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Texas District Court Vacates Part of New IDR Rule for Surprise Medical Billing

JENNIFER WONG

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On February 23, 2022, the U.S. District Court for the Eastern District of Texas vacated certain provisions of the interim final regulations (IFR) which the tri-agency Departments of Labor, Health and Human Services, and Treasury (the "Departments") issued pursuant to the surprise medical billing rules under the No Surprises Act (NSA).[1] The district court found that certain Independent Dispute Resolution (IDR) requirements in the IFR[2] were inconsistent with the statutory language of the NSA, and that the Departments failed to provide the required notice and comment period in violation of the Administrative Procedures Act (APA).

Background

The NSA was signed into law on December 27, 2020, as part of the Consolidated Appropriations Act of 2021 (CAA). Among other things, the NSA provides participants with protections against surprise medical billing that could arise in certain situations where a participant receives care from an out-of-network provider, such as in an emergency, or when being treated at an in-network facility by an out-of-network provider. The NSA limits the participant's cost to

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IN THIS ISSUE...

Mia Butzbaugh and Joelle Tavan Join the Trucker ✦ Huss Team in New Portland Office

Trucker Huss, APC is pleased to announce that Mia Butzbaugh and Joelle Tavan, two experienced benefits attorneys in Portland, Oregon, have joined the firm as of January 1, 2022. Immediately prior to joining the firm, Mia was a partner and head of the employee benefits group at Miller Nash LLP in Portland, while Joelle served as counsel at the firm.

Joelle Tavan Mia Butzbaugh

Mia Butzbaugh has more than 15 years of experience in employee benefits law and specializes in representing multiemployer pension and health and welfare plans. Mia has served as general counsel to many types of multiemployer plans, from large pension plans with alternative investments to small vacation plans, from plans terminated by mass withdrawal to those launching variable annuity programs. With this experience, she can readily assist trustees with issues that are common to collectively bargained plans and to identify and help solve problems that may be unique to a given plan.

Joelle Tavan has over 13 years of experience advising employers on all aspects of the design, operation, and compliance of their qualified retirement plans (including defined benefit plans and 401(k), profit sharing, ESOPs, and money purchase pension plans). She prepares plan documents and summary plan descriptions and advises plan sponsors and fiduciaries on how to address and resolve compliance issues, corrections under Employee Plans Compliance Resolution System and the Voluntary Fiduciary Correction Program, and fiduciary best practices. She also represents clients before the Internal Revenue Service and Department of Labor in plan audits and investigations.proposed guidance issued by those agencies.

Mia and Joelle will be working from our new Portland, Oregon office.

the in-network cost-sharing amount, which must be applied to the participant's deductible and out-of-pocket maximums under the Plan, and prohibits the out-of-network provider from balance billing the participant. Additionally, the NSA requires that Plans and Insurers either reimburse out-of-network providers with a statutorily determined "out-of-network rate" or resolve the dispute through a statutorily defined IDR process.

The No Surprises Act IDR Procedure

The NSA establishes an IDR process which consists of "baseball-style" arbitration between the Plan or Insurer and the out-of-network provider, meaning that the arbitrator (referred to as an "IDR entity" in the regulations) must choose between the offers submitted by the parties. The NSA statute states that when selecting the proper payment amount, the arbitrator must consider:

1. The Qualifying Payment Amount[3] (QPA) for the applicable year for items or services that are comparable to the service at issue, and are in the same geographic region; and
2. "Additional circumstances" subject to certain prohibited considerations.

These "additional circumstances" include the following five factors:

i. The level of training, experience, and quality and outcomes measurement of the provider or facility that furnished the service.

ii. The market share held by the out-of-network provider or facility, or that of the Plan in the geographic region where the service was provided.

iii. The acuity of the participant receiving the service, or the complexity of furnishing the service to the participant.

iv. The teaching status, case mix, and scope of services of the out-of-network facility that furnished the service.

v. Demonstration (or lack thereof) of good faith efforts made by the out-of-network provider or facility and the Plan to enter into network agreements and contracted rates with each other during the previous 4 plan years.

The Departments' Interim Final Regulations (Parts I and II)

On July 13, 2021, the Departments issued Part I of the NSA IFRs ("July IFR"), which established how the NSA is applicable to group health plans, and the process for calculating the QPA.[4] Under the July IFR, a Plan must pay out-of-network providers either the rate provided by an All-Payer Model Agreement or specified state law (if applicable). Where no All-Payer Model Agreement or specified state law is applicable (which is the case for most self-funded ERISA group health plans), the "out-of-network rate" is either the amount agreed to by the Plan and the out-of-network provider, or an amount determined through the IDR process.

On October 7, 2021, the Departments issued Part II of the NSA IFRs ("October IFR"), which detailed the specific steps of the IDR process, including how an arbitrator should determine the "out-of-network rate." The October IFR created a rebuttable presumption that the QPA is the correct payment amount unless either party provides credible information that the QPA is materially different from the QPA rate (the "rebuttable presumption requirement").[5] Under the October IFR, arbitrators are required to select the payment amount closest to the QPA unless either the out-of-network provider or facility, or the Plan, provides information that clearly demonstrates that the correct payment amount is materially different from the QPA.

To support the rebuttable presumption requirement, the October IFR states that:

> The statutory text [of the NSA] lists the QPA as the first factor that the certified IDR entity must consider in determining which offer to select. The 'additional circumstances' that the certified IDR entity must consider if relevant, credible information is provided are described in a separate paragraph, and the certified IDR entity's consideration of additional circumstances is subject to a prohibition on considering certain factors.[6]

Upon the release of the October IFR, there was much consternation from medical providers and facilities regarding the rebuttable presumption requirement, as they viewed it as providing too much deference to the QPA, and accordingly tilting the balance in favor of Insurers and Plans when determining the "out-of-network rate."

Texas Medical Association v. U.S. Department of Health and Human Services

In response to the October IFR and, specifically, the rebuttable presumption requirement, Plaintiff healthcare providers challenged the October IFRs, arguing (i) that they conflict with the statutory text and Congressional intent of the NSA, and (ii), that the October IFR was not properly promulgated with the notice and comment requirements under the APA.

First, the court analyzed the NSA and the October IFR with the two-step Chevron framework, applied by courts when analyzing an agency's statutory interpretation under the APA. In its analysis, the court interpreted (1) if the NSA is ambiguous, and if so, (2) if the Departments' interpretation in the October IFRs is permissible. If the NSA is unambiguous, then the Departments' October IFR must be consistent with the unambiguous intent of Congress, and the Departments are not owed deference in their interpretation of the NSA.

In analyzing the rebuttable presumption under this framework, the court determined that the NSA unambiguously states that arbitrators are required to consider the QPA and any of the five additional circumstances. The court opined that, "[no]thing in the Act…instructs arbitrators to weigh any one factor or circumstance more heavily than the other….And here, the Act nowhere states that the QPA is the 'primary' or 'most important' factor."[7] Accordingly, the court found that the October IFR (and the rebuttable presumption requirement) places its thumb on the scale for the QPA, in contravention of the intent and language of the NSA, and thus must be vacated.

Second, the court considered whether the Departments were required to submit the October IFR for notice and comment as required by the APA. The court found that the CAA did not exempt the October IFR from being submitted for notice and comment, and that the short time period the Departments were given to implement the NSA does not constitute good cause to be granted an exception from the notice and comment requirements. Thus, because the lack of notice and comment caused harm to the Plaintiff, the court determined that the October IFR should also be vacated for violation of the APA — but limited this to the rebuttable presumption requirement, not the other provisions of the October IFR.

Accordingly, the court ordered that the rebuttable presumption requirement provisions be vacated on a nationwide basis, but that the remaining parts of the October IFR (including the procedural steps of the IDR process) remain intact.

The Departments' Response

On February 28, 2022, the Employee Benefits Security Administration issued a memorandum responding to the Texas court decision and provided guidance on how to proceed with the requirements of the NSA and October IFR.[8] The memo explains that the Texas court order does not affect either the July IFR or the October IFR except for the rebuttable presumption requirement under the October IFR. Thus, the surprise billing protections for participants, and most of the IDR process, are still intact despite the Texas court order.

While the Departments review the court decision, the memo states that the Departments will:

- Withdraw guidance that is based on or refers to the rebuttable presumption requirement, and will repost updated documents;
- Provide training on the revised guidance for IDR entities and for parties participating in the IDR; and
- Open the IDR process for submission through the IDR portal, with a 15-day extension for disputes whose open negotiation periods have expired.

Implications

As the Texas court decision invalidated the rebuttable presumption requirements nationwide, the original IDR process as described in the NSA is in effect until an appeals court says otherwise. Out-of-network providers

and facilities are particularly pleased with the Texas court decision because they believe that the rebuttable presumption requirement would limit their ability to receive a payment amount that is higher than the QPA, the median contracted rates in their geographic region. For now, arbitrators will need to consider the QPA and the five additional circumstances, without the requirement that the additional circumstances may only be considered if they make the payment amount materially different from the QPA. However, the practical effect of the removal of the rebuttable presumption may not be as impactful on the IDR process as anticipated.

Although the Texas district court determined that the NSA does not direct arbitrators to weigh any of the factors more heavily than others, in practice, this nevertheless may be the result. The QPA is a quantifiable number determined by a formula that takes into account the specialty of the service and the geographic region the service was provided. The five additional circumstances, on the other hand, are extremely difficult to quantify, and unless the circumstances are unique, will probably not deviate from the QPA significantly. As much as the Texas court would like to suggest that arbitrators can consider the QPA and the additional circumstances equally, the reality is that some of the additional circumstances, such as efforts to negotiate network contracts between the provider and the Plan, inherently do not weigh as heavily as the QPA. Therefore, it seems likely that arbitrators, even without the rebuttable presumption requirement, will start with the QPA, and then decide if any of the additional circumstances provide a sufficient reason to deviate from the QPA.

Next Steps

On March 21, 2022, the U.S. District Court for the District of Columbia will hear cross-motions for summary judgment in a similar NSA case, filed by the Plaintiffs American Hospital Association and American Medical Association, against the Departments.[9] The Plaintiffs in the D.C. district court case make similar arguments against the rebuttable presumption requirement as in the Texas case, and request that the D.C. court also vacate the rebuttable presumption requirement provisions.

Even as the rebuttable presumption requirement litigation makes its rounds through the federal courts, we encourage plan sponsors to review their TPA agreements and remove or significantly revise any "savings" program that charges the Plan a fee when the TPA is able to reduce the initial bill from the out-of-network provider down to the QPA. The TPA should be offering payment at the QPA — or something very close to that amount. If the out-of-network provider or facility does not find the QPA acceptable, then the parties can initiate the IDR process. It is likely that the arbitrator will still find the acceptable payment amount to be offer that is closest to the QPA. We believe that this is the process that should be used to negotiate the payment amounts owed to these out-of-network providers or facilities, rather than the expensive savings programs that are included in many TPA agreements.

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[1] *Texas Medical Ass'n, et al. v. United States Department of Health and Human Services, et al.*, Case No. 6:21-cv-425 (E.D. Tex.)

[2] Requirements Related to Surprise Billing; Part II, 86 Fed. Reg. 55,980 (Oct. 7, 2021).

[3] The QPA is the median of contracted rates for the same or similar service under the Plan in that geographic region.

[4] Requirements Related to Surprise Billing; Part I, 86 Fed. Reg. 36,872 (Jul. 13, 2021).

[5] See 29 C.F.R. § 2590.716-8(a)(2)(viii); 29 C.F.R. § 2590.716-8(c)(4)(ii)(A); 29 C.F.R. § 2590.716-8(c)(4)(iii)(C); 29 C.F.R. § 2590.716-8(c)(4)(iv); 29 C.F.R. § 2590.716-8(c)(4)(vi)(B).

[6] See 86 Fed. Reg. at 55,996.

[7] See *Texas Medical Ass'n* at 8.

[8] EMPLOYEE BENEFITS SECURITY ADMINISTRATION, Memorandum Regarding Continuing Surprise Billing Protections for Consumers (Feb. 28, 2022).

[9] *Ass'n of Air Medical Services, et al. v. U.S. Department of Health and Human Services et al.*, Case No. 1:21-cv-3031-RJL (D.D.C.)

FIRM NEWS

Joe Faucher and **Dylan Rudolph** are featured in the Spring 2022 ABA Tort Trial and Insurance Practice Section (TIPS) Newsletter. Joe serves as the TIPS Employee Benefits Committee Chair and provides a Chair Message. Dylan authored the article, "Litigation and Government Investigation Risk Following the Department of Labor's Cybersecurity Guidance," which provides a synopsis of the DOL's recent guidance on the topic of cybersecurity, as well as increasingly common litigation springing from cybersecurity concerns.

On March 30, **Angel Garrett** was honored as AABA Board Member of the Year at its 46th Annual Gala, held at the Hyatt Regency, San Francisco.

On March 30, **Robert Gower** was a panelist at the ABA Employee Benefits Law Update: A Year in Review, for the session, *Cybersecurity: Protections, Best Practices, Guidance, Investigations, Breaches, Ransoms and Litigation*.

On April 27, Robert will be a presenter at the 2022 Bay Area Virtual Fiduciary Summit. This education-focused fiduciary summit for Bay Area 401(k), 403(b) and DB plan sponsors will review best practices and strategies for healthcare and retirement plans.

On June 14, Robert will be moderating a panel on *Fiduciary Breach Lawsuits and How to Mitigate Risk: Hughes vs. Northwestern U Case,* at the Institutional Investor Retirement Plan Advisors Summit. Robert will discuss to what degree, if any, *Hughes v. Northwestern University* impacts retirement plan advisors. He will also discuss whether DOL changes in audit procedures will affect your practice.

San Francisco Office of Trucker ✦ Huss is moving as of April 1, 2022

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The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

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