



The Cost and Perils of Arbitration

Some lawmakers want to impose government-mandated arbitration as a potential remedy to surprise medical billing. The experience in New York with the state's "baseball-style" arbitration model underscores the unintended consequences and harm from a potential nationwide arbitration model.

New York Tried Arbitration. Costs Went Up.

Under New York's arbitration system, insurers are required to make "reasonable payments" to providers. After receiving that initial payment, providers are able to take cases to arbitration. Providers know that the more claims they take to arbitration, the better chance they will be awarded higher rates based on billed charges.

In the first three years that New York has tracked its surprise billing disputes in the arbitration pipeline, [the number of claims has actually increased](#).¹ These finalized charges far exceed the cost that Medicare and private plans pay for the same care.

- Nationally, the average reimbursement for the highest-level emergency service was [306 percent of Medicare](#), with median reimbursement at [257 percent of Medicare](#).² That puts New York at [4.6 times the national average](#).
- There was a [188 percent increase in claims going to arbitration](#) in New York from 2016-2018, including a [34 percent increase in emergency claims received](#).
- Increasingly, [disputes have sided overwhelmingly with provider's billed charges](#), a 300 percent increase for emergency services disputes since the program began, and a 563 percent increase for other surprise bill disputes involving ancillary providers.

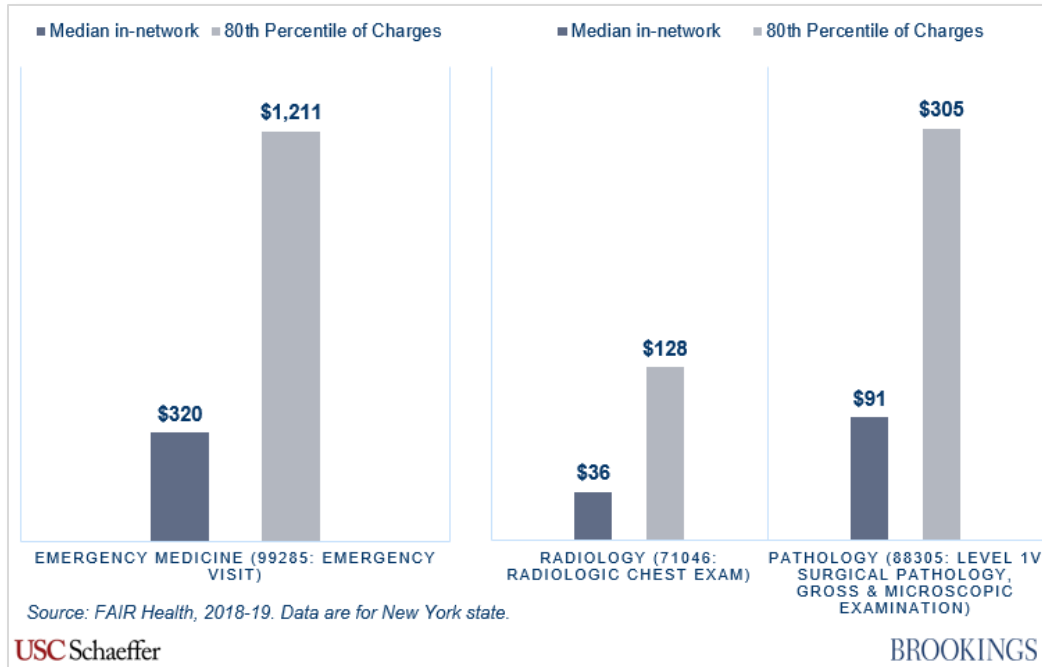
Arbitration builds on a system that already rewards these providers with inflated prices. Those inflated charges mean higher payouts when surprise bills must be resolved using arbitration. In New York, the arbitration process has steered reimbursements towards the 80th percentile of billed charges.³ Indeed, recently introduced federal legislation⁴ modeled after the New York law explicitly directs the arbiter to look at the 80th percentile of billed charges. These inflated payments drive up premiums for everyone.

¹ New York State Department of Financial Services 2016 Report available at: https://www.dfs.ny.gov/docs/reportpub/fraud/ffcpd_annualrep_2016.pdf (pg 23), the 2017 Report available at: https://www.dfs.ny.gov/docs/reportpub/fraud/ffcpd_annualrep_2017.pdf (pg 23) and the 2018 report available at: https://www.dfs.ny.gov/system/files/documents/2019/04/ffcpd_annualrep_2018.pdf (pg 18)

² Trish E, Ginsburg P, Gascue L, Joyce G. Physician Reimbursement in Medicare Advantage Compared With Traditional Medicare and Commercial Health Insurance. JAMA Intern Med. 2017;177(9):1287–1295. <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2643349>

³ "Rep. Ruiz's Arbitration Proposal For Surprise Billing (H.R. 3502) Would Lead To Much Higher Costs And Deficits," Health Affairs Blog, July 16, 2019. <https://www.healthaffairs.org/doi/10.1377/hblog20190716.355260/full/>

⁴ H.R. 3502, "Protecting People From Surprise Medical Bills Act." (116th Congress)



Experts Agree: Arbitration Keeps Costs High

Leading policy experts and organizations representing consumers, employers and unions have urged Congress to stop discriminatory pricing from bad actors and pursue reforms that would lower costs for millions of Americans. Importantly, everyone agrees that protecting consumers means avoiding a costly, burdensome arbitration proposal that would incentivize price-gouging moving forward.

- “We do not have a lot of enthusiasm for arbitration. We believe that that would be disruptive. We believe that that would get in the way of solving this problem. And we believe it would be an unnecessary distraction that ensures at the end of the day a lot of potential abuses disguised in a different form would nevertheless still be inflicted against patients and Americans.” – *Joe Grogan, Assistant to the President for Domestic Policy; Director, Domestic Policy Council, The White House*
- We “are deeply concerned about any mechanism that uses billed charges as a basis for or factor in setting out of network payment. Billed charges are often several times higher than the rates providers typically receive for delivering care and using charges as a basis for or factor in setting rates would inflate costs throughout the system, ultimately raising premiums for consumers.” – *Families USA, AFSCME, American Medical Student Association, Community Catalyst, Consumer Reports, Doctors for America, First Focus Campaign for Children, Health Care for America Now, Mental Health America, MomsRising, National Alliance on Mental Illness, National Association of Social Workers, National Consumers League, National Health Law Program, National Partnership for Women & Families, NETWORK Lobby for Catholic Social Justice, Voices for Progress, 1,000 Days*
- “Specifically, we are concerned about proposals for open-ended arbitration, which have been floated as a solution to the problem. If arbitration appears innocuous, it is to a large extent because it is not transparent. Experience suggests that arbitration would be cumbersome to deploy, and highly favorable to those health care providers who charge high prices today. If Congress were to endorse arbitration, it could potentially open the door to a system quite unintended – establishing an inflationary dynamic that accommodates and encourages the rapid growth of costs.” – *American Enterprise Institute, 60 Plus Association, Foundation for Government Accountability, National Taxpayers Union, Galen Institute and Heritage Foundation, Heritage Action for America, Hoover Institution, Center for a Free Economy, Oklahoma Council of Public Affairs, HSA Benefits Consulting, Independent Women’s Forum, Hoppe Strategies, American Enterprise Institute, Small*

Business & Entrepreneurship Council, Alaska Policy Forum, 60 Plus Association, Mark Pauly (University of Pennsylvania), HSA Coalition, Pacific Research Institute, Manhattan Institute, former Idaho state legislator Eric Redman, The Foundation for Research on Equal Opportunity, Council for Citizens Against Government Waste, Mississippi Center for Public Policy, Grace-Marie Turner (Galen Institute), Association of Mature American Citizens, Council for Affordable Health Coverage

- "...Policy makers should be concerned about any solution—be it baseball-style arbitration or other means—in which a provider's inflated charges factor into the price that is paid. An arbitration approach leaves the charges mechanism largely in place as a starting point for the arbitration. Furthermore, providers may seek to increase charges to have a more favorable starting position in the arbitration process. The proposed legislation might move the financial burden from the individual patient to the insurer, but it also increases the leverage of the providers in the negotiating process, thereby increasing the medical costs for the health plan and the premiums for all health plan members." – *Kevin A. Schulman & Barak D. Richman, Duke University; Arnold Milstein, Stanford University*
- "According to an analysis conducted by USC-Brookings Schaeffer Initiative for Health Policy of newly released data from New York's Department of Financial Services, the New York model is making health care substantially more expensive in the state. In fact, arbiters are typically deciding on dollar amounts above the 80th percentile of typical costs. 'This is an extremely high and extremely inflationary rule of thumb.'" – *Loren Adler, The Brookings Institution / USC-Brookings Schaeffer Institute*
- "In New York, the largest state where arbitration is used for surprise bills, arbitrators are instructed to use the 80th percentile of hospital list prices as the benchmark for their decision. These hospital list prices are a lot like paying full fare for an airline ticket; they often come out to 10 or 20 times what Medicare pays emergency rooms for the same services. By benchmarking out-of-network prices at such a high rate, the New York law incentivizes ER doctors to raise their prices even higher, knowing that by doing so, the benchmark for arbitration will also go up." – *Avik Roy, The Foundation for Research on Equal Opportunity*
- "The Congressional Budget Office and independent economists have found that restricting access to the IDR process would help rein in excessive provider charges and reduce workers' health care premiums. California's experience of implementing a surprise medical billing law that relies on a payment benchmark and limits provider appeals shows that consumer costs can be contained without narrowing insurance provider networks." – *William Samuel, AFL-CIO*
- "Rather than contain costs, therefore, baseball-style arbitration would give providers new incentives to raise their billed charges over time." – *Tara Straw, Center for Budget and Policy Priorities*