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Providers Prevail in Challenge to No Surprises Act Interim Final Rule

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On February 23, a Texas federal court vacated several key portions of an interim final rule (Rule) governing the No Surprises Act's (Act) independent dispute resolution (IDR) process. The court's decision has been lauded by providers as "a major victory for patients and physicians," but criticized by health insurance plans as "wrong and misguided."[1]

As we reported in November 2021, the Texas Medical Association (TMA) filed suit to challenge the Rule's IDR provision and its focus on the qualifying payment amount (QPA) — the payor's median contract rate for the same or similar service in the relevant region — as the default payment for out-of-network reimbursement rates.

In the event of a dispute over an out-of-network reimbursement rate, the IDR process requires both the payor and provider to submit the amount they believe the service provided should cost, along with supporting documentation.[2] The IDR entity then issues a binding determination, selecting the party's offer that it deems the appropriate out-of-network rate for the qualified IDR items or services, taking into account certain considerations that are specified in the Act.[3] The Rule requires the IDR entity to begin with the presumption that the QPA establishes the appropriate rate, allowing for departure from the QPA only if a party presents evidence sufficient to "clearly demonstrate that the [QPA] is materially different from the appropriate out-of-network rate."[4]

TMA initiated litigation under the Administrative Procedure Act (APA) to challenge the Rule, arguing that it conflicted with the statutory text of the Act.[5] As a result, TMA contended that the Rule impermissibly "puts a substantial thumb on the scale in favor of the QPA" — a number that is set by the insurer.[6] TMA also argued the U.S. Departments of Health and Human Services (HHS), Labor, and Treasury, as well as the Office of Personnel Management (the Departments) impermissibly bypassed notice and comment required by the APA.[7]

More specifically, TMA argued that the IDR process was contrary to the plain language of the Act, which enumerates the considerations at arbitration and does not include language contemplating a "rebuttable presumption." The Departments countered that they are entitled to deference when creating regulations and that creating an IDR process that includes a rebuttable presumption is within their purview. They further explained their rationale: Using a clearly defined rebuttable presumption is important as it allows for a predictable out-of-network rate structure and encourages parties to reach an agreement outside of the IDR process, which has the benefit of avoiding administrative costs.[8]

The court sided with TMA and vacated the Rule, finding that it impermissibly departed from the Act's statutory text and that the Departments failed to provide the requisite notice and comment. Although the court recognized the

basic premise that, under administrative law principles, agencies are afforded deference in rulemaking, it explained that deference is not limitless. Agency interpretation must yield "to the unambiguously expressed intent of Congress,"[9] which it determined was *not* to create a rebuttable presumption in favor of the QPA. Rather, the Act clearly established a multifactor analysis to determine reimbursement and "[n]othing in the Act [ ] instructs arbitrators to weigh any one factor or circumstance more heavily than the others." The court explained that the Rule's creation of a "rebuttable presumption" in favor of the QPA effectively rewrote the clear statutory terms in violation of the APA.[10]

Health insurance industry groups voiced their opposition to the court's decision, noting "this wrong and misguided ruling will result in higher health care costs and premiums for consumers and businesses."[11]

Troutman Pepper will continue to monitor and provide updates as significant developments arise.

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[1] Matt Eyles, "AHIP Comments on Court Decision in *TMA v. HHS Surprise Billing Litigation*," Press Release.

[2] *See* 86 Fed. Reg. 55980, at 55994-55995) (2021 Interim Final Rule Part II).

[3] 2021 Interim Final Rule Part II at 56000.

[4] 45 C.F.R. § 149.510(c)(4)(ii).

[5] *Texas Medical Association, et al. v. United States Department of Health and Human Services, et al.*, 6:21-cv-00425, ECF Docket No. 1 at ¶ 1 (E.D. Tex. October 28, 2021).

[6] *Id.* at ECF Docket No. 113.

[7] *Id.* at ECF Docket No. 1 at ¶9.

[8] *Id.* at ¶ 6.

[9] *Id.* at ECF Docket No. 113 at 15 (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

[10] *Id.* at 17.

[11] Matt Eyles, "AHIP Comments on Court Decision in *TMA v. HHS Surprise Billing Litigation*," Press Release.

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