



Add a powerful asset to your law firm:
our financial expertise.



SunTrust Bank, Member FDIC.

From the June 06, 2005 North Carolina Lawyers Weekly.

Order a REPRINT
of this Story

News Story

Federal Judge Okays Duke Medmal Arbitration Form

By Ertel Berry

A woman who signed an arbitration form before treatment at Duke's Private Diagnostic Clinic waived her family's right to sue for malpractice, a federal judge has ruled.

The holding, which stayed a lawsuit brought by the woman's estate over liver surgery that was allegedly botched, gives North Carolina health care providers a green light to offer patients a binding choice to arbitrate medmal disputes before they arise.

ADVERTISEMENT

Although the Duke health system is apparently the only major provider in the state to do that now, the May 17 holding in *Wilkerson v. Nelson* (North Carolina Lawyers Weekly No. 05-03-0658, 16 pages) could prompt others to follow.

In *Wilkerson*, U.S. Middle District Judge William L. Osteen rejected arguments based on common law that the Duke arbitration provision — sandwiched between two other paragraphs dealing with insurance and financial disclosures — was invalid.

- **Consideration.** Both parties agreed to be bound by the arbitration procedures and the result. That reciprocal promise was all the consideration required to support the agreement, Judge Osteen said.
- **Mutual assent.** The patient showed her assent to arbitration by signing the separate signature line for that option. She was charged with knowing what she signed. The plaintiffs didn't offer evidence to rebut the patient's capacity to give that assent, the court said.
- **Binding on family members.** The arbitration clause specifically covered any individual or entity claiming by or through the patient. That clearly included the wrongful death claim brought by her estate, said the court.

- **Public policy.** The arbitration agreement wasn't a contract of adhesion because benefits weren't conditioned on signing it. And it was not so "substantively" unreasonable as to be unconscionable, said Judge Osteen.

"It may be that the arbitration agreement was drafted and positioned in a manner that would avoid drawing undue attention to its terms, and may constitute procedural unfairness," he wrote. "There is nothing, however, substantively unfair about binding arbitration. If there were, there would not be the strong policy favoring it."

Judge Osteen's opinion is the first published opinion from a North Carolina court, state or federal, to address the validity of Duke's pre-dispute arbitration procedure.

The plaintiffs in an earlier case, *Milon v. Duke University*, challenged the validity of the same arbitration form. However, in reversing an appeals panel, the state Supreme Court simply said there was not enough evidence that the patient's wife had authority to sign it for him (see March 18, 2002 Lawyers Weekly).

Washington, D.C. attorney John Simpson, a lawyer for Duke, said that health system's arbitration option for medical claims had been affirmed numerous times in North Carolina Superior Court. *Wilkerson* was a first in the federal system, he said.

"According to my research, this is the first decision by a U.S. district court to uphold an arbitration agreement in the medical malpractice context against common law challenges to the validity of the agreement," he said. "It's certainly the first one I'm aware of in the Fourth Circuit and the first one involving Duke's program."

Arbitration isn't a prerequisite for treatment at Duke, but in a key holding Judge Osteen indicated the provision may have been enforceable even if it was.

"Even if the agreement were one of adhesion, the proper remedy would not be to invalidate the agreement," he wrote. North Carolina courts would merely subject a mandatory arbitration agreement to "greater scrutiny," said Judge Osteen, citing state law on insurance contracts.

"There are cases out there, although not in North Carolina, in which courts have upheld arbitration as a condition for medical treatment," Simpson said. "The ones I know of are not in the context of emergency room treatment but rather in the normal outpatient setting, where someone comes in and seeks out a doctor and is told this is a condition of being seen. Here, all that was academic because at Duke you are not required to sign the agreement to be seen."

Cary attorney Frank Laney, who chairs the dispute resolution section of the North Carolina Bar Association, said consumer arbitration was on the rise "although I couldn't say whether it's hotter in the hospital area than it is for banks or mortgage companies or the guy who sells you a Sony TV."

Laney had not read the *Wilkerson* opinion but said the result didn't surprise him.

"To be honest, unless I'm missing something, I don't find it surprising that a Middle District judge would say that an arbitration clause has to be enforced — unless there was some obvious flaw in the agreement itself," he said. "This may expand the law but I don't think it makes a sharp turn."

The plaintiff's attorney did not return a phone call from Lawyers Weekly before press time.

AAA Procedures May Require Consent

The Duke form in *Wilkerson*, which was signed by the patient in 1999, calls for arbitration under procedures formulated by the American Arbitration Association (see sidebar).

However, other health care providers who want to arbitrate medical claims through AAA won't be able to do so — at least not without the consent of both parties.

The reason: effective Jan. 1, 2003, AAA announced that "as a result of a review of its caseload in the health care area, it will no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate."

That announcement, which didn't affect disputes between medical providers or managed care companies, was in line with a 1998 report on health care dispute resolution.

The report, drafted by a commission of representatives from the ABA, AMA and the AAA, stated: "[T]he commission's unanimous view is that in disputes involving patients and/or plan subscribers, binding arbitration should be used only where the parties agree to same after a dispute arises."

According to Simpson, AAA's 2003 announcement didn't affect Duke's enforcement of pre-dispute arbitration agreements because its program had been "grandfathered in."

"I know a lot of attorneys have gone on the AAA website and concluded that they no longer administer these cases, but that's not accurate," he said. "As long as Duke continues to use AAA procedures, they will administer it."

Asked why AAA changed its policy on medical cases, Simpson responded: "I couldn't tell you."

Kirsten Norlin, a corporate communications official at AAA's national office in New York, said she was not aware that any arbitration programs had been "grandfathered" under the AAA announcement.

"However, that doesn't mean it hasn't happened," she said.

Laney speculated AAA may have started requiring the parties' post-dispute consent "because arbitration clauses are more common, there has been overreaching in some places and there has been more of a tendency for plaintiffs' attorneys to challenge them," he said.

"It could be that AAA just got tired of being stuck in the middle," Laney said.

However, he noted that "there are a number of local and national programs that would be happy to step in to administer these cases if AAA doesn't want to do it."

Costs

According to Simpson, the major benefit of arbitration, to both sides, is lower costs.

"The benefits from arbitration are pretty significant," Simpson said. "Not necessarily by reducing the defendant's exposure, because I don't think it does, but in reducing the cost of handling cases. You don't have to engage in two years of trench warfare and those pretrial litigation costs to go right to the essence of the claim to see whether it's meritorious or not. You get rid of that other stuff that plaintiffs' and defense lawyers make a living on."

However, some lawyers say arbitration procedures — particularly those used by AAA — can be less flexible and more costly than rules selected by the parties themselves (see Oct. 1, 2001 *Lawyers Weekly*).

In 2001, filing fees under AAA reached thousands of dollars, and arbitrators in the Southeast charged up to \$1,200 per day, according to one attorney.

In a case reported in 2003 by *Lawyers Weekly*, attorneys for the family of a Duke patient who wasn't given a key test for heart disease chose not to contest the same arbitration form at issue in *Wilkerson*.

Instead, the plaintiffs' lawyers, Don Beskind, Karen Rabenau, and Howard Twiggs of Raleigh, worked out an agreement with Duke to modify AAA's procedures for discovery and choosing arbitrators (see May 5, 2003 *Lawyers Weekly*).

Despite getting a favorable result — a \$1.5 million arbitration award — Beskind and Rabenau told *Lawyers Weekly* that their arbitration costs were higher than if the case had been litigated.

Some plaintiffs have been successful at challenging consumer arbitration agreements based on the expense issue. That line of attack wasn't addressed in the *Wilkerson* opinion.

— Questions or comments may be directed to Ertel.Berry@nc.lawyersweekly.com.

© 2005 Lawyers Weekly Inc., All Rights Reserved.

**Order a REPRINT
of this Story**

[User Agreement For Subscriber-Only Online Benefits](#) | [Help](#) | [Our Privacy Policy](#)

Send any questions or comments to comments@lawyersweekly.com

Subscriber Services: 1-800-451-9998 Technical Support: 1-800-451-9998

© Copyright 2008 Lawyers Weekly, Inc. All Rights Reserved



Lawyers Weekly does not use spyware; however, we link to a number of other sites and do not take responsibility for any spyware they may use.

This site is best viewed with Internet Explorer 6 ([click here to download](#))

209.42.202.50/5.93