

FPIC

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NEWS & VIEWS

Florida Court Upholds Med Mal Binding Arbitration Agreement



The enforceability of a mandatory binding arbitration agreement in the context of a medical malpractice claim was recently tested in a February 2008 decision by Florida's Second District Court of Appeal (Court) in Jonathan M. Frantz, M.D., P.A. v. Shedden (Frantz). The Court found that the arbitration agreement was valid and that the patient had a meaningful opportunity and ability to know and understand the terms of the agreement before signing it and that the terms of the agreement were reasonable and fair. In a separate analysis the Court also commented that the patient failed to identify any public policy or statutory right that was violated by the agreement. The Court reviewed the terms and the manner in which an arbitration agreement was entered into which were both very similar to the arbitration agreement and program developed by First Professionals Insurance Company (First Professionals) for its insureds. First Professionals' arbitration program has previously and continues to be structured in a way that is very similar to the facts presented in the Frantz case. Upholding the validity of such agreements will assist physicians in managing their exposure to medical malpractice judgments.

First Professionals' Binding Arbitration Program

When medical malpractice claims arise, an alternative to the courtroom is binding arbitration. First Professionals has developed a binding arbitration program (Program) for its Florida policyholders. The objectives of arbitration are to reduce legal costs and facilitate speedier resolution of claims. Binding arbitration means that physicians and patients agree to litigate – outside the court system – any claims that may arise from rendering or failing to render medical care and treatment before an arbitration panel. The arbitration panel is required to follow Florida law and their decision is binding upon the parties except in very limited circumstances. Binding arbitration affords potential benefits to both physicians and patients including:

- √ Lower legal costs for both parties;
- √ Lower indemnity payments through the use of an arbitration panel that, relative to a jury pool, will likely make a more well-reasoned and educated decision based upon the medical facts of the case; and
- √ A more prompt resolution of claims.

“ Upholding the validity of such agreements will assist physicians in managing their exposure to medical malpractice judgments. ”

How Arbitration Works

When the patient and the physician agree to arbitration, they agree to give up their constitutional right to have any potential medical malpractice claims resolved in court. The process begins when one party sends a notice demanding arbitration to the other party.

Upon receipt of the notice, the patient and the physician each name one person to serve as an arbitrator. These two arbitrators then pick the third arbitrator. First Professionals' claims staff will select the arbitrator for its policyholder. Ideally, this arbitrator will be someone who is:

COMPANY NEWS:

A.M. Best Co. has affirmed the financial strength rating of A- (Excellent) of FPIC Insurance Group, Inc. (FPIC) and its four member companies which are led by First Professionals Insurance Company. These ratings reflect FPIC's excellent risk-adjusted capitalization, specialty expertise and leading position within the medical professional liability market, as well as solid operating prospects going forward.

Information in this newsletter does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained here are generalized and may not apply to all practice situations. First Professionals recommends you obtain legal advice from a qualified attorney for a more specific application to your practice. This information should be used as a reference guide only.

First Professionals Insurance Company is Florida's Physicians Insurance CompanySM and the endorsed carrier for professional liability insurance by 22 county medical societies, 15 specialty societies, and three statewide associations in Florida.

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- √ A well qualified physician expert in the same specialty as the defendant;
- √ Someone who is savvy about the legal process;
- √ Experienced in testifying in legal proceedings; and
- √ Effective in analyzing and explaining medical issues.

The arbitrators function as judges, in that they listen to the evidence presented by both sides and they collectively render a decision as to liability and damages. The panel of three arbitrators sets up rules about the witnesses and evidence to be presented. If necessary, the arbitrators can issue subpoenas to compel witnesses to appear at the hearing or to obtain documents.

Each party is represented by his or her own attorney at the arbitration hearing. First Professionals provides its policyholders with an attorney and defense just as it does for claims it defends in a traditional court. Each party has the opportunity to submit evidence and to present and cross-examine witnesses.

Implementing Arbitration into a Physician Practice

First Professionals offers its policyholders two alternative arbitration agreements. They are the same, except for one key provision:

The “*Form A*” agreement requires patients to sign the arbitration agreement as a prerequisite to treatment; whereas

The “*Form B*” agreement permits a patient to terminate the agreement for a period of 30 days from their date of signature.

For policyholders who choose to participate in the Program, First Professionals will provide, at no charge, the arbitration agreement forms, along with a video or DVD in both English and Spanish. These tools allow physicians to effectively inform their patients about the purpose and fundamentals of the arbitration agreement.

Provided that a patient is not in an emergent or urgent condition, physicians present the arbitration agreement to patients (or their representatives) and provide an area where they can view the video or DVD, which lasts approximately five minutes. The patients and/or their representatives are asked to sign the agreement, a copy is given to them, and the originals are placed in the patients’ medical records.

Once a First Professionals’ policyholder completes the order form and signs the arbitration participation agreement, First Professionals will mail an arbitration contract and video within 10 business days. For additional information concerning participation in the Program, please contact Stephany Carter in the Marketing Department at (800) 741-3742 ext. 3064 or at carter@fpic.com. For legal issues concerning the Program please contact Rob Wortelboer, First Professionals’ General Counsel and Vice President at (800) 741-3742 ext. 3281 or at wortelboer@fpic.com. ■

Changes to Bankruptcy Laws Could Put Physicians’ Assets at Greater Risk

Editor’s note: Because our readers are primarily physicians, in most instances in this article we have used the words “physician” or “doctor” instead of “debtor.” The law does, however, apply to all debtors.

For those with some ability to pay all or a portion of their debts – like physicians – the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (Law or Code) will force them to do so. The Law took effect October 17, 2005, and its intended focus was individuals with consumer debt. However, one unintended consequence for physicians is that the Law could thwart their attempts to discharge excess medical malpractice judgments. According to Rob Wortelboer, First Professionals’ General Counsel and Vice President, the Law is complex and important parts are ambiguous.

“We expect clarifications of the Law through court decisions or legislative ‘fixes.’ They may take some time to work through the court system, and Congress can be slow to move or may not move at all,” he said. “Reaching settled, consistent and controlling law is further complicated by the fact that bankruptcy courts are not obligated to follow other bankruptcy courts’ rulings, nor are they necessarily required to follow the rulings of (non-bankruptcy) federal district courts.”



Rob Wortelboer
General Counsel and Vice President

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Chapter 7 Revisited

Chapter 7 bankruptcy, often referred to as “straight” or “liquidation” bankruptcy, is historically the most common type of bankruptcy filing. In Chapter 7, all of the doctor’s non-exempt assets (assets susceptible to creditors) are turned over to a bankruptcy trustee for liquidation, and distribution is then made to creditors based on certain priorities. A Chapter 7 bankruptcy is typically used to eliminate unsecured debts such as credit cards and medical bills. For some physicians it was also used to eliminate excess medical malpractice judgments, although the Law may restrict that, explained Wortelboer.

Under the amended Code, a Chapter 7 case can be dismissed for *abuse* if the physician has primarily consumer debts.

- **Primarily** means more than half of a physician’s debts are consumer debts.
- **Consumer debts** are those incurred for personal, family or household purposes. For example, mortgages for the family home, auto loans, credit card debts and domestic support obligations can be considered “consumer debt.” A medical malpractice judgment would not be considered a consumer debt.

The “Means Test”

Despite the Law’s definition of abuse, bankruptcy courts have rarely found that allowing a debtor with primarily consumer debts to file Chapter 7 constituted the abuse required to dismiss the case. Debtors with primarily consumer debt will be required under the Law to satisfy a “means test.”

Bankruptcy attorneys use computer programs to calculate the complicated “means test.” The means test looks at income and expense (for the past six months) and allows for food, clothing, personal care, transportation, housing, and entertainment.

The guidelines are similar to those used by the IRS to determine a doctor’s ability to repay delinquent taxes. These guidelines provide for allowances based upon local or regional data, and any income left after these items are paid is presumed to be available for debt repayment.

Physicians who seek bankruptcy relief will most likely fail the means test. Their incomes would usually be greater than the median in their communities, and would meet the requisite threshold of disposable income under the Code to pay back a portion of the debt. “If a physician fails the means test, abuse is presumed,” Wortelboer said. “Unless it’s rebutted by extraordinary circumstances, a Chapter 7 case could be dismissed – with potential fees and costs associated with dismissal charged to the doctor. More

likely it would force the doctor into a Chapter 13 or Chapter 11 bankruptcy.”

Impact on Lifestyle

Many physicians would not qualify for Chapter 13 due to debt limit requirements. Chapter 11 is a more likely scenario for physicians who do not qualify for Chapter 7, but still want bankruptcy protection and relief.

Chapter 11 is typically more expensive than Chapter 13 due to the associated fees and costs. Additionally physicians must propose a plan that meets stringent requirements in order to be confirmed by a bankruptcy court and be binding on physicians’ creditors.

Whether in Chapter 11 or Chapter 13, creditors will likely seek to have physicians fund their Chapter 11 or Chapter 13 plans with disposable income. Failure to make plan payments could result in dismissal of a bankruptcy case and subject physicians to debt collection remedies that would involve court appearances and depositions which could prove to be disruptive to physicians’ practices.

Impact on Homestead Exemption

Even if a physician qualifies for Chapter 7, the Law has amended the applicability of the important homestead exemption. Under the Florida Constitution, state residents have an unlimited exemption for their personal residences except for taxes, past due mortgage payments, debts secured by the property, or bills from home improvement contractors. Under the Law, the full exemption applies only if the doctor has resided within one or more Florida homes for 1,215 days (approximately 40 months).

If the doctor has not reached the 1,215 day threshold, the most he or she can protect is \$125,000 (or \$250,000 if married and jointly filing bankruptcy). It is also important to note that even if the physician has been in a Florida residence for 1,215 days there is a danger that the homestead exemption could be significantly limited.

Wortelboer said, “Taking actions such as paying down the mortgage or building a home addition to inject cash, typically a non-exempt asset, into the home, may not be exempt even if the investment was made within 1,215 days prior or if you purchased the home 1,215 days prior to filing.”

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Ten-Year Look-Back

The Code also added a new 10-year look-back provision. It allows the bankruptcy trustee to seek recovery of a transfer by a doctor to a “self-settled trust or similar device” of which the doctor is the beneficiary that was made with the intent to hinder, delay or defraud creditors, if made during the 10 years prior to filing a bankruptcy petition. This provision also applies to the value of the homestead exemption by the amount of equity traceable to proceeds of non-exempt property if the conversion was made within 10 years of filing and was made with the intent to hinder, delay or defraud creditors.

For example, a physician could not take \$100,000 in cash eight years before filing bankruptcy and use it to pay down a mortgage on a homestead, if it was done with the intention of hindering, delaying or defrauding creditors. This provision applies even if the doctor has met the 1,215 day homestead exemption requirement. This makes long-range bankruptcy planning substantially more difficult for physicians.

Time Means Money

With the implementation of the “means test” it is expected that more doctors will be forced out of Chapter 7 and into Chapter 11 or Chapter 13 bankruptcy relief. In such an event, the cost of litigating the bankruptcy will be far more expensive and time consuming. In fact, with aggressive creditors, a bankruptcy proceeding in Chapter 11 or 13 could cost as much money and time as the medical malpractice case that drove the physician into bankruptcy in the first place.

Robert (Bob) E. White Jr., President of First Professionals, said, “The new bankruptcy laws, and uncertainty in their application, make planning for the protection of a doctor’s assets more difficult and limit the doctor’s ability to discharge debts. Purchasing insurance is a prudent option to guard against a physician’s risk of professional liability exposure.”

For additional information regarding bankruptcy issues, please contact Rob Wortelboer, First Professionals’ General Counsel and Vice President at (800) 741-3742 ext. 3281 or at wortelboer@fpic.com. ■

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