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Opinion No. 05-001

Negotiation of Lower TennCare Drug Prices

QUESTION

Is it illegal under Tennessee law for the state to negotiate directly with pharmaceutical manufacturers for lower prices on TennCare prescription drugs?

OPINION

Legislation recently enacted by the General Assembly authorizes the Bureau of TennCare, either on its own or through a contracted pharmacy benefit manager, to negotiate supplemental manufacturer rebates for TennCare prescription drug purchases.

ANALYSIS

In response to increasing Medicaid expenditures for prescription drugs, Congress enacted in 1990 a cost-saving measure that requires drug manufacturers to provide specified rebates to states on their Medicaid purchases of outpatient prescription drugs. *See* 42 U.S.C. § 1396r-8. With a few limited exceptions, the rebate for a “single source drug” or an “innovator multiple source drug,” for example, is set by statute at the difference between the average manufacturer price and the “best price,” or 15.1% of the average manufacturer price, whichever is greater. 42 U.S.C. §§ 1396r-8(c)(1). (The term “best price” is defined as “the lowest price available from the manufacturer during the rebate period to any wholesaler, retailer, provider, health maintenance organization, nonprofit entity, or governmental entity within the United States,” with certain exclusions. 42 U.S.C. § 1396r-8(c)(1)(C)(i).) Nationwide, states have been increasingly interested in securing supplemental drug rebates, over and above the rebate that a pharmaceutical manufacturer is otherwise required to provide under the federal Medicaid Act.

In Tennessee, legislation enacted in 2003 and amended in 2004 authorizes the Bureau of TennCare to contract with one or more pharmacy benefit managers (PBMs) “to administer all or a portion of prescription drug programs for the TennCare program,” Tenn. Code Ann. § 4-3-1013(a),

and further authorizes the Bureau, through a PBM or on its own, “to negotiate supplemental manufacturer rebates for TennCare prescription drug purchases . . . utiliz[ing] the average manufacturer’s price . . . as defined in 42 U.S.C. § 1396r-8(k)(1) or any other recognized acceptable basis for negotiating rebates as the cost basis for the product.” Tenn. Code Ann. § 71-5-197(c). *See also* Tenn. Code Ann. § 4-3-1013 (b)(8) (A PBM may be directed by the TennCare Bureau to “[n]egotiate supplemental rebates with pharmacy manufacturers for prescription drug expenditures.”)

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