LANDMARK SUPREME COURT RULING: STATE REGULATION OF PBM REIMBURSEMENT RATES

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By: Jeff S. Baird, Esq. and Curtis D. Greenwood, Esq.

Speak to any independent pharmacy that has fought against a Pharmacy Benefit Manager's ("PBM's") drug reimbursement rate and you will likely hear some version of the following: "Good luck!" PBMs exercise considerable power over their participant pharmacies, including the ability to set drug reimbursement rates. PBMs develop and administer maximum allowable cost ("MAC") lists that set the rate at which pharmacies are reimbursed for a particular drug. To the dismay of many pharmacies, the MAC rate is often less than the pharmacy's wholesaler drug acquisition cost. To add insult to injury, a 2020 Arkansas Department of Insurance study showed that PBM-affiliated chain pharmacies were reimbursed more (greater than 5%) than regional and independent pharmacies for the same drug.[1] This same study also demonstrated a general movement of steering by PBMs to their affiliate pharmacies over regional and independent pharmacies.

Pharmacies that have tried to appeal PBM's MAC reimbursement rates have discovered that many PBMs have very limited or no formal MAC appeal process. By contract, pharmacies are required to accept the MAC reimbursement rates—even if this means the pharmacy must dispense drugs at a loss—or be terminated from their participation agreements. This has caused many regional and independent pharmacies to close their doors or sell to a larger PBM-affiliated pharmacy chain.

Concerned about predatory drug reimbursement practices by PBMs that were driving regional and independent pharmacies out of business, in 2015, Arkansas passed Act 900 that effectively required PBMs to reimburse Arkansas pharmacies at a price equal to or higher than the pharmacy's wholesale cost. PBMs have challenged Arkansas's law, and other states' similar laws, arguing that under the Employee Retirement Income Security Act of 1974 ("ERISA"), states are preempted from passing laws that potentially affect employee-sponsored benefit plans—benefit plans serviced by PBMs. Courts have generally agreed with PBMs and have invalided states' attempts to regulate PBMs like Arkansas's law—until now.

In one of the most anticipated rulings in the pharmacy world, the United States Supreme Court declared in *Rutledge v. Pharmaceutical Care Management Association*[2] that states do have the ability to pass legislation that requires PBMs to reimburse pharmacies for drugs at a rate equal to or higher than the pharmacies' wholesale cost. In its unanimous 8-0 opinion, the Court ruled that Arkansas's law is not preempted under ERISA and that states may enact laws that regulate PBM reimbursement costs to pharmacies.

What does this mean for regional and independent pharmacies?

Rutledge clears the way for states to pass laws that protect pharmacies from predatory reimbursement practices by PBMs. Independent pharmacies that find themselves in a situation in

[1] "Limited Scope Examination of Pharmacy Benefit Managers," Arkansas Ins. Dept., July 27, 2020, *available at* https://ncpa.org/sites/default/files/2020-10/ark-doi-pbm-mmc-examination.pdf.
[2] Rutledge v. Pharmaceutical Care Management Association (PCMA), 592 U.S. _____ (2020).

which a PBM MAC reimbursement rate is lower than or equal to the acquisition cost of a drug should review their state laws to determine whether their states have passed laws similar to Arkansas's Act 900, which require a PBM to reimburse pharmacies at rates higher than the pharmacy's acquisition cost or the pharmacy may refuse to sell the drug.

Considering that 47 State Attorneys General told the Supreme Court that preserving states' ability to regulate PBMs is essential for curbing harmful business practices in health care and protecting consumers' access to medication, it is very likely that a number of other states will pass laws similar to Arkansas's law.

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