

May 16, 2018

The Honorable David N. Cicilline
Chair
Subcommittee on Antitrust, Commercial and
Administrative Law
U.S. House Committee on the Judiciary
2138 Rayburn Building
Washington, DC 20515

The Honorable F. James Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial and
Administrative Law
U.S. House Committee on the Judiciary
2142 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

The National Consumer Voice for Quality Long-Term Care (“Consumer Voice”) thanks you for holding this hearing, “Justice Denied: Forced Arbitration and the Erosion of our Legal System” exploring how forced arbitration is harmful to consumers and reduces their access to the legal justice system.

Consumer Voice is a national non-profit organization that advocates for quality care, quality of life, and the rights of long-term care consumers in all settings. We have observed that forced arbitration agreements are increasingly used by nursing homes and providers of home and community-based services (HCBS), such as assisted living communities and home care agencies, that receive federal Medicaid and/or Medicare funding. Once signed, these agreements bar consumers from seeking legal action in court should they suffer harm or injury.

Forced arbitration clauses in admission agreements are fundamentally unfair. Nursing facilities and HCBS providers that receive federal Medicaid and/or Medicare funding should not be permitted to impose them on residents or individuals receiving services for the following reasons:

- 1. Forced arbitration agreements are inherently unfair to consumers.** Such agreements frequently allow the long-term care provider to select the arbitrator, the rules for the arbitration process, and where the arbitration will be held. In addition, there is a strong incentive for arbitrators to find in favor of the provider since this can assure them of repeat business.
- 2. Forced arbitration agreements prevent informed decision-making.** An essential component of any decision-making process is gathering the information needed to make the best decision. Yet forced arbitration agreements demand consumers sign the agreement in a vacuum without any information at all about the dispute. No one can make an informed decision under such circumstances!

The National Consumer Voice for Quality Long-Term Care (formerly NCCNHR) is a 501(c)(3) nonprofit membership organization founded in 1975 by Elma L. Holder that advocates for quality care and quality of life for consumers in all long-term-care settings.

- 3. Forced arbitration agreements take advantage of consumers at their most vulnerable.** Nursing facility admission is a difficult and confusing time for residents and their families. They are most often under extreme pressure to find nursing facility placement quickly. Consumers seeking admission to an assisted living residence or services at home or in the community are generally also in a stressful position to find care and services rapidly. As a result, individuals and their family members are generally unaware of what they are signing and unlikely to be able to fully appreciate that they are relinquishing a critical right, let alone understand the significant and irreversible consequences of that decision.
- 4. Forced arbitration agreements restrict resident choice.** Prospective consumers and their families often have little actual choice of nursing facilities or other HCBS service providers due to their geographic location, specific needs, or the necessity of immediate placement when facing imminent hospital discharge. Because forced arbitration agreements are generally offered on a “take it or leave it” basis, individuals and families often feel they have no choice but to sign the agreement, or they will not be admitted to the facility and/or receive the care they need.
- 5. Arbitration can be expensive.** Arbitration is often touted as a lower cost, less burdensome alternative to the traditional legal system. In reality, arbitration can be equally or even more costly than bringing a court claim.¹ Consumers certainly end up paying more since they generally have to pay a part of the arbitrator’s fee in addition to hiring a lawyer.
- 6. Arbitration lessens accountability for poor care.** Because the arbitration and its findings are kept secret, arbitration lessens the degree of accountability of nursing homes, assisted living residences and home and community-based service providers for poor care, abuse, and neglect. This, in turn, can lead to more, not fewer, injuries, and greater costs to taxpayer-funded programs like Medicare.

In February, Rep. Hank Thompson and Sen. Richard Blumenthal introduced the Forced Arbitration Injustice Repeal (FAIR) Act (H.R. 1423/S.R. 610). This important legislation would prevent corporations from forcing nursing home and assisted living residents, older adults, and other individuals receiving services to resolve disputes in private, company-controlled arbitration systems, even when that company has engaged in alleged illegal misconduct. The bill would specifically cover cases involving consumer and civil rights, among others, and it would ensure that federal and state laws enacted to protect legal rights in those cases are properly enforced.

The FAIR Act does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily post-dispute. Arbitration may be a good choice for residents and their families in certain situations, and the FAIR Act would allow long-term care consumers to choose arbitration in the aftermath of being harmed if they truly perceived arbitration to have benefits over proceeding in court.

¹ Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), CONSUMER FIN. PROTECTION BUREAU, Appendix A at 43 (2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

Consumer Voice urges the Committee to support this important legislation, which would restore access to our civil justice system and preserve important civil rights and consumer protections. We appreciate the Committee's interest in this important issue, and thank you for the opportunity to submit testimony.

Sincerely,

Handwritten signature of Lori Smetanka in cursive script.

Lori Smetanka, J.D.
Executive Director

Handwritten signature of Robyn Grant in cursive script.

Robyn Grant
Director of Public Policy and Advocacy