INDEPENDENT PHARMACIES OF MARYLAND

WORKING TOWARDS A STRONGER HEALTH

SB 689

Pharmacy Benefit Managers-Prohibited Actions

Position of: INDEPENDENT PHARMACIES OF MARYLAND

Position: FAVORABLE

THIS BILL WILL PLACE PROHIBITIONS ON CERTAIN PRACTICES OF PHARMACY BENEFIT MANAGERS (PBMs) THAT ARE UNFAIR, ANTI-COMPETITIVE, AND ANTI-CONSUMER.

BACKGROUND OF THIS BILL:

The State of MD recognizes, as a matter of record, the predatory nature of PBMs:

1. The State of Maryland has recognized as a matter of record, that Pharmacy Benefit Managers (PBMs) are in a strong position to take unfair advantage of independent, community pharmacies. In the landmark *Rutledge* decision, decided by the U.S. Supreme Court in 2020, the State of MD, through Attorney General Frosh, joined in an *amicus* brief pointing out the need for state regulation of PBMs, and more particularly, that **PBMs, in operating their own mail order and retail pharmacies, "are particularly susceptible to self-dealing and unfair advantage."**
2. More recently, Md again joined in an *amicus* brief in the U.S. Court of Appeals for the 8th Circuit in 2021, again pointing out the dangers of PBMs. Quotes from the MD *amicus* brief: (1) "**PBMs harm Pharmacies, Consumers, and States."** (2**) "PBMs harm pharmacies by lowering reimbursement rates and favoring certain pharmacies."** (3) PBMs use their **"superior bargaining position" "by steering business-and offering favorable terms-to pharmacies affiliated with the PBM."** (4) **PBMs "steer business away from independent pharmacies and toward PBM-owned or -affiliated pharmacies."** The brief essentially indicts PBMs for their anti-competitive practices.

PBMs use their unfair advantage to rack up tremendous revenues and profits:

3. At the same time as independent pharmacies struggle, PBMs are making record profits because of their "superior bargaining position." Just recently, the largest PBM operation, CVS Caremark, reported staggering 3rd quarter, and 2021 year end results. Just the PBM unit of CVS reported third quarter revenue in excess of $39 Billion, up 9.3%, and year to date revenues of $ 153 Billion, up 8% over a year ago. And as the Wall Street Journal has previously reported, PBMs are by far the most profitable component of the pharmacy drug supply chain, converting a large amount of their revenues into profits. WSJ, February 24, 2018.

WHY THIS BILL IS NECESSARY:

PBMs are the middlemen between insurers, pharmaceutical companies, and pharmacies. Three PBMs control approximately 80% of the market. In addition, PBMs often have common ownership or corporate affiliation with the insurers or managed care organization, and**, significantly, PBMs often own or are affiliated with large chain pharmacies and their own mail order pharmacies.**

Because of these common ownerships, and, again as stated in MD's own court filings, PBMs steer beneficiaries to their own chain or mail order pharmacies, and away from independent pharmacies.

Under current law, PBMs take actions designed to enrich themselves, or their affiliated chain or mail order pharmacies, at the expense of independent, community pharmacies. This bill will address these unfair, anti-competitive and anti-consumer practices:

1. **Spread Pricing. PBMs make substantial revenue off of the deceptive practice of "spread pricing", a practice already banned by a number of states. This is where the PBM is paid for a drug by the plan sponsor at one price, and reimburses the pharmacy for a lesser amount. The PBM pockets the difference as its profit, even though it had absolutely nothing to do with dispensing the drug.** In 2020, a MDH study found that Medicaid PBMs in MD received approximately $72 million by spread pricing. This amount should have been passed through to the pharmacy so that it is adequately compensated, which is simply not happening. Independent pharmacies often lose money in filling these prescriptions, while the PBMs make a profit on the backs of the independent pharmacies. While MD Medicaid now prohibits this, it should be incorporated in statute, and should be prohibited even beyond Medicaid as a deceptive practice.

   The PBMs' claim: this is simply "risk mitigation" whereby the PBM willingly assumes the risk that reimbursement to the pharmacy may be higher than the amount it charges to the drug plan. An absurd claim, given the fact that PBMs take in staggering revenues. One PBM, CVS Caremark, reported revenues of $153 Billion just last year, an amount that demonstrates how little "risk" is actually undertaken by the PBMs, if any.

2. **Any Willing Pharmacy. PBMs control which pharmacies may become participants under a drug plan. Of course, as the MD *amicus* filing notes, PBMs have a vested interest in promoting their own affiliated chain pharmacies as the member pharmacies of the plan, to the exclusion of independent pharmacies.** This is, in itself, anti-competitive and discriminatory against non-PBM owned pharmacies.

In addition, it is anti-consumer. It deprives the consumer his right to have a prescription filled where most convenient, or at a pharmacy that he prefers. As long as a pharmacy is willing to accept the terms and conditions applicable to the plan, including reimbursement, any willing pharmacy should be permitted to join the plan. Approximately 26 states already have a form of "any willing pharmacy" legislation to address this discrimination and self-dealing.

The PBMs claim: AWP would threaten "quality" and "level of service". How, if pharmacies agree to live by the same terms and conditions? And PBMs argue, as with every change that threatens their staggering profits, that it will drive up costs by undermining negotiations. Really? How much competition does anyone believe takes place now when CVS PBM is sitting across from the table from CVS Pharmacy, supposedly negotiating rates? And even if genuine negotiations actually would result in a lower reimbursement, this simply increases the "spread" for more PBM profit, not necessarily any benefit for consumers.

3. **Copays**. PBMs set the **copay** that a pharmacy must charge for a prescription. PBMs set different copay amounts; these are often set lower at PBM affiliated pharmacies in order to steer consumers to use the PBM pharmacy rather than an independent pharmacy.
4. **Mail Order Pharmacy Requirements**. PBMs may require that a specific drug be ordered through a mail order pharmacy. **Mail order pharmacies are often affiliated with or owned by the PBM. This requirement is used to steer consumers to PBM affiliated pharmacies.** While it perfectly fine to allow a consumer to use a mail order pharmacy, the consumer should not be required to do so. It should be his or her choice.

CONCLUSION

This bill will address serious anti-competitive and anti-consumer issues, which the State of MD recognizes exist. We urge a FAVORABLE Report.

James J. Doyle

Jimdoyle3@comcast.net

443-676-2940