

Vote Yes on Prop 79

Cheaper Drugs More Californians Can Count On



Proposition 79 Learns the Lessons of Prior Experience: Enforcement is Needed to Get the Best Price

Lessons from other states, as well as California's own experiences in negotiating discounts from drug companies, demonstrate the need for Prop 79's enforceable approach. To put it simply: negotiations with drug companies will not result in real discounts unless the state has some leverage in the negotiations. Negotiations entirely dependent on the drug companies will fail.

Maine Rx Plus

Enforcement Mechanism Similar to Prop 79: The Maine legislature enacted a drug discount program for uninsured residents in 2000. Like Prop 79, Maine Rx Plus uses the leverage of Medicaid prior authorization to obtain the best drug prices for its uninsured residents. If a drug company refuses to provide sufficient rebates to the Maine discount program, then Maine's Medicaid program may steer its drug purchases to the products of other drug companies that do provide rebates. The company's drugs could be removed from the Medicaid "preferred drug list" and those drugs would require "prior authorization" in order to be prescribed.

If a Medicaid patient needs a drug not on the preferred list, they can still get it through the "prior authorization" process. By law, Medicaid must provide access to necessary drugs, whether or not they are on a preferred list. Patients are further protected because prior authorization will not be used if there is only a single drug in a particular therapeutic category.

The drug companies sued and lost: The Pharmaceutical Research and Manufacturer's Association of America (PhRMA) sued Maine in 2000 to block start-up of the program. PhRMA sued all the way to the U.S. Supreme Court, and lost. PhRMA's lawsuit delayed program start-up to January 2004. The courts rejected PhRMA's claims and allowed the program to go forward without seeking or obtaining approval from the federal government's Medicaid agency. After the case was sent back by the Supreme Court for further proceedings, the final decision in the case by the district court ruled that "[Maine] retains the authority to put prior authorization in place, without first seeking approval of HHS, at any time it chooses." (*PhRMA v. Nicholas*, 353 F. Supp. 2d 231, 239 n.10 (Jan. 27, 2005).

No federal approval needed: Thus, PhRMA is wrong when it claims Prop 79 requires federal approval before start-up. The federal court cases allow California to go ahead with a similar program. PhRMA may choose to sue California over Prop 79, as it did in Maine, but this threat is unlikely to succeed given the Maine precedent.

After the Supreme Court case, Maine revised its program slightly: the biggest change was to limit eligibility to uninsured people below 350% of the federal poverty level (FPL). Previously, all uninsured Maine residents were eligible without regard to income. The new law also clarified that prior authorization would be used if "appropriate. . .to encourage manufacturer and labeler participation in the program" (Me. Rev. Stat. Ann. Tit.22, Sec. 2681(7) (2004)). Thus, the use of prior authorization leverage remains part of Maine Rx Plus, contrary to PhRMA's claims.

The threat of enforcement works: Maine is successfully negotiating discounts of up to 40% from drug companies right now. Because Maine has the authority to use the leverage of prior authorization, the program is working exactly as intended and is achieving its goal: the drug companies are coming to

the table offering sufficient discounts in order to *avoid* having their drugs taken off the preferred list. It is true, as PhRMA claims, that no drugs have yet been put on prior authorization as part of negotiations for the drug discount card. But this only proves the effectiveness of the Maine and Prop 79 approach: the threat of losing market share gives companies a strong incentive to cooperate and offer real discounts. To use an analogy: a parent asks a child to behave or else risk being sent to the child's room. If the child behaves and is never sent to the room, would anyone say the parent's discipline "program" isn't working simply because the child is never sent to the room? The goal of Maine Rx Plus and Prop 79 is to negotiate substantial discounts—not to take drugs off preferred lists. If the goal is achieved, then there is no need to put drugs on prior authorization.

State Pharmacy Assistance Programs: Unlike Prop 79, Prop 78 expressly requires the State of California to seek federal approval for a state pharmacy assistance program. (SPAP). Prop 79 simply requires that the state operate the program "consistent with federal law" and in a manner that maximizes the discounts available to Californians. So it's Prop 78 that requires federal approval, not Prop 79. The drug companies have it backwards. In fact, the Ohio program touted by PhRMA was denied SPAP status.

Many in Maine getting discounts: As of July 1, 2005, Maine Rx Plus had enrolled 93,315, or 28.7%, of an estimated 325,000 eligible residents after 17 months. Enrollment continues to grow every month. The program filled 276,380 discounted prescriptions by that date. Comparisons between the prices in Maine and Ohio will show that Maine prices are significantly less than in Ohio. These Maine prices will be reduced even more as Maine enters the next stage of implementation, negotiating additional rebates.

Ohio's Best Rx

Ohio consumer, senior and labor organizations tried to follow Maine's lead and enact a similar program. Like Prop 79, the Ohio organizations tried to put a citizen's referendum on the ballot to allow voters to enact an enforceable Maine-type discount program.

The bullying tactics of the drug companies: However, as in Maine, PhRMA responded with an aggressive legal attack. PhRMA filed lawsuits in dozens of Ohio counties challenging the signature-gathering effort for the referendum. At the same time, PhRMA offered to agree to a voluntary drug discount program. Without the resources to respond to the PhRMA legal onslaught, the Ohio groups reluctantly agreed to take up PhRMA on its offer.

A limited program: The Ohio legislature enacted the voluntary program, known as Ohio's Best Rx, in December 2003. Discounts from drug companies are entirely voluntary. Like Proposition 78, Best Rx does not allow the state to use its purchasing power from Medicaid, and thus does not use Medicaid leverage to negotiate prices. Eligibility is limited to uninsured people below 250% of FPL, significantly more restrictive eligibility than Prop 79 or Maine Rx Plus.

The program started up on January 11, 2005. As of August 30, 2005, the program had enrolled 34,664 residents, or about 2.5% of about 1.4 million eligible residents after nearly eight months of operation—far below the enrollment levels in Maine Rx Plus.

The Ohio program bases its prices on the average weighted negotiated prices of the state employee and retiree health plans (SE/RHP). Manufacturers may then voluntarily offer greater rebates to Ohio's Best Rx. The Ohio program, however, has had difficulties in determining this averaged weighted price. Pharmacy benefit managers (PBMs) for the SE/RHPs have reportedly refused to provide all data related to pricing, rebates and agreements between the PBMs and the drug manufacturers, thus making it impossible for the state to determine this average price accurately. Like the Maine program, Best Rx also obtains a discount from pharmacies.

Without enforcement, limited results: According to the program's August 2005 report, drug companies are not providing much in savings. The program has provided a total savings of \$1,647,914 to Ohio residents. However, only \$147,116 of that total, or just nine percent, came from drug companies. The other 91% in savings came from the discounts provided by pharmacies (see <http://www.ohiobestrx.org/pdfs/monthlyreport.pdf>, divide line "Total Manufacturer Discounts" by line "Total Savings for Participants"). Thus, the Ohio program has not generated much in discounts from drug companies. Voluntary programs like Best Rx cannot be expected to obtain substantial discounts because there is no incentive for drug companies to reduce their own (high) prices voluntarily.

Harder to enroll and harder to get discounts: Ohio's Best Rx also has a four-month waiting period for enrollees that had any type of prescription drug coverage (Prop 78 has a similar three-month waiting period, Prop 79 does not have any waiting period). Thus, someone with inadequate prescription drug coverage must go without *any* drug coverage for four months (and pay 100% of the costs out-of-pocket) before being eligible to enroll in Ohio's program. Obviously, this strongly discourages enrollment into the program.

California

California has its own experience with trying to get discounts on prescription drug prices. One voluntary approach similar to Proposition 78, the Golden Bear Pharmacy Program, failed when the drug companies refused to participate. After several years of trying to implement Golden Bear, the Schwarzenegger Administration shut it down. In contrast, over the 15 years, California's Medi-Cal program has used its bargaining power as leverage to negotiate and obtain hundreds of millions of dollars of rebates from the drug companies each year. The Schwarzenegger Administration estimates that the Medi-Cal rebate/discount program has saved taxpayers over \$5 billion. Prop 79 builds on this success here in California, by extending the discounts negotiated by the state to those Californians who do not have comprehensive prescription drug coverage. Prop 79 learns the lessons both from California and around the country: states must use their purchasing power as leverage in order to get substantial discounts. States cannot rely merely on the goodwill of the industry to voluntarily lower their own prices. Thus, only Prop79 provides cheaper drugs more Californians can count on.

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Paid for by Yes on 79, a coalition of consumer, senior, labor and health organizations and Consumers Union of U.S., Inc