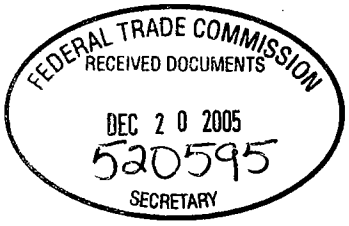
ORIGINAL

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

PUBLIC

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz



In the Matter of NORTH TEXAS SPECIALTY PHYSICIANS, a corporation.	Docket No. 9312

COMPLAINT COUNSEL'S PETITION FOR CLARIFICATION OF CERTAIN STATEMENTS IN THE COMMISSION OPINION

By decision of November 29, 2005, the Commission held that Respondent physician association's conduct constitutes an unlawful horizontal agreement on price. In addition to its discussion of Respondent's conduct, the Commission sought to provide general guidance to others who may in the future seek to distinguish lawful, potentially efficient physician arrangements from unlawful price agreements. We would expect that this guidance will be of significant benefit to physicians, their attorneys, and the courts. It appears, however, that three generalizing statements in that discussion may inadvertently have created confusion as to the lawfulness of certain conduct *other than that challenged in this case.*[1] We respectfully request that the Commission modify its Opinion to clarify these points.

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[1] Some antitrust/healthcare attorneys have expressed to Commission staff concern that these dicta appear to conflict with accepted antitrust principles as reflected in the *Statements of Antitrust Enforcement Policy in Health Care*. U.S. Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care, available at* http://www.ftc.gov/reports/hlth3s.pdf (Aug. 28, 1996) (hereinafter "*Health Care Statements*").

Complaint Counsel seek modification or deletion of the following sentences relating to so-called "messenger model" arrangements:[2]

> (1) "NTSP could, for example, have lawfully polled its members on future fees . . . provided that [among other things] all payor offers were messengered to the physicians" (Op. 34);
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> (3) "As discussed above, the key to a lawful messenger model is that the IPA must be willing to messenger *all* payor offers [as well as avoid coercion and other activities]" (Op. 35 (emphasis in original)); and
>
> (3) "NTSP's refusal to messenger contracts where it determined that less than 50 percent of NTSP physicians would join is precisely the kind of conduct that *Health Care Statement* 9C identifies as a trigger for *per se* liability." Op. 26.

These statements can be read to set forth a rule that a physician organization's failure to "messenger" all payor contract offers is always unlawful, regardless of the surrounding circumstances. Because these sentences imply a more categorical approach than the Commission may have intended, clarification is warranted. In addition, Complaint Counsel also seek deletion or modification of a fourth sentence in the Opinion, because, when taken out of context, it may be read by some as a misstatement of the law as it relates to the number of actors needed to reach an agreement that violates the antitrust laws.

Recognizing the importance of providing clear guidance to the public, the bar, and other courts, courts entertain requests for clarification of their opinions notwithstanding that those clarifications will not alter the holdings. For example, in *Blue Cross & Blue Shield of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995) (Posner, J.), the court modified its opinion in

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[2] "Messenger model" is a phrase used in the *Health Care Statements* and elsewhere to describe a variety of physician arrangements that can facilitate contracting between health care providers and health plans, but that do not involve or facilitate joint price-setting.

response to a Commission/Department of Justice amicus brief seeking clarification of certain statements of the court relating, among other things, to the plausibility of an HMO product market. *See* 65 F.3d 1306, 1415.[3] The Commission's Rules of Practice expressly authorize the Commission similarly to modify its decisions at this stage of proceedings, and we believe it should do so here.[4]

In its Opinion, the Commission addresses Respondent's claim that it had "followed the so-called 'messenger model.'" Op. 24. Reciting and relying upon general and well-accepted principles of antitrust law, the Commission draws a fundamental distinction between physician arrangements that "create[] or facilitate[] collective decisions on prices or price-related terms" and arrangements that preserve "independent, unilateral decisions of the network providers." Op. 25. Observing that some types of activities by an agent for competing providers "can tip the balance toward illegality," the Commission explains that "[i]t is necessary to look at specific facts on a case-by-case basis, because there is not necessarily any single feature that determines the outcome." *Id.* The importance of inquiry into the specific facts surrounding a physician

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[3] *See* Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing, *available at* http://www.usdoj.gov/atr/cases/f0400/0421.htm.

[4] Rule 3.72(a), 16 C.F.R. § 3.72(a), provides that:

> At any time prior to the expiration of the time allowed for filing a petition for review or prior to the filing of the transcript of the record of a proceeding in a U.S. court of appeals pursuant to a petition for review, the Commission may upon its own initiative and without prior notice to the parties reopen the proceeding and enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, rule, order, or opinion issued by the Commission in such proceeding.

arrangement in determining the lawfulness of that arrangement is underscored throughout the Commission's Opinion.

In contrast, the three above-quoted "messenger model" sentences in the *NTSP* Opinion inadvertently may suggest to some an invariant rule that a provider network's failure to transmit every payor offer, under all circumstances and without more, violates the antitrust laws. We believe that these statements, particularly if read apart from the specific facts surrounding Respondent's conduct (which constituted a pattern of open and notorious acts directed toward collective bargaining over physicians' prices),[5] may be misconstrued in a manner that may unnecessarily chill some lawful conduct. Either the deletion or qualification of the quoted sentences would reduce that risk.

Such modifications appear consistent with the Commission's intent in this matter, with the *Health Care Statements*, and with other guidance that the Commission has given. Indeed, clarification of the *NTSP* Opinion as requested will prevent inadvertent confusion as to whether the Commission implicitly is modifying the *Health Care Statements* and other prior guidance. For example, *Health Care Statement* 5B, cited by the Commission in *NTSP* itself, underscores the importance of case-by-case fact assessment.[6] Similarly, in a staff Advisory Opinion Letter regarding Bay Area Preferred Physicians ("BAPP"), cited with approval by the Commission in

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[5] For example, the Respondent used polling to enable members in effect to "vote" on the minimum prices that NTSP then would negotiate, at times coercively, with payors on behalf of the physicians collectively. Op. 18. NTSP's refusals to transmit certain payor offers were part of this broader course of unlawful conduct.

[6] The *Health Care Statements* provide that "[t]he Agencies recognize the need carefully to distinguish procompetitive provision of prospective fee-related information or views from anticompetitive situations that involve unlawful price agreements . . . or conduct that signals or facilitates collective price terms."

NTSP (Op. n.53), staff evaluated BAPP's proposal to contract on behalf of interested physicians only where at least half of its members opted in or where the payor bore contract administration cost. According to the Advisory Opinion, the BAPP proposal was not unlawful on its face.[7] The Advisory Opinion offers numerous cautions to BAPP, but ultimately concludes that "[i]t is not possible to predict with certainty how, in actual operation, BAPP's '50% rule' will affect the contracting process and competitive interaction among its members." Rather, the Advisory Opinion observes, legality of the proposed "50% rule" would turn on case-specific facts. "If BAPP orchestrates or facilitates anticompetitive agreements among its competing physician members," the Advisory Opinion states, then BAPP's conduct might be challenged. In contrast, the three above-quoted sentences in *NTSP* that we recommend be deleted or modified may be construed to mean that any and all physician organizations' refusals to messenger would violate the antitrust laws. The requested clarifications of the *NTSP* Opinion will, we believe, articulate the Commission's intended standard and eliminate possible confusion as to the continued applicability of the Commission's prior pronouncements.

Finally, we request that the Commission delete or modify one additional statement in its Opinion. In a discussion describing how multiple actors may enter into agreement through participation in an organization that they control, the Opinion states: "it is not necessary that there be two or more separate entities to establish an agreement for purposes of the antitrust laws." Op. 15. Plainly, the Commission intended that language to be understood in the context of the explanation of how a plurality of actors can agree by acting through a single organization.

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[7] *See* Advisory Opinion Letter from Jeffrey Brennan, Esq., FTC, to Martin J. Thompson, Esq., Manatt, Phelps & Phillips, L.L.P. (Sept. 23, 2003), *available at* http://www.ftc.gov/bc/adops/bapp030923.htm.

See Op. 15-17. We fear that it may not be so understood by some, who may wrongly conclude that the Commission is acting in contravention of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and the *Colgate*-doctrine. Deletion or modification of the above-quoted language will prevent that result.

In conclusion, Complaint Counsel respectfully request Commission clarification of the *NTSP* Opinion. The requested clarifications would not implicate the holding of the case. Rather, they will mitigate unintended confusion on the part of some readers, and will make clear to all that the Commission remains committed to careful assessment of the facts underlying each particular physician collaboration.

Respectfully submitted,

Michael J. Bloom / (GWH)

December 20, 2005

Michael J. Bloom
Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I, Garth W. Huston, hereby certify that on December 20, 2005, I caused Complaint Counsel's Petition for Clarification of Certain Statements in the Commission Opinion to be served upon the following persons:

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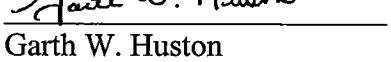
and by e-mail upon the following: William Katz (william.katz@tklaw.com) and Gregory Binns (gregory.binns@tklaw.com).



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