LITIGATION MINUTE: WHEN THE FEDERAL NO SURPRISES ACT'S DISPUTE RESOLUTION PROCESS DOES NOT APPLY: NO "SURPRISE BILLING"

PAYOR-PROVIDER SERIES: PART THREE OF FOUR

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

For health care providers offering items and services to out-of-network (OON) patients[1] in certain emergency and nonemergency settings, the federal No Surprises Act (NSA) establishes a new federal independent dispute resolution (IDR) process designed to resolve applicable payment disputes.

Although the federal IDR process has established an alternative method for resolving some OON payment disputes, many are still subject to litigation in federal courts. Determining which OON payment disputes fall under the federal IDR process is a source of some confusion. Even for OON patients, there are circumstances in which disputes remain subject to litigation because no “surprise bill” occurs.

In a minute or less, here is what you need to know.

Care Settings Where Disputes Do Fall Under the Federal IDR Process

Some might assume that the federal IDR process now applies to all OON disputes for all service types. However, not all OON disputes are adjudicated under the federal IDR process. First, let's look at the care settings in which the federal IDR process applies.

This process determines the OON rate for “qualified IDR items or services,” which include:

- Emergency services (including post-stabilization services) at qualifying facilities;
- Nonemergency items and services furnished by OON providers at certain in-network health care facilities; and
- OON air ambulance services.

Nonsurprise Disputes That Are Still Subject to Litigation

The three categories above are intended to address what is characterized as a “surprise bill” to the patient. OON payment disputes involving self-insured ERISA plans can still be litigated in federal court if they do not meet any of these three categories.

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For example, if a patient seeks nonemergent care at an OON facility, that patient is presumed not to be surprised by the bill from either the OON facility or OON providers practicing at that facility. The patient has an advance (nonemergent) opportunity to determine that they are obtaining services from an OON facility. A payment dispute with the OON ERISA plan would still be governed by the pre-federal NSA process of a patient (or the facility or provider as the patient's assignee) suing the health plan and its fiduciaries in federal court for alleged underpayments under the plan's terms.

It is also important to note that health care facilities covered by the federal NSA are defined in two different settings: emergency services and nonemergency services. In nonemergency situations, such facilities include hospitals (including hospital outpatient departments), critical access hospitals, and ambulatory surgical centers. Therefore, such nonemergent services received outside of such facilities will not result in “surprise bills” falling under the federal IDR process regardless of whether a patient's insurance is OON with the facility or provider, or both.

Let's look at a typical scheduled, nonemergent care setting. For example, if a patient schedules imaging services at an independent diagnostic testing facility (IDTF), any potential payment dispute arising from those services is not subject to the federal IDR process, as IDTFs are not facilities subject to that IDR Process.

Even in a perceived emergency situation, ambiguities remain. For example, if a patient has an OON payment dispute with an urgent care facility for an unscheduled visit that the patient reasonably perceived as emergent, it may not be covered under the federal NSA's IDR process.

Moreover, the federal NSA treats air and ground ambulances differently. OON air ambulance payment disputes are subject to the federal IDR process. However, ground ambulance services are not subject to that process. Thus, a patient may receive urgent care or ground ambulance services in an actual or perceived emergency, yet the federal IDR process will often not apply to OON payment disputes arising from those circumstances.

Background about the federal NSA, federal IDR process, and related case law can be found in prior alerts available here, here, and here, as well as a recent episode of the K&L Gates Triage podcast.

FOOTNOTES

[1] An “OON patient” is a patient whose health insurance plan does not have a contract with the facility or provider in question for payment rates.

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