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Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: A Right-Threatening Procedure

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Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: A Right-Threatening Procedure

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I. Introduction

164. Since its enactment in 1925, the United States Supreme Court has given the Federal Arbitration Act (FAA) a prominent role in determining the legalities of dispute resolution, applying it to an extensive assortment of disputes arguably beyond what the Legislature initially intended. What began as a procedural policy aimed at streamlining commercial business disputes stands in stark contrast to what exists today, an explosive proliferation of pre-dispute binding arbitration clauses in a practically unlimited number of situations that are nearly impossible to challenge. This judicial policy favoring arbitration comes at the expense of almost every consumer in this country, and specifically, at the expense of patients involved in medical malpractice disputes.

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165. In Florida, an increasing number of physicians have started using pre-dispute binding arbitration agreements as a condition precedent to providing treatment to patients in order to resolve future claims of medical malpractice privately and control their exposure to liability, essentially using such agreements as an alternative to litigation. These agreements are advocated by physicians' insurance providers, primarily through the alleged lowering of malpractice premiums when doctors agree to secure pre-dispute arbitration agreements with their patients.

166. Such agreements force patients to either waive their constitutional right to trial or their right to medical treatment, even though there is little evidence to suggest that the use of arbitration agreements reduces medical malpractice insurance premiums as the cost of privately arbitrating claims increasingly reflects that of litigation. Despite the questionable validity of the purported benefits of pre-dispute binding arbitration agreements, the United States Supreme Court has created an unambiguous legal protection for the practice, handicapping state legislatures as well as federal and state courts in their efforts to limit or even regulate the use of pre-dispute binding arbitration agreements in various contexts.

167. This article advocates against the use of pre-dispute binding arbitration agreements as a condition precedent to receiving medical care, and considers not only that the FAA does not apply in the health care context, but that the Florida Supreme Court should render such agreements void as a matter of public policy. It will discuss the history, enforceability, and public policy considerations of using a private arbitral body to resolve medical malpractice claims rather than the traditional public court system. This article will primarily focus on Florida state law, including statutes, case law, and law review articles. However, there is a portion of the article that focuses on the Federal Arbitration Act and how it impacts Florida state law.

II. The Evolution of Pre-Dispute Binding Arbitration

168. At its essence, arbitration can be loosely defined as a consensual and binding process for dispute resolution before a neutral third party.[2] The arbitration process is touted by its supporters as a more expeditious and less expensive alternative to litigation, mainly because of its simpler and more limited rules of procedure and evidence. However, parties to arbitration relinquish important protections that court litigants enjoy, often including access to hearings, limitations to the scope and extent of discovery, and written opinions by a panel of three arbitrators. Furthermore, proceedings are con-

2 James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 L. & HIST. REV. 241, 266 (2013).

ducted in a private setting in which the decisions are final, rarely appealable, and are not subject to public review.[3]

169. Parties can come to arbitration in one of two ways, "as a result of court rules or [from] a contractual agreement to arbitrate."[4] The latter is considered a contract between parties, which means that contract law determines the rights and obligations of the parties.

170. It is important to note that there are several different types of contractual arbitration agreements and significant differences among them. Contractual agreements to arbitrate include "voluntary post-dispute agreements, pre-dispute agreements to arbitrate that are not a precondition of the business relationship, and mandatory pre-dispute agreements that are a precondition of the business relationship." Furthermore, arbitration agreements can be nonbinding, meaning that a displeased party is allowed to take "the dispute to the courts for another hearing," or they can be binding, meaning that the parties have no right of appeal.[5]

171. In voluntary, post-dispute arbitration agreements, two parties agree to submit their dispute to arbitration after that dispute arises. In contrast, parties enter into a pre-dispute binding arbitration agreement before an actual conflict has occurred, and therein "agree" that any future disputes that may arise out of the relationship must use arbitration rather than a court as a forum. These agreements are generally irrevocable.[6]

172. Arbitration agreements, although based on English common law, have had a long-standing history in the United States, dating back to as early as the 1600s. In such simpler times, merchants voluntarily entered into binding arbitration agreements to resolve their disputes outside of court, "because they sought expertise, speed, efficiency, privacy, and neutral decision makers."[7]

173. Historically, courts had the discretion to choose whether or not to enforce such agreements, and while they typically supported the enforcement of post-dispute agreements to arbitrate as well as their resulting awards, many courts were reluctant to

3 Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1148 (2015).

4 Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Realities*, 60 L. & CONTEMP. PROBLEMS 153, 154 (1997).

5 Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Realities*, 60 L. & CONTEMP. PROBLEMS 153, 154 (1997).

6 The Florida Senate Committee on Judiciary, *Review the Use and Enforceability of Arbitration Agreements in the Medical Services and Nursing Home Care Contexts*, S. Rep. No. 2011-129, 2 (2010).

7 James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 L. & HIST. REV. 241, 246 (2013).

support the use of pre-dispute agreements to arbitrate.[8] In fact, these courts perceived pre-dispute arbitration agreements as "an effort to oust the courts of their jurisdiction" and thereby "force parties to surrender their rights to a jury and to a public forum for the resolution of their legal disputes."[9] This perception was not only prevalent in both state and federal courts, but even reached the United States Supreme Court:

> Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. ... In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. ... He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.[10]

174. However, over time, the opposition to this view grew significantly, prompting Congress to pass the Federal Arbitration Act (FAA) in 1925.[11] The purpose of the FAA was to put arbitration agreements on "equal footing" with other contracts and to overcome the "judicial hostility to arbitration,"[12] thereby ensuring the enforcement of both the arbitration agreement itself and any subsequent arbitral award. Still, until quite recently, the use of pre-dispute binding arbitration agreements was limited to commercial contexts, including business-to-business or labor-management relations.[13]

175. Since the 1980s, the United States Supreme Court has increasingly used the FAA to supersede "any state contract law with a disparate impact on the enforceability of arbitration agreements."[14] As a result, pre-dispute binding arbitration agreements began to surface in a broad range of contexts and industries, including business-to-consumer contracts for goods (from mobile homes to computers)[15] and services (from termite exter-

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8 Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just*, 57 STAN. L. REV. 1631, 1635–36 (2005).

9 Niall Mackay Roberts, *Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act*, 49 U.C. DAVIS L. REV. 1547, 1559 (2016).

10 Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1149 (2015); *see Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874).

11 9 U.S.C. §§{} 1–16 (2012).

12 See Deborah R. Hensler et al., *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line between Private and Public Adjudication*, 18 NEV. L.J. 381 (2018); see also James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 L. & HIST. REV. 241, 266 (2013).

13 Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just*, 57 STAN. L. REV. 1631, 1636 (2005).

14 Niall Mackay Roberts, *Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act*, 49 U.C. DAVIS L. REV. 1547, 1551 (2016).; see generally *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

15 *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Cavalier Mfg., Inc. v. Clarke*, 862 So. 2d 634 (Ala. 2003).

minators to tax preparers);[16] in the financial industry (including contracts for personal accounts, house and car loans, payday loans, and credit cards);[17] and in employment contracts. Today, pre-dispute binding arbitration agreements have even expanded into health care (in doctor-patient contracts for medical care, contracts for nursing home care, and health insurance contracts).[18]

The Scope of the FAA

176. In order to understand how pre-dispute binding arbitration agreements have managed to infiltrate nearly every type of transaction we encounter in our daily lives, it is important to understand the federal law itself and the issues that have emerged from it. Section 2 of the FAA provides, in pertinent part, as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[19]

177. This provision essentially allowed business and commercial actors to confidentially agree to submit any future disputes to binding arbitration, with the added assurance that such disputes would be resolved through this private forum rather than through litigation in the public court system, and if necessary, would be enforced by the federal courts.[20]

178. Since its inception, the United States Supreme Court has recognized the FAA as supporting "a national policy favoring arbitration."[21] However, as federal and state courts have attempted to interpret the FAA's applicability, a number of legal issues have

16 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903 (7th Cir. 2004).

17 *Wash. Mut. Fin. Group v. Bailey*, 364 F.3d 260 (5th Cir. 2004); *McKenzie Check Advance of Miss. v. Hardy*, 866 So. 2d 446 (Miss. 2004).

18 *Santiago v. Baker*, 135 So. 3d 569 (2d DCA 2014); *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421 (2017); *Kuhl v. Lincoln Nat'l Health Plan of Kansas City, Inc.*, 999 F.2d 298 (8th Cir. 1993).

19 9 U.S.C. §{} 2. See e.g., *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

20 Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: Law, Ethics, and Prudence*, 28 J. LEGAL MED. 333, 333–95 (2007).

21 Preston D. Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499 (1995) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

been raised, such as the scope by which it was enacted, the breadth of its reach, and the preemptive powers of its various sections over state law.[22] One such issue stemmed from Congress's failure to establish what exactly the phrase "a contract evidencing a transaction involving commerce" meant,[23] leaving it up to the courts to develop and interpret a standard. As a result, lower federal and state courts were split regarding "the extent to which a contract must evidenc[e] a transaction involving commerce' before the FAA would apply."[24]

179. Another issue that still remains the subject of frequent litigation is whether and to what extent the FAA preempts a state law or judicial rule. From 1925 until 1966, the FAA applied almost exclusively in "federal court disputes involving federal substantive law," and was not used to preempt substantive state law, such as tort, contract, and property law. Furthermore, the types of disputes that involved the FAA primarily applied to contracts involving larger, more informed and sophisticated commercial parties, not those "involving individual citizens disputing private law claims like employment agreements, service contracts, consumer loans, and medical malpractice [claims]."[25]

180. However, between 1967 and 1997 a series of United States Supreme Court rulings considerably expanded the scope of the FAA and restricted the reach of state courts' jurisdiction over private arbitration agreements involving individual consumers. For example, in *Southland Corp. v. Keating*, the Court held that the FAA is substantive federal law, thereby preempting all state laws regulating arbitration agreements and transforming a sixty-year-old procedural statute into an unconstitutional infringement of the states' power over their own courts.[26] During this time, numerous state legislatures and courts sought to limit the enforcement and use of pre-dispute binding arbitration clauses by prohibiting these agreements in particular kinds of legal disputes and imposing special conditions or procedural safeguards on the arbitration process.[27]

181. In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, a 7–2 decision, the Supreme Court held that, based on the FAA's legislative history, the phrase "involving commerce" should be interpreted broadly so as to encompass the full extent of Congress's powers under the Commerce Clause, and thus, "the FAA is invoked when a party proves a transaction represents a general practice subject to federal control and the general practice

22 U.S. Cong. Research Serv., Mandatory Arbitration and the Federal Arbitration Act (R44960; Sept. 20, 2017).

23 9 U.S.C. §{} 2 (2012).

24 U.S. Cong. Research Serv., Mandatory Arbitration and the Federal Arbitration Act (R44960; Sept. 20, 2017).

25 Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: Law, Ethics, and Prudence*, 28 J. Legal Med. 333, 343 (2007).

26 *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

27 U.S. Cong. Research Serv., Mandatory Arbitration and the Federal Arbitration Act (R44960; Sept. 20, 2017).

substantially affects interstate commerce."[28] The Court went even further by holding that the FAA supersedes state law requirements that expressly prohibit or impose burdensome requirements on the use of valid pre-dispute binding arbitration agreements, thereby restraining their enforceability.[29] Rather than adhering to the legislative policy of putting arbitration agreements on "equal footing with other contracts," the Supreme Court "replaced it with a judicial policy favoring arbitration."[30]

182. However, this judicial policy did not stop with the Court's decision in *Allied-Bruce Terminix*. Rather, the Supreme Court continued to expand the broad reach of the FAA by issuing subsequent decisions in which the Court sharply restricted judicial review of arbitration outcomes;[31] it determined that lower courts are required to enforce arbitration agreements even in cases of personal injury or wrongful death;[32] it severely limited the defenses available to challenging many different kinds of arbitration agreements and "granted arbitrators (and not judges) the authority to determine whether contractual arbitration provisions are valid or not"; and it has allowed corporations to prohibit class action lawsuits against themselves. In a recent decision by the Supreme Court in *Lamps Plus, Inc. v. Varela*, the Court held that "consent is essential under the FAA," and that the intent of the parties is paramount when determining how to interpret an arbitration agreement. However, even when an arbitration agreement is ambiguous on a particular issue that may "reshape" traditional arbitration agreements, lower courts may not rely on state contract principles regarding the interpretive rule that an agreement must be construed against its drafter. Thus, the Supreme Court's paradoxical recitation that "consent is essential" effectively continues to thwart individuals' access to justice.[33]

183. Collectively, these decisions established a law that all courts:

> must enforce arbitration agreements unless (a) there is an explicit contrary congressional command, (b) the arbitration agreement expressly strips one party of the substantive right to pursue a federal statutory claim, or (c) a state law contract defense invalidates the agreement—but only if that defense does not discriminate against arbitration and does not frustrate the purposes of the FAA (as interpreted controversially by the [Supreme] Court).[34]

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28 Sarah Sachs, *The Jury is Out: Mandating Pre-Treatment Arbitration Clauses in Patient Intake Contracts*, 2 J. Disp. Resol. 117, 127 (2018).

29 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 843 (1995).

30 Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 Case W. Res. L. Rev. 91, 94 (2012).

31 *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013).

32 *Marmet Health Care Center v. Brown*, 565 U.S. 530 (2012).

33 *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019).

34 Sarah Staszak; *In the Shadow of Litigation: Arbitration and Medical Malpractice Reform*, 44 J. Health Pol. Pol'y & L. 267, 286–90 (2019). See generally, e.g., *AT&T v. Concepcion*, 563 U.S. 333 (2011); see

184. As a result, the United States Supreme Court ignited an explosive proliferation of pre-dispute binding arbitration clauses in a practically unlimited number of situations that are virtually impossible to challenge. Nevertheless, the question of whether the FAA preempts a state law or judicial rule continues to be a contentious subject of litigation that has been introduced before the United States Supreme Court at least a dozen times. Still, state and federal courts frequently invalidate certain types of mandatory arbitration agreements, most often in situations where one party has not had the opportunity to negotiate or may not fully appreciate the legal implications of submitting a future claim to binding arbitration, and so "requiring them to settle their disputes through arbitration would be unfair, contrary to public policy, or would somehow not protect the interests of vulnerable individuals."[35] Still, many courts have routinely enforced these types of arbitration agreements, and pre-dispute binding arbitration agreements in healthcare are no exception.[36]

The Medical Malpractice "Crisis"

185. Although arbitration originated in commercial disputes grounded in contract law, it began to emerge in health care, specifically, in an area of tort law, after an unanticipated and dramatic growth in medical malpractice claims in the 1970s.[37] Historically, medical malpractice claims were resolved through tort-based litigation, a highly visible and public forum.[38] However, during the influx of such claims, physician malpractice insurance premiums also began to rise, in some instances allegedly threatening to discontinue the availability of certain specialty health care services,[39] prompting many state legislatures to believe that the costs of litigation and large jury awards were to blame. In response, state legislatures began to implement alternative dispute resolution mechanisms and so-called "tort reform" measures to control the risk and costs associated with medical malpractice claims, including but not limited to, general monetary

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also, e.g., *CompuCredit v. Greenwood*, 565 U.S. 95 (2012); see also *American Express v. Italian Colors Restaurant*, 570 U.S. 228 (2013).

35 U.S. Cong. Research Serv., Mandatory Arbitration and the Federal Arbitration Act (R44960; Sept. 20, 2017).

36 David A. Larson, *Medical Malpractice Arbitration: Not Business as Usual*, 8 Y.B. Arb. & Mediation 69, 71 (2016).

37 Sarah Sachs, *The Jury is Out: Mandating Pre-Treatment Arbitration Clauses in Patient Intake Contracts*, 2 J. Disp. Resol. 117, 120 (2018); see also Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Realities*, 60 L. & Contemp. Problems 153 (1997).

38 Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: Law, Ethics, and Prudence*, 28 J. Legal Med. 333, 334 (2007). For purposes of this article, medical malpractice and medical negligence claims will be referred to as "medical malpractice claims."

39 Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Realities*, 60 L. & Contemp. Problems 153 (1997).

damage caps, shorter statutes of limitations, and no-fault systems for specific types of injuries.[40]

186. In response to the perceived danger of a drastic reduction in the availability of health care services in Florida as the result of the alleged "medical malpractice crisis," the Florida Legislature responded by procedurally and substantively modifying the state's tort system through its enactment of the Medical Malpractice Reform Act of 1975 (the MMA).[41] The MMA is a set of procedures that must be followed before a party can file a medical malpractice claim in court. Under § 766.201, the statute mandates a "presuit investigation" process for all medical malpractice claims,[42] which effectively requires a party to engage in an informal discovery period before filing a lawsuit that can be both costly and time consuming for the patient (or claimant). However, the Florida Supreme Court has emphasized that, when possible, the presuit notice and screening statute should be construed in a manner that favors access to the courts.[43]

187. Under Florida Statute Chapter 766, the presuit process lasts 90 days, unless extended by an agreement between the parties, and "frequently precipitates the decision to engage in arbitration, or even settlement, the intent being that a diligent investigation by both parties will lead to a realistic evaluation of the claim." In other words, it eliminates non-viable and frivolous claims. Once the presuit investigation is complete, the claimant must then mail a notice of intent to the prospective defendant (health care provider) prior to filing suit, and must include a verified, written medical expert opinion attesting that the health care provider's care of the patient fell below the standard of care and caused the patient harm.[44]

188. At the end of the presuit period, the prospective defendant must proceed in one of three ways authorized under Chapter 766.[45] The defendant can either (1) reject the claim, (2) make a settlement offer, or (3) make an offer to arbitrate "in which liability is deemed admitted and arbitration will be held only on the issue of damages, . . . [and] this offer may be made contingent upon a limit of general damages."[46] If the prospective defendant admits liability and both sides voluntarily proceed to arbitration, each side selects one independent arbitrator and the Division of Administrative Hearings appoints an administrative law judge to serve as the chief arbitrator. At this point, the agreement

40 Sarah Sachs, *The Jury is Out: Mandating Pre-Treatment Arbitration Clauses in Patient Intake Contracts*, 2 J. Disp. Resol. 117, 120 (2018).

41 416, Sess. D, 7 (Fla. 2003).

42 Fla. Stat. §{} 766.201 (2018).

43 *Kukral v. Mekras*, 679 So. 2d 278, 280 (Fla. 1996).

44 Fla. Stat. §{} 766.203 (2)–(3) (2018); see, e.g., *Pierrot v. Osceola Mental Health, Inc.*, 106 So. 3d 491, 493 (Fla. 5th DCA 2013).

45 Fla. Stat. §{} 766.106 (3)(b) (2018).

46 Fla. Stat. §{} 766.209 (1) (2018).

to arbitrate becomes binding, and the claimant is prohibited from filing a lawsuit against the defendant.

189. The arbitration scheme under Chapter 766 contains several safeguards to incentivize and protect the interests of injured plaintiffs, including, among other things, the defendant's admission of liability, the selection of neutral arbitrators (including an administrative law judge) with a set range of compensation for each, the defendant's obligation to pay the arbitration costs and fees as well as the interest on damages, joint and several liability of defendants,[47] and most importantly, the right to appeal.[48] Ultimately, statutory arbitration is intended to be affordable to both parties, and a way to resolve a dispute in a fair and timely manner.

The Emergence of Pre-Dispute Binding Arbitration Agreements in Florida

190. Despite the Florida Legislature's attempts to remedy the alleged medical malpractice crisis, including the option of the parties to voluntarily proceed to post-dispute arbitration, pre-dispute binding arbitration agreements began to emerge in the health care industry in Florida as well as other states, and they still exist today. These types of arbitration agreements are both mandatory and binding, and they are typically included in boilerplate contracts presented to patients by health care facilities at the outset of treatment. More often than not, if a patient declines to sign this agreement, the health care provider can refuse treatment, except in instances where the patient has a medical emergency.[49]

191. Although many pre-dispute binding arbitration agreements include language incorporating the substantive provisions of Florida Statutes, Chapter 766, governing medical malpractice claims, they often specify that at the conclusion of the presuit screening period mandated by the Statute, the details regarding the procedure, substance, and final judgement of the arbitration hearing are dictated by the terms outlined in the pre-dispute arbitration agreement itself. Thus, the arbitration hearing is conducted and governed by the provisions of the Florida Arbitration Code, Florida Statutes, Section 682.01 et seq., which differs substantially from the voluntary statutory arbitration under § 766.207.[50]

47 FLA. STAT. §{} 766.207 (3)–(7)(h).

48 *Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016).

49 Sarah Sachs, *The Jury is Out: Mandating Pre-Treatment Arbitration Clauses in Patient Intake Contracts*, 2 J. DISP. RESOL. 117, 118 (2018).

50 *Arbitration Agreement for Claims Arising Out of Or Related To Medical Care and Treatment*, WOMEN'S CARE FLORIDA.

192. First, pre-dispute binding arbitration agreements require the patient to stipulate that any controversy "arising out of or related to the patient's medical care and treatment,"[51] often including both past and future care, must be submitted to binding arbitration, thereby waiving the patient's constitutional right to have any such dispute decided in a public court of law before a jury.[52] Many of pre-dispute binding arbitration agreements specify that by signing the agreement, the parties consent to the participation in arbitration of all proper additional parties to such claims, including "the patient, the patient's estate, any spouse or heirs of the patient, and any children of the patient, whether born or unborn, at the time of the occurrence giving rise to the claim."[53] Furthermore, some of these agreements even contain clauses that explicitly allow the party compelling arbitration the right to proceed without the other party, including the appointment of an arbitrator and the hearings to resolve the dispute, and even allow the arbitrator to render a binding decision despite the opposing party's absence or refusal to participate.[54]

193. Another vital difference from voluntary statutory arbitration under § 766.207 is that in private binding arbitration, the health care provider does not have to admit liability, and therefore, the arbitration hearing not only determines monetary damages, but liability as well. Furthermore, health care providers are not required to incur the arbitrators' costs and attorneys' fees as these agreements typically require both parties to share in such expenses equally. Thus, instead of reducing costs and delay, pre-dispute binding agreements to arbitrate require patients to go through the costly and time-consuming pre-suit process under the MMA and then proceed to a costly and time-consuming arbitration, the procedures and substance of which are dictated by the health care provider's well-crafted agreement. Finally, the selected arbitrators' decision is final, with virtually no appeal available through the trial or appellate court system, regardless of the nature and severity of the patient's claims.[55]

194. Thus, such agreements require patients to arbitrate their claims in exchange for "absolutely nothing in return — no elimination of the risk of not recovering any damages through the [health care provider's] admission of liability, no guarantee of a reduction on expenses inherent in proving a medical malpractice claim, and no assurance that the claim will be resolved quickly."[56] Thus, the incentives for patients to agree to sub-

51 *Santiago v. Baker*, 135 So. 3d 569, 570 (2d DCA 2014).

52 Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Realities*, 60 L. & CONTEMP. PROBLEMS 153, 154–55 (1997).

53 *Arbitration Agreement for Claims Arising Out of Or Related To Medical Care and Treatment*, WOMEN'S CARE FLORIDA.

54 Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: Law, Ethics, and Prudence*, 28 J. LEGAL MED. 333, 337 (2007).

55 FLA. STAT. §{} 766.212 (2018).

56 *Franks v. Bowers*, 116 So. 2d 961 (Fla. 2013).

mit any future dispute to binding arbitration are substantially diminished under these agreements.

Informed Consent in Medicine

195. Another significant point of contention with pre-dispute binding arbitration agreements is the standard of "consent" required to create these agreements. Consent with regards to medical malpractice law (herein, informed consent) is a well-established part of American jurisprudence that is not only codified into the law but also into the practice of medicine itself. The doctrine of informed consent "grew out of a physician's fiduciary duty to [advise a patient of] all facts which might affect the patient's decision to allow medical treatment," and this concept was adopted by tort law as a separate theory of liability, the basic premise of which was to safeguard a patient's authority concerning decisions that affect the patient's own health. The doctrine of informed consent contains three fundamental elements, including the physician's duty to inform the patient, causation, and injury. [57]

196. Florida Statutes Section 766.103, otherwise known as the "Florida Medical Consent Law," requires that, for a patient to give valid, informed consent to any medical treatment in Florida, the healthcare provider must conform to "an accepted standard of medical practice among members of the medical profession" and provide sufficient information to the patient conveying the following: (1) the nature of the procedure; (2) the substantial risks and hazards of the procedure; and (3) the reasonable alternatives to the procedure (including, when appropriate, the option of doing nothing). Under Florida law, a physician's treatment of a patient without adequately informing the patient about the treatment is considered negligence, and a physician's treatment without consent is considered battery. Kinkead on Torts states that the general rule on the subject of informed consent is as follows:

> The patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one.[58]

197. Thus, the law recognizes the importance of the patient's individual interest, that "it is the prerogative of the patient, and not the physician, to decide the direction in which the patient's interests lie," and the law protects this interest through the doctrine of informed consent. [59]

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57 *Greenberg v. Miami Children's Hospital Research Institute, Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003).

58 EDGAR BENTON KINKEAD, 1 KINKEAD ON TORTS §{} 375 (1903).

59 *Canterbury v. Spence*, 464 F.2d 772, 781 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972).

III. Conflicting Views on Pre-Dispute Arbitration Enforceability

198. Following the lead of the United States Supreme Court, Florida's lower federal and state courts have generally enforced pre-dispute binding arbitration agreements in doctor-patient intake contracts much like they have enforced arbitration agreements entered into voluntarily by two or more business entities. However, there has been some recent pushback by the Florida State Legislature as well as the Florida Supreme Court on the enforceability of such agreements.

Santiago v. Baker

199. One of the first cases in Florida in which the Florida Supreme Court upheld the enforceability of a pre-dispute binding arbitration agreement as a precondition for medical treatment was in *Santiago v. Baker*. In 2011, Leydiana Santiago became a new patient at Women's Care Florida (herein, Lifetime). Upon her initial visit, Ms. Santiago executed a pre-dispute binding arbitration agreement, waiving her right to a jury trial and consenting to arbitrate all claims "arising out of or related to her medical care and treatment." During her visit, Ms. Santiago informed the medical staff that she and her husband were planning to have a second child, and shortly thereafter, she became pregnant.

200. However, on two visits several days later, Lifetime advised Ms. Santiago that the pregnancy was nonviable, recommending an optional procedure to remove the tissue, which the patient declined. Prior to her pregnancy, Ms. Santiago was taking a particular medication to treat a chronic disease, and after learning of her nonviable pregnancy, Ms. Santiago "resumed taking the drug, allegedly believing that spontaneous passage of the fetus would occur." Furthermore, she claimed that she was "unaware of the possible adverse effects the drug might have on a fetus." Despite the diagnosis by Lifetime, Ms. Santiago was, in fact, pregnant and subsequently gave birth to a child with severe birth defects allegedly caused by her continued use of the prescription medication. Shortly thereafter, Ms. Santiago and her husband sued Lifetime and her treating obstetrician for medical malpractice, and the health care providers "successfully moved to compel arbitration" pursuant to the agreement Ms. Santiago executed on her first visit.

201. The Second District Court of Appeal upheld the motion to compel arbitration on appeal, stating that Ms. Santiago executed the arbitration agreement willingly and under no coercion or duress. Furthermore, the Court held that not all private arbitration agreements are void as against public policy, and nothing in the applicable statute "prohibits parties from arbitrating their claims by private agreement outside the statutory scheme." However, the Court did note that Mr. Ocasio, the father of the injured child, failed to "challenge on appeal the extent to which he [or even the child] may be bound

by the arbitration agreement," ostensibly waiving the issue of his consent to the agreement, which suggested that the outcome of the case would have been different had this issue been raised.

202. Although Judge Altenbernd concurred in the majority's opinion, he was critical of the decision, noting that on "July 4, 1776, in deciding to declare independence from a king who was regarded as a despot, Thomas Jefferson and John Adams provided a list of grievances that justified the revolutionary decision ... One of those grievances stated: 'For depriving us in many cases, of the benefits of Trial by Jury.'" Judge Altenbernd stated that Amendment VII of the Federal Constitution protects an individual's right to trial by jury , and Florida went even further in adopting Article I, Section 22 of its Constitution, which declares, "[t]he right of trial by jury shall be secure to all and remain inviolate."

203. In his opinion, Judge Altenbernd recognized that a person can waive this constitutional right, but only by a knowing and intelligent decision. He then stated:

> but somehow in deference to the supposed economic efficiency of arbitration, our society seems to be more and more willing to allow the use of form contracts, not subject to negotiation, that force patients, the elderly, the marginally literate, and ordinary consumers of everyday products to waive their constitutional right to trial by jury in common law cases — because the common law cause of action even exists — in order to receive basic goods and services. As this case demonstrates, this occurs even when the people have never personally entered into agreements of any sort.

204. Judge Altenbernd also questioned whether the arbitration agreement could bind the father of the child, someone who neither knew of the agreement, nor consented to it, and therefore, "received no consideration for [it]." Nevertheless, Judge Altenbernd supported the notion of the pre-dispute binding arbitration agreement between a physician and a patient, opining that he agreed with the majority that the constitutional challenge was not preserved for appeal.[60]

Hernandez v. Crespo

205. In 2017, the Florida Supreme Court held in *Hernandez v. Crespo* that a private contractual arbitration agreement between a patient and a physician is void as against public policy if it expressly agrees to be bound by the Florida MMA and substantively deviates from the voluntary binding arbitration provisions, thereby invalidating the Second District Court of Appeal's decision in Santiago. In Hernandez, the patient, Mrs.

60 *Santiago v. Baker*, 135 So. 3d 569, 569–73 (2d DCA 2014); Marc D. Ginsberg, *The Execution of an Arbitration Provision as a Condition Precedent to Medical Treatment: Legally Enforceable: Medically Ethical*, 42 MITCHELL HAMLINE L. REV. 273, 298 (2016).

Crespo, who was 39-weeks pregnant and having contractions, was turned away from her doctor's appointment at Women's Care Florida because she was a few minutes late. Her appointment was subsequently re-scheduled to be four days later. However, Mrs. Crespo delivered her stillborn son one day before the rescheduled appointment.

206. Almost one year after the incident, Mrs. Crespo notified Women's Care Florida and her treating obstetrician that she was initiating litigation regarding the treatment which caused her stillborn son. Over the course of several months, Women's Care Florida and the obstetrician denied Mrs. Crespo's claim and moved to compel arbitration, pursuant to the agreement she had signed with the medical center at the onset of her treatment. Two months later, Mrs. Crespo requested binding arbitration under the voluntary arbitration provision of § 766.207. However, Women's Care Florida and the obstetrician declined to participate.

207. The Court explained in its holding that such private arbitration agreements that include only those statutory provisions favorable to one party, such as changing the cost, award, and fairness incentives of the MMA statutory provisions, contravene the Legislature's intent and are void against public policy. The Court went on to say that:

> [i]f the Legislature had intended for parties to pick and choose which of the MMA's provisions to include in their arbitration agreements, the MMA statutory scheme would be meaningless. Parties could avoid those statutory provisions less favorable to them as Petitioners did in this case . . . thereby disrupting the balance of incentives the Legislature carefully crafted to encourage arbitration.

208. However, the Court's decision did not specifically state that all private pre-dispute binding arbitration agreements in the health care context are unconstitutional, nor did the Court state that all such agreements with unfair provisions are void as against public policy in the state of Florida.[61] Thus, health care providers can just as easily craft arbitration contracts that do not incorporate the provisions of the MMA, in which case the health care provider is free to select the procedures and rules under which the parties arbitrate.

IV. The Adverse Effects of Resolving Medical Malpractice Disputes By Arbitration

209. Despite the current legality of pre-dispute binding arbitration agreements, "the dynamics and operational realities of arbitration frequently impose a wide range of

61 *Hernandez v. Crespo*, 211 So. 3d 19, 21–27 (Fla. 2016)

unjustified limitations on [patients] that are unfair and unwise from a policy standpoint."[62] Forced private arbitration as a forum to resolve medical malpractice claims is legally inappropriate simply because medical services are not "transactions involving commerce," and therefore, the FAA should not preempt state law, nor should it apply at all in such context.

210. Furthermore, pre-dispute binding arbitration agreements as a condition precedent to receiving medical treatment are contrary to both Florida Medical Consent Law and public policy as these agreements fundamentally eliminate the goals and benefits the common law tort system and the MMA statutory arbitration provision were designed to effect, and should thus be rendered unenforceable in the state of Florida. Finally, there is no empirical evidence that suggests such private arbitration is less expensive and time consuming than litigation, nor is there evidence to suggest that there was ever or still is a medical malpractice crisis, an issue of which the Florida Supreme Court is becoming increasingly aware.

Medical Services Are Not Transactions "Involving Commerce"

211. As discussed in Section II (A),

> To be included within the coverage of the [FAA], an arbitration provision must be contained in a "contract evidencing a transaction involving commerce," and "commerce" refers to the "commerce among the several States. ..."[63]

212. However, pre-dispute binding agreements to arbitrate medical malpractice claims are purely intrastate transactions that exclusively involve the relationship between local Florida health care providers and their local Florida patients. Of course, one could argue that modern medicine is not always that simplistic:

> [P]atients are mobile and seek treatment from physicians outside of their home states; physicians utilize medical instruments, supplies and pharmaceutical products, which move through commerce; and payers may include insurance companies, which operate across the country, and Medicare, the federal health insurance program.[64]

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62 Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: Law, Ethics, and Prudence*, 28 J. LEGAL MED. 333, 366 (2007).

63 9 U.S.C. §{} 1, 2 (2012); see also, e.g., *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984).

64 Marc D. Ginsberg, *The Execution of an Arbitration Provision as a Condition Precedent to Medical Treatment: Legally Enforceable: Medically Ethical*, 42 MITCHELL HAMLINE L. REV. 273, 282 (2016).

213. In theory, everything we do, every transaction we make, affects interstate commerce. However, the actual "transaction" referred to in this type of context, is a health care provider physically treating his or her local patient at that health care provider's local place of business. Although under the FAA courts must construe Congress's powers broadly such that they can regulate activities that substantially affect interstate commerce,[65] the scope of this standard should not be extended to include purely intrastate and personal relationships. To do so renders the "substantial effects" test meaningless because it takes a transaction with a relatively trivial impact on interstate commerce as an excuse for broad general regulation of state or private activities.

214. Furthermore, the regulation of health matters is substantive law, which applies to state court proceedings because such matters have always been "primarily, and historically, a matter of local concern,"[66] and the FAA was enacted as a "purely procedural statute intended to make specific performance of arbitration agreements available as a remedy in federal court."[67] Although the United States Supreme Court first declared in 1984 that the FAA was federal substantive law applicable to the states in its decision in *Southland Corp. v. Keating*,[68] several Justices have since voiced their opinion in subsequent decisions that the majority in Southland Corp. was incorrect.[69] Instead of putting arbitration clauses on equal footing with other contracts, the United States Supreme Court created a judicial policy favoring arbitration at the expense of states' powers, and, in this case, patients' rights.

215. Both Justice O'Connor and Justice Rehnquist dissented in the *Southland* majority's decision, persuasively asserting that "Congress viewed the FAA as a procedural statute, applicable only in federal courts."[70] In his dissenting opinion in *Allied-Bruce Terminix*, Justice Thomas explained that an "arbitration agreement is a species of forum-selection clause." Without laying down any rules of decision, it identifies the adjudicator of disputes anda strong argument can be made that such forum-selection clauses "concern procedure rather than substance."[71] Thus, the FAA should not preempt Florida state law on purely intrastate substantive matters, and therefore, should not apply to the enforceability of pre-dispute binding arbitration agreements in the health care context.

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65 *U.S. v. Lopez*, 514 U.S. 549, 559 (1995).

66 *Hillsborough Cty. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 720 (1985).

67 Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1151 (2015).

68 *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

69 *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting).

70 *Southland Corp. v. Keating*, 465 U.S. 1, 25 (O'Connor, J., dissenting).

71 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285–88 (1995).

The Absence of Informed Consent in Pre-Dispute Binding Arbitration Agreements

216. In the current legal environment, patient involvement remains paramount. However, pre-dispute binding arbitration agreements as a precondition to receiving medical treatment raise important questions concerning to what degree a patient's interests are protected given the minimal legal requirements for obtaining patient consent to use private arbitration to resolve future disputes. The predominant issues being the unilateral development of such agreements and the patient's lack of informed decision-making when entering into such agreements.

217. Pre-dispute binding arbitration agreements are unilaterally developed — they are not bargained-for provisions; they are imposed and enforced in the event of a future injury. The decision to limit a patient's inviolate right to trial by jury for future malpractice claims is made before the healthcare provider has even laid eyes, let alone hands, on the patient. "There is no quid pro quo, no negotiation, and no reduction in levels of care or cost; the only difference is the forum in which the [claim is] adjudicated." Furthermore, unlike the criteria required for informed consent, in which a physician is expected to provide sufficient information for the patient to make a meaningful informed decision regarding the proposed medical treatment, consent to private arbitration is premised on a lower legal standard applicable to the formation of contracts in which the parties are merely required to "manifest their assent to the formation of an agreement, such as by signing their names on the document or saying certain words that would lead a reasonable person to conclude that [the parties] have assented to the terms of the [agreement]."[72]

218. Thus, the unilateral nature of pre-dispute binding arbitration agreements frustrates the essential purpose of the informed consent doctrine and the Florida Medical Consent Law, namely the common law establishment of autonomic patient self-determination. Especially considering that the theory of patient self-determination forged the very idea that the law, through the public court system and the legislature, needs to create and enforce a consent doctrine (and a Florida statutory law) to protect the patient's individual interest. Ultimately, at some point, all individuals depend on medical care from a physician or a healthcare provider, and this dependence is critical to individuals' welfare. Thus, it is vital that the legal system protects the interests of the patient and provides a fair and impartial forum for redress when medical malpractice claims arise.

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72 Myriam Gilles, *Operation Arbitration: Privatizing Medical Malpractice Claims*, 15 THEORETICAL INQUIRIES IN L. 671 (2014); see Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and other Contractual Waivers of Constitutional Rights,* 67 L. & CONTEMP. PROBLEMS 167 (2004); see Walter D. Kelly, Jr., *Mandatory Arbitration in the United States and Europe* (2016).

Pre-Dispute Arbitration Agreements in Health Care Violate Public Policy

219. Medical malpractice is a complicated sub-set of tort law, which

> involves a complex system of interrelated rules, including not only substantive rules of conduct and liability, but also damages rules, evidentiary rules concerning proof, and procedural rules concerning trial.[73]

220. Pre-dispute binding arbitration agreements as a condition precedent to receiving medical care substantially limit such rules by privatizing the dispute resolution process through its elimination of the patient's right to a jury trial. Furthermore, such agreements fundamentally disregard the goals and benefits the tort system was designed to effect, all of which are accomplished by resolving tort claims, and thus medical malpractice claims, in a public forum. The use of pre-dispute binding arbitration agreements raises questions of procedural fairness, ethics, and helpfulness for injured patients. The practice is flawed in that, among other things, "it undermines the right to a jury trial and the ability to secure sufficient reimbursement for severe injuries."[74]

221. In general, tort law is "used to determine which losses or injuries suffered by [a person] ought to be remedied and to what extent." Tort law is policy driven and changes with public morality, it is based on logic and experience, political theories, and prejudices, and is "viewed as a means of achieving certain desired (social) goals." In the context of medical malpractice, morality serves to protect the interests of the patient not by commanding how a doctor may, must or must not to behave, but rather "by establishing principles that represent a fair and reasonable regime of personal responsibility for doctors that society adopts and enforces against its members." The primary objective of tort law, and thus medical malpractice law, is to provide compensation to injured patients for harms caused by health care providers, which acts in dual parts: to hold certain actors accountable for the harms they cause and to deter these actors and others from committing similar harmful acts by educating them on what society deems as reasonable standards of conduct as such social considerations evolve.

Compensation and Costs

222. One of the main intentions of tort law is to make the injured patient whole, which of course, can be nearly impossible depending on the nature and severity of the injury suffered. However, the legal system does this to the best extent possible by attempting

73 F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437 (2006).

74 Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: Law, Ethics, and Prudence*, 28 J. LEGAL MED. 333, 334 (2007).

to put the patient in the same or similar financial situation he or she would have been in absent the health care provider's negligent actions. In a medical malpractice dispute, the court, and often the jury, does not decide the case based upon the relationship created explicitly by the parties (to the contract) but instead on the duties society imposes upon their relationship. Thus, liability hinges not only on the relationship between the physician and patient, but also on what society believes, at the time, to be the actual losses or injuries suffered that ought to be remedied and to what extent.[75] Therefore, a patient is entitled to compensation for economic losses, such as past and future lost earnings, past and future medical bills, and noneconomic damages for pain and suffering, but only "when a judge or jury finds that the patient's injury was caused by the negligence of the doctor's substandard care."[76]

223. The nature of pre-dispute binding arbitration agreements effectively eliminates a patient's ability to be fully compensated for his or her injuries as

> comparisons of average awards by arbitrators and courts in ... medical malpractice cases show that arbitration claimants receive only about 20 percent of the damages that they would have received in court.[77]

224. Furthermore, the costs of privately arbitrating such complex disputes are exorbitantly high, "plac[ing] a burden on the patient far in excess of that demanded by the trial court system." For example, a patient resolving a medical malpractice dispute through the traditional court system would not be charged "individually for the various motions, requests, and rulings that are an inescapable part of resolving disputes, especially the type of complicated issues associated with medical negligence."

225. Whereas private arbitrators charge additional fees for virtually every action requested by a patient during arbitration, including a pricey filing fee in order to even initiate a hearing that is invariably more expensive than it costs to file in court.[78] However, these costs do not even include the fifty percent of the arbitrators' hourly fees that the patient will have to pay, likely with a substantial deposit before the hearing begins, with the remaining fees due regardless of whether or not the patient even receives an award. Furthermore, because medical malpractice cases are more complex and can often last weeks, these costs add up quickly.

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75 Andrew Brine, *Medical Malpractice and the Goals of the Tort Law*, 11 HEALTH L.J. 241, 242–44 (2003).

76 Sarah Sachs, *The Jury is Out: Mandating Pre-Treatment Arbitration Clauses in Patient Intake Contracts*, 2 J. DISP. RESOL. 117, 123 (2018).

77 *Groups Launch Nationwide Effort to Stop Use of Binding Mandatory Arbitration Clauses*, PUBLIC CITIZEN (Feb. 24, 2005).

78 Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: Law, Ethics, and Prudence*, 28 J. LEGAL MED. 333, 370 (2007).

226. In the Hernandez case discussed in Part III (B), the patient's counsel described the relative expenses of privately arbitrating their dispute in its appellate brief to the Florida Supreme Court. The Family's counsel explained that

> the prevailing rate for arbitrators under the private agreement's scheme would be $500 per hour and thus the arbitration would cost $12,000 per week... .[Furthermore,] the arbitration in this case likely would take one to two weeks and thus cost the Family, under the Agreement, $30–60,000; and [ ] the Family would have to pay the arbitrators to resolve discovery disputes and summary judgment motions, whereas a trial court judge would do those things for a $400 filing fee.[79]

227. Thus, private arbitration can be exorbitantly expensive, even more so than trial.

228. Because the costs are often so high, patients to these agreements are not only denied access to arbitration, but also to any dispute-resolution forum pursuant to their pre-dispute agreement.[80] This can be especially true in medical malpractice cases, in which patients are often insolvent due to the mounting medical bills they incur associated with the treatment of their injuries. Litigants have unequivocally contended that the "prohibitive arbitration costs frequently render arbitration a meaningless remedy to many injured parties and deny legitimate claimants access to reimbursement."[81] Therefore, private arbitration, and hence, the pre-dispute binding agreements that enforce it, contravene the Florida Legislature's intent in enacting the MMA's dispute-resolution procedures to carefully balance the rights of patients and the needs of doctors to address an "overpowering public necessity" — the alleged medical malpractice crisis.[82]

Public Resolution Sets the Standard of Care and Predicts Future Risk

229. Another important aspect of tort law is to impose liability on the actors responsible for the harm — in other words, to obtain justice, and to deter these actors and others from committing similar harmful acts by regulating behavior and educating them on what society deems as reasonable standards of conduct. "It is this attachment of liability to the doctor's actions and judgments that comprises the deterrence component of the tort system." In theory, in order for deterrence to work effectively, the responsible actors must know what kind of standard society expects of them, they must act rationally and

79 Answer Brief of Appellees, *Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016) (no. 5D15-0332).

80 Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 L. & CONTEMP. PROBLEMS 133, 159–160 (2004).

81 Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: Law, Ethics, and Prudence*, 28 J. LEGAL MED. 333, 372 (2007).

82 *Franks v. Bowers*, 116 So. 3d 1240, 1247 (Fla. 2013).

logically in weighing risks and benefits associated with different actions, and they must directly experience the adverse effect of their careless conduct.[83]

230. In the majority of medical malpractice cases, tort litigation works as a device by which current standards of care are examined, verified, and advanced, thereby setting the boundaries of what society considers to be adequate medical treatment. While the regulatory and educational functions of tort law "may not extend to the public at large[,] [they do] extend beyond the litigants and may profoundly affect conduct that has an impact on the public's well-being and safety."[84] For example, in a study by Northwestern University, researchers looked at the deterrent effect of tort law from evidence of medical malpractice reform across Florida, Georgia, Illinois, Texas, and South Carolina. The results of the study were consistent with the classic theory of tort law deterrence in which medical malpractice liability incentivizes health care providers to concentrate on the quality of care they render to patients.

231. The study showed that when the risk of liability decreases (i.e. strict tort reform measures are adopted), preventable adverse events increase, suggesting that the consideration of potential liability is needed to provide incentives for health care providers to create their own policies and procedures in order to prevent patient injuries. The study also noted that the other sources of financial incentives for hospitals and health care providers to "provide high-quality care can often be perverse: Hospitals earn more revenue from patients who suffer complications than from patients who do not," which makes it more conceivable that if the incentives provided by medical malpractice liability become weaker, quality of patient care may decrease.[85]

232. This implies that without the tort law litigation system, the practice and policy standards in health care would remain rather static. Thus, there seems to be a connection between "the public function of tort law as a means of enhancing practice standards and the educative aspect of keeping doctors informed about the current minimum standards of care and other legal issues through the publication (and sometimes publicity) of important or precedent setting court decisions." Therefore, public judgments rendered by courts in medical malpractice cases are not only desirable mechanisms of social regulation,[86] but are also effective tools for attaining minimum levels of continuing competency.

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83 Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 MD. L. REV. 247 (2017).

84 Andrew Brine, *Medical Malpractice and the Goals of the Tort Law*, 11 HEALTH L.J. 241, 254 (2003).

85 Zenon Zabinski & Bernard S. Black, *The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform*, NORTHWESTERN L. & ECON. RESEARCH PAPER NO. 13-09 (2019).

86 Andrew Brine, *Medical Malpractice and the Goals of the Tort Law*, 11 HEALTH L.J. 241, 254 (2003).

233. The presumably procedural changes of allowing the resolution of medical malpractice disputes in a private forum could have serious substantive implications. Most significantly, it could undermine the regulatory effects of the medical malpractice law system by limiting the dissemination of information regarding medical errors, which aids in the creation and enhancement of standards of conduct, the reduction of future medical accidents, and the ability to hold wrongdoers accountable. Thus, to privatize the process of resolving medical malpractice claims completely through private arbitration can effectively eliminate this deterrent effect.

The Impact of Private Arbitration on Law and Medicine

234. Another major issue with pre-dispute arbitration agreements is that arbitrators are not bound by legal precedent.[87] While arbitration does not necessarily change the basic tort theory of liability as arbitrators are generally required to apply the applicable substantive law of the dispute, "arbitrators are not subject to the same level of appellate review as judges who are deciding cases and, thus, may have greater flexibility to ignore specific substantive law requirements." While this absence of judicial oversight does not necessarily contribute to decision-making inaccuracy itself, it does eliminate a significant check on bias and error. As Judge Altenbernd declared in his concurring opinion in *Santiago v. Baker,*

> juries are not a relic of our history. In both civil and criminal cases, juries serve as a check upon the concentration of power in judges and other members of the political and economic elite. As Floridians, we have constitutionally protected as "inviolate" the right to trial by jury not because it is efficient or tidy, but because the participation of ordinary citizens is essential to a healthy balance of power within a democracy.[88]

235. Furthermore, an arbitrator's decision is rarely appealable, rendering it largely final irrespective of whether the evidence or law supports the outcome. Unless the arbitration agreement requires otherwise, arbitrators do not need to provide a written statement of their reasoning, but even if the agreement did require such a statement, it would have no precedential value because all arbitration proceedings and awards are confidential. As a result, private arbitration fails to develop the law or establish precedent on which others can rely.

236. Thus, the outcome of a privately arbitrated medical malpractice claim has effectively no impact on policies and practices that have widespread effect on developing the

87 Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: Law, Ethics, and Prudence*, 28 J. LEGAL MED. 333, 366 (2007).

88 Thomas Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 208–10 (1996); *see Santiago*, 135 So.3d at 571.

standard of care and preventing future risk. Overall, the private arbitration system has major ethical issues with regards to the rights of the patient. In the hands of the actual court system, decisions rendered by juries and even judges in medical malpractice cases allow the standard of care to evolve incrementally and responsively to the social needs of the time.

V. The Alleged Medical Malpractice Crisis

237. Albeit a separate inquiry, whether there still is, or ever was a medical malpractice crisis is a question of which the Florida Supreme Court has become increasingly skeptical towards, citing this issue in several of its recent opinions and often finding that the historical tort reform measures erode everyday citizens' constitutional right to the access of courts.[89] The Court has even gone so far as to accuse lawmakers of

> "manufacturing a medical malpractice crisis" by asserting the number of physicians in Florida was rapidly decreasing amid rising medical malpractice claims, when in fact, doctors in the state at the time were increasing — and that trend has continued.[90]

Lack of Empirical Evidence to Support Alleged Crisis

238. When medical malpractice insurance rates around the country spiked in the 1970s, the United States Legislature, and the Florida Legislature, increasingly feared that health care providers would be unable to afford the cost of practicing medicine, and as a result, would shut down their offices and clinics, either relocating to a more inexpensive jurisdiction or stop practicing altogether. However, the reasons for the rise and fall in liability insurance "are complex and not directly connected to litigation rates," rather the unavailability of liability insurance as well as its fluctuations are cyclical and influenced by a convergence of macro-economic factors, including

> market competition among liability insurance carriers, and off-target actuarial predictions about projected insurance costs… [t]he intermingling of these contributing factors affect insurance companies' loss ratios at different points in time, requiring them to make up for unanticipated shortfalls by increasing providers' premiums quickly.

89 *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013); *Estate of McCall, et al. v. U.S.A.*, 134 So. 3d 894 (Fla. 2014); *North Broward Hospital District v. Kalitan*, 219 So. 3d 49 (Fla. 2017).

90 Ansara Law Personal Injury Attorneys, *Florida Tort Reform Bill Could Harm Personal Injury Plaintiffs, Lawyers Say*, ANSARA LAW (May 9, 2019).

239. However, policy makers ignored the complexity of these factors, instead, incorrectly assuming that the increase in medical malpractice insurance liability premiums was a direct result of increased litigation, including frivolous lawsuits and outrageous jury verdicts. As a result, "what was a medical malpractice insurance crisis became publicly branded as a 'medical malpractice crisis' demanding tort reform."[91] Since that time, however, many empirical studies have shown that these assumptions were completely misinformed.

240. In Florida, specifically, a Public Citizen study performed in 2002 challenged these assertions by examining statistics from two sources: the injury data reported to Florida's Agency for Health Care Administration by hospitals and the National Practitioner Data Bank's "public use" file, a database listing doctors who commit malpractice. The data showed that from 1996 through 1999, Florida hospitals reported 19,794 medical adverse incidents, but only 3,177 medical malpractice claims. In other words, for every 6 adverse incidents in the hospital, only 1 malpractice claim was ever filed.

241. The report also refuted the idea that medical malpractice liability litigation constitutes a massive "lottery," in which "lawsuits are purely random events bearing no relationship to the care given by a physician." The report based its conclusion off of data reported in the public use file of the National Practitioner Data Bank, finding that "of the malpractice judgments and settlements since September 1990, only six percent, or 2,674 of the state's 44,747 doctors have paid two or more malpractice awards to patients." In other words, this small number of doctors was responsible for approximately $1.2 billion in damages, nearly 51 percent of all medical malpractice payments. Furthermore, the report found that there were 915 doctors who paid three or more malpractice claims that amounted to more than $575 million.[92]

242. Another argument against the existence of a medical malpractice crisis is that trends in data show that the amount of practicing physicians in the state of Florida has not decreased as a result of increased insurance premiums. The 2017 State Physician Workforce Data Book prepared by the Association of American Medical Colleges (AAMC) reflected that in 2017, there were 260.4 active physicians for every 100,000 people in Florida, a number higher than twenty-two other states. Furthermore, data collected through December 31, 2017, reflected that 58.8 percent of active physicians who completed medical school in Florida were still currently practicing in Florida, ranking fourth among the 50 states.[93]

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91 Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 MD. L. REV. 247, 264 (2017).

92 *Florida's Real Medical Malpractice Problem: Bad Doctors and Insurance Companies, Not the Legal System*, PUBLIC CITIZEN'S CONGRESS WATCH (2002).

93 *2017 State Physician Workforce Data Report*, AAMC (Nov. 2016).

243. Additionally, the Office of the State Courts Administrator (OSCA) reports have shown that medical malpractice filings in Florida have decreased significantly. During fiscal year 2003–04, a total of 2,236 professional malpractice actions were filed in Florida Circuit Courts, comprising 1.2 percent of all civil actions filed that year.[94] However, during fiscal year 2017–18, only 1,264 such actions were filed in Florida Circuit Courts, a decrease of more than 43 percent, comprising just 0.69 percent of all civil actions filed.[95] The Annual Reports on Medical Malpractice Financial Information prepared by the Florida Office of Insurance Regulation (FLOIR Annual Report) reflect a similar decrease in both the number of claims and in the amount of noneconomic damages paid by medical malpractice insurance companies.

244. Using this empirical evidence, the Florida Supreme Court has continued to examine whether a medical malpractice crisis still exists, or if it ever existed in the first place, citing much of this data in several of its recent opinions.

Estate of McCall, et al. v. United States of America

245. In 2014, the Florida Supreme Court first questioned the existence of the alleged medical malpractice crisis in *Estate of McCall et al. v. United States*. In its decision, the Court struck down the statutory cap on wrongful death noneconomic damages in medical malpractice lawsuits passed by the Florida Legislature in 2003 under Chapter 766.118 to alleviate the alleged "medical malpractice crisis," ruling it a violation of the State Constitution's Equal Protection Clause. The case involved an action brought by the Estate of Michelle McCall, who died following the birth of her son as a result of medical malpractice. The plurality opinion concluded that the cap on noneconomic damages "bears no rational relationship to a legitimate state objective, thereby failing the rational basis test."[96]

246. The Florida Legislature's purpose in enacting the statute was to address the medical malpractice insurance crisis:

> The Legislature asserted that the increase in medical malpractice liability insurance premiums has resulted in physicians leaving Florida, retiring early from the practice of medicine, or refusing to perform high-risk procedures, thereby limiting the availability of health care.

94 *Trial Court Statistical Reference Guide*, FLORIDA COURTS (2003–2004).

95 *Trial Court Statistical Reference* Guide, FLORIDA COURTS (2017–2018).

96 *Estate of McCall, et al. v. U.S.A.*, 134 So. 3d 894, 903 (Fla. 2014); see also *Florida High Court Strikes Down Statutory Caps On Medical Malpractice Noneconomic Damages in Wrongful Death Cases*, LEXISNEXIS.COM.

247. However, the Court opined that the "conclusions reached by the Legislature as to the existence of a medical malpractice crisis were not fully supported by available data." Rather, the "insurance crisis" was what legislators had maintained was the public necessity requiring the statutory caps. The opinion not only observed that there was a lack of evidence establishing a direct correlation between damage caps and reduced malpractice premiums, but even suggested that "without a statutory mandate that insurance companies lower their insurance premiums in response to tort reform, the savings resulting from reforms such as caps may simply increase insurance company profits." The Court further asserted that, even if a medical malpractice crisis existed when the statute was enacted, "[c]onditions can change, which remove or negate the justification for a law, transforming what may have once been reasonable into arbitrary and irrational legislation."[97]

North Broward Hospital District v. Kalitan

248. The Florida Supreme Court further extended its holding in *McCall* with its subsequent decision in *North Broward Hospital District v. Kalitan* in 2017, which effectively abolished the arbitrary caps on all medical malpractice damages that the Legislature enacted back in 2003. The Court reasoned that just as there was no evidence of a medical malpractice crisis to support the arbitrary caps on wrongful death damages, there was likewise no evidence to support arbitrary caps on personal injury damages in medical malpractice cases. The Court similarly explained that the caps violated the Equal Protection Clause because they created distinct classes of medical malpractice victims and limited the potential recovery of those patients most gravely injured by medical negligence. Furthermore, like in *McCall*, the caps failed to meet the rational basis test because, "[i]n the context of persons catastrophically injured by medical negligence ... it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease."[98]

249. The Court's decision in *Kalitan* was a monumental accomplishment for patients' rights as it represented a step in the right direction for protecting the interests of Floridians who suffer preventable injuries because of medical negligence. The Florida Supreme Court has continued to recognize the importance of public policy over the interests of more powerful corporate entities.

97 *Estate of McCall, et al. v. U.S.A.*, 134 So. 3d 894, 901–13 (Fla. 2014).

98 *North Broward Hospital District v. Kalitan*, 219 So.3d 49, 51–56 (Fla. 2017).

VI. Conclusion

250. Forced private arbitration as a forum to resolve medical malpractice disputes is legally inappropriate simply because medical services are not "transactions involving commerce,"[99] and therefore, the FAA should not preempt state law, nor should it apply at all in such context. Despite the current legality of pre-dispute binding arbitration agreements as a condition precedent to receiving medical treatment, the climate surrounding private arbitration in health care is evolving in Florida. The Florida Supreme Court has become increasingly aware not only of the diminished existence of a medical malpractice crisis, but also of the unjustified and unfair limitations that private arbitration imposes on patients, and that such limitations are not only a violation of Florida statutory law, but also a violation of public policy as they fundamentally eliminate the goals and benefits the tort system was designed to effect.

251. The exorbitant costs of private arbitration practically render the procedure a meaningless remedy to injured patients and deny patients with legitimate claims the access to compensation. Furthermore, private arbitration fails to develop the law or establish precedent on which others can rely, and because arbitration awards are rarely appealable and cannot be cited in future cases, the process not only fails to clarify uncertain areas of the law, but it fails to continuously develop the standard of care as the economic and social considerations in our environment change over time.

252. As is well-established in Florida, a contract that contravenes an established interest of society can be void as against public policy. This is true whether the rights involved are common law rights or statutory rights. However, health care providers improperly use contractual agreements to limit responsibility for a violation of basic standards of medical care by conditioning a patient's right to medical treatment upon agreements that limit their statutory rights. A patient requiring medical care should not need a lawyer to navigate the documents created by the health care provider to ensure that his or her rights are protected. While the views regarding the enforceability of pre-dispute arbitration agreements in health care are starting to evolve, the issues and arguments raised in this article, nonetheless, continue to be of great public importance to the citizens of Florida who must still waive their right to a jury trial and the protections of the Medical Malpractice Act in order to secure necessary medical care.

99 9 U.S.C. §{} 2 (2012).