

2021

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Melissa Ballengee Alexander
University of Wyoming College of Law

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Recommended Citation

Alexander, Melissa Ballengee (2021) "The No Surprises Act Does Not Solve Air Ambulance Cost, Cost-Shifting, and Supply Problems: A Coda," *Wyoming Law Review*. Vol. 21: No. 1, Article 3.
Available at: <https://scholarship.law.uwyo.edu/wlr/vol21/iss1/3>

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WYOMING LAW REVIEW

VOLUME 21

2021

NUMBER 1

THE NO SURPRISES ACT DOES NOT SOLVE AIR AMBULANCE COST, COST-SHIFTING, AND SUPPLY PROBLEMS: A CODA

*Melissa Ballengee Alexander**

After *Rural Health Inequity and the Air Ambulance Abyss* had been sent to the formatter, Congress passed the No Surprises Act (the “Act”), legislation that seeks to protect consumers from balance billing stemming from surprise medical bills, including air ambulances.¹ The Act requires health insurance to cover out-of-network emergency services such as air ambulance as if they were in network, limiting patient liability to in-network cost-sharing amounts and prohibiting balance billing.² It also establishes an independent dispute resolution process for determining the out-of-network reimbursement rate if an insurer and provider cannot agree, and it imposes new reporting and disclosure requirements.³ Once effective, this new law should help resolve the balance billing and narrow network problems identified in *Rural Health Inequity*.⁴

The No Surprises Act is a compromise solution, however, that leaves significant underlying structural problems in the air ambulance market. The Act does not address the cost, cost-shifting, and supply challenges plaguing air ambulances. Section VI of *Rural Health Inequity* discusses why laws that prohibit balance billing, require disclosures, and establish a procedural mechanism for independent dispute resolution fail to remedy these issues. This coda does not

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¹ Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, §§ 101–118, 134 Stat. 1182 (2020) [hereinafter No Surprises Act].

² *Id.* at § 105.

³ *Id.* at § 103 (determination of out-of-network rates; independent dispute resolution process); *Id.* at § 106 (air ambulance reporting requirements); *Id.* at § 109 (Health and Human Services and Government Accountability Office reports on the effects of the Act).

⁴ The No Surprises Act takes effect for insurance policy year or plan beginning January 1, 2022 or later. *Id.*

repeat those arguments but instead provides three reasons the No Surprises Act specifically does not address several pressing air ambulance problems.

First, the No Surprises Act does not establish a benchmark payment standard for out-of-network rates or otherwise provide a mechanism to correct current market price distortion.⁵ Worse, it actually prohibits arbitrators from considering a prominent benchmark payment standard, the Medicare reimbursement rate, making it virtually certain that excess cost and cost-shifting will continue.⁶ The Act instructs arbitrators to consider enumerated factors like median in-network rate, quality of provider, patient acuity, and population density of the location pick-up.⁷ These factors would be appropriate in a well-functioning market, but they ignore existing market failure. Reliance on median in-network rates will only calcify current excess rates.⁸ The Act does at least bar arbitrators from considering provider's billed charges, which tend to inflate costs further.⁹ Nonetheless, the new federal law leaves artificially high air ambulance rates largely unchecked. Without federal action reigning in excess rates or exempting states from Airline Deregulation Act preemption, consumers will continue to bear the burden of an inefficient market, with rural Americans suffering disproportionately.¹⁰

Second, the No Surprises Act neither regulates supply nor frees states to do so. Given how excess supply dramatically increases air ambulance cost, ensuring access while containing cost likely requires government coordination.¹¹ Yet, the Act neither coordinates supply nor allows states to do so. This also virtually ensures inflated air ambulance cost will continue.

⁵ See Erin Fuse Brown et al., *Out-of-Network Air Ambulance Bills: Prevalence, Magnitude, and Policy Solutions*, 98 MILBANK Q. 747, 769 (2020) (arguing government must benchmark out-of-network reimbursement rates to Medicare rates or rely on competitive bidding to reach an efficient market rate for air ambulance).

⁶ No Surprises Act § 103 (factors arbiters may consider).

⁷ *Id.* However, to the extent state law sets a benchmark payment standard for out-of-network rates for fully insured plans, the state benchmark is not preempted and will govern. *Id.*

⁸ Fuse Brown, *supra* note 5, at 768–69 (using median in-network rates “risks ossifying the current above-market rates resulting from a distorted market”).

⁹ No Surprises Act § 103; Benjamin Chartock et al., *Arbitration Over Out-of-Network Medical Bills: Evidence from New Jersey Payment Disputes*, 40 HEALTH AFFS. 130 (2021) (finding surprise bill arbitration decisions were 5.7 times the median in-network rate when providers were able to present evidence of billed charges, increasing cost, and incentivizing inflated charges). Given these results, the Act's refusal to allow arbiters to consider the provider's billed charges is a significant victory. *CONTRAST AIR AMBULANCE AND PATIENT BILLING ADVISORY COMM.'S SUBCOMM. ON PREVENTION OF BALANCE BILLING, REPORT ON PREVENTION OF BALANCE 16* (2021) (recommending arbiters consider provider's billed charges).

¹⁰ No Surprises Act § 103.

¹¹ Henry H. Perritt, Jr., *Medics, Markets, and Medicare*, 43 RUTGERS COMPUT. AND TECH. L.J. 37, 44–45 (2017).

Third, the No Surprises Act does not respond to cost-shifting concerns. Air ambulance providers charge privately insured and uninsured patients up to nine and one-half times the reimbursement rate paid by Medicare and Medicaid patients, significantly more price discrimination than in other areas of healthcare.¹² Providers claim this differential is necessary to offset losses because government-insured reimbursement rates are too low. The large differential may actually reflect a total lack of price control. Either way, since privately insured patients make up only 32% of air ambulance transports, and government-insured patients make up the majority, the inequitable cost or cost-shifting problem must be addressed to avoid unfairly burdening privately insured individuals.

The No Surprises Act also creates a new potential problem. It requires insurers to assume additional liability for out-of-network transports, and therefore, it is likely to increase health insurance premiums.¹³ A small premium increase may be a necessary evil to avoid unfair surprise and illusory insurance. Yet, the Act's failure to insist on efficient air ambulance rate and supply and to end cost-shifting could result in a larger premium increase that actually prices individuals out of the insurance market altogether.¹⁴ Individuals living in rural areas are already uninsured at higher than average rates, largely due to higher premiums and lower income. An increase in premiums could unintentionally exacerbate existing inequities in access to all health care.¹⁵

In conclusion, while the No Surprises Act offers immediate balance billing relief and encourages in-network participation, it leaves significantly more to be done to address the underlying air ambulance problems that disproportionately disadvantage rural Americans. A more comprehensive solution that regulates cost and supply and addresses cost-shifting, or ends Airline Deregulation Act preemption enabling states to do so, as proposed in *Rural Health Inequity and the Air Ambulance Abyss*, remains needed.

¹² Ge Bai et al., *Air Ambulances with Sky-High Charges*, 38 HEALTH AFFS. 1195 (2019).

¹³ No Surprises Act § 102.

¹⁴ See Sarah Kliff, *In Biden's Stimulus Plan, a Provision to Help Millions Get Health Insurance*, N.Y. TIMES 15 (Jan. 17, 2021) (uninsured Americans report unaffordable health insurance premiums as the top reason they are uninsured).

¹⁵ Cognizant of this potential harm, the No Surprises Act does require HHS and GAO reports on the impact of the new law on cost and access in rural areas. No Surprises Act § 109.