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Court Split Spells Trouble on Surprise Billing Award Enforcement

By Lauren Clason

Deep Dive

- Ruling that awards unenforceable in court generates concern
- Other cases creating another test for No Surprises Act

A continued fight between medical providers and insurance companies over how to enforce arbitration awards in surprise billing disputes is splitting the courts and bringing greater uncertainty to an already complicated and fraught process.

Judge Jane Boyle of the US District Court for the Northern District of Texas recently dismissed a suit from air ambulance providers Guardian Flight LLC and Med-Trans Corp. that sought to force insurer Health Care Service Corp. to pay money they were awarded through No Surprises Act arbitration, finding that the law provides no right to sue in court.

By contrast, Judge Kevin McNulty of the US District Court for the District of New Jersey did enforce an arbitration award last September, denying physician practice GPS of New Jersey M.D. P.C.'s request to overturn the final amount owed by Horizon Blue Cross Blue Shield of New Jersey.

Attorneys and lobbyists for providers fear the potential lack of an enforcement mechanism could unravel the already tortured NSA arbitration process, where providers, plans, and arbitrators are entangled in battles over allegations of delayed or nonpayments for services, errors, and misrepresentations.

The No Surprises Act, enacted in 2021 as part of a government funding measure, was intended to shield patients from unexpected out-of-network bills in the event of an emergency or certain instances where they reasonably expected to be receiving in-network care.

Medical providers and health plans are directed under the NSA to work out any related billing disputes through arbitration.

But it has been difficult at times for parties to even use the system because of a shutdown following litigation challenging its setup, conflicts over dispute eligibility, and a case volume that in the first half of 2023 alone reached 13 times the number of disputes federal agencies had predicted for a full calendar year.

HHS, Not Courts

Insurance companies have argued that providers are unfairly trying to force payment in arbitration on disputed claims that contain critical errors like mistakes in contact information and inaccuracies in eligibility determinations. Aetna Inc., for example, said in one case that some awards cited by a provider in their suit didn't even involve the insurer.

Adam Schramek, a partner at Norton Rose Fulbright who represented the providers in the Texas lawsuit, said the NSA's language makes arbitration decisions binding on both plans and insurers.

"The courthouse door should be open for them to enforce those obligations," said Schramek, who's also representing air ambulances in another federal case against Aetna Health Inc. and other insurers over delayed payments.

Insurers argue instead that the Department of Health and Human Services is the proper place to adjudicate complaints, although the Centers for Medicare and Medicaid Services—the HHS subagency charged with handling such matters—is already bogged down by arbitration cases.

"HHS accepts provider complaints—including complaints that health plans are not timely paying [independent dispute resolution] IDR awards—and performs complaint-based audits to enforce the NSA's provisions," HCSC wrote in its motion to dismiss the Texas suit.

CMS has said the agency is "actively investigating and addressing complaints."

In the case against Aetna Health, the insurer argued that it's willing to pay out claims through arbitration once verified, but objected to providers' requests for attorneys' fees, costs, and pre-and post-judgment interest.

Providers Prevail

Insurance companies aren't faring as well as the Congressional Budget Office and others predicted.

Preliminary data shows that providers are winning the majority of arbitration disputes, according to an analysis from the Brookings Institution, while the Commonwealth Fund found that a handful of private-equity backed companies are the main drivers behind the arbitrations.

Yet despite the high win-rate for providers, a 2023 survey of physicians found that insurers weren't paying 52% of arbitration awards.

Several lawyers said they expect the Texas decision to be overturned on appeal, considering that the result—the inability to enforce arbitration awards—would upend the process that Congress created.

"The system just isn't going to work if the provider can't force the plan to pay," said Roberta Casper Watson, a partner at the Wagner Law Group who works with employers on health benefits.

Commercial claims data revealed by CMS in February show that insurance companies are often paying typical out-of-network rates, undermining predictions from the CBO that payment rates would trend toward in-network amounts.

Analysts fear the trend could raise insurance premiums and in-network prices if it continues.

Federal Arbitration Act

Michael Gottlieb, a partner at Gottlieb and Greenspan LLC, said one notable distinction between the Texas and New Jersey cases is reliance on the Federal Arbitration Act, which governs the enforcement of arbitration awards generally.

The FAA helped form the linchpin in McNulty's decision to confirm the awards in the New Jersey case, said Gottlieb, who represented the physician practice.

"The judge ruled that the Federal Arbitration Act, coupled with the No Surprises Act, allows the court to confirm the award," he said.

But the NSA itself contains no provision enforcing the awards, said aequum LLC CEO Christine Cooper, who represents small, self-funded health plans in the arbitration process and in court.

The Texas judge's decision was correct, as Congress chose to incorporate other provisions of the FAA into the NSA, she said.

"The fact that the legislature incorporated some of the FAA and not all of the FAA kind of eliminates or attacks that implied-rights type argument," she said. "Because they could have included the whole thing. They could have included at least the enforcement mechanism, and they didn't."

It would be "most appropriate" for Congress itself to revisit these issues, she said.

Schramek said that while he believes the awards are enforceable under the NSA, the Texas judge's ruling that amending the case would be futile implied she would reject an FAA claim as well.

"I think at the end of the day, the judge in Dallas just reached a different conclusion from the judge in New Jersey," he said.

It's hard to say how the question of court enforcement will be resolved, said David Greenberg, a partner at ArentFox Schiff LLP.

"I think that it depends on which jurisdictions and which judges get these cases," he said. "This is pretty early on."

Neither the attorneys for Horizon at Stradley Ronon Stevens & Young or for HCSC at Reed Smith responded to a request for comment.

New Opportunities

Some insurance companies also are recalculating patient cost sharing amounts after losing arbitration disputes, said Jeffrey Davis, health policy director at McDermott+Consulting who works with providers.

He pointed to a letter the Emergency Department of Practice Management Association and the American College of Emergency Physicians wrote to the departments of Health and Human Services, Labor, and Treasury in February, which contained examples of health plans doing just that.

That's a direct violation of the NSA, he said. If the courts aren't willing to enforce the awards, patients could end up getting billed more again.

"I think this is setting up a dangerous precedent," Davis said of the Texas decision.

Other recent lawsuits could give the courts more opportunities to flesh out whether and how NSA arbitration awards will be enforced.

GPS has sued to force Aetna Life Insurance Co. to pay the remainder of an arbitration award for treating an emergency patient, citing both the NSA and FAA.

Air ambulance company Air Methods LLC sued Independence Blue Cross LLC, bringing claims under the FAA and NSA. They also cited a section of the Employee Retirement Income Security Act that allows beneficiaries to sue when they believe they have been wrongly denied benefits.

Air Methods says it has ERISA standing because it "steps into the shoes of" enrollees in Independence's self-funded plans and payments and benefits are assigned to the provider under the plan.

But Judge Boyle rejected a similar ERISA argument in the Guardian Flight case, noting that enrollees are theoretically protected from surprise bills under the NSA, and are therefore not harmed.

Neither Aetna nor Independence has yet filed a response to the complaints.

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