



CLIENT BULLETIN

Fifth Circuit: Texas Prompt Pay Act Does Not Apply to Third-Party Administration of Self-Funded ERISA Plans

Craig M. Bargher | cbargher@cmn-law.com

In two recent decisions – *Health Care Service Corp. v. Methodist Hospitals of Dallas*, No. 15-10154, 2016 WL 530680, at *1 (5th Cir. Feb. 10, 2016) and *Aetna Life Insurance Co. v. Methodist Hospitals of Dallas*, No. 15-10210 (5th Cir. Feb. 18, 2016) (Unpublished) – the Fifth Circuit held, *inter alia*, that Chapter 1301 of the Texas Prompt Pay Act (the “TPPA”) (TEX. INS. CODE § 1301.001 – 1301.202) does not apply to third-party plan administrators’ administration of self-funded ERISA Plans. The court determined in both cases that the third-party administrators were neither “insurers” nor persons with whom an insurer contracts, under the Texas Prompt Pay Act.

In *Health Care Service Corp.*, Health Care Service Corporation, which operates as Blue Cross and Blue Shield of Texas (“BCBSTX”), acted in two main roles. First, it acted as the administrator for self-funded ERISA Plans, state government plans, and claims under the BlueCard program, which allows beneficiaries covered by out-of-state BCBS plans to access coverage when they are not in the state in which their plans are based. In addition, BCBSTX administered claims in Texas under the Federal Employees Health Benefits Program (“FEHBP”), which is governed by the Federal Employee Health Benefits Act (“FEHBA”) (5 U.S.C. § 8901 - 8914). In *Aetna Life Insurance Co.*, Aetna Life Insurance Company (“Aetna”) administered self-funded ERISA Plans.

Methodist Hospitals of Dallas (“Methodist Hospitals”) argued in both cases that the third-party administrators violated the TPPA, which applies only to preferred provider plans, by failing to comply with the statute’s deadlines for processing “clean claims” under Section 1301.103 (TEX. INS. CODE § 1301.103). BCBSTX and Aetna denied that the TPPA applied to

them. The express applicability provision of the TPPA states that:

this chapter applies to each preferred provider benefit plan in which *an insurer provides, through the insurer’s health insurance policy, for the payment of a level of coverage that is different depending on whether an insured uses a preferred provider or a nonpreferred provider.*

TEX. INS. CODE § 1301.0041(a). (Emphasis added). In addition, Section 1301.109 states that the statute also:

applies to a person, including a pharmacy benefit manager, with whom an insurer contracts to (1) process or pay claims; (2) obtain the services of physicians and health care providers to provide health care services to insureds; or (3) issue verifications or preauthorizations.

TEX INS. CODE § 1301.109.

In both cases, the Fifth Circuit agreed with BCBSTX and Aetna, which both argued that they, as third-party plan administrators for self-funded ERISA plans acting under administrative services only agreements, are neither “insurers” under Section 1301.103, nor persons with whom an insurer contracts under Section 1301.109 of the TPPA. Specifically, the Fifth Circuit rejected Methodist Hospitals’ broad reading of Chapter 1301 and focused on the fact that the third-party administrators did “not provide payments through [their] health insurance policy” when they administered the various plans at issue. *Health Care Service Corp.*, No. 15-10154, 2016 WL 530680, at *4-5; *Aetna Life Insurance Co.*, No. 15-10210, at 6-7 (relying on its decision in *Health Care Service Corp.*). Moreover, in *Health Care Service Corp.*, the Fifth Circuit noted that “BCBSTX, as an administrator, does not confer any



benefits for medical expenses on beneficiaries and therefore does not provide for payment through its “health insurance policy.” *Health Care Service Corp.*, No. 15-10154, 2016 WL 530680, at *5.

Similarly, in *Health Care Service Corp.*, the Fifth Circuit rejected Methodist’s argument that self-funded ERISA Plans, state government plans, and out-of-state BlueCard plans were “insurers” under Section 1301.109. The court reasoned that those plans do not operate under any of the applicable subsection’s “enumerated provisions” and are not “authorized to issue, deliver, or issue for delivery health insurance policies in Texas.” *Health Care Service Corp.*, No. 15-10154, 2016 WL 530680, at *6¹. In *Aetna Life Insurance Co.*, the court relied on the reasoning of its decision in *Health Care Service Corp.* Accordingly, the Fifth Circuit held in both cases that the third-party administrators were not “persons” with whom an insurer contracted under that section. *Health Care Service Corp.*, No. 15-10154, 2016 WL 530680, at *6; *Aetna Life Insurance Co.*, No. 15-10210, at 6-7. Further, in *Health Care Service Corp.*, the court was critical of Methodists Hospitals’ “proffered construction” of the TPPA:

Methodist claims that Chapter 1301 applies to administrators of the plans only when those administrators also happen to operate as insurers. Under Methodist’s proffered construction, Chapter 1301(1) would apply to administrators that are *not* otherwise insurers of insured plans under section 1301.109, (2) would apply to administrators that are otherwise insurers of self-funded plans under section 1301.0041(a), and (3) would *not* apply to administrators that are not otherwise insurers of self-funded plans.

This result makes no sense. First, Methodist leaves unexplained why the legislature would choose to expressly extend Chapter 1301 to administrators of insured plans under section 1301.109, but not extend it to administrators of self-funded plans in the same way. Section 1301.109 could, for example, apply to “a person ... with whom an insurer [or self-funded plan] contracts.” Second, Methodist also leaves unexplained why the legislature would extend Chapter 1301 to administrators of insured plans, regardless of whether the administrator otherwise operates as an insurer, but choose to extend Chapter 1301 to administrators of self-funded plans only when such administrators otherwise operate as insurers.

Health Care Service Corp., No. 15-10154, 2016 WL 530680, at *7.²

These decisions are significant because the Fifth Circuit provided a straightforward analysis of the TPPA’s definitions of “insurer” and the phrase “person ... with whom an insurer contracts,” as applied to third-party administrators. In the context of third-party administration of self-funded ERISA Plans, they will serve as strong persuasive authority in jurisdictions outside the Fifth Circuit addressing the application of any similar prompt pay statutes.

If you have any questions about this Client Bulletin, please feel free to contact any of the attorneys listed or the CMN attorney with whom you regularly work.

Chittenden, Murday & Novotny LLC
303 W. Madison St. Suite 1400
Chicago, Illinois 60606
312.281.3600

¹ Section 1301.001(5) provides that: “Insurer” means a life, health, and accident insurance company, health and accident insurance company, health insurance company, or other company operating under Chapter 841, 842, 884, 885, 982, or 1501, that is authorized to issue, deliver, or issue for delivery in this state health insurance policies. (TEX. INS. CODE § 1301.001(5).)

² Finally, in *Health Care Service Corp.*, the Fifth Circuit held that FEHBA preempted the application of Chapter 1301 to claims arising under FEHBA Plans that BCBSTX processed. The court noted that FEHBA preemption occurs “when (1) ‘the FEHBA contract terms at

issue “relate to the nature, provision, or extent of coverage or benefits,”” and (2) the state law relates to health insurance or plans.” *Health Care Service Corp.*, No. 15-10154, 2016 WL 530680, at *7 (citing *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 145 (2d Cir. 2005), *aff’d*, 547 US. 677 (2006)). The parties disputed only the second part of the test, and the Fifth Circuit held that because Chapter 1301 imposes penalties for late payments, Chapter 1301 “would directly affect the operation of the plans and expand FEHBP carriers’ duties under the plans. On this basis Chapter 1301 does relate to FEHBP plans.” *Id.* at *8.