March 15, 2018

Governor Asa Hutchinson
Office of the Governor, State of Arkansas
500 Woodlane Ave
Little Rock, AR 72201

Re: Veto Request for SB2 and HB1010 – AN ACT TO CREATE THE ARKANSAS PHARMACY BENEFITS MANAGER LICENSURE ACT

Dear Governor Hutchinson:

The Pharmaceutical Care Management Association ("PCMA") respectfully submits the following comments urging you to veto SB2 and HB1010, An Act to Create the Arkansas Pharmacy Benefits Manager Licensure Act. PCMA is the national trade association representing America's pharmacy benefit managers ("PBMs"), which administer prescription drug plans for more than 266 million Americans with health coverage provided through Fortune 500 employers, health insurance plans, labor unions, and Medicare Part D.

SB2 and HB1010 restricts the tools that PBMs use to reduce prescription drug costs while still maintaining high-quality pharmaceutical care, leading to higher prescription drug costs for Arkansas residents and employers. SB2 and HB1010 interfere with business-to-business contracts and includes government rate setting for private businesses.

The provisions of SB2 and HB1010 interfere with PBMs' management and administration of prescription-drug benefits for health plans. PBMs are essential service providers to those benefit plans, and Arkansas cannot use its authority under the guise of licensing them to impose requirements that allow the State to "reach into" existing contracts and impose changes to how ERISA plan administrators choose to structure their benefit design or compensate PBMs for their services.

SB2 and HB1010 are ostensibly designed to simply provide for "regulation and licensure" of pharmacy benefit managers (PBMs) in the State, however, it improperly confers on the State Insurance Commissioner, State Insurance Department, and other state agencies the authority to regulate many aspects of a PBM's business, as well as the choices the PBMs, its clients and the pharmacies that participate in its networks choose to make in negotiations. These include forcing not only PBMs and their clients, but also PBMs and pharmacies, and potentially pharmaceutical manufacturers, to re-write all their present and future contracts to comply with the new requirements:

- PBM clients: SB2 and HB1010 seek to regulate how PBM clients (the employer plans and state and federal programs for which they administer prescription drug benefits) develop and manage their formularies, and how they choose to specify benefit design, pricing terms, levels of access to pharmacy networks, and pharmacy performance requirements.
- PBM-pharmacy networks: SB2 and HB1010 seek to regulate the terms of pharmacy contracts, including credentialing, accreditation, performance standards, reimbursement methodology, amounts and fees chargeable to plan members, and grievance procedures.
- Pharmaceutical manufacturers: SB2 and HB1010 convey authority to the Commissioner to promulgate rules regulating the pricing terms of those contracts, including "rebates, discounts, or other financial incentives and arrangements with drug companies."

SB2 and HB1010 are almost certain to be found unconstitutional for the following reasons:

ERISA Preemption

SB2 and HB1010 run afoul of ERISA, which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[1] Arkansas cannot impose requirements upon PBMs, which administer pharmaceutical benefits for employee benefit plans if those requirements effectively either directly or indirectly regulate the administration of those ERISA plans.[2]

SB2 and HB1010 would almost certainly be deemed unconstitutional under recent rulings of the U.S. Supreme Court, the Eighth Circuit Court of Appeals, and the U.S. District Court for the Eastern District of Arkansas. The Supreme Court has stated that ERISA provides a "comprehensive system for the federal regulation of employee benefit plans"[3] and applies to all employer-based health plans, whether insured or self-insured. Its central design "is to provide a single national scheme for the administration of ERISA plans without interference from the laws of the several States."[4] No state mandate can directly or indirectly interfere with key matters of plan administration, such as dictating terms of PBM contracts with their clients.

In January of this year the Eighth Circuit heard the State of Arkansas's appeal of the Arkansas District Court's opinion striking down Arkansas Act 900 of 2015 as preempted by ERISA,

[1] 29 U.S.C. § 1144(a).
[2] See Pharm. Care Mgmt. Ass'n v. District of Columbia, 613 F.3d 179, 188 (D.C. Cir. 2010).
[3] District of Columbia v. Greater Was. Bd. of Trade, 606 U.S. 125, 127 (1992)
[4] Gobeille v. Liberty Mut. Ins. Co, 136 S.Ct. 936, 947 (2016).

because the statute interfered with key matters of plan administration.[5] Act 900 mandated that pharmacies be reimbursed for the generic pharmaceuticals they dispense at an artificial "acquisition cost." The Act also required PBMs to maintain an administrative appeal procedure to allow pharmacies to challenge reimbursements prospectively and retroactively, even to the point of declining to provide services to a patient or PBM. SB2 and HB1010 go even further than Act 900. This proposed bill would impose broad and unprecedented State oversight of both (I) how PBMs reimburse pharmacies in their networks and (2) how PBMs are compensated under contracts with their client health plans.

This bill facially interferes with the structure of ERISA plans in Arkansas by limiting plan choices, including how ERISA plan administrators choose to reimburse Arkansas pharmacies for member prescription drug benefits through their PBMs, as well as how they choose to compensate PBMs for their services.

Directly on point here-and binding in Arkansas-is the Eighth Circuit's 2017 opinion striking down a similar Iowa law which regulated how PBMs establish generic drug pricing and required that certain disclosures on drug pricing methodology be made to PBMs' network pharmacies as well as the Iowa insurance commissioner.[6] In that Case, the Court found that the Iowa law impermissibly regulated prescription drug benefits for ERISA plans because -like this Resolution-it dictated the manner and terms under which PBMs and pharmacies choose to agree on reimbursements for generic drugs. It also found that the Iowa law had an impermissible "connection with" ERISA plans because it "govern[ed] a central matter of plan administration" as well as "interfer[ed] with nationally uniform plan administration," quoting the Supreme Court in Gobeille. States simply cannot "undermine the congressional goal of minimizing the administrative and financial burden on plan administrators-burdens ultimately borne by the beneficiaries. "[7]

SB2 and HB1010 perversely confers enormous powers on the Commissioner, yet there is no way that the Commissioner's review of pharmacy reimbursement rates or PBM compensation can be accomplished without the reporting, disclosure, and recordkeeping that the Eighth Circuit in Gerhart held to be "fundamental aspects of ERISA", necessitating Federal preemption.

The District Court in Arkansas relied heavily on this Eighth Circuit opinion in Gerhart in invalidating Act 900 in the Rutledge case, as it is binding in Arkansas. It is almost certain that the Circuit Court panel will also rely heavily on that same precedent in upholding the District Court's result sometime this spring. Given that appeal, and the close similarities of SB2 and HB1010 to Arkansas Act 900 as well as the Iowa statute invalidated in Gerhart, we believe enactment of SB2 and HB1010 will be counterproductive legally as well as costly to the citizens of Arkansas

[5] Gobeille v. Liberty Mut. Ins. Co, 136 S.Ct. 936, 947 (2016).
[6] Pharm. Care Mgmt. Ass 'n v. Gerhart, __ (8th Cir. Jan. 11, 2017) reh 'g denied.
[7] Gobeille, 136 S. Ct. at 944.

Legislation is Void Under the Contracts Clause of the Constitution

SB2 and HB1010 would also be void under the Contracts Clause of the U.S. Constitution, which provides that "no state shall…pass any…[l]aw impairing the Obligation of Contracts." The legislation fails the balancing test set up by the U.S. Supreme Court: the State cannot show that SB2 and HB1010 have a significant public purpose that justifies the substantial impairment of existing private contracts to conform to Arkansas' unique requirements.[8]

Section 7 of this legislation declares a "state of emergency" regarding the "sustainability of pharmacies in Arkansas", thus allowing SB2 and HB1010 to become effective on the date of approval by the Governor, or expiration of the period of time during which the Governor may veto it. Thus, it operates as a significant and substantial impairment to all of the pre-existing contractual relationships that PBMs have with their health plan clients and pharmacies, and pharmaceutical manufacturers.

It is not adequate for the Legislature to simply decree in Section 7 that an "emergency" exists without showing (1) that Arkansas residents in fact are lacking "continued access to pharmacy services", and (2) that the method chosen to address this supposed lack of access will be effective. Simply put, the State has not shown that citizens cannot access pharmacy services. And as for citizen health and safety, SB2 and HB1010 itself forbids pharmacy accreditation standards that are more stringent than requirements of the Arkansas State Board of Pharmacy for licensure, unless approved by the Commissioner, risking patient safety by prohibiting standards that are essential for the drug regimens of patients, especially those with complex chronic conditions.

In sum, SB2 and HB1010 is likely to be adjudicated as void by a Court, as it inappropriately inserts the State agencies into the details of the thousands of contracts PBMs have with pharmacies, their clients, and pharmaceutical manufacturers.

For the reasons cited above, PCMA respectfully asks that you veto SB2 and HB1010.

Sincerely,

Melodie Shrader
State Affairs

[8] See *Energy Reserves v. Kansas Power & Light*, Sup. Ct. 1983.