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Effective health care arbitration: A collaborative approach

By Viggo Boserup

One of the most frequent types of health care arbitrations is that between a provider of health care services (e.g., physician, medical group, hospital) and the payor (e.g., health plan, health maintenance organization, insurance company) where the provider is seeking reimbursement for services rendered to plan members or insureds (payor-provider disputes).

Unique Qualities of Payor-Provider Disputes

Multiple Issues. These payor-provider disputes may involve multiple issues or categories of issues, often referred to as "buckets." Each bucket may include a single category of issues, such as lack of authorization, medical necessity, usual and customary rates, eligibility and reasonable value.

Large Volume of Cases. Payor-provider disputes may have a high volume of cases within each bucket. Because the claims may be individually small, the provider will often wait until it has gathered a sufficient number of claims to make filing the action or arbitration worthwhile. Thus, each bucket may contain hundreds or thousands of separate claims that arise under the same contractual or non-contractual relationship.

Ongoing Business Relationships. Finally, in payor-provider disputes, the parties are frequently engaged in ongoing business with each other. Typically, the claims in the original demand for arbitration span fixed dates of service. Very often, however, those claims may be a small portion of the claims ultimately arbitrated. During the pendency of the arbitration, there may accrue claims for additional dates of service or claims that were not part of the original claims but that arose under the same contractual or non-contractual relationship as the original claim(s). At the same time, the existing contract may be expiring, may have expired or may be in the process of being renegotiated during the pending action. So by the time of the arbitration, in my experience, each of the buckets may contain "original" claims, "accrued" claims, "future" claims certain to arise from the relationship and often contract issues that need to be addressed.

Early Collaboration

Given the foregoing unique characteristics of payor-provider disputes, I have found that experienced counsel use arbitration most effectively by planning their approach to arbitration early and collaboratively.

Modify the Arbitration Clause. A most effective use of this tool is the recognition that where they can agree, the parties are not bound by the specific terms of an arbitration clause. Thus, if the clause calls for a panel of three arbitrators, but the ultimate amount of money at issue is relatively small, it might make sense to consider using a single arbitrator.

Strike Lists. Likewise, where the parties cannot agree on an arbitrator and thus require a strike list, the parties should attempt to agree on the number of candidates to be included on the strike list. This is important, as the administering alternative dispute resolution provider is unable to respond to a request from one side only.

Plan for the PAMC. Once the parties have selected an arbitrator, they need to plan for the preliminary arbitration management conference (PAMC), which provides the road map for the entirety of the arbitration. Since the vast majority of cases settle prior to reaching an evidentiary hearing, the PAMC is arguably the most important step in assuring a manageable process that is both efficient and cost-effective, and is most likely to lead to a desirable resolution. Planning for the PAMC is critical in assuring not only an effective PAMC, but also in providing the first, and perhaps the last, opportunity for counsel to develop a comprehensive discovery and trial plan.

Phasing. Thus, depending on the volume of cases in each bucket, counsel should consider the potential discovery issues related to that bucket, the calendar of both counsel and clients, and potentially the use of a phased approach to the evidentiary hearings. Quite often, the resolution of a manageable number of cases in a "Phase I" of an arbitration leads to constructive approaches and, ultimately, resolution of cases in subsequent phases well in advance of further evidentiary hearings.

Discovery Scope. Another issue to consider prior to the PAMC is the scope of discovery. Most health care attorneys appreciate the fact that discovery in arbitration should be proportional and not excessive. With a trial plan in mind prior to the PAMC, counsel will have a clearer understanding of the need for discovery in the arbitration process and will be able to judge more clearly the need for resort to the California Code of Civil Procedure or Federal Rules of Civil Procedure. Having often worked together in other matters, many health care attorneys appreciate the fact that cooperation is not a sign of weakness. It often means your case can stand the light of day, and any competent counsel will generally find a way to discover what he or she needs for the case. Thus, you can either do it up front or engage in a costly and painful battle for it throughout the arbitration process.

Discovery Mechanics. The mechanics of discovery should also be carefully considered. The discovery of documents and electronically stored information should be planned carefully, and counsel should be educated by clients as to the types of electronically stored information, retention and backup systems; destruction policies; and other technical matters. Depositions and the use of experts should also be carefully reviewed prior to the PAMC.

The Evidentiary Hearing

The pre-hearing planning of collaborative counsel will inure to their mutual benefit throughout the evidentiary hearing. I strongly encourage counsel to present claims in a matrix of spreadsheets provided in native format. When this information is shared with the arbitrator, the claims can be reviewed far more efficiently at the hearing, which can facilitate the organization of the arbitrator's notes and ultimate award.

Payor-provider disputes have many moving parts, including the fact that the parties often have ongoing business relationships. The keys to the effective use of arbitration in these disputes are collaboration and planning, which should start with the effective (and sometimes creative) use of the arbitration clause, continue with the process of arbitrator selection and conclude with careful attention to both the scope and mechanics of discovery as well as thorough preparation for the PAMC. ■

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