

THIS ISSUE

| | |
|--|---|
| Court Enforces Arbitration Agreement Absent Specific Evidence That Arbitration Costs Are Excessive and Deter Individual Claims | 1 |
| California Group Health Plan Members Are Entitled to Required Arbitration Disclosures | 2 |
| Recent State Legislation | 2 |
| Did You Know? | 2 |
| Mississippi Supreme Court Declares Arbitration Agreement Fair and Enforceable and Orders Arbitration of Wrongful Death Claims | 3 |
| North Carolina Court Upholds Agreement to Arbitrate Assisted Living Disputes | 3 |
| Group Health Insurance Arbitration Terms Enforced | 4 |

NATIONAL ARBITRATION FORUM

The National Arbitration Forum is a leading provider of dispute resolution services with over 1,500 legally-trained mediators and arbitrators located in all 50 states and 35 countries. We offer a 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.

Court Enforces Arbitration Agreement Absent Specific Evidence That Arbitration Costs Are Excessive and Deter Individual Claims

The Tennessee Court of Appeals was unpersuaded by a class of physicians who argued that the cost of arbitrating several individual payment disputes meant it was too expensive to arbitrate a deceptive practices class action against a health insurance company. The court found that this argument was meritless since it compared an individual lawsuit to a multi-claim class action.

In *Rosenberg v. BlueCross BlueShield of Tennessee, Inc.*, No. M2005-01070-COA-R9-CV, 2006 WL 3455209 (Tenn. Ct. App. Nov. 29, 2006), two physicians who provided services under contracts with Blue Cross Blue Shield Tennessee (BCBST) brought a putative class action against BCBST alleging breach of contract and deceptive practices relating to the insurer's payments to its physicians.

BCBST filed a motion to compel arbitration, which was granted by the trial court over the physicians' objection that arbitration was "cost-prohibitive" and "unenforceable as part of a contract of adhesion." The physicians appealed.

In support of their appeal, the physicians argued that the cost of arbitrating each individual claim for underpayment would be cost-prohibitive, such that the physicians would not have a forum to redress their small claims. But the court found this argument unpersuasive because individual suits were not involved. What was asserted was a multi-plaintiff, multi-count class action involving millions of dollars in potential damages.

As the court put it, for purposes of justifying a class action, the physicians alleged "that their damages are great indeed." But in arguing that the arbitration was cost-prohibitive, the physicians "assert[ed] their claims are of minimal value, even if aggregated over two years."

The court further explained that to succeed in arguing that arbitration was cost-prohibitive, the physicians needed to produce "specific evidence" of the costs of arbitration vis-à-vis litigation. With this information at its disposal, the court would be able to determine if the arbitration agreement was unconscionable based upon (1) the claimant's alleged inability to pay arbitration fees and costs, (2) the cost differential between court and arbitration, and (3) whether the differential was so significant that it deterred claims. Since the physicians produced no such evidence, the court affirmed the order compelling arbitration.

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In the absence of concrete evidence, courts consistently refuse to invalidate arbitration agreements as cost-prohibitive. This approach is consistent with the strong federal policy favoring arbitration. As the court explained, “a party challenging the arbitration provisions of a contract, particularly when those provisions are clear and unambiguous, faces a figurative tsunami of case law, both federal and state, ever strengthening and reinforcing the favored status of arbitration.”

Recent State Legislation

Michigan House Bill 6359, which passed on Dec. 20, 2006, amends the state insurance code to require a Medicare select insurer to use procedures for hearing complaints and resolving written grievances from subscribers. The procedures must be aimed at mutual agreement for settlement and may include arbitration procedures. The grievance procedure must be described in the policy, in the certificate, and in the outline of coverage.

New York Assembly Bill 1115, introduced on Jan. 3, 2007, would amend New York arbitration law to allow for modification of an arbitral award when the “award is subject to a valid offset provision.”

Mississippi House Bill 158, introduced on Jan. 2, 2007, would require the pursuit of mediation in all civil disputes involving a tort and would toll the applicable statute of limitations while the mediation is pending: “The Mississippi Bar shall appoint and certify mediators for such disputes. Mediators shall be members of The Mississippi Bar who have been engaged in the active practice of law for a minimum of five (5) years. The mediator shall make every effort to help parties resolve their dispute in order to avoid litigation.”

California Group Health Plan Members Are Entitled to Required Arbitration Disclosures

In construing a California statute that imposes disclosure requirements on arbitration clauses in health care plans, the California Court of Appeals held that an individual member of a group health plan is entitled to the statutory disclosures.

In *Medeiros v. Superior Court*, No. B193042, 2007 WL 93170 (Cal. Ct. App. Jan. 16, 2007), Health Net and San Bernardino County (the County) entered into a group service agreement providing health insurance to County employees. Medeiros chose Health Net coverage using the County’s benefits election form, which made passing reference to the group service agreement arbitration clause.

When Medeiros later sued for breach of contract, Health Net moved to compel arbitration. Medeiros argued that the arbitration clause was unenforceable based on noncompliance with the disclosure requirements set forth in section 1363.1 of the California Health and Safety

Code. Health Net argued that the arbitration clause should be enforced despite this noncompliance because the County used its own form to enroll Medeiros in the plan.

The Court reasoned that employees enrolling directly with an insurance company should receive the same disclosures as do employees enrolling through their employer. Since

Medeiros was not given the requisite disclosures prior to enrolling in the health plan, the Court refused to compel arbitration.

Ordinarily, the Federal Arbitration Act (FAA) preempts state laws that impose special notice requirements on arbitration agreements. However, the California Court of Appeal has held that the McCarran-Ferguson Act precludes FAA preemption of health insurance disclosure requirements. See *Smith v. PacifiCare Behavioral Health of California, Inc.*, 113 Cal. Rptr. 2d 140 (Cal. Ct. App. 2001);

Employees enrolling directly with an insurance company should receive the same disclosures as do employees enrolling through their employer.

Did You Know?

Parties asserting unwarranted challenges to arbitration awards may be subject to court sanction under Rule 11 of the Federal Rules of Civil Procedure. Courts review arbitration awards with great deference and increasingly frown upon unsupported arguments and accusations.

For example, in refusing to overturn an award in a securities arbitration case, an Alabama federal court taxed attorney’s fees and costs of over \$15,000 to the broker, concluding

that the motion to vacate was “both frivolous and ha[d] no real legal basis, and that it “needlessly increased the cost of litigation.” *Reuter v. Merrill Lynch*, 440 F.Supp.2d 1256 (N.D. Ala. 2006).

The Eleventh Circuit recently put parties on notice that “in order to... protect arbitration as a remedy we are ready, willing, and able to consider imposing sanctions in appropriate cases. *B.L. Harbert Int’l v. Hercules Steel Co.*, 441 F.3d 905, 914 (11th Cir. 2006).

Mississippi Supreme Court Declares Arbitration Agreement Fair and Enforceable and Orders Arbitration of Wrongful Death Claims

Finding the terms of a hospital's arbitration agreement to be fair, the Mississippi Supreme Court held that the agreement applied to a wrongful death action brought by the decedent's beneficiaries. Mississippi joins other state supreme courts in enforcing wrongful death arbitration claims.

In *Cleveland v. Mann*, No. 2005-CA-00924-SCT, 2006 WL 2506753 (Miss. Aug. 31, 2006), Mann died after undergoing three surgical procedures. During one of his medical appointments, Mann signed an arbitration agreement whereby any disputes "arising out of or relating to the performance of medical services" would be submitted to arbitration.

After Mann's death, his heirs brought a wrongful death action against the hospital and surgeon. The hospital and surgeon moved to compel arbitration. In opposing the motion, Mann's heirs argued that the arbitration agreement was unconscionable and that they

were not bound by the agreement as wrongful death beneficiaries. The trial court found the arbitration agreement unconscionable and denied the motion to compel.

On appeal, the court declared the arbitration agreement to be fair and enforceable. In rejecting the heirs' unconscionability argument, the court found that: (1) the agreement contained a conspicuous notice explaining the agreement's legal significance; (2) the agreement gave Mann 15 days to rescind; and (3) Mann signed the agreement 19 days prior to surgery.

The court further held that the arbitration agreement applied to the heirs' wrongful death claim, finding that the agreement covered disputes between the hospital and the patient's "heirs-at-law" and citing the principle

that a party's death does not invalidate an arbitration agreement binding on the party's heirs.

The dissent disagreed with the court's holding that a wrongful death claim is subject to arbitration, reasoning that such a claim is not arbitrable because it cannot be brought by the decedent. The majority refuted this claim, explaining that under Mississippi law a wrongful death action must be premised on a claim the decedent could have brought if death had not ensued.

The court is the third state supreme court to recently hold that an arbitration agreement applies to the beneficiaries of a wrongful death action. See *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661, 664 (Ala. 2004); *Allen v. Pacheco*, 71 P.3d 375, 379 (Colo. 2003).

A party's death does not invalidate an arbitration agreement binding on the party's heirs.

North Carolina Court Upholds Agreement to Arbitrate Assisted Living Disputes

In upholding an arbitration agreement in an assisted living admissions contract, the North Carolina Court of Appeals pointed to voluntary assent to arbitrate and the lack of any evidence of unconscionability.

In *Raper v. Oliver House, LLC*, No. COA06-236, 2006 WL 3487256 (N.C. Ct. App. Dec. 5, 2006), Raper, as administrator of a decedent's estate, sued Oliver House, an assisted living facility, for negligence and wrongful death, including punitive damages. In response, Oliver House filed a motion to compel arbitration. The trial court found the arbitration agreement unconscionable and denied the motion.

The Court of Appeals held that the trial court erred in finding the arbitration agreement unconscionable. Specifically, there was no evidence to support the trial court's finding that there was unequal bargaining power or a lack of independent negotiation because

Raper admitted that she voluntarily entered into the agreement.

Moreover, the use of a preprinted form did not mean that the arbitration agreement was unconscionable. To the contrary, the arbitration agreement was prominently displayed, and there was no attempt to conceal it from Raper.

Also, in light of North Carolina's strong public policy favoring arbitration, there was no evidence to support the trial court's conclusion that the arbitration agreement was unconscionable because it dealt with a "matter of substantial public interest."

Finally, the court found that Raper was estopped from "claim[ing] the benefit of the contract and simultaneously avoid[ing] its burdens." For those reasons, the court remanded the matter with instructions to order arbitration.

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Group Health Insurance Arbitration Terms Enforced

A federal district court in California ordered arbitration of a university student's claim that she was wrongly denied benefits under a Student Health Insurance Plan (SHIP).

In *Fredrickson v. Regents of University of California*, No. C 06-03335 JSW, 2006 WL 3499243 (N.D. Cal. Dec. 4, 2006), Fredrickson, a male to female transsexual, filed suit, alleging that the university and her health insurance company violated her rights by denying coverage for "[p]rocedures or treatments to change characteristics of the body to those of the opposite sex."

The health insurance company filed a motion to compel arbitration. In opposing the motion, Fredrickson argued that the arbitration agreement was unconscionable. The court granted the motion because it found no evidence of procedural or substantive unconscionability.

California employs a "sliding scale" approach to unconscionability, whereby a minimal showing of procedural unfairness may be supplemented by a weighty showing of substantive unfairness and vice versa. However, in examining the SHIP arbitration agreement, the court could not identify any significant indicia of unconscionability.

First, Fredrickson could have selected other health insurance, indicating that the agreement was not negotiated on a "take-it-or-leave-it basis." Second, her alleged "lack of bargaining power" was irrelevant in the group medical insurance context, where an agent with "significant bargaining strength" negotiates on behalf of the group. Finally, the costs of arbitration were not prohibitive, since the insurer agreed to absorb all but \$125 of the arbitration fees.

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