HEALTH LAW ALERT

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Federal Court Enjoins CMS Regulation Banning Arbitration of Nursing Home Disputes

By David J. Hochman, Partner

The United States District Court for the Northern District of Mississippi issued a preliminary injunction barring the scheduled November 28, 2016, implementation of a Center for Medicare and Medicaid Services ("CMS") regulation which would cut off federal funds for nursing homes and other long-term care facilities that require pre-dispute arbitration agreements with their residents or require that a resident agree to arbitration as a condition of admission to the facility. Pre-existing arbitration agreements are not affected by either the regulation or the preliminary injunction.

When this regulation was proposed in July 2015, CMS received almost 1,000 comments regarding various aspects of nursing home arbitration agreements. After considering those comments and conducting other research, CMS concluded that "requiring residents to sign pre-dispute arbitration agreements is fundamentally unfair because, among other things, it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen." (80 Fed. Reg. 68,792) The final regulation issued on September 29, 2016, was much broader than the proposed version that only prohibited requiring an arbitration agreement as a condition of admission to a long-term care facility.

In response to CMS' final regulation, the American Health Care Association and several other nursing home groups sought an injunction to block the regulation contending that it exceeded CMS' statutory authority and was not needed to protect the welfare of nursing home residents.

In his opinion, Judge Mills pointed out that mental competency concerns present a problem unique to nursing home arbitration. According to the National Center for Health Statistics, 50.4 percent of nursing home residents have been diagnosed with Alzheimer's disease or another form of dementia. Arbitration agreements are contracts, and to be enforceable, the parties to the contract must be competent when the agreement is executed. The judge noted that, in his experience, nursing homes will obtain signatures from residents, despite having doubts about their mental competency or the nursing home will have a resident's relative sign the agreement, even though the resident has not given the relative a power of attorney or other legal authority to do so. Despite these issues, the nursing homes pursue legal action to compel arbitration based on these agreements, which are time consuming and costly to defend. In such a suit, it is often necessary to determine if the nursing home resident was competent when the arbitration agreement was signed or if the resident properly authorized a relative to sign on their behalf. While arbitration is generally touted as providing a faster and less costly way to resolve disputes, the need to litigate issues regarding the validity of the arbitration agreement results in the very delays which arbitration is intended to avoid.

While the court believed that the final regulation was based on sound public policy, because nursing home arbitration litigation has several fundamental defects and is inefficient and wasteful, the court granted the preliminary injunction because it determined that the regulation exceeded CMS' rulemaking authority, stating that "it is unwilling to play a role in countenancing the incremental 'creep' of federal agency authority beyond that envisioned by the U.S. Constitution."

While the preliminary injunction temporarily suspends implementation of the new regulation, it does not void it. For that reason, it is important that nursing homes and long-term care facilities understand the new regulation and be prepared to comply with its provisions if and when the regulation goes into effect. Please contact one of the following Roetzel attorneys for more information and guidance.

Author
David J. Hochman
dhochman@ralaw.com

Additional Contacts
Ericka L. Adler
eadler@ralaw.com

Mazen Asbahi
masbahi@ralaw.com

Michael B. Brohman
mbrohman@ralaw.com

Avery Delott
adelott@ralaw.com

Christina M. Kuta
ckuta@ralaw.com

Media Contacts
Wendy Castorena
wcastorena@ralaw.com

Ashley McCool
amccool@ralaw.com