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Provider Asks Justices To Review Fla. Arbitration Decision

By **Abraham Moussako**

Law360, New York (June 12, 2017, 4:47 PM EDT) -- A Tampa Bay-area clinic has asked the U.S. Supreme Court to review a Florida Supreme Court ruling that voided two provider-patient medical malpractice arbitration agreements on the grounds that they selectively included provisions from the state's Medical Malpractice Act favorable only to the doctors and thus went against the legislative intent of the law.

Dr. Eileen Hernandez and Women's Care Florida LLC petitioned for a writ of certiorari to the U.S. Supreme Court on May 26, asking it to hear the Florida Supreme Court's 5-2 decision in December 2016 upholding the voiding of an arbitration contract in a medical malpractice suit brought by Lualhati Crespo and her husband over their stillborn child. The clinic argues the Florida high court's decision is another example of state courts looking to find ways around the Federal Arbitration Act.

"The Florida Supreme Court's application of the [Medical Malpractice Act] to contractual arbitration agreements results in an interpretation of state public policy that is fundamentally inconsistent with, and therefore preempted by, the FAA," the petition says.

The petition argues that the Florida high court's ruling essentially used a state law to void an arbitration agreement, and was part of a "long line" of cases the U.S. Supreme Court has ruled on where states acted similarly. One of the decisions cited by Women's Care Florida was the high court's mid-May Kindred Nursing Centers LP v. Clark et al. ruling, which the petition describes as the court rejecting a "strikingly similar attempt" by a state court — in Kentucky — to go around the FAA.

In Kindred Nursing, the U.S. Supreme Court reversed the Kentucky Supreme Court's refusal to send to arbitration a wrongful death suit against a nursing home, pointing to its 2011 decision in AT&T Mobility LLC v. Concepcion — a case the instant petition also cites — that the FAA can preempt state laws prohibiting class action arbitration waivers. The justices at the time also noted that even a state law that does not explicitly ban arbitrations but is clearly intended to limit them can be overturned.

Bryan S. Gowdy, who represented the Crespos at the state courts, took a different view on the petition when reached by Law360 on Monday.

"The problem with [the clinic's] argument is that this provider specifically wrote and adopted in their agreement that they were applying the Florida Medical Malpractice Act and the Florida arbitration code, [and] made no mention of the Federal Arbitration Act in the agreement, or in any of the courts below until the motion for rehearing."

The clinic filed its motion for rehearing at the Florida high court in January. The Crespos responded later that month. The motion was denied Feb 27, according to the petition.

"The [federal law] arguments were clearly waived," Gowdy said.

Counsel for Women's Care Florida LLC declined to comment.

The Crespos' case stemmed from events in August 2011 when Lualhati Crespo, who was 39 weeks' pregnant and having contractions at the time, was turned away from her doctor's appointment because she was a few minutes late and given a new appointment for four days later. One day before the new appointment date, she delivered her stillborn son, Joseph Crespo.

Women's Care is represented by Erik P. Bartenhagen, Dinah Stein and Mark Hicks of Hicks Porter Ebenfeld & Stein PA.

The Crespos were represented at the Florida Supreme Court by Bryan Gowdy and Jessie Leigh Harrell of Creed & Gowdy PA. Counsel information before the Supreme Court was not available at the time of publication.

The case is Hernandez et al. v. Crespo et al., case number 16-1458, in the Supreme Court of the United States.

--Additional reporting by Nathan Hale, Y. Peter Kang, and Shayna Posses. Editing by Bruce Goldman.

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