

# Arbitration and Managed Care: Will Consumers Suffer if the Two are Combined?

## I. INTRODUCTION

Faced with the ominous possibility of spending almost \$1.7 trillion on health care by the year 2000, American policymakers are finally tackling health care reform.<sup>1</sup> Exponential increases in the cost of health care,<sup>2</sup> combined with the fact that there are 37 million uninsured Americans make this a difficult task.<sup>3</sup> President Clinton and leaders in both political parties have tossed their solutions to the health care dilemma into the legislative arena.<sup>4</sup>

While there has been little consensus, the trend toward "managed care" has emerged as a workable solution to the health care dilemma.<sup>5</sup> "Managed

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<sup>1</sup> Elaine Lu, Recent Development, *The Potential Effect of Managed Competition in Health Care on Provider Liability and Patient Autonomy*, 30 HARV. J. LEGIS. 519, 521 (1993).

<sup>2</sup> In 1965, health care costs only made up about 6% of the Gross National Product (GNP). By 1980, the figure had risen to 9.3% and now health care comprises almost 14% of the GNP. Health care costs in the U.S. rose from \$839 billion in 1992 to an estimated \$940 billion in 1993. David B. Simpson, *Compulsory Arbitration: An Instrument of Medical Malpractice Reform and a Step Towards Reduced Health Care Costs?*, 17 SETON HALL LEGIS. J. 457, 457 (1993).

<sup>3</sup> Gina Kolata, *Will U.S. Be Healthier? Maybe Not, Experts Say*, N.Y. TIMES, Oct. 17, 1993, at 1-1.

<sup>4</sup> In light of the new congressional leadership, health care industry officials expect federal reforms to be minimal. *Health Care Industry Responds to the GOP Takeover*, HEALTH LINE (Nov. 15, 1994). However in the last term, the leading Republican proposal for reform was sponsored by Senator John H. Chafee (R-RI). Chafee's individual mandate proposal would require every individual to have health insurance by 2005, with subsidies phased in over the next 10 years to help the poor. The plan would include changes in the tax code which would force many Americans into health maintenance organizations (HMOs). Also included in the plan is a provision requiring the use of an alternative dispute resolution (ADR) method to resolve malpractice disputes. Opposed by the Republicans are President Clinton's plan, which proposes managed competition in the form of purchasing co-ops, and Representative McDermott's (D-WA) single payer plan. *Health Care Reform: Crunch Time for Congress*, NEWSDAY, May 29, 1994, at A39.

<sup>5</sup> Right now, managed care comprises 28.6% of the health care providers' market, but with its current rate of growth, it will comprise 80% of the market within five years. Rorie Sherman, *Health Plan to Have a Major Legal Impact*, 16 NAT'L L.J. 36 (1993). For more information about managed care, see Clark C. Havighurst, *Prospective Self Denial: Can Consumers Contract Today to Accept Health Care Rationing Tomorrow?*, 140 U. PA. L. REV.

care is an umbrella term covering a wide range of cost-containment efforts aimed at influencing clinical decision-making with a view to preventing overutilization of services."<sup>6</sup> Cost-containment efforts link providers' decisions to their economic interests or to the interests of a health maintenance organization (HMO). However these efforts may be completely contrary to the provider's duty to make decisions on the basis of the patient's medical interests.<sup>7</sup> Under managed care, health care providers<sup>8</sup> make medical decisions within a cost-containment perspective, which is predicted to increase the likelihood of patient harm.<sup>9</sup> This will lead to more medical malpractice litigation, which may increase the need for malpractice reform.<sup>10</sup> As a result, almost all of the proposals for health care reform address the need for malpractice reform, and many policymakers see alternative dispute resolution (ADR) as a viable solution.<sup>11</sup> The focus of this

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1755 (1992).

<sup>6</sup> Havighurst, *supra* note 5, at 1775 n.50. Managed care takes several different forms: health maintenance organizations (HMO), preferred provider organizations (PPO), and utilization review. This Note will focus on HMOs. "An HMO is basically a prepaid health insurance plan in which an organization accepts contractual responsibility for the delivery of a stated range of health services to an enrolled population." WARREN GREENBERG, *COMPETITION, REGULATION, AND RATIONING IN HEALTH CARE* 65 (1991).

<sup>7</sup> Rand E. Rosenblatt, *Primary Care Case Management, the Doctor-Patient Relationship, and the Politics of Privatization*, 36 CASE W. RES. L. REV. 915, 933-34 (1986). In his recent testimony before the Senate Finance Committee, Dr. Clifton R. Cleaveland, President of the American College of Physicians, testified that managed care organizations can put pressure on physicians to more efficiently utilize resources by threatening to terminate their contracts with physicians. *Medical Malpractice and Antitrust Issues in Health Care Reform, Hearing Before the Senate Comm. on Finance*, 103rd Cong., 2nd Sess. (1994), available in LEXIS, Federal News Service File (statement of Dr. Clifton R. Cleaveland, President of the American College of Physicians) [hereinafter *Health Care Reform Hearing*].

<sup>8</sup> This Author uses the term "health care provider" throughout the Note to encompass any group of practitioners or individuals who provide health care to consumers, such as physicians, nurses, optometrists, dentists, and other specialists.

<sup>9</sup> *In Wake of Reform, Use of ADR May Spread Beyond Malpractice Arena, Some Predict*, 2 HEALTH LAW REP. (BNA) No. 40, at D-2 (Oct. 14, 1993).

<sup>10</sup> The medical malpractice system is already considered to be in a crisis state. It harms the doctor-patient relationship and wastes time and money. See discussion *infra* Part II.A. However, the costs attributed to medical malpractice are a relatively insignificant part of the total health care bill. See *Tort Reform Possible, But Not a Big Health Care Money Saver, Rivlin Says*, 1 HEALTH CARE & POL'Y REP. (BNA) No. 30, at 1248 (Oct. 4, 1993) [hereinafter *Tort Reform Possible*].

<sup>11</sup> While the new Republican leadership has not indicated whether it supports arbitration or other ADR methods of reforming the malpractice system, it has indicated specifically in

Note is specifically on arbitration as a solution.<sup>12</sup>

The purpose of this Note is to explore the use of medical malpractice arbitration in the managed care setting. Part II examines the problems within the current medical malpractice system and the benefits that arbitration offers. This section also explains the statutory and common law support for arbitration in the managed care setting. Part III describes how Kaiser Permanente uses and enforces a mandatory arbitration provision in each of its enrollment contracts, and discusses the problems specific to its implementation. On a broader policy level, Part IV examines the contractual and constitutional concerns regarding mandatory agreements to arbitrate in the managed care setting. Part V will balance the benefits of arbitration against the reality that agreements to arbitrate in the managed care setting may further constrict consumers' choices and adversely affect their rights.

### II. SUPPORT FOR AGREEMENTS TO ARBITRATE MEDICAL MALPRACTICE CLAIMS IN THE MANAGED CARE SETTING

Support for arbitration developed in response to the inefficiencies in the current medical malpractice system. The high cost of litigation, in both time and resources, has led members of both the legal and medical communities to arbitration. The result is a list of benefits that purports to be the panacea for the ailments malpractice system's.

#### *A. Problems with the Current System*

Although the cost of medical malpractice is not the only reason for the high cost of health care, it is a prime target for reform.<sup>13</sup> According to one study, the frequency of medical malpractice claims has risen to one claim per every three to four physicians.<sup>14</sup> Along with the high frequency of

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their "Contract with America" a commitment to liability reform. *Health Care Industry: Responds to the GOP Takeover*, HEALTH LINE (Nov. 15, 1994). Plans that were debated in the last congressional session all required the use of an ADR method to resolve medical malpractice disputes. See Kolata, *supra* note 3, at 1-1.

<sup>12</sup> Arbitration is defined as a "process of dispute resolution in which a neutral third party renders a decision after a hearing at which both parties have an opportunity to be heard." BLACK'S LAW DICTIONARY 105 (6th ed. 1990).

<sup>13</sup> According to Alice Rivlin, Deputy Director of the Office of Management and Budget, medical malpractice costs are "not a big factor in the rising cost of health care." In fact, medical malpractice only accounts for about 1% of the total health care costs. The best way to control costs is to alter the way Americans pay for medical care. *Tort Reform Possible*, *supra* note 10, at 1248.

<sup>14</sup> Kirk B. Johnson et al., *The American Medical Association Specialty Society Tort*

claims, the time spent in malpractice suits is a major concern. The average time for a trial is two years, but a suit for a large award can take up to ten years.<sup>15</sup> Because health care is considered a precious resource, wasting the industry's time and money in litigation is not favored.

Another serious concern regarding the current medical malpractice system is the phenomenon of defensive medicine. Defensive medicine requires the use of redundant diagnostic tests and treatment procedures to guard against medical malpractice liability.<sup>16</sup> According to the American Medical Association (AMA); defensive medicine can be blamed for adding as much as \$15 billion to the nation's health care bill.<sup>17</sup> Less conservative estimates blame 30% of the total cost of health care on defensive medicine.<sup>18</sup> By any estimate, defensive medicine is a significant problem which may be a direct result of the current medical malpractice system.

### *B. The Benefits of Arbitration*

In the medical malpractice setting, arbitration will provide a number of benefits over traditional litigation. Arbitration will: (1) be a more efficient means to resolve disputes; (2) save money for both parties involved; (3) save time for both parties and the court system; (4) limit the trauma a malpractice dispute can inflict upon doctors and patients involved in a claim; and (5) coincide with the cooperative contractual relationship between doctors and patients.

#### *1. Greater Efficiency*

The use of a more qualified decisionmaker will make arbitration more efficient than traditional litigation.<sup>19</sup> Most medical malpractice arbitration panels include one medical care provider, one arbitrator selected by the plaintiff, and one neutral arbitrator selected by both parties.<sup>20</sup> Many

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*Reform Proposal*, 1 CTS HEALTH SCI. & L. 6, 7 (1990).

<sup>15</sup> *Id.*

<sup>16</sup> Simpson, *supra* note 2, at 460. See discussion *infra* Part III.B. about why physicians' fears about malpractice liability may be irrational.

<sup>17</sup> Simpson, *supra* note 2, at 460. In a 1992 Gallop poll of general practice physicians, 93% of those surveyed revealed that the threat of medical malpractice liability caused them to order tests they might not have otherwise considered necessary. *Health Care Reform Hearing*, *supra* note 7.

<sup>18</sup> Simpson, *supra* note 2, at 461.

<sup>19</sup> *Id.* at 463-64.

<sup>20</sup> Alicia Roberts, *Alternative Dispute Resolution Takes Less Money, Time; So Arbitrate or Negotiate—Just Don't Litigate*, 5 MANAGED CARE OUTLOOK (Jan. 4, 1993).

analysts believe that the inclusion of a medical care provider on an arbitration panel provides a more effective decisionmaker than a jury, because most jurors lack understanding of medical issues.<sup>21</sup> While weeks may be spent simply educating a jury with a mass of medical facts and issues required for the resolution of the case,<sup>22</sup> specialized triers of fact already have the necessary medical knowledge needed to understand the facts of the case.<sup>23</sup> As a general counsel for Kaiser put it, “[arbitration] is just plain more manageable than the often-unruly court system.”<sup>24</sup>

## 2. Less Expensive

Arbitration can save money for both plaintiffs and defendants by avoiding the expense of a trial. For a plaintiff, the cost of litigating a medical malpractice claim may in many cases exceed the amount paid in compensation to the injured plaintiff.<sup>25</sup> Arbitration may save money for health care providers by avoiding potentially high jury verdicts.<sup>26</sup> Many believe that the typical jury has a tendency to “produce damage awards in an economic vacuum, without reference to, or appreciation of, the effects of excessive recoveries upon the economics of a health care system.”<sup>27</sup> Furthermore, the Government Accounting Office (GAO) recently found that arbitration lowers defense costs for health care providers.<sup>28</sup> Money saved for health care providers will translate into savings for consumers. In fact, managed care providers claim that arbitration helps keep consumer costs for

<sup>21</sup> Johnson et al., *supra* note 14, at 8. *But see* Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 LAW & CONTEMP. PROBS. 43, 82-83 (1991) (stating that contrary to popular opinion, doctors prevail most often in medical malpractice suits and juries are reasonably competent decisionmakers).

<sup>22</sup> Johnson et al., *supra* note 14, at 7.

<sup>23</sup> *Id.*

<sup>24</sup> Roberts, *supra* note 20.

<sup>25</sup> Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429, 435 (1992).

<sup>26</sup> There is a fear among many health care providers that juries will be swayed by sympathy and give plaintiffs huge damage awards. *See* Roberts, *supra* note 20; *see also* Neil D. Schor, Note, *Health Care Providers and Alternative Dispute Resolution: Needed Medicine to Combat Medical Malpractice Claims*, 4 OHIO ST. J. ON DISP. RESOL. 65, 68 (1988); *but see* Metzloff, *supra* note 25, at 434 (stating that juries are competent decisionmakers).

<sup>27</sup> Simpson, *supra* note 2, at 458.

<sup>28</sup> *Issues Relating to Medical Malpractices, Before the Subcomm. on Health of the House Ways & Means*, 103rd Cong., 1st Sess. 20 (1993) (statement of Larry H. Thompson, Asst. Comptroller General) [hereinafter *Medical Malpractice*].

their health care plan affordable.<sup>29</sup>

### 3. *Less Time Consuming*

Arbitration can also save time. According to a recent study, claims resolved through arbitration take an average of nineteen months, as compared to thirty-five months for litigation.<sup>30</sup> In California, a three-day arbitration proceeding can replace a three-week trial.<sup>31</sup> A general counsel for the HMO Maxicare, which uses a mandatory arbitration provision in its enrollment contracts, explained that arbitration only "takes about an hour or two to lay it out in front of the arbitrator."<sup>32</sup> Once the claims are resolved, doctors can focus their attention on administering health care, rather than worrying about malpractice suits.

### 4. *Limits the Trauma to Doctors and Patients*

The use of arbitration can also prevent the trauma which both health care providers and plaintiffs must endure during a medical malpractice trial.<sup>33</sup> Doctors often perceive a negligence claim as an allegation of near criminal conduct.<sup>34</sup> The doctors experience a tremendous amount of guilt and begin to lack confidence in their capabilities. For seriously injured plaintiffs, the long hours of a trial may be difficult or impossible to endure.<sup>35</sup>

The goal of medical malpractice liability is to insure a high level of care, protect patients, and compensate victims of negligence.<sup>36</sup> Arbitration can accomplish these goals without the trauma of a trial. Arbitration is a private process that is capable of awarding damages to an injured plaintiff and ensuring adequate care.<sup>37</sup>

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<sup>29</sup> Roberts, *supra* note 20.

<sup>30</sup> *Medical Malpractice*, *supra* note 28, at 20.

<sup>31</sup> Roberts, *supra* note 20.

<sup>32</sup> *Id.*

<sup>33</sup> Metzloff, *supra* note 25, at 435-36.

<sup>34</sup> *Id.* at 435.

<sup>35</sup> *Id.* at 436 n.28.

<sup>36</sup> See Sylvia A. Law, *A Consumer Perspective on Medical Malpractice*, 49 LAW & CONTEMP. PROBS. 305, 310 (1986).

<sup>37</sup> See F. Patrick Hubbard, *The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective of Tort Reform*, 23 GA. L. REV. 295, 320-23 (1989).

### 5. Coincides with the Cooperative Contractual Relationship Between Doctors and Patients

The adversarial system is at odds with the relationship of cooperation between doctors and patients that is vital to the provision of adequate medical care.<sup>38</sup> The doctor-patient relationship is based on trust, while the adversarial system is based on distrust. Arbitration, without the long discovery process and publicity, fosters a more cooperative atmosphere for resolving disputes.<sup>39</sup> A contractual agreement to arbitrate may also be more compatible with the contractual relationship between doctors and patients.<sup>40</sup>

### C. Statutory Support for Arbitration of Medical Malpractice Claims

The general policy in all fifty states supports arbitration.<sup>41</sup> Fifteen states specifically address how arbitration agreements should be used to resolve medical malpractice claims.<sup>42</sup> Michigan had a program to insure that the option of arbitration is offered to patients at the time they receive health care from a health care provider.<sup>43</sup> Such an agreement can be enforced even if it is signed by the patient prior to receiving care.<sup>44</sup> Pretreatment

<sup>38</sup> Johnson et al., *supra* note 14, at 7-8.

<sup>39</sup> Cf. Metzloff, *supra* note 25, at 440. The problem with arbitration is that it does entail compromise. When both parties enter a medical malpractice action they both desire vindication. The plaintiff wants to punish the health care provider for harming her and the defendant wants to be cleared of all wrongdoing. Yet, compromise decisions do not vindicate either party. *Id.*

<sup>40</sup> Carl M. Stevens, *Medical Malpractice: Some Implications of Contract and Arbitration in HMOs*, 59 HEALTH & SOC'Y 59, 62 (1981).

<sup>41</sup> NANCY K. BANNON, AMA TORT REFORM COMPENDIUM 11 (1989). Currently, medical malpractice claims can be arbitrated in most states under the general arbitration statutes of those states.

<sup>42</sup> Those states that have specifically addressed medical malpractice in their arbitration statutes are: Alabama, Alaska, California, Colorado, Florida, Georgia, Illinois, Louisiana, Maine, New York, Ohio, South Dakota, Vermont, Virginia. *Id.* at 11-17.

<sup>43</sup> MICH. COMP. LAWS §§ 600.5040-.5065 (1979) (repealed). During the fourteen years that the Michigan plan was in effect, 985 claims were filed. Of these claims, the time from claim filing to claim closing was significantly shorter than regular litigation. *Medical Malpractice*, *supra* note 28, at 19.

<sup>44</sup> MICH. COMP. LAWS §§ 600.5040-.5065 (1979) (repealed). Other state statutes still allow pretreatment arbitration agreements. See COLO. REV. STAT. 13-64-403 (1994); ALASKA STAT. § 9.55, 535 (1994) (allowing pretreatment agreements, but the agreement must not be a prerequisite to receiving care).

agreements are also allowed in California and New York.<sup>45</sup> The New York statute specifically allows the use of arbitration agreements in HMOs and other managed care enrollment contracts.<sup>46</sup> These statutes create a fertile legal landscape for mandatory arbitration agreements in the managed care setting.

*D. Common Law Support for Arbitration of Medical Malpractice Claims in the Managed Care Setting*

As a general rule, courts enforce arbitration agreements in the managed care setting.<sup>47</sup> In *Madden v. Kaiser Foundation Hospitals*, the California Supreme Court held that "an agent or representative, contracting for medical services [with an HMO] on behalf of a group of employees has implied authority to agree to arbitration of malpractice claims of enrolled employees arising under the contract."<sup>48</sup> The plaintiff, a state employee who was covered under Kaiser's group health plan, brought a malpractice suit against Kaiser. The plaintiff claimed that she was not bound by the arbitration agreement because she had no knowledge of the agreement; that it was a contract of adhesion; and that it violated her right to a jury trial. The court rejected all three arguments.<sup>49</sup>

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<sup>45</sup> Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language:

It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

CAL. CIV. PRAC. CODE § 1295(a) (West 1994). See also N.Y. PUB. HEALTH LAW § 4406(a) (McKinney 1986).

<sup>46</sup> N.Y. PUB. HEALTH LAW § 4406(a) (McKinney 1986). See also BANNON, *supra* note 41, at 15.

<sup>47</sup> See *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178 (Cal. 1976); see also *Doyle v. Giuliucci*, 40 P.2d 1 (Cal. 1965); *Dutel v. Travelers Health Network of La., Inc.*, 1993 WL 62387, at \*3 (E.D. La. Mar. 2, 1993); *Marciniak v. Amid*, 412 N.W.2d 248 (Mich. Ct. App. 1987).

<sup>48</sup> *Madden*, 552 P.2d at 1180.

<sup>49</sup> *Id.*, 522 P.2d at 1181.



## ARBITRATION, MANAGED CARE AND CONSUMERS

On August 1, 1971, the plaintiff had a hysterectomy at a Kaiser hospital, during which her bladder was punctured and blood transfusions were required.<sup>50</sup> From the blood transfusions, plaintiff developed serum hepatitis.<sup>51</sup> Plaintiff, unaware of the new arbitration provision enacted in May 1971, filed suit against Kaiser and the blood banks.<sup>52</sup> The trial court denied Kaiser's motion to compel arbitration and Kaiser appealed.<sup>53</sup> On appeal, the California Supreme Court compelled arbitration. The court held that it was within the scope of authority of an agent to bind employees to an agreement to arbitrate medical malpractice claims.<sup>54</sup> The court relied on section 2319 of the California Civil Code, which authorizes a general agent "[t]o do everything necessary or proper and usual" for the purpose of serving as an agent.<sup>55</sup> Furthermore, the court, relying on the fact that arbitration is an accepted means of resolving malpractice disputes, concluded that arbitration was within the "proper and usual" guidelines of the statute.<sup>56</sup>

The court disagreed with the plaintiff's claim that the arbitration agreement was a contract of adhesion. According to the court, the Kaiser plan represented the product of negotiation between two parties "possessing parity of bargaining strength."<sup>57</sup> By definition, in a contract of adhesion, the weaker party has no opportunity to negotiate the terms of the contract with the stronger party.<sup>58</sup>

The court also rejected the plaintiff's claim that the Kaiser arbitration agreement violated her constitutional right to a jury trial.<sup>59</sup> The court implied a waiver of the right to a jury trial from the agreement to arbitrate.<sup>60</sup> For its reasoning, the court relied on the regular enforcement of

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<sup>50</sup> *Madden*, 522 P.2d at 1181.

<sup>51</sup> *Id.*

<sup>52</sup> It is not disputed that the Kaiser plan did not contain an arbitration provision at the time the patient enrolled. The provision was added at a subsequent date without the knowledge of the patient, who claimed not to have received the revised contract in the mail.

*Id.*

<sup>53</sup> *Id.* at n.4.

<sup>54</sup> *Id.* at 1182.

<sup>55</sup> *Madden*, 522 P.2d at 1182.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1185. While it may be true that the patient's agent and Kaiser were on equal bargaining terms, the court fails to address the fairness concerns with the arbitration process itself.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1187.

<sup>60</sup> *Madden*, 522 P.2d at 1187 n.12 (California Code of Civil Procedure, section 631, recognizes implied waiver of a right to a jury trial by failure to request a jury or to post jury

arbitration agreements found in labor and commercial contracts which do not expressly contain waivers of the right to a jury trial.<sup>61</sup>

Other state courts have followed *Madden* and upheld arbitration provisions in managed care contracts.<sup>62</sup> In *Leong v. Kaiser Foundation Hospitals*, the Supreme Court of Hawaii held that the arbitration provision in an HMO contract was not a contract of adhesion.<sup>63</sup> The court reasoned that in a contract of adhesion, the stronger party uses oppressive terms to try to limit its obligations and liability.<sup>64</sup> The court held an arbitration provision, does not limit the obligations of the HMO, but "merely substitutes one forum for another."<sup>65</sup>

The benefits of arbitration combined with the statutory and common-law support for arbitration of medical malpractice disputes creates a strong argument for arbitration's expansive use. Yet, arbitration, particularly in the managed care setting, is not without its flaws.

### III. THE KAISER EXAMPLE

#### A. *The Enrollment Contract and the Agreement to Arbitrate*

Arbitrating medical malpractice claims is not an idea born out of the recent health care crisis. Since 1972, Kaiser Permanente, the world's largest health maintenance organization, has mandated the use of arbitration in all of its enrollment contracts.<sup>66</sup> Kaiser is a managed care leader and a model for health care reform.<sup>67</sup> Over 6.6 million of its members in sixteen states<sup>68</sup> are bound to arbitrate any future claims on any legal theory they may have

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<sup>61</sup> *Madden*, 552 P.2d at 1187 n.12.

<sup>62</sup> See *Leong v. Kaiser Found. Hosps.*, 788 P.2d 164 (Haw. 1990); *Wilson v. Kaiser Found. Hosps.*, 190 Cal. Rptr. 649 (Cal. Ct. App. 1983); *Marciniak v. Amid*, 412 N.W.2d 248 (Mich. Ct. App. 1987).

<sup>63</sup> 788 P.2d at 166.

<sup>64</sup> *Id.* at 169.

<sup>65</sup> *Id.* (quoting *Madden*, 552 P.2d at 1186).

<sup>66</sup> Joseph T. McLaughlin et al., *Alternate Dispute Resolution*, C380 A.L.I.-A.B.A. 513, 531 (Feb. 1, 1989).

<sup>67</sup> Martha Groves, *Ailing Health Care System May Get Kaiser-Style Cure*, L.A. TIMES, May 10, 1993, at A-1. See also KAISER PERMANENTE, KAISER PERMANENTE HEALTH CARE FOR LIFE (1993) (This pamphlet can be obtained by writing directly to Kaiser Foundation Health Plan, Inc., 1950 Franklin Street, Oakland, CA 94612.). Following Kaiser's lead, Maxicare Health Plans, another HMO, began using binding arbitration in 1973. It now uses arbitration in four states. Roberts, *supra* note 20.

<sup>68</sup> Groves, *supra* note 67, at A-1.

against a Kaiser hospital, doctor, or facility. Kaiser's experience with mandatory arbitration in medical malpractice may provide some valuable guidance as to how arbitration in a managed health care system would work.

Kaiser primarily provides care through health maintenance organizations. "An HMO is basically a prepaid health insurance plan in which an organization accepts contractual responsibility for the delivery of a stated range of health services to an enrolled population."<sup>69</sup> Nationwide enrollment in HMOs has grown almost as fast as the cost of health care. In 1980, there were only 9.1 million HMO members, but by 1989, the number soared to 32.4 million.<sup>70</sup> Membership growth in HMOs can be attributed to their ability to provide affordable health care. Providers are able to cut costs by employing closed panels of full-time physicians and by contracting with consumers to cover only care rendered by their providers.<sup>71</sup> An HMO that uses a closed panel has employed physicians who agree to cooperate in the HMO's cost containment strategy and will provide services to its enrollees.<sup>72</sup> In this way the HMO can achieve its goal of efficiency by involving providers directly in the cost-containment effort, thus eliminating the need to contract with the enrollee to provide fewer services.<sup>73</sup>

### B. The Process

Kaiser's arbitration process consists of a panel of three arbitrators.<sup>74</sup> One arbitrator is selected by Kaiser and the other arbitrator is selected by the patient/member. Most often the arbitrator chosen by Kaiser is a medical expert or medical care provider.<sup>75</sup> The two arbitrators then select a third arbitrator, who is deemed the neutral member.<sup>76</sup> Costs are shared between the two parties and the decision is binding.<sup>77</sup>

Kaiser's arbitration provision is a binding process that can conclusively

<sup>69</sup> HMOs fall under the managed care cost containment umbrella. GREENBERG, *supra* note 6, at 65. Membership in an HMO is a contractual agreement. Usually employers contract with HMOs to provide a health care package for their employees. Yet, individuals without employee health insurance may also contract with an HMO.

<sup>70</sup> *Id.*

<sup>71</sup> Havighurst, *supra* note 5, at 1779. See also GREENBERG, *supra* note 6, at 65-68.

<sup>72</sup> Havighurst, *supra* note 5, at 1781.

<sup>73</sup> *Id.*; cf. Rosenblatt, *supra* note 7, at 933-34. See also discussion *supra* Part I.

<sup>74</sup> McLaughlin et al., *supra* note 66, at 532.

<sup>75</sup> This is common for medical malpractice. The presence of a medical expert is said to expedite the resolution of the dispute by avoiding the requirement to dispense cumbersome medical information to the decisionmakers. See discussion *supra* Part II.B.1.

<sup>76</sup> McLaughlin et al., *supra* note 66, at 533.

<sup>77</sup> *Id.*

resolve disputes. Judicial review is limited and arbitration decisions can be challenged on only two levels. First, due process or jurisdiction, the plaintiff may appeal to the district court.<sup>78</sup> Second, on traditional contract, such as fraud, duress, or unconscionability, may also provide an avenue for judicial review.<sup>79</sup> The agreement to arbitrate is incorporated into a five page application for the membership/medical questionnaire form.<sup>80</sup> It appears in a grey box, just above the signature line. It is printed in inconspicuous type and is not in bold face type. It reads as follows:

I understand that the Service Agreement provides that all claims arising from alleged violation of any duty incident to the Service Agreement with Kaiser Foundation Health Plan, including any claim for medical or hospital negligence or for premises liability, irrespective of the legal theory asserted, are subject to arbitration.<sup>81</sup>

### C. Problems with the Provision

There are several problems with Kaiser's provision to arbitrate. The most troubling is that arbitration is never defined in any of the material provided by Kaiser.<sup>82</sup> Consumers should be informed that by signing this contract, they are committed to resolving any dispute with Kaiser, including medical malpractice, through binding arbitration.<sup>83</sup> The contract should

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<sup>78</sup> Irving Ladimer et al., *Experience in Medical Malpractice Arbitration*, 2 J. LEGAL MED. 433, 439 (1981). For example, proven bias on the arbitration panel may be appealable. Yet, the lack of notice or understanding of the agreement to arbitrate is not sufficient to preclude arbitration. *See, e.g., Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178 (Cal. 1976).

<sup>79</sup> Lauren K. Saunders, *The Quest for Balance: Public Policy and Due Process in Medical Malpractice Arbitration Agreements*, 23 HARV. J. LEGIS. 267, 271 (1986). For example, the courts will not uphold a contract of adhesion if it is given to patients on a take-it-or-leave-it basis under conditions where the patients cannot obtain the desired service elsewhere. *See Broemmer v. Abortion Servs. of Phoenix*, 840 P.2d 1013 (Ariz. 1992).

<sup>80</sup> KAISER PERMANENTE, KAISER PERMANENTE APPLICATION FOR MEMBERSHIP - MEDICAL QUESTIONNAIRE 5 (rev. 10-06-93) [hereinafter MEMBERSHIP].

<sup>81</sup> *Id.*

<sup>82</sup> The only further information that the booklet gives on arbitration is the following: "[A]ll claims arising from alleged violation of any duty incident to your agreement with Health Plan, including any claim for medical or hospital negligence or for premises liability, irrespective of the legal theory asserted, are subject to arbitration." KAISER PERMANENTE, DISCLOSURE FORM AND EVIDENCE OF CONTRACT 34 (1993).

<sup>83</sup> For more information about the importance of educating consumers before they sign binding arbitration agreements, see Law, *supra* note 36, at 316-18. *See also* Jacqueline R. Baum, Note, *Medical Malpractice Arbitration: A Patient's Perspective*, 61 WASH. U. L.Q.

specify that by signing the agreement, the consumer is waiving her right to a jury trial. An effective standard for a clear and fair arbitration agreement can be found in a California statute for HMOs.<sup>84</sup> The language of the arbitration agreement should not be such that an ordinary person would expect a jury trial.<sup>85</sup> Hence, a fair agreement to arbitrate should define arbitration and its effect on the consumer's rights in language an ordinary person would understand.

Another problem with the contract is that it is signed before the parties know all of the facts, but does not give either party the right to rescind. Statutes in many states allow consumers the right to cancel an arbitration agreement after signing it.<sup>86</sup> The right to rescind in the managed care setting can be particularly important. At the point of contracting for prepaid health care, consumers cannot foresee what type of care they may need in the future.<sup>87</sup> If they happen to develop a serious illness, they may not want to be bound to arbitrate.<sup>88</sup> Also, because consumer choice for providers is limited due to the nature of the HMO, a consumer who is less comfortable with their provider may not want to be bound to arbitrate.<sup>89</sup> Ideally,

123 (1983) (contending that patients are inadequately protected).

<sup>84</sup> See, e.g., CAL. CIV. PROC. CODE § 1295 (West 1995); but see CAL. CIV. PROC. CODE § 1295(f) (Health care service plans may be exempt from provisions a, b, & c, which require that arbitration be defined and explained. However, such health care service plans must have a procedure for notifying prospective subscribers that the plan has an arbitration provision.).

<sup>85</sup> CAL. CIV. PROC. CODE § 1295 (West 1995); COLO. REV. STAT. ANN. § 13-64-403(4) (West 1994) (requiring notice of arbitration be printed in ten-point bold-faced type).

<sup>86</sup> See ALASKA STAT. § 9.55.535(c) (1994) (30 day revocation period); CAL. CIV. PROC. CODE § 1295(c) (West 1995); COLO. REV. STAT. ANN. § 13-64-403(3) (West 1994) (90 days); ILL. REV. STAT. ch. 10, para. 209(c) (1992) (60 days); LA. REV. STAT. ANN. § 9:4235(1) (West 1993) (30 days); VA. CODE ANN. § 8.01-581.12 (Michie 1992) (60 days). Though most of these statutes limit the time a party may rescind the arbitration agreement, they still allow that right. See *infra* note 146.

<sup>87</sup> *Contra* William H. Ginsberg et al., *Contractual Revisions to Medical Malpractice Liability*, 49 LAW & CONTEMP. PROBS. 253, 256 (Spring 1986) (arguing that an HMO enrollment contract is the best time to sign an arbitration clause because the patient is not sick and can make a decision with "full freedom of choice").

<sup>88</sup> Even without a serious illness, consumers may not want to arbitrate. According to an extensive study in Michigan, consumers are generally reluctant to agree to arbitrate medical malpractice claims. Fourteen years ago, Michigan designed a program to make patients aware of the arbitration option, but few patients selected arbitration. Out of the 20,000 claims that were filed for medical malpractice, only 985 had filed for arbitration. See *Medical Malpractice*, *supra* note 28, at 19.

<sup>89</sup> But see Havighurst, *supra* note 5, at 1787-89. Havighurst is a strong supporter of

arbitration should be an agreement between two parties of equal bargaining power. Yet, the inability to rescind the agreement combined with the lack of knowledge regarding their future medical needs, leaves consumers at a considerable disadvantage.

The third problem with the agreement is that it fails to specify that the arbitration is binding. It is important to note that in prior Kaiser contracts, the word "binding" is explicitly stated.<sup>90</sup> A consumer's only indication that the arbitration is binding would come from a study of case law.<sup>91</sup> Therefore, "binding" should not only be defined, but also included.

#### IV. LEGAL CONCERNS OF ARBITRATING MEDICAL MALPRACTICE CLAIMS IN THE MANAGED CARE SETTING

The ambiguities of the Kaiser agreement can be resolved by simply defining arbitration and clarifying other words in the contract. However, resolving the legal concerns of arbitrating in the managed care environment is not as simple. There are two primary areas of concern: contractual and constitutional.

##### A. Contractual Concerns

Arbitration agreements in managed care enrollment contracts may be against public policy because they are contracts of adhesion. A contract of adhesion gives the weaker party to an agreement no realistic choice as to its terms.<sup>92</sup> It is a take-it-or-leave-it situation.<sup>93</sup>

By the very nature of the current health care crisis, consumers may be forced to accept an arbitration provision in an HMO enrollment contract in

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managed care. He believes that consumer choice has not been a helpful source of rationing precious health care resources. Thus, he supports voluntary limits on patients' choices as used in HMOs. *Id.*

<sup>90</sup> OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, THE IMPACT OF AIDS ON THE KAISER PERMANENTE MEDICAL CARE PROGRAM (Northern California Region) 28-29 (July 1988) (displaying Kaiser's Application for Membership — Medical Questionnaire Form from 1987).

<sup>91</sup> See *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178 (Cal. 1976); *Wilson v. Kaiser Found. Hosps.*, 190 Cal.Rptr. 649 (Cal. Ct. App. 1983); *Leong v. Kaiser Found. Hosps.*, 788 P.2d 164 (Haw. 1990).

<sup>92</sup> *Wheeler v. St. Joseph Hosps.*, 133 Cal. Rptr. 775, 783 (Cal. Ct. App. 1976).

<sup>93</sup> See *id.* An adhesion contract is "offered to consumers of goods and services on essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract." *Id.*

order to receive affordable health care. There are over 37 million Americans who are currently uninsured.<sup>94</sup> The profile of these Americans without insurance is strikingly similar to the consumer profile of HMO members. Both groups are younger and employed at organizations with 500 or fewer employees.<sup>95</sup> Small employers are less likely to be able to offer health insurance to their employees.<sup>96</sup> For those without insurance through an employer, an HMO may be their only affordable option to receive adequate health care. It is unrealistic to think that these individuals, who are desperate to obtain health care at a reasonable price, are in a fair bargaining position with an HMO. This gives the HMOs an opportunity to exploit their advantage and require consumers to either sign the arbitration provision or forego health care. It is a clear form of economic adhesion. Such a contract cannot be consensual, and arbitration without consent is disfavored by everyone.<sup>97</sup> Economic factors and the lack of affordable choices should be factored into the legislature's decision-making. Without such analysis, the danger of forcing consumers into arbitration is great. Health care reform may bring an end to the dire predicament of the uninsured, but reform may amplify the concern about contracts of adhesion. For instance, if universal coverage is combined with mandated arbitration of malpractice claims, then more consumers may still be forced to accept an arbitration agreement in order to receive health care.<sup>98</sup> Even if the new Republican-controlled Congress adopts a less-intrusive plan for reform, the trend toward managed care will likely continue, as the market adapts to provide affordable health care to consumers. As managed care grows, the need to keep costs at a minimum becomes more important, and arbitration is likely to play an even greater role. Unfortunately for consumers who do not desire arbitration, the market expansion of managed care may mean that Americans have to forego a choice of forums in return for adequate health care.

On the other hand, some argue that the limited choice managed care

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<sup>94</sup> Kolata, *supra* note 3, at 1-1.

<sup>95</sup> According to one study, the average HMO consumer is below 40 and is in the middle to upper-middle class. The average uninsured American is also younger and largely middle class. Most often he is employed at smaller businesses, where he is less likely to receive health insurance through his employers. ROBERT G. SHOULDICE, INTRODUCTION TO MANAGED CARE 235 (1991) (citing a Louis Harris & Associates study from 1984).

<sup>96</sup> *Broemmer v. Abortion Servs. of Phoenix*, 840 P.2d 1013, 1015 (Ariz. 1992).

<sup>97</sup> See *Broemmer*, 840 P.2d at 1015 (holding that the agreement to arbitrate was not enforceable because it was a contract of adhesion and was thus not voluntarily signed). See also *Wheeler*, 133 Cal. Rptr. at 783 (discussing characteristics of adhesion contracts); Law, *supra* note 36, at 316-17.

<sup>98</sup> See discussion *supra* Part I. (A Kaiser-like cure to the health care crisis is likely.).

offers is the price consumers should pay for affordable health care.<sup>99</sup> Health care with arbitration agreements is better than no health care at all. Furthermore, an arbitrated ruling can be appealed to a district court if there is gross injustice in the arbitration agreement itself.<sup>100</sup> Policymakers must weigh these positive aspects of arbitration with the reality that economics may force consumers to agree to arbitration in order to receive health care.

### B. Constitutional Concerns

Managed care agreements to arbitrate may unconstitutionally abridge consumers' Seventh Amendment right to a jury trial.<sup>101</sup> Courts have skirted around this issue by deeming arbitration agreements as an adequate waiver of the right to a jury trial.<sup>102</sup> Yet, a waiver is not adequate or constitutional if consumers are economically coerced into signing an agreement to receive health care.<sup>103</sup>

In addition, consumers should not be forced to give up their right to a jury trial merely because many health care providers are convinced that arbitration is imperative to affordable health care.<sup>104</sup> Providers fear juries and the jurors' perceived tendencies to sympathize with plaintiffs.<sup>105</sup> This fear is unsubstantiated by the fact that doctors prevail most often in malpractice disputes.<sup>106</sup> In a five-year study on jury verdicts in medical malpractice actions, the plaintiff prevailed only 29% of the time.<sup>107</sup> When judges decided the cases, plaintiffs won 50% of the time.<sup>108</sup> Therefore, the

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<sup>99</sup> See *Wilson*, 190 Cal. Rptr. at 655. The court distinguished cases where arbitration was not enforced on the grounds that the arbitration agreements were not provided by a prepaid health care contract. Thus, it can be inferred that if an individual is in an HMO, she has less right to oppose arbitration than one who is not in an HMO.

<sup>100</sup> Saunders, *supra* note 76, at 271. "Gross injustice" would include problems with the agreement itself such as fraud, duress, and unconscionability. Yet, an allegation of nondisclosure or misunderstanding is not sufficient to vacate an arbitration award. See *Georgia Lamb v. Holy Cross Hosp.*, 148 Cal. Rptr. 273 (Cal. Ct. App. 1978).

<sup>101</sup> U.S. CONST. amend. VII.

<sup>102</sup> See *Madden v. Kaiser Found. Hosps.*, 552 P.2d 478 (Cal. 1976).

<sup>103</sup> See discussion *supra* Part IV. A.

<sup>104</sup> For evidence that medical care providers are convinced arbitration is necessary to provide affordable health care, see Schor, *supra* note 26, at 67; See also *Johnson et al.*, *supra* note 14, at 7.

<sup>105</sup> *Johnson et al.*, *supra* note 14, at 7.

<sup>106</sup> Metzloff, *supra* note 25, at 434.

<sup>107</sup> Simpson, *supra* note 2, at 462 (citing Theodore Eisenberg & Kevin Clermont, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992)).

<sup>108</sup> *Id.*



presumption that a jury will find more often for the plaintiff than would an experienced decisionmaker is seriously challenged. Also, so few cases are determined by juries that providers' fear of a jury's power is irrational.<sup>109</sup> If consumers are going to their constitutional right to a jury trial and its benefits, the reason should be justified. It should not be based on the unsupported fears of the medical community.

Furthermore, resolution without a jury may lead to disproportionately lower damage awards. This is particularly troubling when a case like Shirley Smith's is considered.<sup>110</sup> Ms. Smith was a Kaiser patient who visited a Kaiser facility for over three years complaining about a lump in her breast.<sup>111</sup> Kaiser took no action, so after Smith began to experience leg pains and muscle weakness, she switched to another HMO, where a doctor immediately hospitalized her.<sup>112</sup> The cancer that began in her breast had spread to her lungs and bones.<sup>113</sup> She died at age 42. Her parents filed a wrongful death suit against Kaiser, which was referred to an arbitration panel.<sup>114</sup> In its vigorous defense, Kaiser claimed that its treatment of Smith had met acceptable standards.<sup>115</sup> The panel awarded only \$40,000 to Smith's family.<sup>116</sup> The damage award was barely enough to cover the legal fees and it was grossly inferior to the norm.<sup>117</sup>

Advocates for arbitration want to ignore the important role that juries and the courts have played in regulating the quality of health care.<sup>118</sup> Advancements in informed consent, the standard of care, and professional accountability have all resulted from the tort system.<sup>119</sup> Before juries are

<sup>109</sup> Metzloff, *supra* note 25, at 433. Only 10% of all medical malpractice claims are determined by juries. *Id.* See also Metzloff, *supra* note 21, at 82-84 (illustrating through statistical analysis why it is difficult to prove that there is bias in jury decisions).

<sup>110</sup> Groves, *supra* note 67, at A-4.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Groves, *supra* note 67, at A-4. In medical malpractice, plaintiffs bear the burden of proving that the defendant doctor failed to perform up to a national standard of medical practice. See BARRY R. FURROW ET AL., *HEALTH LAW* 360 (1995).

<sup>116</sup> Groves, *supra* note 67, at A-4.

<sup>117</sup> *Id.* In 1991, the midpoint verdict for a wrongful death suit was \$602,000, over ten times the amount the Smiths received. "Wrongful death" is defined as improper diagnosis, improperly performed surgery, or an inappropriate diagnosis. *TRENDS IN HEALTH CARE PROVIDER LIABILITY: AN ANALYSIS OF JURY VERDICTS* 18 (Brian Shenker ed., 1992).

<sup>118</sup> See, e.g., Nicholas P. Terry, *The Technical and Conceptual Flaws of Medical Malpractice Arbitration*, 30 ST. LOUIS U. L.J. 571, 575 (1986).

<sup>119</sup> Terry, *supra* note 119, at 578.

completely dismissed from medical malpractice, policymakers should consider the positive role juries have played in reshaping medical professional responsibility.

## V. HOW SHOULD ARBITRATION BE USED FOR MEDICAL MALPRACTICE CLAIMS IN THE MANAGED CARE ENVIRONMENT?

Before health care reform combines arbitration with managed care and dispenses it to the American public, the conflict between the benefits of arbitration and our legal ideals should be resolved. Health care reform should not cost consumers their contractual and constitutional rights.

Support for arbitration is not unanimous, nor is it without limits. Clues on how to prevent consumer harm can actually be gathered from the common law and state statutes. Fair and effective arbitration in the managed care setting should have three goals: (1) eliminating the adhesive quality of arbitration agreements in managed care enrollment contracts; (2) eliminating the bias in arbitration panels; and (3) promoting consumers' understanding of arbitration agreements.

### *A. Eliminating the Adhesive Quality of Arbitration Agreements*

Recently, the Supreme Court of Oklahoma broke from the *Madden* precedent and refused to enforce a signed arbitration agreement in an HMO membership contract.<sup>120</sup> The court held that the agreement to arbitrate was not enforceable because it bound the enrollee to arbitrate any future contractual disputes.<sup>121</sup> The court objected to the agreement's absolute requirement of arbitration.<sup>122</sup> The court held this provision to be void under Oklahoma law, which provides that any condition in a contract which restricts a party from enforcing his rights under the contract by the usual legal proceedings is void.<sup>123</sup> Even the petitioner's knowledge and understanding of the arbitration provision was insufficient to sway the court in favor of enforcing the provision.<sup>124</sup> The court held that precontroversy arbitration agreements are unenforceable because they deny courts jurisdiction and are contrary to public policy.<sup>125</sup>

The Oklahoma court made a valid point that pretreatment agreements to arbitrate are not amenable to American public policy. Pretreatment

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<sup>120</sup> *Cannon v. Lane*, 867 P.2d 1235, 1238 (Okla. 1993).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1238-39.

<sup>124</sup> *Id.* at 1239.

<sup>125</sup> *Cannon*, 867 P.2d at 1238.

agreements can be adhesive because they lock consumers into arbitration before they know if and how they may be injured. A number of states prohibit pretreatment agreements to arbitrate medical malpractice claims.<sup>126</sup> In Georgia, "no agreement to arbitrate shall be enforceable unless the agreement was made subsequent to the alleged negligence and after a dispute or controversy has occurred . . ." <sup>127</sup> In Alabama, pretreatment arbitration agreements are also.<sup>128</sup> These statutes and the Oklahoma case indicate that adhesive pretreatment agreements may be contrary to American public policy.

The solution may be to provide some options to those who object to the arbitration agreement at the time of signing the enrollment contract. This would avoid the problem of the "take-it-or-leave-it" adhesion element of the enrollment contract.<sup>129</sup> The managed care provider could offer consumers the option of agreeing to a reasonable cap on recovery damages, if the consumer refuses to sign the arbitration clause.<sup>130</sup> Caps on recovery may be a better solution to the malpractice dilemma. According to a recent study by the Office of Technological Assessment, the one tort reform that reduced malpractice costs was the placing of caps on noneconomic damages.<sup>131</sup> Under this option, the HMO would face only limited liability and the plaintiff would not be locked into an adhesive contract.

Another option the managed care provider could offer is a slightly higher-priced plan, with no obligation to sign an arbitration provision. Because managed care providers claim that arbitration is necessary to help cut costs, the extra fee allows the provider to make up losses they may face without arbitration. In this way, those who strenuously object to arbitration can still sign a managed care enrollment contract and receive care, but are not locked into arbitration.

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<sup>126</sup> The rationale behind such limitations is to protect consumers and patients from having to sign contracts blindly. Prior to treatment, a patient is unable to foresee any possible injuries and if she will desire a jury trial.

<sup>127</sup> GA. CODE ANN. § 9-9-62 (1994).

<sup>128</sup> ALA. CODE § 6-5-485(A) (1994).

<sup>129</sup> See *supra* Part III.A.1.

<sup>130</sup> In order to determine what is a reasonable level, the HMO should use a statistical mean for a specific injury. For example, if the average damage award for doctor malpractice which results in brain damage is \$600,000, then the cap limits what the decisionmaker can award to the injured plaintiff to \$600,000. See *TRENDS IN HEALTH CARE PROVIDER LIABILITY: AN ANALYSIS OF JURY VERDICTS* 19 (Brian Shenker ed., 1992) (illustrating liability through statistical analysis of jury verdicts).

<sup>131</sup> *Health Care Reform Hearing*, *supra* note 7, at 3.

*B. Eliminating the Bias in Arbitration Panels*

Arbitration can meet our constitutional expectations if some of the bias within the arbitration panel is alleviated.<sup>132</sup> Unlike a jury trial, a medical practitioner is required on many medical malpractice arbitration panels.<sup>133</sup> Thus, the plaintiff is subject to a strong bias that is generally weeded out of a courtroom jury by use of peremptory challenges. When the bias within the panel is removed, then the arbitration panel is more like a jury, which is more palatable to our Seventh Amendment priorities. Arbitration is viewed as an "unqualified success" in the eyes of medical practitioners because it is less favorable than the courtroom for the plaintiff.<sup>134</sup> Arbitration is less satisfactory forum for plaintiffs because of limited discovery, the bias of a health care provider on the panel, and the emphasis on compromise.<sup>135</sup> If the constitution requires that the advantages of the court system be preserved, then arbitration is inadequate.<sup>136</sup>

One solution would be simply to eliminate the medical care provider from the panel. Yet, having a medical practitioner on the panel is an efficient way to save time and money. A more viable solution should attempt to eliminate the inherent bias the medical care provider presents. This could be achieved in various ways. First, the arbitration clause should require that the panel member be a medical care provider who practices in a different region than the defendant.<sup>137</sup> For example, it would be highly prejudicial if the defendant and the panel member were fellow staff members at the local Kaiser hospital. Second, the arbitration provision should establish stricter procedural rules regarding the amount of influence the medical care provider can have on the other arbitrators. For instance, the medical expert arbitrator should not be allowed to assume a persuasive position similar to a medical expert witness. If the panel members have questions regarding the medical issues at hand, the medical expert arbitrator should not be looked to for all the answers. If the medical practitioner can be removed as a source of bias, then the arbitration process can benefit from the expert's knowledge without suffering from her partiality.

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<sup>132</sup> See Metzloff, *supra* note 25, at 434; see also Schor, *supra* note 26, at 79.

<sup>133</sup> Saunders, *supra* note 79, at 278; see also discussion about Kaiser *supra* Part II.B.

<sup>134</sup> See Law, *supra* note 36, at 318. Furthermore, arbitrators are less likely to find for a claimant if there is any doubt about liability. Ladimer, *supra* note 78, at 451.

<sup>135</sup> Law, *supra* note 36, at 318.

<sup>136</sup> Saunders, *supra* note 79, at 280.

<sup>137</sup> The preferred location for a medical expert arbitrator would be a similar locality with similar medical technology and knowledge.

### C. Promoting Consumers' Understanding of Arbitration Agreements

The biggest flaws in the Kaiser agreement to arbitrate are those associated with the contract's inability to communicate its purpose.<sup>138</sup> Managed care providers should not be allowed to capitalize on consumers' ignorance of arbitration. If the courts are going to adhere to the traditional rule of contracts that one is bound to what one signs, then managed care providers should bear the duty of notice to consumers.<sup>139</sup>

There are several ways in which a fair agreement to arbitrate can promote consumers' understanding of arbitration. The first way is to clearly define arbitration. The agreement to arbitrate should be written so that an ordinary person in the enrollee's shoes would not expect a jury trial.<sup>140</sup> Ideally when a conflict arises, a consumer should not be surprised when arbitration is required.

Yet, merely including the definition of arbitration is not enough. The agreement should also put the consumer on notice that *any* medical malpractice claim a consumer may have against the managed care provider will be resolved by arbitration. Notice of arbitration is a goal that several state statutes have seen fit to establish. In California, arbitration agreements in medical service contracts must meet certain disclosure qualifications.<sup>141</sup> Immediately before the enrollee's signature line, a statement notifying the signatory that they are giving up their right to a jury trial must appear in ten-point bold red type.<sup>142</sup> A New York statute specifically requires that HMOs inform subscribers of the effect of arbitration on their right to a jury trial and their right of rescission.<sup>143</sup> In South Carolina, if specific notice requirements are not prominently displayed on the contract as required, then

<sup>138</sup> See *supra* Part III.C.

<sup>139</sup> This would avoid the unfairness that occurred in *Leong*. The court held that even though the plaintiffs were not aware of the arbitration provision because it did not exist at the time of their initial enrollment, they were still bound to it. *Leong v. Kaiser Found. Hosps.*, 788 P.2d 164, 168 (Haw. 1990).

<sup>140</sup> N.Y. PUB. HEALTH LAW § 4406(a) (McKinney 1986). See also ALASKA STAT. § 9.55.535 (1994) (mandating that the agreement to arbitrate must be clearly provided in bold print on face of agreement).

<sup>141</sup> CAL. CIV. PROC. CODE § 1295(b) (West 1993). Yet, section 1295(f) may exempt HMOs and other managed care groups from the notice requirements. This would explain why the Kaiser contract, which is still enforced in California, does not meet the requirements listed in 1295(b).

<sup>142</sup> CAL. CIV. PROC. CODE § 1295(b) (West 1993).

<sup>143</sup> Thus, in New York, all claims pursuant to an HMO contract are subject to arbitration where the patient has signed an arbitration agreement or has failed to sign an arbitration declination form. BANNON, *supra* note 41, at 15.

arbitration cannot be compelled.<sup>144</sup> As these states have found, notice requirements are an effective way to guard against unfair agreements to arbitrate. If the legislature adopts an arbitration policy as part of health care reform, such state statutes incorporating notice should serve as models for a national standard.

An arbitration agreement that aims to promote consumers' understanding should also allow consumers an opportunity to change their minds and rescind their acceptance of the contract. Most states allow for a period of rescission, usually thirty, sixty, or ninety days.<sup>145</sup> This is calculated from the last date of treatment. The right to rescission gives patients an opportunity to carefully consider their decision and take into account new factors in their decision-making process.<sup>146</sup>

In summary, a desirable arbitration agreement is one that defines arbitration, puts consumers on notice as to how it will affect their rights, and gives consumers an opportunity to rescind their agreement. These goals, combined with the successful elimination of the adhesive quality of many arbitration agreements as well as the bias in arbitration panels, can make the combination of arbitration and managed care compatible with consumers' contractual and constitutional rights.

## VI. CONCLUSION

While it is difficult to predict exactly what kind of health care reform will emerge from the legislature, the trend toward managed care is likely to continue.<sup>147</sup> The cost-conscious character of managed care will likely increase the amount of patient harm, which will in turn increase the number of medical malpractice claims and the need for malpractice reform. Backed by cost and time benefits, as well as support from the courts, arbitration will emerge as a solution to handle efficiently the increased number of medical malpractice claims. Legislators may look to Kaiser as a model of how to use arbitration in the managed care environment, but the Kaiser

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<sup>144</sup> "A contract subject to arbitration shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract. If such notice is not displayed, the contract is not subject to arbitration." S.C. CODE ANN. § 15-48-10 (Law. Co-op 1993).

<sup>145</sup> See ALASKA STAT. § 9.55.535(c) (1994) (allowing for 30 day period for rescission); COLO. REV. STAT. § 13-64-403(3) (1994) (allowing 90 day period for rescission); OHIO REV. CODE ANN. § 2711.23(b) (Baldwin 1994). See also BANNON, *supra* note 41, at 11-16 (listing statutes which allow for patient right to rescind).

<sup>146</sup> See discussion *supra* Part II.C.

<sup>147</sup> Even without reform, it is estimated that managed care will comprise almost 80% of the health care market. Sherman, *supra* note 5, at 36 (quoting Lawrence Gostin, Executive Director of the American Society of Law, Medicine, and Ethics).

## ARBITRATION, MANAGED CARE AND CONSUMERS

system is not without flaws. The benefits of arbitration cannot blind policymakers to the contractual and constitutional concerns of mandating the use of arbitration in the managed care setting. Arbitration must be instituted with an eye toward preventing consumer harm. Health care reform should not cost consumers their contractual and constitutional rights.

*Amy E. Elliott*

