HB 755

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 unregulated PBMs. Some quotes from that brief: (1) state regulation is necessary **"because 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.

WHAT THIS BILL DOES:

HB 755/SB 690 deals with the unfair, anti-competitive, and anti-consumer routine practices of PBMs. Under the bill, a PBM may not (1) engage in the practice of "spread pricing" which is where the PBM charges a prescription plan one price for a drug, and then reimburses the pharmacy a lesser amount, pocketing the difference; (2) deny a pharmacy the right to participate in a prescription plan, as long as the pharmacy agrees to meet the terms and conditions of the plan; (3) set different fees for a copay, based on whether the pharmacy is an affiliate of the PBM: and (4) require that a beneficiary of a plan use a mail order pharmacy to fill a prescription, since mail order pharmacies are often owned by PBMs.

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**, more significantly, as noted in MD's court filings, 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, or as stated in the federal court filings, that PBMs "are particularly susceptible to self-dealing and unfair advantage." ***Amicus*** **filing, at p. 10.**

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 these unfair, anti-competitive and anti-consumer practices:

1. **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. 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, an untenable business model. The PBMs make this profit on the backs of the independent pharmacies. While MD

Medicaid apparently now prohibits this, it should be incorporated in statute, and should apply beyond Medicaid as a deceptive practice.

2. **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, over inclusion 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, any willing pharmacy should be permitted to join the plan. Approximately 26 states have enacted a form of "any willing pharmacy" legislation to address this discrimination and self-dealing.
3. 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. 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 also 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 a number of serious anti-competitive and anti-consumer issues. We urge a FAVORABLE Report.

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