RAND INSTITUTE FOR CIVIL JUSTICE
RESEARCH | BRIEF

Binding Arbitration Is Not Frequently Used to Resolve Health Care Disputes

Resolution of disputes between patients and health-care providers first became a pressing problem in the 1970s, when malpractice claims grew dramatically. More recently, the growth of managed care has introduced new sets of decisions and decisionmakers into the delivery of health care; now, health plans join with providers in determining appropriate treatment programs and reimbursement schedules, along with access to qualified specialists. The new panoply of decisionmakers and growth of controls substantially increase the probability of disputes.

Anecdotal evidence suggests that, to mitigate the consequences of increased disputes, health plans and providers are turning to alternative forms of dispute resolution. One of those alternatives is mandatory, private, binding arbitration. Mandatory binding arbitration is a highly controversial practice. Its proponents claim that it is efficient, leads to informed decisionmaking, and sustains cordial relationships between patients and their physicians. Detractors charge that arbitrators are reluctant to grant large awards to patients who deserve them, that even egregiously bad decisions cannot be appealed, and that arbitration decisions set no precedents for future decisions to follow. Lawmakers and the judiciary are now being asked to determine the appropriateness and value of subjecting health-care disputes to private, binding arbitration. Unfortunately, both the practice and nascent efforts to curb it have been proceeding in the absence of strong empirical evidence of arbitration's prevalence, the factors influencing its adoption, or its effects.

The Institute for Civil Justice, with funding from the Robert Wood Johnson Foundation, sought to provide evidence illuminating the questions of prevalence and factors leading to adoption in a study of practices in California. California was chosen because that state has a long history of fostering the use of both private arbitration agreements and managed care. This study drew from a new mail survey of physicians and hospitals; interviews with prominent California health plans, malpractice insurers, and arbitration administrators; and a survey of health maintenance organizations previously conducted by an HMO trade association.

The researchers discovered that, contrary to popular belief, arbitration agreements are not widely used in the medical setting, and, where they are, their use typically results from organizational policy directing it.

In the ICJ survey of physicians and hospitals, 91 percent of respondents in both categories reported that they do not ask patients to sign arbitration agreements (see Figure 1). Those hospitals comprising the 91 percent accounted for 80 percent of all hospital admissions. On the other hand, 71 percent of all HMO insurance plans ask new enrollees to sign arbitration agreements. However, in most cases, these agreements only cover disputes between the plan and enrollees over contracts, including disputes over benefits, and such disputes are few, compared to the more prevalent malpractice disputes. For example, in the HMOs studied by the ICJ, only about four coverage disputes occurred per million enrollees per year. Only 28 percent of the HMOs studied--two large and six small ones--asked patients to sign agreements that covered both contract and medical-malpractice disputes, and one of the larger

subsequently ceased covering malpractice disputes. None of the preferred-provider organizations surveyed used agreements at all.

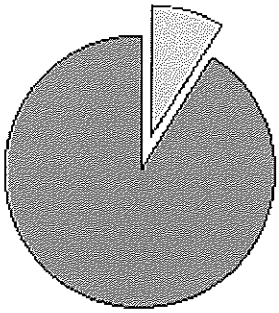

Figure 1--Only 9 Percent of California Health Care Providers Ask Patients to Sign Arbitration Agreements [same percentage applies to physicians (N = 369) and hospitals (N = 99)]

Why do providers fail to ask patients to sign arbitration agreements? The principal reason physicians gave was that they were unfamiliar with them (see Figure 2). Another common reason was that agreements "set the wrong tone," especially with a new patient. Less commonly, physicians noted that their provider group or malpractice insurer opposed agreements or thought that the courts would provide a more favorable outcome. The rationales reported by hospitals for failing to ask patients to sign agreements generally mirror those of the physicians, except that hospitals rarely reported that they were unfamiliar with such agreements.

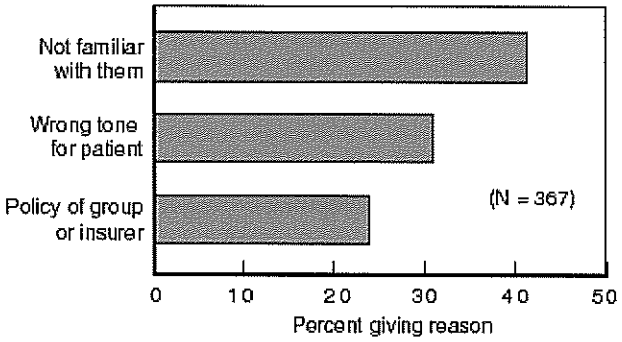

Figure 2--Why Physicians Don't Use Arbitration Agreements

Most physicians who asked patients to agree to binding arbitration reported that they did so on the recommendation of their insurer, and one-third said they did so because it was the policy of their provider group (see Figure 3). One-third believed that arbitration was cheaper than the courts, and some reported simply wanting to avoid courts and juries. (Respondents could choose more than one reason.)

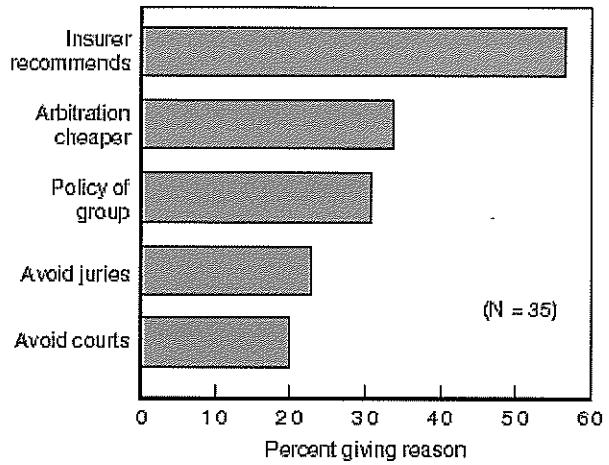

Figure 3--Why Physicians Use Arbitration Agreements

Clearly, malpractice-insurer and provider-group preferences matter. The survey data revealed this in another way: While only 9 percent of all reporting physicians asked patients to approve arbitration agreements, among those insured by CAP/MPT (a liability coverage provider that strongly encouraged arbitration), half asked their patients to sign such agreements. It is also interesting that as many as 40 percent of physicians who describe themselves as engaged in a managed-care practice report using arbitration agreements.

Conversely, physician attitudes shape those of many groups and malpractice insurers. Most of the state's large malpractice insurers are doctor-owned companies, and for the most part (CAP/MPT being an exception) they have ignored arbitration agreements. Physicians typically (about 70 percent of the time) win malpractice suits, and in the face of a claim have the reputation of wanting the most-public affirmation possible of the quality of their care. Arbitration, where physicians prevail only about 60 percent of the time, appears less attractive.

If few physicians overall ask patients to sign arbitration agreements, still fewer require that patients do so (see Figure 4). Of the physicians whose offices routinely request new patients to sign arbitration agreements, 80 percent report that if a patient refuses, they nonetheless provide treatment and usually without additional discussion. This was true even of physicians insured by CAP/MPT, although these doctors were three times as likely to engage in some discussion with their patients.

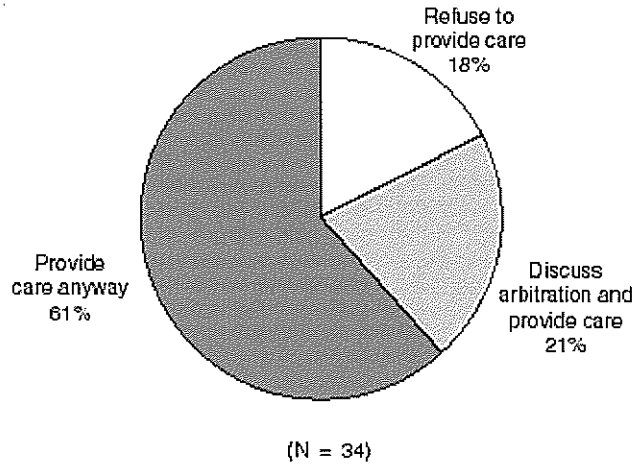

Figure 4--If Patient Refuses to Sign Arbitration Agreement, Most Physicians Provide Care Anyway

Nonetheless, if providers or plans have an agreement in place and a dispute arises, the matter is almost always resolved according to the provisions of that agreement. When CAP/MPT's insured physicians fail to execute arbitration agreements, the insurer goes so far as to search for an enforceable agreement that a codefendant (for example, the hospital) may have secured.

The ICJ survey affords considerable reason to believe that current rates of arbitration-agreement use may grow substantially. Most physicians who reported asking patients to sign agreements said they had started doing so within the previous five or six years--perhaps evidence of an upward trend. As mentioned above, those who do not use agreements typically are not familiar with them or have not received much encouragement to adopt them.

Thus, if future evaluations of arbitration reveal that it saves money without leading to a larger number of adverse outcomes for providers and plans, agreements should become more common among providers. At the same time, legislative efforts are under way to expand the liability of managed-care plans, both for the quality of care delivered under the plans' auspices and for their benefit decisions. These efforts may also lead to expanded use of private, binding arbitration in health-care disputes, because agreements already exist between most plans and their enrollees.

The potential for rapid change suggests that public policymakers need to evaluate seriously the need for additional regulation of private arbitration. Should arbitration agreements be further regulated, given their contractual nature? If so, how? Creating well-targeted public regulation would require sound evidence regarding the effect of these agreements on procedural equity and the interests of all parties.

The Institute for Civil Justice is an independent research program within RAND. The Institute's mission is to help make the civil justice system more efficient and more equitable by supplying government and private decisionmakers and the public with the results of objective, empirically based, analytic research. The ICJ facilitates change in the civil justice system by analyzing trends and outcomes, identifying and evaluating policy options, and bringing together representatives of different interests to debate alternative solutions to policy problems. The Institute builds on a long tradition of RAND research characterized by an interdisciplinary, empirical approach to policy issues and rigorous standards of quality, objectivity, and independence.

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