BROOKINGS

USC-Brookings Schaeffer on Health Policy

"Equal weighting" is a poor framework for arbitration decisions under the No Surprises Act

Matthew Fiedler, Benedic Ippolito, and Loren Adler Thursday, June 24, 2021

Editor's Note:

This analysis is part of the USC-Brookings Schaeffer Initiative for Health Policy, which is a partnership between Economic Studies at Brookings and the University of Southern California Schaeffer Center for Health Policy & Economics. The Initiative aims to inform the national health care debate with rigorous, evidence-based analysis leading to practical recommendations using the collaborative strengths of USC and Brookings. USC-Brookings Schaeffer Initiative research on surprise medical billing was supported by Arnold Ventures.

In December 2020, Congress enacted the No Surprises Act, which will eliminate most surprise out-of-network bills effective January 1, 2022. The law bars health care providers from billing patients for more than their usual in-network cost-sharing in the most common surprise out-of-network billing situations, and it creates a final offer arbitration system to resolve payment disputes between health insurers and health care providers related to care provided in these situations.[1]

In any arbitration system, the most important determinant of arbitration outcomes is the criteria that arbitrators use to reach decisions. The No Surprises Act instructs arbitrators to "consider" a range of factors, including the "qualifying payment amount" (generally the insurer's median in-network rate for the relevant service as of 2019, inflated forward) and a range of characteristics of the insurer, the provider, and the patient involved in any particular encounter. But this naturally raises the question of how arbitrators should integrate those disparate factors to reach decisions.

Groups representing health care providers have argued that the No Surprises Act requires arbitrators to consider or weigh the various factors "equally" and that the agencies responsible for implementing the law (the Departments of Health and Human Services, Labor, and the Treasury, henceforth just "the agencies") should enshrine equal weighting in their guidance to arbitrators. Similarly, a pair of senators recently sent a letter to the

relevant cabinet secretaries arguing that the intent of the No Surprises Act was for arbitrators to "give each arbitration factor equal weight and consideration," and two members of the House of Representatives sent a similar letter saying each factor should be "equally weighed."

This piece considers these arguments and makes three main points. First, the No Surprises Act does not compel any specific approach to integrating the various factors, "equal" or otherwise. Second, unless implemented in tandem with other more substantive guidance, an equal weighting requirement would be close to meaningless and leave arbitrators without an actionable framework for making decisions. A lack of clear guidance would be costly—resulting in excessive use of arbitration, excessive payments to providers, and, in turn, excessive premiums. Third, appropriate guidance to arbitrators—along the lines of what we have suggested in prior work—could avoid these problems while remaining fully consistent with the No Surprises Act. Importantly, for guidance to succeed in averting these problems, it would need to embody substantive judgements about how each of the various factors should affect prices.

The No Surprises Act Does Not Require Equal Weighting

We begin by examining what the No Surprises Act says about how arbitrators should make decisions. In detail, the No Surprises Act instructs arbitrators to "consider" several specific factors:

1. the qualifying payment amount;
2. the level of training, experience, and quality of the clinician, or the teaching status, case mix, and scope of services offered by the facility;
3. the market shares of both parties;
4. patient acuity; and
5. demonstrations of good faith efforts (or lack thereof) to reach a network agreement and any contracted rates between the two parties during the previous four years.

Arbitrators are also instructed to consider any additional information submitted by the parties as well as any additional information they request from the parties, with the exception that they may not consider either a provider's charges or payment rates under

public coverage programs (e.g., Medicare).[2]

Importantly, however, the law provides no substantive guidance on *how* the arbitrators should consider these factors. Particularly relevant for the present purposes, the law does not say that the factors should be considered "equally" nor does the law use any similar word in describing arbitrators' role.[3]

If anything, the text of the law offers clues that lawmakers assumed that the qualifying payment amount would play a central role in shaping arbitration outcomes. Notably, the law devotes hundreds of words to specifying precisely how to calculate the qualifying payment amount but says nothing about how to measure the other factors that must be considered in arbitration. The portion of the law that enumerates the factors that must be considered in arbitration also lists the qualifying payment amount first and in its own subclause, while listing all of the other factors together in a single subsequent subclause. To be clear, these features of the law do not mean that the law *compels* arbitrators to prioritize the qualifying payment amount. But they do make it hard to argue that the law compels any notion of equal weighting.

It may be no accident that the text of law was ambiguous about how arbitrators should integrate the various factors to make decisions. The process that led to the No Surprises Act featured vigorous disagreement among members of Congress about whether arbitration should be used at all and, if so, what factors should be included in that process. Reaching agreement on precisely how arbitrators should integrate the various factors may well have been impossible, leaving little choice but to "punt" many of these questions to the executive branch. Similarly, this history offers substantial reason to be skeptical that lawmakers had any broadly shared understanding of the law's intent.

Emphasizing Equal Weighting Would Likely Leave Arbitrators Without Meaningful Guidance

We now consider the effects of making equal weighting the cornerstone of the agencies' guidance to arbitrators. A challenge in doing so is that advocates of an equal weighting approach have offered scant detail about what guidance the agencies would actually give arbitrators under this approach.

One possibility is that arbitrators would be told to equally weight the factors and little else. Under this approach, an equal weighting requirement would raise more questions than it answers. If the term "weight" is supposed to be interpreted in a mathematical sense, then that raises the question of exactly what calculations arbitrators are supposed to be doing, as well as how the various factors and their "equal weights" are supposed to enter those calculations. Alternatively, if equal weighting is supposed to be interpreted more colloquially to just mean that the factors should be "considered" equally, that raises the question of what equal consideration entails; does it pertain to the time an arbitrator devotes to considering each factor, an arbitrator's mindset in considering the factors, or something else entirely? Faced with these ambiguities, we expect that arbitrators would interpret the requirement as merely requiring them to give some meaningful consideration to each factor. Correspondingly, we expect that this approach would be tantamount to giving arbitrators no guidance whatsoever.

The agencies could, in principle, promulgate guidance that sought to give equal weighting an unambiguous and concrete meaning. For example, the agencies could direct arbitrators to derive an "appropriate" price from an examination of each individual factor in isolation and then take an equally weighted average of those factor-specific prices. To our knowledge, however, none of the advocates for equal weighting have put forward this type of approach or anything similar.

Moreover, even this approach would leave arbitrators without an actionable framework for making decisions since it would remain unclear how to translate each factor into an appropriate price. That ambiguity could, of course, be cleared up through additional guidance. But we are dubious that advocates of equal weighting would actually support this approach since it would require the agencies to make substantive judgements about both the appropriate overall level of prices and how the appropriate price varies based on each factor. Advocates of equal weighting have already explicitly objected to agency guidance that would emphasize the qualifying payment amount, and we suspect that hostility would extend to most approaches with a large agency role in determining what prices are appropriate (unless those approaches were clearly designed to encourage arbitrators to be very generous to providers).

Failing to give arbitrators concrete guidance about how to integrate the various factors would require arbitrators to "fill in the gaps" when making arbitration decisions. This would have two types of negative consequences. First, it would make arbitration decisions less predictable since different arbitrators would undoubtedly integrate the factors in different ways and thus reach different decisions even if presented with identical facts. As we have argued in prior work, that unpredictability would increase the likelihood that providers and insurers would have divergent beliefs about what would happen if any particular case went to arbitration, which would make it harder for them to reach negotiated agreements to avoid arbitration. That, in turn, would increase the use of arbitration and its concomitant administrative costs, at least a portion of which would ultimately be borne by consumers as higher premiums.

Second, a lack of clear guidance would also create a greater risk that arbitration awards would end up being too high or too low on average. We see a particular risk that many arbitrators would treat the qualifying payment amount as a floor on the appropriate price and deviate upward (but rarely downward) from that price based on their consideration of the other factors, particularly provider quality, a sort of Lake Wobegon effect. In our view, if many arbitrators behaved in this way, then it would tend to lead to excessive average arbitration awards. This is because the qualifying payment amount (which is based on historical negotiated rates) is already likely higher than the price that would prevail in a well-functioning market because of the leverage providers have historically derived from the ability to surprise bill patients. As we have discussed in our prior work, high arbitration awards would tend to increase payments to providers, both directly and by increasing providers' leverage in contract negotiations, which would ultimately translate into higher premiums for consumers.

A Better Approach

Giving arbitrators concrete guidance about how to interpret and integrate the various factors could avoid the problems described above while still allowing prices to vary based on the features of specific cases, as Congress seemingly desired. Consistent with the preceding discussion, this would inevitably involve the agencies making substantive judgements about how the appropriate price depends on the various factors. Advocates of

equal weighting might well dislike the judgements the agencies reached; indeed, as noted above, some advocates of equal weighting appear to be particularly concerned that the agencies will promulgate guidance that assigns a major role to the qualifying payment amount. But we see no reason—statutory or otherwise—for the agencies to shy away from making such judgements. Indeed, doing so is the only way to avoid the bad outcomes that would occur in the absence of clear guidance.

In prior work, we have made specific recommendations about what guidance the agencies should offer. In brief, under our proposed approach, arbitrators would be instructed to begin with the presumption that the qualifying payment amount was neither too high nor too low. Arbitrators would then use each of the other factors to assess whether the circumstances of a particular case materially differed from those in the historical data used to calculate the qualifying payment amount. In cases where there was clear evidence of such differences, arbitrators would be instructed to favor offers that are higher or lower than the qualifying payment amount, but only to the extent that the observed differences would lead to higher or lower prices in a hypothetical well-functioning market for the relevant services.

Our proposed approach would ground arbitrators' deliberations in the factors enumerated in the No Surprises Act and, as such, is clearly consistent with the law. As a substantive matter, we expect that guidance like what we propose would result in out-of-network prices that were similar to the qualifying payment amount, both on average and in most (but not all) individual cases. That would make arbitration outcomes relatively predictable, avoiding some of the problems described above. However, average prices under our approach would likely be higher than the prices that would emerge from a well-functioning market for the relevant services since, as noted above, the qualifying payment amount is likely somewhat inflated by the legacy of surprise billing; in light of the emphasis that the No Surprises Act places on the qualifying payment amount, this problem may be hard to avoid. Regardless, our approach would be far better than offering no (meaningful) guidance at all.

Footnotes:

[1] The law uses the term Independent Dispute Resolution instead of arbitration and the term Independent Dispute Resolution Entity instead of arbitrator. Throughout, we use arbitration and arbitrator to be concise.

[2] For air ambulance services, arbitrators also must consider the vehicle type and the population density at the pickup location.

[3] One advocate for the equal weighting approach has pointed to a fact sheet jointly issued by the Republican minorities of the three relevant House committees, which states that the No Surprises Act requires arbitrators to "equally consider" the various factors. But, as discussed above, the text of the No Surprises Act does not, in fact, say this. Moreover, while it is unclear that any fact sheet or similar document should affect how the agencies interpret and implement the No Surprises Act, it is notable that the press release in which the bipartisan, bicameral leadership of the relevant committees announced the agreement that became the No Surprises Act does not include the "equally consider" language. Rather, the press release mirrors the legislative text by listing the factors arbitrators are required to consider and remaining silent on *how* they should be considered.

Disclosures: The authors did not receive financial support from any firm or person for this article or from any firm or person with a financial or political interest in this article. They are currently not an officer, director, or board member of any organization with an interest in this article.