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Doctors Challenge Arbitration Provision of the No Surprises Act

On September 30, 2021, the Department of Labor, the Department of Health and Human Services, and the Treasury Department (the Departments) issued an interim final rule under the No Surprises Act (NSA) that establishes the federal independent dispute resolution (IDR) process that health plans and providers may use to determine the final payment amount beyond allowable patient cost-sharing for out-of-network health care services in situations where the NSA prohibits surprise billing. When the parties cannot agree on an appropriate payment amount, the NSA calls for binding arbitration before a certified IDR entity who must then select one of the parties' offers as the appropriate payment amount.

The Texas Medical Association (TMA) filed this lawsuit alleging that the language in the final rule describing the IDR process ignores

congressional intent and unfairly gives health plans the upper hand in determining the final payment amount when a patient receives care from an out-of-network provider.

To guide the IDR entity in reaching a payment decision, Congress enumerated in detail the factors IDR entities "shall" and "shall not" consider in determining which party's offer to select. According to the TMA, "Congress directed IDR entities to consider all of the enumerated factors and did not assign priority to any one of them, leaving it to each IDR entity to determine how best to weigh the various factors in light of all the facts and circumstances presented in a particular case."

Here, however, the TMA asserts that the Departments, when issuing their interim final rule, revised the statutory language and created a "rebuttable presumption" that requires IDR entities to give greater weight to a single statutory factor – the "qualifying payment amount" (QPA). The QPA is generally the median of the health plan's contracted rates for the relevant item or service, as calculated by the health plan.

This, the TMA argues, will skew IDR results in favor of health plans and undermine providers' ability to obtain adequate compensation for their services. Therefore, the TMA asks the court to strike the arbitration section of the rule and restore the IDR process that Congress had originally intended.

Full text of complaint in Texas Medical Association v. Department of Health and Human Services, 6:21-cv-00425 (E.D. Tex. Filed Oct. 28, 2021)

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