IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

KANSAS CITY UROLOGY CARE, PA, ET AL.,	)	
Plaintiffs,	)	0516-CV04219
v.	)	DIVISION 10
BLUE CROSS AND BLUE SHIELD OF KANSAS CITY, INC., ET AL.,	)	
Defendants.	)	

Order Pursuant to Rule 68.01(g)(3) Rejecting the Report Master of the Special Master and Denying Motions of all Defendants to Compel Arbitration

In the simplest of terms, this is a lawsuit filed by a group of doctors against several health insurance companies who provide coverage to consumers of health care throughout the Metropolitan Kansas City area. These same insurance companies all have provider agreements that dictate fees paid to doctors for covered care. The Plaintiff doctors have alleged a conspiracy to engage in horizontal price-fixing contrary to the Missouri antitrust statutes. See generally R.S.Mo. § 416.011 et seq. The Plaintiff also seeks class action certification in pursuing these claims. See Rule 52.08.

Initially this lawsuit was removed to Federal Court, but subsequently remanded back to the Circuit Court of Jackson County, Missouri. Most of the Defendants in this proceeding have filed motions to compel arbitration based upon arbitration clauses found in various different provider agreements. Upon remand from the Federal Court, this Court appointed a Special Master, Richard McLeod, pursuant to Rule 68 for the purpose of addressing two issues. The first concern was to provide a report to the Court on the issue of whether or not arbitration should be compelled.

Secondarily, the Master was put in place to monitor the production of documents should such discovery begin. It is fair to say that the task of evaluating this arbitration issue became much more involved than the parties, the Court, and even the Special Master anticipated. There was substantial briefing done, two separate sets of oral arguments, and a written report by Mr. McLeod.

In short form, the Master recommended that the motion to compel arbitration be sustained, but that provisions in some of the arbitration clauses that preclude joinder or class action be stricken and that the parties proceed with a single unitary arbitration. Under Rule 68.01(g)(3), the Court may adopt, reject, or modify that report. In analyzing any motion to compel arbitration, there are three basic issues that should be addressed: 1) whether there are agreements that contain arbitration clauses that do exist; 2) if such arbitration clauses exist, whether they apply in the instant case; and 3) if it is found that the arbitration clauses are applicable, whether those agreements are enforceable under the law.

As it relates to the Defendants in this case, although there are numerous existing arbitration agreements, they can essentially be described in three general categories. There are arbitration clauses from contracts involving the United Defendants, the Blue Cross Blue Shield Defendants, and the Humana Defendants.[1] The United and Blue Cross Blue Shield agreements are broadly worded arbitration agreements that do not specifically address the issue of joinder or class action. A fair reading of the Humana agreements clearly reveals language that is intended to preclude class action litigation or joinder of other parties. While the Humana agreements are also broadly worded, they do include language that refers to "state" or "federal" laws which the Court believes would include antitrust claims. The broad language of the United and Blue Cross Blue Shield

[1] There are at least two defendants who have provider agreements that contain arbitration clauses who have not moved to compel arbitration. Further, during the course of oral argument the parties seemed to agree that, at least in a temporal sense, there are some claims that would not be covered by any agreements to arbitrate.

contracts do not specifically address statutory claims and do not specifically address the issue of joinder or class action.

The Court finds that the Humana agreements by their wording would apply to the dispute referenced by the parties. However, deciding the issue of whether the Blue Cross Blue Shield and United agreements apply to this litigation is a more complex and involved analysis. There is much law to suggest that arbitration agreements should be liberally construed in favor of arbitration if the underlying claim "touches matters" covered by the arbitration clause. See, for example, Mitsubishi Motor Company v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, at 625 (1985).[2] Other courts have suggested that a summary judgment standard should be utilized in analyzing arbitration clauses. Thus, if there is a genuine issue as to if such an agreement exists, the case should be one for the courts and if there is no genuine issue that there is, in fact, an arbitration agreement, it should be enforced. See Tinder v. Pinkerton Security, 305 F.3d 728, 735, (7th Cir. 2002); Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51 (3rd Cir. 1980); In re Universal Service Fund Telephone Billing Practices Litigation, 300 F.Supp. 2d. 1107 (D.Kan. 2003). Also, a careful review of some of the language in these arbitration cases suggests that one of the issues to consider is whether or not the arbitration agreement itself effectively waives traditional, jury trial-type rights that would relate to the litigation at hand. See generally Caley v. Gulfstream Aero. Corp., 428 F.3d 1359, 1372 (11th Cir. 2005); American Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 711 (5th Cir. 2002); Sydnor v. Conseco Fin. Servs. Corp., 252 F.3d 302, 307 (4th Cir. 2001).

There are also other key components to every arbitration analysis. First of all, if an arbitration involves anything that touches upon interstate commerce, it does involve the Federal

[2] *Mitsubishi* and cases flowing from that decision clearly hold that antitrust claims are not precluded from arbitration just because of their statutory and remedial nature. See Seacost Motors v. DaimlerChrysler Motors, 271 F.3d 6, 10-11 (1st Cir. 2001); Kotam Elecs. V. JBL Consumer Prods., 93 F.3d 724, 728 (11th Cir. 1996); Jung v. Ass'n of Am. Med.

Arbitration Act. See 9 U.S.C.S. § 2. Further, as it relates to the breadth of the Federal Arbitration Act, state courts have a requirement under the constitutional notions of preemption to apply federal law as relates to arbitration agreements. See Southland Corp. v. Keating, 465 U.S. 1, 17 (1984); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995); Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421, 432 (Mo. 2003).

In reviewing these cases, this Court humbly suggests that the breadth and contours of this preemption doctrine as relates to arbitration agreements is a difficult and complex analysis. Also, there is a body of federal law providing that procedural issues, or issues that involve whether a case is actually capable of arbitration, are frequently matters left better to the initial analysis of the arbitrator as opposed to a trial court. See generally Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003); Howsam v. Dean Witter, Inc., 537 U.S. 79, 85 (2002); Terminix Int'l Co., L. P. v. Palmer Ranch L.P., 432 F.3d 1327 (11th Cir. 2005). That being said, Missouri courts have regularly construed portions of arbitration agreements and ruled on their enforceability. See State ex rel. Vincent v. Schneider, 194 S.W.3d 853 (Mo. 2006); Triarch Indus. v. Crabtree, 158 S.W.3d 772 (Mo. 2004); Kagan v. Master Home Prods., 193 S.W.3d 401 (Mo.App.E.D. 2006).[3]

Of all the cases that have been cited, the most factually similar is Academy of Medicine of Cincinnati, et al., v. Aetna Health, Inc., et al., 842 N.E.2d 488 (Ohio 2006), *cert. denied* 846 N.E.2d 535 (Ohio 2006). That case involved physicians and nonprofit medical societies who sued several health care organizations for a conspiracy to fix reimbursement rates as relates to doctors and hospitals in the Cincinnati, Ohio area. The Ohio Supreme Court affirmed the lower court's denial of a motion to compel arbitration. The court reasoned that the state antitrust claims could be

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Colleges, 300 F.Supp.2d 119, 144-47 (D.D.C. 2004); Cellu-Beep, Inc. v. Telecorp, Inc., 322 F.Supp.2d 122, 125 (D.P.R. 2004); Hunt v. Up North Plastics, 980 F.Supp. 1046, 1050 (D.Minn. 1997).

pursued independent of the provider agreements. Thus, the claims of the physicians were not subject to a motion to compel arbitration, which was a creature of contract. The ruling of the Ohio Supreme Court, if accepted, would clearly provide a legal theory to deny motions to compel arbitration as it relates to the United and Blue Cross Blue Shield Defendants.

It is this Court's best judgment that Academy of Medicine of Cincinnati is not necessarily persuasive as far as the Humana contracts are concerned. The Humana agreements more specifically reference potential statutory actions such as antitrust and arguably provide for a waiver with regard to the attempt to seek class action or conspiracy-type relief. In general terms, Academy of Medicine of Cincinnati basically suggests that the arbitration agreements before the Ohio Supreme Court did not reach or touch the antitrust claims in that particular lawsuit. By contrast, there is a viable argument that the Humana agreements in this case reach and touch conspiracy through specific language.

The next question that must be addressed is whether the arbitration clauses in this case are enforceable. The federal act allows state courts to apply state law on matters of law and equity that relate to state contracts. 9 U.S.C.S. § 2. See also Circuit City Stores v. Adams, 279 F.3d 889 (9th Cir. 2002) *cert. denied* 122 S.Ct. 2319.[4] Obviously, state courts can, and do, construe federal law when it applies to state court litigation regarding issues of arbitration. On some level, federal courts hold that arbitration clauses which effectively prevent a litigant from vindicating his or her statutory rights created by the legislative branch are, in fact, invalid and unenforceable. See generally Mitsubishi Motor Company v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, at 637

[3] From review of the applicable precedent, the Court believes that the question of where federal preemption begins and ends is very fact-intensive and complicated. There are clearly some matters that are left to the trial court as opposed to the arbitrator, and some of those matters are to be decided by state law.

[4] The entirety of Section 2 of Title 9 reads as follows: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to

(1985); Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20, 26 (1991); In re: Cotton Yarn Antitrust Litigation, 406 F.Supp.2d 585, 594 (M.D.N.C. 2005).

Also, the Missouri Court of Appeals for the Western District has ruled that, as a matter of State law, arbitration provisions which prohibit class actions may well be unconscionable and against public policy. See Whitney v. Alltel Communications, Inc., 173 S.W.3d 300, 305-307 (Mo.App.W.D. 2005). The Whitney court affirmed the trial court's ruling that an arbitration clause precluding class actions was procedurally and substantively unconscionable. Whitney involved class action allegations praying for relief under the Missouri Merchandising Practices Act. The Missouri Court of Appeals found that concepts of unconscionability based on state law could invalidate arbitration agreements without contravening the Federal Arbitration Act. See id., at 308-09. In contrast, Judge John Lungstrum, of the Federal District Court of Kansas, in In re Universal Service Fund, held that, as a matter of federal law, the preclusion of class action antitrust claims in an arbitration agreement was not invalid, based upon an analysis of legislative history. That case involved the waiver of class-action relief in a complicated, multi-district litigation dealing with long-distance telephone services. In that case, the provisions eliminating joinder or class action were in bold print and very obvious. Further, they involved federal antitrust claims and not claims under a state statute. Lastly, a careful review of Judge Lungstrum's opinion also demonstrates that state law is often to be applied in deciding issues of unconscionability. See In re Universal Service Fund, at 1121; see also Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996).[5]

The allegations in this cause touch upon a large group of physicians and indirectly individual consumers throughout the Western District of Missouri who receive health care in the Kansas City area. The allegations themselves sound in conspiracy which can hardly be proven

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arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.S. § 2

without joining other parties. Lastly, the legislature of the State of Missouri through statute has clearly demonstrated that the antitrust laws, in part, are to deter anticompetitive conduct. This Court believes that the unique set of facts to this particular litigation creates a factual perfect storm that makes these contracts unconscionable and against the public policy.[6] To enforce these arbitration agreements would be tantamount to granting immunity to these defendants regarding any kind of claim touching upon conspiracy or relief as part of a class action. The Court further believes that Whitney is binding precedent that requires the Motion to Compel, as it relates to the Humana Defendants, to be denied. Additionally, the Court finds that the Humana contracts themselves prevents Plaintiffs from effectively vindicating their statutory rights under Chapter 416, contrary to both state and federal law.

Lastly, this Court adopts the reasoning of the Ohio Supreme Court in Academy of Medicine of Cincinnati, and finds that the Blue Cross Blue Shield and United agreements are inapplicable to the claim in this case.[7]

From a pure policy point of view, this Court believes the reasoning of the Special Master is sound and would be an excellent way to resolve the dispute that is before the Court. A trained arbitrator or arbitration panel skilled in these difficult issues might well be in a better position to deal with the complex issues in this case and, further, do it in a more expedited manner than is available to the ever-busy Circuit Court of Jackson County, Missouri. However, this Court questions its authority to fashion this type of suggested remedy without some kind of guidance

[5] It goes without saying that this Court has an extremely high personal and professional regard for Judge Lungstrum.
[6] Arguably, *Whitney* could be read to suggest that arbitration agreements that preclude class actions would always violate public policy. However, it seems to the Court that unconscionability would frequently be decided on a case-by-case basis, using a very fact-intensive analysis. *See infra* fn. 9.
[7] The Blue Cross and the United agreements do not have direct, specific language that bars class action or joinder of parties. It is clear from the oral argument that United and Blue Cross take the position that appropriate construction of their contracts do, in fact, prevent class actions or joinder. If that were the case, these agreements would similarly fail under the ruling in *Whitney*, and thus be unenforceable for the same reasons that the Court has referenced relative to the Humana contracts.

from a higher court. In order to implement the Master's recommendation the Court would have to, in part, declare certain provisions unenforceable and might well still leave some questions open as to the procedures to be followed and the selection of the arbitrators themselves.[8]

The Court thinks that, at least as it relates to the Humana agreements, the precedent of Whitney is effectively binding on this Court and dictates a finding that the Humana arbitration clauses are, in fact, unenforceable. In addition, the Court believes Whitney would also dictate a construction of the Blue Cross Blue Shield contracts and United contracts as allowing joinder and class action.

The issues in this case as to whether or not these arbitration provisions require the Court to sustain a motion to compel is a close call that is a difficult and complex analysis well-suited for appellate review.[9] By statute, the Defendants have a right to seek appellate review in an interlocutory fashion. R.S.Mo. § 435.440.1 (1). This Court recognizes that the Defendants will likely pursue an immediate appeal. Also, there are some claims in this lawsuit that are not subject to arbitration agreement and at least two of the Defendants who have such agreements have chosen not to move to enforce arbitration.

Anticipating the potential appeal, this Court chooses to stay the entirety of this litigation. In addressing this case, the Court humbly suggests that an appellate court may wish to consider the following:

1) To what extent does federal law apply as opposed to state law and where do the contours of preemption begin and end?

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[8] Whether an appellate court can fashion a remedy similar to the suggestions of the master may well be an issue the Court of Appeals could consider. Also, the Court would humbly suggest that what could be the product of agreement, relative to the manner and form of arbitration, is limited only by the creativity and desires of the parties.

[9] Various courts have dealt with the issue of whether or not arbitration clauses that preclude class actions are enforceable. Those decisions are factually intensive and go both ways. *See generally* Howard, Validity of Arbitration Clause Precluding Class Actions, 13 A.L.R.6th 145 (2006).

2) Are the issues addressed in the litigation concerns that initially should be dealt with by an arbitrator, as opposed to a trial court?

3) If the reasoning of the Ohio Supreme Court in Academy of Medicine of Cincinnati, et al., v. Aetna Health, Inc., et al. is applicable in this case and to be followed, does it apply to the Humana agreements?

4) Because these issues in this case touch upon health care and health insurance, thus being issues vital to the citizens of the State of Missouri, is it appropriate to consider procedural avenues to allow the Missouri Supreme Court to consider jurisdiction in this cause?

Wherefore, based upon the foregoing, the Court orders that the report of the Special Master is hereby rejected. The Court also orders that all motions to compel arbitration are hereby denied. The Court further orders that all litigation in this case is stayed until further order of the Court.[10] Lastly, it is ordered that at any point in time where it appears an appellate court may no longer be entertaining jurisdiction over this matter, this Court should be advised of the same for the purpose of considering an order lifting the stay.

IT IS SO ORDERED.

12-4-06
Date

Charles E. Atwell
Charles E. Atwell
Jackson County Circuit Court Judge

A copy of the foregoing was duly mailed/faxed to:

Richard McLeod
McLeo & Heinrichs Law Firm
2900 City Center Square

[10] There are Defendants who may well have a contractual right to move to compel arbitration, but have not yet done so. The issue of waiver is not presently before this Court, however, the Court's intuition suggests that the time for those Defendants to seek arbitration may well have long since passed.