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Court Split Creates Uncertainty Around Enforcement of the No Surprises Act

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A recent court split about whether awards granted through arbitration under the No Surprises Act (NSA) are enforceable through litigation has created uncertainty around an already complicated process. A Texas judge recently held that the NSA does not grant parties a right to bring suit to enforce arbitration awards, while last year a New Jersey court granted enforcement of a similar award. The resulting split raises questions about the enforceability and utility of the NSA and its Independent Dispute Resolution (IDR) process.

The NSA, included in the federal Consolidated Appropriations Act of 2021, is intended to protect consumers from receiving surprise medical bills from insurance carriers and health care providers. Under the NSA, providers cannot bill patients for more than their in-network copayment, co-insurance, or deductible for the provision of emergency services by out-of-network providers, or for services provided by out-of-network providers at an in-network hospital.

When a patient receives an out-of-network service, a provider submits the claim to the insurer and the insurer responds with an initial payment or a denial for payment. This can lead to providers and insurers disagreeing over the amount an insurer should pay for the service. When these disagreements arise, the NSA directs insurers and providers to engage in an open negotiation. If the negotiation fails, the NSA allows insurers and providers to engage in an IDR process. During an IDR process the parties arbitrate the payment amount through an IDR entity whereby the IDR entity must decide what the insurer must pay. The IDR entity does not independently determine a dollar amount; instead, it chooses between the insurer and provider's proposed dollar amounts (i.e., their "offers"), taking into account supporting evidence. The NSA provides certain factors an IDR entity must consider when choosing between offers, including but not limited to geographic location, the applicable year, the level of training, and experience of the provider.

Under the NSA, the IDR entity's determination is binding and the parties cannot adjudicate the amount unless four circumstances exist. These circumstances are derived from the Federal Arbitration Act (FAA) and include: (1) the existence of fraud, corruption, or undue means, (2) partiality or corruption of the arbitrator, (3) arbitrator misconduct in refusing to postpone a hearing or refusing to hear material and pertinent evidence, or (4) the arbitrator exceeded their powers or a mutual, final, and definitive determination was not made. Essentially, arbitrators must conduct fair and unbiased determinations during the arbitration and if they do not, the parties can sue in court. An issue arises when insurers fail to timely pay providers the IDR arbitration awards, and unsurprisingly, providers are looking to courts to seek enforcement of unpaid IDR arbitration awards.

The NSA does not explicitly outline the mechanism for enforcement of awards granted through the IDR arbitration, but the New Jersey case turned on the argument that the FAA allowed the court to confirm the award. Whether this argument will prevail in other similar cases is yet to be seen, and some argue that enforcement of IDR arbitration awards should be handled via complaints to CMS, the agency charged with handling such matters. The NSA provides important protections for consumers, but at least so far, has resulted in uncertainty for payors and providers alike.

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