FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENTAL SERVICES, **Plaintiff,** **vs.** **ANA LEAH CASTILLON,** **Defendant.**	**CIVIL ACTION NO. 05-0517C** **ORDER GRANTING MOTION TO STAY AND TO COMPEL BINDING ARBITRATION**
ANA LEAH P. CASTILLON and PATRICK CASTILLON, **Counterclaimant and Third Party Plaintiffs,** **vs.** **COMMONWEALTH HEALTH CENTER; DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENTAL SERVICES; PACIFICARE; SHIREEN ALAM; ROBERT GEORGE; and DOES 1-9,** **Counter Defendant and Third Party Defendants.**	

I. Introduction

THIS MATTER came before the Court for a hearing on June 12, 2006 at 9:00 a.m. to consider separate motions filed by the Commonwealth of the Northern Mariana Islands' Department of Health and Environmental Services ("DPH" or Commonwealth Health Center ("CHC")) to strike or dismiss portions of defendant's counterclaim and third party complaint, Dr. Robert George's motion to strike the third party complaint, as well as a motion by Dr. Shireen Alam and TakeCare Insurance Company, Inc. ("TakeCare," formerly "PacifiCare Health Insurance Company of Micronesia, Inc.") to stay the action and compel binding arbitration. Because the Court has determined that the motion to stay the action and compel binding arbitration must be granted, it does not address the remaining motions at this time.

II. Factual and Procedural Background

This matter has been needlessly complicated by the pleadings. The action started when DPH preemptively filed suit to obtain x-ray prints from Ana Leah Castillon that it anticipated would be used as evidence against it in Ms. Castillon's threatened medical malpractice action. Ms. Castillon and her husband thereafter filed their malpractice action against DPH and others by way of counterclaim and third party complaint.

Ana Leigh Castillon was a member of a group health plan provided through her employer by defendant TakeCare's predecessor PacifiCare. On December 25, 2004, Ms. Castillon was admitted to CHC complaining of abdominal pain. She was examined by Dr. Shireen Alam, a physician affiliated with PacifiCare, who consulted with Dr. Robert George, allegedly an employee of CHC. The doctors arrived at a preliminary diagnosis of likely food poisoning and placed Castillon under observation. During her stay at CHC, Castillon was given blood, stool and urine tests, and CT scans and x-rays were performed. When her condition did not improve after four days, Castillon checked herself out of CHC on December 30, 2004, against the advice of her treating physicians. Together with her husband, Patrick Castillon, she boarded a flight to the Philippines to obtain treatment at St. Luke's Medical Center. She

took with her the original prints and only copies of her x-rays and CT results. At St. Luke's, Castillon was treated for appendicitis and her appendix was removed on December 31, 2004.

Believing herself to have been a victim of CHC's negligence in failing to diagnose her appendicitis more promptly, Castillon retained legal counsel and presented a claim to CHC for medical malpractice. CHC responded by rejecting the claim and demanding the return of the original x-rays still in her possession, insisting that the x-rays were the property of CHC and that copies would be unacceptable. Almost a year later, on December 5, 2005, with an impasse between the parties with respect to the return of this evidence, CHC filed for injunctive relief from this Court to compel the return of the original x-rays. On December 7, 2005, Castillon answered and filed a counterclaim asserting all of her allegations of medical malpractice, together with a third party complaint to include her husband's claim for loss of consortium. The counterclaim and third party complaint named as defendants CHC, DPH, PacifiCare and Drs. Alam and George.

On February 8, 2006, PacifiCare's successor, TakeCare, filed a timely motion to stay and to compel binding arbitration of all claims pursuant to a written arbitration agreement contained in the group insurance policy between TakeCare and Castillon's employer PCC Corporation (aka "Saipan Service Station"). The arbitration agreement provides that members of the health plan agree that "[a]ny and all disputes of any kind whatsoever, including, but not limited to, claims for medical malpractice… between member… and PacifiCare… shall be submitted to binding arbitration." The critical portion of the text is as follows:

> I. ARBITRATION FOR GROUP MEMBERS:
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> 1. Any and all disputes of any kind whatsoever, including, but not limited to, claims for medical malpractice (that is as to whether any medical services rendered under the Health Plan were unnecessary or unauthorized or were improperly, negligent, or incompetently rendered) between member (including any heirs or assigns) and PacifiCare except for claims subject to ERISA shall be submitted to binding arbitration. Any such dispute will not be resolved by a lawsuit or resort to court

> process, except as Guam law provides for judicial review of arbitration proceedings. Member and PacifiCare are giving up their constitutional rights to have any such dispute decided in a court of law before a jury, and are instead accepting the use of binding arbitration by three (3) arbitrators and administration of the arbitration shall be performed by an arbitration service as the parties may agree in writing.

Affidavit of Mary P. Torre, Exhibit A: (Group Insurance Policy of PacifiCare Health Insurance Company of Micronesia, Inc., dated March 1, 2004, Section B, ¶ I. 1.)

The arbitration provisions of the health care policy also provide that each side will bear their own costs and the cost of one arbitrator, evenly splitting the cost of the third arbitrator (Section B, ¶ I. 3.); the arbitration hearing shall be held in Guam (Section B, ¶ I. 4.); a mandatory confidentiality upon the entire arbitration proceeding is imposed (Section B, ¶¶ I. 5 – I. 8.); and the confirmation of the arbitration award is to be petitioned to the Superior Court of Guam (Section B, ¶ I. 9.).

TakeCare contends that the arbitration provisions of the health care policy are valid and enforceable in the Commonwealth, and that the agreement to arbitrate in this case must be enforced pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") or, alternatively, pursuant to contemporary common law principles. Castillon argues that the arbitration provisions are unenforceable as contrary to public policy, that the common law as expressed in the ALI Restatements of Law and applicable within the Commonwealth disfavors arbitratrion, and that the FAA does not apply to the CNMI. Castillon further argues that the arbitration agreement is a contract of adhesion and that its terms are so one-sided and burdensome to the claimant that its enforcement would be unconscionable.

III. Issues

1. Does the Federal Arbitration Act apply to the CNMI so as to require enforcement of the agreement to arbitrate contained in Castillon's group health plan policy as to all of Castillon's claims against TakeCare and its health care provider, Dr. Shireen Alam, including the malpractice claims?

2. Is the enforcement of an agreement to arbitrate malpractice claims contrary to a fundamental policy of the Commonwealth or contravene United States common law made applicable to the CNMI by operation of 7 CMC § 3401?

3. Is TakeCare's standardized agreement to arbitrate malpractice claims contained in the group health plan policy unenforceable on grounds of unconscionability?

IV. Analysis

1. Enforcement of Arbitration Agreements in the CNMI under the Federal Arbitration Act.

In order to counteract the pervasive judicial resistance to the enforcement of arbitration agreements that existed at the time, Congress enacted the Federal Arbitration Act in 1925. The Act applies to any "contract evidencing a transaction involving commerce" that contains an arbitration clause. 9 U.S.C. § 2. The Act mandates that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id*. The purpose of the FAA was to establish a strong national policy favoring arbitration and to place contractual agreements to arbitrate disputes "upon the same footing as other contracts." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902 (1996), *quoting, Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 2453, 41 L.Ed.2d 270 (1974). Section 3 of the Act requires the court, once it determines that an otherwise valid agreement to arbitrate exists, to stay the action upon an application by a party pending the completion of arbitration proceedings.

Although the FAA originally applied only in federal courts and was interpreted according to a narrow construction of "commerce among the several States," its scope has been vastly expanded by a number of U.S. Supreme Court decisions.[1] The FAA now applies in state courts, preempting more restrictive state laws, and extends to any transaction within reach of Congress' commerce power. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112, 121 S.Ct. 1302, 1307, 149 L.Ed.2d 234 (2001); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-274, 115 S.Ct. 834, 858, 130 L.Ed.2d 753

[1] *See, generally*, Preston Douglas Wigner, Comment, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1449 (1995).

(1995); *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 858, 79 L.Ed.2d 1 (1984).

Castillon essentially advances two arguments that the FAA does not apply to the CNMI. First, she argues that because there is no local statute or Commonwealth Supreme Court decision governing the arbitration of claims, then the Court must apply the rules of the common law as expressed in the restatements of the law approved by the American Law Institute ("A.L.I."), or as generally understood and applied in the United States pursuant to the mandate of 7 CMC § 3401. This, it is argued, will lead to the application of Section 550 of the Restatement (First) of Contracts (1932), stating that an agreement to arbitrate will *not* be specifically enforced by a court and will not be a bar to a civil action on the same claim.[2] The Restatement (Second) of Contracts, approved by the A.L.I. in 1981, omits any section replacing Section 550 relating to arbitration, noting that the subject matter is now predominantly governed by statute. RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 8 (1981). Castillon therefore argues that this Court should be guided by the Restatement (First) of Contracts, as the only remaining expression of the common law as it exists unaltered by legislation.

Second, Castillon contends that the FAA may not be applied to the Commonwealth without violating the Covenant to Establish a Commonwealth of the Northern Mariana Islands ("Covenant"), specifically those provisions of the Covenant relating to self-government that are found at Sections 103 and 203(d). Section 103 of the Covenant guarantees that the people of the CNMI "will have the right of local self-government and will govern themselves with respect to internal affairs," while Section 203(d) provides that the Constitution or laws of the CNMI may vest local courts with "jurisdiction over all causes in the Northern Mariana Islands over which any court established by the Constitution or laws of the United States does not have exclusive jurisdiction." Castillon cites the CNMI Supreme Court's

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2 RESTATEMENT (FIRST) OF CONTRACTS § 550 (1932) states: "…a bargain to arbitrate either an existing or a possible future dispute is not illegal, unless the agreed terms of arbitration are unfair, but will not be specifically enforced, and only nominal damages are recoverable for its breach. Nor is any bargain to arbitrate a bar to an action on the claim to which the bargain relates."

pronouncement with regard to Covenant Section 203(d) that "Therefore, it is manifestly impermissible for Congress to pass a law that places a case arising under the laws of the Commonwealth beyond the reach of the people or the legislature of the Commonwealth." *Vaughn v. Bank of Guam*, 1 N.M.I. 160, 167-168 (1990) (finding that the establishment of the Commonwealth Supreme Court's appellate authority pursuant to Public Law 6-25 divested the Appellate Division of the District Court and the Ninth Circuit Court of Appeals of jurisdiction over pending Commonwealth trial court appeals, regardless of the prior enactment of 48 U.S.C. § 1694b(c) conferring such jurisdiction). Castillon argues that the application of the FAA to the CNMI must be rejected, because the FAA would analogously intrude upon local sovereignty by removing claims arising under local law (e.g., personal injury claims) from the jurisdiction of the Commonwealth courts.

Addressing Castillon's arguments in turn, it is correct that the CNMI Legislature has enacted no local law providing for the arbitration of claims. It is a mistake, however, to leap to the conclusion that the common law as expressed in the restatements will therefore determine the issue at hand. This is because Section 3401 of Title 7 of the Commonwealth Code precisely says that the common law sources will serve as rules of decision "in the *absence of written law* or local customary law to the contrary" (emphasis added), and the "written law" of the Commonwealth includes those laws of the United States that have been made applicable to the CNMI by Section 502 of the Covenant. These include any federal laws "which are applicable to Guam and which are of general application to the several States as they are applicable to the several states." COVENANT, § 502(a)(2); 48 U.S.C. § 1801. Federal statutes of general applicability to the states and to Guam, therefore, are presumptively applicable to the same extent in the CNMI if they were enacted prior to January 9, 1978, the effective date of the Covenant. *Sablan v. Tenorio*, 4 N.M.I. 351, 358, n. 23 (1996); *U.S. v. Dela Cruz*, 358 F.3d 623 (9th Cir. 2004).

The Federal Arbitration Act was enacted in 1925, and expressly applies to agreements evidencing transactions involving "commerce," which is defined as "commerce among the several

States or with foreign nations, or in any Territory of the United States or in the District of Colombia, or between any such Territory and another, or between any such Territory and any State or foreign nation." 9 U.S.C. § 1. The FAA has been determined to be applicable of its own force to Guam. *Government of Guam v. PacifiCare Health Ins. Co. of Micronesia*, 2004 Guam 17, ¶ 11.[3] As a law of general application to the states and to Guam on the effective date of the Covenant, Section 502(a)(2) of the Covenant makes the Federal Arbitration Act applicable to the CNMI. The congressional intent to give the FAA the widest possible application is evident from the definition of "commerce" in Section 1 of the Act, as well as from the expressed purpose of the Act to provide a uniform national policy in favor of arbitration agreements throughout the United States. *Allied-Bruce Terminix Cos., supra*, 513 U.S. at 277, 115 S.Ct. 834; *See, also, Saipan Stevedore Co., Inc. v. Dir., Office of Workers' Comp. Programs*, 133 F.3d 717, 722-723 (9th Cir. 1998) (Federal Longshoreman's Act of 1927 applies to the CNMI through Section 502(a)(2) of the Covenant, is not inconsistent with other Covenant provisions, and is consistent with congressional intent to provide consistent workers' compensation coverage to longshore and harbor workers).

Castillon's further argument that application of the FAA would violate those provisions of the Covenant related to local self-government are likewise unpersuasive. Unlike the jurisdictional statute at issue in *Vaughn v. Bank of Guam, supra*, 1 N.M.I. at 168, the FAA does not operate to automatically divest the Commonwealth courts of jurisdiction over local matters, but rather ensures the right of the *parties* to contractually agree to a forum of their own choosing. Although 7 C.M.C. § 3101(b) provides

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[3] The significance of the FAA's applicability to Guam in the present case is entirely dependant upon Section 502(a)(2) of the Covenant. TakeCare suggests that because the Act applies "in any Territory," it must apply to agreements involving transactions "in" the CNMI. Congress' use of the word "in" (a territory) in this case would appear to indicate only that there was no need to source congressional authority in the Commerce Clause when exercising its plenary authority under Article I of the U.S. Constitution to apply legislation to the territories or the District of Colombia. Although the federal courts, when addressing issues arising from the CNMI, "have construed the term 'Territory' broadly," *Saipan Stevedore Co., Inc. v. Dir. of Workers' Comp. Programs*, 133 F.3d 717, 723 (9th Cir. 1998), *citing, Micronesian Telecommunications Corp. v. NLRB*, 820 F.2d 1097, 1100 (9th Cir. 1987), Commonwealth courts must remain mindful of the unique relationship between the United States and the CNMI established by the Covenant. *Borgia v. Goodman*, 1 N.M.I. 225, 252 (1990).

that the parties are entitled to a jury trial in controversies exceeding $1,000 in value, the parties are also free to waive a jury trial without any specific procedural hurdles. *Leong v. Kaiser Foundation Hospitals*, 788 P.2d 164, 167 (Hawaii 1990); *Madden v. Kaiser Foundation Hospitals*, 552 P.2d 1178, 1187 (Cal. 1976). Furthermore, it has been held that the stay of an action pending binding arbitration pursuant to the FAA does *not* deprive the trial court of ultimate jurisdiction over the matter. *Sewer v. Paragon Homes, Inc.*, 351 F.Supp. 596, 601 (D. V.I. 1972).

Castillon has not shown how the enforcement of an agreement between the parties to resolve future disputes through arbitration violates any public policy of the Commonwealth. In fact, the Commonwealth Supreme Court has stated in another context:

> While the CNMI has no arbitration statute, it has no law prohibiting arbitration either. Moreover, the Commonwealth Code contains no indication that the legislature favors the adjudication of contract claims in Commonwealth courts… In fact, the CNMI government itself employs arbitration and mediation in disputes with its workers. Thus we see no indication that arbitration is an affront to the legal system of the Commonwealth.

PAC United Corp., Ltd. (CNMI), v. Guam Concrete Builders, 2002 MP 15 ¶ 22, 6 N.M.I. 446, 451 (citation omitted).

Based upon the foregoing, this Court concludes that the Federal Arbitration Act applies to the Commonwealth pursuant to Section 502(a)(2) of the Covenant and is not inconsistent with any further provisions of the Covenant or with any other written law of the Commonwealth.[4]

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[4] Even without such authority, however, general principles of contract law as expressed in the Restatement (Second) of Contracts support the judicial enforcement of agreements of this type. Moreover, if the FAA were determined to be inapplicable to the Commonwealth and Section 3401 of Title 7 operated to make the common law the rule in this case, it still does not follow that Section 550 of the Restatement (First) of Contracts would govern. The Second Restatement's omission of a section stating that arbitration agreements are not specifically enforceable at common law does not support the construction that the Second Restatement has *affirmed* that such agreements are not specifically enforceable at common law. In fact, the Second Restatement states in an introductory note:

> A particularly important change has been effected by statutes relating to arbitration, which have now been enacted in so many jurisdictions that it seems likely that *even in the remaining states*, there has been a change in the former judicial attitude of hostility toward agreements to arbitrate future disputes... Such agreements are now widely used and serve the public interest by saving court time. The rules stated in this Chapter do not preclude their enforcement, *even in the absence of legislation*. RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 8 (1981) (emphasis added).

2. Enforcement of the Arbitration Provisions in Castillon's Group Health Plan.

TakeCare, a Guam corporation doing business in the CNMI, asserts that its Group Health Plan policy represents a valid written agreement containing express arbitration provisions that must be enforced pursuant to the FAA. 9 U.S.C. § 2. Castillon argues, however, that the FAA does not apply in this instance because the dispute over her allegedly negligent medical treatment at CHC does not involve a "commercial transaction" affecting "interstate commerce." Castillon also contends that the arbitration provisions are unenforceable on grounds of unconscionability.

Although there is no CNMI authority addressing these issues, the U.S. Supreme Court has endorsed a broad reading of "commerce," and there is substantial authority from other jurisdictions overwhelmingly rejecting Castillon's arguments in similar circumstances. *Citizen's Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S.Ct. 2037, 2040, 156 L.Ed.2d 46 (2003) (debt-restructuring agreement between Alabama bank and Alabama corporation had sufficient nexus to interstate commerce to require application of the FAA). *Also see, In re Nexion Health at Humble, Inc.* 173 S.W.3d 67, 69 (Texas 2005) (Medicare funds crossing state lines is sufficient "commerce" to invoke FAA); *Erickson v. Aetna Health Plans of California*, 71 Cal.App.4th 646, 651 (C.A. Cal. 4th Dist. 1999) (health plan contracted with government to treat Medicare patients and entered into interstate contracts with vendors and service providers operating on a national basis); *Crawford v. West Jersey Health Systems*, 847 F.Supp. 1232, 1240 (D. N.J. 1994) (defendant provider treated patients out-of-state, accepted payments from out-of-state and interstate insurance companies, advertised out-of-state, and received goods and services from out-of-state vendors).

Section 345(f) of the Restatement (Second) of Contracts further states that "The judicial remedies available for the protection of interests stated in § 344 [expectation, reliance, and restitution interests] include a judgment or order… enforcing an arbitration award." In light of these statements in the latest version of the restatement, it does not appear profitable to turn to the 1932 version of the Restatement of Contracts to ascertain the status of arbitration agreements within the common law as it is applied in the United States today. This Court is guided by the latest version of the Restatement, which does not preclude the enforcement of arbitration agreements.

In the matter before the court, Castillon has not refuted that TakeCare is a Guam corporation engaged in an interstate insurance business. Castillon's Third-Party Complaint, ¶ 15 (PacifiCare is a foreign corporation licensed to do business on Saipan); TakeCare's and Dr. Alam's Reply Brief at 6 (citing TakeCare's Certificate of Authority from CNMI Registrar of Corporations dated March 3, 2006 indicating it has a foreign corporation status). Furthermore, Castillon has not refuted that the Group Health Plan between TakeCare and her employer evidences a transaction between corporate entities sited in Guam and in the CNMI, or that many professional employees of TakeCare and CHC have been trained and are actually domiciled in various states and foreign countries, much less that TakeCare's performance under the plan required the performance of medical services that were dependant upon goods and services received from outside of the CNMI. Given that the U.S. Supreme Court has held that the FAA falls under the "broadest permissible exercise of Congress' Commerce Clause power," *Citizen's Bank*, *supra*, 539 U.S. at 56, 123 S.Ct. 2037, this Court concludes that the Group Health Plan pursuant to which Castillon received her medical treatment at CHC evidences a nexus to interstate commerce sufficient to invoke the FAA.

Castillon's argument that the FAA may only apply to a "commercial transaction," and therefore cannot apply to a "simple tort claim" would have the court misdirect its focus and ignore a considerable volume of authority supporting the enforcement of arbitration agreements when the *subject* of those agreements include the arbitration of what would otherwise be tort claims.[5] The agreement between the parties, if otherwise enforceable, governs their relationship in this case and even serves as the basis for Castillon's naming of TakeCare as a counter-defendant. It is notable that contract provisions for the arbitration of medical negligence claims has become common, if not standard, practice in the health

[5] For example, of the cases already cited, *Erickson*, *Leong*, *Madden*, *Morrison*, and *Nexion* all involved negligence claims arising from medical treatment. In *Erickson*, *Morrison*, and *Nexion*, the FAA was applied to preempt state laws prescribing a particular format for any written agreement to arbitrate personal injury or malpractice claims. The arbitration agreements in *Leong* and *Madden* were enforced on state law grounds.

insurance industry.[6] The Court finds no basis for limiting the enforcement of the arbitration agreement in this case solely because the disputes covered by the contract include claims of negligence.

3. Enforceability of the Arbitration Provisions of the Group Health Plan Under Principles of Contract Law.

Castillon only challenges the validity of the arbitration provisions within the Group Health Plan, not the validity of the entire agreement. Even if the FAA applies in this case, therefore, it is this Court which must determine whether or not those provisions constitute a valid agreement by application of Commonwealth law. 9 U.S.C. § 2; *Buckeye Check Cashing, Inc. v. Cardega*, 126 S.Ct. 1204, 1209, 163 L.Ed.2d 1038 (2006), *citing*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 87 S.Ct. 1801, 1805-06, 18 L.Ed.2d 1270 (1967). Castillon argues that the arbitration provisions of the health plan constitute a contract of adhesion, the terms of which place such a burden on a claimant that the provisions are procedurally and substantively unconscionable.

There is no CNMI statutory or decisional authority addressing the doctrine of unconscionability in this context. The Restatement (Second) of Contracts, section 208, does not state a definition of "unconscionable," but indicates in the comments to that section that factors to be considered in assessing the unconscionability of contract provisions include: 1) the overall gross imbalance of consideration, 2) gross inequality of bargaining power, and 3) unreasonable terms. RESTATEMENT § 208 cmts. c – e.

A number of courts and commentators have reduced these factors to two: "procedural unconscionability," relating to inequality in the bargaining process, and "substantive unconscionability," encompassing an imbalance of consideration and/or overly oppressive terms. *Armendariz v. Foundation Psychcare Services*, 6 P.3d 669, 690 (Cal. 2000), *citing*, 15 Williston on Contracts (3d ed. 1972) § 1763A, pp. 226-227. Although both forms of unconscionability are required to be present in some

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[6] *See, e.g.*, Carol A. Crocca, Annotation, *Arbitration of Medical Malpractice Claims*, 24 A.L.R.5th 1, 1 (1994) (stating that "because of what has been characterized as a 'medical malpractice insurance crisis,' contributed to by the cost of litigation and large jury verdicts in medical malpractice actions, attention has focused on arbitration as a less expensive and more efficient method of dispute resolution.").

degree before a court may refuse to enforce a contract on this basis, the two forms are "balanced" against one another so that the greater the unconscionability of the bargaining process, the less substantively unfair the terms need be before the court may refuse to enforce the bargain, and vice-versa. *Id.* Unconscionability typically, as in this case, is a defense arising from the claim that a contract is one of adhesion. *Id., citing, Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (Cal.1981).

A "contract of adhesion" has been defined as a "standardized contract offered to consumers of goods and services on an essentially 'take it or leave it' basis which limit[s] the duties and liabilities of the stronger parties." *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Texas 1987). The Restatement (Second) of Contracts eschews the term "contract of adhesion," perhaps to avoid the pejorative connotation that has come to surround that term, and replaces it in Section 211 with, simply, "standardized agreements." The Restatement then provides:

> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
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> (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
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> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

Some courts have reasoned that arbitration provisions contained in group health plans do not constitute adhesion contracts because the beneficiary's employer is considered to have acted as the beneficiary's *agent* in negotiating the contract, and the employer is on a more equal footing with the provider and may be presumed to have had at least the opportunity to negotiate all of the terms. *Leong, supra*, 788 P.2d at 168-169; *Madden, supra*, 522 P.2d at 1185. Other courts *have* found similar provisions within insurance agreements to qualify as contracts of adhesion, but have found them to be

enforceable (i.e., not unconscionable) because their terms did not go beyond the reasonable expectations of the adhering party and were not substantively unconscionable. *Graham v. State Farm Mut. Ins. Co.*, 565 A.2d 908, 912 (Del. 1989).

Applying Section 211 of the Restatement to the present case, it cannot be said, based upon the evidence presented, that TakeCare had reason to believe that either Castillon or her employer would not have agreed to the Group Health Plan had they known that the plan contained an agreement to arbitrate disputes. The inclusion of arbitration agreements in health plan policies has become frequent enough that there is no unfair surprise to the beneficiary, nor is there any indication that Castillon had no options for medical treatment, or even for health care insurance, other than to sign the agreement with TakeCare. *See, Madden, supra*, 522 P.2d at 1185-1186. Although it is recognized that there is an ongoing policy debate over whether or not arbitration agreements in standardized health plan agreements *intrinsically* favor providers at the expense of claimants, the state of the law is that such agreements are generally enforceable absent a *gross* disparity in terms. RESTATEMENT § 211; Crocca, *supra*, note 6, 24 A.L.R.5th 1, 1 (1994). Castillon complains that the provisions of the agreement compelling confidentiality and allocating the costs of arbitration are unduly harsh on the claimant. The Court does not find these terms to be unreasonable.

On its face, the requirement of maintaining the confidentiality of the proceedings and the requirement to split the cost of arbitration appear even-handed, although in practice it is often the provider who directly benefits most from confidentiality and it is the claimant who is usually most burdened by the cost of arbitration. Randall, *supra*, note 4, 11 Conn. Ins. L. J. at 258 (2005). Courts have more often held, however, that these built-in disparities fall short of unconscionability. *Green Tree Financial Corp.-Ala. V. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000); *Coleman v. Prudencial Bache Sec. Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986); *Padilla v. State Farm Mut. Ins. Co.*,

68 P.3d 901, 907 (N.M. 2003). This Court is in accord and does not find these provisions of the arbitration agreement contained in the Group Health Plan to be unconscionable.

On the other hand, those provisions of the agreement that require the arbitration to take place in Guam, and require that any judicial proceeding for the confirmation of an arbitral award be brought before a Guam court are substantively unfair to the claimant. It is beyond the reasonable expectations of a party assenting to a health care plan in the CNMI, through her CNMI employer, with a company doing business in the CNMI, to anticipate that a claim arising from medical treatment performed entirely within the CNMI, when all necessary witnesses reside in the CNMI, would have to be arbitrated in Guam, and that she should have to bear the consequent expenses. *Wilmot v. McNabb*, 269 F.Supp.2d 1203, 1211 (N.D. Cal. 2003); *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 108 (C.A. Mo. 2003). Enforcing these venue provisions would have the practical effect of shielding TakeCare from liability for the claims of most of its CNMI customers, rather than simply providing a neutral forum in which to arbitrate disputes. *Comb v. PayPal, Inc.*, 218 F.Supp.2d 1165, 1177 (N.D. Cal. 2002).

The venue provisions of the agreement, however, are severable from the remaining terms, both because of the severability provision of the agreement (Section C ¶ I. 3), and under general principles of law. RESTATEMENT § 208; *Swain, supra,* 128 S.W.3d at 108 ("To invalidate the entire [arbitration] clause on the basis of an unfair arbitration location would… undermine the liberal federal policy favoring arbitration agreements."). Additionally, TakeCare orally stipulated at the hearing to waive the venue provisions of the agreement and to submit to arbitration on Saipan, agreeing that any further judicial proceedings in this case are to occur before the CNMI Superior Court. Excising the venue provisions from the remainder of the agreement, the Court finds the arbitration agreement to be enforceable according to general principles of contract law.

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V. Conclusion

Based upon the authorities cited above and for the reasons stated herein, the Court determines that the written arbitration agreement contained in Section B of the Group Insurance Policy of PacifiCare Health Insurance Company of Micronesia, Inc. between the provider TakeCare and plan member Ana Leigh Castillon is valid and enforceable and that the Federal Arbitration Act (9 U.S.C. §§ 1-16) applies in the CNMI and to this agreement.

Accordingly, pursuant to Section 3 of Title 9 of United States Code, and pursuant to the agreement between the parties, the Court hereby issues a STAY on claims and proceedings between Castillon and TakeCare Insurance Co., Inc., pending the resolution or termination of arbitration of Castillon's claims. In the interest of economy and the fair resolution of all claims, and for good cause, this stay shall apply to all parties and claims in the entire action.

SO ORDERED this 20th day of July, 2006.

/S/ _____
RAMONA V. MANGLONA, Associate Judge