

Blog Post

THE NO SURPRISES ACT: Hoping for an End to the Surprises

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By looking at the events that have transpired since the Consolidated Appropriations Act, 2021, which includes the [No Surprises Act \(the Act\)](#), was signed into law, it is clear that the Departments of Health and Human Services, Labor, and Treasury (collectively, the Departments) have lost their way. The United States District Court for the Eastern District of Texas (the Texas court) has consistently agreed with providers and ruled against the Departments because they have repeatedly violated the Administrative Procedure Act (APA) and disregarded the original intent of the Act: to protect consumers from surprise medical bills and to streamline disputes between payors and providers through an independent dispute resolution process (IDR).

For example, in February 2022, the Texas court [invalidated the portion of the Federal IDR process](#) that hampered out-of-network providers' efforts to negotiate payment rates by essentially creating a rebuttable presumption in favor of the insurer's median contracted rate for the service, the QPA. The same court invalidated a similar regulation that applied to air ambulance payment disputes in July 2022. The Texas court again [invalidated challenged provisions](#) of rules implementing the Act because they improperly permitted the QPA to favor insurers and lowered payments to out-of-network

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providers in February 2023. That same court found that the Departments' increased IDR administrative fee, from \$50 to \$350, violated the Administrative Procedures Act by failing to provide a notice and comment period on August 3, 2023. Most recently, on August 24, 2023, the Texas court set aside portions of the Departments' implementing regulations because all but one of the challenged regulations regarding the QPA calculation violated the Act's plain text.

Given this consistent string of judicial losses, where do the Act's regulations go from here? The Departments need to go back to the basics of the Act's purpose by issuing interpretations and guidance that follow the Act's text and basic principles. Ironically, the Departments' rulemaking to date has devolved into litigation between providers and payors, which is the same problem that has infested our healthcare system for decades and that the Act was partly intended to avoid.

It is inadequate to repeat the phrase "our healthcare system is complicated." It should not take multiple lawsuits interpreting the Act sentence by clause by paragraph to determine the Act's purpose. Such litigation leads to a breakdown of the system, and none of the three major players benefit. The patients, the providers, and the payors all should be working together to put a system in place that functions for everyone and not to the detriment of anyone. Again, we must remember that patients — not profits — are at the forefront of the Act. Yet the arguments that continue to be presented before the courts are that the rules being implemented favor payors over providers, with no mention of the patients. The American Hospital Association has said that the rules being issued by the Departments "unfairly favor insurers to the detriment of hospitals and physicians who actually care for patients. These consumer protections need to be implemented in the right way, and this misses the mark."

Consequently, the Departments suspended the majority of Federal IDR disputes following the Texas court's August 24, 2023, Order. On September 21, 2023, the Centers for Medicare & Medicaid Services (CMS) posted a new notice on its website:

Effective September 21, 2023, the Departments have directed certified IDR entities to resume processing all single and bundled disputes *already submitted to the IDR portal and assigned to a certified IDR entity*. **The ability to initiate new disputes involving air ambulance items or services as well as batched disputes for air ambulance and non-air ambulance items and services is currently unavailable. IDR portal functionalities related to previously initiated batched disputes are also unavailable.** Disputing parties should continue to engage in open negotiation according to the required timeframes.

(emphasis added.) While there are No Surprises in what has transpired, the Departments should use the suspension to cure several issues with how they are attempting to implement the Act.

At the very least, it is clear that unless the Departments make substantial changes to the Federal IDR process, litigation will continue. If the Texas court's past decisions are any indication of future rulings, providers likely will continue to be successful. As the Texas Medical Association (TMA) recently posted on their website, **"Despite TMA's continued success in its No Surprises Act litigation, the battle for a fair IDR process is still far from over."** (emphasis added.) If the Departments have any hope of avoiding more litigation, any rules and other guidance they issue next will need to stay as close to the original intent and language of the Act as possible. This includes ensuring that the determination of the QPA constitutes a fair approach that does not leave any room for speculation that it is tilted to favor anyone.

Another important step for the Departments will be to ensure that they give a notice and comment

period for any rules that require one. The APA requires that agencies provide a “notice-and-comment” procedure that allows the public to submit comments to the Departments regarding proposed substantive rules unless an exception applies. The Texas court, for example, found that the substantial increase in the Federal IDR administrative fee violated the APA because no notice and comment period was provided. Given the Texas court’s history of ruling against the Departments, the agencies would be wise to issue a notice and comment period whenever required.

Perhaps the Departments are starting to catch on, because on September 20, 2023, they released a proposed rule (finally giving an opportunity for notice and comment!) that would set the Federal IDR administrative fee at \$150 per party per dispute for disputes initiated on or after the effective date of the rule or January 1, 2024 — whichever comes later. Providers and anyone else who wishes to submit their comments on this proposed rule must do so no later than 30 days after the proposed rule is published in the Federal Register, which is scheduled for September 26, 2023.

While providers are likely happy with their string of recent wins from the Texas court, it is not all good news for them. No new disputes or previously initiated batched disputes will be reviewed during the current suspension. This pause in the process could be financially problematic for providers waiting for decisions regarding their payment disputes. Moreover, the ongoing open negotiations mean there will continue to be a build-up of disputes waiting for arbitration, creating a definite backlog when the process resumes.

The Act had a simple premise. Figuring out how to implement it has been a procedural nightmare. The Departments must go back to the basics and do what is in the best interest of all parties, but, most importantly, assure that the patients receive the

quality healthcare that our system is designed to provide them.

Changes related to the Act are occurring rapidly. We are available to assist parties seeking guidance regarding adherence to the Act as these Surprises continue.

October 6, 2023 Update: The Centers for Medicare & Medicaid Services (CMS) posted a new notice on its website, notifying the public that the Federal Independent Dispute Resolution (IDR) Portal is re-opened, **effective October 6, 2023**, to initiate certain single and bundled disputes. Processing of in-progress batched disputes, new batched disputes, and new air ambulance disputes remains temporarily suspended while the Departments update batching and air ambulance guidance and operations to align with the Texas Court's recent opinions and orders. Please refer to the CMS notice for information regarding additional time that the Departments are providing parties to submit and respond to certain new disputes.

For our past blogs regarding the No Surprises Act, please go to: <https://www.healthlawrx.com/>.

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