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HEALTH LAW PRACTICE

ALERT

# ARE "NO SUE AGREEMENTS" APPROPRIATE FOR MY PRACTICE?

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Recently, a New Jersey OB/GYN practice began requiring that its prospective patients sign agreements requiring binding arbitration for disputes. The agreements, sometimes referred to as "No Sue Agreements," also required patients to waive their rights to a jury trial and imposed a $250,000 cap on non-economic damages (i.e., pain and suffering). Such agreements are supported by the Obstetricians and Gynecologists Risk Retention Group of America (OGRRGA), a risk retention insurance carrier based in Montana. According to *Michigan Lawyers Weekly*, OGRRGA claims that it will reduce the premiums paid by its OB/GYN insureds by 50 percent if they require their patients to sign No Sue Agreements.

OGRRGA is not the only insurer asking for No Sue Agreements. In fact, Kaiser Permanente, a large insurer in California, adopted a similar approach years ago. Insurance industry experts have been quoted in a variety of publications as saying that physicians' use of No Sue Agreements has gained in popularity, especially in states where efforts at tort reform have been unsuccessful.

Physicians in Pennsylvania, New Jersey, and other states may have started to wonder whether they should use No Sue Agreements in their practices. In order to answer this question, physicians must determine whether No Sue Agreements are enforceable in the state(s) in which they are to be used.

Some argue that the benefits of reducing professional liability insurance premiums outweigh any detriment to patients because reducing premiums helps patients by permitting OB/GYNs to continue to practice; and the patients who do not wish to sign No Sue Agreements are free to seek medical attention elsewhere. Others contend that No Sue Agreements are contracts of coercion and, therefore, are unenforceable because physicians are essentially telling their patients that they will not treat them unless they sign. On OGRRGA's Web site, Kaiser Permanente's administrator is quoted as saying that three cases decided by the U.S. Supreme Court since the year 2000 that deal with the scope of the Federal Arbitration Act will make it very difficult for a state court to find a private arbitration contract unconscionable.

However, states have the authority to govern the overall fairness and operation of the arbitration process and may impose specific requirements that can impact the enforceability of No Sue Agreements from state to state. For example, California has a $250,000 damages cap, which limits the effect of binding arbitration, and California law requires "statutory notice forms" that explain No Sue Agreements to patients. New Jersey, on the other hand, has no such notice requirement, which may cause New Jersey courts to view such agreements differently in terms of enforceability.

Also, the ways in which No Sue Agreements have been drafted and presented to patients, have led

state courts in various jurisdictions to uphold or reject the agreements; although courts in some states have determined that patients may not waive their rights to recover damages for alleged medical malpractice because they lack informed consent and may be executing such waiver under duress. For instance, in 1996, the Utah Supreme Court rejected a No Sue Agreement that was presented to a patient just before surgery and where the patient did not have the time to read or discuss it with her physician (see *Sosa v. Paulos, M.D.*, 924 P.2d 357 (Utah 1996)).

While courts typically frown upon adhesion-type (i.e., "take it or leave it") contracts where the weaker party is unrepresented and asked to give up certain rights they would otherwise have without fully understanding the consequences, No Sue Agreements have been found to be enforceable by various courts in a variety of circumstances. For example, earlier this year, the California Supreme Court found that a No Sue Agreement entered into by a patient during an initial visit with a chiropractor still applied to a medical malpractice claim arising two years later from subsequent treatment for a different condition (see *Reigelsperger v. Siller*, 150 P.3d 764 (Cal. 2007)).

Likewise in 2006, the Mississippi Supreme Court upheld a No Sue Agreement in a wrongful death case, finding that the agreement provided the patient with a "fair opportunity and proper forum" to litigate his claims and that the agreement was binding on the deceased patient's beneficiaries (see *Cleveland, M.D. and Central Surgical Associates, PLLC v. Mann*, 942 So.2d 108, 117 (Miss. 2006)). In 1996, the Tennessee Supreme Court, while cautioning that No Sue Agreements should be "closely scrutinized" to ensure they do not contain terms that are oppressive to patients, held that a No Sue Agreement does not violate public policy, finding it is "as advantageous in this relationship as in any other" (see *Buraczynski v. Eyring, M.D.*, 919 S.W.2d 314, 316, 319 (Tenn. 1996)). However, some states, such as Georgia, prohibit parties in a medical malpractice case from entering into a No Sue Agreement until after a claim arises, and require that a patient have legal representation before executing any agreement.

Also, before "signing on" with an insurance carrier that promises a significant reduction in one's professional liability insurance premiums in exchange for requiring patients to sign No Sue Agreements, physicians should first attempt to assure themselves of the financial health of any such carrier, including whether it is sufficiently capitalized and whether it is admitted and licensed in the state in which the physician practices. For example, in Pennsylvania, physicians that are insured by a non-admitted carrier, (i.e., an insurer not licensed to transact business in Pennsylvania, but one that can write coverage through a Pennsylvania-licensed excess and surplus lines broker), will find themselves without "back-up" coverage through the Pennsylvania Insurance Guaranty Association if their primary, non-admitted carrier becomes insolvent.

In order to have a reasonable chance of being found to be enforceable by a court, a No Sue Agreement must, among other things:

- make clear the rights the patient is relinquishing
- provide the patient with a reasonable opportunity to review, ask questions about, and revoke the agreement
- not condition treatment upon the patient signing the agreement
- make certain that the agreement otherwise complies with state law, including with respect to any limitations on damages, whether it may be entered into before a claim arises, and the extent to which it must specify particular arbitration rules and procedures

Before asking patients to sign No Sue Agreements, physicians should consult with their professional liability insurance carrier to determine whether they favor the use of such agreements, and should consult with legal counsel to determine whether the agreements are enforceable in the jurisdiction in which the physician practices; and, if so, under what circumstances.

For more information about this topic, contact a member of the Health Law Practice.