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## ARBITRATING MALPRACTICE CLAIMS WORTHY OF RECONSIDERATION

Pre-dispute agreements to arbitrate claims repeatedly found enforceable

By **PAUL E. KNAG**

In Connecticut, high costs and coverage terminations have led many physicians to get out of private practice or relocate to states with a better malpractice climate. The providers who have not left are seeking ways to reduce malpractice costs and improve coverage accessibility.

An approach that might be mutually beneficial for both providers and patients would be for providers to offer patients the option of electing arbitration before any dispute arises.

Contrary to what some assume, federal law is clear that pre-dispute agreements to arbitrate malpractice claims can be validly entered into, and that federal law preempts any contrary state law. Connecticut has made no effort to legislate otherwise.

Under the Section 2 of the Federal Arbitration Act (FAA), pre-dispute arbitration clauses in a contract "involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The U.S. Supreme Court has made clear in a number of cases that the FAA

preempts contrary state law. So, for example, in *Doctor's Associates v. Casarotto*, the Supreme Court invalidated a Montana statute that imposed "type face" requirements on otherwise valid arbitration agreements. However, state courts are still permitted to make a determination as to whether the contract is somehow invalid because of unconscionability, lack of consent or other applicable state law concerning contract formation.

Based on FAA, the Supreme Court has repeatedly held that pre-dispute arbitration clauses are enforceable in a wide variety of circumstances. For example, it is now fairly standard for stock brokers to include

a mandatory arbitration/no class action clauses in their customer contracts based on the Supreme Court's decision upholding such contracts in *Shearson/American Express Inc. v. McMahon*.

The Supreme Court has also held in *Gilmer v. Johnson Lace* that mandatory arbitration agreements between employers and employees concerning employment disputes are fully enforceable.

In addition, the Supreme Court has given a very broad view of the in-commerce requirement, holding in *Citizens Bank v. Alafabco Inc.* that the test is whether "in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.'" Applying that test,

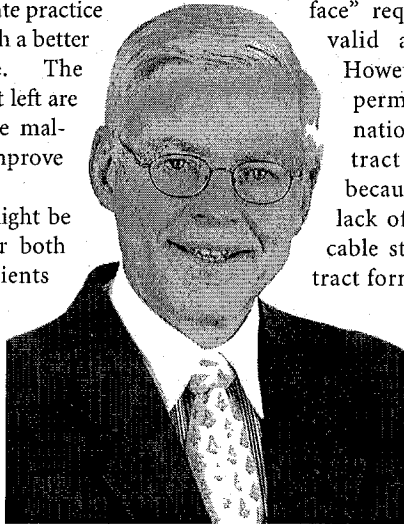
virtually all cases involving health care providers have found the "involving commerce" requirement of the FAA to have been satisfied.

While health providers have not used arbitration with patients nearly to the extent that other industries have used arbitration with consumers, there are many instances where nursing homes, hospitals and other providers have entered into arbitration agreements covering malpractice claims and successfully enforced them.

For example, in March of this year, the Massachusetts Supreme Judicial Court enforced an arbitration agreement entered into by a nursing home patient with a nursing home. There are decisions in a number of other Connecticut Supreme Court cases upholding arbitration clauses covering medical malpractice claims, as well.

On the other hand, arbitration agreements entered into by health care providers have been invalidated based on the lack of adequate consent by the patient, or based on "unconscionability." Among the factors sometimes cited in striking down such an agreement are: the fact that attorneys' fees are imposed on the loser, the fact that the patient is not given the option not to agree, the fact that the arbitration agreement is in the middle of a larger agreement, and pressure to sign without adequate time to understand.

Because of these cases, careful drafting is important. The contract should also specify that damages beyond those available in court cannot be recovered, in view of the Connecticut Supreme Court's recent holding in *MedVal USA Heath Programs Inc. v.*



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*Member Works* that, absent agreement to the contrary, an arbitrator can award such damages.

Because of extensive litigation over arbitrability, both the American Arbitration Association and the American Health Lawyers Association stopped accepting arbitrations involving medical malpractice based on a pre-dispute arbitration clause.

However, the National Arbitration Forum has been handling such disputes. Further, as more and more cases are decided on this issue, and the law has become clearer, the American Health Lawyers Association is looking at the possibility that it will again accept such cases.

### **More Predictable Outcomes**

What would be the potential advantages of using arbitration?

First of all, arbitration clauses by health care providers typically include a provision requiring mediation before commencement of the arbitration. The hope is that this will provide a quick and inexpensive means for resolving many claims. Cases that should be settled can then be resolved without extensive expenditure of legal fees, and perhaps for less money than might be required after extensive court proceedings. Moreover, with a panel of arbitrators known to both plaintiff and defendant attorneys, outcomes would be more predictable than with a jury, thus facilitating settlement.

Second, arbitration would hopefully be more cost effective even if there were not quick settlement. Without the need for a jury trial, the trial could be simplified. And the scope of discovery could be less.

Third, arbitration could be quicker than

litigation.

Fourth, if arbitration is quicker and easier, it may encourage plaintiff attorneys to accept cases that they might not accept under the current system. That, of course, would be good for the patient and a negative for the provider.

Fifth, if more than one provider is targeted in connection with the same incident, it may be necessary to sue one provider in court and another in arbitration. This might deter plaintiffs from claiming against parties who are not likely to be responsible.

Based on the foregoing, it would seem that consideration should be given to using arbitration agreements to resolve health care disputes. If that were to be attempted in a limited way, the experiment could provide data as to the future utility of the arbitration approach. ■