



## **OVERVIEW OF FTC ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS\***

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\* Actions involving pharmaceutical products and distribution are contained in a separate document, *Overview of FTC Actions in Pharmaceutical Products and Distribution*. Information about advisory opinions in the health care and pharmaceutical sectors is contained in the document *Topic and Yearly Indices of Health Care Antitrust Advisory Opinions by Commission and by Staff*.

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## FTC ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS<sup>1</sup>

### I. INTRODUCTION

The Federal Trade Commission is a law enforcement agency charged by Congress with protecting the public against anticompetitive behavior and deceptive and unfair trade practices. The FTC's antitrust arm, the Bureau of Competition, is responsible for investigating and prosecuting "unfair methods of competition" which violate the FTC Act. The FTC shares with the Department of Justice responsibility for prosecuting violations of the Sherman Act and the Clayton Act.

When litigation becomes necessary, the FTC may conduct an administrative adjudication before an FTC Administrative Law Judge. This provides the opportunity for matters raising complex legal and economic issues to be heard, in the first instance, in a forum specially suited for dealing with such matters. Appeals from Commission decisions are taken directly to the federal courts of appeal. The Commission also has the authority under Section 13(b) of the FTC Act to seek a preliminary injunction in federal district court whenever the Commission has reason to believe that a party is violating, or is about to violate, any provision of law enforced by the FTC. Such preliminary injunctions are intended to preserve the status quo, or to prevent further consumer harm, pending administrative adjudication before the Commission. Additionally, the Commission has the authority to seek a permanent injunction in federal district court in a "proper case" pursuant to section 13(b) of the FTC Act.

In the mid-1970's, the FTC formed a division within the Bureau of Competition to investigate potential antitrust violations involving health care. The Health Care Division consists of approximately 40 lawyers and investigators who work exclusively on health care antitrust matters. FTC cases involving health care services and products<sup>2</sup> are summarized below.<sup>3</sup> The summaries are intended to provide a brief overview of the FTC enforcement actions. They do not reflect all subsequent actions taken by the Commission or the parties. The Commission and its

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<sup>1</sup> This summary has been prepared by the FTC Health Care Division staff, and has not been reviewed or approved by the Commission or the Bureau of Competition. Section III describes FTC enforcement involving mergers of health care providers, which are now conducted primarily by the Mergers IV Division of the Bureau of Competition. Section IV describes FTC enforcement involving mergers of medical device and equipment manufacturers, which are conducted primarily by the Mergers I Division of the Bureau of Competition.

<sup>2</sup> Actions involving pharmaceutical products and distribution are contained in a separate document, *Overview of FTC Actions in Pharmaceutical Products and Distribution*, <https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care>.

<sup>3</sup> Commission complaints and orders issued since March 1996 are available at the FTC's website at <http://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care> (under the "Cases" drop down menu).

staff have also responded to numerous requests for guidance from health care industry participants through, among other things, the advisory opinion letter process.<sup>4</sup>

For further information about matters handled by the FTC's Health Care Division, or to lodge complaints about suspected antitrust violations, please write, call, e-mail,<sup>5</sup> or fax this office as follows:

Mailing Address: Health Care Division  
Bureau of Competition  
Federal Trade Commission  
Washington, DC 20580  
Telephone Number: 202-326-2206  
E-Mail: antitrust@ftc.gov  
Fax Number: 202-326-3384

For further information about mergers involving medical devices and equipment manufacturers handled by the FTC's Mergers I Division, please write, call, e-mail, or fax the Mergers I Division as follows:

Mailing Address: Mergers I Division  
Bureau of Competition  
Federal Trade Commission  
Washington, DC 20580  
Telephone Number: 202-326-2682  
E-Mail: antitrust@ftc.gov  
Fax Number: 202-326-2655

For further information about mergers involving hospitals and other health care facilities handled by the FTC's Mergers IV Division, please write, call, e-mail, or fax the Mergers IV Division as follows:

Mailing Address: Mergers IV Division  
Bureau of Competition  
Federal Trade Commission  
Washington, DC 20580  
Telephone Number: (202) 326-3680 and (202)-326-3296  
E-Mail: antitrust@ftc.gov  
Fax Number: (202) 326-2655

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<sup>4</sup> Information regarding advisory opinions is set forth in the *Topic and Yearly Indices of Health Care Antitrust Advisory Opinions by Commission and by Staff*. The indices, the advisory opinions, and other information relating to the Commission's advisory opinion program are also available at the FTC's website at <http://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care>.

<sup>5</sup> Note that e-mail is not secure. Confidential information should be marked "Confidential" and sent via regular mail. To learn how we may use the information you provide, please read our Privacy Policy.

## II. CONDUCT INVOLVING HEALTH CARE SERVICES AND PRODUCTS

### A. Monopolization

**Victrex plc/Invibio Limited/Invibio, Inc.**, FTC File No. 1410042 (proposed consent order accepted for public comment April 27, 2016) (<https://www.ftc.gov/enforcement/cases-proceedings/141-0042/victrex-plc-et-al-matter>). The complaint charged that Invibio, the first company to sell implant-grade polyetheretherketone (PEEK) to medical device makers, illegally exercised its monopoly power to maintain higher prices and impede rivals from becoming effective competitors through its exclusive contracting practices. Implant-grade PEEK is a specialty polymer used by medical device makers to construct spinal, orthopedic, and other human implants. At the time of the complaint, Invibio was the dominant supplier of implant-grade PEEK. Its only competitors in the sale of implant-grade PEEK were Solvay Specialty Polymers LLC and Evonik Corporation. Solvay and Evonik each began to sell PEEK after Invibio had established market dominance, offering prices significantly below the prices charged by Invibio.

According to the complaint, both before and after entry by Solvay and Evonik, Invibio included exclusivity terms in its long-term supply contracts with customers. Invibio employed various strategies to coerce or induce device makers to accede to its exclusivity terms, including threatening to discontinue PEEK supply or to withhold access to regulatory support. The complaint alleged that Invibio's insistence on exclusivity terms was a deliberate and successful strategy to hinder its competitors and to maintain its monopoly power. In 2014, years after entry by Solvay and Evonik, and despite Solvay's and Evonik's lower prices, Invibio still accounted for over 90 percent of PEEK sales worldwide.

The order prohibits Invibio, Inc. and Invibio Limited, along with their corporate parent, Victrex plc, from implementing any agreement or policy that results in exclusivity with customers and from preventing current customers from using an alternate source of PEEK in new products. In addition, the companies must allow current customers meeting certain conditions to modify existing contracts to eliminate any requirement that the customer purchase PEEK exclusively from Invibio. Also under the order, the companies are generally barred from using pricing terms in new contracts that could effectively result in an exclusive arrangement between Invibio and a device maker. These prohibited terms include setting minimum purchase requirements; conditioning discounts or important services on a device maker's purchase from Invibio of a specified percentage of its PEEK requirements; and providing retroactive volume discounts.

**Federal Trade Commission v. Cardinal Health**, Case 15-cv-3031, FTC File No. 1010006 (final order issued April 23, 2015) (<https://www.ftc.gov/enforcement/cases-proceedings/101-0006/cardinal-health-inc>). In April 2015, the FTC filed a stipulated permanent injunction in federal court settling charges that Cardinal Health, Inc. excluded potential entrants and maintained monopoly power in 25 local markets for the sale and distribution of low energy radiopharmaceuticals, by obtaining *de facto* exclusive rights to distribute an essential input, heart profusion agents, from the only two manufacturers. Low energy radiopharmaceuticals are drugs containing radioactive isotopes used by hospitals and clinics for nuclear imaging and other procedures. Radiopharmacies, including Cardinal's, distribute and sell radiopharmaceuticals to hospitals and clinics, which rely on radiopharmacies to compound radiopharmaceuticals and to

provide just-in-time delivery on a daily basis for procedures. At the time of the complaint, Cardinal owned the nation's largest chain of radiopharmacies.

According to the complaint, a radiopharmacy could not profitably operate and compete in a local market without obtaining the right to distribute heart profusion agents from one of the two manufacturers. Cardinal employed various tactics to induce or coerce the only two manufacturers of heart profusion agents to refuse to grant distribution rights to potential entrants in the 25 markets in which Cardinal operated the only radiopharmacy. Cardinal's coercive tactics did not enhance efficiency or otherwise serve procompetitive ends, but rather had the purpose and effect of insulating Cardinal's downstream monopolies from competition. The complaint alleged that Cardinal's conduct enabled it to amass substantial ill-gotten gains by charging hospitals and clinics in the 25 geographic markets supra-competitive prices.

Under the terms of the final order and stipulated permanent injunction, Cardinal was required to disgorge its ill-gotten gains by paying \$26.8 million into a fund for distribution to customers injured by its conduct. The order bars Cardinal from engaging in similar conduct in the future and requires Cardinal to notify the Commission before entering into new exclusive distribution agreements or buying radiopharmacy assets that would not otherwise be subject to the notification requirements of the Hart-Scott Rodino Act. The order also contains provisions designed to facilitate entry and restore competition in six of the relevant markets where Cardinal continues to operate as the sole or dominant radiopharmacy.

**IDEXX Laboratories, Inc.**, C-4383, FTC File No. 1010023 (final order issued February 11, 2013) (<https://www.ftc.gov/enforcement/cases-proceedings/1010023/idx-laboratories-inc-matter>). According to the FTC complaint, IDEXX Laboratories, Inc., the largest U.S. supplier of diagnostic testing products used by companion animal veterinarians, engaged in monopolistic behavior in the market for point-of-care (POC) diagnostic products, including rapid assay tests, equipment and supplies, used to test, diagnose and treat conditions such as heartworm during a single office visit. POC diagnostic products allow veterinarians to provide consumers with real-time results that cannot be obtained by other services, such outside labs. At the time of the complaint, more than 85 % of all products and supplies that companion animal veterinarians purchased through distribution were sourced through one of IDEXX's five top distributors. IDEXX's share of the POC diagnostic market had been at least 70% during each of the prior five years (2006-2011), and no other firm had had more than a 20 % market share. The complaint stated that distributors were the most efficient and easiest way to market POC diagnostic product to veterinarians, and IDEXX barred its distributors from carrying any competing POC diagnostic testing products. Distributors had no choice but to agree to carry IDEXX's products exclusively to avoid termination by IDEXX. The company's exclusionary conduct blocked its competitors from this sales channel, often forcing them out of the market.

The order prohibits IDEXX from maintaining concurrent exclusive distribution agreements with the three top tier distributors for ten years. IDEXX also is prohibited from retaliating against non-exclusive distributors, withholding products, or using other means to limit the distributor's sales of other manufacturer's products. In addition, all future non-exclusive agreements between IDEXX and one of the three national distributors must meet the requirements of the order, and will begin with a two-year term, followed by renewal terms of at least one year. If IDEXX

terminates any non-exclusive distributor agreement, it must notify the FTC and show any future agreements to the agency 30 days before they are signed.

**Transitions Optical, Inc.**, C-4289, FTC File No. 0910062 (final order issued April 22, 2010) (<https://www.ftc.gov/enforcement/cases-proceedings/091-0062/transitions-optical-inc>).<sup>4</sup> The complaint charged that Transitions – which had an 80-85% share of the \$630 million U.S. wholesale photochromic lens market – illegally maintained its monopoly power by engaging in unlawful exclusionary acts at nearly every level of the distribution chain.

Consumers of corrective ophthalmic lenses (used for vision correction and worn in eyeglasses) could purchase those lenses with a photochromic treatment, which protects eyes from ultraviolet (UV) rays, and which lighten and darken depending on the amount of UV light to which they are exposed. Lens manufacturers (known as “lens casters”) supplied lenses to Transitions, which used proprietary methods to apply patented photochromic dyes and other materials to the lenses. Transitions then sold the treated lenses back to the lens casters, who were Transitions’ only direct customers. Lens casters, in turn, sold the photochromic lenses to wholesale optical labs (which resold the lenses to ophthalmologists, optometrists, and opticians) and optical retailers (which dealt directly with consumers).

The complaint charged that Transitions had adopted exclusionary practices with respect to lens casters by: (1) terminating its relationships with lens casters that had developed or sold competing photochromic lenses or treatments; (2) entering into exclusive agreements with certain lens casters; (3) announcing to the industry that it would deal only with lens casters that sold Transitions lenses exclusively; and (4) threatening to terminate lens casters that did not want to sell Transitions lenses on an exclusive basis. According to the complaint, these practices were effective in deterring competition because Transitions photochromic lens sales could represent up to 40% of a lens caster’s profits.

The complaint also charged that Transitions directed its exclusionary practices at wholesale optical labs and optical retailers by: (1) entering into long-term agreements, which were exclusive and difficult to terminate, with over 50 retailers – including many of the largest chains; (2) entering into agreements with over 100 wholesale labs that required those labs to promote Transitions lenses as their preferred photochromic lens, and to withhold sales efforts for competing photochromic lenses; and (3) agreeing with retailers and wholesale labs that a discount would be provided only if the customer purchases all, or almost all, of its photochromic lens needs from Transitions. According to the complaint, these practices were effective in foreclosing Transitions’ competitors from up to 40% of the retailer and wholesale lab distribution channels. The complaint also alleged that the photochromic lens industry had high barriers to entry, including: significant product development costs and capital requirements; intellectual property rights; regulatory requirements; and Transitions’ ability to exclude competitors and control prices.

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<sup>4</sup>This matter was handled by the Anticompetitive Practices Division of the FTC’s Bureau of Competition, which can be contacted at (202) 326-2584 (phone) or (202) 326-3496 (fax).

The consent order: (1) prohibits Transitions from adopting or implementing any agreement or policy that results in exclusivity with lens casters; (2) requires certain safeguards before Transitions may enter into exclusive agreements with retailers or wholesale labs; (3) prohibits Transitions from limiting its customers from communicating or discussing a competing photochromic lens with consumers and others; (4) limits Transitions' ability to offer customers certain types of discounts; and (5) prohibits Transitions from discriminating or retaliating against customers that purchase or sell Transitions lenses on a non-exclusive basis.

**Inverness Medical Innovations, Inc.**, C-4244, FTC File No. 061123 (final order issued January 23, 2009) (<http://www.ftc.gov/enforcement/cases-proceedings/061-0123/inverness-medical-innovations-inc-matter>). The complaint charged that Inverness – the dominant firm in the U.S. market for consumer pregnancy tests, with a 70 % market share – unreasonably restrained competition through its acquisition of certain assets of ACON Laboratories, Inc. (ACON), a competing producer of consumer pregnancy tests. In 2006, Inverness acquired a consumer pregnancy test based on water-soluble dye technology that ACON was developing, as well as assets related to a digital consumer pregnancy test joint venture between ACON and another company, Church & Dwight. The complaint charged that these acquisitions unreasonably restrained competition in two ways. First, Inverness limited potential competition from digital consumer pregnancy test products by, among other things: (1) imposing a covenant not to compete on ACON, which limited the scope and duration of its joint venture with Church & Dwight; (2) requiring ACON to provide Inverness with all profits from the joint venture; and (3) acquiring rights to certain intellectual property developed by ACON and Church & Dwight during their joint venture. Second, Inverness engaged in unfair competition to maintain its monopoly in the consumer pregnancy test market when it bought, but did not use, ACON's water-soluble dye technology assets, because the acquisition of these assets solidified Inverness' monopoly, and kept that technology from being developed into products that would compete with Inverness' consumer pregnancy tests. The consent order contains provisions to prevent Inverness from interfering with the ACON-Church & Dwight joint venture, and to enable those firms to remain competitively viable after the joint venture ends. The order also requires Inverness to divest assets related to ACON's water-soluble dye technology to Aemoh Products, Inc. The order also prohibits Inverness from making infringement claims against certain products that use its water-soluble dye technology.

## **B. Agreements on Price or Price-Related Terms**

**Cooperativa de Médico Oftalmólogos de Puerto Rico**, C-4603, FTC File No. 1410194 (final order issued February 27, 2017) (<https://www.ftc.gov/enforcement/cases-proceedings/141-0194/cooperativa-de-medicos-oftalmologos-de-puerto-rico>). The complaint alleged that Cooperativa de Médico Oftalmólogos de Puerto Rico (“OFTACOOOP”) unlawfully orchestrated an agreement among competing ophthalmologists to refuse to deal with a health plan, MCS Advantage, Inc., and its network administrator, Eye Management of Puerto Rico, LLC. OFTACOOOP is a healthcare cooperative in Puerto Rico composed of about 100 member ophthalmologists. OFTACOOOP's concerted refusal to deal forced MCS to abandon its plan to engage Eye Management to create a lower-cost network of ophthalmologists. The boycott also forced MCS to maintain its then-current reimbursement rates paid to ophthalmologists. MCS provides healthcare services to enrollees of its Medicare Advantage plan, and must offer a



network with a sufficient number of physicians to provide its enrollees with adequate access to healthcare services. Specifically, the complaint alleged that, in an effort to lower its costs after Medicare reduced its premiums, MCS asked Eye Management to create and manage a network of ophthalmologists in Puerto Rico. In response to letters from MCS and Eye Management to individual doctors offering lower rates for the new network, OFTACOOP urged ophthalmologists to refuse to sign the proposed contract and to unite in refusing to deal with Eye Management. In August 2014, Eye Management informed MCS that it had been unable to form an adequate network of ophthalmologists. The ophthalmologists then refused to contract directly with MCS at lower rates thereby forcing MCS to maintain its current reimbursement rates.

The proposed consent order prohibits OFTACOOP from entering into or facilitating agreements between or among ophthalmologists: to refuse to deal, or threaten to refuse to deal, with any payor regarding any term, including price terms, or not to deal individually with any payor, or not to deal with any payor other than through OFTACOOP. The order also prohibits information exchanges to facilitate any prohibited conduct, and it bars any attempts to engage in any prohibited conduct. OFTACOOP is also barred from encouraging, suggesting, advising, pressuring, inducing, or trying to induce anyone to engage in any prohibited conduct. The consent, however, provides that it would not violate the order for OFTACOOP, when negotiating with a payor in compliance with the Commonwealth of Puerto Rico's Act 228 to: (1) reject any offer or counter-offer, or refuse to contract; or (2) exchange information that is reasonably necessary to contract pursuant to negotiating with any payor. This latter order provision recognizes that the Commonwealth authorizes healthcare providers to jointly negotiate (short of coercion) price terms with payors, and establishes a process by which the Commonwealth oversees those negotiations and the agreements resulting from those negotiations.

**Práxedes E. Alvarez Santiago, M.D. et al.**, C-4402, FTC File No. 121-0098 (final order issued May 1, 2013) (<https://www.ftc.gov/enforcement/cases-proceedings/1210098/praxedes-e-alvarez-santiago-md-et-al-pr-nephrologists-matter>). The complaint charged that eight independent kidney specialists (nephrologists) in Puerto Rico violated federal antitrust laws beginning late 2011 by jointly negotiating and fixing prices in order to extract higher reimbursement rates than they were entitled to receive under their contracts with Humana Health Plans of Puerto Rico (Humana) to provide care to indigent patients under Puerto Rico's Medicaid program. When Humana refused to accede to their price demands, the nephrologists collectively terminated their contracts with Humana and refused to treat Humana patients enrolled in the Puerto Rico Medicaid program. The complaint charged that the termination of nephrology services had a significant negative impact on patients and resulted in higher reimbursement rates for physicians. The order prohibits the physicians from jointly entering into agreements regarding any price or non-price terms upon which any individual physician deals with any insurer; negotiating on behalf of another physician with any insurer; or refusing to deal, or threatening to refuse to deal, with any insurer. The order also bars the physicians from collectively refusing to treat patients. It requires the physicians to notify the Commission before entering into certain joint arrangements and to distribute the order to certain people so that they are aware of its terms.

**Southwest Health Alliances, Inc., d/b/a BSA Provider Network**, C-4327, FTC File No. 0910013 (final order issued July 8, 2011) (<https://www.ftc.gov/enforcement/cases-proceedings/0910013/southwest-health-alliances-inc>). In its complaint, the Commission alleged

that Southwest Health Alliances, Inc., d/b/a BSA Provider Network (Southwest Health), violated federal law since 2000 by fixing the prices that its member physicians charged insurers. This violation led to higher prices for consumers and businesses. Southwest Health agreed to an FTC order prohibiting similar conduct in the future, and the Commission approved the final order on July 8, 2011. Southwest Health also settled similar charges brought by the Texas Attorney General. At the time of the complaint, Southwest Health was an independent practice association (IPA) of approximately 900 physician members representing multiple, independent medical practices in the Amarillo area. Three hundred of the physicians provided primary care services. The complaint alleged that since 2000 the network had restrained competition by entering into and implementing agreements to fix the prices and terms of its contracts with health plans. It had also collectively negotiated the terms and conditions under which it would deal with the health plans. According to the complaint, the agreements eliminated competition and harmed consumers by increasing prices for physician services. An IPA that clinically or financially integrates its members' practices may create efficiencies that would justify joint price negotiations. However, because Southwest Health's physicians undertook no such integration, the agreements produced no efficiencies that were beneficial to consumers.

The order settling the FTC's complaint is designed to stop Southwest Health's alleged anticompetitive conduct while permitting it to continue to engage in legitimate joint conduct. The order prohibits Southwest Health from engaging in the following conduct to enter into or facilitate agreements among physicians: (1) negotiations on behalf of any physician with any insurer; (2) enter into negotiations as a payer with any physician; (3) dealing, refusing to deal, or threatening to refuse to deal with any insurer; and (4) not dealing individually with any insurer, or not dealing with any insurer, except through Southwest Health. The order bars Southwest Health from facilitating the exchange of information between physicians concerning the terms on which they will contract with insurers. It does not preclude Southwest Health from engaging in conduct that is reasonably necessary to form or participate in legitimate "qualified risk-sharing" or "qualified clinically integrated" arrangements, as defined in the order. The order also does not prohibit agreements that only involve physicians who are part of the same medical practice. In addition, the order contains notification provisions that will allow the FTC to monitor Southwest Health's compliance with the terms of the order. It will also allow insurers to terminate any contracts, without penalty, entered into with the network since its alleged restraint of trade began in 2000. The order expires in 20 years.

**Minnesota Rural Health Cooperative**, C-4311, FTC File No. 0510199 (final order issued December 28, 2010) (<http://www.ftc.gov/enforcement/cases-proceedings/051-0199/minnesota-rural-health-cooperative-matter>). The complaint charged that competing hospitals, physicians, and pharmacies in rural southwestern Minnesota agreed to fix prices and collectively negotiate contracts – including price terms – with third-party payers in Minnesota through the Minnesota Rural Health Cooperative (MRHC); and that MRHC had undertaken no efficiency-enhancing integration that could justify this conduct. MRHC had about 22 hospital members (representing most of the hospitals and two-thirds of hospital beds) and 114 physician members (who practiced in about 47 clinics) in SW Minnesota. The complaint charged that, since 1996, MRHC negotiated prices and other competitively significant terms with payers in Minnesota on behalf of MRHC physician and hospital members. MRHC and its members refused to negotiate individually with payers. MRHC also threatened to terminate contracts with payers to pressure

them to increase reimbursement rates for MRHC physicians and hospitals. The complaint charged that, through its collective negotiations and coercive tactics, MRHC extracted higher payments and other favorable price-related terms from payers. (*E.g.*, one payer agreed to pay MRHC physicians 27% more, and MRHC hospitals 10% more, than comparable non-MRHC physicians and hospitals.)

The complaint also alleged that, from early 2005 to late 2007, MRHC represented about 70 pharmacy members in obtaining higher Medicare “Part D” prescription drug program reimbursement levels. The complaint charged that MRHC took advantage of Part D regulations requiring each participating pharmacy benefit management company (PBM) or other payer to include enough pharmacies in its pharmacy benefits plan to ensure that 70% of rural Part D beneficiaries lived no more than 15 miles from a participating pharmacy. MRHC urged member pharmacies not to deal individually with PBMs so as to “leverage” their negotiating power, and negotiated and contracted collectively with at least six PBMs.

The order, among other things, prohibits MRHC from entering into or facilitating agreements between or among physicians, hospitals, or pharmacies: (1) to refuse, or threaten to refuse, to deal with any payer regarding the terms, conditions, or requirements upon which any physician deals, or is willing to deal, with any payer (including, but not limited to, price terms); or (2) to not deal individually with any payer, or to not deal with any payer through any arrangement other than one involving MRHC. The order also prohibits MRHC from submitting to the Minnesota Department of Health for approval any agreement with any payer if MRHC or any of its officers, directors, members, or employees engaged in any acts of coercion, intimidation, or boycott of, or any concerted refusal to deal with, any payer seeking to contract with MRHC – provided, however, that it would not violate the order for MRHC, when negotiating with a payer in compliance with Minnesota Annotated Code § 62R.01, *et seq.*, to: (1) reject any offer or counter-offer, or refuse to contract; or (2) exchange information that is reasonably necessary to contract pursuant to negotiating with any payer. This latter order provision recognizes that Minnesota laws: (1) authorize health care provider cooperatives to contract with purchasers on a fee-for-service basis; (2) specify that, with certain limitations, such contracts are not contracts that unreasonably restrain trade; and (3) establish a process by which the State’s Department of Health is to review and approve or disapprove health care provider cooperatives with third-party payers.

**Roaring Fork Valley Physicians IPA, Inc.**, C-4288, FTC File No. 0610172 (final order issued April 5, 2010) (<https://www.ftc.gov/enforcement/cases-proceedings/061-0172/roaring-fork-valley-physicians-ipa-inc>). The complaint charged that an independent practice association (IPA) of approximately 85 independent, competing physicians and physician groups in the Garfield County, Colorado area acted to increase and maintain the reimbursement rates at which its members contracted with payers by: (1) refusing to deal with payers except on collectively agree-upon terms; and (2) coordinating agreements among its members on price-related terms. The complaint charged that, in order to join the RFVP IPA, member physicians signed an agreement by which they agreed to refuse to enter into contracts except on RFVP’s collectively agreed-upon terms. One of the terms was the “Bona Fide Offer Criteria,” under which RFVP would not consider any Medicare-based reimbursement rates proposal to be a bona fide offer – and would not messenger such offers to members. Also, under RFVP’s “Best Practices,” the IPA

insisted that a cost of living increase must be included in payer contracts. In addition, RFVP adopted a restrictive network adequacy rule, under which the IPA would only sign and administer messengered contracts that had been accepted by at least 80% of all its members and 50% of each specialty among its members. The complaint charged that the effect of these practices had been to maintain and increase reimbursement levels in contracts between RFVP members and payers. The order prohibits RFVP from entering into or facilitating agreements between or among health care providers: (1) to negotiate on behalf of any physician with any payer; (2) to refuse, or threaten to refuse, to deal with any payer; (3) to designate the terms, conditions, or requirements upon which any physician deals, or is willing to deal, with any payer (including, but not limited to, price terms); and (4) to not deal individually with any payer, or to not deal with any payer through any arrangement other than one involving RFVP.

**Boulder Valley Individual Practice Association**, C-4285, FTC File No. 0510252 (final order issued April 2, 2010) (<https://www.ftc.gov/enforcement/cases-proceedings/051-0252a/boulder-valley-individual-practice-association>). The complaint charged that a multi-specialty IPA of approximately 365 physician members in the Boulder County, Colorado, area unreasonably restrained competition by unreasonably restraining price and other forms of competition among its members in contracting with payers. The complaint charged that, between 2001 and 2006, BVIPA negotiated and signed agreements, on behalf of its member physicians, with approximately 17 payers, and conducted periodic renegotiations of its contracts with large payers to increase rates. During this time, BVIPA threatened payers facing rate increases with contract termination if they refused to negotiate with the physicians through the IPA, or to otherwise respond to the IPA's demands. In addition, BVIPA actively discouraged members from contracting with payers, and some payers that tried to contract with individual IPA member physicians were required to go through the IPA. Finally, although BVIPA claimed to offer payers the choice of contracting methods, in reality it did not do so, and the IPA continued to negotiate with payers on behalf of its members. The order prohibits BVIPA from entering into or facilitating agreements between or among health care providers: (1) to negotiate on behalf of any physician with any payer; (2) to refuse, or threaten to refuse, to deal with any payer; (3) to designate the terms, conditions, or requirements upon which any physician deals, or is willing to deal, with any payer (including, but not limited to, price terms); and (4) to not deal individually with any payer, or to not deal with any payer through any arrangement other than one involving BVIPA.

**M. Catherine Higgins**, C-4286, FTC File No. 0510252 (final order issued March 30, 2010) (<https://www.ftc.gov/enforcement/cases-proceedings/051-0252/matter-m-catherine-higgins-individual>). The complaint charged that Ms. Higgins, the executive director of the Boulder Valley Individual Practice Association (BVIPA), tried to evade the terms of a 2008 FTC consent agreement with BVIPA (*see above*, and at <https://www.ftc.gov/enforcement/cases-proceedings/051-0252a/boulder-valley-individual-practice-association>). Under that agreement, BVIPA and its employees were ordered to stop facilitating agreements among physicians regarding price terms or collective refusals to deal. However, shortly after the consent agreement was signed, Ms. Higgins asserted that, because she was not named as an individual in the consent order, she could continue to negotiate fees on behalf of BVIPA physicians. BVIPA's Board of Directors granted Ms. Higgins, as executive director, blanket authority to negotiate contracts with payers on behalf of BVIPA and its physician members (who compete with each other),

including the authority to enter into contracts without the approval of BVIPA or its members. The complaint charged that, during her tenure, Ms. Higgins and BVIPA's members used their combined negotiating leverage in negotiations with payers to increase substantially the prices they were paid for physician services. As a result of these negotiations, payers reimbursed BVIPA members at rates approximately 15 to 27 percent higher than those paid in individual contracts in the same geographic area. Ms. Higgins actively exhorted BVIPA members to contract jointly through BVIPA, rather than individually, in order to maximize their bargaining leverage and increase the prices paid to BVIPA members by payers. The complaint also charged that Ms. Higgins and BVIPA refused, or threatened to refuse, to deal with payers except on collectively agreed-upon terms. Even in cases where some BVIPA members sought to contract individually with a payer, Ms. Higgins negotiated and consulted for those members, thereby facilitating the exchange of rate information among them and the coordination of rates among members. The complaint also alleged that Ms. Higgins and BVIPA misled payers during negotiations, by offering them fictitious contracting choices, including a "modified messenger model" and the option of contracting with individual BVIPA members outside the IPA. However, proposals from payers were not messengered to BVIPA's individual members for review unless Ms. Higgins deemed the proposed prices acceptable. Moreover, when payers approached individual BVIPA members, many of these members refused to discuss contracting on an individual basis (referring the payers to BVIPA), while other members agreed to discuss individual contracts only if Ms. Higgins represented them in the negotiations.

The order prohibits Ms. Higgins from entering into or facilitating agreements between or among health care providers: (1) to negotiate on behalf of any physician with any payer; (2) to refuse, or threaten to refuse, to deal with any payer; (3) to designate the terms, conditions, or requirements upon which any physician deals, or is willing to deal, with any payer (including, but not limited to, price terms); and (4) to not deal individually with any payer, or to not deal with any payer through any arrangement other than one involving BVIPA.

**Alta Bates Medical Group, Inc.**, C-4260, FTC File No. 0510260 (final order issued July 10, 2009) (<https://www.ftc.gov/enforcement/cases-proceedings/0510260/alta-bates-medical-group-inc>). In its complaint, the Commission charged that, since at least 2001, ABMG – an IPA consisting of about 600 physician members in the Berkeley/Oakland, California, area – restrained competition on contracts with health plans to provide fee-for-service medical care. The complaint charged that the ABMG did this by facilitating, entering into, and implementing agreements: to fix the prices and other terms in contracts with payers; to engage in collective negotiations over terms and conditions of dealing with payers; and to have ABMG members refrain from negotiating individually with payers, or contracting on terms other than those approved by ABMG. Specifically, the complaint charged that ABMG made proposals and counter-proposals, as well as accepted or rejected offers, without consulting with its individual physician members regarding the prices they unilaterally would accept, and without transmitting payers' offers to its individual physician members until ABMG had approved the negotiated prices. The complaint charged that ABMG did not engage in any activity – *e.g.*, clinical or financial integration of their practices to create sufficient efficiencies – that might justify such collective pricing agreements. The consent order prohibits ABMG from entering into or facilitating agreements between or among health care providers: (1) to negotiate on behalf of any physician with any payer; (2) to refuse, or threaten to refuse, to deal with any payer; (3)

regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payer (including, but not limited to, price terms); and (4) to not deal individually with any payer, or to not deal with any payer through any arrangement other than one involving ABMG.

**North Texas Specialty Physicians v. Federal Trade Commission**, D-9312 (Commission decision issued November 29, 2005, aff'd 528 F.3d 346 (5<sup>th</sup> Cir. 2008), cert. denied 555 U.S. 1170 (Order No. 08-515, February 23, 2009) (<https://www.ftc.gov/enforcement/cases-proceedings/0210075/north-texas-specialty-physicians-matter>). The administrative complaint alleged that North Texas Specialty Physicians, a group of approximately 600 physicians in the Fort Worth, Texas, area, has acted to restrain competition among its participating physicians by combining to fix prices and other competitively significant terms of dealing with payers, thereby increasing the cost of health care for consumers in the Fort Worth area. According to the complaint, NTSP conducted polls of its physician members concerning the minimum fee each would accept for reimbursement, refused to submit payer offers to its physicians unless the terms of those contracts met the group's minimum fee standards, and discouraged physicians from negotiating directly with payers. On November 8, 2004, the administrative law judge issued an opinion in which he upheld the Commission's complaint that NTSP engaged in horizontal price fixing by collectively setting the prices for physician services in non-risk contracts negotiated with health plans. Respondents appealed the ALJ's decision. On November 29, 2005, the Commission affirmed the initial decision with some modifications, and issued an order requiring NTSP to cease and desist from the illegal conduct and to terminate the pre-existing contracts with the health plans. The Commission found that the FTC had jurisdictional authority over NTSP and that NTSP's activities affected interstate commerce because of the payment of fees to NTSP physicians by out-of-state health plans. In addition, the Commission found that the physicians conspired to fix prices even though they did not communicate directly with each other because NTSP acted as an agent for the physicians and was not a "sole actor." Finally, the Commission found that NTSP's claims of efficiencies and spillover were not legitimate. NTSP appealed the Commission's ruling to the U.S. Court of Appeals for the Fifth Circuit. On May 14, 2008, the Court unanimously affirmed the Commission's decision finding that the NTSP had participated in horizontal price-fixing that was not related to any procompetitive efficiencies. The Court remanded the case back to the Commission for modification of one provision in the remedial order. The Commission issued its revised Order on Remand on September 12, 2008.

**Independent Physician Associates Medical Group, Inc., dba AllCare IPA**, C-4245, FTC File No. 0610258 (final order issued February 2, 2009) (<http://www.ftc.gov/enforcement/cases-proceedings/061-0258/independent-physicians-associates-medical-group-inc-dba> ). In its complaint, the Commission charged that a multi-specialty IPA of approximately 500 physician members from multiple independent physician practices in the Modesto, California area acted, since at least 2005, to restrain competition on contracts with PPO payers to provide fee-for-service medical care. The complaint charged that the IPA did this by facilitating, entering into, and implementing agreements: to fix the prices and other terms in contracts with PPO payers; to engage in collective negotiations over terms and conditions of dealing with PPO payers; and to have AllCare members refrain from negotiating individually with such payers, or contracting on terms other than those approved by AllCare. The complaint also charged that, in order to enforce its joint negotiation efforts, AllCare caused a significant number of its member physicians to

send, to at least one payer, the same form letter, which terminated those physicians' individual agreements with the payer, and affirmed that those physicians would contract with the payer only through AllCare. The order prohibits AllCare from entering into or facilitating agreements between or among health care providers: (1) to negotiate on behalf of any physician with any payer; (2) to refuse, or threaten to refuse, to deal with any payer; (3) to designate the terms, conditions, or requirements upon which any physician deals, or is willing to deal, with any payer (including, but not limited to, price terms); and (4) to not deal individually with any payer, or to not deal with any payer through any arrangement other than one involving AllCare.

**Colegio de Optometras de Puerto Rico**, C-4199, FTC File No. 0510044 (final order issued September 6, 2007) (<https://www.ftc.gov/enforcement/cases-proceedings/051-0044/colegio-de-optometras-edgar-davila-garcia-od-carlos-rivera>). In its complaint, the Commission charged that an association of approximately 500 optometrists in Puerto Rico, along with two of its officials, conspired to fix prices and collectively refused to deal with vision and health plans unless the plans raised reimbursement rates for vision care services. The Colegio represented all the licensed optometrists in Puerto Rico. According to the complaint, the association targeted Ivision, a company that contracted with health plans to administer vision plans and provide vision care products and services to plan members. When Ivision entered into new contracts with several health plans that previously had contracted with the optometrists directly, the Colegio threatened to withdraw from the Ivision network if it did not increase its reimbursement rates. In order to maintain its network, Ivision was forced to substantially raise its reimbursement rates to the optometrists. The order prohibits the association from negotiating on behalf of any optometrist with health plans, refusing to deal with or boycotting health plans, determining the terms upon which optometrists will deal with health plans, and refusing to deal individually with any health plan or to deal with any health plan only through an arrangement involving the Colegio.

**Advocate Health Partners, et. al.**, C-4184, FTC File No. 0310021 (final order issued February 7, 2007) (<http://www.ftc.gov/enforcement/cases-proceedings/031-0021/advocate-health-partners-et-al-matter>). The complaint charged that a super-PHO representing eight smaller PHOs and more than 2,600 independent physicians, the Advocate Health Care Network hospital system, and approximately 300 hospital employed physicians, restrained competition for physician services in the Chicago metropolitan area. According to the complaint, Advocate Health Partners negotiated prices and other terms on which they would deal with health plans for the PHO respondents without any efficiency-enhancing integration of the practices that would justify their conduct. Specifically, the complaint alleged that Advocate Health Partners terminated its member physicians' individual contracts with a health plan that contracted directly with the physicians and refused to comply with the PHO's demand for higher fees. Advocate Health Partners also threatened that it would not contract with another health plan for hospital services unless the plan stopped contracting with individual physicians and agreed to a group contract. As a result, the health plan agreed to fees under a group contract that were 20 to 30 percent higher than what it was paying under the individual contracts. The consent order prohibits the respondents from entering into or facilitating any agreement between any physicians to: 1) negotiate on behalf of any physician with health plans; 2) refuse to deal or threaten to refuse to deal with health plans; 3) designate the terms on which its members deal with health plans; and,

4) not to deal individually with any health plan or to deal with any health plan only through an arrangement involving the respondents.

**New Century Health Quality Alliance, Inc.**, C-4169, FTC File No. 0510137 (final order issued September 29, 2006) (<https://www.ftc.gov/enforcement/cases-proceedings/0510137/new-century-health-quality-alliance-inc-prime-care-northeast>). The complaint charged that two Kansas City area IPAs, 18 physician practices that are members of the IPAs, and four former or current officials of the IPAs, collectively agreed to fix prices and other terms on which they would deal with health plans, and that the IPAs' member physicians refused to deal with health plans except by contracting through the IPAs on a capitated basis. At the time of the complaint, the two IPAs, New Century Health Quality Alliance and Prime Care of Northeast Kansas, consisted of 127 primary care physician members practicing in Missouri and Kansas. The two IPAs voted to merge into a single entity, but never completed the steps legally necessary to consolidate, and the complaint also alleged unlawful agreement and action by the two IPAs acting together. According to the complaint, New Century and Prime Care entered into contracts with some health plans under which their member physician practices received capitation payments for providing physician services. In addition to services provided under the IPAs' capitation contracts, the individual physician practices also sold their medical services directly to patients or contracted individually on a fee-for-service basis with other health plans. Starting in 1999, the physician practices, acting jointly through the IPAs, refused to deal on any terms except by continuing to contract through the IPAs on a capitation basis with health plans that previously had contracted with the IPAs on a capitation basis. In addition, the two IPAs joined together to increase the bargaining power of the two IPAs with health plans on behalf of their combined membership in an attempt to force the health plans to accept the terms of dealing jointly agreed upon by the IPAs. The order prohibits the IPAs from entering into, or facilitating, any agreement between or among physicians: 1) to negotiate with health plans on any physician's behalf; 2) to deal, not to deal, or threaten not to deal with health plans; 3) regarding on what terms to deal with any health plan; and, 4) not to deal individually with any health plan, or to deal with any health plan only through an arrangement involving either IPA. For a period of three years, the order also prohibits the four named officials from negotiating with any health plan on behalf of the physician practice respondents, or advising the physician practice respondents on contracts or other dealings with any health plan.

**Puerto Rico Association of Endodontists, Corp.**, C-4166, FTC File No. 0510170 (final order issued August 24, 2006) (<https://www.ftc.gov/enforcement/cases-proceedings/0510170/puerto-rico-association-endodontists-corp-matter>). The complaint charged that an association of approximately 30 endodontists in Puerto Rico collectively agreed to set the prices they would charge dental insurance plans and refused to deal with plans that did not agree to the collectively determined terms. The complaint also alleged that the association formed a Pre-Payments Committee in 2003 in order to negotiate with payers for higher reimbursement. As a result, the association was able to increase the reimbursement received by its members from at least five dental plans. In 2004, the Pre-Payment Committee attempted to raise the rates again by seeking to end the plans' ban on balance billing which as a cost-containment mechanism. The order prohibits the association from negotiating on behalf of any endodontist with payers, refusing to deal with or boycotting payers, determining the terms upon which endodontists will deal with



payers, and refusing to deal individually with any health plan or to deal with any health plan only through an arrangement involving the association.

**Health Care Alliance of Laredo**, C-4158, FTC File No. 0410097 (final order issued March 23, 2006) (<https://www.ftc.gov/enforcement/cases-proceedings/0410097/health-care-alliance-laredo-lc-matter>). The complaint charged that the Health Care Alliance of Laredo (HAL), an 80-member multi-specialty IPA, restrained competition in the Laredo, Texas area, by collectively fixing the prices charged to health plans, and threatening refusals to deal with the health plans. Although the IPA purported to operate as a messenger model, HAL's Board of Managers authorized and directed the contract negotiation process, and sent offers received from the health plans to its member physicians only after the Board had approved the rates. According to the complaint, the IPA did not messenger any rates proposed by the physicians and messengered only the rates the Board approved. The Executive Director also conducted surveys concerning fees and discounts that the members would accept from the health plans. In addition, the IPA urged its members not to sign individual contracts with the health plans. Consequently, many of the health plans were forced to significantly raise the fees paid to physicians, and thereby raised the cost of medical care to consumers in the Laredo area. The order prohibits HAL from entering into or facilitating any agreement between any physicians to: 1) negotiate on behalf of any physician with health plans; 2) refuse to deal or threaten to refuse to deal with health plans; 3) designate the terms on which its members deal with health plans; and, 4) not to deal individually with any health plan or to deal with any health plan only through an arrangement involving the IPA. The order also requires, for three years, that the IPA notify the FTC before acting as an agent or a messenger for any physicians with payers regarding contracts, and requires HAL to terminate any existing contract without penalty at the request of the payer.

**Partners Health Network, Inc.**, C-4149, File No. 0410100, 140 F.T.C. 244 (final order issued September 19, 2005) (<https://www.ftc.gov/enforcement/cases-proceedings/0410100/partners-health-network-inc-matter>). The complaint charged that a physician-hospital organization, representing approximately 225 physicians and two hospitals in the Pickens County area of South Carolina, collectively agreed to fix prices and other terms on which they would deal with health plans, and then refused to deal with health plans that did not agree to its collectively determined prices. The health plans needed access to a large number of physicians who were members of Partners because Partners accounted for approximately 75% of the physicians in the Pickens County area. Although the PHO purported to operate as a messenger model, the PHO's Executive Director negotiated physician contracts with payers using a fee schedule that was created by polling the physician practices. The Executive Director used the highest prices he received from the responding physicians for each medical procedure and assembled those highest prices into a single fee schedule. Consequently, many of the health plans were forced to raise the fees paid to Partners' physicians, and thereby raised the cost of medical care in the Pickens County area. The consent order prohibits the respondent from entering into or facilitating any agreement between any physicians to: 1) negotiate on behalf of any physician with health plans; 2) refuse to deal or threaten to refuse to deal with health plans; 3) designate the terms on which its members deal with health plans; and, 4) not to deal individually with any health plan or to deal with any health plan only through an arrangement involving the PHO. The order also requires, for three years, that the respondent notify the FTC before acting as an agent or a

messenger for any physicians with payers regarding contracts, and requires Partners to terminate any existing contract without penalty at the request of the payer.

**San Juan IPA, Inc.**, C-4142, FTC File No. 0310181, 139 F.T.C. 513 (final order issued June 30, 2005) (<https://www.ftc.gov/enforcement/cases-proceedings/0310181/san-juan-ipa-matter>). The complaint charged that a physician organization representing approximately 80% of the doctors practicing in the Farmington, New Mexico area, restrained competition by agreeing to fix prices and other terms on which they would deal with health plans, and by refusing to deal with the health plans except on the collectively determined terms. As a result of the IPA's conduct, prices for physician services increased in the Farmington area. According to the complaint, San Juan IPA adopted a "PPO Strategy" that required health plans to pay IPA physicians their billed charges minus a 10% discount, a method that increased its members' payments by as much as 60%. In addition, the IPA, although purporting to operate as a messenger model, did not transmit to its members certain offers from the health plans. The consent order prohibits the respondent from entering into or facilitating any agreement between any physicians to: 1) negotiate on behalf of any physician with health plans, 2) refuse to deal or threaten to refuse to deal with health plans, 3) designate the terms on which its members deal with health plans, and 4) not to deal individually with any health plan or to deal with any health plan only through an arrangement involving the IPA. The order also requires that the respondent notify the FTC before acting as an agent or a messenger for any physicians with payers regarding contracts.

**New Millennium Orthopaedics, LLC**, C-4140, FTC File No. 0310087, 139, F.T.C. 378 (final order issued June 13, 2005) (<https://www.ftc.gov/enforcement/cases-proceedings/0310087/new-millennium-orthopaedics-llc-et-al-matter>). The complaint charged that two physician groups providing orthopaedic services in the Cincinnati, Ohio, area, and New Millennium Orthopaedics (NMO), an independent practice association representing the physician groups, jointly negotiated the rates its physician members charged health plans, and refused to deal with one health plan that did not agree to the collectively determined terms. According to the complaint, the two physician groups, through NMO, agreed on prices to propose to health plans that included a base fee schedule and bonus scheme. The bonus scheme rewarded all NMO physicians, including non-surgeons, with higher base rates if NMO as a whole met established performance targets for increasing the percentage of surgical procedures performed by some NMO physicians at ambulatory surgery centers. The order requires the dissolution of NMO. In addition, the order prohibits the two physician group respondents from entering into or facilitating any agreement between any physicians to: 1) negotiate on behalf of any physician with health plans, 2) refuse to deal or threatening to refuse to deal with health plans, 3) designate the terms on which its members deal with health plans, and 4) restrict the ability of any physician to deal with any health plan individually or through any arrangement other than NMO. The order also requires the two physician practices to terminate without penalty any payer contract if the payer voluntarily submits a request for termination.

**Evanston Northwestern Healthcare Corporation/ENH Medical Group, Inc.**, D-9315, FTC File No. 011 0234 (complaint issued February 10, 2004; consent order with one respondent issued May 17, 2005) (<https://www.ftc.gov/enforcement/cases-proceedings/0110234/evanston-northwestern-healthcare-corporation-enh-medical-group>). Count III of the complaint (see Section III A for description of other counts) alleged that after the acquisition of Highland Park Hospital

by Evanston Northwestern Healthcare Corporation (ENH) in January 2000, ENH Medical Group, a group of approximately 460 salaried physicians affiliated with ENH, negotiated prices for physician services on behalf of itself and approximately 450 physicians affiliated with the Highland Park Independent Physician Association, even though the independent group was not financially or clinically integrated internally or with the ENH physicians. In addition, the complaint charged that ENH threatened payers with termination of their contracts if the payers did not agree to contract for both physician and hospital services as a package. The order prohibits the respondent from entering into any agreement among physicians to: 1) negotiate on behalf of the physicians with payers, 2) refuse to deal with payers, 3) designate the terms for dealing with payers, and 4) facilitate exchanges of information among physicians concerning payer contracting. In addition, the order requires ENH Medical Group to terminate without penalty at any payer's request any preexisting contract for physician services. The order does not bar ENH from activities that solely involve ENH employed physicians with respect to ENH physician services.

**Preferred Health Services, Inc.**, C-4134, File No. 041 0099, 139 F.T.C. 266 (final order issued April 13, 2005) (<https://www.ftc.gov/enforcement/cases-proceedings/0410099/preferred-health-services-inc-matter>). The complaint charged that a physician-hospital organization representing approximately 100 physicians and the Oconee Hospital in northwestern South Carolina restrained competition by acting as a contracting representative for its members, collectively negotiating fees and other competitively significant terms with payers on behalf of its members, and threatening refusals to deal with health plans. Preferred Health accounted for approximately 70% of the physicians in the Seneca, South Carolina area, and as a result, health plans needed a large number of physicians who were members of Preferred Health. According to the complaint, Preferred Health used a physician fee schedule created by its Executive Director and approved by its Board of Directors. As a result of Preferred Health's conduct, numerous health plans were forced to raise the fees paid to Preferred Health members, and thereby raised the cost of medical care in the Seneca area. In addition, although Preferred Health represented itself as a messenger model, its physician membership agreement automatically bound the physicians to contracts using the Preferred Health fee schedule. The order prohibits the respondent from entering into or facilitating any agreement between any physicians to: 1) negotiate on behalf of any physician with health plans, 2) refuse to deal or threaten to refuse to deal with health plans, 3) designate the terms on which its members deal with health plans, and 4) restrict the ability of any physician to deal with any health plan individually or through any other arrangement. In addition, Preferred Health is prohibited from acting as an agent for any physicians in connection with health plan contracting. The order also requires that the respondent notify the FTC before acting as an agent or messenger for any health care providers with payers regarding contracts.

**White Sands Health Care System, L.L.C.**, C-4130, FTC File No. 0310135, 139 F.T.C. 15 (final order issued January 11, 2005) (<https://www.ftc.gov/enforcement/cases-proceedings/0310135/white-sands-health-care-system-llc-et-al-matter> ). The complaint charged a physician hospital organization, a 45 member physician group and a consulting firm providing payer contracting services, and the consulting firm's president, with refusing to deal with payers except on collectively agreed-upon terms, and fixing prices for physician and non-physician health care providers in the Alamogordo, New Mexico area. White Sands Health Care System (White Sands) included Alamogordo Physicians, an IPA with approximately 80% of the

physicians in the Alamogordo area, 31 non-physician healthcare providers (including the only 5 nurse anesthetists in the area), and the only hospital in the area. Although White Sands purported to act under a messenger model, the consultant negotiated price and other contract terms with the payers, which were then presented to the Alamogordo Physicians' Board of Directors and the White Sands Board of Managers for approval. As a result of White Sands' conduct, payers were forced to raise fees paid to White Sands providers, increasing the cost of healthcare in the area. The order prohibits the respondents from 1) negotiating on behalf of any health care provider with health plans, 2) refusing to deal or threatening to refuse to deal with health plans, 3) determining the terms to deal with any health plan, and 4) restricting the ability of any health care provider to deal with any payer individually or through any other arrangement. The order also requires that the respondents notify the FTC before acting as an agent or a messenger for any health care providers with payers regarding contracts. For a period of three years, the order prohibits the consultant from negotiating with any payer on behalf of the other respondents, or advising the other respondents on their dealings with any payer.

**Southeastern New Mexico Physicians IPA, Inc.**, C-4113, FTC File No. 0310134, 138 F.T.C. 281 (final order issued August 5, 2004) (<https://www.ftc.gov/enforcement/cases-proceedings/0310134/southeastern-new-mexico-physicians-ipa-inc-corporation-barbara>). The complaint alleged that Southeastern New Mexico Physicians IPA, Inc. (SENM), a physician organization representing 73% of the physicians in the Roswell, New Mexico area, and two of SENM's employees, orchestrated agreements to fix prices and refuse to deal with payers except on collectively agreed-upon terms. According to the complaint, SENM surveyed its members on the minimum price levels they would accept, sent them information about the prices they were paid by payers for their most common medical procedures under previously SENM negotiated contracts, and refused to deal individually with payers unless the contract was approved by SENM's Managed Care Contract Committee and the Board of Directors. In response to the IPA's demands, the payers were forced to revise their price proposals and raise the prices paid to SENM physicians significantly above what the health plans pay other physicians in New Mexico, resulting in increased prices to consumers for physician services in the area. The order prohibits the IPA from 1) negotiating on behalf of any physician with health plans, 2) refusing to deal or threatening to refuse to deal with health plans, 3) determining the terms on which its members deal with health plans, and 4) restricting the ability of any physicians to deal with any payer or provider individually or through any other arrangement. For a period of three years, the order also prohibits the two SENM employees from negotiating with any payer on behalf of the other respondents, or advising the other respondents on their dealings with any payer. The order also requires that the employees notify the FTC before acting as an agent or a messenger for any physicians with payers regarding contracts.

**Piedmont Health Alliance**, D-9314, FTC File No. 0210119i, 138 F.T.C. 675 (final order issued October 1, 2004) (<https://www.ftc.gov/enforcement/cases-proceedings/0210119i/piedmont-health-alliance-inc-et-al-matter>). The administrative complaint charged that Piedmont Health Alliance (PHA), a large physician-hospital organization located in the Unifour area of North Carolina, and ten individual physician members, entered into agreements to fix prices for the services of approximately 450 physicians. According to the complaint, PHA developed fee schedules and collectively negotiated contracts with health plans. In 2001 PHA instituted a new "modified messenger model" method of contracting. The complaint alleged that the new system

of contracting under PHA's "modified messenger model" was not a legitimate messenger model because, among other things, PHA sent information to its physician members concerning the prices received for individual procedures under the price-fixed contracts as a basis for setting up minimum price levels physicians would accept under the "modified messenger model"; and for the two contracts processed under the "modified messenger" system, PHA negotiated various contract terms with the payers, including the overall average price levels paid to its physicians and the specific fee schedules to be used, before transmitting contract offers to its member physicians. The order prohibits PHA from engaging in certain conduct among physicians, including agreeing to negotiate on behalf of the organization with payers, agreeing to refuse to deal with payers, agreeing on any terms for dealing with payers, and facilitating exchanges of information concerning payer contracting. The order also prohibits PHA from preparing fee schedules for physician services and from collecting information about prices and other terms under which physicians are willing to deal with payers. In addition, the order prevents PHA from entering into any type of messenger arrangement on behalf of physicians dealing with payers for 30 months after the order becomes final, and from entering into a "modified messenger" arrangement for 54 months after the order becomes final. The order provides for a mandatory termination date for payers holding contracts with PHA.

**Tenet Healthcare Corp./Frye Regional Medical Center, Inc.**, C-4106, FTC File No. 0210119h, 137 F.T.C. 219 (final order issued January 29, 2004) (<https://www.ftc.gov/enforcement/cases-proceedings/0210119h/tenet-healthcare-corporation-frye-regional-medical-center-inc>). The Commission approved a consent order with Tenet Healthcare Corp. and Frye Regional Medical Center, relating to Frye's participation in the Piedmont Health Alliance (discussed above). According to the complaint, Frye, the largest of the three hospitals in the Piedmont Health Alliance, was instrumental in PHA's formation and operation and participated in the physician price-fixing conspiracy. The order prohibits Tenet and Frye from, among other things, entering into any agreement among any physicians to negotiate on behalf of any physician with payers, to refuse to deal with payers, and to agree on any terms for dealing with payers. The order also requires Frye and Tenet to cease receiving payments under the PHA fee schedules for their employed physicians.

**Memorial Hermann Health Network Providers**, C-4104, FTC File No. 0310001, 137 F.T.C. 90 (final order issued January 8, 2004) (<https://www.ftc.gov/enforcement/cases-proceedings/0310001/memorial-hermann-health-network-providers>). The complaint charged that a physician organization representing approximately 3,000 physicians in the Houston metropolitan area, restrained competition and collectively negotiated fees and other competitively significant terms with payers on behalf of its members, refused to deal with payers except on collectively agreed-upon-terms, and refused to submit payer offers to its members that did not conform to MHHNP's standards for contracts. According to the complaint, MHHNP conducted polls of its physician members concerning the minimum fee each would accept for reimbursement, and then calculated minimum acceptable fees for use in negotiations with the payers. As a result of MHHNP's conduct, payers in some instances were forced to revise their fee proposals, resulting in higher prices for physician services. In addition, MHHNP represented itself as a messenger but refused to submit payers offers that did not meet MHHNP's minimum fees to its members. The order prohibits the respondent from engaging in certain conduct, including agreeing to negotiate on behalf of the organization with payers, agreeing to refuse to

deal with payers, agreeing on any terms for dealing with payers, and facilitating exchanges of information concerning payer contracting among physicians. In addition, the order requires MHHNP to terminate without penalty any preexisting contract for physician services upon receipt of a written request from the payer.

**Surgical Specialists of Yakima**, C-4101, FTC File No. 0210242, 136 F.T.C 840 (final order issued November 14, 2003) (<https://www.ftc.gov/enforcement/cases-proceedings/0210242/surgical-specialists-yakima-pllc-cascade-surgical-partners-inc>). The complaint charged Surgical Specialists of Yakima, and two of its members, Cascade Surgical Partners and Yakima Surgical Associates, with entering into agreements to fix prices and other terms on which they would deal with health plans. According to the complaint, SSY's members, representing 90% of the physicians who specialize in general surgery in the Yakima, Washington area, negotiated collectively with health plans even though the physicians continued to operate independent practices without significant clinical or financial integration. SSY instructed its members to terminate or threaten to terminate their contracts with payers if the group's demands for significantly higher fees were not met. The order prohibits the respondents from engaging in certain conduct, including agreeing to negotiate on behalf of the organization with payers, agreeing to refuse to deal with payers, agreeing on any terms for dealing with payers, and facilitating exchanges of information concerning payer contracting among physicians. The order also requires SSY to revoke the membership of either Cascade Surgical Partners or Yakima Surgical Associates, to reduce the group's market power in general surgery. In addition, SSY is required to terminate without penalty any preexisting contract for physician services at the earlier of any payer's request to terminate the contract, or the termination or renewal date of the contract. The contract may extend up to one year after the date on which the order becomes final if the payer requests to extend the contract to a specific date in writing and SSY does not exercise its right to terminate the contract.

**South Georgia Health Partners, L.L.C.**, C-4100, FTC File No. 0110222, 136 F.T.C. 748 (2003) (final order issued October 31, 2003) (<https://www.ftc.gov/enforcement/cases-proceedings/0110222/south-georgia-health-partners-et-al-matter>). The complaint charged that a large PHO (South Georgia Health Partners), its five owner PHOs, and three associated physician independent practice associations, entered into agreements to fix physician and hospital prices, and refused to deal with payers on an individual basis. According to the complaint, SGHP was formed in 1995 as a vehicle for its members to negotiate collectively for payer contracts. SGHP negotiated physician and hospital contracts for approximately 500 physicians and 15 hospitals, the vast majority of providers covering a large area of southern Georgia. As a result of this conduct, the complaint alleged, SGHP restrained competition among the providers and forced payers to pay higher prices to its providers, thereby increasing the cost of healthcare for consumers. The order prohibits the respondents from engaging in certain conduct, including agreeing to negotiate on behalf of the organization with payers, agreeing to refuse to deal with payers, agreeing on any terms for dealing with payers, and facilitating exchanges of information concerning payer contracting among physicians. The order allows the owner PHOs and IPAs, but not SGHP, to operate any "qualified risk-sharing joint arrangement" or "qualified clinically-integrated joint arrangement." In addition, each respondent having a preexisting contract with a payer for physician or hospital services is required to terminate the contract without penalty at

the earlier of any payer's request to terminate the contract, or the termination or renewal date of the contract.

**Physician Network Consulting, L.L.C.**, C-4094, FTC File No. 0210178, 136 F.T.C. 658 (final order issued August 27, 2003) (<https://www.ftc.gov/enforcement/cases-proceedings/0210178/physician-network-consulting-llc-michael-j-taylor-professional>). The complaint charged a Baton Rouge IPA (Professional Orthopedic Services, Inc.), three orthopaedic practices whose physicians are members of the IPA, the IPA's agent (Physician Network Consulting), and the agent's managing director, with agreeing to terminate their contracts with a payer and collectively refusing to negotiate with the payer until their demand for higher prices was accepted. Members of the IPA provided approximately 70% of orthopaedic medical services in the Baton Rouge, Louisiana area. The order prohibits the respondents from engaging in certain conduct, including agreeing to negotiate on behalf of any physician with payers, agreeing to refuse to deal with payers, and agreeing on any terms for dealing with payers. For a period of three years, the order also prohibits Physician Network Consulting and its managing director from negotiating with any payer on behalf of the other respondents, or advising the other respondents on their dealings with any payer. The order also requires that Physician Network Consulting and its managing director notify the FTC before acting as an agent or a messenger for any physicians with payers regarding contracts. In addition, the respondent physician practices are required to terminate without penalty any contract with the payer upon receipt of a written request.

**Maine Health Alliance**, C-4095, FTC File No. 0210017, 136 F.T.C. 616 (2003) (final order issued August 27, 2003) (<https://www.ftc.gov/enforcement/cases-proceedings/0210017/maine-health-alliance-william-r-diggins-matter>). The complaint charged the Maine Health Alliance (Alliance), along with the Alliance's executive director, with price-fixing in the provision of physician and hospital services. The Alliance is a network of approximately 325 physicians and 11 hospitals operating in five counties in northeast Maine. According to the complaint, the Alliance's members engaged in collective negotiation of contracts with payers in order to gain higher reimbursement and other advantageous contract terms, and refused to contract individually with those payers unwilling to meet the Alliance's terms, resulting in increased health care costs in the five counties. The order forbids the Alliance and its executive director from participating in or facilitating any agreement between physicians or hospitals, including agreeing to negotiate on behalf of the organization with payers, agreeing to refuse to deal with payers, and agreeing on any terms for dealing with payers. The order also requires the respondents to give 60-days notice to the Commission before negotiating price terms with any payer as part of a "qualified risk-sharing joint arrangement" or "qualified clinically integrated joint arrangement." In addition, the Alliance is required to terminate without penalty any preexisting contract for physician or hospital services at the earlier of any payer's request to terminate the contract or the termination or renewal date of the contract. The contract may extend up to one year beyond the termination or renewal date if the payer affirms the contract in writing and the Alliance does not exercise its right to terminate the contract.

**Washington University Physician Network**, C-4093, FTC File No. 0210188, 136 F.T.C. 538 (2003) (final order issued August 22, 2003) (<https://www.ftc.gov/enforcement/cases-proceedings/0210188/washington-university-physician-network>). The complaint charged that a

non-profit physician organization, the Washington University Physician Network (WUPN), consisting of 900 faculty physicians at Washington University and 600 community physicians, restrained competition for physician services in the greater St. Louis area. According to the complaint, the organization fixed prices charged to payers and refused to deal with payers except on collectively determined terms, resulting in higher medical costs for consumers. Although organized as a non-profit entity, WUPN is subject to the Commission's jurisdiction because the for-profit community physicians receive substantial financial benefit from WUPN and play a significant role in governing the organization, including negotiating with payers. The order prohibits WUPN from engaging in certain conduct, including agreeing to negotiate on behalf of the organization with payers, agreeing to refuse to deal with payers, agreeing on any terms for dealing with payers, and facilitating exchanges of information concerning payer contracting among physicians. In addition, WUPN is required to terminate without penalty any preexisting contract for physician services at the earlier of any payer's request to terminate the contract or the termination or renewal date of the contract. The order allows the organization to negotiate or enter into agreements that are solely related to Washington University physicians.

**California Pacific Medical Group, Inc.**, D-9306, FTC File No. 0210143, 137 F.T.C. 411 (final order issued May 10, 2004) (<https://www.ftc.gov/enforcement/cases-proceedings/0210143/california-pacific-medical-group-inc-matter>). The administrative complaint issued against the Brown and Toland Medical Group alleged that the physician group, a multi-specialty IPA with approximately 1500 physician members in San Francisco, restrained trade in the provision of services to PPOs by combining to fix prices and other competitively significant terms of dealing with payers. The complaint alleged that the physician group, originally created to contract with health plans offering HMO products on a capitated basis, formed a PPO network in 2001, and began negotiating fee-for-service agreements with payers for its PPO members. According to the complaint, the IPA negotiated collectively, on behalf of physicians participating in the IPA's PPO contracts, with payers using fee schedules that were significantly higher than the rates the physicians were getting individually; directed its physicians to terminate their individual PPO contracts with payers; and approached other physicians to join in the collective negotiations. The consent order prohibits Brown & Toland from negotiating with payers on behalf of physicians, refusing to deal with payers, and setting terms for physicians to deal with payers unless the physicians are clinically or financially integrated. The order also requires Brown & Toland to terminate preexisting contracts with any payer except those contracts under which Brown & Toland is paid a capitated rate, and contracts which payers affirm.

**Carlsbad Physician Association**, C-4081, FTC File No. 0310002, 135 F.T.C. 804 (final order issued June 13, 2003) (<https://www.ftc.gov/enforcement/cases-proceedings/0310002/carlsbad-physician-association-inc-william-j-baggs-md-srichand>). The complaint charged that the Carlsbad Physician Association (CPA), the association's executive director, and seven physicians who had served on the Board and Contract Committee, agreed to fix prices, and refused to deal with third-party payers except on collectively agreed terms. Members of the association accounted for 83% of primary care physicians and 76% of all physicians in the Carlsbad, New Mexico area. The complaint also alleged that the association refused to messenger payer contract offers to members unless the Contract Committee approved the terms of the contract, and as a result, obtained reimbursement from payers that was substantially higher than the average reimbursement for physician services in New Mexico. The order requires the



dissolution of the association. The order also prohibits the respondents from engaging in certain conduct, including agreeing to negotiate on behalf of the organization with payers, agreeing to refuse to deal with payers, and agreeing on any terms for dealing with payers. The order contains fencing-in relief which for three years bars the individual respondents from acting as an agent in contracting with health plans, and bars the individual physicians from using similar agent as any other physician to contract with health plans. In addition, CPA is required to terminate without penalty any preexisting contract for physician services at the earlier of any payer's request to terminate the contract, or the termination or renewal date of the contract.

**SPA Health Organization (dba Southwest Physician Associates)**, C-4088, File No. 0110197, 136 F.T.C. 119 (final order issued July 17, 2003) (<https://www.ftc.gov/enforcement/cases-proceedings/011-0197/spa-health-organization-dba-southwest-physician-associates>). The complaint charged that a physician organization representing approximately 1,000 physicians in the Dallas/Fort Worth area, restrained competition by collectively negotiating fee schedules and other competitively significant terms with payers on behalf of its members, and refusing to deal with payers except on collectively agreed-upon-terms. As a result of SPA's conduct, prices for physician prices increased in the Dallas/Fort Worth area. According to the complaint, instead of simply acting as a messenger, SPA actively negotiated with the payers by offering proposals and counter-proposals concerning fee schedules, and did not messenger to its physicians payer offers that did not satisfy SPA's Board of Directors. The order prohibits the respondent from engaging in certain conduct, including agreeing to negotiate on behalf of the organization with payers, agreeing to refuse to deal with payers, agreeing on any terms for dealing with payers, and facilitating exchanges of information concerning payer contracting among physicians. In addition, the order requires SPA to terminate without penalty any preexisting contract for physician services upon receipt of a written request from the payer.

**Anesthesia Medical Group, Inc.**, C-4085, 136 F.T.C. 81 and **Grossmont Anesthesia Services Medical Group**, C-4086, FTC File No. 0210006, 136 F.T.C. 65 (final orders issued July 11, 2003) (<https://www.ftc.gov/enforcement/cases-proceedings/0210006/anesthesia-service-medical-group-inc>) (<https://www.ftc.gov/enforcement/cases-proceedings/021-0006/grossmont-anesthesia-services-medical-group-inc-matter>). The complaints charged that two competing groups of anesthesiologists agreed on a strategy to fix the fee for taking call on unscheduled cases and providing services to uninsured patients, and other terms, that both groups would demand from Grossmont Medical Hospital in San Diego County, California. The two groups employ 190 anesthesiologists and accounted for approximately three-quarters of the anesthesiologists with active medical staff privileges at the hospital. The order prohibits the respondents from engaging in certain conduct, including agreeing to negotiate, fix or establish any fee, stipend, or other terms of reimbursement for the provision of anesthesia services, refusing to deal with any payer of anesthesia services, and reducing or threatening to reduce the quantity of anesthesia services provided to any purchaser of such services.

**R.T. Welter and Associates**, C-4063, FTC File No. 0110175, 134 F.T.C. 472 (final order issued October 8, 2002) (<https://www.ftc.gov/enforcement/cases-proceedings/0110175/rt-welter-associates-inc>). The complaint charged that eight competing OB/GYN practices in the Denver area and their agent organized more than 80 OB/GYNs, under the name Professionals in Women's Care, to collectively fix prices, to engage in collective contract negotiations with

payers, and to refuse to deal with payers. By terminating or threatening to terminate their contracts with payers if their demands for higher fees were not met, the physicians were able to pressure the payers into offering contracts with significantly higher fees. According to the complaint, the organization was formed to negotiate contracts with payers, but it was not clinically integrated and did not follow a messenger model arrangement with its agent. The order forbids the respondents from engaging in certain conduct, including agreeing to negotiate on behalf of the organization with payers, agreeing to refuse to deal with payers, and agreeing on any terms for dealing with payers. For a period of three years, the order also prohibits the agent from negotiating with any payer on behalf of the physicians, or advising the physicians on their dealings with any payer. In addition, the order requires each respondent practice group to terminate without penalty any preexisting contract negotiated on behalf of the group by the agent upon receipt of a written request from the payer.

**System Health Providers**, C-4064, FTC File No. 0110196, 134 F.T.C 553 (2002) (final order issued October 24, 2002) (<https://www.ftc.gov/enforcement/cases-proceedings/0110196/system-health-providers-inc-genesis-physicians-group-inc>). The complaint alleged that System Health Providers (SHP) and its parent corporation, Genesis Physician's Group, Inc., a 1250 member physician group, restrained competition in the provision of physician services in the Dallas-Fort Worth area. As a result of this conduct, payers found it difficult to establish a viable physician network unless they paid the fees demanded by SHP. According to the complaint, the respondents collectively agreed to negotiate fees and other significant terms in payers' contracts, refused to deal individually with health plans except through SHP, and refused to messenger payer offers to members that did not conform to SHP's standards for contracts. The complaint also alleged that the group was not clinically integrated and did not participate in any financial risk-sharing. The order forbids the respondents from engaging in certain conduct, including agreeing to negotiate on behalf of the group with payers, agreeing to refuse to deal with payers, and agreeing on any terms for dealing with payers. The order also prohibits the respondents from exchanging information among area physicians concerning negotiations with any health plan regarding the terms, including price, on which the physician is willing to deal. In addition, the order requires the respondents to terminate without penalty any preexisting contract for physician services upon receipt of a written request from the payer.

**Obstetrics and Gynecology Medical Corporation of Napa Valley**, C-4048, FTC File No. 0110153, 133 F.T.C. 794 (final order issued May 14, 2002) (<https://www.ftc.gov/enforcement/cases-proceedings/0110153/obstetrics-gynecology-medical-corporation-napa-valley>). The complaint charged that OGMC, a non-risk-bearing independent practice group comprising the majority of obstetricians and gynecologists in Napa County, California, and six physician shareholders of OGMC agreed to fix prices and other terms on which they would deal with third-party payers, and then collectively refused to deal with third-party payers. According to the complaint, members of OGMC resigned from Napa Valley Physicians, a risk-sharing IPA that contracted with payers, because of dissatisfaction with the level of reimbursement obtained through Napa Valley Physicians. OGMC then boycotted Napa Valley Physicians and payers in order to increase reimbursement. As a result, the complaint charged, Napa Valley Physicians was forced to disband and some HMOs discontinued service in Napa County. The order requires the dissolution of OGMC and forbids the respondents from

engaging in certain conduct including agreeing to negotiate on behalf of physicians with payers, agreeing to refuse to deal with payers, and agreeing on any terms for dealing with payers.

**Physicians Integrated Services of Denver, Inc.**, C-4054, File No. 0110173, 134 F.T.C 118 (final order issued July 16, 2002) (<https://www.ftc.gov/enforcement/cases-proceedings/0110173/physician-integrated-services-denver-inc-michael-j-guese-md>). The complaint charged that an organization (PISD) composed of 41 primary care physicians in the Denver area, the organization's president, and the group's non-physician agent, collectively agreed to fix prices and other terms they would accept from payers, and then terminated or threatened to terminate their contracts with payers if their demands for significantly higher fees were not met. According to the complaint, PISD was formed to negotiate contracts with payers, but was not clinically integrated and did not follow a messenger model arrangement with its agent. The order forbids the respondents from engaging in certain conduct, including agreeing to negotiate on behalf of the organization with payers, agreeing to refuse to deal with payers, and agreeing on any terms for dealing with payers. For a period of three years, the order also prohibits the agent from negotiating with any payer on behalf of the physicians, or advising the physicians on their dealings with any payer. In addition, the order requires PISD to terminate without penalty any preexisting contract for physician services upon receipt of a written request from the payer.

**Aurora Associated Primary Care Physicians, L.L.C.**, C-4055, File No. 0110174, 134 F.T.C. 150 (final order issued July 16, 2002) (<https://www.ftc.gov/enforcement/cases-proceedings/0110174/aurora-associated-primary-care-physicians-llc-richard-patt-md>). The complaint charged that an organization (AAPCP) composed of 45 primary care physicians in the Aurora, Colorado area, two physician leaders, and the group's non-physician agent collectively agreed to fix prices and other terms they would accept from payers, and then terminated or threatened to terminate their contracts with payers if their demands for significantly higher fees were not met. The agent is the same person named in Physicians Integrated Services of Denver, Inc., discussed above. According to the complaint, AAPCP was formed to negotiate contracts with payers but was not clinically integrated and did not follow a messenger model arrangement with its agent. The order forbids the physicians from engaging in certain conduct, including agreeing to negotiate on behalf of the group with payers, agreeing to refuse to deal with payers, and agreeing on any terms for dealing with payers. For a period of three years, the order also prohibits the agent from negotiating with any payer on behalf of the physicians, or advising the physicians on their dealings with any payer. In addition, the order requires AAPCP to terminate without penalty any preexisting contract for physician services upon receipt of a written request from the payer.

**Alaska Healthcare Network, Inc.**, C-4007, File No. 9910103, 131 F.T.C. 893 (final order issued April 25, 2001) (<https://www.ftc.gov/enforcement/cases-proceedings/9910103/alaska-healthcare-network-inc>). The complaint alleged that the Alaska Healthcare Network, Inc., an association of 86 physicians practicing in the Fairbanks, Alaska area, restrained competition among physicians, and blocked or delayed the entry of health care plans into the Fairbanks area. The AHN included approximately 63% of all physicians in full-time, year-round private practice in Fairbanks. The complaint further alleged that, acting as the de facto collective bargaining agent for its members, AHN fixed prices and other terms when contracting with HMOs and other

healthcare payers, refused to deal with payers except on collectively agreed-upon terms, and encouraged its members not to deal with any health plan in any manner except through AHN. The consent order prohibits AHN from: 1) negotiating or refusing to deal with health plans; 2) determining the terms upon which physicians deal with health plans; and, 3) restricting the ability of physicians to deal with any health plan, whether on an individual basis or through any other arrangement. The order also imposes a structural remedy for a period of five years, which requires that if AHN operates a qualified risk-sharing or clinically-integrated joint arrangement, AHN participating physicians can constitute no more than 30% of Fairbanks physicians in five medical specialties. Also, when offering the services of its physicians through any other arrangement permitted by the order, AHN's participating physicians may constitute no more than 50% of Fairbanks physicians in those specialties. In a separate statement, Commissioners Swindle and Leary disagreed with the need for the structural remedy requirement because of the small size of the Fairbanks market.

**Texas Surgeons, P.A.**, C-3944, FTC File No. 9810124 (final order issued May 18, 2000) (<http://www.ftc.gov/enforcement/cases-proceedings/9810124/texas-surgeons-pa-austin-surgical-clinic-association-pa> ). The complaint alleged that Texas Surgeons, P.A., an independent physician association, restrained competition among general surgeons in the Austin, Texas area, resulting in more than \$1,000,000 in increased costs for surgical services in 1998 and 1999. According to the complaint, the IPA collectively refused to deal with two health plans, terminated contracts with Blue Cross of Texas, and threatened to terminate contracts with United HealthCare of Texas if the payer did not comply with the association's demand for rate increases. Both plans increased their rates in response to the IPA's demands. The order prohibits the IPA from 1) negotiating on behalf of any physician with health plans, 2) refusing to deal or threatening to refuse to deal with health plans, 3) determining the terms on which its members deal with health plans, and 4) restricting the ability of any physicians to deal with any payer or provider individually or through any other arrangement. The order also prohibits the respondent from exchanging information among Austin area physicians concerning negotiations with any health plan regarding reimbursement terms, or any physician's intent to refuse to deal with any health plan. In 1999 the Texas legislature enacted a statute that permits the Texas Attorney General to approve, under certain conditions, joint negotiations between health plans and groups of competing physicians. Because it is unclear whether the IPA's conduct in this matter would be approved by the Texas Attorney General, the order allows the IPA to engage in future conduct that is approved and supervised by the State of Texas, if that conduct is protected from liability under the federal antitrust laws under the "state action" doctrine.

**Colegio de Cirujanos Dentistas de Puerto Rico**, C-3953, FTC File No. 9710038 (final order issued June 12, 2000) (<http://www.ftc.gov/enforcement/cases-proceedings/9710038/colegio-de-cirujanos-dentistas-de-puerto-rico>). The complaint charged that an association of approximately 1800 dentists, acting as the collective bargaining agent for its members, fixed prices, boycotted payers to obtain higher reimbursement rates, and restrained truthful advertising by its members. The association, comprising almost all dentists practicing in Puerto Rico, negotiated with numerous payers about fees and set the terms its members would accept from the payers. The complaint also alleged that the association used its Code of Ethics to ban truthful advertising by dentists who advertised their willingness to accept patients from neighboring areas where dentists were conducting a boycott of the Reform, a government program to provide medical

services to the indigent. The order prohibits the association from negotiating on behalf of any dentists with payers or providers, refusing to deal with or boycotting payers, determining the terms upon which dentists will deal with providers, and restricting or interfering with truthful advertising or solicitation concerning dental services.

**Wisconsin Chiropractic Association**, C-3943, FTC File No. 9710117 (final order issued May 18, 2000) (<http://www.ftc.gov/enforcement/cases-proceedings/9710117/wisconsin-chiropractic-association-russell-leonard-matter>). The complaint alleged that the Wisconsin Chiropractic Association and its executive director conspired to boycott third-party payers to obtain higher reimbursement rates, thereby increasing prices for chiropractic services. The Wisconsin Chiropractic Association has 900 members, and represents about 90% of the chiropractors licensed in the state. According to the complaint, the association, in response to the introduction of new billing codes by private insurers and the federal government, advised its members to collectively raise their prices to specific levels, circulated fee schedules to coordinate pricing among its members, advised members to discuss contract offers to improve their bargaining position with payers, and assisted in boycotts of two payers to obtain higher reimbursement rates. The order prohibits the association from fixing prices or encouraging others to fix prices for chiropractic services, boycotting any payer, or negotiating on behalf of any chiropractor or group of chiropractors. The order also prohibits the association from initiating, conducting, or distributing any fee surveys for healthcare goods or services prior to December 31, 2001. In addition, for five years thereafter, the WCA may conduct or distribute fee surveys only if the surveys conform to the safe harbor provisions regarding fee surveys contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.

**Michael T. Berkley, D.C. and Mark A. Cassellius, D.C.**, C-3936, FTC File No. 9910278 (final order issued April 11, 2000) (<http://www.ftc.gov/enforcement/cases-proceedings/991-0278/berkley-michael-t-dc-mark-cassellius-dc>). The complaint alleged that two chiropractors conspired to fix prices for chiropractic services in the La Crosse, Wisconsin area, and boycotted the Gundersen Lutheran Health Plan to obtain higher reimbursement for chiropractic services. As a result of the boycott, Gundersen increased its reimbursement rates by 20%. The order is similar to the Wisconsin Chiropractic Association order (discussed above), and prohibits Drs. Berkley and Cassellius from fixing prices for chiropractic services, engaging in collective negotiations on behalf of other chiropractors, and orchestrating concerted refusals to deal.

**North Lake Tahoe Medical Group, Inc.**, C-3885, FTC File No. 9810261, 128 F.T.C. 75 (final order issued July 21, 1999) (<https://www.ftc.gov/enforcement/cases-proceedings/9810261/north-lake-tahoe-medical-group-inc>). The complaint alleged that North Lake Tahoe Medical Group, Inc. (Tahoe IPA), an independent physician association, restrained competition among physicians and delayed the entry of managed care in the Lake Tahoe Basin in California. Tahoe IPA, based in Truckee, California, is composed of 91 physicians comprising 70% of the physicians practicing in the Lake Tahoe area. The complaint further alleged that the IPA conspired to fix prices, engaged in collective negotiations over prices with payers, and refused to deal with Blue Shield of California and other third-party payers when it did not comply with the Tahoe IPA's plans. The order prohibits the IPA from 1) engaging in collective negotiations on behalf of its members, 2) orchestrating concerted refusals to deal, 3) fixing prices, or any other terms, on which its members deal, and 4) restricting the ability of any physician to deal with any

payer or provider individually or through any arrangement outside of Tahoe IPA. The order also requires Tahoe IPA to terminate the membership of physicians who refused to deal (or gave notice of their intent to refuse to deal) with Blue Shield, unless the physicians make a good faith effort to reparticipate and continue to participate in Blue Shield for a period of six months. In a separate statement, Commissioner Swindle disagreed with the need for the termination requirement because market incentives should result in reparticipation by the physicians in Blue Shield.

**Mesa County Physicians Independent Practice Association, Inc.**, D-9284, FTC File No. 9610027, 127 F.T.C. 564 (final order issued May 4, 1999) (<https://www.ftc.gov/enforcement/cases-proceedings/9610027/mesa-county-physicians-independent-practice-association-inc>). The Commission issued a revised complaint and final order against the Mesa County Physicians Independent Practice Association, Inc., an organization whose members comprise 85% of all physicians and 90% of the primary care physicians in Mesa County, Colorado. According to the complaint, the IPA acted to restrain trade by combining to fix prices and other competitively significant terms of dealing with payers, and collectively refused to deal with third-party payers, thereby hindering the development of alternative health care financing and delivery systems in Mesa County. The complaint alleged that the IPA, through its alliance with the Rocky Mountain Health Maintenance Organization, created a substantial obstacle to the ability of other payers to contract with a physician panel in Mesa County. The complaint also alleged that the IPA's Contract Review Committee negotiated collectively on behalf of the IPA's members with several third-party payers, using an IPA Board-approved set of guidelines and fee schedule, and that a similar organization formed after the proposed consent order was issued in 1998 engaged in the same conduct. The order prohibits the Mesa County IPA from: 1) engaging in collective negotiations on behalf of its members; 2) collectively refusing to contract with third-party payers; 3) acting as the exclusive bargaining agent for its members; 4) restricting its members from dealing with third-party payers through an entity other than the IPA; 5) coordinating the terms of contracts with third-party payers with other physician groups in Mesa County or in any county contiguous to Mesa County; 6) exchanging information among physicians about the terms upon which physicians are willing to deal with third-party payers; and, 7) encouraging other physicians to engage in activities prohibited by the order. The order also requires the Mesa IPA to abolish its Contract Review Committee, and prohibits the IPA from employing any person or participating physician who is conducting payer contract review. The order, however, allows the respondent to engage in 1) any "qualified clinically integrated joint arrangement" (with prior notice to the Commission), and 2) conduct that is reasonably necessary to operate any "qualified risk-sharing joint arrangement" as set forth in the 1996 DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care.

**Ernesto L. Ramirez Torres, D.M.D., et al.**, C-3851, FTC File No. 981 0154, 127 F.T.C. 134 (final order issued February 5, 1999) (<https://www.ftc.gov/enforcement/cases-proceedings/981-0154/ramirez-torres-ernesto-l-dmd-et-al>). The complaint alleged that a group of dentists, comprising a majority of the dentists in Juan Diaz, Coamo, and Santa Isabel, Puerto Rico, fixed prices and engaged in an illegal boycott of a government program to provide dental care for indigent patients. According to the complaint, the dentists threatened a boycott of the reform program if they were not reimbursed at certain prices, and then boycotted the program. After several months, the dentists' price demands were met and they agreed to participate in the

program. The order prohibits the dentists from jointly boycotting or refusing to deal with third-party payers, or collectively determining any terms or conditions for dealing with third-party payers.

**M.D. Physicians of Southwest Louisiana Inc.**, C-3824, FTC File No. 9410095, 126 F.T.C. 219 (final order issued August 31, 1998) (<https://www.ftc.gov/enforcement/cases-proceedings/9410095/md-physicians-southwest-louisiana-inc>). The complaint charged that M.D. Physicians of Southwest Louisiana, Inc., a physician group comprising a majority of the physicians in the Lake Charles area of Louisiana, fixed the prices and other terms on which it would deal with third-party payers, collectively refused to deal with third-party payers, and conspired to obstruct the entry of managed care. According to the complaint, the group was formed in 1987 as a vehicle for its members to deal concertedly with the entry of managed care, and until 1994, the members of MDP dealt with third-party payers only through the group. As a result of this conduct, the complaint alleged, MDP restrained competition among physicians, increased the prices that consumers pay for physician services and medical insurance coverage, and deprived consumers of the benefits of managed care. The consent order prohibits MDP from engaging in collective negotiations on behalf of its members, orchestrating concerted refusals to deal, fixing prices or terms on which its members deal, or encouraging or pressuring others to engage in any activities prohibited by the order.

**Urological Stone Surgeons, Inc.**, C-3791, 9310028, 125 F.T.C. 513 (final order issued April 6, 1998) (<https://www.ftc.gov/enforcement/cases-proceedings/9310028/urological-stone-surgeons-inc-stone-centers-america-llc>). The complaint charged that three companies (Urological Stone Surgeons, Inc., Stone Centers of America, L.L.C., and Urological Services, Ltd.) and two doctors providing lithotripsy services at Parkside Kidney Stone Centers illegally fixed prices for professional urologist services for lithotripsy procedures in the Chicago metropolitan area. Urologists using the Parkside facility account for approximately 65% of urologists in the area. The complaint alleged that the respondents agreed to use a common billing agent (Urological Services, Ltd.), established a uniform fee for lithotripsy professional services, prepared and distributed fee schedules for lithotripsy professional services at Parkside, and billed a uniform amount either from the fee schedule or an amount negotiated on behalf of all urologists at Parkside. The complaint also alleged that the billing agent contracted with third-party payers based on a uniform percentage discount off the urologist's charge for professional services, or a uniform global fee that included professional services, charges for the lithotripsy machine, and anesthesiology services. According to the complaint, the collective setting of fees for lithotripsy services was not reasonably necessary to achieve efficiencies from the legitimate joint ownership and operation of the lithotripsy machines, nor were the urologists sufficiently integrated so as to justify the agreement to fix prices for lithotripsy professional services. The consent order prohibits the respondents from fixing prices, discounts, or other terms of sale or contract for lithotripsy professional services, requires the respondents to terminate third-party payer contracts that include the challenged fees at contract-renewal time or upon written request of the payer, and requires the respondents to notify the FTC at least 45 days before forming or participating in an integrated joint venture to provide lithotripsy professional services.

**College of Physicians-Surgeons of Puerto Rico**, FTC File No. 9710011, Civil No. 97-2466-HL (D. Puerto Rico, October 2, 1997) (<http://www.ftc.gov/enforcement/cases->

[proceedings/9710011/college-physicians-surgeons-puerto-rico-centralmed-inc-fajardo](https://www.ftc.gov/enforcement/cases-proceedings/9710011/college-physicians-surgeons-puerto-rico-centralmed-inc-fajardo)). The Federal Trade Commission and the Commonwealth of Puerto Rico filed a final order, stipulated permanent injunction, and complaint in the U.S. District Court in Puerto Rico against the College of Physician-Surgeons of Puerto Rico (comprised of 8,000 physicians in Puerto Rico), and three physician independent practice associations. The complaint charged that the defendants attempted to coerce the Puerto Rican government into recognizing the College as the exclusive bargaining agent for all physicians in Puerto Rico, with the public corporation responsible for administering a health insurance system that provides medical and hospital care to indigent residents. The complaint also charged that to achieve their goals, members of the College called for an eight-day strike during which they ceased providing non-emergency services to patients. The order prohibits the defendants from boycotting or refusing to deal with any third-party payer, refusing to provide medical services to patients of any third-party payer, or jointly negotiating prices or other more favorable economic terms. The order also calls for the College to pay \$300,000 to the catastrophic fund administered by the Puerto Rico Department of Health. The order does not prevent the defendants from participating in joint ventures that involve financial risk-sharing or which receive the prior approval of the Commission, from petitioning the government, or from communicating purely factual information about health plans.

**Montana Associated Physicians, Inc./Billing Physician Hospital Alliance, Inc.**, C-3704, FTC File No. 9110008, 123 F.T.C. 62 (final order issued January 13, 1997) (<https://www.ftc.gov/enforcement/cases-proceedings/9110008/montana-associated-physicians-inc-billings-physician-hospital>). The complaint charged that a physician association (MAPI) blocked the entry of an HMO into Billings, Montana, obstructed a PPO that was seeking to enter, recommended physician fee increases, and later acted through a physician-hospital organization (BPHA) to maintain fee levels. The order prohibits MAPI and BPHA from agreeing, for a 20 year period, to 1) boycott or refuse to deal with third-party payers; 2) determining the terms upon which physicians deal with such payers; and 3) fixing the fees charged for any physician services. MAPI also is prohibited from advising physicians to raise, maintain, or adjust the fees charged for their medical services, or creating or encouraging adherence to any fee schedule. The order does not prevent these associations from entering into legitimate joint ventures that are non-exclusive and involve the sharing of substantial financial risk. Other types of joint ventures are subject to prior approval of the Commission.

**La Asociacion Medica de Puerto Rico**, C-3583, 119 F.T.C. 772 (final order issued June 2, 1995) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-119>). The complaint charged that the Medical Association of Puerto Rico, its Psychiatry Section, and two of its psychiatrist members illegally conspired to boycott a government insurance program in order to obtain exclusive referral powers from insurers and to increase reimbursement rates. The order prohibits the respondents from agreeing to boycott or refuse to deal with any third-party payer, or refusing to provide services to patients covered by any third-party payer. For a five-year period, the order also: 1) places restrictions on meetings of psychiatrists to discuss refusals to deal with any third-party payer, or the provision of services covered by any third-party payer; and 2) prohibits the respondents from soliciting information from psychiatrists about their decisions to participate in agreements with insurers and provide service to patients, passing such information along to other doctors, and giving psychiatrists advice about making those decisions.



**Trauma Associates of North Broward, Inc.**, C-3541, 118 F.T.C. 1130 (final order issued November 1, 1994) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-118>). The complaint charged that 10 surgeons in Broward County, Florida, through Trauma Associates of North Broward, Inc., conspired to fix the fees they were paid for their services at trauma centers at two area hospitals, and threatened and carried out a concerted refusal to deal, forcing one trauma center to close. Under the consent order, the surgeons agreed to dissolve Trauma Associates of North Broward, Inc., a corporation which allegedly served as a vehicle for the surgeons to engage in collective negotiations with the North Broward Hospital District on fees and other contract terms. The order also prohibited the surgeons from dealing with any provider of health care services on collectively determined terms unless the surgeons are partners or employees in a corporation, or are acting through an “integrated” joint venture and remain free to deal individually with entities that decline to deal with the joint venture.

**McLean County Chiropractic Association**, C-3491, 117 F.T.C. 396 (final order issued April 7, 1994) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-117>). The complaint charged that an association of chiropractors set maximum fees for its members and attempted to negotiate collectively on behalf of those members the terms and conditions of agreements with third-party payers. The order prohibits the respondents from agreeing to determine their fees collectively or dealing with payers on collectively determined terms.

**Roberto Fojo, M.D.**, C-3373, 115 F.T.C. 336 (final order issued March 2, 1992) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-115>). The complaint charged that the former chairman of the ob/gyn department at a hospital in Miami, Florida, along with other department members, coerced the hospital into paying ob/gyns and other physicians for emergency room call services by threatening to refuse to take emergency room call duty. The order prohibits Dr. Fojo from conspiring with other physicians to boycott or threaten to boycott the emergency room at any hospital.

**Debes Corporation**, C-3390, 115 F.T.C. 701 (final order issued August 4, 1992) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-115>). The complaint charged that six nursing homes in the Rockford, Illinois area stopped using temporary nurse registries, following an increase in prices charged by the registries for nursing assistants, in order to eliminate competition among the nursing homes for the purchase of nursing services provided by the registries. The order prohibits the nursing homes from agreeing to boycott the registries, which supplied temporary nursing services to the nursing homes, or to interfere with prices charged by such registries.

**Southbank IPA, Inc.**, C-3355, 114 F.T.C. 783 (final order issued December 20, 1991) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-114>). The complaint charged that 23 obstetrician/gynecologists in Jacksonville, Florida, illegally conspired to fix the fees they charged to third-party payers, boycotted or threatened to boycott third-party payers, and restrained competition among OB/GYNs in the Jacksonville, Florida area. Under the order, the physicians agreed: 1) to dissolve their independent practice association and its parent corporation; 2) not to enter into or attempt to enter into any agreement or

understanding with any competing physician to fix, stabilize, or tamper with any fee, price, or any other aspect of the fees charged for any physician's services; and 3) not to deal with any third-party payer on collectively determined terms unless they are participating in an "integrated" joint venture as defined by the order, or in a partnership or professional corporation. The consent agreement marked the first time dissolution of a health care organization was required as a term of settlement.

**Preferred Physicians, Inc.**, C-3222, 110 F.T.C. 157 (final order issued February 26, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-110>). The complaint charged that 250 physicians in Tulsa, Oklahoma, effectively controlled patient access to the leading hospital in the area, and formed a stock corporation to conduct joint negotiations with third-party payers on the members' behalf. According to the complaint, the corporation had been formed as an exclusive negotiating agent of the otherwise competing members for the purpose of resisting pressure to provide discounts to HMOs and other third-party payers who might seek contracts with members of the corporation. Under the consent order, the corporation agreed not to enter into agreements with its members to deal with third-party payers on collectively determined terms, not to communicate to third-party payers that its members would not participate in plans on terms unacceptable to the corporation, and for five years not to advise its members on the desirability of prices paid for physicians' services by third-party payers.

**Rochester Anesthesiologists, et al.**, D-9199, 110 F.T.C. 175 (final order issued March 8, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-110>). The complaint charged that 31 anesthesiologists in Rochester, New York conspired to increase their fees by negotiating collectively with third-party payers over reimbursement terms, and by threatening not to participate in certain health plans. The complaint further alleged that the anesthesiologists jointly departicipated from Blue Shield when it refused to accede to their demand for higher reimbursement rates. The order prohibits the anesthesiologists from agreeing to conspire to deal with third-party payers on collectively determined terms or to coerce third-party payers.

**New York State Chiropractic Association**, D-9210, 111 F.T.C. 331 (final order issued November 11, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-111>). The complaint charged that a chiropractic association conspired with its members to increase the level of reimbursement paid for chiropractic services by collectively threatening not to participate, and by departicipating from a program of a third-party payer. The order prohibits the association from agreeing to conspire to deal with third-party payers on collectively determined terms, act on behalf of its members to negotiate with third-party payers, or coerce third-party payers.

**Patrick S. O'Halloran, M.D.** (Formerly Newport Rhode Island Obstetricians), C-3232, 111 F.T.C. 35 (final order issued August 26, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-111>). The complaint charged that five obstetricians in the Newport, Rhode Island area concertedly forced the state to raise Medicaid payments to obstetricians by threatening to refuse to accept new Medicaid patients if the state did not raise Medicaid payments. The order prohibits the physicians from agreeing to conspire to

deal with any governmental health care program on collectively determined terms, or to coerce any governmental health care program.

**Oklahoma Optometric Association**, D-9191, 106 F.T.C. 556 (final order issued November 19, 1985) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-106>). The complaint charged that a state optometric association, through its ethical guidelines, unreasonably restricted its members from truthful advertising and soliciting business. By virtue of these guidelines, members were prohibited from, among other things, associating with lay practices, making superiority claims, offering specific guarantees (e.g., to refund the cost of optical goods), and criticizing other optometrists. Under the order, the association agreed to cease restricting its members from truthful advertising and soliciting business, from meeting competitors' prices, and from offering special guarantees, such as refunds to consumers for the cost of optical goods.

**Michigan State Medical Society**, D-9129, 101 F.T.C. 191 (final order issued February 17, 1983) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-101>). The complaint charged that an East Lansing, Michigan medical society illegally obstructed insurers' cost containment programs, by orchestrating a group boycott by its physician members for the purpose of obtaining higher reimbursement. According to the complaint, the medical society organized a proxy campaign which would have allowed the society to collectively terminate its members' participation in third-party payer and Medicaid insurance programs. The Commission decision held that the medical society illegally conspired to obtain its members' permission to collectively terminate participation in third-party payer and Medicaid insurance programs if these payers did not alter cost containment procedures and adopt reimbursement policies acceptable to the society. The order prohibited the medical society from, among other things, entering into agreements with its members to affect the amount, terms of reimbursement, or decision to accept or reject an agreement; acting on behalf of its members through proxy power; influencing its members to refuse to enter into any participation agreement not acceptable to the society; and entering into any agreement with third-party payers concerning the amount, manner of calculation, or terms of reimbursement.

**Association of Independent Dentists**, C-3097, 100 F.T.C. 518 (final order issued October 22, 1982) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-100>). The complaint charged that an association of dentists in Pueblo County, Colorado, illegally restrained competition among its members by adopting and enforcing a bylaw that prevented or hindered its members from truthfully advertising any aspect of their practices without the prior approval of the association's Board of Directors. According to the complaint the association threatened to refuse to sign participating dentist agreements with third-party payers, in order to pressure these payers to increase or maintain the level of reimbursement paid for dental services. Under the order, the medical society agreed to cease restricting truthful advertising by its members, and not to act in any way to coerce third-party payers to accept its positions about reimbursement in dental care coverage plans.

**American Medical Association v. Federal Trade Commission**, D-9064, 94 F.T.C. 701 (final order issued October 12, 1979) *aff'd as modified*, 638 F.2D 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (order modified 99 F.T.C. 440 (1982), 100 F.T.C.

572 (1982), and 114 F.T.C. 575 (1991) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-94>). The complaint charged the AMA with violations of Section 5 of the FTC Act by agreeing to restrict its members' ability to advertise and solicit patients, and engage in price competition and other competitive practices. The Commission decision held that the AMA had illegally engaged in concerted action to restrain competition among its members. The Commission found, among other things, that the AMA, through its ethical guidelines, unreasonably prevented or hindered its members from soliciting business by truthful advertising or other forms of solicitation of patients. In addition, the Commission found that the AMA had illegally restrained its members from offering services on a salaried basis or at below-usual rates for hospitals, HMOs, and other lay institutions. Under the order, the association is prohibited from restraining truthful advertising. The order also prohibits the AMA from placing restrictions on the operation of physician practices that limit a patient's choice of physician services.

**California Medical Association**, C-2967, 93 F.T.C. 519 (final order issued April 17, 1979) (modified 105 F.T.C. 277 (1985) (set aside order, 120 F.T.C. 858 (1995)) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-93>). The complaint charged that a medical association's preparation, publication, and circulation of RVSs, which included instructions for the computation and use of conversion factors, had the effect of establishing, maintaining, or otherwise influencing the fees which physicians charged for their services. The order prohibits the respondent from developing, publishing, or circulating RVSs, or suggesting that monetary conversion factors be applied to RVSs.

**Minnesota State Medical Association**, C-2909, 90 F.T.C. 337 (final order issued October 31, 1977) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-90>). The complaint charged that a medical association's preparation, publication, and circulation of RVSs had the effect of establishing, maintaining, or otherwise influencing the fees which physicians charged for their services. The complaint also charged that the association's component societies had adopted, published, circulated, and recommended to their members conversion factors applicable to the RVSs. The order prohibits the association from developing, publishing, or circulating RVSs and monetary conversion factors applicable to RVSs.

**American College of Radiology**, C-2871, 89 F.T.C. 144 (final order issued March 1, 1977) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-89>), modified 113 F.T.C. 280 (1990). The complaint charged that a medical association's preparation, publication, and circulation of RVSs had the effect of establishing, maintaining, or otherwise influencing the fees which physicians charged for their services. The order prohibits the association from developing, publishing, or circulating RVSs.

**American Academy of Orthopaedic Surgeons**, C-2856, 88 F.T.C. 968 (final order issued December 14, 1976) (modified 105 F.T.C. 248 (1985)) (set aside order, 119 F.T.C. 609 (1995)) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-88>) The complaint charged that a medical association's preparation, publication, and circulation of RVSs had the effect of establishing, maintaining, or otherwise influencing the fees which

physicians charged for their services. The order prohibits the association from developing, publishing, or circulating RVSs.

**American College of Obstetricians & Gynecologists**, C-2855, 88 F.T.C. 955 (final order issued December 14, 1976) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-88>) (modified 104 F.T.C. 524 (1984)). The complaint charged that a medical association's preparation, publication, and circulation of RVSs had the effect of establishing, maintaining, or otherwise influencing the fees which physicians charged for their services. The order prohibits the association from developing, publishing, or circulating RVSs.

### **C. Agreements to Obstruct Innovative Forms of Health Care Delivery or Financing**

**Connecticut Chiropractic Association**, C-4217, FTC File No. 0710074 (final order issued April 14, 2008) (<https://www.ftc.gov/enforcement/cases-proceedings/071-0074/connecticut-chiropractic-association-connecticut-chiropractic>). The complaint charged that two chiropractic trade associations, and the attorney for one of the associations, conspired to boycott a cost-saving health plan for chiropractic services in Connecticut. The investigation was conducted jointly with the Connecticut Office of the Attorney General. The associations, comprising over 500 licensed chiropractors, and the attorney entered into agreements to prevent American Specialty Health from administering a state-wide chiropractic benefits administration program on behalf of health plans. American Specialty Health provides a network of chiropractors and administers the chiropractic benefits program for health plans to help improve the efficiency, increase the quality, and reduce the cost of providing chiropractic care. According to the complaint, the respondents, unhappy with the program's price terms and utilization management requirements, organized monthly meetings and other communications, and encouraged the chiropractors to refuse to participate in the network. The respondents also encouraged the chiropractors to terminate existing relationships with several health plans' American Specialty Health programs. The order prohibits the associations and the attorney from negotiating on behalf of any chiropractor with health plans, refusing to deal with or threatening not to deal with health plans, and determining the terms upon which chiropractors will deal with health plans. The respondents also reached a settlement with the Connecticut Attorney General under which the two associations and the attorney agreed to pay civil penalties to the state, and agreed not to conspire to refuse to deal or threaten to refuse to deal with any health insurer.

**Ernesto L. Ramirez Torres, D.M.D., et al.** (See Section II B for citation and annotation.)

**M.D. Physicians of Southwest Louisiana Inc.** (See Section II B for citation and annotation.)

**Montana Associated Physicians, Inc./Billings Physicians Hospital Alliance, Inc.** (See Section II B for citation and annotation.)

**La Asociacion Medica de Puerto Rico** (See Section II B for citation and annotation.)

**Medical Staff of Good Samaritan Regional Medical Center**, C-3554, 119 F.T.C. 106 (final order issued February 1, 1995) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-119>). The complaint charged that members

of the medical staff of Good Samaritan Regional Medical Center, in Phoenix, Arizona, consisting of more than 500 physicians, conspired to prevent the hospital from opening a multi-specialty clinic that would have competed with the physicians, by threatening to stop admitting patients to the hospital if it proceeded with plans to open the clinic. The order prohibits members of the medical staff from agreeing, or attempting to enter into an agreement, to prevent or restrict the services offered by Good Samaritan, the clinic, or any other health care provider. The order also prohibits the physicians from conspiring to use coercive tactics to prevent competition from other physicians or health care providers.

**Physician Group, Inc.**, C-3610, 120 F.T.C. 567 (final order issued August 11, 1995) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-120>). The complaint charged that Physicians Group Inc., and seven physicians on the board of directors of that organization, conspired to prevent or delay the entry of third-party payers into Pittsylvania County and Danville, Virginia. The complaint also charged that the respondents fixed the terms on which they would deal with third-party payers, including not only price terms but also terms and conditions of cost containment. The order prohibits such conduct, and requires the dissolution of Physicians Group Inc.

**Southbank IPA, Inc.** (See Section II B for citation and annotation.)

**Diran Seropian, M.D.**, D-9248, 115 F.T.C. 891 (final order issued September 11, 1992) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-115>). Dr. Seropian was charged along with physicians and other health practitioners in Medical Staff of Broward General Medical Center (discussed below). He entered a separate consent agreement after litigation against him had commenced.

**Medical Staff of Holy Cross Hospital**, C-3345, 114 F.T.C. 555 (final order issued September 10, 1991) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-114>). The complaint charged that physicians and other health practitioners with privileges to practice at a Fort Lauderdale, Florida hospital conspired with its members to threaten to boycott the hospital, in order to coerce the hospital not to enter a business relationship with the Cleveland Clinic or grant privileges to Clinic physicians. The medical staff entered into a consent order under which it will not, among other things, 1) refuse to deal or threaten to refuse to deal with the hospital or any other provider of health care services; 2) refuse or threaten to refuse to provide, or delay unreasonably in providing, an application for medical staff privileges to any Cleveland Clinic physician; 3) deny, impede, or refuse to consider any application for hospital changes or for changes in hospital privileges by any person solely because of his or her affiliation with the Cleveland Clinic; and 4) (i) deny or recommend to deny, limit, or otherwise restrict hospital privileges for any Cleveland Clinic physician, or (ii) close or recommend to close the medical staff, without a reasonable basis for concluding that the denial, limitation, or restriction serves the interests of the hospital in providing for the efficient and competent delivery of health care services.

**Medical Staff of Broward General Medical Center**, C-3344 114 F.T.C. 542 (final order issued September 10, 1991) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-114>). The complaint charged that the medical staff of physicians and other

health practitioners with privileges to practice at a Fort Lauderdale, Florida hospital conspired with its members to threaten to boycott the hospital, in order to coerce the hospital not to enter a business relationship with the Cleveland Clinic or grant privileges to Clinic physicians. The medical staff entered into a consent order under which it will not, among other things, 1) refuse to deal or threaten to refuse to deal with the hospital or any other provider of health care services; 2) deny, impede, or refuse to consider any application for hospital changes or for changes in hospital privileges by any person solely because of his or her affiliation with the Cleveland Clinic; and 3) deny or recommend to deny, limit, or otherwise restrict hospital privileges for any Cleveland Clinic physician without a reasonable basis for concluding that the denial, limitation, or restriction serves the interests of the hospital in providing for the efficient and competent delivery of health care services.

**Medical Staff of Dickinson County Memorial Hospital**, C-3259, 112 F.T.C. 33 (final order issued July 17, 1989) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-112>). The complaint charged that 12 physicians practicing in Dickinson County, Michigan, two medical societies, and a hospital medical staff conspired to prevent a hospital from opening a clinic that would have competed with the doctors, by threatening not to refer patients to specialists at the hospital. The order prohibits the respondents from conspiring to use coercive tactics to prevent competition from other physicians or health care providers. The order provides that legitimate peer review activities are not prohibited.

**Lee M. Mabee, M.D.**, D-9214, 112 F.T.C. 535 (final order issued November 15, 1989) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-112>). Dr. Mabee was charged along with 11 other obstetricians in Sioux Falls Obstetricians (discussed below). He entered a separate consent agreement after the litigation against him had commenced.

**Eugene M. Addison, M.D.**, C-3243, 111 F.T.C. 339 (final order issued November 15, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-111>). The complaint charged that 14 physicians in the Huntsville, Texas area collectively sought to obtain from HMOs more advantageous terms of participation and, when those efforts proved unsuccessful, collectively refused to deal with the HMOs and attempted to restrict the hospital privileges of physicians associated with the HMOs. Under the order, the physicians agreed not to deal collectively with HMOs or health plans, not to deny hospital staff privileges solely because the applicant was associated with an HMO or health plan, and not to change the hospital's rules or medical staff bylaws in order to limit the participation of any physician in governance of the hospital or medical staff because of affiliation with an HMO or health plan.

**Iowa Chapter of American Physical Therapy Association**, C-3242, 111 F.T.C. 199 (final order issued November 4, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-111>). The complaint charged that a physical therapy association unreasonably restrained competition by adopting a resolution declaring it illegal and unethical for therapists to work for physicians. The order prohibits the association from restricting member therapists from being employed by physicians.

**New York State Chiropractic Association** (See Section II B for citation and annotation.)

**Rochester Anesthesiologists, et al.** (See Section II B for citation and annotation.)

**Medical Staff of Doctors' Hospital of Prince George's County**, C-3226, 110 F.T.C. 476 (final order issued April 14, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-110>). The complaint charged that the medical staff of a Maryland hospital conspired to coerce the owner of the hospital to abandon plans to open an HMO facility in the area, through threats of concerted action to "close" the hospital. Under the order, the medical staff agreed not to organize or encourage any agreement among physicians for the purpose of preventing delivery of health care services by HMOs or other health care facilities.

**Medical Staff of Memorial Medical Center**, C-3231, 110 F.T.C. 541 (final order issued June 1, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-110>). The complaint charged that the medical staff of a hospital in Savanna, Georgia, acting through its credentials committee, conspired to suppress competition by denying a certified nurse-midwife's application for hospital privileges without a reasonable basis. The order prohibits the medical staff from agreeing to deny or restrict hospital privileges to certified nurse-midwives, unless the staff has a reasonable basis for believing that the restriction would serve the interest of the hospital in providing for the efficient and competent delivery of health care services.

**Robert E. Harvey, M.D.**, C-3239, 111 F.T.C. 57 (final order issued August 26, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-111>). The complaint charged that allergists and a clinic in the Victoria, Texas area organized a boycott of manufacturers of new allergy testing products that were being marketed to non-allergist physicians. The order prohibits the allergists from agreeing to conspire to use coercive tactics to prevent competition from doctors who were not allergists.

**Sioux Falls Obstetricians**, C-3241, 111 F.T.C. 122 (final order issued October 11, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-111>). The complaint charged that eleven obstetricians in the Sioux Falls, South Dakota area, who served as the part-time OB faculty of the medical school, illegally attempted to limit competition from the medical school full-time faculty members by threatening a boycott of the obstetrician/gynecologist residency program. The order prohibits the physicians from agreeing to engage in collective coercive activities that interfere with the residency program of the University of South Dakota School of Medicine.

**Preferred Physicians, Inc.** (See Section II B for citation and annotation.)

**Physicians of Meadville**, C-3209, 109 F.T.C. 61 (final order issued March 2, 1987) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-109>). The complaint charged that 61 physicians combined to restrict competition among physicians, by threatening not to refer patients to physician specialists practicing on the medical staff of a hospital in Erie, Pennsylvania, if a group of specialists associated with that hospital opened a satellite office that would compete with the local doctors. The order prohibits the physicians from agreeing to concertedly withhold or threaten to withhold patient referrals from



any physician or other health care provider, or to refuse to deal with or withhold patient admissions from any hospital.

**American Academy of Optometry**, C-3193, 108 F.T.C. 25 (final order issued July 21, 1986) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-108>). The complaint charged that an Academy of optometrists engaged in unlawful concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from soliciting business through truthful advertising and similar means. By virtue of these guidelines, members had been restricted from advertising prices, fees, types of treatment, professional training and experience, special expertise, and products offered for sale, such as contact lenses. The order prohibits the Academy from restricting its members from truthfully advertising and soliciting business. Under the order, the association also agreed to cease restricting its members in their choice of office location.

**Health Care Management Corp.** (formerly Medical Staff of North Mobile Community Hospital), C-3182, 107 F.T.C. 285 (final order issued February 20, 1986) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-107>). The complaint charged that a corporation that owns a hospital near Mobile, Alabama, and the hospital's medical staff conspired to restrain competition from podiatrists, by pressuring individual physicians not to co-admit the patients of a podiatrist already on the staff, and by imposing unreasonable conditions on podiatrists seeking to practice at the hospital. The hospital and its medical staff agreed not to unreasonably restrict podiatrists from practicing at the hospital.

**North Carolina Orthopaedic Association**, C-3200, 108 F.T.C. 116 (final order issued September 19, 1986) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-108>). The agreement settled complaint charges that an orthopaedic association orchestrated an agreement among its members to exclude or unreasonably discriminate against podiatrists who sought hospital privileges or access to hospitals. The order prohibits the association from unreasonably restricting podiatrists from gaining surgical privileges or access to hospitals in North Carolina.

**Hawaii Dental Service Corp.**, C-3158, 106 F.T.C. 25 (final order issued July 26, 1985) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-106>). The complaint charged that a corporation that offered a dental insurance plan, which provided dental services for a prepaid premium and was operated by the dentists who provided the services, limited competition among dentists in the state by enacting bylaws that prohibited the corporation from recruiting and sending dentists to certain counties without the approval of the majority of its members residing in the affected counties. The order prohibits the corporation from conditioning its decisions to send new dentists to certain counties in Hawaii on the approval of member dentists already practicing in those counties.

**Medical Staff of John C. Lincoln Hospital & Health Center**, C-3166, 106 F.T.C. 291 (final order issued September 26, 1985) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-106>). The complaint charged that physicians and other practitioners with privileges to practice at a Phoenix, Arizona hospital and health

center conspired to coerce and threaten to boycott the hospital, so that the hospital would cancel its involvement with an urgent care facility that competed with medical staff members. The order prohibits the medical staff from agreeing to make, or join in plans to make, any threats of unreasonably discriminatory action against any health care facility or professional, or to undertake coercive action to influence reimbursement or insurance determinations, including a refusal to refer, admit, or treat patients.

**Michigan Optometric Association**, C-3170, 106 F.T.C. 342 (final order issued October 10, 1985) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-106>). The complaint charged that an optometric association conspired with its members to place unreasonable restraints upon member optometrists' "corporate practices." According to the complaint the optometric association engaged in illegal concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from truthfully advertising. The ethical guidelines had prohibited members from displaying their names in any manner that stood out from a listing of other occupants of a building; from using professional cards, billboards, letterheads, or stationery containing any information other than certain limited items; from using large signs or any representations of eyes, eyeglasses, or the human head; and from using lettering that was larger than a specified size on windows or doors. The order prohibits the association from restricting its members from truthfully advertising and otherwise soliciting business, providing services or selling optical goods in a retail location, or from providing optometric services or optical goods through corporate practice (i.e., in association with any business corporations other than hospital clinics, HMOs, or professional corporations).

**State Volunteer Mutual Insurance Company, Inc.**, C-3115, 102 F.T.C. 1232 (final order issued September 28, 1983) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-102>). The complaint charged that a Tennessee physician-owned insurance company providing malpractice insurance terminated the insurance of a physician because he had agreed to serve as a back-up physician to certified nurse-midwives who were in independent practice. The order prohibits the insurance company from unreasonably discriminating against physicians who work with independent nurse midwives.

**Indiana Federation of Dentists v. Federal Trade Commission**, D-9118, 101 F.T.C. 57 (1983) rev'd, 745 F.2d 1124 (7<sup>th</sup> Cir. 1984), rev'd, 476 U.S. 447 (1986) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-101>). The complaint charged that an organization conspired to restrain competition among Indiana dentists by promulgating guidelines to prevent dentists from turning over patients' x-rays to dental care insurers. The Supreme Court reversed the Seventh Circuit and affirmed the Commission's holding that the organization of dentists illegally conspired to obstruct third-party payers' cost containment programs through the concerted withholding of patients' x-rays. The order prohibits the dental association from agreeing to obstruct third-party payers use of x-rays or other materials for dental benefit determinations, from compelling a third-party payer to deal with dental health care plans in a certain manner, or influencing a patient's choice of dentists based on the dentist's degree of cooperation with the third-party payer.

**Michigan State Medical Society** (See Section II B for citation and annotation.)

**Texas Dental Association**, D-9139, 100 F.T.C. 536 (final order issued November 19, 1982) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-100>). The complaint charged that a state dental association orchestrated member dentists' withholding of x-rays from insurers who needed them to make benefit determinations. The order prohibits the association from obstructing third-party payers from the predetermination and limitation of dental coverage to the least expensive form of treatment, and from coercing payers to modify dental care coverage plans.

**Sherman A. Hope, M.D.**, D-9144, 98 F.T.C. 58 (final order issued August 5, 1981) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-98>). The complaint charged that five physicians discontinued emergency room coverage to force a Texas hospital to halt its plans to recruit a new physician under financial terms that the physicians opposed. The order prohibits the physicians from undertaking any course of conduct to interfere with the hospital's recruitment of physicians or the hospital's efforts to grant hospital privileges to physicians.

**American Medical Association** (See Section II B for citation and annotation.)

**Forbes Health System Medical Staff**, C-2994, 94 F.T.C. 1042 (final order issued October 15, 1979) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-94>). The complaint charged that the medical staff of a Pennsylvania hospital system, consisting of physicians, dentists, and podiatrists, which was starting its own HMO, had abused the hospital privilege system to hamper competition from a competing HMO. In particular, the group allegedly denied applications by the HMO-affiliated physicians. The order prohibits the group from discriminating against medical staff members who were associated with HMOs, and from excluding applicants for hospital privileges simply because they provided services on other than a fee-for-service basis.

**Indiana Dental Association, et al.**, C-2957, 93 F.T.C. 392 (final order issued March 14, 1979) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-93>). The complaint charged that a state dental association restrained competition among dentists by engaging in concerted action to withhold x-rays from insurers who needed them to make benefit determinations. The order prohibits the dental association from obstructing third-party payers from predetermination of benefits and limitation of dental coverage to the least expensive course of treatment.

**American Society of Anesthesiologists, Inc.**, C-2952, 93 F.T.C. 101 (final order issued January 22, 1979) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-93>). The complaint charged that a medical society, through its ethical guidelines and membership requirements, restrained member anesthesiologists from being paid on other than a fee-for-service basis or from becoming salaried employees at hospitals. The order prohibits the association from restricting its members from rendering services other than on a fee-for-service basis.

**Medical Service Corp. of Spokane County, et al.**, C-2853, 88 F.T.C. 906 (final order issued December 3, 1976) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-88>). The complaint charged that a Blue Shield health payment plan and an affiliated physicians' association in the state of Washington deterred the development of HMOs by denying reimbursement to physicians who provided services to HMOs. The order prohibits the plan and association from pursuing any course of conduct that discriminates against HMOs, or against any physician who practices medicine with an HMO or in any manner other than on a fee-for-service basis.

#### **D. Restraints on Services, Advertising, or other Forms of Solicitation**

State Board Restraints

**The North Carolina State Board of Dental Examiners v. Federal Trade Commission**, C-9343 (initial decision issued July 14, 2011; Commission opinion and final order issued December 2, 2011; affirmed by the U.S. Court of Appeals for the Fourth Circuit May 31, 2013; petition for certiorari granted March 3, 2014; U.S. Supreme Court affirmed February 25, 2015) (<https://www.ftc.gov/enforcement/cases-proceedings/081-0137/north-carolina-board-dental-examiners-matter>). The complaint charged that the North Carolina State Board of Dental Examiners (Dental Board) harmed competition by prohibiting non-dentists from providing teeth-whitening services in the state. The eight-member Dental Board is made up of six licensed dentists elected by dentists, one licensed dental hygienist elected by dental hygienists, and one consumer appointed by the Governor. It is a state agency created to regulate the practice of dentistry in North Carolina and is authorized to petition a state court to enjoin a person from engaging in the unauthorized practice of dentistry. Instead of seeking court orders to block the non-dentists' actions, however, the complaint charged that the Dental Board unilaterally ordered non-dentists to stop providing whitening services. The Dental Board also threatened and discouraged non-dentists who were considering opening teeth-whitening businesses.

Prior to the start of the administrative trial, the Dental Board filed with the FTC a Motion to Dismiss, claiming that the state action doctrine exempted its conduct from antitrust liability. The "state action" doctrine exempts a transaction from federal antitrust scrutiny by providing a narrow exception for antitrust conduct if it is an act of government. The Commission decided that as a state regulatory body controlled by market participants, the Dental Board members may act in their self-interest. As such, active state supervision of the Dental Board is required for state action immunity to apply. The Commission determined that the state did not actively supervise the Dental Board's conduct; therefore, state action immunity did not apply.

Following administrative litigation, on July 14, 2011, the ALJ issued an opinion that non-dentists compete with dentists to provide teeth whitening services in North Carolina and that the Dental Board's concerted action to exclude non-dentist-provided teeth whitening services from the market had a tendency to harm competition. On December 2, 2011, the Commission upheld the decision and entered a final order against the Dental Board. On May 31, 2013, the U.S. Court of Appeals for the Fourth Circuit upheld the Commission's Decision and Order. On February 25, 2015, the Supreme Court agreed and rejected the Dental Board's claim that state action doctrine protected the Dental Board's conduct from federal antitrust scrutiny. The Court held that a state

entity primarily composed of and controlled by participants in the regulated market requires active supervision by the State.

**South Carolina State Board of Dentistry v. Federal Trade Commission**, D. 9311 (petition for certiorari denied January 16, 2007; final order issued September 6, 2007) (<https://www.ftc.gov/enforcement/cases-proceedings/0210128/south-carolina-state-board-dentistry-matter>). The complaint charged that the South Carolina Board of Dentistry unreasonably restricted the delivery of preventive dental services by licensed dental hygienists to children in South Carolina schools. The complaint alleged that after the South Carolina General Assembly passed legislation in 2000 eliminating a statutory requirement that a dentist examine each child before a hygienist may perform cleanings or apply sealants in school settings, the board reinstated the same dental examination requirement in 2001 that the legislature had eliminated, and extended it to the application of topical fluoride in school settings as well. As a result, thousands of children – particularly economically disadvantaged children – were deprived of preventative dental care. According to the complaint, the Board’s action was contrary to state policy and not reasonably related to any countervailing efficiencies or other benefits sufficient to justify its harmful effects on competition and consumers. On October 21, 2003, respondents filed a motion to dismiss based on state action immunity and mootness. The Commission denied the motion as to state action doctrine and instructed an administrative law judge to conduct a limited inquiry on the mootness issue as to the reasonable likelihood that the conduct will recur because of recent amendments to state law. The Commission concluded that the Board had failed to show that the 2001 rule, issued after the legislature had amended state law to allow dental hygienists to provide preventive dental care to children without the dental preexamination, was issued pursuant to a clearly articulated state policy. The Commission also held that the actions of the board appeared to contravene the clear legislative intent in the 2000 amendments to eliminate the preexamination requirement. The Board filed a petition for review with the Court of Appeals for the Fourth Circuit in August 2004. The Commission moved to dismiss the petition for lack of jurisdiction over the agency’s interlocutory order, and in May 2006 the Fourth Circuit dismissed the petition, holding that the Commission’s rejection of the Board’s state action motion did not fall within the small class of interlocutory orders that may be appealed immediately under the collateral order doctrine. The Supreme Court denied the Board’s petition for certiorari on January 16, 2007. The Commission approved a final consent order on September 6, 2007. The order requires the Board to publicize (on its website and in its newsletter) its agreement with the state legislative policy that prevents the Board from requiring examination by a dentist as a condition of dental hygienists providing preventive dental care in public health settings. In addition, the order requires the Board to distribute a copy of the announcement to every licensed dentist, dental hygienist, and to the superintendent of every school district in South Carolina. The order also requires the Board to give the Commission advance notice before adopting rules or taking other actions that relate to dental hygienists’ provision of preventive dental services in public health settings.

**Texas Board of Chiropractic Examiners**, C-3379, 115 F.T.C. 470 (final order issued April 21, 1992) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-115>). The complaint charged that a state chiropractic board illegally conspired to restrain competition among chiropractors through its rules that unreasonably restricted chiropractors from engaging in various forms of nondeceptive advertising and solicitation. The

order prohibits the board from restricting truthful advertising. The Board may adopt and enforce reasonable advertising rules to prohibit advertising that the Board reasonably believes to be false, misleading or deceptive within the meaning of state law, and to prohibit oppressive in-person solicitation.

**Massachusetts Board of Registration in Optometry**, D-9195, 110 F.T.C. 549 (final order issued June 13, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-110>). The Commission decision held that a state optometric board illegally conspired to restrain competition among optometrists, by promulgating and enforcing regulations that prohibited optometrists from truthfully advertising price discounts, that prohibited optical and other commercial establishments from advertising the names of optometrists or the availability of their services, and that prohibited the use of testimonial or sensational advertisements. The Commission found that the regulations were not protected by the state action doctrine because state law did not embody a clearly articulated policy to prohibit optometrists from truthfully advertising discounts, fees, or other information. Under the order, the Board is prohibited from restraining truthful advertising but may adopt and enforce reasonable rules to restrict fraudulent, false, deceptive, or misleading advertising within the meaning of state law.

**Wyoming State Board of Chiropractic Examiners**, C-3221, 110 F.T.C. 145 (final order issued January 13, 1988) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-110>). The complaint charged that a state chiropractic board engaged in unlawful concerted action to restrain competition among chiropractors by adopting rules that prohibited virtually all telephone directory advertising (with the exception of a practitioner's name, address and two additional descriptive lines of information), and other forms of truthful advertising, including advertising about fees or free consultations or examinations. The challenged rules also encouraged chiropractors to agree on the methods of advertising in their areas. The order prohibits the Board from restricting truthful advertising. Under the order, the Board may adopt and enforce reasonable rules to restrict false or deceptive advertising within the meaning of state law.

**Parker v. Kentucky Board of Dentistry** (See Section VI for citation and annotation of *amicus* brief.)

**Wyoming State Board of Registration in Podiatry**, C-3176, 107 F.T.C. 19 (final order issued January 24, 1986) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-107>). The complaint charged that a state podiatric board engaged in unlawful concerted action to restrain competition among podiatrists by restricting most forms of truthful advertising (permitting advertising of little more than name, address, and phone number), and the use of certain advertising media. State law authorized the Board only to regulate the use of untruthful or improbable statements in advertisements. The order prohibits the Board from restricting truthful advertising.

**Montana Board of Optometrists**, C-3161, 106 F.T.C. 80 (final order issued August 29, 1985) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-106>). The complaint charged that a state optometric board engaged in unlawful concerted action

to restrain competition among optometrists by restricting optometrists from truthfully advertising prices, terms of credit, down payments, periodic payments, professional superiority, or from using the expression “Contact Lens Clinic” or “Vision Center.” State law authorized the Board to regulate only the use of untruthful or ambiguous advertising, and prohibited only the use in advertisements of the expression “eye specialist” or “specialist in eye” in connection with the name of an optometrist. The order prohibits the Board from restricting truthful advertising. Under the order, the Board may adopt and enforce reasonable rules to implement state law.

**Louisiana State Board of Dentistry**, D-9188, 106 F.T.C. 65 (final order issued August 26, 1985) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-106>). The complaint charged that a state dental board engaged in unlawful concerted action to restrain competition by restricting dentists from truthfully advertising the prices of their services, particularly discounts. After litigation commenced, the Board entered a consent agreement. Under the order, the Board cannot restrict truthful advertising, but may adopt and enforce reasonable rules, including affirmative disclosure requirements, to restrict false, deceptive, or misleading advertising within the meaning of state law.

### 1. Private Association Restraints

**Colegio de Cirujanos Dentistas de Puerto Rico** (See Section II B for citation and annotation.)

**California Dental Association v. Federal Trade Commission**, 121 F.T.C. 190 (1996) (final order), *aff’d* 128 F.3d 720 (9<sup>th</sup> Cir. 1997); vacated, remanded 526 U.S. 756 (1999); *rev’d*, remanded 224 F.3d 942 (9<sup>th</sup> Cir. 2000); Order Returning Matter to Adjudication and Dismissing Complaint February 15, 2001 (<https://www.ftc.gov/enforcement/cases-proceedings/california-dental-association-matter>). The Commission’s opinion affirmed an ALJ’s decision finding that the California Dental Association violated Section 5 of the FTC Act by unreasonably restricting truthful, nondeceptive advertising. The Commission found that CDA’s restrictions on price advertising were *per se* illegal, and analyzed CDA’s non-price advertising restraints under an abbreviated rule of reason. On 10/22/97, the Ninth Circuit affirmed the Commission’s order in a 2-1 decision, holding that the Commission has jurisdiction over CDA, and that the agreement unreasonably restrained trade under a “quick look” rule of reason analysis. The appeals court found a *per se* analysis inappropriate for the price advertising restrictions. The Supreme Court granted CDA’s petition for certiorari and on 5/24/99 vacated and remanded the Ninth Circuit opinion. The Court upheld the appeals court’s decision regarding the Commission’s jurisdiction over non-profit entities that engage in activities for the economic benefit of their members, but remanded the case to the Ninth Circuit for a fuller consideration of the rule of reason analysis. The Ninth Circuit held that the FTC had failed to prove that CDA’s advertising restrictions were anticompetitive under a rule of reason analysis, and then vacated and remanded the judgment of the FTC on September 5, 2000, and instructed the FTC to dismiss its case against CDA. The Ninth Circuit denied a Commission petition for rehearing *en banc* on November 17, 2000. The Commission issued an order on February 15, 2001 dismissing the case. In a separate statement, Commissioners Pitofsky, Anthony and Thompson stated that although they had concerns about some aspects of the Ninth Circuit’s final ruling, other considerations such as CDA’s compliance with the 1996 order and the outdated nature of the factual record, made seeking review at the Supreme Court impractical.

**National Association of Social Workers**, C-3416, 116 F.T.C. 140 (final order issued March 3, 1993) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-116>). The complaint charged that a professional association of social workers engaged in unlawful concerted action by adopting rules to restrain competition among social workers, by prohibiting association members from 1) using testimonials and other forms of truthful advertising; 2) soliciting the clients of other social workers, even where the clients are not vulnerable to abusive solicitation practices; and 3) prohibiting social workers from paying a fee for receiving a referral. The order prohibits the association from restricting its members from truthful advertising or solicitation, or participation in patient referral services. The order allows the association to adopt reasonable rules to restrict false or deceptive advertising, regulate solicitation of business or testimonials from persons vulnerable to undue influence, and ban solicitation of testimonials from current psychotherapy patients. The association is also permitted to require disclosure of fees that social workers pay to patient referral services.

**American Psychological Association**, C-3406, 115 F.T.C. 993 (final order issued December 16, 1992) (<http://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-115>). The complaint charged that a professional association of psychologists engaged in unlawful concerted action by adopting and enforcing rules to restrain competition among psychologists by prohibiting association members from 1) truthfully advertising comparative statements on services, testimonials, or direct solicitation; and 2) banning participation in certain patient referral services. The order prohibits the association from restricting its members from truthful advertising, solicitation, or participation in patient-referral services. Under the order, the association may adopt reasonable rules to restrict false or deceptive advertising, regulate solicitations of business or testimonials from persons vulnerable to undue influence, and ban solicitation of testimonials from current psychotherapy patients. The association is permitted to require disclosure of fees that psychologists pay to patient referral services.

**Connecticut Chiropractic Association**, C-3351, 114 F.T.C. 708 (final order issued November 19, 1991) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-114>). The complaint charged that an association of chiropractors unreasonably restrained competition by prohibiting its members from offering free services, or services at discounted fees; advertising in a manner that the association considers to be “undignified” and not in “good taste;” and implying that they possess “unusual expertise.” The order prohibits the association from prohibiting, regulating, or interfering with truthful, nondeceptive advertising, including offers of free services, services at discounted fees, and claims of unusual expertise, except that the association may restrict claims of specialization under certain circumstances.

**Tarrant County Medical Society**, C-3219, 110 F.T.C. 119 (final order issued November 2, 1987) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-110>). The complaint charged that a county medical society in Texas illegally conspired to restrain competition among its members through its Board of Censors, which restricted the amount, duration, and size of advertising announcements in newspapers, and the size and number of telephone directory listings by its members. The order prohibits the society from restricting its members from engaging in truthful advertising.



**Michigan Optometric Association** (See Section II B for citation and annotation.)

**Oklahoma Optometric Association** (See Section II B for citation and annotation.)

**American Academy of Optometry, Inc.** (See Section II B for citation and annotation.)

**Michigan Association of Osteopathic Physicians & Surgeons**, C-3112, 102 F.T.C 1092 (final order issued July 26, 1983) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-102>). The complaint charged that a medical society engaged in unlawful concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from soliciting business by truthful advertising or similar means. By virtue of these restraints, members were prohibited from advertising, among other things, fees, acceptance of Medicare or credit cards, professional training and experience, hours and office locations, and knowledge of languages. The order prohibits the medical association from restricting its members from truthfully advertising or soliciting business.

**Washington, D.C. Dermatological Society**, C-3118, 102 F.T.C. 1292 (final order issued October 5, 1983) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-102>). The complaint charged that a medical society engaged in unlawful concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from soliciting business by truthful advertising. By virtue of these restraints, members had been prohibited from advertising, among other things, prices, fees, types or methods of treatment, professional training, experience, special expertise, and the identity, fees, or services of physicians associated with HMOs. The order prohibits the medical society from restricting its members from truthfully advertising or soliciting business.

**Broward County Medical Association**, C-3091, 99 F.T.C. 622 (final order issued June 28, 1982) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-99>). The complaint charged that a medical association in Florida engaged in unlawful concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from soliciting business by truthful advertising of fees or services. By virtue of these restraints, members had been prohibited from advertising, among other things, their fees, acceptance of Medicare or credit cards, professional training and experience, hours and office locations, and knowledge of foreign languages. The order prohibits the medical association from restricting its members from truthfully advertising or soliciting business.

**Association of Independent Dentists** (See Section II B for citation and annotation.)

**American Dental Association, et al.**, D-9093, 94 F.T.C. 403 (final order issued September 6, 1979) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-94>), modified 100 F.T.C. 448 (1982) and 101 F.T.C. 34 (1983). The complaint charged that the ADA illegally engaged in concerted action to restrain competition among its members by adopting and enforcing provisions in its code of ethics that unreasonably prevented

or hindered its members from soliciting business by truthful advertising or similar means. The order prohibits the ADA from restricting its members from truthfully advertising or soliciting business.

**American Medical Association** (See Section II B for citation and annotation.)

#### **E. Illegal Tying and Other Arrangements**

**Home Oxygen and Medical Equipment Co.**, C-3530, 118 F.T.C. 661 (final order issued September 14, 1994), 122 F.T.C. 278 (1996) (order set aside for John E. Sailor – retirement from medical practice); **Home Oxygen Pulmonologists**, C-3531, 118 F.T.C. 685 (final order issued September 14, 1994); and **Homecare Oxygen and Medical Equipment Co.**, C-3532, 118 F.T.C. 706 (final order issued September 14, 1994) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-118>). The complaint charged that a group of physician-investors, who created joint ventures to provide home oxygen delivery services that are ancillary to the physicians’ professional practices, obtained market power, created barriers to entry, and restrained competition in the market for home oxygen systems in Alameda and Contra Costa counties in California. The home oxygen systems are almost invariably prescribed by, or under the direction of, a lung specialist, or pulmonologist and, according to the complaint, approximately 60% of the pulmonologists in the relevant geographic markets were recruited as investors in the joint ventures, which were set up as partnerships. The complaint also alleged that by bringing together so many of the physicians who could influence patient choice, the partnerships had market power in the market for pulmonary services, and had the ability to influence patients’ choice of oxygen suppliers, through a variety of means. The order prohibits the physicians from acquiring or granting an ownership interest in a firm that sells or leases home oxygen systems in the relevant geographic markets if more than 25% of the pulmonologists in the market are affiliated with the firm.

**Sandoz Pharmaceuticals Corporation**, C-3385, 115 F.T.C. 625 (final order issued July 28, 1992) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-115>). The complaint charged that Sandoz unlawfully required those who purchased its schizophrenia drug, clozapine (the first new drug for the treatment of schizophrenia in more than 20 years), to also purchase distribution and patient-monitoring services from Sandoz. Blood monitoring of patients taking clozapine is required to detect a serious blood disorder caused by the drug in a small percentage of patients. The complaint alleged that this illegal “tying” arrangement raised the price of clozapine treatment and prevented others – such as private laboratories, the Veterans Administration, and state and local hospitals – from providing the related blood tests and necessary patient monitoring. The order prohibits Sandoz from requiring any purchaser of clozapine, or a patient taking clozapine, to buy other goods or services from Sandoz. The order guards against the possibility that Sandoz might restrict other firms that want to market generic clozapine in the United States after Sandoz’s exclusive selling right expires in 1994, by requiring Sandoz to provide information on reasonable terms if any company is in need of information about patients who have had adverse reactions to the drug. The order also requires Sandoz to not unreasonably withhold information from researchers studying the medical aspects of clozapine use.

**Gerald S. Friedman, M.D.**, C-3290, 113 F.T.C. 625 (final order issued June 18, 1990) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-113>). The complaint charged that a physician who owned and operated dialysis services in Upland and Pomona, California engaged in an illegal tying arrangement, requiring physicians who used his outpatient dialysis facilities to use his inpatient dialysis services when their patients were hospitalized. The complaint alleged that Dr. Friedman had market power in outpatient services, but could not exploit it because Medicare (the dominant purchaser of chronic dialysis services) limits the amount of reimbursement available for outpatient services. Medicare does not, however, set reimbursement amounts for inpatient dialysis. Consequently, the complaint alleged, Dr. Friedman used the tying arrangements to circumvent Medicare's price regulation and charge higher than competitive prices for the tied inpatient services. Under the order, Dr. Friedman agrees 1) not to require any physician to use his inpatient dialysis service for the physician's patients as a condition for using Dr. Friedman's outpatient dialysis facilities; 2) not to bar physicians who want to treat their patients at Dr. Friedman's outpatient dialysis facilities from owning or operating a competing inpatient dialysis service; and 3) not to deny or otherwise impair a physician's staff privileges at one of his outpatient dialysis facilities because that physician has used or operated an inpatient dialysis service other than Dr. Friedman's.

#### **F. Restrictions on Access to Hospitals**

**Medical Staff of Broward General Medical Center** (See Section II C for citation and annotation.)

**Diran Seropian, M.D.** (See Section II C for citation and annotation.)

**Medical Staff of Holy Cross Hospital** (See Section II C for citation and annotation.)

**North Carolina Orthopaedic Association** (See Section II C for citation and annotation.)

**Eugene M. Addison, M.D.** (See Section III C for citation and annotation.)

**Medical Staff of Memorial Medical Center** (See Section II C for citation and annotation.)

**Health Care Management Corp.** (See Section II C for citation and annotation.)

**Sherman A. Hope, M.D.** (See Section II C for citation and annotation.)

**Forbes Health System Medical Staff** (See Section II C for citation and annotation.)

### **III. MERGERS OF HEALTH CARE PROVIDERS**

#### **A. General Acute Care Hospitals**

**Wellmont Health System/Mountain States Health Alliance**, FTC File No. 1510115 (public comments submitted September 30, 2016, November 21, 2016) (<https://www.ftc.gov/enforcement/cases-proceedings/151-0115/wellmont-healthmountain-states-health>). Federal Trade Commission staff submitted public comments to state agencies in Virginia

and Tennessee regarding the proposed merger of Mountain States Health Alliance and Wellmont Health System, the two largest healthcare systems in the northeast Tennessee/southwest Virginia area. The parties had filed an application for a cooperative agreement in Virginia and a COPA (certificate of public advantage) in Tennessee. Staff submitted its comments to the Southwest Virginia Health Authority and the Virginia State Health Commissioner on September 30, 2016, and to the Tennessee Department of Health on November 21, 2016. Staff also submitted supplemental public comments to the Tennessee Department of Health on January 5, 2017 and the Virginia Department of Health on January 13, 2017.

FTC staff recommended that the respective state agencies not approve the cooperative agreement/COPA. At the time of staff's comments, Mountain States and Wellmont owned and operated the vast majority of the hospitals in the 21-county area identified by the parties. According to staff's public comment, their investigation showed that Mountain States and Wellmont were each other's closest, most-intense competitor and together they would have held a near-monopoly over inpatient services in the area and have significant shares in several outpatient services and physician specialty service lines. FTC staff expressed concern that the proposed merger would lead to significantly less competition for healthcare services in the northeast Tennessee/southwest Virginia area. In the respective comments, staff stated that the "proposed merger present[ed] substantial risk of serious competitive and consumer harm in the form of higher healthcare costs, lower quality, reduced innovation, and reduced access to care," and that "this harm would not be outweighed by any potential benefits of the merger...." Moreover, the staff comment stated that the parties' proposed commitments to restrict their post-merger conduct would be unlikely to mitigate the harm resulting from the loss of competition between the two health systems. Finally, staff's comment stated that the parties' plan of separation understated how difficult it would be to unwind these integrated health systems years later.

**The Penn State Hershey Medical Center/PinnacleHealth System**, D-9368, FTC File No. 1410191 (U.S. Court of Appeals for the Third Circuit reversed district court's denial of preliminary injunction and remanded to the district court with a direction to enter the preliminary injunction on September 27, 2016. The parties subsequently abandoned the transaction and the Commission dismissed its administrative complaint without prejudice on October 23, 2016) (<https://www.ftc.gov/enforcement/cases-proceedings/141-0191/penn-state-hershey-medical-centerpinnaclehealth-system>). On December 7, 2015, the Commission issued a Part 3 administrative complaint challenging the proposed merger of the Penn State Hershey Medical Center (Hershey) and Pinnacle Health System (Pinnacle), the two largest healthcare systems in the Harrisburg, Pennsylvania area. The merged entity would have controlled approximately 76 percent of the Harrisburg area market, which includes Dauphin, Cumberland, Perry and Lebanon counties. In addition to issuing an administrative complaint, the Commission, together with the Commonwealth of Pennsylvania, filed a complaint in the U.S. District Court for the Middle District of Pennsylvania seeking a temporary restraining order and preliminary injunction to prevent the parties from merging pending the outcome of the FTC's administrative adjudication on the merits. The complaint alleged that the merger would substantially lessen competition in the market for general acute care inpatient hospital services sold to commercial insurers in the Harrisburg area, leading to increased healthcare costs and reduced quality of care.

The district court denied the Commission's and Commonwealth of Pennsylvania's motion for a preliminary injunction, holding that the Government did not properly define the relevant geographic market. The Commission and Commonwealth of Pennsylvania appealed to the U.S. Court of Appeals for the Third Circuit, and an injunction pending appeal was granted by the Court of Appeals. On September 27, 2016, the Court of Appeals reversed the district's court's denial of the preliminary injunction concluding that the district court incorrectly formulated and misapplied the proper standard for determining the geographic market and that the Government met its burden to properly define the relevant geographic market. The Court of Appeals further concluded that the Defendants did not rebut the Government's prima facie case that the merger is likely to be anticompetitive, and, accordingly, held that the Government carried its burden to demonstrate that it is likely to succeed on the merits. The Court of Appeals remanded the case and directed the district court to enter the preliminary injunction, which the district court subsequently entered on October 20, 2016. After Hershey and Pinnacle abandoned the proposed merger, the Commission dismissed the administrative complaint on October 23, 2016.

**Advocate Health Care Network, Advocate Health and Hospitals Corporation/NorthShore University HealthSystem**, D-9369, FTC No. 1410231 (complaint dismissed on March 20, 2017 after parties abandon proposed merger) (<https://www.ftc.gov/enforcement/cases-proceedings/141-0231/advocate-health-care-network-advocate-health-hospitals>). On December 17, 2015, the Commission issued a Part 3 administrative complaint challenging the proposed merger of Advocate Health Care Network/Advocate Health and Hospitals Corporation and NorthShore University HealthSystem, two not-for-profit healthcare systems. (NorthShore was formed through Evanston Northwestern Healthcare Corp.'s acquisition of Highland Park Hospital.) In addition to issuing an administrative complaint, the Commission, together with the Attorney General of Illinois, filed suit for a temporary restraining order and a preliminary injunction in federal court to prevent the parties from consummating the acquisition pending the outcome of the administrative trial on the merits. The administrative complaint alleged that the proposed merger would create by far the largest hospital system in Chicago's North Shore Area, which includes northern Cook County and southern Lake County. At the time of the complaint, Advocate and NorthShore were the two largest providers of general acute care inpatient hospital services in the market. Two of Advocate's 11 general acute care inpatient hospitals were located in the North Shore Area. NorthShore owned and operated four general acute care inpatient hospitals, all of them located in the North Shore Area. According to the complaint, the combined Advocate/NorthShore would control 55% of general acute care inpatient hospital services in the market. The complaint further charged that the proposed merger would eliminate the close competition between these direct competitors and lead to increased healthcare costs and reduced incentive to increase service offerings and improve the quality of healthcare.

The District Court for the Northern District of Illinois (Eastern Division) denied the Commission and State of Illinois's motion for a preliminary injunction, holding that they had failed to prove a relevant geographic market. The Commission and State of Illinois appealed, and the district court granted a stay pending appeal. On October 31, 2016, the U.S. Court of Appeals for the Seventh Circuit reversed the district court's denial of a preliminary injunction based on the district court's erroneous geographic market findings and remanded for further proceedings consistent with the circuit court's opinion. On March 7, 2017, the District Court issued an Order preliminarily

enjoining consummation of the proposed merger, at which point the parties abandoned the merger.

**Cabell Huntington Hospital, Inc./St. Mary's Medical Center, Inc.**, D-9366, FTC File No. 1410218 (complaint dismissed without prejudice July 6, 2016)

(<https://www.ftc.gov/enforcement/cases-proceedings/141-0218/cabell-huntington-hospitalst-marys-medical-center-matter>). On November 5, 2015, the Commission issued a Part 3 administrative complaint challenging Cabell Huntington Hospital, Inc.'s proposed acquisition of St. Mary's Medical Center, Inc. from Pallottine Health Services, Inc. The complaint alleged that the proposed acquisition would create a dominant firm with a near monopoly over general acute care inpatient hospital services and outpatient surgical services in a four-county area surrounding Huntington, West Virginia and would lead to increased healthcare costs for local residents and reduced incentives for the merged parties to maintain and improve quality of care. At the time of the complaint, Cabell was a not-for-profit 303-bed hospital that also owned and operated, among other entities, an outpatient surgery center. Pallottine, a not-for-profit organization, owned St. Mary's, a 393-bed Catholic hospital. In addition to its main hospital, St. Mary's managed and had an ownership interest in Three Gables Surgery Center in Proctorville, Ohio and a small emergency room, outpatient laboratory, and imaging center in Ironton, Ohio. According to the complaint, Cabell and St. Mary's, direct competitors located only three miles apart, were the only two general acute care hospitals in the relevant market. Post-merger, the combined entity would account for more than 75% of the discharges in the four-county Huntington area for general acute care inpatient hospital services. Similarly, the combined entity would command a high share of the market for outpatient surgical services in the four-county Huntington area.

On July 6, 2016, the Commission voted to dismiss the complaint in light of the passage in March 2016 of a new West Virginia law relating to certain "cooperative agreements" between hospitals in that state, and the West Virginia Health Care Authority's decision to approve a cooperative agreement between the hospitals. Cooperative agreement laws seek to replace antitrust enforcement with state regulation and supervision of healthcare provider combinations. [The Commission issued a statement](#) regarding its decision to dismiss the complaint.

**Federal Trade Commission v. Phoebe Putney Health System, Inc.**, D-9348 (district court granted defendants' motions to dismiss June 27, 2011; affirmed by U.S. Court of Appeals for the Eleventh Circuit December 9, 2011; petition for certiorari granted June 2012; U.S. Supreme Court reversed and remanded the dismissal of the complaint February 2013; final order issued March 31, 2015) (<https://www.ftc.gov/enforcement/cases-proceedings/111-0067/phoebe-putney-health-system-inc-phoebe-putney-memorial>). The complaint alleged that the proposed acquisition of Palmyra Park Hospital, Inc. by Phoebe Putney Health System, Inc. would result in a monopoly and allow Phoebe Putney to raise prices for inpatient general acute care hospital services sold to commercial health plans, with resulting harm to patients and local employers and employees in Albany, Georgia and the surrounding six-county area. The complaint also alleged that Phoebe Putney structured the acquisition in a way that used the Hospital Authority of Albany-Dougherty County (the Authority) to insulate the anticompetitive acquisition from federal antitrust scrutiny under the "state action" doctrine. At the time of the complaint, Phoebe Putney was a 443-bed hospital in Albany that offered a full range of inpatient general acute care hospital services. The Authority held title to the assets of Phoebe Putney, which it operated under

a long-term lease entered into in 1990. HCA, one of the nation's largest health care services providers, owned Palmyra, also located in Albany. On November 16, 2010, Phoebe Putney made a formal offer to HCA for Palmyra without review or approval by the Authority. Phoebe Putney's board approved the final terms of the deal on December 2, 2010. The transaction was not presented to the Authority until December 21, 2010.

The "state action" doctrine exempts a transaction from federal antitrust scrutiny by providing a narrow exception for antitrust conduct if it is an act of government. The complaint alleged that the state action doctrine did not apply to this transaction, which was motivated and planned exclusively by Phoebe Putney acting in its own private interests with the Authority acting only as a "straw man."

Staff of the FTC, together with the Attorney General of the State of Georgia, filed separate complaints in federal district court in Albany, Georgia. The court dismissed the FTC's complaint and denied its request for an injunction, finding that the transaction was immunized from federal antitrust scrutiny by the state action doctrine. After the U.S. Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court, the parties consummated the acquisition on December 15, 2011. On appeal, the Supreme Court ruled that because the state of Georgia had not clearly articulated a policy that allowed hospital authorities to make acquisitions that substantially lessen competition, the state action immunity doctrine did not apply. The Court's ruling allowed for federal antitrust review of the merger.

On September 5, 2014, the Commission withdrew a proposed consent order issued earlier that year because Georgia's strict Certificate of Need (CON) laws precluded the divestiture of Palmyra. On March 31, 2015, the commission issued the final order: (1) for 10 years, requiring Phoebe Putney and the Authority to give the FTC prior notice before acquiring any part of a hospital or a controlling interest in other healthcare providers in the Albany, Georgia area, and (2) for up to 5 years, prohibiting Phoebe Putney and the Authority from opposing a CON application for an inpatient general acute care hospital in the Albany area.

**Community Health Systems, Inc./Health Management Associates, Inc.**, C-4427, FTC File No. 1310202 (final order issued April 11, 2014) (<https://www.ftc.gov/enforcement/cases-proceedings/131-0202-c-4427/community-health-systems-health-management-associates>). The complaint alleged that the proposed acquisition by Community Health Systems, Inc. (CHS) of Health Management Associates, Inc. (HMA) would reduce competition for inpatient general acute care hospital services in two markets: (1) the Gadsden area of Alabama, where the merger would combine the only two significant providers of inpatient general acute care hospital services, and (2) the Darlington County area of South Carolina, where the merger would combine two of the three significant providers of inpatient general acute care hospital services. At the time of the complaint, CHS owned or leased 135 hospitals, including 131 general acute care hospitals, in 29 states. It was the second-largest U.S. hospital chain. HMA operated 71 hospitals in 15 states. According to the complaint, the proposed acquisition would increase the likelihood that prices of inpatient general acute care hospital services to commercially insured patients would rise and that there would be a decrease in the quality or availability of inpatient general acute care hospital services in the two areas. The order requires CHS to divest the Riverview Regional Medical Center and all of its associated operations and businesses in and

around Gadsden, Alabama, and Carolina Pines Regional Medical Center and all of its associated operations and businesses in and around Hartsville, South Carolina.

**OSF Healthcare System/Rockford Health System**, D-9349, FTC file No. 1110102 (complaint dismissed April 13, 2012) (<https://www.ftc.gov/enforcement/cases-proceedings/111-0102/osf-healthcare-system-rockford-health-system-matter>). The FTC filed an administrative complaint challenging OSF Healthcare System's proposed acquisition of Rockford Health System. The complaint charged that the proposed acquisition would substantially reduce competition among hospitals and primary care physicians in Rockford, Illinois and result in significant harm to local business and patients. Commission staff also filed on November 18, 2011 a complaint in the federal District Court for the Northern District of Illinois seeking an order to enjoin the transaction temporarily to preserve competition for Rockford area residents pending the FTC's administrative proceeding and any subsequent appeals.

The Commission's complaint charged that OSF's proposed acquisition of Rockford Health System would reduce competition in two markets in the Rockford area: (1) general acute-care inpatient services, and (2) primary care physician services. OSF would control 64% of general acute-care inpatient services in the Rockford area post-acquisition. OSF and SwedishAmerican Health Systems would be the only significant competitors in this market, and together they would control more than 99% of the market for general acute-care services in the Rockford area. In the market for primary care physician services there are currently only three significant physician groups in the Rockford area. Post-acquisition, OSF and SwedishAmerican would control almost 60% of all primary care physician services.

The combination of OSF and Rockford Health System would give OSF greater leverage to raise rates, according to the complaint. Increased rates would impose a significant financial burden on local employers and employees, either directly or through higher insurance premiums, co-pays and other out-of-pocket expenses. The proposed acquisition would also increase the incentives and ability for the two remaining hospital systems in Rockford to engage in coordinated anticompetitive behavior, including sharing confidential information, deferring competitive initiatives or aligning managed care contracting strategies. The complaint alleged that the proposed acquisition would also eliminate vital non-price competition among the Rockford hospitals and, as a result, reduce the quality, convenience and breadth of services provided to local residents.

On April 5, 2012, the United States District Court for the Northern District of Illinois granted a preliminary injunction enjoining OSF from its acquisition of Rockford pending completion of an administrative proceeding by the FTC. An evidentiary hearing was scheduled before an administrative judge at the FTC, beginning on April 17, 2012. The Commission dismissed the complaint on April 13, 2012, after OSF abandoned the transaction.

**ProMedica Health System, Inc. v. Federal Trade Commission**, C-9346 (initial decision issued January 5, 2012; Commission opinion and final order issued March 28, 2012); No. 12-3583 (6<sup>th</sup> Cir. affirmed April 22, 2014); U.S. Supreme Court denied petition for certiorari May 4, 2015) (<https://www.ftc.gov/enforcement/cases-proceedings/101-0167/promedica-health-system-inc-corporation-matter>). The complaint charged that ProMedica's acquisition of St. Luke's Hospital



in Lucas County, Ohio, which was consummated on August 31, 2010, would reduce competition and allow ProMedica to raise prices for general acute care and inpatient obstetrical services. Before the acquisition, ProMedica, a not-for-profit healthcare system, operated three general acute care hospitals in Lucas County. St. Luke's was widely recognized as a high-quality, low-cost hospital. The complaint alleged that the acquisition would reduce the number of general acute care hospital competitors in Lucas County from four to three and the combined entity would have a general acute care services market share approaching 60%. In the market for inpatient obstetrical services in Lucas County, the acquisition would leave only two competitors and ProMedica's market share would increase to more than 80%. According to the complaint, the acquisition would vest ProMedica with the ability to demand higher rates for services performed at its three hospitals in Lucas County because the addition of St. Luke's to the ProMedica hospital system would make ProMedica a "must-have" system for health plans seeking to do business in Lucas County.

Following the administrative trial and decision, the Commission upheld the ALJ's initial decision that the acquisition harmed competition and would allow ProMedica to raise the prices of its general acute care inpatient hospital services in Lucas County, Ohio, but also found that inpatient obstetrical services constituted a separate relevant market and that the merger would harm competition in the market. The U.S. Court of Appeals for the Sixth Circuit upheld the Commission's decision and, on May 4, 2015, the Supreme Court denied ProMedica's petition for certiorari.

**Scott & White Healthcare/King's Daughters Hospital**, FTC File No. 0910084 (investigation closed December 23, 2009) (<https://www.ftc.gov/public-statements/2009/12/ftcs-closure-its-investigation-consummated-hospital-merger-temple-texas>). The Director of the FTC's Bureau of Competition issued a statement regarding the FTC's closure of a consummated merger between general acute care hospitals in Temple, Texas. On April 1, 2009, Scott & White Healthcare merged with King's Daughters Hospital in a transaction that was non-reportable under the Hart-Scott-Rodino Act. Scott & White planned to transform Kings Daughters from a general acute care hospital into a freestanding children's hospital, thereby eliminating Scott & White's only competitor in Bell County, Texas. However, this investigation was unusual in that a single issue – whether Kings Daughters qualified for the failing firm defense – was likely dispositive of the merger's legality. Kings Daughters was in poor, and deteriorating, financial condition, and likely would have closed at some point if it was not acquired by another entity. As a result of the investigation, in order to ensure that all other competitive options were explored, Scott & White agreed to offer to sell Kings Daughters to the Seton Family of Hospitals (which had previously shown interest in acquiring Kings Daughters), on condition that it continue to be operated as a general acute care hospital. Seton, however, ultimately decided not to acquire Kings Daughters, largely because of its financial and other deterioration since the merger. This outcome provided an answer to the question of whether there was a viable alternative purchaser for Kings Daughters – and whether Kings Daughters was a "failing firm" – without the inherent delay of litigation and possible appeals. The Commission then closed the investigation.

**Inova Health System Foundation/Prince William Hospital**, 1:08CV460-CMH/JFA, FTC File No. 0610166 (Commission dismissed complaint June 17, 2008) (<https://www.ftc.gov/enforcement/cases-proceedings/0610166/inova-health-system-foundation->

[prince-william-health-system](#)). On May 8, 2008, the Commission authorized the filing of a motion for a temporary restraining order and preliminary injunction to block the acquisition of 180 bed Prince William Hospital by Inova Health System pending the outcome of an administrative trial on the merits. The Commission was joined in its suit in district court by the Virginia Attorney General's office. Inova, the largest hospital system in Northern Virginia, operates five general acute care hospitals in Northern Virginia with a combined total of 1,900 licensed beds. After the merger with Prince William Hospital, Inova would control 73% of the licensed beds in Northern Virginia. The complaint charged that the merger would eliminate a close competitor for general acute care inpatient services and result in significantly higher prices and reduced non-price competition for these services. The Commission argued that hospitals outside of Northern Virginia do not compete with Inova and Prince William because few patients who live in Northern Virginia travel to Maryland or D.C. hospitals for general acute care inpatient services. Shortly after a preliminary district court hearing, the parties announced they had abandoned the transaction. On June 17, 2008, the Commission dismissed its administrative complaint against Inova.

**Evanston Northwestern Healthcare Corporation/Highland Park Hospital**, D-9315, FTC File No. 0110234 (initial decision issued October 17, 2005; Commission opinion and order issued August 2, 2007) (<https://www.ftc.gov/enforcement/cases-proceedings/0110234/evanston-northwestern-healthcare-corporation-enh-medical-group>). The complaint alleged that the acquisition of Highland Park Hospital by Evanston Northwestern Healthcare Corporation (ENH) in January 2000 substantially lessened competition and resulted in substantial price increases for health plans and consumers in violation of Section 7 of the Clayton Act. The merger combined ENH's two acute care hospitals in Cook County, Illinois with Highland Park, the nearest acute care hospital to the north in Lake County. Shortly after merging, according to the complaint, ENH instituted price increases for all three hospitals that were significantly higher than price increases for other comparable hospitals, forcing payers to accept the increases or lose the three hospitals from their networks. The merger also combined two physician groups affiliated with the hospitals. The complaint alleged that after the merger, ENH Medical Group, a group of approximately 460 salaried physicians affiliated with ENH, negotiated prices for physician services on behalf of itself and approximately 450 physicians affiliated with the Highland Park Independent Physician Association, even though the independent group was not financially or clinically integrated internally or with the ENH physicians. In addition, the complaint charged that ENH threatened payers with termination of their contracts if the payers did not agree to contract for both physician and hospital services as a package. In May, 2005, the Commission accepted a consent order for Count III of the complaint (see Section II C). After an administrative trial on the other two counts of the complaint, the administrative law judge ordered Evanston to divest Highland Park to a Commission approved buyer. In an initial decision issued on October 17, 2005, Chief ALJ McGuire ordered the divestiture of Highland Park and ruled that Evanston used its enhanced increased post-merger market share to significantly raise prices above its premerger prices, and above price increases obtained by other hospitals in the area. On appeal, the Commission upheld the ALJ's ruling that the merger gave the combined entity the ability to raise prices through the exercise of market power; however, the Commission ordered an alternate remedy to restore competition. The order requires ENH to establish separate independent contract negotiating teams for the Evanston and Glenbrook Hospitals and another for Highland Park Hospital, that will allow managed care organizations to negotiate separately

for the competing hospitals. The order also contains arbitration provisions if a dispute arises between a payer and ENH relating to prices and/or other terms, and requires ENH to give prior notification for ten years to the Commission for any future hospital acquisition in the Chicago MSA.

**Federal Trade Commission v. Tenet Healthcare Corp., et al.** (Doctors Regional Medical Center), D-9289; FTC File No. 9710090, No. 98-3123EML, 17 F. Supp. 2<sup>nd</sup> 937 (E.D. Mo. 1998); rev'd 186 F.3d 1045 (8<sup>th</sup> Cir. 1999), 128 F.T.C. 793 (1999) (order dismissing administrative complaint) (<http://www.ftc.gov/enforcement/cases-proceedings/9710090/tenet-healthcare-corporation-inc-poplar-bluff-physicians-group>). On April 16, 1998, the Commission authorized the filing of a motion for a temporary restraining order and preliminary injunction, pending the outcome of an administrative trial, to block the acquisition of 230 bed Doctors Regional Medical Center in Poplar Bluff, Missouri, by Tenet Healthcare Corp. Tenet, the second largest for-profit hospital system in the United States, already owned 201 bed Lucy Lee Hospital, the only other general acute care hospital in Poplar Bluff. According to the Commission complaint, filed in U.S. District Court for the Eastern District of Missouri, Eastern Division, the merger of the two general acute care hospitals, having approximately 78% of the market for acute-care inpatient services in Poplar Bluff, would create a virtual monopoly for acute care inpatient services, eliminate substantial competition between the two hospitals, and provide the merged party with the ability to exercise market power. The Commission was joined in its suit in district court by the Missouri Attorney General's office. On July 30, 1998, the judge issued a preliminary injunction pending the completion of an administrative trial. In granting the preliminary injunction, the judge agreed with the geographic market identified by the Commission and ruled that the FTC was likely to succeed on the ultimate issue of whether the merger would have the effect of substantially lessening competition. According to the district court decision, the benefits to consumers and efficiencies encouraged by the intense competition between the two hospitals, which had directly competed for managed care contracts, would be eliminated if the merger were allowed to proceed. The defendants appealed to the Eighth Circuit and on July 22, 1999, the appeals court reversed the district court's decision. The Eighth Circuit found that the Commission failed to prove its geographic market, and therefore could not show that the merged parties would possess market power. In October 1999, the Eighth Circuit denied petitions by the FTC and State of Missouri for a rehearing *en banc*, and denied the Commission's motion to stay the mandate. On October 27, 1999, Justice Thomas denied an emergency motion to stay the mandate. On December 3, 1999, the Commission "determined not to seek further review of the Court of Appeals decision." The Commission dismissed the administrative complaint on December 23, 1999.

**Tenet Healthcare Corporation/OrNda Healthcorp.** C-3743, FTC File No. 9710024, 123 F.T.C. 1337 (May 20, 1997) (<https://www.ftc.gov/enforcement/cases-proceedings/9710024/tenet-healthcare-corporation>). The Commission issued a consent agreement settling charges that the acquisition of OrNda Healthcorp by Tenet Healthcare Corp. would substantially lessen competition for general acute care services in the San Luis Obispo, California area. Tenet and OrNda were the second and third largest chains of general acute care hospitals in the country, and the two leading providers of acute care hospital services in San Luis Obispo County. Tenet owned 195-bed Sierra Vista Regional Medical Center in San Luis Obispo, and 84-bed Twin Cities Community Hospital in Templeton; OrNda owned 147-bed French

Hospital Medical Center in San Luis Obispo. OrNda also owned 70-bed Valley Community Hospital in Santa Maria, about 30 miles south of the city of San Luis Obispo and just south of San Luis Obispo County. According to the complaint, the combination of the three largest of the five hospitals in San Luis Obispo County would eliminate competition between Tenet and OrNda, significantly increase the high level of concentration for acute care hospital services, and increase the market share of Tenet to over 71%.

The order required Tenet to divest French Hospital Medical Center and other related assets in San Luis Obispo County, to an acquirer approved by the Commission, by August 1, 1997. Tenet was also required to divest its stock in Monarch Health Systems, an integrated health delivery system operating in San Luis Obispo and Santa Barbara counties, which was one third owned by OrNda and was a major customer of French Hospital. For a period of ten years after the order is made final, Tenet must notify the Commission before combining its acute care-hospitals in San Luis Obispo County with any other acute care hospital in that area, or acquiring Monarch stock. In addition, for a period of ten years, the acquirer of French Hospital must notify the Commission before selling the hospital to anyone owning another acute care hospital in San Luis Obispo County. The FTC did not challenge the merger in any other markets. This matter involves the same market and the same principal hospitals at issue in a previous Commission hospital merger case, American Medical International, Inc. (discussed below), which also resulted in the divestiture of French Hospital.

**Federal Trade Commission v. Butterworth Health Corp. and Blodgett Memorial Medical Center**, D-9283, FTC File No. 9510126, 124 F.T.C. 424 (1997) (order granting motion to dismiss); 1996-2 Trade Case ¶71,571 (W.D. Mich); 1997-2 Trade Case ¶71,863 (6<sup>th</sup> Cir.) (Sixth Circuit Rule 24 limits citation to specific situations) (<https://www.ftc.gov/enforcement/cases-proceedings/9510126/butterworth-health-corporation-blodgett-memorial-medical>). On January 19, 1996, the Commission authorized the filing of a preliminary injunction to block the combination of the two largest acute care hospitals in Grand Rapids, Michigan, 529-bed Butterworth Hospital and 328-bed Blodgett Memorial Medical Center. The complaint alleged that the merger would substantially lessen competition in the provision of general acute care hospital services in the greater Kent County, Michigan area, and primary care inpatient hospital services in the immediate Grand Rapids area. The district court judge denied the request for a preliminary injunction on September 26, 1996, ruling that although the FTC had properly identified the alleged product and geographic markets, and demonstrated that the merged party would have substantial market power in the relevant markets, the Commission had failed to show that the merged non-profit entity would exercise its market power to harm consumers. On November 18, 1996, the Commission voted to appeal the district court decision, and issue an administrative complaint. In an unpublished decision, the Sixth Circuit Court of Appeals affirmed the district court on July 8, 1997, finding that the district court did not abuse its discretion in denying preliminary relief. On September 26, 1997, the Commission dismissed the administrative complaint on the grounds that further litigation was not in the public interest.

**Columbus Hospital/Montana Deaconess Medical Center**, FTC File No. 9510117 (closing letter sent June 28, 1996). This matter involved the merger of Columbus Hospital and Montana Deaconess Medical Center, the only two general acute care hospitals in Great Falls, Montana. The closing letters stated that although the transaction raised significant antitrust concerns, the

Commission closed this investigation in light of regulatory involvement by the state of Montana. The Montana legislature enacted a statute providing that a “certificate of public advantage” (COPA) issued by the Montana State Department of Justice signaled the state’s intent to “substitute state regulation for competition.” The COPA issued for this merger included comprehensive price controls, including a patient revenue cap, conditions relating to the quality of hospital care, and conditions concerning the hospitals’ dealings with health plans, physicians, competitors, and ancillary service providers. The regulations also involved ongoing enforcement of the regulatory scheme.

**Local Health System, Inc.** (Port Huron Hospital/Mercy Hospital), C-3618, 120 F.T.C. 732 (final order issued October 3, 1995) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-120>); No. 94 CV 74798 (E.D. Mich.) (Preliminary injunction suit filed November 30, 1994). On November 9, 1994, the Commission authorized the staff to seek a preliminary injunction to block the combination of the only two general acute care hospitals in Port Huron, Michigan. The matter involved the proposed merger of non-profit Port Huron Hospital and non-profit Mercy hospital-Port Huron, and the creation of a new non-profit corporation, Lakeshore Health System, Inc. Soon after the court proceedings were begun, the parties elected to call off their proposed merger, and the court proceedings were put on hold pending settlement discussions. On October 3, 1995, the Commission accepted a consent order, which for three years required prior Commission approval before the parties carried out any renewed attempt to merge their operations, and for ten years required prior notice to the Commission of any significant combination of their hospitals with each other or with hospitals belonging to third parties.

**Federal Trade Commission v. Freeman Hospital**, D-9273, 911 F. Supp.1213 (W.D. Mo. 1995), *aff’d* 69 F.3d 260 (8<sup>th</sup> Cir. 1995). This matter involved the merger of Freeman and Oakhill hospitals, the second and third largest acute care hospitals in Joplin, Missouri. A preliminary injunction suit was filed and orally dismissed on February 22, 1995 (dismissed by written order, February 28, 1995). The dismissal was stayed by order of the Eighth Circuit on March 1, 1995, enjoining further consolidation and retaining jurisdiction pending an evidentiary hearing. The district court on June 6, 1995, denied the Commission’s request for a preliminary injunction. On November 1, 1995, the Eighth Circuit Court of Appeals affirmed the district court’s decision, finding that the Commission had failed to show that the relevant geographic market was what the Commission had alleged. On December 1, 1995, the Commission voted to dismiss the administrative complaint after concluding that further litigation was not in the public interest.

**Columbia/HCA Healthcare Corporation/Healthtrust, Inc.-The Hospital Company**, C-3619, 120 F.T.C. 743 (final order issued October 3, 1995) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-120>); 124 F.T.C. 38 (1997) (modifying order); Civil Action No. 1:98CV01889 (D.D.C. filed July 30, 1998) (order violation final judgement). The complaint alleged that Columbia/HCA Healthcare Corporation’s (Columbia/HCA) planned acquisition of Healthtrust, Inc.-The Hospital Company (Healthtrust) would substantially lessen competition for general acute care hospital services in six geographic markets. Columbia/HCA and Healthtrust are the two largest chains of general acute care hospitals in the country. According to the complaint, Columbia/HCA and Healthtrust are competitors in six areas that are relevant geographic markets: the Salt Lake City-Ogden

Metropolitan Statistical Area, Utah; the Denton, Texas, area; the Ville Platte-Mamou-Opelousas, Louisiana, area; the Pensacola, Florida, area; the Okaloosa, Florida, area; and the Orlando, Florida, area. In each of these areas, the market for acute care inpatient hospital services is highly concentrated, whether measured by Herfindahl-Hirschman Indices (HHI) or by four-firm concentration ratios, and entry is difficult due to state certificate of need regulations, substantial lead times required to establish a new acute care hospital, and other factors.

Healthtrust was under a prior Commission order, issued in Healthtrust, Inc.-The Hospital Company (discussed below). That order required Healthtrust to obtain prior Commission approval before transferring hospitals it owned in the Salt Lake City-Ogden Metropolitan Statistical Area, to anyone who operated other hospitals in that same area. Columbia/HCA already operated hospitals in that area. Healthtrust applied for prior approval to transfer the four hospitals it owns in that area to Columbia/HCA, conditioned upon Columbia/HCA subsequently divesting three hospitals (two owned by Healthtrust and one by Columbia/HCA). At the same time the Commission accepted the consent agreement for public comment, it granted prior approval to Healthtrust to transfer the four Salt Lake City-Ogden Metropolitan Statistical Area hospitals to Columbia/HCA, subject to the subsequent divestitures.

Under the consent order, Columbia/HCA was required to divest seven hospitals within 12 months to a purchaser approved by the Commission. Columbia/HCA agreed to divest a single hospital in each of four of the geographic markets: the Denton, Texas, area; the Ville Platte-Mamou-Opelousas, Louisiana, area; the Pensacola, Florida, area; and the Okaloosa, Florida, area. Columbia/HCA also was ordered to divest three hospitals in the Salt Lake City-Ogden Metropolitan Statistical Area, to a purchaser approved by the FTC, within nine months of the Commission granting Healthtrust's application for prior approval. For a period of ten years, Columbia/HCA must notify the Commission before either acquiring another acute care hospital in any of the relevant geographic markets, or transferring an acute care hospital to anyone operating another acute care hospital in the same relevant geographic market. In addition, for a period of ten years, the acquirer of each of the divested acute care hospitals must notify the Commission before selling the facility to anyone owning another acute care hospital in the same relevant geographic market.

In addition, Columbia/HCA was ordered to terminate a joint venture in the Orlando, Florida, area. Healthtrust and Orlando Regional Health System (ORHS) jointly owned and operated the South Seminole Hospital, in Longwood, Florida. ORHS operated four hospitals in the Orlando area in addition to its partnership interest in South Seminole Hospital. The interest in the South Seminole Hospital was Healthtrust's sole hospital in the Orlando area. Columbia owned four other hospitals in the Orlando area. The complaint alleged that Columbia/HCA's acquisition of Healthtrust's interest may increase the likelihood of collusion or interdependent coordination by the remaining firms in the market, because the South Seminole Hospital would be jointly owned by Columbia/HCA and ORHS. Columbia/HCA was ordered to terminate the joint venture within six months after the order becomes final, either by buying out ORHS' interest in the joint venture or by selling Healthtrust's interest to a purchaser approved by the FTC.

On July 30, 1998, Columbia agreed to pay a \$2.5 million dollar civil penalty to settle a Commission complaint that it violated the above order concerning Columbia/HCA's acquisition

of Healthtrust, and that it also violated the order in Healthtrust, Inc.-The Hospital Company, under which Healthtrust was required to obtain Commission approval before selling any assets to a competitor. After its purchase of Healthtrust, Columbia/HCA was bound by the earlier Healthtrust order. Columbia/HCA, when it violated the 1995 order, failed to satisfy the conditions under which the Commission had granted prior approval to the acquisition of Healthtrust. In its complaint filed in U.S. District Court for the District of Columbia, the FTC charged that Columbia/HCA did not complete the divestiture of South Seminole Hospital until September of 1997, while the order required it to do so by April 1996. The complaint further charged that Columbia/HCA did not complete the divestiture of Davis and Pioneer Valley hospitals in Utah until May of 1996, while the order required that it do so by January 1996. The complaint also charged that Columbia/HCA did not hold the assets and confidential information of Davis and Pioneer Valley hospitals separate between the hospitals and Columbia/HCA, as required by the order.

**Columbia Hospital Corporation/Medical Center Hospital**, D-9256, 117 F.T.C. 587 (final order issued May 5, 1994); 126 F.T.C. 192 (1998) (modifying order substituting a prior notice provision for the prior approval requirement); No. 93-30-FTM-CIV-23D (M.D. Fla., preliminary injunction issued May 21, 1993) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-117>). The Commission's administrative complaint charged that the proposed acquisition by for-profit Columbia Hospital Corporation of Adventist Health System's non-profit Medical Center Hospital in Punta Gorda, Florida, would significantly increase already high levels of concentration in the Charlotte County area by eliminating competition between Medical Center and Fawcett Memorial Hospital, a hospital in Port Charlotte, Florida, already owned by Columbia. On February 1, 1993, the Commission filed a preliminary injunction suit in the Middle District of Florida, and the State of Florida filed an affidavit supporting the Commission's suit. The district judge issued a temporary restraining order until he could rule on the motion for a preliminary injunction. The judge granted that motion May 5, and entered a stipulated preliminary injunction (without right of appeal) on May 21. Columbia called off its proposed acquisition. The Commission's consent order, which concluded the administrative proceedings, prohibits Columbia from merging its hospital in the Charlotte County area with Medical Center or any other hospital in that area, unless it obtains prior Commission approval. Columbia also must give the Commission advance notice of certain joint ventures with the other Charlotte County hospitals.

**Columbia Healthcare Corporation/HCA-Hospital Corporation of America**, C-3505, 118 F.T.C. 8 (final order issued July 5, 1994) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-118>); 126 F.T.C. 160 (1998) (modifying order substituting a prior notice provision for the prior approval requirement). The complaint charged that the merger of Columbia Healthcare Corporation and HCA-Hospital Corporation of America, two large for-profit hospital chains, may substantially lessen competition in the market for general acute care inpatient hospital services in the Augusta, Georgia/Aiken, South Carolina area. According to the complaint, the merger would significantly increase the already high level of concentration in the market, and could enhance the possibility of collusion or interdependent coordination by the remaining firms in the market.

Under the consent order, Columbia was required to divest Aiken Regional Medical Center in Aiken, South Carolina, within 12 months after the order became final to a purchaser approved by the FTC. Columbia also was required to hold Aiken Regional separate from its other operations, and to maintain its marketability and viability as an independent competitor in the market until the divestiture was completed. Columbia also was prohibited, for ten years, from merging its remaining hospital in the market (Augusta Regional Medical Center in Augusta, Georgia) with any other acute care hospital in the market without the FTC's prior approval. The FTC did not challenge the merger in any other markets.

**Dominican Santa Cruz Hospital/AMI-Community Hospital of Santa Cruz**, C-3521, 118 F.T.C. 382 (final order issued August 18, 1994) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-118>). The complaint charged that non-profit Dominican Santa Cruz Hospital in Santa Cruz, California, and its parent Catholic Health Care West, violated Section 7 of the Clayton Act when they acquired for-profit AMI-Community Hospital of Santa Cruz. That acquisition was completed in 1990 (no premerger notification was required). Dominican and AMI-Community were the only two general hospitals in Santa Cruz, and there was only one other general hospital in the Santa Cruz metropolitan area. The complaint alleged general acute care hospital services within that area to be the relevant market, and that market already to have been highly concentrated and difficult to enter prior to the acquisition. The order does not require Dominican or Catholic Health Care West to divest AMI-Community Hospital, but prohibits them from acquiring all or any significant part of any other general hospital in the relevant market within the next ten years, unless the Commission gives prior approval to the transaction.

**Parkview Episcopal Medical Center/St. Mary-Corwin Hospital**, File No. 9310025 (preliminary injunction authorized January 31, 1994). On January 31, 1994, the Commission authorized the staff to seek a preliminary injunction to block the merger of the only two general acute care hospitals in Pueblo County, Colorado. The matter involved the proposed acquisition of nonprofit Parkview Episcopal Medical Center by nonprofit St. Mary-Corwin Hospital and its corporate parent Sisters of Charity Health Care Systems. Several days after the Commission's decision to challenge the transaction, the parties announced they had abandoned the transaction.

**Adventist Health System/West/Ukiah General Hospital**, D-9234, 117 F.T.C. 224 (final order dismissing lawsuit issued April 1, 1994) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-117>). This matter concerned the 1988 acquisition of a for-profit hospital in Ukiah, California by a non-profit hospital chain that already operated a hospital in that community. The FTC issued its complaint challenging the acquisition in late 1989, alleging that the acquisition endangered competition by giving the hospital chain dominance of the local general acute care hospital services market (with a market share exceeding 70%, and only one or two competitors left after the acquisition). An FTC administrative law judge dismissed the complaint, finding that the Commission lacked jurisdiction over the challenged acquisition because it was not covered by Section 7 of the Clayton Act. In August 1991, the Commission unanimously reversed the ALJ's decision and sent the case back to the ALJ for trial on the merits, holding that Section 7's "asset acquisition" clause covers acquisitions by non-profit entities. On December 9, 1992, the administrative law judge dismissed the complaint on the merits, finding the acquisition not likely to be anticompetitive.



On April 15, 1994, the Commission dismissed staff's appeal to the Commission, concluding that complaint counsel had not proven the geographic market alleged in the complaint, or that the acquisition would be anticompetitive in a larger market. Two Commissioners issued concurring opinions concerning the lack of evidence of anticompetitive effects resulting from the merger.

**Healthtrust, Inc.-The Hospital Company/Holy Cross Health Services of Utah**, C-3538, 118 F.T.C. 959 (final order issued October 20, 1994); 126 F.T.C. 170 (1998) (modifying order substituting a prior notice provision for the prior approval requirement); Civil Action No. 1:98CV01889 (D.D.C. filed July 30, 1998) (order violation final judgement) (see Columbia/HCA-Healthtrust, above) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-118>). On March 22, 1994, the Commission authorized its staff to seek a preliminary injunction to block the acquisition by Healthtrust of three hospitals in the Salt Lake City, Utah area. Healthtrust, which owns Pioneer Valley Hospital in West Valley City, and Lakeview Hospital in Bountiful, would have acquired Holy Cross Hospital of Salt Lake City, Holy Cross-Jordan Valley in West Jordan, and St. Benedict's Hospital in Ogden from Holy Cross Health Services of Utah. The FTC staff did not file suit, and instead negotiated a consent agreement to settle the matter. Healthtrust was permitted to acquire the three Holy Cross Health Services hospitals, but was required to divest Holy Cross Hospital of Salt Lake City within six months after the order became final, to a purchaser approved by the FTC. Healthtrust was also required to hold Holy Cross Hospital separate from its other operations, and to maintain its marketability and viability as an independent competitor in the market until the divestiture was completed. The order also prohibited Healthtrust from merging any of its hospitals in Weber, Salt Lake, or Davis counties in Utah with any other general hospital in those counties, absent advance Commission approval, for a period of ten years.

**Federal Trade Commission v. Hospital Board of Directors of Lee County** (Lee Memorial Hospital/Cape Coral Hospital), D-9265; 1994-1 Trade Case. ¶ 70,593 (M.D. Fla.); aff'd 38 F.3d 1184 (11<sup>th</sup> Cir. 1994). The Commission issued an administrative complaint, and filed a preliminary injunction suit in Federal court, charging that the proposed acquisition of non-profit Cape Coral Hospital by publicly-owned Lee Memorial Hospital would endanger competition in Lee County, Florida in violation of Section 7 of the Clayton Act. According to the complaints, the merger would significantly increase already high levels of concentration in Lee County by eliminating competition between Cape Coral and Lee Memorial. (The Federal court complaint alleged, as measured by patient admission, the Herfindahl-Hirschman Index would increase by 1775 from 3523 to 5289, and Lee Memorial's market share in Lee County would increase to 67%, as a result of the acquisition.)

The Commission's preliminary injunction suit was filed in the U.S. District Court for the Middle District of Florida on April 28, 1994. The district court judge granted a temporary restraining order until he could rule on the motion for a preliminary injunction. On May 16 the court ruled in favor of defendants on their motion to dismiss based on state action immunity. The Commission appealed that decision to the U.S. Court of Appeals for the Eleventh Circuit. On May 18 that court stayed the district court's order dismissing the Commission's complaint (thereby reinstating the temporary restraining order against completion of the proposed merger), pending consideration of the Commission's appeal. The Court of Appeals on November 30 affirmed the district court's ruling, and thereafter vacated its stay blocking the merger. The Commission filed

a petition for rehearing *en banc*, which was denied on March 9, 1995. The challenged acquisition was called off on February 1, 1995, after Cape Coral entered into a definitive agreement to be acquired by Health Management Associates. The Commission thereafter suggested that the preliminary injunction proceeding was moot, and moved to vacate the appeals and district courts' prior decisions; that motion was denied, as was the Commission's rehearing petition, in March, 1995. On July 7, 1995, the Commission voted not to seek Supreme Court review, bringing to a close the Federal court proceedings.

The Commission's administrative complaint was issued May 6, 1994. The ensuing administrative litigation was stayed pending completion of the federal court litigation. On July 7, 1995, the Commission concluded the administrative proceedings by dismissing the administrative complaint, on the grounds that because of the cancellation of the proposed Lee Memorial-Cape Coral merger, further proceedings to pursue additional relief were not in the public interest.

**Columbia Hospital Corporation/Galen Health Care, Inc.**, C-3472, 116 F.T.C. 1362 (final order issued November 19, 1993) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-116>); 126 F.T.C. 150 (1998) (modifying order substituting a prior notice provision for the prior approval requirement). The complaint charged that the merger of Columbia Hospital Corporation and Galen Health Care, Inc., two large for-profit hospital chains, may substantially lessen competition in the market for general acute care inpatient hospital services in the Kissimmee, Florida area, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. According to the complaint, the merger would significantly increase already high levels of concentration in the market, could create a firm whose market share is so high as to lead to unilateral anticompetitive effects, and it could enhance the possibility of collusion or interdependent coordination by the remaining firms in the market. Under the order, Columbia was required to divest Kissimmee Memorial Hospital in Osceola County. The order also prohibits Columbia and Galen from acquiring any other hospital in Osceola County for 10 years without prior FTC approval. Columbia divested Kissimmee Memorial to Adventist Health System/Sunbelt Health Care Corporation without objection from the FTC. The FTC did not challenge the merger in any other markets.

**University Health, Inc./St. Joseph Hospital**, C-9246, 115 F.T.C. 880 (final order issued September 9, 1992) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-115>; 1991-1 trade Cases ¶69,400 (S.D.Ga.) and 1991-1 Trade Cases ¶69,444 (S.D. Ga.), *rev'd*, 938 F.2d 1206 (11<sup>th</sup> Cir. 1991). The Commission issued an administrative complaint charging that the acquisition of nonprofit St. Joseph Hospital by nonprofit University Health, Inc., which operated University Hospital, would substantially lessen competition in the market for general acute care hospital services in the Augusta, Georgia, area, in violation of § 7 of the Clayton Act. The Commission complaint charged that, whether measured by the Herfindahl-Hirschman Index or by four-firm concentration ratios, the proposed acquisition would create a hospital whose market share would be so high as to lead to dominant firm status.

In addition, the Commission filed a preliminary injunction suit on March 20, 1991, in the Southern District of Georgia. The district court denied the preliminary injunction on the merits, but upheld Commission jurisdiction in the matter, in a bench ruling issued on April 4. On appeal

by the Commission, the Eleventh Circuit Court of Appeals reversed the district court, and instructed the district court to issue a preliminary injunction. On May 7, 1991, the district court issued an order enjoining consummation of the proposed merger pending the outcome of the Commission's administrative proceedings. The hospitals thereafter called off the transaction.

On July 26, 1991, the Eleventh Circuit issued a unanimous opinion, explaining its reasons for reversal of the district court decision. The Court of Appeals held that the FTC had made a strong prima facie case showing that the proposed acquisition would substantially lessen competition in the Augusta area, and that the failure to grant a preliminary injunction would frustrate the Commission's ability to protect the public from anticompetitive behavior. In granting the injunction, the appeals court affirmed the district court's holding that the FTC may enforce §7 of the Clayton Act against asset acquisitions involving solely non-profit entities. The court also found that Georgia's certificate-of-need law constituted a substantial barrier to the entry of new competitors or to expansion by existing hospitals. The court also rejected arguments presented by the hospitals concerning a "weakened competitor" defense and the non-profit status of the acquiring hospital. Possible efficiencies resulting from the acquisition were found to be too speculative and insubstantial to undermine the Commission's prima facie showing of illegality.

The Commission's administrative proceeding was later settled by consent order. Under the order University 1) was prohibited from acquiring, or being acquired by, any hospital in the Augusta area without prior Commission approval; and 2) was required to notify the Commission before entering into joint ventures with other hospitals in the Augusta area.

**The Reading Hospital, et al./Community General Hospital**, 113 F.T.C. 285 (1990) (consent order) (<http://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-113>). The complaint charged that the merger of non-profit Reading Hospital and Medical Center and non-profit Community General Hospital injured consumers by restricting competition in general acute-care hospital services in the Reading, Pennsylvania, area. According to the complaint, the two hospitals were both independent private, non-profit corporations until December 1985, when they formed a new corporation, Berkshire Health System, to operate the two hospitals. Community General left the Berkshire Health System in January, 1989, and Berkshire was dissolved in December 1989. During the period of consolidation, the complaint alleged that Berkshire controlled two of the three general acute care hospitals in the Berks County area, with a market share of 77%. The Herfindahl-Hirschmann Index increased from about 4700 to 6500 points based on in-patient days. The complaint alleged that the consolidation eliminated competition between the two hospitals denying patients, physicians, and purchasers of health care coverage the benefits of free and open competition based on price, quality, and service. Under the order, the hospitals, which had already terminated their affiliation, were required to obtain Commission approval before merging with each other or with any other hospital in Berks County, Pennsylvania.

**Hospital Corporation of America**, D-9161, 106 F.T.C. 361 (final order issued October 25, 1985) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-106>), aff'd, 807 F.2d 1381 (7<sup>th</sup> Cir. 1986), cert. denied, 481 U.S. 1038 (1987). The Commission decision held that a for-profit hospital chain's acquisition of several competing hospitals in the Chattanooga, Tennessee area violated § 7 of the Clayton Act and § 5 of the FTC

Act, because it tended to lessen competition substantially in the market for general acute care hospital services in Chattanooga. The Commission ordered the divestiture of two hospitals and the termination of a management contract with another hospital. The Commission rejected the argument that health care acquisitions were immune from the antitrust laws. The Commission found that Chattanooga hospitals had a history of interaction that facilitated collusion, and that the acquisitions at issue made it more likely that the hospitals could successfully collude to decrease or eliminate competition. After the acquisitions, HCA owned or managed 5 of the 11 hospitals in the Chattanooga urban area. HCA increased its market share in the Chattanooga area from 13.8 to 25.8 percent measured by inpatient days, from 13.6 to 26.7 percent measured by approved acute care beds, and from 14.3 to 25.5 percent measured by net patient revenues. The Herfindahl-Hirschman Index increased from 2028 points to 2467 measured by inpatients days, from 1932 to 2416 measured by approved acute care beds, and from 2220 to 2634 measured by net patient revenues. The Commission holding was affirmed by the Seventh Circuit Court of Appeals.

**Hospital Corporation of America/Forum Group Inc.**, C-3167, 106 F.T.C. 298 (final order issued September 30, 1985) (modified 106 F.T.C. 609 (December 16, 1985)) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-106>). The complaint charged that the acquisition by HCA, a for-profit hospital chain, of hospitals in the Virginia and Texas areas from Forum Group Inc., another for-profit hospital chain, violated § 7 of the Clayton Act and § 5 of the FTC Act because these acquisitions might substantially lessen local market competition in, respectively, the psychiatric hospital services market and general acute care hospital services market. HCA already owned a psychiatric hospital in the Norfolk area, and operated under management contract a large county general hospital near Forum's hospital in Midland. The complaint charged that as a result of the acquisitions, HCA increased its market share of general acute care hospital services in the Texas area from about 50% to about 58% based on licensed general acute care beds, and from about 55% to 60% based on inpatient days. The Herfindahl-Hirschman Index increased from about 3530 points to about 4350, based on licensed general acute care beds, and from about 3990 to about 4550 based on inpatient days. The complaint also charged that as a result of the acquisitions, HCA increased its market share of psychiatric hospital services in the Norfolk, Virginia, Metropolitan area from about 15% to about 45% based on licensed psychiatric beds, and from about 12% to about 38% based on psychiatric inpatient days. The Herfindahl-Hirschman Index increased from 1700 to about 2590 based on licensed psychiatric beds, and from about 1590 to about 2050 based on psychiatric patient days. HCA, agreed to divest two psychiatric hospitals in the Norfolk, Virginia, metropolitan area, and one general acute care hospital in Midland, Texas.

**American Medical International, Inc./French Hospital**, D-9158, 104 F.T.C. 1 (final order issued July 2, 1984) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-104>) (order modified 104 F.T.C. 617 (1984) and 107 F.T.C. 310 (1986)). The Commission decision held that a for-profit hospital chain's acquisition of a competing hospital in the city and county of San Luis Obispo, California, violated § 7 of the Clayton Act and § 5 of the FTC Act because the acquisition may substantially lessen competition in the market for general acute care hospital services in that area. The Commission rejected the agreement that the acquisition was exempt from antitrust scrutiny because of the National Health Planning and

Resources Act (since repealed). The Commission found that the acquisition lessened both price and nonprice competition, rejecting the argument that there is no price or nonprice competition among hospitals. AMI's acquisition gave AMI control of three of the five hospitals in San Luis Obispo County. As a result of the acquisition, AMI increased its market share from 55.6 to 75.7 percent in the county market, and from 57.8 to 87 percent in the city market, measured on the basis of inpatient days (measured on the basis of gross hospital revenues, the figures were 52.2 to 71.3 percent and 53.3 to 82.4 percent, respectively, for the county and city markets). The Herfindahl-Hirschman Index increased from 3818 points to 6025 in the county market and from 4370 to 7775 in the city market based on inpatient days (measured on the basis of gross hospital revenues, the figures were 3518 to 5507 and 3996 to 7097, respectively, in the county and city markets). The Commission ordered divestiture of the acquired hospital.

## B. Physician Practice Groups

**CentraCare Health System/St. Cloud Medical Group**, FTC File No. 1210069 (final order issued January 6, 2017)

(<https://www.ftc.gov/enforcement/cases-proceedings/161-0096/centracare-health-system>). The complaint challenged CentraCare Health System's acquisition of St. Cloud Medical Group (SCMG), alleging that the merger of the two largest providers of adult primary care, pediatric care, and obstetrics/gynecology (OB/GYN) services in St. Cloud, Minnesota would eliminate price and non-price competition. The acquisition also allegedly would increase CentraCare's bargaining leverage with commercial health plans. However, the complaint further recognized that SCMG was failing financially and unlikely to survive on its own, and that, despite a good-faith search, it had not identified an alternative buyer for the entire group. As alleged in the complaint, there was compelling evidence that physicians would leave the practice (and potentially the St. Cloud area), if the acquisition were not consummated. Such physician departures would cause an immediate decline in revenues that could further destabilize the group.

The consent order permits the acquisition to proceed, but requires CentraCare to allow a number of SCMG doctors to accept local employment opportunities or establish new practices post-acquisition without the risk of violating non-compete provisions in their employment contracts. If, after 90 days of the issuance of a final order, fewer than eight SCMG physicians have notified their intent to seek alternate employment, then CentraCare must also suspend the non-compete agreements of legacy CentraCare adult primary care, pediatric, and OB/GYN physicians (i.e., those that were employed by CentraCare prior to the merger), allowing those physicians to accept alternate employment opportunities in the St. Cloud area. To encourage the creation of new competitors and the strengthening of smaller competitors, the order requires CentraCare to deposit \$500,000 into an escrow account to be awarded as \$100,000 departure payments to the first five physicians who leave CentraCare, either to create a new medical practice or to join a third-party medical practice that has five or fewer physicians in the St. Cloud area.

**Keystone Orthopaedic Specialists, LLC/Orthopaedic Associates of Reading, Ltd.**, C-4562, FTC File No. 1410025 (final order issued December 14, 2015)

(<https://www.ftc.gov/enforcement/cases-proceedings/141-0025/keystone-orthopaedic-specialists-llc-orthopaedic-associates>). The complaint challenged the consummated physician practice group merger among orthopedists in Berks County, Pennsylvania. The complaint charged that in 2011, orthopedists affiliated with six independent physician groups merged their practices to form

Keystone. The merger combined 19 out of 25, or 76%, of the orthopedists practicing in Berks County. One of the merging practices was Orthopaedic Associates. Three years after the merger and predating the Commission's investigation, six orthopedists left Keystone for reasons independent of the investigation and resumed doing business as Orthopaedic Associates. The complaint alleged that the merger substantially lessened competition for orthopedic physician services in Berks County, Pennsylvania, eliminated price and non-price competition, and created a dominant orthopedic practice. Following the merger, Keystone exercised unilateral market power to raise prices for orthopedic physician services.

The order settling charges preserves Orthopaedic Associates' separation by requiring Keystone and Orthopaedic Associates to obtain prior approval from the Commission before acquiring any interest in each other. The order also requires Keystone and Orthopaedic Associates to obtain prior approval from the Commission before (1) either practice may acquire another orthopedic practice located in Berks County or (2) entering into any affiliation agreement with an orthopedist who during the prior year provided services in Berks County. The order further prohibits certain joint activity among competing orthopedists who are members of or employed by Keystone or Orthopaedic Associates. The order also requires Keystone and Orthopaedic Associates to terminate, without penalty, any existing contracts with payers for the provision of orthopedic physician services at the earlier of a written request from a payer to terminate or the earliest termination or renewal date under the contract.

**Federal Trade Commission v. St. Luke's Health System Ltd. and Saltzer Medical Group,**

**PA**, FTC File No. 1210069, 13-cv-00116-BLW, (9<sup>th</sup> Cir. affirmed February 10, 2015)

(<https://www.ftc.gov/enforcement/cases-proceedings/121-0069/st-lukes-health-system-ltd-saltzer-medical-group-pa>). The FTC, together with the Attorney General of Idaho, filed a joint complaint in federal district court to unwind St. Luke's Health System Ltd.'s consummated acquisition of Saltzer Medical Group, P.A. According to the complaint, St. Luke's is a not-for-profit health system with headquarters in Boise, Idaho. At the time of the acquisition, it owned and operated six hospitals and employed several hundred physicians. Saltzer was the oldest and largest independent, multi-specialty physician practice group in Idaho before its acquisition by St. Luke's on December 31, 2012. The complaint alleged the acquisition combined the two largest providers of adult primary care physician services in the Nampa area, which together would command nearly an 80% share of that market. The acquisition also combined, according to the complaint, each firm's closest competitor in the market for adult primary care services, reducing the alternatives available to health plans assembling provider networks in the Nampa area. The FTC and Idaho Attorney General alleged that the acquisition would give St. Luke's greater bargaining leverage with health plans, leading to higher health care costs for local employers and their employees. The district court held that the merger violated Section 7 of the Clayton Act and Section 48-106 of the Idaho Competition Act and ordered St. Luke's to fully divest itself of Saltzer's physicians and assets. On appeal, the Ninth Circuit affirmed the judgment of the district court.

**Renown/HealthSierra Nevada Cardiology Associates/Sierra Nevada Cardiology Associates,**

C-4366, FTC File No. 1110101 (final order issued November 30, 2012)

(<http://www.ftc.gov/enforcement/cases-proceedings/1110101/renown-health-matter> ) The complaint charged that the acquisition of two local cardiology groups by Renown Health, the

largest provider of acute care hospital services in northern Nevada, reduced competition for the provision of adult cardiology services in the Reno area. In late 2010, Renown Health acquired the medical practice of Sierra Nevada Cardiology Associates (SNCA), which consisted of 15 cardiologists. In March 2011, Renown Health acquired Reno Heart Physicians (RHP), a medical group with 16 cardiologists. At the time of the complaint, there were very few independent cardiologists practicing in the Reno area. Therefore, competition for adult cardiology services was effectively eliminated.

Contracts between Renown Health and the cardiologists contained “non-compete” provisions that prevented them from joining medical groups that competed with Renown Health. As a result of the acquisitions and the non-compete clauses, Renown Health employed 88% of the cardiologists in the Reno area. The complaint alleged that Renown Health’s acquisition of two competing practices led to the elimination of competition based on price, quality and other terms. The consolidation also increased Renown Health’s bargaining power with insurers and would possibly result in higher prices for adult cardiology services in the Reno area.

During the FTC public comment period, Renown Health was required to suspend the non-compete provisions for at least 30 days. During that time, former SNCA and RHP cardiologists were free to contact other employers about leaving Renown Health, and they were required to notify a special monitor appointed by the FTC about any contacts they made to ensure that they were included in a group of up to 10 cardiologists that would be allowed to join competing groups. After the FTC finalized the order, another 30-day release period began during which other cardiologists were allowed to leave Renown Health, provided that certain conditions were met, including the requirement that they continue to practice in the Reno area for at least one year.

At any time during the second 30-day period Renown Health could ask the FTC to end the release order if 10 of its cardiologists left for competing practices. If fewer than six cardiologists left Renown Health after the end of the release period, Renown Health was required to continue suspension of the non-compete provisions until at least six cardiologists accepted offers with competing practices in the Reno area.

#### **Providence Health & Services/Spokane Cardiology and Heart Clinics Northwest**

(transactions abandoned on or about February 18, 2011)

[https://www.ftc.gov/sites/default/files/documents/closing\\_letters/providence-health-services/spokane-cardiology-and-hearts-clinic-northwest/110321providencstatement.pdf](https://www.ftc.gov/sites/default/files/documents/closing_letters/providence-health-services/spokane-cardiology-and-hearts-clinic-northwest/110321providencstatement.pdf)).

On July 21, 2010, Providence Health & Services announced its intention to acquire Spokane Cardiology and Heart Clinics Northwest. Providence planned to acquire the assets of each cardiology practice group and subsequently to employ all, or virtually all, of their affiliated physicians. Federal Trade Commission staff, in cooperation with staff in the Antitrust Division of the Washington Attorney General’s Office, investigated the likely competitive effects of the transactions. Commission staff expressed serious concerns to the parties regarding possible anticompetitive effects of the proposed transactions that could increase health care costs in the Spokane area, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. On or about February 18, 2011, the parties abandoned the transactions. The Commission then voted to close its investigation.

### C. Other Hospitals, Health Care Facilities, and Providers

**DaVita, Inc./Renal Ventures Management LLC**, FTC File No. 1510204 (proposed order issued March 28, 2017) (<https://www.ftc.gov/enforcement/cases-proceedings/151-0204/davita-rv-management-renal-ventures>) The complaint alleged that the acquisition by DaVita, Inc., the second-largest provider of outpatient dialysis services in the United States, of competitor Renal Ventures Management, LLC, the seventh-largest provider, would lead to significant anticompetitive effects in the New Jersey markets of Brick, Clifton, Somerville, Succasunna, and Trenton, and in the Dallas-area markets of Denton and Frisco where the two companies had directly competing clinics. In those markets, the merger would represent either a merger to monopoly or a reduction of competitors from three to two. The Commission alleged that without that competition, the likely result would be reduced quality and higher prices for dialysis patients. The Commission further alleged that new entry of competing dialysis in these seven markets was not likely, because the markets did not have sufficient available kidney specialists to support new competition.

Under the terms of the proposed order, DaVita must divest seven dialysis clinics located in the markets listed above to PDA-GMF Holdco LLP, a joint venture between Physicians Dialysis and GMF Capital LLC (“PDA”). Further, DaVita must obtain agreements from the medical director of each divested clinic to continue providing physician services after it transfers ownership to the buyer of the clinic; obtain consent from the relevant landlords to transfer leases for the facilities to the buyer; and provide the buyer an opportunity to interview and hire employees from the divested clinics. Also, the proposed order bars DaVita from contracting with the medical directors of the seven clinics for three years, and it must provide transition services for up to 24 months. The proposed settlement also allows the FTC to appoint a monitor to ensure DaVita’s compliance.

**Rangers Renal Holding, LP and US Renal Care, Inc./Dialysis Parent, LLC and Dialysis Holdco, LLC**, C-4570, FTC No. 1510215 (final order issued March 17, 2016) (<https://www.ftc.gov/enforcement/cases-proceedings/151-0215/rangers-renal-holding-lp-us-renal-care-inc-dialysis-parent>). The complaint alleged that the proposed acquisition by Rangers Renal Holdings LP, the parent of US Renal Care, Inc., of Dialysis Parent, LLC, would likely substantially lessen competition in one market—Laredo, Texas core-based statistical area—for the provision of outpatient dialysis services. At the time of the complaint, US Renal Care was the third-largest provider of outpatient dialysis services in the United States. Dialysis Parent, among other things, was engaged in the provision and sale of outpatient dialysis services as DSI Renal, the sixth-largest provider of outpatient dialysis services in the United States. According to the complaint, the proposed acquisition would reduce the number of providers in the market from three to two, leaving only the combined firm and Fresenius Medical Care North America. The complaint also alleged that the proposed acquisition likely would increase the ability of the merged entity to unilaterally raise prices and reduce its incentives to improve service or quality. The order settling charges requires US Renal Care to divest DSI Renal’s three outpatient dialysis clinics in Laredo, Texas to Satellite Healthcare Inc.



**Keystone Orthopaedic Specialists, LLC./Orthopaedic Associates of Reading, Ltd.** (See Section III B for citation and annotation.)

**St. Luke's Health System Ltd./Saltzer Medical Group, PA** (See Section III B for citation and annotation.)

**HIG Bayside Debt/Symbion Holdings Corporation**, C-4494, FTC File No. 141-0183 (final order issued December 22, 2014) (<https://www.ftc.gov/enforcement/cases-proceedings/141-0183-c-4494/hig-bayside-debt-et-al>). The complaint charged that the proposed acquisition by Surgery Center Holdings, Inc., a subsidiary of H.I.G. Bayside Debt & LBO Fund II, L.P. which does business as Surgery Partners, of Symbion Holdings Corporation would substantially lessen competition for the sale and provision of outpatient surgical services to commercial health plans and commercially insured patients in the Orange City/Deltona Area of Florida. At the time of the complaint, Surgery Partners owned, in whole or in part, 47 multi-specialty ambulatory surgery centers in 18 states. Symbion owned, in whole or in part, 44 multi-specialty ambulatory surgery centers in 21 states, as well as several short-stay surgical hospitals. According to the complaint, the proposed acquisition would have combined the only two multi-specialty ambulatory surgical centers in the Orange City/Deltona Area of Florida, and would have left commercial health plans and commercially insured patients there with only one meaningful alternative to Surgery Partners' outpatient surgical services. The complaint alleged that the proposed acquisition would eliminate direct and substantial competition between Surgery Partners and Symbion, increase the likelihood that Surgery Partners would unilaterally exercise market power, and that the likely ultimate effect of the merger would be increased prices and decreased quality or availability of outpatient surgical services in the Orange City and Deltona areas of Florida. The consent order requires Surgery Center Holdings, Inc. to divest its ownership interest in Blue Springs Surgery Center in Orange City, Florida.

**Reading Health System/Surgical Institute of Reading L.P.**, C-9353, FTC File No. 1210155 (Commission dismissed complaint December 7, 2012) (<https://www.ftc.gov/enforcement/cases-proceedings/1210155/reading-health-system-surgical-institute-reading-matter>). On November 16, 2012 Commission approved the filing, jointly with the Pennsylvania Attorney General, of a complaint in the U.S. District Court for the Eastern District of Pennsylvania seeking a preliminary injunction to block the proposed acquisition of the Surgical Institute of Reading L.P. (SIR) by Reading Health System, two health care providers in Berks County, Pennsylvania. The complaint alleged that the combination would significantly reduce competition in the area surrounding Reading, Pennsylvania and result in reduced quality of care and higher health care costs to the area's employers and residents.

Reading Health System is a comprehensive, not-for-profit health care system in Berks County, Pennsylvania. Its main facility is The Reading Hospital, a 737-bed facility that provides inpatient general acute care, tertiary services and outpatient care. SIR is a for-profit physician-owned surgical specialty hospital located in Wyomissing, Pennsylvania, within Berks County. It has 15 licensed beds and provides a range of inpatient and outpatient surgical services. SIR is owned by 16 physicians and has 22 independent doctors on staff.

The FTC's administrative complaint, issued on November 16, 2012, alleged that the proposed acquisition would reduce competition in four markets where Reading Health System and SIR compete: (1) inpatient orthopedic surgical services; (2) outpatient orthopedic surgical services; (3) outpatient ear, nose and throat (ENT) surgical services; and (4) outpatient general surgical services. The complaint states that the proposed acquisition would decrease the number of meaningful competitors in the market for inpatient orthopedic surgical services in the Reading area from three to two. The markets for outpatient general surgical services and outpatient ENT surgical services would be left with one other significant competitor, and the number of competitors for outpatient orthopedic surgical services would decrease from four to three. The complaint charged that the proposed acquisition would increase Reading Health System's leverage and enable it to raise the reimbursement rates it negotiates with commercial health plans. As a result, health care costs of local employers would increase, potentially forcing them to cut benefits and burdening their employees with higher costs. The proposed acquisition would also eliminate important non-price competition between Reading Health System and SIR and lead to a decrease in the quality of existing facilities and services.

On November 30, 2012 FTC staff, Reading Health System and SIR filed a joint motion to dismiss the complaint because the parties had abandoned the proposed acquisition. The Commission ordered the dismissal of the complaint on December 7, 2012.

**Alan B. Miller/Universal Health Services**, C-4372, FTC File No. 1010142 (final order November 30, 2012) (<https://www.ftc.gov/enforcement/cases-proceedings/1010142/universal-health-services-inc-psychiatric-solutions-inc-alan-b>). The complaint charged that the acquisition by Universal Health Services, Inc. (UHS) of Ascend Health Corporation would be anticompetitive and would violate federal antitrust laws. UHS owned or operated 25 acute care hospitals and 198 behavioral health facilities in 36 states, Washington, D.C., Puerto Rico and the U.S. Virgin Islands. It is one of the largest hospital management companies in the country. Ascend owned or operated nine behavioral health facilities in Arizona, Oregon, Texas, Utah and Washington State. The complaint alleged that the proposed acquisition would lead to a virtual monopoly in the provision of acute inpatient psychiatric services to commercially insured patients in the El Paso, Texas/Santa Teresa, New Mexico area. Competition between UHS and Ascend benefitted consumers in the El Paso/Santa Teresa area through lower health care costs, higher quality of care, and improved services. According to the FTC's complaint, the proposed acquisition would have increased the likelihood that UHS could have increased prices for acute inpatient psychiatric services or decreased the quality or availability of such services in the El Paso, Texas/Santa Teresa, New Mexico area. The order requires UHS to sell its Peak Behavioral Health Services facility in the El Paso/Santa Teresa area within six months to an FTC-approved buyer. To ensure that the Peak assets attract a buyer that can effectively compete with UHS after the sale, the order allows the Commission to require a second UHS behavioral health facility, Mesilla Valley Hospital in Las Cruces, New Mexico, to be sold together with Peak if Peak alone is not divested to an approved buyer within six months.

**Renown/HealthSierra Nevada Cardiology Associates/Sierra Nevada Cardiology Associates** (See Section III B for citation and annotation.)

**Fresenius Medical Care AG & Co. KgaA/Liberty Dialysis Holdings, Inc.** C-4348, FTC. File No. 1110170 (modified final order issued May 25, 2012) (<http://www.ftc.gov/enforcement/cases->

[proceedings/111-0170/fresenius-medical-care-ag-co-kga-matter](http://www.ftc.gov/enforcement/cases-proceedings/111-0170/fresenius-medical-care-ag-co-kga-matter)). The complaint charges that the acquisition by Fresenius of Liberty Dialysis Holdings, Inc. would harm competition in numerous local markets for outpatient dialysis services around the country. Fresenius operates more than 1800 outpatient dialysis clinics throughout the United States. Liberty is the third-largest provider of outpatient dialysis services in the country. It operates 260 dialysis centers in 32 states and the District of Columbia.

According to the complaint, the proposed acquisition would violate Section 5 of the FTC Act and Section 7 of the Clayton Act by eliminating competition in 43 local markets. It would lead to monopolies for outpatient dialysis services in 17 of the 43 markets. In 24 other markets the proposed acquisition would cause the number of dialysis providers to drop from three to two. In the remaining two markets competition would be significantly reduced. The elimination of head-to-head competition between the two firms is likely to lead to higher prices and reduced quality for dialysis consumers.

The final order required Fresenius to divest 52 clinics to Dialysis Newco, Inc. of Nashville, Tennessee, one outpatient clinic to Alaska Investment Partners LLC of Anchorage, Alaska, five clinics to Dallas Renal Group, of Dallas, Texas and two clinics to Satellite Healthcare, Inc. of San Jose, California. It also required Fresenius to end one management services agreement, under which it managed an outpatient dialysis clinic on behalf of a third party. For each clinic it is selling, Fresenius must also assure that the physicians currently working there will stay with the clinic after it is sold. To ensure that the required divestitures are successful, the order also contained additional terms, *e.g.*, providing each buyer with an opportunity to interview and hire employees for the clinics they are buying; requiring Fresenius to provide transition services to the divested clinics for up to 12 months, if necessary; and requiring Fresenius to provide each buyer with a license to use its policies, procedures, and medical protocols at the divested clinics.

**Laboratory Corporation of America Holdings/Orchid Cellmark, Inc.**, D-4341, FTC File No. 1110155 (final order issued January 30, 2012) (<http://www.ftc.gov/enforcement/cases-proceedings/111-0155/laboratory-corporation-america-holdings-orchid-cellmark-inc>) The complaint alleged that LabCorp's acquisition of Orchid Cellmark, Inc. would reduce competition in the national market for paternity testing services provided to government agencies. These agencies contract with laboratory testing companies to provide DNA testing services, and they use those tests to resolve paternity issues. At the time of the complaint, LabCorp and Orchid were the two most significant providers of these paternity testing services in the U.S., and they conducted a substantial majority of all paternity tests performed for government agencies. They were routinely the top two choices and the lowest-priced bidders for providing paternity testing services to government agencies. The order requires LabCorp and Orchid to divest the portion of Orchid's U.S. paternity testing business that focuses on sales to government agencies, and related assets, to DNA Diagnostics Center (DDC).

**Healthcare Technology Holdings, Inc./SDI Health LLC**, C-4340, FTC File No. 1110097 (final order issued January 9, 2012) (<http://www.ftc.gov/enforcement/cases-proceedings/111-0097/healthcare-technology-holdings-inc-matter>). The FTC in its complaint alleged that the proposed acquisition of SDI Health LLC by Healthcare Technology Holdings, Inc., through its wholly owned subsidiary IMS Health Inc., would substantially increase IMS' share in the

promotional audit and medical audit markets while eliminating the direct competition of SDI, its only significant competitor. As a result, the acquisition likely would lead to a unilateral exercise of market power by IMS in these markets and an increase in prices.

At the time of the complaint, IMS and SDI produced and sold health care data and analytics to customers such as pharmaceutical and biotechnology firms. Customers use these data and analytics to promote and market their products, and otherwise manage their operations. IMS and SDI also competed in the provision of promotional audits, which are market research products that estimate advertising and other promotional activities for branded drugs. Pharmaceutical manufacturers and other customers use promotional audits to determine how much to spend in various categories to promote their branded drugs. IMS and SDI were also competing providers of medical audits, which estimate actual medical diagnoses made, and therapies described, by physicians. Customers use medical audit data to assess which products are used to treat specific diseases, and to help them understand drug prescription and treatment trends in the health care marketplace.

The complaint alleged that the U.S. market for promotional audits was highly concentrated, with IMS, SDI and Cegedim S.A. as the only competitors. SDI had 68% of the market; IMS has a 30% share and Cegedim has only 2 % of the market. In the market for medical audits, IMS and SDI were the only two competitors. IMS controlled 53% of the market while SDI held the remaining 47%.

The order requires Healthcare Technology to sell all of the overlapping SDI businesses related to both promotional and medical audits to a FTC-approved buyer within three months of the consummation of the acquisition.

**DaVita, Inc./CDSI I Holding Company**, C-4334, FTC File No.111-0103 (final order issued October 21, 2011) (<http://www.ftc.gov/enforcement/cases-proceedings/1110103/davita-inc>). The complaint alleged that DaVita's proposed acquisition of CDSI I Holding Company would result in higher prices and lower quality for outpatient dialysis services. (Dialysis treatment, a life-sustaining therapy for patients with end-stage renal disease, replicates kidney function by removing toxins and excess fluid from the blood.) According to the complaint, in 16 local markets the proposed acquisition would either give DaVita a monopoly or reduce the number of dialysis providers from three to two. In six other markets, the merged firm would have a major share of the market and face only two significant competitors. The consent order requires DaVita to sell 29 dialysis clinics in Alabama, Arizona, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, South Carolina, Tennessee and Texas. The order preserves competition in 22 geographic markets where the Commission alleged that consumers would be harmed by the acquisition. The settlement requires DaVita to sell the clinics to Dialysis Newco, Inc., a corporation formed by venture capital firms Frazier Healthcare and New Enterprise Associates.

**Universal Health Services, Inc./Psychiatric Solutions, Inc.**, C-4309, FTC File No. 1010142 (final modified order issued April 19, 2011) (<https://www.ftc.gov/enforcement/cases-proceedings/1010142/universal-health-services-inc-psychiatric-solutions-inc-alan-b>). The complaint alleged that the acquisition of Psychiatric Solutions, Inc. by Universal Health Services, Inc. would reduce competition in the provision of acute inpatient psychiatric services in

three local markets: Delaware, Puerto Rico and metropolitan Las Vegas. Universal Health is one of the nation's largest hospital management companies. Facilities owned by Universal Health and Psychiatric Solutions are the leading providers of acute inpatient psychiatric services in each of the three markets. The complaint charged that the combined market share of Universal Health and Psychiatric Solutions in each market is 60% or more. The acquisition would have significantly increased Universal Health's market power and enabled it to profit by unilaterally raising reimbursement rates negotiated with commercial health plans. In each of the relevant markets regulatory requirements pose a significant barrier to entrants seeking to establish new psychiatric facilities or expand their existing facilities.

As a condition of its acquisition of Psychiatric Solutions, Universal Health was required by the order to sell 15 psychiatric facilities: two inpatient hospitals in Las Vegas; one inpatient hospital in Delaware; and one inpatient hospital and 11 affiliated outpatient clinics in Puerto Rico.

**Laboratory Corporation of America/Westcliff Medical Laboratories, Inc.**, D-9345, FTC File No. 1010152, (complaint dismissed April 21, 2011) (<https://www.ftc.gov/enforcement/cases-proceedings/1010152/laboratory-corporation-america-laboratory-corporation-america>). The Commission filed an administrative complaint alleging that LabCorp's acquisition of Westcliff Medical Laboratories, Inc., which was consummated on June 16, 2010, would lead to higher prices and lower quality in the Southern California market for the sale of clinical laboratory testing services to physician groups. LabCorp, Westcliff and Quest Diagnostics Incorporated serve the vast majority of the physician groups in the area. LabCorp and Westcliff perform clinical laboratory testing services at the request of a patient's individual physician, but the ultimate payer varies depending on the patient's health plan. In California, physician groups typically contract to pay for laboratory tests performed by HMOs. A physician group will usually contract on a capitation basis; however, some physician groups pay laboratories on a fee-for-service basis.

According to the complaint, Westcliff had been expanding its share of physician group business and had priced its capitated laboratory testing services more aggressively than its most significant competitors, LabCorp and Quest. In several instances, Westcliff thwarted LabCorp's attempts to raise prices by offering lower capitated contract rates to physician groups. The acquisition gave LabCorp and Quest approximately 89% of the market. It made it more likely that the two remaining firms would increase prices, and it deprived physician groups of leverage to keep prices low for clinical laboratory testing services. The complaint alleged that entry into the market for the sale of clinical laboratory services to physician groups, or expansion by small fringe firms, was unlikely to restore the competition lost as a result of the acquisition. Barriers to entry include economies of scale, which create significant advantages for larger laboratories and limit the entry and expansion of smaller firms; high fixed costs that characterize the clinical laboratory testing business; and the assumption of substantial financial risk when contracting with physician groups on a capitated basis.

On June 25, 2010, LabCorp agreed to hold the Westcliff assets separate and apart while the Commission investigated the acquisition. The Commission filed an action in federal court on December 3, 2010 requiring LabCorp to continue holding the Westcliff assets separate and apart during the administrative proceeding. On February 22, 2011, the court denied the Commission's

motion. It held that the Commission's alleged product market of the sale of capitated clinical laboratory testing services to physician groups should be expanded to include fee-for-service contracts with independent physician associations. The court also rejected the Commission's proposed geographic market of Southern California and held that the geographic market should be based on the locations of the labs of LabCorp and Westcliff in Northern and Southern California. The court also found that there were new entrants in Southern California and accepted LabCorp's assertion that, absent a hold separate, the transaction would result in over \$22 million annually in merger-specific efficiencies.

On February 28, 2011, the Commission filed in the Ninth Circuit an emergency motion for an injunction pending appeal. On March 14, 2011, the court denied the Commission's emergency motion. The Commission withdrew its appeal on March 23, 2011, and on April 21, 2011, the Commission issued an order dismissing its complaint.

**Providence Health & Services/Spokane Cardiology and Heart Clinics Northwest** (See Section III B for citation and annotation.)

**Carilion Clinic/Center for Advanced Imaging and the Center for Surgical Excellence**, D-9338, FTC File No. 0810259 (final order issued November 23, 2009; order to maintain assets issued October 6, 2009) (<https://www.ftc.gov/enforcement/cases-proceedings/0810259/carilion-clinic-corporation-matter>). The Commission's complaint challenged Carilion's acquisition of the Center for Advanced Imaging (CAI) and the Center for Surgical Excellence (CSE), the only independent (*i.e.*, non-hospital-owned) competing providers of advanced outpatient imaging services and outpatient surgical services in the Roanoke, Virginia, area. According to the complaint, Carilion was the dominant hospital system in southwest Virginia, and had an ownership interest in various healthcare businesses – including outpatient imaging and surgical services – in that area. Carilion's acquisition of CAI and CSE left only one other competitor – an HCA hospital – in the markets for advanced outpatient imaging services and outpatient surgical services in the Roanoke area. The complaint stated that, prior to the acquisition, CAI and CSE offered patients outpatient imaging and surgery services more conveniently, and at prices substantially lower, than Carilion or HCA. The complaint also alleged that competition from CAI and CSE spurred Carilion to improve the quality, services, and amenities at its own outpatient facilities, and would have continued to spur such competition absent the acquisition.

The complaint charged that the acquisition would produce several anticompetitive price and non-price effects. First, eliminating CAI and CSE as competitors would substantially reduce the leverage of health insurance plans to negotiate prices for services to be charged at CAI and CSE facilities, resulting in Carilion's unilateral ability to charge health plans higher prices at these facilities. Indeed, Carilion acknowledged that it would increase post-acquisition prices for CAI and CSE services. Second, the acquisition would directly and substantially harm patients by increasing their out-of-pocket costs. For example, Carilion planned to increase the out-of-pocket cost for a brain MRI for many patients at CAI facilities by almost 900%, from about \$40 to \$350. Third, the acquisition would decrease the incentive of Carilion's only remaining post-acquisition competitor for outpatient imaging and surgical services, HCA, to compete aggressively, and would increase the likelihood of coordinated action between Carilion and HCA.

The Commission's orders required Carilion, within three months, to divest CAI and CSE in a manner that restored them as viable, independent competitors. Among other things, the orders require that Carilion: (1) maintain the viability, marketability, and competitiveness of CAI and CSE assets prior to divestiture; (2) refrain, for six months, from soliciting for employment any physician practice that has referred patients to CAI since January 1, 2008, in order to allow CAI to reestablish its referral base; (3) refrain, for one year, from making any changes that would restrict Carilion's own physicians who have referred patients to CAI from doing so; (4) facilitate and refrain from hindering the hiring or re-hiring of employees by CAI and CSE after their divestiture; and (5) refrain from using or disclosing competitively sensitive information. In March 2010, the Commission approved Carilion's divestment of CSE to Fairlawn Surgery Center, LLC. On August 12, 2010, the Commission approved the divestiture of CAI to InSight Health Corporation.

**Fresenius AG/American Renal Associates**, C-4202, FTC File No. 0510234 (final order issued October 17, 2007) (<https://www.ftc.gov/enforcement/cases-proceedings/0510234/american-renal-associates-inc-corporation-fresenius-medical>). ARA and Fresenius entered into an asset purchase agreement under which ARA agreed to pay Fresenius \$1.6 million to close three clinics in Rhode Island, and to purchase five other clinics from Fresenius in Rhode Island. The complaint charged that the agreement to close the three clinics, each of which was located close to a competing ARA clinic, was a per se illegal horizontal agreement to eliminate competition. The complaint also charged that ARA's acquisition of two kidney dialysis clinics from Fresenius in Rhode Island, combining the only two providers of outpatient dialysis services in the Warwick/Cranston area, substantially reduced competition in violation of Section 7 of the Clayton Act. According to the complaint, health plans benefitted from the direct competition between ARA and Fresenius when negotiating benefits for their members, and as a result, the acquisition would lead to higher prices and reduced incentives to improve service. The complaint also stated that the difficulty of locating nephrologists to serve as clinic medical directors made timely entry unlikely. The parties terminated the agreement after the FTC raised antitrust concerns. The order prohibits ARA and Fresenius from entering into any agreement for ten years with any clinic operator to close any clinic or allocate any dialysis services market, territory, or customer. The order also requires ARA to give prior notice to the Commission for ten years if it acquires any dialysis clinics in the Warwick/Cranston area.

**Fresenius AG/Renal Care Group**, C-4159, FTC File No. 051 0154 (final order issued June 30, 2006) (<https://www.ftc.gov/enforcement/cases-proceedings/051-0154/fresenius-ag-matter>). The complaint charged that Fresenius' acquisition of kidney dialysis clinics from Renal Care Group would substantially lessen competition and/or create a monopoly for outpatient kidney dialysis services in 66 geographic markets nationwide. Fresenius and Renal Care Group, the largest and third largest chains of outpatient kidney dialysis clinics in the country, operated over 1600 outpatient kidney dialysis clinics. In the 66 markets where Fresenius and Renal Care Group competed with each other, few competitors provided outpatient kidney dialysis services, and the difficulty of locating nephrologists to serve as clinic medical directors made entry unlikely. According to the complaint, the relevant geographic market is local and limited by factors such as the distance patients are able to travel for treatment. The order requires Fresenius to divest 91 outpatient kidney dialysis clinics and Renal Care Group's joint venture equity interests in 12 clinics to National Renal Institutes. In order to ensure continuity of care, the order requires

Fresenius, among other things, to obtain the agreement of the doctors and lessors of the divested clinics to continue to provide service under the new management. In addition, the order restricts Fresenius from contracting with the medical directors of the divested clinics for three years and prevents Fresenius from offering the employees of the divested clinics incentives to decline NRI's offer of employment. Fresenius is also required to notify the Commission before acquiring or selling any outpatient dialysis clinics in the 66 markets. Fresenius' acquisition was allowed to proceed in the other markets.

**DaVita Inc./Gambro Healthcare**, C-4152, FTC File No. 0510051, 140 F.T.C. 609 (final order issued November 14, 2005) (<https://www.ftc.gov/enforcement/cases-proceedings/0510051/davita-inc>). The complaint charged that DaVita's acquisition of dialysis clinics from Gambro Healthcare would substantially lessen competition for outpatient dialysis services in 35 geographic markets nationwide. DaVita and Gambro were the second and third largest chains of outpatient dialysis clinics in the country, and operated over 1200 outpatient dialysis clinics. In the 35 markets where DaVita and Gambro competed, few competitors provided outpatient dialysis services and the difficulty of locating nephrologists to serve as clinic medical directors made entry unlikely. According to the complaint, the relevant geographic market is local and limited by factors such as the distance patients are able to travel for treatment. The order requires DaVita to divest 69 outpatient dialysis clinics and end two management services contracts. The Commission approved the sale of 68 of the divested clinics to Renal Advantage Inc., and one clinic to the clinic's medical director and partner. The Commission also entered an order to maintain the assets of the divested clinics as competitive and viable entities until their sale and transfer occurs. The order also requires DaVita to notify the Commission before acquiring any outpatient dialysis clinics in the 35 markets for five years from final Commission approval of the order. DaVita's acquisition was allowed to proceed in the other markets.

**Quest Diagnostics Inc./Unilab Corporation**, C-4074, FTC File No. 0210140, 135 F.T.C. 350 (final order issued April 3, 2003) (<https://www.ftc.gov/enforcement/cases-proceedings/0210140/quest-diagnostics-incorporated-unilab-corporation>). The complaint charged that the merger of Unilab, and Quest, two of the largest independent clinical laboratories competing in the market for clinical laboratory testing services in Northern California, would result in prices increases for IPAs, other physician groups, and consumers. Both companies operate patient service centers, full service clinical laboratories and smaller stat (rapid response) laboratories, and together have more than 70% of the clinical laboratory testing services market. According to the complaint, Quest and Unilab compete for contracts to provide laboratory testing services to the patients of physician groups that assume substantial financial risk under capitation arrangements with managed care plans, including providing lab services to their patients enrolled in the health plans. The order requires that the companies divest to Laboratory Corporation of America 46 patient services centers, 5 stat laboratories, all of Quest's and one of Unilab's contracts with physicians groups in Northern California, and related assets, including customer lists, necessary for the provision of clinical laboratory testing services. In addition, the order contains provisions to ensure the success of the divestiture including the provision of transitional services and incentives for employees to accept employment with Laboratory Corporation of America, and the appointment of an interim monitor.



**Federal Trade Commission v. The Hearst Trust, et. al.**, (First Data Bank, Inc./Medi-Span, Inc.), Civil Action No. 1:01CV00734 (D.D.C. filed April 5, 2001); Civil Action No. 1:01CV02119 (D.D.C. filed October 11, 2001) (civil penalty action) (<http://www.ftc.gov/enforcement/cases-proceedings/9910323b/hearst-trust-hearst-corporation-us-ftc>). In a complaint filed in U.S. District Court for the District of Columbia, the Commission charged Hearst and its wholly owned subsidiary, First DataBank, Inc., with illegally acquiring a monopoly in the market for electronic integratable drug information databases, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. According to the complaint, the 1998 acquisition of Medi-Span, Inc., allowed First DataBank to institute substantial price increases to its customers for use of the electronic databases which contain clinical, pricing and other information on prescription and non-prescription drugs. The complaint also charged Hearst with violating Section 7A (a) of the Clayton Act, by illegally withholding certain 4(c) documents about the Medi-Span acquisition that were required for pre-merger notification review under the Hart-Scott-Rodino Act. The complaint asked the Court to order Hearst to create and divest a new competitor to replace Medi-Span, and to disgorge the illegally gained profits from the anticompetitive price increases. On December 14, 2001, the Commission voted to approve a proposed settlement that required Hearst to divest the former Medi-Span to Facts and Comparisons and to pay \$19 million in disgorgement of illegal profits to its customers. Commissioners Leary and Swindle issued dissenting statements concerning the disgorgement portion of the order. The district court approved the final order and stipulated permanent injunction on December 18, 2001. The Commission also asked the Department of Justice to file a separate complaint in U.S. District Court seeking civil penalties for Hearst's failure to comply with pre-merger notification reporting requirements.

In a final judgment filed on October 11, 2001, Hearst agreed to pay \$4 million in civil penalties. On January 9, 2002, the Commission filed a brief as intervenor opposing the private class plaintiffs' petition for an award of \$5 million in attorney fees which represented 22% of the total direct purchaser settlement payment of \$24 million. The Commission argued that private counsels' fees should be reduced to reflect the minimal legal work and limited incremental value that the private attorneys contributed to the settlement after the Commission had reached a tentative settlement with the parties of \$16 million. On May 21, 2002, the district court ruled that the private attorneys were only entitled to a percentage of the settlement attributable to their efforts in the litigation and reduced their award to \$2.4 million.

**Yellowstone Community Health Plan/Blue Cross Blue Shield of Montana**, FTC No. 9910028 (closing letter sent July 14, 1999). This matter involved the merger of Blue Cross Blue Shield of Montana (BCBSMT) and Yellowstone Community Health Plan (Yellowstone), two of the largest health insurers in Montana. The Commission's closing letter stated that although the transaction raised significant antitrust concerns, the Commission closed this investigation in light of conditions placed on the merger by the Montana Insurance Commissioner, in consultation with Commission staff. These conditions included requirements that providers' contracts with the merged entity not prohibit or discourage providers from serving as or contracting with any other health plans, insurers, or HMOs. The conditions also disallowed the sale or transfer of any stock in the joint venture without the written consent of the Commissioner, and required the merged entity to file quarterly reports with the Commissioner.

**Charter Medical Corporation/National Enterprises**, C-3558, 119 F.T.C. 245 (final order issued February 14, 1995) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-119>). The complaint charged that Charter Medical Corporation's (Charter) planned purchase of psychiatric facilities from National Medical Enterprises (NME) would substantially lessen competition for inpatient psychiatric services in four geographic markets, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Charter and NME are the two largest chains of psychiatric hospitals in the country. According to the complaint, Charter and NME are competitors in the Atlanta, Memphis, Orlando, and Richmond markets, where there are few competitors providing inpatient psychiatric services and entry is difficult due to state certificate of need regulations and other factors.

The order requires Charter to exclude the acquisition of NME's psychiatric facilities in Atlanta, Memphis, Orlando, and Richmond from the acquisition agreement. The order also requires Charter to obtain prior Commission approval before acquiring or selling any psychiatric facilities in those markets for ten years from final Commission approval of the order. Charter's acquisition was allowed to proceed in the other markets.

**Healthsouth Rehabilitation Corp./ReLife Inc.**, C3570, 119 F.T.C. 495 (final order issued April 12, 1995) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-119>). The complaint charged that the planned merger of two large rehabilitation hospital systems, HEALTHSOUTH Rehabilitation Corp. (HEALTHSOUTH) and ReLife Inc. (ReLife), would substantially lessen competition for inpatient rehabilitation hospital services in three geographic markets, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. According to the complaint, HEALTHSOUTH and ReLife are competitors in Birmingham, Alabama, Charleston, South Carolina, and Nashville, Tennessee. All three rehabilitation hospital services markets are highly concentrated, and entry is difficult because of state certificate of need regulations.

The order requires HEALTHSOUTH to: 1) divest Nashville Rehabilitation Hospital in Nashville within 12 months; 2) terminate a HEALTHSOUTH management contract to operate a rehabilitation unit at Medical Center East in Birmingham within 90 days; and, 3) terminate a ReLife management contract to operate a rehabilitation unit at Roper Hospital in Charleston by October 1, 1995. HEALTHSOUTH's acquisition was allowed to proceed in the other markets. The order also requires HEALTHSOUTH to obtain FTC approval before it merges any of its rehabilitation hospital facilities with any competing rehabilitation hospital facility in those markets. HEALTHSOUTH also must give the Commission prior notice before carrying out certain joint ventures with competing rehabilitation facilities in the three markets.

**Columbia/HCA-John Randolph**, C-3627, 120 F.T.C. 949 (final order issued November 24, 1995) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-120>). The complaint alleged that Columbia/HCA's acquisition of John Randolph Medical Center in Hopewell, Virginia would increase Columbia/HCA's market share for psychiatric hospital services in the Tri-Cities (Petersburg and its suburbs) area of Virginia from 50 to 70 percent, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. John Randolph Medical Center is a 150-bed general hospital with a 34-bed psychiatric inpatient unit and Columbia owns Poplar Springs Hospital, a psychiatric hospital in Petersburg, Virginia.

There is only one other hospital in the area offering psychiatric hospital services and entry is difficult due to state certificate of need regulations.

Under the order, Columbia may acquire John Randolph Medical Center only if it divests Poplar Springs Hospital within 12 months of the Commission's final approval of the order. The order also requires Columbia/HCA to notify the Commission before combining its psychiatric facility with any other psychiatric facility in the Tri-Cities area for ten years from final Commission approval of the order.

**Columbia/HCA Healthcare Corporation/Medical Care America**, C-3544, 118 F.T.C. 1174 (final order issued December 6, 1994); 126 F.T.C. 181 (1998) (modifying order substituting a prior notice provision for the prior approval requirement) (<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-118>). The complaint charged that the merger of Columbia/HCA Healthcare Corporation and Medical Care America may substantially lessen competition in the market for outpatient surgical services in the Anchorage, Alaska area, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Columbia, a large for-profit hospital chain, and Medical Care America, a large ambulatory surgical center chain, both had facilities in Anchorage. According to the complaint, Columbia operated a hospital in Anchorage which competed with Medical Care America's ambulatory surgical facility in that city, Alaska Surgery Center. The complaint further alleged that the market for outpatient surgical services in Anchorage was highly concentrated, and that entry is difficult. Finally, the complaint alleged that the merger may substantially lessen competition by significantly increasing the already high level of concentration in the market, and enhancing the possibility of collusion or interdependent coordination by the remaining firms in the market.

Under the order, Columbia was required to divest the Alaska Surgery Center within 12 months after the order became final, to a purchaser approved by the FTC. Columbia was also required to hold the Alaska Surgery Center separate from its other operations, and to maintain its marketability and viability as an independent competitor in the market until the divestiture is completed. For a period of ten years, the required Columbia to receive prior Commission approval before either acquiring another outpatient surgical facility in Anchorage, or transferring an outpatient surgical facility to anyone operating another outpatient surgical facility in Anchorage. In addition, for a period of ten years, the acquirer of Alaska Surgery Center must obtain Commission approval before selling the facility in Anchorage.

**Hospital Corporation of America** (See Section III A for citation and annotation.)

#### IV. MERGERS OF MEDICAL DEVICE AND EQUIPMENT MANUFACTURERS

**Abbott Laboratories/St. Jude Medical, Inc.**, C-4600, FTC File No. 1610126 (final order issued February 14, 2017) (<https://www.ftc.gov/enforcement/cases-proceedings/161-0126/abbott-laboratories-st-jude-medical-matter>). The complaint alleged that the proposed acquisition by Abbott of St. Jude would lessen competition and increase the ability of the merged entity to raise prices in the U.S. markets for vascular closure devices and steerable sheaths.

■ Vascular closure devices are used to close arterial holes resulting from vascular catheterization procedures. At the time of the complaint, Abbott and St. Jude were the two largest suppliers of vascular closure devices in the United States, with a combined market share of over 70%. Only two other firms supplied vascular closure devices in the United States.

■ Steerable sheaths are used in electrophysiology procedures to treat complex heart arrhythmias, such as atrial fibrillation. At the time of the complaint, St. Jude was the largest supplier of steerable sheaths in the U.S. market. Abbott had recently entered the market. Other suppliers in the market had low single-digit market shares.

The complaint also charged that the proposed acquisition would eliminate potential competition between Abbott/ACT and St. Jude in the U.S. market for lesion-assessing ablation catheters if Abbott acquired ACT's lesion-assessing ablation catheter assets.

The order requires the parties to divest St. Jude's vascular closure device business and Abbott's steerable sheath business to Terumo Corporation. It also requires Abbott to notify the Commission if it plans to acquire ACT's lesion-assessing ablation catheter assets.

**Valeant Pharmaceuticals, International Inc./Paragon Vision Sciences, Inc and CRT Technology, Inc.** FTC File No. 1510236, 1610028 (final order issued January 25, 2017)

(<https://www.ftc.gov/enforcement/cases-proceedings/151-0236-161-0028/valeant-pharmaceuticals-international-inc>). The complaint alleged that the acquisition by Valeant of Paragon substantially lessened competition in the markets for polymer discs, or "buttons," used to make three different types of rigid gas permeable (GP) contact lenses: 1) orthokeratology contact lenses, which are worn to reshape the cornea; 2) large-diameter scleral contact lenses which cover the white of the eye and are used post-surgery for transplants to treat eye disease; and 3) general vision correction contact lenses. The complaint alleged that prior to the acquisition, Valeant and Paragon were the only FDA approved producers of GP buttons for orthokeratology. As a result of the acquisition, Valeant acquired a monopoly in the market for FDA-approved GP buttons for orthokeratology GP lenses. Prior to the acquisition, Valeant and Paragon were two of four producers of GP scleral buttons. As a result of the acquisition, Valeant accounted for 70-80 percent of the market for FDA-approved GP buttons for large-diameter scleral GP lenses. Prior to the acquisition, Valeant and Paragon were the largest manufacturers of GP buttons for general vision correction. As a result of the acquisition, Valeant accounted for approximately 65-75 percent of the market for FDA-approved GP buttons for general vision correction GP lenses.

After the Paragon acquisition, Valeant also purchased Pelican Products LLC, a manufacturer of contact lens packaging, and the only producer of FDA-approved vials for wet-shipping finished orthokeratology lenses. The complaint further alleged that the acquisition eliminated innovation competition between Valeant and Paragon. Prior to the acquisition, Valeant and Paragon competed on innovation, with the incentive to develop new GP lens buttons and improved button materials by investing in research, development, and adoption.

The order requires Valeant to divest Paragon in its entirety, including the assets of Pelican Products LLC, to Paragon Companies LLC, a newly created entity.

**Federal Trade Commission v. Steris Corporation and Synergy Health PLC**, D-9365, FTC File No. 1510032, No. 1:15 CV 1080 (district court denied FTC motion for preliminary injunction September 24, 2015; Commission dismissed administrative complaint October 30, 2015) (<https://www.ftc.gov/enforcement/cases-proceedings/151-0032/sterissynergy-health-matter>). On May 28, 2015, the Commission issued an administrative complaint alleging that Steris's proposed \$1.9 billion acquisition of Synergy would eliminate likely future competition for contract radiation sterilization services, particularly gamma or x-ray sterilization services, in certain regional markets in the United States. Sterilization is a critical final step in the manufacture of many healthcare products, as it is necessary to eliminate bacteria and other microorganisms living on or within products and is required by the U.S. Food and Drug Administration. At the time of the complaint, Steris and Synergy were the second and third largest sterilization companies in the world. Steris also was the largest and one of only two suppliers of gamma radiation sterilization services in the United States. Synergy operated gamma sterilization facilities outside of the United States and offered other services in the United States. The complaint alleged that the proposed acquisition would eliminate likely future competition between Steris's gamma sterilization facilities and Synergy's planned x-ray sterilization facilities in the United States, thus depriving customers of an alternative sterilization service and additional competition in certain regional markets.

On May 29, 2015, the Commission asked the United States District Court for the Northern District of Ohio to enjoin the transaction pending the conclusion of the administrative litigation. On September 24, 2015, the district court denied the FTC motion for a preliminary injunction. On October 30, 2015, the Commission dismissed the administrative complaint.

**Wright Medical Group, Inc./Tornier N.V.**, C-4559, FTC File No. 1510018 (final order issued November 5, 2015) (<https://www.ftc.gov/enforcement/cases-proceedings/151-0018/wright-medical-group-inctornier-nv>). The complaint alleged that the proposed merger of Wright Medical Group, Inc. and Tornier, N.V. would lessen current competition in the markets for (1) total ankle replacements, used to treat end-stage ankle arthritis; (2) total silastic big toe joint replacements, used to treat an arthritic condition in the first metatarsophalangeal joint of the big toe; and (3) total silastic toe joint replacements for the second through fifth "lesser" toes, used to treat severe arthritis in the lesser metatarsophalangeal joints of the lesser toes. According to the complaint, Wright and Tornier were each other's closest competitor and two of only three significant suppliers of total ankle replacements in the United States. The complaint further alleged that the two companies were the two major suppliers of total silastic big toe joint replacements, with approximately 60% and 38% of the market, respectively. In the market for total silastic lesser toe joint replacements, the complaint alleged that Wright had a market share of approximately 44% and Tornier had a share of approximately 32%. Wright and Tornier were each other's closest competitor. By eliminating competition between the two companies, the complaint charged that the proposed merger would increase the likelihood that: (1) a combined Wright-Tornier would be able to unilaterally exercise market power; (2) research and development would be reduced; and (3) customers would be forced to pay higher prices. The order requires the parties to divest to Integra Lifesciences Corporation all of Tornier's rights and assets related to the following reconstructive joint markets: (1) total ankle replacements; (2) total silastic big toe joint replacements; and (3) total silastic toe joint replacements for the lesser toes.

**Zimmer Holdings, Inc./Biomet, Inc.**, C-4534, FTC File No. 1410144 (final order issued August 11, 2015) (<https://www.ftc.gov/enforcement/cases-proceedings/141-0144/zimmer-holdings-inc-biomet-inc>). The complaint alleged that Zimmer Holdings, Inc.'s proposed acquisition of Biomet, Inc. and its parent company, LVB Acquisition, Inc., would likely reduce competition in the markets for unicondylar knee implants, total elbow implants, and bone cement. According to the complaint, Zimmer and Biomet were two of only three substantial competitors in the U.S. markets for unicondylar knee implants and total elbow implants, and two of only four significant competitors in the U.S. market for bone cement. By eliminating competition between Zimmer and Biomet and reducing the number of competitors for the sale of each product, the complaint charged that the proposed acquisition would likely lead to Zimmer unilaterally exercising market power in each market, resulting in lower levels of quality and service and higher prices for consumers. The order requires the merged company to divest Zimmer's U.S. ZUK unicondylar knee implant rights and assets, and Biomet's U.S. Discovery total elbow implant and Cobalt bone cement rights and assets to approved buyers.

**Medtronic, Inc./Covidien plc**, C-4503, FTC File No. 1410187 (final order issued January 13, 2015) (<https://www.ftc.gov/enforcement/cases-proceedings/141-0187/medtronic-inc-covidien-plc-matter>). The complaint alleged that Medtronic, Inc.'s proposed acquisition of Covidien plc would eliminate future competition between Medtronic and Covidien in the highly concentrated market for developing, manufacturing, and selling drug-coated balloon catheters used to treat peripheral artery disease in the femoropopliteal (fem-pop) artery. The complaint charged that Medtronic and Covidien were the only two prospective suppliers that had advanced clinical-trials for fem-pop drug-coated balloon catheters and were, thus, the only competitors likely to enter the monopoly market. As a result, the complaint concluded that the proposed acquisition would reduce future competition, increase the likelihood one of the companies would forego or delay entry, reduce the likelihood of price competition, and reduce research and development in the market for drug-coated balloon catheters used in fem-pop arteries. The order requires the companies to divest Covidien's drug-coated balloon catheter business to an approved buyer.

**Thermo Fisher Scientific Inc./Life Technologies Corporation**, C-4431, FTC File No. 131 0134 (final order issued January 30, 2014) (<https://www.ftc.gov/enforcement/cases-proceedings/131-0134/thermo-fisher-scientific-inc-matter>). The complaint alleged that Thermo Fisher Scientific Inc.'s proposed acquisition of Life Technologies Corporation would likely lessen competition and increase the likelihood of higher prices in the following three markets by eliminating direct competition between the companies:

- Cell culture media are mixtures of salts, sugars, amino acids, vitamins, ions, and trace elements that are used to support the growth of cells. The complaint alleged that the proposed acquisition would reduce the number of major suppliers of cell culture media from three to two.

- Cell culture sera complement media by providing growth factors and other nutrients necessary for mammalian cells. The complaint charged that the proposed acquisition would substantially increase concentration in the cell culture sera market by combining the two most significant competitors and reducing the number of major suppliers from three to two.

■ The short/small interfering ribonucleic acid (siRNA) reagents are used to study gene function by silencing gene expression and protein synthesis. The companies are two of only four significant competitors. The complaint alleged that the proposed acquisition would substantially increase concentration in the market for siRNA reagents.

The order settling the Commission's charges requires Thermo Fisher to divest its gene modulation business, Dharmacon, which includes the siRNA reagents business, as well as its cell culture media and sera business, HyClone.

**Corning Incorporated/Becton-Dickinson and Company's Discovery Labware Division**, C-4380, FTC File No.1210133 (final order issued December 20, 2012) (<https://www.ftc.gov/enforcement/cases-proceedings/1210133/corning-incorporated>). The complaint alleged that the proposed acquisition by Corning Incorporated of Becton-Dickinson and Company's Discovery Labware Division would violate the FTC Act and Section 7 of the Clayton Act in the U.S. markets for cell culture dishes, cell culture flasks, and tissue culture treated (TCT) cell culture multi-well plates. These products are specially treated to promote cell growth, and they feature surfaces or containers upon which to cultivate cells. They are used by researchers at drug companies, bio-tech firms, and universities in their cell culture work.

Corning, headquartered in New York, is the leading manufacturer of specialty plates, glass, plastics, and ceramics for a variety of applications. Corning's Life Sciences division is a leading producer of plastic lab ware, including cell culture dishes, TCT cell culture multi-well plates, and cell culture flasks. Discovery Labware, Inc. is a division of Becton-Dickinson and is based in Bedford, Massachusetts . Becton-Dickinson is a global medical technology company that supplies plastic lab ware through Discovery Labware, including TCT cell culture multi-well plates, cell culture dishes, and cell culture flasks.

The Commission's complaint alleged that the North American markets for the three markets—TCT cell culture multi-well plates, cell culture dishes and cell culture flasks—were highly concentrated. At the time of the complaint, Corning and Discovery Labware were the leading suppliers in each market. The complaint stated that the proposed acquisition would eliminate the direct competition between Corning and Discovery Labware in the three markets. By purchasing its most significant competitor, Corning could raise prices for these lab ware products.

The order requires Corning to provide assets and assistance to Sigma-Aldrich Co., LLC to manufacture Corning's line of TCT cell culture multi-well plates, cell culture dishes and cell culture flasks in a manner similar to Corning's process. Until Sigma Aldrich develops its own manufacturing capabilities for these products, Corning will supply the products to Sigma Aldrich to be marketed under Sigma Aldrich's own brand, allowing Sigma Aldrich to immediately replace the competition lost as a result of Corning's acquisition of Discovery Labware.

**Johnson & Johnson/Synthes, Inc.**, C-4363, FTC File No. 1110160 (final order issued August 7, 2012) (<https://www.ftc.gov/enforcement/cases-proceedings/1110160/johnson-johnson-synthes-inc>). The complaint charged that Johnson & Johnson's proposed acquisition of Synthes, Inc. would harm competition in the U.S. market for distal radius plating systems, which are internal devices that are surgically implanted on the underside of the wrist to achieve proper alignment of

the radius bone after a fracture. Distal radius fractures occur when a portion of the radius closest to the wrist is broken and typically happen when a person braces for a fall. They are among the most common types of fractures, and they happen most often when an older person falls or when people play sports.

At the time of the complaint, the U.S. market for volar distal radius plating systems was highly concentrated. According to the complaint, Synthes, the leading maker of these plating systems in the U.S. accounted for 42% of all U.S. sales in 2010. Johnson & Johnson acquired its volar distal radius plating system from Hand Innovations in 2006, and the system was one of the first anatomically contoured volar distal radius plating systems on the market. Johnson & Johnson's system accounted for 29% of all system sales in 2010. The proposed acquisition would permit Johnson & Johnson to raise prices unilaterally for the systems by eliminating its only significant competitor.

The order requires Johnson & Johnson to sell its U.S. volar distal radius plating systems to a qualified. Johnson & Johnson selected Biomet to purchase its entire trauma portfolio, including the volar distal radius plating systems. Biomet is a successful orthopedics company with a volar distal radius plating system that is not competitively significant

**Grifols, S.A./Talecris Biotherapeutics Holdings Corp.**, C 4322, FTC File No. 1010153 (final order issued July 20, 2011) (<https://www.ftc.gov/enforcement/cases-proceedings/1010153/grifols-sa-talecris-biotherapeutics-holdings-corp-matter>). The complaint charged that Grifols, S.A.'s proposed acquisition of Talecris Biotherapeutics Holdings Corp. would be anticompetitive because it would eliminate direct competition for products in three blood plasma-derived markets. The Commission approved a final order on July 20, 2011 requiring Grifols to make significant divestitures prior to its acquisition of Talecris. Grifols, headquartered in Barcelona, Spain develops and manufactures human blood plasma-derived products and has facilities in Barcelona and Los Angeles. Talecris is based in Research Triangle Park, North Carolina and also develops, manufactures and sells blood plasma-derived products worldwide. The FTC complaint alleged that Grifols' proposed acquisition of Talecris would lessen competition in the U.S. markets for three blood plasma-derived products: (1) Immune globulin (Ig), which is used to treat, among other things, immune deficiencies and neurological disorders; (2) albumin, which is used to expand blood volume, prime heart valves during cardiac surgery, treat burn victims, and replace proteins in patients suffering from liver failure; and (3) plasma-derived Factor VIII (pdFVIII), which is used to treat bleeding disorders, primarily hemophilia and von Willebrand disease. Each of these products must be approved by the Food and Drug Administration for sale in the United States. The FDA requires that the products be made only from plasma collected in the United States and manufactured at FDA-approved plants.

At the time of the complaint, Grifols and Talecris had approximately 8.4% and 22.8% of the U.S. Ig market, respectively. Their merger would leave only three significant manufacturers with nearly all of the U.S. Ig sales. In the market for albumin, the companies had shares in the U.S. of approximately 13% each, and the acquisition would leave only four significant competitors. Grifols and Talecris had 23% and 3.6% of the U.S. pdFVIII market, and after the merger there would be only three main competitors. According to the FTC, with fewer competitors in the



market, the remaining firms could more easily work together through coordinated interaction to reduce supply and raise price for consumers.

The FTC's order requires Grifols to (1) sell the fractionation facility Talecris currently owns in Melville, New York to Kedrion, S.p.A. (Kedrion), a manufacturer of plasma-derived products in Europe and other markets and a new entrant in the U.S. plasma-derived products industry; (2) sell to Kedrion its plasma collection centers in Mobile, Alabama, and Winston-Salem, North Carolina; (3) sell Talecris' Koate pdFVIII business, including the Koate brand name in the United States, to Kedrion; and (4) manufacture private-label Ig, private label albumin, and Koate for seven years for Kedrion to sell in the United States. The order is designed to expedite Kedrion's entry as an additional competitor into each of the three blood plasma-derived markets by ensuring that Kedrion will have adequate supplies of Ig, albumin and pdFVIII to sell in the United States.

**Agilent Technologies, Inc./Varian, Inc.**, C-4292, FTC File No. 0910135 (final order issued June 25, 2010) (<http://www.ftc.gov/enforcement/cases-proceedings/091-0135/agilent-technologies-inc-matter>). The Commission's complaint challenged the proposed \$1.5 billion proposed acquisition of Varian, Inc., by Agilent Technologies, Inc. Agilent is a global supplier of a wide array of scientific measurement instruments and related products and services, including machines that determine the contents of human tissue samples, and microarrays that are used to analyze gene expression, which are commonly used in cancer research. At the time of the complaint, Varian supplied scientific instruments and chemical analysis technologies to customers worldwide. Those customers included academic researchers, forensics laboratories, food safety and agriculture laboratories, and pharmaceutical companies. The complaint alleged that the proposed acquisition would have anticompetitive effects in three U.S. markets: (1) inductively coupled plasma-mass spectrometry instruments, among others, that are used to analyze inorganic materials, most often in testing water samples; (2) Triple Quadrupole Gas Chromatography-Mass Spectrometry (3Q GC-MS) instruments, which combine a gas chromatograph with a mass spectrometer, and which are used to identify and quantify trace amounts of substances in a wide variety of samples, such as performance enhancing drugs in blood and pesticides in food; and (3) micro gas chromatography instruments that are used to detect the presence of toxins in the air or in emissions. They are used primarily in the oil, mining, and waster disposal industries.

According to the Commission's complaint, the proposed merger would eliminate close competition between the products sold by Agilent and those sold by Varian. The proposed acquisition would reduce the number of providers for the first two products in the United States from four to three, and would create a monopoly in the market for micro gas chromatography instruments. The order requires Agilent to divest the assets of Varian's inductively coupled plasma-mass spectrometry instruments and 3Q GC-MS instruments business to Bruker Corp. and Agilent's micro gas chromatography instruments to Inficon.

**Danaher Corporation/MDS, Inc./MDS Analytical Technologies, Inc.**, C-4283, FTC File No. 0910159 (final order issued March 16, 2010) (<https://www.ftc.gov/enforcement/cases-proceedings/091-0159/danaher-corporation-mds-inc-matter>). The Commission's complaint challenged the proposed \$650 million acquisition of MDS, Inc.'s MDS Analytical Technologies

(US), Inc. (MDS) subsidiary by Danaher Corporation. Danaher and MDS are competitors in the North American market for laser microdissection devices (LMDs). LMDs are used to separate small groups of (or even single) cells from larger tissue samples for specialized tests, such as DNA or RNA analysis or protein profiling. These techniques are particularly useful in the fields of oncology, cell biology, molecular pathology, and forensic medicine, in order to analyze disease progression and develop more targeted treatments. The complaint charged that, while other techniques exist for separating cells or proteins, they cannot reliably and precisely create pure cell samples, and are not substitutes for LMDs. The proposed acquisition would reduce the number of LMD suppliers in the North American market from four to three, and would leave the combined firm with a 50% market share. The complaint charged that entry by other LMD firms was unlikely to be timely or sufficient to counteract the anticompetitive effects of the acquisition, due primarily to technology development, licensing, and marketing hurdles. The consent order requires Danaher to divest the assets of MDS's Arcturus Life Sciences business segment (which includes assets and licenses relating to the manufacture and sale of LMDs and associated reagent products) to Life Technologies Corporation.

**Thoratec Corporation/HeartWare International, Inc.**, D-9339, FTC File No. 0910064 (order dismissing complaint August 11, 2009) (<https://www.ftc.gov/enforcement/cases-proceedings/0910064/thoratec-corporation-heartware-international-inc-matter>). In its complaint, the Commission charged that Thoratec's proposed \$282 million acquisition of HeartWare would eliminate the one company poised to challenge Thoratec's monopoly of the U.S. left ventricular assist device (LVAD) market. LVADs are a life-sustaining technology for treating end-stage heart failure patients. The complaint stated that Thoratec's products were the only LVADs approved for sale in the U.S. by the FDA. HeartWare was developing an innovative new LVAD (called the HVAD) that promised superior reliability with fewer surgical complications. The HVAD was expected to enter the market in late 2011 or early 2012. (The complaint stated that a few other companies were developing LVADs, but that none had HeartWare's potential to challenge Thoratec's monopoly – and none would reach the market prior to HeartWare's HVAD.) The complaint charged that Thoratec was willfully attempting to monopolize and conspiring to maintain its monopoly in the U.S. LVAD market, thereby denying patients the potentially life-saving benefits of competition between Thoratec and HeartWare. According to the complaint, competition would intensify once HeartWare's HVAD received FDA approval, resulting in lower prices and enhanced features for this product. On July 31, 2009, Thoratec and HeartWare announced that they had terminated the merger agreement, and decided not to proceed with the acquisition at that time. The Commission issued an order dismissing the complaint on August 11, 2009.

**Endocare, Inc./Galil Medical, Ltd.**, FTC File No. 0910026 (Endocare announced it had terminated merger agreement with Galil; Chairman, Commissioners issued statements June 9, 2009) (<https://www.ftc.gov/public-statements/2009/06/endocare-inc-and-galil-medical-ltd>). The Commission investigated the proposed merger of two companies that manufacture and sell products used for a therapeutic treatment of prostate and renal cancer. These products consist of consoles and consumables that physicians (primarily urologists) administer to provide "cryotherapy" – a form of therapy that combats cancer by freezing it (in contrast to other therapies, such as radiation therapy or surgery). In June 2009, Endocare announced it had terminated its merger agreement with Galil. The Chairman and two Commissioners issued a joint

statement, and one Commissioner issued a separate statement, concerning Endocare's announcement.

**CSL Limited/Cerberus-Plasma Holdings, LLC**, D-9337, FTC File No. 0812255 (Case No. 09-cv-1000-CKK) (D.D.C. May 29, 2009) (administrative complaint issued May 27, 2009) (<https://www.ftc.gov/enforcement/cases-proceedings/081-0255/csl-limited-corporation-cerberus-plasma-holdings-llc-matter>). The Commission issued an administrative complaint to block CSL Limited's proposed \$3.1 billion acquisition of Talecris Biotherapeutics Holdings Corp. (a wholly owned subsidiary of Cerberus-Plasma Holdings, LLC). The Commission also sought a preliminary injunction in federal court to halt the transaction pending the outcome of the administrative trial. The administrative complaint charged that the proposed acquisition would substantially lessen competition in the U.S. markets for four plasma-derivative protein therapies: Immune globulin (Ig); Albumin; Alpha-1; and Rho-D. The complaint further alleged that the effect would be further tightening of supply relative to demand and steeper price increases – potentially depriving critically ill patients of needed treatments (which can cost more than \$90,000 annually per patient). At the time of the complaint, CSL was the world's second-largest supplier of plasma-derivative protein therapies. CSL owned and operated more than 70 plasma collection facilities in the U.S. and Germany, and three manufacturing facilities in Europe and the U.S. Talecris was the world's third-largest producer of plasma-derivative protein therapies. Like CSL, Talecris owned a number of plasma collection centers, as well as two manufacturing facilities, in the U.S. The complaint stated that the plasma-derivatives products industry had become much more concentrated since 1990 (from 13 firms to five), and had resulted in an oligopolistic industry wherein competition had been greatly curtailed. The complaint charged that the proposed acquisition would have further anticompetitive effects in each of the following markets:

- **Ig and Albumin.** Ig is a widely-prescribed drug, used most commonly to treat primary immunodeficiency diseases and certain neurological conditions. IVIG, the predominant form of Ig, has over 20 FDA-approved indications, and as many as 150 off-label uses. Albumin is used as a blood volume expander and to prime heart valves during surgery. There are no good substitutes for Ig or Albumin. The acquisition would decrease the number of firms in these markets from five to four, and the combined firm would control nearly 50% of the market.

- **Alpha-1.** Alpha-1 is FDA-approved to treat alpha-1 antitrypsin deficiency-related lung disease. There are no good substitutes. The acquisition would reduce the number of competitors in this market from three to two, with the combined CSL/Talecris holding a market share of over 80%, and would eliminate the existing vigorous competition.

- **Rho-D.** Rho-D is used to prevent hemolytic disease in newborns. There are no good substitutes. The acquisition would reduce the number of competitors in this market from three to two, and CSL/Talecris would have a 40% market share.

The complaint also charged that there were significant regulatory, intellectual property, and capital requirements in these markets that make entry or expansion unlikely to occur to a degree sufficient to offset the anticompetitive effects of the proposed acquisition. Following the Commission's filing of its administrative complaint and the preliminary injunction lawsuit, CSL announced that it would not proceed with the proposed acquisition of Talecris.

**Getinge AB/Datascope Corp.**, C-4251, FTC File No. 091 0000 (final order issued March 9, 2009) (<http://www.ftc.gov/enforcement/cases-proceedings/091-0000/getinge-ab-datascope-corp-matter>). The complaint charged that Getinge's proposed acquisition of Datascope would lessen competition in the U.S. market for endoscopic vessel harvesting (EVH) devices, which are used in coronary artery bypass graft (CABG) surgery to remove a vein from the patient's leg or arm for use as a conduit to bypass one or more blocked coronary arteries. According to the complaint, Getinge and Datascope are two of only three companies selling EVH devices in the U.S. The complaint charged that a combined Getinge/Datascope would control approximately 90% of the highly-concentrated EVH device market in the U.S., and result in a duopoly, which likely would lead to increased prices and decreased innovation for those devices. New entry into this market would be difficult because developing, working around or acquiring licenses to critical intellectual property, obtaining FDA approval, and marketing the devices would take significantly more than two years. The consent order settling the charges requires Datascope to divest its EVH product line to Sorin Group USA, Inc.

**Inverness Medical Innovations, Inc.** (See Section II A for citation and annotation.)

**Fresenius Medical Care/Daiichi Sankyo**, C-4236, FTC File No. 0810146 (final order issued October 20, 2008) (<https://www.ftc.gov/enforcement/cases-proceedings/081-0146/fresenius-medical-care-ag-co-kgaa-et-al-matter>). The complaint alleged that Fresenius' acquisition of an exclusive sublicense to manufacture and supply the intravenous iron drug Venofer to dialysis clinics would allow Fresenius, the largest provider of dialysis services and products, to increase Medicare reimbursement payments for Venofer. Venofer is used to treat iron deficiency anemia in patients undergoing chronic hemodialysis and is reimbursed by Medicare under the Medicare Part B end-stage renal disease program based on the manufacturer's average sales price (ASP) plus 6%. Drug manufacturers are required to submit their ASP to the Center for Medicare & Medicaid Services (CMS) each calendar quarter and that information is used to calculate the CMS reimbursement rate. According to the complaint, the acquisition would give Fresenius the ability and incentive to report higher prices for Venofer used in its own clinics to CMS thereby increasing Fresenius' ASP. Under the order, Fresenius will be restricted from reporting an intra-company transfer price higher than the level set in the order, which is derived from current market prices. In addition, the order provides that if a generic Venofer product receives final approval by the FDA, Fresenius will be required to report its intra-company transfer price at the lowest of either the level set forth in the order or the lowest price at which Fresenius sells Venofer to any customer until December 31, 2011. On January 1, 2012, CMS will implement a new reimbursement methodology based on a new bundled pricing system, which will eliminate the concerns raised by the transaction.

**Kyphon Inc./Disc-O-Tech Medical Technologies LTD.**, C-4201, FTC File No. 071 0101 (final order issued December 3, 2007) (<https://www.ftc.gov/enforcement/cases-proceedings/071-0101/kyphon-inc-disc-o-tech-medical-technologies-ltd-et-al-matter>). The complaint charged that Kyphon's acquisition of Disc-O-Tech would harm competition and allow Kyphon to unilaterally raise prices in the market for minimally invasive vertebral compression fracture treatment products used in the treatment of vertebral compression fractures. Disc-O-Tech's Confidence system competed directly with Kyphon's kyphoplasty product. Disc-O-Tech introduced its Confidence system in 2006, and was expected to make significant inroads into Kyphon's near-

monopoly position. According to the complaint, Kyphon appeared to have undertaken the acquisition with the specific intent of precluding other major spine companies from acquiring the Confidence system and marketing it against Kyphon. The order requires Kyphon to divest all assets related to the Confidence system, rights to certain of Disc-O-Tech's development efforts related to the system and any other additional assets not included in the divestiture that would allow the acquirer to immediately enter the market for minimally invasive vertebral compression fracture treatment as a viable competitor. In addition, the order contains provisions to ensure the success of the divestiture including the provision of transitional services, and maintaining the viability of the assets to be divested until they have been transferred to a Commission-approved buyer. The order also bars Kyphon from suing the buyer for infringing on any intellectual property rights acquired from Disc-O-Tech.

**Hologic, Inc./Fischer Imaging Corporation**, C-4165 FTC File No. 0510263 (final order issued August 9, 2006) (<https://www.ftc.gov/enforcement/cases-proceedings/0510263/hologic-inc-matter>). The complaint alleged that the acquisition of Fischer Imaging Corporation's breast cancer screening and diagnosis business would eliminate Hologic's only significant competitor for the sale of prone stereotactic breast biopsy systems. The complaint argued that there was little chance for new entry by other competitors because of the strength and breath of Hologic's patent holdings, and research, development, and regulatory barriers. The consent order requires Hologic to divest to Siemens all of the prone stereotactic breast biopsy related assets it acquired from Fischer.

**Boston Scientific/Guidant Corporation**, C-4164, FTC File No. 0610046 (final order issued July 21, 2006) (<https://www.ftc.gov/enforcement/cases-proceedings/0610046/boston-scientific-corporation-guidant-corporation-matter>). The complaint charged that competition or potential competition would be harmed in four medical device markets if Boston Scientific acquired Guidant. The four markets are drug eluting stents, PTCA balloon catheters, coronary guidewires and implantable cardioverter defibrillators. Drug eluting stents are used to treat patients with coronary artery disease by propping open clogged arteries and eluting a drug that helps prevent the arteries from renarrowing. According to the complaint, the merger would remove one of two potential competitors with the ability to offer a drug eluting stent with the RX delivery system. PTCA balloon catheters are long thin flexible tubes with a small inflatable balloon at its tip used in interventional cardiology procedures. A coronary guidewire is an extremely thin wire with a flexible tip which is used to deliver the PTCA balloon catheter to a lesion site. The complaint alleged that the merger would eliminate competition between Boston Scientific and Guidant and reduce the number of significant competitors in both the PTCA balloon catheter and coronary guidewire markets. The consent order requires Boston Scientific to divest Guidant's vascular business, which includes its drug eluting stent development program, and its PTCA balloon catheter and coronary guidewire products to Abbott.

Implantable cardioverter defibrillators are small electronic devices implanted to prevent sudden death from cardiac arrest due to abnormal heart rhythms, and to restore normal heart rhythms. Medtronic, Guidant, and St. Jude Medical accounted for more than 98% of U.S. sales of implantable cardioverter defibrillators in the U.S. Boston Scientific, however, had an option to purchase Cameron, a potential entrant into the market. The option gave Boston Scientific rights to certain nonpublic information about Cameron's ICD product, and control over certain

Cameron activities. The consent order imposes limits on Boston Scientific's access to Cameron's information, its ability to exercise control over Cameron, and contains provisions governing its equity investment in Cameron. The consent order also requires Abbott to relinquish voting rights to the small equity position it owns in Boston Scientific, and to divest that equity position within 30 months.

**Johnson & Johnson/Guidant Corporation**, C-4154, FTC File No. 0510050, 140 F.T.C. 1062 (final order issued December 21, 2005); Order Reopening and Setting Aside Order issued May 25, 2006 (<https://www.ftc.gov/enforcement/cases-proceedings/051-0050/johnson-johnson-matter>). The complaint alleged that Johnson & Johnson's acquisition of Guidant would lessen direct or potential competition between the two companies in three highly concentrated markets for drug eluting stents, endoscopic vessel harvesting devices, and proximal anastomotic assist devices. After a consent order was issued by the Commission and before Johnson & Johnson completed its acquisition of Guidant, Boston Scientific made a competing bid for Guidant, and Guidant agreed to be acquired by Boston Scientific (see Boston Scientific/Guidant above). On January 25, 2006, Guidant terminated its agreement with Johnson & Johnson. On May 25, 2006, the Commission reopened and set aside the order.

**Cytc Corp./Digene Corp.**, FTC File No.0210098 (preliminary injunction authorized June 24, 2002) (<https://www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytc-corps-acquisition-digene-corp>). The Commission authorized staff to seek a preliminary injunction that would block the proposed merger of two corporations that manufacture and sell tests used in screening for cervical cancer. Cytoc's product accounted for 93% of the US market for liquid-based Pap tests used in primary screening for cervical cancer. Only one other company, Tripath Imaging, marketed an FDA-approved liquid-based Pap test, and a few other companies may have entered the market in the future. Digene was the only FDA approved supplier of a DNA-based test for the human papillomavirus (HPV) which is thought to be the cause of cervical cancer. Digene's HPV test was used as a back-up test for equivocal Pap tests but was likely to become a primary screening test, first in conjunction with a liquid Pap test, and then as a stand-alone test. Cytoc was the only company that had FDA approval to market the use of the HPV test from its liquid Pap test samples. If filed in court, the Commission's complaint would have alleged that as a result of the acquisition, Cytoc would be in a position to eliminate Tripath as a competitor by limiting access to Digene's HPV test, and to prevent the entry of other companies that had plans to sell liquid Pap tests in the future. The Commission also cited concerns that the acquisition would eliminate future competition between Cytoc's liquid Pap test and Digene's HPV test as a primary screening test. Within a week after the Commission's decision to challenge the transaction, Digene terminated its acquisition agreement with Cytoc.

**Tyco International, Ltd./Mallinckrodt, Inc.**, C-3985, FTC File No. 0010208 (final order issued December 1, 2000) (<http://www.ftc.gov/enforcement/cases-proceedings/0010208/tyco-international-ltd-matter>). The complaint alleged that the acquisition of Mallinckrodt by Tyco would lessen competition in the U.S. market for endotracheal tubes, the principle means by which anesthesia and oxygen are administered to patients in operating and emergency rooms. The merger would have provided Tyco with over 86% of the market. According to the complaint, new entry into the endotracheal tube market was unlikely because it requires the development of a full line of products in a number of sizes and configurations, procurement of

manufacturing equipment, establishment of production practices in conformity with FDA regulations, and the development of a track record and customer base. The consent order required the divestiture of Tyco's endotracheal tube business to Hudson RCI.

**Medtronic Inc./Avecor Cardiovascular, Inc.**, C-3879, FTC File No. 9810329, 127 F.T.C. 842 (final order issued June 3, 1999) (<https://www.ftc.gov/enforcement/cases-proceedings/9810329/medtronic-inc>). The complaint charged that the merger of Medtronic and Avecor would lessen competition for the research, development, manufacture and sale of non-occlusive arterial pumps in the U.S. Non-occlusive arterial pumps are perfusion devices used to circulate the blood in heart/lung machines during cardiac surgery. Avecor had recently introduced its technologically advanced non-occlusive arterial pump to compete against Medtronic's Bio-Pump, the market leader. According to the complaint, the two companies competed directly with each other in a highly concentrated market. The consent order requires Medtronic to divest Avecor's non-occlusive arterial pump assets to Baxter Healthcare Corp.

**SNIA S.p.a./COBE Cardiovascular Inc.**, C-3889, FTC File No. 9910095, 128 F.T.C.168 (final order issued July 28, 1999) (<https://www.ftc.gov/enforcement/cases-proceedings/9910095/sniaspa-matter>). The complaint alleged that SNIA's acquisition of COBE from Gambro AB would substantially lessen competition in the market for research, development, manufacturer and sale of heart-lung machines. SNIA and COBE were the largest and third largest manufacturers of heart-lung machines in the U.S. The complaint also alleged that new entry was unlikely because of the time required to design and develop a new machine, gain customer acceptance, obtain FDA approval and develop a national sales and service network. The consent order requires SNIA to divest COBE's heart-lung machine business to Baxter Healthcare Corporation.

**Medtronic Inc./Physio-Control International Corp.**, C-3842, 9810324, 126 F.T.C. 865 (December 21, 1998) (<https://www.ftc.gov/enforcement/cases-proceedings/9810324/medtronic-inc-matter>). The complaint charged that Medtronic's acquisition of Physio-Control's automated external defibrillator business would lessen competition, reduce innovation and increase prices in the market for automated external defibrillators. Automated external defibrillators are portable automated devices used by emergency personnel to treat persons suffering from sudden cardiac arrest. Although Medtronic did not manufacture automated external defibrillators, it had an ownership interest, including the right to name a member to the company's board of directors and receive certain non-public competitively sensitive information, in SurVivaLink Corp., one of Physio-Control's direct competitors. The consent order prohibited Medtronic from exercising its right to name a member to SurVivalink's Board of Directors, participating in any business decisions, proposing any corporate action, and receiving any competitively sensitive information.

**Mediq Inc./Universal Hospital Services**, FTC File No. 9610066, Civ. No. 97-1916 (D.D.C.) (preliminary injunction filed August 22, 1997) (<https://www.ftc.gov/news-events/press-releases/1997/09/mediq-informs-ftc-it-will-abandon-merger-uhs-face-challenge>). On August 22, 1997, the Commission filed for a preliminary injunction to block the acquisition of Universal Hospital Services by Mediq Inc. The complaint alleged that the merger of the two largest national firms that rent movable medical equipment to hospitals would give Mediq a monopoly in the market for national customers, and a dominant share of the rental markets in many metropolitan areas. Hospitals rent movable medical equipment, including respiratory, infusion,

and monitoring devices, during periods of peak need. According to the complaint, hospitals enter into long-term contracts in which they agree to use a supplier for a large percentage of their rental needs in return for relatively low prices. The complaint argued that it would take a new entrant too long to compete effectively with the merged firm. A month after the Commission challenged the transaction in court, the parties abandoned the transaction.

**Wesley-Jessen Corporation/Pilkington Barnes Hind International, Inc.**, C-3700, FTC File No. 9610060, 123 F.T.C. 1 (final order issued January 3, 1997)

(<https://www.ftc.gov/enforcement/cases-proceedings/9610060/wesley-jessen-corporation-matter>). The complaint alleged that the acquisition by Wesley-Jessen of Pilkington would create a near monopoly in the market for the manufacturer and sale of opaque contact lenses. Opaque contact lenses are corrective or solely-cosmetic lenses that change the appearance of the wearer's eye color. According to the complaint, the merged firm would control 90% of the U.S. market, and was unlikely to face new competition because of broad patents for the design and manufacture of opaque lenses held by the parties. The complaint also alleged that prices for opaque contact lens had dropped substantially when Pilkington introduced its Natural Touch line in 1992, and the result of the merger would be higher consumer prices and reduced innovation and quality. The consent order required Wesley-Jessen to divest the opaque contact lens business of Pilkington to a Commission-approved buyer, and required the acquirer to obtain the necessary FDA approvals and begin producing its own lenses within 18 months of Commission approval of the settlement.

**Fresenius AG and Fresenius USA, Inc./National Medical Care**, C-3689, FTC File No. 9610053, 122 F.T.C. 310 (final order issued October 15, 1996)

(<http://www.ftc.gov/enforcement/cases-proceedings/9610053/fresenius-ag-fresenius-usa-inc-matter>). The complaint alleged that the acquisition of National Medical Care by Fresenius would lessen competition in the U.S. market for the manufacture and sale of hemodialysis concentrate, a bicarbonate solution used in hemodialysis treatment. Fresenius was one of the world's leading producers of kidney dialysis equipment, and National Medical Care was the largest dialysis services company in the U.S. Fresenius and National Medical Care competed directly with each other and controlled approximately 50% of the market for the hemodialysis concentrate. The consent order requires Fresenius to divest its Lewisberry, Pennsylvania hemodialysis concentrate manufacturing facility to Di-Chem, and to maintain the marketability, viability, and competitiveness of the Lewisberry plant.

**Johnson & Johnson/Cordis Corp.**, 121 F.T.C. 149 (1996) (consent order)

(<https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes/volume-121>). The complaint alleged that Johnson & Johnson's acquisition of Cordis Corp. would reduce competition and innovation in the market for neurological shunts used to treat hydrocephalus, a brain disorder that primarily afflicts young children. According to the complaint, the combined companies would control 85% of the U.S. market. The complaint also alleged that entry by a new competitor was unlikely because of the difficulty of developing new designs, establishing manufacturing facilities, organizing a sales force and obtaining FDA approval. The consent order required the divestiture of Cordis' Neuroscience Business to a Commission-approved buyer within 12 months, and required that the viability and competitiveness of the Cordis assets be maintained until the divestiture was complete.



## V. STATE ACTION DEFENSES

**Federal Trade Commission v. Phoebe Putney Health System, Inc.** (See Section III A for citation and annotation.)

**The North Carolina State Board of Dental Examiners v. Federal Trade Commission** (See Section II D 1 for citation and annotation.)

**South Carolina State Board of Dentistry** (See Section II D 1 for citation and annotation.)

**Surgical Care Center of Hammond v. Hospital Service Dist. No. 1 of Tangipahoa Parish** (See Section VII for citation and annotation of *amicus* brief).

**Bolt v. Halifax Hospital Medical Center** (See Section VII for citation and annotation of *amicus* brief).

**Massachusetts Board of Registration in Optometry** (See Section II D 1 for citation and annotation.)

**Patrick v. Burget** (See Section VII for citation and annotation of *amicus* brief).

**Lombardo v. Our Lady of Mercy Hospital** (See Section VII for citation and annotation of *amicus* brief).

**North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc.** (See Section VII for citation and annotation of *amicus* brief).

## VI. INDUSTRY GUIDANCE STATEMENTS INVOLVING HEALTH CARE SERVICES AND PRODUCTS

### A. 1996 Statement of Antitrust Enforcement Policy in Health Care

On September 15, 1993, the Federal Trade Commission and the Department of Justice jointly issued six policy statements containing “safety zones” for provider conduct that the agencies generally would not challenge under the antitrust laws. These statements reflected prosecutorial standards based on the agencies’ previous advisory opinions, case law, and experience with respect to the covered activities. The policy statements were updated and expanded on September 27, 1994, when the agencies issued nine statements of enforcement policy and analytical principles. Seven of the statements contained safety zones, and two statements described the agencies’ analytical process for analyzing certain health care activities. On August 28, 1996, in response to changes in the health care market, the agencies issued revisions to statements eight and nine concerning physician network joint ventures and multiprovider networks.<sup>6</sup>

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<sup>6</sup> *Statements of Antitrust Enforcement Policy in Health Care*, issued on August 28, 1996, 4 Trade Reg. Rep. (CCH) ¶13,153; *Statements of Enforcement Policy and Analytical Principles Relating*

1. Mergers. Except in extraordinary circumstances, the Commission will not challenge mergers of general hospitals where one hospital has fewer than 100 beds, fewer than 40 patients a day, and is more than five years old.

2. High Tech Joint Ventures. Except in extraordinary circumstances, the Commission will not challenge joint ventures among hospitals to purchase, operate and market high-technology or other expensive medical equipment, that involve only the number of hospitals necessary to support the equipment. If more than the minimum number of hospitals are included in the venture, but the additional hospitals could not support the equipment on their own or through a competing joint venture, the agencies will not challenge the venture. Neither the FTC nor the Justice Department has challenged an integrated joint venture to provide such services.

3. Joint Ventures Involving Specialized Clinical or other Expensive Health Care Services. The statement explains how the agencies will analyze hospital joint ventures to provide specialized clinical or other expensive health care services. Under a “rule-of-reason” analysis, the agencies define the relevant market, weigh any anticompetitive effects against any procompetitive efficiencies generated by the venture, and examine whether collateral restraints, if any, are necessary to achieve the efficiencies sought by the venture. The statement does not include a safety zone for such ventures, because the agencies believe that they must acquire more expertise in evaluating the cost of, demand for, and potential benefits from such joint ventures before they can articulate a meaningful safety zone. Neither the FTC nor the Justice Department has challenged an integrated joint venture to provide such services.

4. Information Sharing. Except in extraordinary circumstances, the Commission will not challenge the collective provision by health care providers of medical information to help purchasers of their services resolve issues about the mode, quality or efficiency of medical treatment. Thus, the FTC would not object to a medical society collecting outcome data from its members about a particular procedure, and then providing that information to purchasers. Nor would the FTC challenge the development of suggested standards for clinical patient care by physicians. This safety zone does not protect provider conduct to coerce compliance with recommendations, and does not cover the collective provision of fee-related information to purchasers.

5. Information Collection. Except in extraordinary circumstances, the Commission will not challenge health care providers’ collective provision of current or historical, but not prospective, fee-related information to health care purchasers, as long as the activity meets conditions designed to ensure that providers cannot share the information among themselves to coordinate prices or engage in other conduct that harms consumers. A third party must manage

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*to Health Care and Antitrust*, issued on September 27, 1994, 4 Trade Reg. Rep. (CCH) ¶13,152; and *Department of Justice and Federal Trade Commission Antitrust Enforcement Policy Statements in the Health Care Area*, issued on September 15, 1993, 4 Trade Reg. Rep. (CCH) ¶13,151. The 1996 Policy Statements are available on the FTC’s website at [https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements\\_of\\_antitrust\\_enforcement\\_policy\\_in\\_health\\_care\\_august\\_1996.pdf](https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf).

the collection of the information. Any information that is shared among the providers generally must be more than three months old and it must be based on information from at least five providers; no one provider's data can represent more than 25% of the statistic; and the data must be aggregated so recipients cannot identify the prices charged by an individual provider. The policy statement goes on to caution that such collective provision of fee-related information by competing providers may not involve joint negotiation of, or agreement on, price or other competitively-sensitive terms by the health care providers, or involve any coercive collective conduct.

6. Price Surveys. Except in extraordinary circumstances, the Commission will not challenge participation by competing providers in surveys of prices for hospital services, or salaries, wages, or benefits of hospital personnel, under certain conditions designed to ensure the data is not used to coordinate prices or costs. To satisfy these conditions, the survey must be managed by a legitimate third-party; the data provided by hospitals must be more than three months old; and at least five hospitals must report the data on which each statistic is based. No one hospital's data can represent more than 25% of the statistic, and the survey results must be sufficiently aggregated to make it impossible to determine the prices or compensation for any particular hospital.

7. Purchasing Arrangements. Except in extraordinary circumstances, the Commission will not challenge joint purchasing arrangements among health care providers, as long as they meet conditions designed to ensure they do not become vehicles for monopsonistic purchasing or for price fixing. To fall within this safety zone, the purchases made by the health care providers must account for less than 35% of the total market for the purchased items; and for joint purchasing arrangements including direct competitors, the cost of the purchased items must account for less than 35% of the total market for the purchased items, and the cost of the purchased items must account for less than 20% of the total revenues of each purchaser.

8. Physician Network Joint Ventures. The revised statement on physician network joint ventures provides an expanded discussion of the antitrust principles that apply to such ventures. The statement explains that where physicians' integration through the network is likely to produce significant efficiencies, any agreements on price reasonably necessary to accomplish the venture's procompetitive benefits will be analyzed under the rule of reason. The revisions focus on the analysis of networks that fall outside the safety zones, particularly those networks that do not involve the sharing of substantial financial risk by their physician participants. The safety zones for physician network joint ventures (exclusive physician network joint ventures comprised of no more than 20% of the physicians in any specialty in a geographic market who have active hospital staff privileges and who share substantial financial risk; non-exclusive physician network joint ventures comprised of no more than 30% of the physicians in each specialty in a geographic market who have active staff privileges and who share substantial financial risk) remain unchanged, but the revised statement identifies additional types of financial risk-sharing arrangements that can qualify a network for the safety zones. The statement adds three hypothetical examples to show how the agencies will apply the antitrust laws to specific situations.

9. Multiprovider Networks. Multiprovider networks are ventures among providers to jointly market their services to health benefits plans and others. Because multiprovider networks involve a large variety of structures and relationships among many different types of health care providers, the agencies are unable to set out a safety zone. The 1996 statement explains that multiprovider networks will be evaluated under the rule of reason, and will not be viewed as *per se* illegal if the providers' integration through the network is likely to produce significant efficiencies that benefit consumers, and if any price agreements by the networks are reasonably necessary to realize those efficiencies. The revised statement gives examples of arrangements through which financial risk can be shared among competitors in a multiprovider network, but does not foreclose other possibilities. Many of the revisions to this statement reflect changes made to the revised statement on physician network joint ventures. The statement also sets forth four hypothetical examples of how the agencies will apply the antitrust laws to specific situations involving multiprovider networks.

#### **B. 2011 Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations**

On October 20, 2011, the Federal Trade Commission and the Department of Justice issued a final version of the Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program. (<http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/pdf/2011-27944.pdf>). The Shared Savings Program promotes the formation and operation of Accountable Care Organizations (ACOs) to serve Medicare fee-for-service beneficiaries. An ACO is a group of health care providers that seek to improve quality and reduce the cost of health care by, among other things, becoming accountable for a patient population through integrated health care delivery systems. The Policy Statement is intended to ensure that health care providers have the antitrust clarity and guidance needed to form procompetitive ACOs that participate in both the Medicare and commercial markets. It applies to all provider collaborations that are eligible and intend, or have been approved, to participate in the Medicare Shared Savings Program.

The agencies will not challenge as *per se* illegal an ACO that participates in the Shared Savings Program and jointly negotiates with private insurers to serve patients in commercial markets if the ACO meets certain conditions. The ACO must comply with CMS' eligibility criteria and use the same governance and leadership structures and clinical and administrative processes to serve patients in both Medicare and commercial markets. ACOs meeting these criteria will be subject to a "rule of reason" analysis by the agencies in analyzing their joint pricing activities.

The Policy Statement also provides for an antitrust "safety zone" for certain ACOs. Barring extraordinary circumstances the agencies will not challenge ACOs that fall within the safety zone. With some exceptions, eligibility for the safety zone is based on the combined Primary Service Area (PSA) shares of ACO participants that provide a common service (*e.g.*, the same physician specialty or the same inpatient service) to patients from the same PSA. To fall within the safety zone, an ACO's independent participants that provide a common service must have a combined share of 30% or less of each common service in each participant's PSA, where two or more participants provide that service to patients in that PSA. The Policy Statement emphasizes that certain ACOs that fall outside of the safety zone may be perfectly lawful.

The Policy Statement contains examples of conduct that, under certain circumstances, may raise anticompetitive concerns. All ACOs should refrain from, and implement safeguards against, conduct that may facilitate collusion among ACO participants in the sale of competing services outside of the ACO. In addition, for ACOs that may have market power, the Policy Statement identifies four types of conduct that, depending on the circumstances, may prevent private insurers from obtaining lower prices and better quality services for their enrollees. They are (1) discouraging private payers from incentivizing patients to choose certain providers through provisions such as “anti-steering”, “anti-tiering” or “most-favored-nation”; (2) tying sales of the ACO’s services to the private payer’s purchase of other services from providers outside the ACO; (3) contracting on an exclusive basis with ACO physicians, hospitals, ambulatory surgery centers or other providers, thereby preventing or discouraging these providers from contracting with private payers outside the ACO; and (4) restricting a private payer’s ability to make available to its health plan enrollees cost, quality, efficiency and performance information to help enrollees evaluate and select providers in the health plan if that information is similar to the cost, quality, efficiency and performance measures used in the Shared Savings Program.

The agencies will offer voluntary expedited 90-day reviews for newly-formed ACOs that are seeking additional antitrust guidance. The Policy Statement contains detailed instructions for any newly-formed ACO that wishes to take advantage of the voluntary expedited antitrust review process. The agencies also provide additional information in *Frequently Asked Questions About Voluntary Expedited Review Under the Statement of Antitrust Enforcement Policy Regarding ACOs Participating in the Medicare Shared Savings Program* at <https://www.ftc.gov/system/files/attachments/press-releases/federal-trade-commission-department-justice-issue-final-statement-antitrust-policy-enforcement/111020acofaq.pdf>.

### **C. Advisory Opinions**

Under the statements, the Commission has committed to responding within 90 days to requests for advice from health care plans or providers about matters addressed by the “safety zones” or the non-merger policy statements; and within 120 days to requests for advice regarding multiprovider networks and other non-merger health care matters. The response period will commence once all necessary information has been received by the Commission. Information regarding advisory opinions is set forth in *the Topic And Yearly Indices of Health Care Advisory Opinions By Commission And By Staff*. The index and the text of the advisory opinions are available at the FTC’s website at <https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care>.

### **D. Other Guidance Involving Health Care Services and Products**

#### **1. 2004 Report: Improving Health Care: A Dose of Competition**

In July 2004, the Federal Trade Commission and Department of Justice issued a joint report to inform consumers, businesses, and policy-makers on a range of issues affecting the cost, quality, and accessibility of health care. (<https://www.ftc.gov/reports/improving-health-care-dose-competition-report-federal-trade-commission-department-justice>). The report is based

on 27 days of FTC/DOJ Joint Hearings on Health Care and Competition Law and Policy, held from February through October 2003; an FTC-sponsored workshop in September 2002; and independent research. The report addresses two basic questions. First, what is the current role of competition in health care, and how can it be enhanced to increase consumer welfare? Second, how has, and how should, antitrust enforcement work to protect existing and potential competition in health care? The report provides significant recommendations and observations on a variety of topics. With respect to pharmaceuticals, it addresses the impact of competition law and policy on cost, innovation, and access to pharmaceutical products, as well as the role of pharmaceutical benefit managers and direct to consumer advertising.

## 2. 1981 Commission Policy Statement

**Federal Trade Commission, Enforcement Policy with Respect to Physician Agreements to Control Medical Prepayment Plans**, 46 Fed. Reg. 48,982 (1981). The Commission Statement sets forth enforcement policies in connection with physician control of prepayment plans. Under the Commission’s policy, physicians’ control of a prepayment plan will raise antitrust concerns when formation or operation of the plan eliminates potential competition or reduces competition among physicians or competing plans – for example, where a plan with significant market power artificially inflates fees, unreasonably excludes certain types of providers from coverage, or prevents the formation of competing plans.

## VII. AMICUS BRIEFS INVOLVING HEALTH CARE SERVICES AND PRODUCTS

**Teladoc, Incorporated, et al. v. Texas Medical Board et al., Brief for the United States and the Federal Trade Commission as Amici Curiae**, No. 16-50017 (5<sup>th</sup> Cir. 2016)

(<https://www.ftc.gov/news-events/press-releases/2016/09/amicus-brief-filed-ftc-doj-urges-appeals-court-dismiss-appeal>). Teladoc is a provider of telehealth services. Its physicians provide treatment and prescribe medications to patients based on their medical records and information obtained from telephone and video-conference consultations with the patients. The Texas Medical Board adopted a rule in 2010 restricting video consultation and another rule in 2015 requiring a face-to-face contact between patients and physicians before physicians can issue prescriptions by telephone. Teladoc, arguing that the rules significantly restricted competition from telehealth services, successfully obtained a preliminary injunction barring the board from enforcing the rules. The board moved to dismiss Teladoc’s claims, contending that the state action doctrine barred the antitrust claim. In an order filed December 14, 2015, the court denied the board’s motion, ruling that the state action doctrine did not apply because the requirement of “active supervision” was not met. On January 8, 2016, the board appealed, contending that the denial of its motion was immediately appealable as a final judgment under the collateral order doctrine.

The Department of Justice and the Federal Trade Commission filed an amicus brief on September 9, 2016 arguing that the court should dismiss the appeal for lack of jurisdiction and that even if the court found jurisdiction, it should reject application of the state action doctrine. Specifically, the brief argued that, as there was no final judgment resolving the underlying litigation, an order denying a motion to dismiss an antitrust claim under the state action was not immediately appealable under the collateral order doctrine. Further, even if the court did find jurisdiction, it should hold that the state action doctrine did not shield the board’s rules from

federal antitrust scrutiny because the board did not carry its burden to show active supervision. The brief argued that there was no evidence that any disinterested state official reviewed the board rules at issue to determine whether they promoted state regulatory policy rather than the board members' private interests in excluding Teladoc from the Texas market.

**Surgical Care Center of Hammond v. Hospital Service Dist. No. 1 of Tangipahoa Parish, Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Suggestion of Rehearing En Banc, Supplemental En Banc Brief for the United States and the Federal Trade Commission as Amici Curiae urging reversal in support of Appellant**, 153 F.3d 220 (5<sup>th</sup> Cir. 1998); reh'g granted en banc, 162 F.3d 294 (5<sup>th</sup> Cir. 1998); rev'd and remanded, 171 F.3d 231 (5<sup>th</sup> Cir. 1999), cert denied, 120 S. Ct. 398 (1999). An outpatient surgical center sued a Louisiana hospital service district alleging anticompetitive activity in violation of Section 2 of the Sherman Act that included signing exclusive contracts with five managed care plans. The district court and a panel of the Fifth Circuit concluded that the hospital district, as a state political subdivision, was entitled to state action immunity because the conduct was a foreseeable result of the state statutory scheme which authorizes hospital districts and specifies their powers and duties. The Department of Justice and Commission filed an amicus brief in support of a rehearing *en banc*, and later a supplemental amicus brief on the merits in support of reversal, arguing that state action immunity protects state subdivisions only when there is a clearly articulated state policy to displace competition. The briefs also argued that the panel's ruling held conduct immune from the Sherman Act and gave the hospital district, in the absence of a state policy to displace competition, special license to violate the antitrust laws.

**Ertag v. Naples Community Hospital, Brief for the United States and the Federal Trade Commission as Amicus Curiae**, No. 92-341-CIV-FTM-25D, slip op. (M.D. Fla., July 31, 1995); No. 95-3134 (11<sup>th</sup> Cir.). In a case where neurologists alleged that a hospital violated the federal antitrust laws by restricting the official interpretation of MRI scans to radiologists, the district court granted summary judgment for the defendant hospital on the ground that the complaining neurologists lacked standing under Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11<sup>th</sup> Cir. 1991), because they could not show antitrust injury nor were they efficient enforcers of antitrust law. The Commission and the Justice Department filed an amicus brief arguing that Todorov did not establish a general rule barring suits by excluded competitors. The brief also argued that a general rule denying standing to excluded competitors whenever there is a possibility consumers or the government could sue is inconsistent with Supreme Court precedent.

**Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic, Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing**, 65 F.3d 1406 (7<sup>th</sup> Cir. 1995), cert. denied, 116 S. Ct. 1288 (1996). A health insurer filed an antitrust suit against a clinic, claiming that the clinic had monopolized the market for HMOs and engaged in various anticompetitive agreements. The Commission and Justice Department filed an amicus brief in support of a petition for rehearing, asking that the court modify its opinion on the subject of whether HMOs constitute an antitrust market, and whether "most favored nations" provisions may be anticompetitive.

**Nurse Midwifery Associates v. Hibbett, Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court**, 918 F.2d 605 (6<sup>th</sup> Cir. 1990), appealing

689 F. Supp. 799 (M.D. Tenn. 1988). In an antitrust case by two self-employed nurse midwives against a physician-owned malpractice insurance company, which had canceled the malpractice insurance of an obstetrician who had agreed to collaborate with the nurse midwives, the Commission filed an amicus brief arguing that the District Court erred in holding that the physician-controlled corporation must be viewed as a single entity and that its conduct therefore could not be deemed to be concerted action cognizable under the antitrust laws.

**Bolt v. Halifax Hospital Medical Center, En Banc Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court**, appealing 851 F.2d 1273 (11<sup>th</sup> Cir. 1988), vacated, reh'g granted en banc, 861 F.2d 1233 (11<sup>th</sup> Cir. 1988), remanded to panel, 874 F.2d 810 (11<sup>th</sup> Cir. 1990), cert. denied, 109 L. Ed. 322 (1990). In an antitrust action brought by a vascular and general surgeon, whose medical staff privileges had been revoked at three hospitals, against the hospitals, members of their medical staffs, and the local medical society, at issue was whether the “active supervision” component of the state action doctrine was satisfied by the availability of common law judicial review. In its amicus brief, the Commission argued that the Eleventh Circuit Court panel had previously erred in holding that “active supervision” was met by common law judicial review, which entailed consideration of the fairness of the procedures used by the private parties, the validity of the private decision makers’ criteria under state law, and the sufficiency of the evidence. The Commission stated that even if Florida courts in fact provided sufficient review to meet the panel’s standard, that standard would not satisfy the standard set forth by the Supreme Court in Patrick v. Burget, 486 U.S. 94 (1988), for “active supervision” – that the state undertake a thorough, on-the-merits review of individual private decisions to determine whether that conduct is in accordance with state policy.

**Patrick v. Burget, Brief of the United States and Federal Trade Commission as Amici Curiae on Petition for Writ of Certiorari, and Brief of the United States and Federal Trade Commission as Amicus Curiae on Writ of Certiorari**, 486 U.S. 94 (1988). A jury verdict in favor of a physicians who had alleged bad faith termination of staff privileges by physicians and a hospital in violation of the antitrust laws was reversed by the Ninth Circuit, which held that the defendants’ action was protected by the state action doctrine because state law required hospitals to conduct peer review to promote quality of care. The Department of Justice and Commission filed an amicus brief supporting certiorari, and later an amicus brief on the merits in support of reversal, arguing that the state action doctrine did not immunize the challenged conduct from antitrust liability because there was no state supervision of that conduct.

**Parker v. Kentucky Board of Dentistry, Brief of the Federal Trade Commission as Amicus Curiae**, 818 F.2d 504 (6<sup>th</sup> Cir. 1987). In a case where a dentist challenged the constitutionality of the Kentucky Board of Dentistry’s advertising restrictions, which allowed the Board to prohibit the use of terms such as “orthodontics,” “braces,” and “brackets” in advertisements by general dentists, the Commission filed an amicus brief arguing that such advertisements were not misleading and, therefore, could not be prohibited by the state under the First Amendment. The Commission also argued that there are strong public policy reasons for allowing truthful advertising by professionals, and that unnecessary restrictions on such advertising hinder competition as well as the flow of useful consumer education.



**Bhan v. NME Hospitals, Inc., Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court**, 772 F.2d 1467 (9<sup>th</sup> Cir. 1985). In a nurse anesthetist's suit challenging a hospital's policy of allowing only physician anesthesiologists to perform anesthesia services in the hospital's operating rooms, the Commission filed an amicus brief arguing for reversal of the district court's dismissal of the case based on that court's reasoning that physician anesthesiologists and nurse anesthetists did not compete. The Commission argued that California law does not preclude competition between the two groups, and that the district court's finding was contrary to established precedent and the premises of antitrust law.

**Lombardo v. Our Lady of Mercy Hospital, Brief of the Federal Trade Commission as Amicus Curiae**, No. 85-2474 (7<sup>th</sup> Cir. Amicus brief filed Nov. 7, 1985), appeal dismissed, (appealing Lombardo v. Sisters of Mercy Health Corp., 1985-2 Trade Cases (CCH) ¶66,749 (N.D. Ill. 1985)). In a case brought by two osteopathic physicians charging that an Indiana hospital's denial of staff and surgical privileges violated federal and state antitrust laws, the Commission filed an amicus brief arguing that the state action doctrine would not protect from antitrust scrutiny the denial of privileges and the participation of private physicians in adopting and implementing the hospital policy excluding osteopathically-trained surgeons. The Commission argued that neither of the two requirements for state action – a clear articulation of an intention to supplant competition or active state supervision – was met under the relevant statute which required hospitals to have peer review systems and hospital privilege review mechanisms.

**Jefferson Parish Hospital District No. 2 v. Hyde, Brief of the United States and Federal Trade Commission as Amicus Curiae on Petition for Writ of Certiorari**, 466 U.S. 2 (1984). Hyde concerned whether a contract for a single group of anesthesiologists to provide exclusive anesthesia services to a Louisiana hospital was per se illegal under the Sherman Act, as a “tie in” of surgical and anesthesia services. The Department of Justice and the Commission filed an amicus brief arguing that exclusive contracts should be judged under the rule of reason rather than under the per se standard, because such contracts may enhance competition among hospitals and among anesthesiologists, and because the allegedly tied products are normally used as a unit. The Supreme Court ruled that the answer to the question whether one or two products are involved turns not on the functional relationship between them (i.e., not on whether it is a functionally integrated package of services), but rather on the character of the demand for the two items. Per se condemnation is appropriate only if the seller is able to “force” the tied product onto buyers by virtue of its market power.

**North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc., Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court**, 722 F.2d 59 (4<sup>th</sup> Cir. 1983), cert. denied, 471 U.S. 1003 (1985). The Attorney General of North Carolina brought suit alleging that the acquisition of a private psychiatric hospital by a hospital system, which would result in the system's ownership of all the private psychiatric hospitals within the area served by the Western North Carolina Health Systems Agency, violated the federal and state antitrust laws. The Commission and Department of Justice filed an amicus brief arguing that the National Health Planning Act and the state statute adopted pursuant to that Act did not impliedly repeal the antitrust laws, because there was no “plain repugnancy” between the regulatory

scheme and the antitrust laws. They also argued that the defendants' activities were not exempt from antitrust scrutiny under the state action doctrine.

**Trustees of Rex Hospital v. Hospital Building Co., Brief of the United States and Federal Trade Commission as Amici Curiae on Petition for Writ of Certiorari**, 464 U.S. 890 and 904 (1983) (denying writ of certiorari) . In an antitrust suit brought by a hospital operator alleging a conspiracy by other hospital operators to prevent the plaintiff from expanding its hospital facilities, the Commission and Department of Justice filed an amicus brief in support of the petition for certiorari, arguing that the Court of Appeals had erred in creating a special rule-of-reason standard under the Sherman Act for evaluating the actions of private health care providers who had attempted to block the construction or expansion of competing hospital facilities through the certificate-of-need (CON) process. The Department of Justice and Commission argued that the rule of reason analysis adopted by the lower court might improperly protect abuse of the CON process by hospital competitors.

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