U.S. Abandons Ban On Nursing Home Arbitration Agreements

Article
June 6, 2017

The federal government's effort to ban pre-dispute arbitration agreements in nursing homes is essentially over, given a proposed revised rule released on June 5, 2017.

Last fall, the U.S. Centers for Medicare and Medicaid Services (CMS) issued a regulation banning such agreements in nursing homes and other long-term care facilities participating in Medicare or Medicaid. However, yesterday CMS proposed a revised rule that drops the ban.

Just three days earlier, the U.S. Court of Appeals for the Fifth Circuit granted the government's motion to dismiss its own appeal of a preliminary injunction against the ban.

The ban was issued in the final days of President Barack Obama's administration, but the administration of President Donald Trump has signaled its disfavor for regulations, including the CMS arbitration ban.

CMS's proposed revised rule not only would allow pre-dispute arbitration agreements, but it would also allow such agreements to be a condition of admission to the facility.

The revised rule retains these proposals from last fall's regulation:

- The arbitration agreement must be explained to the resident and his or her representative in a form, manner and 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 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.

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The revised rule adds these new proposals:

- 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, then the language of the agreement must be in plain writing and in the admissions contract.
- The facility must post a notice regarding its use of binding arbitration in an area that is visible to both residents and visitors.

CMS stated that arbitration agreements benefit both sides by allowing for faster and cheaper resolution of claims, and that banning such agreements would significantly increase the cost of care and require facilities to divert scarce resources from resident care to the defense of litigation.

The ban was scheduled to go into effect in November 2016. However, that month it was postponed indefinitely by U.S. District Judge Michael P. Mills of the Northern District of Mississippi. The judge granted a preliminary injunction preventing CMS from enforcing the rule. The injunction was requested by the American Health Care Association, the nation's largest association of long-term care providers, and other parties.

The legal dispute over the ban returns to the federal district court. In granting the preliminary injunction, Judge Mills acknowledged concerns about pre-dispute arbitration agreements in nursing homes, including signatures from residents lacking mental competency or from relatives lacking legal authority. However, the court raised concerns about the rule's conflict with the Federal Arbitration Act, which supports arbitration. The court was also concerned about separation of powers and CMS' "breathtakingly broad assertion of authority."

The plaintiffs' bar is trying to step into the government's shoes to preserve the ban. On June 2, 2017, counsel for American Association for Justice (an organization of plaintiff's trial lawyers) and the National Consumer Voice for Long Term Care notified Judge Mills that it would file a motion to intervene in the proceedings, and asked the court not to grant a permanent injunction against the ban until the plaintiffs' bar can be heard.

CMS's proposed revised regulation will not take effect until after a comment period. Until the regulation is finalized, and the federal court action is resolved, providers may continue to offer pre-dispute arbitration agreements that meet the standards for substantive and procedural fairness. Providers should also consider adopting the proposed requirements listed above.