

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MED-TRANS CORPORATION,

Plaintiff,

v.

CASE NO. 3:22-cv-1077-TJC-JBT

CAPITAL HEALTH PLAN, INC. and
C2C INNOVATIVE SOLUTIONS,
INC.,

Defendants.

MED-TRANS CORPORATION,

Plaintiff,

v.

CASE NO. 3:22-cv-1139-TJC-JBT

BLUE CROSS AND BLUE SHIELD OF
FLORIDA, INC. and C2C
INNOVATIVE SOLUTIONS, INC.,

Defendants.

REACH AIR MEDICAL SERVICES,
LLC,

Plaintiff,

v.

CASE NO. 3:22-cv-1153-TJC-JBT

KAISER FOUNDATION HEALTH
PLAN, INC. and C2C
INNOVATIVE SOLUTIONS, INC.,

Defendants.

MOTION HEARING
BEFORE THE HONORABLE TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE
Jacksonville, Florida
May 16, 2023
10:04 a.m.

(Proceedings recorded by mechanical stenography; transcript
produced by computer.)

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P R O C E E D I N G S

May 16, 2023

10:04 a.m.

- - -

COURT SECURITY OFFICER: All rise. The United States District Court in and for the Middle District of Florida is now in session. The Honorable Timothy J. Corrigan presiding.

Please be seated.

THE COURT: How is everybody doing?

Well, good morning. We're on the record in *Med-Trans Corporation versus Capital Health*, 3:22-cv-1077; *Med-Trans versus Blue Cross*, 3:22-cv-1139; and *REACH Air Medical Services versus Kaiser Foundation*, 3:22-cv-1153.

Starting with the plaintiff, I'll go ahead and get appearances, please.

MR. SCHRAMEK: Your Honor, Adam Schramek, along with Abraham Chang and Lanny Russell on behalf of the plaintiffs.

THE COURT: Okay.

Good to see you, Mr. Russell.

All right. Let's -- I guess Kaiser is up front here. So we'll start with Kaiser.

MR. KESHAVARZI: Good morning, Your Honor. Moe Keshavarzi for Kaiser Foundation Health Plan.

THE COURT: All right.

MR. DODD: Good morning, Your Honor. Christian Dodd, also for Kaiser Foundation Health Plan.

10:06 1 THE COURT: All right. Capital Health.

10:06 2 MR. SMITH: Good morning, Your Honor. Ruel Smith of
10:06 3 Hinshaw & Culbertson for the defendant Capital Health Plan,
10:06 4 Incorporated.

10:06 5 MR. LEHNER: Good morning, Your Honor. Steven
10:06 6 Lehner, also on behalf of Capital Health Plan.

10:06 7 THE COURT: Mr. Conner, Blue Cross.

10:06 8 MR. CONNER: Good morning, Your Honor. Tim Conner
10:06 9 for Florida Blue.

10:06 10 THE COURT: Good to see you, sir.

10:06 11 Mr. Fackler.

10:06 12 MR. FACKLER: And Mr. Giboney on behalf of C2C
10:06 13 Innovative Solutions, Inc.

10:06 14 THE COURT: All right. Good to see everyone.

10:06 15 Of course, some of the local folks I know, but...

10:06 16 So we're here today on motions addressed to the
10:06 17 complaints that have been filed in these three cases. So,
10:06 18 first, before we get started, let me -- let me express my deep
10:07 19 concern that we don't have enough lawyers working on this case.

10:07 20 So -- and then I -- I was following the -- I read the
10:07 21 opinions out in Texas, too. I'm not sure how to say the
10:07 22 judge's name. Is it Kernodle maybe?

10:07 23 MR. SCHRAHEK: That's correct.

10:07 24 THE COURT: Anyway, I saw he's been busy out there
10:07 25 with this law too.

10:07 1 So among other things, the new law seems to be job
10:07 2 security for federal judges, and so I appreciate Congress
10:07 3 helping us out with that.

10:07 4 So, anyway, I've read all the papers, I think. I may
10:07 5 not have read every single attachment to papers. So if there's
10:07 6 something particular that you want me to make sure I'm aware
10:07 7 of -- I know we're on a motion to dismiss, but we're also a
10:08 8 little bit in an area where it's more likely I would consider
10:08 9 attachments and things than I might otherwise.

10:08 10 For example, I do have a copy of the three awards
10:08 11 that were given in this case by Mr. Fackler's client. And so
10:08 12 if there's something else that you really think I need to be
10:08 13 looking at -- but I have read all the briefs. I've read the
10:08 14 complaints. I've read some case law. I'm familiar with other
10:08 15 case law.

10:08 16 So I think I have a fairly good place to start,
10:08 17 although, of course, you're way ahead of me. So -- so it's --
10:08 18 it's your job to get me caught up.

10:08 19 So I think the way I'm going to do this -- and, oh,
10:08 20 by the way, as some of you know, I'm actually the chief judge
10:08 21 of the court right now, which if we had -- if we had the
10:08 22 resources could actually be a full-time job, but it's not. I
10:09 23 have to do both of these jobs.

10:09 24 And so I need to stop at 10:30 for about 10 minutes
10:09 25 or so to make a presentation that couldn't be rescheduled. So

10:09 1 we'll be -- we'll just be in recess for about 10, no more than
10:09 2 15 minutes starting at 10:30, and then we'll resume. So just
10:09 3 for everybody's planning purposes.

10:09 4 I think what I want to do, if I could -- I know we're
10:09 5 on motions to dismiss, which might -- might suggest that the
10:09 6 defendants should go first, but I think I -- I'd rather start
10:09 7 with the plaintiff, if I could. And the way we're going to do
10:09 8 this is when you're the one speaking, I'll ask you to come up
10:09 9 to the -- to the podium.

10:09 10 So whoever is going to speak on behalf of the
10:09 11 plaintiff, come on up.

10:09 12 So what I wanted to do was to just start -- we have
10:09 13 to start somewhere. There's lots of places we could start.
10:10 14 But what I thought I want to do, since we're on a motion to
10:10 15 dismiss the complaint, is actually start with the complaint.
10:10 16 And so -- and I have some specific questions based on the
10:10 17 complaint. I'm reading the Capital Health complaint.

10:10 18 As I read the other complaints, they're all
10:10 19 relatively similar, although there are some differences. But
10:10 20 they're -- in essence, they're pretty similar.

10:10 21 So it starts out -- the introduction says, "Med-Trans
10:10 22 files this case to vacate an Independent Dispute Resolution
10:10 23 ('IDR') arbitration award made by federal contractor...pursuant
10:10 24 to the No Surprises Act."

10:10 25 It says that the NSA took effect on January 1st,

10:10 1 2022. It's implemented with an unprecedented mandatory federal
10:10 2 arbitration process.

10:10 3 And then it goes on to say as part of that federal
10:10 4 arbitration process the Department creates a list of entities.
10:11 5 There's virtually no information available to the parties to
10:11 6 evaluate the competency or quality of the various entities.
10:11 7 And if the parties to the proceeding do not agree on which IDR
10:11 8 entity to use, the Department appoints one for them.

10:11 9 And then under the NSA, the IDR's identity -- I'm
10:11 10 sorry, the IDR entity's decision is binding on the parties
10:11 11 unless it meets the requirements for review.

10:11 12 Paragraph 5 refers to the arbitrator.

10:11 13 Paragraph 6 refers to vacating the award.

10:11 14 Paragraph 16 references arbitration entities.

10:11 15 Paragraph 16 refers to arbitration.

10:12 16 So my first two questions are -- you seem to kind of
10:12 17 go out of your way in your -- in your motion papers to say this
10:12 18 isn't an arbitration, but yet the complaint might lead you to
10:12 19 think otherwise.

10:12 20 MR. SCHRAMEK: Your Honor, we don't dispute that
10:12 21 Congress in the legislative discussions referred to this
10:12 22 colloquially as arbitration. The statute never refers to it as
10:12 23 arbitration, however. And the point in our briefing is that
10:12 24 this is not a Federal Arbitration Act -- FAA -- arbitration.
10:12 25 So sometimes we may not have made that as clear, but that's our

10:12 1 point.

10:12 2 THE COURT: Well, I guess my point is that other than
10:12 3 you in your motion to dismiss briefing, everybody calls it
10:12 4 arbitration. Judge Kernodle called it an arbitration. You
10:12 5 call it an arbitration in your complaint. They all say it's an
10:12 6 arbitration. And so I just wanted to understand what -- why --
10:13 7 why that makes a difference.

10:13 8 MR. SCHRAMEK: It makes a significant difference,
10:13 9 Your Honor, from our point of view. Because when you look at
10:13 10 the Federal Arbitration Act, right, and it's based on -- the
10:13 11 whole concept is you have a contract that's -- you know,
10:13 12 relates to interstate commerce, and accordingly is going to be
10:13 13 subject to federal law.

10:13 14 And what the Federal Arbitration Act says is we are
10:13 15 going to allow the enforcement of arbitration, right? We're
10:13 16 going to -- we're going to -- that's a policy of the United
10:13 17 States. We're going to allow arbitration. Because at the time
10:13 18 it was passed, a lot of states didn't like arbitration; they
10:13 19 wanted to invalidate contracts and things like that.

10:13 20 THE COURT: You're speaking a little fast for me.

10:13 21 MR. SCHRAMEK: Sorry, Judge.

10:13 22 THE COURT: That's okay.

10:13 23 MR. SCHRAMEK: And so what -- the whole point of that
10:13 24 is -- the Federal Arbitration Act is premised on an agreement
10:13 25 and a consent of the parties to arbitrate.

10:13 1 THE COURT: Well, we -- you and I may be able to
10:13 2 agree that -- that the arbitration contemplated under this act
10:13 3 is not FAA arbitration, per se. There is a portion of the
10:13 4 arbitration act which is incorporated into the statute. We can
10:14 5 talk about whether that tries to incorporate the entire
10:14 6 statute. But let's say you and I were to agree that it
10:14 7 doesn't, which I think is your position.

10:14 8 It doesn't mean that this isn't an arbitration, does
10:14 9 it? And -- and I'm -- and so when you kept -- in your
10:14 10 briefing, when you kept saying that it's not an arbitration,
10:14 11 there's all kinds of arbitrations.

10:14 12 And we know, for example, in this case -- at least it
10:14 13 looks like the kind of arbitration that Congress selected was
10:14 14 the baseball arbitration, which is you -- you pick a side and
10:14 15 that's -- that's who wins.

10:14 16 So I guess I'm -- I'm just -- I want to make sure
10:14 17 that I'm understanding what you're saying when your papers seem
10:14 18 to disavow this being an arbitration.

10:14 19 MR. SCHRAMEK: So, Your Honor, our point is that this
10:14 20 is not a Federal Arbitration Act arbitration, which would be
10:14 21 premised on consent of the parties, which would have all the
10:14 22 procedural safeguards of a Federal Arbitration Act arbitration,
10:15 23 which would have a scope of the parties' agreement to
10:15 24 arbitrate.

10:15 25 And because of that, our argument is that the Court

10:15 1 cannot blindly apply Federal Arbitration Act case law without
10:15 2 doing an analysis of -- whether you call it arbitration,
10:15 3 dispute resolution -- whatever you want to call it, that we
10:15 4 need to do a substantive analysis of this IDR process. Let's
10:15 5 not worry about labels or terminologies. What's happening?

10:15 6 THE COURT: Does -- does Congress have the ability to
10:15 7 create an arbitration process that's not voluntary --

10:15 8 MR. SCHRAMEK: Your Honor, I think -- oh, I'm sorry.

10:15 9 THE COURT: Excuse me -- is not voluntary and has the
10:15 10 attributes that this one has? I mean, does it have to have all
10:15 11 the things -- so you're saying on one hand it's not FAA
10:15 12 arbitration, it doesn't have all the accoutrements. And I --
10:15 13 and maybe I agree with that. But on the other hand you're
10:15 14 saying it should have all that stuff.

10:15 15 Is that -- are those two things consistent with each
10:16 16 other? And is Congress empowered to create a different way to
10:16 17 do it?

10:16 18 MR. SCHRAMEK: Your Honor, Congress certainly has the
10:16 19 power to force arbitrations, to require mandatory arbitrations.
10:16 20 Counsel on defendants' side, of course, cite to the Railway Act
10:16 21 cases. There's termiticide [sic] act cases. You can do it.

10:16 22 You have to have, though, in it some sort of
10:16 23 procedural safeguards, including meaningful judicial review.

10:16 24 So can Congress create this IDR process that it
10:16 25 created? We believe the answer to that question depends on

10:16 1 this Court's ruling as to the level of judicial review you get
10:16 2 under the statute, the No Surprises Act.

10:16 3 So, for example, if this Court were to rule, "We're
10:16 4 going to apply the FAA case law, you're going to have to file a
10:16 5 motion, you're going to have to prove up front with all the
10:16 6 evidence and all the burden of the FAA without any discovery,
10:16 7 that's it, that's all you get," we would argue that the process
10:16 8 Congress has implemented with that level of judicial review
10:17 9 would violate due process and that it is -- there is a problem.

10:17 10 THE COURT: And is there -- what would be your best
10:17 11 case to -- to make that point? In other words, what's the case
10:17 12 that says that if Congress hasn't provided sufficient due
10:17 13 process in the arbitration process that that's -- that Congress
10:17 14 has now -- as I understand what you're saying, Congress has now
10:17 15 passed an unconstitutional law? What case says that? Or
10:17 16 what -- what would be the line of authority that would support
10:17 17 that argument?

10:17 18 MR. SCHRAHEK: So, Your Honor, currently, if you look
10:17 19 at the cases we cited -- and I'll have to pull one up here.
10:17 20 But there's several state law cases that have done an analysis,
10:17 21 a due process analysis, that said that you have to have a
10:17 22 meaningful review and have conducted that analysis.

10:17 23 Frankly, Congress has never passed anything like
10:17 24 this. So we could not find any authority along a statute of
10:17 25 this type.

10:18 1 THE COURT: You're talking about there was like a New
10:18 2 Mexico case and a -- there were several states that you cited.

10:18 3 MR. SCHRAMEK: And the New York case, yes, Judge. So
10:18 4 it's the state law cases we're drawing upon, and that we're
10:18 5 also saying if you look at the -- the arbitrations that
10:18 6 Congress has mandated in the past, they've all had a level of
10:18 7 meaningful review, or like the Federal Arbitration Act, that's
10:18 8 premised on the consent of the parties and the scope of the
10:18 9 agreement.

10:18 10 So if I've agreed to it -- and if I have agreed to
10:18 11 the scope and I've agreed to the arbitrator and I've agreed to
10:18 12 the procedures, then, sure, you can't get to federal court.
10:18 13 The hurdle is going to be very high.

10:18 14 But when a regime like this, which is unprecedented
10:18 15 in the law -- I can't find anything similar to it, Your Honor,
10:18 16 in any of the statutes previously passed.

10:18 17 When something like this is passed, if you just
10:18 18 blindly apply the Federal Arbitration Act cases and standards
10:18 19 as if we had agreed to it, as if we had all the discovery and
10:18 20 the processes that underlie the Federal Arbitration Act, or
10:18 21 that we'd agree not to do the discovery, right -- I can
10:18 22 agree -- I think one of the cases we cite to says that, you can
10:19 23 agree to anything. They're fundamentally different.

10:19 24 And I think that was a Judge Easterbrook case, in
10:19 25 which he said, you know, it's a fundamental difference between

10:19 1 a compelled arbitration and an arbitration by the parties. The
10:19 2 parties can agree to anything. And then --

10:19 3 THE COURT: Well, is -- if that's what we're talking
10:19 4 about -- and it really gets to kind of my question, is if --
10:19 5 isn't your beef either with Congress to change the law, or if
10:19 6 the law itself is unconstitutional, shouldn't you be in the
10:19 7 same kind of lawsuit that the folks out in Texas are in?

10:19 8 I mean, why -- why would these -- if these parties --
10:19 9 if your opponents are participating in the system that Congress
10:19 10 set up, and if Mr. Fackler's client is just doing the thing
10:19 11 that -- that the law says that that's what they're supposed to
10:19 12 do, why is your beef with them and not either Congress or suing
10:20 13 to have the law declared unconstitutional?

10:20 14 Because when I -- when I see your prayer for relief,
10:20 15 even though you talk about due process a lot, there's no prayer
10:20 16 for relief in this case that -- to have the law declared
10:20 17 unconstitutional. You're asking for pretty specific relief as
10:20 18 it relates to this case.

10:20 19 So what -- how do I analyze that?

10:20 20 MR. SCHRAMEK: So, Your Honor, I think we get back to
10:20 21 the point that under the NSA there's a provision that talks
10:20 22 about judicial review. And it says judicial review shall be
10:20 23 available, right, in the circumstances of the four standards
10:20 24 under the Federal Arbitration Act. That's what it says.

10:20 25 It doesn't incorporate any other provision of the

10:20 1 arbitration act. And it doesn't talk about what the scope of
10:20 2 judicial review is going to be. It merely says judicial review
10:20 3 shall be available in these circumstances.

10:20 4 So the question for this Court is: Well, if those
10:20 5 circumstances are alleged, what -- what does judicial review
10:21 6 look like? What does judicial review look like in a proceeding
10:21 7 to where I've never seen their pleading and to which I had no
10:21 8 opportunity to respond to their pleading, and yet, because of
10:21 9 the allegations we make, we believe there's been a material
10:21 10 misrepresentation of the QPA?

10:21 11 And in the case of Kaiser, we know there was a
10:21 12 misrepresentation with Kaiser, because they submitted a
10:21 13 different QPA for us than they submitted to the IDR entity.

10:21 14 So that on its face creates an issue of what was
10:21 15 going on at Kaiser, how were they calculating it. Did they
10:21 16 make the misrepresentation to us? Or did they make the
10:21 17 misrepresentation --

10:21 18 THE COURT: I'm looking here -- the law says that a
10:21 19 determination of a certified IDR entity under subparagraph (a)
10:21 20 shall be binding upon the parties involved in the absence of a
10:21 21 fraudulent claim or evidence of misrepresentation of fact, and
10:21 22 then shall not be -- and shall not be subject to judicial
10:22 23 review except in the cases described in paragraphs (1) through
10:22 24 (4).

10:22 25 It's a little bit clunky, because you don't know what

10:22 1 (1) is supposed to be. It's a little clunky. But when you get
10:22 2 to (1) through (4), maybe you just -- maybe (1) is just another
10:22 3 way of saying either fraud or undue means, maybe. I don't
10:22 4 know.

10:22 5 But -- but -- so why isn't -- and then wouldn't
10:22 6 you -- wouldn't you then apply FAA law to that as to what that
10:22 7 means? In other words, if you -- if you're able to show --
10:22 8 whether it be a complaint or a motion is not, I don't think,
10:22 9 super important to me at the moment.

10:22 10 But whatever it is, you've now -- you're now seeking
10:22 11 to review this arbitration award. And you're going to claim
10:22 12 that the award was procured by fraud or undue means; the fraud
10:23 13 or undue means being that the -- your opponent submitted
10:23 14 erroneous information to the arbitrator.

10:23 15 And so I guess I'm wondering -- and then all the --
10:23 16 the FAA law that -- how you apply that would be applied. Why
10:23 17 is that not -- why is that not what we should be doing?

10:23 18 MR. SCHRAMEK: So this comes to really the first
10:23 19 issue of law that we're asking this Court to rule upon, which
10:23 20 is that we don't disagree that one of the required standards
10:23 21 is, for example, undue means.

10:23 22 But what we do disagree with is opposing counsel's
10:23 23 citation to cases suggesting that undue means has to rise to
10:23 24 the level of bribery or, you know, an assault on the
10:23 25 arbitrator. There's some case law out there that would put

10:23 1 undue means at a very high level.

10:23 2 What we say is if you look at the section you just
10:23 3 read, Judge, the first part of that section starts that -- says
10:24 4 that if there is a misrepresentation of facts to the IDR
10:24 5 entity, that the award is not going to be binding because you
10:24 6 have properly secured it.

10:24 7 And so when we get to the next level that says
10:24 8 judicial review is not available except in those four cases,
10:24 9 what we're asking the Court to do is to interpret the NSA
10:24 10 statute to say, "Well, if you look at how it's structured, one
10:24 11 type of undue means under the statute is a misrepresentation of
10:24 12 fact to an IDR entity."

10:24 13 So to the extent the FAA case law is inconsistent
10:24 14 with that, it really doesn't matter. And that's what I mean by
10:24 15 we shouldn't blindly apply that case law, because we now have
10:24 16 a statute that specifically provides an example of what an
10:24 17 undue mean would be.

10:24 18 So we're perfectly fine proceeding in this case with
10:24 19 having to prove that there was a material misrepresentation of
10:24 20 fact, and that if we prove that, that qualifies for judicial
10:24 21 review and the award is undone.

10:24 22 THE COURT: Well, what happens in a -- what
10:25 23 happens -- I mean, one reason I think that -- at least it
10:25 24 looked like that Congress set up this system. I mean, it's
10:25 25 kind of retail arbitration, right?

10:25 1 They pay the -- they pay Mr. Fackler's client \$350,
10:25 2 as opposed to the thousands and thousands of dollars that
10:25 3 arbitrations usually cost, and you get -- I don't know what the
10:25 4 other IDRs do, but you get a pretty cookie-cutter --
10:25 5 cookie-cutter award. And it's not really subject to review
10:25 6 very much, except in gross circumstances.

10:25 7 Isn't that -- wasn't that Congress's effort to come
10:25 8 up with a way to resolve these disputes but not have to spend a
10:25 9 ton of money doing it? And -- and I'll add -- your client wins
10:26 10 a lot of these things, right? You participate. You win.

10:26 11 I assume -- are you -- are you willing to have --
10:26 12 every time you win -- are you willing to end up in federal
10:26 13 court every time you win, when Blue Cross says, "Hey, wait a
10:26 14 minute. What about us?"

10:26 15 So isn't -- isn't that what -- isn't that what
10:26 16 Congress was trying to avoid?

10:26 17 MR. SCHRAMEK: So, Your Honor, we do believe that
10:26 18 Congress was looking for a -- an efficient, relatively cheap
10:26 19 way to try to resolve these disputes. But at the same time, we
10:26 20 think Congress necessitated a meaningful level of judicial
10:26 21 review if you met certain requirements. And that's the tie-in
10:26 22 to the FAA.

10:26 23 In the cases we have, we have decisions -- and this
10:26 24 is where discovery is going to come in, helpful to the Court,
10:26 25 Your Honor, I believe, because you're looking at four decisions

10:26 1 independently, right, just the four we've sued upon -- or the
10:27 2 three in this litigation.

10:27 3 In discovery we're going to be able to show other
10:27 4 decisions that came before it, back when the illegal
10:27 5 presumption was in place. And what you're going to see is the
10:27 6 language being used by the IDR entities was that illegal
10:27 7 presumption.

10:27 8 THE COURT: Isn't the whole -- isn't the whole
10:27 9 problem -- if I start -- if every time one of these things goes
10:27 10 wrong, in the opinion of either you or the insurance companies,
10:27 11 if we're going to get into federal court and have discovery and
10:27 12 look what we did and look what -- then the whole system is
10:27 13 going to collapse, isn't it? That's exactly what Congress
10:27 14 didn't want, right?

10:27 15 MR. SCHRAMEK: So I don't think that that's going to
10:27 16 happen, Judge. This is not, you know, going to result in some
10:27 17 waterfall of litigation and everyone's going to be objected to.

10:27 18 I think what you have here are specific situations to
10:27 19 where we have insurers that have asserted QPAs, that based on
10:27 20 our market experience, based on third-party independent
10:27 21 databases, are materially understated. We know the market.

10:27 22 For example, let's talk about Capital Health.
10:27 23 Capital Health operates out of --

10:27 24 THE COURT: Well, we will do that in 10 minutes.

10:28 25 MR. SCHRAMEK: All right. Thank you, Judge.

10:28 1 THE COURT: We're in recess.

10:28 2 MR. SCHRAMEK: Thank you, Judge.

10:28 3 COURT SECURITY OFFICER: All rise.

10:28 4 (Recess from 10:28 a.m. to 10:45 a.m.; all parties
10:45 5 present.)

10:45 6 COURT SECURITY OFFICER: All rise. This Honorable
10:45 7 Court is now in session.

10:45 8 Please be seated.

10:45 9 THE COURT: All right. What about Capital Health?

10:45 10 MR. SCHRAMEK: So, Your Honor, Capital Health is a
10:45 11 good example of why this case is not something that's going to
10:45 12 result in a waterfall and why we do have a cause and factual
10:45 13 allegations to support the relief requested.

10:45 14 Capital Health, as you likely know, operates in seven
10:45 15 counties in Florida. It's very small. It's a Blue Cross
10:45 16 licensee. So we have two Blues in Florida, which is very
10:45 17 unusual. Usually there's one per state.

10:45 18 And what that -- in that case we had a fixed-wing --
10:46 19 a fixed-wing transport over 200 miles from Tallahassee to
10:46 20 Orlando. And in that proceeding, if you don't have a QPA --
10:46 21 Congress has outlined what you can do if you don't have a QPA.
10:46 22 But to have a QPA, you need at least three in-network contracts
10:46 23 to come up with a QPA.

10:46 24 They said they had a QPA. They paid a very low
10:46 25 amount on the -- on that transport. And, hence, our question

10:46 1 is: How could you have a QPA? We're out of network with you.
10:46 2 We know the market. We know our competitors. Who are these
10:46 3 network agreements you have that you can have a QPA that you're
10:46 4 claiming that's the middle price? That's the sort of
10:46 5 objective, good-faith allegation that should allow us to get
10:46 6 into the courthouse door.

10:46 7 The other side of that coin is if we can't get into
10:46 8 the courthouse door -- if you look yesterday, Envision Health
10:46 9 filed for bankruptcy, citing the NSA and being low-balled on
10:46 10 payments from insurance companies, saying, "We're having to
10:46 11 file bankruptcy because we're getting paid less than our fixed
10:46 12 costs." And they're all claiming they have this QPA.

10:47 13 Well, we have a specific example here. Capital
10:47 14 Health for seven counties in Central Florida, where are all
10:47 15 these contracts you have with these planes to transport
10:47 16 patients across the country?

10:47 17 That's our business. We know our business. That's
10:47 18 an example of why we believe we need discovery. And if, in
10:47 19 fact, their QPA was not -- are they doing some deal where
10:47 20 they're renting the network agreements from their other Blue
10:47 21 Cross friends just so they can come up with a QPA?

10:47 22 That's the sort of improper tactics that we're trying
10:47 23 to bring some sort of sunshine to in the Sunshine State. We
10:47 24 want to see the facts. We want to see discovery. And we think
10:47 25 that's the sort of --

10:47 1 THE COURT: Well, isn't there a process under the law
10:47 2 for you to petition the Department to -- if you feel like --
10:47 3 that -- that QPAs aren't being adjudicated properly -- or found
10:47 4 properly, isn't -- doesn't the statute provide a vehicle to
10:47 5 have that reviewed by the government?

10:47 6 MR. SCHRAMEK: Your Honor, it doesn't. And that's
10:47 7 one of our fundamental disagreements in the briefing. There is
10:47 8 no process, procedure, or administrative right for us to do
10:48 9 anything.

10:48 10 All we can do -- in one of the guidance papers that
10:48 11 they sent out, they said, "If you think someone is
10:48 12 miscalculating the QPA, let us know. We may -- we may look
10:48 13 into it."

10:48 14 That's it.

10:48 15 I do insurance class-action defense on the other side
10:48 16 on property and casualty. I know what an administrative right
10:48 17 looks like, a complaint process, and a right to appeal, a right
10:48 18 to an administrative hearing through a state administrative
10:48 19 office.

10:48 20 That's the sort of process that states have put into
10:48 21 place so that if you have a problem with an insurer, you
10:48 22 actually have a right, you can go and you have to exhaust
10:48 23 before you can come to this court.

10:48 24 There is nothing like that under the NSA. There is
10:48 25 nothing like that with the Departments. We have no power to

10:48 1 file a complaint, to secure a hearing, to compel a hearing. In
10:48 2 state insurance laws, a lot of times if the commissioner denies
10:48 3 you a hearing, within 30 days you have the right to demand a
10:48 4 hearing. If they deny it, you get to go straight to court.
10:48 5 There's nothing like that in the NSA. There's no procedure.

10:48 6 And they talk about, "Well, the Departments have the
10:49 7 right to audit us."

10:49 8 You know, they want to go outside the record and
10:49 9 point you to a bunch of, you know, references. By the way, the
10:49 10 reference to, "If you have a complaint, let us know. We may
10:49 11 look into it," that's outside the record. That's an
10:49 12 attachment. That's not in our complaint.

10:49 13 But if you want to go outside the record, look at the
10:49 14 same document that says, "We anticipate doing nine audits" --
10:49 15 of the hundreds of insurance companies across the country and
10:49 16 thousands of health plans that exist, the Departments
10:49 17 anticipate doing nine audits next year. Nine. Yeah.

10:49 18 I'll play those numbers if I'm on the defendants'
10:49 19 side. You know why? Because they get to unilaterally pick how
10:49 20 much to pay on each transport. They can pay a nickel, \$5, \$10.
10:49 21 They can do whatever they want. And we have to then go through
10:49 22 the IDR process. And if we miss one deadline --

10:49 23 THE COURT: What's the history of 100 -- out of 100
10:49 24 of these claims, how many end up not being agreed upon at the
10:49 25 get-go?

10:49 1 MR. SCHRAMEK: Well, Your Honor, I don't have the
10:49 2 stats with me, but I can tell you we -- we do not agree in the
10:50 3 beginning with many at all. It's -- the open negotiation
10:50 4 process, honestly -- Envision Health in its bankruptcy filing
10:50 5 said that the implementation of the No Surprises Act has been a
10:50 6 disaster. It's been so in favorable -- in favor of insurance
10:50 7 companies that they are filing bankruptcy over it, because
10:50 8 there's a number of got-yous through the IDR process. And if
10:50 9 you miss one deadline, you lose your claim.

10:50 10 In fact, there's a report that came out from the
10:50 11 federal government in which they showed -- I think about half
10:50 12 of the transports that got filed were knocked out for
10:50 13 qualification. They didn't qualify. Most of those are likely
10:50 14 because you missed a deadline, so you missed your deadline,
10:50 15 because it's 30 days. And if you miss it, you don't get
10:50 16 review.

10:50 17 So there's so many got-yous on the IDR process,
10:50 18 they're happy to pay low-ball every claim and just hope only
10:50 19 half of them make it through, because then they're saving a ton
10:50 20 of money.

10:50 21 That's why we have so many lawyers in this courtroom.
10:50 22 It's not because of one transport of \$15,000. It's because of
10:50 23 the system that is protecting the insurers, that is allowing
10:51 24 them to underpay and deny claims and never get to the
10:51 25 courthouse door to see what they're really doing. That's what

10:51 1 this is all about, Your Honor.

10:51 2 So whether you call it -- you know, "We're going to
10:51 3 go into the FAA. It's not an actual arbitration" -- however
10:51 4 you want to look at it, what we're looking for is discovery and
10:51 5 our day in court on the facts and -- and then allowing to
10:51 6 actually proceed in this case.

10:51 7 Even under the FAA -- if you want to call this an FAA
10:51 8 proceeding, we're fine with that. Just give us -- allow us
10:51 9 discovery. Their Federal Arbitration Act cases -- and we've
10:51 10 cited them in our briefs, in which the courts allowed not only
10:51 11 discovery -- they say, "We're going to remand to the trial
10:51 12 court" -- these are appellate decisions -- "so that you can
10:51 13 call the arbitrator to be a witness. And we're going to look
10:51 14 into whether or not the arbitrator was actually interested or
10:51 15 not."

10:51 16 So your hands aren't tied if we call it a Federal
10:51 17 Arbitration Act case. You know, that's what we're here to do,
10:51 18 to get past the hurdle of the pleadings so we can get to the
10:51 19 discovery and get to the merits of these claims.

10:51 20 Does Capital Health have in-network agreements or
10:51 21 not? This is limited discovery. We should be able to get to
10:52 22 the bottom of this very quickly.

10:52 23 THE COURT: Is the decision as to what the QPA is, is
10:52 24 that -- does that solely reside with the insurer?

10:52 25 MR. SCHRAMEK: Absolutely, Judge. It solely resides

10:52 1 within them. I can give you e-mail upon e-mail, letter upon
10:52 2 letter in which we've asked for the details. We've asked --
10:52 3 we've offered confidentiality agreements. We'll do it
10:52 4 attorney's-eyes-only. They're not giving it up. It's only in
10:52 5 their sole possession. And that's what Rule 9(b) has to do
10:52 6 about with the pleading requirement for a fraud claim.

10:52 7 You know we only can provide those allegations on
10:52 8 information and belief. What they're doing in their systems
10:52 9 and how they're calculating things and what they're counting
10:52 10 and not counting, that's solely within their possession.

10:52 11 The only other thing I'd add, Your Honor, is -- I did
10:52 12 want to make sure -- you asked about the cases. And it's
10:52 13 actually a case opposing counsel cited. It's the FIFRA,
10:52 14 Federal Insecticide and Fungicide Rodent Act [sic].

10:52 15 And they point to that and say, "See, you can compel
10:52 16 arbitration and it's under the FAA. No problem.

10:53 17 But, again, I'm asking the Court to look at -- look
10:53 18 behind what the case law says, and, you know, quotes here and
10:53 19 there, and to say, "Well, what were they doing in that
10:53 20 situation?"

10:53 21 Well, under FIFRA, FIFRA applied the AAA rules,
10:53 22 American Arbitration Association rules, in the statute. It
10:53 23 allowed discovery, opportunity to respond. There's a hearing.

10:53 24 I'll take the FIFRA procedures any day of the week.
10:53 25 That's why that case -- the court came out and said, "Oh, yeah,

10:53 1 no problem here. You know, there's -- this is a fair
10:53 2 procedure," et cetera.

10:53 3 There is no case that I've been able to locate in
10:53 4 which Congress has enacted a regime quite like this, right,
10:53 5 that would apply the FAA -- now, again, if we don't blindly
10:53 6 apply the FAA and look at the merits, Your Honor, that undue
10:53 7 means any material misrepresentation of fact.

10:53 8 THE COURT: So I guess the last question I'm going to
10:53 9 have of you right this minute, because I do need to give the
10:53 10 other side some time here -- the last question I'm going to
10:53 11 have for you is: How much of this is really a disagreement
10:54 12 with the way the law is structured, as opposed to a viable --
10:54 13 you claim in your papers that this is not an action under the
10:54 14 FAA, this is an action under the act itself, the NSA?

10:54 15 And how do I separate out what seems to be
10:54 16 dissatisfaction with the law itself, as opposed to a viable
10:54 17 cause of action in these specific cases?

10:54 18 MR. SCHRAMEK: And, Your Honor, that kind of gets
10:54 19 back to the point of the law says -- the NSA says judicial
10:54 20 review in these four circumstances.

10:54 21 As far as the amount, type, and extent of that
10:54 22 judicial review, that's an issue of first impression for this
10:54 23 Court.

10:54 24 And what we're asking this Court to do is say based
10:54 25 on the law structure, based on looking how this -- whether you

10:55 1 call it arbitration, dispute resolution, whatever -- based on
10:55 2 how it works, that judicial review has to be a little more
10:55 3 meaningful. Undue means case law doesn't -- you don't just
10:55 4 blindly apply it. The statute itself says a misrepresentation
10:55 5 means the award is no good.

10:55 6 So if you have evidence, a good-faith pleading
10:55 7 allegation of a material misrepresentation, that's going to
10:55 8 allow me, the Court, to give you some judicial review, to look
10:55 9 at what's going on, to peek behind the curtains, and to decide
10:55 10 on the merits of the case whether or not these awards are being
10:55 11 improperly secured.

10:55 12 So we do think, you know, meaningful judicial review
10:55 13 can fit within the confines of what is a process that -- sure,
10:55 14 you know, there's some issues we don't like about it. But
10:55 15 those are the issues that the Court can look at and go, All
10:55 16 right. In light of those facts, given the fact you don't get
10:55 17 to see their pleading, given the fact only they have the
10:55 18 information in their QPA, given the fact that you have this --

10:55 19 THE COURT: When you say you don't get to see their
10:55 20 pleading, what does that mean? You never get to see it, or you
10:55 21 only see it after it's submitted?

10:55 22 MR. SCHRAMEK: Never. To this day I have not seen
10:55 23 any -- all I get to see is the decision. So I -- luckily --

10:56 24 THE COURT: So wait a minute. So they submit
10:56 25 something and you submit something, but you -- you don't get to

10:56 1 see what that is?

10:56 2 MR. SCHRAMEK: That's right. So the only reason
10:56 3 we're here --

10:56 4 THE COURT: Is that the way -- I mean, is that the
10:56 5 way it's supposed to be?

10:56 6 MR. SCHRAMEK: So the statute is silent on that
10:56 7 issue. The statute doesn't say we don't get to see the other
10:56 8 side's pleadings. The statute says, "We're going to leave it
10:56 9 to the Departments to implement a process for these disputes to
10:56 10 be resolved."

10:56 11 During that process the Departments built this
10:56 12 portal, kind of like ECF. And, Your Honor, I'll be very frank.
10:56 13 Until it went live, we all wondered, "Are we going to be able
10:56 14 to see the other side's pleading when we log into this portal?"

10:56 15 It's not being done. There's no regulation that says
10:56 16 we don't get to see it. There's no statute that says we don't
10:56 17 get to see it. The Departments have simply implemented in a
10:56 18 manner to where we never see it. So that's kind of --

10:56 19 THE COURT: Have you asked them about it, or...

10:56 20 I mean, have you asked them to be able to see them,
10:56 21 or not?

10:56 22 MR. SCHRAMEK: I'm not sure, Your Honor. I don't
10:56 23 handle the administrative kind of side with the discussions
10:57 24 with CMS of my clients.

10:57 25 THE COURT: I mean, in baseball arbitration, like

10:57 1 Major League Baseball, do they get to see them? Do you know?

10:57 2 MR. SCHRAMEK: Your Honor, I'm not sure. I'm not an
10:57 3 expert on -- I don't have any baseball clients. I wish I did,
10:57 4 but...

10:57 5 THE COURT: Yeah.

10:57 6 MR. SCHRAMEK: But --

10:57 7 THE COURT: So you don't -- so you're submitting your
10:57 8 bid and they're submitting their bid. Neither one of you gets
10:57 9 to see what those are or the reasons for it. And then you get
10:57 10 this two-page cookie-cutter decision?

10:57 11 MR. SCHRAMEK: That's right.

10:57 12 THE COURT: That's the way it works?

10:57 13 MR. SCHRAMEK: That's right. Sometimes the decision
10:57 14 discloses the QPA. Sometimes it doesn't. In these examples
10:57 15 that's why we're here. It was disclosed, the QPA. And, for
10:57 16 example, like on the Kaiser case, we saw a QPA that was
10:57 17 different --

10:57 18 THE COURT: Can you ask the IDR to see it?

10:57 19 MR. SCHRAMEK: There's no process for that.

10:57 20 THE COURT: Okay.

10:57 21 MR. SCHRAMEK: And so in the Kaiser case, as I
10:57 22 mentioned, there's two QPAs at issue. And that's why we filed
10:58 23 against Kaiser. They want to say, "Oh, they're the same.
10:58 24 They're cookie-" -- "we have cookie-cutter complaints."

10:58 25 No. If you actually look at the facts, Capital

10:58 1 Health -- we have a different factual basis for being here than
10:58 2 we do for Kaiser.

10:58 3 THE COURT: Because they gave you one QPA and gave
10:58 4 them another?

10:58 5 MR. SCHRAMEK: That's right.

10:58 6 THE COURT: So do you know what the QPA is before the
10:58 7 process, because you already got it when the bill came out, or
10:58 8 not?

10:58 9 MR. SCHRAMEK: That's a whole 'nother -- you're
10:58 10 supposed to. You're supposed to. I'd say when this process
10:58 11 began, 90 percent of the times the insurers were not listing
10:58 12 the QPAs on their EOBs. It's better now, a year in. We see it
10:58 13 a lot more. But they do list it on their EOBs. They're
10:58 14 supposed to. And they're supposed to give all these statutory
10:58 15 disclaimers.

10:58 16 But what they don't do is tell you about how they
10:58 17 arrived at it or any of the details behind it. So we usually
10:58 18 get the QPA and then we go through the process.

10:58 19 But, again, many cases we don't even get the QPA.
10:58 20 Because, remember, they don't have to pay the QPA. That's kind
10:58 21 of one of the things with the No Surprises Act. You have to
10:58 22 calculate your median contract rate, but you get to pay
10:58 23 whatever you want.

10:58 24 So we get EOBs all the time where we see a payment
10:59 25 and it calls it the "allowable," whatever that means, is what

10:59 1 they've allowed, what they've unilaterally decided to pay us,
10:59 2 without any disclosure of what their QPA is.

10:59 3 THE COURT: I just went through a
10:59 4 four-and-a-half-week -- I went through it twice -- a
10:59 5 four-and-a-half-week healthcare fraud trial in this -- in this
10:59 6 courthouse.

10:59 7 And something that I probably should have known, but
10:59 8 I didn't, was that the benefits are essentially adjudicated by
10:59 9 the computer. They're not -- no human being actually, like,
10:59 10 looks at it to decide whether to pay it or how much to pay it.
10:59 11 It's all done by the computer.

10:59 12 And is that what happens here? Or are there actual
10:59 13 human beings? Or do you know -- are there actual human beings
10:59 14 that decide, "Okay. Here's the" -- "here's the QPA, but we're
10:59 15 only going to pay half of that," or whatever? Do you have any
10:59 16 way to know that?

11:00 17 MR. SCHRAMEK: The only way I have to know that, Your
11:00 18 Honor, is judicial review. And that's why we're here. I'm
11:00 19 certainly familiar with many large payers use computer systems
11:00 20 that adjudicate claims on all the insurance sides. And I've
11:00 21 been involved in cases to where we've done an internal
11:00 22 investigation, you know, as part of a market-conduct exam and
11:00 23 found errors in the software. Right?

11:00 24 If that's happening, that's a misrepresentation of
11:00 25 the QPA on these awards. And the Department's already

11:00 1 announced in one of their quarterly updates that they had found
11:00 2 payers, insurance companies, that were using ghost rates,
11:00 3 meaning they had zero dollar rates that they were feeding into
11:00 4 the system to come up with a QPA.

11:00 5 And, in fact, there's a declaration that was filed
11:00 6 with Judge Kernodle down in Texas that had a public expert that
11:00 7 looked at some Aetna claims, and they found that Aetna had air
11:00 8 ambulance rates with psychiatrists, nurses, chiropractors.

11:00 9 Now, how do you think a chiropractor who doesn't own
11:00 10 an air ambulance -- are they going to negotiate that rate? Of
11:01 11 course not. They don't care. Put whatever you want on it.
11:01 12 I'm just looking at my chiropractor code, right?

11:01 13 So that's the problem with this system, right? Do we
11:01 14 have real rates? Do we have ghost rates? Is there an error in
11:01 15 their system or are they defrauding the system? We have a
11:01 16 good-faith allegation to get behind the curtains and, through
11:01 17 discovery, to figure out what's really going on, Your Honor.

11:01 18 THE COURT: Thank you.

11:01 19 I don't have a particular preference as to who goes
11:01 20 next. I don't know if y'all talked about that among yourselves
11:01 21 or -- did you?

11:01 22 MR. KESHAVARZI: We have, Your Honor.

11:01 23 THE COURT: All right. You're it?

11:01 24 MR. KESHAVARZI: Yes, Your Honor. Thank you.

11:01 25 THE COURT: All right. And you're Kaiser, right?

11:01 1 MR. KESHAVARZI: Yes, Your Honor.

11:01 2 THE COURT: All right. Go ahead, sir.

11:01 3 MR. KESHAVARZI: Your Honor, Moe Keshavarzi for
11:01 4 Kaiser Foundation Health Plan. And I want to start first, Your
11:01 5 Honor, by thanking you for granting my pro hac vice application
11:01 6 and allowing me to appear today and speak to you.

11:01 7 THE COURT: Yes, sir.

11:01 8 MR. KESHAVARZI: So thank you for that.

11:01 9 Your Honor, if I may -- if I may just take 60 seconds
11:01 10 to just go back before the NSA. I think context matters.

11:01 11 THE COURT: Sure.

11:02 12 MR. KESHAVARZI: And I think the history matters
11:02 13 here.

11:02 14 Your Honor, in 1978 Congress passed the Airline
11:02 15 Deregulation Act. The purpose of the Airline Deregulation Act
11:02 16 was to promote competition in the airline industry -- in the
11:02 17 commercial airline industry and allow more airlines to enter
11:02 18 the market and airlines that existed to grow.

11:02 19 Air Florida was one of those entities that grew as a
11:02 20 result of the Airline Deregulation Act. And what the Airline
11:02 21 Deregulation Act, or the ADA, said was that states could pass
11:02 22 no law limiting what airlines could charge; couldn't tell
11:02 23 airlines what to do about anything.

11:02 24 One unintended consequence of the Airline
11:02 25 Deregulation Act was the air ambulance industry. Because as a

11:02 1 result of the Airline Deregulation Act, air ambulance companies
11:02 2 could charge whatever they wanted. And if they didn't get what
11:02 3 they wanted from the health plan or the insurance company, they
11:02 4 could balance-bill the patient and try to collect it from the
11:02 5 patient.

11:02 6 The legislative history of the No Surprises Act is
11:02 7 full of stories of patients whose lives were ruined as a result
11:03 8 of balance billing, significant sums.

11:03 9 And because the air -- the air ambulance industry
11:03 10 could -- the companies could charge whatever they wanted, there
11:03 11 was no incentive or desire to contract. So you had air
11:03 12 ambulance companies without a contract -- why would you
11:03 13 contract if you can charge whatever you want? -- transporting a
11:03 14 patient, sending a bill for 100,000, 200,000. There are many
11:03 15 examples higher than that.

11:03 16 And if the insurance company said, "I'm going to pay
11:03 17 you 50,000 or 40,000," they would say, "I want all of it or I'm
11:03 18 going to go after your patient."

11:03 19 And so this created a real problem. And the
11:03 20 legislative history of the NSA talks about this. States that
11:03 21 tried to limit this by passing laws that prohibited balance
11:03 22 billing or limited what air ambulance companies could charge,
11:03 23 New Mexico, California, Texas, did that. Those laws were met
11:03 24 swiftly and fiercely by lawsuits by air ambulance companies
11:04 25 challenging those laws.

11:04 1 So it's that -- if I had a chart for you that showed
11:04 2 air ambulance prices going up from 1978 to 2021 the NSA passed,
11:04 3 it would be like this. I mean, it went straight up. And it
11:04 4 was a big problem. And this is what led in part to the NSA.

11:04 5 And so what did the NSA do? If you look at the
11:04 6 history of the law, Your Honor, and the text of the statute,
11:04 7 there are really twin goals of the statute, twin aims of the
11:04 8 statute.

11:04 9 The first was no balance billing. We're going to
11:04 10 keep patients out of the middle of this. No more balance
11:04 11 billing. Goal number one.

11:04 12 Goal number two -- and this is what Your Honor was
11:04 13 alluding to, was having a dispute resolution mechanism that was
11:04 14 efficient, quick, and created a system that forced air
11:04 15 ambulance companies and health plans and insurance companies to
11:04 16 come together and contract, because the process would -- it
11:04 17 would be better to contract and more efficient to contract and
11:04 18 go through dispute resolution mechanisms.

11:04 19 The whole process was designed to -- to have a cheap,
11:05 20 inexpensive, quick, and, as Your Honor said, a retail-style
11:05 21 arbitration process.

11:05 22 For example, from the time that the health plan gets
11:05 23 the bill, they have 30 days to pay it. There's a 30-day
11:05 24 negotiation period. And then 30 days for them to -- for the
11:05 25 air ambulance company to file their IDR request.

11:05 1 The IDR entity has to render a decision within 30
11:05 2 days. The whole process is supposed to take four months.
11:05 3 There's a prohibition against batching. You can't combine a
11:05 4 bunch of claims.

11:05 5 After a decision has been rendered, there's a
11:05 6 cooling-off period, and you can't go back to the same entity
11:05 7 for a number of months.

11:05 8 So the whole process is designed to be cheap,
11:05 9 inexpensive, and to force the parties to contract and
11:05 10 incentivize the parties to contract.

11:05 11 That's what the NSA is about. And I should say that
11:05 12 during the -- while the law was being considered, there was
11:05 13 vehement opposition by the air ambulance industry to the law.
11:05 14 And the moment it was passed there were lawsuits filed
11:05 15 challenging it.

11:05 16 So there has always been a concerted effort to
11:06 17 undermine the law before it was passed and after it was passed.
11:06 18 And I respectfully submit that this lawsuit and those like it
11:06 19 that are filed in Texas are part of that concerted effort to
11:06 20 undermine the law.

11:06 21 And, really, Your Honor, the --

11:06 22 THE COURT: Who are the plaintiffs out in Texas?

11:06 23 MR. KESHAVARZI: They're GMR subsidiaries. GMR is a
11:06 24 parent company of REACH Air. And they're --

11:06 25 THE COURT: So it's the airline industry that's the

11:06 1 plaintiffs?

11:06 2 MR. KESHAVARZI: It's airline -- air ambulance
11:06 3 companies, Your Honor. Well, I'm not sure which Texas case --

11:06 4 THE COURT: You're talking about the one that
11:06 5 Judge Kernodle keeps having to -- to find that the regulations
11:06 6 aren't right.

11:06 7 MR. KESHAVARZI: Oh, okay. That one I -- I'm not
11:06 8 sure whether it's an industry group or air ambulance companies,
11:06 9 but I thought you were talking about the other cases that are
11:06 10 pending in Texas.

11:06 11 THE COURT: Because there's other cases a little
11:06 12 similar to this one, too.

11:06 13 MR. KESHAVARZI: There are. There are. There are.
11:06 14 Yes, Your Honor.

11:06 15 THE COURT: And who is that in front of? And has he
11:06 16 or she done anything yet?

11:06 17 MR. KESHAVARZI: Yes, Your Honor. Let me just -- I
11:06 18 don't have the judge's name.

11:06 19 MR. SCHRAMEK: Judge Alfred Bennett.

11:07 20 THE COURT: What court is it in?

11:07 21 MR. SCHRAMEK: Southern District of Texas, Houston.

11:07 22 THE COURT: Houston. Okay. And what's the status of
11:07 23 the case?

11:07 24 MR. KESHAVARZI: There's some matters under
11:07 25 submission. I know there hasn't been a rule on the Kaiser

11:07 1 matter there. There has been some orders that have been
11:07 2 issued.

11:07 3 THE COURT: Okay.

11:07 4 MR. KESHAVARZI: So, Your Honor, that NSA background,
11:07 5 that's the background against which we stand here today.

11:07 6 THE COURT: Well, if I were to just -- I hear you.
11:07 7 And what -- if I were to say to you that the -- the problem
11:07 8 that Congress was trying to address was here, and that Congress
11:07 9 tried to address the issue to bring it back to -- to a median,
11:07 10 and that the way it's being implemented and applied by the
11:07 11 insurance companies has brought it back over this way, so now
11:08 12 instead of it being all -- all in favor of the air transport
11:08 13 companies, now it's just all in favor of the insurance
11:08 14 companies -- if I were to say that to you, and the way -- that
11:08 15 the way that the insurance companies are handling it, the way
11:08 16 the process is set up, it's -- that's what's happening, what
11:08 17 would you say to me?

11:08 18 MR. KESHAVARZI: I wholeheartedly disagree, Your
11:08 19 Honor. When we were here in January, counsel was telling you
11:08 20 how they win most of these IDRs.

11:08 21 So this notion that, you know, they're about to go
11:08 22 out of business because of these IDRs is just not true, Your
11:08 23 Honor. And they told you themselves that they're winning them.

11:08 24 CMS -- there are two bases for audit by CMS. There's
11:08 25 a mandatory audit that CMS must do. It's built in the law.

11:08 1 Every year CMS must audit the QPA calculation of 25 insurance
11:08 2 company or health plans. That's a mandatory audit. There's
11:09 3 also a permissive audit that's unlimited in number.

11:09 4 So upon a complaint by an air ambulance company, CMS
11:09 5 can audit the health plan. And as somebody who represents
11:09 6 health plans in this area, Your Honor, I can tell you that GMR
11:09 7 and its subsidiaries are prolific filers of complaints with
11:09 8 CMS. And CMS is asking, indeed, questions of health plans
11:09 9 about their QPA calculations.

11:09 10 This notion that these health plans are committing
11:09 11 fraud, Your Honor, fraud -- they have a license from CMS to
11:09 12 sell coverage and they're committing fraud when CMS can audit
11:09 13 them -- I respectfully submit, Your Honor, that that's just not
11:09 14 the case. There's no evidence of it presented to you. And if
11:09 15 there is anything going on, CMS is well-equipped and positioned
11:09 16 to address the issue.

11:09 17 And if there are shortcomings in the law, well,
11:09 18 that's a basis for them to file a constitutional challenge to
11:09 19 the law, not to try to modify the existing arbitration process.

11:09 20 I want to talk for a moment, Your Honor, about the
11:09 21 case law that they cited, this idea that, "Well, Congress
11:10 22 created a right and, therefore, there must be a remedy for that
11:10 23 right, that there must be" -- "there must be some sort of
11:10 24 judicial proceeding that allows for discovery, because they
11:10 25 cannot have created this right without creating a judicial

11:10 1 remedy in discovery."

11:10 2 Your Honor, that is exactly what happened in the
11:10 3 *In re Motors Liquidation* case, where -- this is a case that we
11:10 4 cited. This is in Kaiser's reply brief, Your Honor, at page 3.
11:10 5 I know the other plans cited it as well.

11:10 6 And what -- and in that case Congress created a
11:10 7 remedy and a mandatory arbitration process, but did not allow
11:10 8 for any judicial review. And there was a challenge to that
11:10 9 law.

11:10 10 They said, as REACH Air argues, it cannot be that
11:10 11 Congress created a right without a remedy without judicial
11:10 12 review. And what the Court said is that where Congress creates
11:10 13 a new statutory right, Congress has the authority to decide the
11:10 14 method for the protection of that right.

11:10 15 And Congress was free to mandate arbitration of the
11:10 16 right and completely prescribed judicial review, which is what
11:11 17 happened in that case.

11:11 18 THE COURT: It did kind of raise my antenna a little
11:11 19 bit when I found out that -- I mean, I understand retail
11:11 20 arbitration, but it is -- it is -- it seems a little odd that
11:11 21 you file these things with an arbitrator who, from all I can
11:11 22 tell, is an unnamed person -- you know, it would be interesting
11:11 23 to know who is actually sitting around doing these things,
11:11 24 but -- that neither side gets to see the other side's stuff --
11:11 25 that seems awful odd, doesn't it?

11:11 1 MR. KESHAVARZI: Your Honor, the -- the statute
11:11 2 itself doesn't talk about the specific process. CMS was
11:11 3 empowered to promulgate regulations that talk about that
11:11 4 process and who gets to see what and how that works. Those are
11:12 5 the regulations that are being challenged. Again, if --

11:12 6 THE COURT: When you say regulations are being
11:12 7 challenged, are they being challenged in this suit or are they
11:12 8 being challenged somewhere else?

11:12 9 MR. KESHAVARZI: This is the Texas litigation that I
11:12 10 was talking about. So there is -- if they're unhappy with the
11:12 11 way the IDR process is set up, if there's a due process
11:12 12 challenge to that, well, you know, they can take that up in an
11:12 13 appropriate court with an appropriate claim.

11:12 14 But the whole -- and I go back to what the whole
11:12 15 purpose of the law was, Your Honor, which is -- the purpose of
11:12 16 the law is to have this efficient, quick, and to -- process
11:12 17 where parties are incentivized to come together and negotiate.
11:12 18 And Congress had the right to do that, Your Honor. And not
11:12 19 only is that --

11:12 20 THE COURT: And how often is that negotiation
11:12 21 working?

11:12 22 MR. KESHAVARZI: Well, Your Honor, here's the
11:12 23 problem. As a result of the history of the NSA -- the pre-NSA
11:12 24 world that I told you, and as a result of the private equity
11:12 25 companies getting into the airline -- air ambulance industry,

11:12 1 there are -- most of the air ambulance companies in the United
11:13 2 States are owned by three companies, GMR, PHI, and Air Methods,
11:13 3 right?

11:13 4 So that has created challenges in terms of
11:13 5 negotiations. You know, I can tell you anecdotally, because
11:13 6 I'm involved with some of those negotiations, that there are
11:13 7 negotiations happening with some of those entities and some of
11:13 8 their subsidiaries in certain jurisdictions.

11:13 9 Has the process been perfect? No. But this kind of
11:13 10 pain that they complain about -- and I can sit here and tell
11:13 11 you about all the things I want to know about, their profit
11:13 12 structure and cost structure and how much money they're making,
11:13 13 and how much their executives are getting paid that I'd want to
11:13 14 know in discovery that I don't know when I submit my IDR --
11:13 15 those pains are supposed to be -- they're not bugs. They're
11:13 16 features of the system. They're supposed to be --

11:13 17 THE COURT: They're supposed to incentivize you to
11:13 18 work it out so that you don't -- you don't have --

11:13 19 MR. KESHAVARZI: Absolutely.

11:13 20 THE COURT: The arbitration is designed to be a --

11:13 21 MR. KESHAVARZI: Discouraged.

11:13 22 THE COURT: -- a poor substitute, essentially. It's
11:13 23 the -- it's the last resort of those who could not agree
11:13 24 reasonably?

11:14 25 MR. KESHAVARZI: It's punishment if you can't agree

11:14 1 to it. Absolutely. And, Your Honor, I'd also want to cite on
11:14 2 this point of whether Congress can limit the right of review --
11:14 3 that's the *Thomas versus Union Carbide* case.

11:14 4 That's a Supreme Court case, Your Honor, where the
11:14 5 court -- where the Supreme Court said Congress "may create a
11:14 6 seemingly 'private' right that is so closely integrated into a
11:14 7 public regulatory scheme as to be a matter appropriate for
11:14 8 agency resolution with limited involvement by the Article III
11:14 9 judiciary."

11:14 10 That's the Supreme Court talking about the limited
11:14 11 judiciary review under the pesticide law that they were citing
11:14 12 to. So --

11:14 13 THE COURT: Well, let me ask you this. There is some
11:14 14 judicial review, right, that -- it says that it's limited to
11:14 15 the arbitration act. I have two questions.

11:14 16 One is: So how do you -- and I'm assuming you're
11:14 17 speaking for everyone, but if not, somebody will tell me.

11:14 18 How do you read this section that -- and I -- it's
11:15 19 too long to quote which subsection it is. But the -- the
11:15 20 section that says, "The determination of a certified IDR entity
11:15 21 under subparagraph (a)" -- and then there's this number (1).
11:15 22 And then there's number (2).

11:15 23 And number (2) says, "Shall not be subject to
11:15 24 judicial review except in a case described under the (1)
11:15 25 through (4) of the FAA."

11:15 1 So what -- how do you -- what does number (1) mean in
11:15 2 terms of judicial review?

11:15 3 And, number two, if, for example, a insurance company
11:15 4 has a flawed process for coming up with its -- with its QPA --
11:15 5 is that the right term? -- they -- is this designed to get at
11:15 6 that, or not?

11:16 7 MR. KESHAVARZI: A couple of responses to that, Your
11:16 8 Honor. Number one, there's a brief that the United States
11:16 9 filed for you over the weekend. And there is great discussion
11:16 10 in that brief about what this section means.

11:16 11 And one of the things that the United States talks
11:16 12 about in their brief -- and this is something that the plans
11:16 13 that are before you today have also talked about -- is that
11:16 14 this section shall not be subject to this judicial review
11:16 15 except as paragraphs (1) through (4) -- is a divestiture of
11:16 16 jurisdiction except in a narrow circumstance, right?

11:16 17 What it's saying is that -- it's not like there's a
11:16 18 broad right or ability or private right of action. There's
11:16 19 this narrow basis for review. And it's limited as set forth in
11:16 20 the Federal Arbitration Act.

11:16 21 So that's one answer to Your Honor. And I'm going to
11:16 22 talk about one thing for a moment before I go back to the -- to
11:16 23 the next question you had, Your Honor, because I think this is
11:16 24 responsive to your question.

11:16 25 And I think it's -- what's really important here is

11:16 1 that when it says "subject to judicial review under section 1
11:16 2 through 4," putting aside what "judicial review" means, it
11:16 3 certainly means through a motion and not a complaint, a motion
11:17 4 and not a complaint.

11:17 5 That matters -- as the *O.R. Securities* case from the
11:17 6 Eleventh Circuit has told us, it matters because how the
11:17 7 parties appear in court -- it matters in terms of burden, in
11:17 8 matters in terms of what discovery you get, it matters in terms
11:17 9 of what happens, and who must file what.

11:17 10 So they were required, Your Honor, to file a motion.
11:17 11 And how do we know that? Because the FAA in section 6 says
11:17 12 that this judicial review that has been incorporated is to be
11:17 13 done through a motion, not a complaint.

11:17 14 THE COURT: Well, I'm not convinced, though, that
11:17 15 Congress -- by just citing this provision here, that Congress
11:17 16 meant to incorporate the entire FAA into this -- into this
11:17 17 process. I mean, it's not altogether clear, but I -- why do
11:17 18 you think it does?

11:17 19 MR. KESHAVARZI: Several answers, Your Honor. And
11:17 20 I'm going to read for you from the *Cheminova* case, which
11:18 21 said -- this involved FIFRA, the insecticide case that we
11:18 22 were -- the pesticide case. And in that case the statute
11:18 23 doesn't even mention -- doesn't even mention the FAA.

11:18 24 And what the court in that case -- it's still
11:18 25 borrowed, because it talked about arbitration. With respect to

11:18 1 judicial review, the court borrowed and used the FAA
11:18 2 mechanisms.

11:18 3 And what the court said is, "This Court must assume
11:18 4 that absent indication to the contrary, Congress intended for
11:18 5 FIFRA arbitrations to fit within the existing arbitration law."

11:18 6 That's what the court said in the *Cheminova* case that
11:18 7 we cited.

11:18 8 In *O.R. Securities* it involved an NASD arbitration.
11:18 9 NASD says nothing about the FAA. And the Eleventh Circuit said
11:18 10 that that complaint should be dismissed, because they had filed
11:18 11 a complaint challenging an NASC arbitration rather than the
11:19 12 motion.

11:19 13 And what the Eleventh Circuit Court of Appeals said,
11:19 14 Your Honor, is that, "No, no, no, the FAA governs," even though
11:19 15 NASC doesn't talk about the FAA. "And under the FAA you were
11:19 16 required to file a motion."

11:19 17 THE COURT: If you could just slow down just a little
11:19 18 bit for me, sir.

11:19 19 MR. KESHAVARZI: Sure.

11:19 20 THE COURT: Go ahead.

11:19 21 MR. KESHAVARZI: That *O.R. Securities* point is
11:19 22 important. I want to make sure -- so the Eleventh Circuit in
11:19 23 *O.R. Securities* -- I'm sorry I'm going fast. I'm three hours
11:19 24 behind so I had to drink a lot of coffee this morning.

11:19 25 THE COURT: Well, I can probably listen to you in

11:19 1 that speed, but it's a little hard for Ms. Bishop to get you
11:19 2 down in that speed.

11:19 3 So go ahead.

11:19 4 MR. KESHAVARZI: I've been yelled at by a lot of
11:19 5 court reporters.

11:19 6 What the Eleventh Circuit said in the *O.R. Securities*
11:19 7 case is that -- that case involved an NASC arbitration. The
11:19 8 NASC does not talk about the Federal Arbitration Act; doesn't
11:19 9 mention it; doesn't even incorporate it; doesn't say anything
11:19 10 about it.

11:19 11 And in that case, an NASC arbitration was challenged
11:19 12 through a complaint, as plaintiffs are doing here. And the
11:19 13 Eleventh Circuit said, "No, the FAA says you bring a motion,
11:19 14 not a complaint."

11:20 15 But here's another point, Your Honor, that I think --
11:20 16 if you believe that all Congress did was incorporate section
11:20 17 10(a), which is what they're saying, then there is another
11:20 18 reason for you to dismiss this complaint.

11:20 19 If you look at the complaint -- it's paragraph 39 in
11:20 20 the Kaiser complaint. In some of the other complaints it's
11:20 21 paragraph 38 -- what is a remedy they ask of Your Honor? The
11:20 22 remedy they ask of you is to order a rehearing.

11:20 23 There's nothing in section 10(a), which is, according
11:20 24 to them, the only section that incorporated into the NSA --
11:20 25 there's nothing in 10(a) that allows for a rehearing. All it

11:20 1 says is that in the following cases the court may vacate the
11:20 2 award. It doesn't say there can be a rehearing. The rehearing
11:20 3 authority comes from 10(b). Not 10(a). 10(b).

11:20 4 And their view is Congress only said 10(a); only
11:20 5 10(a) is incorporated. Okay?

11:20 6 Same with venue. Your Honor, if Congress only
11:20 7 incorporated 10(a), we're in the wrong venue. Because venue
11:21 8 comes from 10(c), not from 10(a).

11:21 9 So it cannot be that Congress only incorporated 10(a)
11:21 10 when it invoked the FAA. The Court must conclude, I
11:21 11 respectfully submit, that, as in the *Cheminova* court, that
11:21 12 Congress was not writing on a blank slate when it talked about
11:21 13 arbitrations, that Congress was intending for this process to
11:21 14 operate within the existing law.

11:21 15 Let me give you another example, Your Honor. If the
11:21 16 FAA was not incorporated except for section 10(a), what
11:21 17 prohibits them, or us, from coming to you -- there's a
11:21 18 provision in section 12 of the Federal Arbitration Act that
11:21 19 says a judicial review must be done within 90 days, right?
11:21 20 According to them, that's not incorporated, because that's --
11:21 21 only 10(a) is incorporated.

11:21 22 If that's right, Your Honor, and all Congress did was
11:21 23 incorporate 10(a), what prevents them, or us, from coming to
11:22 24 you ten years from now and saying, "Judge, ten years ago there
11:22 25 was some arbitrations that I'm really unhappy about and I want

11:22 1 to appeal them"?

11:22 2 What limits the time within which a challenge can be
11:22 3 brought? Okay?

11:22 4 And -- and the *Cheminova* case is really interesting,
11:22 5 Your Honor. In that case -- again, under FIFRA arbitrations,
11:22 6 FIFRA does not mention the Federal Arbitration Act at all. And
11:22 7 the aggrieved party in that case, in *Cheminova*, filed their
11:22 8 judicial review motion outside of 90 days.

11:22 9 And what the court said there -- said, "Look, the law
11:22 10 doesn't talk about the FAA. We don't think Congress wrote
11:22 11 against -- on a blank slate. It operates within the FAA. FAA
11:22 12 requires 90 days. Therefore, you should have brought it within
11:22 13 90 days."

11:22 14 So we respectfully submit, Your Honor, that Congress
11:22 15 did not and could not have only incorporated section 10(a).

11:23 16 That --

11:23 17 THE COURT: All right. I'll -- I'll let you talk --
11:23 18 I mean, I'll let you assume that for purposes of my next
11:23 19 question.

11:23 20 MR. KESHAVARZI: Okay.

11:23 21 THE COURT: What does number (1) mean? It has to
11:23 22 mean something. What does it mean? Does it provide an
11:23 23 additional grounds for review? Does it just -- what does it
11:23 24 provide?

11:23 25 And, number two, even if -- even if we have the

11:23 1 accoutrements of the FAA, in terms of procedure, would a --
11:23 2 let's just say -- assuming arguendo, would a fraudulent
11:23 3 calculation of the QPA -- would that subject the award -- if
11:23 4 that could be shown, would that subject the award to being
11:23 5 vacated?

11:23 6 MR. KESHAVARZI: Your Honor, when you say what number
11:23 7 (1) means, are you -- are you saying number (1) as in the
11:23 8 number (1) under the statute, or are you saying what does this
11:24 9 (a) through (4) mean?

11:24 10 THE COURT: No. What I mean is: What does it mean
11:24 11 when it says shall be binding upon the parties, in the absence
11:24 12 of a fraudulent claim or evidence of misrepresentation of facts
11:24 13 presented to the IDR entity?

11:24 14 What -- that says what it says.

11:24 15 MR. KESHAVARZI: Yes. I understand the question.

11:24 16 THE COURT: But what do you do with?

11:24 17 MR. KESHAVARZI: I understand your question. I
11:24 18 think --

11:24 19 THE COURT: So, for example, if -- the way I would
11:24 20 read that is if an insurance company submits a fraudulent QPA
11:24 21 to the IDR entity, then this -- this seems like it says that's
11:24 22 unlawful. Does it provide -- can somebody come into a federal
11:24 23 court and assert that, or not?

11:24 24 MR. KESHAVARZI: Your Honor, what I believe the
11:24 25 statute does -- what we submit the statute does is that they

11:24 1 incorporate the body of law under the FAA. And so what the
11:24 2 body of law talks about is that -- the number one purpose of
11:24 3 arbitration is finality. You know, there are these protections
11:24 4 built in.

11:25 5 And so if there is evidence of fraud, but -- but not
11:25 6 something that can be construed as potentially a mistake that
11:25 7 they're construing as fraud -- true evidence of fraud, some --
11:25 8 and if you look at the case law under -- under the FAA, these
11:25 9 petitions, motions challenging an award by an arbitrator based
11:25 10 on a fraud or undue influence, are truly extreme cases. These
11:25 11 are not -- you know, I can stand here and --

11:25 12 THE COURT: Well, I -- I agree with you. I'm
11:25 13 familiar enough -- I mean, I -- we have a lot of arbitration
11:25 14 cases. I'm familiar that it's darn near impossible to get an
11:25 15 arbitration award vacated under the FAA. It's really, really
11:25 16 hard.

11:25 17 And what I'm asking you is: Does this addition of
11:25 18 (a)(1) -- does that add a potential ground that would be of the
11:26 19 more typical fraud claim, like -- like a fraudulent QPA? Does
11:26 20 that add anything to what judicial review is allowed?

11:26 21 MR. KESHAVARZI: Your Honor, we submit that -- that
11:26 22 the way the statute operates is that it is not -- (2) gives --
11:26 23 there's nothing about fraudulent claim or evidence of
11:26 24 misrepresentation that's different than -- than (2), because
11:26 25 what it -- it says it's binding, and then it shall not be

11:26 1 subject to judicial review.

11:26 2 So the only way you can even walk through the doors
11:26 3 of the courthouse is under (2). So it doesn't say that (1) --
11:26 4 admittedly, it's not -- as Your Honor noted earlier, this is
11:26 5 not a model of draftsmanship. But one has to look at: What is
11:26 6 the basis for judicial review?

11:26 7 And what it says is "shall not be subject to judicial
11:27 8 review unless," except. And I think that's clear. So it --
11:27 9 and I think that gives --

11:27 10 THE COURT: All right. Well, let me ask you this
11:27 11 way. Assume arguendo that a hypothetical insurance company --
11:27 12 certainly not your client, I'm sure, but -- is -- is creating
11:27 13 fraudulent QPAs so that they can get them submitted to the IDR
11:27 14 entity, and that will influence the awards in their favor, and
11:27 15 that they either made them up or they borrowed from somebody
11:27 16 they shouldn't have, or they just -- just said, "All right.
11:27 17 Here's the real QPA, but we're going to cut it 50 percent. And
11:27 18 we're going to tell them that's what the QPA is" -- if any of
11:27 19 that was happening and it was intentional, and that got
11:27 20 submitted to an IDR entity, and the IDR based the decision on
11:27 21 fraudulent information, is any of that conduct actionable in
11:28 22 a -- in a court? Can that be reviewed by a court, or not?

11:28 23 MR. KESHAVARZI: If it was filed as a motion, and if
11:28 24 there was evidence of fraud or undue means such that it meets
11:28 25 the burden set forth under the Federal Arbitration Act, that's

11:28 1 what the statute says. But it would have to be evidence with a
11:28 2 motion sufficient to meet the standards under the Federal
11:28 3 Arbitration Act.

11:28 4 And this is really important, Your Honor. There has
11:28 5 been a lot of confusion -- the -- the CMS has recognized this.
11:28 6 And there's been a lot of press on this about the calculation
11:28 7 of the QPA.

11:28 8 So when they stand here and they say "fraud," because
11:28 9 they used this contract and not that contract, I can tell you
11:28 10 that -- that this -- how you calculate the QPA -- there was
11:28 11 a -- the statute is almost in a foreign language, Your Honor.

11:28 12 It is not clear how health plans are supposed to
11:28 13 calculate the QPA. So health plans go to CMS, ask for
11:28 14 guidance, and CMS comes with some guidance. They issue
11:29 15 regulations. The regulations get challenged. Additional
11:29 16 regulations get submitted.

11:29 17 So, you know, just because somebody's reported a QPA
11:29 18 with which they disagree, that doesn't mean it's fraud. Right?

11:29 19 THE COURT: Well, but how -- how are you going to
11:29 20 know that? In other words, you -- I mean, that could be a
11:29 21 conclusion you reach at the end of it, but it -- you're saying
11:29 22 what, that they would have to file a proper motion -- they
11:29 23 would have to file essentially a motion to vacate under the FAA
11:29 24 in order to get that in front of a court, and that motion
11:29 25 itself would have to have enough in it to -- to require the

11:29 1 court to proceed?

11:29 2 MR. KESHAVARZI: Right. Your Honor, if -- if -- how
11:29 3 does a party get that evidence in a private arbitration? I
11:29 4 mean, it's not -- evidence of fraud is not -- is not -- someone
11:29 5 is always going to be able to argue to you, "Well, it's
11:29 6 difficult for me to get evidence of fraud. Why don't you lower
11:30 7 the burden for me to get into court?"

11:30 8 But the FAA makes it clear, and the *O.R. Securities*
11:30 9 case make it clear, that, you know, under the FAA it has to be
11:30 10 a motion and it has to be with evidence.

11:30 11 I'll give you an example of what could be fraud. One
11:30 12 way I could verify fraud is -- you know, Kaiser has records of
11:30 13 how its patients -- how far its patients were transported. If
11:30 14 we get a bill from the air ambulance company and, you know, we
11:30 15 look at the bills and we see that they're billing for
11:30 16 additional mileage, for example, or they're billing for
11:30 17 returning the airplane empty back to the airport, you know,
11:30 18 maybe that's evidence of fraud.

11:30 19 So it -- the evidence of fraud is not -- QPA is not
11:30 20 necessarily what Congress had in mind. There's no evidence
11:30 21 that's been submitted to you that what Congress was talking
11:30 22 about with this exception -- narrow exception for judicial
11:30 23 review was a calculation of the QPA.

11:30 24 Again, they can go to CMS and say, "Please review the
11:30 25 health plan's QPA."

11:30 1 And the health plan's relationship with CMS is
11:31 2 sacrosanct. It gives them the reason --

11:31 3 THE COURT: So why isn't -- why isn't this problem
11:31 4 solved -- this is maybe beyond the case, but I'm going to ask
11:31 5 it anyway.

11:31 6 Why isn't this problem solved by having the air
11:31 7 transport companies in network?

11:31 8 MR. KESHAVARZI: Well, Your Honor, I think the
11:31 9 problem is solved by having the air ambulance companies in
11:31 10 network. But being in network means having a contract, right?
11:31 11 And I'll tell you -- you know, this is outside of --

11:31 12 THE COURT: That's all right. I asked. You can go
11:31 13 ahead.

11:31 14 MR. KESHAVARZI: But I -- but I think there is --
11:31 15 what happened was -- you know, this was kind of a tectonic --
11:31 16 January 1, 2022, was a tectonic shift in the relationship
11:31 17 between plans and air ambulance companies.

11:31 18 Respectively -- and I don't mean this pejoratively,
11:31 19 but air ambulance companies are holding on to those glory days
11:32 20 of pre-NSA, where they could charge whatever they want.

11:32 21 And health plans want to see the -- what I would call
11:32 22 salutary effect of the NSA. So prices are lowered. And I
11:32 23 think there has to be a little bit of this tug and -- tug of
11:32 24 war through the arbitration process -- we win some/you lose
11:32 25 some -- until the parties come together.

11:32 1 I can -- again, outside of the record, I can see that
11:32 2 process is working itself out. I mean, this -- the -- we're
11:32 3 still, I think, looking -- looking into the future when we look
11:32 4 back -- these are the early days of the NSA still. And I think
11:32 5 the problem -- it's going to work itself out. And I think
11:32 6 this -- again, I'm going to repeat myself. But this mess, I
11:32 7 suspect, is a feature, not a bug. This is what -- they were
11:32 8 hoping that this kind of chaos would bring the parties
11:32 9 together.

11:32 10 THE COURT: Because I read some -- I think the
11:32 11 government, in their brief, maybe -- somebody said they've --
11:32 12 the number of adjudications has just -- has been way, way, way
11:33 13 more than anybody ever could have possibly imagined, right?

11:33 14 MR. KESHAVARZI: Well, yeah. So -- so this is the --

11:33 15 THE COURT: I mean, it's amazing that Mr. Fackler's
11:33 16 client -- I mean, I don't know how many of these things they
11:33 17 have. But based on the adjudications, it probably has not
11:33 18 taken them a whole lot of time per -- per claim, that's for
11:33 19 sure. But -- so you're saying right now -- so what it sounds
11:33 20 to me, like, the whole system is under stress. Is that
11:33 21 accurate?

11:33 22 MR. KESHAVARZI: I would say that's an
11:33 23 understatement, Your Honor. And let me -- and this goes back
11:33 24 to -- counsel used the word "waterfall." I'm going to call it
11:33 25 flood gates.

11:33 1 According to CMS, in the third quarter of 2022 alone,
11:33 2 in the third quarter alone, there were approximately, if I'm
11:33 3 not mistaken, 70,000 IDR submissions. Okay?

11:33 4 GMR, the parent company of REACH, is responsible for
11:34 5 just under half of those. Okay?

11:34 6 So, Your Honor, I can stand here -- and if the
11:34 7 standard for review -- judicial review is what REACH claims it
11:34 8 is, I can file a complaint saying, you know, the information
11:34 9 they provided to the air ambulance company -- to the IDR
11:34 10 company could not possibly -- could not possibly have been
11:34 11 proper, and I want to go to court and do discovery to see what
11:34 12 they're telling the air ambulance company.

11:34 13 I mean, if Your Honor says that the threshold for
11:34 14 judicial review is as low as they want it to be, Your Honor --
11:34 15 this is not a parade of horrors. They're going to do it,
11:34 16 and -- and health plans will do it, because you can go to court
11:34 17 and do discovery. And I would love to do discovery on the air
11:34 18 ambulance company side, as I said earlier.

11:34 19 And so the -- the -- the federal courthouse is going
11:34 20 to be inundated with complaint after complaint, challenging,
11:34 21 trying to vacate arbitration awards by air ambulance companies
11:34 22 and by health plans. That's not what Congress meant.

11:34 23 And this is really -- if you read the legislative
11:35 24 history and the text of the NSA, Your Honor, one fact is
11:35 25 inescapable. One cannot walk away from it believing this.

11:35 1 And I think what Congress intended to do was create
11:35 2 an efficient, quick, inexpensive process. The notion that
11:35 3 somehow silently, without saying so, Congress allowed for
11:35 4 complaints to be filed, created a private right of action to
11:35 5 allow for complaints to be filed in federal court with the full
11:35 6 rights of discovery is completely contrary to that, completely
11:35 7 contrary to this process of limited arbitrations.

11:35 8 In their view those arbitrations are an
11:35 9 administrative remedy that must be exhausted before you get to
11:35 10 court, a weigh station that you just go through before you come
11:35 11 into court.

11:35 12 And if that position is adopted, Your Honor, that's
11:35 13 precisely what's going to happen. Because writing a complaint
11:35 14 that gets you to court and gets you past 12(b)(6), similar to
11:36 15 those allegations that they have, is not difficult. And, like
11:36 16 I said, I can put a complaint together that says that.

11:36 17 THE COURT: All right. I'm going to -- I don't know
11:36 18 what your allocation is here, but we're not -- we don't have
11:36 19 unlimited time. So if y'all --

11:36 20 MR. KESHAVARZI: I understand.

11:36 21 THE COURT: If y'all -- if other people have things
11:36 22 to say, we probably need to let them do that. If you have a --
11:36 23 a great last point you want to make, go ahead.

11:36 24 MR. KESHAVARZI: All my great points are out.

11:36 25 THE COURT: All right. Thank you.

11:36 1 MR. KESHAVARZI: Your Honor, thank you very much for
11:36 2 your time. I really appreciate it.

11:36 3 THE COURT: Thank you.

11:36 4 Who's next?

11:36 5 And, of course, the advantage of going second is you
11:36 6 get to go second. The disadvantage is I'm going to ask you not
11:36 7 to -- to completely repeat what's been said. We're going to
11:36 8 have to move this along a little more. All right?

11:36 9 MR. SMITH: I understand, Your Honor. Ruel Smith for
11:36 10 Capital Health Plan, Incorporated.

11:36 11 I want to give you a little information about Capital
11:37 12 Health Plan. Plaintiff's counsel remarked that it was unusual
11:37 13 to see two Blue entities in one state. Perhaps it's because
11:37 14 Capital Health Plan is a little unique among the plans here.

11:37 15 It was formed over 40 years ago to create a quality
11:37 16 affordable health care system, delivered at -- mostly to
11:37 17 government employees. So in the seven counties where Capital
11:37 18 Health Plan operates, almost every primary member is an
11:37 19 employee of the state government.

11:37 20 For those reasons, Capital Health Plan prides itself
11:37 21 on administrative efficiency in an attempt to provide best
11:37 22 service for those consumers, because often, unfortunately,
11:37 23 government employees are paid a little below the average income
11:37 24 for people in the community.

11:37 25 In this case the -- the Capital Health Plan patient

11:38 1 was transported from Tallahassee to Orlando. And we went
11:38 2 through the open negotiation process and then the IDR process.
11:38 3 And the IDR entity, C2C, selected Capital Health Plan's offer.

11:38 4 Now, I wanted to --

11:38 5 THE COURT: So are you -- are you the one that had
11:38 6 two different QPAs, or not?

11:38 7 MR. SMITH: No, Your Honor. That allegation, at
11:38 8 least, is as to Kaiser.

11:38 9 THE COURT: Okay.

11:38 10 MR. SMITH: The allegation as to Capital Health --

11:38 11 THE COURT: I forgot to ask about that, but go ahead.

11:38 12 All right. Go ahead.

11:38 13 MR. SMITH: As I understand what plaintiff is
11:38 14 contending about Capital Health is that it has a limited
11:38 15 geographic area. And plaintiff constitutes a large portion of
11:38 16 the air ambulance services that are available.

11:38 17 And so in a sort of supposition almost, plaintiff
11:38 18 says they can't possibly have three fixed-wing contracts. And
11:38 19 I'm not telling you that there's a factual dispute about --
11:39 20 what I'm -- it doesn't matter.

11:39 21 Because that sort of supposition, speculation, that
11:39 22 can't be the basis for vacatur of an arbitration award. The --
11:39 23 the reason that arbitration awards are initiated by motion, and
11:39 24 why you've got to bring everything -- bring everything out --
11:39 25 out up front, if you will -- you have the immediate burden if

11:39 1 you're the one seeking to vacate an arbitration award.

11:39 2 That's why it -- it's important because that burden
11:39 3 is with the party seeking to vacate. It never moves to the
11:39 4 party defending an arbitration award.

11:39 5 That's why the motion/complaint distinction is
11:39 6 important. It's not notice pleading. They've got to come out
11:39 7 and demonstrate. And they've got to come out and demonstrate
11:39 8 with evidence that reaches the clear and convincing standard.

11:39 9 And it can't be: We -- we don't see how it could be
11:39 10 the way they say it is. That's not evidence. That's
11:40 11 supposition. That's speculation. So that is the reason that
11:40 12 allegation doesn't reach the level of -- of sufficiency to
11:40 13 vacate this award.

11:40 14 I'd like to move on to a couple of additional points
11:40 15 here. There's another reason why Your Honor can look at why --
11:40 16 why it needs to be a motion that's entirely separate from the
11:40 17 FAA or the NSA. And that's that Federal Rule of Civil
11:40 18 Procedures 81 governs which rules apply in certain types of
11:40 19 proceedings.

11:40 20 And as we -- a lot of us are familiar with it because
11:40 21 it talks about which rules apply in removed actions. But it
11:40 22 also discusses which rules apply in an action under Title 9 of
11:40 23 the U.S. Code, which is exactly where 10(a) is that the NSA
11:40 24 incorporates the FAA from.

11:41 25 So in a way, Rule 81 incorporates the FAA into the

11:41 1 judicial review paragraph that is set forth in the NSA. And
11:41 2 there is also the matter of Federal Rule of Civil Procedure
11:41 3 7(b), which governs requests for a court order.

11:41 4 And what are you being asked to do here, Judge?
11:41 5 You're being asked to vacate the award, make some declarations,
11:41 6 and direct that the IDR entity rehear the entire dispute.

11:41 7 That's a request for an order that under the Federal
11:41 8 Rules of Civil Procedure has to be made by a motion. And it's
11:41 9 got to be supported properly.

11:41 10 And it doesn't -- that standard matters, because they
11:41 11 had the burden to show you that right up front, not to come
11:41 12 here and say, "We get discovery and then we get to show you."

11:41 13 So for all of those reasons, the motion distinction
11:41 14 is important and the standard applies.

11:42 15 Now, plaintiff has argued that this can't be -- or
11:42 16 that -- that the Court needs to graft some additional judicial
11:42 17 review due process protections on to the IDRE process.

11:42 18 You heard from Kaiser's counsel how, no, just because
11:42 19 it's not voluntary, just because it's a compelled arbitration,
11:42 20 there is still the ability of Congress to make a -- to provide
11:42 21 a regime that calls for binding arbitration for which judicial
11:42 22 review is limited, or, in the case of the *In Re General Motors*
11:42 23 case that Kaiser's counsel mentioned, nonexistent.

11:42 24 The Court said Congress in that case may establish
11:42 25 under a statute the right to resolution of certain disputes by

11:42 1 binding arbitration without a right of substantial judicial
11:42 2 review.

11:42 3 Now, that has also been said about the NSA. The
11:43 4 Eastern District of New York decided a case called *Haller*
11:43 5 *versus United States Health & Human Services*. That is
11:43 6 Case No. 21-cv-7208, decided in --

11:43 7 THE COURT: Is that in your brief?

11:43 8 MR. SMITH: No, Your Honor.

11:43 9 THE COURT: Okay. All right. Go ahead.

11:43 10 MR. SMITH: But in that case the -- the plaintiff,
11:43 11 Dr. Haller, was attacking the NSA on Seventh Amendment grounds,
11:43 12 due process grounds they argued it was taking.

11:43 13 The court examined it extensively and noted that the
11:43 14 IDR process is a situation where Congress provided an expert
11:43 15 and inexpensive method for dealing with a class of questions of
11:43 16 fact particularly suited to examination and determination by an
11:43 17 administrative agency assigned to that task.

11:43 18 And for that reason the court in that case said
11:44 19 Congress can properly assign those tasks to a non-Article III
11:44 20 tribunal without running afoul of due process.

11:44 21 Your Honor summed it up very well when you -- when
11:44 22 you talked about it being a retail arbitration that is -- is
11:44 23 designed to accomplish a lot, with not a lot -- with not -- not
11:44 24 a lot of resources, and that, as Your Honor said, in the
11:44 25 absence of something gross is generally not reviewable. And

11:44 1 that is as Congress intended the IDR process.

11:44 2 And it -- it may be that air ambulance companies are
11:44 3 upset with the outcome some of the time, although one would
11:44 4 think that the GMR entities, and the success rate they have
11:44 5 argued in this court, suggest they would be happy more often
11:44 6 than not. Sometimes the plans may be unhappy.

11:44 7 But the important driver in the NSA is the protection
11:44 8 that it affords to the consumers, the patients, who are the
11:44 9 priority of -- of the health plans, or should be. And the way
11:45 10 it does that --

11:45 11 THE COURT: Who pays the 350 bucks to Mr. Fackler?

11:45 12 MR. SMITH: The losing party, Your Honor.

11:45 13 THE COURT: Okay.

11:45 14 MR. SMITH: So all of this, I think, has been pretty
11:45 15 well trod. We think the arbitration nature of IDR --

11:45 16 THE COURT: So your -- the bottom line is your view
11:45 17 is that the only way that they can come into my court is via
11:45 18 motion under the arbitration act, and the only grounds that
11:45 19 they can assert are the four that are listed in number (2)
11:45 20 there, right? And what -- which has some pretty high standards
11:45 21 to get relief.

11:45 22 What's your view of how number (1) fits into that?

11:45 23 How do you -- how do you see the statute? What is -- assuming
11:46 24 it has to mean something, what is it -- what do you do with it?

11:46 25 MR. SMITH: Sure. Sure. It -- it means -- and

11:46 1 it's -- it means what it says, that -- that if there were fraud
11:46 2 or evidence of misrepresentation, an IDR award is potentially
11:46 3 not valid. But judicial review is not the way that's
11:46 4 accomplished. Because section (2) -- subsection (2) --

11:46 5 THE COURT: Well, how would it -- who would decide it
11:46 6 wasn't valid if the court -- if there's not a court to say so?
11:46 7 It wouldn't just happen in a vacuum, right? How would that --
11:46 8 how would that happen?

11:46 9 MR. SMITH: Well, as someone who has shepherded
11:46 10 health plans through an audit or two, a regulatory audit, I can
11:46 11 tell you that they -- they sample the submissions in the case
11:46 12 of Medicare supplement insurance, that when they -- when they
11:46 13 adjudicate a claim and a Medicare beneficiary is unhappy with
11:46 14 it, there's a grievance and appeal process. Those grievance
11:47 15 and appeal process submissions are audited by CMS when they
11:47 16 audit a health plan.

11:47 17 And in the same -- I haven't had the -- haven't had
11:47 18 the benefit of working through an NSA audit, but -- but the
11:47 19 authority is certainly there for --

11:47 20 THE COURT: But your view is that that is not -- that
11:47 21 number (1) does not get incorporated into number (2)?

11:47 22 MR. SMITH: The remedy that is in this courthouse is
11:47 23 in FAA section 10(a). The remedy for --

11:47 24 THE COURT: Would the sentiment or the principle
11:47 25 that's in number (1) -- would that inhere in any of the four

11:47 1 reasons that you can seek judicial review, or not?

11:47 2 MR. SMITH: Only insofar as it reaches the level of
11:47 3 what the cases tell us about what undue means must consistent
11:47 4 of.

11:47 5 THE COURT: Okay. All right.

11:47 6 MR. SMITH: And if --

11:47 7 THE COURT: Thank you, sir.

11:47 8 MR. SMITH: -- there's no further questions, Your
11:47 9 Honor --

11:47 10 THE COURT: Yes, sir. Appreciate it. Thank you.
11:47 11 Who's next?

11:48 12 Mr. Conner.

11:48 13 MR. CONNER: Good morning, Your Honor.

11:48 14 THE COURT: Good morning.

11:48 15 MR. CONNER: May it please the Court. I will try not
11:48 16 to repeat. However --

11:48 17 THE COURT: Appreciate it.

11:48 18 MR. CONNER: -- just a few points. So --

11:48 19 THE COURT: So how are you and Capital -- are y'all
11:48 20 related to each other or not? I mean your companies.

11:48 21 MR. CONNER: Yes.

11:48 22 THE COURT: So how -- are they a subsidiary of you,
11:48 23 or what?

11:48 24 MR. CONNER: Used to be, but -- Florida Blue used to
11:48 25 be the parent company at one time. It was reorganized about

11:48 1 ten years ago. It's now GuideWell Mutual Holding Company. And
11:48 2 underneath GuideWell Mutual Holding Company are the various
11:48 3 pieces of the enterprise.

11:48 4 Florida Blue is an affiliated company with Capital
11:48 5 Health Plan under that GuideWell Holding Company.

11:48 6 THE COURT: So does that mean you can share
11:48 7 information about these QPAs? I mean, can you create joint
11:48 8 ones?

11:48 9 Is there any -- your opponent seems to think
11:48 10 something is going on here. And I don't know. But do you have
11:49 11 the ability under the -- either the law or anything else that
11:49 12 says that you-all can talk about these things? Or are you
11:49 13 completely separate in your -- in your decision-making on these
11:49 14 matters?

11:49 15 MR. CONNER: So my understanding is that we are
11:49 16 completely separate. They are separate corporations under
11:49 17 Florida law.

11:49 18 THE COURT: Okay.

11:49 19 MR. CONNER: CHP has its own in-house attorney,
11:49 20 et cetera, apart from Florida Blue. Because I asked the same
11:49 21 question on the front end of this, Your Honor, thinking that,
11:49 22 you know, there's certainly a possibility of sharing network,
11:49 23 sharing information, et cetera, and how does that work.

11:49 24 And while I can't stand here and tell you I know
11:49 25 exactly how it might work, what I was told, that they do not

11:49 1 share.

11:49 2 THE COURT: So when Capital comes up with a QPA,
11:49 3 that's theirs; and when you come up with one, that's yours; and
11:50 4 the twain don't meet, as far as you know?

11:50 5 MR. CONNER: That's my understanding.

11:50 6 THE COURT: Okay. Go ahead, sir.

11:50 7 MR. CONNER: Okay. So I just wanted to address,
11:50 8 though, this issue that you've been -- you've asked a few
11:50 9 questions about, and that is: What do you do with number (1)
11:50 10 versus number (2)?

11:50 11 So I -- so I think from my perspective, Your Honor,
11:50 12 there is no basis to come into the courthouse and allege number
11:50 13 (1) was violated, because the statutory language is very clear,
11:50 14 and in number (2) it says judicial review only under these four
11:50 15 circumstances.

11:50 16 That number (1) could have been under number (2), but
11:50 17 it wasn't. And there are all kinds of examples of statutes out
11:50 18 there that have some substantive provision, but there's no
11:50 19 private cause of action that's allowed.

11:50 20 There are provisions under Florida law, under the HMO
11:51 21 statute, which is the --

11:51 22 THE COURT: I guess the problem I have with it --
11:51 23 and, you know, it is -- it's written the way it's written. And
11:51 24 maybe you're right. The problem I have with it is -- and we'll
11:51 25 just take QPA as an example.

11:51 1 One of your colleagues says, well, you know, fraud
11:51 2 doesn't necessarily -- can not necessarily just occur on one
11:51 3 side of a transaction. I mean, if the -- if the air companies
11:51 4 want to double the mileage fraudulently -- this is all
11:51 5 hypothetical, of course. I'm not accusing anybody of anything.

11:51 6 MR. CONNER: Right.

11:51 7 THE COURT: But that -- but fraud doesn't necessarily
11:51 8 only come on one side or the other. But when Congress said "in
11:51 9 the absence of a fraudulent claim or evidence of
11:51 10 misrepresentation of facts presented to the IDR entity
11:51 11 involved," it does make you think that Congress was saying that
11:51 12 if somebody in the course of this submits fraudulent
11:52 13 information to Mr. Fackler's client, that that's bad, and --
11:52 14 but what do you -- what do you do about it?

11:52 15 Is it -- if it's -- if that same evidence would not
11:52 16 be good enough to get you a vacatur under (1) through (4), then
11:52 17 what does it even mean?

11:52 18 MR. CONNER: Yeah. So there's -- there's all kinds
11:52 19 of examples in the law, Judge, where, you know, the legislature
11:52 20 will say, "This is bad conduct. We are not going" -- you know,
11:52 21 "we believe" -- you know, for instance, in Florida we have the
11:52 22 Unfair Deceptive Trade Practices Act. And there's all kinds of
11:52 23 things under FDUTPA that are prescribed as bad conduct, but
11:52 24 there's not necessarily a cause of action that is available to
11:53 25 a party just because they've suffered that bad conduct.

11:53 1 THE COURT: All right. Then let me stop you right
11:53 2 there. Are you saying to me, then -- are you saying to me,
11:53 3 then, that if -- if Florida Blue finds out that on a systematic
11:53 4 and regular basis that -- that the air transport carriers are
11:53 5 doubling the mileage that they really flew in calculating their
11:53 6 positions and so forth, that there is no way for you to have
11:53 7 that reviewed by a court, that that's just -- that's just the
11:53 8 way it goes, and that because it doesn't fit under (1) through
11:53 9 (4) of section 10(a), then -- if it doesn't -- and maybe it
11:54 10 does. I don't know. But if it doesn't, that's just the way it
11:54 11 goes?

11:54 12 MR. CONNER: What I'm saying is under that subsection
11:54 13 (1) I did not believe we could bring a claim for judicial
11:54 14 review of the arbitration decision. There may be other
11:54 15 remedies, if it's for judicial review under (2), and I could
11:54 16 make a fraud claim stick, for instance, under subsection (1) of
11:54 17 that --

11:54 18 THE COURT: You might be able to just sue them for
11:54 19 common law fraud. I don't know.

11:54 20 MR. CONNER: But on the other hand -- that's what I
11:54 21 was going to say next, is there are other remedies out there
11:54 22 that are available that have nothing to do with NSA.

11:54 23 THE COURT: Is there any, like -- of course, then you
11:54 24 get into preemption, and so it's -- all right. I don't --

11:54 25 MR. CONNER: That would be doubtful that --

11:54 1 THE COURT: I don't want that case. All right?

11:54 2 MR. CONNER: I would be doubtful that the --

11:54 3 THE COURT: File that out in Texas, will you?

11:55 4 MR. CONNER: I would be doubtful that the NSA would
11:55 5 actually preempt my ability to bring a common law fraud claim,
11:55 6 for instance, under Florida law. But --

11:55 7 THE COURT: Okay. But -- but your view is that even
11:55 8 though one says what it says, it does not trigger the right to
11:55 9 come into this court and seek judicial review, just based on
11:55 10 that -- based on an allegation that there has been a fraudulent
11:55 11 claim or evidence of misrepresentation of facts presented to
11:55 12 the IDR entity? That's your view.

11:55 13 MR. CONNER: That's correct.

11:55 14 THE COURT: All right. Go ahead.

11:55 15 MR. CONNER: And the reason is because of the
11:55 16 language of the next section, which says it's limited to, which
11:55 17 leads to my next point. And Your Honor asked this question of
11:55 18 plaintiff's counsel, wouldn't you apply the FAA law when you
11:55 19 apply those four bases of review that are provided for?

11:56 20 And I think the answer has to be, yes, you would.
11:56 21 When Congress passes the NSA, it doesn't do it on a blank
11:56 22 slate. It presumably does it with knowledge of what the law
11:56 23 has been that has developed over years under Title 9 under the
11:56 24 FAA.

11:56 25 And there is case law -- and we have cited a lot of

11:56 1 it in our papers -- that has developed under those four
11:56 2 subsections of that particular portion of the FAA. And I think
11:56 3 that comes with the incorporation of those pieces.

11:56 4 So you have to look to that law to determine what
11:56 5 does that mean, what do those four sections mean. So that was
11:56 6 my next point.

11:56 7 And then, finally, Your Honor, my -- my last point
11:56 8 here is going to be that you -- you asked a question wasn't
11:56 9 Congress trying to avoid a lot of litigation and discovery by
11:57 10 doing this. They knew what they were doing. They created this
11:57 11 retail arbitration process.

11:57 12 And the answer is, yes, that's exactly what they were
11:57 13 doing. And they knew that they were doing that.

11:57 14 So from my experience in Florida, I have, in the last
11:57 15 four years, litigated over 1,000 cases that are under what
11:57 16 it -- what Florida decided to do.

11:57 17 So what Florida decided to do was not have an IDR
11:57 18 process. They have a statute. And there's two statutes,
11:57 19 really, that we litigate. One is directly under chapter 627 of
11:57 20 the insurance code. The other is under the HMO statute, which
11:57 21 is chapter 641.

11:57 22 And they both come -- they both prescribe a
11:57 23 methodology about how you determine how much gets paid when
11:58 24 there's an emergency service and it's an out-of-network
11:58 25 provider. And it always comes down to: What is the usual and

11:58 1 customary rate in that market for that service?

11:58 2 Now, that's the language of that statute.

11:58 3 Unfortunately everybody has a different opinion about what that
11:58 4 means, "usual and customary rate."

11:58 5 So what ends up happening is that we litigate those
11:58 6 issues, and we -- and we do lots of discovery about: What have
11:58 7 you accepted in other circumstances? Do you have a contract
11:58 8 with anybody else? What are your overhead costs? You know,
11:58 9 all of this stuff.

11:58 10 And then layered on to that we have to have expert
11:58 11 witnesses. So we have to have experts on economic issues, what
11:58 12 the market is, who's accepting what, what does that mean for
11:58 13 the usual and customary rate. We have to have experts on how
11:59 14 things were coded.

11:59 15 So CPT codes are the way that bills get generated
11:59 16 for -- you know, there's a CPT code for just about everything.

11:59 17 THE COURT: I know that. I spent eight -- nine weeks
11:59 18 listening to CPT code stuff.

11:59 19 MR. CONNER: Yeah. So we have to have an expert
11:59 20 on --

11:59 21 THE COURT: Ms. Hatfield has PTSD, I think.

11:59 22 MR. CONNER: -- is that the appropriate CPT code?

11:59 23 And then we have to have other experts. And it takes a lot of
11:59 24 time and a lot of money. And that is the thing -- that is the
11:59 25 thing --

11:59 1 THE COURT: I understand the point you're making.

11:59 2 MR. CONNER: Yes.

11:59 3 THE COURT: And so I -- the contrast. I understand
11:59 4 that. I'm a little confused -- is -- does this federal act
11:59 5 not --

11:59 6 MR. CONNER: It doesn't apply to everything.

11:59 7 THE COURT: It doesn't?

11:59 8 MR. CONNER: Right.

11:59 9 THE COURT: So give me an example of what it doesn't
11:59 10 apply to.

11:59 11 MR. CONNER: So I have active litigation right now
11:59 12 with a group of neuroscience and -- scientists in Miami-Dade
12:00 13 who render their services to hospital patients allegedly on an
12:00 14 emergency basis and then they bill. And we -- we ask --

12:00 15 THE COURT: So that's not covered by this act?

12:00 16 MR. CONNER: That's not covered by this act. And we
12:00 17 have -- I think it's 3,000 claims that have now been
12:00 18 consolidated in that particular matter. And that's just one of
12:00 19 them that --

12:00 20 THE COURT: But I take your point that -- I take your
12:00 21 point.

12:00 22 MR. CONNER: So Florida went one way. Congress went
12:00 23 another way. So that's -- that's it.

12:00 24 THE COURT: Thank you.

12:00 25 MR. CONNER: Thank you.

12:00 1 THE COURT: All right. I think we're just going to
12:00 2 keep going, because we're -- Mr. Fackler is going to get to
12:00 3 talk, and then I'll probably let plaintiff's counsel talk a
12:00 4 little bit more.

12:00 5 I know we've kind of reversed the -- the usual course
12:01 6 of things. But I think this is the way it's played out. It's
12:01 7 been appropriate.

12:01 8 So, Mr. Fackler, let me hear from you, please.

12:01 9 Is there -- anybody need a break? Or can we -- I
12:01 10 think we're going to be done within the half hour, so --
12:01 11 everybody all right?

12:01 12 MR. FACKLER: I only had 45 minutes, Your Honor.

12:01 13 THE COURT: Okay. Good.

12:01 14 MR. FACKLER: I'm --

12:01 15 THE COURT: Well, at the end of the half hour we'll
12:01 16 all just leave and you can just keep talking. How about that?

12:01 17 MR. FACKLER: It happens at home all the time, Your
12:01 18 Honor.

12:01 19 On behalf of the poor substitute, C2C, may it please
12:01 20 the Court.

12:01 21 Your Honor, just a little bit of what my client does
12:01 22 and how it goes through the process. We had to apply to be
12:01 23 certified. There's a process. The statute says you have to
12:01 24 have sufficient legal, medical, and other expertise, and
12:01 25 sufficient staffing.

12:01 1 We do that. We have medical experts. We have legal
12:01 2 experts. Your Honor asked a question about the process. It's
12:01 3 a team process. There's not one necessarily that does it from
12:01 4 soup to nuts. It's a process.

12:02 5 We try to help, you know, guide them through the
12:02 6 system. But as Your Honor intimated, we can't spend two days
12:02 7 on each case. That's simply impractical. So as part of that
12:02 8 process, we've --

12:02 9 THE COURT: I'd feel a little better about it -- and
12:02 10 I'm not criticizing. I'd feel a little better about it if I
12:02 11 hadn't read three awards and they all had the exact same
12:02 12 language in them.

12:02 13 MR. FACKLER: And that was my very next point, Your
12:02 14 Honor, is we work with CMS, the Medicaid department. They
12:02 15 issue templates for all of the IDREs. We use that template.
12:02 16 It gets modified. It gets modified. It gets modified.

12:02 17 So there is some flexibility, certainly, on how we do
12:02 18 it, but there is a template that the Department suggests we
12:02 19 use, and that we follow it.

12:02 20 We have weekly, biweekly, and monthly meetings. I
12:02 21 feel very sorry for our in-house counsel who is attending these
12:02 22 on the regular. All the other IDREs get the same templates.
12:02 23 There's one in the public record.

12:03 24 THE COURT: So if there was some implied criticism --
12:03 25 maybe not even implied criticism from the plaintiffs that they

12:03 1 get better, more reasoned decisions from the other IDRs, I take
12:03 2 you would -- you wouldn't -- you don't agree with that?

12:03 3 MR. FACKLER: Your Honor, all I can say is there's
12:03 4 one other in the public record that we find. And that's in the
12:03 5 Eastern District -- or the Southern District of Texas.

12:03 6 That award is very similar to ours, remarkably
12:03 7 similar. Slight different verbiage. The language that we're
12:03 8 criticized for that's arguably a presumption, they quote the
12:03 9 vacated provision of that statute.

12:03 10 You know, we -- candidly, Your Honor, we get
12:03 11 criticized because we didn't contest that we've used -- never
12:03 12 used an illegal presumption. We have never used an illegal
12:03 13 presumption, just to be clear. We've never done that. And
12:03 14 so --

12:03 15 THE COURT: What are you doing now that the court out
12:03 16 in Texas has vacated the final regulations? What do you --
12:03 17 you're just -- are you just trying to apply the statute? Or
12:03 18 what do you --

12:03 19 MR. FACKLER: The process works when we get a new
12:04 20 opinion, a new order. Slam on the brakes. We work with the
12:04 21 Department, get the new method and new process out. We work
12:04 22 with them. We try to comply with the court's order and move
12:04 23 forward. That's what we do, Your Honor.

12:04 24 So let me talk briefly, if I can, about our
12:04 25 entitlement to immunity. We've gone back and forth about

12:04 1 whether we're an arbitrator. I think it's clear we're an
12:04 2 arbitrator under all the language that we've seen. The NSA
12:04 3 refers to the FAA.

12:04 4 The process used complies with having the elements
12:04 5 that are advocated and required by the Eleventh Circuit in
12:04 6 *Advanced Bodycare Solutions*. The legislative history refers to
12:04 7 us in our -- as an arbitrator. The case law -- there are three
12:04 8 cases that have dealt with this, all refer to this as
12:04 9 arbitration.

12:04 10 Interestingly, though, Your Honor, even if we're not
12:04 11 an arbitrator, we're entitled to immunity for the same public
12:04 12 policy reasons that an arbitrator is.

12:05 13 Your Honor saw the statement of interest from the
12:05 14 government. The IDREs are the cornerstone, is the language
12:05 15 that the government used.

12:05 16 If we are dragged into suit either as a defendant or
12:05 17 as part of discovery, which I'll get to in a second, a lot of
12:05 18 the IDREs are going to have no choice but to drop out. For
12:05 19 365 -- it's now, candidly, up to 689, or something around that
12:05 20 range. They're going to drop out and the whole system is going
12:05 21 to collapse.

12:05 22 Additionally, the other public policies for an
12:05 23 arbitrator, a decision-maker needs to be immune from influence.
12:05 24 And there are cases from the various circuits, *New England*
12:05 25 *Cleaning Services*.

12:05 1 Interestingly, as soon as these cases were filed,
12:05 2 plaintiffs said to the CMS, the Department, "Hey, you've got
12:05 3 to -- there's a conflict of interest now. You've got to get
12:05 4 rid of C2C on all of our cases, because we've sued them now and
12:05 5 now there's a conflict."

12:05 6 That's the exact type of pressure that is
12:06 7 inappropriate for a decision-maker.

12:06 8 A couple of other points, Your Honor, we talked about
12:06 9 discovery --

12:06 10 THE COURT: And the way you get the cases are either
12:06 11 the parties pick you or you're on some kind of a random wheel
12:06 12 and you get picked for --

12:06 13 MR. FACKLER: And from our perspective, Your Honor,
12:06 14 we don't know. They could have picked us each time, or they
12:06 15 could have been the poor substitute from wherever. We don't
12:06 16 know. That's not --

12:06 17 THE COURT: And who runs the wheel, CMS or --

12:06 18 MR. FACKLER: CMS.

12:06 19 So let's talk, then, about -- real quickly about the
12:06 20 discovery. Plaintiff mentioned a case where it allowed the
12:06 21 deposition of an arbitrator. That is not incorrect, but that
12:06 22 is limited to bias and prejudice.

12:06 23 That's when we are -- we own Blue Cross Blue Shield,
12:06 24 or we have a relationship with Kaiser. That is not to delve
12:06 25 into the process and the decision that we make.

12:06 1 The case that's cited in the papers is *Hoeft versus*
12:07 2 *MF- -- MVL Group*, out of the Second Circuit. There the
12:07 3 district court allowed the arbitrator to be deposed.

12:07 4 And the circuit court said, "You should not have
12:07 5 allowed the arbitrator to be deposed as to his decision-making
12:07 6 process."

12:07 7 Now, the plaintiff in this case has submitted some
12:07 8 draft discovery to you -- I don't know if you remember that
12:07 9 from our telephonic conference -- but to give us an idea of
12:07 10 what type of discovery -- what discovery would look like. And
12:07 11 part of that was directed to my client. A lot of that
12:07 12 discovery went to our decision-making process.

12:07 13 And under the case law, the one I just cited, and
12:07 14 others, that's what we're immune to. You know, the appellate
12:07 15 court doesn't ask you to be deposed in your decision-making
12:07 16 process which law clerk dealt with these cases.

12:07 17 Similarly for an arbitrator, we should not be
12:07 18 deposed. We should not be involved at all in discovery in this
12:07 19 case. And we certainly shouldn't be a defendant in this case.

12:07 20 And, candidly, we have no --

12:08 21 THE COURT: And how do you get to be an IDR? CMS
12:08 22 picks you?

12:08 23 MR. FACKLER: No, you go through a certification
12:08 24 process. It's 300gg. I can cite the rest of it.

12:08 25 THE COURT: Oh, that's right. You have to have all

12:08 1 the criteria. But who actually then says, "Okay. You're
12:08 2 certified"?

12:08 3 MR. FACKLER: The Department, CMS, is my
12:08 4 understanding, Your Honor.

12:08 5 THE COURT: All right. Thank you.

12:08 6 MR. FACKLER: I think that's -- well, apparently
12:08 7 that's all I have.

12:08 8 THE COURT: No.

12:08 9 MR. FACKLER: There was --

12:08 10 THE COURT: I'm sorry. I thought you were --

12:08 11 MR. FACKLER: I do have one quick point.

12:08 12 THE COURT: Yeah. No, I'm -- you -- no, you're good.
12:08 13 I misunderstood you. Sorry.

12:08 14 MR. FACKLER: No, that's fine. There's an assertion
12:08 15 that we have to be in this suit in order to get full relief,
12:08 16 Your Honor, that they couldn't get full relief on a rehearing
12:08 17 unless we're in this suit.

12:08 18 Two responses to that. When we got first sued, we
12:08 19 reached out to the plaintiff and said, "We'll rehear it. Don't
12:08 20 sue us. We don't need to be in this suit. If it's vacated,
12:08 21 we'll agree to rehear it. We don't want to be in this suit."

12:08 22 That was denied. They didn't want to do that.
12:08 23 Apparently there's some other motive beside us needing to be in
12:09 24 the suit. Whether that's discovery for a competitive
12:09 25 advantage, I don't know. But we offered to do that. The

12:09 1 answer was no.

12:09 2 THE COURT: So what happens under -- under the FAA --
12:09 3 I mean, I guess -- I guess I've never really thought about it.
12:09 4 I'd have to go back and look at some of my decisions, but -- I
12:09 5 haven't vacated very many, I don't think.

12:09 6 But if an arbitrator's award is vacated under the
12:09 7 FAA, I've always just assumed it goes back to the arbitration
12:09 8 and they do it again or something, right?

12:09 9 MR. FACKLER: Right. The FAA does have a provision.
12:09 10 These gentlemen probably know it better. I think it's 12 for
12:09 11 rehearing. That allows, if it's for a certain reason, for a
12:09 12 mistake or improper, it can go to the same IDRE. If it's for
12:09 13 bias or fraud, it's supposed to go to a separate one.

12:09 14 And curiously, here, we're not being accused of bias
12:09 15 or prejudice, but yet they want to send it back to the same
12:10 16 arbitrator.

12:10 17 And, additionally, if they are so concerned about
12:10 18 getting a remedy post vacatur, they should sue the Department.
12:10 19 They're the ones that can assign to the appropriate -- create a
12:10 20 policy, allow -- reopen the portal to file their IDRE. The
12:10 21 Departments can do that.

12:10 22 And so the appropriate party here is the Departments,
12:10 23 if they're concerned about their ability to get full relief, if
12:10 24 Your Honor (a) accepts the case and ultimately vacates the
12:10 25 arbitration award.

12:10 1 Finally, I just want to point out a couple of
12:10 2 administrative things. If we are so bad at the process --
12:10 3 and I can give you some statistics about other IDREs far
12:10 4 outside of the record, but we're not biased toward one side or
12:10 5 the other. Our statistics are similar with other IDREs.

12:10 6 But if we're bad, there's a method to revoke our
12:11 7 certification. They can apply to -- say, "CMS, these guys are
12:11 8 terrible. They don't follow the law," and we can have our
12:11 9 certification revoked.

12:11 10 We know that someone has challenged our
12:11 11 certification. We don't know who. We don't know why. We're
12:11 12 not told that. But we do know that that -- our certification
12:11 13 has not been revoked.

12:11 14 THE COURT: Thank you.

12:11 15 MR. FACKLER: Thank you.

12:11 16 MR. KESHAVARZI: Your Honor, I know I spoke, but you
12:11 17 had a question when somebody spoke after me about the different
12:11 18 QPAs. And I would not want to get on a plane --

12:11 19 THE COURT: That's fine. I'll go ahead and let you
12:11 20 talk about that. And then I'll hear from the plaintiff.

12:11 21 Go ahead.

12:11 22 MR. KESHAVARZI: Thank you, Your Honor. I appreciate
12:11 23 it.

12:11 24 THE COURT: I got mixed up who it was. Yeah.

12:11 25 MR. KESHAVARZI: Yeah. Your Honor --

12:11 1 THE COURT: This was the scrivener's error or
12:11 2 something, right?

12:11 3 MR. KESHAVARZI: Yes. And so when there's an
12:11 4 evidence of payment -- if you were hearing about CPT codes, I'm
12:11 5 sure they're cousins. They go with EOPs. And when we issue
12:11 6 the EOP to the air ambulance company, on the bottom it says the
12:11 7 QPA is this.

12:11 8 The words -- the QPA -- the QPA is this or greater.
12:12 9 That word was missing. And they have additional EOPs that have
12:12 10 that language added to them. This was not fraud. This was not
12:12 11 a fraudulent intent. What Kaiser did is report the correct QPA
12:12 12 to the IDR entity.

12:12 13 And, Your Honor, every single one of the awards
12:12 14 they've shown you discloses the QPA. It would be -- what kind
12:12 15 of fraud is it where Kaiser is telling them what the QPA is,
12:12 16 but then also disclosing it to the IDRE, when we know the IDRE
12:12 17 is going to put it in their award, or is likely to put it in
12:12 18 the award, so they're going to see it. That in and of itself
12:12 19 shows you that there is no fraud there. And --

12:12 20 THE COURT: Well, wait a minute. Let me make sure I
12:12 21 understand. So if it's better -- let's see. So is it -- who
12:12 22 is it better for if the QPA is lower?

12:12 23 MR. KESHAVARZI: Well, I'm not sure who it's better
12:13 24 for. But the way it works is -- the QPA has nothing to do with
12:13 25 the amount we actually pay. The amount can be anything. You

12:13 1 can pick it out of a hat.

12:13 2 The QPA is the average -- it's the contracted rate
12:13 3 from which the amount -- the patient copay is calculated. So
12:13 4 from that perspective, it's actually -- what happened benefits
12:13 5 them.

12:13 6 What Kaiser did is Kaiser issued its EOP and said the
12:13 7 QPA is X -- or X is -- QPA is X. What it should have said is
12:13 8 that QPA is -- X is QPA or greater than the QPA. And then
12:13 9 Kaiser reported the correct QPA to the IDR entity.

12:13 10 And they know about that because the IDR entity put
12:13 11 it in the document. And most IDR awards disclose the QPA in
12:13 12 the award. So if you're committing -- committing fraud, it
12:13 13 doesn't make sense to tell them one thing when you know a month
12:13 14 down the line they're going to see --

12:13 15 THE COURT: What would be the reason that -- if
12:14 16 the -- if there's a contest and the QPA is supposed to be a
12:14 17 median of the payments, why wouldn't -- why wouldn't the
12:14 18 insurance company just always pay the QPA?

12:14 19 MR. KESHAVARZI: Sometimes they do. But sometimes,
12:14 20 as what Kaiser does -- Kaiser pays them more than the QPA.
12:14 21 Because what Kaiser is trying to do is trying to discourage
12:14 22 IDRs. And that's what the record shows.

12:14 23 THE COURT: I assume sometimes they pay less, too,
12:14 24 right?

12:14 25 MR. KESHAVARZI: Well, Your Honor, I'm not a --

12:14 1 again, I'm going outside of the record. But I'm not aware
12:14 2 of -- the QPA is not something that fluctuates that much.
12:14 3 Because the way it's structured -- and so it wouldn't make
12:14 4 sense to have a methodology that changes your calculation other
12:14 5 than for mileage. You know, once you come up with a
12:14 6 methodology, you use that methodology to pay, you just plug in
12:15 7 the rates and you calculate --

12:15 8 THE COURT: I guess what I'm trying -- and we're
12:15 9 going to stop this in a minute, because it's probably not --
12:15 10 I'm probably not understanding it as well as I should, but I
12:15 11 don't think it matters a whole lot.

12:15 12 But -- so why -- I guess this is my question: Why is
12:15 13 there -- what's the source of the disagreement usually when you
12:15 14 want to pay one thing and they want you to pay more? And are
12:15 15 there actual human beings involved in these decisions? Or is
12:15 16 this all done by the computer, or what?

12:15 17 MR. KESHAVARZI: It's hybrid, Your Honor. It's
12:15 18 certainly not just by the computer and pressing a button.
12:15 19 There is a calculation of a QPA. I can only speak for Kaiser.
12:15 20 And I'm not -- part of this is highly confidential, trade
12:15 21 secret, so I can't get into the details of it. But, you know,
12:15 22 there is a methodology for --

12:15 23 THE COURT: I won't tell anybody. Go ahead.

12:15 24 MR. KESHAVARZI: Okay. Since you promised.

12:16 25 There is the QPA. And the QPA is calculated -- and

12:16 1 there's one QPA. You know, for different regions, it might
12:16 2 vary. But you calculate it for the region. And that said that
12:16 3 the QPA doesn't fluctuate, because the -- NSA says you
12:16 4 calculate it based on your contracts for this rate.

12:16 5 And then -- and then there is -- you can decide how
12:16 6 you want to pay the air ambulance company. You could decide,
12:16 7 for example, that the proper rate would be X times Medicare,
12:16 8 right, this multiple of Medicare. You could decide that it's
12:16 9 QPA plus this. Or it could just be a fixed amount. I mean,
12:16 10 there's different ways that health plans could do it, if that's
12:16 11 your question.

12:16 12 If your question is how -- what factors does the IDR
12:16 13 entity consider, those are, you know --

12:16 14 THE COURT: No. I was asking how y'all figure it
12:16 15 out. And I guess what I'm asking is: What's a typical reason
12:16 16 that y'all can't agree and it has to go to an IDR? Is it -- is
12:16 17 it too much mileage? Is it -- what is it? What's the --

12:16 18 MR. KESHAVARZI: It's amount. It's just amount.
12:16 19 It's -- you know, I have not seen incidents of it being a
12:17 20 mileage issue. There have been a couple of times where there
12:17 21 was a discrepancy in mileage. We didn't assume it was fraud.
12:17 22 We went to the --

12:17 23 THE COURT: But if you want to pay \$20,000 and they
12:17 24 want \$40,000, what's -- what's the difference? How is that --
12:17 25 what are they saying and what are you saying? Why -- why is it

12:17 1 \$20,000 different?

12:17 2 MR. KESHAVARZI: The story -- I've seen these come
12:17 3 from the air ambulance companies. It's, you know, "We're" --
12:17 4 "it's a price of readiness. The air ambulance has to be ready.
12:17 5 It has to be equipped. This is what we get under our
12:17 6 contracts. Under some of our contracts you should pay us this
12:17 7 rate."

12:17 8 And the health plan says, "No. Under my contracts I
12:17 9 pay this much, and, you know, this" -- "this is" -- "we think
12:17 10 this is justified because of this market condition and that
12:17 11 market condition."

12:17 12 And part of the problem, Your Honor, is that the QPA
12:17 13 calculation under the NSA is based on pre-NSA contracts. This
12:17 14 is what I was talking to you earlier about, that the -- the
12:17 15 tectonic shift and things changing.

12:18 16 I'll just say one last thing because you had a
12:18 17 question. And it's not -- this is argument. This is just
12:18 18 information.

12:18 19 You were asking about NSA and its applicability to
12:18 20 state law. The NSA applies to air ambulance services and non
12:18 21 air ambulance services.

12:18 22 With respect to air ambulance services, which is why
12:18 23 we're here today, the NSA always applies. States can't have
12:18 24 air ambulance laws because of the Airline Deregulation Act.

12:18 25 With respect to the non air ambulance services, the

12:18 1 NSA is a gap filler. States that had existing laws that
12:18 2 prohibited balance billing and had a mechanism for reimbursing
12:18 3 between -- reimbursements between hospitals and physicians and
12:18 4 patients, those states the NSA doesn't apply there. But if the
12:18 5 state didn't have that mechanism, then the NSA fills the gap.

12:18 6 THE COURT: Thank you.

12:18 7 MR. SCHRAHEK: Your Honor, Kaiser is probably one of
12:18 8 the greatest offenders of slashing their reimbursement rates on
12:18 9 the front end after the NSA went into effect. Pre-NSA we were
12:18 10 getting fair awards from them, fair prices, fair allowables.
12:18 11 And they unilaterally decided to slash those.

12:19 12 Whether that matches their QPA or not really is not
12:19 13 relevant when you go to a 50-percent-of-a-revenue model. We do
12:19 14 have to be ready 24 hours a day, across the United States, and
12:19 15 in rural areas where very few transports occur, to have
12:19 16 helicopters and fixed wings ready like that on a moment's
12:19 17 notice so that patients can get to an ER room within an hour of
12:19 18 the accident, to a critical care center.

12:19 19 That's what costs a lot of money. I'm going to be
12:19 20 frank. It's expensive. It's an expensive business to run.
12:19 21 And what we are seeing here is the problem with the NSA and the
12:19 22 Envision bankruptcy that I mentioned earlier today. So that's
12:19 23 what we're talking about.

12:19 24 And all of this, "Well, no, it was a scrivener
12:19 25 error," that came after we sued them. That's their defense, if

12:19 1 we go to the merits, right?

12:19 2 They're going to have to prove that not through their
12:19 3 counsel, but through actual witnesses and evidence. And that's
12:19 4 all we're asking for today. I'd like to bring your attention
12:19 5 back to the big issue, which is -- we heard a lot about the
12:19 6 burden of proof.

12:19 7 If, in fact, the Court were to rule the way the
12:19 8 insurance industry is asking it to rule, you'd be -- decided
12:20 9 that we don't get to see each other's pleadings, we don't get
12:20 10 to know who the arbitrator is, we don't get a reasoned award,
12:20 11 and the only way we can challenge that is if we file a motion,
12:20 12 fulfilling the burden of proof of clear and convincing evidence
12:20 13 with proving fraud at the very front end, with them never
12:20 14 having to participate in discovery.

12:20 15 Of course that's why there are eight, ten lawyers on
12:20 16 this side. That's what the insurance industry wants.

12:20 17 Your Honor, we're asking for a very reasonable
12:20 18 construction of the NSA. You keep talking about the (1) versus
12:20 19 (2). Well, (1) says if you make a misrepresentation of fact,
12:20 20 the award is not enforceable. (2) lists four grounds for
12:20 21 judicial review.

12:20 22 One ground is undue burden, undue influence, right,
12:20 23 prejudice, if the material misrepresentation easily fits within
12:20 24 that first prong of the FAA. Very easily does.

12:20 25 And that's all we're asking for the Court to do, to

12:20 1 say, "Yes. You get over the hurdle, you can make the
12:21 2 allegation, and, in fact, the undue means equals a
12:21 3 misrepresentation of fact."

12:21 4 THE COURT: What about the idea that, you know, yes,
12:21 5 this is a pretty streamlined procedure and -- and it's not the
12:21 6 greatest due process invention known to man, but that Congress
12:21 7 did it on purpose, Congress didn't want it to be pretty, they
12:21 8 wanted it to be easy and fast and hopefully not used very
12:21 9 much -- which that part doesn't seem to have come out very well
12:21 10 -- and that that's just the way it is in baseball arbitration.
12:21 11 You put up a number, they put up a number, and somebody is
12:21 12 going to win and somebody is going to lose, and -- and that
12:21 13 that's the way Congress wanted it, and that Congress was within
12:21 14 its right to do it that way, and that if you start having -- if
12:21 15 you start having federal court cases every time somebody
12:21 16 disagrees with an award and get discovery and so forth, which
12:21 17 can go both ways, then you're going to be way beyond what
12:22 18 Congress intended, and it's -- it will, in effect, make
12:22 19 non-viable the system that the act sets up?

12:22 20 What about that argument?

12:22 21 MR. SCHRAMEK: Your Honor -- and I'm just going to
12:22 22 show a couple of slides, if I could, in responding to that --

12:22 23 THE COURT: Sure.

12:22 24 MR. SCHRAMEK: -- since the PowerPoint is already up.
12:22 25 But this really gets to the issue about what we were talking

12:22 1 about a moment ago, the undue means, right? We were talking
12:22 2 about undue means should be a misrepresentation.

12:22 3 I do not believe that you have heard anything today
12:22 4 that would suggest that people and attorneys who are officers
12:22 5 of the court can just make up something and get into the court
12:22 6 and get into discovery. And that's not the record before you
12:22 7 in the three case that we've brought.

12:22 8 We know there were two misrepresentations of the QPA
12:22 9 in Kaiser. One of them had to be inaccurate. We know the
12:22 10 Capital Health facts and circumstances.

12:22 11 So we're talking about actual real disputes with a
12:22 12 real factual basis. And Congress did specifically say judicial
12:23 13 review would be allowed.

12:23 14 And if this Court rules that because of the way
12:23 15 you've been heard today -- the arguments being made today,
12:23 16 that, in fact, there will never be judicial review, because
12:23 17 here's how the Court is going to apply the NSA and we're going
12:23 18 to ignore (a)(1) -- "Yeah, we're going to act like that's some
12:23 19 regulatory oversight. We're going to ignore (a)(1) and go to
12:23 20 (a)(2), and put FAA case law that assumed due process existed,"
12:23 21 well, Your Honor, then Congress did not create judicial review
12:23 22 at all.

12:23 23 And Congress clearly said there would be judicial
12:23 24 review in certain circumstances. And we're only here saying
12:23 25 that we fit within those circumstances, including the undue

12:23 1 means.

12:23 2 And on the Fifth Circuit case of *PoolRe Insurance*
12:23 3 *Corporation*, that's a case where the arbitrator applied the
12:23 4 wrong rules. They applied the -- they didn't apply the rules
12:23 5 the parties agreed to. And the Fifth Circuit said, "The rules
12:23 6 of the game are important. And the arbitrator" -- "they may
12:23 7 have discretion in certain things, but they can't apply the
12:23 8 wrong rules."

12:23 9 That's why we're here. We've alleged the wrong rules
12:23 10 were applied. We know there was an illegal presumption. They
12:24 11 mentioned the case in Houston where the IDR entity actually
12:24 12 cited the invalidated regulation. We also know -- you hear
12:24 13 about, oh, the win rates. Sometimes you'll win some.
12:24 14 Sometimes you'll lose some.

12:24 15 We're here -- we haven't filed hundreds of these.
12:24 16 You heard how many we participate in, right?

12:24 17 "Oh, they're the biggest filing of IDR proceedings."

12:24 18 We've only filed five in the entire country in a
12:24 19 year. Why is that? Because C2C gave us a zero percent win
12:24 20 rate.

12:24 21 We're not talking about you win some, you lose some,
12:24 22 and let's play ball. We're talking about an illegal
12:24 23 presumption that the insurer always wins.

12:24 24 That's very factually different than the normal
12:24 25 process, or -- you know, this isn't about speculation. This is

12:24 1 about reality.

12:24 2 The reason we filed this is because Capital Health is
12:24 3 in seven counties, we know the market, and we said, "Where are
12:24 4 these fixed-wing transport contracts?"

12:24 5 That's not speculation. That's a factual basis for
12:24 6 an allegation that should survive and allow to go forward.

12:24 7 The other thing I did want to talk --

12:24 8 THE COURT: Did y'all tell the CMS because you had
12:24 9 sued the -- the arbitrator that they couldn't be on your cases
12:25 10 anymore?

12:25 11 MR. SCHRAMEK: We asked them not to place C2C on our
12:25 12 cases anymore, not because simply we had sued them, but also
12:25 13 because -- that we had a zero percent win rate, and we believed
12:25 14 they were applying an illegal presumption contrary to law. So
12:25 15 we did ask them.

12:25 16 THE COURT: Do you know -- do you know -- Mr. Fackler
12:25 17 says that their rates are about the same as every other IDR.
12:25 18 Do you have reason to doubt that, or what?

12:25 19 MR. SCHRAMEK: I can -- I can only talk about
12:25 20 personal experience. I don't have discovery into what his
12:25 21 rates are.

12:25 22 THE COURT: How many did you have with C2C?

12:25 23 MR. SCHRAMEK: At the time we filed, it was three.
12:25 24 And we lost all three to different entities, the different
12:25 25 insurers, meaning each of the insurers would have had different

12:25 1 position statements they submitted. And every time we got the
12:25 2 cookie-cutter response with the language we believe is an
12:25 3 illegal presumption.

12:25 4 THE COURT: So you only had experience with three of
12:25 5 them when you filed the suit? How many have you had since
12:25 6 then?

12:25 7 MR. SCHRAHEK: Your Honor, I'm not sure. I'm happy
12:25 8 to look into that and provide you the information.

12:25 9 THE COURT: How many do you have in the -- I mean,
12:25 10 how many do you have out there in the world, not just C2C? Do
12:25 11 you know?

12:25 12 MR. SCHRAHEK: Your Honor, there have been weeks in
12:26 13 which we've filed up to 350 position statements in one week for
12:26 14 IDR transports.

12:26 15 So, yes, we have a very high volume in the IDR
12:26 16 process, but we're compelled to. Because if we don't follow
12:26 17 the IDR process, we're not going to get enough money to
12:26 18 reimbursement to -- in order to continue -- you know, to
12:26 19 operate and do the things we need to do in the normal
12:26 20 operations.

12:26 21 THE COURT: And didn't you tell me the first time you
12:26 22 had a 92 percent success rate or something?

12:26 23 MR. SCHRAHEK: Your Honor, that was -- yes, at that
12:26 24 time. And I'd like to put the portion of this transcript --
12:26 25 mark it as confidential, pursuant to a protective order to be

12:26 1 filed, if needed, if we can't agree to it.

12:26 2 Because we do consider the specific win rate to be
12:26 3 proprietary information. The Court -- no one is in the court
12:26 4 other than counsel. So there's no issue there. We can redact
12:26 5 the transcript.

12:26 6 Yes, it was at that time. It's gone down since.

12:26 7 THE COURT: Why is that proprietary?

12:26 8 MR. SCHRAMEK: Your Honor, we believe because -- we
12:26 9 believe it's proprietary information because our other -- our
12:26 10 competitors are looking at, you know, what is their win rate,
12:26 11 what is our win rate. There's issues about who's investing in
12:27 12 the process.

12:27 13 They know how many we're filing, right? So if they
12:27 14 look how many we're filing, they look at the win rate, and they
12:27 15 do the math to see what's the cost of your program, they might
12:27 16 start filing more, right, and being -- and so we believe it's
12:27 17 very proprietary, Your Honor, and competitively sensitive.

12:27 18 THE COURT: I mean, you're -- I didn't ask you. You
12:27 19 told me, right?

12:27 20 MR. SCHRAMEK: I did, Your Honor, at the first
12:27 21 hearing. I did.

12:27 22 THE COURT: Okay.

12:27 23 MR. SCHRAMEK: And I'll tell you again. Again, for
12:27 24 purposes of this, we want to be very open and transparent to
12:27 25 the Court's inquiries. The magistrate judge did rule that that

12:27 1 information could be redacted last time.

12:27 2 THE COURT: That's fine. I don't -- I mean, it's all
12:27 3 right with me. I guess I'm -- so is the -- is all this secret
12:27 4 from the rest of the world?

12:27 5 In other words, is the -- are the only people that
12:27 6 see the award the two parties? It's not public record. It's
12:27 7 not -- it's just the two parties get it?

12:27 8 MR. SCHRAHEK: That's my understanding, Your Honor.
12:27 9 There is aggregated information that's put out on a quarterly
12:27 10 basis by CMS. You heard about that today. In fact, you'll see
12:27 11 the last bullet point of my statement of interest on the United
12:27 12 States's response.

12:27 13 THE COURT: Yeah. I'm not seeing anything because
12:28 14 I -- it's not coming up on my screen. But that's okay. You
12:28 15 have the --

12:28 16 MR. SCHRAHEK: I can read it to you, if --

12:28 17 THE COURT: No, that's all right.

12:28 18 How come it's not here? Do you know? It usually is
12:28 19 right here for me, but...

12:28 20 You can -- do you have -- do you have a piece of
12:28 21 paper? Or is it all on your computer?

12:28 22 MR. SCHRAHEK: Unfortunately I was making edits until
12:28 23 late last night, so I do not have a copy, including drafting
12:28 24 this --

12:28 25 THE COURT: Okay. There we go. I got it now.

12:28 1 Thank you, Kerri.

12:28 2 MR. SCHRAMEK: -- drafting this slide over breakfast.

12:28 3 But the Q4 -- you heard about the volume. It was
12:28 4 110,000 disputes in Q4, according to the government's
12:28 5 submission that they made recently.

12:28 6 And they put in their own brief that the IDR entities
12:28 7 get between, I think, 385 and \$770 an hour -- not an hour, per
12:28 8 decision.

12:28 9 So if you do that math, in Q4 that means the IDR
12:28 10 entities, including Mr. Fackler's client, divvied up between
12:28 11 them -- there's only about 12 or 13 -- 38 and a half to \$77
12:28 12 million.

12:28 13 So the idea that, you know, poor Mr. Fackler -- his
12:28 14 client is going to have to answer as to whether he applied an
12:28 15 illegal presumption, Your Honor, they're doing very well.

12:29 16 In fact, the program is seeing 14 times more IDR
12:29 17 disputes than they -- than CMS anticipated they would have.
12:29 18 Why?

12:29 19 Because providers are being so significantly
12:29 20 underpaid at every level that this is the only way they're
12:29 21 going to be able to make the business model work, is
12:29 22 participating in these IDRs and filing them.

12:29 23 And we never argued there's a cause of action against
12:29 24 IDR entities. The government spends about half their time on
12:29 25 that argument in their brief. They ignore that we're seeking

12:29 1 declaratory injunctive relief against the IDR entities. The
12:29 2 Eleventh Circuit --

12:29 3 THE COURT: Why do you need that, though? I mean,
12:29 4 if -- I mean, you never -- you don't usually sue the
12:29 5 decision-maker when you have a dispute. It's -- it's -- you
12:29 6 sue the parties involved and the Court figures it out. Why do
12:29 7 you need it?

12:29 8 MR. SCHRAHEK: This goes to your question, Your
12:29 9 Honor, about, "Well, you just vacate it and you never see it
12:29 10 again."

12:29 11 Well, both under the AAA rules and the American
12:29 12 Health Lawyer Association rules, they have specific rules for
12:29 13 when you initiate a new arbitration proceeding. Is it being
12:30 14 initiated by agreement of the parties -- you attach the
12:30 15 agreement -- or by court order, and you attach the court order.

12:30 16 So if you're being initiated by court order, you
12:30 17 submit it to say, "Look, it's been vacated," and they open a
12:30 18 new proceeding.

12:30 19 So there's a procedure. There's a rule I can follow.
12:30 20 I can go -- if the -- you know, if you vacate an FAA
12:30 21 arbitration proceeding, I can go to one of those providers
12:30 22 and --

12:30 23 THE COURT: So you're worried if I say it's vacated
12:30 24 and don't say anything else that they're just going to --
12:30 25 nothing is going to happen?

12:30 1 MR. SCHRAMEK: Your Honor, I have no process right
12:30 2 now to do anything with that. CMS has no rules about -- and
12:30 3 this is my part about the government as well.

12:30 4 They never addressed the issue of, "Well, what
12:30 5 happens next, government? You're" -- you know, "the
12:30 6 Departments, U.S." -- "how does this work if it's" -- "why
12:30 7 don't you tell us" -- "tell the court -- give it assurance that
12:30 8 it can have a rehearing without the party being" -- "without
12:30 9 the IDR entity being a party."

12:30 10 They provide no explanation of that. There's no
12:30 11 rule. They could have passed rule-making to address this. We
12:30 12 wouldn't have to be here. It's not there.

12:30 13 THE COURT: What about in the government's brief?
12:30 14 Did it -- did it talk about that, or not?

12:30 15 MR. SCHRAMEK: No, no. It's a glaring omission.

12:31 16 They have immunity. Dismiss them, because, you know,
12:31 17 we don't want the IDR entities to have to be involved in
12:31 18 lawsuits. But no discussion about how do we get this case back
12:31 19 before the proper -- now, they mention, "Well, you should sue
12:31 20 the Departments."

12:31 21 Well, Your Honor, again, the IDR entity is the one
12:31 22 that made the decision.

12:31 23 I also cited the case law in our -- in our brief
12:31 24 about -- you know, in mandamus proceedings in state court. You
12:31 25 sue the judge for the mandamus, you know. And the Attorney

12:31 1 General usually comes in and defends the judge, right.

12:31 2 And so it's not unprecedented that you sue the
12:31 3 decision-maker in an appeal or a mandamus. And, here --

12:31 4 THE COURT: I'm generally opposed to it, but...

12:31 5 MR. SCHRAMEK: My wife is a judge, too. I
12:31 6 understand.

12:31 7 But -- Your Honor, but here it's a necessary party.
12:31 8 And we really need them to get the relief we're asking for. I
12:31 9 would just --

12:31 10 THE COURT: Usually the people that sue me are --
12:31 11 don't have lawyers, but -- but -- all right. I understand what
12:31 12 you're saying. Let me ask you this.

12:31 13 My law clerk, unfortunately, who worked on this -- is
12:31 14 working on this with me came down with COVID, of all things,
12:31 15 and so he's participating remotely.

12:32 16 And he reminds me that the *Cheminova* case which was
12:32 17 relied on, I think by Kaiser, was in their reply, and that you
12:32 18 never really got to talk about that case. That's the D.C.
12:32 19 case.

12:32 20 Are you familiar with it? And what's your view of
12:32 21 it?

12:32 22 MR. SCHRAMEK: So Your Honor, standing here, I cannot
12:32 23 respond to that particular case. I have points on the other
12:32 24 ones they mentioned.

12:32 25 THE COURT: Okay.

12:32 1 MR. SCHRAMEK: But I'm happy to provide a response to
12:32 2 that after the hearing --

12:32 3 THE COURT: Why don't you do that.

12:32 4 MR. SCHRAMEK: -- to that specific case.

12:32 5 THE COURT: I'm talking, like, two pages.

12:32 6 MR. SCHRAMEK: Yeah. Absolutely.

12:32 7 THE COURT: Okay. I just -- it's a case that they
12:32 8 pretty heavily relied on in their presentation, but it was in
12:32 9 their reply, so you didn't get a chance to talk about it.
12:32 10 so --

12:32 11 MR. SCHRAMEK: We will follow up on that, Your Honor.
12:32 12 But on the *Union Carbide* case, which was FIFRA, it was silent
12:32 13 to, say, the Federal Arbitration Act. There was no reference
12:32 14 to it. But the statute itself required an arbitration under
12:32 15 AAA rules.

12:32 16 Well, that's a no-brainer. We know the AAA rules.
12:33 17 We know how those work. We know there's due process there. So
12:33 18 applying the FAA -- if the AAA rules apply, that's a fair
12:33 19 result. That's a common-sense result. That doesn't mean you
12:33 20 apply it to this statutory regime.

12:33 21 And on the *O.R. Securities* front, that's the case
12:33 22 that says even if you file a complaint the court has discretion
12:33 23 to treat it as a motion to vacate under the FAA, so it's not --
12:33 24 you know, it's not a -- the end of the game if you style it as
12:33 25 a complaint.

12:33 1 And that had to do with the NASD, National
12:33 2 Association of Security Dealers. And the court noted that
12:33 3 that's a voluntary security association. You don't have to be
12:33 4 a member. You voluntarily join. So you voluntarily join and
12:33 5 then you're subject to arbitration. Again, we're back to the
12:33 6 voluntariness.

12:33 7 So their cases are not on point, Your Honor. And at
12:33 8 the end of the day, you asked the question isn't it -- what's
12:33 9 it better for if the QPA is lower? Is that better for the
12:33 10 insurers or not? The answer is unquestionably, absolutely 100
12:33 11 percent of the time yes. And that's why we're here.

12:33 12 THE COURT: Thank you.

12:33 13 MR. SCHRAMEK: If the Court has any other
12:33 14 questions --

12:33 15 THE COURT: Thank you.

12:33 16 MR. SCHRAMEK: Thank you, Your Honor.

12:33 17 THE COURT: Thank you.

12:34 18 So -- so I guess this is kind of a thing. And
12:34 19 obviously a lot is going on both in this court and in courts
12:34 20 around the country. I'm not familiar with the Texas case.

12:34 21 Are any of y'all parties in the -- not the one in
12:34 22 front of -- not the one against HHS, but the other cases -- are
12:34 23 any of you parties in that? Who's --

12:34 24 MR. SCHRAMEK: Your Honor, in the Southern District
12:34 25 of Texas case --

12:34 1 THE COURT: Yes. That's the Houston case?

12:34 2 MR. SCHRAMEK: Yes, Your Honor. Those are two cases
12:34 3 that were filed by many clients, GMR subsidiaries.

12:34 4 THE COURT: Okay. Against any of these providers, or
12:34 5 different providers?

12:34 6 MR. SCHRAMEK: One against Kaiser, which is the same.
12:34 7 And after we filed this case, we then had decisions by a
12:35 8 different IDR entity in which we saw the same pattern of
12:35 9 mis- -- what we claim is a misrepresentation of the QPA. And
12:35 10 so we aggregated those in Houston, because that's where the
12:35 11 other IDR entity is -- met with those cases.

12:35 12 THE COURT: And what's the -- what's the status of
12:35 13 those cases?

12:35 14 MR. SCHRAMEK: So both of those cases -- we filed
12:35 15 them -- the others are against Aetna, which is not a party to
12:35 16 any of these.

12:35 17 We filed the Aetna case first. And it was assigned
12:35 18 to Judge Bennett. Then we filed the second case against
12:35 19 Kaiser. We listed it as a related case in filing, but it got
12:35 20 assigned to a different judge.

12:35 21 And so when we had the status with Judge Bennett, we
12:35 22 noted that. He suggested it probably made sense to consolidate
12:35 23 it. Those were recently consolidated, so now they're both
12:35 24 before Judge Bennett.

12:35 25 We did have oral argument on the motion to dismiss

12:35 1 already on that -- on that matter. It was just Aetna. Kaiser
12:35 2 did not participate, because it was pre-consolidation.

12:35 3 And so now those both are pending. We've had one
12:35 4 oral argument, but they're both fully briefed.

12:36 5 THE COURT: Are the issues essentially the same?

12:36 6 MR. SCHRAMEK: Yes, Judge.

12:36 7 THE COURT: Can you -- when you file your two pages
12:36 8 on that case, can you give me the -- make sure we've got the
12:36 9 cites -- I mean, the location of those cases, please.

12:36 10 MR. SCHRAMEK: Yes, Your Honor. We'll add it.

12:36 11 THE COURT: And when you -- how long will it take you
12:36 12 to file your little paper on the one case?

12:36 13 MR. SCHRAMEK: If we could do it by -- today is
12:36 14 Tuesday, so if we -- by Friday be okay?

12:36 15 THE COURT: That would be more than okay. Yeah.

12:36 16 MR. SCHRAMEK: Okay.

12:36 17 THE COURT: So -- okay. If you -- yes, that's fine.
12:36 18 Is that easy to do, or do you need --

12:36 19 MR. SCHRAMEK: Yes. We can do that.

12:36 20 THE COURT: Yeah. That's fine. I don't think I'll
12:36 21 have a ruling out by then, so -- have a seat.

12:36 22 So there's two ways that I can go when I have oral
12:36 23 argument. One thing I have tried to do more over the last
12:36 24 several years as an efficiency is to -- is to prepare, have
12:37 25 argument, and then just rule from the bench. And I can do that

12:37 1 in -- about 50 percent of the time. This isn't one of them.

12:37 2 And so I'm going to have to write an order. And I'll
12:37 3 do the best I can to get about the business of it, but I can't
12:37 4 tell you exactly when that will be.

12:37 5 I'm assuming -- just by the tenor of things and the
12:37 6 way this has played out around the country, I'm assuming that
12:37 7 there's not either -- there's not an appetite for y'all to try
12:37 8 to discuss some resolution of this before I end up having to
12:37 9 rule.

12:37 10 What I'll do is -- is there anybody here who wants to
12:37 11 stand up and say they'd like to try to see if there could be
12:37 12 some facilitated resolution before I rule?

12:38 13 (No response.)

12:38 14 THE COURT: Okay. So -- so --

12:38 15 MR. KESHAVARZI: Maybe we can have C2C --

12:38 16 MR. SCHRAMEK: We finally agreed on something.

12:38 17 THE COURT: Yeah. You agreed. Yeah.

12:38 18 Say that again.

12:38 19 MR. KESHAVARZI: Maybe we can have C2C be the
12:38 20 mediator.

12:38 21 MR. FACKLER: We can mediate, Your Honor. Special
12:38 22 price today.

12:38 23 THE COURT: Right. So -- okay. So I'm going to have
12:38 24 to rule. And I will. I feel like -- I feel like the briefing
12:38 25 has been good. I feel like this has been helpful to me. And

12:38 1 I'll just do the best I can to give you a decision as soon as I
12:38 2 can. That's about all I can say to you. I don't know of any
12:38 3 other thing to do.

12:38 4 And I'm not inclined to allow the case to go further
12:38 5 until I figure out what kind of -- what I've got here. So I'm
12:38 6 not allowed to -- I'm not inclined to allow discovery or
12:38 7 anything at this point. I need to grapple with these legal
12:38 8 issues.

12:38 9 Because I just -- it's a -- I think it's a -- I think
12:39 10 that probably you need an opinion from me in order to figure
12:39 11 out where we are. And so I will do the best I can.

12:39 12 I've got -- I think the three cases are all -- yeah,
12:39 13 they're all with me. So I'll issue one opinion for all cases.
12:39 14 They raise essentially the same issues, a little bit of
12:39 15 difference in a couple of them. Until that happens, that's all
12:39 16 I've got for you.

12:39 17 Is there anything else from the plaintiff that you
12:39 18 can think of today, sir?

12:39 19 MR. SCHRAMEK: Your Honor, I would just note that
12:39 20 there was a motion for an amicus brief filed. We responded to
12:39 21 that. I think you can decide that likely on the papers. But
12:39 22 we're certainly available to entertain any questions.

12:39 23 THE COURT: Yeah. I won't take argument on that.
12:39 24 I'll be honest with you, I -- I remember now -- yeah, Richard,
12:39 25 my law clerk, told me that I was carrying that today. I'll

12:39 1 take a look at it and make a decision within the context of it.

12:40 2 MR. SCHRAMEK: And, Your Honor, my colleagues
12:40 3 reminded me that there are a lot of things that the government
12:40 4 said that we could respond to, to the extent you would find
12:40 5 that helpful, if you're going to reference their statement and
12:40 6 position.

12:40 7 THE COURT: Yeah. I -- I have to confess, I did not
12:40 8 recall -- I didn't ask for that, right?

12:40 9 MR. SCHRAMEK: No.

12:40 10 THE COURT: They just filed it.

12:40 11 MR. SCHRAMEK: Yes.

12:40 12 THE COURT: And they're allowed to do that, I guess,
12:40 13 if they're the government, I guess. So, you know, I think
12:40 14 that's -- I think that would be fair -- if you really want to,
12:40 15 I think that would be fair.

12:40 16 So here's what I'm going to do. I'm going to give
12:40 17 you leave to file a brief that includes the case we referenced,
12:40 18 includes the reference to this Texas case, and includes any
12:40 19 response to the government's position.

12:40 20 I'm going to limit that to -- how long was the
12:40 21 government's brief?

12:40 22 MR. SMITH: 26 pages.

12:40 23 THE COURT: If I limit you to ten pages, is that good
12:40 24 enough?

12:40 25 MR. SCHRAMEK: Yes, Your Honor. I think we can --

12:41 1 we're not going to be repetitive of any arguments, but just
12:41 2 address the --

12:41 3 THE COURT: I think that's fair enough, because the
12:41 4 government just came in and dropped that brief. And it was --
12:41 5 I thought it was well written and well done. And obviously
12:41 6 that's a position of the United States that I need to take into
12:41 7 account. But I do think it would be fair to give you a chance
12:41 8 to respond to it.

12:41 9 For some reason --

12:41 10 MR. SCHRAMEK: They had very strong positions on
12:41 11 their regulations in the Eastern District of Texas as well.

12:41 12 THE COURT: Yeah. So -- I don't think you need to do
12:41 13 that by Friday, though. So -- everybody is over there, thank
12:41 14 goodness, right?

12:41 15 Mr. Russell, you were going to have to get -- work
12:41 16 all night on it, I'm sure.

12:41 17 So today is May 17th, right, or -- no, today is the
12:41 18 16th. Sorry. I'll give you until -- can I -- how about a week
12:42 19 from Friday, so the 26th? Is that enough time?

12:42 20 MR. SCHRAMEK: Yes, Judge.

12:42 21 THE COURT: Okay. All right.

12:42 22 MR. SMITH: Your Honor, I rise to --

12:42 23 THE COURT: What purpose do you rise?

12:42 24 MR. SMITH: I rise with a -- with a concern of the
12:42 25 defendants that may not be an issue, but we --

12:42 1 THE COURT: Yeah.

12:42 2 MR. SMITH: -- wouldn't want to not have flagged it.

12:42 3 THE COURT: Yeah.

12:42 4 MR. SMITH: If the supplemental briefing by the

12:42 5 plaintiff triggered the need for reply by any of the

12:42 6 defendants, perhaps leave to prepare a joint opposition --

12:42 7 or -- or further briefing/response within a week following

12:42 8 their deadline, if -- if one were to --

12:42 9 THE COURT: I'll see. If you -- if you feel like

12:42 10 they've said something -- all I'm asking them to do is respond

12:42 11 to that case, which was relied on by Kaiser but not available

12:42 12 to them at the time. And then I'm giving them a chance to

12:42 13 respond to a brief that was filed by the government.

12:42 14 So I'm not sure why that would trigger it. But if

12:42 15 you get bothered by something or you really feel like -- that

12:43 16 something needs to be said, you can file a motion for leave to

12:43 17 file a reply. You can get their position -- under our local

12:43 18 rule you're required to get the position of the other side.

12:43 19 And if you do propose it, I think a joint submission would be

12:43 20 preferable.

12:43 21 MR. SMITH: Thank you, Your Honor.

12:43 22 THE COURT: Thank you.

12:43 23 All right. Anything else on the defense side?

12:43 24 (No response.)

12:43 25 THE COURT: All right. Well, thanks for the help.

12:43 1 Good to see everyone. And I will get you an order as soon as I
12:43 2 can, but don't hold me to any specific date. I'm just going to
12:43 3 have to work on it. Okay?

12:43 4 MR. KESHAVARZI: Thank you.

12:43 5 THE COURT: First of all, I've got to figure out what
12:43 6 the answer is, and then I've got to write an opinion.

12:43 7 All right. Thank you.

12:43 8 MR. KESHAVARZI: Thank you.

12:43 9 MR. SCHRAMEK: Thank you, Your Honor.

12:43 10 COURT SECURITY OFFICER: All rise.

12:43 11 THE COURT: Yeah. If any rulings come out in that
12:43 12 Texas case, would you please file a notice with me?

12:43 13 MR. SCHRAMEK: Absolutely.

12:43 14 THE COURT: Thank you.

15 (The proceedings concluded at 12:43 p.m.)

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CERTIFICATE

UNITED STATES DISTRICT COURT)
)
MIDDLE DISTRICT OF FLORIDA)

I hereby certify that the foregoing transcript is a true and correct computer-aided transcription of my stenotype notes taken at the time and place indicated herein.

DATED this 18th day of May, 2023.

s/Shannon M. Bishop
Shannon M. Bishop, RDR, CRR, CRC