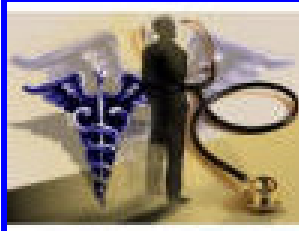


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Health -E- News

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SECTION NEWS

Meet Caroline Blankenship, New Board Member.

Caroline Blankenship's background includes over twenty years experience in health care operations, policy and planning. She earned an MBA in Finance from University of New Mexico's Anderson Graduate School of Management. Following this, she was the co-recipient of a W.K. Kellogg Foundation fellowship that supported her study of Medicaid Managed Care in New Mexico. Her work in policy and planning included clients such as the New Mexico Primary Care Association, New Mexico Department of Health, and Southwest Communication Resources.

Caroline received her law degree from the University of New Mexico School of Law where she was named Health Law Scholar, participated on the National Moot Court team, and was awarded Honors in Clinical Law. Her paper, "ERISA and State Regulation of Health Care" received an American Bar Association writing award, thesis honors, and the UNM Alumni Award for Excellence in Legal Research and Writing. She is a member of the American Bar Association, the New Mexico Bar Association Health Law Sections and the American Health Lawyers Association.

Caroline's primary practice areas at Miller Stratvert, P.A. includes health law and civil defense litigation. She lives in Cedar Crest with her husband, Dale and two dogs, Woodrow and Laura Darling.

2007 HEALTH LAW SYMPOSIUM: COPING WITH CATASTROPHIC ILLNESS - LEGAL & MEDICAL ISSUES FACING PATIENTS, PROVIDERS AND EMPLOYERS OCTOBER 18, 2007 STATE BAR CENTER.

Mark Your calendars Now! The keynote speaker will be a high ranking representative from the UNM Cancer Center. Lish Whitson, a patient advocate attorney from Seattle, Washington will provide advice on representing patients with catastrophic illness. Professor Eugene Volokh, a professor at the UCLA Law School who will speak on Medical Self-Defense, Experimental Therapies and Organ Sales. Ruth Siegel, Esq., will address em-

ployment aspects of catastrophic illness. Chris Joseph, with Survivors of Cancer Legal Services "SCALES," and Anita Miller, Esq. will discuss the SCALES program. George Koinis, the section's current Chair, will host and conduct a wrap up session.

NATIONAL NEWS

Peer Review Documents Now Admissible in Discrimination Actions in Eleventh Circuit

The Eleventh Circuit recently joined the Fourth and Seventh Circuits in holding that in federal discrimination actions state privilege rules will not prevent discovery of physician peer review documents. The case before the Eleventh Circuit involved a Georgia surgeon who claimed that he was denied hospital privileges because of his race. At trial, the surgeon had attempted to use hospital peer review records to prove that the hospital's peer reviewers had subjected his performance to an unusual and unfair level of scrutiny because of his race, and, based on that unfair scrutiny, had terminated his privileges. The hospital objected to the proof citing a state shield on revelation of peer review documentation. The Eleventh Circuit observed that the state peer review statutes sought to balance the need for candor in peer review discussions with the needs of the plaintiffs in a malpractice suit. However, the Court determined that, when balanced against the need for full disclosure in a discrimination action, peer review privilege did not have sufficient weight. The Court therefore overturned the district court action, vacated the summary judgment, and allowed the parties to engage in further discovery.

Source: [11th Circuit: Interests in Federal Civil Rights Cases Trump Hospitals' Shield Against Disclosure](#), Fulton County Daily Report

[Editor's Note: This issue remains undecided in the 10th Circuit. The following decisions in the 10th Circuit have declined to recognize a federal common law peer review privilege:

- *Sonnino v. Univ. of Kan. Hosp. Auth.*, 221 F.R.D. 661 (D. Kan. 2004) (Title VII gender discrimination claims)
- *Cohlmia v. Ardent Health Svcs., LLC*, 448 F.Supp.2d 1253 (N.D. Okla. 2006) (antitrust claims).
- *Aramburu v. Boeing Corp.*, 885 F.Supp. 1434 (D. Kan. 1995) (Title VII, Americans with Disabilities Act)

The U.S. Supreme Court also was "disinclined" to recognize the common law peer review privilege for universities when Congress did not see fit to include it in Title VII. *Univ. of PA. v. EEOC*, 593 U.S. 182 (1990) (holding that common law peer review privilege would not protect peer review materials from disclosure in university professor's Title VII race and sex discrimination claim against university).

If any members of the Health Law Section are aware of new decisions in the state or federal court that address peer review privilege or confidentiality, please forward them to the Editor.

The Tenth Circuit does recognize the privilege in medical malpractice cases, as long as the materials fall within the protection of a state peer review statute. *Nalder v. W. Park Hosp.*, 254 F.3d 1168 (10th Cir. 2001).

The Editor thanks **Katherine J. Gibson** of Bannerman & Williams for assistance in preparing this Editor's Comment].

Stark Whole Hospital Exception in the Crosshairs Again?

A revised version of The Children's Health and Medicare Protection Act of 2007 just emerged from the House Ways and Means Committee with an amendment introduced by Representative Pete Stark. Along with authorizing State Children's Health Program (S-CHIP) funds and eliminating the scheduled reductions to the physician fee schedule for 2008 and 2009, the bill amends the Stark whole hospital exception. More specifically, the section-by-section analysis states:

Sec. 651. Limitation on exception to the prohibition on certain physician referrals to hospitals. Eliminates the whole hospital exception so that physicians cannot self refer to hospitals in which they have ownership. Applies to all hospitals—not just specialty hospitals. Grandfathers hospitals that were in operation with Medicare provider agreements as of the date of introduction of the bill [July 24, 2007]. Requires grandfathered hospitals to meet standards within 18 months of enactment that include: preventing growth, requiring disclosure of ownership, limiting physician ownership to an aggregate of no more than 40% of the facility and no more than 2% individually, and disclosing to patients if they fail to have 24 hour physician coverage.

If enacted into law, this provision would significantly restrict physician ownership of hospitals and require the restructuring of many existing entities. Representative Stark chose to attach this whole hospital exception amendment to a bill that has strong support in Congress. To continue federal funding of S-CHIP, the bill must pass by September 30. Notably, the language amending the Stark whole hospital exception is not included in the Senate version of this legislation. The fate of the whole hospital amendment will likely be decided in the Conference Committee.

Access the [full text of Bill](#).

[Editor Comments: This was an AHLA Alert prepared by Robert G. Homchick, Esquire (Davis Wright Tremaine, Seattle, WA)]

ARBITRATION OF HEALTH RELATED-ISSUES.

By John Bannerman

*[Editors Comment: This is a portion of a paper prepared by the author for the Health Law Section at the 2007 Annual Meeting of the State Bar. It is reprinted with the permission of the Center for Continuing Legal Education. **The article only represents the opinions of the author, and not the Health Section Board or the State Bar of New Mexico.**]*

Because institutional healthcare providers usually promote the use of arbitration, they want to enforce the provisions, which individual health care providers often want to avoid. One important reason to elect the use of arbitration is confidentiality. In a competitive market, terms of employment and other related factors are proprietary. In a health care setting, the reasons for termination may involve sensitive and protected patient information. For this reason, employers often opt for arbitration. For the same reasons, the mere threat of litigation by a medical staff member, independent contractor or employee often brings pressure to bear on the employer, because with the threat of litigation comes the unspoken threat of exposure of all things confidential. Employers and hospitals would prefer to blunt, if not eliminate this threat by having the arbitrator (not the courts) decide the

important threshold question of whether or not there is an enforceable agreement to arbitrate.

Arbitration clauses are commonly used in many health-related contracts and forms. In 2001 the New Mexico Legislature radically amended the New Mexico Uniform Arbitration Act ("NMUAA"). There may be arbitration provisions still being used that conflict with the 2001 revisions to the NMUAA.

In the author's opinion, the **NMUAA is a mess**. It contains inconsistent provisions, enacts new and very critical provisions, but it does not include important statutory definitions, and even the compilations of the statute are confusing. This is important because §44-7A-5 lists sections that cannot be waived. The Miche compilation, unlike the West compilation, places the complete section cite in brackets. This creates more confusion. Is it the subsection or the entire section that is waived? A person relying on the Miche compilation may argue that all of Section 44-7A-6, not just 6(a), cannot be waived. Both compilations in the main text list subparts for a number of the sections, but including one sub-part but not another in the non-waiver provision doesn't make sense in a number of situations.

The Federal Arbitration Act.

There are two arbitration statutes that a health lawyer can rely upon. Given the problems inherent in the NMUAA, which are discussed below, the practitioner may want to rely when possible on the *Federal Arbitration Act*, 9 U.S.C. §§ 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233) ("FAA").

The FAA applies to contracts or transactions that involve interstate commerce, and in light of revision in 2001 to the NMUAA and case law, it is advisable that the interstate aspect of the contract be addressed in a contractual "whereas clause" or similar provision. Without an interstate commerce link, a state court may determine that the FAA does not apply. Where applicable, the arbitration provision should expressly refer to the FFA as the basis for arbitration. This is very important in certain contracts, particularly those in which the NMUAA "disabling civil dispute provision" may apply.

Section 1 of the FAA defines "commerce" to mean "commerce among the several States or with Foreign Nations." There is no "federal question" link to the FFA, so the fact that a health plan may be subject to ERISA cannot provide the necessary link. Actual "commerce" must be involved.

Recently, the Arkansas Supreme Court ruled that the FAA did not apply to an arbitration provision in an employment contract between an Arkansas medical corporation and a physician. The court ruled that the corporation had failed to meet its burden in demonstrating that the employment contract at issue evidenced a transaction involving interstate commerce. It viewed the contract as one between a local doctor and a local entity and although some aspects of the corporation's business may have involved interstate commerce, performance under the employment agreement did not. See *Arkansas Diagnostic Ctr., P.A. v. Tahiri*, No. 06-667, --- S.W.3d ----, 2007 WL 1560548 (Ark. May 31, 2007).

A careful reading of the *Tahiri* case indicates that the arbitration provision made no mention of either the Arkansas statute or the FFA. The parties agreed to arbitrate pursuant to the rules of the American Arbitration Association ("AAA"). It remains to be seen to what ex-

tent the New Mexico Courts will honor a contract provision whereby the parties expressly agree to arbitrate pursuant to the FAA.

It is also clear that Dr. Tahiri was not recruited from out of state – another distinction that might have made a difference in some recruitment agreements. Apparently, the doctor did not treat patients from other states. For certain medical practices, those with high profile specialties that draw patients from out of state or those near the border of the state, this may make a difference. A practice or a group that treats a large number of foreign workers, be they legal or illegal, may also meet the “commerce test.”

Why is it important to avoid the NMUAA applying to some contracts? There are a number of reasons.

Who Makes the Initial Decision of Arbitrability?

Often a party to an arbitration clause doesn't want to arbitrate, and they will challenge the enforceability of the arbitration clause. Until the 2001 amendments to the NMUAA, that challenge clearly took place in state court. By the time the “enforceability issue” was litigated, the case was practically over.

In New Mexico, a series of cases decided before 2001 held that the courts will decide whether or not an arbitration provision is enforceable. However, the United States Supreme Court decision in *Buckeye Check Cashing v. Cardegna*, 126 S. Ct. 1204 (2006), when read in conjunction with an overlooked change in wording made during the 2001 re-enactment of the NMUAA, may have partially undermined this New Mexico case authority.

In the *Buckeye* case, the United State Supreme Court held that plaintiff's claim that the underlying contract was illegal and void *ab initio* was to be determined by the arbitrator, not the Court. In reaching its decision, the *Buckeye* Court relied upon *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 87 S. Ct. 1801 (1967). In the *Prima Paint* case, the plaintiff filed a diversity suit in federal court to rescind an agreement for fraud in the inducement and to enjoin arbitration. The claim of fraud was in the inducement of the underlying contract and not the arbitration clause contained in the contract. The United State Supreme Court held that, under the Federal Arbitration Act, a claim of fraud in the inducement of the entire contract was for the arbitrator to decide in absence of evidence that the contracting parties intended to withhold that issue from arbitration.

New Mexico case law has taken the opposite position in applying the pre-2001 New Mexico Uniform Arbitration Act. As held in *Shaw v. Kuhnel & Assocs., Inc.* 102 N.M. 607, 608, 609, 698 P.2d 880, 881, 882 (1985), and reaffirmed in *Richards v. Allianz Life Ins. Co.*, 133 N.M. 229, 232, 62 P.3d 320, 323 (2002), the New Mexico state courts have retained the right to decide in the first instance whether the underlying contract was procured by fraud. As noted in *Shaw*: “It would be ridiculous and contrary to the statutory language to require parties to arbitrate an issue of fraud in the inducement only to have the arbitration clause declared invalid if such fraud is found to exist by the arbitrator.” *Shaw*, 102 N.M. at 608, 609, 698 P.2d at 8981, 882. Subsequent decisions have relied on *Shaw*. For the most recent case, see *Sisneros v. Citadel Broadcasting*, 2006-NMCA-102.

However, both *Shaw* and *Richards* were decided under the old New Mexico Uniform Arbitration Act, NMSA 1978, §§ 44-7-1 to -22 (1971), which was applicable to arbitration agreements entered into prior to July 1, 2001. The 1971 Act was repealed, effective July 1, 2000, and replaced with another version, NMSA 1978, §§ 44-7A-1 to -32 (2001). The

2001 NMUAA contains a new provision which one could argue legislatively overrules the holdings in *Shaw* and *Richards*. NMSA 1978, §44-7A-7(c) provides:

“An arbitrator **shall** decide whether a condition precedent to arbitrability has been fulfilled and **whether a contract containing a valid agreement to arbitrate is enforceable.**” (Emphasis added.)

The emphasized phrase, which was added in 2001, is **identical** to the phrase used in the Federal Arbitration Act and it is the same phrase that forms the basis for the United States Supreme Court’s decision in *Buckeye Check Cashing v. Cardegna*.

In every reported New Mexico decision published after 2001, Section 7(c) of the 2001 NMUAA has been ignored.

Unlike *Shaw* and *Richards*, the *Sisneros* decision involved an employment and arbitration agreement signed in September 2002, after the 2001 NMUAA became effective. When *Sisneros* was terminated in January 2003, he filed a lawsuit alleging that he was fraudulently induced into signing his employment agreement and the agreement to arbitrate was illusory. The employer filed a motion to stay the proceedings and compel arbitration. The court granted summary judgment on the claim that fraud in the inducement prohibited arbitration. In a decision that never cites or discusses the 2001 NMUAA, the Court of Appeals reverses the grant of summary judgment, and in doing so relies on *Shaw* and earlier New Mexico decisions for the proposition that “...whether a valid contract to arbitrate exists is a question of state contract law.” It’s as if no one looked at the 2001 NMUAA or relied upon it.

While there are no reported New Mexico cases that have dealt with the mandatory language in Section 7(c), it is based upon Section 6(c) of the Uniform Arbitration Act (2000). Comments to Section 6(c) of the Uniform Arbitration Act states in relevant part:

The language of Section 6(c), ‘whether a contract containing a valid agreement to arbitrate is enforceable,’ is intended to follow the ‘separability’ doctrine outlined in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967) [discussed above].

Since Section 7(c) of the 2001 NMUAA is identical to the Uniform Arbitration Act, one could argue that the New Mexico Legislature intended that New Mexico should follow *Prima Paint’s* “separability” doctrine. One might also contend that the *Buckeye Cash Checking*, coupled with the provisions of Section 7(c), trump former New Mexico case authority and give to the arbitrator, not the courts, the authority to determine “...**whether a contract containing a valid agreement to arbitrate is enforceable.**”

Another argument favoring the arbitrator making the determination regarding the enforceability of an arbitration provision may be the arbitration provision’s reference to or the adoption of the rules of the American Arbitration Association. Section R-7(b) of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (“AAA Commercial Rules”), effective September 15, 2005, provides:

The arbitrator shall have the power to determine the

existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause (emphasis added).

Clearly, the argument exists that under the Federal Arbitration Act, the AAA Commercial Rules, and Section 7(c) of the 2001 NMUAA, which adopts the Federal Arbitration Act and AAA formula, the arbitrator is to decide whether an underlying contract to arbitrate is unenforceable.

On the other side of the argument, the 2001 NMUAA also contains conflicting provisions regarding who determines whether an agreement to arbitrate is enforceable. The provision in §44-7A-7(c) giving the arbitrator the authority to determine whether a contract to arbitrate is enforceable, conflicts with §44-7A-7(b) which reads, "The Court shall decide whether an agreement exists or a controversy is subject to an arbitration agreement." §§44-7A-8(a) and (b) (formerly §44-7-2) allow the court, upon motion by a party to the agreement, to "...find that there is no enforceable agreement to arbitrate." Similarly, Section 8(c) of the 2001 NMUAA refers to the court finding there is no enforceable agreement." Section 44-7A-9 allows the court to enter orders granting provisional remedies - before an arbitrator is appointed - to protect the effectiveness of the arbitration proceeding. Section 44-7A-27 vests the court with the jurisdiction to "...enforce an agreement to arbitrate." Section 44-7A-28 addresses motions related to venue, and Section 44-7A-29 (a)(1) allows for an appeal from "...an order denying a motion to compel arbitration," which infers the court and not the arbitrator decides whether arbitration should proceed.

Section 44-7A-5 clearly allows a party to seek a judicial determination of the applicability or enforceability of a "Disabling Civil Dispute Clause."

Until a party raises the provision of Section 7(c) of the 2001 NMUAA and its nexus with the Federal Arbitration Act and the *Prima Paint* and *Buckeye Check Cashing* cases, the intent of the New Mexico Legislature in revising Section 7(c) will remain unclear.

Additional Problems with New Provisions of the 2001 NMUAA.

The 2001 Act also contains a number of "new" provisions which, if ignored, diminish the effectiveness of arbitration agreements.

The "Disabling Civil Dispute Clause;"

Section 44-7A-1(b) of the NMUAA contains a set of legislatively defined terms, including definitions for "standard form contract or lease" and "disabling civil dispute clause;" the latter being unenforceable and voidable under Section 44-7A-5 as between a "consumer, borrower, tenant or employee." Among the seven prohibited provisions are two provisions regarding attorney fees and costs, a provision foregoing access to rules of discovery, and limitations on the use of an inconvenient forum. Any new arbitration agreement prepared after July 1, 2001, must avoid the use of these provisions in any contract between a consumer, borrower, tenant or employee, or expressly clearly and legally waive them.

What does this mean to the health care attorney? First, every arbitration clause you and your clients use needs to be reviewed. If they do not waive the provisions of §44-7A-5,

then revise them. If you are stuck with them, determine if they will remain effective.

The Disabling Civil Dispute Clause ("DCDC") is defined as:

44-7A-1(b)(4)...a provision modifying or limiting procedural rights necessary or useful to a *consumer, borrower, tenant or employee* in the enforcement of substantive rights against a party drafting a *standard form contract or lease*, such as, by way of example, a clause requiring the consumer, borrower, tenant or employee to:

- (a) assert a claim against the party who prepared the form in a forum that is less convenient, more costly or more dilatory than a judicial forum established in this state for resolution of the dispute;
- (b) assume a risk of liability for the legal fees of the party preparing the contract, but a seller, lessor or lender may exact from a buyer, tenant or borrower an obligation to reimburse the seller, lessor or lender for a reasonable fee paid to secure enforcement of a promise to pay money;
- (c) forego access to the discovery of evidence as provided in the rules of procedure of a convenient judicial forum available to hear and decide a dispute between the parties;
- (d) present evidence to a purported neutral person who may reasonably be expected to regard the party preparing the contract as more likely to be a future employer of the neutral person;
- (e) forego recourse to appeal from a decision not based on substantial evidence or disregarding the legal rights of the consumer, tenant or employee;
- (f) decline to participate in a class action; or
- (g) forego an award of attorney fees, civil penalties or multiple damages otherwise available in a judicial proceeding.

The first problem is the NMUAA does not define the terms "consumer, borrower, tenant, or employee." Is a patient a consumer? Is a Medical Director an employee? Does this provision apply to "consumer" products and services, or does it apply to commercial office leases with a provider? Does it apply to a physician recruitment agreement in which the doctor is not viewed as an employee, but a loan is made to the doctor to establish his or her practice (thus triggering the borrower status)? Does it apply to vendor agreements? Does it apply to disputes arising out of the quality of care at a nursing home or hospital? Does it apply to coverage disputes under an insurance policy or HMO plan? What about ERISA preemption?

The statute defines a "standard form contract or lease" to mean "...a written instrument prepared by a party for who its use is routine in business transactions with consumers of goods or services, borrowers, tenants, or employees." (§44-7A-1(b)(8)). This clearly extends the Act to practically every type of paper form used in the health delivery industry in New Mexico.

It is uncertain what happens to the rest of an Arbitration agreement if it contains a DCDC. Section 44-7A-5 provides:

In the arbitration of a dispute between a consumer, borrower, tenant or employee, and another party, a disabling dispute clause contained in a document relevant to the dispute is unenforceable against and voidable by the consumer, borrower, tenant and employee. If the enforcement of such a clause is at issue as a preliminary matter in connection with a arbitration, the consumer, borrower, tenant or employee may seek judicial relief to have the clause declared unenforceable in a court having personal jurisdiction of the parties and subject matter of the issue (emphasis added).

Because the DCDC is not void – it is voidable. Thus, a failure to raise this issue immediately may be viewed as a waiver.

Another area of uncertainty is whether or not there are limits to the phrase “enforcement of substantive rights.” The definition lists seven examples, and interestingly, these examples apply only to “consumer, tenant or employee.” “Borrow” is not included, perhaps by oversight, but it is difficult to tell given the other problems with this statute.

Some of these examples can be avoided by drafting a carefully worded and balanced arbitration clause, but two examples make no sense whatsoever. Example (b) seems to indicate that a consumer, tenant or employee cannot be required to “assume a risk of liability for the legal fees of the Party preparing the contract.” In any other contract without an arbitration clause, a provision awarding fees is enforceable. Additionally, §44-7A-22(b) expressly permits the arbitrator to “...award attorney fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by agreement of other parties to the arbitration proceeding.”

However, the death knell provision for any arbitration provisions with a DCDC may be Example (e), which prohibits a DCDC from requiring a protected party from “...forego[ing] recourse to appeal from a decision not based on substantial evidence, or disregarding the legal rights of the consumer, tenant or employee” (again Borrower is omitted). Arbitration is intended to be final and “appeal rights” are expressly limited by §44-7A-24 to six narrow grounds, none of which involve the appellate rights listed in §44-7A-1(4)(e). Perhaps an appeal could be granted to a second arbitrator, but this defeats the purpose behind arbitration.

The good news, however, is the provisions of §44-7A-5 can be waived. Section 44-7A-4(a) lists certain provisions of the NMUAA that cannot be waived “before a controversy arises that is subject to an agreement to arbitrate,” and Section 5 is not on this list. Nor is it on the list of provisions in Section §44-7A-4(b) that are non-waivable either before or after a controversy arises. (Please note the discussion above regarding the different compilations of the statute and the confusion regarding how much of a section may be subject to a non-waiver.)

The real problem is determining whether or not you need a waiver. This issue was discussed above.

Pursuant to §44-7A-4(b), these provisions of the Act cannot be waived before a controversy arises:

- §44-7A-6(a) waiving the right file an application for judicial relief
- §44-7A-7(a) acknowledging the validity and enforceability of arbitration provisions. This is where the compilation problem becomes an important consideration. If the non-waiver provision applies only to 7(a), then an arbitration provision can waive 7(b) which expressly states that the court shall decide whether an agreement to arbitrate exists or a controversy is subject to an arbitration agreement. It is 7(b) which conflicts with the last clause of Section 44-7A-7(c) that states that it is the arbitrator that decides "... whether a contract containing a valid agreement to arbitrate is enforceable," which is the language used in the FAA and relied upon by the U.S. Supreme Court in *Buckeye Check Cashing*.
- §44-7A-9 granting an arbitrator the power to issue provisional pre-hearing remedies.
- §44-7A-18(a) and (b) providing for the issuance of subpoenas and taking of depositions
- §44-7A-27 providing for judicial enforcement of an award
- §44-7A-29 providing for appeals from an order or judgment in a civil action related to the arbitration
- §44-7A-10 unreasonably restricting the right to notice of the initiation of the arbitration proceeding
- §44-7A-12 unreasonably restricting the right to disclosures by neutral arbitrators.
- §44-7A-17 waiving the right to be represented by a lawyer, unless the agreement is between an employer and a labor union in which case it can be waived.

The foregoing provisions can be waived by agreement of the parties after arbitration is invoked.

These provisions are listed in §44-7A-4(c) as those that cannot be waived either before or after an arbitrable dispute arises:

- §44-7A-3(a) - When the act governs an agreement to arbitrate
- §44-7A-4 - The nonwaivable provisions section can't be waived
- §44-7A-8 - Allows for Motions to compel or stay arbitration – it is this provision that is inconsistent with the FAA and the new language in Section 7
- §44-7A-15 - Immunity for the arbiters
- §44-7A-19 - Allows for judicial enforcement of a pre-award ruling by the arbitrator
- §44-7A-21(d) and (e) - Modification of an arbitration award by court or arbitrator
- §44-7A-23 - Confirmation of the award by judicial order
- §44-7A-24 - Procedure for vacating an award and grounds for vacating an award.
- §44-7A-25 - Modification or correction of an award
- §44-7A-26(a) and (b) - Judgment on the award and procedure to obtain fees and costs incurred after the award is entered.
- §44-7A-30 - Uniformity and application of construction – in light of some of

the radical changes made in 2001, this section is a joke. It requires the court to construe the statute to "promote uniformity of the law with respect to its subject matter among the states that enact it."

§44-7A-31 – Waiver of electronic signatures in Global and National Commerce Act.

§44-7A-32 - The savings Clause

§44-7A-33 – In neither the West nor the Miche compilation is there a Section 33! This makes one wonder about all of the citations within the statute to the sections that cannot be waived.

Elements of a well worded Arbitration Clause and Waiver.

Experienced litigators know that experienced judges can always come up with a rationale to explain their decision, and no matter how carefully you draft a waiver for the DCDC section of the NMUAA, you run the risk that a judge who wants to apply it will say you didn't do enough. Based on current law and wisdom, an arbitration provision and the waiver of §44-7A-5 should:

- Be set apart from the boilerplate in the document;
- Use a distinctive font;
- Be signed separately, and it is suggested that the waiver of §44-7A-5 and §44-7A-7 (b) also be signed or initialed;
- Explain that by agreeing to arbitrate a dispute under the contract, both parties are giving up certain statutory and legal rights to enforce the agreement in a court of law;
- Avoid the argument that the contract is illusory. The arbitration clause should be balanced and provide both parties the same rights and benefits. For example, the drafting party should not be the only party who can recover attorney fees. Don't preserve a right to seek injunctive relief in the courts – this has been held to create an illusory right – "we both have to arbitrate but I can enforce the covenant not to compete in court." Consider dealing with the factors listed in §44-7A-1(4), even though you waive §44-7A-5;
- Make specific reference to the use of the Federal Arbitration Act, if you have a legal basis to argue that it applies, and set forth that basis in the arbitration clause: *"Hospital provides services in a large geographic area including patients from other states and foreign countries. It is engaged in interstate commerce and, therefore, the parties agree to arbitrate any dispute arising under this agreement pursuant to the Federal Arbitration Act using the { } Rules of the American Arbitration Association."*
- Avoid a dispute on how to select a neutral arbitrator. If you elect not to use the full services of a local or national organization, you need to address how to select an arbitrator. One solution is for each side to propose an arbitrator and they select a third. This is expensive, however, and it results in a 3-judge panel. Another solution is for each side to recommend three names. The names are then rank ordered by number with "1" being the most preferred. The person with the lowest total number ("2" being the best a person could do) is the arbitrator. Ties, if any, are broken by a coin toss. §44-7A-12 allows the Court to appoint an arbitrator if the parties cannot agree.

Other Provisions of the NMUAA

A new provision, Section 44-7A-6, addresses applying for "judicial relief, but the type of

relief being sought in this section is *not defined*. The section provides procedural rights to notice, and arguably does not address substantive rights.

The new clause in Section 44-7A-7(c), which conforms to language in the Federal Arbitration Act as discussed above.

A new set of provisions regarding the rights and responsibilities of arbitrators. Section 44-7A-13 requires conflict disclosures and §44-7A-15 grants the arbitrators immunity from civil liability to the same extent as a judge acting in a judicial capacity. Subsection 15 also protects them from being called as a witness and from producing documents, unless the testimony or documents are necessary to determine a claim by an arbitrator or arbitration organization *against* a party to the arbitration or to be used as evidence at a hearing to vacate the award, but only have the movant makes a *prima facie* showing that he or she has grounds to vacate the award. When arbitrators or arbitration organizations are sued, or subpoenaed to testify or produce records and the court decides they are immune, they are entitled to recover attorney fees and other reasonable expenses. Arbitrators can grant a summary disposition of a claim or particular issue (§44-7A-16), and they now have broad legislative powers regarding discovery (§44-7A-18). An arbitrator's pre-award rulings can be enforced by a court, but only after the party requests that ruling be incorporated into an award (Is it called a "pre-award award?") and then the prevailing party may make an expedited motion before a court to confirm the award. The courts can then vacate, modify, correct or affirm the pre-award ruling.

Again, wording in the new Act may create ambiguity with regard to conducting Arbitration "conferences" as opposed to "hearings." This may be important when there is more than one arbitrator. Section 44-7A-14 requires that when there is more than one arbitrator, there must be a majority vote to exercise the power of the arbitrators, "but all of them shall conduct the hearing under Section 16(c). [44-7A-16 NMSA 1978]." Section 16(a) allows the arbitrators to hold "conferences with the parties before the hearing..." Section 16(c) then discusses the hearing, and this section seems to refer to the main trial or hearing on the merits. The new Act is less than clear on how multiple arbitrators handle discovery disputes or summary dispositions. Must all of them participate?

A new provision on remedies (including express language regarding punitive damages) and fees and expenses. See §44-7A-22.

New provisions on modifying or correcting an award (§44-7A-25), and appeals (§44-7A-29).

A specific provision which purports to make the new Uniform Arbitration Act conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act. [If anyone can explain the purpose for §44-7A-31 to the Editor, he will publish the explanation.]

PRACTICE POINTERS:

If a health care client has used an arbitration provision implemented after July 1, 2001, the provision should be reviewed to determine if it complies with the provisions of the 2001 NMUAA, and in particular the definition of a "disabling civil dispute clause" which is voidable under §44-7A-5. Consider whether the client can use the Federal Arbitration Act and,

if so, specifically refer to the Federal Arbitration Act in the arbitration provision. Also refer to or invoke the AAA rules. Specifically, refer to and invoke the provisions of Section 7(c) of the 2001 NMUAA, and provide that all disputes, including whether a valid contract to arbitrate exists shall be decided by the arbitrator or arbitrators. Also have the parties expressly waive the provisions of Sections 5, 7(b) and (d).

When contemplating the enforcement of an arbitration agreement that is subject to the current 2001 NMUAA, review the 2001 Act and evaluate whether or not the agreement is subject to an initial judicial determination as to whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. Then decide whether you want to go to court or avoid the courts. If you want to try and avoid a judicial determination regarding enforceability use the new language added to §44-7A-7(c), the line of U.S. Supreme Court cases cited at the beginning of this article, and let the Editor of the Health Law Section's newsletter know the result.

The usual Disclaimer

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