

# Protecting Older Adults from Surprise Medical Bills

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NATIONAL  
CENTER ON  
**LAW &  
ELDER  
RIGHTS**

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## National Consumer Law Center

The National Consumer Law Center (NCLC) uses its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults and people of color. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC authored this issue brief as part of a contract with the National Center on Law and Elder Rights.

## Introduction

An alarming number of consumers struggle with medical bills in the United States, with medical debt representing over half of all debts in collections.<sup>1</sup> “Balance billing” or surprise billing is a common cause of medical debt and happens in emergency and non-emergency contexts when a patient is seen by an out-of-network provider who then bills the patient the remainder of the bill that insurance has declined to cover.<sup>2</sup> The more consumers interact with the healthcare system, the more likely they are to experience surprise bills. For this reason, surprise bills may disparately impact older adults (who are more likely to have chronic conditions<sup>3</sup> that require more frequent medical care). While there are surprise billing protections within Medicare and Medicaid, the federal No Surprise Act and state surprise billing laws may offer protection to older adults who carry private commercial insurance plans.

## Key Lessons

- 1. Medicaid and Medicare have surprise billing protections that prohibit balance billing.** Medicaid and Medicare protections against surprise or balance billing broadly prohibit providers from engaging in the practice of balance billings. However, some hospitals still balance bill Medicare and Medicaid patients.
- 2. The federal No Surprises Act (NSA) provides broad protections against balance billing for private commercial insurance plans but does not preempt stronger state laws.** The NSA takes patients out of the middle of billing disputes between insurers and healthcare providers. At its core, the No Surprises Act provides for an independent dispute resolution (IDR) process to settle disputes between providers and insurers, meaning patients will not be billed for the unreimbursed amount of the bill.<sup>4</sup> The states can impose stronger surprise billing protections as long as those laws do not prevent application of the No Surprises Act.

1 Consumer Financial Protection Bureau, *Medical Debt Burden in the United States*, February 2022.

2 AARP, *What Causes Surprise Medical Bills?* August 8, 2019. Typically surprise or balance bills happen when a patient receives emergency services or has a scheduled procedure at a hospital or ambulatory surgical facility.

3 Consumer Financial Protection Bureau, *Medical Billing and Collections Among Older Americans*, May 2023 (highlighting that older adults face greater risk of medical debt collections because they are more likely to have chronic conditions).

4 The arbitration requirements of the No Surprises Act have been repeatedly challenged in court, with courts vacating some portions of the arbitration requirements. The Act requires that if a provider and insurer cannot agree upon the out-of-network rate for a service at issue, each party submits a proposed rate to the IDR entity, or arbitrator. The arbitrator then chooses one of the two rates presented as the appropriate payment for the service. According to the Act, the arbitrator must base this choice on several factors, including the qualifying payment amount (QPA), which is the median of the contracted rates recognized by the plan or issuer for a specific service in the same or similar geographic region within the same insurance market, and certain “additional circumstances.” See 42 U.S.C. § 300gg-111(a)(3)(E) and 42 U.S.C. § 300gg-111(c)(5)(C)(ii).

3. **There are exceptions to the No Surprises Act’s protections for patients enrolled in private commercial insurance plans.** The NSA allows for certain exceptions to the balance billing protections. For example, if a patient receiving certain post-stabilization<sup>5</sup> services (i.e. services provided after initial emergency care to maintain, improve, or resolve the patient’s condition) consents to receive those services from a nonparticipating (out-of-network) provider or facility.
4. **State laws may provide protections against other types of balance billing, including for ground ambulance transport.** More than half of states have enacted their own surprise or balance billing laws.<sup>6</sup>

#### How Does a Patient Know if They Have Been Balance Billed?

“Balance billing” refers to situations where a provider bills the patient for the difference between the provider’s charge and the allowed amount (the amount the patient’s insurance will pay). For example, if the provider charges \$100 and the allowed amount (what the insurance will pay) is \$70, the provider may bill the patient for the remaining \$30 balance.

## Medicaid and Medicare Have Surprise Billing Protections That Prohibit Balance Billing

Medicaid law prohibits health care providers from engaging in the practice of balance billing, or collecting additional amounts from Medicaid patients for a covered benefit to make up for the difference between chargemaster (the healthcare provider’s rates for all services and products) and Medicaid rates.<sup>7</sup> The prohibition against balance billing applies when the provider submits a claim for Medicaid payment, even if Medicaid denies the claim.<sup>8</sup> The Medicare Act contains a similar protection against balance billing.<sup>9</sup> Most patients who have both Medicaid and Medicare coverage—sometimes referred to as “dual-eligibles”—cannot be balance billed for any difference between the lower Medicaid reimbursement rate and the higher Medicare reimbursement rate.<sup>10</sup>

Despite the clear prohibition against balance billing, hospitals have been known to make collection efforts and obtain judgments against Medicare and Medicaid patients based on balance billing.<sup>11</sup>

#### PRACTICE TIP

A patient may be able to assert a claim for violation of the Medicare or Medicaid prohibitions against balance billing as a violation of other statutes, such as the Fair Debt Collection Practices Act or a state Unfair, Deceptive, and Abusive Practices statute. If the patient’s claim is against the Medicare program itself, there may be administrative remedies that would first need to be exhausted before bringing legal action.

5 The term “to stabilize,” with respect to an “emergency medical condition,” is defined at 42 U.S.C. § 1395dd(e).

6 Maanasa Kona, The Commonwealth Fund, [State Balance-Billing Protections](#), February 2021.

7 42 U.S.C. § 1396a(a)(25)(C); 42 C.F.R. § 447.15.

8 See *Banks v. Sec’y of Ind. Family & Soc. Servs. Admin.*, 997 F.2d 231 (7th Cir. 1993) (provider is precluded from seeking payment from patient after submitting claim to Medicaid, whether Medicaid pays the claim or denies it); *Serafini v. Blake*, 213 Cal. Rptr. 207 (Cal. Ct. App. 1985) (provider cannot bill Medicaid patient for claims denied by Medicaid due to provider error).

9 42 U.S.C. § 1395cc(a)(1)(A).

10 Centers for Medicare and Medicaid Services, Medicare Learning Network, MLN Matters No. SE 1128 Revised, [Prohibition Billing Dually Eligible Individuals Enrolled in the Qualified Medicare Beneficiary \(QMB\) Program](#), June 2018.

11 While one federal court of appeals has held that the Medicaid Act does not provide for a private remedy to enforce the balance billing prohibition, the Supreme Court of Arizona reached the opposite conclusion. See *Martes v. Chief Executive Officer of S. Broward Hosp. Dist.*, 683 F.3d 1323 (11th Cir. 2012) (holding that a section 1983 claim will not lie against officials of a government hospital for violation of the Medicaid balance billing prohibition); *Ansley v. Banner Health Network*, 459 P.3d 55 (2020). There is also no private right of action to bring an affirmative suit under this provision of the Medicare Act. See *Wogan v. Kunze*, 666 S.E.2d 901 (S.C. 2008) (no private right of action under Medicare Act for physician’s failure to file Medicare claim).

## The Federal No Surprises Act (NSA) Provides Broad Protections Against Balance Billing for the Private Commercial Insurance Plans but Does Not Preempt Stronger State Laws

Enacted as part of the Consolidated Appropriations Act, the No Surprises Act broadly prohibits out-of-network bills for emergency and certain non-emergency situations. The law protects patients by prohibiting the following:

- Surprise billing for emergency services, including air ambulance services (but not ground ambulance services).<sup>12</sup>
- High out-of-network cost-sharing for emergency and non-emergency services.<sup>13</sup>
- Out-of-network charges for ancillary care (like an anesthesiologist or assistant surgeon) at an in-network facility in all circumstances.<sup>14</sup>
- Other out-of-network charges without advance notice.<sup>15</sup>

The NSA's protections apply to private commercial health insurers that offer group or individual health insurance coverage, grandfathered or transitional plans, state government employee plans, and self-funded group plans.<sup>16</sup> The NSA's protections do not apply to beneficiaries or enrollees in Medicare, Medicare Advantage, Medicaid, and other such federal plans because these programs have their own protections to minimize surprise medical bills.<sup>17</sup> However, some older adults carry private insurance (e.g. through retirement plans) to which the NSA's protections may apply. The law's broad protections cover a variety of circumstances for consumers with private insurance, including emergency care, air ambulances, and non-emergency care.

Under the NSA, a health insurance plan or policy that provides or covers any benefits relating to emergency care must cover those emergency services without the need for any prior authorization determination and regardless of whether the provider or facility is or is not participating—i.e., in-network or out-of-network with the insurer.<sup>18</sup> The nonparticipating (out-of-network) provider or facility may not bill or hold liable the insured patient for costs beyond in-network cost-sharing amounts.<sup>19</sup> The NSA's balance billing prohibition and its in-network cost-sharing requirement also applies when an insured patient receives non-emergency care from nonparticipating providers at participating (in-network) facilities.<sup>20</sup> The protections extend to the entire “visit”<sup>21</sup> at an in-network facility, which includes devices, imaging services, lab services, and more, even if those services are from out-of-network providers at the in-network facility.<sup>22</sup> The No Surprises Act sets a minimum standard for surprise billing protections. The states can impose stronger surprise billing protections as long as those laws do not prevent application of the No Surprises Act.

12 42 U.S.C. §§ 300gg-111 to -112

13 42 U.S.C. § 300gg-111.

14 42 U.S.C. § 300gg-111(a)(3)(C)(i).

15 42 U.S.C. § 300gg-111(a)(1)(C)(iv).

16 42 U.S.C. § 300gg-111. Definitions of the different types of health insurance plans are found at section 2791 of the Public Health Service Act (42 U.S.C. § 300gg-91), section 733 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1191b), and section 9832 of the Internal Revenue Code of 1986 (26 U.S.C. § 9832).

17 Centers for Medicare and Medicaid Services, [The No Surprises Act's Continuity of Care, Provider Directory, and Public Disclosure Requirements](#).

18 42 U.S.C. § 300gg-111(a)(1).

19 42 U.S.C. § 300gg-111(a)(1).

20 42 U.S.C. § 300gg-132.

21 45 C.F.R. § 149.30.

22 42 U.S.C. § 300gg-132(a)-(b).

**PRACTICE TIP**

Generally speaking, insured consumers should be protected automatically by the NSA and do not need to take affirmative steps to invoke the safeguards of this law. Any arbitration of healthcare costs should happen between the provider and the insurer or payor without the consumer's involvement. Patients may [submit a complaint](#) to the Department of Health and Human Services if they believe their rights under the NSA have been violated. Link: <https://www.cms.gov/medical-bill-rights>.

## There Are Exceptions to the No Surprises Act's Protections for Patients Enrolled in Private Commercial Insurance Plans

Under the NSA's notice and consent exception, a patient can knowingly and voluntarily agree to be balance billed for out-of-network services in certain circumstances, but only if the patient gives prior written consent to waive their rights under the NSA.<sup>23</sup> One such exception relates to out-of-network post-stabilization services, which generally fall within the NSA's prohibition on balance billing. "Post-stabilization" refers to services provided as part of outpatient observation or an inpatient or outpatient stay to maintain the patient's stabilized condition or improve or resolve the condition after initial emergency services are provided.<sup>24</sup> To be balance billed for post-stabilization services, the patient must be in the condition to give informed consent and travel without medical transport, and the provider must furnish written notice and satisfy any additional state law requirements.<sup>25</sup> The patient must receive the written notice at least 72 hours in advance and then provide written consent to bear responsibility for the out-of-network amounts.<sup>26</sup> The notice must include a good-faith cost estimate, must be available in the 15 most common languages in the state, and must not be buried with other documents.<sup>27</sup>

However, the NSA's protections cannot be waived for emergency services, unexpected urgent medical needs that arise from non-emergency care, specialty services related to emergency care (e.g., anesthesiology, pathology, etc.), diagnostic services (e.g., lab services and radiology), or post-stabilization services where the above-noted requirements are not satisfied.<sup>28</sup>

**PRACTICE TIP**

Be aware of the following exceptions to the good faith estimate: providers do not have to list a diagnosis code if the diagnosis is unknown or there is no relevant code; the estimate can be limited to the initial visit and does not have to include costs of future visits; providers are not required to furnish an estimate to walk-in patients; and providers are not required to furnish an estimate to patients who were insured when an appointment was scheduled but who became self-pay or uninsured by the time of the appointment.

23 42 U.S.C. § 300gg-132.

24 42 CFR § 438.114

25 See Centers for Medicare and Medicaid Services, *Frequently Asked Questions for Providers About the No Surprises Rules*, April 2022, explaining the conditions that have to be met for post-stabilization services to fall within the exception.

26 42 U.S.C. § 300gg-111(a)(3)(c).

27 42 U.S.C. § 300gg-132(d).

28 42 U.S.C. § 300gg-132; 42 CFR § 438.114.

## State Laws May Provide Protections Against Other Types of Balance Billing, Including for Ground Ambulance Transport

At least 33 states have enacted their own surprise billing (or balance billing) laws.<sup>29</sup> For example, some states' surprise billing protections extend to ground ambulance services, whereas the No Surprises Act's protections exclude ground ambulance services.<sup>30</sup> State laws that address surprise or balance billing vary, and might only apply to services provided in an emergency room or to certain types of private health insurance.<sup>31</sup> Other state laws have created a dispute resolution process where health care providers and insurance companies can negotiate among themselves a fair payment for out-of-network claims.<sup>32</sup>

### PRACTICE TIP

The federal No Surprises Act defers to state laws in certain ways, specifically regarding notice and consent protections, and on how to resolve billing disputes.

## Conclusion

Surprise medical bills can send a patient spiraling into medical debt, further harming the patient's health and well-being. For older adults on fixed incomes, a surprise medical bill can mean the difference between whether or not they buy groceries, pay the power bill, or purchase necessary prescriptions. Additionally, the impact of medical debt is more acute among Black older adults, who are more than twice as likely to carry medical debt compared to older white adults.<sup>33</sup> The prohibitions within Medicaid and Medicare provide a layer of protection against surprise or balance bills, while the federal No Surprises Act and state surprise billing laws protect older adults who carry private commercial insurance. Surprise billing laws have their limitations, but older adults should be aware of these protections and the complaint processes available if they believe they have been billed in violation of these surprise billing protections.

## Additional Resources

- Resources for patients interested in learning more about their rights under the No Surprises Act:
  - » [No Surprises Act of the 2021 Consolidated Appropriations Act](#), Pub. L. No. 116-260, § 109, 134 Stat. 2578 (Dec. 27, 2020).
  - » Patients should also visit the [Centers for Medicare and Medicaid Services](#) for a short factsheet.
- Resources for filing a complaint if a patient has been balance billed in violation of state and federal law:
  - » If a patient believes their rights under the federal No Surprises Act have been violated, they can [file a complaint with the Department of Health and Human Services online](#) or by calling 1-800-985-3059.
  - » Some states also have established their own complaint procedures. Patients should visit their state's department of health to find out more details.

29 Maanasa Kona, The Commonwealth Fund, [State Balance-Billing Protections](#), February 2021.

30 Surprise billing laws in Colorado, Delaware, Ohio, West Virginia, New York, Maryland, and Vermont cover ground ambulances. See Madeline O'Brien, The Commonwealth Fund, [Map: No Surprises Act Enforcement](#).

31 Kevin Lucia et al., The Commonwealth Fund, [Balance Billing by Health Care Providers: Assessing Consumer Protections Across States](#), June 2017.

32 N.Y. Fin. Serv. Law § 601 (McKinney).

33 Berneta Haynes, National Consumer Law Center, [The Racial Wealth and Health Gap](#), February 2022.

- Resources for learning more about federal and state surprise billing protections:
  - » National Consumer Law Center, *Collection Actions*, 9.3.7 (5th ed. 2020).
  - » Visit [The Commonwealth Fund](#) to find out more about state surprise billing protections available.
- Resources for patients struggling with medical debt:
  - » National Consumer Law Center, [Surviving Debt](#) (see Chapter 11 for medical debt).
  - » Patients should visit [Legal Services Corporation](#) or the [ElderCare Locator](#) to find free income-based legal help.

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**Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).**

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