Federal Court Enjoins CMS Ban on Pre-Dispute Arbitration Agreements in Long-Term Care Facilities

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On November 7, 2016, a federal judge enjoined the Centers for Medicare and Medicaid Services (CMS) from enforcement of its recently-announced ban on arbitration clauses in the contracts of long-term care facilities that participate in Medicare or Medicaid. In an alert (CMS Bans Pre-Dispute Arbitration Agreements for Long-Term Care Facilities) published on September 29, 2016, White and Williams advised clients about a newly-announced ban imposed by CMS which was to become effective on November 28, 2016. The court's injunction prevents the new CMS ban from going into effect. Because most skilled nursing facilities participate in Medicare or Medicaid, the ban would have required virtually the entire industry to alter proposed residence and care contracts.

Citing "separation of powers" concerns, in *American Health Care Association et al. v. Burwell*, U.S. District Judge Michael P. Mills (N.D. MS) granted a preliminary injunction sought by the American Health Care Association and others. The injunction prohibits CMS from enforcing the ban set forth in the Federal Register on October 4, 2016, and which was to be codified at 42 CFR §483.70(n). See also, 81 Fed. Reg. at 68,867.

Applying the familiar standards for granting injunctive relief, Judge Mills first concluded that it is likely that CMS will ultimately lose on the merits. The court noted that in decisions issued in 2011, 2012, and 2013, the U.S. Supreme Court required courts to enforce privately negotiated arbitration agreements pursuant to the Federal Arbitration Act, 9 U.S.C. § 2. Significantly, Judge Mills also concluded that neither the Medicare Act nor the Medicaid Act give CMS the executive authority to prohibit arbitration in the long-term care industry.

CMS had relied on a statutory clause that enables the Secretary of Health and Human Services to impose "such other requirements relating to the health and safety [and the well-being] of residents . . . as [she] may find necessary," 42 U.S.C. §§ 1395i- 3(d)(4)(B), 1396r (d)(4)(B), and to establish "other right[s]" to "protect and promote the rights of each resident," in addition to those expressly set forth in the statutes and regulations. Id. §§1395i-3(c)(1)(A)(xi), 1396r(c)(1)(A)(xi). The court found such authority to be inadequate to express a Congressional intent to override the Federal Arbitration Act in the nursing home context. Although CMS relied on letters from 34 U.S. Senators who favor the proposed ban, Judge Mills was dubious of the Constitutional propriety of using a minority of Congressional support:

> The fact that those Senators urged CMS to adopt the Rule raises concerns in this court's mind that they were attempting to accomplish by agency *fiat* what they could not accomplish through the legislative process, namely abolish nursing home arbitration. However much sympathy this court might have with the public policy considerations which motivated that desire, the basic concept of separation of powers is far more fundamental and important than the pending arbitration issue.

Still, noting the tenor of Congress, the court wrote,

> While there is undoubtedly a great deal of Congressional gridlock, Congress' failure to enact positive legislation should not serve as an excuse for the executive branch to assume powers which are properly reserved for the legislative branch. It appears to this court that the Rule enacted by CMS in this case crosses the line.

The court expressed sympathy for the public policy concerns that CMS cited as underlying its ban, but it noted that an Executive branch agency must have statutory authority to enact regulations. "The problem … is that CMS does not have the authority to ban nursing home arbitration on general policy grounds." The court also expressed concern that CMS may have impermissibly sidestepped the economic-impact analysis required under the Regulatory Flexibility Act, 5 U.S.C. § 601. The court likewise questioned CMS' failure to conduct proper studies of the pros and cons of arbitration clauses instead of relying on unsubstantiated, self-serving statements from the American Trial Lawyers Association and other interested proponents.

Noting that arbitration clauses are currently acceptable to CMS and enforceable at law, the court concluded that a preliminary injunction was the appropriate relief to retain the *status quo* and avoid potential irreparable harm. Judge Mills likewise determined that the harm imposed by denying an injunction far outweighed any harm in issuing the order. The court was particularly concerned about the immediacy of the ban's November 28, 2016 effective date.

The court expressed considerable concerns about arbitrations involving a population prone to experience mental degradation and deficiencies. "This case places this court in the undesirable position of preliminarily enjoining a Rule which it believes to be based upon sound public policy." Still, the court decided that it was "unwilling to play a role in countenancing the incremental "creep" of federal agency authority beyond that envisioned by the U.S. Constitution."

Although the *American Health Care Association* case was filed in Mississippi, the order is not geographically limited. The order enjoins enforcement of the new regulation without regard to geographical jurisdiction. Any appeal from Judge Mills' order will go to the Fifth Circuit Court of Appeals.

Bill Kennedy offers clients an uncommon combination of backgrounds in both the courtroom and the boardroom. Bill is a litigator who investigates and defends claims in both the professional and general liability contexts. For fifteen years, Bill was a chair, officer, and director on the boards of a national organization that provides a full range of residential and health care services to thousands of seniors around the country. If you have questions or would like additional information, please contact Bill Kennedy (kennedyw@whiteandwilliams.com; 215.864.6816) or another member of our Healthcare Group.