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Legal Sidebar

Overview of Select No Surprises Act Litigation

September 7, 2023

The No Surprises Act (NSA), part of the Consolidated Appropriations Act, 2021 (P.L. 116-260), established various consumer protections related to 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. In those situations, 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. Under the federal payment methodology, when an insurer and an out-of-network provider cannot agree on the relevant payment amount, either party may initiate an independent dispute resolution (IDR) process before a private arbitrator, or an IDR entity, who would select between the parties' payment offers after considering a list of statutory factors. This process effectively results in the provider and insurer recognizing the same total price for care.

Since the NSA's enactment, the Departments of Health and Human Services, Labor, and the Treasury (tri-agencies or Departments) have issued several rules and guidance implementing the IDR process. Various aspects of these actions have been the subject of legal challenges. This Sidebar provides background on the NSA and the relevant regulatory actions, an overview of a select set of legal challenges that have resulted in certain changes to the IDR process, and certain considerations for Congress.

Background

The NSA's Statutory Requirements

The NSA enacted a number of private health insurance reforms, including new requirements on providers and insurers regarding surprise billing and other consumer protections. With respect to protection related to surprise billing, the law recognizes surprise billing circumstances to include 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 those circumstances, the NSA generally caps the consumers' financial responsibility to the amount they would have paid had the service been provided in-network. In addition, the law specifies a methodology used to determine how much insurers must pay the out-of-network providers for care.

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In general, under the federal 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. Each party participating in the IDR process must pay to the tri-agencies an administrative fee established by the Secretaries, at an amount such that the total amount of fees collected is "estimated to be equal to the amount of expenditures estimated to be made by the [Secretaries] for such year in carrying out the IDR process." In addition to the administrative fee, the IDR process also entails a fee payable to the IDR entity.

Under the IDR process, the provider and insurer each submit a proposed payment amount to the arbitrator and additional information relating to the submission. In deciding which offer to select, the statute directs the IDR entity to consider (1) the item or service's qualifying payment amount (QPA), defined as an insurer's 2019 median in-network rate for a particular service provided by a provider in the same or similar specialty, indexed for inflation; and (2) information related to any of the specified "additional circumstances" listed in a different subclause, including the provider's level of training, experience, and quality and outcome measurements. The law also prohibits the arbitrators from considering certain factors, such as the usual and customary charges and billed charges. An arbitrator's payment determination, with some limited exceptions, is generally binding and not judicially reviewable. The party whose offer is not chosen must pay the IDR entity fee.

The NSA delegates to the tri-agencies' Secretaries the authority to establish "by regulation one [IDR] process" under which certified arbitrators determine the amount of the disputed payment in a manner consistent with the statute. The law also directs the Secretaries to flesh out various additional aspects of the IDR process. The Secretaries, for example, are directed to establish through rulemaking the methodology insurers must use to determine the QPA and the information insurers must share with providers when making such a determination. The Secretaries are also directed to, for example, specify additional criteria under which multiple disputed items and services may be batched together to be considered as part of a single determination.

Tri-Agency Actions to Implement the NSA

Since the NSA's enactment, the tri-agencies have undertaken numerous actions to implement the NSA, including its requirements related to the QPA, the fees associated with IDR process, the scope of a single IDR determination, and how IDR entities should select between the parties' proposed amounts.

QPA Requirements

As to the QPA, the tri-agencies issued an initial set of interim final rules in July 2021 (July 2021 IFR) that addressed, among other issues, how insurers should determine the QPA for a relevant item or service. The methodology generally directed insurers to calculate the median contracted rates by looking to the contracted payment for a particular service under each of the plans that the insurer has negotiated in advance with providers of that service. The relevant providers should be in the same or similar specialty within each applicable insurance market and in the same geographic region. For self-insured group health plans administered by third-party administrators, the rules—to reduce administrative burden on plan sponsors—permitted the third-party administrators to calculate the relevant QPA using rates recognized under all plans administered by the third-party administrator. The rules further fleshed out the QPA methodology by, for instance, specifying when separate QPAs for a service should be calculated (e.g., if an insurer's contracted rates for a service vary materially based on provider specialty).

The rules also directed insurers to exclude certain payment rates from the QPA calculation, such as rates under "single case agreements" that the insurers may at times negotiate with a provider regarding

particular services in unique circumstances, as well as amounts under certain "risk sharing, bonus, penalty, or other incentive-based or retrospective payments or payment adjustments."

The July 2021 IFR also specified the information an insurer must share about the QPA with a provider. In general, at the time of each initial payment or notice of denial of payment, the insurer must disclose the (1) QPA for each item or service involved; and (2) a statement certifying that each QPA shared was determined in accordance with the applicable regulatory requirements.

IDR Process Fees

In a second set of interim final rules published in October 2021 (October 2021 IFR), the tri-agencies addressed, among other issues, the applicable IDR process fees. The rules specified when and how the parties must pay the IDR entity and administrative fees. The rules further provided that the amount of an administrative fee, as well as a predetermined range of IDR entity fees that such entity generally can charge, will be specified by the tri-agencies through annual guidance.

Based on these rules, the tri-agencies also issued a CY2022 fee guidance setting the fee and fee ranges, with the administrative fee set at $50 per party. In October 2022, the tri-agencies issued a CY2023 fee guidance that kept the administrative fee at $50 per party. In December 2022, however, the tri-agencies amended the guidance to increase the administrative fee to $350 per party, based on newly available data and analysis on the costs of the IDR process. The tri-agencies explained that the fee increase reflected the rising volume of disputes as well as the additional costs incurred by the tri-agencies in assisting IDR entities with making certain threshold eligibility determinations. The tri-agencies stated that the increase was necessary to comply with the statutory directive for the estimated total administrative fees collected to cover the estimated expenditures of administering the IDR process.

IDR Determination

More broadly, the October 2021 IFR also established the IDR process. The rules, among other things, specified how an arbitrator should select between the parties' offers in a determination, when multiple items or services may be batched together in a single determination, and arbitrator certification standards. As to the arbitration determination, the rules generally directed the arbitrator to "select the offer closest to the [QPA] unless [the arbitrator] determines that credible information submitted by either party . . . clearly demonstrates that the [QPA] is materially different from the appropriate out-of-network rate." As to the treatment of batched items and services, the rules generally permitted multiple items and services to be batched jointly as part of one payment determination if (1) the items and services were part of a bundle payment arrangement; or (2) the items and services had the same service code and were billed by the same provider or facility to the same insurer and furnished within a specified period.

Select Litigation Over Tri-Agency Actions

Since the NSA's enactment, several providers and/or their professional organizations have challenged the law or various implementing agency actions on different grounds. This section provides an overview of one set of litigation focused on some of the implementing agency actions discussed above.

Litigation Over How Arbitrators Should Select Between Offers

As discussed in this Insight, one aspect of the October 2021 IFR, concerning how an arbitrator should select between the parties' offers during the IDR process, was subject to challenge soon after the rules' issuance. The U.S. District Court for the Eastern District of Texas, in *Texas Medical Ass'n v. U.S. Department of Health & Human Services* (*TMA I*), agreed with the plaintiffs that the rules applied a

presumption in favor of the QPA and that such presumption conflicted with the NSA's unambiguous statutory directive to consider all statutory factors in every case.

In response to the order, the tri-agencies issued an August 2022 final rule that removed the presumption in favor of the QPA and provided other instructions to the arbitrators on how to consider the relevant statutory factors. Under the August 2022 final rule, the arbitrator, for instance, must consider only credible information that is related to the item of service at issue, and must avoid double-counting information—such as patient acuity and complexity—that the QPA already takes into account. The final rule also requires the arbitrator to provide a written decision that includes an explanation of the determination, including why the arbitrator concluded that any additional information considered was not already reflected in the QPA. The tri-agencies expressed the view that these requirements reflect an appropriate exercise of their authority to "establish by regulation one [IDR] process" because they "encourage[] a consistent methodology for evaluation of information when making a payment determination," thereby promoting consistency and predictability in the arbitration process.

The same plaintiffs (plus one additional provider) sued again, in *TMA II*, to challenge these portions of the final rule. In February 2023, the district court again ruled in favor of the plaintiffs, holding that the final rule "improperly limits arbitrators' discretion by dictating how they may consider the statutory factors—in direct conflict with the [NSA]," which "vests discretion in the arbitrators—not the Departments—to determine the proper payment based on their expertise as set forth in the statute." In so holding, the court rejected the tri-agencies' position that the final rule, pursuant to the authority granted to the Departments to establish the IDR process, merely imposed "reasonable evidentiary and procedural rules" that filled "a 'gap' in the statute concerning how to evaluate the various pieces of information that go into selecting payment amounts." The court vacated the challenged portions of the final rule, and the tri-agencies have modified their guidance to IDR entities accordingly. The government's appeal of the district court's order is pending in the U.S. Court of Appeals for the Fifth Circuit.

Litigation Over Administrative Fee Increase and Batching Rules

In *TMA IV*, the *TMA II* plaintiffs and several additional providers challenged both the December 2022 fee guidance's increase of the administrative fee to $350 as well as the portions of the October 2021 IFR that permitted only items and services of the same service code to be batched together in a single determination. Plaintiffs argued that the fee increase and the same-service-code batching criteria violate the Administrative Procedure Act (APA) because they should have been subject to notice-and-comment rulemaking. Plaintiffs also argued that each action also violates the APA because they were arbitrary and capricious. According to plaintiffs, the fee increase and same-service-code rule together unreasonably block access to the IDR process by making it cost prohibitive to arbitrate small-value claims.

On August 3, 2023, the district court held that the tri-agencies' failure to provide notice and comment for the December 2022 fee guidance and the batching portion of the October 2021 IFR violated the APA. The court concluded that the fee guidance was a substantive rule that binds would-be arbitration participants and thus must undergo notice-and-comment rulemaking. In so concluding, the court rejected the tri-agencies' argument that the fee guidance was an interpretive rule exempt from notice and comment because the guidance merely supplies the specific dollar amount the statute and regulations already oblige IDR participants to pay. The court also concluded that the tri-agencies lacked good cause to bypass notice and comment with respect to the fee guidance. In the court's view, the tri-agencies failed to show why they could not have engaged in rulemaking between October 2022 and January 2023, nor had they sufficiently demonstrated that it would be "eminently impracticable" to undergo annual notice and comment to determine the IDR administrative fee. As to the batching rule, the court concluded that it was not a rule of agency procedure exempt from notice and comment and that the tri-agencies failed to explain why they could not have provided notice and comment in the one-year time frame Congress gave them to promulgate rules related to the IDR process. The court further concluded that the procedural defects on

both actions were not harmless, and accordingly, vacated the December 2022 fee guidance's $350 administrative fee and the same-service-code batching criteria. As of the time of this writing, the government's time to appeal the order has not expired, and the tri-agencies have reverted the administrative fee to $50 for disputes initiated on or after August 3, 2023.

Litigation Over the QPA Methodology and Disclosure Requirements

In *TMA III*, the *TMA II* plaintiffs challenged portions of the July 2021 IFR that set forth the methodology for calculating the QPA as well as the related disclosure requirements. Plaintiffs argued that the rules at issue were inconsistent with the statutes or arbitrary and capricious. Regarding the QPA calculation, plaintiffs argued, for instance, that the rules impermissibly or arbitrarily allow for the inclusion of certain rates such as "ghost rates" that are included in contracts but not actually paid to providers, as well as rates from providers not within the same specialty. According to plaintiffs, inclusion of those rates artificially lowers the relevant services' QPA. Plaintiffs also objected to the rules' exclusion of bonus and incentive payments, as well as one-off single case agreements from QPA calculations. For self-insured plans, plaintiffs also objected to the flexibility provided by the rules for third-party administrators to calculate contracted rates using rates across all self-insured plans administered by an administrator. Regarding QPA disclosure, plaintiffs contended the rules should require the disclosure of additional information, including each rate included in the QPA calculation. (The district court also consolidated the claims of several air ambulance plaintiffs into *TMA III.* Those claims are beyond the scope of this Sidebar.)

In an August 24, 2023, decision, the district court largely agreed with plaintiffs, holding that the challenged rules related to the QPA methodology are inconsistent with the statute. In the court's view, the challenged rules generally conflict with the NSA's unambiguous directive to calculate the QPA using "contracted rates" recognized by the plan or issuer "as the total maximum payment" for the same or similar item or service "that is provided by a provider in the same or similar specialty." In so concluding, the court generally rejected the tri-agencies' position that the relevant terms left undefined in the statute—such as "contracted rates," "total maximum payment," or " provided by a provider in the same or similar specialty"—or arguably conflicting references within the statute—left room for the agencies to reasonably interpret the provisions based on applicable industry norms, administrative burden, or other considerations. The court, however, upheld the rules' QPA disclosure requirements as reasonable. Based on these conclusions, the district court vacated the relevant QPA methodology rules and guidance. As of the time of this writing, the IDR process is temporarily suspended while the tri-agencies update the relevant guidance, and the government's time to appeal the order has not expired.

Consideration for Congress

Litigation over the NSA highlights areas in which the law grants or potentially grants the tri-agencies with authority to implement a range of policy choices within the statutory parameters, as well as potential areas of statutory ambiguity. The set of litigation discussed in this Sidebar, for instance, highlights certain stakeholder concerns related to the IDR decisionmaking process, IDR determination costs and scope, and the QPA methodology. To the extent Congress determines that the relevant range of policy choices should be limited or expanded, or that the law should be otherwise clarified, Congress may amend the NSA to alter its scope or method of implementation.

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