MANDATORY ARBITRATION: FEDERAL AGENCIES VS. CONGRESS

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While the Pennsylvania appellate decisions discussed in this double issue of the Verdict are inconsistent in protecting the rights of our citizens, the battle to ensure fairness with respect to mandatory arbitration is having greater success through federal agency regulations. When Congress created the Consumer Financial Protection Bureau ("CFPB") in 2010, it gave it the power to restrict the use of mandatory arbitration agreements by financial services providers. At the time it created the CFPB – during the immediate aftermath of the Great Recession – it would appear Congress appreciated the hazards posed by banks with too much power over consumers. How soon they forget. When the CFPB tried to use its power to regulate mandatory arbitration in May of this year, Congress quickly threatened to take the power away.

On May 5, 2016, the Consumer Financial Protection Bureau issued a 377-page proposal that would prohibit financial service providers from requiring consumers to waive the right to class action litigation in their mandatory arbitration agreements.[1] The CFPB concluded that "individual dispute resolution mechanisms are an insufficient means of ensuring that consumer financial protection laws and consumer financial contracts are enforced."[2] Class actions, in contrast, "provide a more effective means of securing relief for large numbers of consumers affected by common legally questionable practices and for changing companies' potentially harmful behaviors."[3] The proposed regulation, which would appear at 12 C.F.R. § 1040.1 through 1040.5, would require financial service providers' arbitration agreements to contain the following language: "We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it."[4] This is music to consumer advocates' ears.

Congress's response to this CFPB proposal was swift and hostile. On July 11, 2016, the U.S. House of Representatives passed an appropriations bill that would strip the CFPB of power to regulate banks' ability to use arbitration agreements.[5] The bill prohibits any funding made available by Congress to the CFPB from being "used to regulate pre-dispute arbitration agreements."[6] As if that weren't decisive

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enough, Indiana Rep. Marlin Stutzman introduced a bill on June 22, 2016 that would amend the Consumer Financial Protection Act to repeal the provision giving the CFPB authority to restrict the use of mandatory arbitration agreements.[7]

On September 27, 2016, the Centers for Medicare and Medicaid Services ("CMS") issued final rules that will prohibit binding, pre-dispute arbitration clauses in federally funded "skilled nursing facilities ("SNFs") – commonly referred to as nursing homes. Clauses that have become embedded in the fine print of nursing home admission contracts have pushed disputes about safety and the quality of care out of the public view of court proceedings, into the closet of private arbitrations. Although "personal care homes" (often called assisted living facilities) are not covered by Medicare, this rule would affect nursing homes nationwide, where 1.5 million of our citizens now reside. In its summary description of the new rules, CMS explained that the new final rules will revise the requirements that SNFs must meet in order to participate in the Medicare and Medicaid programs. The new CMS rules prohibiting mandatory arbitration clauses were set to go into effect on November 28, 2016, but on November 7, a federal court granted an injunction blocking implementation.[8]

How will this play out? Which will have its way, Congress or the federal agencies that are attempting to protect our individual rights to jury trials? Only time will tell, but consumers' rights hang in the balance.

NOTES

[1] See Bureau of Consumer Financial Protection, Docket No. CFPB-2016- 0020 (http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf).

[2] Id. at 95.

[3] Id. at 92.

[4] Id. at 361.

[5] H.R. 5485, 114 th Congress (2016).

[6] Id. at Sec. 506.

[7] H.R. 5569, 114 th Congress (2016).

[8] See the article by Leslie A. Bailey of Public Justice in this issue of The Verdict.

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JOSEPH Z. TRAUB

It was in law school that Joseph Traub was first inspired to work on behalf of catastrophically injured laborers, helping represent them in claims against the manufacturers of the defective industrial machines that caused their injuries. Since graduating, cum laude, from Temple University Beasley School of Law, his professional work has expanded to representing people catastrophically injured by defective industrial and consumer products, unsafe construction practices, dangerous driving and serious medical errors. For example, he has represented a man thrown from a scissor lift with poor lateral stability, a woman whose arm was pulled into a commercial ironing roller, a family struck by a drunk driver, and a man whose throat cancer was missed by a pathologist. His work has helped provide financial relief, as well as a sense of justice and resolution, to victims and their families while also encouraging safer products and medical practices.

Mr. Traub has lectured and published articles on various topics relevant to the practice of personal injury litigation, including principles of legal ethics, strategies in construction litigation and federal preemption. As a member of the Amicus Curiae Committee of the Pennsylvania Association for Justice, Mr. Traub advocates for the rights of injured persons in the appellate courts of Pennsylvania. His appellate advocacy on behalf of his own clients has resulted in several positive developments in the law, including ensuring funds are available to compensate malpractice victims where a doctor's insurance carrier goes bankrupt (Heim v. Medical Care Availability and Reduction of Error Fund, 23 A.3d 506 (Pa. 2011)), and allowing medical experts to testify where they are familiar with the care at issue even if they do not practice in the same specialty as the defendant (Vicari v. Spiegel, 989 A.2d 1277 (Pa. 2010)). He is also on the Board of Directors of the National Lawyers Guild Philadelphia Chapter, an association of lawyers and legal workers doing primarily civil rights and public interest advocacy. In his free time he enjoys distance running and playing drums in a band.

PRACTICE AREAS

- Car Accidents
- Construction Accidents
- Helicopter Crashes
- Insurance
- Medical Malpractice
- Professional Malpractice

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- Philadelphia Trial Lawyers Association
- Lawyers Club of Philadelphia
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