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OPINION COMMITTEE



CHARLES SCHWERTNER

STATE SENATOR • DISTRICT 5

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FILE # RQ-0016-KP
I.D. # 47727

April 30, 2015

The Honorable Ken Paxton
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

RQ-0016-KP

RE: *Modified Request for Opinion regarding Sections 843.306 and 1301.057, Texas Insurance Code (RQ - 0016 - KP)*

Dear Attorney General Paxton,

As a follow-up to my letter March 12, 2015, I respectfully request your opinion on the following matters:

1. Do the provisions of Section 843.306, Texas Insurance Code, regarding notice of termination by a Health Maintenance Organization ("HMO") of a provider agreement apply to a pharmacy benefit manager acting on behalf of the HMO?
2. Do the provisions of Section 1301.057, Texas Insurance Code, regarding notice of termination by a Preferred Provider Organization ("PPO") of a provider agreement apply to a pharmacy benefit manager acting on behalf of the PPO?

A pharmacy benefit manager ("PBM") is an entity that acts on behalf of an insurance company or managed care company in managing pharmacy benefits provided to beneficiaries or enrollees of the insurance or managed care plan. PBMs create pharmacy panels through provider participation agreements with individual pharmacy service providers. PBMs then contract with HMOs, PPOs, and other entities to provide and administer pharmacy benefits to beneficiaries or enrollees of the HMOs, PPOs, or other insurance plans through panels of contracted pharmacies. Section 4151.151, Texas Insurance Code, defines a pharmacy benefit manager as "a person, other than a pharmacy or pharmacist, who acts as an administrator in connection with pharmacy benefits."

HMOs are authorized to delegate certain functions to third parties ("Delegated Entities") under Subtitle C, Title 8, Chapter 1272, Texas Insurance Code. These delegated entities are subject to all statutory and regulatory requirements applicable to the functions delegated to them by the HMO. Tex. Ins. Code §1272.002. Section 1272.001, Texas Insurance Code, defines a delegated entity as:

an entity, other than a health maintenance organization authorized to engage in business under Chapter 843, that by itself, or through subcontracts with one or more

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entities, undertakes to arrange for or provide medical care or health care to an enrollee in exchange for a predetermined payment on a prospective basis and that accepts responsibility for performing on behalf of the health maintenance organization a function regulated by this chapter, Chapter 222, 251, or 258, as applicable to a health maintenance organization, Chapter 843 or 1271, Section 1367.053, Subchapter A, Chapter 1452, or Subchapter B, Chapter 1507.

This definition accords with the definition of a “delegated entity” in Section 843.002, Texas Insurance Code, which is in the chapter applicable to HMOs. As PBMs are delegated the authority to contract with providers and administer pharmacy benefits on behalf of HMOs, including the payment of pharmacy claims, they appear to be “delegated entities” under both definitions. As such, they are required to comply with all statutory and regulatory requirements applicable to those functions under Section 1272.002, Texas Insurance Code.¹

HMOs are required to provide written notice, prior to termination, of any provider agreement with a physician or other provider. Tex. Ins. Code § 843.306. Pursuant to 28 T.A.C. § 11.901, the time for notice of termination is no less than ninety (90) days prior to termination. This section also provides for review by an advisory panel. Texas insurance regulations also require that notice of these provisions be included in all provider agreements.

As the contracting of providers and the termination of those provider agreements are functions of HMOs that have been delegated to PBMs, it appears that under Section 1272.002, Texas Insurance Code, a PBM is subject to these same requirements regarding the provision of notice of termination to pharmacy providers that they contract with.

There are several other provisions of the Texas Insurance Code that are specifically made applicable to PBMs. These include prompt claims payment under Subchapter J, Chapter 843, applicable to HMOs; Chapter 1301 related to prompt payment of claims by PPOs; and audits of pharmacies under Chapter 1369. These provisions were passed within the last several years after PBMs became more prevalent in the insurance industry.

PPOs are regulated under Chapter 1301, Texas Insurance Code. PBMs that contract with PPOs are subject to the same prompt claims payment obligations as HMOs under Section 1301.109, Texas Insurance Code. Section 1301.057, Texas Insurance Code, requires similar notice of termination requirements on PPOs as those related to HMOs. Thus, a PPO is required to provide 90 days advance written notice of termination and an opportunity for a reasonable review mechanism to review the termination. Just as a PBM is an administrator under Sections 1272.001 and 4151.151, Texas Insurance Code, a PBM should be subject to the same statutory and regulatory requirements as the PPOs whose pharmacy benefits they manage and administer, including the notice requirements of Section 1301.057.

The termination notice requirements applicable to HMOs and PPOs under Sections 843.306 and 1301.057, Texas Insurance Code, appear to be equally applicable to PBMs that contract with pharmacy providers to act on behalf of those HMOs and PPOs in administering pharmacy benefits

¹ Interestingly, the Texas Attorney General took the position that a PBM is an administrator under Title 13, Texas Insurance Code, that regulates other insurance professionals in U.S. ex rel Romadoss v. Caremark, SA99-CA-00914, USDC Western District of Texas.

and contracting with pharmacies to provide pharmacy services. Prior to termination of a provider agreement with a pharmacy service provider, a PBM that provides services on behalf of an HMO or PPO must give 90 days' written notice to the provider and an opportunity for a review of the termination.

Thank you for your consideration of this issue. Please do not hesitate to contact me if you need any additional information regarding this request.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Schwertner". The signature is written in a cursive, somewhat stylized font.

Senator Charles Schwertner, Chair
Senate Committee on Health & Human Services

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OPINION COMMITTEE



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FILE # ML-47714-15
I.D. # 47714

RQ-0016-KP

March 12, 2015

The Honorable Ken Paxton
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

RE: *Whether the provisions of Section 843.306, Texas Insurance Code, regarding notice of termination by a health maintenance organization ("HMO") of a provider agreement with a participating provider apply to a pharmacy benefit manager acting on behalf of the HMO.*

Dear Attorney General Paxton,

I respectfully request your opinion on the following matter. Specifically, the issue is whether the provisions of Section 843.306, Texas Insurance Code, regarding notice of termination by a health maintenance organization ("HMO") of a provider agreement with a participating provider apply to pharmacy benefit managers acting on behalf of the HMO.

A pharmacy benefit manager ("PBM") is an entity that acts on behalf of an insurance company or managed care company in managing pharmacy benefits provided to beneficiaries or enrollees of the insurance or managed care plan. PBMs create pharmacy panels through provider participation agreements with individual pharmacy service providers. PBMs then contract with HMOs and other entities to provide and administer pharmacy benefits to beneficiaries or enrollees of the HMOs or other insurance plans through panels of contracted pharmacies. Section 4151.151, Texas Insurance Code, defines a pharmacy benefit manager as "a person, other than a pharmacy or pharmacist, who acts as an administrator in connection with pharmacy benefits."

HMOs are authorized to delegate certain functions to third parties ("Delegated Entities") under Subtitle C, Title 8, Chapter 1272, Texas Insurance Code. These delegated entities are subject to all statutory and regulatory requirements applicable to the functions delegated to them by the HMO. Tex. Ins. Code §1272.002. Section 1272.001, Texas Insurance Code, defines a delegated entity as:

an entity, other than a health maintenance organization authorized to engage in business under Chapter 843, that by itself, or through subcontracts with one or more entities, undertakes to arrange for or provide medical care or health care to an enrollee in exchange for a predetermined payment on a prospective basis and that accepts responsibility for performing on behalf of the health maintenance organization a function regulated by this chapter, Chapter 222, 251, or 258, as

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applicable to a health maintenance organization, Chapter 843 or 1271, Section 1367.053, Subchapter A, Chapter 1452, or Subchapter B, Chapter 1507.

This definition accords with the definition of a "delegated entity" in Section 843.002, Texas Insurance Code, which is in the chapter applicable to HMOs. As the PBMs are delegated the authority to contract with providers and administer pharmacy benefits on behalf to HMOs, including the payment of pharmacy claims, they appear to be "delegated entities" under both definitions. As such, they are required to comply with all statutory and regulatory requirements applicable to those functions under Section 1272.002, Texas Insurance Code.

HMOs are required to provide written notice, 90 days prior to termination, of any provider agreement with a physician or other provider. Tex. Ins. Code §843.306. This section also provides for review by an advisory panel. Texas insurance regulations also require that notice of these provisions be included in all provider agreements.

As the contracting of providers and the termination of those provider agreements are functions of an HMO that have been delegated to PBMs, it appears that under Section 1272.002, Texas Insurance Code, a PBM is subject to these same requirements regarding the provision of notice of termination of the provider contracts to pharmacy providers.

There are several other provisions of the Texas Insurance Code that are specifically made applicable to PBMs. These include prompt claims payment under Subchapter J, Chapter 843, applicable to HMOs; Chapter 1301 related to prompt payment of claims by PPOs; and audits of pharmacies under Chapter 1369. These provisions were passed within the last several years after PBMs became more prevalent in the insurance industry.

The termination notice requirements applicable to HMOs by Section 843.306, Texas Insurance Code, appear to be equally applicable to PBMs that contract with pharmacy providers to act on behalf of those HMOs in administering pharmacy benefits and contracting with pharmacies to provide pharmacy services. Prior to termination of a provider agreement with a pharmacy service provider, a PBM that provides services on behalf of an HMO must give 90 days' written notice to the provider and an opportunity for a review of the termination.

Thank you for your consideration of this issue. Please do not hesitate to contact me if you need any additional information regarding this request.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Schwertner", written in a cursive style.

Senator Charles Schwertner, Chair
Senate Committee on Health & Human Services