Healthcare Law Alert: Texas Court Sets Aside Key Parts of the Independent Dispute Resolution Process Under the Federal No Surprises Act – All Jurisdictions Affected

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The No Surprises Act (NSA)[1] was enacted on December 27, 2020, and went into effect on January 1, 2022. The new law protects patients from surprise out-of-network (OON) bills and creates a new federal independent dispute resolution (IDR) process to resolve payment disputes between payors and OON providers.

On February 23, 2022, a federal district court in the Eastern District of Texas vacated[2] certain parts of the October 7, 2021 interim final rule (Rule)[3] that implements the IDR process under the federal NSA. This decision affects every jurisdiction in the U.S., not just Texas. The court determined that the U.S. Department of Health and Human Services, the U.S. Department of Labor, and the Department of the Treasury (collectively, the Departments) were mistaken in instructing arbitrators to give the qualified payment amount (QPA) extra weight compared to other factors during the IDR process. The QPA is a rate set by each insurer based on the median of the contract rates that such insurer pays for the same or similar service in the same or similar specialty and region. The court held that these portions of the Rule conflict with the NSA and must be set aside. This lawsuit brought by the Texas Medical Association (TMA) against the Departments is one of six lawsuits challenging the Rule around the country.

Background

The NSA provides a "baseball-style" arbitration process by which, in an attempt to resolve payment disputes, provider and insurer each submit a proposed payment amount and explanation to the arbitrator. In setting forth the terms of the IDR process, the NSA states that, when determining an appropriate OON rate, the IDR arbitrator "shall" consider multiple factors including the QPA, training and experience, complexity of procedure or medical decision-making, as well as any relevant information submitted by either party. The NSA does not impose any more or less weight on any of these factors.

However, in promulgating the Rule, the Departments set the QPA. It is then up to the provider to overcome the rebuttable presumption that the QPA is the appropriate rate for the items or services provided. The Rule acknowledges that other factors, if credible, can be considered but that, in order to deviate from the QPA, providers must demonstrate that the QPA is "materially different" from the appropriate OON rate by submitting evidence in support of the other factors enumerated in the NSA.

The Texas Court Ruling

The Texas Medical Association, a physician advocacy group based in Austin, Texas, challenged the Rule's rebuttable presumption that directed IDR arbitrators to assume that the QPA is the appropriate OON payment amount unless a party submits credible information that clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate. This standard, plaintiffs argued, is unlawful because it is inconsistent with the NSA and exceeds the scope of the Departments' authority. TMA additionally argued that the federal agencies should have provided an opportunity for advance public notice and comment and asked the court to vacate the challenged provisions of the Rule.

Judge Jeremy D. Kernodle of the Eastern District of Texas explained:

The rule…places its thumb on the scale for the QPA, requiring arbitrators to presume the correctness of the QPA and then imposing a heightened burden on the remaining statutory factors to overcome that presumption…. If Congress had wanted to restrict arbitrators' discretion and limit how they could consider the other factors, it would have said so especially here, where Congress described the arbitration process in meticulous detail.

Relying on a Supreme Court precedent, the court noted that "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." The court agreed with the plaintiffs that the disputed provisions of the Rule are inconsistent with the text of the NSA and therefore vacated them.

The vacated provisions of the Rule are:
• The definition of "material difference;"
• The requirement that the IDR entity select the offer closest to the QPA unless there is credible information to demonstrate that this is not the appropriate rate;
• The requirement that "additional information" clearly demonstrate that the QPA is materially different from the OON rate;
• The four examples describing how IDR entities should choose between competing offers; and
• The requirement that the IDR entity explains why it chose an offer not closest to the QPA.

The court also found that the Departments improperly and without justification bypassed the required "notice and comment" process under the Administrative Procedure Act when issuing the Rule. According to the court, this deprived healthcare providers the opportunity to explain (1) why the Rule is inconsistent with the NSA, (2) how the Rule negatively impacts providers, and (3) how the agencies could draft a rule consistent with the NSA. Following the Texas court's ruling, the Departments may now appeal the TMA decision to the Fifth Circuit Court of Appeals and request a stay pending their appeal.

It is critical to note that the Texas decision does not invalidate the NSA nor does it invalidate the entire IDR process under the NSA. It only invalidates the above provisions. The IDR process remains available to resolve payment disputes between payors and OON providers. The Departments expect to issue the final IDR rule by May 2022.

Other Lawsuits Challenging the Rule

In addition to the TMA case discussed above, there are currently five other lawsuits challenging the Rule's requirement that IDR entities must presume that the QPA is the appropriate OON rate (**click here** to view table). The status of these five lawsuits is in flux. Since they were filed in different jurisdictions than the TMA case, they may proceed as scheduled or the respective plaintiff(s) may ask for a stay pending further proceedings of the TMA decision.

For more information about these lawsuits or the No Surprises Act and its requirements, please contact the attorneys below or any member of our Healthcare Law Practice Group.

[1]The No Surprises Act is available at https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf

[2]Texas Medical Association v. U.S. D.H.H.S., No. 6:21-cv-425 (E.D. Tex.), Summary judgment opinion dated February 23, 2022, available at https://sponsors.aha.org/rs/710-ZLL-651/images/2022.02.23-TMA%20v.HHS-Mem.Op.pdf

[3]Interim Final Rules dated October 7, 2021, available at https://www.govinfo.gov/content/pkg/FR-2021-10-07/pdf/2021-21441.pdf

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