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No Surprises Here! Fifth Circuit Upholds Health Care Provider Challenge to No Surprises Act Regulations

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In a recent win for health care providers, the United States Court of Appeals for the Fifth Circuit has affirmed a lower court's decision to vacate key portions of regulations issued by the U.S. Departments of Treasury, Labor, and Health and Human Services (collectively, the "Departments") under the No Surprises Act ("NSA"). The decision marks the most recent chapter in the ongoing legal challenges involving the NSA.

Prior Rulemaking, Lower Court Litigation, and Issues on Appeal

The NSA was enacted in 2020 to protect patients from unexpected medical bills incurred from out-of-network care, particularly during emergencies or when receiving non-emergency services at in-network facilities. These "surprise" bills often occur when patients unknowingly receive treatment from providers outside their insurance network leading to unexpected out-of-pocket costs. To address this, the NSA limits patient expenses to the amounts they would have paid had the services been rendered on an in-network basis. The NSA also establishes a process for health care providers and payers to determine the appropriate reimbursement rate for the services. Specifically, the NSA sets forth an open negotiation period followed by a "winner-take-all" or "baseball-style" arbitration, in which an independent dispute resolution entity ("IDRE") selects an offer from either the payer or provider as the payment amount.

In selecting offers, the NSA directs IDREs to consider multiple factors, including the Qualifying Payment Amount ("QPA"), which is the median in-network rate paid by insurers for specific services in a geographic area, as well as the provider's experience, patient acuity, the complexity of the services provided, the market share held by the provider or insurer in the geographic region, and the history of negotiations between the provider and insurer. Crucially, the NSA does not place greater weight on any of the factors. The initial regulations promulgated by the Departments, however, directed IDREs to consider the QPA first, thereby creating a presumption that the QPA was the appropriate jumping-off point in determining the out-of-network rate.

In response, health care providers in Texas represented by the Texas Medical Association ("TMA") filed suit, arguing that these regulations unfairly tilted the arbitration in favor of insurers by prioritizing the QPA. As alleged by the TMA, this overemphasis of the QPA neglected the multifaceted approach mandated by the NSA, potentially compromising the fairness of the arbitration process. The United States District Court for the Eastern District of Texas agreed, ultimately ruling that the Departments' regulations improperly elevated the QPA above the other factors, and therefore vacated those provisions of the regulations. The Departments appealed.

On appeal, the Fifth Circuit upheld the District Court's order, holding that the challenged regulations imposed extra-statutory requirements that skewed the arbitration process in favor of insurers. The Fifth Circuit identified three specific impositions that exceeded the Departments' authority under the NSA and the Administrative Procedures Act. First, the Fifth Circuit observed that the Departments' regulations mandated that arbitrators prioritize the QPA before considering other factors, which effectively contravened the NSA's mandate for an equitable consideration of all factors. By structurally embedding the QPA as the initial consideration, the Fifth Circuit reasoned, the Departments' regulations distorted the intended parity among the factors, thereby inherently benefiting insurers. In the Fifth Circuit's view, such a configuration not only skewed the balance of the arbitration process in favor of payers, but also undermined the broader legislative goal of providing disputing parties with a balanced and impartial dispute resolution mechanism.

Second, the Fifth Circuit held that the regulations unduly restricted IDREs from considering any information not deemed "credible" or directly related to the QPA, thereby limiting the scope of evidence that could influence arbitration decisions. This restriction, the Fifth Circuit held, effectively and improperly narrowed the IDREs' ability to make fully informed decisions based on a comprehensive range of evidence, all of which was crucial to achieving the fair adjudication objectives set forth in the NSA. Thus, this limitation not only compromised the ability of IDREs to weigh all pertinent information, but also undermined the NSA's intention to facilitate a holistic and unbiased decision-making process once arbitration had commenced.

Finally, the Fifth Circuit declared that the Departments' requirement that IDREs provide written explanations whenever their decisions deviated from the QPA conflicted with the NSA. Here, the Fifth Circuit held that this added procedural burden could discourage IDREs from considering and incorporating other relevant, non-QPA, factors, all of which could be critical for a balanced and equitable outcome. By imposing such a requirement, the Fifth Circuit held that the Departments not only created a disincentive for IDREs to depart from the QPA, but once again skewed the arbitration process in favor of insurers, who benefit from the QPA's typically lower rates.

Collectively, the Fifth Circuit found that each of these procedural hurdles compromised the integrity and fairness of the arbitration process, contravening the equitable principles envisioned by the NSA.

What's Next? Additional Rulemaking and/or Litigation in a Post-*Chevron* World

Although a win for health care providers, the Fifth Circuit's decision is not the final word in the implementation of the NSA. Indeed, lingering questions remain as to whether the Departments will issue new regulations that adhere more closely to the NSA or else appeal the Fifth Circuit's ruling. Either option carries risks. If the Departments issue new regulations, they may face additional challenges from health care providers. If they appeal, their next stop would be the Supreme Court, which has already curtailed agency authority. Either way, the regulatory framework surrounding the NSA remains in flux as additional rulemaking issued by the Departments earlier this year is expected to become final later this calendar year. Accordingly, health care providers should continue timely filing negotiation and arbitration notices under the NSA and retain skilled counsel to advise them on compliance with the NSA.

Proskauer's Health Care Group is closely monitoring developments related to the NSA and its implementation. We are committed to providing timely updates and guidance to help our clients understand and adapt to these changes. Subscribe to our Health Care Law Brief to stay informed about the latest developments in healthcare law and policy.

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