

Ask An Attorney

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If I include an arbitration clause in my patient agreements to resolve patient disputes or claims, is it enforceable?

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In 2012, the U.S. Supreme Court rendered its decision in *Marmet Health Care Ctr., Inc. v. Brown*, which involved a West Virginia prohibition on nursing home admission agreement arbitration clauses. The response from the Court was blunt: when the state law prohibits the arbitration of a particular type of claim, the analysis is straightforward; the conflicting rule is displaced by the Federal Arbitration Act. The Act states that agreements to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

The Marmet decision appears as though it strikes down all prohibitions against predispute arbitration agreements, not simply those limited to personal injury or wrongful death in the nursing home context. Thus far, New York State courts have agreed. However, arbitration agreements must also pass muster under New York contract law.

In *Stewart v. Contemporary Dental Implant Ctr., Inc.*, a New York court addressed an arbitration agreement within an informed consent form signed by a patient prior to receiving dental care. The thrust of the opinion is that predispute binding arbitration agreements within a medical consent form will be valid so long as: (1) the circumstances of their signing are generally reasonable; (2) they are not a requirement for obtaining emergency medical care; and (3) they contain a clear notice that the signee is waiving his/her right to a trial by jury.

While it is not clear that all mandatory arbitration clauses in the medical field will be honored, it appears that, so long as the agreement is reasonable, for non-emergency care, and clearly notes its impact on a signatory's right to a trial by jury, medical service providers should be protected.

Before adopting a mandatory arbitration clause, each practice should check with their malpractice insurance carrier to ensure that the adoption of arbitration will not negatively impact coverage of a claim. Also, the practice should have a thorough discussion with their attorney as to the merits of arbitration vs. court proceedings in the context of a medical malpractice claim. Consider that even though the practice may legally do so, the practice may not be better off in arbitration. Attorneys may well differ in judgment on this decision.

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