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No Surprises Act: A State Perspective

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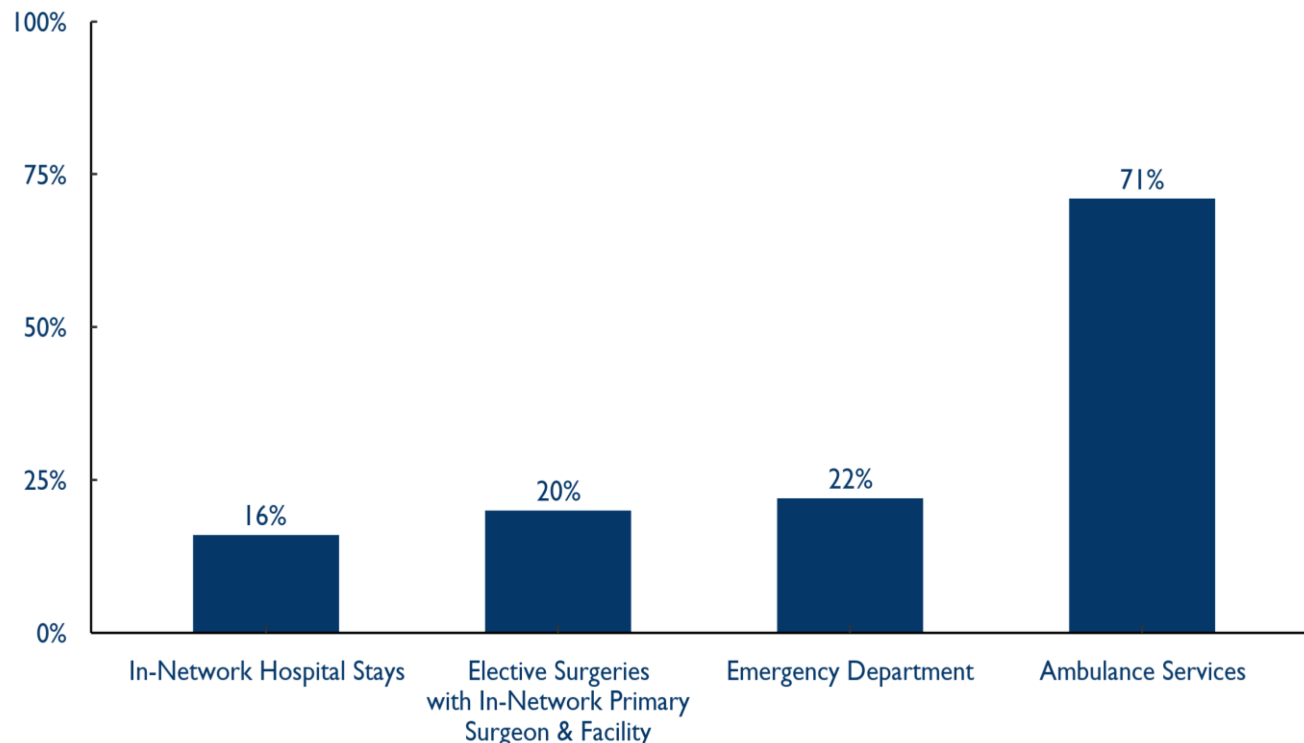
Surprise Bills Were Common – But Not Everywhere



Sources: Pollitz et al. 2020, Chhabra et al. 2020, Cooper and Scott Morton 2016, Chhabra et al. 2020

<2%

The average rate of surprise bills for most emergency depts

At 15% of hospitals, *at least 80%* can be balanced billed

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This reflects strategic behavior by *some* providers

"Balance Billing for TeamHealth is a Contract Leveraging Tool"

- Leif Murphy, President & CEO of TeamHealth

Source: New York Times, Cooper et al. (2020)

Case Study:

When one ER staffing company—EmCare—contracts with a hospital → Out of network bills jump 80%

This is not an accident. This is a business model.

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Market Failure → Higher Premiums

Separate contracting for hospitals & certain hospital-based clinicians that patients don't choose causes market failure

- **Result: Premiums 1-5% higher than if surprise billing were illegal**

(Duffy et al. 2020, Cooper et al. 2020, CBO 2019; CBO 2021)

Legislative Solution: No Surprises Act

Applies to most surprise bills

- All out-of-network emergency facility and professional services
- Post-stabilization care at out-of-network facilities until transfer possible
- Air ambulance transports
- Out-of-network services delivered at or ordered from an in-network facility (in some cases, exception allowed if patient is notified and consents).

Legislative Solution: No Surprises Act

Consumer protections

- Patients cannot be balanced billed
- Care must be treated as in network for cost sharing

Resolving disputes between providers and insurers

- If negotiations fail, either party can trigger an Independent Dispute Resolution process
- Each party submits price offer, arbitrator chooses one
- Arbitrators must consider historical median in-network payment for similar services and "additional circumstances" of the case

Ongoing Legal Challenges

Dispute over how arbitrator should rule

- Congress enumerated factors to consider
- Administration: Select offer closest to median in-network price unless specifics of case warrant deviation
  - Ensures law reduces premiums as intended & minimizes over-reliance on arbitration
- Providers: Argue that any guidance violates congressional intent

Texas plaintiffs did not challenge the law more broadly—only arbitration guidance.

What's Next After Texas?

- Arbitration guidance temporarily set aside until circuit court ruling (on appeal) or final rule issued
- Similar cases in DC set for 3/17, others later
- Will arbitration decisions closely follow median in-network prices anyway?
- Pending case in NY challenges entire law

Interaction with State Laws

Context

- Many states have existing laws that regulate some sources of surprise bills in the fully-insured market

New federal law will often supersede state laws

- Applies to all self-insured plans (not affected by state laws due to ERISA)
- Applies to fully-insured plans in settings not covered by state law (e.g., many states do not include OON emergency services)

Interaction with State Laws

When state laws will matter

- Cases where protections under state law exceed federal law (e.g., not allowing for notice & consent exceptions to OON care at INN facilities).
- Payments between fully-insured plans and OON providers still governed by state law, not federal law.

Presents a question for states

- Administrative simplicity and reduced complexity from aligning state law with federal.

Interaction with State Laws

Role for states

- **Primary enforcement authority over providers (including air ambulances) and fully-insured health plans**
- **Option for collaborative enforcement agreement**

Role for federal government

- **Enforcement over self-insured and FEHB plans**
- **Fallback enforcement over other entities if states do not substantively enforce the law**