LITIGATION BETWEEN ANTHEM AND EXPRESS SCRIPTS

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PHARMACY BENEFIT MANAGERS

Pharmacy benefit managers (PBMs) manage prescription drug, prescription device, or pharmacist services for health insurance plan sponsors (e.g., insurance companies or self-insured employers). They act as fiscal intermediaries that specialize in the administration and management of prescription drug benefit programs.

ISSUE

Summarize the current litigation between Anthem, Inc. and Express Scripts, Inc.

ANTHEM, INC. V. EXPRESS SCRIPTS, INC.

Since 2009, Anthem (a health insurer) and Express Scripts (a pharmacy benefit manager, or PBM) have been parties to a contract under which Express Scripts is the exclusive provider of PBM services to Anthem's health plans. The 10-year contract ends in 2019. As part of this transaction, Express Scripts purchased Anthem's previous in-house PBM company.

On March 21, 2016, Anthem sued Express Scripts in the U.S. District Court, Southern District of New York, seeking to collect approximately $15 billion in damages and to end the contract. In its complaint, Anthem alleges that Express Scripts (1) overcharged Anthem and (2) committed "operational breaches" of the contract. The majority of the damages Anthem seeks stem from the alleged overcharging.

The overcharging allegations relate to a provision in the contract which provides for Anthem or a third-party consultant to conduct a periodic market analysis "to ensure that [Anthem] is receiving competitive benchmark pricing." Under the contract, if Anthem or the consultant determines that the contract's pricing terms are not competitive, Anthem can "propose renegotiated terms" to Express Scripts, and Express Scripts "agrees to negotiate in good faith over the proposed new pricing terms" (Complaint at 5-6). Anthem alleges that Express Scripts breached its contractual obligation to conduct these good faith negotiations, and that this failure led to Express Scripts overcharging Anthem by approximately $13 billion over the remaining term of the agreement, plus approximately $1.8 billion in overcharges in the required post-termination transition period of up to one year.

The alleged operational breaches include Express Scripts' alleged failure to (1) apply correct prior authorization review criteria; (2) properly file, process, and report specified files in relation to Medicare Part D prescription drug plans; and (3) correct defects in its claim processing system within a required period. Anthem is seeking at least $150 million in damages for the alleged operational breaches.

On April 19, 2016, Express Scripts filed its answer to Anthem's complaint. (The document is available through the PACER system.) In its answer, Express Scripts generally denied Anthem's allegations and asserted several affirmative defenses and counterclaims.

For example, in the answer, Express Scripts alleges that:

1. when the parties entered the contract, "Anthem elected to receive higher pricing over the course of the contract in exchange for $4.675 billion in upfront cash";

2. Express Scripts has "fully satisfied its obligation to negotiate in good faith as to Anthem's proposed new pricing terms" and is not required to agree to pricing concessions; and

3. Anthem, rather than Express Scripts, failed to negotiate in good faith, such as by failing to provide "any of the market information or data that allegedly supported [Anthem's] $13 billion demand" (Answer at 2-3).

Express Scripts also generally denies Anthem's allegations of operational breaches of the contract. The answer states that any "isolated operational issues" that did occur do not amount to a material breach or provide a basis for Anthem to terminate the contract.

Among other counterclaims, Express Scripts alleges that Anthem breached the contract by failing to negotiate new pricing terms in good faith. Express Scripts seeks unspecified damages for this alleged breach. Express Scripts also is seeking to recover the amount of the upfront payment ($4.675 billion), plus interest, on the grounds of unjust enrichment.

This case is still in its early stages. According to the docket, discovery is due by December 1, 2017.

There have been other recent examples of litigation involving contract disputes between PBMs and parties receiving their services. It appears that most of these cases involved far smaller amounts in dispute, and many cases ended in a settlement.

For example, in a 2009 lawsuit from Tennessee, Coventry Health Care (a parent company of several insurers and health maintenance organizations) sued Caremark for breach of contract. Caremark is a PBM owned by CVS. Among other things, Coventry alleged that Caremark breached the contract by improperly paying certain prescription pharmacy claims, thus causing damages to Coventry. In its answer, Caremark generally (1) denied Coventry's claims for damages and (2) asserted a counterclaim for breach of contract, alleging that Coventry failed to pay certain invoices as required by the contract. After several procedural steps to the litigation, the parties settled for an undisclosed amount in 2011 (U.S. District Court, Middle District of Tennessee, Case No. 3:09-cv-01009).

ADDITIONAL RESOURCES

Herman, Bob. *Anthem's feud with Express Scripts gets uglier*, Modern Healthcare, April 20, 2016.

Herman, Bob. *Anthem Sues Express Scripts for $15 billion over drug pricing*, Modern Healthcare, March 21, 2016.

Livingston, Shelby. *Anthem suit over drug costs may start trend*, Business Insurance, March 27, 2016.

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