Health Care Beat – Episode 57: Health care Dispute Resolution
(This transcript was generated through AI technology.)

Amanda Genovese: Welcome to Health Care Beat, a health law podcast brought to you by Seyfarth Shaw's cross-disciplinary Health Care group.

Chris DeMeo: Each Health Care Beat episode focuses on key industry trends and legal developments while identifying practical takeaways for those dealing with these issues every day.

Amanda Genovese: I'm Amanda Genovese, a Seyfarth attorney in New York.

Chris DeMeo: I'm Chris DeMeo, a Seyfarth attorney in Houston. Let's get started.

Amanda Genovese: On this episode of Health Care Beat, we'll explore emerging trends in health care dispute resolution. We will highlight the increasing importance of mediation and arbitration as practical, cost-effective alternatives to traditional litigation. I'd like to welcome my co-host for today's episode, Torrey Young, a partner in Seyfarth's New York office and a member of the firm's complex commercial litigation practice. I'm also really lucky I get to work with Torrey quite often, so you're in for a treat. We're also joined by John Libby, a health care and commercial arbitrator and mediator at Libby ADR, LLC. John, welcome to Health Care Beat.

John Libby: Thanks for having me.

Torrey Young: Yes, I'm thrilled you're here, John. Our paths have crossed with the New York City Bar Association's Health Law Committee, but it is fantastic to have you here. John is a former federal prosecutor with nearly 40 years of experience in complex civil litigation and white collar criminal defense in the health care industry before becoming a full-time mediator and arbitrator in 2024. He's an arbitrator and mediator with the American Arbitration Association and the American Health Law Association Dispute Resolution Service. So welcome, John. As we get started here, I think we all want to know what are some of the hot topics that you're seeing in health care arbitration. But before we get there, tell us a little bit about how people end up in arbitration or mediation.

John Libby: Well, first of all, thank you again for having me. And I just wanted to start out by saying that nothing I say today is intended to prejudge any issue in any of my pending or future matters, either as an arbitrator or as a mediator. So to answer your question, Torrey, the most common way that people end up in arbitration obviously is there's an arbitration clause in the contract between the parties. And as you probably know, arbitration is highly favored as a matter of public policy. And most courts, absent very extraordinary circumstances, will enforce those arbitration clauses if one party or another resists the attempt to take the case in arbitration. Another somewhat less common way is that parties to a dispute which may not have an arbitration clause will agree to arbitrate, so take the matter out of the courts and put into arbitration, according to a particular—administered by a particular service and in accordance with the particular service's rules. So those are really kind of the two major ways that a dispute is going to end up into arbitration.

Torrey Young: And once the dispute is there, what are the types in health care? Is it payer-provider or False Claims Act? What is it that you're seeing?

John Libby: So the most common are payer-provider disputes between an insurance company, an insurance payer and a provider, whether it's a hospital or a medical group or some other type of provider of services. And again, arbitration clauses are very common in those contracts between those entities. So that's the most common one. The second one that we see as arbitrators are what I would call business divorces. There's some sort of joint venture or partnership between providers that somehow blows apart. And in that case, you'll have issues arising out of division of assets or who owes who money and things like that. And the unique thing about those types of cases, and I'm seeing that in a couple of cases I have now, is obviously unique to the health care industry—or statutes like the Anti-Kickback Statute and Stark and things like that, which make unwinding those types of relationships more complicated. In fact, I have a particular case right now where one of the defenses that one of the parties has raised is that the contract that they entered into with their former partner was illegal, which is kind of interesting. And so you get a lot of interesting issues in those types of cases. Other typical areas where you'll see health care issues and arbitration are medical staff issues—there are services that provide hearing officers for peer review matters, employment matters. I mean, obviously, arbitration clauses are common in employment throughout various industries, but certainly also in health care. And then a more specialized example of that in health care would be whistleblower cases in the False Claims Act area where the whistleblower or the relator has an arbitration agreement in their employment contract. And so all or part of the False Claims Act issues end up in arbitration.

Amanda Genovese: And going back to your point about various contracts and in particular in the payer-provider space, various contracts having arbitration provisions in the dispute resolution section of the agreement, are you seeing the utilization of more specific rules being called for such as AAA health care payer-provider arbitration rules, or is it still fairly loose—whatever the parties agree would be the relevant laws to follow and the process to follow, whether that be the federal rules or the commercial rules? How is that looking for you presently?

John Libby: So the most common thing that I see in arbitration clauses, especially in the payer-provider area, is they will use AAA and then the commercial rules. I think the health care payer-provider rules are a little bit more recent. I certainly have some cases that use those rules, but typically it's more AAA commercial rules. If I could just take a slight sort of gloss on your question in terms of how these clauses are drafted, one of the frustrations or potential frustrations for arbitrators, it's really what I see as two things. One is the arbitration clause is a little too specific in terms of the qualification of the arbitrator, in which case the service actually has to find that particular—an arbitrator who has five years of experience doing one particular thing, which is I think pretty rare. And so being overly specific in terms of the qualification of the arbitrator is a problem. The other area that is somewhat frustrating once you are appointed as an arbitrator is where parties try to be too specific in terms of discovery, either they will just sort of incorporate court discovery rules wholesale, in which case you lose all the advantages of the efficiency and speed of arbitration. And the other downside I see to that is what I try to do when I work with parties at a preliminary hearing is I try to design a discovery process for them for that particular case. And I think, for example, rules like the AAA rules, whether they're the commercial rules or the health care payer-provider rules, provide kind of a general framework within which you can work with the parties to design a specific discovery process, whether it's a particular number of depositions, particular number of document requests, et cetera. If the parties just have—incorporate the federal rules of civil procedure and all those discovery processes, you feel like you're back in federal court and you lose the advantages of the arbitration process.

Amanda Genovese: Absolutely, absolutely. And there is flexibility as well. Ultimately, and John, I don't know if you have a position on this, a lot of times we go into arbitration, we know a lot of the counsel on the other side and we say to them, I know the contract says X, Y, and Z, but let's stipulate to, instead of having a panel preside over the entire arbitration, let's do a hybrid approach. Have somebody basically conduct all pre-final hearing discovery dispositive motions, and then appoint the final two panel members 60 days before the final hearing for all pre-trial workup. Are you seeing more of that as well, or how is that playing out in the different arbitrations you're hearing?

John Libby: Yeah, typically, if some of the contracts that I see call for a panel of three arbitrators over a certain dollar amount of dispute, what typically happens in those is either the chair will just take the lead and make sure that the wing arbitrators, as they're called, are okay with the process, or the parties will stipulate, as you say, that the chair will just handle all pretrial matters and the wing arbitrators will come in for the hearing. It's interesting, though, in most of the panels that I'm on, whether I'm the chair or the wing, we, the wings—we all three kind of get together and discuss everything. So I'm seeing less of the chair taking the lead. And I don't quite know why that is. But part of the problem is parties have to understand when they write a panel of three arbitrators into a clause, it's for a good reason because they don't want to rest their fate in the hands of one person. But it does more than triple the cost. It actually, I think AAA has done studies that show that the cost increases by five times. Definitely don't want a panel of three arbitrators unless the stakes are pretty high.

Amanda Genovese: And if you were to go back to your defense lawyer days, what would you be asking now of potential arbitrators in the selection process?

John Libby: That's an interesting question. I guess I would certainly want someone with health care experience. The advantage of having someone with background in the industry is you don't have to explain what a claim is. You don't have to explain what billed charges are versus contractual rates versus allowed costs versus co-payments and all that sort of stuff. So I definitely want someone with that type of background. But also as an arbitrator, whether they come from the payer side or the provider side—I actually had the good luck to represent both payers and providers when I was in practice—you want to make sure that they're fair and impartial, whatever their background is, and they don't have a particular bias toward one side or the other.

Torrey Young: So there's a lot going on in the health care space right now. How are changes to government programs like Medicare or Medicare Advantage impacting some of the disputes that you're seeing?

John Libby: So it's interesting because most of the time you're not running into the government directly in the arbitration world, it's a matter of private contract between parties. But since a lot of these contracts refer to Medicare and Medicaid regulations, refer to Medicare and Medicaid rates, sometimes changes at the government level will affect how those contracts are interpreted. And different parties will take different positions. One party might say that particular Medicare rate was just a benchmark and whatever it was at the time, that's what the rate should be. And the other party might say, well, the rate has changed or changed retroactively, and so we should get the benefit of that. So I've definitely seen cases where there are those types of interactions and arguments being made based on changes in government programs and in government rates.

Amanda Genovese: Can you walk us through any of the typical precondition requirements in the health care contracts and how they shape the process for you?

John Libby: So a lot of contracts have sort of pre-arbitration requirements. Obviously, if you're dealing with an insurer in a payer-provider case, there are internal appeal requirements that the insurer has. And then a lot of these contracts have pre-arbitration either good faith discussion requirements or requirements to mediate before you file the arbitration. What I have seen is some parties make the argument that those processes weren't followed and therefore the other side has waived the right to arbitrate. And again, without prejudging anything, that is a matter of contract language and contract interpretation. I would tend to think that as an arbitrator, my duty would be to find a way to enforce the arbitration clause just given the strong public policy in favor of arbitration, unless the contract literally says you waive your right to arbitrate and you're gonna go to court if you don't follow these procedures, which it's very rare to see that in contract language. So the whole notion of preconditions, I think it's good to have those in contracts. I think parties are well counseled to follow those types of procedures to try to resolve matters before the arbitration starts. But I think it would take a lot for me as an arbitrator to find that the right to arbitrate has been waived because one or more of those steps wasn't followed. And we see this all the time where some of these preconditions require a meeting of account representatives or a meeting of client representatives when a lot of these issues—the formality associated with doing so negates the fact that there's been discussions for years as to the lead up to arbitration.

Amanda Genovese: And after that, we have mediation. And then after that, you get to the formal arbitration process. A lot of times, depending on the nature of the relationship, to your point, the parties will agree to forego those client representative meetings to maybe try to mediate in advance. But the formalities associated with doing so may not make sense. On the flip side, there are situations where it makes sense to get representatives in the room to try to narrow the scope of a possible dispute before you even mediate it. So I fully appreciate what you're saying that it's kind of, I think, contract party and issue specific as whether or not to press hard on some of those precondition requirements.

John Libby: Yeah, absolutely. My overall philosophy throughout the whole process is I want the parties to talk to each other as much as possible, including about settlement. I have a matter right now where I've got a motion for summary adjudication that I allowed the parties to file on several claims. And in the briefing process, they've continued to talk and they've already resolved all but two of the claims, which I will then have to rule on. So again, what I try to make sure the parties understand is I'm here to serve their process and serve whatever they've agreed to. But they have a responsibility, as you point out, Amanda, even before the arbitration starts to try to resolve as much as they can. And especially in the health care field and in the payer-provider context, these are ongoing relationships. This is not a situation where people get into a fight and never speak again. These are hospitals and payers that have to deal with each other on a day-by-day basis. And so it's in their interest to try to resolve as much as they can at whatever point in the process, whether it's before the arbitration starts or as they go through the process, narrowing the issues as they go along.

Amanda Genovese: So speaking of resolution and helping lawyers counsel their clients and temper expectations going into arbitration, is it true that there's a split-the-baby approach and the idea is that they're asking for this, we're asking for that, and we're going to kind of end up somewhere in the middle once we go to arbitration, or should we be counseling clients differently? Not that you're advising us as to.

John Libby: Well, there is this sort of perception out there that arbitrators just split the baby because they're trying to keep everyone happy. There actually does happen to be an AAA study from a few years ago, which showed that not to be true. They looked at commercial cases in general, but they looked at a small sample of health care cases as well. And only 5% of the cases ended up in that middle range of 41 to 60% of the amount requested. The nice thing about health care cases is, at least on a claim-by-claim basis, there's obviously sometimes room for interpretation and sometimes witness testimony will sway whether or not pre-authorization was obtained or whether the particular procedure was medically necessary within the terms of the contract. But most of the time, as the arbitrator, you have to decide one way or another. There's no sort of room to split the baby. Now, across a whole set of claims, it may look like you're splitting the baby, but on a claim-by-claim or issue-by-issue basis, I think most arbitrators, certainly in the health care field, would say that they're making principled decisions and they're not trying to kind of please all sides by just giving something from one side and something to the other side.

Amanda Genovese: So in the payer-provider context, since you're talking about claims, how does that process typically unfold? What is it that you're looking at?

John Libby: So I have some claims which have—they may be high dollar claims, but there's only, say, seven or eight claims. And so you can go through those individually and you go through what's presented is the contractual language, the particular rates, how it's calculated, whether the contractual requirements were met by the provider. And that can consume hearing days, but it's important to go through it claim by claim. On the other side of the coin, you've got cases with thousands of claims. And there you have to resort to some type of sampling or bellwether approach where you do that same sort of very detailed examination of the claim, but then you extrapolate that out to a statistically significant sample. And that can get very complicated in terms of the different stratifications of the claims and what claims end up in what strata, and obviously you need experts on both sides to work that through. So as the arbitrator, you know up front how many claims are in dispute and you talk to the parties about how are we going to try these claims? Are we going to go through claim by claim or are we going to have some type of sampling protocol or some other approach to decide the case as a whole?

Amanda Genovese: Just about every hospital system dispute that we have—I represent payers. The firm represents both providers and payers, but my practice is on the payer side. To your point, it could be 10 claims, it could be 500,000 claims, and I've had both. And it really becomes a battle of the statisticians to figure out what that sample looks like. You talk to really smart people and they slice and dice and next thing you know, you get to a claim population. But a lot of times what that also signals to me is the scope of the claim review, the claim specific stuff that needs to be sorted out and discovery needs to be taken on. And you may even need experts to weigh in on medical necessity. That really dictates how long a final hearing will take and what that final hearing will look like. Can you fill us in on what your thought process is associated with setting that final hearing date as well as how much time is actually needed given the scope of the case?

John Libby: Yeah, absolutely. It's very tough. I have to rely to a certain extent on the parties and counsel. These are, as you probably know, Amanda, these are parties and counsel that they work together a lot, have probably multiple cases, either the same clients or different clients. And so you're looking at—I mean, right now I'm setting hearing dates for a lot of these cases into late 2027. In fact, I think I just had my first one that ended up in 2028. So you're talking about long lead times, mostly because of the schedule of counsel, also because it takes both sides a long time to pull the documents together and to match up the claims and make

sure they're talking about the same population. And then if you're looking at doing sampling, that obviously takes some time as well for the experts to dig in and do their modeling and that has to be built into the process as well. So the short answer is from the arbitrator standpoint, as much as I would like to say, arbitration should be speedy and efficient and all that sort of stuff, I can't tell parties to do all that in six months because it's just not realistic for all the reasons that I just said. So it really ends up being a matter of having the parties develop a schedule that makes sense. The one thing I do say is once you agree on the schedule, let's try to stick to it. I don't want to have a lot of continuances. I'll be somewhat liberal if they say they need a little bit more time for discovery or for good cause to adjust the schedule. But I tell them upfront, once that hearing date is set, I really don't want it moving because we're all busy. My schedule is busy, their schedule is busy, and it's really disruptive to try to find another window. And especially back to the earlier point about panels, trying to get scheduling together for three busy arbitrators is even more challenging.

Amanda Genovese: So it's very, very true. So sticking to the schedule is a great practical tip. Do you have any other dos or don'ts for lawyers who might be arbitrating in the health care space?

John Libby: So what I really like—I have a form scheduling order that I send out to parties before the preliminary hearing. And what I encourage them to do is to work through that and try to agree as much as possible to the schedule and to, for example, what the scope of discovery is gonna look like—to agree to that as much as possible before we sit down for the preliminary hearing. I don't mind if people disagree on certain aspects of it. In fact, that's kind of to be expected. But I want them to try to work out the schedule and what the shape of the arbitration is going to look like as much as possible. That makes the rest of it a lot smoother. So that preliminary hearing is really critical. And I would urge counsel on both sides to take it very seriously and to take the preparation for it very seriously. Because I have some cases where I've done the preliminary hearing, scheduling orders in place, and I don't hear from counsel until they start filing their witness list and exhibit list for hearing. And that's really good. That means they've gotten everything in shape by themselves. But of course I do say I'm always available if you need me to resolve disputes. And I have some cases that feel like, you know, I'm a federal judge with discovery disputes every two weeks. So it kind of runs the gamut. But again, preparation for and dealing with the preliminary hearing and getting that scheduling order in place, that to me is the crucial step that counsel should focus on.

Amanda Genovese: Well, John, thank you so much. Obviously mediation, arbitration are critical tools in the health care space. I don't know how we would be able to meaningfully both defend our clients, structure arbitrations that make sense and work collaboratively with folks across the table without the help of really, really good arbitrators that understand the process and understand structuring the process. So it's really great that you are here today and we thank you for all of your time that you've given us.

John Libby: Torrey and Amanda, thank you very much for having me. It was a pleasure.

Amanda Genovese: Thanks, John.

And thank you for joining us for another edition of Seyfarth's Health Care Beat podcast, bringing you the latest developments and pressing issues in health law so you'll never miss an episode. Be sure to visit Seyfarth.com or follow us on SoundCloud or Apple podcasts. If you enjoy this episode, please share it with your friends and colleagues. We look forward to having you with us again soon.