# Report of the Special Committee on Insurance to the 2016 Kansas Legislature

**Chairperson:** Representative Scott Schwab

**Vice-chairperson:** Senator Jeff Longbine

**Other Members:** Senators Elaine Bowers, Tom Hawk, and Rick Wilborn (substitute); and Representatives Daniel Hawkins, Roderick Houston, and Jim Kelly

**Study Topic**

- ***Review Pharmacy Benefits Management Legislation.***
  - In February, the Senate Committee on Financial Institutions and Insurance reviewed 2015 SB 103, a bill that would enact new law establishing requirements for Pharmacy Benefits Managers (PBMs). The Committee is to review 2015 SB 103 and relevant issues associated with pharmacy benefits management, including maximum allowable cost (MAC) pricing of generic drugs, and the implications for Kansas pharmacies and health plans.
- ***Study the Need to Increase the Minimum Motor Vehicle Liability Insurance Policy Limits and, If Needed, What Limits Would be Indicated***
  - In February, the House Committee on Insurance held a hearing on HB 2067. The bill would have increased the mandatory minimum motor vehicle liability policy limits. The Committee indicated the need to further study the matter before action, if any, was taken. Under existing law, KSA 40-3107, the minimum policy coverage limits in any one accident is $25,000 for bodily injury or death of one person and $50,000 for two or more persons, and $10,000 for harm to or destruction of the property of others.

# 2015 Special Committee on Insurance

## Pharmacy Benefits Manager Legislation

**Conclusions and Recommendations**

The Committee recommends the insurance committees of the Senate and House take up 2015 SB 103 or a compromise replacement bill early in the 2016 Session. [The bill remains in the Senate Committee on Financial Institutions and Insurance.] The Committee commends the parties to the bill for their efforts to reach a compromise on the bill.

***Proposed Legislation:*** None.

### Background

The charge to the Special Committee on Insurance was to review and make recommendations on two topics assigned by the Legislative Coordinating Council: pharmacy benefits management legislation and relevant issues, including Maximum Allowable Cost (MAC) pricing of generic drugs and the implications for Kansas pharmacies and health plans (2015 SB 103), and the need to increase minimum motor vehicle liability insurance policy limits and, if needed, what limits would be indicated (2015 HB 2067). The Committee was authorized to meet for one day.

On the subject of the pharmacy benefits management legislation, the Committee was directed to review 2015 SB 103 and the relevant issues associated with pharmacy benefits management, including MAC pricing of generic drugs, and the implications for Kansas pharmacies and health plans.

In February 2015, the Senate Committee on Financial Institutions and Insurance reviewed SB 103, a bill that would enact new law establishing requirements for Pharmacy Benefits Managers (PBMs), including publication of price lists and the drugs included on the lists, an appeals process for network pharmacies requesting reimbursement for drugs subject to MAC, and penalties for PBMs found to be in violation of the act, and would amend the Pharmacy Benefits Manager Registration Act (Act) to update the definition of "pharmacy benefits manager." This study topic was requested by the Senate Committee.

### Committee Activities

The Committee met on December 7, 2015, and considered both assigned topics. As part of its review of the PBM legislation, the Committee received an overview of the bill and current registration requirements in law for PBMs, comparative information on similar legislation addressing PBMs and MAC pricing of generic drugs, and an update and comments from conferees to the original bill.

**Overview of current registration requirements for PBMs; legislation in other states.** Committee staff outlined the registration requirements for PBMs that provide "claims processing services, other prescription drug or device services, or both, to covered persons who are residents of this state." The law requires PBMs to register or renew on an annual basis (registrations expire March 31), submit a renewal form to the Insurance Commissioner, and pay a renewal fee of $140. The Commissioner may revoke or suspend a registrant until the renewal and penalty fee (also specified in the amount of $140) is paid. The law grants the Commissioner authority to adopt rules and regulations, including requirements relating to the application form, to carry out the Act. Any person who acts as a PBM without being registered is subject to a fine of $500 for each violation. Moneys received by the Commissioner pursuant to the Act are to be remitted to the State Treasury at least monthly and credited to the Pharmacy Benefits Manager Registration Fund. Finally, the Act contains a severability clause. The Act has not been amended since its enactment in 2006.

*MAC legislation in the states.* Utilizing a legislative database, as well as review of articles and interest group website content, analysis was conducted by committee staff to determine whether other states have bills similar to 2015 SB 103 pending or have enacted such legislation. At the time of this survey, nine states enacted legislation in 2015 relating to the use of MAC pricing and prescription drug reimbursement. In addition to Kansas, eight states introduced similar legislation. Additional published states' information indicated, since 2013, 17 states have enacted legislation implementing transparency within MAC lists.

**2015 SB 103.** The bill, as introduced, would amend the Pharmacy Benefits Manager Registration Act. Under current law, PBMs must obtain a valid certificate of registration issued by the Insurance Commissioner prior to operating as a PBM in the state. Most insurance plans, Medicare, and Medicaid use PBMs to process payments for prescription medications. The PBMs then use MAC lists to reimburse pharmacies for generic drugs.

The bill would place restrictions on the drugs PBMs may place on MAC lists, require the PBMs to update each MAC list every seven business days, make the updated lists available to network pharmacies in a readily accessible and usable format, and require PBMs to implement an appeal process for network pharmacies regarding the reimbursements of drugs subject to MAC pricing.

According to the fiscal note on the bill, as introduced, prepared by the Division of the Budget, the Kansas Insurance Department states any additional workload that would result from the enactment of the bill could be absorbed by the agency's current staff and budget. The Kansas Board of Pharmacy states the bill would have no fiscal effect on the agency. The Kansas Department of Health and Environment (KDHE) indicates the bill would reduce the flexibility of PBMs using MAC pricing for generic drugs, an effective mechanism to control prices for the state's healthcare plan. By restricting the use of MAC pricing, KDHE estimates the bill would have the potential to increase the cost of the state's healthcare plans by $3,145,976 in FY 2016 and $3,350,923 in FY 2017. Additionally, KDHE indicates the other state funded healthcare plans, KanCare and SCHIP, could experience similar cost increases, but KDHE could not provide an accurate fiscal impact because the managed care organizations have their own PBMs for those plans.

**Comments from interested parties.** In lieu of a formal hearing on the bill, conferees were asked to provide an update on efforts to reach consensus on the provisions contained in the original bill and issues identified at the time of the Senate Committee hearing.

The Government Affairs Committee Chairperson, Kansas Pharmacists Association (KPhA), provided an update on discussions between the interested parties, indicating representatives of KPhA and the PBMs have met in an effort to find a common ground regarding the provisions of SB103 [the KPhA was the primary proponent of the bill, as introduced]. After several sessions of negotiations, the parties have reached a consensus and the language provided to the Committee reflects the extensive discussions. She also noted the amendment addresses the concerns stated by KDHE in the original fiscal note. The KPhA conferee indicated the consensus language: 1) requires PBMs to update the MAC list every seven business days and apply the updates within one business day; 2) adds language that the drug must be available from a wholesaler in Kansas and that source identified, whether it is for placing a drug on the MAC list, or later in the appeal section, providing the pharmacy with wholesalers where the drug can be purchased; 3) provides that the PBM establish a process for each network pharmacy provider to readily access the MAC list; 4) establishes an appeals process that provides, a) if the pharmacy prevails, it has the ability to reverse and rebill and the resulting changes become effective going forward for all similarly situated pharmacies; and b) if the appeal is denied, the PBM provides the appealing pharmacy the National Drug Code number from a national or regional wholesaler operating in Kansas where the drug is generally available for purchase at a price equal to or less than the MAC that may be substituted lawfully; and 5) [this compromise does] not contain an enforcement provision for the Act.

The Senior Director, State Government Affairs, Express Scripts [a PBM] commented on SB 103 and the compromise language presented to the Committee. He stated Express Scripts and the KPhA and its members have been negotiating during the interim and both parties have reached a compromise that would be acceptable to Express Scripts. The conferee's remarks also addressed how PBMs generally use MAC pricing and reimbursement methods, stating these methods ensure a fair reimbursement to pharmacies for generic drugs. MAC pricing was originally developed by state Medicaid programs after an audit proved there was overpayment for generic medications. Today, the conferee noted, 46 Medicaid programs, multiple federal programs, and most private payers use their own MAC processes.

Committee members and the conferees discussed the compromise language and reviewed topics associated with the reimbursement for generic drugs. The KPhA conferee stated the purpose of the bill is to improve the viability of pharmacies in the state of Kansas by providing the pharmacies with the information they need to adequately price their drugs. Also discussed was the variance in pricing, not only on the cost of an individual drug, but also from pharmacy to pharmacy based on contracts with PBMs and, in some cases, wholesalers. The Committee reviewed the current appeals process with the pharmacist conferee. The PBM representative responded to a question regarding the financial impacts of drug pricing methodologies on pharmacies located in rural areas, including price fluctuation and inventory controls. The conferee indicated that, in part, MAC pricing was created to address the pricing of generic drugs (replacements for brand name drugs, at less cost) for State Medicaid programs. Under the consensus language, pharmacies, the conferee stated, should be better informed regarding their cost and pricing.

## Conclusions and Recommendations

Following discussion, the Committee made the following recommendation:

- The insurance committees of the Senate and House take up 2015 SB 103 or a compromise replacement bill early in the 2016 Session. [The bill remains in the Senate Committee on Financial Institutions and Insurance.] The Committee commends the parties to the bill for their efforts to reach a compromise on the bill.

# 2015 Special Committee on Insurance

## Minimum Motor Vehicle Liability Insurance Limits

### Conclusions and Recommendations

The Committee recommends a bill to increase the minimum limit specified in KSA 40-3107 for property damage from the current $10,000 to $25,000. (The Committee made no recommendation on either bodily injury limit.)

With regard to the issues of uninsured and underinsured motorists, including the determination of penalties and consequences for drivers, discussed before the Committee and outlined in this report, the Special Committee requests its report be directed to the committee leadership of the House and Senate Judiciary Committees.

***Proposed Legislation:*** One bill [to be introduced in the House].

### Background

The charge to the Special Committee on Insurance was to review and make recommendations on two topics assigned by the Legislative Coordinating Council: pharmacy benefits management legislation and relevant issues, including Maximum Allowable Cost (MAC) pricing of generic drugs and the implications for Kansas pharmacies and health plans (2015 SB 103), and the need to increase minimum motor vehicle liability insurance policy limits and, if needed, determine what limits would be indicated (2015 HB 2067). The Committee was authorized to meet for one day.

In February 2015, the House Committee on Insurance held a hearing on HB 2067. The bill would have increased the mandatory minimum motor vehicle liability policy limits. After hearing proponent and opponent testimony, no action was taken. The Committee indicated the need to study the matter before action, if any, was taken. Under KSA 40-3107, the minimum policy coverage limits in any one accident are $25,000 for bodily injury or death of one person and $50,000 for two or more persons, and $10,000 for harm to or destruction of the property of others. The last changes to these limits were made in 1981.

The topic was requested by the insurance committee conferees of the House and Senate.

### Committee Activities

The Committee met on December 7, 2015, and considered both assigned topics. As part of its review of the motor vehicle liability insurance policy limits, the Committee received an overview of the bill and comparative information on the minimum limits in the states; received formal testimony from proponents, those who were neutral, and opponents; and held a roundtable discussion with representatives of State agencies, consumers, insurance agents, insurance companies, law enforcement associations, and a vehicle leasing company; a plaintiff's attorney; and a legislator (proponent of the bill).

**Overview of the topic: history of Kansas law and legislation, compulsory minimum limits.** Committee staff outlined the law enacted and legislation considered relating to the topic. Minimum motor vehicle liability insurance policy limits were first enacted in 1957 with coverage minimum limits in any one accident of $5,000 for bodily injury to or death of one person and $10,000 for two or more persons, and $1,000 for harm to or destruction of the property of others. Coverage limits, when referenced, often are listed to reflect the limits in sequential order and separated by a slash mark; the 1957 limits would be indicated as "$5,000/$10,000/$1,000." In 1973, enacted Sub. for HB 1129 included an increase in the limits, to $15,000/$30,000/$5,000. In 1974, enacted SB 918 codified the requirements, which were not changed, at KSA 40-3107. In 1981, the passage of SB 371 amended those limits upward to $25,000/$50,000/$10,000, the statutory limits that continue in effect to date. HB 2231, also introduced in 1981, proposed the same limits as SB 371. In 1984, technical changes were made to KSA 40-3107; the changes did not affect the policy coverage limits.

No further legislation related to increasing minimum policy coverage limits was introduced until the 1989 Legislative Session, when HB 2482 would have increased the minimum coverage limits to $50,000/$100,000/$20,000. A hearing on the bill took place on March 15, 1989, before the House Committee on Insurance, but no further action was taken. Minimum policy coverage limit legislation was introduced in 1995, with SB 369 proposing an increase in the limits to $50,000/$100,000/$20,000. The following year, HB 2844 was introduced, seeking the same minimum policy coverage limits sought in 1995. In 1998, SB 634 was introduced by the Senate Committee on Judiciary to address minimum policy coverage limits. The bill proposed limits of $100,000/$200,000/$40,000. The bill was referred to the Senate Committee on Financial Institutions and Insurance, but no hearing was held. The bill died in Committee.

The last attempt to increase the minimum policy limits, prior to the introduction of 2015 HB 2067, occurred in 2012 with the introduction of HB 2679 by the House Committee on Insurance. The bill would have increased the minimum policy coverage limits to $50,000/$100,000/$25,000. The bill was referred to the House Committee on Insurance, but no hearing was held on the bill. The bill died in Committee at the end of the 2012 Session.

A chart outlining states' present minimums for bodily injury (BI), aggregate BI, and property damage (PD) is appended to this report. The chart also illustrates the variation of each limit among the states.

**HB 2067.** The bill, as introduced, would amend KSA 40-3107 to increase the minimum policy coverage limits in any one accident from $25,000 to $50,000 for bodily injury to or death of one person and from $50,000 to $75,000 for bodily injury to or death of two or more persons, and from $10,000 to $35,000 for harm to or destruction of the property of others. Two technical changes related to drafting style also would be made. The bill would take effect on publication in the statute book.

According to the fiscal note prepared by the Division of the Budget, the Kansas Insurance Department states enactment of the bill would cause an increase of premiums that consumers would pay for auto insurance; however, the Department indicates the potential increase would be minimal. Additionally, the Department states the bill has the potential to increase taxes collected from insurance companies from higher premiums for auto insurance from the higher minimum levels of coverage. However, the Department states, there also is a potential for a reduction of premiums taxes collected if more individuals would choose not to pay higher premiums and become uninsured. Either way, the fiscal effect on insurance premiums taxes collected by the state cannot be estimated. Any fiscal effect associated with the bill is not reflected in *The FY 2016 Governor's Budget Report*.

**Comments on HB 2067 – proponents and neutral parties.** The following association representatives and individuals appeared before the Committee and provided testimony in support of the bill: representatives of the Kansas Association of Insurance Agents and the Kansas DUI Impact Center; one insurance agent; two plaintiff's attorneys; four private citizens; and Representative Gonzalez (who requested the bill for introduction in the House Insurance Committee).

Proponents generally described the current minimum limits as outdated and noted the inflationary increases in costs, both for health care for injured persons and for vehicle repair and replacement, that have occurred since the limits were last adjusted, and they pointed to a cost shift from some drivers onto other drivers, to health insurers and hospitals, to employers, and to government payors. Proponents also highlighted the purpose of the limits, including the protection of individuals from carrying too little coverage (underinsured) in an accident and the protection of others from having to bear the cost of an insurance claim through their own policies if they are injured or their property is damaged by someone who is underinsured. The private citizens shared personal experiences of automobile accidents resulting in loss of life, medical expenses, and property loss and testified as to the lack of adequate compensation under the current coverage limits to cover the losses incurred by the injured parties. Additionally, some proponents encouraged the Committee to establish new minimum limits that mirror 2015 law (House Sub. for SB 117; modified by SB 101) which imposed limits on personal automobiles used to provide transportation network company services — $50,000/$100,000/$25,000.

Written proponent testimony was submitted by the following association representatives and individuals: representatives of the Kansas Association for Justice, the Kansas Association of Professional Insurance Agents, and the National Association of Insurance and Financial Advisors–Kansas; four insurance agents; and two private citizens.

*Neutral Testimony.* The Committee received neutral testimony from a representative of the State Farm Insurance Companies. The conferee stated that an efficiently administered financial responsibility or safety responsibility law could be as effective as a compulsory or mandatory insurance law; high minimum limits, the conferee suggested, could be counterproductive as they could aggravate problems of insurance affordability for some drivers and could lead to more uninsured drivers. One possible solution to help stabilize an increase in limits suggested by the conferee would be to increase the medical threshold from $2,000 to $2,500 (under the Kansas no-fault law, tort recovery is limited to individuals meeting a threshold that includes first-party medical benefits exceeding $2,000).

**Comments on HB 2067 – opponents.** The Committee received testimony from representatives of the American Insurance Association (AIA) and Enterprise Leasing Company of Kansas, LLC. Opponents generally stated enactment of this bill would result in increased premiums, which could result in individuals who could least afford the premium increases dropping their insurance coverage. In addition, a conferee cited the impact on leasing companies, as the bill could increase a company's operating costs at a time when it is already dealing with rising vehicle costs, and the business would have no choice but to pass some of these costs to its customers. A conferee asked the Committee to consider another potential consequence – persons dropping full coverage (in effect today) and carrying only the minimum limit due to increased premiums. The conferees also noted existing minimum automobile insurance liability limits in Kansas are in line with those of most states.

Written opponent testimony was submitted by representatives of American Family, Key Insurance Company, and the Property Casualty Insurers of America (PCI).

**Roundtable Discussion.** The Committee was joined by the following participants in a roundtable discussion on topics associated with the increase of the minimum auto insurance liability limits and the current requirements in law: Lisa Kaspar, Director of Vehicles, Kansas Department of Revenue; Clark Shultz, Government Affairs, Kansas Insurance Department; Lt. A.M. Winters, Kansas Highway Patrol; Representative Ramon Gonzalez; Larrie Ann Brown, PCI; Lonny Claycamp, Insurance Planning; Thomas Gordon, senior advocate; Richard James and DeVaughn James, injury lawyers; Andrie Krahl, Kansas DUI Impact Center; Ed Klumpp, representing various law enforcement associations; David Monaghan, American Family; Christine Peterson, Enterprise Leasing; Brad Smoot, AIA; Bill Sneed, State Farm; and Tim Tyner, Tyner Insurance Group.

These were among the topics discussed and issues identified during the roundtable:

- **Options to address the affordability of coverage for persons who cannot afford or obtain coverage in the private market;**

- On this topic, discussion included the current participation rate in the assigned risk pool and the likelihood more drivers would require coverage in the pool as the uninsured motorist rate (UMR) increases.

- The legislator (bill proponent) spoke from the perspective of law enforcement. A law enforcement stop results in a series of consequences; if a driver is convicted for not having insurance, it is a misdemeanor with a fine varying from $250 to $1,000. If the driver has been stopped and convicted previously, there could be suspension or the car could be towed. At this point, the driver may be in a "cycle": uninsured and unable to purchase insurance. A law enforcement representative talked about the "fine line," as communities and judges must weigh the issues of the cost of insurance and the public safety concerns.

- The issue of "cost shifts" from the responsible driver to other parties, including other drivers, hospitals and medical care providers, and government payors, received considerable attention from the roundtable. Participants discussed some of the differences seen in health insurance and auto insurance, as health insurance can be "subsidized" for lower income persons (*e.g.,* through Medicaid, Medicare, and the Health Insurance Marketplace). A similar subsidy does not exist for the person buying auto insurance.

● **In addition to cost and affordability, other contributing factors associated with persons opting to purchase coverage at the minimum limits;**

- On this topic, discussion included the "virtual" or on-line availability of insurance coverage. A participant commented that often coverage purchased on-line is for the minimum limits—the cheapest option presented to the buyer. Agents, the participant noted, are generally advising their insureds to purchase higher levels of coverage. An insurance company representative estimated 95 percent of his company's book of business was written for limits higher than the minimums.

- The same insurance company representative also addressed the impact of on-line shopping for insurance policies, in terms of numbers in the past two years. He estimated, for his client, 25 percent to 30 percent of its policies are "sold" on-line. He also indicated this is where most of the minimum-only coverage is being purchased and indicated, although the policy is sold without a direct agent interaction, the policyholder is assigned to a local agent for follow-up.

● **Determining what rate of uninsurance is "reasonable" given an estimated current UMR of ten percent; and**

- On this topic, discussion included where Kansas ranks among states' minimum limits and associated average premiums and where Kansas would fit with the increased minimum limits. It was suggested Kansas would "move up the ladder" but not have premium costs as high as some of the coastal states given regional differences. The participants discussed the variance in costs, using the perspective of purchasing parts at an auto body shop (prices vary by rural and urban and by region and availability, and labor costs can vary).

- The Director of Vehicles noted the work of a task force on issues relating to real-time reporting of insurance information (from the book of business submitted by insurance companies to the verification of proof of insurance at the time of vehicle registration or at the time of an accident or law enforcement stop). [Real-time data could better identify an uninsured motorist at any point in time.]

- Participants also discussed reasons why drivers are uninsured. An insurance company representative mentioned the "silver bullets"—the young, invincibles who take on this risk. A law enforcement representative stated, from his experience, there are three classes of uninsured persons – those with a cost issue and typically at "average risk," those who are high risk due to prior tickets and accidents, and the "arrogant," those who choose to ignore the risk and requirements.

- A participant suggested it is often the penalties that determine how far a person is willing to go. For example, he suggested, a person may choose to buy a policy immediately following an accident before the coverage becomes more expensive. Strengthening the penalty means more people buying insurance. A law enforcement representative commented it is about a "risk" factor – not having insurance. This is a two-fold issue, getting caught coupled with the cost factors.

● **Consideration of the potential consequences of changing one or more of the minimum limits in law and the resulting effect on driver behavior.**

- On this topic, discussion included data cited by an insurance industry representative (2012 industry claims data) that indicated an estimated 12 percent of households would be impacted by higher rates. Conversely, it was noted, those drivers currently maintaining higher limits of coverage "pay" in a no-fault accident or when the other underinsured driver is at fault.

- Additionally, a Committee member noted determination of the appropriate minimum limits in law should also take into account the current requirements for personal injury protection and tort law (*e.g.*, recovery of damages, medical benefits).

- A participant suggested higher limits were needed to help address a problem among young Kansans today. The underage drinking levels seen among Kansas high school students, she noted, place Kansas in the top five.

- Additionally, in terms of driver behavior, participants pointed to driving as a privilege, not a right, and the impact driving underinsured or uninsured has on other drivers. Those drivers or property owners may not be able to afford vehicle repair or replacement costs or costs from injuries and lost wages not covered by insurance.

- The roundtable members discussed the adequacy of the property damage limit and discussion continued to what levels would be "adequate" to place responsibility back on the at-fault driver. The policy decisions associated with establishing limits on transportation network companies (*e.g.*, Uber and Lyft) and the comparative risks between those regulated entities and Kansas drivers also were discussed.

- An insurance industry representative noted increasing the limits is not needed to cover the costs of injuries in today's health care market since the average cost of auto injury claims, in general, is lower than the current BI limits. Based on 2012 claims data, it is estimated that the average BI payment for nine out of ten injury claims in Kansas was only about $13,400. Additionally, the average PD liability claim cost in Kansas is less than

$3,200 per insured vehicle; the current limit of $10,000 per accident is more than sufficient to cover this amount. An insurance agent commented the cost to increase the PD minimum from $10,000 to $25,000 or even to $50,000 is inexpensive – an estimated $1/ car/ 6 months. The whole conversation is with BI limits.

## Conclusions and Recommendations

Following discussion, the Special Committee made the following recommendations:

- The Committee recommends a bill, (to be introduced in the House) to increase the minimum limit specified in KSA 40-3107 for property damage from the current $10,000 to $25,000. (The Committee made no recommendation on either bodily injury limit.); and
- With regard to the issues of uninsured and underinsured motorists, including the determination of penalties and consequences for drivers, discussed before the Committee and outlined in this report, the Special Committee requests its report be directed to the committee leadership of the House and Senate Judiciary Committees.