HB 382 (2023)

Maryland Medical Assistance Program and Managed Care Organizations That Use Pharmacy Benefit Managers-Reimbursement requirements

POSITION OF IPMD: FAVORABLE

1. HB 382 sets minimum reimbursement levels to pharmacies under Medicaid at least equal to the NADAC acquisition cost of the drug plus a professional dispensing fee determined in accordance with the most recent in state cost-of-dispensing survey.

2. Medicaid MCO reimbursements to pharmacies by PBMs are notoriously low. According to the 2020 Myers and Stauffer study, the average is about 50 cents as a dispensing fee per subscription, well below actual costs. Pharmacies estimate it is actually 35 cents. This business model is not sustainable and dispensing fees must be significantly boosted under Medicaid managed care. Under traditional Medicaid, reimbursements approved by CMS are around $ 10.67 as a professional dispensing fee.

3. PBMs and their affiliated pharmacies, including PBM mail order pharmacies, are unbelievable profitable, as PBMs have the power to steer business to their affiliated pharmacies, the power to require the use of their mail order pharmacies, the power to determine who will be included in their networks, the power to set plan terms on a take it or leave it basis; in addition, they reap large profits through rebates from drug companies and through spread pricing. Moreover, PBM and PBM affiliated pharmacies are often a part of the same large conglomerate; for example the CVS PBM, a part of the large conglomerate consisting of Aetna Insurance, CVS Pharmacies, CVS PBM, and CVS Mail Order Parmacies. So all of these profits that derive from the power of the PBM end up in the same corporate pocket. For fiscal year ending 2022, just the PBM division of CVS had revenues over $169 Billion, up 10.6% over a year ago (and up 8% over the year before). Independent pharmacies have none of these advantages of these large, vertically integrated conglomerates, or access to theeir unbelievably large revenue streams.

4. **To treat all pharmacies in the same manner, for purposes of Medicaid reimbursement is nonsensical. To equate independent pharmacies, and PBM owned or affiliated pharmacies such as CVS and PBM mail order pharmacies in the same manner for reimbursement purposes as independent pharmacies is irrational.**

5. Thus, HB 382 differentiates among different types of pharmacies, between local independent pharmacies, and PBM owned or legally affiliated retail and mail order pharmacies. This provision is clearly legal, and makes a reasonable distinction between independent pharmacies, and large national corporate conglomerates and their pharmacies affiliated with the PBMs.

For those interested in the legal aspects of a Bill making reimbursement decisions based on local pharmacies as opposed to national conglomerates that include PBM affiliated pharmacies, please continue below. The distinction HB 382 makes along these lines is entirely legal:

6. **Equal Protection. The proposed bill excluding PBM pharmacies and mail order pharmacies is lawful and would be much less restrictive in its application than a MD law upheld by the U.S. Supreme Court in *Exxon Corp. v. Governor of MD*, 437 U.S. 117 (1978). That law prohibited producers or refiners of gasoline from even operating gas stations within the state of MD. A state investigation indicated that gasoline stations operated by producers or refiners received preferential treatment, and that the legislation was "designed to correct the inequities in the distribution and pricing of gasoline." The Supreme Court found that the due process claim "requires little discussion." The Court noted that the state found the law necessary to deal with the decrease in the competitiveness of the retail market, and that the state had clear authority "to legislate against what are found to be injurious practices in [the state's] internal commercial and business affairs." The Court quickly dismissed the refiners' claim. All that was required was some rational basis for the law. In the present bill, HB 382 would also be designed to deal with the known competitive inequities enjoyed by PBM affiliated pharmacies. The bill easily meets the equal protection test for economic legislation.**

7. **A Commerce Clause challenge by PBM pharmacies would equally fail. PBM affiliated pharmacies may claim that making a distinction as to their affiliated pharmacies would unduly burden or discriminate against interstate commerce, on the basis that these pharmacies or their parent companies are not MD corporations. The big 3 PBM operators and pharmacies are all located out of the state of MD: CVS Caremark in Rhode Island; Express Scripts in Missouri; Optum in Minnesota.**

8. **HB 382 would distinguish between local pharmacies and out of state pharmacies and PBM affiliated pharmacies by giving higher reimbursement rates to in-state based**

independent pharmacies. But any claim that this violates the Commerce Clause would fail.

9. **The law is well established that when a state acts as a "market participant", rather than simply a regulator of an activity, commerce clause principles simply do not apply. See, *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794 (1976), where MD paid state funds to recover abandoned vehicles in MD, but with much less onerous payment requirements for MD domestic firms, as opposed to out of state firms which also recovered vehicles in MD. In rejecting a challenge based on the (dormant) commerce clause, the Supreme Court stated: "Nothing in the purpose animating the Commerce Clause prohibits a State… from participating in the market and exercising the right to favor its own citizens over others." 426 U.S. at 810. MD was a "market participant" under the state's abandoned vehicle plan, paying state funds to procure a service, and legally permitted to favor its own firms.**

10. **See also: *Asante v. Cal Department of Health Care Services*, 886 F. 3d 795 (9th Cir. 2018); California Medicaid Medi-Cal program did not violate commerce clause in adopting different policies relating to reimbursement of out of state hospitals; state was acting as a "market participant" and was therefore exempt from dormant commerce clause requirements, allowing its reimbursement policies to favor California state hospitals.**

    As the Court stated in *Asante*, "However, states are not merely regulators, they are also economic actors that participate in the marketplace. When a state is acting as a market participant, rather than a market regulator, its decisions are exempted from the dormant Commerce Clause." 886 F. 3d 800

11. **In the present case involving HB 382, it is clear that the state of MD is acting in the Medicaid market as a market participant. The bill deals specifically with the payment of state funds for Medicaid prescriptions. The state is essentially buying those prescriptions. As a market participant, as a purchaser of prescription services, there is no commerce clause issue if the state wishes to favor its own local pharmacies for payment over the firms of other states.**

12. Neither the Due Process Clause, nor the Commerce Clause, prohibit the exclusionary language in this bill allowing for increased reimbursement to local independent pharmacies over out of state firms.

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