MED MAL GAME CHANGER

The Texas Supreme Court strikes down bar to arbitration agreements.

BY MICHAEL L. HOOD AND DAVID M. MERRYMAN

A recent Texas Supreme Court decision changes the landscape for arbitration of medical malpractice claims. In *Fredericksburg Care Co., L.P. v. Juanita Perez et al*,[1] the court held that the arbitration-friendly Federal Arbitration Act[2] preempts the more stringent requirements found in the Texas Medical Liability Act.[3] As a result, many providers, especially nursing homes and home health care operators, may start including arbitration clauses in their agreements with patients.

The TMLA and Arbitration

Before the court's decision in *Fredericksburg*, it was the general rule in Texas that health care providers did not ask patients to agree to standard arbitration clauses in pretreatment agreements. Few Texas providers would rely on arbitration clauses because they feared violating TMLA Section 74.451, which requires that arbitration agreements include the following in 10-point boldface type:

> Under Texas law, this agreement is invalid and of no legal effect unless it is also signed by an attorney of your own choosing. This agreement contains a waiver of important legal rights, including your right to a jury. You should not sign this agreement without first consulting with an attorney.

Section 74.451 further states that providers who fail to comply with its requirements risk liability under the Texas Occupations Code or the Texas Deceptive Trade Practices-Consumer Protection Act.

Before *Fredericksburg*, Texas's lower courts routinely rejected the argument that the FAA preempts the TMLA.[4] The issue in these cases was whether TMLA Section 74.451 was a law enacted for the purpose of regulating the business of insurance within the meaning of the McCarran-Ferguson Act[5] and thus exempted from FAA preemption.

Under the MFA, state laws enacted for the purpose of regulating insurance prevail over general federal laws that do not specifically relate to the business of insurance. The plaintiffs in these cases argued "reverse preemption," reasoning that Section 74.451 was enacted to regulate the business of insurance, that the MFA exempted Section 74.451 from FAA preemption, and that courts could not enforce arbitration because standard arbitration clauses do not comply with Section 74.451.

The *Fredericksburg* Case

In *Fredericksburg*, however, the Texas Supreme Court unanimously ruled that the MFA does not apply to the TMLA because the TMLA does not regulate the business of insurance.[6] According to *Fredericksburg*, if the FAA applies to an agreement to arbitrate a health care liability claim, and the arbitration agreement satisfies the FAA, courts must enforce arbitration of health care liability claims regardless of whether the arbitration agreement complies with the TMLA.[7]

Fredericksburg operated a nursing home, where Elisa Zapata was a patient. She signed a preadmission agreement that included a standard arbitration clause stating:

> Any legal dispute, controversy, demand or claim . . . that arises out of or relates to the Resident Admission Agreement or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration . . . and not by lawsuit or resort to court process . . . .[8]

Zapata died at Fredericksburg, and her beneficiaries filed medical malpractice claims against the nursing home in state court. Fredericksburg moved the trial court to compel arbitration on the grounds that the FAA preempted TMLA Section 74.451. The beneficiaries objected on the grounds that the MFA exempted the TMLA from FAA preemption. The beneficiaries prevailed at trial and before the court of appeals, and Fredericksburg appealed to the Texas Supreme Court.[9]

The *Fredericksburg* Decision

The Texas Supreme Court started its analysis by making two preliminary findings. First, it concluded that the FAA applied to the arbitration agreement.[10] The FAA applies to contracts involving interstate commerce.[11] The federal government had paid Fredericksburg Medicare payments on behalf of the deceased patient, which the court found to be sufficient to establish interstate commerce.[12]

Second, the court held that the FAA preempted TMLA Section 74.451, which requires an arbitration clause to have additional elements, including 10-point boldface type, specific language warning the patient that he or she is waiving rights, and the patient's attorney's signature on the agreement—none of which the FAA requires.[13] The court, therefore, concluded that it would enforce the standard arbitration clause unless Zapata's beneficiaries could show an exemption to FAA preemption.

The court next considered the MFA and the "reverse preemption" argument. The beneficiaries argued that Section 74.451 was state law enacted for the purpose of regulating the business of insurance and that it fell within the MFA's protection and was exempted from FAA preemption.[14]

The court addressed both TMLA Chapter 74 and Section 74.451 specifically to decide whether the Texas Legislature

enacted them "for the purpose of regulating the business of insurance." The court wrote that the MFA's definition of "regulating the business of insurance" had both a narrow focus regarding laws "protecting or regulating the relationship between the insurer and insured," as well as a broader focus regarding laws that "possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance."[15]

The court acknowledged that the Texas Legislature enacted the TMLA and Section 74.451 with the goal to make health care in Texas more available and less expensive by reducing the cost of health care liability claims.[16] But the court held that the Legislature's goal of lowering rates was "too tenuous of a connection to the business of insurance" to qualify for MFA protection.[17] It wrote that "a tenuous connection to the ultimate aim of insurance, however, is insufficient to escape preemption"[18] and also concluded that Section 74.451, which applies to agreements between patients and providers, has "little to do with the relationship between the insurance company and its policyholders."[19]

The court found that the Zapata beneficiaries failed to show that Section 74.451 is aimed at protecting or regulating the performance of a contract for insurance, either between a health care provider and its malpractice insurer or between the patient and his or her insurer.[20] Because neither the TMLA nor Section 74.451 was "enacted for the purpose of regulating the business of insurance," the court held that the MFA does not exempt them from FAA preemption.[21] It remanded the case to the trial court with instructions to stay or dismiss the state court lawsuit and order Fredericksburg and the Zapata beneficiaries to arbitrate their dispute.[22]

Various interest groups—including the Texas Chapter of the American Board of Trial Advocates,[23] the Texas Association of Defense Counsel,[24] and the Texas Medical Liability Trust and ProAssurance Corporation[25]—filed amici curiae briefs urging the Texas Supreme Court to withdraw its opinion. Some of the arguments raised included that *Fredericksburg* disregards the plain language of the TMLA and its history, forces Texas patients to forfeit their jury trial and appellate rights, and allows abusive and neglectful health care providers to arbitrate claims in secrecy. Nevertheless, the court refused to reconsider its ruling, and *Fredericksburg* is controlling law. Time will tell if the Texas Legislature desires to, or is able to, amend the TMLA to bring it within the scope of the MFA and thereby reimpose limits on health care arbitration.[26]

Implications for Providers

Now that the Texas Supreme Court has opened the door to FAA-friendly arbitration agreements between patients and health care providers, providers may be asking themselves whether they should seek arbitration. Providers will need to consider whether their arbitration agreements are enforceable and whether they are consistent business needs.

Providers must show that their arbitration agreements affect interstate commerce in order to establish that the FAA applies to the agreement and preempts the TMLA.[27] In *Fredericksburg*, the court found that the FAA applied because the nursing home received Medicare payments on behalf of the patient.[28] The agreement must also satisfy the FAA's requirements that arbitration agreements be in writing, agreed to by the parties, and cover the claims at issue.[29] Even FAA-friendly arbitration clauses are subject to state law contract defenses—such as duress, incapacity, and lack of authority[30]—so providers should consider whether the circumstances under which they ask patients to agree to arbitration may later invalidate the agreement.

With *Fredericksburg*, the Texas Supreme Court has granted providers more flexibility to adopt pretreatment arbitration agreements. Nevertheless, such clauses might not be appropriate for every provider. Providers should discuss the advantages and disadvantages of arbitration when considering whether to adopt arbitration agreements as part of their practices. **TBJ**

Notes

1. 461 S.W.3d 513 (Tex. 2015), *reh'g denied* (June 26, 2015).
2. 9 U.S.C. §1 *et. seq.*
3. Tex. Civ. Prac. & Rem. Code §74.451.
4. *See, e.g., In re Kepka*, 178 S.W.3d 279, 291-93 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding), *disapproved in part on other grounds, In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 647 (Tex. 2009); *In re Sthran*, 327 S.W.3d 839, 843-47 (Tex. App.—Dallas 2010, no pet.). *But see The Villas of Mount Pleasant, LLC v. King et al.*, 454 S.W.3d 689, 691-98 (Tex. App.—Texarkana, 2014) (holding that the FAA preempted the TMLA).
5. 15 U.S.C. §1011-1015.
6. *Fredericksburg*, 461 S.W.3d at 528.
7. *Id.*
8. *Fredericksburg Care Co., L.P. v. Perez*, 406 S.W.3d 313, 315-16 (Tex. App.—San Antonio 2013), *rev'd sub nom. Fredericksburg Care Co., L.P. v. Perez*, 461 S.W.3d 513 (Tex. 2015).
9. *Fredericksburg*, 461 S.W.3d at 516.
10. *Id.* at 517-18.
11. 9 U.S.C. §1-2.
12. *Fredericksburg*, 461 S.W.3d at 518.
13. *Id.*
14. *Id.* at 517.
15. *Id.* at 521.
16. *Id.* at 523.
17. *Id.* at 524 (internal quotation omitted).
18. *Id.* at 522 (internal citations and quotations omitted).
19. *Id.* at 526-27 (internal quotation omitted).
20. *Id.* at 529.
21. *Id.*
22. *Id.*
23. Brief of Amicus Curiae TEX-ABOTA in Support of Respondents' Motion for Rehearing, *Fredericksburg*, 461 S.W.3d 513 (No. 13-0573).
24. Amicus Brief Letter of TADC in Support of Respondents' Motion for Rehearing, *Fredericksburg*, 2015 WL 1035343 (No. 13-0573).
25. Brief of Amicus Curiae Texas Medical Liability Trust et al. in Support of Respondents' Motion for Rehearing, *Fredericksburg*, 461 S.W.3d 513 (No. 13-0573).
26. The Texas Supreme Court identified several factors indicating that a statute regulates the business of insurance for the purposes of the MFA. *Fredericksburg*, 461 S.W.3d at 522 ("Examples of practices that fall within the scope of the MFA include the fixing of rates, the selling and advertising of policies, [] the licensing of insurance companies and their agents[,] . . . the writing of insurance contracts and the actual performance of those contracts.") (internal citations omitted).
27. 9 U.S.C. §2.
28. *Fredericksburg*, 461 S.W.3d at 518.
29. 9 U.S.C. §2.
30. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

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