STATE OF LOUISIANA
DEPARTMENT OF JUSTICE
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OPINION 25-0044

61-C LAWS - Special Legislation

La. C.C. art. 2989
La. C.C. art. 3001
La. R.S. 22:1660.9
La. R.S. 22:1857.1
La. R.S. 22:1860.2
La. R.S. 22:1863
La. R.S. 46:460.36
LAC 37:XIII.18509

An Effective Rate Pricing clause in a contract between a Pharmacy Benefits Manager and a Pharmacy Services Administrative Organization that is contracting on behalf of a "local pharmacy," as defined by La. R.S. 46:460.36(A), is not enforceable against the local pharmacy.

The Honorable Michael Echols
Representative – District 14
300 Washington Street, Suite 203
Monroe, LA 71201

Dear Representative Echols:

Our office received your request for an opinion regarding the enforceability of effective rate pricing contractual clauses against a "local pharmacy," a statutorily defined term that refers to a pharmacy domiciled in at least one Louisiana parish with fewer than ten retail outlets under its corporate umbrella,[1] in light of La. R.S. 22:1863(2).

Question: Are Effective Rate Pricing clauses in contracts entered into between Pharmacy Services Administrative Organizations, as agents for local pharmacies, and Pharmacy Benefits Managers enforceable against the local pharmacies?

Conclusion: An Effective Rate Pricing clause in a contract between a Pharmacy Benefits Manager and a Pharmacy Services Administrative Organization that is contracting on behalf of a "local pharmacy," as defined by La. R.S. 46:460.36(A), is not enforceable against the local pharmacy.

Background

Pharmacy Benefits Managers (PBMs) manage prescription drug insurance benefits for the vast majority of Americans,[2] including Louisiana residents. PBMs operate as middlemen in the drug supply chain, connecting drug manufacturers, plan sponsors (such as insurance companies or employers), pharmacies, and ultimately consumers. As noted in your request, PBMs create pharmacy networks and determine prescription drug reimbursements, drug coverage, and patient out-of-pocket costs. PBMs also reimburse pharmacies for prescription drugs.

To access the large pharmacy networks created by PBMs, many local pharmacies contract with Pharmacy Services Administrative Organizations (PSAOs) to negotiate and

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[1] La. R.S. 46:460.36.
[2] https://www.ama-assn.org/system/files/prp-pbm-shares-hhi.pdf

execute contracts with PBMs.[3] You advise that the contracts between PBMs and PSAOs—acting as agents for local pharmacies—often contain Effective Rate Pricing (ERP) clauses.[4] You further advise that PBMs use these clauses to set pharmacy reimbursement rates, ostensibly to stabilize pharmacy reimbursement and prevent over- or under-reimbursements throughout a defined period. Because PBMs do not determine ERP until the end of that period, the initial reimbursement rate may differ from the final rate.

In addition, you advise that the ERP clauses in the PBM-PSAO contracts are enforced against local pharmacies. Specifically, ERP clauses allow PBMs, through the PSAO, to impose an aggregate contractual rate on all local pharmacies within the PSAO. Instead of ensuring ***each*** local pharmacy meets the contractual rate for a particular prescription drug on an individual basis, PBMs group ***every*** local pharmacy in the network together to guarantee the PBM pays no more than the contractual rate for a particular prescription drug across the whole network, regardless of the varying drug acquisition costs. When a PBM audit identifies a potential overpayment on a local pharmacy's prescription drug claims, the PBM withholds future reimbursements via the pharmacy's PSAO until the aggregate contractual rate is achieved. You further advise that ERP clauses prevent local pharmacies from accurately predicting revenue, which impedes cash flow. As a result, local pharmacies cannot afford to maintain inventory or provide care for their patients.

Analysis

La. R.S. 22:1863(2) provides:

> "Maximum Allowable Cost List" means a listing of the National Drug Code used by a pharmacy benefit manager setting the maximum allowable cost on which reimbursement to a pharmacy or pharmacist may be based. "Maximum Allowable Cost List" shall include any term that a pharmacy benefit manager or a healthcare insurer may use to establish reimbursement rates for generic and multi-source brand drugs to a pharmacist or pharmacy for pharmacist services. The term "Maximum Allowable Cost List" shall not include any rate mutually agreed to and set forth in writing in the contract between the pharmacy benefit manager and the pharmacy or its agent and shall not include the National Average Drug Acquisition Cost. ***A pharmacy benefit manager may use effective rate***

[3] *See* LAC 37:XIII.18509, promulgated by the commissioner of insurance governing PSAOs, which provides that the "roles and responsibilities solely within the purview of" PSAOs include: negotiating contracts, drug reimbursement rates, payments, and audit terms on behalf of pharmacy clients with PBMs; and developing pharmacy networks by using contracts that generally authorize PSAOs to interact with PBMs.

[4] You advise that local pharmacies are generally not provided with a complete copy of the PBM-PSAO contract. As you note, La. R.S. 22:1857.1 requires an organization representing independent pharmacies to provide them with a copy of any new contract, provider agreement, amendment to such contract or agreement, or other provider documentation concerning the pharmacy's network participation with a third-party payor. Although you suggest that the failure of PSAOs to provide unredacted copies of contracts with PBMs is an unfair trade practice, you have not requested an opinion on this issue.

> ***pricing for a pharmacist or pharmacy that is not a local pharmacy or local pharmacist as defined in R.S. 46:460.36(A).***[5]

La. R.S. 22:1863(2)(emphasis added). This statute clearly and unambiguously provides that a PBM may use ERP for a pharmacist or pharmacy that is ***not*** a local pharmacy or local pharmacist. Applying the canon of statutory interpretation "*expressio unius est exclusio alterius*"—the inclusion of one thing implies the exclusion of the other—it follows that the Louisiana Legislature did not intend for PBMs to use ERP for a local pharmacy or local pharmacist. Moreover, the plain language of the statute is not restricted to a PBM's use of ERP via contract. Thus, it is the opinion of this office that, under La. R.S. 22:1863(2), a PBM may not use ERP for a local pharmacy, whether through direct contract with the local pharmacy or any other means.

In addition, La. R.S. 22:1860.2 provides:

> A. A health insurance issuer or a pharmacy benefit manager shall not directly or indirectly charge or hold a pharmacist or pharmacy responsible for any fee related to a claim that is any of the following:
>
> (1) Not apparent at the time of claim processing.
>
> (2) Not reported on the remittance advice of an adjudicated claim.
>
> (3) After the initial claim is adjudicated.

If a PBM uses ERP to withhold future reimbursement to a local pharmacy via the pharmacy's PSAO, the PBM violates La. R.S. 22:1860.2 by indirectly holding the local pharmacy responsible for a fee related to a claim after the point of adjudication.

Furthermore, because the contracts between PSAOs and local pharmacies authorize the PSAO to negotiate and enter into contracts on the local pharmacies' behalf, PSAOs are mandataries of the local pharmacies in their network. *See* La. C.C. art. 2989 ("A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal."). As a mandatary, the PSAO has a fiduciary duty to the local pharmacy. *See* La. C.C. art. 3001 ("The mandatary is bound to fulfill with prudence and diligence the mandate he has accepted. He is responsible to the principal for the loss that the principal sustains as a result of the mandatary's failure to perform."). In addition to this general fiduciary duty, a PSAO "that contracts with a pharmacy to perform any activity related to prescription drug benefits or to act as the pharmacy's agent is obligated to that pharmacy for the duties of care, competence, good faith and fair dealing, and loyalty." La. R.S. 22:1660.9(A). Since

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[5] "Local pharmacy" is defined to mean any pharmacy domiciled in at least one Louisiana parish that has fewer than ten retail outlets under its corporate umbrella and contracts with the managed care organization or the managed care organization's contractor in its own name or through a PSAO and not under the authority of a group purchasing organization. R.S. 46:460.36(A).

Louisiana law does not allow PBMs to use ERP for a local pharmacy, a PSAO breaches its fiduciary duties to local pharmacies in its network if it allows ERP to be applied to those local pharmacies by virtue of an intermediary contract.

Finally, we note that PBMs routinely contend that pharmacies are bound by the terms of contracts entered into by the PBM and the PSAO as the authorized contracting agent for the pharmacy.[6] Thus, PBMs recognize that PSAOs are acting as agents, or mandataries, of local pharmacies when negotiating and entering into contracts with PBMs.

Based on the foregoing, it is the opinion of this office that an ERP clause contained in a contract between a PBM and a PSAO contracting on behalf of a local pharmacy is unenforceable against the local pharmacy.

We trust that this opinion of the Attorney General adequately responds to your inquiry. However, if our office can be of further assistance, please do not hesitate to contact us.

With best regards,

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ATTORNEY GENERAL

BY: ______________________________
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[6] *See, e.g.*, *Lackie Drug Store, Inc. v. OptumRx, Inc.*, 4:20CV1515 JM, 2024 WL 505519, at *1 (E.D. Ark. Jan. 30, 2024) (PBM contended that PSAO entered into network agreement as the plaintiff pharmacy's authorized contracting agent; plaintiff initially contested but, after further discovery, acknowledged that it was bound by the agreement between the PBM and the PSAO of which the pharmacy was a member); *Physician Specialty Pharmacy, LLC v. Prime Therapeutics, LLC*, 18-CV-1044 (MJD/TNL), 2019 WL 6910145, at *2 (D. Minn. Dec. 19, 2019) (PBM asserted that plaintiff pharmacy was bound by the PBM-PSAO contract because the PSAO, as the pharmacy's agent, authorized the pharmacy's participation in the PBM's network through that contract; court decided the motion before it without deciding this issue); and *Park Irmat Drug Corp. v. Optumrx, Inc.*, 152 F.Supp.3d 127, 135-36 (S.D.N.Y.2016) (PBM asserted, and court agreed, that plaintiff pharmacy was bound by agreement between its agent PSAO and a PBM).