

# Don't Get Trapped By PBMs' Rebate Labeling Games

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**Transparency in contracting is a great thing, but it takes vigilance to keep it from clouding over**

By **Linda J. Cahn**

“**W**hat’s in a name? That which we call a rose by any other name would smell as sweet.” Juliet was speaking of Romeo, and expressing a universal truth. Unfortunately, pharmacy benefit management companies (PBMs) would like the world to believe otherwise, at least when thinking about PBMs’ rebates. For them, calling a rebate by another name means that it is something other than a rebate. Therefore, PBMs need not pass through any third-party money that they choose not to call a rebate.

Accordingly, it is imperative that health plans and other PBM clients understand PBMs’ rebate labeling games. Moreover, it is critical that these clients learn how to end all rebate manipulations, since PBMs are siphoning off billions of dollars of clients’ potential savings, and clients aren’t even aware that they are doing so.

## **PBMs’ contracts with clients**

Most PBM/client contracts contain core language in which PBMs define the term “rebates” and agree to pass through all or most rebates to their clients. Here are three examples:

- Rebate means the rebates, including base and market share rebates, collected by the PBM in its capacity as a group purchasing organization for the client from various pharmaceutical companies that are attributable to prescriptions dispensed to members, but specifically excluding any rebates paid with respect to utilization of specialty drugs.
- Rebates means retrospective rebates or discounts which are paid to the PBM pursuant to the terms of a contract with a pharmaceutical

manufacturer and directly attributable to the utilization of certain pharmaceuticals by members. Rebates do not include administrative fees, software, or data fees paid by pharmaceutical manufacturers to PBM.

- The PBM may receive fees or other compensation from pharmaceutical companies for services rendered and property provided to pharmaceutical companies, including without limitation administrative fees not exceeding three percent of the AWP [average wholesale price] of the products dispensed across PBM’s book of business. In addition, the PBM’s mail service and specialty pharmacies receive discounts or rebates from pharmaceutical companies that are attributable to or based on product purchases by the PBM’s mail order or specialty pharmacies. The term rebates ... does not include the fees, compensation, and discounts described in this section.



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This language may appear benign, but it is anything but. If a PBM enters into contracts with drug manufacturers and chooses to give rebates another name — like administrative fees or health management fees or grants — the PBM will arguably eliminate its obligation to pass through the financial benefits to its clients.

Moreover, a PBM can deprive its clients of rebates by ensuring the rebates are paid on a basis that

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is not attributable to the clients' drug purchases. For example, if a PBM/manufacturer contract states that the manufacturer must pay a specified amount of rebates (say \$10 million) to the PBM if the PBM increases the manufacturer's market share in a therapeutic drug category by an identified percentage (say 1 percent), the rebates will arguably not be attributable to any client.

Furthermore, if a PBM enters into contracts with wholesalers, distributors, or other third parties, even if the PBM labels the money rebates, it will arguably be allowed to retain all such monies because they were received from an entity other than a pharmaceutical manufacturer.

### **Rebate transparency**

Not surprisingly, litigation filed against PBMs during the past decade has alleged that they are engaged in all the rebate labeling games described above. Moreover, lawyers allege that PBMs' games are enabling them to deprive their clients of billions of dollars in potential savings.

When my consulting firm initially describes PBMs' rebate labeling games to our new clients, they nearly always ask us the same question: "Given that PBMs can endlessly invent new labels for rebates, how can we ever keep them from retaining all money that they characterize with a new label?" Fortunately, the answer is not difficult.

We have created a new phrase — financial benefits — that we include in all PBM contracts that we draft for clients. We define the phrase to include "all financial benefits the PBM receives, including but not limited to all: rebates, discounts, credits, fees, grants, chargebacks, or other payments or financial benefits of any kind."

By inserting the phrase "including but not limited to," we ensure that PBMs cannot invent a label for rebates that will exclude them.

By adding language that explicitly states that all financial benefits are covered by our definition, regardless of who provides those benefits, we ensure that our clients receive their pro rata share of all financial benefits, including those that PBMs receive from drug manufacturers, wholesalers, distributors, and all other third parties.

Not surprisingly, PBMs not only engage in rebate labeling games, but they also try to ensure that their clients are unable to detect the extent to which they are doing so.

Thus, notwithstanding that most PBMs claim their contracts are transparent, almost all PBM/client contracts limit clients' ability to audit rebates.

Many PBMs accomplish this task by inserting a single word into their contracts: proprietary. When clients conduct audits, PBMs point to that word and claim that it precludes the clients and their auditors from having access to most rebate information because it is confidential.

Other PBMs insert a single sentence into their contracts to obtain the same result. For example, here's the boilerplate used by one large PBM to limit clients' access to information:

"Audit materials and documentation provided by PBM will be limited to client-specific information."

Since rebates that a PBM relabels are not passed through to clients, the rebates are not client-specific, and a PBM can therefore refuse to provide any information about them.

### **Achieving real disclosure**

When our firm creates requests for proposals (RFPs) inviting PBMs to compete for our clients' business, we draft an entirely different form of contract and demand that PBM contestants accept core elements of our contracts. Before our clients select a finalist, we insist that all semifinalists execute our contract, binding themselves to all that they have promised to provide during our process.

Our contract's audit provisions include several paragraphs related to rebates and all other financial benefits, all as defined in our contracts. Those terms make clear that PBMs must provide all documents and data related in any way to any financial benefits, including but not limited to all contracts with manufacturers and other third parties, all PBM invoices to third parties, all documents reflecting third party payments to the PBM, and so on.

Our contracts also contain detailed requirements identifying the information that PBMs must provide to enable our clients to verify the accuracy of their calculations of our clients' pro rata share of financial benefits.

Tellingly, when we conduct an RFP process for our clients, many PBMs refuse to accept our audit terms and drop out, even though they have repeatedly claimed to be transparent and consulting companies have certified them as transparent. Apparently, it is a lot easier for a PBM to claim that it

is transparent than it is for a PBM to execute a contract requiring real transparency.

Our RFP experience demonstrates a significant reality of the current PBM marketplace: PBMs' executed contract terms — not their representations — are what matters.

### Other rebate antics

Many other problems related to PBMs' payment of rebates are embedded in most PBM/client contracts.

For example, most PBM/client contracts contain language like the following, stating that clients will forfeit all rebates if certain events occur:

"All rebate payments will immediately cease accruing to client, and client hereby expressly authorizes PBM to retain any and all rebate payments that have accrued to such date, upon the occurrence of any of the following: (i) breach by client of any obligations set forth in this agreement; (ii) termination of this agreement by either party; (iii) PBM's exercise of its right to terminate any clinical program services; and (iv) any change in the pharmaceutical industry practices or marketplace conditions that may affect the payment of rebates."

Note that an inconsequential client breach such as a delay in paying an invoice by one day could result in a client forfeiting all rebates. Note also that several of the "events" listed are not within a client's control. Finally, note that most PBMs pass through rebates approximately 9 to 18 months after clients have earned them, meaning rebate forfeitures could result in a significant loss of money to clients.

Many PBMs also contract to provide per-script rebate guarantees such as \$7 per retail prescription and \$15 per mail prescription, but include language that allows them to change or even eliminate the guaranteed payments if marketplace conditions occur that prevent them from doing so.

Many PBM/client contracts also contain contradictory rebate language, like the next paragraph in which a PBM purports on the one hand to pass through 100 percent of all rebates while on the other hand limiting its rebate obligation to a specified amount per prescription:

PBM will provide client with 100 percent of the rebates PBM receives. PBM will make payments to client on a per-net-paid-claim basis, regardless of the amount of rebates received by

PBM. PBM will make such payments in accordance with the amounts set forth in the table below [for retail, 90-day retail, and mail order].

Most PBM/client contracts also explicitly state that PBMs may retain all rebates received in connection with specialty drugs. For example, note the following contradictory language consistently found in one PBM's contracts claiming what the PBM can do so to ensure that it can provide good discounts to its clients:

"Rebates: To provide the steepest discounts possible, 100 percent of specialty rebates will be retained by PBM."

When assembled together, the above rebate provisions stand out as a monument to poor contracting practices. Indeed, when they are illuminated with a spotlight, one has to wonder how anyone could allow such language into a contract.

However, most of the cited provisions can be found in most PBM/client contracts, including the contracts of large and small insurance companies, corporations, unions, and even government entities. Accordingly, all such entities must reach at least four conclusions about PBMs and the PBM industry:

- PBMs are stuffing client contracts with many provisions that are driving up their clients' costs, contrary to their clients' interests.
- Most consulting firms and lawyers are incapable of detecting and eliminating PBMs' pernicious contract language and/or not interested in doing so because the consulting firms and lawyers have their own brokerage or other financial relationships with PBMs.
- Clients must locate a consulting firm — or lawyer — that will end PBMs' contracting antics, meaning an entity or individual with sufficient knowledge of the PBM industry and sufficient legal skills to draft and negotiate an entirely different form of PBM contract.
- Clients must also ensure that all entities or individuals representing them will act as fiduciaries and will be free of all conflicts of interest.

Ultimately, "a rose by any other name" is still a rose, and a rebate by any other name must still be considered a rebate, even by a PBM. And all PBM clients must see to it that PBMs understand that fact. **MC**