



The Pharmacist Activist

Volume 13, No. 1 • January 2018

Editorial

The FTC Must Prevent CVS from Acquiring Aetna, and Require CVS to Divest Caremark!

I must give CVS credit for two things. First – it discontinued the sale of tobacco products. Second – it is **BOLD!** However, I must quickly add that the most recent important example of the boldness of CVS, the plan to acquire Aetna, will have very damaging consequences for consumers/patients, pharmacies, and others, and must be prevented!

The announcement by CVS of its plan to acquire Aetna for \$69 billion has been widely publicized. Actually, the transaction is valued at approximately \$77 billion when the assumption of Aetna's debt is included. The executives of the two companies have stated that one of the primary goals of the merger is to save the healthcare system money. Conveniently ignored in the announcement of the plan are the anticipated increased revenues for the proposed combined company and the strategies for increasing revenues.

The Federal Trade Commission (FTC) is the agency that was established for the purposes of protecting consumers and eliminating and preventing anticompetitive business practices. Among its recent actions were its successful challenges to Aetna's proposed acquisition of Humana and Anthem's proposed acquisition of Cigna, because of concerns that the mergers of such large health insurance

companies would reduce competition in the marketplace. In addition, Walgreens' recent plan to acquire Rite Aid was substantially reduced in scale because of concerns that the FTC would block the purchase. As a consequence, the number of Rite Aid stores purchased by Walgreens is less than one-half of the total number it initially wanted to acquire.

The proposed CVS-Aetna merger has been defended by some as being acceptable because they view it as a "vertical" merger (i.e., among companies that do not directly compete in many areas now) rather than a situation in which these two large companies are currently direct competitors. However, there can be no question that the proposed merger would result in a combined organization that would have even greater resources, power, and influence than they already have. As just one example, approximately 22 million people have health insurance coverage with Aetna and it could be anticipated that these individuals would be required to obtain their prescription medications from a CVS pharmacy. The freedom of choice for patients to select the pharmacy in which they will obtain their medications and related services is already seriously compromised in many existing prescription benefit plans. If the proposed merger is permitted to proceed, the situation will become even more anticompetitive and many

Contents

Index for Volume 12, 2017 Page 4

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more individuals will be restricted in choosing the pharmacy they wish to use. The FTC must prevent the proposed merger!

The present situation

Justification for an FTC action to prevent the proposed merger does not even require speculation about what strategies these companies would use if they were permitted to merge. Rather, the justification can be based on facts about what is occurring in the prescription plans that CVS and Caremark are administering right now. It is my strong opinion that these programs are blatantly anticompetitive and represent an egregious conflict of interest when an organization that administers prescription plans can require and/or provide financial incentives for individuals to use pharmacies that it owns. As one example, in an increasing number of prescription plans provided by CVS/Caremark, there is a policy such as the following that is included in the information provided to participants:

“Fill limit for long-term medications”

Your plan allows two 30-day fills of long-term medications at any pharmacy in our network. After that, your plan will cover long-term medications only if you have 90-day supplies filled through mail service or at a CVS Pharmacy. If you continue to have 30-day supplies of long-term medications filled after two times, **your plan will not pay for them.** (emphasis added)

With Maintenance Choice, you can avoid paying more for your long-term prescriptions. All you need to do is have 90-day supplies filled through mail service or at a CVS Pharmacy.”

The reference to “mail service,” of course, means CVS Caremark Mail Service Pharmacy. Actually, the statement, “you can avoid paying more for your long-term prescriptions,” may be a false and misleading promotion. Many prescriptions are for medications for which an inexpensive generic equivalent is available. The cost for the patient of a 90-day supply of such a medication from a pharmacy other than CVS could very well be less than the amount of the copay the participant would have to provide CVS/Caremark for a 90-day supply of the medication. However, to add insult to injury, the “agreements”

established by CVS/Caremark with other chain and independent pharmacies often contain restrictions that pharmacists are prevented from informing patients about alternative arrangements that would let them continue to use their current pharmacy and obtain medications at what may be lower prices than if they were obtained at CVS. Pharmacists who are thought to be “violating” the “agreement” are at risk of more frequent audits or being dropped from the network. As a further insult, CVS/Caremark is reducing compensation for pharmacists for an increasing number of medications to an amount that is less than what the pharmacist must pay for them.

How can these policies and practices be viewed as anything other than anticompetitive? They will become even worse if CVS is permitted to acquire Aetna. The FTC must not only prevent this merger, but it must also require CVS to divest Caremark for engaging in anticompetitive practices that the FTC did not foresee when it permitted CVS to acquire Caremark.

Independent pharmacists should carefully evaluate the terms of the prescription benefit plans administered by CVS/Caremark, as well as similar plans from other pharmacy benefit managers and insurance companies. These are typically provided on a “take it or leave it basis,” with no opportunity for negotiation. However, there may be strategies that will enable a pharmacy to retain patients who are otherwise required or provided incentives to obtain their medications from a CVS pharmacy. Although I usually deplore the advertising of prices for prescription medications, circumstances of the type being imposed on local pharmacies justify doing so. As one example, as a general practice apart from whether a patient is a participant in a prescription benefit program or which one he/she has, independent pharmacists should actively encourage patients to ask about and discuss the prices of their medications. Along with this step, pharmacists should also prominently identify the prices for 90-day supplies of the most commonly dispensed inexpensive generic medications and invite comparisons with the prices they would pay elsewhere. My expectation is that these prices will often be lower than what the patient would have to provide as a copay if the prescription was obtained at CVS. For example, the copay identified in many plans for a 90-day supply of a generic drug is \$40.

CVS certainly has not avoided claims of overcharging its customers, as is evident most recently in a settlement reached for allegedly overcharging customers in California. An initial settlement in the amount of \$2.4 million for charging more than the advertised price for products was reached in 2015. However, apparently some of these practices continued and CVS agreed last month to pay an additional \$551,687 and to designate two executives who will be accountable for pricing issues in southern and northern California

More hypocrisy

In November, CVS issued a press release with the title, “CVS Health Joins with the National Consortium of State-Operated Comprehensive Rehabilitation Centers to Help More Americans with Disabilities Find Meaningful Employment.” At first glance this appears to be a laudable and impressive action. However, it brought to mind the unfortunate experience of a long-term CVS pharmacist with a chronic medical problem that was associated with significant physical limitations (i.e., disabilities). Nevertheless, this pharmacist was the manager of a CVS store that was among the highest in attaining performance metrics of all the stores in its district, and was highly regarded by his pharmacy staff. A district manager made changes and imposed expectations that exacerbated the pharmacist’s physical challenges and created significant stress to the point that the pharmacist needed to be on sick leave and eventually disability leave. As soon as the maximum time period for the disability leave was completed, CVS fired the pharmacist. The pharmacist sued and, following extended legal negotiations, received a settlement from CVS. I do not know the amount of the settlement but it is rumored to be substantial which is apparently confirmed by CVS’s insistence on confidentiality of the terms of the settlement. Perhaps CVS management has experienced a religious “conversion” or otherwise decided to amend its ways with respect to those with disabilities, but this previous action contradicts the message of its press release.

Another press release (January 15, 2018) is headlined, “CVS Pharmacy Makes Commitment to Create New Standards for Post-Production Alterations of Beauty Imagery.” The release includes the statement, “This new

initiative is being introduced in an effort to lead positive change around transparency in beauty as well as to allow customers to differentiate between authentic and materially altered imagery,” and that “The CVS Beauty Mark will start to appear on CVS Pharmacy-produced beauty imagery in 2018...” I must admit that I had not been aware of the apparent importance of this matter, but I am very encouraged to note the discovery of and apparent commitment to transparency. We must now request data regarding prescription/dispensing errors in CVS pharmacies, the number of lawsuits against CVS for such errors that have been filed, settled, or concluded at trial, and the amounts of rebates/discounts received by CVS/Caremark from pharmaceutical companies. Unfortunately, the response is likely to be that transparency only applies to beauty.

Boldness

If CVS is permitted to acquire Aetna, I expect that the consequences will be harmful for patients who will not receive important services and information, for independent pharmacies and chain pharmacies that will receive even poorer compensation and/or be excluded from CVS pharmacy networks, as well as for the professional role of pharmacists. The profession of pharmacy and our professional associations must respond with boldness and urgency.

Daniel A. Hussar

UPDATE: On January 16, an Aetna investor filed a proposed class-action lawsuit against the company and some of its executives and board members that alleges that the company tried to convince its shareholders to vote in favor of the acquisition by CVS by filing a form that included “materially incomplete and misleading” information with the Securities and Exchange Commission.

Daniel A. Hussar

Index for Volume 12, 2017

| | |
|-------------------|---|
| January (No. 1) | Pharmacy FAILS Drug Interaction Investigation! Pharmacists: Be on Guard and Stand Your Ground Against Metrics! |
| February (No. 2) | Drug Interaction Investigation: Part 2 There Must be Mandatory Reporting of Serious Medication Errors and Prohibition of Confidentiality Agreements that Restrict Disclosure! New Drug Review: Patiromer sorbitex calcium (Veltassa) |
| March (No. 3) | Many Walmart Customers Will Stop Smoking Today! Their Funerals Will Be Held Sometime in the Next Three or Four Days |
| April 1 (No. 4) | Hungarian-American Pharmacists Association (HAPA) Established! New Drug Review: FDA Approves Sale of Prescription Placebo |
| May 1 (No. 5) | Our Profession's Own Pharmacy Care Administrator (PCA): Can a Dream Become Reality? Table: New Therapeutic Agents Marketed in the United States in 2016 |
| June (No. 6) | Our Profession's Own Pharmacy Care Administrator (PCA): Part 2 - Honest, Simple, Clear, Fair, Transparent! New Drug Review: Ocrelizumab (Ocrevus) |
| July (No. 7) | Our Profession's Own Pharmacy Care Administrator (PCA): Part 3 New Drug Review: Crisaborole (Eucrisa) |
| August (No. 8) | Our Profession's Own Pharmacy Care Administrator (PCA): Part 4 New Drug Review: Plecanatide (Trulance) |
| September (No. 9) | Our Profession's Own Pharmacy Care Administrator (PCA): Part 5 New Drug Review: Sildenafil mesylate (Xadago) |
| October (No. 10) | The Independent Community Pharmacist Summit on Strategy, Structure, and Survival (ICPSSSS) New Drug Review: Glecaprevir/pibrentasvir (Mavyret) |
| November (No. 11) | Some Pharmacists Still Sell Cigarettes – Such as Walgreens at the Congested Corner of Smokey and Sickly! New Drug Review: Voxilaprevir/sofosbuvir/velpatasvir (Vosevi) |
| December (No. 12) | Blessings and Dreams |

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The opinions and recommendations are those of the author and do not necessarily represent those of his full-time employer or the publisher.

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