

## 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.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. The following definition shall apply in this Complaint. *Third-party payer* or *payer* means any entity that provides a program of reimbursement for dental health care services to employees or members of any business organization, and any person, such as an independent claims adjuster, who provides evaluative services in connection with any such reimbursement program.

PAR. 2. Respondent Indiana Federation of Dentists ("IFD") is an unincorporated association with its principal place of business at 2403 Raible Ave., Anderson, Indiana. The IFD is composed of dentists licensed to practice dentistry in the State of Indiana and has approximately 250 members.

PAR. 3. The Indiana Dental Association ("IDA"), is an Indiana corporation with approximately 2000 members, all of whom are licensed to practice dentistry in Indiana. IDA charters, and is divided into, geographic component societies. Membership in a component society is a condition of membership in IDA.

PAR. 4. Members of respondent and of IDA are engaged in the business of providing dental health care services to patients for a fee and are paid for such services from the patients' personal funds and/or from funds provided under dental health care benefits programs. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other dentists. [2]

PAR. 5. Among respondent's objectives is representation of dentists in socio-economic matters, as a result of which respondent is a corporation organized to carry on business for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. In 1976, total expenditures for dental health care services in the United States were approximately \$8.6 billion. The annual rate of expenditure in Indiana is at least \$150 million.

PAR. 7. In the course and conduct of their businesses, members of respondent, among other things,

(A) Receive substantial revenue from private third-party payers and from the Federal Government in payment for rendering dental health care services, which money flows across state lines;

(B) Provide dental health care services to patients who receive reimbursements from private third-party payers and from the Federal Government for payments made for such services, which reimbursements flow across state lines;

(C) Receive and treat patients from states other than Indiana; and

(D) Utilize and prescribe drugs, medicines, and other products which are shipped in interstate commerce;

as a result of which the acts and practices herein below alleged are in or affect commerce within the meaning of the Federal Trade Commission Act, and respondent is subject to the jurisdiction of the Federal Trade Commission.

PAR. 8. A substantial portion of the population of Indiana is covered by dental health care benefits programs administered by third-party

payers. Many of such programs include provisions for determination of benefits in advance of treatment ("predetermination") and limitation of coverage to the least expensive adequate course of treatment, with a requirement that radiographs ("X-rays") be submitted to aid in benefit determination. The purpose of such provisions is to contain the cost of dental care. Their efficient utilization requires cooperation from treating dentists.

PAR. 9. Since at least 1961, IDA, its component societies, and their members have engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation by dentists with dental health care benefits programs containing predetermination and least expensive adequate course of treatment [3] provisions. In the course thereof, IDA, its component societies, and their members in concert and agreement among themselves, and with IFD and its members, as hereinbelow alleged, *inter alia*:

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

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

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

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

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

PAR. 10. In or about September 1976, respondent was organized and founded by dentists, at least some of whom were or had been members or officers of IDA. In or about September 1976, respondent announced its intention to adopt and pursue the purposes of the agreement and concert of action alleged in Paragraph Nine.

PAR. 11. Since September 1976, respondent and its members, in concert and agreement among themselves, have acted in furtherance of the agreement and concert of action alleged in Paragraph Nine, and have otherwise engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation with dental health care benefits programs

containing predetermination and least expensive course of treatment provisions by, *inter alia*:

A. Promulgating, adopting, publishing, and distributing to its members a purported "work rule" that details certain uniform courses of conduct for dentists in their dealings with third-party payers; and [4]

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

PAR. 12. The acts, practices and methods of competition alleged in Paragraphs Nine through Eleven have had, or have the tendency or capacity to have, among others, the following effects:

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

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

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

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

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

PAR. 13. The aforesaid acts and practices of respondent constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, and are within the scope of Section 5(m)(1)(B) of said Act.

INITIAL DECISION BY

PAUL R. TEETOR, ADMINISTRATIVE LAW JUDGE

MARCH 24, 1980

#### I. SUMMARY OF PROCEEDINGS

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

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

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

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

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

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

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

Paragraph 11 of the Complaint added the following:

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

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

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

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

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

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

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

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

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

- A. Competition among dentists in Indiana has been hindered, restrained, foreclosed, and frustrated;
- B. The cost of dental health care services in Indiana has been or may be stabilized, fixed, or otherwise tampered with;
- C. Consumers have been or may be deprived of the benefit of third-party payers' cost-containing measures, including lower or potentially lower costs for dental health care services and dental health care benefits insurance;
- D. Consumers have been or may be denied the benefits of a second dentist's opinion as to the adequacy of proposed dental treatment; and
- E. Consumers have been limited in their opportunity to select dentists who cooperate with dental health care benefits programs.

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

1. to cease and desist from engaging in any activity that has the purpose or effect of causing or inducing dentists not to cooperate with any third-party payer;
2. to cease and desist from engaging in any activity which has the purpose or effect of causing or inducing consumers to [4] choose dentists who do not cooperate with third-party payers;
3. to cease and desist from engaging in any activity that compels or coerces any third-party payer to incorporate, delete, or modify any provision in any existing or proposed dental health care benefits program;
4. to cease and desist from all activities that have the purpose or effect of influencing the selection of dental consultants or the opinions rendered by such consultants; and
5. to notify their members and local chapters of the substantive relief provided by the order, including affirmative statements advising members that they are free to make their own decisions concerning cooperation with third-party payers.

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>4</sup> Tr 1058.

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

## List of Witnesses

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

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## List of Witnesses

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

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## List of Witnesses

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

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

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

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

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

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

<sup>6</sup> See transcript references cited in CPF 112-13, 115-16, 120-22, 175.

<sup>7</sup> See transcript references cited in CPF 87, 112-13, 115-19, 121, 125-27.

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

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

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

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

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

<sup>8</sup> See transcript references cited in CPF 94-99, 105, 108-110.

<sup>9</sup> See transcript references cited in CPF 107-110.

<sup>10</sup> See transcript references cited in CPF 180-82.

<sup>11</sup> See transcript references cited in CPF 134-35.

<sup>12</sup> See transcript references cited in CPF 151, 176-179.

<sup>13</sup> See transcript references cited in CPF 151, 183-187.

<sup>14</sup> CX 505A; CX 575A-C; CX 584A-E.

<sup>15</sup> See transcript references cited in CPF 140, 193.

<sup>16</sup> See transcript references cited in CPF 145, 157; see also CX 194K and CX 492A.

<sup>17</sup> See transcript references cited in CPF 145.

<sup>18</sup> See transcript references cited in CPF 147-164.

<sup>19</sup> See transcript references cited in CPF 150, 153, 162.

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

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

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

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

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

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

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

<sup>20</sup> See Pars. 187 to 209, below.

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

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

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

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

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

## II. OVERVIEW

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

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

<sup>21</sup> CX 139 I.

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

<sup>23</sup> Tr 394-95.

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

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

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

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

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

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

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

<sup>27</sup> Tr 272, 276-77, 397, 527-28, 979, 980-81, 986, 1152, 1430.

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

<sup>29</sup> CX 394G.

<sup>30</sup> CX 47K.

<sup>31</sup> CX 47J.

<sup>32</sup> Tr 2714.

<sup>33</sup> This is a frequent phrase in the record here. See *e.g.*, CX 397A.

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

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

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

### III. FINDINGS OF FACT

#### A. Respondent

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

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

#### *Section 2. Objectives:*

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

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

<sup>35</sup> CX 477C; CX 22A.

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

<sup>37</sup> CX 13A-B. Also quoted in Par. 105, below.

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

- a.) To represent dentists in all socio-economic matters, negotiations and grievances with employers, third, and fourth parties or any group that is involved in financing or delivery of dental care. The ultimate purpose being to promote better patient care and to prevent abuses and correct inequities in the delivery of dental care to the public;
- b.) To seek to insure adequate compensation and proper working conditions for dentists commensurate with their training and skill and the responsibility they bear for the life and health of their fellow human beings;
- c.) The establishment or approval of appropriate utilization review or peer review procedures which do not interfere with the doctor-patient relationship and the maintenance of the highest quality of dental care;
- d.) To associate together all dentists for their mutual benefit and protection;
- e.) To unite the efforts of dentists in obtaining and preserving the individual freedom of action necessary for the success of their professional endeavors;

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

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

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

<sup>38</sup> See RPF 2, IPF 116, 117.

<sup>39</sup> CX 811A (including 100 percent of all dental specialists in the area).

<sup>40</sup> CX 811B (including 67 percent of all dental specialists in the area).

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

<sup>42</sup> Tr 2261.

<sup>43</sup> The IDA mailing list is said to miss only 12-15% of all Indiana dentists (CX 303E).

<sup>44</sup> CX 12.

<sup>45</sup> Respondent's Answer to Complaint, Par. 17.

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

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

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

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

<sup>47</sup> See Par. 94, below.

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

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

### B. *Interstate Commerce*

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

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

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

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

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

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<sup>49</sup> CCPF, page 20.

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

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Figure 1

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

	Indiana		Anderson Area		Lafayette Area		Ft. Wayne Area	
	1976	1977	1976	1977	1976	1977	1976	1977
Interstate Payments Into Indiana Under Dental Plans With Prudential And Alternate Benefits Features								
Actna	\$1,875,000	\$2,250,000						
CG	9,322,800	9,707,000	\$2,141,100	\$2,600,100			\$1,151,995	\$1,453,751
Metropolitan	284,000	339,000						
Travelers	489,522	2,365,887			\$3,694	\$77,816		
Prudential	440,000	1,178,000						
Equitable	456,750	375,600						
Other Relevant Interstate Dental Benefit Payments								
Peter Paul Inc. (Frankfort, Ind.)					\$3,870	\$18,864		
Johns-Manville (Alexandria, Ind.)			\$11,476	***				
Totals	\$12,868,072	\$16,215,487	\$2,152,576	\$2,600,100	\$7,564	\$95,680	\$1,151,995	\$1,453,751

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

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

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

[25] C. *The IDA Boycott*

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

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

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

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

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

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

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

<sup>52</sup> CX 798E; CX 799E.

<sup>53</sup> CX 303E.

<sup>54</sup> Tr 2261.

<sup>55</sup> CX 3B, CX 4B, CX 5B, CX 6B, CX 7C, CX 8B, CX 9B, CX 10B, CX 11B.

<sup>56</sup> CX 798G; CX 799G.

<sup>57</sup> CX 798L; CX 799 I.

<sup>58</sup> CX 3D; CX 72C; CX 99D; CX 433.

<sup>59</sup> CX 798Q; CX 799M.

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

Figure 2

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

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

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

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

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

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

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

<sup>60</sup> CX 106, CX 490B.

<sup>61</sup> CX 106.

<sup>62</sup> CX 47, CX 72, CX 99.

<sup>63</sup> CX 47A, CX 72A and CX 99B. This record contains no later editions or revisions.

<sup>64</sup> CX 47C.

<sup>65</sup> CX 47E.

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

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

6. The areas of responsibility involved in the administration of the plan must be recognized and properly evaluated.

a. The administration of the professional phases of the plan should be entirely within the control of professional personnel. Professional standards and treatment should not be controlled by non-dental administrators.

b. The method of authorization of dental health care under pre-payment plans should be limited to determining the eligibility of the patient and [30] extent of liability of the plan and should prevent any interference with the dentist-patient relationship or with the judgment and decision of the dentist. The plan must not *require* the dentist to submit<sup>69</sup> radiographs (X-rays) to a third party. (emphasis in original)

c. The submission of a total estimate is acceptable, *if requested by the patient*. (emphasis in original)<sup>70</sup>

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

Dental radiographs (X-rays) are a part of the dentist’s legal health records. They are available for valid review by a qualified representative(s) of your insurance company in this office. *Radiographs (X-rays) will not be submitted to third parties for their use in determination of benefits (e.g., least expensive adequate procedure or optional course of treatment) because a determination of an adequate treatment plan can only be made after a knowledge of the following:*

A. Complete patient evaluation

B. Radiographs

C. Additional diagnostic procedures as required. (emphasis added)<sup>71</sup> [31]

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

<sup>67</sup> CX 47E.

<sup>68</sup> CX 47E.

<sup>69</sup> Later revisions inserted here “either pre or post operative.” See CX 99F.

<sup>70</sup> CX 47E.

<sup>71</sup> CX 47G. See also CX 72F and CX 99 I (same wording in later revisions of Manual).

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

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

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

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

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

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

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

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

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

<sup>72</sup> The same invitation to check X-rays in the attending dentist’s office appears in a “sample letter to (insurance) carrier if carrier requests X-rays. . . .” CX 47X; CX 720; CX 99V.

<sup>73</sup> Tr 341-42, 924-25, 978, 1221, 1232, 1383-84, 1457; CX 303E; CX 316.

<sup>74</sup> See Pars. 120-148 below (re reasonableness of the restraint).

<sup>75</sup> CX 47I *et seq.*; CX 72H *et seq.*; CX 99K *et seq.*

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

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

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

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<sup>77</sup> CX 47J-K.

<sup>78</sup> CX 47L-M; CX 72I-J; CX 99M-N.

Initial Decision

101 F.T.C.

ATTENDING DENTIST'S STATEMENT

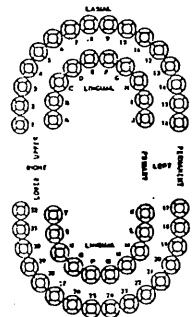
FIGURE 177A

FORM 1771

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

CX ED-47-L

Form fields for patient and dentist information including name, address, birth date, and insurance details.



INDICATE MISSING TEETH WITH AN "X"

\*MARKS FOR UNUSUAL SERVICES

Table with columns: TOOTH # OR SURFACE, DESCRIPTION OF SERVICE, DATE, FEE, and FOR CARRIER USE ONLY. Includes entries for Initial Oral Examination, Intra-Oral Complete Series, and Amalgam-one surface-permanent.

SAMPLE

Summary section for orthodontics, including fields for diagnosis, date of appliance insertion, and total fee.

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

SIGNED PATIENT, OR PARENT IF MINOR DATE

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

SIGNED DENTIST DATE

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

SIGNED INSURED PERSON DATE

Form Approved by the Council on Dental Care Programs of the A. D. A., June 1, 1971

Figure 3-B

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

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

1. Our professional services are rendered on the basis that all costs of treatment will be paid by the patient.
2. In some plans, the dental insurance contract is written to provide for the least expensive, adequate procedure as determined by the insurance company. The carrier will request x-rays to make this determination. If your contract is written in these terms, please give special attention to the following:
  - A. The Indiana Dental Association does not agree with such a contract.
  - B. Trying to determine if a treatment plan is adequate based on x-rays alone is impossible without an in-office examination of the patient.
  - C. X-RAYS WILL NOT BE SUBMITTED TO A THIRD PARTY FOR THIS PURPOSE.
  - D. Your dental insurance contract is an agreement between you and/or your employer and their insurance carrier. Indiana dentists are not bound by any dental care insurance contract stipulation.

