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Class Action Waivers in Employment Agreements Held to Violate Federal Labor Laws

By Nicole M. Gill and Lee A. Rosengard

On August 22, the Ninth Circuit Court of Appeals became the second circuit court to deal a blow to employment arbitration agreements containing class action waivers, in Morris v. Ernst & Young, LLP, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016). At issue was whether an employer violated the National Labor Relations Act, 29 U.S.C. § 157, by requiring its employees to sign an employment agreement mandating arbitration of employment claims regarding wages, hours, and terms and conditions of employment, yet precluding them from bringing those claims as class actions. The plaintiffs argued that this waiver violated federal labor laws, specifically relying on previous determinations of the National Labor Relations Board that stated concerted action waivers violated the NLRA.

In holding that the firm's concerted action waiver violated the NLRA, the court gave considerable deference to the Board's previous determinations, see, e.g., In Re D. R. Horton, Inc., 357 NLRB 2277 (2012), and found that these holdings coincided with

continued on page 2

New Rule From the Centers for Medicare and Medicaid Services Will Open Courtroom Doors to Residents of Long-Term Care Facilities

By Bridget C. Giroud and Lee A. Rosengard

On September 28, the Centers for Medicare and Medicaid Services announced the issuance of a rule prohibiting, prospectively, predispute arbitration agreements between Medicare and Medicaid-participating long-term care facilities and their residents. See Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68688 (Oct. 4, 2016), https://www.federalregister.gov/documents/2016/10/04/2016-23503/medicare-and-medicaid-programs-reform-of-requirements-for-long-term-care-facilities. The rule also places certain restrictions on post-dispute arbitration agreements, including requirements that facilities explain any such agreement in a way that the resident can understand, receive acknowledgement from the resident that he or she understands the agreement, and draft agreements to provide for a neutral arbitrator and a mutually convenient

continued on page 3

Class Action Waivers *continued from page 1*

Congress' clear intent behind the NLRA. Specifically, the language of the NLRA establishes the right of employees to act in concert; Sections 7 and 8 of the Act provide: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . [It is] an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158. Additionally, the court concluded that the Federal Arbitration Act did not dictate a contrary result, for the FAA does not mandate the enforcement of contract terms that waive substantive federal rights. See 9 U.S.C. § 2.

A lengthy dissent argued that the majority's decision cut to the core of the FAA's command to enforce arbitration agreements according to their terms. Additionally, the dissent stated that the majority's holding directly contradicted the Supreme Court's previous decision that allowed waivers of class actions in the arbitration context. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (stating a waiver of class actions is typical in the arbitration context because the class procedural mechanism "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

The Ninth Circuit decision closely follows a decision by the Seventh Circuit in Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016). Relying on statutory interpretation similar to that used by the Ninth Circuit, the Seventh Circuit panel unanimously held that the NLRA rendered unenforceable those contract provisions that purportedly waived employees' access to collective remedies for wage-and-hour claims.

It is unclear whether other circuits will follow the lead of the Seventh and Ninth Circuits. In particular, in years prior, the Second, Fifth, Eighth and Eleventh Circuits have enforced concerted action waiver clauses in employment agreements of the very kind held unenforceable by the Seventh and Ninth Circuits. See Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326 (11th Cir. 2014); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013). The Supreme Court will have a chance to resolve this conflict in the circuits, as the plaintiffs in the Ninth Circuit case have filed a petition for certiorari. See Ernst & Young, LLP v. Morris, No. 16-300 (Sept. 8, 2016).

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While it is unclear whether other circuits will follow the Ninth Circuit's lead or whether the Supreme Court will affirm or reverse that decision, the Ninth Circuit holding has implications for both employers and employees. From an employee's perspective, this ruling prevents employers from stymieing those employees who would hesitate, for reasons of expense, among others, to pursue claims against their employers by themselves. From the employer's perspective, the Ninth Circuit's decision is worrisome, for it opens up the possibility that employees may initiate class actions against employers even in the face of employment agreements that previously rendered that option impossible.

As parties in arbitrations do not enjoy the procedural safeguards and finality of class claims under Federal Rule of Civil Procedure 23, the introduction of class actions to this nonjudicial dispute resolution process raises concerns. Under Rule 23, for a class action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard and a right to opt out of the class. These procedural requirements ensure that absent class members are bound by the court's decision, which eliminates duplicative litigation. Some arbitral bodies, such as the American Arbitration Association, do have rules governing class arbitrations that mirror those provided by the federal rules. In the absence of arbitration forum rules that follow Rule 23, however, arbitrators are left with little guidance regarding the amount of process required for absent parties to be bound by the results of a class arbitration. This leaves open the possibility of absent class members bringing their own, similar claims, resulting in the possibility of inconsistent awards driven by the lack of clarity over the reach of a class arbitration decision.

Look for future editions of Stradley Ronon's ADR Advisor for more about this developing line of cases. ■

New Rule From the Centers for Medicare and Medicaid Services *continued from page 1*

location. Under the rule, long-term care facilities may not require that residents agree to arbitration as a condition of continued residency, nor may they prohibit residents from communicating with federal, state or local officials. In addition, the rule introduces certain protective requirements for arbitration agreements signed by someone other than the resident, on the resident's behalf. The rule also lifts the veil of secrecy from these arrangements by requiring facilities to retain and make available to CMS upon request all arbitration decisions, and their corresponding arbitration agreements, for five years.

CMS called for these changes in the wake of disturbing and persistent stories of long-term care facilities relegating residents' abuse and neglect claims to private arbitration. See Jessica Silver-Greenberg & Michael Corkery, In Arbitration, a 'Privatization of the Justice System,' N.Y. TIMES, November 1, 2015, http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html. Because arbitration decisions are often confidential, CMS believed that this system allowed facilities to hide unfavorable outcomes. Moreover, the decision to move into a long-term care facility is often an emotional one, made out of necessity because of health and safety issues. In its responses to comments on the rule, CMS highlighted that prospective residents and their families may not have the time to seek legal advice and may feel their residential health care options are limited. This rule attempts to shift some of the bargaining power out of the hands of the facilities by permitting arbitration agreements only post-dispute, when residents and their families better understand what is at stake and have more time to consider the matter.

Many state leaders backed the rule's prohibition on predispute arbitration agreements, with CMS citing letters of support from across the country, including one from 34 senators and another from 16 state attorneys general.

Still, the rule has faced criticism from members of the long-term care facility industry, who worry about increased costs from additional litigation, and from legal analysts, who say the rule overreaches. During the rule's review period, CMS received comments questioning its authority to enact the rule under the Federal Arbitration Act, which generally requires the enforcement of arbitration agreements. However, in response to comments citing the FAA, CMS noted that the plain language of the FAA limits its application to existing arbitration agreements. Thus, the rule does not aim to affect the enforceability of existing arbitration agreements between long-term care facilities and their residents, but only agreements entered into after the effective date of the rule. Ultimately, CMS concluded that the rule is well within its statutory authority and is similar to actions it has taken in the past.

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However, some courts have rejected state laws conflicting with the spirit of the FAA. For example, in Taylor v. Extendicare Health Facilities, Inc., No. 19 WAP 2015, 2016 WL 5630669 (Pa. September 28, 2016), the Supreme Court of Pennsylvania turned to the FAA when considering a nursing home's effort to compel arbitration of wrongful death and survival claims brought by the beneficiaries of a deceased resident. The Court of Common Pleas and the Superior Court had rejected the nursing home's attempt at bifurcating the beneficiaries' claims to force the survival claim into arbitration under the decedent's arbitration agreement with the nursing home. However, the Supreme Court of Pennsylvania held that the FAA's federal mandate of judicial enforcement of arbitration agreements preempted the state law requiring the consolidation of wrongful death and survival claims relied upon by the decedent's beneficiaries. Thus, the Supreme Court of Pennsylvania reversed the Superior Court, severing the claims and likely pushing the survival claim out of the court system. While the majority briefly noted concerns about elder abuse and the unequal bargaining power of long-term care facilities and their residents, it ultimately concluded that the FAA, and the U.S. Supreme Court's strict interpretation of the FAA, left it with no choice but to enforce the parties' arbitration agreement.

Indeed, a preliminary injunction granted by a federal court in Mississippi on November 7 has already delayed the effective date of the rule's prohibition on predispute arbitration agreements, originally set for November 28. Am. Health Care Ass'n v. Burwell, No. 3:16-CV-00233, 2016 WL 6585295

continued on page 4

New Rule From the Centers for Medicare and Medicaid Services *continued from page 3*

(N.D. Miss. Nov. 7, 2016). The court concluded that CMS had likely exceeded its statutory authority under the Medicare Act and the Medicaid Act and that permitting the prohibition to stand could set precedent for broad agency power generally. Additionally, the court was not persuaded by CMS' narrow interpretation of the FAA or its factual justification for the prohibition, although the court acknowledged legitimate mental competency concerns with arbitration agreements between long-term care facilities and their residents. Following this decision, it remains unclear when, if at all, this portion of the rule will go into effect, and whether the issue will require a ruling from the United States Supreme Court. ■

Stradley At Work

Kevin Casey, as a member of a three-arbitrator panel, recently conducted a Markman (claim construction) hearing in a patent arbitration involving multiple patents directed to furniture.

Bennett Picker, as a representative of the International Mediation Institute to the United Nations, participated in meetings at the UN in June. He met with a number of delegations to discuss ways in which early mediation efforts can reduce conflict within and among nations.

The AAA has appointed **Lee A. Rosengard** as sole arbitrator in a commercial dispute between a manufacturer and a distributor of its products.

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