

Alliance for Justice
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October 14, 2015

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-3260-P
P.O. Box 8010
Baltimore, MD 21244

RE: Comments to Bureau of Centers for Medicare & Medicaid Services Regarding Notice of Proposed Rulemaking and Request for Comments on Use of Binding Arbitration Agreements by Long-Term Care Facilities

Docket No. CMS-3620-P

To Whom It May Concern:

Alliance for Justice respectfully submits this letter in response to the Center for Medicare & Medicaid Services (CMS) request for comments on the use of forced arbitration agreements by long-term care facilities. Specifically, CMS asked “whether agreements for binding arbitration should be prohibited” in long-term care agreements. Alliance for Justice urges CMS to prohibit pre-dispute forced arbitration in all long-term care contracts. Forced arbitration is an inherently unjust practice that cannot be corrected with reforms short of outright prohibition.

Alliance for Justice (AFJ) is a national association of more than 100 organizations, including a broad array of groups committed to progressive values and access to justice for all Americans. Among AFJ’s member organizations are several groups specifically dedicated to the protection of senior citizens and consumer rights.¹ Based on our work and the work of our member organizations, we have grown increasingly concerned about the nearly ubiquitous presence of pre-dispute forced arbitration clauses in nursing home contracts.² AFJ has prepared a number of reports³ detailing the harmful effects of forced arbitration on consumer choice, corporate

¹ AFJ member organizations include AARP, Compassion & Choices, Consumer Action, Consumers Union, National Consumer Voice for Quality Long-Term Care, National Association of Consumer Advocates, and National Senior Citizens Law Center.

² Fairness in Nursing Home Arbitration Act of 2008: Hearing on H.R. 6126 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. (2008).

³ See, e.g., Alliance for Justice, *Arbitration Activism: How the Corporate Court Helps Business Evade Our Civil Justice System* 2011), <http://www.afj.org/connect-with-the-issues/the-corporate-court/arbitration-activism-how-the-corporate-court-helps-business-evade-our-civil-justice-system.pdf>; Nan Aron, *CFPB Study Proves Forced Arbitration Harms Consumers; Agency Should Prohibit the Practice Wherever It Can*, Huffington Post, Mar. 20, 2015, http://www.huffingtonpost.com/nan-aron/cfpb-study-proves-forced_b_6911050.html.

accountability, and the continued vitality of our legal system. AFJ publications have detailed the stories of many consumers who have been denied access to the courts as a result of corporate abuse of pre-dispute arbitration clauses, including those prohibiting collective action.⁴ AFJ also produced a short documentary, *Lost in the Fine Print*,⁵ that demonstrates the harm of forced arbitration for consumers, employees, and small businesses.

As the agency responsible for protecting residents in nursing homes and long-term care facilities, it is vital that CMS prohibit pre-dispute forced arbitration agreements. CMS's proposed reforms to forced arbitration, while well-intentioned, fail to adequately address its harms.

First, arbitration proceedings, when used, lack the basic hallmarks of due process that define our venerated courts system.⁶ Claims are adjudicated in private proceedings, often before biased arbitrators chosen by the company invoking the forced arbitration clause. There is no public record; corporations choose the same arbitrator or arbitration company for all their contracts, creating a risk of repeat-player bias in decisionmaking;⁷ consumers have no choice in who hears their claims or where they are heard; and, without the normal rules of evidence and procedure, discovery is often limited, making legitimate claims harder to prove. Yet despite these deficiencies, arbitration decisions are final and there is no meaningful appellate review. In short, arbitration is a rigged game that is forced upon consumers, often when the last thing on their minds is how they might handle some hypothetical future dispute.

Second, forced arbitration deters many consumers from bringing their claims in the first place. In the most thorough empirical study of forced arbitration to date, the Consumer Financial Protection Bureau (CFPB) reported staggering numbers that show the extent of claim suppression. For example, according to the study, consumers of financial products or services in six product markets⁸ from 2010 to 2012 filed only 411 arbitration cases each year, even though “tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses.”⁹ In contrast, from 2008 to 2012, at least 32 million consumers per year were eligible for relief from class settlements, with total relief worth \$2.7 billion.¹⁰

For these reasons, pre-dispute forced arbitration is problematic whenever it appears in the fine

⁴ Id.

⁵ LOST IN THE FINE PRINT (Alliance for Justice 2014), available at www.lostinthefineprint.org.

⁶ See generally Lina Khan, *Thrown Out of Court: How corporations became people you can't sue*, Washington Monthly, June/July/August 2014, http://www.washingtonmonthly.com/magazine/junejulyaugust_2014/features/thrown_out_of_court050661.php?page=all.

⁷ See Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, 15-16. (2007), <http://www.citizen.org/documents/ArbitrationTrap.pdf>; Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Studs. 1, 15 (2011), http://www.consumeradvocates.org/sites/default/files/AnImperialStudy_0.pdf.

⁸ The six markets included are: credit card; checking account/debit cards; payday loans; prepaid cards; private student loans; and auto loans.

⁹ Consumer Financial Protection Bureau, *Arbitration Study Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf, at 11.

¹⁰ Id. at 16; Section 8: What Is the Value of Class Action Settlements at 4.

print of consumer and employee agreements. But it is especially egregious when used against nursing home residents and their families, who are among society's most vulnerable people. Entering a facility is usually the result of a dramatic change in health or ability. It is therefore a stressful moment in the lives of residents and their loved ones, one in which their only concern is the health and well-being of the resident, not the contours of an arbitration agreement and what it might mean if there's a dispute down the road. And because families want to choose a location that's nearby, they generally face little choice when selecting a long-term care facility. With limited choice and the stress of failing health and major life change, residents are easily coerced by facilities with far superior bargaining power.

That nursing home residents often need the courts to secure justice is, sadly, well-established. It's estimated that over 5 million nursing home residents are abused, neglected, or exploited each year,¹¹ and a report issued by the HHS Office of Inspector General found that in 2012 "85 percent of nursing facilities reported at least one allegation of abuse or neglect."¹²

Further, beyond individual residents who are harmed, forced arbitration also threatens the public welfare. The prospect of lawsuits and class litigation is a powerful incentive for nursing homes to improve quality of care and ensure resident safety. And lawsuits can lead to settlements that require nursing homes to improve their practices and institute life-saving operational reforms.¹³ In contrast, even if a resident prevails in arbitration, the secrecy of those proceedings and limits on discovery prevent wrongdoing from being exposed to the public and remedied on a large scale. This problem is compounded by confidentiality clauses that prohibit residents from discussing any incidents with government officials, thereby blocking public enforcement of consumer protection laws.

These problems cannot be fixed or avoided by anything other than prohibiting forced arbitration entirely. The criteria CMS propose to reform forced arbitration are inadequate and do not fix the practice's fundamental flaws. For example, the proposed protections fail to address the practical realities that accompany the stressful process of admission into a nursing home. Further explaining arbitration agreements or making their existence in contracts more obvious would not eliminate the pressure to sign them. This is especially true when, as is often the case, a resident is hospitalized and needs to locate a facility immediately, or when a resident's change in health precludes him or her from researching and visiting multiple facilities. Under such duress it is unlikely that residents will understand the severe implications of the forced arbitration provisions.

Importantly, banning *forced* arbitration is not the same as banning arbitration entirely. It does not prevent facilities and residents from agreeing to arbitration post-dispute, when the risk of coercion is smaller and the resident is already aware of the harm for which he or she seeks

¹¹ U.S. Department of Health and Human Services, Administration for Community Living, Release of the FY 2014 Budget Request to Congress, February 13, 2013.

¹² U.S. Department of Health and Human Services, Office of Inspector General, *Nursing Facilities' Compliance With Federal Regulations for Reporting Allegations of Abuse or Neglect*, (August 2014), <http://oig.hhs.gov/oei/reports/oei-07-13-00010.pdf>.

¹³ For examples, see Center for Justice & Democracy, *Fact Sheet: Lawsuits Save Seniors' Lives*, <http://centerjd.org/content/fact-sheet-lawsuits-save-seniors-lives>.

redress. It only ensures that people are not coerced into signing away their legal rights at a vulnerable time before any dispute has occurred.

The Congressional Budget Office projects that one-fifth of the country's total population will be 65 or older by 2050—a 12 percent increase from 2000.¹⁴ CMS must safeguard this vulnerable population from having to sacrifice integral consumer protections and constitutional rights in order to receive necessary nursing home care and services. We strongly urge a complete prohibition of forced pre-dispute arbitration provisions in long-term care facility contracts.

Sincerely,

A handwritten signature in black ink, appearing to read "Nan Aron". The signature is fluid and cursive, with a long horizontal stroke at the end.

Nan Aron
President, Alliance for Justice

¹⁴ Congressional Budget Office, *Rising Demand for Long-Term Services and Supports for Elderly People*, (June 2013), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/44363-LTC.pdf>.