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# Locke Lord QuickStudy: No Surprises Act Update: Providers ??Receive Favorable Verdict Regarding Independent ?Dispute ??Resolution ?Process

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On February 23, 2022 U.S. District Court Judge Jeremy D. Kernodle vacated certain provisions of CMS regulations implementing the federal Independent Dispute Resolution process under the federal No Surprises Act. The case is *Texas Medical Association and Adam Corley v. U.S. Department of Health and Human Services et al*., Case No. 6:21-cv-425-JDK (E.D. Tex.).

The Plaintiffs, Texas Medical Association and Dr. Adam Corley ("Plaintiffs"), filed a lawsuit against the Departments of Health and Human Services, Treasury, Labor, and Office of Personnel Management (the "Government") alleging (1) the requirement that the Independent Dispute Resolution entity adopt a rebuttable presumption in favor of the Qualifying Payment Amount conflicts with the statute, and (2) that the Government violated the Administrative Procedure Act by foregoing notice and comment when it issued an interim final rule under the No Surprises Act. The challenged regulations were implemented in an October 7, 2021 interim final rule . This is the first lawsuit decided challenging the No Surprises Act Independent Dispute Resolution process, and will almost certainly be appealed by the federal government.

In granting summary judgment to the Plaintiffs, the Court first ruled that the Plaintiffs had the right to bring their lawsuit because they had demonstrated two cognizable injuries: (1) the deprivation of the arbitration process established by Congress under the No Surprises Act, and (2) financial harm resulting from the regulation's presumption in favor of the offer closest to the Qualifying Payment Amount.[1]

The Court then rejected the Government's argument that it was entitled to deference under the so-called "Chevron Doctrine." Specifically, the Government argued that the regulation was supported by the "overall statutory scheme." The Court disagreed, holding "that the [No Surprises] Act unambiguously establishes the framework for deciding payment disputes and concludes that the [r]ule conflicts with the statutory text." The Court found that the No Surprises Act is clear that arbitrators "shall consider" both the qualifying payment amount and the other factors provided in the No Surprises Act, without one factor being weighed more heavily than the others. The other factors provided in the No Surprises Act are:

- "the level of training, experience, and quality and outcomes measurements of the provider or facility";

- "market share held by the nonparticipating provider or facility";

• “acuity of the individual receiving such item or service”;

• “teaching status, case mix, and scope of services of the nonparticipating facility”; and

• [d]emonstrations of good faith efforts (or lack of good faith efforts)” of the parties to enter into a network agreement.

In turn, Judge Kernodle stated that:

“[t]he Rule thus places its thumb on the scale for the Qualifying Payment Amount, requiring arbitrators to presume the correctness of the Qualifying Payment Amount and then imposing a heightened burden on the remaining statutory factors to overcome that presumption.”

The Court found the Government arguments to be “unpersuasive,” finding that Congress would have been clear if it wished to restrict the arbitrators’ discretion and that the Government added several key words not in the statute into the regulation. In other words, the Courts do not have to defer to agency action if that action is inconsistent with the clear guidance set forth by Congress.

Judge Kernodle also found the Government’s failure to provide notice and comment before issuing the regulations violated the Administrative Procedure Act. Notably, the Court rejected the Government’s arguments relating to the limited period in which to implement the No Surprises Act through rulemaking. The opinion calls into question the Government’s failure to explain why the Requirements Related to Surprise Billing regulations Part I (which defined the Qualifying Payment Amount) and Part II (implementing the Independent Dispute Resolution process) could not have been written in tandem. The Court stated that:

“if the Departments had provided notice and comment, Plaintiffs could have submitted the specific reasons and authorities for why they believed the rule is inconsistent with the Act, how the Rule would impact them as providers, and how the Rule could be drafted to track the statutory text more closely.”

Judge Kernodle vacated certain provisions of the final rule, finding “that there is nothing the Departments can do on remand to rehabilitate or justify the challenged portions of the Rule as written.” The Court agreed with the Plaintiffs that vacating the challenged sections of the rule will not interrupt the Independent Dispute Resolution process but merely result in cases being decided as the statute directs and without the a presumption in favor of the Qualified Payment Amount.

[1]The Qualifying Payment Amount is generally the plan or issuer’s median contracted rate for the same or similar item or service in that geographic region as of 2019, adjusted by the Consumer Price Index for All Urban Consumers. *See* 45 § C.F.R. 149.140(c).

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