In the Matter of North Texas Specialty Physicians, a corporation
Docket No. 9312

OPINION OF THE COMMISSION

By LEARY, Commissioner, For A Unanimous Commission:

I. Introduction

This case involves the question of whether an independent physician association's contracting activities with payors amounts to unlawful horizontal price fixing, or is competitively benign activity that may enhance efficiency and innovation in the delivery of health care. The Commission has accepted numerous consent orders over the last ten years involving conduct similar to that at issue in the case at hand.[1] The common theme of these cases has been coordinated bargaining by groups of competing physicians, in order to increase their reimbursement rates. In these cases, competing physicians have often joined together in independent practice associations (IPAs, or networks) and agreed to boycott or refuse to deal with particular payors during contract negotiations. When the competing physicians are not financially or clinically integrated in a manner that is likely to produce efficiencies, the Commission has consistently maintained that this type of conduct amounts to illegal price fixing.

We recognize that physicians can join together and negotiate fees in ways that do not harm competition. Health care providers (including physicians) and those who pay for their services (*i.e.*, payors) are increasingly devel 10.00 0.00 0.00 rgBT303.00.00 0.01.0.0000o2he70.00 0.00 0.00 rgc

[1] *See, e.g., In the Matter of San Juan IPA, Inc.,* Docket No. C-4142 (consent order issued June 30, 2005), http://www.ftc.gov/opa/2005/07/fyi0548.htm; *In the Matter of New Millennium Orthopaedics, LLC,* Docket No. C-4140 (consent order issued June 13, 2005), http://www.ftc.gov/opa/2005/06/fyi0543.htm; *In the Matter of White Sands Health Care System, L.L.C*, Docket No. C-4130 (consent order issued Jan. 11, 2005), http://www.ftc.gov/opa/2005/01/fyi0504.htm; *In the Matter of Piedmont Health Alliance, Inc.,* Docket No. 9314 (consent order issued Oct. 1, 2004), http://www.ftc.gov/opa/2004/10/fyi0457.htm; *In the Matter of Southeastern New Mexico Physicians IPA, Inc.,* Docket No. C-4113 (consent order issued Aug. 5, 2004), http://www.ftc.gov/opa/2004/08/fyi0445.htm; *In the Matter of California Pacific Medical Group, Inc.,* Docket No. 9306 (consent order issued May 10, 2004), http://www.ftc.gov/opa/2004/05/fyi0431.htm.

findings of fact of the Initial Decision to the extent those findings are not inconsistent with this opinion.

We find that the activities of Respondent, taken as a whole, amount to horizontal price fixing which is unrelated to any procompetitive efficiencies. Respondent's conduct could be characterized as *per se* unlawful under the antitrust laws, and thus subject to summary condemnation. For the reasons explained below, however, it is more appropriate to apply the "inherently suspect" analysis of our recent decision, *Polygram Holding, Inc.*,[4] as affirmed by the D.C. Circuit, *Polygram Holding, Inc. v. FTC,* 416 F.3d 29 (D.C. Cir. 2005). But, we also emphasize that a *per se* analysis and an inherently suspect analysis are close neighbors, and that the determination of illegality here does not require an elaborate inquiry into effects in the market.

II. Background

A. Respondent's Activities

NTSP is an organization of independent physicians and physician groups that was formed, and is managed and operated by, physicians. Although its size has varied, NTSP had approximately 575 members in 2003 and 480 members at the time of trial in April 2004. IDF 32. As of 2003, NTSP was comprised of practitioners in 26 medical specialties as well as some primary care physicians. *Id.* These doctors are located principally in the Tarrant County, Texas area, which includes the city of Fort Worth. IDF 31. The participant physicians have distinct economic interests reflecting their separate clinical practices. IDF 35. Many members compete with one another. IDF 36.

NTSP's main functions are to negotiate and review contract proposals for member services that are submitted by payors, including insurance companies and health plans; to review payment issues; and to act as a lobbyist for its members' interests. IDF 39. NTSP negotiates both risk-sharing contracts (risk contracts)[5] and non-risk-sharing contracts (non-risk contracts). IDF 46. The former typically reimburse doctors on a dollar amount per patient basis, whereas the

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RR - Respondent's Reply Brief

References to investigational hearing or deposition transcripts included in the trial record as exhibits are made using the exhibit number with the witness' name and type of interview provided in parentheses: CX__ (Van Wagner Dep. at __).

[4] 5 Trade Reg. Rep. (CCH) ¶ 15,453 (FTC 2003), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf [hereinafter *Polygram*, or *Polygram Comm'n Op.*].

[5] Risk-sharing contracts are also known as capitation contracts.

latter provide "fee-for-service" payment. IDF 13-15. The challenged conduct in this case involves solely the negotiation of non-risk contracts, which are far more common for NTSP.[6] IDF 46, 48-50. NTSP's original focus was on risk contracting when it was founded in 1995. IDF 19, 46. The initial interest of payors in NTSP's risk contract declined, however, and by 2001 NTSP's Board decided to center its focus on how to benefit its members for fee-for-service contracts in addition to risk contracts. IDF 46-50; CX 83 at 3. NTSP's Board has acknowledged that risk contracting "is a small part of the business." CX 83 at 3; IDF 46-50. In fact, at the time of oral argument, NTSP had only one risk contract (albeit a substantial one). IDF 49. Only about half of NTSP's physicians participate in its one risk contract. IDF 51; Van Wagner Tr. 1830; Frech Tr. 1353-54.

NTSP's physicians enter into a Physician Participation Agreement (PPA) with NTSP that grants NTSP the right to receive all payor offers and imposes on the physicians a duty to forward payor offers to NTSP promptly. CX 0276; CX 275 at 24. The physicians agree that they will not individually pursue a payor offer unless and until they are notified by NTSP that it has permanently discontinued negotiations with the payor. CX 0311 at 10; CX 0276; CX 1178 (Hollander Dep. at 68). Each NTSP member's PPA provides that NTSP must promptly forward (messenger) the fee reimbursement and other economic provisions of any non-risk offer to the member physicians. CX 275 at 24. If more than 50 percent of the members accept those provisions, NTSP will then proceed to negotiate the contract. IDF 67; CX 275 at 25-26. At times NTSP has gathered powers of attorney from its physicians, which give NTSP the legal authority to negotiate non-risk contracts on behalf of those physicians. CX 1173 (Deas IH at 56-57); Palmisano Tr. 1250-51.

NTSP conducts annual polls of its physicians to determine minimum reimbursement rates for use in negotiation of health maintenance organization (HMO) and preferred provider organization (PPO) product contracts with payors. CX 1195 (Van Wagner Dep. at 66-67). NTSP's polling form asks physicians individually for the minimum payments that they would accept for the provision of medical services pursuant to a fee-for-service HMO or PPO agreement. CX 0565; CX 1196 (Van Wagner IH at 26-29, 43-44, 62). NTSP uses the poll responses to calculate the mean, median, and mode (averages) of the minimum acceptable fees identified by its physicians, and then uses these measures to establish its minimum contract prices. IDF 93. NTSP then reports these measures back to its participating physicians. CX 0103 at 4-5; CX 1196 (Van Wagner IH at 26-29, 43-44, 62); CX 1042. NTSP's polling form explains to the participating physicians that "NTSP polls its affiliates and membership to establish Contracted Minimums. NTSP then utilizes these minimums when negotiating managed care contracts on behalf of its participants." CX 0387 at 1; CX 0633.

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[6] NTSP has 20 non-risk contracts. IDF 50; CX 1196 (Van Wagner IH at 14). It does not receive revenues from these contracts; it does, however, receive revenues from its one risk contract. IDF 21.

B. History of the Case and Summary of Initial Decision

The Commission's complaint, issued on September 16, 2003, charges NTSP with the unlawful negotiation of agree

The ALJ rejected Respondent's claim that it was a single entity incapable of conspiring with its members, ID at 70-71, and held that evidence of direct agreements among physicians was not needed to demonstrate the conspiracy. *Id.* at 68-69. The ALJ relied on *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 356 (1982), where the Court found concerted action without finding that the competing physicians agreed directly with each other to set prices. The ALJ also found that NTSP had offered no plausible claim that its collective price setting was ancillary to any procompetitive activity. ID at 87. He therefore concluded that "the actions taken by NTSP to coerce health insurance payors to increase their offers of rate reimbursement or to offer more favorable economic terms to NTSP's physicians constitute an unreasonable restraint of trade." ID at 88. He also found that NTSP's actions had caused payors to increase their offers, and concluded that this fact provided sufficient evidence of anticompetitive effects, to the extent an examination of effects is required. *Id.* at 87. The ALJ issued an order that requires NTSP to cease and desist from collective price fixing in its negotiation of non-risk contracts and to terminate any existing non-risk contracts. *Id.* at 92-97.

C. Questions Raised by the Appeal

1. Respondent's Appeal

Respondent appeals from the ALJ's determination that its conduct violated Section 5 of the FTC Act, and also maintains that the ALJ's cease and desist order is not appropriate. Respondent's supporting arguments sometimes overlap, but may be sorted out as follows:

First, Respondent argues that the Commission lacks jurisdiction over NTSP because it is a memberless non-profit organization, which is not engaged in interstate commerce.

Second, Respondent argues that the ALJ erred in finding that Complaint Counsel had shown concerted action when there was no evidence of direct collusion among NTSP's physicians. Respondent asserts that NTSP cannot and does not bind any participating physicians to its non-risk contracts, and that any non-risk contracts to which NTSP decides to become a party must be messengered to the physicians for their individual decisions on whether to join.

Third, Respondent contends that even if Complaint Counsel had shown there was concerted action, the conduct must be analyzed under the rule of reason. Respondent argues that the ALJ therefore erred when he found a violation, because Complaint Counsel did not meet their burden to show anticompetitive effects in a properly defined relevant market.

Fourth, Respondent argues that the ALJ erred when he found that NTSP had insufficient evidence of procompetitive justifications. Respondent asserts that all the evidence available shows that NTSP had legal and business justifications for its actions. Respondent argues that the ALJ compounded this error when he denied NTSP discovery needed to further establish its procompetitive justifications.

Fifth, Respondent argues that it was error for the ALJ to find that NTSP's conduct had a net anticompetitive effect in the absence of any showing by Complaint Counsel that there was a less restrictive alternative or that NTSP's justifications for its conduct were pretextual.

Sixth, Respondent argues that it was error for the ALJ to enter an order that was not narrowly tailored to any antitrust violation properly found.

2. Complaint Counsel's Appeal

Complaint Counsel appeal two aspects of the ALJ's decision, but otherwise ask that the Commission affirm the finding of liability. First, Complaint Counsel argue that it was error for the ALJ to hold it was necessary to prove a relevant market in the case of a *per se* unlawful price-fixing agreement. Complaint Counsel argue that no proof of market definition or market power is required to establish a *per se* violation, and that any naked price agreement among competitors (actual or potential) is conclusively presumed unlawful.

Second, Complaint Counsel argue that the ALJ's order is too narrow and fails to provide essential relief. Complaint Counsel argue that the core prohibitions fail to provide adequate protection against further violation. Complaint Counsel also argue that the ALJ added two unwarranted provisos that are likely to enable NTSP to continue certain conduct that the ALJ found was used to accomplish the unlawful price-fixing scheme.

III. Jurisdictional Issues

We consider this issue first, although Respondent does not give it prominence. The Commission has jurisdiction over NTSP as a corporation only if NTSP is organized to carry on business for the pecuniary benefit of its members and NTSP's conduct at issue is "in or affecting commerce." 15 U.S.C. §§ 44, 45 (1994). Respondent contends that it was error for the ALJ to find that the FTC has jurisdiction over NTSP because NTSP is incorporated under Texas law as a "memberless" non-profit organization (and therefore its physicians are not "members" of NTSP), and none of NTSP's actions were in interstate commerce. RAB at 58-59.

We find that NTSP clearly is a "c

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[7] *See also* CX 350 ("NTSP was started in an attempt to provide a seat at the table of medical business for the individual specialty physicians . . . . NTSP through, [sic] PPO and risk

pecuniary benefit test of FTC jurisdiction. Indeed, we find that NTSP does not appear to have any purpose other than to carry on business for the profit of its members. It is not necessary for the challenged conduct to increase NTSP's members' profits, as NTSP intimates. In *California Dental*, 526 U.S. at 767 n.6, the Supreme Court stated, "[i]t should go without saying that the FTC Act does not require for Commission jurisdiction that members of an entity turn a profit on their membership, but only that the entity be organized to carry on business for members' profit."

NTSP's argument that its physicians are not "members" because of the way it is incorporated elevates form over substance.[8] NTSP's physicians possess sufficient indicia of membership to qualify as members within the meaning of Section 4:

- They come together with other members of their profession to promote their common business interests.
- They elect representatives to its governing board.
- They contribute funds to finance NTSP's activities.
- NTSP internal documents refer to its physicians as "members."

IDF 20, 21, 24, 33, 42, 44, 48, 160, 2872.00000a144.0000 496.3200 TD(NTSP intey2 160, 2800 1.00000 0.0000

contracts, has provided a consistent premium fee-for-service reimbursement to the members when compared with any other contracting source."); CX 550.

[8] The mere form of incorporation is not controlling in matters of FTC jurisdiction. *See Cmty. Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1018-19 (8th Cir. 1969).

[9] *See, e.g., Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 328-31 (1991); *McLain v. Real Estate Bd. of New Orleans, Inc.,* 444 U.S. 232, 241 (1980); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 743-45 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784-85 (1975).

IV. Legal Framework

In order to find liability under Section 5 of the FTC Act, we will examine 0.tion that

[10] For purposes of this case, we can assume that the definition of "unfair methods of competition" under the FTC Act, 15 U.S.C. § 45, is the same as the definition of a "contract combination . . . or conspiracy, in restraint of trade . . . ." under Section 1 of the Sherman Act, 15 U.S.C. § 1.

[11] The requirement that the restraint be unreasonable – coupled with recognition that some restraints can conclusively be presumed so – dates from 1911 in *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

on the ground that prices have been set at "reasonable" levels[12] or that coordination is necessary for survival in times of distress.[13] We do not believe that the *per se* condemnation of naked restraints has been affected by anything said either in *California Dental* or *Polygram.*

There is precedent for outright *per se* condemnation of conduct that parallels the conduct in issue here. The Supreme Court held in *Maricopa*, 457 U.S. at 356-57, that traditional antitrust laws apply to price fixing in the context of physician fee negotiation, and held that it was *per se* unlawful horizontal price fixing for a group of competing physicians to agree to set a maximum fee to offer health insurers for providing medical services to patients. The means used to implement a price fixing agreement in *Maricopa* are similar to those used by NTSP. In *Maricopa*, the medical societies: (a) set a maximum price for health services that could be charged to policyholders of approved health insurance plans;[14] (b) used polling as a device for determining the price; (c) did not necessarily have agreement directly between physicians in the price-setting process; and (d) allowed the physicians the freedom to set their own prices.[15]

We also are familiar with these practices and this industry.[16] The Commission has issued complaints in numerous cases, which challenge conduct by physician IPAs similar to that in *Maricopa* and that in the case at hand. *See, e.g., supra* note 1. The FTC and Department of Justice *Health Care Statements* provide specific warning about the illegality of this type of conduct. *See Health Care Statements, supra* note 2, *Statement* 8.

Although NTSP's activities could be characterized as *per se* illegal because they are closely analogous to conduct condemned *per se*

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[12] *See United States v. Trenton Potteries Co.,* 273 U.S. 392, 398-99 (1927); *United States v. Addyston Pipe Steel Co.,* 85 F. 271, 288-91 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).

[13] *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218-21, 229 (1940).

[14] Note that in one respect the conduct here is even worse than that condemned in *Maricopa* because NTSP has set minimum prices. *See* Section V.B.1.a.

[15] *Arizona v. Maricopa County Med.* Soc'y, 1979 WL 1638 at *1 (D. Az. June 5, 1979), *aff'd*, 643 F.2d 553 (9th Cir. 1980), *rev'd on other grounds*, 457 U.S. 332 (1982).

[16] A *per se* characterization would not necessarily be foreclosed, even if we did not have this industry-specific experience. *Maricopa* stated that the *per se* rule does not need to "be rejustified for every industry that has not been subject to significant antitrust litigation." 457 U.S. at 350-51. On the other hand, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979), emphasized that a *per se* label is appropriate only when courts "have had considerable experience with certain business relationships." We do not need to parse these statements closely, in light of our experience with both the industry and the practices.

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First, in the years since *Maricopa* was decided, the Supreme Court has urged caution in the application of the *per se* label to conduct in a professional setting where "the economic impact . . . is not immediately obvious." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986); *see also California Dental*, 526 U.S. at 770-71. Some might claim that the likely economic impact of the restraints in issue here is "immediately obvious" enough to satisfy this standard, but we do not need to reach that question because we have available in this case an extensive record on which to buttress our conclusions about the likely effects of Respondent's conduct.

Second, since *Maricopa*, we have a better understanding of the potential integration efficiencies of physician IPAs. We would view NTSP's activities very differently if NTSP were able to demonstrate that the participating physicians were financially or clinically integrated in performing its numerous non-risk contracts, and thus driven by incentives similar to those present in its single remaining risk contract. Under the well-established law of ancillary restraints, recent precedents like *Polygram*, and the principles described in our *Health Care Statements* and *Competitor Collaboration Guidelines*,[17] Respondent could have prevailed if the integrated venture were likely to enhance efficiencies and NTSP's conduct were reasonably related to the overall agreement and reasonably necessary for achieving those efficiencies. *See* discussion in Section V.C.1., *infra*. This means that some initial inquiries about whether there is integration, the likely effects of integration, and the reasonableness of the specific restraint are necessary in order to decide whether to apply a rule of reason. It is of course possible to conclude we then have a *per se* case based on a *per se* illegal restraint if these initial inquiries are decided adversely to a respondent. But, it is semantically awkward to use a *per se* label once a number of "reasonableness" issues have been addressed, sometimes at length. What does it really mean to say we have a *per se* case, once we have considered and rejected justifications for a restraint? What it means, as a practical matter, is that no further proof of market effects is required; the case is over. As will be made clear in the discussion below, however, we arrive at exactly the same result when we follow the "inherently suspect" analysis outlined in *Polygram* –

[17] Fed. Trade Comm'n and U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 [hereinafter *Competitor Collaboration Guidelines*].

[18] *See generally MedSouth*, *supra* note 2, where Commission staff did not recommend the Commission take enforcement action against a physician IPA proposal whereby the IPA physicians would collaborate on information sharing, treatment coordination, practice

activity by use of terminology that could be misunderstood. This is not a factor that was considered in *Maricopa* over twenty years ago, but we do think it is a factor that needs to be considered after a decision like *California Dental*.

So, at least this time, after the first full administrative trial in a generation, we will instead follow the methodology of *Polygram*, and consider each of Respondent's justifications in some detail. We want to emphasize again, however, that this is not the same thing as a full blown rule of reason inquiry. If we find that Respondent's proffered justifications for NTSP's inherently suspect conduct are not legitimate – after the examination that follows – it is not necessary to go on and find actual adverse market effects. *See* Section V.E. *infra*.

B. The *Polygram* Analysis

In the words of the D.C. Circuit, an offense can be described as "inherently suspect" when there is a "close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare." *Polygram*, 416 F.3d at 37. The determination is based on the conduct's "likely tendency to suppress competition." *Polygram Comm'n Op. supra* note 4, at 29. As the Commission described, "[s]uch conduct ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation." *Id.* At this stage, the focus of the inquiry is on the nature on the restraint rather than on the market effects in a particular case.[19] If a plaintiff is able to make an initial showing that particular conduct meets these strictures, and the defendant makes no effort to advance any procompetitive justification for the conduct, then the case is concluded and the practices are condemned. *Polygram Comm'n Op. supra* note 4, at 29.

A defendant can avoid summary condemnation, however, if it can advance a legitimate justification for the practice. As we explained in *Polygram*, "[s]uch justifications may consist of plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question; or they may consist of reasons why the practices are likely to have beneficial effects for consumers." *Id.* The defendant need only articulate a legitimate justification, and is not obliged to prove the competitive benefits. (Remember that the issue at this initial stage is simply whether the practice

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protocols, and enforcement standards. *See also* Thomas B. Leary, *The Antitrust Implications of "Clinical Integration": An Analysis of FTC Staff's Advisory Opinion to MedSouth*, 47 ST. LOUIS U. L. J. 223 (Spring 2003).

[19] As the D.C. Circuit pointed out in *Polygram*, this is not a fixed category. It must evolve "as economic learning and market experience evolve." 416 F.3d at 37; *see also* Thomas B. Leary, *A Structured Outline for the Analysis of Horizontal Agreements*, http://www.ftc.gov/speeches/leary/chairsshowcase.talk.pdf at 7-10, (describing distinction between cases "that focus on the nature of the restraint" and those "that focus on the nature of the market") (emphasis in original).

[20] The concept of ancillary restraints, which allows an agreement that would otherwise be viewed as a naked restraint of trade to be evaluated in light of the procompetitive effects of an efficiency-enhancing integration of economic activity to which it is reasonably related, is subsumed in the Commission's *Polygram* analysis. *See Polygram Comm*

If a defendant is able to advance a justification that meets both of these requirements – cognizable and plausible – the plaintiff must then make a more detailed showing that the restraints at issue are likely to harm competition. *Id.* at 32. The degree of proof required depends on the circumstances of the case and the degree to which antitrust tribunals have experience with the restraint in question. *Id.* The Supreme Court stated succinctly that the inquiry must be "meet for the case." *California Dental,* 526 U.S. at 781. In *Polygram*, the Circuit Court used similar language, stating that, "the extent of the inquiry is tailored to the suspect conduct in each particular case," 416 F.3d at 34. We interpret this precedent as endorsement of a "spectrum" or "sliding scale" analysis, which more accurately describes the way cases are actually decided today.[21]

C. The *Health Care Statements*

The FTC and Department of Justice *Health Care Statements* provide guidance about the agencies' enforcement intentions on issues which are likely to arise in the health care industry. They lay out principles that we believed to be consistent with the state of the law when they were issued in 1993 and revised in 1994 and 1996. Even though the *Health Care Statements* were issued before the *California Dental* or *Polygram* opinions were written, and also before the *Competitor Collaboration Guidelines* were issued, we believe that their analysis of horizontal restraints among competing physicians is still viable and also uniquely valuable because of their specificity. The *Health Care Statements* lay out the circumstances when a rule of reason analysis is appropriate for price-setting conduct between competing physicians and – like the analysis in *Polygram* – they allow for procompetitive justifications in certain circumstances. *See Health Care Statements*, *supra* note 2, *Statement* 8.

Price-setting conduct of physician networks qualifies for rule of reason treatment where the "physician's integration through a network is likely to produce significant efficiencies" and the agreement on price is "reasonably necessary to realize those efficiencies." *Health Care Statements, supra* note 2, *Statement* 8B1.[22] *The Health Care Statements* describe two different types of integration that can qualify a physician network for rule of reason treatment – financial and clinical. *Id.* The Commission has applied this analysis in numerous enforcement actions.

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ancillarity analysis, or *Polygram's* more inclusive analysis.

[21] We believe that this analytical framework may also help to resolve the apparent inconsistency between those decisions that use *per se* terminology and those that use rule of reason terminology in facially similar situations. *See* cases cited in ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, 53-58 (5th ed. 2002).

[22] The *Competitor Collaboration Guidelines, supra* note 17, refer to "cognizable efficiencies" for which the restraint in issue is "reasonably necessary." §§ 3.36(a), 3.36(b).

Although our analysis of NTSP's conduct generally follows the legal framework outlined in *Polygram*, we also refer to the industry specific concepts identified in the *Health Care Statements* to the extent appropriate.

V. Analysis of the Challenged Restraints

A. Existence of an Agreement

In order to decide whether there is a violation of Section 5 of the FTC Act in this case, we will first look to see if there is an agreement. There is a fundamental distinction between unilateral and multilateral action. The matter is easy to decide when two or more separate legal entities overtly agree on a restraint that each will adopt. However, an action nominally taken by a single entity is also construed as the product of agreement for purposes of the antitrust laws when the entity is controlled by a group of competitors and is serving as the agent of the group. There are many ways that association/agents can legally act for the collective benefit of the group. Associations can, for example, negotiate prices for office facilities or wages for employees; agents can establish prices for services that the association itself provides for members or non-members. These are matters of no antitrust significance, because there is no

[23] *See, e.g., Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 694-96; *United States v. Sealy, Inc.*, 388 U.S. 350, 352-54 (1967). *Cf. Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 509 (1988); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 99 n.18 (1984).

[24] *See supra* note 23. They could, for example, coordinate their activities through a single "trust." It would seem rather odd to immunize this kind of activity, given the popular name of the basic legal regime we apply here: "The Antitrust Laws."

Respondent states that NTSP is a 5.0l(a) memberless non-profit corporation under Texas law.[25] RAB at 14. Respondent argues that because of this "memberless" status, NTSP should be viewed as a sole actor, both in management of its affairs, and in its refusal to deal with payors on non-risk contracts, and that therefore NTSP cannot be found to conspire under Federal competition law. *Id.* at 14-15. At the outset, we reject this argument. Substance prevails over form in antitrust law, and the technical manner in which an organization is incorporated does not control.[26] We have to look beneath the surface.

We find that NTSP is controlled by competing physicians, and therefore is not a sole actor for purposes of the antitrust laws. We agree with the ALJ's conclusion that NTSP's participating physicians have taken collective action to obtain higher fees from payors. ID at 53-55. The fact that NTSP physicians elect representatives from their ranks to serve on the eight-member Board of Directors of NTSP and set NTSP policy supports this conclusion. IDF 23, 24, 33, 38.

Respondent's briefs rely heavily on *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758 (5th Cir. 2002), to assert that NTSP's mere existence does not satisfy the concerted action requirement of Sherman Act Section 1. RAB at 12. Respondent's discussion of *Viazis* has confused the requirement of "collective action" with the separate requirement of an "unreasonable restraint of trade." *Viazis* merely states that a trade association is not by its nature a "walking conspiracy" even though it inherently involves collective action by competitors – there must also be an unreasonable restraint of trade. *Viazis*, 314 F.3d at 764. We do not disagree.

Respondent also argues that because NTSP cannot and does not bind any of its physicians to non-risk contracts, there cannot be any collusion among physicians (and therefore no agreement). RAB at 8. Respondent cites ALJ findings that the doctors did not discuss among themselves or directly enter into price agreements with one another, and points out that the ALJ's finding that there was no collusion among NTSP's physicians was based on this evidence. RAB at 11. This argument, as presented, conflates what really are two separate issues.

The first issue raised by this particular argument is whether parties can enter into an agreement absent direct communication with each other. It has long been settled that they can. In *Maricopa,* the Supreme Court found an agreement among physicians without finding that the competing physicians agreed directly with each other. 457 U.S. at 356; *see also* ID at 68.

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[25] Section 5.01(a) of the Texas Medical Practice Act allows non-profit entities to engage in the practice of medicine for the purposes of research, medical education, or the delivery of health care to the public. TEX. OCC. CODE. ANN. § 162.001 (Vernon 2004).

[26] In *Community Blood Bank,* 405 F.2d at 1018-19, the circuit court determined that jurisdiction was to be determined "on an ad hoc basis" and that the mere form of incorporation was not controlling.

Similarly, in *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia* 624 F.2d 476, 479-81 (4th Cir. 1980), the court found collective action by a group that was controlled by its physician members without finding that the plan's individual physicians had met and agreed directly with each other. The *Health Care Statements* also explain that physicians do not have to directly agree with one another to engage in price fixing, and that a common agent can be used to exert the bargaining leverage of a group of physicians. *Health Care Statements, supra* note 2, *Statement* 9Dl and 9D4 n.66. In this case, it is enough that participating physicians individually authorized NTSP to take certain actions on their behalf, knowing that others were doing the same thing.[27] Indirect communications of this kind are sometimes referred to as "hub-and-spoke" conspiracies.[28]

The second issue is whether it is possible to find that there was an agreement on price even though individual physicians were not bound to adhere to contract terms negotiated by NTSP. We address this issue in the discussion of NTSP's restraints in Section V.B.1. immediately below (analysis of whether NTSP's conduct amounts to price fixing). It is enough to say here that the opt-out right does not negate the existence of an agreement.

B. Restraint of Trade – *Prima Facie* Case

We next examine whether NTSP's conduct amounts to a restraint of trade, specifically, price fixing. First we look at the factual evidence to determine whether the conduct amounts to price fixing, and is thus illegal absent a cognizable and plausible justification. We discuss different kinds of activity separately for convenience and to provide guidance about what we regard as highly suspect behavior. We want to make clear, however, that our ultimate conclusions in this case do not stand or fall on our assessment of separate actions; the ultimate conclusions are rather predicated on the likely effects of the actions taken together.[29]

After discussion of the restraints separately, we then address in Section V.C. below the justifications advanced for each of them. We also describe the conduct that the Commission

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[27] For example, NTSP would inform physicians who had not yet granted it contract negotiation authority but were considering it, the number of other member physicians who had already given NTSP that authority. CX 1066 at 1; CX 0548 at 1.

[28] *See, e.g.*, *Toys "R" Us*, *Inc. v. FTC*, 221 F. 3d 928, 934-36 (7th Cir. 2000) (finding evidence of horizontal agreement where petitioner served as "ringmaster"); *United States v. Masonite* Corp., 316 U.S. 265, 276 (1972) (fixing of prices by one member of group pursuant to express delegation, acquiescence, or understanding just as illegal as fixing of prices by direct, joint action); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("unlawful conspiracy may be and often is formed without simultaneous action or agreement").

[29] The decision to view the conduct as a whole in this case should not be understood to mean that any one of the actions is necessarily benign standing alone.

does not find to be price fixing in Section V.D., in order to give guidance to the health care community.

1. Challenged Restraints

a. NTSP's Use of a Poll

NTSP conducts annual polls of its physicians to determine minimum reimbursement rates for use in negotiation of HMO and PPO product contracts with payors. CX 1195 (Van Wagner Dep. at 66-67). NTSP's polling form asks the physicians individually for the minimum price that they would accept for the provision of medical services pursuant to a fee-for-service HMO or PPO agreement. CX 0565; CX 1196 (Van Wagner IH at 26-29, 43-44, 62). NTSP uses these poll responses to calculate the mean, median, and mode of the minimum acceptable fees identified by its physicians, and then uses these averages to establish its minimum contract prices. NTSP then reports these measures back to its participating physicians. CX 0103 at 4-5; CX 1196 (Van Wagner IH at 26-29, 43-44, 62); CX 1042. NTSP's polling form explains to the participating physicians that "NTSP polls its affiliates and membership to establish Contracted Minimums. NTSP then utilizes these minimums when negotiating managed care contracts on behalf of its participants." CX 0387 at 1; CX 0633.

We find that NTSP's use of a poll facilitated a price-fixing agreement among its competing physician members. Frech Tr. 1316-24; 1326. NTSP physicians were aware that NTSP would use individual member's poll responses to create group "averages" that would be used by their organization in the coming year's negotiations with payors. IDF 88-90, 93-94. It was a way to communicate to their competitors what they would like to get in the future – not what they had gotten in the past, or, indeed, what they might settle for individually. When they cast a vote on the desired minimum price for the group, they were not simply reporting past or current prices, they were telegraphing their intentions about future prices. Thus, NTSP physicians anticipated that any individual response would help to raise or lower the average fee for the group – an average that NTSP would then use in negotiating with payors. *See* IDF 88, 96-100. NTSP physician responses to the polls were *interdependent* and not independent.

Respondent argues that NTSP's use of its poll and its minimum reimbursement schedule are not concerted action and have legitimate business purposes.[30] RAB at 21-22. Respondent states that NTSP does not divulge to any phy

[30] We address Respondent's efficiency arguments associated with NTSP's poll in Section V.C. below.

party; physicians are not bound to their poll responses, and the poll does not require or induce a physician to contract in a particular manner or even at all. *Id.* at 22. Respondent points out that less than 34 percent of the physicians responded to the poll. *Id.* at 23. Furthermore, Respondent

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[31] *See Nat'l Elec. Contractors Ass'n , Inc. v. Nat'l Constructors Ass'n*, 678 F.2d 492, 500 (4th Cir. 1982) (*citing Yarn Processing Patent Validity Litig.,* 541 F.2d 1127, 1137 (5th Cir. 1977), *cert. denied*, 435 U.S. 910 (1977) (interference with the market forces freely setting prices sufficient to constitute price fixing)).

We find that the PPA in effect renders NTSP as the sole bargaining agent of NTSP competing physicians and thus facilitates price fixing among NTSP physicians. The terms of the PPA and the manner in which NTSP has utilized them hinder the ability of payors to assemble a marketable physician network in the Fort Worth area without submitting to the collective bargaining of NTSP. Frech Tr. 1313-16.

Respondent argues that NTSP's PPA gives NTSP no authority to bind physicians, and that any non-risk contracts in which NTSP decides to join as a party must be messengered to the physicians for their own individual decisions on whether to join. RAB at 8, 19. In addition, Respondent argues that the PPA's terms do not prevent a physician from negotiating with a payor directly or through another entity. *Id.* at 19.

We find that although the PPA requires NTSP to deliver contracts to its physicians, the evidence shows that NTSP rejects and does not deliver any contract that falls below its minimum reimbursement schedule. CX 1196 (Van Wagner IH at 68-69). Other terms of the PPA are inconsistent with Respondent's assertion that any non-risk contracts must be messengered. For example, the PPA contains provisions whereby 50 percent of NTSP's membership must approve the reimbursement proposal of a payor before an offer is "messengered" by NTSP to the physicians for actual opt-in/out of the proposed contracts.[32] CX 0276 at 1-2. This conduct has the potential to raise the level at which variability occurs, just as the use of polling data does.

We also find that each NTSP physician's ability to opt in or out of a contract – NTSP's inability to "bind" its members to a contract – does not eliminate the existence of a price-fixing agreement when providers collectively negotiate with payors over what contract terms will be offered. It is not necessary that there be uniform adherence to specific prices by individual members. In *Maricopa*, the Supreme Court found a price-fixing agreement even though the participating physicians were free to set their own prices. 457 U.S. at 356. The Commission reached a similar result in *Motor Transport Ass'n of Connecticut, Inc.*, 112 F.T.C. 309, 336 (1989), stating that association members "need not agree to a single price level in order to fix prices."[33] In this case, NTSP is able to exert collective bargaining power and hence fix prices because NTSP does not messenger contracts below its minimum reimbursement schedule. Instead it rejects the contracts outright on behalf of its physicians and NTSP's collective bargaining leverage is thus exerted before its physicians even have a chance to opt in or out of a contract.

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[32] The PPA contains another provision allowing for NTSP counter offers to payor rate proposals based on direction from at least 50 percent of NTSP's physicians. CX 0275 at 26.

[33] *See also In the Matter of Kentucky Household Goods Carriers Assoc., Inc.*, Docket No. 9309, 2005 WL 1541548 at *11 (FTC June 21, 2005), *review pending*, No. 05-4042 (6th Cir. Aug. 18, 2005); *cf. In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445-50 (9th Cir.1990) (circulation of current price lists sufficient for liability, even without evidence of agreement to adhere to them), *cert denied,* 500 U.S. 959 (1991).

agreement authorizing NTSP to negotiate on their behalf. IDF 205. Thereafter CIGNA received 40 letters on behalf of 52 physicians that were virtually identical to the sample letter provided by NTSP. IDF 206. On two other occasions, NTSP threatened to terminate its contract with CIGNA and then later actually terminated its contract, when terms were not satisfactory to NTSP. CIGNA was then forced to capitulate to NTSP's demands. *See* IDF 221-48. We find that NTSP illegally utilized refusals to deal and termination of contracts to enhance the bargaining power of the participating physicians and command higher prices. Frech Tr. 1309-12; 1325.

Respondent argues, first, that NTSP's refusals to deal with payors are protected by the *Colgate* doctrine. RAB at 14-15, *citing United States v. Colgate & Co.,* 250 U.S. 300 (1919). This doctrine holds that a firm, acting unilaterally, may lawfully decide with whom it will, or will not, deal. *Colgate*, 250 U.S. at 307. Respondent views NTSP's refusals of payor offers as the lawful unilateral act of NTSP, and not the act of a group of horizontal competitors acting collectively through its agent, NTSP. RAB at 14-17. It reiterates for this purpose the familiar refrain that (1) NTSP does not have the ability to bind physicians, and (2) that each physician decides individually whether to accept a payor's offer. *Id.* Respondent also cites *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407-08 (2004), where the Supreme Court reaffirmed the *Colgate* doctrine, and warned that overly zealous enforcement of the antitrust laws can injure competition and innovation. Respondent argues that this admonition should apply to NTSP's refusals to deal. RAB at 15.

Second, Respondent argues as a policy matter that NTSP needs the ability to refuse contracts because it faces potential liability

[35] *See Indiana Fed'n of Dentists*, 476 U.S. at 465 ("That a particular practice may be unlawful is not, in itself, sufficient justification for collusion among competitors to prevent it . . . .") (*citing Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 468 (1941)).

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collectively set prices and present its physicians as a unified and strong force within Fort Worth. These practices reduce the risk that payors would be able to contract around NTSP, and thereby enhance NTSP's bargaining power over price. Frech Tr. 1325-27; Grizzle Tr. 730, 746-47, 750-51. Because NTSP physicians comprise a large percentage of physicians in Fort Worth, their threat to withhold services severely damages the perceived adequacy of a payor's physician network, and makes it more difficult for a payor to obtain or maintain business. Grizzle Tr. 730-31; Jagmin Tr. 1091-92; Mosely Tr. 139-40. Payors are therefore more willing to pay the NTSP physicians' consensus price because of the threat to their physician networks. Grizzle Tr. 730, 746-47, 750-51; Frech Tr. 1325. NTSP itself summarized the concern succinctly: "NTSP has become a 'gorilla network' with 124 PCP's . . . and 528 specialists." CX 0209 at 2; CX 0310. Conduct that confers on competitors a collective power over price falls within the classic definition of price fixing.

Respondent argues that the Supreme Court's *California Dental* opinion prevents the Commission from condemning NTSP's conduct without a full rule of reason analysis. Respondent's first point in this argument is simply a reiteration of a claim already considered in another context. Respondent says that because there was no direct collusion among physicians,[41] NTSP's conduct meets *California Dental*'s threshold test for determining that a "quick look" rule of reason analysis is not appropriate.[42] RAB at 28-29. Respondent adds that a quick look rule of reason analysis is appropriate only in limited circumstances, when it can be shown that "the great likelihood of anticompetitive effects can be easily ascertained." *Id.* at 29 (*citing California Dental*, 526 U.S. at 771). Because there was no direct collusion among NTSP physicians, Respondent states that the only possible candidates for a quick look under *California Dental* are the PPA provision requiring physicians to notify NTSP of payor offers that they receive directly, and the powers of attorney. *Id.* Respondent further argues that because both of these have plausible procompetitive effects, NTSP's conduct must be judged under a full rule of reason. *Id.*

The first problem with Respondent's argument is that it depends on the faulty conclusion that there was no collusion among NTSP's physicians, simply because they did not directly communicate with each other. As discussed above in Section V.A., the physicians combined in other ways and their conduct can be characterized as price fixing. Moreover, *California Dental* essentially involved collective restrictions on advertising, not on the prices charged. The Court observed that the advertising restrictions in question were "very far from a total ban on price or discount advertising." *California Dental*, 526 U.S. at 773. The threshold question in *California*

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[41] As pointed out in Section V.A. above, the fact that the doctors did not communicate among themselves, but rather acted through a common agent, does not affect liability.

[42] We have used "inherently suspect" in *Polygram* and in this opinion to refer to conduct that may be justified in some circumstances but, absent these circumstances, can be condemned without an extensive demonstration of adverse market effects in the case at hand. We believe this level of inquiry is what the Supreme Court means by a "quick look."

Dental was whether the likelihood of anticompetitive effects from restrictions on professional price and quality advertising was sufficiently verifiable in theory and in fact to fall within a general rule of illegality. *Id.* at 771. The Court determined that the restrictions were, at least on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient. *Id.* Indeed, the Court expressed concern that "the particular restrictions on professional advertising could have different effects from those 'normally' found in the commercial world," *id.*

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[43] Our analysis here deviates somewhat from Complaint Counsel's proffered analysis. Complaint Counsel's arguments against Respondent's proffered justifications are couched in terms of whether NTSP's price fixing was ancillary to any significant productive collaboration among its participating physicians. As we mentioned above in Section IV.A., the doctrine of ancillary restraints is subsumed in the *Polygram* analysis. (The *Polygram* methodology can also be used more broadly to deal with justifications of a different kind. It could be applied, for example, in a case like *Broadcast Music,* 441 U.S. at 20-25, where the argument was that the system could not function at all without collective agreement on price terms, or *United States v. Brown University*, 5 F.3d 658, 677 (3d Cir. 1993), where agreements on student aid could be characterized as pro-competitive overall.) When we use the terminology of *Polygram* rather than the terminology of ancillary restraints, it does not mean that we disagree with Complaint Counsel's alternative analysis.

We first do not accept Respondent's premise that NTSP's poll and efforts to "limit" NTSP's involvement to certain non-risk contracts are justified because they will help NTSP to determine when spillover efficiencies are likely to occur. *Id.* at 48-50. The prices NTSP sets through the minimum reimbursement schedule were not prices sought by risk panel doctors, but instead were averages of the members who responded, which includes non-risk doctors. IDF 51, 87, 89-90, 93. NTSP's Board members and senior management were never informed of individual poll responses; they received only aggregated, average results, which did not reveal to what extent risk panel physicians were likely to participate in non-risk contracts.[44] IDF 94-95. Although these limitations may be prudent, they undercut an argument that the minimum reimbursement schedule could help NTSP determine when spillover efficiencies would occur. As discussed above, it is evident that the poll and limitations were designed for another purpose. *See* discussion in Section V.B.1.a.

Respondent has thus failed to articulate a logical nexus between these activities that facilitate price fixing and the claimed efficiencies. As we stated in *Polygram*, a defendant

> must do more than merely assert that its purported justification benefits consumers. Although the defendant need not produce detailed evidence at this stage, it must articulate the specific link between the challenged restraint and the purported justification to merit more searching inquiry into whether the restraint may advance procompetitive goals, even though it facially appears of the type likely to suppress competition.

Polygram Comm'n Op., supra note 4, at 31-32.

This conclusion is reinforced by the statement of NTSP's executive director, Karen Van Wagner. During an investigational hearing when she was asked the question whether reimbursement rates at or above NTSP's contracting minimums were necessary in order for NTSP to achieve clinical integration, she testified:

> I think it's the other way around. We've achieved a certain degree of clinical integration. We've achieved a certain level of medical management. We've achieved a certain amount of cost savings, satisfaction, quality of care for the members. That basically is reflected in the rates that we ask the payors to give us because that's the value we provide them, so I view it the other way around. Clinical integration is necessary to justify the minimums that the members authorize us to go and try and find.

CX 1196 (Van Wagner IH at 145-46). We explained in *Polygram*

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[44] Respondent even emphasized in its appeal brief that "it is impossible for [anyone] to determine the response of any specific physician or speciality, or even to determine whether they responded." RAB at 24.

[45] Respondent argues instead that the concept of clinical integration does not encompass the full scope of conduct that is justifiable under the rule of r

not address how these nebulous “teamwork” efficiencies are dependent on its price-fixing activities.

[46] Respondent also states that NTSP’s comments to a payor about the terms that physicians might find attractive or reasonable can help to educate the payor and expedite contract negotiations. RAB at 34. For reasons discussed in Section V.D. *infra*, this kind of activity is not necessarily suspect.

[47] *See, e.g., Maricopa*, 457 U.S. a

efficient, higher quality market participants, absent a demonstration that the challenged practices made an essential contribution to these efficiencies.[50] Evidence on the performance of NTSP physicians, standing alone, would not prove that nexus.

D. Potentially Permissible Conduct

Although we have rejected the proffered justifications for NTSP's particular activities, we do not want this opinion to be read so broadly that it would chill potentially efficient practices. We do not question that NTSP's risk contract and its physicians who participate in it achieve efficiencies, and it could even be possible for these efficiencies to spillover to its non-risk contract in certain circumstances. As we discussed above in Section IV, if an IPA can establish that its joint negotiation of price is reasonably related to an efficiency-enhancing integration of the participants' economic activity and is reasonably necessary to achieve the procompetitive benefits of that integration, the price-related activities may be lawful. A good example of this is described in the Commission staff's advisory opinion letter to MedSouth, Inc., a multi-specialty physician practice association in Denver, Colorado.[51]

Commission staff did not object to MedSouth's partial integration proposal that included joint negotiation for the sale of its participating physicians' services to payors on a fee-for-service basis. *MedSouth*, *supra* note 2, at 1, 8-9. Commission staff concluded that MedSouth could plausibly produce sufficient procompetitive effects to justify joint negotiations of fees. *Id.* at 1, 8. This conclusion was based on the extensive clinical resource management program that MedSouth developed for its participating physicians, and that was described in detail in the advisory opinion letter. *Id.* at 2-4, 8. It is also noteworthy that MedSouth did not plan to

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[50] *See, e.g., Broad. Music,* 441 U.S. at 23-24 (declining to find blanket license fee plan *per se* illegal where plan contributed to integration of sales, monitoring, and enforcement against unauthorized copyright use); *Nat'l Soc'y of Prof'l Eng'rs,* 435 U.S. at 693-95 (rejecting petitioners argument that preventing inferior work justified anti-competitive agreement).

[51] Another example is *In the Matter of California Pacific Medical Group, Inc.*, Docket No. 9306 (consent order issued May 11, 2004), http://www.ftc.gov/os/adjpro/d9306/index.htm, where Commission staff advised California Pacific Medical Group, Inc., d/b/a Brown & Toland Medical Group, that as of that time they would not recommend action against a clinically- integrated PPO product that Brown & Toland Medical Group created after entering into a consent order with the Commission. *See* Advisory Opinion Letter from Daniel P. Ducore, Esq. and David R. Pender, Esq., FTC, to Richard A. Feinstein, Esq., Boies, Schiller & Flexner, LLP (Apr. 5, 2005), http://www.ftc.gov/os/adjpro/d9306/050405cpbresponsetbtnotice.pdf.

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Note that these modified practices would not be justified on the ground that they contribute to efficiency of medical practice in the same way that integration does. They rather contribute to the efficiency of the contract negotiation process itself. Because they are not designed to enhance the bargaining power of the physicians, they are not suspect in the first place. They are benign even in the absence of integration.

NTSP can also act as a messenger so long

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accept, unless the payors agree to bear the group's contract administration costs).

[54] We warn, however, that the distinction between lawful and unlawful use of powers of attorney or agency arrangements and the messenger model may require careful counseling. As evidenced by NTSP's conduct in this case, there are many different ways that a power of attorney or agency arrangement and the messenger model can be abused in a manner that facilitates price fixing.

[55] Although Complaint Counsel did not define the market, the ALJ found sufficient evidence to do so on his own. ID at 61-64.

As made clear in the discussion above, we find that proof of market definition and market power is *not* required in this case because Respondent did not meet its burden of establishing a legitimate justification for NTSP's inherently suspect practices. The ALJ may have confused *identification* of a market in which anticompetitive effects are presumed to occur with *definition* of a relevant market in order to measure market share and draw inferences about market power. As we stated in *Kentucky Household Goods Carriers*, "[i]t is obviously necessary to identify the goods or services that are subject to the price-fixing or other anticompetitive restraint . . . [i]t is not necessary, however to show that these goods or services constitute a relevant antitrust product market, as described, for example, in the *Horizontal Merger Guidelines*."

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[56] In fact, even in a full blown rule of reason case, it may not be necessary to calculate shares in a relevant market if more direct evidence of market effects is available. *See Indiana Fed'n of Dentists*, 476 U.S. at 460-61; *In the Matter of Schering-Plough Corp.*, Docket No. 9297, 2003 WL 22989651, at *9,11,13 (F.T.C. Dec. 8, 2003) (citations omitted), *rev'd on other grounds, Schering-Plough Corp. v. F.T.C.*, 402 F.3d 1056 (11th Cir. 2005), *petition for cert. filed* (U.S. Aug. 29, 2005) (No. 05-273).

concerted effort by NTSP's participating physicians to increase their bargaining power. As discussed above, because Respondent did not meet its burden to establish a legitimate justification for this inherently suspect conduct, NTSP's conduct can be condemned with no further analysis under *Polygram* and other authorities.

VI. Remedy

The Commission has wide discretion in its choice of a remedy for violations of Section 5 of the FTC Act. *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946). This discretion includes not just the prohibition of the illegal practice in the manner exercised in the past, but also so-called "fencing-in" relief, which refers to provisions in an order that are broader in scope than the conduct that is declared unlawful. Fencing-in relief is deemed necessary in some cases in order to prevent future unlawful conduct.[57] The Commission's remedy, however, must be reasonably related to the violation. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel*, 327 U.S. at 613.

In this case, we have the benefit of the Commission's extensive experience in crafting appropriate remedies for physician IPAs that have engaged in conduct similar to that of NTSP. Over the years the Commission has fine tuned the relief necessary to prevent future illegal conduct in these cases. To the extent order provisions in these cases have proved ineffective or unnecessary, the Commission has appropriately modified them. The order we impose in this case – which was proposed by Complaint Counsel and is somewhat different than the ALJ's order – is consistent with recent past relief accepted in settlement in similar cases, and is based on the Commission's extensive experience. We are therefore confident that the relief will effectively remedy NTSP's illegal conduct and is neither too narrow nor too broad. Our order is designed to protect the public against any further violations by NTSP, but also to allow NTSP to pursue arrangements that may produce efficiencies without significant risk of anticompetitive consequences.

As usual, Paragraph I of the order defines terms that will be used, and Paragraph II contains general prohibitions against participation in or facilitation of a conspiracy among any physicians. It specifically prohibits agreements to "negotiate"[58] with any payor on behalf of physicians or to refuse to deal on their behalf. A proviso to Paragraph II, however, allows NTSP to engage in "qualified" risk-sharing or clinically-integrated arrangements, and even to set prices for its physicians' services when doing so is reasonably necessary to the joint arrangement.

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57 *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *Kraft, Inc. v. FTC*, 970 F.2d 311, 326-27 (7th Cir. 1992).

58 Although our order does not define the term "negotiate," we intend it to incorporate the distinctions described in *Health Care Statements* 4 and 5 between the lawful provision of factual information and views to payors (as in a true messenger model) and efforts to enhance the collective bargaining power of the participating physicians.

In a "qualified clinically-integrated joint arrangement," as defined by the order in Paragraph I.I., physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. Any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement. In a "qualified risk-sharing joint arrangement," also defined by the order (Paragraph I.J.), all physician participants must share substantial financial risk in order to create incentives for the physician participants jointly to control costs and improve quality. In both cases, any agreements on price or other terms must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

Paragraph III of the order allows NTSP to act as a messenger or an agent on behalf of physicians for contracts with payors, but for three years NTSP is required to notify the Commission in advance before it does so. This prior notice provision is necessary because of NTSP's past deviations from the messenger model. We have accepted this type of prior notice provision in the past. Our order also requires NTSP to terminate any non-risk contracts it negotiated on behalf of its physicians, so NTSP does not continue to benefit from its unlawfully negotiated contracts. Paragraphs IV.B. and C. set forth the terms by which NTSP is required to terminate the contracts, and additional related requirements. The remaining provisions of our order are either administrative in nature, or relate to NTSP's requirement to notify affected persons of the existence of the order. They impose little burden on NTSP. The order terminates after twenty years.

Respondent argues that the ALJ's order is not narrowly tailored to any antitrust violation properly found. Respondent first asserts that because there was no collusion among physicians, the ALJ's order is not supported in the record. It claims, for example, that because NTSP has the right to negotiate its own contracts, the remedy cannot prohibit NTSP from negotiating contracts. And because there was no collusion among the physicians, it says termination of NTSP's existing physician contracts is not warranted. RAB at 60-62. Respondent also argues that, as worded, prohibitions on NTSP's role in payor negotiations with physicians (particularly on information exchanges among physicians) would apply to non-price as well as price terms and thus conflict with *Health Care Statements* and applicable law. *Id.* at 62.

Respondent's arguments essentially restate their rejected claim that there have been no violations. We find that the prohibitions on collective negotiation and the need to terminate existing contracts are both "reasonably related" to NTSP's unlawful conduct. We also find that the ban on collective bargaining through the use of non-price terms as well as price terms is necessary to ensure that NTSP does not seek to perpetuate its unlawful conduct by orchestrating agreements through non-price or non-economic terms. We also find that it is necessary to terminate NTSP's contracts, so that NTSP's physicians do not continue to reap the benefits of their unlawful price fixing. Even though the contracts are already terminable at will, mandatory termination is necessary to avoid the risk that payors might fear retaliation or suffer short-term

competitive disadvantage if they voluntarily terminate a contract with NTSP. The Commission has used similar or broader fencing-in relief in other physician price-fixing cases.[59]

We find that the ALJ's order is inappropriately narrow in some of its core provisions and therefore fails to provide adequate protection against further violations. Paragraph II of the ALJ's order omitted provisions proposed by

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[59] *See, e.g., In the Matter of Partners Health Network, Inc.*, Docket No. C-4149 (consent order, issued Aug. 5, 2005), http://www.ftc.gov/os/caselist/0410100/0410100.htm, (order requires prior notice for three years before Partners Health Network, Inc. can participate in a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement); *In the Matter of New Millennium Orthopaedics, LLC,* Docket No. C-4140 (consent order, issued May 2, 2005), http://www.ftc.gov/opa/2005/06/fyi0543.htm, (order requires dissolution of IPA).

[60] As noted above, NTSP even has the ability to act as a "messenger" under the order. If Respondent complies with the standards for this activity, described in Section V.B.1.e. above, there would not be an order violation.

views relevant to various health plans,"[61] and (2) a provision stating that nothing in the order would "require respondent to violate state or federal law." ID at 94. We find that neither of the provisos is necessary to protect legitimate conduct by NTSP.[62] The communication of "purely factual information" is already covered by Paragraph III, which allows NTSP to act as a messenger and, given Respondent's history, we believe that advance notification is necessary for a period of time. In addition, because we have found that there is no basis for a claim that NTSP's refusals to deal were prompted by concerns over violations of law, we do not believe it is prudent to leave the door open for similar unfounded claims in the future. There is nothing in the order we enter that will require Respondent to engage in illegal activity.

Respondent finally argues that Complaint Counsel's proposed changes to the ALJ's order raise serious policy questions about the Commission's agenda on physician teamwork efforts. RR at 24. Respondent states that Complaint Counsel's order will chill legitimate conduct on NTSP's part in response to illegal conduct and breaches of contract by insurance companies, and will discourage teamwork efforts among physicians which do not fit the currently narrow definitions of risk-sharing or clinical integration. *Id.* at 31. Respondent also points out that it is difficult to find any economic evidence that the Commission's enforcement agenda has had any positive economic effect, in the effort to control total medical expenses. Respondent states that any Commission policy to arbitrarily limit innovation is questionable. *Id.* at 36-37.

Respondent's arguments here misunderstand the Commission's role in this industry. We have a responsibility to prosecute antitrust offenses, but, as stated at the outset, we also should foster pro-competitive, innovative delivery mechanisms for health care in this country. NTSP's illegal conduct has not helped it achieve any efficiencies. Our order, which proscribes only conduct used to carry out NTSP's unlawful price-fixing activities, will not inhibit any efforts to achieve efficiency and innovation though the teamwork or other integration of physicians. We describe in Section V.D. above the many constructive activities that an IPA can undertake, consist with the antitrust laws. And as noted above, Paragraph II of our order allows NTSP to engage in legitimate joint arrangements and even set prices for its physicians' services, but only when doing so is reasonably necessary to achieve the efficiencies of the joint arrangement.

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[61] The ALJ also limited the scope of a provision barring information exchanges. Paragraph II.B. of the ALJ's order prohibits the exchange of information about the terms on which physicians are willing to deal with a payor, but does not include a prohibition on exchange of information about a physician's willingness to deal with a payor. We have included this prohibition in past physician price-fixing Commission orders and believe it should be included in this order. NTSP was able to orchestrate its unlawful price-fixing scheme in part by communicating that its physicians were unwilling to deal with payors in certain situations.

[62] Nearly anything could be termed providing "information" and "views." For example, NTSP's announcement that its physicians will not contract with payors at prices below a certain level could be characterized as conveying factual "information" or as an "expression of views."

VII. Conclusion

For all of the reasons outlined above, we conclude that NTSP's contracting activities with payors amount to unlawful horizontal price fixing. Through the various mechanisms described above, NTSP was able to orchestrate price agreements among its physicians. In physician IPA cases like this one, the focus is not necessarily on any single price-fixing mechanism, but rather on the conduct as a whole. Here the evidence shows not only negotiation activity in aid of a collective agreement on a minium fee schedule, but also specific enforcement mechanisms – such as the ponsarcy sinsgtheepowvereshof atttoririneyicaindscollective withdrapds(Ltipeyswic)Tjg6(16a920sfr)Tjl00ctivesiwians.

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