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Many Fear Ruling Moves Med Mal to Arbitration

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The prospect of moving medical malpractice litigation away from Texas state district courts and into arbitration is a frightening prospect for some plaintiff and defense lawyers alike.

Plaintiff lawyers fear the unseemly prospect of health care providers requiring patients to give up the right to a trial by jury before receiving treatment. And defense attorneys worry doctors could give up far too much in the way of their appellate rights if an arbitrator misapplies the state tort reform laws designed to protect their clients.

Those are just some of the reasons why organizations representing both sides of the bar are now calling on the Texas Supreme Court to reconsider a recent decision they believe could open up those possibilities.

The case that concerns the Texas Trial Lawyers Association, the Texas Association of Defense Counsel and the Texas Chapter of the American Board of Trial Advocates is *Fredericksburg Care Company v. Perez.*

In that March 6 decision, the high court reversed

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Delayed Requests for Execution Stays + CCA = Contempt Citations

Lawyers Point to Fifth Circuit's Alternative Approach

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The Texas Court of Criminal Appeals has relented slightly in its battle with well-known death-row defense lawyer David Dow by allowing him to represent Robert Lynn Pruett, a convicted murderer scheduled for execution on April 28.

By doing so, the state's highest court of appeals for criminal cases made an exception for Dow, who was suspended Jan. 14 from practicing before it for one year due to his alleged delayed filing of a request for a stay of a scheduled execution.

Dow

The appeals court continues to bar Dow from representing his other clients before it without obtaining prior permission.

The CCA's suspension of Dow, a University of Houston Law Center professor who represents perhaps more death-row defendants than any other Texas lawyer, throws into high relief the appeals court's aggressive policies and practices as applied to criminal defense lawyers who file emergency requests for stays of execution.

Since the court initiated a 2008 rule setting a time limit on when such requests can be filed before a scheduled execution, the court has asked criminal defense lawyers six times to show cause for allegedly untimely filings. In five of those six instances, the court has found defense counsel in contempt. The one exception was Lydia M.V. Brandt of The Brandt Law Firm in Richardson. Citing her thorough explanation of the reasons and circumstances of her untimely filing, Sian Schilhab, the appeals court's general counsel, told Brandt in a Sept. 13, 2011, letter that she no longer would be required to appear at a show cause hear-

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Judge Denies DOJ Request

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A Texas federal judge has denied the Obama administration's request to allow its executive actions on immigration policies to temporarily move forward. The same judge also issued another order stating he was "extremely troubled" by federal government lawyers' representa-

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two lower rulings denying a nursing home defendant's motion to compel arbitration in a wrongful death case—even though an arbitration agreement between the defense and the plaintiffs did not comply with a notice provision found in §74.451 of the Texas Civil Practices & Remedies Code.

That notice provision is part of the Texas Medical Liability Act, the 2003 omnibus tort reform law passed by the Texas Legislature. Specifically, §74.451 states that for an agreement to arbitrate a heath care liability claim to be valid, it must contain a warning in bold, 10-point type that it must be signed by an attorney of the patient's choosing.

The high court ruled unanimously in *Fredericksburg Care* that the Federal Arbitration Act (FAA), which has no such notice provision, preempts §74.451.

To arrive at his decision, Justice Paul Green rejected the plaintiffs' contention that the federal McCarran-Ferguson Act (MFA) applies in *Fredericksburg Care*. The MFA provides an exemption to federal preemption if a state statute was enacted for the "purpose of regulating the business of insurance."

"Section 74.451 of the Texas Civil Practices & Remedies Code was not a law enacted by the Texas Legislature for the purpose of regulating the business of insurance," Green wrote. "It simply applies to agreements to arbitrate health care liability claims between patients and health care providers. Accordingly, the MFA does not exempt §74.451 from preemption by the FAA, and the trial court should have granted Fredericksburg's motion to compel arbitration."

The plaintiffs filed a motion for rehearing in *Fredericksburg Care* on March 24. It urges the court to follow a Colorado Supreme Court decision that reached the opposite conclusion about the MFA's application to Colorado's health maintenance organizations. The Texas Supreme Court has yet to rule on the motion for rehearing.

The rehearing motion has drawn the amici support of both the Texas Association of Defense Counsel and TEX-ABOTA (Texas Chapters of the American Board of Trial Advocates), an organization comprised of both plaintiff and defense lawyers dedicated to the preservation of the right to a jury trial.

TEX-ABOTA's March 27 amici brief argues that few patients can appreciate the effect of signing a pre-dispute arbitration clause when seeking health care and *Fredericksburg Care* "effectively sanctioned the unknowing waiver of Texas consumer's constitutional right to a jury trial."

While *Fredericksburg Care* concerns a nursing home, Joe Hood, a partner in El Paso's Windle Hood Norton Brittain & Jay who wrote TEX-ABOTA's brief, fears the decision will encourage other health care providers—such as doctors and hospitals—to place arbitration agreements in their patient contracts to keep potential medical malpractice cases out of state court.

"It will encourage a lot of providers to go in that direction. They perceive, incorrectly, that they are better off going to arbitration," said Hood, an appellate lawyer who defends medical malpractice cases. "But the reality is, when you go to arbitration you're going to have to live by it."

David Chamberlain, the president of TEX-ABOTA and former president of the Texas Association of Defense Counsel, agrees with Hood. He filed his own brief before the high court urging it to withdraw the *Fredericksburg Care* decision.

The Texas Legislature passed the 2003 tort reform measure as a way to reduce skyrocketing medical malpractice premiums, said Chamberlain, something he heard over and over as he monitored that legislation while serving as president of the defense counsel bar group.

"To say Chapter 74 had nothing to do with the regulation of insurance is just flat wrong. It's like almost no one on the court was around at that time," said Chamberlain, a medical malpractice defense attorney and partner in Austin's Chamberlain McHaney.

While doctors and hospitals may be tempted to sign arbitration agreements to keep litigation with patients out of a courtroom, that's not always a good idea, Chamberlain said.

"A defense attorney will tell you there are a lot of protections in Chapter 74 that can be applied in arbitration and sometimes they're not," he said. "And then the physician has no right to appeal."

Peter Kelly wrote an amicus brief on behalf of the Texas Trial Lawyers Association before the high court decided *Fredericksburg Care* advocating that the court reject the motion to compel arbitration. Now he represents the plaintiffs in *Fredericksburg Care,* and filed the motion for rehearing.

Kelly said he is encouraged by the amici support the motion for rehearing has received.

"On one hand the defense lawyers want to have the procedural protections for their doctor clients. And plaintiff lawyers want the procedural protections for their clients," said Kelly, a partner in Kelly, Durham & Pittard. "And all of these organizations … are deeply committed to the principle of a trial by jury."

Shawn Golden, a partner in San Antonio's Golden & Barrera who represents Fredericksburg Care, said the amici are missing the point of the high court's decision.

"I get where they're coming from, but this isn't a public policy case. It's a statutory interpretation case," Golden said. "Whether or not arbitration should be favored as a matter of public policy is not an issue that's before the court. Whether or not arbitration is a good or bad thing is not the issue before the court."

He added, "And you know, it really is an issue of federal importance. If these people have a problem with arbitration, maybe they need to talk to Congress about the Federal Arbitration Act." TNL

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tions in their litigation battle with Texas and 25 other states over immigration reform.

"This court expects all parties, including the government of the United States, to act in a forthright manner and not hide behind deceptive representations and half-truths," wrote U.S. District Judge Andrew S. Hanen of the Southern District of Texas in Brownsville in one of his two orders issued on April 7 in *Texas v. United States*.

In that order, Hanen called for the government lawyers to provide by April 21 all related documentation to an advisory they provided to the court.

ESMER OLVERA

Hanen

That advisory informed the court of the actions U.S. Citizenship and Immigration Services took before it issued a Nov. 20, 2014, memorandum announcing it would not consider what's known as "deferred action for childhood arrivals" (DACA) program applications until Feb. 18.

The Obama administration initiated the DACA program to allow undocumented immigrants who came to the U.S. as children to remain.

In his order, Hanen concluded that the federal government, despite multiple assurances that no DACA-related actions would be taken before Feb. 18, granted about 100,000 such applications before announcing the proposed program. Texas and other states have sued to prevent the program from launching.

Not surprisingly, Texas politicians, who have previously expressed opposition to President Barack Obama's proposed immigration reforms, welcomed Hanen's orders—both the one chastising the government lawyers and the other denying its request to go forward temporarily with its immigration reforms.

Texas Attorney General Ken Paxton, whose office leads the plaintiffs in *Texas v. United States,* said in a statement issued after Hanen's rulings that the federal lawyers' misrepresentations reflect "a pattern of disrespect for the rule of law in America."

U.S. Senator John Cornyn, R-Texas, said in a statement that he was encouraged by Hanen's rulings.

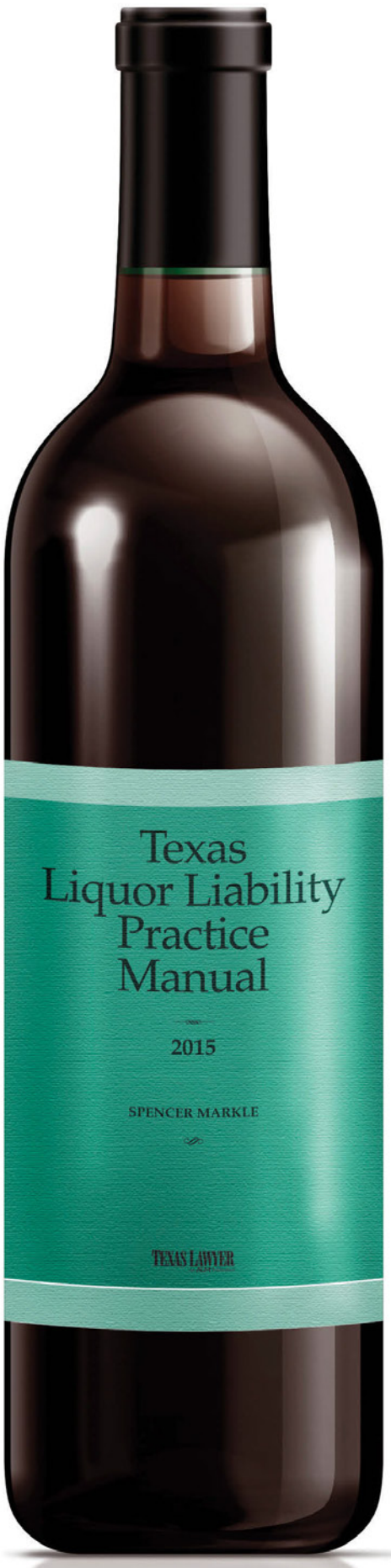
"Republicans in Congress will continue to stand up for the American people by fighting for the rule of law," Cornyn said.

In Hanen's order regarding the government lawyers' alleged misrepresentations, he wrote that other federal judges would consider striking the government pleadings as a result. But Hanen said the issues at stake deserve to be fully considered by appeals courts, including the U.S. Supreme Court, so he would not strike the government's pleadings at this juncture since the case would then end. He might, however, strike or issue other sanctions in the future based on the government lawyers' misrepresentations, Hanen wrote.

Emily Pierce, a spokeswoman for the U.S. Department of Justice, issued a statement after Hanen's rulings.

"We emphatically disagree with the district court's order regarding the government's statements," she said.

The federal government will continue its appeal of Hanen's injunction barring the launching of the DACA program at the U.S. Court of Appeals for the Fifth Circuit, Pierce added. TNL



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Spencer Markle, a partner at Markle • De La Cruz, LLP, is a veteran trial lawyer with more than 30 years of litigation experience. He has handled over 100 jury trials and over 100 dram shop cases from both sides of the docket, including the seminal case, *FFP Operating Partners v. Duenez*.

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