



# Department of Justice

FOR IMMEDIATE RELEASE  
MONDAY, APRIL 4, 1977

AT  
202-739-2014

The Department of Justice announced today that it does not intend to oppose under the antitrust laws the operation of peer review committees by the International Chiropractors Association.

Donald I. Baker, Assistant Attorney General in charge of the Antitrust Division, said the Department's position was stated in a business review letter issued March 2, 1977.

The letter indicated that the Antitrust Division understands that the purpose of the committees is to act as mediators in fee disputes between third-party reimbursement organizations and chiropractors.

The committees function in a purely advisory capacity, the letter noted. Its recommendations are disclosed only to the requesting party and are based on the facts of each particular case.

The letter added that the Department of Justice could change its decision if future evidence disclosed an intent to control or increase fees charged.

Under the Department's business review procedure, an applicant may submit a proposed course of action to the Antitrust Division and receive a statement as to whether the Division will challenge the course of action under the federal antitrust laws.

(MORE)

A file containing the business review request and supplementary material, together with the Department's response, is available in the Legal Procedure Unit of the Antitrust Division, Room 3307, Department of Justice, Washington, D. C. 20530.

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Department of Justice

Washington, D.C. 20530

MAR 2 1977

Mr. J. Brian Niederhauser  
Legal Department  
International Chiropractor Association  
777 Chamber of Commerce Building  
Indianapolis, Indiana 46204

Dear Mr. Niederhauser:

Pursuant to the Department's Business Review Procedure (28 CFR 50.6), a copy of which is enclosed, we have reviewed your request for a statement of the Department's enforcement intentions regarding the International Chiropractors Association Peer Review Committees as set forth in your letter with enclosures, of July 31, 1975, and supplemented by your letters, with enclosures, dated February 24, 1976 and September 22, 1976.

Based upon the documentary materials which you have provided, it is our understanding that the purpose of the Committees is to act as mediators in disputes between third party reimbursement organizations and chiropractic care providers by attempting to settle disputes over the amount of particular fees charged by providers. We further understand that the Committees act in a purely advisory capacity, that the recommendations are only disclosed to the requesting party, and are based upon the unique facts of each particular case.

In light of the character of the Committees' functions, we have no present intention to bring suit under the antitrust laws. However, should any evidence disclose an intent to control or upwardly influence the range of fees charged, or that the Committees' operations have a substantial effect in this regard, we would not feel constrained by this representation.

As outlined in the provisions of the enclosed regulation, your letters of July 31, 1975, and February 24, 1976, will be made available to the public on request within 30 days of this letter unless you request that any part of the matter be withheld in accordance with Section 9 of the regulation.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'D.I. Baker', written in a cursive style.

DONALD I. BAKER  
Assistant Attorney General  
Antitrust Division

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July 31, 1975

Mr. Lewis Bernstein, Chief  
Special Litigation Section  
Antitrust Division  
United States Department of Justice  
Washington, D. C. 20530

Dear Mr. Bernstein:

We represent the International Chiropractors Association, which is seeking a statement of the intentions of the Department of Justice with regard to their Peer Review Committee under the "Business Review Procedure" 28 C.F.R. 50.6.

There are a number of state and national peer review organizations, each of which is sponsored by a chiropractic association. The International Chiropractors Association (ICA) is one of two national chiropractic professional organizations. Its object, as outlined in the ICA Constitution, is as follows:

"The Association shall aim by research, publicity, combative and defensive legislation, lawful legal protection, cooperation, and in every legitimate and ethical way, to promote the advancement of the Science and Art of Chiropractic and the professional welfare of members thereof, to the end that every locality shall have knowledge of Chiropractic and the unhampered right and opportunity of obtaining the services of Chiropractors of unquestionable standing and ability; this Association without reservation affirming the belief in the justice of the principle of allowing the sick to seek and obtain the services of practitioners of personal choice, of whatever calling, or school; and this Association to undertake everything that it can legally, lawfully and financially do to defend this principle."

In the past the chiropractic profession has experienced difficulty with some health insurance carriers who have threatened to or have actually suspended coverage for chiropractic services, feeling that such claims were often excessive. In order to help insure that patients would be able to freely choose chiropractic

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care on the same basis that they might choose from among any of the healing arts, the peer review procedure was instigated by the ICA. Its function is to aid communication among the patients, the health insurance companies, and the profession; further, the members of the Committee act as a resource pool of professional expertise, ready to answer questions presented to them as to the usual and customary charges for particular services in the locale in question.

The organizational structure of the ICA Peer Review Committee is outlined in the attached Exhibit "1".

The purpose of the Peer Review Committee is twofold. If requested to do so by all parties concerned, the Peer Review Committee will act as an arbitrator in resolving the dispute. However, the more common method of initiation of the review procedure is a request by the subject chiropractor or by a third-party reimbursement organization, i.e., an insurance carrier.

The most frequently encountered fact situation is as follows: A chiropractic physician treats a patient for a vertebral subluxation. The patient submits a claim to his health insurance. The health insurance carrier considers the charge for the services excessive. Many policies provide for payment or reimbursement on the basis of "customary", "reasonable", or "usual" charges. Thus, the question is often whether particular charges meet this criteria, and is not whether the charges are "too high" or "too low". The insurance company may contend that either the individual charges (i.e., for an office visit) are higher than is "customary" in the area, or it may contend that there is a multiplicity of charges; that is, the chiropractic physician has charged separate fees for each individual method of treatment applied as well as for the office visit, and that the total exceeds that customary in the area. It is not unusual to find instances where more than one member of a family is treated and charged on each visit; furthermore, recognized chiropractic procedures require frequent treatments at the outset of the chiropractic regimen. Therefore, these charges can escalate in a very short period of time.

The insurance claims agent is faced with a dilemma. Frequently, he is unfamiliar with chiropractic methodology and terminology. If efforts to receive clarification from the chiropractor

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are unproductive, the insurance company may seek professional expertise and advice to aid in its determination of whether the charges are justified.

In seeking review, the health insurance claims department then forwards the claim and pertinent documentation to the regional chairman of the Peer Review Committee. The Committee Chairman appoints three Committeemen to review the particular charge, one of the Committeemen being a resident of the state in which the treatment in question took place. The Peer Review Committee members are instructed not to review the claim in the light of their own professional philosophy or practice or in the light of the philosophy of the International Chiropractors Association, but rather to evaluate the claim in accordance with and under the standards of the state law and practice of the profession in the locality in which the treatment was rendered.

A relative value schedule, which may be found at page 7 of Exhibit "1" is furnished to the Committee members. This schedule does not set fees, but merely assists the Committee member in assessing the value of various chiropractic services relative to each other. The reviewing member may utilize it or not, at his discretion. (As the relative value schedule is not integral to the peer review system, we would delete it in the event that its use is determinative as to the enforcement intentions of the Department of Justice.)

The Committee then forwards its reply to the insurance company on form ICA-CRC-Form 1, a copy of which is found on page 8 of the pamphlet furnished herewith as Exhibit "1". This action ends the involvement of the Peer Review Committee.

No follow-up of any sort is made by the ICA Peer Review Committee. Indeed, whether or not the claimant-chiropractor is ever informed that a review committee decision has been rendered is a matter within the discretion of the health insurance company. The Committee is not notified of the resolution of the controversy. The Committee's suggestion is in no way binding on any party; the insurance company is free to ignore or accept it--to pay the original claim amount, the amount suggested by the Committee as being usual and customary, or nothing at all. Should the insurance company pay less than the full amount requested, the claimant-chiropractor is free to proceed against the insurance company or to require his patient to pay the remainder. The ICA exerts no

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pressure whatsoever in any attempt to insure that its suggestions are followed. There are no disciplinary proceedings available to influence acceptance of the Committee's determination; indeed, many of the chiropractors whose claims are the subject of review are not members of the ICA.

In short, the International Chiropractors Association looks upon the service it provides as being similar to the advice offered by an expert witness retained by an attorney prior to litigation in order to assist the attorney in preparation and evaluation of his case. The expert has no interest in the outcome of the case, and his opinion, while it may be used as evidence in subsequent litigation, has no binding effect on anyone. The relevancy of the Committee's recommendation--that is, the extent to which the Committee members represent the claimant's peers--and the accuracy of the recommendation may be, of course, matters of dispute between the patient, the chiropractor, and the insurance company.

It is possible, of course, that the activities of our Peer Review Committee, along with those of peer review committees sponsored by other chiropractic organizations, may have an eventual minor affect on the prices consumers must pay for chiropractic services. However, we feel certain that the activity of the Committee does not constitute price-fixing under the Sherman Act. The benefits stemming from the advisory activities of such committees are, of course, obvious.

Our confidence in the legality of this procedure notwithstanding, we deem it advisable to submit the matter to the Justice Department under the business review procedure in the light of Goldfarb v. Virginia State Bar, (U.S. Sup.Ct., June 16, 1975) 43 L.W. 4723, and recent statements by representatives of the Justice Department that investigations would proceed in all of the professions to put an end to monopolistic behavior.

With regard to Goldfarb, supra, we note with interest the following language:

"A purely advisory fee schedule issued to provide guidelines, or an exchange of price information without a showing of an actual restraint on trade, would present us with a different question, e. g., American Column and Lumber v. United States,

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257 U.S. 377 (1921); Maple Flooring Assn. v. United States, 268 U.S. 563, 580 (1925); but see United States v. National Assn. of Real Estate Boards, 339 U.S. 485, 488-489, 495 (1950). ... The price information disseminated did not concern past standards, cf. Cement Manufacturers Protective Assn. v. United States, 268 U.S. 588 (1925), but rather minimum fees to be charged in future transactions, and those minimum rates were increased over time. The fee schedule was enforced through the prospect of professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms. 43 L.W. at 4726."

We reiterate that there is no disciplinary machinery either available or potential which could be used to encourage acceptance of the suggestions of a review committee in an individual case, much less in all future incidents.

Since the holding of Cement Manufacturers Protective Association v. United States was reaffirmed in Goldfarb, we find the following language therefrom of particular interest:

"...in our view, the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, which information they are free to act upon or not, as they choose, cannot be held to be an unlawful restraint upon commerce, even though, in the ordinary course of business, most sellers would act on the information and refuse to make deliveries for which they were not legally bound.

...

Nor, for the reasons stated, can we regard the gathering and reporting of information, through the co-operation of the defendants in this case, with reference to production, price of cement in actual closed specific-job contracts, and of transportation costs from chief points of production in the cement trade, as an unlawful restraint of commerce; even though it be assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price. 264 U.S. 588 at 603-604."

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Moreover, we are uncertain of the antitrust implications where, insofar as the activities of a peer review organization have any effect on prices, that effect would be to encourage rather than inhibit price competition.

The final complicating factor is the effect of the congressional mandate contained in 42 U.S.C. §1320c-1 et seq., directing the formation of professional standards review organizations by private professional associations. It should be noted that although only doctors of medicine or osteopathy are mentioned specifically in the P.S.R.O. statute [See §1320c-1(b)(1)(A)], the Act applies to health care services "for which payment may be made under the Social Security Act" (§1320c). Services of chiropractors are covered under the Social Security Act. [See 42 U.S.C. §1395x (r) and (s)] The Secretary is thus mandated under §1320c-1(b)(1)(B) and §1320c-1(a) to establish at the earliest practicable date an agreement with a qualified peer review organization in the chiropractic field.

Since the intrusion by the peer review committee into the chiropractic profession is not as extensive as that of analogous activities directed by the P.S.R.O. statute, and since the peer review committees do not have the broad enforcement powers granted a P.S.R.O. under the Social Security Act, we do not believe that Congress could have intended such activities to be construed as monopolistic.

We will, of course, gladly furnish any further information necessary in order that you make your determination. Please feel free to contact us at any time.

Very truly yours,

  
J. Brian Niederhauser

JBN/lpn