Supreme Court Rejects Med Mal Arbitration Fight

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Law360, New York (January 8, 2018, 6:48 PM EST) -- The U.S. Supreme Court declined Monday to review a Florida appellate ruling that found a Kindred unit's patient arbitration agreement unenforceable because it ran afoul of state law, despite the health care provider's warnings that the ruling could render every health care arbitration agreement in the Sunshine State "unenforceable."

The high court's refusal to grant Kindred Hospitals East LLC's certiorari petition is the latest move in a series of running battles over the enforceability of health care arbitration agreements in the Southeast.

Those fights, in turn, stem from a more fundamental dispute between state courts and the Supreme Court over the scope of the Federal Arbitration Act, a long-standing legal tug-of-war that both sides in the dispute at hand attempted to use to their advantage in their briefs.

"If the ruling below is permitted to stand, then every contractual agreement to arbitrate healthcare disputes in Florida would be unenforceable," Kindred had written in its petition. "Equally troubling, it could inspire other state courts to exhibit the same cavalier disregard of [the Supreme Court's] decisions."

Marianne Klemish had sued Kindred and several doctors for medical malpractice in state court after she suffered unspecified injuries during a 2012 stay at an Ocala, Florida, hospital, a move Kindred argued was prohibited by an arbitration agreement signed by both parties.

Florida's Fifth District Court of Appeal sided with Klemish in July 2016 and overturned a trial court's ruling that compelled the parties to go to arbitration, per the terms of the contract.

The appeals court found that the arbitration agreement was invalid because it selectively incorporated provisions from Florida's Medical Malpractice Act that were favorable to Kindred and left out provisions favorable to patients.

Kindred's arbitration agreement would have still required patients to have a third-party doctor sign off on the reasonable possibility of medical malpractice claims, for example, but would not require Kindred to admit liability upfront and only haggle over the size of the award, as the MMA does.

Florida's Supreme Court declined to hear the dispute, after deciding a **nearly identical case** in favor of a patient in October. The health care provider in that suit had also attempted to bring the case to the U.S. Supreme Court, a request **the court denied**.

Kindred **called the Fifth District's Klemish decision** "yet another in a long line of state court decisions ignoring or seeking to evade" the Supreme Court's FAA precedents," saying it flies in the face of those decisions. The Supreme Court has generally held that the FAA strictly limits state courts' ability to invalidate arbitration agreements.

"The court held that a contractual arbitration agreement between a healthcare provider and a patient is unenforceable unless the agreement mirrors the statutory scheme outlined in the Florida MMA," Kindred wrote in its petition. "This 'arbitration-specific' rule stands in stark contrast to [the Supreme Court's] repeated instruction that the FAA preempts state-law rules that 'single out' arbitration contracts … 'for disfavored treatment.'"

Klemish died in January 2017 at 62, and in her estate's response to Kindred's petition, the estate said the Supreme Court did not have jurisdiction to hear the suit, since Kindred never raised the FAA preemption argument before the trial court or the Fifth District. On top of that, the contract at issue never mentions the FAA, the estate said.

For those reasons, "the case would be a poor vehicle for deciding any issue of the scope of FAA preemption," the estate wrote. "A case in which the issues had been aired and addressed below would be a vastly superior choice for consideration by this court."

The estate acknowledged that ever since the landmark 1984 Southland Corp. v. Keating decision, the Supreme Court has almost always ruled that the FAA wins out over conflicting state law when faced with the question.

The high court's 2015 case DirectTV Inc. v. Imburgia, for example, held that the FAA preempted California law that was hostile to class action waivers.

And in May 2017, the Supreme Court **reversed a decision** by Kentucky's high court and upheld the enforceability of a different Kindred unit's arbitration agreement with a patient. Kindred cited that ruling repeatedly in its Klemish petition.

Even so, the estate indicated she was willing to go to the mat if the Supreme Court did decide to hear her case, pointing to Justice Clarence Thomas' repeated dissents in FAA-related cases to support her argument that the high court's FAA-friendly stance is misguided.

"If certiorari is granted, respondents will expressly ask this court to overrule Southland and adopt Justice Thomas's dissenting opinions" that the FAA does not apply to state court proceedings, the estate wrote.

Neither party responded Monday to requests for comment.

Kindred is represented by Andrew J. Pincus, Archis A. Parasharami and Daniel E. Jones of Mayer Brown LLP.

Klemish's estate is represented by Bryan S. Gowdy, Jessie L. Harrell and Rebecca Bowen Creed of Creed & Gowdy PA.

The case is Kindred Hospitals East LLC v. Estate of Marianne Klemish and Frank Klemish, case number 17-365, in the Supreme Court of the United States.

--Additional reporting by Carolina Bolado, Rachel Graf and Y. Peter Kang. Editing by Edrienne Su.