NEXSEN | PRUET

Lawsuit Filed Challenging the No Surprises Act

Related Professionals

Shannon V. Lipham
803.540.2155
SVLipham@nexsenpruet.com

Practices

Health Law

Article
12.10.2021

A lawsuit has been filed against the Department of Health and Human Services (HHS), the Department of Labor, and the Department of the Treasury in the Eastern District of Texas challenging key portions of the Centers for Medicare and Medicaid Services' proposed regulations implementing the No Surprises Act. The lawsuit was filed by a trade association that represents more than 55,000 physicians and medical students called Texas Medical Association (TMA) on October 28, 2021. It alleges the No Surprises regulations "were improperly issued without the requisite notice and comment[,] and … unlawfully restrict IDR [independent dispute resolution] entities' ability to consider and exercise their discretion weighing all of the required factors identified by Congress when selecting the appropriate payment amount" for out-of-network (OON) services.

The primary issue in the lawsuit is the Qualifying Payment Amount ("QPA"). In the regulations, the QPA is the default payment amount for OON reimbursement rates, and represents the payor's median contract rate for the same or similar service in the relevant region. When IDR is initiated, the proposed regulations require the IDR entity to "begin with the presumption" that the QPA establishes the appropriate rate. Departure from the QPA is allowed only if a party shows evidence that "clearly demonstrates that the [QPA] is materially different from the appropriate out-of-network rate." TMA's argument is that the presumption in favor of the QPA unfairly favors payors "and undermine[s] providers' ability to obtain adequate compensation for their services." It also argues that the presumption does not follow the requirement of the Act that OON reimbursement rates be established by considering a number of factors, only one of which is the QPA and none of which are given particular priority. These factors are listed in the memo.

TMA also alleges that the QPA will often be lower than the fair market value of reimbursement amounts paid in the marketplace, because it relies on the median of contracted rates rather than the median of actual payments made pursuant to each contract. Using median payments, it argues, would be more accurate in approximating prevailing market rates.

Another notable argument by TMA is related to the lack of transparency surrounding the calculation of the QPA. It argues the information payors will

use to calculate the QPA is solely within their control, and the mandatory disclosures related to the QPA are insufficient to allow HHS, the IDR entities, or providers to ascertain whether a payor has correctly calculated the QPA.

A copy of the lawsuit can be found here. As of now, the regulations will still become effective as of January 1, 2022. The Plaintiffs in the case have informed the Court that they will file a motion for summary judgment this week, with a hearing set for early February.