Nursing Home Arbitration Agreements: A Changing Landscape

Insights
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Because arbitration proceedings often offer a less costly and more efficient alternative to the burdens of protracted courtroom litigation, arbitration agreements are increasingly common in the nursing home industry. However, the current legal landscape regarding arbitration clauses in nursing home admission agreements is an active and evolving area of the law, and providers should be aware of the latest developments.

The Uncertain Status Of The CMS Rule

Last year, the Centers for Medicare & Medicaid Services (CMS) issued a final rule which would have prohibited long-term care (LTC) facilities from requiring incoming patients to agree to mandatory arbitration for subsequent disputes. The rule was scheduled to take effect on November 28, 2016 as part of a broader reorganization and revision of the regulations governing LTC facilities. Compliance with the rule would have been a requirement for those facilities that wanted to continue participating in the Medicare and Medicaid programs.

The federal CMS vaguely reasoned "that requiring residents to sign pre-dispute arbitration agreements is fundamentally unfair because, among other things, it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen." Thus the rule would have only prohibited *pre*-dispute arbitration agreements, although it would have included other safeguards for *post*-dispute arbitration agreements (and would not have impacted those agreements signed before implementation of the rule).

However, a federal court recently blocked the rule from going into effect, and now its future is uncertain. Shortly after the rule was announced, one of the leading national provider associations, the American Health Care Association (AHCA), along with three member nursing homes, challenged the rule's prohibition against pre-dispute arbitration agreements by filing suit in federal district court in Mississippi. The court granted the plaintiffs' motion for a preliminary injunction on November 7 and temporarily blocked CMS from enforcing the arbitration prohibition.

The court granted the injunction because it found that the plaintiffs proved they were likely to prevail on two grounds: that the rule is preempted by the Federal Arbitration Act (FAA), and that CMS does not have the authority to ban arbitration agreements under its generalized statutory mandate to promote resident "health, safety, and welfare."

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In the court's view, "CMS does not appear to have conducted its own independent study of whether arbitration agreements harm resident health." Specifically, the court criticized CMS's "sparse" administrative record used to justify the rule. In short, CMS failed to make requisite efforts to prove that arbitration had negative effects on the efficiency and fairness of dispute resolution in nursing home disputes, where the mental competency of residents entering the agreement is often at issue.

What Will The Future Hold?

In light of the injunction, CMS hit the brakes on enforcing the rule. In a memorandum sent to states and Medicare contractors in December 2016, the agency announced it would suspend enforcement of the rule until the injunction is lifted, and that Medicare surveyors will not audit facilities for compliance.

As of the date of publication, CMS has been relatively silent regarding its plan of action in response to the injunction. One possible option for the agency would be to reopen the administrative rulemaking process to further develop a record proving its theory that arbitration agreements have a negative impact on resident rights. If CMS pursues this option, it may request the court dismiss the case as moot, or stay the litigation pending completion of the revived rulemaking process.

On the other hand, it may decide that it wants to continue to litigate the matter in court, relying on the evidence it has already developed. After all, the November 7 court order was merely a preliminary injunction, and the parties could continue to argue about whether the order should become permanent. How the court would ultimately rule is difficult to predict.

While public policy pursuant to the FAA favors contractual arbitration provisions, courts are more hesitant to uphold them in the context of healthcare law, particularly in the nursing home industry. In fact, the court's order granting the preliminary injunction cautioned against "fundamental defects" of arbitration agreements due to patient mental competency issues, which could indicate the injunction is on shaky ground.

Court decisions from other jurisdictions seem to demonstrate similar concern for patient rights and mental capacity in the context of arbitration agreements. In response to this developing area of the law, the U.S. Supreme Court recently granted review of a case that will hopefully provide clarity about the enforceability of healthcare industry arbitration agreements. The Court's decision could well foreshadow how it would rule on the challenge to the CMS prohibition on mandatory arbitration.

On the other hand, it remains to be seen how the Trump administration will view the rule's provision banning mandatory arbitration clauses in nursing home contracts. After all, the president has vowed to dramatically lower regulatory burdens on business. Given that the nursing home industry is actively opposed to the new rule, the incoming administration could take steps to dismantle it before it ever takes effect.

What Should Nursing Homes Do?

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At this time, the law remains as it was prior to the rule's promulgation: LTC facility pre-dispute arbitration agreements are not necessarily invalid. However, it is essential that your process is transparent and that you address patient mental capacity issues head on when obtaining arbitration agreement signatures at the time of admission. This necessarily requires you to obtain powers of attorney granting an individual authorization to sign an arbitration agreement on a loved one's behalf.

Given the fluid nature of this issue, it will remain important to stay up to date on the developing law. The Healthcare Practice Group of Fisher Phillips will continue to provide you with updates as the legal landscape evolves.

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