between health plans and numerous physicians.

The proposed Final Judgment makes clear that the critical feature of a properly devised and operated messenger model is that individual providers make their own separate decisions about whether to accept or reject a purchaser's proposal, independent of other physicians decisions and without any influence by the messenger. (Section II(H)) The messenger may not, under the proposed Judgment, coordinate individual providers' responses to a particular proposal, disseminate to physicians the messenger's or other physicians' views or intentions concerning the proposal, act as an agent for collective negotiation and agreement, or otherwise serve to facilitate collusive behavior.4 The 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.5

Ĭf, on the other hand, HealthCare Partners or DAIPA 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 or members of HealthCare Partners or DAIPA (to the extent they compete with other owners or members or compete with physicians on their provider panels) must share substantial financial risk, and comprise no more than 30% on a nonexclusive basis, or 20% on an exclusive basis, of the physicians in any relevant market: and (2) to the extent HealthCare Partners or DAIPA has a provider panel that exceeds either of these limits in any relevant market, there must be a

divergence of economic interest between the owners and the subcontracting physicians, such that the owners have the incentive to bargain down the fees of the subcontracting physicians. (See II(L) (1) and (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 payers access to larger physician panels.

a. QMCP Ownership Requirements

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% on a nonexclusive basis, and 20% on an exclusive basis, 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. These limitations are particularly critical in this case in view of defendants prior conduct in forming negotiating groups with nearly every physician with active staff privileges at Danbury Hospital.

The 20% and 30% limitations will prevent defendants from aggregating market power to pursue and achieve the same type of anticompetitive effects that led to this action. Consistent with the reasons for these limitations, the proposed Final Judgment permits recruitment of new physicians, and thus an increase in the supply of physicians

in the Danbury area, even if that recruitment causes a QMCP to exceed the 20% or 30% limitation. Similarly, defendants will not violate the proposed Final Judgment if these limits are exceeded as a result of a physician exiting any relevant market.

In addition, the 30% limitation does not apply where a QMCP includes any single physician or pre-existing practice group that already has more than a 30% market share. In these circumstances, no aggregation of market power could occur as a result of the practice group joining the QMCP. To quality for this exemption, the pre-existing practice group must exist as of the date of the filing of the Complaint in this action (Section II(I)) For example, Danbury Hospital would violate the Final Judgment if it owns an interest in a QMCP in which DOPS participates as an owner on a nonexclusive basis and, after the filing of the complaint, DOPS acquires physician practices that cause it to exceed the 30% limitation or increase its market share in markets where it already exceeds 30%.7

b. OMCP Subcontracting Requirements

Many employers and payers may want managed care products with panels larger than permitted by the 20% and 30% limitations. The QMCP's subcontracting requirements are designed to permit a larger physician panel, but with restrictions to avoid the risk of competitive harm. To offer panels above the 20% and 30% limits, a QMCP must operate with the same incentives as a nonprovider-controlled plan. Specifically, the owners of a QMCP must bear significant financial risk for the payments to, and utilization practices of, the panel physicians in excess of the 20% and 30% limitations. These requirements significantly reduce the incentives for a QMCP to use the subcontracts as a mechanism for increasing fees for physician services.

Consequently, the proposed Final Judgment permits a QMCP to subcontract with any number of physicians in a market provided important safeguards are met. Under Section II(L)(2) of the proposed Final Judgment, the subcontracting physician panel may exceed the 20% or 30% limitation if the organization bears significant financial risk for payments to and the utilization practices of the subcontracting physicians and does not compensate those subcontracting

⁴For example, it would be a violation of the proposed Final Judgment if the messenger were to select a fee for a particular procedure from a range of fees previously authorized by the individual physician, or if the messenger were to convey collective price offers from physicians to purchasers or negotiate collective agreements with purchasers on behalf of physicians. This would be so even if individual physicians were given the opportunity to "opt in" to any agreement. In each instance, it would in fact be the messenger, not the individual physician, who would be making the critical decision, and the purchaser would be faced with the prospect of a collective response.

⁵ For 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. The proposed Final Judgment gives guidelines for these and other activities that a messenger may undertake without violating the Final Judgment. (Section II(H))

⁶ The proposed Final Judgment embodies the parties' stipulation that only physicians with active staff privileges (not including those with just courtesy privileges) at Danbury Hospital are in any relevant physician market. One anticompetitive effect remedied by the proposed Final Judgment was the reduction in competition among these physicians, which allowed both the exercise of horizontal market power in physician markets and the willful maintenance of the Hospital's market power in acute inpatient hospital service. Accordingly, the 20% and 30% limitations apply to this universe of doctors. The proposed Final Judgment specifies three separate product markets to which these limitations apply: adult primary care doctors (Section II(M)(1)), OB/GYNs (Section II(M)(2)), and pediatricians (Section IIM)(3). The limitations also apply to any other relevant product market for physician services. (Section II(M)(4)) The proposed Final Judgment permits plaintiffs to give written approval of relevant markets differing from those specified.

⁷In contrast, the 20% limitation does not have an exception for pre-existing practice groups because in an exclusive arrangement such practice groups could have the incentives and ability to create the same type of cartel that the proposed Final Judgment is intended to break up.