Appellate Division Upholds Right to Arbitrate Medical Malpractice Cases – But Only After Overcoming Huge Hurdle

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On August 18, 2010, New Jersey's Appellate Division issued a decision that agreements between physicians and their patients requiring malpractice claims to be submitted to arbitration, rather than to a jury trial, were not necessarily against public policy. But given the Court's decision, it is doubtful that many cases will ever reach an arbitrator.

In the case of Moore v. Woman to Woman Obstetrics & Gynecology the Court rejected the arguments by the plaintiffs and the New Jersey Association for Justice (formerly the NJ Trial Lawyers Association) that all pre-dispute agreements to submit medical malpractice claims to binding arbitration are unenforceable. However, the Court similarly rejected the arguments by the defendants and the Medical Society of New Jersey that these agreements were necessarily enforceable. Instead, the Court imposed what may become insurmountable hurdles on physicians to prove that arbitration agreements with their patients were not procured through undue influence.

Undue influence, according to the Court, would make an arbitration agreement unenforceable. To determine whether undue influence caused the patient to sign the agreement a number of factors must be considered. One primary factor to consider is that a patient is justified in assuming that her physician would not act in a manner inconsistent with her welfare. Therefore, if the agreement was found to be contrary to the patient's best interest, that could form the basis to declare the agreement unenforceable.

In deciding whether to enforce an arbitration agreement, a court must also consider the manner in which the contract was formed, the characteristics of the patient--including age, literacy, and lack of sophistication--hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process. In considering the setting, the court must determine the parties' relative bargaining positions, the degree of economic compulsion motivating the patient, and the public interests affected by the agreement.

Because of the need to weigh each of these factors, the Appellate Court sent the case back to the trial court to conduct a fact-finding hearing in order to decide whether the arbitration agreement should be enforceable. The Court also held that in all future cases the question of enforceability must be decided on a case-by-case basis.

In its decision, the Court also held that the arbitration agreement in question could not bind the spouse of the patient signing the agreement to waive his right to trial on his separate claim, absent his separate consent. In another recent decision, a court held that provisions in another arbitration agreement, which limited a patient's right to discovery and to punitive damages, were overreaching and unenforceable.

Given the hurdles established by the Appellate Division, it is unlikely that many of these mandatory arbitration agreements will ultimately be upheld. Rather, this ruling will add yet another layer of complexity, and additional cost, to litigating malpractice claims.

A trial before a trial will need to take place in order for a court to determine whether the arbitration agreement can be enforced. Given the need to show that the agreement was knowingly, voluntarily, and willingly signed by the patient, with the patient's best interest at heart, may simply be too difficult to prove. Additionally, the cost of the preliminary trial, alone, may offset any potential savings associated with an arbitration process.

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