

Mississippi Medical News

YOUR PRIMARY SOURCE FOR PROFESSIONAL HEALTHCARE NEWS

[Our Publications](#)

[Advertise](#)

[Contact Us](#)

[Archives](#)

[Subscriptions](#)

■ **Avoiding a Jury: The Enforceability of Arbitration Clauses in Mississippi**

BY W. DAVIS FRYE AND SCOTT PEDIGO

Three weeks before a scheduled procedure, a patient was presented with an arbitration agreement by his surgeon.

The contract stated in bold letters that any potential claim of negligence or medical malpractice must be decided by a neutral arbitrator, making clear that the patient waived his right to a jury trial by signing the agreement.

The patient signed the document as requested and the surgeon conducted the procedure. Two months later, the patient died, and his family filed a lawsuit in Hinds County Circuit Court, claiming that the surgeon conducted the surgical procedure negligently and failed to provide the patient with appropriate postoperative care. In response to the lawsuit, the surgeon filed a motion to dismiss and enforce the arbitration agreement but the trial court refused, holding that the contract was patently unfair and unenforceable.

The Mississippi Supreme Court overturned the trial court and enforced the arbitration agreement between the surgeon and his patient. According to the Supreme Court, the contract was enforceable because of its clarity and fairness to the patient. As a result, the surgeon was able to reduce the expense and risk associated with litigation in Mississippi and require the patient's family to submit its claims to a neutral arbitrator instead of a jury.

While this ruling is encouraging to healthcare professionals in Mississippi, it does not mean that a physician can simply include a form arbitration agreement in his intake documents and avoid a jury trial as a result. Instead, courts will scrutinize arbitration agreements between doctors and their patients and will conduct fact intensive inquiries that will turn on the form and substance of the agreements as well as the circumstances that existed at the time the agreement was signed.

If drafted properly and presented under the proper circumstances, arbitration agreements between healthcare professionals and their patients will likely be enforced. However, appellate courts in Mississippi often refuse to enforce arbitration agreements. In fact, within the last two years, appellate courts in Mississippi have invalidated more arbitration agreements than they have enforced. It is therefore imperative that healthcare providers present reasonable and easy-to-read arbitration agreements to their patients while implementing procedures to ensure that their patients sign the agreements knowingly and voluntarily without coercion.

The Law Governing the Enforceability of Arbitration Agreements

Although courts in Mississippi favor arbitration, plaintiffs often succeed in avoiding arbitration agreements by relying on a defense of "unconscionability." This defense may be used to avoid the enforcement of a contract that is deemed unfair or oppressive, and courts specifically recognize two types of unconscionability — procedural and substantive.

Procedural unconscionability looks beyond the terms that define a contract and focuses upon the circumstances surrounding the contract's execution. For example, procedural unconscionability may exist where one party lacks understanding of the contract terms because of inconspicuous print; the use of complex, legalistic language; or the inability to study the contract and inquire about the meaning of its terms. Additionally, a court may find procedural unconscionability where a party involuntarily signed the agreement because it was presented on a "take it or leave it" basis to a weaker party with no real opportunity to negotiate its terms. For example, if a patient is in considerable pain at the time that an arbitration agreement is presented to him and he has no available alternatives for healthcare without signing the agreement, a court will likely refuse to enforce the contract for the patient's lack of voluntariness.

Substantive unconscionability relates to the enforceability of the specific terms of the arbitration agreement. If the contract is so overly oppressive or one-sided that one party is left without a remedy for the other party's breach, the contract will not be enforced. If an arbitration clause permits only the more sophisticated party to compel arbitration, courts are likely to find that the arbitration agreement is substantively unconscionable. In addition, a contract that arbitrarily limits the amount of damages that may be recovered by an injured party in a malpractice action may be substantively unconscionable.

Taking Steps to Increase the Likelihood An Arbitration Agreement Will Be Enforced

If a healthcare provider employs an arbitration agreement, there are several steps that should be taken to increase

the likelihood of its enforcement:

- The provider should ensure that the contract is consistent with current legal requirements and can withstand challenge in the court room.
- The arbitration agreement should be easy to understand and should emphasize in bold type the patient's voluntary waiver of a jury trial.
- The provider should obtain the patient's initials by each provision of the arbitration agreement in order to signify that the contract was fully explained to the patient who had an opportunity to ask questions and consider the meaning of the contract.
- The agreement should provide a patient with a fair opportunity to dispute his claims in a proper forum with neutral arbitrators.
- The provider should properly train all staff members who are responsible for the intake of patients to ensure that they comply with appropriate standards and procedures when obtaining signatures on arbitration agreements.
- Finally, if a lawsuit is filed against a provider, the provider should take appropriate procedural steps to compel arbitration early in the litigation. In this manner, a provider can avoid a claim that he has waived his right to enforce an arbitration agreement.

Conclusion

Disputes with patients are time consuming and costly. Unfortunately, healthcare professionals are frequently faced with claims brought by their patients as a result of our increasingly litigious society. Arbitration is often a more efficient way to resolve these disputes. It typically costs less than traditional litigation, and the results are not based upon the whim of a jury. If the steps outlined above are taken, providers will increase the likelihood that their arbitration agreements will be enforced, and they can reduce the expense, burden and risk associated with jury trials in Mississippi.

W. Davis Frye is an attorney specializing in healthcare litigation with the Jackson office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

March 2007

[Printer-friendly format](#)

Do you know someone else who would like to see this?	
Your Email:	<input type="text" value="spedigo@bakerdonelsc"/>
Their Email:	<input type="text" value="spedigo@bakerdonelsc"/>
Comment:	<div style="border: 1px solid black; height: 100px;"></div>
	(Will be included with e-mail)
	<input type="button" value="Send to a friend"/>

Copyright © and Trademark ™ 2006 All Rights Reserved
[Copyright Statement](#) | [Privacy Statement](#) | [Terms of Service](#)

Empowered by Bondware Web Solutions
 Web Design for your eBusiness, eCommerce store, Association, Publication or Organization.

