

# Who's Driving Healthcare Prices: A Look at Anticompetitive Conduct of Various Players in the Healthcare Market

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*On Thursday, April 4, The Source attended the "Antitrust in the New Millennium Symposium" hosted by UC Hastings College of the Law. This blog focuses on the session "New Antitrust and Healthcare", moderated by [The Source Board member](#) and UC Hastings Professor Thomas Greaney, and featuring the panel of, notably all women, UC Hastings Professor Robin Feldman, California Senior Assistant Attorney General Kathleen Foote, and American Antitrust Institute (AAI) President Diana L. Moss.*

What drives rising healthcare prices? Perhaps it stems from anticompetitive conduct in the provider market. Perhaps the convoluted system of the pharmaceutical industry is to blame.

The panel of antitrust experts believes that healthcare prices are increased by anticompetitive conduct in terms of exclusionary contracts and market concentration. Hospitals and pharma both engage in anticompetitive contracts that contribute to rising healthcare costs. Additionally, increased market concentration from both vertical and horizontal mergers, across provider, payer, and pharma markets, exacerbate the issue.

## **Exclusionary Contracts in Provider Markets**

Many local markets are dominated by “must have” hospital systems and physician groups. As a result of their market power, these providers often include anti-steering, anti-tiering, and gag-clause provisions in contracts with insurers. According to Kathleen Foote, these clauses prevent insurance companies from disclosing cheaper healthcare services to consumers or simply restrict tiers that incentivize cheaper plans. In response, Foote noted that states are taking an active role in antitrust actions against such anticompetitive conduct. In 2008, the Texas AG brought a suit against a [hospital in Wichita Falls](#) that had entered into exclusionary contracts that inhibited commercial health insurers from contracting with competitors.[\[1\]](#) In North Carolina, the AG sued [Atrium Health](#) for anti-steering provisions in contracts with insurers,[\[2\]](#) which recently settled with the Department of Justice (DOJ). Most notable is the suit filed by the California AG office against [Sutter Health](#), which is set for trial this August. Foote explained that these state enforcement efforts against the practice of exclusionary contracts attempt to reestablish the playing field in the provider market. Foote added that additionally, states like Massachusetts and Rhode Island have taken further steps to impose price caps, encourage price transparency, and prohibit anticompetitive provisions healthcare contracts.

## **Anticompetitive Conduct in the Pharmaceutical Industry**

Providers are not the only guilty players in the healthcare market. Professor Robin Feldman took a look at how the pharmaceutical industry contribute to increasing healthcare prices in terms of prescription drugs. First, there is what

Professor Feldman described as “The Fatal Attraction of Pay-for-Delay,” [\[3\]](#) when a brand drug manufacturer pays a generic drugmaker to stay off the market and they would share the monopoly rent. Feldman explained that pay-for-delay is a popular practice among pharmaceutical companies and that the FTC has a hard time detecting these “highly suspect” deals as it’s hard to find the flow of value or profit. Second, there is the “evergreening” problem. Evergreening is the practice of extending patents over products that are set to expire. Usually, this is done with a simple modification or repurposing of a drug such as a tweak in dosage or application. Feldman stated that  $\frac{3}{4}$  drugs associated with new patents are from existing drugs. She explained that this hurts competition because when a company makes changes to an existing drug, the research and development is much less – therefore, companies are reaping great rewards for no new innovations. As a solution, Professor Feldman proposes a “one and done” policy that allows pharmaceutical companies one period of protection only, which they can pick.

And let’s not forget the convoluted system of pharmacy benefit managers (PBMs), cautioned Professor Feldman. Anticompetitive contracts allow these drug middlemen to pocket rebates from drug manufacturers. More importantly, because of the hidden nature of these contracts, which often are not even accessible to auditors, health plans, and by extension consumers, do not know the net price of the drug. Because complexity often gets exploited, Feldman proposes that ruthless simplicity would solve a lot of these problems. She believes there needs to be more transparency, as “markets and gardens grow best in the sun.”

## **Market Concentration Across the Board**

One important player missing from this blame list is insurance companies. Two words: market concentration. Providers, payers, and pharma continue to consolidate at an alarming rate, not just horizontally but also vertically. The hot topic last summer was the CVS-Aetna merger, which brings together the nation's largest retail pharmacy chain and one of the largest PBMs and the third largest health insurer. Both AAI President Diana L. Moss and Professor Greaney urged California Insurance Commissioner Dave Jones to block the vertical merger. Greaney argued that if the merger goes forward, consumers will be faced with a market with only three PBMs, all of which will be integrated with an insurer and align their interests with the insurer.[\[4\]](#) Moss agreed that the merger raises entry level barriers and leads to exclusionary anticompetitive effects.[\[5\]](#) Judge Richard Leon of the U.S. District Court for the District of Columbia has questioned whether the Department of Justice (DOJ), in approving the merger, did enough to protect competition in the healthcare industry.[\[6\]](#) At a hearing on April 5, he ordered an evidentiary hearing on the merits of the deal to be scheduled for May 2019.[\[7\]](#)

Many legal professors, economists, and lawyers agree that antitrust law is either incorrect or misunderstood. Professor Greaney believes that market concentration is the leading cause of high costs in healthcare and that antitrust enforcement has neglected the risks, in effect making antitrust laws "really not helpful in terms of guidance."[\[8\]](#) Professor Feldman thinks that the courts do not have good tools to investigate and enforce antitrust issues. Perhaps Judge Leon is taking the first step to change these trends.

It is hard to say which player is most responsible in this blame game for rising healthcare prices, but it seems clear that

anticompetitive conduct in the form of exclusionary contracts by providers, drugmakers, and PBMs reduce competition and contribute to higher prices without improvement in quality or innovation. Furthermore, additional horizontal and vertical mergers increase market concentration and bargaining power for these players. Stay tuned to *The Source* as we continue to diligently track all of these issues and bring the latest trends and developments.

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[1] *U.S. and State of Texas v. United Regional Health Care System*,

<https://www.justice.gov/opa/pr/justice-department-reaches-settlement-texas-hospital-prohibiting-anticompetitive-contracts>

[2] *U.S. and the State of North Carolina v. Carolinas Healthcare System*. For additional information on this case, see coverage on The Source Blog:

<https://sourceonhealthcare.org/litigation-and-enforcement-highlights-december-2018/>.

[3] Robin Feldman & Prianka Misra, *The Fatal Attraction of Pay-for-Delay*, Chicago-Kent Journal of Intellectual Property (Jan. 25, 2019),

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3316339](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3316339)

[4] Megan O’Leary, *CVS-Aetna Merger: Competition and Patient Care Concerns Raised at CDI Hearing*, The Source on Healthcare Price and Competition (June 26, 2018), <https://sourceonhealthcare.org/cvs-aetna-merger-competition-and-patient-care-concerns-raised-at-cdi-hearing/>

[5] Diana L. Moss, *AAI Asks DOJ to Explain Its Approval of CVS-*

*Aetna Merger*, American Antitrust Institute (Dec. 18, 2018), <https://www.antitrustinstitute.org/work-product/aai-asks-doj-to-explain-its-approval-of-cvs-aetna-merger/>

[6] Brent Kendall, *Federal Judge to Hold Hearings on Decision to Allow CVS-Aetna Merger*, The Wall Street Journal (Apr. 5, 2019), <https://www.wsj.com/articles/judge-to-allow-witness-testimony-on-cvs-aetna-merger-11554494817>

[7] Bryan Koenig, *No 'Rubber Stamp' From Judge for DOJ's CVS-Aetna Deal*, Law360 (Apr. 8, 2019), <https://www.law360.com/articles/1147529/no-rubber-stamp-from-judge-for-doj-s-cvs-aetna-deal>

[8] O'Leary, *supra* note 4.