arbitration, where the court believes that one party is attempting to circumvent appropriate findings by the arbitrator.

VI. CONCLUSION

The above cases confirm that the courts will give deference to the arbitration clause in any contract,[22] as well as to the FAA and its underlying principle that assigns importance to arbitration within the system of adjudication in the United States. Nonetheless, courts will review carefully state law, as well as all facts and circumstances surrounding a dispute about whether a court or an arbitrator should decide the case. In spite of the prominence of arbitration in the legal system, federal and state courts protect the right of a consumer to bring his or her claims to court, or to a jury trial. Wrongful death actions against nursing homes and long term care facilities are a special type of consumer dispute, in which the details of the state statutes are of paramount importance. By contrast, commercial parties can remain secure in the knowledge that the courts often will uphold arbitration processes, decisions and awards in cases conducted pursuant to arbitration clauses in contracts involving purely business healthcare disputes and parties.

[22] This brief summary updating recent caselaw does not cover cases where a challenge is brought in court to the validity of the entire contract containing the arbitration clause.

WHY ARBITRATION IS THE PREFE DISPUTE RESOLUTION VEHICLE FO INTEGRATED DELIVERY SYSTEM DISPUTES

Paul E. Knag[*] *and Daniel J. Kagan*[**]

Healthcare mergers and acquisitions have been heating up in recent years, as result of policies adopted by Medicare and under the Patient Protection and Affordable Care Act ("PPACA").[1] Larger hospitals and health systems are gobbling up their smaller competitors, including physicians and other small providers. This consolidation has also led to the rise of the for-profit hospital and for-profit health system. As a result of these changes within the healthcare sphere, the increased web of integrated entities requires parties to resolve their inevitable disputes with care in order to avoid any disruption to the delivery of their product, healthcare services.

I. WHAT'S TRENDING? CONSOLIDATION IN THE HEALTHCARE MARKET AND WHERE THE UNITED STATES HEALTHCARE SYSTEM IS HEADED

Healthcare in the United States continues to trend toward greater and greater consolidation. This consolidation is not limited solely to providers, as 2016 has seen the proposed mergers of four of the largest health insurance companies, Aetna with Humana and Cigna with Anthem. The increase in healthcare consolidation is due to a number of market drivers, including, but not limited to, the requirements and incentives of the PPACA and Medicare Shared Savings Program[2] (and the subsequent rise in Accountable Care Organizations ("ACOs") and ACO activity), credit unavailability and

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[1] H.B. 3590, Pub. L. 111-148 (March 11, 2010).

[2] Section 3022 [Medicare Shared Savings Program] amends Title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.) by adding new § 1899 [42 U.S.C. 1395jjj].

other financial constraints, the high cost of information technology, specifically electronic medical record systems, the high cost of monitoring and compliance with state and federal reimbursement and regulatory requirements, consumer insensitivity on price and the ability of larger hospital systems to receive better reimbursement from third party payors.

When disputes arise among these highly intertwined organizations, these organizations are left with untangling a mess while simultaneously ensuring that the mess does not unravel their entire business. In the event of these disputes, arbitration or other alternative dispute resolution mechanisms, for a variety of reasons, will be preferred over traditional litigation.

II. THE MECHANICS OF AN INTEGRATED DELIVERY SYSTEM – WHEN ONE PART IS BROKEN, HOW DO YOU CONTINUE TO RUN THE MACHINE?

An integrated delivery system can take shape as a variety of different structures, for-profit or non-profit, a single organization, parent holding company system, hospital-controlled system, physician-controlled system or it can have all its assets owned by a management services organization, among others. Each of these structures contains its own unique differences.

By way of example only, commonly, an integrated delivery system can be composed of a parent holding company, with a network of healthcare organizations under it. These entities can include, but are not limited to, a flagship hospital, other regional hospital facilities, a physician practice organization and other ancillary services such as an ambulatory surgery center, urgent care centers, preventive medicine, mental health, rehabilitation services and long-term care facilities ranging from home health and assisted living to hospice care. With the inclusion of additional service lines, the integrated delivery system becomes not only larger but also more complex.

Each integrated delivery system, using its size and market share, contracts for services and components essential to making it run like a well-oiled machine. In such manner, an integrated delivery system typically owns or leases the assets necessary to provide comprehensive

health care services to its patients.[3] For example, a successful integrated delivery system could have various personal service arrangements for a variety of services, contract for a single electronic medical record system to promote integration amongst its service lines, contract directly with insurance companies to ensure the system receives the best rates, contract as one entity with vendors for all essential supplies and employ and compensate all employees (including physicians) and independent contractors.

However, either internal disputes arising among the entities compromising the integrated delivery system or external disputes with outside contractors or entities can threaten to, or in actuality, disrupt the entire system. While parties create integrated delivery systems to achieve efficiencies and to have hospitals and physicians work together, as in any relationship, differences in opinion can lead to a breakdown or a break-up. Thus, in the event of the inevitable dispute, it is vital for these integrated systems to navigate choppy waters with care, such that the disputes do not compromise the system's ability to provide its essential service, comprehensive healthcare to its patients.

These disputes come in all shapes and sizes, the scope of which will inform the type of dispute resolution mechanism most appropriate.[4] For an integrated delivery system, large disputes can loom over the organization and threaten to upend the daily business. These disputes can include, but are certainly not limited to: payment and reimbursement issues with the government and/or primary payors, employment or contract disputes with employed physicians or large physician practice groups; disputes between a physician practice group and the hospital; personal service arrangement disputes for contracted services; healthcare joint venture disputes; and complex disputes arising from the fallout of a merger of an entity into the system. Even disputes on a more micro level, such as a dispute with a single physician or a patient complaint, due to the sensitivity of the subject matter, can greatly impact the integrated system from a public relations standpoint, a financial standpoint or both.

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[3] Gerald R. Peters, *Building an Integrated Delivery System*, AHLA-Papers P12139304 (Dec. 13, 1993).

[4] For a thorough discussion on disputes in healthcare related specifically to alternative dispute resolution, *see* John W. Cooley, *A Dose of ADR for the Healthcare Industry*, 57-APR Disp. Resol. J. 16 (2002).

With every dispute comes a dispute resolution mechanism, and while litigation may be appropriate in some circumstances, depending on each dispute and the needs of the parties, some form of alternative dispute resolution, likely to be a combination of mediation and arbitration or only arbitration, is the most likely to minimally disrupt the integrated delivery system machine.

III. TO ALL THE ARBITRATION NAYSAYERS, HERE ARE THE REASONS WHY ARBITRATION IS IMPORTANT IN THE CONTEXT OF DISPUTES ARISING IN AN INTEGRATED DELIVERY SYSTEM

With the rise of integrated delivery systems, it is natural to expect a rise in the number of disputes occurring within such systems. While many contracts with an integrated delivery system may already have alternative dispute resolution mechanisms in place, it is important for a system to understand where it needs to protect itself and where it makes sense to have a uniform approach to resolve issues that arise.

Arbitration in particular carries with it many advantages that do not exist within the parameters of traditional litigation. These advantages include, but are not limited to the following: (1) confidentiality and privacy of the arbitration proceedings, subject to losing that benefit if there are related court proceedings; (2) the ability to reduce damage to business relationships; (3) the ability to streamlining of discovery; (5) the ability to build in mediation requirements; (6) the ability to limit damages and prevent use of class actions and otherwise mold the potential remedy; (7) the possibility for a speedier and less costly resolution to the dispute; and (8) limited recourse to courts.[5]

First and foremost, alternative dispute resolution and arbitration offer a layer of confidentiality that litigation does not. There are many types of disputes that can occur between an integrated delivery system and another entity where the system would benefit from a shield from the media and general public purview. By resolving a dispute outside the court system, an integrated delivery system can avoid negative press or bad publicity. Situations where this could be particularly instrumental include disputes with physicians who are part of the system, any major reimbursement dispute with an

[5] *See Generally* Katherine Benesch and Geoff Drucker, *Arbitration and Mediation in the New Health Care Universe*, available at https://www.healthlawyers.org/Events/Programs/Materials/Documents/PHL14/ff_benesch_drucker.pdf.

insurance carrier or any dispute where litigation could reveal a proprietary business practice or trade secret involved in operating an integrated delivery system.

Another benefit of resolving disputes out of the court room is that it can help to maintain important business relationships, both internal and external. Oftentimes a very public litigation can lead to fractured business relationships. Internally, within an integrated delivery system, the system's structure inextricably ties parties together. To continue operating, disputes among internal entities cannot threaten to upset the internal business relationships essential for continued smooth operation. Thus, any dispute among entities within the system, settled outside the court system, is less likely to disrupt the system as a whole. The same goes for those business relationships with outside or external entities. For example, parties should want to keep disputes with prominent external entities, such as a primary payor, out of the court system not only for confidentiality reasons, but to ensure that the relationship between the parties stays as cordial as possible. As explained at the outset of the article, as healthcare providers consolidate so are healthcare insurers, such that losing the business of any health insurance company due to a dispute and fractured relationship could have an even greater impact on the health system's bottom line.

One word singles out an arbitrator from a judge, expertise. This expertise is another benefit as to why arbitration makes sense in the context of integrated delivery system disputes. Parties entering arbitration can agree on a single arbitrator or a panel of three arbitrators, all of which have the technical level of expertise necessary to adjudicate the dispute. The learning curve of the business of healthcare is steep; however it is an entirely different beast to understand the evolving landscape of the current United States healthcare system and its complex statutory and regulatory scheme, including the aforementioned PPACA. Thus, why should parties submit to a bench or jury trial, which requires them to establish a firm foundation and education on the basics of the law during trial, when their decision-maker can already be a pre-selected expert in the field?

Another benefit of arbitration is that it can add checks and balances to the aspects of litigation that have become unwieldy in recent times, namely e-discovery and general discovery. Given the size of integrated delivery systems and the examples of disputes described above, the types of disputes experienced by integrated delivery systems would likely contain a high volume of discovery and consequently, the

amount of evidence that a system would formally enter in a trial would be extensive. However, in an arbitration hearing a party can enter evidence with greater ease because the formal rules of evidence do not apply. Similarly, due to certain types of arbitration containing rules for limited discovery, such rules can inherently keep increasing costs at bay.[6] For example, the American Arbitration Association's Healthcare Payor Provider Arbitration Rules, most recently amended in November of 2014, state that "[d]iscovery shall be more streamlined unless the parties agree otherwise or the arbitrator decides otherwise based on the existence of extraordinary information."[7] More specifically, Rule 22 states that "[t]he parties shall each be limited to one deposition unless otherwise agreed to by the parties or ordered by the Arbitrator for good cause shown."[8] Further, with regard to document production, under Rule 23, an arbitrator may require, among other possible requirements related to documents, the parties to exchange documents in their possession or custody on which they intend to rely.[9] Additionally, parties can arrange arbitration hearings with carefully crafted scheduling orders in order to expedite the process and to help keep costs under control. Therefore, although these rules only apply in the context of a specific type of dispute, it is clear that arbitration can offer more in the way of economic efficiencies than traditional litigation.

Arbitration, as a contract device, provides for great flexibility in its implementation. As discussed in further detail later in the article, parties can draft an arbitration clause that builds in mandatory mediation, prior to ever proceeding to arbitration. With mediation requirements built into an arbitration clause, a dispute has the potential to be resolved more easily without going through the protracted formalities of a full-blown arbitration from the start. Additionally, arbitration clauses can be drafted to limit the ability of the arbitrator to award certain types of damages or equitable relief. In this way arbitration can mold the potential remedy, by offering creative solutions, which can involve awarding some level of damages, but also include non-traditional remedies, such as offering ways to repair fractured relationships and business structures. This flexibility is increasingly advantageous and important for disputes arising within integrated delivery systems, where such flexibility in resolutions can help keep vital business relationships intact. Additionally, mandatory arbitration can prohibit the use of class actions, and the subsequent unwanted exposure and publicity that comes with them. While class action lawsuits may be less prevalent in an integrated delivery system setting, requiring arbitration ensures that a class action lawsuit, and its ensuing costs and potential damage, does not occur, thereby not actively disrupting the integrated delivery system.

[6] An arbitration clause can also be drafted to provide for limited discovery. *See* discussion in Part IV.

[7] American Arbitration Association, AAA® Healthcare Payor Provider Arbitration Rules and Mediation Procedures (November 1, 2014), available at https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004106&RevisionSelectionMethod=LatestReleased, at 6.

[8] *Id.* at 19.

[9] *Id.*

While not always true, another potential positive attribute of resolving a dispute via arbitration is that arbitration cases can be less costly and take less time than traditional litigation. Costs are curbed through many of the advantages described above, *e.g.* limiting discovery. Although there are critics who state that over time arbitrations are more and more robust and similar to full-blown litigation, the industry is attempting to address such concerns. The longer any dispute goes on, the more expensive it becomes, but the methods of limiting discovery mentioned earlier go a long way in reducing both cost and time.

Lastly, arbitration provides a sense of finality. Once an arbitrator reaches a decision with regard to any dispute; such decision is final. Stated differently, after an arbitrator renders a decision, there is limited recourse for the parties to the court system. This is great news when it comes to controlling costs, as the binding nature of arbitration stems the ongoing costs of litigation and any subsequent appeals. For these reasons, arbitration can offer a finality that litigation cannot typically provide.

While the aforementioned positive attributes of arbitration tend to outweigh the negative ones, there are certain situations where arbitration or other forms of alternative dispute resolution may not be the preferred method of settling a dispute. First, unlike a judge who works for the state or federal government, in an arbitration parties pay an arbitrator differing amounts depending on the length of the arbitration. Thus, some people argue that there is no real incentive for an arbitrator to "turn off the meter." However, if an arbitrator wants to have a quality reputation and continue to hear disputes, he or she has the motivation to resolve disputes as quickly, efficiently, and fairly as possible. Next, as mentioned above, certain types of

arbitrations have built-in limited discovery, but if discovery is not limited for a specific dispute, that process alone can easily become as extensive, and therefore as expensive, as litigation. Thus, the onus is on the parties to agree to reasonable discovery in order to keep arbitration costs at bay. Lastly, while this article highlighted the pros of binding arbitration, the flip-side is that if the integrated delivery system is on the losing side of an arbitrator's decision, it has no ability to appeal the unfavorable result. Overall, each contract and relationship between entities requires a forward-thinking nuanced analysis to determine whether arbitration or alternative dispute resolution is appropriate in the event any dispute arises.

IV. SO WE DECIDED WE WANT TO ARBITRATE GOING FORWARD. WHAT DOES OUR ARBITRATION CLAUSE LOOK LIKE? WHAT FACTORS DO INTEGRATED DELIVERY SYSTEMS NEED TO CONSIDER IN DRAFTING ARBITRATION CLAUSES?

At its core, arbitration is a creature of contract. Therefore, while it may be difficult to require or force arbitration for any disputes arising out of a contract that does not contain an arbitration clause, integrated delivery systems can craft alternative dispute resolution and arbitration clause language to fit the particular needs of any agreement amongst internal parties or between the integrated delivery system and a contracting entity. Because an alternative dispute resolution or arbitration clause has many components, drafting an appropriate clause requires a thorough explanation to the client of its options with regard to the specifics of the clause as well as in what ways the clause is binding upon them. When drafting, attorneys should use the resources available to them, such as the American Arbitration Clause Builder application, which can assist attorneys in developing alternative dispute resolution clauses to best fit the client's needs.[10] This tool can help craft language to address concerns of the parties, such as provisions to eliminate certain types of damages and class actions, provisions mandating a specific type of dispute resolution mechanism and provisions limiting discovery, among others.

[10] *Alternative Dispute Resolution ClauseBuilder® Tool*, American Arbitration Association, available at https://www.clausebuilder.org/cb/faces/index?_afrLoop=1227998353790145&_afrWindowMode=0&_adf.ctrl-state=jiekqra9g_4 (last visited Sept. 13, 2016).

When drafting an arbitration or alternative dispute resolution clause, the first consideration an attorney must contemplate is whether given the context of the contract or relationship between the parties, does it make sense to pursue a two-step alternative dispute resolution process? If that answer is yes, then the clause would require the partics to enter some form of negotiation or perhaps non-binding mediation, and only if the dispute could not be resolved after such attempts to come to a mutual agreement do the parties subsequently submit to binding arbitration. Sample language to this effect could be:

> The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between officers who have authority to settle the controversy and who supervise and manage the persons directly responsible for the administration of this Agreement. Any party many give the other party written notice of any dispute not resolved in the normal course of business. Within fifteen (15) days after delivery of the notice, the receiving party shall submit to the other a written response. Within thirty (30) days after delivery of the notice, officers of both parties shall meet at a mutually acceptable time and place. If the matter is not resolved by negotiation pursuant to paragraphs___ above, then the matter will proceed as set forth in paragraph(s) ___.

Next, attorneys must consider whether the arbitration clause should limit the types of disputes arising under an agreement that can go forward to arbitration. For example, the clause can specify that the parties can arbitrate X type of dispute, whereas the parties must mediate Y type of dispute and there is no alternative dispute resolution for Z type of dispute. This may be preferred if the parties can anticipate the types of disputes that may arise under the contract or agreement.

When it comes to choosing who will adjudicate the dispute, the arbitration clause can set forth the number of arbitrators specifically, one or three, and the method of appointment. An integrated delivery system may want to force the hand and require three arbitrators for its larger contracts, where the dollar amounts at stake may be higher; whereas the less costly option of one arbitrator may make sense in other lower value disputes.

Attorneys must also consider governing law. This provision in the clause sets forth the governing law of the arbitration and the location in

which the parties hold the arbitration. Governing law is critical in the context of integrated delivery system disputes because healthcare statutes and regulations can vary greatly from state to state. The choice of what law governs also implicates venue in the event there is the need for any ancillary relief, such as an injunction, a prejudgment remedy, whether a client can subpoena third parties and third party documents or for enforcing or vacating any arbitration awards.

Clients also need to consider whether they want to limit the possible remedies via arbitration. Simply stated, this means that the arbitration clause can limit the powers of the arbitrators to award any compensatory damages. Sample language to this effect could be: "The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute." With regard to enforcement of any arbitration decision, a simple provision that states: "The arbitration award shall be final and binding on the parties and may be entered and enforced in any court having jurisdiction" should suffice.

Arbitration clauses can also be forward-thinking by setting forth the ways in which the arbitration is paid for. Attorneys should strongly consider incorporating this type of provision into the arbitration clause, specifically addressing fees and costs. Generally, the default rule here is that the parties split evenly the administrative fees and the arbitrator's compensation. Most arbitration clauses are silent with regard to attorney's fees; however, drafting can change whether attorney's fees are awarded. Careful drafting here is necessary. For example, drafting a clause that simply awards attorney's fees to the "prevailing party" may leave too much ambiguity. This is because who constitutes the "prevailing party" is up for debate given the potential creative remedies available to the arbitrator. Thus, a potential provision in an arbitration clause could be as follows:

> "The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees."

This language still allows for the arbitrator to decide who the prevailing party is, but also provides the option that neither party "prevailed" such that neither party is entitled to costs and fees.

Finally, when drafting an arbitration clause, an attorney should consider including a provision for speediness, so as to not drag out the arbitration process, as one of the aforementioned positives of arbitration is that it is supposed to control costs. This provision may call for or require the parties to set out a scheduling order to keep the arbitration chugging along at an appropriate clip. Given all these variations and complexities with drafting appropriate arbitration clauses, attorneys must be very careful to ensure that they are drafting clauses consistent with clients' wishes while understanding the nuances given the particular facts and relationship between the parties in each agreement.

V. SO, WHAT IS THE OVERALL TAKEAWAY?

Integrated delivery systems should incorporate alternative dispute resolution into the system's overall dispute resolution process. Certain disputes arising within integrated delivery systems lend themselves to alternative dispute resolution rather than litigation. While attorneys must consider all factors before deciding how to resolve a dispute, and while attorneys need to consider and decide many of these decisions prior to any dispute ever arising, it is clear that arbitration has the potential to resolve unique healthcare disputes arising in integrated delivery systems in a timely, cost-effective way.