Texas Federal District Court Vacates Key Parts of the No Surprises Act Interim Final Rule Relating to the IDR Process

Insights 03.30.22

On February 23, 2022, a federal judge for in the U.S. District Court for the Eastern District of Texas, the Honorable Jeremy D. Kernodle, vacated portions of the payor-provider independent dispute resolution ("IDR") regulations that govern certain out-of-network provider payment disputes because they conflict with the unambiguous text of the No Surprises Act ("NSA"). This case was brought by the Texas Medical Association ("TMA") and Dr. Adam Corley, a Texas physician, and it is one of a handful of Federal cases challenging the imposition of a "rebuttable presumption" in favor of the qualifying payment amount (generally based on the payer's median in-network rate) ("QPA").

Significantly, the court vacated the challenged decisions on a nationwide basis, rejecting the Departments' (Treasury, Labor and Health and Human Services) request that any relief be limited to remand without vacatur and/or confined to the Plaintiffs. The government has not announced whether or not it seeks to appeal the ruling. Any notice of appeal must be filed no later than April 25, 2022.

This judicial decision is the first of the current challenges to the IFR. This case, *Texas Medical Association & Adam Corley, v. United States Department Of Health And Human Services, et al.* ("*TMA*"), is one of at least six lawsuits challenging implementation of the NSA. Of these, two cases challenging this regulation on behalf of individual providers and three national associations—the American Hospital Association, the American Medical Association, and the Association of Air Medical Services—are receiving particular attention. These cases are now consolidated under the Association of Air Medical Services case, *Association of Air Medical Services, et al v. United States Department Of Health And Human Services, et al.* ("*Association of Air Medical Services*"). Judge Richard J. Leon of the United States District Court for the District of Columbia held hearings on cross-motions for summary judgment in those cases on March 21, 2022, but he is not expected to rule on the motions until after the deadline for the government to appeal in the *TMA* case has passed.

The IDR Process and Regulations

The NSA created an independent dispute resolution ("IDR") process to resolve certain out-of-network payment disputes between providers and payers in circumstances where applicable state law does not establish a methodology for determining the payment amount. The IDR process uses baseball style arbitration—each party offers a payment amount, and the IDR entity must select one amount or the other. Under the NSA, the IDR entity must consider a number of factors, including the QPA; information on certain additional circumstances (*e.g.*, the provider's level of training, the provider's market share, and the complexity of the services); and any additional information a party submits or the IDR entity requests. The parties cannot offer and the IDR entity cannot consider information on three prohibited considerations: usual and customary charges, the provider's charges, and public payor rates.

The portion of the IFR vacated in *TMA* requires the IDR entity to "select the offer closest to the qualifying payment amount" and to deviate from this default decision only if "credible information" "clearly demonstrates that the qualifying payment amount is materially different from the appropriate out-of-network rate." 45 CFR § 149.510(c)(4)(ii). These instructions created a "rebuttable presumption" that the QPA is the appropriate out-of-network payment amount and thereby weighted the QPA

above the other factors.

The Decision

Judge Kernodle issued a decision and final judgment vacating provisions of the IFR relating to the "rebuttable presumption." The provisions that were vacated are as follows:

- The requirement that the IDR entity select the offer closest to the QPA unless there is credible information to demonstrate that this is not the appropriate rate;
- The requirement that "additional information" clearly demonstrate that the QPA is materially different from the out-of-network rate;
- The definition of "material difference;"
- All four examples on how IDR entities should choose between competing offers; and
- The requirement that, if the IDR entity does not choose the offer closest to the QPA, the IDR entity's written decision include an explanation of the credible information demonstrating that the QPA was materially different from the appropriate out-of-network rate.

Plaintiffs challenged the QPA presumption, contending that it clearly contradicts the plain text of the NSA. The Departments responding, arguing that the structure of the NSA showed that the QPA plays an outsized role in the IFR process and accordingly, the QPA is entitled to more weight because it is the first factor in a list of factors for an IDR entity to review and it is central to the NSA. Further, the government claimed that Plaintiffs "misread" the IFR, which it characterized as directing the IDR entity to start with reviewing the QPA and then to account for additional factors as appropriate.

After concluding that the plaintiffs have standing to challenge the QPA presumption, the court rejected the Departments' arguments and agreed with Plaintiffs substantive challenge to the QPA presumption. It held that the NSA is unambiguous in requiring an IDR entity to consider all circumstances listed in the NSA and that the NSA does not weight any factor or circumstances more heavily than another. The challenged provisions of the IFR, however, added several mandates that give the QPA outsized importance compared to other statutory factors. Thus, the QPA presumption goes against the plain text of the NSA by placing its "thumb on the scale for the QPA."

Plaintiffs' also challenged the IFR as procedurally improper because the Departments failed to provide notice and comment. The court agreed, concluding that the Departments did had neither express authority nor good cause to bypass public notice and comment requirements. In particular, the court noted that the government had a full year to promulgate the rule using notice and comment rulemaking, but failed to do so. The failure to follow the proper procedure in promulgating the IFR thus provides a second independent basis to set aside the IFR.

CMS' Response to the Decision

On February 28, 2022, the Departments released a memorandum addressing the court's decision in this case. In it, the Departments emphasized that the court's decision does not affect the other rules promulgated pursuant to the No Surprises Act, and stated they are reviewing the court's decision and considering next steps. While the Departments review, they decided to:

- Immediately withdraw guidance based upon the portions of the vacated rule. After the Departments have updated the guidance to conform with the court's order, they will repost them.
- Train certified IDR entities and parties on the above-mentioned, revised guidance.
- Open the IDR process through the IDR Portal. For disputes with expired open negotiation periods, the Department will permit submission of a notice of initiation of the IDR within 14 business days following the opening of the IDR Portal.

Impact of *TMA* in *Association of Air Medical Services*

In response to the decision in *TMA*, the parties in *Association of Air Medical Services* submitted additional briefing on the *TMA* . Should the Departments choose to appeal in *TMA*, their supplemental briefing in *Association of Air Medical Services* provides a preview of the potential arguments the Departments may make on appeal.

In that submission, the Department doubled down on their argument that the QPA should hold more weight because the statutory text treats it as the reasonable amount of payment the market has established for a medical service. The Department also pushed back on the argument that granting that insurers had the ultimate say over in-network rates. Instead, the QPA represent the standard market rate for in-network services, which is derived from a bargaining process where the insurer does not always have the ultimate power to set rates. The Departments also argued that because the QPA is set apart from the other statutory factors and the statute describes the other factors for the IDR entity as "additional information" or "additional circumstances," the IDR should begin with and give more weight to the QPA. For the Departments, such a reading of the NSA is reasonable and entitled to *Chevron* deference. With respect to the procedural challenge to the IFR, the Department argued that an interim final rule was necessary because stakeholders required time to prepare for the new payment processes.

At hearing on March 21, 2022, The Departments' Counsel reiterated the Departments' intention to release a final rule on the Federal IDR process in May of this year. Furthermore, Counsel informed Judge Leon that the Government had not yet decided whether or not to appeal *TMA* to the Fifth Circuit. Following the hearing, it appears unlikely that the government will have the benefit of reviewing any decision from the D.C. District Court before the April 25, 2022 deadline to appeal in the *TMA* case. Notably, *Association of Air Medical Services* raises additional claims concerning the calculation of the QPA for air ambulance providers, and those claims will remain live even if the Departments decline to appeal the *TMA* decision.

Other Surprise Billing Developments

At the time of writing, the Federal IDR portal is not fully operational and parties cannot yet submit the notice of IDR initiation through the portal. The regulatory deadline for timely submission of the notice of initiation of IDR may, in cases involving out-of-network care furnished early in the year, expire before the IDR portal is open. In these cases, CMS indicated in its February 29, 2022 memorandum that the notice of initiation can be submitted through the portal within "within 15 business days following the opening of the IDR Portal." The IDR portal will be available here.

Separately, on March 21, 2022, the California Department of Managed Health Care (DMHC) released All-Plan Letter 22-011, which, among other things, clarified that (1) payment disputes regarding emergency services covered by DMHC-regulated plans will continue to be resolved pursuant to California case law and the Knox-Keene Act and (2) payment disputes between providers and health plans or insurance plans licensed by DMHC or the California Department of Insurance involving non-emergency, noncontracted services at in-network facilities will continue to be resolved in accordance with California's AB 72. Where applicable, these California dispute resolution processes apply in lieu of the Federal IDR process. Previously, a December 22, 2021 CMS memorandum to California officials had indicated that payment disputes involving emergency services would be subject to the Federal IDR process even where the payor is a DMHC-regulated health plan. CMS memoranda regarding application of the NSA in light of specified state laws in each state and territory are available here.

Conclusion

The decision in *TMA* addresses provider concerns that the QPA rebuttable presumption would exert a downward pressure on payments to providers for out-of-network services and would provide payor leverage to negotiate even steeper in-network discounts. Moving forward, it remains to be seen whether the Departments will appeal Judge Kernodle's decision to the Fifth Circuit Court of Appeals and how the Departments' forthcoming final rule will address the *TMA* decision and the voluminous comments offered by stakeholders in response to the IFR.

Hooper, Lundy & Bookman, P.C. is a national firm practicing exclusively for clients in the health care industry. For more information on issues regarding the No Surprises Act, please contact Katrina Pagonis or Jeffrey Lin in San Francisco, Sansan Lin in Los Angeles, Sven Collins in Denver, or any other member of our Hooper, Lundy & Bookman team.

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