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Committee on Judiciary

REVIEW THE USE AND ENFORCEABILITY OF ARBITRATION AGREEMENTS IN THE MEDICAL SERVICES AND NURSING HOME CARE CONTEXTS

Issue Description

Florida traditionally has favored arbitration. In 1957, the Legislature enacted the Florida Arbitration Code, which prescribes a framework governing the rights and procedures under arbitration agreements, including the enforceability of arbitration agreements. Alternative dispute resolution has been recognized as a viable alternative to litigation in a court or jury trial, and it historically has been attractive for the resolution of commercial business disputes.

In recent years, businesses have promoted binding arbitration in contracts to resolve disputes or claims between businesses and consumers before any actual conflict. For various reasons, health care providers, including nursing homes, have been securing agreements from consumers to submit future claims involving medical services to arbitration for resolution. Arbitration agreements are contracts, and, generally, contract law governs issues relating to any objections to the use of this method of alternative dispute resolution. Under applicable federal law, courts must compel arbitration unless a party objects and demonstrates that grounds exist under state law for the revocation of the arbitration provisions.

Under varying circumstances, consumers sign arbitration agreements prior to treatment where they have not had an opportunity to negotiate or may not fully appreciate the legal implication of submitting future claims to arbitration. In response, state legislatures have enacted legislation prescribing certain safeguards for patients and consumers of medical and health care services when considering arbitration as an alternative forum to a court or jury trial. State legislation adopted to prescribe safeguards may be subject to federal preemption.

Several bills have been filed but not enacted in recent years in Florida to address consumer arbitration issues. In 2008, legislation was filed to create a "Florida Consumer Arbitration Act," which would create disclosure and disqualification requirements on the arbitration industry when administering consumer arbitration. In 2010, legislation was introduced to create certain safeguards for patients and consumers dealing with the use and enforceability of arbitration agreements involving medical services.

This report provides background information and highlights some of the issues under federal and state law on consumer arbitration, with a focus on arbitration agreements in the medical services and nursing home care contexts.

Background

Arbitration Generally

Arbitration is an alternative dispute resolution process in which parties "subm[it] a dispute to one or more impartial persons for a final and binding decision."¹ Arbitration is intended to be a speedy and economic alternative to court litigation, which is often slow, time-consuming, and expensive.² Parties to arbitration voluntarily give up substantial safeguards that court litigants enjoy, which may include the discovery process

¹ See the definition of "arbitration" at the website of the American Arbitration Association, <http://www.adr.org/sp.asp?id=28749> (last visited Sept. 24, 2010).

² *ManorCare Health Services, Inc. v. Stiehl*, 22 So. 3d 96, 105 (Fla. 2d DCA 2009).

where parties obtain information from one another.³ Because an arbitration agreement is a contract, the rights and obligations of the parties are determined under contract law.⁴

Agreements for pre-dispute arbitration involve those contracts where parties agree in advance of any dispute or claim that a party, for any future claim that arises, must use arbitration rather than a court as a forum. In contrast, post-dispute arbitration involves a scenario where two parties to an existing dispute agree after the dispute arises to submit the dispute to arbitration. A pre-dispute binding arbitration agreement differs significantly from a post-dispute arbitration agreement because it is entered into before an actual conflict has arisen and generally is irrevocable. Pre-dispute arbitration clauses are now common in a number of standard form contracts such as credit card agreements, long-term care facility agreements, insurance contracts, mobile phone contracts, real estate agreements, and car purchase agreements. This report limits its discussion to pre-dispute arbitration unless stated otherwise.

Federal Arbitration Act

Congress enacted the Federal Arbitration Act (FAA) in 1925 to establish, in part, the enforceability of pre-dispute arbitration agreements involving interstate commerce.⁵ The United States Supreme Court has recognized that with the passage of the FAA, Congress expressed intent for courts to enforce arbitration agreements and to place these agreements on an equal footing with other contracts.⁶ The FAA established a federal policy that favors and encourages the use of arbitration to resolve disputes. Due to this federal policy, the use of pre-dispute arbitration agreements has expanded beyond use in commercial contexts between large businesses and those with equal bargaining power, to use in noncommercial consumer contracts.⁷

Florida Litigation Reform/Use of Arbitration

With the threat of litigation, nursing homes, assisted living facilities, physicians, and insurance companies have been using binding arbitration contracts more frequently with patients and consumers.⁸ In response to a 2006 ruling of the Florida Supreme Court that patients could waive a constitutional cap on plaintiff attorney's fees in medical liability cases, the Florida Medical Association through its continuing medical education programs began to circulate a model arbitration agreement for physicians to ask their patients to sign which limits noneconomic damages to \$250,000.⁹

The use of binding arbitration in nursing home admissions was extensively discussed in the context of nursing home insurance coverage and tort reform by individuals who testified in 2002 and 2003 before the Joint Select Committee on Nursing Homes. The presiding officers of the Legislature appointed the committee in December 2002 to address the continuing crisis facing Florida's nursing homes in both obtaining and maintaining adequate insurance coverage.¹⁰ In November 2003, the presiding officers of the Legislature re-appointed the select committee to reconsider issues regarding the continuing liability insurance and lawsuit crisis facing Florida's

³ Amanda Perwin, *Mandatory Binding Arbitration: Civil Injustice By Corporate America*, White Paper for the Center for Justice & Democracy, No. 13 (August 2005), available at <http://www.centerjd.org/archives/issues-facts/ArbitrationWhitePaper.pdf> (last visited Sept. 24, 2010).

⁴ Marjorie A. Shields, *Validity, Construction, and Application of Arbitration Agreement in Contract for Admission to Nursing Home*, 50 A.L.R. 6th 187 (2009).

⁵ See 9 U.S.C.A. ss. 1-16.

⁶ *Allied-Bruce Terminix Cos, Inc. v. Dobson*, 513 U.S. 265, 270-271 (1995).

⁷ Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361 (Fall 2010).

⁸ Amy Lynn Sorrel, *Arbitrate, Not Litigate: A Growing and Popular Alternative to Lawsuits*, AMERICAN MEDICAL NEWS (Aug. 27, 2007), and Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453 (2006).

⁹ Sorrel, *supra* note 8; see Kenneth A. DeVille, *The Jury is Out: Pre-dispute Binding Arbitration Agreements for Medical Malpractice Claims*, 28 J. LEGAL MED. 333 (2007) (citing Tanya Albert, *Patients in Liability Hot Spots Asked to Arbitrate, Not Litigate*, AMERICAN MEDICAL NEWS (Feb. 10, 2003)).

¹⁰ Joint Select Committee on Nursing Homes, The Florida Legislature, *Report of the Joint Select Committee on Nursing Homes* (March 1, 2004).

long-term care facilities and to assess the impact of the reforms passed by Legislature in 2001.¹¹ The 2001 legislation dealt with the quality of care, tort reform, and insurance coverage in the nursing home industry.¹²

The committee heard testimony from nursing home residents, long-term care facilities, and insurers of long-term care facilities on the use of binding arbitration agreements with nursing home admissions. Residents testified that many nursing home agreements “include binding arbitration clauses with very low caps on damages which must be signed as a prerequisite to admission.”¹³ A number of legislative actions were proposed by residents or facilities who testified before the committee relating to the use of binding arbitration in nursing home admissions: eliminate binding arbitration clauses in admissions contracts (residents); develop a statewide standardized nursing home admission contract (residents); and require voluntary binding arbitration with caps on noneconomic damages with or without a cap on punitive damages (facilities).¹⁴ The committee did not recommend any legislation.

Findings and/or Conclusions

Florida Arbitration Code

The Florida Arbitration Code¹⁵ (FAC) is applicable to arbitration agreements that do not involve interstate commerce.¹⁶ The FAC governs the arbitration process, including the scope and enforceability of arbitration agreements, the appointment of arbitrators, arbitration hearing procedures, the entry and enforcement of arbitral awards, and any appeals of awards. Under the FAC, Florida courts have held that the determination of whether any dispute is subject to arbitration should be resolved in favor of arbitration.¹⁷ A court’s role in deciding whether to compel arbitration is limited to three gateway issues to determine the enforceability of an arbitration agreement: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived.¹⁸ The FAC applies in arbitration cases only to the extent that it is not in conflict with federal law.¹⁹

Federal Preemption

The Federal Arbitration Act (FAA) governs the enforcement of arbitration agreements in contracts involving interstate commerce. The FAA embodies a liberal federal policy favoring arbitration agreements.²⁰ Arbitration agreements within the scope of the FAA are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²¹ The FAA creates a body of federal substantive law that applies in state as well as federal courts.²² The FAA preempts any inconsistent state law that stands as an obstacle to the enforcement of arbitration agreements except for grounds as exist at law or in equity for the revocation of any contract.²³ As a matter of federal law, any doubts regarding whether an agreement to arbitrate is subject to arbitration should be resolved in favor of arbitration.²⁴

¹¹ *Id.*

¹² See CS/CS/CS/SB 1202 (2001 Reg. Sess.); ch. 2001-45, Laws of Fla.

¹³ Joint Select Committee on Nursing Homes, *supra* note 10, at 10.

¹⁴ *Id.* at 17-18.

¹⁵ Sections 682.01-682.22, F.S.

¹⁶ Michael Cavendish, *The Concept of Arbitrability Under the Florida Arbitration Code*, 82 FLA. B.J. 18, 19 (Nov. 2008) (citing *O’Keefe Architects, Inc. v. CED Construction Partners, Ltd.*, 944 So. 2d 181, 184 (Fla. 2006)).

¹⁷ Cavendish, *supra* note 16, at 20 (citing *Waterhouse Constr. Group, Inc v. 5891 S.W. 64th Street, LLC*, 949 So. 2d 1095, 1099 (Fla. 3d DCA 2007)).

¹⁸ *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999).

¹⁹ *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 573 (Fla. 1st DCA 1999), *review denied*, 763 So. 2d 1044 (Fla. 2000), and *Florida Power Corp. v. Casselberry*, 793 So. 2d 1174, 1179 (Fla. 5th DCA 2001).

²⁰ *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001).

²¹ Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 399-401 (2004).

²² *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

²³ *Powertel*, 743 So. 2d at 574, and see *Southland*, 465 U.S. at 10-17.

²⁴ *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

Enforceability of Arbitration Agreements

Long-term Care Facilities

Recently, courts have been dealing with litigation regarding the enforceability of pre-dispute arbitration agreements between residents and long-term care facilities, including nursing homes.²⁵ Although some long-term care facilities may require it as a condition of admission, other facilities may simply request that a resident, at the time of admission, sign an agreement to arbitrate any future disputes between the facility and resident. Mandatory arbitration usually involves a “take it or leave it” agreement drafted by the facility to resolve any future dispute. Persons in favor of the use of mandatory arbitration to resolve nursing home disputes argue that it is economically efficient for the financial survival of the long-term care industry in response to an escalation of litigation costs to cover general and professional liability.²⁶

In some cases, residents who have a legal dispute with a facility may find themselves opposing the facility’s desire to arbitrate the legal claim. The initial burden of establishing the existence of a valid arbitration agreement falls on the party (facility) moving to compel arbitration, and once satisfied the burden shifts to the resident to establish the absence of a valid or enforceable arbitration agreement. The arbitration agreement requires any future disputes between a resident and the nursing home to be resolved through binding arbitration. The arbitration agreement designates an alternative forum to a judicial proceeding to resolve the dispute.

The rise in litigation is due in part to the nursing home admissions process where persons representing a nursing home may require arbitration agreements to be signed by a resident, relative, or other person on behalf of the resident. Common legal issues that arise in litigation due to the use of arbitration agreements in the nursing home context involve the validity of or the authority of the person who signed, or the capacity or competency of the resident to sign the required documents.²⁷

Although states may not impose any special limitations on the use of arbitration clauses, the question of the validity of an arbitration clause is one of state law.²⁸ State courts struggling with the enforceability of arbitration agreements have to find grounds as exist at law or in equity for the revocation of any contract to remain in harmony with the FAA and state law policy, which favor the enforcement of arbitration.

When a party challenges the validity of an agreement to arbitrate, he or she must assert contract defenses applicable to all contracts, such as fraud, duress, or unconscionability.²⁹ To analyze unconscionability, courts look at the relative bargaining power of the parties and the terms of the agreement. Procedural unconscionability refers to the specific circumstances under which the contract is entered, while substantive unconscionability deals with the unreasonableness or unfairness of the contractual terms.³⁰

Courts have also invalidated contracts, including arbitration agreements, on public policy grounds.³¹ In contracts that contain remedial limitations on the rights of nursing home residents, courts have rendered such arbitration agreements void and unenforceable as against public policy.³²

Although state contract law may be used to interpret and enforce arbitration agreements, if the state law makes the arbitration void or is inconsistent with federal policy to favor arbitration, it may be susceptible to a preemption argument under the FAA. Georgia and Illinois have laws that impose limitations on arbitration clauses. The

²⁵ Reed R. Bates & Stephen W. Stills, Jr., *Arbitration in Nursing Home Cases: Trends, Issues, and a Glance Into the Future*, 76 DEF. COUNS. J. 282 (July 2009).

²⁶ Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 473-475 (2006).

²⁷ Bates, *supra* note 25, at 282-284.

²⁸ *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999), *review denied*, 763 So. 2d 1044 (Fla. 2000).

²⁹ *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 397 (Fla. 2005).

³⁰ *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. 4th DCA 2003) (citing *Kohl v. Bay Colony Club Condo., Inc.*, 398 So. 2d 865, 867 (Fla. 4th DCA 1981)).

³¹ See *Jaylene, Inc. v. Steuer*, 22 So. 3d 711, 714 (Fla. 2d DCA 2009) (Northcutt, J., concurring) (citing E. Allan Farnsworth, *Unenforceability on Grounds of Public Policy*, in *Contracts* ch. 5 (2d ed. 1990)).

³² *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. 4th DCA 2005), *review denied*, 917 So. 2d 195 (Fla. 2005).

Georgia law provides that “no agreement to arbitrate shall be enforceable unless the agreement was made subsequent to the alleged malpractice and after a dispute or controversy has occurred and unless the claimant is represented by an attorney at law at the time the agreement is entered into.”³³ The Georgia statute has been found to be preempted by the FAA.³⁴ Illinois has adopted statutes that make any waiver by a nursing home resident or his or her legal representative of the right to commence an action under the Illinois Nursing Home Care Act, whether oral or in writing, void and without legal force or effect. The Illinois law also provides that any party to an action under the Illinois Nursing Home Care Act must be entitled to a trial by jury and that any waiver of that right before the commencement of an action, whether oral or in writing, must be void and without legal force and effect.³⁵ However, the Illinois Supreme Court has held that the public policy behind the antiwaiver provisions of the Illinois Nursing Home Care Act is not a valid contract defense to avoid preemption by the FAA.³⁶

Florida Nursing Home Experience

Florida jurists have expressed concern regarding the volume of cases involving pre-dispute agreements to arbitrate used by nursing homes and the potential effect on the rights of nursing home residents in Florida.³⁷ More than 35 opinions written by Florida appellate courts have addressed nursing home admissions contracts containing agreements to arbitrate.³⁸ The use of nursing home agreements containing “form” arbitration provisions has become routine throughout Florida, as evidenced by the litigation regarding these provisions in all five of the district courts of appeal.³⁹

Courts recognize that nursing home agreements containing pre-dispute arbitration provisions are drafted in favor of nursing homes.⁴⁰ One appellate judge pointed out that “[a] careful review of the agreement causes one to wonder why any resident who actually understood the agreement...would ever sign such a one-sided arrangement.”⁴¹ Nursing home residents may be significantly incapacitated, incompetent to sign, dependent on a relative, and often under time constraints to find a safe facility during an emotional time when dealing with a “form contract applicable to a large group of senior citizens.”⁴² Also, this contract may address “special rights created by the [L]egislature for the protection of the elderly, and when the contract is not a unique contract negotiated on a level playing field.”⁴³

In addition, some Florida courts allow an arbitrator to make decisions about the enforceability of clauses in an arbitration agreement, including cases when those clauses limit or eliminate rights specially created by the Legislature to protect nursing home residents.⁴⁴ Other Florida courts have allowed trial courts rather than an arbitrator to rule on the enforceability of restrictive clauses that would eliminate statutory substantive rights and remedies enacted for elderly and vulnerable individuals.⁴⁵ Two cases involving nursing home arbitration provisions that limit statutory rights are pending before the Florida Supreme Court.⁴⁶

³³ GA. CODE ANN. s. 9-9-62 (2007).

³⁴ *Triad Health Management of Georgia, III, LLC v. Johnson*, 679 S.E.2d 785 (Ga. Ct. App. 2009).

³⁵ 210 ILL. COMP. STAT. ss. 45/3-606, 45/3-607 (West 2008).

³⁶ *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207 (Ill. 2010).

³⁷ See the concurring opinion in *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 301-309 (Fla. 4th DCA 2005), *review denied*, 917 So. 2d 195 (Fla. 2005).

³⁸ See the concurring opinion by Judge Altenbernd in *ManorCare Health Servs., Inc. v. Stiehl*, 22 So. 3d 96, 104 n. 7 (Fla. 2d DCA 2009).

³⁹ *Blankfeld*, 902 So. 2d at 307.

⁴⁰ Judge Altenbernd, *supra* note 38, at 101-109; *Blankfeld*, 902 So. 2d at 307-308.

⁴¹ Judge Altenbernd, *supra* note 38, at 101-102.

⁴² *Id.* at 103.

⁴³ *Id.*

⁴⁴ See *Jaylene, Inc. v. Steuer*, 22 So. 3d 711, 713 (Fla. 2d DCA 2009) (citing *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 So. 2d 86, 87 (Fla. 2d DCA 2005)).

⁴⁵ Judge Altenbernd, *supra* note 38, 101(citing *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574 (Fla. 1st DCA 2007); *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242 (Fla. 5th DCA 2006); *Lacey v. Healthcare & Ret. Corp. of Am.*, 918 So. 2d 333, 335 (Fla. 4th DCA 2005)).

⁴⁶ *Gessa v. Manorcare of Florida, Inc.*, SC09-768, and *Shotts v. OP Winter Haven, Inc.*, SC08-1774.

An arbitrator faces a difficult choice when an agreement to arbitrate limits relief mandated by statute and becomes part of a dispute to be settled in arbitration.⁴⁷ Federal courts have also struggled with the choice to sever illegal provisions or void the entire arbitration clause.⁴⁸ The U.S. Court of Appeals for the Eleventh Circuit has held that an arbitration agreement in an employment discrimination claim containing provisions that defeat a federal statute's remedial purpose is not enforceable.⁴⁹

Health Consumer Arbitration-Industry Standard

Representatives of the American Arbitration Association (AAA), the American Bar Association, and the American Medical Association have jointly created a due process protocol for resolution of health care disputes to address perceived inequities in the use of pre-dispute arbitration involving individual patients.⁵⁰ In addition, the AAA, the world's largest provider of alternative dispute resolution services, as of January 1, 2003, announced that it will no longer accept the administration of cases involving individual patients without a *post-dispute* agreement to arbitrate.⁵¹ The AAA policy recognizes that individual patients without the appropriate due process safeguards may not be in an equal bargaining position with a health care institution when the parties agree in advance to use arbitration to resolve disputes and are bound by the outcome of the arbitration.⁵²

The American Health Lawyers Association (AHLA) provides alternative dispute resolution services. The AHLA amended its rules for consumer health care liability claims filed with its arbitration service after January 1, 2004, to provide that it will only administer such claims if an agreement to arbitrate was entered into by the parties in writing after the injury had occurred or a judge orders that AHLA administer an arbitration under the terms of a pre-injury agreement.⁵³

Physician-Patient Arbitration Agreements

In addition to nursing homes, insurance companies and physicians have frequently requested that patients enter into binding pre-dispute arbitration agreements. Some malpractice insurers, such as First Professionals Insurance Company (FPIC), have encouraged insured physicians to use agreements to arbitrate liability claims with their patients.⁵⁴ In 2009, FPIC had 23.5 percent of the malpractice insurance market in Florida,⁵⁵ and currently 184 of 6,600 physicians insured by FPIC participate in its arbitration program.⁵⁶

Under contract law, state courts review the arbitration agreements to determine whether or not they are unenforceable contracts of adhesion or contain illegal provisions that would make them void as against public policy. State courts have both upheld⁵⁷ and rejected binding pre-dispute agreements to arbitrate liability claims.⁵⁸ Even though physician-patient agreements have been enforced by some state courts as not void against public

⁴⁷ Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 565 (Spring 2009).

⁴⁸ *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1058 (11th Cir. 1998).

⁴⁹ *Id.* at 1062.

⁵⁰ American Arbitration Association, American Bar Association, and American Medical Association, DUE PROCESS PROTOCOL FOR RESOLUTION OF HEALTH CARE DISPUTES (1998), available at <http://www.adr.org/sp.asp?id=28633> (last visited Sept. 24, 2010).

⁵¹ See American Arbitration Association, HEALTHCARE POLICY STATEMENT, <http://www.adr.org/sp.asp?id=32192> (last visited Sept. 24, 2010).

⁵² *Id.*

⁵³ This rule became effective June 2006. See American Health Lawyers Association rule amendments, <http://www.healthlawyers.org/Resources/ADR/Pages/RulesAmendment.aspx> (last visited Sept. 24, 2010). <http://www.firstprofessionals.com/RiskManagement/Prevention/ArbitrationProgram/default.aspx> (last visited Sept. 24, 2010).

⁵⁵ Florida Office of Insurance Regulation, *2009 Annual Report on Medical Malpractice Financial Information Closed Claim Database and Rate Filings*, 10 (Sept. 30, 2009), <http://www.florir.com/pdf/MedicaMalReport10012009.pdf> (last visited Sept. 23, 2010).

⁵⁶ Source: First Professionals Insurance Company.

⁵⁷ See *Jonathan M. Frantz, M.D., P.A. v. Shedden*, 974 So. 2d 1193 (Fla. 2d DCA 2008), and *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996).

⁵⁸ See *Broemmer v. Abortion Services of Phoenix Ltd.*, 840 P.2d 1013 (Ariz. 1992).

policy, the enforceability of pre-dispute arbitration in this context is still developing, as states adopt requirements to safeguard consumers when entering these agreements to arbitrate.

The proliferation of arbitration for medical malpractice, as one legal scholar has noted, is typically addressed within the context of “public policy doctrine” in the courts or the regulatory authority of state legislatures. However, under current legal requirements imposed by the preemptive protection of the FAA, such agreements will likely proliferate and “no state legal body can act to remedy the ills of pre-dispute binding arbitration.”⁵⁹ The FAA expresses Congressional support and intent to prevent state legislatures and courts, both federal and state, from failing to enforce arbitration agreements.

Some physician-patient arbitration agreements have been held to be unenforceable under state laws governing the use of agreements to arbitrate disputes between physicians and patients if the agreements fail to meet notice and other procedural requirements prescribed in the laws.⁶⁰ Physician-patient arbitration agreements may withstand contract defenses of unconscionability when state law establishes a uniform procedure for providers and patients to agree to submit medical services disputes to arbitration. Under these state laws, patients are usually given an opportunity to unilaterally revoke the arbitration agreement. California and Ohio both impose special requirements on binding arbitration contracts for medical services. For an arbitration agreement to be valid under the Ohio law, it must give the patient a right to withdraw within 60 days of signing and must meet additional requirements specified in the law. The Ohio law also requires the agreement to state that the continued provision of medical services is not contingent on the patient’s agreement for claims to be resolved in arbitration.⁶¹

The California law passed as part of a comprehensive litigation reform package as a statutory endorsement of physician-patient arbitration. Patients and their health care providers may agree that any future dispute may be resolved through binding arbitration. The California law requires specific language for arbitration agreements involving medical services and also provides that such agreements be revocable within 30 days. The California law requires agreements to arbitrate disputes over medical services to provide notice to a patient that he or she is giving up the right to a jury or court trial, and a court has found that the notice requirement may not be waived.⁶² The California law functions to facilitate agreements to resolve medical malpractice disputes in advance by providing criteria for uniform language and conspicuous appearance of any arbitration provisions in medical services agreements.⁶³ To the extent the California law promotes a voluntary binding arbitration process for the resolution of medical malpractice, the notice requirement alerts consumers that they may be waiving a constitutional right to a jury or court trial and thereby avoids any challenges to the procedure under which the waiver occurred.

Louisiana and Arizona prohibit arbitration agreements that require the patient to select a physician who serves as an arbitrator in physician-patient arbitration agreements.⁶⁴ Some states, like Colorado, provide that a patient has a specified number of days to rescind an arbitration agreement after execution and that no health care provider may refuse services if the patient refuses to execute the agreement or exercises the right to rescind the agreement.⁶⁵

The U.S. Supreme Court has held that the FAA preempts state law requiring specific notice requirements for arbitration agreements.⁶⁶ Despite this ruling, various states have enacted notice and other requirements governing

⁵⁹ DeVile, *supra* note 9, at 366.

⁶⁰ Timothy F. McCurdy, *The Doctor Will See You Now (If You Signed the Arbitration Agreement)*, 65 J. MO. B. 232, 233 (September-October 2009).

⁶¹ OHIO REV. CODE ss. 2711.22 and 2711.23(A)-(J).

⁶² CAL. CIV. PROC. CODE s. 1295(a) and (b) and *Rosenfield v. Superior Court*, 143 Cal. App. 3d 198 (Cal. Dist Ct. App. 1983).

⁶³ Roger Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 PEPP. DISP. RESOL. L.J. 1, 39 (February 2004) (citing *County of Contra Costa v. Kaiser Found. Health Plan, Inc.*, 54 Cal. Rptr. 2d 628, 634 (Cal. Ct. App. 1996)).

⁶⁴ *Broemmer*, 840 P.2d at 1018, and LA. REV. STAT. ANN. s. 9:4233 (2009).

⁶⁵ See COLO. REV. STAT. ANN. s. 13-64-403, which may be preempted by the FAA. See *Allen v. Pacheco*, 71 P.3d 375, 383-384 (Colo. 2003), which acknowledges that the FAA may preempt the arbitration provisions of the Colorado law.

⁶⁶ *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

arbitration agreements between health care providers and patients which remain unchallenged on the issue of federal preemption under the FAA.

Some case law suggests that a state statute that regulates the business of insurance and imposes notice requirements inconsistent with the FAA may be reverse-preempted under the federal McCarran-Ferguson Act.⁶⁷ The McCarran-Ferguson Act provides that an act of Congress may not be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance.⁶⁸ Under this scenario, the state law is challenged as being preempted by the FAA, and if the state law relates to the regulation of the business of insurance it may be saved from the preemptive effects of the FAA when the McCarran-Ferguson Act applies. There is a three-part test to establish whether the McCarran-Ferguson Act applies: (1) whether the federal law (e.g., the FAA) relates specifically to bar the application of a state law; (2) whether the state law was specifically enacted to regulate the business of insurance; and (3) whether the state law would be impaired, invalidated, or superseded by application of federal law (e.g., the FAA).⁶⁹

Consumer Safeguards with Arbitration

Standard Nursing Home Admissions Agreements

Some states have established standard nursing home admissions agreements to provide procedural fairness for nursing home residents.⁷⁰ California requires all nursing homes to use a new standard admissions agreement.⁷¹ As a part of this framework, the law provides that all arbitration clauses must be included on a form separate from the rest of the nursing home admissions contract and requires all contracts containing arbitration clauses to indicate that the agreement to arbitrate is not a precondition for medical treatment or for admission to the facility. These safeguards are an attempt to ensure that consumers voluntarily and knowingly agree to any arbitration provisions to settle future disputes. The use of a standard nursing home admissions agreement may simplify the process and reduce the chances of procedural unfairness in the presentation of arbitration agreements. Additionally, more consumers may make better informed choices to accept or reject arbitration agreements to resolve nursing home disputes.

The regulations for a standard nursing home admissions agreement were adopted, and then a legal challenge was filed.⁷² The challenge included an allegation that the regulations interfered with the enforceability of otherwise valid agreements to arbitrate disputes between nursing homes and residents and therefore were preempted by the FAA.⁷³ Although the court rejected the preemption argument, the court in its order required the California Department of Health Services to modify the regulations to address other issues that were raised in the challenge. As a result, the original regulations have not been enforced and will not be enforced until the modified regulations are adopted.⁷⁴

Regulation of Consumer Arbitration

In addition to enacting legislation to provide for uniform procedures in the use of consumer arbitration provisions in medical services and nursing home agreements, states are adopting laws to curtail perceived abuses against consumers within the arbitration industry. A new approach is emerging among states to provide consumer safeguards by regulation of the arbitration industry.⁷⁵ This new approach has not yet been fully litigated and appears to be inconsistent with the FAA's central purpose to ensure that private agreements to arbitrate are enforced with the same deference granted to contracts generally. To the extent that the laws providing safeguards for consumer arbitration are inconsistent with the FAA, these laws may be subject to preemption challenges. Despite the inconsistency, state legislatures are adopting laws to directly regulate the arbitration industry. One

⁶⁷ 15 U.S.C. ss. 1011-1015, 1012(b); and *Allen*, 71 P.3d 375.

⁶⁸ 15 U.S.C. s. 1012(b).

⁶⁹ *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1220 (11th Cir. 2001).

⁷⁰ *Palm*, *supra* note 26, at 482.

⁷¹ CAL. HEALTH & SAFETY CODE s. 1599.61.

⁷² *Parkside Special Care Center, Inc. v. Shewry*, Case No. GIC 860574 (March 21, 2007).

⁷³ Correspondence from staff of the California Office of the Attorney General.

⁷⁴ Correspondence from staff of the California Department of Public Health.

⁷⁵ *Drahozal*, *supra* note 21, at 393-395.

focus of these laws appears to ensure that adequate safeguards exist to protect consumers from unnegotiated arbitration clauses in form contracts. These laws also ensure that consumers gain knowledge regarding any potential bias that arbitrators may hold for consumers or an industry.⁷⁶

New Mexico regulates arbitration to give a consumer a legal remedy to void a clause in a form contract that modifies or limits procedural rights against the consumer when resolving a dispute in arbitration.⁷⁷ The New Mexico arbitration law defines “disabling civil dispute clause” to include any provision found in a form contract requiring arbitration which would typically diminish consumer rights relating to: the choice of a forum to settle a dispute; discovery requirements; participation in a class action; appeal of a decision; and the awarding of attorney fees, civil penalties, or multiple damages.⁷⁸

California has stringent disclosure requirements for arbitrators. Arbitrators must disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”⁷⁹ The existence of any ground that could disqualify a judge must be disclosed by the arbitrator. Other disclosures include: specified information relating to noncollective bargaining cases, any names and attorney-client relationship the proposed neutral arbitrator has or had with any party or lawyer to the arbitration proceeding, and any professional or significant personal relationships the arbitrator or his or her spouse or minor child has or had with any party or lawyer to the arbitration.⁸⁰ Arbitrators in California must comply with ethical standards, which include disclosures required in all arbitration proceedings.⁸¹

California imposes additional disclosure and disqualification requirements on arbitrators and private arbitrating companies. A proposed neutral arbitrator must be disqualified for failure to comply with the disclosure requirements, and any party who fails to receive the disclosures may serve a notice of disqualification within 15 calendar days after the proposed arbitrator fails to do so.⁸² A private arbitration company may not administer consumer arbitration services if the company has a financial interest in any party to a proposed arbitration.⁸³

Private arbitration companies in both California⁸⁴ and the District of Columbia⁸⁵ must annually collect and make available certain information regarding consumer arbitration in a computer-searchable database. The District of Columbia requires any arbitration organization that administers 50 or more consumer arbitrations annually to collect, publish at least quarterly, and make available to the public specified information in a computer-searchable database.⁸⁶

The regulation of the arbitration process or industry may curb inappropriate conduct between arbitrators and parties to consumer arbitration. Mandated disclosure and disqualification requirements may better educate consumers regarding the impartiality of arbitrators and reduce the instances of unprofessional or unethical conduct. Despite these potential positive outcomes for consumer arbitration, increased regulation of the arbitration industry may not be welcomed by business interests. Some legal scholars question the effectiveness of the state reforms to regulate the conduct of all arbitrators out of concerns that such regulation may create a hostile

⁷⁶ *Id.*

⁷⁷ N.M. STAT. ANN. s. 44-7A-5.

⁷⁸ N.M. STAT. ANN. s. 44-7A-1(4).

⁷⁹ CAL. CIV. PROC. CODE s. 1281.9(a). Montana has a similar arbitrator disclosure law. See MONT. CODE ANN. s. 27-5-116.

⁸⁰ CAL. CIV. PROC. CODE s. 1281.9

⁸¹ See *Cal. Ethics Standards For Neutral Arbitrators In Contractual Arbitration*,

http://www.courtinfo.ca.gov/rules/documents/pdfFiles/ethics_standards_neutral_arbitrators.pdf (last visited Sept. 24, 2010).

⁸² CAL. CIV. PROC. CODE s. 1281.91

⁸³ CAL. CIV. PROC. CODE s. 1281.92

⁸⁴ CAL. CIV. PROC. CODE s. 1281.96.

⁸⁵ DC ST s. 16-4430.

⁸⁶ DC ST s. 16-4430. The information includes but is not limited to: the name of the business that is a party to the arbitration; a description of the dispute; whether the consumer was the prevailing party; the number of occasions the business has been a party to arbitration administered by the arbitration organization; the disposition of the dispute; the amount of the claim, award, or other relief granted; the name of the arbitrator; the arbitrator’s fee; and the percentage of the arbitrator’s fee allocated to each party.

environment for the use of arbitration to settle commercial disputes.⁸⁷ These scholars believe that the regulation may bring unintended results such as an increased risk of delays in getting an arbitration award and greater transaction costs for businesses that have traditionally resolved disputes using arbitration.⁸⁸ The focus of the reforms is on consumer arbitration; however, the reforms' disclosure and disqualification requirements may burden commercial arbitration with the possibility of additional means for arbitration awards to be vacated.⁸⁹ Under California's disclosure laws, even when commercial parties have agreed to waive the statutory disclosure requirements, a court held that disclosure requirements may not be waived.⁹⁰

Additionally, some of the reforms may be preempted by federal law. As an example, courts recognize significant preemption issues for California's disclosure and disqualification requirements with the disclosure and challenge requirements of the U.S. Securities and Exchange Commission.⁹¹

Federal Legislation

In recent years, legislation has been introduced in Congress to provide additional safeguards to consumers who enter pre-dispute arbitration agreements. The Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong., makes pre-dispute mandatory arbitration agreements between residents of a long-term care facility and the facility unenforceable.⁹² The legislation applies only to a dispute or claim that arises on or after its effective date. The Congressional report of the bill in the Senate Judiciary Committee notes that attempts under state law to limit or void the enforceability of pre-dispute mandatory arbitration agreements in nursing home cases have been found by courts to be preempted by the FAA.⁹³ The bill was placed on the Senate legislative calendar but did not pass the Senate.

The Arbitration Fairness Act of 2007, S. 1782, 110th Cong., provides that no pre-dispute arbitration agreement may be valid or enforceable if it requires arbitration of an employment, consumer, or franchise dispute. The legislation also invalidates any dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power. The legislation provides, further, that the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. The legislation exempts arbitration provisions in collective bargaining agreements from its requirements. The bill did not pass, and similar legislation has been filed in the 111th Congress.⁹⁴

Additional federal legislation introduced addressing pre-dispute arbitration includes the Consumer Fairness Act of 2009, H.R. 991, 111th Cong. (2009), which prohibits pre-dispute arbitration agreements in consumer contracts.⁹⁵

⁸⁷ See Jaimie Kent, *The Debate In California Over and Implications of New Ethical Standards for Arbitrator Disclosure: Are the Changes Valid or Appropriate?*, 17 GEO. J. LEGAL ETHICS 903 (Summer 2004) (citing Ruth V. Glick, *Should California's Ethics Rules be Adopted Nationwide? No! They Are Overbroad and Likely to Discourage Use of Arbitration*, 9(1) DISP. RESOL. MAG. 13, 15 (2002)).

⁸⁸ See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 40-44 (2010).

⁸⁹ *Id.*

⁹⁰ *Id.* at 42 (citing *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 18 Cal. Rptr. 3d 142, 149-151 (Cal. Ct. App. 2004)).

⁹¹ See, e.g., *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097 (N.D. Cal. 2003).

⁹² Similar federal legislation was introduced during 2009 in the 111th Congress. See the Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (Senator Martinez) and H.R. 1237.

⁹³ Senate Committee on Judiciary, *Fairness in Nursing Home Arbitration Act*, 110th Cong. 2d sess., 2009, S. Rep. 110-518, at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:sr518.110.pdf (last visited Sept. 24, 2010).

⁹⁴ See Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009), referred to the Committee on Judiciary, and H.R. 1020, 111th Cong. (2009), referred to the Subcommittee on Commercial and Administrative Law of the Committee on Judiciary and discharged from the Subcommittee on Commercial and Administrative Law on Jun. 21, 2009.

⁹⁵ See Consumer Fairness Act of 2009, H.R. 991, 111th Cong. (2009), referred to the House Committee on Financial Services on Feb. 11, 2009. A related Senate bill has not been filed.

Options and/or Recommendations

This report does not offer recommendations for action by the Florida Legislature. Rather, the report provides an overview of legal parameters relating to the use, enforceability, and regulation of consumer arbitration, particularly in the medical services and long-term care fields. Based on the research and findings presented in this report, there are approaches the Legislature could consider if it wishes to enact policy in this area, recognizing that some of the approaches may face preemption challenges under federal law. Among the measures that some other states have adopted to address the use of pre-dispute arbitration provisions in consumer contracts are:

- Impose disclosure and disqualification requirements on arbitrators administering consumer arbitration;
- Establish notice requirements for arbitration clauses in agreements for medical services;
- Adopt a uniform standardized nursing home admissions agreement and impose notice and procedural requirements for arbitration provisions of nursing home claims and disputes; and
- Give consumers a legal remedy to void a clause in a form contract that modifies or limits procedural rights against the consumer when resolving a dispute in arbitration.

The law on the use and enforcement of pre-dispute arbitration agreements requiring mandatory binding arbitration to resolve disputes involving medical services is not yet settled. State legislatures have passed laws to protect consumers by imposing minimum requirements for health care providers who in advance of any conflict request patients or consumers to submit in arbitration any medical service claims or disputes. State courts must enforce arbitration agreements unless a consumer challenges the agreement under a valid contract defense. Contract defenses arguing unconscionability where the parties show unfair circumstances surrounding the manner of how the agreement was reached or that the agreement overwhelmingly favored one party have been used successfully to invalidate arbitration agreements.

Nursing homes and other health care providers argue a valid need for the use of arbitration as a tool to rein in their potential risk of loss for expenses relating to litigation. Consumer groups argue that consumers are waiving a valuable constitutional right to trial without any meaningful choice.

State attempts to invalidate potentially over-reaching arbitration agreements between consumers and the health care industry continue to be subject to preemption arguments under federal arbitration law. As an alternative approach, several states are regulating the arbitration industry to require stringent disclosures and disqualification standards for consumer arbitration. Although disclosure provides additional information to consumers, there is disagreement on the effect such requirements may have on continued use of commercial arbitration and other alternative dispute resolution models used in business. Additionally, to the extent that such disclosure and disqualification requirements conflict with federal law, there may be significant preemption issues.