

CAPITOL STREET

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ALERT: FTC Sues Big 3 PBMs

Insulin Practices Under Scrutiny, FTC Warns Manufacturers

Relevant Companies



»» Our Take & Next Up

FTC lawsuit against the big 3 PBMs (CVS, UNH, CI) focuses on insulin rebating practices and may face an uphill battle in the federal courts post-Chevron. Today, the Federal Trade Commission (FTC) sued the big 3 PBMs (Caremark Rx, Express Scripts (ESI), and OptumRx) and their affiliated group purchasing organizations (GPOs) for allegedly engaging in anticompetitive and unfair rebating practices for insulin drugs (press release [here](#)). The lawsuit is a follow-up to the FTC's PBM [report](#) released this summer that confirmed what the agencies and lawmakers already know about the effects of consolidation, PBM formulary control, and rebating practices. It follows Cigna's own [lawsuit](#) against the FTC that demand the interim report is withdrawn. The case is expected to be released on September 23 (Monday), but the FTC may find it difficult to prove anticompetitive conduct as the courts have been relatively unfriendly to the agency in their antitrust cases. The burden of proof is further weighed against the agency post-Chevron as the courts may find the FTC as overreaching their delegated authority by attempting to regulate commercial rebating practices.

The lawsuit was filed days before the end of FTC Chair Lina Khan's term (September 25) and could take months if not years to move. We believe the lawsuit has limited impact to PBMs at this time due to the limited empirical evidence on PBMs in the FTC's report and the potential to see the lawsuit withdrawn in 2025 under a Trump administration. However, with continued Congressional focus on anti-PBM reform, the pressure may continue for PBMs in 2025, particularly for Medicare and Medicaid reform.

»» Key Points

The lawsuit alleges that the big 3 PBMs (UNH, CVS, CI) and their GPOs have abused their economic power by rigging pharmaceutical supply chain competition in their favor. The FTC focuses on the rebating system and increasingly inflated insulin list prices. The agency states that insulin products with higher list prices generate higher rebates and fees for the PBMs and GPOs and further accuses PBMs of keeping hundreds of millions of dollars in rebates and fees each year and using rebates to attract clients. The complaint also alleges that even when low list price insulins became available, the PBMs systematically excluded them in favor of identical high list prices.

These “anticompetitive” complaints may fall outside of the agency’s authorities in a post-Chevron.

Following the dismantling of Chevron, agencies are expected to be limited in their enforcement action to what is delegated by the text of the law. Challenging rebating practices is new to the FTC. With the limited amount of empirical evidence, the agency has shown so far in their interim report, the courts may rule that agency is overstepping in their ability to determine anticompetitive conduct.

In the FTC Bureau of Competition’s statement, the agency also warns insulin manufacturers about the possibility of future enforcement actions (unlikely at this time). In his statement, the FTC Bureau of Competition Deputy Director Rahul Rao noted that while the lawsuit is against PBMs, manufacturers have also contributed to driving up insulin prices and may face a similar lawsuit in the future. We believe that the statement is largely messaging with FTC enforcement against manufacturers unlikely due to the agency’s difficulty in trying to address PBMs and the current elections. The statement noted that “all drug manufacturers should be on notice that their participation in the type of conduct challenged here can raise serious concerns... and that the Bureau of Competition reserves the right to recommend naming drug manufacturers as defendants in any future enforcement actions.”

Part 2 of FTC analysis is coming in 2025 (at the soonest); the initial PBM report released this summer fell short of expectations for some lawmakers and witnesses. Stakeholders noted that there was limited empirical evidence about the effects of PBMs on consumers. The agency also highlighted several limitations themselves in the report. The FTC remains in discussions with PBM GPOs (Ascent, Zinc, Emisar) and their info may not be received until 2025. Part 2 of the PBM report is not likely to be released until the middle of next year at the soonest (depending on the election results). Our take is [here](#).

On the legislative side, we restate our thesis that PBM reform is (finally) likely to pass at the end of year. We still anticipate some anti-PBM policies to materialize in an end of the year package as a pay-for. PBM provisions that are likely to be included in a lame duck package are expected to be Medicare & Medicaid reforms (transparency, spread pricing ban, de-linking) with some possible commercial transparency requirements on plan reporting and annual disclosures (as passed in the House). See our analysis [here](#).

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