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N.M. HIGH COURT, ARK. FED. COURT RULE AGAINST FORCED ARBITRATION IN NURSING HOME CASES

April 2020 - Maureen Leddy

Nursing home residents saw two favorable decisions in two days as the New Mexico Supreme Court rejected a nursing home's arbitration agreement and a federal district court in Arkansas nixed a nursing home industry challenge to a Centers for Medicare & Medicaid Services (CMS) final rule that prohibits facilities receiving Medicare and Medicaid funds from using forced arbitration agreements. AAJ filed amicus briefs in both cases, arguing that the circumstances surrounding nursing home forced arbitration agreements are "uniquely vulnerable to abuse" in that there is "usually . . . no choice but to sign in the face of a nursing home's ultimatum," and that it is "grossly unfair and unreasonable" to eliminate residents' option to litigate their claims in court. (*Peavy v. Skilled Healthcare Grp.*, 2020 WL 1672428 (N.M. Apr. 6, 2020); and *Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health & Human Servs.*, 2020 WL 1696009 (W.D. Ark. Apr. 7, 2020).

In *Peavy v. Skilled Healthcare Group*, the New Mexico Supreme Court unanimously affirmed trial and state appellate court rulings that the nursing home's forced arbitration agreement was substantially unconscionable. Beverly Peavy was a resident at the Rehabilitation Center of Albuquerque. After she died in April 2010, Keith Peavy, her son, sued the facility and related parties for wrongful death, negligence, misrepresentation, and unfair trade practices. The defendants countered that Keith's claims should be dismissed and the dispute sent to arbitration because as Beverly's durable health care attorney in fact, he had signed an agreement to arbitrate any claims of negligence and inadequate care when Beverly was admitted to the facility in 2008.

Keith countered that the forced arbitration agreement was unenforceable because it mandated arbitration of negligence claims but not claims regarding collections or discharge of residents. The lower courts agreed, finding that the agreement was "facially one-sided" because it mandated arbitration of claims most likely to be brought by residents, while exempting from arbitration claims most likely to be brought by the facility. The state appellate court also held that the defendants had failed to justify the one-sidedness of the agreement.

In a de novo review, the New Mexico high court clarified the two-step analysis for substantive unconscionability in arbitration agreements. Courts first must "analyze the arbitration agreement on its face" to assess the "legality and fairness of the contract terms themselves." (*Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901 (N.M. 2009).) If the agreement is facially one-sided, the court said, then the drafting party bears the burden of submitting evidence to show that the agreement is fair and reasonable and that enforcement would not be substantively unconscionable. (*Bargman v. Skilled Healthcare Grp., Inc.,* 292 P.3d 1 (N.M. Ct. App. 2012).) Using this test, the high court affirmed, finding that the forced arbitration agreement was facially one-sided and that the facility had failed to present evidence showing why collections actions, as opposed to other claims, should be exempted from the agreement.

AAJ, along with the New Mexico Trial Lawyers Association, submitted an amicus brief in support of the plaintiff in *Peavy*, arguing that "[a]llowing the drafter [of an arbitration agreement] to evade the one-sidedness doctrine simply by articulating a purportedly legitimate business reason for the one-sided carve-out would effectively nullify the one-sidedness doctrine."

"We are fortunate that the New Mexico Supreme Court understands the inherent unfairness of forced arbitration schemes and is willing to continue its tradition of subjecting such contracts to close scrutiny," said Rob Treinen, of Albuquerque, one of the authors of the amicus.

Milwaukee attorney Jeffrey Pitman, who represented the plaintiff in *Peavy*, called the decision "a big win for nursing home residents and consumers of New Mexico. It clarifies the law regarding enforcement of arbitration agreements in the state." Pitman added that "nursing home residents are often the victims of unfair, forced arbitration agreements." The court's decision in *Peavy* made it "clear how they can fight back."

The next day, an Arkansas district court upheld the CMS's final rule from July 2019 that prohibits facilities receiving Medicare and Medicaid funding from requiring residents to sign forced arbitration agreements as a condition of admission. In 2019, a group of nursing homes filed a complaint in the Western District of Arkansas seeking a preliminary injunction of the rule's effect and challenging its legality. The nursing homes argued, among other things, that the rule violates the Federal Arbitration Act (FAA) and the Administrative Procedure Act.

The government agreed to stay enforcement of the rule until Apr. 17, 2020, and both sides moved for summary judgment. The district court granted the government summary judgment, rejecting each of the nursing homes' claims in turn. First, the court said, the rule does not run afoul of the FAA because nursing homes still can enforce agreements entered into that violate the rule—but in doing that, a nursing home would "expos[e] itself to the possibility of corrective action by CMS for a violation of the facility's participation agreement." The rule does not "undermine the validity or enforceability of the agreement when it comes before a court," the court said, but rather "only establishes conditions of the facility's receipt of federal subsidies."

The court noted that "the federal government has broad authority to place conditions on the use of funds it distributes, even broader than its authority to impose direct restrictions, so long as those conditions are related to the goals of the program." Here, the court said the rule's purpose is related to the CMS programs' goals because long-term care residents often do not have many facilities to choose from, and residents should not have to choose between foregoing care or forgoing access to a judicial forum. Rejecting the nursing homes' argument that ending participating in the CMS programs is not a real choice, the district court noted that courts

"have held time and time again that the participation of private entities in Medicare and Medicaid is always voluntary, and providers can avoid regulations to which they object by choosing not to participate."

The court disagreed with the nursing homes' argument that the Supreme Court's holding in *Epic Systems Corp. v. Lewis*—that an "explicit congressional authorization" is required before a statute can displace the FAA—is applicable in this case. (138 S. Ct. 1612 (2018).) Here, it is not the statute, but the CMS's regulations that are potentially displacing the FAA, the court said, and *Epic* does not support the proposition that "federal agencies lack authority to disfavor arbitration agreements in any respect." The court concluded that an agency need not "have explicit authorization from Congress to regulate the use of binding pre-dispute arbitration agreements by voluntary participants in a federal program it administers."

The court also rejected the nursing homes' claims that the rule exceeded the CMS's statutory authority, finding it to be within the plain language of the authorizing statute—it protects the health and welfare of Medicare and Medicaid recipients. In addition, the court found that the agency was not arbitrary and capricious in its adoption of the rule and that it need not provide empirical evidence to support its position. It was sufficient for the agency to rely on comments received, a review of court decisions, and academic literature that all demonstrated "pre-dispute arbitration agreements were detrimental to the health and safety of [long-term care] facility residents."

Washington, D.C., attorney Matthew Wessler, who wrote the amicus brief on behalf of AAJ, the Arkansas Trial Lawyers Association, National Consumer Voice for Quality Long-Term Care, and Justice in Aging in support of the government, was "pleased that the court rejected this industry-led challenge to invalidate CMS's nursing-home rule." He added that "The court recognized what AAJ had argued in its brief filed in the case: that CMS acted well within its statutory authority in promulgating the rule and that the rule itself was fully consistent with the FAA. Especially in these challenging times, improving the health and safety of nursing home residents should be praised, not undermined."

On April 15, 2020, the nursing home plaintiffs filed a notice of appeal. A motion for continuation of the rule stay was pending at the time of publication.

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