

## Arbitrating Health Care Disputes

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*Abstract: There is a wide variety of health care industry disputes. The complexity of many health care disputes, the parties' desire for confidentiality, the ongoing business relationships between and among the parties and the importance of privacy of health care information make arbitration more advantageous than litigation for health care disputes. This article will discuss the nature of the disputes that are commonly brought to arbitration, the issues that characterize these disputes and how they can best be resolved, and sample language for drafting an arbitration clause for provider/payor disputes, which account for the largest volume of health care industry disputes that utilize arbitration.*

Many different kinds of health care industry disputes benefit from resolution in binding arbitration rather than by traditional litigation in the courts. Factors that can make arbitration more advantageous for such disputes than litigation include the complexity of many health care disputes, parties' desire for business confidentiality and protection of personal health information, preservation of ongoing business relationships between and among the parties, decision making by a professional with healthcare expertise, and potential savings in time, energy and cost. This article will discuss the nature of the disputes that are commonly brought to arbitration, the issues that characterize these disputes and how they can best be resolved, and sample language for drafting an arbitration clause; this clause is particularly focused on provider/payor disputes, which account for the largest volume of health care industry disputes that utilize arbitration.

### A. Overview of Health Care Disputes

Health care disputes range from disputes between an individual patient and his or her insurance carrier or medical provider to complex disputes between hospitals and payors involving hundreds of millions of dollars. The following list illustrates the broad range of disputes arising in today's health care industry:

- Payment, reimbursement billing and coding disputes involving private (e.g. health insurance plans) and government payors (Medicare, Medicaid), and patients and providers of medical services and products including hospitals, pharmacies, physicians;
- Managed care disputes between payers and providers involving contract interpretation, risk sharing, insurance, reimbursement and administrative issues;
- Employment contract disputes between physicians and medical groups or hospitals (including covenants not to compete);
- Complex disputes arising from mergers, acquisitions and joint ventures between hospitals, insurance companies and physician groups;
- Disputes arising out of transactions involving technology and intellectual property;
- Class actions over coverage and claims payment;

- Exclusion of physician groups from limited provider networks;
- Disputes between medical laboratories and their billing companies;
- Disputes regarding diversion of medical products from one distribution channel into another;
- Patient safety claims against hospitals, nursing homes, physicians and other professionals, and product liability claims against drug and device manufacturers;
- Disputes among members of physician groups (or between the “group” and individual physicians) or between hospitals and physicians and other staff;
- False Claims Act and other fraud claims against hospitals, pharmaceutical companies and medical device manufacturers;
- Risk management controversies involving issues about responsibility for patient injuries and deaths (especially those outside the norm of “garden variety” med mal claims);
- Risk management controversies (including insurance coverage) for various commercial claims, for example relating to payment disputes or fraud claims; and
- Medical malpractice cases.

## **B. Dispute Needs and Concerns in the Health Care Industry**

### *1. Complexity of regulatory issues, medical and technical issues, and reimbursement issues*

The health care industry is one of the most highly regulated industries in the United States. The federal government and individual states have statutes and regulations governing managed care, insurance, Medicare and Medicaid, regulation of new pharmaceuticals, fraud and abuse laws pertaining to providers and insurers, nursing home regulation, and licensing requirements for professionals and institutions. This body of health care law and regulation is technical, complicated and changing every year and with every political cycle. Arbitration allows health care parties to select decision-makers who are knowledgeable about health care and insurance regulation and compliance issues, reimbursement and billing issues, coding practices, quality of care issues, and privacy regulations such as HIPAA and HITECH. Experienced health care arbitrators understand the complex business arrangements between the various types of health care parties involved in disputes. In addition, the parties may want to select an arbitrator with relevant regulatory or scientific background or expertise. Thus, arbitration can provide decision-making far more knowledgeable about the business and legal context of the healthcare industry than a typical judge or jury.

### *2. Concerns for long-term business relationships*

Many health care contract disputes involve providers, such as hospitals, and payors, such as insurance companies, who want to and need to continue to do business with each other year after year inasmuch as their customers – patients and policyholders – want and need the services that the other party provides. An arbitration process can produce a final, quicker, less expensive, and less contentious outlet for healthcare business disputes that is less likely than litigation to wreck ongoing business relationships

### *3. Concerns for business confidentiality*

The health care industry is characterized by fast-paced technological changes as well as the need to adapt to a shifting political and regulatory environment. Hospitals, insurers, pharmaceutical companies and laboratories carefully protect their confidential and proprietary business information, trade secrets and customer lists. Arbitration enables the parties to protect their proprietary information from competitors and keep it out of the public domain. Industry members may be experimenting with new forms of health care delivery, new partnerships, and new sources of investment, all of which would suffer if aired in a public dispute.

### *4. Concerns for patient privacy*

Personal health information, including medical records, patient data and health insurance records, is granted special privacy protection under state and federal law. The Health Insurance Affordability and Accountability Act (“HIPAA”) applies to personal health care information whether in litigation or arbitration, and requires that it be disclosed only under strict limitations and subject to strict security. The Health Information Technology for Economic and Clinical Health (HITECH) Act, enacted to promote the adoption and meaningful use of health information technology, addresses the privacy and security concerns associated with the electronic transmission of health information, in part, through provisions that strengthen the civil and criminal enforcement of the HIPAA rules. Because of these safeguards, dispute resolution that involves personal health information requires great care by the parties and the forum to insure that such information, and the electronic systems used to transmit and store that information, be secure, confidential, and not available to public view. Arbitration offers a confidential and private depository for the filing and maintaining of pleadings, motions and exhibits: an attractive alternative to filing such materials in court and seeking protective orders, while worrying that a filing will not remain sealed.

A second consideration involving privacy is the emotional aspect of health care disputes, which may involve issues of medical malpractice, patient safety, the loss of a physician’s license and bio-ethics. Arbitration provides a forum for private resolution in which these considerations may be taken into account.

### *5. Concerns for costs*

The health care industry is under political scrutiny for its rising costs and facing social and economic pressures to control costs. Arbitration, if managed properly, will normally bring quicker and less costly resolution than litigation.

## **C. Example: Arbitration of Physician Business/Employment Disputes**

Physicians take pride in their profession. Their work is demanding, they are under great stress, and they have gone through extensive training to get to where they are. When their employment environment turns sour, emotions can run high. If relationships among physicians or with other providers are fractured, a host of claims may ensue including (but assuredly not limited to): demands for repayment of loans; claims for breach of non-compete, non-solicitation, and antitheft provisions; allegations of billing improprieties or violation of federal and state

anti-fraud laws; and violations of federal, state and local laws regarding employment discrimination.

Arbitration can assist parties to these disputes in attaining several mutually shared goals. When business arrangements among physicians turn sour, a principal goal is (or should be) to get the business and legal issues resolved quickly, inexpensively, and fairly. Many of these business organizations can benefit from contractual requirements that the parties arbitrate their business disputes. These disputes often escalate into ugly charges among former colleagues about quality of care, billing legalities, employment discrimination and harassment, or “stealing” patients, employees, and technology. Ordinarily, neither side benefits from airing those charges publicly.

A well drafted arbitration clause in the organizational documents for a professional practice or other contract documenting the business arrangements between physicians can provide for an expert, efficient, and cost-effective arbitration. It can require appropriate expertise on the part of the arbitrator (including certain types or years of experience as arbitrator and/or in health care cases), and a hearing within a few months after an exchange of necessary documents and information but without the lengthy contentious discovery process that often makes litigation in the courts so protracted and costly. A business arbitration, when properly managed by an experienced arbitrator, should almost always be quicker and less costly than a comparable lawsuit in court.

#### **D. Example: Tips for Drafting an Arbitration Clause for Health Care Provider – Payor Disputes**

Provider-payor disputes comprise the largest volume of healthcare disputes that utilize arbitration. Payors are insurance companies or parties that administer health care, and providers are hospitals, physician groups, physicians, laboratories and the entire range of health care professionals and service providers that provide healthcare services

Arbitrating a significant healthcare reimbursement dispute may involve multiple issues and thousands of claims that arise under one or more contractual relationships or courses of conduct. Without firm direction by the arbitrator(s) and thorough preparation and cooperation by counsel, the process will go off the rails in a disastrous and expensive way. The road map to an effective arbitration starts with a comprehensive arbitration clause. The items set forth below will assist in constructing an arbitration clause for provider-payor healthcare disputes.

First, start with a basic arbitration clause.

- Basic clause. Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration]. If the amount in controversy is less than or equal to \_\_\_ million dollars (\$xx,000,000), the arbitration shall be conducted before a single neutral Arbitrator selected from the XXXX Health Care panel. If the amount in controversy exceeds \_\_\_ million dollars (\$xx,000,000), the arbitration shall be conducted by three neutral Arbitrators selected

from the XXXX Health Care panel. The term “Arbitrator” shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite arbitration. The arbitration shall be administered by [arbitral institution] pursuant to its [Health Care or Comprehensive] Arbitration Rules and Procedures, provided, however, that the provisions of this Arbitration Clause shall supplement the XXXX Rules and control in the event of a conflict. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

- Adding new claims: During the time an arbitration is pending it is common for new disputed claims for patient treatment to arise, so there should be a mechanism for easily wrapping them into the arbitration if the parties wish.
- Adding parties: An arbitration may well involve parties in addition to a hospital and a health plan. Also part of the dispute may be third party payors, affiliated entities, physicians’ groups, third party administrators, or employer-payors. It may be possible to establish arbitration agreements with the third parties as well. There should be a mechanism for smoothly adding them to the arbitration if a legal basis to do so exists, and a provision that the absence of a third party will not deprive the arbitrator(s) of jurisdiction.
- Selecting the Arbitrator(s): Healthcare cases present their own vocabulary, their own body of federal and state law, and their own unique business practices. As familiarity with this landscape is valuable, the clause might provide that the arbitrators shall be attorneys or retired judges experienced in resolving disputes between health plans and providers.
- Initial Meet and Confer: It cannot be overstated how much a sound process in these cases depends on cooperation among experienced counsel. A robust meet-and-confer attended by first-chair counsel and party representatives with the requisite knowledge and authority is an essential start. The agenda should be to develop a process and timeline for (a) exchanging information about disputed claims, (b) the phasing of the hearing, and (c) any other case management hurdles. Parties may decide to present pure legal issues, if any, in a first phase. Frequently, the remainder of a healthcare dispute divides naturally into a number of phases, separated by legal issue, by chronology of claims, or by type of claim (inpatient/outpatient, PPO/HMO, contracted/non-contracted). Ideally, the outcome of this meet-and-confer should be a joint draft Case Management Order to present to the panel as an agenda for the initial Case Management Conference. If any disputes remain, they should be presented as well.
- Initial Case Management Conference/Order: Every arbitration should commence with a thorough Case Management Conference with the arbitrator(s), either in person or by conference call. The intent is to determine the process and set the timeline for the remainder of the case through hearing and award. Through this Initial Case Management Conference the parties can decide whether to bifurcate or phase issues, schedule dispositive motions, allow sampling of claims, provide discovery scope and deadlines, and decide other process issues. Since healthcare cases typically require decisions on masses of claims and issues, this Conference and the resulting Order are even more critical.
- Exchange of Spreadsheets: It is almost always essential to provide for an early exchange of spreadsheets of claims for which a party seeks recovery or offset. A clause might set a

timetable: e.g., for the claimant to provide a spreadsheet within 90 days after the demand or 30 days after the Case Management Order is entered. A responsive spreadsheet might be required in 30 days. The clause should direct counsel to confer about discrepancies or omissions from the spreadsheets, so that the panel will ultimately deal with apples and apples.

- **Sampling:** In these cases it is almost always necessary for counsel to select a handful of disputed claims to present in detail to the arbitrator(s), with the expectation that the decisions will be extrapolated to the entire body of disputed claims. Such sampling is more typical with respect to contractual and rate disputes than with medical necessity claims which typically turn on individual facts. The clause should expressly allow sampling, require counsel to confer on a methodology to be used, and expressly allow the arbitrator(s) to base an award upon such sampling.
- **Discovery:** Despite the complexity of these cases, discovery can often be limited to an exchange of relevant documents. Few, if any, fact depositions may be required, although expert depositions are routinely allowed. Some clauses bar all non-expert discovery beyond the document exchange except by leave of the arbitrator(s). One clause now in use bars the arbitrator(s) from ordering extensive search and production of electronic information (ESI). In drafting the clause, consider how limiting discovery can save cost and time without sacrificing fairness.

With an arbitration clause in place that deals with the issues outlined above, the parties and the arbitrator(s) will find it much easier to produce a streamlined and focused process.

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