

IN THE MATTER OF

TEXAS BOARD OF CHIROPRACTIC EXAMINERS

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

Docket C-3379. Complaint, Apr. 21, 1992--Decision, Apr. 21, 1992

This consent order requires, among other things, the Texas licensing Board to repeal existing rules that prohibit truthful, nondeceptive advertising, and certain types of solicitation, and also prohibits respondent from adopting similar rules or policies in the future. In addition, respondent is prohibited from taking or threatening disciplinary action against any person or organization that advertises truthfully.

Appearances

For the Commission: *Gary Kennedy* and *Thomas Carter*.

For the respondent: *Frank Knapp, Jr.*, Assistant Attorney General, Austin, TX.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Texas Board of Chiropractic Examiners has violated Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

RESPONDENT

PARAGRAPH 1. Respondent Texas Board of Chiropractic Examiners ("the Board") is organized, exists and transacts business under the laws of the State of Texas, and has its principal office and place of business at Building C, Suite 245, 1300 East Anderson,

Austin, Texas. The Board is subject to the Commission's jurisdiction pursuant to Section 5 of the Federal Trade Commission Act.

PAR. 2. The Board is composed of nine members who are appointed by the governor to staggered six-year terms. Six of the members must be chiropractors who have practiced continuously in Texas for at least five years prior to their appointment to the Board, and the members must continue to practice chiropractic while on the Board. The other three members must be individuals who are not associated with the health care profession. Tex. Civ. Code Ann. Art. 4512b, Sections 3(b) and (c). Board members spend a relatively small percentage of their time on Board matters, and compensation is limited to a per diem and transportation allowance for days of actual service. Tex. Civ. Code Ann. Art. 4512b, Section 11(c).

PAR. 3. The Board has exclusive authority to license chiropractors in Texas. It is unlawful to practice chiropractic in Texas without first obtaining a license from the Board. Tex. Civ. Code Ann. Art. 4512b, Section 5(a). The Board is authorized to adopt rules and regulations necessary for the performance of its duties. Tex. Civ. Code Ann. Art. 4512b, Section 4(a). The Board is also authorized to refuse to issue a license to, or to suspend or revoke an existing license of, any person found guilty of any of sixteen enumerated offenses. Tex. Civ. Code Ann. Art. 4512b, Section 14(a).

TRADE AND COMMERCE

PAR. 4. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, chiropractors in Texas compete with one another, and with a majority of the members of the Board.

PAR. 5. The acts and practices described below are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

STATE POLICY CONCERNING
CHIROPRACTIC ADVERTISING AND SOLICITATION

PAR. 6. The State of Texas has no articulated policy to restrict chiropractors from engaging in truthful, nondeceptive advertising. Section 14(a) of the Texas Chiropractic Act, however, authorizes the Board to impose two sorts of restrictions on truthful, nondeceptive advertising. Section 14(a)8 authorizes a ban on truthful, nondeceptive claims of professional superiority, and Section 14(a)16 authorizes a ban on solicitation of patients by use of case histories of patients of other chiropractors. Otherwise, under Section 17b of the Act, "The Board may not adopt rules restricting . . . advertising by a person regulated by the Board except to prohibit false, misleading, or deceptive practices by the person."

UNLAWFUL BOARD CONDUCT

PAR. 7. The Board combined or conspired with its members or others, or acted as a combination of its members or others, to restrain competition among chiropractors by preventing them from disseminating truthful, nondeceptive information in their advertising and solicitation. In furtherance of this combination or conspiracy, the Board has engaged in the following acts or practices, among others:

(A) Adopted and maintained Rules of Practice that declared the following to be unprofessional conduct:

1. Making damaging statements about another licensee or group of licensees (Rule 75.1(1));
2. Using such terms in advertising as "most modern," "scientific," "latest procedures," "best equipped," or "any other like words or phrases" (Rule 75.1(3)); and
3. Soliciting patients by demonstrating chiropractic "in public places" (Rule 75.1 (5)).

(B) Adopted and maintained Rules of Practice that prohibit chiropractors from using any form of public communication that:

1. Contains self-laudatory statements (Rule 77.2(1));
2. Contains statistical data or other information based on past performance or prediction of future success (Rule 77.2(3));
3. Contains testimonials about or endorsements of chiropractors, or utilizes case histories of chiropractors' patients (Rule 77.2(4)); or
4. Contains statements that are intended or are likely to attract patients by the use of showmanship or self-laudation, including but not limited to the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, jingles, music, lyrics, pictures or photographs, or sensational language or format (Rule 77.2(5)).

(C) Adopted and maintained a Rule of Practice that specifies that advertising must be "dignified" and can only contain twelve categories of information (Rule 77.3).

CONSUMER AND COMPETITIVE INJURY

PAR. 8. The combination or conspiracy and the acts and practices described above have restrained and continue to restrain competition unreasonably and to injure consumers by, among other things:

- (A) Depriving consumers of the benefits of vigorous competition among chiropractors;
- (B) Depriving consumers of truthful, nondeceptive information about the fees, services, and products offered by chiropractors;
- (C) Preventing chiropractors from engaging in truthful, nondeceptive advertising about their fees, services and products; and
- (D) Preventing chiropractors from engaging in truthful, nondeceptive solicitation.

PAR. 9. The acts and practices described above constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act. The acts and practices, or the effects thereof, are continuing and will continue in the absence of the relief requested.

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 the respondent having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, 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 aforesaid draft of 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the 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 Texas Board of Chiropractic Examiners is organized, exists and does business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at Building C, Suite 245, 1300 East Anderson, Austin, TX.
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

I.

It is ordered, That for the purposes of this order, the following definitions shall apply:

A. "*Board*" shall mean the Texas Board of Chiropractic Examiners, its members, officers, agents, representatives, employees, successors, and assigns.

B. "*Disciplinary action*" shall mean: (1) a refusal to grant, or the revocation or suspension of, a license to practice chiropractic in Texas; (2) a refusal to admit a person to examination for a license to practice chiropractic; (3) the issuance of a formal or informal warning, reprimand, censure, or cease and desist order against any person or organization; (4) the imposition of a fine, probation, or other penalty or condition; or (5) the initiation of an administrative, criminal, or civil court proceeding against any person.

C. "*Person*" shall mean any natural person, corporation, partnership, governmental entity, association, organization, or other entity.

II.

It is further ordered, That the Board, directly or indirectly, or through any device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Prohibiting, restricting, impeding or discouraging any person from providing information about any chiropractic product or service, including (i) publishing or advertising, or (ii) soliciting or attempting to solicit patients. The practices from which the Board shall cease and desist include, but are not limited to:

(1) Adopting or maintaining any rule, regulation, policy, or course of conduct that prohibits or seeks to prohibit chiropractors from advertising or solicitation;

(2) Taking or threatening to take any disciplinary action against any chiropractor for advertising or solicitation; or

(3) Declaring it to be an illegal, unethical, unprofessional, or otherwise improper or questionable practice for any chiropractor to advertise or solicit patients.

B. Inducing, urging, encouraging or assisting any non-governmental person to take any action that if taken by the Board would be prohibited by part II A above.

Provided that, nothing contained in this part shall prohibit the Board from formulating, adopting, disseminating and enforcing reasonable rules or taking disciplinary or other action, to prohibit (1) practices that the Board reasonably believes to be false, misleading or deceptive within the meaning of Section 17b of the Chiropractic Act of Texas, (2) any truthful, nondeceptive advertising or solicitation that the Board reasonably believes to be subject to prohibition by the Board pursuant to a Texas statute, (3) uninvited, in-person solicitation of actual or potential patients who because of their particular circumstances are vulnerable to undue influence.

III.

It is further ordered, That the Board shall:

A. Distribute by first-class mail a copy of the announcement attached hereto as Appendix A, a copy of this order and a copy of the accompanying complaint in the following manner:

(1) Within thirty (30) days after the date this order becomes final, to each person licensed to practice chiropractic in Texas as of such date and to each person whose application for, or a request for reinstatement of, a license is pending on such date; and

(2) For five (5) years after the date this order becomes final, to each person who applies for a license to practice chiropractic in Texas within thirty (30) days after the Board receives such application;

B. Within thirty (30) days after the date this order becomes final, remove or revise Rules 75.1(1), 75.1(3), 75.1(5), 77.2(1), 77.2(3), 77.2(4), 77.2(5), and 77.3 of the Rules and Regulations of the Board and any other provision of the Rules and Regulations of the Board and any policy statement or guideline, provision, interpretation, or statement that is inconsistent with Part II of this order;

C. Notify the Federal Trade Commission at least thirty (30) days in advance if possible, or otherwise as soon as possible, of any change in the Board's authority to regulate the practice of chiropractic in Texas that may affect compliance obligations arising out of this order, such as the complete or partial elimination of that authority, the complete or partial assumption of that authority by another governmental entity, or the dissolution of (or other relevant change in) the Board;

D. Within sixty (60) days after the date of service of this order, submit to the Federal Trade Commission a written report setting forth in detail the manner and form in which the Board has complied and is complying with this order; and

E. 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 II and III of this order, including but not limited to any advice or interpretations rendered with respect to chiropractors engaging in advertising or solicitation.

APPENDIX A

ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued a consent order against the Texas Board of Chiropractic Examiners that became final on [date]. The order provides that the Board may not prohibit chiropractors from engaging in truthful, nondeceptive advertising or solicitation.

As a result of the order, the Board may not (1) adopt or maintain rules, regulations or policies that prohibit truthful, nondeceptive advertising or solicitation; (2) take or threaten disciplinary action against any person or organization that so advertises or solicits; or (3) declare it to be illegal, unethical, unprofessional, or otherwise improper or questionable for persons to engage in truthful, nondeceptive advertising or solicitation. The order also prohibits the Board from encouraging any person or organization to take actions that the order prohibits the Board from taking.

The order does not affect the Board's authority to prohibit advertising that is likely to deceive or mislead the public, nor does the order affect the Board's authority to prohibit the advertising of professional superiority or the advertising of the performance of professional services in a superior manner. In addition, the order does not prevent the Board from disciplining licensees for engaging in such advertising. The order also does not restrict the Board's ability to prohibit uninvited, in-person solicitation of actual or potential patients who because of their particular circumstances are vulnerable to undue influence.

For more specific information, you should refer to the FTC order itself. A copy of the order and the accompanying complaint is enclosed.

(Title)

Texas Board of Chiropractic Examiners