

340B REPORT

In What Is Believed to Be the First State Action, W.Va. Says Express Scripts' 340B Claims ID Policy Violates State Law

By Tom Mirga

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Pharmaceutical benefit manager Express Scripts' (ESI) controversial 340B claims identification and submission requirement violates West Virginia law, state Insurance Commissioner Allan McVey has ruled.

McVey [on Dec. 8](#) adopted and approved a hearing examiner's Nov. 17 finding that ESI's requirement, which took effect nationally on March 1, applies exclusively to 340B entities and forces them to incur additional expenses not assessed on similar providers. The examiner held this is discriminatory and "obviously against" the state's [2018 law](#) regulating the PBM industry.

The West Virginia law bars PBMs from reimbursing 340B entities at a rate lower than that for non-340B entities for the same drugs. It also bars PBMs from assessing "any fee, charge-back, or other adjustment upon the 340B entity on the basis" of the entity's participation in 340B.

Under ESI's requirement, when a claim is determined post-adjudication to be 340B-eligible, pharmacies must resubmit the claim using a claims-transaction protocol called N1, with a code showing the claim was filled with a 340B-purchased drug. The policy applies to entities' in-house and contract pharmacies. Entities or their contract pharmacies that determine post-adjudication that a previously submitted claim is 340B eligible have just 10 days to resubmit the claim to ESI using the N1 transaction and required claims ID code.

The 340B Coalition, an umbrella group of 13 associations whose members include covered entities, [protested to ESI](#) that no payer before had ever required use of the N1 transaction for 340B claims. Implementing the policy, they said, would take great time and expense, require updating millions of claims manually, and likely would cause many entities to lose 340B savings than Congress intended for them to have.

[ESI told the coalition](#) its new policy "was thoroughly evaluated" to ensure that it does not impede providers' ability "to receive the advantages of the 340B program." It said it has "already granted numerous pharmacies extensions for their operational compliance."

The American Hospital Association also [sent ESI a letter](#) telling the PBM its policy "is a major overreach" and should be withdrawn immediately. AHA told ESI that federal 340B contract pharmacy guidance assigns PBMs "no official role in the 340B billing or oversight processes."

The West Virginia insurance commissioner's final order is believed to be the first administrative or judicial ruling nationally on the legality of ESI's action. The complaint was filed by the West Virginia Primary Care Association (WVPCA), the West Virginia Hospital Association (WVHA), Fruth Pharmacy (a family-owned drug store chain), and four of the state's top health systems—CAMC Health System, Mountain Health Network, West Virginia University Health System, and Marshall Health.

WVHA President & CEO Jim Kaufman this morning expressed gratitude to Insurance Commissioner McVey for supporting the hospitals and other providers that filed the complaint against ESI.

“The Commissioner’s finding notes that Express Scripts discriminated against health care providers who are participating in the 340B drug discount program by requiring unnecessary administrative burdens,” Kaufman said. “Commissioner McVey’s action helps hospitals and other providers use the limited resources they have to ensure needed access to care across West Virginia.”

“We are thankful for the leadership of West Virginia Commissioner, Allen McVey, in supporting our state’s federally qualified health centers and other 340B covered entities with this decision regarding our complaint,” Sherri Ferrell, CEO of the West Virginia Primary Care Association, said this morning. “The decision identifies the unfair targeting of pharmacies, and prohibits PBMs from imposing burdensome, discriminatory requirements on these providers,” Ferrell added. “This will allow health centers and other covered entities to use their resources to provide better, more comprehensive health care services to patients who need them the most.”

We reached out to ESI early this morning for comment on McVey’s decision and will update this story if it responds.