

# Litigation and Enforcement Highlights – January 2019

Happy 2019! In this New Years issue, we recap the final litigation and enforcement moments of 2018. In antitrust litigation, we look closer at a major developing lawsuit that brings anticompetitive generic drug pricing practices into the national spotlight. Also, two federal appeals courts weighed in on antitrust litigation in the commercial health insurance and pharmaceutical industries, respectively. In enforcement action, we discuss the final mega merger of 2018 and what its approval means for the healthcare market.

## **Massive Antitrust Lawsuit Keeps Snowballing Toward Judgment Day for Generic Drugmakers**

This month we highlight a massive federal antitrust lawsuit brought by 48 states, Washington D.C., Puerto Rico, and classes of private plaintiffs against nearly 20 generic drug companies. The lawsuit, originally filed in August 2016 and now consolidated into multidistrict litigation (MDL) in the Eastern District of Pennsylvania, alleges that generic manufacturers colluded to fix the prices of more than 300 generic drugs, in violation of the Sherman Antitrust Act and state antitrust laws.[\[1\]](#) According to statements from state attorneys general, employees of major manufacturers like Mylan, Sandoz, and Teva would directly communicate with each other to discuss strategies to divvy up the market to limit competition and hike up prices.[\[2\]](#) The companies used their own lingo by calling the market a “sandbox” where everyone was expected to play nice, and made sure each company got its “fair share” when dividing up the market by territory.[\[3\]](#) As a result, prices of drugs for

treatment of common symptoms such as anxiety, insomnia, and diabetes doubled, tripled, or even increased by as much as 1,000%.[\[4\]](#)

This lawsuit sheds new light on the actual pricing of generic drugs. Generic drugs are generally believed to be low-cost alternatives and often used to introduce competition to the much scrutinized, more expensive brand-name drugs. However, according to this lawsuit, even prices of supposed low-cost generics are inflated due to anticompetitive practices within the pharmaceutical market. If these generics are used to bring *down* costs of brand name drugs, this begs the question of how much *more* manufacturers mark up brand-name drugs and how much more consumers pay for pharmaceuticals in general.

in addition to current probes by the state AGs and a criminal investigation by the Department of Justice, Senator Elizabeth Warren called for senate hearings on the allegations in this case, signaling a general increase in scrutiny over anticompetitive practices in the drug industry. The expanded scope of investigation garnered significant media attention and riled up public outcry, leading defendants to request a gag order on state AGs to keep allegations of the case confidential and in the courtroom. Plaintiffs argue that the public has a right to know and the district court judge in Pennsylvania agreed, denying the motion in the first order of the new year.[\[5\]](#) As the generic drug industry faces its judgment day, The Source will continue to bring the latest developments and analysis in this significant case.

## **Federal Appeals Courts Shed Light on Antitrust Enforcement in Insurer and Pharma Markets**

In other antitrust litigation news, two circuit courts issued

decisions to bring guidance to antitrust enforcement of health insurers and the pharmaceutical industry.

[Last April](#), The Source reported that Alabama federal court held in a private class action against Blue Cross and Blue Shield[\[6\]](#) that its anticompetitive practices constituted a “per se” violation of the Sherman Act. In other words, as long as the plaintiffs prove the insurers engaged in the alleged behavior, the court would assume that such action hindered competition and hold BCBS liable. On interlocutory appeal, the 11<sup>th</sup> Circuit Court of Appeals ruled against BCBS and upheld the lower court’s use of the highest legal standard in a one-sentence opinion. In this particular case, this ruling makes it easier for plaintiffs to prove BCBS’ liability, without having to produce evidence of economic harm in a long and expensive trial (see [April Highlights](#) for detailed analysis). For antitrust litigation as whole, this decision signals the courts’ increased scrutiny and disapproval of anticompetitive practices, making it easier for private plaintiffs, including insureds and providers, to hold insurers liable for and possibly deter any such behavior.

In pharma litigation, the 8<sup>th</sup> Circuit Court of Appeals refused to greenlight an antitrust spat concerning mail-order pharmacies. A New York-based mail-order pharmacy accused Express Scripts, a pharmacy benefit manager (PBM) that also operates its own mail-order pharmacy, of conspiring with other PBM-owned mail-order pharmacies such as CVS, in violation of the Sherman Antitrust Act.[\[7\]](#) The lawsuit alleges that the PBMs used their market power to squeeze other independent mail-order pharmacies from their networks. The 8<sup>th</sup> Circuit [affirmed](#) the lower court’s dismissal of the action because the plaintiff did not identify the “relevant market” that Express Scripts allegedly monopolized under Section 2 of the Sherman Act, and the PBMs’ action to terminate the plaintiff from their networks did not occur in

“parallel” to constitute a conspiracy under Section 1 of the Sherman Act.

## **Another Mega Merger Wrap up a Major Year for Transformative Healthcare Mergers**

Finally, following the three mega mergers approved last month (see [December Highlights](#)), one more major merger pushed through before the close of the year. Cigna-Express Scripts, which received DOJ approval in September (see [Highlights post](#)), gained state regulatory approval from all states, including California and New York, and closed the \$67 billion deal right before the holidays.[\[8\]](#) The states imposed conditions on this vertical merger similar to those of the CVS-Aetna merger, including the requirement to not raise premiums to pay for the merger and investments in the state healthcare systems. While California required the new entity to keep premium increases to a minimum, New York specifically prohibited Express Scripts from giving preferential pricing to Cigna or excluding independent pharmacies from its network.[\[9\]](#)

Critics are skeptical as to the companies’ claims that the integration would produce cost savings for consumers due to greater efficiency and negotiating power. Given the already highly concentrated and opaque PBM industry, increased consolidation would only exacerbate the lack of competition and transparency. The heightened state and congressional scrutiny of PBMs as seen in the latest legislative session (see [Spotlight on 2018 State Drug Legislation: Part 6](#)) provides hope that antitrust enforcers will hold the industry more accountable through increased oversight and regulation.

That's all for this month's Litigation and Enforcement Highlights. Stay tuned for the latest developments in these cases and check back next month for more litigation and enforcement actions on [The Source Blog](#). In the meantime, be sure to check out the [Enforcement page](#) of The Source for timeline and geographic trends of federal, state, and private enforcement actions.

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[1] In Re: Generic Pharmaceuticals Pricing Antitrust Litigation, No. 2:16-MD-02724. See The Source case info: <https://sourceonhealthcare.org/litigation/in-re-generic-pharm-pricing-antitrust-litig/>.

[2] Christopher Rowland, *Investigation of generic 'cartel' expands to 300 drugs*, The Washington Post, Dec. 9, 2018.

[3] Dylan Scott, *A groundbreaking antitrust lawsuit is ensnaring the generic drug industry*, Vox, Dec. 10, 2018.

[4] According to Business Insider, which obtained a copy of the unredacted complaint filed under seal in the Eastern District of Pennsylvania.

[5] Matthew Perlman, *Judge Won't Gag AGs In Generics Price-Fixing Case*, Law360, Jan. 4, 2019.

[6] In re: Blue Cross Blue Shield Antitrust Litigation, N.D. Ala., No. 2:13-CV-20000-RDP.

[7] Park Irmat Drug Corp. v. Express Scripts Holding Co., 2018 BL 459125, 8th Cir., No. 18-1628.

[8] Evan Sweeney, *Cigna closes \$67B Express Scripts acquisition*,

*promising affordability and choice*, Fierce Healthcare, Dec. 20, 2018.

[\[9\]](#) *Shelby Livingston, Calif., N.Y. approve Cigna-Express Scripts merger with conditions*, Modern Healthcare, Dec. 13, 2018.