

AHLA Case Scenario

Health insurers will often offer policyholders a “pharmacy benefit” that will allow an insured to obtain some drugs from designated pharmacies by paying a co-payment that is less than the price of the drug. The balance of the cost of the drug is paid to the pharmacy by an insurance company from funds advanced by CMS under Medicare Part D, pursuant to a stand-alone prescription drug plan (“PDP”) or a Medicare Advantage Prescription Drug Plan (“MA-PD”).

Global Primary Insurance (“Global”) is an insurance company whose sole business is the sale of pharmacy benefit insurance policies, issued in accordance with Medicare Part D. Software Pharmacy Benefit Manager (“Software”) provides to insurers the pharmacy benefit management services that are required for the sale and administration of pharmacy benefit insurance. Software contracted (the “Agreement”) with Global to provide such services.

CMS has requirements specifying when prior authorization (PA) is needed and also when high-cost edits (drugs whose costs exceed a certain dollar amount) are required. CMS discovered inaccuracies regarding PAs and high-cost edits and required Global to take corrective action. When CMS found that appropriate corrective action had not been taken, it terminated Global as a Part D participant, effectively ending the business.

Pursuant to the Agreement, Software was appointed Global’s agent for the purpose of making payments to pharmacies, and was to then invoice Global for the amount of such payments. Global paid no invoices issued by Software subsequent to the CMS termination. Software commenced arbitration to recover unpaid pharmacy claims and administrative fees, lost profits, legal fees, injury to business reputation, and injunctive relief seeking to require Global to escrow certain funds that Software claims it was entitled to receive.

The Agreement gave Global the right to conduct a fraud, waste, and abuse audit and a pharmacy benefit manager audit of Software under certain circumstances. Global counterclaimed seeking to obtain both audits, and also asserted a claim of fraud and negligence against Software, claiming that Software falsely represented information to Global, which Global in turn communicated to CMS. That information, claims Global, was the basis for the CMS decision to terminate Global’s Part D participation.

AHLA appointed you to chair an arbitration panel for this matter. Your conflict check reveals that, three years ago, your firm provided legal services to Software on a real estate matter unrelated to the current dispute. The attorney who provided the services in question is no longer with your firm. While reviewing the list of attorneys, parties, and witnesses, you note that the senior partner of the law firm representing Global once served with you on a panel of

arbitrators. He is not involved in the current arbitration. You also note that the daughter of lead counsel for Software was a babysitter for your two-year-old twins on several occasions.

Following disclosures, you are appointed as chair of a three-person panel. After appointment of the arbitrators and prior to the pre-hearing conference, Global retains a second law firm to represent it which is currently involved in an unrelated legal proceeding in which a fellow arbitrator serves as opposing counsel. Global now objects to that arbitrator's participation on the panel. Both audits requested by Global will take extensive time to complete. The Agreement is unclear as to which party should pay for the audits. Software has objected to both audits requested by Global.

Software is based in New York and Global is based in Indianapolis. The parties dispute which states' law governs the dispute. Of the team members responsible for designing Software's pharmacy benefit management software, one is no longer employed by Software and has moved to India.

The parties estimate that there are more than one million documents of relevance to the dispute, encompassing business operations in 27 states over a three-year period. Global wants to present damage evidence based upon a sampling of certain states and time periods. Software objects. Software wants depositions of representatives of pharmacies in all states in which Global did business. Global objects, arguing that such testimony would be duplicative and that any depositions taken should be via videoconference. Global wants to depose the former employee who now lives in India; Software objects.

CMS has stated to both parties that it will provide no documents or witnesses in the proceeding and will contest any subpoena. Both parties request that subpoenas be issued to CMS for documents and depositions.

Global has filed a "Request for Mediation" and asked that you, as panel chair, mediate the dispute before either party incurs significant attorney fees. Software has responded that it will consider the issue and requested that it be a topic at the preliminary hearing.

The arbitration clause in the Agreement states: "All claims arising out of or relating to the Agreement, or the performance or breach thereof, shall be arbitrated in accordance with the commercial rules of the American Health Law Association before a panel of arbitrators." Although the Agreement specifies that the arbitration will occur in Washington, D.C., the parties cannot agree on a facility to hold the arbitration hearing.