

Opioid Litigation Update
Regarding Pharmacy Benefit Managers (PBMs)
May 7, 2024

Municipalities throughout the Commonwealth are parties to national litigation involving opioid manufacturers and distributors, and are currently receiving allocations of settlement funds based upon negotiated settlements arising from such litigation. As you may be aware, the national consortium of attorneys representing plaintiffs in this litigation is seeking authority to amend existing litigation complaints to add additional counts against new defendants based upon the roles of pharmacy benefit managers in the opioid crisis and their alleged failure to undertake their duties in monitoring opioid prescription practices. Authorizing such an amendment would permit Cities and Towns to participate in that expanded litigation and possibly benefit from settlements or judgments with respect to these additional defendants. Whether to authorize the amendments is a policy decision for the City or Town. However, the decision must be communicated to the consortium on or before **May 17th** as this decision requires an affirmative response. Please see the attached communication providing contact information with respect to approval of such amendment. No amendment can be made to the complaints without approval of the City or Town as plaintiff.

Please contact Attorney Mark R. Reich (mreich@k-plaw.com) if you have any further questions.

Disclaimer: This information is provided as a service by KP Law, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship with KP Law, P.C. Whether to take any action based upon the information contained herein should be determined only after consultation with legal counsel.



CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE
PROTECTED COMMUNICATION

April 26, 2024

VIA EMAIL & U.S. MAIL

Lauren Goldberg
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

Re: ACTION REQUIRED – Opioid PBM Update

Dear Lauren Goldberg:

Over the course of the last eight years, your opioid consortium has now recovered approximately \$60 billion from pharmaceutical manufacturers, distributors, and pharmacies. These funds will go a long way to helping abate the opioid crisis, but our work is not done.

As part of our continued efforts to help remedy the effects of the opioid crisis in your community, our consortium has been investigating the role that pharmacy benefit managers (PBMs) played in contributing to the crisis. PBMs are companies who administer prescription drug plans for health insurers, self-insured employers, and governments; negotiate drug prices and availability with drug manufacturers; process and pay claims; review drug utilization data and operate mail-order pharmacies.

Judge Polster recently opened a new bellwether track of cases against Express Scripts and OptumRx, two of the three PBMs with the largest market share in the United States¹¹⁵³. We are in the process of drafting a motion that would give all plaintiffs in the MDL the right to amend their claims by opting-in to a master pleading which follows the existing bellwether complaints (available here) and sets forth the legal and factual basis for claims against the PBMs. In connection with this effort, we are recommending that, subject to our obtaining Court approval, you agree to amend your current complaint to add claims against Express Scripts and OptumRx and their relevant subsidiaries (the PBM Defendants) concerning their role in fueling the opioid crisis¹¹⁵⁴.

¹¹⁵³ The other of the three largest PBMs in the country, CVS Caremark/Caremark Rx, is a subsidiary of CVS Health. Caremark was included in the recent national CVS settlement.

¹¹⁵⁴ The relevant Express Scripts entities are: Express Scripts, Inc.; Express Scripts Administrators, LLC; Medco Health Solutions, Inc.; ESI Mail Order Processing, Inc.; ESI Mail Pharmacy Service, Inc.; Express Scripts Pharmacy, Inc.; Evernorth Health, Inc. (formerly Express Scripts Holding Company); and Express Scripts Specialty Distribution Services, Inc. The relevant OptumRx entities are: UnitedHealth Group, Inc., Optum, Inc., OptumInsight, Inc., OptumInsight Life Sciences, Inc., OptumRx, Inc., OptumRx Discount Card Services, LLC; Optum Perks, LLC; OptumHealth Care Solutions, LLC; OptumHealth Holdings, LLC; and Optum Health Networks, Inc.



NATIONAL OPIOID LITIGATION

To understand the PBM Defendants' ability to impact the opioid crisis, one need look no further than the statements of their own employees who, in internal emails, stated as follows:

"No component of our healthcare system is in a better position to deliver more immediate and more impactful changes to the current course of this crisis than our nation's PBMs. . . . PBM's are in a very powerful position to deploy systems-based claims edits that can ensure that physician prescribing and pharmacy dispensing is in line with the most-up-date scientific evidence and national consensus guidelines . . . PBMs also bring enormous clinical and analytic horsepower to the table to be able to more effectively screen for aberrant prescribing and dispensing of opioids by our nation's physicians and pharmacies; to risk stratify patients based upon potentially for dependency, addiction and overdose; and the ability to deploy numerous interventions targeted at both the provider and the patient themselves to clinically intervene in a more timely and effective manner to decrease such risks. As an intermediary between the physician, pharmacist, patient, pharmaceutical manufacturer, health systems, and other components of the industry, the PBM is also in an ideal position to drive improvements in education and awareness of the dangers of opioid therapy and the various tools available for all constituents to contribute to positive change in the course of this epidemic."

Despite all these resources and a raging epidemic, one can only wonder why the PBM Defendants failed to act. Again, to answer this question, we need look no further than their own documents. For example, in 2017, when clients and government agencies were "demanding" change to limit the flow of pills, Express Scripts concluded that if they "were to implement either the 7 day or 10 day limit on short acting opioids which are most profitable for us we are looking to lose \$10-\$20 Million in margin." In other words, Express Scripts knew that if they put tools in place to restrict short acting opioid prescription fills to seven or ten days, it would cost them \$10 to \$20 million per year.

The PBM Defendants' role in creating and sustaining the opioid epidemic has been largely hidden from public scrutiny. However, evidence recently developed in the MDL, including the documents described above, reveals that the PBM Defendants, hired by third party payors, insurers, and health plans to design formularies and administer prescription drug programs and colluded with the Opioid Manufacturers to make opioids more available. The PBM Defendants had a broad scope of knowledge concerning the opioid crisis by virtue of their access to opioid utilization data for the individuals covered by the insurance plans they administer, their contracts with over 98% of the retail pharmacies in the country, and the detailed dispensing data they collect with respect to the opioid prescriptions filled at every pharmacy in their networks.

Instead of using this data, however, to identify concerning red-flag opioid prescriptions and implement restrictions that would have curtailed the flow of pills, the PBM Defendants knowingly ignored this information and, to increase their profits, they permitted their pharmacy networks to dispense billions of opioid pills into communities across the country. These actions by the PBM Defendants allowed the market to be flooded with prescription opioids and facilitated the opioid epidemic. Based on their conduct, the PBM Defendants would be sued in their

The logo for National Opioid Litigation features two vertical yellow bars of varying heights on the left, followed by the text "NATIONAL OPIOID LITIGATION" in a bold, blue, sans-serif font.

NATIONAL OPIOID LITIGATION

capacities as: (1) PBMs; (2) data, analytics, research, and marketing providers; and (3) mail-order pharmacies.

If the Court permits it, amending your complaint will ensure that you have the opportunity to participate in any recovery if there is a favorable resolution of claims against the PBMs. Public entities that amend their complaints potentially could recover from the PBMs, while cities and counties who do not amend may be unable to participate in any recovery.

Please respond by Friday, May 17, 2024 confirming that you agree to the amendment of your complaint to add the PBM Defendants, including related subsidiaries. Alternatively, if you have any questions about the case against the PBMs or the proposed amendment process, let us know.

Send all responses and inquires on this topic to Aaron Harrah at Hill, Peterson, Carper, Bee & Deitzler, PLLC at amendmycomplaint@hpcbd.com.

For your convenience and to assist us with tracking responses, if your subdivision agrees to amend its complaint to add the PBM Defendants, in the subject line of your responsive email, please use the following format: [State abbreviation]_[Subdivision name]_[Subdivision type (County, Tribe, Parish, City, Town)]_[Agree].

As an example, if Greenbrier County, West Virginia, agrees to amend its complaint to add the PBM Defendants the subject line of its responsive email would be: WV_Greenbrier_County_Agree.

A Tribe's response would be: MT_Blackfeet_Tribe_Agree.

A Parish's response would be: LA_St. John's_Parish_Agree.

The same format would apply similarly to Cities and Towns.

We look forward to hearing from you. Thank you for the continued opportunity to serve your community.

Thank you,

Aaron Harrah

amendmycomplaint@hpcbd.com

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IMPORTANT INFORMATION REGARDING EMAIL COMMUNICATIONS

Our Consortium regularly sends communications to our clients via email. However, we have noticed that our emails have a very low open rate, meaning that you are potentially not receiving the most up-to-date information in the case, often due to email security settings or SPAM filters.

The attached letter was also sent via email from OpioidLitigation@LevinLaw.com, with a subject line of: *ACTION REQUIRED - Opioid PBM Update - PROTECTED - CONFIDENTIAL - ATTORNEY CLIENT PRIVILEGED*. We ask that you take a moment to ensure you received that email.

To ensure prompt delivery of our emails, we ask that you work with your IT staff to “whitelist” or add OpioidLitigation@LevinLaw.com to your safe senders list.

We also strongly recommend whitelisting or adding the following domain names to your safe senders list:

LevinLaw.com

BaronBudd.com

FarrellFuller.com

McHughFuller.com

GreeneKetchum.com

HPCBD.com

PowellMajestro.com

Whitelisting varies by email client, internet security provider, and service provider. Please ask your IT staff to assist you in this process.

Please keep us informed of any changes to contact information, so that our communications get to the right people.



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Forwarding Service Requested