Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Texas Health Care Providers Weigh Arbitration Agreements

By **Jess Davis**

Law360, Dallas (March 09, 2015, 9:18 PM ET) -- A Texas Supreme Court ruling Friday cleared the path for health care providers to require arbitration agreements with patients, and though nursing homes and long-term care providers are expected to move quickly to adopt standard arbitration clauses, it's too early to tell whether litigation will decline as a result.

In Fredericksburg Care Co. LP v. Perez, the court held a Texas nursing home was wrongly denied arbitration in a wrongful death suit because an arbitration clause in its preadmission agreement didn't meet strict requirements set out in the Texas Medical Liability Act: that the notice be bold, in 10-point type, with a conspicuous warning to the patient, and include a disclaimer that the agreement is invalid unless signed by the patient's attorney.

The court held the state law's requirements are preempted by the Federal Arbitration Act, rejecting the argument that the federal McCarran-Ferguson Act shielded the TMLA from preemption.

With the strict arbitration notice requirements in the TMLA off the table, health care lawyers say more providers are likely to require patients to sign an arbitration clause before treatment, particularly in nursing homes, other long-term care facilities and small hospital chains that want to control litigation costs and reduce negative publicity.

"It's a big deal," Monte James of Jackson Walker LLP said, adding that he’s telling his clients the ruling will have a significant effect on the health care industry in Texas. The language in the TMLA meant he was never fully comfortable telling clients it was safe to include an arbitration clause in their admission agreements because violating the notice requirements left physicians open to penalties under the state's Occupations Code and left health care facilities potentially liable under the Texas Deceptive Trade Practices-Consumer Protection Act.

"I suspect that most savvy nursing home operators and hospitals will put arbitration agreements in their admissions packets and you'll see this in the coming years," James said.

Malpractice claims are already difficult to bring in Texas and expensive to try, so adding arbitration costs on top of that further dissuades plaintiffs and eliminates the potential an inflamed jury might award a big number to a sympathetic plaintiff, he said.

James said he's convinced the ruling will lead to fewer malpractice claims, as plaintiffs see less of an upside to bringing a dispute to an arbitration panel. And he said nursing homes are more apt to adopt

new arbitration agreements than the state's large hospital chains because they are typically owned by smaller companies and have fewer resources to fight litigation.

"I think that they probably would benefit across the board by these arbitration provisions and it probably would even further decrease the number of cases brought against them," he said.

David Walsh of Chamblee Ryan Kershaw & Anderson PC, whose practice includes defending medical malpractice claims, said the TMLA's arbitration requirements were so onerous that most health care providers "didn't even bother with them." No patient would show up to the emergency room with a lawyer ready to sign off on an arbitration agreement, he said.

"In the next year or two, the biggest thing that's going to happen is seeing a big push to get arbitration agreements signed," Walsh said, especially among the state's nursing homes.

He said because most cases against a nursing home wouldn't include a claim for economic damages, and state law caps noneconomic damages against a facility at $250,000, it may be prohibitively expensive to bring a claim against a nursing home in arbitration because a plaintiff has to share in the cost of the proceeding on top of paying legal fees.

In the Fredericksburg case, Princeton Place Rehabilitation and Healthcare Medical Center had moved to compel arbitration in a health care liability lawsuit launched by former patients and residents, or representatives of their estates, who claimed they were neglected, abused and denied appropriate medical and nursing care. A trial court denied the motion, and the Fourth Court of Appeals affirmed.

The appellate court held the TMLA's arbitration requirements are part of a law enacted for the purpose of regulating the business of insurance within the meaning of the McCarran-Ferguson Act and were protected from FAA preemption.

But the Texas Supreme Court held the arbitration section of the TMLA isn't related to performance of an insurance contract between either the patient and her insurer or the health care provider and its insurer, so the McCarran-Ferguson Act didn't apply.

Greg Cardenas of Byrne Cardenas & Aris LLP, who represents hospitals and other health care providers, said he thinks the ruling's impact is more about perception. Because the Federal Arbitration Act doesn't have the same requirement an arbitration clause be bold, in 10-point type and conspicuous, he said the Fredericksburg Care decision will embolden facilities that want the possibility of arbitration but don't want the inclusion of an arbitration clause in their admission packet to scare off potential patients.

"Perhaps a provider chose not to market that in their admission packets or not to use arbitration because they didn't want to appear to be asking a patient to give up their right to a jury trial, or didn't like the look of it," Cardenas said. "Now, providers can say, 'We don't have to be as conspicuous, we can put our provision in the middle of the contract, it won't jump off the page. If we favor arbitration, it doesn't have to be as obvious anymore.'"

Cardenas said arbitration is no longer as inexpensive or fast as it once was, and isn't as desirable for health care providers in most jurisdictions, with an exception for disputes that arise in areas where juries are notorious for handing out large verdicts, the stereotype being South Texas, the Rio Grande Valley and some parts of East Texas.

Walsh said defense lawyers in much of the state believe juries have a lot of respect for health care providers, and defendants tend to do well in court. And he said even in parts of the state where a large jury verdict looms ominously, some health care providers prefer litigation because they know they have a good shot at overturning an adverse verdict in Texas' relatively conservative appellate courts.

"I don't know that everybody's going to be fully on board with this immediately," he said.

And still unknown is how a court would apply defenses to arbitration agreements in a medical malpractice case like unconscionability or duress, he said. A plaintiff who wants to avoid arbitration might argue he was in a uniquely vulnerable position to be taken advantage of when he signed an admission agreement that had an arbitration clause, whether that was checking into a nursing home or seeking treatment for an urgent illness or traumatic injury, he said.

"I don't know how the courts are going to shake that out," Walsh said.

Most facilities already have an arbitration agreement in their admissions packets, even if courts were reluctant to enforce those agreements, according to Richard Cheng of Anderson Kill PC, who specializes in long-term care and was the general counsel for a large nursing home provider for three years. He expects the Fredericksburg Care decision to cause a more gradual increase in malpractice arbitrations, rather than a sudden spike.

"I don't believe that health care providers are going to have an internal policy or practice to arbitrate everything," Cheng said. "You have to evaluate it on a case-by-case basis — you're going to have to weigh the pros and cons, the cost and benefits on a case-by-case basis."

Weighing against arbitration is its cost, and the general finality of an arbitrator's decisions, Cheng said. It's difficult to overturn an arbitration award, which a provider may not want if it's dealing with an arbitrator who is not well-educated in the nursing home or long-term care industry, he said.

Factors that may weigh in favor of arbitration include the expense of litigation, which comes with more burdensome discovery, and the negative publicity that can accompany a public malpractice lawsuit, he said.

James said he thinks smaller hospitals are likely to adopt an arbitration requirement, but larger hospital chains may not, because they already benefit from medical malpractice tort reforms enacted by the state in 2003 and saw a steep decline in litigation.

And he points out so-called "tort claim hospitals" are unlikely to adopt arbitration practices because they have even more protections against malpractice claims. That group includes public hospitals, operated by a city, county or hospital district, which have important tort claim defenses in state law that privately owned hospitals don't.

"It's wholly possible some providers would decide: 'We're handling it just fine right now in the court system, we don't have much litigation, we're not going to mess with it,'" James said. "That would not be an imprudent decision."

Fredericksburg Care was represented by Shawn C. Golden and Roy R. Barrera of Golden & Barrera PC.

Perez was represented by Gavin McInnis and Marynell Maloney of Marynell Maloney Law Firm PLLC.

The case is Fredericksburg Care Co. LP v. Perez et al., case number 13-0573, in the Supreme Court of the State of Texas.

--Editing by Katherine Rautenberg and Mark Lebetkin.
