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Contorting the Law: The Governing Statute of Limitations in Arbitrating Medical Malpractice Claims

INTRODUCTION

We are not insensitive to the fact that to a certain extent this opinion can be construed as undermining the time limitations imposed by MICRA on bringing medical malpractice lawsuits.¹

In the recent case of *Meyer v. Carnow*, a California Court of Appeal was asked to determine the appropriate statute of limitations for commencement of court proceedings to compel arbitration.² The Medical Injury Compensation Reform Act of 1975,³ (MICRA) sets forth, among other things, a statute of limitations for commencing medical malpractice claims in the judicial arena.⁴ MICRA also provides for and authorizes arbitration of medical malpractice claims as a substitute for litigation.⁵ However,

1. *Meyer v. Carnow*, 185 Cal. App. 3d 169, 175 n.3, 229 Cal. Rptr. 617, 620 n.3 (1986).

2. *Id.* at 173, 229 Cal. Rptr. at 618.

3. "SECTION 1. This act shall be known and may be cited as the Medical Injury Compensation Reform Act." 2 Stat. 3949-4007 (1975).

4.

In an action for injury or death against a health care provider, based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.

CAL. CIV. PROC. CODE § 340.5 (West 1982 & Supp. 1988).

5.

(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence shall have such provision as the first article of the contract and shall be expressed in the following language: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

(b) Immediately before the signature line provided for the individual contracting for medical services must appear the following in at least 10-point bold red type:

MICRA does not specifically embrace the issue presented in *Meyer*: Where there is a written agreement to arbitrate potential claims between a doctor and patient, does the statute of limitations applicable to medical malpractice actions govern a petition to compel arbitration, or does the statute of limitations applicable to contracts govern?⁶ The California Court of Appeals held that the statute of limitations applicable to contracts governs a petition to compel arbitration of a medical malpractice claim.⁷ The basis for this holding was that the right to compel arbitration arose out of a written agreement, therefore arbitration is a matter of contract, and an action to compel arbitration is an action to compel specific performance of a contract.⁸

This Comment argues that the statute of limitations to compel arbitration should not exceed the statute of limitations for the underlying claim. This Comment first presents the case of *Meyer v. Carnow* and discusses how the court reached its conclusion. Second, it examines the evolution of the statutes of limitations applicable to tort actions generally, and medical malpractice actions specifically; and further addresses breach of contract in the rendition of medical services and the statute of limitations applicable to contracts and arbitration. Third, it examines the purpose of MICRA and the problems it was designed to remedy. The shortcomings in *Meyer v. Carnow* and MICRA are presented and analyzed, and the possible chilling effect they may have on arbitration

“NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.”

CAL. CIV. PROC. CODE § 1295(a)-(b) (West 1982).

6. *Meyer v. Carnow*, 185 Cal. App. 3d 169, 229 Cal. Rptr. 617 (1986). California Code of Civil Procedure § 337 as amended in 1975 by MICRA reads as follows:

Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. 2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

CAL. CIV. PROC. CODE § 337 (West 1982).

7. *Meyer*, 185 Cal. App. 3d at 173, 229 Cal. Rptr. at 618.

8. *Id.* at 173-74, 229 Cal. Rptr. at 618.

agreements between doctors and patients is discussed. Finally, in concluding that relief lies in the hands of the legislature, this Comment proposes alternative legislation as a solution to the current state of the law.

I. *Meyer v. Carnow*

On April 21, 1978, petitioner, Dorothy Meyer, executed a treatment and arbitration agreement⁹ with her podiatrist, respondent, Dr. Jacob Carnow. On April 25, 1978, Meyer underwent surgery on her left toe and remained under Carnow's care until June 1981.¹⁰ In January 1983 (four and one-half years from the date of surgery), Meyer, after consulting another doctor, discovered that the surgery and treatment rendered by Carnow were below the standard of professional care.¹¹

Subsequently, in August of 1983, Meyer retained an attorney who sent a letter to Carnow demanding arbitration of Meyer's claim pursuant to the arbitration agreement.¹² In November of 1984, more than one year after the date of the demand letter, Carnow's insurance carrier refused Meyer's demand for arbitration on the grounds that Meyer did not have a valid claim.¹³

9. The agreement provided:

In the event of any controversy between the PATIENT . . . and the ATTENDING PODIATRIST . . . involving a claim in tort or contract the same shall be submitted to arbitration. Within fifteen (15) days after the PATIENT or ATTENDING PODIATRIST shall give notice to the other of demanding arbitration of such controversy, the parties to the controversy shall each appoint an arbitrator and give notice of such appointment to the other. Within a reasonable amount of time after such notices have been given the arbitrator so selected shall select a neutral arbitrator and give notice of the selection thereof to the parties. The arbitrator shall hold a hearing within a reasonable time for [sic] the date of notice of selection of neutral arbitrator. All notices or other papers required to be served shall be served by the United States mail. Except as provided herein the arbitration shall be conducted in accordance with and governed by the provisions of Title 9 of the California Code of Civil Procedure. The patient may withdraw from the arbitration portion of this agreement within thirty (30) days from the date of this agreement by notification of this intent to do so to the ATTENDING PODIATRIST by registered mail.

Meyer, 185 Cal. App. 3d at 171-72, 229 Cal. Rptr. at 617.

10. *Id.* at 172, 229 Cal. Rptr. at 617.

11. *Id.*

12. The letter stated:

Demand is hereby made for Arbitration . . . with respect to the medical service treatment, and care negligently rendered by you . . . [to Meyer] from on or about April 21, 1978 to on or about July 30, 1981

Please select an arbitrator to act on your behalf in this matter and inform us of your choice.

Take notice that should you refuse to arbitrate this matter, [Meyer] shall take further steps to effect arbitration according to law.

Id. at 172, 229 Cal. Rptr. at 617-18.

13. In a footnote, the court stated: "The 15-month hiatus was caused by Dr.

Thereafter, in December 1984, Meyer filed a petition to compel Carnow to submit to arbitration.¹⁴ In opposing the petition, Carnow relied on the statute of limitations applicable to medical malpractice claims as an affirmative defense.¹⁵ Carnow argued that the petition to compel arbitration was untimely, thus Meyer's claim was barred.¹⁶ The trial court agreed with Carnow's argument and denied the petition.¹⁷

Meyer then appealed.¹⁸ The appellate court ruled in Meyer's favor, holding that the right to compel arbitration arose out of the written agreement she had with Carnow, therefore the appropriate statute of limitations was that applicable to contracts.¹⁹ Because the contract statute of limitations is four years and commences when the right to compel arbitration arises, the petition to compel arbitration was timely.²⁰ Meyer's right to compel arbitration arose when Carnow refused her demand to submit to arbitration in November of 1984,²¹ rendering the petition filed in December of 1984 timely and well within the four-year statute of limitations.²²

In concluding its opinion, the court stated that the issue was

Carnow's investigation of the merits of Meyer's claim. We are somewhat puzzled by this as nothing in the arbitration agreement provides for such an investigation prior to arbitration; instead, the question of the merits of the claim would seem to be a matter for the arbitrator to resolve." *Id.* at 174 n.1, 229 Cal. Rptr. at 619 n.1.

14. *Id.* at 172, 229 Cal. Rptr. at 618; *see also* CAL. CIV. PROC. CODE § 1281.2 which reads as follows:

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

- (a) The right to compel arbitration has been waived by the petitioner; or
- (b) Grounds exist for the revocation of the agreement.

CAL. CIV. PROC. CODE § 1281.2 (West 1982).

15. *Meyer*, 185 Cal. App. 3d at 172-73, 229 Cal. Rptr. at 618. Among the basic affirmative defenses available to medical practitioners in a medical malpractice lawsuit is the often used running of the statute of limitations. *See* Comment, *A Four Year Statute of Limitations for Medical Malpractice Cases: Will Plaintiff's Case be Barred?*, 2 PAC. L.J. 663 (1971). *See also* Note, *Medical Malpractice: A Survey of Statutes of Limitations*, 3 SUFFOLK U.L. REV. 597, 604-06 (1969).

16. "Utilizing either provision of [CCP § 340.5], Dr. Carnow urged Meyer's December 1984 motion to compel arbitration was untimely. That is, he claimed in the alternative that the three year limit had begun in April 1978 when Dr. Carnow performed the surgery so that it had run in April 1981 or that the one year limit had commenced in January 1983 when another physician advised Meyer of the malpractice and it had expired in January 1984." *Meyer*, 185 Cal. App. 3d at 173, 229 Cal. Rptr. at 618.

17. *Id.* at 173, 229 Cal. Rptr. at 618.

18. *Id.* at 171, 229 Cal. Rptr. at 617.

19. *Id.* at 173-74, 229 Cal. Rptr. at 618-19. *See also* CAL. CIV. PROC. CODE § 337 (West 1982).

20. *Meyer*, 185 Cal. App. 3d at 174, 229 Cal. Rptr. at 619.

21. *Id.*

22. *Id.* However, the real problem is that the *demand* for arbitration was made after the statute of limitations had run on the medical malpractice claim.

whether Meyer had waived her right to demand arbitration by not asserting it earlier.²³ Thus, the case was sent back to the trial court with directions to resume proceedings in accordance with the appellate court's view that in deciding whether Meyer waived her right, the trial court could look to Section 340.5 of the California Code of Civil Procedure.²⁴

II. STATUTES OF LIMITATIONS

A. Tort Claims

Until 1970, there was no California legislation that specified a statute of limitations for medical malpractice claims.²⁵ In 1872, California enacted Code of Civil Procedure section 340(3) which set forth a one-year maximum time limitation within which to commence civil actions for libel, slander, assault, battery, or false imprisonment.²⁶ In 1905, Section 340(b) was amended to include actions for civil negligence. However, Section 340(b) did not address medical malpractice claims specifically.²⁷

In 1917, in *Krebenios v. Lindauer*,²⁸ the California Supreme Court construed Section 340(b) to include actions by patients against physicians for injuries caused by the physician's negligent or unskillful treatment.²⁹ In *Krebenios* the plaintiff filed a complaint against his employer *ex delicto*³⁰ for an injury sustained on June 24, 1912, and then filed an amended complaint *ex contractu*³¹ on September 28, 1914, to avoid the one-year tort statute of limitations.³² The defendant demurred on the grounds that the action was in tort and not in contract, thus barred by the statute of limitations.³³ The court held that where an employee sues his employer for personal injuries suffered as a result of the employment, the cause of action is one in tort and not in breach of the employment contract.³⁴ In support of its conclusion, the court re-

23. *Id.* at 175, 229 Cal. Rptr. at 619-20.

24. *Id.*; see *infra* note 77 and accompanying text.

25. Comment, *supra* note 15, at 664.

26. *Id.*

27. *Id.*

28. 175 Cal. 431, 166 P. 17 (1917).

29. Comment, *supra* note 15, at 664 n.11 (citing *Krebenios*, 175 Cal. at 432, 166 P. at 17-18).

30. "From a delict, tort, fault, crime, or malfeasance. In both the civil and the common law, obligations and causes of action are divided into two classes—those arising *ex contractu* (out of contract) and those *ex delicto*. The latter are such as grow out of or are founded upon a wrong of tort. . . ." BLACK'S LAW DICTIONARY 509 (5th ed. 1979).

31. See *id.*

32. *Krebenios*, 175 Cal. at 432, 166 P. at 17-18.

33. *Id.* at 431-32, 166 P. at 17-18.

34. *Id.* at 432, 166 P. at 18.

lied on *Gillette v. Tucker*³⁵ wherein it was stated that medical malpractice claims will be regarded as *ex contractu* or *ex delicto*, depending on the circumstances and pleadings.³⁶ In *Gillette*, a surgeon had negligently left a sponge in the patient's wound but had continued to treat her thereafter.³⁷ "[T]he action was brought more than one year after the sponge was left in the wound but within less than one year after the severance of that relationship."³⁸ However, this construction did not establish when the cause of action arose nor when the statute of limitations began to run. *Krebenios* applied a strict interpretation of the one-year tort statute of limitations, which was followed until 1936. This meant that a plaintiff could only bring a medical malpractice action if he discovered the injury and brought his claim within one year from the date of the injury.³⁹

In 1936, the California Supreme Court set a new precedent in *Huysman v. Kirsch*,⁴⁰ holding that the statute of limitations did not start running until the patient discovered the injury, thus establishing the "discovery" rule.⁴¹ In *Huysman*, plaintiff sued defendant for malpractice.⁴² On December 26, 1930, defendant advised plaintiff that surgery was necessary to properly treat and cure a uterine tumor, at which time plaintiff employed defendant as her physician and surgeon.⁴³ The date of the injury was January 9, 1931, when defendant failed to remove a drainage tube from the plaintiff's abdominal cavity.⁴⁴ Defendant did not remove the tube until September 26, 1932.⁴⁵ Thus, the tort was a continuing one.⁴⁶ Although the injury occurred on January 9, 1931, plain-

35. *Id.* (citing *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639, 65 N.E. 865 (1902)).

36. *Id.*

37. *Id.*

38. *Id.*

39. See Comment, *supra* note 15, at 665.

40. 6 Cal. 2d 302, 57 P.2d 908 (1936).

41. "[T]he statute of limitations should not run against an injured [person's] right to compensation during the time said person was in ignorance of the cause of his disability and could not with reasonable care and diligence ascertain such cause." *Id.* at 312, 57 P.2d at 913.

42. *Id.* at 303, 57 P.2d at 909.

43. *Id.*

44. *Id.* at 304, 57 P.2d at 909.

45. *Id.*

46.

[I]f we call malpractice a tort in this case, it is a tort growing out of a breach of contract which the law implies from the surgeon's employment and undertaking to perform the operation. . . . [I]t was a continuous obligation . . . and it was alive and binding so long as the relation of physician and patient subsisted. If so, it was the ever present duty of the surgeon to remove the sponge from the body of the patient. It was a constant and daily obligation to use ordinary skill and care. . . . Neglect of this duty imposed by a continuous obligation was a continuous and

tiff did not discover it until September 26, 1932, and it was held that this later date, and not the former, began the running of the one-year statute of limitations.⁴⁷ This liberal interpretation and numerous variations expanding thereon⁴⁸ abrogated the effectiveness and purpose of the statute of limitations.⁴⁹

In 1970, the California Legislature passed the first medical malpractice statute of limitations, establishing a four-year maximum time period within which to bring a claim.⁵⁰ The purpose of the 1970 statute of limitations (as with statutes of limitations in general) was to bar stale claims and protect tortfeasors from the threat of a lawsuit hanging in the wings for an indefinite period of time.⁵¹ Moreover, when successfully raised as an affirmative de-

daily breach of the same, and as the facts show, caused continuous, increasing, daily and uninterrupted injury.

Id. at 308, 57 P.2d at 911.

47. *Id.* at 304, 57 P.2d at 909.

48. For example, as noted in *Huysman*, "the courts have held that the statute does not commence to run while the physician and patient relationship continues because the patient usually does not have knowledge of the physician's negligence but rather the patient continues to rely on the skill, judgment and advice of the physician." *Id.* at 312, 57 P.2d at 913.

49.

The cases have uniformly followed the *Huysman* "discovery" rule and have expanded it by establishing new exceptions. Thus, the courts have held that the statute does not commence to run while the physician and patient relationship continues; or, until the plaintiff discovers the injury, or through the use of reasonable diligence should have discovered it, whether such actual or constructive discovery occurs prior to or after termination of the physician-patient relationship; or, if there is an act or omission on the part of the physician which would toll or interrupt the running of the statute or estop the physician from asserting that the action is barred.

In the years subsequent to 1936, the courts have made knowledge the basis for commencing the statutory period and have evolved on a continuing path of liberalization in the interpretation of Code of Civil Procedure Section 340.

Comment, *supra* note 15, at 666 (footnotes omitted).

50.

Section 340.5 is added to the Code of Civil Procedure to read: In an action for injury or death against a physician or surgeon . . . based upon such person's alleged negligence, or for rendering professional services without consent, or for error, or omission in such person's practice, four years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever first occurs. This time limitation shall be tolled for any period during which such person has failed to disclose any act, error, or omission upon which such action is based and which is known or through the use of reasonable diligence should have been known to him.

Comment, *supra* note 15, at 668 (citing S.B. 362, Cal. Stats. 1970, c. 360, § 1, at 771.)

51. "Statutes of limitations . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Tel. v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).

fense by a health care provider in a medical malpractice claim, the statute of limitations is a complete and absolute bar to recovery.⁵² The statute of limitations is the most effective defense available to a health care provider. Thus, in accordance with public policy which requires timely assertion of rights against an alleged tortfeasor,⁵³ this statute of limitations is intended to promote fairness and certainty of medical malpractice claims because memories fade, witnesses disappear and evidence may be lost over the passage of time.⁵⁴ The difficulty in proving that the physician exercised professional skill and due care increases over time.⁵⁵ Moreover, it may become impossible to determine whether the patient's injury was in fact the result of the physician's negligence or whether it was the result of some other cause.⁵⁶

Finally, in 1975, the California Legislature passed the Medical Injury Compensation Reform Act⁵⁷ in response to California's medical malpractice insurance crisis.⁵⁸ Section 25 of MICRA amended Section 340.5 of the California Code of Civil Procedure and set forth a new statute of limitations for medical malpractice claims.⁵⁹ In an action against a health care provider for professional negligence, the "time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three

52. See Note, *supra* note 15, at 606.

53. See *id.*

54. *Order of R.R. Tel.*, 321 U.S. at 348-49.

55. Originally, to protect the perishable nature of personal injury actions, the statute of limitations for medical malpractice suits was one year from the date of the negligent act, not one year from the date of discovery of the injury. Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528 (1957); Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

56. Note, *supra* note 15, at 606; Note, *Malpractice*, *supra* note 55, at 528.

57. 2 1975 Cal. Stat. 3949 ch.1 § 1.

58.

This act is an *urgency* statute necessary for immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

There is a crisis in health care in California because of the inability of many physicians and surgeons to secure malpractice insurance which may cause many of them to leave the private practice of medicine. To help solve this problem, it is imperative that this act take effect immediately. The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system. . . .

2 1975 Cal. Stat. 4007 ch.2 §§ 11 & 12.5(1)(b) (emphasis added). See also Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L.R. 829 (1979).

59. CAL. CIV. PROC. CODE § 340.5 (West 1982 & Supp. 1988).

years beyond the actual date of injury unless tolled” by fraud, intentional concealment, or the internal presence of a non-therapeutic foreign body.⁶⁰

B. Contract Claims

The statute of limitations for commencing an action for breach of contract is four years from the date of the breach.⁶¹ In addition to tort causes of action based on medical malpractice, lawsuits against physicians have also been based on breach of an express contract.⁶² A doctor and patient are at liberty to contract for a particular result which if not achieved gives rise to a cause of action for breach of contract.⁶³ A cause of action for breach of contract is entirely separate from a cause of action for malpractice, although both may arise from the same transaction.⁶⁴ Moreover, it is no defense to a breach of contract claim that the physician acted innocently or without negligence.⁶⁵ The damages to be recovered in a malpractice claim are for personal injuries, including pain and suffering; whereas the damages for a breach of contract claim are usually limited to expenditures made for doctors, nurses and medicines.⁶⁶ However, in special cases, the courts may allow damages for pain and suffering if they naturally flow from the

60. *Id.*

61. CAL. CIV. PROC. CODE § 337 (West 1982).

62. *Sullivan v. O'Connor*, 363 Mass. 579, 581-82, 296 N.E.2d 183, 185-86 (1973); *Guilmet v. Campbell*, 385 Mich. 57, 67 n.1, 188 N.W.2d 601, 605 n.1 (1971) (“It is well settled that a physician or surgeon may bind himself by express contract to perform a cure or obtain specific results by treatment or an operation.”); *Stewart v. Rudner*, 349 Mich. 459, 84 N.W.2d 816 (1957); *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955); *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794, *aff’d.*, 94 N.Y.S.2d 98 (1949).

63. *Sullivan*, 363 Mass. at 581-82, 296 N.E.2d at 185-86; *Guilmet*, 385 Mich. at 67 n.1, 188 N.W.2d at 605 n.1; *Stewart*, 349 Mich. at 467-68, 84 N.W.2d at 822-23; *Robins*, 308 N.Y. at 546, 127 N.E.2d at 331; *Colvin*, 276 App. Div. at 9, 92 N.Y.S.2d at 795, *aff’d.*, 94 N.Y.S.2d 98 (1949).

64. “[T]his cause of action (in contract) is entirely separate from malpractice, even though they both, as here, may arise out of the same transaction. . . . The two causes of action are dissimilar as to theory, proof and damages recoverable. Malpractice is predicated upon the failure to exercise requisite medical skill and is tortious in nature. The action in contract is based upon a failure to perform a special agreement. Negligence, the basis of the one, is foreign to the other.” *Stewart*, 349 Mich. at 468, 84 N.W.2d at 823 (quoting *Colvin*, 276 App. Div. 2d at 9, 92 N.Y.S.2d at 795).

65. “[I]t is hardly a defense to a breach of contract that the promisor acted innocently and without negligence.” *Sullivan*, 363 Mass. at 584, 296 N.E.2d at 187. “If a doctor makes a contract to effect a cure and fails to do so, he is liable for breach of contract even though he use [sic] the highest possible professional skill.” *Robins*, 308 N.Y. at 547, 127 N.E.2d at 332.

66. “The damages recoverable in malpractice are for personal injuries, including the pain and suffering which naturally flow from the tortious act. In the contract action they are restricted to the payments made and to the expenditures for nurses and medicines or other damages that flow from the breach thereof.” *Stewart*, 349 Mich. at 468, 84 N.W.2d at 823 (quoting *Colvin*, 276 App. Div. 2d at 10, 92 N.Y.S.2d at 795).

breach of contract.⁶⁷

C. *Petitions to Compel Arbitration*

When a doctor and patient sign a contract agreeing to arbitrate claims that may arise out of the physician-patient relationship, the statute of limitations for a petition to compel arbitration is that applicable to contracts,⁶⁸ not that applicable to medical malpractice claims.⁶⁹ Upon the physician's refusal to submit to arbitration at the demand of the allegedly injured patient, the patient may, within four years from the date of the doctor's refusal, petition the court to compel arbitration.⁷⁰ The court itself does not have jurisdiction over the merits of the claim for medical malpractice. It merely has jurisdiction over the issue of breach of contract.⁷¹

67. In *Stewart v. Rudner*, a 37 year-old woman contracted with her physician to perform a Caesarean section to deliver her baby. Because the woman had previously suffered two miscarriages and because of her age, she felt that a Caesarean section was absolutely necessary so as to avoid the "hazards of a normal delivery." The physician testified, "I knew Mrs. Stewart wanted a Caesarean. I knew also of the possible problems in the delivery of this child."

In June, the physician recommended that plaintiff have x-rays taken, at which time the baby was eight months in development. In September, plaintiff believed that she was long overdue because the baby would have come to full term in July. On the evening of September 4th, plaintiff began to have labor pains and entered the hospital. At that time fetal heart tones were heard, but by the early morning hours of September 5th, no fetal heart tones were heard. The physician told the head doctor of obstetrics to handle the case but failed to inform him about the Caesarean section. Consequently, after examining plaintiff and hearing no fetal heartbeat he performed an episiotomy to facilitate delivery of the dead fetus.

Thereafter, plaintiff sued both her physician and the delivering physician for breach of contract. The court found that the parties indeed had a contract for the Caesarean. As for damages, the general rule is that damages for mental suffering are not recoverable in contract situations, but where as here the contract is concerned with life and death and mental solicitude the parties may reasonably be said to have contracted with reference to the payment of damages for pain and suffering therefor in the event of breach. *Stewart*, 349 Mich. at 460-66, 468-73, 84 N.W.2d at 819-21, 823-25.

68. "[T]he applicable statute of limitations is the one governing actions on a written contract. . . . [B]ecause the party's right to arbitrate arose out of a contract . . . [the] Code of Civil Procedure section 337, which establishes a four year statute of limitations for actions upon 'any contract, obligation or liability founded upon an instrument in writing,' should apply." *Meyer v. Carnow*, 185 Cal. App. 3d 169, 173, 229 Cal. Rptr. 617, 618 (1986).

69.

[R]eliance upon the statute of limitations applicable to medical malpractice lawsuits is misplaced. Meyer is not seeking to invoke the jurisdiction of a judicial forum to litigate the merits of a malpractice claim but rather seeks from the superior court an order that Dr. Carnow abide by a contract he signed. The statute of limitations applicable to a judicial action to compel arbitration should not be dependent on how the claim for which arbitration is sought is characterized. *Id.* at 174, 229 Cal. Rptr. at 619.

70. "[T]he contract statute of limitations does not commence until the cause of action to compel arbitration arises and that such right does not accrue until there has been a demand to arbitrate and a refusal to submit to arbitration." *Id.*

71. The right to petition the court to compel arbitration is a cause of action that

Therefore, because the action is one for breach of contract, the statute of limitations for compelling arbitration is that applicable to contracts and not that applicable to the underlying substantive claim, e.g., medical malpractice.

Petitioning the court to compel arbitration is, in essence, an action for specific performance of the terms of the contract.⁷² The court hearing the petition does not settle the substantive merits of the underlying dispute for which the arbitration is sought;⁷³ and “an order to arbitrate such controversy may not be refused on the ground that the petitioner’s contentions lack substantive merit.”⁷⁴ The court will deny a petition to compel arbitration⁷⁵ only upon proof of waiver of the right to demand arbitration by the petitioner, upon grounds for revocation of the agreement, or where there is an unreasonable delay in demanding arbitration.⁷⁶ Indeed, in deciding whether the petitioner has commenced a timely action to compel arbitration:

[T]he superior court can, by analogy, look to the provisions of Code of Civil Procedure section 340.5 to the extent the statute demonstrates the Legislature’s determination of what, given its concern about a major statewide health crisis, is a reasonable time in which to file a lawsuit based upon a claim of medical malpractice.⁷⁷

However, “[w]here an arbitration agreement does not specify a

arises out of the breach of contract. The breach of contract occurs when one party to the arbitration agreement refuses the other party’s demand to submit to arbitration. So, too, the statute of limitations applicable to contracts commences when the cause of action arises. *Id.*

72. *La Pietra v. Freed*, 87 Cal. App. 3d 1025, 1030, 151 Cal. Rptr. 554, 556 (1978).

73. The court in *Meyer* stated: “Indeed, the language of the arbitration clause at bench makes clear that its provisions apply either to a tort claim (e.g., malpractice) or to a contract claim (e.g., an action for money for services rendered) arising out of the doctor-patient relationship. Hence, utilizing the four-year period found in Code of Civil Procedure section 337 will ensure consistency of decision in regard to judicial enforcement of promises to arbitrate.” *Meyer*, 185 Cal. App. 3d at 174, 229 Cal. Rptr. at 619.

74. CAL. CIV. PROC. CODE § 1821.2 (West 1982). In *A.D. Hoppe Co. v. Fred Katz Constr. Co.*, although there was a high probability that no substantive controversy existed, “under the California Arbitration Act the courts of this state are not permitted to refuse arbitration on the ground that the contentions of the party seeking arbitration lack substantive merit.” 249 Cal. App. 2d 154, 162, 57 Cal. Rptr. 95, 99 (1967).

75. “[T]he court shall order the petitioner and respondent to arbitrate the controversy . . . unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement.” CAL. CIV. PROC. CODE § 1281.2 (West 1982).

76. The California courts have found waiver of the right to demand arbitration where the petitioner has taken steps inconsistent with his intent to invoke arbitration; where the petitioner has acted in bad faith or engaged in willful misconduct; or where the petitioner has unreasonably delayed in demanding arbitration. *Davis v. Blue Cross of N. Cal.*, 25 Cal. 3d 418, 425-26, 600 P.2d 1060, 1064, 158 Cal. Rptr. 828, 832 (1979) (and cases cited therein).

77. *Meyer v. Carnow*, 185 Cal. App. 3d 169, 175, 229 Cal. Rptr. 617, 620 (1986).

time within which arbitration must be demanded, a reasonable time is allowed, and what constitutes a reasonable time is a question of fact, depending upon the situation of the parties, the nature of the transaction, and the facts of the particular case."⁷⁸

III. ANALYSIS AND CRITICISM OF THE CURRENT INTERPRETATION

A. *Meyer v. Carnow Does Not Support the Proposition That the Four-Year Contract Statute of Limitations Governs the Underlying Medical Malpractice Claim In Contractual Arbitration*

In response to the statewide health care insurance crisis, the California Legislature enacted MICRA, providing, among other things, a statute of limitations specifically addressed to litigation of medical malpractice claims.⁷⁹ However, MICRA may have fallen short by failing to provide a statute of limitations for the arbitration of medical malpractice claims.⁸⁰ The result has been to contort⁸¹ the law. Not only has the law been twisted out of shape,⁸² it has been twisted and bent upon itself.⁸³ The law of contracts and the law of torts are in conflict with one another and have been unnaturally and unnecessarily commingled in the sphere of medical malpractice.

The statute of limitations is necessary to promote fairness and certainty in litigating medical malpractice claims.⁸⁴ Whether litigating or arbitrating a medical malpractice claim, the problems encountered with evidence, witnesses and proof of professional negligence over the passage of time are the same—witnesses disappear, evidence is lost, and memories fade.⁸⁵ To have two statutes of limitations when arbitrating a medical malpractice claim only contorts the matter.

78. *Id.* at 175, 229 Cal. Rptr. at 619 (quoting *Sawday v. Vista Irrigation Dist.*, 64 Cal. 2d 833, 836, 415 P.2d 816, 817, 52 Cal. Rptr. 1, 3 (1966)).

79. CAL. CIV. PROC. CODE § 340.5 (West 1982 & Supp. 1988).

80. MICRA merely approves arbitration as a substitute for litigation of medical malpractice claims. CAL. CIV. PROC. CODE § 1295 (West 1982).

81. The word "contort" has a two-fold meaning in this Comment. First, as an acronym it refers to the commingling of contract and tort law. Thus, taking "con" from contract and adding to it the word "tort" we get the acronym "contort." Second, as aptly defined in the dictionary it means "[t]o twist, wrench, or bend severely out of shape. . . . To become twisted into a strained shape or expression. . . . To twist together. . . . Twisted or strained out of shape. . . . Twisted or bent upon itself." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 289 (6th ed. 1976).

82. *Id.*

83. *Id.*

84. *Order of R.R. Tel. v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).

85. *Id.*

Although the patient and physician give up their constitutional right to a trial by jury when they contract to arbitrate their potential claims,⁸⁶ they are not waiving the same claims or affirmative defenses that they could otherwise raise in a court of law.⁸⁷ Indeed, pursuant to California Code of Civil Procedure section 1295(a),⁸⁸ arbitration is a substitute for litigation, and to hold that a claim which would be barred in court by the statute of limitations is not barred in arbitration would be in abrogation of the purpose of arbitration—to resolve disputes quickly and cheaply, but to resolve them nonetheless.⁸⁹ Moreover, any such holding would discourage arbitration due to uncertainty of the applicable law to the underlying claim.⁹⁰ Because arbitration is a substitute for litigation, the claims and defenses that may be asserted in a court of law may also be asserted in arbitration.⁹¹ Thus, the affirmative defense that the medical malpractice statute of limitations has run, which may be asserted in a court of law, may also be asserted in arbitration.⁹²

Meyer is limited to holding that the four-year contract statute of limitations governs a petition to compel arbitration of a medical malpractice claim.⁹³ This holding does not extend the statute of

86. “Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.” CAL. CIV. PROC. CODE § 1295 (West 1982).

87. “To conclude arbitration is not an action for purposes of Civil Code section 3294 [punitive damages] would be in disregard of another purpose of arbitration. Arbitration serves as the substitute for proceedings in court. As a substitute, arbitration would not be encouraged by a decision which effectively holds that claims which may otherwise be asserted in a court of law may not be asserted in arbitration.” *Baker v. Sadick*, 162 Cal. App. 3d 618, 628, 208 Cal. Rptr. 676, 684 (1984).

88. CAL. CIV. PROC. CODE § 1295 (West 1982).

89. “One of the primary objectives of arbitration is to effect the expeditious and economical solution of disputes.” *Baker*, 162 Cal. App. 3d at 628, 208 Cal. Rptr. at 683. “California has a public policy of a long standing nature in favor of arbitration over litigation as a method to settle disputes because it is expeditious, inexpensive, avoids the delays of litigation, and relieves overburdened courts. This policy favoring arbitration extends to its use in settlement of medical malpractice claims.” *Meyer v. Carnow*, 185 Cal. App. 3d 169, 173-74, 229 Cal. Rptr. 617, 618 (1986) (citations omitted).

90. In 1984 a California Court of Appeal was called upon to determine whether punitive damages could be awarded pursuant to California Civil Code section 3294 in an arbitration proceeding based upon medical malpractice. The court concluded that in a court proceeding for medical malpractice, compensatory and general damages for negligence as well as punitive damages may be recovered upon proof that the defendant is guilty of malice, either express or implied. Therefore, the court held that because punitive damages may be asserted in a court of law, they may also be asserted in arbitration. *Baker*, 162 Cal. App. 3d at 627, 208 Cal. Rptr. at 682.

91. “Punitive damages which may be asserted in a court of law may also be asserted under the arbitration clause in question. . . . As a substitute, arbitration would not be encouraged by a decision which effectively holds a claim which may otherwise be asserted in a court of law may not be asserted in arbitration.” *Id.* at 627-28, 208 Cal. Rptr. at 682.

92. *Id.*

93. *Meyer*, 185 Cal. App. 3d at 174, 229 Cal. Rptr. at 619.

limitations governing the underlying medical malpractice claim to four years. Any such inference would contravene the time limitations that are prescribed by MICRA for the medical malpractice claim itself regardless of whether it is resolved in litigation or arbitration.⁹⁴ Indeed, the *Meyer* decision may have no effect at all other than to set precedent for granting petitions to compel arbitration of claims which might otherwise be barred by the statute of limitations applicable to the underlying medical malpractice claim. As a result, time and money will be unnecessarily expended in petitioning the court to compel arbitration and defending against the petition. Moreover, the court's time will be needlessly wasted in hearing petitions to compel arbitration of claims without merit because the statute of limitations has run on the underlying claim. This does not relieve court congestion.

When the California Legislature enacted MICRA, it did so embracing four major concerns: time limitations,⁹⁵ damages,⁹⁶ attorney's fees, and arbitration.⁹⁷ Both the amended statute of limitations and the approval of arbitration as a favored and constitutional means of settling disputes were intended to remedy the health care crisis.⁹⁸ The statute of limitations reduces the length of time in which a medical malpractice action can be brought, thereby reducing the number of potential claims. Moreover, arbitration, as an alternative to litigation, reduces the cost of settling medical malpractice disputes by eliminating the costly formalities of in-court litigation.⁹⁹

However, MICRA may have fallen short with respect to time limitations and arbitration. The problem is that an agreement to

94. CAL. CIV. PROC. CODE § 340.5 (West 1982 & Supp. 1988).

95. *Id.*

96. A report of the Task Force on Medical Liability and Malpractice released by Health Secretary Otis Bowen stated that the number of malpractice claims filed against physicians and the size of jury awards started going up at an unprecedented rate beginning in the late 1960s. The report also stated that changes in state tort laws passed in the mid-1970s are having some beneficial effect and that state tort laws could reduce insurance premiums if fair and reasonable limits are placed on malpractice damage awards. San Diego Union, Aug. 8, 1987, at A-26, col. 1.

97. CAL. CIV. PROC. CODE § 1295 (West 1982).

98.

(b) The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future.

2 1975 Cal. Stat. 3949 ch.2, § 12.5(1)(b).

99. *Meyer v. Carnow*, 185 Cal. App. 3d 169, 173, 229 Cal. Rptr. 617, 618 (1986).

arbitrate is a contract wherein “[b]oth parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.”¹⁰⁰ It is breach of this contract, i.e., refusing the demand to arbitrate, not an injury due to medical malpractice, that gives rise to a cause of action to petition the court to compel arbitration.¹⁰¹ Thus, a patient could demand arbitration long after the medical malpractice statute of limitations has run. Notwithstanding, when the respondent refuses the demand because the statute has run on the underlying claim, the petitioning party has four years from the date of refusal to petition the court to compel arbitration.¹⁰² If the court determines that a written agreement to arbitrate does exist, it must order the parties to arbitrate regardless of the underlying substantive merits.¹⁰³ The parties then enter arbitration to resolve the substantive merits of the dispute for which arbitration was sought in the first place. However, the statute of limitations is a special defense and one that does not involve the merits.¹⁰⁴ Therefore, it would seem that the *Meyer* court not only could have, but should have looked to the statute of limitations on the underlying claim.

B. *The Paradox: Litigation vs. Arbitration*

1. *Litigation of a Medical Malpractice Claim*—In its simplest form, the first hurdle to get over in bringing a medical malpractice action is the statute of limitations.¹⁰⁵ Indeed, if the answer to

100. CAL. CIV. PROC. CODE § 1295(a) (West 1982).

101.

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement. (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.

CAL. CIV. PROC. CODE § 1281.2 (West 1982).

102. CAL. CIV. PROC. CODE § 337 (West 1982).

103. “If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner’s contentions lack substantive merit.” CAL. CIV. PROC. CODE § 1281.2 (West 1982).

104. “When the answer pleads that the action is barred by the statute of limitations . . . or sets up any other *defense not involving the merits* of the plaintiff’s cause of action but constituting a bar . . . the court may . . . proceed to trial of the special defense or defenses before the trial of any other issue in the case. . . .” CAL. CIV. PROC. CODE § 597 (West Supp. 1988) (emphasis added).

105. Not only is the statute of limitations an affirmative defense to be plead in the

a complaint against a physician for alleged medical malpractice pleads that the action is barred by the statute of limitations, then that issue must be tried separately and before any other issues in the case are tried.¹⁰⁶ If the statute has run, there is no need to resolve the substantive issues and prove the elements of the medical malpractice claim because the patient is barred from bringing the action.¹⁰⁷ If the statute of limitations has not run, the substantive issues of the medical malpractice claim will be tried to determine the outcome of the case.¹⁰⁸

2. Arbitration of a Medical Malpractice Claim—In its simplest form (setting aside the issue of waiver), the first hurdle to get over in petitioning the court to compel arbitration of a medical malpractice claim is the statute of limitations applicable to contracts. If the petition is brought more than four years after the *right*¹⁰⁹ to petition has accrued, the court will refuse to order arbitration and the matter will end there. If, however, the petition is brought within four years, the court will grant specific performance of the contract by ordering the parties to arbitrate.

With respect to waiver, the court could use the same bifurcated procedure it would use in litigation pursuant to Code of Civil Procedure section 597.5. Before ordering arbitration, it could first resolve the statute of limitations issue. Upon petitioning the court to compel arbitration, the first hurdle to overcome would be the contract statute of limitations. If the petition is timely in this respect, the second hurdle to overcome would be the medical malpractice statute of limitations. If the statute has run on the underlying claim, the court could deny the petition on one of two grounds: One, that the underlying claim is simply barred by the medical

answer, but it is also characterized as a special defense not involving the merits. *Id.*

106. "In an action against a physician or surgeon . . . based upon such person's alleged professional negligence . . . if the answer pleads that the action is barred by the statute of limitations and if any party so moves or the court upon its own motion requires, the issues raised thereby must be tried separately and before any other issues in the case are tried." CAL. CIV. PROC. CODE § 597.5 (West Supp. 1988).

107. "[I]f the decision of the court, or the verdict of the jury, upon any special defense so tried . . . is in favor of the defendant pleading the same, judgment for the defendant shall thereupon be entered and no trial of other issues in the action shall be had. . . ." CAL. CIV. PROC. CODE § 597 (West Supp. 1988).

108. "If the issue raised by the statute of limitations is finally determined in favor of the plaintiff, the remaining issues shall then be tried." CAL. CIV. PROC. CODE § 597.5 (West Supp. 1988).

109. Without even looking at the issue of waiver, it would seem that no "right" even exists if the demand is made after the statute of limitations has run on the underlying claim. The arbitration agreement becomes void after the underlying claim becomes moot because the statute of limitations has already run. Thus, because there is no "right" to demand arbitration in the first place, there could never be a "right" to compel arbitration when that demand is refused.

malpractice statute of limitations; the other, that the petitioner has waived the right to demand arbitration by unreasonable delay in demanding arbitration because the malpractice statute of limitations has run.¹¹⁰

The petition to compel arbitration has no relation to the underlying medical malpractice claim.¹¹¹ Therefore, as the law stands according to the *Meyer* court, if the petition to compel arbitration is filed after the medical malpractice statute of limitations has run, but within four years from the time the right to so petition accrues, the court *must* grant the order to arbitrate because it may not deny the order on the grounds that the underlying claim lacks substantive merit.¹¹² However, if the court were to deny the petition on the grounds that the statute of limitations has run on the underlying claim, it would not be denying it for lack of substantive merit because the statute of limitations has nothing to do with the substantive merits of the claim.¹¹³

In light of the foregoing it must be remembered that it is not specific performance of the arbitration agreement that is of ultimate importance to the parties, but rather the underlying claim for which arbitration is sought. Winning the petition to compel arbitration has no meaning unless the underlying claim is still fresh. The statute of limitations for medical malpractice is a special affirmative defense and one that may be validly raised in arbitration.¹¹⁴ Thus, if the statute of limitations has run on the underlying claim, the order compelling arbitration is a naked victory. Speaking in terms of pure logic, in order for the petitioner to have any success in arbitration, he must at least demand arbitration within the time prescribed by the shorter statute of limitations applicable to medical malpractice. If not, the physician will raise the affirmative defense that the claim is barred and the patient will

110. "In deciding whether [petitioner] has acted in a timely fashion, the superior court can, by analogy, look to the provisions of Code of Civil Procedure section 340.5 to the extent the statute demonstrates the Legislature's determination of what, given its concern about a major statewide health crisis, is a reasonable time in which to file a lawsuit based upon a claim of medical malpractice." *Meyer v. Carnow*, 185 Cal. App. 3d 169, 175, 229 Cal. Rptr. 617, 620 (1986). See also CAL. CIV. PROC. CODE § 1281.2(a) (West 1982).

111. In 1967 a California Court of Appeal held that it "was improper for the trial court to base its order denying defendant's petition to compel arbitration under building construction contracts on the ground that defendant's contention lacked substantive merit, even though a strong probability that no controversy actually existed between the parties was indicated by the facts . . . and that defendant raised the arbitration issue without specifying what the arbitrable controversy was." *A.D. Hoppe v. Fred Katz Constr. Co.*, 249 Cal. App. 2d 154, 57 Cal. Rptr. 95 (1967).

112. *Id.* at 162, 52 Cal. Rptr. at 100.

113. The statute of limitations is a special defense not involving the merits. CAL. CIV. PROC. CODE § 597 (West Supp. 1988).

114. *Baker v. Sadick*, 162 Cal. App. 3d 618, 627, 208 Cal. Rptr. 676, 682 (1984).

lose the claim.¹¹⁵

*C. A Comparative Analysis of Three Hypothetical Scenarios:
The Number of Steps it Takes to Conclude That the Claim for
Medical Malpractice is Barred by the Statute of Limitations*

1. Bifurcated Litigation

STEP 1: Plaintiff files a complaint for medical malpractice.

STEP 2: Defendant files an answer and pleads as a special defense that the action is barred by the medical malpractice statute of limitations.¹¹⁶

STEP 3: The case is bifurcated pursuant to California Code of Civil Procedure section 597.5.¹¹⁷

STEP 4: The court tries the issue regarding the medical malpractice statute of limitations separately, before any other issues.¹¹⁸ If it finds that the statute has run, thus barring the claim, the matter is at an end and there is no need to try the case on the substantive merits.¹¹⁹

STEP 5: If the court finds that the statute has not run, it goes on to try the remaining substantive issues upon which a verdict will be rendered.¹²⁰

RESULT: It takes only four steps in bifurcated litigation to determine whether the claim for medical malpractice is barred by the statute of limitations.

*2. Arbitration using the Medical Malpractice Statute of
Limitations*

STEP 1: Petitioner demands arbitration of a medical malpractice claim after the statute of limitations has run on the claim.¹²¹

STEP 2: Respondent refuses to submit to arbitration on the grounds that the statute of limitations has run on the underlying claim¹²² and therefore petitioner no longer has the "right" to demand arbitration.

STEP 3: Petitioner files a petition to compel arbitration of the medical malpractice claim.¹²³

STEP 4: Respondent files a response opposing the petition on the

115. *Id.*

116. CAL. CIV. PROC. CODE § 597.5 (West Supp. 1988).

117. *Id.*

118. *Id.*

119. CAL. CIV. PROC. CODE § 597 (West Supp. 1988).

120. *Id.*

121. CAL. CIV. PROC. CODE § 340.5 (West 1982).

122. *Id.*

123. CAL. CIV. PROC. CODE § 1281.2 (West 1982).

grounds that the statute of limitations on the underlying medical malpractice claim has run.

STEP 5: Assuming there is no dispute as to the contract statute of limitations,¹²⁴ i.e., the petition to compel arbitration was filed within the statutory time, the court then tries the issue regarding the statute of limitations on the underlying claim.¹²⁵ If the statute has run, the case ends and the court refuses to order arbitration.¹²⁶

STEP 6: If the statute of limitations has not run, the court goes on to order arbitration. The parties enter arbitration and resolve the substantive merits.

RESULT: It takes five steps using the statute of limitations as a special defense to determine that the claim is barred, compared to the four steps it takes to bifurcate and try the same issue in litigation. This is only one step more than in the procedure bifurcating litigation of the same claim.

3. *Arbitration Without Using the Medical Malpractice Statute of Limitations*

STEP 1: Petitioner demands arbitration of a medical malpractice claim after the statute of limitations has run on the claim.¹²⁷

STEP 2: Respondent refuses the demand for arbitration on the grounds that the statute of limitations has run on the underlying claim¹²⁸ and that therefore petitioner no longer has the "right" to demand arbitration.

STEP 3: Petitioner files a petition to compel arbitration of the medical malpractice claim.¹²⁹

STEP 4: Respondent files a response opposing the petition on the grounds that the medical malpractice statute of limitations has run, thus barring the claim.

STEP 5: The court determines that because the petition was timely filed, i.e., within the time permitted under the contract statute of limitations,¹³⁰ it must order the parties to arbitrate without regard to the statute of limitations on the underlying claim.¹³¹

STEP 6: In arbitration, respondent again argues that the medical malpractice statute of limitations has run, thus barring the

124. CAL. CIV. PROC. CODE § 337 (West 1982).

125. CAL. CIV. PROC. CODE § 597.5 (West Supp. 1988).

126. CAL. CIV. PROC. CODE § 597 (West Supp. 1988).

127. CAL. CIV. PROC. CODE § 340.5 (West 1982 & Supp. 1988).

128. *Id.*

129. CAL. CIV. PROC. CODE § 1281.2 (West 1982).

130. CAL. CIV. PROC. CODE § 337 (West 1982).

131. CAL. CIV. PROC. CODE § 1281.2 (West 1982).

claim.

STEP 7: The arbitration proceeding is bifurcated pursuant to Code of Civil Procedure section 597.5.

STEP 8: The arbitrator hears the issue regarding the medical malpractice statute of limitations. If the arbitrator determines that the statute has run, the case ends here.¹³²

STEP 9: If the arbitrator determines that the statute has not run, the substantive issues of the claim are heard and a decision is rendered.¹³³

RESULT: It takes eight steps to determine that the case was barred by the statute of limitations compared to the four steps it takes in litigation and the five steps it takes in determining whether to order arbitration using the underlying claim's statute of limitations. This makes the present state of the law the least desirable avenue of dispute resolution where the statute of limitations on the medical malpractice claim is in issue.

Each step costs money and takes time which unnecessarily increases with each step. This does not reduce court congestion or the cost of suit. It takes the court the same number of steps and the same amount of time, if not less, to determine that the underlying claim is barred by the statute of limitations as to determine waiver of the right to demand arbitration based upon an unreasonable delay in that the underlying statute of limitations has run. However, what is interesting is that the petitioner who demands arbitration after the statute of limitations has run on the underlying claim has not "waived" the right to demand by unreasonably delaying the demand, but rather the petitioner no longer has the right to waive. The right evaporated when the statute ran. Therefore, following this logic, the court need not consider the issue of waiver.

If the courts were permitted to follow the steps outlined in part 2 above, it would discourage parties from needlessly filing petitions to compel arbitration and wasting court time on claims that are ultimately barred. Otherwise, parties may feel that it is worth their own time and money to get the petition filed and arbitration ordered, even though the medical malpractice statute of limitations has run, in the hopes that the arbitrator will hear the substantive issues regardless of the statute of limitations and find for the petitioner. The reason is that an arbitration award cannot later be vacated on the grounds that the arbitrator committed an error in law or fact.¹³⁴

132. CAL. CIV. PROC. CODE § 597 (West Supp. 1988).

133. CAL. CIV. PROC. CODE § 597.5 (West Supp. 1988).

134. CAL. CIV. PROC. CODE § 1286.2 (West 1982).

*D. To Determine Waiver of the Right to Compel Arbitration,
the Court May Look to the Statute of Limitations on the
Underlying Medical Malpractice Claim*

Although the court is forbidden from denying an order compelling arbitration on the grounds that the underlying claim lacks substantive merit,¹³⁵ it may do so on the grounds that the party seeking the order has waived his or her right to arbitration.¹³⁶ Among those factors which constitute waiver, the most important with respect to the statute of limitations, is when the party has “unreasonably” delayed the demand to arbitrate.¹³⁷ Absent language in the arbitration agreement specifying a reasonable time within which arbitration must be demanded, the issue of reasonable time becomes an issue of *fact* for the trial court that is considering the petition to compel arbitration.¹³⁸ This is where waiver becomes important: In determining whether the petitioner demanded arbitration within a reasonable time, the court *can* look to the statute of limitations on the underlying claim¹³⁹ “to the extent the statute demonstrates the legislature’s determination of what . . . is a reasonable time in which to file a lawsuit based on a claim of medical malpractice.”¹⁴⁰

Therefore, the arbitration agreement should state specifically what is a reasonable time in which either party may demand arbitration. As applied to the patient, a reasonable time would be no less than that provided in Code of Civil Procedure section 340.5 (the statute of limitations for medical malpractice). Thus, the patient would have to demand arbitration within three years from the date of injury. If the patient waits longer than three years from the date of injury, the doctor could raise the argument in court that the patient waived the right to compel arbitration as specified in the agreement itself. Upon this showing of waiver, the court will deny the order to compel arbitration. However, if the doctor fails to provide a specific time, he will have to hope that the

135. CAL. CIV. PROC. CODE § 1281.2 (West 1982).

136. “Civil Procedure section 1281.2 permits a trial court to deny the request if the party seeking arbitration has waived its right thereto.” *Meyer v. Carnow*, 185 Cal. App. 3d 169, 174, 229 Cal. Rptr. 617, 619 (1986).

137. “The courts have found waiver of the right to demand arbitration in the following situations: (1) when a party has unreasonably delayed in commencing proceedings to compel arbitration; (2) when the party seeking arbitration has previously acted inconsistently with an intent to invoke arbitration; and (3) when a party has acted in bad faith or engaged in willful misconduct.” *Meyer*, 185 Cal. App. 3d at 175 n.2, 229 Cal. Rptr. at 619 (citing *Davis v. Blue Cross of Northern California*, 25 Cal. 3d 418, 600 P.2d 1060, 158 Cal. Rptr. 828 (1979) and cases cited therein).

138. *Id.* at 175, 229 Cal. Rptr. at 619.

139. *Id.*

140. *Id.*

court hearing the petition concludes that a reasonable time within which to demand arbitration is per se the time required by the medical malpractice statute of limitations.

The problem with relying on the court to find waiver is that if arbitration is ordered, and if the arbitrator proceeds to resolve the claim even though it is otherwise barred by the medical malpractice statute of limitations, the award cannot later be vacated on the grounds that the arbitrator committed an error in law or fact.¹⁴¹

An unlikely alternative would be to disregard the medical malpractice statute of limitations entirely once the claim is brought to arbitration so long as the petition to compel arbitration is timely filed. However, this would undermine, if not abrogate, the purpose of MICRA and render meaningless the public policy favoring arbitration as an inexpensive alternative to litigation.

Arbitration is important only to the extent that (1) it is a favored alternative to litigation because it tends to reduce court congestion and eliminate the costly formalities of litigation,¹⁴² and (2) both parties to an arbitration agreement give up their constitutional rights to have their claims heard in a court of law and by a jury.¹⁴³ However, it must be remembered that it is not arbitration in and of itself that the parties are ultimately concerned with. It is the underlying claim to be arbitrated that is of ultimate importance. Whether the arena for resolution of disputes is in the formal setting of a court of law or in the informal setting of a conference room, the underlying claim should be determinative of the applicable statute of limitations.¹⁴⁴ Otherwise, considering the po-

141. The sole grounds for vacating an arbitration award are set forth in Code of Civil Procedure section 1286.2 which reads as follows:

[T]he court shall vacate the award if the court determines that: (a) The award was procured by corruption, fraud or other undue means; (b) There was corruption in any of the arbitrators; (c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrators; (d) The arbitrators exceed their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or (e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

CAL. CIV. PROC. CODE § 1286.2 (West 1982).

"The parties to an arbitration provision agree that they will be bound by the decision of the arbitrators on the matters submitted for arbitration whether that decision determines disputed questions of *law* or *fact*, and whether it is *right* or *wrong*." Canadian Indemnity Co. v. Ohm, 271 Cal. App. 2d 703, 709, 76 Cal. Rptr. 902, 906 (1969) (quoting B.S.B. Constr. Co. v. Rex Constr. Co., 200 Cal. App. 2d 327, 334, 19 Cal. Rptr. 167, 172 (1962)) (emphasis added).

142. Meyer v. Carnow, 185 Cal. App. 3d 169, 173, 229 Cal. Rptr. 617, 618 (1986).

143. CAL. CIV. PROC. CODE § 1295 (West 1982).

144. The Meyer court flatly rejected this proposition raised by the respondent stating

tential for abuse, the courts will become needlessly flooded with petitions to compel arbitration of untimely substantive claims.

Finally, the language of California Code of Civil Procedure section 1295 authorizes arbitration of *any* dispute as to professional negligence. "Any dispute" includes disputes as to duty, breach, cause, damages, and defenses.¹⁴⁵ Thus, in accepting arbitration as a substitute for litigation, the parties are not giving up the right to raise those disputes which they would be permitted to raise in a court of law.¹⁴⁶ What they are giving up is the right to have those disputes resolved in a court of law before a jury¹⁴⁷ and some discovery provisions otherwise available in litigation.¹⁴⁸ Among those disputes are affirmative defenses and among those defenses is the statute of limitations applicable to medical malpractice claims.

E. Waiver: The Only Defense Under the Present State of the Law

The court is forbidden from denying a petition to compel arbitration on the grounds that the underlying claim lacks substantive merit.¹⁴⁹ However, the court is not forbidden from, but rather is permitted to deny the petition on the grounds that the statute of limitations has run on the underlying claim where the doctor raises the issue of waiver.¹⁵⁰ Waiver occurs when the patient has

that "[t]he statute of limitations applicable to a judicial action to compel arbitration should not be dependent on how the claim for which arbitration is sought is characterized." *Meyer*, 185 Cal. App. 3d at 174, 229 Cal. Rptr. at 619.

145. "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law. . . ." CAL. CIV. PROC. CODE § 1295 (West 1982). *See also Baker v. Sadick*, 162 Cal. App. 3d 618, 627, 208 Cal. Rptr. 676, 681 (1984) (an arbitration agreement extends to disputes involving punitive damages pursuant to California Civil Code § 3294).

146. "As a substitute [to litigation], arbitration would not be encouraged by a decision which effectively holds a claim which may otherwise be asserted in a court of law may not be asserted in arbitration." *Baker*, 162 Cal. App. 3d at 628, 208 Cal. Rptr. at 683-84.

147. CAL. CIV. PROC. CODE § 1295(a) (West 1982).

148.

The [California] Legislature enacted Code of Civil Procedure sections 1283, 1283.05 and 1283.1 establishing procedures for discovery in arbitration proceedings. . . . One of the primary objectives of arbitration is to effect expeditious and economical solution of disputes. These objectives are accomplished in part by minimizing the formalities and trappings in arbitration which are adherent [sic] in litigation. . . . [J]udicial interference in the form of ordering depositions in arbitration proceedings is incompatible with the strong public policy in favor of settling arbitrations speedily with a minimum of court interference. From this rationale it does not follow that a proceeding in arbitration which is not an action for purposes of discovery is not [otherwise] an action. . . .

Baker, 162 Cal. App. 3d at 628, 208 Cal. Rptr. at 683-84 (footnote and citation omitted).

149. CAL. CIV. PROC. CODE § 1281.2 (West 1982).

150. *Meyer v. Carnow*, 185 Cal. App. 3d 169, 175, 229 Cal. Rptr. 617, 619 (1986).

unreasonably delayed the demand for arbitration.¹⁵¹

Therefore, where the statute of limitations on the underlying medical malpractice claim has indeed run, otherwise barring the claim in a court of law, a doctor opposing a patient's petition to compel arbitration must raise the issue of waiver.¹⁵² If the arbitration agreement is silent as to a reasonable time within which the patient may demand arbitration, the court is permitted to look to the underlying medical malpractice statute of limitations to determine if demand was untimely (not to determine that the underlying claim is barred) so as to constitute the patient's waiver of his or her right to demand arbitration.¹⁵³

The best protective measure, of course, is to specify in the arbitration agreement what constitutes a reasonable time within which to demand arbitration and what constitutes waiver of that right.¹⁵⁴ The most reasonable way to accomplish this, being fair to both the patient and the doctor, is to incorporate Code of Civil Procedure section 340.5, with the following alterations:

In an action for injury or death against a *physician*, based upon such person's alleged professional negligence, the time *within which to demand arbitration* shall be three years after the date of injury or one year after the patient discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time *to demand arbitration* exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose of effect, in the person of the injured person. *Any demand for arbitration made beyond the three year limitation set forth above shall constitute a WAIVER of the patient's right thereto.*

Therefore, demanding arbitration would toll the statute of limitations on the underlying claim so long as it was made within the one-year or three-year time limit set forth in Code of Civil Procedure section 340.5.

At this point it is helpful to review the pertinent facts in *Meyer* with respect to the time sequence regarding the statute of limitations. On April 25, 1978, Meyer underwent surgery at which time the alleged injury occurred. This started the running of the medical malpractice statute of limitations. On April 25, 1981, three

151. *Id.*

152. In *Meyer*, the trial court did not hear evidence on the issue of waiver, which is a question of fact, but rather erroneously concluded that Code of Civil Procedure section 340.5 mandated a denial of the petition to compel arbitration. *Meyer*, 185 Cal. App. 3d at 175, 229 Cal. Rptr 619-20.

153. *Id.*

154. *Id.*

years later, the statute ran its course on Meyer's claim, barring it at that point. In January 1983, Meyer finally discovered her injury. However, she discovered it four and a half years *after* the injury occurred. To look at it another way, she discovered the injury one and a half years after the statute of limitations had run its course. Lastly, and most importantly, Meyer demanded arbitration in August 1983, *more than five years after* the injury occurred and *more than two years after* the statute of limitations had run its course on the medical malpractice claim.

Thus, the discovery of the injury and demand to arbitrate the dispute as to that injury occurred after the statute of limitations had already run. Meyer's claim was barred more than a year before she discovered her injury and more than two years before she demanded arbitration. Therefore, Meyer's "right" to demand arbitration evaporated when the statute of limitations ran its course on the claim.

Refusal of the demand to arbitrate constitutes breach of the arbitration agreement which gives rise to a cause of action to petition the court to compel arbitration.¹⁵⁵ However, the arbitration agreement was only valid in the event of an injury, and then valid only for a maximum of three years thereafter. After three years and no demand for arbitration, the agreement becomes void and thus there is no right to demand arbitration. Therefore, refusal of that demand does not constitute breach.

IV. PROPOSED SOLUTIONS

A. Waiver

The legislature should amend Code of Civil Procedure section 1281.2 to read as follows:

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit *but may be refused on the ground that the right to compel arbitration has been waived by the petitioner. Waiver shall be found to exist where the claim is barred by the statute of limitations applicable to the underlying substantive claim in that DEMAND to arbitrate was not made within three years after the date of injury or one year after petitioner discovered, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time to demand arbitration exceed three years unless tolled.*

155. *Id.* at 174, 229 Cal. Rptr. at 619.

This alternative gives the trial court a bright line to determine whether a petitioner has waived the right to demand arbitration, rather than requiring it to look “by analogy” to Code of Civil Procedure section 340.5.¹⁵⁶

B. Statute of Limitations

In the alternative, the Legislature should amend MICRA’s arbitration provision, Code of Civil Procedure section 1295, to read:

(a) In a claim for injury or death against a health care provider based upon such person’s alleged professional negligence, the time to *demand arbitration* shall be three years after the date of injury or one year after the petitioner discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for *demanding arbitration* exceed three years unless tolled.

First Option for Subsection (b);

(b) If demand is timely made pursuant to subsection (a) above, and refused, the petitioner shall have four years from the date of refusal to petition the court to compel arbitration.

Second Option for Subsection (b);

(b) If demand is timely made pursuant to subsection (a) above, and refused, the petitioner shall have *one* year from the date of refusal to petition the court to compel arbitration.

Under this alternative, there is a separate statute of limitations specifically addressed to arbitration of a medical malpractice claim. If the respondent urges that the statute of limitations has run on the underlying claim, the court can resolve the issue without having to determine the issue of waiver.

The first option for subsection (b) simply retains the four-year contract statute of limitations¹⁵⁷ with respect to petitioning the court to compel arbitration. On the other hand, the second option for subsection (b) reduces that time to one year so as to preserve the time constraints of the medical malpractice statute of limitations while leaving a reasonable, albeit arbitrary, time within which to petition the court to compel arbitration.

Without these clarifications, patients may be lulled into sitting on meritorious claims believing that they have four years from the time a doctor refuses a demand to arbitrate regardless of the date

156. *Id.* at 175, 229 Cal. Rptr. at 619.

157. CAL. CIV. PROC. CODE § 337 (West 1982).

of injury, only to realize that their claim is actually barred (if not ultimately governed) by the medical malpractice statute of limitations. In addition, a chilling effect may befall doctors who, believing that patients have an extended (if not limitless) period of time within which to demand arbitration of medical malpractice claims, will refuse to sign arbitration agreements with their patients.

CONCLUSION

The important issues giving impetus to MICRA's enactment were not that patients be able or unable to sue doctors for medical malpractice. Rather, the important issues were and still are the "skyrocketing malpractice premium costs and resulting . . . breakdown of the health delivery system."¹⁵⁸ What is important is improving the quality of health care. MICRA addressed these issues by imposing restrictions on medical malpractice lawsuits, including time limitations.

Indeed, the court in *Meyer* acknowledged that its holding may be undermining those time limitations,¹⁵⁹ but it leaves the problem unresolved. However, resolution of this issue is not the responsibility of the California courts, but rather the California Legislature. Unless it was the intention of the legislature, it would be a stretch of the imagination to conclude that the four-year statute of limitations applies to the underlying medical malpractice claim. To avoid further confusion and "contortion," only one statute of limitations should govern and that necessarily is the shorter of the two, i.e. the one applicable to the underlying claim. Even though the underlying claim is not determinative of the applicable statute of limitations to compel arbitration, it is determinative of the time within which arbitration can be demanded as well as the final resolution of the case if the defendant is permitted to raise it as an affirmative defense,¹⁶⁰ or in the form of waiver on the part of the patient,¹⁶¹ and does so successfully.

Once the petitioner demands arbitration within the medical malpractice statute of limitations time period, it is up to the respondent to either submit or refuse to submit to the demand for arbitration. If the respondent refuses the demand, the arbitration contract will have been breached at which time the petitioner's cause of action to petition the court will accrue.¹⁶²

158. 2 1975 Cal. Stat. 4007, ch.2 § 12.5(1)(b).

159. *Meyer*, 185 Cal. App. 3d at 175 n.3, 229 Cal. Rptr. at 620.

160. *Baker v. Sadick*, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984).

161. *Meyer*, 185 Cal. App. 3d at 174-75, 229 Cal. Rptr. at 619.

162. *Id.* at 174, 229 Cal. Rptr. at 619.

It is then from the time the respondent refuses a *timely* demand for arbitration that the petitioner has four years within which to petition the court to compel arbitration. If the petitioner demands arbitration of a claim that no longer exists, it is the same as demanding a claim that never was, and thus there never was any “right” to demand arbitration.

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