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COURT URGED TO STRIKE DOWN MICHIGAN DRUG PRICE CONTROL LAW (*PhRMA v. Michigan Dep't of Community Health*)

The Washington Legal Foundation (WLF) this week urged the Michigan Court of Appeals to strike down a Michigan program that seeks to impose price controls on pharmaceuticals sold to Medicaid recipients in the State.

In a brief filed in *Pharmaceutical Research and Manufacturers of America v. Michigan Dep't of Community Health*, WLF argued that the program is invalid because it conflicts with Michigan law and violates separation-of-powers principles of the Michigan Constitution. WLF also argued that the program will mean substandard medical care for the State's poorest citizens, because it will result in their being denied access to essential drugs that the State has deemed too expensive.

"If Michigan seeks to hold down drug costs, it must do so in a way that does not sacrifice patient care," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Regardless whether the Michigan program ultimately produces cost savings, it is poor health-care policy and is precisely the type of program that the Michigan legislature intended to prohibit," Samp said.

The Michigan program establishes a list of preferred drugs that doctors may prescribe for Medicaid patients without seeking any advance approval. If a doctor wishes to prescribe a drug not included on the list, she may do so only if she goes through a "prior authorization" procedure and explain to state officials why she believes it is necessary to prescribe a non-listed drug. In practice, very few doctors will take the time to seek such prior authorization, which the State is free to deny regardless whether the treating doctor insists that her patient needs the drug in question. The result is that sales of non-listed drugs to Medicaid patients have plunged since the program took effect in January.

For a manufacturer to have one of its drugs included on the preferred list, it must agree to pay a supplemental rebate to Michigan (in addition to the rebate already mandated under the federal Medicaid program) in order to reduce the drug's effective price to a level no higher than the lowest available price for the least expensive drug in the same therapeutic class. Those manufacturers who have not agreed to pay the rebate have had their drugs excluded from the preferred list, to a large extent without regard to the effectiveness of those drugs and without regard to the availability of other drugs that provide equivalent benefits.

Drug manufacturers filed suit against the Michigan program in November. The trial court granted a preliminary injunction against the program in January, finding that the program violated Michigan law. The court of appeals granted a stay of the injunction -- allowing the program to go forward -- pending completion of Michigan's appeal.

In its brief, WLF argued that the Michigan legislature has never granted state Medicaid officials authority to adopt a prior authorization program. WLF argued that there is considerable evidence that the legislature explicitly disapproved of such programs.

While conceding that it lacked statutory authority in the past, the Department of Community Health (DCH) asserts that its appropriation bill for 2001-02 grants it authority to adopt a prior authorization program. WLF disputed that contention; moreover, WLF argued, the provision in the 2001-02 appropriation bill upon which DCH relies is invalid because it violates separation-of-powers principles. The provision states that any Medicaid program changes adopted by DCH must be submitted to two legislative leaders to give them an opportunity to veto the changes. WLF argued that such "legislative veto" provisions are unconstitutional because they do not adhere to constitutionally-mandated procedures for the adoption of legislation.

WLF argued that there are sound medical reasons underlying the Michigan legislature's ban on prior authorization programs. WLF cited to numerous studies that show that when States have attempted to limit prescription drug sales as a cost-saving measure, patient health has suffered. Indeed, WLF argued, States in those situations often end up paying more, because patients who formerly were being treated effectively through medication end up having to be hospitalized after being denied their normal medications.

WLF is a public interest law and policy center with supporters in all 50 States, including many in Michigan. WLF devotes a significant portion of its resources to defending the rights of individuals and businesses faced with excessive government regulation. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302.