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Unsurprisingly, The No Surprises Act Has Surprises: Part II

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On December 9, the American Medical Association (AMA) and the American Hospital Association (AHA) (the Associations) filed a lawsuit in the U.S. District Court for the District of Columbia challenging the proposed regulations implementing the No Surprises Act (Act) that the U.S. Departments of Health and Human Services (HHS), Labor, and Treasury, as well as the Office of Personnel Management (the Departments) issued in September (the Interim Final Rule).[1] Like the similar lawsuit recently filed by the Texas Medical Association (TMA) in the Eastern District of Texas, the Associations allege that the independent dispute resolution (IDR) provisions of the regulation unfairly tilt in favor of health insurers.[2] We previously issued client alerts summarizing Part I and Part II of the proposed rules, and summarizing the lawsuit filed by TMA.

The Associations claim that the "new rule places a heavy thumb on the scale during the independent arbitration process in a way that directly conflicts with statutory text."[3] The lawsuit contends that the Departments' Interim Final Rule unfairly defaults to the insurer's "qualifying payment amount" (the QPA) unless there is evidence to support a contrary reimbursement rate for relevant out of network services. The Act defines the QPA as the "median of the contracted rates recognized by the plan or issuer" for the same or similar item or service provided by a provider in the same or similar specialty within the geographic region in which that item or service was furnished.[4] Plaintiffs argue this change will harm patients by reducing access to care by discouraging meaningful contracting negotiations, reducing provider networks, and encouraging insurers to avoid providers with higher costs, such as teaching hospitals.[5]

The lawsuit specifically targets the requirement in the Departments' Interim Final Rule, stating that the arbitrator "must presume that the QPA is [the] appropriate" out-of-network rate.[6] The lawsuit alleges that the Interim Final Rule "affirmatively forbids" the arbitrator from considering any factor beyond the QPA unless "a party submits information … that the certified IDR entity determines is credible."[7] The Associations, like the TMA, contend that this departs from the Act's requirement that out-of-network reimbursement rates be established by considering a number of factors explicitly set forth in Subparagraph C of the Act, only one of which is the QPA, without giving presumptive weight to any particular factor.[8] They argue that "Congress mandated that the arbitrator must consider each of these factors in determining which offer to select, but Congress left it to the discretion and expertise of the arbitrator to decide how much weight to give each factor in light of the facts and circumstances of a particular case."[9]

The Associations also take issue with the Departments' policy justifications for defaulting to the QPA over the

other statutory factors. Specifically, they contend that while the Departments seek to prioritize predictability in arbitration outcomes and to put downward pressure on what they saw as historically inflated out-of-network prices for services, Congress crafted an approach in the Act, which expressly sought to balance the interests of payors and providers without unduly favoring either side.[10]

The health insurance industry noted the recent cases challenging the IDR process, but pointed to the beneficial outcomes of the regulation. For instance, insurers assert that the IDR regulations will reduce high out-of-network costs by limiting the incentive of profiting from the leverage of surprise billing.[11] Moreover, insurers argue the Congressional Budget Office's estimate that the Act would reduce premiums actually "hinged on the assumption that out-of-network rates would generally be consistent with the QPA."[12]

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

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[1] *See American Medical Association et al. v. United States Department of Health and Human Services et al.*, 1:21-cv-03231 (D.D.C. December 8, 2021).

[2] According to the AMA, the lawsuit does not seek to halt implementing the entire act, only the dispute resolution portion. *See* Joyce Frieden, AMA, American Hospital Association Sue Over Surprise Billing Law, medpage today, here.

[3] *American Medical Association et al.*, *1:21-cv-03231* at ¶ 2.

[4] 42 U.S.C. § 300gg-111(a)(3)(E)(i).

[5] *American Medical Association et al.*, *1:21-cv-03231* at ¶ 9; *see also* Joyce Frieden, AMA, American Hospital Association Sue Over Surprise Billing Law, medpage today, here.

[6] *Id.* at ¶ 53 (citing 86 Fed. Reg. 55980, at 55995) (2021 Interim Final Rule Part II).

[7] *Id.* at ¶ 54 (citing Interim Final Rule Part II at 55997).

[8] The Act requires the IDR to consider: 1) any information requested by the IDR entity from the parties; 2) additional information submitted by a party relating to (a) the level of training, experience, and quality and outcome measurements of the provider or facility that furnished the IDR item or service, (b) the market share held by the provider or facility in which the IDR item or service was provided, (c) the acuity of the recipient of the IDR item or service, (d) the teaching status, case mix, and scope of services of the facility that provided the IDR item or service, and (e) demonstration of good faith efforts (or lack thereof) made by the provider, facility, or plan to enter into network agreements with each other; and 3) any additional information submitted by a party that does not include information on the factors in (a)-(e); *see also American Medical Association et al.*, 1:21-cv-03231 at 46; *see also* 2021 Interim Final Rule Part II at 56104.

[9] *American Medical Association et al.*, 1:21-cv-03231 at ¶ 46.

[10] *American Medical Association et al.*, 1:21-cv-03231 at ¶¶ 61-62.

[11] Julia Appleby, Suit by Doctors, Hospitals Seeks Change in How Arbitrators Settle Surprise Billing Cases, Kaiser Health News, here.

[12] Katie Keith, *Doctors, Air Ambulance Operators Challenge Interpretation of No Surprises Act*, Health Affairs, here.

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