No Surprises Act

Certified Independent Dispute Resolution Entities

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Federal Hearings and Appeals Services, Inc.

iMPROve Health

IPRO

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Maximus Federal Services, Inc.

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SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005, UNITED STATES OF AMERICA
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March 7, 2023

Lisa Hanson
General Counsel
C2C Innovative Solutions, Inc.
301 W. Bay Street, STE 1110
Jacksonville, FL 32202

Re: Recent Litigation Update for Certified IDR Entities

Dear Ms. Hanson,

A federal judge recently invalidated core provisions of the regulations governing how you preside over reimbursement disputes pursuant to the Independent Dispute Resolution ("IDR") process under the No Surprises Act ("NSA"). This court decision significantly impacts how you execute your duties, and it is important that you understand the judge's reasoning in this case. As counsel for the Texas Medical Association and the other plaintiffs in that lawsuit, we encourage you to consult with your own attorneys about how this court decision affects your work as a certified IDR entity. Failure to adhere to this court decision puts C2C Innovative Solutions at risk, including reversal of your decisions and potential decertification.

In September 2021, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") released an interim final rule that created a "rebuttable presumption" in favor of the qualifying payment amount ("QPA") during IDR. The Departments directed arbitrators to select the bid closest to the QPA unless "credible information . . . clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate." 86 Fed. Reg. 55,980, 55,984 (Oct. 7, 2021).

Our clients challenged the QPA rebuttable presumption as unlawful. *See Tex. Med. Ass'n v. U.S. Dep't of Health & Hum. Serv*s., 587 F. Supp. 3d 528 (E.D. Tex. 2022) ("*TMA I*"). In *TMA I*, a federal judge agreed that the QPA rebuttable presumption was unlawful because it "place[d] its thumb on the scale for the QPA, requiring arbitrators to presume the correctness of the QPA and then imposing a heightened burden on the remaining statutory factors to overcome that presumption." *Id.* at 542. Accordingly, the judge vacated those provisions of the September 2021 interim final rule. Following the decision, the Departments issued subregulatory guidance and directed IDR entities to use this guidance as they kicked off the IDR process in April 2022.

In August 2022, the Departments issued a final rule that, while formally abandoning the QPA rebuttable presumption, nonetheless similarly elevated the QPA through a series of interlocking requirements restricting how IDR entities could consider the non-QPA factors. Our clients again challenged this regulation as unlawful because, among other reasons, it persisted in privileging the QPA over the other relevant statutory factors.

Once again, a federal judge agreed that the Departments' QPA-centric rules were unlawful. On February 6, 2023, a judge vacated the challenged provisions of the August final rule, concluding that the Departments violated the NSA's clear terms by favoring the QPA during the IDR process. *See Tex. Med. Ass'n v. U.S. Dep't of Health & Hum. Servs.*, 2023 WL 1781801, at *13 (E.D. Tex. Feb. 6, 2023). The court explained that the NSA "nowhere states that the QPA is the primary or most important factor—or that it must be weighed more heavily than, or considered before, other factors." *Id.* at *11. Thus, the court concluded that although the August final rule "avoid[ed] an explicit presumption in favor of the QPA," it "nevertheless continue[d] to place a thumb on the scale for the QPA by requiring arbitrators to begin with the QPA and then imposing restrictions on the non-QPA factors that appear nowhere in the statute." *Id.* This, the court ruled, was unlawful because the Departments were "attempt[ing] to control how arbitrators evaluate the information properly before them and introduc[ing] limitations not found in the statute." *Id.* The court criticized the Departments for "not relinquish[ing] their goal of privileging the QPA, tilting arbitrations in favor of insurers, and thereby lowering payments to providers." *Id.* at *13.

TMA II has concrete implications for IDR entities' work as arbitrators moving forward. First, any application of the now-vacated August 2022 final rule that favors the QPA undermines the integrity of an arbitrator's decision and makes it vulnerable to legal challenge. Second, arbitrators must consider all statutorily relevant factors in reaching a decision, with arbitrators retaining ultimate discretion in weighing those circumstances.

Further, the court's decision makes clear that IDR entities are not required to:

- Consider the QPA first among the statutory factors
- Presume the QPA is credible while subjecting other relevant information to a credibility test
- Ignore non-QPA information unless the provider can prove that this information is not already accounted for or reflected in the QPA
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If an IDR entity were to apply any of the Departments' rules that have now been vacated, this would subject the payment determination to potential judicial review, could render the decision no longer binding on the parties, and could even result in decertification by the Departments.

To avoid these risks, IDR entities should closely adhere to the text of the NSA in reaching payment determinations. As the court in *TMA II* explained, the NSA "already tells arbitrators what evidence they 'shall consider' and what evidence they 'shall not consider.'" *TMA II,* 2023 WL 1781801, at *12. In addition to the QPA, the NSA requires IDR entities to consider the following factors, regardless of whether these factors might overlap with information incorporated into the QPA:

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On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,

Brenna E. Jenny
Eric D. McArthur
Jaime L.M. Jones

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March 7, 2023

Joan C. Ragsdale
Chief Executive Officer
EdiPhy Advisors LLC
1500 Urban Center Drive
Birmingham, AL 35242

Re: Recent Litigation Update for Certified IDR Entities

Dear Ms. Ragsdale,

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March 7, 2023

Keith J. Saunders
Chief Executive Officer
Federal Hearings and Appeals Services, Inc.
117 West Main Street
Plymouth, PA 18651

Re: Recent Litigation Update for Certified IDR Entities

Dear Mr. Saunders,

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March 7, 2023

Dr. Leland Babitch
Chief Executive Officer
iMPROve Health
625 Kenmoor Ave SE, Suite 350, PMB 47995
Grand Rapids, MI 49546

Re: Recent Litigation Update for Certified IDR Entities

Dear Dr. Babitch,

A federal judge recently invalidated core provisions of the regulations governing how you preside over reimbursement disputes pursuant to the Independent Dispute Resolution ("IDR") process under the No Surprises Act ("NSA"). This court decision significantly impacts how you execute your duties, and it is important that you understand the judge's reasoning in this case. As counsel for the Texas Medical Association and the other plaintiffs in that lawsuit, we encourage you to consult with your own attorneys about how this court decision affects your work as a certified IDR entity. Failure to adhere to this court decision puts iMPROve Health at risk, including reversal of your decisions and potential decertification.

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March 7, 2023

Tierre A. Jeanné-Porter
Associate Vice President, Compliance
IPRO
1979 Marcus Avenue
Lake Success, NY 11042

Re: Recent Litigation Update for Certified IDR Entities

Dear Ms. Jeanné-Porter,

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Further, the court's decision makes clear that IDR entities are not required to:

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To avoid these risks, IDR entities should closely adhere to the text of the NSA in reaching payment determinations. As the court in *TMA II* explained, the NSA "already tells arbitrators what evidence they 'shall consider' and what evidence they 'shall not consider.'" *TMA II,* 2023 WL 1781801, at *12. In addition to the QPA, the NSA requires IDR entities to consider the following factors, regardless of whether these factors might overlap with information incorporated into the QPA:

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On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,

Brenna E. Jenny
Eric D. McArthur
Jaime L.M. Jones

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March 7, 2023

Melissa Leigh
Chief Legal Officer
Keystone Peer Review Organization, Inc.
777 East Park Drive
Harrisburg, PA 17111

Re: Recent Litigation Update for Certified IDR Entities

Dear Ms. Leigh,

A federal judge recently invalidated core provisions of the regulations governing how you preside over reimbursement disputes pursuant to the Independent Dispute Resolution ("IDR") process under the No Surprises Act ("NSA"). This court decision significantly impacts how you execute your duties, and it is important that you understand the judge's reasoning in this case. As counsel for the Texas Medical Association and the other plaintiffs in that lawsuit, we encourage you to consult with your own attorneys about how this court decision affects your work as a certified IDR entity. Failure to adhere to this court decision puts Keystone Peer Review Organization at risk, including reversal of your decisions and potential decertification.

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Sincerely,

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March 7, 2023

Bruce Perkins
Deputy General Counsel
Maximus Federal Services, Inc.
1600 Tysons Blvd, Suite 1400
McLean, VA 22102

Re: Recent Litigation Update for Certified IDR Entities

Dear Mr. Perkins,

A federal judge recently invalidated core provisions of the regulations governing how you preside over reimbursement disputes pursuant to the Independent Dispute Resolution ("IDR") process under the No Surprises Act ("NSA"). This court decision significantly impacts how you execute your duties, and it is important that you understand the judge's reasoning in this case. As counsel for the Texas Medical Association and the other plaintiffs in that lawsuit, we encourage you to consult with your own attorneys about how this court decision affects your work as a certified IDR entity. Failure to adhere to this court decision puts Maximus Federal Services at risk, including reversal of your decisions and potential decertification.

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March 7, 2023

Emmanuel Kabiritsi
Director of Operations
MCMC Services, LLC
1451 Rockville Pike #440
Rockville, MD 20852

Re: Recent Litigation Update for Certified IDR Entities

Dear Mr. Kabiritsi,

A federal judge recently invalidated core provisions of the regulations governing how you preside over reimbursement disputes pursuant to the Independent Dispute Resolution ("IDR") process under the No Surprises Act ("NSA"). This court decision significantly impacts how you execute your duties, and it is important that you understand the judge's reasoning in this case. As counsel for the Texas Medical Association and the other plaintiffs in that lawsuit, we encourage you to consult with your own attorneys about how this court decision affects your work as a certified IDR entity. Failure to adhere to this court decision puts MCMC Services at risk, including reversal of your decisions and potential decertification.

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March 7, 2023

Stacy Jones
Chief Operating Officer
MET Healthcare Solutions
2211 W. 34th Street
Houston, TX 77018

Re: Recent Litigation Update for Certified IDR Entities

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On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,

Brenna E. Jenny
Eric D. McArthur
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AMERICA • ASIA PACIFIC • EUROPE

March 7, 2023

Meredith Merlini
Vice President, Operations
National Medical Reviews, Inc.
607 Louis Drive, Suite C
Warminster, PA 18974

Re: Recent Litigation Update for Certified IDR Entities

Dear Ms. Merlini,

A federal judge recently invalidated core provisions of the regulations governing how you preside over reimbursement disputes pursuant to the Independent Dispute Resolution ("IDR") process under the No Surprises Act ("NSA"). This court decision significantly impacts how you execute your duties, and it is important that you understand the judge's reasoning in this case. As counsel for the Texas Medical Association and the other plaintiffs in that lawsuit, we encourage you to consult with your own attorneys about how this court decision affects your work as a certified IDR entity. Failure to adhere to this court decision puts National Medical Reviews at risk, including reversal of your decisions and potential decertification.

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Our clients challenged the QPA rebuttable presumption as unlawful. *See Tex. Med. Ass'n v. U.S. Dep't of Health & Hum. Servs.*, 587 F. Supp. 3d 528 (E.D. Tex. 2022) ("*TMA I*"). In *TMA I*, a federal judge agreed that the QPA rebuttable presumption was unlawful because it "place[d] its thumb on the scale for the QPA, requiring arbitrators to presume the correctness of the QPA and then imposing a heightened burden on the remaining statutory factors to overcome that presumption." *Id.* at 542. Accordingly, the judge vacated those provisions of the September 2021 interim final rule. Following the decision, the Departments issued subregulatory guidance and directed IDR entities to use this guidance as they kicked off the IDR process in April 2022.

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March 7, 2023

Dr. Robert Porter
Medical Director
Network Medical Review Company, Ltd.
1252 Bell Valley Road, Suite 210
Rockford, IL 61108

Re: Recent Litigation Update for Certified IDR Entities

Dear Dr. Porter,

A federal judge recently invalidated core provisions of the regulations governing how you preside over reimbursement disputes pursuant to the Independent Dispute Resolution ("IDR") process under the No Surprises Act ("NSA"). This court decision significantly impacts how you execute your duties, and it is important that you understand the judge's reasoning in this case. As counsel for the Texas Medical Association and the other plaintiffs in that lawsuit, we encourage you to consult with your own attorneys about how this court decision affects your work as a certified IDR entity. Failure to adhere to this court decision puts Network Medical Review Company at risk, including reversal of your decisions and potential decertification.

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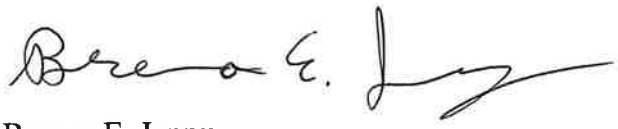

Brenna E. Jenny
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Jaime L.M. Jones

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March 7, 2023

Candace Daigle
Director, Compliance HIPAA & Privacy Officer
ProPeer Resources, LLC
5600 Schertz Pkwy, Ste. 200 PO Box 519
Schertz, TX 78154

Re: Recent Litigation Update for Certified IDR Entities

Dear Ms. Daigle,

A federal judge recently invalidated core provisions of the regulations governing how you preside over reimbursement disputes pursuant to the Independent Dispute Resolution ("IDR") process under the No Surprises Act ("NSA"). This court decision significantly impacts how you execute your duties, and it is important that you understand the judge's reasoning in this case. As counsel for the Texas Medical Association and the other plaintiffs in that lawsuit, we encourage you to consult with your own attorneys about how this court decision affects your work as a certified IDR entity. Failure to adhere to this court decision puts ProPeer Resources at risk, including reversal of your decisions and potential decertification.

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March 7, 2023

William McBee
Chief Compliance Officer
Provider Resources, Inc.
153 E 13th Street, Suite 1400
Erie, PA 16503

Re: Recent Litigation Update for Certified IDR Entities

Dear Mr. McBee,

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- Provide special justification as to why weight was given to non-QPA information

This should not present a meaningful change in practice for you. The August 2022 final rule applied only to items and services furnished on or after October 25, 2022, and it is our understanding that claims for this time period were not under review prior to the date of the judge's decision in *TMA II* (February 6, 2023).

If an IDR entity were to apply any of the Departments' rules that have now been vacated, this would subject the payment determination to potential judicial review, could render the decision no longer binding on the parties, and could even result in decertification by the Departments.

To avoid these risks, IDR entities should closely adhere to the text of the NSA in reaching payment determinations. As the court in *TMA II* explained, the NSA "already tells arbitrators what evidence they 'shall consider' and what evidence they 'shall not consider.'" *TMA II,* 2023 WL 1781801, at *12. In addition to the QPA, the NSA requires IDR entities to consider the following factors, regardless of whether these factors might overlap with information incorporated into the QPA:

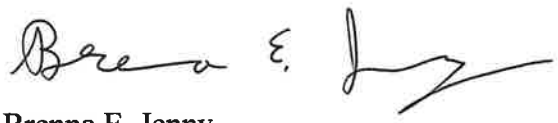
> (I) The level of training, experience, and quality and outcomes measurements of the provider or facility that furnished such item or service (such as those endorsed by the consensus-based entity authorized in section 1890 of the Social Security Act).
>
> (II) The market share held by the nonparticipating provider or facility or that of the plan or issuer in the geographic region in which the item or service was provided.
>
> (III) The acuity of the individual receiving such item or service or the complexity of furnishing such item or service to such individual.
>
> (IV) The teaching status, case mix, and scope of services of the nonparticipating facility that furnished such item or service.
>
> (V) Demonstrations of good faith efforts (or lack of good faith efforts) made by the nonparticipating provider or nonparticipating facility or the plan or issuer to enter into network agreements and, if applicable, contracted rates between the provider or facility, as applicable, and the plan or issuer, as applicable, during the previous 4 plan years.
>
> (VI) Any other information submitted by the parties relating to their offers.

Other information relating to an offer can include historical and current contracted rates with payors or information from aggregated market databases of paid commercial claims, such as FAIR Health data.

Arbitrators should keep in mind that the NSA *does not* instruct them to weigh any of these factors or circumstances more heavily than others. *TMA II*, 2023 WL 1781801, at *11. Nor is the goal to reduce reimbursement to clinicians. Instead, the NSA instructs arbitrators to consider all of the above factors, and "the weighing of those factors is left to the [arbitrator's] sound discretion." *Id.* at *12.

On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,



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