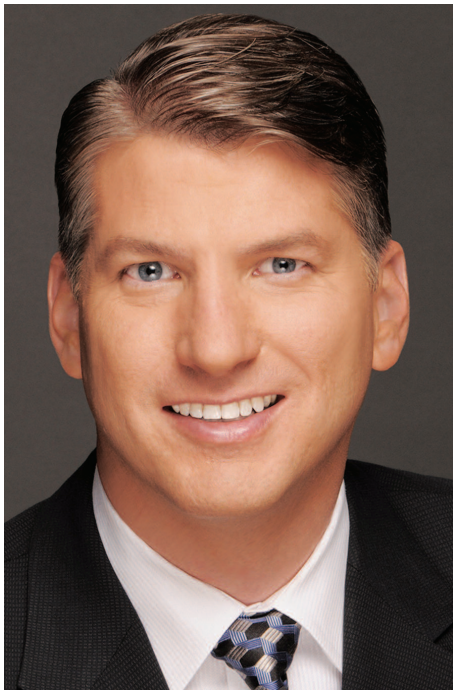
CHICAGO LAWYER

MARCH 2017

MED-MAL MATTERS



# BITTER PILL

## When 'routine' paperwork signs away your rights

**By THOMAS A. DEMETRIO and KENNETH T. LUMB**

In a climate where pre-dispute arbitration agreements are increasingly being forced upon consumers, the Supreme Court of North Carolina in January dealt a significant blow to these agreements in the physician-patient arena.

In *King v. Bryant*, No. 294PA14, the plaintiff, Mr. King, was referred to Dr. Bryant for evaluation and treatment of inguinal hernias. When he walked in for his initial appointment, Dr. Bryant's receptionist handed him a stack of intake forms to complete and sign while he waited to see the doctor. One of those forms was an agreement entitled "Agreement to Alternative Dispute Resolution," which Dr. Bryant's staff routinely presented to new patients along with other intake forms before they first met with the doctor. The agreement stated that any disputes would be subject to binding private arbitration; that at least one arbitrator had to be a physician board certified in the same specialty as Dr. Bryant and that the other two had to be either doctors or lawyers. The very last sentence stated that signing was "not a precondition to receiving health care services."

Mr. King filled out and signed the forms, assuming the paperwork was "routine."

Unfortunately for Mr. King, during the surgery, Dr. Bryant injured the distal abdominal aorta, causing bleeding, arterial occlusion and a thromboembolism. Mr. King was left with extensive medical bills, scarring, numbness and limited use of his right foot and leg. When he filed a lawsuit against Dr. Bryant and his employer, he was surprised to learn that he had allegedly signed away his 7th Amendment right to a jury trial.

The case eventually made its way to the Supreme Court of North Carolina on the defendants' motion to enforce the pre-dispute arbitration agreement, which argued that the Federal Arbitration Act (FAA) (9 U.S.C. 2) required enforcement and preempted any state law impediments to arbitration. Under the FAA and US Supreme Court precedent, only state law generally applicable to contracts can invalidate an arbitration agreement, and all provisions that treat an arbitration agreement differently are preempted.

The evidence before the court established that the plaintiff signed but had not read the arbitration agreement and had no idea it was there. When provided a copy by his attorney after the lawsuit was filed, Mr. King read it but did not understand it. It was undisputed that no one at Dr. Bryant's office provided any explanation regarding the agreement or even mentioned its existence.

The plaintiff argued that the defendants had breached a fiduciary duty and that the agreement was thus unenforceable by virtue of non-preempted state law. The defendants argued that no fiduciary relationship existed because Dr. Bryant had not yet seen and accepted Mr. King as a patient at the time he signed the agreement.

The court, however, noted that the technical existence of a physician–patient relationship was irrelevant if a fiduciary relationship had already been created. Under North Carolina (and Illinois) law, a fiduciary relationship is created whenever confidence and trust on one side results in superiority and influence on the other side. Part and parcel of a fiduciary's responsibility is the duty to disclose all material facts. A failure to do so, which benefits the fiduciary at the other party's expense, is a breach of the duty.

The court found that even before Dr. Bryant first laid eyes upon Mr. King, a fiduciary relationship had been established. Mr. King sought advice from a person with superior skill and knowledge. The majority of those "routine papers" he signed were related to medical history, information that is inherently sensitive and confidential.

The court also held that the defendants breached their fiduciary duty by failing to make full disclosure of the nature and importance of the agreement at or before the time Mr. King was asked to sign it. In addition, the court stated, the defendants benefited from Mr. King's action in signing the arbitration agreement by ensuring that any dispute would be resolved "using the forum, procedures, and decision makers of [the defendants'] choice." The court therefore held that the agreement was unenforceable and, because its decision did not rest upon grounds that treated arbitration agreements differently from any other agreement, it did not run afoul of FAA preemption.

Though Illinois courts have not addressed this specific issue, the outcome would likely be the same. In *Witherell v. Weimer*, 118 Ill. 2d 321 (1981), the Illinois Supreme Court recognized that there is a fiduciary relationship between physician and patient. That duty requires the physician to provide full disclosure and act in the best interest of the patient. It is hard to imagine a scenario where, after truly full disclosure, a patient would voluntarily choose to waive a constitutional right. More importantly, it is hard to imagine how a pre-dispute waiver could ever be in a patient's best interest. Therefore, merely asking a patient to sign one may violate the fiduciary duty. CL

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