Arbitration of medical malpractice claims

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Because of what has been characterized as a "medical malpractice insurance crisis," contributed to by the cost of litigation and large jury verdicts in medical malpractice actions, attention has focused on arbitration as a less expensive and more efficient method of dispute resolution. While courts have not objected on principle to contracts providing for the arbitration of medical malpractice claims between a patient and a health care provider, issues have been raised as to patients' understanding of such contracts and the potentially coercive circumstances under which the agreements are made. In Broemmer v Abortion Servs. of Phoenix, Ltd. (1992, Ariz) 840 P2d 1013, 24 ALR5th 793, the court refused to enforce a contract to arbitrate because it was presented to the patient as a condition of treatment, contained no explicit waiver of the right to jury trial, and provided that any arbitrator be an obstetrician–gynecologist. However, some jurisdictions have enacted statutes specifically governing medical malpractice arbitration agreements and a presumption of validity may attach to an agreement conforming to statutory requirements. Cases discussing the validity, scope, and effect of contracts to arbitrate medical malpractice claims, whether or not subject to statutory prescriptions, are collected in this annotation.

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I. Preliminary Matters  

§ 1[a] Introduction—Scope  

This annotation[FN1] collects cases deciding issues related to the arbitration of medical malpractice claims, including the validity and effect of statutes[FN2] governing such arbitration, and agreements to arbitrate whether governed by a statute. The term "arbitration" refers to a procedure for settling disputes by submission to one or more persons selected by the parties or specified by statute for the purpose of investigating the dispute and making a final and binding decision and award, in lieu of a judicial proceeding.[FN3] Occasionally a nonbinding procedure may be termed "arbitration," but cases involving such procedures are not within the scope of this annotation.[FN4]
A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein, including those listed in the Jurisdictional Table of Cited Statutes and Cases.

§ 1[b] Introduction—Related annotations

Related Annotations are located under the Research References heading of this Annotation.

§ 2[a] Summary and comment—In general

While there is no question that medical malpractice disputes are arbitrable,[FN5] the use of arbitration clauses in contracts for health care services is distinct from their use in settling labor or commercial disputes, because the legal relationship between provider and patient is determined by both private contract law and public tort law. There is tension between contract law, the principles of which have been applied to binding arbitration clauses in labor and commercial agreements for years, and the application of tort law to enforce conformity with standards of care desired by society, particularly standards of professional care.[FN6]

In addition, since patients as a class are not apt to be familiar with arbitration, and may perceive the health care provider as an authority figure, courts have scrutinized agreements carefully, sometimes analyzing a contract to arbitrate medical malpractice claims as a contract of adhesion, particularly when it is presented to the patient as a condition of treatment. Generally, however, when the legislature has provided a statutory framework for such agreements, with safeguards against overreaching by the health care provider, the courts have interpreted and applied the statute in the light of the legislative goal of encouraging arbitral rather than judicial settlement of medical malpractice disputes.

There have been various challenges to the validity of statutes governing agreements to arbitrate medical malpractice claims under state and federal constitutional provisions. One court held that there was no violation of substantive or procedural due process rights under a statute imposing noneconomic damage caps on those electing binding arbitration (§ 3[a]). The validity of a statute which provided that a physician or other health care provider be a member of the arbitration panel deciding such claims was also upheld (§ 3[b]) against the contention that the composition of the panel violated due process. Another court could find no basis for invalidating the period for the revocation of an agreement to arbitrate medical malpractice claims provided in the governing statute in the fact that it was different from the statute of limitations governing such claims (§ 3[c]). However, a statute providing for binding arbitration of medical malpractice claims but guaranteeing every litigant the right to a jury trial (§ 3[d]) was held too inconsistent validly to be applied.

The statute imposing noneconomic damage caps on those electing to settle a malpractice dispute by arbitration was also upheld against an equal protection challenge, as was a statute denying minors the right to disaffirm agreements to arbitrate signed on their behalf, while providing that persons with other disabilities could revoke after a disability was removed (§ 4). Courts have also held (§ 5) that statutes governing arbitration of medical malpractice claims do not violate constitutional provisions guaranteeing access to the courts and right to a jury trial.

At least one statute governing agreements to arbitratemedicalmalpractice claims provides that an agreement conforming to the statutory requirements enjoys a presumption of validity, and this has been construed to mean that, once a prima facie case of conformance has been presented, the burden of going forward with the evidence shifts to
the party alleging the invalidity of the agreement (§ 6[a]), and thus, the presumption cannot be said to have a conclusive effect on the determination of validity (§ 6[b]). Since requirements for validity may go beyond what may be discerned from the agreement itself, courts have held that a hearing may be necessary to establish the circumstances surrounding the execution of an agreement and rule whether this was done in accordance with statutory procedures (§ 7). Courts have also permitted evidence of the customary procedure of a health care provider in offering a patient an agreement to arbitrate medical malpractice claims and, absent credible contradiction, it may be sufficient to establish the validity of an agreement (§ 8).

Medical malpractice arbitration agreements have frequently been challenged on the ground that they are contracts of adhesion, meaning standardized contract forms offered to consumers of goods and services on a "take it or leave it" basis without affording the consumer a realistic opportunity to bargain, when the consumer cannot obtain the desired product or services except by acquiescing to the form contract. The general rule that a person who signs a contract is bound by all of its terms even though he signed it without reading it is said to be inapplicable in the case of a contract of adhesion, and the enforceability of the contract depends upon whether the terms of which the weaker party was unaware are beyond the reasonable expectations of an ordinary person or are oppressive or unconscionable. [FN7]

In the case of agreements to arbitrate medical malpractice claims which were not governed by statute, courts have both enforced (§ 9[a]) and refused to enforce (§ 9[b]) the contracts alleged to be adhesive or unconscionable, depending on the particular circumstances.

On the other hand, courts have rejected the contention that agreements conforming to the requirements of a particular governing statute were contracts of adhesion or unconscionable (§ 10[a]), including the case of an agreement which contained a provision for retroactive application not found in the statute (§ 10[b]), even though questions may still be raised about the validity of consent in particular cases (see §§ 17–22).

A contract to arbitrate medical malpractice claims may also be unenforceable because it contains provisions violating public policy, such as granting a unilateral right to reject an award to one party (§ 11), limiting the damages available to the malpractice plaintiff (§ 12), or requiring a 30–day notice of claim (§ 13).

As to the standard of consent required from a patient agreeing to arbitrate, courts considering the issue when there was no statute governing malpractice arbitration agreements have held that there must be a knowing, voluntary, and intelligent waiver of the right to jury trial (§ 14). The contention that one signing such an agreement must be represented by counsel has been rejected, however (§ 15), and courts presented with allegations of fraud, mistake, misrepresentation, or coercion in the execution of agreements have held that they were not established by malpractice plaintiffs seeking to avoid an obligation to arbitrate (§ 16).

Under particular statutes governing contracts to arbitrate medical malpractice claims, courts have generally upheld the validity of a patient's consent when the agreement and the circumstances surrounding its execution conformed to statutory requirements (§ 17), even when the patient contended that he or she had not read or understood the contract (§ 18). The courts have also failed to sustain allegations of fraud, misrepresentation, mistake, or coercion in the execution of agreements governed by statute (§ 19), although a hearing may be required to determine the truth of such allegations (§ 21), and it has been held that a malpractice plaintiff seeking to establish the invalidity of consent to arbitrate on these grounds has the burden of proof (§ 22). On the other hand, the court held that the consent of a patient executing an agreement to arbitrate while in pain was not a valid consent (§ 20).

Agreements to arbitrate medical malpractice claims in a jurisdiction having a statute governing such agreements are also subject to challenge on the ground that they fail to conform to one of the statute's requirements. Under a statute requiring the patient to be provided with a booklet containing information about the agreement, and a copy of the agreement itself, courts have both enforced (§ 23[a]) and refused to enforce (§ 23[b]) contracts to arbitrate,
depending on whether the patient established the failure of a health care provider to supply the booklet or the copy, and have in some cases required a hearing on the issue (§ 24). As to other failures to conform to statutory requirements, an agreement was not rendered invalid by the use of an incorrect type size for the required statutory advisements (§ 25), but was not enforceable when it specified an incorrect revocation period (§ 26). Under the particular circumstances involved, it has also been held that presenting the information booklet or the agreement at a different time from that specified in the statute did not affect the validity of the contract to arbitrate (§ 27).

Under a statute providing specially that a patient receiving emergency treatment could not be offered an agreement to arbitrate medical malpractice claims until the treatment was finished, the court held that giving the patient the information booklet before emergency treatment, instead of with the agreement, was sufficient compliance with the statute (§ 28). In the case of a person signing a contract to arbitrate on behalf of a person receiving emergency treatment, such as a parent, the court found that the statutory procedures applicable in an emergency treatment situation must be followed (§ 29). A hearing may be necessary (§ 30) in order to determine whether a patient receiving emergency treatment was presented an agreement to arbitrate medical malpractice claims in conformance with statutory requirements. However, a patient who did not experience a condition which might threaten his life or health was not required to be dealt with as an emergency patient under the statute, even though treated in the emergency room (§ 31).

Under a statute providing for two warnings that the patient was relinquishing the right to a jury trial, one of them in boldfaced red type, the court held that an agreement failing to contain the advisements was unenforceable (§ 32).

The courts have considered several other issues affecting the validity of agreements to arbitrate medical malpractice claims. Some courts have held (§ 33) that contracts calling for the arbitration of all disputes except those concerning the fees of the health care provider were void for lack of reciprocally enforceable obligations, since they excluded the only type of claim a health care provider was likely to have against a patient. However, an agreement which failed to contain an express waiver of jury trial not required by statute (§ 34), or which omitted a party's name or signature (§ 35), or was undated (§ 36), was still enforceable. An agreement between a patient and a hospital, which referred to other agreements between doctors and the hospital concerning the doctors' agreement to participate in arbitration, was not invalid because the collateral agreements were not read to the patient (§ 37).

The courts are also in agreement, at least under statutes which so specify, that a parent has the authority to bind a minor child to a contract to arbitrate medical malpractice claims signed on the child's behalf, the agreement not being subject to disaffirmance by the child upon reaching majority (§ 38), and this rule has been applied to an unborn (§ 39) and even an as yet unconceived child (§ 40). Valid agreements to arbitrate medical malpractice claims may also be negotiated by the representatives of state employees, who may then elect a particular health care plan containing the arbitration clause (§ 41).

Although a parent has the authority to bind a minor to an agreement to arbitrate medical malpractice claims, one court, considering whether a pregnant minor, who contracted for medical services on her own behalf under a statute permitting her sole consent for pregnancy treatment, could then disaffirm an arbitration contract, held that she could not (§ 42).

A statute governing agreements to arbitrate medical malpractice claims may require that agreements offered to patients by health care providers contain a clause that the agreement may be revoked within a certain period of time after execution or after discharge from the hospital. Courts have held (§ 43) that such a contract is impliedly revoked by the filing of a malpractice action within the specified period and also that the patient's legal representative, for example, the spouse of a comatose patient, is a proper person to make an effective revocation (§ 44). It has also been determined that the transfer of the patient from one hospital to another is not a "discharge" within the meaning of the statute and so does not initiate the running of the revocation period (§ 45). However, a patient could not receive the benefit of the "discovery" rule, which may toll the statute of limitations for medical malpractice actions, to toll the
running of the revocation period applying to the agreement until a malpractice claim was discovered (§ 46), and one who has accepted benefits under a health care plan containing an agreement to arbitrate medical malpractice claims was held estopped to assert revocation of the agreement (§ 47).

The courts have allowed the tolling of the statutory revocation period in cases in which a patient who signed an agreement to arbitrate medical malpractice claims has died or become legally disabled to exercise the right, applying two different theories. Under the "disability" theory (§ 48), by the same reasoning used to toll the statute of limitations on a cause of action for medical malpractice, courts have held that the revocation period is tolled until the appointment of a legal representative having the authority to exercise the right to revoke. The estate of a deceased minor was also entitled to the tolling of the revocation period until the appointment of a personal representative (§ 49[a]), however, the rule did not apply to a mentally retarded minor whose contract to arbitrate was signed by a parent on his behalf (§ 49[b]). Since a legal representative may have no way of knowing of the existence of an arbitration agreement signed by a deceased patient, under the "discovery" rule (§ 50), the courts have also held that the representative was entitled to the tolling of the 60–day revocation period until the discovery of the existence of an arbitration agreement.

Many issues have arisen as to the scope and application of agreements to arbitrate medical malpractice claims. Applying the principle that any ambiguities in a contract of adhesion must be resolved against the drafter, one court interpreting a provision for the arbitration of "any legal claim or action in connection with this hospitalization" said it could be construed by a patient as covering only disputes over hospital bills, and found medical malpractice claims outside the scope of the agreement (§ 51). Another court, construing a definition of "patient," which included the patient's dependents, pointed out that the agreement did not intend to cover disputes arising out of the treatment of one other than the named patient, and did not apply to the cause of action of a mother, who was the named patient, and father for the wrongful death of their newborn child (§ 52).

An agreement to arbitrate medical malpractice claims signed by a patient on admission to the hospital usually refers to claims arising from treatment rendered during the hospital stay, and courts have decided, based on the accompanying facts, that an agreement was (§ 53[a]) or was not (§ 53[b]) applicable at the time the patient received the allegedly negligent treatment, in response to the contention that the malpractice complained of arose before or after the hospitalization. In cases involving patients' agreements with health care providers other than hospitals, which frequently are not specific as to duration, the determination that they were (§ 54[a]) or were not (§ 54[b]) applicable to the time when treatment was received was also dependent on the particular circumstances.

An important issue in the interpretation of agreements to arbitrate medical malpractice claims is their enforceability against those who are not parties to the agreement. In a case in which the malpractice plaintiff was seeking to enforce arbitration, the court held that the doctor–employee of a health care services corporation was bound by its prepaid services contract with the patient, which stated that any claim against the medical group employing him was subject to arbitration (§ 55[a]). However, an individual agreement to arbitrate between a patient and a physician was not enforceable as to a claim against another doctor who later joined the practice, which was formally reorganized (§ 55[b]). An agreement to arbitrate medical malpractice claims signed by a patient on admission to the hospital may include a clause providing that the patient agrees to arbitrate claims of malpractice against those of the hospital's independent staff physicians who have agreed to arbitrate (in separate agreements between the hospital and the independent staff physicians). Courts have generally held such agreements enforceable by independent staff physicians (§ 56[a]), and it is not necessary that the patient be informed as to the particular doctors who have signed agreements with the hospital. Doctors who have not executed such an agreement, however, or who have done so after the patient signed his or her contract with the hospital, have not been permitted to enforce the arbitration clause against a malpractice plaintiff (§ 56[b]).

In a few cases, courts have considered whether patient's claims other than malpractice were subject to an agreement to arbitrate with a health care provider, and have held that the agreements did in fact extend to claims of intentional tort (§ 57), including punitive damages (§ 58), and general negligence (§ 59). The issue of whether a
claim fell within the statutory coverage has also been decided in favor of arbitration in the case of a patient who alleged a hospital's failure to provide competent staff (§ 60).

Courts have also had occasion to determine that third–party claims, derivative of the patient's cause of action, were within the scope of an agreement to arbitrate medical malpractice disputes between a patient and a health care provider (§ 61). In California, however, courts have differed as to whether parties with claims such as wrongful death or loss of consortium were bound by an agreement to arbitrate executed by the patient, some holding that third parties were bound (§ 62[a]) and others that they were not (§ 62[b]).

Finally, it has been held that an arbitrator had the power to apply the statute of limitations to the claim of a malpractice plaintiff submitted to arbitration pursuant to an agreement (§ 63) and, under a statutory scheme allowing for arbitration of medical malpractice claims and a presuit screening process, the court decided that a party who had elected binding arbitration was not also entitled to have a medical malpractice claim reviewed by the presuit screening panel (§ 64).

§ 2[b] Summary and comment—Practice pointers

The question of the validity of an agreement to arbitrate medical malpractice claims is essentially a judicial question, and the trial court has jurisdiction to consider such issues as the voluntariness of a party's signature or the timeliness of a revocation, even though the agreement conforms to statutory requirements.[FN8] It has also been held that the trial court has jurisdiction to decide such preliminary matters as whether the malpractice plaintiffs had the power to revoke the agreement, on the ground that the question went directly to the determination of whether there was a valid agreement to arbitrate.[FN9]

However, if there exists a valid, binding agreement, there is disagreement among some courts as to whether the trial court is then divested of original jurisdiction over the claims subject to arbitration. It has been held that arbitration may not be denied on the ground that there are claims which are not arbitrable, the court saying that the rules governing joinder of claims could not be used to expand the jurisdiction of the trial court so that the whole action could be tried in one forum. As to the arbitrable claims, the court said the Circuit Court's function was no longer original, but was in the nature of an appellate court with supervisory powers, and the issue of joinder properly arose only when jurisdiction otherwise existed.[FN10] It has also been held that because the trial court lacked subject matter jurisdiction over malpractice claims covered by a valid arbitration agreement, the plaintiff, on seeking judicial confirmation of the award, was not entitled to prejudgment interest under a statute allowing such interest on a judgment in a civil action.[FN11]

On the other hand, there is authority that the trial court is not divested of jurisdiction over claims subject to a valid arbitration agreement, and may therefore properly consider whether the assertion of the arbitration agreement as a defense to the patient's court action is timely. One court raised the possibility that if the Circuit Court were divested of subject matter jurisdiction over malpractice controversies subject to an agreement to arbitrate, this might result in leaving unprotected a medical malpractice judgment entered, but arguably void, when an arbitration agreement existed but was never asserted.[FN12] Taking a similar position on the jurisdictional question, another court decided that a defendant must raise an agreement to arbitrate medical malpractice claims as an affirmative defense in the first responsive pleading in order to preserve the right of arbitration or to assert the agreement as the basis of a motion for summary disposition, on the theory that an arbitration agreement was in the nature of a release or a statute of limitations, narrowing a party's legal rights to pursue a particular claim in a particular forum, without going to the merits of the claim.[FN13]

The question of the nature of the trial court's jurisdiction of an arbitration proceeding once arbitration has been ordered also affects the resolution of other issues which may arise in the arbitration proceeding itself. The power of the trial court to dismiss the arbitration proceeding for delay in its prosecution has been a disputed issue, some
courts holding that the trial court has no jurisdiction to dismiss an arbitration proceeding for failure to prosecute it in a reasonably diligent fashion,[FN14] and it is the prerogative of the arbitrator to dismiss contractual arbitration proceedings (or award nothing) for failure to advance them in timely fashion.[FN15] Another court upheld dismissal by the trial court, however, stating that unless the trial court had power to dismiss the proceedings, the other party would have no means, if all arbitrators had not been appointed, of seeking dismissal or moving the litigation along.[FN16] It has also been pointed out, however, that under those circumstances, there was statutory authority, upon the petition of a party to the arbitration agreement, for the court to appoint an arbitrator, after which the party seeking to expedite the proceedings could apply to the arbitrator for dismissal based on delay, and the arbitrator, once appointed, has authority to determine whether a party should take nothing because of unwarranted delay in prosecuting the proceedings.[FN17] The same question may be raised concerning the power of the trial court to intervene in or monitor discovery proceedings in arbitration. In the opinion of one court, such a practice would result in the very delays incident to civil actions that the arbitration agreement was designed to avoid, and only arbitrators can order discovery in the arbitration proceedings.[FN18]

There is also disagreement as to whether a statute providing that an action at law may be dismissed for failure to bring it to trial within 5 years applies to an action at law which is stayed during the pendency of contractual arbitration proceedings. Although it has been held that in computing the time within which an action must be brought, the time during which the action was stayed must be excluded,[FN19] and the application of the stay exclusion to an action at law does not depend on the reasonable diligence of the plaintiff in the related arbitration proceedings,[FN20] the period during which an action has been stayed pending arbitration has not always been excluded in determining whether the action at law should be dismissed for failure to bring it to trial within the statutory period.[FN21] It has also been held that dismissal of the arbitration proceedings by the trial court was appropriate on the basis that the 5–year period to bring an action to trial, while not directly applicable to arbitration proceedings, was nonetheless an appropriate criterion for determining whether a party to an arbitration had violated the contractual provision to prosecute the arbitration with "reasonable diligence."[FN22]

Courts have also differed as to whether the dismissal of the action at law automatically terminates an arbitration proceeding, some courts holding that the fate of the action at law has no direct effect, and therefore its dismissal does not constitute a ground to dismiss the arbitration.[FN23] However, there is also authority that a dismissal of the action at law results in vacating the order for arbitration and terminating the arbitration itself.[FN24]

Counsel should note that, in the case of a patient who has executed an agreement to arbitrate medical malpractice disputes which applies to the hospital and those of its independent staff doctors who have agreed to arbitrate, arbitration may not be compelled against such an independent staff doctor unless the doctor's agreement with the hospital to participate in arbitration is made part of the record.[FN25]

Statutes governing agreements to arbitrate medical malpractice claims may provide specific procedures for insuring that arbitrators and panelists are free from bias, and for challenging the impartiality of a proposed arbitrator.[FN26] There is also authority that reversal of an arbitration award was justified when an arbitrator failed to disclose that, after being named an arbitrator, he had rendered professional services as a witness on behalf of the law firm representing one of the defendant doctors, because, even though the arbitrator may not be biased or guilty of wrongdoing, such relationships must be disclosed to the parties if the integrity and effectiveness of the arbitration process is to be preserved.[FN27] However, the mere fact that a judge sat on the board of directors of another hospital which was not the defendant in the malpractice action, was not enough evidence of bias, when it was not shown that he had a direct interest in the outcome of the suit, or harbored any bias or prejudice which would override his ability to provide a fair forum.[FN28]

As to circumstances which have given rise to claims of waiver or estoppel, it has been held that a party's participation in discovery proceedings when they are relevant to the validity of an arbitration agreement does not waive the right to demand arbitration, and there was no waiver when there was a reasonable delay by a hospital, which needed to depose the malpractice plaintiff, particularly when the hospital's answer had raised the presence of
the arbitration agreement.\[FN29\] However, a party may be estopped to claim that an award should be set aside for failure of the other party to provide discovery, when there is a stipulation by general entry signed by counsel stating that no further pleadings, motions, discovery, or delays would be permitted.\[FN30\]

It has also been noted that a provision in a contract to arbitrate medical malpractice claims which was void as against public policy could not be validated by estoppel or waiver.\[FN31\]

According to one court, there is almost uniform refusal to vacate an arbitrator's award because of an error of law or fact, and an award will not be set aside except upon a clear showing of fraud, misconduct, or some other irregularity rendering the award unjust, inequitable, or unconscionable.\[FN32\]

II. Validity of Statutes Governing Medical Malpractice Arbitration

§ 3[a] Under due process clause—Noneconomic damage cap

In the following case, the court held that there was no violation of substantive or procedural due process rights under a statute governing binding arbitration of medical malpractice claims which imposed a noneconomic damage cap on a plaintiff electing arbitration.

In University of Miami v Echarte (1993, Fla) 618 So 2d 189, 18 FLW S 284, cert den (US) 123 L Ed 252, 114 S Ct 304, more fully set out in § 5, the court, in addition to holding that a statute imposing noneconomic damage caps on a party electing binding arbitration of a medical malpractice claim did not violate the right to access to the courts, held without discussion that there was no violation of substantive or procedural due process rights under Fla Const art I, § 9, and US Const amend XIV, § 1; equal protection guaranties under Fla Const art I, § 22, and US Const amend XIV, § 1; the single subject requirement under Fla Const III, § 6; the taking clause under Fla Const art X, § 6(a); or the nondelegation doctrine under Fla Const art II, § 3.

§ 3[b] Under due process clause—Composition of arbitration panel

The courts in the following cases held that a statute governing medical malpractice arbitration did not violate due process rights by specifying that a physician or other health care provider be a member of the arbitration panel deciding such claims.

Although earlier cases held to the contrary,\[FN33\] in Morris v Metriyakool (1984) 418 Mich 423, 344 NW2d 736, \[FN34\] the court held that a statutory provision of the Medical Malpractice Arbitration Act, Mich Comp Laws § 600.5044(2), requiring that, under agreements providing for arbitration of medical malpractice claims, the arbitration panel include a physician or, in certain circumstances, a hospital administrator or other health care professional, did not violate guaranties of due process under the federal or Michigan constitution. The other members of the panel under the statute were to be an attorney–chairperson and a person who was not a licensee of a health care profession, an attorney, or a representative of a hospital or an insurance company. Two patients in different cases who had signed agreements to arbitrate malpractice claims argued that the statute violated due process because a high probability existed that the tribunal would be biased against a claimant, and the statute did not mandate a form of agreement which disclosed the composition of the panel. No showing of actual bias on the part of a particular arbitration panel was claimed, said the court, but affidavits by insurance underwriters asserted that doctors and hospital administrators had a vested interest in medical malpractice claims, even against others, because such claims directly and substantially affected the rate of insurance premiums and the availability of insurance. The probability of bias was enhanced by the composition of the advisory panel which selected the pool of candidates from which the arbitrators were chosen, said one malpractice plaintiff, because one half of the advisory committee was to include health care providers, malpractice insurance carriers, and lawyers, and the medical part of the committee had a direct interest in reducing the number and size of malpractice awards. The court said that there was not sufficient grounds to conclude that medical members of arbitration panels had a direct pecuniary interest in their decisions, would not act honestly, or that the decisions would have a substantial effect on the availability of insurance or insurance

premiers, and the probability of unfairness or actual bias was not constitutionally intolerable. As to the claim that medical members possessed a subliminal bias against malpractice plaintiffs, the court expressed the opinion that they were not so identified and aligned with malpractice defendants that they would be expected to favor them, because their professional interests were not adverse to patients, or even malpractice claimants, on a consistent, daily basis.

A malpractice plaintiff failed to prove clearly that a statute governing arbitration of medical malpractice claims violated due process in requiring that one of the three arbitrators on a panel be a member of the health care community, the court held in Brown v. Siang (1981) 107 Mich App 91, 309 NW2d 575, app den 419 Mich 875. The plaintiff argued that the right to an impartial tribunal was denied, introducing the depositions of insurance experts who stated that an increase in the amount of money awarded in malpractice cases would be reflected in higher insurance premiums for all health care providers in the state, and thus a physician or hospital administrator who sat on the arbitration panel was necessarily biased due to a direct pecuniary interest in purchasing malpractice insurance. Distinguishing the case from other situations in which either criminal rights or conflicting official positions were involved, the court pointed out that the act allowed the parties to agree to waive the right to a jury trial and submit the dispute to arbitration, and that there was no showing that health care providers would receive lower insurance premiums as a direct result of the arbitration process. The act required that only one of three arbitrators be a member of the health care community, the court observed, a result could only be reached by a majority of the tribunal, and therefore no one member of the three–member panel could be presumed to direct the outcome. Furthermore, the statute contained safeguards to insure impartiality and to cure any possibility that an irate health care provider would serve on the panel, said the court, in that an arbitration award could be vacated when there was evidence of partiality by an arbitrator, and there was no evidence in the record that all physicians disfavored equitable results in malpractice cases. Neither was there evidence that the amount of malpractice awards or the cost of malpractice had decreased since the act took effect, said the court, and the nexus between the size and frequency of the awards and malpractice insurance premiums was too remote, in view of the fact that several other criteria are considered in setting rates. Finally, the court concluded, the inclusion of an expert on the panel was desirable because of the highly technical nature of the proceedings.


In Cushman v. Frankel (1981) 111 Mich App 604, 314 NW2d 705, app den 419 Mich 875, the court rejected the contention that the statutory requirement that a medical malpractice arbitration panel include a doctor or hospital administrator violated due process. The court cited the reasons given in Brown v. Siang (1981) 107 Mich App 91, 309 NW2d 575 (this subsection), and said that the danger of biased decisionmaking was significantly lower in the case of the arbitration panel than in other situations in which the potential fairness of a hearing officer was questioned. The arbitration statute itself provided for procedures to reduce the possibility of bias among panel members, the court observed, in that it instructed the arbitration association to conduct an initial screening of potential panel candidates for possible bias; moreover, in each case, a panel candidate was required to complete, under oath, a current personal disclosure statement, and the parties were to receive any information indicative of partiality (Mich Comp Laws § 600.5045(1)). They were also permitted to submit reasonable voir dire questions to an arbitration candidate within 10 days of receipt of the candidate's name, under Mich Comp Laws § 600.5045(2), the court continued, and could strike from the list of potential candidates any person found unacceptable (Mich Comp Laws § 600.5044). Although the arbitration association could ultimately impose a panel member upon the parties when mutual agreement could not be reached, panel members thus appointed were nonetheless challengeable for cause under Mich Comp Laws § 600.5044(5), said the court, refusing to conclude that there was an inherent prejudice within the medical profession so deeply held as to preclude members from ever standing in judgment of their colleagues. In the case of virtually all licensed professions and occupations, including the medical profession, the public's interest in competent and professional conduct was protected primarily by members of the groups.
themselves, the court observed. It was no longer impossible or nearly so to find expert medical witnesses to testify in favor of plaintiffs in malpractice cases, the court concluded, and the safeguards of the malpractice arbitration scheme were adequate to insure fair and impartial arbitration panels.

§ 3[c] Under due process clause—Period of revocation of agreement

In the following case, the court held that there was no basis for invalidating the period for the revocation of an agreement to arbitrate medical malpractice claims found in a statute governing such agreements because it was different from the statute of limitations for medical malpractice.

In Harte v Sinai Hospital of Detroit (1985) 144 Mich App 659, 375 NW2d 782 (disagreed with on other grounds by Villarreal v Chun, 199 Mich App 120, 501 NW2d 227), the court rejected the argument of a malpractice plaintiff, who had executed an agreement to arbitrate medical malpractice claims against the hospital where her child was delivered, that the agreement under the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., should be set aside because there was a gross disproportion between the statutorily prescribed 60-day revocation period of the arbitration agreement and the malpractice statute of limitations. The court said that there was no actual conflict between the statutes and thus no legal rationale upon which to invalidate the statutory revocation period.

§ 3[d] Under due process clause—Inconsistency of statute

A statute governing the arbitration of medical malpractice arbitration claims was so inconsistent that it could not be validly applied, the court held in the following case.

In Awa v Guam Memorial Hospital Authority (1984, CA9 Guam) 726 F2d 594, the court held that the Medical Malpractice Claims Mandatory Screening and Mandatory Arbitration Act, an uncodified statute which provided for mandatory arbitration and detailed review procedures in medical malpractice actions but also guaranteed to every litigant the right to a trial by jury, was so inconsistent and unintelligible that it could not be applied in several combined medical malpractice actions which had been dismissed by the trial court on the ground that the malpractice plaintiffs had failed to comply with the statute. Observing that it could not overturn a decision of the District Court of Guam on a matter of local law, custom, or policy if the decision was based upon a tenable theory and was not inescapably wrong or manifestly in error, the court agreed with the appellate division of the District Court that it was impossible to construe the act so as to give effect to its contradictory and incomplete provisions. The act provided that a civil action for medical malpractice could be instituted only after there had been a screening and arbitration of the claim, described the composition of the screening panel and the hearing procedures for determining liability, provided for review procedures, and provided that the award, once confirmed, would have the same force and effect as a judgment in a civil action. While recognizing that statutes enjoyed a strong presumption of validity, the court said that in requiring mandatory screening and arbitration while preserving the statutory right to a jury trial, the statute was so inconsistent that it could not be applied. The court rejected the suggestion of the malpractice defendants that the act did not guarantee the right to a jury trial itself, but merely contemplated the preservation of any such right that already existed in Guam, and because there was no constitutional right to a jury, the statutory language had no effect and did not conflict with the mandatory screening and arbitration provisions. The statute could not be construed to make mere surplusage of the statutory provision guaranteeing a right to a jury trial, which was clear and unequivocal, said the court. The court also disagreed with the interpretation that the act contemplated a jury trial after all arbitration proceedings and judicial review were complete, pointing out that there was no provision which specifically allowed a jury trial after a court had vacated or confirmed an arbitration award, and such an interpretation would conflict with § 9990.10(o), which gave a confirmed award the same force and effect as the judgment in a civil action. Furthermore, such a construction would render the mandatory screening and arbitration requirement meaningless, said the court, because any party dissatisfied with the result could re litigate all the issues before a jury, and the settling of malpractice claims would then become more costly and less efficient, contrary to the expressed legislative intent. Neither may the right to a jury trial be applied to the provision providing for the appeal of a screening panel's finding of no liability, the court explained, because the word "appeal" does not contemplate a jury trial and a de novo trial on the merits; moreover, the jury trial guaranty applies to "every litigant"
and could not be restricted to the situation in which the screening panel found no liability. The District Court also rightly rejected an interpretation which would apply the jury trial guaranty to the act's review procedures for arbitration decisions, said the court, as they were very narrow, did not explicitly mention or even seem to contemplate a jury trial, and such a guaranty would be no guaranty at all. The severability provision could not save the statute, the court concluded, because the statute could not be rewritten to omit one or the other of the conflicting provisions as mere surplusage.

§ 4. Under equal protection clause

In the following cases, the courts held that statutes governing the arbitration of medical malpractice claims did not violate the guaranty of equal protection under the law.

In University of Miami v Echarte (1993, Fla) 618 So 2d 189, 18 FLW S 284, cert den (US) 126 L Ed 252, 114 S Ct 304, more fully set out in § 5, the court, in addition to holding that a statute imposing noneconomic damage caps on a party electing binding arbitration of a medical malpractice claim did not violate the right to access to the courts, held without discussion that there was no violation of equal protection guaranties under Fla Const art I, § 22, and US Const amend XIV, § 1; substantive or procedural due process rights under Fla Const art I, § 9, and US Const amend XIV, § 1; the single subject requirement under Fla Const art III, § 6; the taking clause under Fla Const art X, § 6(a); or the nondelegation doctrine under Fla Const art II, § 3.

The Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., did not violate the equal protection clause of either the federal or state constitution, the court held in Crown v Shafadeh (1986) 157 Mich App 177, 403 NW2d 465, because it bound minors to the arbitration agreement provided for in the statute after the expiration of the 60-day revocation period, while persons "otherwise disabled" were permitted to toll the 60-day limitation via Mich Comp Laws § 600.5851(1). The medical malpractice plaintiff, who was a minor, had the burden of showing the classification was arbitrary and without reasonable justification, said the court, because age is not a "suspect classification" for equal protection purposes. That burden was not met, the court continued, simply because the legislature recognized the need to protect mentally incapacitated persons. Since children's rights are deemed to be adequately protected by their parents, no special protection was required for them, and the state's interest in encouraging arbitration, coupled with the parents' active participation in executing the arbitration agreements, provided reasonable justification for treating those agreements differently from other types of contracts executed by minors, the court concluded.

§ 5. Under clause guaranteeing access to courts and trial by jury

Statutes governing the arbitration of medical malpractice claims did not violate constitutional provisions guaranteeing access to the courts and trial by jury, the courts held in the following cases.

In University of Miami v Echarte (1993, Fla) 618 So 2d 189, 18 FLW S 284, cert den (US) 126 L Ed 252, 114 S Ct 304, the court held that statutes providing for a monetary cap on noneconomic damages when a party requested arbitration of a medical malpractice claim did not violate a claimant's right of access to the courts under Fla Const art I, § 21, reversing and remanding the trial court's declaratory judgment to the contrary. The statutory scheme to address the medical liability insurance crisis contained two components, the court observed: a presuit investigation process to eliminate frivolous claims and a voluntary arbitration process to encourage settlement of claims. If a claimant established reasonable grounds for the medical negligence claim at the completion of the presuit investigation, either party could request that a medical arbitration panel determine the amount of damages, pursuant to Fla Stat § 766.207(2). The other party's agreement to participate in arbitration bound both parties to the arbitration panel's decision and precluded other remedies by the claimant against the defendant, and under § 766.207(7), a claimant's noneconomic damages were limited to a maximum per incident calculated on a percentage basis with respect to capacity to enjoy life. In § 766.211 (Supp 1988), the statute provided for prompt payment of the award to the claimant, including interest at the legal rate and a penalty rate if the defendant failed to pay within 90 days of the award. That section also required the defendant to pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, up to 15 percent of the award, and to pay all arbitration costs, and each defendant participating in the arbitration proceeding was held jointly and severally liable for all damages assessed.
by the panel. If the defendant refused arbitration, the claimant could proceed to trial under § 766.209(3) without any limitation on damages and was entitled to receive reasonable attorney's fees up to 25 percent of the award. If the claimant refused a defendant's offer to arbitrate, the claimant could proceed to trial under § 766.209(4), but noneconomic damages were capped at a certain sum per incident. The court said that the statute must be tested against the principle that the legislature had the power to abolish a right of access to the courts for redress of a particular injury only if it provided a reasonable alternative to protect the rights of the people of the state to redress for injuries, unless the legislature could show an overpowering public necessity for the abolishment of the right, and no alternative method of meeting the public necessity could be shown. The initial question was whether the arbitration statutes, with the noneconomic damage caps, provided claimants with a "commensurate benefit" for the loss of the right to fully recover noneconomic damages, explained the court. Noting that a claimant's right was only limited after a defendant agreed to submit to arbitration, the court said that the defendant's offer to arbitrate provided the claimant with the opportunity to receive prompt recovery without the risk of uncertainty of litigation or having to prove fault in a civil trial. The defendant or the defendant's insurer was required to conduct an investigation to determine liability within 90 days of receiving the claimant's notice to initiate a malpractice claim, observed the court, and the defendant was obligated to provide a verified written medical expert's opinion to corroborate an assertion of lack of reasonable grounds to show a negligent injury. The claimant benefited from the quick determination, the court continued, and also saved the cost of attorney's and expert witness' fees which would be required to prove liability. Furthermore, a claimant who accepted an offer to have damages determined by an arbitration panel received the additional benefits of the relaxed evidentiary standard for arbitration proceedings under Fla Stat § 120.58 (1989), joint and several liability of multiple defendants, prompt payment of damages after the arbitration panel's determination, interest penalties against the defendant for failure to pay an award promptly, and limited appellate review of the award, requiring a showing of "manifest injustice." The court rejected the District Court's finding that because the medical malpractice arbitration statutes did not provide a no-fault basis for recovery, or mandatory insurance coverage to assure recovery, they did not provide a commensurate benefit. Medical malpractice arbitration statutes were less restrictive than the workers' compensation statutes, the court pointed out, and the task force appointed by the legislature to study the problem specifically considered and rejected other methods to control increases in the medical malpractice insurance rates, which, according to the task force report, were not effective to answer the problem. One of the legislature's factual findings set out in the preamble to the law was that if the present crisis were not abated, persons subject to civil actions would be unable to purchase liability insurance, and injured persons would therefore be unable to recover damages for either their economic or noneconomic losses, said the court, and the legislature's conclusion clearly was that the current crisis constituted an "overpowering public necessity." Moreover, the court continued, the legislature's factual and policy findings were supported by the task force's findings and the courts are bound to give great weight to legislative determinations of fact. The record also supported the conclusion that no alternative or less onerous method existed, said the court, as to which conclusion the plan as a whole, rather than a specific part of the plan, must be considered. The task forces considered different solutions to a complex problem and concluded that all the measures taken were necessary, the court observed, and it was clear that both the arbitration statute, with its conditional limits on recovery of noneconomic losses, and the strengthened regulation of the medical profession were necessary to meet the medical malpractice insurance crisis.

In HCA Health Servs., Inc. v Branchesi (1993, Fla) 620 So 2d 176, 18 FLW S 291, the court reversed and remanded the appellate court's decision that Fla Stat §§ 766.207 and 766.209 (1989) violated the right of access to the courts, based on University of Miami v Echarte (1993, Fla) 618 So 2d 189, 18 FLW S 284, cert den (US) 126 L Ed 252, 114 S Ct 304 (this section).

The court affirmed a trial court's order granting the defendant doctor's motion to compel arbitration in Santelli v Arean (1993, Fla App D2) 616 So 2d 1154, 18 FLW D 1012, reported in full (Fla App D2) 1993 Fla App LEXIS 4252, review den (Fla) 624 So 2d 268, rejecting the malpractice plaintiffs' contention that the arbitration provisions of Fla Stat §§ 766.207 and 766.209 (1989) were unconstitutional in that the limitations and damage caps imposed when arbitration was elected violated their rights of access to the courts and a jury trial. The statutes were not unconstitutional as applied to the facts of the case, said the court, because the plaintiffs actually requested binding arbitration and voluntarily subjected themselves to the limits, even though nothing in the statute required them to do so.

which the court rejected the claim of an infant plaintiff that his mother could not legally bind him to arbitrate a medical malpractice claim before he was born, upholding the Medical Malpractice Arbitration Act, Mich Comp Laws § 600.5046(2), against the argument that if the statute were construed to include a fetus in utero, it would be deprived of the constitutional right to sue in court and to a jury trial.

In Rome v Sinai Hospital of Detroit (1982) 112 Mich App 387, 316 NW2d 428, app den 419 Mich 875, the court held, without discussion, that the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., was not unconscionable on the ground that it violated a malpractice plaintiff's constitutional right to access to the courts.

However, see Wright v Central Du Page Hospital Asso. (1976) 63 Ill 2d 313, 347 NE2d 736, 80 ALR3d 566, involving the validity of a statute authorizing the formation of medical panels to review medical malpractice claims prior to trial, which, while not constituting arbitration boards, could render a binding decision if agreed to by the parties in writing, in which the court held the statute invalid on the grounds that it empowered the nonjudicial members of the medical review panel to exercise a judicial function in violation of Ill Const art VI, §§ 1 and 9, and that the requirement that a claim first be submitted to the medical panel resulted in an impermissible restriction on the right of trial by jury under Ill Const art I, § 13.

III. Validity of Contracts to Arbitrate Medical Malpractice Claims

A. Generally

§ 6[a] Presumption of validity of agreement conforming to statute—Effect of presumption on proof

In the following cases the courts held that the effect of a statutory presumption of validity of an agreement to arbitrate medical malpractice claims that conformed to the statutory requirements was to shift the burden of going forward with the evidence to the party alleging the invalidity of the agreement.

In Kukowski v Piskin (1982) 415 Mich 31, 327 NW2d 832, § 56[a], the court rejected the contention of a malpractice plaintiff that the statutory presumption of validity of an agreement to arbitrate medical malpractice disputes which conformed to statutory requirements did not apply to the agreement she executed with a hospital, because the agreement failed to communicate adequately that it applied to services performed by nonemployees of the hospital, such as the independent staff physician against whom she had a claim.

Although earlier cases held to the contrary,[FN35] in McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88, also reported in §§ 19 and 23[a], the court held that, although the burden of proving the validity of an agreement to arbitrate malpractice claims remained with the proponent of the agreement, the effect of the statutory presumption of validity of an agreement complying with the statutory requirements was to shift the burden of going forward with the evidence to the person challenging its validity, affirming the trial court's judgment that a pregnant mother had executed a valid agreement to arbitrate before being treated by doctors against whom she subsequently brought a malpractice action. The patient argued that enforcement would deprive her of her constitutional right to a jury trial and court access, and therefore the burden of proof should rest upon the defendant doctors to show a valid contract. The doctors contended that arbitration was a matter of contract and one who signed a written agreement was presumed to understand it; because the agreement conformed to the statutory requirements and was therefore presumed valid under Mich Comp Laws §§ 600.5041(7) and 600.5042(8), the burden of proving invalidity should be with the malpractice plaintiffs. The court said that under Mich R Evid 301, the effect of a presumption was to shift the burden of going forward with the evidence related to the presumed fact, although the burden of persuasion was not shifted and remained throughout the trial upon the party on whom it was originally cast. Tracking the statutory prescriptions for a valid agreement to arbitrate malpractice claims in Mich Comp Laws §§ 600.5041 and 600.5042, the court said that the presumption of validity accrued when the defendant offered evidence that (1) a written arbitration agreement complying with the statute has been signed by the person receiving health care or treatment or his or her legal representative; (2) the arbitration agreement provides that the offer to arbitrate, if accepted by the patient, is revocable in writing for 60 days; (3) the arbitration agreement states, above the signature line in 12–point boldface type, that it is not a prerequisite to health care or treatment and that it may be revoked within 60 days after execution by notification in writing to the proper party; (4) the patient has been given a
booklet detailing specific provisions of the arbitration agreement; (5) the patient has been given a copy of the arbitration agreement; and (6) the offer to arbitrate has not preceded the provision of emergency care. Once a showing is made which gives rise to the presumption, the court continued, it will stand unless rebutted by evidence that either demonstrates noncompliance with the statutory requirements or establishes one or more defenses, such as coercion, mistake, duress, or fraud. The evidence by which a defendant might sustain the ultimate burden of persuasion could include proof of habit or routine utilized by the hospital in admitting its patients, because it would be unrealistic to expect specific recall on the part of hospital admitting personnel in each individual case, said the court. The court disagreed with several prior cases [FN36] to the extent that the courts had placed the burden on the defendant to prove by clear and convincing evidence that the plaintiff knowingly, intelligently, and voluntarily waived his or her right to court access. Declining to infuse constitutional concerns equivalent to those in a criminal proceeding into what it termed "a civil litigant's contractual choice of forum decision," the court noted that a party's voluntary decision to arbitrate did not involve the complete relinquishment of a constitutional right, nor raise the spectre of procedural due process violations. There is not a federal constitutional right to trial by jury in state court civil cases, observed the court, and the statutory presumption is wholly consistent with common–law principles of contract law which hold that the burden of proving nonarbitrability is assigned to the party seeking to avoid such an agreement and not to the party seeking to enforce the agreement. The court pointed out that Michigan law further presumed that one who signed a written agreement knew the nature of the instrument so executed and understood its contents. If it had been the intent of the legislature to do no more than establish a presumption which accrued after the defendant fulfilled the burden of demonstrating a knowing, intelligent, and voluntary waiver, then the presumption would serve little or no purpose, and the practical effect of placing the burden on the health care provider would be to undermine the objectives of the Medical Malpractice Arbitration Act, the court concluded.

In Hawker v Northern Michigan Hospital, Inc. (1987) 164 Mich App 314, 416 NW2d 428, the court held that the trial court, anticipating the decision in McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88 (this subsection), correctly placed the burden of proof on the defendants in a malpractice action to show strict compliance with the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., the statute governing the validity of agreements to arbitrate medical malpractice claims, and then required the malpractice plaintiff to introduce evidence that would counteract the prima facie case. The trial court properly applied the statutory presumption of the validity of an agreement conforming to the statutory requirements in allocating the burden of proof and in rejecting the malpractice plaintiff's contention that the defendants were required to establish that the agreement was entered into by the patient knowingly, voluntarily and intelligently, said the court.

§ 6[b] Presumption of validity of agreement conforming to statute—Conclusiveness of presumption

[Cumulative Supplement]

The court held in the following case that although a statute governing medical malpractice arbitration agreements provided that an agreement conforming to the requirements was presumed valid and not adhesive, this did not preclude a patient from attempting to establish that there had been no knowing and voluntary waiver of the right to jury trial.

The trial court must make a factual ruling on the question whether a person signing an agreement to arbitrate medical malpractice claims actually knew or reasonably should have known that he or she was waiving jury trial rights and agreeing to arbitrate any medical malpractice controversy, the court held in Ramirez v Superior Court of Santa Clara County (1980, 1st Dist) 103 Cal App 3d 746, 163 Cal Rptr 223, even though the agreement conformed to statutory requirements and was presumed valid under the statute, directing the trial court to vacate its order compelling arbitration of the malpractice claim of a plaintiff who contended that she did not read the agreement and did not know what she was signing. She signed the agreement on behalf of her daughter, who was taken to the hospital and examined by an emergency room physician who allegedly failed timely to diagnose the child's meningitis. The arbitration agreement was presented to the mother, who was Spanish–speaking, by a nurse who, although she spoke Spanish, did not attempt to explain the agreement, but who denied telling the mother that the agreement had to be signed before her baby would be treated. The mother stated that she believed she had to sign all the papers handed to her before her child would be examined and could not remember whether she was given a copy
of the agreement. The court said that it must decide, in the light of California Civ Proc Code § 1295 (Deering), which prescribed the exact language to be used for an arbitration provision in a medical services contract, the form and placement of a warning notice to the person signing the contract, and provided for rescission of the contract by written notice within 30 days of signature, and that a contract complying with those requirements was not a contract of adhesion nor unconscionable nor otherwise improper, whether there was any basis for a signatory's claim that she did not read the form or understand that she was agreeing to arbitrate medical malpractice disputes. Ordinarily a person with the capacity of reading and understanding an instrument, on signing it, may not, in the absence of fraud, imposition, or excusable neglect, avoid its terms on the ground of failure to read it before signing, said the court. However, the court continued, the rule did not apply when the contract was properly characterized as a contract of adhesion, agreeing with the plaintiffs' argument that the legislature could not establish a conclusive presumption that the arbitration agreement in proper form was not a contract of adhesion. Stating that in order to avoid impairment of the right to a trial by jury in civil cases, § 1295 must be read as permitting a very limited species of attack by one who signed an agreement in proper form, the court explained that a party may seek to show that he or she was coerced into signing or did not read the many waiver notices provided and did not realize that the agreement was an agreement to arbitrate. This was a difficult burden, said the court, as a party attacking the arbitration agreement would have to explain how she failed to notice the 10–point red type above the signature line, why she did not ask questions about what she was signing, that no one explained the document to her or asked her to read it before signing it, and why it was not rescinded within 30 days after it was signed. However, when the arbitration agreement is signed as part of the admission procedure in an emergency room, something less than fraud or imposition would suffice for explaining a failure to read the instrument, said the court. The trial court apparently did not resolve the conflict between the hospital's evidence and the mother's statements about the circumstances surrounding the execution of the agreement, the court concluded, and if all the mother's evidence were found to be true, it would be a strong case for an unknowing, involuntary signature on the agreement, although the greatest difficulty would be explaining why the agreement was not read during the 30–day period for rescission provided by the statute.

See Coon v Nicola (1993, 5th Dist) 17 Cal App 4th 1225, 21 Cal Rptr 2d 846, 93 CDOS 6059, 93 Daily Journal DAR 10331, § 10[b], in which the court, determining the validity of a contract to arbitrate medical malpractice claims which conformed to a statute governing such agreements, but which contained an additional provision not mentioned in the statute, said that California Civ Proc Code § 1295(e) (Deering), providing that a conforming agreement was not a contract of adhesion or unconscionable, was not applicable to terms not addressed by the legislation, and a contract containing such terms could be found to be adhesive depending on the circumstances.

See Moore v Fragatos (1982) 116 Mich App 179, 321 NW2d 781, (disapproved on other grounds by McKinstry v Valley Obstetrics–Gynecology Clinic, P.C., 428 Mich 167, 405 NW2d 88), § 20, for a case in which the court found an agreement to arbitrate medical malpractice claims invalid because the patient was in pain at the time of its execution, stating that the statutory presumption of validity could not be regarded as conclusive.

CUMULATIVE SUPPLEMENT

Cases:

Presumption that arbitration agreement is valid for purposes of Medical Malpractice Arbitration Act (MMAA) which arises when certain evidence is presented, including evidence that agreement provides that offer to arbitrate, if accepted by the patient, must be revocable in writing for 60 days, may be rebutted if patient presents evidence of noncompliance with the statutory requirements. M.C.L.A. §§ 600.5040 et seq. (Repealed). Kosmyna v. Botsford Community Hosp., 238 Mich. App. 694, 607 N.W.2d 134 (1999).

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[END OF SUPPLEMENT]

§ 7. Necessity of hearing
[Cumulative Supplement]

In the following case the court held that a hearing was necessary to establish the circumstances surrounding the execution of an agreement to arbitrate medical malpractice claims in order to determine whether it was executed in accordance with statutory requirements.

See also Ramirez v Superior Court of Santa Clara County (1980, 1st Dist) 103 Cal App 3d 746, 163 Cal Rptr 223, § 6[b], in which the court held that even though an agreement to arbitrate medical malpractice claims conformed to statutory requirements and was presumed valid under the statute, the trial court must make a factual ruling on the question whether a person signing the agreement actually knew or reasonably should have known that he or she was waiving jury trial rights and agreeing to arbitrate any medical malpractice controversy.

The question whether an arbitration agreement was executed in accordance with statutory requirements, the court held in May v St. Luke's Hospital (1984) 139 Mich App 452, 363 NW2d 6, was properly before the trial court, and an evidentiary hearing was necessary in order to determine the validity of the agreement. The trial judge had previously held that the proper forum for the resolution of a factual dispute concerning the validity of the agreement was the arbitration panel. However, said the court, the fact that the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., was legislation in derogation of the common law required strict statutory compliance before arbitration could be ordered. The court remanded for an evidentiary hearing on the question whether the hospital complied with the statute, including determinations of whether the deceased mother of the malpractice plaintiff was given a copy of the information brochure, a copy of the agreement or an explanation of the arbitration procedure, and also whether the arbitration agreement was presented to her before emergency treatment was completed, which, said the court, would appear to be required by Mich Comp Laws § 600.5042(1).

CUMULATIVE SUPPLEMENT

Cases:

Trial court was not required to hold evidentiary hearing in connection with its determination that arbitration agreement was valid and enforceable under Medical Malpractice Arbitration Act (MMAA), as defendant health care providers presented evidence, including arbitration agreement and affidavit regarding hospital clerk's habit and custom, which gave rise to statutory presumption of validity, and plaintiff's evidence failed to create question of fact regarding noncompliance. M.C.L.A. §§ 600.5040 et seq. (Repealed). Cox v. D'Addario, 225 Mich. App. 113, 570 N.W.2d 284 (1997).

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[END OF SUPPLEMENT]

§ 8. Evidence of customary procedure of health care provider

Evidence of the customary procedure of a health care provider concerning the circumstances surrounding the execution of an agreement to arbitrate medical malpractice claims, and its conformance to statutory requirements, was sufficient to establish its validity, the courts held in the following cases.[FN37]

The court in McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88, also reported in §§ 6[a], 19, and 23[a], after deciding that the effect of the statutory presumption of the validity of an agreement to arbitrate medical malpractice claims was to shift the burden of going forward with the evidence to the party challenging its validity, held that the evidence by which a defendant might sustain the ultimate burden of persuasion could include proof of habit or routine utilized by the hospital in admitting its patients, because it would be unrealistic to expect specific recall on the part of hospital admitting personnel in each individual case.

The existence of a valid agreement to arbitrate medical malpractice claims, otherwise in compliance with the requirements of the Medical Malpractice Arbitration Act, was established by testimony as to the customary
procedure of the hospital's admitting clerk, the court held in Hawker v Northern Michigan Hospital, Inc. (1987) 164 Mich App 314, 416 NW2d 428. A review of the agreement revealed that it was signed by the plaintiff's decedent, that it contained a provision informing the signatory of a 60–day revocation period, and that it contained the statutorily required language concerning revocation and that signing the agreement was not a prerequisite to receiving medical treatment, observed the court. At the evidentiary hearing, the admissions clerk for the hospital testified that it was her employer's standard procedure to offer every patient an arbitration agreement, that she never signed an arbitration agreement when the patient had not signed agreement in front of her, that the agreement was given to the patient and signed by the patient at the same time as the consent form, and that it was never done otherwise for patients receiving elective surgery. She further testified that at the time the patient signed the arbitration agreement she was supplied with an information booklet detailing the provisions. The witness, furthermore, had an independent memory of the patient based on a discussion of mutual acquaintances at the time of the admission, observed the court, and she described the decedent, identified her own signature and testified that she observed the decedent signing the document. Although she did not remember the date and the agreement was undated, a time card was introduced in evidence showing that she had worked on the day in question, and in light of this testimony, the defendants carried their burden of proof, the court concluded.

In Green v Gallucci (1988) 169 Mich App 533, 426 NW2d 693, the court held that when evidence of the customary hospital admissions procedure supported the conclusion that an arbitration agreement conformed to statutory requirements, the failure of a malpractice plaintiff to locate an information brochure or an original or duplicate original of an arbitration agreement in the effects of the deceased patient did not establish that the agreement allegedly signed by the patient was invalid. Under Mich Comp Laws § 600.5041(6), the agreement to arbitrate offered to a patient receiving health care must be accompanied by a brochure and the patient should subsequently be furnished with either an original or duplicate original of the agreement, observed the court. Reiterating the burden of proof and the effect of the statutory presumption of validity of a properly executed arbitration agreement under McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88 (§ 6[a]), the court stated that the malpractice defendants had demonstrated that the arbitration agreement itself complied with the statutory requirements. The testimony of the admitting clerk, that it was customary admissions procedure to furnish each patient with an arbitration booklet and a copy of the arbitration agreement, was relevant and sufficient under the circumstances to establish the validity of the agreement, the court concluded.

See McKain v Moore (1988) 172 Mich App 243, 431 NW2d 470, § 23[b], in which the court, while reversing the trial court's finding that an agreement to arbitrate medical malpractice claims was obtained in conformance with statutory requirements, stated that the hospital was entitled to rely on evidence of habit or routine used by its employees in admitting its patient in order to go forward with their burden of establishing a prima facie case that the agreement was valid.

See Guadano v Long Island Plastic Surgical Group, P.C. (1982, ED NY) 607 F Supp 136 (applying New York law), § 9[a], for a case in which evidence of the customary procedure of the health care provider was a substantial factor in establishing the validity of an agreement to arbitrate medical malpractice claims not subject to statutory requirements.

In Broemmer v Abortion Servs. of Phoenix, Ltd. (1992) 173 Ariz 148, 840 P2d 1013, 126 Ariz Adv Rep 3, 124 Ariz Adv Rep 6, 24 ALR5th 793 (§ 9[b]), the court noted that the absence of testimony that it was the customary procedure of the health care provider to explain an agreement to arbitrate medical malpractice claims to the patient was a factor in finding the agreement unenforceable.

B. Contracts Alleged to be Adhesive or Unconscionable

§ 9[a] Contracts not governed by statute, generally[FN38]—Held valid

[Cumulative Supplement]

Agreements to arbitrate medical malpractice claims, not governed by a statute relating specifically to medical malpractice arbitration, were not invalid as unconscionable or contracts of adhesion, the courts held in the following cases.

A group medical plan negotiated by a state agency on behalf of its employees was not a contract of adhesion,
the court held in *Madden v Kaiser Foundation Hospitals* (1976) 17 Cal 3d 699, 131 Cal Rptr 882, 552 P2d 1178, and the medical malpractice claim of a state employee was subject to an arbitration clause in the plan agreement, reversing the trial court's order denying enforcement of the provision. The patient, who underwent a hysterectomy at a hospital covered by the plan, contracted serum hepatitis when blood transfusions were given to her after her bladder was perforated during surgery. The medical plan in question did not contain an arbitration provision at the time the patient joined it, but it was added later without the knowledge of the patient, who apparently did not receive a brochure announcing the inclusion of the arbitration provision in the plan. After holding that the state agency, in negotiating such agreements, had the implied authority to agree to the inclusion of an arbitration provision (§ 41), the court acknowledged that the rule that one who assents to a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument is inapplicable in the case of a contract of adhesion, and that provisions in adhesion contracts which limit the duties or liability of the stronger party will not be enforced unless such provisions are conspicuous, plain, and clear and will not operate to defeat the reasonable expectations of the parties. However, pointing out that in the typical adhesion–contract case, the stronger party drafts the contract, and the weaker party has no opportunity, either personally or through an agent, to negotiate concerning its terms, the court stated that the plan in question represented the product of negotiation between parties with parity of bargaining strength. The patient was not deprived of any realistic opportunity to look elsewhere for a more favorable contract, since the patient could have selected any one of several medical plans, some of which did not include arbitration provisions, the court pointed out, and furthermore, the contractual plan provisions were not weighted in favor of the health plan corporation so as to limit its obligations or liability.

Although invalidating the contract on other grounds, in *Sanchez v Sirmons* (1983) 121 Misc 2d 249, 467 NYS2d 757, more fully reported in § 14, the court held that an agreement between a physician and a patient to arbitrate medical malpractice disputes was not a contract of adhesion, because the patient was not confronted with an emergency and could have obtained an elective abortion at many other health facilities in the area without being compelled to agree to arbitrate any malpractice claim arising from its performance.

Granting the malpractice defendants' request for an order staying the medical malpractice action and compelling arbitration of the issues raised in the complaint, the court in *Guadano v Long Island Plastic Surgical Group, P.C.* (1982, ED NY) 607 F Supp 136 (applying New York law), held that the patient had failed to make out a case that the arbitration clause was unconscionable. The patient had undergone elective cosmetic surgery and had been sent the arbitration agreement by mail prior to her preoperative office visit. The court admitted the evidence of the office nurse concerning the practice of adhering to certain rules and procedures in procuring a patient's agreement to arbitrate. A cover letter accompanying the agreement explained the nature of the arbitration process, that it was a substitute for decision by judge or jury, and that signature of the agreement was required. The nurse also testified that she advised the patient that some of the reasons for the agreement to arbitrate were the increase in malpractice actions, rising insurance premiums, court costs, and large jury awards in medical malpractice cases. There was further information about the process consisting of the nature of the arbitrators, the relinquishment of the right to trial by jury, the finality of the arbitration findings, the right to be represented by counsel at the proceeding, and the availability of booklets provided by the American Arbitration Association, together with the opportunity to speak to the doctor if the patient had any objections or questions concerning the agreement. The court observed that the consequences of the agreement were explained to the patient, the surgery was elective, and was necessary for cosmetic reasons only, and the success of the operation did not require that it be performed within any particular timeframe or by that particular surgeon. Furthermore, the court said the patient failed to allege any special circumstances, for example, that the parties had a prior relationship, which might indicate unequal bargaining power.

**CUMULATIVE SUPPLEMENT**

**Cases:**

Under law of necessities, providing that children who are normally incompetent to contract may be bound to terms of contracts for necessary services such as medical treatment, arbitration clause that mother of minor nursing-home resident entered into with nursing home did not violate public policy and, thus, was enforceable with respect to action that mother, as personal representative of resident's estate, brought against nursing home for wrongful
death, negligence, and breach of fiduciary duty; agreement between mother and nursing home was for medical care of resident. MN MedInvest Co., L.P. v. Estate of Nichols ex rel. Nichols, 908 So. 2d 1178 (Fla. Dist. Ct. App. 2d Dist. 2005).

Arbitration clause contained in vehicle sales contract, which compelled arbitration of all controversies or claims concerning the sale, was not substantively unconscionable; arbitrators were free to enter award having injunctive or declaratory component, clause was silent as to who was required to pay fees, and arbitration rules noted that fees could be deferred or reduced in event of hardship. Stewart Agency, Inc. v. Robinson, 855 So. 2d 726 (Fla. Dist. Ct. App. 4th Dist. 2003).

Arbitration agreement between patient, surgeon, and surgeon's professional association was not procedurally unconscionable adhesion contract; patient did not appear to surgeon to be under pain or stress at time of signing, patient initialed provision that he was not in need of emergency care or under immediate stress, agreement was signed 19 days before surgery, and agreement allowed for changes if desired by patient and presented to clinic for approval. Cleveland v. Mann, 942 So. 2d 108 (Miss. 2006).

Though nursing home admissions agreement, which contained challenged arbitration provision, was a contract of adhesion, it was not therefore procedurally unconscionable; patient and his daughter executed agreement without exigency, arbitration terms were prominent in the agreement, and there was not otherwise a lack of knowledge or voluntariness. 9 U.S.C.A. § 2 Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507 (Miss. 2005).

Arbitration clause in nursing home admissions agreement was not oppressive and therefore substantively unconscionable; it provided daughter of deceased patient with a fair process in which to pursue her wrongful death claims, and it bore some reasonable relationship to the risks and needs of the business. 9 U.S.C.A. § 2 Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507 (Miss. 2005).

Binding arbitration clause, in a form that patient signed in medical clinic's waiting room, which form also requested patient's insurance information and patient's agreement to statement of financial responsibility, was not substantively unfair, as element for unconscionability under North Carolina law; while patient but not physicians promised to arbitrate disputes, it was difficult to imagine physicians pursuing claims against patient arising out of the care and treatment patient received from them. Wilkerson ex rel. Estate of Wilkerson v. Nelson, 395 F. Supp. 2d 281 (M.D. N.C. 2005) (applying North Carolina law).

Although constituting contract of adhesion, arbitration agreement between physician and patients was not unconscionable, oppressive, or outside reasonable expectations of parties, and was enforceable; agreement was not contained in parties' other agreements, but was separate document clearly identified as arbitration agreement, and agreement did not give physician advantage in arbitration process itself and did not change physician's duty to use reasonable care in treating patients or limit his liability for breach thereof. Buraczynski v. Eyring, 919 S.W.2d 314 (Tenn. 1996).

[Top of Section]

[END OF SUPPLEMENT]

§ 9[b] Contracts not governed by statute, generally[FN39]—Held invalid

[Cumulative Supplement]

The courts held in the following cases, involving agreements to arbitrate medical malpractice claims which were not governed by statute,[FN39] that the contracts were invalid because they were contracts of adhesion or unconscionable.

In Broemmer v Abortion Servs. of Phoenix, Ltd. (1992) 173 Ariz 148, 840 P2d 1013, 126 Ariz Adv Rep 3, 124 Ariz Adv Rep 6, 24 ALR5th 793, the court held that an agreement to arbitrate was not enforceable against a medical malpractice plaintiff, because it was part of a contract of adhesion which failed to meet the reasonable expectations of the patient, reversing and remanding the summary judgment against the patient on a motion to compel arbitration granted by the trial court. Under Ariz Rev Stat § 12–1501, written agreements to arbitrate were authorized and it was provided that they were valid, enforceable, and irrevocable, except on such grounds as exist at law or in equity for the revocation of any contract, the court observed. However, the standardized contract offered to the patient on a
take it or leave it basis was an adhesive contract, said the court, and in addition to removing from the courts any potential dispute concerning fees or services, the drafter inserted additional terms potentially advantageous to itself requiring that any arbitrator be a licensed medical doctor specializing in obstetrics/gynecology. The contract was not negotiated, the court continued, but was prepared by the clinic and presented to the patient as a condition of treatment, and staff at the clinic neither explained its terms nor indicated that she was free to refuse to sign the form, but merely represented to the patient that she had to complete it and did not provide her with a copy. A contract of adhesion may be enforceable if it does not violate the reasonable expectations of the adhering party and its provisions are not unconscionable, said the court. Comparing the facts with those of Obstetrics & Gynecologists Wixted, etc. v Pepper (1985) 101 Nev 105, 693 P2d 1259 (this subsection), the court noted that in both cases the patients stated they did not recall signing the agreement to arbitrate nor having it explained to them. However, the court observed that the clinic in the case at bar did not establish that it was the procedure of the clinic staff to offer to explain agreements to patients, and it was further distinguished by the absence in the agreement of an explicit statement that both parties were waiving the right to a jury trial. The issues of knowing consent and reasonable expectations are closely related, said the court, explaining that when there was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that the right was knowingly, voluntarily, or intelligently waived, a finding was compelled that the waiver of such fundamental rights was beyond the reasonable expectations of the patient. It would also be unreasonable to enforce the term requiring arbitrators to be licensed obstetricians/gynecologists, the court continued, when it was not negotiated, and the clinic failed to explain it to her or call it to her attention. Because the contract was unenforceable as falling outside the patient's reasonable expectations, it was unnecessary to determine whether the contract was also unconscionable, the court concluded.

An arbitration provision contained in a hospital's standard printed admission form, which had all the characteristics of a contract of adhesion, was held to be unenforceable with regard to the medical malpractice claim of a patient who did not know of, and was not advised of, the existence of the arbitration provision in Wheeler v St. Joseph Hospital (1976, 4th Dist) 63 Cal App 3d 345, 133 Cal Rptr 775, 84 ALR 3d 343,[FN40] an appeal from a judgment ordering confirmation of the arbitration award in favor of the defendant hospital and doctors. The arbitration clause covered any legal claim or civil action in connection with the hospitalization, by or against the hospital or its employees or any doctor of medicine agreeing in writing to be bound by the provision, and was to be effective unless the patient initialed the form at a specific spot signifying that he did not agree to arbitration, or unless he sent a written communication to the hospital within 30 days of his discharge stating that he did not consent to arbitration. The patient, who suffered a brain stem infarction rendering him a total quadriplegic following his admission for an angiogram and catheterization studies in connection with a coronary insufficiency, did not read the hospital admission form, was not given a copy of the form, and neither he nor his wife knew of the existence of the arbitration provision until the wife's attorney informed her that the hospital was attempting to compel arbitration. The court stated that the hospital's standard printed admission form possessed all of the characteristics of a contract of adhesion. The general rule that a person who signs a contract is bound by all of its terms even though he signed it without reading it is inapplicable in the case of a contract of adhesion, said the court, and the enforceability of such a contract depends upon whether the terms of which the weaker party was unaware are beyond the reasonable expectations of an ordinary person or are oppressive or unconscionable. The court pointed out that a patient, who is usually directed by his treating doctor to be admitted to the hospital where the doctor enjoys staff privileges, normally feels that he has no choice but to seek admission to the designated hospital and to accede to all of the terms and conditions for admission. Noting that a patient may reasonably expect the hospital admission form to pertain to an agreement to abide by the hospital rules and regulations, and to the obligation to pay for the services rendered by the hospital, the court said that the patient would not expect his signature to an admission form to be taken as an agreement to give the hospital, as well as any doctor, the option to compel arbitration of a malpractice claim. The objective of a hospital in including an arbitration clause is to avoid a jury trial and hopefully minimize losses for any medical malpractice, stated the court, however, although an express waiver of a jury trial is not required in an arbitration agreement, the patient does forfeit a valuable right which should not be lost unless there is awareness of the arbitration provision and its implications. Reversing the judgment of the trial court, the court stated that in order to be binding, an arbitration clause incorporated in an adhesive hospital admission form should be called to the patient's attention and he or she should be given a reasonable explanation of its meaning and effect, including an explanation of any options available to him or her. These procedural requirements will not impose an unreasonable burden on the hospital, the court continued, as the hospital's admission clerk need only direct the patient's attention...
to the arbitration provision, request him or her to read it, and give the patient a simple explanation of its purpose and effect, including the available options. Although the admission form gave the patient the option of not agreeing to arbitration, the existence of the option was not called to the patient's attention, said the court, and the lower court erred in impliedly finding that an agreement to arbitrate existed.

In *Beynon v Garden Grove Medical Group* (1980, 4th Dist) 100 Cal App 3d 698, 161 Cal Rptr 146, the court held that a trial court could not refuse to affirm an arbitration award in favor of a medical malpractice plaintiff, based on the exercise by the defendant doctor and hospital of a unilateral right to reject the award provided by their contract with the patient to arbitrate, because the provision was unenforceable under adhesion contract principles. The clause, in a master group policy, was not called to the subscriber's attention and was void as against public policy, said the court, as it allowed the defendants alone to reject the arbitrators' decision and to require that the dispute be resubmitted to another arbitration panel of three doctors. The patient had enrolled in the group health care service plan through her employment, and was provided with a pamphlet which stated that the plan was described in the master agreement and policy effective as of May 1, 1974, but she was never provided with a copy of the master policy. Late the next year she filed a malpractice suit based on medical care received pursuant to the health plan, but upon being notified by the defendants of the provision for arbitration in the policy, she allowed a motion to compel arbitration to be granted without opposition. In the action to confirm her award, the patient said that she had never signed an agreement containing the provision allowing unilateral rejection of the award, had never seen a master policy, and was not aware of the fact that the provision was part of it. The court agreed with the plaintiff's contention that, under adhesion contract principles, the provision of the agreement was unenforceable because it was never called to her attention when she enrolled in the plan, and unexpectedly and unreasonably limited the obligations of the health plan and health care provider. When a contract is adhesive, said the court, a provision which limits the liabilities and duties of the stronger party will not be enforced unless it is clear and conspicuous, and will not operate to defeat the reasonable expectations of the weaker party. There was no evidence that the agreement was negotiated by parties having a parity of bargaining strength, the court continued, or that the patient had a realistic opportunity to bargain or to seek a more favorable contract. The brochure prepared and distributed by the health plan made only a brief reference to arbitration and there was no reference to the provisions of the paragraph at issue, the court observed, if indeed it was at that time a part of the master policy, the record failing to contain a copy of the master policy in force when the plaintiff enrolled. In addition to the right to reject the award without cause and require rearbitration, the agreement also provided that each side bear half the cost of the proceedings, irrespective of the outcome, so that a member who had already incurred substantial expenses in the first arbitration proceeding could be discouraged from further pursuit of the claim in another arbitration proceeding, explained the court. The court distinguished the situation from that in which a master policy was negotiated by an agent or representative of the employees (see § 41), but said that even if it had been, the implied authority of an agent could not be stretched to distinguish the situation from that in which a master policy was negotiated by an agent or representative of the employees.

When a contract is adhesive, there is no implied authority of an agent to bind the stronger party to an agreement which operates to defeat the reasonable expectations of the weaker party. The supreme court has emphasized the importance of apprising a beneficiary of a contract dispute subject to arbitration, the process to be utilized, and how it is to be initiated (*California Health and Safety Code* § 1373(1) (Deering)). The failure of the health plan to inform subscribers that the health care provider had the right to reject an award without cause, and to require rearbitration before a special panel, rendered their bare statement as to the existence of arbitration misleading, said the court. Although legislation requiring that health care service plans be fair, reasonable, and consistent with the objectives of the governing legislation was not in force when the policy at issue was executed, the court noted, the statutory standard was but an expression of adhesive contract principles which the courts had developed and applied over the years in the insurance context, and under those principles, the provision was violative of public policy. The court rejected the plaintiff's argument that the provision had, for its object, indirectly, the exculpation of the health care provider from liability for its negligence, in violation of *California Civ Code* § 1668 (Deering), because, although the provision was weighted in favor of the health care provider, it did not totally exempt it from negligence. However, in light of the almost universal public reliance upon prepaid health plan service contracts and insurance as a means of paying for hospital and medical services, said the court, provisions which can render arbitration a one-sided, expensive, and protracted procedure weighted against the subscriber are manifestly harmful to the public interest. The court confirmed the arbitration.
award, stating that the invalid provision relating to the three-doctor panel was severable from the remainder of the contract, which was otherwise a complete and valid agreement to submit disputes arising under the agreement to arbitration and to provide the procedure for the initiation of the proceedings, untainted by the invalid provision.

Characterizing the agreement as a contract of adhesion, in Obstetrics & Gynecologists Wixted, etc. v. Pepper (1985) 101 Nev 105, 693 P2d 1259, the court affirmed the judgment of the District Court that a malpractice plaintiff did not give a knowing consent to an arbitration agreement prepared by a clinic which had prescribed oral contraceptives for her. When the plaintiff suffered a cerebral incident which left her partially paralyzed, she sought to bring a malpractice action alleging that it had been caused by the clinic's negligence in prescribing the contraceptive, which was contraindicated by her medical history. The clinic required its patients to sign the arbitration agreement before receiving treatment, the court observed, and the agreement expressly waived the right to a trial as to all disputes between the parties. The receptionist handed the patient the arbitration agreement along with two information sheets and allegedly informed the patient that any questions would be answered, said the court, and if the patient refused to sign the agreement, the clinic refused treatment. Although ostensibly the clinic would consent to provide treatment in some emergency situations, the record did not reflect that that had ever occurred, the court continued, and there was no option to revoke the agreement within a specified period of time. Since the clinic set up the existence of the agreement to preclude the lawsuit, it had the burden of showing that a binding agreement existed, said the court, and although the trial court did not enter any findings of fact or conclusions of law, the court may imply findings where the evidence clearly supports the judgment. Based on the affidavits of the parties, the trial court could certainly have found that the arbitration agreement was an adhesion contract, a standardized contract form offered to consumers of goods and services essentially on 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 service except by acquiescing to the form of the contract, the court stated, because the contract was prepared by the medical clinic, presented to the patient as a condition of treatment, and she had no opportunity to modify any of its terms. Although an adhesion contract may be enforceable if it falls within the reasonable expectations of the weaker or adhering party and is not unduly oppressive, the court said it would not enforce a provision limiting the duties or liabilities of the stronger party absent plain and clear notification of the terms and an understanding consent. The proof did not compel the conclusion that the patient knowingly consented, when she did not remember receiving any information regarding the terms of the arbitration agreement, the court continued. Although the receptionist stated that the policy was to inform the patient that any questions he or she might have would be answered, the contents of both affidavits were perfectly consistent with the conclusion that the agreement was never explained to the patient, said the court, and it was reasonable to find that there was no informed consent and no meeting of the minds occurred.

In Miner v. Walden (1979) 101 Misc 2d 814, 422 NYS2d 335, the court denied the motion of a defendant doctor in a malpractice action to dismiss the complaint and compel arbitration, because the alleged agreement to arbitrate executed by the patient was a contract of adhesion, unconscionable and unilateral. The court found the credible testimony to be that prior to each of the patient's operations, she was called into the doctor's office, and in the presence of the doctor and a nurse, an explanation was made to her as to the meaning and purpose of the arbitration form, an authorization for surgery, and other papers. These forms were enclosed in an envelope and mailed to the plaintiff with a covering letter, which indicated that the form consenting to arbitration required her signature. The court stated that notwithstanding the cogency of the policy favoring arbitration, it could not displace the necessity for proof of a voluntary agreement to arbitrate. Considering the principles governing the enforcement of contracts of adhesion, the court observed that since the word "require" appeared twice in the form letter, the patient seeking an operation, even though elective, was placed in an inferior bargaining position. As to the patient's awareness of the contractual provision and understanding assent thereto, the court said that to compare the limited educational background of the patient against that of a professional doctor and his nursing staff would be unreasonable and unconscionable. The average person was not disposed to question or doubt a doctor's treatment, the court continued, nor does the average person leave a doctor relied upon and shop for another who does not require an arbitration agreement to be signed. Therefore, the classic elements of unconscionability were present, said the court, unequal bargaining power, resulting in a contract more favorable to the defendant and for the sole benefit of the defendant. An agreement to arbitrate must be openly and fairly entered into and will not be enforced unless it is mutually binding, said the court. The agreement at issue purported to be an exchange of promises to arbitrate with each promise serving as consideration for the other, but in return for the patient's consent to arbitrate all claims arising out

of the medical relationship, the doctor agreed to arbitrate all claims except claims of money due for services rendered, said the court. In a doctor–patient relationship, the only possible claim the doctor would have was such a claim, the court pointed out, and there was no showing of the existence of the reciprocally enforceable obligation. Furthermore, there was still a question as to whether the plaintiff did in fact read the agreement and, if so, understood it, the court concluded, even assuming a presumption that one who signs a contract has read it.

CUMULATIVE SUPPLEMENT

Cases:


Negotiation of arbitration agreement between physician and patient was procedurally unconscionable, where patient was given copy of agreement mere minutes before she was to undergo surgery while she was dressed in surgical clothing, agreement was on printed form, agreement was drafted by physician, and no one explained to patient content of agreement or her option of not signing agreement. Revocation of unconscionable arbitration agreement between physician and patient in malpractice action would have been warranted if patient did not receive copy of agreement or was precluded from exercising agreement's clause that provided 14–day period in which patient could revoke agreement; however, if patient did receive copy and was not precluded from exercising right to revoke, then severance of unconscionable clause and enforcement of remained of agreement was warranted. Contractual term requiring award of attorney fees to physician defendant who is loser in malpractice arbitration, that is embedded in nonnegotiated agreement, in substantively unconscionable and against public policy. Sosa v Paulos (1996, Utah) 924 P2d 357, 299 Utah Adv Rep 26.

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[END OF SUPPLEMENT]

§ 10[a] Contracts governed by statute—Generally

In the following cases, the courts held that contracts conforming to a statute providing specific requirements for agreements to arbitrate medical malpractice claims were not adhesive or unconscionable.

In Bolanos v Khalatian (1991, 2nd Dist) 231 Cal App 3d 1586, 283 Cal Rptr 209, 91 CDOS 5504, 91 Daily Journal DAR 8439, more fully reported in § 18, upholding a contract to arbitrate medical malpractice claims against the patient's contention that she had not read or understood the arbitration agreement, the court said that since the arbitration agreement complied with statutory requirements for validity under California Civ Proc Code § 1295 (Deering), providing that it include certain language and a warning in 10–point bold red type to the effect that the agreement relinquished the right to a jury trial, as a matter of public policy it was not a contract of adhesion nor unconscionable nor otherwise improper, under California Civ Proc Code § 1295(e), and therefore the general rule that one who signed an agreement could not avoid its terms on the ground of failure to read it was applicable.

In Morris v Metriyakool (1984) 418 Mich 423, 344 NW2d 736,[FN41] the court rejected the contention that an agreement signed by a patient to arbitrate medical malpractice claims under the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., was a contract of adhesion or unconscionable. Contracts of adhesion are standardized forms prepared by one party, offered without the opportunity for bargaining and under circumstances

in which the second party cannot obtain the desired product or service without acquiescing, said the court. Regardless of any possible perception among patients that the provision of optimal medical services was conditioned on signing the agreement, the court continued, the required 60-day rescission period, of which patients had to be informed, protected patients by allowing them to obtain medical services without binding them to the terms of the agreement. Neither was the agreement unconscionable, continued the court, because it concealed the fact that the right to jury trial was waived. The agreement was not long or complicated, specifically stated that the dispute would be settled by an arbitration panel rather than a judge or jury, and the court was not persuaded that an ordinary person signing the agreement would expect a jury trial. Furthermore, said the court, there was no constructive fraud rendering the agreement unconscionable because it did not disclose the composition of the panel, which included a physician or other health care professional, the attitudes of physicians, the fact that the medical member might be intrinsically biased against the patient, and the probability that medical malpractice awards were affected by awards in malpractice cases. The medical malpractice defendants did not breach a legal or equitable duty which had the effect of deceiving the patient, nor have they received an unmerited benefit, concluded the court.

A malpractice plaintiff failed to prove by clear evidence that an arbitration agreement signed by the deceased patient, which conformed to the requirements of the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., was a contract of adhesion and beyond the reasonable expectation of the parties, the court held in Brown v Siang (1981) 107 Mich App 309, 309 NW2d 575, app den 419 Mich 875. An adhesion contract is a standardized contract 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 desired product or services cannot be obtained except by acquiescing to the form contract, observed the court. A finding that the contract is one of adhesion is only the first step in rendering it unenforceable, the court continued, as it must also be determined that the terms of which the adherent was unaware are beyond the reasonable expectations of an ordinary person or are oppressive or unconscionable. Distinguishing an agreement to arbitrate under the statute from an agreement which unobtrusively inserted an agreement to arbitrate in a middle of a document entitled “Conditions of Admission,” the court also noted that the contract defenses of fraud, duress, or corruption remained available to patients on a case-by-case basis. The form clearly states that the agreement to arbitrate is not a prerequisite to care, the court pointed out. Furthermore, the patient is given 60 days after execution in which to revoke the agreement, said the court, thereby alleviating the possibility of coerciveness in the admission room. The patient has a realistic and fully informed choice based upon the form and the booklet presented, the court continued, and even if it could be said that the patient felt obligated to sign the agreement in order to receive the best health care possible, the terms of the agreement were within the reasonable expectation of the patient. Finally, the court concluded, there was no evidence of unfair advantage being given to the defendants by the statute.

In Cushman v Frankel (1981) 111 Mich App 604, 314 NW2d 705, app den 419 Mich 875, the court rejected a malpractice plaintiff's claim that a medical malpractice arbitration agreement executed by his decedent was a contract of adhesion. An adhesion contract is offered on a take or leave it basis to a consumer who has no realistic bargaining strength and who cannot obtain the desired services or goods without consenting to the contract terms, said the court. The patient was able to receive health care without foregoing the choice between arbitration or court trial, the court continued, because Mich Comp Laws §§ 600.5041(2) and 600.5042(2) specifically required the agreement to state that execution was not a prerequisite to treatment. Furthermore, the court concluded, arbitration agreements may be revoked within 60 days of execution, or with regard to hospitals, within 60 days of discharge, under Mich Comp Laws §§ 600.5041(3) and (5); 600.5042(3) and (4).

Courts have been unanimous in rejecting the claim that the arbitration agreement form specified by the Medical Malpractice Arbitration Act, Mich Comp Laws § 600.5040 et seq., is unconscionable or a contract of adhesion, the court said in Murray v Wilner (1982) 118 Mich App 352, 325 NW2d 422, revd on other grounds 419 Mich 872, 348 NW2d 6.

In Gale v Providence Hospital (1982) 118 Mich App 405, 325 NW2d 439, revd on other grounds 419 Mich 873, 348 NW2d 6, the court noted that the malpractice plaintiff's contention that an agreement, governed by the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., to arbitrate medical malpractice claims sought to be enforced against her, was an adhesion contract, had been uniformly rejected.

In Sabatini v Marcuz (1983) 122 Mich App 494, 332 NW2d 512, revd on other grounds 419 Mich 873, 348 NW2d 6, the court stated that the contention that an arbitration agreement, under the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., constitutes an unenforceable contract of adhesion, had been
uniformly rejected.

**CUMULATIVE SUPPLEMENT**

**Cases:**


Arbitration agreement providing that parties to contract would not use attorneys to present their dispute conditioned arbitration of patient's claim of dental malpractice on patient's prospective waiver of right to counsel, and therefore peer review committee that rendered arbitration award did not follow proper procedure, in light of statute precluding waiver of right to counsel in arbitration proceedings, and award could not serve as foundation for defense of arbitration and award in patient's subsequent malpractice action; mere couching of waiver in terms of agreement between parties did not alter its essential character as compulsory condition of arbitration that violated statute. *McKinney's CPLR 3211(a), par. 5, 7506(d). Volpe v. Cortes, 16 A.D.3d 675, 792 N.Y.S.2d 536 (App. Div. 2d Dep't 2005).*

[Top of Section]

[END OF SUPPLEMENT]

**§ 10[b] Contracts governed by statute—Including terms not specified by statute**

A contract providing for retroactive effect of an agreement to arbitrate medical malpractice claims, which otherwise conformed to a statute providing specific requirements for such agreements, was not a contract of adhesion, the court held in the following case.

A retroactive malpractice arbitration agreement was not unconscionable and did not include terms beyond the reasonable expectations of the parties, the court held in *Coon v Nicola (1993, 5th Dist) 17 Cal App 4th 1225, 21 Cal Rptr 2d 846, 93 CDOS 6059, 93 Daily Journal DAR 10331,* reversing the trial court's denial of the malpractice defendant's motion to compel arbitration. The patient had been informed of a missed diagnosis after surgery, and on a followup visit to the doctor's office, signed an agreement providing for arbitration of disputes concerning prospective care which also contained a clause covering services already rendered. It was undisputed that the patient signed the agreement, and separately initialed, as requested on the contract, the clause pertaining to prior treatment. The patient argued that the statute governing agreements to arbitrate medical malpractice claims did not authorize enforcement of the clause, which was unconscionable, and the trial court had based its finding that the parties were of grossly unequal bargaining power on the fact that the patient was taking pain medication. The court noted that the contract incorporated all the language required by *California Civ Proc Code § 1295* (Deering), and rejected the contention that statutory language describing an agreement to arbitrate claims arising from "subsequent transactions" precluded statutory authority for the retroactive application of an agreement. Nothing in the statute stated that a medical malpractice arbitration agreement may not include additional provisions, said the court, and a statutory reference to the fact that certain language must be in the first article of such a contract implied that other articles could be added. Neither was there a specification of the method of arbitration to be used, the court continued, and the freedom of choice in that regard would indicate that other provisions were allowed. The court pointed out that *California Civ Proc Code § 1281* (Deering) permitted an agreement to arbitrate "an existing controversy or a controversy thereafter arising," concluding that §§ 1281 et seq, applied to medical malpractice arbitration agreements to the extent that they did not conflict with the specific provisions of *California Civ Proc Code § 1295* (Deering). This would permit the parties, so long as the requirements for a valid medical malpractice arbitration agreement were met, to agree legally to arbitrate pre-existing claims, subject to the same grounds for revocation as exist in the general statute, the court decided. As to whether the agreement was unconscionable, the court said that...
California Civ. Proc. Code § 1295(e) (Deering), providing that a conforming agreement was not a contract of adhesion or unconscionable, was not applicable to terms not addressed by the legislation, and a contract containing such terms could be found to be adhesive depending on the circumstances. Although the arbitration form was drafted by the defendant, a standardized form does not render the agreement invalid, but rather the question is whether the stronger party has disappointed the expectations of the weaker party, explained the court. Observing that there was no indication that the patient did not have an opportunity to question the meaning of the contract, the court also pointed out that there were no hidden terms, the agreement was revocable within 30 days, and the retroactive effect provision, far from being buried, was singled out for the patient to initial. Neither was there any suggestion that the patient could not have sought treatment elsewhere, and he was not in an emergency situation, added the court, emphasizing that the doctor's liability was not limited, but merely determined in a different forum, with each party having an equal voice in the selection of the arbitrators. Furthermore, said the court, although the patient stated that the pain medication made him sleepy, there was no indication that he could not read or understand the agreement, or that the doctor knew or took advantage of his medicated state, and he signed the agreement with the knowledge that the diagnosis of a fracture had been missed. All those facts led to the conclusion that the reasonable expectations of the parties were not frustrated, the court declared, also ruling that there was no basis for finding a contract of adhesion due to the parties' grossly unequal bargaining positions.

C. Contracts or Contract Provisions Alleged Violative of Public Policy

§ 11. Provision of unilateral right to reject award

The court held in the following case that a provision in a contract to arbitrate medical malpractice claims allowing a unilateral right to object to the award was violative of public policy.

In Beynon v Garden Grove Medical Group (1980, 4th Dist) 100 Cal App 3d 698, 161 Cal Rptr 146, more fully reported in § 9[b], the court held that a trial court could not refuse to affirm an arbitration award in favor of a medical malpractice plaintiff, based on the exercise by the defendant doctor and hospital of a unilateral right to reject the award in a provision of their contract with the patient, because the provision violated public policy. Allowing the defendants alone to reject the arbitrators' decision and to require that the dispute be resubmitted to another arbitration panel of three doctors, the master group health policy provision was void, said the court, pointing out that the agreement also provided that each side bear half the cost of the proceedings, irrespective of the outcome. Therefore, a member who had already incurred substantial expenses in the first arbitration proceeding could be discouraged from further pursuit of the claim in another arbitration proceeding, explained the court. The supreme court has emphasized the importance of apprising a beneficiary of a contract of the availability of arbitration and the means of initiating it, the court continued, and has noted recent legislation governing health care service plans which require them in informational brochures to disclose explicitly the existence of any arbitration procedures and to include in the subscriber's contract a provision setting forth the type of dispute subject to arbitration, the process to be utilized, and how it is to be initiated (California Health and Safety Code § 1373(1) (Deering)). The failure of the health plan to inform subscribers that the health care provider had the right to reject an award without cause and to require rearbitration before a special panel rendered their bare statement as to the existence of arbitration misleading, said the court. Although legislation requiring that health care service plans be fair, reasonable, and consistent with the objectives of the governing legislation was not in force when the policy at issue was executed, the court noted, the statutory standard was but an expression of adhesive contract principles which the courts had developed and applied over the years in the insurance context, and under those principles, the provision was violative of public policy. In light of the almost universal public reliance upon prepaid health plan service contracts and insurance as a means of paying for hospital and medical services, said the court, provisions which can render arbitration a one-sided, expensive, and protracted procedure weighted against the subscriber are manifestly harmful to the public interest.

§ 12. Limitation of damages

The court held in the following case that a provision in an agreement to arbitrate medical malpractice claims
was violative of public policy when it limited damages available to the plaintiff.

In Tatham v Hoke (1979, WD NC) 469 F Supp 914, aff’d without op (CA4 NC) 622 F2d 584 and aff’d without op (CA4 NC) 622 F2d 587 (applying North Carolina law), the court held that an arbitration provision was unenforceable as violative of public policy when it was included in a contract between an abortion patient and her doctor containing provisions absolutely limiting the damages available and requiring a 30-day notice of claim. The patient testified that she was referred to the defendant's clinic by a counseling center, did not remember reading the back of the form when she signed it, and could not recall its contents. The doctor testified that all prospective patients were required to sign the agreement. While those facts were insufficient to find that the agreement was an unenforceable adhesion contract, the court, the contract was for exculpation from liability of an enterprise highly regulated by state authorities, who have demonstrated the public interest and the desire that the practitioners remain amenable to private suit as well as public review. The provisions were unenforceable under North Carolina law as contrary to public policy, said the court, because, although the controlling principle was that a clear and significant inequality of bargaining power must be demonstrated to support invalidation of a limitation of liability clause in a private sector contract, there was a much lesser showing, if any, required when the entity seeking exculpation was heavily affected with the public interest. In order to be separable, the arbitration provision must be in no way dependent upon the enforcement of the illegal provisions, and capable of being construed divisibly, said the court, but the contract contemplated arbitration only of claims filed within the 30-day time limit for such filing, and the arbitrator's decision was subordinated to the recovery ceiling imposed. There was no severability clause, the court continued, and nothing to indicate that a court might extend the jurisdiction of the arbitrators to claims which did not meet the time limit or expand the arbitrator's authority to award damages in excess of the ceiling and so construct an alternative proceeding even remotely resembling what the contracting parties might have contemplated. Therefore, the invalid exculpatory provisions fundamentally affected the course of any arbitration proceedings and necessitated that the contract language mandating those proceedings be set aside, concluded the court.

§ 13. Notice of claim requirement

The court held in the following case that a provision in an agreement to arbitrate medical malpractice claims requiring a 30-day notice of claim was violative of public policy.

A contract providing for the arbitration of medical malpractice claims, but also requiring that there be notice of claims within 30 days, as well as absolutely limiting the damages awardable, violated public policy and was unenforceable, the court held in Tatham v Hoke (1979, WD NC) 469 F Supp 914, aff’d without op (CA4 NC) 622 F2d 584 and aff’d without op (CA4 NC) 622 F2d 587 (applying North Carolina law). The doctor testified that all prospective patients were required to sign the agreement, and the patient testified that she was referred to the defendant's clinic by a counseling center for an abortion, did not remember reading the back of the form when she signed it, and could not recall its contents. The court said that the contract, although not adhesive, was for exculpation from liability of an enterprise highly regulated by state authorities, who have demonstrated in the public interest the desire that the practitioners remain amenable to private suit as well as public review. Although a clear and significant inequality of bargaining power must be demonstrated to support invalidation of a limitation of liability clause in a private sector contract, the court continued, there was a much lesser showing, if any, required when the entity seeking exculpation was heavily affected with the public interest, and the provisions were unenforceable under North Carolina law as contrary to public policy. The court observed that the arbitration provision must be capable of being construed divisibly and in no way dependent upon the enforcement of the illegal provisions in order to be separable. However, there was no severability clause and the contract contemplated arbitration only of claims filed within the 30-day time limit for such filing, and the arbitrator's decision was subordinated to the recovery ceiling imposed, said the court. Nothing in the contract indicated that a court might construct an alternative proceeding, even remotely resembling what the contracting parties might have contemplated, by extending the jurisdiction of the arbitrators to claims which did not meet the time limit or their authority to award damages in excess of the ceiling, the court concluded, and therefore the invalid provisions fundamentally affected the course of any arbitration proceedings and necessitated that the contract language mandating those proceedings be set aside.
§ 14. Requirement of informed and voluntary waiver of jury trial

A malpractice defendant asserting an agreement to arbitrate medical malpractice claims, not governed by a statute with specific requirements for such agreements, must prove that the malpractice plaintiff made a informed and voluntary waiver of the right to jury trial, the courts held in the following cases.

Reversing summary judgment to compel arbitration, the court held in Broemmer v Abortion Servs. of Phoenix, Ltd. (1992) 173 Ariz 148, 840 P2d 1013, 126 Ariz Adv Rep 3, 124 Ariz Adv Rep 6, 24 ALR5th 793, that an agreement to arbitrate claims of medical malpractice between a patient and a clinic was not enforceable because, inter alia, there was no evidence that the right to jury trial was knowingly, voluntarily, or intelligently waived. Construing the contract as adhesive (see § 9[b]), the court said that, in addition to including terms advantageous only to the clinic, the agreement was not negotiated, it was presented to the patient as a condition of treatment, and no attempt was made by the clinic staff to explain the terms, which did not include an explicit waiver of the right to a jury trial.

A patient who did not know of, and was not advised of, the existence of the arbitration provision in a hospital's standard printed admission form, which had all the characteristics of a contract of adhesion, was not bound by the agreement, the court held in Wheeler v St. Joseph Hospital (1976, 4th Dist) 63 Cal App 3d 345, 133 Cal Rptr 775, 84 ALR3d 343, more fully reported in § 9[b]. The patient did not read the hospital admission form, was not given a copy of it, and neither he nor his wife knew of the existence of the arbitration provision until the wife's attorney informed her that the hospital was attempting to compel arbitration. The court said that arbitration is consensual in nature so that a party cannot be compelled to arbitrate a dispute it has not agreed to submit, and the patient does forfeit a valuable right which should not be lost unless there is awareness of the arbitration provision and its implications. Although the admission form gave the patient the option of not agreeing to arbitration, the existence of the option was not called to the patient's attention, said the court, and the lower court erred in impliedly finding that an agreement to arbitrate existed.

See Obstetrics & Gynecologists Wixted, etc. v Pepper (1985) 101 Nev 105, 693 P2d 1259, § 9[b], for a case in which the court held, as to an agreement to arbitrate medical malpractice disputes in an adhesive contract, that a malpractice plaintiff did not give a knowing consent to the agreement prepared by a clinic, and it would not enforce a provision limiting the duties or liabilities of the stronger party absent plain and clear notification of the terms and an understanding consent.

In Miner v Walden (1979) 101 Misc 2d 814, 422 NYS2d 335, more fully reported in § 9[b], the court refused to enforce an alleged agreement to arbitrate medical malpractice disputes because, inter alia, there was no informed consent. Prior to each of the patient's operations, she was called into the doctor's office, and in the presence of the doctor and a nurse an explanation was made to her as to the meaning and purpose of the arbitration form, an authorization for surgery, and other papers. These forms were enclosed in an envelope and mailed to the plaintiff with a cover letter, which indicated that the form consenting to arbitration required her signature. Notwithstanding the cogency of the policy favoring arbitration, said the court, it could not displace the necessity for proof of a voluntary agreement to arbitrate. As to the patient's awareness of the contractual provision and understanding assent thereto, the court said that to compare the limited educational background of the patient against that of a professional doctor and his nursing staff would be unreasonable and unconscionable. The average person was not disposed to question or doubt a doctor's treatment, the court continued, and there was, furthermore, a question as to whether the plaintiff did in fact read the agreement and, if so, understood it.

In Sanchez v Sirmons (1983) 121 Misc 2d 249, 467 NYS2d 757, the court held that an agreement to arbitrate contained in a "Consent to Abortion" form signed by a patient was unenforceable because it was not demonstrated that she made a knowing, voluntary, and intelligent waiver of her constitutional right to a jury trial. The patient testified that she signed the agreement but did not study its numerous provisions, because she thought she was only giving her consent to an abortion. Noting that the law indulged every reasonable presumption against the waiver of a fundamental right, the court said it could not recognize such a waiver when the patient had not been made aware of the arbitration provision or its implications, and that the circumstances under which the agreement was signed must
also be taken into account. Observing that under statutes in other states, agreements were subject to requirements
designed to insure adequate notice and information to the patient, such as being set forth on a separate sheet of paper
and using boldface type, the court said the agreement did not insure that the patient knew she was surrendering her
right to litigate a malpractice claim before a jury. Furthermore, it was given to the patient only a few hours before
surgery, and did not afford her a reasonable time to reflect on whether she should have revoked the contract after it
was executed, the court concluded.

CUMULATIVE SUPPLEMENT

Cases:

District court lacked subject matter jurisdiction over claims against health plan and physician arising from death
of patient; patient had agreed to binding arbitration in enrolling in health plan through her employer, and arbitration

Father who signed medical arbitration agreement compelling arbitration of all claims relating to doctor's
treatment and care of father could not waive rights of adult daughters to have jury trial of their wrongful death
claims arising from doctor's alleged malpractice during surgery on father; father was not daughters' agent, daughters
were not married to him, and daughters were not minors. Buckner v. Tamarin, 119 Cal. Rptr. 2d 489 (App. 2d Dist.
2002).

§ 15. Requirement of counsel

The court held in the following case that it was not necessary that a party to an agreement to arbitrate medical
malpractice claims, not governed by a statute specifying requirements for such contracts, be advised by counsel
before the execution of the agreement.

In Guadano v Long Island Plastic Surgical Group, P.C. (1982, ED NY) 607 F Supp 136, also reported in §§ 9[a]
and 16, the court applied New York law in rejecting a malpractice plaintiff's argument that an arbitration agreement
was inherently inequitable because the patient was asked to relinquish her constitutional right to a jury trial without
the assistance of counsel. The patient was fairly advised concerning the nature of the arbitration process, observed
the court, and the cover letter which accompanied the agreement explained that decisions concerning disputes
covered by the agreement would be made by an impartial arbitrator instead of either a judge or a jury, and that the
doctors' desire for arbitration was in part attributable to large jury awards in medical malpractice cases. The patient
made no allegations that she failed to understand any of the implications which would ensue from the election of the
arbitration process, the court continued, and there is no reason to adopt a rule that encourages the advice of counsel
whenever a contract includes an arbitration clause, which would also be inconsistent with the state's public policy
favoring arbitration.

§ 16. Allegations of fraud, mistake, misrepresentation, or coercion

Allegations of fraud, mistake, misrepresentation, or coercion were not established, the courts held in the
following cases, by malpractice plaintiffs asserting the invalidity of a contract to arbitrate medical malpractice
claims, not governed by a statute providing specific requirements for such agreements.

A malpractice plaintiff's consent to arbitration was not obtained by misrepresentation, the court held in Zupan v
Firestone (1982, 1st Dept) 91 App Div 2d 561, 457 NYS2d 43, affd 59 NY2d 709, 463 NYS2d 439, 450 NE2d 245,
granting the defendant dentist's motion to dismiss the complaint. The patient voluntarily submitted a complaint to
the dental society and received in return a consent form to arbitration before the society's patient relations committee, which provided that, by signing the consent, she agreed to accept the decision of the committee as final, conclusive, and binding, and waived the right to bring an action against the dental society or the dentist. The dentist had returned the society's postcard indicating that he had received notice of the dispute, would be present at the time appointed for the hearing, and he would abide by the final decision, the court observed, and therefore there was mutuality of consent, with waiver of internal appeal. The committee awarded the patient a sum of money contingent upon her returning the bridgework, and summarily denied the dentist's request to appeal the decision, returning the money to him after the plaintiff failed to return the bridgework. There was no misrepresentation in the consent form signed by the patient which would bar enforcement of the arbitration award, said the court. Although the parties' consent forms were not identical, they contained similar consents to be bound and neither side was afforded the right to appeal, the court pointed out, and since the dentist's attempt to appeal was denied as a nullity, both were on an equal footing. The court also rejected the patient's contention that the money award was rendered inequitable by failure of enforcement, when the malpractice plaintiff elected not to pursue her claim for reimbursement from the defendant doctor because she was unwilling to submit to having to give back the bridgework which was the cause of her complaint. However, the arbitration award was no less significant in respect of the provisions of New York Civ Prac L & R § 3211(a)(5) (Consol), which required the plaintiff to comply with the arbitration committee's directives and, thus, barred the suit, and the award was final and binding upon the plaintiff, the court concluded.

The court refused to set aside a malpractice arbitration agreement in Guadano v Long Island Plastic Surgical Group, P.C. (1982, ED NY) 607 F Supp 136 (applying New York law), on the ground that the defendant doctors had induced the patient to sign it by failing to advise her that the arbitration clause encompassed claims for medical malpractice. The clause provided that arbitration would resolve "all claims and disputes that may arise in the future out of our medical relationship except for claims of money due for services rendered." The patient submitted no affidavit, although given the opportunity to do so, which would tend to establish her ignorance concerning the scope of the arbitration agreement, the court observed, and the explanation of the advantages of arbitration from the standpoint of the doctors sufficiently apprised the patient of the fact that it covered malpractice disputes even if the broad language of the clause did not. The same facts required rejection of the claim of mistake, said the court, because the patient had reason to know of the meaning the doctors attached to the arbitration agreement, and they had no reason to believe that the patient might believe that the comprehensive arbitration clause would exclude malpractice claims.

E. Consent to Arbitrate in Agreement Conforming to Statutory Requirements

§ 17. Generally

[Cumulative Supplement]

In the following cases, the courts held that there had been valid consent to agreements to arbitrate medical malpractice claims which conformed to the requirements of a statute governing such agreements.

The patient's execution of an agreement to arbitrate medical malpractice claims, which conformed to the requirements of the Malpractice Arbitration Act of 1975, Mich Comp Laws §§ 600.5040 et seq., did not represent a nonconsensual waiver of a constitutional right, the court held in Brown v Siang (1981) 107 Mich App 91, 309 NW2d 575, app den 419 Mich 875, despite the assertion of the malpractice plaintiff that her decedent was unable to understand the ramifications of the agreement. Although the agreement conformed to the statutory requirements, observed the court, the malpractice plaintiff argued that many aspects of the statute were not revealed to the patient when the agreement was signed, for example, that informal rules of evidence are followed at arbitration proceedings. The court said, however, that this provision, as well as the remaining procedural steps outlined in the statute which were not expressed in the form agreement, did not result in the relinquishment of a constitutional right, and the only constitutional right relinquished by signing the agreement was a right to a trial before a court of law. The form signed by the patient stated that the signer understood that there was a choice of trial by judge or jury, or of arbitration, and explained the arbitration procedure as decision by a panel, and stated that the signer freely chose arbitration, observed the court. There was no evidence that the patient was induced to sign the agreement by fraud or that she was unable to understand it, the court continued, for the language was plain, and there was no support for
the allegation of a nonconsensual waiver of a constitutional right.


Presuming that the malpractice plaintiff's decedent read the terms of an arbitration agreement between herself and the hospital which conformed to statutory requirements before signing it, said the court in Cushman v Frankel (1981) 111 Mich App 604, 314 NW2d 705, app den 419 Mich 875, it was a knowing waiver of the constitutional right to the trial of any dispute before a court provided by Mich Const art 1, § 14 (1963). The agreement stated that the signer understood the choice under law between trial by judge or jury, and arbitration, explained what an arbitration procedure was, and further stated that arbitration was freely chosen, certifying that the signer had read the agreement or had it read to him or her, understood its contents, and executed it of his or her own free will. The agreement also stated that the person executing it had received a complete copy of the booklet explaining the agreement, and the contention that the patient made an unknowing waiver of constitutional rights was not merited, the court concluded.

The trial court did not err in granting a motion to compel arbitration of the patient's malpractice claim, the court held in Harte v Sinai Hospital of Detroit (1985) 144 Mich App 659, 375 NW2d 782 (disagreed with on other grounds by Villarreal v Chun, 199 Mich App 120, 501 NW2d 227), upholding the validity of an agreement to arbitrate such claims which conformed to statutory requirements and stating that there was no issue regarding the validity of her consent. The patient asserted that she did not knowingly, voluntarily, and intelligently waive her and her son's constitutional rights to court access and a jury trial. The court noted that the patient had the burden of persuasion in showing an invalid waiver, since the arbitration agreement and the information booklet given to her clearly indicated that arbitration was an alternative to trial by jury.[FN44] The plaintiff did not allege any noncompliance with the statutory requirements, said the court, and therefore the agreements to arbitrate were presumed valid under Mich Comp Laws § 600.5041(7). The plaintiff read the agreement and the booklet, consulted her brother, an attorney, about its contents, and no factual issue was raised concerning whether she understood the contents of the agreement, the court concluded.

CUMULATIVE SUPPLEMENT

Cases:

Patient's physician was not a third–party beneficiary of the patient's contract with her medical benefit plan, and thus the failure of the plan's disclosure brochure to mention arbitration did not invalidate the patient's arbitration contract with the physician under the Knox–Keene Health Care Services Plan Act, where the physician was neither an agent nor an employee of the plan but an independent contractor twice removed—that is, an independent contractor of an independent contractor of the plan. West's Ann. Cal. Health & Safety Code §§ 1342, 1363(a)(10). Hollister v. Benzl, 71 Cal. App. 4th 582, 83 Cal. Rptr. 2d 903 (4th Dist. 1999), review denied, (July 28, 1999).

Agreement between HMO and patient for medical services, containing provision for binding arbitration, must comply with Heath Care Availability Act requirements to be enforceable by individual health care providers in medical malpractice action. Colorado Permanente Medical Group, P.C. v. Evans, 926 P.2d 1218 (Colo. 1996), reh'g denied, (Dec. 9, 1996).

§ 18. Patient's alleged failure to read or understand agreement

The courts upheld the validity of agreements to arbitrate medical malpractice claims which conformed to the requirements of a statute governing medical malpractice arbitration contracts in the following cases, in which patients contended that they had not read or understood the agreement.

See Ramirez v Superior Court of Santa Clara County (1980, 1st Dist) 103 Cal App 3d 746, 163 Cal Rptr 223, §
6[b], in which the court held that the trial court must make a factual ruling on the question whether a person signing an agreement to arbitrate medical malpractice claims actually knew or reasonably should have known that he or she was waiving jury trial rights and agreeing to arbitrate any medical malpractice controversy, in the case of a patient who contended that she did not read the agreement and did not know what she was signing.

In Bolanos v Khalatian (1991, 2nd Dist) 231 Cal App 3d 1586, 283 Cal Rptr 209, 91 CDOS 5504, 91 Daily Journal DAR 8439, the court upheld a contract to arbitrate against the patient's contention that she had not read or understood the arbitration agreement, which conformed to statutory requirements, reversing the denial of a physician's motion to compel arbitration of a mother's malpractice action against him, joined by causes of action belonging to the father and the child for injuries incurred by the child during delivery. The patient had visited the doctor for obstetric care and treatment, and at her initial visit, she was given a physician–patient arbitration agreement in Spanish, since she did not read English. She signed and dated the agreement, which conformed to statutory requirements under California Civ Proc Code § 1295 (Deering) that it include certain language and a warning in 10–point boldfaced red type to the effect that the agreement relinquished the right to a jury trial. The patient submitted an affidavit stating that she read Spanish only with difficulty and that the document was not explained to her at the doctor's office. The court noted that since the arbitration agreement complied with the statutory requirements, as a matter of public policy it was not a contract of adhesion, nor unconscionable, nor otherwise improper, under California Civ Proc Code § 1295(e) (Deering), and therefore the general rule that one who signed an agreement could not avoid its terms on the ground of failure to read it was applicable. The patient's declaration did not say that she could not read or understand the agreement, the court observed, she offered no evidence that she was forced or tricked into signing it, and there was no suggestion that her physical condition required immediate medical attention or that she involuntarily signed the documents in order to receive urgent medical treatment.

In Michaelis v Schori (1993, 2nd Dist) 20 Cal App 4th 133, 24 Cal Rptr 2d 380, 93 CDOS 8650, 93 Daily Journal DAR 14683, review den (Cal) 1994 Cal LEXIS 548, the court, in a footnote, rejected any contention that the malpractice plaintiff, who had signed a medical malpractice arbitration agreement when she was a pregnant minor, was not bound by the contract because she did not realize what she was signing. By the terms of the governing statute, California Civ Proc Code § 1295(e) (Deering), the agreement was not one of adhesion, said the court, and therefore the general rule, that one who signs a contract cannot avoid its terms on the ground of failure to read it, applied.

In Ciaccio v Cazayoux (1987, La App 1st Cir) 519 So 2d 799, the court held that a patient was bound by a signed agreement to arbitrate disputes arising out of claims based on negligence or medical malpractice with the obstetricians she consulted during her pregnancy, in spite of her testimony that she thought her treatment was conditioned on signing it, that she thought it meant she could not sue the doctors, and that she was unaware of her right to revoke it. There was a legislative policy favoring arbitration, said the court, and the legislature had amended the arbitration law specifically to include arbitration of disputes connected with medical or dental contracts. The statute, La Rev Stat Ann § 9:4230–9:4236, provided that a voluntary agreement was valid and enforceable, and that the patient must be informed in writing of the right to revoke the agreement within 30 days, the method of revocation, and that acts of negligence occurring before revocation were subject to the agreement. Courts are bound to give legal effect to all written contracts according to the intent of the parties, to be determined by the words of the contract, when these are clear, explicit, and lead to no absurd consequences, said the court, and a person who signs a written instrument cannot avoid its obligations by contending that he did not read it, that it was not explained, or that he did not understand it. The patient was a high school graduate, the court continued, who testified that she had no trouble reading and understanding what she read, and that she never communicated a desire to revoke the agreement, because she was unaware of her right to revoke. However, the agreement clearly reflected the patient's right and the procedure for revocation, as required by the statute, the court pointed out, and under those circumstances, she was bound by the agreement to submit her claims for the wrongful death of her premature twins to arbitration.

Although remanded on other grounds (see § 21), the court held in Horn v Cooke (1982) 118 Mich App 740, 325 NW2d 558, that there was no issue as to the validity of a patient's consent to an arbitration agreement, executed before surgery, which conformed to statutory requirements, although she might have been incapable of reading it, when she had had the opportunity to have the agreement read to her. She contended that she was unable to understand the nature and consequences of the arbitration agreement due to her limited ability to read, her fears regarding the surgery, and the failure of the defendants to explain the agreement to her. The court noted that the
right to a trial waived by the plaintiff in the agreement was clearly and unambiguously stated, and that the agreement recited that the signatory had read or had read to her the agreement and fully understood its contents. The patient had contemplated the surgery for some time, had undergone a similar operation approximately 1 month before, and had signed another agreement to arbitrate at that time, said the court. She had ample time to consider the agreement and its ramifications away from the hospital environment, and had had the opportunity of twice having the agreement read to her before she signed it. These safeguards were sufficient to find that the patient had knowingly waived the right to trial, the court concluded, and the semiliterate status of the plaintiff did not allow her to avoid the agreement because of her own negligence in signing a document without learning of its contents. The court rejected the argument that the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., had established an "inherently oppressive" arbitration scheme that could never result in a laymen's knowing and voluntary waiver of the right to trial. The act provided a number of safeguards to insure that the execution of all agreements resulted in a knowing and voluntary waiver, said the court, including a statement in a 12–point type that the patient need not agree to arbitrate, a prohibition against offering the agreement at the time the patient was undergoing emergency treatment, and a provision that allowed a patient to withdraw from the agreement within 60 days of discharge from the hospital. The court specifically disagreed with the decision of the court in Moore v Fragatos (1982) 116 Mich App 179, 321 NW2d 781 (disapproved by McKinstry v Valley Obstetrics-Gynecology Clinic, P.C., 428 Mich 167, 405 NW2d 88), that the hospital was required to provide additional information about the arbitration process in order to obtain a valid waiver of the right to jury trial in an arbitration agreement, pointing out that much of the information required by the court in that case was contained within the patient information booklet required to be furnished to all patients under Mich Comp Laws § 600.5041(6).

Generally, a failure to read a written contract did not require rescission of the contract unless other facts indicated fraud or deception, the court held in Feinberg v Straith Clinic (1986) 151 Mich App 204, 390 NW2d 697, app den 428 Mich 906, rejecting the plaintiff's contention that an arbitration agreement conforming to statutory requirements was ineffective in the absence of a voluntary, knowing, and intelligent waiver of his constitutional rights. The trial court had found that the malpractice plaintiff had failed to read medical malpractice arbitration agreements before signing them, but the court observed that whether the strict standard of requiring a voluntary, knowing, and intelligent waiver applied in the civil law had not been resolved by the United States Supreme Court, and concluded that such a result was not warranted. The United States Constitution, Amend VII, has been construed to permit the waiver of a jury trial in a civil case unless demanded, the court continued, and such a waiver could not be characterized as a knowing and intelligent one, although it could be characterized as "voluntary," which included the concept of implied consent or waiver. Although the court noted that it was not bound by the Seventh Amendment to the United States Constitution, it said there was no reason to construe Mich Const art I, § 14 (1963), differently from its federal counterpart. Both provisions were intended to preserve the right to a civil jury trial as it existed at common law, said the court, and to interpret the state provision as allowing a lesser standard than the Federal Constitution would pave the way for forum shopping by nonresident plaintiffs. The legislature has provided safeguards to insure the fairness of the arbitration agreements and of the arbitration process, the court continued, and the arbitration agreement signed by the malpractice plaintiff in this case complied with the statute, the form was approved by the commissioner of insurance, and it was boldly labeled "arbitration agreement." In such a context, the court decided, a standard for waiver requiring voluntariness sufficiently accommodated the various interests involved. The malpractice plaintiff had the ability and opportunity to read the arbitration agreements, and although he was somewhat nervous, he was also somewhat nonchalant or careless about the admission procedure because his wife and her friend had undergone successful cosmetic surgery through the same clinic, said the court. Under the "voluntary" standard, there was some room for application of a concept of constructive notice, the court concluded, and although he may not have been knowledgeable of the consequences of signing the arbitration agreement, his choice to do so was voluntary.

However, in Aluia v Harrison Community Hospital (1984) 139 Mich App 742, 362 NW2d 783 (disapproved by McKinstry v Valley Obstetrics-Gynecology Clinic, P.C., 428 Mich 167, 405 NW2d 88), although the case was disapproved because of the standard of consent espoused by the court (see § 6[a]), the court said that the trial court erred in finding a valid consent to an agreement to arbitrate medical malpractice claims executed by a patient who spoke very little English, whose son's affidavit, uncontradicted by the affidavit of the hospital admissions clerk, was to the effect that he did not fully understand the explanation given to him by the clerk, and therefore could not adequately translate and convey the information to his mother. An issue of material fact was created as to whether
the deceased patient validly waived her right to a jury trial, said the court. The clerk's affidavit stated merely that she had told the son that arbitration must be offered by the hospital, and that the agreement could be canceled, observed the court, and there was no evidence that the full agreement was explained.

§ 19. Allegations of fraud, mistake, misrepresentation, or coercion, generally

[Cumulative Supplement]

In the following cases the courts held that allegations of fraud, mistake, misrepresentation, or coercion were not established by malpractice plaintiffs seeking to assert the invalidity of an agreement to arbitrate medical malpractice claims which conformed to statutory requirements.

In Guertin v Marrella, the companion case to McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88, more fully reported in § 23[a], the court rejected the contention that an agreement to arbitrate medical malpractice claims should be set aside because the standard explanation given by the hospital admissions clerk was misleading. The clerk had testified that she informed patients to the effect that even if they signed the agreement and did not "renege" within 60 days, they could still sue the hospital in a court of law and still have the right to a jury "if the arbitration agreement [sic] was in [their] favor." The court acknowledged that the explanation was inaccurate and misleading, but pointed out that there was no evidence to suggest that the patient signed the agreement in reliance on the representations, nor even that they were a contributing influence upon his decision to sign the agreement. The patient, moreover, had submitted an affidavit swearing that the arbitration agreement was simply presented for signature without any explanation, and although he gave several reasons for signing the document in his testimony, none of them related to the explanation given by the hospital admitting clerk, the court concluded.

The court rejected a claim of fraudulent inducement to execute an agreement to arbitrate medical malpractice claims by a patient who brought actions against a hospital and independent staff doctors for alleged negligence in the delivery of her child in Harte v Sinai Hospital of Detroit (1985) 144 Mich App 659, 375 NW2d 782 (disagreed with on other grounds by Villarreal v Chun, 199 Mich App 120, 501 NW2d 227). The patient alleged that the hospital acted fraudulently in sending her the agreements to arbitrate 3 days after her discharge, because the hospital had full knowledge of the circumstances of the child's delivery and did not inform her of the malpractice that had taken place. However, the court determined that the patient had alleged no misrepresentation or omission made by the hospital or its employees with the intention of inducing her to agree to arbitrate, and therefore there were no facts to support a finding that the agreements could be set aside as fraudulently induced.

In Crown v Shafadeh (1986) 157 Mich App 177, 403 NW2d 465, more fully reported in § 35, the court rejected the minor plaintiff's claim that an agreement to arbitrate executed by her mother on her behalf was induced by fraud, stating that the mother's deposition testimony refuted her claim of fraudulent inducement, apparently referring to the testimony concerning the circumstances surrounding the execution of the agreement.

CUMULATIVE SUPPLEMENT

Cases:

Evidence supported claim, asserted as defense to petition of health maintenance organization (HMO) to compel arbitration of malpractice complaint, that HMO fraudulently induced plan participant to enter arbitration agreement; arbitration agreement called for appointment of neutral arbitrator within 60 days of filing of claim, even though such timely appointment had occurred in only one percent of cases during previous years, and claimants presented evidence that 144 day period between initial presentation of claim and agreement on neutral arbitrator resulted from delays attributable to HMO. West's Ann.Cal.C.C.P. §§ 1281.2, 1290.2. Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903, 21 Employee Benefits Cas. (BNA) 1407 (1997), as modified, (July 30, 1997).

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§ 20. Patient in pain at time of execution

A patient who was in pain at the time of execution of an agreement to arbitrate medical malpractice claims conforming to statutory requirements did not give a valid consent, the court held in the following case.

But see Coon v Nicola (1993, 5th Dist) 17 Cal App 4th 1225, 21 Cal Rptr 2d 846, 93 CDOS 6059, 93 Daily Journal DAR 10331, § 10[b], in which the court held, inter alia, that a patient's affidavit that he was taking pain medication which made him sleepy at the time he executed an agreement to arbitrate both existing and prospective medical malpractice claims did not establish that the parties were of grossly unequal bargaining power so as to render the contract adhesive.

See Pipper v Di Musto (1979) 88 Mich App 743, 279 NW2d 542, § 30, in which the court, holding that the question, whether the hospital offered a patient the option to arbitrate by agreement after or before her emergency care was completed, required an evidentiary hearing, stated that it was also necessary to receive evidence on the patient's contention that at the time it was signed she was experiencing uterine bleeding and abdominal pain.

In Moore v Fragatos (1982) 116 Mich App 179, 321 NW2d 781, held that the trial court erred in finding that a malpractice plaintiff knowingly and voluntarily signed an agreement to arbitrate medical malpractice claims, because, inter alia, he was in pain at the time of its execution. Even if the patient knew and understood the nature of the agreement he had executed, said the court, his waiver of the right to a jury trial was nevertheless involuntary as a matter of law because when he was asked to sign the agreement at the time of his admission to the hospital, the uncontroverted evidence showed that he was in considerable pain, and the defendants made no effort to preserve an accurate record of the circumstances surrounding the execution of the agreement. Rejecting the contention that the existence of a 60–day revocation period could validate a waiver ineffective when executed, the court also said that the statutory presumption of the validity of a conforming agreement could not be regarded as conclusive.

§ 21. Necessity of hearing

The courts held in the following cases that a hearing was necessary to determine whether a malpractice plaintiff's allegations of fraud, misrepresentation, or coercion rendered an agreement to arbitrate medical malpractice claims conforming to statutory requirements invalid.

The trial court must conduct a full hearing and take testimony, the court held in Capman v Harper-Grace Hospital (1980) 96 Mich App 510, 294 NW2d 205, when the patient's parol representations raised a legitimate defense of coercion to an agreement to arbitrate medical malpractice claims, but was unsupported except by assertions of the patient's counsel. The patient contended that the hospital preconditioned her health care upon her signing the arbitration agreement, observed the court, although the agreement contained an explicit statement that it was not a prerequisite to health care or treatment and could be revoked within 60 days after discharge. Pointing out that a presumption of validity applied to the agreement under Mich Comp Laws § 600.5042(8), the court said that the plaintiff then had the burden of coming forward with evidence to rebut or meet the presumption. When no ambiguity exists in a written contract, parol evidence inconsistent with the written terms of the contract is inadmissible, the court explained, but when it is offered to show that the written contract was void or not binding, a hearing was necessary in order to determine the facts at the time the agreement was executed.

In Horn v Cooke (1982) 118 Mich App 740, 325 NW2d 558, the court remanded to permit the trial court to take additional testimony on the question whether the malpractice plaintiff was induced to sign the arbitration agreement by misinformation or fraud. The patient contended that her consent to arbitrate had been obtained by a fraudulent misrepresentation as to the scope of the surgery to be performed. If this misinformation was in fact given with the intention of inducing her to agree to arbitrate and was relied upon by her, the agreement may be set aside as having been fraudulently obtained, said the court. The determination of whether an arbitration contract exists was for the courts to decide applying general contract principles, the court observed, and when a signature to an arbitration agreement is obtained by coercion, the agreement, like any other contract, is void or at least voidable due to duress.
The court rejected the argument that no fraud could be shown because the agreement did not involve a violation of the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., concluding that if the trial court found that it was induced by fraudulent misrepresentation, the agreement should be voided.

§ 22. Burden of proof

The burden of proof was on a malpractice plaintiff asserting the invalidity of an agreement to arbitrate medical malpractice claims which conformed to statutory requirements, on the ground of coercion or constructive fraud, the court held in the following case.

Stating that the burden of avoiding agreements to arbitrate medical malpractice claims on the ground of coercion or fraud in the inducement, as with other contracts, rested with those who desired to avoid them, the court held in Morris v Metriyakool (1984) 418 Mich 423, 344 NW2d 736, that malpractice plaintiffs had the burden of proving that the defendants were guilty of constructive fraud or coercion in inducing them to sign the agreements. The plaintiffs argued that because the agreements waived the constitutional right to a jury trial and access to court, the burden should be on the defendants to show a voluntary, knowing, and intelligent waiver. The Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5041(7) and 600.5042(8), provided that an agreement which conformed to the statutory requirements should be presumed valid, the court pointed out, and the burden of proving a ground for rescinding or invalidating a contract is not altered merely because the contract entailed eschewal of constitutional rights.

F. Alleged Failure to Conform to Statutory Requirements

§ 23[a] Failure to provide information booklet or copy of agreement—Held valid

[Cumulative Supplement]

In the following cases, the courts held that malpractice plaintiffs had failed to establish the invalidity of an agreement to arbitrate medical malpractice claims conforming to statutory requirements based on the alleged failure of the health care provider to provide an information booklet or a copy of the agreement.

In McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88, the court held that there was sufficient evidence to support the trial court's judgment that a pregnant patient had executed a valid agreement to arbitrate her malpractice claim, and she failed to establish that she had not received the required informational booklet. After holding that the effect of the presumption of validity of an arbitration agreement which complied with the statutory requirements was to shift the burden of going forward with the evidence to the person challenging its validity (§ 6[a]), the court noted that the patient had gone to the hospital for a routine stress test, ordered by her doctor, during her pregnancy and was afterwards admitted to the hospital because of the results of her blood test. At the evidentiary hearing she conceded that her signature was on the arbitration agreement, that she was a high school graduate, and had previously executed arbitration agreements in connection with medical treatment. Nonetheless, the court emphasized, she claimed that on that hospitalization, and that one only, she did not receive the brochure explaining the arbitration agreements and did not understand or remember signing them. Although the admitting clerk could not recall the admission of the patient, she testified that the normal admitting procedure included offering the arbitration agreement with an explanation of its contents, advising each patient who signed the agreement that he or she would have 60 days to change his or her mind, and providing each patient with a copy of the booklet and the agreement. The court rejected the contention that the plaintiff was treated in an emergency situation, pointing out that she had testified that other than being upset over the welfare of the child, she was in her faculties and not physically ill. Given the defendant's prima facie showing of compliance with the statute, and the plaintiff's failure to rebut the presumption, the validity of the arbitration agreement was established, the court concluded. In a companion case, Guertin v Marrella, the court also held that the trial court did not clearly err in placing the burden of going forward with the evidence on the malpractice plaintiff who wished to assert the invalidity of an arbitration agreement which conformed to the statutory requirements, and in concluding that the evidence was insufficient to establish the agreement's invalidity. The hospital admitting clerk testified that it was her normal procedure to supply each patient with an arbitration brochure on admission, that she followed that procedure
with every patient and could recall no exception, although she could not recall the admission of the particular patient at issue. The patient asserted that he had never received an informational booklet explaining the arbitration agreement and that, at the time he signed it, it was simply presented to him with no explanation. Although he specifically recalled not getting a copy of the booklet, the court pointed out, he could not remember the date of his admission, how old he was on the date of admission, who admitted him or even the sex of the individual who admitted him, and he also testified that it was his common practice to read materials provided to him and that he was a high school graduate able to read and write.

The trial court did not err in granting accelerated judgment to malpractice defendants based on evidence that the requirements of the Medical Malpractice Arbitration Act had been met, the court held in Kunath v Sinai Hospital of Detroit (1986) 149 Mich App 32, 385 NW2d 715 (disagreed with on other grounds by Hendrickson v Moghissi, 158 Mich App 290, 404 NW2d 728), despite the patient's testimony that she did not know what she had signed and did not receive a booklet or any other information to explain arbitration. The office assistant, while having no independent recollection of the patient, testified that it was her habit to ask an incoming patient to read the arbitration agreement, to determine whether the patient was familiar with the agreement, and if the patient were not, then to explain it, and finally to give an explanatory booklet with the agreement form without regard to whether the patient executed the agreement. The trial court's factual determination was not clearly erroneous in light of the habit testimony, the court explained, which the trial court apparently found to be the more credible evidence, and the plaintiff had failed to carry her burden of proof.[FN47]

In Feinberg v Straith Clinic (1986) 151 Mich App 204, 390 NW2d 697, app den 428 Mich 906, the court, upholding the validity of an agreement to arbitrate medical malpractice claims between a cosmetic surgery patient and a clinic, held that the trial court correctly found that the patient had not carried his burden of proof to establish that he had not received the booklet which was supposed to accompany the agreement.[FN48] The trial court had to discount a great deal of the testimony of both the patient and the clinic's representative in terms of the circumstances surrounding his signing of the agreement, the court pointed out.

The trial court correctly found that a patient had signed a valid agreement to arbitrate her malpractice claim, the court held in Hendrickson v Moghissi (1987) 158 Mich App 290, 404 NW2d 728, although the patient contended that she had never received the information brochure required by Mich Comp Laws § 600.5041(6) to be given her in conjunction with the offer to arbitrate. At the evidentiary hearing on the circumstances surrounding the signing of the agreement, the hospital presented the testimony of the employee who had signed the admitting form, who testified that although she had no independent recollection of the patient, it was the habit of the receptionist in her office to provide the patient with a copy of the information brochure along with some forms to be filled out in the reception room, and the admitting interviewer would routinely refer to the brochure when presenting the arbitration agreement for the patient's signature. The conclusion of the trial court that the patient had been provided with the required information brochure was not clearly erroneous, said the court, and it properly relied upon habit testimony in support of its conclusion.

CUMULATIVE SUPPLEMENT

Cases:

Under Ohio law, failure of seller of manufactured home to provide buyers with copy of rules of American Arbitration Association (AAA) did not invalidate buyers' consent to arbitration clause in purchase agreement, even though clause provided that arbitration would take place pursuant to AAA rules. Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910 (N.D. Ohio 2003) (applying Ohio law).

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[END OF SUPPLEMENT]

§ 23[b] Failure to provide information booklet or copy of agreement—Held not valid
The courts held in the following cases that the failure of a health care provider to provide an information booklet or a copy of the agreement as required by statute rendered an agreement to arbitrate medical malpractice claims invalid.

The trial court's finding that an agreement to arbitrate executed by a patient on her admission to the hospital was presented in conformance with the statutory requirement to supply an informational brochure was not supported by the evidence, the court held in Ewald v Pontiac General Hospital (1982) 121 Mich App 793, 329 NW2d 495, and no valid arbitration agreement was formed. The court said that compliance with Mich Comp Laws § 600.5041(6), which required that the patient be furnished with an informational brochure at the time of the execution of the agreement, was crucial to the creation of a valid agreement. The patient denied that she was given the brochure, and the hospital admitting clerk did not contradict her, having no recollection of the specific event, said the court. Moreover, the clerk admitted that informational brochures were given out only if the patient stated that she was unaware of arbitration or did not sign the requested form, the court observed, and the obviously incorrect criteria for dispensing the brochures gave little support to the trial court's finding that the statute was followed. In spite of strong public policy favoring arbitration, an arbitration agreement cannot be legally valid unless it is in strict compliance with the arbitration statute, concluded the court.

In Osborne v Arrington (1986) 152 Mich App 676, 394 NW2d 67, more fully reported in § 49[b], the court, after holding that a mentally retarded minor was not entitled to the tolling of the 60–day revocation period applicable to an agreement to arbitrate medical malpractice claims executed by a parent on his behalf, remanded for a determination of whether the health care provider had failed to supply the information brochure required by statute, stating that the failure, if proven, would result in an unenforceable agreement.

The finding that the hospital had provided a patient with a booklet explaining an agreement to arbitrate medical malpractice claims that he was asked to execute was clearly erroneous, the court held in McKain v Moore (1988) 172 Mich App 243, 431 NW2d 470, when the hospital representative's credibility with regard to the items supplied to the patient was impaired by the patient's copy of the arbitration agreement. The hospital was entitled to rely on evidence of habit or routine used by its employees in admitting its patient in order to go forward with their burden of establishing a prima facie case that the agreement was valid, said the court. Based on the testimony of the control clerk for the emergency department on the date of the patient's treatment, concerning the custom and habit of providing each patient with an information booklet and giving patients treated in the emergency room an arbitration agreement only after treatment had been rendered, the court decided that the hospital carried its burden and the agreement was presumed valid. However, the credibility of the clerk's testimony that the patient was given the yellow copy of the agreement only after the clerk had signed the agreement and added the date and time was severely damaged by the introduction of the patient's yellow copy of the arbitration agreement, observed the court, which did not bear the clerk's signature, the date, or the time. While the hospital's copy did bear this information, the clerk did not follow her usual custom and habit on the day the patient was admitted, and she admitted as much to the trial court, so that a finding that the patient was provided with a booklet on those facts was clearly erroneous, the court concluded, reversing the order to compel arbitration.

§ 24. Necessity of hearing

A hearing was necessary in order to determine whether a health care provider had failed to provide an information booklet or a copy of an agreement required by statute to establish the validity of an agreement to arbitrate medical malpractice claims, the courts held in the following cases.

Agreeing with a malpractice plaintiff that an arbitration agreement cannot be legally valid unless it is in strict conformance with the arbitration statute, the court in Rome v Sinai Hospital of Detroit (1982) 112 Mich App 387, 316 NW2d 428, app den 419 Mich 875, remanded to the trial court for an evidentiary hearing on whether the plaintiff received any explanation or information about the agreement at the time she executed it, or received the informational brochure and a duplicate copy of the original agreement as required by statute. The plaintiff's affidavit as to the circumstances surrounding the execution of the agreement was contradicted by an affidavit of the hospital employee which stated that, in accordance with routine practice in carrying out her duties, she explained the arbitration agreement to the patient, gave her a copy of the agreement and a brochure explaining it, advised her that
her signature was not required, and that if she did sign, there was a 60-day revocation period. The plaintiff did not deny the existence of a signed arbitration agreement form, said the court, but since the statute providing for arbitration agreements in medical malpractice actions was in derogation of the common law, the remand and hearing were necessary to insure that strict compliance with the act had been observed.

Although disposing of the case before reaching the issue, in McCloy v Dorfman (1983) 123 Mich App 710, 333 NW2d 338, vacated on other grounds 419 Mich 874, 347 NW2d 700, the court stated that when there was clearly a factual dispute regarding whether a malpractice plaintiff had received an information brochure and a copy of the agreement she allegedly signed providing for the arbitration of medical malpractice claims, it was necessary to remand the case for an evidentiary hearing to resolve the dispute. The court expressed the opinion that an arbitration agreement between a patient and a health care provider was unenforceable if the patient did not receive the information brochure and a copy of the executed contract. The court also stated, in rejecting another issue raised by the malpractice plaintiff, that it was well settled that one who signed a contract could not be heard to say, when enforcement is sought, that he or she did not read it or thought its terms were different, unless there was a showing of fraud or mutual mistake.

Reversing the trial court's order to compel arbitration, made after argument on the defendant's motion to dismiss, in Roberts v McNamara-Warren Community Hospital (1984) 138 Mich App 691, 360 NW2d 279 (disapproved by McKinstry v Valley Obstetrics–Gynecology Clinic, P.C., 428 Mich 167, 405 NW2d 88), the court remanded for an evidentiary hearing to ascertain the circumstances surrounding the signing of an arbitration agreement between a malpractice plaintiff and a hospital. The plaintiff contended that neither she nor her mother was provided with the information brochure required under the Medical Malpractice Arbitration Act, Mich Comp Laws § 600.5041(6). Arbitration agreements under the Act were not legally enforceable unless obtained in strict compliance with the requirements of the statute, said the court, and failure to supply the patient with a copy of the brochure would result in an unenforceable agreement.

§ 25. Incorrect type size

[Cumulative Supplement]

An agreement to arbitrate medical malpractice claims was not rendered invalid by the use of an incorrect type size for the required statutory advisements, the court held in the following case.

Although reversing summary disposition of the plaintiff's malpractice claim on other grounds, the court said that the trial court did not err in upholding the validity of an arbitration agreement in which a specified sentence was not in 12–point type, as required by statute, in Haywood v Fowler (1991) 190 Mich App 253, 475 NW2d 458, app den 439 Mich 930, 479 NW2d 693. Under Mich Comp Laws § 600.5042(4), the agreement was required to contain the statement, that it was not a prerequisite to health care or treatment and could be revoked within 60 days after discharge of the patient, in 12–point boldface type immediately above the space for signature of the parties, observed the court. The plaintiff submitted an affidavit from an alleged printing expert who had measured the type and determined that it was only 9–point type, said the court, the difference being approximately half an inch. Although an arbitration agreement cannot be legally valid unless it is in strict compliance with the arbitration statute, said the court, interpreting the term "strict compliance" is similar to interpreting "strict construction" of a statute, and the spirit and purpose of a statute prevailed over the strict letter. Pointing out that the statement in the agreement was much larger than the other type on the page, was in boldfaced type and capital letters, the court said it was very noticeable and thus fulfilled the legislative purpose behind the statutory requirement and was in strict compliance with it. A finding to the contrary would require that even a much larger type, if used, would not strictly comply with the statute either even though it would presumably be more noticeable, said the court.

CUMULATIVE SUPPLEMENT

Cases:

Disclosure of binding arbitration in health insurance provider's enrollment form did not stand out and was not readily noticeable as required by statute; disclosure was printed in same font as most of form and disclosure heading
appeared to be in faint boldface type, disclosure was second of two single-spaced paragraphs of small, condensed type, neither disclosure nor preceding paragraph was indented, and disclosure was not bolded, underlined, or italicized. West's Ann. Cal. Health & Safety Code § 1363.1. Zembsch v. Superior Court, 146 Cal. App. 4th 153, 53 Cal. Rptr. 3d 69 (1st Dist. 2006), as modified, (Jan. 11, 2007) and review denied, (Mar. 28, 2007).

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[END OF SUPPLEMENT]

§ 26. Incorrect revocation period

An incorrect revocation period contained in an agreement to arbitrate medical malpractice claims rendered the agreement invalid, the court held in the following case.

An arbitration agreement under the Medical Malpractice Arbitration Act cannot be legally valid unless it is in strict compliance with the arbitration statute, the court held in Brintley v Hutzel Hosp. (1989) 181 Mich App 566, 450 NW2d 79, app den 435 Mich 855, affirming the judgment of the trial court that an arbitration agreement was invalid on its face because it provided that it could be revoked within 60 days after execution rather than within 60 days after discharge as required by the statute. The defendant argued that the noncompliance was merely technical, but the court said that when an agreement fails strictly to comply with the statutory language, it is not binding, and the party pleading the existence of an arbitration agreement bears the burden of establishing that it was executed in strict compliance with the statute. Mich Comp Laws § 5042(4) provided that the agreement "shall contain the following provision in 12–point bold–face type…. may be revoked within 60 days after discharge by notification in writing." A party must show compliance with this requirement to establish that the arbitration agreement conforms to the statute, said the court, and since it was not in strict compliance, there was no error in finding the agreement invalid per se, the court concluded.

§ 27. Time of presentation of agreement or information booklet

Patients who received an arbitration agreement, or the information booklet required by a statute governing agreements to arbitrate medical malpractice claims, at a time different from that specified in the statute were, under the circumstances, bound by their contracts, the courts held in the following cases.

In Harte v Sinai Hospital of Detroit (1985) 144 Mich App 659, 375 NW2d 782 (disagreed with on other grounds by Villarreal v Chun, 199 Mich App 120, 501 NW2d 227), the court held that agreements to arbitrate medical malpractice claims applied to a patient's action in connection with the birth of her son, even though she was sent the agreements and signed them after her discharge from the hospital. Liberal construction of the scope of an arbitration agreement was appropriate, said the court, and the agreement stated that it would apply to claims "which may arise in the future out of or in connection with the health care rendered to me during this hospital stay…. by this hospital…. and those of its independent doctors who have agreed to arbitrate." The language of the agreement referred to “this hospital stay,” observed the court, and the patient testified that she went to the hospital only once and understood that the agreement related back to her hospital stay.

A hospital's procedure in presenting the information brochure relating to an arbitration agreement prior to execution of the agreement did not violate the Medical Malpractice Arbitration Act's requirement, the court held in Mariani v Holloway (1986) 157 Mich App 570, 403 NW2d 463, app den 428 Mich 870. Under Mich Comp Laws § 600.5041(6), the form of the agreement must be accompanied by an information brochure which should be furnished to the person receiving health care at the time of execution, observed the court. The evidence showed that the receptionist at the hospital handed the patient an anesthetic checklist and the arbitration information brochure at the same time, and although the patient was free to read the brochure at her discretion, she was required to fill out the checklist immediately in order to meet with the anesthesiologist to discuss the impending surgical procedure. The admitting clerk then asked the patient to sign the arbitration agreement, without pointing out that the information brochure received earlier explained the effect of her signature, 5 to 20 minutes having elapsed from the time the patient was furnished the information brochure until she signed the arbitration agreement. The court adopted the
reasoning of another panel in Stefani v Bhagat (1986) 149 Mich App 431, 386 NW2d 203, app den 426 Mich 856, § 28, in which the plaintiff was furnished the information brochure upon her arrival at the hospital, some 4 hours prior to emergency treatment, but received the arbitration agreement after the treatment was administered in compliance with Mich Comp Laws § 600.5042(1). This complied with the legislature's intent, said the court, noting that the typically inevitable waiting time can be used constructively by patients to educate themselves about the arbitration procedure and its significance, and that this additional time to digest the information could only further the statute's purpose. Pointing out that emergency health care provided by a hospital was treated somewhat differently in that the arbitration agreements must be offered after the emergency care, the court said that this factor did not distinguish the case. Neither did the rationale depend on whether a patient actually used the additional time to become familiar with the information, although that may relate to a patient's understanding of the agreement, said the court. Observing that the time period separating the presentation of the brochure and the execution of the agreement in the previous case was 4 hours, the court concluded that the shorter time period did not violate the statute and the arbitration agreement was enforceable.

§ 28. Compliance with emergency treatment procedures, generally

The court held in the following case that the presentation of the information booklet, required by statute to be presented to a patient asked to execute an agreement to arbitrate medical malpractice claims sufficiently, complied with the procedure specified in the statute for persons receiving emergency treatment.

In Stefani v Bhagat (1986) 149 Mich App 431, 386 NW2d 203, app den 426 Mich 856, the court held that it was sufficient compliance with the Medical Malpractice Arbitration Act to provide a patient with a brochure explaining the arbitration agreement prior to the time she received treatment, after which she was offered the agreement for execution. The patient was provided with the explanatory brochure required by Mich Comp Laws § 600.5041(6) when she first arrived at the hospital seeking emergency treatment, and was offered the agreement itself some 4 hours later, after treatment was completed, while the statute provided that the brochure be given to the person receiving health care at the time of execution of the agreement. The patient argued that there should be a narrow construction of that language and that since she was not provided with a brochure at the same time as she was offered the agreement for signature, the trial court's order compelling arbitration in her medical malpractice action should be reversed. The court acknowledged that there was authority that arbitration agreements under the statute were not legally enforceable unless obtained in strict compliance with requirements of the statute. However, said the court, by supplying the patient with the information booklet upon her arrival at the hospital, there was compliance with the statute, which must be construed in light of the general purpose sought to be accomplished. When the information booklet is furnished to the patient at the same time the arbitration agreement is presented, there was a possibility that the patient would feel too pressured to read the booklet carefully and to take the time to consider fully the implications of a decision to sign the agreement, said the court, while on the other hand, when the patient is handed the booklet upon arrival at the hospital, the waiting time could be used constructively by patients to educate themselves about the procedure and its significance. The purpose of the booklet is to avoid the possibility of constructive fraud which might arise due to the failure of the arbitration agreement itself to provide certain vital information, the court concluded, and therefore the additional time to peruse it could only further the purpose of the statute.

§ 29. Application to parent or guardian of minor patient

The court held in the following case that the specified procedures for presenting an agreement to arbitrate medical malpractice claims to a person receiving emergency care applied to the person signing an agreement on the patient's behalf.

As a matter of law, the terms "a person receiving health care" and "a person receiving emergency health care" include a parent or guardian who signs an agreement to arbitrate medical malpractice claims on behalf of a minor child, the court held in Latham v Wedeking (1987) 162 Mich App 9, 412 NW2d 225, reversing and remanding summary disposition on behalf of defendants seeking to compel arbitration against a minor, whose agreement to arbitrate had been signed by her mother on her behalf. The child had been taken to the emergency room on two
different occasions, and allegedly suffered mental retardation as a result of the failure to diagnose Reyes Syndrome on the first visit. The statute provided that a person receiving emergency health care or treatment could be offered the option to arbitrate but only after the emergency care or treatment was completed (Mich Comp Laws § 600.5042(1)), observed the court. The defendant doctors and health center argued that the disputed language was inapplicable because the mother was not the person receiving the emergency health care, even though she could bind the child to arbitration by signing the agreement on her behalf. The court concluded that, in view of the parents' power to bind their minor children to an arbitration contract, it was the most consistent reading of the statute to require that the person who signs on behalf of the person receiving emergency treatment be asked to execute the agreement only after the completion of medical treatment.

§ 30. Necessity of hearing

In the following cases, the courts held that a hearing was necessary in order to determine whether a patient receiving emergency treatment was presented an agreement to arbitrate medical malpractice claims in conformance with statutory requirements.

In Pipper v Di Musto (1979) 88 Mich App 743, 279 NW2d 542, the court reversed and remanded the trial court's grant of a defendant doctor's motion for accelerated judgment, stating that the question whether the hospital offered a patient the option to arbitrate by agreement after or before her emergency care was completed required an evidentiary hearing. The patient contended, inter alia, that the agreement was vitiated because at the time it was signed, she was experiencing uterine bleeding and abdominal pain. Although a hearing on the motion was held, there was no evidence on that prefatory question, observed the court, which if applicable would render the agreement nugatory under Mich Comp Laws § 600.5042(1), which provided that a person receiving emergency health care or treatment must be offered the option after the emergency care or treatment was completed. The patient's affidavit sufficiently created a question of fact as to whether she was a person receiving emergency health care or treatment within the meaning of the statute and as to when the hospital offered her the option to sign the arbitration agreement, said the court. The patient had also made an attack on the constitutionality of the statute, and the court, vacating the trial judge's constitutional ruling, stated that if the patient did not meet the conditions of the emergency exception, she could still challenge the statute's constitutionality.

In May v St. Luke's Hospital (1984) 139 Mich App 452, 363 NW2d 6, more fully reported in § 7, the court remanded for an evidentiary hearing on the question whether a hospital asserting the validity of a medical malpractice arbitration agreement had complied with the requirements of Mich Comp Laws § 600.5041, and also whether the arbitration agreement was presented to her before emergency treatment was completed, which, said the court, would appear to be required by Mich Comp Laws § 600.5042(1).

§ 31. Definition of "emergency treatment"

In the following cases, the courts determined that a patient who did not experience a condition which might threaten his life or health was not required to be treated as an emergency patient under the statute governing medical malpractice arbitration agreements.

In McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88, more fully reported in § 23[a], the court rejected the contention that a pregnant patient challenging the validity of a medical malpractice arbitration agreement had complied with the requirements of Mich Comp Laws § 600.5041, and also whether the arbitration agreement was presented to her before emergency treatment was completed, which, said the court, would appear to be required by Mich Comp Laws § 600.5042(1).

A patient who was treated at an emergency room for pain in the shoulder did not receive "emergency treatment" within the meaning of the Medical Malpractice Arbitration Act, the court held in McKain v Moore (1988) 172 Mich App 243, 431 NW2d 470, and it was therefore irrelevant whether he signed the agreement prior to or after receiving the treatment. Under Mich Comp Laws § 600.5042(1), a person who received health care in a hospital could execute an agreement to arbitrate, but a person receiving emergency health care or treatment could be offered the option to arbitrate only after the emergency care or treatment was completed, the court pointed out. The trial court had ruled that he was given the arbitration agreement after treatment because he had 60 days within which to reject the
agreement to arbitrate. Application of this reasoning would result in deeming valid every arbitration agreement signed upon entry to the hospital and prior to the receipt of emergency medical treatment which was not revoked within the statutory period, said the court, and it would nullify the effect of the express language of the statute. The phrase "emergency health care or treatment" was ambiguous, the court observed, in that it was uncertain whether it should include the mere act of walking into an emergency room to seek health care or be defined by the nature of the medical care necessary or believed necessary. "Emergency health care or treatment" has been construed to mean any care or treatment urgently warranted by circumstances under which a delay would endanger the life or health of the patient, stated the court. In the case of the patient with shoulder pain, delaying treatment for the length of time necessary for him to read the arbitration agreement and decide whether to accept or reject it would not have endangered his life or health, and it was not necessary that the hospital prove he received the agreement after the treatment, the court concluded.

§ 32. Failure to contain required advisements

[Cumulative Supplement]

An agreement to arbitrate medical malpractice claims which did not contain the warnings required by a statute governing such agreements was ipso facto invalid, the court held in the following case.

The failure of a health care contract to contain the advisements specified in California Civ Proc Code §§ 1295(a) and 1295(b) (Deering) automatically rendered the agreement unenforceable as to its arbitration provisions, the court held in Rosenfield v Superior Court (1983, 2nd Dist) 143 Cal App 3d 198, 191 Cal Rptr 611, stating that § 1295 is mandatory and pre–empts the general provisions of California Civ Proc Code § 1281.2 (Deering) in regard to medical malpractice arbitration agreements. The patient had on three separate occasions executed a printed form supplied by the defendant doctor which provided for the submission of disputes to arbitration, but which failed to include the warning required by the statute that the parties were giving up their constitutional right to court or jury trial, and the repeated warning to the same effect which was required to appear in at least 10–point boldfaced red type. The lower court had determined that although the statute employed the mandatory terms "shall" and "must" relative to the inclusion of those warnings, and California Civ Proc Code § 1295(e) shielded conforming contracts from attack on grounds of adhesion, unconscionability, or other impropriety, the statute did not expressly state that nonconforming arbitration contracts were invalid. The general statute governing the enforceability of arbitration provisions, California Civ Proc Code § 1281.2 (Deering), provided that a court must order arbitration if it determined that an agreement to arbitrate existed, unless grounds existed for the revocation of the agreement. The court noted that the terms "shall," "must," and "all" were ordinarily used to express what is mandatory, and the statutory requirements that the advisements be included in "all" medical service arbitration contracts, in specified language and in prominent locations in 10–point boldfaced red type, evidenced an implicit legislative determination that they were critical to safeguard against unknowing waiver of the constitutional right to jury trial. To conclude that the general statute governing enforceability took precedence over those specific statutory requirements would be inconsistent with the legislature's intent, said the court, and if an arbitration agreement does not contain the prescribed warnings, factual issues are then created concerning the parties' reasonable expectations and whether the contract is in fact oppressive or unconscionable. A different result was not compelled because the Medical Malpractice Act was adopted for the apparent benefit of the medical community, the court continued, as the advisement requirements were clearly intended to promote a patient's awareness that execution of the contract would constitute a waiver of certain constitutional rights. The court also rejected the argument that compulsory arbitration provisions were enforceable unless proven by the patient to be adhesive or unconscionable, pointing out that the legislature had in other areas of consumer protection enacted statutes requiring otherwise valid contracts to comply with formal advisory requirements in order to be enforceable.

CUMULATIVE SUPPLEMENT

Cases:

Arbitration agreements related to medical malpractice claims and all claims arising from services provided by
nursing home, which were executed by home and relative with power of attorney for resident upon her admission to facility, were unenforceable for failure to properly display required disclosures stating that consent to arbitration was not a precondition for admission or medical treatment. West's Ann. Cal. Health & Safety Code § 1599.81(a); 22 CCR § 72516(d). Swayne v. Torrance Care Center West, Inc., 157 Cal. App. 4th 172, 68 Cal. Rptr. 3d 588 (2d Dist. 2007).


Arbitration provision in health insurer's enrollment form violated statutory disclosure requirements that such provisions be displayed immediately before signature line and be prominently displayed on the enrollment form, where provision appeared before paragraph authorizing release of medical information and where provision was in same type size and font as provisions authorizing deductions and release of medical information, and while arbitration provision constituted separate numbered paragraph, it did not stand out and was not readily noticeable from other provisions. West's Ann. Cal. Health & Safety Code § 1363.1(b, d). Malek v. Blue Cross of California, 121 Cal. App. 4th 44, 16 Cal. Rptr. 3d 687 (2d Dist. 2004).

Provisions of Health Care Availability Act (HCAA) governing form of arbitration agreements, and specifying that precise statutory advisements must be included in agreements applied, and agreement between HMO and patient's employer based on form which did not comply with statutory requirements was void and did not bar medical malpractice action against physician, two nurses, and professional medical corporation; each defendant was health care provider, agreement involved provision of medical services by HMO and individual defendants, and agreement contained provision for binding arbitration, even though agreement was obtained by HMO and not by individual defendants. Evans v Colorado Permanente Medical Group, P.C. (1995, Colo App) 902 P2d 867, reh den (Mar 30, 1995) and affd in part and revd in part on other grounds, remanded (Colo) 926 P2d 1218.

Plastic surgeon could not invalidate arbitration agreement between himself and patient, even though agreement, which surgeon's office provided, did not contain statutorily–required language which informed patient that she would have 30 days in which to revoke the agreement after signing it, where 30–day period had elapsed without patient revoking agreement, patient took affirmative steps to substantially comply with the agreement, and the omitted language was for patient's protection, not surgeon's, and she chose arbitration. LSA–R.S. 9:4235. Webb v. Massiha, 841 So. 2d 848 (La. Ct. App. 5th Cir. 2003).

Arbitration agreement signed by patient before undergoing surgery at hospital which provided that patient may have a change of mind and cancel agreement within 60 days, but did not provide that patient's legal representative could also do so on behalf of patient, and did not inform patient that the hospital could not cancel the agreement, failed to strictly comply with requirements of Medical Malpractice Arbitration Act (MMAA), under which agreement must completely inform parties to agreement as to who may cancel it, and thus was not enforceable by hospital. M.C.L.A. § 600.5042(3) (Repealed). Kosmyna v. Botsford Community Hosp., 238 Mich. App. 694, 607 N.W.2d 134 (1999).

[Top of Section]

[END OF SUPPLEMENT]

G. Other Requirements for Validity

§ 33. Mutuality of obligation

[Cumulative Supplement]

An agreement to arbitrate medical malpractice claims which did not contain reciprocally enforceable obligations was invalid, the court held in the following cases.

In Dwyer v Biddle (1948) 274 App Div 903, 83 NYS2d 138, a memorandum decision, the court affirmed an
order denying the defendant's motion for the stay of a medical malpractice action until the parties arbitrated, stating
that there was no satisfactory showing by the parties of the existence of a reciprocally enforceable written contract
containing the claimed arbitration clause.

Affirming the trial court's denial of a physician's application for a stay of proceedings in a medical malpractice
action pending arbitration, in Wolfman v Herbstritt (1985, 2d Dept) 114 App Div 2d 955, 495 NYS2d 220, the court
stated that the agreement signed by the malpractice plaintiff lacked mutuality of consideration because the defendant
docor's only conceivable action against her, that is, for fees, was specifically exempted from resolution by
arbitration, and the agreements were therefore unenforceable. An earlier agreement signed by the patient was also
invalid because it failed to inform her that by agreeing to submit any disputes, except for fees, to arbitration, she was
waiving her rights to a trial by judge or jury, said the court.

In Miner v Walden (1979) 101 Misc 2d 814, 422 NYS2d 335, the court denied the motion of a doctor,
defendant in a malpractice action, to dismiss the complaint and compel arbitration on the ground that, inter alia, the
alleged agreement executed by the patient lacked reciprocally enforceable obligations. Also finding the agreement to
be unconscionable, and an unenforceable contract of adhesion (§ 9[b]), the court said that an agreement to arbitrate
must be openly and fairly entered into and will not be enforced unless it is mutually binding. The agreement at issue
purported to be an exchange of promises to arbitrate, with each promise serving as consideration for the other, but in
return for the patient's consent to arbitrate all claims arising out of the medical relationship, the doctor agreed to
arbitrate all claims except claims of money due for services rendered, said the court. In a doctor–patient relationship,
the only possible claim the doctor would have was such a claim, the court pointed out, and therefore, the existence
of a reciprocally enforceable obligation was not shown.

CUMULATIVE SUPPLEMENT

Cases:

Due to ambiguity in patient's offer to arbitrate her medical negligence claim against dentist, no valid written
agreement to arbitrate existed between patient and dentist; patient made offer to arbitrate after dentist had rejected
patient's claim, dentist's rejection of claim was not admission of liability, and statute on voluntary binding arbitration
of medical negligence claims envisioned case where liability was not at issue, and parties wished to arbitrate

§ 34. Express waiver of jury trial

The courts held in the following cases that an express waiver of the right to jury trial was not necessary to the
validity of an agreement to arbitrate medical malpractice claims.

Stating that when parties agree to submit their disputes to arbitration, they select a forum that is alternative to,
and independent of, the judicial forum, in which disputes are not resolved by juries, the court in Madden v Kaiser
Foundation Hospitals (1976) 17 Cal 3d 699, 131 Cal Rptr 882, 552 P2d 1178 (among conflicting authorities noted in
Keller Construction Co. v Kashani (2nd Dist) 220 Cal App 3d 222, 269 Cal Rptr 259, review den (Cal) 1990 Cal
LEXIS 3214), more fully reported in § 9[a], rejected the contention that an arbitration provision contained in a group
medical insurance policy which required the arbitration of all disputes, including malpractice claims, was invalid
because it did not expressly waive the parties' constitutional right to a jury trial. Stating that to predicate the legality
of a consensual arbitration agreement upon the parties' express waiver of a jury trial would be as artificial as it
would be disastrous, the court, noting that there are literally thousands of commercial and labor contracts that
provide for arbitration but do not contain express waivers of jury trial, pointed out that holding invalid an arbitration
clause on this ground would frustrate the parties' interests and destroy the sanctity of their mutual promises.
In *Wheeler v. St. Joseph Hospital* (1976, 4th Dist) 63 Cal App 3d 345, 133 Cal Rptr 775, 84 ALR3d 343, more fully reported in § 9[b], the court stated that an express waiver of the right to trial by jury is not required in agreeing to arbitration. Reversing the judgment of the trial court compelling arbitration, however, the court stated that the patient signing an adhesive hospital admission form agreeing to arbitrate any claim, including malpractice claims, forfeits a valuable right by agreeing to forego a jury trial, and held that the law should not decree a forfeiture of such a valuable right when the patient has not been made aware of the existence or implications of an arbitration provision contained in such an adhesive contract.

However, see *Broemmer v Abortion Servs. of Phoenix, Ltd.* (1992) 173 Ariz 148, 840 P2d 1013, 126 Ariz Adv Rep 3, 124 Ariz Adv Rep 6, 24 ALR5th 793, § 9[b], for a case in which the court found that the absence of a conspicuous or explicit statement that both parties were waiving the right to a jury trial, or any evidence that the right was knowingly, voluntarily, or intelligently waived, compelled a finding that the loss of the right to jury trial was beyond the reasonable expectations of the patient.

And see *Rosenfield v Superior Court* (1983, 2nd Dist) 143 Cal App 3d 198, 191 Cal Rptr 611, § 32, decided under a statute specifically governing medical malpractice arbitration agreements, in which the court held that the failure of a health care contract to contain the advisements specified in California Civ Proc Code §§ 1295(a) and 1295(b) (Deering), which warned that the parties were giving up the constitutional right to a jury trial, automatically rendered the agreement unenforceable as to its arbitration provisions.

See also *Wolfman v Herbstritt* (1985, 2d Dept) 114 App Div 2d 955, 495 NYS2d 220, § 33, in which the court stated that an agreement signed by the patient was invalid because it failed to inform her that by agreeing to submit any disputes except for fees to arbitration, she was waiving her rights to a trial by judge or jury.

### § 35. Party's name or signature

In the following cases the courts held that agreements to arbitrate medical malpractice claims which omitted a party's name or signature were not invalid.

The trial court did not err in granting the defendant's motion to compel arbitration, the court held in *Crown v Shafadeh* (1986) 157 Mich App 177, 403 NW2d 465, rejecting the contention that the absence of a minor's signature on the arbitration agreement and the absence of her name in the designated space rendered the agreement invalid. The mother of the minor patient had signed the agreement on her behalf, the court observed, and although her name was not typed in the designated space, her name and patient number were stamped across the top of the form. The mother knew that the form related to her daughter and admitted signing it on her behalf, and she was adequately identified, said the court, noting that Mich Comp Laws § 600.5046(2) of the malpractice arbitration statute changed the common law to permit a parent to bind a child to an arbitration agreement.

The failure of a hospital representative to sign an agreement to arbitrate executed by a patient in the emergency room did not render the contract invalid, the court held in *McKain v Moore* (1988) 172 Mich App 243, 431 NW2d 470. The patient argued that because he did not receive a copy of the agreement bearing the hospital agent's signature, the hospital did not communicate its acceptance of the patient's offer to arbitrate and no binding contract came into existence. Contract principles apply to arbitration agreements, said the court, and a true meeting of the minds was required for a valid agreement, judged by an objective standard, and looking to the express words and visible acts of the parties. The hospital presented the patient with the arbitration agreement, which constituted an offer of the option to arbitrate, said the court, and the patient was free to accept or reject the offer. Since he understood the agreement and signed it voluntarily, his signature constituted an acceptance of the hospital's offer, the court concluded, and at that moment there was a meeting of the minds and a valid and enforceable contract.

### § 36. Date on agreement

An agreement to arbitrate medical malpractice claims which was undated, the court held in the following case, was nevertheless enforceable when the time of execution could be determined from other evidence.

An agreement to arbitrate medical malpractice claims was not invalid because it was undated, the court held in *Hawker v Northern Michigan Hospital, Inc.* (1987) 164 Mich App 314, 416 NW2d 428. Under general contract principles, said the court, an otherwise enforceable agreement was not rendered unenforceable due to the absence of
a date set forth on the face of the document, and the date may be established by appropriate proof. The trial judge found at the evidentiary hearing that the absence of the date did not prevent him from finding that the document had been executed, and that the agreement was signed at the time of the patient's admission, findings which were not clearly erroneous, the court concluded.

§ 37. Necessity of reading collateral agreements

The court held in the following case that it was not necessary to the validity of an agreement between a patient and the hospital to arbitrate medical malpractice claims, which referred to other agreements between doctors and the hospital concerning arbitration, that the collateral agreements be read to the patient.

A hospital's failure to have arbitration participation agreements between itself and staff doctors read to a patient, who was offered an agreement to arbitrate claims against the hospital and those of its independent staff who had agreed to arbitrate, did not render the patient's contract invalid, the court held in Green v Gallucci (1988) 169 Mich App 533, 426 NW2d 693. Mutuality of assent between the hospital and the doctors was established when the hospital offered the participation agreements to the doctors and they accepted them by signing, the court explained, and at that time a binding contract was established. The participation agreements were signed prior to the malpractice plaintiff's decedent's hospitalization and the execution of her agreement with the hospital, the court concluded, and thus the plaintiff was required to arbitrate her claims.

H. Validity as to Particular Persons

§ 38. Minor child

A minor child may be bound by his or her parent to an agreement to arbitrate medical malpractice claims signed on the child's behalf, the courts held in the following cases.

Stating that if minors were always free to disaffirm arbitration awards, they would be effectively denied the benefits of arbitration, for few adults would agree to submit minors' claims to arbitration, the court in Doyle v Giuliucci (1965) 62 Cal 2d 606, 43 Cal Rptr 697, 401 P2d 1 (among conflicting authorities noted in Keller Construction Co. v Kashani (2nd Dist) 220 Cal App 3d 222, 269 Cal Rptr 259, review den (Cal) 1990 Cal LEXIS 3214), rejected the contention that a minor, who was subject to a contract between her father and a medical group which provided for arbitration of malpractice claims arising from the services rendered by the medical group, had the power to disaffirm an arbitration award as a facet of the minor's ability to disaffirm a contract. Noting that California Civ Proc Code § 1287.6 (Deering) provided that an arbitration award, which had not been confirmed or vacated, had the same force and effect as a contract in writing between the parties to the arbitration, the court stated that the purpose of this statute was not to afford minors the opportunity to disaffirm arbitration awards, but to strengthen such awards by making it clear that they are binding as contracts even after the time for seeking judicial confirmation has expired. The issue was not decided by California Civ Proc Code § 35 (Deering), providing for the disaffirmance of contracts by minors, said the court, because the provision did not apply to contracts made between adults, such as that for group medical service, of which the child is a third–party beneficiary. There was a compelling reason to recognize a parent's power to bind the child to arbitration as implicit in the right and duty to care for the child, the court continued, and the restriction on the minor's rights was a reasonable one in that it merely specified a forum for the settlement of disputes.

In Benson v Granowicz (1984) 140 Mich App 167, 363 NW2d 283, the court held that a parent may waive a minor child's rights to a jury trial by signing an arbitration agreement on its behalf. The 8–month–old child was treated as an outpatient in the emergency room of a hospital, and his mother had executed the agreement, which was pursuant to the Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq. While under the common law a parent had no authority to waive, release, or compromise claims by or against his or her child, said the court, the common law may be modified or abrogated by statute. The Malpractice Arbitration Act clearly changed the common law to permit the parent to bind a child to an arbitration agreement under Mich Comp Laws § 600.5046(2). There could be no constitutional challenge based on the statutory change in the common law, the court
concluded, affirming the judgment of the trial court to compel arbitration.

See Crown v. Shafadeh (1986) 157 Mich. App. 177, 403 NW2d 465, § 4, for a case upholding the constitutionality of the distinction in a statute, governing malpractice arbitration agreements, between minors and persons otherwise disabled under the equal protection clause, in terms of their ability to revoke an agreement to arbitramedicalmalpractice disputes upon the removal of a legal disability.

CUMULATIVE SUPPLEMENT

Cases:

Provision in group health care service plan requiring submission to bindingarbitration was part of contract accepted by employee and was binding on daughter of employee's dependent; thus, arbitration of daughter's medicalmalpractice claim was neither involuntary nor nonconsensual. Turner v. Superior Court, 67 Cal. App. 4th 1432, 80 Cal. Rptr. 2d 84 (2d Dist. 1998), review denied, (Mar. 9, 1999).

§ 39. Unborn child

A parent had the authority to bind an unborn child to an agreement to arbitramedicalmalpractice claims signed on the child's behalf, the court held in the following cases.

A claim for prenatal injuries by a child who became a member of a medical and hospital insurance group at birth was governed by a bindingarbitration clause in the group plan agreement, the court held in Wilson v. Kaiser Foundation Hospitals (1983, 3rd Dist) 141 Cal App 3d 891, 190 Cal Rptr 649. The court reversed an order of the trial court denying enforcement of the arbitration provision in the medical services contract, which was included in the mother's agreement as a member of a nonprofit corporation operating a prepaid service plan for medical and hospital services. The arbitration clause provided that any claim which arose from the alleged violation of a legal duty incident to the agreement would be submitted to bindingarbitration, if the claim were asserted by a member, or by a member's heir or personal representative, on account of death, mental disturbance, or bodily injury arising from the rendition of or failure to render services under the agreement, irrespective of the legal theory upon which the claim was asserted. The mother was enrolled at the time of the infant patient's birth, and 4 months later, she formally enrolled the infant as a family dependent member of the group plan. The infant contended that he was not a member under the terms of the agreement at the time of his prenatal injuries, or at the time of his birth, and that since the agreement did not expressly provide for arbitration of prenatal injuries, his action was properly filed in superior court. The trial court denied the petition to compel arbitration only in regard to the infant's claim of prenatal negligence, on the basis that, although he was not automatically a member of the health plan at the time of birth, the mother's enrollment had the effect of enrolling him retroactively to the time of birth under the provisions of the agreement. Noting that the facts were not in dispute and that therefore it was the duty of the court to make its own independent determination of the meaning of the language used in the agreement, the court stated that California Health & Safety Code § 1373(c) (Deering) required every plan contract, providing coverage to family members who were dependents of the subscriber or enrollee, to grant immediate coverage from and after the moment of birth to any dependent newborn infant. Whether based on the statute, or the trial court's determination that the subsequent enrollment of the patient was retroactive to the time of birth, the result was that the infant was a member of the health plan as of that time, and therefore all claims asserted regarding birth and postbirth services were properly ordered into arbitration. As to the claim of prenatal negligence, the court pointed out that at the time of the negligent infliction of the prenatal injuries, the infant, as a fetus, accrued no right of action against the wrongdoer. The right of action for the prenatal injuries was conditioned upon the child being born alive, said the court, and therefore the cause of action did not arise until the infant was deemed a member of the plan. Moreover, the child sought to assert
a right to benefits under the agreement and yet avoid submission to arbitration of claims arising out of services rendered, the court stated, while his mother sought obstetric care from the defendants pursuant to her membership in the plan and so elected and expected medical services for both herself and her unborn child. Since the agreement provided for prenatal care to the mother and her unborn child, all such care was rendered subject to the agreement, and since the arbitration clause was not limited to claims for services rendered to members, but applied to all claims for bodily injury arising from the rendition of or failure to render services, the claim was covered by the agreement even if the infant were not a member at the time of their rendition, the court reasoned. The mother indisputably had the legal authority to contract for medical care of the unborn child and to bind him to arbitration, concluded the court, distinguishing the situation in which a parent's wrongful death claim regarding a minor child was not subject to an arbitration agreement signed by the mother, when the agreement contained no reference to the expected child, was not part of a comprehensive health care contract, and did not purport to compel arbitration of disputes arising out of the treatment of persons other than the named patient.

A physician–patient arbitration agreement, which provided that in the case of a pregnant mother seeking medical care, the term "patient" meant both the mother and the mother's expected child or children, could be enforced against the patient's child, the court held in Bolanos v Khalatian (1991, 2nd Dist) 231 Cal App 3d 1586, 283 Cal Rptr 209, 91 CDOS 5504, 91 Daily Journal DAR 8439. The agreement conformed to the statutory requirements of California Civ Proc Code § 1295 (Deering), and contained a clause making it clear that the agreement was intended to bind all parties whose claims arose out of or were related to the treatment provided to the patient, said the court. The mother clearly had the authority to bind her child to arbitrate claims related to medical service for her under California Civ Proc Code § 1295 (d) (Deering), the court explained, which provided that a contract for medical services to a minor was not subject to disaffirmance if signed by the minor's parent or legal guardian. There was no reason not to apply the statutory prohibition against disaffirmance by a minor of a contract for medical services to a minor who was at the time unborn, said the court.

In McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88, the court held that a pregnant woman could bind her child to arbitration in a medical malpractice action when she signed an agreement to arbitrate on its behalf while the child was in utero. Under the Medical Malpractice Arbitration Act, Mich Comp Laws § 5046(2), a minor child could be bound by a written agreement to arbitrate disputes, controversies, or issues arising from medical services, upon the execution of an agreement on his behalf by a parent or legal guardian, and the minor child could not subsequently disaffirm the agreement, noted the court. The mother argued that the fetus in utero was not a minor child within the meaning of the statute and that if the statute were construed to include a fetus in utero, it would be deprived of the constitutional right to sue in court and to a jury trial. The court said that the purpose of the statute was to allow parents to bind their children, all of their children, to arbitration, rather than permitting a child subsequently to avoid arbitration at the age of majority. In view of this purpose, explained the court, the minor child born after parental consent to arbitration could not be distinguished from a minor child who was not born prior to parental consent, expressing the opinion that the legislature did not intend to create such a distinction. Neither a fetus in utero nor a minor child has the capacity to contract for medical care on his own behalf and can only do so by a parent or guardian, the court continued, pointing out that under Michigan common law, a fetus in utero is a person for purposes of tort law if the fetus is born alive subsequent to the alleged injury or if the fetus was viable at the time of the alleged injury. That status is consistent with the conclusion that a fetus in utero should be considered a minor child within the language of the statute under the same conditions, the court concluded.

In Harte v Sinai Hospital of Detroit (1985) 144 Mich App 659, 375 NW2d 782 (disagreed with on other grounds by Villareal v Chun, 199 Mich App 120, 501 NW2d 227), the court held that an agreement signed by a parent on behalf of an unborn child to arbitrate claims arising from treatment rendered at the time of his birth was applicable to the malpractice claim of the infant, stating that the medical malpractice arbitration law clearly allowed a parent to bind a child to an arbitration agreement (Mich Comp Laws § 600.5046(2)).

§ 40. Unconceived child

The court held in the following case that a future parent had the authority to bind an as yet unconceived child to arbitrate medical malpractice claims in an agreement signed on the child's behalf.
A minor plaintiff was bound to arbitrate his malpractice claim against an obstetrician with whom his mother had signed an agreement to arbitrate claims arising out of medical services rendered to her at a time when the minor plaintiff was not yet conceived, the court held in Pietrelli v Peacock (1993, 1st Dist) 13 Cal App 4th 943, 16 Cal Rptr 2d 688, 93 CDOS 1301. The agreement stated that it applied to any controversy between the doctor and persons, born or unborn, on behalf of whom the mother had the power to contract. Reversing the denial of the doctor's motion to compel arbitration of the claim, the court noted the strong public policy favoring arbitration over litigation as a means of dispute resolution, as embodied in California Civ Proc Code § 1295 (Deering), and said there was no question that the services, which were the subject of the action, fell within the parameters of the agreement under that statute. The minor plaintiff contended that since he was not conceived at the time of the execution of the agreement, his mother had no power to bind him. Noting that it was established that a mother could validly bind an expected child to arbitration of all claims for negligence in prenatal and postnatal medical treatment, the court pointed out that it was settled that nonsignatories could be bound by agreements executed on their behalf. Furthermore, said the court, in other contexts, the law recognized the ability of a party to act on behalf of and affect the rights of persons who have not yet come into existence, such as a class of persons entitled to a testamentary bequest which is to take effect at a certain time, regardless of whether they are born before or after the testator's death. The same principles were applicable as in the case of an unborn but conceived person subject to an arbitration agreement, said the court, because at the moment of his conception, the minor plaintiff became an unborn person within the definition set forth in the contract. By electing to receive the obstetric services provided for under the agreement, the plaintiff's mother impliedly agreed to arbitration for her unborn child, and since he had no cause of action before he was conceived, the election became binding on him at birth, the court concluded.

§ 41. State employee

State employees electing a particular health care plan could be bound to an arbitration provision negotiated by their representative, the court held in the following case. Stating that an agent or other fiduciary who contracts for medical treatment on behalf of his beneficiary has implied authority to agree to a contract which provides for the arbitration of claims for medical malpractice, the court in Madden v Kaiser Foundation Hospitals (1976) 17 Cal 3d 699, 131 Cal Rptr 882, 552 P2d 1178, held that the medical malpractice claim of a state employee was subject to an arbitration provision contained in an amended group medical insurance contract negotiated by a hospital and a state agency on behalf of state employees. The court noted that the state agency acted as the agent of the state employees, the acts of an agent within the scope of his authority bind the principal, and an agent has the authority to do everything necessary or proper and usual for effecting the purpose of his agency. Arbitration is a "proper and usual" means of resolving malpractice disputes, the court continued, so that an agent empowered to negotiate a group medical contract has the implied authority to agree to the inclusion of an arbitration provision. Arbitration has become a favored method of resolving disputes expeditiously and economically, said the court, rejecting the contention that arbitration provided an extraordinary method of resolving disputes and consequently the authority of an agent to agree to arbitration must be specially conferred. But see Beynon v Garden Grove Medical Group (1980, 4th Dist) 100 Cal App 3d 698, 161 Cal Rptr 146, § 9[b], for a case in which the court, while distinguishing the case from one involving a master policy negotiated by an employee agent or representative, said that even if it had been, the implied authority of an agent could not be stretched to authorize the inclusion of an extraordinary provision, such as a clause giving the health care provider a unilateral right to reject the award and require rearbitration.

IV. Revocation or Disaffirmance of Agreement

A. Generally

§ 42. Disaffirmance by minor of agreement relating to obstetrical care

A minor who had signed an agreement to arbitrate medical malpractice claims which might arise from
obstetrical services could not disaffirm the contract, the court held in the following case.

Construing a statute providing that a minor could give a consent to medical treatment relating to contraception or pregnancy not subject to disaffirmance, together with a statute pertaining to medical malpractice arbitration agreements, the court held in Michaelis v Schori (1993, 2nd Dist) 20 Cal App 4th 133, 24 Cal Rptr 2d 380, 93 CDOS 8650, 93 Daily Journal DAR 14683, review den (Cal) 1994 Cal LEXIS 548, that an emancipated minor could not disaffirm such an agreement entered into as part of a contract for medical services related to the prevention or treatment of pregnancy. During her first visit to the obstetrician, the 17–year–old patient signed an otherwise binding arbitration agreement, but argued that since her parent or guardian had not signed the agreement, it was subject to disaffirmance. This was because California Civ Proc Code § 1295 (Deering) provided that an arbitration agreement in a contract for services to a minor was not subject to disaffirmance "if signed by the minor's parent or guardian." The court observed that, although the rule was traditionally that a minor was protected by the law through the right to disaffirm contracts, the legislature had made exceptions, one of which was California Civ Proc Code § 34.5 (Deering), specifying that a minor could give consent to medical services relating to the treatment or prevention of pregnancy, which consent was not subject to disaffirmance, notwithstanding any other provision of law. The purpose was to encourage pregnant minors to seek obstetrical care, said the court, and the power to consent to medical treatment necessarily included authority over the questions of payment and resolution of disputes. The patient argued that the statute pertaining to arbitration was the more specific statute and therefore should prevail over the statute dealing with medical care in general. The court disagreed, stating that arbitration was an integral part of medical contracts under the malpractice reform statute, which must be deemed the general statute, subject to exceptions carved out by those Civil Code sections concerning specific types of health care. Furthermore, the two sections were not in conflict, said the court, pointing out that the arbitration statute stated only one side of the proposition, that a contract was binding on the minor if signed by a parent or guardian, leaving open the possibility of exceptions to the unstated corollary if a parent or guardian does not sign. Although under § 1295 the contract would generally be subject to disaffirmance if not signed by a parent, when a minor alone consented to, and therefore contracted for, a type of medical care specified in § 34.5, the consent was not subject to disaffirmance, and by parity of reasoning, the arbitration provision could not be disaffirmed, the court ruled. The exceptions deal with types of medical care a minor might be reluctant to seek if parental consent were required, so that if the consent were required for a minor's binding arbitration agreement, explained the court, it would result in a restriction of the minor's right to obtain health care, not intended by the legislature when it enacted the medicalmalpracticearbitration statute.

§ 43. Filing of malpractice action as revocation

Cumulative Supplement

In the following cases the courts held that the filing of a malpractice action impliedly revoked an agreement to arbitratemedicalmalpractice claims.

The filing of a medicalmalpractice complaint would serve impliedly to revoke an arbitration agreement between a patient and a health care provider, the court held in Amwake v Mercy-Memorial Hospital (1979) 92 Mich App 546, 285 NW2d 369, more fully reported in §§ 45 and 48, and the agreement, executed by a patient who became comatose for a long period after an operation, was timely revoked by the malpractice complaint brought by her estranged husband as next friend. The court expressed the opinion that since an action is commenced by the filing of the complaint for statute of limitations purposes, by analogy, the malpractice complaint filed within the limitation period specified by statute would have the effect of revoking the agreement.

In Di Ponio v Henry Ford Hospital (1981) 109 Mich App 243, 311 NW2d 754 (disapproved on other grounds by McKinstry v Valley Obstetrics–Gynecology Clinic, P.C., 428 Mich 167, 405 NW2d 88), the court held that the filing of a medical malpractice action implicitly revoked an agreement between a patient and a health care provider to arbitrate medical malpractice claims, and since the legal representative of a deceased patient had filed an action within 60 days of appointment, the arbitration agreement was timely revoked under its revocation provision. The court had decided that upon the death of a patient prior to discharge from the hospital, the 60–day period for revocation of an agreement to arbitrate medical malpractice claims signed by the patient must be tolled by the adoption of a tolling provision analogous to that of either "disability" or "discovery," [FN50] until the appointment of

a legal representative.

Although the complaint had not been filed in time to revoke the agreement to arbitrate medical malpractice claims at issue, the court in Boiko v Henry Ford Hospital (1981) 110 Mich App 514, 313 NW2d 344, more fully reported in § 48, noted that the filing of a complaint may be held to constitute an implied revocation of an arbitration agreement.

CUMULATIVE SUPPLEMENT

Cases:

Defendant in medical malpractice action waived his right to arbitrate, even if arbitration clause was enforceable, by actively participating in litigation prior to making belated demand for arbitration. Figueroa v Flatbush Women's Services, Inc., 244 A.D.2d 453, 664 N.Y.S.2d 118 (2d Dep't 1997).

§ 44. Revocation by legal representative

An agreement to arbitrate medical malpractice claims was validly revoked by the legal representative of the patient, the court held in the following case.

The husband of a deceased patient was the legal representative of his wife from the time she entered a comatose state until an administrator was appointed after her death, and was thus entitled to revoke an agreement to arbitrate which he had executed with the hospital on her admission for surgery, the court held in Edwards v St. Mary's Hospital (1984) 135 Mich App 753, 356 NW2d 255. Under Mich Comp Laws § 600.5042(3), an agreement to arbitrate must provide that the person receiving health care or treatment, or his legal representative, but not the hospital, could revoke the agreement within 60 days after discharge from the hospital by notifying the hospital in writing, observed the court. In deciding the definition of the words "legal representative" as used in the statute, the court said the term was not necessarily restricted to the personal representative of one deceased, but was sufficiently broad to cover all persons who stood in his place and represented his interests with respect to his property, whether transferred to them by his acts or by operation of law. It was natural to include a husband within the term "legal representative" when his wife was comatose, because normally the husband will look out for his wife's business and best interests until an administrator was appointed, the court concluded, reversing and remanding the action for trial.

CUMULATIVE SUPPLEMENT

Cases:

Mere existence of form dated four days before hospital admission was insufficient to permit finding that personal representative for deceased patient should have discovered arbitration agreement patient had with hospital, and thus 60–day revocation period did not start to run then, although trial court found based on physician's testimony that agreement did apply to admission four days later, as there was no information on face of form regarding what hospital stay it applied to, and patient was neither in hospital nor admitted to hospital on date it was signed. M.C.L.A. § 600.5838(2). Phillips v. Grace Hosp., 228 Mich. App. 717, 580 N.W.2d 1 (1998), appeal dismissed (Mich. Dec. 1, 1998).

Filing of medical–malpractice action by legal guardian of incapacitated adult did not constitute valid revocation of arbitration agreement, where legal representative may revoke arbitration agreement within 60 days of patient's discharge from hospital, and 60–day period began to run, at latest, when plaintiff became patient's permanent
§ 45. Effect of hospital's transfer of patient

The transfer of a patient from one hospital to another did not initiate the running of the 60-day period to revoke an arbitration agreement signed by the patient with the first hospital, the court held in the following case.

An arbitration agreement, executed by a patient who became comatose for a long period after an operation, was timely revoked by the malpractice complaint brought by her estranged husband as next friend, the court held in Amwake v Mercy-Memorial Hospital (1979) 92 Mich App 546, 285 NW2d 369, and the transfer of the patient from one hospital to another did not initiate the 60-day period within which the agreement could be revoked. Reversing the trial court's grant of the hospital's motion for accelerated judgment of dismissal, the court noted that after the patient became comatose and was transferred from the defendant hospital to another hospital, her estranged husband was appointed next friend and filed a medical malpractice complaint on her behalf, 60 days after the date of her operation, which included a claim for loss of consortium. The trial court granted a motion for the defendants on the basis that the complaint was filed 61 days after the patient's discharge from the first hospital and was not a timely revocation of the arbitration agreements. Five months later the patient's father was appointed as her special guardian and he instituted another action on her behalf, ultimately appealing a second order for compulsory arbitration. Observing that the case involved the rights of a person who was in a coma when the first malpractice case was filed, and still in the hospital when the guardian's case was instituted, the court said that under Mich Comp Laws § 600.5042(3), an agreement to arbitrate must provide that it may be revoked within 60 days after the patient's discharge from the hospital by notifying the hospital in writing. The patient was not discharged within the meaning of the statute, the court decided, since the simple transfer from one hospital to another could not start the running of the 60-day period when it was apparent that the patient still required care for a condition which arose during her hospital stay. A conclusion to the contrary would permit hospitals to shuttle patients from one hospital to another simply to start the 60-day period, explained the court. The patient was still in the second hospital in connection with the operation when the second suit was filed, and therefore the period had not even begun, the court continued, and her notice, via the suit, was an effective revocation. A second basis for finding a timely revocation, even assuming the 60-day period had begun to run when the patient was transferred, was that the complaint was filed exactly 60 days after the transfer, added the court. Since an action is commenced by the filing of the complaint for statute of limitations purposes, by analogy, the court explained, the filing of the first complaint on the 60th day after transfer would serve impliedly to revoke the arbitration agreements.

§ 46. Revocation after discovery of malpractice

The "discovery" rule, as it applied to the tolling of the malpractice statute of limitations, did not apply to the revocation of an agreement to arbitrate medical malpractice claims, the court held in the following case.

A medical malpractice arbitration agreement was not timely revoked on the theory that the revocation was within 60 days of the discovery of the malpractice, the court held in Capman v Harper-Grace Hospital (1980) 96 Mich App 510, 294 NW2d 205, reversing and remanding the trial court's denial of the hospital's motion to compel arbitration, for evidence as to whether there was reason to find the revocation period tolled on the basis of the patient's inability to communicate her revocation to the hospital within the required time or authorize her legal representative to do so. The plaintiff had argued that the agreement was timely revoked within 60 days of the discovery of the alleged malpractice, which was, however, not within 60 days of her discharge from the hospital. Because a statute of limitations could work a harsh result upon a person unable to recognize the existence of a claim, the discovery rule is important and necessary to temper the result by permitting a tolling of the statute, said the court.

court. However, no such harsh result arises from the operation of the 60–day period allotted for revocation under the malpractice arbitration statute, said the court, because the claim is not lost as it would be if it were time barred. Furthermore, the court continued, the statute's language is clear and specific, requiring a provision allowing revocation within 60 days after discharge, and the agreement to arbitrate incorporated this language. The patient agreed to submit any and all claims to arbitration, said the court, and it made no sense to interpret this language to mean that the 60–day period is tolled while plaintiffs are unaware of the very same claims. It would be different if the plaintiff were physically and mentally incapable of revoking the agreement during the 60–day period, the court observed, and the trial court must set forth findings of fact and the law upon which they are based after a full evidentiary hearing.

§ 47. Estoppel to assert revocation

The court held in the following case that a patient who had accepted benefits under a health care plan containing an agreement to arbitrate medical malpractice claims was estopped to assert an implied revocation of the agreement.

It would be inequitable to allow a patient to assert rights and benefits under a group health plan and then seek to avoid arbitration of a malpractice claim called for in the contract on the basis of a purported termination of the health plan prior to the treatment on which the malpractice claim was based, the court held in Avina v Cigna Healthplans of California (1989, 2nd Dist) 211 Cal App 3d 1, 259 Cal Rptr 105, review den (Cal) 1989 Cal LEXIS 3401. The malpractice plaintiff was enrolled in the health plan by virtue of her husband's employment and, although he requested through his employer that he and his family be enrolled in another plan as of a certain date, the wife continued to receive medical care and treatment, including a 5–day hospitalization, after that date, representing herself to be a member in good standing of the health plan by presenting her group membership card. The trial court had denied the defendants' motion to compel arbitration on the basis that the malpractice plaintiff was not a member of the plan when she had surgery, but the court said that notwithstanding the purported termination of the health plan, the patient was estopped by her subsequent conduct from denying the existence of a contractual obligation to arbitrate. Reversing the order of the trial court, the court said that the suggestion, that in order to maintain its arbitration rights, a medical provider must, on every occasion, challenge and examine the continuing eligibility of each purportedly covered member presenting himself or herself for treatment, was contrary to reason and all existing authority.

§ 47.1. Other issues

Revocation or disaffirmance of an agreement to arbitrate medical malpractice issues has been held impermissible under circumstances other than those discussed in §§ 42-47 of this annotation.

CUMULATIVE SUPPLEMENT

Cases:

Arbitration agreement entered by parties to medical malpractice action was a statutory arbitration agreement, and thus was irrevocable except by mutual consent, where agreement incorporated by reference American Arbitration Association medical malpractice arbitration rules, which provide that parties to agreement governed by rules are deemed to have consented to entry of judgment upon arbitration award. M.C.L.A. §§ 600.5001, 600.5011. Hetrick v. Friedman, 237 Mich. App. 264, 602 N.W.2d 603 (1999).
B. Tolling of Revocation Period After Patient's Death or Disability

§ 48. Until removal of disability, generally

The death or disability of a patient who had signed an agreement to arbitrate medical malpractice claims tolled the statutory revocation period until the appointment of a legal representative ended the inability of the patient to revoke the agreement, the courts held in the following cases.

Under agreements providing that they could be revoked by the patient or the patient's legal representative within 60 days of discharge from the hospital, a comatose patient had 60 days from the time her inability was removed by the appointment of a legal representative to revoke agreements to arbitrate medical malpractice claims executed before the onset of her disability, the court held in Amwake v Mercy-Memorial Hospital (1979) 92 Mich App 546, 285 NW2d 369. Reversing the trial court's grant of the hospital's motion for accelerated judgment of dismissal, the court noted that after becoming comatose, the patient was transferred from the defendant hospital to another hospital. While she was still comatose, her estranged husband was appointed next friend and filed a medical malpractice complaint on her behalf, 60 days after the date of her operation, which included a claim for loss of consortium. The trial court granted a motion for the defendants on the basis that the complaint was filed 61 days after the patient's discharge from the first hospital and was not a timely revocation of the arbitration agreements. Five months later the patient's father was appointed as her special guardian and he instituted another action on her behalf, ultimately appealing a second order for compulsory arbitration. The court said that under Mich Comp Laws § 600.5042(3), an agreement to arbitrate must provide that it may be revoked within 60 days after the patient's discharge from the hospital by notifying the hospital in writing. Having decided that the transfer of the patient from one hospital to another could not start the running of the 60–day period (§ 45), the court pointed out that, even if it had, her unconscious state rendered her totally unable to revoke the arbitration agreements within the required period. The court drew a parallel to the general savings provisions which create exemptions from the running of the statute of limitations, noting that, under Mich Comp Laws § 600.5851(1), those who are minors, insane, or imprisoned at the time the claim accrues, have a 1–year grace period after their disability is removed in order to bring their actions, although the period of limitation has run. Clearly, the patient's comatose state prevented her from communicating her revocation to the hospital within the required time or authorize her legal representative to do so.

In Amwake v Mercy-Memorial Hospital, the court held that after becoming comatose, the patient was transferred from the defendant hospital to another hospital. While she was still comatose, her estranged husband was appointed next friend and filed a medical malpractice complaint on her behalf, 60 days after the date of her operation, which included a claim for loss of consortium. The trial court granted a motion for the defendants on the basis that the complaint was filed 61 days after the patient's discharge from the first hospital and was not a timely revocation of the arbitration agreements. Five months later the patient's father was appointed as her special guardian and he instituted another action on her behalf, ultimately appealing a second order for compulsory arbitration. The court said that under Mich Comp Laws § 600.5042(3), an agreement to arbitrate must provide that it may be revoked within 60 days after the patient's discharge from the hospital by notifying the hospital in writing. Having decided that the transfer of the patient from one hospital to another could not start the running of the 60–day period (§ 45), the court pointed out that, even if it had, her unconscious state rendered her totally unable to revoke the arbitration agreements within the required period. The court drew a parallel to the general savings provisions which create exemptions from the running of the statute of limitations, noting that, under Mich Comp Laws § 600.5851(1), those who are minors, insane, or imprisoned at the time the claim accrues, have a 1–year grace period after their disability is removed in order to bring their actions, although the period of limitation has run. Clearly, the patient's comatose state prevented her from communicating her revocation to the hospital within the required time or authorize her legal representative to do so.

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§ 48. Until removal of disability, generally

The death or disability of a patient who had signed an agreement to arbitrate medical malpractice claims tolled the statutory revocation period until the appointment of a legal representative ended the inability of the patient to revoke the agreement, the courts held in the following cases.

Under agreements providing that they could be revoked by the patient or the patient's legal representative within 60 days of discharge from the hospital, a comatose patient had 60 days from the time her inability was removed by the appointment of a legal representative to revoke agreements to arbitrate medical malpractice claims executed before the onset of her disability, the court held in Amwake v Mercy-Memorial Hospital (1979) 92 Mich App 546, 285 NW2d 369. Reversing the trial court's grant of the hospital's motion for accelerated judgment of dismissal, the court noted that after becoming comatose, the patient was transferred from the defendant hospital to another hospital. While she was still comatose, her estranged husband was appointed next friend and filed a medical malpractice complaint on her behalf, 60 days after the date of her operation, which included a claim for loss of consortium. The trial court granted a motion for the defendants on the basis that the complaint was filed 61 days after the patient's discharge from the first hospital and was not a timely revocation of the arbitration agreements. Five months later the patient's father was appointed as her special guardian and he instituted another action on her behalf, ultimately appealing a second order for compulsory arbitration. The court said that under Mich Comp Laws § 600.5042(3), an agreement to arbitrate must provide that it may be revoked within 60 days after the patient's discharge from the hospital by notifying the hospital in writing. Having decided that the transfer of the patient from one hospital to another could not start the running of the 60–day period (§ 45), the court pointed out that, even if it had, her unconscious state rendered her totally unable to revoke the arbitration agreements within the required period. The court drew a parallel to the general savings provisions which create exemptions from the running of the statute of limitations, noting that, under Mich Comp Laws § 600.5851(1), those who are minors, insane, or imprisoned at the time the claim accrues, have a 1–year grace period after their disability is removed in order to bring their actions, although the period of limitation has run. Clearly, the patient's comatose state prevented her from communicating her revocation to the hospital within the required time or authorize her legal representative to do so.

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mandate, the agreement to arbitrate executed by the plaintiffs' decedent provided that it could be revoked within 60 days after discharge from the hospital by notification in writing. The hospital argued that the death of the patient was analogous to a discharge, and since the arbitration agreement was an enforceable contract, it bound the decedent's personal representatives; furthermore, the statute was applicable to either personal injury or death resulting from malpractice, and did not contain any special provision tolling the 60–day period until appointment of a personal representative or until discovery of the agreement. The malpractice plaintiffs argued that the patient's death was more like the onset of a disability than discharge from the hospital, in that it rendered the decedent incapable of any and all ability to act on his own behalf. Therefore, based on the "disability" provision of Mich Comp Laws § 600.5851, the revocation period was tolled during the period of disability and did not recommence until the disability was removed, in the instant case by the appointment of the decedent's personal representatives. The court said that it must first recognize that enforcement of the arbitration agreement involved the denial of the constitutional right to a trial before a court of law, and therefore every doubt must be resolved in favor of guaranteeing that there was an intentional, willing, and knowing relinquishment or abandonment of this fundamental right.\[FN53\] The revocation period was intended to provide a grace period in order to insure that there was an intentional relinquishment of the right to a trial in a court of law, said the court, as well as to provide a limitation period in order to afford a reasonable time within which revocation must be made. Neither of those purposes was furthered by allowing the 60 days to run regardless of whether there was any individual with the legal capacity to make such legal determinations, the court observed, rejecting as simplistic the argument that the patient's death should be equated with discharge. Rather, death created a disability which was not removed until a personal representative was appointed, and the revocation period was tolled until a legal representative was vested with the authority to revoke or ratify the agreement, the court concluded.

The legal representative of a deceased patient has 60 days from the time he or she is appointed after the death of a patient to exercise the right to revoke a medical malpractice arbitration agreement, the court held in Boiko v Henry Ford Hospital (1981) 110 Mich App 514, 313 NW2d 344, and it was not necessary for a patient to be discharged from the hospital before his death in order for the arbitration contract to be binding. The court reversed the trial court's denial of a motion by the defendants to compel arbitration, because the legal representative had failed timely to revoke the agreement after her appointment. It was stipulated that the patient, who had died of a heart attack in the hospital, had signed the agreement voluntarily and that it complied with all statutory requirements including sufficient notice of the legal representative's right to revoke the agreement. The legal representative was appointed more than a year after the patient's death and filed suit in malpractice and wrongful death approximately 2 years after the patient died. The trial judge held the agreement unenforceable because the patient was deprived of the opportunity to revoke by not having been discharged from the hospital. Under the Michigan Medical Malpractice Arbitration Act, Mich Comp Laws § 600.5040(1), the statute was applicable to the arbitration of a dispute arising out of or resulting from injury to or the death of a patient, observed the court. It also provided, under Mich Comp Laws § 600.5042(3), that the agreement must provide that a person or his or her legal representative had the right to revoke, the court continued, which clearly contemplated the application of the act to cases in which the patient died because in that case the right to revoke would rest with the legal representative of the decedent. Section 5040(1) evidences a strong legislative intent that the provisions of the statute apply not only to disputes arising out of or resulting from injury, but also to those involving death, the court continued. There was no provision in the act suggesting that its application to death actions was limited to cases in which death occurred after discharge, and if, as the malpractice plaintiff argued, the act were applicable only in cases where the patient died more than 60 days after discharge, the provision giving a legal representative the right to revoke within 60 days after discharge would be superfluous, since the legal representative of a decedent is not normally appointed until after the decedent's death. Furthermore, said the court, the trial court's reasoning that the agreement never came into being because the opportunity to revoke was not exercisable was contrary to elementary principles of contract law, because it construed a revocation or termination provision as establishing a condition precedent to the existence of a binding contract. The premise that a contract was not enforceable if it included a revocation period and circumstances resulted in the inability of a party to take advantage of the possibility of termination was without support either in the arbitration agreement or in the arbitration act itself, said the court. Rejecting the suggestion of the defendant to equate death with discharge so that the 60–day period for revocation would begin to run for the representatives upon either the death or the discharge of the patient, the court pointed out that that may result in injustice in those cases where more than 60 days pass after death before the appointment of a legal representative. By analogy with the
situation of a patient who was comatose and was given 60 days from the time her disability was removed to revoke the agreement, the court said a legal representative of the decedent should have 60 days from the time he or she is appointed and thus vested with the legal authority to revoke the agreement. The legal representative, however, had made no attempt to revoke the agreement either within 60 days of the patient's death nor within 60 days of her appointment, and, while noting that the filing of a complaint may be held to constitute an implied revocation of an arbitration agreement, the court pointed out that the action had not been filed until several months after the appointment, and the agreement to arbitrate was therefore binding.

See Hawker v Northern Michigan Hospital, Inc. (1987) 164 Mich App 314, 416 NW2d 428, § 50, for a case holding alternatively that the trial court could have correctly found that an agreement to arbitrate medical malpractice claims was not timely revoked based on the running of the statutory period from the time of the appointment of a legal representative of a deceased patient.

§ 49[a] Of a minor—Death of minor

The court held in the following case that the legal representative of a deceased minor, whose parent had signed an agreement to arbitrate medical malpractice claims on his behalf, was entitled to the tolling of the statutory revocation period until appointment, as would be the legal representative of a deceased adult patient.

Stating that there was no persuasive reason to distinguish between revocation of an agreement to arbitrate medical malpractice claims following the death of a minor and revocation following the death of an adult, the court in Winkler v Children's Hosp. of Michigan (1992) 196 Mich App 290, 492 NW2d 825, app den 442 Mich 885, 500 NW2d 479, held that the statutory 60-day revocation period did not begin to run until the appointment of a personal representative of the estate of the deceased minor. The patient's mother had signed an agreement to arbitrate any future claims regarding his hospital care on his behalf, and 7 months after his death following vascular surgery, a personal representative of the estate was appointed. One month later, the personal representative sent a letter to the hospital purporting to revoke the agreement signed by the child's mother and shortly thereafter instituted an action for wrongful death. The defendants moved to dismiss the complaint or to compel arbitration on the ground that the agreement was not revoked within the 60-day period specified in Mich Comp Laws § 600.5042, arguing that the plaintiff had the authority to revoke the arbitration agreement within the period but failed to do so, and there was no tolling of the period until the appointment of a personal representative. The statute required that an agreement to arbitrate must provide that the person receiving health care or his legal representative may revoke the agreement within 60 days after discharge from the hospital, observed the court. Stating that the case was analogous to situations involving the death of an adult patient, which resulted in the tolling of the 60-day period until the appointment of a personal representative, the court perceived strong policy reasons to maintain a consistent rule regarding revocation when the patient died, whether the patient was an adult or a minor. The personal representative is the only person empowered to bring a wrongful death action, explained the court, and since the question whether to bring a wrongful death action involves the decision to revoke the agreement, the personal representative is the proper party to make the decision. The court rejected an analogy with the situation in which the minor child was mentally incompetent at the time of the execution of the agreement, and the incompetence did not toll the running of the revocation period. [EN54]

§ 49[b] Of a minor—Mental retardation of minor

A minor plaintiff who suffered from mental retardation was not entitled to have the 60-day revocation period for the revocation of an agreement to arbitrate medical malpractice claims tolled during his disability, the court held in the following case.

It was error to refuse to compel arbitration of the medical malpractice claim of a mentally retarded infant plaintiff whose mother had signed an arbitration agreement on his behalf, because the plaintiff's mental incompetence did not toll the running of the 60-day revocation period, the court held in Osborne v Arrington (1986) 152 Mich App 676, 394 NW2d 67. The court noted that the statute, Mich Comp Laws § 600.5046(2), provided that a minor child would be bound by a written agreement to arbitrate executed on his behalf by a parent or legal guardian, and that the minor could not subsequently disaffirm the agreement. The trial court had found that Mich Comp Laws...
§ 600.5851(1) created an exemption from the running of the period of limitation in the Medical Malpractice Arbitration Act, by providing that if a person first entitled to bring an action was under 18, insane, or imprisoned at the time of the accrual of the claim, he or those claiming under him would have 1 year after the disability was removed through death or otherwise to bring an action, even though the period of limitation had run. The Medical Malpractice Arbitration Act clearly changed the common law to permit a parent to bind her child to an arbitration agreement, the court observed, and the situation is distinguishable from those in which persons who signed an arbitration agreement later became disabled for one reason or another and the courts found the period of revocation tolled, by analogy with the statute of limitations tolling period for mental incapacity. The legislative determination that a parent could bind the minor child to an arbitration agreement not subject to disaffirmance has been upheld (§§ 38-40), the court stated, and nothing in the record suggested that the mother was not in a sufficient physical and mental condition to revoke the arbitration agreement within the 60–day period. The parent was competent, and no complete bar to the minor malpractice plaintiff's claim resulted, the court concluded, reversing the trial court's denial of the defendant's motion for accelerated judgment on that ground. However, the case had to be remanded because the plaintiff raised additional issues, on which the trial court had not ruled, with respect to the defendant's compliance with the statutory requirements regarding presentation of the arbitration agreement. The failure to supply a copy of the information brochure, if proven by the plaintiff, would result in an unenforceable arbitration agreement, said the court.

§ 50. Until discovery of arbitration agreement or time agreement should have been discovered

The legally appointed representative of a deceased patient was entitled to the benefit of the tolling of the 60–day revocation period until the discovery of the existence of a medical malpractice arbitration agreement or the time when the agreement should have been discovered, the court held in the following cases.

In Di Ponio v Henry Ford Hospital (1981) 109 Mich App 243, 311 NW2d 754 (disapproved on other grounds by McKinstry v Valley Obstetrics–Gynecology Clinic, P.C., 428 Mich 167, 405 NW2d 88), the court held, alternatively, that upon the death of a patient prior to discharge from the hospital, the 60–day period for revocation of an agreement to arbitrate medical malpractice claims signed by the patient must be tolled by the adoption of a tolling provision analogous to that of either "discovery" or "disability." [FN55] Shortly after the patient's death, the malpractice plaintiffs requested copies of all his records from the defendant hospital, but they first learned of the agreement when the defendant hospital filed a motion for accelerated judgment and to compel arbitration in response to the filing of the plaintiffs' wrongful death action on behalf of the decedent's estate. The trial court denied the motion, allowing the malpractice plaintiffs 2 months from the date of the discovery of the existence of the arbitration agreement to serve the defendant with notice of revocation. Having rejected the contention that the Circuit Court did not have jurisdiction to determine the timeliness of the revocation, the court observed that, pursuant to statutory mandate, the agreement to arbitrate executed by the plaintiffs' decedent provided that it could be revoked within 60 days after discharge from the hospital by notification in writing. In addition to holding that, because the patient's death was more like the onset of a disability than discharge from the hospital, the revocation period was tolled until a legal representative was vested with the authority to revoke or ratify the agreement, the court agreed with the malpractice plaintiffs' argument that, based on the "discovery" rule of Mich Comp Laws § 600.5838(2), the limitation period did not begin to run until they discovered or should have discovered the existence of the claim.

The trial court correctly applied the tolling provisions for the statutory revocation period of an agreement to arbitrate medical malpractice claims, based on either a "discovery" or "disability" rule, in determining that, more than 60 days having elapsed after the personal representative should have discovered a deceased patient's agreement with a hospital to arbitrate medical malpractice claims before a letter purporting to revoke the agreement was sent, the agreement was not revoked in a timely manner, the court held in Hawker v Northern Michigan Hospital, Inc. (1987) 164 Mich App 314, 416 NW2d 428. There were two standards by which to measure the running of the 60–day revocation period, observed the court: the "disability" provision standard under Mich Comp Laws § 600.5851 and the "discovery" provision standard under Mich Comp Laws § 600.5838(2). The trial court found that in view of correspondence between the attorney for the estate and the hospital, the time when the arbitration agreement should have been discovered had expired before the revocation letter was sent, a ruling which was not clearly erroneous,
said the court. Alternatively, the trial court was also correct in finding that, considering the running of the period to begin at the appointment of an administrator for the estate or a personal representative, the period to terminate the agreement expired a month before the actual revocation letter, the court concluded.

V. Scope of Agreement to Arbitrate Medical Malpractice Claims

A. In General

§ 51. Agreement as excluding malpractice claims

Construing ambiguities in an adhesive hospital admission form providing for the arbitration of medical malpractice claims, the court held in the following case that the agreement was not applicable to the patient's malpractice claim.

Stating that ambiguities in the terms of an adhesion contract must be resolved against the party who prepared the contract, the court in Wheeler v. St. Joseph Hospital (1976, 4th Dist) 63 Cal. App. 3d 345, 133 Cal. Rptr. 775, 84 A.L.R.3d 343, more fully reported in § 9[b], held that a number of ambiguities in an adhesive hospital admission form requiring arbitration of any legal claim or civil action in connection with the hospitalization, by or against the hospital or its employees or any doctor of medicine agreeing in writing to be bound by the provision, rendered a malpractice claim of a patient beyond the scope of the arbitration provision. Pointing out that the provision made no express mention of medical malpractice claims, but referred generally to any claim in connection with the hospitalization, the court held that the phrase "any legal claim or civil action" could reasonably be interpreted by a layman as only covering disputes over hospital bills, and that the phrase "in connection with this hospitalization" could reasonably be interpreted to refer only to claims arising out of services rendered by the hospital, and not to medical malpractice committed by the patient's doctor. Stating that the phrase, "any doctor agreeing in writing to be bound" by the provision, was ambiguous and uncertain as to when and how the agreement was to be manifested, the court pointed out that the patient was never told that all doctors having staff privileges at the hospital had previously agreed to the arbitration provision, and held, resolving the ambiguities in favor of the patient, that the arbitration provision should not extend to malpractice claims against "any doctor of medicine" without some explanation to the patient at the time he signs the admission form of the intended scope of the arbitration provision.

§ 51.5. Definition of "claim"

[Cumulative Supplement]

The court in the following case defined the term "claim" as used in mandating the arbitration of claims against a health care provider.

CUMULATIVE SUPPLEMENT

Cases:

Term "claim," as used in statute mandating arbitration of claims against health care provider for medical injury in which damages of more than limit of concurrent jurisdiction of district court are sought, means group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from narrow concept of cause of action. Code, Courts and Judicial Proceedings, § 3–2A–02(a). Lerman v. Heeman, 347 Md. 439, 701 A.2d 426 (1997).

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[END OF SUPPLEMENT]
§ 52. Definition of "patient"

The definition of "patient" in an agreement providing for the arbitration of medical malpractice claims did not include the child of an obstetrical patient, the court held in the following case, and a claim for the wrongful death of the child was not within the scope of the agreement.

In Weeks v Crow (1980, 4th Dist) 113 Cal App 3d 350, 169 Cal Rptr 830, the court held that an agreement with a hospital to arbitrate medical malpractice claims of the patient, which defined "patient" as including the "undersigned patient or dependent of patient, whether or not a minor, or the heirs–at–law or personal representative of patient," did not apply to the cause of action of the patient and her husband for the wrongful death of their newborn child. The agreement provided for arbitration of "any dispute as to medical malpractice, that is, as to whether any medical services rendered under this contract" were improperly rendered. An examination of the agreement indicated that the parties did not agree to arbitrate claims of malpractice of the care of the baby, said the court, because the agreement contained no reference to the child, which could also easily have been named as a patient if such had been intended. The court rejected the argument that since the definition of "patient" in the agreement included dependents of the named patient, the contract covered arbitration of malpractice claims for treatment of dependents. The argument assumed that the definition was intended to describe the individuals to whom treatment was to be rendered, explained the court, but the definition included those persons who may have a cause of action arising from negligent treatment of the named patient, and was intended to enumerate the parties intended to be bound by the agreement to arbitrate such claims. The definition did not expand the scope of the agreement to cover disputes arising out of the treatment of persons other than the named patient, the court concluded.

B. Application of Agreement at Time of Alleged Malpractice

§ 53[a] Agreement with hospital—Held applicable

Agreements to arbitrate medical malpractice claims applied to a patient's action in connection with the birth of her son, even though she was sent the agreements and signed them after her discharge from the hospital, the court held in Harte v Sinai Hospital of Detroit (1985) 144 Mich App 659, 375 NW2d 782. Liberal construction of the scope of an arbitration agreement was appropriate, said the court, and the agreement stated that it would apply to claims "which may arise in the future out of or in connection with the health care rendered to me during this hospital stay.… by this hospital…. and those of its independent doctors who have agreed to arbitrate." The language of the agreement referred to "this hospital stay," observed the court, and the patient testified that she went to the hospital only once and understood that the agreement related back to her hospital stay. The court also stated that the mother's claims arising from prenatal care should be included in the arbitration proceeding, as they were inextricable from the arbitrable claims because they involved the same damages.

In Marciniak v Amid (1987) 162 Mich App 71, 412 NW2d 248, app den 430 Mich 860, the court held that a patient's malpractice complaint was within the scope of an arbitration agreement which she signed with the hospital, rejecting her argument that it arose before her admission by virtue of the doctor's decision to perform an allegedly unnecessary second surgery, which resulted in pain, suffering, and further corrective surgery. She had signed an arbitration agreement with the hospital which purported to cover any claims or disputes which arose in the future, out of or in connection with the health care rendered during the hospital stay, by the hospital, its employees, and those of its independent staff doctors and consultants who had agreed to arbitrate, the surgeon being one of those doctors who had previously agreed to do so. The court pointed out that in the same suit, the patient had attempted to recover from the hospital and two staff doctors for damages identical to those asserted against the doctor performing the surgery, and therefore her claim against the doctor involved the same damages and was inextricable from her arbitrable claims. The recovery sought arose in connection with surgery performed at the hospital and so arose out of her care there under the agreement, the court concluded, reversing the trial court's denial of the doctor's motion to compel arbitration.

A patient who signed an agreement to arbitrate medical malpractice claims when she visited the hospital for
preoperative tests was bound by the agreement to arbitrate her malpractice claim against the hospital and doctors, based on alleged negligence which occurred when she was operated on 3 days later, the court held in Grazia v. Sanchez (1993) 199 Mich App 582, 502 NW2d 751, affirming summary disposition for the defendants. The plaintiff argued that the agreement pertained only to the testing and procedures performed on the day she signed it. The court observed that a provision of the statute governing agreements to arbitrate medical malpractice claims, Mich Comp Laws § 600.5041(6), specified that each admission to a hospital should be treated as separate for purposes of such an agreement, but that a person receiving outpatient care could consent to an agreement covering a specific or continuing program of treatment. Citing Harte v. Sinai Hospital of Detroit (1985) 144 Mich App 659, 375 NW2d 782, this subsection, the court said that since, in that case, an arbitration agreement signed after the care was rendered related back to the date of service, it had no hesitation in holding that a similar agreement signed before elective surgery related forward to the surgery itself. The patient argued that the agreement referred to "this hospital stay" and the preoperative visit was the only stay to which it could apply, but the court said there was no evidence that she was admitted or discharged from the hospital before the day she was admitted for surgery, and the visit before the surgery was not a "hospital stay" at all. Furthermore, the unrebutted affidavit of the manager of the hospital's preadmission testing unit testified that during the preadmission procedure, the patient was clearly told that the arbitration agreement was for the upcoming admission, the court continued. Such evidence of habit or routine was admissible to show the circumstances surrounding the execution of the agreement, explained the court, and the patient had submitted no evidence that she believed the agreement pertained only to the preadmission procedures.

CUMULATIVE SUPPLEMENT

Cases:

Once defendant hospital or health care provider who seeks to enforce arbitration agreement meets initial burden of producing prima facie evidence that agreement was executed in strict compliance with Medical Malpractice Arbitration Act (MMAA), statutory presumption of validity accrues, and burden of going forward with evidence to rebut presumption then shifts to party seeking to avoid agreement. M.C.L.A. §§ 600.5040 et seq. (Repealed). Jozwiak v. Northern Michigan Hospitals, Inc., 231 Mich. App. 230, 586 N.W.2d 90 (1998).

Arbitration agreement between physician and patient was not unenforceable due to fact that medical treatment giving rise to lawsuit was rendered prior to time patient signed agreement, particularly in view of fact that patient initialed clause that applied to previously rendered treatment. West's Tenn.Code, § 29-5-302(a). Buraczynski v. Eyring, 919 S.W.2d 314 (Tenn. 1996).

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[END OF SUPPLEMENT]

§ 53[b] Agreement with hospital—Held not applicable

In the following cases, the courts held that the agreement of a patient with a hospital to arbitrate medical malpractice claims was not applicable to the time the patient alleged the malpractice arose.

Allegedly negligent actions taken prior to a malpractice plaintiff's admission to the hospital were not covered in an agreement to arbitrate which stated that it applied to any claims or disputes which might arise in the future out of or in connection with the health care rendered during the hospital stay, the court held in Troy v. Leep (1980) 101 Mich App 425, 300 NW2d 598. After being treated for a weak cervix when she experienced spotting during her pregnancy, the patient gave birth to a premature child who subsequently died. During her hospital stay she executed the agreement to arbitrate, but the negligence alleged in her malpractice action was the failure of the doctor to suture her cervix during the treatment prior to the hospital stay in order to prevent the premature birth of the child. The arbitration agreement only covered actions for health care rendered while the patient was in the hospital, said the court, and did not cover allegations of negligent actions prior to the patient's admission, reversing the order of the
trial court compelling arbitration and remanding the case for trial.

An arbitration agreement stating that it applied to the patient's care during "this hospital stay and/or emergency room visit" applied only to malpractice committed while the patient was on hospital premises and receiving treatment, the court held in McKain v Moore (1988) 172 Mich App 243, 431 NW2d 470. The patient had received emergency room treatment for shoulder pain, had had X–rays taken, and the X–rays were reviewed after the patient left the hospital, revealing an osteosarcoma, which was never communicated to the patient. Given its plain meaning, and the fact that the word "this" is printed in capital letters and in boldfaced type, said the court, it concluded that medical action taken or not taken subsequent to the patient's discharge was not covered by the agreement. Although there was language in the booklet, that the hospital was supposed to provide to the patient, stating that the agreement covered claims arising from care and treatment rendered, the language did not appear on the agreement that the patient signed, said the court. The hospital could not assert that the booklet language was binding when the language was not included in the text of the agreement, and the hospital had not proved that the patient received a booklet, the court concluded, reversing the trial court's ruling that the agreement was binding with regard to actions taken subsequent to the emergency room visit.

Reversing summary disposition of a plaintiff's malpractice claim in favor of the defendants on the basis of an arbitration agreement, in Haywood v Fowler (1991) 190 Mich App 253, 475 NW2d 458, app den 439 Mich 930, 479 NW2d 693, the court held that an agreement signed upon admission to the hospital was not valid as to a subsequent hospitalization which commenced 1 day after the plaintiff's first discharge. Under Mich Comp Laws § 600.5042(6), each admission to a hospital was treated as separate and distinct for the purposes of an agreement to arbitrate, said the court, and the agreement itself contained language that it applied to care during "this" hospital stay. When the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning, the court continued, and the agreement, particularly by capitalizing and printing "this" in boldfaced type, limits its applicability to the existing hospital admission, an interpretation consistent with the statute.

The defendant's contention that the plaintiff left his first hospital stay against medical advice did not change the fact that the second hospitalization was a separate admission, and the agreement signed when the patient was admitted the first time was not binding on him for claims of medical malpractice stemming from the second hospitalization, the court concluded.

In Villarreal v Chun, (1993) 199 Mich App 120, 501 NW2d 227, the court held that a malpractice plaintiff could not be compelled to arbitrate a malpractice claim to the extent it resulted from care provided by the defendant doctor outside the hospital, when the patient had signed an agreement to arbitrate with the hospital which applied only to care rendered during the hospital stay. The doctor provided the plaintiff's decedent with care both in and out of the hospital over a period of several months, the court pointed out, and the malpractice claim rested on the failure to provide proper care and therefore necessarily occurred both in and out of the hospital. Reversing the trial court's summary judgment for the defendant doctors on the basis of the arbitration agreement to the extent that it applied to actions taken subsequent to the patient's discharge, the court concluded, reversing the trial court's ruling that the agreement was binding with regard to actions taken subsequent to the emergency room visit.

Canonicity with other health care providers—Held applicable

§ 54[a] Agreements with other health care providers—Held applicable
In the following cases, the courts held that agreements with health care providers other than hospitals to arbitrate medical malpractice claims were applicable to the time when the patient received treatment.

A contract delineating a specific course of treatment to be administered is not required by the statute nor normally expected by a patient, the court said in *Hilleary v Garvin* (1987, 2nd Dist) 193 Cal App 3d 322, 238 Cal Rptr 247, holding that an arbitration agreement, which tracked the mandatory language found in *California Civ Proc Code § 1295* (Deering), was effective for all subsequent open-book account transactions for medical services, when the patient had voluntarily signed an agreement stating that any dispute as to medical malpractice would be submitted to arbitration. The patient signed the agreement when she went to the doctor for treatment for her pregnancy, and she later suffered a miscarriage and underwent surgery for removal of fibroid tumors of the uterus. When she brought a malpractice action based on failure to properly close the incision, the trial court found the arbitration agreement to be ambiguous and denied the doctor's petition to compel arbitration. The patient submitted herself to the medical group for a course of continuing treatment relating to complications of childbirth, said the court, and the parties, as in the traditional doctor–patient relationship, entered into an implied-in-fact contract that the defendant would use his best medical judgment to diagnose and treat her condition, and in return, she would follow his prescribed treatment and pay for his services. Her condition was one of a complicated pregnancy with associated gynecological problems, the court continued, rejecting the patient's argument that the statute contemplated only underlying contracts which were reduced to writing. The clear meaning of the statute was that any contract for health care, with certain exceptions not relevant, whether written or oral, express or implied, was within the ambit of the legislation providing for voluntary agreements to arbitrate, said the court, and *California Civ Proc Code § 1295 subd (c) (Deering)* particularly recognized that most medical care was dispensed without recourse to formalized payment structures. The patient's uncommunicated subjective intent, that the agreement covered the arbitration of medical services rendered in relation only to the pregnancy, was not relevant, and the existence of mutual assent was to be determined by objective criteria, explained the court. Based on the standard of whether a reasonable person would, from the conduct of the parties, conclude that there was mutual agreement, the court pointed out that the patient voluntarily signed the agreement explicitly stating that any dispute as to medical malpractice would be submitted to arbitration and there was no evidence from which a reasonable person could conclude that the parties intended the followup surgery for removal of the tumors to be severable from the treatment for the pregnancy.

When a patient, in the course of an ongoing doctor–patient relationship, sought treatment for a condition of the type which had initially brought him to the doctor's office, at which time he had signed an arbitration of malpractice claim agreement, the agreement covered the subsequent treatment, the court held in *Gross v Recabaren* (1988, 2nd Dist) 206 Cal App 3d 771, 253 Cal Rptr 820. The patient had initially received treatment consisting of the excision of a mole and a cyst from his scalp and returned 18 months later when he was diagnosed as having a malignant cyst on his nose. He was treated over a period of 8 months, and argued that the arbitration agreement had been intended to cover only those services rendered contemporaneous to its signing. The court observed that there was a strong public policy favoring arbitration over litigation as a speedy and relatively inexpensive means of dispute resolution, and that the agreement signed by the patient was drafted pursuant to the statutory requirements of *California Civ Proc Code § 1295* (Deering). The agreement did not expressly delineate the scope of the services contracted for, said the court, other than to state that the doctor agreed to provide to the patient medical, surgical, and related health care services in consideration for payment on a fee for service basis, and any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration. While refusing to define the full reach of the agreement, the court was satisfied that it was at least intended to encompass those situations in which a patient, in the course of an ongoing doctor–patient relationship, seeks treatment for a condition of the type which initially brought him to the doctor's office. To impose on the physician the extra burden of having to renew the arbitration agreement each time there was a variation of treatment or ailment would be impractical and would frustrate the purpose of the statute, said the court. The patient sought medical services for treatment of similar problems, the court continued, and there was no objective evidence from which a reasonable person could conclude that either of the parties viewed their relationship as having terminated after the initial treatment. Although it was not necessarily anticipated that the patient would return, that he did return when he needed additional treatment was persuasive evidence of an ongoing relationship, the court explained, as was the manner in which the medical and billing records were maintained by the
Under California Civ Proc Code § 1295(c) (Deering), the agreement, once signed, governed all subsequent open–book account transactions for medical services for which the contract was signed, until or unless rescinded by written notice within 30 days of signature. The "open" or "closed" nature of a book account turned not on the account balance, but on the parties' expectations of possible future transactions between them, the court explained, and since the parties' relationship was ongoing at the time of the patient's second surgery, that procedure must be deemed a "subsequent open–book account transaction for medical services" within the meaning of the statute. The fact that there was no outstanding balance on the account was not determinative, concluded the court, reversing and remanding the trial court's decision that the arbitration agreement between the parties was not applicable to the malpractice action.

CUMULATIVE SUPPLEMENT

Cases:

Arbitration agreement that was signed when chiropractor first treated patient applied to medical malpractice claim arising from treatment for a different condition two years later, inasmuch as the agreement stated that it was intended to bind the patient and health care provider "who now or in the future treats the patient"; regardless of whether patient had a present intention to return for treatment, he agreed that if he did decide to do so, the arbitration provision would apply to a future dispute. West's Ann.Cal.C.C.P. § 1295. Reigelsperger v. Siller, 40 Cal. 4th 574, 53 Cal. Rptr. 3d 887, 150 P.3d 764 (2007).

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[END OF SUPPLEMENT]

§ 54[b] Agreements with other health care providers—Held not applicable

[Cumulative Supplement]

Agreements with health care providers other than hospitals to arbitrate medical malpractice claims were not applicable to the time when the patient received treatment, the courts held in the following cases.

An agreement to arbitrate medical malpractice claims arising in connection with medical care received over a period of 1 year from the date of the agreement between a patient and his surgeon did not apply to a claim of negligence committed before the agreement was signed, the court held in Miller v Swanson (1980) 95 Mich App 36, 289 NW2d 875. The malpractice plaintiff had an operation in order to correct a deformity in his wrist, after which he experienced sharp pains, and X–rays were taken which allegedly disclosed a needle–shaped object embedded in his wrist, although the doctor assured him nothing was amiss. Before a second operation was scheduled, he voluntarily signed a standard form arbitration agreement, and during that operation the doctor removed a surgical needle from his wrist. Over 6 months later, the malpractice plaintiff attempted to revoke the arbitration agreement but was unable to do so because the 60–day period allowed for revocation under Mich Comp Laws § 600.5041(5) had expired, after which he filed suit charging fraud, negligence, and misrepresentation. The trial court correctly applied a three–pronged test to determine arbitrability, said the court, inquiring whether there was an arbitration agreement between the parties, whether the claim was "on its face" or "arguably" related to the contract, and whether the dispute was "expressly exempt" by the terms of the contract. The parties agreed that the first and third parts of the test were met in that there was an arbitration agreement and the dispute was not expressly exempted by the terms of the contract. As to whether the claim was on its face or arguably related to the arbitration agreement signed by the malpractice plaintiff, the defendant doctor contended that the agreement was ambiguous as to whether its terms related back to the first surgery, and that since it was ambiguous, it was necessarily "arguably related" to the agreement. The agreement provided, in part, that it applied to disputes which may arise in the future out of or in connection with medical care rendered to the patient, and that it would apply to any future claims or disputes arising out of or in connection with medical care received over a period of 1 year from the date of the agreement. The court said that on
its face, the agreement referred to future medical services, in terms of "medical care received over a period of 1 year from this date." The defendants also argued that the phrase "in connection with medical care received" was susceptible to a construction including medical care received both in the past and in the future. However, the court pointed out that the language was qualified by the words indicating application to future care. Assuming arguendo that the medical services were to be rendered in a two-step operative procedure, as the defendant doctor alleged, the court said that it still did not follow that the agreement could relate back to the first surgery when it expressly referred to care received over a period of one year from the date of the agreement. The court also rejected the argument that the dispute with the doctor did not arise until the malpractice plaintiff filed his lawsuit. Pointing out that Mich Comp Laws § 600.5001 provided that a provision in a written contract to settle a controversy thereafter arising by arbitration was valid, the court said it would not construe the word "controversy" to mean only a complaint filed in court or a cause of action, because had the legislature intended such a restrictive definition of the term, it would have indicated its meaning more specifically.

CUMULATIVE SUPPLEMENT

Cases:

Implied-in-fact agreement between chiropractor and patient establishing doctor-patient relationship for single treatment did not establish open book account, and thus arbitration provision which was part of such agreement did not apply to chiropractor's single treatment of such patient two years later, which treatment gave rise to medical malpractice action, even though language in arbitration clause provided that it was intended to bind parties "now or in the future," where there was no ongoing doctor-patient relationship, and patient paid for prior single treatment in full closing out account at that time, despite ongoing chronic lower back condition which required ongoing care. West's Ann.Cal.C.C.P. § 1295(c). Reigelsperger v. Siller, 125 Cal. App. 4th 1008, 23 Cal. Rptr. 3d 249 (3d Dist. 2005).

In action by patient against physician for professional negligence, trial court properly found that arbitration agreement patient signed in 1990 did not govern 1993 treatment giving rise to litigation, where there was sufficient evidence to support trial court's finding that there was no continuing physician–patient relationship between parties and, therefore, no expectation of future medical transactions between them. Cochran v Rubens (1996, 4th Dist) 42 Cal App 4th 481, 49 Cal Rptr 2d 672, 96 CDOS 801, 96 Daily Journal DAR 1218.

No enforceable arbitration clause existed under health plan of health maintenance organization (HMO) as to claims arising from medical treatment during year before health plan agreement was modified to include arbitration clause, which did not indicate whether its terms would apply to claims made for treatment made before clause was added. George Washington University v. Scott, 711 A.2d 1257 (D.C. 1998).

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[END OF SUPPLEMENT]

C. Application of Agreement to Actions Against Nonsignatories

§ 55[a] Generally—Held applicable

[Cumulative Supplement]

In the following cases, the courts held that an agreement to arbitrate medical malpractice claims was applicable to the claim of a patient against a doctor employee of the patient's health care corporation, or against an associate of the patient's physician, even though he had not signed the agreement. In Harris v Superior Court (1986, 2nd Dist) 188 Cal App 3d 475, 233 Cal Rptr 186, the court directed the trial court to vacate its order denying the malpractice plaintiffs' motion to compel a defendant doctor to participate in arbitration, stating that he was bound by his health corporation employer's agreement to arbitrate in a contract for
prepaid health services. The plaintiffs were enrolled in the program as a benefit of the father's employment and at the time of enrollment, he was furnished with an application and a document explaining the agreement, which stated that any claim asserted against the medical group which employed the physician was subject to binding arbitration. The trial court reasoned that the doctor was not a party to the arbitration agreement. Observing that an action to compel arbitration is an action to compel specific performance of a contractual agreement to arbitrate, the court said there was no doubt that the enrollment form arbitration clause, which specifically named the medical group and its contracting health professionals, gave the doctor as its employee the contractual rights to compel arbitration of a malpractice claim against him. Under the doctor's construction, the patient could not compel him to arbitrate because only the patient executed the enrollment form, and it would in effect grant an option to the employees and other contracting professionals to choose arbitration or litigation but to impose arbitration on any plaintiff. It was well established that a nonsignatory beneficiary of an arbitration clause was entitled to require arbitration, said the court, but whether such a one can be forced to arbitrate was a closer question. When the record showed that the doctor was an employee of the medical group and that he provided medical care to its patients, that relationship was sufficient to bind him to the arbitration agreement which named the medical group, the court decided. The professional corporation could render medical services to patients only through its employees, and the doctor acted as an employee and on the corporation's behalf when he rendered medical care to the plaintiff. He was therefore subject to the corporation's obligations under the agreement, just as the plaintiffs, also nonsignatories, were bound by the father's agreement. A third-party beneficiary of a contract can gain no greater right under that contract than the contracting parties, the court continued, and the physician was a third-party beneficiary of the arbitration provision. Since the contracting parties which procured this benefit for him waived their rights to trial and agreed to arbitrate instead, the doctor could have no greater right under the contract. Furthermore, said the court, the voluntary acceptance of the benefit of a transaction constitutes consent to all the obligations arising from it, so far as the facts are known or ought to be known to the person accepting. The doctor obtained patients through enrollments in the health plan and his acceptance of that benefit necessarily entailed acceptance of the agreement that members' claims would be subject to binding arbitration, the court explained. There was no concern under the circumstances that binding arbitration was imposed contrary to a party's reasonable expectations or that loss and unfair imposition would result, the court concluded.

In Mormile v. Sinclair (1994, 4th Dist) 21 Cal. App. 4th 1508, 26 Cal. Rptr. 2d 725, 94 CDOS 438, 94 Daily Journal DAR 727, the court held that a medical malpractice arbitration agreement specifying that it applied to claims against "the physician, and the physician's partners, associates, association, corporation or partnership, and the employees, agents and estates of any of them..." was broad enough to encompass the physician whose failure to treat the patient was alleged to have resulted in a stillbirth, as an associate or employee of the doctor with whom she had signed the agreement. The pregnant patient signed the agreement on her first visit for obstetrical care; when she began labor, the first doctor told her that another doctor would meet her at the hospital, but he never arrived to attend the delivery.

**CUMULATIVE SUPPLEMENT**

**Cases:**

Arbitration agreement in a health plan's election form bound deceased patient's widow and adult children in their action for, inter alia, wrongful death; the arbitration agreement applied to any claim brought by a health plan member or his heir or personal representative, the patient and widow were both enrolled in the plan through the widow's employer, and because the widow was bound by the arbitration agreement, the children also had to submit their wrongful death claims to arbitration in light of California's "one action rule" and other policy concerns favoring arbitration of all heirs' claims. Clay v. Permanente Medical Group, Inc., 540 F. Supp. 2d 1101 (N.D. Cal. 2007).

Mother's designation of daughter in durable power of attorney for health care authorized daughter to enter into binding arbitration agreements with extended care facility, which agreements governed daughter's suit against facility following mother's death, in which suit daughter was joined by other surviving relatives, alleging negligence, elder abuse, fraud, unlawful business practices, and wrongful death; power of attorney authorized daughter to make "all health care decisions" for her mother and did not restrict daughter's authority as agent to enter into arbitration.

Under Arbitration Code, medical malpractice plaintiffs were entitled to join defendants' liability insurer where circuit court, in confirming arbitrator's award, had to enter judgment in accordance with that award, unless insurer could establish either that coverage had been denied or that defendant have been undertaken subject to valid reservation of rights. Tallahassee Memorial Regional Medical Ctr. v. Kinsey, 655 So. 2d 1191 (Fla. Dist. Ct. App. 1st Dist. 1995).

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[END OF SUPPLEMENT]

§ 55(b) Generally—Held not applicable

[Cumulative Supplement]

The subsequent associate of a doctor with whom a patient had contracted to arbitrate malpractice claims was not bound by the agreement, the court held in the following case.

An agreement to arbitrate medical malpractice claims with an incorporated solo medical practitioner did not extend to a malpractice claim against another doctor who later became associated with the first practitioner in a reorganized medical group, the court held in Schirmer v Fisher (1991, 4th Dist) 235 Cal App 3d 398, 286 Cal Rptr 590, 91 CDOS 8433, 91 Daily Journal DAR 12939, review den, op withdrawn by order of ct (Cal) 92 CDOS 2671, 92 Daily Journal DAR 1545. The agreement provided that it would apply to all parties whose claims might arise out of or relate to treatment or services provided by the physician. Treated by the first doctor for back pain, the patient returned to the office more than a year later, after the doctor had changed his corporate name and employed another doctor to whom the patient was referred. The physician against whom the malpractice claim was brought appealed the trial court's denial of his motion to compel arbitration, arguing that the agreement signed by the patient expressly covered future services and bound her to arbitrate disputes arising out of services provided by the first doctor's employees. It was clear that the patient agreed to arbitrate her controversies with the first doctor, said the court, and in determining the scope of an arbitration clause, the court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made. When the patient signed the agreement, there was no medical group, because the first doctor was in practice by himself, and she had no reason to believe that she would be treated by any other doctor, the court explained. The significant fact was not the passage of time between visits or the variation in ailments, the court continued, but rather the total change in the physician–patient relationship, after the patient signed the arbitration agreement. Stating that judicial enthusiasm for alternative methods of dispute resolution should not override the rules governing the interpretation of contracts, the court stated in conclusion that the agreement did not reflect an intention by either party to cover medical treatment other than that rendered by the first physician.

CUMULATIVE SUPPLEMENT

Cases:

Agreements to arbitrate, signed by adult children of resident of convalescent hospital shortly after resident's admission to the hospital and when resident was mentally incompetent, were not enforceable, in action in which children, as successors-in-interest to deceased resident, asserted personal injury claims against hospital operators and also brought wrongful death claims in their own right; resident had not signed durable power of attorney and resident had lacked the capacity to authorize either child to enter into arbitration agreements. Pagarigan v. Libby Care Center, Inc., 120 Cal. Rptr. 2d 892 (App. 2d Dist. 2002).

Wrongful death action brought against convalescent home by deceased patient's husband and adult children, in
their individual capacities, was not subject to arbitration; although husband signed arbitration agreements with convalescent home on behalf of patient, there was no evidence that he signed the agreements in his personal capacity, and the adult children did not sign the agreements. Fitzhugh v. Granada Healthcare and Rehabilitation Center, LLC, 150 Cal. App. 4th 469, 58 Cal. Rptr. 3d 585 (1st Dist. 2007).

Husband of skilled nursing facility patient with dementia had no authority to bind patient to arbitration agreements he signed when she was admitted to facility; husband had no power of attorney at the time, patient did nothing to allow facility to believe husband had authority to act for her, and marital status alone was not sufficient to create agency. Flores v. Evergreen At San Diego, LLC, 148 Cal. App. 4th 581, 55 Cal. Rptr. 3d 823 (4th Dist. 2007).

Agreement to arbitrate between plaintiff–patient and defendant–health care provider does not bind cross–complainant who was not party to agreement and who seeks equitable indemnity from health care provider, in view of constitutional and procedural rights of nonsignatory third parties who had no prior connection to a signatory party to arbitration agreement. Right to arbitration depends on contract. Party cannot be compelled to arbitrate dispute it has not elected to submit to arbitration. County of Contra Costa v Kaiser Foundation Health Plan, Inc. (1996, 1st Dist) 47 Cal App 4th 237, 54 Cal Rptr 2d 628, 96 CDOS 5116, 96 Daily Journal DAR 8216, mod (1st Dist) 47 Cal App 4th 1771a, 96 CDOS 5856, 96 Daily Journal DAR 9382.

Health insurer which had intervened in insured's medical malpractice action, asserting a contractual lien against any judgment or settlement, but which did not sign arbitration agreement entered by insured and defendant in action, could not be required to arbitrate any claim it had against defendant. Hetrick v. Friedman, 237 Mich. App. 264, 602 N.W.2d 603 (1999).

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§ 56[a] Hospital staff physicians—Agreement held applicable

In the following cases, the courts held that patients were bound, under agreements to arbitrate medical malpractice claims executed with the hospital, to arbitrate their malpractice claims with hospital staff physicians who had agreed to arbitration in a separate contract with the hospital to which the patient was not a party.

In Kukowski v Piskin (1982) 415 Mich 31, 327 NW2d 832, the court held that an arbitration agreement between a patient and a hospital, which provided that it covered claims or disputes in connection with health care rendered by the hospital, its employees, and those of its independent staff doctors and consultants who had agreed to arbitrate, was applicable to a negligence action against an independent staff doctor who had consented to arbitrate, in a separate agreement between himself and the hospital. The patient argued that the agreements to arbitrate, which she had conceded executed with two hospitals where she received treatment, bound her only with respect to the hospitals, and that a separate agreement would have been necessary to bind her with respect to the physician. She pointed out that the first sentence of the agreements she had signed said, "I understand that the hospital and I by signing this document agree to arbitrate any claims." The court said, however, that the agreement must be viewed in the context of the Medical Malpractice Arbitration Act of 1975, Mich Comp Laws §§ 600.5040 et seq., which provided that it applied to disputes arising from the performance of professional services by a health care provider, hospital, or their agent, Mich Comp Laws § 600.5040(1), and also provided that the definition of "health care provider" included a person such as the defendant doctor. The court noted that the act described two types of arbitration, the first pursuant to an agreement with a health care provider who was not an employee of the hospital (Mich Comp Laws § 600.5041(1)) and the second pursuant to an agreement with the hospital (Mich Comp Laws § 600.5042(1)). As against the patient's contention that the agreement with the hospital which she signed did not extend to a nonemployee health care provider, the court said the act clearly provided otherwise, Mich Comp Laws § 600.5042(5) stating that all surgical and medical procedures performed by a participating health care provider in a hospital were covered by the terms and conditions applicable to the agreement between the patient and the hospital. The patient further argued that the negligent conduct of the doctor ought not to be characterized as "surgical and medical procedures" within the meaning of Mich Comp Laws § 600.5042(5), but the court said that by the same
reasoning, one could argue that when a physician was negligent or engaged in malpractice, the physician's activities were not "the performance of professional services," which would render the entire act meaningless in light of its stated application. The patient also asserted that the arbitration agreement failed to communicate adequately that the statute provided for the application of the agreement to services performed by nonemployees of the hospital, and, absent such disclosure, the statutory presumption of the validity of the agreement (Mich Comp Laws § 600.5042) would not apply. However, the court pointed out, the arbitration agreement stated: "I understand that this agreement is binding on me... as well as on this hospital, its employees and those of its independent staff doctors and consultants who have agreed to arbitrate," and thus plainly disclosed that the agreement was binding on the patient and her independent staff doctor. Hospitals and health care providers were referred to in tandem throughout the Michigan Malpractice Arbitration Act, observed the court, which provided for an inclusive plan to implement the public policy of speedy and flexible resolutions of disputes by voluntary submission to arbitration. The physician's agreement with the hospital to arbitrate covered the circumstances of the case, the statutory presumption of validity applied, and the patient, having signed an agreement valid in other respects which she did not revoke, was required to pursue her claim as she had agreed, the court concluded.

In McCloy v Dorfman (1983) 123 Mich App 710, 333 NW2d 338, vacated on other grounds 419 Mich 874, 347 NW2d 700, the court rejected the argument of a malpractice plaintiff that an arbitration agreement between herself and a defendant hospital did not cover a defendant doctor because it made no reference to him and he did not sign it. The agreement signed by the patient stated that it was binding on the patient, and the employees of the hospital and those of its independent staff doctors and consultants who had agreed to arbitrate. The court pointed out that language of a similar nature had been interpreted to mean that the patient clearly agreed to arbitrate claims involving parties other than the hospital, including those independent staff doctors who had executed an agreement with the hospital. The patient's unawareness of the defendant's agreement to arbitrate was not fatal to the defendant's motion to compel arbitration because the patient had agreed to arbitrate any disputes arising from health care rendered by any doctor who had so agreed. However, although it appeared that the defendant doctor was an independent staff doctor within the meaning of the agreement, the court concluded, it was error to compel arbitration when his agreement to arbitrate with the defendant hospital was not part of the trial record and there was no basis for holding that he was included in the agreement signed by the plaintiff.

In Harte v Sinai Hospital of Detroit (1985) 144 Mich App 659, 375 NW2d 782, the court held that an arbitration agreement covering independent staff physicians who had agreed to arbitrate created a valid arbitration agreement between the patient and those staff physicians even though no notice was given to the patient as to which doctors actually had agreed to arbitrate. The agreement unambiguously included the independent staff physicians, said the court, and the Medical Malpractice Arbitration Act provided that an arbitration agreement between a hospital and patient extends to health care providers (Mich Comp Laws § 600.5042(5)). The fact that the patient was unaware of the doctor's agreements to arbitrate was not material, the court concluded. In Marciniak v Amid (1987) 162 Mich App 71, 412 NW2d 248, app den 430 Mich 860, the court held that a patient who had freely chosen to sign a hospital arbitration agreement which unambiguously extended to independent staff doctors was compelled to arbitrate her malpractice complaint with such a doctor and it made no difference that she did not know whether he had signed an agreement to arbitrate with the hospital. The agreement contained a clause stating that it was binding on the patient, the hospital, its employees, and those of its independent staff doctors and consultants who had agreed to arbitrate. The patient brought a complaint against the hospital, two of its staff doctors, and the defendant doctor, arising out of surgery which was performed by him at the hospital. The court reversed the trial court's denial of his motion to compel arbitration, pointing out that the Medical Malpractice Arbitration Act (Mich Comp Laws § 600.5040(1)) applied to arbitration of claims arising from the performance of professional services by a health care provider, hospital, or their agent, and that the term "health care provider" included an independent staff physician (Mich Comp Laws § 600.5040(2)(b)). The act further provided under Mich Comp Laws § 600.5042(5) that notwithstanding the continuing existence of a health care provider-patient arbitration agreement, all surgical and medical procedures performed by a participating health care provider in a hospital would be covered by the terms and conditions applicable to the agreement between the patient and the hospital, the court observed.

See Green v Gallucci (1988) 169 Mich App 533, 426 NW2d 693, § 37, in which the court held that a hospital's failure to have arbitration participation agreements between itself and staff doctors read to a patient, who was offered an agreement to arbitrate claims against the hospital and those of its independent staff who had agreed to arbitrate, did not render the patient's contract invalid.
§ 56[b] Hospital staff physicians—Agreement held not applicable

In the following cases the courts held that patients who had executed agreements with hospitals to arbitrate medical malpractice claims were not bound thereby to arbitrate a claim with a hospital staff physician who was not a party to the agreement.

In Brown v Considine (1981) 108 Mich App 504, 310 NW2d 441, the court held that a patient was not required to submit her malpractice claim against a doctor to arbitration when, although she had signed an agreement to arbitrate with the hospital which included claims against independent physicians who agreed to arbitrate, the defendant doctor had executed his agreement with the hospital only after the execution of the patient's contract and after the alleged acts of malpractice. A contract is made when both parties have executed or accepted it, and not before, said the court, and while there was no question that the agreement covered the hospital, in regard to the doctor, it was ambiguous at best. Taken literally, said the court, the use of the term "who had agreed" referred to an action taken some time in the past, and the arbitration agreement specifically referred to claims "which may arise in the future." If the patient were required to arbitrate her malpractice claim against the doctor, the agreement would be covering a claim of malpractice based upon acts which occurred in the past and which it did not cover, and furthermore, the court stated, the construction advocated by the defendant exceeded the range of expectations of any knowledgeable patient who would read and execute the agreement. Since the hospital is not liable for the acts of a staff physician on a respondeat superior theory, and given that it is more likely that a patient will be harmed by his own doctor's negligence, as opposed to the independent negligence of the hospital, it is plausible that a given patient would agree to arbitrate with the hospital but not the doctor, the court observed. However, under the defendant doctor's proposed construction, said the court, even a patient who had consciously made this choice, knowing that his doctor had not agreed to arbitrate, could nonetheless lose the right to sue the physician in court if the latter subsequently executed a participation agreement with the hospital. The court rejected the defendant's reliance on the principle that arbitration agreements were to be liberally construed in favor of arbitrability, saying that the issue was not arbitrability but the problem of whether an arbitration contract even existed in respect to the claim against the doctor. Nothing in the Medical Malpractice Act required a plaintiff who has agreed to arbitrate with the hospital also to arbitrate with the doctor, the court concluded, and had the doctor never executed a participation agreement with the hospital, the need for litigation in two forums would be obvious.

When an independent staff doctor had not signed an agreement to arbitrate with the hospital, the patient's agreement with the hospital to arbitrate medical malpractice disputes did not apply to the malpractice claim against him, the court held in Belobradich v Sarnsethsiri (1983) 131 Mich App 241, 346 NW2d 83. The doctor argued that as an "on call" specialist assigned to the patient's case by the hospital, he was included in the agreement to arbitrate signed by the patient on admission. He contended he should be covered because the patient looked to the hospital for treatment and perceived the defendant solely as an agent of the hospital, relying on authority that under the doctrine of agency by estoppel, the hospital could be held liable for the acts of medical personnel who were its ostensible agents. The court disagreed, stating that an independent medical contractor, arguably held out as the hospital's agent, did not become implicitly bound to an arbitration agreement executed between the hospital and the patient. Furthermore, although the doctor had signed an agreement but only several months after the patient had been treated, the court, following Brown v Considine (1981) 108 Mich App 504, 310 NW2d 441 (this subsection), said that to hold him bound by the agreement would be contrary to its explicit language that it would be binding upon those of the hospital's "independent staff doctors… who have agreed to arbitrate."

The estate and professional corporation of a deceased physician who had not signed an agreement to arbitrate with the patient who brought a malpractice claim could not obtain dismissal of the claim in favor of arbitration by virtue of the agreement executed between the patient and the hospital, the court held in Smith v Ruberg (1988) 167 Mich App 13, 421 NW2d 557. The patient upon his admission had signed an agreement to arbitrate medical malpractice claims with the hospital, but the surgeon was not a party to that agreement and did not execute an agreement of his own. Under Mich Comp Laws § 600.5046(4), a person who is not a party to the arbitration agreement may join in the arbitration at the request of any party, observed the court, but the statutory language is clear and unambiguous, and absent a request, the statute does not grant a nonparty any right to compel arbitration. Since the defendants were not invited to join in arbitration, and did not claim any independent right to arbitration,
the Circuit Court erred as a matter of law in granting their motion, the court concluded, pointing out that the trial court had found, and the defendants did not challenge, that the doctor and hospital had not had an employer-employee relationship.

D. Application of Agreement to Other Tort Claims of Patient

§ 57. Intentional tort, generally

The court held in the following case that an agreement to arbitrate medical malpractice claims was applicable to a patient's claim of intentional tort against a physician.

A patient's claim which included allegations of intentional tort as well as negligent acts was subject to arbitration, when there was an agreement to submit disputes to arbitration, the court held in Herrera v Superior Court (1984, 2nd Dist) 158 Cal App 3d 255, 204 Cal Rptr 553, affirming the decision of the trial court to compel arbitration. The trial court had erred, however, in refusing to allow the patient to amend her complaint to include the intentional tort claims, said the court, rejecting the patient's contention that her complaint was not subject to arbitration because California Civ Proc Code § 1295 (Deering) contemplated arbitration only of doctors' negligent acts and not their intentional torts. The court noted that the specific language of the required arbitration provision went beyond negligence, including "any dispute as to medical malpractice, that is, as to whether any medical services rendered under the contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered." Furthermore, said the court, it is settled law that a malpractice action can include theories other than negligence, such as battery, breach of contract, and deceit, and the patient's interpretation of the statute would render meaningless the definition of malpractice given in the arbitration provision, contrary to the rule of statutory interpretation that significance should be given to each word of a statute. The court also disagreed that since the general language of the required arbitration provision followed a more specific earlier statement saying that § 1295 applied only to cases involving professional negligence, the general language included only those actions referred to in the specific prior language. There was no basis for concluding that the arbitrators would exceed their powers in making an award based on an intentional tort, said the court, and the decision to include actions for intentional torts in the arbitration provision was in keeping with the state policy favoring arbitration as a means of settling disputes. The court further noted that there were no grounds for revoking the arbitration agreement, which had apparently been signed by the patient and explained to her.

§ 58. Punitive damages

A claim for punitive damages was within the scope of an agreement to arbitrate medical malpractice claims, the court held in the following case.

An agreement providing for arbitration of "any" issue of medical malpractice authorized the arbitrator to award punitive damages in arbitration of a medical malpractice claim, the court held in Baker v Sadick (1984, 4th Dist) 162 Cal App 3d 618, 208 Cal Rptr 676, affirming the trial court's ruling that the contract language, in conjunction with that of the governing statute, could be interpreted to include claims involving more than mere negligence. An agreement to arbitrate is a contract and an arbitrator may consider only such disputes as are covered by the agreement, the court said, and, although awards may be vacated if they are not within the arbitrator's power, any ambiguities in the scope of arbitration are resolved in favor of coverage. The arbitration agreement at issue expressly provided, without limitation, that "any dispute as to medical malpractice" would be determined by submission to arbitration, the court pointed out. The doctor argued that the agreement was tailored after California Civ Proc Code § 1295 (Deering), which applied to disputes involving "professional negligence," and did not encompass intentional tort claims. However, the patient's medical malpractice action included claims that the surgery was unnecessary and that her consent was fraudulently induced, and those were appropriate factual bases for recovering punitive damages, the court observed. In a standard form arbitration agreement, any ambiguities were also to be resolved against the draftsman, said the court, noting that the agreement defined disputes as to medical malpractice to include medical services which were unnecessary, unauthorized, or improperly, negligently, or incompetently rendered. This definition could be construed to embrace more than mere negligence when considered in conjunction with the

language of the agreement and that of the statute that "any dispute as to medical malpractice" was to be submitted to arbitration, the court explained. On the other hand, neither the statute nor the agreement specifically mentioned or authorized a claim for punitive damages, continued the court, and the definition of "professional negligence" in California Civ Proc Code § 1295(g)(2) (Deering) appeared to limit recovery to that for a "negligent act or omission." This created an uncertainty or ambiguity in its contrast with the broad "any issue" language of California Civ Proc Code § 1295(a) and in that context, the language favorable to the patient's position would be adopted, the court decided, also pointing out that the doctor, having consented to the submission of the dispute to arbitration, could not assert a lack of authority in the arbitrators to award punitive damages. The doctor also contended that the award was precluded because the total award exceeded the statutory limit for compensatory damages under California Civ Code § 3333.2 (Deering). The court disagreed, stating that in a court proceeding, both compensatory and general damages for negligence as well as punitive damages could be recovered in medical malpractice actions upon proof that the defendant was guilty of malice, so those damages could also be asserted under the arbitration clause when the issue was submitted by the patient, or with the consent of both parties. The court also rejected the doctor's contention that New York Civ Code § 3294 (Deering), the statutory basis for punitive damages, did not authorize such damages because arbitration was not an "action," explaining that because an arbitration proceeding was not an action for purposes of discovery, it did not mean that it was not an action for purposes of the statute authorizing punitive damages. Arbitration would not be encouraged by a decision which held that a claim was precluded which might otherwise be asserted in a court of law, said the court, also rejecting the argument that punitive damages were a form of penalty reserved for imposition by the state and should not be enforced when provided for in a private agreement, particularly since arbitration awards were not reviewable. Although courts historically have adopted a restrictive attitude towards awards of punitive damages, said the court, under appropriate circumstances, they are awarded because they are considered to serve the dual purpose of punishing and deterring the wrongdoer and others from engaging in similar egregious conduct in the future. The court reasoned that even though punitive damages were not usually awarded in a contract dispute, the fact that the power of the arbitrators was derived from an agreement did not justify the conclusion that punitive damages were not awardable in a claim which would otherwise support them. Legislative policy strongly favors arbitrated settlements of medical malpractice claims, the court pointed out, and although awards are not reviewable, a holding that they may be awarded under an agreement to arbitrate as broad as the one at bar did not divest the parties of their power to control the scope of arbitration by other terms in an agreement.

§ 59. Ordinary negligence

[Cumulative Supplement]

The court held that an agreement to arbitrate medical malpractice claims was applicable to a claim of ordinary negligence in the following case.

A patient's claim against a hospital for ordinary negligence was not outside the scope of agreements to arbitrate authorized by statute, the court held in Nemzin v Sinai Hospital (1985) 143 Mich App 798, 372 NW2d 667, affirming the trial court's grant of accelerated judgment compelling arbitration. The patient had suffered a fall from a hospital bed after surgery when he was in a semiconscious or unconscious state and alleged that this fall was due to the failure of hospital employees to raise the bed safety rails into position. He had executed a standard arbitration agreement when he entered the hospital and never revoked it. He argued that the language of Mich Comp Laws § 600.5040(1), which provided that the provisions of the chapter would be applicable to the arbitration of a dispute resulting from injury or death of a person "caused by an error, omission, or negligence in the performance of professional services," demonstrated an intent to cover only claims sounding in malpractice, rather than ordinary negligence. The language on which the patient relied was ambiguous, said the court, in that it is not clear whether the phrase "in the performance of professional services" was intended to modify the entire phrase "an error, omission, or negligence," or merely the word "negligence." An established principle of statutory construction is that a modifying clause is confined to the last antecedent unless something in the subject matter or dominant purpose of the statute requires a different interpretation, observed the court. The purpose of the statute, to contain rapidly escalating health care costs by reducing litigation, would be served, not hindered, by construing the statute to authorize agreements to arbitrate claims of ordinary negligence arising out of health care or treatment as well as

claims of medical malpractice or negligence in the performance of professional services, said the court. Moreover, the court continued, broad language used in other sections of the statute showed that the legislature did not intend to limit the scope of arbitration, because the statute provided that a person who received health care from the health care provider or who received health care in a hospital, could execute an agreement to arbitrate a dispute "arising out of health care or treatment" (Mich Comp Laws §§ 600.5041(1), 600.5042(1)). The court rejected the argument that an ordinary patient would not understand that claims based on ordinary negligence would fall within the scope of the agreement, based on the language of the standard agreement which the plaintiff had executed: "I understand that this hospital and I by signing this document have agreed to arbitrate any claims or disputes…. which may arise in the future out of or in connection with the health care rendered to me...."

CUMULATIVE SUPPLEMENT

Cases:

Former nursing home resident's negligence complaint against nursing home fell within the scope of arbitration agreement executed by the parties; arbitration provision provided that any legal dispute "shall be resolved exclusively by binding arbitration and not by a lawsuit." Community Care Center of Vicksburg, LLC v. Mason, 966 So. 2d 220 (Miss. Ct. App. 2007).

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[END OF SUPPLEMENT]

§ 60. Other or unspecified claims

The claim that a hospital failed adequately to supervise a staff physician alleged malpractice within the scope of a medical malpractice arbitration agreement, the court held in the following case.

In Danner v Holy Cross Hosp. (1991) 189 Mich App 397, 474 NW2d 124, the court held that a patient's claim that a hospital failed to review the competency of a doctor who treated him and restrict his surgical privileges alleged malpractice against the hospital, and thus was subject to the agreement to arbitrate claims signed by the patient. The patient asserted that his claim alleged only corporate negligence and not malpractice or vicarious liability for the treatment which was rendered. The claim arose from matters directly related to the providing of medical care, said the court, because the negligence is alleged to have occurred within the course of a professional relationship, and the providing of professional medical care and treatment by a hospital includes the supervision of staff physicians and decisions regarding selection and retention of the medical staff. The court rejected the contention that the statute governing arbitration agreements contemplated that a defendant hospital must itself actually render treatment for a claim to be arbitrable, because the only way a hospital could render treatment was through its nurses and physicians, and the trial court properly held the matter to be subject to the arbitration agreement.

CUMULATIVE SUPPLEMENT

Cases:

Arbitration clause of health maintenance organization's (HMO) contract with member applied to wrongful death claims, as claims for "death," even though a wrongful death claim was separate and distinct from a cause of action the deceased member could have maintained had he survived. West's C.R.S.A. §§ 13-21-201 et seq.Allen v. Pacheco, 71 P.3d 375 (Colo. 2003).
E. Application of Agreement to Third–Party Claims

§ 61. Generally

In the following cases the courts held that an agreement to arbitrate medical malpractice claims was applicable to third–party claims.

Although affirming the trial court's denial of a hospital's motion for accelerated judgment seeking to enforce an arbitration agreement executed by a patient, the court in Ballard v Southwest Detroit Hospital (1982) 119 Mich App 814, 327 NW2d 370, later proceeding (Mich) 334 NW2d 375, held that the agreement executed by a deceased patient was binding upon the appointed personal representative of her estate when it had never been revoked. The question whether the personal representative under the wrongful death statute was bound by the decedent's agreement to arbitrate, said the court, involved consideration of both the Medical Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq., and the Wrongful Death Act, Mich Comp Laws § 600.2922. The arbitration statute provided that it was applicable to the arbitration of a dispute arising out of injury to, or the death of, a person caused by the negligence of a health care provider, the court observed, and thus seemed to anticipate that arbitration agreements would remain in effect after a patient's death and would bind the estate's personal representative. Moreover, said the court, the agreement at issue provided that it was binding on all the patient's agents, representatives, and heirs and assigns, and, as a general rule, an otherwise valid contract is binding upon a deceased party's personal representative. While the trial court reasoned that a wrongful death action involved rights of the personal representative separate from those of the decedent which could not be altered by the agreement, the court said that the allowance of additional damages to the personal representative did not justify the conclusion that he or she should not be bound. The cause of action under the Wrongful Death Act was a derivative one, observed the court, and any substantive impediment which would have prevented the decedent from commencing suit would likewise preclude suit by the representative. The court distinguished cases under statutes which provide an independent cause of action in favor of a personal representative and heirs of the decedent, and concluded that the personal representative was bound by the arbitration agreement to the same extent that the decedent would have been bound had she survived.

Without specifying the nature of the cause of action, the court held in Harte v Sinai Hospital of Detroit (1985) 144 Mich App 659, 375 NW2d 782 (disagreed with on other grounds by Villarreal v Chun, 199 Mich App 120, 501 NW2d 227), that a father's claim arising from treatment rendered to his child at the time of birth was derivative of the child's claim for malpractice and therefore subject to the arbitration clause in an agreement signed by the mother on behalf of the child before birth.

CUMULATIVE SUPPLEMENT

Cases:

Arbitration clause of health maintenance organization's (HMO) contract with member applied to wrongful death claims brought by a non-party spouse as an "heir"; a non-party could be bound by the terms of an agreement if the parties so intended, and a spouse was an "heir" under the meaning of the contract. Allen v. Pacheco, 71 P.3d 375 (Colo. 2003).


Where spouse of patient has derivative claim for loss of consortium, both spouses are required to either accept

Physician's post–judgment motion for contribution against another physician, arising out of medical malpractice action in which physicians were held jointly liable for a $3,354,808.55 judgment, was not subject to mandatory arbitration under Health Care Malpractice Claims Act; issue of joint negligence had already been settled in underlying lawsuit, such that return to arbitration would serve no purpose. Code, Courts and Judicial Proceedings, § 3–2A–02. Lerman v. Heeman, 347 Md. 439, 701 A.2d 426 (1997).

§ 62[a] California cases—Agreement held applicable

The courts held in the following California cases that third–party claims were included within the scope of an agreement to arbitrate medical malpractice disputes.

In Herbert v Superior Court (1985, 2nd Dist) 169 Cal App 3d 718, 215 Cal Rptr 477 (criticized by Baker v Birnbaum (2nd Dist) 202 Cal App 3d 288, 248 Cal Rptr 336, reh den (Jul 14, 1988) and review den (Sep 15, 1988)), the court directed the trial court to vacate an order that the adult children of a deceased health care plan member who had agreed to arbitrate malpractice claims were not bound by the agreement. The widow and five minor children of the deceased patient were also members of the plan, having been enrolled by the patient and, together with the three adult children, brought a wrongful death action against the hospital. They argued that none of them should be compelled to submit to arbitration, while the defendants argued that the trial court should have ordered the three adult children into arbitration as well as the wife and the minor children. The court observed that the statutory cause of action for wrongful death was a single and indivisible one, and therefore the case must be tried in a single forum. Spouses may contract for health plans for each other due to their mutual obligations of care and support and their fiduciary relationship, said the court, and the arbitration provision in the master contract for the health care plan covered claims asserted by a member, or by a member's heirs or personal representatives, contemplating arbitration of a claim for the wrongful death of a member when asserted by a surviving member. The widow and the five minor children who were members of the plan were bound by the contractual provisions of the plan agreement, including the arbitration clause, said the court. The fact that a single cause of action exists in the heirs for the wrongful death of a decedent is a strong reason for holding the nonsigning heirs to be bound by the agreement as well, the court continued, to prevent splitting the litigation into different tribunals. Furthermore, it would obviously be unrealistic to require the signatures of all the heirs, since they are not even identified until the time of death, may not be available when their signatures are required, and, if they refused to sign, should not be in a position possibly to delay medical treatment to the party in need, observed the court. Although wrongful death was technically a statutory cause of action in the heirs, the court said that in a practical sense, it was derivative of a cause of action of the decedent, who is otherwise able to bind his or her heirs through wills and other testamentary dispositions. The concept of binding the heirs was not illogical but in fact the only pragmatic solution to the problem, noted the court, pointing out that there were other instances in which a decedent may limit or bar certain types of actions by heirs and may also choose the forum in which the claim of his or her heirs, arising out of the decedent's death, may be tried. Moreover, said the court, a father may bind a minor child, a husband may bind a wife, and a mother may bind a child to arbitrate claims arising out of the child's prenatal injuries, even though the child was not a plan member when injuries occurred. By referring to arbitration of wrongful death claims in the statute, the legislature evidenced an intent that a patient who signs an arbitration agreement may bind his or her heirs to that agreement, and it would be illogical to construe the statutory provisions to apply only under the fortuitous circumstances that all potential heirs were also plan members, the court concluded.

When a patient expressly contracted to submit to arbitration "any dispute as to medical malpractice," and the agreement fully complied with the statutory requirements of California Civ Proc Code § 1295 (Deering), it applied to all medical malpractice claims arising out of the services contracted for, regardless of whether they were asserted
by the patient or a third party, including a loss of consortium claim by the patient's spouse, the court held in Gross v Recabaren (1988, 2nd Dist) 206 Cal App 3d 771, 253 Cal Rptr 820. A loss of consortium claim is based on the physical injury or disability of the spouse, said the court, and although the statute was silent as to the effect of the agreement on the claims of those other than the patient, that logic precludes excluding its binding effect on them. It would be impractical for a physician to ascertain the patient's marital status and whether it had changed since the last visit each time the patient came for treatment, the court pointed out, and would have a deleterious effect on the physician–patient relationship. Furthermore, the court said, and most significantly, it would be improper to authorize an intrusion into the patient's confidential relationship with a physician as the price for guaranteeing that a third person, even a spouse, had access to a jury trial on matters arising from the patient's own treatment. It would be impermissible to adopt a rule that would require patients and their spouses, or their physicians, to communicate with each other regarding their respective medical treatment, or that would permit one spouse to exercise a type of veto power over the other's decisions, and construing the statute to require a spouse's concurrence in an arbitration agreement would, in certain situations at least, have that effect, said the court. A patient's privacy rights with respect to medical matters are accorded special protection by the legislature, the court continued, and the zone of privacy extends to the details of one's medical history, pointing out that if reproductive health care decisions are involved, the Federal Constitution would be implicated, as well as California Const Art 1 § 1. It would appear indisputable that if spouses disagree on any decision regarding the terms of medical treatment, including the desirability of an arbitration provision, the view of only one can prevail, and since the patient is more directly and immediately affected, the balance must weigh in that individual's favor, the court concluded.

In Bolanos v Khalatian (1991, 2nd Dist) 231 Cal App 3d 1586, 283 Cal Rptr 209, 91 CDOS 5504, 91 Daily Journal DAR 8439, the court held that an agreement to arbitrate medical malpractice claims, signed by an expectant mother when she was admitted to the hospital, which conformed to the statutory requirements of California Civ Proc Code § 1295 (Deering), and which contained a clause making it clear that the agreement was intended to bind all parties whose claims arose out of or were related to the treatment provided to the patient, was applicable to the father's claim for emotional distress at witnessing injuries suffered by the child at birth. The agreement provided that in the case of a pregnant woman seeking medical care, the term "patient" meant both the mother and the mother's expected child or children. After holding that the agreement was applicable to the malpractice claim of the unborn child of the patient,[FN59] the court noted that as to the husband's claim, there was a split of authority as to the applicability of an arbitration agreement to one who was not a signatory to it. However, the court concluded that when a patient expressly contracted to submit to arbitration "any dispute as to medical malpractice," and the agreement fully complied with the requirements of the statute, it must be deemed to apply to all medical malpractice claims arising out of the services contracted for, regardless of whether they were asserted by the patient or a third party.

In Michaelis v Schori (1993, 2nd Dist) 20 Cal App 4th 133, 24 Cal Rptr 2d 380, 93 CDOS 8650, 93 Daily Journal DAR 14683, review den (Cal) 1994 Cal LEXIS 548, the court held that a medical malpractice arbitration agreement applied to the claims of a stillborn baby's father arising out of alleged malpractice in the treatment of a pregnant patient. The agreement covered "any dispute as to medical malpractice" and stated it was to "bind all parties" whose claims arose out of the treatment rendered to the patient, including, by its terms, the expected child in the case of a pregnant patient, observed the court. It has previously been held that such agreements bind third–party nonsignatories, said the court, citing Bolanos v Khalatian (1991, 2nd Dist) 231 Cal App 3d 1586, 283 Cal Rptr 209, 91 CDOS 5504, 91 Daily Journal DAR 8439 and Gross v Recabaren (1988, 2nd Dist) 206 Cal App 3d 771, 253 Cal Rptr 820, this subsection.

A patient's agreement to arbitrate all claims arising out of the treatment provided by her physician, "including any spouse or heirs of the patient," was binding on her husband, who asserted a claim for loss of consortium, the court held in Mormile v Sinclair (1994, 4th Dist) 21 Cal App 4th 1508, 26 Cal Rptr 2d 725, 94 CDOS 438, 94 Daily Journal DAR 727, reversing the trial court's refusal to compel arbitration as to the husband. Arbitration agreements were enforced with regularity against nonsignatory parties, noted the court, as consistent with the language and the goals of the statute governing medical malpractice arbitration agreements, the judicial preference for joining negligence and loss of consortium actions, and the protection of the physician–patient relationship and the privacy rights of the patient. As to the last, it would be impermissible to adopt a rule that would require patients or physicians to seek another's agreement to arbitration before treatment could be obtained, thus possibly permitting one spouse to exercise a type of veto power over the other's decisions, the court explained, and the patient's right to
decide the terms of her medical treatment outweighed the husband's right to jury trial of a loss of consortium claim. Agreements with identical language to the one at issue have been interpreted to include third-party claims, continued the court, distinguishing the agreement from one which had no language purporting to include claims other than those asserted by the patient, or on her behalf, or on behalf of a person for whom the patient was responsible. Finally, the court pointed out that if the husband were allowed to litigate his claim, no efficiency would be effected, and anomalous results, such as the wife failing to establish liability but the husband recovering in his action, might be brought about.

CUMULATIVE SUPPLEMENT

Cases:

Patients' allegations of entanglement between company employed to service ophthalmic lasers and physician that performed laser eye surgeries brought case against company well within scope of the language of patients' agreement regarding arbitration of questions of joinder of parties relevant to a full settlement of an arbitrated dispute. Zakarian v. Bekov, 98 Cal. App. 4th 316, 119 Cal. Rptr. 2d 623 (1st Dist. 2002).

§ 62[b] California cases—Agreement held not applicable

In the following California cases, the courts held that agreements to arbitrate medical malpractice claims did not apply to third-party claims.

In Rhodes v California Hospital Medical Center (1978, 2nd Dist) 76 Cal App 3d 606, 143 Cal Rptr 59 (criticized by Gross v Recabaren (2nd Dist) 206 Cal App 3d 771, 253 Cal Rptr 820) and (criticized by Mormile v Sinclair (4th Dist) 21 Cal App 4th 1508, 26 Cal Rptr 2d 725, 94 CDOS 438, 94 Daily Journal DAR 727),[FN60] the court held that an agreement to arbitrate executed on behalf of a deceased patient by her husband as agent was not binding on her heirs. The husband and son filed an action for wrongful death and the hospital sought arbitration of the claim relying on two instruments, one executed by the decedent and one executed by the husband on her behalf, both containing provisions calling for arbitration. The court affirmed the trial court's denial of the petition for arbitration, rejecting the hospital's reliance on prior authority which barred the heirs in a wrongful death action because of defenses going to the merits of the decedent's cause of action. The court also rejected any analogy with the question of a parent's authority to bind a minor child to arbitrate medical malpractice disputes, saying that the situation did not involve any contract by a person having protective powers, and that, assuming the arbitration agreement would have bound the deceased wife, the analogy revealed nothing as to the effect of his agency on the husband's rights. Although there was a strong public policy in favor of arbitration, the court said it did not extend to those who were not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement. The constitutional and procedural rights of the decedent's heirs in their own independent action may not be barred by the agreement, even though a wrongful death action must rest on a cause of action in the decedent, the court concluded.

Stating that the husband's exercise of his right to a jury trial was paramount to the court's convenience in having all parties to a malpractice action litigate in a single action, the court in Baker v Birnbaum (1988, 2nd Dist) 202 Cal App 3d 288, 248 Cal Rptr 336, reh den (Jul 14, 1988) and review den (Sep 15, 1988) and (criticized by Gross v Recabaren (2nd Dist) 206 Cal App 3d 771, 253 Cal Rptr 820) and (criticized by Mormile v Sinclair (4th Dist) 21 Cal App 4th 1508, 26 Cal Rptr 2d 725, 94 CDOS 438, 94 Daily Journal DAR 727),[FN61] held that a husband who had not signed an arbitration agreement was not bound to arbitrate his claim for loss of consortium against a defendant doctor, when the medical services for which his wife had contracted were for herself alone. The agreement signed by the wife had provided that it applied to any dispute as to medical malpractice as to the patient and anyone else

who might have a right to assert a claim on her behalf, as well as other persons for whom she had responsibilities, such as herself and any children. Affirming the motion to compel arbitration as to the wife, the court said that the policy in favor of arbitration did not extend to those, such as the husband, who were not parties to an arbitration agreement or had not authorized anyone to act for them in executing such an agreement. The statute authorizing arbitration of medical malpractice disputes, California Civ. Proc. Code § 1295 (Deering), did not discuss whether claimants other than signatories might be bound by the agreement to arbitrate, said the court, and there is authority that in some circumstances a person who has authority to contract for medical services on behalf of another may bind that person to an agreement to arbitrate his or her medical claims. The court distinguished the situation, however, from that of a husband acting as a spouse's agent or fiduciary in enrolling her in a health care plan, the contract of which provides that the family would be bound by the provisions of the master contract, including an agreement to arbitrate. The wife's contract was for medical services solely on her own behalf and the agreement related only to such services as would be provided to her under the private contract, the court pointed out. The court rejected the doctor's contention that there was anything in the agreement extending it to any claim by the husband, stating that the agreement referred to claims asserted by the wife or on her behalf, or on behalf of some person for whom the wife had responsibility. Acknowledging that nonsignatories have been held to be bound to an arbitration clause in a group medical coverage plan, the court expressed the opinion that an individual contract for medical services should be more rigorously analyzed and less quickly applied to the claims of a nonsignatory, and rejected the rationale that solely to avoid litigation of multiple claims in two different tribunals, a person with a derivative claim could be forced to arbitrate.

F. Other Matters

§ 63. Power of arbitrator to apply statute of limitations

In the following case, the court held that an arbitrator had the power to apply the statute of limitations to the claim of a malpractice plaintiff under an agreement to arbitrate medical malpractice disputes.

The broad grant of authority in an arbitration agreement between a medical malpractice plaintiff and the defendant doctor included the authority to assess the timeliness of the plaintiffs' arbitration demands, the court held in Nielsen v Barnett (1992) 440 Mich 1, 485 NW2d 666, and the application of a malpractice statute of limitations to the plaintiffs' claim was within the reasonable expectation of the parties. Almost 2 years after the patient's discharge from the hospital stay giving rise to the alleged malpractice claim, she and her husband filed a malpractice complaint which was subsequently dismissed on the defendants' motion to compel arbitration pursuant to the arbitration agreement. The patient filed a demand for arbitration nearly 16 months after the Circuit Court's order and the defendants were granted a motion to dismiss the claim as untimely pursuant to the 2–year statute of limitations applicable to malpractice claims, Mich Comp Laws § 600.5805(4). It was undisputed that the arbitration agreement did not explicitly subject the plaintiffs' claim to a period of limitation, observed the court, but the agreement provided that arbitration would be conducted in accordance with Michigan law and the Michigan Medical Arbitration Rules, and the agreement was governed by the Malpractice Arbitration Act, Mich Comp Laws §§ 600.5040 et seq. The statute did not specify a period of limitation for medical malpractice claims brought before an arbitration panel, said the court, and, although the Michigan Medical Arbitration Rules now provide that the same period of limitation applies whether a malpractice claim is brought in court or before an arbitration panel, at the time plaintiff filed her demand, the rules did not specifically provide for a period of limitation. Noting prior authority that arbitrators' power, derived from an agreement, was broad enough to include awarding interest as an element of damages, even though not explicitly provided for in the agreement, the court stated that Michigan law had long provided that the resolution of claims in court actions be subject to periods of limitation, and the policies supporting such statutes were equally relevant to claims pursued under the Malpractice Arbitration Act. The agreement contained a broad grant of authority to resolve claims, and the absence of a provision specifically authorizing a determination of timeliness was not fatal, the court continued, although there was the additional question whether the particular area of limitation applied was consistent with the parties' reasonable expectations in agreeing to arbitrate any future claims or disputes. Since the plaintiffs did not demand arbitration until well over 2 years after their claim accrued, the arbitration panel did not exceed its authority as a matter of contract interpretation by directly
applying the 2–year malpractice statute of limitations to the plaintiffs' claim, the court decided, as it would not be beyond the reasonable expectations of the parties that the arbitration panel would judge the timeliness of the plaintiffs' claim consistently with the legislature's determination of the appropriate period of limitation for a malpractice action. As to whether there was error in failing to apply the tolling provision of Mich Comp Laws § 600.5856, the court agreed with the plaintiffs that they should have the benefit of having the statute tolled during the pendency of their court action. However, said the court, the statute of limitations was not tolled until the plaintiffs received notice of the entry of judgment which was significantly later than their filing of the action. Since they were present when the circuit judge dismissed their suit and ordered them to arbitrate and had actual knowledge of the substance of the court's judgment, their lack of notice of the entry of the judgment did not extend the tolling period.

§ 63.5. Power of court to apply statute of limitations

[Cumulative Supplement]

CUMULATIVE SUPPLEMENT

Cases:

Issues of exception of prescription and motion to exclude evidence that were filed by physician against whom medical malpractice action was brought were governed by arbitration agreement between physician and patient that provided that parties would submit any controversy arising out of claims based on negligence or medical malpractice to arbitration, and trial court properly dismissed physician's motion and exception based on lack of authority to rule on motion and exception; physician was bound by agreement he made to arbitrate claims associated with controversy. Parker v St. Tammany Parish Hosp. Serv. Dist. (1996, La App 1st Cir) 670 So 2d 531, writ den (La) 672 So 2d 925.

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[END OF SUPPLEMENT]

§ 64. Effect of agreement on party's right to screening panel

Under a statutory scheme governing the arbitration of medical malpractice claims, the court held in the following case that a party who had elected binding arbitration was not also entitled to have the claim reviewed by a presuit screening panel.

A validly executed agreement to arbitrate medical malpractice claims between a physician and a patient precludes the physician's right to participate in a medical review panel proceeding and to use findings in such a proceeding as evidence in the arbitration, the court held in In re Medical Review Panel for Claim of Teal (1988, La App 4th Cir) 531 So 2d 1108, cert den (La) 533 So 2d 375. The patient sued the physician and several other doctors in connection with a problem pregnancy and a medical review panel was convened, but the District Court dismissed the physician who had executed the arbitration agreement from the review panel proceeding based on the existence of the agreement. The court upheld the dismissal, observing that neither party was attempting to revoke the arbitration agreement and both had stipulated to the validity of the contract. The malpractice plaintiffs correctly contended, said the court, that arbitration was a method of resolving disputes chosen by the parties as a substitute for a court trial, and was to be distinguished on that basis from the review panel proceeding, a nonbinding, pre–judicial review of the facts which could be used as evidence in an ordinary trial proceeding. The very purpose of arbitration was to proceed outside the ordinary system, the court continued, and therefore when the parties so elect, they should not be permitted to avail themselves of both arbitration and statutes which are designed to work within the system. The statute, La Stat Ann § 40:1299.47(A)(1), clearly and unambiguously stated that all malpractice claims must be

heard by a medical review panel except for those which were validly agreed to be submitted to arbitration, the court concluded, and neither the physician nor the patient may avail themselves of the benefits of both procedures.

§ 65. Rejection of award

[Cumulative Supplement]

CUMULATIVE SUPPLEMENT

Cases:

Where parties agreed to determine medical malpractice damages in voluntary binding arbitration, trial court lacked jurisdiction to entertain defendants' petition for declaratory relief when dispute arose as to what damages were recoverable; by agreeing to binding arbitration, parties gave arbitrators sole authority to determine their recoverable damages and waived right to challenge arbitrators' award of damages, even if arbitrators made error of law. Mogler v Franzen (1996, Fla App D4) 669 So 2d 269.

Absent effective notice of rejection and action to nullify, award in health–claims arbitration may be filed with appropriate circuit court and confirmed by that court, in which event award constitutes final judgment of that court. But effective notice of rejection and filing of action to nullify can result in trial of malpractice action in circuit court. In this respect, filing of notice of rejection and action to nullify in compliance with Health Care Malpractice Claims Act (Act) is somewhat analogous to noting appeal where appeal is de novo trial. It is consistent with legislative directive to interpret filing "within 30 days after the award is served" in Act to include notice of rejection filed before service of award on rejecting party, if notice of rejection is filed after decision has been announced and if that notice of rejection remains uncountermanded on docket at time award is formally served. Curry v Hillcrest Clinic (1995) 337 Md 412, 653 A2d 934.

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[END OF SUPPLEMENT]

§ 66. Matters affecting validity of award

[Cumulative Supplement]

CUMULATIVE SUPPLEMENT

Cases:

Erroneous use of instruction on contributory negligence during arbitration under Maryland's Health Care Malpractice Claims Act (Act) did not provide basis for vacating award of arbitration panel; while use of instruction constituted error of law, narrow statutory grounds for vacating award do not contemplate that legal errors may serve as basis for vacating award, and error was not akin to corruption, fraud, misconduct, or undue means, and was not completely irrational. Term "undue means" as will warrant vacation of arbitration award under Act contemplates some type of bad faith in process. "Misconduct" sufficient to warrant vacating award under Act is something patently egregious, such as arbitrator sleeping during testimony or having ex parte contacts. Hott v Mazzocco (1996, DC Md) 916 F Supp 510 (applying Md. law).

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§ 67. Presumption of correctness

[Cumulative Supplement]

CUMULATIVE SUPPLEMENT

Cases:

Effect of statutory presumption of correctness applicable to decision of arbitration panel under Health Claims Arbitration Act is exactly effect described in provision of evidence code governing presumptions; at subsequent trial de novo, party challenging decision of arbitration panel has burden of producing evidence tending to disprove panel's decision, and once burden is met presumption retains enough vitality so that, without any other evidence, party that prevailed at panel can get to jury. Carrion v Linzey (1996) 342 Md 266, 675 A2d 527, reconsideration den (May 31, 1996).

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Section 1[a] Footnotes:

[FN1] This annotation supersedes the one at 84 A.L.R.3d 375, which need no longer be consulted.

[FN2] The statutes considered are those specifically governing medical malpractice arbitration and not arbitration generally.

[FN3] To be distinguished from the submission of medical malpractice claims to arbitration is the submission, pursuant to statute, of medical malpractice claims to a pretrial nonbinding medical panel, for the purpose of preliminarily passing on the merits of the claim. As to the validity and construction of state statutory provisions relating to the submission of medical malpractice claims to pretrial panels, see 80 A.L.R.3d 583.
[FN4] See, for example, Crawford v Leahy (1992) 326 Md 160, 604 A2d 73, cert den (US) 121 L. Ed. 2d 147, 113 S Ct 206, reh den (US) 121 L. Ed. 2d 574, 113 S Ct 644.

Section 2[a] Footnotes:


[FN7] See, for example, Wheeler v St. Joseph Hospital (1976, 4th Dist) 63 Cal App 3d 345, 133 Cal Rptr 775, 84 A.L.R.3d 343.

Section 2[b] Footnotes:


Section 3[b] Footnotes:


Section 6[a] Footnotes:

[FN35] In the following cases the court placed the burden of proof on the malpractice plaintiff to prove the invalidity of the agreement: Harte v Sinai Hospital of Detroit (1985) 144 Mich App 659, 375 NW2d 782, (disagreed with on other grounds by Villarreal v Chun, 199 Mich App 120, 501 NW2d 227) (§§ 17, 19); Kunath v Sinai Hospital of Detroit (1986) 149 Mich App 32, 385 NW2d 715, disagreed with on other grounds by Hendrickson v Moghissi, 158 Mich App 290, 404 NW2d 728) (§ 23[a]); and Feinberg v Straith Clinic (1986) 151 Mich App 204, 390 NW2d 697, app den 428 Mich 906 (§§ 18, 23[a]); see also § 22, regarding the burden of proof when there are allegations of coercion, misrepresentation, or fraud in the execution of agreements.


Section 8 Footnotes:

[FN37] Cases in which evidence of the customary procedure of a health care provider in presenting an agreement to arbitrate medical malpractice claims was discussed by the court in determining the validity of such an agreement may be found in §§ 23, 24, and 27.

Section 9[a] Footnotes:

[FN38] The agreements referred to are those not governed by a statute relating specifically to medical malpractice arbitration, although a statute governing arbitration generally may apply.

Section 9[b] Footnotes:

[FN*] The agreements referred to are those not governed by a statute relating specifically to medical malpractice arbitration, although a statute governing arbitration generally may apply.

[FN39] The agreements referred to are those not governed by a statute relating specifically to medical malpractice arbitration, although a statute governing arbitration generally may apply.
Section 10[a] Footnotes:

[FN40] See Bolanos v Khalatian (1991, 2nd Dist) 231 Cal App 3d 1586, 283 Cal Rptr 209, 91 CDOS 5504, 91 Daily Journal DAR 8439, § 10[a], for a case decided under a California statute providing requirements for agreements to arbitrate medical malpractice claims (California Civ Proc Code § 1295 (Deering)).


[FN42] The agreements referred to are those not governed by a statute relating specifically to medical malpractice arbitration, although a statute governing arbitration generally may apply. See also § 9, discussing contracts alleged to be adhesive or unconscionable.

[FN43] The agreements referred to are those governed by a statute relating specifically to medical malpractice arbitration and not merely arbitration generally. See also cases in which contracts to arbitrate medical malpractice claims governed by statute were alleged to be adhesive (§ 10).

Section 17 Footnotes:

[FN44] The case was decided before McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88, § 6[a], in which the court held that the effect of the statutory presumption of validity of an agreement to arbitrate medical malpractice claims conforming to statutory requirements was not to place the burden of proof on the party seeking to avoid the agreement, but to shift the burden of going forward with the evidence on the issue of validity to that party (usually the malpractice plaintiff) after the proponent of the agreement (usually the malpractice defendant) established that the statutory conditions were satisfied.

Section 20 Footnotes:

[FN45] The case was disapproved based on the application of the standard that a party seeking to assert a waiver of the constitutional right to access to the courts in a civil proceeding must establish that the waiver was made knowingly, voluntarily, and intelligently by clear and convincing evidence. In McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88 (§ 6[a]), the court rejected the reasoning leading to the application of this standard, and also approved the use of evidence of the customary procedure of a health care provider to establish a prima facie case that the statutory requirements pertaining to the execution of the arbitration agreement were followed (§ 8).

Section 22 Footnotes:


Section 23[a] Footnotes:

[FN47] The case was decided before McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428 Mich 167, 405 NW2d 88, § 6[a], in which the court held that the effect of the statutory presumption of validity of an agreement to arbitrate medical malpractice claims conforming to statutory requirements was not to place the burden of proof on the party seeking to avoid the agreement, but to shift the burden of
going forward with the evidence on the issue of validity to that party (usually the malpractice plaintiff) after
the proponent of the agreement (usually the malpractice defendant) established that the statutory conditions
were satisfied.

[FN48] The case was decided before McKinstry v Valley Obstetrics-Gynecology Clinic, P.C. (1987) 428
Mich 167, 405 NW2d 88, § 6[a], in which the court held that the effect of the statutory presumption of
validity of an agreement to arbitrate medical malpractice claims conforming to statutory requirements was
not to place the burden of proof on the party seeking to avoid the agreement, but to shift the burden of
going forward with the evidence on the issue of validity to that party (usually the malpractice plaintiff) after
the proponent of the agreement (usually the malpractice defendant) established that the statutory conditions
were satisfied.

Section 24 Footnotes:

[FN49] The case was disapproved because the trial court was ordered on remand to determine the validity
of consent based on whether the defendant proved that the plaintiff knowingly, intelligently, and
voluntarily waived her right to court access, a standard of waiver rejected by the court in McKinstry v

Section 43 Footnotes:

[FN50] For the court's discussion of the application of the "disability" rule, see § 48; discussion of the
"discovery" rule will be found in § 50.

Section 44 Footnotes:

[FN51] See §§ 48-50 for cases allowing the tolling of the revocation period until the appointment of a legal
representative when the patient has died or become disabled.

Section 48 Footnotes:


6[a], deciding the effect of the statutory presumption of validity of agreement to arbitrate which conformed
to the statute's requirements, the court disapproved of the reasoning that the agreement waived a
constitutional right and therefore the person seeking to enforce the agreement must prove that the waiver
was knowingly, intelligently, and voluntarily made.

Section 49[a] Footnotes:


Section 50 Footnotes:


Section 53[b] Footnotes:
Section 61 Footnotes:


Section 62[a] Footnotes:

[FN57] The court affirmed the trial court's denial of the hospital's motion on the ground of the unconstitutionality of the statute which was later disapproved in Morris v Metriyakool (1984) 418 Mich 423, 344 NW2d 736, § 3[b].

Section 62[b] Footnotes:

[FN58] For discussion of Baker v Birnbaum, holding that third parties were not bound by the agreement of a patient to arbitrate medical malpractice claims, see § 62[b].

[FN59] For discussion of this issue, see § 39.

Section 62[b] Footnotes:

[FN60] For discussion of Gross and Mormile, holding that an agreement to arbitrate medical malpractice claims applied to third–party claims, see § 62[a].

[FN61] For discussion of Gross and Mormile, holding that agreements to arbitrate medical malpractice claims applied to third–party claims, see § 62[a].


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