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COMMENT

TWENTY YEARS LATER . . . CONTRACTUAL ARBITRATION AS MEDICAL MALPRACTICE TORT REFORM

I. INTRODUCTION

Almost 20 years have passed since a perceived rise in medical malpractice pushed the healthcare industries into crisis.¹ During the early 1970s, the medical insurance community, healthcare providers, and the general public, concluded that the number of medical malpractice lawsuits — and the resulting judgment awards — were rising at an alarming rate.² Some portions of the healthcare community saw these increases as a threat to the strength and quality of medical care in the United States.³

Healthcare providers, lawyers, insurance companies, and state legislatures all reacted to the crisis in their own way. The healthcare providers became more defensive in their approach to patient care.⁴ Lawyers used new strategies in both the prosecution and defense of medical malpractice. The courts accepted many of these new theories of liability and defense.⁵ Insurance companies either

1. See U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE* (1973); see also *Gross v. James A. Recdabaren, M.D., Inc.*, 253 Cal. Rptr. 820 (Ct. App. 1988).

2. Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 57, 57-58.

3. See Nicholas P. Terry, *The Technical and Conceptual Flaws of Medical Malpractice Arbitration*, 30 ST. LOUIS U. L.J. 571, 575-77 (1986). There is some debate within the legal community regarding the validity of the crisis of the mid-1970s as well as the second crisis of the early 1980s. *Id.* at 575-80.

4. See generally Clark C. Havighurst, *Private Reform of Tort-Law Dogma: Market Opportunities and Legal Obstacles*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 143. Diagnostic tests were performed when earlier they had seemed unnecessary, too troublesome, or too costly. *Id.* at 159.

5. These judicial changes were many and varied. They included changes in the standard of care to rules involving expert witnesses and the defenses of informed consent. See generally STEVEN F. PEGALIS & HARVEY F. WACHMAN, 2 *AMERICAN LAW OF MEDICAL MALPRACTICE* 1-64 (1981); 70 *C.J.S. Physicians and Surgeons* §§ 70, 92, 122 (1987). Although the area of medical malpractice legal evolution is interesting, the scope of this Comment will be limited to the acceptance, advantages, and disadvantages of arbitration in this area.

dropped out of insuring doctors and hospitals altogether or increased their rates dramatically.⁶ Influenced by this, state legislatures began to enact numerous types of medical malpractice tort reforms.⁷ The Missouri legislature, for example, has enacted five statutes designed to counter the medical malpractice crisis.⁸ The various reforms enacted by state legislatures included changes in the substantive law, such as lowering the standard of care required.⁹ More commonly, legislatures changed procedural, filing, and evidentiary rules (i.e., shortening the statute of limitations or requiring a malpractice certification affidavit of a healthcare provider).¹⁰

In addition to the legislative reactionary reforms, the hospitals, the doctors, and the new breed of healthcare providers, group health plans such as health maintenance organizations (HMOs),¹¹ began to install their own tailor-made tort reforms by entering private contracts with their patients.¹² Many of these medical service contracts included a clause mandating binding arbitration as an alternative forum for dispute resolution.¹³

Although there is minimal empirical data to support many of the conclusions,¹⁴ the purported advantages and disadvantages of using private tort reform such as contractual arbitration are popular subjects of debate.¹⁵ This

6. See David S. Starr, *The No-Fault Alternative to Medical Malpractice Litigation: Compensation, Deterrence, and Viability Aspects of a Patient Compensation Scheme*, 20 TEX. TECH L. REV. 803, 804 (1989).

7. Lauren K. Saunders, *Legislative Research Bureau Report, The Quest for Balance: Public Policy and Due Process in Medical Malpractice Arbitration Agreements*, 23 HARV. J. ON LEGIS. 267, 268 (1986).

8. See MO. REV. STAT. § 538.225 (Supp. 1991) (expert opinion affidavit requirement); MO. REV. STAT. § 538.230 (Supp. 1991) (special rule for joint liability for malpractice defendants); MO. REV. STAT. § 538.210 (Supp. 1991) (\$350,000 cap for non-economic damages); MO. REV. STAT. § 538.210(5) (Supp. 1991) (substantive rule for punitive damages); MO. REV. STAT. § 538.220(2) (Supp. 1991) (periodic payment option).

9. See, e.g., MO. REV. STAT. § 538.225 (requiring plaintiff's affidavit to state that health care provider failed to use reasonable care).

10. See, e.g., MO. REV. STAT. § 538.225(4); see also Terry, *supra* note 3, at 577-79.

11. Health maintenance organizations are groups of participating healthcare providers that provide medical service to enrolled members of group health insurance plans. See BLACK'S LAW DICTIONARY 721 (6th ed. 1990).

12. William H. Ginsburg et al., *Contractual Revisions to Medical Malpractice Liability*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 253, 255-57. The private reforms found in these medical service contracts often include agreements to accept periodic payments, to accept a pre-set limit on damages if a lawsuit results, or to agree not to invoke the collateral source rule. *Id.* at 258-64.

13. See Terry, *supra* note 3, at 585-88. The decision to include such an arbitration agreement in a contract for medical services is traditionally voluntary on the part of both the provider and the patient. *Id.* at 585. However, Michigan has gone so far as to enact laws requiring that all hospitals include a contractual clause to arbitrate in their admissions documents which patients can either accept or reject. See MICH. COMP. LAWS ANN. §§ 600.5040-.5065 (West 1987).

14. Duane H. Heintz, *Arbitration of Medical Malpractice Claims: Is It Cost Effective?*, 36 MD. L. REV. 533, 536-37 (1977).

15. See Havighurst, *supra* note 4, at 161-62.

Comment will examine both the acceptance of and the use of private contract arbitration clauses in the medical malpractice legal arena.

II. ARBITRATION AGREEMENTS

A. *The Private Contract Arbitration Agreement*

Private contractual agreements establish arbitration as an alternative forum to the court system for the individual providers and their patients.¹⁶ As with any contract, the parties voluntarily enter into the agreement; if the contract is legally valid, the parties must submit their dispute to an arbitrator, whose decision is final and binding on the parties.¹⁷

For several years, labor and commercial transaction contracts have used private arbitration agreements in order to select a forum.¹⁸ A certain body of law developed out of the litigation resulting from such use of arbitration clauses.¹⁹ This resultant body of law established a precedent for the use of arbitration clauses in all private contracts, including medical service contracts.²⁰

The philosophy behind the use of arbitration clauses is to provide a substituted forum which is less troublesome, less expensive, less time consuming, and less public for the participants.²¹ Many commentators view arbitration as a process that is more understandable to the participants and better tailored to the dispute at hand than a traditional courtroom forum.²² Furthermore, the arbitration forum is highly flexible;²³ the procedures used can be manipulated by the wishes of the parties involved,²⁴ and the traditional rules of evidence or discovery may be employed if desired.²⁵ On the other hand, the parties may wish to dispense with these formalities to simplify the process.²⁶

The contract agreement can specify who chooses the arbitrator;²⁷ the decision can rest with the parties themselves or with objective groups such as the American Arbitration Association.²⁸ In addition, the parties can stipulate the

16. James A. Henderson, Jr., *Agreements Changing the Forum for Resolving Malpractice Claims*, 49 *LAW & CONTEMP. PROBS.*, Spring 1986, at 243, 243.

17. PEGALIS & WACHMAN, *supra* note 5, at 14-15.

18. See FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* (4th ed. 1985).

19. See *id.* at 23-50.

20. See *id.* at 29-32.

21. LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 297 (1986).

22. *Id.* at 297-98.

23. *Id.* at 250; Havighurst, *supra* note 4, at 161.

24. RISKIN & WESTBROOK, *supra* note 21, at 250; Havighurst, *supra* note 4, at 161.

25. RISKIN & WESTBROOK, *supra* note 21, at 276.

26. *Id.* at 276, 297.

27. *Id.* at 298.

28. *Id.* at 253.

qualifications which the arbitrator must exhibit.²⁹ Finally, the agreement can vest the dispute decision-making power with an individual arbitrator or a panel of three or more arbitrators.³⁰

B. State Regulation of Arbitration Agreements

A variety of state statutes regulate the use of arbitration agreements. The Uniform Arbitration Act³¹ has been adopted by a majority of states.³² The U.A.A. regulates all arbitration agreements in private contracts whether or not they encompass medical services;³³ some statutes even prohibit agreements to arbitrate future tort disputes.³⁴ In addition, some state legislatures have enacted statutes specifically regulating the use of arbitration agreements in medical service contacts.³⁵ These statutes often try to provide some degree of protection to the patient; such protection may be via requiring the type displaying the arbitration clause in the contract to be a larger size than the rest of the contract or requiring the subject clause to be printed in a different color.³⁶ These statutes often require either the inclusion of a statement advising the patient that signing the arbitration clause is voluntary or inclusion of a statement explaining that receipt of treatment is not contingent on signing such an agreement.³⁷ Still others require notice to the patient that signing such an agreement will be a waiver of the patient's constitutional right to sue.³⁸ Additionally, some statutes require a provision that the agreement to arbitrate be rescindable by the patient within a certain period of time.³⁹

The Michigan Medical Malpractice Arbitration Act⁴⁰ is an example of a statute that sets out specific conditions for the arbitration agreement to be enforceable.⁴¹ Under this statute, all hospitals are required to include a binding

29. For example, some state statutes that regulate arbitration clauses in medical service contracts may require that one or more of the arbitrators have a medical background. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5044.

30. *See* Saunders, *supra* note 7, at 272.

31. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 4 (1985) [hereinafter U.A.A.].

32. *See Recent Developments: The Uniform Arbitration Act*, 1992 J. DISP. RESOL. 411, 411 n.3. In addition, numerous states have enacted arbitration statutes directed at the use of arbitration clauses as a medical malpractice alternative. *See* Terry, *supra* note 3, at 587.

33. *See* U.A.A. § 1.

34. *See* Terry, *supra* note 3, at 587-88.

35. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 600.5040-.5065; P.R. LAWS ANN. tit. 26, § 4109 (Supp. 1989); *see also* Saunders, *supra* note 7, at 269-72.

36. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 600.5021-.5042.

37: *See id.*

38. *See, e.g.*, CAL. CIV. PROC. CODE § 1295(b) (West 1982); ILL. STAT. ANN. ch. 10, para. 209(d) (Smith-Hurd Supp. 1992); *see also* Saunders, *supra* note 7, at 274.

39. *See, e.g.*, ALASKA STAT. § 09.55.535(c) (1983) (30 days); ILL. ANN. STAT. ch. 10, para. 209(c) (Smith-Hurd Supp. 1992) (60 days).

40. MICH. COMP. LAWS ANN. §§ 600.5040-.5060.

41. *See id.* § 600.5041(7).

arbitration clause in their contracts for medical services or admission.⁴² The Michigan statute also requires that such clauses be printed in 12-point type and include a statement informing the patient that "[t]his agreement to arbitrate is not a prerequisite to health care or treatment and may be revoked within 60 days after execution by notification in writing."⁴³

C. *The Courts' Response*

Because labor and commercial contracts have contained binding arbitration clauses for many years, a substantial amount of general precedent on the legality of arbitration clauses exists.⁴⁴ However, the use of arbitration clauses in medical service contracts presents a new legal situation with which a court must contend. The legal relationship between provider and patient is a hybrid of both private contract law and public tort law.⁴⁵ This hybrid nature creates a tension between the precedential acceptance of arbitration in contract cases and a general premise that tort law exists to force a general conformity with standards of care demanded by society, especially for members of a profession.⁴⁶ This tension creates variations by the courts in enforcement of arbitration clauses in medical service contracts that would otherwise not occur in the enforcement of the same clause in a commercial or labor contract.⁴⁷ The courts' response to arbitration clauses in medical service contracts have not consistently mirrored precedent established by decisions on arbitration clauses in labor or commercial contracts.⁴⁸

The courts' role in enforcing contractual arbitration comes in two chronological stages; the first occurs before arbitration takes place. In the first stage, the court decides whether the contract is valid and whether the dispute must be resolved through arbitration;⁴⁹ in the second, the court reviews the decision of the arbitrator.⁵⁰ The courts are much more active in the first phase.⁵¹

42. *Id.* § 600.5041(6).

43. *Id.* § 600.5041(5).

44. See generally RISKIN AND WESTBROOK, *supra* note 21, at 250-67.

45. See P.S. Atiyah, *Medical Malpractice and the Contract/Tort Boundary*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 287, 288-91.

46. See Havighurst, *supra* note 4, at 148-56.

47. See Terry, *supra* note 3, at 572.

48. See RISKIN & WESTBROOK, *supra* note 21, at 306-22; Terry, *supra* note 3, at 585-88.

49. See Saunders, *supra* note 7, at 280-83.

50. See Dickinson v. Kaiser Found. Hosp., 169 Cal. Rptr. 493, 494 (Ct. App. 1980).

51. More case law exists concerning issues of enforceability. Courts generally give great deference to an arbitrator's decision. See Sobol v. Hertz Warner, 469 F.2d 1211, 1213-15 (2d Cir. 1972). *But see* Sprinzen v. Nomberg, 389 N.E.2d 456, 457-60 (N.Y. 1979) (discussing the types of arbitration decisions which a court may overturn on public policy grounds).

1. Pre-Arbitration Responses

When contracts redistribute risks which, within a societal context, have already been distributed in large part by tort law standards, it is perceived that the courts themselves are reticent to enforce such contracts.⁵² An example is a contract between a doctor and patient containing an exculpatory clause eliminating all liability of the doctor for any malpractice that might occur.⁵³ In one case involving such a contract, a court found such a contract invalid because of the societal notion that the doctor owes the patient some degree of duty of care which is absolute within their relationship regardless of any private agreements between the two individuals.⁵⁴ Enforcement of such a contract, therefore, seems to be contrary to public policy.⁵⁵

Traditionally, the determination of acceptable standards of medical care and the compensation of victims of malpractice has been allocated to the tort law system.⁵⁶ Arbitration agreements change the forum and the decision-maker for these determinations; through the use of a medical service contract, public tort law becomes private tort determinations. Contract law then becomes the focus of the court's analysis instead of the tort considerations of breach of duty and compensation for injury.⁵⁷

Arbitration, prior to the medical malpractice crises, had been used predominately in the labor and commercial fields.⁵⁸ Arbitration agreements reached within these two arenas were generally analyzed by the courts under a traditional contract approach.⁵⁹ However, disputes arising under medical service contracts and those arising under labor or commercial transaction contracts differ considerably: The dispute in a medical service contract concerns negligence in the form of malpractice, whereas in commercial contracts the dispute concerns non-compliance of terms. The legal system deals differently with the relationships between people within a negligence dispute and those within a non-compliance of a contract dispute. Within a contract dispute, the court looks to the explicit language of the terms upon which the parties agreed, the capacity of the parties to contract, the extent of the relationship per the subject agreement, and the actions for which each party is responsible and any resulting non-compliance.⁶⁰ In a tort dispute, the court, and often the jury, does not decide a case based upon the relationship created explicitly by the parties but instead on the duties society imposes upon their relationship.⁶¹

52. See Atiyah, *supra* note 45, at 298-301.

53. See *Emory Univ. v. Porubiansky*, 282 S.E.2d 903, 903-04 (Ga. 1981).

54. See *id.* at 905.

55. See *id.*; see also Ginsburg et al., *supra* note 12, at 253-55.

56. See Terry, *supra* note 3, at 590-93.

57. See Saunders, *supra* note 7, at 280-83.

58. See generally RISKIN & WESTBROOK, *supra* note 21, at 250-67.

59. *Id.* at 273-75.

60. See Terry, *supra* note 3, at 589-90.

61. *Id.* at 590-91.

Because of this distinction between the underlying disputes, there is some substance to the policy argument that contractual agreements are not suitable vehicles for eliminating tort liability.⁶² Numerous state courts have refused to enforce exculpatory clauses in contracts for medical services. In *Emory University v. Porubiansky*,⁶³ a case illustrative of courts' hostility to contractual escapes of tort liability, the Georgia Supreme Court refused to enforce an exculpatory clause that eliminated liability of a dental clinic after a woman suffered a broken jaw from treatment for an impacted tooth.⁶⁴ The Georgia Supreme Court held that enforcement of the exculpatory clause in the medical service contract would be against public policy because the state imposed a duty on professionals, specifically those practicing in the medical field, to perform within certain standards.⁶⁵ The court concluded that the professional should not be allowed to relieve herself of that duty.⁶⁶ Generally, courts will refuse to enforce similar clauses because they may substantially or completely shift all risk to the patient.⁶⁷

In arbitration clauses, however, the change is not necessarily a shift in the risk but, instead, a change of the forum for the resolution of a possible claim.⁶⁸ Additionally, medical care has been traditionally grounded in contracts for services, although the duties of care prescribed have been established through the tort system.⁶⁹ Perhaps because of the strength of having a signed contract before it as well as the strength of ample precedent upholding arbitration clauses in the labor and commercial arenas, a court will generally order arbitration in many malpractice cases when there is an arbitration agreement between the parties.⁷⁰

When the courts have restricted or invalidated arbitration agreements for medical malpractice claims, they generally base their holdings on numerous legal theories.⁷¹ The most common of these are: 1) constitutionality; 2) deficiencies in statutory requirements for arbitration agreements; and 3) contractual challenges, such as holding the agreement unconscionable or holding that the dispute is outside the scope of the agreement.

a. Constitutionality

The United States Constitution and all but two states' constitutions provide a right of access to the court system for the redress of injuries and a right to a

62. *Id.*

63. 282 S.E.2d 903.

64. *Id.* at 903-04.

65. *Id.* at 905.

66. *Id.* at 906.

67. See Havighurst, *supra* note 4, at 164.

68. See Henderson, *supra* note 16, at 248.

69. See Atiyah, *supra* note 45, at 292.

70. There are no statistical studies on the number of cases. See PEGALIS & WACHSMAN, *supra* note 5, at 15.

71. See Terry, *supra* note 3, at 588-612.

trial by jury in civil suits allowing for damages.⁷² An injury for medical malpractice, whether it proceeds under tort or contract theory, is compensated in court by a monetary damage award.

The constitutionality of arbitration agreements has been challenged on numerous grounds including a violation of the right of access to the courts,⁷³ the right to an impartial decision-maker,⁷⁴ and a right to a jury trial.⁷⁵ One recent example is found in *University of Miami v. Echarte*.⁷⁶ In *Echarte*, the Florida Court of Appeals held that Section 766.207⁷⁷ of the Florida statutes was unconstitutional.⁷⁸ The statute provided a method for the parties to agree to a voluntary, binding, post-occurrence arbitration agreement to resolve medical negligence claims.⁷⁹ The court based its holding upon the Florida constitution's right of access to the courts provision.⁸⁰ Another constitutional issue is the procedural due process right to an impartial decision-maker.⁸¹ However, the courts have generally rejected this argument, finding that the interest of arbitrators, even if they are healthcare professionals, is too attenuated to cause a direct conflict or bias.⁸²

Even though the federal and state constitutions protect the rights of individuals, an individual may waive a constitutional right;⁸³ contracting to use binding arbitration would be a waiver of the right to a trial by jury. Valid waiver of a constitutional right is not readily accepted by the courts; the U.S. Supreme Court has even held, in *Aetna Insurance Co. v. Kennedy*,⁸⁴ that the courts should "indulge every reasonable presumption against waiver."⁸⁵

The courts will accept a waiver of constitutional rights when the agreement to do so is voluntary, such as in the case of contractual binding arbitration

72. U.S. CONST. amend. VII. The two states without such constitutional rights are Colorado and Louisiana. In addition, the Commonwealth of Puerto Rico has no constitutional provision for a right to a jury trial.

73. See *University of Miami v. Echarte*, 585 So. 2d 293, 296 (Fla. Ct. App. 1991).

74. Saunders, *supra* note 7, at 273.

75. *Id.*

76. 585 So. 2d 293. The plaintiff in the case was treated for a brain tumor by the University hospital. *Id.* at 295. As a result of alleged malpractice, her right arm and hand were amputated. *Id.*

77. FLA. STAT. ch. 766.207 (Supp. 1988).

78. *Echarte*, 585 So. 2d at 296.

79. FLA. STAT. ch. 766.207(3). The statute was enacted by the Florida legislature in response to a report concerning the medical malpractice crisis in Florida drafted by the Academic Task Force for Review of Insurance and Tort Systems. *Echarte*, 585 So. 2d at 296.

80. *Echarte*, 585 So. 2d at 296.

81. Saunders, *supra* note 7, at 276.

82. See *Vincent v. Romagosa*, 425 So. 2d 1237, 1239 (La. 1983); *Morris v. Metriyakool*, 344 N.W.2d 736, 738 (Mich. 1984); *Parker v. Childrens' Hosp.*, 394 A.2d 932, 944 (Pa. 1978); see also *Terry*, *supra* note 3, at 595.

83. Saunders, *supra* note 7, at 269-72.

84. 301 U.S. 389 (1937). In this case, the Court addressed a waiver of due process rights. *Id.* at 393. The Court has also applied this standard to waiver of constitutional rights within the criminal law context. See *Brady v. United States*, 397 U.S. 742, 747 (1970).

85. *Aetna Ins. Co.*, 301 U.S. at 393.

agreements⁸⁶ where the voluntary nature of such agreements may be at issue. In circumstances surrounding medical service contracts with hospitals, a patient's voluntary acceptance of the terms may truly be in question because of the unequal bargaining power surrounding an agreement for medical care, especially if there is only one hospital in town. Some states, specifically Michigan and California, have dispensed with the need for express proof of waiver in arbitration agreements.⁸⁷ Instead, these jurisdictions apply the traditional presumption that one who signs a written agreement is presumed to understand it and act voluntarily.⁸⁸ On the other hand, some states require that the medical service contract contain a statement that the agreement is a voluntary waiver of constitutional rights.⁸⁹

b. Statutory Deficiencies

Many states have statutes regulating the use of private contractual arbitration,⁹⁰ some of which are specifically directed at the use of arbitration in medical service contracts.⁹¹ These statutes govern the language and form that must be used in arbitration agreements.⁹² Non-compliance with the statutes' terms provides grounds on which the courts can circumvent an order to arbitrate. Under various statutes, the arbitration agreement must be printed in a larger type size, must include an option to rescind that part of the contract within a specific time, or must include an express statement that signing the agreement constitutes a waiver of a constitutional right.⁹³

However, court interpretation of when an arbitration clause is in compliance varies. The Michigan courts, in interpreting the Michigan Medical Malpractice Arbitration Act,⁹⁴ are inconsistent in their holdings on the need for exact compliance with the statute. An example of the inconsistency appears when comparing the cases of *Haywood v. Fowler*⁹⁵ and *McKain v. Moore*.⁹⁶ In *Haywood*, the court ordered arbitration even though the size of the print was smaller than mandated in the statute.⁹⁷ The Michigan Court of Appeals held that

86. See Terry, *supra* note 3, at 593-98.

87. See *Morris*, 344 N.W.2d at 741; *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1187 (Cal. 1976).

88. See *Morris*, 344 N.W.2d at 742; *Madden*, 552 P.2d at 1187-88.

89. See *supra* notes 38-39 and accompanying text.

90. See *Saunders*, *supra* note 7, at 268.

91. See *supra* note 35 and accompanying text.

92. See, e.g., MICH. COMP. LAWS ANN. §§ 600.5040-.5065; see also *Saunders*, *supra* note 7, at 268 nn.7-8.

93. See, e.g., *id.* §§ 600.5041-.5042.

94. *Id.* §§ 600.5040-.5065.

95. 475 N.W.2d 458 (Mich. Ct. App. 1991).

96. 431 N.W.2d 470 (Mich. Ct. App. 1988).

97. *Haywood*, 475 N.W.2d at 460.

even though the print size was not that mandated in the statute, it was larger than the rest of the print and, therefore, was sufficient.⁹⁸

In *McKain*, however, the Michigan Court of Appeals held that strict compliance with the statute is necessary in order for the arbitration agreement to be enforceable in court.⁹⁹ Here, the court held that the arbitration agreement had not been executed in strict compliance with the Michigan statute; because there was conflicting evidence as to what the patient understood to be the agreement, the court refused to compel arbitration.¹⁰⁰ Such inconsistency in enforcement of exact compliance leads to much pre-arbitration litigation. This inconsistency provides for some escape from routine court orders compelling arbitration.

c. Contractual Challenges

A court must find that a valid contract exists in order to compel arbitration for the resolution of a dispute.¹⁰¹ One way for a court to avoid an order compelling arbitration is to find either that the contract as a whole or the arbitration clause itself is invalid.

The issue of which forum decides the validity — the court or the arbitrator — must be resolved first.¹⁰² As a general rule, federal courts will refuse to adjudicate issues of contract validity when a valid arbitration clause is found within the contract itself.¹⁰³ In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,¹⁰⁴ the U.S. Supreme Court suggested that even in cases where the issue is fraud in the inducement of the contract as a whole, the arbitrator holds the authority to decide that issue.¹⁰⁵ The Court continued that courts only have authority to adjudicate claims that the arbitration clause was fraudulent; all other claims of contract validity are to be decided by the arbitrator.¹⁰⁶ This logic appears to leave federal courts very little room to maneuver around arbitration clauses.

98. *Id.*

99. *McKain*, 431 N.W.2d at 476.

100. *Id.*

101. *See, e.g., id.* at 475; *Horn v. Cooke*, 325 N.W.2d 558, 560 (Mich. Ct. App. 1982).

102. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985).

103. *See AT & T Technologies, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-85 (1960); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

104. 388 U.S. 395.

105. *Id.* at 404 (Section 4 of the Federal Arbitration Act, 9 U.S.C. §4, "does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").

106. *See id.* at 403-04. This case adopted the concept of severability of arbitration clauses from the rest of the contract. *See id.* at 402-04. In this way, even if the arbitrator finds the contract as a whole is invalid, the authority to decide the issue still stands.

While most state courts that have faced the issue after *Prima Paint* have followed the severability approach, some states courts have refused.¹⁰⁷ Even in jurisdictions where the courts have affirmed the authority of the arbitrator to decide some issues of contract validity, they have retained the authority of the courts to decide other issues of contract validity.¹⁰⁸

Many states routinely decide the contract validity issues before ordering arbitration. Two predominant defenses that create loopholes for the enforcement of arbitration clauses are an allegation that the contract is one of adhesion or an allegation that the contract is unconscionable. Generally, a contract is found to be unconscionable where there is disparity between the parties' bargaining power *and* the result benefits the stronger party¹⁰⁹ *or* when the contract terms are against public policy.¹¹⁰ A contract of adhesion is one where (1) there exists an unequal bargaining power, (2) the stronger party offers only pre-set terms, and (3) no bargaining for the desired services occurs.¹¹¹ The weaker party must accept the pre-set terms or go without the desired services or product.¹¹² Although contracts of adhesion are not necessarily invalid, they may be deemed unconscionable or the court may find the terms are beyond the reasonable expectations of an ordinary person.¹¹³

Although courts generally favor arbitration agreements,¹¹⁴ when the arbitration agreement falls within a contract for medical services, a court may look to the circumstances surrounding the signing of the agreement.¹¹⁵ Contracts for medical services are highly susceptible to being defined as contracts of adhesion because persons in need of medical care are often not in a position of equal bargaining power. In *Ramirez v. Superior Court, Santa Clara County*,¹¹⁶ the California Court of Appeals remanded a case to the trial court because the trial court "did not resolve the factual issues of coercion" and of whether Ms. Ramirez understood or reasonably should have understood the contract.¹¹⁷ The court's reasoning rested on whether or not the patient felt compelled to sign the agreement in order to receive treatment.¹¹⁸ Whether or not the patient was aware of the arbitration agreement in a standardized form is

107. See RISKIN & WESTBROOK, *supra* note 21, at 267.

108. See, e.g., *Exercycle Corp. v. Maratta*, 174 N.E.2d 463 (N.Y. 1961). The issues which the *Exercycle* court retained for its own were: (1) voidability of the contract through fraud or duress against one of the parties; (2) the frivolous nature of the claim; (3) illegality of performance; and (4) whether a condition precedent to arbitration was fulfilled. *Id.* at 334-35.

109. See Saunders, *supra* note 7, at 280.

110. See E. ALLAN FARNSWORTH, *CONTRACTS* §§ 5.1 - 5.9 (1982) (emphasis added).

111. BLACK'S LAW DICTIONARY, *supra* note 11, at 40 (defining "adhesion contract").

112. *Id.*

113. *Id.*

114. See Saunders, *supra* note 7, at 281.

115. *Id.* at 282-83.

116. 163 Cal. Rptr. 223 (Ct. App. 1980).

117. *Id.* at 229-30.

118. *Id.* at 227-29.

an additional issue in deciding if the agreement is one of adhesion. This second issue is especially important for hospital admissions forms.¹¹⁹ Courts, in dealing with contracts for medical services, may use these arguments to advance any underlying concepts that malpractice claims should be heard in a court and not by an informal process like arbitration.¹²⁰

Courts also limit the scope of arbitration clauses, thereby limiting the number of disputes that must be resolved through arbitration. The *Haywood* court held that the arbitration agreement there only covered the patient's first visit to the hospital and not any subsequent visits, even if they were related to the same treatment because there was not a signed agreement for each subsequent visit.¹²¹

The scope of coverage of the arbitration agreement is also at issue when included in group health plan agreements, such as HMOs. In this type of setting, treatment is provided under an insurance-type agreement. When this agreement is provided through an employee coverage plan, the argument is asserted that only the employee-signatory to the coverage plan should be forced to arbitrate and other family members covered should not be forced to arbitrate.¹²² Courts have generally rejected this argument for derivative claims such as loss of consortium and for infants covered by the parents' insurance plan. In *Leong v. Kaiser Foundation Hospitals*,¹²³ the court held that the infant could not circumvent the arbitration agreement because his parents had chosen to accept the medical treatment that was offered.¹²⁴

2. Post-Arbitration Review

The extent of review of arbitrators' decisions vary with the jurisdiction. In federal courts, the standard of review is governed by the holdings of *Sobel v. Hertz Warner Co.*¹²⁵ and *Wilko v. Swan.*¹²⁶ The general standard of review is to assess the arbitrator's decision only as to whether it manifestly disregards the law.¹²⁷ This is a rather strict standard and generally precludes any analysis of the justice of a particular result.

State courts also tend to give great deference to the arbitrator's decision. In *Schneider v. Kaiser Foundation Hospitals*,¹²⁸ the California Court of Appeals corrected an arbitration award to a value larger than the statutory limit on

119. See *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775, 785 (Ct. App. 1976); see also *Sanchez v. Sirmons*, 467 N.Y.S.2d 757 (Sup. Ct. 1983).

120. See *Ginsburg et. al.*, *supra* note 12, at 253-55.

121. *Haywood*, 475 N.W.2d at 458.

122. See, e.g., *Leong v. Kaiser Found. Hosps.*, 788 P.2d. 164, 169 (Hawaii 1990).

123. 788 P.2d 164.

124. *Id.* at 169.

125. 469 F.2d 1211 (2d Cir. 1972).

126. 346 U.S. 427 (1953).

127. *Id.* at 436.

128. 264 Cal. Rptr. 227 (Ct. App. 1989).

malpractice damages.¹²⁹ However, a state court can refuse to enforce the decision to arbitrate, often basing its refusal on public policy.¹³⁰ If the result of the decision would offend the court, it may rely on this doctrine. This provides another outlet for the courts to provide an escape from arbitration.

III. ANALYSIS

A. *Post-Arbitration Review*

Arbitration agreements in medical service contracts are predominately litigated at the pre-arbitration hearing stage. When asked to determine the validity and scope of these agreements, courts respond in a variety of ways. Often the agreement is found valid, and the parties are forced to arbitrate their dispute.¹³¹ However, such enforcement of arbitration clauses in medical service contracts is inconsistent; often, courts will use a contract theory defense or find noncompliance with the pertinent state statute in order to refuse to order the parties to arbitrate. This inconsistency leads to a great deal of pre-arbitration litigation.

This pre-arbitration litigation defeats much of the purpose for installing arbitration clauses in these medical service contracts. The parties spend much time and money pursuing their claim of validity or invalidity, and the courts often respond not with clear rules but instead with a myriad of exceptions and loopholes to enforceability. This creates much uncertainty in the enforceability of the agreements and, therefore, additional litigation. This has an added disadvantage of clogging the courts' dockets.

Much of this confusion seems to occur because of the hybrid nature of medical care. Tort influences such as general public safety, acceptable standards of care, and a desire to compensate true victims for their injuries stand on one side while the contract influences of freedom to contract and predictability stand on the other. In the middle is a general uneasiness about the national cost of healthcare and skyrocketing insurance costs.¹³²

It appears that when the courts invalidate an arbitration clause, they do so not out of a concern over an invalid contract but out of a fear that arbitration is not the best choice of forum for medical malpractice claims. A court's true motivation for refusing to order arbitration may come not from some invalid contract consideration but instead from an underlying sense of concern for a consistent standard of care in medical care or simply as a response to an affront on the court's public tort jurisdiction.¹³³

129. *Id.* at 237.

130. For an example of such refusal, see *supra* notes 54-55 and accompanying text.

131. See Terry, *supra* note 3, at 586.

132. See, e.g., Saunders, *supra* note 7, at 268.

133. See Havighurst, *supra* note 4, at 163, 166-68.

This fear seems to have some merit. Medical malpractice developed within the distinct area of tort law for good reason. Tort law was created with the hope of influencing the actions of society.¹³⁴ In the area of healthcare, tort law sets out to influence the quality of care given and to ensure a minimal standard that is used by healthcare providers.¹³⁵ The influence of the tort system comes from monetary sanctions¹³⁶ which create a deterrent effect in a similar fashion to those created by criminal sanctions. To privatize the process completely, which occurs in private arbitration, seems to eliminate this deterrent effect.

Yet, as a counter argument, the use of privately contracted arbitration does have its advantages. Arbitration may be more just than a formal court process. Because litigation involving a medical malpractice claim entails the use of expert witnesses, extensive discovery, and documentation, it is very expensive to pursue; medical malpractice claims having a low dollar amount injury might never be tried due to the prohibitive costs of the process.¹³⁷ Some resolution and compensation may still be available if the victim has access to arbitration. Arbitration would provide a forum for malpractice claims too small to pursue in court. In addition, arbitration generally is less expensive, less time consuming, and more "user friendly" than the traditional legal process.¹³⁸ Victims may be able to pursue their claims without the aid of a lawyer. This reduces the cost of the process as a whole and would allow small-claim suits an avenue for resolution. Often patients subjected to some medical malpractice only want their costs paid and the doctor or hospital to be sanctioned; arbitration could provide this objective to these individuals.

Both of these arguments have merit. When courts reluctantly enforce or completely invalidate an arbitration agreement, they invariably choose one of these sets of values and advantages over the other. This is not the only option open to the courts. A suggested response is to exchange the timing of judicial oversight from the beginning of the arbitration process to the end: Allow the arbitration hearing to take place, then allow a decision to be rendered. Later, if the parties are not satisfied with the result, the courts can then step into the dispute. The difficulty with this approach is the established legal precedent created from decisions concerning labor and commercial arbitration awards.¹³⁹ However, these cases can easily be distinguished because of the strong tort influence found in medical malpractice cases.

One alternative approach would be to introduce a new standard of review which gives less deference to the arbitrator. A model from which to draw a

134. See Atiyah, *supra* note 45, at 292.

135. See Terry, *supra* note 3, at 624.

136. *Id.* at 627-28.

137. See RISKIN & WESTBROOK, *supra* note 21, at 306.

138. See Havighurst, *supra* note 4, at 167.

139. See RISKIN & WESTBROOK, *supra* note 21, at 295.

hybrid standard of review is the approach taken to rulings by administrative agencies.¹⁴⁰

Private arbitration parallels administrative hearings in a number of ways. The hearings are less formal, consume less money and time, and often the decision-maker is knowledgeable about the subject matter of the dispute. The differences come from their origins and in the scope of review available to the parties involved.

State courts could develop a new standard of review for medical malpractice arbitration cases based on precedent available from judicial review of administrative decisions. Options would include *de novo* review, substantial evidence review, or even substituted judgment. Another alternative would be simply to use the appellate review standards; this may entail deputizing the arbitration hearing process as a type of associate or inferior trial court.

The advantages to shifting the courts' involvement in arbitration agreements to the post-arbitration stage are numerous. First, the parties may actually be satisfied by the arbitration decision and never need to darken the courthouse door. This would achieve the goals driving the use of arbitration (to minimize the process so as to preserve money and time, to reduce court dockets, and to provide a process that is satisfying to the participants).

The amount of pre-arbitration litigation could be reduced by a court's rejection of the often strained exceptions to an order forcing arbitration. This would be more acceptable in light of the concept that the award would be reviewable. In addition, it could influence the arbitrator's use of generally accepted standards of care. If the arbitrator's decision did not reflect the court or legislative standard, the court could remand the case. The court process could establish some type of publication of acceptable arbitration rulings and awards. This publication could then achieve one of the positive aspects of the tort process, which is to influence society. In this situation, publication could help inform the medical community of acceptable standards of care. It would also provide for the general tort objective of deterrence of the same malpractice. Lastly, the parties may feel more comfortable choosing arbitrators with an expertise in the healthcare profession and less compelled to bicker over arbitrators that show a loyalty for one side over the other if they know the award will be reviewable.

IV. Conclusion

Medical service contracts containing agreements to arbitrate future disputes cause difficulty for courts because of the tension between contract enforcement and the development of tort law within the area of medicine as well as the consistent enforcement of that law. Courts disturbed with restricting the access to the court system or with the affront to their jurisdiction may find grounds for invalidating the agreement. Other courts, influenced by the individual right to

140. Worker's Compensation Administrative Hearing Procedures would be one such example. See, e.g., MO. REV. STAT. § 287.490 (1986).

contract and amenable to arbitration as a litigation alternative, order arbitration. This inconsistency increases pre-arbitration litigation which subsequently defeats the goal of arbitration, which is generally to avoid the court process.

Because of the unique nature of medical treatment and its contract and tort characteristics, it may be best to create an area of law dealing with these cases in a manner which is tailored to this unique nature. One alternative would be for the courts to accept review of arbitration awards.

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