantial effect on interstate commerce in the provision of dental health care benefits programs. (See, particularly, ID 11 and Figure 1, ID p. 24.)

III. CONSPIRACY

Respondent does not contest the ALJ's finding that IDA conspired with its members to boycott dental insurers. However, respondent asserts the absence of sufficient evidence in the record to sustain the ALJ's finding that IFD members conspired among themselves and with IDA to withhold dental x-rays from dental care insurers. We conclude, however, that the preponderance of evidence in the record supports such a finding.

The record here is rich with evidence from which a "reasonable inference" can be drawn of the adoption and continuation of IDA's activities by respondent and its members. *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). See also *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087 (5th Cir. 1978), cert. denied, 437 U.S. 903 (1978); *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978). Contrary to respondent's characterization of IFD as "a breakaway group of dentists who were dissatisfied with IDA policy" (RAB 58), the record shows that a major impetus for the formation of IFD was a [13] growing apprehension that IDA's activities could be challenged successfully under the antitrust laws, coupled with a misimpression that a "dentists' union" would be immune from such action. (ID 87-98) Some IFD leaders also felt that a union could be more effective than IDA in dealing with dental insurers, and that a union was a "more suitable vehicle" than IDA for such activities. (ID 102) However, their intent was not to set off in a new direction, but rather to continue the same activities through a new organizational form. In addition to evidence of this fact found by the ALJ in statements of IDA and IFD leaders before and immediately after the formation of IFD, there is evidence in the record that well after IFD was created, its leaders continued to view its mandate as one of continuing the IDA conspiracy. (E.g., CX 540A, Tr 1715-16) The record contains evidence not only of the declaration of common objectives by the leaders of both organizations, but also of cooperation between members and leaders of both organizations (e.g., CX 486A-C, CX 490A-B, CX 492A, CX 543A) and leader-

ship by the same persons in both organizations in the formulation of policies for dealing with third party insurers. (ID 15 and Fig. 2, ID 16 and 25) Hence, we conclude that the record supports a finding of conspiracy between IDA and IFD, notwithstanding IDA's gradual withdrawal during the period that IFD was being organized. [14]

With regard to the issue of whether respondent conspired with its members to withhold x-rays, the record is replete with evidence of adherence to common objectives and of coordinated activities by respondent and its members. First of all, a major formal objective of IFD, as stated in its Constitution and by-laws, is "[t]o 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." (CX 13A) Subsequent to IFD's formation, the IFD Work Rule was adopted at an annual meeting of the full membership. (CX 537A) By direction of the Executive Board (CX 541A), the Work Rule was printed on the back of a claim form created by IFD for its members. (CX 542A-B) This form was used by members refusing to submit x-rays to dental insurers. (CX 680-682; CX 713; CX 718) IFD members also used a common form letter to deny requests for x-rays. (CX 586A-B; ID 114 and ID p. 85) On at least two occasions, IFD's President responded on behalf of another IFD member in refusing to submit x-rays. (CX 652, 653; CX 654, 655) On another occasion, a request to an IFD member resulted in a call from IFD's Vice President; this call further resulted in a meeting between IFD representatives and a manager of CG, after which CG refrained from making further requests of Madison County IFD members for x-rays. (ID 117) IFD's President also represented its members in a meeting with another dental insurer and the union and Madison County employer whose dental plan was administered by that company. (ID 118) He stated that IFD members would not submit x-rays. (Tr 1625) [15] IFD's policy to withhold x-rays was also expressed by its representatives in meetings with other employers and unions. (*E.g.*, Tr 1665-1667, CX 544A.) Hence, we conclude that there is ample evidence in the record to support a conspiracy among members of IFD and between IFD and its members.

IV. SECTION 5

Respondent is alleged to have engaged in unfair methods of competition by conspiring with certain Indiana dentists to refuse to provide x-rays to dental insurers for use in benefits determination. Central to the Commission's complaint is the following charge:

PAR. 2. Since September 1976, respondent and its members, in concert and agree-

ment 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 * * * .

As described in paragraph nine of the complaint, the specific acts and practices include: (1) promulgating guidelines and principles for dealing with third-party payers, along with forms and information to facilitate adherence to them; (2) encouraging members to refuse to serve as dental consultants for third-party payers and to refuse to provide x-rays to them for use in benefits determination; and (3) conducting meetings 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. [16]

The ALJ found that IFD had engaged in these practices. We agree that the record shows clearly that IFD pursued these practices, principally as a follow-up to the activities of the IDA before IFD was formed. The respondent, in fact, does not appear to dispute vigorously that it engaged in these practices but rests its case primarily on the proposition that the conduct was not unlawful under a rule of reason analysis and that it was justified for reasons related to the quality of dental care. In particular, IFD argues that "under the rule of reason the pro-competitive or beneficial effect of respondent's alleged conduct on health and safety, outweighs any anti-competitive or anti-consumer effects." (RAB 4)

The ALJ found that respondent's conduct amounted to a *per se* violation of Section 5 of the FTC Act on the grounds that it constituted a group boycott which is unlawful *per se*. In addition, however, the ALJ found that IFD's conduct substantially harmed competition under a rule of reason analysis so as to violate Section 5 even under a more far-reaching examination of competitive effects.

In reviewing the ALJ's findings, we address first the proper standard of analysis of the reasonableness of the alleged acts and practices. The Supreme Court has stated that some practices which restrain competition should be held *per se* unlawful without the need for substantial inquiry into their competitive effects. Thus, some practices which have been consistently found to harm competition with little or no competitive justification are held *per se* unlawful in order to avoid "the necessity for an [17] incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Arizona v. Maricopa County Medical Society*, 50 U.S.L.W. 4687, 4691 (U.S. June 18,

1982), quoting *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

Accordingly, courts have determined that *per se* illegal practices include, for example, horizontal division of markets, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); price fixing agreements, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); and group boycotts, *Fashion Originators' Guild of America, Inc., v. Federal Trade Commission*, 312 U.S. 457 (1941); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

Examination of the group boycott cases reveals some which involve agreements between businesses which were designed to exclude or limit actual or potential competitors from the market. For example, in *Fashion Originators'*, 312 U.S. at 467-468, wholesale firms with a substantial market share sought to prevent potential competition from so-called "style pirates" by agreeing to implement an elaborate enforcement plan and an agreement not to sell to non-conforming firms. The Supreme Court held, notwithstanding the tortious nature of the conduct of the "pirates," that the wholesalers' boycott agreement and enforcement plan were *per se* illegal. 312 U.S. at 467-68. In [18] *Klor's*, 359 U.S. at 211-212, the Supreme Court held *per se* illegal an agreement by several manufacturers not to sell to a single retailer upon the solicitation not to deal by the retailer's competitor.

Other group boycott cases involve practices implemented for the purpose of extracting more advantageous business terms or practices for economic gain. For example, in *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930), an agreement among competing film distributors to utilize only a standard form contract, which contained binding arbitration of disputes provisions, in transactions with film exhibitors and an agreement to refuse to deal with non-conforming exhibitors were held to comprise an illegal concerted refusal to deal. Although the Court had not yet clearly distinguished the *per se* and rule of reasons approach to analysis of restraints on competition, the film distributors' agreement was found unlawful without an elaborate inquiry about competitive effects. The contract arrangement in *Paramount Lasky* would have resulted in a highly probable anticompetitive effect because it eliminated competition as to key provisions in contracts with film exhibitors.

The Supreme Court made clear in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), that the concept of "boycott" includes a concerted refusal to deal with another party in an effort to obtain advantageous terms in the commercial relationship. *Id.* at 541. However, the Court did not decide whether a concerted refusal to deal, as examined in *Barry*, was subject to the *per se* test of illegality. *Id.* at 544. [19]

Despite the fact that at least some types of group boycotts have been found unlawful *per se*, we disagree with the ALJ that a *per se* analysis is appropriate here. First, we note that the type of restrictions on competition encountered here have not been the subject of frequent prior antitrust analysis. The conduct by the Indiana dentists involved a group decision to withhold x-rays from parties which were neither customers nor competitors. IFD conspired to withhold a tool of medical diagnosis, the x-ray, rather than all significant aspects of the dentist-insurer transaction. Finally, this arrangement arose in the context of health providers' bargaining with third-party payers as to the mechanisms which could be used to review claims. Because there has not been extensive analysis by the Commission or the courts of this type of restraint, a *per se* analysis is less appropriate. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *American Medical Ass'n v. FTC*, 94 F.T.C. 701, 1003 (1979), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 50 U.S.L.W. 4313 (U.S. March 23, 1982).

Second, we observe that the respondent's conduct is not wholly motivated by an anticompetitive purpose. While, as we discuss below, the practices do have a significant effect in reducing competition, they arise in the context of proffered justifications for their use and thus, are not "naked restraints of trade with no purpose except stifling of competition," which [20] would make a *per se* analysis more appropriate. *Broadcast Music*, 441 U.S. at 20; *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

Third, as discussed above, it is not clear that this type of group boycott should be subject to a *per se* analysis, even when viewed as one of a class of restraints with which courts have had long experience. While it limits competition among participants in the boycott, it is not aimed principally at excluding competitors. Thus, while we do not express a view as to whether any boycott which is not aimed at excluding competitors should be analyzed under a rule of reason, the lack of clear precedent for a *per se* analysis in this situation is another reason for engaging in an inquiry about competitive effects.¹⁰

Therefore, we turn to a consideration of the reasonableness of respondent's no-submission requirement. The test of legality is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691 (1978). To assess the legality

¹⁰ We note that the Supreme Court has recently stated that a rule of reason analysis is not appropriate merely because of the peculiar characteristics of the health care market or because professionals are parties to the challenged conduct. *Arizona v. Maricopa County Medical Society*, 50 U.S.L.W. at 4691.

of the IFD restrictions under a rule of reason analysis, we must examine their nature, purpose [21] and effect on competition, including an assessment of any possible procompetitive impact. *Chicago Board of Trade*, 246 U.S. at 238.

The full scope and effect of IFD's own practices can be fully understood only by examining also the activities of IDA and IFD's relationship to IDA.¹¹ As we discussed in Part II, IDA adopted a manual, which was distributed to all IDA members, specifying "Principles of Acceptability" for dental insurance plans, including the condition that these plans not require the submission of x-rays. The manual contained form letters to be given to patients stating that x-rays would be available to insurers only in the dentist's office and, by inference, directed member dentists not to violate this condition for an "acceptable" dentist-insurer relationship. In addition to distributing this manual, in 1973 IDA conducted a campaign to obtain signed pledge cards from its members by which member dentists promised to comply with the manual's principles. More than 85 percent of the membership promised to comply. (CX 74A) Subsequently, in 1975, IDA conducted a mail survey to determine compliance. [22]

Although IDA's official policies always focused on the use of x-rays by dental insurers, the record evidences a discernable undercurrent of hostility toward third party payment plans as a whole, and particularly plans that contained alternative benefits limitations. Announcing the organizational meeting for the pledge campaign, the co-chairmen, Drs. Rohn and McClure, began their letter: "As you know, there is significant rapid growth of group-funded dental care programs in Indiana. The IDA has *prepared to meet this challenge* through the development and implementation of the 'Indiana Plan.' " (emphasis added) The letter continued to warn that "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." (CX 125) The back of the IDA Approved National Dental Claim Uniform Report Form contained a note to dental patients that included the following:

* * * * *

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:

¹¹ "Late-comers to antitrust conspiracies, who, while knowing of the prior existence of the conspiracy, join it in order to promote the unlawful object for which it was organized, are liable for everything done during the period of the conspiracy's existence." *In Re Nissan Motor Corp. Antitrust Litigation*, 430 F. Supp. 231, 232, (S.D. Fla. 1977).

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

* * * * *

(CX 75D) [23]

Similarly, the sample letter to insurers contained in the IDA manual included this explanation for the refusal to submit requested x-rays: "As you know, the Indiana Dental Association's Principles of Acceptability advise dentists not to submit radiographs to a third party because the use of these (x-rays) interfere [sic] with the dentist's professional judgment by altering or suggesting alternative methods of treatment, and possible legal involvement if the radiographs were lost." (CX 47X)

Moreover, it is clear that the concern of IDA's members over possible interference in the doctor-patient relationship was not limited to the effect such interference might have on patient welfare. It also extended to issues of professional pride and the economic well-being of Indiana dentists. Dr. McClure, who later became the first president of IFD, said in a speech to the association's Council on Dental Care Programs in 1974: "We are fighting an *economic war* where the very survival of our profession is at stake. (emphasis added) * * * The name of the game is money. The government and labor are determined to reduce the cost of the dental health dollar at the expense of the dentist. There is no way a dental service can be rendered cheaper when the third party has to have its share of the dollar." (CX 372A) Reviewing some of the "problems" with existing insurance plans, he predicted: "The fight for x-rays will continue, although I have reasons to believe they may start off without them, they will eventually switch to this method of [24] determining benefits. *This is the only way they can control their costs.*" (emphasis added) (CX 372E)

With the formation of IFD, the economic motive became more explicit. As IFD's first Secretary explained in a letter to an Evansville dentist during the formation of the federation: "If you will read the object of the association [ADA] in the constitution and by-laws, you will realize that the association was not designed nor intended to represent us in socio-economic or political areas. * * * It is our opinion that a more suitable vehicle is needed to represent us in these areas and that a union is the most advantageous choice to satisfy the needs previously mentioned." (CX 484A-B) IFD's Constitution and By-laws state thirteen objectives for the organization. The first four are 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, [25]

(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 * * *.

(emphasis added) (CX 14A)

These objectives were emphasized in communications among members. For example, the June 1, 1978, newsletter of IFD Chapter II stated: "Those of us in the I.F.D. believe that WE are the ONLY organization uniquely set up to protect the socio-economic areas of our members. The working conditions of our members is [sic] important to us and must remain foremost in our actions." (CX 499A)

As we discussed more fully in Part III, there is no doubt that IFD was created to follow up on IDA activities and goals. It is equally clear that a major reason for creating IFD was to avoid the antitrust laws under the mistaken impression that IFD would be exempt as a "union." (CX 476B; CX 484A; CX 489B) IFD included in its Constitution a procedure for authorizing "strikes, job actions, or other forms of economic pressure" by local chapters to accomplish its objectives. (CX 13Q) Moreover, the Constitution provided for discipline of IFD members for failure to conform to the Constitution and By-laws and for "any action detrimental to the welfare of this organization." (CX 13T-U) While the Constitution did not provide a sanction specifically for failure to participate in a boycott, the Executive Committee considered on at least two occasions the question of "retaliatory gestures" against dissident members and [26] clearly considered "severe measures" of reprisal a possibility, albeit as a last resort. (CX 512A and CX 522; Tr 2429-31)

In 1977 IFD adopted and disseminated the IFD Work Rule, which provided that a dentist has a responsibility to prevent a determination of a patient's condition without the benefit of a complete dental examination. The clear understanding of this rule was that insurance company use of x-rays (without an examination of the patient) in claims review was a form of "determination" of the patient's condition that the dentist was obliged to prevent. After formal adoption of IFD's Work Rule, dentists, using a form prepared by IFD, refused to provide x-rays to third-party payers. Thus, the practical implementation of the Work Rule was to refuse to cooperate with claims review programs which relied upon submission of x-rays. The effect of re-

spondent's conduct was to reduce competition among dentists to cooperate with dental reimbursement plans and, by doing so, to thwart the efforts of individual insurance companies to contain costs by offering coverage for only the least expensive adequate course of treatment.

There is no doubt that IDA's practices, later continued by IFD, had an effect on the way in which dentists cooperated with dental insurance plans. It is quite clear that dental insurance companies were unable to obtain x-rays with the regularity and frequency desired in order to carry out their claims review process. Aetna, for example, began a program for employees of International Harvester on July 1, 1971. The plan covered employees in primarily 23 states and several foreign countries. [27] (ID 40; RX 99B) Only in Indiana did Aetna experience any difficulty in obtaining x-rays for review of dental treatments. (RX 99B-C; Tr 1243) Within one year, there was a backlog of approximately 600 unpaid claims, because of Aetna's inability to verify the maximum allowable benefits. (Tr 1267, 1274) In a one-time effort to eliminate this backlog, the company's dental consultant visited the offices of all the dentists who had refused to submit x-rays and reviewed the claims with them, also urging them to submit x-rays in the future. (Tr 1268) There were two general reactions to his plea: "one, 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." (Tr 1275) In January, 1974, Aetna's consultants began doing in-mouth examinations of claimants in its Ft. Wayne office; they continued this practice until the end of November, 1978. (Tr 1276-79) In that period, the company conducted 4,700 exams at an estimated cost of ten dollars each. (Tr 1279)

CG also modified its practices in an effort to deal with IDA's demands. CG came to a "gentleman's agreement" with IDA whereby the claim form would continue to require x-rays but CG would not insist on the dentist's compliance. (ID 74) CG also allowed a dental consultant, approved by IDA, to operate out of the dentist's own office rather than CG's claim office as a result of IDA pressure. (ID 78) Both of these cases illustrate an insurance company, confronted by the economic power of united dentists, responding to that economic power rather than to a [28] dental services market characterized by competition among dentists.

Moreover, it is clear that IFD's practices continued to have an effect similar to that initiated by IDA; they were, indeed, an effective continuation of the IDA conspiracy. IFD representatives met with CG to discuss CG's x-ray submission policies, a meeting which concluded in CG's decision not to make further x-ray requests from Madison County dentists. (ID 117) IFD's President, Dr. McClure, also met with a representative of Brockway Glass, an employer located in Madison

County, which had arranged for employee dental coverage through Metropolitan Life Insurance Company. McClure stated that the federation of dentists he represented would not submit x-rays. (ID 118; Tr 1625) In short, the record contains numerous examples where the dentist-insurance company relationship that would have existed in the absence of this market power was altered.

There is no doubt that IDA and IFD were able to achieve substantial market power by colluding. In 1974, 85–88 percent of Indiana dentists belonged to IDA. (CX 303E) In particular areas, IFD was able to achieve remarkably high degree of participation. In Madison County, 95 percent of all practicing dentists had joined IFD Chapter I by September 8, 1976, according to the chapter's secretary. (CX 484B) The Chapter II news letter reported in September, 1977, that "[a]ll but a few dentists in our four county area are now members of the Federation." (CX 549A) Even though the actual total membership of IFD was small, its market power in some localities was clear [29] from its effect on the behavior of insurers and the functioning of the dentist-insurer relationship.¹²

Such concerted activity by competitors resulted in reducing or eliminating competition among dentists as to their policy of dealing with third-party payers. Patients who were covered by dental plans providing for cost-containment programs such as those here found it difficult to purchase care from dentists who would satisfy the terms of their coverage. In the absence of such concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to treat patients and comply with the requests of patients' third-party insurers. By colluding, competitor dentists were freed to some extent from these market forces because they knew other participants in the boycott would also refuse to cooperate. Consequently, the dentist-insurer relationship was determined by economic coercion, not by market competition. The final victim in this distortion of the market was the patient policyholder who lost the value of his insurance company's efforts to contain costs. [30]

Complaint counsel have argued that the conspiracy had other effects on competition, including that insurers were less able to compete on the basis of cost-containment and that patients were deprived of information that might lead them to switch dentists. As for the effect on competition in the dental insurance market, we agree that a secondary effect of concerted behavior on the part of dentists was to

¹² As in any rule of reason case, attention must be paid to market definition in order to assess competitive effects. No elaborate analysis is required here, since the record shows that under IDA's leadership, the conspiracy spanned many, if not most, localities in Indiana. Under the leadership of IFD, it continued to be strong in the local areas covered by that organization's three chapters. The record shows no competition from out-of-state dentists, except in two localities near Louisville, Kentucky. (CX 151B; CX 186C; CX 76F)

prevent insurers from implementing cost-containment efforts. This may well have reduced competition among insurers. The record shows that dental insurance grew in significance in Indiana beginning in the mid 1970's as various insurers offered group coverage to employers. Inevitably, a principal concern of both employer and employee groups was the premium. Consequently, both employer and employee groups were concerned about cost-containment measures practiced by insurers. This concern is illustrated by General Motors' insistence that its claim form continue to require x-rays, despite CG's willingness to provide an explicit exemption for IDA members. (CX 327W) Similarly, Aetna representatives told IFD representatives that Aetna's market survival required cost-containment measures. (CX 284B) [31]

Concerted behavior among competitors which prevents or hinders the marketing of goods or the implementation of services by competitors in another market may harm competition in that other market.¹³ Here, respondent's efforts to achieve a uniform course of conduct among dentists in their dealings with dental insurers affected a significant aspect of the insurers' businesses, *i.e.*, the operation of cost-containment efforts through the "alternative benefits" mechanism. The harm to these efforts may have reduced competition among insurers by preventing them from competing on the basis of reduced premiums. Respondent's activities may also have prevented new entrants from obtaining customers by offering innovative and effective cost-containment measures. However, despite complaint counsel's argument, the Commission's complaint did not clearly allege harm to competition in the dental insurance market, and conclusions about competitive harm to this market are unnecessary to our decision. Accordingly, we decline to make such a finding. [32]

Respondent makes a variety of contentions that the collective refusal to provide x-rays did not harm competition, including the assertions that there was not an absolute "shut off" of x-rays to insurance companies (RAB 15-16) and that the benefits of predetermination are not well-established and might cost more than they are worth. (RAB 17) While it is true that respondent was willing to allow *some* arrangement whereby x-rays could be examined by insurers—in particular, allowing insurers' consultants to make visits to the dentists' offices—the record is clear that this was prohibitively expensive. (ID p. 89, fn. 337) Moreover, even if the procedure were feasible at a higher cost, coercing parties into adopting such a procedure through collusion of

¹³ For example, in *Fashion Originators'*, concerted action by manufacturers to protect themselves from competition by "style pirates" also harmed competition at the retail level by narrowing the sources from which retailers could buy dresses. 312 U.S. at 465. In another case, a boycott by lumber retailers of wholesalers that were also competing at retail affected not only retail competition but also impeded wholesale trade by reducing the number of potential purchasers from the boycotted companies. *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 614 (1914).

competitors still distorts the competitive process. Commercial dealings are structured by leverage of combined market power rather than by competition.

Finally, we reject the IFD's position that to establish liability, the record must establish that predetermination, or more generally, use of x-rays by dental insurers to determine what services they will pay for under alternative benefits coverage, is effective in containing costs. (RAB 17) We do not require an analysis of the actual net impact on the operating costs of insurers or of the actual dollar losses to policyholders or employers in order to conclude that respondent's actions are anticompetitive. The task of identifying the precise impact of these types of restrictions and segregating the effects of other forces is likely to be infeasible. *See, AMA*, 94 F.T.C. at 730. [33] To require such a showing would often impose an impossible burden on complaint counsel and preclude prohibiting plainly anticompetitive restraints until their precise impact could be measured. Moreover, it is not for IFD or the Commission to judge the efficiency of the arrangements selected by insurance companies to control costs. An antitrust violation cannot be justified on the grounds that it sought to remedy a poor business decision by the targets of a boycott. It is enough that the restraint is shown to have significantly distorted the competitive process by forcing insurers to comply with the demands of united competitors, thereby significantly altering the nature of their claims review process and their attempts to implement cost-containment measures.

In summary, we find that IFD's practices substantially limited competition among dentists in their willingness to cooperate with dental insurance cost-containment programs.¹⁴ We turn now to respondents' principal argument in defense—that the restraints on competition resulting from the challenged concerted behavior resulted in benefits adequate to offset any anticompetitive effect. IFD claims that the restraints had a procompetitive effect which offset any harm to competition and, more broadly, that the restraints resulted in social benefits, particularly an improvement in the quality of dental care. [34]

We note at the outset that the burden of proving sufficient justification for restraints which have been shown substantially to harm competition rests with respondents. Such justifications cannot be speculation only but must be established by record evidence in order to be considered an adequate justification for otherwise anticompetitive behavior. We consider first IFD's argument that its conduct was procompetitive.

¹⁴ As for complaint counsel's argument that patients were deprived of information that would lead them to switch dentists, we agree that this is a possible effect of the boycott. Based upon the record, however, we cannot infer an adequately significant effect on competition from this limitation on information. Therefore, we decline to make a finding on this point.

As discussed above, a principal device used by IFD for achieving concerted behavior on the part of member dentists was its Work Rule. The Work Rule in part provided:

The patient's dentist, therefore, has a moral and legal responsibility to not allow a determination of his patients [sic] condition to be made for any purpose, without the benefit of a complete examination, which takes into account all of the elements described.

(CX 537A)

It is clear from the record that the principal purpose and effect of this Rule was to refuse to provide x-rays to insurance companies that wished to use them along with other information to review claims for reimbursement.

IFD argues that concerted adherence to the Work Rule actually promoted competition among dentists:

Certainly promoted are novel means of competing concepts of dental care, such as employer or union organized clinics. Competition is naturally promoted among dentists who treat only after total diagnosis, in that their total treatment plan will be more successful from both a preventative viewpoint and long term maintenance of oral health. Error is less likely, thus reducing needed corrective work. Proper diagnosis will promote proper services, and satisfied patients will patronize those dentists.

(RAB 24-25) [35]

As to IFD's proposition that "novel means of competing concepts of dental care" are promoted, this is simply unsupported by the evidence. IFD has pointed to no record evidence, or even to any logical argument, suggesting that the Work Rule was in any way necessary to promote "total treatment plans" or any other novel form of dental care. Rather, individual dentists were free to offer such plans or not, just as they would have been in the absence of the Work Rule. Respondent's essential point appears to be simply that such plans were *permitted* by the Work Rule. While this may well be true, it hardly constitutes a showing that the Rule was necessary to achieve some competitive benefit that would have compensated for the Rule's anticompetitive effect.

A similar flaw defeats IFD's second proffered justification, that the Work Rule promoted higher quality care and more satisfied patients. The heart of this position seems to be the contention that the Rule promoted the health of the people of Indiana by preventing insurance companies from reaching erroneous conclusions regarding the least expensive adequate course of treatment for dental patients.¹⁵ Such

¹⁵ There is evidence that some members of IFD objected to the fundamental policy of insurers of covering only the least expensive adequate course of treatment, preferring dental coverage for the "best" treatment that could be provided the patient. However, respondent has not sought to justify its actions on the ground that such a policy is harmful, and this does not appear to have been an official position of IFD.

erroneous conclusions would, the argument goes, cause insurance companies to deny claims for adequate treatment and thereby pressure patients, and through them their dentists, to opt for less than adequate [36] treatment. Two practices of insurers could lead, in IFD's view, to erroneous claims determinations: (1) undue reliance on x-rays, particularly due to the failure to examine the patient personally, and (2) the examination of x-rays by non-dentists.

These contentions, too, are lacking in any evidentiary support. IFD has not pointed to any evidence—or even argued—that any consumers have in fact been harmed by alternative benefits determinations, or that actual determinations have been medically erroneous. Not a single instance has been cited where any dentist agreed to provide less-than-adequate treatment because of the fear of an erroneous insurance determination. Indeed, with respect to the examination of x-rays by non-dentists, the record shows that non-dentists are authorized by insurers only to *approve* claims; determinations which deny payment must be made by a dental consultant. (ID 158–61) Consequently, it is difficult to understand how patients could even possibly be harmed by the insurers' use of non-dentists.¹⁶ [37]

Moreover, the courts have properly shown great hesitancy in accepting such justifications for clearly anticompetitive acts. In *National Society of Professional Engineers*,¹⁷ the Supreme Court announced that a rule of reason analysis is confined to an assessment of effects on competition and necessarily excludes a justification that other social values which may be advanced outweigh the loss of competition. In that case, the petitioners, a society of professionals selling engineering services, had argued that competitive bidding by the society members would be dangerous to the public health by reducing the quality of services provided. The Court rejected this type of justification on the basis that "the Rule of Reason does not support a defense based upon the assumption that competition itself is unreasonable."¹⁸

The Court's decisions have not completely clarified this distinction between effects on competition, which should properly be considered under the rule of reason, and other effects which should not be considered. One factor in making this distinction is whether the challenged conduct amounts to a clear attempt to substitute a private association's judgment about the benefits of competition for a Congressionally-expressed preference in favor of it. This was the case in *Professional Engineers*, where a private association argued that competition itself was [38] undesirable because it led, in that industry, to poor quality—a proposition the Court was unwilling to accept.

¹⁶ Respondent's primary argument regarding the screening of x-rays by lay persons, that it violates state law, will be discussed in Part V of this Opinion in connection with the state action defense.

¹⁷ *National Society of Professional Engineers v. U.S.*, 435 U.S. 679 (1978).

¹⁸ *Id.* at 696.

In other cases, challenged restraints have limited competition in certain ways only to increase it in other ways, for example, by creating a new product to be offered. This was the case in *Broadcast Music*, where the Court held the rule of reason applicable to a blanket licensing scheme which necessarily fixed the prices among competing composers. Similarly, restrictions on the timing of transactions have been upheld as contributing to the efficiency of organized markets.¹⁹ Thus, an agreement by competing health professionals to allocate admitting privileges at a hospital facility to avoid overcrowding and improve efficient use of the facility could be assessed under a rule of reason.

A third category of cases involves restraints which are clearly intended to achieve an end other than a limitation on competition and in which the effect on competition is at most incidental, in light of the actual purpose of the restraint. For example, sanctions of athletes for gambling in professional sports competition have been upheld.²⁰ Thus, guidelines promulgated by a professional health association recommending the avoidance of a drug discovered to be dangerous could not be considered an antitrust violation in the absence of any purpose [39] to limit competition. Similar results have been reached where boycotts are clearly political in nature and are not aimed at competitors.²¹ As in the application of any legal standard, some situations will present difficult factual questions as to the effect on competition and the true purpose of the restraint. Moreover, some cases will call for the exercise of sound prosecutorial discretion by the Commission in considering how non-competitive values relate to the nature of the restraint and the rule of reason analysis set out in *Professional Engineers*.

Fortunately, we need not resolve all these questions here. Even when self-regulation may have been necessary for some legitimate purpose, the courts have insisted that the restraints go no further than is necessary to achieve the desired goal.²² We applied this principle in our *AMA* decision, where we reviewed a professional association's ethical restrictions on price advertising and price competition. We found that an absolute ban on advertising, including non-deceptive advertising, lessened rather than promoted competition, and that the restrictions were much broader than necessary to accomplish the legitimate, pro-competitive goal of preventing deceptive advertising. 94 F.T.C. at 1010. [40]

A fortiori, when self-regulation is not actually necessary for any

¹⁹ *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

²⁰ *Deeson v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir. 1966), cert. denied, 385 U.S. 846 (1966); *Molinas National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961).

²¹ See *Missouri v. N.O.W.*, 620 F.2d 1301 (8th Cir.) cert. denied, 449 U.S. 842 (1980).

²² See e.g., *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas Light Coke Co.*, 364 U.S. 656 (1961).

legitimate purpose and has clear anticompetitive effects, the courts have not hesitated to strike down the restraints. For example, in *American Medical Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943), an association of physicians attempted to induce hospitals not to deal with doctors who participated in prepaid medical programs. The association argued that its concerted behavior was justified because, in its view, these programs were contrary to the public interest and participation in them was unethical. The Supreme Court refused to review the finding of the court of appeals that this conduct harmed competition and that there were alternative methods by which the association could advance its views about alternative delivery systems.²³ 317 U.S. 613 (1943).

The restraint involved here falls squarely into this category of cases. IFD's concerted refusal to furnish x-rays to third-party payers substantially harmed competition among dentists by eliminating incentives for individual dentists to cooperate with cost-containment programs of third-party payers. This refusal to deal reduced consumer choice and impaired insurance companies' ability to conduct cost-containment programs. IFD has presented no evidence to even suggest that these restraints were necessary to serve any legitimate, pro-competitive purpose. There is no basis for concluding that [41] IFD's concerted refusal to deal encouraged development of new methods of care delivery or otherwise encouraged competition among individual dentists. We therefore find that IFD's conduct constituted an unfair method of competition in violation of Section 5 of the FTC Act.

The complaint also alleged that the activities of respondent were "unfair acts or practices" within the meaning of Section 5 as well as unfair methods of competition. It is clear that practices *may* be both unfair methods of competition and unfair practices. For example, in *AMA*, 94 F.T.C. at 1010, we found that AMA's restrictions on price advertising were unfair because they impeded the flow of information about the availability and price of medical services to consumers.

In determining whether a practice is unfair, we are concerned primarily with its impact on consumers, principally individuals purchasing a product or service for their own consumption or investment. In brief, consumer injury that is substantial, not reasonably avoidable, and not outweighed by offsetting benefits to competition or consumers is the primary criterion for a finding of unfairness. (See Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, December 1980.) In addition, the Commission also relies where possible upon established public policy in determining which practices are unfair. *Id.* [42]

²³ See also *Michigan State Medical Society*, Docket No. 9129, [101 F.T.C. 191] where we addressed similar issues and reached a similar result.

The record in this case contains some evidence of consumer injury in the form of denied or delayed reimbursement for dental care expenditures. However, neither the parties nor the ALJ have analyzed the issue of unfairness liability to any degree. Because our finding of an unfair method of competition in this case is sufficient to support the relief ordered, we decline to decide whether the challenged practices are also unfair.

V. STATE ACTION

Respondent and Intervenor, the State of Indiana, adopting Part IV. D. of respondent's appeal brief as its own, assert that the state action doctrine forecloses antitrust liability for the alleged anticompetitive conduct, citing the development of the caselaw in *Parker v. Brown*, 317 U.S. 341 (1943), *Asheville Tobacco Board of Trade, Inc. v. FTC*, 263 F.2d 502 (4th Cir. 1959),²⁴ *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). That doctrine exempts from federal antitrust law certain state action and actively supervised private action undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy that consciously rejects unrestrained competition in favor of other social values. *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96, 107 (1978); *California Retail [43] Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

Respondent asserts that the Indiana Dental Law (Indiana Code 25-14-1-1 *et seq.*), which prohibits the unlicensed practice of dentistry, clearly prohibits the lay screening of dental x-rays by employees of dental insurers.²⁵ By virtue of this [44] prohibition, the argument

²⁴ In this case, the court of appeals applied the state action doctrine to the enforcement of the FTC Act. While all Supreme Court interpretations of the doctrine have concerned the Sherman Act, we assume for purposes of this decision that the doctrine applies equally to an enforcement action under the FTC Act, when the allegation of unfair methods of competition is based on Sherman Act principles.

²⁵ The law provides in pertinent part:

Sec. 23. Any person shall be said to be practicing dentistry within the meaning of this chapter who uses the word "dentist" or "dental surgeon" or the letters "D.D.S." or "D.M.D." or other letters or titles in connection with dentistry:

- or owns or operates a dental office or is manager or conductor of the same;
- or advertises or permits to be advertised by sign, card, circular, handbill, newspaper, radio, or otherwise that he can or will attempt to perform dental operations of any kind;
- or 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;
- or extracts human teeth or corrects malpositions of the teeth or jaws;
- or administers dental anesthetics, whether local or general;
- or makes x-rays pictures of the human teeth or jaws;
- or makes impressions or casts of any oral tissues or structures for the purpose of diagnosis or treatment thereof or the construction, repair, reproduction or duplication of any prosthetic device to alleviate or cure any oral lesion or replace any lost oral structures, tissue, or teeth;
- or engaged [sic] in practices included in the curricula of recognized dental colleges * * *.

continues, the collective private actions of IFD and its members to frustrate the lay screening of x-rays is protected from liability under the antitrust laws.

As discussed further below, respondent's "state action" argument fails in several respects. First, and most fundamentally, the Indiana law does not affirmatively express any policy in favor of collusion among dentists in order to prevent or influence the use of x-rays by insurance companies. Respondent, in fact, does not appear to argue that the State of Indiana has expressed a policy against competition among dentists, which must be the principal concern of a "state action" analysis. Second, it is far from clear that the Indiana statute prohibits lay persons from reading x-rays for purposes of screening dental insurance claims, as opposed to determining treatment. Finally, respondent has not shown that its conduct, which essentially amounted to private enforcement of this state statute, was supervised by state authorities. We discuss each of these points in turn.

Assuming for a moment that the Indiana statute does prohibit lay persons from reading x-rays and that "dentists who knowingly [sic] submit radiographs (x-rays), or other diagnostic data to third persons, including insurance companies that allow lay persons other than licensed dentists to review such data, are aiding and abetting the unlawful practice of dentistry" (RAB 46), such a "state policy to supplant competition" (RAB 39) between dentists and non-dentists is insufficient to protect the activity [45] at issue in this case. This case concerns concerted actions among dentists regarding their dealings with dental insurers; and the Indiana legislature did not compel, authorize, or even contemplate private agreements among dentists not to cooperate with dental insurers that might be using lay persons to read x-rays—or other concerted efforts to influence the business practices of insurers. There simply is no "clearly articulated and affirmatively expressed" state policy concerning such elimination of competition among dentists in their dealings with insurers.

Respondent argues that "the Indiana dentists who choose to obey Indiana Dental Law cannot be in violation of antitrust law." (RAB 48) But this is not a case of individual dentists simply conforming their conduct to state law.²⁶ Apparently, respondent would have us conclude that Congress intended for federal antitrust laws to give way when private parties, by conduct which would otherwise violate the antitrust laws, take it upon themselves to enforce their interpretation of the provisions of any state law. No Supreme Court decision ar-

²⁶ Indeed, Indiana state law seems actually to have little to do with the activities charged here. Neither IDA's Principles of Acceptability nor IFD's Work Rule concerned *who* at insurance companies should or should not read x-rays. The focus of these policies and the activities of IDA and IFD was, rather, the notion that x-rays should not be used in any manner without a personal examination of the patient. We can determine no way in which the challenged conduct was logically directed toward compliance with state law.

ticulating the state action doctrine can be read to endorse such an interpretation of congressional intent. [46]

Furthermore, we cannot accept respondent's contention that Indiana law clearly prohibits the screening of x-rays by lay employees of insurers for the narrow purpose of referring questionable claims to dental consultants. The Indiana statute does not specifically address such conduct (although it does prohibit lay persons from taking x-rays), and the state has never sought to enforce the statute against insurers that use non-dentists in such a way. Indeed, on August 15, 1978, IFD brought suit against the state and the Indiana State Board of Dental Examiners alleging that they had "wholly failed, refused, or neglected to take any action to enforce the laws of the State of Indiana" as interpreted by IFD.²⁷ (CX 508A, D) Therefore, the applicability of the statutory prohibition on the unlicensed "practice of dentistry" to such a situation has not been considered by the Indiana Courts. In Pennsylvania, however, a very similar statute has been held not to prohibit a first review of radiographs by a lay clerk to determine whether they satisfy Blue Shield standards. *Pennsylvania Dental Ass'n v. Comm. Ins. Dept.*, 398 A.2d 729, 734 (Pa. Cmwlth. 1979).²⁸ Furthermore, an [47] Illinois appellate court has held that even as performed by a dentist, the act of "merely corroborating the claim presented [by reading an x-ray provided to an insurer] so as to know whether or not payment of the cost thereof should be made" is not the practice of dentistry. *Pflugerv. Sundstrand Corp.*, 405 N.E.2d 12, 16 (Ill. App. 1980). Particularly in light of these opinions, it cannot be concluded that there is a "clearly articulated and affirmatively expressed" state policy concerning such conduct.²⁹

In furtherance of its state action argument, respondent has pointed to the issuance of a 1974 unofficial advisory letter of the Deputy Attorney General of Indiana (IX-5), various bulletins or letters subse-

²⁷ The suit against the state and the board was dropped when the state agreed to intervene in this case. (ID 183)

²⁸ The Pennsylvania statute provides:

A person engages in the "Practice of Dentistry," within the meaning of this act, who diagnoses, treats, operates on, or prescribes for any disease, pain or injury, or regulates any deformity or physical condition of the human teeth, jaws, or associated structures, or conducts a physical evaluation, or administers anesthetic agents, or who fits, constructs, and inserts any artificial appliance, plate, or denture for the human teeth or jaws, or who holds himself or herself out as being able or legally authorized to do so. 63 P.S. § 121, as quoted by the court at 398 A.2d 734 n.4.

²⁹ Respondent has argued that in addition to constituting an unlawful diagnosis, the reading of x-rays by insurance company employees also violates a provision of the dental code that includes in the definition of the practice of dentistry "practices included in the curricula of recognized dental colleges." Indiana Code 25-14-1-23. Radiology is a required subject in the curricula of state dental schools. 828 Indiana Administrative Code 1-1-1(c) (1979 Ed.). Therefore, respondent argues, the reading of x-rays by unlicensed persons violates the statute.

Bacteriology, anesthesia, pathology, and "medicine" are also subjects required to be taught in the dental schools. Yet, surely respondent would not suggest that they are the exclusive domain of dentists. Indeed, as the Supreme Court of Indiana has held, "practices included in the curricula" does not refer to subjects taught in dental colleges "but to those things which are practiced as provided in the curricula, which evidently mean the things practiced in the dental clinic, such as, operative prosthetic dentistry, crown and bridge work, inlay, and orthodontia." (emphasis added) *State v. Williams*, 5 N.E.2d 961 (Ind. 1937). This provision of the statute therefore, is of little independent significance.

quently issued by the State Board of Dental [48] Examiners (e.g. IX 6, IX 9), and a joint letter issued by the State Board and the Insurance Commissioner on September 24, 1979 (IX 162). In all of these documents, the Indiana Dental Law is interpreted as prohibiting the screening of dental x-rays by lay persons.³⁰ However, as the ALJ has explained, none of these documents constitute action of the state acting as sovereign, since none was developed according to the applicable requirements of the Indiana Administrative Procedure Act. (ID 152-153, 167-181)³¹ Respondent has apparently conceded this point and has argued not that these documents establish the state policy regarding the screening of x-rays, or even that they constitute some evidence of the state policy, but rather that they evidence "state supervision of the scheme chosen to replace the rules of the market place." (RAB 39)

Conduct by private parties that would otherwise violate the anti-trust laws is not immunized by the state action doctrine unless the activity is "actively supervised" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. at 105. Because respondent did not address the question of whether its *concerted* activities were compelled or authorized by a clearly articulated state policy, it also did not consider whether those activities were actively supervised by the state. [49] Instead, it pursued the misguided argument that the practice of dentistry by *individual* dentists in Indiana was being supervised adequately by the state, through the State Board of Dental Examiners. We need not consider the issue of supervision in this case in any event, because respondent has not satisfied the requirement of establishing a clearly articulated state policy regarding the challenged conduct.

In addition to supporting respondent's state action arguments, intervenor asserts that in this case the Commission "is clearly attempting to invade the State's sovereign right pursuant to the Tenth Amendment" to regulate the practice of dentistry in Indiana. (IAB 7-8) However, as the above discussion reveals, the authority of the State of Indiana has not been questioned by the Commission in this case. The Commission has not questioned the validity of the Indiana Dental Law or the manner in which it has been enforced by the state. The sole focus of this case is the concerted private actions of IDA, IFD, and their members—actions in no way compelled or expressly contemplated by Indiana law. Furthermore, the Commission's Order against respondent will not interfere with the state's enforcement of the Dental Law, even if it should seek to enforce the interpretation

³⁰ We note that all of these documents postdate some of IDA's activities in furtherance of the IDA-IFD conspiracy—most notably its 1973 pledge drive for support of its Principles of Acceptability.

³¹ Since this is the case, we need not consider whether the state board is authorized to promulgate substantive regulations defining the practice of dentistry.

of it asserted in this proceeding. The Order does not compel any dentist to cooperate with an insurance company that uses lay persons to screen dental x-rays, nor does it give any form of protection to or approve of such a screening procedure. Therefore, the Commission's order does not impinge on the ability of the State of Indiana, acting as sovereign, to [50] regulate the practice of dentistry in the manner the state sees fit.

VI. COLLATERAL ESTOPPEL

On July 17, 1979, the Commission was ordered by Judge Cale J. Holder, United States District Court, Southern District of Indiana, to allow the State of Indiana to intervene in this proceeding. (IX 1000U) (The background on this order, which the Commission did not appeal, is explained in the Initial Decision, findings 191-207.) Respondent and Intervenor, adopting Part IV.E. of respondent's brief as its own, assert that various of Judge Holder's findings of fact and conclusions of law foreclose the Commission from "further litigation of the state action issue." (RAB 49)

Respondent claims that the following "findings of fact" by the judge are pertinent:

2. Plaintiff Indiana State Board of Dental Examiners (hereinafter Board), pursuant to I.C. 25-14-1-1 *et seq.*, has been granted the duty and power by the Indiana General Assembly to administer, supervise and enforce the Indiana Dental Act—which provides for the regulation of dentists and the practice of dentistry within the State.

6. Since at least 1887 the State of Indiana, pursuant to the police power reserved to it as a sovereign state, has had legislation regulating dentists and the practice of dentistry.

17. The State of Indiana has and is, actively regulating both dentists and the practice of dentistry in the State. [51]

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 are not licensed to practice dentistry, to read or diagnosis[sic] the X-rays. (IX 1000Z5,6,9)

Respondent also relies on these conclusions of law:

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 as reserved to the State under its police powers by the Tenth Amendment to the Constitution of the United States. *Linder v. United States*, 268 U.S. 5 (1925). *F.T.C. v. Simeon Management Corp.*, 391 F. Supp. 697, 705 (N.D. Cal., 1975) *aff'd* 532 F.2d 708. *Cf. National League of Cities v. Usery*, 426 U.S. 833 (1976).

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.

Leedom v. Kyne, 358 U.S. 184 (1958). *Jewel Cos. v. Federal Trade Comm.*, 432 F.2d 1155 (7th Cir., 1970). (IX 1000Z10)

Contrary to respondent's assertion, these findings, even assuming the doctrine of collateral estoppel applied, would not preclude the Commission from considering here whether the state action doctrine protects respondent's conduct. The court did not consider all of the elements of the state action doctrine; nor did it purport to do so.³² Assuming the Commission were bound by the court's "factual" finding #18, respondent's state action defense would still be defeated by the fact that its actions were [52] not compelled or expressly contemplated by Indiana law—they were purely private conduct. As to the court's legal conclusions, they do not appear to have any relevance to a state action analysis. Rather, they pertain to the Commission's jurisdiction in this case in light of the state's purportedly exclusive powers to regulate the practice of dentistry in Indiana.

Furthermore, we concur with the ALJ's finding that the court's determinations were not essential to the judgment ordered; consequently, the doctrine of collateral estoppel does not apply here.³³ When Judge Holder ordered the Commission to allow the State of Indiana to intervene in this proceeding, he adopted *in toto* the state's proposed findings. (See IX 1000Z5-10 and CX 853 A-G) However, these findings had been offered in support not only of the proposed order ultimately granted by the judge, but also of an order directing the Commission to terminate this proceeding. Obviously, many findings necessary to support the latter order would not be necessary to support the former. [53] Legal conclusions #3 and #6 appear to be two such findings, since they deal with the Commission's jurisdiction. Indeed, it would seem that these conclusions would have compelled the judge to order this proceeding terminated. Thus, we believe that these conclusions were not essential to the judgment entered. The court's conclusion of law #5 would seem to have been sufficient:

5. The State meets the requirements for intervention as established by the FTC in the [sic] *Firestone Tire and Rubber Company*, Dkt. 8818, 77 F.T.C. 1666, 1669 (1970) in that *the issues the State seeks to raise* cannot be properly raised and argued by the current parties to the proceeding and only minimal additional cost and time will be required by its intervention. (emphasis added) (IX 1000 Z10)

³² Indeed, it would have been premature for the court to rule on the applicability of the state action doctrine to this case before the conclusion of the administrative proceeding. *California ex rel. Christensen v. FTC*, 549 F.2d 1321 (9th Cir.), *cert. denied*, 434 U.S. 876 (1977).

³³ It is beyond dispute that an issue must have been decided necessarily in a first action in order for reconsideration of that issue to be barred in a second proceeding. *Cromwell v. County of Sac*, 94 U.S. 351, 354 (1876); *Haize v. Hanover Ins. Co.*, 536 F.2d 576, 579 (3d Cir. 1976). "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, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." (emphasis added) Restatement, Second, Judgments § 27 (1982).

We agree with complaint counsel that it would be anomalous for the court to have ordered the State of Indiana's intervention, if it intended to foreclose any argument on the issues the state sought to raise. We also agree that the Commission is not required to accept the court's subsequent characterization of all of its findings as necessary for the relief sought,³⁴ when our own analysis compels its rejection. *Hartmann v. Time, Inc.*, 166 F.2d 127, 138 n.17 (3d Cir.), *cert. denied*, 334 U.S. 838 (1948). [54]

VII. ORDER

The ALJ entered an order against IFD, dissolving it as an entity, and against the members of IFD, prohibiting them from collectively refusing to submit x-rays or deal with anyone to "force their will on the target of such boycott." Complaint counsel did not propose an order dissolving IFD as an organization but did propose additional provisions, including a more general ban on coercion of dental insurers, a prohibition on attempting to influence consumers' choice of dentists based upon the dentist's cooperation with insurers, and a ban on coercing the insurer's choice of dental consultants or the consultant's judgment.

We decline to accept the ALJ's conclusion that an order dissolving IFD is necessary. It is true that the courts have upheld dissolution of organizational entities where they have been principally designed to implement an antitrust violation and where dissolution was the most effective way of preventing the recurrence of the violation.³⁵ We also agree with the ALJ that IFD was created primarily to continue the implementation of IDA's boycott of dental insurers. However, we note that IFD's constitution and bylaws contain objectives other than coercing dental insurers. Moreover, there are certainly legitimate [55] functions its members may wish to pursue through the vehicle of a special organization such as IFD. Consequently, we believe it is adequate to ban specific activities of IFD and to rely upon compliance with the terms of these restrictions, in order to prevent a recurrence of antitrust violations and to restore competition to the dental market.³⁶ Only in circumstances where there is no significant function remaining for an organization other than to repeat antitrust viola-

³⁴ The court stated on October 18, 1979, that the Commission "is unhampered by this Court's ruling of August 17, 1979 in fulfilling its mission in Docket No. 9118." But it added, "The findings of fact as found and the conclusions of law thereon are necessary for the relief sought." (IX 1000E-F) The full text of the October 18 order appears on pp. 124-25 of the Initial Decision.

³⁵ *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 98, 103 (1962); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 428 (1945).

³⁶ We take no position on the circumstances under which IFD might qualify as a "labor organization," except to note that respondent did not pursue or appeal the argument that its conduct was entitled to immunity from the antitrust laws under the "labor exemption."

tions, or in which a conduct order would not reasonably be expected to prevent repeating such violations or to restore competition, would a dissolution order be appropriate.

Our prior orders in analogous situations³⁷ have been intended principally to bar collective action by dentists which results in coercion of dental insurers in regard to the dentist-insurer relationship. Here, the principal anticompetitive result of IFD's conduct was to achieve a uniformity among its members in their dealings with insurers, *i.e.*, a concerted refusal to provide x-rays for claims review, thus disrupting insurers' cost-containment programs. More generally, respondent coerced these companies into operating in a certain way. Thus, we include provisions prohibiting activities which have the purpose or effect of collective refusals to submit [56] x-rays or more generally to coerce insurers or their employees to behave in a certain way. This latter provision would necessarily include insurers' choice of consultants and insurers' influencing consultants. This provision would not, however, prevent noncoercive communications between IFD and insurers regarding the manner in which insurers conduct their business. IFD remains free to urge third party payers to adopt or abandon certain practices, so long as it does so in a noncoercive way and avoids suggesting to its members that they refuse to cooperate with those payers that reject its advice.

We also include a provision prohibiting IFD from collectively attempting to influence patients not to choose particular dentists. This provision is justified on the basis of an incident in the record where a person acting for the benefit of IFD did influence a patient group directly by persuading an employer to stop listing dentists who cooperated with third-party payers (*see* CX 563B), as well as on the basis that this is a fencing-in provision which prohibits IFD from coercing insurers indirectly through influencing patient behavior. As such, it is reasonably related to the unlawful practices.³⁸ [57]

In order to make it clear that the order does not apply to dentists acting individually, we have provided that individual dentists may deal with insurers in the way each sees fit. We have also provided that this order does not prohibit IFD from adopting *bona fide* guidelines concerning the exposure of patients to radiation. IFD has not claimed that any of its activities challenged here were prompted by a concern that complying with the requests of third-party payers would expose dental patients to unnecessary radiation. What little evidence there is in the record indicates that the payers in Indiana request only

³⁷ See *Indiana Dental Ass'n*, 93 F.T.C. 392 (1979); *Texas Dental Association*, Docket No. 9139 (Nov. 19, 1982) [100 F.T.C. 536].

³⁸ See *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *Litton Industries v. FTC*, 676 F.2d 364, 370-71 (9th Cir. 1982); *Sears Roebuck & Co. v. FTC*, 676 F.2d 385, 391-92 (9th Cir. 1982); *American Home Products Corp. v. FTC*, No. 81-2930, slip op. at 45-50 (3rd Cir. Dec. 3, 1982).

x-rays that are necessary for diagnosis of the patient's condition and determination of an appropriate course of treatment, *i.e.*, x-rays that would normally be taken by the patient's dentist as part of good dental care.³⁹ Nevertheless, in order to avoid any misunderstanding as to the subject of this case or apprehension over the meaning of the order as it pertains to this issue, we have included a specific provision on this point.⁴⁰ [58]

Finally, we include notification and reporting requirements to insure that individual IFD members are aware of the Order and that the Commission may monitor respondent's compliance with other order provisions.

FINAL ORDER

This matter, having been heard by the Commission upon the appeal of respondent from the Initial Decision, and upon briefs and oral argument thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to deny the appeal of respondent Indiana Federation of Dentists,

It is ordered, That the Initial Decision of the administrative law judge be adopted as Findings of Fact and Conclusions of Law except to the extent inconsistent with the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to Cease and Desist is hereby entered. [2]

I

It is ordered, That the following definition shall apply in this Order: *third-party payer* means any entity that provides a program of reimbursement for dental health care services to employees or members of any other organization, and any person who provides evaluative services in connection with any such reimbursement program.

³⁹ Testimony of Connecticut General employee Chichester, Tr 396-97, 563-64.

⁴⁰ A misunderstanding of the proposed consent order in the Texas Dental Association case, Docket 9139 (Nov. 19, 1982) [100 F.T.C. 536], caused the Deputy Commissioner of the Food and Drug Administration to file a concerned public comment. He read the order in that case to require dentists to submit x-rays requested by insurers, even if that would mean exposing the patient to needless radiation. FDA's fears were relieved by the Commission's assurance that the order applies only to x-rays that already exist, and it does not prohibit the association from adopting professional standards concerning the appropriateness of taking x-rays. 47 Fed. Reg. 52993 (Nov. 24, 1982). Furthermore, neither that order nor the one we are issuing today pertains to the actions of dentists acting individually.

II

It is further ordered, That respondent, its successors or assigns, and its officers and representatives shall cease and desist from engaging in any activity, course of conduct, practice, or policy that in whole or in part:

A. Requests, urges, recommends or suggests that dentists, or has the purpose or effect of requiring or organizing dentists to: (1) refuse to submit radiographs or other pre-treatment or post-treatment reports, analyses, and materials in response to a third-party payer's request for use in benefit determination; or (2) refuse to deal in any particular way with any one or more third-party payers; [3]

B. Compels, threatens, or coerces any third-party payer to operate or deal in any way in connection with dental health care benefits program; or

C. Has the purpose of causing or inducing consumers to choose dentists who do not cooperate with third-party payers, or influencing to any degree consumers' choice of dentists based on the degree or manner of non-cooperation between such dentists and any third-party payer or payers.

III

It is further ordered, That nothing contained herein shall be deemed: (1) to prohibit members of IFD, acting individually and not at the encouragement or inducement of IFD, from dealing with third-party payers in the way each sees fit; or (2) to prohibit respondent from adopting *bona fide* guidelines concerning the exposure of dental patients to radiation. [4]

IV

It is further ordered, That, within thirty (30) days after this Order becomes final, respondent shall mail to each of its members a copy of the Commission Order in this matter, as well as a letter, in the form shown as "Appendix A" to this Order, advising that respondent has abandoned all policies, guidelines, principles, work rules and statements that directly or indirectly request, urge, recommend or suggest that dentists, or have the purpose or effect of requiring or organizing dentists to: (1) refuse to submit radiographs or other pre-treatment or post-treatment reports, analyses, and materials in response to a third-party payer's request for use in benefit determination; or (2) refuse to deal in any particular way with any one or more third-party payers.

Final Order

101 F.T.C.

The letter shall further advise that dentists are free to choose to deal with any such programs and payers in such manner as they decide individually. Respondent shall also mail a copy of the Order and the letter to every person who joins respondent within three (3) years of the date of service of this Order; [5]

V

It is further ordered, That, within sixty (60) days after service of this Order, and annually on the anniversary date of the original report, for each of the five (5) years thereafter, respondent shall file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this Order.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in it, such as dissolution or other action resulting in the emergence of a successor organization, which may affect compliance obligations arising out of this Order.

Commissioner Douglas did not participate.

APPENDIX A

(Respondent's Letterhead)

Dear Doctor:

As you may be aware, the Federal Trade Commission has issued an order against the Indiana Federation of Dentists. This order requires, in essence, that the Indiana Federation of Dentists cease and desist from certain activities that are concerned with dental health care benefits programs and cooperation by dentists with the administrators of such programs. The order also requires that you be sent a copy of the order and this letter.

You are hereby notified that the Indiana Federation of Dentists has abandoned all policies, guidelines, and principles that directly or indirectly request, urge, recommend or suggest that dentists, or have the purpose or effect of requiring or organizing dentists to: (1) refuse to submit radiographs or other pre-treatment or post-treatment reports, analyses, and materials in response to a third-party payer's request for use in benefit determination; or (2) refuse to deal in any particular way with any one or more third-party payers. You are further notified that you are free to choose to deal with any such payers and programs in such manner as you decide individually.

A copy of the FTC's order is enclosed.

Sincerely,

President

Enclosure