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September 14, 2015

Centers for Medicare & Medicaid Services
Department of Health & Human Services
Attn: CMS-3260-P
PO Box 8010
Baltimore, MD 21244-8010

Dear Sir or Madam:

On July 16, 2015, the Centers for Medicare & Medicaid Services (CMS) published a proposed rule and sought public comment on revisions to requirements for Long-Term Care facilities' participation in the Medicare and Medicaid programs. PIAA appreciates this opportunity to provide its perspective on the specific issue of binding arbitration in nursing home contracts.

Interest of PIAA

PIAA is the insurance industry trade association that represents a full range of entities doing business in the medical professional liability (MPL) arena. These include domestic MPL insurance companies, risk retention groups, captives, trusts, and other entities. PIAA members include MPL enterprises owned and/or operated by physicians, hospitals, health systems, dentists and oral maxillofacial surgeons, podiatrists, chiropractors, and healthcare providers such as nurse practitioners, nurse midwives, CRNAs, and many others, as well as insurance carriers with a substantial commitment to the MPL line. PIAA members insure more than two-thirds of America's private practicing physicians as well as dentists, nurses and nurse practitioners, and other healthcare providers, and insure more than 2,000 hospitals. PIAA member companies are aware that some of the individuals/entities for whom they provide indemnity protections utilize arbitration agreements with their patients, and as such wish to comment on the broader implications of CMS's desire to regulate such agreements.

Comments

PIAA shares CMS's view that binding arbitration agreements should center on fairly resolving disputes between parties, whether those parties are nursing homes and their patients or patients' families, or healthcare professionals/institutions and their patients or patients' families. As such, it is important that such agreements are entered into openly and with full knowledge by both parties as to what the terms of the agreement mean. We believe the proposed rule, however, is inappropriate at the present time and that the suggestion that binding arbitration should be banned entirely would be unwise policy for the American public.

Banning of Binding Arbitration

There are multiple reasons for CMS to not heed calls to ban binding arbitration in nursing home contracts, or for that matter, in any healthcare-related contracts. To begin, the proposed rule itself notes that, "Arbitration can result in disputes being resolved faster and in a less burdensome manner for both parties." Our members' experience indicates that binding arbitration can not only greatly reduce the amount of time that it takes to resolve a claim, but also increase the amount of funds available to compensate an injured patient. Without such agreements in place, an average MPL claim takes approximately four years to resolve. In addition, arbitration is on average cheaper than litigation for everyone involved given the shorter time frame to adjudication and given that arbitration does away with formal procedures like the use of paid expert witnesses. This ensures that more of the approximately 50 percent of MPL awards that are currently consumed by the legal system would instead be available to provide additional patient compensation. Clearly, dispute resolution options that reduce this wait time and ensure that more of a patient's award actually goes to meet the patient's healthcare needs should be preserved, not banned.

Furthermore, numerous court rulings relying on the Federal Arbitration Act have indicated that efforts to limit the use of binding arbitration violate that Act. It is difficult to see how an outright ban of binding arbitration by CMS would be able to withstand a similar judicial scrutiny. A ban would undoubtedly face legal challenges, resulting in a significant level of uncertainty, not to mention substantial cost to all parties, as such challenges worked their way through the court system. We do not believe the uncertainty or costs associated with a ban would benefit patients or healthcare providers.

Administrative Limitations on Arbitration

As previously noted, we agree that providing for the underlying fairness of binding arbitration agreements is an important element of their implementation. It is only just that patients should be fully aware of the details of such agreements, and the implications of engaging in them, before they are asked to sign a binding arbitration agreement. It is also clear, however the role that government might play in that process, if any, is still a point of contention.

The proposed rule regarding binding arbitration failed to note any specific circumstances which necessitated CMS's action at this time. Instead, the rule appears to be based on speculation about the possibility that abuse in the implementation of such agreements *might* exist, or that patients *might* be disadvantaged by such agreements. It seems logical, however, that if action is to be taken to prevent unfairness in the application of binding arbitration agreements, then substantiated evidence that unfairness actually exists would be provided. Without clear evidence that such agreements are being abused in some way, it does not seem possible that an appropriate solution can be proffered.

The question at hand is not one that has been ignored by other branches of the government. For many years now, Congress has been discussing and debating the use of binding arbitration

agreements and the implications of such agreements on the consuming public. Numerous, bipartisan bills have been introduced in that time, but Congress has declined to act presumably because the nature of the problem, if one exists, is not fully understood or because the optimal solution has not yet been found. For CMS to preempt efforts by the public, through its elected representatives, to fully understand and develop appropriate solutions to issues regarding binding arbitration appears unnecessary. Instead, PIAA strongly recommends that CMS withhold acting on this portion of the proposed rule until Congress has more fully explored this issue to determine what, if any, actions are appropriate.

We appreciate the opportunity to provide input regarding the binding arbitration provisions of the proposed rule. Please do not hesitate to contact me should you need any further information.

Sincerely,

A handwritten signature in blue ink that reads "B. Atchinson". The signature is fluid and cursive, with a large initial "B" and a stylized "A".

Brian Atchinson
President and CEO