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Court Endorses Arbitration Pursuant to Nursing Home Admission Agreement

When a patient and his or her responsible party agree to resolve any dispute with a nursing home by arbitration, the contract will be enforced, but one-sided remedy limits can be severed from the agreement, according to the Supreme Court of Mississippi.

In *Vicksburg Partners, L.P. v. Stephens*, No. 2004-CA-01345-SCT (Miss. 2005), Stephens brought a negligence and wrongful death suit over the care her father received at a Vicksburg facility. When her father was admitted, Stephens, serving as responsible party, her father, and a Vicksburg representative all signed two Admission Agreements containing arbitration provisions. Vicksburg sought to compel arbitration of the claims.

The first Admission Agreement required arbitration of "any and all claims, disputes, and/or controversies." The second barred punitive damages and limited actual damages to the lesser of \$50,000 or the daily rate multiplied by the number of days the resident was in the facility.

The Court began by holding that the Federal Arbitration Act (FAA) applies to nursing home admissions agreements. Evidence of actual interstate commerce is not required. As long as the economic activity in question "in the aggregate" represents a "general practice ... subject to federal control," the FAA governs the agreement.

Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57 (2003).

Here, the Court found the potential receipt of out-of-state supplies and insurance payments as well as Medicare reimbursements was more than sufficient. FAA coverage of nursing home admissions contracts has rapidly become a settled legal issue. See *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983, 988 (Ala. 2004).

"We now know that there is nothing inherently wrong with mandatory, binding arbitration of disputes arising from nursing home admission contracts."

—VICKSBURG PARTNERS COUNSEL
 WILLIAM R. LANCASTER

Stephens argued the agreements were invalid because they were offered on a "take it or leave it" basis and her father would not have been admitted without signing. The Court agreed the Admission Agreements were adhesion contracts executed "with no real opportunity to bargain," but concluded they were not procedurally unconscionable.

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Procedural unconscionability requires “evidence of a lack of knowledge or voluntariness by the weaker party.” Here, admission was not urgent and the arbitration terms were “easily identifiable” within the forms. The Court concluded that Stephens and her father were “two competent individuals signing a well-marked, highly visible agreement which indicated very clearly that dispute resolution would be accomplished by way of arbitration.”

The Court then found that the arbitration terms were also not substantively unconscionable. Substantive unconscionability requires that the terms alter “the legal rights of the parties” and “abridge[] the damages which they may obtain.” In contrast, this arbitration provision was “benign in its effect on the parties’ ability to pursue potential actions.”

While acknowledging that an increased level of sensitivity is required in analyzing contracts for medical services, the Court refused to adopt a rule amounting to “a blanket policy of striking any arbitration clause contained within the body of a contract of adhesion.”

According to Vicksburg Partners’ counsel William R. Lancaster from Alford, Clausen & McDonald in Mobile, Alabama, “One of the most important aspects of the case is that we now know that there is nothing inherently wrong with mandatory, binding arbitration of disputes arising from nursing home admission contracts.”

However, the Court found the agreed remedy limitations placed a “unilateral ceiling” on Vicksburg’s potential liability. Concluding the limits were oppressive and violated the reasonable expectations of the weaker party, the Court struck the terms pursuant to the agreement’s severability provision.

In an unusual gesture, the Court concluded its comprehensively reasoned opinion with a direct address to the Mississippi legal, and healthcare, communities:

“Arbitration is about choice of forum—period.”

—SUPREME COURT OF MISSISSIPPI

“We have hopefully today driven home a point for the benefit of the bench and the bar, as well

as those individuals or entities who find themselves involved with contracts containing arbitration

ASK THE EXPERTS

What are the Differences Between “Administered” and “Ad Hoc” Arbitration?

The essential difference is that administered arbitrations are administered by an independent and neutral arbitration organization under established rules and procedures. Ad hoc arbitrations are conducted on a case-by-case basis. The distinction is crucial to those drafting arbitration clause language.

Administered arbitrations offer numerous advantages, including:

- Predictability in timelines, discovery and costs
- Efficient and impartial administration
- Arbitrator rosters and selection procedures
- Conflict checks and arbitrator disqualification criteria
- Notice and calendar coordination
- Document submission and handling procedures
- Scheduling hearing rooms and allocating costs

Without an administrator, there is a substantial need for party cooperation in resolving these matters. But, the disputing parties may already be too polarized to agree on procedural details. Such indecision leads to delay and higher costs.

At its worst, ad hoc arbitration can result in parties having to resort to the court system in order to resolve differences on how to proceed in arbitration. Simply stated, when no one is in charge of routine administrative matters, the arbitration process becomes inefficient and its advantages are easily lost.

The type of arbitration parties find themselves involved in is determined by the terms of the arbitration agreement itself. The most effective way to ensure that future disputes will be efficiently resolved in administered arbitration is to incorporate a standard clause of the sort recommended by the major institutional ADR providers, such as the National Arbitration Forum.

These clauses are brief, have been consistently construed in thousands of cases, and are respected and understood by judges and arbitrators. Such clauses incorporate the organization’s arbitration rules by reference, so drafting lengthy provisions addressing procedural details is unnecessary.

One ADR expert put it best: “Parties are decidedly better off engaging the services of a reputable ADR services provider to help them manage the arbitration proceeding than winging it on their own.”

clauses. Arbitration is about choice of forum—period.”

The Court continued:

“Both the patient, as well as the person responsible for him, willingly, knowingly, and voluntarily agreed to have future disputes decided by a mutually selected arbitration panel. We have invalidated any limit on... liability and removed language restricting punitive damages, and we find that the parties should undertake arbitration as agreed and avail themselves of the federally endorsed and substantively benign arbitration clause contained in the body of their contract.”

It is difficult to imagine a more forceful judicial endorsement of the practice of contractual arbitration between patients and providers.

Fear of Lawsuits May Be Fueling “Defensive Medicine”

A recent JAMA article asked physicians who said they practice defensive medicine out of fear of lawsuits to describe their behavior. Specific cited incidents included:

- Ordering unnecessary imaging studies
- Restricting the scope of practice and referring patients
- Eliminating procedures prone to complications
- Avoiding patients with complex medical problems

The researchers concluded that some cited practices were merely wasteful, but that others “reduce access to care and even pose risks of physical harm to patients.” See *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, JAMA 2005 293: 2609-2617.

Health Plan Arbitration Clauses Endorsed In California

Court finds that state agency does not violate individual employee’s right to a jury trial by approving group health plans requiring arbitration

The California Legislature expressly approves of binding arbitration provisions in health plans, according to the California Court of Appeals.

In *Viola v. California Department of Managed Health Care*, No. B174455 (Cal. App. 2005), Viola claimed Department approval of employee health plans containing arbitration clauses violated his “constitutional right to choose” between arbitration and a jury trial.

The court disagreed, finding “no authority in the federal or state constitutions to support this claim in the context of a group plan negotiated by an employer and an insurer.”

California health plans are regulated by the Department of Managed Care under the Knox-Keene Act. *Cal. Health & Safety Code* § 1340 et seq. (2000). Under the Act, the Department must approve a plan unless the contract, disclosure form, or coverage is untrue, misleading, deceptive or otherwise not in compliance with the Act.

Viola argued the Department must disapprove any plan with an arbitration clause, because such plans eliminate an individual employee’s right to a jury trial without obtaining an individualized jury trial waiver.

The court unmasked the “fundamental problem” with Viola’s theory. The California Legislature endorsed predispute arbitration agreements as a valid method to waive the right to a jury trial. *Grafton Partners v.*

Superior Court, 36 Cal.4th 944 (2005); see also Cal. Code of Civil Proc. § 1281 (arbitration statute).

In fact, the Department’s enabling statute, the Knox-Keene Act, specifically permits arbitration clauses in health plans if certain disclosure requirements are met, such as the arbitration provision must be prominently displayed above the enrollment form’s signature line.

The court logically concluded, “the Legislature has expressly approved arbitration as a forum for resolution of disputes under health services contracts, thus authorizing waiver of jury trial for such disputes.”

Finally, the court noted that Viola’s theory ran contrary to the Supreme Court of California’s opinion in *Madden v. Kaiser Foundation Hospitals*, which held that employers have implied authority to agree to binding arbitration of claims arising under a health plan it negotiated as part of an employee benefit package. 552 P.2d 1178 (Cal. 1976).

When selecting an arbitration administrator, it is important to carefully review its rules and policies. Some administrators do not administer healthcare consumer arbitrations, for instance. NAF administers the full range of healthcare dispute resolution services, including arbitrations resulting from predispute agreements between patients and health plans.

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Claim Arbitrated Despite AAA Bar on Patient Cases

AAA's Policy Not a Bar to Parties Arbitrating Elsewhere

The Supreme Court of Alabama compelled a patient to arbitrate, despite an American Arbitration Association (AAA) policy of refusing to hear individual patient claims under pre-dispute arbitration agreements.

In *Blue Cross Blue Shield of Alabama v. Rigas*, No. 1040173 (Ala. 2005), Blue Cross denied payment after Rigas' surgery. The Blue Cross plan required arbitration under AAA “rules and procedures” and Blue Cross moved to compel arbitration.

Rigas' argued the arbitration clause was unconscionable because all available plans mandated arbitration. The Court disagreed, holding that a “no meaningful choice” argument must be supported—at minimum—by evidence of attempts to obtain other coverage or to negotiate removal of the agreed clause.

Rigas also claimed there was a “procedural defect” in the agreement, because it incorporated AAA rules. AAA issued a January 2003 Health Care Policy Statement announcing it would “no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate.”

The Court ordered non-AAA arbitration, reasoning that the unavailability of a named arbitrator does not void the clause. See *Ex parte Warren*, 718 So.2d 45, 48 (Ala. 1998).

Healthcare entities should be aware of AAA's policy of refusing to administer cases involving individual patients under predispute arbitration agreements. The National Arbitration Forum continues to administer all claims permitted by law, including healthcare claims involving individual patients.

NATIONAL ARBITRATION FORUM

The National Arbitration Forum (NAF) is a leading provider of dispute resolution services, with over 1,500 legally-trained mediators and arbitrators located in 50 states and 29 countries. NAF offers the full range of healthcare dispute resolution services, including arbitrations resulting from predispute agreements between patients/enrollees and healthcare providers and plans, medical disclosure/ “I'm Sorry” programs, and arbitration and mediation of contractual disputes between providers, plans, and payers.

To receive the complimentary White Paper, *Mediating and Arbitrating Healthcare Disputes*, which includes drafting tips and model ADR language, or for expert information on how to implement a healthcare ADR program, contact Keith Maurer, Director of Healthcare and Insurance ADR Services, at kmaurer@arb-forum.com or 952-516-6426.