

HB 601-senate finance-IPMD.pdf

Uploaded by: Doyle, James

Position: FAV



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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Crossover_HB0601_FAV_OAG HEAU.pdf

Uploaded by: O'Connor, Patricia

Position: FAV

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STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
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March 30, 2021

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

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

Re: House Bill 601 (Pharmacy Benefits Managers - Definition of Purchaser and ERISA): Support

The Office of the Attorney General's Health Education and Advocacy Unit (HEAU) supports House Bill 601 which would repeal the current exclusion of ERISA plans from the definition of the term "purchaser" in Maryland's registration and regulatory scheme regarding pharmacy benefits managers (PBMs).

Maryland is one of many states that have enacted legislation in recent years to curb abusive prescription drug reimbursement practices by PBMs, who make money on the spread between the rates at which they reimburse pharmacies and the drug prices they charge health plans. The Pharmaceutical Care Management Association (PCMA), a PBM trade association, launched litigation across the country to invalidate these state laws intended to address escalating prescription drug prices. PCMA contended that state regulation of PBMs generally, and state drug-reimbursement regulations specifically, were categorically preempted by ERISA. Maryland's current PBM law does not apply to health benefit plans subject to ERISA. Md. Code Ann., Ins. § 15-1601(i).

PCMA challenged an Arkansas law requiring a PBM to reimburse pharmacies for prescription drugs at a rate equal to or higher than the pharmacy's acquisition cost. The PCMA litigation ended unfavorably for PBMs when the Supreme Court recently ruled 8-0 that "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." *Rutledge v. Pharmaceutical Care Management Association*, 592 U.S. , 141 S.Ct. 474 (2020). The Court concluded the Arkansas law is "merely a

form of cost regulation” without an impermissible connection to an ERISA plan because the law would not effectively dictate plan choices. *Id.* at 481. In addition, because the law did not act “immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law’s operation,” the Court concluded the law did not impermissibly “refer to” ERISA and upheld the law. *Id.*

This bill removes the blanket ERISA exclusion, but conservatively leaves in place carve-outs for such plans to allow time to study the ramifications of *Rutledge*. We acknowledge and are grateful for the efforts of the Health and Government Operations subcommittee, and the Insurance Commissioner and staff, to address questions about the *Rutledge* ruling’s impact that were raised in multiple meetings by various stakeholders, and to begin the process of expanding Maryland’s regulation of pharmacy benefits managers without an ERISA exemption.

We urge the committee to give House Bill 601 a favorable report.

cc: Sponsor

HB0601 - PBMs - Revisions - FAV - Dr. Hose - EPIC

Uploaded by: RASMUSSEN, DENNIS

Position: FAV

3/30/2021

HB0601



A Network Of
Independently Owned
Pharmacies

Testimony offered on behalf of:
EPIC PHARMACIES, INC.

IN SUPPORT OF:
HB0601 – Pharmacy Benefits Managers – Revisions, as Amended

Senate Finance Committee
Hearing: 3/30/2021 at 1:00 PM

EPIC Pharmacies, Inc. **SUPPORTS HB0601** – Pharmacy Benefits Managers - Definition of Purchaser and ERISA, as amended by the House.

We have been following federal ERISA lawsuits related to PBMs for the last several years as they made their way through the court system and were encouraged in 2020 when 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. When the case was postponed in April due to the pandemic, we never thought we would have a ruling prior to the 2021 legislative session. I, and the collective pharmacy community, were surprised when the Court quickly returned a unanimous decision in December on behalf of Rutledge and the State of Arkansas.

In this Committee and Subcommittee hearings for as long as we can remember, we have heard from PCMA that any State law regulating PBMs is preempted by ERISA and therefore only represents the fully insured marketplace. The Supreme Court once and for all eliminated this argument and has indicated that all PBM plans are subject to regulation by State Legislatures and committees such as this one. HB0601 is a simple bill that eliminates the mention of ERISA in the definition of a purchaser and therefore cleans up Maryland law to eliminate any reference to or limitations based on this federal statute. We believe this 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 which ultimately benefits patients.

I thank the Committee for all the work they have done in the last several years and respectfully request a favorable report on HB0601, as amended by the House.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian M. Hose".

Brian M. Hose, PharmD
EPIC PharmPAC Chairman
brian.hose@gmail.com

HB0601 - PBMs - Revisions - FAV - Wiener - Mt. Ve

Uploaded by: RASMUSSEN, DENNIS

Position: FAV

3/30/2021

HB0601

Mt. Vernon Pharmacy

900 Cathedral St. * Baltimore, Maryland 21201 * Phone: 410-539-8030 * Fax: 410-539-8115
Prescription and Over the Counter Medications * Prescription Counseling * Diabetes Supplies * Vaccinations

**Testimony offered on behalf of:
MT. VERNON PHARMACY**

IN SUPPORT OF:

HB0601 – Pharmacy Benefits Managers – Revisions, as Amended

Senate Finance Committee
Hearing: 3/30/2021 at 1:00 PM

On behalf of **Mt. Vernon Pharmacy**, an EPIC Pharmacy member, I would urge the Committee to **Support HB0601 – Pharmacy Benefits Managers – Revisions, as amended by the House.**

Do you want the bills that the Maryland legislature passes into laws to be relevant?

For as long as I can remember, PBMs have asserted that local State laws have very little impact and effect because the PBM's activities are exempt from Maryland laws because of ERISA preemption.

On December 10, 2021, now considered a national holiday by Community Pharmacists, the Supreme Court of the United States unanimously ruled in *Rutledge vs. PCMA*, that PBM's are indeed not exempt from State laws because of ERISA.

HB0601, as amended, with input from the Attorney General's office, cleans up language in Maryland law as a result of the Supreme Court ruling.

If the legislature passes legislation in hopes that it has meaning, I cannot imagine how this bill could be opposed by any legislator in the General Assembly.

I respectfully request a **Favorable Opinion on HB0601, as amended.**

Sincerely,



Steve Wiener, Pharmacist
Mt. Vernon Pharmacy and Mt. Vernon Pharmacy at Fallsway
EPIC PharmPAC Treasurer
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2021.03.29 MD HB 601 Testimony.pdf

Uploaded by: Johansen, Michael

Position: UNF



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March 29, 2021

Chairwoman Delores G. Kelley
Vice Chair Brian J. Feldman
Senate Finance Committee
Miller Senate Office Building, 3 East
Annapolis, Maryland 21401

House Bill 601 – Altering the Definition of Purchaser

Dear Chairwoman Kelley, Vice Chair Feldman, and Members of the Senate Finance Committee:

On behalf of the Pharmaceutical Care Management Association (PCMA), I appreciate the opportunity to provide comments on the House-amended version of HB 601, a bill to amend the statutory definition of purchaser in various sections of the Insurance Statute (15-1601 through 15-1633). I respectfully request an unfavorable report on the bill.

PCMA is the national trade association representing America's Pharmacy Benefit Managers (PBMs), which administer outpatient prescription drug plans for more than 266 million Americans with health coverage provided through Fortune 500 large and small employers, labor unions and government programs. PBMs are projected to save payers over \$34.7 billion through the next decade -- \$962 per patient per year – as a result of tools such as negotiating price discounts with drug manufacturers, establishing and managing pharmacy networks, in addition to disease management and adherence programs for patients.

HB 601 is a response to the recent December 2020 decision of the US Supreme Court commonly referred to as "Rutledge," in which the court was asked to examine whether an Arkansas law regarding Maximum Allowable Cost ("MAC") reimbursements to pharmacies was preempted by federal ERISA statute, or in other words, whether ERISA plans were exempt from the state's MAC law. Ultimately, the court held that the Arkansas law is not preempted by ERISA, because the MAC-specific law in question was simply a "rate regulation," which is something states have the authority to regulate, even if it impacts a plan's costs.

In fact, the Court acknowledged that the law in question could raise costs for ERISA plans and that those plans could pay more for prescription benefits in Arkansas as a result, as compared to other states. Additionally, the Court implied that states are still not allowed to force employer plans to structure benefits in a specific way, and that a law that increases costs so much for employers that the employer must restructure its benefits may run into trouble with the federal law.

It is with these cost considerations for employers and local governments in mind that we respectfully oppose HB 601. I appreciate the opportunity to voice our concerns and am happy to answer any questions you may have.

Sincerely,

Heather R. Cascone

Kipke - HB601 - OAG

Uploaded by: Kipke, Nicholas

Position: INFO

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 19, 2021

The Honorable Nicholas R. Kipke
212 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Kipke:

You have asked for advice concerning whether the entire PBM law can be applied to ERISA plans under the law as interpreted in the *Rutledge* case. Specifically, you have asked whether the *Rutledge* ruling applies only to issues related to reimbursement. It is my view that the *Rutledge* holding is not so limited, and that PBM laws may apply to ERISA plans so long as their application does not have the effect of dictating plan terms or effectively forcing certain options in plan structure.

In my letter of January 6, 2021, I discussed the opinion of the Supreme Court in *Rutledge v. Pharmaceutical Care Management Association*, 141 S.Ct. 474 (2020), which addressed an ERISA challenge to an Arkansas law very similar to those found in Insurance Article (“IN”), §§ 15-1628.1 and 15-1642¹ and held that the law “ha[d] neither an impermissible connection with nor reference to ERISA and [wa]s therefore not preempted.” *Id.* at 478.

ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA. 29 U.S.C. § 1144(a). Generally, “a state law relates to an ERISA plan if it has a connection with or reference to such a plan.” *Rutledge*, 141 S.Ct. at 479, citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001). Addressing the “connection with” portion of the test first, the Court considered ERISA’s objectives “as a guide to the scope of the state law that Congress understood would survive.” *Id.* at 480, citing *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 325 (1997). The Court concluded that “ERISA is . . . primarily concerned with pre-empting laws that require providers to

¹ The Act required PBMs to tether reimbursement rates to pharmacies’ acquisition costs by timely updating their MAC lists when drug wholesale prices increase. It also required that PBMs provide administrative appeal procedures for pharmacies to challenge MAC reimbursement prices that are below the pharmacies’ acquisition costs, and barred them from paying less than the acquisition cost if the pharmacy could not have acquired the drug at a lower price from its typical wholesaler. The Act further permitted a pharmacy to decline to sell a drug to a beneficiary if the relevant PBM will reimburse the pharmacy at less than its acquisition cost. *Id.* at 479.

The Honorable Nicholas R. Kipke

March 19, 2021

Page 2

structure benefit plans in particular ways, such as by requiring payment of specific benefits, or by binding plan administrators to specific rules for determining beneficiary status,.” *Id.* The Court further stated that a “state law may also be subject to preemption if “acute, albeit indirect, economic effects of the state law force an ERISA plan to adopt a certain scheme of substantive coverage.” *Id.* In summary, the Court stated that “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.” This language does not limit this conclusion to regulations relating to reimbursement, but would include any regulation that might increase costs or alter incentives but would fall short of forcing plans to adopt any particular scheme of substantive coverage. The *Rutledge* Court found that the effect of the Arkansas law was not “so acute that it will effectively dictate plan choices,” and thus found that it did not have an impermissible connection with an ERISA plan. *Id.* at 481.

Turning to the “refers to” branch of the test the Court stated that a law refers to ERISA plans if it “acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation.” *Id.* at 481, citing *Gobeille v. Liberty Mut. Ins. Co.*, 577 U. S. 312, 319-320 (2016). It held that the Arkansas law did not refer to ERISA plans because it applied to PBMs whether or not they manage an ERISA plan, and did not directly regulate health benefit plans at all.

Maryland laws regulate a number of aspects of the interactions between a PBM and a contracted pharmacy, but none address the structure of plans or place requirements or prohibitions on the structure of any plan. Nor does it appear that any of the provisions would have the effect of forcing a PBM to structure their plans in a particular way. In addition, like the Arkansas law, the provisions of the bill apply to PBMs whether or not they are ERISA plans and do not directly regulate health benefit plans. For these reasons it is my view that the current provisions of Title 15, Subtitle 16 that House Bill 601 would make applicable to PBMs that do manage ERISA plans would not be preempted. It is possible, however, that some provisions would have some effect on plan structure of which I am not aware.

Sincerely,



Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
kipke15