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## THE BASSETT BULLETIN™

### ATTENTION TEXAS BUSINESSES: IS YOUR FEDERAL ARBITRATION CLAUSE UNENFORCEABLE?

The Fifth Circuit recently held that a Federal Arbitration Act (“FAA”) provision between a nursing home and a surviving spouse was unenforceable because another federal law, the McCarran-Ferguson Act (“MFA”), allowed the surviving spouse to claim that the contested FAA provision failed to satisfy Texas arbitration notice requirements. *In re Sthran*, 05-10-01176-CV (5<sup>th</sup> Cir. Oct. 2010).

Before *Sthran*, Texas companies could generally enforce their FAA arbitration provisions even if those provisions did not comply with Texas arbitration notice requirements because the FAA is a federal statute, and federal law generally pre-empts state law. After *Sthran*, Texas companies may no longer be able to compel federal arbitration without strictly following Texas arbitration notices procedures.

### THE FACTS OF *STHRAN*

In *Sthran*, a patient was admitted to a nursing home. Upon admission, the patient’s spouse signed an admission contract. The admission contract contained an arbitration provision pursuant to the FAA. The arbitration provision did not contain the proper language from the relevant Texas statute (“Texas Notice Statute”). The language from the Texas Statute is as follows:

“UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.”

*Tex. Civ. Prac. & Rem. Code Ann.* §§74.451(a).

The patient died while in the nursing home. The surviving spouse sued the nursing home for wrongful death and negligence. The nursing home moved to arbitrate the lawsuit under the FAA and the trial court ordered arbitration.

The surviving spouse appealed and argued that because the arbitration provision did not contain proper Texas notice requirements, the federal arbitration provision was unenforceable. Furthermore, the surviving spouse argued that the MFA prevented the nursing home from arguing that the state notice requirements did not apply to a federal arbitration provision.

The McCarran–Ferguson Act, 15 U.S.C. §§ 1011-1015, is a United States federal law that exempts the business of insurance from most federal regulation. The MFA provides, in pertinent part, “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance [ . . . ] unless such Act specifically relates to the business of insurance.” 15 U.S.C.S. § 1012(b).

Because the FAA does not “specifically relate to the business of insurance,” *Sthran* held that the FAA cannot supersede the Texas Notice Statute. *Id.* at p.4. As a result, the Texas Notice Statute is binding on health care providers who wish to use federal arbitration provisions in its contracts.

## MY BUSINESS IS NOT IN THE HEALTH CARE INDUSTRY. HOW DOES *STHRAN* AFFECT ME?

To reach its ruling, the *Sthran* court found that the Texas Notice Statute “was a law enacted for the purpose of regulating the business of insurance because it possessed the end, intention, or aim of adjusting the business of insurance [and] the relationship between health-care insurers and their insureds.” *Id.* at p. 4.

As a result, *Sthran* held that a nursing home was “in the business of insurance” because it had a business relationship with a liability insurer who would indemnify the nursing home for any damages it had to pay to the surviving spouse!

Therefore, if your company has any sort of relationship with an insurance company, such as general liability insurance, director & officer insurance, or malpractice insurance, your company may be found to be “in the business of insurance.”

## WHAT DOES THIS MEAN?

The *Sthran* decision brings federal arbitration provisions in Texas under closer scrutiny.

Does the *Sthran* decision affect your company? Ask yourself these questions:

1. Is my company related to the “business of insurance?” Even if you are not an insurance company, under *Sthran*, your company could be in the business of insurance if it has a business relationship with an insurance company.
2. Do my form contracts contain arbitration provisions pursuant to the FAA?
3. Is there a Texas statute that regulates what my arbitration provisions should say?

If you answered “yes” to all three questions, then *Sthran* may prevent you from enforcing your federal arbitration provision if that provision does not comply with Texas law. **Regardless of whether or not your company utilizes FAA arbitration provisions**, you must make sure that the arbitration provisions comply with Texas state law.



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