WISDOM. APPLIED.

WEISS

February 28, 2022

Surprise: Arbitration Regulations Under No Surprises Act Ruled Illegal

A friend in the insurance industry once told me that insurance companies are just more favorably regulated banks.

For example, in surfing the waves of the federal No Surprises Act, payors can restrict membership in their network and otherwise artificially reduce average reimbursement and then pay out-of-network providers based on the artificially low rate.

But just how much influence that average rate has on out-of-network providers who don't agree to accept it as payment in full is at the heart of a lawsuit in which the providers just won the first round.

The Background

In broad terms, the No Surprises Act prohibits out-of-network providers from billing patients more than the patients would have paid out of pocket if the providers had been in-network. In other words, the law prohibits balance billing.

At the same time, it requires that a health plan must pay the out-of-network providers what it, the health plan, determines it would've paid the providers had they been in-network.

If you didn't want to contract with the health plan, or if the health plan didn't want to contract with you, the health plan still gets the benefit of paying you low in-network rates.

If you thought involuntary servitude was illegal, the joke was on you. The politics of this are fairly straightforward. There are more voters with crummy health plan coverage than there are voters who are physicians. As Benjamin Franklin noticed, democracy is two wolves and a lamb voting on what to have for lunch.

But what happens, in terms of the process, if you're not happy with what the health plan decides to pay you, which will almost always be the case?

The Act includes a process, the independent dispute resolution ("IDR") process, designed to resolve the dispute. It's essentially "baseball style" arbitration, with each of the providers and the plan submitting offers, and with a supposed neutral, a "certified IDR entity", choosing one of the offers as the payment amount. But that's where things broke down.

Although the No Surprises Act contained more detail than most laws do about its implementation and was clear as to a list of factors that the certified IDR entity must take into account in choosing one of the offers, by the time the law was delegated to the U.S. Department of Health and Human Services for implementation, the regulators changed the way the factors were to be considered.

Specifically, the Act itself provides for consideration of *multiple factors* including the health plan's median contract rate for the item or service in the geographic area, called the "qualifying payment amount" or "QPA" (i.e., the rate that the health plan can influence by way of refusing to contract, threatening termination from the network, and so on), the provider's level of training, experience, quality and outcomes measurements, and the acuity of the patient or the complexity of the service provided.

On the other hand, HHS's interim final rule on the dispute resolution process, which, as you will learn, was adopted without compliance with the federal Administrative Procedures Act ("APA"), limited the authority of the certified IDR entity: Instead of weighing *all* of the factors, the regulations provided that the certified IDR entity *must* choose the offer closest to the QPA, that is, what is certainly the lowball amount offered by the payor, *unless* the certified IDR entity determines that *credible information* submitted by either party clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate, or if the offers are equally distant in opposing directions.

The Lawsuit

As a result, the Texas Medical Association and a physician brought suit claiming both that the regulation's process conflicted with the No Surprises Act's statutory requirements, and that the rule had been adopted without compliance with the APA's notice and comment requirements.

On February 23, 2022, the U.S. District Court for the Eastern District of Texas granted a motion for summary judgment in favor of the plaintiffs, striking the regulation's out-of-network payment arbitration rules.

The plaintiffs argued that the statutory text was unambiguous as to the fact that *all* of the factors were to be taken into account by the certified IDR entity and weighted depending on the particular case's facts, not presumptively weighted in favor of the QPA amount absent extraordinary circumstances. They also argued that, as discussed above, the QPA amount is subject to manipulation by the payor, giving payors control over the amount ultimately paid if it were the controlling factor.

In making his ruling striking down the IDR process, U.S. District Court Judge Jeremy D. Kernodle agreed with the plaintiffs, stating that "the Rule's presumption in favor of the offer closest to the QPA 'will systematically reduce out of network reimbursement compared to an IDR process without such a presumption.'"

He also stated that, "the Rule thus places 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", and, "if Congress had wanted to restrict arbitrators' discretion and limit how they could consider the other factors, it would have said so – especially here, when Congress described the arbitration process in meticulous detail."

Where We Are Now

At this point, it's unclear whether the government will appeal or go back to the drawing board in connection with IDR regulations.

Regardless of which route the government takes, it should be noted that numerous other provisions of the Act and of the regulations remain in effect, such as good faith estimates of prices, and patient notices.

Additional Observations

On a meta level, the Court's decision highlights the problem of an administrative state, one in which regulators, whom no one elected and whom hardly anyone can fire, make pronouncements that gain the force of law.

In the usual case, Congress does not do deep work on statutory language, leaving even more discretion to regulators as "experts", who both know more than you do as well as what's good for you. If you don't believe me, just ask them.

Perhaps one day, and I know this is just a dream, Congress will do more work on implementation in general, just as they did with the IDR process in the No Surprises Act. That will constrain regulators, at least for as long as judges are independent. And, then, we won't need as many regulators.

Don't feel sorry for those regulators who'll be laid off. I plan on opening a job training program for them. They'll get to learn a new skill and then work for an entire year without knowing their compensation, at which time I'll get to set their pay retroactively based on my *2020* average payment to a former regulator, which was zero. Hey, it *is* the market rate and it's certainly what they're worth.

How to Deploy the Secret Sauce of *Opportunistic* Strategy - Webinar On Demand

They say that COVID-19 has changed the world, creating the "new normal." Many of your colleagues and many hospital administrators are running scared.

Others, leaders like you, know that *crisis means opportunity*.

Let me provide you with the strategic tools and insights that you need in order to seize opportunities, whether they're in the context of your current business relationships, the expansion of your business activities, or the creation of new ventures.

You will learn:

• Defense as a defective default: It's necessary, but not sufficient.
• Exploiting weakness: Drop the guilt and identify opportunity.
• Flat line negotiation is fatal: Understand its myths and limitations.
• Negotiation reality: Learn to identify and deploy on multiple planes to affect the outcome.
• Maneuver: Harness the power of maneuver, both in overall strategy and in specific negotiation strategy.

Others see a crisis and freeze in fear. Learn how to see the opportunities and obtain the tools to increase your odds of obtaining them.

The price to attend is $479. The cost of not attending is astronomical.

Get Access Now!

Newsflash: Business Life In the Time of Coronavirus - The Way Out

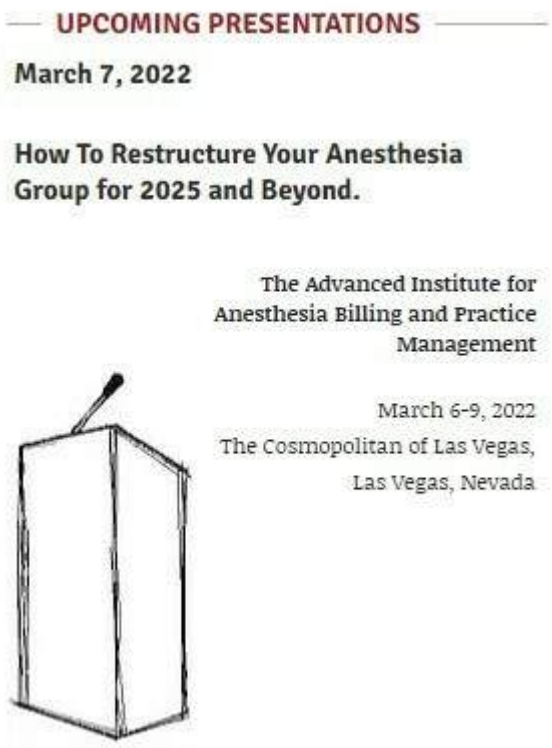
The coronavirus crisis, especially as it has become politicized, raises a number of business issues and, quite frankly, business opportunities in regard to future disruptive events.

Check out our mini-series, with actionable business lessons for medical group leaders.

Sooner or later this crisis will end. You can't allow yourself to be too busy, too occupied, too concerned with current events, to devote time and effort to strategizing for your future.

Wisdom. Applied. 159 - That Knife in Your Back Has Your Partner's Fingerprints on It

Breaches of fiduciary duty and of contractual commitment within medical groups occur every day. The question is, are those duties enforced?



All Things Personal

I received the helpful email and text reminders of my need to schedule an appointment. So far, so good.

But when I called the office, at 3:47 p.m., I got a recording saying that office hours were 9:00 to 5:00 so please call back the following business day. Hmm.

I waited a week and then called back at 9:07 a.m.. The phone was answered -- I could hear noise in the background -- and then hung up. Twice. I called in again and got a "yes, what do you want?" Hmm, must have run out of patient care early that day.

If it weren't for the fact that the physician is a friend, I'd have dumped these chumps by now. I still might.

How much time and money do you spend developing referrals, growing goodwill, and building both the top and bottom lines, only to have your efforts destroyed by poorly designed systems (maybe) or uncaring and inept staff?

Maybe it's an urban legend that only one in ten happy customers will give a positive social media review but that a single customer with a poor experience will leave a negative review. Or, maybe it's that a customer with a good experience tells, on average, nine people about the good experiences, while he or she tells nearly twice as many (16 people) about poor ones.

But it's no maybe to know that at least one customer told, as of this writing, 21,083,895 YouTube viewers of the poor customer service he received from one well known service provider.

How do you like your odds?

Help Us Help You With Helpful Content

What tailored content would you most like to see during this time? How can we focus on solutions to your most pressing strategic concerns?

Please **fill out our confidential survey** to ensure we best serve your needs!

Podcast Compilation Greatest Hits - Manage Your Practice Edition

We've curated our most popular podcasts on managing your practice into our second compilation album.

Sit back, enjoy, and think about your future.

Listen here.

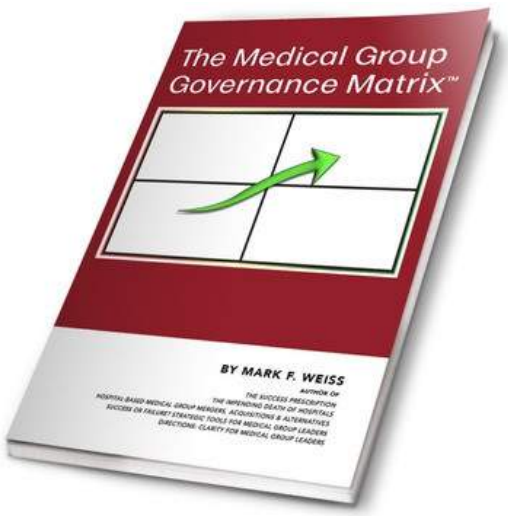
Recent Posts

- The Inflation Tax
- Time Travel
- The Devaluation of Value-Based Billing
- Trigger Warning! Mark Waxes Political on Government Shutdowns and Healthcare Industry-Killing Regulations
- Refill on Compound Drugs: Miracle Cure or Kickback Lure?

Published Articles

- Popularity Contests and Disruptive Physicians: Avoiding the Death of Your Anesthesia Group, Fall 2021 Issue of Communique.
- You Have Enough Problems. Why Buy Compliance Risk?, Summer 2020 Issue of MiraMed Focus
- Who Really Owns Your Anesthesia Group?, Summer 2020, Communique

Books and Publications



We all hear, and most of us say, that the pace of change in healthcare is quickening. That means that the pace of required decision-making is increasing, too. Unless, that is, you want to take the "default" route. That's the one is which you let someone else make the decisions that impact you; you're just along for the ride. Of course, playing a bit part in scripting your own future isn't the smart route to stardom. But despite your own best intentions, perhaps it's your medical group's governance structure that's holding you back. In fact, it's very likely that the problem is systemic. The Medical Group Governance Matrix introduces a simple four-quadrant diagnostic tool to help you find out. It then shows you how to use that tool to build your better, more profitable future. Get your free copy here.

Whenever you're ready, here are 4 ways I can help you and your business:

1. Download a copy of The Success Prescription. My book, The Success Prescription provides you with a framework for thinking about your success. Download a copy of The Success Prescription here.

2. Be a guest on "Wisdom. Applied. Podcast." Although most of my podcasts involve me addressing an important point for your success, I'm always looking for guests who'd like to be interviewed about their personal and professional achievements and the lessons learned. Email me if you're interested in participating.

3. Book me to speak to your group or organization. I've spoken at dozens of medical group, healthcare organization, university-sponsored, and private events on many topics such as The Impending Death of Hospitals, the strategic use of OIG Advisory Opinions, medical group governance, and succeeding at negotiations. For more information about a custom presentation for you, drop us a line.

4. If You're Not Yet a Client, Engage Me to Represent You. If If you're interested in increasing your profit and managing your risk of loss, email me to connect directly.