

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

INDUSTRY, BUSINESS, AND LABOR COMMITTEE

Tuesday, November 8, 2005
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Karen K. Krebsbach, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Karen K. Krebsbach, Duaine C. Espgaard, Tony Grindberg, Joel C. Heitkamp, Duane Mutch; Representatives Bill Amerman, Tracy Boe, Donald L. Clark, Donald D. Dietrich, Mark A. Dosch, Glen Froseth, Pat Galvin, Nancy Johnson, Jim Kasper, George J. Keiser, Scot Kelsh, Dan J. Ruby, Don Vigesaa

Member absent: Senator Dave Nething

Others present: See attached appendix

It was moved by Representative Keiser, seconded by Senator Mutch, and carried on a voice vote that the minutes of the August 24, 2005, meeting be approved as distributed.

PHARMACY BENEFITS MANAGEMENT STUDY

Chairman Krebsbach called on committee counsel to review a memorandum entitled [Pharmacy Benefits Management Industry - Background Memorandum](#).

Chairman Krebsbach called on Dr. Patricia A. Hill, North Dakota Pharmacists Association, who introduced three individuals who presented testimony on behalf of the North Dakota Pharmacists Association: Dr. Robert L. Garis, Creighton University School of Pharmacy; Mr. Gary Gustafson, Fairview Health Systems; and Mr. Gunnar Marich, PBM Analyzers, LLC.

Dr. Garis presented written documents, copies of which are on file in the Legislative Council office [[Dr. Garis's presentation](#)]. He said a pharmacy benefit manager (PBM) provides a valuable service in claims processing for which the PBM deserves a reasonable return. However, he said, a key issue to consider is that hidden cashflows to the PBM are used to compensate for artificially low administration fees. He said purchasers generally do not know the actual price of the PBM service because the PBM industry does not appear to include disclosure of cashflows that are "under the radar." He said some PBMs charge a realistic and fair administration fee for the service with no other cashflows and generally provide a good value while other PBMs charge a low administration fee and augment the low fee with markups on individual prescriptions through spread

pricing and through mail-order pharmacies with excess of markups. He said spread pricing and high profits on generic drugs are methods through which PBMs are able to make a significant amount of money that the plan sponsor is not fully aware.

In response to a question from Representative Kasper, Dr. Garis said disclosure requirements would help plan sponsors reduce costs and keep costs down for consumers.

In response to a question from Representative Froseth, Dr. Garis said although contracts with PBMs are negotiable, most plan sponsors do not have the information they need to negotiate a reasonable contract.

In response to a question from Representative Ruby, Dr. Garis said the prescriptions with the highest spread are generally the least commonly used and are not a high profile or highly advertised product.

In response to a question from Senator Espgaard, Dr. Garis said if a plan sponsor has information regarding spread pricing, the plan sponsor can determine which PBM offers a better value.

In response to a question from Senator Krebsbach, Dr. Garis said if manufacturers posted drug prices, more information would be available to help in making better decisions with respect to the selection of a PBM.

Dr. Garis said plan sponsors have been convinced by PBMs that a PBM affiliate mail-order pharmacy is a cheaper option for plan members so that the sponsors will channel their members away from a community pharmacy and toward mail-order pharmacies. He said a study performed by Creighton University researchers concluded that when a member copayment is lowered to provide an incentive for members to go with a mail-order service, the mail-order option costs the plan sponsor more than a retail pharmacy.

In response to a question from Representative Vigesaa, Dr. Garis said PBMs will establish multiple maximum allowable cost lists and apply different lists to different plans.

In response to a question from Representative Keiser, Dr. Garis said when a PBM offers a lower copayment for the use of a mail-order pharmacy, it appears to the plan sponsor that the cost of the drug

will be lower. However, he said, that is often not the case.

Dr. Garis said a January 2000 report by the Government Accounting Office which concluded that PBMs save money over cash prices did not independently verify information provided by PBMs or pharmacies. He said a Price Waterhouse Coopers report from 2004 which suggests that PBMs should not be regulated was a report commissioned by the lobby group for the PBM industry and assumes that any regulation would eliminate all benefit management tools. A Congressional Budget Office report from 2004, he said, was based on data generated through a survey of large PBMs. He said that report suggested that PBMs save 30 percent but did not specify from what source the savings would come.

Dr. Garis said PBMs should disclose the source and magnitude of cashflows to provide plan sponsors with adequate information to protect themselves. In addition, he said, legislation is necessary to protect consumers and lower costs for employers.

Mr. Gustafson submitted written documents, copies of which are on file in the Legislative Council office [[Mr. Gustafson's presentation](#)]. He said the PBM industry has generally been unregulated and the PBM industry has not made it easy for businesses and consumers to understand the business practices of the industry. He said the marketplace is not satisfied with current PBM services because there is a misalignment with customers' needs and expense savings are illusory. He said even large companies do not have human resource professionals that clearly understand the PBM industry and who are fully capable of negotiating a fair contract with a PBM. He said transparency is important so that plan sponsors are aware of rebates, average wholesale price manipulation, spread pricing, and drug utilization data selling. He said PBMs do more to increase costs than lower costs. Because Fairview Health Systems discovered that it was not being treated fairly by its PBM, he said, he participated in the establishment of a new PBM that eliminated spread pricing and selling of employees' drug utilization data.

In response to a question from Representative Kasper, Mr. Gustafson said PBMs play an important role in adjudicating claims. However, he said, it is important that PBMs disclose vital information so that companies can compare PBMs before entering a contract.

In response to a question from Senator Krebsbach, Mr. Gustafson said not all drugs are included on a maximum allowable cost list.

In response to a question from Representative Keiser, Mr. Gustafson said competition would be stimulated through disclosure and transparency requirements for PBMs.

In response to a question from Representative Galvin, Mr. Gustafson said generic drugs are usually

cheaper in the United States than in Canada. However, he said, brand name drugs are generally cheaper in Canada. In addition, he said, rebates are not allowed in Canada.

In response to a question from Senator Krebsbach, Mr. Gustafson said although PBMs provide a valuable service, the industry has become a profitmaking center. He said there is a better way to do business.

Mr. Marich submitted written documents, copies of which are on file in the Legislative Council office. He said his company performs audits of compliance with contract terms in contracts between plan sponsors and PBMs. He said contract violations are found 100 percent of the time. He said some PBMs have more than 50 maximum allowable cost lists and it is often difficult to determine which list is used under a contract. He said it is important for clients of his company to have independent audits performed and for the clients to know which maximum allowable cost list is being used as well as all other pricing schemes in the contract. He said a PBM should not be allowed to sell the client's data.

In response to a question from Representative Kasper, Mr. Marich said data sales are a profit source for PBMs through which a manufacturer of a product may manipulate employer groups to purchase more of the product.

In response to a question from Representative Amerman, Mr. Marich said a PBM will generally seek to settle a claim or pay back an overcharge when a violation of a contract is found.

In response to a question from Representative Froseth, Mr. Marich said although legislation requiring transparency in PBM contracts provides some information, the laws generally do not require divulgence of everything in a contract.

Chairman Krebsbach called on Ms. Linda Johnson Wurtz, AARP, who introduced Mr. Mike Saxl, who provided testimony on behalf of the AARP. Mr. Saxl submitted written documents which are on file in the Legislative Council office [[Mr. Saxl's presentation](#)]. He said the three trends that have been driving the rapid, sustained growth of the cost of prescription drugs are the increase in the number of prescriptions per person, the replacement of older, less costly medications with newer, higher-cost prescriptions, and the increase in the prices of prescription drugs. He said prescription drug expenditures are the fastest component of health care spending and national spending on prescription drugs has grown by over 10 percent each year since 1995, which is more than double the rate of growth of spending on hospital care or physician and clinical services. He said Americans pay the highest prices for brand name drugs in the world.

Mr. Saxl said PBMs act as middlemen between drug manufacturers, retail pharmacies, and health plans and, except in the case of mail-order

pharmacies, never purchase or handle prescription drugs. However, he said, PBMs have unique power to influence the market for prescription drugs, including prices, market share, and total benefit costs. He said PBMs negotiate the customer's ultimate cost, including reimbursement to the retail pharmacy and payment to the manufacturer of the drug. He said PBMs operate through the establishment of networks of participating pharmacies that accept a given reimbursement rate and through negotiation of rebates with drug manufacturers.

Mr. Saxl said the PBM market is dominated by three large companies. He said PBMs use calling centers to actively encourage doctors to switch individual patients to a preferred drug to maximize the profit from the manufacturer. Because drug manufacturer rebates are often confidential between the PBM and the manufacturer, the payer may not be aware of the share of rebate the PBM is retaining. He said legislative bodies need to get involved because state government and businesses are making spending decisions without access to all the necessary information. He said transparency is critical for fair dealing. In addition, he said, PBMs may negotiate price breaks on prescription drugs but some PBMs have financial interests that conflict with that mission. Other issues that must be addressed, he said, are spread pricing, drug switching, collection and sale of patient information, and the refusal by PBMs to be audited or to release information.

Mr. Saxl said 13 states have recently considered PBM regulation. He said Maine, South Dakota, and the District of Columbia have enacted PBM regulation legislation. He said the South Dakota law has not been challenged in court and a federal district judge has upheld the Maine law recently. He said a similar lawsuit has presented a challenge to the District of Columbia law. He said goals for PBM legislation should ensure that transactions are transparent, provide some means of state enforcement, establish a legal duty between the PBM and the clients of the PBM, and make court settlements a part of the law.

Chairman Krebsbach called on Mr. Peter Hardy, Medco Health Solutions, Inc., for comments regarding the study of the PBM industry. Mr. Hardy submitted written information, copies of which are on file in the Legislative Council office. He said PBMs are generally for-profit companies and process over 500 million transactions per year. He said the average gross margin for the PBM industry is 5 percent and the annual net profit is 1.4 percent. He said PBMs are the only entities in the drug supply chain dedicated to lowering costs and increasing quality. He said this is done through advising plan sponsors on benefit design options, pooling purchasing ability of millions of consumers to negotiate lower drug prices, linking networks of pharmacies, and using cost-quality management tools to make drug benefits safer and more affordable.

Mr. Hardy said in 2005 the number of North Dakota residents with prescription drug coverage administered through PBMs is approximately 456,000. During 2005, he said, drug spending by PBM arrangements in this state is estimated to be \$330 million. He said PBMs are estimated to save North Dakota consumers and employers \$112 million on the cost of prescription drugs and from 2005 through 2014 PBMs will save North Dakota consumers and employers an estimated \$2.7 billion on the cost of prescription drugs.

Mr. Hardy said a number of states have considered legislation regulating PBMs but most have not enacted such legislation because PBMs do not contract directly with consumers, PBMs do not create benefit designs, and PBM activities are already regulated. He said the Federal Trade Commission has concluded that PBMs offer lower prices on prescription drugs than retail pharmacies and are very effective at capitalizing on opportunities to dispense generic medications. The General Accounting Office, he said, concluded that PBM prices are generally lower for brand name and generic drugs and PBM mail-order drug prices are significantly lower than retail cash prices. He said the Congressional Budget Office concluded that PBMs have the potential to save as much as 30 percent in total drug spending relative to unmanaged purchases of prescription drugs if PBMs are able to use their full range of price discounts and rebates, utilization control tools, and other tools for encouraging appropriate utilization. He said a Price Waterhouse Coopers study indicated that pharmacy benefit management reduces prescription costs by 25 percent compared to retail purchases and pharmacy benefit management will save \$1.3 trillion in drug expenditures over the next 10 years.

Mr. Hardy said additional legislation relating to transparency is not necessary because the marketplace is working well and there is vigorous competition in the marketplace for PBM services. He said mandating a one size fits all approach is anticompetitive. He said the decision whether to purchase drugs by mail order or at retail is a planned design decision for the client, not the PBM. He said retail spread is similar to a markup in any other business and no other industry is required to disclose its markup to its customers. With respect to therapeutic interchange, he said, PBMs do not switch prescriptions, only a licensed prescriber may do that. However, he said, a PBM may encourage the use of the most cost-effective drugs. He said a Harvard study indicated that generic dispensing rates and generic substitution rates are essentially the same at a PBM-owned mail-order pharmacy and at retail. He said disclosure of rebates is not necessary because the marketplace is working and contractual audit rights are generally applicable. He said any allegations of PBM conflict of interest and self-dealing are without merit. He said because PBMs are

regulated directly at the state level in their capacity as licensed, certified, or registered entities such as resident or nonresident pharmacies, or other regulated organizations, additional regulation is not necessary. In addition, he said, PBMs are regulated indirectly through contractual compliance with state and federal requirements imposed on insurers, health maintenance organizations, and employer-sponsored plans. He said PBMs play a unique role in holding down costs and increasing restrictions on PBMs would impact all payers while providing no benefit to consumers.

In response to a question from Representative Kasper, Mr. Hardy said Medco does not do much business in North Dakota and does not conduct business in Maine and South Dakota. He said the reduction in competition in states that have enacted regulatory measures may be contributing to higher costs in those states.

In response to a question from Representative Vigesaa, Mr. Hardy said there may be different maximum allowable cost lists for different customers and different situations.

In response to a question from Representative Keiser, Mr. Hardy said legislation may result in the standardization of contracts which would reduce the incentive to discount prices.

Chairman Krebsbach called on Mr. Allen Horne, Caremark, Inc., for comments regarding the PBM industry study. Mr. Horne said Caremark processed approximately 376,000 retail claims in North Dakota last year. He said the company also processed 36,000 mail-order claims and has 1,500 retail pharmacies in its network. He said the market is very competitive and PBMs need to make a profit. Although mistakes are made, he said, the mistakes are unintentional and a plan sponsor can change to another PBM if there is dissatisfaction with a PBM. He said Caremark has an external pharmacy therapeutics committee consisting of outside pharmacists and doctors to establish formulary drug lists.

Chairman Krebsbach called on Mr. Dan Ulmer, Noridian Mutual Insurance Company, for comments regarding the PBM industry study. He said more time was spent on the PBM regulation legislation last session than any other legislation he can recall. Because the law became effective in August, he said, it will take time to see what happens as a result of the law. He said the Insurance Commissioner has authority to oversee the industry. He said this may be an issue that will require further study during the next interim.

In response to a question from Representative Kasper, Mr. Ulmer said most pharmacies are signing contracts to participate in Noridian's PBM network.

In response to a question from Representative Froseth, Mr. Ulmer said he is not sure of the impact of mail-order pharmacies on rural pharmacies.

Representative Froseth said he is especially concerned with the loss of community pharmacies.

Mr. Howard Anderson, Jr., North Dakota Board of Pharmacy, said because a plan sponsor generally will end up paying more for mail-order drugs, doing business with the local pharmacy is a better option. He said disclosure is necessary to see what is going on behind the scenes with PBMs and it is important to not drive people toward mail-order purchases based on incorrect information.

UNEMPLOYMENT INSURANCE TAX RATE STRUCTURE STUDY

Chairman Krebsbach called on Ms. Beth Zander, Job Service North Dakota, for comments regarding the committee's study of the unemployment insurance tax rate structure. Ms. Zander submitted written testimony, a copy of which is on file in the Legislative Council office. She said Job Service has broken the study into two phases--data collection and data analysis. She said the data collection portion of the study will be completed by the end of February 2006 and the analysis is expected to be completed by the end of May 2006. She said Job Service will present a report to this committee by the end of June 2006.

Ms. Zander said a primary factor affecting the internal data is a conversion of industry codes, which was conducted in 2002. She said Job Service is able to run an additional conversion effort by employer going back to 1993 with one data set and to 1996 with another. She said another factor limiting the use of internal data involves availability of yearly employer account data. Because the unemployment insurance tax experience rating was changed in 1999 to include the reserves paid over the last six years in the calculation of the reserve ratio, along with lifetime cumulative reserve for the positive and negative balance determination, substantial resources would be required to recreate yearly data from the older cumulative data due to the purge of records in compliance with legal requirements. She said before 1999, the lifetime cumulative was used solely and there was no retention of yearly data. She said Job Service will continue to update the committee on the progress of its study.

In response to a question from Representative Keiser, Ms. Zander said Job Service will run an analysis to look at the potential for making a classification change revenue-neutral.

JOB SERVICE REEMPLOYMENT PROCESS STUDY

Chairman Krebsbach called on Mr. Larry Anderson, Job Service North Dakota, for comments regarding the committee's study of reemployment processes. Mr. Anderson submitted written testimony, a copy of which is on file in the Legislative Council office. He said representatives of Job Service have met with various industry groups to acquaint others with the study and solicit involvement and

feedback. He said representatives of Job Service have also made other efforts to solicit information and feedback from business groups and labor representatives. He said representatives of Job Service are undertaking data collection to aid in this study and have begun reviewing job-attached statutes and practices from other states. He said he will continue to update the committee on the progress of data collection and analysis.

SHARED WORK DEMONSTRATION PROJECT STUDY

Chairman Krebsbach called on Mr. Anderson for comments regarding the committee's study of the shared work demonstration project. Mr. Anderson submitted written testimony, a copy of which is on file in the Legislative Council office. Mr. Anderson said representatives of Job Service have continued to work with a potential employer for the shared work demonstration project. He said representatives of Job Service will continue to meet with the employer to address concerns expressed at prior meetings. He said he will continue to update the committee regarding progress with the shared work demonstration project.

In response to a question from Representative Amerman, Mr. Anderson said union representatives were included in the first meeting with the potential participating employer but were not included at the second meeting because there were significant issues to overcome with the company before addressing other issues that may be relevant to the labor representatives.

Representative Keiser said it appears that the model proposed by Job Service does not follow the intent of the legislation which was to allow a gradual building of reserves over time to be used for shared work programs.

Mr. Anderson said Job Service is attempting to develop a model to follow the intent of the Legislative Assembly.

In response to a question from Senator Grindberg, Mr. Anderson said Job Service is attempting to develop a program that would allow manufacturers to remain competitive globally while being employee-friendly. He said Job Service is attempting to find a method through which to address the administrative problems in establishing a shared work project program. He said Job Service representatives will present another model to the employer which will comply with the legislation.

Ms. Maren Daley, Job Service North Dakota, said the programs in Kansas and Minnesota do not have

to operate in a manner that the employer's unemployment insurance experience ratings are not compromised and that the unemployment trust fund is not negatively impacted so as to result in a greater tax burden for the remainder of employees.

Representative Keiser said the intent of the shared work program was to be a savings program through which an employer could prepare for and accommodate layoffs by prepaying into its reserve and thereby maintaining its positive rate.

In response to a question from Senator Heitkamp, Ms. Daley said Job Service has several tools to address the possibility that a low unemployment rate can be a detriment to bringing new employers into the state. She said labor market availability studies done in conjunction with the Commerce Department are available and Job Service is working with manufacturers in developing comprehensive recruiting plans. In addition, she said, the labor force is growing. She said Job Service is succeeding at getting people into employment in areas where jobs are available such as oilfield jobs.

In response to a question from Representative Froseth, Ms. Daley said there is a growing labor pool on Indian reservations and Job Service is working to address the high unemployment rate on the reservations. She said one of the main challenges is transportation to jobs.

Ms. Anderson said appointments have been made to the new Job Service Advisory Council and the council will be meeting soon.

MISCELLANEOUS MATTERS

Chairman Krebsbach said the committee will receive a report on the professional employer organizations study at the next meeting.

Representative Froseth requested the Legislative Council staff to provide members of the committee with copies of the PBM legislation from Maine, South Dakota, and the District of Columbia.

Chairman Krebsbach said the next meeting of the committee will be January 5, 2006. There being no further business, Chairman Krebsbach adjourned the meeting at 4:20 p.m.

John Bjornson
Committee Counsel

[ATTACH:1](#)