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INSIGHT

No Surprises Act's Independent Dispute Resolution Process and Related Litigation

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On December 27, 2020, the No Surprises Act (NSA), part of the Consolidated Appropriations Act, 2021 (P.L. 116-260), was enacted to address *surprise billing* (i.e., circumstances where individuals receive large, unexpected medical bills when they are unknowingly, and potentially unavoidably, treated by out-of-network providers). Surprise billing is rooted in most private insurers' use of provider networks, which generally results in consumers paying more for out-of-network care (relative to the same in-network care).

The NSA established federal surprise billing requirements with respect to out-of-network emergency services, out-of-network nonemergency services provided during a visit at an in-network facility, and out-of-network air ambulance services. In these situations and for plan years beginning on or after January 1, 2022, the NSA generally limits the amount consumers pay for care and specifies a methodology used to determine how much insurers must pay providers for care, including the use of an independent dispute resolution (IDR) process. Taken together, these requirements effectively result in the provider and insurer recognizing the same total price for care. This Insight provides an overview of the NSA's IDR process; the Departments of Health and Human Services, Labor, and the Treasury's (tri-agencies') implementation of these requirements; and related litigation.

The NSA's IDR Process and the Interim Final Rule

Under the federal payment methodology, the insurer must make an initial payment (or notice of denial of payment) to the out-of-network provider for services rendered, after which either party may initiate open negotiations to attempt to reach an agreed-upon payment amount for services. If negotiations are unsuccessful, the parties may use the IDR process, which is a baseball-style arbitration process wherein the arbitrator chooses one of the parties' proposals to resolve the dispute. Under the IDR process, the provider and insurer each submit a proposed payment amount to the arbitrator and additional information relating to the submission. After considering specified criteria (discussed below), the arbitrator selects one of the two offers as the final payment amount, which is binding. This federal methodology would not apply in states with an all-payer model agreement or in situations addressed by a state surprise billing law payment methodology.

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On October 7, 2021, the tri-agencies established, among other things, the IDR process in an interim final rule (IFR). The IFR specified how the arbitrator should consider the information submitted by providers and insurers when selecting a payment amount, the treatment of batched services, and arbiter certification and conflict of interest standards.

The October IFR built upon a previous NSA-related IFR published by the tri-agencies on July 13, 2021. That IFR addressed, among other issues, NSA rules for determining the qualifying payment amount (QPA), which is defined as an insurer's 2019 median in-network rate for a service, indexed for inflation.

Litigation over the NSA's Provisions and the IFR

One particular aspect of the October IFR, concerning how an arbitrator should select between the parties' proposals during the arbitration process, has been the subject of ongoing litigation. The NSA generally directs the arbitrator to consider (1) the QPA of the item or service and (2) five additional, specified circumstances, including the provider's level of training, experience, and quality and outcome measurements, in making this determination. (For air ambulance determinations, the NSA directs the arbitrator to consider a different set of additional circumstances.)

The IFR implemented these provisions by generally directing the arbitrator to "select the offer closest to the [QPA] unless [it] determines that credible information submitted by either party ... clearly demonstrates that the [QPA] is materially different from the appropriate out-of-network rate." The additional information that the parties may submit for consideration includes the five statutorily specified additional circumstances. In the IFR, the tri-agencies explained their view that this weighting toward the QPA was the best interpretation of the relevant provisions because the statutory text lists the QPA as the first factor, along with detailed rules for calculating the QPA, while the additional circumstances are described in a separate paragraph with limited guidance on their consideration and definitions.

Several providers and their trade associations filed at least six separate lawsuits to challenge this aspect of the IFR. According to the plaintiffs, the IFR directed arbitrators to consider the QPA as the presumptively appropriate payment amount and this presumption conflicts with the NSA's unambiguous statutory directive to consider all statutory factors in every case. In *Texas Medical Ass'n v. U.S. Department of Health & Human Services*, the U.S. District Court for the Northern District of Texas agreed. According to the court, nothing in the NSA "instructs arbitrators to weigh any one factor or circumstance more heavily than the others," nor does the law "impose a 'rebuttable presumption' that the offer closest to the QPA should be chosen." Instead, the court concluded that the NSA unambiguously instructs the arbitrator to select one of the two offers submitted by the parties after taking into account *all* statutory factors. The court also concluded that the IFR violated the Administrative Procedure Act's notice-and-comment rulemaking requirements.

Based on these conclusions, the district court, on February 23, 2022, vacated five portions of the IFR related to instructions to the arbitrator on how to select between the parties' offers, including related definitions and examples. On February 28, 2022, the tri-agencies announced that, consistent with the court's order, the guidance documents based on or referring to the vacated portions of the IFR are withdrawn and will be revised with conforming updates.

All six NSA suits to date challenge these and other related portions of the IFR. Two of the pending suits also raise additional claims. One case challenges the July IFR on the methodology used to calculate the QPA for air ambulance services; these claims are subject to a pending motion for summary judgment before the district court. Another more recently filed case broadly challenges the NSA—including provisions that establish the IDR process and prohibit providers from sending balance bills to patients—as violating the Seventh Amendment, the Due Process Clause of the Fifth and Fourteenth Amendments, and the Fifth Amendment's Takings Clause.

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