Texas Insurance Statute Does Not Preclude Discounts for Uninsured

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A hospital’s documented plan to provide discounts to certain uninsured patients does not implicate Article 21.79F of the Texas Insurance Code (the “Code”), according to the Texas Department of Insurance (the “Department”). In an August 20, 2004 letter to the Texas Hospital Association noting numerous hospital inquiries, Jose Montemayor, the Commissioner of Insurance (the “Commissioner”), clarified that “the purpose and intent of Article 21.79F is not to prohibit the types of discount programs being considered by some hospitals.”¹

Article 21.79F makes it a Class B misdemeanor and a fraudulent insurance act under Article 1.10D of the Code to intentionally or knowingly charge two different prices for the same product or service, where the higher price is based on the fact that an insurer will pay for some or all of the product or service. Presumably, hospitals are concerned that provision of the same health care good or service to an insured patient at a price higher than the price charged an uninsured patient implicates this statute. The Commissioner’s letter notes that the statute has caused some hospitals to delay implementing discounts to uninsured patients in Texas.

Article 21.79F expressly does not apply to provision of health care services to Medicaid or Medicare patients or to medically indigent persons who qualify for sliding fee scales. These express exceptions cover what otherwise might be proscribed discounts to patients when third-party payors are involved but are silent about discounts to certain

¹ Letter from Jose Montemayor, Commissioner, Texas Department of Insurance, to Richard Bettis, President and CEO, Texas Hospital Association (August 20, 2004), available at http://www.law.uh.edu/healthlawperspectives/exhibits/TexasDepartmentofInsurance.pdf.
uninsured and underinsured patients. To maintain its tax exempt status in Texas, a nonprofit hospital must provide a certain level of charity care to medically indigent and financially indigent persons. Tex. Health & Safety Code Ann. § 311.043(d). “Medically indigent” persons cannot afford to pay the balance of hospital bills remaining after payment by third party payors where the balance exceeds a certain percent of the patient’s annual gross income. Id. § 311.031(13). “Financially indigent” persons are uninsured or underinsured and accepted for care with no obligation or a discounted obligation to pay. Id. § 311.031(7). Article 21.79F’s silence on the financially indigent category may be cause for concern in implementing discount programs.

Given the Commissioner’s silence in his recent letter on any exception to applicability of Article 21.79F, his advice might be construed to expand categories to which the statute does not apply to the uninsured regardless of financial ability or inability to pay. However, taken in context, the Commissioner’s advice (and underlying hospital inquiries) appears to pertain to those of the uninsured who cannot afford the costs of either health care or health insurance. The Commissioner distinguished between providers that seek to take advantage of the fact that an insurer is obligated to pay on behalf of a consumer (being those providers the statute is intended to address) and providers with documented plans to provide discounts to consumers who cannot afford to pay. He concluded with hope that hospitals continue to move forward with such plans.

The Department’s guidance regarding Article 21.79F comes at an opportune time as nonprofit hospitals face increasing pressure regarding charity care. For example, among the allegations in a recent spate of class action lawsuits filed by uninsured patients against nonprofit hospitals are that defendants charge “uninsured patients the highest and full
undiscounted cost for medical care at grossly inflated rates from the actual cost of providing such services” while discounting charges to private insurance companies.² The Department’s clarification should quell concerns that Article 21.79F might preclude discounts for the uninsured poor. In addition, legislation is pending in California to require discounts to certain financially challenged uninsured patients.³ Thus, it would seem that if the provision of voluntary charity care is deemed inadequate or flawed, then it may be legislated and further regulated. Harmonization of statutory and regulatory schemes to which Texas nonprofit hospitals are subject should facilitate voluntary charity care efforts. The Department’s recent clarification of Article 21.79F appears to have achieved some harmony between Texas nonprofit and insurance statutes.

² Complaints and related information on the class action litigation are available at http://www.nfplitigation.com/NotForProfit/disclaimer.aspx.