GROOM LAW GROUP

Publications

A Surprise Turn of Events for the No Surprises Act Dispute Resolution Process

ATTORNEYS & PROFESSIONALS

Jon Breyfogle
jbreyfogle@groom.com
202-861-6641

Lisa Campbell
lcampbell@groom.com
202-861-6612

Tamara Killion
tkillion@groom.com
202-861-6328

Matthew Lanahan
mlanahan@groom.com
202-861-6640

Mark C. Nielsen
mnielsen@groom.com
202-861-5429

Seth Perretta
sperretta@groom.com
202-861-6335

Ryan C. Temme
rtemme@groom.com
202-861-6659

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The ongoing implementation of the No Surprises Act's ("NSA") prohibition on surprise balance billing, and the related independent dispute resolution ("IDR") process between payers and providers became much less certain after a ruling by a federal district court in the Eastern District of Texas on February 23, 2022. In what could be the first of a series of decisions concerning the interim final regulations ("IFR") implementing the IDR process under the NSA, the district court struck down specific provisions of the IFR—mainly what it referred to as a "presumption" that the IDR entity select the offer presented to it that was most closely aligned with the Qualifying Payment Amount ("QPA") unless a party demonstrated credible evidence that the result should be materially different. *See Texas Medical Association v. HHS* (Case No. 6:21CV00425, E.D. Tex.). District courts across the country are at varying points in considering five more challenges to the IDR process, which may further complicate this matter before it reaches the appellate courts. The Department of Labor ("DOL") posted a memorandum[1] in response to the district court's decision indicating that it is considering how to proceed in the litigation, and that it will be updating existing guidance to reflect the court's decision. As a result, the IDR process will likely continue without any direction to the IDR entities regarding the weighting of the various factors. Because the QPA is at the heart of the IDR process as envisioned by the IFR, the court's decision—and those that will follow it—will determine how the IDR process unfolds for both payers and providers.

The IDR Process Under the NSA and the IFR

The NSA includes provisions establishing an IDR process for disputes between out-of-network emergency care and air ambulance providers and certain out-of-network providers at in-network facilities on the one hand and insurers/plans on the other, concerning the amount ultimately paid to the provider. The NSA specifies a "baseball" style arbitration process, where each side makes an offer and the arbitrator selects one or the other as the most reasonable payment amount, an amount which is binding on the parties. The NSA provides a list of factors to be considered by the arbitrator, including first, the QPA (which is, generally speaking, the median in-network rate for the same service in the same geographic area), followed by a list of additional factors. Notably, the No Surprises Act does not specify the weight to be accorded by the IDR entity to the different factors. The IFR provides that the IDR entity must select the offer closest to the QPA unless the additional factors clearly demonstrate that a materially different amount is correct. This, in effect, creates a presumption that the QPA is correct (the "QPA Presumption").

The Parties' Arguments

Plaintiffs in *Texas Medical Association v. HHS* challenge the QPA on two grounds:[2] first, on a substantive basis they allege that the implementing regulations depart entirely from the text of the NSA in establishing the QPA Presumption; second, they allege a procedural violation by the government in failing to engage in notice and comment rulemaking and instead issuing an interim final rule. The government resists both of those arguments and in response argues that the Plaintiffs lack standing to challenge the rule.

The Decision in Texas Medical Association v. HHS

The court found for Plaintiff entirely and rejected both the government's counter arguments and their affirmative argument regarding standing. To quote the court: "In sum, the Court holds that (1) Plaintiffs have standing to challenge the Departments'[3] September 2021 interim final rule implementing the No Surprises Act, (2) the Rule conflicts with the unambiguous terms of the [No Surprises] Act, (3) the Departments improperly bypassed notice and comment in implementing the challenged portions of the Rule, and (4) vacatur and remand is the proper remedy."

What Happens Now

- *Does this have nationwide effect?* Nationwide effect of district court decisions is the subject of intense debate, both academically and at the Supreme Court level. Generally, a district court's decision is binding only upon the parties before it. Put simply, a district court's opinion has no precedential effect except for its power to persuade. But during the Obama and Trump years, in particular, parties have run to courts in favorable jurisdictions (the 5th and 9th Circuits, especially, and respectively) to seek vacatur of administrative rules—and seeking nationwide injunctive effect. According to the memorandum posted by DOL, they are treating the decision as having nationwide effect and rescinding existing guidance with plans to reissue it to conform with the court's decision.
- *Can the government appeal?* It is likely that the government can appeal, though it is not certain and DOL's memorandum casts some questions regarding how the government will respond in the litigation. The district court resolved an issue that is both purely legal and unlikely to be curable on remand. Fifth Circuit precedent indicates that a decision of this nature is likely appealable. If the government does appeal, they are also likely to seek a discretionary stay of the district court's decision pending that appeal, although this seems less likely based on the DOL memorandum. Briefing on the issue of the stay could take a matter of days or weeks, depending on the urgency with which it is pursued by the government. The independent dispute resolution process is slated to start issuing decisions by approximately April of this year, so there is a looming deadline.
- *What happens in the interim?* At the moment, the QPA Presumption is vacated with nationwide effect. If no stay is issued and the district court's decision is not overturned, the IDR process may begin without the benefit of the QPA Presumption.
- *What parts of the surprise billing rules are affected?* The decision only affects the basis for the IDR process decisions.
- *Do plans and issuers still use the QPA for determining cost-sharing?* Yes—the role of the QPA in determining cost-share amounts is unaffected by the court's ruling.
- *What about the other cases?* We are tracking five other cases lodging similar challenges to the QPA Presumption. Those cases could continue and could issue divergent decisions, but may be found to have been mooted by any guidance issued pursuant to the

DOL memorandum. In any event, the validity of the QPA Presumption could eventually be resolved by the Supreme Court, if the government elects to continue defending it.

Groom will be monitoring these changes as they develop, so please check back here for updates or reach out to us with any questions you may have.