

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF THE ATTORNEY GENERAL

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Attorney General Racine and Colleagues Side with Consumers in Contract Disputes with Long-Term-Care Facilities

Attorneys General Say Pre-Dispute Binding Arbitration Clauses Should Be Prohibited

WASHINGTON, D.C. – Attorney General Karl A. Racine has joined colleagues from around the country in expressing his strong opposition to pre-dispute arbitration clauses in contracts for long-term-care facilities, saying their use erodes the rights of families at a sensitive time and gives consumers little bargaining power when disputes occur. Such clauses typically require that claims against a business – even for cases of abuse or neglect – must be brought before a private arbitration provider chosen by the facility, prohibiting consumers from filing suit.

Attorney General Racine and counterparts from 15 other states urged the stronger consumer protections in comments submitted to the federal Centers for Medicare and Medicaid Services (CMS). The agency solicited feedback on whether binding arbitration agreements should be prohibited in long-term care contracts.

“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 our claims,” the attorneys general wrote. “This is especially true when consumers are making the difficult decisions regarding the long-term care of loved ones. These contractual provisions may be neither voluntary nor readily understandable for most consumers.”

The American Arbitration Association determined in 2003 that it would not administer healthcare arbitrations between patients and service providers that related to medical services unless all parties agreed to arbitration after the dispute occurred.

A Consumer Financial Protection Bureau study of arbitration agreements in financial-services contracts found that consumers were largely unaware about whether their contracts contained an arbitration clause and that it restricted their ability to sue in court.

In the comments, the attorneys general contend that an individual entering a nursing home or other long-term care facility, or family members acting on their behalf, are often making a healthcare choice under stressful circumstances. In such circumstances, the officials argue, consumers are unlikely to make a rational or informed decision about the resolution of future disputes.

In many instances, a resident or family member only discovers the existence of a binding arbitration clause after a dispute arises or a tragic event occurs.

“While arbitration can be a good method of resolving disputes short of litigation, the decision to enter into arbitration should not be taken out of the hands of families long before they envision a potential conflict,” Attorney General Racine said. **“The worst time to waive your right to seek remedies in a court of law is when you or a family member is going through the sensitive process of entering a long-term-care facility.”**

The use of binding arbitration agreements has other negative consequences for consumers: less accountability for the long-term-care industry; lower awards when an arbitrator finds in the consumer’s favor, including in cases of severe negligence or mistreatment; and a reduced incentive for institutions serving consumers to change unlawful or harmful practices.

Maryland Attorney General Brian E. Frosh drafted the comments that were submitted to CMS, with assistance from other state attorneys general. Besides the District, other states that signed on are California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, New York, Rhode Island, Oregon, Vermont, and Washington state.

A copy of the comments that the attorneys general submitted to CMS is attached.

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