OVERVIEW OF FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS

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FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS[1]

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 Clayton Act.

When litigation becomes necessary, many of the FTC's adjudicative matters are conducted in 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 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 thirty-five lawyers and investigators who work exclusively on health care antitrust matters. Health Care Division staff also work with staff in the FTC's seven regional offices on health care matters. FTC cases involving health care services and products are summarized below.[2] The Commission and its staff have also responded to numerous requests for guidance from health care industry participants through, among other things, the advisory opinion letter process, and through the issuance of statements on enforcement policy.[3]

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[1] 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. Sections III and V describe FTC enforcement involving mergers in the pharmaceutical industry and the medical equipment industry, which are conducted primarily by the Mergers I Division of the Bureau of Competition. Section IV describes FTC enforcement investigations involving hospital mergers, which are now conducted primarily by the Mergers IV Division of the Bureau of Competition.

[2] Commission complaints and orders issued since March 1996 are available at the FTC's web site at http://www.ftc.gov/bc/healthcare/antitrust/commissionactions.htm.

[3] Information regarding advisory opinions is set forth in the *Topic and Yearly Indices of Health Care 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 web site at http://www.ftc.gov/bc/healthcare/industryguide/opinionguidance.htm.

For further information about matters handled by the FTC's Health Care Division, or to lodge complaints about suspected antitrust violations, please write, call, or fax this office as follows:

Mailing Address: Health Care Division
Bureau of Competition
Federal Trade Commission
Washington, DC 20580

Telephone Number: 202-326-2756
Fax Number: 202-326-3384

For further information about pharmaceutical mergers and medical equipment mergers handled by the FTC's Mergers I Division, please write, call, 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
Fax Number: 202-326-2655

For further information about hospital mergers handled by the FTC's Mergers IV Division, please write, call, 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) 326-2769 or (202)-326-2214
Fax Number: (202) 326-2286

II. CONDUCT INVOLVING HEALTH CARE SERVICES AND PRODUCTS

A. Monopolization

Novartis AG, C-4296, FTC File No. 1010068 (consent order issued September 28, 2010) (http://www.ftc.gov/os/caselist/1010068/index.shtm). The Commission's complaint challenges Novartis AG's proposed $28.1 billion acquisition of Alcon, Inc., from Nestle, S.A. The complaint alleges that this acquisition would lessen competition in the $12.4 million U.S. market for injectable miotics – a class of prescription pharmaceuticals used to induce miosis (*i.e.*, constriction of the pupil), most commonly during cataract surgery. Novartis and Alcon each produces an injectable miotics product – Miochol-E and Miostat, respectively – for which there is no generic version. Novartis and Alcon are the only suppliers of injectable miotics in the U.S., with respective market shares of 67% and 33%. The complaint alleges that entry into the market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the acquisition because, in part, of lengthy FDA approval requirements and the fact that the market is small and in decline, with limited opportunities for new entrants. The consent order requires Novartis to divest its rights and assets in its injectable miotics product, Miochol-E, to Bausch & Lomb, Inc., an eye-health company that does not currently participate in the U.S. injectable miotics market.

Ovation Pharmaceuticals, Inc., FTC File No. 0810156 (http://www.ftc.gov/os/caselist/0810156/index.shtm); **Federal Trade Commission v. Lundbeck, Inc.**, Civil No. 0:08-cv-06379-JNE-JJG (D. Minn.) (Findings of Fact, Conclusions of Law, and Order issued August 31, 2010). In December 2008, the Commission filed a complaint in the U.S. District Court for the District of Minnesota, challenging the purchase of the U.S. rights to NeoProfen – a drug for the treatment of patent ductus arteriosus ("PDA"), a potentially deadly heart defect affecting many premature infants – by Ovation (which was purchased in 2009 and renamed Lundbeck, Inc.). (The State of Minnesota also filed a complaint.) The Commission's complaint charges that the purchase eliminated Ovation's only competitor for the drug-based treatment of PDA, and thereby preserved Ovation's U.S. monopoly in the market for FDA-approved drugs to treat PDA. At the time of the purchase, NeoProfen was awaiting approval by the FDA. According to the complaint, Ovation expected that NeoProfen, once approved, would take a substantial portion of sales from Ovation's PDA drug, Indocin, and that Ovation acquired NeoProfen to eliminate this threat. The complaint charges that, after acquiring the rights to NeoProfen, Ovation raised the price of Indocin by nearly 1,300%; and when Ovation launched NeoProfen, it set the price at virtually the same level. At the time of the complaint, Ovation had maintained prices for the two drugs at or above this level for more than two years. The complaint charges that Ovation's acquisition of NeoProfen substantially raised prices, reduced competition, and maintained Ovation's monopoly in PDA drug treatments in violation of Section 7 of the Clayton Act and Section 5(a) of the FTC Act. The complaint seeks equitable relief, including divestiture and disgorgement of unlawfully obtained profits from Ovation's sales of Indocin and NeoProfen.

On August 31, 2010, the district judge held that the plaintiffs had not proved that NeoProfen and Indocin compete in the same product market, and, therefore, had failed to

demonstrate that the acquisition substantially lessened competition or maintained a monopoly. As a result, the court dismissed both actions.

Carilion Clinic, D.9338, FTC File No. 0810259 (consent order issued November 23, 2009; Order to Maintain Assets issued October 6, 2009); (divestiture of ~~one~~ acquired firm ~~(~~CSE~~)~~ approved by Commission, March 26, 2010); (divestiture of acquired firm CAI approved by Commission, August 12, 2010) (www.ftc.gov/os/adjpro/d9338/index.shtm). The Commission's complaint challenges 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 is the dominant hospital system in southwest Virginia, and has an ownership interest in various healthcare businesses – including outpatient imaging and surgical services – in that area. Carilion's acquisition of CAI and CSE leaves 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 states 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 alleges 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 charges that the acquisition will produce several anticompetitive price and non-price effects. First, eliminating CAI and CSE as competitors will 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 will 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 will decrease the incentive of Carilion's only remaining post-acquisition competitor for outpatient imaging and surgical services, HCA, to compete aggressively, and will increase the likelihood of coordinated action between Carilion and HCA.

The Commission's orders require Carilion, within three months, to divest CAI and CSE in a manner that restores 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. The orders permit the Commission to appoint a monitor to ensure Carilion's compliance with the orders.

In March 2010, the Commission approved Carilion's divestment of CSE to Fairlawn

Surgery Center, LLC, to satisfy, in part, the requirements of the consent order. Carilion represented that Fairlawn and InSight would be ~~a~~ viable competitors in the markets for outpatient surgical services and outpatient imaging services, respectively, in the Roanoke area, and that the proposed divestitures would, with regard to CSE, meet the goal of the order to restore competition to the Roanoke area.

Transitions Optical, Inc., C-4289, FTC File No. 0910062 (consent order issued April 22, 2010) (www.ftc.gov/os/caselist/0910062/index.shtm).[4] The complaint charges that Transitions – which has an 80-85 percent share of the $630 million U.S. wholesale photochromic lens market – used its monopoly power to commit unlawful exclusionary acts to maintain that monopoly power. Consumers of corrective ophthalmic lenses (used for vision correction and worn in eyeglasses) can 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") supply lenses to Transitions, which uses proprietary methods to apply patented photochromic dyes and other materials to the lenses. Transitions then sells the treated lenses back to the lens casters, who are Transitions' only direct customers. Lens casters, in turn, sell the photochromic lenses to wholesale optical labs (which resell the lenses to ophthalmologists, optometrists, and opticians) and optical retailers (which deal directly with consumers).

The complaint charges that Transitions has adopted exclusionary practices with respect to lens casters by: (1) terminating its relationships with lens casters that have 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 are effective in deterring competition because Transitions photochromic lens sales can represent up to 40 percent of a lens caster's profits. The complaint also charges 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 require 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 will be provided only if the customer purchases all, or almost all, of its photochromic lens needs from Transitions. According to the complaint, these practices are effective in foreclosing Transitions' competitors from up to 40 percent of the retailer and wholesale lab distribution channels. The complaint also alleges that the photochromic lens industry has 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.

The consent order: (1) prohibits Transitions from adopting or implementing any

[4] 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).

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.

Pfizer, Inc./Wyeth, C-4267, FTC File No. 0910053 (consent order issued January 25, 2010) (www.ftc.gov/os/caselist/0910053/index.shtm). The Commission's complaint challenges Pfizer's proposed $68 billion acquisition of Wyeth (particularly, Wyeth's "Fort Dodge" animal health division). Both firms manufacture human and animal health biological and pharmaceutical agents. The combined firm would have projected worldwide revenues of almost $72 billion. The complaint charges that the acquisition would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by reducing competition in the following 21 U.S. markets for animal health products:

- *Cattle Health Product Markets.* Pfizer and Wyeth's Fort Dodge animal health division are the market leaders in the area of cattle health products. After the acquisition, Pfizer would have over 60 percent of several relevant cattle health product markets.

  - *Killed cattle respiratory vaccines* prevent respiratory diseases in pregnant cattle without the risk of causing abortion. Pfizer and Fort Dodge account for over 50 percent of all killed respiratory vaccine sales in the U.S. As a result of the acquisition, Pfizer would control 61 percent of the market for 5-way vaccine (the most commonly used killed respiratory vaccine), leaving only one other significant competitor in this $15.3 million market.

  - *Modified-live cattle respiratory vaccines* prevent the same diseases as killed respiratory vaccines, but contain modified-live, rather than killed, antigens to stimulate greater protection. Because they induce stronger immunities, most customers will use modified-live vaccines for non-pregnant cattle. Pfizer and Fort Dodge account for over 53 percent of all modified-live respiratory vaccine sales in the $63 million U.S. market. As a result of the acquisition, Pfizer would control over 68 percent of the market for 5-way vaccine (the most commonly used modified-live respiratory vaccine).

  - *Cattle reproductive vaccines* are used to prevent abortions in pregnant cattle. The most significant markets for these vaccines include the markets for: (1) modified-live 10-way vaccines; (2) killed 10-way vaccines; and (3) lepto/vibrio vaccines. After the acquisition, Pfizer would control 83 percent of the $13 million U.S. market for modified-live 10-way vaccine, with the remaining 17 percent of the market divided among three other firms. Pfizer would also control 76 percent of the U.S. market for killed 10-way vaccine, with the rest of that market divided between two firms. Pfizer would also control almost 39 percent of the lepto/vibrio market, with another firm at 41 percent.

  - *Cattle pasteurella vaccines* are used to prevent pneumonia and other respiratory infections in cattle caused by certain bacteria. The proposed acquisition would reduce

the number of competing firms in the U.S. market from five to four, and would leave Pfizer significantly larger than any of its remaining competitors.

- *Lactating-cow and dry-cow mastitis treatments* are used to treat infections of the udder that occur either during lactation or between pregnancies. The markets for these treatments are highly concentrated, and the proposed acquisition would give Pfizer control of over 90 percent of each market.

- *Dairy cattle broad-spectrum antibiotics with low milk-withholding times* (*i.e.*, an FDA-mandated waiting period between the administration of the antibiotic and the time when milk from the affected cattle may be distributed for sale) are used to treat a variety of infections that affect dairy cattle. Pfizer and Fort Dodge products have very low withholding times (zero days and two-to-four days, respectively). A generic version of one of Pfizer's products was recently introduced. The proposed acquisition would reduce the number of firms selling these antibiotics in the U.S. market from three to two, and would give Pfizer a near monopoly in this $162 million market.

- *Cattle macrocyclic lactone parasiticides* are the newest and most effective class of cattle parasiticides in the U.S. There are three companies producing branded products in this $118 million market: Pfizer, Fort Dodge, and Merial. Generic versions of Merial's (but not Pfizer's or Fort Dodge's) product are available, but do not provide a significant competitive restraint due to their poor reputation in this market. The proposed acquisition would increase the concentration in this market significantly, leaving Pfizer with about 42 percent of the market.

- *Cattle benzimidazole parasiticides* are an older generation of drugs used to treat internal parasites such as lugworms, tapeworms, and liver flukes. The proposed transaction would reduce the number of suppliers of these parasiticides in the $16 million U.S. market from three to two, and would increase Pfizer's market share to 33 percent.

■ *Companion Animal Health Product Markets.* Pfizer and Fort Dodge are two of only four major suppliers in the relevant companion animal vaccines and pharmaceuticals markets. In most of these markets, the proposed acquisition would reduce the number of competitors from four to three, and give Pfizer control of between 50 and 100 percent of the market. Pfizer and Fort Dodge have broad and significantly overlapping portfolios of companion animal health products.

- *Canine combination vaccines* prevent common canine diseases, such as those caused by canine distemper, adenovirus, parainfluenza, parvovirus, and coronavirus. The proposed acquisition would reduce the number of significant suppliers of canine combination vaccines in the U.S. from four to three in this $126 million market.

- *Canine monovalent parvovirus vaccines* are administered as booster shots to puppies for many of the diseases treated by canine combination vaccines. The proposed acquisition would reduce the number of suppliers of this vaccine in the U.S. from four to three in this $2.1 million market, and would give Pfizer control of 66 percent of the market.

- *Canine monovalent coronavirus vaccines* represent a $2.3 million market in the U.S. The proposed acquisition would reduce the number of suppliers of this vaccine from four to three, and would leave Pfizer with an 81 percent share of the market.

- *Canine monovalent leptospira vaccines* represent a $9.2 million market in the U.S. Pfizer and Fort Dodge are currently the only two suppliers of this vaccine. The proposed transaction would give Pfizer control over 100 percent of this market.

- *Canine bordetella vaccines* are used primarily to treat the most common form of upper respiratory infection contracted by dogs in the U.S. The proposed acquisition would reduce the number of suppliers of these vaccines from five to four, and would leave Pfizer with a significantly larger share of this $53.3 million market than its three remaining competitors.

- *Feline combination vaccines* are used to prevent common feline diseases, such as feline panleukopenia, rhinotracheitis, chlamydia, and calcivirus. There are four significant suppliers of these vaccines in the $28 million U.S. market. The proposed acquisition would reduce the number of suppliers of these vaccines from four to three, and would leave Pfizer with a considerably larger share of this market than its two remaining competitors.

- *Feline leukemia vaccines* provide protection against feline leukemia, a fatal disease that breaks down a cat's immune system and leaves it vulnerable to other diseases. There are four companies that supply these vaccines in the $38 million U.S. market. The proposed acquisition will reduce the number of suppliers of these vaccines from four to three, and leave Pfizer with a significantly larger market share than its two remaining competitors.

- *Companion animal rabies vaccines* are used to prevent rabies. The proposed transaction would reduce the number of suppliers in this $60 million U.S. market from four to three.

- *Companion animal cephalosporins* are a recent generation of broad-spectrum antibiotics that can be used to treat a wide range of infections. Pfizer and Fort Dodge are the only two suppliers of branded companion animal cephalosporins in the $52 million U.S. market. While there are generic human and animal cephalosporin products in the market, they have limited competitive significance because of dosing differences found in the generic human products and a relative lack of technical and research support offered with the generic animal products. The proposed acquisition would give Pfizer control of 70 percent of this market.

■ *Equine Health Product Markets.*

- *Equine tapeworm parasiticides containing praziquantel* are used to treat tapeworms and other internal parasites, which are the leading cause of equine colic. The proposed acquisition would reduce the number of suppliers of these parasiticides in the $22 million U.S. market from three to two, and would give Pfizer control of 64 percent of the market.

- *Equine herpesvirus vaccines* are used primarily to prevent equine rhinopneumonitis, an upper respiratory disease that can cause abortions in pregnant mares. The proposed acquisition would reduce the number of suppliers of these vaccines in the $30 million U.S. market from four to three, leaving Pfizer significantly larger than its two remaining competitors.

- *Equine joint-injected steroids* can be used to treat joint inflammation, osteoporosis, and lameness in horses. Pfizer and Fort Dodge are the only two providers of these steroids in the $7.3 million U.S. market. The proposed acquisition would leave Pfizer with 100 percent of the market.

The complaint states that entry into the manufacture and sale of the relevant markets would not be timely, likely, or sufficient to counteract the anticompetitive effects of the proposed acquisition, due to, among other things, research and development costs, regulatory hurdles, and the need to gain customer acceptance. The complaint also charges that the proposed acquisition would cause significant competitive harm to consumers in the relevant markets by: eliminating actual, direct, and substantial competition between Pfizer and Wyeth; increasing the likelihood that Pfizer could unilaterally exercise market power; increasing the likelihood of coordinated action between suppliers; reducing Pfizer's incentives to pursue further research and development; and increasing the likelihood that consumers will pay higher prices. The consent order requires that Pfizer divest the Fort Dodge U.S. animal health products business in all areas of overlap (except for equine tapeworm parasiticides and equine herpesvirus vaccines) to Boehringer Ingelheim Vetmedica, Inc. In the area of equine tapeworm parasiticides, Pfizer is ordered to return Pfizer's exclusive distribution rights to these products to Virbac S.A. In the area of equine herpesvirus vaccines, Pfizer is ordered to divest Pfizer's equine herpesvirus vaccine products to Boehringer. The assets for each of these divestitures include all of the relevant intellectual property, customer lists, research and development information, and regulatory materials, as well as two of Fort Dodge's three U.S. manufacturing facilities. These divestitures will fully preserve the competition that the proposed acquisition would eliminate.

Schering-Plough Corporation/Merck & Co., Inc., C-4268, FTC File No. 0910075 (consent agreement accepted for public comment; consent order issued October 29, 2009) (www.ftc.gov/os/caselist/0910075/index.shtm). The Commission's complaint challenges Schering's proposed $41.1 billion acquisition of Merck. Merck and Schering both supply a variety of human and animal health products. Merck's animal health products business is carried on through Merial Limited, an equally-owned joint venture of Merck and Sanofi-Aventis S.A. The complaint charges that the acquisition would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by lessening competition in the following U.S. markets:

- *Neurokinin 1 ("NK1") receptor antagonists* for chemotherapy-induced nausea and vomiting ("CINV") and post-operative nausea and vomiting ("PONV") in humans. Merck's Emend is the only NK1 receptor antagonist for CINV and PONV in the U.S. At the time the proposed acquisition was announced, Schering was in the process of out-licensing rolapitant, an NK1 receptor antagonist for CINV and PONV that Schering had been developing – one of a very limited number of such drugs in development for the U.S. market. The proposed acquisition

would likely reduce the combined firm's incentive to license rolapitant, which would compete with Emend.

- *Live poultry vaccines* and *Killed poultry vaccines* for the prevention or treatment of: (1) each strain of Marek's disease; (2) each strain of infectious bronchitis; (3) Newcastle disease; (4) each strain of infectious bursal disease; (5) reovirus; (6) fowl pox; (7) coccidiosis; (8) lanyngotracheitis; (9) avian encephalomyelitis; and (10) tenosynovitis. Merck (through Merial) and Schering are the two largest producers of poultry vaccines in the U.S. Together, Merial and Schering account for over 75 percent of all poultry vaccine sales in the U.S. Three other suppliers account for the balance of U.S. poultry vaccine sales.

- *Cattle gonadotropins*. These products are used to treat follicular cysts in cattle, and to synchronize the reproductive cycles of cattle undergoing artificial insemination. Merck (through Merial) and Schering are two of only three suppliers of cattle gonadotropins in the U.S. market.

The consent order requires Merck to divest all of its interest in Merial to its joint venture partner, Sanofi-Aventis. This sale was completed in September 2009, at the same time terminating the Merial joint venture. In order to ensure that the combined Merck/Schering and Sanofi-Aventis do not combine their animal health businesses after the divestiture, the order prohibits Merck from acquiring any of Merial's animal health assets, or otherwise combining the animal health businesses of Merck and Sanofi-Aventis, without prior approval of the Commission. The order also requires Schering to divest all of the assets relating to its NK1 receptor antagonist, rolapitant, to Opko Health, Inc. In order to ensure that this divestiture is successful, the order requires Schering and Merck to provide transitional services to enable Opko to complete clinical testing and obtain regulatory approval to market rolapitant in the U.S. The order also allows the Commission to appoint an Interim Monitor to ensure that the parties fulfill their obligations relating to the divestiture.

The Commission issued the complaint and order, and served them upon Merck and Schering at the same time it accepted the consent agreement for public comment. As a result, the order became effective immediately. *See* 16 C.F.R. § 2.34(c). This matter represents an "exceptional case" (64 Fed. Reg. 46267 (1999)) in which it is appropriate to issue a final order before receiving public comment, because of the risk that the combined Merck/Schering and Sanofi-Aventis might combine their animal health businesses after the proposed acquisition was consummated, and thereby reverse the animal health remedy of the consent agreement.

Thoratec Corporation/HeartWare International, Inc., D.9339, FTC File No. 0910064 (administrative complaint filed July 28, 2009) (www.ftc.gov/os/adjpro/d9339/index.shtm). In its complaint, the Commission charges 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 states that Thoratec's products are the only LVADs approved for sale in the U.S. by the FDA. HeartWare is developing an innovative new LVAD (called the HVAD) that promises superior reliability with fewer surgical

complications. The HVAD is expected to enter the market in late 2011 or early 2012. (The complaint states that a few other companies are developing LVADs, but that none have HeartWare's potential to challenge Thoratec's monopoly – and none will reach the market prior to HeartWare's HVAD.) The complaint charges that Thoratec is 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 will intensify once HeartWare's HVAD receives 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.

CSL Limited/Cerberus-Plasma Holdings, LLC, D. 9337, FTC File No. 0812255 (administrative complaint issued May 27, 2009) (http://www.ftc.gov/os/adjpro/d9337/index.shtm); Case No. 09-cv-1000-CKK (D.D.C. May 29, 2009) (motion for preliminary injunction filed) (http://www.ftc.gov/os/caselist/0810225/index.shtm); (CSL announced that it will not proceed with the proposed acquisition, June 8, 2009) (http://www.ftc.gov/opa/2009/06/csl.shtm). The complaint seeks 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 complaint charges 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 alleges that the effect will 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). CSL is the world's second-largest supplier of plasma-derivative protein therapies. CSL owns and operates more than 70 plasma collection facilities in the U.S. and Germany, and three manufacturing facilities in Europe and the U.S. Talecris is the world's third-largest producer of plasma-derivative protein therapies. Like CSL, Talecris owns a number of plasma collection centers, as well as two manufacturing facilities, in the U.S. The complaint states that the plasma-derivatives products industry has become much more concentrated since 1990 (from 13 firms to five), and has resulted in an oligopolistic industry wherein competition has been greatly curtailed. The complaint charges 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 (with two of the remaining firms being too small to have a significant market impact). In each market, following the proposed acquisition, the combined firm would control nearly 50 percent of the market. Moreover, Talecris has been a unique competitive restraint in these markets, and so its elimination would be particularly detrimental to competition.

The acquisition would substantially lessen competition by enabling the remaining firms in these markets to engage more completely and successfully in coordinated interaction that harms consumers.

- *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. Talecris has been a vigorous competitor in this market for the past five years. The acquisition would leave the combined CSL/Talecris with a market share of over 80 percent, and would eliminate the existing vigorous competition. The two remaining firms in this market would then be able to coordinate more completely and successfully on price.

- *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. Talecris has been one of two relatively low-price suppliers of Rho-D, and its elimination would likely end that vigorous price competition. The acquisition would leave the combined CSL/Talecris with a 40 percent market share. The two remaining firms in this market would be able to coordinate more completely and successfully on price.

The complaint also charges that there are 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 will not proceed with the proposed acquisition of Talecris.

Inverness Medical Innovations, Inc., C-4244 (consent order issued January 23, 2009) (http://www.ftc.gov/os/caselist/0610123/index.shtm). The complaint charges that Inverness – the dominant firm in the U.S. market for consumer pregnancy tests, with a 70 percent 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 charges 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.

Cephalon, Inc., Civil Action No.: 1:08-cv-00244 (D.C.D.C.) (complaint filed February 13, 2008) (http://www.ftc.gov/os/caselist/0610182/index.shtm). The Commission filed a complaint in U.S. District Court for the District of Columbia seeking a permanent injunction against Cephalon for engaging in an overall course of anticompetitive conduct to prevent generic competition to Provigil, a drug used to treat sleep disorders, and which accounted for more than 40% of Cephalon's total sales. The complaint alleged that four generic manufacturers (all considered first filers by the FDA for generic Provigil) were involved in patent litigation over the only remaining patent covering Provigil, and Cephalon paid the generic manufacturers over $200 million dollars to abandon the patent litigation and agree to refrain from selling a generic version of Provigil until 2012. According to the complaint, the agreements not only prevented competition from the four first filers but also blocked competition from other generic manufacturers because of the 180-day exclusivity held by the first filers under the Hatch-Waxman Act. As a result of the agreements, Cephalon denied consumers access to lower-cost generic versions of Provigil and forced consumers to pay hundreds of millions of dollars more a year than they would have if generic Provigil entered the market. The Commission is asking the Court to order that Cephalon's conduct, including entering into the agreements, violates Section 5 of the FTC Act. The Commission is also asking the Court to order a permanent injunction stopping Cephalon from enforcing or maintaining the agreements, and enjoining Cephalon from engaging in similar conduct in the future.

Bristol-Myers Squibb Company, 135 F.T.C. 444 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume135.pdf#page=449). The Commission charged in its complaint that Bristol engaged in a pattern of anticompetitive activity over the past decade in order to delay generic competition and maintain its monopoly over three highly profitable branded drugs with total net annual sales of two billion dollars. As a result of Bristol's illegal conduct, consumers paid hundreds of millions of dollars in additional costs for these prescription drugs. The drugs named in the complaint were the anti-anxiety drug, BuSpar, and two anti-cancer drugs, Taxol and Platinol. The pattern of illegal activity involved misusing regulations set up by Congress to hasten the approval of generic drugs, misleading the FDA and the U.S. Patent and Trademark Office in order to protect patents on these branded drugs, and filing baseless patent infringement lawsuits against would be generic competitors. As detailed in the complaint, the anticompetitive activities involving BuSpar included: paying a would-be generic competitor $72.5 million to settle patent litigation, thereby preventing the introduction of a generic BuSpar; filing false information with the FDA in order to list a patent in the Orange Book, thereby automatically obtaining additional 30-month stays; and filing baseless patent infringement suits against potential generic competitors. The complaint alleged that Bristol engaged in similar types of activities with Taxol, a chemotherapy drug originally developed and funded by the National Cancer Institute, which had given Bristol exclusive marketing rights. This conduct including improperly listing three patents in the Orange book, filing misrepresentative statements with the FDA, and entering into an unlawful agreement with a generic competitor in order to obtain an additional 30-month stay on FDA approval of generic Taxol. Similarly, according to the

complaint, Bristol engaged in the same type of unlawful activities involving another chemotherapy drug, Platinol, that also included wrongfully submitting a patent for listing in the Orange Book, and filing patent infringement lawsuits against each of four potential generic entrants, resulting in the delay of a generic Platinol.

The order contains general prohibitions concerning conduct relating to Orange Book listings (detailed in the Commission's recent study, *Generic Drug Entry Prior to Patent Expiration*), enforcement of patents, and the settlement of patent litigation when that conduct is designed to delay or prevent generic competition. For example Bristol is prohibited from late listing patents after competitors have filed applications with the FDA for generic entry. The order also contains prohibitions relating specifically to the listing and enforcement of patents relating to Taxol and BuSpar, including listing any patent in the Orange Book relating to products with the same active ingredient, or taking any action that would trigger an additional 30-month statutory stay on final FDA approval of a generic form of Taxol or BuSpar (the order does not provide specific relief for Platinol because a court held the only unexpired patent on Platinol was invalid).

Biovail Corporation, 134 F.T.C. 407 (2002) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume134.pdf#page=411). The complaint charged that Biovail illegally acquired the exclusive license to a drug patent in order to prevent generic competition from ending its monopoly in the antihypertension drug Tiazac. Biovail then wrongfully listed the acquired patent as claiming Tiazac in the FDA's Orange Book in order to maintain its monopoly. As a result of the Orange Book listing and other conduct, including making a misleading statement to the FDA during the regulatory process, the complaint alleged that Biovail sought to illegally delay the entry of generic Tiazac by gaining a second 30-month stay on generic entry through patent infringement litigation. The order requires Biovail to divest part of the exclusive rights of the acquired patent back to DOV Pharmaceuticals, the original owner. In addition, the order prohibits Biovail from taking any action that would trigger an additional statutory stay on final FDA approval of a generic form of Tiazac. The order also prohibits Biovail from wrongfully listing any patents in the Orange Book.

Mylan Laboratories, et al., 62 F. Supp. 2d 25 (D.D.C. 1999) (http://www.ftc.gov/os/caselist/x990015ddc.htm). In a complaint seeking injunctive and other relief filed in U.S. District Court for the District of Columbia, the Commission charged Mylan Laboratories and three other companies, Profarmaco S.R.L., Cambrex Corporation, and Gyma Laboratories, with restraint of trade and conspiracy to monopolize the markets for two generic anti-anxiety drugs, lorazepam and clorazepate. The complaint also charged Mylan with monopolization and attempted monopolization of those markets. Thirty four state Attorneys General filed a similar complaint in U.S. District Court. According to the FTC's complaint, Mylan, the nation's second largest generic drug manufacturer, sought to restrain competition through exclusive licensing arrangements for the supply of the raw material necessary to produce the lorazepam and clorazepate tablets, thereby allowing Mylan to dramatically increase the price of lorazepam and clorazepate tablets. On July 7, 1999, the court denied defendants' motions to dismiss the FTC complaint, finding that § 13(b) of the FTC Act allows the Commission to seek permanent injunctive relief for violations of "any provision of law" enforced by the FTC, and allows the Commission to seek monetary remedies such as the disgorgement of profits. On

November 29, 2000, the Commission approved a proposed settlement, subject to approval by the federal district court, under which Mylan agreed to pay $100 million for distribution to injured consumers and state agencies. The defendants also agreed to an injunction barring them from entering into similar unlawful conduct in the future. Fifty states and the District of Columbia also approved the agreement. In a separate statement, Commissioner Leary dissented regarding the financial aspects of the settlement because of his concern that it sets an undesirable precedent for use of the Section 13(b) remedy in federal and state antitrust enforcement, and conflicts with the holding in Illinois Brick concerning the ability of indirect purchasers to claim damages. In a separate statement, Commissioners Pitofsky, Anthony, and Thompson agreed with the need to use discretion in seeking disgorgement in future antitrust cases, but stated that the decision to seek disgorgement in this case was appropriate and consistent with policy considerations towards indirect purchasers raised by Illinois Brick. On February 9, 2001, the court entered the Stipulated Permanent Injunction agreed to by the parties. On February 1, 2002, the court granted final approval of the settlement agreement and distribution plan under which Mylan was required to place $100 million into an escrow account for disbursement to purchasers of lorazepam and/or clorazepate during the time period covered by the settlement.

B. Agreements Not to Compete

Transitions Optical, Inc. (See Section II A for citation and annotation.)

Federal Trade Commission, et al. v. Watson Pharmaceuticals, Inc., et al. ("Generic Androgel"), CV-09-00598 (civil complaint filed in U.S. District Court for the Central District of California, January 27, 2009), FTC File No. 0710060 (http://www.ftc.gov/os/caselist/0710060/index.shtm). **In Re: Androgel Antitrust Litigation (No. II)**, MDL Docket No. 2084 (All Cases), 1:09-MD-2084-TWT (N.D. Ga. Feb. 22, 2010) (order granting motions to dismiss complaints). In January 2009, the FTC, joined by the State of California, filed a civil complaint in U.S. district court against Watson Pharmaceuticals, Inc., Par Pharmaceutical Companies, Inc., Paddock Laboratories, Inc., and Solvay Pharmaceuticals, Inc. The complaint challenged agreements in which Solvay allegedly paid generic drug makers Watson and Par to delay generic competition to Solvay's branded testosterone-replacement drug AndroGel. AndroGel has consistently been Solvay's best-selling product, with 2007 sales of over $400 million, accounting for about one-third of Solvay's U.S. revenues. The complaint charged that Watson and Par (through its partner Paddock) each sought FDA approval in 2003 to market generic versions of AndroGel. Both firms certified in their FDA filings that their generic products did not infringe the only patent Solvay had relating to AndroGel, and that the patent was invalid. The patent's expiration date was in August 2020. Watson received FDA final approval to market its generic product in early 2006. The complaint charged that the defendants knew that, if Watson or Par were to enter the market with less expensive generic versions of AndroGel, Solvay's AndroGel sales would plummet and consumers would benefit from the lower prices. The complaint charged that Solvay acted unlawfully to eliminate this threat, by paying Watson and Par a share of its AndroGel profits in exchange for abandoning their patent challenges and agreeing to delay generic entry until 2015. As a result, the complaint charged, the three companies are cooperating on the sale of AndroGel and sharing the monopoly profits, rather than

competing. The complaint further charged that potential competition was harmed because of the elimination of two potential competitors; and that consumers were harmed by being forced to pay higher prices for AndroGel than for generic versions of that drug. The Commission sought a judgment declaring that Solvay's agreements with Watson and Par (and Paddock) violate Section 5(a) of the FTC Act, and injunctive relief restoring competitive conditions and barring the defendants from engaging in similar or related conduct in the future.

A number of private parties also filed antitrust actions against Solvay, Watson, Par, and Paddock. These actions, along with the Commission's lawsuit, were transferred to the U.S. District Court for the Northern District of Georgia. The defendants filed motions to dismiss these complaints. In February 2010, the district court granted these motions to dismiss as to the complaints of the Commission and certain private plaintiffs, and granted in part and denied in part those motions as to the complaints of other private plaintiffs. Relying primarily on Valley Drug Co. v. Geneva Pharms, Inc., 344 F.3d 1294 (11th Cir. 2003), the court decided, *inter alia*, that the arguments of the Commission and other plaintiffs were inconsistent with that decision.

Federal Trade Commission v. Bristol-Myers Squibb Company, Civ. No. 09-0576 (D.D.C. March 30, 2009) (final judgment) (http://www.ftc.gov/os/caselist/0610235/index.shtm). A U.S. District Court judgment requires drug manufacturer Bristol-Myers Squibb Company (BMS) to pay a $2.1 million civil penalty for violating its reporting requirements under the Medicare Modernization Act[5] (MMA) and for violating the terms of a 2003 FTC consent decree. The 2003 consent decree settles charges that BMS had entered into agreements with potential generic drug manufacturers to delay their entry into the market in exchange for payments from BMS, and requires BMS to submit certain future drug settlement agreements to the Commission for review. The MMA also requires that certain drug company agreements be reported to both the FTC and the U.S. Department of Justice (DOJ).

According to the complaint, in 2006 BMS and Apotex entered a patent settlement, in which, among other things, BMS granted Apotex a license to sell a generic version of Plavix, and BMS agreed not to launch, or authorize any other party to launch, its own generic version of Plavix during the first six months of the license. BMS's agreement not to launch an authorized generic for six months could be of significant value to Apotex, because it would make the Apotex product the only generic available during that period. BMS submitted the proposed agreement to the FTC for review, as required by the 2003 order; and both BMS and Apotex filed in accordance with the MMA. When Commission staff raised concerns regarding BMS's agreement not to launch an authorized generic for six months, BMS withdrew its submission, executed a revised settlement with Apotex, and then submitted the revised proposed settlement to the FTC. This revised proposed settlement agreement omitted the mention of any promise by BMS not to launch an authorized generic during the first six months of the Apotex license. In Apotex's submission of the revised proposed settlement agreement, it informed the FTC that BMS had made certain oral representations in addition to those included in the written revised settlement agreement.

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[5] Title XI, Subtitle B of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. Law 108-173, 117 Stat. 2461 (Dec. 8, 2003).

Upon request by Commission staff, BMS submitted a certification, under oath, that it had not represented to Apotex that BMS would refrain from launching an authorized generic version of Plavix during the first six months of the Apotex license. Apotex later submitted additional materials, including a sworn declaration, confirming its position that BMS had made additional oral representations. Faced with conflicting sworn statements, the Commission opened a non-public investigation, and informed the DOJ of the conflicting declarations. Upon investigation, DOJ filed criminal charges against BMS and a former BMS executive, Dr. Andrew G. Bodner. Ultimately, BMS pled guilty to two counts of perjury and subsequently paid $1 million in fines (the maximum penalty for the two counts) for, among other things, failing to disclose its representations to Apotex that BMS would not launch an authorized generic. Dr. Bodner also pleaded guilty to making a false statement to the government and was fined and sentenced to two years of probation. The Commission then sued BMS for violation of the 2003 consent order and the MMA, and sought civil penalties. The $2.1 million civil penalty judgment in this case represents the maximum statutory penalty available for BMS's civil violations.

Warner Chilcott Corporation/Barr Pharmaceuticals, Civil Action No. 1:05-CV-2179-CKK (D.D.C.) (complaint filed November 7, 2005, amended complaint filed December 2, 2005) (http://www.ftc.gov/os/caselist/0410034/0410034.htm)). The Commission filed a complaint in U.S. District Court for the District of Columbia seeking an injunction against an agreement entered into by Warner Chilcott and Barr to prevent entry of Barr's generic version of Warner Chilcott's highly profitable Ovcon 35 oral contraceptive. Under the March, 2004 agreement, Warner Chilcott agreed to pay Barr $20 million in exchange for Barr's delaying entry of its generic version of Ovcon for five years. According to the complaint, Warner Chilcott expected to lose 50% of its net sales of $71 million earned from branded Ovcon upon entry of a generic. Barr filed an application in 2001 with the FDA to make and sell a generic version of Ovcon, and at the beginning of 2003, Barr announced its intention to market its generic version of Ovcon by the end of the year. After Barr received FDA approval to make and sell its generic version of Ovcon in April 2004, Warner Chilcott paid Barr the $20 million, thus preventing Barr from selling a generic version of Ovcon until May 2009. The Commission filed a preliminary injunction on September 25, 2006, after it learned that Warner Chilcott was planning to launch a new chewable version of Ovcon, switch patients over to the new product, and then stop selling Ovcon. Because generic substitution would be unavailable if regular Ovcon was no longer available at the pharmacy, this switch strategy would have destroyed the market for generic Ovcon. Shortly after the Commission filed the request for a preliminary injunction, Warner Chilcott abandoned the provision in the 2004 agreement that prevented Barr from entering the market with its generic version, and Barr launched its generic version. Warner Chilcott also agreed to a settlement in which it agreed not to enter into any supply agreements with generic manufacturers in which the generic agrees not to compete with Warner Chilcott. The agreement also prohibits Warner Chilcott from entering into any agreement where Warner Chilcott provides the generic with anything of value, the generic refrains from research development, manufacturing, marketing, distribution or sale of a generic version, and the agreement adversely affects competition. The district court entered a final order settling the matter with Warner Chilcott on October 23, 2006. On November 2007, the court entered a final order settling the Commission's complaint against Barr. The Commission's settlement agreement with Barr forbids Barr from entering into anticompetitive supply agreements with branded companies, similar to the agreement with

Warner Chilcott discussed above, and any anticompetitive agreements with branded manufacturers in which Barr receives monetary compensation or agrees to limit the research, development, manufacturing, marketing, distribution of the generic product. The agreement also requires Barr to give the Commission prior notification for ten years if Barr enters into any other agreements with branded manufacturers that have the potential to harm competition.

Perrigo Company/Alpharma Inc., Civil Action No. 1:04CV01397 (RMC) (D.D.C.), (complaint filed August 17, 2004) (http://www.ftc.gov/os/caselist/0210197/0210197.htm). In a complaint seeking injunctive and other relief filed in U.S. District Court for the District of Columbia, the Commission charged two generic drug manufacturers, Alpharma, Inc. and Perrigo Company, with entering into an agreement to limit competition for over-the-counter store-brand children's liquid Ibuprofen. The two companies were the only manufacturers of over-the-counter store-brand children's liquid Ibuprofen approved by the FDA. Fifty state attorneys general also filed a similar complaint in U.S. District Court. According to the FTC's complaint, Perrigo and Alpharma agreed to allocate to Perrigo the sale of over-the-counter store-brand children's liquid Motrin for seven years, in return for an up-front payment and a royalty on Perrigo's sales of the drug. Both parties projected that prices would rise 25% if they allocated the market. As a result of the agreement, Perrigo raised its prices to those customers who had negotiated lower prices when the two companies were competing. On August 25, 2004, the court granted final approval of settlement agreements under which Alpharma and Perrigo were required to disgorge $6.25 of illegal profits for disbursement to consumers harmed by the illegal agreement. The settlement agreements also forbid the defendants from entering into agreements not to compete where one party is the first filer of an abbreviated new drug application with the FDA.

Bristol-Myers Squibb Company (See Section II A for citation and annotation.)

Biovail Corporation/Elan Corporation 134 F.T.C 302 (2002) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume134.pdf#page=306). According to the complaint, Biovail and Elan were the only companies with FDA approval to market 30 mg and 60 mg generic Adalat. Elan was the first to file for FDA approval on the 30 mg dosage, and Biovail was the first to file for FDA approval on the 60 mg dosage. Pursuant to the Hatch-Waxman Act, Elan qualified for 180 days of exclusivity for the 30 mg product upon receiving final FDA approval, and Biovail qualified for 180 days of exclusivity on the 60 mg product upon receiving final FDA approval. Each was the second to file on the dosage for which the other was the first filer. Prior to generic entry, Bayer's sales of the branded form of the 30 mg and 60 mg products were in excess of $270 million a year. In October 1999, Biovail and Elan entered into an agreement involving these products. In exchange for specified payments, Elan appointed Biovail as the exclusive distributor of Elan's 30 mg and 60 mg products and allowed Biovail to profit from the sale of both products. Biovail appointed Teva Pharmaceuticals, Inc. to sub-distribute Elan's 30 mg product in the United States, and agreed to appoint another firm to sub-distribute Elan's 60 mg product. The agreement had a minimum term of 15 years.

In March 2000, the FDA gave final approval to Elan's 30 mg product and Elan, under its agreement with Biovail, entered the market with its 30 mg product through Biovail. In December 2000, the FDA gave final approval to Biovail's 60 mg product and Biovail entered the market

with that product. Also in December 2000, the FDA gave final approval to Biovail's 30 mg product, but Biovail never launched that product. Similarly, in October 2001, the FDA gave final approval to Elan's 60 mg product, but Elan never launched that product. Thus, Elan had a monopoly over 30 mg generic Adalat, the profits from which it shared with Biovail; Biovail had a monopoly over 60 mg generic Adalat, having paid Elan a multi-million dollar royalty; and neither launched a product in competition with the other's dosage form.

The order requires Biovail and Elan to terminate their agreement immediately, and prohibits them from entering similar agreements in the future. It requires them to use best efforts to effect independent launches of both 30 mg and both 60 mg generic Adalat products as promptly as possible, and contains an interim supply arrangement to ensure that consumers continue to have access to at least one 30 mg and one 60 mg product while Biovail and Elan unwind their agreement. In addition, the order contains strict reporting and notice requirements intended to assist the Commission in monitoring compliance with the order.

Schering-Plough Corporation, et. al., D. 9297, Initial Decision issued June 27, 2003, rev'd by Commission Decision and Order, December 8, 2003 (136 F.T.C. 956 (2003)) (http://www.ftc.gov/os/decisions/docs/Volume136.pdf#page=961); rev'd 402 F.3d 1056 (11th Cir. 2005); order denying rehearing *en banc* issued May 31, 2005 (Pet. App. 36a-153a (unreported); Petition for Certiorari filed August, 2005. The complaint alleged that Schering-Plough Corporation, Upsher-Smith Laboratories and American Home Products Corporation entered into anticompetitive agreements in which Schering paid Upsher and American Home Products millions of dollars to forgo launching a competitive generic alternative to K-Dur 20, an extended-release potassium chloride supplement manufactured by Schering. Schering sued Upsher, a generic drug manufacturer, for patent infringement after Upsher sought FDA approval to manufacture and distribute Klor Con M20, a generic version of K-Dur 20. According to the complaint, Schering and Upsher reached an agreement in 1997 to settle the patent infringement lawsuit, whereby Schering paid Upsher $60 million dollars and Upshur agreed not to market any generic version of K-Dur 20 until September, 2001. Under the agreement, Schering received licenses to market five of Upsher's products but, the complaint charged, Schering paid Upsher to secure it's agreement to the 2001 entry date, and the effect of the agreement was to ensure that no other company's generic K-Dur 20 could obtain FDA approval and enter the market during the term of the agreement.

The complaint also alleged that Schering agreed to pay ESI Lederle, Inc., a division of American Home Products, to forgo marketing its generic version of K-Dur 20, in connection with settlement of patent infringement litigation. American Home Products agreed to a proposed consent agreement, and on April 2, 2002, the Commission approved a final order settling the charges against American Home Products. (see American Home Products discussed below).

After an administrative trial as to respondents Schering and Upsher, the ALJ dismissed the complaint. In an initial decision issued on June 27, 2002, Judge Chappell ruled that Schering's payments to Upsher were solely for licenses to Upsher's products and not in exchange for agreement to the 2001 entry date. The ALJ also held that complaint counsel could not prevail absent proof that the Upsher and AHP products did not infringe Schering's patent. In addition, he

found that the relevant product market was all oral potassium supplements, and that Schering did not have monopoly power in that market. Complaint counsel appealed.

On December 8, 2003, the Commission reversed the ALJ's decision. It ruled that Schering paid Upsher to delay the entry of generic competition, and not merely for the products licensed. The Commission also ruled that Schering's agreements with both Upsher and AHP were anticompetitive because Schering's payments resulted in greater protection from competition than the parties expected from continued litigation. In addition, the Commission considered it not necessary or desirable to adjudicate the merits of the underlying patent disputes in order to assess the competitive effects of the agreements.

On March 8, 2005, the Eleventh Circuit set aside the Commission decision, and vacated the cease and desist order. The Eleventh Circuit held the Commission did not establish that the challenged agreements restricted competition beyond the exclusionary effects of Schering's patent. On May 31, 2005, the Eleventh Circuit denied the Commission's petition for rehearing *en banc*. The Commission filed a petition for certiorari in August, 2005. The Supreme Court denied the petition on June 26, 2006.

American Home Products, 133 F.T.C. 611 (2002) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume133.pdf) (see Schering-Plough Corporation discussed above) The complaint alleged that Schering agreed to pay ESI Lederle, Inc., a division of American Home Products, to forgo marketing its generic version of K-Dur 20, in connection with settlement of patent infringement litigation. (see Schering-Plough Corporation discussed above) ESI agreed, in exchange for the payments, not to market any generic version of K-Dur 20 until January 2004, and to market only one generic version between January 2004 and September 2006 (when Schering's patent expired). ESI also agreed not to prepare, or help any other firm prepare, bioequivalence studies necessary for FDA approval of an application for a generic version of K-Dur 20 until September 2006. American Home Products agreed to a proposed consent agreement and on April 2, 2002, the Commission approved a final order settling the charges against American Home Products. The order prohibits American Home Products, whether acting as a brand or generic competitor, from entering into agreements in which a generic company agrees not to market its drug or enter the market with a non-infringing generic drug.

Hoechst Marion Roussel, Inc./Carderm Capital L.P./Andrx Corp., 131 F.T.C. 927 (2001) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume131.pdf). The complaint alleged that Hoechst and Andrx entered into an agreement in which Andrx was paid millions of dollars to delay bringing to market a competitive generic alternative to Cardizem CD. Andrx, a generic drug manufacturer, was the first to file for FDA approval to market its generic version of Hoechst's brand name hypertension and angina drug, Cardizem CD, but was sued by Hoechst for patent infringement. Because of Hatch-Waxman provisions that grant the initial generic manufacturer a 180 day market exclusivity period, the complaint alleged the effect of the agreement was to ensure that no other company's generic drug could obtain FDA approval and enter the market during the term of the agreement. Under the agreement, according to the complaint, Andrx agreed not to market its product when it received FDA approval, not to give up or relinquish its 180-day exclusivity right, and not to market a non-infringing generic version of

Cardizem CD during the ongoing patent litigation. The order prohibits respondents from entering into agreements in which the first generic company to file an ANDA agrees: 1) not to relinquish its rights to the 180-day exclusivity period; and 2) not to develop or market a non-infringing generic drug product. The order also requires Hoechst and Andrx to notify the Commission, and obtain court approval, before entering into any agreements involving payments to a generic company in which the generic company temporarily refrains from bringing a generic drug to market.

Abbott Laboratories/Geneva Pharmaceuticals, Inc. C-3945, C-3946 (consent orders issued May 22, 2000) (http://www.ftc.gov/os/caselist/c3945.htm). The complaint alleged that Abbott paid Geneva $4.5 million per month to delay bringing to market a generic alternative to Abbott's brand-name hypertension and prostate drug, Hytrin. Geneva, a generic drug manufacturer, sought and received FDA approval to market its generic capsule version. After Geneva received FDA approval, Abbott and Geneva reached an agreement whereby Geneva would not bring a generic version of Hytrin to market during the ongoing patent litigation on Geneva's tablet version of Hytrin in exchange for the $4.5 million monthly payment, an amount which exceeded the amount Abbott estimated Geneva would have received if it actually marketed the generic drug. Because of Hatch-Waxman provisions that grant the initial generic manufacturer a 180-day market exclusivity period, the complaint alleged the effect of the agreement was to ensure that no other company's generic Hytrin could obtain FDA approval and enter the market during the term of the agreement. The consent orders prohibit Abbott and Geneva from entering into agreements in which a generic company agrees with the brand drug manufacturer to 1) give up or transfer its Hatch-Waxman 180-day exclusivity rights, or 2) not enter the market with a non-infringing product. In addition, the orders require that agreements involving payments to a generic company to stay off the market during the pendency of patent litigation be approved by the court with notice to the Commission. Geneva was also required to waive its right to a 180-day exclusivity period for its generic tablet, so other generic tablets could immediately enter the market. In a statement accompanying the consent orders, the Commission warned that in the future it will consider its entire range of remedies in enforcement actions against similar arrangements, including seeking disgorgement of illegally obtained profits.

C. Agreements on Price or Price-Related Terms

Minnesota Rural Health Cooperative, C-4311, FTC File No. 0510199 (consent order issued December 28, 2010) (http://www.ftc.gov/os/caselist/0510199/index.shtm). The complaint charges 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 has undertaken no efficiency-enhancing integration that could justify this conduct. MRHC has about 22 hospital members (representing most of the hospitals and two-thirds of hospital beds) and 114 physician members (who practice in about 47 clinics) in SW Minnesota. The complaint charges 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 charges 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 alleges 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 charges 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 payor 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., FTC File No. 0610172 (consent order issued April 5, 2010) (www.ftc.gov/os/caselist/0610172/index.shtm). The complaint charges 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 contract 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 charges that, in order to join the RFVP IPA, member physicians sign an agreement by which they agree to refuse to enter into contracts except on RFVP's collectively agreed-upon terms. One of these terms is 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 percent of all its members and 50 percent of each specialty among its members. The complaint charges that the effect of these practices has 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, FTC File No.0510252 (consent order issued April 2, 2010) (http://www.ftc.gov/os/caselist/0510252/index.shtm). The complaint charges 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 charges 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 proposed consent 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, FTC File No. 0510252 (consent order issued March 30, 2010) (www.ftc.gov/os/caselist/0510252/higgins/index.shtm). The complaint charges 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 http://www.ftc.gov/os/caselist/0510252/index.shtm). 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 charges 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 are 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 charges 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 alleges 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 (consent order issued July 10, 2009) (www.ftc.gov/os/caselist/0510260/index.shtm). In its complaint, the Commission charges 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 charges 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 charges 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 charges 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.

Independent Physician Associates Medical Group, Inc., dba AllCare IPA, C-4245 (consent order issued February 2, 2009) (http://www.ftc.gov/os/caselist/0610258/index.shtm). 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 charges 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 charges 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 consent 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 (consent order issued September 6, 2007) (http://www.ftc.gov/os/caselist/0510044/index.shtm). 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 (consent order issued February 7, 2007) (http://www.ftc.gov/os/caselist/0310021/0310021.htm). 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 (consent order issued September 29, 2006) (http://www.ftc.gov/os/caselist/0510137/0510137.htm). 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. The two IPAs, New Century Health Quality Alliance and Prime Care of Northeast Kansas, consist 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 consent 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 (consent order issued August 24,

2006) (http://www.ftc.gov/os/caselist/0510170/0510170.htm). The complaint charged that an association of approximately thirty 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 (consent order issued March 23, 2006) (http://www.ftc.gov/os/caselist/0410097/0410097.htm). 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., 140 F.T.C. 244 (2005) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume140.pdf#page=250). 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., 139 F.T.C. 513 (2005) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume139.pdf#page=518) The complaint charged that a physician organization representing approximately 80 percent 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 percent discount, a method that increased its members' payments by as much as 60 percent. 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, 139 F.T.C. 378 (2005) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume139.pdf#page=383). 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 (complaint issued February 10, 2004 ; consent order with one respondent issued May 17, 2005) (http://www.ftc.gov/os/adjpro/d9315/index.htm). Count III of the complaint (see Section IV 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., 139 F.T.C. 266 (2005) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume139.pdf#page=271). 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., 139 F.T.C. 15 (2005) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume139.pdf#page=20). 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 Alamagordo, New Mexico area. White Sands Health Care System (White Sands) included Alamagordo Physicians, an IPA with approximately 80% of the physicians in the Alamagordo 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 Alamagordo 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., 138 F.T.C. 281 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume138.pdf#page=286). 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, 138 F.T.C. 675 (2004) (consent order)

(http://www.ftc.gov/os/decisions/docs/Volume138.pdf#page=680). 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 thirty months after the order becomes final, and from entering into a "modified messenger" arrangement for fifty four 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., 137 F.T.C. 219 (2004) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume137.pdf#page=223). 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, 137 F.T.C. 90 (2004) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume137.pdf#page=94). 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 to members payer offers 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 proposed 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, 136 F.T.C 840 (consent order) (2003) (http://www.ftc.gov/os/decisions/docs/Volume136.pdf#page=845). 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.

North Texas Specialty Physicians, D. 9312 (Commission decision issued November 29, 2005, aff'd 528 F.3d 346 (5th Cir. 2008), cert. denied 555 U.S. ___ (Order No. 08-515, February 23, 2009) (http://www.ftc.gov/os/adjpro/d9312/index.htm). 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.

South Georgia Health Partners, L.L.C., 136 F.T.C. 748 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume136.pdf#page=753). 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., 136 F.T.C. 658 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume136.pdf#page=663). 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, 136 F.T.C. 616 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume136.pdf#page=621). 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, 136 F.T.C. 538 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume136.pdf#page=543). 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., 137 F.T.C. 411 (2004) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume137.pdf#page=415). 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, 135 F.T.C. 804 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume135.pdf#page=809). 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), 136 F.T.C. 119 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume136.pdf#page=124). 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., 136 F.T.C. 81 (2003) (consent order) and **Grossmont Anesthesia Services Medical Group**, 136 F.T.C. 65 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume136.pdf#page=86) (http://www.ftc.gov/os/decisions/docs/Volume136.pdf#page=70). 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, 134 F.T.C. 472 (2002) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume134.pdf#page=476). 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, 134 F.T.C 553 (2002) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume134.pdf#page=557). 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, 133 F.T.C. 794 (2002) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume133.pdf#page=799). 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., 134 F.T.C 118 (2002) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume134.pdf#page=122). 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. 134 F.T.C. 150 (2002) (http://www.ftc.gov/os/decisions/docs/Volume134.pdf#page=154). 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., 131 F.T.C. 893 (2002) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume131.pdf). 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 (consent order issued May 18, 2000) (http://www.ftc.gov/os/caselist/c3944.htm). 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 statue 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 (consent order issued June 12, 2000) (http://www.ftc.gov/os/caselist/c3953.htm). 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 (consent order issued May 18, 2000) (http://www.ftc.gov/os/caselist/c3943.htm). 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, (consent order issued April 11, 2000) (http://www.ftc.gov/os/caselist/c3936.htm). 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 proposed 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., 128 F.T.C. 75 (1999) (consent order) (http://www.ftc.gov/os/decisions/docs/vol128/FTC_VOLUME_DECISION_128_(JULY_-_DECEMBER_1999)PAGES_1-136.pdf#page=75). 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 ninety-one 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., 127 F.T.C. 564 (1999) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume127.pdf#page=564). 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.

Asociacion de Farmacias Region de Arecibo, 127 F.T.C. 266 (1999) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume127.pdf#page=266). The complaint alleged that an association, composed of approximately 125 pharmacies in northern Puerto Rico, fixed the terms and conditions, including fixing prices, of dealing with third party payers, and threatened to withhold services from a government program to provide health care services for indigent patients. The association was formed in 1994 as a vehicle to negotiate with health plans. According to the complaint, in January 1995, the association refused to contract with Triple-S, the payer for the reform program in northern Puerto Rico, until Triple-S raised the fees paid to the association's members. Furthermore, in March 1996, the association threatened to withhold its members' services unless Triple-S rescinded a new fee schedule calling for lower reimbursement fees for the pharmacies. Triple-S acceded to the association's demands and increased fees by 22%. The order prohibits the association from negotiating on behalf of any pharmacies with any payer or provider, jointly boycotting or refusing to deal with third party payers, restricting the ability of pharmacies to deal with payers individually, or determining the terms or conditions for dealing with third party payers.

Ernesto L. Ramirez Torres, D.M.D., et al., 127 F.T.C. 134 (1999) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume127.pdf#page=134). 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., 126 F.T.C. 219 (1998) (consent order) (http://www.ftc.gov/os/decisions/docs/vol126/FTC_VOLUME_DECISION_126_(JULY_-_DECEMBER_1998)PAGES_202-325.pdf#page=18). 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.

Institutional Pharmacy Network, 126 F.T.C. 138 (1998) (consent order) (http://www.ftc.gov/os/decisions/docs/vol126/FTC_VOLUME_DECISION_126_(JULY_-_DECEMBER_1998)PAGES_105-201.pdf#page=34). The complaint alleged that five institutional pharmacies unlawfully fixed prices and restrained competition among institutional pharmacies in Oregon, leading to higher reimbursement levels for serving Medicaid patients in Oregon long-term care institutions. The five pharmacies, Evergreen Pharmaceutical, Inc., NCS Healthcare of Oregon, Inc., NCS Healthcare of Washington, Inc., United Professional Companies, Inc., and White, Mack and Wart, Inc. (which provide institutional pharmacy services for 80% of those patients in Oregon receiving such services) competed to provide prescription drugs and services to long term care institutions. According to the complaint, the pharmacies formed IPN to offer their services collectively and maximize their leverage in bargaining over reimbursement rates, but did not share risk or provide new or efficient services. The order prohibits IPN and the institutional pharmacy respondents from entering into similar price fixing arrangements.

Urological Stone Surgeons, Inc., 125 F.T.C. 513 (1998) (consent order) (http://www.ftc.gov/os/decisions/docs/Vol125/FTC_VOLUME_DECISION_125_(JANUARY_-_JUNE_1998)PAGES_490-594.pdf#page=24). 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/os/caselist/9710011.htm). 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., 123 F.T.C. 62 (1997) (consent order) (http://www.ftc.gov/os/caselist/c3704.shtm). 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.

RxCare of Tennessee, Inc. et al., 121 F.T.C. 762 (1996) (consent order) (http://www.ftc.gov/os/decisions/docs/vol121/FTC_VOLUME_DECISION_121_(JANUARY_-_JUNE_1996)PAGES_762-860.pdf). The complaint charged that RxCare of Tennessee, a leading provider of pharmacy network services in that state, used a "most favored nation" clause (MFN) in order to discourage pharmacies from discounting, and to limit price competition among pharmacies in their dealings with pharmacy benefits managers and third-party payers. The MFN clause at issue required that if a pharmacy in the RxCare network accepted a reimbursement rate from any other third-party payer that is lower than the RxCare rate, the pharmacy must accept that lower rate for all RxCare business in which it participates. Combined with RxCare's market power (the network included 95% of all chain and independent pharmacies in Tennessee), the

complaint alleged that the MFN clause forced some pharmacies in the network to reject lower reimbursement rates for prescriptions they fill for patients covered by other health plans. The order bars RxCare from including the MFN clause in its pharmacy agreements.

La Asociacion Medica de Puerto Rico, 119 F.T.C. 772 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_(JANUARY_-_JUNE_1995)PAGES_724-829.pdf#page=49). The complaint charged that the Medical Association of Puerto Rico, its Physiatry Section, and two of its physiatrist 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 physiatrists 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 physiatrists about their decisions to participate in agreements with insurers and provide service to patients, passing such information along to other doctors, and giving physiatrists advice about making those decisions.

Trauma Associates of North Broward, Inc., 118 F.T.C. 1130 (1994) (consent order) (http://www.ftc.gov/os/decisions/docs/vol118/FTC_VOLUME_DECISION_118_(JULY_-_DECEMBER_1994)PAGES_1130-1228.pdf). The complaint charged that ten 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, 117 F.T.C. 396 (1994) (consent order) (http://www.ftc.gov/os/decisions/docs/vol117/FTC_VOLUME_DECISION_117_(JANUARY_-_JUNE_1994)PAGES_316_-_418.pdf#page=81). 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.

Baltimore Metropolitan Pharmaceutical Association, Inc., and Maryland Pharmacists Association, 117 F.T.C. 95 (1994) (consent order) (http://www.ftc.gov/os/decisions/docs/vol117/FTC_VOLUME_DECISION_117_(JANUARY_-_JUNE_1994)PAGES_1_-103.pdf#page=95). The complaint alleged that the Maryland Pharmacists Association (MPhA) and the Baltimore Metropolitan Pharmaceutical Association

(BMPA), in response to cost-containment measures initiated by the Baltimore city government employees' prescription-drug plan, illegally conspired to boycott the plan in order to force higher reimbursement rates for prescriptions. According to the complaint, the associations' actions increased the cost of obtaining drugs through prescription drug plans, and reduced price competition between the firms providing these prescriptions. Under the consent order, MPhA and BMPA are prohibited from entering into, organizing, or encouraging any agreement between or among pharmacy firms to refuse to enter into, or to withdraw from, any participation agreement offered by a third-party payer. In addition, for five years, the associations are prohibited from providing comments or advice to any pharmacist or pharmacy concerning participation in any existing or proposed participation agreement, or the intention of other pharmacists or pharmacies to withdraw from or join a participation agreement. The associations are also prohibited from continuing meetings if two persons make statements concerning their firms' intentions to join a participation agreement.

Southeast Colorado Pharmacal Association, 116 F.T.C. 51 (1993) (consent order) (http://www.ftc.gov/os/decisions/docs/vol116/FTC_VOLUME_DECISION_116_(JANUARY_-_DECEMBER_1993)PAGES_1-112.pdf#page=49). The complaint alleged that the Southeast Colorado Pharmacal Association (SCPhA) illegally conspired to boycott a prescription drug program offered through a state-retirees health plan in an attempt to force the program to increase its reimbursement rate for prescriptions filled by its pharmacy members. The order prohibits the association from entering into or threatening to enter into any agreement with pharmacies to withdraw or refuse to participate in similar reimbursement programs in the future. In addition, for five years, SCPhA is prohibited from providing comments or advice to any pharmacist or pharmacy concerning participation in any existing or proposed participation agreement, communicating the intention of other pharmacists or pharmacies to withdraw from or join a participation agreement, or soliciting other pharmacy firms' intentions about entering into a participation agreement. The association is also prohibited from continuing meetings of pharmacy representatives if members make statements concerning their firms' intentions to join a participation agreement.

Roberto Fojo, M.D., 115 F.T.C. 336 (1992) (consent order) (http://www.ftc.gov/os/decisions/docs/vol115/FTC_VOLUME_DECISION_115_(JANUARY_-_DECEMBER_1992)PAGES_336-432.pdf). 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, 115 F.T.C. 701 (1992) (consent order) (http://www.ftc.gov/os/decisions/docs/vol115/FTC_VOLUME_DECISION_115_(JANUARY_-_DECEMBER_1992)PAGES_670-773.pdf#page=32). 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., 114 F.T.C. 783 (1991) (consent order) (http://www.ftc.gov/os/decisions/docs/vol114/FTC_VOLUME_DECISION_114_(_JANUARY_-_DECEMBER_1991_)PAGES_696-797.pdf#page=88). The complaint charged that twenty three 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.

Peterson Drug Company, 115 F.T.C. 492 (1992) (litigated order) (http://www.ftc.gov/os/decisions/docs/vol115/FTC_VOLUME_DECISION_115_(JANUARY_-_DECEMBER_1992)PAGES_433-559.pdf#page=60). As a member firm of Chain Pharmacy Association, Peterson Drug Company was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan, an attempt by New York State to reduce the reimbursement received by pharmacies participating in the state's employee prescription drug plan. After Peterson failed to appeal an Administrative Law Judge's decision in favor of complaint counsel, the Commission adopted the initial decision and entered an order similar to the Chain Pharmacy order (discussed below).

Chain Pharmacy Association, 114 F.T.C. 327 (1991) (consent order) (http://www.ftc.gov/os/decisions/docs/vol114/FTC_VOLUME_DECISION_114_(_JANUARY_-_DECEMBER_1991_)PAGES_250-366.pdf#page=78). The complaint charged that the Chain Pharmacy Association (Chain) and its members conspired to boycott the New York State Employees Prescription Plan, in order to force an increase in reimbursement rates for plan participants who provide prescriptions to state employees. The complaint alleged that the collective refusal to participate in the program injured consumers in New York by reducing competition among pharmacy firms with respect to third-party prescription plans. The order prohibits Chain from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into third-party payer prescription drug plans. Also, for a period of ten years, the order prohibits Chain from communicating to any pharmacist or pharmacy firm information regarding any other pharmacy firm's intentions to enter or refuse to enter into such a participation agreement, or from continuing meetings of pharmacy firm representatives if two persons make statements concerning their firms' intentions to join a participation agreement. For a period of eight years, the order prohibits Chain from advising another pharmacy firm on whether to enter into any payer participation agreement. See Pharmaceutical Society of the State of New York, Inc. (discussed below).

Fay's Drug Company, Inc., 114 F.T.C. 344 (1991) (consent order) (http://www.ftc.gov/os/decisions/docs/vol114/FTC_VOLUME_DECISION_114_(_JANUARY_-_DECEMBER_1991_)PAGES_250-366.pdf#page=95). As a member firm of Chain Pharmacy Association, Fay's Drug Company, Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan, an attempt by New York State to reduce the reimbursement received by pharmacies participating in the state's employee prescription drug plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

Kinney Drugs, Inc., 114 F.T.C. 367 (1991) (consent order) (http://www.ftc.gov/os/decisions/docs/vol114/FTC_VOLUME_DECISION_114_(_JANUARY_-_DECEMBER_1991)PAGES_367-485.pdf). As a member firm of Chain Pharmacy Association, Kinney Drugs, Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan, an attempt by New York State to reduce the reimbursement received by pharmacies participating in the state's employee prescription drug plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

Melville Corporation, 114 F.T.C. 171 (1991) (consent order) (http://www.ftc.gov/os/decisions/docs/vol114/FTC_VOLUME_DECISION_114_(_JANUARY_-_DECEMBER_1991)PAGES_152-249.pdf#page=20). As a member firm of Chain Pharmacy Association, Melville Corporation was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan, an attempt by New York State to reduce the reimbursement received by pharmacies participating in the state's employee prescription drug plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

Rite Aid Corporation, 114 F.T.C. 182 (1991) (consent order) (http://www.ftc.gov/os/decisions/vol114.shtm). As a member firm of Chain Pharmacy Association, Rite Aid Corporation was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan, an attempt by New York State to reduce the reimbursement received by pharmacies participating in the state's employee prescription drug plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

James E. Krahulec, 114 F.T.C. 372 (1991) (consent order) (http://www.ftc.gov/os/decisions/vol114.shtm). As a member firm of Chain Pharmacy Association, James E. Krahulec, along with Rite Aid and the members of Chain Pharmacy Association, was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

Pharmaceutical Society of the State of New York, Inc., 113 F.T.C. 661 (1990) (consent order) (http://www.ftc.gov/os/decisions/docs/vol113/Volume113_625-714.pdf#page=37). The complaint charged that the Pharmaceutical Society of the State of New York, Inc. (PSSNY)

conspired to boycott the New York State Employees Prescription Plan, in order to force an increase in reimbursement rates for plan participants who provide prescription drugs to state employees. According to the complaint, the society's actions reduced price competition, forced the state to pay substantial additional sums for prescription drugs, and coerced the state into raising the prices paid to pharmacies under the state plan. Under the consent order, the society agreed not to enter into any agreement between pharmacy firms to withdraw from or refuse to enter into any participation agreement. Also, for a period of ten years, the order prohibits PSSNY from continuing meetings if two persons make statements concerning their firms' intentions to join a participation agreement; and requires PSSNY to refrain from communicating to any pharmacist or pharmacy firm any information regarding any other pharmacy firm's intentions to enter or refuse to enter into such a participation agreement. For a period of eight years, the order prohibits PSSNY from providing comments or advice to any pharmacist or pharmacy on the desirability of participating in any existing or proposed participation agreement. *See* Chain Pharmacy Association (discussed above).

Empire State Pharmaceutical Society, Inc., 114 F.T.C. 152 (1991) (consent order) (http://www.ftc.gov/os/decisions/docs/vol114/FTC_VOLUME_DECISION_114_(_JANUARY_-_DECEMBER_1991)PAGES_152-249.pdf). An affiliate of Long Island Pharmaceutical Society, Empire State Pharmaceutical Society was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

Capital Area Pharmaceutical Society, 114 F.T.C. 159 (1991) (consent order) (http://www.ftc.gov/os/decisions/vol114.shtm). An affiliate of PSSNY, Capital Area Pharmaceutical Society was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

Alan Kadish, 114 F.T.C. 167 (1991) (consent order) (http://www.ftc.gov/os/decisions/vol114.shtm). As president of PSSNY, Alan Kadish was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

Long Island Pharmaceutical Society, Inc., 113 F.T.C. 669 (1990) (consent order) (http://www.ftc.gov/os/decisions/docs/vol113/Volume113_625-714.pdf#page=45). An affiliate of PSSNY, Long Island Pharmaceutical Society, Inc. was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

Pharmaceutical Society of Orange County, Inc., 113 F.T.C. 645 (1990) (consent order) (http://www.ftc.gov/os/decisions/docs/vol113/Volume113_625-714.pdf#page=21). An affiliate of PSSNY, Pharmaceutical Society of Orange County, Inc., was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

Westchester County Pharmaceutical Society, 113 F.T.C. 159 (1990) (consent order) (http://www.ftc.gov/os/decisions/vol114.shtm). An affiliate of PSSNY, Westchester County Pharmaceutical Society, Inc., was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

Brooks Drug, Inc., 112 F.T.C. 28 (1989) (consent order) (http://www.ftc.gov/os/decisions/docs/vol112/FTC_VOLUME_DECISION_112_(_JULY_-_DECEMBER_1989)PAGES_1-174.pdf#page=28). As a member firm of Chain Pharmacy Association, Brooks Drug Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

Carl's Drug Co., Inc., 112 F.T.C. 15 (1989) (consent order) (http://www.ftc.gov/os/decisions/docs/vol112/FTC_VOLUME_DECISION_112_(_JULY_-_DECEMBER_1989)PAGES_1-174.pdf#page=15). As a member firm of Chain Pharmacy Association, Carl's Drug Co., Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

Genovese Drug Stores, Inc., 112 F.T.C. 23 (1989) (consent order) (http://www.ftc.gov/os/decisions/docs/vol112/FTC_VOLUME_DECISION_112_(_JULY_-_DECEMBER_1989)PAGES_1-174.pdf#page=23). As a member firm of Chain Pharmacy Association, Genovese Drug Stores, Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

Preferred Physicians, Inc., 110 F.T.C. 157 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol110/FTC_VOLUME_DECISION_110_(JULY_1987_-_JUNE_1988)PAGES_104-206.pdf#page=54). The complaint charged that two hundred and fifty 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., 110 F.T.C. 175 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol110/FTC_VOLUME_DECISION_110_(JULY_1987_-_JUNE_1988)PAGES_104-206.pdf#page=72). The complaint charged that thirty-one

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, 111 F.T.C. 331 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol111/FTC_VOLUME_DECISION_111_(_JULY_1988_-_JUNE_1989)PAGES_322_-_417.pdf#page=10). 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) 111 F.T.C. 35 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol111/FTC_VOLUME_DECISION_111_(_JULY_1988_-_JUNE_1989)_PAGES_1_-_99.pdf#page=35). 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, 106 F.T.C. 556 (1985) (consent order) (http://www.ftc.gov/os/decisions/docs/vol106/FTC_VOLUME_DECISION_106_(JULY_-_DECEMBER_1985)PAGES_528-END.pdf#page=29). 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, 101 F.T.C. 191 (1983) (http://www.ftc.gov/os/decisions/docs/vol101/FTC_VOLUME_DECISION_101_(JANUARY_-_JUNE_1983)PAGES_191-315.pdf). 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, 100 F.T.C. 518 (1982) (consent order (http://www.ftc.gov/os/decisions/docs/vol100/FTC_VOLUME_DECISION_100_(JULY_-_DECEMBER_1982)PAGES_431-530.pdf#page=88). 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, 94 F.T.C. 701 (1979) (http://www.ftc.gov/os/decisions/docs/vol94/FTC_VOLUME_DECISION_94_(JULY_-_DECEMBER_1979)PAGES_674-774.pdf#page=28), 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)). 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, 93 F.T.C. 519 (1979) (consent order) (modified 105 F.T.C. 277 (1985)) (set aside order, 120 F.T.C. 858 (1995)) (http://www.ftc.gov/os/decisions/docs/vol93/Volume93Pages519-618.pdf#page=1). 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 Medical Association, 90 F.T.C. 337 (1977) (consent order) (http://www.ftc.gov/os/decisions/docs/vol90/FTC_VOLUME_DECISION_90_(JULY_-_DECEMBER_1977)PAGES_257-349.pdf#page=81). 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, 89 F.T.C. 144 (1977) (consent order) (http://www.ftc.gov/os/decisions/docs/vol89/FTC_VOLUME_DECISION_89_(JANUARY_-_JULY_1977)PAGES_107-206.pdf#page=38), 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, 88 F.T.C. 968 (1976) (consent order) (http://www.ftc.gov/os/decisions/docs/vol88/FTC_VOLUME_DECISION_88_(JULY_-_DECEMBER_1976)PAGES_906-1003.pdf#page=63) (modified 105 F.T.C. 248 (1985)) (set aside order, 119 F.T.C. 609 (1995)). 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, 88 F.T.C. 955 (1976) (consent order) (http://www.ftc.gov/os/decisions/docs/vol88/FTC_VOLUME_DECISION_88_(JULY_-_DECEMBER_1976)PAGES_906-1003.pdf#page=50) (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.

D. Agreements to Obstruct Innovative Forms of Health Care Delivery or Financing

Transitions Optical, Inc. (See Section II A for citation and annotation.)

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

Connecticut Chiropractic Association, C-4217 (consent order issued April 14, 2008)

(http://www.ftc.gov/os/caselist/0710074/index.shtm). 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 five hundred 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.

South Carolina State Board of Dentistry, D. 9311 (consent order issued September 6, 2007) (http://www.ftc.gov/os/adjpro/d9311/index.htm). 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 flouride 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.

Asociacion de Farmacias Region de Arecibo (See Section II C for citation and annotation.)

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

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

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

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

Medical Staff of Good Samaritan Regional Medical Center, 119 F.T.C. 106 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_(JANUARY_-_JUNE_1995)PAGES_106-216.pdf). 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., 120 F.T.C. 567 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol120/FTC_VOLUME_DECISION_120_(JULY_-_DECEMBER_1995)PAGES_509_-_612.pdf#page=59). 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 C for citation and annotation.)

Diran Seropian, M.D., 115 F.T.C. 891 (1992) (consent order) (http://www.ftc.gov/os/decisions/docs/vol115/FTC_VOLUME_DECISION_115_(JANUARY_-_DECEMBER_1992)PAGES_880-976.pdf#page=12). 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, 114 F.T.C. 555 (1991) (consent order) (http://www.ftc.gov/os/decisions/docs/vol114/FTC_VOLUME_DECISION_114_(_JANUARY_-_DECEMBER_1991)PAGES_486-586.pdf#page=70). 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, 114 F.T.C. 542 (1991) (consent order) (http://www.ftc.gov/os/decisions/docs/vol114/FTC_VOLUME_DECISION_114_(_JANUARY_-_DECEMBER_1991)PAGES_486-586.pdf#page=57). 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, 112 F.T.C. 33 (1989) (consent order) (http://www.ftc.gov/os/decisions/docs/vol112/FTC_VOLUME_DECISION_112_(_JULY_-_DECEMBER_1989)PAGES_1-174.pdf#page=33). The complaint charged that twelve 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., 112 F.T.C. 517 (1989) (consent order) (http://www.ftc.gov/os/decisions/docs/vol112/FTC_VOLUME_DECISION_112_(_JULY_-_DECEMBER_1989_)PAGES_488_-_587.pdf#page=48). Dr. Mabee was charged along with 11 other obstetricians in Certain Sioux Falls Obstetricians (discussed below). He entered a separate consent agreement after the litigation against him had commenced.

Eugene M. Addison, M.D., 111 F.T.C. 339 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol111/FTC_VOLUME_DECISION_111_(_JULY_1988_-_JUNE_1989)PAGES_322_-_417.pdf#page=18). The complaint charged that fourteen 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, 111 F.T.C. 199 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol111/FTC_VOLUME_DECISION_111_(_JULY_1988-_JUNE_1989)PAGES_199_-_321.pdf). 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 C for citation and annotation.)

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

Medical Staff of Doctors' Hospital of Prince George's County, 110 F.T.C. 476 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol110/FTC_VOLUME_DECISION_110_(JULY_1987_-_JUNE_1988)PAGES_476-548.pdf). 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, 110 F.T.C. 541 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol110/FTC_VOLUME_DECISION_110_(JULY_1987_-_JUNE_1988)PAGES_476-548.pdf#page=66). 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., 111 F.T.C. 57 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol111/FTC_VOLUME_DECISION_111_(_JULY_1988_-_JUNE_1989)_PAGES_1_-_99.pdf#page=57). The complaint charged that allergists and a clinic in the Victoria, Texas area organized a boycott of manufacturers of new allergy testing products which 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, 111 F.T.C. 122 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol111/FTC_VOLUME_DECISION_111_(_JULY_1988-_DECEMBER_1989)PAGES_100-_198.pdf#page=23). 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.

Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court, Nurse Midwifery Associates v. Hibbett, 918 F.2d 605 (6th 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. The Sixth Circuit reversed the District Court on this issue.

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

Physicians of Meadville, 109 F.T.C. 61 (1987) (consent order) (http://www.ftc.gov/os/decisions/docs/vol109/FTC_VOLUME_DECISION_109_(JANUARY_-_JUNE_1987)_PAGES_1-100.pdf#page=61). The complaint charged that sixty-one 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, 108 F.T.C. 25 (1986) (consent order) (http://www.ftc.gov/os/decisions/docs/vol108/FTC_VOLUME_DECISION_108_(JULY_-_DECEMBER_1986)PAGES_1-104.pdf#page=25). 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), 107 F.T.C. 285 (1986) (consent order) (http://www.ftc.gov/os/decisions/docs/vol107/FTC_VOLUME_DECISION_107_(JANUARY_-_JUNE_1986)PAGES_240-312.pdf#page=46). 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, 108 F.T.C. 116 (1986) (consent order) (http://www.ftc.gov/os/decisions/docs/vol108/FTC_VOLUME_DECISION_108_(JULY_-_DECEMBER_1986)PAGES_105-192.pdf#page=12). 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., 106 F.T.C. 25 (1985) (consent order) (http://www.ftc.gov/os/decisions/docs/vol106/FTC_VOLUME_DECISION_106_(JULY_-_DECEMBER_1985)PAGES_1-94.pdf#page=25). 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, 106 F.T.C. 291 (1985) (consent order) (http://www.ftc.gov/os/decisions/docs/vol106/FTC_VOLUME_DECISION_106_(JULY_-_DECEMBER_1985)PAGES_291-360.pdf). 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, 106 F.T.C. 342 (1985) (consent order) (http://www.ftc.gov/os/decisions/docs/vol106/FTC_VOLUME_DECISION_106_(JULY_-_DECEMBER_1985)PAGES_291-360.pdf#page=52). 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 Corp., 102 F.T.C. 1232 (1983) (consent order) (http://www.ftc.gov/os/decisions/docs/vol102/FTC_VOLUME_DECISION_102_(JULY_-_DECEMBER_1983)PAGES_1176-1273.pdf#page=57). 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, 101 F.T.C. 57 (1983) (http://www.ftc.gov/os/decisions/docs/vol101/FTC_VOLUME_DECISION_101_(JANUARY_-_JUNE_1983)PAGES_57-190.pdf), rev'd, 745 F.2d 1124 (7th Cir. 1984), rev'd, 476 U.S. 447 (1986). 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 C for citation and annotation.)

Texas Dental Association, 100 F.T.C. 536 (1982) (consent order) (http://www.ftc.gov/os/decisions/docs/vol100/FTC_VOLUME_DECISION_100_(JULY_-_DECEMBER_1982)PAGES_531-END.pdf#page=6). 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., 98 F.T.C. 58 (1981) (consent order) (http://www.ftc.gov/os/decisions/docs/vol98/FTC_VOLUME_DECISION_98_(JULY_-_DECEMBER_1981)PAGES_1-106.pdf#page=58). 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 C for citation and annotation.)

Forbes Health System Medical Staff, 94 F.T.C. 1042 (1979) (consent order) (http://www.ftc.gov/os/decisions/docs/vol94/FTC_VOLUME_DECISION_94_(JULY_-_DECEMBER_1979)PAGES_977-1079.pdf#page=66). 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, 93 F.T.C. 392 (1979) (consent order) (http://www.ftc.gov/os/decisions/docs/vol93/FTC_VOLUME_DECISION_93_(JANUARY_-_JUNE_1979)PAGES_302-401.pdf#page=91). 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, 93 F.T.C. 101 (1979) (consent order)

(http://www.ftc.gov/os/decisions/docs/vol93/FTC_VOLUME_DECISION_93_(JANUARY_-_JUNE_1979)PAGES_1-109.pdf#page=101). 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, 88 F.T.C. 906 (1976) (consent order) (http://www.ftc.gov/os/decisions/docs/vol88/FTC_VOLUME_DECISION_88_(JULY_-_DECEMBER_1976)PAGES_906-1003.pdf). 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.

E. Restraints on Advertising and Other Forms of Solicitation

1. Private Association Restraints

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

California Dental Association, 121 F.T.C. 190 (1996) (final order) (http://www.ftc.gov/os/decisions/docs/vol121/FTC_VOLUME_DECISION_121_(JANUARY_-_JUNE_1996)PAGES_190-290.pdf), aff'd 128 F.3d 720 (9th Cir. 1997); vacated, remanded 526 U.S. 756 (1999); rev'd, remanded 224 F.3d 942 (9th Cir. 2000); Order Returning Matter to Adjudication and Dismissing Complaint (FTC Commission Actions: February 15, 2001 (http://www.ftc.gov/os/caselist/d9259.htm)). 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, 116 F.T.C. 140 (1993) (consent order) (http://www.ftc.gov/os/decisions/docs/vol116/FTC_VOLUME_DECISION_116_(JANUARY_-_DECEMBER_1993PAGES_113-205.pdf#page=28). 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, 115 F.T.C. 993 (1992) (consent order) (http://www.ftc.gov/os/decisions/vol115.shtm). 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, 114 F.T.C. 708 (1991) (consent order) (http://www.ftc.gov/os/decisions/docs/vol114/FTC_VOLUME_DECISION_114_(_JANUARY_-_DECEMBER_1991_)PAGES_696-797.pdf#page=13). 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, 110 F.T.C. 119 (1987) (consent order)) (http://www.ftc.gov/os/decisions/docs/vol110/FTC_VOLUME_DECISION_110_(JULY_1987_-_JUNE_1988)PAGES_104-206.pdf#page=16). 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 C for citation and annotation.)

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

American Academy of Optometry, Inc. (See Section II C for citation and citation.)

Michigan Association of Osteopathic Physicians & Surgeons, 102 F.T.C 1092 (1983) (consent order) (http://www.ftc.gov/os/decisions/docs/vol102/FTC_VOLUME_DECISION_102_(JULY_-_DECEMBER_1983)PAGES_1092-1175-2.pdf#page=1). 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, 102 F.T.C. 1292 (1983) (consent order) (http://www.ftc.gov/os/decisions/docs/vol102/FTC_VOLUME_DECISION_102_(JULY_-_DECEMBER_1983)PAGES_1274-1361.pdf#page=19). 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, 99 F.T.C. 622 (1982) (consent order) (http://www.ftc.gov/os/decisions/docs/vol99/FTC_VOLUME_DECISION_99_(JANUARY_-_JUNE_1982)PAGES_621-END.pdf#page=2). 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 C for citation and annotation.)

American Dental Association, 94 F.T.C. 403 (1979) (consent order) (http://www.ftc.gov/os/decisions/docs/vol94/FTC_VOLUME_DECISION_94_(JULY_-_DECEMBER_1979)PAGES_331-428.pdf#page=73), 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 C for citation and annotation.)

2. State Board Restraints

North Carolina Board of Dental Examiners, C-9343 (complaint issued June 17, 2010) (http://www.ftc.gov/os/adjpro/d9343/index.shtm) The complaint charged that the North Carolina Board of Dental Examiners (Dental Board) is harming competition by prohibiting non-dentists from providing teeth-whitening services in the state. The Dental Board has impermissibly ordered non-dentists to stop providing teeth-whitening services; as a result, it is harder to obtain these services in North Carolina, and the services are more expensive for North Carolina consumers. According to the complaint, teeth-whitening services are less expensive when performed by non-dentists than when performed by dentists. A non-dentist typically charges between $100 and $150 per whitening session, while a dentist typically charges between $300 and $700 per session, with some procedures costing as much as $1000. Many dentists offer patients both in-office teeth whitening services and take-home teeth-whitening kits. Teeth-whitening services are being offered in salons, retail stores and kiosks. The Dental Board, a state agency created to regulate the practice of dentistry in North Carolina, is authorized to petition a state court to deem a particular conduct an unauthorized practice of dentistry and issue an injunction. It believes that non-dentists' provision of teeth-whitening services constitutes the unauthorized practice of dentistry under North Carolina law. Instead of seeking court orders to block the non-dentists' actions, the Dental Board has unilaterally ordered non-dentists to stop providing whitening services. It sent 42 letters instructing teeth-whitening providers that they were practicing dentistry illegally and ordered them to stop. The Dental Board also threatened and discouraged non-dentists who were considering opening teeth-whitening businesses, and it sent letters to mall owners and property management companies stating that teeth-whitening services offered in malls are illegal. The complaint charges that the Dental Board's actions significantly diminish the availability of teeth-whitening services in North Carolina and constitute a conspiracy among the dentist members of the Dental Board in violation of federal law. In the administrative proceeding the Commission rejected the Dental Board's argument that the state action doctrine exempts it from antitrust scrutiny under the FTC Act and denied the Dental Board's motion to dismiss the complaint.

Texas Board of Chiropractic Examiners, 115 F.T.C. 470 (1992) (consent order) (http://www.ftc.gov/os/decisions/docs/vol115/FTC_VOLUME_DECISION_115_(JANUARY_-_DECEMBER_1992)PAGES_433-559.pdf#page=38). 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, 110 F.T.C. 549 (1988) (http://www.ftc.gov/os/decisions/docs/vol110/FTC_VOLUME_DECISION_110_(JULY_1987_-_JUNE_1988)PAGES_549-END.pdf). 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, 110 F.T.C. 145 (1988) (consent order) (http://www.ftc.gov/os/decisions/docs/vol110/FTC_VOLUME_DECISION_110_(JULY_1987_-_JUNE_1988)PAGES_104-206.pdf#page=42). 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.

Brief of the Federal Trade Commission as Amicus Curiae in Parker v. Kentucky Board of Dentistry, 818 F.2d 504 (6th 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. The court ruled that the board's

outright ban was unconstitutional.

Wyoming State Board of Registration in Podiatry, 107 F.T.C. 19 (1986) (consent order) (http://www.ftc.gov/os/decisions/docs/vol107/FTC_VOLUME_DECISION_107_(JANUARY_-_JUNE_1986)PAGES_1-75.pdf#page=19). 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, 106 F.T.C. 80 (1985) (consent order) (http://www.ftc.gov/os/decisions/docs/vol106/FTC_VOLUME_DECISION_106_(JULY_-_DECEMBER_1985)PAGES_1-94.pdf#page=80). 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, 106 F.T.C. 65 (1985) (consent order) (http://www.ftc.gov/os/decisions/docs/vol106/FTC_VOLUME_DECISION_106_(JULY_-_DECEMBER_1985)PAGES_1-94.pdf#page=65). 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.

F. Illegal Tying and Other Arrangements

Home Oxygen and Medical Equipment Co., 118 F.T.C. 661 (1994), 122 F.T.C. 278 (1996) (order set aside for John E. Sailor – retirement from medical practice); **Home Oxygen Pulmonologists**, 118 F.T.C. 685 (1994); and **Homecare Oxygen and Medical Equipment Co.**, 118 F.T.C. 706 (1994) (consent orders) (http://www.ftc.gov/os/decisions/docs/vol118/FTC_VOLUME_DECISION_118_(JULY_-_DECEMBER_1994)PAGES_632-729.pdf#page=30). 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 percent 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 percent of the pulmonologists in the market are affiliated with the firm.

Sandoz Pharmaceuticals Corporation, 115 F.T.C. 625 (1992) (consent order) (http://www.ftc.gov/os/decisions/docs/vol115/FTC_VOLUME_DECISION_115_(JANUARY_-_DECEMBER_1992)PAGES_560-669.pdf#page=66). 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., 113 F.T.C. 625 (1990) (consent order) (http://www.ftc.gov/os/decisions/docs/vol113/Volume113_625-714.pdf#page=1). 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 alleges, 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 agreed 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.

G. Restrictions on Access to Hospitals

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

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

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

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

Eugene M. Addison, M.D. (See Section II D for citation and annotation.)

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

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

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

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

Brief of the United States and Federal Trade Commission as Amicus Curiae on Petition for Writ of Certiorari, Jefferson Parish Hospital District No. 2 v. Hyde, 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. The Court ruled that because the record did not contain evidence that the hospital forced anesthesiology services on unwilling patients, there was no basis for applying the per se rule against tying to the exclusive contract arrangement at issue.

III. PHARMACEUTICAL MERGERS

A. Horizontal Mergers Between Direct Competitors

Novartis AG (See Section II A for citation and annotation.)

Ovation Pharmaceuticals, Inc.; **Federal Trade Commission v. Lundbeck, Inc.** (See Section II A for citation and annotation.)

Schering-Plough Corporation/Merck & Co., Inc. (See Section II A for citation and annotation.)

Pfizer, Inc./Wyeth (See Section II A for citation and annotation.)

CSL Limited/Cerberus-Plasma Holdings, LLC (See Section II A for citation and annotation.)

Teva Pharmaceutical Industries Ltd./Barr Pharmaceuticals, Inc., C-4242 (consent order issued February 9, 2009) (http://www.ftc.gov/os/caselist/0810224/index.shtm). The complaint alleged that Teva's acquisition of Barr would lessen competition in 29 U.S. generic drug markets, including:

- *Tetracycline HCl tablets; Chlorzoxazone tablets; Desmopressin acetate tablets.* Tetracycline HCl is an old, broad-spectrum antibiotic used now primarily for the treatment of acne and rosacea. Chlorzoxazone is a centrally acting muscle relaxant used to treat muscle spasms. Desmopressin acetate is a synthetic replacement for an antidiuretic hormone that reduces urine production during sleep, and is used to treat bed-wetting in children. Because Teva and Barr are the only suppliers of these generic products in the U.S., the proposed acquisition would create a monopoly in each of these three markets.

- *Tamoxifen citrate; Cyclosporine liquid.* Tamoxifen citrate is a selective estrogen receptor modulator that is used in the treatment of breast cancer. Cyclosporine is an immunosuppressant used to prevent the rejection of transplanted organs. Combined, Teva and Barr currently account for 73 percent of the generic tamoxifen citrate market and 55 percent of the generic cyclosporine liquid market. The proposed acquisition would reduce the number of competitors in each market from three to two.

- *Metoclopramide HCl tablets; Carboplatin injection; Metronidazole tablets; Trazodone HCl tablets; Cyclosporine capsules; Flutamide capsules; Glipizide/metformin HCl tablets; Deferoxamine injection; Mirtazapine ODT.* The proposed acquisition would reduce the number of competitors in the U.S. from four to three in each of these nine markets.

  - Metoclopramide HCl is a dopamine receptor antagonist used to treat nausea and vomiting as well as gastroesophageal reflux disease. Teva and Barr are two of only four suppliers supplying all dosage forms of this generic drug. A combined Teva/Barr would possess 82 percent of the overall metoclopramide HCl market.

  - Carboplatin is a chemotherapy drug used to treat ovarian, lung, head, neck, and certain other cancers. Teva and Barr are two of the leading suppliers of generic carboplatin injection, with a combined market share of 60 percent.

  - Metronidazole is an anti-infective used in the treatment of a variety of bacterial infections. Barr and Teva have 50 percent and 39 percent, respectively, of the generic

metronidazole market.

- Trazodone is an antidepressant with a sedative effect. The proposed acquisition would result in a combined Teva/Barr share of 75 percent of the generic trazodone market.

- Cyclosporine is an immunosuppressant used to prevent the rejection of transplanted organs. In the generic cyclosporine tablets market, Teva and Barr have roughly equal shares, and a combined share of 41 percent.

- Flutamide is an anti-androgen drug used to treat prostate cancer. In the generic flutamide market, Teva and Barr have shares of 28 percent and 14 percent, respectively.

- Glipizide/metformin is commonly prescribed as a first line treatment for diabetes. Teva and Barr have 26 percent and 25 percent shares, respectively.

- Deferoxamine is a chelating agent used to remove excess iron from the body. In the generic deferoxamine market, a combined Teva and Barr would possess 16 percent of the market.

- Mirtazapine is an antidepressant used to treat moderate to severe depression. Barr and Teva have 26 percent and 10 percent, respectively, of the generic mirtazapine market.

■ *Epop; Fluoxetine weekly capsules.* In these two product markets, the proposed acquisition would eliminate important and significant future competition. Epop is used to treat severe primary pulmonary hypertension. Epop is a new generic market, and Teva is currently the only generic epop supplier. However, Barr is developing a generic epop product. Fluoxetine weekly capsules are a widely-prescribed antidepressant; and both Teva and Barr have generic products in development for this market. Few other firms are capable of, or interested in, entering these markets.

■ *Oral contraceptives.* Oral contraceptives are pills taken by mouth to prevent ovulation and pregnancy, and are the most common method of reversible birth control. Teva's acquisition of Barr is likely to lessen competition in 13 oral contraceptive markets, including: two markets in which both Teva and Barr participate; ten markets in which Barr participates and Teva is developing a product; and one market in which both Teva and Barr are developing products.

- Teva and Barr both participate in the generic Ortho-Cyclen and generic Ortho Tri-Cyclen markets, both of which are already highly concentrated, with only one other firm participating in each market. A combined Teva and Barr would have 61 percent of the generic Ortho-Cyclen market, and 51 percent of the generic Ortho Tri-Cyclen market.

- Barr competes in ten oral contraceptives markets where Teva is developing a competing product. These markets include generic products equivalent to: Ortho-Cept;

Mircette; Triphasil; Alesse; OrthoNovum 1-35; OrthoNovum 7/7/7; Loestrin FE (1 mg/.02 mg & 1.5 mg/.03 mg); Loestrin FE (1mg/.2 mg); Loestrin FE 24; and Ovcon 35. In each of these markets, Teva is one of a limited number of firms capable of developing a generic oral contraceptive product that would compete in that market, and is well-positioned to enter the markets in a timely manner.

- Both Teva and Barr are developing generic products equivalent to Ortho Tri-Cyclen Lo 28, and are among a limited number of firms with this product in development.

The complaint charges that entry into the above markets would not be timely or sufficient to deter or counteract the anticompetitive effects of the acquisition. The combination of generic drug development times and FDA drug approval requirements takes at least two years. Entry also would not be likely because many of the markets in question are relatively small and in decline, offering limited and insufficient sales opportunities to encourage new entry. The complaint also charges that the acquisition would harm to consumers in the above markets. In generic pharmaceutical markets, pricing is heavily influenced by the number of competitors that participate in a given market, with prices decreasing with the entry of each additional competitor. Also, the complaint charges that the acquisition would increase both the likelihood of coordinated action by the remaining competitors in the above markets, and the likelihood that the combined entity would delay or forego the launch of new products into these markets. The consent order requires Teva and Barr to divest certain rights and assets related to the above products to a Commission-approved acquirer. The order requires Teva and Barr to provide transitional services to enable the acquirer to obtain all necessary FDA approvals.

King Pharmaceuticals, Inc./Alpharma, Inc., C-4246 (consent order issued February 2, 2009) (http://www.ftc.gov/os/caselist/0810240/index.shtm). The complaint charges that King's acquisition of Alpharma would cause significant anticompetitive harm by eliminating competition between King and Alpharma in the market for oral long acting opioid analgesics ("oral LAOs"). The merging firms offer the only two competitively significant branded morphine sulphate oral LAOs, which are particularly close competitors within the larger oral LAO market. The complaint charges that the loss of head-to-head competition between King's Avinza and Alpharma's Kadian would likely result in higher prices for branded morphine sulphate oral LAOs. The complaint states that entry into the market for the manufacture and sale of oral LAOs is difficult, expensive, and time-consuming – obtaining FDA approval to make and sell oral LAOs takes at least two years – and would not offset the anticompetitive impact of the acquisition. The consent order requires King to divest Kadian to drug-manufacturer Actavis (which currently manufactures Kadian for King). Actavis, one of the world's largest generic drug companies, will continue to sell Kadian in competition with Avinza and other oral LAOs, and will now be able to introduce an "authorized" generic version of Kadian earlier than Kadian's 2010 patent expiration date. The consent order provides that, if the Commission later determines that Actavis is not an acceptable acquirer of Kadian, the parties will unwind the divestiture and then re-divest Kadian to another Commission-approved buyer within six months after the order becomes final.

Sun Pharmaceuticals Industries/Taro Pharmaceutical Industries, C-4230 (consent order

issued September 16, 2008) (http://www.ftc.gov/os/caselist/0710193/index.shtm). The complaint charged that Sun's acquisition of Taro would result in reduced competition and higher prices to consumers for three generic formulations of the anticonvulsant drug carbamazepine. The drugs named in the complaint were immediate-release carbamazepine tablets, chewable carbamazepine tablets, and extended-release carbamazepine tablets. The complaint alleged that the merger would reduce the number of firms producing the generic chewable tablet from three to two and reduce the number of firms producing the immediate-release form from four to three, leaving Teva as the only remaining significant competitor. In the market for the generic extended-release form, Sun and Taro were the only companies that had applied for FDA approval to market the drug, and as a result, the merger would eliminate future competition completely. The order requires that Sun divest all of its rights and assets related to the development, manufacture, and marketing of the three generic carbamazepine drugs to Torrent Pharmaceutical Limited or another Commission approved buyer. The order also requires that Sun provide transitional services including help obtaining necessary FDA approvals and technical transfer assistance.

Schering-Plough Corporation/Organon BioSciences N.V., C-4211 (consent order issued December 28, 2007) (http://www.ftc.gov/os/caselist/0710132/index.shtm). The complaint charged that Schering's acquisition of Organon from Akzo-Nobel would harm competition in three highly concentrated markets for live poultry vaccines. According to the complaint, the merger created a monopoly in the market for vaccines for the prevention and treatment of the Georgia 98 strain of infectious bronchitis virus, and gave Schering-Plough a dominant share in the markets for live vaccines for the prevention and treatment of fowl cholera due to Pasteurella multocida, and live vaccines for the prevention and treatment of Mycoplasma gallisepticum in poultry. The order requires Schering-Plough to divest to the Fort Dodge division of Wyeth all of the assets, including research, development, customer, supplier and manufacturing contracts, and all intellectual property excluding trademarks, of its live vaccine for the Georgia 98 strain of infectious bronchitis and its live Mycoplasma gallisepticum vaccine, and Organon's live fowl cholera vaccine. The order also includes a supply and transition services agreement under which Schering-Plough will provide the vaccines for two years to Wyeth until Wyeth obtains the necessary regulatory approvals to bring the vaccines in-house.

Mylan Laboratories/E. Merck oHG., C-4200 (consent order issued November 1, 2007) (http://www.ftc.gov/os/caselist/0710164/0710164.shtm). The complaint charged that Mylan's acquisition of a generic subsidiary of Merck would result in reduced competition and higher prices to consumers for five generic drugs produced by both companies to treat hypertension and cardiac problems. The drugs named in the complaint were: acebutolol hydrochloride capsules (a beta blocker used to treat hypertension), flecainide acetate tablets (an anti-arrhythmia drug used to treat heart problems), guanfacine hydrochloride tablets (an alpha blocker used to treat hypertension), nicardipine hydrochloride capsules (a calcium channel blocker used to treat hypertension), and sotalol hydrochloride AF tablets (a beta blocker used to treat hypertension). Mylan and Merck, through an agreement with Par Pharmaceuticals, were the only two suppliers of generic acebutolol hydrochloride capsules, and among a small number of suppliers for the other four drugs. The order requires that Merck divest its assets in the five drugs to Amneal. The order also requires that Mylan and Merck provide transitional services to help Amneal obtain necessary FDA approvals.

Rite Aid Corp./The Jean Coutu Group, Inc., C-4191 (consent order issued June 1, 2007) (http://www.ftc.gov/os/caselist/0610257/0610257.shtm). The complaint charged that Rite Aid's acquisition of Brooks and Eckerd retail pharmacies from the Jean Coutu Group would substantially lessen competition in the retail sale of pharmacy services to cash customers in twenty-three local markets in Connecticut, New Hampshire, New York, New Jersey, Maryland, Maine, Pennsylvania, Vermont, and Virginia. Rite Aid and Brooks/Eckerd accounted for at least half (and up to 100%) of the pharmacies in each market. The complaint also alleged that the merger would allow Rite Aid to unilaterally exercise market power in the retail sale of pharmacy services to cash customers, and make it likely that cash paying pharmacy customers would pay higher prices in those markets. According to the complaint, the market for sales of pharmacy services to cash customers is separate from the market for sale of pharmacy services to customers covered by third party payers. The order requires Rite Aid to divest one store in each of the twenty-three markets to a Commission-approved buyer. The order also contains an asset maintenance agreement requiring the respondents to preserve the viability and competitiveness of the drug stores to be divested, a provision that allows the Commission to appoint a trustee if the required divestitures are not completed as required by the order, and a ten-year prior notice requirement for the acquisition of any store within five miles of any of the divested pharmacies.

Activas Group/Abrika Pharmaceuticals, Inc., C-4190 (consent order issued May 18, 2007) (http://www.ftc.gov/os/caselist/0710063/index.shtm). The complaint alleged that the merger of Actavis and Abrika would create a monopoly in the market for generic isradipine capsules and allow Actavis to exercise its unilateral market power to increase prices. Isradipine is used for the treatment of hypertension, ischemia, and depression. The order requires Activas to divest certain rights and assets related to generic isradipine capsules to Cobalt Laboratories, Inc within ten days of the acquisition, and to transfer its supply arrangement for generic isradipine to Cobalt.

Hospira, Inc./Mayne Pharma Limited, C-4182 (consent order issued January 18, 2007) (http://www.ftc.gov/os/caselist/0710002/index.htm). The complaint alleged that Hospira's acquisition of Mayne would reduce current horizontal competition or potential competition in already concentrated markets for five generic injectable drugs. According to the complaint, the number of generic suppliers has a direct and substantial effect on generic pricing in markets where there are a limited number of competing suppliers, because each additional supplier can have a competitive impact on the market. The drugs named in the complaint were: hydromorphone hydrochloride, nalbuphine hydrochloride, morphine sulfate, and preservative-free morphine, analgesics used to treat moderate to severe pain; and deferoxamine mesylate, an iron chelator used to treat acute iron poisoning or chronic iron overload. Hospira and Mayne were two of only three suppliers of hydromorphone hydrochloride in the U.S. market. In the markets for nalbuphine hydrochloride, morphine sulfate, preservative-free morphine and deferoxamine mesylate, Hospira was either the only supplier or one of a small number of suppliers, and Mayne was one of a limited number of suppliers in the process of entering these markets. The order requires the divestiture of Mayne's hydromorphone hydrochloride, nalbuphine hydrochloride, morphine sulfate, preservative-free morphine and deferoxamine mesylate assets to Barr.

Johnson & Johnson/Pfizer, C-4180 (consent order issued January 16, 2007) (http://www.ftc.gov/os/caselist/0610220/0610220.shtm). The Commission's complaint charged

that Johnson & Johnson's acquisition of Pfizer's Consumer Healthcare business would increase concentration and reduce competition in the U.S. markets for four over-the-counter drugs. According to the complaint, the acquisition would have enabled Johnson & Johnson to raise prices and reduce the incentive to innovate and develop new products in the four markets:

- *Over-the-counter H-2 blockers*. H-2 blockers are used to prevent and relieve heartburn associated with acid indigestion. Johnson & Johnson's Pepcid and Pfizer's Zantac accounted for over 70% of sales in the highly concentrated H-2 blocker market. The order requires the divestiture of Pfizer's Zantac assets to Boehringer. The order also contains provisions concerning to ensure that the divestiture is successful, and that the viability of the divested assets is maintained until they are transferred to Boehringer.

- *Over-the-counter* hydrocortisone *anti-itch products*. Hydrocortisone anti-itch products are topical medications used to treat minor skin irritations and inflamations. Johnson & Johnson's Cortaid product and Pfizer's Cortizone product accounted for over 55% of sales in a highly concentrated market. The order requires the divestiture of Pfizer's Cortizone product to Chattem. The order also contains provisions to ensure that the divestiture is successful, and that the viability of the divested assets is maintained until they are transferred to Chattem.

- *Over-the-counter night-time sleep aids*. Night-time sleep aids are used for the relief of occasional sleeplessness by individuals who have difficulty falling asleep. Johnson & Johnson's Simply Sleep product and Pfizer's Unisom product accounted for over 45% of sales in a highly concentrated market. The order requires the divestiture of Pfizer's Unisom sleep-aid assets to Chattem. The order also contains provisions concerning to ensure that the divestiture is successful, and that the viability of the divested assets is maintained until they are transferred to Chattem.

- *Over-the-counter diaper rash treatments*. Diaper rash treatments are creams or ointments that are available without a prescription for the prevention and treatment of diaper rash. Johnson & Johnson's Balmex product and Pfizer's Desitin products accounted for approximately 50% of sales in a highly concentrated market. The order requires the divestiture of Johnson & Johnson's Balmex diaper rash treatment product to Chattem. The order also contains provisions concerning to ensure that the divestiture is successful, and that the viability of the divested assets is maintained until they are transferred to Chattem.

Watson Pharmaceuticals Inc./Andrx Corp., C-4172 (consent order issued December 6, 2006) (http://www.ftc.gov/os/caselist/0610139/index.htm). The complaint alleged that Watson's acquisition of Andrx substantially lessened actual, potential, and future competition in thirteen separate markets for generic pharmaceutical products, and increased the likelihood that consumers would be forced to pay higher prices.

- *Generic hydrocodone bitartrate/ibuprofen tablets*. Hydrocodone bitartrate/ibuprofen is a combination analgesic and anti-inflammatory drug used for the short-term management of acute pain. Watson, under a marketing agreement with Interpharm, and Andrx were two of three suppliers of generic hydrocodone bitartrate/ibuprofen. The order

requires Watson to terminate its marketing agreement with Interpharm, and return all of the Watson rights and assets necessary to market generic hydrocodone bitartrate/ibuprofen tablets back to Interpharm.

- *Generic glipizide ER tablets*. Glipizide ER is used in the treatment of type 2 diabetes to stimulate the release of insulin and reduce blood sugar levels in the body. The acquisition would have increased Watson's market share to over 80 percent and left only one other U.S. supplier of generic glipizide ER. The order requires the divestiture of the Andrx rights and assets necessary to develop, manufacture, and market generic glipizide ER tablets to Actavis Elizabeth LLC.

- *Generic oral contraceptives*. Andrx and Teva had a marketing agreement under which Teva marketed eleven oral contraceptives for Andrx. In each of the markets, Watson and Andrx/Teva were among a limited number of current suppliers or potential entrants. In the markets for branded Ortho-Cyclen and Ortho Tri-Cyclen, the acquisition would have resulted in only one other generic supplier in each market. Watson was one of two or three generic suppliers in seven additional markets for Ortho-Cept, Triphasil 28, Alesse, Ortho-Novum1/35, Ortho-Novum 7/7/7, Loestrin FE (1mg/0.020 mg), and Loestrin FE (1.5mg/0.030 mg), in which Andrx/Teva were developing competitive generic products. In addition, both Watson and Andrx/Teva were in the process of developing generic equivalents of Mircette tablets and generic Ovcon-35 tablets. The order requires the divestiture of the Andrx rights and assets to the eleven general oral contraceptives to Teva, and requires Andrx to supply Teva with the products for five years in order to provide Teva with the time needed to gain FDA approval to manufacture and sell the drugs.

Barr Pharmaceuticals Inc/Pliva, C-4171 (consent order issued December 8, 2006) (http://www.ftc.gov/os/caselist/0610217/0610217.htm). The Commission's complaint charged that Barr's $2.5 billion acquisition of Pliva would have eliminated current or potential competition in the product markets for three generic drugs and the market for organ preservation solutions higher prices:

- *Generic trazodone hydrochloride*. Trazodone is an antidepressant that is supplied by five companies. Barr and Pliva were two of three suppliers of the 150 mg formulation. The acquisition would have increased Barr's overall market share in all formulations to 64%. The order requires the divestiture of Barr's trazodone hydrochloride assets to Apotex, and requires Barr to provide Apotex with various transitional services until Apotex obtains FDA approval to manufacture trazodone hyrdrochloride itself.

- *Generic Triamterene/HCTZ.* Triamterene/HCTZ is used in the treatment of high blood pressure. The acquisition would have reduced the number of suppliers from five to four and increased Barr 's market share to 35%. The order requires the divestiture of Barr's triamterene/HCTZ assets to Apotex, and requires Barr to provide Apotex with various transitional services until Apotex obtains FDA approval to manufacture triamterene/HCTZ itself.

- *Generic nimodipine.* Nimodipine is used to treat symptoms resulting from a

ruptured blood vessel in the brain. The patent on the branded product had expired and there were currently no generic versions on the market. The merger would have eliminated potential competition between Barr and Pliva, the only companies seeking approval to offer generic nimodipine. The order requires the divestiture of Pliva's nimodipine assets to Banner within ten days of the acquisition, or Barr's nimodipine assets to Cardinal within sixty days of the acquisition.

- *Organ preservation solutions*. These solutions are used during the harvesting of donor organs to preserve them prior to transplant. Barr and Pliva accounted for approximately 90% of the market. The order requires the divestiture of Pliva's organ preservation solution business to New Custodial, a company formed for the purpose of marketing and selling Pliva's organ preservation solution product.

Teva Pharmaceutical Industries/IVAX Corporation, C-4155 (consent order issued March 2, 2006) (http://www.ftc.gov/os/caselist/0510214/0510214.htm). The complaint alleged that Teva's $7.4 billion acquisition of IVAX would lessen current and/or future competition between the two companies in fifteen highly concentrated markets for generic pharmaceuticals, and result in the delay or elimination of additional price competition or higher prices for consumers:

- *Generic amoxicillin clavulanate potassium*. Amoxicillin clavulanate is a penicillin antibiotic. Teva, IVAX, Sandoz and Ranbaxy were the only suppliers of amoxicillin clavulanate in the U.S. The merger would increase Teva's market share for all formulations to over 50%, and leave Teva the only supplier of the 600 mg powder formulation. The order requires the divestiture of IVAX's amoxicillin clavulanate potassium assets to Par.

- *Cefaclor LA tablets*. Cefaclor tablets LA tablets are a cephalosporin antibiotic. As Teva and IVAX were the only competitors in this market, the merger would create a monopoly. The order requires the divestiture of IVAX's cefaclor LA tablets to Par.

- *Pergolide mesylate tablets.* Pergolide mesylate tablets are used to treat Parkinson's disease. Teva and IVAX were the only competitors in this market. The order requires the divestiture of Teva's Pergolide mesylate tablets to Par.

- *Estazolam tablets (used to treat seizure disorders)*. Teva (with 52% of the market), IVAX (with 13% of the market) and Watson were the only suppliers of generic estazolam tablets in the U.S. The order requires the divestiture of Teva's estazolam tablets to Par.

- *Leuprolide acetate*. Leuprolide acetate is an injectable drug used to treat prostate cancer. Teva, (with a 50% market share), IVAX and Sandoz were the only three companies in the market. The order requires the divestiture of IVAX's leuprolide acetate injection kits to Par.

- *Nabumetone tablets*. Nabumetone tablets are used to treat inflamation. Teva, the leading supplier had a 60% market share. IVAX and Sandoz were the only other companies in the market. The order requires the divestiture of IVAX's nabumetone tablets to Par.

- *Amoxicillin*. Amoxicillin is a penicillin antibiotic used to treat infections. Although five companies supplied various formulations of the drug, only Teva, IVAX and Ranbaxy supplied the 200 mg and 400 mg oral suspensions and the 875 mg tablet formulations. The order requires the divestiture of IVAX's amoxicillin to Par.

- *Propoxyphene hydrochloride capsules*. Propoxyphene hydrochloride capsules are analgesics. Teva, IVAX, Mylan and Qualitest were the only suppliers in the market. The order requires the divestiture of IVAX's propoxyphene hydrochloride capsules to Par.

- *Nicardipine hydrochloride capsules*. Nicardipine hydrochloride capsules are used to treat heart conditions. Teva, IVAX, Mylan and Par were the only suppliers in the market. The order requires the divestiture of IVAX's nicardipine hydrochloride capsules to Barr.

- *Flutamide capsules*. Flutamide capsules are used in the treatment of cancer. After the acquisition, Teva (with 62% of the market), Sandoz and Barr would be the only suppliers of flutamide capsules in the U.S. The order requires the divestiture of Teva's flutamide capsules to Par.

- *Clozapine tablets*. Clozapine tablets are used in the treatment of psychotic and maniacal disorders. IVAX, Mylan and Caraco were the only suppliers in the U.S. Teva, however, had obtained FDA approval and recently begun supplying clozapine to some of its customers. The order requires the divestiture of Teva's clozapine tablets to Par.

- *Tramadol/acetaminopen tablets*. IVAX, Par and Caraco (a recent entrant) were the only suppliers in the U.S. Teva was in the process of entering the market and was the only other supplier capable of entering the market in a timely fashion. The order requires the divestiture of Teva's tramadol/acetaminopen tablets to Barr.

- *Glipizide and metformin hydrochloride tablets*. Glipizide and metformin hydrochloride tablets are blood glucose regulators used to treat type II diabetes. Teva and Sandoz were the only suppliers and IVAX was one of a small number of suppliers capable of entering the market in a timely manner. The order requires the divestiture of IVAX's glipizide and metformin hydrochloride tablets to Barr.

- *Calcitrol injectables*. Calcitrol is an injectable form of vitamin D used by dialysis patients. Teva and American Pharmaceutical Partners were the only suppliers in the U.S. market. IVAX, through a distribution agreement with Genix Therapeutics, was the only supplier capable of entering the market in a timely fashion. The order requires the divestiture of IVAX's calcitrol injectables to Par.

- *Cabergoline tablets*. Cabergoline tablets are used in the treatment of Parkinson's disease. Teva and IVAX were two of a small number of suppliers capable of entering the market when Pfizer's patent for the branded product Dostinex expired in December, 2005. The order requires the divestiture of Teva's cabergoline tablets to Barr.

Novartis AG, 140 F.T.C. 480 (2005) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume140.pdf#page=486). The complaint alleged that Novartis AG's acquisition of EON Labs would lessen competition and result in higher prices in the markets for three generic drugs. According to the complaint, the generic forms of these drugs constituted the appropriate product market under which to analyze the merger because the branded drug did not effect the pricing of the generic. Novartis and Eon were significant competitors in the markets for generic desipramine hydrochloride tablets (a tricyclic antidepressant), generic orphenadrine citrate ER tablets (a muscle relaxant), and generic rifampin oral capsules (used in the treatment of tuberculosis):

- *Generic desipramine hydrochloride tablets*. Prior to the acquisition, only Novartis and Eon marketed all six strengths of generic desipramine hydrochloride tablets in the U.S. The sole other competitor, Watson Pharmaceuticals, marketed only three of the six strengths. After the acquisition, Novartis would account for more than95% of all generic desipramine hydrochloride tablets sold in the U.S. The order requires the divestiture of Eon's desipramine hydrochloride assets to Amide. The order also requires Novartis to enter into a supply agreement with Amide until Amide gains FDA approval to manufacture the drugs on its own.

- *Generic orphenadrine citrate ER tablets*. Prior to the acquisition, Novartis, Eon, and Impax manufactured and marketed generic orphenadrine citrate ER tablets in the U.S. After the acquisition Novartis would account for 70% of U.S. sales. The proposed order requires the divestiture of Novartis' orphenadrine citrate ER tablets to Amide. The order also requires Novartis to enter into a supply agreement with Amide until Amide gains FDA approval to manufacture the drugs on its own.

- *Generic rifampin oral capsules*. Novartis, Eon, and VersaPharm manufactured and marketed generic rifampin oral capsules in the U.S. After the acquisition, Novartis would account for 70% of U.S. sales. The order requires the divestiture of Novartis' generic rifampin oral capsules assets to Amide, which currently contract manufactures rifampin for Novartis.

Genzyme Corporation/Ilex Oncology, 139 F.T.C. 49 (2005) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume139.pdf#page=54). The complaint alleged that the merger of Genzyme and Ilex eliminated competition in the market for immunosuppressant drugs used in solid organ transplants (SOT). SOT acute therapy drugs are used in solid organ transplants to suppress the transplant recipient's immune system. Genzyme, the leading supplier of SOT acute therapy drugs, marketed Thymoglobulin. Ilex's Campath, a new entrant into the market, was an especially close competitor to Thymoglobulin due to its similar mechanisms of action. According to the complaint the other four immunosuppressant drugs on the market were not substitutes for Genzyme's and Ilex's SOT acute therapy drugs because of different mechanisms of action. The order requires Genzyme to divest its contractual and decision making rights, including its portion of the earnings from sales of Campath, to Schering, which already markets and distributes Campath in the U.S. The order also appointed a monitor to oversee the divestiture of Campath earnings from solid organ transplant sales.

Sanofi-Synthelabo/Aventis, 138 F.T.C. 478 (2004) (consent order)

(http://www.ftc.gov/os/decisions/docs/Volume138.pdf#page=483). The complaint alleged that the merger of two large French pharmaceutical companies would lessen competition in three pharmaceutical markets in the United States and increase the likelihood that consumers would be forced to pay higher prices:

- *Factor Xa Inhibitors*. Factor Xa inhibitors are anticoagulent products used to treat conditions related to excessive blood clot formation. Sanofi and Aventis were the only two companies positioned to successfully compete in the market for factor Xa inhibitors. Lovenox, manufactured by Aventis, accounted for 92% of factor Xa inhibitor sales in the U.S. Sanofi manufactured Arixtra, a recent entrant to the market. The order requires that Sanofi: 1) divest Arixtra to Glaxo, 2) transfer Manufacturing facilities used to produce Arixtra to Glaxo, 3) contract manufacture certain ingredients until Glaxo can obtain the necessary regulatory approvals and supply sources to make the ingredients, and 4) help Glaxo complete three clinical trials.

- *Cytotoxic Colorectal Cancer Drugs*. Cytotoxic drugs are used in the treatment of colorectal cancer. Sanofi's Eloxatin and Camptosar (irinotecan), which was manufactured by Yakult Honsha and marketed in the U.S. by Pfizer, accounted for over 80% of the U.S. market. Aventis did not market a similar drug in the U.S., but licensed irinotecan under the brand name Campto from Yakult for sale in other territories. In addition, through contractual relationships with Pfizer, Aventis shared the results of key clinical trials with Pfizer, and possessed a number of U.S. patents relating to Camptosaur. According to the complaint, the merger gave Sanofi access to Camptosar's pricing, forecasts, and marketing strategy, which would result in diluted competition between Sanofi and Pfizer. The order includes provisions that require the parties to divest to Pfizer key clinical studies for Campto that Aventis is currently conducting, certain U.S. patents and other assets related to areas where Pfizer markets Camptosar.

- *Prescription Insomnia Treatments*. Sanofi's Ambien accounted for over 85% of the U.S. market for prescription insomnia treatments. Sepracor planned to enter this market within nine months as a competitor to Sanofi with its product Estorra, which is licensed to Sepracor from Aventis. Under the licensing agreement, Aventis is entitled to royalty payments based on Estorra sales. After the acquisition Sanofi would control the leading product in the market and have a financial stake in what is likely to be its main competitor. The order requires the parties to divest Aventis' contractual rights to Estorra, either to Sepracor or a third party approved by the FTC.

Pfizer Inc./Pharmacia Corporation, 135 F.T.C. 608 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume135.pdf#page=613). The complaint alleged that Pfizer's $60 billion acquisition of Pharmacia would lessen direct or potential competition between the two companies in nine highly concentrated markets, and result in the delay or elimination of additional price competition or higher prices for consumers:

- *Extended Release Treatments for Overactive Bladder (OAB).* Pharmacia's Detrol and Detrol LA and Johnson & Johnson's Ditropan XL were the only two extended release OAB products marketed in the U.S. Pfizer, one of two companies best-positioned to enter the market

within the next two years, was in the process of seeking FDA approval for darifenacin, its extended release OAB product. The complaint alleged that the merger would eliminate potential competition between Pharmacia and Pfizer and increase the likelihood that Pfizer would delay the launch of darifenacin. The order requires Pfizer to divest darifenacin and certain other assets to Novartis AG and contains other provisions to ensure that the divestiture is successful.

- *Combination Hormone Replacement Therapies (HRT)*. Pfizer's femhrt and Pharmacia's Activella were two of the three leading combination HRT products marketed in the U.S. After the merger, Pfizer and Wyeth, the other leading competitor, would control approximately 94% of the HRT market. The order requires the divestiture of Pfizer's femhrt to Galen Holdings plc, and contains other provisions to ensure that the divestiture is successful.

- *Treatments for Erectile Disfunction (ED)*. With over 95% of the U.S. ED market and a second generation Viagra-like product in development, Pfizer dominated the research, development, manufacture and sales of prescription drugs for ED. Pharmacia, Pfizer's only significant potential competitor, had two products, IN APO and PNU-142,774, in clinical development. The order requires Pharmacia to return all of its rights for IN APO to Nastech Pharmaceutical Company, and to divest all of its rights and interests for the field of human sexual for PNU-142,774 to Neurocrine Biosciences, Inc. The order also contains other provisions to ensure that the divestiture is successful.

- *Drugs for Canine Arthritis.* Three companies sold prescription drugs for the treatment of canine arthritis: Pfizer's product, Rimadyl, accounted for 70% of the market and Wyeth's product, EtoGesic, accounted for 30% of the market. Novartis began marketing Deramaxx in early 2003 under a licensing agreement with Pharmacia, which currently manufactured Deramaxx, and supplied it to Novartis. The complaint alleged that because of its license and supply agreement with Novartis, Pfizer, the leading competitor in the market, would control the manufacturing and supply of the competing product Deramaxx, and under the existing licensing agreement, have access to Novartis' sensitive confidential information on Deramaxx' pricing, forecasts, and marketing strategy. The order requires Pharmacia to renegotiate its license and supply agreement with Novartis to allow Novartis to operate as an independent competitor by eliminating the control Pfizer would have over Novartis's product, restricting the type of information Pfizer would be able to obtain about Deramaxx, and allowing Novartis to compete with Pfizer in the development of a second generation canine arthritis product.

- *Antibiotic Treatments for Lactating Cow Mastitis and Dry Cow Mastitis.* Pfizer, Pharmacia and Wyeth were the only significant competitors in the markets for lactating cow and dry cow mastitis antibiotic products. After the merger Pfizer and Pharmacia would account for 50% of the sales of lactating cow mastitis products and55% of the sales of dry cow mastitis products. The order requires Pfizer to divest all of its U.S. rights to its bovine mastitis antibiotic products to Schering-Plough Corporation.

- *Over-the-Counter Hydrocortisone Creams and Ointments.* Pfizer's Cortizone brand and Pharmacia's Cortaid brand were the only two branded hydrocortisone creams on the U.S. market, and accounted for 55% of the over-the-counter sales of hydrocortisone creams and

ointments. The order requires Pharmacia to divest its Cortaid business to Johnson and Johnson.

- *Over-the-Counter Motion Sickness Medications.* Pfizer, with its Bonine product and Pharmacia, with its Dramamine product were the two leading suppliers in this market and accounted for a combined market share of 77%. The order requires Pfizer to divest its U.S. and Puerto Rican Bonine assets to Insight Pharmaceuticals Corporation.

- *Over-the Counter Cough Drops.* Pfizer, with its Halls brand and Pharmacia, with its Ludens brand, were the only two significant competitors in the over-the-counter cough drops market. The order requires Pfizer to divest its Halls cough drop business to Cadbury Schweppes.

Baxter International Inc./Wyeth Corporation, 135 F.T.C. 49 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume135.pdf#page=54). The Commission's complaint charged that Baxter's acquisition of the generic injectable drug business from Wyeth's subsidiary, ESI Lederle, would reduce either current horizontal competition or potential competition in the market for five injectable drugs:

- *Propofol.* Baxter, under a supply agreement with GenesiaSicor, marketed the only generic version of AstraZeneca's branded propofol Diprivan, an anesthetic preferred for outpatient surgery because of its short duration profile. Wyeth was in the process of seeking FDA approval and was one of two companies most likely to enter the market with its own generic version. The complaint alleged that new entry would be difficult and lengthy. Among other things, the preservatives used in the Baxter marketed propofol and in AstraZeneca's product are patent protected and the manufacturing process complex. In order to preserve the future competition and probable lower prices in the market that would have resulted from the entry of a Wyeth generic propofol, the order required the divestiture of Wyeth's propofol business to Faulding Pharmaceutical Company, as well as other requirements to ensure the success of the divestiture.

- *Pancuronium.* In the market for pancuronium, a long-acting neuromuscular blocking agent used to freeze muscles during surgery and for patients who are mechanically ventilated, Baxter (under an exclusive marketing agreement with GenesiaSicor), along with Wyeth, and Abbott were the only suppliers. The complaint alleged that the acquisition would have reduced the number of competitors from three to two, leaving Baxter and Wyeth with a combined market share of 74% after the acquisition. New entry was unlikely because pancuronium was an older drug with limited usage. The order required Baxter to divest its pancuronium assets to GenesiaSicor.

- *Vecuronium.* Wyeth discontinued its production of vecuronium, an intermediate-acting neuromuscular blocking agent used during surgery or ventilation, in 2001, but planned to re-launch the product. Prior to stopping production, Baxter (under an exclusive supply agreement with GenesiaSicor) and Wyeth were the two largest of five vecuronium suppliers and held a 53% combined market share. The complaint charged that the acquisition would eliminate the price competition that would have resulted when Wyeth re-entered the market. The order requires Baxter to divest its vecuronium assets to GenesiaSicor.

- *Metoclopramide.* The acquisition would have combined two of four companies supplying metoclopramide, an antiemetic used in certain types of chemotherapy and other post-operative treatments. Wyeth, manufacturer of the branded version of metoclopramide, and Baxter, the exclusive supplier of GenesiaSicor's generic metoclopramide drug, together accounted for over half of the U.S. market. The order requires Baxter to terminate its interests in and divest its assets to GenesiaSicor.

- *New Injectable Iron Replacement Therapies (NIIRTs*). The complaint alleged harm to potential competition and/or price competition in the market for NIIRTs, including both iron gluconate and iron sucrose, which are used to treat iron deficiencyin hemodialysis patients. Baxter and Watson jointly marketed Ferrlecit, one of only two NIIRT's approved for sale in the U.S. Wyeth was the best positioned firm to successfully enter the market. The complaint charged that entry was difficult and lengthy. Among other things, a lack of raw material suppliers and complex manufacturing processes complicate entry. The order requires Baxter to terminate its co-marketing agreement with Watson and provides incentives for Baxter to proceed with development of Wyeth's iron gluconate product.

Amgen Inc./Immunex Corporation, 134 F.T.C. 333 (2002) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume134.pdf#page=337). The complaint alleged that Amgen's $16 billion acquisition of Immunex would lessen direct or potential competition in three highly concentrated biopharmaceutical markets:

- *Neutrophil Regeneration Factors.* Amgen's Neupogen and Neulasta and Immunex's Leukine were the only neutrophil regeneration factors approved by the FDA for sale in the U.S. Neutrophil regeneration factors are used to help the immune systems of chemotherapy patients by increasing the production of two types of white blood cells. The order requires that Immunex divest its Leukine product to Schering AG.

- *TNF Inhibitors.* TNF inhibitors are used to treat inflamation in patients having autoimmune diseases by preventing the binding of TNF (a cytokine that promotes inflamation) receptors and proteins. Immunex was one of two companies that marketed TNF inhibitors in the U.S. Amgen, one of three companies that had TNF inhibitors in clinical development for sale in the U.S., planned to launch its product in 2005. The order requires that Amgen license certain patents to Sereno, a Swiss company developing a TNF inhibitor for use in Europe, that block Sereno's ability to market in the U.S.

- *IL-1 Inhibitors.* IL-1 inhibitors are also used to treat inflamation in patients with autoimmune diseases. Amgen manufactured the only IL-1 inhibitor on the market in the U.S. Immunex and Regeneron were the only companies with IL-1 inhibitors in clinical trials; Immunex, however, held several patents that could delay or stop the development and marketing of Regeneron's IL-1 inhibitor. The order requires that Immunex license certain patents to Regeneron that will allow it to develop and bring its product to market.

The Hearst Trust, et. al., 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/os/caselist/ca101cv00734ddc.htm). 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.

Glaxo Wellcome plc/SmithKline Beecham plc, 131 F.T.C. 56 (2001) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume131.pdf#page=61). The Commission's complaint charged that the merger of Glaxo Wellcome (Glaxo) and SmithKline Beecham (SB) would create the world's largest research-based pharmaceutical manufacturer, substantially lessen competition in nine separate pharmaceutical markets, and result in fewer consumer choices, higher prices and less innovation. In six markets the order required divestiture:

- *5HT-3 Antiemetic Drugs.* Glaxo and SB accounted for 90% of the sales of new generation drugs used in chemotherapy to reduce the incidence of side effects. The order required the divestiture of the worldwide rights of SB's drug Kytril to F. Hoffman LaRoche.

- *Injectable Antibiotic Ceftazidime.* Glaxo and SB were the only two manufacturers of ceftazidime, and Glaxo was the largest of three firms marketing ceftazidime. The order required the divestiture of SB's U.S. rights to manufacture and market ceftazidime to Abbott Laboratories.

- *Oral and Antiviral Drugs for the Treatment of Herpes, Chicken Pox and Shingles*. Glaxo's Valtrex and SB's Famvir were the only second-generation antiviral prescription drugs available on the market, and no other companies have similar products in development. The order required the divestiture of SB's antiviral drug Famvir to Novartis.

- *Topical Antiviral Drugs for the Treatment of Herpes Cold Sores.* SB's Denavir was the only FDA approved prescription topical antiviral drug sold in the US, and Glaxo, the only potential entrant into the market, was seeking FDA approval to market its European antiviral Zovirex in the U.S. The order required SB to divest Denavir to Novartis.

- *Prophylactic Vaccines for the Treatment of Herpes.* Glaxo and SB were the leading two of only a few firms pursuing the development of a preventative vaccine. The order required Glaxo to return to its British collaborator, Cantab Pharmaceuticals, all rights to its technology for the development of a prophylactic herpes vaccine.

- *Over-the Counter H-2 Blocker Acid Relief Products.* Glaxo's Zantac 75 and SB's Tagamet were two of the four branded OTC H-2 acid blockers on the market. The order required the divestiture of Glaxo's U.S. and Canadian Zantac trademark rights to Pfizer.

In three markets the order addressed competitive overlaps with other research and development firms where the merger was likely to result in delay, termination, or failure to develop as a competitor:

- *Topoisomerase I Inhibitor Drugs Used to Treat Certain Tumors.* SB's Hycamptin was a second line therapy for non-small cell lung cancers and SB was developing a firstline therapy for colorectal and other solid-tumor cancers. Glaxo, through a collaboration with Gilead Sciences, was developing a drug, GI147211C, which would have been in direct competition with SB's Hycamptin. Only one other company manufactured similar anti-tumor drugs. The order required Glaxo to assign all of its relevant intellectual property rights and relinquish all of Glaxo's reversionary rights to GI147211C to Gilead Sciences.

- *Migraine Headache Treatment Drugs.* Glaxo's Immitrex and Amerge were the leading sellers of triptan drugs for the treatment of migraine headache. SB had an interest in another triptan drug, frovatriptan, which was being developed and scheduled for launch by Vernalis Ltd. in the second half of 2001. The order required SB to assign all of its intellectual property rights and relinquish all options to regain control over frovatriptan to Vernalis Ltd.

- *Drugs to Treat Irritable Bowel Syndrome.* Glaxo owned and was conducting clinical trials on Lotronex, which had been taken off the market because of possible side effects. SB had an option to acquire and market renzapride which was being developed by the British firm Alizyme Therapeutics plc. Because the merger would eliminate one of the few efforts underway to develop a drug for the treatment of irritable bowel syndrome, the order required SB to assign all of its intellectual property rights and relinquish all options to regain control over renzapride to Alizyme.

After the Commission issued the proposed consent agreement, the Commission continued to investigate the potential effects of the merger in the smoking cessation products market where Glaxo sold the prescription drug Zyban, and SB marketed Nicoderm and Nicorette, two over-the-counter nicotine replacement products. On January 23, 2001, the Commission closed the smoking cessation products investigation.

Pfizer Inc./Warner-Lambert Company, C-3957 (consent order issued July 27, 2000) (http://www.ftc.gov/os/caselist/c3957.htm). The complaint alleged that Pfizer's acquisition of Warner-Lambert Company would lessen competition in four pharmaceutical markets:

- *Antidepressant Drugs Called Selective Serotonin Reuptake Inhibitors (SSRIs) and Selective Norepinephrine Reuptake Inhibitors (SNRIs).* Pfizer manufactured Zoloft, the second largest selling SSRI, and Warner and Forest Laboratories co-promoted Celexa, the fastest-growing SSRI. The order required Warner to end its co-promotion agreement with Forest, return all confidential information regarding Celexa to Forest, maintain the confidentiality of all Celexa marketing information, and prohibited former Warner sales employees involved in marketing Celexa from selling Zoloft until March 2001.

- *Pediculicides or Treatments for Head Lice Infestation.* Pfizer and Warner were the two largest manufacturers and accounted for approximately 60% of the market. The order required Pfizer to divest its brand RID to Bayer Corporation.

- *Drugs for Treating Alzheimer's Disease.* Pfizer's Aricept and Warner's Cognex were the only two drugs sold in the U.S. for the treatment of Alzheimer's disease. The order required the divestiture of Cognex to First Horizon.

- *EGFr-tk Inhibitors (drugs used to treat solid tumor cancers).* Pfizer and Warner were the two most advanced among four companies developing EGFr-tk inhibitors. The order required Pfizer to return its EGFr-tk inhibitor, CP-358,774, along with its technology and knowhow assets to its development partner OSI, to grant OSI an irrevocable worldwide license to its rights and patents jointly owned with Pfizer, to provide OSI with a manufacturing and supply agreement for the continued supply of CP-358,774 until the transfer of the manufacturing technology to a new manufacturer, and to pay OSIs costs for completing clinical trials on the drug. The order also provided for the appointment of an interim trustee to ensure that the development of CP-358,774 is maintained in the future.

Cardinal Health, Inc./ McKesson Corp., 12 F. Supp. 2d 34 (D.D.C. 1998) (http://www.ftc.gov/os/caselist/ca98595ddc.htm). In 1998, the FTC successfully challenged two mergers involving the nation's four largest drug wholesalers -- McKesson merging with AmeriSource and Cardinal Health with Bergen-Brunswig. If the mergers had been permitted, the two survivors would have controlled over 80% of the prescription drug wholesaling market, significantly reducing competition on price and services. The FTC filed the two actions in district court in March 1998, and the case was litigated for approximately seven weeks during June and July. Judge Sporkin enjoined both acquisitions in a 73-page opinion issued at the end of July.

Roche Holding Ltd., 125 F.T.C. 919 (1998) (consent order) (http://www.ftc.gov/os/caselist/c3809.htm). The complaint charged that Roche's proposed $11 billion acquisition of Corange Limited would harm competition in two U. S. markets: 1) Thrombolytic agents, which are given to heart attack victims as soon as possible after the onset of symptoms in order to dissolve blood clots. Roche, through its majority ownership in Genentech, and Corange, through its Boehringer Mannheim subsidiary, produced the two safest and most effective thrombolytic agents in the U. S. There were no competitive substitutes for thrombolytic agents, and only one other significantly less effective thrombolytic agent was approved for use in the United States; and 2) DAT reagents, which are chemical antibodies that detect whether an illegal substance is present in a urine sample. Workplace DAT screening is conducted at commercial laboratories with instruments designed to use only workplace DAT reagents, and such drug screening is significantly different than hospital-based screening. The DAT reagent market was highly concentrated, and dominated by three of four producers, including Roche and Corange. The complaint alleged that the acquisition, if consummated, would eliminate actual competition between Roche and Corange in the markets for the research, development, manufacture, and sale of cardiac thrombolytic agents and of DAT reagents used in workplace testing. The acquisition would increase the likelihood that Roche would unilaterally exercise market power in cardiac thrombolytic agents, and the likelihood of collusion or coordinated action among the remaining firms in the DAT reagents market.

The order required Roche to divest or license all of the assets relating to Corange/Boehringer Mannheim's United States and Canadian cardiac thrombolytic agents business to a Commission-approved buyer. Roche was also required to divest, within 60 days of the final order, Corange/Boehringer Mannheim's worldwide DAT reagents business, and to grant to the purchaser an exclusive, world-wide royalty-free license for DAT reagents. Although the divestitures took place within the required time, the Commission included a "crown jewel" provision that would have required a larger asset divestiture had the more narrowly tailored divestiture not occurred.

American Home Products Corporation, 123 F.T.C. 1279 (1997) (http://www.ftc.gov/os/caselist/c3740.shtm). The complaint alleged that the acquisition of Solvay's animal health business by American Home Products would harm competition in the U. S. market for three types of "companion animal" vaccines. The acquisition would have given American Home Products a dominant position in the markets for canine lyme vaccines, canine corona virus vaccines, and feline leukemia vaccines, enabling it to unilaterally exercise market power, as well as increasing the likelihood of collusion or coordinated action among the remaining firms. The complaint alleged that American Home Products and Solvay were actual competitors for the three vaccines in the United States; that all three markets were highly concentrated; and that entry into each market was difficult and time consuming, with a number of broad patents governing the manufacture of the three products compounding the difficulty of new entry. The order required American Home Products to divest Solvay's U. S. and Canadian rights to the three types of vaccines to Schering-Plough no later than 10 days after the date on which the order became final. In addition, American Home Products had to provide assistance to Schering-Plough in obtaining United States Department of Agriculture certifications, and to manufacture and supply the three vaccines to Schering-Plough for a period of 24 to 36 months or until

Schering-Plough obtained the approvals. The order also included provisions protecting Schering-Plough from patent infringement lawsuits relating to the three vaccines.

Baxter International, Inc., 123 F.T.C. 904 (1997) (consent order) (http://www.ftc.gov/os/caselist/c3726.shtm). The complaint alleged that Baxter's acquisition of Immuno International raised competitive problems in both a current goods market, where the two firms were horizontal competitors, and an innovation market, where neither firm produced a current product but both were among the few firms with a chance to enter the market. Both firms manufactured a wide variety of biological products derived from human blood plasma. The complaint alleged that competition in two plasma products where entry was difficult and time consuming would be harmed : 1) the market for Factor VIII inhibitors for hemophiliacs, which was highly concentrated, as Baxter and Immuno were the only two companies marketing those products in the United States; and 2) the market for fibrin sealants, a product that controls bleeding in surgical procedures, in which there were no current producers in the United States and Baxter and Immuno were two of only a few companies seeking FDA approval for the products. With no other comparable products slated for launch before late 1999, Baxter and Immuno were posed to be the sole entrants in a market with estimated potential U.S. sales of $200 million. The acquisition would have allowed Baxter to eliminate one of the research tracks and exercise unilateral market power. The order required both divestiture and licensing. In the market for Factor VIII inhibitors, the order required Baxter to divest its Autoplex product to a Commission-approved buyer within four months. The order also required licensure of Baxter's fibrin sealant, and required Baxter to provide the acquirer, Haemacure, with finished product for sale.

J.C. Penney Company/Eckerd Corporation/Rite Aid, 123 F.T.C. 778, 795 (1997) (consent orders) (http://www.ftc.gov/os/caselist/c3721c3722.shtm). In October, 1996, Thrift Drug, a subsidiary of J.C. Penny entered into an agreement to purchase 190 drug stores in North and South Carolina from Rite Aid; in November, 1996, Omega Acquisition Corp., another subsidiary of J.C. Penny, entered into an agreement to purchase Eckerd, which owned 1,724 drug stores in thirteen states including North and South Carolina. The complaint charged that the acquisitions would give J.C. Penny a dominant position in Charlotte, Greensboro, and Raleigh-Durham, North Carolina, and Charleston, South Carolina, and allow J.C. Penny to raise prices for pharmacy services to third-party payers. The order required J.C. Penny to divest 161 drug stores: 34 Thrift drug stores in the Charlotte and Raleigh-Durham areas, 110 Rite Aid drug stores in North Carolina, and 17 Rite Aid drug stores in Charleston, South Carolina. The order barred J.C. Penny from acquiring the 127 stores in North and South Carolina until a divestiture agreement approved by the Commission was in place, and in addition, allowed the Commission to appoint a trustee to divest the other 63 drug stores acquired from Rite Aid if the divestitures of the 127 stores were not completed on time. The order also required that the stores be divested to a single pharmacy chain to ensure that the buyer could maintain the size and resources necessary to serve as a competitive pharmacy chain in a PBM's pharmacy network.

CVS Corporation/Revco, 124 F.T.C. 161 (1997) (consent order) (http://www.ftc.gov/os/decisions/docs/vol124/FTC_VOLUME_DECISION_124_(JULY_-_DECEMBER_1997)PAGES_126-214.pdf#page=36); Civil Action No. 1:98CV0775 (D.D.C. filed March 26, 1998). The complaint charged that the merger of two large retail drug store

chains, CVS and Revco, would give the combined company a dominant position in pharmacy services in Virginia, and in the Binghamton, New York area. According to the complaint, the combined firm would have the ability to increase prices for the sale of retail pharmacy services and restrict services to third-party payers, particularly affecting retail pharmacy networks administered by PBMs which depend on competition among pharmacy chains to keep the cost of pharmacy services competitive. The order required CVS to divest 114 Revco drug stores in Virginia to Eckerd Corporation, and to divest six Revco drug stores in the Binghamton market to Medicine Shoppe. The order allowed the Commission to appoint a trustee who would have the right to divest all 234 Revco drug stores in Virginia and 11 CVS drug stores in the Binghamton market if the required divestitures were not completed three months after the order was finally approved by the Commission. In addition, CVS and Revco signed an asset maintenance agreement requiring them to preserve the viability and competitiveness of the drug stores to be divested. In March 1998, CVS agreed to pay a $600,000 civil penalty for violating the asset maintenance agreement, the violation of which resulted in the inability of Eckerd to offer pharmacy services that were competitive with the services offered by the pharmacies CVS retained. According to the complaint which was filed in U.S. District Court for the District of Columbia, CVS removed the pharmacy computers and all access to Revco's online data systems prior to the divestiture of the Virginia pharmacies to Eckerd, and then refused to provide Eckerd with the patient pharmacy files in a computerized format that could be used by Eckerd's online computer system.

Rite Aid Corporation/Revco D.S., Inc., FTC File No. 961-0020 (preliminary injunction authorized April 17, 1996) (http://www.ftc.gov/opa/1996/04/riterevc.shtm); (transaction abandoned April 24, 1996) (http://www.ftc.gov/opa/1996/04/ritenogo.shtm). On April 17, 1996, the Commission authorized staff to seek a preliminary injunction to block the acquisition of the Ohio based Revco drug store chain by Rite Aid, which is headquartered in Pennsylvania. The complaint charged that the merger of the two largest retail drug store chains in the country would substantially reduce competition for prescription drugs sold in retail pharmacy outlets in numerous geographic areas, including Ohio, Indiana, Maryland, Pennsylvania, Virginia, West Virginia, North Carolina and New York. A week after the Commission's decision to challenge the transaction, Rite Aid notified the Commission that it had abandoned the transaction.

Rite Aid Corporation/Brooks Pharmacies, FTC File No. 951-0120 (closing letter sent May 31, 1996) (http://www.ftc.gov/opa/1996/06/ram.htm). In September, 1995, Rite Aid entered into an agreement with the Commission under which it was allowed to acquire several Brooks retail pharmacy stores in Maine from Maxi Drug, Inc. pending completion of the Commission's investigation into possible antitrust violations. As a condition for the Commission agreeing not to challenge the acquisition in federal district court, Rite Aid agreed to maintain the marketability and viability of Rite Aid's and Brooks' pharmacies, and to restore any lost competition in the relevant markets. Rite Aid reached a similar agreement with the Maine Attorney General's Office, which investigated the case jointly with the FTC. The Commission closed its investigation in June, 1996, citing a consent agreement that Rite Aid entered into with the Maine Attorney General requiring Rite Aid to divest pharmacies in three relevant geographic markets in Maine.

IVAX/Zenith Laboratories, 119 F.T.C. 357 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_(JANUARY_-_JUNE_1995)PAGES_316-412.pdf#page=42). The Commission charged that the merger of IVAX and Zenith would create a monopoly in the market for extended release verapamil, a generic drug used to treat patients with chronic cardiac conditions. IVAX manufactured and sold Verapamil, and Zenith held an exclusive marketing and sales distribution agreement for Verapamil with G.D. Searle. The consent order permitted IVAX to acquire Zenith except for Zenith's rights to market or sell verapamil under Zenith's exclusive distribution agreement with Searle. For ten years, the order also required IVAX to obtain prior Commission approval before acquiring any stock in a company that manufacturers or is an exclusive distributor for another manufacturer for extended-release verapamil. The prior approval requirement also applies to any exclusive agreement IVAX negotiates to distribute another manufacturer's extended-release verapamil.

American Home Products Corporation/American Cyanamid Company, 119 F.T.C. 217 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_(JANUARY_-_JUNE_1995)PAGES_217-315.pdf#page=1). The complaint charged that American Home Products and American Cyanamid competed or potentially competed with each other in three highly concentrated markets for tetanus and diphtheria vaccines, cytokine drugs administered to patients undergoing chemotherapy, and research for a vaccine to treat rotavirus, a diarrheal disease. The consent order required that American Home Products divest its tetanus and diphtheria vaccine business to a Commission approved buyer, and license American Cyanamid's rotavirus research to a Commission-approved licensee. American Home Products licensed the manufacturing rights of two cytokines that were pending FDA approval to Sandoz. American Home Products licensed the manufacturing rights of two cytokines that were pending FDA approval to Sandoz. The order required changing the licensing agreement for cytokines and eliminating reporting arrangements to assure that American Home Products does not obtain competitively-sensitive information.

Rite Aid Corporation/LaVerdiere's Enterprises, Inc., 118 F.T.C. 1206 (1994) (consent order), Civil Action No. 1:98CV0484 (D.D.C. filed February 27, 1998), 125 F.T.C. 846 (1998) (modifying order) (http://www.ftc.gov/os/decisions/docs/vol118/FTC_VOLUME_DECISION_118_(JULY_-_DECEMBER_1994)PAGES_1130-1228.pdf#page=77). The complaint charged that Rite Aid's acquisition of LaVerdiere would substantially lessen competition and increase the prices for prescription drugs sold in retail pharmacy stores in Bucksport and Lincoln, Maine, and in Berlin, New Hampshire. The order required Rite Aid to divest either its own drug stores or the acquired LaVerdiere drug stores in the three cities to a Commission-approved buyer who would operate the stores in competition with Rite Aid. Rite Aid failed to meet the twelve-month deadline for divestiture, and in February, 1996, the Commission appointed a trustee to divest the drug stores. The trustee found buyers for the Lincoln, Maine store and the Berlin, New Hampshire store, but could not find a buyer for the Bucksport, Maine store. In February, 1998 Rite Aid agreed to pay a $900,000 civil penalty to settle a Commission civil complaint filed in U.S. District Court for the District of Columbia that it failed to comply with the divestiture terms of the 1994 order. Rite

Aid then petitioned the Commission to reopen and modify the 1994 order to eliminate the divestiture requirement for the Bucksport, Maine store because neither Rite Aid nor the trustee had been able to find a buyer. The Commission granted the petition in May, 1998, eliminated the divestiture requirement for the Bucksport store, and substituted prior notification and waiting requirements for the prior approval requirement.

TCH Corporation, et al., 118 F.T.C. 368 (1994) (consent order) (http://www.ftc.gov/os/decisions/docs/vol118/FTC_VOLUME_DECISION_118_(JULY_-_DECEMBER_1994)PAGES_340-451.pdf#page=29). The complaint charged that the merger of two drug store chains, TCH and Payless, would violate the antitrust laws, and lead to higher prices and restricted output in six markets in California, Oregon and Washington: Fort Bragg, Bishop, Mt. Shasta, and Taft, California; Florence, Oregon; and Ellensburg, Washington. TCH already owned the Thrifty drug store chain and Bi-Mart, a chain of membership discount stores. The complaint also alleged that the acquisition would eliminate competition between Thrifty or Bi-Mart and Payless, and increase the likelihood of market control or collusion by Thrifty. The order required TCH to divest to Commission-approved buyers, within one year, the pharmacy business in either the Thrifty, Bi-Mart, or Payless drug stores in the six markets. The order also required TCH to maintain the drugs stores until divested as viable and marketable assets.

Revco D.S. Inc./Hook-SupeRx, 118 F.T.C. 1018 (1994) (consent order) (http://www.ftc.gov/os/decisions/docs/vol118/FTC_VOLUME_DECISION_118_(JULY_-_DECEMBER_1994)PAGES_930-1029.pdf#page=89). The complaint charged that the acquisition of the Hook-SupeRx drugstore chain by Revco would substantially reduce competition, raise prices, and reduce service in three markets in Covington, Marion, and Radford, Virginia. The order required Revco to divest either its own pharmacies or the pharmacies acquired from Hook-SupeRx in the three towns within one year, and to maintain the viability of the pharmacies prior to divestiture. The order also provided for the appointment of a trustee if the one year deadline for divestiture was not met. In March, 1995 the Commission approved Revco's divestiture of two Hook-SupeRx pharmacies in Radford. The Commission appointed a trustee in February, 1996, to divest the pharmacies in Covington and Marion because Revco had failed to meet the divestiture deadline called for in the 1994 order. In November 1996, the Commission approved an application from the trustee to divest the drug stores in Marion and Covington to Horizon Pharmacies Inc.

Dow Chemical Company, et. al., 118 F.T.C. 730 (1994) (consent order) (http://www.ftc.gov/os/decisions/docs/vol118/FTC_VOLUME_DECISION_118_(JULY_-_DECEMBER_1994)PAGES_730-820.pdf). The complaint alleged that the purchase of Rugby Darby Group Companies, Inc. (Rugby) by Marion Merrell Dow, Inc. (MMD) would substantially lessen competition by creating a monopoly in the U.S. market for dicyclomine capsules and tablets, a medication used to treat irritable-bowel syndrome. According to the complaint, MMD and Rugby competed directly and were the only two FDA approved manufacturers of dicyclomine in the U.S. The order required MMD to license dicyclomine formulations and production technology to a third party within12 months, and to contract manufacture dicyclomine for a third party awaiting FDA approval to sell its own dicyclomine. For a period of ten years, the order also required MMD and its parent Dow Chemical to obtain prior approval of the

Commission before acquiring any dicyclomine manufacturing, production, or distribution capabilities.

B. Potential Competition Mergers

Watson Pharmaceuticals, Inc./Robin Hood Holdings ("Arrow"), C-4276, FTC File No. 0910116 (consent order issued January 7, 2010) (www.ftc.gov/os/caselist/0910116/index.shtm). The Commission's complaint challenges Watson's proposed $1.75 billion acquisition of Arrow. The complaint charges that the acquisition would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by eliminating significant future competition by reducing the number of potential generic pharmaceutical suppliers in the U.S. markets for generic cabergoline tablets and generic dronabinol capsules. Cabergoline – the generic name of Pfizer's branded drug Dostinex – is a dopamine receptor agonist used to treat Parkinson's Disease and multiple medical problems resulting from excessive production of the hormone prolactin. Arrow is one of only three suppliers of generic cabergoline in the $44.8 million U.S. market. Watson has FDA approval to sell generic cabergoline, and is poised to enter the market within two years. The proposed acquisition, however, would eliminate the likely entry of Watson's competing product. Dronabinol – the generic form of Solvay's Marinol – is used to treat nausea and vomiting caused by cancer therapy, as well as loss of appetite and weight loss in HIV patients. Watson is one of only two suppliers of generic dronabinol in the $74.4 million U.S. market. Arrow's subsidiary, Resolution Chemicals Ltd., is developing a generic dronabinol product, and is one of a limited number of firms capable of developing generic dronabinol and marketing it in a manner that is timely and sufficient to have a competitive impact. The proposed acquisition would eliminate the likely entry of the Arrow/Resolution competing product.

The complaint charges that the proposed acquisition would cause significant competitive harm in these two generic markets. In generic markets, pricing is heavily influenced by the number of competitors in the market. The price of a generic product generally decreases with the entry of the second, third, and even fourth competitor. The proposed acquisition would eliminate a likely future competitor in each of the markets at issue, reduce future competition in those markets between Watson and Arrow, and increase the likelihood that consumers will pay higher prices for these generic products. The complaint states that entry into these generic markets would not be timely or sufficient to deter or counteract the anticompetitive effects of the proposed acquisition, because of long drug development times, regulatory requirements, and unique conditions within each market that make additional entry unlikely. The consent order requires Watson to divest its generic cabergoline product to Impax Laboratories, Inc. The order also requires Arrow to divest its Resolution subsidiary to a new entity named Reso Holdings, which is owned in part by Resolution's current management. The order also requires Arrow to sell its U.S. marketing rights for generic dronabinol to Impax, which will replicate Arrow's role as the U.S. marketer for that product once Resolution obtains all necessary regulatory approvals. The acquirers of the divested assets must receive prior approval from the Commission, so that the competitive environment that existed in these markets prior to the proposed acquisition will be maintained.

Schering-Plough Corporation/Merck & Co., Inc. (See Section II A for citation and annotation.)

Teva Pharmaceutical Industries Ltd./Barr Pharmaceuticals, Inc. (See Section III A for citation and annotation.)

Sun Pharmaceuticals Industries/Taro Pharmaceutical Industries (See Section III A for citation and annotation.)

Hospira, Inc./Mayne Pharma Limited (See Section III A for citation and annotation.)

Johnson & Johnson/Pfizer (See Section III A for citation and annotation.)

Watson Pharmaceuticals Inc./Andrx Corp. (See Section III A for citation and annotation.)

Barr Pharmaceuticals Inc/Pliva (See Section III A for citation and annotation.)

Allergan Inc./Inamed Corp., C-4156 (consent order issued April 17, 2006) (http://www.ftc.gov/os/caselist/0610031/0610031.htm). The complaint charged that Allergan's acquisition of Inamed would reduce competition and remove a future competitor in the market for botulinum toxin type A products, used for the non-surgical removal of wrinkles. Allergan marketed Botux, the only botulinum toxin approved by the FDA to treat facial wrinkles. Inamed licensed the exclusive rights from Ibsen to develop and distribute Reloxin, and was planning to enter the market with Reloxin, currently in Phase III clinical development. The order requires that Allergan divest the development and distribution rights, including the ongoing clinical trials, for Reloxin to Ipsen, ensure that confidential business information relating to Reloxin will not be obtained by Allergan, and provides that Ipsen will be able to enter into employment contracts with key individuals who have experience relating to Reloxin.

Teva Pharmaceutical Industries/IVAX Corporation (See Section III A for citation and annotation.)

Cephalon, Inc./Cima Labs Inc., 138 F.T.C. 583 (2004) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume138.pdf#page=588). The complaint charged that Cephalon's acquisition of Cima Labs would lessen potential competition and create a monopoly in the market for prescription drugs for the treatment of breakthrough cancer pain (BTCP). Cephalon marketed Actiq (fentanyl), the only FDA approved drug for the treatment of BTCP, and was in the process of developing a sugar free formulation for launch in 2005. Cima Labs was in Phase III clinical trials of Ora Vescent fentanyl, a fast-dissolving, sugar-free fentanyl product, and the firm best positioned to enter the BTCP drug market. The complaint also charged that the acquisition could delay or end the launch of Ora Vescent fentanyl, eliminate the price competition resulting from Cima Labs' entry into the market, and delay entry of generic Actiq into the BTCP drug market. The order requires Cephalon to grant a license and transfer all of the technological knowledge for Actiq to Barr Laboratories, a generic drug manufacturer, in order that Barr can market a generic equivalent of Actiq that will be launched as soon as the FDA approves Cima Labs' Ora Vescent fentanyl. The order also contains provisions to ensure that Barr is able to

compete successfully in the BTCP drug market and that Cephalon does not delay the development and launch of Ora Vescent fentanyl.

Pfizer Inc./Pharmacia Corporation (See Section III A for citation and annotation.)

Baxter International Inc.,/Wyeth Corporation (See Section III A for citation and annotation.)

Amgen Inc./Immunex Corporation (See Section III A for citation and annotation.)

Cytyc Corp./Digene Corp., FTC File No.0210098 (preliminary injunction authorized June 24, 2002) (http://www.ftc.gov/os/caselist/0410203/0410203.shtm). 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. Cytyc 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. Cytyc 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, Cytyc 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 Cytyc'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 Cytyc.

Glaxo Wellcome PLC/SmithKline Beecham PLC (See Section III A for citation and annotation.)

Hoechst AG/Rhone-Poulenc, C-3919 (consent order issued January 18, 2000) (http://www.ftc.gov/os/caselist/c3919.htm). The complaint charged that Hoechst's acquisition of Rhone-Poulenc would harm competition in the market for direct thrombin inhibitors, which are drugs used in the treatment of blood clotting diseases. Sales of direct thrombin inhibitors total about $15 million in the U.S. market. Hoechst sold Refludan, the only direct thrombin inhibitor currently sold in the U.S. market. Rhone-Poulenc was in the final stages of developing its direct thrombin inhibitor, Revasc, which it licensed from Novartis in 1998. According to the complaint, direct thrombin inhibitors are more effective and safer than other available alternatives for treating blood clotting diseases, and Hoechst and Rhone-Poulenc were each other's closest competitors. The complaint charged that the merger eliminated direct competition between Hoechst and Rhone-Poulenc, and in addition, reduced potential competition and innovation competition among researchers and developers of direct thrombin inhibitors. The order required Hoechst to transfer all of Rhone-Poulenc's rights for Revasc to Novartis or some other third party, and to enter into a short term service agreement with the acquirer of Revasc in order to

ensure the continued performance of development work on Revasc.

Zeneca Group PLC, 127 F.T.C. 874 (1999) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume127.pdf#page=874). Zeneca's proposed acquisition of Astra raised antitrust concerns based upon potential competition. Zeneca entered into an agreement with Chiroscience Group plc to market and assist in the development of levobupivacaine, a new long-acting local anesthetic being developed by Chiroscience. Long-acting local anesthetics are pharmaceutical products used to relieve pain during the course of surgical or other medical procedures, without the use of general anesthesia, and for certain procedures are the only viable anesthetic. Zeneca proposed to acquire the leading supplier of long-acting local anesthetics, Astra, which was one of only two companies approved by the FDA for the manufacture and sale of these kinds of drugs in the United States. Although Zeneca did not currently participate in the market for long-acting local anesthetics, by virtue of its agreement with Chiroscience, it was an actual potential competitor. The Commission's complaint alleged that the acquisition would result in the elimination of a significant source of new competition. The consent order required Zeneca to transfer and surrender all of its rights and assets relating to levobupivacaine to Chiroscience no later than 10 business days after the date the Commission accepted the agreement for public comment. The assets to be transferred to Chiroscience consisted principally of intellectual property and know-how, and included all of the applicable patents, trademarks, copyrights, technical information, and market research relating to levobupivacaine. During a transitional period, Zeneca was required to continue carrying out certain ongoing activities relating to the commercialization of levobupivacaine, including manufacturing, regulatory, clinical, development, and marketing activities. Zeneca was also required to divest its approximately three percent investment interest in Chiroscience.

Hoechst AG, 120 F.T.C. 1010 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol121/FTC_VOLUME_DECISION_121_(JANUARY_-_JUNE_1996)PAGES_1-97.pdf#page=44). The complaint alleged that potential competition would be harmed in four markets if Hoechst, a German pharmaceutical company, acquired Marion Merrill Dow in a $7.1 billion dollar merger that at the time created the world's third largest pharmaceutical company. The four markets accounted for $1.4 billion in U. S. sales, and affected hundreds of thousands of consumers who suffered from hypertension, angina, arteriosclerosis, and tuberculosis. The relevant markets all featured current production by one of the merging firms and the potential for the other firm to enter the market with a new product: 1) The largest market was the $1 billion once-a-day diltiazem market, where MMD's Cardizem CD had a dominant share. Prior to the merger, Hoechst and Biovail were jointly developing Tiazac to compete against Cardizem CD. Although Hoechst returned the rights to Tiazac to Biovail before the merger agreement was finalized, the order also required Hoechst to provide Biovail with a letter of access to toxicology data necessary to secure FDA approval, to return to Biovail and refrain from using any confidential information, and to end and refrain from litigations or citizen petitions regarding Tiazac; 2) Hoechst marketed Trental, the only drug that was currently approved by the FDA for intermittent claudication, a painful leg cramping condition that affects over 5 million people in the U.S. MMD had rights to Beraprost, one of the few drugs in development for this condition before the merger. The order required Hoechst to divest either Trental or Beraprost; 3) MMD marketed Pentasa, one of two oral forms of a drug used to treat the

gastrointestinal diseases of ulcerative colitis and Crohn's Disease, which affects over 1 million people in the U.S. Hoechst was one of only a few firms developing a generic form of this drug. Hoechst was required to divest one of the two drugs; 4) MMD marketed a brand of the TB drug rifampin. Hoechst was one of only a few firms developing a generic form of rifampin. Hoechst was required to divest one of the two drugs. In each market, Hoechst was required to divest either the current line of business or the potential new product to a Commission-approved buyer that would develop and market it; and to prevent the deterioration of the assets involved, maintain its research and development efforts at pre-merger planned levels pending divestiture, and provide technical assistance and advice to the purchasers in obtaining FDA approval.

American Home Products Corporation/American Cyanamid Company (See Section III A for citation and annotation.)

C. Innovation Market Mergers

Teva Pharmaceutical Industries Ltd./Barr Pharmaceuticals, Inc. (See Section III A for citation and annotation.)

Pfizer Inc./Warner-Lambert Company (See Section III A for citation and annotation.)

Baxter International, Inc. (See Section III A for citation and annotation.)

Ciba-Geigy, Ltd., 123 F.T.C. 842 (1997) (consent order) (http://www.ftc.gov/os/caselist/9610055.shtm). The complaint alleged that the merger of Ciba-Geigy and Sandoz would result in an anticompetitive impact on the innovation of gene therapies. The firms' combined position in gene therapy research was so dominant that other firms doing research in this area needed to enter into joint ventures or contract with either Ciba-Geigy or Sandoz in order to have any hope of commercializing their own research efforts. Without competition, the combined entity could appropriate much of the value of other firms' research, leading to a substantial decrease in such research. In addition, there was direct competition between the two companies with respect to specific therapeutic products. At the time of the merger, no gene therapy product was on the market, but potential treatments were in clinical trials. The complaint noted that the first products would not be available until the year 2000, but that the market could grow to $45 billion by the year 2010. The complaint identified five relevant product markets, all of which were located in the United States. The first relevant market encompassed the technology and research and development for gene therapy overall. The other markets each involved the research and development, manufacture, and sale of a specific type of gene therapy: cancer; graft-versus-host disease (GVHD); hemophilia; and chemoresistance. In the market for overall gene therapy, the complaint alleged that Ciba and Sandoz controlled the key intellectual property rights necessary to commercialize gene therapy products. For each of the four specific gene therapy markets, the complaint asserted that the relevant market was highly concentrated and that Ciba and Sandoz were the two leading commercial developers of the gene therapy product. Moreover, entry into the gene therapy markets was difficult and time-consuming because any entrant would need patent rights, significant human and capital resources,

and FDA approvals.

The order centered on the intellectual property rights. The new company, Novartis, was required to grant to all requesters a non-exclusive license to certain patented technologies essential for development and commercialization of gene therapy products. Depending on the patent, Novartis could receive an up-front payment of $10,000 and royalties of one to three percent of net sales. Novartis also was required to grant a non-exclusive license of certain technology and patent rights related to specific therapies for cancer, GVHD, and hemophilia to a Commission-approved licensee. Novartis could request from the licensee consideration in the form of royalties and/or an equivalent cross-license. Further, the merged company could not acquire exclusive rights in certain intellectual property and technology related to chemoresistance gene therapy.

The Upjohn Co., 121 F.T.C. 44 (1996) (consent order) (http://www.ftc.gov/os/decisions/docs/vol121/FTC_VOLUME_DECISION_121_(JANUARY_-_JUNE_1996)PAGES_1-97.pdf#page=44). The complaint alleged that the acquisition of Pharmacia Aktiebolag by Upjohn would harm competition in the market for topoisomerase I inhibitors, drugs used in conjunction with surgery to treat colorectal cancer. The merging firms were two of only a very small number of companies in the advanced stages of developing the drugs. Upjohn's CPT-11 was the most advanced product, with Pharmacia's 9-AC product a few years behind. Because it would take the other companies years to reach the advanced stage of development, the complaint alleged that it was not likely that other firms would constrain the merged firm from terminating development of one of the products or raising prices. The order required the merged firm to provide technical assistance and advice to the acquirer toward continuing the research and development of 9-AC.

Glaxo PLC, 119 F.T.C. 815 (1995) (http://www.ftc.gov/os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_(JANUARY_-_JUNE_1995)PAGES_724-829.pdf#page=92). The complaint alleged harm to innovation markets where the merging parties – Glaxo and Burroughs Wellcome – were the two firms furthest along in developing an oral drug to treat migraine attacks. Current drugs existed to treat migraine, but they were available only in injectable form and were not sufficiently substitutable to be included in the relevant market. The complaint alleged that the acquisition would eliminate actual competition between the two companies in researching and developing migraine remedies. The complaint also alleged that the acquisition would reduce the number of research and development tracks for these migraine remedies, and increase Glaxo's unilateral ability to reduce research and development of these drugs. The order required the combined firm to divest Wellcome's assets related to the research and development of the migraine remedy. Among those assets were patents, technology, manufacturing information, testing data, research materials, and customer lists. The assets also included inventory needed to complete all trials and studies required to obtain FDA approval.

D. Vertical Mergers

Fresenius Medical Care/Daiichi Sankyo, C-4236 (consent order issued October 20, 2008) (http://www.ftc.gov/os/caselist/0810146/index.shtm). 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 in the United States, 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 six percent. 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.

Merck & Co., Inc., 127 F.T.C. 156 (1999) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume127.pdf#page=156). The complaint alleged that Merck's ownership of Medco, a pharmacy benefits manager ("PBM"), would allow Merck to favor its own drugs on Medco's formularies. A PBM's formulary often affects drug choice and reimbursement under certain health plans. The order requires Merck/Medco to maintain an open formulary, whereby drugs are selected according to objective criteria by an independent panel of physicians, pharmacists, and others, known as a Pharmacy and Therapeutics Committee.

Eli Lilly/PCS, 120 F.T.C. 243 (1985) (consent order) (http://www.ftc.gov/os/decisions/docs/vol120/FTC_VOLUME_DECISION_120_(JULY_-_DECEMBER_1995)PAGES_206_-_311.pdf#page=38); 127 F.T.C. 577 (1999) (set aside order). The complaint alleged that Lilly's acquisition of PCS, a pharmacy benefits manager ("PBM"), from McKesson Corp. would allow Lilly to favor its own drugs on PCS's formularies. A PBM's formulary often affects drug choice and reimbursement under certain health plans. The order requires Lilly/PCS to maintain an open formulary, whereby drugs are selected according to objective criteria by an independent panel of physicians, pharmacists, and others, known as a Pharmacy and Therapeutics Committee. The order was set aside in 1999 because Lilly sold PCS to Rite Aid Corp.

IV. MERGERS OF HEALTH CARE PROVIDERS

A. General Acute Care Hospitals

ProMedica Health System, C-9346 (complaint issued January 6, 2011)

(http://www.ftc.gov/os/adjpro/d9346/index.shtm) The complaint charges that ProMedica's acquisition of St. Luke's Hospital in Lucas County, Ohio, which was consummated on August 31, 2010, will 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 alleges that ProMedica's acquisition of St. Luke's threatens to harm competition substantially in two relevant service markets in Lucas County, Ohio: 1) general acute-care inpatient hospital services; and 2) inpatient obstetrical services. The acquisition reduces the number of general acute-care hospital competitors in Lucas County from four to three: ProMedica, Mercy Health Partners and The University of Toledo Medical Center (UTMC). According to the complaint, after acquiring St. Luke's ProMedica has a market share approaching 60 percent for general acute-care services in Lucas County. In the market for inpatient obstetrical services in Lucas County, the acquisition leaves only two competitors, since UTMC does not compete in this market. ProMedica's market share after the acquisition will increase to more than 80 percent. The complaint also charges that the acquisition eliminates significant price and non-price competition between ProMedica and St. Luke's in both the general acute-care and inpatient obstetrical markets.

According to the complaint, the acquisition vests 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 makes ProMedica a "must-have"system for health plans seeking to do business in Lucas County. Such plans cannot offer a viable provider network without including ProMedica's hospitals. The complaint also alleges that competition between ProMedica and St. Luke's has spurred both parties to increase quality of care, offer additional services and provide other non-financial benefits to the residents of Lucas County. The acquisition will result in a loss of this competition and a reduction of the quality and breadth of services that the parties offered. The complaint charges that entry of a new hospital or expansion by the two remaining hospitals is unlikely to counteract the harm to competition that the acquisition is likely to cause in the relevant service markets.

Although the acquisition has been consummated, ProMedica agreed to refrain from fully integrating St. Luke's with its own hospitals and operations during the Commission's investigation of the potential anticompetitive effects of the transaction. The Commission filed an action in federal court on January 7, 2011 requiring ProMedica to continue holding the assets of St. Luke's separate and apart during the administrative proceeding. On March 29, 2011 the court granted the Commission's motion for a preliminary injunction based on the Commission's findings of fact and conclusions of law. The administrative hearing is currently scheduled to begin on May 31, 2011.

Scott & White Healthcare/King's Daughters Hospital, FTC File No. 0910084 (investigation closed December 23, 2009) (www.ftc.gov/opa/2009/12/scottwhite.shtm). 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, D. 9326 (Complaint issued May 8, 2008) (http://www.ftc.gov/os/adjpro/d9326/index.shtm). 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, D. 9315 (Complaint issued February 10, 2004; Initial Decision issued October 17, 2005; Commission opinion issued August 2, 2007) (http://www.ftc.gov/os/adjpro/d9315/index.shtm). 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.

Tenet Healthcare Corp., et al., D. 9289; No. 98-3123EML, 17 F. Supp. 2nd 937 (E.D. Mo. 1998); rev'd 186 F.3d 1045 (8th Cir. 1999), 128 F.T.C. 793 (1999) (order dismissing administrative complaint) (http://www.ftc.gov/os/caselist/d9289.htm). 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 Popular 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 Popular 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, 123 F.T.C. 1337 (1997) (consent order) (http://www.ftc.gov/os/caselist/c3743.shtm). 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.

Butterworth Health Corp., D.9283; 124 F.T.C. 424 (1997) (Order granting motion to dismiss) (http://www.ftc.gov/os/decisions/docs/vol124/FTC_VOLUME_DECISION_124_(JULY_-_DECEMBER_1997)PAGES_407-502.pdf#page=18); 1996-2 Trade Case ¶71,571 (W.D. Mich); 1997-2 Trade Case ¶71,863 (6th Cir.) (Sixth Circuit Rule 24 limits citation to specific situations). 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. 951-0117 (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 statue 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., 120 F.T.C. 732 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol120/FTC_VOLUME_DECISION_120_(JULY_-_DECEMBER_1995)PAGES_704_-_813.pdf#page=29); 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.

Freeman Hospital, D.9273; 911 F. Supp.1213 (W.D. Mo. 1995), aff'd 69 F.3d 260 (8th 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/Heathtrust, Inc.-The Hospital Company, 120 F.T.C. 743 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol120/FTC_VOLUME_DECISION_120_(JULY_-_DECEMBER_1995)PAGES_704_-_813.pdf#page=40); 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-Hirchsman 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 twelve 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, 117 F.T.C. 587 (1994) (consent order) (http://www.ftc.gov/os/decisions/docs/vol117/FTC_VOLUME_DECISION_117_(JANUARY_-_JUNE_1994)PAGES_515_-_596.pdf#page=73); 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). 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, 118 F.T.C. 8 (1994) (consent order) (http://www.ftc.gov/os/decisions/docs/vol118/FTC_VOLUME_DECISION_118_(JULY_-_DECEMBER_1994)PAGES_1-116.pdf#page=8); 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 twelve 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, 118 F.T.C. 382 (1994) (consent order) (http://www.ftc.gov/os/decisions/docs/vol118/FTC_VOLUME_DECISION_118_(JULY_-_DECEMBER_1994)PAGES_340-451.pdf#page=43). 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 Community Hospital of Santa Cruz. That acquisition was completed in 1990 (no premerger notification was required). Dominican and 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 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. 931-0025 (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, 117 F.T.C. 224 (1994) (http://www.ftc.gov/os/decisions/docs/vol117/FTC_VOLUME_DECISION_117_(JANUARY_-_JUNE_1994)PAGES_206_-315.pdf#page=19). This matter concerned the 1988 acquisition of a for-profit hospital in Ukiah, California by a non-profit hospital chain which 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, 118 F.T.C. 959 (1994) (consent order) (http://www.ftc.gov/os/decisions/docs/vol118/FTC_VOLUME_DECISION_118_(JULY_-_DECEMBER_1994)PAGES_930-1029.pdf#page=30); 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). 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.

Hospital Board of Directors of Lee County, FTC Docket No. 9265; 1994-1 Trade Case.

¶ 70,593 (M.D. Fla.); aff'd 38 F.3d 1184 (11th 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., 116 F.T.C. 1362 (1993) (consent order) (http://www.ftc.gov/os/decisions/docs/vol116/FTC_VOLUME_DECISION_116_(JANUARY_-_DECEMBER_1993)PAGES_1297-1407.pdf#page=66); 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., 115 F.T.C. 880 (1992) (consent order) (http://www.ftc.gov/os/decisions/docs/vol115/FTC_VOLUME_DECISION_115_(JANUARY_-_DECEMBER_1992)PAGES_880-976.pdf); 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 (11th 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, 113 F.T.C. 285 (1990) (consent order)

(http://www.ftc.gov/os/decisions/vol113.shtm). 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, 106 F.T.C. 361 (1985) (http://www.ftc.gov/os/decisions/docs/vol106/FTC_VOLUME_DECISION_106_(JULY_-_DECEMBER_1985)PAGES_361-527.pdf#page=1), aff'd, 807 F.2d 1381 (7th 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% measured by inpatient days, from 13.6% to 26.7% measured by approved acute care beds, and from 14.3% to 25.5% 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, 106 F.T.C. 298 (1985) (consent order) (http://www.ftc.gov/os/decisions/docs/vol106/FTC_VOLUME_DECISION_106_(JULY_-_DECEMBER_1985)PAGES_291-360.pdf#page=8), (modified 106 F.T.C. 609 (1985) . 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., (formerly Medical Staff of North Mobile Community Hospital) 104 F.T.C. 1 (1984) (http://www.ftc.gov/os/decisions/docs/vol104/FTC_VOLUME_DECISION_104_(_JULY-_DECEMBER_1984)_PAGES_1-120.pdf) (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% in the county market, and from 57.8% to 87% 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% and 53.3% to 82.4%, 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. Other Hospitals, Health Care Facilities, Providers and Payers

Universal Health Services, Inc., C-4309 (consent order issued December 15, 2010) (http://www.ftc.gov/os/caselist/1010142/index.shtm). The complaint alleged that the acquisition of Psychiatric Solutions, Inc. by Universal Health Services, Inc. would reduce competition in the provision of acute inpatient services 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 percent 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. The proposed order requires Universal Health to sell 15 psychiatric facilities as a condition of its acquisition of Psychiatric Solutions. The facilities to be sold are two inpatient hospitals in Las Vegas; one inpatient hospital in Delaware; and one inpatient hospital and eleven affiliated outpatient clinics in Puerto Rico.

Laboratory Corporation of America, FTC File No. 1010152 (complaint issued November 30, 2010) (http://www.ftc.gov/os/adjpro/d9345/index.shtm) The Commission filed an administrative complaint alleging that LabCorp's acquisition of Westcliff Medical Laboratories, Inc., which was completed 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 has been expanding its share of physician group business and has 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 gives LabCorp and Quest approximately 89 percent of the market. It makes it more likely that these two remaining firms will increase prices, and it deprives physician groups of leverage to keep prices low for clinical laboratory testing services. The complaint alleges that entry into the market for the sale of clinical laboratory services to physician groups, or expansion by small fringe firms, is 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 assertion that absent a hold separate, the transaction will result in over $22 million

annually in merger-specific efficiencies.

The Commission filed a notice of appeal on February 23, 2011 in the U.S. Court of Appeals for the Ninth Circuit. On February 28, 2011 the Commission filed in the Ninth Circuit court 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.

Carilion Clinic (See Section II A for citation and annotation.)

Fresenius AG/American Renal Associates, C-4202 (consent order issued October 17, 2007) (http://www.ftc.gov/os/caselist/0510234/index.shtm). 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 (consent order issued June 30, 2006) (http://www.ftc.gov/os/caselist/0510154/0510154.shtm). 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 proposed 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., 140 F.T.C. 609 (2005) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume140.pdf#page=615). 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, 135 F.T.C. 350 (2003) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume135.pdf#page=355). 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 proposed 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 proposed 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.

Yellowstone Community Health Plan/Blue Cross Blue Shield of Montana, FTC No. 991-0028 (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 form 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.

Fresenius AG and Fresenius USA, Inc., 122 F.T.C. 310 (1996) (consent order) (http://www.ftc.gov/os/caselist/c3689.htm). 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 it's Lewisberry, Pennsylvania hemodialysis concentrate manufacturing facility to Di-Chem, and to maintain the marketability, viability, and competitiveness of the Lewisberry plant.

Charter Medical Corporation/National Enterprises, 119 F.T.C. 245 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_(JANUARY_-_JUNE_1995)PAGES_217-315.pdf#page=29). 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., 119 F.T.C. 495 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_(JANUARY_-_JUNE_1995)PAGES_413-517.pdf#page=83). 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 impatient 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 twelve months; 2) terminate a HEALTHSOUTH management contract to operate a rehabilitation unit at Medical Center East in Birmingham within ninety 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, 120 F.T.C. 949 (1995) (consent order) (http://www.ftc.gov/os/decisions/docs/vol120/FTC_VOLUME_DECISION_120_(JULY_-_DECEMBER_1995)PAGES_893_-_1002.pdf#page=57). 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 percent 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 twelve 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, 118 F.T.C. 1174 (1994) (consent order); 126 F.T.C. 181 (1998) (modifying order substituting a prior notice provision for the prior approval requirement) (http://www.ftc.gov/os/decisions/docs/vol118/FTC_VOLUME_DECISION_118_(JULY_-_DECEMBER_1994)PAGES_1130-1228.pdf#page=45). 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 twelve 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 IV A for citation and annotation.)

V. MERGERS OF MEDICAL EQUIPMENT MANUFACTURERS

Agilent Technologies, Inc., C-4292, FTC File No. 0910135 (consent order issued June 25, 2010) (http://www.ftc.gov/os/caselist/0910135/index.shtm). The Commission's complaint challenges 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. Varian supplies scientific instruments and chemical analysis technologies to customers worldwide. Those customers include academic researchers, forensics laboratories, food safety and agriculture laboratories, and pharmaceutical companies. The complaint alleges that the proposed acquisition would have anticompetitive effects in several U.S. markets, including the market for 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.

According to the Commission's complaint, less expensive GC-MSs are widely available, but they are not substitutes for 3Q GC-MSs because their substantially lower sensitivity make them unsuitable for certain applications. The complaint alleges that, where the significantly greater performance of a 3Q GC-MS is required, customers would not switch to other instruments or technologies even if the price of 3Q GC-MSs increased by five to ten percent. According to the complaint, the proposed acquisition would reduce the number of 3Q GC-MS providers in the United States from four to three, with the combined firm's market share exceeding 48%. The order requires Agilent to, *inter alia*, divest the assets of Varian's 3Q GC-MS instruments business to Bruker Corp. within ten days of closing its acquisition of Varian.

Danaher Corporation/MDS, Inc., C-4283, FTC File No. 0910159 (consent order issued March 16, 2010; order to maintain assets issued January 27, 2010) (www.ftc.gov/os/caselist/0910159/index.shtm). The Commission's complaint challenges the

proposed $650 million acquisition of MDS, Inc.'s MDS Analytical Technologies (US), Inc. ("MDS") subsidiary by Danaher Corporation ("Danaher"). 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 charges 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 percent market share. The complaint charges that entry by other LMD firms is 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. (See Section II A for citation and annotation.)

Endocare, Inc./Galil Medical, Ltd., FTC File No. 0910026 (Endocare announced it had terminated merger agreement with Galil; Chairman, Commissioners issue statements, June 9, 2009) (www.ftc.gov/opa/2009/06/endocare.shtm). 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.

Getinge AB/Datascope Corp., C-4251 (consent order issued March 9, 2009) (http://www.ftc.gov/os/caselist/0910000/index.shtm). The complaint charges 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. Getinge and Datascope are two of only three companies selling EVH devices in the U.S. The complaint charges that a combined Getinge/Datascope would control approximately 90 percent of the highly-concentrated EVH device market in the U.S., and result in a duopoly, which is likely to 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 will remedy the proposed acquisition's anticompetitive effects by requiring Datascope to divest its EVH product line to a Commission-approved buyer – Sorin Group USA, Inc. – within 10 days of the date the deal is

consummated, in order to ensure the continuing, viable, and competitive operation of the Datascope EVH business in the same manner as at the time the acquisition was announced. The order will allow Sorin to enter and compete in the U.S. EVH devices market. The order also permits the Commission to appoint an interim monitor to oversee Datascope's compliance with the order, which the Commission did in February 2009.

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

Kyphon Inc./Disc-O-Tech Medical Technologies LTD., C-4201 (consent order issued December 3, 2007) (http://www.ftc.gov/os/caselist/0710101/index.shtm). 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, Kyhon 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., C-4165 (consent order issued August 9, 2006) (http://www.ftc.gov/os/caselist/0510263/0510263.htm). 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 (consent order issued July 21, 2006) (http://www.ftc.gov/os/caselist/0610046/0610046.htm). 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 thirty months.

Johnson &Johnson/Guidant Corporation, 140 F.T.C. 1062 (2005) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume140.pdf#page=1068); Order Reopening and Setting Aside Order issued May 25, 2006. 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.

Tyco International, Ltd./Mallinckrodt , Inc., C-3985 (consent order issued December 1, 2000) (http://www.ftc.gov/os/caselist/c3985). The complaint alleged that the acquisition of Mallinckrodt by Tyco would lesson 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., 127 F.T.C. 842 (1999) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume127.pdf#page=842). 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., 128 F.T.C.168 (1999) (consent order) (http://www.ftc.gov/os/decisions/docs/vol128/FTC_VOLUME_DECISION_128_(JULY_-_DECEMBER_1999_)PAGES_137-232.pdf#page=32). 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., 126 F.T.C. 865 (1998) (consent order) (http://www.ftc.gov/opa/1998/10/aed.shtm; http://www.ftc.gov/os/decisions/docs/vol126/FTC_VOLUME_DECISION_126_(JULY_-_DECEMBER_1998)PAGES_822-END.pdf). 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 defibillators. 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 Medronic 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. 961-0066 (preliminary injunction authorized July 29, 1997) (FTC Commission Actions: Civ. No. 97-1916 (D.D.C., filed August 22, 1997) (FTC Commission Actions: August 22, 1997) (http://www.ftc.gov/os/caselist/ca971916ddc.htm). 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., 123 F.T.C. 1 (1997) (consent order) (http://www.ftc.gov/os/decisions/docs/Volume123.pdf). 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.

Johnson & Johnson/Cordis Corp., 121 F.T.C. 149 (1996) (consent order) (http://www.ftc.gov/os/decisions/docs/vol121/FTC_VOLUME_DECISION_121_(JANUARY_-_JUNE_1996)PAGES_98-189.pdf#page=52). 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 twelve months, and required that the viability and competitiveness of the Cordis assets be maintained until the divestiture was complete.

VI. INDUSTRY GUIDANCE STATEMENTS

A. Statements 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.[6]

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

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[6] *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 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 web site at http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm .

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. Collection of the information must be managed by a third party. 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 percent 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 percent 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 percent 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 percent of the total market for the purchased items, and the cost of the purchased items must account for less than 20 percent 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 percent 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 percent 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. 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.

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 web site at http://www.ftc.gov/bc/healthcare/industryguide/opinionguidance.htm.

D. Citizen Petition to the Food and Drug Administration

The Bureau of Competition and the Policy Planning Staff of the Federal Trade Commission submitted a Citizen Petition to the Commissioner of Food and Drugs on May 16, 2001, in which it requested guidance on the FTC staff's interpretation of certain FDA regulations related to patent listings in the Orange Book. The petition sought the FDA's views on the two prong criteria that a patent must meet under 21 C.F.R. § 314.53 (b) before it can be listed in the Orange Book. The petition also asked for guidance on other patent listing issues, including whether an NDA holder can list a patent for an unapproved aspect of an approved drug, or a chemical compound not approved for use as the drug substance in an approved drug product, and the meaning of the term "drug product" as it relates to infringement analysis under the regulation. FDA never formally responded to our citizen's petition, but instead issued proposed regulations on October 24, 2002, to modify in part its regulations concerning Orange Book listings. Staff submitted comments to the proposed regulations on December 23, 2002. FDA's proposed regulations remain pending.

E. Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations

On March 31, 2011 the Federal Trade Commission and the Department of Justice issued a joint statement describing how the agencies will enforce the antitrust laws regarding the new Accountable Care Organizations (ACOs) – groups of health care providers collaborating under the Affordable Care Act of 2010 to improve health care quality and reduce costs. The 2010 Act encourages health care providers to form integrated organizations to offer services jointly in order to reduce costs and improve the quality of patient care in the United States. The goal of ACOs is to improve coordination of care that will result in efficiencies and cost savings for consumers. The Act requires ACOs to serve fee-for-service beneficiaries through Medicare's Shared Savings Program and to sign up with the Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) to participate in the program for at least three years starting January 1, 2012. The FTC and DOJ acknowledge that ACOs may generate opportunities for health care providers to innovate in both the Medicare and commercial markets in order to achieve the cost savings that Congress intended with the establishment of the Shared Savings Program. However, the agencies also understand that collaborations among competitors – the consequence of the formation of ACOs– may raise concerns about competition. The proposed antitrust Policy Statement has been developed jointly by the FTC and DOJ to coordinate competition analysis with CMS' review of ACO applications in order to ensure that the formation of these organizations do not lead to reduced competition and higher prices for consumers.

The joint Policy Statement is intended to provide sufficient antitrust guidance to health care providers so that they can form procompetitive ACOs. It describes 1) the ACOs to which the Statement will apply; 2) when the FTC and DOJ will apply particular antitrust analyses to those ACOs; 3) an antitrust safety zone for certain ACOs; 4) the CMS-mandated antitrust review process for certain other ACOs; and 5) options for ACOs to obtain additional antitrust guidance if they fall outside the safety zone but below the CMS-mandated antitrust threshold. The FTC and DOJ will evaluate applicants that meet the CMS eligibility criteria for the Shared Savings

Program based on the ACO's share of services in each participant's Primary Service Area (PSA). ACOs with high PSA shares may pose a higher risk of being anticompetitive and also may reduce quality, innovation and choice for Medicare and commercial patients. High PSA shares may reduce the ability of competing ACOs to form and could allow an ACO to raise above competitive levels prices charged to commercial health plans.

Depending on the ACO's range of PSA shares, CMS may mandate, or an ACO may seek, an expedited antitrust review. An ACO will submit its request for expedited review to both the FTC and DOJ, and the agencies will determine which of the two will review the request. The FTC and DOJ have committed to a 90-day expedited review of ACOs that are subject to mandatory review, or that seek expedited review, after all required documents and information have been received. The agencies are accepting public comment on the proposed Policy Statement through May 31, 2011.

VII. AMICUS BRIEFS

Brief Amicus Curiae of Federal Trade Commission In Support of Rehearing *En Banc*, Arkansas Carpenters Health and Welfare Fund v. Bayer AG, Bayer Corp. (In Re Ciprofloxacin Hydrochloride Antitrust Litigation), Docket No.'s 05-2851-cv (L) and 05-2852-cv (CON) (2nd Cir.) (May 20, 2010) (http://www.ftc.gov/opa/2010/05/deposit.shtm); **Brief of Amicus Curiae Federal Trade Commission, In Support of Appellants and Urging Reversal, In re Ciprofloxacin Hydrochloride Antitrust Litigation**, No. 2008-1097 (Fed. Cir.) (January 25, 2008) (http://www.ftc.gov/os/2008/01/080129cipro.pdf). The case, filed by direct and indirect purchasers of the wide-spectrum antibiotic drug ciprofloxacin hydrochloride ("Cipro"), involves agreements between defendants Bayer AG and its U.S. subsidiary Bayer Corporation – manufacturer of Cipro and assignee of U.S. Patent No. 4,670,444 which claims the active ingredient in Cipro – and generic manufacturers Barr Laboratories, Inc., The Rugby Group, Inc., Hoechst Marion Roussel, Inc., and Watson Pharmaceuticals, Inc. Under the terms of those agreements (executed in January 1997), Bayer paid the generic companies approximately $398 million in exchange for their agreements not to manufacture any form of Cipro and for Barr's agreement to terminate its challenge to Bayer's patent by converting its Abbreviated New Drug Application for a generic form of Cipro to permit Barr to market its generic drug only upon expiration of the '444 patent in December 2003. The Commission urged the Court to reverse the District Court's decision and argues that the district court's ruling is not compelled by the patent laws, and it conflicts with fundamental antitrust principles.

In April 2010, a three-judge panel of the Court of Appeals for the Second Circuit affirmed the district court's summary judgment for the defendants, holding that Joblove v. Barr Labs, Inc. (In re Tamoxifen Citrate Antitrust Litig.), 466 F.3d 187 (2nd Cir. 2005), was dispositive. See Docket No.'s 05-2851-cv (L) and 05-2852-cv (CON) (2nd Cir. April 29, 2010) (http://www.ftc.gov/opa/2010/04/cipro.shtm). However, "because of the 'exceptional importance' of the antitrust implications of reverse exclusionary payment settlements of patent infringement suits," the court of appeals' opinion invited the plaintiffs-appellants to petition for rehearing *en banc*, which they did. On May 20, 2010, the Commission filed a brief, as *amicus*

curiae, urging the Second Circuit to grant a rehearing *en banc*. On September 7, 2010, the Second Circuit (over one written dissenting opinion) denied the petition for rehearing *en banc*.

Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellants, **In re DDAVP Direct Purchaser Antitrust Litigation**, No. 06-5525 (2nd Cir.) (May 25, 2007) (http://www.ftc.gov/os/2007/05/DDAVPCommission-DoJBrief.pdf). The plaintiffs, direct purchasers of the branded drug DDAVP, brought a class action under Section 4 of the Clayton Act, alleging that defendants Ferring B.V. and Ferring Pharmaceuticals, Inc., who owned the patent for desmopressin acetate -- the active ingredient in DDAVP, and Aventis Pharmaceuticals, Inc., the patent's exclusive licensee in the United States, violated Section 2 of the Sherman Act, by maintaining and enforcing a patent procured by intentional fraud on the Patent and Trademark Office. The plaintiffs charged that defendants prevented and delayed lower-priced generic equivalents of DDAVP from entering the market. In their brief, the Department of Justice and the Federal Trade Commission urged the court of appeals to reverse the district court's holding that plaintiffs lacked antitrust standing as direct purchasers to bring monopolization claims against the defendants arising out of the manufacturers' maintenance and enforcement of a patent allegedly procured through intentional fraud on the Patent and Trademark Office.

Brief of Amicus Curiae Federal Trade Commission in Support of Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing En Banc, In re Tamoxifen Citrate Antitrust Litigation, Case No. 03-7641 (2nd Cir.), filed November 30, 2005 (http://www.ftc.gov/os/2005/12/051202amicustamoxifen.pdf). The Appeals Court upheld a district court's dismissal of an antitrust challenge to a patent litigation settlement between AstraZeneca, the manufacturer of the cancer treatment drug, tamoxifen citrate, and Barr Laboratories. The Commission's brief argued that the Appeals Court panel did not properly consider the Hatch Waxman Act which encourages challenges to patents in order to facilitate the early entry of generic drugs into the market. The Commission argued that the Appeals Court decision, if not corrected, would permit the holder of a challenged drug patent to forestall competition by paying a generic rival to stay out of the market even if its patent claims are weak. The Commission also argued that consumers have benefitted from the large savings that have resulted from successful challenges to listed patents.

Brief of Amicus Curiae Federal Trade Commission Supporting Appellant's Combined Petition for Rehearing and Rehearing En Banc, Case No. 03-CV-10167 (Fed Cir.), filed 2/11/05 (http://www.ftc.gov/os/caselist/tevapharm/tevapharm.htm); **Brief of Amicus Curiae Federal Trade Commission Supporting Appellant and Urging Reversal** in **Teva Pharmaceuticals USA, Inc. v. Pfizer, Inc.**, Case No. 04-1186 (Fed. Cir.), filed March 31, 2004 (http://www.ftc.gov/os/2004/04/040331amicusbrieftevavpfizer.pdf). Teva sought a declaratory judgment that its generic version of Pfizer's sertraline hydrochloride drug would not infringe a patent held by Pfizer (or that the patent was invalid). The district court dismissed Teva's complaint for lack of subject matter jurisdiction. The Commission's brief explains that declaratory actions by generic companies (such as Teva) play a vital role in the Hatch-Waxman regime by providing these applicants with the opportunity to eliminate bottlenecks that can delay them from obtaining FDA approval to market their product. The brief argues that the district

court applied the wrong test to assess jurisdiction in the Hatch-Waxman cases brought by a "second" generic applicant, such as Teva. It argues that the court failed to take account of the fact that, unless Teva can obtain a court decision regarding Pfizer's patent, the FDA cannot give Teva approval to market its generic drug until 180 days after the first generic applicant (Ivax Pharmaceuticals) enters the market with its version. The brief also explained that the district court's holding will leave subsequent generic applicants (such as Teva) powerless to prevent brand-name manufacturers and first generic applicants from greatly delaying other generic manufacturers from entering the market. On January 21, 2005, the Court of Appeals for the Federal Circuit affirmed the judgment of the district court. On February 11, 2005, the Commission filed a second amicus brief in support of Teva's combined petition for rehearing and rehearing en banc, arguing that the district court had not applied the proper standard in evaluating whether there was an actual controversy between Teva and Pfizer.

Memorandum of Law of Federal Trade Commission as Amicus Curiae Concerning Torpham's Cross Motion for Entry of An Amended Order in **Smithkline Beecham Corporation v. Apotex Corporation**, Case No. 99-CV-4304 (E.D. Pa., January 29, 2003) (http://www.ftc.gov/ogc/briefs/smithklineamicus.pdf). Smithkline Beecham (now GlaxoSmithKline) sued Apotex, a generic drug manufacturer, for infringing two patents on it's antidepressant drug Paxil. After the district court ruled the Glaxo patents invalid, Apotex filed a motion to have the two patent listings removed from the Orange Book. In response to this motion, the Commission filed an amicus brief arguing that improper listings in the Orange Book effect competition and harm consumers. The Commission detailed the anticompetitive effects resulting from improper listings, including additional 30-month stays of FDA approval, that ultimately delay the entry of generic drugs. The Commission also argued that consumers benefit from the large savings that result from the competition provided by generic drugs, an estimated $30 million dollars a month in the case of a generic Paxil. The Commission argued that a de-listing remedy is consistent with the Court's judgment of invalidity, because it would prevent the branded manufacturer from benefitting from the 30-month stay of FDA approval even after a judgment of invalidity.

Memorandum of Law of Amicus Curiae the Federal Trade Commission in Opposition to Defendant's Motion to Dismiss In re: Buspirone Patent, Antitrust Litigation, 185 F. Supp. 2d 363 (SD. NY. 2002) (http://www.ftc.gov/ogc/briefs/buspirone.pdf). The In re: Buspirone Patent and Antitrust Litigation involves claims by generic drug manufacturers that Bristol-Myers-Squibb, manufacturer of the brand drug BuSpar, attempted to delay generic competition to BuSpar, in violation of Section 2 of the Sherman Act, when it filed misrepresentative claims to the FDA concerning the listing of a newly issued patent in the Orange Book. BMS filed a motion to dismiss the case on the grounds that the listing is valid petitioning to a government agency and therefore immune from the antitrust laws under *Noerr*. In its amicus brief, the Commission argued that Orange Book filings are not immune from Sherman Act liability under *Noerr* because: 1) they are ministerial filings and not legitimate petitions intended to influence governmental decision-making; 2) they do not constitute adversarial pre-litigation threat letters incidental to litigation, and 3) they are not necessary for patent infringement litigation. The Commission also argued that even if the Orange Book listings constitute "petitioning" under *Noerr*, the misrepresentation and sham exceptions may deprive BMS of *Noerr* immunity. The

court ruled that the listing of the buspirone patent in the Orange Book was not valid petitioning of a government agency and therefore not protected under *Noerr;* in addition, according to the court, the plaintiffs had shown that there was reason to warrant an exception to *Noerr* immunity because BMS had obtained the patent fraudulently and attempted to maintain a monopoly by bringing the patent litigation.

Brief of the Federal Trade Commission as Amicus Curiae in American Bioscience, Inc. v. Bristol-Myers Squibb Co., No. CV-00-08577 WMB (AJWx) (C.D. Cal., September 1, 2000) (http://www.ftc.gov/os/caselist/cv0008577cdcwd.htm). American Bioscience, Inc. (ABI) sued Bristol-Myers Squibb, the maker of Taxol, a drug used to treat cancer, to force it to list a patent on the FDA Orange Book, and obtained an unopposed temporary restraining order (TRO). As part of a proposed settlement between ABI and Bristol, the parties agreed that (1) the court would enter a finding that ABI's patent should be listed in the Orange Book, and (2) Bristol would maintain the listing of the patent in the Orange Book. In its amicus brief, the Commission asked the judge to consider the anticompetitive ramifications of the proposed settlement. First, another court might find any judicial finding that the patent met the statutory requirements for listing on the Orange Book persuasive, or even conclusive, thus hindering a generic company's attempt to challenge the listing. Second, the order to maintain the listing would conflict with any later court order requiring Bristol to delist the patent, and resolving the conflicting court orders could further forestall generic entry. The brief also announced the Commission's investigation of ABI and Bristol, and asked the court to consider its pendency when deciding on the proposed settlement. The court ultimately determined that ABI could not maintain a private action under the Food, Drug, and Cosmetics Act, dissolved the TRO, and ordered Bristol to delist the ABI patent.

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, Surgical Care Center of Hammond v. Hospital Service Dist. No. 1 of Tangipahoa Parish, 153 F.3d 220 (5th Cir. 1998); reh'g granted en banc, 162 F.3d 294 (5th Cir. 1998); rev'd and remanded, 171 F.3d 231 (5th 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. The en banc court ruled unanimously that the state legislature did not make sufficiently clear its intent to insulate the hospital district from the constraints of the Sherman Act, reversed the panel's ruling and remanded the case back to the district court. The Supreme Court denied the defendant's petition for certiorari on November 1, 1999.

Brief for the United States and the Federal Trade Commission as Amicis Curiae in Ertag v. Naples Community Hospital, No. 92-341-CIV-FTM-25D, slip op. (M.D. Fla., July 31, 1995); No. 95-3134 (11th 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 (11th 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. In an unpublished decision on August 1, 1997, the Eleventh Circuit reversed the district court decision, ruling that the district erred in concluding that the neurologists lacked standing to assert their antitrust claims.

Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing, Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406 (7th 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. The Court modified its decision by adding statements that its rulings on these two issues were based upon and related only to the facts in the immediate case. In all other respects, the court denied the petition for rehearing.

Brief of the Federal Trade Commission as Amici Curiae on Appeal from United States District Court, Nurse Midwifery Associates v. Hibbett, (See Section II C for citation and annotation.)

Brief of the Federal Trade Commission as Amici Curiae on Appeal from United States District Court, Parker v. Kentucky Board of Dentistry, (See Section II D for citation and annotation.)

En Banc Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court, Bolt v. Halifax Hospital Medical Center, appealing 851 F.2d 1273 (11th Cir. 1988), vacated, reh'g granted en banc, 861 F.2d 1233 (11th Cir. 1988), remanded to panel, 874 F.2d 810 (11th 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. The en banc court ruled that the appellee hospitals and their medical staffs waived at oral argument any claim to state action immunity. The court reinstated the panel opinion in 851 F.2d 1273, with the exception of the discussion of the state action exemption, which remains vacated. Approximately one month later, a panel of the 11th Circuit held, in Shahawy v. Harrison, 875 F.2d 1525 (11th Cir. 1989), that judicial review of hospital privilege decisions did not meet the standards for active supervision set forth by the Supreme Court in Patrick.

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, Patrick v. Burget, 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. The Supreme Court reversed the Ninth Circuit on this issue.

Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court, Bhan v. NME Hospitals, Inc., 772 F.2d 1467 (9th 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. The Ninth Circuit reversed the district court on this issue.

Brief of the Federal Trade Commission as Amicus Curiae, Lombardo v. Our Lady of Mercy Hospital, No. 85-2474 (7th 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

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Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court, North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc., 722 F.2d 59 (4th 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. The Fourth Circuit held that antitrust immunity was implied by the legislative history and regulatory structure of the Act.

Brief of the United States and Federal Trade Commission as Amici Curiae on Petition for Writ of Certiorari, Jefferson Parish Hospital District No. 2 v. Hyde, (See Section II F for citation and annotation.)

Brief of the United States and Federal Trade Commission as Amici Curiae on Petition for Writ of Certiorari, Trustees of Rex Hospital v. Hospital Building Co., 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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