

# States Are Taking the Helm on Antitrust Enforcement Efforts in Healthcare

State enforcement is the theme of the month in healthcare antitrust. A panel of antitrust experts at a recent [Antitrust Symposium](#) hosted by UC Hastings College of the Law discussed how exclusionary contracts and anticompetitive conduct by players in both the provider and pharmaceutical markets hinder competition and drive up healthcare prices. This edition of *Litigation and Enforcement Highlights* takes a look at current anticompetitive practices of providers and PBMs and the ensuing state regulatory efforts to address them.

## A Tale of Two Coasts in Provider Market Enforcement

As we covered in previous issues of [Litigation and Enforcement Highlights](#), state attorneys general from coast to coast are stepping up their enforcement efforts to ensure competition in the healthcare market. Notable recent cases include Wichita Falls in Texas [\[1\]](#) and St. Luke's in Idaho, [\[2\]](#) while additional cases are pending in Washington, California, and Pennsylvania. This month, we saw major developments in these pending cases, although on opposite ends of the spectrum.

### *Washington*

The state of Washington scored a victory in March as CHI Franciscan Health System settled the Washington AG's 2017 lawsuit. [\[3\]](#) Last month, we [previewed](#) a number of pretrial rulings in the case, including the dismissal of defendant

physician group WestSound Orthopaedics and Clayton Act claims. Trial was set to take place on March 19 over the issue of CHI Franciscan's anticompetitive transactions with physician group The Doctors Clinic (TDC), for violation of Section 1 of the Sherman Act. The complaint alleged that CHI Franciscan and TDC together control more than 35 percent of the market for primary care physician services. According to Washington AG Bob Ferguson, the settlement terms "include a significant payment to the state and will restore competition and choices for healthcare services on the Kitsap Peninsula, benefiting patients and doctors." [\[4\]](#)

### *California*

California also has reason to celebrate. Just two days after Washington's settlement with CHI Franciscan, a California state court judge denied Sutter Health's motion for summary judgment [\[5\]](#) in the high-profile case against the Northern California hospital giant. [\[6\]](#) As California Assistant Attorney General Kathleen Foote noted at the UC Hastings Antitrust Symposium, the AG's 2018 lawsuit is now consolidated with a private class action filed in 2014. The state alleges price fixing and monopolization by way of anti-steering and anti-tiering exclusionary contracts, in violation California's Cartwright Act. The trial in this case is set for August 2019.

### *Pennsylvania*

In contrast to the smooth sailing in west coast states, Pennsylvania's efforts to restore competition to the provider market are facing greater challenges. First, the Pennsylvania Commonwealth Court Judge Robert Simpson denied AG Josh Shapiro's motion to extend the in-network access agreement between UPMC and Highmark, set to expire on June 30. Faced with the expiring consent decree and increased anticompetitive and network

restrictive behavior by UPMC, the AG sought to modify and extend the original decree, which would require UPMC to open its provider network and fairly negotiate with Highmark and other health plans (see The Source [February](#) and [March](#) Highlights for more details). In denying the extension, Judge Simpson [ruled](#) that “because the OAG does not plead fraud, accident or mistake, this Court lacks the power or authority to modify the termination date of the Consent Decree without the consent of the parties, even if it were in the public interest to do so.” The silver lining, however, is that the judge denied UPMC’s motion to dismiss the AG’s claims. Shapiro has already [appealed](#) the decision to the Supreme Court of Pennsylvania.

Further complicating the dispute and broadening the stakes, a Pennsylvania hospital group has [filed a motion](#) to join the lawsuit. Following UPMC’s countersuit against the AG, the Hospital and Healthsystem Association of Pennsylvania (HAP) is also challenging Shapiro’s proposal against UPMC. Given the state action proposes contracting requirements against UPMC based on the claim that UPMC violated its charitable obligations as a nonprofit charity, HAP believes the enforcement action could “potentially force all not-for-profit hospitals to do business with any insurer regardless of that insurer’s offered payment terms, procedures for assuring high-quality care, or the strength of its provider network.”[\[7\]](#) Regardless of how this case may turn out, as a recent [Health Affairs article](#) suggests, state regulators are commendable for stepping up with creative enforcement ideas when federal antitrust enforcement fails.

## **Prescription Drug Spread Pricing and Overcharges Spur State Action Against PBMs**

The other side of the equation in rising healthcare prices is

the pharmaceutical industry. Of the important players in that market, pharmacy benefit managers (PBMs) are coming under increasing scrutiny for their highly suspect and secretive conduct in contract negotiations between drug manufacturers and health plans. March was a busy month for state action against PBM practices, as we saw both Ohio and Kentucky launch cases for drug overcharges by PBMs.

### *Ohio*

First, Ohio's attorney general Dave Yost [sued OptumRx](#) in Ohio state court, claiming that between 2015 and 2018, the PBM failed to pass drug discounts to Ohio's Bureau of Worker's Compensation and overcharged the state by more than \$15.8 million.[\[8\]](#) This action results from the state's ongoing investigation of PBM practices, which previously led to the state's cancellation of PBM contracts in Medicaid over issues of spread pricing. (See *The Source* blog post [Innovations in State Medicaid Programs to Control Prescription Drug Costs](#) for more info).

### *Kentucky*

In neighboring Kentucky, attorney general Andy Beshear launched the state's own investigation into PBM overcharges in the state's Medicaid program. Following recent spotlight on the PBM practice of spread pricing, Kentucky is taking an active stance to audit the past five years of drug pricing practices of CVS Caremark and Express Scripts, the two large PBMs, that contract with the state Medicaid program. Citing concerns that "PBMs... have grown into powerful industry middlemen that go to great lengths to hide and complicate drug pricing information,"[\[9\]](#) Beshear will look at details of how PBMs have determined, billed and paid drug reimbursement rates, as well as alleged discrimination against independent pharmacies.

As states begin to focus more on underlying antitrust issues

that lead to high prices in healthcare markets, this is only the beginning of state enforcement action, with more sure to come. In the words of the Ohio AG: "These are the first raindrops, but there's a storm a-comin'." [\[10\]](#)

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[\[1\]](#) United States and the State of Texas v. United Regional Health Care System of Wichita Falls, No. 7:11-cv-00030. See *The Source* case summary: <https://sourceonhealthcare.org/litigation/united-states-and-the-state-of-texas-v-united-regional-health-care-system/>

[\[2\]](#) Federal Trade Commission and State of Idaho v. St. Luke's Health System, Ltd and Saltzer Medical Group, P.A. No. 1:12-CV-00560-BLW. See *The Source* case summary: <https://sourceonhealthcare.org/litigation/federal-trade-commission-and-state-of-idaho-v-st-lukes-health-system-ltd-and-saltzer-medical-group-p-a-3/>

[\[3\]](#) State of Washington v. CHI Franciscan Health System, et al., No. 3:17-cv-05690. See *The Source* case summary: <https://sourceonhealthcare.org/litigation/state-of-washington-v-franciscan-health-system-et-al/>

[\[4\]](#) Alex Kacik, *CHI Franciscan settles antitrust lawsuit with Washington*, Modern Healthcare, March 19, 2019.

[\[5\]](#) Bruce D. Sokler, *Antitrust Claims Against Sutter Health Move Forward in Consolidated State Actions*, The National Law Review, March 21, 2019.

[\[6\]](#) People of the State of California ex rel. Xavier Becerra v. Sutter Health, No. CGC-14-538451. See *The Source* case summary: <https://sourceonhealthcare.org/litigation/people-of-the-state-of>

[-california-ex-rel-xavier-becerra-v-sutter-health/](#)

[7]

<https://www.haponline.org/Newsroom/News/ID/5050/HAP-Statement-HAP-Takes-Action-to-Protect-Patients-Access-to-Care>

[8] Ohio v. Optum Admin. Services, LLC , Ohio Ct. Com. Pl., No. 19-cv-2263, 3/15/19 .

[9]

<https://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=739>

[10]

[https://www.ohioattorneygeneral.gov/Media/News-Releases/March-2019/Yost-Files-Lawsuit-to-Recover-Nearly-\\$16-Million-i](https://www.ohioattorneygeneral.gov/Media/News-Releases/March-2019/Yost-Files-Lawsuit-to-Recover-Nearly-$16-Million-in)