

# Antitrust in Healthcare: Enforcement & Litigation Cases and Trends

The Source's focus on healthcare competition includes collecting and reporting on antitrust litigation and enforcement activity in the sector. We follow state and federal enforcement efforts by attorneys general and the Federal Trade Commission and Department of Justice, as well as private actions brought by individuals and classes of plaintiffs. The [Litigation/Enforcement](#) page contains three main sections: (1) the federal merger enforcement timeline|(2) the state-by-state map of recent and ongoing litigation and enforcement activity|and (3) documents including case summaries, litigation documents, news articles, press releases, and more, organized by topic/case. We hope these three elements will allow you to find what you need to learn about and follow antitrust developments, whether you are looking to track general trends or specific case happenings.

## ▪ A Short Primer on Antitrust Law and Healthcare

As a general matter, the purpose of the federal and state antitrust laws is to promote and protect competition. The two main federal antitrust statutes, the Sherman Act and the Clayton Act, are general proscriptions that omit reference to specific anti-competitive activities. Most states have antitrust laws that closely track the federal statutes. In light of the general nature of the laws, courts have developed a common law of antitrust. Here, we offer a brief introduction to the principal federal statutes under which federal and state enforcement officials and private plaintiffs bring antitrust claims.

The Sherman Act, Section 1, prohibits "every contract,

combination ... or conspiracy in restraint of trade.” 15 U.S.C. § 1. Common law has distilled the two substantive elements to a statutory violation as (1) an agreement and (2) conduct that unreasonably restrains trade. The courts have identified some restraints that are considered violations *per se*, whereas other challenged restraints receive more extensive analysis. The restraints covered by Section 1 include: price fixing (competitors agreeing to set prices or terms of sale)|market division (competitors carving up markets)|exclusive dealing (requiring that a party deal with one enterprise to the exclusion of its competitors)|group boycotts (collective refusals to deal to exclude an enterprise from the marketplace)|and tying arrangements (when a firm with market power conditions the sale of one product on the additional purchase of a second, unwanted product).

The Sherman Act, Section 2, prohibits monopolization, attempted monopolization and conspiracies to monopolize. The two elements of monopolization are: (1) the possession of monopoly power and (2) willful acquisition or maintenance of that power (as distinguished from legitimate growth or development of an enterprise). Federal and state authorities, as well as private plaintiffs, may sue under both Section 1 and Section 2 of the Sherman Act to recover monetary damages. In addition, some offenses covered by the Act, including, e.g., price-fixing, may be prosecuted criminally, and carry penal fines and prison terms.

The Clayton Act, Section 7, prohibits mergers and acquisitions whose effect may be to “substantially lessen competition” or that “tend to create a monopoly.” 15 U.S.C. § 18. In evaluating transactions under the Clayton Act, courts look at market concentration and market share, as well as other factors to determine the likelihood that a merger would violate the Act. Similar to the Sherman Act, federal and state authorities, as well as private plaintiffs, may bring claims under the Clayton Act. For mergers of a certain size, entities

must file a premerger notification with the Federal Trade Commission and the Antitrust Division of the Department of Justice, (“the Agencies”) per the Hart-Scott-Rodino Act. Under the premerger notification program, the Agencies have an opportunity to request more information from entities planning to merge, and to challenge or place conditions on a deal. Notwithstanding this review program, the Agencies, state authorities and private plaintiffs may challenge consummated mergers under the Clayton Act.

Healthcare markets present a special case for antitrust law application in that they contain more distortions and restrictions on competition than most other markets for good and services to which the antitrust laws also apply. Federal and state laws governing licensing, payment, for-profit versus non-profit status, tax treatment, and insurance make healthcare a more complex realm than the average market for widgets. Policy makers and enforcement officials have struggled over the past several decades to find a balance that encourages both growth and competition in healthcare that benefits both healthcare enterprises and consumers alike. The Source’s [Litigation/Enforcement](#) page looks at these efforts both historically and in the present, to provide insight into the strategies used over time and being used today to promote a working healthcare economy. We also look at how consumers have responded by exercising their own rights to sue under the antitrust laws.

#### ▪ **A Walk Through the Federal Merger Enforcement Timeline**

The Source’s Federal Merger Enforcement Timeline tracks merger enforcement efforts by the Agencies over almost four decades. We included this long view to show how antitrust enforcement policy has developed over time. The Timeline’s pop-ups will give you a summary of the important events, and link you to relevant case summaries, pleadings, and court opinions. You may also find those documents below the map, in the documents section of the [Litigation/Enforcement](#) page.

The Source Timeline begins in the late 1980s and goes through to the present. In the first two decades covered, the timeline makes clear that (1) federal challenges to mergers in healthcare were limited and (2) many of these challenges failed in federal or administrative courts. The tide began to change in 2002, when the FTC took on a policy of studying past mergers to determine their effects on competition. That effort turned up empirical evidence that deals left unchallenged, or where the FTC challenged and lost, had negatively affected competition in healthcare markets. Thereafter, the FTC filed suit challenging the consummated merger of Chicago hospitals, which continued as an enforcement matter until 2008, and resulted in a follow-on private class action, that was just recently [certified](#).

The Timeline demonstrates that, in the recent past, there has been considerable activity, often resulting in successful challenges in the forms of settlements or favorable court decisions. This comes as no surprise following the FTC's May 2012 announcement that it planned to challenge hospital mergers that led to excessive consolidation and higher healthcare costs. Former FTC Chair Jon Leibowitz told the Wall Street Journal then, "If you want to do something about controlling costs in healthcare, you have to challenge anticompetitive hospital mergers." Since then, the FTC has vigorously pursued hospital mergers, which you will see as a concentration of dots on the far right of The Source Timeline.

But, there is more to the story. While the government has stepped up its challenges to *anticompetitive* mergers among providers, it has simultaneously endorsed consolidation it believes will lead to *procompetitive* effects through the Affordable Care Act. For example, the ACA has encouraged the formation of accountable care organizations ("ACOs"), which are coordinated groups of providers and sometimes third-party payers. As the FTC and DOJ explained in their joint *Statement of Antitrust Enforcement Policy Regarding ACOs Participating*

*in the Medicare Shared Savings Program*, “The [ACA] seeks to improve the quality and reduce the costs of health care services in the United States by, among other things, encouraging physicians, hospitals, and other health care providers to become accountable for a patient population through integrated health care delivery systems.” Although providers have accused the government of having conflicting policies on consolidation issues, enforcement officials maintain that their policy is to promote procompetitive mergers through which efficiencies may be maximized to provide higher quality, lower cost care, while halting anticompetitive combinations through which providers seek to achieve and leverage market power to charge higher prices to payers and consumers.

Check in on The Source Timeline regularly to track federal merger enforcement activity in real time!

- **Using the State-by-State Map**

The state-by-state map contains information about both merger and conduct cases at both the state and federal levels, organized geographically by state. Accordingly, there is some overlap with the Timeline as to federal merger enforcement activity. But, unlike the timeline, which reaches back more than twenty five years, the map is limited to the past few years. And, it contains cases involving claims of anticompetitive conduct in the non-merger context, including health plan contracting (MI), geographic tying (CA), and monopolization (TX). The geographic presentation allows you to identify pockets of state and federal antitrust enforcement activity (which often are coordinated). In addition, you may use the map to follow ongoing cases, for which The Source posts regular updates and new litigation documents as they become available.

- **Finding the Documents You Need**

Below the map, you will find an array of documents and articles relating to litigation and enforcement. You may view all of these documents at once, filter them by jurisdiction (federal or state), or even search by specific case name. We have created specific folders for cases of great import and for ongoing cases. There, you will find case-specific documents, including pleadings and court opinions, without having to gain access to legal databases or the courts' electronic filing systems, or to sort through case dockets to find the most important filings and opinions. We track multiple dockets daily, so you should always be able to find the most recent litigation documents for the cases we track here.

Thanks for using The Source. Please let us know if we could do anything to make your experience with the Litigation/Enforcement page better!