UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUARDIAN FLIGHT, LLC, Plaintiff, v. AETNA HEALTH, INC., and MEDICAL EVALUATORS OF TEXAS ASO, LLC, Defendants.	§	CIVIL ACTION NO. 4:22-cv-03805 Hon. Alfred H. Bennett

CONSOLIDATED WITH

REACH AIR MEDICAL SERVICES LLC, CALSTAR AIR MEDICAL SERVICES, LLC and GUARDIAN FLIGHT, LLC, Plaintiffs, v. KAISER FOUNDATION HEALTH PLAN INC., and MEDICAL EVALUATORS OF TEXAS ASO, LLC, Defendants.	§	CIVIL ACTION NO. 4:22-cv-03979

PLAINTIFFS' SUPPLEMENTAL BRIEF ON DEFENDANTS' MOTIONS TO DISMISS IN RESPONSE TO THE MIDDLE DISTRICT OF FLORIDA'S DECISION

Plaintiffs Guardian Flight LLC ("Guardian Flight"), REACH Air Medical Services LLC ("REACH"), and CALSTAR Air Medical Services LLC ("CALSTAR") (collectively "Texas Plaintiffs") file this Supplemental Brief on Defendants' Motions to Dismiss in Response to the Middle District of Florida's Decision on similar motions and would respectfully show the Court as follows:

INTRODUCTION

This Court held a status conference on June 30, 2023 at which it stayed discovery until the Middle District of Florida ("Florida Court") in *Med-Trans Corporation v. Capital Health Plan, Inc et al.*, 3:22-cv-1077-TJC-JBT (M.D. Fla. 2022) and *REACH Air Med. Servs., LLC v. Kaiser Foundation Health Plan Inc. et al.*, 3:22-cv-1153-TJC-JBT (M.D. Fla. 2022) issued a decision on pending motions to dismiss lawsuits challenging Independent Dispute Resolution ("IDR") awards under the No Surprises Act ("NSA") that raised similar legal issues to those in this proceeding. Dkt. 65.[1] This Court allowed supplemental briefing on the pending motions to dismiss within 14 days of the Florida Court's decision. Dkt. 69 at 13:7-13.

On November 2, 2023, the Florida Court issued its decision in two similar cases filed against insurers Kaiser Health Plan and Capital Health Plan.[2] It held that: (1) challenges to IDR awards are not subject to the FAA's procedures and are properly brought by complaint; (2) review of IDR awards under the FAA standards is "extremely narrow" and misrepresentations of fact to IDR entities are insufficient to state a claim to vacate an award; (3) Plaintiffs' allegations failed to state a claim under this standard; and 4) IDR entities are not proper parties to IDR challenges. Dkt. 65 at 10, 12-14, 17, 20. Accordingly, the Court dismissed the complaint. Dkt. 65 (3:22-cv-1077, M.D. Fla.).[3] Plaintiffs respond below to each holding and note any factual distinctions in the matters pending before this Court.

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[1] For ease of reference, all citations to the Florida Court's decision are the docket in *Med-Trans Corporation v. Capital Health Plan, Inc et al.*, 3:22-cv-1077-TJC-JBT (M.D. Fla. 2022).

[2] REACH Air Medical Services, LLC is both a plaintiff in the Florida case and this case.

[3] While the Court provided the Florida Plaintiffs an opportunity to amend, they filed a notice declining to do so as there are no additional factual allegations to make. Dkt. 66 (3:22-cv-1077).

ARGUMENT AND AUTHORITIES

I. The Florida Court correctly decided that IDR challenges can be brought by complaint.

The Florida Court properly concluded that IDR challenges under the NSA are properly brought by complaint, rejecting arguments that challenges to IDR proceedings must be brought by motion with supporting evidence attached. It noted that the NSA does not incorporate the FAA's procedural requirements and "does not discuss ***how*** to raise [IDR award challenges]." Dkt. 65 at 11. The Florida Court likewise rejected the argument that the FAA's procedural requirements apply by default. It reasoned that [i]nterpretation of statutes is guided by text…" and without express incorporation of the FAA's procedural requirements, the Florida Court would not assume their applicability for a statutorily compelled process.[4] *Id.* at 14.

II. The Florida Court incorrectly concluded that material misrepresentations of fact to an IDR entity are not enough to vacate an IDR award .

The NSA states that IDR awards are not subject to judicial review except on the four grounds stated in the FAA. As the Court noted, one of those grounds is "where the award was procured by corruption, fraud, or undue means." Dkt. 65 at 15. Similarly, the NSA states:

> A determination of a certified IDR entity under subparagraph (A)-
>
> (I) ***shall be binding*** upon the parties involved, ***in the absence of*** a fraudulent claim or ***evidence of misrepresentation of facts presented to the IDR entity*** involved regarding such claim; and

42 U.S.C. § 300gg-111(c)(5)(E)(i)(I)–(II) (emphasis added). The Court concluded that misrepresentations of fact to an IDR entity "***might*** support judicial review in a given case" but that the claims "must be asserted within the confines of § 10(a) of the FAA." Dkt. 65 at 18 (emphasis added). It explained that review under the FAA is "extremely narrow" and that courts have

[4] The Florida Court also drew the distinction that the FAA applies to arbitrations by agreement between parties, and here the IDR process is compelled by statute.

construed "undue means" to require "measures equal in gravity to bribery, corruption, or physical threat to an arbitrator." *Id.* at 15 (citing *Floridians for Solar Choice, Inc. v. PCI Consultants, Inc.*, 314 F. Supp. 3d 1346, 1355 (S.D. Fla. 2018)). Accordingly, the Court concluded that Plaintiff's allegations of fraud and misrepresentations of fact failed to state a claim to vacate the IDR awards at issue. *Id.* at 18.

Plaintiffs believe that the Florida Court erred in failing to harmonize the text of the NSA with that of the FAA and instead applying FAA case law in a vacuum as if the NSA text did not exist. In particular, the NSA itself creates a category of cases that always qualifies as an award that was procured by fraud or undue means under the FAA. In particular, where a party secures an award through misrepresentations of fact to an IDR entity, it is subject to judicial review and may be vacated under the FAA. Indeed, there is symmetry in the language of when an award may be vacated under the FAA and when it is unenforceable under the NSA:

FAA:	NSA:
[A court] may make an order vacating the [arbitration] award upon the application of any party to the arbitration ***where the award was procured by corruption, fraud, or undue means . . .***	A determination of a certified IDR entity . . . ***shall be binding*** upon the parties involved, ***in the absence of a fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity involved*** regarding such claim;

The Florida Court's opinion violates that rule that courts "must construe statutes so as to ***give meaning to all terms***, and simultaneously to ***avoid interpretations that create internal inconsistencies or contradictions.***" *In re McBryde*, 120 F.3d 519, 525 (5th Cir. 1997) (emphasis added). Under the Court's reasoning, Congress defined when an award was unenforceable but at the same time concluded this standard was insufficient to vacate the same award. Such a conclusion makes no sense. As the Fifth Circuit notes, "[s]tatutes generally should be construed to avoid an absurd result," meaning ones that "no reasonable person could intend." *United States*

v. Bittner, 19 F.4th 734, 748 (5th Cir. 2021), cert. granted, 142 S. Ct. 2833 (2022) (citation omitted). An absurd result is reached if statutorily-defined unenforceable awards procured through misrepresentations of fact cannot be vacated. Importantly, such a result is contrary to public policy because where a payor defrauds the IDR process, the losing provider does not *enforce* such an award. The defrauded provider needs to *vacate* the award so the proper award may be entered by an IDR entity upon the actual facts, not misrepresentations and lies.

The FAA case law relied upon by the Florida Court concerns situations where parties who voluntarily arbitrated their disputes with full discovery later claim the award was secured through "undue means" and thus should be vacated under the FAA. Courts faced with this argument have no statutory definition or legislative examples of "undue means" to apply. Accordingly, the courts made up a standard and examples. But here, no such guesswork is required. Congress specifically defined what would invalidate an IDR award – a misrepresentation of fact to an IDR entity. Accordingly, that scenario qualifies as "fraud or undue means" as a matter of law.[5]

Due process likewise demands that judicial review be available when undue means such as misrepresentations of fact are used to secure an IDR award. As noted in the briefing here, Plaintiffs do not receive copies of the insurer's submission, the IDR entity provides no meaningful analysis of its decision, and no discovery is allowed. IDR proceedings are far different from the types of FAA arbitrations on which the "undue means" case law was developed. Rather than blindly applying FAA case law in this very new and different context, this Court should harmonize the statutes, consider the factual and procedural distinctions, and conclude that when a party

[5] It is noteworthy that the misrepresentations at issue in the cases before the Florida Court and here concern the QPA. That is a statutory factor that must considered in the award determination and one to which the government attempted to give controlling effect in now-vacated regulations.

secures an IDR award by misrepresenting facts, it qualifies as a matter of law for review under the FAA for having been "procured by corruption, fraud or undue means."

III. The Florida Court incorrectly concluded Plaintiffs' allegations were inadequate to state a claim for relief.

The Florida Court next concluded that Plaintiffs failed to state a claim because their allegations that the insurers "submitted ***incorrect*** QPAs" (emphasis added), failed to make required disclosures, and that the IDR entity applied an illegal presumption in the QPA's favor "are deficient." Dkt. 65 at 19. The Court provides no further explanation of why Plaintiffs' allegations are inadequate. Moreover, the Court mischaracterized their allegations.

With respect to Defendant Kaiser, what the Florida Plaintiffs actually alleged was that it:

- "implemented a bad faith scheme" to "minimize payments on air ambulance transports";
- Furthered the scheme "by concealing information essential to understanding what its QPA actually is and how it is calculated";
- "misled" the IDR entity "into believing that Kaiser had offered more that its QPA";
- "duped" Plaintiff "into submitting briefing "based on a higher QPA" than had actually been submitted; and
- Secured IDR awards "through undue means."

Dkt. 1 at ¶¶ 5, 35 (3:22-cv-1153, M.D. Fla.). These allegations are of a fraudulent scheme implemented by an insurer to game the IDR process, which is much more than just submitting "incorrect" QPAs. A different type of fraud was alleged against Capital Health, which Plaintiff contends does not actually have enough fixed wing contracts to have a QPA, yet implemented a fraudulent scheme to report an artificially low one. Dkt. 1 at ¶ 33 (3:22-cv-1077, M.D. Fla.).

These allegations of fraudulent schemes, implemented by two insurance companies to game the IDR system and defeat awards through fraud and misrepresentation, devised at a time

when the federal government was trying to give controlling weight to the QPA, adequately stated a claim for relief under the NSA. The Florida Court was wrong to conclude to the contrary and this Court should not do the same. With respect to Kaiser, the factual allegations in the cases before this Court include several IDR awards improperly secured through a pattern and practice of fraudulent misrepresentations. *See* Dkt. 1 at ¶¶ 17-22, 49, 51 (4:22-cv-3979, S.D. Tex).

IV. The Florida Court did not explain how relief could be awarded without an IDR entity as party.

With little analysis, the Florida Court stated that it agreed with the Florida Defendants and the United States[6] that an IDR entity is "entitled to arbitrator's immunity and that there is no Article III case or controversy between the [Florida Plaintiffs] and [the IDR entity]." Dkt. 65 at 20 . In a single conclusory sentence, the Court disposed of the Florida Plaintiffs' claims against the IDR entities, reasoning that "[n]othing suggests that IDR entities are proper parties to suit under the NSA, so here the inquiry ends." *Id.*

Without repeating its prior briefing, Plaintiffs disagree that anonymous employees at IDR entities qualify for arbitrator immunity. And IDR entities are necessary parties because they must rehear a payment dispute if the Court vacates the award they made. Without the IDR entity participating in the proceeding, a court is powerless to order a rehearing and provide relief necessary in such a dispute. Plaintiffs challenging IDR disputes would be left without a remedy.

CONCLUSION

For these reasons, this Court should deny Defendants' motions to dismiss and allow Plaintiffs to proceed with discovery into the merits of its claims that insurers improperly procured IDR awards through fraud and undue means.

[6] The United States of America filed a statement of interest arguing in support of the IDR entities motions to dismiss. Dkt. 58 (3:22-cv-1077, M.D. Fla.).

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CERTIFICATE OF SERVICE

I certify that on November 15, 2023, a true and correct copy of the foregoing was served via the Court's ECF system on all counsel of record.

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