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ARBITRATION OF MEDICAL MALPRACTICE CLAIMS: PATIENT'S DILEMMA AND DOCTOR'S DELIGHT?

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I. INTRODUCTION

Pre-dispute arbitration agreements in medical services contracts are becoming more common and have recently been the subject of much litigation, and even more controversy. Proponents of such agreements contend that they constitute legitimate means to control the explosion in medical malpractice litigation and its negative secondary effects, including skyrocketing malpractice premiums and a shortage of doctors in high-risk specialties and in certain geographic areas. Others label them unconscionable contracts of adhesion, amounting to nothing more than mechanisms by which doctors can overreach their patients, denying them the due process protections afforded by the civil justice system. This controversy arises in the context of the doctor-patient relationship, historically one of society's most sacred and protected. It is this issue, examined in light of extant jurisprudential, ethical and public policy considerations, which is the subject of this Article. We urge that the real work in the resolution of these questions should come, not from the wooden application of legal principles surrounding adhesion contracts, unconscionability, violation of public policy, and all-encompassing legislation; but, rather, from the enactment, application, and enforcement of standards of medical ethics, similar to the manner in which the legal profession has chosen to deal with this issue.

A brief overview of the arbitral process will serve as a starting point to the understanding of the issues involved.[1] Next, the statutory and common law affecting arbitration is considered.[2] Issues of contract law raised by arbitration agreements in the medical malpractice context are explored in the Article's next section.[3] The ethical, societal, and practical policy considerations surrounding the use of arbitration clauses in medical services contracts are then examined.[4] Recommendations regarding the use of arbitration in connection with these uniquely sensitive disputes and the manner in which that use should be policed—if at all—conclude this Article.[5]

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1. *See infra* part II.
2. *See infra* part III.
3. *See infra* part IV.
4. *See infra* part V.
5. *See infra* part VI.

II. THE ARBITRATION PROCESS

Arbitration is a method of dispute resolution by which parties agree to submit a dispute—either before or after it arises—to one or more neutral third parties for binding resolution.[6] It is an adversarial process by which evidence is submitted at a hearing, using relaxed rules of procedure and evidence. Perceived advantages include savings of time and cost, confidentiality, control, and enhanced potential for the preservation of the parties' relationship.

In the United States, the resolution of medical malpractice disputes has historically fallen within the domain of the civil litigation system. The hallmarks of that system are high cost, delay, publicity, and unpredictable results. Medical malpractice claims under tort-based litigation are almost always hotly contested due to the seriousness of the injuries sustained by the plaintiffs and the potential for excess judgments, reputational damage, increased cost of liability insurance, and other negative secondary effects to the physician. These issues seemed to reach their zenith in the mid-1970s—the period of the so-called "malpractice crisis"— resulting in the enactment of tort reform measures in a number of states and the genesis of the notion that there must be a better way to resolve these and other claims.[7] Arbitration has been identified as one means to cure some of the "evils" of medical malpractice litigation.[8]

III. THE LAW OF ARBITRATION

The principal federal law governing arbitration is the Federal Arbitration Act ("FAA"). Congress passed the FAA in 1925 to end persistent judicial animosity toward the arbitral process, which manifested itself in the refusal of the courts to enforce arbitration agreements. The essence of the FAA is to require the courts to enforce written arbitration contracts "involving commerce" or pertaining to "maritime transactions."[9] The FAA declares such agreements "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[10] The FAA is widely applicable, given the United States Supreme Court's expansive view of the term "involving commerce".[11] In *Allied-Bruce Terminix v. Dobson*, the Supreme Court construed the statutory language to be substantially equivalent to the very broad term "affecting" commerce.[12] The Court interpreted the "involving commerce" language as signaling congressional intent to exercise its power in this area to the broadest extent permissible under the Commerce Clause.[13] *Allied-Bruce*

6. BLACK'S LAW DICTIONARY (8th ed. 2004).
7. *See* Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).
8. *See* Thomas Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203 (1996).
9. 9 U.S.C. § 2 (West 2006).
10. *Id.*
11. *Id.*
12. Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 273–274 (1995)
13. *Id.*

Terminix was affirmed in *Citizens Bank v. Alafabco, Inc.*, which further broadened the applicability of the FAA, holding that the specific transaction at issue need not have a "substantial effect on interstate commerce," as long as such transactions, taken as a whole, constitute "a general practice . . . subject to federal control."[14]

A number of states have enacted arbitration statutes. Not surprisingly, some of the state provisions conflict with the FAA, giving rise to preemption issues. The FAA contains no specific preemption of state arbitration law. Accordingly, once it is determined that the FAA applies ("involving commerce" or "maritime transactions"), the question is whether it is the FAA or state law that governs. The United States Supreme Court resolved this issue in a series of cases beginning with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, in which the court held that the FAA, not state law, binds federal courts sitting in diversity.[15] Next, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the court held that the FAA constituted substantive federal law applicable to arbitration agreements involving commerce and, as such, governed in both state and federal courts.[16] The final step was taken in *Southland Corporation v. Keating* when the United States Supreme Court held that a California statute restricting the enforceability of contractual agreements to arbitrate conflicted with section 2 of the FAA, and was therefore void under the Supremacy Clause.[17]

It is important to note that the FAA does not necessarily govern all arbitration agreements affecting interstate commerce. Under the FAA, parties to arbitration agreements generally have the right to structure those agreements as they wish. This includes the right to invoke state arbitration law by specific incorporation, even if the FAA would otherwise be applicable.[18] Similarly, in circumstances not affecting interstate commerce, and in which the FAA would not be applicable according to its terms, the parties may mandate application of the FAA in the arbitration agreement, thereby preempting conflicting state law.[19]

Once it is determined that an arbitration agreement is subject to the terms of the FAA, a number of the FAA's procedural rules come into play

14. Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56–57 (2003) (quoting Mandeville, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)). In Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock, No. 2007-CA-01250-COA, 2008 WL 3843820 (Miss. Ct. App. Aug. 19, 2008) the Mississippi Court of Appeals recently reiterated that an arbitration clause in a nursing home admissions contract evidences "in the aggregate economic activity affecting interstate commerce" thereby making the FAA applicable. *Id.* at 1.

15. 388 U.S. 395, 417 (1967).

16. 460 U.S. 1, 24 (1983).

17. 465 U.S. 1, 10–11 (1984). This decision was founded on the conclusion that Congress, in enacting the FAA, established a national policy favoring arbitration, thereby precluding the states from requiring parties to arbitration agreements to resolve their disputes by litigation.

18. Volt Info. Sci., Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989).

19. *Id.* at 476–77; Geosurveys, Inc. v. State Nat'l Bank, 143 S.W.3d 220 (Tex. App. 2004); Hudson v. ConAgra Poultry Co., 484 F.3d 496 (8th Cir. 2007). *See generally* Stanley A. Leasure, *Arbitration of Nursing Home Claims: Oklahoma Goes Its Own Way*, 60 OKLA. L. REV. 737 (2007).

as default provisions for issues not addressed in the arbitral agreement. These include provisions for the appointment of arbitrators; summoning of witnesses before the arbitral tribunal; and, access to court imposed sanctions to compel attendance and punish recalcitrant witnesses.[20] The FAA also vests the court with important enforcement mechanisms. The first of these allows the entry of an order staying litigation upon a finding that the disputed issue is subject to a written arbitration agreement.[21] Likewise, a party refusing to participate in arbitration in the face of a binding arbitration agreement is subject to the entry of an order compelling that party to proceed with arbitration in the manner required by the agreement.[22] The FAA provides for a summary proceeding in such circumstances and if the court is satisfied that an arbitration agreement has been made or that failure to comply is not at issue, the court must summarily direct the arbitration to proceed.[23] If these issues are contested, the court is to make a summary determination, unless a jury trial is demanded.[24] Another enforcement tool in the court's armamentarium is with respect to arbitral awards. If the parties have so agreed, judgment may be entered upon an arbitration award, thereby bringing to bear the collection and enforcement procedures available to judgment creditors.[25]

The statutory grounds for vacatur under the FAA have been the subject of much litigation, and a detailed examination of the issue of vacatur is beyond the scope of this article.[26] However, a brief overview of vacatur is useful in considering the efficacy of arbitration agreements in medical services contracts. Since the primary purpose of arbitration is to avoid litigation, it must be emphasized that the scope of review of arbitration awards permitted by the FAA is very limited.[27] It is also important to note that neither legal nor factual errors are sufficient to set aside an arbitration award.[28] The FAA provides only four circumstances in which a court may vacate an arbitral award: (1) "the award was procured by corruption, fraud, or undue means;" (2) "evident partiality or corruption" on the part of the arbitrators; (3) misconduct on the part of the arbitrators by improperly "refusing to postpone the hearing," refusing to hear material evidence, or prejudicing the rights of a party; and, (4) the "arbitrators exceeded their powers, or . . . imperfectly executed them."[29] These statutory grounds for

20. 9 U.S.C.A. § 5, 7 (West 2006).

21. *Id.* at § 3.

22. *Id.* at § 4.

23. http://att.yahoo.com/mail

24. *Id.*

25. 9 U.S.C.A. § 9 (West 2006). This enforcement mechanism is not exclusive. An action at law is available as an additional means to that provided in this section of the FAA. *See, e.g.,* Photopaint Technologies, LLC v. Smartlens Corp., 335 F.3d 152 (2d Cir. 2003).

26. *See generally* Stanley A. Leasure, *Vacatur of Arbitration Awards: The Poor Loser Problem or Loser Pays?* 29 U. ARK. LITTLE ROCK L. REV. 489 (2007).

27. Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1998).

28. NF&M Corp. v. United Steel Workers of Am., 524 F.2d 756, 759 (3d Cir. 1975).

29. 9 U.S.C.A. § 10 (West 2006). The United States Supreme Court recently ruled that the grounds for expedited vacatur and modification specified under the FAA are exclusive and may not be expanded by agreement of the parties. Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S.Ct. 1396 (2008); *see*

vacatur of arbitration awards are construed quite narrowly.[30] In addition to the statutory grounds, some jurisdictions have adopted a few narrowly construed common law bases upon which arbitration awards may be set aside, including those found to be in manifest disregard of the law, contrary to public policy, irrational, or arbitrary and capricious.[31] The FAA also provides three circumstances in which arbitral awards may be judicially modified or corrected: (1) "evident material miscalculation of figures or . . . mistake in a description;" (2) an award upon a matter not submitted to the arbitrators; or, (3) an award imperfect in form, but not affecting the merits.[32]

Finally, the FAA has identified orders involving the arbitration process from which an appeal may be taken. These include orders denying a stay, orders compelling arbitration, and orders confirming, modifying or vacating an award.[33] Appeals may also be taken from interlocutory orders granting, continuing, or modifying an injunction against arbitration, or a final decision with respect to an arbitration that is subject to the FAA.[34] However, no appeal may be taken from interlocutory orders granting a stay, directing arbitration to proceed, compelling arbitration, or refusing to enjoin arbitration subject to the FAA.[35]

Generally modeled after the arbitration statutes of New York, the Conference of Commissioners on Uniform State Laws promulgated the Uniform Arbitration Act of 1956 (UAA).[36] Most states have passed general arbitration statutes that are typically some version of the UAA. The

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also Stanley A. Leasure, *Arbitration After* Hall Street v. Mattel: *What Happens Next?*, 31 U. ARK. LITTLE ROCK L. REV. ___ (forthcoming 2009) (analyzing the *Hall Street* decision and its implications for the future of arbitration).

30. MidAmerican Energy Co. v. Int'l Bd. of Elec. Workers Local 499, 345 F.3d 616, 622 (8th Cir. 2003) (stating fraud to be sufficient to justify the setting aside of an arbitration award—must have been materially related, undiscoverable, and established by clear and convincing evidence); Forsythe Int'l S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990) (stating undue means must be outcome determinative and result of intentional misconduct); Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1995) (stating evident partiality or misconduct must be so pervasive as to destroy "fundamental fairness"); Jacada (Europe), Ltd. v. Int'l Marketing Strategies, Inc., 401 F.3d 701, 712 (6th Cir. 2005) (*abrogated on different grounds by Hall St.*, 128 S.Ct. at 1396) (an arbitrator must be found to have exceeded his powers or so imperfectly executed them that a final and definite award on the subject matter was not made, and arbitrator must have acted irrationally or clearly beyond the scope of the arbitration submission).

31. Hoffman v. Cargill, Inc., 236 F.3d 458, 462 (8th Cir. 2001) (finding that manifest disregard is limited to circumstances where governing law is identified by the arbitrator who then proceeds to ignore it); Swift Industries, Inc. v. Botany Industries, Inc., 466 F.2d 1125, 1131 (3d Cir. 1972) (holding that irrationality suffices only when the award is completely irrational and viewed in the context of arbitration agreement); United Food & Commercial Workers' Union Local No. 655 v. St. John's Mercy Health Sys., 448 F.3d 1030, 1033 (8th Cir. 2006) (stating that a violation of public policy is established when the award clearly violates public policy); United Paper Workers Int'l Union v. Misco, 484 U.S. 29, 42–44 (1987) (stating that violation of public policy is also established when award conflicts with law and legal precedent); Brown v. Raucher Pierce Refsnes, Inc., 994 F.2d 775, 781 (11th Cir. 1990) (stating that for an award to be arbitrary and capricious, it must exhibit "wholesale departure from the law").

32. 9 U.S.C.A. § 11(a)–(c) (West 2006).

33. *Id.* at § 16(a)(1).

34. *Id.* at § 16(b)(2), (3).

35. *Id.* at § 16(b)(1)–(4).

36. UNIF. ARBITRATION ACT (1956).

UAA's drafters had several objectives, including the validation of arbitration agreements, provision of mechanisms by which the power of state courts could be marshaled to enforce, confirm, vacate or modify arbitral awards, and to fill gaps left in less than complete arbitration agreements.[37] It has been adopted in 28 states and the District of Columbia.[38] The Revised Uniform Arbitration Act ("RUAA") was introduced to deal with a number of emergent issues.[39] These include the determination of arbitrability; disclosure of matters bearing on arbitrators' partiality; immunity of arbitrators from civil liability; authority of arbitrators to require prehearing discovery and motion practice; and, the available remedies (e.g. attorney's fees and punitive damages).[40] The RUAA has been adopted in 12 states.[41] In addition, to augment arbitration statutes of general application, the legislatures in a number of states have passed statutes specifically addressing arbitration of medical malpractice cases in the 1970s and 1980s.[42]

IV. THE CONTRACT ISSUES

An overarching principle of the FAA is that parties to arbitral agreements may, for the most part, structure them as they choose.[43] The question of the intent to submit a particular dispute to arbitration has been the subject of much litigation. Even in cases falling within the scope of the FAA, state contract law is determinative.[44] A two-prong test is usually applied, requiring the court to first determine whether a valid agreement to arbitrate exists and, if so, then to decide whether the dispute in question

37. UNIF. ARBITRATION ACT (1956), Prefatory Note, 2005 Main Volume.

38. The following states have adopted the Uniform Arbitration Act of 1956: Alaska, Arizona, Arkansas, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and Wyoming. UNIT. ARBITRATION ACT (1956), Table of Jurisdictions Wherein Act Has Been Adopted.

39. UNIF. ARBITRATION ACT (2000), Prefatory Note, 2005 Main Volume.

40. *Id.*

41. Those states which have adopted the Revised Uniform Arbitration Act of 2000 are Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah and Washington. UNIF. ARBITRATION ACT (2000), Table of Jurisdictions Wherein Act Has Been Adopted.

42. *See* U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: ALTERNATIVES TO LITIGATION, GAO HRD-92-28 (Jan., 1992) [hereinafter MEDICAL MALPRACTICE]. The states having passed specific medical malpractice arbitration statutes include: Alabama, Alaska, Illinois, Kansas, Kentucky, North Dakota, Ohio, Utah, Vermont, Virginia, and West Virginia. *See* Kenneth A. DeVille, *The Jury Is out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims*, 28 J. LEGAL MED. 333 (2007). The specifics of the arbitration statutes vary from state to state, but include such matters as procedures by which claims will be arbitrated, and a general framework for arbitration including such matters as: size of the arbitral panel; manner of selection of arbitrators; right of revocation. *See* MEDICAL MALPRACTICE, *supra* note 42.

43. Mastrobouno v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995).

44. Patterson v. Tenent Healthcare, Inc., 113 F.3d 832, 834 (8th Cir. 1997).

falls within the scope of that agreement.[45] Notwithstanding the strong policy of the FAA favoring arbitration, intent is the principal issue and intent to submit a particular dispute to arbitration must be found before the agreement will be enforced.[46] In a medical context, patients seeking to avoid the enforcement of medical services arbitration agreements frequently claim the agreement is unconscionable on one of the following grounds: (1) coercion; (2) absence of mutuality; (3) burdensome expense; (4) bias of the arbitrator; or, (5) unreasonable arbitral provisions.[47]

In *Covenant Health Rehabilitation of Picayune, L.P. v. Brown*, the Mississippi Supreme Court addressed, in detail, the issue of the unconscionability of an arbitration provision in a nursing home agreement.[48] This was a wrongful death action brought on behalf of a former resident of the defendant nursing home who contended the care rendered the decedent was grossly negligent.[49] When suit was filed, the defendant nursing home filed a motion to compel arbitration based on an arbitration clause contained in the admissions agreement.[50] In response, the Plaintiffs contended, *inter alia*, that the arbitration clause was procedurally and substantively unconscionable.[51] The trial court held that the admissions agreement was not procedurally unconscionable, but struck the arbitration provision of the admissions agreement as substantively unconscionable.[52] The nursing home appealed.[53]

At the outset, the Mississippi Supreme Court pointed out that it would continue its practice of striking unconscionable contractual terms while allowing the remainder of the agreement to be enforced.[54] With respect to the issue of substantive unconscionability, the court noted that its review would be limited to the four corners of the agreement and that a finding of per se unconscionability requires a showing that the contractual "language significantly alters the legal rights of the parties involved and severely abridges the damages which they may obtain."[55]

The Plaintiffs contended that numerous provisions of the arbitration agreement in question were substantively unconscionable including, *inter alia*: limitations on the facility's liability,[56] waiver of punitive damages,[57]

45. Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock, No. 2007-CA-01250-COA, 2008 WL 3843820 at 2 (Miss. Ct. App. Aug. 19, 2008). Daisy Mfg. Co. v. NCR Corp., 29 F.3d 389, 392 (8th Cir. 1994).

46. *Mastrobouno*, 514 U.S. at 57; ITT Hartford Life & Annuity Ins. Co. v. Amerishare Investors, Inc., 133 F.3d 664, 668 (8th Cir. 1998).

47. Elizabeth K. Stanley, *Parties' Defenses to Binding Arbitration Agreements in the Health Care Field and the Operation of the McCarran-Ferguson Act*, 38 ST. MARY'S L.J. 591, 624–625 (2007).

48. 949 So. 2d 732 (Miss. 2007).

49. *Id.* at 735.

50. *Id.* at 735–736.

51. *Id.*

52. *Id.* at 735.

53. *Id.*

54. *Id.*

55. *Id.* at 737-738 (citing Vicksburg Partners, L.P. v. Stevens, 911 S.W.2d 507, 521 (Miss. 2005)).

56. *Id.* at 739. The limitation of liability provision provided: "Should any claim, dispute or controversy arise between the Parties or be asserted against any of the Facility's owners, officers, directors

and the requirement that disputes be submitted to arbitration.[58] The Mississippi Supreme Court found the limitations on liability[59] and the waiver of punitive damages[60] substantively unconscionable. Reversing the holding of the trial court, the Supreme Court found the agreement to submit disputes to arbitration under the auspices of the American Arbitration Association rules and procedure—after striking the offending provisions referred to above—enforceable.[61] The Mississippi Supreme Court concluded that those portions of the admissions agreement not found to be unconscionable should be enforced as written.[62]

Another example is found in *Cleveland v. Mann*, a case decided by the Mississippi Supreme Court.[63] In this case of first impression, the court addressed the enforceability of pre-dispute arbitration agreements between doctor and patient.[64] The patient sought treatment from his surgeon for a post-surgical hernia, and at his office appointment, signed a "Clinic-Physician-Patient Arbitration Agreement."[65] After the surgical repair of his hernia, Mann developed complications requiring a subsequent surgery.[66]

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or employees, the settlement of thereof shall be for actual damages not to exceed the lesser of (a) $50,000 or (b) the number of days that Resident was in the Facility multiplied times the daily rates applicable for said Resident. This limitation of liability shall be binding on the Resident, Responsible Party, and the Resident's heirs, estate and assigns." *Id.*

57. *Id.* at 739. The punitive damages waiver contained the following terms: "[t]he Parties hereto agree to waive any punitive damages against each other and agree not to seek punitive damages under any circumstances." *Id.*

58. *Id.* at 740. The arbitration clause stated: "[i]f the Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them, and the Facility or its Owners, officers, directors or employees shall be resolved by binding arbitration administered by the American Arbitration Association and its rules and procedures. The Arbitration shall be heard and decided by one qualified Arbitrator selected by mutual agreement of the Parties. Failing such agreement each Party shall select one qualified Arbitrator and the two selected shall select a third. The Parties agree that the decision of the Arbitrator(s) shall be final. The Parties further agree that the Arbitrators shall have all authority necessary to render a final, binding decision of all claims and/or controversies and shall have all requisite powers and obligations. If the agreed method of selecting an Arbitrator(s) fails for any reason or the Arbitrator(s) appointed fails or is unable to act or the successor(s) has not been duly appointed, the appropriate circuit court, on application of a party, shall appoint one Arbitrator to arbitrate the issue. An Arbitrator so appointed shall have all the powers of the one named in this Agreement. All Parties hereto agree to arbitration for their individual respective anticipated benefit of reduced costs of pursuing a timely resolution of a claim, dispute or controversy, should one arise. The Parties agree to share equally the costs of such arbitration regardless of the outcome. Consistent with the terms and conditions of this Agreement, the Parties agree that the Arbitrator(s) may not award punitive damages and actual damages awarded, if any, shall be awarded pursuant to Section E.7." *Id.*

59. *Id.* at 738–739 (citing *Vicksburg Partners*, 911 So. 2d at 523 in which identical language had been found unconscionable). *See also* Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock, No. 2007-CA-01250-COA, 2008 WL 3843820, at *5 (Miss. Ct. App. Aug. 19, 2008).

60. *Id.* at 739. *See also* Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock, No. 2007-CA-01250-COA, 2008 WL 3843820, at *5 (Miss. Ct. App. Aug. 19, 2008).

61. *Id.* at 740.

62. *Id.* at 741 (citing Miss. Code Ann. § 75-2-302 (1) (1972)): B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So. 2d 483, 491 (Miss. 2005); Russell v. Performance Toyota, Inc., 826 So. 2d 719, 724–25 (Miss. 2002); Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 131 So. 350, 357 (1930).

63. 942 So. 2d 108 (Miss. 2006).

64. *Id.* at 113.

65. *Id.* at 111. The agreement provided "[p]atient agrees that in the event of any dispute, claim, or controversy arising out of or relating to the performance of medical services . . . such dispute or controversy shall be submitted to JAMS . . . ." *Id.* at 113.

66. *Id.* at 111.

During the course of treatment for these complications, he was diagnosed with liver cancer and died.[67] The plaintiffs brought a wrongful death action against the surgeon and others who filed a motion to compel arbitration and stay proceedings.[68] Mann's survivors resisted arbitration, claiming, *inter alia*, that the agreement was one into which Mr. Mann had not knowingly, voluntarily, and intelligently entered.[69] The trial court concluded that the agreement was unconscionable and adhesive, and denied the motion to compel arbitration; the defendants appealed.[70]

After first finding the FAA applicable by virtue of the transaction's connection to interstate commerce,[71] the Mississippi Supreme Court emphasized that under this statute it must consider whether "legal constraints external to the parties' agreement [e.g. fraud, duress, unconscionability] foreclosed arbitration of the claims."[72] The Court considered both procedural unconscionability (lack of knowledge, legalistic language, disparity in sophistication or bargaining power, lack of opportunity to study the contract, etc.) and substantive unconscionability (oppressive terms).[73] The plaintiffs claimed that the agreement was substantively unconscionable because it required that the arbitration be supplied by a specific service provider.[74] The Court found no substantive unconscionability because the specified arbitration service was neutral and provided neutral arbitrators.[75] The Court also held in favor of the defendants on the issue of procedural unconscionability, based on a number of factors, including: lack of complex language; prominent notice of the forfeiture of right to jury trial; full statement and explanation of terms; provision of ample opportunity to inquire about terms; 15 day rescission period; and, a provision allowing the patient to make written changes for approval by the provider.[76]

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67. *Id.*

68. *Id.*

69. *Cleveland*, 942 So. 2d at 111.

70. *Id.* at 112.

71. *Id.* at 113 (citing Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507, 514–15 (Miss. 2005) (holding that nursing home contracts "affect interstate commerce" and are, accordingly, within the ambit of the FAA)).

72. *Id.* at 113–14; *see also* Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock, No. 2007-CA-01250-COA, 2008 WL 3843820 at 4 (Miss. Ct. App. Aug. 19, 2008); Rogers-Dabbs Cheverolet-Hummer, Inc. v. Blakeney, 950 So. 2d 170, 177 (Miss. 2007); Trinity Mission of Clinton, LLC v. Barber, 98 So. 2d 910 (Miss. Ct. App. 2007). Under Mississippi common law, "unconscionability" is "the absence of meaningful choice on the part of the parties, together with contract terms which are unreasonably favorable to the other party." *Clevelend*, 942 So. 2d at 114 (citing East Ford, Inc. v. Taylor, 826 So. 2d 709, 715 (Miss. 2002)) (quoting Bank of Ind., N.A. v. Holyfield, 476 F.Supp. 104, 109 (S.D.Miss. 1979)); *see also* Entergy Miss., Inc. v. Burdette Gin Co., 726 So. 2d 1202, 1207 (Miss. 1998).

73. *Cleveland*, 942 So. 2d at 114.

74. *Id.* at 117.

75. *Id.* The court defined substantive unconscionability as "a one-sided agreement whereby one party is deprived of all benefits of the agreement or left without a remedy for another party's nonperformance or breach." *Id.* (quoting *Vicksburg Partners*, 911 So. 2d at 521. The oppressiveness of terms can also rise to the level of substantive unconscionability under Mississippi law. *East Ford*, 826 So. 2d at 714.

76. 942 So. 2d at 115–116 (Miss. 2006). In *East Ford*, 826 So. 2d at 714, the Mississippi Supreme Court declared "procedural unconscionability" to include circumstances in which there is exhibited lack

On the other hand, in *Sosa v. Paulos* the Utah Supreme Court found the arbitration agreement procedurally unconscionable because it required the patient to reimburse the doctor his attorney's fees if the patient recovered less than half the amount claimed in the arbitration.[77] That case arose as the result of a medical malpractice suit in which the plaintiff contended the doctor had committed surgical malpractice.[78] The arbitration agreement was executed less than an hour before surgery when Sosa was undressed and in her surgical clothing.[79] The agreement was presented by a representative acting on the doctor's behalf, and was accompanied by a "Patient Informed Consent and Release of Claims" and a "Consent for Use of Freeze Dried or Flesh Donor Tissue."[80] Sosa admitted that she signed all of the documents without reading them, but claimed that no one discussed the agreement with her at any time prior to its execution.[81] The defendant doctor moved to stay the proceedings and compel arbitration.[82] In response, Sosa contended that the agreement was unenforceable as procedurally and substantively unconscionable.[83] The trial court agreed with the plaintiff and denied the motion to stay.[84]

On appeal, the Utah Supreme Court found the provision requiring the patient to pay the doctor's attorneys' fees substantively unconscionable on its face because those terms were so one-sided as to oppress and unfairly surprise an innocent party.[85] In addition, the Court considered the circumstances under which the contract was negotiated (minutes before surgery, in a state of fear and anxiety, rushed, and without explanation) to be "surrounded" by procedural unconscionability.[86] The case was remanded to the trial court with instructions that if the trial court determined that the plaintiff received a copy of the agreement and was not precluded from revoking the agreement, then the attorneys' fee portion of the agreement (found to be substantively unconscionable) would be severed and the remainder of the agreement enforced.[87] The appellate court further held that if the trial court found that Sosa did not receive a copy of the agreement or

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of knowledge or voluntariness, small print, legalistic language, difference in sophistication or bargaining power and lack of opportunity to study and discuss terms.

77. 924 P.2d 357, 362–63 (Utah, 1996). The arbitration agreement provided in part: "[i]f the arbitrators award patient less than one-half (1/2) of the amount sought by patient in arbitration, then the patient shall be responsible for . . . payment of all expenses, costs, arbitrators' fees, and reasonable attorney's fees incurred by physician in connection with the arbitration, including payment to physician at the rate of $150.00 per hour for time spent by physician defending himself in connection with the arbitration."

78. *Id.* at 359.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Sosa*, 924 P.2d at 359.

83. *Id.* at 360.

84. *Id.*

85. *Id.* at 362.

86. *Id.* at 362–63.

87. *Id.* at 365.

was precluded from exercising her right to revoke, the original determination of the trial court that the agreement was unconscionable *in toto* would be affirmed.[88]

In *Wheeler v. St. Joseph Hospital,* the California Court of Appeal reviewed the claim of a medical malpractice plaintiff that the arbitration agreement he signed was void as an adhesion contract.[89] Wheeler underwent an angiogram at the defendant hospital and suffered serious complications, which left him a quadriplegic.[90] After Wheeler filed suit, the hospital sought the entry of an order compelling arbitration pursuant to an arbitration clause contained in the hospital admission documents.[91] The plaintiffs claimed that the arbitration clause constituted an "adhesion contract," which the court characterized as a "standardized contract form [ ] offered to consumers . . . on essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract."[92] According to the court, the distinctive feature of an adhesion contract is that the weaker party has no choice of terms.[93] The Court of Appeal held that since Wheeler was in no position to reject the agreement, bargain, or find another hospital, the arbitration clause possessed the characteristics of an adhesion contract.[94]

The court did, however, explain that the question was not merely whether the contract was adhesive, but whether its terms exceeded reasonable expectations or were oppressive or unconscionable.[95] The determination of those issues, according to the court, hinged on the legitimate expectations of the patient and the extent to which those expectations were not met.[96] In examining the transaction, the court recognized many indicators of the patient's legitimate expectations and the extent to which those expectations were not met.[97] The court found valid assent lacking on these

88. *Sosa*, 924 P.2d at 365.

89. 63 Cal. App. 3d 345, 355 (Cal. Ct. App. 1976).

90. *Id.* at 349.

91. *Id.* at 350. The arbitration agreement provided in part: "Arbitration Option: Any legal claim or civil action in connection with this hospitalization, by or against hospital or its employees or any doctor of medicine agreeing in writing to be bound by this provision, shall be settled by arbitration at the option of any party bound by this document in accordance with the Commercial Arbitration Rules of the American Arbitration Association and with the Hospital Arbitration Regulations of the California Hospital Association (copies available on request at the hospital admission office), unless patient or undersigned initials below or sends a written communication to the contrary to the hospital within thirty (30) days of the date of patient discharge. If patient, or undersigned, does not agree to the 'Arbitration Option,' then he will initial here." *Id.* at 351.

92. *Id.* at 356.

93. *Id.*

94. *Id.* at 357.

95. *Wheeler*, 63 Cal. App. 3d at 357.

96. *Id.*

97. *Id.* The court found those factors to include: patient had no opportunity to choose among various conditions in admission documents so that he could secure a jury trial; patient had no realistic choice among hospitals because he was directed to hospital by doctor and to gain admission to hospital, he was required to sign the admission documents containing the arbitration agreement; and, contract was signed in the stressful atmosphere of hospital admitting room without any procedures calculated to alert the patient to existence of "arbitration option." *Id.*

facts.[98] In the court's view, the public policy concerns precluding the enforcement of adhesion contracts trumped public policy considerations favoring arbitration.[99]

V. THE POLICY CONSIDERATIONS

That medical care providers believe that the American system of tort litigation has contributed to problems with the cost, quality, and availability of medical care is an understatement. The providers aver the existence of a causal relationship between this broken system and increased costs for medical care, escalation of malpractice premiums, and physicians leaving, or declining to enter, high-risk specialties.[100] The American Medical Association has identified one-third of states as in full-blown medical liability crisis.[101] According to the AMA and several studies, litigation anxiety linked with increased insurance premiums results in the practice of defensive medicine and the avoidance of high-risk specialties.[102] Some contend that certain parts of the country suffer from physician shortages as a result of this issue.[103] One mechanism considered in an attempt to ameliorate this problem is the use of pre-dispute arbitration clauses.[104] A study conducted by Rolph, et al. examined the reasons medical care providers did or did not use pre-dispute arbitration agreements.[105] They found that HMOs using arbitration on a frequent basis did so because they considered arbitration to be quicker, cheaper, and less likely than litigation to yield extreme results.[106] The researchers found no medical malpractice insurance carriers to have required pre-dispute arbitration agreements. However, one carrier that did encourage such agreements cited reduced costs, time-savings for the insured physicians, availability of knowledgeable adjudicators, and reduced defense costs as potential benefits.[107] On the other hand, a major California insurer that did not encourage the use of arbitration agreements concluded that under California tort reform measures, better results were obtainable in court. Another carrier indicated that its shareholder doctors believed such agreements were detrimental to the doctor-patient relationship.[108]

The central players on the other side of this debate, who advance their position just as zealously, are the trial lawyers:

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98. *Id.* at 366.

99. *Id.* at 356.

100. Emily Chow, *Health Course: An Extreme Makeover of Medical Malpractice with Potentially Fatal Complications*, 7 YALE J. HEALTH POL'Y L. & ETHICS 387, nn.2–5 (2007).

101. *Id.* at 388–89.

102. *Id.* at 389.

103. *Id.*

104. Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, N.Y. TIMES, Mar. 10, 1997, at A1.

105. Elizabeth Rolph, Eric Moller and John E. Rolph, *Arbitration Agreements in Healthcare: Myths and Reality*, 60 LAW & CONTEMP. PROBS. 153, 176 (1997).

106. *Id.* at 176.

107. *Id.*

108. *Id.* at 176–77.

> Arbitration clauses can put unwitting consumers at the mercy of a biased decision maker who is not bound to follow the law and who is often in an inconvenient place.
>
> * * *
>
> Key points of interest to litigators are that claimants appear to suffer significant economic loss when their fundamental constitutional right to jury trial is waived and that claimed social benefits of mandatory arbitration are illusory.[109]

Some of the specific points urged by the plaintiffs' trial bar in opposition to the view of arbitration as a cure-all include: arbitration does not necessarily reduce cost;[110] the phenomenon of "repeater bias;"[111] the menace to many societal interests arising from the secret resolution of significant disputes with potentially far reaching effects;[112] and, pre-dispute arbitration agreements being forced on unwitting patients with no real choice.[113] Detractors also claim that the informality of arbitration has the effect of insulating the arbitrator's errors from all meaningful review.[114] In this same vein, they point out that arbitration's informality leads to truncated discovery and abbreviated evidentiary presentations, which impair the rights of the patient who is saddled with the burden of proof on both liability and damages.[115] Others argue that patient consent is, at best, illusory and, at worst, patently nonexistent.[116]

A number of studies, including one conducted by the Private Adjudication Center of the Duke Law School, have attempted to identify the frequency and efficacy with which arbitration has been implemented in medical malpractice cases. In the Duke study, 19 medical malpractice cases were decided by arbitration. The consensus was that the resolution of these disputes was efficient from the perspectives of both time and economics.[117] The frequency of the use of arbitral provisions in medical services contracts was the subject of a Rand study in California.[118] This study found that these agreements were being used on a routine basis by only 9%

109. John Vail, *Defeating Mandatory Arbitration* Clauses, 36 TRIAL 70, 70–71 (Jan. 2000).

110. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 694 n.318 (1996).

111. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 190 (1997) (arguing that to be financially successful, arbitrators must favor corporate entities which regularly use arbitration clauses and regularly retain the services of arbitrators).

112. Pacific Gas & Elec. v. Public Util. Comm'n, 475 U.S. 1, 8 (1986).

113. Broughton v. Cigma Healthplans, 76 Cal. Rptr. 2d 431 (Cal. Ct. App. 1998), *aff'd* in part & *rev.* in part, 988 P.2d 67 (Cal. 1999).

114. Kenneth A. DeVille, *The Jury is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims*, 28 J. LEGAL MED. 333, 366 (2007); *see also*, Stanley A. Leasure, *Vacatur of Arbitration Awards: The Poor Loser Problem or Loser Pays?* 29 U. ARK. LITTLE ROCK L. REV. 489 (2007).

115. DeVille, *supra* note 99, at 369.

116. *Id.* at 379 (citing Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah, Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1395 (1996)).

117. Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 223–24 (1996).

118. *See* Rolph, Moller and Rolph, *supra* note 90, at 153.

of the hospitals and doctors with about 20% of the overall admissions to hospitals being subject to such agreements.[119] When asked their reasons for using such agreements, physicians identified conformity with practice group policy (31%) and cost effectiveness (34%).[120] Almost all reported satisfaction with their decision to utilize these agreements.[121] The United States General Accounting Office has also presented the results of a survey of medical malpractice claims arbitrated under a Michigan statute during the period November 1976–March 1991. During the timeframe surveyed, 882 claims were made of which 222 (25%) were withdrawn or administratively closed without a hearing; 331 (38%) settled without a hearing; 272 (31%) resulted in panel decisions; and 57 (6%) remained open at the end of the period studied.[122] Of those claims resulting in a panel decision, 72 (26%) resulted in payments ranging from $250 to $1,700,000.[123]

VI. CONCLUSION

The debate over the regulation of health care in the United States is not going away. One part of that debate involves identifying who should decide when a patient's injury has been caused by a deviation from the medical standard of care and determining the amount of damages. For several decades, the medical establishment has felt under siege from tort litigation. It blames this system for many things including: escalating malpractice premiums, the practice of defensive medicine, and the lack of necessary medical care in areas experiencing a "malpractice crisis" or for those in need of practitioners in "high risk" specialties such as neurosurgery and obstetrics. One way some healthcare providers have attempted to address the "litigation crisis" is through the use of pre-dispute arbitration clauses. The nature of the physician-patient relationship gives rise to serious questions about the propriety of such agreements and, if used, how they should be implemented or restricted.

Trial lawyers, consumer advocates, and others suspicious of the healthcare industry's motives contend that subjecting patients to pre-dispute arbitration agreements amounts to nothing more than an attempt to deny—to those who need it most—access to the American civil justice system. They say that most of the time, such agreements are not the result of a meeting of the minds between the patient and the healthcare provider, but instead the result of adhesion contracts with unconscionable terms, designed to thwart the legitimate rights of the patient.

Historically, these agreements have been primarily regulated under the common law of adhesion contracts, unconscionability, public policy,

119. *Id.* at 171.

120. *Id.* at 174.

121. Rolph, Moller and Rolph, *supra* note 90, at 175; *see also* Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L. J. 45 (2000).

122. MEDICAL MALPRACTICE, *supra* note 42.

123. *Id.* Those claims going to panel decision took an average of 23 months to resolve and ranged from three to 114 months in duration.

and sometimes by specific statutory provisions. The ability of patients to establish unconscionability, violation of public policy or unenforceability usually proves difficult. Frequently, the presence of genuine assent cannot be seriously argued when the patient executed a medical services agreement. This is particularly true considering the patient signs away meaningful judicial oversight, the constitutional right to a jury trial, and agrees to a system that significantly alters procedural rights.

Analogies have been drawn to the law of commerce. There, genuine assent by the weaker party to the terms of a form contract—which is concededly absent—is accepted because that party agrees to "unknown terms, relying on the good faith of the dominant party," all in the name of eliminating detailed bargaining.[124] These contracts are sometimes justified with the claim that they produce the same societal benefits resulting from the standardization of goods and services.[125] Another premise of justification is that dominant parties will be constrained by market considerations in the selection of form contract terms. Nevertheless, one must question whether, from a societal standpoint, it is best that the legal relationship between patient and physician be treated like the rental of a Ford Taurus at the Los Angeles International Airport. Perhaps the focus should be on the ethical considerations surrounding the doctor-patient relationship rather than determinations based on all-encompassing legislation; the vagaries and fact intensive determinations under common law contract theories of unscionability, adhesion or public policy; or strained analogies to commercial law rules.

The legal profession—which has at its core a relationship as sacrosanct as that of physician-patient—has faced similar legal, ethical, and public policy questions regarding the use of pre-dispute arbitration clauses in attorney-client agreements. In this context, the real work has come from the consideration and application of the rules of professional conduct for lawyers. The American Bar Association Committee on Ethics and Professional Responsibility has addressed this issue. It concluded that such clauses are ethically permissible only if the lawyer fully apprises the client of the advantages and disadvantages of arbitration so as to enable him or her to give informed consent to the arbitral provision.[126] The ABA Committee also opined that the rules of professional conduct preclude the use of arbitration provisions to prospectively limit, in any way, the lawyer's

124. Irma S. Russell, *Got Wheels?Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 LOY. L.A. L. REV. 137, 165 (2006) (citing RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b. (1981)).

125. *Id.* at 164 (citing RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a. (1981)).

126. ABA Comm. on Ethics and Prof'l Resp., Formal Op. 02-425 (2002). A number of state bar committees on professional responsibility are in accord. *See* Stanley A. Leasure and Wayne L. Anderson, *Arbitration of Attorney/Client Disputes: The Missouri Perspective*, 64 J. MO. BAR 238 (2008); Stanley A. Leasure and Wayne L. Anderson, *Disputes Between Attorneys and Clients in Oklahoma: A Role for Arbitration?*, 79 OKLA. B.J. 847 (2008).

liability to the client. In addition, the Committee made clear that the lawyer bears an affirmative ethical duty to discuss the advantages and disadvantages of binding arbitration with the client.[127]

There is nothing inherently evil about the inclusion of a provision for binding arbitration in a contract between a competent patient and a medical care provider. The problem centers on the fundamental contract concept of genuine assent. Assuming the patient is given an appropriate explanation of the nature and effect of a binding arbitration clause in a physician-patient agreement so as to allow an informed decision to be made, there is no reason that the patient and the doctor should be denied the opportunity to make the decision that arbitration meets their needs. However, in light of the fact that the doctor, or other medical care provider, is typically in the dominant position, it is incumbent upon the medical care provider—bound by appropriately defined ethical obligations to the patient—to exercise professional judgment in deciding when, and under what circumstances it is possible to obtain the genuine assent of a patient.

127. *Id.*