HINSHAW

Alerts

U.S. District Court Issues Preliminary Injunction Stalling and Possibly Precluding CMS' Final Rule's Ban on Long-Term Care Resident Arbitration Agreements

November 15, 2016
Long-Term Care Alert

On November 7, 2016, Judge Michael P. Mills of the United States District Court for the Northern District of Mississippi issued an Order temporarily preventing CMS from implementing its Final Rule banning pre-dispute arbitration agreements between long-term care facilities and residents (set to be implemented on November 28, 2016) (hereinafter the "Arbitration Ban"). *Am. Health Care Ass'n v. Burwell.* In short, this means that the Arbitration Ban will not go into effect until further order of the Court.

Background

In July, 2015 CMS proposed to revise the regulations governing the participation of Long-Term Care facilities that receive funding from Medicare and Medicaid. In addition to numerous changes, the proposed rule requested public comments on the use of mandatory arbitration agreements as a condition of admission to the facility.

CMS subsequently received over 1,000 comments related to the use of the arbitration agreements in Long-Term Care facilities.

On September 28, 2016, CMS promulgated a 713 page reform (codified as 42 CFR 483.70 *et seq.*) which barred pre-dispute arbitration agreements between nursing facilities in the Medicare or Medicaid programs and their nursing home residents. The Arbitration Ban portion specifically stated that 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"

The Arbitration Ban was to take effect on November 28, 2016.

Attorneys

David J. Alfini

Adam S. Guetzow

Service Areas

Complex Tort & General Casualty

On October 17, 2016, four plaintiffs including The American Health Care Association filed suit in the U.S. District Court for the Northern District of Mississippi against CMS. The case, *Am. Health Care Ass'n v. Burwell*, No. 3:16-CV-00233 (N.D. Miss. Nov. 7, 2016), sought an Order from the Court "enjoining" or stopping the Arbitration Ban from going into effect.

On November 7, 2016, Judge Michael P. Mills issued a 40 page order granting a preliminary injunction preventing the Arbitration Ban from going into effect.

The Order

It is important to note the ruling was based entirely on the record presented to the Court by both sides to the litigation as well as other interested parties who filed briefs with the Court. The Court was careful to state that it was not taking notice of any other information, including its own experience hearing cases between long-term care facilities and residents.

Additionally, it is also critical to note that the Court made no final ruling on the merits of the Arbitration Ban. In fact, the language of the Order indicated that the Court was sympathetic to CMS' goals with the Rule. That being said, the Court found that the American Health Care Association and the other plaintiffs met the legal burden for obtaining a preliminary injunction.

While the Court addressed several legal issues relevant to the those issues before the Court, the ruling can be boiled down to the fact that CMS likely exceeded its authority by promulgating the Arbitration Ban. Therefore, CMS was enjoined or prevented from enforcing the rule.

CMS is a federal agency created by congress. The act authorizing CMS gives the secretary the authority to impose "such other requirements relating to the health and safety [and the well-being] of residents ... as [she] may find necessary," 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.

The Court examined the record in this case and found that it was lacking in support that the Arbitration Ban was consistent with CMS' statutory authority. The Court stated that CMS had not made the "requisite efforts to actually prove that nursing home arbitration had the sort of negative effects which [CMS] quoted various commenters as saying it had." That is, the Court was not persuaded by the public comment period. Additionally, the Court noted two important factors in making its ruling.

First, CMS expressly allowed the arbitration provisions for many years. The Court cites to no reason given by CMS for this change in opinion.

Second, this type of policy and legal change is likely the province on the legislature, not a federal agency like CMS. Congress has addressed this issue and declined to pass legislation. Therefore, it appears that CMS is circumventing Congress by passing a rule that Congress declined to pass as a law. In particular, the Court stated "…it is unwilling to play a role in countenancing the incremental "creep" of federal agency authority beyond that envisioned by the U.S. Constitution." *Am. Health Care Ass'n v. Burwell.*

What Happens Next

The ruling was a preliminary injunction. This is not necessarily a ruling on the merits. The parties could continue to litigate the mater in this Court. Additional evidence could be offered and the preliminary injunction could be vacated by the Court or affirmed as a permanent injunction.

The more likely next step would be an appeal by CMS. A preliminary injunction is immediately appealable to the Federal Appeals Court, in this case, the Fifth Circuit.

What This Means to Facilities

The rule banning arbitration agreements will ***not*** go into effect on November 28, 2016. Moreover, so long as the preliminary injunction remains in place, long-term care facilities will not be in violation of CMS' Final Rule if they do not act by November 28, 2016 to amend their admission agreements to eliminate pre-dispute binding arbitration. The Rule will not

become active without further action from the Court.

[1] [1]80 Fed. Reg. 42, 168, 42, 169 (July 16, 2015)

[2] 81 Fed. Req. at 68, 867

[3] The suit actually names Sylvia Mathews Burwell in her official capacity as Secretary of Health and Human Services and Andrew M. Slavitt in his official capacity as Administrator of the Centers for Medicare and Medicaid Services.

[4] 42 U.S.C. §§ 1395i–3(d)(4)(B), 1396r(d)(4)(B)

[5] Id. §§ 1395i–3(c)(1)(A)(xi), 1396r(c)(1)(A)(xi).3

https://hinshaw.gccportfolio.com/