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Minimizing The Costs And Consequences Of Payor-Provider Dispute

by Russell Beck

Our legal system is broken. Commercial litigation, with all of its attendant ills – including its high costs, significant time demands, unquantifiable risks, delayed outcome, publicity, and resultant animosity – has become ever more expensive, time-consuming, and prevalent. Exacerbating the problem, lawsuits can be filed with little or no foundation. Moreover, in industries in which the parties have a continuing relationship, lawsuits are frequently employed as a means of leveraging bargaining power on other matters.

The health care industry is no exception. And, when it comes to disputes between payors and providers, the issues and relationships are particularly ill-suited to conventional litigation; the issues are myriad and complex, the relationships delicate, and the transactions frequently span years and involve hundreds of thousands or millions of dollars.

Recognizing this, dispute resolution should be approached and managed as any other cost of doing business. Not surprisingly, as with any other cost, prevention is preferable to cure. In the context of dispute resolution, prevention – or at least minimization of the impact – is most-effectively achieved at the beginning of a contractual relationship, or for existing relationships, in conjunction with contract renegotiation and renewal. Accordingly, a great-deal of thought must be given up front to the likelihood of a dispute arising, what the nature of the dispute is likely to be, and how best to achieve an appropriate resolution of the dispute.

Mediation

There are a handful of general concepts that can be employed to prevent or minimize the costs and consequences of a payor-provider dispute. Chief among them is early intervention through mediation or neutral case evaluation.

Mediation is essentially a negotiation conducted with the assistance of a trained intermediary called a "mediator." The mediator's job is to cut through ancillary issues and bring the parties together. However, mediation, like any other negotiation, will yield a resolution of the issues only if both sides agree; neither party can be forced to accept the proposals that are made during the process -- but both parties are required to listen.

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Accordingly, other than unassisted negotiation, mediation is, by far, the quickest and most cost-effective way to resolve a dispute – and it's the only resolution in the hands of the parties themselves; all others require a third-party to make the final decision. Perhaps equally important, mediation is entirely confidential; nothing that occurs at the mediation can be used or disclosed after the mediation.

Mediation can, and typically should, be established by a contractual requirement of mandatory mediation prior to the commencement of any legal proceedings. While the requirement of mediation must be established by contract, even in the absence of a requirement, the parties are always free to later agree to pursue mediation; without the requirement, however, one of the parties may be recalcitrant. Accordingly, while that recalcitrance could ultimately result in a failed mediation, it is best to include the requirement in the contract, and address the recalcitrance in the context of the mediation, as opposed to fighting over whether to participate in mediation.

Mediation will only work if both sides are pre-

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pared and interested in settling. Given that payors and providers who are involved in a dispute typically have on-going business, both sides should have an interest in getting the issues resolved. However, unlike mediation in many other contexts, the issues are usually extremely complex with significant long-term consequences, and require the application of intricate rules to thousands of claims. Accordingly, mediation of payor-provider disputes can frequently benefit substantially when the financial implications can be assessed by experts during the mediation.

While early mediation is frequently successful, many times the issues (or the consequences of failing to settle early) are not sufficiently understood by one or more of the parties or other factors prevent resolution before more formal dispute resolution procedures are employed. Even if an early mediation is unsuccessful, however, it does not mean that the process was wasted. Frequently, the dialogue and exchange of information that occurs during an early mediation can narrow the areas of focus for subsequent litigation or arbitration, and set the stage for a subsequent mediation or self-directed settlement negotiation.

Arbitration and binding mediation

Recognizing during contract negotiations that, despite best efforts, parties are occasionally unable to resolve their dispute without a binding determination by a third party, the parties should consider whether it's likely to be in their best interests to leave resolution to the court system (i.e., litigation), or whether they want to have it resolved through a private process that they have more control over. There are two options in this regard: arbitration and binding mediation.

Arbitration is a private litigation. Although originally a very streamlined process, commercial arbitration has grown to look much like litigation. Nevertheless, it still offers significant advantages over litigation.

First is time; both overall-duration and its toll on the time of the business people. Litigation is a lengthy (frequently multi-year) process, typically requiring the involvement of many people (including current and former employees), and then it is not over until all appeals have been exhausted. In contrast, arbitration is generally much faster, less demanding on the time of others, and effectively over when the arbitrator renders his or her decision.

The latter is because, although an arbitration award can be appealed, the bases upon which it can be appealed are extremely narrow and rarely successful. Such finality, however, also means lack of reviewability, which, of course, has its risks. Those risks can, to some extent at least, be managed by agreement in the contract of specific procedures to ensure that the process is best suited for the type of dispute that is likely to arise.

Accordingly, the second advantage of arbitration over litigation is control; control over the process and control over the selection of the decision-maker. With regard to process, litigation has predetermined rules designed for general application. In contrast, the parties in arbitration decide what rules will apply. Although several arbitration services offer their own rules, they are basically scaled-down versions of the rules of procedure applicable in litigation, and may not fit the types of disputes that arise in the context of payor-provider relationships.

Another advantage to arbitration over litigation is cost. Although the parties pay for the arbitrator (or arbitrators) and, in some instances, the service itself (the American Arbitration Association, for example), those costs typically are offset through the savings associated with the process as a whole. On the whole, arbitration tends to much less expensive than an equivalent litigation. And, the more controls put on the process up front in the parties' contract, the better that those costs can be controlled and predicted when the dispute arises.

Finally, the ability to maintain the confidentiality of the arbitration should be considered. Just like mediation, because the process is a private dispute resolution, all of the information disclosed in arbitration can be kept confidential. That said, parties frequently do not consider that in the end, an award will be issued, which will likely be filed in court. Accordingly, the nature of the award is something that the parties need to address up front.

Implications

Whatever procedure is ultimately employed, the more thought that can be put into it up front, the more likely that the best-possible outcome will be achieved with the least cost and distraction. If the contracts are already in place, and a dispute arises before contract renewal arises, many of these same concepts can be put in place – they just need to be negotiated while the dispute is underway. However, given that the parties are likely to have an ongoing relationship, their interest in a dispute-resolution procedure that minimizes acrimony, saves time and costs, and gives definiteness to their relationship should be aligned.

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