Volunteer interviewers needed for our second Member Spotlight – Medical Malpractice!

The members of the Healthcare Litigation and Risk Management IG collectively have a wealth of experience and knowledge in many different areas of practice. In an effort to highlight our members and to provide an additional opportunity for networking, the “Member Spotlight” section will highlight one or more members in a written interview-style format. Each Member Spotlight will focus on a different practice area within our IG. We published our first Member Spotlight in the July 2017 Newsletter. Our featured topic area was the False Claims Act. Thank you to our interviewees and our interviewers!

We are now currently searching for younger members who are interested in serving as interviewers for our second Member Spotlight. Our second Member Spotlight will focus on Medical Malpractice. This is a great opportunity to network and publish something. If you are interested in this opportunity, please contact Michael Morton at michael.morton@lcba.state.nv.us.

Tip of the Month

CMS Revisits Pre-Dispute Binding Arbitration for Nursing Home Residents

In June 2017, the Centers for Medicare and Medicaid Services (“CMS”) announced plans to revoke an Obama-era rule prohibiting nursing homes that accept Medicare or Medicaid funds from including language in their resident contracts requiring that disputes be settled by a third party rather than a court. The District of Columbia and 16 states are pushing back...asking the Trump administration to reconsider its decision to revoke the October 2016 rule banning “forced” arbitration agreements in nursing homes and long term care contracts.

More than 75 consumer groups, health and advocacy groups and the AARP have opposed the proposed changes to the rule which they claim will strip nursing home residents and family members of the right to sue nursing homes for alleged abuse, neglect or sexual assault. They are joined by the state attorney generals for the District of Columbia, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New York, North Carolina, Oregon, Pennsylvania, Vermont and Washington.

“Pre-dispute binding arbitration agreements in general can be procedurally unfair to consumers, and can jeopardize one of the fundamental rights of Americans; the right to be heard and seek judicial redress for claims,” the attorneys general stated in their comments to CMS. ¹

¹ See “16 states, DC push Trump admin to protect right to sue nursing homes”, by Lydia Wheeler, The Hill, August 8, 2017 http://thehill.com/regulation/345781-16-states-dc-push-trump-
agreed-upon arbitration agreements that are reached to resolve a dispute at the time of the dispute; however, they oppose the imposition of “forced” arbitration agreements on families who, under pressure, seek to admit a loved one into a long-term care facility and may not be able to object to the inclusion of the arbitration clause in admission documents. Such language – often buried deep in the fine print - forces residents or their families to settle neglect and abuse allegations privately with an arbitrator rather than through the courts. Signing the pre-dispute arbitration agreements may be a condition of admission removing the “voluntariness” aspect of the agreement during the emotionally-charged admission process.

The nursing home industry disagrees. The American Health Care Association (“AHCA”) and a group of nursing homes had sued CMS and the Department of Health and Human Services in October of 2016, claiming that the rule violated the Federal Arbitration Act and that the agencies had overstepped their statutory authority in issuing the rule. Last November, Judge Michael Mills of the U.S. District Court for the Northern District of Mississippi granted a request from members of the nursing home industry to enjoin the rule from taking effect on November 28, 2016 while it was being challenged in court. In June of this year, a federal judge gave the parties’ joint request to put a case on hold until CMS reconsiders the rule.

The AHCA and other groups, including the U.S. Chamber of Commerce, claim that restricting arbitration would raise the cost of nursing home care and make it harder, and costlier, for residents to resolve disputes. These groups argue that many residents’ claims are too small to justify paying a lawyer to handle the matter and that in any event, most people do not have the resources to do so. The AHCA claims that arbitration is less expensive and more efficient than litigation and that there is no monetary limit on the monetary award that residents can receive through the arbitration process.

Judge Mills based his order temporarily blocking the rule from taking effect last November on a finding that although the public policy considerations motivating the rule might be sympathetic, the Court was unwilling to allow CMS to overstep its executive authority. “This court believes that Congress might reasonably consider this inefficiency, as well as the extreme stress many nursing home residents and their families are under during the admissions process, as sufficient reason to decide that arbitration and the nursing home admissions process to not belong together.” However, he noted that Congress did not enact the rule, a federal agency did, and “therein lies the rub.”

Claims settled in arbitration appear to have worked out to the nursing homes’ advantage. Agreements reached out of court cost about 16% less on average than claims that do not involved arbitration per a 2015 statement by the insurance broker Aon Global Risk Consulting. Industry representatives claim that money spent on litigation should instead be directed towards patient care. Families, on the other hand, relate that they feel pressure to sign the binding arbitration agreements and do not understand what they are agreeing to. They do not realize that awards in arbitration nursing home cases are usually lower than those reached in court.

In May, 2017, the United States Supreme Court upheld the use of binding arbitration agreements in a nursing home case involving a wrongful death brought against Kindred Healthcare, striking down a Kentucky Supreme Court opinion refusing to permit the enforcement of binding arbitration agreements under state law. The issue is far from settled however, and CMS will issue its response to comments shortly. CMS has stated that it would revise the existing rule and allow nursing homes to use the pre-dispute arbitration agreements if the agreements are “written in plain language” and “are

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4 See “Fight over right to sue nursing homes heats up”, The Hill, id.
5 See, “Federal judge blocks rule giving nursing home residents right to sue,” The Hill, id.
6 Id.
8 Id.
explained to the prospective resident.” The resident must also acknowledge that they understand the agreement they are signing... a difficult task in the stressful and emotional environment surrounding long term care admission.  

✓ Our “Tip of the Month” was provided by Virginia B. Evans, Esq.

Volunteer Writers Needed! We are always searching for members of the IG who are interested in writing for this section. Entries do not have to be long – 50 to 1500 words (not a limit, just a guide). This is a great way to share helpful information with your IG colleagues. If you are interested in writing for this section please contact Ardith Bronson at ardith.bronson@dlapiper.com.

UPCOMING PROGRAMS

Private Enforcement of Anti-Kickback Laws

Format: Webinar
Date: October 12, 2017
Time: 12:00 PM – 1:30 PM (ET)
Credits: 1.5 General CLE Credit Hours
Panelists: Ardith Michelle Bronson & Stephen Mooney
Moderator: Sean McKenna

Description: Learn about the legal strategies and tactics private payors are using to combat referral, kickback or other fraud schemes allegedly engaged in by providers who do not accept payments from any federal or state programs. As governmental funds are not involved, false claim statutes and similar anti-fraud measures do not apply, so such schemes are not prosecuted by governmental agencies. Private payors have begun filing suits asserting common law fraud and other theories to combat such arrangements.

Our panelists will discuss:

- The legal theories advanced in these lawsuits
- The defense perspective
- Significant court rulings

Register at: https://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=277020822&sc_cid=CE1707PEA-FMP

10 See “16 states, DC push Trump admin to protect right to sue nursing homes,” The Hill, id.
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