Texas Court Sides with Challengers to Independent Dispute Resolution Process Under No Surprises Act

What You Need to Know

- A federal court sided with challengers in finding that certain CMS rules conflict with the federal No Surprises Act, pressuring healthcare providers to lower their offers in arbitration.
- The Court vacated portions of the CMS rules pertaining to the independent dispute resolution (IDR) process established by the No Surprises Act, although unchallenged provisions of the rules remain in effect.
- It remains to be seen how arbitrators will incorporate the Court's opinion in making decisions moving forward, particularly outside of Texas.

Earlier this year, the U.S. District Court for the Eastern District of Texas issued a ruling that certain Centers for Medicare & Medicaid Services (CMS) rules conflict with the federal No Surprises Act and must be set aside under the Administrative Procedure Act (APA). The No Surprises Act became effective January 1, 2022.

The Court's decision in *Texas Medical Association et al. v. United States Department of Health and Human Services et al.* effectively removes a bias toward average in-network rates many healthcare providers believe was created by the rules. The decision is attracting national attention as multiple lawsuits pend against provisions of the new federal law and regulations in multiple jurisdictions.

Independent Dispute Resolution (IDR) Process

The CMS rules at issue govern the binding arbitration process for resolving payment disputes between certain out-of-network providers and group health plans and health insurance issuers.

The No Surprises Act includes requirements that limit the amount that out-of-network providers can bill patients for emergency services and has requirements related to non-emergency services provided by out-of-network providers at in-network facilities. The No Surprises Act establishes an independent dispute resolution (IDR) process that applies if the payer and out-of-network provider are unable to negotiate a mutually acceptable payment, in the absence of a state All-Payer Model Agreement or specified state law. Some states, including New Jersey and New York, have laws establishing IDR processes, but even those state laws don't reach self-insured ERISA plans, so the federal IDR applies in those instances.

The IDR process is "baseball-style" arbitration. The provider and insurer each submit a proposed payment amount and explanation to the arbitrator, and the arbitrator must select one of the two proposed payment amounts taking into account considerations specified in the law.

The rules at issue provide that the IDR entity must select the offer closest to "the qualifying payment amount" (QPA), unless the IDR entity determines that credible information submitted by either party clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate, or if the offers are equally distant from the QPA but in opposing directions.

While other factors can be submitted for the consideration of the arbitrator, the QPA is typically the median rate the insurer would have paid for the service if provided by an in-network provider or facility.

Court Ruling

The plaintiffs successfully argued that the CMS rules improperly require arbitrators to "give outsized weight" to a single statutory factor, the QPA, in conflict with the No Surprises Act, by imposing a rebuttable presumption in favor of the offer closest to the QPA. An arbitrator following the regulations would be required to issue a decision biased in favor of the payer's in-network rates, depressing the results otherwise intended by the No Surprises Act.

Granting the plaintiffs' motion for summary judgment, the Court agreed and found that bias to conflict with the No Surprises Act, stating that: "...the Act plainly requires arbitrators to consider all the specified information in determining which offer to select."

The Court invalidated the requirement that the arbitrator select the offer closest to the QPA amount in the absence of credible information to demonstrate that is not appropriate; examples provided in the interim final rules issued pursuant to the No Surprises Act demonstrating how IDR entities choose an offer; and the requirement that the IDR entity explain why it chose an offer that was not the closest to the QPA. All other parts of the rules remain in effect.

Defendants also improperly bypassed notice and comment required by the APA, and thus the rules were set aside for this additional reason.

It remains to be seen how arbitrators under the No Surprises Act will incorporate the Court's opinion in making decisions, particularly outside of the Eastern District of Texas. We will be tracking related developments and will keep you apprised accordingly.

Please contact the author of this Alert, **Neil M. Sullivan**, with questions or to discuss your specific business circumstances.

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