



The Daily Dish

The FTC and Insulin

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There are losers, and then there are the Chicago White Sox and the Federal Trade Commission (FTC). Eakinomics can't explain the Sox, but the FTC wandered into the wasteland with the arrival of the Biden Administration and its departure from the consumer welfare standard. The latest evidence is the FTC's administrative complaint against the three largest pharmacy benefit managers (PBMs) regarding insulin.

Fred Ashton has a [complete analysis](#), but the short version is that the FTC is “alleging the entities engaged in anticompetitive rebate schemes that incentivized manufacturers to artificially inflate the list price of insulin, restricted patient access to more affordable insulin through exclusionary practices, and shifted the cost of high list price insulin to ‘vulnerable patient populations,’ violating Section 5 of the FTC Act.”

Let's focus on three aspects of this move. The first is that the FTC avoided the federal courts and instead took the administrative action route. This means the case will be argued in front of the FTC's administrative law judge, who will issue an initial non-binding decision. At that point, the three commissioners (two have recused themselves) get to make the final judgment by either agreeing or disagreeing. If this sounds far from impartial, it is, and especially so because the three commissioners have a [history](#) of critical comments regarding the PBMs.

Second is the notion that the PBMs are engaged in anticompetitive rebate schemes. The reality is that the PBMs are engaged in contracts. They work for insurance companies. Their job is to control the spending on prescription drugs and they use formularies to do so. Manufacturers offer rebates for preferred placement on the formularies. The image of PBMs demanding rebates to line their pockets is misleading. PBMs are trying to make money – as would any business – but their contracts dictate whether, and how much, they may retain of the rebates received from manufacturers. There is nothing inherently anticompetitive about trying to fulfill your contractual obligations.

Third, the FTC argues that “the competition to get on formularies, in fact, incentivizes manufacturers to raise the list price of prescription drugs only to provide PBMs with larger rebates to keep alternative drugs with a lower list price off formularies. In turn, since these rebates do not flow directly to patients, those who lack insurance, have high-deductible plans, or co-pay arrangements tied to the list price could face higher costs.” This is nonsense. The manufacturers determine where to get the funds to pay rebates, not the PBMs. They could borrow the money, reduce dividend payments, pay lower wages, or make many other financial adjustments. None of this is the PBMs' call. And the PBMs have no relationship with patients, insured or otherwise. They are neither in the position to raise prices nor to shift costs to consumers.

The complaint is full of shoddy analysis, feels fundamentally political in character, and should not survive even a kangaroo court.

This is not to say there are no problems with drug markets in the United States. But drug markets are quite complex and contain myriad relationships. Any analyses should recognize this and be comprehensive in their scope. Actions based on the FTC's analysis run a real risk of unintended consequences.