Texas Association of Health Plans
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April 27, 2022

Re: Applicability of SB 1264 and the No Surprises Act

The Texas Association of Health Plans (TAHP) is the statewide trade association representing health insurers, health maintenance organizations, and other related health care entities operating in Texas. We are writing today because we have heard from a significant number of member health plans that they are having difficulty determining when SB 1264, rather than the No Surprises Act (NSA), applies to a claim. Thus, we ask that the agency provide guidance to issuers and providers on the applicability of Texas state law for the purposes of surprise billing disputes.

Because the NSA will apply when Texas law does not, it is imperative that the agency provide some guidance as to the extraterritoriality of the provisions of SB 1264. While some choice-of-law issues can be complicated fact questions that are better left to a court or administrative hearing, established precedent created by state and federal courts will address the overwhelming majority of cases. If the Department is willing to share this established precedent in the form of guidance, it will be a significant benefit to both health care providers and benefit plan issuers as they assess which rules apply to dispute resolution processes.

Choice of Law Provisions

The first question courts will address in extraterritoriality cases is whether a contract has a choice of law provision. "In Texas, contractual choice-of-law provisions are ordinarily enforced if the chosen forum has a substantial relationship to the parties and the transaction."[1] Courts rely on Restatement (Second) of Conflict of Laws § 187 to decide whether other considerations trump the parties' choice of law.[2] Therefore, the parties' choice will control unless the state has no substantial relationship, or applying the law would be contrary to the interest of another state with a greater interest. Texas courts have acknowledged that an appropriate choice of law provision in an insurance contract is controlling, but if there is no such a provision, the court will look to state statute: "In Texas, when… a contract does not contain an express choice-of-law provision, a court must determine whether a relevant statute directs the court to apply the laws of a particular state."[3]

[1] *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 705 (5th Cir. 1999).
[2] *DeSantis v. Wackenhut Corp.,* 793 S.W.2d 670, 677-78 (Tex. 1990).
[3] *Reddy Ice Corp. v. Travelers Lloyds Ins. Co.*, 145 S.W.3d 337, 340 (Tex. App.–Houston [14th Dist.] 2004, pet. denied).

General Rule

When the insurance contract does not have a choice of law provision, a court will look to Article 21.42 to determine which state law applies. On its face, Art. 21.42 applies Texas insurance law to "Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State." However, the United States Supreme Court has determined that the law is "incapable of being constitutionally applied… since the effect of such application would be to regulate business outside the state of Texas and control contracts made by citizens of other states in disregard of their laws." *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1984).

The Texas Supreme Court has since noted, "Our Texas statute, Article 21.42, was upheld as constitutional in *International Brotherhood of B.M.I.S. v. Huval*, 140 Tex. 21, 166 S.W.2d 107 (1942); however, the statute cannot be given extraterritorial effect." *See, e.g., Austin Building Co. v. National Union Fire Ins. Co.,* 432 S.W.2d 697, 701 (Tex. 1968). Most recently, the Houston Court of Appeals stated the modern test for Art 21.42 applicability in the *Reddy Ice* case.[4] "For the statute to apply, the insurance proceeds must be payable to a Texas citizen, the policy must be issued by a company doing business in Texas, and the policy must arise in the course of the insurance company's Texas business."

The practical meaning of this precedent is that, if an insurance company sells a policy to a policyholder in Texas, then Texas laws apply to that policy, and only to that policy. Texas laws do not apply when a customer located outside Texas buys a policy from an insurance company, even if one or more of the people who have coverage under the policy subsequently moves to Texas, and even when the insurer sells other policies to other individuals in Texas, because the contract in question did not arise out of the business that the company conducted in Texas. This rule applies regardless of whether the company is licensed in Texas.

Group Plans

Prior to 1937, Texas courts consistently held that when a group insurer issued and delivered the group policy to a Texas beneficiary, the acts of issuance and delivery were "doing business" in Texas, and therefore Art. 21.42 was applicable. Then, in *Boseman v. Connecticut Gen. Life Ins. Co*., 1937, 301 U.S. 196, the United State Supreme Court rejected that policy as unconstitutional. In an effort to replace the pre-1937 theory for group policies, the Texas Supreme Court proposed the *Wann* rule, which essentially does away with the third prong of the general Art. 21.42 test.[5] In other words, if the insured can show that the insurer does *any* business in Texas, then Texas laws

[4] *Reddy Ice, 145 S.W.3d at 341.*
[5] *Metropolitan Life Ins. Co. v. Wann*, 1937, 130 Tex. 400, 109 S.W.2d 470

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apply. However, given the holding in *Boseman*, issuance and delivery will clearly not satisfy the "doing business" test.

Significantly, it is still an open question whether the truncated test in *Wann* would suffer the same or similar fate as *Dunken* did before the Supreme Court if applied too broadly. Given our own courts' acknowledgment that Art. 21.42 cannot be given extraterritorial effect, it seems unlikely Texas could use Art. 21.42 essentially to rewrite another state's mandates for policies issued to (group) policyholders in that other state.

The tension between *Wann* and more common, modern cases, like *Austin Builders* and *Reddy Ice*, is *Wann's* bootstrapping the question whether an insurer does *any* business in Texas, on one hand, to *other* non-Texas business, on the other, namely to a policy that was issued, underwritten, and delivered to the employer purchasing it wholly outside Texas. This gloss invites confusion about which states' laws, such as coverage mandates, define the coverage being underwritten and purchased by the employer or other group.

Moreover, Texas courts in modern cases recognize that when a policy covers risks in several jurisdictions, "the place of contracting, place of negotiation, and the domicile of incorporation, and place of the business become the primary factors to determine which law applies." *Reddy Ice Corp.,* 145 S.W.3d at 346. And where the insured risks under that policy, such as under a group policy, are not located in a single jurisdiction, neither the location of the insured risk or of payment on it is of any particular consequence under the Restatement provisions adopted by Texas courts. *See id.* (citing Restatement (Second) of Conflict of Laws § 193, cmt. a, and courts in Texas applying it)). The rationale is that it would be inappropriate to subject an insurer to multiple potentially conflicting state laws under one contract when that issue is more appropriately determined uniformly by the state under whose laws the policy was promulgated.

In contrast, applying *Wann's* truncated approach too broadly would require essentially all group-policy issuers that do *any* business in Texas to conform *all* group policies issued to employers outside this state to Texas law on the chance that a single employee might become a Texas resident. Such a broad rule would defy the state interests as enforced by out-of-state regulators approving group policy forms in its own jurisdiction, as well as the reasonable expectations of the insurer underwriting premiums for that specified coverage and the out-of-state employer-policyholder purchasing it, violating the principles of the Restatement (Second) of Conflict of Laws, § 188, especially if the parties included a choice of law provision as set forth in § 187.

In any event, *Wann* was decided in 1937, and until the courts clarify its applicability, we ask that the Department limit its guidance to the precedent that can confidently be applied, which is the *Reddy Ice* test.

Recommended Guidance

As an initial matter, we ask the agency to confirm that, as contemplated in Restatement (Second) of Conflict of Laws § 187, the law chosen by the parties in a group policy issued outside Texas determines whether Texas law, specifically SB 1264 and its dispute resolution provisions, applies.

Absent an express choice of law in the group policy, given that the predominant test for extraterritoriality is straightforward, we ask that the agency provide written guidance to plans and providers on the intersection of the NSA and SB 1264. As noted above, while there may be borderline cases that arise based on fact questions, most issues would be addressed by providing the test developed by Texas courts. We recommend that such guidance include the following:

> *SB 1264 applies to any insurance contract with an applicable choice-of-law provision dictating that Texas law controls. The No Surprises Act (NSA), or another state's law, applies when a choice-of-law provision dictates that another state's law controls. If there is no applicable choice-of-law provision, SB 1264 will apply if:*
>
> *(1) the insurance proceeds are payable to a citizen or inhabitant of Texas;*
>
> *(2) the policy is issued by an insurer doing business in Texas; and*
>
> *(3) the policy must be issued in the course of the insurance company's business in Texas.*

Publishing this information in formal agency guidance would provide a significant amount of clarity for issuers and providers while also ensuring that the state is not violating constitutional principles. The agency could include a link to this guidance in its surprise billing portal so that issuers could note whether they believe the claim falls within state jurisdiction and provide relevant information. In other words, not only would this alleviate confusion for issuers and providers on the front end, but it would also reduce the administrative burden on the agency of having to sort through the particulars of a claim to determine which law applies.

Alternatively, if the Department nonetheless thinks the *Wann* test applies to certain issues arising under group policies issued outside Texas, we suggest limiting any guidance to these unique circumstances. Both under the federal No Surprises Act and SB 1264, the patient is protected from certain surprise balance bills. The need for clarity is in determining whether the state or federal dispute resolution processes apply to out-of-state group policies. Neither of these processes, however, implicates coverage mandates or the like because they apply only to disputes over reimbursement for covered services. Accordingly, any guidance should be limited to these unique

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circumstances and the state's interest and reasonable expectations about how certain disputes over reimbursement for otherwise covered services are resolved under SB 1264.

TAHP and its member plans sincerely appreciate your consideration of this matter. Please contact us if you have any questions or concerns.

Sincerely,

Jamie Dudensing, RN
CEO
Texas Association of Health Plans