

**COMMENT: THE APPEARANCE OF IMPROPRIETY:  
MAKING AGREEMENTS TO ARBITRATE IN HEALTH  
CARE CONTRACTS MORE PALATABLE**

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I. INTRODUCTION

Consumers appear skeptical of arbitration, and nowhere is this mistrust more evident than with respect to health care. Critics

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often say that when patients forgo their right to sue, the health care industry strips them of a valuable right at a time when they might be at their most vulnerable. Despite this apparent lack of consumer confidence, many Managed Care Organizations (MCOs)<sup>1</sup> and private physicians are trying to contain the rising costs of health care by asking patients to give up their rights to sue prior to receiving insurance coverage or medical care.<sup>2</sup> In addition, some state legislatures are enacting laws aimed at directing health-related claims to arbitration,<sup>3</sup> and both state and federal courts continue to give Alternative Dispute Resolution (ADR) a ringing endorsement.<sup>4</sup>

While the critics of arbitration seem to have the loudest voices, preliminary studies show that the majority of patients are still willing to sign the agreements.<sup>5</sup> Skeptics assume that for a wronged

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1. Patricia I. Carter, *Binding Arbitration in Malpractice Disputes: The Right Prescription of HMO Patients?*, *HAMLIN J. PUB. & POL'Y* 423, 424-25 (1997) (defining managed care as "a combination of techniques intended to assure that the covered individuals receive the most appropriate level and duration of care at the most appropriate price"). Managed care programs take a variety of forms, including Preferred Provider Organizations (PPO), Health Maintenance Organizations (HMO), and Individual Practice Organizations (IPO). *Id.* at 425. Twenty percent of Americans are members of HMOs. *Id.* While HMOs have been the most financially successful, they are the most restrictive in retaining control over the price and quantity of health care services they provide to their members. *Id.* at 426. This article will refer generally to Managed Care Organizations (MCO) as encompassing the different types of organizations.

2. See, e.g., Carol A. Crocca, Annotation, *Arbitration of Medical Malpractice Claims*, 24 A.L.R.5th 1, 1 (1994) (stating that "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"); Carter, *supra* note 1, at 424 (noting that the health care industry is under public pressure to limit rising health care costs and that by incorporating binding arbitration agreements into member services contracts with patients, managed care organizations have been able to reduce their costs in the manner of handling disputes with patients); Jane Spencer, *Signing Away Your Right to Sue—In Significant Legal Shift, Doctors, Gyms, Cable Services Start to Require Arbitration*, *WALL ST. J.*, Oct. 1, 2003, at D1 (stating that in an effort to fend off a growing number of lawsuits, more and more companies are asking consumers to sign "mandatory arbitration" agreements and waive their right to sue the company in the event a dispute should arise).

3. See, e.g., ALASKA STAT. § 09.55.535 (Michie 2003); 710 ILL. COMP. STAT. 15/1-14 (2004).

4. See *infra* Part III.A.

5. Interview with Keith Maurer, Associate General Counsel, National Arbitration Forum (Jan. 30, 2004). In one Florida hospital, during the first month of a program offering arbitration agreements, 1576 out of 2683, or nearly sixty

party arbitration provides a less-than-adequate substitute for the court system.<sup>6</sup> In addition, skeptics believe that providers put arbitration clauses into contracts only to benefit corporations at the expense of the individual bringing a claim.<sup>7</sup> Legal grounds for patients' attacks on arbitration agreements most often rest on assertions that MCOs and private physicians are stripping them of the right to due process by coercing them into signing something they do not want to sign.<sup>8</sup> Similarly, arbitration opponents often argue that courts should not enforce such agreements after a dispute arises because such an agreement is unconscionable under basic contract principles.<sup>9</sup> This anti-arbitration approach runs counter to a growing body of statutory and case law at the federal and state levels favoring arbitration as a fair and efficient means to resolve disputes.<sup>10</sup> The assumption that signing an arbitration agreement precludes patients from being able to rectify wrongs through legal channels also overlooks the fact that arbitration does not prevent parties from obtaining compensation for civil wrongs; it simply provides a different forum for dispute resolution.

In fact, many feel that arbitration is not only a different forum, but also a better option for would-be litigants.<sup>11</sup> Numerous

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percent of admissions chose to sign the agreement. The percentage has continued to climb. *Id.*

6. Interview with Roger S. Haydock, Director, Institute for Advanced Dispute Resolution; Professor of Law, William Mitchell College of Law; Director, National Arbitration Forum in Minneapolis, Minn. (Oct. 23, 2003) [hereinafter Haydock Interview].

7. *Id.*

8. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 53 (1997) (noting the commonality of the health industry requiring customers to agree to binding arbitration as a condition of receiving health services); Spencer, *supra* note 2, at D1.

9. See *infra* Part III.C (discussing how courts have interpreted arbitration agreements in health care contracts). See also *infra* Part III.B.2 (discussing the unconscionability analysis used by courts to assess the validity of certain contract clauses).

10. See Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 176 (2002) (stating that over the course of the seventy-five years since the enactment of the Federal Arbitration Act (FAA), both Congress and the United States Supreme Court have demonstrated clear support of the expanded use of arbitration as an accessible, affordable, and fair way to resolve disputes and provide civil justice relief for everyone in American society).

11. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“[B]y agreeing to arbitrate . . . a party does not forgo the substantive rights . . . ; it

arbitration supporters believe that arbitration is inherently a better way to resolve disputes because it is faster, cheaper, and at least as fair as litigation.<sup>12</sup> Some argue that the expense of litigation, combined with the minute chance that one's case will actually get to trial, has essentially rendered the tort system inaccessible to the average litigant.<sup>13</sup> Under this view, the right to arbitrate a dispute is more valuable to a potential claimant than the right to sue, and the absence of an arbitration clause takes away that right.<sup>14</sup>

Those who oppose arbitration clauses in health care contracts as being a way for the health care industry to exploit consumers must recognize that ADR may be a better option for patients with a dispute. While this may be true, a well-developed body of contract law dictates that patients must be able to enter into an agreement to arbitrate without being coerced. Drafters must carefully word contracts between patients and health care providers to reflect the need to protect consumers.

While patients and consumer advocates must have an open mind about the possible benefits of ADR, the onus is on the health care industry to provide a balance between advocating for ADR and protecting patients' due process rights. The industry must create an environment in which patients see arbitration as a superior option to litigation. Health care providers must provide the

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only submits to their resolution in an arbitral, rather than a judicial, forum") (internal citations omitted).

12. Haydock & Henderson, *supra* note 10, at 191; *see also* Schwartz, *supra* note 8, at 67.

13. Haydock & Henderson, *supra* note 10, at 191.

A system that costs a lot of money to participate in, takes way too long to reach a final decision, requires help from a monopolistic profession, and may include unpredictable and inadequately knowledgeable decision makers has to be avoided. It can only serve the rich and those that can wait a long time for results which they can afford to appeal and wait even longer.

*Id.* *See also* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1996) (focusing on why settlement is so pervasive in today's society). Out of the hundreds of thousands of civil lawsuits that are filed each year, the great majority are settled and only a small percentage are tried to a jury or a judge. *Id.* Some proposed reasons for this phenomenon include, scarcity of judges, the ability of the parties themselves to control settlement, and the fact that adversary fact-finding is expensive and unpredictable. *Id.* at 3. As a result of these factors, Gross and Syverud contend that the savings realized by settling privately—in time, money, and risk—are greater in the current system than they would be in a quicker, cheaper, and more predictable system. *Id.* at 4.

14. Haydock & Henderson, *supra* note 10, at 191.

necessary education, carefully drafted contracts, and appropriate procedural safeguards fundamental to a viable system of ADR. If doctors, hospitals, and MCOs are vigilant in implementing these goals, patients will likely flow with the tide of pro-arbitration sentiment currently sweeping the nation's courts and lawmakers.

This article will begin by describing the peculiar nature of the analysis of arbitration clauses in health care contracts, including the complexity that arises when trying to categorize issues as sounding in either tort or contract.<sup>15</sup> Next, the article will examine both statutory and case law governing arbitration agreements in general, how courts have analyzed arbitration agreements under the substantive law of contract,<sup>16</sup> and how courts have applied that analysis to arbitration clauses in health-related contracts.<sup>17</sup> Lastly, the article will propose some concrete steps providers can take to correct the sort of appearance of impropriety that causes critics, commentators, and patients themselves to be suspicious of these agreements.<sup>18</sup>

## II. THE COMPLEXITY OF ANALYZING HEALTH CARE CONTRACTS: CONTRACT OR TORT?

Maintaining high quality while containing the rising costs of medical care is at the root of every health care contract.<sup>19</sup> Often, disputes that arise from these agreements can be contract claims, tort claims, or both.<sup>20</sup> The line between where an insurance-related contract dispute ends and where a malpractice claim begins is often fuzzy. Courts, however, must often characterize issues as being one or the other, thus dictating a patient's remedies.<sup>21</sup>

To illustrate the problem, a "contract" decision made by an MCO may result in a physical injury to a patient, and thus the two

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15. See *infra* Part II.

16. See *infra* Part III.A-B.

17. See *infra* Part III.C.

18. See *infra* Part IV.

19. See Crocca, *supra* note 2, at 1.

20. *Id.* at 24. See also Wendy K. Mariner, *Standards of Care and Standard Form Contracts: Distinguishing Patient Rights and Consumer Rights in Managed Care*, 15 J. CONTEMP. HEALTH L. & POL'Y 1, 24 (1998) ("managed care brought together elements of health insurance and patient care that traditionally have been handled separately by the law").

21. See Mariner, *supra* note 20, at 24. For example, in *Corcoran v. United HealthCare, Inc.*, the court held that United HealthCare in fact made medical decisions, but only in the context of the availability of benefits. 965 F.2d 1321, 1331 (5th Cir. 1992). Therefore, any tort actions were preempted by ERISA. *Id.*

areas of law bleed together in a sometimes indiscernible way.<sup>22</sup> In analyzing the validity of binding arbitration clauses, courts may apply the same legal principles that govern standard commercial agreements to health care contracts.<sup>23</sup> However, those same courts will use tort law when assessing whether a health care professional provided care to a patient that conforms to the standard of care required in a certain community.<sup>24</sup> This dual approach can be problematic in cases involving benefit decisions that influence patient care because “benefit decisions are typically governed by contract, while patient care decisions are typically governed by tort law.”<sup>25</sup> If contracts govern “benefit” decisions, then it is essentially impossible to hold a health plan accountable for its influence on quality of care.<sup>26</sup> The courts’ approach to these types of decisions raises questions as to whether analyzing claims under the rubric of contract strips patients of their rights against their MCO that would normally be grounded in tort.<sup>27</sup>

Take, for example, the question of whether the choice to use one particular hospital instead of another should be considered a decision about particular benefits a patient is entitled to (a contract issue), or about the quality of care he or she will receive at the hospital (a tort issue). In *Kuhl v. Lincoln National Health Plan Inc.*, physicians agreed that a man who suffered a heart attack should have surgery at a St. Louis hospital because the hospitals in Kansas City did not have adequate equipment.<sup>28</sup> The health plan denied

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22. See *Pappas v. Asbel*, 768 A.2d 1089, 1093-94 (Pa. 2001) (holding that ERISA did not preempt the medical malpractice claim against the HMO in light of the Supreme Court’s recent decision of *Pegram v. Herdrich*, 530 U.S. 211, 228-29 (2000)). The *Pappas* court explains the three types of decisions that HMO professionals make, as defined by the Supreme Court in *Pegram*. These decisions include: pure “eligibility decisions,” which turn on a plan’s coverage of a particular condition; “treatment decisions,” which are those that involve determining the appropriate medical response given a patient’s symptoms; and “mixed eligibility and treatment decisions,” where coverage and medical judgment are intertwined. *Pappas*, 768 A.2d at 1093-94.

23. Crocca, *supra* note 2, at 25.

24. *Id.*

25. Mariner, *supra* note 20, at 24-25.

26. See *id.* at 26. Mariner points out some other ways that managed care organizations can influence patient care. For example, health care plans sometimes offer advice and assistance in selecting physicians, they may encourage their members to use preventive care services, or they may create incentives for health care providers themselves to recommend certain drugs or treatments. *Id.* at 27.

27. See *id.* at 28.

28. *Kuhl v. Lincoln Nat’l Health Plan, Inc.*, 999 F.2d 298, 300 (8th Cir. 1993).

him that opportunity, stating that he had to use one of its listed providers, but changed its mind several weeks later.<sup>29</sup> By the time the surgical team at the St. Louis hospital was available to perform the surgery, Kuhl's heart had deteriorated beyond repair.<sup>30</sup> Kuhl died in December 1989, before the health plan had made its final decision about whether it would cover a transplant, and his wife sued the plan for medical malpractice.<sup>31</sup> The Eighth Circuit held that there was no valid malpractice claim because the plan did not make a *medical* decision per se; rather the court characterized the claim for denial of benefits as sounding in contract law rather than tort.<sup>32</sup>

The court's decision in *Kuhl* fails to recognize the medical treatment choices made by the plan in the process of denying benefits.<sup>33</sup> Simply because the provider's decision was not specifically about what benefits Kuhl was entitled to receive, but where he would receive them, the substance of the decision should not remove the claim from the realm of tort law.<sup>34</sup>

An arbitration clause may not directly address standards of patient care, but courts have acknowledged that the relationship between a patient and his or her health care provider is one that requires protection.<sup>35</sup> Thus, the courts have scrutinized these agreements carefully and have approached health care contracts as being ones of adhesion.<sup>36</sup> The delicate nature of negotiating for health care and a patient's ability to seek redress for wrongs may partially explain some of the trepidation people feel in signing arbitration clauses.

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29. *Id.*

30. *Id.*

31. *Id.*

32. *See id.* at 303.

33. Mariner, *supra* note 20, at 26.

34. *Id.* (stating that at the very least, the plan's decision about what hospital Kuhl was entitled to use had elements of medical judgment for a covered benefit because most plans would consider the quality of care in selecting hospitals with which to work).

35. Crocca, *supra* note 2, at 25.

36. *Id.*

## III. ARBITRATION: LAW AND POLICY

A. *Federal and State Arbitration Law*

In general, the Federal Arbitration Act (FAA) governs arbitration disputes.<sup>37</sup> The United States Supreme Court has held that the FAA applies to all arbitrations involving interstate commerce, construing interstate commerce broadly and thereby encompassing most agreements.<sup>38</sup> The FAA states that any arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>39</sup> Courts have consistently acknowledged that Congress created a strong federal policy that favors arbitration agreements through the language of the FAA.<sup>40</sup>

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37. 9 U.S.C. §§ 1-16 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

38. *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040 (2003) (interpreting “the term ‘involving commerce’ in the FAA as the functional equivalent of the more familiar term ‘affecting commerce’—words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power”); *Allied-Bruce Terminix, Cos. v. Dobson*, 513 U.S. 265, 275 (1995) (stating that a broad interpretation of interstate commerce language “is consistent with the Act’s basic purpose, to put arbitration provisions on ‘the same footing’ as a contract’s other terms”); *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (stating that a broad interpretation “embodies Congress’ intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause”); *Southland Corp. v. Keating*, 465 U.S. 1, 14-15 (1984) (holding that the requirement that the transaction involve commerce is a constitutionally necessary qualification on the FAA’s reach).

39. 9 U.S.C. § 2 (2000). This section of the FAA states in full:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

*Id.*

40. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (holding that “it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act”); *Southland Corp.*, 465 U.S. at 15 (stating that by implementing language that an arbitration provision is valid and irrevocable, Congress declared a national policy favoring arbitration and withdrew power of the states to require a judicial forum for resolution of claims that the contracting parties agreed to resolve by arbitration); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 n.27 (1983) (stating that “the policy of the

Given this government attitude favoring arbitration, courts resolving doubts as to the arbitrability of a claim must resolve any doubts in favor of arbitration.<sup>41</sup>

State governments have joined Congress by incorporating aspects of the FAA into their own state laws, and crafting laws that address issues specifically related to arbitration.<sup>42</sup> While state law governing arbitration can broaden the scope of arbitrable disputes, the Supreme Court has held that the FAA preempts state laws and

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Arbitration Act requires a liberal reading of arbitration agreements”).

41. *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 392 (6th Cir. 2003) (noting that “[i]t is a well-established rule that any doubts regarding arbitrability should be resolved in favor of arbitration”); *Commercial Union Ins. Co. v. Gilbane Bldg. Co.*, 992 F.2d 386, 388 (1st Cir. 1993).

42. See ALASKA STAT. §§ 9.43.10-.220 (Michie 2003); ARIZ. REV. STAT. ANN. §§ 12-1501 to -1518 (West 2004); ARK. CODE ANN. §§ 16-108-201 to -224 (WESTLAW through 2003 legislation); COLO. REV. STAT. §§ 13-22-201 to -409 (WESTLAW through 2003 legislation); DEL. CODE ANN. tit. 10, §§ 5701-5725 (WESTLAW through 2003 legislation); FLA. STAT. ch. 682.01-682.22 (WESTLAW through 2003 legislation); IDAHO CODE §§ 7-901 to -922 (Michie, WESTLAW through 2003 legislation); 710 ILL. COMP. STAT. ANN. 5/1-5/23 (West 2003); IND. CODE ANN. §§ 34-57-2-2 to -22 (West, WESTLAW through 2003 legislation); IOWA CODE ANN. §§ 679A.1-.19 (West, WESTLAW through 2003 ch. 35) (recognized as preempted by *Faber v. Menard, Inc.*, 267 F. Supp. 2d 961 (N.D. Iowa 2003)); KAN. STAT. ANN. §§ 5-401 to -422 (WESTLAW through 2002 legislation); KY. REV. STAT. ANN. §§ 417.045-.240 (Michie, WESTLAW through 2003 legislation); LA. CIV. CODE ANN. art. 9:4201-.4217 (West 1991); ME. REV. STAT. ANN. tit. 14, §§ 5927-5949 (West, WESTLAW through 2003 legislation); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-201 to -234 (WESTLAW through 2004 legislation); MASS. GEN. LAWS ANN. ch. 251, §§ 1-19 (West, WESTLAW through 2003 legislation ch. 9); MICH. COMP. LAWS ANN. §§ 600.5001-.5035 (West, WESTLAW through 2003 legislation); MINN. STAT. §§ 572.08-.30 (WESTLAW through 2001 1st Spec. Sess.); MISS. CODE ANN. §§ 11-15-1 to -37 (WESTLAW through 2003 legislation); MO. REV. STAT. §§ 435.350-.470 (WESTLAW through 2003 legislation); MONT. CODE ANN. §§ 27-5-111 to -324 (WESTLAW through 2003 legislation); NEB. REV. STAT. §§ 25-2601 to -2622 (WESTLAW through 2003 legislation); NEV. REV. STAT. 38.015-.360 (1995); N.J. STAT. ANN. §§ 2A:23A-1 to -19 (West, WESTLAW through 2003 legislation); N.M. STAT. ANN. §§ 44-7-1 to -22 (Michie, WESTLAW through 2003 legislation); N.Y. C.P.L.R. 7503-7514 (McKinney 1980 & Supp. 1997); N.C. GEN. STAT. §§ 1-569.1 to .31 (WESTLAW through 2003 legislation); N.D. CENT. CODE §§ 32-29.2-01 to -20 (1996); OHIO REV. CODE ANN. §§ 2711.01-.16 (WESTLAW through 2003 legislation); OKLA. STAT. tit. 15, §§ 801-818 (WESTLAW through 2003 legislation); 42 PA. CONS. STAT. §§ 7301-7320 (1982); R.I. GEN. LAWS §§ 10-3-1 to -21 (WESTLAW through 2002 legislation); S.D. CODIFIED LAWS §§ 21-25A-1 to -38 (WESTLAW through 2003 legislation); TENN. CODE ANN. §§ 29-5-301 to -320 (WESTLAW through 2003 legislation); TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-.023 (Vernon 1996); UTAH CODE ANN. §§ 78-31a-1 to -20 (1996); VT. STAT. ANN. tit. 12, §§ 5651-5681 (WESTLAW through 2003 legislation); VA. CODE ANN. §§ 8.01-581.01 to -.016 (Michie, WESTLAW through 2003 legislation); WYO. STAT. ANN. §§ 1-36-101 to -119 (Michie, WESTLAW through 2002 legislation).

policies regarding arbitration where state court rulings or statutes are contrary or more restrictive.<sup>43</sup> In *Perry v. Thomas*, the Supreme Court held:

State law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text] of [the FAA].<sup>44</sup>

Therefore, while states may invalidate an arbitration clause “upon such grounds as exist at law or in equity of the revocation of *any* contract” under section 2 of the FAA, a state cannot “decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.”<sup>45</sup>

While the FAA preempts state statutory schemes that are more restrictive, state contract principles apply to whether agreements to arbitrate are valid and enforceable, just as they would to any other contract dispute arising under state law.<sup>46</sup> As the Seventh Circuit stated in *Stone v. Doerge*, decided in May 2003:

Nothing in the Federal Arbitration Act overrides normal rules of contractual interpretation; the Act’s goal was to put arbitration on a par with other contracts and eliminate any vestige of old rules disfavoring arbitration. Arbitration depends on agreement, and nothing beats normal rules of contract law to determine what the parties’ agreement entails.<sup>47</sup>

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43. See *Doctor’s Assocs., Inc., v. Casarotto*, 517 U.S. 681, 686 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Allied-Bruce*, 513 U.S. at 271-72; *Southland Corp.*, 465 U.S. at 10-11; *Fazio*, 340 F.3d at 392-93.

44. 482 U.S. 483, 492 n.9 (1987).

45. *Allied-Bruce*, 513 U.S. at 281. See also *Doctor’s Assocs.*, 517 U.S. at 687 (stating that “courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions”).

46. *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003) (stating that federal law affects the “extent to which state law may specify special rules for arbitration: any rule of state law disfavoring or prohibiting arbitration for a class of transactions is preempted, save upon such grounds as exist at law or in equity for the revocation of any contract”).

47. *Id.* (citations omitted). The court also states that “generally applicable rules of New York contract law govern, but any rules of state law that give special treatment to arbitration agreements are inapplicable.” *Id.* See also *Fazio*, 340 F.3d at 393; *Great Earth Co. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002) (stating that state law determines whether the agreement to arbitrate was validly obtained and

The FAA leaves state courts to use the contract law of their state to interpret the validity of the agreement to arbitrate itself. The federal policy requiring liberal construction of arbitration clauses mandates that state courts construe applicable law in favor of arbitration.<sup>48</sup>

*B. State Contract Law: Interpreting the Validity of Arbitration Clauses*

Before a court is justified in granting a motion to compel arbitration, it must engage in a two-step process governed by state rather than federal law.<sup>49</sup> First, the court must determine whether a valid agreement to arbitrate exists and then whether the issues involved fall within the scope of the agreement.<sup>50</sup> A court may invalidate an arbitration agreement for the same reasons it might invalidate any contract—including forgery, unconscionability, or lack of consideration.<sup>51</sup> The *Stone* court notes that mandating courts to favor arbitration when possible is not the same as requiring courts to “foist arbitration on parties who have not

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the FAA preempts any state laws that are specific to arbitration); *Doctor's Assocs.*, 517 U.S. at 686-87; *First Options, Inc. v. Kaplan*, 514 U.S. 938 (1995).

48. *Commercial Union Ins. Co. v. Gilbane Bldg. Co.*, 992 F.2d 386, 388 (1st Cir. 1993) (stating that policy favoring arbitration “applies whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”).

49. *See Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 365 (2nd Cir. 2003) (stating that before “compelling arbitration, the district court must first determine two threshold issues that are governed by state rather than federal law”: first, whether or not the parties entered into a contractually valid arbitration agreement; and second, whether the dispute itself falls within the scope of the agreement). *See also Fazio*, 340 F.3d at 393 (citing *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Sixth Circuit said in *Stout* that “[w]hen considering a motion to stay proceedings and compel arbitration under the Act, a court has four tasks: first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement.” *Stout*, 228 F.3d at 714. The court went on to add two more prongs to the analysis by saying that “third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.” *Id.* *See also Bratt Enters., Inc. v. Nobel Int’l Ltd.*, 338 F.3d 609, 612 (6th Cir. 2003) (stating that “a court must engage in a limited review to determine whether the dispute is arbitrable; meaning that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement”).

50. *Cap Gemini*, 346 F.3d. at 365.

51. *Fazio*, 340 F.3d at 393.

genuinely agreed to that device.”<sup>52</sup> While that may be true, given the FAA’s strong policy favoring arbitration and the equally powerful policy favoring the freedom to contract as one of the fundamental tenets underlying American jurisprudence, convincing a court to invalidate an arbitration agreement is difficult.<sup>53</sup>

### 1. *Arbitration Clauses in Adhesion Contracts*

Contracts of adhesion may contain arbitration agreements. Because the contracts this article discusses are generally between an MCO and one consumer, usually a patient, the analysis will focus on what is necessary to enforce a valid adhesion contract.

Simply put, an adhesion contract is a contract in which one party dictates the terms of the agreement to the other party, and the other party has no voice in its formulation.<sup>54</sup> Legal scholars and courts have developed more detailed definitions, including:

- (1) a standardized (typed or printed) form document
- (2) drafted by, or on behalf of, one party which
- (3) participates routinely in numerous like transactions and
- (4) presents the form to the other “adhering” party on a take-it-or-leave-it basis;
- (5) the adhering party enters into few transactions of the type in question, and
- (6) the adhering party signs the form after dicker over the few terms, if any, that are open to bargaining.<sup>55</sup>

One scholar characterized the process of entering into a contract of adhesion as being “not one of haggle or cooperative process but rather of a fly and flypaper.”<sup>56</sup>

One commonly cited negative aspect of adhesion contracts is

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52. *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003).

53. *See* Schwartz, *supra* note 8, at 36-37 (stating that the Supreme Court has broadly endorsed the enforcement of adhesive pre-dispute arbitration agreements and has created a “doctrine of rigorous enforcement” of pre-dispute arbitration clauses); Haydock & Henderson, *supra* note 10, at 175 (stating that judicial opinions and congressional action through the FAA show clear support of use of methods of alternative dispute resolution instead of litigation to resolve issues).

54. JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.4 (1993).

55. *See* Schwartz, *supra* note 8, at 55 (citing Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983)). Professor Schwartz notes that he refers only to six of the seven factors Professor Rakoff uses in his original definition, omitting the last component that “the adhering party’s primary obligation is the payment of money,” because Professor Schwartz feels that Professor Rakoff’s analysis applies to not only consumer contracts, but contracts of employment as well. Schwartz, *supra* note 8, at 1191 n.61.

56. Arthur Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 143 (1970).

that the drafters, usually a much larger entity than the adhering party, may draft the contract to protect their best interests, making it less likely that the adhering party's expectations will be met.<sup>57</sup> Most analyses of adhesion contracts also include an evaluation of the disparity of bargaining power between the contract's drafter and the adherent that often accompanies such agreements.<sup>58</sup> Additionally, there is likely to be "disparate knowledge" between the parties, causing the adhering party to be disadvantaged by a lack of information about a certain term and, in the case of arbitration, about the likelihood and nature of any future disputes that may arise.<sup>59</sup> Courts closely examine those situations in which the contracting parties have conflicting interests, making it more likely that the stronger party might take advantage of the adhering party by skewing the terms in its favor.<sup>60</sup>

While there are clearly issues of fairness raised by adhesion contracts, scholars note that there is nothing inherently wrong with them. Furthermore, many if not most daily, common transactions involve contracts drafted by one party and presented on a take-it-or-leave-it basis.<sup>61</sup>

Plaintiffs in health care contracts cases often try to invalidate arbitration clauses on the basis of unconscionability.<sup>62</sup> Patients make some of the following arguments when attacking an arbitration clause: an individual was forced to sign the agreement and had no meaningful choice because the service at the heart of the contract was public or essential; the arbitration clause binds one party but not the other and is therefore not mutual; it is prohibitively costly for an individual to participate in the arbitration process; the arbitration process or the arbitrator is not neutral or independent; or the clause unreasonably reduces an individual's rights, for example, by denying remedies.<sup>63</sup>

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57. PERILLO, *supra* note 54, § 1.4.

58. Schwartz, *supra* note 8, 55.

59. *Id.*

60. *Id.* at 56.

61. PERILLO, *supra* note 54, § 29.10. *See also id.* § 1.4 (stating that "[adhesion contracts exist] in many of the transactions of vast scale that are of great importance to the functioning of the economy" and that they are a "part of the fabric of our society. [Contracts of adhesion] should neither be praised nor denounced by the legal scholar").

62. While there are many other contract-based challenges to arbitration clauses, unconscionability is most relevant to the discussion of procedural safeguards and due process rights, and the article will focus on it.

63. *See* Roger S. Haydock, *Arbitration*, in MINNESOTA PRACTICE (forthcoming

## 2. *Unconscionability Analysis*

Courts have defined unconscionability as “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”<sup>64</sup> Courts have further tried to clarify the concept by distinguishing between procedural and substantive unconscionability.<sup>65</sup> Procedural unconscionability relates to the bargaining process resulting in the agreement, while substantive unconscionability examines whether the terms of the agreement itself are oppressive.<sup>66</sup> To invalidate an agreement to arbitrate, a court must find that there is both procedural and substantive unconscionability.<sup>67</sup>

Procedural unconscionability exists when the parties to a contract did not freely bargain for it.<sup>68</sup> Indications of procedural unconscionability generally fall into two categories: lack of voluntariness and lack of knowledge.<sup>69</sup> To determine whether there was a lack of voluntariness in forming the contract, courts look at “the use of high-pressure tactics, coercion, oppression, or threats short of duress, or by a great imbalance between the parties’ bargaining power.”<sup>70</sup> Non-negotiable terms on the stronger party’s side, or prevention of the weaker party from negotiating more favorable terms, denotes unequal bargaining power.<sup>71</sup> The terms might prevent the weaker party from negotiating such things as market factors or timing.<sup>72</sup> Lack of knowledge manifests in the classic forms of small print, indecipherable or ambiguous language, or lack of the opportunity to study the contract and ask about its terms.<sup>73</sup> Obvious disparities in sophistication, knowledge, and experience between the parties may lead to procedural unconscionability.<sup>74</sup>

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publication) (manuscript at 12-13, on file with author).

64. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

65. *Lovey v. Regence BlueShield of Idaho*, 72 P.3d 877, 882 (Idaho 2003).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

On the other hand, substantive unconscionability focuses solely on the term or provision at issue in a particular case.<sup>75</sup> Courts have long drawn on a definition dating back to eighteenth-century England stating that a substantively unconscionable bargain is one “no [person] in [his or her] senses and not under delusion would make on the one hand, and . . . no honest and fair [person] would accept on the other.”<sup>76</sup> Courts must consider the purpose and effect of the terms at issue, whether those terms are oppressive or exceedingly one-sided in light of the needs of both parties, the commercial setting in which the parties executed the agreement, and the reasonableness of the terms at the time the parties contracted.<sup>77</sup>

Another specific concern arising in relation to arbitration clauses in all kinds of contracts is that because the transaction might center around wages, price, or medical services provided, and the arbitration clause may not be at the essence of the transaction, the adhering party is not likely to pay much attention to the clause.<sup>78</sup> Even if average citizens do read and understand the clause, most probably do not have a great deal of experience with either arbitration or litigation, a fact that might lead to an undervaluation of the right to a judicial forum.<sup>79</sup>

Plaintiffs have challenged many arbitration clauses on the grounds of unconscionability, but the challenges usually fail.<sup>80</sup> This is likely due to the string of United States Supreme Court decisions making “it clear that arbitration is a preferred method of dispute resolution.”<sup>81</sup> Courts have held that an arbitration clause requiring “a forum with excessively high fees is unconscionable in a

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75. *Id.*

76. *Id.*; see also PERILLO, *supra* note 54, at § 29.4 (quoting *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Ch. 1750)).

77. *Lovey*, 72 P.3d at 883. See also PERILLO, *supra* note 54, at § 29.4 (stating that under Official Comment 1 to the Uniform Commercial Code § 2-302, “the ultimate question is ‘whether, in the light of general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract’”).

78. Schwartz, *supra* note 8, at 56-57.

79. *Id.* at 57.

80. PERILLO, *supra* note 54, at § 29.4 (citing *Young v. Jim Walter Homes*, 110 F. Supp. 2d 1344 (M.D. Ala. 2000); *Green Tree Fin. Corp. of Ala. v. Wampler*, 749 So. 2d 409 (Ala. 1999); *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999); *Tjart v. Smith Barney, Inc.*, 28 P.3d 823 (Wash. Ct. App. 2001)).

81. PERILLO, *supra* note 54, § 29.4.

consumer transaction with a relatively small amount at issue.”<sup>82</sup> However, “the mere fact that a party cannot afford the normal arbitration fees does not create a defense of unconscionability.”<sup>83</sup>

In a related matter, courts have held that employment contracts containing arbitration clauses that bind only the employee but not the employer are unconscionable for lack of mutuality.<sup>84</sup> In an unpublished California Court of Appeals case, the court held that an arbitration clause in an employment contract was procedurally unconscionable because signing it was a condition of being hired, and the clause was substantively unconscionable because it did not require the employer to submit its claims to arbitration.<sup>85</sup> The court also considered that the clause required the employee to pay one-half of the fees for arbitration and required that the arbitration take place before judges that charged high prices.<sup>86</sup>

Pre-dispute arbitration clauses contained in adhesion contracts raise issues of fairness and due process, but they are permissible and enforceable.<sup>87</sup> Reflecting the analysis outlined above, courts will generally uphold arbitration clauses in adhesion contracts as long as the arbitration terms are not procedurally and substantively unconscionable.<sup>88</sup> Most courts will protect parties to an adhesion contract involving public or essential services if the parties have greatly disparate bargaining power, there was no opportunity for negotiation, and the parties could not obtain services elsewhere.<sup>89</sup>

*C. How the Courts Have Interpreted Arbitration Clauses in Health-Related Contracts: Case Law*

The Supreme Court of the United States has not directly addressed the validity of an agreement to arbitrate in health care contracts.<sup>90</sup> The Court has addressed the issue of arbitration

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82. *Id.* (citing *Brower v. Gateway 2000*, 246 A.D.2d 246 (N.Y. 1998)).

83. *Id.* (citing *Fleetwood Enters., Inc., v. Bruno*, 784 So. 2d 277 (Ala. 2000)).

84. *Id.* (citing *Armendariz v. Found. Health Psychcare Servs. Inc.*, 6 P.3d 669 (Cal. 2000)).

85. *Id.* (citing *McCoy v. Superior Court*, 87 Cal. App. 4th 354 (2001)).

86. *Id.*

87. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 681 (1996).

88. *See Haydock, supra* note 63, at 7.

89. *Id.* at 11.

90. While not directly related to the focus on patients' rights that this article takes, the Supreme Court's decision in *PacifiCare Health Systems, Inc., v. Book*, 123 S. Ct. 1531 (2003), might be of interest. This case arose out of a lawsuit brought by

clauses, but has not made a distinction between patients as consumers of health care and other kinds of consumers.<sup>91</sup> However, the Supreme Court has approached arbitration clauses with a great deal of deference, and each of the Justices who has considered the issue has recognized the benefits of a well-run arbitration system.<sup>92</sup>

The federal courts of appeals have dealt with the question of whether arbitration clauses in health care contracts should be enforceable on a limited basis, concluding generally that such clauses should and will be enforceable. For example, in *Chappel v. Laboratory Corp. of America*, the Ninth Circuit upheld the validity of an arbitration clause in an ERISA-governed health benefits plan.<sup>93</sup> The *Chappel* court stated, “if the plan contains an arbitration clause, the plaintiff must arbitrate the dispute in accordance with the clause in order to exhaust his administrative remedies before filing suit . . . unless he can show that the arbitration clause is unenforceable or invalid.”<sup>94</sup> The plaintiff’s argument was threefold: first, that the plan waived its right to arbitrate by first

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physicians against MCOs that had failed to reimburse the doctors for patient services. *Id.* at 1533. The doctors alleged, inter alia, that the organizations violated the Racketeering Influenced and Corrupt Organizations Act (RICO). *Id.* When the MCOs moved to compel arbitration as per their agreements with the doctors, the district court denied the motion stating, “the arbitration clauses [in question] prohibited awards of ‘punitive damages,’ and hence an arbitrator lacked the ability to award treble damages under RICO.” *Id.* at 1532. The Eleventh Circuit agreed with the district court that given the remedial limitations in the arbitration clauses, “[T]he plaintiff[s] may not be able to obtain meaningful relief for allegations of statutory violations in an arbitration forum.” *Id.* at 1534 (quoting *In re Managed Care Litig.*, 132 F. Supp. 2d 989, 1005 (S.D. Fla. 2000)). In writing for the Court, Justice Scalia held that since the remedial limitations in the arbitration clauses themselves were ambiguous, and because the Court would have to speculate as to how an arbitrator might construe the remedial limitations, that it was not for the Court to resolve that ambiguity. *Id.* at 1535-36. The case was remanded for further proceedings, and at the time of this publication has not been decided. In *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, a Seventh Circuit case, health care providers brought a claim against a group of affiliated corporations that administered benefits, CIGNA, alleging that it installed a computer program for calculating the amount it owed that resulted in systematic underpayment. 294 F.3d 849, 850 (7th Cir. 2002).

91. Haydock Interview, *supra* note 6.

92. Haydock & Henderson, *supra* note 10, at 175-76 (stating that all of the twenty-four different justices who have been members of the Court since 1960 “were members of the majority upholding arbitration in at least one case during their tenure, and [the majority of the Justices] were members of the majority a number of times”).

93. 232 F.3d 719 (9th Cir. 2000).

94. *Id.* at 724.

litigating the dispute in federal court; second, that the clause should be invalid because some of its terms were more restrictive than the statutory rights guaranteed to plan participants under ERISA; and third, that employment contracts are not governed under the FAA.<sup>95</sup> The court rejected all three claims and enforced the arbitration clause.<sup>96</sup>

To waive the right to arbitrate, the defendant must have known of their right to arbitrate, “acted inconsistently with that right, and, in doing so, prejudiced Chappel by their actions.”<sup>97</sup> The court said that nothing in the defendant’s litigation behavior was inconsistent with the intent to arbitrate.<sup>98</sup> As for the more restrictive language in the arbitration agreement, the court held that a cost-sharing provision did not render the arbitration agreement unenforceable.<sup>99</sup> Finally, whether the plaintiff could prove that the clause was part of the employment contract and thus not governed by the FAA, he would still be required under the law of contract to arbitrate in accordance with the clause.<sup>100</sup> The court did allow the plaintiff to amend his complaint to state a claim for breach of fiduciary duty by failing to adequately notify him of the existence and terms of the arbitration clause.<sup>101</sup> The court reasoned that because mandatory arbitration was part of the plan’s claim procedure, and because the claimant would have taken certain steps to obtain external review of his claim, the plan should have brought the arbitration clause to the claimant’s attention.<sup>102</sup>

In *Seymour v. Blue Cross/Blue Shield*,<sup>103</sup> the Tenth Circuit considered whether an arbitration award fell within the public policy exception to enforcement of arbitration awards.<sup>104</sup> In that case, the parties mutually agreed to arbitrate a claim against the health care organization after it declined to pay for the plaintiff’s

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95. *Id.* at 724-25.

96. *Id.* at 724.

97. *Id.*

98. *Id.*

99. *Id.* at 725. Compare *Chappel*, 232 F.3d 719 with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that a claim under Age Discrimination in Employment Act (ADEA) can be subjected to compulsory arbitration, and the plaintiff was bound by the agreement unless he could show an “inherent conflict between arbitration and the ADEA’s underlying purposes”).

100. *Chappel*, 232 F.3d at 725.

101. *Id.* at 726.

102. *Id.*

103. 988 F.2d 1020 (10th Cir. 1993).

104. *Id.*

son's liver transplant.<sup>105</sup> The arbitration panel found that the company was not legally obligated to pay for the transplant.<sup>106</sup> Because the Seymours claimed that Blue Cross unilaterally modified the original policy without receiving a written agreement from the Seymours, the court would not enforce the arbitration award, finding it counter to Utah public policy.<sup>107</sup> Relying on federal policy dictating that a federal court should do everything it can to avoid overturning an arbitration award,<sup>108</sup> the *Seymour* court held that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority . . . error does not suffice to overturn his decision."<sup>109</sup>

Among state courts, California has had many cases involving various issues related to health care arbitration clauses come before its judiciary, paving the way for those that have followed.<sup>110</sup> In 1976, the California Supreme Court reversed the California Court of Appeals in the seminal case of *Madden v. Kaiser Foundation Hospitals*.<sup>111</sup> This case involved a state employee covered by a group health plan negotiated by his employer who brought a medical

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105. *Id.* at 1022.

106. *Id.*

107. *Id.*

108. *Id.* (citing *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 764 (1983) (stating that "a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be a better one")).

109. *Seymour*, 988 F.2d at 1022-23 (quoting *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

110. *See generally* *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 972 (Cal. 1997) (presuming arbitrability); *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178 (Cal. 1976) (finding that an agent or representative has the implied authority to agree to arbitration of malpractice claims for enrolled employees); *Zolezzi v. Pacificare of California*, 129 Cal. Rptr. 2d 526, 539 n.11 (Ct. App. 2003) (holding that the McCarran-Ferguson Act does not prevent the Federal Arbitration Act from preempting application of statutory disclosure requirements for arbitration clauses in health care service plans found in California state law); *Pagarigan v. Libby Care Center, Inc.*, 120 Cal. Rptr. 2d 892, 895 (Ct. App. 2002) (holding that arbitration clause in nursing home admissions contract was unenforceable because adult children of resident who signed the agreement did not have authority as agents to bind the resident); *Smith v. Pacificare Behavioral Health of California, Inc.*, 113 Cal. Rptr. 2d 140, 162 (Ct. App. 2002) (holding that where health service plan was engaged in the business of insurance and was thus governed by the McCarran-Ferguson Act, an arbitration provision in a health services contract that did not satisfy the statutory disclosure requirements was not enforceable); *Warren-Guthrie v. Health Net*, 101 Cal. Rptr. 2d 260, 266 (Ct. App. 2000) (state law allowing a court to disregard an arbitration clause due to the possibility of inconsistent rulings was preempted by the FAA).

111. 552 P.2d 1178 (Cal. 1976).

malpractice claim against the health plan.<sup>112</sup> When Kaiser moved to compel arbitration per the agreement it negotiated with the State Employees Retirement System Board of Administration, the plaintiff contended that the arbitration provision did not bind her because she did not personally contract for it.<sup>113</sup> The court then considered whether an agent or representative, contracting for medical services on behalf of a group of employees, has the implied authority to agree to arbitration of malpractice claims for enrolled employees.<sup>114</sup>

The California Supreme Court made several bold statements about the practice of arbitration.<sup>115</sup> The court stated that while in the past courts sometimes regarded arbitration as suspect, today arbitration is an accepted mode of dispute resolution.<sup>116</sup> Further, the court held that employers could enter into contracts related to medical services on behalf of their employees, and that simply because an arbitration agreement is embedded in an adhesion contract does not make it invalid.<sup>117</sup> After all, the parties negotiating for the arbitration contract had equal bargaining power.<sup>118</sup> The *Madden* court finally noted that in negotiating the arbitration clause, the employer (or state board) was merely providing “a forum for enforcement of the rights of enrolled employees rather than a substantive limitation of them.”<sup>119</sup> Along those same lines, the court rejected the plaintiff’s contention that the arbitration provision violated her constitutional right to a jury trial, because persons can freely contract to resolve disputes through arbitration rather than by juries.<sup>120</sup>

In 1997, the California Supreme Court considered an arbitration provision in another health care contract in *Engalla v. Permanente Medical Group, Inc.*<sup>121</sup> The court first looked to see if the arbitration clause itself was unconscionable.<sup>122</sup> The court noted in its analysis that in addition to the doctrine of unconscionability

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112. *Id.* at 1180-81.

113. *Id.* at 1181.

114. *Id.* at 1180.

115. *See id.* (stating that “courts in the past regarded arbitration as an unusual and suspect procedure”).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. 938 P.2d 903 (Cal. 1997).

122. *Id.* at 924.

derived from contract law, HMOs were regulated by a state law that required that “all contracts made in connection with a health service plan be ‘fair, reasonable, and consistent with the objectives’ of that statute.”<sup>123</sup> Therefore, the court concluded, “HMOs had a special obligation not to impose contracts on their subscribers that are one-sided and lacking in fundamental fairness.”<sup>124</sup> While the court acknowledged that the contract had some of the attributes of adhesion, it held that the agreement was not unconscionable because the plaintiff’s argument did not revolve around any defect or one-sidedness in its contractual provisions;<sup>125</sup> rather, the plaintiff argued that the HMO had set up a system of arbitration inherently unfair to its claimants.<sup>126</sup> The court then remanded the case on the issues of fraud and waiver.<sup>127</sup>

In another prominent state court case, *Broemmer v. Abortion Services of Phoenix, Ltd.*, the Supreme Court of Arizona revisited a decision holding that an adhesion contract, which had required Broemmer to arbitrate a medical malpractice claim, thereby waiving her right to a jury trial, was unconscionable.<sup>128</sup> To determine whether the clause was enforceable, the court examined whether the provision fell within the reasonable expectations of the plaintiff.<sup>129</sup> Because of the complexities of that particular situation, the court chose not to enforce the agreement to arbitrate, stating that the contract itself fell outside Broemmer’s reasonable expectations.<sup>130</sup> The court said that there was neither a conspicuous or explicit waiver of her right to a jury trial, nor any evidence that she waived the right knowingly, voluntarily, and intelligently.<sup>131</sup> The court also noted that at the time of the decision Broemmer was still not sure what arbitration entailed, and that severe emotional strain, coupled with her lack of education, contributed to the court’s assessment that the clause did not

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123. *Id.* (citing Knox-Keene Health Care Service Plan Act, CAL. HEALTH & SAFETY CODE, § 1367, subd. (h) (West 2004)).

124. *Id.* at 924.

125. *Id.* at 925.

126. *Id.* at 925. Kaiser, the HMO in this case, reserved an unlimited right to veto arbitrators proposed by the other party. *Id.* The plaintiffs also argued that Kaiser had “an unfair advantage as a ‘repeat player’ in arbitration, possessing information on arbitrators that [they] themselves lacked.” *Id.*

127. *Id.*

128. 840 P.2d 1013 (Ariz. 1992).

129. *Id.* at 1016.

130. *Id.* at 1017.

131. *Id.*

coincide with her reasonable expectations.<sup>132</sup>

The Tennessee Supreme Court, however, went the other direction, compelling arbitration in a case between a patient and her physician.<sup>133</sup> In considering whether such an agreement was valid under the Tennessee Arbitration Act,<sup>134</sup> the court examined whether the clause was contained in a contract of adhesion, and if so, whether the contract was enforceable.<sup>135</sup> The test for enforceability used by the *Buraczynski* court was to ascertain whether the terms of the contract were beyond the reasonable expectations of an ordinary person.<sup>136</sup> In this case, two different plaintiffs brought medical malpractice claims against the defendant, Dr. Edward Eyring.<sup>137</sup> Since both patients had signed agreements to arbitrate with the physician, he moved to compel arbitration.<sup>138</sup>

The court acknowledged that, in general, courts around the nation are reluctant to enforce arbitration agreements between patients and health care providers.<sup>139</sup> The court qualified this statement by citing some specific strikes against certain types of agreements.<sup>140</sup> For instance, courts do not favor agreements hidden within other types of contracts that do not afford patients an opportunity to question the terms or purpose of the agreement.<sup>141</sup> This is particularly true when a patient is required to accept the terms on a take-it-or-leave-it basis and when the agreements give the health care provider an unequal advantage in

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132. *Id.*

133. *Buraczynski v. Eyring*, 919 S.W.2d 314, 314 (Tenn. 1996).

134. *See* TENN. CODE ANN. § 29-5-302(a) (1995).

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

136. *Id.*

137. *Id.* at 316-17.

138. *Id.* at 317.

139. *Id.* at 320-21 (citing *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013, 1016 (Ariz. 1992); *William F. Robinson, M.D., Ltd. v. Pepper*, 693 P.2d 1259, 1261 (Nev. 1985) (refusing to enforce an arbitration agreement found within a clinic admission form that gave the patient no option to revoke the agreement and regain the right to a jury trial); *Benyon v. Garden Grove Med. Group*, 161 Cal. Rptr. 146, 150, 152 (Cal. Ct. App. 1980) (refusing to enforce an arbitration clause where the group health insurance plan had the unilateral right to reject an arbitrator's decision without cause and to require another arbitration before a panel of three physicians when the insured is unaware of the provision and that the provision required the insured to pay half the costs of both arbitrations)).

140. *Buraczynski*, 919 S.W.2d at 321.

141. *Id.*

the arbitration process itself.<sup>142</sup>

While the *Buraczynski* court conceded that the arbitration agreement was contained in a contract of adhesion and presented to the plaintiffs on a take-it-or-leave-it basis, it still chose to enforce the agreement.<sup>143</sup> The court noted that the arbitration clause was on a separate page attached to an explanation about arbitration and an encouragement to discuss questions about the agreement with Dr. Eyring.<sup>144</sup> The arbitration agreement equally bound Dr. Eyring, and each side in the dispute had an opportunity to choose the arbitrator. In addition, the arbitration agreement included a ten-point, capital letter, red message directly above the signature line. The message read, “by signing this contract, you are giving up your right to a jury or court trial” on any malpractice claim.<sup>145</sup> Patients also had the right to revoke the agreement for any reason within thirty days of its execution and regain the right to a jury trial.<sup>146</sup> Finally, the agreement did not limit the doctor’s liability for negligence, but “merely shifted the disputes to a different forum.”<sup>147</sup> With these procedural safeguards in place, the court felt that the arbitration procedure itself did not offer an unfair advantage to the physician.<sup>148</sup>

The *Buraczynski* court also engaged in a public policy analysis, considering whether the arbitration agreements between physicians and patients were void *ab initio* as against public policy.<sup>149</sup> While the court acknowledged the “unique relationship” between physician and patient, it thought that arbitration was an advantageous relationship because it was quicker, less expensive, relieves court congestion, and in cases where the provisions did not limit liability, simply provided a different forum for resolving disputes.<sup>150</sup>

Other states have dealt with the issue of the enforcement of arbitration agreements in health care contracts, usually finding the

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 319.

150. *Id.* at 318-19 (citing Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 956 (1972); Timothy E. Travers, Annotation, *Arbitration of Medical Malpractice Claims*, 84 A.L.R.3d 375, 377 (1978 & Supp. 1995)).

arbitration agreements enforceable.<sup>151</sup> There are some cases in which they are not enforceable, including when the arbitration is prohibitively costly,<sup>152</sup> the clause was proposed on a take-it-or-leave-it basis, the clause was “buried” on the tenth page of an eleven-page agreement, the clause was written in the same size font as the rest of the agreement, and the clause did not adequately describe how the arbitration clause would work.<sup>153</sup> The *Buraczynski* opinion is helpful in providing a list of possible dos and don’ts for health care organizations in drafting arbitration clauses.

#### IV. MANAGING CONFLICTING GOALS THROUGH PROCEDURAL SAFEGUARDS

Most people would not deny that health care providers and insurers face a myriad of complex issues in trying to provide adequate care for their patients while simultaneously containing the cost. As previously noted, many operators in the health care and health insurance industries are requiring customers to agree to binding arbitration as a condition of both using hospital services

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151. See, e.g., *Cent. Reserve Life Ins. Co. v. Fox*, No. 1011121, 2003 WL 21480608 (Ala. June 27, 2003) (enforcing an arbitration agreement between health insurer and insured but invalidating “condition precedent” to appealability of the decision because insurer waived conditions by moving to compel arbitration); *Allen v. Pacheco*, 71 P.3d 375, 381 (Colo. 2003) (en banc) (holding that arbitration clause in HMO contract applied to a wrongful death claim brought by a non-party spouse as an “heir”); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1255 (Colo. Ct. App. 2001) (stating that an arbitration clause was not void for lack of mutuality as long as the parties have provided each other with adequate consideration beyond the promise to arbitrate); *Consol. Res. Healthcare Fund v. Fenelus*, 853 So. 2d 500, 504-05 (Fla. Dist. Ct. App. 2003) (stating that an arbitration clause in nursing home admission agreement was not unconscionable and thus enforceable even though clause did not allow signor a chance to affirmatively release his right to trial); *Murphy v. Mid-West Nat’l Life Ins. Co. of Tenn.*, 78 P.3d 766, 768 (Idaho 2003) (holding that while there was no showing that an arbitration agreement was unconscionable, the prohibitive costs of arbitration rendered the provision unenforceable in a case where the fees were \$2500 for a case worth \$10,000); *Lovey v. Regence BlueShield of Idaho*, 72 P.3d 877, 889 (Idaho 2003) (holding that the arbitration agreement in BlueShield policy was not procedurally or substantively unconscionable); *Jozwiak v. N. Mich. Hosp. Inc.*, 586 N.W.2d 90, 93 (Mich. Ct. App. 1998) (stating that repeal of Medical Malpractice Arbitration Act did not retroactively invalidate arbitration agreement).

152. *Colo. Permanente Med. Group, P.C. v. Evans*, 926 P.2d 1218, 1226 (Colo. 1996) (stating that an HMO must comply with the requirements for enforceable arbitration clauses as laid out in Colorado’s Health Care Availability Act).

153. *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 734 (Tenn. Ct. App. 2003).

and applying for health insurance.<sup>154</sup> The justification for these agreements is generally the goal of furthering “two sometimes mutually exclusive public policies.”<sup>155</sup> Those public policies include lowering medical malpractice insurance premiums by decreasing the cost and frequency of medical malpractice litigation and adequately compensating those injured by health care providers’ negligence.<sup>156</sup> Requiring consumers of managed care plans to agree to an arbitration process in an adhesion contract raises questions rooted in the conflict between being fair to patients and administering effective, economically efficient care.<sup>157</sup> Binding arbitration may provide a superior alternative to litigation for both patients and managed care organizations.<sup>158</sup> It falls on the shoulders of the proponents of arbitration to demonstrate to patients and consumers that it is fair and equitable, and that the outcomes are commensurate to that of litigation in the vast majority of situations.

There are two competing viewpoints regarding the enforceability of arbitration clauses in health care contracts.<sup>159</sup> The “pro-arbitration” approach focuses on the advantages and efficacy of using an alternative method of dispute resolution while sometimes neglecting to address the necessity for valid contract formation.<sup>160</sup> ADR opponents, on the other hand, focus on the illegitimacy of the arbitration agreement itself while often failing to consider the benefits of ADR.<sup>161</sup>

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154. See Schwartz, *supra* note 8, at 53; Symposium, *ADR in Health Care*, 16 WHITTIER L. REV. 61 (1995).

155. Weldon E. Havens, *Medical Arbitration Agreements*, 41 ORANGE COUNTY LAWYER 14, 14 (1999).

156. *Id.*

157. See Carter, *supra* note 1, at 433 (stating that while arbitration is considered to be speedier and less costly than litigation, there is concern, particularly in the HMO field, that patients, in losing their right to a judicial hearing, will lose their right to a fair hearing).

158. See *Allied-Bruce Terminix, Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citing Congress’ intent that arbitration appeal to businesses, corporations, and individuals).

159. See Havens, *supra* note 155, at 15 (stating medical arbitration contracts ensure the continued availability of professional liability insurance to health care providers, which in turn provides the best source of available funds to compensate victims of medical malpractice).

160. See *id.* (providing support for arbitration clauses).

161. See Jennifer Gillespie, *Physician-Patient Arbitration Agreements: Procedural Safeguards May Not Be Enough*, 1997 J. DISP. RESOL. 119, 119 (1997) (stating that many patients are being presented with the choice of signing an arbitration agreement or forgoing treatment); Carter, *supra* note 1, at 423 (asserting that the

The “pro-arbitration” approach is rooted in the belief that arbitration is always better than litigation. Under this approach, analysis of contract formation may be subverted to the end goal of arbitration. At its negative extreme, this favors businesses over consumers and seeks to protect large, powerful entities drafting what amount to adhesion contracts that are likely to favor their own interests and shift as much risk as possible to the adhering party.<sup>162</sup> In a more positive light, however, those who favor arbitration for settling claims feel that these clauses benefit plaintiffs in a tort system that large corporations with vast resources can easily manipulate.<sup>163</sup>

The contrasting approach focuses on the fact that plaintiffs have forgone access to the tort system instead of on the efficacy and fairness of the arbitration itself. These ADR opponents apparently assume that giving up the right to a civil jury trial somehow obliterates one’s ability to seek redress for wrongs.<sup>164</sup> Certainly scrutinizing the manner in which parties form arbitration agreements deserves attention, but it is not the only consideration. Giving people access to a fair system in which they have an opportunity to be heard is the ultimate goal of the American justice system. Undeniably, most patients would never see the inside of a courtroom if litigation was their only option.

The key is to seek balance. Arbitration may benefit all involved in the long run, but notions of fair play demand that people validly contract to use arbitration rather than litigation.<sup>165</sup> Perhaps more importantly, people need to feel that they are being treated fairly within whatever system they have available to them to resolve disputes, and health care providers can take steps to safeguard due process as well as to educate patients and consumers about the benefits of arbitration over litigation.

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power of HMOs may skew the arbitration process and “pile poor legal care on top of poor medical care”).

162. Haydock Interview, *supra* note 6.

163. *See generally* Haydock & Henderson, *supra* note 10 (laying out the essential elements to a fair dispute resolution system).

164. *See generally* Schwartz, *supra* note 8, at 117 (stating that settlements arguably deprive the public of a jury trial); Spencer, *supra* note 2, at D1 (reflecting that critics of arbitration provisions equate no right to trial or appeal as a second-rate justice system).

165. *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997) (Kennard, J., concurring) (stating that private arbitration may resolve disputes faster and cheaper than judicial proceedings, but that it may also become an instrument of injustice if imposed on a take-it-or-leave-it basis).

### A. Education

Health care organizations must legitimize arbitration agreements in the eyes of their patients by giving people more confidence in them. This can happen only through education. At this point, many people fear arbitration agreements because they think that if something happens to them they will not be able to do anything about it. This is not true; arbitration agreements merely change the forum of the dispute. Before people will want to engage in ADR, they must understand the trade-off; while they are giving up one right, they are gaining another of equal or greater value. Health care providers must help their patients understand that if a problem arises, they can still bring a claim, and that the system in which they may do so has its own set of procedural rules and ways of ensuring fair evaluation and compensation. Patients should know how and why parties choose a neutral arbitrator and what the likely credentials of the neutral would be.

Health care providers at all levels need to provide written information and access to staff who are available to answer any questions patients may have about submitting a claim to ADR. If patients have a positive attitude about ADR, then whatever additional staff and materials providers would have to pay for would more than pay for themselves in time saved and initial stages of litigation avoided.

### B. Careful Drafting

As the case law shows, providers must carefully draft arbitration agreements to withstand judicial scrutiny. Not only is the content of these clauses crucial, but so are their location within the contract and their visual appearance.<sup>166</sup>

### C. Content

Because the use of ADR is growing and because an ADR program was one of the proposed elements of the "Patient's Bill of Rights,"<sup>167</sup> a multi-disciplinary commission convened in the late

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166. See Havens, *supra* note 155, at 15 (describing that California requires arbitration agreements to appear in the first article of the contract and that an additional warning in at least ten-point red font is to appear immediately before the signature line).

167. Aimee E. Bierman, *A Modest Proposal: Model Arbitration Provisions in the Age of Managed Care*, 45 WAYNE L. REV. 173, 174 n.6 (1999) (stating that the

1990s to develop guidelines for a model ADR system in the medical field.<sup>168</sup> The commission's proposed agreement included the following:<sup>169</sup> the scope of the agreement, who would administer the process, some procedural elements relating to when and how the process would work, how the parties choose neutral arbitrators, and how fees are paid.<sup>170</sup> The agreement should also explicitly state that by signing, one is giving up the right to a court or jury trial, but also that the agreement is not a prerequisite to health care, and that the agreement is revocable within a certain time frame.<sup>171</sup>

The *Buraczynski* court provided valuable guidance by specifically mentioning both the positive and negative aspects of the arbitration agreement.<sup>172</sup> Using the proposed agreement above and the *Buraczynski* discussion, the following sections provide

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Commission on Health Care Dispute Resolution (CHCDR) issued a report to President Bill Clinton in March of 1998 urging the adoption of the "Patient's Bill of Rights").

168. *Id.* at 174. The goals of CHCDR, which was composed of representatives from the American Bar Association, the American Medical Association, and the American Arbitration Association, were to promote due process safeguards and encourage greater understanding, awareness, and acceptance of ADR in the context of managed care. *Id.* at 174-75.

169. The actual text of the proposed agreement read:

Any controversy or claim arising out of or relating to this Managed Care Organization contract, or the breach thereof, shall be settled by binding arbitration. The arbitration process will be administered by the American Arbitration Association under its Health Care Claim Settlement Procedures, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The controversy or claim will be submitted to arbitration upon the written demand of one of the parties directed to the other party. The arbitration process shall commence within the following time frames: acute emergencies—24 hours; general emergencies—72 hours; non-emergencies—45 days. Three (3) arbitrators will be selected, within ten (10) days of notice to the AAA of the existence of the dispute. If either of the parties fails to agree to any of the arbitrators named, the AAA is empowered to appoint the arbitrator(s) as necessary. The initiating party shall advance one-half of the AAA fees that are operative at the time of filing; the opposing party will pay the remainder. By signing this agreement you are agreeing to have any dispute regarding health care coverage decided by the aforementioned arbitrators and you are giving up your right to a court or jury trial. This agreement to arbitrate is not a prerequisite to health care or treatment and it may be revoked by the member or his legal representative within sixty (60) days after execution by notifying the MCO in writing.

*Id.* at 175-76.

170. *Id.*

171. *Id.*

172. See *Buraczynski v. Eyring*, 919 S.W.2d 314, 321 (Tenn. 1996).

additional concrete suggestions for health care providers to use in drafting a fair and sound arbitration agreement.

*D. Tell Patients the Truth*

Any arbitration clause in the health care context should say clearly that by signing the contract, he or she is giving up the right to a jury trial.<sup>173</sup> Educating patients as to what they are getting in return should serve to balance uneasiness they may feel in signing such an agreement.

*E. Do Not Make Patients Bear a Heavy Financial Burden*

Courts do not generally look kindly on agreements that require the patient to bear the burden of the fees up front.<sup>174</sup> Since most medical malpractice attorneys accept cases on a contingency fee basis, asking claimants to come up with a significant chunk of money at the beginning of the process may effectively make it impossible for them to proceed. Thus, even if a patient stands to recover the money at a later point, health care providers must ensure that the cost of arbitration does not stand in the way of people bringing a claim.

*F. Make Signing the Agreement Optional*

While the growing trend is to require patients to sign these agreements as a prerequisite to treatment, health care providers should make it optional. Adequate education and counseling for patients presented with options, as well as the ability to ask questions of staff about ADR procedures, should counteract much of the reticence. Making arbitration a choice rather than an obligation will serve to protect patients' procedural due process rights and will bolster the legitimacy of a signed arbitration agreement in the unlikely event a claim should arise.

*G. Make the Agreement Revocable*

Making the agreement revocable further ensures that a court will enforce it. As with making arbitration optional, giving a patient the choice to revoke the agreement within a set period increases

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173. Bierman, *supra* note 167, at 176.

174. *Id.*

fairness for patients. Allowing patients to revoke an agreement within sixty days, for example, may seem like a risk, but the benefits to health care providers through increased fairness and patient confidence in the agreement will outweigh any possible risk.

#### *H. Make the Agreements Mutual*

While courts do not always require mutuality of an arbitration agreement for it to be enforceable, ensuring that the agreements bind both patient and provider is a good idea. The *Buraczynski* court noted this as a factor working in favor of clause enforceability.<sup>175</sup>

#### *I. Do Not Limit Liability*

For the agreements to withstand close scrutiny, they must not change the health care provider's duty to the patient in any way by limiting liability for a breach of that duty.<sup>176</sup>

#### *J. Do Not Bury It*

Keep the arbitration agreement on a separate sheet of paper entitled "Physician-Patient Arbitration Agreement."<sup>177</sup> It either should be near the front of any long contract or handed to a patient separately while drawing his or her attention to it.

#### *K. Use Big, Bold Type and Clear Language*

It is not appropriate to write an arbitration clause in fine print. While providers must balance the need to be clear with the desire not to assault patients with an aggressive typeface that gives people a negative impression of ADR, the agreement should be easy to understand and easy to see. It might help to highlight salient portions such as the fact that one is giving up his right to sue, but not his right to be compensated for any wrong. Providers could also highlight the optional nature of the agreement as well as a patient's ability to revoke.

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175. *Buraczynski*, 919 S.W.2d at 321.

176. *See id.*

177. *See id.*

*L. Encourage People to Ask Questions*

The clause should contain not only an explanation of what arbitration is, but also should encourage the patient to discuss questions with the physician or with some person specifically designated for that purpose.<sup>178</sup>

Implementing these safeguards and continuing to educate the public as to the benefits of arbitration versus litigation ideally will serve to free up the court system from unnecessary litigation regarding the validity of the arbitration agreements themselves. Health care insurers and providers should work to make their patients feel better about signing an arbitration agreement and promote fair agreements, even in the context of an adhesion contract. Such steps will benefit not only the providers, but also patients and taxpayers through lower premiums and state health care costs.

V. CONCLUSION

The medical establishment is caught between containing escalating costs for both patients and doctors and providing quality health care to patients. One solution to managing these sometimes competing goals is to provide access to a viable alternative dispute resolution system. Managed care organizations cannot do this, however, by forcing patients into forgoing the right to a jury trial against their will. The health care industry can tackle this problem in two ways: first, by helping people understand that giving up the right to trial does not mean they will lose the opportunity to hold their providers accountable should a dispute arise; and second, by giving patients a choice. Vigilantly implementing procedural safeguards and educating patients about arbitration will help to create an environment in which people trust their health insurers and providers, where they can receive fair treatment in an equitable forum, and where health care professionals, and ultimately taxpayers, can reserve precious time and money for what really matters—making patients better.

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178. *See id.*