

# Litigation and Enforcement Highlights – February 2019

February has been a busy month for state attorneys general from coast to coast, as AGs from Pennsylvania and California assert their authorities to regulate transactions in the healthcare provider market. On the drug pricing front, we follow up on the latest action in the nationwide litigation against the now infamous generic drug price fixing scheme that, fueled by increased media attention, has rallied state, federal, and private forces across the country.

## **Pennsylvania AG Sues Payer-Provider for Restrictive Network Access**

In an effort to regulate Pennsylvania's provider and insurance market, Pennsylvania Attorney General Josh Shapiro has stepped in to intervene in the long-standing battle over market share between University of Pittsburgh Medical Center (UPMC) and Highmark Health. The AG filed a [court petition](#) to require UPMC to open its provider network and fairly negotiate with Highmark Health and other health plans.<sup>[1]</sup> The legal action alleges that as a nonprofit charity, UPMC's anticompetitive behavior has violated its charitable obligations to act in the public interest by charging patients insured by competitors high out-of-network rates for access to UPMC's hospitals and physicians.

If this sounds like deja-vu, it's because this has indeed all happened before. In 2011, Highmark acquired West Penn Allegheny Health System to compete directly with UPMC, which also operates a health plan in the western Pennsylvania region. The spat eventually drove both integrated systems to exclude one

another's facilities from each other's networks. In 2014, the state issued a consent decree to ensure coverage and affordable, in-network access for patients. Five years later, with the decree expiring on June 30, the same issues are resurfacing. The [AG alleges](#) that despite the consent decree, UPMC failed to limit amounts charged to Highmark subscribers, denied treatment to out-of-network patients, and refused to contract with Highmark and other health plans. Furthermore, the lawsuit alleges that UPMC's anticompetitive behavior has extended beyond the western Pennsylvania market to the eastern part of the state, where the health plan withheld access to its doctors for patients insured by competing health plans.

In response to the alleged violations and in anticipation of the expiration of the original decree, the AG has proposed a modified decree, which would extend the agreement and allow the parties to offer tiered health plans with preferred providers at lower cost. While Highmark agreed, UPMC rejected the proposal, prompting the lawsuit. For a detailed history of the UPMC-Highmark dispute and antitrust enforcement efforts, visit the Pennsylvania AG [website](#).

## **California AG Continues His Efforts to Block Sale of Nonprofit Hospitals**

On the other coast, California's attorney general has also been busy regulating the provider market. In 2015, The Source followed then-California AG [Kamala Harris' approval](#) of the controversial sale of six Catholic Daughters of Charity Health Facilities to form Verity Health. At the time, the AG's office imposed strict conditions on the new owners, including requirements to keep providing critical health services to area residents for five to 10 years. Fast forward to 2019, Harris'

successor, now Attorney General Xavier Becerra, seeks to enforce these conditions on the sale of two of those hospitals, both in bankruptcy, to Santa Clara County. Becerra argues that the conditions originally imposed on the 2015 sale bind any future owners of the hospitals, including the government. Specifically, the two nonprofit hospitals, O'Connor Hospital in San Jose and St. Louise Regional Hospital in Gilroy, must operate as acute care hospitals and offer emergency services for 10 years.

It appears, however, the AG is fighting a losing battle. U.S. Bankruptcy Court Judge Ernest Robles [ruled](#) at the end of 2018 that the sale was free and clear of the conditions and not subject to review by the attorney general's office. The AG responded with [an appeal](#) to challenge the ruling, along with a motion to temporarily block the sale. Santa Clara County argues that blocking the sale would force the hospitals to close and have the opposite effect of the AG's intent to "preserve vital healthcare services in Santa Clara County." Additionally, the County assures that it is investing \$235 million in the hospitals to keep and expand vital healthcare services, not to shut them down, as the AG fears in the absence of contractual guarantees. The court agreed with the county government and [denied the motion](#) to suspend the sale, ruling that Becerra failed to identify a statutory provision that establishes his authority to review the sale, and that efforts to block the sale "would set in motion a series of events that, in all probability, would reduce the availability of healthcare services to the public."

However, Becerra is not ready to quit. He followed up his efforts with a motion for an emergency stay of the sale in U.S. District Court. The motion will be heard on February 22<sup>nd</sup> and will be the AG's final attempt to block the deal. The Source will be sure to bring the latest developments.

## **UnitedHealthcare is the Latest to Join Generic Drug Pricing Litigation**

Last month, we highlighted a [major antitrust case](#) against generic drug manufacturers involving nearly all 50 states, classes of private plaintiffs, the Department of Justice, and even Congress.<sup>[2]</sup> Now UnitedHealthcare, the largest insurer in the U.S., wants to join the party. Using evidence of industrywide price-fixing of generic drugs from ongoing state and federal investigations, UnitedHealthcare filed suit in Minnesota federal court against dozens of generic manufacturers to recover “several billion dollars” in alleged damages and overcharges.<sup>[3]</sup> The [complaint alleges](#) a group of “core conspirators,” including Teva and Mylan, colluded to “fix, increase, stabilize, or maintain prices of generic drugs.” The lawsuit gives examples of inflated prices of generic drugs by as much as 3,400 percent and argues “there are no market forces that explain the pricing of the drugs... other than collusion.”

UnitedHealthcare is only one of the large insurers who wants a piece of the action against the generic drug industry, and may not be the last ([Humana filed a similar suit](#) back in August 2018 in Pennsylvania federal court). In the consolidated MDL litigation pending in Pennsylvania federal court, the state AGs have brought a motion to unseal the redacted complaint, arguing that it is warranted by public importance of the litigation. As more evidence surfaces, more parties will undoubtedly become involved in this massive case that promises to affect all generic drug consumers. The Source eagerly awaits the unfolding of this drama as generic manufacturers face growing pressure from all fronts to answer for their anticompetitive practices.

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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[\[1\]](#) Pennsylvania v. UPMC, Pa. Commw. Ct., No. 334 M.D. 2014, filed 2/7/19.

[\[2\]](#) 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/>.

[\[3\]](#) United Healthcare Serv., Inc. v. Actavis HoldCo U.S., Inc., D. Minn., No. 19-cv-121.