NO SURPRISES ACT: OPEN NEGOTIATION STRATEGIES & COMPROMISES

Now that the No Surprises Act (NSA) has taken effect, both payors and providers are working tirelessly to understand the new patient protection regulatory framework.

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This important new process not only requires a unique calculation for surprise bills according to a new in-network methodology, but also encourages negotiations instead of balance billing when that rate is not accepted.

The traditional appeals and balance bills on past claims have been combined into a new form for NSA claims: the Open Negotiation Notice.

Not to be ignored, this form carries with it a looming threat of formal action if negotiations fail after 30 business days. A prepared Third Party Administrator (TPA) should know the events and steps involved in the Open Negotiation process, understand the factors and benchmarks available during the negotiation, and learn a few strategies that have surfaced in the early part of this year during these negotiations.

AN OUT-OF-NETWORK EMERGENCY CLAIM WALKS INTO A TPA...

When a TPA receives a medical bill that meets the criteria for a surprise billing claim, the first step is to determine the Qualifying Payment Amount (QPA) and issue payment.

While many providers may accept this initial payment, which is intended to represent the median in-network rate, some providers may disagree with the amount and seek additional payment.

The NSA prevents additional payment from the patient (a balance bill), and instead requires an Open Negotiation period between the payor and provider. The explanation of benefits (EOB) sent to the provider and should include the contact email for the Open Negotiation Notice (perhaps in a reason code).

Including a contact email on the EOB not only provides a clear path to start the negotiation process, but that same EOB would serve as evidence if a party ignores the provided contact and sends the Open Negotiation Notice elsewhere and then attempts to leverage the failed notice later in the process.

The Open Negotiations process includes the following events: the Open Negotiation Notice, review and a good faith response, and resolution or representation. Each stage is an opportunity to leverage the available rules for efficient closure of the claim.

The Open Negotiation Notice most likely will arrive by email, and intake actions should include verification that the form is complete and includes all required information, and a secure request for any additional, necessary information to identify the claim (Open Negotiation Notice forms do not presently require patient or claim identifiers).

Once the Open Negotiation Notice arrives and is verified as complete, a rapid review of the available benchmarks for the specific claim to validate the range for negotiation and a good faith response will keep the conversation on track.

A response might include an express intent to negotiate in good faith, a short explanation that the payment (or offer) is supported by independently reviewed benchmarks, and a clear outline of the dates and deadlines ahead.

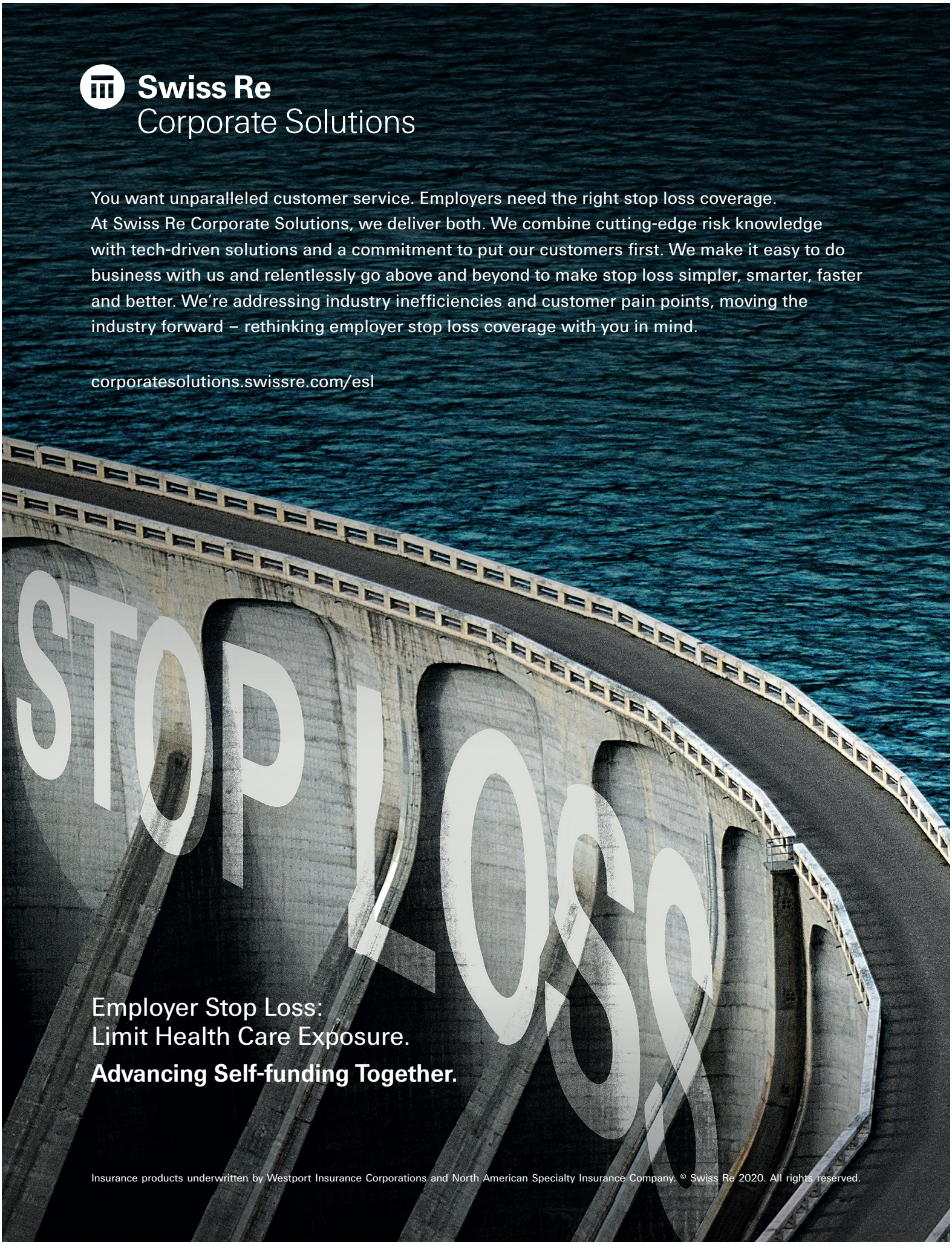
As offers are exchanged there may be possibility for resolution, which avoids the formal process of Independent Dispute Resolution (IDR).

However, if it looks like the negotiation will fail, any records of benchmarks and good faith attempts to negotiate should be documented, and the final letter prior to IDR should clearly identify the contact information (including an email address) for representation in IDR.

THE QPA NO LONGER STANDS OUT IN A CROWD OF FACTORS

The Interim Final Rule for the No Surprises Act (NSA) placed the QPA) at the center of any dispute. Independent Dispute Resolution Entities (IDREs) were instructed to presume the QPA as correct and place the burden on a provider to prove why additional payment was necessary.

NSA negotiations (and disputes) looked like the exception rather than the norm. However, the recent opinion in T*ex. Med. Ass'n v. United States Dep't of Health & Human Servs. (E.D. Tex. 2022*), struck down the presumption that the QPA was correct, and guidance now pointed to a number of equal factors to be considered in a payment determination in addition to the QPA.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While this case is being appealed, for the time being this litigation has essentially relegated the QPA to one of many starting points (and potential end points) in a surprise billing negotiation.

THE QPA

This benchmark is either supplied by the network based on the median contracted rate, or derived from a database if the median contracted rate is not available. Identifying whether a QPA is from a network or derived from a database would be helpful information for an IDRE.

However, the updated rules do not currentlly identify the QPA as the primary factor, and the rules expressly do not require an exploration of the exact calculation or methodology as part of a negotiation or dispute.

A short and simple statement about the QPA source and calculation could avoid a situation where a QPA could be put on trial rather than the main issue: whether or not the payment is reasonable.

With the QPA in the relegated position (for now) the additional factors available for negotiation (and dispute resolution) are as follows: the level of training, experience, and quality measurements; market share; patient acuity; teaching status, case mix, and scope of services; demonstration of good faith efforts; and additional related credible information.

THE LEVEL OF TRAINING, EXPERIENCE, AND QUALITY MEASUREMENTS

A provider may now argue that the quality level of their services merits a payment higher than the QPA, and a TPA would want to analyze that statement using objectively available data.

Facility quality benchmarks are publicly available through the Hospital Value Based Payment System Data, which is arguably published for use in this kind of analysis.

Further, the Merit Based Incentive Payment System data is also available for analysis of professional service providers. Some services (like durable medical equipment sold in emergency situations) would not rely on training or experience of the provider, which might be worth noting if those are a large portion of a surprise bill.

MARKET SHARE

A TPA may be able to show that an initial payment is reasonable even if there are higher contracted rates in the area because of deficiencies in a specific market.

The most common available data for this factor is a provider directory, such as the Hospital General Information published by Medicare. Directories such as this would allow an analysis of the ownership percentages in the area and whether there is meaningful competition, or whether the market power in the area allows a single entity to dictate price.

PATIENT ACUITY

A provider may argue that the medical services are complex and additional payment is warranted because of the patient acuity. A TPA could frame this discussion around the diagnosis reported when the service was provided.

One method to identify the acuity of the patient is the score assigned to a specific diagnosis or procedure for its complexity and resource use, such as the Diagnosis Related Group Relative Weight information published by Medicare.

TEACHING STATUS, CASE MIX, AND SCOPE OF SERVICES

Drawing from the individual case/acuity scores in patient acuity, a case mix index of the provider's typical or historical services would help identify whether a specific case is an outlier for the provider. If the case is not an outlier, a TPA could argue that this routine case would not demand unique payment accommodations.

DEMONSTRATION OF GOOD FAITH EFFORTS

The open negotiation period and related communications create an opportunity to document good faith. Also, if a party has access to past attempts to reach a network agreement, this data may be important as well. It would not be surprising if this factor tied in directly with market share to show that an entity with control over the market would not respond to any reasonable requests for compromise.

ADDITIONAL RELATED CREDIBLE INFORMATION

Specific cases may hinge on information that does not fit directly in the above categories. For instance, an article or interview that contradicts other pricing evidence, or an example of a medical device available online for a much lower or higher cost directly from the manufacturer could affect negotiations and dispute resolution when contract rates are in conflict.

EARLY NEGOTIATION STRATEGIES AND RESPONSES

While many parties are using the Open Negotiation process to efficiently resolve disputes, two suspect approaches to Open Negotiations that might threaten efficiency have surfaced in the short time since the process has been in place: Open Negotiations as pretext and Open Negotiations as discovery.

OPEN NEGOTIATIONS AS PRETEXT

If a party does not include all of the required information on an Open Negotiation Notice, sends only one email to a generic inbox without follow up, and then files for IDR as soon as the time has passed, this is strong evidence that the communication is a pretext to pull the other party into a dispute without a meaningful conversation.

An effective response to this strategy is to identify that the Open Negotiations Notice is incomplete, so the process has not started, and any attempt to file for IDR will be promptly disputed as untimely.

Further, even if the Open Negotiation Notice is sufficient, bad faith negotiations could arguably be a viable reason to request an extension of time (available for reasons except payment) when a dispute is filed, and as credible evidence as to why the non-initiating party's offer should be considered in a dispute.

OPEN NEGOTIATIONS AS DISCOVERY

When a negotiating party stalls negotiations with demands for very specific evidence about the variables, algorithms, and sources for a QPA payment, they may be trying to use the Open Negotiations process as a discovery process rather than to resolve the claim at issue in good faith.

This strategy, and the laundry list of "interrogatories" included in these letters give the impression that the origins of a QPA are on trial or will be on trial.

An effective response to this strategy is to provide a short statement that the QPA was "provided by the network" or "derived from a database" and, state an intent to negotiate in good faith, evidenced by responding to communications, presenting offers, and identifying a credible basis for those offers; identify that the IDR process specifically does not require the IDRE to consider the calculation of the QPA, and the QPA is not on trial; and warn that repeated demands for extensive information that is not to be considered in IDR is evidence of bad faith and an attempt to derail any meaningful negotiations.

CONCLUSION

From the initial payment to a settlement or final determination, a properly executed Open Negotiation strategy will likely resolve claims much faster than in the nebulous days of balance bill defense and confusing collection tactics.

The three most important strategies to adopt are: a prompt response upon receipt of an Open Negotiation Notice, evidence packed communication in negotiations, and demonstrated, documented evidence of good faith.

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