

ORIGINAL

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

PUBLIC

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



Complaint Counsel seek modification or deletion of the following sentences relating to so-called

“~~_____~~” _____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);

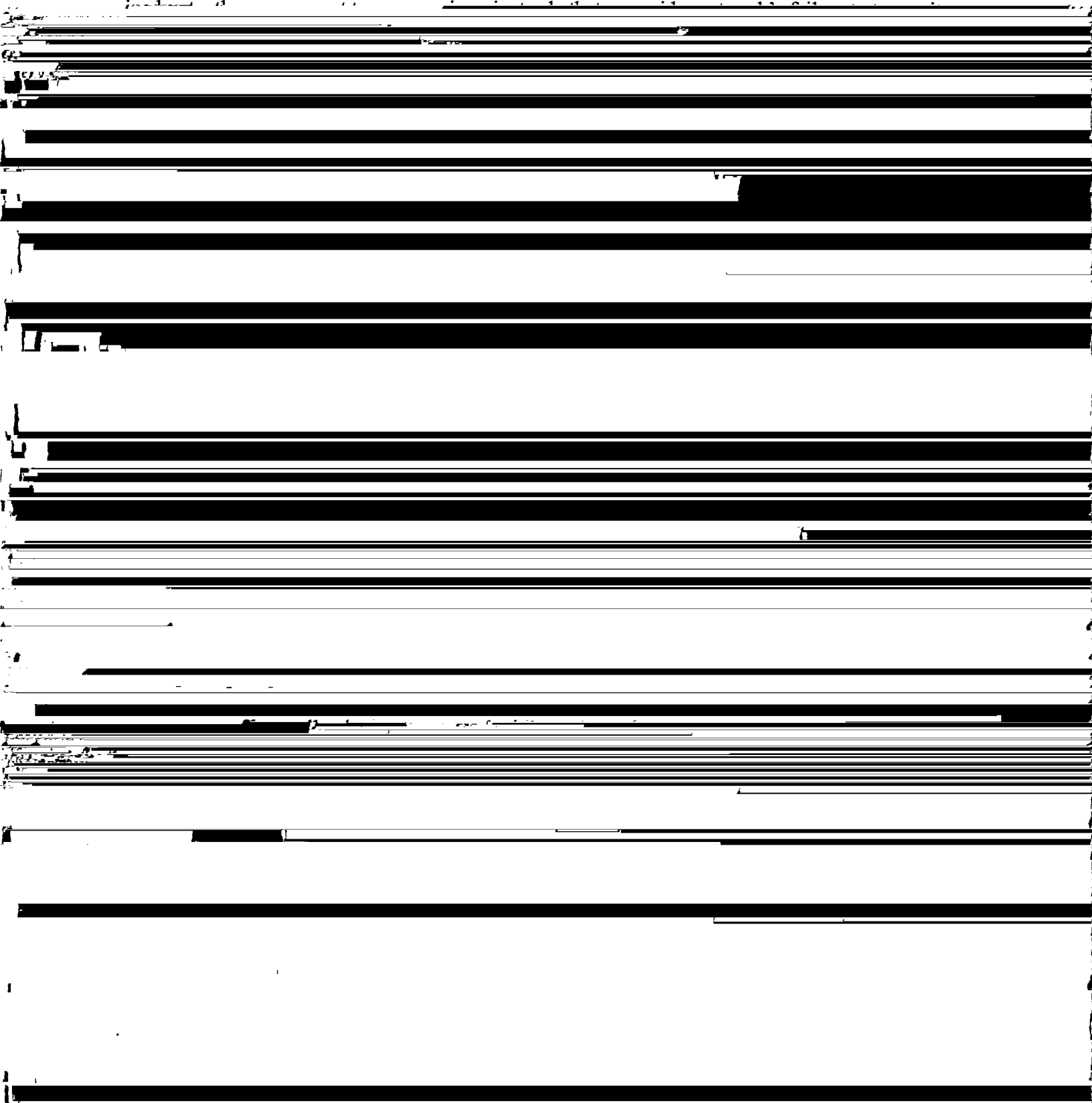
(3) “As discussed above, the key to a lawful messenger model is that the IPA must be

(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.

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



NTSP (Op. n. 52) 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.” But for the Ad. Op.

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*

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,

CERTIFICATE OF SERVICE

I, Garth W. Huston, hereby certify that on December 20, 2005, I caused Complaint
Complaint Petition for Clarification of Certain Statements in the Commission Opinion to be

served upon the following persons:

Office of the Secretary (original and 12 copies via hand delivery, electronic version via e-mail)