



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 13, 2021

The Honorable Tamara L. Cochran-May  
San Patricio County Attorney  
400 West Sinton, Room 108  
Sinton, Texas 78387

**Opinion No. KP-0367**

Re: Whether subsection 20.05(a)(5) of the Business and Commerce Code prohibits a consumer reporting agency from reporting certain information if the consumer is covered by a self-funded plan with a reference-based-pricing program (RQ-0385-KP)

Dear Ms. Cochran-May:

You ask whether subsection 20.05(a)(5) of the Business and Commerce Code prohibits a consumer reporting agency from reporting certain information if the consumer is covered by a self-funded plan with a reference-based-pricing program.<sup>1</sup>

**Background**

Chapter 20 of the Business and Commerce Code regulates consumer credit reporting agencies' authority to provide consumer reports to third parties. *See* TEX. BUS. & COM. CODE §§ 20.01–.31. When authorized, a consumer credit reporting agency may furnish a person's consumer report to third persons for credit, insurance, employment, and other potentially sensitive purposes.<sup>2</sup> *Id.* § 20.02(a). Subsection 20.05(a)(5) of the Business and Commerce Code provides as follows:

(a) [A] consumer reporting agency may not furnish a consumer report containing information related to:

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<sup>1</sup>*See* Letter from Honorable Tamara L. Cochran-May, San Patricio Cnty. Att'y, to Honorable Ken Paxton, Tex. Att'y Gen. at 2 (Oct. 20, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0385KP.pdf> ("Request Letter").

<sup>2</sup>*But see* TEX. BUS. & COM. CODE § 20.05(c) ("A consumer reporting agency may not furnish medical information about a consumer in a consumer report that is being obtained for employment purposes or in connection with a credit, insurance, or direct marketing transaction unless the consumer consents to the furnishing of the medical information.").

(5) a collection account with a medical industry code, if the consumer was covered by a *health benefit plan* at the time of the event giving rise to the collection and the collection is for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim[.]

*Id.* § 20.05(a)(5) (emphasis added).<sup>3</sup> You tell us that some employers provide health care benefits using self-funded plans known as reference-based-pricing plans. *See* Request Letter at 1–2. You ask whether the phrase “covered by a health benefit plan” in subsection 20.05(a)(5) includes self-funded plans that have implemented reference-based pricing. *Id.* at 2.

### **Construction of Subsection 20.05(a)(5), Texas Business and Commerce Code**

Courts construing a statute attempt to effectuate the Legislature’s intent as expressed in the words of the statute. *Sunstate Equip. Co., LLC v. Hegar*, 601 S.W.3d 685, 689–90 (Tex. 2020). To do so, courts start with a statute’s “text and the plain meaning of its words construed within the statute as a whole.” *Id.* at 690. Furthermore, courts do not construe statutes in isolation but rather within the context of “the surrounding statutory landscape.” *LTTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 75 (Tex. 2011).

While the Business and Commerce Code does not specifically define “health benefit plan,” the remainder of subsection 20.05(a)(5) provides the context from which the scope of the prohibition can be determined. *See* TEX. BUS. & COM. CODE § 20.05(a)(5). The prohibition in subsection 20.05(a)(5) on reporting is limited to information related to a collection account for an outstanding balance “owed to an emergency care *provider* or a facility-based *provider* for an *out-of-network* benefit claim.” *Id.* (emphasis added). Thus, the subsection contemplates a health benefit plan utilizing a network of providers. A “provider network” generally means

a health benefit plan under which health care services are provided to enrollees through contracts with health care providers and that requires those enrollees to use health care providers participating in the plan and procedures covered by the plan. The term includes a network operated by:

- (A) a health maintenance organization;
- (B) a preferred provider benefit plan issuer; or
- (C) another entity that issues a health benefit plan, including an insurance company.

TEX. INS. CODE § 1456.001(6). Thus, subsection 20.05(a)(5) applies only to information concerning a collection account for a plan utilizing a network of providers and that distinguishes

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<sup>3</sup>Subsection 20.05(a) has exceptions for information provided in certain specified circumstances not pertinent to your question. *See id.* § 20.05(a), (b), (b-1).

between payment to network providers and out-of-network providers. *See* TEX. BUS. & COM. CODE § 20.05(a)(5).

### **Application of Subsection 20.05(a)(5) to Reference-Based-Pricing Plans**

Neither the Business and Commerce Code nor the Insurance Code specifically address reference-based-pricing plans. Reference-based pricing may be a feature of a variety of different programs or plans. *See* Terry Humo, *Employer's Guide to Self-Insuring Health Benefits* ¶¶ 250, 252, 1993 WL 13550442 (Sept. 2015 Supp.). Because the applicability of the statute will depend on the particular facts concerning a reference-based program or plan, we cannot answer your question as a matter of law. *See* Tex. Att'y Gen. Op. No. KP-0309 (2020) at 4 (stating that the opinion process cannot resolve issues requiring the consideration of specific facts). You ask specifically about a program that “does not have a network.” Request Letter at 1–2. A court would likely conclude that subsection 20.05(a)(5) does not apply to a self-funded plan that does not utilize a network of providers.

### **Application of Subsection 20.05(a)(5) to Hospitals' Collection Agencies**

You also ask whether the statute prohibits Texas hospitals' collection agencies from furnishing to a credit bureau information about an individual's “outstanding balance for medical bills other than copayments, deductibles and coinsurance whose employer has adopted” a reference-based-pricing program. *Id.* at 2. The prohibition in subsection 20.05(a)(5) applies to a “consumer reporting agency,” which is “a person that regularly engages wholly or partly in the practice of assembling or evaluating consumer credit information or other information on consumers to furnish consumer reports to third parties for monetary fees, for dues, or on a cooperative nonprofit basis.” TEX. BUS. & COM. CODE §§ 20.01(5), .05(a). Even assuming a hospital's collection agency qualifies as a consumer reporting agency, subsection 20.05(a)(5) does not preclude it from furnishing to a credit bureau information about an individual's outstanding balance for medical bills when the individual's employer has adopted a reference-based-pricing program that does not utilize a provider network. *See id.* § 20.05(a)(5).

**S U M M A R Y**

Subsection 20.05(a)(5) of the Business and Commerce Code prohibits a consumer reporting agency from furnishing a consumer report containing information about certain collection accounts for an outstanding balance owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim. A court would likely conclude that subsection 20.05(a)(5) does not apply to a self-funded plan that does not utilize a network of providers. The subsection does not preclude Texas hospitals' collection agencies from furnishing to a credit bureau information about an individual's outstanding balance for medical bills when the employer has adopted a reference-based-pricing program that does not utilize a provider network.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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