

(Surprise) Bills, Bills, Bills

Navigating Independent Dispute Resolution

by | **Jennifer Rigterink**

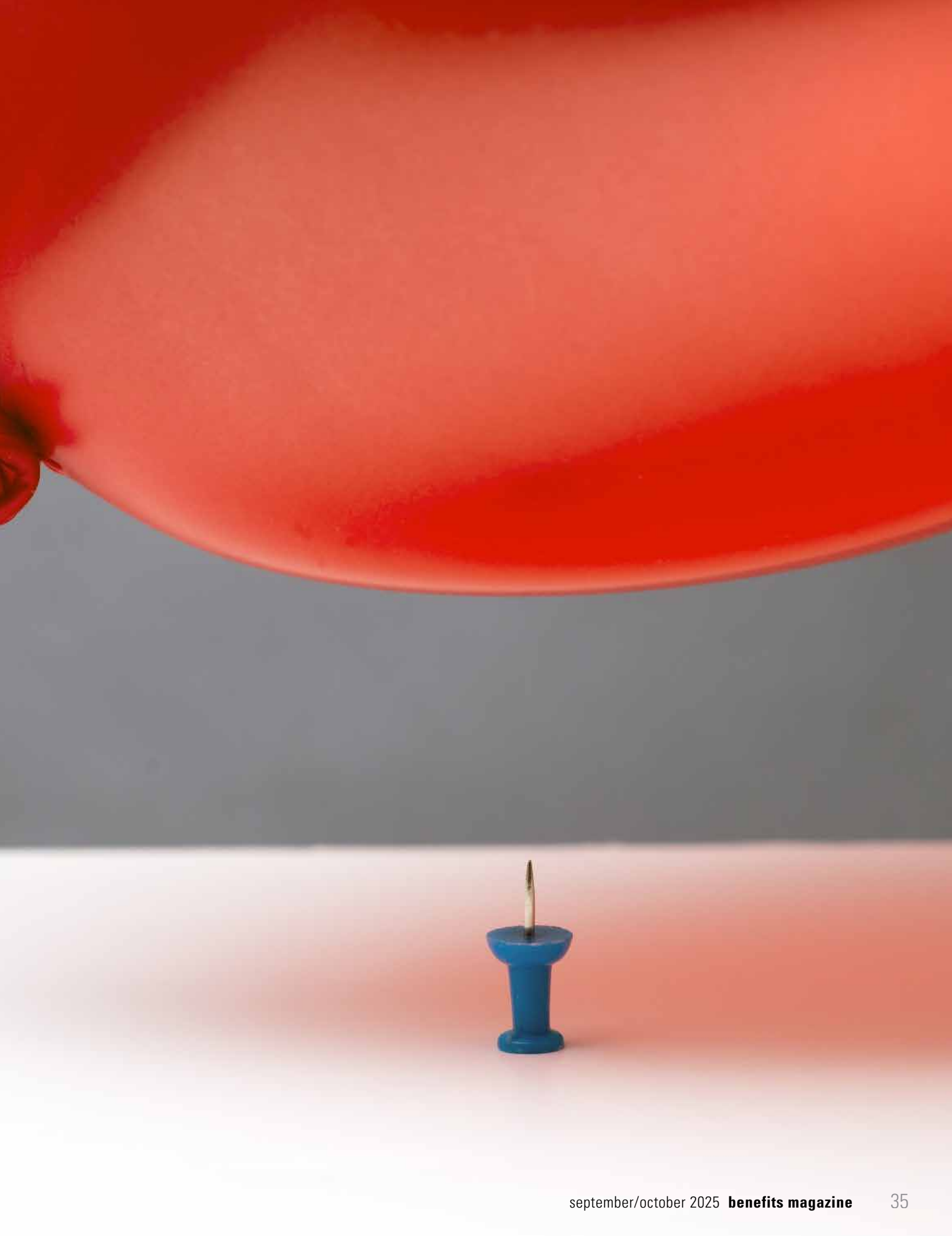
Health plans often struggle to successfully navigate the independent dispute resolution (IDR) process established by the No Surprises Act. What is the root of the issue, and how can plan sponsors and fiduciaries respond?

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Many health plan sponsors are discovering unelcome surprises from the independent dispute resolution (IDR) process put in place by the No Surprises Act (NSA) to resolve payment disputes, evidenced by the following anecdotal comments from employers and plan sponsors.

“Providers don’t want to be in our plan’s network because they can get higher reimbursement rates through the IDR process.”

“Our plan recently received notice of an IDR award requiring that the plan pay \$300,000 to an out-of-network (OON) provider for a service that costs \$3,000 when performed in network.”

“We just found out that the plan has to pay an IDR award for services that aren’t even covered by the health plan.”

How Did We Get Here?

Nearly five years ago, Congress enacted the NSA to establish various consumer protections related to *surprise billing*—a catchall term used to describe situations in which plan participants receive unexpected medical bills after being treated by OON providers. Recognizing that, in some

circumstances, participants do not have a choice of provider and may face unexpectedly high medical bills as a result, the NSA limits the amount that participants would pay for OON emergency services, OON nonemergency services provided at an in-network facility and OON air ambulance services. In addition, for these NSA-protected services, OON providers are prohibited from *balance billing* participants (i.e., billing participants for amounts in excess of the plan’s payment for the item or service).

Separate from the determination of the participant’s cost-sharing amount, the NSA created a process to determine the amount that would be paid by the health plan to the OON provider for the NSA-covered service. Under these rules, the health plan is required to pay the OON provider a reasonable amount for the service. If the OON provider disagrees with the payment amount and the parties cannot work out an amount during the good-faith negotiation period required by the NSA, either party may engage a certified third-party IDR entity to select the amount that the plan will pay for the service. (The participant’s cost-sharing amount is not impacted by the offer ultimately selected by the IDR entity.)

During the IDR process, the plan and the OON provider each submit a payment offer for the service to the IDR entity, based on a set of statutory factors.¹ Included in the statutory factors is something called the *qualifying payment amount (QPA)*, which is the plan’s median in-network rate for the service in 2019, indexed for inflation. The IDR entity is required to select one of the offers submitted by the plan or the provider; in other words, the IDR entity may not “split the difference” when making its award determination.

How Are Health Plans Faring in the IDR Process?

Health plan sponsors continue to report issues navigating the IDR process and tend to pay significantly more for OON services under the IDR process than if in-network rates applied. Based on recent government reporting on IDR results in 2023, OON providers prevail in approximately 80% of IDR determinations, and the OON amounts selected by the IDR entities are typically several times the median in-network rate for the service.² As one example, government reporting indicated that in the fourth quarter of 2023, the prevailing offer in the IDR process for 22% of surgery determinations was greater than 3,000% of the relevant QPA for the service. While the other reported variations are not as

takeaways

- The No Surprises Act (NSA) limits the amount that health plan participants pay for out-of-network (OON) medical services in specific instances when participants do not have a choice of provider and may face unexpectedly high medical bills as a result.
- The NSA established the independent dispute resolution (IDR) process to determine the amount that health plans should pay OON health care providers when there is a dispute over the amount.
- Health plan sponsors continue to report issues navigating the IDR process and tend to pay significantly more for OON services under the IDR process than if in-network rates applied. OON providers prevailed in more than 80% of payment disputes in 2023.
- Sponsors of fully insured plans are unlikely to have control over the IDR process because the insurer is responsible.
- Sponsors and fiduciaries of self-insured plans may want to request regular reporting from the plan’s third-party administrator (TPA), if applicable, about the plan payments through the IDR process to better inform management of the IDR process.
- Plan sponsors and fiduciaries may also want to educate participants and encourage them to use in-network providers for scheduled nonemergency services.

Know Your NSA Terms

Following are some of the key terms related to payment dispute resolution under the No Surprises Act (NSA).

- **Out-of-network (OON) provider:** A provider who doesn't have a contract with a health plan to provide services. Plan participants typically pay more to see an OON provider than an in-network provider who has agreed to provide services to members of the plan.
- **Independent dispute resolution (IDR) process:** If a health plan and an OON provider cannot come to an agreement on a payment amount for NSA-protected services during the open negotiation period, the parties enter the IDR process, under which the health plan and the OON provider each submit a payment offer for a health care service, and a certified IDR entity selects one of the offers.
- **Surprise billing:** Situations in which plan participants receive unexpected medical bills after being treated by OON providers. NSA-covered services are limited to OON emergency rooms, OON air ambulances and OON providers at in-network facilities.
- **Qualifying payment amount (QPA):** A health plan's median in-network rate for a health care service, indexed for inflation.

dramatic, on the whole, the prevailing offers selected by the IDR entity tend to be significantly higher than the QPA for the item or service (and are trending higher over time).

The increasing volume of disputes has also put pressure on health plan sponsors. In 2023, OON providers and facilities initiated more than 99% of disputes for the IDR process, meaning that the OON provider was unwilling to accept the health plan's payment for the NSA-covered service and chose to pursue IDR.³ The number of disputes initiated in IDR in 2023 was more than five times greater than the number of disputes initiated in IDR in 2022.

Why Is This Happening?

The demonstrated success of OON providers during the IDR process (as noted above, OON providers prevailed in more than 80% of disputes during 2023) suggests that OON providers may continue to pursue payment through the IDR process rather than accept in-network reimbursement rates.⁴ Based on government reporting, it also appears that some claims being submitted for IDR are not eligible, such as those initiated before the enactment of the NSA or for services not

covered by the plan. Ineligible claims should be dismissed by the IDR entity, but some are overlooked.⁵ Overall, this may impact the long-term viability of plan provider network participation and in-network reimbursement rates. In the short term, the pace at which OON providers are using the IDR process and the award amounts obtained through IDR may stress the ability of health plans to manage expenses.

Issues Relating to Scheduled Services at In-Network Facilities

The guiding purpose of the NSA was to prevent participants from receiving surprise bills in situations where there is no time to shop around for an in-network provider. Emergency services and air ambulances fit this mandate. The issue is more complicated when it comes to nonemergency services performed by OON providers at in-network facilities. The examples cited by the government agencies in the NSA regulations suggest that NSA protections were intended to apply when patients at in-network facilities didn't know the underlying network affiliation of the various providers with whom they might interact. For example, it is not uncommon for a patient

to encounter OON anesthesiologists, radiologists and imaging services while receiving treatment at an in-network facility.⁶ This is understandably confusing for plan participants who selected in-network facilities and for whom OON bills for those services would come as a surprise.

Health plan sponsors are reporting, however, that OON providers who perform scheduled nonemergency services at in-network facilities (e.g., a planned knee replacement) may take the position that the visit is covered by the NSA and thus eligible for IDR. The application of the NSA to scheduled nonemergency services appears to conflict with the stated purpose of the statute, since they presumably would not come as a surprise. However, the NSA does not exclude scheduled non-emergency services performed by OON providers at in-network facilities from the NSA protections if notice and consent are not obtained from the participant in advance of the service.⁷ This appears to be the case even if the participant knew or should have known the provider's OON status based on consulting and preoperative services rendered by the OON provider before the procedure.

Takeaways and Challenges Ahead for Health Plan Sponsors and Fiduciaries

The first order of business for health plan sponsors and fiduciaries is to identify the party responsible for monitoring NSA-covered claims paid by the plan. For fully insured plans, the insurer is responsible for the IDR process, and the plan sponsor is unlikely to have any control.

For self-insured plans, if the plan is administered by a third-party administrator (TPA), plan sponsors and fiduciaries should request regular reporting from the TPA about the plan payments through the IDR process. The TPA typically sets the offer during the open negotiation period and IDR process. Reporting should include the following.

- Details about the success of the plan in the IDR process relative to results achieved by other similar self-funded plans
- The median amount by which offers selected by the IDR entity exceed the in-network rate and QPA
- Confirmation that the TPA is timely submitting all required documentation during the IDR process

If the plan is self-administered, the sponsor should track this information to better inform future offers in the IDR process and to increase the chances that the plan offer is selected during IDR.

In addition to requesting and reviewing regular reporting by the plan's TPA about IDR results, plan sponsors and fiduciaries may want to consider educating participants about the impact that increased costs associated with the IDR process may have on the plan as a whole and encourage them to use in-network providers for scheduled nonemergency services when possible. Although participants remain protected from balance billing by OON providers for NSA-covered services, to the extent that current IDR payment and volume trends continue, it may result in plans having to increase participant cost sharing to cover costs associated with increased use of the IDR process by OON providers.⁸ Participant utilization of in-network providers when possible remains the best

strategy to mitigate the potential risk of excess IDR awards and administrative costs associated with the IDR process.

Health plan sponsors and fiduciaries should also monitor recent litigation developments. One NSA quirk is that while the statute confirms that awards entered by an IDR entity are binding and not subject to judicial review (except in certain narrow situations under Section 10 of the Federal Arbitration Act), there is no clear private right of action under the NSA for OON providers to bring a lawsuit in federal court to confirm IDR awards. That said, many OON providers have filed suit in federal court to enforce IDR awards that remain unpaid, attempting to confirm the awards on the basis that there is an implied right of action to do so under the NSA. To date, courts have reached conflicting decisions on this issue.⁹ If judicial consensus is reached that the NSA should be interpreted to permit confirmation of IDR awards in federal court, this development could further increase the number of disputes pushed into the IDR process.

What's Next?

Case law and regulatory changes with respect to surprise billing continue to develop rapidly. Plan sponsors and fiduciaries should request regular reporting from plan service providers to confirm understanding of plan performance in the IDR process. If necessary, sponsors and fiduciaries should ask detailed follow-up questions to avoid future (unwelcome) surprises. 🗣️

Endnotes

1. The statutory factors include (1) the item's or service's *qualifying payment amount (QPA)*, defined as the plan's median in-network rate in 2019 for the particular item or service provided by a provider in the same or similar specialty, indexed for inflation, and (2) information related to the provider's level of training, experience, and quality and outcome measurements. 42 USC §300gg-11(c)(5)(C).

2. Congressional Research Service, "No Surprises Act (NSA) Independent Dispute Resolution (IDR) Process Data Analysis for 2023" (January 17, 2025).

3. Congressional Research Service, "No Surprises Act (NSA) Independent Dispute Resolution (IDR) Process Data Analysis for 2023" (January 17, 2025), Figure 1.

4. By way of additional background, the regulations issued by the Treasury Department, Department of Labor (DOL) and the Department of Health and Human Services (HHS) in 2021 required that certified IDR entities apply a rebuttable presumption that the plan's QPA for the item or service should be selected by the IDR entity as the prevailing offer. Requirements Related to Surprise Billing: Part II, 86 Fed. Reg. 55,890 (Oct. 7, 2021). However, a federal court concluded in February 2022 that this rulemaking exceeded the statutory authority and vacated the portion of the rule requiring that the IDR entity apply the QPA as a rebuttable presumption. *Texas*

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Medical Association v. United States Department of Health and Human Services, 587 F. Supp. 3d 528 (E.D.Tex. 2022).

5. Based on government reporting analyzed by KFF, during the first quarter of 2023 through the second quarter of 2024, approximately 41% of disputes submitted for IDR were challenged by noninitiating parties for eligibility, and 12% of disputes were closed by the IDR entity for ineligibility or other reasons. “The performance of the federal independent dispute resolution process through mid-2024,” Peterson-KFF Health System Tracker (May 29, 2025). Two recent lawsuits allege that a number of out-of-network (OON) providers knowingly submitted ineligible claims to the IDR process. See *Blue Cross Blue Shield Healthcare Plan of Georgia, Inc. v. HaloMD, Inc.*, Case No. 1:25-cv-02919-TWT (N.D.Ga. May 27, 2025); *Community Insurance Company D/B/A Anthem Blue Cross and Blue Shield v. HaloMD, Inc.*, Case No. 1:25-cv-00388-MWM (S.D. Ohio June 10, 2025). In June 2025, the Departments of Treasury, HHS and DOL issued joint technical assistance intended to assist parties when reopening IDR disputes to correct certain administrative and jurisdictional errors, including IDR determinations on ineligible claims. See Federal Independent Dispute Resolution (IDR) Technical Assistance for Certified IDR Entities and Disputing Parties (June 2025).

6. Requirements Related to Surprise Billing, Part I, 86 Fed. Reg. 36872, 36874 (July 13, 2021) (“For non-emergency care, a person may choose a participating facility (and possibly even a participating provider) but not know that at least one provider involved in their care (for example, an anesthesiologist or radiologist) is a nonparticipating provider.”).

7. 42 USC §300gg-11(b)(1).

8. Congressional Research Service, “No Surprises Act (NSA) Independent Dispute Resolution (IDR) Process Data Analysis for 2023” (January 17, 2025) (“How these aspects of the IDR process evolve could have broader implications over time in provider network participation, in-network reimbursement rates for these types of services, and health insurance premiums over time.”).

bio



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9. *Guardian Flight, LLC v. Aetna Life Insurance Company*, No. 3:24-cv-00680-MPS, 2025 WL 1399145 (D.Conn. May 14, 2025) (The NSA provides private cause of action to enforce IDR awards); *Guardian Flight LLC v. Health Care Service Corporation*, 735 F. Supp. 3d 742, 750 (N.D.Tex. 2024) (The NSA does not create private cause of action to enforce IDR awards), aff’d 140 F.4th 271 (5th Cir. June 12, 2025); *Worldwide Aircraft Services, Inc. v. Worldwide Insurance Services, LLC*, 2024 BL 327726 (M.D.Fla. Sept. 18, 2024) (confirming OON provider IDR award); *GPS of New Jersey M.D., P.C. v. Horizon Blue Cross & Blue Shield*, No. CV-22-6614 (KM) (JBC), 2023 WL 5815821 (D.N.J. Sept. 8, 2023) (confirming OON provider IDR award).

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