



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 8<sup>th</sup> 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 8<sup>th</sup> 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.

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