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RQ-0256-KP

FILE # ML-48463-18

I.D. # 48463

November 26, 2018

Office of the Attorney General  
Attention: Opinion Committee  
P.O. Box 12548 | Austin, TX 78711-2548  
via email to [opinion.committee@oag.texas.gov](mailto:opinion.committee@oag.texas.gov)

re: Request for opinion on prompt pay statute's application to out-of-network claims

Dear General Paxton:

I write on behalf of a committee of a house of the Legislature to request a written opinion on several questions affecting the public interest.

Background

The Texas Prompt Pay Act ("TPPA") is codified in chapters 1301 and 843 of the Texas Insurance Code, which govern preferred provider organizations ("PPOs") and health maintenance organizations ("HMOs"), respectively. These provisions are designed to ensure timely processing and payment of insurance claims by financially penalizing insurers that fail to meet statutory deadlines. However, ambiguity in these laws has led to out-of-network emergency care providers dealing with claims for fully insured (*i.e.*, non-ERISA) patients that are paid long after the TPPA requires, if they are paid at all.

Applicable Legal Standards

PPOs

The TPPA applies to a PPO as an "insurer" through the "insurer's health insurance policy." TEX. INS. CODE ANN. § 1301.0041. PPOs cannot reimburse covered claims on a discounted fee basis unless the provider has contracted with the PPO. *Id.* § 1301.056. Provisions relating to prompt payment are included in both subchapters C and C-1 of chapter 1301, and section 1301.137's penalties are expressly tied to the entirety of Subchapter C. *Id.* § 1301.137.

Section 1301.001 distinguishes between "preferred providers" (those that have contracted with the PPO) and "out-of-network providers" (those that have not contracted with the PPO), facially suggesting that the chapter's prompt payment requirements only apply to preferred providers. *Id.* § 1301.001. However, section 1301.069 effectively converts all emergency care providers into preferred providers for prompt payment purposes. *See id.* § 1301.069 (applying all "provisions . . . relating to prompt payment" to nonpreferred providers of emergency care). Other portions of the chapter support that conclusion as well. *See, e.g., id.* § 1301.0053 (requiring nonpreferred provider reimbursement at usual and customary rate); *id.* § 1301.155(b) (requiring reimbursement for nonpreferred provider emergency services "at the preferred level of benefits"). If section 1301.069 creates a special inclusion for out-of-network emergency care, then it follows that the deadlines and penalties for nonpayment of emergency care claims also apply to out-of-network emergency care claims.



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The deadlines for a PPO to act on a clean claim apply only to those submitted by preferred providers. *Id.* § 1301.103. The penalties for violating the deadlines are set out in section 1301.137, which similarly refers to penalty payments to preferred providers. *Id.* § 1301.137. Applying these deadlines and associated penalties to out-of-network emergency care claims due to the special inclusion is consistent with the plain language and spirit of the TPPA, which the Legislature passed to combat unnecessary delays in healthcare payments. Conversely, limiting the penalties that enforce deadlines to only some providers would create the absurd result of making the TPPA irrelevant for out-of-network emergency care claims; if prompt payment provisions did not apply there, then section 1301.069 would be mere surplusage.

IIMOs

The framework for paying claims by HMOs closely resembles PPOs, and the deadlines and penalties are the same. *Compare id.* §§ 1301.103 & 1301.137 (creating PPO deadlines and penalties for clean claims), *with id.* §§ 843.338 & 843.342 (creating IIMO deadlines and penalties for clean claims). Section 843.351 parallels section 1301.069 in subjecting emergency care claims to all “provisions . . . relating to prompt payment.” *Id.* § 843.351. The same considerations, therefore, apply in both the PPO and IIMO contexts.

Departmental Interpretation

The Texas Department of Insurance seems to believe that the TPPA’s deadlines apply to out-of-network emergency service provider claims but that its associated penalties do not. The Department’s website provides this guidance:

**Q:** May an out-of-network provider of emergency services recover a penalty from a MCC for late payment of a clean claim?  
**A:** No. While 28 TAC §21.2823 clarifies that the MCC must promptly pay the out-of-network provider within the period provided in TIC §843.338 or §1301.103 and 28 TAC §21.2807, the MCC is liable only to a preferred provider for a late payment penalty under TIC §843.342 or §1301.107 and TAC §21.2815.  
 If, however, the MCC fails to pay within the period required by TIC §843.338 or §1301.103 and 28 TAC §21.2807, the out-of-network provider may file a complaint with TDI, and the agency may elect to take administrative action against the carrier, including assessment of an administrative penalty.

<https://www.tdi.texas.gov/hprovider/ppsb418faq.html#general>.

The statutory and regulatory citations supporting that answer are unrelated to the issue posed in the prefacing question: whether statutory penalties can be assessed for a PPO’s or IIMO’s refusal to timely pay a clean claim. The answer also does not square with the Legislature’s directive to include emergency services in the provisions relating to prompt payment. Since the response was not adopted after formal proceedings, contradicts the plain language of the statute, and is not a reasonable interpretation of “provisions . . . relating to prompt payment,” it should not be given deference. *See generally* R.R. *Comm’n of Tex. v. Tex. Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011) (providing overview of authorities holding



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agency interpretations deferred to only when formally adopted, in accord with plain statutory language, and reasonable interpretation of ambiguous language).

Questions Posed

I am asking the Office of the Attorney General for an opinion on the following questions:

1. Do sections 1301.103 and 1301.137 apply to emergency care claims submitted by out-of-network providers (via section 1301.069 or otherwise)? What about the similar provisions in sections 843.338 and 843.342 (via section 843.351 or otherwise)?
2. If emergency care claims submitted by out-of-network providers are not governed by those sections, then what are the "provisions . . . relating to prompt payment" referred to by section 1301.069? What about the similar provision in section 843.351?
3. If the deadlines or penalties associated with a PPO's processing of emergency care claims are not set out in chapter 1301, does the statute require or allow the Texas Department of Insurance to promulgate rules setting alternatives? If not, what standards govern the timely payment and resolution of those emergency care claims? What about the similar provisions for HMOs set out in Chapter 843?

I appreciate your thoughtful and expeditious consideration so that the Legislature is fully informed on these issues when it meets this coming January. Please do not hesitate to contact me if I can be of any further assistance in answering this request.

Respectfully,

A handwritten signature in black ink, appearing to read "Joe Moody".

JOE MOODY  
Chair, Committee on Criminal Jurisprudence