Health Care LEGAL UPDATE

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Enforceability of Patient Arbitration Agreements

By Vince Hess

If a health care provider in Texas wants an enforceable agreement with its patient requiring arbitration of disputes about the quality of care, does the provider need to have the patient's lawyer sign the arbitration agreement? Hospitals, nursing homes, clinics and physicians might have thought that they could legitimately avoid this requirement of Texas law, but a recent decision by a Texas court of appeals could mean that the requirement of a lawyer's signature applies in all instances — unless the Texas Supreme Court acts.

The practical effects of such a requirement on the intake process at hospitals, nursing homes, and other health care providers are not clear. The effects could be severe for those providers who strongly prefer arbitration of disputes about the quality of their care. And what can they do if a patient does not even have a personal lawyer?

The ruling at issue, which was recently issued by a Texas court of appeals — and which is now pending in the Texas Supreme Court — could require nursing homes, and perhaps other health care providers, to revise their arbitration agreement forms for their patients. In particular, in order to be enforceable as to health care liability claims (such as negligence in treatment), the arbitration agreements would need to include the notice disclosing patient's rights required by the Texas medical liability statute. The statute also requires signature by the patient's lawyer. The parties have recently submitted briefs to the Texas Supreme Court, which has not, as of press time, decided whether to consider the ruling by the court of appeals.

Texas Law Generally Favors Arbitration Agreements

Arbitration agreements are generally enforceable, including arbitration agreements in a health care context— such as in the relationship of doctor-patient, pharmacy – pharmacy benefits management company, and nursing home – patient.

Enforceability of Arbitration Agreements

The standards for whether an arbitration agreement may be enforced are, in essence, whether an agreement to arbitrate exists and whether the claims at issue fall within the scope of the agreement to arbitrate.

An agreement to arbitrate does not need to be in any particular form (subject to the disclosure requirements discussed below) but the language must clearly indicate the parties' intent to arbitrate. For example an arbitration agreement does not have to be signed so long as it is in writing and the circumstances show that the parties agree to it. Further, the agreement to arbitrate does not have to be set forth expressly in each contractual document covered by the agreement, and the arbitration agreement can be incorporated by reference in the other contractual documents.

The strong presumption favoring arbitration is well recognized in the case law. Courts must resolve any doubts about the scope of an arbitration agreement in favor of arbitration.

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The Deficit Reduction Act of 2005

By Maria Smith

On February 8, 2006, President George W. Bush signed the Deficit Reduction Act of 2005 (the "DRA") into law. It is anticipated that the DRA will reduce Medicare and Medicaid expenditures by over $11 billion. This synopsis highlights certain Medicare and Medicaid provisions, found in Titles V and VI of the DRA, that impact health care providers.

HIGHLIGHTS

Hospital Quality Improvement. The DRA increases the penalty against hospitals that participate in Medicare's Hospital Quality Alliance and fail to report their quality of care data. For 2007 and thereafter, non-reporting

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Enforceability of Patient Arbitration Agreements

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Texas Medical Liability Statute

The Texas medical liability statute allows for "a physician, professional association of physicians, or other health care provider" to request or require that a patient or prospective patient execute "an agreement to arbitrate a health care liability claim." The statute defines "health care liability claim" as, in part, a claim "against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care." However, the arbitration agreement must contain a notice in 10-point boldface stating, in part, that the patient's attorney must also sign the agreement. The notice must also state that the agreement "contains a waiver of important legal rights, including your right to a jury."

Some health care providers evidently have tried to avoid the Texas arbitration notice requirement by instead including in the arbitration agreement a provision expressly stating that the agreement is governed by the Federal Arbitration Act (FAA), so that requirements of Texas law with respect to arbitration clauses would be preempted (or superseded) by federal law. As a result, the notice required by the Texas medical liability statute would be inapplicable, and an arbitration agreement would be enforceable even without the Texas notice.

In the absence of an express choice of law clause, some health care providers evidently have tried to avoid the Texas arbitration notice requirement by offering evidence to a court that the relationship between the parties affects or involves interstate commerce, and consequently federal law, not Texas law, would apply. For example, the fact that Medicare payments were made to a nursing home to help pay for the patient's care has been found sufficient to establish interstate commerce and therefore the applicability of the FAA. Similarly, the FAA was found to apply to a chiropractor who used equipment purchased outside of Texas, who obtained malpractice coverage from a carrier in California, and whose patients were covered mostly by carriers located outside of Texas.

"Reverse Preemption" of the FAA by the Texas Medical Liability Statute

A decision last July by the First District Court of Appeals in Houston has led to uncertainty as to whether the notice under Texas law is required for an arbitration agreement to be effective as to a "health care liability claim" regardless of the applicability of the FAA.

In *In re Kepka,* a patient died at a nursing home, and the patient's widow brought suit against the home for negligence and gross negligence, asserting claims under both the Texas wrongful death statute and the Texas survival statute. The nursing home sought to enforce an arbitration agreement signed by the widow when the decedent was admitted to the nursing home. The arbitration agreement included a provision expressly providing that the FAA applied, and it included a notice of waiver of jury trial. However, the agreement did not include a signature by the patient's lawyer. The trial court ordered arbitration, but the court of appeals disagreed.

Instead, the court of appeals found that another federal statute "reverse preempted" the FAA, and consequently the Texas arbitration notice requirement applied. The other federal statute in question, the McCarran-Ferguson Act, provides, in short, that federal law does not invalidate or supersede "any law enacted by any state for the purpose of regulating the business of insurance."

The court of appeals determined that the Texas arbitration notice requirement was part of an overall statutory scheme enacted with the purpose of decreasing the costs of claims relating to health care, in order to make insurance reasonably affordable so providers could have protection from liability and so consumers could have more accessible health care. As a result, the Texas statute had the intent of controlling the relationship between health care insurers and their insureds (health providers). Consequently, the McCarran-Ferguson Act prevented the FAA from preempting the Texas arbitration notice requirement. Because the arbitration agreement did not comply with the Texas arbitration notice requirement, the widow's claims could not be ordered to arbitration.

The court of appeals acknowledged that this was a case of first impression. The nursing home has requested review by the Texas Supreme Court, arguing that the Court should review this matter in part because it is a case of first impression. As of press time, the Texas Supreme Court has not announced whether it will review the case.

Other litigants are now arguing reverse preemption to avoid arbitration agreements. In an opinion several months after the court of appeals decided In re Kepka, the Texas Supreme Court expressly declined to consider the issue of reverse preemption in another case involving enforceability of a nursing home's arbitration agreement. The Texas Supreme Court said the question of reverse preemption had not been raised in the lower courts and therefore the Court would not address it. Evidently the issue of reverse preemption was raised for the first time in that case after the decision in In re Kepka. Another Texas court of appeals has rejected a reverse preemption argument involving the Texas Workers' Compensation Act, because even if that case involved a claim under the Act, the court found no inconsistency between the Act and the FAA.

If the Texas Supreme Court upholds the ruling in In re Kepka, the effect on health care providers who want enforceable arbitration agreements with their patients could be severe.

If you have any questions regarding arbitration agreements, please contact Vince Hess at (214)740-8732 or vhess@lockeliddell.com ■