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## **Nationwide Scrutiny of PBMs Prompts Lawsuits, Legislation & Investigations**

Pharmacy Benefit Managers (PBMs) face legal challenges from coast to coast, notably a massive federal prosecution in Philadelphia. This document summarizes the charges in that case, as well as various other suits, investigations and legislative actions across the country.

### **United States of America v. Medco**

The U.S. Justice Dept. has accused Medco Health Solutions, Inc., the nation's largest PBM, of "a systematic pattern of conduct" to defraud the federal government and its employees or retirees who received mail order prescriptions from the firm under a contract with the Blue Cross and Blue Shield Association. Medco also is accused of paying \$87.4 million in cash kickbacks to a health plan to obtain Medicare contracts.

### **Medco 20-state Settlement**

Attorneys general in 20 states and Medco Health Solutions in April 2004 reached a settlement of state unfair trade practices cases. In addition to paying \$20.2 million to the states, \$6.6 million in fees and costs and about \$2.5 million to patients, Medco agreed to

- Disclose to prescribers and patients the minimum or actual cost savings for health plans and the difference in co-payments made by patients;
- Disclose to prescribers and patients Medco's financial incentives for certain drug switch
- Adopt a code of ethics and professional standards.

### **FTC Conducting PBM Conflict of Interest Study**

The Federal Trade Commission is conducting a "Conflict of Interest Study" that examines whether the cost to group health plans of using mail-order pharmacies integrated with pharmacy benefit managers (PBMs) is more than that of using non-integrated mail-order pharmacies or over-the-counter retail pharmacies.

Congress asked the Commission to investigate whether PBMs make decisions that increase the PBMs' profits while raising the costs of pharmacy benefits for their clients. A previous public study has found evidence suggesting that PBMs use generic substitution and other actions in their mail-order pharmacies more often than when prescriptions are dispensed through other channels (over-the-counter at a retail pharmacy or through a mail-order pharmacy not integrated with a PBM).

### **Alabama**

Two independent pharmacies in October 2003 accused the four biggest PBMs in federal court of using "anticompetitive practices" against small operators. Medco, Caremark Rx, AdvancePCS and Express Scripts used their status as middlemen to set prices and force "unconscionable" reimbursement rates on community pharmacies, say the plaintiffs' attorneys.

### **California**

The American Federation of State County and Municipal Employees (AFSCME) sued the four largest PBMs in April 2003 under California's Unfair Competition Act. The union's Los Angeles Superior Court filing says AdvancePCS, Inc.; Caremark Rx, Inc.; Express Scripts, Inc; and Medco Health Solutions "consistently fail to pass [prescription] savings along to health plans and their members -- choosing instead to pocket the savings and increase their own profits. In so doing, the four named PBMs have willfully contributed to escalating drug costs and have failed in their fiduciary duty to those client health plans."

### **Florida**

The state attorney general's Medicaid Fraud Control Unit in August 2003 subpoenaed records of Medco dealings with several health maintenance organizations. "Our objective is to make sure our citizens are getting their money's worth and that they're safe," said Charlie Crist, Florida attorney general.

More recently, two pharmacists from the mail-order division of Caremark Rx Inc. say in a Leon County Circuit Court whistleblower lawsuit that their employer regularly resold medications that had been returned by patients. A Caremark manager's deposition indicated the firm shipped returned drugs from Texas and Florida to Illinois in an apparent effort to get around state laws.

### **Medco Settlement**

In December 2002, Medco agreed to pay \$42.5 million to settle several lawsuits by employer health plans and beneficiaries. Plaintiffs, who filed federal cases in St. Petersburg, Fla., under the Employee Retirement Income Security Act (ERISA), accused the PBM of secretly promoting Merck brand drugs to reap lucrative rebates. Court filings show Medco kept more than \$2.8 billion in drug manufacturer rebates from 1995-99.

### **Missouri**

The world's largest private coal company sued Merck, alleging that its former PBM arm, Medco Health Solutions, illegally pushed Merck drugs when cheaper medicines were available. In its \$35-million case filed Dec. 23, 2003, Peabody Energy Corp. of St. Louis charged that Merck defrauded 31,000 Peabody employees and retirees, as well as millions of other patients, through racketeering, fraud and embezzlement.

### **New York**

The state filed a breach-of-contract lawsuit in August 2004 against Express Scripts, Inc., the third-largest U.S. pharmacy benefit manager. The firm is accused of adding millions of dollars in prescription drug costs for New York's largest employee health plan.

"Rather than being part of the solution to this (health care cost) crisis by keeping drug costs as low as possible, we discovered that Express Scripts engaged in a series of deceptive schemes," Atty. Gen. Elliot Spitzer said. "It improperly lined its pockets at the expense of health plans and consumers, driving up the very drug costs it is supposed to lower."

### **Ohio**

Also on Dec. 31, 2003, Ohio's attorney general filed a civil complaint saying Medco overcharged the state Teachers' Retirement System by up to \$50 million over 13 years. The suit contends that since 1988, Medco kept \$8.30 per prescription that should have gone into the pension fund for 113,000 retired teachers, their spouses and dependents. Medco prices allegedly were higher than at local pharmacies, and the state accuses it of undercounting pills and using clerks to dispense or cancel prescriptions without the required review by a licensed pharmacist. "The corporate culture of Medco encouraged profit above service," said Atty. Gen. Jim Petro. His filing states: "Medco did not use its best efforts in good faith to obtain the lowest possible drug prices."

### **Pennsylvania**

Medco is accused in an August 2003 federal lawsuit of setting artificially low reimbursement rates for retail drug stores. The plaintiff, Brady Enterprises, seeks class-action status in the Philadelphia case.

### **South Dakota**

The South Dakota House of Representatives February 12, 2004, passed a bill that would require pharmacy benefit managers (PBMs) to disclose what kinds of rebates and other deals they get from drug manufacturers. Such information would be given to insurance companies, hospitals, state officials and others who have contracts with PBMs. The measure is now before the state Senate.

### **Vermont**

Express Scripts, Inc., the PBM for nearly 20,000 government workers and retirees, should be investigated for "potentially fraudulent business practices," State Auditor Elizabeth Ready said in a June 2003 letter to the state attorney general. She voiced concern that the state "may be paying a hidden profit ... due to the difference between what Express Scripts pays a pharmacy for a prescription and what the company then charges the state of Vermont for that prescription."

### **West Virginia**

The state accuses Medco of failing to pass along an estimated \$6 million in rebates from drug makers. This case was filed in November 2002 and is pending in court.

### **Wisconsin**

In September 2003, Medco was sued in federal court by American Medical Security Holdings, a former customer based in Green Bay, Wis., which says the PBM breached contract terms involving discounted pricing and prescription dispensing fees.

*Sources: This summary was compiled from newspaper and wire service reports, industry newsletters and plaintiff attorneys' websites. The Coalition for Quality Healthcare is a not-for-profit 501(c)6 organization that seeks to protect the right of patients to fill prescriptions wherever they wish. It strongly supports efforts to reduce healthcare costs for employers and patients. For more information, visit the Coalition's Web site at [www.PharmacyChoices.org](http://www.PharmacyChoices.org).*

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