



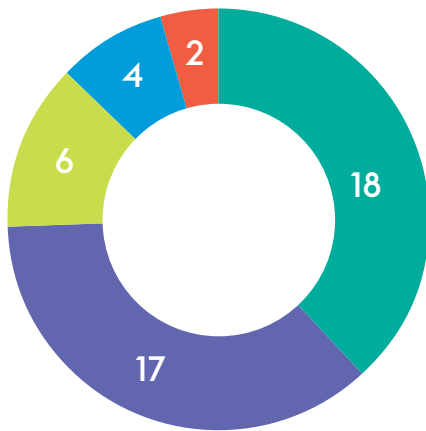
2020 HEALTH ANTITRUST LITIGATION UPDATE FOR PROVIDERS

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Antitrust & Competition Practice Group

What Cases Were Filed in 2018 and 2019?

TOTAL CASES FILED: **27** in 2018 | **20** in 2019

Who Is Suing Providers?



Competing Providers

e.g., competing hospitals; physician groups; ambulance services providers

Healthcare Workers

e.g., individual physicians or specialists; dentists

Government Entities

e.g., Federal Trade Commission; State of California; county governments

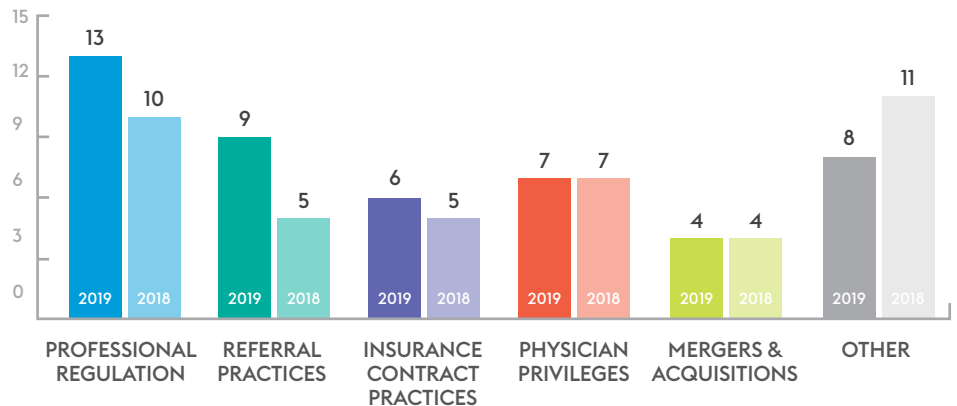
Patients/Consumers

e.g., former patients

Other

e.g., competing regulatory boards; providers of medical transportation services

What Cases Are Being Brought?



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., Competing provider alleging that area hospital attempted to monopolize the market for home health services by stopping referrals to plaintiff’s company

INSURANCE CONTRACT PRACTICES

E.g., Government alleging that health system used market power to prevent payors from steering patients to lower-cost providers

PHYSICIAN PRIVILEGES

E.g., Oncology services providers alleging that competing practitioners and hospital system conspired to exclude them from the market by entering into an exclusive services agreement

MERGERS & ACQUISITIONS

E.g., Federal Trade Commission (FTC) challenging a merger on the basis that the merger will result in significantly lessened competition

OTHER

E.g., Neurologist alleging his competitors engaged in coordinated boycott to refuse to see his patients for urgent care when defendants were on call at a hospital



GOVERNMENT INTEREST IN PROFESSIONAL REGULATION/REGULATORY BOARD CASES

SmileDirectClub, LLC (SmileDirectClub) is a teledentistry company that partners with dentists to provide clear aligner therapy for teeth straightening. SmileDirectClub has three cases pending against the dental boards of Alabama, California and Georgia. SmileDirectClub challenges the licensing boards' regulations that ban SmileDirectClub's taking of photographic images as the unlicensed practice of dentistry if not directed by or under the direct supervision of an in-state dentist.¹ The FTC and Department of Justice (DOJ) Antitrust Division filed joint briefs supporting SmileDirectClub in two of the three cases, which are currently pending before the US Court of Appeals for the Eleventh Circuit. In those two cases, the district courts rejected the dental boards' motion to dismiss on state action immunity grounds, and the boards filed interlocutory appeals to the Eleventh Circuit. The agencies support SmileDirectClub, and argue that the district courts properly concluded that the dental boards failed to establish the "active supervision" element of the state action immunity defense. The agencies' briefs reflect the federal regulators' skepticism of the state action defense immunizing the actions of state regulatory bodies.

¹The cases are *Leeds v. Jackson et al.*, No. 19-11502 (11th Cir.), *Sulitzer et al. v. Tippins et al.*, Case No. 19-cv-8902 (C.D. Cal.), and *SmileDirectClub, LLC v. Battle, et al.*, Case No. 19-12227 (11th Cir).



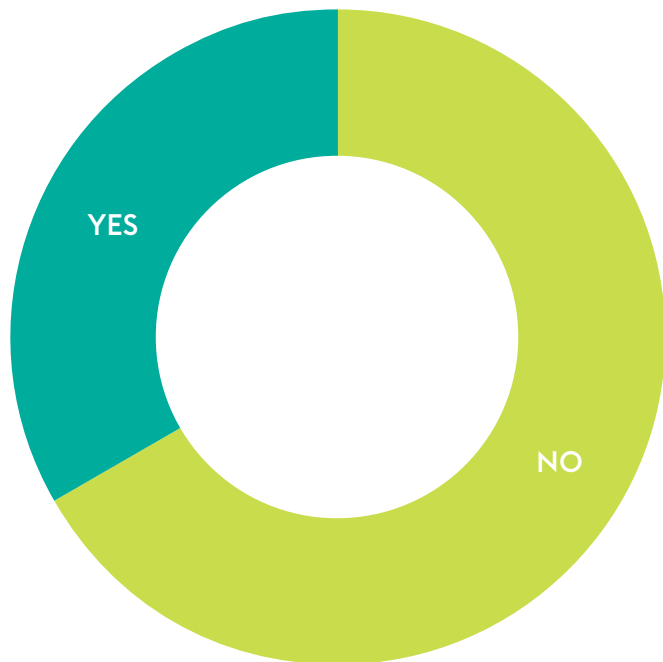
INSURANCE CONTRACTS

Healthcare providers' contracts with insurance providers continue to be a focus for both private plaintiffs and the government. These claims can take a variety of forms. **Exclusive dealing** claims allege that a provider's exclusive or narrow network agreement with an insurance company forecloses competition by preventing competitors from accessing insured patients. **Tying** claims allege that a provider was able to force or coerce an insurance company to contract with it for one service line because the provider has market power in another. **Monopolization** claims allege that a provider acquired or maintained a monopoly through its payer contracting practices (typically, through anti-steering or exclusivity provisions). **Conspiracy** or **group boycott** claims allege the existence of an illegal agreement to exclude competitors.

HOW WERE CASES DECIDED IN 2018 AND 2019?

PLEADINGS STAGE

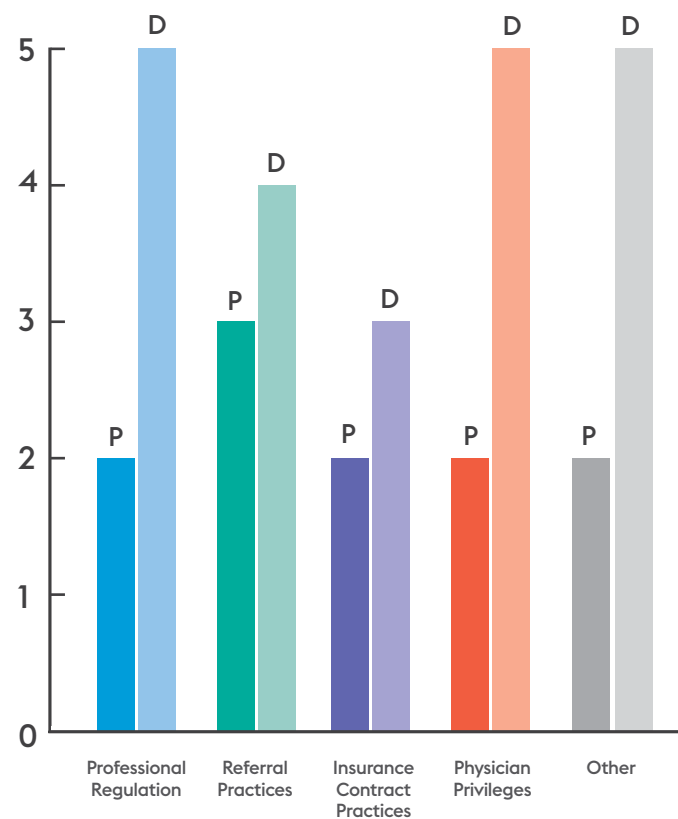
Did Antitrust Claims Survive the Pleadings Stage?



Defendants were successful in **two-thirds** of cases decided on the pleadings in 2018–2019. **This is down from a 75%** success rate for defendants in the prior two years. In sum: Plaintiffs filed more cases that survived a motion to dismiss on the pleadings.

Results by Type of Case Being Brought

Plaintiff Wins or Defendant Wins



PLAINTIFF WIN IN A REFERRAL PRACTICES CASE

Defendants fare far better than plaintiffs in referral practices cases. These are cases challenging practices that prohibit or block referrals to a plaintiff (typically, another provider). In 2018 and 2019, plaintiffs survived a motion to dismiss three times, but lost motions to dismiss five times. An example of a successful plaintiff’s case is *American Home Healthcare Services, Inc. v. Floyd Memorial Hospital & Health Services et al.*, Case No. 17-cv-00089 (S.D. Ind.). In that case, American Home Healthcare alleged that Floyd Memorial Hospital attempted to monopolize home healthcare referrals of patients discharged from its hospital and interfered with American’s patients’ choice of a home healthcare agency. American alleged harm to competition by claiming that Floyd’s self-referral policy disregarded patient choice. The court viewed Floyd as an “essential facility” for American to receive referrals.

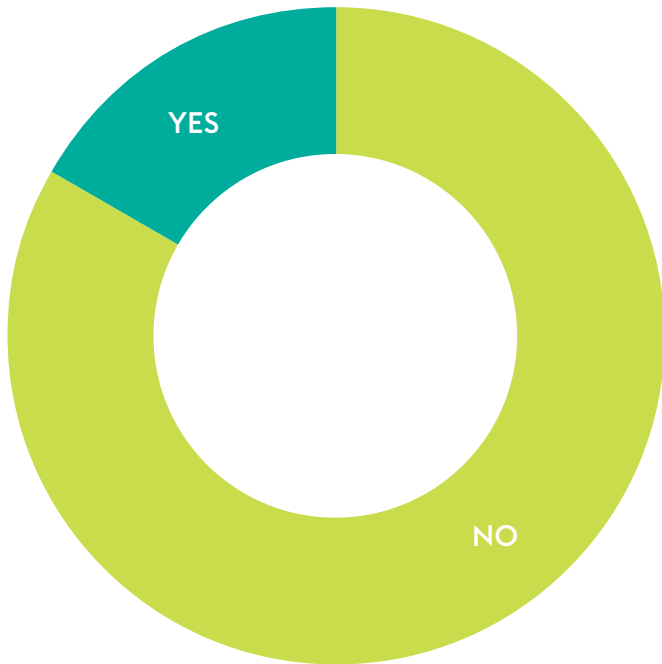
HARM TO COMPETITION

A major challenge for plaintiffs in all antitrust cases against healthcare providers is proving that the defendant’s actions harmed *competition*, not just the plaintiff. Harm to competition means higher costs, lower quality or an inability to access care. The US Court of Appeals for the Ninth Circuit recently took up this issue in *Conklin v. University of Washington Medicine, et al.*, Case No. 19-35181 (9th Cir.). Plaintiff, an osteopathic physician, challenged his inability to participate in the match process for medical fellowships. The Ninth Circuit affirmed dismissal of the case because Plaintiff failed to allege *harm to competition*. The court reasoned that Plaintiff had failed to allege any change in price, availability of services or quality of services in the relevant market. The Ninth Circuit reached the opposite conclusion in *Ireland v. Bend Neurological Associates LLC, et al.*, Case No. 18-35316 (9th Cir.). There, a neurologist claimed that a competing neurology group coordinated a boycott against Plaintiff by refusing to see Plaintiff’s patients for urgent care. The Ninth Circuit allowed Plaintiff’s antitrust claims to survive because Plaintiff alleged that Defendants refused to provide services to certain types of patients altogether, which meant the market suffered from reduced services. This was plausible harm to competition.

HOW WERE CASES DECIDED IN 2018 AND 2019?

SUMMARY JUDGMENT STAGE

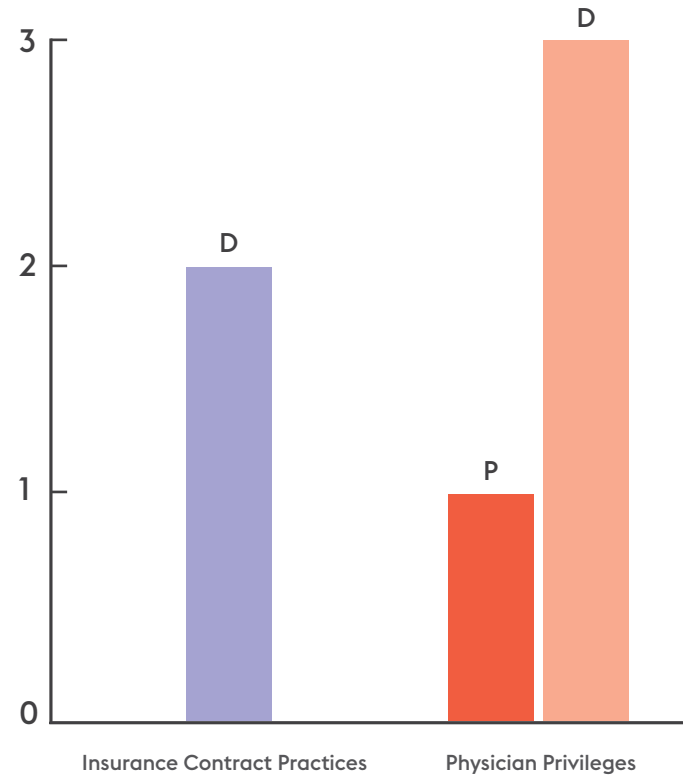
Did Antitrust Claims Survive the Summary Judgment Stage?



Only 6 cases were decided at summary judgment in 2018-2019, with only one plaintiff's case surviving summary judgment. Summary judgment remains a huge hurdle for plaintiffs with antitrust claims against healthcare providers, but typically requires enduring discovery to obtain.

Results by Type of Case Being Brought

Plaintiff Wins or Defendant Wins



PLAINTIFF WIN AT SUMMARY JUDGMENT

Plaintiff survived summary judgment in one case during 2018 and 2019: *Toronto v. Jaffurs et al.*, No. 16-cv-01709 (S.D. Cal.). Plaintiff, a pediatric surgeon, alleged that Defendants (two California hospitals, one hospital's medical staff and several physicians) made false statements as part of a conspiracy to exclude him from privileges at Defendant hospitals. The court denied Defendants' motion for summary judgment based on Plaintiff's evidence of harm to a market for craniofacial surgery services, and that Defendants worked together to ensure Plaintiff's privileges application was denied. The relevant market of craniofacial surgery services was important because courts are more likely to find harm to competition arising out of privileging decisions when the plaintiff physician practices in a narrow or specialized field.

LOOKING FORWARD: FTC AND DOJ ACTIVITY DURING COVID-19 AND BEYOND

The FTC and DOJ have been highly active this year, bringing new lawsuits in federal court after years-long investigations and challenging high-profile mergers. Healthcare remains a significant focus of both agencies, with the [FTC reporting in April 2020](#) that **46% of enforcement actions in the past five years** have been in the healthcare space. In a statement issued on October 6, 2020, Ian Conner, Director of the FTC's Bureau of Competition, [reported](#) the Bureau had "the busiest merger enforcement year" in 20 years, with 28 merger enforcement actions in the fiscal year. Bottom line: Healthcare remains a significant focus—from pharmaceuticals to healthcare technology to healthcare providers—and the antitrust agencies are more active than ever. The strong emphasis on enforcement comes from both sides of the aisle, so we expect the trend to continue in 2021 regardless of any election results.

Two cases currently pending in the US District Court for the District of DC involve government challenges of exclusive contracts. We expect these cases to shape **exclusive dealing** law going forward, which will impact healthcare providers and how they use exclusive and semi-exclusive contracts. In addition, we expect that the FTC's pending challenge to **Thomas Jefferson University** and **Albert Einstein Healthcare Network's** merger may provide additional guidance on the "flailing firm" defense, as one of the issues is Einstein's financial state and future competitiveness.

McDERMOTT WILL & EMERY'S HEALTHCARE ANTITRUST GROUP IS UNIQUELY POSITIONED TO DELIVER RESULTS

Benchmark Litigation 2021

ANTITRUST TIER 2 NATIONAL RANKING, ILLINOIS – HIGHLY RECOMMENDED;
Katharine O'Connor and Michelle Lowery - 40 & Under Hot List and Future Stars

Legal 500

RECOGNIZED IN CARTEL, MERGER CONTROL AND CIVIL LITIGATION/CLASS ACTIONS

Chambers USA

BAND 2 FIRM RANKING (ANTITRUST ILLINOIS); Stephen Wu individually ranked

Global Competition Review 2020

RANKED AS ELITE IN UNITED STATES: ILLINOIS

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