

IN THE MATTER OF  
MICHIGAN STATE MEDICAL SOCIETY

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

*Docket 9129. Complaint, July 27, 1979—Final Order, Feb. 17, 1983*

This Final Order, among other things, requires an East Lansing, Mich. medical society to cease from entering into agreements with its members to affect the amount, manner of calculating or terms of reimbursement for physical services; and to refrain from influencing its members to refuse to enter into any participation agreement not acceptable to the Society or its members; or to complete the claim forms used by any third-party payer. The Society is barred from entering, either on its own behalf or on behalf of its members, into any agreement with a third-party payer that concerns the amount, manner of calculation, or terms of reimbursement; and from influencing, by any means, a member's decision to accept or reject a participation agreement. The order also bars the Society from engaging in any action having the effect of coercing, compelling or inducing a third-party payer to accept the position taken by the Society regarding the terms or conditions of a participation agreement. Additionally, the Society is required to publish provisions of the order in a prescribed manner and to provide current and future members with a copy of the order.

*Appearances*

For the Commission: *Steven T. Kessel, M. Elizabeth Gee, Jill M. Frumin and Valorie P. Watkins.*

For the respondent: *A. Stewart Kerr, William A. Sankbeil and John L. Shoemaker, Kerr, Russell and Weber, Detroit, Mich.*

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 named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Michigan State Medical Society is a corporation formed pursuant to the laws of the State of Michigan, with its principal business offices at 120 W. Saginaw St., East Lansing, Michigan. Respondent is a professional association for Michigan

physicians. Approximately 8,700 physicians are members of respondent, constituting a substantial majority of Michigan physicians.

PAR. 2. Respondent charters component medical societies which are organized at the county level in the State of Michigan. Membership in respondent is a prerequisite to membership in a component society.

PAR. 3. Some members of respondent are engaged in the business of providing medical health care services to patients for a fee. Except to the extent that competition has been restrained as herein alleged, some members of respondent have been and are now in competition among themselves and with other physicians. [2]

PAR. 4. Respondent is organized for the purposes, among others, of guarding and fostering its members' material interests and insuring that its members receive fair remuneration for services rendered. Respondent engages in activities which further its members' pecuniary interests. By virtue of such purposes and activities, respondent is a corporation 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. 5. Third party payers for health care services that do business in Michigan, including Blue Cross and Blue Shield of Michigan ("BCBSM") and Michigan Medicaid, and some subscribers of BCBSM, are engaged in interstate commerce. The acts and practices described hereinbelow are in interstate commerce or affect the interstate activities of respondent's members, third party payers or some BCBSM subscribers, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 6. Respondent has restrained competition among physicians in the State of Michigan by acting as a combination of at least some of its members, or by combining or conspiring with at least some of its component societies or with at least some of its members, to:

A. Fix, stabilize, or otherwise tamper with the fees which physicians in Michigan receive for their services.

B. Engage in concerted action to restrict, regulate, impede or interfere with the health care cost containment or reimbursement policies of BCBSM or Michigan Medicaid.

C. Engage in concerted negotiations with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM.

PAR. 7. Respondent has engaged in acts and practices in furtherance of the combination and conspiracy, including among other things: [3]

A. Soliciting and collecting "proxies" from respondent's members which enabled respondent to collectively terminate such members' written agreements with BCBSM and Michigan Medicaid to provide medical services to persons who receive benefits from BCBSM or Michigan Medicaid, if BCBSM and Michigan Medicaid did not adopt reimbursement policies acceptable to respondent;

B. Engaging in concerted action against BCBSM which included, among other things, organizing a concerted refusal by members of respondent to deal with BCBSM.

C. Engaging in negotiations with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM.

D. Entering into an agreement with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM.

PAR. 8. The purpose, tendency and effect of the combination and conspiracy and of the acts and practices described in Paragraphs Six and Seven has been to:

A. Restrain competition among physicians in the State of Michigan.

B. Fix, stabilize, or otherwise tamper with the fees which physicians in Michigan receive for their services.

C. Deprive third party payers of the benefits of competition among physicians in Michigan.

D. Deprive subscribers and consumers of the benefits of third party payers' independently determined reimbursement policies or health care cost containment efforts.

PAR. 9. The combination and conspiracy and the acts and practices described in Paragraphs Six and Seven constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY

THOMAS F. HOWDER, ADMINISTRATIVE LAW JUDGE

JUNE 19, 1981

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this case on July 27, 1979, charging the respondent Michigan State Medical Society ("MSMS") with engaging in unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Specifically, paragraph six of the complaint charged that respondent restrained competition among physicians in the State of Michigan by acting as a combination of at least some of its members, or by combining or conspiring with at least some of its component societies or with at least some of its members, to:

Fix, stabilize, or otherwise tamper with the fees which physicians in Michigan receive for their services; [2]

Engage in concerted action to restrict, regulate, impede or interfere with the health care cost containment or reimbursement policies of Blue Cross and Blue Shield of Michigan ("BCBSM") or Michigan Medicaid; and

Engage in concerted negotiations with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM.

In furtherance of the alleged combination and conspiracy, paragraph seven charged respondent MSMS with engaging in various acts and practices, including:

Soliciting and collecting "proxies" from respondent's members which enabled respondent to collectively terminate such members' written agreements with BCBSM and Michigan Medicaid to provide medical services to persons who receive benefits from BCBSM or Michigan Medicaid, if BCBSM and Michigan Medicaid did not adopt reimbursement policies acceptable to respondent;

Engaging in concerted action against BCBSM which included, among other things, organizing a concerted refusal by members of respondent to deal with BCBSM;

Engaging in negotiations with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM; and

Entering into an agreement with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM.

According to paragraph eight, the purpose, tendency and effect of the alleged combination and conspiracy and of the acts and practices described in paragraphs six and seven was to:

Restrain competition among physicians in the State of Michigan;

Fix, stabilize, or otherwise tamper with the fees which physicians in Michigan receive for their services;

Deprive third party payers of the benefits of competition among physicians in Michigan; and

Deprive subscribers and consumers of the benefits of third party payers' independently determined [3] reimbursement policies or health care cost containment efforts.

Respondent answered on September 19, 1979, denying the above

allegations, and also challenging other allegations concerning "commerce" and whether it is a corporation organized for profit. Respondent further asserted various affirmative and special defenses.

Prehearing conferences were held on September 4, 1979; March 27, 1980; and September 3, 1980.

Documentary discovery was conducted beginning in October 1979. Following completion of discovery, adjudicative hearings were held in Washington, D.C., and Detroit, Michigan in June, September, October and March, 1980. The trial produced a transcript record of 2041 pages and approximately 418 exhibits. The record was closed on January 12, 1981.

Proposed findings and reply findings were filed by the parties in February 1981.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied.

This proceeding is before me upon the complaint, answer, testimony and other evidence, and the proposed findings of fact and conclusions of law filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions and arguments of the parties have been considered, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial issues not necessary for this decision.

Certain abbreviations, including the following, are used in this decision:

CX - Commission's Exhibit

RX - Respondent's Exhibit

The transcript of testimony is referred to with the last name of the witness and the page number or numbers upon which the testimony appeared.

Having heard and observed the witnesses, and after having reviewed the entire record in this proceeding, I make the following findings: [4]

#### FINDINGS OF FACT

##### I. RESPONDENT MICHIGAN STATE MEDICAL SOCIETY

1. Respondent Michigan State Medical Society, a Michigan corporation, is a professional association for Michigan physicians with its principal offices in East Lansing (Complaint, Par. 1; Answer, Par. 1).

As of January 1978, the membership of MSMS totaled approximately 8700 physicians (CX 6; CX 15-Z-2). Over 80 percent of medical doctors practicing in Michigan are members of MSMS (CX 50-A).

2. The House of Delegates is the MSMS legislative body (CX 4-F, N). Its powers and duties include adopting rules and regulations to administer the affairs of MSMS and transacting all of the business of MSMS not otherwise specifically delegated (CX 4-N). The House of Delegates has authority to appoint committees, to receive their reports, and to act on them (CX 4-N; Hayes 324-25). The House of Delegates is composed of representatives elected by MSMS' local component societies, as well as by specialty sections of MSMS representing medical specialty groups (CX 4-M; CPF 15; *see also* Hayes 325). About 90 percent of the delegates attending the 1978 MSMS House of Delegates annual session were elected by the local component societies (CX 11-Z-41-44).

3. The House of Delegates meets annually (CX 4-N; Hayes 325). There have also been special meetings called to deal with matters requiring immediate consideration (Hayes 326-27; *see also* CX 4-N). At regular and special meetings the House of Delegates receives and acts upon proposed policy resolutions (CX 4-N-O; Hayes 325).

4. The Council is MSMS' executive body (CX 4-F, P). It is elected by the House of Delegates and has authority between House of Delegates meetings to act on behalf of MSMS and for the House of Delegates (CX 4-F; Hayes 327). The Council's functions include carrying out directives and resolutions enacted by the House of Delegates, acting on matters that arise between House of Delegates meetings which must be resolved prior to the next scheduled House of Delegates meeting, and monitoring the functions of various MSMS committees, including committees appointed by the Council or by the House of Delegates (Hayes 328).

5. MSMS charters component societies which are organized at the county level in Michigan. Membership in MSMS is a prerequisite to membership in a component society (Complaint, Par. 2; Answer, Par. 2). Component societies are distinct organizational entities and, subject to MSMS review, adopt their own constitutions and bylaws (CX 4-F-G; [5] *see, e.g.*, CX 309). Component societies conduct separate membership meetings (*see, e.g.*, CX 325). As of 1978, MSMS had 55 component societies (CX 6-Z-118).

## II. SECTION 4 JURISDICTION

## A. Activities of the Michigan State Medical Society

6. The Michigan State Medical Society was established in 1910 pursuant to Act No. 171 of the Public Acts of Michigan for 1903, entitled "Act for the Incorporation of Associations not for Pecuniary Profit" (CX 5-B-C).

7. The stated purposes of the Michigan State Medical Society are as follows: "to federate and to bring into one compact organization the entire medical profession of the State of Michigan and to unite with similar societies in other states to form the American Medical Association; with a view to the extension of medical knowledge and to the advancement of medical science; to the elevation of the standard of medical education, and to the enactment and enforcement of just medical laws; to the promotion of friendly intercourse among physicians, and to the guarding and fostering of their ["material", found in the 1910 Articles, was deleted by 1941] interests; and to the enlightenment and direction of public opinion in regard to the great problems of medicine, so that the profession shall become more capable and more honorable within itself, and more useful to the public in the prevention and cure of disease and in prolonging and adding comfort to life" (1941 Articles of Incorporation Extending Corporate Term, CX 5-J).

8. An additional purpose of MSMS is "To bring into one viable, effective organization the ethical physicians licensed to practice in Michigan in order that their contribution to human welfare will be enhanced" (June 1978 MSMS Constitution and Bylaws, CX 4-E).

9. In order to accomplish the above, the MSMS constitution provides that the organization will work to accomplish the following subpurposes: (A) to constitute, support and advise the American Medical Association in cooperation with similar societies of other states, in meeting its appropriate responsibilities; (B) to charter and organize constituent component medical societies; (C) to conceive, develop and administer health education programs designed to improve public understanding, awareness and acceptance of good medical standards, practices and concepts, as they relate to personal health, [6] scientific progress and society's advancement; (D) to stimulate advancement of the science and art of medicine and continually to seek to advance the medical, scientific, social, environmental, economic and medical political knowledge of its members in order that the doctor may better serve his patients and the public health generally; (E) to aid Michigan physicians individually and collectively in maintaining high levels of ethical conduct and standards of practice to protect and serve the

total public; (F) to provide medical leadership in meeting the health needs of the people by working with other medical and non-medical groups and individuals; (G) to preserve, protect and enhance physician-patient relationships, as basic to the delivery of quality health care; (H) to promote quality medical and health care by development and support of activities appropriate to this goal; (I) to advocate fair remuneration for services rendered; (J) to insure the adequacy of medical manpower by attracting capable people into the medical and health professions and to work toward the most effective distribution of their services; (K) to encourage medical students and physicians-in-training to participate in organized medicine in order to enable MSMS to be representative of all physicians; (L) to support the efforts of those who would preserve, protect and enhance the reputation and services of the medical profession; (M) to institute and provide specific services to meet the needs of the members; and (N) to foster and support continuing medical education (June 3, 1978 MSMS Constitution and Bylaws, CX 4-E).

10. The Scientific Assembly is one of the three major divisions of MSMS, and it is defined as "\*\*\*\* the convocation of its members for a presentation and discussion of subjects pertaining to the art and science of medicine and to the conservation of the health of the public" (June, 1978 MSMS Constitution and Bylaws, CX 4-E and F).

11. MSMS has the following standing scientific committees, which are called upon from time to time to study and develop programs dealing with specific diseases and problems such as: Committee on Aging; Committee on Blood Banks; Committee on Cancer; Committee on Cardiac Disease Control; Committee on Child Welfare; Committee on Diabetes Control; Committee on Highway Injury; Committee on Iodized Salt; Committee on Maternal and Perinatal Health; Committee on Mental Health; Committee on Occupational Medicine; Committee on Respiratory Diseases; Committee on Rural Medical Service; Committee on Venereal Disease Control (June, 1978 MSMS Constitution and Bylaws CX 4-S).

In pursuit of its goals, MSMS has been actively engaged in the following programs: [7]

#### 1. *Continuing Medical Education*

12. The MSMS Commission on Continuing [Medical] Education ("CCME") was given the responsibility of developing standards for minimal continuing education requirements for doctors practicing in Michigan (CX 7-U). In May, 1974 it recommended (and the House of Delegates subsequently adopted) a program which would require 150 hours of continuing education over a three-year period (CX 7U and W).



13. Subsequently, the AMA provisionally authorized the CCME to review and accredit continuing education programs in Michigan (CX 7-U-V).

### *2. Public Health Activities and Education*

14. MSMS participated in the National Immunization Month (October, 1973) by issuing news releases, broadcasting radio and television messages, holding news conferences, and printing posters to be hung in doctors' offices, in an effort to increase the level of immunization among Michigan citizens (CX 7-I).

15. MSMS was also involved in a pilot program (funded by a grant from the AMA) to improve medical care and health services in correctional institutions in four Michigan counties (CX-9V; CX 10-Y; CX 11-Z-5). In addition, it researched issues concerning the development of nuclear power in Michigan (CX 9-Z-15); broadcast radio programs regarding health issues (CPF 54); and distributed signs warning of the secondary effects of smoking (CX 9-X).

16. In 1974 and 1975, the MSMS Public and Environmental Health Committee took the following actions: Recommended that use of the Dri-dot Blood Test for gonorrhea be discontinued; worked on a new immunization reporting system between physicians, local health departments, and schools; studied the toxicology of the environment; and debated the role of public health medical practice. During this same time period, the Council approved the following recommendations of this Committee: that MSMS appoint a physician to serve as the Society's official representative to the Michigan Diabetes Association; that MSMS support efforts to eliminate the tuberculin skin test from the Michigan School Code; and that MSMS recognize the Michigan Heart Association guidelines for hypertension screening (CX 8-Z-13).

17. In addition, MSMS aided the State Department of Public Health in locating residents suffering from Reye's Syndrome, as part of a special disease control project (CX 9-Y); established a family planning training [8] program for physicians in rural areas (CX 9-V); lobbied against the legalization of laetrile (CX 11-Z-S); passed a resolution urging the President and Congress to consider implementing a recommendation of the National Academy of Science's Committee regarding the Veteran's Administration health care system (CX 11-Z-30).

### *3. The Profession*

18. Pursuant to House of Delegates Resolution 73A-13, MSMS in 1974 voiced concern for the shortage of primary care physicians in Michigan. MSMS wrote letters to deans of medical schools, directors of training, and six hospitals with family practice residency programs,

and wrote letters to the Boards of Trustees of all Michigan hospitals, voicing this concern. MSMS also issued news releases, and speeches were given by MSMS officials, to encourage more physicians to train as primary care specialists (CX 7-H).

19. MSMS engaged in activities to aid physicians with alcohol and drug abuse problems (CX 9-Y, 9-Z-10, CX 145-C, CX 10-Z-18, CX 182-Z-3, CX 11-Z-12); conducted a seminar on the subject of better physician/patient relationships (CX 11-Z-13); and served on an advisory committee to the Michigan Health Data Corporation, to assist in the task of collecting data to evaluate the performance of Michigan hospitals.

#### 4. *Maternal and Perinatal Health*

20. In 1974, the Committee on Maternal and Perinatal Health of MSMS was approached by the Michigan Department of Public Health and asked to consider the initiation of a family planning training program in rural areas. The Committee mailed questionnaires to physicians in various areas of the state to obtain information on current developments in family planning, and to create a format for dispensing family planning information (CX 9-Z-8-9).

21. The Committee also sponsored a conference on maternal and perinatal health, published and distributed desk reference cards for use by physicians and hospitals, sponsored a program for expectant parents and continued various studies and projects (CX 8-Z-10).

22. Committee discussions covered such topics as standards for perinatal nutritional care, fetal monitoring, maternal deaths from oxytocin, ectopic pregnancy deaths, etc. (CX 9-Z-13-14; CX 10-Z-21; RPF 59). In addition, the Committee studied maternal mortality in the state, perinatal morbidity and mortality and supported a Maternal Mortality Registry and a Placental Tissue Registry (CX 11-Z-[9]5). MSMS also arranged to have newborns covered by hospital insurance, and worked on a plan to screen newborns for diseases (CX 8-Z-10).

#### 5. *Alcohol and Drug Abuse*

23. The MSMS Committee on Alcohol and Drug Dependency was instrumental in 1975 and 1976 in the implementation of the Public Intoxification Act and the development of regulations governing the operation of detoxification centers. The Committee also recommended that legislation be enacted making it illegal for physicians to dispense Schedule II Drugs from their offices in quantities larger than for one day's usage (CX 9-Z-10).

24. MSMS assisted in a month-long campaign on alcoholism, held in February of 1976 (CX 174-B).

### 6. *Eye Care*

25. The Committee on Eye Care in 1974-1975 considered at its meeting the following subjects: the Lion's Club Preschool Vision Screening Program, low vision clinics, ophthalmology referrals for rehabilitation, vision aspects of the Medicaid Program, eye care for trainable mentally retarded children, problems of coverage insufficiency, safety glasses for one-eyed amblyops, vision problems in low income areas, mobility of preschool and young children with severe vision impairment, and legislation to make school vision screening mandatory. During this time, the Committee on Eye Care also continued to serve in an advisory capacity to the Vision Section of the Michigan Department of Public Health's Bureau of Maternal and Child Health, and the Division of Services to the Blind of the Michigan Department of Social Services (CX 8-Z-10).

26. In 1975 and 1976, the Committee reviewed two proposed drafts for the Vision Section of the Medicaid Manual, studied the development of techniques for vision testing the mentally retarded and/or handicapped child, and developed guidelines for the treatment of tropias (CX 9-Z-12; CX 10-Z-20).

### 7. *Miscellaneous Programs and Activities*

27. The Committee on Aging drafted principles on improving care for the elderly, and also monitored federal and state legislation and programs pertaining to the elderly (CX 8-Z-9).

28. In October, 1975, the MSMS Committee on Highway Injury studied several bills pending before the Michigan Legislature concerning emergency medical service and other safety related issues (CX 9-Z-11). [10]

29. In 1975, the MSMS Ad Hoc Task Force on Public Health Statutes Revision Project ("PHSRP") was created by the MSMS Committee on State Legislation and Regulations to monitor the Public Health Statutes Provision Project. The Ad Hoc Task Force subsequently formulated MSMS responses to recommendations, and played a significant role in modifying the PHSRP Proposals as they were drafted into legislative form (CX 9-Z-5).

30. Pursuant to Resolution 75A-36, MSMS resolved to work closely with the Michigan Department of Health to upgrade and enforce existing guidelines for proper quality control of independent laboratories (CX 8-Z-25).

31. During May, 1975-1976, the Committee on Children and Youth accomplished the following: Agreed to work in cooperation with the Michigan Chapter of the American Academy of Pediatrics and the Michigan Perinatal Association toward the development of more in-

tensive care centers for infants in Michigan; recommended the development of a program in Michigan for the screening of newborns for disease (particularly congenital); endorsed the Right to Read Program; lent its support to efforts in the state to promote and provide educational programs on bicycle safety; and suggested that the Committee offer its counsel, when needed, to the Michigan Community Coordinated Child Care Council. The MSMS Council, during this same time period, approved recommendations of this Committee that MSMS support amendments to the Michigan Education Code to provide for the periodic re-evaluation of children enrolled in special education programs; and that MSMS support amendments to the Michigan Education Code to provide that children with scientifically documented learning disabilities, as well as physically handicapped and/or mentally retarded children, be eligible for special education programs under the Michigan Education Code (CX 9-Z-11).

32. Between May, 1975 and May, 1976 the Commission on Continuing Medical Education received provisional authorization to perform accreditation surveys within the State of Michigan by the AMA Council on Medical Education (CX 9-R).

33. During this period, MSMS was instrumental in getting the state legislature to pass a bill that defined death (CX 9-Y).

34. At this time an MSMS committee was appointed to respond to Mental Health Department Rules and Regulations regarding use of psychotropic drugs, and one set of such rules was amended pursuant to the review of this committee (CX 10-G). [11]

35. MSMS periodically informed its members of the possible legal ramifications of generic drug substitution (CX 10-G).

36. In the summer of 1977, the MSMS Committee on State Legislation and Regulations lobbied for MSMS regarding proposed Eye Bank legislation; laetrile legislation; a one-day, one-trial jury system; legislation on head and neck radiation-thyroid cancer; health and human sexuality education legislation; the New Public Health Code; legislation concerning patients' rights and responsibilities; legislation regarding dentists signing death certificates; and legislation dealing with a hospital construction moratorium (CX 182-H-I).

37. From May, 1977 to May, 1978, the MSMS Committee on CME Accreditation conducted 16 surveys, with seven hospitals receiving accreditations for the first time (CX 11-Z-4).

38. The MSMS Task Force on Medical Care Costs developed practical guides to assist hospital medical staffs in developing cost containment strategies and programs, helped the MSMS Committee on CME programming in developing a course on medical care costs for the 1978 MSMS Scientific Meeting, and maintained liaison with the

