A. Respondent American Medical Association publish a copy of this Order in the *Journal of the American Medical Association* and in *American Medical News;* [305]

B. Respondent Connecticut State Medical Society publish a copy of this Order in *Connecticut Medicine;* and

C. Respondent New Haven County Medical Association, Inc. publish a copy of this Order in *Issues and Insights.*

IV.

It is further ordered, That respondents, within ninety (90) days after this Order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which they have complied with this Order. [306]

APPENDIX A

Constitutions and Bylaws of AMA's constituent and component medical societies providing that AMA's Principles of Medical Ethics shall govern the conduct of their members and that unethical conduct shall be grounds for expulsion:

Medical Society	Constitution and/or Bylaws
Allegheny County Medical Society	CX 2185, pp. 10, 13, 15, 17, 40, 42
Arizona Medical Association, Inc.	1871I, K–L
Bexar County Medical Society	472C, G
California Medical Association	477I, L, Z–6
Camden County Medical Society of the State of New Jersey	747L–M, R
Catawba County Medical Society	2226C, G
Chattanooga and Hamilton County Medical Society, Inc.	1904I, M, V
Chicago Medical Society: The Medical Society of Cook County	2025M, N
Colorado Medical Society	2307Z–9, Z–22, Z–27
Connecticut State Medical Society	991D, L–M (*See* 1404I, J)
Dallas County Medical Society	1905D, F, W–X
Medical Society of the District of Columbia	1976R–S, V [307]
Florida Medical Association	2543C, K

Philadelphia County Medical Society	756A, M, N
Pierce County Medical Society	135A–B, F, H
Prince George's County Medical Society	689K, D
Santa Clara County Medical Society	748N
St. Louis Medical Society	983E
Tarrant County Medical Society	1894A, E [309]
Tennessee Medical Association	14H, L
Texas Medical Association	1899D, U
Travis County Medical Society	1882B, N, Z–9
Medical Society of Virginia	1879Z–8, O–P, Z–5
Volusia County Medical Society	1961K, P, D–E
Washington State Medical Association	475G–H, O, M–N
State Medical Society of Wisconsin	1912B, G [310]

APPENDIX B

State Statutes Regarding Physician Advertising and Solicitation

In 1975, at the commencement of the proceedings in this case, a substantial majority of states had statutes which prohibited or restricted advertising by physicians. Ten states declared any form of physician advertising to be illegal:

(a) Arixona, Ariz. Rev. Stat. §32–1401 (10)(C), §33–1451 (1976) (RX 706);
(b) Arkansas, Ark. Stat. Ann. §72–613(m) (1975) (RX 707);
(c) Florida, Fla. Stat. Ann. §458.1201(1) (f) (1976) (RX 710);
(d) Georgia, Ga. Code Ann. §84–916(a)(6) (1976) (RX 711);
(e) Louisiana, La. Stat. Ann. §37–1285(19) (1976) (RX 717);
(f) Michigan, Mich. Stat. Ann. §14.542(11) (1), (11)(27)(g), (1976) (RX 719);
(g) Missouri, Mo. Ann. Stat. §334.100(12) (1976) (RX 721);
(h) Ohio, Ohio Rev. Code Ann. §4731.22(b)(5) (1975) (RX 727);
(i) Tennessee, Tenn. Code Ann. §63–619 (1976) (RX 734); and,
(j) Utah, Utah Code Ann. §§58–12–36(4), 58–1–25(1) (1973) (RX 736).

Eight states prohibited advertising in an "unethical" manner:

(a) Delaware, Del. Code Tit. 24, §1741(9) (1974) (RX 709);
(b) Idaho, Idaho Code §54–1810(c) (1976) (RX 713); [311]
(c) Maine, Me. Rev. Stat. tit. 32, §3282(A)(B) (1977) (RX 718);
(d) Nebraska, Neb. Rev. Stat. §71–147(11)–(13) (1976) (RX 722);
(e) North Dakota, N.D. Cent. Code §43–17–31(11) (1960) (RX 726);
(f) Rhode Island, R.I. Gen. Laws §§5–37–4, 5–37.1–5 (1976) (RX 731);
(g) South Carolina, S.C. Code Ann. §40–47–200 (7) (1975) (RX 732); and,
(h) Wyoming, Wyo. Stat. §33–340 (1975) (RX 740).

Four states prohibited all advertising except notices of openings or closings of a practice or listing in a directory:

(a) Alaska, Alaska Stat. §§08.64303(b)(1), 08.64.380(3)(D) (1977) (RX 705);
(b) Illinois, Ill. Rev. Stat. ch. 91, §§16a(13), 16a-1 (1976) (RX 714);
(c) New Jersey, N.J. Stat. Ann. §45.9.16 (1976) (RX 723); and,
(d) Oklahoma, Okla. Stat. Ann. tit. 59 §§503, 509(2) (1977) (RX 728).

Sixteen states made it illegal for a physician to engage in misleading or deceptive advertising:

(a) Alabama Ala. Code §§34-24-90 (1975) (RX 704);
(b) Connecticut, Conn. Gen. Stat. §20-44 (1958) (RX 708);
(c) Hawaii, Haw.Rev.Stat. §§453-8, (5) (6) (1975) (RX 712);
(d) Iowa, Iowa Code Ann. §§147.55-(7) (1976) (RX 715);
(e) Kansas, Kan. Stat. §§65-2836(b), 65-2837(g) (1976) (RX 716); **[312]**
(f) Mississippi, Miss. Code §73-25-29(8)(c) (1976) (RX 720);
(g) New Mexico, N.M.Stat.Ann. §§67-5-9(9), (B)(9) (1975) (RX 724);
(h) North Carolina, N.C.Gen. Stat. §§90-14, 9014(8) (1975) (RX 725);
(i) Oregon, O.Rev.Stat. §677.190(10) (1971) (RX 729);
(j) Pennsylvania, Pa.Stat.Ann. tit. 63, §421.15 (a)(92) (1976) (RX 730).;
(k) Rhode Island, R.I.Gen.Laws §§5-37-4, 5-37.1-5 (1976) (RX 731);
(l) South Dakota S.D. Codified laws §§36-4-29, 36-4-30 (5) (1977) (RX 733);
(m) Texas, Tex. Rev. Civ. Stat. Ann. art. 4505(6) (1976) (RX 735);
(n) Vermont, Vt. Stat. Ann. tit. §§ 1353(2), 1361 (1977) (RX 737);
(o) Virginia, Va. Code §§54-316, 54-317(4) (1977) (RX 738); and,
(p) Washington, Wash.Rev.Code §§18.72.030(4), 18.72.250 (1975) (RX 739).

Alabama also provides for suspension or revocation of a medical license for any violation of the Principles of Medical Ethics as set forth in the *Opinions and Reports* of the Judicial Council of the AMA (RX 704B).

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

The complaint in this case was issued on December 19, 1975, charging that the American Medical Association (AMA), the Connecticut State Medical Society (CSMS), and the New Haven County Medical Association, Inc. (NHCMA) violated Section 5 of the Federal Trade Commission Act ("Act")[1] through ethical restrictions on advertising and solicitation, as well as other competitive restrictions. The AMA is the largest medical and professional association in the world. (ID 6) Its membership includes approximately 200,000 physicians, representing 53 percent of all doctors in the nation and 72 percent of office-based practitioners. (RX 658) The AMA is a federation of 55 constituent associations, representing states, commonwealths, territories, and insular possessions. (RX 220, p.27, CX

[1] 15 U.S.C. 45(a)(1)(1976).

990E) Each of these constituent societies has in turn chartered component societies representing smaller geographic areas such as counties. (CX 990E) There are approximately 2,000 component societies in the AMA. (RX 220, p.27) Membership in a component society is a prerequisite to membership in a constituent association and membership in a constituent association is a prerequisite to membership in the AMA. (ID 6) [2]

CSMS is a constituent society of AMA composed of eight component county medical societies, one of which is NHCMA. In 1975, CSMS had approximately 4,400 members, representing approximately 82 percent of the physicians registered in Connecticut. NHCMA had approximately 1,200 members in 1975, representing approximately 71 percent of the physicians registered in New Haven County. (ID 8-9)

The AMA House of Delegates, which is composed of delegates from each constituent or state society, is the official legislative and national policymaking body of AMA with authority to amend the AMA *Constitution and Bylaws,* and the *Principles of Medical Ethics ("Principles").* (ID 7) The AMA operates eight standing committees on specific subjects, known as Councils. *Id.* One of these councils, the Judicial Council, has responsibility for interpreting the AMA *Constitution and Bylaws,* and the *Principles.* (Tr. 3982)

The case against respondents focuses upon their ethical code and interpretations of this code. The AMA adopted a *Code of Ethics* at its first meeting in 1847. (ID 102) With minor revisions, the language and concepts of the original code remained unchanged until 1957. In that year, AMA's House of Delegates adopted a shortened version of the *Code of Ethics,* entitled *The Principles of Medical Ethics,* consisting of ten brief sections. As noted above, the Judicial Council interprets the *Principles* and hears actions based on infractions of the *Principles. Id.* The Judicial Council's interpretations are periodically published under the title *Opinions and Reports of the Judicial Council ("Opinions and Reports").*

The gravamen of the complaint in this case is that respondents, through their ethical canons, agreed to prevent or hinder their members from soliciting business, by advertising or otherwise, from engaging in price competition, and from otherwise engaging in competitive practices. The complaint alleged that these agreements constitute unfair methods of competition and unfair acts or practices in violation of Section 5.

Following an extended trial, the Administrative Law Judge (ALJ) concluded that the Commission possessed jurisdiction over the respondents' practices since each of the respondents is a "corpora-

tion" within the meaning of Section 4 of the Act, and because the challenged acts, practices, and methods of competition are in or affect commerce. With respect to the merits, the law judge found that respondents, their constituent and component medical societies, and their members have agreed to adopt, disseminate and enforce ethical standards that ban physician solicitation of business and severely restrict physician advertising. Additionally, the ALJ held that respondents have unlawfully sought to prevent or hinder certain contractual arrangements between physicians and health care delivery organizations and between physicians and nonphysicians. [3]

To remedy the violations found as well as to protect the public now and in the future, the ALJ issued an order that requires, *inter alia,* respondents to cease and desist from restricting advertising, solicitation, and certain contract practices of their members for a minimum of two years. At the end of this period, the order permits AMA to develop and disseminate ethical guidelines with respect to advertising and solicitation, on condition that respondents first obtain the Commission's approval of these guidelines.

Respondents argue in their appeal to the Commission that they are not "corporations" as defined in Section 4 of the Act. Although AMA concedes that its activities fall within and affect interstate commerce, CSMS and NHCMA urge the Commission to overrule the ALJ's finding of interstate commerce jurisdiction. All respondents object to the finding of a conspiracy, with AMA asserting that it should not be held accountable for the activities of its member societies and the Connecticut respondents attempting to disassociate themselves from proof involving AMA and unnamed state and local societies. With respect to the alleged restraints on advertising, solicitation and contractual arrangements, AMA rests its case primarily upon recent modifications to its ethical positions disseminated after issuance of the complaint and, together with the Connecticut respondents, challenges the sufficiency of the evidence to sustain the law judge's conclusions.

I JURISDICTION

A. Of "Corporations" Under Section 4

At the outset, the Commission must determine whether it has jurisdiction over the respondents. Section 5(a)(2) of the Act[2] extends

[2] 15 U.S.C. 45(a)(2)(1976).

the Commission's jurisdiction to "persons, partnerships, or corporations" and Section 4 defines "corporation" to include:

> any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.[3]

In analyzing whether this language applied specifically to respondents, the ALJ felt that the Commission could "assert jurisdiction over nonprofit organizations whose activities [4] engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." (ID 238)[4]

Respondents challenge this formulation of the legal standard under Section 4, but their briefs reflect some differences regarding the standard to be applied. AMA argues that the sole inquiry under Section 4 should be to determine whether the respondent is carrying on business in order to accumulate gain for distribution to its shareholders or members. Focusing on the organization's purpose rather than its activities, NHCMA suggests that the proper test is whether the respondent has been organized for the purpose of engaging in business activities to provide gain to its members. Finally, CSMS urges a combination of the criteria suggested by the other respondents. It says that the test should be whether the respondent has been organized *and* operated to profit its members.

We are satisfied that the ALJ has articulated the proper test for examining whether respondent is a "corporation" within the meaning of Section 4. The substantiality test appropriately places the principal focus upon the nature of respondents' activities and is supported by precedent. *National Commission on Egg Nutrition,* 88

[3] 15 U.S.C. 44 (1976).

[4] The following abbreviations will be used in this opinion:

ID	-	Initial Decision page number
Tr.	-	Transcript page number
CX	-	Complaint Counsel's exhibit number
RX	-	Respondent AMA exhibit number
RCX	-	Respondent's CSMS exhibit number
RNHX	-	Respondent's NHCMA exhibit number
RAB	-	Respondent AMA Appeal Brief
RCAB	-	Respondent NHCMA Appeal Brief
CAB	-	Complaint Counsel's Answering Brief
TROA	-	Transcript of Oral Argument before the Commission
App.A	-	Appendix A of this Opinion

F.T.C. 89, 177 (1976) *modified* 570 F.2d 157 (7th Cir. 1977), *cert. denied,* 99 S. Ct. 86 (1978).[5] Clearly, Congress did not intend to bring "any and all nonprofit corporations regardless of their purposes and activities" within the Commission's jurisdiction. *Community Blood Bank of the Kansas City Area, Inc.* v. *F.T.C.,* 405 F.2d 1011, 1018 (8th Cir. 1969). On the other hand, the legislature did not provide a "blanket exclusion" from FTC jurisdiction for all nonprofit corporations, since it recognized that certain "corporations ostensibly organized not-for-profit, such as trade associations, were merely [5] vehicles through which a profit could be realized for themselves or their members." *Id.* at 1017. Thus, the "mere form" of incorporation is not dispositive; it is the "reality" of a respondent being in law and in fact a charitable organization (the determination of which must necessarily be conducted on an ad hoc basis) that places it beyond the Commission's reach. *Id.* at 1018–19.

Respondents contend that for the Commission to assert jurisdiction over them, it must find that they are engaged in some undertaking for the purpose of realizing gain for ultimate distribution to their members. They argue that it is improper for the Commission to focus upon activities which provide only an "economic benefit" for their members. (RAB 17–18) It is clear, however, that an organization may fall within the ambit of Section 4 even though it only "indirectly" pursues profit for its members. *National Commission on Egg Nutrition, supra,* 517 F.2d at 488.[6] Section 4 does not require a transfer or delivery of monetary profits to the members of a nonstock corporation, only that the activities of the corporation provide pecuniary benefits to its members. AMA itself concedes as much when it acknowledges that the Commission has exercised jurisdiction many times in the past over trade associations. (RAB 19)[7] Its effort to distinguish these cases on grounds that the entities involved were devoted primarily to enhancing the pecuniary benefit

[5] In the related preliminary injunction action, the district court held that the respondent was a "corporation" within the meaning of Section 4 by virtue of the fact that many of its members were connected with the egg industry and because its activities "directly promote[d], at least to some extent, the financial health of the egg industry." F.T.C. v. *National Comm'n on Egg Nutrition,* 1975–1 Trade Cas. (CCH) ¶60, 246 at 65,967 (N.D. Ill. 1974), *rev'd on other grounds,* 517 F.2d 485 (1975), *cert. denied* 426 U.S. 919 (1976).

There is some support for the notion that a respondent is subject to FTC jurisdiction if one of its purposes is noncharitable in nature, perhaps only to the extent of its noncharitable activities. *See Community Blood Bank, supra,* 405 F.2d at 1022. ("[W]e hold . . . [t]hat under § 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital, which are organized for and actually engaged in business for *only* charitable purposes, and do not derive *any* 'profit' for themselves or their members . . . ."). (Emphasis supplied.) In view of our determination, *infra,* that respondents are subject to the Commission's jurisdiction under the substantiality test, we need not determine whether jurisdiction might exist under some alternative test.

[6] The district court's opinion also supports the proposition that jurisdiction may attach even though there is no actual distribution of profits to the respondent's members. *National Comm'n on Egg Nutrition, supra,* 1975–1 Trade Cas. (CCH) ¶60, 246 at 65,967.

[7] This authority is well established. *E.g., FTC* v. *Cement Inst.,* 333 U.S. 683, 687 (1948); *Fashion Originator's Guild of America* v. *FTC,* 312 U.S. 457, 461 (1941); *FTC* v. *Pacific States Paper Trade Ass'n,* 273 U.S. 52 (1927).

of their members implicitly recognizes that the degree of pecuniary benefit conferred is the fundamental issue, not whether the benefit is physically distributed. [6]

AMA may have abandoned the contention offered below that for an organization to be subject to the Commission's jurisdiction, profit-seeking must play a dominant role in its activities. *Compare* RAB 25 *with* TROA 101. The Connecticut respondents continue to maintain, however, that a respondent is exempt from prosecution if its activities are substantially educational, scientific, and charitable in nature, *i.e.*, even if its commercial activities predominate. RCAB 8; RNAB 4–5. This latter formulation turns the correct standard on its head, in our view, permitting a corporation to escape liability before the Commission for anticompetitive practices, despite the fact that a major portion of its operations provide a pecuniary benefit to its membership. While commercial activity which is only incidental to the eleemosynary functions of a nonstock corporation may not support a claim of jurisdiction, *Egg Nutrition,* 88 F.T.C. at 178–79; *cf. Community Blood Bank,* 405 F.2d at 1017, an organization which exists in substantial part for the pecuniary benefit of its members surely comes within Section 4.

On a slightly different tack, AMA asserts that the legislative history of the Act reveals a congressional intent not to subject professional societies to Commission jurisdiction. In support of this proposition, it cites a decision construing a provision of the Florida antitrust statute,[8] the absence of professional society testimony on the bills that became the Federal Trade Commission Act, and the fact that the 95th Congress failed to enact legislation which would have given the Commission jurisdiction over all nonprofit corporations. We think respondent makes too much of too little. In essence, AMA would have us infer an exemption from the Act for a particular class of organizations, persons and corporations based upon the absence of specific statutory language or legislative history reflecting a congressional desire to have the Act apply to this class. The incredible sweep of such a position and the extraordinary demands it would place upon the legislature perhaps explain why it is unsupported by any precedent of which we are aware.

With respect to the inaction of the 95th Congress, it is well-settled

[8] In *Feminist Women's Health Center, Inc.* v. *Mohammad,* 586 F.2d 530 (5th Cir. 1978), the court held that the medical profession was not "any person" within the meaning of the Florida antitrust law. In considering it unlikely that the 1915 Florida legislature intended its statute to apply to the medical profession, the court applied state law and, in so doing, relied heavily on a recent state appellate court interpretation to that effect. *Mohammad, supra* at 552–53. However, the court reversed a decision granting summary judgment to defendants on a Sherman Act count, following the holding of *Goldfarb* that the learned professions are not exempt from the Sherman Act.

that "the views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one."[9] The peril is particularly acute when the subject of congressional inaction is broader in scope than the point [7] for which it is cited. As noted by AMA, the legislation before the 95th Congress would have amended Section 4 to remove the nonprofit exemption altogether, exposing true charitable organizations to the jurisdiction of the Commission. Even assuming that the 95th Congress had some special insight into the intent of a Congress which preceded it by more than sixty years, it is impossible to fathom with any confidence the significance for this case of congressional inaction on the specific amendment recently considered.[10]

We find no reason to differ with the ALJ's conclusion that respondents are engaged substantially in activities which confer a pecuniary benefit upon their members. AMA's own statements belie any suggestion that such activities are only incidental to eleemosynary functions. One of the purposes for which AMA was founded in 1847 was to promote "the usefulness, honor and interest of the medical profession. . . ."[11] The AMA's articles of incorporation, as amended in 1902, stated that one of the objects of the Association was "safeguarding the *material* interests of the medical profession. . . ." (CX 1355–H) (emphasis added). Additionally, the proceedings of AMA's House of Delegates in 1975 indicate that the association continues to exist as "an organization of and for the medical profession." (CX 1042J) [8]

Promotional literature and other material sent by AMA to its members sound the recurring theme that the Association is substantially engaged in protecting the rights and fostering the interests of American doctors. (CX 1532B, 1224, 1528, 1545D, 232D, 2630) For

[9] *United States* v. *Price*, 361 U.S. 304, 313 (1960); *see also United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *United States* v. *United Mine Workers*, 330 U.S. 258, 281–82 (1947).

[10] The then Chairman of the Commission, Calvin J. Collier, testifying on behalf of the Commission, supported the amendment on grounds that it would avoid the often time-consuming proof necessitated by the *Community Blood Bank* analysis. Chairman Collier expressed the view that, where anticompetitive or deceptive behavior is involved, there was little reason for identifying "charitable" corporations, since the harm to the public is the same whether the corporation engages in such behavior for profit or for charity. H.R. Rep. No. 95–339, 95th Cong., 1st Sess. at 54 (1977). The excerpt from the Report of the House Committee on Interstate and Foreign Commerce, quoted by AMA, indicates only that certain minority members of the committee were concerned not that the Commission could properly exercise jurisdiction over an entity found to be "organized to carry on business for its own profit or that of its members," but rather that the proposed amendment would *extend* the Commission's jurisdiction to encompass genuine nonprofit organizations. *Id.* at 120.

[11] Memorandum in Support of Respondent American Medical Association's Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction at 12–13 (March 24, 1976) (Quoting from the preamble to AMA's Constitution, adopted in May 1847).

AMA suggests that reliance upon references to the "interests" of physicians overlooks the fact that physicians have policy goals unrelated to profit maximization. While certain of these references are admittedly ambiguous, consideration of the record as a whole leaves little doubt that one of the purposes for which AMA was organized and for which it continues to operate is the economic betterment of its members.

example, a pamphlet sent to AMA's membership in 1974, entitled "What Do You Get For Your Dues?", emphasizes the "remarkable range of tangible benefits and services" provided by AMA membership and describes these benefits and services as "invaluable - personally and professionally." (CX 259C, D) The same pamphlet specifically refers to insurance programs, AMA's retirement plan, physician placement service, publications (such as *Prism,* a socio-economic magazine), authoritative legal information and guidelines, and "professional management information and guides to increase the productivity and profitability of your practice." (CX 259D)[12] The record provides ample substantiation for these promotional statements. (ID 57–59) Practice management programs warrant particular attention because they have been assigned a high priority by AMA and because they present some of the most "tangible benefits" to the association and its members. (CX 1543Z–10) We find it significant that expenditures for this program have more than doubled in the last three years. (ID 57)

According to AMA, the most important of all the tangible benefits and services they offer is the fact that a member has "an effective and influential national spokesman to represent [his/her] views, interests and rights." (CX 259Z–13) The record supports this assertion, describing legislative and lobbying efforts by AMA with respect to price controls on physicians' fees, Medicare, national health insurance, health maintenance organizations (HMOs), the Keogh Act, malpractice insurance legislation, and other issues affecting the financial health of AMA's membership. (See ID 41–49) AMA's intercession on behalf of its members with insurance carriers, such as Blue Shield, government medical care programs, and hospital administrators also provides economic benefits. (ID 50–53) The record of this proceeding documents additional pecuniary benefits in the form of litigation and substantial public relations activity in support of its legislative program. (ID 52–56)

Our determination that AMA engages in substantial activities for the economic benefit of its membership is intended in no way to denigrate the many valuable eleemosynary activities in which AMA is engaged. Respondent's educational, scientific, and public health efforts represent a laudable public service recognized by this agency and the country as a whole. Such activities do not, however, provide immunity from the laws designed to protect the public from anticompetitive practices. [9]

The record also persuades us that the Connecticut respondents

[12] See also CX 245D, reproduced at ID 40. It is noteworthy that AMA's "medicolegal" symposiums have frequently focused on the business practice aspects of the profession. (ID 58)

exist in substantial part for the economic advantage of their members and that the law judge's finding in this regard should be upheld. (*See* ID 73–101, 241–51) Without reiterating all of the various economic activities referenced by the ALJ, we note that both CSMS and NHCMA have promoted the economic interests of their members through lobbying and legislative efforts, through sponsorship of insurance plans such as the Professional Liability Insurance Program, and through relationships with third-party payers. Moreover, both of these respondents have played key roles in the formation of "Foundations for Medical Care," an alternative to HMO's operating on a prepaid basis with fee-for-service physicians.[13]

Record evidence concerning the CSMS *Relative Value Guide ("RVG")* provides added support to the ALJ's finding. The *RVG* provides a precise description and identification in coded form of the services rendered by physicians. (CX 1175D) When utilized with a conversion factor, a relative value guide can be used to generate a fee schedule. *Id.* CSMS first adopted the *RVG* in 1965, republished it in 1971, and distributed it to its membership and to third-party payers up until 1977. (I.D. 85–86) CSMS recommended no specific conversion factors, but did advise its members to check with other physicians in the community to derive an "appropriate" conversion factor. (CX 1171A) Although there is some evidence that third-party payers in Connecticut used their own or different relative value scales and that CSMS advised its members to use the precise coding approved by the specific third-party payer, the record also shows that the *RVG* was utilized by the NHCMA Peer Review Committee to decide complaints regarding members' fees and by the New Haven County Foundation for Medical Care. (CX 1178, 2424C, 2425, 2433) Based on this evidence, we conclude that the *RVG* provided important economic benefits to CSMS and NHCMA members.

The Connecticut respondents object to the law judge's finding that the benefits of AMA membership may be imputed to CSMS and NHCMA and that the benefits of CSMS membership may be imputed to NHCMA. This finding was based on the requirements that a physician must be a member of NHCMA in order to join CSMS and must be a member of both NHCMA and CSMS in order to join AMA. Clearly, little weight should be given to the fact that NHCMA was formed several years prior to CSMS or that both

[13] Respondents argue that the primary purpose of each of these functions is to advance societal welfare through better public health. We have already addressed the contention that to fall within the Commission's jurisdiction, an association must exist primarily for the economic benefit of its members. Likewise, it is unnecessary for the Commission to find that the dominant purpose or effect of any particular activity is profit-making so long as the aggregate total of activities providing any pecuniary gain represents a substantial part of a respondent's overall operation.

organizations predate the creation of the AMA. [10] AMA and CSMS provide valuable benefits to their members and membership in CSMS and/or NHCMA is the *sine qua non* of obtaining these benefits. The fact that approximately half of NHCMA's and CSMS' members chose to join the AMA provides some indication that these benefits were more than negligible. Consequently, we believe it proper to take into account the pecuniary advantages provided by the larger associations.

In light of this evidence regarding the economic activities of all three respondents, the Commission finds it difficult to discern the "striking similarities" alleged to exist between the respondents in this docket and the Kansas City Area Hospital Association ("KCAHA"), a respondent in the *Community Blood Bank* case. By contrast to our findings here, KCAHA funds never "inured to the benefit of any of [its] members" and were utilized "exclusively" for educational and charitable purposes. *Community Blood Bank, supra,* 405 F.2d at 1020. Here, there is abundant record evidence that respondents have engaged in activities providing pecuniary benefits to their members. Respondents' membership serves to distinguish them from the hospital association involved in *Community Blood Bank,* providing further evidence that they exist in substantial part for the profit of their members. Of the 43 member hospitals of KCAHA, 21 were incorporated as not-for-profit charitable or religious associations, 12 were instrumentalities of federal, state, or local governments, and only 2 were organized as proprietary corporations. *Community Blood Bank, supra,* 70 F.T.C. at 767, 405 F.2d at 1020 n. 16.

The KCAHA also differs from respondents in that it is exempt from Federal income tax as a charitable organization pursuant to 26 U.S.C. 501(c)(3)(1976), whereas respondents qualify for an exemption under 26 U.S.C. 501(c)(6)(1976).[14] [11] The latter provision exempts "business leagues, chambers of commerce, real estate boards, boards of trade or professional football leagues. . . ."[15] By contrast, the KCAHA and the American Medical Association Education and

[14] Affidavit of John F. Kelly at 2 (April 5, 1976), attached to Complaint Counsel's Memorandum in Opposition to Respondent's Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction (April 8, 1976) ("Kelly Affidavit"); CX 1393.

[15] Section 1.501(c)(6)-1 of the Internal Revenue Regulations defines a "business league" as:

> . . . an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. Treas. Reg. §1.501(c)(6)-1 (1958).

Research Foundation, an AMA subsidiary, come within Section 501(c)(3) of the Code, 26 U.S.C. 501(c)(3)(1976).[16] This provision exempts from Federal income tax:

> Corporations, and any community chest, fund, or foundations, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . ., or for the prevention of cruelty to children or animals . . . .

Respondents contend that it makes no difference under what provision an organization is tax-exempt, so long as it is not required to pay any tax. We recognize that a respondent's status as either a §501(c)(3) or (6) tax-exempt organization does not obviate the relevance of further inquiry into a respondent's operations and goals. Nevertheless, the tax-exempt status is certainly one factor to be considered. Rulings of the Internal Revenue Service are not binding upon the Commission, *Ohio Christian College,* 80 F.T.C. 815, 848 (1972), but a determination by another Federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded. Here, respondents' inability to qualify under §501(c)(3) simply means that the IRS does not consider them to be organized and operated "exclusively" for charitable goals, a fact that sets them apart from the KCAHA.[17] [12]

AMA and NHCMA also appeal from the ALJ's determination that their ethical restrictions on advertising, solicitation and contract practice provide a substantial economic benefit to their members. In AMA's view, the law judge's finding amounts to the circular contention that a corporation is subject to Commission jurisdiction whenever it engages in anticompetitive behavior.[18] This argument has potential merit only in a case in which the jurisdictional finding is premised solely upon respondent's illegal acts, and in which the illegal activity does not confer a substantial economic benefit upon the respondent's members.[19] We cannot adopt the view that challenged acts and practices which provide some pecuniary benefit to an organization's membership should not be judged against the substan-

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[16] *Kelly Affidavit* at 2.

[17] Of course, failure to qualify as tax exempt under §501(c)(3) does not by itself necessarily mean that a respondent is within the reach of Section 4 of the FTC Act, since, as we have discussed *supra,* the pecuniary benefit of its activities to its members must constitute a substantial part of its activities under Section 4.

[18] AMA also references its arguments, considered *infra,* that it has not imposed the alleged restrictions and that there is no evidence that these restrictions have affected its members' financial position. NHCMA simply states that the ALJ's finding is a conclusion on the merits and not a proper finding on the jurisdictional issue.

[19] A respondent could also come within Section 4 based on the alleged illegal activity alone if that activity conferred economic benefits upon its members and represented a substantial portion of its overall operations. *Cf. National Comm'n on Egg Nutrition, supra,* 517 F.2d at 488.

tiality criterion along with other activities simply because such acts and practices coincidentally violate Section 5.

Finally, AMA charges that the law judge improperly rejected the budgetary analysis which it offered to quantify the proportion of its activities devoted to the economic benefit of members. At trial, AMA offered the testimony and report of its expert witness, Dr. Frederick Sturdivant, who classified respondents' activities as follows:

(1) Category A - education, scientific, and association activities;[20]
(2) Category B - indirect economic benefit;
(3) Category C - direct economic benefit;
(4) Category D - miscellaneous (RX 743, p. 5)

Dr. Sturdivant then analyzed each of AMA's 318 project request forms from 1977 and, after consulting with appropriate AMA officials where necessary, assigned each project to a specific category. (Tr. 6428, 6459) Dr. Sturdivant's [13] report indicates that AMA allocated 90.6% of its budget to Category A activities,[21] leading him to conclude that AMA "is a professional association engaged overwhelmingly in scientific and educational activities." (RX 743, p. 28) Dr. Sturdivant's analysis indicates that 5.8% of the budget had a direct or indirect economic benefit to members (Categories B and C), and 3.6% belonged in the miscellaneous group (Category D). *Id.*

Dr. Paul Feldstein, complaint counsel's expert witness, criticized the Sturdivant Report generally on grounds that a budgetary approach is unsuitable for examining the economic relationship of an association of health professionals to its members. (CX 2586-C, -D) Dr. Feldstein also found certain specific deficiencies with the Sturdivant Report. The correction of these deficiencies led him to the conclusion that between 35 and 43 percent of AMA's budget provides economic benefit to its members. (CX 2586-D)

The resource allocation decisions of an organization certainly provide one perspective on the purposes of that organization. However, there are analytical problems with such an approach, since a small budget allocation may have a disproportionate benefit

[20] Category A was further subdivided as follows:
1) lay public education;
2) journals and scientific publications;
3) scientific policy;
4) other scientific;
5) data on physicians and health care;
6) medical quality control and education;
7) government interface; and
8) organizational maintenance and operations. (RX 743, p.7)

[21] The percentages set forth in the text reflect our recalculation of Dr. Sturdivant's percentages to take account of the nine projects omitted from his original computations and noted at RX 743, p. 8. Seven of the nine projects not classified by Dr. Sturdivant have been allocated to Category D.

to members. Additional difficulties arise when the focus is a professional association, inasmuch as the activities of such a group do not fit neatly into economic and non-economic pigeonholes. Certain legislative and lobbying activities, for example, may have economic as well as public health or welfare objectives.[22] Likewise, a professional association's legal counsel may be essential to achievement of that association's eleemosynary goals, yet spend a significant portion of time advising members on the commercial aspects of their profession. These observations are especially applicable to AMA. (CX 2586 O-Q, Tr. 8882, 8988, 9066-71, 9082-83, 9128) Indeed, disaggregation of AMA's budget into economic and non-economic components is especially problematic due to the fact that AMA has consolidated many of its programs in recent years, reducing the number of programs from 583 in 1975 to 318 in 1977 and presumably enlarging the number of distinct activities contained in individual programs. (Tr. 6428-29) [14]

Apart from some general discomfort with application of the budgetary approach to this case, we entertain certain reservations as to the validity of Dr. Sturdivant's findings. At the outset, we note that Dr. Sturdivant had done no previous work with respect to the medical profession or, for that matter, any professional or not-for-profit association. (Tr. 6416-17) Because of his background and because proper classification of each of AMA's activities necessitated an understanding of those activities, Dr. Sturdivant was compelled to rely upon the program descriptions contained on the AMA request forms prepared after the complaint was filed[23] and on supplemental information provided by AMA officials. (Tr. 6431, 6459) In view of the clear opportunity for manipulation of the input to Dr. Sturdivant's study and the absence of any procedural safeguards to minimize the likelihood of manipulation, we are particularly reluctant to give his report any weight. *See Philadelphia Carpet Co.*, 64 F.T.C. 762, 776 (1964), *aff'd per curiam*, 342 F.2d 994 (3d Cir. 1965).

In addition to these problems, we find Dr. Sturdivant's report deficient in a number of other respects. First, we do not view it as appropriate to consider organization maintenance in the non-economic benefit category. Most of these activities are neutral in nature and should be excluded from the calculation. Others, such as the funds allocated to the Advisory Committee on Services to Young

[22] The Commission considers Dr. Sturdivant's decision to include all legislative and lobbying efforts in Category A as particularly suspect. As we indicated *supra*, a number of these activities have a direct economic impact on AMA's members. Moreover, Dr. Sturdivant conceded that he had conducted only a summary review of AMA's legislative positions and was unaware, for example, of the AMA's activities with respect to the Keogh Act. (Tr. 6458-59)

[23] These forms were prepared in May or June 1976. Dr. Sturdivant testified that he did not know what instructions had been given to the individuals who prepared the project descriptions. (Tr. 6431)

Physicians might, upon examination of its recommendations, be included in Category B or C.[24] Second, Dr. Sturdivant failed to include expenditures by entities established by the AMA with Association funds, such as the American Medical Assurance Company,[25] which perform significant economic services for AMA's membership. (Tr. 6451) The Sturdivant Report is also vulnerable to charges that the classification criteria were not applied in a consistent fashion. (CX 2586-M) Lastly, the wide variations in expenditures for legislative and political activities by AMA from year to year may make it inappropriate to use any single year as a basis for a budgetary analysis of the AMA. (CX 2586-K, L) [15]

Accordingly, we affirm the ALJ's finding that respondents are "corporations" within the meaning of Section 4.

B. Interstate Commerce Jurisdiction

Although the AMA admits that its challenged activities fall within the Commission's interstate commerce jurisdiction, (Tr. 2120, 2124) CSMS and NHCMA contend that they are local organizations with local concerns and that their acts and practices cannot be considered, as they were by the ALJ, to be in or to affect commerce. We find little merit in these arguments. CSMS and NHCMA were not charged with acting independently to restrict the practices of Connecticut physicians. The complaint alleges and the Commission finds, *supra* at 18, that all three respondents have conspired with others to restrict advertising, solicitation, and certain contract practices of their members throughout the United States. The participation of respondents along with other AMA constituent and component societies in this nationwide conspiracy, taken together with AMA's stipulation that its acts and practices are in and affect interstate commerce, thus leave little room for doubt that the alleged activities of CSMS and NHCMA also fall within interstate commerce. As the Supreme Court has stated:

> The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combinations and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state. (*FTC* v. *Cement Institute,* 333 U.S. 683, 696 (1948).)

Even apart from the involvement of the Connecticut respondents

[24] Dr. Sturdivant included this in Category A because he saw it as an aspect of attracting and retaining young physicians in the AMA. (Tr. 6571) Under this approach, almost any project providing economic benefit to AMA's members could be considered part of the organization's maintenance activities.

[25] This company provides reinsurance for medical liability insurance companies owned by state medical societies. (ID 54)

in this national conspiracy, there is ample proof of an interstate commerce nexus in the aggregation of factors cited by the law judge. (ID 252) Foremost among these is the impact the restrictions have upon out-of-state public and private funds providing payment for medical services rendered in Connecticut. Respondents' ethical restrictions affect the volume and destination of these payments, which total several million dollars per annum. (ID 10, 252) Although CSMS and NHCMA concede the substantiality of these payments, they argue that they relate to the practice of medicine by their members, not to their own challenged acts, and that the record merely demonstrates that individual activities of their members may affect interstate commerce. In our view, respondents' argument reflects a misunderstanding of the applicable law and unduly cabins the jurisdiction of the Commission, contrary to the recently expressed intent of Congress. [16]

The legislative history of the Magnuson-Moss Act[26] reveals that Congress broadened the Commission's jurisdiction so that it would encompass "acts or practices which, although local in character, affect interstate commerce." H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. at 45 (1974).[27] Since Section 1 of the Sherman Act has been held to apply to contracts, combinations, or conspiracies which, however local their immediate objectives, substantially and adversely affect interstate commerce, *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948), acts or practices within Sherman Act jurisdiction must a fortiori be subject to FTC jurisdiction. Accordingly, it is instructive to look to cases construing the Sherman Act for initial guidance as to the reach of Section 5.[28]

Such cases provide substantial precedent for the ALJ's conclusion. In *Hospital Bldg. Co.* v. *Rex Hospital Trustees,* 425 U.S. 738 (1976), for example, the Court reversed a summary dismissal on jurisdictional grounds since the complaint alleged that petitioner's purchases of out-of-state medicines and supplies and its revenues from out-of-state insurance companies would be less than they otherwise would be if respondents and their co-conspirators succeeded in blocking petitioner's planned hospital expansion. Assuming in this case that each of respondents' members does not have an equal desire to advertise or solicit customers (TROA 32), the revenues of some physicians subject to the alleged restrictions unquestionably will be affected by those restrictions.

[26] Pub. Law No. 93-637, 88 Stat. 2183 (1974).

[27] One of the reasons for the amendment was to obviate the inordinate expenditure of time and effort required to marshal evidence needed to satisfy purely jurisdictional technicalities.

[28] Of course, practices that affect commerce in a less than substantial way may nonetheless be within the Commission's jurisdiction.

A year earlier in *Goldfarb, supra,* 421 U.S. at 783, the Court determined that a minimum fee schedule for title examinations imposed by the county bar association had a sufficient nexus with interstate commerce because a substantial portion of mortgage funds used to purchase homes in the county came from outside the state. The Court further noted that substantial loan money was guaranteed by the United States Veterans Administration and the Department of Housing and Urban Development, both of which were headquartered out-of-state. Because lenders require title examinations as a condition of making loans, the Court held that the legal services at issue were an integral part of an interstate transaction and that a restraint on those services substantially affected commerce under the Sherman Act. *Id.* at 784–85. [17] Just as the minimum fee schedule deprived consumers of free competition in the title search market, respondents' ethical restrictions have a significant impact upon the volume, price, and distribution of medical services in the State of Connecticut. And, whereas the financing of property in *Goldfarb* was affected only indirectly by the restraint through the title examination requirement, the restraint here affects the very services being financed by out-of-state funds. Rather than a restriction going to an integral but collateral service, as was involved in *Goldfarb,* the restraint before us is more analogous to a restriction intended to prohibit the sale of property that would otherwise be financed with out-of-state funds.[29]

The Sherman Act real estate cases cited by respondent are distinguishable because they do not involve the broader jurisdictional standard of Section 5. In addition, these cases are factually different from the case at bar. Unlike physicians, whose services are the principal cause of interstate health insurance payments, real estate brokers have been found to be neither necessary nor integral participants in the interstate aspects of realty financing and insurance. *McLain* v. *Real Estate Bd. of New Orleans,* 583 F.2d 1315 (5th Cir. 1978), *cert. granted,* 99 S. Ct. 2159 (1979). In *Bryan* v. *Stillwater Bd. of Realtors,* 578 F.2d 1319 (10th Cir. 1977), plaintiff's contention that he had been unlawfully expelled by the defendant was found to have no logical nexus with allegations that the defendant's conduct occured in interstate commerce. In *Income Realty & Mortgage, Inc.* v. *Denver Bd. of Realtors,* 578 F.2d 1326 (10th

[29] In *State of Arizona* v. *Maricopa Medical Soc'y,* 1979-1 Trade Cas. (CCH) ¶62,694 (D. Ariz. 1979), a medical society was found to be affecting commerce through alleged price fixing. The court there found that while the sales by physicians of their services were not interstate transactions, ¶62,694 at 77,894, the alleged price-fixing affected the sale of services by physicians and the sale of services by physicians directly affected the health insurance premiums and claim payments that cross state lines. *Id.* at 77,894–95. The restraints involved in this case have much the same effect upon health care payments. *See also United States* v. *American Soc'y of Anesthesiologists, Inc.,* 1979-2 Trade Cas. (CCH) ¶62,739 (S.D.N.Y. 1979).

Cir. 1978), plaintiff's allegation was limited to the conclusory statement that the parties were engaged in the interstate brokerage of real estate.

We therefore concur in the ALJ's finding that the challenged practices of the Connecticut respondents are in and affect interstate commerce. [18]

II LIABILITY

The focus of this case is the legality under Section 5 of respondents' restrictions upon the advertising, solicitation, and contractual practices of their members. The nature, scope, and impact of these restrictions are specifically at issue. All respondents challenge the adequacy of the evidence to sustain a finding that they have unreasonably and unfairly restricted physicians' advertising, solicitation, and contractual arrangements. While AMA does not directly defend its 1971 guidelines, which were in effect at the time this proceeding was commenced, it argues that our focus should be upon ethical guidelines adopted *pendente lite* and that, in any event, it is not responsible for enforcement actions taken by state and local medical societies. CSMS and NHCMA both emphasize their individual autonomy and assert that the evidence is insufficient to connect them in a conspiracy with AMA. They further allege that they were given insufficient notice of the allegation of conspiracy involving their members. We address each of these issues below, beginning with the conspiracy allegations.

A. Conspiracy

Evidence adduced at trial provides substantial proof of a conspiracy to impose the challenged ethical restrictions: first, between and among respondents and other constituent associations and component societies, and second, between respondents and their members. We note at the outset that the structure of respondent's organization—a single national organization, state or constituent associations, and local or component societies—is conducive to development of system-wide consensus on ethical matters to which all members must adhere. The governing structure of the AMA reflects this hierarchical system in that members of the AMA House of Delegates are selected by constituent associations and members of the constituent societies' ruling bodies are selected by their respective component societies. (ID 7)

The record also describes the various steps taken by respondents to insure that all of their members follow the same or substantially

similar ethical guidelines. The constitutions and bylaws of AMA, CSMS, and NHCMA, as well as most of AMA's other constituent and component medical societies make compliance with AMA's *Principles of Medical Ethics* a requirement of continued membership. (CX 990I, 991D, 1404I, ID 306–09) Although state associations may apply their own principles of professional conduct to their members, those principles may not be inconsistent with the *Constitution and By-Laws* of the AMA. (CX 1435Z–20)[30] Moreover, AMA has said that a physician acts "unethically" when he or she disregards "local custom," and has urged its [19] component societies to "exercise great caution to insure full compliance with the spirit and intent of the *Principles.* (CX 210, 462Z–9) Although the Connecticut respondents argue to the contrary, AMA has stated that county societies are required to apply all of the interpretations contained in the *Opinions and Reports* (CX 489). It is evident, therefore, that the *Principles* and the *Opinions and Reports* play a central role in delineating the ethical standards for physicians in this country.

In addition to promulgation and distribution of broad ethical pronouncements to constituent and component societies, AMA has provided ethical advice to local societies in specific situations. (CX 54, 168, 768B, 1287)[31] AMA refers complaints and inquiries on ethical matters to the appropriate state or local societies and constituent associations refer complaints and provide guidance to component societies. (ID 105) In short, the record of this proceeding substantiates the involvement of respondents, as well as affiliated medical societies, in the enforcement of the challenged ethical restrictions. (*See* ID 118–24, 133–44, 146–48, 152–60, 172–76, 187–94, 198–99, 212–21, 223–26) These enforcement activities were fully consistent with the *Principles* and interpretations of the *Principles* found in AMA's *Opinions and Reports.* Indeed, there is no evidence before us that state or local medical societies have ever strayed far from the ethical norms established by AMA.

Measured against recent decisions involving conspiracy allegations in a professional association context, there can be little dispute over the law judge's findings on the conspiracy issue.[32] In *Goldfarb,*

[30] A member of the AMA must comply with the *Principles* in order to retain his or her membership. (CX 990I)

[31] On occasion, AMA's advice has ventured beyond ethical interpretations to guidance regarding enforcement action. For example, Mr. Edwin J. Holman, then secretary to AMA's Judicial Council, suggested that the Saginaw County Medical Society advise a physician that a sign posted on his lawn advertising medical treatments should be removed. (CX 91A) Alternatively, Mr. Holman suggested that the local society promulgate guidelines and, if the offending physician did not remove the sign after an appropriate period of time, bring charges of unethical conduct against the physician. (CX 91A, B)

[32] Respondents' reliance upon *UMW* v. *Coronado Coal Co.*, 259 U.S. 344 (1921) and *Coronado Coal Co.* v. *UMW,* 268 U.S. 295 (1924), is misplaced. The Court there rejected claims of a conspiracy between the International and its local unions in connection with damage caused to the Coronado Coal Company's Prairie Creek mine, finding that the interference with the coal company was neither initiated, participated in, or ratified by the International. *Id.,*

(Continued)

supra, 355 F. Supp. 491, [20] 494–96 (E.D. Va. 1973), the district court found that the Virginia State Bar and the Fairfax County Bar Association had agreed to fix prices. The district court noted that the Virginia State Bar had played only a minor role in the matter. However, holding that defendants were engaged in a "classic illustration of price fixing," 421 U.S. at 783, the Supreme Court dispelled any doubt as to the culpability of the state defendant:

> Of course, an alleged participant in a restraint of trade may have so insubstantial a connection with the restraint that liability under the Sherman Act would not be found, see *United States* v. *National Assn. of Real Estate Boards,* 339 U.S., at 495; however, that is not the case here. The State Bar's fee schedule reports provided the impetus for the County Bar, on two occasions, to adopt minimum-fee schedules. More important, the State Bar's ethical opinions provided substantial reason for lawyers to comply with the minimum-fee schedules. Those opinions threatened professional discipline for habitual disregard of fee schedules, and thus attorneys knew their livelihood was in jeopardy if they did so. Even without that threat the opinions would have constituted substantial reason to adhere to the schedules because attorneys could be expected to comply in order to assure that they did not discredit themselves by departing from professional norms, and perhaps betraying their professional oaths. (421 U.S. at 791 n. 21).

It is noteworthy that the record in *Goldfarb* was devoid of proof that the state association had sent letters or referred complaints to the county bar associations. Nor was there any evidence that the state bar had coordinated the activities of its constituent societies with respect to specific fact situations. In fact, the uncontradicted evidence showed, as it does here with respect to AMA, that the Virginia State Bar had never taken any disciplinary action against an attorney for failing to adhere to the fee guidelines. *Goldfarb, supra,* 355 F. Supp. at 496. The case thus stands for the proposition that a professional association may take part in a conspiracy in restraint of trade even though its participation is limited to promulgating ethical guidelines with the intent that affiliated societies will enforce those guidelines and that members will follow them.[33] [21]

A conspiracy involving a professional society, affiliated national

259 U.S. at 393. Indeed, the union's constitution provided that no district was permitted to engage in strikes involving all or a major portion of its members without sanction of the International, and that a district could order local strikes only on their own responsibility. *Id.*, 259 U.S. at 384–85. AMA's role in the promulgation and enforcement of the ethical restrictions at issue in this proceeding is considerably more extensive than the role of the International in the Prairie Creek incident.

[33] As such, the conspiracy here is different in character from that considered in *Interstate Circuit* v. *United States,* 306 U.S. 208 (1939), where a conspiracy was inferred, in large measure, from the fact that without "substantially unanimous" action on the part of all distributors there was a risk of a substantial loss of business and goodwill. *Id.* at 222. By contrast, promulgation of a code of ethics implies agreement among the members of an organization to adhere to the norms of conduct set forth in the code. The extent to which members abide by the ethical standards does not bear upon the existence of a conspiracy, rather it indicates how effective the conspiracy has been in carrying out its objectives.

and state societies, and its members, was established in the *Professional Engineers* case, a case remarkably similar to the facts in this docket. *United States* v. *National Society of Professional* Engineers, 389 F. Supp. 1193, 1201 (D.C.C. 1974), *vacated,* 422 U.S. 1031 (1975) *aff'd on rehearing,* 404 F. Supp. 457 (D.D.C. 1975), *aff'd and modified,* 555 F.2d 978 (D.C. Cir. 1977), *aff'd* 435 U.S. 679 (1978).[34] The National Society of Professional Engineers (NSPE), which counted as members 17 percent of the registered engineers in the United States, was affiliated with professional engineering societies in each state. *Id.* at 1195. Enforcement of the NSPE Code of Ethics was principally left to these state societies, although NSPE developed disciplinary procedures for the state societies to follow and played a significant role in coordinating and encouraging state society enforcement efforts. *Id.* at 1196.[35] State societies were autonomous in the sense that NSPE had no authority to compel an affiliated society to take any action or to refrain from taking any action; NSPE's only power over affiliated societies was the power to withdraw their charters of affiliation. *Id.* at 1213. NSPE's actions were characterized as successful by the district court, inasmuch as there were few significant defections by NSPE members from the ethical restriction upon bidding practices. *Id.* at 1196.

AMA attempts to distinguish the *Professional Engineers* case by suggesting that NSPE was found to have violated the antitrust laws on the basis of its own code of ethics, not on the basis of actions by state or local affiliates. AMA Reply Brief at 14. Such an argument, however, misperceives the thrust of that case, since, as in the instant matter, the conspiracy determination in *Professional Engineers* was supported by evidence that the NSPE promulgated the anticompetitive ethical guidelines and assisted state officials in enforcing those guidelines.[36] [22]

We further reject the notion proffered by AMA that the autonomy of its constituent and component societies and their voluntary adoption of an ethical code precludes a finding of conspiracy. The law is clear that a conspiracy may be found whether or not one conspirator exercises control over the actions of its co-conspirators. *FTC* v. *Cement Institute,* 333 U.S. 683 (1948); *cf. United States* v.

[34] *See also United States* v. *Texas State Bd. of Public Accountacy,* 464 F. Supp. 400 (D.Tex. 1978), *aff'd and modified,* 592 F.2d 919 (5th Cir. 1979) (conspiracy found between the state board and accountants holding permits to practice in Texas on basis of acquiescence of permit holders in ban on competitive bidding under threat of disciplinary action by state board).

[35] Authoritative interpretations of NSPE's Code of Ethics are contained in the opinions of NSPEC's Board of Ethical Review. *Professional Engineers, supra,* 389 F. Supp. at 1214.

[36] The district court noted that NSPE officials had promoted and coordinated enforcement with officials from affiliated societies in the District of Columbia, Pennsylvania, North Carolina, West Virginia and Kentucky in connection with a West Virginia airport project. *Id.* at 1210–12.

Texas State Bd. of Public Accountancy, supra, 464 F. Supp. at 403. Certainly, the autonomous status of the affiliated societies in the *Professional Engineers* case did not absolve the NSPE of liability in the face of evidence showing that the NSPE encouraged and coordinated state and local enforcement activity. *Professional Engineers, supra,* 389 F. Supp. at 1196, 1201, 1213.[37]

The Connecticut respondents argue that the trial record does not even contain "slight evidence"[38] connecting CSMS and NHCMA to the alleged conspiracy of AMA and other medical societies. Both respondents further maintain that they were afforded insufficient notice of the second prong of complaint counsel's conspiracy theory charging a conspiracy between respondents and their members.[39]

In our view, the evidence is more than sufficient to connect the Connecticut respondents to the conspiracy involving AMA and other medical societies restricting the advertising, solicitation, and contract practices of their members. As the ALJ noted (ID 283–87), there is not only evidence generally of the ties between AMA and its member societies on ethical matters, from which an inference can be drawn as to the Connecticut respondents' involvement in the conspiracy, but there is also independent evidence of specific actions by these respondents directly linking them to the conspiracy. Moreover, the evidence of affirmative acts by the Connecticut respondents is bolstered by the absence of any proof whatsoever demonstrating that CSMS and NHCMA ever took any position in conflict with AMA's challenged restraints. [23]

The CSMS has adopted the *Principles* (CX 991D). While it has not formally adopted the *Opinions and Reports,* it has indicated that the "policies of the AMA are guides to our action" (Tr. 8282) and has cited the recommendations of the Judicial Council in discouraging a senior citizen discount program for medical services. (CX 30) Moreover, CSMS has stated that "advertising is prohibited by medical ethics." (CX 30) Consistent with this position, the vice president of CSMS filed a complaint in his official capacity with NHCMA, charging Dr. Leon Zucker with unethical publicity in connection with a newspaper article reporting surgery performed by Dr. Zucker. (CX 2006A, *see also* ID 167–68.) In another incident, a member of the CSMS Council, the executive body of CSMS, filed a complaint with the NHCMA against Dr. Sugn Liao, regarding

[37] We note that local societies are not so autonomous that they are permitted to have less stringent restrictions upon advertising or solicitation than those found in the 1977 edition of *Opinions and Reports.* (App. A, p. 1)

[38] Once a conspiracy is established, only "slight evidence" is needed to connect a particular participant with that conspiracy. *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).

[39] AMA apparently does not contest the finding of a conspiracy between it and its members. (RAB 33–47; *but see* TROA 17)

newspaper and TV advertising for an acupuncture clinic opened by Dr. Liao. (CX 701A; *see also* ID 160.) With respect to the contract practice allegations, the record shows that the CSMS House of Delegates approved resolutions disparaging the corporate practice of medicine and supporting the traditional fee-for-service method of compensation. (CX 1344Z–9, –10, –11)

The evidence concerning respondent NHCMA is equally incriminating. NHCMA bylaws provide that "[t]he principles of medical ethics of the AMA as reflected in the Judicial Council shall govern the conduct of members," (CX 1404I) creating a strong inference that members of NHCMA are bound by the *Opinions and Reports* as well as the *Principles*. While this evidence alone is sufficient to sustain a finding of liability against NHCMA, the record also documents the actions taken by NHCMA against Drs. Zucker and Liao, (ID 160, 167–68)[40], and investigation by NHCMA of a radiology clinic to determine if it was soliciting patients (CX 782–86), action against Dr. Zucker on another occasion for telephone directory listings outside the area in which Dr. Zucker's office was located, (CX 136A, B) and efforts by NHCMA to limit announcements of office openings and relocations to one newspaper insertion. (CX 81)[41] [24]

With respect to the Connecticut respondents' position regarding inadequate notice of a conspiracy between them and their members, we note that the complaint alleged a conspiracy between "respondents and others." (Complaint ¶¶6–7) Complaint counsel's trial brief explained, however, that the case-in-chief would only challege "an agreement among respondents and their affiliated medical societies to hinder competition among medical doctors." Trial Brief of Counsel Supporting the Complaint at 1 (April 18, 1977). Although complaint counsel described AMA as "a collective body of individual entrepreneurs" during the case-in-chief, (Tr. 503–04) this brief reference was clearly inadequate to correct the impression previously conveyed in the trial brief. An articulation of the alternative theory, i.e., a conspiracy between respondents and their members, is found in complaint counsel's conspiracy memorandum filed prior to defense hearings, but even this statement conflicts with other sections of the memorandum. Memorandum on Conspiracy Law and Related Evidence Questions at 2, 19 n., 26 (November 7, 1977).

[40] The testimony of Dr. Tierney, who received the complaints against Dr. Zucker as president of NHCMA, reflects some concern regarding the accuracy of the headline of the article which formed the basis for the complaint. (Tr. 8483) This headline characterized the operation performed by Dr. Zucker as "rare," whereas Dr. Tierney felt the term "uncommon" to be a more appropriate description of its frequency of occurrence. *Id.* The minutes of the NHCMA Board of Censors meeting with Dr. Zucker, however, reflect a concern with "personal aggrandizement," and do not allude in any respect to a deception problem. (CX 695C,D)

[41] NHCMA's reliance upon the advice of AMA and AMA's dependence upon NHCMA for enforcement action is also well-documented. (CX 672–73A, 783, 784A, 785)

Complaint counsel's proposed findings submitted to the ALJ after trial contain the first clear statement of the alternative conspiracy theory. Proposed Findings of Fact and Conclusions of Counsel Supporting the Complaint at 260 (July 27, 1978). Respondents had an opportunity to address this theory before the law judge and before the Commission on appeal from the initial decision and in fact addressed the evidence in support of this theory in their appeal briefs. (RCAB at 48; RNAB at 38) Moreover, respondents do not allege and we do not understand how the allegation of a conspiracy between them and their members would necessitate the introduction of evidence additional to that already offered to rebut the alleged conspiracy between respondents and other constituent and component societies. We conclude, therefore, that any incertitude which may have existed with respect to complaint counsel's conspiracy allegations during trial did not prejudice CSMS and NHCMA since all facts relevant to the alleged unlawful acts were fully litigated. *See Golden Grain Macaroni* v. *FTC,* 472 F.2d 882 (9th Cir. 1972), *cert. denied,* 412 U.S. 918 (1973); *Armand Co., Inc.* v. *FTC,* 84 F.2d 973 (2d Cir. 1936), *cert. denied,* 299 U.S. 597 (1936). [25]

B. Restrictions on Advertising and Solicitation

As its principal defense to the charge of unlawfully restricting the advertising and solicitation of its members, AMA asserts that it should not be judged on the basis of what it characterizes as "obsolete" positions contained in the 1971 *Opinions and Reports,* but rather that the Commission should consider instead the statements contained in the 1977 *Opinions and Reports.* Respondent contends that the appropriate standard for judging this ethical code is the rule of reason. Analyzed according to this standard, AMA suggests that the record is devoid of proof establishing that it has unlawfully suppressed competition. With respect to its prior ethical position, as articulated in the 1971 *Opinions and Reports,* AMA argues that it neither enforced this position nor engaged in a conspiracy with constituent and component societies (TROA 29, 34). It concedes, however, that some statements contained in the 1971 *Opinions and Reports* could be construed as prohibiting price advertising and that state and local societies might have violated the law. (TROA 30–31, 33).

Before examining the facts of record, it is necessary to determine whether respondent's restrictions should be tested under a *per se* standard or according to the rule of reason. The ALJ found it unnecessary to consider whether AMA's restrictions constituted a *per se* violation of Section 5 since he concluded that the rule of reason

was clearly violated. Complaint counsel agree with this assessment but nonetheless urge that the restrictions on advertising and solicitation imposed by respondents should be considered illegal on their face. (TROA 91–92)

These restrictions do represent a restraint upon price advertising (ID 118–22, 132, 154, 193), and it is true that restraints on the advertising of prices have previously been considered *per se* illegal by some courts. *United States* v. *Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7th Cir. 1961); *United States* v. *The House of Seagram, Inc.*, 1965 Trade Cas. (CCH) ¶71,517 (S.D. Fla. 1965). Moreover enforcement of these restrictions by disciplinary action that threatens or results in the loss of valuable privileges associated with membership has earmarks of a group boycott, long considered a violation of the antitrust laws without regard to business justifications. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941).[42] [26]

But while *per se* rules are considered a valid and valuable tool of antitrust enforcement, *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 99 S. Ct. 1551, 1556 (1979), we are not prepared to classify the challenged restraints as *per se* illegal in this instance and thereby preclude analysis of procompetitive justifications offered on their behalf. Professional restraints on advertising and solicitation have not previously been subject to extensive scrutiny under the antitrust laws, and the courts have been reluctant to classify practices as *per se* violations before acquiring sufficient experience with them. *Broadcast Music, supra*, 99 S. Ct. at 1556–7. In addition, we recognize that professional services may differ in some respects from other businesses. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696 (1978); *Goldfarb, supra*, 421 U.S. at 788–89 n.17. Arguments suggesting that competition is contary to the public interest are not cognizable under the rule of reason, but other justifications for ethical norms, such as the facilitation of nondeceptive advertising, may be procompetitive and must be taken into account. *Professional Engineers, supra*, 435 U.S. at 692, 696.

We turn then to consideration of the reasonableness of respondents' advertising and solicitation guidelines.[43] 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

[42] These restrictions further evince in certain respects the characteristics of a horizontal allocation of customers, (ID 171–73) also considered to be *per se* illegal under the antitrust laws. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899).

[43] While it is unnecessary in this case for us to distinguish between the analysis required under Section 1 of the Sherman Act and Section 5, it is important to note that acts or practices that fall short of violating the Sherman Act may nonetheless traverse the more encompassing standard of illegality defined by Section 5.

suppress or even destroy competition." *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918); *Professional Engineers, supra,* 435 U.S. at 691. To assess the legality of the restrictions under a rule of reason analysis, we must examine their nature, purpose and effect on competition, including in the calculus any possible procompetitive impact. *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918). As the Court observed in *Professional Engineers, supra,* the unreasonableness of trade restrictions can be based either

> (1) on the nature or character of the contracts, or
> (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. (435 U.S. at 690)

Thus, the contours of the analysis required under the rule of reason will vary somewhat depending upon the nature of the restraint. [27]

Evaluation of AMA's *Principles of Medical Ethics,* the 1971 *Opinions and Reports,* and assertions of AMA, state and local medical society officials, allows little latitude for dispute over the nature and scope of respondents' restrictions at the time the complaint was issued.[44] The *Principles* make clear that physicians should "uphold the dignity and honor of the profession" and "should not solicit patients."[45] All solicitation, whether direct or indirect, is forbidden, and "solicitation" is defined in the 1971 *Opinions and Reports* as any "attempt to obtain patients or patronage by persuasion or influence." (CX 462Z–6)[46] Hence, it is fair to say that almost all advertising and promotional activity is proscribed, with a few narrowly circumscribed exceptions. *See, generally* ID 115–118. A doctor may only furnish the public with information regarding his or her name, type of practice, location of office and office hours, and this information must be communicated through the "accepted local media," which includes "telephone listings, office signs, professional cards, and dignified announcements." (CX 462Z–6) Although the guidelines in theory permit listing in a physician or telephone

[44] We reject respondents' suggestion that the focus for determining liability should be ethical positions or statements disseminated after issuance of the complaint. AMA does not contend that this case is moot. Consequently, its 1977 edition of *Opinions and Reports* is properly assessed in the context of relief rather than of liability. *See infra* at 45–57.

[45] AMA's first *Code of Ethics,* adopted in 1847, contained the following section:

> It is derogatory to the dignity of the profession to resort to public advertisements or private cards or handbills, inviting the attention of individuals affected with particular diseases—publicly offering advice and medicine to the poor gratis, or promising radical cures; or to publish cases and operations in the daily prints, or suffer such publications to be made;—to invite laymen to be present at operations,—to boast of cures and remedies,—to adduce certificates of skill and success, or to perform any other similar acts. These are highly reprehensible in a regular physician. (*Percival's Medical Ethics,* App. III at 226 (C. Leake ed. 1927).)

[46] Our discussion here also encompasses solicitation restraints applicable to medical organizations through contract practice restrictions imposed upon physicians. (CX 462Z–13)

directory, or the sending of announcements regarding follow-up treatments or the opening or removal of an office (CX 462Z–6, –7, –8), the AMA has strictly limited the manner in which its members may utilize these media for solicitation of new patients. [28]

Analysis of the effect of these far-reaching restraints upon the health care market necessitates an awareness of the role advertising and solicitation play in the efficient operation of a competitive economy. Advertising serves to disseminate "information as to who is producing and selling what product, for what reason, and at what price." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 765 (1976). Advertising thus performs an indispensable function in the allocation of resources in a free enterprise system. *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 364 (1977).[47] Bans on advertising increase the difficulty of finding the lowest cost seller of acceptable ability or quality, isolating sellers from competition and reducing the incentive to price competitively. *Id.* at 377. Entry barriers are often lower with advertising than they would be in its absence, allowing new competitors to penetrate the market. *Id.* at 378. As a result of easier entry and lower search costs, prices are often lower when advertising is unrestrained. *Id.* at 377.

Given the integral function of advertising and other forms of solicitation to the workings of competition in our society, we begin with the recognition that AMA's broad proscription of advertising and solicitation has, by its very essence, significant adverse effects on competition among AMA's members. *See Professional Engineers, supra* 435 U.S. at 692–93; *Smith* v. *Pro Football, Inc., supra,* 593 F.2d at 1183; *Mardirosian* v. *American Institute of Architects,* 1979–2 Trade Cas. (CCH) ¶62,745 (D.D.C. 1979). While the nature or character of these restrictions is sufficient alone to establish their anticompetitive quality, the record contains additional corroborative evidence of significant anticompetitive effects. [29]

The ALJ's initial decision documents at great length the impact that respondents' restraints have had in several specific situations and we need not reiterate the details of each incident. (ID 118–52, 154–56, 160–68, 171–97, 258–63) This evidence is susceptible to no interpretation other than that ethical principles of the medical profession have prevented doctors and medical organizations from disseminating information on the prices and services they offer,

[47] The Court has also stated:

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. (*Professional Engineers, supra,* 435 U.S. at 695.)

Clearly, a patient does not have the opportunity to select among alternative offers if, because of ethical bans, he or she is ignorant of the choices available.

severely inhibiting competition among health care providers. Because prepaid health care plans and other alternative providers depend heavily on advertising to announce their existence and explain their programs (Tr. 478, 482–84, 1556), the advertising restrictions have had an even harsher impact on such organizations.

AMA's principal argument on the issue of anticompetitive effects is that the record contains no evidence that its restrictions have raised prices. In particular, respondent claims the record contains no systematic study of prices. Moreover, AMA suggests a number of factors which militate against a price impact, including the ready availability of fee information by word-of-mouth, the significance of professional reputation, accessibility, and patient satisfaction, the impact of public and private health insurance, and the unresponsiveness to price advertising of demand for emergency and specialty care. (RAB 53–54)

We do not agree with AMA that an impact upon physician fees must be demonstrated in order to characterize respondent's ethical restraints as unreasonably anticompetitive. Nor do we accept the contention that proof of an effect upon fees can only be shown by means of a full-blown econometric study. The task of identifying the precise impact of the restrictions and segregating fully effects owing to other forces in the marketplace may render such a study infeasible.

Nevertheless, the record evidence is sufficient, in our view, to establish an adverse effect upon fees. First, there is proof that advertising of low cost services has been suppressed. (ID 118–22, 124–43) Moreover, physician directories entered into evidence by respondents demonstrate that prices vary widely for such basic services as initial office visits, return office visits, and house calls, even among physicians in the same specialty. (RX 267 at 8, 407, 666 at App. C, RNHX 149) There are also substantial variations for off-hour physician's services and diagnostic and operative procedures. (Tr. 633–36, 1357–58, 1815) Price variations among family and general practitioners sometimes exceed 500 percent for such basic services as immunizations, pap smears, pelvic examinations, and urinalysis. (RX 666, App. C) [30]

The evidence indicates, moreover, that specific fee information is important to consumers, that consumers lack access to fee and other information necessary to make an informed choice of a physician, and that information obtained by word-of-mouth does not fill this need. (ID 110, 112–14) Given these circumstances, economic theory suggests that price differences for equivalent services would dimin-

ish with price advertising and the concomitant reduction in search costs.[48]

AMA's attempt to discount the impact of its effective ban on price advertising is not wholly without merit. To be sure, other factors, such as reputation for quality service and referrals, accessibility, need for emergency care, and even bedside manner, are likely to weigh heavily in the choice of a physician and effect some disparity in prices.[49] Furthermore, the extent to which medical services are covered by Medicare, Medicaid, or private health insurance will reduce *pro tanto* the patient's interest in fee information. A patient requiring immediate attention is not apt to seek out the lowest-priced emergency room. But these considerations do not fully explain the vast price disparity evidenced in the record, nor do they contradict the record evidence demonstrating the value of fee information to most consumers. At most, they imply that consumer sensitivity to price is a function of their out-of-pocket expenses[50] and that other factors may be paramount over price considerations in specific situations.[51] [31]

Inquiry into the purpose of the challenged ethical restrictions lends additional support to our finding of substantial anticompetitive effects. We recognize respondents' concern about false and deceptive advertising, but their objectives go far beyond this concern. Indeed, the record describes several instances in which a disdain for competition, not false or deceptive advertising, appears to be the sole motivation for suppressing promotional activities. AMA and local medical society officials have repeatedly spoken out against physicians "competing against each other for selfish, personal reasons" (CX 272B) and against "overly aggressive competition." (CX 10B) For example, Dr. Stephen C. Biering, Chairman of AMA's section on medical schools, testified that it would be inappropriate for physicians to compete with other physicians on the basis of price, quality, and service and that doctors should not compete in the commercial sense under any circumstances. (Tr. 9544–45, 47–48; *see also* ID 174, 193, 212–13, 256–57)[52]

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[48] G. Stigler, "The Economics of Information," *The Organization of Industry*, 186–87 (1968). This is not the first time that evidence of price disparity has been attributed to advertising restraints. *See Bates, supra*, 433 U.S. at 377; *Virginia Pharmacy, supra*, 425 U.S. at 754 n.11, 763–64.

[49] Advertising may affect the importance of these factors to a patient. For example, without advertising, reputation information may be difficult or costly to obtain, as may information about the availability of new services.

[50] Third party payments accounted for 69.7% of personal health care expenditures in 1977. U.S. Dep't of Health, Education, and Welfare, *Health, United States, 1978*, at Table 153 (1978). However, it is not known what percentage of the population has full or nearly full coverage for medical expenses.

[51] Between 10 and 25% of all physician contacts occur on an emergency basis. (Tr. 6116–17)

[52] When asked by AMA's counsel what he meant in saying that physicians should not compete in the commercial sense, Dr. Biering replied:

> I mean by that that a physician would say, come to my office. You can get better, quicker and at less

(Continued)

Our finding of substantial adverse effects on competition is supported, therefore, by the underlying nature of the restrictions, extensive evidence of direct competitive injury cited by the ALJ, proof of price disparity for physician services, and evidence concerning the purpose of the restraints. In order to determine whether the restraints are unreasonably anticompetitive, however, it is necessary to balance the alleged procompetitive virtues of the challenged restraints against these anticompetitive evils. We are hampered somewhat in this task since AMA does not really defend the statements contained in the 1971 edition. Instead, it essentially limits its defense to justification of the 1977 *Opinions and Reports,* maintaining that this later position regulates and thereby promotes competition among physicians. Respondent contends that competition flourishes when consumers receive truthful information, but that dissemination of false or deceptive information is ultimately anticompetitive. (RAB 57–58) Because there are many similarities between the 1971 and 1977 *Opinions and Reports,* it is fair to take into [32] consideration in adjudicating the legality of AMA's ethical restrictions those arguments offered in connection with post-complaint modifications of these restrictions.

In *Professional Engineers, supra,* the Court considered the Society's claim that competitive pressure to offer low-price engineering services would encourage deceptive bidding and adversely affect the quality of the work, thereby impairing public health and safety. In responding to these contentions, the Court emphasized the competitive focus of a Rule of Reason analysis:

> Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions. (435 U.S. at 688.)

In rejecting the Society's defense, the Court further explained:

> Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem of professional deception is a proper subject of an ethical canon. But, once again, the equation of competition with deception, like the similar equation with safety hazards, is simply too broad; we may assume that

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expense. I use a less expensive hospital and so on than my colleague across the street, which precisely is what commercial advertising does. It exhorts the public to buy something because it is cheaper, better, more available, etc. And physicians, simply, are not in the business of selling a product or guaranteeing results. (Tr. 9548)

While any claim that results are guaranteed would raise obvious problems, Dr. Biering's objection to advertising is clearly much broader.

competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition. (435 U.S. at 696). (Footnote omitted.)

Ethical restraints can be justified under the rule of reason, therefore, only if they promote competition, rather than merely other social goals, and if they are not overly broad.[53]

In view of this background, we accept the contention that an ethical precept narrowly directed toward false or deceptive advertising and unfair solicitation may enhance competition by insuring the communication of accurate information in a manner that allows it to be processed unburdened by unscrupulous practices. Respondent's restrictions are of a different kind, however, reflecting a belief that the best way to interdict false and deceptive advertising and overreaching [33] by physicians is to proscribe practically the full spectrum of advertising and solicitation activities. The evidence confirms that the restrictions have been applied as an absolute ban governing situations in which the dangers contemplated by respondent are imperceptible if they exist at all. For example, a form letter from *Anthropometrics* to approximately 50 presidents of corporations announcing establishment of an Executive Fitness Control Center to provide comprehensive physical exams and follow-up therapy to corporate executives was considered unethical solicitation. (ID 146) In another instance, the AMA indicated that a letter from a group of radiologists to physicians was objectionable if it was designed to solicit referrals. (CX 783A) It is evident from these examples that AMA's effective ban on advertising and solicitation applies "with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers." *Professional Engineers, supra,* 435 U.S. at 692.

Implicit in AMA's argument is the proposition that any less inhibitory restraint on advertising or solicitation will be likely to encourage false and deceptive advertising and unfair practices by physicians. But AMA has simply not demonstrated that a broad ban is necessary to ensure that advertising is nondeceptive and that solicitation is inoffensive to vulnerable classes of consumers. We note initially that the record does not document widespread abuses among the 47.4% of licensed physicians in the United States who are not members of AMA. (RX 658, 660)[54] Moreover, a substantial

[53] *See also Smith* v. *Pro Football, Inc., supra,* 593 F.2d at 1187; *Mardirosian, supra,* 1979-2 Trade Cas. (CCH) at ¶78,247. In *Smith,* the D.C. Circuit suggested that a practice could survive the rule of reason only if it has positive, economically procompetitive benefits that offset its anticompetitive effects, "or, at the least, if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is *insubstantial.*" *Smith, supra,* 593 F.2d at 1188-89 n. 68 (emphasis in original).

[54] *See* AMA's Proposed Findings of Fact, 330-369.

majority of states have statutes governing advertising by physicians as well as medical licensing boards that can take action against physicians in the event abuses occur. (ID 108–10, 310–12) And we think it fair to presume that the vast majority of physicians will advertise their prices and services in a nondeceptive fashion and will avoid solicitation practices that take unfair advantage of their patients. *See Bates, supra,* 433 U.S. at 379.[55]

We conclude, therefore, that AMA's justification for the challenged restraints bears no reasonable relationship to legitimate, procompetitive concerns and that such justification is entitled to little weight in the overall balance of competitive effects. Whether viewed alone, or in conjunction with other evidence of purpose and effect, AMA's restraints on advertising and solicitation unreasonably impede competition. We accordingly find that these restrictions are unfair methods of competition in violation of Section 5. [34]

In addition to finding AMA's restrictions on advertising and solicitation to be unfair methods of competition, the Commission concurs with the ALJ's determination that the same restraints also constitute unfair acts or practices. The Commission may, like a court of equity, consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[5]" *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 244 (1971).[56]

AMA offers nothing to undermine the finding that the position on advertising and solicitation espoused in the 1971 *Opinions and Reports* results in substantial harm to consumers and offends public policy.[57] We doubt that it could do more on this record even if it wished. As noted before, there is considerable evidence that consumers lack access to information important in choosing a physician. (ID 110–14) AMA's wholesale restrictions on advertising and solicitation impede communication of this information resulting in significant fee disparity and economic harm to consumers. Many patients, unable to locate a physician, turn to emergency rooms for care that

[55] A state, acting on behalf of the interest of its citizens, is undoubtedly entitled to greater latitude in preventing deception and unfair practices than a professional association representing the interests of horizontal competitors. *Compare Friedman* v. *Rogers,* 99 S. Ct. 887 (1979) *with Professional Engineers, supra,* 435 U.S. at 699; *see also American Medical Ass'n* v. *United States,* 130 F.2d 233, 247–50 (D.C. Cir. 1942), *aff'd,* 317 U.S. 519 (1943).

[56] In footnote 5, the Court stated:

> The Commission has described the factors it considers in determining whether a practice which is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:
>
> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." (405 U.S. at 244–45 n.5.) (Citation omitted.)

See also Spiegel, Inc. v. *FTC,* 540 F.2d 287, 293 (7th Cir. 1976).

[57] AMA seeks instead to have the Commission adjudicate the fairness of the 1977 edition. AMA Reply Brief 24–25.

could be provided at less expense in a doctor's office. (ID 154, CX 959Y–Z1, Tr. 2312, 5415–16, RX 72 at 76) While it is impossible to quantify precisely how much of the aggregate annual expenditures for physician services[58] represents consumer injury attributable to the challenged restrictions, we are convinced that the record in this case supports a finding of substantial injury.

Nor can it be questioned that broad bans on advertising and solicitation are inconsistent with the nation's public policy. "Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange." [35] *Bates, supra,* 433 U.S. at 376. And "[i]t is a matter of public interest that [purchasers'] decisions, in the aggregate, be intelligent and well informed." *Virginia Pharmacy, supra,* 425 U.S. at 765. Apart from its economic function, commercial advertising may convey important information of general public interest. *Bates, supra,* 433 U.S. at 364; *Virginia Pharmacy, supra,* 425 U.S. at 764. On a more individual level, restraints on the advertising of medical services, like the suppression of prescription drug price information, have a disproportionate effect on the poor, the sick, and the aged. *Id.* at 763. Given the prevailing disparity of prices, information as to who is charging what "could mean the alleviation of physical pain or the enjoyment of basic necessities." *Id.* at 764. [36]

C. Contract Practice

The complaint in this docket also challenges under Section 5 certain restrictions imposed by respondents with respect to the contractual activities of their members. The *Principles* state that:

> A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care. (CX 462Z–12)[59]

Several provisions of the 1971 *Opinions and Reports* interpreting this precept are alleged by complaint counsel to have anticompetitive effects and to be unfair acts or practices. They concern three general categories of activities:

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[58] $19 billion was spent in 1974. (CX 989D)

[59] The AMA *Principles* had a provision on contract practice as early as 1912. That provision stated:

> It is unprofessional for a physician to dispose of his services under conditions that make it impossible to render adequate service to his patient or which interfere with reasonable competition among the physicians of a community. To do this is detrimental to the public and the individual physician, and lowers the dignity of the profession. (*Percival, supra,* App. V at 268–69)

The current language was apparently adopted in 1957. (CX 1435Z–19)

1) contractual arrangements which affect the adequacy of fees, involve underbidding, or preclude the free choice of a physician;

2) compensation of physicians on a basis other than the traditional fee-for-service norm; and

3) physician arrangements with non-physicians.

For the reasons set forth below, we conclude that each of AMA's restrictions addressed to these activities is an unreasonable restraint of trade and hence an unfair method of competition.[60] Though the *Principles* couch the ethical standard in terms of preventing impairment of medical judgment and deterioration of medical care, the interpretations, [37] as reflected in the *Opinions and Reports*, bear little relation to those objectives. Whatever the extent to which quality of care concerns are cognizable under the antitrust laws—*e.g.*, where the restrictions have procompetitive virtues or have little effect on competition, *cf. Professional Engineers, supra*, 435 U.S. at 696, n.22—the restraints here go far beyond anything that might be reasonably related to the goal of preventing use of improper medical procedures. Moreover, as will be pointed out below, some of the restrictions are similar to practices that have long been condemned as unreasonably anticompetitive.

1) Adequacy of Fees, Underbidding, and Free Choice

Opinion 3 of Section 6 of the *Opinions and Reports* lists several contractual restrictions that are unfair or unethical. These are:

(1) When the compensation received is inadequate based on the usual fees paid for the same kind of service and class of people in the same community.

(2) When the compensation is so low as to make it impossible for competent service to be rendered.

(3) When there is underbidding by physicians in order to secure the contract.

(4) When a reasonable degree of free choice of physicians is denied those cared for in a community where other competent physicians are readily available.

(5) When there is solicitation of patients directly or indirectly. (CX 462Z-12, -13)

The use of the above-described standards for determining whether a contract is ethical received the approval of the House of Delegates

[60] We reject the notion, however, that these restrictions also constitute unfair acts or practices. Complaint counsel has simply not adequately articulated a theory by which these ethical restraints can be considered under the *S&H* standard. *Sperry & Hutchinson, supra*, 405 U.S. 244.

in 1927. (CX 1435S,T) Although the record does not indicate the motivation for the 1927 action, AMA's anticompetitive purpose is evident in the Minority Report to a 1932 report of the Committee on the Costs of Medical Care, entitled "Medical Care for the American People." (CX 2085Z–32–65) The Minority Report, which was endorsed by the House of Delegates in 1933 as "expressive, in principle, of the collective opinion of the medical profession," (CX 1435Z–42) provides a valuable insight into the thinking of the AMA at a point in time reasonably contemporaneous with incorporation of the five standards into the *Opinions and Reports.* After reiterating the five factors noted above, the Minority Report states:

> One of the strongest objections to industrial medical services, mutual benefit associations, so-called health and hospital associations, and other forms of contract practice is that there has been found no means of preventing destructive competition between individuals or groups concerned with these [38] movements. This injects a type of commercialism into medical practice which is harmful to the public and the medical professions and results in inferior quality of medical service.
>
> One of the pernicious effects of contract practice schemes is that each of them stimulates the launching of other similar schemes until there are many in the field competing with each other. The first may have safeguards against many of the abuses of contract practices, but as new ones are formed the barriers are gradually broken down in order to secure business.
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> * * * * *
>
> The minority recognizes the advantage of group practice under certain conditions, especially in communities where practically all of the physicians can be joined in one, or at the most, two groups. (CX 2085Z–39, –40, –44)

With respect to the voluntary insurance systems operated through contracts with organized groups of the medical profession, the Minority Report stated that these systems were:

> . . . giving rise to all the evils inherent in contract practice . . . . Wherever they are established there is solicitation of patients, destructive competition among professional groups, inferior medical service, loss of personal relationship of patient and physician, and demoralization of the professions. It is clear that all such schemes are contrary to sound public policy and that the shortest road to commercialization of the practice of medicine is through the supposedly rosy path of insurance. (CX 2085Z–46; *see also* CX 2085Z–40, –42, –57, –58)

With this background in mind, we turn to consideration of the specific restrictions encompassed within Opinion 3.[61]

[61] The restraints on solicitation by organizations with which a physician has contracted are considered above in conjunction with AMA's general restraints on advertising and solicitation.

AMA's ethical restrictions regarding the adequacy of compensation received by physicians received brief attention at trial.[62] However, the law is clear that agreements [39] that seek to place a floor under price are illegal *per se. United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 (1940); *Goldfarb, supra,* 421 U.S. at 781–83. Although there is no evidence that these provisions have had the effect of raising physicians' fees or preventing fees from falling below a particular level, an actual impact on prices need not be found in order to establish a conspiracy to fix prices. "[A] conspiracy to fix prices violates §1 of the [Sherman] Act . . . though it is not established that the conspirators had the means available for accomplishment of the objective. . . ." *Socony, supra,* 310 U.S. at n. 59.

It is evident from a facial examination of AMA's ethical provisions and from evidence concerning adoption of these restraints that they are designed to limit price competition among doctors. Respondent does not suggest any alternative motive cognizable under the antitrust laws. Moreover, the existence of a restriction on underbidding alongside these ethical precepts reinforces the perception that a physician is to a large degree insulated from price competition. *See Goldfarb, supra,* 421 U.S. at 781–82. Respondent's argument that it has never made any attempt to enforce these provisions is irrelevent, since "subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." *United States* v. *National Ass'n of Real Estate Bds.,* 339 U.S. 485, 489 (1950); *see also Goldfarb, supra,* 421 U.S. at 781, 791 n.21. We believe that this restriction is so akin to the more traditional forms of price fixing that it should be treated in the same fashion. Accordingly, we hold that the provisions governing adequacy of compensation are *per se* unreasonable and hence unfair methods of competition.

AMA's ban on "underbidding by physicians in order to secure [a] contract" (CX 462Z–13) also requires a little discussion. An interpretation of this restriction approved by AMA's Judicial Council (CX 539B) makes clear that the only bidding activity permitted is a bid submitted in answer to a personal request when the physician knows that his or hers is the only quote requested:

> However, when a form letter is sent through the mails requesting a medical doctor to bid against what could be a large group of the local medical society, several ethical questions are raised. The first question, in order of importance, is whether or not an

[62] The record does show that as late as 1974, the Judicial Council was distributing a model contract for emergency room physicians, approved by the House of Delegates, which required fees to "conform generally with those customarily charged in the locality and nearby localities for comparable services." (CX 868, 869A–D, 954C; *see also* CX 1155E, AMA's model partnership agreement for members of hospital medical staffs, which includes a parallel provision on usual and customary fees.)

affirmative response to such a general invitation to bid for use of the physician's professional services would be within keeping of the dignity of the medical profession? Secondly, a doctor would know by the type of request tendered to him that he probably is going to be competing against many of his associates for a specific contract or employment. Wouldn't this be a competitive force of so great a magnitude that it would cause a deterioration of the quality of the medical service rendered? . . . .

Thirdly, wouldn't such a request, if answered, make an inroad into the concept of professionalism in that it reduces the profession to a business? . . . . [40]

. . . [I]t is also my opinion that where the request lowers the dignity of the medical profession and causes or *reasonably* could cause a deterioration in medical service, then a bid in answer to such a request would be unethical. (CX 1158D) (Emphasis in original.)

This explanation leaves little room for doubt that the ban on "underbidding" has both the purpose and the intrinsic effect of suppressing competition even in the absence of formal enforcement efforts. As with the competitive bidding ban considered in *Professional Engineers,* "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers, supra,* 435 U.S. at 692; *see Texas State Bd. of Pub. Accountancy, supra,* 464 F. Supp. at 402. Again, the record is devoid of any procompetitive justification offered by respondent and we are aware of none. Thus, we are compelled to conclude that the restriction on bidding by physicians is an unreasonable restraint of trade and an unfair method of competition.

Respondent's 1971 edition of *Opinions and Reports* states that in a community where other competent physicians are readily available, a contract to deliver medical services is unethical unless there is a reasonable degree of free choice of physicians. (CX 462Z–13; *see also* 462L–N) This position, which also traces its origin to the House of Delegates' action of 1927, was reaffirmed in a Judicial Council decision of 1947 (CX 1435Z–57) and in a 1959 House of Delegates action. (RX 308 at 29) The 1932 Minority Report makes clear that the purpose of this provision is primarily the anticompetitive one of suppressing the activities of competitors, not solicitude for the rights of patients.[63] Given this background, it is logical to infer that the ethical restriction has had the effect of impairing competition from alternative providers in the medical service market by discouraging use of innovative arrangements that can deliver services at lower cost. In the absence of mitigating evidence of procompetitive effects, we find the restriction unreasonably restrictive of competition and an unfair method of competition. [41]

[63] Indeed, this restraint is but another way of accomplishing the objectives of the restriction on non-fee-for-service compensation.

2) Non-Fee-for-Service Compensation

AMA's support of the fee-for-service method of compensation is extensively documented in the record of this proceeding. The 1971 *Opinions and Reports* state that:

A physician should not dispose of his professional attainments or services to any hospital, corporation or lay body by whatever name called or however organized under terms or conditions which permit the sale of the services of that physician by such agency for a fee. (CX 462Z–13; *see also* CX 462Z–14)[64]

While such a restriction does not have a direct impact on price, it clearly limits the ability of hospitals, prepaid health plans, and other lay organizations to dealing with physicians on the traditional basis of fee-for-service and precludes the use of salaries or other arrangements that may be more cost efficient. The purpose of this restriction is manifest: to retain for the physician the full profit generated by his or her services and to preclude competition by group health plans, hospitals and other organizations not directly under the control of physicians.[65] The record is replete with instances in which this restriction has been applied, including enforcement action taken after issuance of the complaint in Texas and Florida. (ID 219–21; *see also* [42] ID 212–18)[66] This evidence corroborates the anticompetitive nature of the restraint.

AMA argues generally that there has been a failure of proof with respect to the contract practice aspect of the case, yet it does not directly dispute the evidence referenced above. Indeed, AMA's emphasis on the 1977 position suggests that it all but concedes the illegality of earlier statements effective as of issuance of the

[64] This restriction was also published in AMA's 1974 *Report on Physician-Hospital Relations.* (CX 959Z–2, –64)

[65] Respondent's purpose is set forth with unusual clarity in the 1971 *Opinions and Reports:*

> There are insurance companies administering workmen's compensation benefits wherein the salaries or fees paid to the physician by the insurance company are so much below the legal fees on which the premium paid by the industry is based as to furnish a large direct profit to the insurance company. Certain hospitals are forbidding their staffs of physicians to charge fees for their professional services to 'house cases' but are themselves collecting such fees and absorbing them in hospital income. Some universities, by employing full-time hospital staffs and opening their doors to the general public, charging such fees for the professional care of the patients, as to net the university no small profit, are in direct and unethical competition with the profession at large and their own graduates. They are making a direct profit by a practice of questionable legality, from the professional care. (CX 462Z–13)

[66] In *American Medical Ass'n* v. *United States,* 130 F.2d 233 (1942), *aff'd,* 317 U.S. 519 (1943), the AMA and the Medical Society of the District of Columbia were convicted of a conspiracy to hinder and obstruct operations of Group Health Association, Inc. Group Health was a non-profit corporation organized by government employees to provide medical care and hospitalization on a risk-sharing prepayment basis, utilizing salaried physicians. In reinstating the indictment, the court of appeals noted that the conspiracy reflected AMA's long opposition to risk-sharing plans for medical service as well as the fear of its members of competition from doctors connected with such plans. *United States* v. *American Medical Ass'n,* 110 F.2d 703, 707 (D.C. Cir. 1940).

It is not clear from the reported opinions whether AMA's hostility toward Group Health was premised upon the fact that it employed physicians as opposed to general fears regarding competition posed by risk-sharing plans. Nevertheless, we think AMA's prior conviction is relevant background to the contract practice issues of this case and the evidence demonstrating continued opposition by the medical profession to alternative providers of medical care.

complaint. Respondent does point to the competitive vitality of Health Maintenance Organizations (HMOs) in general, arguing that a Staff Report to the Commission entitled, "The Health Maintenance Organization and Its Effects on Competition" (1977) demonstrates the commercial success of HMOs. Apart from the fact that the report was not admitted into evidence for the truth of its contents, (Tr. 7754) its conclusions have little relevance to this proceeding. That opposition to HMOs may have lessened over time does not negate the fact that the restrictions exist and have been enforced with anticompetitive effects. Moreover, complaint counsel's case with respect to the fee-for-service restriction is not limited to HMOs but includes evidence regarding group [43] health plans (CX 580), corporations (ID 213–14, CX 822–24), hospitals (ID 215–18), and a medical clinic (CX 814–15).[67]

Once again, in light of the anticompetitive character of the restraints and the absence of any countervailing justifications, we find that respondent's efforts to prevent the use of alternatives to the fee-for-service concept are unreasonable and constitute an unfair method of competition in violation of Section 5.

3) Arrangements between Physicians and Non-Physicians

Partnerships and similar relationships between physicians and non-physicians, which involve the sharing or splitting of professional fees, are unethical according to *The Principles of Medical Ethics* and the 1971 *Opinions and Reports.* (CX 1189A, 462Z–15, –16, 1153–54, 1196) The *Opinions and Reports* also state that physicians may form professional associations and professional corporations only if ownership and management of the affairs of the corporations remain in the hands of licensed physicians. (CX 462Z–15, –16) According to AMA, these provisions were designed to avoid problems that can occur when a non-physician partner or associate advocates medically unsound treatment which the physician is powerless to oppose. They are also ostensibly intended to prevent consumers from believing that the non-physician partner or associate has skills or training equal to that of the physician or that the physician is supervising all work when he or she is not.[68] [44]

[67] The AMA disclaims any involvement in the difficulties of the Florida Health Care Plan (FHCP). (RAB 8, 59) While direct action was taken against FHCP by the state and county medical societies, this action was premised upon AMA's ethical guidelines concerning contract practice for the profit of lay groups. (*See* CX 825, 2544, 2564–65, 2572E.) AMA's participation in state and local efforts to hinder operation of the FHCP is also seen in its transmittal of "anti-HMO" information to the county society. This material was provided in order to give the society and its members "all of the necessary information and 'ammunition' to rebut HMO activities in your area." (CX 2101A) Dr. Davis, the President of FHCP, interpreted AMA's offer of assistance to mean: "We don't like you and we are going to do all we can to destroy you." (Tr. 9219)

[68] AMA's Proposed Conclusions of Law at 139.

Complaint counsel's proof regarding these restrictions shows that they were enforced and that association with a non-physician can benefit doctors.[69] Admittedly, the competitive effects of these restrictions may not be as severe as some of the contractual restraints previously discussed. Nevertheless, the organizational impediments at issue here preclude on their face a wide variety of professional ventures by physicians that may involve some financial or other type of association with non-physicians (be they lay persons or other health care professionals). It is difficult to see how such sweeping ethical proscriptions are needed to prevent deception or to prevent non-physicians from having undue influence over medical procedures,[70] and, not surprisingly, respondent offers no satisfactory explanation. Moreover, these restrictions overlap to some extent with the restraints on non-fee-for-service forms of practices, since in both instances lay persons will derive financial benefits from their association with physicians. Indeed, the requirement that all corporations and associations be owned and managed by physicians could be used to prevent physicians from associating with many HMOs or prepaid health care plans, irrespective of quality or deception factors.

By keeping physicians from adopting what may be more economically efficient business formats in particular situations—as evidenced in part by the examples cited in the record—the restraints inevitably have an adverse effect on competition. Due then to the overbreadth of these restrictions and their inherent anticompetitive characteristics, we hold that they constitute unfair methods of competition under Section 5. [45]

III RELIEF

A. Abandonment

AMA maintains that the Commission should accord considerable weight to its voluntary abandonment of the positions outlined in the 1971 edition of *Opinions and Reports* and should judge respondent on the basis of its current positions contained in the 1977 edition of *Opinions and Reports,* relevant excerpts of which are set forth in Appendix A of this opinion. AMA does not assert that the case is

[69] Complaint Counsel's Proposed Findings at 256–59.

[70] In fact, of those provisions of the 1971 *Opinions and Reports* interpreting Section 6 of the *Principles of Medical Ethics,* only Opinion 6 (dealing with relationships between psychiatrists and psychologists) is specifically limited to the issue of allocating responsibility for matters involving professional judgment. That Opinion states that "[i]n relationships between psychiatrists and practicing licensed psychologists, the physician should not delegate to the psychologist any matter requiring the exercise of professional medical judgment."

moot; instead, it argues that there is no cognizable danger of recurrent violation.

The record of this proceeding reveals, however, that at the time of issuance of the complaint in December 1975 (six months after *Goldfarb*), AMA's Judicial Council had only begun to review its ethical guidelines. Hence, abandonment took place, if at all, after commencement of this lawsuit. The limited, ambiguous steps undertaken by AMA subsequent to issuance of the complaint, ostensibly to bring its ethical code into conformity with the law, provide further justification for an order in this case. Far from assuring that the ethical restrictions found violative of Section 5 have been completely abandoned by respondent, the 1977 edition of *Opinions and Reports* is itself evidence that there is a perceptible risk of a recurrence of the practices adjudicated in this case.

We think AMA attaches unwarranted significance to the actions that it undertook prior to issuance of the complaint and apparently without knowledge of the Commission's investigation. Minutes of the Judicial Council meeting of September 12, 1975, almost three months after *Goldfarb* was decided, state that the Council considered the issue of advertising and solicitation to be "a matter which would require its continued attention and concern with the possibility of updating prior Opinions and Reports in the future to clarify the important ethical considerations involved." (CX 504C) The scope of this possible "updating" is indicated by other minutes of the meeting. These show that the Council continued at this time to consider solicitation and advertising by doctors to be improper. (CX 504A, C) And, according to its Secretary, the Judicial Council felt at its September meeting that a major revision of the profession's position on advertising was unnecessary and inadvisable. (RX 627(a), (b))[71] **[46]**

The Judicial Council was no more specific with regard to its plans at the time of its meeting of November 29 and 30, 1975. The minutes reveal that the Judicial Council decided to prepare an updated report on advertising for the upcoming Annual Convention "indicating the profession's responsibility to the public to circumvent deceptive trade practices by reasonable restrictions and the importance of state statutes in this area." (CX 503I) While this minute indicates that the Judicial Council intended the updated report to focus on deception, another minute reports that the Council's

[71] With respect to community professional directories, prepaid health plans, and HMOs, Mr. Nortell noted that "certain information may be disseminated, if it is not used in a self-aggrandizing manner or to make qualitative judgment about physicians." (RX 627(a)) He also referred to letters printed in the *ABA Journal* emphasizing "the anticompetitive impact that advertising could have on a profession as well as the difficulty of distinguishing between deceptive and nondeceptive advertising." (RX 627(b))

restrictive Guidelines on Telephone Directory Listings were transmitted to an official of the Hartford County Medical Association.[72]

All we can learn from the record, therefore, is that prior to issuance of the complaint, the Judicial Council was sensitive to legal questions regarding professional advertising and solicitation but had formed no clear idea, nor analyzed in any detail, the extent to which existing guidelines should be modified. Thus, the first official statement of AMA's post-*Goldfarb* position on advertising and solicitation is found in the Statement of the Judicial Council on Advertising and Solicitation, ("Statement"), which was discussed and approved by the Council at its meeting of April 9, 1976, nearly four months after initiation of this proceeding. The minutes of this meeting make clear that the Council did not consider the Statement to be a departure from past position.[73] [47]

Before examining the precise language of the 1977 edition, it is instructive to point out that respondent has not modified the *Principles of Medical Ethics* at all since their adoption in 1957. Section 4 of the *Principles* continues to state that "[p]hysicians should . . . uphold the dignity and honor of the profession and accept its self-imposed disciplines." (RX 1, p.4) Section 5 still cautions that physicians "should not solicit patients." (RX 1, p.5) Since these statements have been the subject of extensive AMA explication in the past, they carry important connotations in a medical ethics context. For example, the 1971 edition of *Opinions and Reports* sets forth what the "dignity . . . of the profession" mandates with respect to advertising:

> Respecting the dignity of their calling, physicians should resort only to the most limited form of advertising and then only to the extent necessary to serve the common good and improve the health of mankind.[74]

[48] This statement has been repeated without modification since 1955. (CX 463R, 464R, 465R, 466V, 467Z–3) Hence, republication of the unchanged *Principles* inherently meant that anything more than

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[72] (CX 503H) The Guidelines on Telephone Directory Listings apparently were not superceded by the 1976 Statement on Advertising and Solicitation since the Judicial Council authorized its Secretary to send both documents in response to a telephone listing inquiry. (CX 501D)

[73] The minutes state that "the Council unanimously voted to issue a statement to reaffirm the long-standing policy of the Judicial Council on Advertising and solicitation by physicians. . . ." (CX 502A) At its June 26, 1976 meeting, the Judicial Council approved a new edition of *Opinions and Reports*, incorporating the Statement. (CX 501F) Up until that point, the Judicial Council was apparently still distributing copies of the 1971 edition. (Tr. 4361) The new edition was published in March 1977. (Tr. 4335)

[74] The 1971 edition also uses the words "dignity," "dignified," or "honor" in connection with physician announcements, open houses, and statements of professional qualifications. (CX 462Z–6, –7, –9) With respect to the use of signs, the 1971 edition states that "the physician . . . and his component society should fully observe the precept of the Principles: "A physician is expected to uphold the dignity and honor of his vocation." (CX 462Z–10) "Professional dignity" is also used in the context of purveyal of medical services to the direct profit of lay organizations. (CX 462Z–13) Similar references are sprinkled throughout the 1958, 1960, 1964, 1965, and 1966 editions of *Opinions and Reports* (CX [illegible])

the "most limited form of advertising" was contrary to professional dignity.[75] [49]

AMA asserts that the Judicial Council's 1977 *Opinions and Reports* reflect a reinterpretation of the *Principles.* However, respondent has never unequivocally indicated to its members that the purportedly "archaic" interpretations of the *Principles* contained in the 1971 *Opinions and Reports* have been superceded or rescinded.[76] (ID 230–31) The preface to the 1977 edition did note that some items in past editions of *Opinions and Reports* were withdrawn "because they did not adequately reflect current conditions of medical practice or legal requirements." (RX 1, p.1) But those items found to be inconsistent with prevailing legal requirements were never specified. Such vagueness stands in stark contrast to past occasions in which AMA specifically notified its members that it was toughening its stance on advertising. (CX 463P, 465P) More importantly, the 1977 edition expressly "reaffirms the long-standing policy of the Judicial Council on advertising and solicitation by physicians." (App.A, p.1) Such a statement implicitly invites members of the AMA and its constituent and component societies to retain and to rely upon the more detailed ethical pronouncements included in the 1971 edition.[77] Likewise, AMA's characterization of the 1977 edition as an "updating" of the *Opinions and Reports* is susceptible to the interpretation

[75] The term "solicit" also comes encumbered with meaning acquired over the years. Based on a 1957 opinion, the 1958 and 1960 editions take an approach to advertising and solicitation remarkably similar to the approach taken in the 1977 edition:

The Principles of Medical Ethics do not proscribe advertising as such; they proscribe the solicitation of patients. Advertising, in its broad sense, means the act of making information, fact, or intention known to the public. Solicitation, as used in the Principles, means the attempt to obtain patients by persuasion or influence. Advertising, as distinguished from solicitation, is not in itself unethical. (CX 466W, 467Z–4, App. A, p. 1)

However, this statement was expressly superceded in the 1964 edition which states:

The Principles of Medical Ethics proscribe the solicitation of patients or patronage. Solicitation, as used in the Principles, means the attempt to obtain patients or patronage by persuasion or influence. However, the public is entitled to know the names of physicians, the type of their practices, the location of their offices, their office hours and the like. The doctor may ethically furnish this information through the accepted local media of communication, which are open to all physicians on like condition. Telephone listings, office signs, professional cards, dignified announcements, all are acceptable media of making factual information available to the public. The particular use to be made of any medium of communication and the extent of that use are, however, matters to be determined according to local ideals. What constitutes an excess, what is not in keeping with the ideals of medicine and what amounts to solicitation are questions of fact. The application of this principle is to be made locally. (CX 465P, Q)

The latter position, in which solicitation swallows up any prior distinction with advertising, was repeated in the 1966 and 1971 editions. (CX 464P, 463P, 462Z–6) AMA's resurrection of the 1955 opinion thus suggests that, despite some semantic variations, nothing has really changed.

[76] To withdraw from a conspiracy one must take affirmative action to disavow or defeat the purpose of the conspiracy. *Hyde* v. *United States,* 225 U.S. 347, 369 (1912). *See also United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 47–48 (1960). ("It does not appear even that Parke Davis has announced to the trade that it will abandon the practices we have condemned.")

[77] AMA's assertion in a caveat to the 1977 edition that distribution of the previous edition of *Opinions and Reports* had been suspended is not equivalent to a rescission of the earlier edition. A reasonable construction of this announcement is that additional copies of the earlier edition were no longer available. Had AMA wished to advise its members not to rely upon copies of the 1971 edition in their possession, a straightforward, cautionary statement to this effect would have been simple to make.

that additional guidelines have been included only to address new issues of medical ethics, and that most existing precepts retain their currency. (RX 4, p.52)

Exegesis of AMA's 1977 *Opinions and Reports* reveals an important discrepancy between these guidelines and the position of AMA described at oral argument, a discrepancy that brings into sharp focus the extent to which AMA has attempted to comply with the law.[78] Counsel for respondent [50] stated that the 1977 edition would permit physicians to advertise in newspapers the price of routine services. (TROA 8) A physician would have great difficulty, in our view, reaching the same conclusion from a reading of the 1977 edition. That publication mentions fee advertising only in the context of a "reputable directory." (App. A, p.1) Fee information might be included within the class of "other useful information that the public is entitled to know." However, "other useful information" is to be furnished through the "accepted local media," which includes "office signs, professional cards, dignified announcements, telephone directory listings and reputable directories." (App. A, p.1) Newspapers are notably omitted from this enumeration. Since the 1977 edition was published eight months before the Supreme Court decision in *Bates, supra,* 433 U.S. 350, we cannot fault respondent for failing to anticipate the disposition of that case.[79] Nevertheless, AMA's professed "good faith" efforts to comply with the developing law in the area of professional restraints must be measured against the fact that its position on physician advertising has not changed to any significant degree.

Further examination of the 1977 *Opinions and Reports* in light of the 1971 edition demonstrates the extent to which physician advertising and solicitation continues to be circumscribed by AMA. As noted earlier, the *Principles* continue to proscribe, without exception, any solicitation of patients. However, the meaning of "solicitation" has been narrowed somewhat. "Solicitation" is defined in the 1971 *Opinions and Reports* as an "attempt to obtain patients or patronage by persuasion or influence," and it is clear that

[78] Counsel for AMA conceded that there were "problems" with the 1977 edition and that "it could have been phrased differently." (TROA 26)

[79] In defending the reasonableness of its advertising and solicitation revisions, AMA claims that the Court in *Bates* cited with approval AMA's new advertising code. To be sure, the Court in that case contrasted the restrictions imposed by the State Bar of Arizona with those adopted by respondent, observing that "it appears that even the medical profession now views the alleged adverse effect of advertising in a somewhat different light from the appellee." 433 U.S. at 369, n. 20. It is obvious, however, that the Court was simply illustrating, by way of comparison, the extremely rigid position of the Arizona Bar. Clearly, the Court was not attempting to pass judgment on the constitutional or antitrust merits of respondent's advertising restrictions.

traditional advertising as well as personal solicitation of patients is prohibited by that language.[80] By contrast, the 1977 edition redefines "solicitation" in terms of statements or claims that: [51]

> (1) contain testimonials,
> (2) are intended or likely to create inflated or unjustified expectations of favorable results,
> (3) are self-laudatory and imply that the physician has skills superior to other physicians engaged in his field or specialty of practice, or
> (4) contain incorrect or incomplete facts, or representations or implications that are likely to cause the average person to misunderstand or be deceived. (App. A, p.2)

"Advertising," although never fully defined, is technically permitted under the new guidelines, and "solicitation," which is defined to cover various forms of advertising, including any self-laudatory claims as well as deceptive representations, is forbidden.

Since all advertising is to some degree self-laudatory, the 1977 edition suggests that beneath respondent's rhetoric, ethical precepts with respect to advertising haven't changed very much. This view finds support in AMA's argument to the Commission.[81] Respondent's counsel defended the ban on self-laudatory and superiority claims on grounds that such claims convey no useful information and can only be misleading, since they are not susceptible to any kind of measurement. (TROA 22–23) This characterization of claims as misleading on the basis of their utility to consumers or ease of measurement illustrates the potential scope of respondent's ban on "solicitation."

Similarly, the 1977 edition ban on superiority claims could have far-reaching implications. Such a ban proscribes all forms of comparative advertising, no matter how truthful. More importantly, because any advertisement of a doctor's skills or experience may imply superiority, the 1977 edition confirms that AMA wishes to interdict a vast spectrum of advertising practices based on its view that such practices are inherently deceptive.

The overbreadth with respect to other claims encompassed by the "solicitation" definition exacerbates the difficulty of discerning

[80] The 1971 edition states:

> Solicitation of patients, directly or indirectly, by a physician, or by groups of physicians, is unethical. This principle protects the public from the advertiser and salesman of medical care by establishing an easily discernible and generally recognized distinction between him and the ethical physician. (CX 462Z–5; *see also* CX 778A)

[81] It should also be noted that the Judicial Council's 1974 Report on Community Professional Directories, which is still in effect (Tr. 3998), states that directory listings shall not include any "self-aggrandizing statement." (RX 5)

precisely what representations, if any, will be tolerated under the new rules. The first category makes clear that any and all testimonials regarding physician services are inherently misleading. (TROA 24) Clearly, a testimonial pertaining to medical care could well present the potential for deception if, for example, the experience of the endorser did not represent the typical experience of other patients, or if, due to the infrequency and complexity of such care, results could not be predicted with any degree of accuracy in other cases. However, AMA's ban would also cover nondeceptive testimonials. For example, testimonials directed toward aspects [52] of a physician's practice other than quality or efficacy, such as accessibility or courteous service, would be prohibited.[82]

The phrase "incomplete facts" is also troublesome. Such facts must be supplemented in order to prevent a claim from being considered "solicitation." Inasmuch as there is no requirement that these facts be material to a patient's decision to utilize a physician's services, or that the absence of such facts would be deceptive, the spectre of lengthy, burdensome disclosures is raised for any doctor who contemplates advertising. Indeed, the danger here is enhanced by the apparent overlap of claims identified by the second and fourth categories. Finally, we note that the fourth category implies that representations directed to a sophisticated group of consumers might nonetheless be unethical if "they are likely to cause the average person to misunderstand or be deceived." This overbreadth is worrisome in view of the fact that AMA and its local societies have taken action to restrict physician advertising to other physicians or otherwise sophisticated recipients. (ID 146–47)

The Judicial Council's discussion of medical directories represents a marked improvement over the 1971 edition.[83] Unfortunately, respondent has imposed new and unnecessary conditions upon the use of such directories. Fee information may not be included in a directory unless "disclosure is made of the variable and other pertinent factors affecting the amount of the fee specified." Again, the ambiguity concerning what will be considered "pertinent factors" at the local level could lead to the imposition of onerous disclosure requirements or chill the exercise of individual discretion.

The uncertainty of the 1977 edition with respect to advertising and

[82] The Commission has issued Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. 255 (1979).

[83] App. A, p.1. The 1971 *Opinions and Reports* stated:

> Most, if not all, listings of physicians by specialty in directories published by commercial concerns, are but subtle ways of avoiding the pronouncement of the Principles of Medical Ethics concerning solicitation . . . . A physician who uses or permits the use of his name in a commercial directory that fails to include on like terms and without discrimination the names of all licensed physicians practicing in the area served by the directory has the burden of proving that his action is in keeping with the Principles. (CX 462Z–8)

solicitation is compounded by the statement that "[l]ocal, state, or specialty medical associations, as autonomous organizations, may have ethical restrictions on advertising, solicitation of patients, or other professional conduct of physicians that exceed the Principles of Medical Ethics." (App. A, p.1) Thus the extremely limited guidance [53] conveyed by the 1977 edition regarding permissible advertising is subject to the caveat that such advertising could nevertheless lead to disciplinary action if it offends local custom or usage. Moreover, this statement creates another clear link with the 1971 edition. That document placed substantial emphasis upon local custom and usage with respect to permissible communications media, announcements, signs, and open houses. (CX 462Z–7, –8, –9, –10) Given this background, the Judicial Council's reaffirmation of AMA's long-standing policy on advertising and solicitation, (App. A, p.1) and the strong inference that local societies cannot have less restrictive ethical guidelines, it is inevitable that many physicians will be deterred from advertising, whether or not local societies take any specific action in this area.

Respondent's negative attitude toward physician advertising is confirmed by other segments of the 1977 edition. Physicians, as distinguished from commercial enterprises, are not free to engage in advertising "puffery" or to be "baldly self-laudatory" in making superiority claims. (App. A, p.2) And they are permitted to have their photographs published only in connection with a meeting of a recognized medical organization, when elected to office, or when quoted by name on matters of general interest, not related to care of a specific patient. (RX 1, p. 35) "Photographs of physicians in connection with social or civic affairs, not related to medical news or the care of patients, may be published unless the frequency of such photographs bespeaks self-exploitation." *Id.* Another section, entitled "Advertising, Solicitation, and HMOs," states that HMO or prepaid health care plan advertising may not identify any particular physician unless the entire roster of physicians is disclosed. (App. A, p.3) Respondent explains that this restriction is necessary to prevent patients from believing that the physician would be routinely available to all subscribers when this is not the fact. However, AMA does not explain why a simple disclaimer regarding the limited availability of named physicians would not suffice.[84]

We do not mean to imply that precise guidance regarding what claims are false and deceptive is feasible for all kinds of physician advertising. The facts and circumstances of each representation will

[84] AMA also defends this language by citation to the language contained in 42 U.S.C. 360e–10(b) (1976). However, that section pertains to state laws and does not immunize private restrictions on advertising by HMOs.

ultimately be determinative. Moreover, what may be false and deceptive for doctors may be permissible for sellers of other products and services. Harmless puffery for a household product may be deceptive in a medical context. But a doctor would have great difficulty distinguishing between innocuous representations and an abridgement of ethical norms. AMA provides no assistance whatsoever in making this distinction, and its studied ambiguity overall is likely, in our view, to deter truthful ads unnecessarily. [54]

The equivocal language of the 1976 Statement and its often antagonistic tone toward advertising and solicitation, taken together with AMA's decision not to amend the *Principles of Medical Ethics,* has sent a clear signal to the medical profession. It is hardly surprising that many constituent and component societies continued to rely upon the 1971 *Opinions and Reports* even after issuance of the 1976 Statement. (ID 227–28) Indeed, there is evidence that AMA's own officials failed to comprehend the alleged change of position urged upon respondent's counsel. The Chairman of AMA's Board of Trustees testified that it is AMA's position that advertising must be tasteful as well as factually correct. (Tr. 9660–61) A member of the House of Delegates testified that a clinic could be disciplined for advertising the services it performs because it is soliciting business and subject to misinterpretation by the patient. (Tr. 9718)

With respect to the contract practice aspect of this case, AMA argues that the "archaic" statements in the 1971 edition of *Opinions and Reports* have either been voluntarily eliminated or substantially revised in the 1977 edition. The Commission recognizes that the discussion of contractual relationships and free choice contained in the 1977 *Opinions and Reports* represents a significant improvement over earlier versions. (App.A, pp.2, 3)[85] For example, the 1977 edition makes clear that "free choice" is not intended to preclude the use of alternative health care delivery systems, including closed panel systems, that limit the patient's choice to those physicians employed by those kinds of plans. (App. A, p.3) However, by contrast to the AMA's position on advertising and solicitation, there is no evidence that AMA or its Judicial Council even reviewed its position on contract practice issues prior to issuance of the complaint. Indeed, counsel for AMA stated in January 1977 that respondent's current

[85] The 1977 edition provides that physicians working for prepaid plans "should not be subjected to lay interference on professional matters . . . ." (App.A, p.3) This represents a laudable change from the 1971 edition, which forbade employment with prepaid plans altogether and required that ownership and management of professional associations and corporations remain in the the hands of licensed physicians. (CX 462Z–15, –16) Nevertheless, the sweep of AMA's past ethical pronouncements creates some uncertainty regarding the scope of "professional matters" under the new guidelines.

policies on contract practice are "best reflected . . . in the 1974 *Report on Physician-Hospital Relations.*"[86] Like the 1971 edition of *Opinions and Reports,* the 1974 *Report on Physician-Hospital Relations* has never been expressly rescinded. Nor has the AMA communicated to its members its current belief that this document contains positions which are now obsolete. [55]

On balance, we are persuaded that the overwhelming weight of the record evidence contradicts respondent's abandonment argument. Further supplementing this evidence is the law judge's decision to render adverse findings against AMA based upon its refusal to comply with a duly authorized subpoena *duces tecum.*[87] AMA's contention that the Commission lacks authority to make adverse findings pursuant to Section 3.38(b)(1) of the Commission's Rules of Practice is without merit. The adverse inference rule has a solid foundation in the common law,[88] is part of the Federal Rules of Civil Procedure,[89] and has been applied in the context of administrative proceedings.[90] The cases cited by respondent deal not with adverse findings but rather with the Commission's authority to seek penalties for noncompliance of compulsory process. Those decisions are inapposite here.

Application of the adverse inference rule may only be made when the party's failure to produce documentary or other evidence is not adequately explained. *Evis Mfg. Co.* v. *FTC,* 287 F.2d 831, 847 (9th Cir. 1961); *cert. denied,* 368 U.S. 824 (1961). Thus, the adverse inference rule makes the conduct of the person withholding the material an evidentiary fact in and of itself. The resulting inference may be strong or weak, depending on the person's conduct and the surrounding circumstances. *See* 2 J. Wigmore, *Evidence* §285 (3d ed. 1940); *McCormick's Handbook of the Law of Evidence* §272 at 659 (2d ed. 1972). For example, an inference drawn against a respondent offering a weak explanation for its refusal to produce relevant evidence will be stronger than an inference drawn against a respondent providing a more plausible explanation.

It is necessary, therefore, to evaluate respondent's contention that its failure to comply with the administrative subpoena was based

[86] Motion to Certify to the Commission the Motion of Respondent American Medical Association to Reconsider Issuance of the Complaint in this Docket at 6-7 (Jan. 14, 1977).

[87] The ALJ found that:

> AMA's conduct with respect to the formal and informal promulgation, distribution and enforcement of the "Principles of Medical Ethics," established by the record as existing prior to 1975, continued thereafter.

Order Ruling on Complaint Counsel's Motion for Adverse Rulings and Other Relief Due to Noncompliance with Subpoena *Duces Tecum* by Respondent the American Medical Association at 10 (Feb. 25, 1977).

[88] *Armory* v. *Delamirie,* 1 Str. 505 (K.B. 1722); 2 J. Wigmore, *Evidence* §285 (3d ed. 1940).

[89] Fed. R. Civ. P. 37(b)(2)(A).

[90] *International Union (UAW)* v. *NLRB,* 459 F.2d 1329, 1338-39 (D.C. Cir. 1972); *Charles of the Ritz Dist. Corp.* v. *FTC,* 143 F.2d 676, 679 (2d Cir. 1944).

upon a "good-faith" attempt to establish a pre-trial test of the jurisdictional issue in this case. [56] The weight of case precedent supports the view that the Commission's jurisdiction should be judicially reviewed only after agency action has been completed and not in a subpoena enforcement action. *E.g., Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 211-14 (1946); *FTC* v. *Markin,* 532 F.2d 541 (6th Cir. 1976). The only decision cited by AMA in support of its asserted right to raise the jurisdictional question in the enforcement proceedings is *FTC* v. *Miller,* 549 F.2d 452 (7th Cir. 1977). That case suggests the following exceptions to the *Oklahoma Press* rule:

(1) where the agency has clearly violated a right secured by statute or agency regulation;
(2) where the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations; or
(3) where the issue cannot be raised upon judicial review of a later order of the agency. *Id.* at 460.

Respondent does not disclose the exception upon which it would have relied, but it is clear to us that AMA would have had considerable difficulty relying upon any of these exceptions. First, because the status of AMA is unclear on the facts, it could not establish that the Commission had clearly violated its alleged right to be immune from FTC proceedings. Second, the jurisdictional issue—whether AMA is organized to carry on business for its own profit or that of its members—is not a strictly legal issue but one requiring a factual determination for its resolution. Finally, the Commission's jurisdiction to enter an order against AMA is an issue that may be raised upon judicial review of any such order, as it has been raised in AMA's appeal to the Commission from the initial decision.

Since it therefore seems likely that AMA's contemplated challenge on jurisdictional grounds to enforcement of the subpoena would have failed, respondent's refusal to comply with the subpoena is not sufficiently explained. It is noteworthy that AMA complied with every other subpoena issued in this proceeding save the one directed at its principal defense. In view of this fact and the absence of a strong explanation for noncompliance, we think the most plausible reason for AMA's refusal is that the evidence sought would have been unfavorable to its cause. Accordingly, we believe the law judge properly exercised his discretion under Rule 3.38(b)(1).[91] [57]

The Commission concludes, therefore, that there is no evidence

[91] Whether the inference standing alone would be sufficient to rebut AMA's abandonment claim is an issue we need not decide. Suffice it to say, the inference drawn here is consistent with other evidence, such as AMA's 1977 *Opinions and Reports,* which independently supports the need for a cease and desist order.

that AMA clearly and effectively abandoned the practices at issue here prior to commencement of this proceeding. We also reject AMA's contention that publication of the 1977 *Opinions and Reports* after issuance of the complaint demonstrates that there is no cognizable danger of recurrent violation. Abandonment of illegal practices during trial does not diminish the Commission's discretion to enter an appropriate cease and desist order. *See United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 47–48 (1960); *Giant Food, Inc.* v. *FTC*, 322 F.2d 977, 987 (D.C. Cir. 1963); *Spencer Gifts* v. *FTC*, 302, F.2d 267 (3d Cir. 1962). That is particularly true where the purported abandonment consists of equivocal statements and efforts to reinterpret central principles in a manner contrary to their commonsense and historical meaning, suggesting that the practices, if abandoned at all, may be resumed. [58]

B. Order

The ALJ issued an order which, *inter alia,* prevents respondents from policing the advertising and solicitation activities of their members for a period of two years. At the end of that period, respondents may formulate, adopt and disseminate ethical guidelines governing advertising and solicitation only if these guidelines have been approved by the Commission. Complaint counsel supports this order, contending that the medical atmosphere with respect to advertising is so inflamed at present that a two-year cooling-off period is warranted. (TROA 61–62) AMA argues that the government should not preclude it from dealing with the difficult problem of deception in medical advertising because, as a professional society, AMA has a responsibility to regulate deceptive practices by its members. (RAB 70; TROA 15–16) AMA further argues that the provision requiring the AMA to obtain prior Commission approval before publishing ethical standards on advertising or solicitation constitutes a prior restraint on speech that is beyond the authority of the Commission. (RAB 72–80)[92]

We have modified the order issued by the ALJ in light of our conviction that the AMA has a valuable and unique role to play with respect to deceptive advertising and oppressive forms of solicitation by physicians. As modified, the order will permit AMA to adopt and enforce reasonable ethical guidelines concerning advertising that is false or deceptive within the meaning of Section 5. In view of the

[92] Counsel for AMA observed at oral argument that "[i]f Hippocrates were alive today, he would have to come here to get your stamp of approval before he wrote the Hippocratic Oath." (TROA 13) We hasten to point out that the Oath of Hippocrates contains no provision dealing with advertising or solicitation. (RX 1, p. 51) Indeed, Thomas Percival's *Medical Ethics,* upon which AMA's first *Code of Ethics* was based (RX 1, p. 2), contains no mention of advertising or solicitation. *Percival, supra.*

potential overreaching that may occur in the absence of professional regulation, the order will also permit AMA to disseminate guidelines proscribing uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstance, are vulnerable to undue influence. *See Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447 (1978).[93] [59]

The Commission recognizes that the deception standard incorporated into the order does not delineate with absolute precision the latitude which we have given AMA to prescribe new ethical restrictions. If the Commission were capable of such precision, it could draft the new guidelines itself and exclude AMA from any role in their formulation. We are persuaded, however, that AMA is capable of applying general principles of deceptive advertising law in a medical context taking into account the substantial body of law construing Section 5 of the FTC Act. Additionally, our analysis of AMA's 1971 and 1977 *Opinions and Reports* provides considerable guidance regarding the deficiences of past pronouncements. Moreover, pursuant to Section 3.61(d) of the Commission's Rules of Practice, the Commission will be available upon request to provide advice as to whether a proposed course of action, if pursued by respondent, will constitute compliance with the order. *See FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 394 (1965).

We cannot emphasize too strongly that AMA's discretion with respect to solicitation and advertising is limited to "reasonable" ethical guidelines. The list of particular items of information helpful to consumers in choosing a physician, set forth in the Initial Decision (ID 110–11), is illustrative of the kind of information which should be permitted in most cases without additional qualification. It is especially important that price advertising remain as unfettered as possible. Where ads merely state the price of medical services, particularly services that are routine or fairly well standardized, there is little need for restrictions to prevent deception. Where restrictions, such as affirmative disclosures, are justified, they should be reasonably related to the goal of preventing deception. Across-the-board bans on entire categories of representations or general restrictions applicable to any representation made through a specific medium are highly suspect.

At the same time, the order permits AMA to deal effectively with all forms of deceptive advertising, including unsubstantiated representations, affirmative misrepresentations (express or implied), and

[93] We fail to perceive any comparable danger of harassment or duress with respect to solicitation which occurs via written communication or other media. *Contra, Adler, Barish, Daniels, Levin & Creskoff* v. *Epstein,* 393 A.2d 1175 (Pa. 1978), *appeal dismissed and cert. denied,* 99 S. Ct. 2817 (1979).

representations that are deceptive for failure to disclose a material fact. The FTC has held under Section 5, for example, that if health claims are not intended to embrace all interpretations reasonably attributable to them, then they must be specifically limited by express qualifying language. *Grove Laboratories, Inc.*, 71 F.T.C. 822, 835 (1967).[94] **[60]**

The Commission's order allows the AMA no discretion with respect to unfairness other than the authority already mentioned with respect to solicitation. The history of this proceeding, and in particular AMA's 1977 *Opinions and Reports,* underlines the danger of permitting the medical profession broad discretion to proscribe unfair practices. In the event AMA is able to define with specificity unfair acts or practices that should be addressed in ethical guidelines, it may petition the Commission for modification of the order pursuant to Section 3.72(b)(2) of the Commission's Rules of Practice. *See Professional Engineers, supra,* 435 U.S. at 699.

Moreover, in the event that AMA (or a constituent or component society) becomes concerned with an advertising or solicitation practice which is beyond the scope of its power under the terms of the Commission's order, but which the association believes presents a threat to the public, it is of course not entirely without recourse. As we noted earlier, the states are well-equipped to respond to abuses through their medical licensing boards (I.D. 310–12), and the order does not prevent AMA from referring serious incidents to these public authorities when necessary.

We have also included a requirement that AMA afford any member charged with a violation of ethical standards promulgated in conformity with this order due notice and an opportunity for a hearing. *Silver* v. *New York Stock Exchange,* 262 U.S. 341, 361–63 (1963). In fact, this kind of requirement was suggested by AMA as an alternative to the prior approval provision in the ALJ's order, should the Commission issue an order allowing respondent to regulate deceptive advertising. This provision is intended to give members a reasonable chance to contest the charges, including adequate time to prepare and present evidence in their behalf.

The Commission believes that a disaffiliation provision patterned after a similar provision in the ALJ's order is essential to prevent recurrence of the practices documented by the record in this proceeding.[95] AMA's claim that it does not have the power to

[94] We also note that an ad's capacity for deception under Section 5 must be judged in light of the understanding and the corresponding potential for misunderstanding of the audience to which the ad is directed. *ITT Continental Baking Co., Inc.* v. *FTC,* 532 F.2d 207 (2d Cir. 1976); *Aronberg* v. *FTC,* 132 F.2d 165, 167–68 (7th Cir. 1942); *Travel King, Inc.*, 86 F.T.C. 715, 773 (1975).

[95] As modified, the order affords AMA 120 days to determine whether a constituent or component organization

(Continued)

disaffiliate state and local medical societies is without merit. The House of Delegates adopted a resolution in 1855 asserting that no state or local society that had not adopted the *Code of Ethics* would be entitled to representation in AMA. (CX 1435Z–15, –16) [61] In addition, an AMA official has rendered an opinion indicating that there is no legal impediment to a bylaw provision permitting expulsion of a state association under certain circumstances. (CX 1958A, B) The legal arguments in opposition to the disaffiliation provision are equally unconvincing. Similar provisions were imposed in *Professional Engineers, supra*,[96] and in *National Housewares Inc.*, 90 F.T.C. 512 (1977).

We agree with counsel for the Connecticut respondents (TROA 107) that the inclusion of a disaffiliation provision with respect to AMA renders it unnecessary to bind CSMS and NHCMA to a similar order in order to obtain effective relief. Accordingly, the Commission exercises its discretion to omit respondents CSMS and NHCMA from the cease and desist order.

We have modified those order provisions dealing with the contract practice aspects of this case in order to focus more precisely on the restrictions substantiated by the record in this proceeding. With respect to the restrictions relating to underbidding, the adequacy of fees, or compensation on a basis other than the traditional fee-for-service norm, the order prohibits AMA from interfering in any way with the consideration received by physicians in exchange for their services. The order also includes specific prohibitions on ethical pronouncements or representations addressing the propriety of closed panel or other limited choice arrangements as well as physician arrangements with non-physicians.

Finally, we have included in the order a requirement that for five years AMA maintain records sufficient to describe any action taken with respect to conduct covered by the order and provide the Commission with an annual report of such activities. [62]

IV POST-ARGUMENT MOTIONS

A. Motion to Dismiss

In a motion filed subsequent to the oral argument in this case, AMA urges the Commission to dismiss the proceeding on account of

must be disaffiliated. This interval should be sufficient in most cases to evaluate the facts and circumstances surrounding the conduct considered contrary to Part I, II or III of the Order. Again the Commission is available to advise AMA pursuant to Rule 3.61(d) and will consider a request for tolling of the 120 day period where appropriate.

[96] The district court's unreported order is found in the Appendix to Complaint Counsel's Post-Trial Reply Brief, filed August 25, 1978. The disaffiliation provisions of this order were not modified by the court of appeals or by the Supreme Court.

the Commission's acceptance of a consent agreement in *American Dental Association et al. (ADA),* Docket No. 9093.[97] The consent agreement provides that, upon entry of a final adjudicated order in the *AMA* case, the Commission would issue an order against the *ADA* respondents incorporating the relevant provisions of the *AMA* order conformed so as to be applicable to the *ADA* respondents. It also provides that the *ADA* complaint will be dismissed in the event that the final adjudicated order in the *AMA* case results in a dismissal of the complaint on the merits or for lack of jurisdiction. Prior to final resolution of the *AMA* case, the agreement provides interim relief concerning the dental associations' ethical restrictions on advertising and solicitation.

AMA contends that the consent agreement deprives it of a fair proceeding because the existence of the agreement will influence the Commission, preventing it from basing its decision in this case on the facts of record. AMA further believes that the existence of both cases demonstrates the Commission's concern with announcing a general policy on the role of dental and medical societies with respect to advertising and solicitation, and that rulemaking rather than adjudication should be used to announce such a policy.

The mere fact that respondents in the *ADA* matter have reached a settlement with the Commission in which they agree to be bound by the disposition of issues here does not mean that the Commission will abandon its responsibility to decide this case on the record of this proceeding. A similar issue arose in *American Home Products Corporation* v. *FTC,* 420 F.2d 232 (6th Cir. 1968) Respondent there complained that the Commission deprived it of a fair hearing by allowing other sellers of the same type of product to stipulate that their cases should be decided on the basis of the record in respondent's case. The court of appeals held that this [63] assertion of unfairness was unfounded and that the respondent had not been prejudiced by the procedure. *Id.* at 238.[98]

The Commission does not find persuasive AMA's assertion that rulemaking rather than adjudication is required here. Rulemaking is not required simply because the Commission has reason to believe that more than one party has engaged in similar or identical violations of §5 of the Federal Trade Commission Act. The choice

[97] By motion filed on June 18, 1979, CSMS and NHCMA joined in AMA's motion.

[98] It is not unusual for respondents to agree to a consent order that contains provisions that relate to some occurrence outside that case, including provisions that are contingent on the disposition of other litigated matters. *See, e.g., International Paper Company,* 84 F.T.C. 9, 14 (1974) (consent order provides that if a final order is entered against other companies or if the complaint against them is dismissed, settling parties have the option to accept such order as dismissed in lieu of consent order); *Ford Motor Company,* Docket No. 9073 (Decision and Order, March 29, 1979) [93 F.T.C. 402] (consent order provides that if related cases result in adjudicated or consent orders with less restrictive standards, settling parties may petition for conforming modification of order).

between rulemaking and adjudication lies primarily in the informed discretion of the agency. *See NLRB* v. *Bell Aerospace Company,* 416 U.S. 267, 294 (1974); *SEC* v. *Chenery Corporation,* 332 U.S. 194, 202–203 (1947).

Accordingly, respondents' motion to dismiss the proceeding is denied. [64]

B. Connecticut Respondents' Motion To Reopen and Supplement the Record

Respondents CSMS and NHCMA move that the record in this proceeding be reopened to admit into evidence an article printed in the *Waterbury Sunday American* on April 29, 1979, entitled: "Doctor's Methods Stir Controversy." The article relates to Dr. Leon Zucker, a witness for complaint counsel, describes his opthalmology practice, and quotes his patients as well as various physicians familiar with him or the medical techniques he utilizes. Two of the sources quoted in the article, Drs. Jerome Freedman and David W. Parke, filed the complaints regarding Dr. Zucker's publicity which led to NHCMA's investigation. (CX 694B, 695C)[99] Neither man was called as a witness by counsel for the Connecticut respondents.

We decline to grant respondents' motion because it is not at all clear why the Connecticut respondents could not have called as witnesses during trial those persons quoted in the article. Had respondents done so, the testimony of these individuals would have been received subject to the traditional safeguards of the oath, cross-examination, and analysis by the trier of fact. Instead, we are asked to admit what is in essence uncorroborated hearsay evidence highly prejudicial to complaint counsel.

For these reasons, the motion of the Connecticut respondents to reopen and supplement the record is denied.

An appropriate order is attached.

APPENDIX A

EXCERPTS FROM 1977 EDITION OF AMA'S OPINIONS AND REPORTS (RX 1)

Advertising and Solicitation (¶6.00)

This statement reaffirms the long-standing policy of the Judicial Council on advertising and solicitation by physicians. The Principles of Medical Ethics are intended to discourage abusive practices that exploit patients and the public and interfere with freedom in making an informed choice of physicians and free competition among physicians.

[99] Dr. Freedman, now president of CSMS, filed his complaint against Dr. Zucker in his previous capacity as vice president of CSMS. (CX 2006A) Dr. Parke filed his complaint in his former capacity as president of the Connecticut Society of Eye Physicians. (CX 2006B, C)

Advertising. The Principles do not proscribe advertising; they proscribe the solicitation of patients. Advertising means the action of making information or intention known to the public. The public is entitled to know the names of physicians, the type of their practices, the location of their offices, their office hours, and other useful information that will enable people to make a more informed choice of physician.

The physician may furnish this information through the accepted local media for advertising or communication, which are open to all physicians on like conditions. Office signs, professional cards, dignified announcements, telephone directory listings, and reputable directories are examples of acceptable media for making information available to the public.

A physician may give biographical and other relevant data for listing in a reputable directory. A directory is not reputable if its contents are false, misleading, or deceptive or if it is promoted through fraud or misrepresentation. If the physician, at his option, chooses to supply fee information, the published data may include his charge for a standard office visit or his fee or range of fees for specific types of services, provided disclosure is made of the variable and other pertinent factors affecting the amount of the fee specified. The published data may include other relevant facts about the physician, but false, misleading, or deceptive statements or claims should be avoided.

Local, state, or specialty medical associations, as autonomous organizations, may have ethical restrictions on advertising, solicitation of patients, or other professional conduct of physicians that exceed the Principles of Medical Ethics. Furthermore, specific legal restrictions on advertising or solicitation of patients exist in the medical licensure laws of at least 34 states. Other states provide regulation through statutory authority to impose penalties for unprofessional conduct.

Solicitation. The term "solicitation" in the Principles means the attempt to obtain patients by persuasion or influence, using statements or claims that (1) contain testimonials, (2) are intended or likely to create inflated or unjustified expectations of favorable results, (3) are self-laudatory and imply that the physician has skills superior to other physicians engaged in his field or specialty of practice, or (4) contain incorrect or incomplete facts, or representations or implications that are likely to cause the average person to misunderstand or be deceived.

Competition. Some competitive practices accepted in ordinary commercial and industrial enterprises—where profit-making is the primary objective—are inappropriate among physicians. Commercial enterprises, for example, are free to solicit business by paying commissions. They have no duty to lower prices to the poor. Commercial enterprises are generally free to engage in advertising "puffery," to be boldly self-laudatory in making claims of superiority, and to emphasize favorable features without disclosing unfavorable information.

Physicians, by contrast, have an ethical duty to subordinate financial reward to social responsibility. A physician should not engage in practices for pecuniary gain that interfere with his medical judgment and skill or cause a deterioration of the quality of medical care. Ability to pay should be considered in reducing fees, and excessive fees are unethical.

Physicians should not pay commissions or rebates or give kickbacks for referral of patients. Likewise, they should not make extravagent claims or proclaim extraordinary skills. Such practices, however, common they may be in the commercial world, are unethical in the practice of medicine because they are injurious to the public.

Freedom of choice of physician and free competition among physicians are prerequisites of optimal medical care. The Principles of Medical Ethics are intended to curtail abusive practices that impinge on these freedoms and exploit patients and the public.

Contractual Relationships (¶4.05)

The contractual relationships that physicians assume when they enter prepaid group practice plans are varied.

Income arrangements may include hourly wages for physicians working part time, annual salaries for those working full time, and share of group income for physicians who are partners in groups that are somewhat autonomous and contract with plans to provide the required medical care. Arrangements also usually include a range of fringe benefits, such as paid vacations, insurance and pension plans.

Physicians may work directly for plans or may be employed by the medical group or the hospital that has contracted with the plan to provide services. The AMA recognizes that under proper legal authority such plans may be established and that a physician may be employed by, or otherwise serve, a medical care plan without violating the Principles of Medical Ethics. It believes that in the operation of such plans physicians should not be subjected to lay interference on professional matters and that their primary responsibility should be to the patients they serve.

Advertising, Solicitation, and HMOs (¶6.01)

It is not unethical for a physician to provide medical services to members of a prepaid medical care plan or to members of a health maintenance organization which seeks members (or subscribers) through advertising its services, facilities, charges, or other non-professional aspects of its operation as long as such advertising does not identify, refer to, or make any qualitative judgment concerning any physician who provides service to the members or subscribers.

The foregoing qualification is intended to discourage deceptive advertising which would lead prospective members (or subscribers) to believe that the services of a named physician who has a reputation for outstanding skill would be routinely available to all members (or subscribers) having need for his kind of services if in fact this is not so. However, the publication by name of the roster of physicians who provide services to members, the type of practice in which each is engaged, biographical and other relevant information as outlined in "Advertising and Solicitation" above is not a deceptive practice.

Free Choice (¶6.28)

Free choice of physicians is the right of every individual. The individual may select and change at will the physicians who serve him, or he may choose a medical care plan such as that provided by a closed panel or group practice, or he may choose to obtain medical care by becoming a subscriber of a health maintenance or service organization. The freedom of the individual to select his preferred system of medical care and free competition among physicians and alternative systems of medical care are prerequisites of ethical practice and optimal medical care.

FINAL ORDER

This matter having been heard by the Commission upon the appeals of respondents from the Initial Decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to deny the appeal of respondent American Medical Association and to grant the appeal in part of respondents

Connecticut State Medical Society and New Haven County Medical Association, Inc.,

It is ordered, That the Initial Decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, 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 be, and it hereby is entered. [2]

I.

It is ordered, That respondent American Medical Association, and its delegates, trustees, councils, committees, officers, representatives, agents, employees, successors and assigns, directly or indirectly, or through any corporate or other device, in or in connection with respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms or conditions of sale of physicians' services, or of information about physicians' services, facilities or equipment which are offered for sale or made available by physicians or by any organization with which physicians are affiliated;

B. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the solicitation, through advertising or by any other means, including but not limited to bidding practices, of patients, patronage, or contracts to supply physicians' services, by any physician or by any organization with which physicians are affiliated; and

C. Inducing, urging, encouraging, or assisting any physician, or any medical association, group of physicians, hospital, insurance carrier or any other non-governmental organization to take any of the actions prohibited by this part.

Nothing contained in this part shall prohibit respondent from formulating, adopting, disseminating to its constituent and component medical organizations and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients, who,

because of their particular circumstances, are vulnerable to undue influence. [3]

II.

It is further ordered, That respondent American Medical Association, and its delegates, trustees, councils, committees, officers, representatives, agents, employees, successors and assigns, directly or indirectly, or through any corporate or other device, in or in connection with respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Restricting, regulating, impeding, advising on the ethical propriety of, or interfering with the consideration offered or provided to any physician in return for the sale, purchase or distribution of his or her professional services;

B. Restricting, interfering with, or impeding the growth, development or operations of any entity that offers physicians' services to the public, by means of any statement or other representation concerning the ethical propriety of medical service arrangements that limit the patient's choice of a physician;

C. Restricting, interfering with, or impeding the growth, development or operations of any entity that offers physicians' services to the public, by means of any statement or other representation concerning the ethical propriety of participation by non-physicians in the ownership or management of said organization; and

D. Inducing, urging, encouraging, or assisting any physician, or any medical association, group of physicians, hospital, insurance carrier or any other non-governmental organization to take any of the actions prohibited by this part.

III.

It is further ordered, That respondent American Medical Association cease and desist from taking any formal action against a person alleged to have violated any ethical standard promulgated in conformity with this Order without first providing such person with:

A. Reasonable written notice of the allegations against him or her;

B. A hearing wherein such person or a person retained by him or her may seek to rebut such allegations; and

C. The written findings or conclusions of respondent with respect to such allegations. [4]

IV.

It is further ordered, That respondent American Medical Association:

A. Send by first class mail a copy of a letter in the form shown in Appendix A to this Order to each of its present members and to each constituent and component organization of respondent, within sixty (60) days after this Order becomes final.

B. For a period of ten years, provide each new member of respondent and each constituent and component organization of respondent with a copy of this Order at the time the member is accepted into membership.

C. Within ninety (90) days after this Order becomes final, remove from respondent American Medical Association's *Principles of Medical Ethics* and the Judicial Council's *Opinions and Reports,* and from the constitution and bylaws and any other existing policy statement or guideline of respondent, any provision, interpretation or policy statement which is inconsistent with the provisions of Parts I and II of this Order and, within one hundred and twenty (120) days after this Order becomes final, publish in the *Journal of the American Medical Association* and in *American Medical News* the revised versions of such documents, statements, or guidelines.

D. Require as a condition of affiliation with respondent that any constituent or component organization agree by action taken by the constituent or component organization's governing body to adhere to the provisions of Parts I, II, and III of this Order.

E. Terminate for a period of one year their affiliation with any constituent or component organization within one hundred and twenty (120) days after learning or having reason to believe that said constituent or component organization has engaged, after the date this Order becomes final, in any act or practice that if committed by respondent would be prohibited by Parts I, II or III of this Order.

V.

It is further ordered, That respondent American Medical Association: [5]

A. Within sixty (60) days after the Order becomes final publish a copy of this Order with such prominence as feature articles are regularly published in the *Journal of the American Medical Association* and in *American Medical News* or in any successor publications.

B. Within one hundred and twenty (120) days after this Order becomes final, file a written report with the Federal Trade Commis-

sion setting forth in detail the manner and form in which it has complied with this Order.

C. For a period of five (5) years after this Order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts I and II of this Order, including but not limited to any advice or interpretations rendered with respect to advertising, solicitation, or contract practice involving any of its members.

D. Within one year after this Order becomes final, and annually thereafter, for a period of five (5) years, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by Parts I and II of this Order, including but not limited to any advice or interpretations rendered with respect to advertising, solicitation or contract practice involving any of its members.

VI.

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

APPENDIX A

Dear Doctor:

As you know, the Federal Trade Commission issued a complaint against the AMA on December 19, 1975, challenging the AMA's ethical restrictions on the advertising, solicitation, and contractual practices of its members. The complaint also named the Connecticut State Medical Society and the New Haven County Medical Association, Inc. as respondents.

In an opinion issued on [insert issue date], the FTC held that the AMA, the two Connecticut medical societies, and other state and local medical associations have unlawfully restricted the advertising, solicitation, and contractual practices of their members in violation of Section 5 of the Federal Trade Commission Act.

In conjunction with that opinion, the Commission issued an order which has now become final. This order is printed in the [insert issue date] issue of the *Journal of the American Medical Association,* the [insert issue date] issue of *American Medical News* and may be obtained from the AMA headquarters or from your state or local medical society.

Among other things, the order forbids any action by AMA that would:

- Restrict its members; solicitation of patients by advertising, submission of bids, or other means.

- Interfere with either the amount or the form of compensation provided a member in exchange for his or her professional services.

- Characterize as unethical the use of closed panel or other health care delivery plans that limit the patient's choice of a physician.

- Characterize as unethical the participation of non-physicians in the ownership or management of health care organizations that provide physician services to the public.

However, the order does not prohibit the AMA from formulating and enforcing reasonable ethical guidelines governing deceptive advertising and solicitation (including unsubstantiated representations). The AMA may also issue guidelines concerning uninvited, in-person solicitation of patients who, because of their particular circumstances, are vulnerable to undue influence.

Finally, the order requires the AMA to amend the *Principles of Medical Ethics* and the Judicial Council's *Opinions and Reports* and to sever all ties for one year with any state or local medical society that engages in conduct of the type prohibited under the order.

Thank you for your cooperation.

Sincerely,

_____

President

IN THE MATTER OF

FORBES HEALTH SYSTEM MEDICAL STAFF

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2994. Complaint, Oct. 15, 1979 — Decision, Oct. 15, 1979

This consent order, among other things, requires a Pittsburgh, Pa. medical association (Medical Staff), to cease engaging in actions having the purpose or effect of excluding from appointment to Medical Staff applicants who are associated with a Health Maintenance Organization (HMO), or who practice on an other than fee-for-service basis. The association is further prohibited from unreasonably delaying final recommendations on staff privilege applications, and from according discriminatory treatment to HMO-associated members, which may prevent them from providing effective patient care at Forbes. Additionally, respondent would be required to change its Bylaws to conform with the terms of the order.

Appearances

For the Commission; *Barbara K. Shapiro* and *James E. McCarty.*

For the respondent: *Eric F. Stoer* and *Daniel Masur,* Pittsburgh, Pa.

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 Forbes Health System Medical Staff has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The Forbes Health System Medical Staff (hereinafter "Medical Staff") is an unincorporated association, organized and existing under the laws of the Commonwealth of Pennsylvania, and located at 500 Finley St., Pittsburgh, Pennsylvania. It is composed of the more than 300 medical physicians, osteopathic physicians, dentists, and podiatrists who have been granted privileges by the Forbes Health System to attend patients in the Forbes Health System.

PAR. 2. The Forbes Health System (hereinafter "Forbes") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. The physical facilities of Forbes consist of

East Suburban Health Center and Columbia Health Center, each of which is a general hospital, and Pittsburgh Health Center, presently being converted from a general hospital to a skilled nursing center. Each of these facilities is in the greater Pittsburgh area.

PAR. 3. A "Health Maintenance Organization" (hereinafter "HMO") is an organization which, in return for advance periodic payments, accepts contractual responsibility to provide or arrange for the provision of a stated range of health care services to an enrolled population. There are two principal types of HMOs, Individual Practice Associations (hereinafter "IPA") and closed panel group practices. An IPA is an HMO generally open to participation by all members of a defined class of physicians practicing within the IPA's marketing area; usually such physicians are compensated by the IPA primarily on a fee-for-service basis. A closed panel group practice is an HMO in which participation is generally limited to a number of physicians determined by the HMO and selected by the HMO to render service to HMO enrollees on a full or part time basis; usually such physicians are compensated in substantial part without regard to the type or amount of services rendered to individual enrollees of the HMO.

PAR. 4. Except to the extent that competition has been restrained as hereinafter alleged, and depending on their specialties, physicians are in competition with each other and with HMOs, and HMOs are in competition with each other. It is important for the success of HMOs and to the successful practice of their physicians that HMO physicians be granted privileges at hospitals convenient to them and to their patients.

PAR. 5. The Medical Staff has engaged in activities relating to the economic aspects of the practice of medicine, as a result of which activities it is organized 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 the course and conduct of their business, HMOs and physicians in the greater Pittsburgh area charge fees and collect payments which, in substantial part, are paid directly or indirectly with federal funds or funds received interstate from insurance companies, employers, and Blue Cross and Blue Shield plans. The flow of said funds is affected by competition among physicians and HMOs in the greater Pittsburgh area and by the acts and practices of the Medical Staff and its members as hereinafter alleged, as a result of which said acts and practices are in and affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 7. Appointment to the Medical Staff is a prerequisite to regular utilization by a physician of the facilities of Forbes. Applications for appointment are reviewed by the Medical Staff, and the recommendation of the Medical Staff is usually followed by the governing body of Forbes, which makes the final decision on staff privileges applications.

PAR. 8. The Medical Staff and its members individually, collectively, and collusively delayed action upon applications for appointment to the Medical Staff and refused to recommend such appointments for the purpose, and with the effect, of preventing and forestalling competition with the Medical Staff's members and an IPA in which its members might participate from the applicants and a closed panel group practice for which the applicants provided medical services.

PAR. 9. As a result of the acts, practices, and methods of competition hereinabove alleged, in the greater Pittsburgh area:

(a) competition among physicians has been restrained;

(b) competition among HMOs has been restrained;

(c) entry of HMOs into physician services markets and the growth of HMOs have been restrained;

(d) HMO physicians have been denied access to important hospital facilities; and

(e) consumers under the care of HMO physicians have been denied access to important hospital facilities.

PAR. 10. The acts, practices, and methods of competition alleged herein, individually and in conjunction with each other, constitute unfair methods of competition and unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act by the respondent herein.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid

draft of complaint, a statement that the signing of said judgment is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent, Forbes Health System Medical Staff, is an association organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and located at 500 Finley St., Pittsburgh, Pennsylvania.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That the following definitions shall apply in this order:

A. "Respondent" or "the Medical Staff" means the Forbes Health System Medical Staff, its successors and assigns. The Medical Staff is an unincorporated association consisting of that group of medical physicians, osteopathic physicians, dentists and podiatrists who are granted privileges by the Forbes Health System to attend patients in the Forbes Health System.

B. "Forbes" means Forbes Health System, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania.

C. "Health Maintenance Organization" means an organization which, in return for advance periodic payments, accepts contractual responsibility to provide or arrange for the provision of a stated range of health care services to an enrolled population.

D. "Applicant" means any medical physician, osteopathic physi-

cian, dentist or podiatrist who applies for appointment to the Medical Staff to attend patients in the Forbes Health System.

E. "Effective date of this order" means the date of issuance of the Commission's decision and order with respect to this matter.

F. "Completed application" means submission of the application form and all documentation required by the Bylaws of the Medical Staff.

II.

It is further ordered, That respondent shall not directly or indirectly enter into, adhere to, promote or follow any course of conduct, practice or policy, or any agreement or understanding, having the purpose or effect of

(a) excluding any applicant from appointment to the Medical Staff by reason in whole or in part of the fact that such applicant practices medicine, osteopathic medicine, dentistry, or podiatry to any extent on other than a fee-for-service basis, or by reason in whole or in part of the fact that such applicant is associated in any way with a Health Maintenance Organization;

(b) delaying final recommendation by the Medical Staff on the appointment to the Medical Staff of any applicant beyond the first regular quarterly Medical Staff meeting which is eighty or more days after the completed application is submitted, or if the completed application is submitted less than 80 days prior to a regular quarterly medical staff meeting, beyond the end of the next calendar quarter following that in which the completed application is submitted, but in no event beyond 180 days following submission of the completed application; or

(c) according different treatment to a class of Medical Staff members associated in any way with a Health Maintenance Organization, as a result of which the Health Maintenance Organization or any Medical Staff member associated in any way with it may be hindered in or prevented from providing effective patient care at Forbes; *provided, however,* that individual day-to-day hospital staff administrative decisions, such as scheduling and departmental duty assignments on a seniority basis, shall not constitute a violation of this section unless they constitute a pattern of different treatment.

III.

It is further ordered, That within sixty (60) days following the effective date of this order the respondent shall revise the Medical Staff's By-Laws to conform with the requirements of this order.

IV.

It is further ordered, That commencing thirty (30) days after the date of this order the respondent shall mail a copy of this order and of the complaint in this proceeding to each officer and member of the Medical Staff and to each applicant for appointment to the Medical Staff.

V.

It is further ordered, That the respondent shall, within sixty (60) days following the effective date of this order, and thereafter on the first anniversary date of the effective date of this order, and at such other times as the Commission may by written notice to the respondent require, file or cause to be filed with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

VI.

It is further ordered, That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the Medical Staff that may affect compliance obligations arising out of this order.

VII.

It is further ordered, That unless altered, modified, or set aside in accordance with Sections 3.71 and 3.72 of the Commission's Rules of Practice or such similar rules as may be in effect from time to time, this order shall remain in effect for ten (10) years after the effective date of this order.

IN THE MATTER OF

INDIANA FEDERATION OF DENTISTS

Docket 9118. Interlocutory Order, Oct. 16, 1979

ORDER GRANTING INTERVENTION TO STATE OF INDIANA

On August 17, 1979, the United States District Court for the Southern District of Indiana issued a judgment ordering the Commission to allow the State of Indiana, by its Attorney General, to intervene in the above-captioned proceeding. In compliance with that judgment we reverse our earlier denial[1] of intervention.

It is ordered, That the Commission's order of February 5, 1979, is reversed and that the application for intervention by the State of Indiana be, and hereby is, granted.

[1] Order Denying Petition of State of Indiana to Intervene, Dkt. 9118 (February 5, 1979) [93 F.T.C. 231].

IN THE MATTER OF

HASTINGS MANUFACTURING COMPANY

Docket 4437. Interlocutory Order, Oct. 22, 1979

ORDER DENYING RESPONDENT'S REQUEST FOR CONFIDENTIAL TREATMENT OF ITS PETITION TO REOPEN AND RELATED FILINGS

At the close of its Reply filed on July 31, 1979, respondent Hastings Manufacturing Company requested that its petition to reopen this proceeding and related filings be kept confidential. It argued that the filings "outline areas of vulnerability in Hastings' ability to compete, *i.e.,* the inability to offer a stock lift," and that such information, if made public, could be used by Hastings' competitors to "seriously injure" the firm. The Commission immediately placed the documents *in camera* pending consideration of Hastings' request. On September 6, 1979, the Commission ordered the parties to rebrief the question, *inter alia,* of what legal or factual basis might exist for granting the confidentiality request. Hastings filed additional briefs pursuant to this order on October 1 and 15, 1979, but in them declined to elaborate on the conclusory rationale for confidential treatment that it had advanced earlier.

The Commission's Rules of Practice and the case law establish a strong presumption in favor of opening adjudicative proceedings to the public and making pleadings, exhibits, and other papers in such proceedings available for public inspection. 16 C.F.R. 3.41(a), 4.9(b)(4); *E. Griffiths Hughes, Inc.* v. *FTC,* 63 F.2d 362, 363-64 (D.C. Cir. 1933); *H. P. Hood & Sons, Inc.,* 58 F.T.C. 1184, 1186 (1961). The presumption can be overcome, and information placed *in camera,* "only in those unusual and exceptional circumstances when good cause is found on the record." 16 C.F.R. 3.45(b).

Respondent Hastings has failed to establish the presence of such circumstances here. The information that Hastings seeks to protect — namely, references to its inability to offer stock lifts to its customers — has long been a matter of public record. Hastings' inability to offer stock lifts is the direct result of a Commission cease-and-desist order specifically prohibiting the practice. The public has continuously had access to that order for over 30 years through the official published reports of the Commission and the Court of Appeals. *Hastings Manufacturing Co.,* 39 F.T.C. 498 (1944), *aff'd,* 153 F.2d 253 (6th Cir. 1946). Indeed, Hastings has not even attempted to argue that placing the petition and related filings on the public record would disclose a theretofore confidential fact. Instead, Hast-

ings has asserted that such an action would unfairly spotlight and "further emphasize" the fact.

The Commission is aware of no precedent or legal authority for placing adjudicative filings *in camera* in such circumstances, and respondent has pointed to none in its briefs. In fact, since the petition and related filings appear to contain no information that would fall within any of the exemptions to the Freedom of Information Act (5 U.S.C. 552(b)), the Commission would be obliged to produce them to any member of the public who requested access to them.

For the above reasons, the Commission hereby denies respondent's request for confidential treatment of the petition and related filings. Accordingly,

It is ordered, That five days from the date of this order, the Secretary shall place on the public record this order, respondent's petition to reopen this proceeding and all subsequently filed briefs, orders, and other papers relating to the petition.

It is further ordered, That immediately upon issuance of this order, the Secretary shall telephone respondent's counsel and read the order to such counsel.

IN THE MATTER OF

TRANS WORLD ACCOUNTS, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9059. Final Order, Oct. 25, 1977 — Modifying Order, Oct. 25, 1979

This order further modifies the Commission's July 25, 1979 "Modified Order to Cease and Desist," 44 FR 49650, 94 F.T.C. 141, by inserting paragraph 3 which had been omitted pending its reformulation in accordance with the March 29, 1979 mandate of the Court of Appeals for the 9th Circuit.

ORDER ON REMAND

This matter is before the Commission upon remand from the Ninth Circuit Court of Appeals, which affirmed the Commission's findings of violation and enforced the order entered by the Commission save for paragraph 3 thereof. As to that paragraph, the Court remanded to the Commission for reformulation.

The Commission found, *inter alia,* that Trans World Accounts has misrepresented the imminency of legal action in its form collection letters, implying therein that legal action would be taken within very short periods of time following refusal by the alleged debtor to pay a debt, when, in fact, the only response to nonpayment by Trans World would be to send another letter in its form series.

Paragraph 3 of the Commission's order prohibited both misrepresentations of the imminency of legal action, *and* of its likelihood. This was intended to eliminate misrepresentations of the imminency of legal action, and to "fence-in" related misrepresentations of the *likelihood* of legal action. In remanding this order provision, the Court of Appeals applied the terms "vagueness and overbreadth" to that portion of the order fencing-in misrepresentations of the likelihood of legal action. Respondents argue that the Court held that a showing of misrepresentations of the imminency of legal action was insufficient to justify any fencing-in order as to the likelihood of legal action. Complaint counsel argue that the Court made clear that the Commission was not powerless to fence-in misrepresentations of the likelihood of legal action, but merely objected to the manner in which the Commission had done so.

From the Court's opinion, we are not entirely sure what is the source of its objection to the breadth of the Commission's order. Both sides have offered plausible interpretations. For the reasons noted

below, we believe that it will be sufficient for the purposes of this proceeding if we adopt the order proposed by respondents.[1]

The Fair Debt Collection Practices Act, 15 U.S.C. 1692, prohibits on pain of $10,000 civil penalties per violation, any "false, deceptive, or misleading representation or means in connection with the collection of any debt", 15 U.S.C. 1692e. Among the deceptive practices specifically enumerated are "The threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. 1692e(5).

Respondents suggest that their messages are merely "educational" rather than "threatening." The two attributes are not mutually exclusive, however, and coalesce perfectly in the typical debt collection missive. In our experience, debt collectors are not in business to give free correspondence courses in Creditors' Remedies. When a letter is sent to a debtor for the purpose of collecting a debt, and the writer makes the observation that the debtor "will" or "may" be sued if he or she does not pay, that observation is very likely to be perceived by the debtor as a threat. Why else, after all, would the debt collector have spent money to include that information in its letter?

This commonsense proposition finds support in the decision of the Ninth Circuit, as complaint counsel observe. The Court recognized that statements to the effect that legal action "may" be taken if the debtor did not pay within five days were threats of imminent legal action, not merely abstract statements of creditors' legal rights.

In this case, of course, as the Court and respondents observe, there was no proof that respondents misrepresented the *likelihood* of legal action, and no order against such misrepresentations will enter. But respondents would err grievously to assume that they, therefore, are entitled in the future to misrepresent the likelihood of legal action, particularly given the provisions of the Fair Debt Collection Practices Act cited above.

A valid function is performed by advising debtors of the possibility of legal action if legal action *as to the debtor being informed* is, indeed, a realistic possibility. Where form letters are used to communicate the possibility of legal action, however, some care is necessary to avoid deception. If, for example, debtors allegedly owing small amounts are rarely or never sued in the event that they fail to pay, it is plainly deceitful to threaten such debtors with the reasonable possibility of legal action. The deceit as to those debtors

[1] We have, however, retained the term "legal action" rather than "lawsuit". There is no reason why respondents should be allowed to misrepresent the imminency of any form of "legal action" (*e.g.*, referral to an attorney, levying on a judgment). This is clearly permissible fencing-in, and the Court of Appeals expressed no objection to this formulation in the order that was before it.

not likely to be sued is not obviated merely because the same form letters are sent to other debtors, owing much larger amounts, who are likely to be sued.

A debt collector must, therefore, take care that when threatening legal action, the threat be accompanied by an intention to take such legal action as to the debtor being threatened in the event that payment is not made or a defense not raised by the debtor. In the case of form-letter threats, particular care is needed to assure that such threats are not directed at recipients against whom the collector or creditor would be unprepared to take legal action in the event that payment or a defense were not forthcoming. If particular creditors do not take legal action against debtors owing small amounts, then it is simply dishonest to send form letters on behalf of those creditors to those debtors that in any way suggest that legal action may be taken.

With these observations we shall enter the order proposed by respondents, after substitution of the words "legal action" for "lawsuit".

Therefore, *it is ordered,* That the Commission's "Modified Order to Cease and Desist" dated July 25, 1979, be further modified by the insertion of paragraph 3 to read:

3. Misrepresenting directly or by implication, that legal action with respect to an alleged delinquent debt has been or will be initiated, or misrepresenting in any manner the imminency of legal action.

IN THE MATTER OF

ATLANTIC RICHFIELD COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9089. Complaint, Oct. 13, 1976 — Decision, Oct. 29, 1979

This consent order, among other things, requires a Los Angeles, Calif. integrated energy company, engaged in various other activities including those related to copper, to timely divest its interest in the Heddleston copper and molybdenum mineral property and Bear copper mineral property located in Lyon County, Nevada; its entire voting stock interest in the Inspiration Consolidated Copper Company; and its joint venture interest in the Anamax Mining Company, a Pima County, Arizona integrated copper company. Each of the divestitures would have to be to an "Eligible Person," and upon company's failure to divest these interests within specified time periods, divestiture authority must be transferred to a trustee who will be charged to attempt diligently to effect divestiture at fair value within three years from the date of his appointment. Should the trustee not have divested the property within such three-year period, he would be required to divest it within one year at the best price he is reasonably able to obtain. The order additionally provides for arbitration should any dispute regarding the terms of the order arise between respondent and the Commission or trustee.

Appearances

For the Commission: *Ernest A. Nagata, Risa D. Sandler, Paul Breitstein* and *Wallace A. Witkowski.*

For the respondents: *Frances X. McCormack* and *Donald A. Bright,* Los Angeles, Calif. and *Jerome Shapiro, Hughes, Hubbard & Reed,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Atlantic Richfield Company, a corporation subject to the jurisdiction of the Commission, has acquired a part and has entered into an agreement to acquire the whole of the stock of The Anaconda Company, a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the

Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. Atlantic Richfield Company

1. Respondent, Atlantic Richfield Company (hereinafter "ARCO") is a Pennsylvania corporation with its principal office and place of business located at 515 South Flower St., Los Angeles, California.

2. In 1975, ARCO had sales of $7,307,854,000 and assets of $7,364,787,000. In that year it was the 15th largest publicly held industrial corporation in the nation in total sales and ranked 13th in assets. ARCO ranked eighth in net income and seventh in total assets among petroleum companies in 1975.

3. ARCO is an integrated energy company which is involved in the exploration for and production of crude oil and natural gas, transportation of oil and gas, the manufacturing, refining and marketing of petroleum and gas products, the production and sale of uranium oxide, exploration for copper, and the ownership of coal reserves and sale of coal. In addition, ARCO is a substantial producer of petrochemicals, plastics and plastic products.

4. At all times relevant herein, ARCO was engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce as commerce is defined in the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

II. The Anaconda Company

5. Respondent, The Anaconda Company (hereinafter "Anaconda"), is a Montana corporation with its principal office and place of business located at 25 Broadway, New York, New York.

6. In 1975, Anaconda had sales of $1,087,778,000 and assets of $2,007,453,000. In that year it ranked 188th in sales and 71st in assets among publicly held industrial corporations in the United States.

7. Anaconda is principally engaged in the business of producing primary copper, brass mill products, wire mill products, primary aluminum, fabricated aluminum products, uranium oxide and industrial valves. In 1975, it had sales of uranium oxide amounting to $24 million; it had sales of primary copper and copper products amounting to $625.1 million; and it had sales of aluminum and aluminum products amounting to $335.8 million.

8. In 1975, Anaconda was the third ranking producer of copper in

the nation, was a leading national producer of primary aluminum, aluminum products and brass mill products, and is believed to have been the second largest producer of uranium oxide in the nation.

9. At all times relevant herein, Anaconda was engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce as commerce is defined in the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

III. The Proposed Acquisition

10. On March 18, 1976, ARCO made a cash tender offer for approximately 6,013,000 shares, or 27 percent, of Anaconda common stock at a price of $27 per share, or a total transaction price of approximately $162 million.

11. On July 1, 1976, ARCO entered into a preliminary merger agreement with Anaconda and purchased $100 million principal amount of Anaconda's 8 percent conditionally convertible subordinated debentures.

12. On July 26, 1976, the parties entered into a plan and agreement of reorganization (the "merger agreement"). Under the terms of the merger agreement, Anaconda will become a wholly-owned subsidiary of ARCO, and each share of Anaconda common stock will be converted into one-half share of ARCO common stock and a right to receive $6 in cash.

13. A special meeting of Anaconda shareholders regarding the merger proposal is to be held on October 20, 1976. The affirmative vote of 66 2/3 percent of the outstanding shares of Anaconda common stock is required for approval of the proposal. Anaconda's management has recommended shareholder approval of the proposal.

IV. Trade and Commerce

14. The relevant geographic market is the United States as a whole. The relevant product markets are the following:

(a) Copper mine production.

(b) Production and sale of refined copper.

(c) Production and sale of uranium oxide.

A. *Copper Mine Production*

15. Copper mine production in the United States in 1975 was approximately 1.41 million short tons.

16. Concentration in domestic copper mine production is high, with the top four firms accounting for 59.0 percent and the top eight firms accounting for 86.6 percent of production in 1975.

17. Anaconda was the third largest company in mine production in 1975 with 11.1 percent.

18. Barriers to entry into copper mine production are high.

19. ARCO is a likely potential entrant into copper mine production. It has demonstrated interest in entering the industry, and is involved in exploration for copper.

20. ARCO is one of the few most likely potential entrants into copper mine production.

B. *Refined Copper*

21. Production capacity for refined copper in the United States was 3,027,800 tons at the end of 1975.

22. Concentration in the production and sale of refined copper is high, with the top four firms accounting for 72.0 percent and the top eight firms accounting for 93.1 percent of domestic refining capacity in 1975.

23. In 1975, Anaconda was the fourth largest refiner of copper with 10.1 percent of domestic capacity.

24. Barriers to entry in the production and sale of refined copper are high.

25. ARCO is a likely potential entrant into the production and sale of refined copper. It has demonstrated interest in entering the industry, and is involved in exploration for copper.

26. ARCO is one of the few most likely potential entrants into the production and sale of refined copper.

C. Uranium Oxide

27. Production of uranium oxide in the United States for domestic consumption in 1974 totaled 23,756,565 pounds and in 1975 totaled approximately 23,200,000 pounds.

28. Concentration in the production of uranium oxide is high, with the top four firms accounting for 60 percent and the top eight firms accounting for 84 percent of total United States production in 1974.

a. Actual Competition

29. In 1974, Anaconda was the second largest producer and seller of uranium oxide in the nation, with 17.8 percent of total United States production. Anaconda is believed to have remained the second

largest producer in 1975 with approximately 15 percent of total United States production. Anaconda's sales of uranium oxide in 1975 totaled $23,994,000.

30. In 1975, ARCO entered into the production of uranium oxide. A joint venture in which ARCO owns a 50 percent interest began operations in April 1975 with a development period running through the month of July 1975. ARCO's share of the joint venture's 1975 production of uranium oxide amounted to 49,000 pounds, or 0.21 percent of total United States production. ARCO's 1975 shipments of uranium oxide amounted to 32,690 pounds, or 0.13 percent of total domestic shipments. ARCO's sales of uranium oxide in 1975 totaled $652,492.

31. Anaconda is believed to be the fifth largest holder of uranium reserves in the United States. ARCO is also a substantial holder of uranium reserves. Substantial portions of the reserves of each are presently uncommitted.

32. Anaconda and ARCO are competitors in the production and sale of uranium oxide in the United States.

b. Potential Competition

33. Barriers to entry into the production and sale of uranium oxide are substantial.

34. ARCO is a likely potential competitor on a significant scale in the production and sale of uranium oxide by reason of its demonstrated interest, size and financial resources, and technical capabilities, among other factors.

35. ARCO is one of the few most likely potential competitors on a significant scale in the production and sale of uranium oxide.

V. Effects of the Acquisition

36. The effects of the acquisition of Anaconda by ARCO may be substantially to lessen competition or to tend to create a monopoly in the production and sale of refined copper and uranium oxide and in copper mine production throughout the United States in violation of Section 7 of the Clayton Act, as amended, and the effects of the acquisition may be unreasonably to restrain trade and to hinder competition unduly in the production and sale of refined copper and uranium oxide and in copper mine production, thereby constituting a restraint of trade and an unfair act and practice and an unfair method of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways among others:

(a) Significant potential competition between ARCO and producers of copper, including Anaconda, both in copper mine production and in the production and sale of refined copper, will be eliminated.

(b) Actual competition between ARCO and Anaconda in the production and sale of uranium oxide will be eliminated.

(c) Significant potential competition between ARCO and producers of uranium oxide, including Anaconda, will be eliminated.

VI. Violations Charged

37. The acquisition of Anaconda common stock by ARCO and the merger agreement between ARCO and Anaconda constitute violations of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

Commissioner Dole did not participate for reason of absence.

Decision and Order

The Commission having heretofore issued its amended complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed by interested persons pursuant to Section 3.25(f) of its Rules, and having modified the consent agreement, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby

makes the following jurisdictional findings and enters the following order:

1. Respondent Atlantic Richfield Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 515 South Flower St., Los Angeles, California.

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

ORDER

For purposes of this order, the following definitions shall apply:

(a) "Respondent" means Atlantic Richfield Company, a corporation, and its subsidiaries, successors and assigns.

(b) The term "Subsidiary" with respect to any Person named herein means any corporation in which such named Person owns fifty percent (50%) or more of the outstanding securities having ordinary voting power to elect a majority of the Board of Directors of such corporation (whether or not any other class of security has or might have voting powers by reason of the happening of a contingency).

(c) "Person" means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association or organization, or government or agency or political subdivision thereof, or other business or legal entity, other than Respondent.

(d) "Copper Company" means any Person having Operating Copper Properties within the Restricted Area whose combined average annual copper mine production for the five years immediately preceding an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order exceeded 10,000 short tons of recovered copper, excepting any such Person which has ceased production of copper from all of its Operating Copper Properties within the Restricted Area for more than two years prior to an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order.

(e) "The Copper Market" shall consist of all primary copper production from mines in the United States, as reported by the American Bureau of Metal Statistics for the most recent applicable calendar year or years for which statistics have been published prior to the date of an acquisition or Joint Venture which may be subject

to the provisions of Paragraphs I through V, VIII, IX or X of this order.

(f) "Operating Copper Property" means any deposit which at the time of an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order is being mined and (i) which is being operated primarily for the purpose of recovering copper contained in the ore being mined. (ii) for which the dollar value of copper recovered exceeds the dollar value of each other mineral recovered except as provided in Paragraph IX, or (iii) which is producing, as a by-product or co-product of other mine production, copper at an average annual rate of 20,000 short tons or more of recovered copper after adjustment in each year for production lost as a result of strikes or other labor interruptions. Operating Copper Properties shall also include:

(1) Any deposit, which would otherwise be an Operating Copper Property, except that its operation has been suspended or discontinued for less than two years prior to an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order or whose operations were suspended as a consequence of or in connection with the contemplated acquisition of such deposit by Respondent.

(2) Any Non-Operating Copper Property which at the time of an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order is under active mine development and is scheduled by its owner or owners to enter into production within five years.

(g) "Non-Operating Copper Property" means any deposit for which its owner or owners contemplate at the time of an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order (i) that any operation would be primarily for the recovery of copper, (ii) that the dollar value of copper recovered would exceed the dollar value of each other mineral to be recovered except as provided in Paragraph IX, or (iii) that any operation would produce, as a by-product or co-product of its mine production, copper at an average annual rate of 20,000 short tons or more of recovered copper.

(h) (1) Subject to the provisions of subparagraph (2) of this definition "h", "Eligible Person" means all Persons other than Noranda Mines Ltd., INCO Ltd., the Anglo American Group, and any of their respective subsidiaries, and any other Person having more than ten percent (10%) of the Copper Market for any of the three calendar years immediately preceding (i) an attempt by such

Person to acquire a property or interest to be divested under the provisions of Paragraphs I through V of this order, or (ii) an attempt by such Person to enter into a Joint Venture with Respondent which may be subject to the provisions of Paragraphs IX and X of this order. The "Anglo American Group" means the Anglo American Corporation of South Africa Limited, Charter Consolidated Ltd., De Beers Consolidated Mines Ltd., Hudson Bay Mining and Smelting Co., Limited, Minerals and Resources Corporation Ltd., Anglo American Corporation of Canada Limited, and Inspiration Consolidated Copper Company and their respective subsidiaries.

(2) Any Person otherwise eligible under subparagraph (1) of this definition "h" having between five percent (5%) and ten percent (10%) of the Copper Market for any of the three calendar years immediately preceding any of the events described in sections (i) and (ii) of subparagraph (1) of this definition "h", shall be considered to be an "Eligible Person" only upon prior approval of the Commission.

(i) "Ineligible Person" means all Persons other than those classified as "Eligible Persons" in definition "h."

(j) "Divest" means any act by which Respondent sells, transfers, conveys or relinquishes ownership, possessory interest and control in a property subject to this order.

(k) "Fair Value" means such consideration, taking into account all terms and conditions of transfer and payment therefor, that would be exchanged between a willing buyer and a willing seller for the transfer of a property, where neither buyer nor seller was under any constraints or impediments, including any obligation on the part of the seller to transfer the property within a specified period, whether or not that fact were known to the buyer.

(l) "Joint Venture" means a joint business undertaking by two or more Persons, for the purpose of carrying out a particular objective or objectives, pursuant to an agreement which provides for (i) joint contributions to capital, which may include tangible and intangible assets, (ii) sharing of profits or production in kind, and (iii) a mutual right to control, *provided, however,* that this definition shall not include any venture in which Respondent presently participates, and, *provided further,* that a holder of a right to a Deferred Compensation Interest shall not for that reason be a participant in a Joint Venture.

(m) "Restricted Area" means the United States, including Puerto Rico.

(n) "Deferred Compensation Interest" means any promise of deferred payment, including any royalty, carried interest, production payment or other interest that is not coupled with a right to

participate in the operation or management of a property, except to the extent necessary to protect the holder's Deferred Compensation Interest upon default or where actions by the purchaser or operator threatened destruction of, or substantial harm to, the holder's Interest. Payment to the holder of a Deferred Compensation Interest may include cash or production in kind. Payment to Respondent with respect to a Deferred Compensation Interest shall not exceed either (i) ten percent (10%) of production in kind, (ii) ten percent (10%) of gross proceeds, (iii) ten percent (10%) of net profits, or (iv) ten percent (10%) of net smelter returns resulting from the operation of a property subject to such Interest.

(o) "Major Change of Condition" means an involuntary reduction in Respondent's domestic production of copper whereby its total domestic copper mine production in any calendar year fails to exceed 110,000 short tons of recovered copper and it appears that such reduced level of production (absent any act permitted by Paragraph XI) is unlikely to be materially increased above 110,000 short tons of recovered copper, annual production, for a two-year period following such year of initial reduction. Such involuntary reduction means:

(i) acts of God including fire, flood and earthquakes, unexpected variations or changes in the technical characteristics of ore deposits, rebellion, riot, civil unrest or war, whether declared or not;

(ii) changes in operating, raw materials, transportation or other costs beyond the direct control of Respondent; or

(iii) the action or inaction of any federal, state or local government entity, including without limitation actions promulgating, modifying or refusing to modify environmental, health, safety or other regulations

as a result of which, continued operations at previous levels at any copper property or facility, including any concentrator, smelter or refinery of Respondent, would result in net operating losses as measured by the difference between actual or expected operating revenues and actual or expected cash costs of production, along with any actual or expected capital charges directly related to the involuntary reduction, for the affected properties and facilities. Further, Respondent's copper mine production in any year shall be adjusted by the amount of production lost through any strike or other labor interruption (whether legal or illegal, authorized or unauthorized), as measured by the actual production in the previous year for the period corresponding to the period of strike or labor interruption (unless a strike or labor interruption was in effect during such prior period, in which case the measurement shall be

based on the next closest year during which there was no strike or labor interruption during the corresponding period), provided that if an involuntary reduction, as defined herein, occurs prior to a strike or labor interruption, the production lost as a result of strike or labor interruption shall be measured by the prior year's production adjusted downward by the effect of the involuntary reduction.

(p) "Catastrophic Change of Condition" means a Major Change of Condition whereby Respondent's total domestic copper mine production in any calendar year fails to exceed 80,000 short tons of recovered copper.

(q) "Limitation Period" means the period commencing at the Effective Date of this order and terminating on the fifth anniversary of such date; *provided, however,* that: (i) should Respondent fail to divest four of the five properties subject to Paragraphs I through V within two calendar years of the Effective Date of this order, the Limitation Period shall be extended day for day by the time in excess of two calendar years from such Effective Date taken by Respondent to divest the fourth property which is ultimately divested, and (ii) the Limitation Period shall be extended day for day by the time in excess of four calendar years from such Effective Date taken by Respondent to divest the fifth property which is ultimately divested (with any additional time resulting from the operation of clauses (i) and (ii) to be calculated concurrently rather than consecutively); and, *provided further,* that in no event shall the Limitation Period extend beyond the tenth anniversary of the Effective Date of this order.

(r) "Anamax" means Anamax Mining Company, a partnership organized under the laws of the State of Arizona between the Anaconda Company and Amax Arizona, Inc., a subsidiary of Amax.

(s) "Effective Date" means the day on which this order becomes final by service upon Respondent by the Commission.

I

It is ordered, That within three years of the Effective Date of this order, Respondent shall divest its entire interest in the Heddleston property which shall include all fee lands, patented mining claims, unpatented mining claims, leases and other interests, including water rights appurtenant thereto, located in the following legal subdivisions situated in Lewis and Clark County, State of Montana, to wit:

Township 14 North, Range 6 West, Montana Principal Meridian

Sections 16 to 22, inclusive; 27 to 29, inclusive; and 31 to 34, inclusive.

Township 15 North, Range 7 West, Montana Principal Meridian

Sections 20 to 22, inclusive; 27 and 28,

to an Eligible Person, *provided, however,* that Respondent may continue to hold a Deferred Compensation Interest. Should Respondent, after diligent efforts, fail to divest the Heddleston property at Fair Value within the specified three-year period, it shall transfer authority to divest the property to a Trustee as provided in Paragraph XII.

II

It is further ordered, That within four years of the Effective Date of this order, Respondent shall divest its entire interest in the Ann Mason property which shall include all fee lands, patented mining claims, unpatented mining claims, leases and other interests, including water rights appurtenant thereto, located in the following legal subdivisions situated in Lyon County, State of Nevada, to wit:

Township 13 North, Range 24 East, Mount Diablo Base and Meridian

Section 10: SE 1/4
Section 11: S 1/2
Section 12: SW 1/4
Section 13: W 1/2
Section 14: All
Section 15: E 1/2
Section 22: NE 1/4
Section 23: N 1/2
Section 24: NW 1/4

to an Eligible Person, *provided, however,* that Respondent may continue to hold a Deferred Compensation Interest. For purposes of this Paragraph II, Amax and its subsidiaries shall be considered Eligible Persons if, with respect to the divestiture of the Respondent's interest in Anamax provided in Paragraph V, Respondent shall have obtained from Amax or its subsidiaries and/or Anamax substantially the entire Helvetia Property, as described in Paragraph V(2), subject to the retention by Anamax or Amax or its subsidiaries of a Deferred Compensation Interest in a magnitude not to exceed that set forth in the last sentence of definition "n." Should Respondent, after diligent efforts, fail to divest the Ann Mason property at a Fair Value within such four year period, it shall

transfer authority to divest the property to a Trustee as provided in Paragraph XII.

III

It is further ordered, That within four years of the Effective Date of this order, Respondent shall divest its entire interest in the Bear property which shall include all fee lands, patented mining claims, unpatented mining claims, leases and other interests, including water rights appurtenant thereto, located in the following legal subdivisions situated in Lyon County, State of Nevada, to wit:

Township 14, North, Range 25 East, Mount Diablo B.M.

Section 33:	E 1/2 SW 1/4, W 1/2 SE 1/4, S 1/2 NE 1/4 SE 1/4

Township 13 North, Range 25 East, Mount Diablo B.M.

Section 3:	SW 1/4 NW 1/4, N 1/2 NW 1/4 SW 1/4
Section 4:	NE 1/4, E 1/2 E 1/2 NW 1/4, N 1/2 N 1/2, SE 1/4

to an Eligible Person, *provided, however,* that Respondent may continue to hold a Deferred Compensation Interest. For purposes of this Paragraph III, Amax and its subsidiaries shall be considered Eligible Persons if, with respect to the divestiture of the Respondent's interest in Anamax provided in Paragraph V, Respondent shall have obtained from Amax or its subsidiaries and/or Anamax substantially the entire Helvetia Property, as described in Paragraph V(2), subject to the retention by Anamax or Amax or its subsidiaries of a Deferred Compensation Interest in a magnitude not to exceed that set forth in the last sentence of definition "n." Should Respondent, after diligent efforts, be unable to divest the Bear property at Fair Value within such four year period, it shall transfer authority to divest the property to a Trustee as provided in Paragraph XII.

IV

It is further ordered, That within one year of the Effective Date of this order, Respondent shall divest its entire voting stock interest (including any common or preferred stock which it may own at the time of disposition) in Inspiration Consolidated Copper Company, or

any successor thereto, to an Eligible Person. For purposes of this Paragraph IV, the Anglo-American Group shall be considered to be an Eligible Person. Should Inspiration Consolidated Copper Company, or any successor thereto, fail or refuse to redeem for any reason, including lack of capital or earned surplus sufficient to permit lawful redemption, the common or preferred stock held by Respondent at the time such stock is tendered for redemption, Respondent shall have an additional two years to dispose of its interest. Should Respondent, after diligent efforts, fail to divest its interest in Inspiration Consolidated Copper Company or any successor thereto at Fair Value within the specified additional two year period, Respondent shall transfer authority to divest its interest to a Trustee as provided in Paragraph XII. Fair Value for purposes of this Paragraph IV shall be defined to be any consideration equal to or greater than $33 a share, or the equivalent thereto after adjustment for any stock dividends or stock splits which may occur after March 1, 1979.

V

It is further ordered, That within five years of the Effective Date of this order, Respondent shall Divest its interest in Anamax to an Eligible Person. Anamax is engaged in the mining of copper in Pima County, Arizona, from the Twin Buttes Mine and the Palo Verde Mine, the latter mine operated by the Eisenhower Mining Company, a partnership with Asarco, Inc. Anamax's current annual production capacity from the two mines is 120,000 tons of recovered copper, including 35,000 tons of electrowon refined copper, and Anamax intends to produce uranium from copper ores. For purposes of this Paragraph V Amax and its subsidiaries shall be considered to be Eligible Persons.

Provided, however, that notwithstanding the foregoing:

(1) It is intended that the divestiture of Respondent's interest in Anamax is to be accomplished in such a manner as to avoid a termination of the Anamax partnership for federal income tax purposes. It is recognized that under Section 708(b)(1)(B) of the Internal Revenue Code, and the pertinent Treasury Regulations, the partnership will be treated as having terminated for tax purposes in the event that there is a sale or exchange of 50% or more of partnership capital and profits within a twelve month period; such a tax termination would potentially generate severe adverse tax consequences. In order to avoid such a termination, Respondent shall

not be required to divest its entire interest in Anamax on condition that:

(a) Respondent shall, in any event, divest at least so much of its interest in Anamax as to constitute a divestiture of a 45% interest in the capital of Anamax (as the term "capital" is used in Section 708 of the Internal Revenue Code of 1954 in its present form or as hereafter amended or in any corresponding provision of any subsequent federal tax law), provided that notwithstanding any other provision of this order said divestiture shall include, for purposes of the 45% divestiture requirement, divestiture by way of a total or partial liquidation of Respondent's interest in Anamax as provided in subparagraph (2) or a total or partial reallocation of Respondent's interest within Anamax as provided in subparagraphs (3) and (4) and/or a sale, exchange, transfer or other disposition of such interests or any combination of the foregoing;

(b) In complying with its obligations under this subparagraph (1), Respondent shall first propose a divestiture which will reduce its interest in Anamax to an interest which shall not exceed an interest reasonably adequate to prevent a termination of the Anamax partnership for federal tax purposes, provided, for purposes of this subparagraph (1)(b), said divestiture shall include divestiture by way of a total or partial liquidation of Respondent's interest in Anamax as provided in subparagraph (2) or a total or partial reallocation of Respondent's interests within Anamax as provided in subparagraphs (3) and (4) and/or a sale, exchange, transfer or other disposition of such interests or any combination of the foregoing. Respondent may then seek a ruling from the Internal Revenue Service to the effect that the divestiture proposed under this subparagraph (1)(b) will not cause a termination of Anamax for purposes of such Section 708 in its present form or as hereafter amended or under any corresponding provision of any subsequent federal tax law. Should the Internal Revenue Service decline to issue such ruling or fail to issue such ruling within a period of seven months after the ruling is requested, Respondent shall effect a divestiture pursuant to subparagraph (1)(a).

(c) Thirty (30) days prior to filing any request for such ruling as is described under subparagraph (1)(b) above, Respondent shall provide a copy of such request to the Commission, and the Commission thereafter will have twenty (20) days in which to submit the question of Respondent's compliance with subparagraph (1)(b) above to arbitration pursuant to Paragraph XIX or pursuant to such other procedure as the Commission and Respondent may then agree to.

Any arbitration held under this subparagraph (1)(c) shall be solely for the purpose of determining whether Respondent's proposed divestiture, as set forth in the request for ruling, constitutes a reasonable effort to comply with the provisions of subparagraph (1)(b). The arbitrator shall be required to render his decision within seventy-five (75) days of the date the Commission shall submit the proposed divestiture to arbitration; should the arbitrator decide in Respondent's favor or fail to issue a final decision within such seventy-five (75) day period, Respondent shall be entitled to go forward with the proposed divestiture, which shall be deemed to be in compliance with the provisions of subparagraph (1)(b);

(d) If the Commission believes that a ruling requested under subparagraph (1)(b) should be issued, Respondent will not object to the Commission's submission of such views to the Internal Revenue Service; and

(e) Respondent's remaining non-divested interest in Anamax, whether retained pursuant to subparagraph (1)(a) or (1)(b), but excluding any interest retained or received by Respondent as provided in subparagraphs (2), (3) and (4), shall be arranged so that Respondent will receive cash or other monetary consideration, rather than take copper in kind, in connection with Anamax's continued operations, provided that such arrangement shall not be required if Respondent (i) seeks the concurrence of Anamax and any partner or partners therein and fails to receive such concurrence within eight months after such concurrence is requested, or (ii) seeks a ruling from the Internal Revenue Service, and the Service declines or fails to issue a ruling within eight months after such ruling is requested, that such arrangement, combined with any other changes in Respondent's interest in Anamax, will not cause a termination of Anamax for purposes of Section 708 of the Internal Revenue Code of 1954 in its present form or as hereafter amended or in any corresponding provision of any subsequent federal tax law.

(2) Notwithstanding anything in subparagraph (1) or otherwise contained in this order, Respondent may receive from Anamax in total or partial liquidation of or in exchange for Respondent's interest therein (a) all or a portion of Anamax's interest in any one or more of the properties in the following townships situated in Pima County, State of Arizona, including East Helvetia, West Helvetia, Empire Ranch and Cienega Ranch (the "Helvetia Property"), to wit:

Township 18 South, Ranges 15, 16, 17 and 18 East
Township 19 South, Ranges 15, 16, 17 and 18 East,

Township 20 South, Ranges 17 and 18 East, all Gila and Salt River Base and Meridian,

which property is presently owned or controlled by Anamax, and/or (b) current or deferred cash payments from Anamax (any deferred cash payments may be evidenced by Anamax's promissory note or notes).

(3) Nothing in subparagraph (1) or otherwise contained in this Order shall preclude Respondent from effecting the divestiture of its interests in Anamax through a reallocation of partnership interests within Anamax as a result of which Respondent retains or increases an interest in the Helvetia Property, which may be held within, and be owned by, the Anamax partnership, in which Respondent may have an interest, provided that Respondent's interests in other partnership capital (other than that subject to this subparagraph (3)) shall not exceed the amounts permitted by subparagraph (1), and further provided that any management rights which may be held by Respondent in Anamax, attributable to an interest held under this subparagraph (3), shall be limited to the Helvetia Property, and do not permit Respondent to participate in the active management or control of those other portions of Anamax divested pursuant to this Paragraph V.

(4) Notwithstanding anything in subparagraph (1) or otherwise contained in this order, Respondent may retain, as a partner in Anamax or otherwise, the right to take in kind, or the right to sell, any minerals produced by Anamax other than uranium and copper (except that this exclusion shall not apply to uranium and copper produced as a consequence of the operation of the Helvetia Property, as provided under subparagraph (3), or as a consequence of the provisions of subparagraph (1)(e)).

Provided further, Respondent shall use its best efforts to maintain in force to the time of divestiture contemplated by this Paragraph V those provisions in the Partnership Agreement, as presently amended, which provide that should Respondent's interest in Anamax be reduced to less than 45%, it shall cease to be entitled to equal participation in the management of the partnership and, further, that should its interest be reduced to less than 20%, such remaining interest may, under certain circumstances, be purchased at the option of Amax.

Provided further, that Respondent shall not make any voluntary contribution to Anamax which would have the effect of increasing its percentage partnership interest in Anamax, provided that Respondent shall remain free to make any contributions necessary to meet

its obligations pursuant to the Partnership Agreement, as amended, any production payment agreement in effect on the Effective Date of this order or the mining plan in effect on the Effective Date of this order or any successor mining plan adopted under the Partnership Agreement, as amended, provided that the implementation of any such successor plan shall not increase Respondent's percentage partnership interest in Anamax.

And provided further, that should Respondent, after diligent efforts, be unable to divest its interest in Anamax, as provided by this Paragraph V at Fair Value within such five year period, it shall transfer authority to divest such interest, to the extent required by this Paragraph V, to a Trustee as provided in Paragraph XII.

VI

It is further ordered, That Respondent, as part of its compliance with provisions in Paragraphs I, II, III and V, shall undertake reasonable steps to advertise the availability for acquisition of the properties subject to said respective paragraphs. In discharge of this obligation, Respondent shall advertise each property, so long as it has not been divested, twice yearly in *Engineering and Mining Journal, Mining Congress Journal, Mining Engineering, London Mining Journal,* and *The Wall Street Journal.* Such advertisements shall contain a description of the property offered at least as detailed as the description contained in this order, and shall refer inquiring persons to an employee of Respondent active in Respondent's efforts to sell such property, giving his address and telephone number. In addition, Respondent shall within 30 days of the Effective Date of this order mail a description of each property, including the information set forth above, to no less than 50 Eligible Persons engaged in mining within the United States. Respondent agrees that it will negotiate in good faith with all Persons seeking to acquire any of the properties subject to Paragraphs I, II, III and V who are Eligible Persons, who appear to be genuinely interested in acquiring such property for their use or on behalf of an Eligible Person, and who demonstrate to Respondent their financial ability to accomplish purchase at Fair Value. Respondent shall make available to such *bona fide* prospective purchasers, to the extent it has the legal right to do so, access to factual data, including drill hole locations, logs and assay reports, and will permit escorted on-site inspections of the properties, subject to Respondent having obtained written agreement that such Person will hold confidential any information disclosed, will use such information solely for the purpose of evaluating the property and will not use such information for any

business or competitive purpose. With respect to Anamax, Respondent will use its best efforts to obtain the consent of Amax or its subsidiaries to the disclosure of factual data to prospective purchasers consistent with the provisions of the preceding sentence. Respondent shall not be required to deal with Persons purporting to act as agents for certain unknown or unspecified buyers whether or not such Persons state they intend to collect a commission or other consideration from Respondent.

VII

It is further ordered, That with respect to the divestitures required by Paragraphs I, II, III and V, this order shall not be deemed to prohibit Respondent (i) from accepting a Deferred Compensation Interest or (ii) from retaining, accepting and enforcing a promissory note, mortgage, deed of trust, lien or other similar interest, not to exceed 25 years in duration, that is not coupled with a right to participate in the operation or management of the property, except upon default or where actions by the purchaser or operator threaten destruction of, or substantial harm to, such interest or interests of Respondent and then only to the extent necessary to protect such interests, for the purpose of securing to Respondent payment of the price agreed upon by Respondent and the purchaser in connection with each divestiture; *provided, however,* that if Respondent by enforcement or settlement of such interest, or for any other reason, regains direct or indirect ownership or control of any of the divested assets, properties, rights and privileges, tangible and intangible, Respondent shall, consistent with the provisions of this order, redivest such ownership or control as expeditiously as possible, but in no event beyond two years of the time of reacquisition; *provided further,* that should Respondent fail to redivest any such reacquired ownership or control within two years as specified in this Paragraph VII, Respondent shall transfer authority to divest the property to a Trustee as provided in Paragraph XII.

VIII

It is further ordered, That during the Limitation Period Respondent shall not acquire, through purchase, lease or other such transaction which would confer upon Respondent ownership or control or possessory interest, any Operating Copper Property within the Restricted Area from any Copper Company, without the prior approval of the Commission; however, this restriction shall not apply to any acquisition of any ore deposit or deposits in the aggregate of

less than 250,000 tons of recoverable copper which (i) is adjacent to or nearby an ore deposit owned or controlled by Respondent prior to such acquisition, (ii) would, in the interests of adopting efficient mining practices, be consolidated with Respondent's deposit for mining purposes and share a common ore concentrator with Respondent's deposit and (iii) does not contain recoverable copper in excess of the amount of recoverable copper in such adjacent or nearby deposits owned or controlled by Respondent immediately prior to the acquisition.

IX

It is further ordered, That during the Limitation Period, Respondent shall not participate in any operating Joint Venture with any Ineligible Person with respect to any Operating Copper Property within the Restricted Area, provided further that no Joint Venture permitted by this Paragraph IX shall engage in the joint marketing or sale of copper, in whatever form, produced by the Joint Venture.

Provided, however, that nothing in this Paragraph IX or Paragraph X shall prevent Respondent from participating in the State of Alaska during the Limitation Period in (i) any operating Joint Venture with respect to an Operating Copper Property owned or controlled by Respondent prior to the establishment of such Joint Venture or (ii) any Joint Venture engaged in the development or construction of mine facilities with respect to a Non-Operating Copper Property owned or controlled by Respondent prior to the establishment of such Joint Venture, so long as:

(i) No more than a 40 percent (40%) interest in the capital and profits in any such Joint Venture is held, singly or in the aggregate, by Ineligible Persons;

(ii) Neither Kennecott Copper Corp., Phelps-Dodge Corporation, Newmont Mining Corp. nor Asarco Inc. participates in any such Joint Venture, without prior approval of the Commission; and

(iii) Any such Joint Venture shall not engage in the joint marketing or sale of copper, in whatever form, produced by such Joint Venture.

Provided further, that nothing in this Paragraph IX or in Paragraph X shall prevent Respondent from participating in the State of Alaska during the Limitation Period in (i) any operating Joint Venture with respect to an Operating Copper Property owned or controlled by a Person other than Respondent prior to the establishment of such Joint Venture, or (ii) any Joint Venture

engaged in the development or construction of mine facilities with respect to a Non-Operating Copper Property owned or controlled by a Person other than Respondent prior to the establishment of such Joint Venture so long as:

(i) Respondent holds no more than a 40 percent (40%) interest in the capital and profits in any such Joint Venture;

(ii) No more than two Ineligible Persons may participate with Respondent in any such Joint Venture; and

(iii) Any such Joint Venture shall not engage in the joint marketing or sale of copper, in whatever form, produced by such Joint Venture.

And provided further, that for purposes of this Paragraph IX and Paragraphs VIII and X with respect to ore deposits in the State of Alaska, clause (ii) in definition "f" shall read "(ii) for which the dollar value of copper recovered exceeds the dollar value of all other minerals recovered" and clause (ii) in definition "g" shall read "(ii) that the dollar value of copper recovered would exceed the dollar value of all other minerals to be recovered;" definitions "f" and "g" shall in all other respects remain unchanged.

X

It is further ordered, That during the Limitation Period, Respondent shall not participate in any Joint Venture engaged in the development or construction of mine facilities with any Ineligible Person with respect to any Non-Operating Copper Property within the Restricted Area, provided further that no Joint Venture permitted by this Paragraph X shall engage in the joint marketing or sale of copper, in whatever form, subsequently produced by the Joint Venture.

Provided further, that nothing contained in Paragraphs VIII, IX and X shall prevent Respondent, in the interest of adopting efficient mining practices at a specific mining property, from acquiring or receiving, or in turn transferring or delivering, or swapping, copper deposits, ore, or concentrates from, to, or with another Copper Company or Companies owning or operating a copper property adjacent to or overlapping copper properties of Respondent, provided, however, that such transactions shall involve no more of the respective adjacent or overlapping copper properties than is reasonably necessary to such purpose.

XI

It is further ordered, That in the event of a Major Change of Condition, Respondent shall be entitled within the Limitation Period to make one acquisition or to enter into one Joint Venture which would otherwise be prohibited by Paragraphs VIII, IX or X, provided that such acquisition or Respondent's share of such Joint Venture shall not increase Respondent's total domestic copper mine production above 145,000 short tons of recovered copper a year, and further provided that no Joint Venture permitted by this Paragraph XI shall engage in the joint marketing or sale of copper, in whatever form, subsequently produced by the Joint Venture. In the event of a Catastrophic Change of Condition, Respondent shall be entitled to make one such acquisition or enter into one such Joint Venture without limitation as to size.

XII

It is further ordered, That should it be necessary to appoint a Trustee with respect to a property subject to Paragraphs I through V, such Trustee shall be appointed by agreement of Respondent and the Commission, acting through the Director of the Bureau of Competition or such other person as the Commission may designate. If they are unable to agree, then each shall nominate a representative, who, along with a third person appointed under the Commercial Rules of the American Arbitration Association, shall select the Trustee by majority vote. The Trustee shall be charged to attempt diligently to effect divestiture at Fair Value within three years from the date of his appointment. Should the Trustee not have divested the property within such three year period, he shall divest it within one year at the best price he is reasonably able to obtain. The functions and obligations of the Trustee are set forth in Appendix I. Nothing shall prevent Respondent from divesting a property after the appointment of a Trustee.

XIII

It is further ordered, That Respondent may not divest more than two of the properties subject to Paragraphs I through V to any one Eligible Person, including the subsidiaries of such Person, without the prior approval of the Commission, except that Amax and its subsidiaries may purchase the properties subject to Paragraphs II, III and V consistent with the provisions of said Paragraphs.

XIV

It is further ordered, That nothing in this Order shall prohibit:

(1) Acquisition by Respondent of all or part of the securities or assets of its subsidiaries.

(2) Formation of subsidiaries by Respondent and the transfer thereto of assets of Respondent or of other subsidiaries.

XV

It is further ordered, That Respondent may apply for relief to the Commission upon the occurrence of any change subsequent to the Effective Date of this order which substantially alters the competitive situation in the copper industry or which materially affects the copper operations of the Respondent.

XVI

It is further ordered, That jurisdiction is retained by the Commission for the purpose of enabling the parties to this order to apply to it at any time for such future orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions hereof; *provided, however,* that in no event shall the provisions of this order be enlarged or extended to require Respondent to divest properties or interests other than those specified in Paragraphs I, II, III, IV and V or to limit or otherwise restrict Respondent's activities other than as set forth in Paragraphs VIII, IX and X. Any order of the Commission construing or declining to construe or modifying or declining to modify any of the provisions of this order shall be appealable, to the extent provided by statute, to any court of any competent jurisdiction.

XVII

It is further ordered, That pending any divestiture required by this order, Respondent shall not knowingly cause or permit the deterioration of the assets and properties specified in Paragraphs I, II, III and V in any manner that impairs the marketability of any such assets and properties. Respondent may, but shall not be required to, make capital expenditures for the improvement of any such assets and properties to an extent consistent with other provisions of this order.

XVIII

It is further ordered, That in addition to the requirements of

Paragraphs I through V concerning the divestitures ordered therein, none of the stock, assets, properties, rights, privileges or interests of whatever nature, tangible or intangible, ordered to be divested shall be sold or transferred, directly or indirectly, to any Person who is at the time of the divestiture an officer, director, employee or agent of, or under the control or direction of, Respondent, or to any person who owns or controls, directly or indirectly, more than one percent (1%) of the outstanding shares of the capital stock of Respondent.

XIX

It is further ordered, That any dispute between Respondent on the one hand and the Commission or the Trustee on the other hand arising under Paragraphs I through XII shall be resolved at the option of Respondent, the Commission or the Trustee by arbitration undertaken pursuant to the Commercial Rules of the American Arbitration Association.

XX

It is further ordered, That within sixty (60) days from the Effective Date of this order, and three times annually thereafter, until it has fully complied with Paragraphs I through V of this order, Respondent shall submit a verified report in writing to the Commission setting forth in reasonable detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include: (a) a specification of the steps taken by Respondent to make public its desire to divest the properties specified in Paragraphs I through V, (b) a list of all Persons or organizations to whom notice of divestiture has been given, and (c) a summary of all negotiations undertaken, giving the identity and address of all interested persons or organizations and indicating whether the negotiations are concluded or are still underway, provided, however, that Respondent may delete from the report the identity of persons it has negotiated with if, in its business judgment, the disclosure of such information as a consequence of a request or suit by any Person or any committee or subcommittee thereof would hinder its efforts to divest any property subject to Paragraphs I through V at Fair Value. In each case, Respondent will make available for inspection in Washington D.C. a complete copy of its report containing such deleted information which may be reviewed by, but not copied by, personnel from the Commission. Upon request from the Commission, Respondent will make available such additional information relating to any specified negotiation which is

reasonably necessary to enable the Commission to review Respondent's efforts to comply with the provisions of Paragraphs I through V of this order; *provided, however,* Respondent may limit disclosure of confidential or proprietary information in accord with the procedures set forth in the preceding sentence.

XXI

It is further ordered, That Respondent shall notify the Commission at least thirty (30) days prior to any change in its corporate structure (such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation) which may affect compliance obligations arising out of this order.

XXII

It is further ordered, that for so long as the Limitation Period is in effect, Respondent shall notify the Commission at least sixty (60) days in advance of (i) any acquisition by it of any Operating Copper Property or Non-Operating Copper Property within the Restricted Area from any Copper Company or (ii) any participation by it in any operating Joint Venture with respect to any Operating Copper Property within the Restricted Area, or (iii) any participation by it in any Joint Venture engaged in the development or construction of mine facilities with respect to any Non-Operating Copper Property within the Restricted Area. If any such acquisition or Joint Venture is to be undertaken pursuant to any Major Change of Condition or Catastrophic Change of Condition, Respondent shall provide at the time of notification above, a description of such Major Change of Condition or Catastrophic Change of Condition.

XXIII

It is further ordered, That Respondent shall, upon written request of the Secretary of the Commission or the Director of the Bureau of Competition of the Commission made to Respondent at its principal office for the purpose of securing compliance with this order, and for no other purpose, permit duly authorized representatives of the Commission, subject to any legally recognized privilege:

(1) Reasonable access during the office hours of Respondent, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, and other records and documents in Respondent's

possession or control which relate materially and substantially to any matter contained in this Order.

(2) An opportunity, subject to the reasonable convenience of Respondent, to interview officers or employees of Respondent, who may have counsel present, regarding such matters.

The foregoing provision shall not be interpreted to provide any access for the Commission to records relating to any of the business activities of the Respondent other than its copper operations subject to this order.

XXIV

It is further ordered, That no acquisition, Joint Venture or other act or transaction to which Respondent is a party shall be deemed immune or exempt from the provisions of the antitrust laws by reason of anything contained in this order.