Schein, Patterson, and Benco Sued for Price Fixing

By Scott and Jacob Drucker

THE BULLET POINTS

* Who’s in trouble: Henry Schein, Patterson, and Benco (the “Big 3”) sued by over a dozen dentists in class action cases for keeping prices high
* Why they’re in trouble: Big 3 accused of illegally colluding by using their market power to force partners to avoid working with certain competitors
* Evidence: Allegedly boycotting the Texas Dental Association annual meeting following a TDA partnership with an online GPO, and allegedly forcing manufacturers and other distributors to avoid doing business with the online GPO
* What’s at stake: According to the first class action suit, 3 times overcharges (potentially a 10% markup over 4 years)

The 3 largest distributors of dental supplies [have been accused](https://dentistrylawblog.wordpress.com/tag/dental-class-action-suit-sherman-act-antitrust-violations-defense-attorney-supreme-court-antitrust-decision-north-carolina-dental-regulatory-board-board-of-dentistry-dentist-lawyer-dental-distr/) of breaking laws to keep prices high. Dentists have filed over a dozen class action anti-trust lawsuits in the past month, accusing the distributors of colluding to maintain high prices, in direct violation of the Sherman Act. So what actually happened?

BACKGROUND

Most dental manufacturers don’t sell their goods direct to dentists; they sell in bulk to distributors, who turn around and sell the supplies retail to the end user. Distributors, if large enough, are able to able to influence the behavior of other market players. They can set prices, promote certain products over other ones, and use that power to influence the behavior of their manufacturers as well.

The largest of the distributors are Henry Schein, Patterson, and Benco, who are sometimes collectively called the Big 3. These 3 companies together control over 80% of the market, which has a total size of $7 billion. (These numbers can be found in various court documents, and are corroborated by the annual reports of the distributors themselves.) The Big 3 partner with virtually all of the major manufacturers and sell their products directly to dentists.

In fact, the market is so concentrated in the hands of those 3 companies that, according to court documents, it surpasses the threshold established by the US Department of Justice for what would be considered a “highly concentrated” industry. This is established by using a measurement produced by the Herfindahl-Hirschman Index.

LEGAL SITUATION

Several years ago, a new online Group Practice Organization (GPO) called SourceOne Dental partnered with the Texas Dental Association (TDA) to help their members find more affordable supplies. Schein, Patterson, and Benco allegedly began talking amongst themselves to eliminate their new competition. The Big 3 allegedly threatened their manufacturers, either explicitly or implicitly, into not doing business with the online GPO or with any distributor that sold through the new GPO.

The Big 3 also pulled out of the 2014 annual TDA meeting, allegedly boycotting it and coercing others into doing the same. According to court allegations, the message sent by the Big 3 was clear: don’t do business with them, or you don’t do business with us. And when 3 companies control over 80% of the market, other companies can find it difficult not to acquiesce.

Such activities, if true, violate both federal and Texas state law.

Following the incident, Benco was sued by the State of Texas, which was represented by its Attorney General, Ken Paxton. Benco wound up paying a settlement of $300,000 to Texas in 2015, as detailed in [the case’s final judgment](https://www.texasattorneygeneral.gov/files/epress/files/2015/April/benco_agreed_final_judgment.pdf), filed in April of 2015. Bolstered by this settlement, the GPO [filed suit](http://www.newsday.com/business/henry-schein-named-in-antitrust-suit-by-e-commerce-company-1.10876825) in September against Schein, Patterson, and Benco in federal court, claiming that they violated the federal Sherman Act. History buffs may recall that the Sherman Act is the same piece of legislation that was used to break up Rockefeller’s Standard Oil in 1911.

This isn’t the first time that Henry Schein in particular has come under scrutiny for these kinds of violations. A family-owned dental supply distributor in Texas called Archer and White Sales tried expanding its sale of Danaher products, and allegedly ran against collusion between Schein, an unnamed distributor, and Danaher. According to the complaint filed in court, Archer was essentially strong-armed into either raising its prices of Danaher products or restricting its geographic footprint. Archer [sued](http://www.plainsite.org/dockets/nl3nihfb/texas-eastern-district-court/archer-and-white-sales-inc-v-henry-schein-inc-et-al/) Schein and Danaher for violations of both federal and Texas state law in 2012. The case went to arbitration in 2013, according to the latest public court records.

THE DIFFERENCE THIS TIME

This time, though, a distributor has filed suit in federal court and is bolstered by a public settlement in the state of Texas. The original complaint explicitly states: “The damages caused by Defendants’ boycott to dental professionals in the form of higher prices is distinct from, and not duplicative of, the damages caused to SourceOne, in the form of lost profits and damaged equity and goodwill.” In other words, the document left the door wide open for dentists themselves to sue.

And that’s exactly what happened. It’s no longer only competing distributors who are taking Schein and Patterson to court. Emboldened by the settlement in Texas and SourceOne’s lawsuit in federal court, ordinary dentists across the country [have filed](https://dockets.justia.com/browse/state-new_york/court-nyedce/noscat-13/nos-410) over a dozen lawsuits against Schein, Patterson, and Benco. The premise of the lawsuits is simple: if the large distributors have been illegally using their market influence to keep prices higher, the dentists want their money back.

THE DAMAGES

These are all class action suits, meaning that every dentist who bought from one of the Big 3 could be entitled to a piece of the settlement. And the settlement could be quite substantial: the first suit, filed by Dr. Schwartz, indicates that the Big 3 took home profit margins as high as 11%, while similar companies in the medical space, such as McKesson and Cardinal Health, had profit margins “between 0.2 and 1.5 percent.”

That’s an additional markup of roughly 10%, and the Schwartz complaint asks for damages of 3 times overcharges since at least as early January 2012. Now a bit of back-of-the-envelope math: the damages are 3 times a 10% markup of 80% of the market for four years equals $6.72 billion. That’s equivalent to a payout of over $36,000 to every dentist in the USA, paid for by Henry Schein, Patterson, and Benco.

Only time will tell whether or the Big 3 should be worried about these class action suits. But this time, it’s not just competitors taking legal action; it’s dentists, too.

Scott and Jacob Drucker are co-founders of [Supply Clinic](supplyclinic.com), the online marketplace for dental supplies. Supply Clinic lets users buy tens of thousands of products, from dozens of different vendors, all on one site. The site provides the price savings of transparent comparison-shopping with the conveniences of one-click order.