CMS Reverses Its 2016 Position on Pre-Dispute Arbitration

On June 8, 2017, CMS issued a proposed rule that reversed its position prohibiting pre-dispute arbitration agreements in long term care facilities.[1] This was the culmination of policy making and unmaking that, with respect to the latest clash on Skilled Nursing Facility/ Nursing Facility arbitration practice, started on October 4, 2016.[2]

2016

On October 4, 2016, CMS had issued its final rule providing for reform of the requirements that long-term care facilities must meet in order to participate in the Medicare and Medicaid programs. In the rule, CMS listed the requirements facilities needed to follow if they chose to ask residents to sign agreements for binding arbitration.

Further, and very alarming to long term care facilities, **the final rule prohibited pre-dispute agreements for binding arbitration**. Thus ensued a trail of actions including public comments arguing vociferously for and against the prohibition, a lawsuit asking for preliminary and permanent injunction, and CMS' rethinking of the prohibition.

On October 17, 2016, the American Health Care Association (AHCA) and a group of affiliated nursing homes filed a complaint in the United States District Court for the Northern District of Mississippi seeking a preliminary and permanent order enjoining agency enforcement of the prohibition on pre-dispute arbitration agreements regulation

On November 7, 2016, thirty-four days after the issuance of the regulation prohibiting pre-dispute arbitration agreements, the district court preliminarily enjoined enforcement of that regulation.[3] The court struck a serious blow to the prohibition.

- It held that the plaintiffs were likely to prevail in their challenge to the 2016 final rule;
- It concluded that it would likely hold that the rule's prohibition against LTC facilities entering into pre-dispute arbitration agreements was in conflict with the Federal Arbitration Act (FAA); and
- The court also reasoned that it was unlikely that CMS could justify the rule, or could overcome the FAA's presumption in favor of arbitration, by relying on the agency's general statutory authority under the Medicare and Medicaid statutes to establish rights for residents or to promulgate rules to protect the health, safety and well-being of residents in LTC facilities.

CMS honored the ruling and, on December 9, 2016, CMS issued a nation-wide instruction to State Survey Agency Directors. The agency directed them **not** to enforce the 2016 final rule's prohibition of pre-dispute arbitration provisions during the period that the court ordered

[1] 82 Federal Register 26649, June 8, 2017, CMS-3342-P.
[2] For the purposes of this article, the terms long term care (LTC) facilities, SNFs and NFs, and nursing homes are used interchangeably. LTC
[3] Id. at 26650.

injunction remained in effect. And, determining that "further analysis was warranted," it went back to the drawing board!

2017

The culmination was the prohibition's demise as of the new proposed rule. CMS reviewed the prohibition policy and concluded that an outright ban on pre-dispute arbitration agreements and the further restrictions on post-dispute arbitration agreements did not strike the best policy balance. This was especially so in light of the protections for residents CMS would include in their reconsideration and new rulemaking, and in light of subsequent review of the public comments that CMS received on the July 16, 2015 proposed rule (80 FR 42168) expressing support of arbitration in LTC settings.

In the proposed rule of June 8, 2017, CMS propounded policy reasons for its policy reversal but was forthcoming about the court's impact on CMS' actions. CMS stated:

> The district court's decision in granting the preliminary injunction against Enforcement of the prohibition on pre-dispute arbitration agreements indicated that CMS would at a minimum face some substantial legal hurdles from pursuing the arbitration policy set forth in the 2016 final rule.[4]

CMS declared that prohibition on **pre-dispute binding** arbitration agreements was removed. But it did not abandon all of its 2016 new arbitration policies. It retained those that focused on transparency surrounding the arbitration process and added it others, as follows:

- All agreements for binding arbitration must be in plain language;
- If signing the agreement for binding arbitration is a condition of admission into the facility, the language of the agreement must be in plain writing and in the admissions contract;
- The agreement must be explained to the resident and his or her representative in a form and manner they understand, including that it must be in a language they understand;
- The resident must acknowledge that he or she understands the agreement;
- The agreement must not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including federal and state surveyors, other federal or state health department employees, or representatives of the State Long-Term Care Ombudsman;
- If a facility resolves a dispute with a resident through arbitration, it must retain a copy of the signed agreement for binding arbitration and the arbitrator's final decision so it can be inspected by CMS or its designee; and
- The facility must post a notice regarding its use of binding arbitration in an area that is visible to both residents and visitors.

CMS also indicated that the current Executive Branch regulatory policy had an impact on the agency's revision. It stated:

[4] Id. at 26652.

> Additionally, we have reviewed the "Requirements for Long-Term Care Facilities," consistent with the January 30, 2017 Executive Order "Reducing Regulation and Controlling Regulatory Costs (E.O. 13771). We believe that a ban on pre-dispute arbitration agreements would likely impose unnecessary or excessive costs on providers.[5]

It further opined that "…this proposal is consistent with our approach to eliminating unnecessary burden on providers."[6] For those wishing to comment, the comments must be received by CMS no later than 5 p.m. on August 7, 2017.

Postscript and Opinion

Arbitration with respect to the nursing home industry, to borrow a term from Howard Glickman, is a "flashpoint."[7] In my opinion, it has been thus for a long time and will probably remain so for some time. It is common knowledge that the issue truly ignited in the 1990s when runaway tort liability in Florida, Texas and elsewhere became a causal factor for SNFs/NFs' use of arbitration agreements. The Wall Street Journal (WSJ) reported:

> The industry was alarmed in the late 1990s by a rash of huge jury awards. In one case, $83 million was awarded in the death of a Texas woman with infected bedsores; $95 million went to a California woman who fractured her hip and shoulder when she allegedly was dropped by nursing-home staff. Both awards were knocked down by the trial judges: the Texas judgment to $56 million, and the California award down to $3.6 million. **But plaintiffs' lawyers were newly drawn to nursing-home suits by the big awards.**[8]

The WSJ article by Nathan Koppel was cited by Representative Lamar Alexander in his opposition in 2008 to H.R. 6126 amending the Federal Arbitration Act to make unenforceable any agreement to arbitrate a dispute arising out of a contract between a long-term care facility and a resident, if the agreement was made before the dispute arose. See H.R. Rep.No. 110-894, pages 20 and 21.[9]

In conclusion, the nursing homes have survived this latest regulatory challenge unless there is another surprise in the final rule. But the intense dislike and mistrust of mandated arbitration will linger in several circles – e.g., advocates, trial lawyers, certain members of Congress and more. In order to stave off any further major challenges regarding mandatory pre-dispute arbitration for the time being, nursing homes must pay very close attention to the newly minted CMS guidelines.

---

[5] Id. at 26650

[6] Ibid.

[7] Howard Glickman, Nursing Homes Can Continue to Require Residents to agree to Binding Arbitration, Forbes Contributor, **https://www.forbes.com/sites/howardgleckman/2017/01/04/nursing-homes-can-continue-to-require-residents-to-agree-to-binding-arbitration/#6a2682102df9.**

[8] H.R. Rep.No. 110-894 at pages 20-21, Statement of Rep Lamar Smith , et al.l, H. Comm. On the Judiciary citing Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forego Lawsuits*, Wall Street Journal, p. A1 (April 11, 2008) (''Koppel, *Nursing Homes*'').

[9] Ibid.