

Ban Pre-Dispute Arbitration Agreements in Long-Term Care

Use of Pre-Dispute Arbitration Agreements in Long-Term Care is Widespread

Arbitration is a legal process in which a dispute is settled by one or more arbitrators who decide the outcome instead of a jury made up of members of the community. “Pre-dispute arbitration” (also referred to as “forced arbitration”) means that the consumer is asked, or required, to agree to arbitration before any dispute arises and without even knowing the nature of the dispute – which can involve severe neglect, serious injuries or even death. Pre-dispute arbitration agreements are increasingly used by long-term care facilities as a means of preventing residents or family members from filing a lawsuit in the event of harm or injury.

In November 2016, the Centers for Medicare and Medicaid Services (CMS) released the Medicare and Medicaid Programs: Reform of Requirements for Long-Term Care Facilities Rule that included a section prohibiting pre-dispute arbitration agreements between federally funded nursing facilities and residents. The rule was never implemented due to legal action initiated by the American Health Care Association, a nursing home trade association. Then, in June 2017, CMS issued a proposed rule that would allow providers not only to continue to use these agreements, but to also coerce residents into signing these agreements and forfeiting their rights, or risk not being admitted to the facility.

In November 2017, CMS released Entering into Binding Arbitration Agreements and Arbitrator/Venue Selection and Retention of Agreements. These rules require facilities to explain arbitration agreements to the consumer and prohibit facilities from denying admission or discharging consumers who refuse to agree to arbitration. The rules ensure that if a consumer does agree to the arbitration agreement, the arbitrator will be a neutral party and mutually agreed upon and the venue will be convenient to both parties. While these rules are reassuring, they do not go far enough to protect long-term care consumers.

Prohibiting Pre-Dispute Arbitration Agreements is Important to Long-Term Care Consumers

These agreements:

Prevent informed decision-making. An essential component of any decision-making process is gathering the information needed to make the best decision. Yet pre-dispute arbitration agreements force people to make a decision in a vacuum without any information about the dispute. No one can make an informed decision under such circumstances!

Take advantage of consumers when they are most vulnerable. Nursing facility admission is a difficult and chaotic 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 often 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.

Are inherently unfair to consumers. While the arbitration agreements are required to provide for the selection of a neutral, mutually agreed upon arbitrator and a venue that is convenient to both the facility and the consumer, the long-term care provider is still permitted to set the rules for the arbitration process. In addition, there is a strong incentive for arbitrators to find in favor of the provider since this can assure them of repeat business.

Restrict consumer choice. Prospective consumers and their family 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. Long-term care facilities are not permitted to deny admission or to discharge consumers who refuse to sign pre-dispute arbitration agreements, but many individuals and families often still 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.

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 often end up paying more since they generally have to pay a part of the arbitrator's fee in addition to hiring a lawyer.

Hide poor care. Arbitration proceedings and results against long-term care providers usually remains confidential. This allows unsafe providers to prolong misconduct and suppress information about dangerous conditions and practices. For instance, without knowledge of a nursing home's substandard care, abuse, or neglect, consumers may choose a nursing home or remain in one and may suffer harm as a result.

What Congress Can Do

Over the past year, over 170,000 residents of long-term care facilities have died from COVID-19. Countless others have suffered from harm and neglect. Pushing families and residents into a process that strongly favors the nursing home industry over resident rights and safety is unjust and unfair. Congress must stand with residents and their families and support The Fairness in Nursing Home Arbitration Act (H.R. 2812) and the FAIR Act (H.R. 963) and reject forced arbitration.

We ask Congress to:

- Support H.R. 2812, The Fairness in Nursing Home Arbitration Act, which would ban the use of pre-dispute arbitration agreement in nursing homes.
- Support H.R. 963 the Forced Arbitration Injustice Repeal Act (FAIR), which would prohibit pre-dispute arbitration in a wide range of settings, including long-term care.

