UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUARDIAN FLIGHT, LLC ***Plaintiff,***	§ § §	
	§	**Civil Action: No. 4:22-CV-03805**
v.	§ §	
ATENA HEALTH, INC., and MEDICAL EVALUATORS OF TEXAS ASO, LLC ***Defendants.***	§ § §	

DEFENDANT'S MEDICAL EVALUATORS OF TEXAS ASO, LLC'S POST ARGUMENT BRIEF REGARDING IMMUNITY

NOW COMES Defendant, MEDICAL EVALUATORS OF TEXAS ASO, LLC ("MET") and files this its *Post Argument Brief Regarding Immunity* and would respectfully show to the Honorable Judge as follows:

SUMMARY OF THE ARGUMENT

This is a simple case. The "No Surprise Act" ("NSA") provides that a determination by an Independent Dispute Resolution ("IDR") award "shall be binding on the parties" and "shall not be subject to judicial review" except in certain circumstances. The first exception is where a claim is fraudulent or there is evidence of misrepresentation of facts presented to the IDR entity involved in determining the claim. Second, an award may be set aside in any case that falls within the scope of any of the paragraphs (1) through (4) of section 10(a) of Title 9 – which is the Federal Arbitration Act.

IDR Should Receive Judicial Immunity

Courts follow a functional approach to immunity law whose analysis rests on functional categories, not on the status of the defendant. Absolute immunity flows not from rank or title or "location within the government," but from the nature of the responsibilities of the individual official. The following factors, among others, are characteristic of the judicial process and to be

considered in determining absolute as contrasted with qualified immunity : (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process, and (f) the correctability of the error on appeal. *Cleavinger v. Saxner*, 474 U.S. 193, 201, 106 S.C.t 496, 88 L.E.d2d 507 (1985) (citing *Butz v. Economou*, 438 U.S. 478, 511, 98 S.Ct. 2894, 57 L.E.d2d 895 (1978); see also *Burns v. Reed*, 500 U.S. 478, 499, 111 S. Ct. 1934, 1946 (1991) (Dissent, J. Scalia) (observing that judicial Immunity has been extended not only to judges narrowly speaking, but to "military and naval officers…grand and petit jurors…commissioners appointed to appraise damages… arbitrators… .") .

In *Austin Municipal Securities, Inc. v. Nat'l ass'n of Sec. Dealers, Inc.*, the Supreme Court narrowed the Butz factors down to a tripartite formula. Under this test if: "a) the official's functions share the characteristics of the judicial process; b) the official's activities are likely to result in recriminatory lawsuits by disappointed parties; and c) sufficient safeguards exist in the regulatory framework to control unconstitutional conduct, then that person's official conduct is absolutely immune from civil liability. *Austin Mun. Secur., Inc., v. Nat'l Asso. of Sec. Dealers, Inc.*, 757 F.2d 676, 688 (5th Cir. 1985).

In *Austin Mun. Secur., Inc.*, the Court found that the securities association and its disciplinary officers were entitled to absolute immunity from prosecution for personal liability on claims arising within the scope of their official duties. The first *Austin* factor was met for the disciplinary officers ("DBCC") since their role was both prosecuting and adjudicating securities law violations. Like the DBCCs in *Austin*, IDR entities under the No Surprises Act adjudicate disputes based on two competing submissions. The *Austin* Court also held that the DBCC met the second *Austin* factor, since they were likely targets for lawsuits due to their role in disciplining

members for securities law violations. IDRs are likewise targets for lawsuits for their role in the IDR process, as evidenced by the lawsuits filed against them in Texas and Florida.

Although the No Surprises Act takes each of the *Austin* factors into account, this Court, during the motion to dismiss hearing, was particularly interested in the third factor—what safeguards existed to protect participants in the IDR process from unconstitutional conduct. First and foremost, Independent Dispute Resolution ("IDR") entities are independent entities tasked with engaging in "baseball" style arbitration to decide between two competing bids. The overseeing government agency (primarily Health and Human Services, or HHS) must establish a process to certify (and recertify) IDR entities. 42 U.S.C.S. § 300gg-111(c)(4)(A)(i). The certification process must ensure that IDR entities have sufficient legal and medical knowledge and other expertise and sufficient staffing to make determination on a timely basis. *Id*. The IDR entity cannot be a party or employee or agent of a party, does not have a material, familial, financial, or professional relationship with a party, or have a conflict of interest with a party. 42 U.S.C.S. § 300gg-111(c)(4)(F). This is markedly different from the members of a prison disciplinary committee in *Cleavinger*, who were, the Court observed, "prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties." *Cleavinger*, 474 U.S. at 204. The Court further noted that they were employees of the prison system, subordinates to the warden who would review their work, and worked with fellow employees whose credibility they would judge. *Id*. The Court also compared the committee members to membership on a parole board, which the Court said was "a 'neutral and detached' hearing body." *Id*. The Court concluded the officials were not a neutral and impartial body. *Id*. at 205 (comparing discipline committee to school board acting as adjudicators of school disciplinary process, who are entitled only to qualified immunity).

The process is adversarial and subject to appeal. The No Surprises Act first permits the parties to resolve the dispute among themselves. If they do not, one or both can invoke the IDR process. They can then jointly select from a list of pre-approved IDR entities to decide their dispute. Only if they are unable to decide does HHS step in and randomly appoint an IDR entity. 42 U.S.C.S. § 300gg-111(c)(1)(A), (1)(B), (4)(F). Each party may submit to the IDR entity: (a) an offer and (b) such information as requested by the certified IDR entity relating to such offer, and (c) any information relating to such offer submitted by either party. If dissatisfied with the award, the aggrieved party may file an action to set it aside. The Act provides five bases for setting aside an award: (a) "a fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity involved regarding such claim;" and (b) "in a case described in any of paragraphs (1) through (4) of section 10(a) of title 9." As the Court is aware, those sections allow a court to set aside an arbitration award where (a) "the award was procured by corruption, fraud, or undue means ;" (b) "there was evident partiality or corruption in the arbitrators," (c) "the arbitrators were guilty of misconduct, …" or (d) "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(1)-(4). Furthermore, an appeal may be taken from a decision of the district court in refusing to vacate an arbitration award. 9 U.S.C. § 16(a)(1)(E).

Given that the IDR process satisfies all three of *Austin's* factors, MET should be granted absolute immunity from prosecution. This would protect IDR entities from personal liability for claims that arise from their official duties.

Legislative History

The legislative history supports the conclusion that the IDR process is arbitration. The Labor and Education Committee report on the No Surprises Act favorable compares the IDR process to arbitration:

> A key element of any solution to address surprise billing comprehensively is the payment rate, which is the amount that payers must remit to providers for out-of-network items and services. Two payment rate options have emerged as the predominant contenders to correct the market failure associated with surprise billing: (1) the benchmark rate model, and (2) the IDR process, also referred to as arbitration.

H.R. REP. 116-615, 56 (Dec. 2, 2020), p. 56-57.

Similar to Railroad Labor Act

Congress has enacted other statutes that mandate arbitration similar to the No Surprise Act, like the Railroad Labor Act ("RLA"). In 1932 the RLA was amended to include mandatory arbitration of certain disputes. The RLA evinces a strong preference for alternative dispute resolution and sharply limits judicial involvement in labor disputes. See *Tex. & New Orleans R.R. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 562-65, 74 L. Ed. 1034, 50 S. Ct. 427 (1930).

Both the RLA and NSA share a common goal. Both Acts are aimed at promoting stability and preventing unfair practices. The RLA seeks to prevent disruption to transportation networks by regulating labor relations, while the NSA seeks to protect patients from unexpected medical bills by regulating billing practices. In more similar, both Acts contain provisions that limit judicial involvement in disputes, instead mandating alternative dispute resolution mechanisms.

CONCLUSION & PRAYER

WHEREFORE, PREMISES CONSIDERED, MET respectfully prays the Court to dismiss all of Plaintiff's claims asserted against it with prejudice; or alternatively strike Plaintiff's claims and award Defendant MET attorney's fees and all other relief Defendant MET may be entitled to.

Respectfully submitted,

THE VETHAN LAW FIRM, PC

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically on April 28, 2023. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ *Joseph L. Lanza*
Joseph L. Lanza