FEDERAL COURT STRIKES DOWN QUALIFYING PAYMENT AMOUNT PRESUMPTION UNDER NO SURPRISES ACT DISPUTE RESOLUTION PROCESS

On February 23, 2022, the U.S. District Court for the Eastern District of Texas (the "Court") vacated key portions of a regulation implementing the independent dispute resolution ("IDR") process under the No Surprises Act (the "Act"). An interim final rule published in the Federal Register on October 7, 2021 (the "Rule") implementing certain parts of the Act would have required Certified Independent Dispute Resolution Entities ("IDR Entities") to employ a presumption in favor of the Qualifying Payment Amount ("QPA") when determining the payment owed to an out-of-network ("OON") provider from a payer through the IDR process.

The court ruled that the presumption in favor of the QPA conflicts with the text of the Act and therefore must be set aside. Additionally, the court ruled that - when making the Rule - the Departments of Health and Human Services ("HHS"), Labor and Treasury and the Office of Personnel Management (collectively, the "Departments") improperly bypassed notice and comment procedures as required by the Administrative Procedures Act ("APA").

BACKGROUND – THE NO SURPRISES ACT

The Act protects patients from certain surprise medical bills, including when a patient receives OON emergency services or non-emergency services from an OON provider at an in-network facility. In these situations, the Act and the Rule require that a patient not be charged more than their in-network cost-sharing amount for the OON item or service. For further discussion of the Act's billing prohibitions and patient cost-sharing protections, please refer to our previous article available here.

The Act also established a "baseball style" IDR process in which an IDR Entity ultimately determines the appropriate rate to be paid to an OON provider for items/services subject to the surprise billing protections under the Act. This process is independent of the patient cost-sharing protections and is only available if the OON rate for such items/services is not otherwise determined based on specified state law or an All-Payer Model Agreement, and if the parties fail to come to an agreement through a mandated informal good faith negotiation period. For further discussion regarding the IDR process under the No Surprises Act, please refer to our article here.

Relevant to this legal challenge, in the Rule, the Departments specified that in determining the appropriate rate for items and services provided by an OON provider, an IDR Entity must "begin with the presumption that the QPA is the appropriate out-of-network rate" for the item or service in question. The Act defines the QPA as an amount that is equal to the applicable health plan's median contracted rate on January 31, 2019, for (a) the same or similar item or service; (b) furnished by a provider in the same or similar specialty; and (c) in the same geographic region, increased annually for inflation.

The Rule also requires that the IDR Entity:

(1) "must select the offer closest to the QPA unless the certified IDR entity determines that credible information submitted by either party clearly demonstrates that the QPA is materially different from the appropriate out of-network rate" and

(2) not determine "whether the QPA has been calculated by the plan or issuer correctly."

Thus, the Rule effectively created a rebuttable presumption that the amount closest to the QPA is the proper payment amount.

LEGAL CHALLENGE

Following publication of the Rule, several lawsuits were initiated against the Departments challenging the Rule's validity and the presumption in favor of the QPA. One such challenge was initiated by the Texas Medical Association and a Texas provider (collectively, the "Plaintiffs") in the U.S. District Court for the Eastern District of Texas.

In their legal challenge, the Plaintiffs noted that the Act includes six (6) mandatory factors[1] IDR Entities must consider when determining

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the appropriate payment amount for OON items and services. While the QPA is one of the six factors, there is no indication in the text of the law that the QPA should be given any greater weight than the other enumerated factors. This is in stark contrast to the Rule that establishes a required presumption in favor of the QPA, that can only be overcome by the OON provider showing "credible information" that "clearly demonstrates that the QPA is materially different from the appropriate OON rate." The Plaintiffs argued that "the Rule puts a substantial thumb on the scale in favor of the QPA" that is inconsistent with the language of the No Surprises Act and beyond the statutory authority granted to the Departments by the Act.

The Plaintiffs also argued that the portions of the Rule providing the presumption that the QPA is the appropriate OON rate should be vacated since, when making the Rule, the Departments did not go through the notice and comment rulemaking process as required by the APA.

FEDERAL COURT DECISION

The Court agreed with the Plaintiffs, holding that Congress "unambiguously established a framework for deciding payment disputes" and that the Rule "rewrites clear statutory terms." Therefore, the Court vacated those portions of the Rule which established the presumption in favor of the QPA in determining the appropriate OON rate.

The Court further agreed that the Departments failed to comply with the notice and comment rulemaking process when they issued the Rule as an "interim final rule." Although agencies may promulgate rules via interim final rules in certain circumstances, the Court concluded publishing the Rule as an interim final rule was not proper here. Although the Court remanded the Rule to the Departments for review and reconsideration, it only vacated the provisions establishing the presumption in favor of the QPA.

This decision does not, therefore, invalidate the entire IDR process. Instead, IDR Entities are now required to comply with the exact language of the Act and give equal weight to each of the six Congressionally mandated factors when determining the appropriate OON rate, without a presumption in favor of the QPA.

PRACTICAL TAKEAWAYS

- This decision provides a more equal playing field for providers who utilize the No Surprises Act's IDR process. Now, an IDR Entity will have to equally weigh all the required factors prior to determining the appropriate rate for the items or services provided by an OON provider. This should provide more opportunities for providers utilizing the IDR process to clearly demonstrate why the appropriate reimbursement for their services exceeds what the plan is offering to pay.
- The Court's holding that the Departments violated the APA by not undergoing the traditional notice and comment rulemaking procedure may support future lawsuits challenging the rulemaking process the Departments used to implement No Surprises Act regulations. The Departments may take this issue up on appeal, and future court rulings on this issue would have implications beyond just this set of rules.

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[1] The 6 factors include (1) the QPA, (2) the level of training, experience and quality and outcomes measurements of the provider or facility, (3) the market share held by the OON provider, facility or health plan, (4) the acuity of the individual receiving such item or service; (5) the teaching status, case mix and scope of services of the OON facility and (6) evidence of efforts of the OON provider and insurer to enter into a network agreement. *See* 42 U.S.C. § 300gg-111(c)(5)(C).

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