



The Daily Dish

Drug Price Arbitration

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Eakinomics: Drug Price Arbitration

When Congress returns from its Independence Day recess, the final push for drug price legislation will begin in earnest. Among the proposed solutions for keeping drug prices down is the use of arbitration. As AAF's Christopher Holt notes in [Baseball, Arbitration, and Drug Pricing](#), "The American Bar Association (ABA) defines [arbitration](#) as 'a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments.'" It is more easily defined than adopted, however; he carefully reviews the myriad decisions that would have to be made in order to turn the arbitration idea into a programmatic reality.

To my eye, two issues stand out. The first is the drug price version of "be careful what you wish for." Advocates wish for lower prices. But consider that in its advanced notice of proposed rulemaking, the Department of Health and Human Services (HHS) floated the notion of basing Medicare Part B drug reimbursements on an [international price index](#) (IPI) because the 27 drugs it studied were on average 80 percent cheaper in the other countries. Arbitration is seen as a less mechanical means to the same end. Perhaps more important, however, only 11 of those 27 drugs were available in all of the countries. More generally, the 14 countries being considered by HHS for the IPI had access to only 48 percent of new drugs and took an average of 16 months to make those drugs available. Put bluntly, the high price paid in other countries is having limited or no access to modern therapies. The same could be true under arbitration, as there is no guarantee that manufacturers would produce and sell in the United States at an arbitrated price.

The second issue is where arbitration would take place. There has been no mention of imposing arbitration on the commercial market — thank goodness. That would be an unprecedented interference in private negotiations. One possibility is in Medicare Part B. But the problem is that arbitration is the fallback when negotiations fail, and there currently is no negotiation in Part B, beyond what occurs in the private sector (which is the basis for payments in Medicare Part B). One would have to adopt some sort of "negotiation" between the government and drug manufacturers to put arbitration in the mix.

Or, arbitration could occur in Part D. At present, the non-interference clause prohibits the government from intervening in the negotiations between drug manufacturers and drug plans. Perhaps arbitration could be added as another option if negotiations fail. But thus far they have never failed! Introducing arbitration may just create an incentive not to negotiate in good faith. More likely is that advocates would also allow the government to negotiate on behalf of the prescription drug plans — a [terrible idea](#) — and use arbitration as the backup. In any event, there would have to be major reforms before one could imagine arbitration entering the scene, and those reforms might be undesirable.

Arbitration is an interesting concept. But it should stay as just exactly that, and not become a part of prescription drug policy.