HB 601

Pharmacy Benefit Managers-Revisions

Position: FAVORABLE

HB 601 as amended and passed by the House, should be adopted and reported favorably in the same form by the Senate Finance Committee in order to implement the Supreme Court decision in *Rutledge*.

HB 601 was introduced as the result of the Supreme Court decision in *Rutledge v. Pharmaceutical Care Management Association* (_U.S._, Dec 10, 2020). *Rutledge* greatly expanded the authority of state legislatures to regulate Pharmacy Benefit Managers (PBMs). *Rutledge* concerned an Arkansas law that effectively required PBMs to reimburse pharmacies at a price equal to or higher than the pharmacies' wholesale costs, to prevent them from losing money on the sale of a drug. The PBMs, through their association, PCMA, actually challenged the law, contending that the state's authority to regulate PBMs was preempted by ERISA. The Court unanimously rejected that argument.

1. **In passing HB 601 in its amended form, the House has partially implemented the holding of *Rutledge*. The bill eliminates ERISA plans from key exemptions in the Insurance Code, thereby allowing reforms of the law governing pharmacies and PBMs to take broader effect in ERISA plans, and implementing the Court's decision in MD.**

PBMs are the "middlemen" between insurers, pharmaceutical manufacturers, and pharmacies. They develop formularies, that is, the list of drugs covered under a plan. They negotiate with pharmaceutical companies to have their drugs placed on the formulary. They negotiate the costs of the prescription plan with insurers or managed care organizations. And they dictate to pharmacies in the health plan the reimbursements made to pharmacies.

PBMs collect fees from all of these groups. They receive rebates from the manufacturers to have drugs placed on the formulary. They engage in "spread pricing" where the PBM charges the insurer one price for the cost of a drug to a beneficiary, and yet reimburses the pharmacy a lesser amount, retaining the difference as profit. They claw back from pharmacies various direct and indirect remuneration fees based on a largely unknown rating system of pharmacies. Some of the largest PBMs which control most of the market are owned or have common ownership with the insurers. And PBMs operate their own retail, mail order, and specialty pharmacies.

PBMs have, financially, done exceptionally well under this system. Independent, community pharmacies have not done so well, many having had to sell out to the PBM chains; others,

continuing in business, often take losses on prescriptions because of low reimbursement rates paid to them by the PBMs.

States throughout the country have desired to more fully regulate the conduct of PBMs. One large obstacle to doing so has been ERISA preemption, which had been held by various courts to largely foreclose state PBM regulation of ERISA plans.

That belief was widely held until the *Rutledge* decision. In that case, a unanimous Supreme Court gave much broader authority to the states to regulate ERISA PBMs. This authority is what the states had wanted, including MD, and this is what HB 601 allows.

In fact, MD's Attorney General, Brian Frosh, had joined in an *amicus* filing with dozens of other states, to urge the Court to take the case and broaden the states' regulatory authority over PBMs. The *amicus* filing, citing to the broad power of PBMs, and the fact that PBMs owned their own retail and mail order pharmacies, referred to the potential "undue influence" and "self-dealing" of PBMs. Attorney General Frosh and the others could not have been disappointed with the Court's ruling.

The Court explained, "ERISA is therefore **primarily concerned** with preempting laws that require providers to structure benefit plans in particular ways, **such as by requiring payment of specific benefits**." Op. at 4-5. (emphasis added)

The core of the Courts holding is this: "In short, ERISA does not pre-empt state rate regulations that merely increase costs or alter incentives for ERISA plans **without forcing plans to adopt any particular scheme of substantive coverage." Op at 6. (emphasis added)**

Throughout the House proceedings, the PBMs have attempted to protect their interests by reading the *Rutledge* holding in the most narrow way, even clearly contradicting the Court's own language cited above. But nothing in MD law, or in HB 601, **requires** a PBM to adopt any **substantive benefit or above. But specific coverage**. If the Court's own language was not clear enough to the PBMs, on March 19, the Attorney General's legislative counsel issued an opinion cited by Delegate Kipke indicating that MD law and HB 601 did **not** appear to violate the holding of Rutledge. "It is my view that Rutledge is not so limited [only to issues related to reimbursement], and that **PBM laws may apply to ERISA plans** as long as their application does not have the effect of dictating plan terms or effectively forcing certain options in plan structure." Assistant Attorney General Kathryn Rowe, March 19, 20221.

As a result, the House passed HB 601 which, although not going as far as permitted by *Rutledge*, addresses some key concerns of independent, community pharmacies. The bill will now allow state regulation of PBMs administering ERISA plans previously off-limits. Additionally, HB 601 will now more broadly cover and prohibit various financial claw backs that have been used for years by PBMs against independent pharmacies, such as additional fees for adjudicating claims, and direct and indirect remuneration fees based on patient outcomes and metrics.

While many other PBM abuses still need to be addressed, HB 601 is an excellent foundation to start further discussions concerning PBM reform, including such issues as "spread pricing", which in 2018, amounted to $72 million for PBMs just under the Medicaid program.

The *Rutledge* case, as urged by Attorney General Frosh and many other state Attorneys General, has now given MD that opportunity, but to take advantage of this new authority, and implement it in the state, HB 601 needs to be passed.

2. The PBMs, in arguing against HB 601 in the House, were simply arguing for a continued statutory immunity to their unfair practices.

At the present time, PBMs enjoy an immunity to many of their practices concerning any ERISA plan. This is because of the statutory definition of a "purchaser" under current MD law. So, under current law, there is no opportunity to further regulate PBMs with respect to any employer plan. The PBMs would like to see this continue, even as MD's own Attorney General, in an *amicus* filing with other states, urged the Supreme Court to allow for greater state oversight, citing potential undue influence and self-dealing. The Supreme Court did just that in Rutledge.

PBMs opposed HB 601, because they want their legislative immunity to their unfair practices to continue, without debate or risk of change by the General Assembly.

If HB 601 is enacted, in its amended form, PBMs would still be entirely free to argue that any particular statute was pre-empted by ERISA. There is nothing in HB 601 which restricts the PBMs from arguing and legally challenging that a particular statute violates ERISA.

So, the PBMs lose nothing by the enactment of HB 601, except a now defunct legal claim that the state is powerless to legislate reforms. On the other hand, should HB 601 fail, MD beneficiaries and particularly, independent, community pharmacies, lose all opportunity to further regulate PBMs under ERISA plans for unfair practices that need reform.

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