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OPINION COMMITTEE

42781  
FILE # ML-42769-02  
I.D. # 42769  
42781

August 27, 2002

The Honorable John Cornyn  
Office of the Attorney General of the State of Texas  
Attention: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Attorney General Opinion Request Concerning the HMO Act

Dear Attorney General Cornyn:

I hereby request an opinion on the following matters:

1. Does the Health Maintenance Organization ("HMO") Act authorize the Texas Department of Insurance to enforce provisions of the HMO Act against physicians that are not under contract with an HMO?
2. Does the HMO Act, under Article 20A.18A(g) or otherwise, prohibit a physician that is not under contract with an HMO from recovering the balance of billed charges from an HMO enrollee?

Attached to this opinion request is a memorandum of points and authorities in support of the request, which I hope will be helpful to you in forming your opinion. Thank you for your attention to this, and please do not hesitate to call if you have any questions.

Sincerely,

  
Bob Turner

BT/twt

**MEMORANDUM OF POINTS AND AUTHORITIES**  
**IN SUPPORT OF REQUEST FOR ATTORNEY GENERAL OPINION**

**I. INTRODUCTION**

The Health Maintenance Organization ("HMO") Act requires HMO contracts with physicians and providers to include a clause holding enrollees harmless for the cost of covered health services.<sup>1</sup> Physicians and providers that participate in an HMO's network contractually agree to predetermined rates for covered services, and the "hold harmless" clauses in their contracts require network physicians to accept payment from the HMO as payment in full. The Texas Department of Insurance ("TDI") has recently attempted to enforce the "hold harmless" provisions of HMO contracts against physicians that have not contracted with HMOs ("Non-Contracted Physicians") when those physicians treat HMO enrollees in facilities contracted with the HMOs. TDI hides behind the HMO Act as supposed authority for this enforcement activity, but the Texas Legislature has clearly stated that HMO Act does not apply to physicians and that the HMOs have the ultimate responsibility of building an adequate network of physicians and providers. Non-Contracted Physicians are not required to accept payment from HMOs as payment in full by contract or by law.

**II. DISCUSSION**

**A. The HMO Act Does Not Apply to Non-Contracted Physicians**

It is important to recognize what the HMO Act does and does not do. The HMO Act does authorize and regulate the activities of HMOs and certain of their delegates. It does not regulate physicians nor does it give TDI the authority to enforce the Act against physicians. Article 20A.26(f)(1) of the HMO Act specifically states:

This Act shall not be applicable to (A) any physician, so long as that physician is engaged in the delivery of care that is within the definition of medical care; or (B) any provider that is engaged in the delivery of health care services other than medical care as part of a health maintenance organization delivery network.

TDI's enforcement authority, therefore, exists only as to HMOs, those attempting to perform the functions of an HMO without an HMO certificate of authority,<sup>2</sup> and those entities to which HMOs delegate certain of their functions.<sup>3</sup> The HMO Act regulates physician conduct only *indirectly* by requiring HMOs to include certain provisions in their contracts with physicians.

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<sup>1</sup> See Texas Insurance Code, Art. 20A.18A(g). All citations herein are to the Texas Insurance Code unless specifically stated otherwise.

<sup>2</sup> See Art. 20A.03(f).

<sup>3</sup> See Art. 20A.02, subsections (ee), (ff) and (gg) (for definitions of "delegated entity," "delegated network," and "delegated third party," respectively) and Art. 20A.18C.

There is no provision of law that allows TDI to enforce contractual provisions directly against individual physicians, much less Non-Contracted Physicians.<sup>4</sup>

TDI's position that Non-Contracted Physicians may not balance bill patients conflicts with the HMO Act. The Texas Legislature has already set the relevant policy: The prohibition on balance billing of HMO patients is not a general requirement set forth in the HMO Act, but rather a specific *contractual* provision that is required to be in all agreements between an HMO and a contracting provider or contracting physician. Therefore, the prohibition is by definition inapplicable to physicians and providers who have not entered into such agreements with the patient's HMO.<sup>5</sup>

Had the Legislature wished to make the HMO Act and TDI enforcement authority directly applicable to physicians and other health care providers, it could have done so. In fact, it did precisely the opposite by stipulating that the HMO Act does not apply to such physicians and providers.

**B. Texas Law Does Not Prohibit Non-Contracted Physicians From Seeking Full Payment From HMO Enrollees**

Not only has the Legislature protected physicians by specifically excluding them from the scope of enforcement of the HMO Act, it has gone even further to expressly require HMOs to carry the burden of providing an adequate network of physicians and providers to enrollees. For example, Article 20A.04(a)(14) of the HMO Act requires HMOs to provide TDI with information demonstrating the adequacy of the physician and other provider network configuration. If medically necessary covered services are not available through network physicians or providers, Article 20A.09(f) requires HMOs to allow a referral to a non-network physician or provider and mandates that the HMO reimburse the non-network physician at the usual and customary or an agreed rate.<sup>6</sup>

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<sup>4</sup> The Texas Legislature has, however, granted TDI the power to regulate delegated networks. See Arts. 20A.18C-18F. TDI could potentially file a complaint with the Texas State Board of Medical Examiners if it believed a physician's conduct amounted to a violation of the Medical Practice Act.

<sup>5</sup> In fact, Jose Montemayor, Texas Commissioner of Insurance, wrote a column that is still posted on the TDI website entitled "HMO Members Are Protected from Balance Billing." In that column, Mr. Montemayor states that "[t]he other side of the coin is that doctors and providers not under contract with your HMO can bill you for services. And a provider on the HMO's network can bill you for services that the HMO does not cover. This is where it's important for patients to accept some responsibility for managing their own health care." Also in that article, while addressing an out-of-network San Antonio lab's billing of patients, the Commissioner states that the billing is proper because, although the physicians had sent the patients to the lab, the lab had no contract with the patients' HMO. Therefore, "[w]ithout a contract, there was no hold harmless clause to protect patients against balance billing."

<sup>6</sup> See also: Article 20A.04(a)(16) (requiring an HMO to provide TDI with documentation that it will pay for emergency care performed by non-network physicians and providers at a reasonable or customary or an agreed rate); 28 Tex. Admin. Code §11.2001 (requiring HMOs to "arrange for covered services, including referrals to participating and nonparticipating referral specialists, to be accessible to enrollees on a timely basis in accordance with medically appropriate guidelines consistent with generally accepted practice parameters"); and 28 Tex. Admin.

Thus, the onus of building an adequate network by negotiating and contracting with providers and physicians is unquestionably on the HMO, the entity licensed and regulated by TDI. The HMO's failure to enter into contracts with physicians who practice in Contracted Facilities does not magically shift the burden of the cost difference between billed charges and the HMO's determination of "usual and customary" charges onto the Non-Contracted Physician by preventing that physician from balance billing the patient. When HMO enrollees become responsible for the balance of the billed charges, it results from the failure of the HMO to negotiate contracts successfully and not from the Non-Contracted Physicians. It is within the power of the HMOs to ameliorate this situation by (1) contracting with physicians, (2) not contracting with hospitals if the HMO cannot secure contracts with the hospitals' hospital-based physicians, ~~or~~ (3) disclosing to the members which physicians have a contract with the HMO, or (4) agreeing with its policyholders to cover all costs of physicians and other providers rendering services in a contracted facility.

### III. Conclusion

Texas law does not punish Non-Contracted Physicians by prohibiting them from recovering the balance of billed charges from patients. Physicians that contract with HMOs are bound to accept negotiated rates as full payment for covered services under the HMO Act. Non-Contracted Physicians are not subject to rates negotiated through a contract, but are paid what HMOs unilaterally determine to be "usual and customary" rates for the covered services. Forbidding Non-Contracted Physicians from recovering the balance of billed charges from patients is not supported by any provision of the HMO Act, and goes against the stated intention of the Legislature to exclude physicians from the requirements of the HMO Act and to hold HMOs accountable for building adequate networks. Thus, the Attorney General should rule that the TDI is without authority to enforce provisions of the HMO Act against Non-Contracted Physicians.

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