ANTITRUST UPDATE FOR HEALTH CARE PROVIDERS

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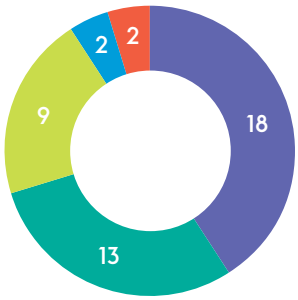
Total Cases Filed: 17* in 2017 | 27 in 2018

Who Is Suing Providers?



Competing Provider
(*e.g.*, competing hospital; physician group)

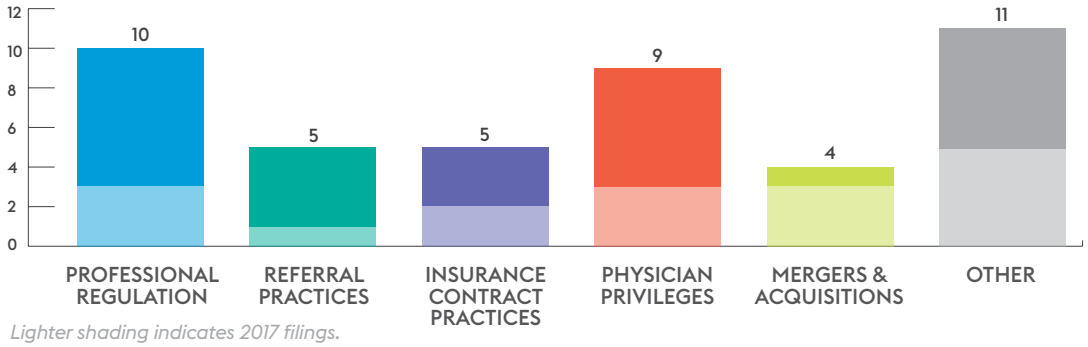
Health Care Worker
(*e.g.*, individual physicians)

Government
(*e.g.*, Federal Trade Commission; State governments)

Patient/Consumer
(*e.g.*, former patients)

Other
(*e.g.*, competing regulatory board; provider of medical transportation services)

What Cases Are Being Brought?



Lighter shading indicates 2017 filings.

PROFESSIONAL REGULATION
- *E.g.*, Physicians in various medical specialties claiming that regulatory boards used alleged market power in board certification to force physicians to pay for "maintenance of certification" programs

REFERRAL PRACTICES
- *E.g.*, Class action alleging unlawful agreement between defendants to refer exclusively to each other, harming regional competition for oncology services

INSURANCE CONTRACT PRACTICES
- *E.g.*, Competing health care provider alleging that health system and payors foreclosed plaintiff from competing in the market through exclusive contracts

PHYSICIAN PRIVILEGES
- *E.g.*, Physician alleging that a health system revoked her privileges after a sham peer review process as a result of discrimination and intervention by a competing practice

MERGERS & ACQUISITIONS (CLAYTON ACT § 7)
- *E.g.*, Federal Trade Commission and state government suing to stop a proposed acquisition by health system of a physician-owned professional corporation

OTHER
- *E.g.*, Physician alleging that competing neurologists engaged in illegal group boycott by refusing to see plaintiff's patients for urgent care when defendants were on call at local hospital

2018 SAW A SIGNIFICANT UPSWING IN ANTITRUST LITIGATION AGAINST PROVIDERS

Twenty-seven cases were filed in 2018 versus 17 in 2017. The rise was due in large part to an increase in professional regulation/regulatory board cases as well as cases falling outside of the traditional categories of antitrust cases brought against providers, like physician privileging and exclusive contracting.

PROFESSIONAL REGULATION/REGULATORY BOARD CASES: In 2018, three cases were filed against medical specialty boards by plaintiff physicians claiming that the boards unlawfully use their alleged monopoly in board certifications to require physicians to pay for Maintenance of Certification programs. A number of cases were filed in the beginning of 2019 as well, and now are pending before the Judicial Panel on Multidistrict Litigation to determine whether they should be consolidated for pretrial proceedings. Oral argument before the JPML occurred on May 30, 2019.

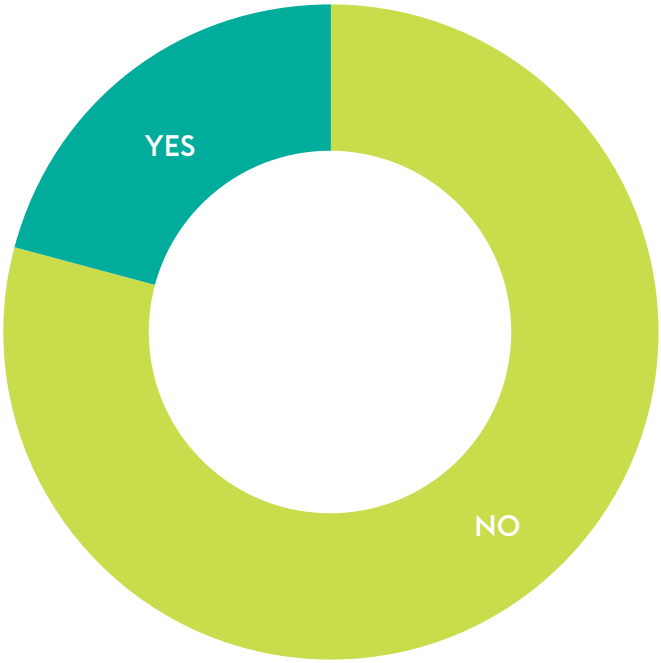
DIRECT AGREEMENTS BETWEEN COMPETITORS: Plaintiffs are filing claims against health care providers with more frequency that allege illegal, direct agreements between competitors. For example, in ***Conklin v. University of Washington Medical Center et al.***, No. 18-cv-090 (W.D. Wash.), plaintiff osteopathic surgeon alleged that defendant medical centers and medical schools conspired to discriminate against osteopathic physicians in favor of allopathic physicians by refusing to allow osteopathic physicians consideration for certain fellowships. A group boycott claim and a wage-fixing claim—two other competitor agreement causes of action—also were brought against health care providers in 2018.

**Number of 2017 cases updated from last year's edition based on refined data.*

HOW WERE CASES DECIDED IN 2017 AND 2018?

PLEADINGS STAGE

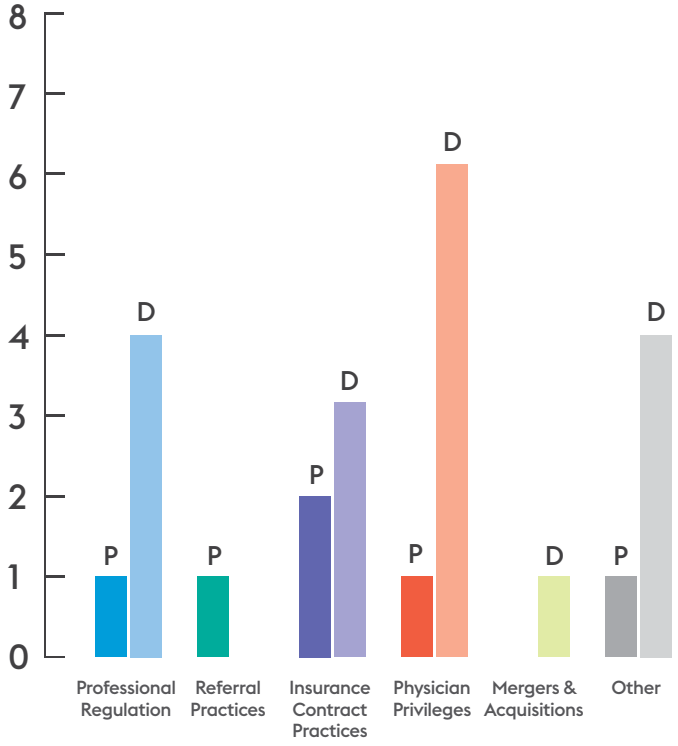
Did Antitrust Claims Survive the Pleadings Stage?



Defendants were successful in **75%** of cases decided on the pleadings in 2017-2018. In only **6** out of **24** cases, at least one antitrust claim survived a provider defendant's challenge.

Results by Type of Case Being Brought

Plaintiff Wins or Defendant Wins



SUCCESS AND FAILURE IN PROFESSIONAL REGULATION CASES

Defendants fared far better than plaintiffs in professional regulation cases, with 4 cases being dismissed and only 1 surviving. The case surviving a motion to dismiss is ***Henry et al. v. North Carolina Acupuncture Licensing Board et al.***, No. 15-cv-831 (M.D.N.C.). There, plaintiffs are physical therapists who practice or want to practice "dry needling" and patients who receive dry needling from physical therapists. Dry needling is similar to acupuncture, and plaintiffs allege that the acupuncturist trade association conspired with the state acupuncture regulatory board to issue cease and desist letters to and initiated state litigation against physical therapists practicing dry needling. ***Jemsek v. North Carolina Medical Board***, No. 16-cv-59 (E.D.N.C.), on the other hand, was dismissed. In that case, a physician practicing outside of North Carolina sued the state medical board and its current and past members for conspiring with a health insurance company to stamp out plaintiff's procedure for treating chronic Lyme disease in order to benefit their own business interests and limit competition for treatment of Lyme disease. The Fourth Circuit affirmed dismissal.

PLAINTIFF WIN IN DENIAL OF PRIVILEGES CASE

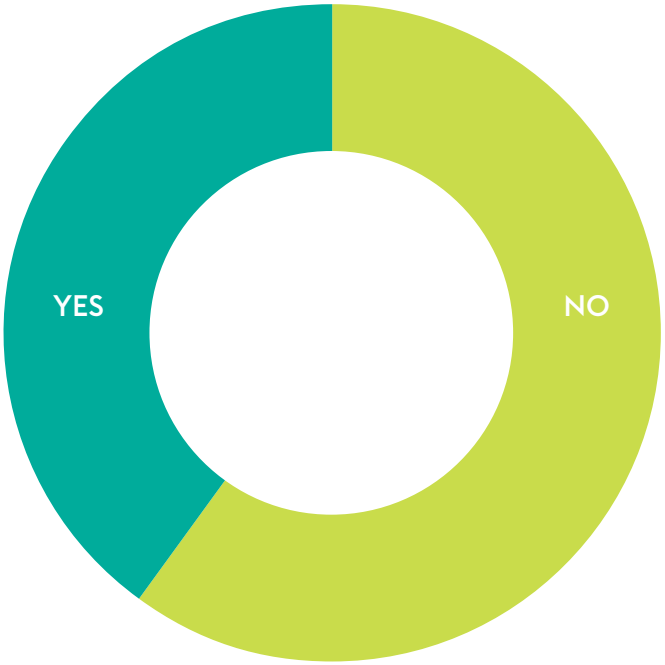
Defendants succeeded in 7 denial of physician privileges cases and lost in only one. The one case surviving dismissal was ***Toranto v. Jaffurs et al.***, No. 16-cv-1709 (S.D. Cal.), where a plaintiff physician sued defendant hospitals and their employees alleging a conspiracy to prevent plaintiff from obtaining privileges as a pediatric craniofacial plastic surgeon. The Court held that plaintiff's claims survived under a rule of reason analysis. In denying defendants' motion to dismiss plaintiff's antitrust claims, the court highlighted plaintiff's allegations that patients needing pediatric craniofacial plastic surgery would have longer wait times and increased recovery times. This case presently is at the summary judgment stage.

IT'S NOT OVER TIL IT'S OVER: DOJ INTERVENTION AT SETTLEMENT

The Department of Justice has filed several Statements of Interest (SOI) in health care antitrust matters in 2018 and 2019. In ***Seaman v. Duke University et al.***, No. 15-cv-462 (M.D.N.C.), the DOJ (which had previously filed an SOI) also has sought to intervene in the class action settlement of these claims. The suit, originally filed in 2015, alleges Duke University and the University of North Carolina School of Medicine had an anticompetitive no-poach agreement. The parties recently settled after the court granted certification of a class of medical faculty in March 2018. The DOJ seeks to intervene because the settlement involves injunctive relief, which it wants authority to enforce.

SUMMARY JUDGMENT STAGE

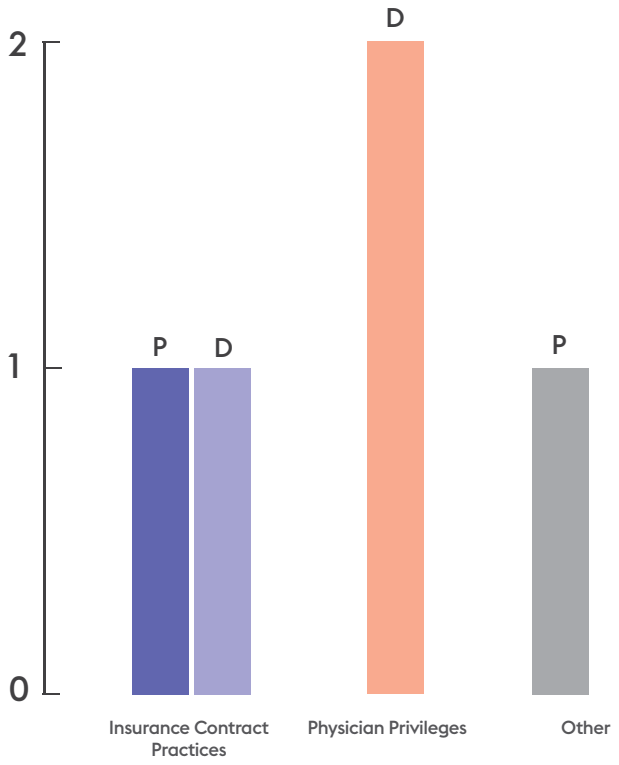
Did Antitrust Claims Survive the Summary Judgment Stage?



Only **5** cases were decided at summary judgment in 2017-2018, with at least one antitrust claim surviving a provider defendant's motion for summary judgment in **2** of those cases.

Results by Type of Case Being Brought

Plaintiff Wins or Defendant Wins



PLAINTIFF WIN AT SUMMARY JUDGMENT

Plaintiff survived summary judgment in ***United Biologics, LLC v. American Academy of Allergy Asthma & Immunology et al.***, No. 5:14-cv-00035 (W.D. Tex.). There, a trade association sued on behalf of its member primary care physicians providing allergy and asthma care services, alleging that the three national allergy specialist trade associations and an allergy blood test manufacturer conspired to restrict competition by persuading payors to refuse to reimburse for allergy services provided by non-specialists. After some defendants settled, the court denied defendants' motions for summary judgment, but a jury eventually decided against plaintiffs, finding that the remaining defendant did not conspire with others to restrain trade. The court denied plaintiff's motion to set aside the jury verdict.

DEFENDANT WIN AT SUMMARY JUDGMENT

McGary v. Williamsport Regional Med. Ctr. et al., No. 12-cv-01742 (M.D. Pa.), a case originally filed in 2012 by a cardiothoracic surgeon alleging arbitrary denial of privileges at an "open staff" hospital, was decided in the defendants' favor. The court ruled that plaintiff's conspiracy claims failed because the hospital defendant as a legal matter was incapable of conspiring with its own agents (the individual physician defendants), and that plaintiff's monopolization claims failed because she provided no evidence that defendants' reasons for not credentialing her were outdated or pretextual as she claimed. The case currently is on appeal.

SPOTLIGHT: GOVERNMENT IMMUNITY DEFENSE

Even though government enforcers like the DOJ may in some instances successfully bring suit against health systems controlled by state or county government agencies, private plaintiffs may not fare as well. A pair of recent cases demonstrate this. In ***United States et al. v. The Charlotte-Mecklenburg Hospital Authority***, No. 16-cv-00311 (W.D.N.C.), state and federal governments filed suit, alleging that the defendant was using restrictive agreements with commercial payors to prevent them from steering patients to "use less expensive health care services." In the follow-on class action, ***Benitez v. Charlotte-Mecklenburg Hospital Authority***, No. 18-cv-00095 (W.D.N.C.), the court dismissed plaintiffs' claims for monetary damages because defendant, as a local government-controlled system, was immune from money damages antitrust claims. The court also stayed the injunctive relief claims in *Benitez* pending the outcome of the government's litigation. Because the government's suit sought identical injunctive relief, which the court awarded in that action in April 2019, the private plaintiffs here are likely to see the balance of their claims dismissed as moot.

LOOKING FORWARD

In 2019 so far, in addition to the medical specialty board cases described on page one, several interesting cases have been filed. In one example—***Mendlow v. Klein et al.***, No. 19-cv-01771 (C.D. Cal.)—a *pro se* Plaintiff filed suit in March 2019 against several doctors, medical systems and the state health insurance exchange, alleging a concerted refusal to deal with potential patients that have been involved in medical malpractice cases in the past or that refuse to sign legal waivers prior to receiving care.

Two recent government settlements also are likely to impact the health care antitrust landscape moving forward. In ***United States v. The Charlotte-Mecklenburg Hospital Authority***, No. 16-cv-311 (W.D.N.C.), the parties entered a consent decree that prevents the defendant's successor Atrium Health from enforcing steering restrictions in contracts with health insurers. We expect to see similar consent decrees to come in future matters. And in ***Washington v. Franciscan Health System et al.***, No. 17-cv-05690 (W.D. Wash.), the State of Washington settled with a health system in a case alleging the health system's contracts with its co-defendant to jointly contract with payors constituted *per se* illegal price fixing agreements. The court has not yet approved the settlement, but the case reminds providers that their contractual relationships falling short of full economic unity of interest will garner attention from the antitrust enforcers.

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for the seventh consecutive year
- Global Competition Review

Antitrust group nationally recognized as **Tier 1**
- U.S. News – Best Lawyers 2019

Antitrust group ranked in
Illinois and **Washington, DC**
- Chambers USA

Jeffrey Brennan
individually ranked in
Washington, DC
- Chambers USA

Ashley Fischer & Stephen Wu
individually ranked in IL
- Chambers USA

Stephen Wu & Katharine O'Connor
recognized for their expertise in antitrust litigation
- Legal 500

Other rankings include *Chambers Global, International Who's Who of Competition Lawyers, The World's Leading Competition and Antitrust Lawyers, Best of the Best Antitrust/Competition Lawyers* and *PLC Which Lawyer?*

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