

Fifth Circuit Affirms Vacatur of Insurer-Friendly “No Surprises Act” Regulations

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In a win for health care providers, on August 2, the Fifth Circuit Court of Appeals affirmed a Texas federal judge's grant of summary judgment in favor of the Texas Medical Association and LifeNet, an air ambulance company, in their consolidated lawsuit challenging provisions of a Final Rule regarding the No Surprises Act. By affirming the district court's vacatur of regulations which established decision-making priorities for independent arbitrators appointed to resolve insurance reimbursement disputes pursuant to the No Surprises Act, the Fifth Circuit removed regulatory guardrails that encouraged these arbitrators to prioritize the qualifying payment amount (QPA) over other factors when rendering a decision on out-of-network rates.

Under the No Surprises Act, out-of-network rate disputes are determined by an Independent Dispute Resolution (IDR) process in which both a provider and insurer submit an offer for payment, and an arbitrator chooses one of the two offers as the out-of-network rate. The factors the arbitrator considers in making its determination includes the QPA, which is typically the median rate the insurer would have paid for comparable services in the same geographic area. The factors also include “additional circumstances” such as the doctor's level of training and the complexity of the case.

Previously, the methodology for calculating QPAs, established by the Departments of Health and Human Services, Labor, and Treasury (collectively, the Departments), included a rule that there was a rebuttable presumption that the QPA was the appropriate payment amount for the arbitrator to select. However, after several unfavorable district court decisions regarding this rule, the Departments promulgated a new Final Rule in August 2022 which did away with the rebuttable presumption that the QPA was the appropriate amount, and instead set out three procedures for arbitrators to follow in assessing which offer to select.

These three procedures require that: (1) the arbitrators must consider the QPA first and then the other factors; (2) the arbitrators must not consider information that is not credible or related to the issue, or that is already accounted for in the QPA; and (3) the arbitrators must explain their reasons if they depart from the QPA.

The plaintiffs challenged these three provisions of the Final Rule in the instant case. They allege the Departments lack statutory authority to promulgate these three aspects of the arbitration process which, the plaintiffs contend, favor the QPA as the appropriate payment amount. In affirming the district court's grant of summary judgment in the plaintiffs' favor, the Fifth Circuit agreed.

The court held that the No Surprises Act did not delegate to the Departments the authority to set substantive standards for the independent arbitrators to observe and that the Departments exceeded their authority by

interfering with the arbitrators' discretion to balance the statutory factors.

This ruling removes procedural guardrails, which encouraged consistent methodology for evaluating the information available to the IDR arbitrators. Arbitrators will no longer be directed to consider the QPA above any of the other factors enumerated by the statute, and need not justify any departure from the QPA in rendering their decisions. This could result in more IDR arbitrators selecting a provider's offer over the insurer's offer. Consistent with standard health care marketplace metrics, insurers' offers are generally at or below the QPA, while providers' offers are typically higher than the QPA. Insurers should consider that arbitrators' selections are now less tethered to the QPA than ever, both when negotiating out-of-network rates before either party submits a matter to IDR and when submitting an offer to the arbitrator.

Given the import of this ruling to the health care industry and the interest expressed by powerful groups on both sides, the Departments may elect to appeal this decision to the U.S. Supreme Court. The Final Rule at issue will remain in place until the Supreme Court resolves this matter or denies the Departments' application for writ of certiorari. If the Supreme Court declines to hear this matter or eventually rules against the Departments, the Departments will remove the three challenged provisions from the Final Rule, leaving arbitrators with less department-directed guidance when selecting an offered rate.

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