McDermott Will & Emery

Antitrust Litigation Update for Health Care Providers

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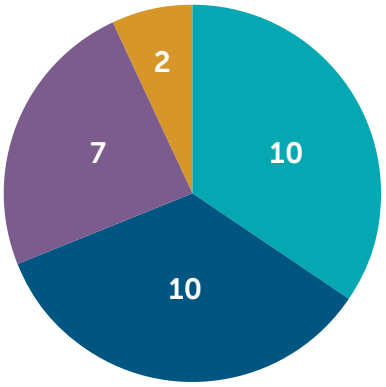
What Cases Were Filed in 2016 and 2017?

Total Cases Filed:

14 in 2016

15 in 2017

Who Is Suing Providers?



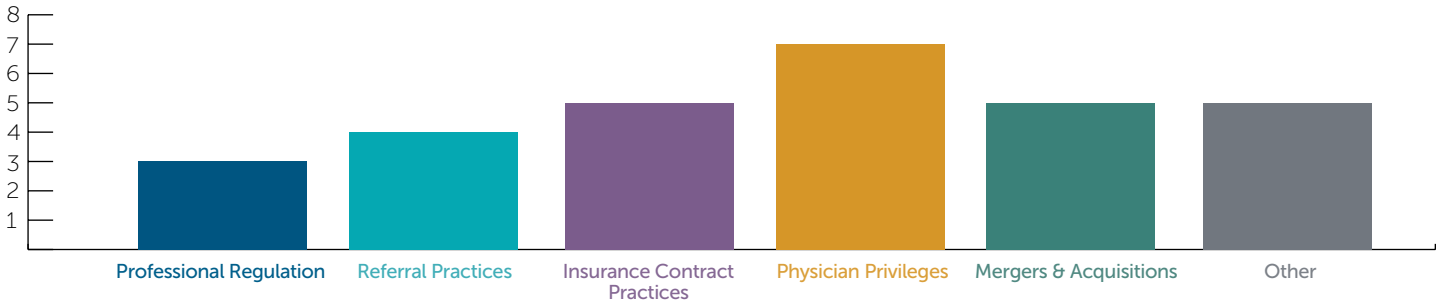
Competing Provider
(*e.g.*, competing hospital, ambulatory surgery center, laboratory testing services provider)

Health Care Worker
(*e.g.*, physician, dentist, physical therapist)

Government
(*e.g.*, US Department of Justice, US Federal Trade Commission, State of Washington)

Other
(*e.g.*, nursing staffing company; broker of medical transportation services)

What Cases Are Being Brought?



Professional Regulation

- *E.g.,* Dentist alleging that state medical board conspired to terminate its contract with the plaintiff for provision of Medicaid dental services
- Provider of alternative medicine alleging that members of state medical board brought disciplinary proceedings against him to exclude him from the market

Physician Privileges

- *E.g.,* Physician alleging that a medical center and several doctors revoked her privileges after she brought safety concerns to light, in order to limit competition for medical services
- Physician whose application for medical privileges at the defendant hospital was denied, ostensibly due to poor clinical judgment and prior failure to maintain certifications, alleging that the denial resulted from defendant's attempt to monopolize the market

Referral Practices

- *E.g.,* Physician alleging scheme by competing physicians and hospitals to refuse to refer patients to the plaintiff's ambulatory surgery center
- Putative class of independent physicians and physician practices alleging that the defendant hospitals coerced affiliated physicians not to send patients to independent health care practitioners

Mergers & Acquisitions (Clayton Act § 7)

- *E.g.,* State of Washington alleging that the defendants, a health system and competing clinic, entered into an unlawful series of agreements to jointly negotiate and fix the prices for the services they provide
- Federal Trade Commission alleging that acquisition was likely to lessen competition in the provision of dialysis

Insurance Contract Practices

- *E.g.,* Hospital alleging that competing health care system used contracts with insurance company to exclude the plaintiff from the market
- Laboratory testing services provider alleging that its competitor colluded with a health insurer to exclude the plaintiff from the market by refusing to reimburse providers who used the plaintiff's services

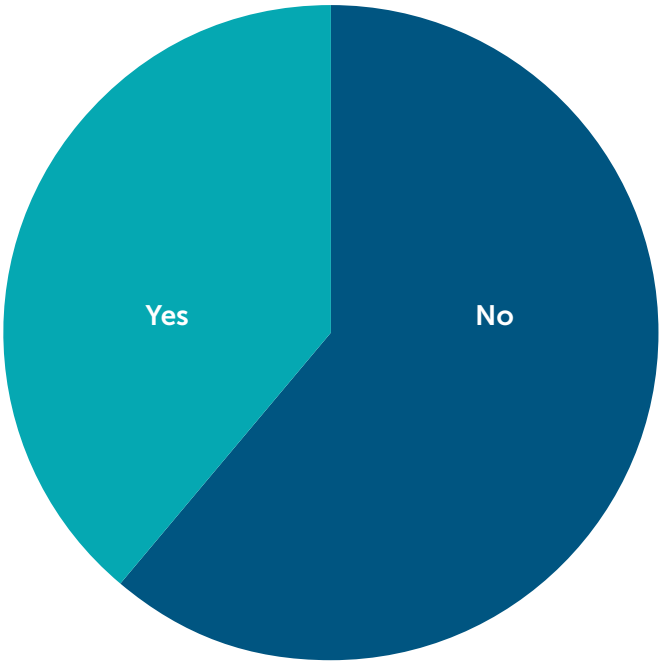
Other

- *E.g.,* Nursing staffing company alleging that defendant hospitals coerced the plaintiff to join their joint registry under threat of group boycott
- Broker of medical transportation services alleging that medical transportation companies conspired through trade association to negotiate higher rates and more favorable terms

How Were Cases Decided in 2016 and 2017?

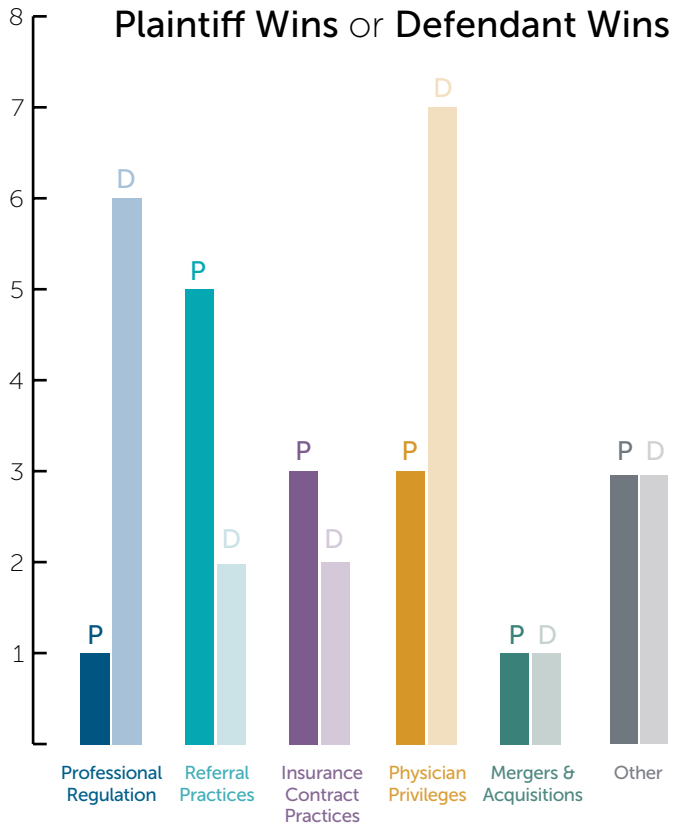
Pleadings Stage

Did Antitrust Claims Survive the Pleadings Stage?



In **12** of the **31** cases decided in 2016 – 2017, at least 1 antitrust claim survived a provider defendant's challenge to the sufficiency of the pleadings.

Results by Type of Case Being Brought



Spotlight: Plaintiff Win in Referral Practices Case

Plaintiffs fared better than provider defendants at the pleadings stage in Referral Practices cases, with 5 cases surviving versus 2 being dismissed. One example is *BRFHH Shreveport LLC v. Willis-Knighton Medical Center*, No. 5:15-cv-02057 (W.D. La.). In *BRFHH*, the plaintiff hospital operator and plaintiff insurer alleged that defendant, an operator of hospitals and clinics, violated the antitrust laws by acquiring rival providers, entering into non-compete contracts with physicians, and controlling physician referrals. The court denied the defendant's motion to dismiss on March 31, 2016.

Spotlight: Provider Win in Professional Regulation Case

On the flip side, a category in which provider defendants fared better than plaintiffs at the pleadings stage was Professional Regulation, with 6 cases being dismissed versus 1 surviving dismissal. A typical example is *Allibone v. Texas Medical Board*, No. 1:17-cv-00064-SS (W.D. Tex.), in which a doctor sued his state's medical board and its members after the board brought disciplinary proceedings against him. He alleged that board members abused their authority to exclude him from the market. The court dismissed his antitrust claims on immunity grounds on October 20, 2017.

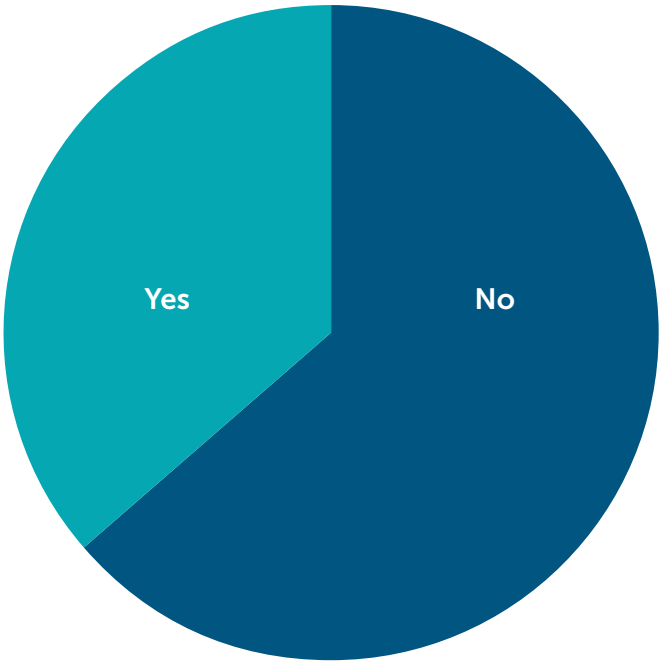
Spotlight: Success and Failure in Physician Privileges Cases

Physician privileges cases are being filed regularly (7 times in 2016/2017) even though statistically they are overwhelmingly dismissed at the pleading stage (7 dismissals for defendants versus 3 wins for plaintiffs). An example of a case surviving the pleadings stage is *Northern California Minimally Invasive Cardiovascular Surgery et al. v. NorthBay Healthcare Corp. et al.*, 3:15-cv-06283 (N.D. Cal.). The plaintiff there, the area's only robotic cardiac surgeon, alleged that defendant and its administrators conspired with the plaintiff's former business partner to force plaintiff out of the market, leaving the market with lower quality competitors who performed more invasive surgeries. The court found the plaintiff sufficiently alleged an unlawful conspiracy, leading to lesser quality services being offered. The case settled in January 2017.

In contrast, *Sherr v. HealthEast Care System et al.*, No. 0:16-cv-03075 (D. Minn.), demonstrates a typical loss. There, a neurosurgeon claimed that defendants (2 health systems and 6 physicians) colluded to have complaints against him brought before a peer review panel, leading to summary suspension of his privileges at 2 hospitals. Plaintiff's antitrust claims were dismissed in their entirety because: (1) plaintiff alleged conspiracies between health care systems and their own medical staffs, which must be dismissed under *Copperweld*; and (2) plaintiff's allegations of a larger conspiracy among all defendants amounted to nothing more than allegations of parallel conduct.

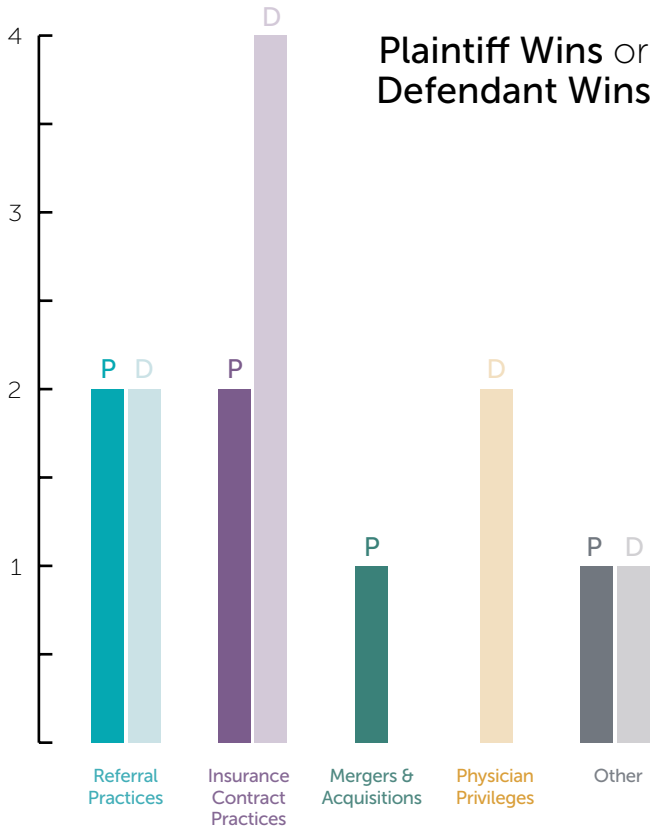
Summary Judgment Stage

Did Antitrust Claims Survive the Summary Judgment Stage?



In **4** of the **11** cases decided in 2016 – 2017, at least 1 antitrust claim survived a provider defendant's motion for summary judgment.

Results by Type of Case Being Brought



Spotlight: Plaintiff Win at Summary Judgment

Plaintiffs survived summary judgment and secured a settlement during trial in a case brought in the Middle District of Florida. In *Omni Healthcare Inc. et al v. Health First, Inc. et al.*, No. 6:13-cv-01509 (M.D. Fla.), several medical practices and providers alleged that the Health First defendants, a group of affiliated hospitals, physician practices and health plans, violated §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act by acquiring one of the largest physician groups in the area and by mandating exclusive referral and admission practices within the Health First system. The court ruled that a genuine dispute existed for trial as to plaintiffs' antitrust claims under all 3 federal statutes.

Spotlight: Defendant Win at Summary Judgment

Defendants succeeded in defeating exclusive dealing claims in a case brought in the District of New Jersey.[1] The Third Circuit affirmed in August 2016. In *Deborah Heart & Lung Center v. Virtua Health, Inc. et al.*, 833 F.3d 399 (3rd Cir. 2016), plaintiff claimed that its referrals from a local cardiology group dried up when the group entered an exclusive contract with another health system, Virtua, and shortly afterward signed a new set of physician leases with doctors practicing at a third health system, Penn Presbyterian. Plaintiff lost the case because it failed to show the agreements had anticompetitive effects in the market. Plaintiff tried to prove harm as to only those patients who appeared in Virtua's emergency room. Therefore, it improperly limited its analysis to a small portion of patients in the relevant area—it needed to show competitive harm to patients in the entire relevant area.

[1]Plaintiff brought a monopolization claim as well, which was dismissed at the pleading stage.

Looking Forward

Early 2018 has seen filings in all of the categories of cases filed in 2016 and 2017. Referral Practices cases were the most commonly filed during the first 5 months of the year, followed by Physician Privileges, Insurance Contract Practices and Professional Regulation cases.

Spotlight: Cases to Watch

Wahidullah Medical Corp. v. St. Joseph Hospital of Eureka et al., No. 18-cv-2074 (N.D. Cal.) is one of the Referral Practices cases filed so far in 2018. Plaintiff alleges that, prior to 2017, St. Joseph was the only provider of outpatient medical laboratory testing services in Eureka, California. In January 2017, plaintiff opened an outpatient medical lab in Eureka that competes with St. Joseph. Plaintiff claims that St. Joseph responded by trying to push plaintiff out of the market by: (1) blocking electronic receipt of test results from the plaintiff's facility; (2) blocking plaintiff from receiving a patient's doctor's order from St. Joseph; and (3) advising patients that they have gone to the "wrong" lab when they go to plaintiff's facility. Plaintiff claims group boycott, conspiracy to monopolize, attempted monopolization and Cartwright Act violations. As of this publication, the defendants' deadline to answer the complaint was extended by agreement until the end of June.

California ex rel. Xavier Becerra v. Sutter Health, No. CGC-18-565398 (Cal. Sup. Ct.) is a case brought by the California attorney general (AG) alleging violations of the California Cartwright Act. The AG claims that Sutter's market power has allowed it to increase prices by "compel[ing] all, or nearly all, of the Network Vendors [or payors] operating in Northern California to enter into unduly restrictive and anticompetitive written Healthcare Provider agreements." In particular, the AG claims Sutter's contracts: (1) force payors to accept networks that include all Sutter hospitals; (2) prohibit incentives to patients to use facilities other than Sutter's; and (3) prohibit payors from disclosing Sutter's prices for general acute care inpatient and outpatient services "to anyone before the service is utilized and billed." The parties extended Sutter's deadline to respond to the complaint by agreement.

United States et al. v. The Charlotte-Mecklenburg Hospital Authority, No. 3:16-cv-00311-RJC-DCK (W.D.N.C.) was filed in June 2016. The government alleges that the defendant (doing business as Carolinas HealthCare System or CHS) has restrictive agreements with commercial payors that cause payors to direct patients to CHS rather than "use less-expensive healthcare services offered by CHS's competitors." The government claims CHS has "imposed steering restrictions" in its payor contracts—specifically, the government challenges language that payors "shall not directly or indirectly steer business away from" CHS or that gives CHS the right to terminate agreements when payors steer patients to other providers. The court denied CHS's motion for judgment on the pleadings, finding the government sufficiently alleged competitive harm through increased health insurance premiums, reduced insurance options for residents, and higher out-of-pocket costs. A bench trial has been set for May 2019.