

RESOLUTION 04-09-2007

DIGEST

Arbitration: Payment of Expenses by Medical Providers and Insurers

Amends Code of Civil Procedure section 1284.2 to require a medical service provider or health insurer to bear the expenses of arbitration.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolution found.

Reasons:

This resolution amends Code of Civil Procedure section 1284.2 to require a medical service provider or health insurer to bear the expenses of arbitration. This resolution should be approved in principle because most medical service providers and health insurance companies use mandatory, boilerplate language containing an arbitration provision, which amounts to compelled arbitration.

People receiving medical services or purchasing health insurance do not have a meaningful opportunity to refuse the arbitration provisions in their insurance plans. Thus, medical service providers and health insurers have the advantage of compelling arbitration of consumer claims, whether for denial of coverage, medical malpractice, or any other claims.

Although arbitration might be cost-effective for the medical industry, it is typically much more costly for individuals of lesser or modest means. In general, filing and per diem fees in arbitration hearings are much higher than what one would encounter in courts. The difference causes an even more pronounced unfairness in malpractice cases, where a patient might have suffered serious adverse consequences as a result of malpractice and then is required to prosecute that claim in a lengthy and costly arbitration proceeding.

In the employment context, employers who impose “mandatory arbitration as a condition of employment” are required to “bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) Medical service providers and health insurers should be subject to similar requirements, given their much more advantageous position over their clients and their practical ability to impose mandatory arbitration agreements on patients.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1284.2 to read as follows:

1 §1284.2

2 (a) Unless the arbitration agreement otherwise provides or the parties to the
3 arbitration otherwise agree, and subject to subdivision (b) of this section, each party to the
4 arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator,
5 together with other expenses of the arbitration incurred or approved by the neutral arbitrator,
6 not including counsel fees or witness fees or other expenses incurred by a party for his own
7 benefit.

8 (b) If one party to the arbitration agreement elects to compel arbitration and that
9 party is a medical service provider or health insurer, the expenses and fees of the neutral
10 arbitrator, together with other expenses of the arbitration incurred or approved by the neutral
11 arbitrator, not including counsel fees or witness fees, shall be paid for by the party electing
12 to compel the arbitration.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing Law: Provides that unless otherwise agreed, both parties to an arbitration must pay their own pro rata share of the expenses and fees of arbitration except that each party must pay its own fees and costs (e.g., counsel costs, witness fees) incurred in the prosecution or defense of the arbitration proceeding.

This Resolution: Would require medical service providers or health insurers who elect to compel arbitration to pay the entire cost of the arbitration except for those fees and costs incurred by each party in the prosecution or defense of the compelled arbitration.

The Problem: While arbitration is often perceived as a less expensive alternative to litigation, there are a number of situations wherein the cost of arbitration runs substantially higher. In certain circumstances, such as when a health insurer or medical service provider compels arbitration, this increased cost has the potential to create a substantial economic hardship for the individual and effectively frustrates the interests of justice.

When an individual seeks medical attention or attempts to purchase health insurance there is little opportunity to negotiate favorable terms: Medical providers can elect not to treat patients who refuse to sign their arbitration provisions and health insurance companies can refuse to sell individual policies unless the potential insured agrees to sign the company’s arbitration agreement. This take-it-or-leave-it manner of doing business leaves few options for those seeking quality medical care and affordable insurance coverage. Insurance companies and medical services providers know that moving to compel an arbitration can have a chilling effect on the claim of a patient or insured of modest means.

Under similar circumstances, California courts have held that “when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee

would not be required to bear if he or she were free to bring the action in court.” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83)

Clearly it stands to reason that when a medical service provider or health insurer imposes what is in essence a "mandatory" arbitration provision as a condition of service, then the arbitration agreement or arbitration process should not require the insured to bear any type of expense that the insured would not be required to bear if he or she was free to bring the action in court.

This resolution ensures that if a medical service provider or a health insurer elected to compel arbitration, they would be the ones who would bear any additional expenses involved. This resolution preserves the individuals right to have their claims presented in a judicial forum and prevents the medical service provider or health insurer from using disparate bargaining positions and legal maneuvering as a means of forcing an opposing party into submission.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE:

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

Resolution 04-09-07 is overbroad, encourages repudiation of contracts in bad faith, conflicts with expressed legislative intent, and ignores existing consumer protections. Because of the proposal’s slash and burn approach to a poorly defined problem, it should be denied.

Resolution 04-09-07 fails to define “medical service provider.” A medical service provider may be a hospital, physician, nurse, paramedic, fire chief, city, or teaching institution. (*Valley Medical Transport, Inc. v. Apple Valley Fire Protection Dist.*, 17 Cal.4th 747, 751.) By extension, the term may include in-home health aides, free standing urgent care clinics, sole practitioners, assisted living facilities, and nursing homes, to name just a few. In such contexts, none of the author’s rationale applies. The intent of the resolution is to redistribute the cost of arbitration where arbitration clauses are buried in adhesion contracts, forced upon patients with no bargaining power. However, health care arbitration agreements may not use “take-it-or-leave-it” agreements as a matter of law, and may not be a condition of receiving necessary services.