SB 615 (HB 819 cross-file)

Pharmacy Benefit Managers-Prohibited Actions

Position of: INDEPENDENT PHARMACIES OF MARYLAND

Position: FAVORABLE

WHAT THIS BILL DOES:

SB 615 deals with unfair, anti-competitive, and anti-consumer routinely practiced by Pharmacy Benefit Managers (PBMs). It adds to actions that may not be taken by a PBM against a pharmacy. Under the bill, a PBM may not (1) diminish reimbursement to a pharmacy for a prescription based on patient scores or metrics; (2) engage in the practice of "spread pricing", which is where the PBM charges a prescription plan one price for a drug, and then pays the pharmacy a lesser amount, the PBM then pocketing the difference as profit; (3) deny any pharmacy the right to participate in a prescription plan, as long as the pharmacy agrees to meet the terms and conditions of the plan; (4) set different fees for a copay, based on whether the pharmacy is affiliated with an independent or a chain pharmacy; and (5) require that a beneficiary of a plan use a mail order pharmacy to fill a prescription.

WHY THIS BILL IS NECESSARY:

PBMs are the middlemen between insurers, pharmaceutical companies, and pharmacies. They are hired by insurers and managed care companies to negotiate prices, and they also set reimbursement amounts to the pharmacies which provide prescriptions to beneficiaries of the health plan. And the reimbursement contracts presented to the pharmacies are take it or leave it contracts.

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

Because of these common ownerships, PBMs have every incentive to steer beneficiaries to their own chain or mail order pharmacies, something recognized by an amicus filing joined in by the State of MD in a recent Supreme Court case. In that case, *Rutledge v. Pharmaceutical Care Management Association* (PCMA is the organization which represents PBMs) (Dec. 10, 2020), PBMs actually challenged a state law requiring them to at least reimburse pharmacies equal to the pharmacies' wholesale cost of the drug. **The Court**

unanimously ruled against the PBMs, recognizing the state's legitimate rights to broadly regulate PBMs.

Attorney General Brian Frosh, on behalf of the State of MD, joined many other states in an *amicus* filing urging the Court to take the case on appeal, which it did. With respect to PBMs, the *amicus* filing stated something which is key to this bill: that PBMs, in operating their own mail order and retail pharmacies, "are particularly susceptible to self-dealing and unfair advantage." *Amicus* filing, at p. 10.

The undisputed fact is that PBMs make tremendous profits under this system. See, for example, The Wall Street Journal, February 24, 2018, in the article "Hidden Profits in The Prescription Drug Supply Chain". **PBMs are among the most profitable part of that chain. Many independent pharmacies struggle financially, even as they subsidize PBMs through practices such as "spread pricing."**

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 prohibit unfair, anti-competitive and anti-consumer practices.

1. PBMs should not be permitted to reduce reimbursement to a pharmacy based on the outcome of a patient on a drug. The pharmacist simply fills the prescription as ordered; his reimbursement should not be dependent or reduced simply because of a patient score or metric.
2. **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 received approximately $72 million in MD by spread pricing. Instead of going into the pockets of PBMs, 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 prescriptions, an untenable business model.
3. **PBMs control which pharmacies may become participants under the plan. Of course, as the MD *amicus* filing notes, PBMs have a vested interest in promoting their own chain pharmacies that they are affiliated with.** This is, in itself, anti-competitive. 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, any willing pharmacy should be permitted to join the plan. Many states have enacted forms of "any willing pharmacy" legislation.
4. PBMs set the copay that a pharmacy must charge for a prescription. The pharmacy may get a portion of that copay. The law requires that all pharmacies, whether affiliated or independent, must receive the same amount of the copay. However, it does not require

that the copay amount be set equally among affiliated and independent pharmacies. PBMs, therefore, set different copay amounts; these are often lesser at affiliated pharmacies in order to attract consumers to use the PBM affiliated pharmacy rather than an independent pharmacy.

5. PBMs sometimes require that a specific drug be ordered through a mail order pharmacy. **Mail order pharmacies are typically affiliated with or owned by the PBM. 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 choice**. And the consumer should not be required to "opt out." It should be his unfettered choice at the outset.

We urge a FAVORABLE Report for SB 615.

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