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Robert C. Danner

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**THE IMPACT OF ARBITRATION ON
MEDICAL MALPRACTICE:
MADDEN V. KAISER FOUNDATION HOSPITALS**

The spiraling cost of medical malpractice insurance, evidenced by annual increases of nearly 486 percent,¹ accompanied by a dramatic rise in the number of malpractice claims asserted,² larger recoveries,³ and a significant decrease in the number of carriers offering professional liability coverage⁴ have led to an undisputed crisis within the health care profession. In an attempt to reduce the impact of these factors, arbitration has, with increasing frequency, been substituted for a judicial determination of malpractice disputes.

The California courts have consistently found arbitration to be a favored method for the expeditious settlement of claims,⁵ and have upheld such provisions in a wide variety of settings.⁶ The reticence of the courts to allow artificial and deleterious obstructions to restrict the growth of the arbitral process is reflective of a strong public policy.⁷

1. Butler, *Arbitration: An Answer to the Medical Malpractice Crisis*, 9 BEVERLY HILLS B.J. 41 (Sept.-Oct. 1975) [hereinafter cited as Butler].

2. Currently, one out of every five physicians will be forced to defend against a malpractice action during his or her career. *Id.* at 68.

3. Illustrative of the increase in the amount of damages recoverable in malpractice actions is *Niles v. City of San Raphael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974), which resulted in a judgment of \$4,025,000.

4. Nationally, fewer than twelve companies write over ninety percent of all physician malpractice coverage. In early 1975, medical malpractice insurance coverage in Southern California was available from only two carriers: CNA and Travelers. Since that time, CNA has withdrawn completely from the professional liability field. Butler, *supra* note 1, at 69-70.

5. *Federico v. Frick*, 3 Cal. App. 3d 872, 875, 84 Cal. Rptr. 74, 76 (1970).

6. *Fire Fighters Union v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974) (collective bargaining agreements); *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal. App. 3d 35, 100 Cal. Rptr. 791 (1972), *aff'd*, 414 U.S. 117 (1973) (agreement to arbitrate rights of employees arising out of a profit sharing plan); *Gear v. Webster*, 258 Cal. App. 2d 57, 65 Cal. Rptr. 255 (1968) (disputes arising under the Realtor's Code of Ethics); *Straus v. North Hollywood Hosp., Inc.*, 150 Cal. App. 2d 306, 309 P.2d 541 (1957) (arbitration applied to the ordinary transactions of medical entities); *Larrus v. First Nat'l Bank*, 122 Cal. App. 2d 884, 266 P.2d 143 (1954) (disputes arising out of the opening of a bank account).

California now requires the arbitration of uninsured motorist claims. See CAL. INS. CODE ANN. § 11580.2(f) (West 1972).

7. The early common law courts did not favor arbitration, and greatly limited the powers of arbitrators. But in recent times a great change in attitude and policy has taken place. Arbitrations are now usually covered by statutory law, as they are in California. Such statutes evidence a strong public policy in favor of arbitrations,

Although there have been numerous and unambiguous expressions of a judicial presumption in favor of arbitrability,⁸ it was not until the 1965 decision of *Doyle v. Giuliucci*⁹ that it became clear that arbitration agreements would be valid when applied to medical malpractice disputes.

In a unanimous opinion, the court in *Doyle* upheld the validity of a contract between the father of an injured minor and the Ross-Loos Medical Group which included a provision requiring the arbitration of all tort and contract claims arising under the agreement. Chief Justice Traynor observed that "[t]he arbitration provision in such contracts is a reasonable restriction, for it does no more than specify a forum for the settlement of disputes."¹⁰ *Doyle* has been interpreted as an unqualified endorsement of the right of a fiduciary to enter into an agreement to arbitrate, rather than litigate, medical torts with an insurer of group health services.¹¹ Even though arbitration was judicially accepted as a valid alternative to the adjudication of medical malpractice claims, questions going to the scope of its application were left unanswered.

Doyle was significantly reaffirmed under extreme factual circumstances by the California Supreme Court in *Madden v. Kaiser Foundation Hospitals*.¹² In *Madden*, the court was presented with the issue

which policy has frequently been approved and enforced by the courts.

Crofoot v. Blair Holdings Corp., 119 Cal. App. 2d 156, 183-84, 269 P.2d 156, 170 (1953), disapproved on other grounds in *Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 363 P.2d 313, 14 Cal. Rptr. 297 (1961).

No insurer authorized to provide professional liability coverage in California can refuse to issue or renew insurance at rates which are not excessive or unfairly discriminatory to persons in the health care profession solely on the grounds that such person has entered into an arbitration agreement with his patients. See CAL. INS. CODE ANN. § 11588 (West Supp. 1977).

8. In *Gear v. Webster*, 258 Cal. App. 2d 57, 65 Cal. Rptr. 255 (1968), the court stated:

A heavy presumption weighs the scales in favor of arbitrability; an order directing arbitration should be granted "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Id. at 61, 65 Cal. Rptr. at 257, quoting *O'Malley v. Wilshire Oil Co.*, 59 Cal. 2d 482, 490, 381 P.2d 188, 194, 30 Cal. Rptr. 452, 458 (1963).

9. 62 Cal. 2d 606, 401 P.2d 1, 43 Cal. Rptr. 697 (1965).

10. *Id.* at 610, 401 P.2d at 3, 43 Cal. Rptr. at 699. In support of his view, Chief Justice Traynor further discussed the judicial safeguards which surround the arbitral process. See also CAL. CIV. PROC. CODE §§ 1281.2, 1286.2, 1287, 1294 (West 1970). It is additionally significant that Chief Justice Traynor found it unnecessary even to mention possible adhesion contract issues.

11. *Madden v. Kaiser Foundation Hosps.*, 123 Cal. Rptr. 696 (1975), vacated, 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976).

12. 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976).

of whether an agent, in contracting for group health services, had implied authority to agree to the arbitration of all malpractice claims arising under the agreement, and if such authority existed, whether the arbitration provision was enforceable. With the court's affirmance of both the enforceability of the arbitration provision and the agent's authority to bind the principal, significant questions regarding the enforceability of arbitration agreements between a health care provider and a patient were answered.

In order to make group health plans available to state employees, the Meyers-Geddes State Employee's Medical and Hospital Care Act¹³ authorized the Board of Administration of the State Employees Retirement System¹⁴ (the Board) to enter into renewable one-year contracts with carriers offering basic health plans.¹⁵ Madden, a state employee, enrolled under a plan which was the result of a medical services contract between the Board and Kaiser Foundation Health Plan (Kaiser).¹⁶ Included in the contract was a provision which allowed the Board to amend its agreement with Kaiser without the knowledge or consent of employee-beneficiaries.¹⁷

When Madden initially enrolled under the Kaiser Plan in 1965, it did not contain a provision requiring arbitration for the settlement of disputes. However, in April 1971, Kaiser mailed its annual brochure to its subscribers which described the plan and stated that all claims involving professional liability and personal injury would be submitted to arbitration. Subsequently, on May 28, 1971, the Board and Kaiser amended their contract to include a clause requiring the binding arbi-

13. CAL. GOV'T CODE ANN. §§ 22751-22840 (West Supp. 1977).

14. The Board was created by the State Employees Retirement Act of 1945. CAL. GOV'T CODE ANN. §§ 20100-20107 (West Supp. 1977).

15. CAL. GOV'T CODE ANN. §§ 22774, 22790, 22793 (West Supp. 1977). The Act provides that state employees may enroll under any health plan resulting from a contract between the Board and the medical service carriers. *Id.* § 22810.

Although § 22793 clearly requires that all contracts negotiated by the Board contain a grievance procedure in order to insure that the rights of the employee-beneficiaries are protected, the Act neither expressly grants nor restricts the authority of the Board to incorporate a provision requiring binding arbitration into any health care services contract to which it is a party.

16. For a list of additional defendants, *see* note 19 *infra*.

17. The pertinent part of the provision stated that the agreement would be subject to amendment . . . by mutual agreement between [Kaiser] and . . . [the] Board without the consent or concurrence of the Members. *By electing* medical and hospital coverage pursuant to this Agreement, or accepting benefits hereunder, all Members . . . agree to all terms, conditions and provisions hereof.

Madden v. Kaiser Foundation Hosps., 17 Cal. 3d at 704, 552 P.2d at 1178, 131 Cal. Rptr. at 884-85 (emphasis added).

tration of "any claim arising from the violation of a legal duty incident to this Agreement."¹⁸

In August 1971, while Madden was undergoing a hysterectomy at the Kaiser Hospital in Los Angeles, her bladder was perforated and blood transfusions were required. As a result of these transfusions, Madden contracted serum hepatitis.

Upon recovery, Madden filed a malpractice complaint against Kaiser and several other defendants.¹⁹ Kaiser moved to stay the action and compel arbitration pursuant to the provision in its contract with the Board. In opposition to this motion, Madden contended that arbitration should not be enforced because at the time of her surgery, she had no knowledge of the provision.²⁰ The trial court denied the motion. Kaiser appealed,²¹ and the court of appeal reversed, upholding the validity of the arbitration clause.²²

In affirming the appellate court's decision,²³ the supreme court analyzed three separate issues vital to a determination of the extent of the utility of arbitration when applied to a contract between a health care provider and a patient. First, did the Board, as agent for state employees enrolled under the Kaiser plan, have the implied authority to agree to the amendment requiring binding arbitration? This issue takes on added significance when consideration is given to the large

18. *Id.*, 552 P.2d at 1181, 131 Cal. Rptr. at 885.

19. In addition to Kaiser Foundation Health Plan, Kaiser Foundation Hospitals and Southern California Permanente Group (which contracted with Kaiser Foundation Health Plan to provide the hospital and medical services required by its contract with the Board), Angela Young, M.D., a surgeon associated with the Southern California Permanente Group, California Transfusion Services and the American Red Cross were joined as defendants. *Id.* at 702 n.1, 552 P.2d at 1178 n.1, 131 Cal. Rptr. at 883 n.1.

Defendants' California Transfusion Services and American Red Cross, who supplied the blood to Kaiser Foundation Hospitals, did not claim to be covered by the arbitration clause incorporated into the Kaiser plan, and therefore, were not parties to the appeal. *Id.* at 705 n.3, 552 P.2d at 1181 n.3, 131 Cal. Rptr. at 885 n.3.

20. Madden had filed a declaration stating that because of an absence from work caused by illness, she had not received the April, 1971, brochure and that she was unaware of the amendment to the original contract between the Board and Kaiser. *Id.* at 705, 552 P.2d at 1181, 131 Cal. Rptr. at 885.

21. In addition, Kaiser appealed from the trial court's order of May 22, 1974, denying a petition for reconsideration of the April 22, 1974 order. The supreme court held that since the first order was "clearly appealable" under Code of Civil Procedure § 1294(a) as an "order dismissing or denying a petition to compel arbitration," a second appeal would serve no purpose and would therefore receive no consideration. *Id.* at 705 n.4, 552 P.2d at 1181 n.4, 131 Cal. Rptr. at 885 n.4.

22. *Madden v. Kaiser Foundation Hosps.*, 123 Cal. Rptr. 696 (1975), *vacated*, 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976).

23. 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882.

number of persons covered by group medical plans. Second, was the arbitration clause voidable as a contract of adhesion? Finally, did the arbitration requirement violate the employee-beneficiaries' constitutionally protected right to trial by jury?

I. IMPLIED AUTHORITY OF THE BOARD TO AGREE TO THE ARBITRATION OF MALPRACTICE CLAIMS

Pursuant to the provisions of the Meyers-Geddes Act,²⁴ the Board is empowered to negotiate and enter into contracts designed to provide state employees, and their dependents, with group health benefit plans.²⁵ When serving in this capacity, or when negotiating and enacting subsequent amendments to the original agreement, the Board acts as the employee's agent.²⁶ So long as the Board is acting within the scope of its authority it will bind the participating employees under the basic precepts of agency law.²⁷

Given the agency relationship between the Board and Madden, the California Supreme Court was called upon to determine whether the Board, by amending the Kaiser contract to include the arbitration provision, had exceeded the bounds of its authority. In holding that the Board did have the power to amend the arbitration agreement, the court relied upon Civil Code section 2319, which authorizes a general agent "[t]o do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of the agency."²⁸ The critical question was whether arbitration was, in fact, a "proper and usual" means for effecting the purpose of the Board's agency; namely, to facilitate the procurement of group health care plans.

In an earlier interpretation of section 2319, a California District Court of Appeal in *Meyers v. Stephens*²⁹ held that a selling agent was "au-

24. See note 13 *supra* and accompanying text.

25. CAL. GOV'T CODE ANN. §§ 22774, 22790, 22793 (West Supp. 1977).

26. 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882.

When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums and generally in doing whatever may serve to obtain and keep the insurance in force, employers act not as agents of the insurer but for their employees or for themselves. *Blos v. Banker's Life, Co.*, 133 Cal. App. 2d 147, 150-51, 283 P.2d 744, 746 (1955), quoting *Boseman v. Connecticut Gen. Life Ins. Co.*, 301 U.S. 196, 204 (1937).

27. CAL. CIV. CODE § 2330 (West 1970). See also *Myers v. Stephens*, 233 Cal. App. 2d 104, 112, 43 Cal. Rptr. 420, 427 (1965); *Burgess v. Security First Nat'l Bank*, 44 Cal. App. 2d 808, 819, 113 P.2d 298, 306 (1941).

Section 2330 has also been held to apply to the amendments of existing contracts. See *Gear v. Webster*, 258 Cal. App. 2d 57, 65 Cal. Rptr. 255 (1968).

28. CAL. CIV. CODE § 2319 (West 1970).

29. 233 Cal. App. 2d 104, 43 Cal. Rptr. 420 (1965).

thorized to do *whatever is necessary and usual* to carry out the purpose of the agency, that is, the sale."³⁰ The basic rationale of this opinion was that any customary method may be resorted to if it is an effective means of attaining the objectives for which the agency was created.³¹ Consistent with the rule in *Meyers*, the *Madden* court concluded that since arbitration had become an accepted means of resolving medical malpractice disputes, "an agent empowered to negotiate a group medical contract has the implied authority to agree to the inclusion of an arbitration provision."³² In addition, the supreme court commented that

[t]he agent today who consents to arbitration follows a "proper and usual" practice "for effecting the purpose" of the agency; he merely agrees that disputes arising under the contract be resolved by a common, expeditious and judicially favored method.³³

The court's conclusion that arbitration has become a customary device for settling malpractice disputes, and therefore should be regarded as being "proper and usual" within the meaning of section 2319, is supported by legislative enactment as well as by case law. This is most clearly illustrated by section 1295 of the Code of Civil Procedure,³⁴ which sets forth mandatory language and form requirements for arbitration clauses in medical services contracts in negligence disputes.³⁵ *Madden*, then, must be construed as a continuing expression

30. *Id.* at 113, 43 Cal. Rptr. at 428.

31. As to this point, the RESTATEMENT (SECOND) OF AGENCY is in accord. Section 35 states that "[u]nless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it."

32. 17 Cal. 3d at 706, 552 P.2d at 1182, 131 Cal. Rptr. at 886.

33. *Id.* at 707, 552 P.2d at 1183, 131 Cal. Rptr. at 887.

34. CAL. CIV. PROC. CODE § 1295 (West Supp. 1977).

35. *Id.* Section 1295(b) requires that immediately before the signature line of the individual contracting for medical services, the following must appear in at least ten-point bold red type:

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 TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

It should be noted that the notice requirement of § 1295(b) does not conclusively eliminate the possible invalidation of the contract. Circumstances existing at the time the contract was executed may be such that adhesion contract principles will require that the arbitration provision, if not the entire contract, be set aside. *See* note 70 *infra* and accompanying text.

In addition to California, eight other states have enacted legislation similar to § 1295: ALA. CODE tit. 7, §§ 176(7)-(19) (Supp. 1975); LA. REV. STAT. ANN. § 9:4230 (West Supp. 1977); MD. CTS. & JUD. PROC. CODE ANN. § 3-2A01 (Supp. 1976); MICH. COMP. LAWS § 500.3051 (Supp. 1976); OHIO REV. CODE ANN. § 2711.21-.24 (Page Supp. 1976); PA. STAT. ANN. tit. 40, § 1301.101 (Purdon Supp. 1976); S.D. COMPILED LAW ANN. § 21-25B-1 (Supp. 1976); VA. CODE §§ 8-911-922 (Supp. 1976).

of the favored position accorded arbitration vis à vis medical malpractice disputes.

In terms of upholding an agent's authority to bind its principal to arbitration, the *Madden* holding is consistent with the practices relating to collective bargaining agreements which involve factual circumstances similar to the Kaiser-Board negotiations. The authority of union representatives to agree to arbitration is specifically recognized by California law,³⁶ and arbitration has become a customary method of resolving labor disputes.³⁷ In referring to the beneficial application of arbitration to labor-management conflicts, the court in *Fire Fighters Union v. City of Vallejo*³⁸ stated:

[B]ecause arbitration substitutes for economic warfare the peaceful adjudication of disputes, and because controversy takes on ephemeral shapes and unforeseeable forms, courts do not congeal arbitration provisions into fixed molds but give them dynamic sweep.³⁹

In substance, this is also indicative of contemporary federal policies respecting arbitration.⁴⁰

In noting the experience of the courts in dealing with arbitration within the context of labor law, the *Madden* court indicated its refusal to sacrifice "these thousands" of collective bargaining agreements "on the altar of an exotic and arid legalism that in all these years has not even occurred to the parties."⁴¹

Of major importance to the issue of the Board's authority to agree to binding arbitration was the supreme court's refusal to distinguish between the facts present in *Doyle* and those in *Madden*.⁴² *Doyle* held

36. CAL. CIV. PROC. CODE § 1280(a) (West 1972) states that an "agreement" for the purposes of the California Arbitration Act, §§ 1280-1290, includes "agreements between employers and employees or between their respective representatives." *Id.* (emphasis added).

37. 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976).

38. 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974).

39. *Id.* at 615, 526 P.2d at 975, 116 Cal. Rptr. at 511, quoting *Butcher's Union Local 299 v. Cudahy Packing Co.*, 66 Cal. 2d 925, 938, 428 P.2d 849, 856, 59 Cal. Rptr. 713, 720 (1967).

40. "Federal policy favors the settlement of labor-management disputes by grievance and arbitration mechanisms; this has been expressed by Congress in section 203(d) of the Labor Management Relations Act." *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*, 4 Cal. 3d 888, 892, 484 P.2d 1397, 1399, 95 Cal. Rptr. 53, 55 (1971).

41. 17 Cal. 3d at 708, 552 P.2d at 1184, 131 Cal. Rptr. at 887.

42. The plaintiff in *Madden* sought to distinguish *Doyle* on the basis that the minor in that case did not question the authority of her father to agree to the arbitration provision until after the award had been rendered. In contrast, she raised her objections to the clause at the earliest point possible. The supreme court pointed out that the result in *Doyle* was not dependent upon the failure of the minor to make a timely

that the duty of a parent to provide for the care of his child implicitly included the authority to bind the child to an arbitration clause included in a medical services contract.⁴³ Noting that both parent and agent are fiduciaries, with limited powers and subject to rigid standards of honesty and fair dealing,⁴⁴ the court could find no persuasive reason why the implied authority of an agent should differ from the rule expressed in *Doyle*.⁴⁵ Expanding its previous holding, the court concluded that "an agent or *other fiduciary* who contracts for medical treatment on behalf of his beneficiary" possesses the authority to agree to a provision requiring that malpractice claims be submitted to binding arbitration.⁴⁶

This decision merely recognizes the need for a fiduciary to possess sufficient bargaining flexibility to provide the principal with the best health care plan available. Since arbitration clauses are becoming common additions to medical services contracts, a restriction of a fiduciary's power which excludes the authority to agree to arbitration would greatly reduce the number, and possibly the quality, of plans available to the principal.

A particularly significant factor included in the *Madden* decision was that, even under the extreme factual setting,⁴⁷ the contract beneficiary was bound to the arbitration agreement without her express knowledge or consent. Several cases have held that a principal will be bound by amendments to a contract even if he or she does not have knowledge or notice of the changes.⁴⁸ The agreement between Kaiser and the Board expressly stated that it was to be subject to amendment without notice to the employee-member. Thus, under the prevailing

assertion of her objections, but had been decided solely on the fact that the minor's father, as a fiduciary, had acted within the scope of his authority. *Id.* at 709 n.10, 552 P.2d at 1184 n.10, 131 Cal. Rptr. at 888 n.10.

43. *Doyle v. Giuliani*, 62 Cal. 2d 606, 610, 401 P.2d 1, 3, 43 Cal. Rptr. 697, 699 (1965). See also CAL. CIV. PROC. CODE § 1295(d) (West Supp. 1977).

44. The standards to which an agent fiduciary is to be held will be less stringent than that of a parent fiduciary. While the former will be held to a standard of high responsibility and good faith, the latter will, in addition, be subject to the court's control of any settlement or compromise of the minor's claim. See CAL. CIV. PROC. CODE § 372 (West 1973).

45. 17 Cal. 3d at 709, 552 P.2d at 1184, 131 Cal. Rptr. at 888.

46. *Id.* (emphasis added).

47. *Madden* contended that she had not received the April 1971 brochure (which mentioned for the first time the inclusion of the arbitration provision) because of her absence from work. See note 20 *supra*.

48. See *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal. App. 3d 35, 100 Cal. Rptr. 791 (1972), *aff'd*, 414 U.S. 117 (1973); *Gear v. Webster*, 258 Cal. App. 2d 57, 65 Cal. Rptr. 255 (1968).

rule,⁴⁹ the beneficiary's knowledge was not required in order to effectuate a binding provision.

Briefs submitted *amicus curiae* suggested that the court fashion a rule invalidating any arbitration provision in a group insurance policy that purported to bind the beneficiary unless he or she had actual knowledge of the provision's existence. Citing the impossibility of establishing an orderly system of administration, the supreme court declined to consider any such proposal.⁵⁰

II. THE VALIDITY OF MEDICAL MALPRACTICE ARBITRATION; AN ADHESION CONTRACT PERSPECTIVE

The contract of adhesion⁵¹ provides a significant exception to the rule that one who manifests assent to a contract is bound by its terms and will not be heard to complain regarding provisions of which he or she was not aware.⁵² Generally, courts will refuse to enforce the provisions of an adhesion contract which purport to limit the duties or liabilities of the party enjoying a superior bargaining position, unless such terms are "conspicuous, plain and clear."⁵³ On this basis, Madden claimed that the Kaiser contract was adhesory in that the arbitration

49. See cases cited note 48 *supra*.

50. 17 Cal. 3d at 709 n.11, 552 P.2d at 1184 n.11, 131 Cal. Rptr. at 888 n.11. The court also pointed out that the proposed rule would be viable only if arbitration were still considered an extraordinary remedial procedure, which is in direct conflict with the view expressed by the court.

51. In defining a contract of adhesion, the supreme court in *Steven v. Fidelity & Casualty Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962) noted that

[t]he term [adhesion contract] refers to a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis, without opportunity for bargaining and under such conditions that the "adherer" cannot obtain the desired product or service save by acquiescing in the form agreement.

Id. at 882, 377 P.2d at 297, 27 Cal. Rptr. at 185 (citations omitted). See also *Player v. George M. Brewster & Son., Inc.*, 18 Cal. App. 3d 526, 533, 96 Cal. Rptr. 149, 154 (1971).

52. *Federico v. Frick*, 3 Cal. App. 3d 872, 84 Cal. Rptr. 74 (1970). See also *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971), *aff'd*, 414 U.S. 117 (1973).

53. *Steven v. Fidelity & Casualty Co.*, 58 Cal. 2d 862, 878, 377 P.2d 284, 294, 27 Cal. Rptr. 172, 182 (1962).

Further, the RESTATEMENT (SECOND) OF CONTRACTS (Tent. Draft Nos. 1-7, 1973) is in accord. Section 234 states that

[i]f a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Id.

clause was "inconspicuous, unexpected, and disrupt[ed] the members' reasonable expectation that a malpractice claim [would] be adjudicated by trial by jury."⁵⁴

Courts presented with attempts to invalidate arbitration provisions as adhesory have consistently upheld their validity. The court of appeal in *Federico v. Frick*⁵⁵ concluded that the disputed standard union employment contract before it "may well be a contract of adhesion,"⁵⁶ but refused to declare that it was not within the purview of the California Arbitration Act,⁵⁷ preferring to leave such a task to the legislature. In a subsequent case, *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,⁵⁸ the court was again faced with a strong challenge to the validity of an arbitration clause based upon adhesion contract arguments. After viewing the problem in terms of the reasonable expectations of the party occupying the weaker bargaining position,⁵⁹ it was determined that there had been no showing "that arbitration would be contrary to the reasonable expectation of any party or that any loss or unfair imposition would result."⁶⁰ The pivotal factor here is that a clause requiring the submission of the dispute to arbitration does not prejudice the claims of either party, but requires only that the controversy be transferred *in tact* to another forum for settlement.

In contrast, the typical adhesion contract which is struck down as unconscionable is characterized by a considerably stronger party⁶¹ forc-

54. 17 Cal. 3d at 710, 552 P.2d at 1185, 131 Cal. Rptr. at 889.

55. 3 Cal. App. 3d 872, 84 Cal. Rptr. 74 (1970).

56. *Id.* at 875, 84 Cal. Rptr. at 75.

57. CAL. CIV. PROC. CODE §§ 1280-1290 (West 1972).

58. 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971).

59. Analysis of the adhesory provision from the perspective of the weaker party had become the customary test for determining the effects of its inclusion. As Professor Kessler stated:

[C]ourts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's "calling," and to what extent the stronger party disappointed reasonable expectations based on the typical life situation.

Kessler, *Contracts of Adhesion—Some Thought About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943) [hereinafter cited as Kessler].

The rationale for the conventional expectations test is that the weaker party has either been harmed or overreached. However, in cases such as *Madden*, in which the plaintiff has arguably received certain benefits from the contested provision and can show no significant prejudice, the test loses much of its appeal. This gives rise to the question of whether the test has any validity when applied to arbitration clauses, since such provisions are seldom considered to be prejudicial to either party.

60. 20 Cal. App. 3d at 672, 97 Cal. Rptr. at 813.

61. The official comments to the Restatement of Contracts point out that the disparity in bargaining power is not the only factor to be considered.

A bargain is not unconscionable merely because the parties to it are unequal in

ing the weaker party to adhere to its terms on a "take it or leave it" basis. Professor Kessler, in his classic discourse on contracts of adhesion,⁶² stressed that this disparity in bargaining power, combined with the weaker party's vague understanding of the agreement, is the key to determining whether the agreement is, in fact, adhesory.⁶³ The importance of this status relationship is evident in all those cases in which the court, believing the contract to be one of adhesion, refused to enforce it. A clear example occurred in *Steven v. Fidelity & Casualty Co.*,⁶⁴ where the California Supreme Court invalidated the terms of an insurance policy issued by the defendant through a machine located in an airport terminal. The court based its decision on the theory that since the insured had absolutely no bargaining power whatsoever, the provisions of the contract must have been "conspicuous, plain and clear" in order to be binding upon him.⁶⁵

This oppressive relationship was found to be nonexistent in *Madden*. The Kaiser plan was held to be the result of negotiations between parties "possessing a parity of bargaining strength."⁶⁶ The Board, as representative for those employees who enrolled under the plan, possessed sufficient bargaining strength to elevate the employees' collective bargaining power to the same level enjoyed by Kaiser. As a result of this collectivity, the Board secured medical services for state employees on more favorable terms than they could have obtained by bargaining individually.⁶⁷ Accordingly, the arbitration provision was the product of a legitimate bargaining process, rather than a term forced upon the individual employee by Kaiser.

In support of her contention that the arbitration provision was part of a contract of adhesion, Madden placed substantial reliance upon *Tunkl v. Regents of the University of California*.⁶⁸ However, the court found this case clearly inapposite.⁶⁹ In *Tunkl*, the plaintiff, upon

bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

RESTATEMENT (SECOND) OF CONTRACTS, § 234, Comment d (Tent. Draft Nos. 1-7, 1973).

62. Kessler, *supra* note 59.

63. *Id.* at 632.

64. 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

65. *Id.* at 878, 377 P.2d at 294, 27 Cal. Rptr. at 182.

66. 17 Cal. 2d at 711, 552 P.2d at 1185, 131 Cal. Rptr. at 889.

67. *Id.*

68. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

69. 17 Cal. 3d at 712, 552 P.2d at 1186, 131 Cal. Rptr. at 890.

entering the University of California at Los Angeles Medical Center, was required to sign a document setting forth "Conditions of Admission." Included in these conditions was a provision purporting to release the hospital and the Regents from all liability which might arise out of the plaintiff's treatment.⁷⁰ After viewing these terms in the light of Tunkl's physical condition at the time he executed the release,⁷¹ the court stated that "we cannot but conclude that the instant agreement manifested the characteristics of the so-called adhesion contract."⁷² The crucial difference between the agreements involved in *Madden* and *Tunkl* is that the contested provision in the former case was designed neither to exculpate Kaiser nor to cause any participant in the plan to contract away any cause of action which might accrue to him by reason of Kaiser's negligence.⁷³ Whereas Tunkl contracted away his rights against the Regents and the hospital, Madden merely joined in a stipulation as to a particular forum for the settlement of any claims which might be made against Kaiser. In addition, the physical condition of the plaintiff in *Tunkl* was such that he had no realistic choice but to agree to the terms of the "Conditions of Admission." By contrast, the plaintiff in *Madden* had the opportunity to select from among several plans offered by the Board⁷⁴ or to contract individually for medical services.

Madden clearly indicates that an arbitration provision alone will not invalidate a medical services contract for unconscionability, or as a contract of adhesion.⁷⁵ Since arbitration has no effect on the merits

70. The pertinent portions of the release were as follows:

In consideration of the hospital and allied services to be rendered and the rates charged therefor, the patient or his legal representative agrees to and hereby releases the Regents of the University of California, and the hospital from *any and all liability for the negligent or wrongful acts of omissions of its employees*, if the hospital has used due care in selecting its employees.

60 Cal. 2d at 94, 383 P.2d at 442, 32 Cal. Rptr. at 34. (emphasis added).

71. At the time that Tunkl signed the release, he was in severe pain, under sedation and was probably unable to read the terms of the agreement. *Id.* at 95 n.1, 383 P.2d at 442 n.1, 32 Cal. Rptr. at 34 n.1.

72. *Id.* at 102, 383 P.2d at 447, 32 Cal. Rptr. at 39.

73. After considering the particular circumstances involved in *Madden*, the court concluded that

the principles of adhesion contracts, as elucidated and applied in *Tunkl* and the other cases we have cited, do not bar enforcement of terms of a negotiated contract which neither limit the liability of the stronger party nor bear oppressively upon the weaker.

17 Cal. 3d at 712, 552 P.2d at 1186, 131 Cal. Rptr. at 890.

74. *Id.* Among the various plans offered by the Board were several which did not include arbitration provisions.

75. CAL. CIV. PROC. CODE § 1295(e) provides that any contract for medical services which complies with the mandatory form and language requirements of subdivisions (a),

of any party's claim, a comparison with the traditional evils associated with contracts of adhesion is simply inappropriate.

III. ARBITRATION AND THE RIGHT TO TRIAL BY JURY

An argument frequently raised in opposition to the enforcement of binding arbitration provisions is that group health care plans violate the constitutionally protected right to trial by jury.⁷⁶ Although article I, section 16, of the California Constitution does declare that trial by jury is an "inviolable right" which "shall be secured to all," it also provides that the parties to a civil action may waive their rights to a jury trial by mutual consent "expressed as prescribed by statute."

In *Harmon v. Hopkins*,⁷⁷ article I, section 16⁷⁸ was held to have delegated to the legislature the power to determine what acts or omissions would deprive a litigant in a civil action of the right to trial by jury. The legislature's expression of the manner by which trial by jury can be effectively waived is found in section 631 of the Code of Civil Procedure, which provides, in relevant part, that waiver will be accomplished in the following manner:

- (1) By failing to appear at the trial;
- (2) By written consent filed with the clerk or judge;
- (3) By oral consent, in open court, entered in the minutes or docket;
- (4) By failing to announce that a jury is required
- (5) By failing to deposit with the clerk, or judge, a sum equal to the amount of one day's jury fees payable under the law, as provided herein.⁷⁹

In terms of the effect on the statute, there is authority for the proposition that a party may neither waive his right to a jury by implication⁸⁰ nor be deprived of his right by any means other than those set forth in section 631.⁸¹

When presented with the contention that section 631 provides an *exclusive* enumeration of the means by which a party can waive his

(b) and (c) shall not be a contract of adhesion, unconscionable, or otherwise improper. Since only health care service plan contracts are exempted from § 1295, the decision in *Madden* resolves the last area of doubt concerning the enforceability and validity of arbitration agreements.

76. U.S. CONST. amend. VII.

77. 116 Cal. App. 184, 2 P.2d 540 (1931).

78. At the time *Harmon* was decided, article I, § 16 was designated article I, § 7.

79. CAL. CIV. PROC. CODE § 631 (West Supp. 1977).

80. See *Hayden v. Friedman*, 190 Cal. App. 2d 409, 12 Cal. Rptr. 17 (1961).

81. See *Harmon v. Hopkins*, 116 Cal. App. 184, 2 P.2d 540 (1931).

right, the *Madden* court responded that "when the Legislature enacted the specific language of the California Arbitration Act⁸² to govern the enforcement of arbitration agreements, it did not require that such agreements conform to section 631."⁸³

The supreme court supported this position by noting that section 631 assumes that an action is pending before a court of law, and relates only to the manner of waiver *after* the dispute has been submitted to the judicial forum.⁸⁴

Arbitration and adjudication are separate and independent processes which should not be burdened by interdependent regulations. A requirement that agreements falling under the California Arbitration Act be in compliance with the terms of section 631 would serve to defeat the principal purposes of arbitration: to reduce the congestion in the courts and to obviate the delays of litigation.⁸⁵

The *Madden* court also discarded the argument that the terms of an arbitration agreement should include an express waiver of the right to have the dispute brought before a jury, stating that to "predicate the legality of a consensual arbitration agreement upon the parties' express waiver would be as artificial as it would be disastrous."⁸⁶

A significant number⁸⁷ of commercial and labor contracts incorporate provisions requiring binding arbitration but do not include express jury waivers. The courts when dealing with disputes arising from such contracts, have not invalidated the arbitration clause because there had been no express waiver. In *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*⁸⁸ the plaintiff-employer elected to settle a contract dispute by suing on the contract, thereby ignoring the clause requiring the submission of any such dispute to arbitration. Even though the arbitration provision did not expressly waive the employer's right to a

82. CAL. CIV. PROC. CODE §§ 1280-1290 (West Supp. 1977).

83. 17 Cal. 3d at 713, 552 P.2d at 1187, 131 Cal. Rptr. at 891.

84. *Id.*

85. *Id.*

86. The court, in noting that it is common knowledge that disputes settled by arbitration are not resolved by juries, indicated that a party to an otherwise valid arbitration provision could not entertain a reasonable expectation that he would be entitled to a jury on issues covered by the agreement. Since arbitration, by definition, excludes access to a jury determination, an express waiver of the right to a jury trial would be, at best, redundant. *Id.*, 552 P.2d at 1189, 131 Cal. Rptr. at 893.

87. The court in *Madden* commented that there are "literally thousands of commercial and labor contracts which provide for arbitration but do not contain express waivers of jury trial." *Id.* at 714, 552 P.2d at 1187, 131 Cal. Rptr. at 891.

88. 4 Cal. 3d 888, 484 P.2d 1397, 95 Cal. Rptr. 53 (1971).

jury trial⁸⁹ the court unanimously affirmed the lower court's order to compel arbitration.⁹⁰

The *Charles J. Rounds Co.* and *Madden* courts' refusals to invalidate arbitration provisions simply because no express waiver had been made, reflects the reticence of the courts to interfere with the contractual freedom of the parties. It is clear that a party to an arbitration agreement will be charged with the knowledge that by freely entering into such an agreement he is sacrificing his right to have the case heard by a jury.

IV. CONCLUSION

The holding in *Madden* is neither novel nor revolutionary. It is, in actuality, merely the logical extension of the rules expressed in previously decided cases. However, the supreme court's decision must be viewed as a significant reaffirmation of the legitimacy of arbitration in health care service plans. It signifies the highly favored position accorded arbitration by the judiciary as a parallel and independent forum for the settlement of disputes. The court could have chosen to invalidate the arbitration provision on several appealing grounds yet refused to do so even under the severe factual circumstances.

The benefits of arbitration are frequently overlooked by advocates representing injured plaintiffs. Arbitration provides a speedy and less expensive alternative to a jury trial for those persons whose injuries are not commensurate with the expense and delay of adjudication. Relatively informal procedures and liberal rules of evidence aid an injured plaintiff in the presentation of his claim. Additionally, the safeguards provided by the legislature in the California Arbitration Act insure that the arbitral forum will be a fair, as well as viable, alternative to trial by jury.

Arbitration is not a panacea. It cannot eliminate all malpractice problems, but it can be effective in reducing their impact. A substantial number of states in addition to California have recognized the utility

89. *Id.* at 891, 484 P.2d at 1398, 95 Cal. Rptr. at 54.

90. *Id.* at 899, 484 P.2d at 1404, 95 Cal. Rptr. at 60. Although noted by the supreme court, the Code of Civil Procedure explicitly exempts health care service plans from the requirement of subdivisions (a) and (b) that it contain an express statement that the parties by signing this agreement waive their constitutional right to a jury or court trial. CAL. CIV. PROC. CODE § 1295(f) (West Supp. 1977). Instead, the Health and Safety Code only requires that "[i]f the plan utilizes arbitration to settle disputes, the plan contracts shall set forth the type of disputes subject to arbitration, the process to be utilized, and how it is to be initiated." CAL. HEALTH & SAFETY CODE ANN. § 1373(i) (West Supp. 1977). Therefore, it seems clear that a health care service plan does not have to include an express waiver of a jury or court trial.

of arbitration, and have enacted statutes which permit parties to agree, in advance of a dispute, to submit all of their claims to binding arbitration.⁹¹ Several of these statutes apply exclusively to the arbitration of medical malpractice disputes.⁹² In addition, arbitration provides a means of dealing with the realities of the medical malpractice crisis without resorting to full scale tort reform.

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91. Other states which permit such agreements are: Ala., ALA. CODE tit. 7, §§ 176(7)-176(19) (Supp. 1975); Alas., ALASKA STAT. §§ 09.43.010-.43.220 (1973); Ariz., ARIZ. REV. STAT. §§ 12-1501 to -1511 (1956); Ark., ARK. STAT. ANN. §§ 34-501 to -510 (1962); Col., COL. CONST. Art. XVIII, § 3 (1973); Conn., CONN. GEN. STAT. ANN. §§ 52-408 to -424 (West 1958); Del., DEL. CODE tit. 10, §§ 5701-5725 (1975); Fla., FLA. STAT. ANN. §§ 682.01-.22 (West Supp. 1977); Hawaii, HAW. REV. STAT. §§ 658-1 to -15 (1968); Ida., IDAHO CODE §§ 7-901 to -910 (1948); Ill., ILL. ANN. STAT. ch. 10, § 101-102 (Smith-Hurd 1975); Ind., IND. CODE §§ 3-201 to -226 (1971); Kan., KAN. CIV. PRO. STAT. ANN. §§ 5-201 to -213 (Vernon 1964); La., LA. REV. STAT. ANN. §§ 9-4201 to -4217 (West 1951); Me., ME. REV. STAT. tit. 14, §§ 1151-1155 (1965); Md., MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1974); Mass., MASS. GEN. LAWS ANN. ch. 251, §§ 1-22 (1959); Mich., MICH. STAT. ANN. §§ 27A.5001 to .5035 (1962); Minn., MINN. STAT. ANN. §§ 572.01 to .07 (West 1947); Nev., NEV. REV. STAT. §§ 38.015 to .205 (1973); N.H., N.H. REV. STAT. ANN. §§ 541.1-542-10 (1955); N.J., N.J. STAT. ANN. §§ 2A:24-1 to :24-11 (1952); N. Mex., N.M. STAT. ANN. §§ 22-3-9 to -3-31 (Supp. 1975); N.Y., N.Y. CIV. PRAC. LAW §§ 7051-7514 (McKinney's 1963); N.C., N.C. GEN. STAT. §§ 1-567.1 to -599.1 (1969); Ohio, OHIO REV. CODE ANN. §§ 2711.01-15 (Page 1954); Ore., OR. REV. STAT. §§ 33.210-.340 (1975); Pa., PA. CONS. STAT. §§ 1-209 (1963); R.I., R.I. GEN. LAWS §§ 10-3-1 to -20 (1970); S.D., S.D. COMPILED LAWS ANN. §§ 21-25A-1 to -38 (1976); Tex., TEX. REV. CIV. STAT. ANN. art. 224 (Vernon 238-6 1973); Va., VA. CODE §§ 8-503 to -507 (1957); Wash., WASH. REV. CODE ANN. §§ 7.04.010-.220 (1961); Wis., WIS. STAT. ANN. §§ 298.01-.18 (1958); and, Wyo., WYO. STAT. §§ 1-1048.1-21 (1959).

92. See note 35 *supra*.