NEXSEN | PRUET

Federal Judge Strikes Down Portions of No Surprises Act Regulation

Related Professionals

Shannon V. Lipham
803.540.2155
SVLipham@nexsenpruet.com

Industries

Health Care

02.25.2022

In a ruling issued yesterday, a federal judge in Texas ruled that the guidance related to the arbitration process in the No Surprises Act must be vacated.

The ruling came down as part of a lawsuit filed by the Texas Medical Association (TMA) against HHS, which is only one of several lawsuits filed challenging the arbitration process created by the Department of Health and Human Services. The lawsuit alleged that the No Surprises Act regulations are “manifestly unlawful and will unfairly skew [arbitration] results in payors’ favor, granting them a windfall they were unable to obtain in the legislative process.”

U.S. District Judge Jeremy D. Kernodle granted a motion for summary judgment filed by TMA, which challenged the interim final rule governing the Independent Dispute Resolution (IDR) process for disputes between out-of-network providers and health insurers. The No Surprises Act was passed to shield patients from surprise medical bills for services unexpectedly provided by out-of-network providers. The IDR process applies when payors and out-of-network providers can’t agree on reimbursement. Under the rule, in those situations, both sides will submit their preferred payment amount to the arbitrator, who will select one of the two amounts.

Judge Kernodle agreed, ruling that this baseball-style arbitration rule conflicts with the statutory text of the No Surprises Act. Instead of allowing arbitrators to consider all factors laid out in the Act in deciding on a reimbursement rate, the rule required them to select the offer closest to the qualifying payment amount, which is generally the median of the contracted rates recognized by a payor under their plans or coverage. The language of the No Surprises Act itself does not say anywhere that the qualifying payment amount is the primary, or even the most important, factor to be considered.

According to the order, the rule “places its thumb on the scale for the [qualifying payment amount], requiring arbitrators to presume the correctness of the [qualifying payment amount] and then imposing a heightened burden on the remaining statutory factors to overcome that presumption." The order also said the government "improperly bypassed notice and comment required by the APA, and thus the rule must be set aside for this additional reason."

The No Surprises Act, and the overall IDR process contained within it, are still in place. The IDR process will still be available to resolve payment disputes between payors and out-of-network providers. This ruling applies on a nationwide basis to vacate the challenged provisions of the interim final rule – the parts that gave guidance to the IDR entities. Without these guidelines in place, IDR may proceed and providers may be more likely to utilize the process without the arbitrator being required to "place their thumb on the scale" in favor of payers. Federal officials have indicated that a final IDR rule will be issued by May 2022 to set in place the guidelines for that process.