

THOUGHT LEADERSHIP

LEGAL UPDATES

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Industry

Healthcare

Arbitration Agreements Must Strictly Comply With Colorado Statute

In a decision dated September 8, 2016, a panel of the Colorado Court of Appeals determined that a pre-dispute agreement between a healthcare provider and a patient to submit healthcare disputes to binding arbitration must strictly comply with the mandated language and format requirements outlined in § 13-64-403 of the Health Care Availability Act (the Act). This statute sanctions binding arbitration agreements when such agreements are entered into voluntarily and contain certain notifications, disclaimer language and formatting intended to aid the patient in deciding whether to agree to binding arbitration.

Boldface Is Required Detail

The issue before the Court in *Fischer v. Colorow Health Care LLC* was whether the mandated language and format set forth in the Act requires strict compliance for the agreement to be enforceable. Specifically, the agreement in *Colorow* contained three discrepancies:

The wording was not identical to the mandated language (although probably consistent in meaning).

There were typographical errors in the form.

The waiver and rescission paragraphs required under § 403(4) were not in boldface type.

The Court sided with the plaintiff and held the agreement to be unenforceable based on its finding that the agreement did not strictly comply with the statute's requirement to use boldface type for the paragraphs providing for a waiver of a court or jury trial and a 90-day rescission period. The Court did not

decide the other two issues regarding the agreement's discrepancies, and thus they remain open questions.

The Court determined that strict compliance was necessary for four reasons:

The statute uses the term "shall" in relation to the requirements. "Shall" legally confirms a strict compliance requirement.

The statute takes jurisdiction away from courts and gives it to an arbitrator. Statutes that change the courts' jurisdiction also require strict compliance.

The court acknowledged that while the statute is an example of inartful drafting, the Court must nevertheless look to the General Assembly's stated purpose in enacting the Act's provisions concerning the mandated language and format for such agreements. The Court focused on the overall need to ensure that binding arbitration agreements are entered into voluntarily by the patient and that voluntariness is secured only through a strict compliance requirement.

The Court rejected the defendant's substantial compliance argument since it would place a heavy burden on plaintiffs that could ultimately lead to inconsistent decisions by lower courts on whether the agreement was in compliance with the Act's mandated language and format.

What This Means to You

This new decision requires all Colorado healthcare providers who wish to utilize pre-dispute binding arbitration agreements in resolving disputes over medical care with patients to review their forms or templates for such agreements to ensure they strictly comply with the mandated language and format requirements of the Act. Noncomplying arbitration agreements could be rendered unenforceable if challenged, allowing plaintiffs and their attorneys to circumvent these agreements to litigate claims. This could result in time-consuming and costly legal proceedings.

Contact Us

For more information or guidance on reviewing or potentially revising a binding arbitration agreement, please contact Fred Miles, Carol Manteuffel or another member of Husch Blackwell's Healthcare team.