



Patient Privacy at Risk in Senate Bill Aimed at Pharmacy Managers

Eric Boehm

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A bill working its way through the Senate that promises to reduce prescription drug prices might have a nasty side effect: an invasion of medical privacy.

The Pharmacy Benefit Manager (PBM) Transparency Act of 2022, a bipartisan effort led by Sens. Maria Cantwell (D–Wash.) and Chuck Grassley (R–Iowa) aims to crack down on middlemen in the pharmaceutical supply chain.

These pharmacy benefit managers are third-party administrators who work with private insurers and government-run health programs like Medicare to handle price negotiations, insurance claims, and rebate programs. Advocates for PBMs claim they save patients money by negotiating more significant rebates from drug companies and passing the savings along. A PBM working on behalf of an insurance company might deal with a drugmaker for a lower price per dose in exchange for having that company's drug be the one the insurance company prioritizes in the list of prescriptions it makes available to policyholders.

Still, PBMs have other incentives, like favoring higher-priced drugs or keeping portions of those rebates, that can drive costs up—and, like so much else in America's health care system, the lack of actual prices makes it impossible to know how much things cost.

Cantwell's and Grassley's bill attempts to address some of that opacity by giving government agencies the authority to investigate PBM pricing schemes. The bill requires PBMs to file an annual report with the Federal Trade Commission (FTC) about fees charged to pharmacies and reimbursements sought from drug companies.

Here's where it gets tricky. In addition to the FTC authority, the bill also authorizes state attorneys general "to conduct investigations, to administer oaths or affirmations, or to compel the attendance of witnesses or the production of documentary or other evidence."

In short, it could allow attorneys general to seek patient-level information about prescriptions—including potentially sensitive information about whether individuals have been prescribed, for example, abortion drugs or hormones used in gender transitions.

The bill seems to give a "tremendous amount of power" to state attorneys general to seek information about PBMs and the patients that are their customers, says Caleb Kruckenberg, an attorney with the Pacific Legal Foundation, a libertarian legal nonprofit.

"If an Attorney General brought a lawsuit against a pharmacy or a PBM, the details of what prescriptions the pharmacy filled and for whom would be relevant and, therefore, almost certainly subject to discovery," Kruckenberg tells *Reason*. "The Attorney General could potentially look at each transaction at a pharmacy for compliance involving specific drugs—including highly personal drugs like Prozac, Viagra, or Mifepristone."

"Patients may not even know that their data is released," Greg Dolin, a University of Baltimore law professor and senior litigation counsel at the New Civil Liberties Alliance, a nonprofit that defends constitutional rights, tells *Reason*.

Since the bill's main thrust seems to be aimed at reimbursement and financial issues, it's unclear whether patient data would be directly jeopardized. But if an attorney general seeks prescription information under the bill's provisions, "it's not clear who would represent patients' interest," says Dolin.

The PBM bill was reported out of the Senate Commerce Committee in December and is waiting to be brought to the floor for a vote. Earlier this month, *Axios* reported that it could be included in a larger package of health care reforms that Senate Majority Leader Chuck Schumer (D-N.Y.) aims to bring to the Senate floor in May.

While there is nothing in the bill that explicitly requires PBMs to release patient-level data to the FTC or state attorney generals—and any future litigation over its provisions would likely be limited to fighting over financial information—some civil libertarians are worried about the open-ended nature of the bill's enforcement provisions.

"I fear that an activist attorney general could use the patient-level health data thus collected to learn which of their constituents have taken COVID-19 vaccines or taken other treatments in which they have an ideological or political interest, which could lead to discrimination or other civil penalties," says Jeffrey A. Singer, a physician and senior fellow at the Cato Institute.

A better solution, of course, would be to overhaul the entire American health insurance system to make room for more markets and actual price signals, rather than layering another set of regulations and asking more government overseers—at the FTC and in state attorney general offices—to decide how much things should cost and who ought to profit. Policymakers should empower consumers of health care to make informed decisions, rather than relying on potentially politically motivated attorneys general to police prescription drug prices.

Instead, we get this insider fight between the big pharmaceutical companies, which blame PBMs for the high cost of drugs and want to see more federal regulation of them, and insurance companies, which have worked to bring PBMs under their control

Patients, unsurprisingly, will get caught in the middle.