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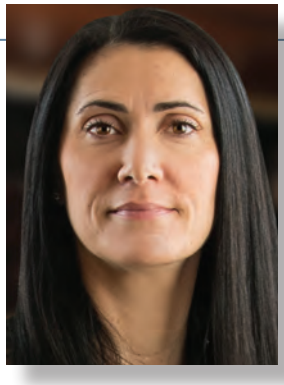

Is the New Rule Barring Nursing Home Pre-dispute Binding Arbitration Dead in the Water?

by Rachel A. Fuerst

On September 29, 2016, The Centers for Medicare & Medicaid Services (CMS) published new and revised long-term care facility rules that drastically increased protections for nursing home residents.[1] These new protections added changes which should result in improvements in the overall quality of care and conditions provided to residents and families and in individual citizens' ability to monitor the quality of care provided.

The most widely touted aspect of the federal revisions is the modification that long-term care facilities can no longer force pre-dispute binding arbitration on nursing home residents and families—the Arbitration Rule.[2] The Arbitration Rule was supposed to take effect on November 28, 2016;[3] however, a recent injunction issued in a federal district court has affected its implementation and may foreshadow more challenges.[4] This article addresses the Arbitration Rule, the injunction and the potential effects.

Pre-dispute Binding Arbitration – A "Tool for Pure Delay"

Nursing homes often obtain signatures on pre-dispute arbitration agreements from relatives who do not have a valid power of attorney or from unwitting residents who are not mentally competent because of dementia or disease.[5] The same nursing homes will then file motions to compel arbitration on the basis of the invalid arbitration agreements.[6] Considering the significant expense and time involved in the resulting litigation which serves to delay the underlying lawsuits for years, the end results are pyrrhic victories for residents and their families.[7] In examining this very issue, the Northern District Court of Mississippi in *American Health Care Assoc. v. Burwell*, No. 3:16-CV-00233, noted it was "unaware of any form of litigation which provides as effective a tool for pure delay, while not advancing the underlying litigation . . ."[8]

The Arbitration Rule

In July of 2015, CMS proposed revising the regulations governing participation of long-term care facilities in Medicare and Medicaid in part "to improve the quality of life, care, and services in LTC [long-term care] facilities, optimize resident safety, [and] reflect current professional standards."[9] After proposing rules, requesting and receiving comments on same, and conducting research, CMS was "convinced that requiring residents to sign pre-dispute arbitration agreements is fundamentally unfair . . ."[10] CMS then promulgated the Arbitration Rule which requires that long-term care facilities that participate in Medicare or Medicaid "must not enter into a predispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the LTC facility."[11]

Nursing Homes Fight to Retain a "Fundamentally Unfair" Tool

On October 14, 2016, the American Health Care Association, an industry group that represents most nursing homes in the United States, a Mississippi nursing home trade group and three individual Mississippi nursing homes sent a letter to the Secretary of Health and Human Services and the Acting Administrator of CMS expressing their concerns regarding the Arbitration Rule.[12] Three days later, those same nursing home groups filed a complaint seeking "entry of a declaratory judgment that the Arbitration Rule is unlawful . . ." and an injunction enjoining enforcement of the Rule in the Northern District of Mississippi.[13]

Injunction

On November 7, 2016, the Honorable Michael P. Mills of the United States District Court of the Northern District of Mississippi granted the preliminary injunction blocking enforcement of the Arbitration Rule.[14] The injunction was granted even though the Court believed that the Arbitration Rule was "based upon sound public policy," and that nursing home arbitration litigation is inefficient and wasteful.[15]

The Court granted the injunction based on what it labeled "incremental 'creep' of a federal agency authority beyond that envisioned by the U.S. Constitution" and based upon legal questions regarding arbitration issues.[16] In its ruling, the Court examined four elements that a plaintiff must establish to secure a preliminary injunction in the Fifth Circuit:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.[17]

The major part of the ruling focused on the first element, a substantial likelihood of success on the merits.[18] The Court ruled that this factor very strongly weighed in favor of the plaintiffs—the nursing home companies.[19] The strongest arguments in the nursing homes' favor were (1) that the Arbitration Rule was barred by the Federal Arbitration Act[20] and (2) that neither the Medicare nor Medicaid Acts gave CMS the authority to prohibit arbitration in long term care facilities.[21]

With regard to the Federal Arbitration Act, the federal government argued that the Arbitration Rule does not bar pre-dispute arbitration agreements or those already in existence but merely provides strong financial disincentives

(withholding of federal money) for nursing homes to enter into new ones.[22] The nursing homes argued the Arbitration Rule was actually "economic dragooning" because the nursing homes were left with "no real option but to acquiesce to the government's preferred policy."[23] The Court agreed with the Plaintiffs' argument and felt that the Arbitration Rule was a *de facto* ban that would not survive scrutiny under the Federal Arbitration Act.[24]

With regard to whether CMS had the statutory authority to make the Arbitration Rule, the federal government argued that it had authority based upon the grant to the Secretary to impose "such other requirements relating to the health and safety [and the well-being] of residents . . . as [she] may find necessary,"[25] and to establish "other right[s]" to "protect the rights of each resident . . ."[26] The Court felt that this language was too vague and tenuous, and the Arbitration Rule "crosse[d] the line" into areas reserved for the legislative branch.[27] Additionally, the Court noted that Congress's legislative history specifically included granting certain federal agencies the authority to regulate or prohibit the use of arbitration agreements, which Congress had considered but declined to adopt with regard to nursing homes.[28]

The Court also ruled that the nursing homes were not likely to be successful in arguing either that the Arbitration Rule was arbitrary or capricious or that the Arbitration Rule violated the Regulatory Flexibility Act, 5 U.S.C. §601, *et seq.*[29] But, the strength of the nursing homes' first two arguments greater outweighed these wins for the federal government.

On the element of substantial threat of irreparable harm, the Court considered "it virtually certain that plaintiffs would, in fact, suffer at least some irreparable harm if the Rule goes into effect on November 28 and is later held unlawful."[30] This "significant" irreparable harm was identified as lost signatures on pre-dispute arbitration contracts and "substantial administrative expenses" for the revising of admission agreements and staff re-training.[31]

The third and fourth preliminary injunction factors were discussed together as they were substantially similar.[32] The Court found support for the nursing homes' positions on both.[33] After finding the overall tally in favor of plaintiff nursing homes, the Court granted the injunction concluding that "the balance of harms and the public interest support holding [the Arbitration Rule] in abeyance until the doubts regarding its legality can be definitively resolved by the courts."

After Effects in North Carolina

The injunction indefinitely postpones the Arbitration Rule from taking effect in the Northern District of Mississippi until the lawsuit is settled. In light of the federal district court's injunction order preliminarily enjoining CMS from enforcing 42 C.F.R. 480.70(n)(1), CMS announced it will "not enforce 483.70(n)(1) until and unless the injunction is lifted."[34]

While this injunction guts one of the most monumental parts of the new Rules, there were other significant changes to the Rules that took effect on November 28, 2016. Those other changes were not challenged in the recent litigation. ◆

1. 81 Fed. Reg. 68,688 - 68,872 (https://federalregister.gov/d/2016-23503).
2. 81 Fed. Reg. at 68,867 (42 C.F.R. Part 483.70(n)(1)).
3. 81 Fed. Reg. at 68,698.
4. *Am. Health Care Ass'n, et al. v. Burwell, et al.*, No. 3:16-CV-00233, slip op. (N.D. Miss. 2016) , 2016 WL 6585295.
5. *Am. Health Care Ass'n,* slip op. at 4-5.
6. *Id.*
7. *Am. Health Care Ass'n,* slip op. at 7.
8. *Id.*
9. *Am. Health Care Ass'n,* slip op. at 2, citing 80 Fed. Reg. 42,168 - 42,169.
10. *Id.* at 2, citing 80 Fed. Reg. 68,792.
11. 81 Fed. Reg. at 68,867 (codified at 42 C.F.R. Part 483.70(n)(1)).
12. Compl. Ex. 5, *Am. Health Care Ass'n, et al. v. Burwell, et al.*, No. 3:16-CV-00233 (October 17, 2016).
13. Compl. at 34-35.
14. *Am. Health Care Ass'n, et al. v. Burwell, et al.*, slip op. at 40.
15. *Id.* at 39.
16. *Id.*
17. *Id.* at 9, citing *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009).
18. *Id.* at 9-32.
19. *Id.* at 9.
20. *Id.* at 9-18.
21. *Id.* at 18-28.
22. *Id.* at 10.
23. *Id.* citing, e.g. Plaintiffs' Brief at 10, *Nat'l Fed. of Indep. Bus. V. Sebelius*, 132 S. Ct. 2566, 2605 (2012).
24. *Id.* at 10.
25. *Id.* at 19 citing 42 U.S.C. §§1395i-3(d)(4)(B), 1396r(d)(4)(B).
26. *Id.* at 19 citing 42 U.S.C. §§1395i-3(c)(1)(A)(xi).
27. *Id.* at 19.
28. *Id.* at 20-21.
29. *Id.* at 28-30.
30. *Id.* at 32.
31. *Id.* at 32-33.
32. *Id.* at 33-39.
33. *Id.*
34. "Long-Term Care (LTC) Regulations: Enforcement of Rule Prohibiting Use of Pre-Dispute Binding Arbitration Agreements is Suspended so Long as Court Ordered Injunction Remains in Effect," S&C: 17-12-NH (Dec. 9, 2016) (Memorandum from David R. Wright, Director, Survey and Certification Group, to State Survey Agency Directors).