CMS Federal Nursing Home Arbitration Agreement Ban Is Not Likely to Remain Unchallenged

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People in this country have long enjoyed the right to contract. Included with that right is the ability to agree to resolve potential disputes out of court and in arbitration. The Centers for Medicare & Medicaid Services' (CMS) new rule, independent of any congressional action and contrary to judicial opinions, says that if federal funds are used to pay healthcare costs to a nursing home, people no longer have the right to agree to arbitrate a dispute until after a dispute arises. CMS's action represents a fundamental shift in healthcare dispute resolution and contract law in this country that goes well beyond what CMS originally proposed and is not likely to go unchallenged.

On October 4, 2016, CMS published its final "Reform of Requirements for Long-Term Care Facilities" rule in the *Federal Register*, marking the first significant revision since 1991 for the conditions for participation for long-term care facilities. According to CMS, the final rule was "necessary to reflect the substantial advances that have been made over the past several years in the theory and practice of service delivery and safety" in the post-acute care setting.[1] The final rule implements much of the proposed rule that was released in July 2015, but in at least one significant case, goes much farther. Beginning November 28, 2016, patients and family members may no longer agree to binding arbitration agreements with long-term care facilities during the admission process. Plus, despite significant language about "forced" arbitration and "agreements as a condition of admission," the rule even bans optional arbitration agreements that are not a precondition to admission.

CMS Administrator Andy Slavitt stated in a blog post that the pre-dispute arbitration agreement ban will "strengthen the rights of residents and families in the event that a dispute arises with a facility."[2] However, CMS's authority to restrict parties' right to agree to arbitrate will certainly be litigated, especially when the agreement is not a precondition to admission. While the new rule appears to be inconsistent with the Federal Arbitration Act (FAA) and repeated Supreme Court decisions stressing the benefits of arbitration,[3] it is also an extremely broad and likely unconstitutional power grab by a federal agency.

For example, courts have consistently held that, to regulate arbitration, an agency must show evidence of Congressional intent to do so.[4] On several occasions, however, Congress has been presented with the option to grant authority to regulate arbitration agreements to agencies, and it

1 https://federalregister.gov/d/2016-23503 (last accessed October 2, 2016).

2 https://blog.cms.gov/2016/09/28/commitment-to-person-centered-care-for-long-term-care-facility-residents/ (last accessed October 2, 2016).

3 *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 132 S. Ct. 1201, 1203 (2012) (per curiam) (unanimously invalidating a state's public policy against arbitrating personal injury or wrongful death claims against nursing homes); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.").

4 The courts have held that a federal agency may not prohibit or regulate arbitration unless such regulation is based upon a reasonable interpretation of legislation evincing a congressional intent to bar arbitration. *See, e.g., Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002) (declining to enforce FTC regulations that would have prohibited arbitration of Magnuson-Moss Warranty Act claims); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 473 (5th Cir. 2002) (compelling arbitration despite FTC regulations that would have banned arbitration of claims); Shearson/American Express v. McMahon, 482 U.S. 220, 226 (1987) (holding that FAA requires arbitration of federal statutory claims unless overridden by clear congressional command).

has repeatedly declined.[5]

CMS responds to these challenges by claiming authority to issue the rule because it does not affect existing agreements and only regulates "the conditions of adoption of such agreements." Therefore, CMS argues, "the terms of the FAA are not implicated." And CMS has this authority in order to regulate participation in the Medicare and Medicaid programs. In particular, CMS claims that "pre-dispute arbitration agreements have a deleterious impact on the quality of care [under the Medicare and Medicaid programs]." However, any assertion that the use of arbitration agreements is at all tied to resident health and safety "simply perpetuates the historical prejudice against arbitration agreements that Congress sought to eradicate when it enacted the FAA some [90] years ago."[6]

Oddly enough, the new rule closes its comments on the arbitration agreement ban by arguing a point that does not even apply to the new ban and exemplifies its overreach: "it is ***unconscionable*** for LTC facilities to ***demand, as a condition of admission***, that residents or their representatives sign a pre-dispute agreement for binding arbitration." Indeed, CMS now also bans optional arbitration agreements that are not conditions of admission. Further, it goes without saying that the court system, not a federal agency, is the appropriate forum for unconscionability challenges to contracts.[7]

This ban on pre-dispute arbitration agreements is one of the most significant and headline-grabbing portions of the new rule. For the rule to withstand judicial scrutiny, Congress would have had to delegate this authority to CMS, which it does not appear to have done. Do not expect the rule to go unchallenged for long.

5 *See* Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong.; Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong.; Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Cong.; Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. (2008); Arbitration Fairness Act of 2009, S. 931, 111th Cong.; Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong.; and Consumer Fairness Act of 2009, H.R. 991, 111th Cong.

6 *Rainbow Health Care Ctr. v. Crutcher*, 2008 WL 268321, at *7 (N.D. Okla. Jan. 29, 2008).

7 In instances in which arbitration agreements have gone too far – for example, by shortening the time for claimants to file a claim – courts will declare the agreement unconscionable and unenforceable. *See, e.g., Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910 (Ct. App. Miss. 2007) and *Altera Healthcare Corp v. Estate of Jeanette Kelley*, 953 So. 2d 574 (Ct. App. Fla. 2007). The FAA also retains significant protections for consumers; it does not preclude parties from raising state contract defenses, such as fraud, duress, and unconscionability, as grounds for invalidating an arbitration agreement. *Doctor's Assoc., Inc., v. Casarotto*, 517 U.S. 681, 687 (1996). In fact, the United States Supreme Court has observed that trial courts continue to exhibit "hostility" toward arbitration agreements – hostility that the FAA was intended to expunge – and thus courts tend to look for reasons to invalidate arbitration agreements. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1745 (2011).

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