

Senior Living and Long-Term Care Blog

Perspectives on the legal trends, regulatory policy and other issues facing the senior living and long-term care industry



Signing on the Dotted-Line: Arbitration Clauses Have Found New Footing in Texas Nursing Home Admission Agreements

By Kimberly Gordy and Daniel Sternthal

The fog that has surrounded the enforceability of arbitration agreements between providers and residents in Texas nursing facilities has recently dissipated a bit thanks to a recent Texas Supreme Court decision.

According to *Fredericksburg Care Co. v. Perez*, a recent opinion by the Texas Supreme Court, a long-term care facility was entitled to arbitrate a dispute—rather than going to court—even though the facility’s admission agreement, which contained an arbitration provision, did not conform to the state requirements under the Texas Medical Liability Act (TMLA), which are perceived by many providers as overly burdensome.

Prior to this decision, such arbitration clauses drafted in Texas had to satisfy terms set out in Section 74.451 of the Texas Civil Practice and Remedies Code, unless the Federal Arbitration Act (FAA) preempted the State law. Under TMLA, Healthcare entities, including nursing home providers, were required to draft their arbitration clause in conspicuous, large, bold-faced font, and insert consumer protection warnings advising residents that they were waiving important legal rights. TMLA even required that the patient’s attorney sign the agreement. Given these stipulations, many long term care providers shied away from arbitration clauses, often concerned that the language would alarm potential residents and expose the provider to liability under the Texas Occupations Act or the Texas Deceptive Trade Practices Act.

Now, *Fredericksburg Care Co. v. Perez* has lessened the ambiguity for providers regarding whether the required standard is the TMLA or the FAA. In *Fredericksburg*, the family of a patient sued the facility, alleging negligent care and wrongful death. When *Fredericksburg* moved to compel arbitration, the Plaintiff argued that the agreement was void because the clause was not in 10-point boldface type and did not contain consumer warnings. *Fredericksburg* argued that the agreement was actually governed by the FAA. The dispute went all the way up to the Texas Supreme Court, and the Court made three key findings:

1. The FAA did apply to the arbitration clause because the pre-admission agreement affected interstate commerce through the facility’s payment by Medicare.
2. Even though Texas requirements were not met, the clause satisfied the FAA requirements that it be in writing, agreed to by all parties, and cover that claim at issue; and perhaps of most significance.

3. The Court held that the TMLA requirements do go beyond the FAA requirements and, because they directly conflict with the FAA, FAA preemption applies. The Plaintiff challenged this point, arguing that the McCarran-Ferguson Act, which exempts state insurance law from federal preemption, should apply, thus triggering the TMLA requirements. However, the Texas Supreme Court held that the TMLA provision in Texas only has a “tenuous impact” on the business of insurance, and was intended only to apply to the provider-patient relationship. For this reason, the Court held that the McCarran-Ferguson Act does not apply, and the FAA does preempt Texas law under these circumstances.

So what does this mean for providers going forward?

It means that providers are more likely to be able to enforce binding arbitration even if the provision does not conform to the TMLA requirements, so long as the underlying agreement affects interstate commerce, and the arbitration provision satisfies the FAA specifications.

The *Fredericksburg* case has made it easier for providers looking to arbitrate healthcare liability claims in the nursing home context. However, it is important to keep a few things in mind before automatically implementing arbitration in a facility. The FAA requirements mandate that the party give proper consent—this is an important consideration in the long term care context, because, while a patient or resident may still have the capacity to consent to medical treatment, he or she may not meet the more stringent standard set for capacity to contract. Operators should ensure that the resident either has full capacity to contract, or a designated legal representative is available to sign and proper documentation of such representation is obtained. Providers should also keep in mind that, while arbitration has many benefits, it can sometimes prove more expensive than litigation, if all claims fall under the arbitration provision and the end result is not subject to appeal. Further, the state law monetary limits on a nursing home resident’s recovery do not apply.

For these reasons, providers should give due consideration before incorporating arbitration provisions into their admission agreements and, if they decide to do so, ensure that they implement the provisions in a way that is consistent with applicable law, including the *Fredericksburg* case.

If you would like further information on this topic, please contact a member of the [Senior Living & Long-Term Care Team](#), your Seyfarth attorney, [Joan Casciari](mailto:jcasciari@seyfarth.com) at jcasciari@seyfarth.com, [Daniel Sternthal](mailto:dsternthal@seyfarth.com) at dsternthal@seyfarth.com or [Brian Ashe](mailto:bashe@seyfarth.com) at bashe@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Senior Living and Long-Term Care Blog is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Senior Living and Long-Term Care Blog | April 15, 2015

©2015 Seyfarth Shaw LLP. All rights reserved. “Seyfarth Shaw” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.