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News Story

Experts Debate Duke's Pre-Dispute Arbitration Policy

A recent Appeals Court case has raised questions about the use of private arbitration by Duke Hospital and its affiliates.

Duke, one the state's largest health care providers, uses a standard form that asks patients to decide whether they want to submit claims to arbitration. Arbitration isn't a prerequisite for treatment, and patients don't have to sign the form. If they do, however, they may have waived their right to a jury trial — even before any medmal dispute arises.

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The impact of Duke's medmal arbitration program isn't limited to medical facilities in Durham and Raleigh.

According to the Duke University Health System web page, Duke has affiliated services in 27 counties in North Carolina and southern Virginia, including primary care doctors, clinics, and home health care and hospice agencies.

Like all ADR options, arbitration's relative speed and low costs can benefit some medmal plaintiffs who choose that route after a treatment dispute arises, according to attorneys and mediators interviewed by Lawyers Weekly.

But some lawyers have expressed concerns about two features of Duke's approach:

* **Pre-dispute agreement.** Duke's procedure of getting an arbitration agreement before a dispute arises may vary from the recommendations of a 1998 task force report. The report was drafted by representatives from the American Bar Association, American Medical Association, and American Arbitration Association.

The commission addressed arbitration in the context of managed health care problems — not medmal claims. But for managed health care claims, the commission said "binding arbitration should be used only where the parties agree to [it] after a dispute arises."

* **AAA arbitration procedure.** The Duke form calls for arbitration under procedures formulated by AAA. Some lawyers say those procedures can be less flexible — and more costly — than rules selected by the parties themselves.

Filing fees under AAA can reach thousands of dollars, and arbitrators in the Southeast charge $125-$250 per hour or up to $1,200 per day, according to one attorney.

Duke's arbitration program was put in the spotlight by the Court of Appeals ruling in *Milon v. Duke University* (North Carolina Lawyers Weekly No. 1-07-1224, 17 pages).

In that case, a divided panel said a wife could sign her husband's name on the arbitration agreement at a Franklin County clinic owned by Duke.

If that ruling stands, the plaintiff could lose the right to a jury trial on a potential negligence claim he already had after prostate surgery at Duke's Private Diagnostic Clinic in Durham (see Aug. 21 Lawyers Weekly).

If the wife's action is affirmed in *Milon*, a trial judge will still have to rule on the plaintiff's other objections to the arbitration agreement: mistake, lack of mutual assent, overreaching, unfair advantage, undue influence, and constructive fraud.

Experts Comment

Lawyers Weekly asked several lawyers and dispute resolution experts for their views on arbitrating medmal claims in general — and Duke's arbitration program in particular.

"We've successfully arbitrated at least 25 medical negligence cases through the Private Adjudication Center," said Duke law professor Tom Metzloff, who chairs the Adjudication Center's board.

Those cases went to arbitration after a dispute arose, according to Metzloff.

"But the U.S. Supreme Court has made it clear that pre-dispute arbitration provisions are valid under the federal arbitration act as well," he said. "Arbitrating medical negligence claims may be a bad idea for some people, and they should have a choice whether to sign an agreement or not. But there's no question that those agreements are enforceable."

If the program is set up properly, malpractice cases are "fully suitable" for arbitration, according to Metzloff.

"People who are still fighting the enforceability of these agreements should be talking instead about the quality of the process," he said. "There needs to be some ability for the plaintiffs to have input into the selection of the arbitrators, and at least some discovery. You need to have a list of arbitrators who have a good, firm understanding of medical realities. And you need to have all your legal remedies available in the arbitration process."

Role In Medmal Dispute

Robert Meade, a senior vice-president for AAA, agreed that arbitration had a role in medmal disputes.

"You get to choose your arbitrators from a panel of experts," he said. "And the process is months, if not years, shorter than the legal system."

Meade said AAA agrees with the 1998 commission's recommendations against enforcing pre-dispute arbitration agreements in health care cases.

"The protocol says that it's inappropriate to ask patients to sign an agreement in advance," said Meade. "We agree that asking a patient on a gurney with an IV drip to sign an agreement would be subject to that protocol. If someone files for arbitration and the other side objects because they were under duress, or some condition so that the patient couldn't decide, we might refuse to administer the arbitration or let the arbitrator decide whether the agreement was unconscionable."

Mandatory Arbitration Criticized

An article posted on a law firm web site by Raleigh plaintiffs' attorney Karen Rabenau criticizes the use of mandatory arbitration clauses in medical negligence cases.

"Arbitration is a valuable tool for resolving disputes when there is equal bargaining power between parties who knowingly choose this method of dispute resolution," Rabenau wrote. "Such is not the case in the context of pre-dispute clauses so often unwittingly signed by patients prior to treatment."

According to Rabenau , pre-dispute arbitration agreements can be attacked on several grounds, including lack of mutual assent, unconscionability, and constructive fraud.

Rabenau 's article makes two other objections to medmal arbitration under AAA: limitations on discovery, and the potential financial burden imposed on consumers.

She cites these provisions of AAA's "Health Care Claims Settlement Procedures."

* **Size of claim determines number of arbitrators.** If the amount in controversy is less than $100,000, one arbitrator is chosen from a list of attorneys. Over that amount, a panel of three arbitrators is drawn from a list of health care professionals, attorneys, and public members, including business people and non-health care professionals.

* **Non-refundable filing fee**. Half of this fee is paid by the patient and half by the health care provider. For one arbitrator, it's $500. That figure goes to $1,000 for a three-member panel.

* **Hearing fees**. An administrative fee of $100 is due from the parties for each day of a single-arbitrator hearing. For three-person panels, the fee is $150 for each hearing day.

* **Arbitrator fees.** According to Rabenau , a list of 25 AAA arbitrators in the Southeast showed hourly fees ranging from $125 to $250, up to $1,200 per day.

AAA's health care claims rules do state that the administrative fees may be deferred or reduced "in the event of extreme hardship on the part of any party."

AAA's arbitration rules also allow very little discovery, according to Rabenau . Rule 5 gives each side only one deposition unless the parties and arbitrators agree otherwise.

Arbitration Outside AAA

Greensboro defense attorney Richard Vanore has arbitrated several medical negligence cases after disputes arose, although not under AAA rules.

"Arbitration is not a foreign concept to folks who do medical malpractice cases," he said. "It's like any other claim. It's not a frequent thing but it does happen occasionally when the circumstances are just right for both parties, depending on each side's view of the liability and damages issues."

"The problem with AAA is that they have a lot of rules and requirements that in my opinion would be more appropriate for construction claims and things like that," Vanore said. "Also, under AAA, the whole idea is to have a blue ribbon panel of arbitrators. You'd never get that in a civil setting. In construction cases, having contractors and business owners on a panel usually doesn't matter to either side. You can get a blue ribbon group in those cases that satisfies everybody.

"But in personal injury cases, plaintiffs may have a very different view than defendants," he said. "I don't think many plaintiffs' lawyers would agree to let a physician arbitrate their medical malpractice claim. AAA provides a list of people and you get to strike so many off. Then it comes down to those who are left. If there's a basis for recusal, you can ask for it, but AAA doesn't have to honor your request. That would be totally unacceptable in a civil action."

Historical Limitations

Pittsboro attorney Roy Baroff, who chairs the North Carolina Bar Association's dispute resolution section, said arbitration has historically been limited to the employment arena — but the concept is spreading to other areas.

"Over the years, other organizations and institutions have been looking at ways to manage disputes in their businesses," he said. "The health care field has been one of them. Looking at alternative ways to manage medical malpractice claims has become of particular interest in the last four or five years. We already have a mediated settlement conference program built into the legal system. What Duke apparently does is try to take those disputes outside the legal system to binding arbitration.

"I can't speak for the section but my sense is that arbitration historically was thought to be a good choice for dispute resolution because it would give you a decision that was faster and generally less expensive than traditional litigation," Baroff said. "I will say I've heard comments that while it may be faster, it's not that much less expensive. While it doesn't have all the formalities of the courtroom, you're still presenting your case to a tribunal and developing evidence as if you were trying the case.

"I can't speak specifically to the AAA rules, but my sense is that although the overall process is certainly faster, the cost factor in arbitration can be close to what you'd spend in litigation. You're paying filing fees, and the arbitrators' fees as well.

"One of the issues for any consumer signing a contract is whether they understand the provisions they're agreeing to," said Baroff. "Agreeing to arbitrate on a voluntary basis after a dispute arises when people can be better informed seems like a more level playing field. The folks in our section are in favor of having choices. At the same time, we want to be sure people are making informed choices."

Greensboro defense lawyer Tom Duncan, who is also a member of the dispute resolution council, has mediated medmal claims as part of the court system, but never arbitrated one privately. He had some concerns about using AAA to arbitrate disputes outside the commercial context.

"Who the arbitrators will be is critical," he said. "How will they be chosen? It doesn't seem to me that a panel of AAA arbitrators will necessarily be familiar with the standard of care in Franklin County, although as a practical matter jurors don't have any particular knowledge about that either."

Cary attorney and mediator Randy Ward said he was not familiar with the specifics of the Duke program.

"But in general, all ADR is faster and less expensive in terms of costs and wear and tear on the parties. I can see that being important in a medmal case where someone has died and the plaintiffs are feeling more vulnerable emotionally. And a settlement frequently clears the way to more and better medical treatment for an injured person."

However, the cost of mounting a defense or prosecuting a medmal case in arbitration is expensive enough that it could leave one party at an economic disadvantage, said Ward.

"Arbitration is the most court-like of any alternative dispute resolution method, so you have a lot of the same litigation expenses," he said.

Another concern for Ward: institutional bias.

"Medmal plaintiffs might be concerned whether arbitrators who are experts in their field would feel more kindly toward institutions that create arbitration opportunities and select them on a frequent basis," he said. "You don't have a real judge who's insulated from the day-to-day economic concerns of judging a case."

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