

**ANALYSIS OF AGREEMENT CONTAINING  
CONSENT ORDER TO AID PUBLIC COMMENT**  
*In the Matter of the Connecticut Chiropractic Association, the  
Connecticut Chiropractic Council, and Robert L. Hirtle, Esq., File No. 071 0074*

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

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

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way. Further, the proposed order has been entered into for settlement purposes only and does not constitute an admission by any proposed respondent that said respondent violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

### **The Complaint**

The allegations of the complaint are summarized below.

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

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

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

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

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

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

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

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

### **The Proposed Consent Order**

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

The proposed order's specific provisions are as follows:

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

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

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

arrangement,” or conduct that only involves chiropractors who are part of the same chiropractic group practice (defined in Paragraph I.F).

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

A “qualified clinically-integrated joint arrangement,” on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among chiropractors. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

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

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

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

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

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