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**Arbitration Provision is Not Enforceable Unless  
Prominently Displayed in Health Care Service Plan's Enrollment Form**

By Robert R. Pohls

Section 2 of the Federal Arbitration Act (the "FAA") declares that written arbitration provisions are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In *Doctor's Associates v. Casarotto* (1996) 517 U.S. 681, the U.S. Supreme Court therefore held that the FAA preempts state statutes which purport to make the enforceability of arbitration agreements depend on whether they comply with special notice provisions that are not generally applicable to other types of contracts.

California's Fourth District Court of Appeal applied similar reasoning to conclude in *Erickson v. Aetna Health Plans of California, Inc.* (1999) 71 Cal.App.4<sup>th</sup> 646 that the FAA preempts California Health & Safety Code Section 1363.1, a statute which provides that a binding arbitration clause in a health care service plan must incorporate various disclosures. Two years later, though, California's Second District Court of Appeal reached a contrary conclusion. See, *Smith v. PacifiCare Behavioral Health of California* (2001) 93 Cal.App.4<sup>th</sup> 139. When doing so, it reasoned that the FAA cannot preempt California Health & Safety Code Section 1363.1 since the state statute was enacted "for the purpose of regulating the business of insurance" and the McCarran-Ferguson Act provides that no federal law may be construed to "invalidate, impair, or supersede" such a law unless the federal law "specifically relates to the business of insurance." *Id.*, at 154, citing 15 U.S.C. Section 1012(b).

Although the California Supreme Court has yet to address the conflict between *Erickson* and *Smith*, several interim appellate courts have agreed with the *Smith* court's holding that the FAA does not preempt California Health & Safety Code Section 1363.1. See, e.g., *Pagarigan v. Superior Court* (2002) 102 Cal.App.4<sup>th</sup> 1121 [distinguishing *Erickson* by noting that it involved the federally-regulated Medicare program]; *Imbler v. PacifiCare of California* (2002) 103 Cal.App.4<sup>th</sup> 567 [same]. Several other decisions have likewise held arbitration provisions to be unenforceable when they do not satisfy the statute's requirement that the arbitration disclosure be "prominently displayed on the enrollment form signed by each subscriber or enrollee." See, *Malek v. Blue Cross of California* (2004) 121 Cal.App.4<sup>th</sup> 44, 50; *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4<sup>th</sup> 1419, 1423; and *Zembsch v. Superior Court* (2006) 146 Cal.App.4<sup>th</sup> 153, 158.

*Burks v. Kaiser Foundation Health Plan, Inc.* (Cal.App., Mar. 5, 2008) provided another California appellate court with an opportunity to address that issue. Turning to the question of whether the subject arbitration provision satisfied the statutory requirement, the Court first noted that "the only fact other than placement above the signature line that [the health care service plan] relies on to establish that its arbitration disclosure was prominently displayed on the enrollment form is that the notice is 'plainly set apart from the rest of the enrollment form's content by a solid horizontal border'." It then explained that such placement of the text "does little (if anything) to make the disclosure stand out from its surroundings." In turn, the Court concluded that the arbitration provision was not enforceable because it had not been prominently displayed on the enrollment form.



The Court also rejected the health care service plan's argument that it had substantially complied with California Health & Safety Code Section 1363.1, explaining that "anything less than actual compliance with the prominence requirement is unacceptable."

### **About the Author**

*Rob Pohls* has been shaping California insurance law for more than 20 years. He is the principal of *Pohls & Associates*, a firm in the San Francisco Bay Area that he established in 1999 to represent life, health, disability and long term care insurance companies in bad faith, ERISA and other forms of complex litigation. As a member of the Association of Life Insurance Counsel and a former Chair of the American Bar Association's Health & Disability Insurance Law Committee, he is a prolific author and frequent speaker on issues of interest to the insurance and financial services industries. More information about Rob, his firm and his practice is available online at: [www.califehealth.com](http://www.califehealth.com). Contact him by e-mail at: [rpohls@califehealth.com](mailto:rpohls@califehealth.com).