

1997

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Jennifer Gillespie

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NOTES

Physician-Patient Arbitration Agreements: Procedural Safeguards May Not Be Enough

*Buraczynski v. Eyring*¹

I. INTRODUCTION

Insurance companies and physicians increasingly are requiring medical malpractice claims to be settled by arbitration.² As a result, many patients are being presented with a new choice when they enter their doctor's office: Sign an arbitration agreement or forgo treatment with their physician.

In *Buraczynski v. Eyring*, the physician required the patients to sign an arbitration agreement prior to performing medical services for them.³ The agreement contained provisions designed to ensure that the patient made an informed decision before consenting to the agreement.⁴ But what if there were no other doctors available if the patient chose not to sign?

II. FACTS AND HOLDING

On September 11, 1990, Carolyn Bridges underwent total knee replacement surgery under the care of Dr. Edward Eyring and his assistant, Becky Phillips.⁵ Two months later Bridges signed an arbitration agreement with Dr. Eyring, initialing a retroactive clause in the agreement.⁶ Shortly after signing the arbitration agreement, Bridges began experiencing difficulties with her newly replaced knee.⁷ She eventually consulted with another orthopedic surgeon who indicated that the prosthesis had been improperly applied.⁸ Because the first procedure was faulty, Bridges underwent a second knee surgery, replacing the first prosthesis with a lesser quality joint.⁹

1. 919 S.W.2d 314 (Tenn. 1996).

2. See generally, Eleanor Kinney, *Malpractice Reforms in the 1990's: Past Disappointments, Future Success?*, 20 J. HEALTH POL. POL'Y & L. 99 (1995).

3. 919 S.W.2d at 317.

4. *Id.*

5. *Id.* at 316.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

On December 3, 1990, Helen Parker also entered into an arbitration agreement with Dr. Eyring, which was identical to the agreement between Eyring and Bridges.¹⁰ On February 26, 1991, Dr. Eyring and Becky Phillips performed a total knee replacement on Parker.¹¹ In June of 1991, following numerous complications and an infection, Helen Parker died.¹² Appellants Beverly Buraczynski and Stanley Parker are Helen Parker's children.¹³

The arbitration agreements signed by Bridges and Parker were adhesion contracts offered to the patients on a "take it or leave it" basis.¹⁴ The agreements covered all medical negligence and malpractice claims arising out of the doctor-patient relationship and bound not only the patient, but her spouse and heirs as well.¹⁵ The contract provided that the physician was bound by the arbitrator's decision regarding medical malpractice claims and fee claims for disputed treatments.¹⁶ Additionally, patients had thirty days from the time they signed to revoke the agreement by submitting written notice to Dr. Eyring.¹⁷

Appellants Beverly Buraczynski and Stanley Parker and appellant Carolyn Bridges filed separate malpractice actions against Eyring and Phillips.¹⁸ In response, Eyring and Phillips petitioned to have the arbitration agreements enforced against both appellants.¹⁹ The trial court conducted a joint hearing in which it found that the arbitration agreements were not contemplated by the Tennessee Arbitration Act and were unenforceable as contracts because they lacked consideration.²⁰

The cases were then consolidated for appeal to the Tennessee Court of Appeals.²¹ The appellate court reversed the trial court's judgment, finding that despite the "unique" contractual relationship between physician and patient, the Tennessee Arbitration Act applied and the contract was supported by adequate consideration.²²

The Supreme Court of Tennessee granted certiorari to consider the validity of the physician-patient arbitration agreement.²³ On appeal, appellants argued that the arbitration agreements between the doctor and his patients were void as against public policy.²⁴ Alternatively, they argued that the agreements were too broad to be

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 317.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 316.

19. *Id.* at 317.

20. *Id.*

21. *Id.*

22. *Buraczynski v. Eyring*, No. 1994 WL 677487 (Tenn. Ct. App. 1994).

23. *Buraczynski*, 919 S.W.2d at 317.

24. *Id.* at 318.

enforceable.²⁵ Additionally, Bridges argued that the statute did not apply to retroactive arbitration agreements.²⁶

Doctor Eyring argued that the agreement was not void as against public policy, distinguishing *Olson v. Molzen*,²⁷ a case involving an exculpatory clause which limited the physician's liability.²⁸ He also argued that the agreement was not too broad, pointing to other courts that did not require specificity in physician-patient arbitration agreements.²⁹ Finally, Eyring asserted that retroactive arbitration agreements have been uniformly upheld in other courts if the patient was aware of the retroactive provisions in the agreement.³⁰

The Tennessee Supreme Court upheld the court of appeal's decision.³¹ The supreme court found that the physician-patient arbitration agreements were consistent with public policy, were not overly broad, and were enforceable adhesion contracts because they were supported by consideration and were not oppressive or unconscionable.³²

III. LEGAL BACKGROUND

In 1983, the Tennessee General Assembly enacted the Tennessee Arbitration Act ("TAA").³³ Derived from the Uniform Arbitration Act,³⁴ the TAA defined the parameters of arbitration in Tennessee. Section 29-5-302(a) of the statute provides that arbitration agreements are valid, except for agreements that would ordinarily not be enforceable in law or equity based on general contract principles.³⁵ The statute, however, does not address the validity of physician-patient arbitration agreements in the medical malpractice context. Further, no Tennessee court has ever considered the issue of the validity of physician-patient arbitration agreements. Prior Tennessee cases and the Tennessee Uniform Arbitration Act, however, have established a public policy favoring dispute resolution through arbitration, not litigation.

When deciding issues of first impression, Tennessee case law and the Tennessee Arbitration Act recognize the desirability of looking to the law of sister states construing the uniform acts. Section 29-5-320 of the TAA provides that provisions under the Act shall be construed to effectuate the uniform purpose of the

25. *Id.*

26. *Id.*

27. 558 S.W.2d 429 (Tenn. 1977).

28. *Buraczynski*, 919 S.W.2d at 318.

29. *Id.*

30. *Id.*

31. *Id.* at 321.

32. *Id.*

33. Tenn. Code Ann. § 29-5-301, et seq. (1983).

34. *Id.*

35. *Id.* § 29-5-302(a).

states adopting uniform acts.³⁶ In 1985, in *Holiday Inns v. Olsen*,³⁷ the Tennessee Supreme Court stated that when opinions of other states are within the spirit of the Tennessee statute and do not offend state public policy, the legislative intent of uniformity will be upheld by following the decisions of sister states.³⁸ In 1991, the Tennessee Court of Appeals applied this reasoning in its decision in *Wachtel v. Shoney's, Inc.*³⁹ In *Wachtel*, the court relied on the method of statutory construction set forth in *Olson* to rely on Nevada law in construing a provision of the Uniform Arbitration Act adopted by both states.⁴⁰ Similarly, because the issue in *Buraczynski* was one of first impression, the Tennessee Supreme Court followed earlier Tennessee decisions in looking to sister states for precedent on the interpretation of the Uniform Arbitration Act.⁴¹

A. Scope of Agreements

In 1987, the California Court of Appeals in *Hilleary v. Garvin*⁴² found that an arbitration agreement between a physician and patient covered the continuing professional relationship, not just the initial treatment.⁴³ In *Hilleary*, the patient entered into the arbitration agreement with the treating doctor prior to treatment for vaginal bleeding and an exam to determine if she was pregnant.⁴⁴ During a follow up visit, the doctor recommended surgery to prevent the diagnosed condition from recurring.⁴⁵ The subsequent surgery was the subject of the patient's malpractice claim.⁴⁶

The California Court of Appeals found that the arbitration agreement signed before the initial treatment was binding because it complied with the mandates of the California Arbitration Act, § 1295,⁴⁷ which covers physician-patient arbitration agreements.⁴⁸ The court rejected the plaintiff's claim that the agreement covered only the initial treatment sought and found the contract unambiguous despite its lack of specificity in delineating covered procedures and treatments.⁴⁹ On this point, the

36. *Id.* § 29-5-320.

37. 692 S.W.2d 850 (Tenn. 1985).

38. *Id.* at 853.

39. 830 S.W.2d 905 (Tenn. Ct. App. 1991).

40. *Id.* at 909.

41. 919 S.W.2d 314, 318.

42. 238 Cal. Rptr. 247 (Cal. Ct. App. 1987).

43. *Id.* at 250.

44. *Id.* at 248.

45. *Id.*

46. *Id.*

47. CAL. CIV. PROC. CODE § 1295(a) (West 1975). Adopted in 1975, this statute defines the requirements for a valid arbitration agreement between physicians and patients.

48. *Hilleary*, 238 Cal. Rptr. at 249.

49. *Id.*

court stated that such delineation was "neither required by the statute nor normally expected by a patient."⁵⁰

In 1988, in *Gross v. James Recabaren, M.D., Inc.*, the California Court of Appeals again addressed the issue of the scope of an arbitration agreement.⁵¹ In *Gross*, the patient signed an arbitration agreement prior to the doctor removing two benign masses from the patient, which required no further treatment.⁵² Eighteen months later the patient returned to have a lesion on his nose examined.⁵³ The lesion was malignant and radical surgery was required.⁵⁴ The surgery for the malignant lesion on the patient's nose was the subject of the malpractice claim underlying the arbitration dispute.⁵⁵

The patient argued that the arbitration agreement covered only the services rendered contemporaneously with its signing.⁵⁶ The court rejected this argument, stating that the agreement cannot reasonably be said to be limited to the contemporaneous services.⁵⁷ The court stated, "To impose upon a physician, during a continuous doctor-patient relationship, the extra burden of having to renew the arbitration agreement each time there is a variation in treatment or ailment would be impractical and would frustrate the purpose of the [arbitration] statute"⁵⁸ Further, the court found that neither party could have reasonably considered the relationship terminated after the treatment of the benign moles.⁵⁹ The court looked at the patient's return to the physician for subsequent treatment and at the doctor's billing methods as evidence of an on going relationship.⁶⁰ Because the disputed treatment was part of an ongoing physician-patient relationship, the court held that the arbitration agreement was enforceable.⁶¹

In 1993, the California Court of Appeals considered another aspect of the permissible scope of physician patient arbitration agreements. In *Coon v. Nicola*,⁶² the court considered the validity of a retroactive clause in an arbitration agreement.⁶³ Following treatment for a fractured wrist, plaintiff signed an arbitration agreement during a follow-up visit with the doctor.⁶⁴ The agreement included a provision entitled "Retroactive Effect", which made the agreement effective as of the date of

50. *Id.*

51. *Gross*, 253 Cal. Rptr. 820 (Cal. Ct. App. 1988).

52. *Id.* at 821.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 822.

57. *Id.*

58. *Id.* (quoting *Hilleary v. Garvin*, *supra* at 42).

59. *Id.* at 824.

60. *Id.*

61. *Id.*

62. 21 Cal. Rptr. 2d 846 (Cal. Ct. App. 1993).

63. *Id.* at 848.

64. *Id.*

the first medical services.⁶⁵ The provision was specifically initiated by the plaintiff when the agreement was signed.⁶⁶ Subsequently, the plaintiff filed a suit for malpractice, claiming the arbitration statute did not authorize retroactive agreements.⁶⁷

The California Court of Appeals found that the statute did not preclude retroactive agreements from being incorporated into an arbitration agreement even though the statute did not address retroactive agreements specifically.⁶⁸ In its decision, the court relied on contract principles which are generally applicable to retroactive contracts and on public policy favoring arbitration.⁶⁹ The court concluded that "as long as the provisions of section 1295 [of the California Code of Civil Procedure] are met as to a medical malpractice arbitration agreement, parties may legally agree to arbitrate pre-agreement claims."⁷⁰

B. Adhesion Aspect of the Agreement

In 1985, the Nevada Supreme Court upheld a lower court's ruling invalidating a physician-patient arbitration agreement in *Obstetrics and Gynecologists William G. Wixted, M.D., Patrick M. Flanagan, M.D., William F. Robinson, M.D. Ltd. v. Pepper*.⁷¹ In *Pepper*, the patient signed an arbitration agreement prior to receiving a medical examination and a prescription for oral contraceptives from the clinic.⁷² Standard procedures at the clinic required the patient to sign the arbitration agreement and complete two other forms prior to receiving treatment.⁷³ The clinic staff was available to answer questions, but the patient had no recollection of the agreement being explained to her.⁷⁴ The agreement did not provide the patient with an opportunity to revoke the agreement, therefore, when the patient signed she could not regain her right to a jury trial.⁷⁵

The Nevada Supreme Court found that although the district court had entered no findings of fact or conclusions of law, the district court could have found the agreement unenforceable because it was an unacceptable adhesion contract.⁷⁶ The Nevada Supreme Court defined an adhesion contract as a standardized contract offered on a "take it or leave it" basis.⁷⁷ The court also noted that the defining feature of an adhesion contract is that the weaker party has no real choice as to the

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 850.

69. *Id.*

70. *Id.* at 851.

71. 693 P.2d 1259 (Nev. 1985).

72. *Id.* at 1260.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (relying on *Miner v. Walden*, 422 N.Y.S.2d 335, 337 (N.Y. Sup. Ct. 1979)).

terms of the contract.⁷⁸ The court found, however, that an adhesion contract is not necessarily unenforceable if it tracks the reasonable expectations of the weaker party and if it is not unduly oppressive.⁷⁹ Because the district court could have found that the patient in this case was not alerted to the agreement or its consequences, so that she did not give her informed consent and so that no meeting of the minds occurred, the supreme court upheld the district court's decision.⁸⁰ The arbitration agreement was, therefore, unenforceable.⁸¹

In 1992, the Supreme Court of Arizona in *Broemmer v. Abortion Services of Phoenix Ltd.*⁸² considered the enforceability of a physician-patient arbitration agreement.⁸³ Prior to undergoing an abortion procedure at an abortion clinic, plaintiff was given three forms to complete and return before services would be rendered.⁸⁴ Included in the three forms was an agreement to arbitrate any dispute arising out of treatment.⁸⁵ The agreement contained provisions limiting potential arbitrators to doctors specializing in obstetrics or gynecology.⁸⁶ Plaintiff completed and returned all three forms in less than five minutes, receiving no counsel from the staff of the clinic and no notice of the arbitration agreement's existence.⁸⁷

The Arizona Supreme Court relied on *Wheeler v. St. Joseph Hospital*⁸⁸ in defining an adhesion contract as one offered on a take it or leave it basis in which the weaker party has no realistic choice as to its terms and cannot obtain the desired services elsewhere.⁸⁹ Because the arbitration agreement in *Broemmer* was a form contract offered to plaintiff on a take it or leave it basis and because the selection of arbitrators provision was potentially advantageous to the doctor, the court found that the agreement was an adhesion contract.⁹⁰

The court noted, however, that finding that the agreement was an adhesion contract was not determinative of its enforceability.⁹¹ The court looked at the two judicially imposed limitations on the enforceability of adhesion contracts enunciated in *Graham v. Scissor-Tail, Inc.*⁹² to determine if the *Broemmer* adhesion contract was enforceable.⁹³ In *Graham*, the court stated that to be a valid adhesion contract, an agreement must fall within the reasonable expectations of the parties and not be

78. *Id.* (relying on *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775, 783 (Cal. Ct. App. 1976)).

79. *Id.* at 1261 (relying on *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172-73 (Cal. 1981)).

80. *Id.*

81. *Id.*

82. 840 P.2d 1013 (Ariz. 1992).

83. *Id.* at 1015.

84. *Id.* at 1014.

85. *Id.*

86. *Id.*

87. *Id.* at 1015.

88. 133 Cal. Rptr. 775 (Cal. Ct. App. 1976).

89. *Broemmer*, 840 P.2d at 1015-16.

90. *Id.* at 1016.

91. *Id.*

92. 623 P.2d 165 (Cal. 1981).

93. 840 P.2d at 1016.

unduly oppressive or unconscionable.⁹⁴ The *Broemmer* court found that although adhesion contracts are not *per se* unenforceable, the agreement in this case was unenforceable because it exceeded the reasonable expectations of the plaintiff.⁹⁵ The court, therefore, did not need to determine if the contract was unconscionable.⁹⁶

The dissent in *Broemmer* disagreed with the majority's opinion that the contract was beyond the reasonable expectations of the plaintiff.⁹⁷ The dissent argued that the majority's decision was without basis in fact or law and displayed a preference for litigation.⁹⁸ Looking at the face of the arbitration agreement, the dissent pointed to the wording, "AGREEMENT TO ARBITRATE", at the top of the contract and to the capitalized heading of the agreement advising the patient to read the agreement carefully before signing.⁹⁹ The dissent argued that there was nothing in the record indicating that arbitration of a malpractice claim was beyond the reasonable expectations of the parties.¹⁰⁰

IV. INSTANT DECISION

In *Buraczynski v. Eyring*, the Tennessee Supreme Court was asked to decide if a physician-patient arbitration agreement was enforceable or if it was void as against public policy.¹⁰¹ Because this was an issue of first impression, the court looked at the history of arbitration in Tennessee and at the law of sister states to form the basis of its decision.¹⁰² The court followed the mandate of the Tennessee Arbitration Act¹⁰³ which directs that the opinions of other state courts should be considered in construing the uniform act to "effectuate its general purpose to make uniform the laws of those states which enact it."¹⁰⁴ The court also relied on *Holiday Inns v. Olsen*,¹⁰⁵ where the court held that the decisions of sister states were relevant in construing uniform acts even though they were not binding upon Tennessee courts.¹⁰⁶

94. 623 P.2d at 172-73.

95. *Broemmer*, 840 P.2d at 1017. In deciding if the agreement was beyond the plaintiff's reasonable expectations, the court looked at the factors listed in *Obstetrics and Gynecologists William G. Wixted, M.D., Patrick M. Flanagan, M.D., William F. Robinson, M.D. Ltd. v. Pepper*, 693 P.2d 1259 (Nev. 1985); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984); and RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

96. *Id.*

97. *Id.* at 1018.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Buraczynski*, 919 S.W.2d 314, 317.

102. *Id.* at 318.

103. TENN. CODE ANN. § 29-5-320 (1996).

104. *Buraczynski*, 919 S.W.2d at 318.

105. 692 S.W.2d 850 (Tenn. 1985).

106. *Buraczynski*, 919 S.W.2d at 318.

After establishing the basis on which it would make its decision, the court considered the policy arguments proposed by the parties, focusing on the general public policy favoring alternative dispute resolution.¹⁰⁷ The court began by noting the fact that no court has ever broadly rejected arbitration agreements in the medical services area.¹⁰⁸ The court then looked at the Tennessee Legislature's act of adopting the U.A.A. as an indication of a legislative policy favoring arbitration.¹⁰⁹ The court further noted its own rule promulgating court-administered alternative dispute resolution.¹¹⁰ While recognizing the special relationship between patients and their doctors, the court found arbitration to be as useful in the medical context as in any other.¹¹¹ The court noted that arbitration agreements designate an alternative forum, but do not limit liability.¹¹² Therefore, the court joined the "unanimous authority" from other states in finding that physician-patient arbitration agreements are not *per se* void as against public policy.¹¹³

The court then considered the scope of the particular arbitration agreements challenged in the instant case. The court first looked to California case law to decide if a physician patient arbitration agreement must be limited to a specific surgery or course of treatment or if it could encompass the entire medical relationship.¹¹⁴ The court relied on *Hilleary v. Garvin*¹¹⁵ in approving the broader type of arbitration agreement.¹¹⁶

In adopting the reasoning of the California court, the Tennessee court noted the similar scope of the agreements in *Hilleary* and the present case.¹¹⁷ In ruling that the breadth of the agreements did not render them unenforceable, the court stated that imposing a burden to renew an arbitration agreement at each variation in treatment in a continuous doctor-patient relationship would frustrate the purpose of the arbitration statute which is "to facilitate, not emasculate" the arbitration process.¹¹⁸

The court then considered whether the retroactive provision requiring arbitration of the suit arising from prior medical treatment was too broad to be enforceable. The court looked to the language of the Tennessee Arbitration Act to

107. *Id.*

108. *Id.* (citing Stanley Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 956 (1972) and *Arbitration of Medical Malpractice Claims*, 84 A.L.R.3d 375, 377 (1978 & Supp. 1995)).

109. *Id.* at 318-19.

110. *Id.* at 319.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. 238 Cal. Rptr. 247 (Cal. Ct. App. 1987). See also *Gross v. James A. Recabaren, M.D., Inc.*, 253 Cal. Rptr. 3d 820 (Cal. Ct. App. 1988).

116. *Buraczynski*, 919 S.W.2d at 319. The court found the language of *Hilleary* to be applicable despite its reliance on a California arbitration statute which specifically addressed medical arbitration agreements. *Id.*

117. *Id.*

118. *Id.* (quoting *Hilleary*, 238 Cal. Rptr. at 250).

decide if retroactive clauses are enforceable.¹¹⁹ The statute provides that agreements to arbitrate "any controversy thereafter arising" are valid and enforceable except upon such grounds as exist in law or equity.¹²⁰ The court reasoned that Bridges agreed to submit to arbitration any future controversy arising out of past medical treatment by initialing the clause pertaining to previously rendered care.¹²¹ Therefore, relying on the language of the statute and Bridges's knowledge of the retroactive clause, the court found that the retroactive clause was enforceable.¹²²

The next issue facing the court was the adhesion aspect of the agreement. The court began its analysis by defining an adhesion contract.¹²³ Noting that other jurisdictions consider the adhesion issue under general contract principles,¹²⁴ the court defined an adhesion contract as "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the customer cannot obtain the desired product or service except by acquiescing to the form of the contract."¹²⁵ The court also noted that the defining feature of an adhesion contract is that a party with less bargaining power has no real choice in the terms of the contract.¹²⁶ The court then looked at the facts of the instant case and found that the agreements were standardized form contracts offered to the patients on a "take it or leave it" basis.¹²⁷ The court further found that if the patients had not signed the agreements, the result would have been a loss of the desired medical services from Dr. Eyring.¹²⁸ Therefore, the court concluded that the arbitration agreements were adhesion contracts.¹²⁹

The court's analysis did not end with the determination that the agreements were adhesion contracts. Instead, the court stated that finding that the agreements were adhesion contracts did not foreclose the agreements' enforceability.¹³⁰ Again citing *Broemmer*, the court stated that "enforceability generally depends on whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable," noting that courts will not enforce adhesion contracts which disserve the weaker party while limiting the liability of the

119. *Id.*

120. *Id.* See TENN. CODE ANN. § 29-5-302(a)(1983).

121. *Id.*

122. *Id.* See *Coon v. Nicola*, 21 Cal. Rptr. 2d 846, 850-51 (Cal. Ct. App. 1993).

123. *Buraczynski*, 919 S.W.2d at 320.

124. *Id.* See *Broemmer v. Abortion Services of Phoenix Ltd.*, 840 P.2d 1013 (Ariz. 1992); *Leong by Leong v. Kaiser Foundation Hosp.*, 788 P.2d 164 (Haw. 1990); *Obstetrics and Gynecologists William G. Wixted, M.D., Patrick M. Flanagan, M.D., William F. Robinson, M.D. Ltd. v. Pepper*, 693 P.2d 1259 (Nev. 1985); *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775 (Cal. Ct. App. 1976).

125. *Buraczynski*, 919 S.W.2d at 320 (citing *Broemmer*, 840 P.2d at 1015 and *Black's Law Dictionary* 40 (6th ed. 1990)).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

stronger party.¹³¹ The court recognized that, in general, courts will not enforce physician-patient arbitration agreements hidden in other contracts when the agreements: (1) give the patient no right to question the terms or purpose of the agreement, (2) require the patient to choose between forever waiving their right to jury trial or forgoing necessary medical treatment, and (3) give the physician an unequal advantage in the arbitration process itself.¹³²

Examining the agreements in the present case, the court found that they contained none of the oppressive aspects discussed above.¹³³ It noted that the agreements in the present case were separate documents entitled "Physician-Patient Arbitration Agreement," with short explanations attached encouraged the patients to discuss any questions with Dr. Eyring.¹³⁴ The court found no unfair advantage given to the doctor by the agreement.¹³⁵ The court pointed to the terms of the contract which (1) entitled each side to choose one arbitrator (the two of whom would then choose a third), (2) bound Dr. Eyring to the arbitrator's decision concerning not only the medical malpractice claim, but disputed fee claims as well, and (3) notified the patient that he or she was relinquishing his or her right to a jury trial and gave the patient thirty days to reclaim that right.¹³⁶ Additionally, the court noted that the retroactive provision was addressed in a separate clause which the patient was required to initial.¹³⁷ The court found that the most important element in determining whether the adhesion contracts were enforceable was whether the arbitration agreements changed the doctor's duty of care or limited his liability.¹³⁸ Because the court found that none of the provisions of the contract were unconscionable, oppressive, or outside the parties' reasonable expectations, it held that the agreements were enforceable.¹³⁹

The court summarized its findings by stating that physician-patient arbitration agreements are not *per se* void as against public policy and that the specific agreements in the present case are enforceable.¹⁴⁰ The court cautioned that agreements of this type "must be closely scrutinized to determine if unconscionable or oppressive terms are imposed upon the patient which [would] prevent enforcement of the agreement."¹⁴¹

V. COMMENT

131. *Id.*

132. *Id.* at 321. See *Pepper*, 693 P.2d at 1260; *Beynon v. Garden Grove Medical Group*, 161 Cal. Rptr. 146, 150 (Cal. Ct. App. 1980); *Broemmer*, 840 P.2d at 1016.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 316.

The Tennessee Supreme Court correctly applied the law of other jurisdictions to the facts of *Buraczynski*. Its decision, however, should not be interpreted as a broad approval of physician-patient arbitration agreements. While recognizing a number of elements which guard against procedural unfairness, the court also recognized the potential for oppressive or unconscionable terms and conditions being employed which would render this type of arbitration agreement unenforceable.¹⁴² The court cautioned that adhesion-type arbitration agreements should be closely scrutinized for such oppressive and unconscionable terms.¹⁴³ The analysis should proceed beyond the provisions of the contract and include an examination of the true extent of the patient's ability to choose whether or not to sign the agreement.

The *Buraczynski* court pointed to several procedural safeguards rendering the physician-patient arbitration agreements enforceable.¹⁴⁴ The court noted that the agreements were separate documents, not hidden in other pre-admission forms, and that the agreements contained short explanations.¹⁴⁵ Also, the agreements did not provide an unfair advantage to the doctor or limit his liability.¹⁴⁶ Furthermore, the patients were informed in capitalized red type that they were surrendering their right to a jury trial and had thirty days to revoke the agreement.¹⁴⁷ While these elements certainly are effective procedural safeguards, they are protecting the patient's right to make an informed choice before signing a contract forfeiting the right to a jury trial. In modern practice, however, the patient may not have the option of choosing another doctor. Therefore, these procedural safeguards which protect the patient's right to make an informed decision may not be enough.

An estimated 40 million Americans belonged to health maintenance organizations (HMOs) in the early 1990's.¹⁴⁸ HMOs limit their subscribers' choice of physicians to those affiliated with the insurance company in order to reduce costs. If the affiliated doctors require patients to sign an arbitration agreement as a prerequisite to treatment, patients may be left with no alternative but to sign the agreement simply because they are not authorized to seek treatment from another physician and still receive insurance coverage. As HMOs become more common, more people may find themselves being forced to sign adhesion contracts forfeiting their right to a jury trial without the choice of selecting another doctor as the *Buraczynski* court assumed was possible.

In *Buraczynski*, the court characterized the patient's decision as a choice between signing the agreement and being treated by the doctor offering the agreement or simply choosing another physician.¹⁴⁹ Although the court

142. *Id.*

143. *Id.*

144. *Id.* at 321.

145. *Id.*

146. *Id.*

147. *Id.*

148. See Jacob S. Hacker, *National Health Care Reform: An Idea Whose Time Came and Went*, 21 J. HEALTH POL. POL'Y & L. 647, 655 (1996).

149. *Buraczynski*, 919 S.W.2d at 320.

acknowledged the difficulty in abandoning an established physician-patient relationship, it did not consider that the choice for many patients may really be between signing the agreement, foregoing treatment completely, or forgoing health insurance coverage.

The modern trend toward managed care may severely limit the patient's choice of physicians. Hypothetically, if the patients in *Buraczynski* were members of an HMO which designated Dr. Eyring as the only covered orthopedic surgeon in their coverage area, the patients would be forced to choose between forgoing their right to a jury trial and foregoing treatment or insurance coverage. That is really no choice at all.

The Tennessee Supreme Court acknowledged that these types of medical malpractice arbitration agreements are adhesion contracts.¹⁵⁰ The court hinged enforceability upon the parties' reasonable expectations and upon a determination of whether the agreement was oppressive or unconscionable.¹⁵¹ The court determined that the agreements in the present case were enforceable because they were in essence fair because they afforded procedural safeguards to the patients.¹⁵²

Focus on procedure, however, may be missing the larger issues involved in physician-patient arbitration agreements. With the high cost of health care, treatment without insurance coverage is certainly oppressive. Most people cannot afford to refuse to sign an arbitration agreement if that refusal means no treatment or no insurance coverage. Furthermore, the right to a jury trial is a constitutional guarantee.¹⁵³ Patients are being asked to choose between foregoing a constitutional right and foregoing medical treatment. This choice is far too oppressive and unconscionable for any procedural safeguards to cure. Before courts step in and enforce agreements denying one party a constitutional right, they should consider the realistic choices which that party has and what that party is receiving in exchange. The judiciary needs to be aware of the changing landscape of the medical services industry in making decisions that will help shape that landscape.

VI. CONCLUSION

Arbitration is an excellent means of alternative dispute resolution in the medical malpractice area, but it should not be imposed upon unwilling patients. Arbitration should be encouraged - not required. The *Buraczynski* court reached the correct conclusion for the particular facts of the case presented to it, but that decision should not be expanded without considering the realistic options available to patients. Assuming patients may simply choose another physician is a leap that cannot be

150. *Id.*

151. *Id.*

152. *Id.* at 321.

153. U.S. CONST. amend. VII. Additionally, forty-eight state constitutions guarantee the right to a jury trial. See Paul Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 CATH. U. L. REV. 737, 738 (1989).

made in the present state of health care. Approval of arbitration agreements signed by patients with no realistic choice is not the right decision for health care consumers in the modern health care system.

JENNIFER GILLESPIE