Arbitration agreements emerging trend in Mississippi

In Focus

By Jonathan R. Werne

Physicians and other healthcare providers are constantly searching for ways to manage risk (and more important, costs) when it comes to defending medical malpractice claims related to the care and treatment provided at their facilities. One of the ways a healthcare provider can manage this risk is to require patients to sign an arbitration agreement. Generally speaking, an arbitration agreement signed by a patient would require all disputes related to the medical care and treatment provided by the physician or healthcare provider to be resolved by a panel of arbitrators rather than a court of law.

Until recently, it was uncertain whether medical arbitration agreements would be held enforceable under Mississippi law. Courts across the country have been divided on the issue. Even the arbitration community has been strategically hesitant in affording validity to such agreements. For example, in January 2003, the American Arbitration Association announced that it will no longer arbitrate cases involving patients without a post-dispute agreement to arbitrate. Other arbitration associations have followed suit.

However, within the last year, the Mississippi Supreme Court in two cases (*Vicksburg Partners, L.P. v. Stephens* and *Cleveland v. Mann*) has enforced arbitration agreements related to the services provided by physicians and other healthcare providers. In the latest Mississippi Supreme Court decision, the Court even enforced an arbitration agreement against the deceased patient's heirs in a wrongful death action. Without question, these cases have opened the door to medical malpractice arbitration in Mississippi.

Of course, one obvious question is how does an arbitration agreement benefit a physician or part of a healthcare facility in regard to the care provided to your patients. There are multiple reasons why a physician or healthcare provider would desire an arbitration agreement: (1) the participants may select an arbitrator with a certain area of expertise, (2) arbitration can be less time consuming than the crowded court system, (3) arbitration can be less expensive than in a typical lawsuit, (4) arbitration hearings and results can be private, (5) arbitration decisions are binding on all parties and (6) the arbitration process is generally more flexible than the courts.

Physicians who may desire to have new patients sign an arbitration agreement can follow some general principles that significantly affect whether a court will enforce an arbitration agreement, if challenged. For example, the court will look to whether the agreement is procedurally and/or substantively unconscionable. Procedural unconscionability looks to the circumstances surrounding the formation of a contract. Procedural unconscionability may be shown by demonstrating "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms."

In the two recent cases, the Court provided several reasons why the arbitration agreements or provisions were not procedurally unconscionable: (1) the arbitration provision appeared on the last page of the agreement; (2) the language of the provision was clear; (3) the heading of the provision was in all caps and bold-faced type; (4) the provision itself was printed in bold-faced type of equal size or greater than the print in the rest of the agreement; (5) there was another provision above the signature line in all caps and bold-faced type drawing special attention to the party's consent to the arbitration provision; and (6) the patient initialed the arbitration provision indicating his understanding of the provision.

Substantive unconscionability primarily focuses on whether the provision is substantively unfair, such as those that are oppressive. Arbitration agreements must provide patients with an impartial process to pursue their legal claims. The physician or healthcare provider cannot require patients to limit their legal rights or limit the liability of the physician or healthcare provider.

In one of the two cases, the Mississippi Supreme Court struck down portions of the arbitration provision considered to be substantively unconscionable. One portion eliminated from the agreement prohibited an arbitrator from awarding punitive damages to the patient or healthcare provider. The healthcare provider, the Court noted, profits considerably more than the patient by having both parties waive their right to recover punitive damages. The Court also invalidated a portion of the arbitration provision, which limited the recovery of damages from the healthcare provider, but did not limit the amount a healthcare provider could recover.

The Mississippi Supreme Court did not go as far as to hold that arbitration agreements will be upheld in circumstances where a patient is in need of immediate healthcare. Under such a fact scenario, an arbitration agreement would ultimately require patients either to waive their legal rights or forgo necessary medical treatment.

While the two recent rulings are favorable to arbitration, there is no guarantee that every arbitration agreement will be enforced by Mississippi trial courts in every situation. The courts will examine each arbitration agreement on a case-by-case basis. Thus, the Mississippi Supreme Court's rulings cannot simply be used as a checklist of requirements, which will guarantee enforcement. Furthermore, there are additional federal laws and/or regulations that may be applicable depending upon the healthcare provider (e.g., nursing home, hospital, physician clinic, home health) seeking enforcement of the arbitration agreement. Likewise, there are significant procedural issues that must be addressed such as (1) how many arbitrators will be selected — one or three; (2) how will the arbitrator(s) be selected — agreement between the parties or each party pick one and then the arbitrators select a third arbitrator; (3) will the arbitrators be required to have an expertise — have a medical degree; (4) how will the cost of arbitration be paid — equally split between the parties or losing party pays the costs; and (5) will the arbitration proceedings and results be held confidential.

Based on the recent Mississippi Supreme Court cases, trial courts will be decidedly more inclined to enforce arbitration agreements than in the past. Accordingly, physicians and other healthcare providers should consider how an arbitration agreement can help manage their risk in defending medical malpractice claims filed against them. Physicians and other healthcare providers should also keep in mind how the requirement of an arbitration agreement will affect their relationship with their patients. It is imperative that physicians and other healthcare providers consult with their attorney before requiring patients to sign an arbitration agreement.

Jonathan R. Werne is a second-year associate at Brunini, Grantham, Grower and Hewes, PLLC. This article is not intended to be an exhaustive review of the law regarding arbitration agreements and should not be relied upon as legal advice. Send questions or comments about this column to the MISSISSIPPI BUSINESS JOURNAL *at mbj@msbusiness.com.*