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NCPA Issue Brief: Copay Clawbacks and So-Called ‘Gag’ Clauses

News media and policy-maker attention on pharmacy copay clawbacks and so-called “gag clauses” has intensified over the past 18 months, largely as a result of pharmacists’ efforts to draw attention to pharmacy benefit manager practices that disadvantage pharmacy patients.

Community pharmacists support prohibitions on copay clawbacks and so-called “gag clauses” because they may result in patients being charged inflated prices for their medications.

To date, the following 18 states have passed prohibitions on pharmacy copay clawbacks: Arizona, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, New York, North Carolina, North Dakota, Ohio (executive action), South Carolina, Texas, Utah, and Virginia.

To date, the following 22 states have passed prohibitions on so-called “gag clauses,” which refers to PBMs restricting pharmacists’ ability to communicate with patients about certain issues related to pricing and cost: Arizona, Arkansas, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Nevada, New York, North Carolina, North Dakota, Ohio (executive action), South Carolina, South Dakota, Utah, Virginia, and West Virginia.

Legislation to prohibit copay clawbacks and/or so-called “gag clauses” has been introduced in at least a dozen states in the 2018 legislative session.

So-Called ‘Gag Clauses’

The expression “gag clauses” is really a misnomer, since what is most often being referred to are multiple contract provisions or requirements embedded in lengthy provider manuals that include overly broad confidentiality requirements and non-disparagement clauses, as well as requirements that pharmacies charge insured patients what the PBM says at point of sale. This has the effect of chilling a range of pharmacist communications with patients and others for fear of retaliation by the PBM.

Most often community pharmacists are forced to sign take-it-or-leave-it contracts from PBMs with these provisions. Why do they sign? Because they can’t fill prescriptions for that plan sponsor’s patients if they don’t. Any notion that the contract is negotiable is false. Some PBMs have even included provisions that some pharmacists interpret as prohibiting communication with news media, policy makers and elected officials.

For example, one of the largest PBMs has used a Pharmacy Provider Agreement that includes the following provisions that highlight the issues:

Confidentiality: Provider acknowledges and agrees that in the performance of services hereunder, Provider will comply with the Confidentiality provisions set forth in the Provider Manual and as set forth in this Agreement.

Contacting Sponsors or Media. Provider hereby agrees (and shall cause its affiliates, employees, independent contractors, shareholders, members, officers, directors and agents to agree) that it shall not engage in any conduct or communications, including, but not limited to, contacting any media or any Sponsor and/or Sponsor’s Members or other party without the prior consent of [PBM].

Violation of any of these provisions or others may lead the PBM to terminate the contract with the pharmacy and remove the pharmacy from the PBM's networks, resulting in the inability of the pharmacy to continue to service a significant percentage of its customers, potentially causing access problems for patients and subjecting the pharmacy to retaliation in the form of abusive audits.

Copay Clawbacks

Some confusion exists over the word "clawback." A copay clawback occurs when a PBM charges the patient a copay or cost share at point-of-sale that is higher than the price the PBM negotiated with the pharmacy for the medication, and the PBM (NOT the pharmacy) keeps the difference for itself. In other words, the PBM "claws back" the excess of the patient's copay.

Here's an example. Let's say your doctor writes you a prescription for Sprintec, a common medication. You present a prescription at the pharmacy. The pharmacist or technician runs the transaction through its point-of-sale terminal and is informed by the PBM that administers your prescription drug plan that your cost share is \$50. Say the pharmacy's contract with the PBM calls for the pharmacy to be reimbursed \$12 for that medication. Some PBMs require the pharmacist to charge you the full cost share, and then the PBM requires the pharmacy to remit the \$38 difference back to the PBM.

If your medications are covered by insurance, it's important to remember that at the pharmacy counter, the price you pay is determined by the PBM that administers your health plan's prescription drug benefit, and not by the pharmacy. If you're paying cash, on the other hand, the pharmacy determines the price.

Sometimes the news media or others refer to "clawbacks" in Medicare Part D. These "clawbacks" are done via unpredictable Direct and Indirect Remuneration ("DIR") fees that the PBM takes back from the pharmacy months after point-of-sale on a prescription. DIR fees are entirely different from copay clawbacks and should be referred to as retroactive pharmacy DIR fees, not as clawbacks.

Related Media:

- <https://www.nbcnews.com/health/health-care/could-your-health-insurance-be-costing-you-money-pharmacy-n811171>
- <https://khn.org/news/filling-a-prescription-you-might-be-better-off-paying-cash/>
- <https://www.bloomberg.com/news/articles/2017-02-24/sworn-to-secrecy-drugstores-stay-silent-as-customers-overpay>
- <https://www.bloomberg.com/news/articles/2017-07-11/pharmacy-clawbacks-targeted-in-latest-state-law-aimed-at-pbms>
- <https://www.cbsnews.com/news/pharmacies-drug-costs-co-pay-benefits-managers/>
- <http://dfw.cbslocal.com/2017/06/19/pharmacists-point-finger-at-middlemen-for-soaring-drug-costs/>
- <http://www.dispatch.com/content/stories/local/2016/10/23/critics-say-middlemen-drive-up-prescription-drug-prices.html>
- <http://www.11alive.com/article/news/investigations/side-effects/the-middlemen-responsible-for-high-prescription-drug-prices/412787385>
- <http://www.ksla.com/story/32063957/zurik-investigator-says-medical-waste-probe-reveals-fraud>
- <http://www.fox8live.com/story/31985650/zurik-pharmacists-customers-nationwide-coping-with-clawbacks>
- <http://www.fox8live.com/story/31891070/zurik-copay-or-you-pay-prescription-drug-clawbacks-draw-fire>