1976 WL 30794 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
June 23, 1976

***1** Mr. Robert C. Toomey
House Medical, Military, Public and Municipal Affairs Committee
Post Office Box 11867
Columbia, SC 29211

Dear Mr. Toomey:
Your letter of inquiry on behalf of Representative Cecil Collins regarding H. 3896 or the constitutionality of binding arbitration has been referred to me for a response. Since your letter makes reference to the arbitration procedure in a specific bill, I am confining my remarks to the procedure contemplated therein. This bill provides (1) that a person who receives health care services from a health care provider, may if offered, executed an agreement to arbitrate a dispute, controversy, or issue arising out of health care services or treatment by health care provider [Section 11(1)]; (2) that any agreement to arbitrate shall provide that its execution is not a prerequisite to health care treatment [Section 11(2)]. (3) Finally Section 25 of the bill provides for an appeal to the Circuit Court in the county where the matter was heard, the review to be limited to the record of the case.

This bill would require that one entering into the contemplated contractual agreement arbitrate his dispute upon demand [Section 14(1)] before seeking access to the courts. Such contractual requirements have been traditionally viewed as unenforceable in South Carolina as contrary to public policy. See: Jones v. Enoree Power Company, 75 SE 452 (1912). However, South Carolina courts have upheld the validity of arbitration provisions in contracts which made specific items subject to arbitration as a condition precedent to the bringing of a suit. Miller v. British American Assurance Company, 119 S.E.2d 527 (1961). Since the basis for rejecting common law arbitration was the holding that such an agreement was contrary to public policy Jones at 454, the concern here must focus on the determination of public policy.

Public policy may be altered by constitutional provision, statutes or judicial decisions. 17 C.J.S. § 211(b). Since the bill in question necessarily provides legislative authorization for binding arbitration, it would constitute a declaration by the legislature of the public policy involved. Such a determination is a clear prerogative of the legislature. Accordingly, it is the view of this Office that H.3896 would be proper legislation.

It does not appear that any constitutional issue is involved. The South Carolina Constitution of 1895 specifically provided for arbitration, see Article VI, § 1. This provision was deleted in the 1973 revision as unnecessary; see: Final Report of the Commission the Make a Study of the South Carolina Constitution of 1895, p. 73. Moreover the statutory provisions relating to arbitration § 10-1901, Code of Laws of South Carolina, 1962, as amended, contemplate the arbitration of present disputes, not future ones, and are therefore inapplicable to this bill.
Sincerely,

M. Elizabeth Crum
Assistant Attorney General
***2** Kenneth L. Childs
Staff Attorney

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