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State Data Can Guide On Federal 'No Surprises Act' Arbitration

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The No Surprises Act, passed in late 2020 as part of the Consolidated Appropriations Act of 2021, introduces surprise billing legislation at the federal level and will make sweeping changes to the health care industry in the years to come.

Beginning Jan. 1, 2022, patients will only be responsible for their in-network cost-share and will no longer be balanced-billed when they receive the following care from nonparticipating providers: (1) emergency services, (2) air ambulance transport and (3) services in a participating facility, unless the patient first gives informed consent.

In other words, a nonparticipating provider can no longer bill a patient for charges that are not covered by insurance. If providers are dissatisfied with their payment, they can initiate independent dispute resolution with the patient's health plan or insurer. These disputes are resolved by an independent dispute resolution entity that decides between the parties' offers in a baseball-style arbitration.

In making their decision, independent dispute resolution entities are required to consider the qualifying payment amount, which is generally the payor's median negotiated rate with other providers for the item or service at issue.

Independent dispute resolution entities also consider other metrics such as the parties' respective market share and any previously negotiated rates between the parties.

Independent dispute resolution entities cannot, however, consider the provider's billed charges, usual and customary charges — which is typically defined as what providers in the area usually charge — or reimbursement rates under government programs such as Medicare or Medicaid.

The results of independent dispute resolution are binding except in very limited circumstances.

Much remains to be seen about the impact of the No Surprises Act, including the effects of rulemaking expected later this year. However, states with existing surprise billing laws that track the federal independent dispute resolution process provide helpful insights.

As discussed below, state data demonstrates that awards are driven by the information the arbitrator considers. In states that allow consideration of billed charges, providers are winning arbitrations more frequently and with awards many times greater than typical negotiated rates.

And, for the most part, state arbitration programs are experiencing frequent utilization, although regional market dynamics such as private equity investment impact both awards and utilization.

This experience counsels stakeholders to carefully consider the information they submit to independent dispute resolution entities and to consider market dynamics in crafting their strategy and approach to the independent dispute resolution process.

Arbitration awards are guided by the information arbitrators consider, and consideration of billed charges increases awards.

In states with arbitration processes comparable to the independent dispute resolution process — that is, voluntary, binding and baseball-style — the data show a clear trend: Providers are collecting significantly more through arbitration than in-network providers would for the same service, particularly when arbitrators consider a provider's billed charge when choosing an award.

For example, New Jersey's surprise billing legislation mirrors the new federal requirements.[1] A study of 1,695 New Jersey arbitration cases from 2019 found that providers won 59% of arbitrations, and across all arbitrations arbitrators awarded amounts approximately 5.7 times greater than the median in-network rate for the same service.[2]

Moreover, nearly one-third of arbitrator awards to providers were greater than 10 times the median in-network rate.[3] Even when health plans won the arbitration, meaning the arbitrator chose their offer amount instead of the provider's, the median payment was approximately 1.76 times the median in-network rate.[4]

These results suggest that provider recoveries are linked to the information arbitrators consider.[5] Although arbitrators in New Jersey may consider a number of factors,[6] in practice they are given the 80th, 90th and 95th percentiles of both billed charges and allowed amounts, defined as the actual, negotiated prices paid to the provider for a service.[7]

Arbitrators' decisions track the 80th percentile of providers' billed charges, which is generally higher than in-network rates.[8] This consideration of billed charges likely boosts provider recoveries in New Jersey.[9]

New York goes one step further by instructing arbitrators to consider the 80th percentile of providers' billed charges.[10] Arbitration awards track that figure: New York's Department of Financial Services reports that arbitration awards average 8% higher than the 80th percentile of billed charges.[11] As in New Jersey, the consideration of billed charge percentiles likely drives these results.[12]

In Texas, surprise billing arbitrators are mandated to consider 10 factors, including the 80th percentile of a provider's billed charges, the provider's training, case complexity, contracting history between the parties, and the median in-network rate for the service in that area.[13]

Texas arbitrations also favor providers: Average awards are 4.7 times the average original plan payment.[14] However, the awards tend to track a lower percentage of billed charges than seen in New York and New Jersey, as the average provider recovery is 35% of billed charges.[15]

By contrast, the No Surprises Act precludes independent dispute resolution entities from considering both a provider's billed charges and the usual and customary charges, which are generally defined as the typical amount charged by a provider for the item or service.[16]

It also mandates consideration of the qualifying payment amount, which is in most cases the median in-network rate for the item or service.[17]

Consequently, providers may not see the results in the federal independent dispute resolution process that they have seen in states like New Jersey, New York and Texas. And, given the act's emphasis on the qualifying payment amount as a benchmark, independent dispute resolution awards may tend to cluster around median in-network rates.

That said, providers may still be able to submit evidence of billed charges in independent dispute resolution through other means, such as introducing previous negotiated rates when those rates were based on billed charges. Rulemaking may further clarify the evidence independent dispute resolution entities may consider, and whether charge-based evidence can be introduced in this way.

Private equity investment and geographic market dynamics affect arbitration utilization and awards.

State data also shows that there are regional trends in the utilization rates of state arbitration processes.

For instance, providers are using Texas' arbitration system far more frequently than in other states. Data from Jan. 1, 2020, through Oct. 31, 2020, reported 32,036 requests for arbitration, with 6,317 claims being resolved by an arbitrator. Most claims are resolved prior to arbitration, and some are later determined to not be eligible for arbitration.[18]

This enormous utilization rate is likely a product of more than Texas' large population.[19] Rather, the significant private equity investment in the Texas health care system[20] appears to be driving the lion's share of Texas arbitrations — in the first six months of 2020, 85% of arbitrations came from just three private-equity-backed physician staffing and billing organizations.[21]

New York and New Jersey have experienced fewer per capita arbitration requests than Texas; however, they have still seen a relatively large number of provider arbitrations under their respective surprise billing laws.

In 2020, New Jersey received 5,715 arbitration requests, which is about half of the arbitration requests seen in Texas on a per capita basis.[22] In 2018, the last year for which there is data, 1,148 arbitration decisions were rendered in New York — adjusted for population, roughly one-third of the arbitration decisions rendered in Texas.[23] Neither state is reported to have the same level of private equity investment as Texas.[24]

Although Nevada also has a voluntary, binding and baseball-style arbitration process, data from March 1, 2020, through Dec. 31, 2020, evidences even lower utilization.[25] Only 782 requests for arbitration were submitted through the end of 2020, and 97 were actually resolved by an arbitrator, which, per capita, is roughly 15% of the awards rendered in Texas and 50% of the awards rendered in New York.[26]

Nevada is also unique in that its arbitrators are choosing health plans' offers much more frequently than providers' offers.[27] Health plans won 83 out of 90 times (92%) against out-of-network professional providers and three out of seven times (43%) against out-of-network emergency facilities.[28] This may be a function of fewer providers operating out of network in Nevada as compared to other states.

The varying utilization in Nevada, New Jersey, New York and Texas illustrates that even under a uniform federal system, regional market dynamics will likely drive differing utilization and results. In states with an organized out-of-network provider base and substantial private equity investment, utilization may be higher and results may be more advantageous to providers.

By contrast, in states where providers are largely in-network with health plans, the providers are less organized, and/or private equity investment is minimal, there may be fewer arbitrations and more payor-friendly awards.

Stakeholders should consider their market carefully in preparing for the launch of the federal independent dispute resolution process, and be flexible to the market dynamics that reveal themselves as the process develops and matures.

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[1] N.J. Rev. Stat. § 26:2SS-1 to 20.

[2] Benjamin L. Chartock, Loren Adler, Bich Ly, Erin Duffy, Erin Trish, Arbitration Over Out-of-Network Medical Bills: Evidence from New Jersey Payment Disputes, Health Affairs (January 2021) https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00217.

[3] Id.

[4] Id.

[5] Id.

[6] Id.

[7] Id.

[8] Id.; Sabrina Corlette, Jack Hoadley, Maanasa Kona, & Madeline O'Brien, Taking the Disputes out of Dispute Resolution: Lessons from State Balance Billing Laws. The Center on Health Insurance Reforms, Georgetown University Health Policy Institute (March 2021); Jacqueline LaPointe, Physicians Hail New York's Surprise Billing Law as a Success, RevCycle Intelligence (September 30, 2019), https://revcycleintelligence.com/ news/physicians-hail-new-yorks-surprise-billing-law-as-a-success.

[9] Chartock et al., supra note 2.

[10] Robert King, USC-Brookings Report: New York Arbitration Law Leading to Higher Costs, Fierce Healthcare (October 25, 2019) https://www.fiercehealthcare.com/payer/usc-brookings-ny-arbitration-law-leading-to-higher-costs.

[11] Loren Adler, Experience with New York's Arbitration Process for Surprise Out-of-Network Bills, USC-Brookings Schaeffer on Health Policy (October 24, 2019), www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2019/10/24/experience-with-new-yorks-arbitration-process-for-surprise-out-of-network-bills/#:~:text=The%20New%20York%20Department%20of%20Financial%20Services%20report%20finds%20that,80th%20percentile%20of%20charges.&text=Unfortunately%2C%20however%2C%20the%20New%20York,80th%20percentile%20of%20charges.

[12] Id.

[13] Tex. Ins. Code § 1467.083.

[14] Corlette et al., supra note 8.

[15] See id.

[16] 26 USCS § 9816.

[17] Id.

[18] Tex. Dep't of Ins., Balance Billing Protections, Senate Bill 1264 Biennial Report, 2020 (December 2020), https://www.tdi.texas.gov/reports/documents/SB1264-report-december-2020.pdf.

[19] Corlette et al., supra note 8.

[20] S&P Capital IQ (2021). Capital IQ Company Screening Report.
Retrieved May 6, 2021, from https://capitaliq.com/.

[21] Corlette et al., supra note 8.

[22] Id.

[23] N.Y. State Dep't of Fin. Servs., New York's Surprise Out-of-Network Protection Law, Report on the Independent Dispute Resolution Process (September 2019), https://www.dfs.ny.gov/system/files/documents/2019/09/dfs_oon_idr.pdf.

[24] S&P Capital IQ (2021). Capital IQ Company Screening Report. Retrieved May 6, 2021, from https://capitaliq.com/.

[25] Nev. Rev. Stat. §§ 439B.700–760.

[26] Nev. Dep't of Health and Hum. Servs. Office for Consumer Health Assistance, Payment for Medically Necessary Emergency Services Provided Out-of-Network Annual Report (2020), http://dhhs.nv.gov/uploadedFiles/dhhsnvgov/content/Programs/CHA/AB469%20LCB%20Annual%20Report%202020.pdf.

[27] Id.

[28] Id.

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