



## **Modern Arbitration Clauses Place Health Care Providers into Unanticipated Corner**

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Whether to agree to a binding arbitration clause is a critical issue that should be on every healthcare provider’s contract negotiation checklist. Unfortunately, these clauses often go unnoticed or are not fully appreciated. The repercussions of such an oversight can be significant. Binding arbitration is not simply a matter of choosing to resolve a disagreement in one arena (arbitration) in lieu of another (court of law). Rather, it is a decision that materially alters the dynamic of the parties’ relationship as it imparts significant leverage to the managed care organization.

Current arbitration clauses are being crafted in a manner that curtails available remedies to providers, and further, erects procedural hoops to be jumped through before an issue can be brought to arbitration. What was initially intended to be an efficient and cost-effective alternative to conventional litigation has become a well-crafted deterrent to seeking recourse for unpaid or underpaid services. Furthermore, these arbitration clauses not only impact the cost and scope of relief available to providers, but also effectively negate the ability to seek redress in the court of public opinion. Because arbitrations are not a matter of public record, they do not receive the media “splash” given to court actions, which can act as a deterrent to contractual breach, and an incentive to resolve matters swiftly and appropriately.

The following points further illustrate the various restrictions and problem areas in today's managed care arbitration provisions, and the disadvantages of arbitration to healthcare providers in general:

- **Multi-tiered informal resolution pre-requisites.** Mandatory pre-arbitration “discussions” are now common conditions of managed care agreements. A typical clause contains language similar to the following:

The parties agree to establish an informal procedure to resolve disputes arising under this Agreement...prior to submitting such disputes to formal arbitration. As needed, the board of directors of each party shall designate a joint committee consisting of three (3) persons from each board to review such disputes and attempt to resolve them. In the event the committee is unable to satisfactorily resolve a dispute within ninety (90) days of appointment to the committee, the dispute shall be submitted to arbitration.

Pursuant to such requirements, the parties need to wait three months before submitting their dispute to arbitration. Perhaps the disagreement will be solved by the informal talks that transpire during this period. However, more often than not this mandatory informal dispute resolution is merely a necessary postponement of the actual resolution. If an informal dialogue was a generally successful method of resolving claims, it would not need to be “mandatory.” The resulting drain on time and resources hinders the ability to obtain actual recourse.

- **Class / Collective action prohibitions.** Many arbitration clauses now preclude the filing of class-action claims or otherwise prohibit one healthcare provider from joining in an arbitration with another similarly situated (and aggrieved) provider. By design, these new provisions dissuade providers from challenging an inappropriate practice, which on an individual level may be cost prohibitive, but collectively with other providers could be pursued. The renowned In Re Managed Care litigation illustrates the effectiveness of class actions and why the inability to form a class is extremely significant.

- **Cost deterrents.** Arbitration clauses typically require parties to evenly share in arbitration costs by inserting language such as the following: “each party shall shoulder its own costs, but shall share the cost of the resolution entity equally.” Many provisions require three-person panel arbitrations with stringent selection guidelines. For example:

The panel of arbitrators shall be selected as follows: one member of the panel shall be designated by HOSP; one member shall be designated by [HMO]; and the third member shall be selected by the members designated by HOSP and [HMO].

The time involved with the arbiter selection process and the cost of an arbiter’s time, which can be upwards of \$400 an hour, has made arbitration a high-cost alternative to the traditional court setting, under which the judge and jury can resolve a claim for the cost of a relatively small filing fee and jury claim fee (to the extent a jury is preferred to a bench trial).

- **Recovery limitations.** Arbitration clauses typically exclude recovery of punitive damages, costs and/or interest. The end result is that a provider is seldom “made whole” by the arbitration process even when it is able to recover what it was originally entitled to be compensated.
- **Lack of certainty.** There is always a degree of unpredictability when resolution of a dispute is left to the judgment of a third party. However, unlike the judicial setting, wherein a court is bound by procedural guidelines and legal precedent, an arbiter’s discretion can be virtually limitless. Moreover, unlike a trial which is subject to appeal, an arbitration’s ruling is seldom reversible. As explained in *Wise v. Wachovia Securities*, 450 F.3d 265, (7<sup>th</sup> Cir.2006) (considering an appeal of an arbitrator’s decision):

[T]he issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all.

As further stated in *Barvati v. Josephthal, Lyon & Ross*, 28 F.3d 704 (1994), “[I]t is commonplace to leave the arbiters pretty much at large in the formulation of remedies, just as in the principles of contract interpretation.” Thus, no matter how “wacky” the interpretation of a contract an arbitrator may use, as long as he interprets it, his award will stand.

- **Absence of *stare decisis*.** One of the most distinguishing characteristics of an arbitration proceeding is the absence of *stare decisis*, meaning “the policy of the court to stand by precedent.” Instead, a decision made during one proceeding will not affect the decision in a following, similar proceeding. In other words, arbitration lacks the deterrent of an unfavorable court decision having been issued. Thus, even if a managed care company is proven wrong in one hearing, it may not alter its practice, since a future arbitration will begin with a clean slate.
- **Impact on managed care behavior.** The impact of the binding arbitration clause is not limited to the actual remedy of a dispute. Rather, a further concern of these modern clauses is how they affect the manner in which managed care organizations treat their business relationships. If these organizations know that their actions are not likely to be readily challenged due to the expensive, multi-step process of arbitration, or scrutinized by their shareholders or the public at large, it creates a disincentive to strictly adhere to contractual obligations.

As the above examples illustrate, binding arbitration clauses should not be ignored. Alternative dispute resolution, such as arbitration, is always available to parties of a contract; it need not be specifically referenced, or made a mandatory requirement. However, when it becomes binding and replete with additional restrictions, it is no longer a tool for parties to efficiently resolve disputes, but rather a shield for one party against a bona fide dispute of the other. While it could be argued that the terms of these arbitration clauses apply equally to all

parties to the agreement, they undoubtedly tilt in favor of the managed care organizations as they are the authors of the language:

The party who actually does the writing of an instrument will presumably be guided by his own interests and goals in the transaction. He may choose shadings of expression, words, more specific or more imprecise, according to the dictates of these interests. *Israel v. State Farm Mut. Auto. Ins. Co.* 789 A.2d 974, 977 (Conn.,2002).

Therefore, providers should pay close attention to these clauses and, more appropriately, should take measures to minimize administrative hurdles and limitations upon otherwise available remedies, before agreeing to sign on the dotted line.