ARBITRATION

LeadingAge has always supported the use of properly structured arbitration agreements in the aging services context. See the Arbitration Statement at the end of this document. Moreover, we have lobbied against attempts by Congress to ban pre-dispute arbitration over the years and submitted extensive comments against banning pre-dispute arbitration agreements in our response to the proposed Requirements of Participation (ROPs) for Long Term Care Facilities rule.

Yet despite our vigorous and extensive comments, CMS, on September 28, 2016, issued the final ROPs rule, which included a ban on pre-dispute arbitration agreements between skilled nursing facilities and their residents. The ban goes into effect on November 28, 2016.

Litigation

The American Health Care Association (AHCA) filed a lawsuit in federal court (Northern District of Mississippi) challenging the pre-dispute arbitration ban on October 17, 2016. AHCA asked the court to grant a preliminary injunction halting the pre-dispute arbitration ban. The suit alleges that the ban violates the Federal Arbitration Act, that CMS lacked the statutory authority to ban pre-dispute arbitration agreements, and that CMS' actions were arbitrary and capricious.

On Friday, October 21, 2016, the judge scheduled a hearing on the preliminary injunction for November 3, 2016. The judge anticipates granting or denying the motion in a decision by Monday, November 7, 2016. After that point, the parties are able to appeal the decision to the United States Fifth Circuit Court of Appeals.

Analysis of LeadingAge Options

A. Joining the AHCA Challenge Now

LeadingAge was not asked to join or participate in the AHCA lawsuit prior to its filing – that apparently was a strategic decision by AHCA – nor has LeadingAge been asked to join or participate in the suit subsequent to its filing. Further, it would be impractical and impossible to participate at the District Court level because of the short time frame allotted for briefing as well as conducting the hearing on the preliminary injunction. There simply was not sufficient time to file a motion to submit an amicus brief or subsequently to draft an appropriate amicus. Moreover, the court is not required to accept motions to file an amicus brief. Amicus briefs are much more common at the appellate level.

B. Filing Separate Litigation

Separate from the timing and procedural hurdles of joining or participating in the AHCA lawsuit at the district court level, LeadingAge staff and the legal committee explored the idea of filing a separate lawsuit.

The key issues in assessing separate litigation were: standing to bring a suit, differentiating our lawsuit from that being pursued by AHCA in terms of the legal issues and theories presented, the impact on our membership, the likelihood of success, and the cost associated with pursuing separate litigation when viewed in light of the other aforementioned factors.

First, we would need to find a member that uses arbitration agreements and is willing to participate as a plaintiff. In addition, that plaintiff would likely need to have some sort of differentiating characteristic from the nursing home plaintiffs in the AHCA suit. Not having a differentiating factor for our own litigation could subject the suit to an order staying the litigation pending the AHCA decision, rather than being viewed on its own separate merits.

Standing to bring a suit requires an actual *controversy* rather than a theoretical legal argument. To date, we do not have a controversy, and the time and effort involved to find an ideal plaintiff in a friendly jurisdiction would be significant.

As for the likelihood of success, we note that the ROPs do not entirely foreclose arbitration as an option between a long-term care facility and its residents in the event of a dispute; they merely ban pre-dispute agreements to arbitrate. We also note that AHCA did not address the *Illinois Council* case, a Supreme Court decision that held that challenges to Medicare/Medicaid regulations must first go through the administrative appeals process before a federal court has federal question jurisdiction. As such, the Legal Committee questioned the likelihood of success on the merits, which is a critical factor in any motion for a preliminary injunction.

Next, we do not have conclusive evidence on how many of our members actually use pre-dispute arbitration agreements and how big of an impact this would have on our membership as a whole. From our informal polling of members and legal committee members, the majority of our members do not utilize pre-dispute arbitration agreements. Moreover, the issue is really state specific sometimes due to varying state statutes and court decisions regarding the enforceability of arbitration agreements in the health care context. Additionally, the threat of litigation varies from state to state and those members that feel more at risk of litigation tend to utilize arbitration agreements more often than members in less litigious regions. The states that have voiced the most concern so far are Florida, New York, and New Jersey.

The final issue to consider is the cost associated with initiating and pursuing litigation. A conservative estimate to initiate litigation and pursue it through the first appellate stage is $150,000 -$200,000. A federal district court decision would certainly be appealed by the losing party and likely would be appealed from the Court of Appeals to the Supreme Court as well. Such litigation is not inexpensive and if appealed to the Supreme Court the costs could easily double or triple.

We are mindful of the political implications of the lawsuit being filed by AHCA. The optics of AHCA filing suit to challenge the ban and LeadingAge not being part of that effort at this point is not lost on staff and leadership. Nonetheless, one concern was filing litigation (or taking some

other action) just for the for the sake of doing so, regardless of the strength of the arguments and the likelihood of success.

So, at this point, a more prudent use of time and resources is to wait two weeks and re-examine our options as the AHCA case proceeds.

Joining or Participating at a Later Stage

Based on the procedural posture of the AHCA litigation and the obstacles for filing a separate lawsuit, the best option is to wait on the district court decision in the AHCA litigation. Once that order is issued, the losing party will appeal to the Fifth Circuit Court of Appeals, presenting a greater opportunity to participate in the litigation.
Once so appealed, the Fifth Circuit will issue a scheduling order setting both the time for briefing and a hearing date.

Thus, based on the posture of the AHCA litigation in two weeks we could possibly file a motion to submit an amicus brief to share our unique position and impact on our members as well as opine on the legal merits of the case.

As noted previously, LeadingAge has always supported properly executed and fair arbitration pre-dispute agreements. Below is LeadingAge's position on arbitration agreements:

Arbitration Statement

LeadingAge supports the use of properly structured arbitration agreements in the aging services context. Such agreements can afford both providers and consumers a speedy and cost-effective alternative to traditional lawsuits. In fact, the United States Supreme Court, in 2012, upheld the use of such agreements under the Federal Arbitration Act. LeadingAge, however, also recognizes the need for prospective residents and their families to understand and knowingly enter into any such agreements. Consequently, we have developed common sense recommendations regarding the use of pre-dispute arbitration agreements by our members, which in concert with applicable state laws, ensures that the agreements are fair to both parties:

- Signing an arbitration agreement should not be a condition of admission to a nursing home or other senior living community. State courts have often found arbitration agreements to be unconscionable if admission is predicated on signing an agreement.

- The arbitration provisions should be included in an agreement separate from the admissions or other entrance agreement. This practice ensures that the arbitration language will not be lost in the admissions agreement and highlights to the reader the importance of arbitration.

- The arbitration agreement should include a rescission period. This gives consumers a chance to reconsider and cancel their agreement to arbitrate.

- Arbitration agreements should not limit a resident's rights and remedies under law, other than to specify the forum and procedures for dispute resolution. Most if not all states that have addressed this issue have found limitations on rights and remedies to be a trigger for determining an arbitration agreement was unconscionable. The more onerous the contract, the less likely it has been to be enforced under existing law and practice.

Quality of care is not determined by the forum chosen for resolution of whatever disputes may arise between providers and consumers. Arbitration agreements can expedite the resolution of disputes for all parties and prevent unnecessary expense that takes resources away from resident services.