proper role of the messenger is simply to facilitate the transfer of information between purchasers of physician services and individual physicians or physician group practices and not to coordinate or otherwise influence the physicians decision-making process.¹¹

If, on the other hand, Health Choice wants to negotiate on behalf of competing physicians, it must restructure itself to meet the requirements of a QMCP as set forth in the proposed Final Judgment. To comply, (1) the owners of members of Health Choice (to the extent they compete with other owners or members or compete with physicians on Health Choice's provider panels) must share substantial financial risk, and comprise no more than 30% of the physicians in any relevant market; and (2) to the extent Health Choice has a provider panel that exceeds 30% of the physicians in any relevant market, there must be a divergence of economic interest between the Health Choice owners and the subcontracting physicians, such that the owners have the incentive to bargain down the fees of the subcontracting physicians. (Section II(I)(2).) As explained below, the requirements of a QMCP are necessary to avoid the creation of a physician cartel while at the same time allowing payors access to such panel.

The financial risk-sharing requirement of a QMCP ensures that the physician owners in the venture share a clear economic incentive to achieve substantial cost savings and provide better services at lower prices to consumers. This requirement is applicable to all provider-controlled organizations since without this requirement a network of competing providers would have both the incentive and the ability to increase prices for health care services.

The requirement that a QMCP not include more than 30% of the local physicians in certain instances is designed to ensure that there are available sufficient remaining physicians in the market with the incentive to contract with competing managed care plans or to form their own plans. This limitation is particularly critical in this case in view of the defendants' prior conduct in forming negotiating groups with up to 85% of the local physicians.

Many employers and payors in the St. Joseph area indicated that they may want managed care products with all or many of the physicians in St. Joseph on the provider panel. The QMCP's subcontracting requirements are designed to let Health Choice (or any other QMCP) offer a large physician panel, but with restrictions to avoid the risk of competitive harm. To offer panels above 30%, Health Choice must operate with the same incentives as a nonprovider-controlled plan. Specifically, the owners of Health Choice must bear significant financial risk for the payments to, and utilization practices of, the panel physicians. These requirements prevent Health Choice from using the subcontracts as a mechanism for increasing fees for physician services.

Čonsequently, the proposed Final Judgment permits a QMCP to subcontract with any number of physicians in a market provided three important safeguards are met. Under Section II(I)(2) of the proposed Final Judgment, the subcontracting physician panel may exceed the 30% limitation only if (1) there is a sufficient divergence of economic interest between those subcontracting physicians and the owners such that the owners have the incentive to bargain down the fees of the subcontracting physicians, (2) the organization does not directly pass through to the payor substantial liability for making payments to the subcontracting physicians, and (3) the organization does not compensate those subcontracting physicians in a manner that substantially replicates ownership.

Health Choice would meet the subcontracting requirements if, for example, Health Choice were compensated on a capitated, per diem, or a diagnostic related group basis and, in turn, reimbursed subcontracting physicians pursuant to a fee schedule. In such a situation, an increase in the fee schedule to subcontracting physicians during the term of the Health Choice contract with the particular payor would not be directly passed through to the payor and, instead, would be borne by Health Choice itself. This would provide a substantial incentive for Health Choice to bargain down its fees to the subcontracting physicians.

On the other hand, the subcontracting requirements would not be met if a Health Choice contract with a payor were structured so that significant changes in the payments by Health Choice to its physicians directly affected

payments from the payor to Health Choice, or if the payor directly bears the risk for paying the panel physicians or pays the panel physicians pursuant to a fee-for-service schedule. The requirements would also not be satisfied if contracts between Health Choice and the subcontracting physicians provided that payments to the physicians depended on, or varied in response to, the terms and conditions of Health Choice's contracts with payors.12 Any of these scenarios would permit Health Choice to pass through to payors, rather than bear, the risk that its provider panel will charge fees that are too high or deliver services ineffectively.13

2. Prohibition on Exclusivity

Sections IV(A), V(A), and VI(B) of the proposed Final Judgment enjoin defendants from requiring physicians to deal exclusively with their managed care plans or urging physicians not to contract with other payors. Health choice is also required to inform both its providers and payors with which it has or is negotiating contracts, that each provider is free to contract separately with any managed care plan on any terms. (Section VII(A) (1) and (2).) These provisions will encourage the development of competing managed care plans in the St. Joseph area by ensuring that physicians remain free to decide individually whether, and on what terms, to participate in any managed care plan.

3. Physician Acquisitions

Section VI(D) of the proposed Final Judgment enjoins Heartland from acquiring additional family practice and general internal medicine physician practices in Buchanan County without plaintiff's prior written approval, and from acquiring any other active physician practice in Buchanan County without 90 days' prior notification.¹⁴

¹⁴ By letter dated June 8, 1995, from Chief of Staff, Antitrust Division, Lawrence R. Fullerton, to counsel for Heartland, Thomas P. Watkins, Esq., plaintiff has indicated to Heartland that it does not intend to challenge the acquisition of Internal Medicine Associates of St. Joseph, a three-physician

¹¹For example, the messenger may convey to a physician objective or empirical information about proposed contract terms, convey to a purchaser any individual physician's acceptance or rejection of a contract offer, canvass member physicians for the rates at which each would be willing to contract even before a purchaser's offer is made, and charge a reasonable, non-discriminatory fee for messenger services, provided the messenger totherwise acts consistently with the proposed Final Judgment.

¹² Nothing in the proposed Final Judgment prohibits Health Choice or any other QMCP from entering into arrangements that shift risk to providers so long as those provisions are consistent with the criteria for a QMCP set forth in Section II(I) of the Judgment.

¹³ Similarly, Health Choice would fail the ownership replication restriction of Section II(I) of the proposed Final Judgment if, for example, the owners paid themselves a dividend and then, through declaration of a bonus, paid the same or similar amount to the subcontracting physicians. The same would be true if the owners otherwise structured dividends, bonuses, and incentive payments in such a way that ensures that subcontracting and owning physicians receive equal overall compensation.