

SB0690 ERISA- FAV - SHERR - HERPEL - EPIC.pdf

Uploaded by: DENNIS RASMUSSEN

Position: FAV



A Network Of
Independently Owned
Pharmacies

Testimony offered on
behalf of:

EPIC PHARMACIES, INC.

IN SUPPORT OF:

SB0690 – Pharmacy Benefits Managers – Definitions of Carrier, ERISA, and Purchaser.

Senate Finance Committee
Hearing: 3/16/22 at 1:00 PM

EPIC Pharmacies, Inc. **SUPPORTS SB0690 – Pharmacy Benefits Managers - Definitions of Carrier, ERISA, and Purchaser.**

Independent pharmacy has been dealing with the repercussions of Federal ERISA laws in Maryland as they related to PBMs for many years. The State and the HGO Committee have always taken the PBM assumption that their unscrupulous business practices were protected by ERISA laws as fact. Finally, Federal cases have made their way through the court system and in 2020, the Supreme Court decided to hear Rutledge v. PCMA. This case was brought by the Arkansas Attorney General in defense of a 2015 law that regulates PBM reimbursement to pharmacies and mandates fair payments for all insurance plans represented by the PBMs. In December of 2020 the court unanimously ruled on behalf of Rutledge and Arkansas. EPIC worked with the Committee in 2021 to remove any mention or implication that ERISA preempted PBM legislation from Maryland law but were discouraged by the committee's reluctance to broadly apply the ruling, choosing to only target reimbursement. Since last session, it has become clear in an opinion from the Maryland Attorney General and a report from the Maryland Insurance Administration that the ruling most certainly should apply to all types of PBM regulation. SB0690 will clean up the Maryland statute and expand the regulation of PBMs to all plans and all sections of the law.

In this Committee, hearings for as long as we can remember, EPIC fought the efforts of PCMA to limit any State law regulating PBMs to a very small percentage of plans. The Supreme Court eliminated the ERISA excuse from this argument and has indicated that all PBM plans are subject to regulation by State Legislatures and committees such as this Finance Committee. SB0690 will allow the State to enforce all current PBM laws in a way that more uniformly regulates the industry and allows for a more level playing field. This will ultimately benefits patients in Maryland.

3/16/2022

SB0690

We thank the committee for all the work they have done in the last two sessions and respectfully ask **your support for SB0690.**

Sincerely,

Dr. Jeffrey B. Sherr, P.D.
MD EPIC PharmPAC/Board Vice Chair
Owner, Apple Discount Drugs
443-235-2401
jeff@apple drugs.com

Dr. Gerard A. Herpel, P.D.
MD EPIC PharmPac & EPIC Board
Owner, Deep Creek Pharmacy
301-616-0130
docjer@deepcreekpharmacy.com

SB 690-IPMD-Favorable.pdf

Uploaded by: James Doyle

Position: FAV



SB 690

Pharmacy Benefit Managers- Definitions of Carrier, ERISA, and Purchaser

Position of Independent Pharmacies of Maryland (IPMD): FAVORABLE

WHAT THIS BILL DOES:

- **This Bill will subject ERISA Pharmacy Benefit Managers (PBMs) to all of the provisions of the Insurance Code, set out in Title 15, subtitle 16, that non-ERISA PBMs must already comply with.** Under this bill, all of the provisions of the Insurance Code dealing with PBMs will apply equally to ERISA PBMs.
- **This Bill implements the broad state regulation of ERISA PBMs as permitted by the decision of the U.S. Supreme Court in *Rutledge v. Pharmaceutical Care Management Association*, 141 S. Ct. 474 (2020).** *Rutledge* held, unanimously, that states have broad authority to regulate ERISA PBMs. The Supreme Court held in this landmark ruling that ERISA preemption did not apply as long as states did not require payment of specific benefits, or set rules for determining beneficiary status.
- Last session, in enacting Chapter 358, the General Assembly carved out or exempted ERISA PBMs from several sections of Title 15, subtitle 16 of the Insurance Code, because of claims by the PBMs that the *Rutledge* decision was very limited and did not allow full application of the Insurance Code to ERISA PBMs. To clarify the issue, the General Assembly wisely required an MIA study to clear up the issue of the scope of *Rutledge* and pre-emption.
- **The resulting MIA study completely rejects the position of the PBMs that ERISA pre-emption would prohibit or restrict full application of Title 15, subtitle 16, to ERISA PBMs:**
“It is the view of the MIA that, should the legislature elect to make all of the current provisions of Title 15, Subtitle 16 [of the Insurance Code] applicable to PBMs when contracted with an ERISA plan, the enforcement of those laws by the MIA would not be preempted by ERISA. Relying on *Rutledge*, we conclude that none of the Maryland PBM laws if applied to a PBM contracted to an ERISA plan would have an impermissible connection with or an impermissible reference to ERISA plans. The laws in question are concerned primarily with PBM-pharmacy relationships. They do not require an ERISA plan to pay specific benefits or bind plan administrators to specific rules for determining beneficiary status, adopt particular benefits, force ERISA plans to report detailed information, or otherwise control the benefit design and administration of an ERISA plan. And, they apply whether the PBM is contracted to an ERISA plan or a non-ERISA plan.” MIA report at page 17, emphasis added.
- **The bill also implements the position of record of the State of MD, in federal court filings, calling for broader regulation of PBMs.** As stated in the amicus brief in the *Wehbi* case, (see below), joined in by the State of MD: **“State regulation [of PBMs] is necessary because PBMs harm Pharmacies, Consumers, and States.”; “PCMA [the lobbying arm of the PBM s]**



attempts to limit Rutledge’s holding to cost regulations. PCMA is wrong. Rutledge reaffirmed that regulations that do not ‘for[ce] plans to adopt any particular scheme of substantive coverage’ are not preempted.” Amicus brief, emphasis added.

- ***Pharmaceutical Care Management Association v. Wehbi***, No.18-2929, U.S. Court of Appeals for the 8th Circuit, (2021), agreed with the view of MD; it rejected the very limited view of the PBMs of the *Rutledge* decision, and agreed with MD and the amici states, concluding there was no ERISA preemption where the state statute did not “require payment of specific benefits” or “bind plan administrators to specific rules for determining beneficiary status.”
- **THE POSITION OF LEGISLATIVE COUNSEL TO THE GENERAL ASSEMBLY also agrees:** “the current provisions of Title 15, subtitle 16 that House Bill 601 [as originally introduced in 2021] would make applicable to PBMs would not be preempted.”
- Passage of this bill is important to independent pharmacies, as it will finally require ERISA PBMs to comply with the same rules as non-ERISA PBMs. Currently, ERISA PBMs are exempt from many Insurance Code rules that non-ERISA PBMs must comply with. Rules prohibiting a pharmacy from discussing retail price information with a customer; recommending a more affordable drug; requiring a plan beneficiary to use a PBM affiliated pharmacy; allowing PBMs to reimburse pharmacies in an amount less than they reimburse their own pharmacies; no requirement to comply with the detailed pharmacy audit procedures set out in the Insurance Code; exempting ERISA PBMs from being required to set up review processes on pharmacy claims for disputed reimbursement claims, and other Code procedures that apply to other PBMs.
- **All of the relevant authorities, the MIA, the MD Attorney General, legislative counsel to the General Assembly, and the very recent federal 8th Circuit Court of Appeals decision in the *Wehbi* case, reject the position of the PBMs on the scope of *Rutledge*, and support the position of this bill that the state of MD may make all of the provisions of Title 15, subtitle 16 of the Insurance Code applicable to ERISA PBMs.**
- Any uncertainty concerning *Rutledge* has now been cleared up: ERISA pre-emption has no application to this bill. This bill will now eliminate the carve-outs given last session that were given due to the misinterpretation of the law by the PBMs, and apply those provisions of the Insurance Code equally to ERISA PBMs, as now clearly permitted by law.

Contact: James J. Doyle

Jimdoyle3@comcast.net

443-676-2940

DistrictAttnyPrivPracTestimony2022docx.pdf

Uploaded by: Justin Ready

Position: FAV

JUSTIN READY
Legislative District 5
Carroll County

—
MINORITY WHIP

—
Finance Committee



James Senate Office Building
11 Bladen Street, Room 315
Annapolis, Maryland 21401
410-841-3683 • 301-858-3683
800-492-7122 Ext. 3683
Justin.Ready@senate.state.md.us

THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

March 16, 2022

SB 906 Carroll County - State's Attorney - Restrictions on Practice

Chairman Smith, Vice Chair Waldstreicher, and members of the Judicial Proceedings Committee,

Senate Bill 906 is legislation that would prohibit the Carroll County State's Attorney from engaging in the private practice of law while serving as State's Attorney. Currently, only three counties, including Carroll County do not have this prohibition in law. Senate Bill 906 will simply codify what has been the practice in the Carroll County State's Attorney's office for over 30 years.

The Carroll County Senator voted 3-0 in favor of Senate Bill 906.

I respectfully request a favorable report on Senate Bill 906.

SB0690-453128-01 MD Ins Admin.pdf

Uploaded by: Justin Ready

Position: FAV



SB0690/453128/1

AMENDMENTS
PREPARED
BY THE
DEPT. OF LEGISLATIVE
SERVICES

24 FEB 22
15:18:07

BY: Senator Ready
(To be offered in the Finance Committee)

AMENDMENTS TO SENATE BILL 690
(First Reading File Bill)

AMENDMENT NO. 1

On page 1, in line 2, strike “**Definitions of Carrier, ERISA, and**” and substitute “**Definition of**”; in line 3, strike beginning with “repealing” through the second “and”; in line 14, strike “15–1606,”; and in line 15, strike “15–1628(a), 15–1628.3,”.

AMENDMENT NO. 2

On page 2, in lines 6, 16, 19, 24, 25, and 26, in each instance, strike the bracket; in line 19, strike “**(E)**”; and in lines 25 and 26, strike “**(F)**” and “**(G)**”, respectively.

On page 3, in lines 11, 13, 15, 17, 19, 21, and 26, in each instance, strike the brackets; and in the same lines, strike “**(H)**”, “**(I)**”, “**(J)**”, “**(K)**”, “**(L)**”, “**(M)**”, and “**(N)**”, respectively.

On page 4, in lines 20, 22, and 26, in each instance, strike the brackets; and in the same lines, strike “**(O)**”, “**(P)**”, and “**(Q)**”, respectively.

On page 5, in lines 4, 7, 18, and 20, in each instance, strike the brackets; in the same lines, strike “**(R)**”, “**(S)**”, “**(T)**”, and “**(U)**”, respectively; and strike in their entirety lines 22 through 24, inclusive.

On pages 7 and 8, strike in their entirety the lines beginning with line 18 on page 7 through line 16 on page 8, inclusive.

OAG HAU_FAV_SB0690.pdf

Uploaded by: Patricia O'Connor

Position: FAV

BRIAN E. FROSH
Attorney General

ELIZABETH F. HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

Writer's Direct Email:
poconnor@oag.state.md.us



WILLIAM D. GRUHN
Chief
Consumer Protection Division

Writer's Direct Fax No.
(410) 576-6571

Writer's Direct Dial No.
(410) 576-6515

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

March 15, 2022

To: The Honorable Delores G. Kelley
Chair, Finance Committee

From: The Office of the Attorney General's Health Education and Advocacy Unit

Re: Senate Bill 690 (Pharmacy Benefits Managers - Definition of Carrier, ERISA, and Purchaser): Support

The Office of the Attorney General's Health Education and Advocacy Unit (HEAU) supports Senate Bill 690, which removes carve outs for ERISA plans, allowing previously enacted protections to help more consumers. This bill provides that Maryland's Pharmacy Benefits Manager (PBM) regulatory scheme applies when a PBM contracts with a health benefit plan, including an ERISA plan, in keeping with the conclusions in the Report of the Maryland Insurance Administration *on Rutledge v. Pharmaceutical Care Management Association* and its impact on Title 15, Subtitle 16 of the Maryland Insurance Article issued on January 5, 2022:

Rutledge recognizes that PBMs are not health benefit plans as defined under ERISA and, thus, that the regulation of PBMs is not preempted by ERISA. *Rutledge* confirmed that this is so, even when the purchaser of PBM services is an ERISA plan, as long as the state's regulation of the PBM does not effectively regulate the ERISA plan itself. While that line has been the subject of much litigation, as a general rule this means that state laws that direct the decisions of the ERISA plan itself, such as requiring certain benefits, benefit structures, or benefit determinations, are preempted; while state laws regulating PBMs that may also impact ERISA plan costs and design structures or that might result in some lack of uniformity in plan design are not preempted.

Applying that standard to Maryland law, **it is the view of the MIA that should the legislature determine to apply additional provisions of Title 15, Subtitle 16 to PBMs when providing services to an ERISA plan, ERISA would not preempt the MIA's enforcement of those laws in that context.** This view is informed in part by the recent opinion of the U.S. Court of Appeals for the Eighth Circuit in *Pharmaceutical Care Management Assoc. v. Wehbi*, No. 18-2926 (8th Cir. Nov. 17, 2021) (“*Wehbi*”), the first case applying the *Rutledge* decision. On remand from the U.S. Supreme Court following *Rutledge*, the Eighth Circuit in *Wehbi* found that North Dakota laws broadly regulating PBMs were not preempted by ERISA. While not binding on Maryland (which is in the Fourth Circuit), the reasoning of the Eighth Circuit is persuasive and presents a logical application of *Rutledge* and prior Supreme Court jurisprudence relating to ERISA preemption to legislative provisions similar to those in force in Maryland respecting PBMs.

(Emphasis added).

We concur with the MIA's conclusions and urge a favorable report from the committee.

cc: Senator Ready, Sponsor