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Arbitration in Health Care: Have We Created A Private Court System?

By Steven P. Blonder*

I. Introduction

Over the past two decades, significant changes have occurred regarding the role of non-judicial venues in the adjudication and resolution of disputes. Previously, the primary means of deciding disputes between parties was the judicial system, with courts and judges making decisions that determined the parties’ respective rights. Today, that is no longer the case. Arbitration has become a significant forum within which a myriad of disputes are addressed.

Within the past decade, a variety of businesses, both large and small, have used arbitration as a primary means of dispute resolution. For most of its existence, matters subject to arbitration were largely confined to labor disputes, certain consumer issues and business disputes where particular businesses included in their transactional documents an arbitration provision. In light of two recent U.S. Supreme Court cases upholding arbitration provisions in a variety of contexts, the use of arbitration has significantly expanded. This holds particularly true for companies who interact with consumers, as companies have often inserted arbitration clauses in their agreements in an effort to limit their exposure to either large jury awards, class action lawsuits or both.

The health care industry provides a prime example of this trend. Nursing home admission agreements and medical consent forms provide a glimpse into the extent to which arbitration has crept into the medical arena. A number of health care publications have detailed how families unwittingly sign arbitration agreements when checking aging relatives into long-term care facilities and find their hands tied when a problem arises.1 Recently, the New York Times ran a report highlighting the impact of forced arbitration on consumers, citing a number of examples in the health care arena.2 The problem has led a group of U.S. Senators to express deep concerns about a system “that consumers are involuntarily forced into, that lacks transparency and is not subject to meaningful appeal.”3 This comes on the heels of a September 2015 letter in which a group of Senators called forced arbitration in long-term care agreements “unfair to residents and their families” and urged the Centers for Medicare and Medicaid Services to prohibit senior-care facilities it contracts with from using arbitration provisions.

The counter argument is that arbitration agreements are a useful tool for saving patients and facilities time and money—resources that are better spent on patient care. Aon Global Risk Consulting has reported that dispute resolutions reached outside of the court system cost, on average, sixteen percent less than claims not involving arbitration.4

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1 Modern Healthcare interviewed one woman who described the intake paperwork as follows: “It was kind of like here’s 1,000 papers . . . Some they explain, and some they don’t.” For the complete article, see Lisa Schencker, Nursing homes’ use of binding arbitration comes under fire, MODERN HEALTHCARE, August 8, 2015, http://www.modernhealthcare.com/article/20150808/MAGAZINE/308089979 (last visited Nov. 16, 2015).


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II. Arbitration and Its History

In 1925, Congress passed the Federal Arbitration Act ("FAA"), which made agreements to arbitrate legal and enforceable and expressed a public policy in favor of arbitration. The exceptions were generally limited to situations where one party to the arbitration agreement could demonstrate a ground for rescission (i.e., fraud, duress, unconscionability or the like) that would undermine the validity of the entire contract.

In 2011, in a case styled AT&T Mobility LLC v. Concepcion, the Supreme Court held that the FAA preempted California state law that conditioned the enforceability of arbitration agreements on the availability of class action procedures. That case involved cell-phone contracts that provided for the arbitration of all disputes between the parties in non-class, non-consolidated proceedings. The Supreme Court upheld the arbitration provisions on a 5-4 vote. Two years later, the Supreme Court held that courts are not permitted under the FAA to invalidate contractual waivers of class arbitrations, and that arbitration agreements will generally be enforced as applied to federal claims absent “contrary congressional command.” These recent cases have made it possible for companies to use arbitration to resolve disputes while managing class-related litigation.

Further, in the health care realm, the Supreme Court upheld long term care facilities’ right to enforce binding arbitration agreements in situations involving allegations of personal injury or wrongful death. Growing public awareness has forced some corporations to back away from efforts to unilaterally impose arbitration.

By 2008, litigants who felt that an arbitrator had made a wrong decision by not following the law had been raising the arbitrator’s “manifest disregard for the law” as a ground to prevent confirmation of the award in court. The Supreme Court, however, shut down that avenue for appeal, holding that the parties to an arbitration agreement could not expand the grounds for judicial review of an arbitration award even if their contract expressly allows it. The Supreme Court held that courts should defer to arbitrators and generally uphold arbitration awards unless there are grounds for vacating the award expressly set forth in the FAA. Such grounds are limited and include, for example, instances where the arbitrator exhibits bias or exceeds his or her powers.

III. Benefits and Limitations of Arbitration

Arbitration has been perceived to offer a series of advantages as compared to having a dispute resolved in court. For example, arbitration is often faster than litigation in court, cheaper and more flexible. Discovery is typically more limited than in court cases. Arbitration also allows the parties to select their own tribunal, which may be highly desired when a dispute is highly technical or requires the decision-maker to have specialized knowledge. This is particularly true in health care contracts where terms of art need to be interpreted, for example construing reimbursement rates or other technical issues, and using an arbitrator with experience or background in the health care business may result in a more reliable resolution of an issue than a decision made by a judge possessing a general background.

On the flip side, arbitration has corresponding disadvantages. There may be a lack of procedural safeguards and the evidentiary rules are generally relaxed. The arbitrators are paid directly by the parties, thus adding an extra layer of expense. Arbitration awards are not directly enforceable, and a party seeking to enforce an award must resort to the court system. Rule of applicable law is not necessarily binding on an arbitrator, and appeals are limited. Further, the perceived advantages of arbitration are often illusory.

Arbitration proceedings are overseen by retired judges or arbitration-trained lawyers. A recent New York Times report finds rampant bias and inconsistent rules within the process. According to the data...
analyzed by the Times, at arbitration, the deck is often stacked in favor of a corporate defendant. Even when plaintiffs win in health care cases, the closed arbitration process prevents the public from finding out about the defendant’s misconduct, such as malpractice. The Times concluded that in addition to prohibiting class action lawsuits, forced arbitration agreements force individuals into a “privatized judicial system” that operates without the transparency, predictability or consistency of the court system.

A recent study by Today’s General Counsel analyzed the trends and attitudes toward arbitration among in-house attorneys. The study concluded:

“[I]n-house attorneys are of two minds about arbitration … They like the less formal setting, and the chance to avoid unfavorable courts and runaway juries. But they view the decisions of arbitrators as difficult if not impossible to appeal, and they deplore the compromise verdicts that arbitrators render. Asked if they thought arbitration generally turned out to be a better solution than litigation, 42 percent called it a toss-up.”

The three primary reasons identified to arbitrate, rather than litigate, were the existence of a contract requiring arbitration, confidentiality, and the perception of arbitration being less costly. The primary reasons given not to arbitrate were the difficulties of appealing, the arbitrator not being required to follow legal rules, and the lack of confidence in the neutrality of the third-party. The study concluded that the best approach is arbitration with a prerequisite for the parties to attempt to resolve the dispute through mediation prior to initiating arbitration.

Arbitration provisions routinely appear in employment agreements for physicians. Hospitals and other medical practices use arbitration provisions to avoid litigation over contractual issues when a physician leaves a practice or employment at a hospital. Indeed, the American Medical Association’s most recent model Physician-Hospital Employment Agreement contains a fairly broad arbitration provision. The model form requires that, first, the parties mediate any dispute and, if mediation proves unsuccessful, then any dispute is subject to arbitration under the auspices of the American Health Lawyers Association or the American Arbitration Association. The arbitration provision in the model form also provides that no punitive damages may be awarded by an arbitrator, and that the costs of the arbitration are borne equally by the parties. In this context, the cost is ostensibly less than full-blown litigation in court, and the interest of confidentiality is furthered. On the other hand, the parties may end up with significant administrative costs stemming from the arbitration while the amounts actually in dispute are small.

Arbitration provisions are also becoming commonplace in health care service contracts. One challenge to using arbitration provisions is that while medical supply companies, rehabilitation companies, benefits managers, pharmacies and others often operate on a national level with form or national contracts, an arbitration provision may call for the arbitration to be held in a locale other than where the service is actually provided. This only serves to increase the costs and inconvenience for at least one of the parties. Moreover, many of these arbitration provisions contain no limitation on the discovery that may be undertaken or any appeal guidelines.

Health care-related companies are increasingly involved in situations involving fraud and abuse issues. But these types of concerns generally fall outside of the ambit of an alternative dispute resolution provision, such as arbitration, because they involve governmental entities. Thus, no arbitration provision, regardless of its breadth, can capture fraud and abuse claims, which may constitute the largest potential liability facing a health care provider.
Additionally, where the issue in dispute relates to the termination of a provider agreement, or the interpretation of a term in a contract, arbitration may not provide the relief sought because the arbitrator is not obligated to follow the law, and there is no meaningful opportunity for appeal. In these situations, a court may provide a more appropriate forum to adjudicate an issue.

**IV. Conclusion: So, Is Arbitration Good or Bad?**

One’s vantage point greatly shapes the answer to the question of whether arbitration is beneficial or harmful. On this point, the differences are no different whether inside or outside of the health care realm. Detractors point to the usurpation of the Seventh Amendment’s right to a jury and the creation of a private court system utterly lacking in procedural safeguards and with no body of precedents to provide predictability to participants. They decry depriving Americans of their constitutionally-granted day in court. These detractors also bemoan the negative impact on class action litigation.

Supporters of arbitration, on the other hand, point out the efficiencies generated through arbitration—the ability to resolve disputes quickly and less costly than via the courts, and the confidentiality that attaches to the arbitration process. They also champion the limited discovery, if any, that takes place in arbitration.

Either way, arbitration is likely here to stay for the foreseeable future. As many clients of health care attorneys, particularly physicians, will be unfamiliar with dispute resolution options, health care attorneys should be prepared to explain the potential benefits and costs of arbitration to clients during contract and transaction negotiations.