

Dancing with the devil: Benefits managers and pharmacies

By **Neil M. Abramson and Anne Lewis**

Law360 Canada (May 13, 2024, 2:38 PM EDT) -- Ontario pharmacists have multiple and often competing responsibilities. Beyond their clinical duties, many pharmacists are business owners, employers, mentors and teachers. However, their primary duty is always to the public. Unfortunately, Ontario pharmacists are increasingly being subjected to pressures that seemingly bear no relationship to their ability to serve the public and which threaten to shift the focus within the profession from patient-centred care to commercial concerns.

One such pressure has recently been imposed by Express Scripts Canada (Express Scripts), a "pharmacy benefits manager" with market dominance in Ontario. As a pharmacy benefits manager, Express Scripts acts as an intermediary between patients, pharmacies and health insurers by managing prescription drug benefits for health insurers. In essence, insurers and insurance plan sponsors may subcontract their claims to Express Scripts, which adjudicates patient coverage on their behalf. Like other pharmacy benefits managers, Express Scripts utilizes software that enables pharmacies to submit claims simultaneously with dispensing, often requiring patients to pay only a relatively small copayment.



Neil M. Abramson



Anne Lewis



z_wei: ISTOCKPHOTO.COM

Unsurprisingly, since they offer a streamlined and convenient service, pharmacy benefits managers now occupy a dominant market position and continue to acquire an ever-increasing share of the business of pharmacy. Indeed, Express Scripts's clients include some of the largest insurers in Canada, such as Manulife, Desjardins and Empire Life. For many pharmacists, Express Scripts handles claims for the lion's share of its patients.

Bolstered by this market dominance, as of Jan. 1, 2024, Express Scripts now requires pharmacies to pay a mandatory fee in order to submit claims electronically. If the pharmacy does not pay this fee, it will not be able to submit claims to Express Scripts. Patients insured by an Express Scripts client will

thus have to pay out of pocket for their medication and submit a claim to their insurer directly. The obvious concern for pharmacy owners is that those patients will go elsewhere to have their prescriptions filled.

This news was received with concern by the profession, considering the potential ramifications that it may have on pharmacies who decline (or are unable) to comply with Express Scripts's terms. As a result, the Canadian Pharmacists Association (CPhA) filed a complaint with the Competition Bureau — Canada's consumer antitrust "watchdog" — on Feb. 28, 2024, alleging that Express Scripts was engaging in anti-competitive behaviour. In a statement, the CPhA wrote:

CPhA's complaint underscores the broader implications of ESC's practices, which extend beyond contractual grievances to patient care and access. By dictating terms to pharmacies, ESC effectively limits the choices and accessibility of health-care services for Canadians. This not only restricts competition but also undermines the foundational principles of equity and access in the Canadian health-care system.

In bringing this matter to the attention of the Competition Bureau, CPhA seeks not just to address the specific issues related to ESC, but to prompt a thorough examination of the [pharmacy benefits manager] industry as a whole. The practices employed by [pharmacy benefits managers] have far-reaching consequences for the health-care sector, influencing everything from the availability of medications to the financial sustainability of pharmacies.

However, this is far from the only commercial pressure affecting the practice of pharmacy today, nor is it the only pressure that is currently attracting legal scrutiny. For instance, the CBC recently reported that pharmacists at some Shoppers Drug Mart pharmacies in Ontario have been subject to "borderline abusive" pressure to conduct unnecessary MedsChecks in order to turn a profit.

Ontario's MedsCheck program is intended to reimburse pharmacies for one-on-one meetings with eligible patients (i.e., those living with a chronic condition and taking three or more prescription medications; living in a long-term care home; or living with type 1 or type 2 diabetes) to discuss their medication, identify any issues with same and explain all. Since the beginning of the COVID-19 pandemic, the Ontario government has allowed pharmacists to conduct these consultations over the phone. While the service is free to the public, each MedsCheck can be billed to the province for up to \$75.

According to the CBC, some former employees believe that Shoppers Drug Mart pharmacies in Ontario are taking advantage of this program for financial reasons. The CBC reported that, in a single week in February 2024, medication reviews accounted for more than 75 per cent of the revenue brought in by Shoppers Drug Mart pharmacies across Ontario, for a total of \$1,423,900. In comparison, 28 Shoppers Drug Mart pharmacies in the Vancouver area billed just \$27,210 for the medication reviews in the same week.

Some Ontario pharmacy staff have apparently alleged that they have been pressured to regularly "cold call" customers who were technically eligible for a MedsCheck but were not "high risk" and did not need a consultation with a pharmacist. Some also claimed that they have been given MedsCheck "quotas." In an internal letter sent to Shoppers Drug Mart management last year, a group of pharmacy owners said that this was creating safety concerns, affecting the quality of care that they could provide and affecting the mental health of pharmacy employees.

Not long after that story was published, a former pharmacy franchise owner filed a proposed class action lawsuit against Shoppers Drug Mart and Loblaws, alleging that the companies imposed "unsafe and unethical" practices to increase profits. Moreover, it is claimed that pharmacists who raised concerns about these practices had their franchise agreements terminated. The Ontario College of Pharmacists also appears to be conducting its own review of Shoppers Drug Mart and claims from "thousands" of pharmacy employees who reported, according to registrar Shenda Tanchak, "volume-focused corporate pressure" and real or feared "reprisal if they fail to meet corporate objectives."

Shoppers Drug Mart denies these allegations and the proposed class action against it has not yet

been tested in court. Regardless, the question remains: how can pharmacies handle these increasing pressures and manage both the business and the practice of pharmacy? Some may be tempted to bill aggressively to compensate for unavoidable overhead or cut corners to meet corporate expectations. However, pharmacists would be wise to remember not only that their duty is first and foremost to the public but also that it is they who will face the consequences of any perceived impropriety.

Obviously, pharmacists are expected to provide high-quality care to their patients. However, their professional obligations also require that they bill patients and insurers reasonably, transparently and in keeping with the standards of the profession. As a rule of thumb, pharmacies should not charge patients any amounts above and beyond what is allowable as a copayment under their provider agreement with a benefits manager. In addition, markups should be consistent for all cash payers and private payers, alike. At the time of writing, Express Scripts seems to be setting the standard for markups at 9 per cent on brand name products and 10 per cent for generics.

Pharmacies that charge excessive or unreasonable markups run the risk of triggering an insurance audit, which can have dire consequences. With the click of a button, benefits managers, like Express Scripts, can identify pharmacies that are charging above the norm and demand an explanation of their billing practices. Not only is gathering and responding to historical claims information intrusive and time-consuming but also it can come with a huge price tag. If the benefits manager is not satisfied with the pharmacy's explanation, it will demand reimbursement for any amount deemed an overpayment. In more extreme circumstances, the pharmacy may be delisted, meaning that it will not be able to submit claims to the pharmacy benefits manager. This can obviously have extremely serious adverse effects, sometimes resulting in the closure of a pharmacy. Further, other benefit managers might "catch wind" of this and initiate their own audits, causing a snowball effect.

In addition, both billing issues and standard-of-care issues (such as providing unnecessary and/or subpar MedsChecks) can give rise to regulatory concerns. Critically, it is the pharmacist who will bear the brunt of an Ontario College of Pharmacists (the College) investigation, even if they are acting on the direction of corporate ownership. A College investigation can result in terms and conditions on the pharmacist's ability to practise, a practice suspension, or — in the worst case — the permanent revocation of their Certificate of Registration. Insurers and pharmacy benefit managers are also increasingly making it a term of their agreements with pharmacies and pharmacists that significant regulatory concerns in and of themselves may be grounds for delisting.

When it comes to balancing the many, and ever-increasing, pressures on their practices, it is no surprise that some pharmacists and pharmacy owners are turning to creative solutions. However, those pharmacists would be wise to avoid being "penny wise and pound foolish." A pharmacist's highest duty is, at all times, to their patients. If there is one takeaway from all of this, it is that the risk arising from aggressive billing or the provision of unnecessary or substandard services in order to mitigate commercial pressures simply is not worth it. Instead, pharmacists would do well to challenge their professional organizations and buying groups to lobby for changes in the profession so that patient-centred care can remain at the fore.

A partner in Torkin Manes's Litigation Group and chair of the Health Professionals Group, Neil M. Abramson has built a robust law practice that encompasses a broad range of civil litigation matters. A significant portion of his practice is devoted to the defence of health professionals, and he is certified by the Law Society of Ontario as a specialist in health law and civil litigation. Anne Lewis is an associate at Torkin Manes LLP and a member of its Health Professionals Group. Her practice encompasses a range of civil litigation matters, and she has particular expertise in health law, professional discipline and defamation.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the author's firm, its clients, LexisNexis Canada, Law360 Canada or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437-828-6772.