2016

Medical Malpractice Arbitration: Not Business as Usual

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Publication Information
8 Yearbook on Arbitration and Mediation 69 (2016)

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Abstract
There is an interesting exception to businesses', employers', and service providers' seemingly universal embrace of arbitration processes, particularly mandatory pre-dispute arbitration. Although it may be difficult to believe given arbitration's current popularity, not everyone requires his or her clients to sign mandatory pre-dispute arbitration agreements. In fact, some service providers prefer to avoid arbitration regardless of whether it is arranged pre- or post-dispute. So which merchants or service providers are choosing to forgo arbitration and, more importantly, why do they dislike arbitration? And do politics have anything to with their choices? Physicians are not, shall we say, the world's greatest fans of arbitration. It turns out that regulatory policies and practices, in other words politics, provide one important reason why physicians prefer to avoid arbitration. And there are additional reasons that explain why this particular group of service providers has not followed the "mad rush" to arbitration. This article will explain why at least one group of service providers, physicians, do not regard arbitration as the answer to all of their prayers.

Keywords
Arbitration and award, Malpractice, ADR

Disciplines
Dispute Resolution and Arbitration | Medical Jurisprudence

MEDICAL MALPRACTICE ARBITRATION: NOT BUSINESS AS USUAL

By
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I. INTRODUCTION

The authors hope that no one still seriously contends that politics do not affect arbitration. In fact, it frankly is difficult to understand the most recent United States Supreme Court decisions addressing arbitration unless one appreciates how those decisions further the interests of the business community. One cannot make bold assertions of this nature without at least some explanation, of course, and more discussion will follow. But the primary focus of this article is on an interesting exception to businesses', employers', and service providers' seemingly universal embrace of arbitration processes, particularly mandatory pre-dispute arbitration. Although it may be difficult to believe given arbitration's current popularity, not everyone requires his or her clients to sign mandatory pre-dispute arbitration agreements. In fact, some service providers prefer to avoid arbitration regardless of whether it is arranged pre- or post-dispute. So which merchants or service providers are choosing to forgo arbitration and, more importantly, why do they dislike arbitration? And do politics have anything to with their choices?

Dictionaries generally provide several different definitions for the word "politics." Merriam-Webster, for example, offers no fewer than five different definitions with ten separate subparts in its "Full Definition" Section.[1] The second definition provided explains that politics can be "political actions, practices, or policies."[2] Although perhaps not the most informative definition one can imagine, it is helpful for our purposes. Physicians are not, shall we say, the world's greatest fans of arbitration. It turns out that regulatory policies and practices, in other words politics, provide one important reason why physicians prefer to avoid arbitration. And there are additional reasons that explain why this particular group of service providers has not followed the "mad rush" to arbitration. This article will explain why at least one group of service providers, physicians, do not regard arbitration as the answer to all of their prayers.

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[1] Dictionary entry for "politics," MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/politics (last visited Aug. 12, 2016).

[2] *Id.*

Arbitration clauses frequently appear in consumer and employment contracts,[3] and they are not unknown in the healthcare field. Nursing homes and similar facilities use binding pre-dispute arbitration clauses to reduce litigation expenses.[4] Contracts between patients and individual medical providers, however, are a conspicuous exception to the otherwise ever-increasing practice of inserting pre-dispute, binding arbitration agreements into contracts.[5]

Some commentators believe that eventually medical malpractice will be resolved in arbitration. Professor Myriam Gilles has suggested, for instance, that "all manner of tort claims (including negligence, loss of chance, and other allegations of medical malpractice . . .) could soon be hashed out in the sequestered universe of arbitration."[6] But the authors do not anticipate that physicians will embrace arbitration anytime soon.

On the one hand, is this situation merely the result of old habits dying hard? If so, then we can expect that eventually mandatory arbitration clauses will appear in physician-patient contracts much more frequently than they do today. Yet on the other hand, is there something about arbitration that is so unattractive for physicians that they will make every effort to avoid it? Keeping in mind that the medical providers are the ones drafting, and thus controlling, the arbitration clauses, is it not possible to craft arbitration clauses that provide the same benefits enjoyed by numerous businesses and employers? Perhaps surprisingly, at least at the present time the answer appears to be "no."

Many of the assumed advantages of arbitration such as faster resolutions, lower costs, and greater confidentiality may not be as compelling when it comes to medical malpractice claims. First, litigation outcomes are generally quite positive for physicians.

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[3] It is difficult to quantify the prevalence of pre-dispute arbitration contracts. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1284 (2009). Nevertheless, Professor Schwartz cites researchers who have attempted to assess the frequency of pre-dispute arbitration clauses. *See* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 408 (2007) (explaining that fifteen to twenty-five percent of employers use mandatory arbitration contracts); Linda J Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer's Experience*, 67 L. & CONTEMP. PROBS. 55, 62-64 (2004) (finding that about thirty-five percent of businesses an average Los Angeles consumer might patronize used mandatory arbitration contracts, with the greatest prevalence (sixty-nine percent) in the financial category). More frequently, scholars give qualitative estimates. *See, e.g.,* Myriam Gilles, *Operation Arbitration: Privatizing Medical Malpractice Claims*, 15 THEORETICAL INQUIRES L. 671, 678 (2014) (asserting that arbitration clauses are "ubiquitous" in consumer contracts outside of healthcare).

[4] Gilles, *supra* note 3, at 672-74 (reviewing the use of binding pre-dispute arbitration by nursing homes and similar healthcare facilities).

[5] Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims*, 28 J. LEGAL MED. 333, 334 (2007) (stating that it is "not yet common" to employ arbitration in medical malpractice disputes); Gilles, *supra* note 3, at 681-82 (binding arbitration clauses are "conspicuously absent from most healthcare contracts"); Ann H. Nevers, *Medical Malpractice Arbitration in the New Millenium: Much Ado About Nothing*, PEPP. DISP. RESOL. L. J. 45, 50 (2000) (stating that "arbitration has not been widely used" in medical malpractice); Thomas Pedroni & Ruth F. Vadi, *Mandatory Arbitration or Mediation of Health Care Liability Claims?*, 39 MD. BAR J. 54, 57-58 (2006) (listing twenty states with no reported case law regarding medical malpractice arbitration).

[6] Gilles, *supra* note 3, at 676.

Physicians understandably are reluctant to accept different resolution processes when they are not convinced that the outcomes will be equally favorable, much less even better. Second, physicians generally are shielded from litigation expenses by malpractice insurance. Thus, arguments about the reduced costs of arbitration are not persuasive to physicians. Third, while disputes may be resolved more quickly with arbitration than they would be through litigation, other commonly reported advantages of arbitration—such as the ability to select your decision-maker, the availability of neutrals with specific expertise, and privacy—may seem illusory to the physician. Finally, because of the regulatory environment, in other words "politics," physicians are very wary of, and opposed to, compromise judgments and awards in malpractice cases. The perception that arbitration often results in a compromise decision, a proverbial "splitting of the baby," makes arbitration uniquely unattractive to physicians seeking complete vindication for both professional and personal reasons.

II. MEDICAL MALPRACTICE CLAIMS ARE ARBITRABLE

A. In General

Courts enforce binding, pre-dispute arbitration agreements routinely and medical malpractice arbitration agreements are not treated differently.[7] The goal of this article is not to review and summarize the United States Supreme Court's willingness over the past three decades to assert the pre-emptive reach of the Federal Arbitration Act (FAA) and enforce pre-dispute mandatory arbitration clauses even when they include controversial language such as class action waivers. But a brief review of two of the most recent cases nonetheless may be helpful, and will suffice to prove the point that this Court believes a contract should be enforced, particularly if it is an arbitration contract.

In December 2015, the United States Supreme Court rejected the California Court of Appeal's determination that a service agreement's binding arbitration clause containing a class-arbitration waiver was unenforceable. The agreement at issue in *DIRECTV, Inc. v. Imburgia*,[8] did state that it shall be governed by the Federal Arbitration Act. But the immediately preceding contract section also stated "that if the 'law of your state' makes the waiver of class arbitration unenforceable, then the entire arbitration provision 'is unenforceable'."[9] When DIRECTV drafted the service agreement and at the time the class action litigation began, class-arbitration bars like this one were regarded as unconscionable and unenforceable under California law.[10]

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[7] Marmet Health Care v. Brown, 132 S. Ct. 1201, 1203 (2012) ("The [FAA] statute's text includes no exception for personal-injury or wrongful-death claims.").

[8] DIRECTV Inc. v. Imburgia, 136 S. Ct. 463 (2015).

[9] *Id.* at 466.

[10] *See* Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

As Justice Ginsburg in her dissent explained,[11] this class action litigation had been underway for almost three years when the Court decided *AT&T Mobility v. Concepcion*[12] and declared that the Federal Arbitration Act pre-empts state rules that make class-arbitration bans unenforceable. Acknowledging that the phrase "the law of your state" was ambiguous and could be interpreted to mean "the law of your state to the extent it is not pre-empted by the FAA," or "the law of your state without considering the pre-emptive effect, if any, of the FAA," the court of appeals had interpreted the phrase against the interest of the adhesive contract drafter DIRECTV.[13]

When contract interpretation questions arise we generally and correctly attempt to determine the intent of the parties. If that truly is our concern, then it is genuinely difficult to imagine how a court could conclude that when these parties signed this contract in 2007, they not only somehow knew that four years later the Supreme Court would announce that the FAA pre-empts state law bans on compelled class action waivers, but that they also wrote that understanding into their contract.[14] It is infinitely more likely that the parties intended the phrase to refer to the law as it existed at the time that they signed their contract, unaffected by a federal pre-emptive reach that would not be declared until years later.

In what must be seen as an effort to preserve the enforceability of an arbitration agreement, however, the majority framed the question as whether "the law of your state," can include an invalid law.[15] The Court then answered that question by asserting (speculating?) that California courts would never have made a similar interpretation if another type of contract other than an arbitration contract had been involved, and thus failed to place arbitration contracts on equal footing with other contracts.[16] Adding that judicial construction of a statute ordinarily applies retroactively and that the phrase "law of your state" is not ambiguous, the Court remanded and demanded that the court of appeals enforce the arbitration agreement.[17]

Although some might agree with the majority, if arbitration is a "creature of contract" then the authors maintain that the parties agreed to a contract that should not have been enforced. Yet the majority was determined to ensure that this binding arbitration contract was not going to be avoided. Quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*.[18] and *Volt Information Sciences, Inc. v Board of Trustees of Leland Stanford Junior Univ*.,[19] Justice Ginsburg reminds us that arbitration must be

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[11] *Imburgia*, 136 S. Ct. at 472 (Ginsburg, J., dissenting).

[12] AT&T Mobility v. Concepcion*,* 563 U.S. 333 (2011).

[13] *Imburgia*, 136 S. Ct. at 472 (Ginsburg, J., dissenting).

[14] *Id*.

[15] *Id.* at 469.

[16] *Id.* at 469-471.

[17] *Id.* at 471.

[18] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2011).

[19] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

based upon "consent, not coercion," and that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review."[20] There was no reason to refer to a consumer's state law if DIRECTV intended to incorporate state law as preempted by the FAA.[21]

In *American Express Co. v. Italian Colors Restaurant*,[22] the Court also reviewed an arbitration agreement that contained a class action waiver. Merchants filed a class action claiming a violation of Section 1 of the Sherman Act. When American Express moved to compel individual arbitration, the merchants submitted an economist's declaration estimating that the cost of an essential expert analysis would be from several hundred thousand to more than one million dollars although an individual plaintiff's recovery would be only $12,850, or $38,549 trebled.[23] Although the district court dismissed the lawsuits, the court of appeals reversed and held that because the parties would face prohibitive costs if compelled to arbitrate, the class action waiver was unenforceable.[24]

The Supreme Court responded, however, by declaring that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[25] The Court limited the possibility of escaping an arbitration contract when a party could not effectively enforce a statutory right in arbitration, the "effective vindication" exception, by stating that the exception only preserved a party's "right to pursue" a statutory remedy. The fact that it was financially infeasible or even impossible to prove a statutory violation does not change the fact that the right to pursue the remedy was not eliminated.[26]

Although the majority distinguished the case, the dissent maintained that the language and logic of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*.[27] is undeniable. Citing well-known Supreme Court cases, the dissent explained that the critical justification for permitting statutory claims to be decided in arbitration is that "a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[28] Arbitration clauses should be enforced only if "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[29] The arbitration agreement should be set aside if

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[20] *Imburgia*, 136 S. Ct. at 473 (Ginsburg, J., dissenting).

[21] *Id*. at 474 (Ginsburg, J., dissenting).

[22] Am. Express v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

[23] *Id.* at 2308.

[24] *Id.*

[25] *Id.* at 2309.

[26] *Id.* at 2311.

[27] Mitsubishi Motors Corp. v. Soler Chysler-Plymouth Inc., 473 U.S. 614 (1985).

[28] *Italian Colors*, 133 S. Ct. at 2314 (Kagan, J., dissenting) (quoting *Mitsubishi Motors*, 473 U.S. at 628).

[29] *Italian Colors*, 133 S. Ct. at 2314 (Kagan, J., dissenting) (quoting *Mitsubishi Motors*, 473 U.S. at 637).

arbitration would be so difficult that the claimant "will for all practical purposes be deprived of his day in court."[30] *Green Tree Fin. Corp.-Alabama v. Randolph* further confirmed that arbitration costs so prohibitive they foreclose consideration of statutory claims would violate the effective-vindication rule and prevent enforcement of the arbitration agreement.[31]

The most important reason for including the preceding brief discussion of two United States Supreme Court arbitration cases in this article is not to persuade the reader that they were wrongly decided. Rather, the reason this discussion is included to illustrate the Supreme Court's determination to enforce mandatory arbitration clauses even in the face of strong arguments against enforcement. These cases demonstrate that the Court will make every effort to enforce arbitration agreements as written.

Thus, the current situation is that courts enforce binding, pre-dispute arbitration agreements routinely and, as one should expect, medical malpractice arbitration agreements are not an exception.[32] *Marmet Healthcare v. Brown*, for example, was a medical malpractice action against a nursing home in which the United States Supreme Court pre-empted a state legislature's attempt to limit pre-dispute mandatory arbitration.[33] The Court declared that West Virginia's state law "prohibition against pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA [Federal Arbitration Act]."[34]

In fact, in order to ensure enforceability, the validity of medical malpractice arbitration agreements has been recognized by statute in thirteen states, including California.[35] California courts, in turn, have upheld arbitration awards to both plaintiffs and named physician defendants.[36] Arbitration agreements mandating arbitration of medical malpractice cases have been upheld in other states as well.[37]

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[30] *Id.* (Kagan, J., dissenting) (quoting *Mitsubishi Motors*, 473 U.S. at 632).

[31] *Id.* at 2318 (Kagan, J., dissenting) (citing Greentree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000)).

[32] Marmet Health Care v. Brown, 132 S. Ct. 1201, 1203 (2012) ("The [FAA] statute's text contains no exception for personal-injury or wrongful-death claims").

[33] *Id*.

[34] *Id.* at 1204. The case ultimately was remanded, however, to determine whether the arbitration clauses were unenforceable under state common law principles that were not specific to arbitration and pre-empted by the Federal Arbitration Act. *Id.*

[35] David Shieh, *Unintended Side Effects: Arbitration and the Deterrence of Medical Error,* 89 N.Y.U. L. REV. 1806, 1808-09 (2014).

[36] *E.g.,* Anderson v. Kaiser Permanente Medical Group, No. B252061, 2015 WL 139728 (Cal. Ct. App. Jan. 12, 2015) (finding that arbitrator did not deny plaintiff's request for a continuance, and upholding arbitrator's award to physician defendant); Watson v. Knorr, No. H036430, 2013 WL 1944007 (Cal. Ct. App. May 13, 2013) (holding that it was for the arbitrator to determine both entitlement to and amount of costs to be awarded and upholding award of $1,092,797 plus costs to plaintiff against urologist defendant).

[37] *E.g.*, Gordon v. Shield, 41 So. 3d 931 (Fla. Dist. Ct. App. 2010) (holding that surgeon did not waive right to arbitrate by participating in pre-suit investigation required by statute); King v. Bryant, 737 S.E.2d 802 (N.C. Ct. App. 2013) (holding that arbitration agreement was not too indefinite to enforce in a malpractice

The absence of a state statute specifically authorizing pre-dispute agreements to arbitrate medical malpractice disputes is not a barrier to enforcement of such agreements. As is apparent from the recent cases noted above, the Federal Arbitration Act has been interpreted expansively in order to uphold pre-dispute arbitration agreements. Additionally, all fifty states have enacted statutes ensuring the enforceability of arbitration agreements in general.[38] These statutes and judicial decisions provide strong authority for enforcing pre-dispute medical malpractice arbitration agreements.[39]

B. Arguments to Avoid Enforcement Rarely Succeed

No one should be surprised that agreements to arbitrate medical malpractice disputes are enforceable.[40] Although Section 2 of the FAA does state that agreements to arbitrate are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract,"[41] and although some commentators assert that courts remain "enraptured" with contract defenses such as unconscionability,[42] it has proven very difficult to escape arbitration clauses asserting contract defenses. Unconscionability arguments may appear particularly promising because pre-dispute mandatory arbitration clauses frequently are found in contracts that are adhesive in nature, yet those arguments rarely are successful.[43] In an effort to protect their citizens, state legislatures may enact legislation expressly limiting the enforceability of pre-dispute arbitration clauses. But, as was the case in *Marmet Health Care v. Brown*, those statutes will be pre-empted because the court likely will be unable to find that the agreements are "unenforceable under state common law principles that are not specific to arbitration."[44]

Attempts to escape medical malpractice arbitration clauses are occasionally successful, however. California courts, for instance, have denied motions to compel arbitration in medical malpractice actions against physicians where waiver or bias has been found despite a valid pre-dispute arbitration agreement.[45] In another situation, where

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action against surgeon); Fleming v. Simper, 158 P.3d 1110 (Utah Ct. App. 2007) (holding that patient did not provide clear and convincing evidence that arbitration judgment was procured through fraud).

[38] Pedroni & Vadi, *supra* note 5, at 56.

[39] *Id*. at 57.

[40] Gilles, *supra* note 3, at 689.

[41] Federal Arbitration Act, 9 U.S.C. § 2 (2016).

[42] Gilles, *supra* note 3, at 689.

[43] *Id.* at 688-89.

[44] Marmet Health Care v. Brown, 132 S. Ct. 1201, 1204 (2012) (disallowing a categorical rule against pre-dispute arbitration agreements).

[45] Law v. Gorny, No. G046953, 2013 WL 1561512, at *6 (Cal. Ct. App. Apr. 15, 2013) (holding that defendant obstetrician waived his contractual right to arbitration by participating in judicial discovery and thus prejudicing plaintiff); Gray v. Chiu, 151 Cal. Rptr. 3d 791, 799 (Cal. Ct. App. 2013) (holding that defendant surgeon's attorney's undisclosed membership in the same alternative dispute resolution firm as

none of the defendant physicians had actually signed the arbitration agreement, the California Court of Appeal refused to order arbitration because the physicians were unable to establish that they were parties to a valid arbitration agreement—there was no signature on the line for "Physician's or Authorized Representative's Signature."[46]

C. Are Wrongful Death Actions Arbitrable?

While the legal authority supporting arbitration of medical malpractice actions is substantial, an important issue concerning medical malpractice and arbitration remains unsettled. In a wrongful death suit, can a plaintiff-survivor be bound by an arbitration agreement signed by the decedent?

In California, the answer is yes. In *Ruiz v. Podolsky,* claimants filed a wrongful death action against the surgeon who treated decedent.[47] Decedent and surgeon had signed an agreement to arbitrate malpractice claims that stated it was the parties' intention to bind all parties, including spouse and heirs, to arbitrate any claim arising out of treatment provided by the surgeon.[48] The California Supreme Court held that the state's Medical Injury Compensation Reform Act allowed patients to bind heirs making wrongful death claims to arbitration agreements.[49] The supreme courts of Florida and Alabama have come to similar conclusions in cases involving wrongful death actions against nursing homes.[50]

The Utah Supreme Court, however, has rejected that position for several different reasons. In *Bybee v. Abdulla,* surviving spouse Lisa Bybee filed a wrongful death action against the physician who had treated her decedent husband Mark for depression.[51] The decedent had signed an agreement to arbitrate all claims arising from the medical care provided by the physician, expressly binding all persons with claims arising out of care provided by the physician to the decedent including any spouse or heirs.[52] The claimant

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arbitrator raised reasonable doubt about arbitrator's impartiality, and directing lower court to vacate arbitration award).

[46] Pelter v. 1-800-GET-THIN, No. B250124, 2014 WL 5449682, at *2 (Cal. Ct. App. Oct. 28, 2014) (holding that defendant physicians had not established that they were parties to the arbitration agreement, and thus upholding denial of petition to compel arbitration).

[47] Ruiz v. Podolsky, 237 P.3d 584, 595 (Cal. 2010) (holding that arbitration agreement between decedent and surgeon bound heirs pursuing a wrongful death action).

[48] *Id.* at 586.

[49] *Ruiz*, 237 P.3d at 584.

[50] Laizure v. Avante at Leesburg, 109 So.3d 752, 762 (Fla. 2013) (holding that arbitration agreement between decedent and nursing home bound estate and heirs in wrongful death action); Briarcliff Nursing Home v. Turcotte, 894 So.2nd 661, 665 (Ala. 2004) (holding that administratrix and executor of an estate "stand in the shoes of the decedent" and have no more power than decedent would have possessed).

[51] Bybee v. Abdulla, 189 P.3d 40, 50 (Utah 2008) (holding that decedent's wife was not bound by arbitration agreement between decedent and physician, and was not required to arbitrate her wrongful death claim).

[52] The agreement stated:

asserted she was not bound by the arbitration agreement between the decedent and the physician. The court recognized a "strong public policy favoring arbitration," but held that this policy was insufficient to bind a non-signatory to an arbitration contract.[53] The Utah Constitution promises that the right to pursue a wrongful death claim cannot be abrogated.[54] Furthermore, Utah law recognizes a wrongful death action as a separate claim, apart from a personal injury claim.[55] Finally, the court held that the decedent's spouse was not a third-party beneficiary of the arbitration clause.[56]

Other state courts have also held that in wrongful death actions related to medical negligence claims against nursing homes, non-signatories cannot be bound to arbitration clauses signed by decedent.[57]

In a very recent case, the United States Court of Appeals for the Sixth Circuit affirmed the district court's denial of a motion to compel arbitration of a wrongful death claim. In *Richmond Health Facilities v. Nichols*, the Sixth Circuit considered a nursing and rehabilitation facility's arbitration agreement that applied to all disputes, including wrongful death, that "binds [decedent] Charles Nichols and all persons with claims through or on behalf of him, including 'any personal representative, responsible party, guardian, executor, administrator, legal representative, agent or heir'."[58] Declaring that the FAA does not alter basic principles of contract law, the court applied Kentucky state contract formation law and held that the wrongful death claim does not derive from any claim on behalf of the decedent and that executrix Adrianne Nichols was not a third party beneficiary of the agreement because the decedent simply had no authority to settle or

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We expressly intend that this Agreement shall bind all persons whose claims for injuries and losses arise out of medical care rendered or which should have been rendered by Physician after the date of this Agreement, including any spouse or heirs of the patient and any children, whether born or unborn at the time of the occurrence giving rise to any claim . . . .

Id. at 42.

[53] *Id.* at 43.

[54] *Id.* at 44-45.

[55] *Id.* at 46.

[56] *Bybee*, 189 P.3d at 49-50.

[57] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 361 (Ill. 2012) (holding that a nonparty to a nursing home arbitration agreement cannot be bound by the agreement in a wrongful death action); Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 600 (Ky. 2012) (holding claimants not bound by decedent's arbitration agreement in wrongful death action against nursing home); Lawrence v. Beverly Manor, 273 S.W.3d 525, 530 (Mo. 2009) (holding that claimants not bound by arbitration agreement between decedent and nursing home in a wrongful death action); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007); Boler v. Sec. Health Care, 336 P.3d 468, 477 (Okla. 2014) (holding that arbitration agreement signed by decedent's attorney in fact not binding on personal representative and heirs in a wrongful death action against nursing home); Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 663 (Pa. Super. Ct. 2013).

[58] Richmond Health Facilities v. Nichols, 811 F.3d 192, 194 (2016).

affect claims that belong to others.[59] The Sixth Circuit Court additionally concluded that the state law was not pre-empted by the FAA under *Concepcion* because it did not categorically prohibit arbitration of all wrongful death claims, but instead held only that beneficiaries are not bound by agreements signed only by the decedent.[60] Furthermore, unlike the California rule in *Concepcion*, the Kentucky rule did not make arbitration more cumbersome, costly, or more procedurally complicated.[61]

III. PURPORTED ADVANTAGES OF MEDICAL MALPRACTICE ARBITRATION

Academic observers have noted the potential benefits of arbitrating medical malpractice disputes for both claimants and physicians.[62] Chief among the advantages cited have been quality of the decision-maker, speed of resolution, and reduced litigation expenses.[63]

A. Qualified Decision Makers

Some writers do not believe lay juries possess the competence to decide medical malpractice cases.[64] By allowing specialist neutrals to decide medical tort cases, some scholars believe results will be more accurate.[65] In addition, qualified decision makers

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[59] *Id.* at 195-97. The court noted that some jurisdictions hold that beneficiaries are bound by decedent's arbitration agreements because under their state law the wrongful death claim is derivative, and some courts require arbitration even if the claim is not derivative. The court provided the following authorities: Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752,762 (Fla. 2013) ("[T]he nature of a wrongful death cause of action in Florida is derivative in the context of determining whether a decedent's estate and heirs are bound by the decedent's agreement to arbitrate."); THI of N.M. at Hobbs Ctr., LLC v. Spradlin, 532 F. App'x. 813, 817-18 (10th Cir. 2013) (holding that, under New Mexico law, a wrongful death claim is a derivative action, and so non-signatory wrongful-death beneficiaries were bound by an arbitration provision). Similarly, other courts have held that a wrongful-death beneficiary was still subject to a decedent's arbitration agreement notwithstanding the independent nature of the claim. *See, e.g.,* Allen v. Pacheco, 71 P.3d. 375, 379 (Colo. 2003) (en banc) (holding that wrongful-death claim was required to be arbitrated under decedent's arbitration agreement even though claim was independent in nature); *see generally Richmond Health Facilities*, 811 F.3d at 196 n.3 (surveying relevant cases); *Ping*, 376 S.W.3d. at 598 (collecting cases).

[60] *Richmond Health Facilities*, 811 F.3d at 198.

[61] *Id.* at 200.

[62] Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration,* 31 WAKE FOREST L. REV. 203, 227 (1996) (summarizing benefits of arbitration for both claimants and physicians in medical malpractice); DeVille, *supra note* 5, at 339-42 (noting the potential benefits of arbitrating medical malpractice disputes, but also noting that these benefits may be more theoretical than real).

[63] Metzloff, *supra* note 62, at 227; DeVille, supra note 5, at 339-42.

[64] Metzloff, *supra* note 62, at 208.

[65] DeVille, *supra* note 5, at 341; Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1021 (1996).

enhance efficiency of dispute resolution by obviating the need to educate a jury about medical practice and science.

These advantages of decisional accuracy and efficiency should work to the advantage of both plaintiffs and defendants. Plaintiffs, however, may reasonably fear bias when decision makers and defendants share the same culture. Will doctors favor doctors? These fears may be overblown, however, as generally physicians do not serve as arbitrators.[66]

In fact, physicians may have more concerns about the biases of neutrals than claimants. The Kaiser Permanente medical malpractice dispute arbitration process is probably more transparent than any other.[67] Under this arbitration system, all arbitrators must be members of the State Bar of California, or retired state or federal judges.[68] One claimed advantage of medical malpractice arbitration is the availability of expert arbitrators, but one quickly can see that medical practitioners are almost completely absent from the list. Although there are more than 350 individuals listed in the Office of the Independent Administrator's "Names of Neutral Arbitrators," only two individuals have the title of "Dr." (which may indicate a medical/health science degree but could represent a Ph.D. in another field).[69] And those two individuals, Drs. Urs Martin Laeuchli and Lawrence J. Rudd, also are attorneys.[70] Given the fact that attorneys are the

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[66] OFFICE OF THE INDEP. ADM'R, QUALIFICATIONS FOR NEUTRAL ARBITRATORS FOR KAISER PERMANENTE'S MANDATORY ARBITRATION SYSTEM (amended Feb. 27, 2014), http://www.oia-kaiserarb.com/pdfs/NA-Qualifications-Amended-02-27-14.pdf (neutral arbitrators must be members of a state bar or retired judges); *Practice: Health Care – Overview*, JAMS, https://www.jamsadr.com/healthcare#overview (when describing neutrals, states that "The JAMS Health Care Practice Group includes retired . . . judges and former litigators") (last visited Aug. 12, 2016); *Qualification Criteria and Responsibilities for Members of the AAA Panel of Healthcare Arbitrators*, AM. ARB. ASS'N, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003875 (last visited Nov. 22, 2015) (neutrals must be healthcare business executives, attorneys, or judges).

[67] An abundance of information about the Kaiser mandatory arbitration process and outcomes are available through its website. OFF. INDEP. ADMIN'R, HTTP://WWW.OIA-KAISERARB.COM/14 (last visited Aug. 15, 2016). Caution is advised in interpreting the data, however. First, the information is aggregated data and includes more than just malpractice arbitration data; in 2014 93% of the arbitrated claims were for malpractice. Second, outcomes are reported for each year, but not for each claim; this may lead to inconsistencies between numerators and denominators when calculating percentages, as claims do not all open and close in the same year. Third, while medical malpractice actions do not always involve claims against physicians, the data as presented does not break down claims against doctors, nurses, pharmacists, etc., separately.

[68] OFFICE OF THE INDEP. ADM'R, *supra* note 66.

[69] *See generally Names of Neutral Arbitrators,* OFF. INDEP. ADMIN'R, http://www.oia-kaiserarb.com/4/neutral-arbitrators/names-of-neutral-arbitrators (last visited Mar. 19, 2016). At this site, each neutral arbitrator is listed by name and title; the only suffixes listed are Esq. and Ret. [Judge] and the only titles are Mr., Ms. Judge, Justice, (one) Honorable, (one) Chief, (one) Professor, and two attorney Drs. *See* OFFICE OF THE INDEP. ADM'R, NORTHERN CALIFORNIA NAS (July 29, 2016), http://www.oia-kaiserarb.com/pdfs/ncalnas.pdf [hereinafter NORTHERN CALIFORNIA NAS]; OFFICE OF THE INDEP. ADM'R, SAN DIEGO CALIFORNIA NAS (July 29, 2016), http://www.oia-kaiserarb.com/pdfs/SDNAS.pdf; OFFICE OF THE INDEP. ADM'R, SOUTHERN CALIFORNIA NAS (July 29, 2016), http://www.oia-kaiserarb.com/pdfs/scalnas.pdf [hereinafter SOUTHERN CALIFORNIA NAS].

[70] *See* NORTHERN CALIFORNIA NAS, *supra* note 69, at 2; SOUTHERN CALIFORNIA NAS, *supra* note 69, at 2.

individuals who initiate almost all the medical malpractice lawsuits against physicians, it does not require a great leap of faith to believe that physicians may not trust, or even like, attorneys. And evidence exists that supports that belief.[71] In light of the often strained and distrustful relationship between physicians and attorneys, no one should be surprised when physicians hesitate to place their professional futures in the hands of a single, or even a panel of three, attorney arbitrator(s).

Physicians actually have good reason to prefer a trial by jury rather than either a trial by a judge or an arbitration before an attorney or a retired judge. Juries find for physicians in nearly eighty percent of cases.[72] There is evidence doctors win malpractice actions only about half as often when judges decide cases compared to when juries decide.[73] A discrepancy this large is actually quite unusual and does not exist for other personal injury litigation.[74] This discrepancy provides confirmation for survey data that juries may be predisposed toward physician defendants in malpractice disputes.[75]

B. Rapid Resolution

Arbitration generally is regarded as more efficient in terms of time than litigation. There is no need to select and educate a jury, for instance. There typically is less conflict over evidence because evidentiary rules usually are much more relaxed. Discovery also is much more limited. As a result of these time-savings, arbitration claimants do not have to wait as long for compensation as they do in litigation, and defendant practitioners do not have to suffer through a lengthy period of uncertainty, self-doubt, and clouded reputation.

An analysis of 1,452 litigated malpractice claims from throughout the United States reveals that the average time from opening the claim to closing it was three years.[76] In sharp contrast, the 604 disputes between Kaiser Permanente and its members that were arbitrated in 2014 were closed on average in less than one year.[77] Thus, rapid resolution

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[71] Peter D. Jacobson, *Mutual Distrust: Mediating the Conflict Between Law and Medicine*, 37 U. MEM. L. REV. 493, 499 (2007) (commenting on antagonism between doctors and lawyers); Andrew Jay McClurg, *Fight Club: Doctors vs. Lawyers—A Peace Plan Grounded in Self-Interest*, 83 TEMP. L. REV. 309, 313 (2011) (documenting antagonism between doctors and lawyers, exploring the roots of this antagonism, and calling for improved relations).

[72] DeVille, *supra* note 5, at 368.

[73] Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1474 (2007) (reviewing jury research in medical malpractice trials).

[74] Peters, Jr., *supra* note 73, at 1474.

[75] *Id.* at 1482-83.

[76] David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2027 (2006) (an analysis of 1452 closed malpractice claims from throughout the United States).

[77] OFFICE OF THE INDEP. ADM'R, ANNUAL REPORT OF THE OFFICE OF THE INDEPENDENT ADMINISTRATOR OF THE KAISER FOUNDATION HEALTH PLAN, INC. MANDATORY ARBITRATION SYSTEM FOR DISPUTES WITH

of claims is a real advantage of arbitration over litigation for both claimants and defendants.

C. Reduced Litigation Expenses

As one would expect, medical malpractice litigation is expensive.[78] In addition to filing fees and attorney's fees common to any litigation, almost all medical malpractice claims require at least one, and often multiple, expert witnesses. Due to the great expense of litigating medical malpractice claims, an aggrieved patient usually needs to retain an attorney willing to pay litigation expenses until settlement. This has three consequences for the patient: (1) the patient is unlikely to find an attorney willing to take even a clear case of malpractice if the damages are small; (2) even if damages are high, and it seems malpractice occurred, an attorney still will not take the case unless the chance of winning justifies the expense of suing; and (3) even if the patient triumphs in court, her award will be substantially reduced after litigation expenses are paid.[79] The fact that plaintiffs must overcome these consequences lends support to the perception that litigation is a more favorable dispute resolution process for medical practitioners than less costly arbitration. The first two points are particularly important and will be further discussed below.[80]

While it is true that arbitrating medical malpractice claims probably is less expensive than litigating those same claims in court, the fact that a case will be heard by an arbitrator does not necessarily solve a claimant's financial problems. Unless the claimant can work out a contingency fee arrangement with an attorney, upfront fees and out of pocket expenses (to pay neutrals, discovery costs, and expert witnesses) may still be quite high for the plaintiff. This can discourage the plaintiff from even initiating a claim in either forum.[81]

As compared to claimants, litigation expenses may be much less of a deterrence for physicians because many, if not almost all, of these expenses likely are covered by

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HEALTH PLAN MEMBERS 26 (2015), http://www.oia-kaiserarb.com/pdfs/2014-Annual-Report.pdf (93% of new cases in 2014 were medical malpractice cases).

[78] Seth Seabury et al., *Defense Costs of Medical Malpractice Claims*, 366 NEW ENG. J. MED. 1354,1355 (2012) (An analysis of 26,853 malpractice claims that closed between 1995 and 2005 showed average costs of defending a claim of $17,130 when no payment was made and $45,070 when a payment was made); Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System,* 67 VAND. L. REV. 151, 185 (2014) (A 2012 online survey of plaintiff's attorneys revealed these average litigation expenses: cases dismissed without payment, $18,062.76; cases settled with payment, $58,275.89; cases resulting in jury verdict for plaintiff, $97,369.79).

[79] A 2012 online survey of plaintiff's attorneys asked about expected damages required to take a case of medical malpractice. Shepherd, *supra* note 78. The median expected damages threshold to take a case with a 95% chance of winning was $250,000. *Id.* at 187-88. For cases with a 51% chance of winning the median threshold was $500,000. *Id.* For cases with a 25% chance of winning the median threshold was $1,000,000. *Id.* This same study revealed average contingent fees of about 35%, and contingent fees greater than 40% in about 8.5% of cases ending in settlement. *Id.* at 184.

[80] *See infra* Part V.D.

[81] *See* DeVille, *supra* note 5, at 370.

malpractice insurance.[82] Although incurred litigation costs may affect future malpractice insurance premiums, the cost saving advantages of arbitration to the physician him or herself, and the benefit that defending an arbitration in lieu of a trial may have for insurance premiums, may be too small to influence a physician's preference for arbitration or litigation.

IV. PATIENTS POTENTIALLY ARE WELL SERVED BY MEDICAL MALPRACTICE ARBITRATION

If the problem of upfront fees and out of pocket expenses can be overcome, then the rapid resolution of disputes and the reduced cost of pursuing a claim should make arbitration an attractive option for the health care consumer. The Kaiser Permanente arbitration system solves the problem of neutral fees by paying all of these costs for the claimant if the claimant agrees to waive its party arbitrator.[83] In 2014, Kaiser paid the neutral arbitrator fee in ninety percent of cases.[84] Kaiser will also waive the $150 Arbitration Filing Fee in cases of hardship; in 2014 the Office of the Independent Arbitrator granted a waiver for fifty of the fifty-three requests.[85]

V. PHYSICIANS ARE NOT WELL SERVED BY MEDICAL MALPRACTICE ARBITRATION

In almost every medical malpractice claim, there are at least two parties with an interest in a finding of non-negligence: the insurer and the physician. The motivations of these parties are not the same, however. On the one hand, the insurer wants to keep the total cost (cost of litigation plus awarded damages) of the suit as low as possible. On the other hand, the physician is less concerned with the cost of the suit, which in most cases

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[82] David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L REV. 1085, 1127 n.140 (2006) (reporting that "insured providers contribute personal assets to judgments or settlements" in less than one percent of cases).

[83] Disputes in the Kaiser system seeking damages of $200,000 or less are heard by one arbitrator, unless the parties agree that the dispute will be heard by one neutral arbitrator and two party arbitrators. OFFICE OF THE INDEP. ADM'R, RULES FOR KAISER PERMANENTE MEMBER ARBITRATIONS 4 (amended Jan. 1, 2016), http://www.oia-kaiserarb.com/pdfs/Rules.pdf. Disputes seeking more than $200,000 are heard by one neutral arbitrator and two party arbitrators. *Id.* However, Kaiser will pay all neutral fees in a dispute seeking damages of $200,000 or less if the claimant waives any present or future claims based on Kaiser's payment of neutral fees. *See id.* at 4-5. In the case of claims exceeding $200,000, Kaiser will be pay all neutral fees if the claimant agrees to a hearing by one arbitrator, and waives any present or future claims based on Kaiser's payment of neutral fees. *Id. See generally Explanation of Waivers*, OFF. INDEP. ADM'R, http://www.oia-kaiserarb.com/45/forms/forms-for-parties/explanation-of-waivers (last visited Nov. 22, 2015).

[84] OFFICE OF THE INDEP. ADM'R, *supra* note 77.

[85] *Id*. at 34.

is entirely covered by the insurer.[86] Instead, the physician is apprehensive about maintaining both a self-image and a reputation of competence.

Physicians are aware they likely will be sued at some point in their careers. A recent study estimated that physicians in high litigation risk specialties (e.g., neurosurgery, general surgery) faced a ninety-nine percent probability of being sued for malpractice by age sixty-five; physicians in low litigation risk specialties (e.g., nephrology, psychiatry) faced a seventy-five percent chance of being sued by age sixty-five.[87]

Given these odds, physicians take the risk of a malpractice suit seriously. So long as physicians have a significant voice in determining the forum where malpractice claims will be heard, they will have to be convinced that the forum will protect not just the economic interests of the insurer and physician, but also the intangible self-image and reputation interests of the physician.

Physicians worry that arbitration will not adequately protect their intangible interests.[88] Physicians seek to be held blameless, and arbitration is perceived as too prone to compromise.[89] Some writers acknowledge this point of view, but do not consider it reasonable in the context of modern arbitration which protects against trivial claims.[90] But even if it is true that arbitration reduces unworthy claims, a physician's intangible interests are no less threatened by nontrivial claims.

A. Arbitration Perceived as Prone to Compromise

Empirical evidence that arbitration is a forum prone to compromise is scant.[91] In this regard, however, perception can be more important than reality. Large numbers of corporate counsel believe arbitration leads to compromise awards.[92] The California

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[86] Hyman & Silver, *supra* note 82, at 1126-27 (explaining that a malpractice insurer sometimes needs the consent of the defendant to settle, that defendants are almost always shielded from the cost of settlement, and that defendants are concerned about the "reputational" and "reporting" effects of a settlement).

[87] Anupam B. Jena et al., *Malpractice Risk According to Physician Specialty*, 365 NEW ENG. J. MED. 629, 632-33 (2011) (analyzing the database of a large national malpractice insurer to determine risk of a claim, and the percentage of claims resulting in payment to the plaintiff).

[88] Metzolff, *supra* note 62, at 220 (arguing that arbitration is perceived by physicians as too prone to compromise).

[89] Metzolff, *supra* note 62, at 220

[90] Gilles, *supra* note 3, at 682-83.

[91] Carter Greenbaum, *Putting the Baby to Rest: Dispelling a Common Arbitration Myth*, 26 AM. REV. INT'L ARB. 101 (2015) (reviewing empirical evidence that arbitration tends toward compromise decisions and reporting original data).

[92] DOUGLAS SHONTZ ET AL, RAND INST. FOR CIVIL JUSTICE., BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL 11 (2011) (reporting that of 121 corporate counsel who responded to an internet survey, 71% believed that arbitrators tended to "split the baby"); Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 53 (2014) (reporting

Supreme Court has acknowledged the perception that arbitration is more likely to produce a compromise decision.[93] Judge Richard Posner has commented on "the splitting-the-difference character of arbitration."[94]

A rational physician, believing that she practices quality medicine, may desire her day in court, a forum seen as less prone to compromise. The feeling is that litigation is where strong cases are vindicated. And this feeling is reinforced by the success rates physicians have achieved when malpractice cases are decided by juries. Physicians' preference for litigation is consistent with a touted corporate strategy: "[A] company that believes it has a strong legal and factual position may want to avoid arbitration, with its tendency to 'split the difference,' in favor of a judicial forum where it may be more likely to win a clear-cut victory."[95]

B. Intangible Concerns

1. Self-Image

A doctor sued for malpractice suffers emotionally and can interpret the lawsuit as a personal attack.[96] Some scholars have hypothesized that the defendant physician's self-esteem is the dominant nonmonetary concern in a malpractice action.[97] To defend herself from what she perceives as an unwarranted attack on her competence, and to protect her self-image, a physician seeks complete vindication. Complete vindication cannot be found in a forum prone to compromise.

2. Reputational Concerns

a. Name Clearing

It certainly is true that some physicians value the "name clearing" function of the

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that 42-47% of corporate attorneys indicated that they had not used arbitration in certain cases because it "results in compromised outcomes").

[93] Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 693 (Cal. 2000) (discussing discovery and adherence to the law as advantages of courtroom litigation over arbitration).

[94] Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U.L. REV. 1259, 1261 (2005).

[95] Corp. Counsel Section of the N.Y. State Bar Ass'n, *Report on Cost-Effective Management of Corporate Litigation*, 59 ALB. L. REV. 263, 272 (1995). *See also Armendariz*, 6 P.3d at 693.

[96] McClurg, *supra* note 71, at 348.

[97] Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 365 (1991) (analyzing 529 civil jury trials in California).

judicial process.[98] When physicians are accused of negligence, they want their day in court and the court's public declaration that the care they provided met or exceeded professional standards. This interest is similar to the physician's self-image concern, but here the desire is for external vindication rather than internal vindication. Just as with self-image concerns, arbitration is seen as a forum friendly to compromise.[99] And a compromise award does not completely vindicate the physician's action, but rather does the opposite—it is a declaration that the physician did something wrong.

It can be argued that because arbitration is private and typically confidential, no one will know a physician has been named in a malpractice action. Therefore, name clearing will be unnecessary.

It is impossible, however, for a physician to keep malpractice actions entirely private. At a minimum, as further explained below, malpractice actions that are open at the time of credentialing or re-credentialing will be known to hospital re-credentialing staff personnel, the hospital credentialing committee, the hospital executive committee, and the hospital board of directors.[100] Any money paid on behalf of the physician as a result of a settlement, judgment, or arbitration award will be known to these same staff and committee members, and also must be reported to the state medical board in many states as well as the National Practitioner Data Bank.[101] The existence and nature of these regulatory requirements, of course, provide an example of how politics can influence the desirability of arbitration.

In addition, medical insurance staff will know of the suit, as will attorneys involved in the case. Expert witnesses will know of the suit. Finally, close family members will know of the malpractice action. With the accusation of negligence known to so many, the name clearing function of litigation remains an important consideration.

b. Hospital Credentialing and State Licensing

When applying for hospital privileges, a physician must usually report any history of malpractice claims.[102] Jury verdicts and settlements are considered "red flags," and

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[98] *Id.* Kent D. Syverud, *The Duty to Settle,* 76 VA. L. REV. 1113, 1173-74 (1990).

[99] Metzoloff, *supra* note 62, at 220.

[100] In a typical process, hospital credentialing staff collect all credentialing data and present it to the hospital credentialing committee; the credentialing committee reviews the physician file and makes a recommendation regarding credentialing to the executive committee; the executive committee approves or rejects the recommendation and forwards their decision to the hospital board of directors; and the board makes the final decision to grant or deny hospital privileges. EDWARD E. HOLLOWELL & JENNIFER L. SMITH, AMERICAN COLLEGE OF LEGAL MEDICINE, PART II BUSINESS ASPECTS OF MEDICAL PRACTICE, CHAPTER 11 COPROVIDERS AND INSTITUTIONAL PRACTICE 99 (2007), http://www.ablminc.org/model_curriculum_lmme_2010/book_legal%20medicine-7th_2007/ch11-coproviders%20&%20institutional%20practice.pdf (last visited Sept. 25, 2016).

[101] *See infra* Parts V.B.2.b., V.B.2.c.

[102] NATIONAL ASSOCIATION MEDICAL STAFF SERVICES, THE IDEAL CREDENTIALING STANDARDS: BEST PRACTICE CRITERIA AND PROTOCOL FOR HOSPITALS (Feb. 2014), http://www.namss.org/Portals

result in greater scrutiny of the application.[103] In addition, physicians generally must undergo a re-credentialing process every two years at all hospitals where they hold privileges.[104] Physicians must update their files with a report of all malpractice claims paid since they were last credentialed. These settlements, judgments, and arbitration awards must be explained. So physicians obviously will be worried that any payment will make it more difficult to obtain or retain hospital privileges.

In addition, some states require malpractice settlements and awards be reported to the state board of medical practice.[105] A report of malpractice can trigger an investigation and discipline by the licensing board. Thus, because of the rules and politics of hospital credentialing and state licensing, any money paid as a result of a malpractice claim will be perceived as career threatening.

c. National Practitioner Data Bank

Physicians have a powerful interest in not being listed in the National Practitioner Data Bank (NPDB). Although the enabling legislation for the NPDB, the Health Care Quality Improvement Act of 1986 (HCQIA) was passed by Congress four years earlier,[106] the NPDB did not begin collecting reports on medical malpractice payments or adverse licensure, clinical privileges, and professional society membership actions taken against practitioners until September 1, 1990.[107] Among other provisions, it requires that all payments in satisfaction of a medical malpractice claim be reported to the NPDB.[108]

/0/Regulatory/NAMSS%20Roundtable%20Credentialing%20Best%20Practice%20Criteria%20White%20Paper.pdf.

[103] *Id.*

[104] THE JOINT COMM'N, CREDENTIALING STANDARD (2011), http://www.jointcommission.org/assets/1/18/20110705_LTC_Credentialing.pdf.

[105] *Compare* MED. BD. OF CAL., MEDICAL BOARD OF CALIFORNIA LICENSING PROGRAM APPLICATION (rev. 2013), http://www.mbc.ca.gov/Forms/Applicants/US-Canada/us-application_forms_l1a-l1f.pdf (requires reporting of any "claim or action" filed against the applicant that resulted in a malpractice settlement, and also any "judgment or arbitration" awarded in the amount of $30,000 or more), *with* MINN. BD. OF MED. PRACTICE, MALPRACTICE HISTORY REPORT (2014), https://mn.gov/boards/assets/Malpractice_History_Report_2006a.pdf_tcm21-36592.pdf (requires reporting of "any medical malpractice settlement or award relating to the quality of medical treatment"), *and Medical Malpractice Questions 2012 Physician License Renewal Application*, VT. MED. SOCT'Y http://www.vtmd.org/medical-malpractice-questions-2012-physician-license-renewal-application (last visited Nov. 23, 2015) (Vermont Board of Medical Practice requires reporting "about pending claims and claims that resulted in court judgments, arbitration awards or settlements").

[106] Health Care Quality Improvement Act of 1986, Pub. L. No. 99-660, tit. IV, 100 Stat. 3784 (codified at 42 U.S.C. ch. 117 (2016)).

[107] *NPDB Timeline*, NAT'L PRACTITIONER DATA BANK, http://www.npdb.hrsa.gov/topNavigation/timeline.jsp (last visited March 24, 2016).

[108] 42 U.S.C.A § 11131 (West 2015).

This requirement includes arbitration awards.[109] Furthermore, it requires that all hospitals access this information when first credentialing a physician, and at least every two years afterwards, so long as the physician remains on the hospital staff.[110] A hospital that does not request this information as required is presumed to have knowledge of the information in any medical malpractice action.[111] The NPDB can also be accessed by insurers and used to inform decision-making about whether to include a physician in a provider network.[112] Professor Van Tassel has likened listing in the NPDB to being "blacklisted."[113]

To avoid the potentially devastating consequences of mandatory reporting, it is believed that many physicians are willing to settle only the strongest cases against them.[114] In all other cases, the physician has a strong incentive to litigate.[115] And again, one can see the effect that politics, albeit commendatory and even essential, can have on the attractiveness of arbitration.

C. Privacy

Privacy often is listed as one of the advantages of arbitration. For the healthcare provider, however, this purported benefit is often illusory. As explained above, any damages paid to a claimant will be known to some hospital personnel and must be reported during credentialing or re-credentialing. Those payments also must be reported to the NPDB. In regard to these disclosures, which have significant consequences for physicians, arbitration is no more private than a trial.

And even though medical malpractice trials take place in an open courtroom, these trials, generally, are not widely publicized.[116] Thus, the promised privacy benefit of arbitration over a trial may not be compelling for a physician. Any small privacy advantage that arbitration may offer is heavily outweighed by the self-image and name clearing advantages of courtroom litigation, as described above.

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[109] Nevers, *supra* note 5, at 73 (summarizing information regarding the NPDB as a potential disincentive for physicians to arbitrate).

[110] 42 U.S.C.A. § 11135(a).

[111] 42 U.S.C.A. § 11135(b).

[112] Nevers, *supra* note 5, at 73.

[113] Katharine A. Van Tassel, *Blacklisted: The Constitutionality of the Federal System For Publishing Reports of "Bad" Doctors in the National Practitioner Data Bank*, 33 CARDOZO L. REV. 2031 (2012) (focusing on the career impairing results of listing on the NPDB after an adverse peer review; the same negative consequences can follow listing for a malpractice settlement, and it is likely physicians fear NPDB listing for any cause).

[114] Metzloff, *supra* note 62, at 220.

[115] *Id.* at 205-206; Haavi Morreim, *Malpractice, Mediation, and Moral Hazard: The Virtues of Dodging the Data Bank*, 27 OHIO ST. J. ON DISP. RESOL. 109 (2012) (arguing that the NPDB makes early dispute resolution unattractive to physicians).

[116] Gross & Syverud, *supra* note 97, at 365.

D. Physicians Fare Well in Medical Malpractice Litigation

Medical malpractice plaintiffs face daunting challenges. First, a potential litigant must find an attorney to take her case. Without an attorney, a plaintiff has virtually no chance of winning a medical malpractice trial.[117] In arbitration, however, an aggrieved patient can pursue a claim without a lawyer. For example, in 2014 twenty-five percent of claimants in the Kaiser system proceeded *pro se*.[118]

Because it is expensive to bring a medical malpractice claim, plaintiffs' attorneys turn down many cases. Malpractice attorneys, typically proceeding under a contingent fee arrangement, decline to take at least eighty percent of the cases offered to them.[119] A plaintiff's attorney may not take a case because she estimates the chances of winning are too low, or because damages recovered will be too small to justify the expense of pursuing the claim.[120] The reality is that small claims against physicians simply are not litigated,[121] and most potential claims against physicians are small.[122] Because arbitration may remove, or at least reduce, barriers to asserting small claims, physicians may reasonably fear that arbitration will increase the number of claims they will have to defend.

As mentioned earlier, there is evidence that physicians currently enjoy a pro-defendant bias in medical malpractice litigation.[123] Professor Peters reviewed a large amount of empiric data concerning jury accuracy and bias in medical malpractice trials.[124] He found that juries decided for plaintiffs in ten to twenty percent of cases where independent reviewers did not find evidence of negligence.[125] An erroneous finding of negligence in up to twenty percent of jury trials is a disturbing statistic for physicians to contemplate. At the other end of the spectrum, however, in those cases where independent reviewers thought there very likely was negligence, plaintiffs won only about fifty percent of the cases.[126] Furthermore, juries find for plaintiffs in medical

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[117] Hyman & Silver, *supra* note 82, at 1117.

[118] OFFICE OF THE INDEP. ADM'R, *supra* note 77.

[119] Hyman & Silver, *supra* note 82, at 1102 (reviewing the "sorting function" of medical malpractice claimant's attorneys).

[120] Hyman & Silver, *supra* note 82, at 1115 (explaining that the expected value of a claim is equal to the expected recovery "discounted by the probability of obtaining it").

[121] *Id*. at 1118 (contrasting the likelihood of bringing a small claim for medical malpractice with the likelihood of bringing a similar-sized claim for an auto accident).

[122] *Id*. at 1114 (reviewing data from two studies).

[123] *See supra* notes 72-75 and accompanying text.

[124] Peters, *supra* note 73, at 1454.

[125] *Id*. at 1492.

[126] *Id.* at 1492.

malpractice cases only about half as often as judges do.[127] Summarizing the data, Professor Peters believes that physicians have a genuine advantage in jury trials.[128] To make the case in favor of litigation even stronger, defendants in medical malpractice trials fare at least as well, and perhaps better, on appeal than do plaintiffs.[129] A physician's ability to even attempt to vacate an unfavorable arbitration award, in contrast, is much more limited than his or her opportunity to appeal an unfavorable trial judgment.[130]

VI. CURRENT AND FUTURE STATUS OF MEDICAL MALPRACTICE ARBITRATION

A. Current Status

The use of arbitration to settle medical malpractice claims appears to be extremely uncommon in some states, but arbitration is used in other jurisdictions. Nowhere, however, is it typical to resolve medical malpractice claims by arbitration.[131] One putative advantage of arbitration is that it is private. As discussed above, this advantage may be more illusory than real, but it does make it extremely difficult to know how arbitration actually functions in medical malpractice cases.

The best window on medical arbitration, as it is actually practiced in the United States, is provided by the Kaiser Permanente Health Plan. In California, all Kaiser Permanente enrollees must sign an agreement to arbitrate, among other things, claims of medical malpractice by any Kaiser doctor.[132] Kaiser provides a wealth of current and historical information about its arbitration process.[133] It is impossible to say if the Kaiser

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[127] *Id*. at 1474 (This is in contrast to most other forms of civil litigation, where there are similar outcomes between jury and bench trials.).

[128] *Id*. at 1493 (hypothesizing that this advantage is most likely the result of one or more of three factors: jury distrust of malpractice claimants; more skilled and persuasive defense attorneys and experts; and scrupulous adherence to the burden of proof, where juries find for the defendant when testimony for both parties is believable).

[129] In a study of appealed state court decisions, including both bench and jury trials, defendants in medical malpractice actions achieved reversal or remand in 33.3% of cases, as compared to 23.9% of cases for plaintiffs. Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 134 (2009) This difference was not significantly different, but when all civil actions were considered, defendants were successful in 41.5% of cases, whereas plaintiffs were successful in only 21.5%, a difference that was statistically significant. *Id.*

[130] Federal Arbitration Act § 10, 9 U.S.C. § 10 (2016).

[131] *See generally* Schwartz, *supra* note 3.

[132] Shieh, *supra* note 35, at 1826 (reviewing the evolution and current state of medical malpractice arbitration at Kaiser Permanente).

[133] The Office of the Independent Administrator, which oversees arbitrations between Kaiser and its members, provides information about Kaiser arbitration rules, forms, arbitrators, annual reports dating back to 1999, and the 1998 Blue Ribbon Report, which was prompted by *Engalla v. Permanente Medical Group,*

arbitration process is typical of medical malpractice arbitration, as every contract between provider and patient will be different. Nevertheless, Kaiser participates in hundreds of malpractice arbitrations every year and provides detailed summary data of these proceedings.

The Office of the Independent Administrator for the Kaiser mandatory arbitration process reports that in 2014 there were 630 demands for arbitration.[134] Of these, 588 were demands for arbitration of medical malpractice claims.[135] If the claimant would agree to use only a neutral arbitrator, then Kaiser paid all arbitrator fees. In 2014 Kaiser paid these fees in ninety percent of the cases.[136]

In twenty-five percent of the cases, the claimant proceeded *pro se.*[137] Although one of the advantages of arbitration for plaintiffs is that it is at least possible to proceed *pro se* in arbitration (whereas it is almost impossible in litigation), in this small sample *pro se* claimants did not fare well. Claimants were *pro se* in only three of the fifty-six cases decided after a hearing, and the claimant won only one of those cases.[138] In cases that settled before a hearing, the claimant was *pro se* in only nine percent.[139]

Fifty-six cases were fully arbitrated in 2014.[140] Of these, Kaiser prevailed in sixty-eight percent and the claimant prevailed in thirty-two percent.[141] In the eighteen cases that resulted in awards to the claimant, those awards ranged from $7,000 to $2,181,375 (median award $250,000 and average award $597,342).[142] In addition to the fully arbitrated claims, forty-six percent of claims were settled before a final judgment.[143]

It is difficult to make a direct comparison between these cases and cases that are litigated. It may be easier for *pro se* plaintiffs to proceed in arbitration, for instance, but at least in this system they did not experience much success. The poor results for the claimants in the twenty-five percent of cases pursued *pro se* might have occurred because they were weak cases, and the claimants were *pro se* because no attorney would take such a weak case. Alternatively, the cases might have been reasonable, but the *pro se*

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938 P.2d 903 (Cal. 1997), a California Supreme Court decision critical of Kaiser's former arbitration process. *See generally* OFF. INDEP. ADMIN'R, *supra* note 67.

[134] OFFICE OF THE INDEP. ADM'R, *supra* note 77, at ix.

[135] *Id.* at 12 (other claims were for other torts, premises liability, benefits disputes, and liens).

[136] OFFICE OF THE INDEP. ADM'R, *supra* note 77, at viii.

[137] *Id.*

[138] *Id.* at 30.

[139] *Id.* at 28.

[140] *Id.* at 28-30 (46% of all cases resulted in settlement, 24% in claimant withdrawal, 4% in abandonment by the claimant, 3% in dismissal by the arbitrator, 13% in summary judgment, and 9% in a post-hearing decision).

[141] OFFICE OF THE INDEP. ADM'R, *supra* note 77, at 30.

[142] *Id.*

[143] *Id.* at 28 (reporting that settlements represented forty-six percent of closures).

claimants may have been very ineffective representing themselves. One should note that not all of the cases involved medical malpractice claims: Only ninety-three percent of the Kaiser claims were for medical malpractice.[144] Furthermore, all of these cases were from one region of the United States, so comparisons with national data might be misleading.

Keeping these caveats in mind, the Kaiser outcomes nonetheless do seem consistent with those obtained through litigation. One study indicated plaintiffs receive a monetary settlement in fifty-six percent of malpractice actions in litigation.[145] Plaintiffs win 26.8 percent of medical malpractice cases that are decided at trial.[146] The cases that proceeded to an arbitration hearing were settled much faster than those that proceed to a judgment in court.[147]

Looking at the arbitral awards obtained through the Kaiser data, one might suspect the physicians' fear of arbitration is misplaced. But the sample is so small that it is impossible to draw any reliable conclusions. Obviously more empirical evidence would be extremely helpful, but it typically is unavailable. While these results do raise the possibility that physicians will not fair as badly in arbitration as they believe, the arbitral awards still were not as favorable for physicians as the outcomes in jury trials.

B. The Future

Although pre-dispute arbitration agreements to decide malpractice claims against physicians are not commonly used in states such as Minnesota, for instance, this situation certainly could change.[148] Litigation may become somewhat more favorable for claimants, and correspondingly less for physicians, as legislatures and courts adjust the balance of power in medical malpractice suits.[149] For instance, a new opportunity for plaintiffs was created when the Minnesota Supreme Court recently adopted the loss of chance doctrine for medical malpractice,[150] a doctrine that is not unique to Minnesota.

And as noted earlier, the United States Supreme Court continues to uphold arbitration agreements that are particularly helpful for defendants.[151] If statutes are

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[144] *Id.* at 11.

[145] Shepherd, *supra* note 78, at 183 (reporting results of a 2012 online survey of 464 plaintiff's attorneys).

[146] Eisenberg & Heise, *supra* note 129, at 137 (citing United States Department of Justice statistics).

[147] *See supra* Part III.B.

[148] *See* Carol A. Crocca, *Arbitration of Medical Malpractice Claims*, 24 A.L.R. 5TH 1 (1994) (citing no Minnesota cases in Table of Cases); Pedroni & Vadi, *supra* note 5, at 58. Search of the WestlawNext database on October 3, 2015 revealed no cases decided by Minnesota state courts or Minnesota cases decided by United States federal courts. Search terms were "arbitration" and "medical malpractice," limited to "Minnesota" and without date limitation.

[149] Gilles, *supra* note 3, at 690-94.

[150] Dickhoff v. Green, 836 N.W.2d 321 (Minn. 2013) (holding that a loss of chance claim is cognizable in Minnesota; this doctrine allows a plaintiff to recover damages if her chance of recovery or survival was substantially reduced, even if her chance was less than fifty percent at the outset).

[151] *See supra* Part II.A.

enacted and court rules adopted that make courtrooms less hospitable to physicians, data is collected that shows that physicians do not lose more frequently or suffer larger damage awards in arbitration than in court (including jury trials), and the pro-arbitration judicial opinions currently being written continue, then more pre-dispute medical malpractice arbitration agreements likely will be written. Those are some big "ifs," however.

Given the potentially severe consequences, physicians understandably are very concerned about malpractice claims. At least for the time being, they are more comfortable with judicial processes than they are with arbitration. The comparative costs inherent in each of these two dispute resolution processes are not likely to sway physician preference for the courthouse over arbitration. Physicians are more concerned about the implications for licensing and accreditation (our political environment), as well as for self-image and reputation, whenever any dollar amount is paid in settlement. And regardless of whether it is correct or not, the belief persists that a compromise award resulting in at least some payment is more likely in arbitration than the courtroom.

Of course, prediction is hard, especially about the future.[152] This analysis would change dramatically if some form of the Arbitration Fairness Act was signed into law. This Act, as proposed in 2015,[153] would prohibit binding pre-dispute arbitration agreements involving consumers. Medical malpractice arbitration may become even more unlikely. While a binding post-dispute arbitration agreement still would be possible, physicians probably would not choose this option unless it was perceived as offering a more favorable forum for vindication than litigation.

One increasingly common employment arrangement may result in more medical malpractice arbitration. The percentage of physicians in independent practice has been decreasing for years.[154] As doctors shift from being independent professionals to employees of Health Maintenance Organizations (HMOs) and hospitals, they may have to agree as a condition of employment that both they, and their patients (who will agree to a similar contract clause), will resolve medical malpractice claims in arbitration. But although business entities may be more persuaded than doctors to choose arbitration because of its lower costs, so long as it is significantly more likely that a medical malpractice claim can be successfully defended before a jury rather than an arbitrator, these employers still may prefer the courtroom to defend malpractice claims. The businesses instead may limit their pre-dispute arbitration agreements to the doctors' own employment related problems.

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[152] The provenance of this expression is unknown. It has been attributed to Yogi Berra and Niels Bohr, among others. However, it first appeared in print in 1948, and was said to be a pun heard in the Danish parliament. *It's Difficult to Make Predictions, Especially About the Future*, QUOTE INVESTIGATOR (Oct. 20, 2013), http://quoteinvestigator.com/2013/10/20/no-predict/.

[153] Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015).

[154] Stephen L. Isaacs et al., *The Independent Physician—Going, Going . . .,* 360 NEW ENG. J. MED. 655 (2009).

VII. CONCLUSION

Benefiting from the Federal Arbitration Act and favorable Supreme Court jurisprudence, pre-dispute arbitration agreements have become the norm in American life. Even businesses in the medical field such as nursing homes, for example, have accepted pre-dispute arbitration agreements as a strategy to control the costs of negligence actions. Physicians, however, have not embraced arbitration as a means of resolving malpractice disputes.

There are several reasons for this anomaly. First, two of the advertised advantages of arbitration over litigation—qualified decision makers and lower expenses than litigation —may not resonate with physicians. Doctors would rather entrust their fate to a jury of laypersons than a panel of attorneys and retired judges, and doctors are shielded from the cost of litigation by insurance.

When a physician is accused of malpractice, her overarching concerns are likely to be internal self-image and external reputation, not economic considerations. The doctor wants to vindicate her own competence, clear her name, avoid having to declare a malpractice settlement when credentialing, steer clear of any licensing complications a malpractice settlement might create and, above all, keep her name out of the National Practitioner Data Base. The reporting requirements, and the way that these requirements discourage physicians from choosing arbitration, is an example of how politics have affected medical malpractice arbitration. These very real concerns often are threatened as much by a small monetary settlement as by a large settlement. The danger is in the settlement, not the amount.

Doctors will choose the forum that provides the best opportunity for total vindication. Under current conditions, that forum is the courtroom. In the courtroom the physician is protected by the full array of procedural safeguards, can fully utilize depositions and discovery, and, importantly, can explain her action to a sympathetic jury. In contrast, arbitration is viewed as a process prone to undesired compromise.

One development could make pre-dispute binding medical malpractice arbitration agreements more common. Judicial or legislative initiatives might make litigation less favorable for physicians. This could tip the balance toward arbitration. At present, however, the unique concerns of physicians make even pre-dispute binding arbitration unattractive compared to litigation.