Comments of State Attorneys General on Mandatory Arbitration Provisions In Long-Term Care Facility Contracts

Thank you for the opportunity to submit comments on Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 136 (proposed July 16, 2015)(to be codified at 42 CFR Pts 405, 431, 447, 482, 483, 485, and 488), which included a request for comments on whether long-term care facilities should be prohibited from including binding arbitration provisions in their contracts. The undersigned Attorneys General strongly believe that pre-dispute binding arbitration agreements are harmful to residents of long-term care facilities and that the Centers for Medicare and Medicaid Services ("CMS") should prohibit binding arbitration clauses in long-term care facility contracts.

The Federal Arbitration Act ("FAA") as conceived in 1925 was intended to facilitate arbitration of disputes between commercial entities of similar situation and bargaining power.[1] In recent years, however, this premise has eroded. Companies routinely impose mandatory arbitration in a wide range of consumer contracts where the consumer has little bargaining power. Increasingly, consumers are presented with "take it or leave it" fine print contracts containing pre-dispute arbitration clauses in which consumers are required to waive their right to seek judicial resolution of future disputes (and appeal thereof) in federal or state court. Courts

[1] Congress enacted the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, "to place arbitration agreements upon the same footing as other contracts. Thus, arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2. Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of...overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (internal citation omitted). *See also AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1759 (2011) (dissent) ("When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power.").

have found such language binding on the consumer even if he or she is not aware of the clause, never saw the provision, and had no opportunity to negotiate or reject the clause.[2] These concerns are especially acute at the time a particularly vulnerable individual is entering a long-term care facility, an emotional time for both the individual and the family, who typically are faced with a large number of documents that need to be completed to enroll in the facility. Only after tragic events do many people discover that the contract contains a binding arbitration clause requiring that claims against the facility – even for cases of abuse or neglect – must be brought before a private arbitration provider chosen by the nursing home.[3]

As State Attorneys General, we have substantial experience with protecting our most vulnerable citizens whose care is entrusted to long-term care and nursing home facilities. As you are aware, in addition to our role in protecting the consumers of our states, we represent the state certification agencies that conduct the annual certification of long-term care and nursing home facilities participating in Medicare and Medicaid. We also represent the state licensing authorities that oversee these facilities and their direct care staff.

Among these agencies' responsibilities is the enforcement of nursing home residents' bill of rights adopted in state law. These state laws include many of the protections of residents addressed in Medicaid regulations[4] but may also provide additional protections.[5] As part of their bill of rights, many states provide remedies that allow the resident to seek damages and/or

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[2] In some cases, such agreements have been found to be procedurally unconscionable when challenged on such grounds. *See, e.g., Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 201 (3d Cir. 2010) ("We have consistently found that adhesion contracts – that is, contracts prepared by the party with greater bargaining power and presented to the other party for signature on a take-it-or-leave-it basis satisfy the procedural element of the unconscionability analysis.") (internal quotation marks omitted).

[3] In other cases, a resident or resident's family having a complaint about a long-term care facility is advised by the facility that their only avenue for addressing the complaint is through arbitration.

[4] *See, e.g.*, 42 C.F.R. § 483.10.

[5] *Id.*

injunctive relief for violations of the state's bill of rights.[6] In some states, the statute precludes waiver by contract of these remedies.[7] These provisions are an important incentive to the provision of quality care by nursing homes. Yet, long-term care providers have and likely will continue to assert that the Federal Arbitration Act authorizes providers to include pre-dispute binding arbitration clauses at the time of admission that deprive residents and their families of their state law rights to judicial relief.

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. 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. Often consumers do not recognize the significance of these provisions, if they are aware of them at all, especially in the context of requiring care in a nursing home. Investigative studies have revealed that arbitrators have a powerful incentive to favor the dominant party in the arbitration (*i.e.*, the corporation).[8]

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[6] *See, e.g.*, Cal. Health & Safety Code § 1430; Conn. Gen. Stat. § 19a-550; Fla. Stat. Ann. § 400.023; Ga. Code Ann. § 31-8-126; 210 Ill. Comp. Stat. Ann. 45/3-602; La. Rev. Stat. Ann. 40:2010.9; Md. Code Ann., Health Gen. § 19-343; Mo. Ann. Stat. § 198.093; N.H. Rev. Stat. Ann. § 151:30; N.J. Stat. Ann. § 30:13-8; N.Y. Pub. Health Law § 2801-d; N.C. Gen. Stat. Ann. § 131E-123; Ohio Rev. Code Ann. § 3721.17; Okla. Stat. Ann. tit. 63, § 1-1918; Wis. Stat. Ann. § 50.10.

[7] *See, e.g.*, Conn. Gen. Stat. § 19a-550; 210 Ill. Comp. Stat. Ann. 45/3-606; Okla. Stat. Ann. tit. 63, § 1-1939; N.J. Stat. Ann. 30:13-8.1.

[8] For example, in 2009, the Minnesota Attorney General's Office filed a lawsuit against the National Arbitration Forum – then the largest arbitration company in the country for consumer credit disputes – following a year-long investigation, alleging that it misrepresented its independence and hid its extensive ties to credit card companies, other creditors, and the collection industry from consumers and the public. The litigation resolved with a Consent Judgment, barring the company from the business of arbitrating credit card and other consumer disputes. *See* Complaint, *State of Minnesota by its Attorney General, Lori Swanson v. National Arbitration Forum, Inc., et al.*, Minn. Dist. Ct., Hennepin County (July 14, 2009), *available at* http://www.ag.state.mn.us/pdf/pressreleases/signedfiledcomplaintarbitrationcompany.pdf. *See also* Testimony of Lori Swanson, Minnesota Attorney General, to U.S. Judiciary Committee on October 13, 2011, "Arbitration, Is It Fair When Forced?", *available at* http://www.cpradr.org/Portals/0/Resources/10132011ArbFairnessSenateTestimony/Swanson%20Testimony.pdf. Anecdotal evidence supporting this bias is also discussed in Costs of Arbitration Report, Public Citizen's Congress Watch (Apr. 2002), at p. 68, *available at* http://www.citzen.org/documents/ACF110A.pdf. More recently, in *After the Revolution: An Empirical Study of Consumer Arbitration*, University of California, Davis law professors David Horton and Andrea Cann Chandrasekher examined more recent arbitration data and concluded that there is indeed a

This is unfair to the consumer,[9] who is bound by the arbitrator's decision. High arbitration costs[10] and inconvenient venues combined with class action waiver provisions, which prohibit collective arbitration, deter harmed individuals from pursuing their rights.

Pre-dispute binding arbitration clauses are particularly ill-suited to agreements pertaining to health care, such as those between nursing homes and their residents. Indeed, even the American Arbitration Association ("AAA") itself has recognized that pre-dispute arbitration agreements are not appropriate in the healthcare context. In 2003, the AAA announced that it would not administer healthcare arbitrations between individual patients and healthcare service providers that relate to medical services, such as negligence and medical malpractice disputes, unless all parties agreed to submit the matter to arbitration *after* the dispute arose. The AAA Healthcare Policy Statement states that the policy is consistent with the *American Arbitration Association/American Bar Association/American Medical Association Due Process Protocol for the Mediation and Arbitration of Health Care Disputes*. According to the ABA, that protocol provides that:

"repeat player" bias in the arbitration industry insofar as consumers who arbitrated against what they called "super repeat defendants" (defined as businesses who arbitrated more than 276 times during the studied time period of July 1, 2009 through December 31, 2013) had statistically significantly *worse* outcomes than those who litigated against other defendants. *See* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 Geo. L.J. ___ (forthcoming) (2015), *available at* http://ssrn.com/abstract=2614773.

[9] *See Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 114-15 (2000) ("Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a "repeat player" in the arbitration system. (Bingham, Employment Arbitration: The Repeat Player Effect (1997) 1 Employee Rts. & Employment Policy J. 189; Schwartz, *supra*, 1997 Wis. L.Rev. at pp. 60–61.) It is perhaps for this reason that it is almost invariably the employer who seeks to compel arbitration. (See Schwartz, *supra*, 1997 Wis. L.Rev. at pp. 60–63.)").

[10] *See, e.g., Costs of Arbitration Report*, Public Citizen's Congress Watch (Apr. 2002), at p. 1 ("The cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit. Our comparison of court fees to the fees charged by the three primary arbitration provider organizations demonstrates that *forum costs* – the costs charged by the tribunal that will decide the dispute – can be up to five thousand percent higher in arbitration than in court litigation. These costs have a deterrent effect, often preventing a claimant from even filing a case."), *available at* http://www.citizen.org/documents/ACF110A.pdf.

> *In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.*
> The Commission concluded in its Protocol that binding forms of ADR, most notably arbitration, should be voluntary in order to ensure that the parties' constitutional and other legal rights and remedies are protected. There are four major types of arbitration agreements: (1) pre-dispute, final and binding arbitration, (2) pre-dispute, nonbinding arbitration, (3) post-dispute, final and binding arbitration, and (4) post-dispute, nonbinding arbitration. ***It is the Commission's unanimous view that in disputes involving patients and/or plan subscribers, binding arbitration should be used only where the parties agree to same after a dispute arises. This is the only way to guarantee that the agreement to arbitrate is both knowing and voluntary.***

American Bar Association Section of Dispute Resolution, Section of Labor and Employment Law, Commission on Legal Problems of the Elderly, Report to the House of Delegates, Approved by the ABA House of Delegates February 8, 1999 (emphases added).

Pre-dispute binding arbitration clauses can result not only in harm to consumers, but also in a systemic failure to hold accountable long-term care facilities that abuse the trust placed in them by consumers. The few claims that are fully arbitrated are typically only adjudicated as to a single consumer, due to inclusion of class-action prohibitions, and the decisions are often confidential. This means that a decision in favor of one consumer will have no precedential value or binding effect against the long-term care provider with respect to legal or arbitral proceedings brought by other consumers. Thus, a long-term care provider's loss in one arbitration simply becomes a cost of doing business rather than a mandate to change unlawful or harmful practices. Additionally, to the extent that an arbitrator finds in favor of the consumer, the awards tend to be lower than those in court proceedings. As noted in the Wall Street Journal, nursing homes' average costs to settle cases have begun dropping, according to an industry study, even as claims of poor treatment are on the rise.[11] Mandatory arbitration is reducing the

[11] Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits,* Wall Street Journal, April 11, 2008.

number of patients winning punitive judgments, the added penalties for severe negligence.[12] Moreover, the prevalence of mandatory arbitration inhibits the development through judicial precedent of preventive standards for corporate conduct. As a result, long-term care providers are less likely to be held accountable for wrongdoing, and the standards governing their conduct are prevented from developing in a manner that better protects patients.

Moreover, most consumers are completely unaware, until such time as a dispute arises, both (a) that they are subject to mandatory arbitration clauses; and (b) that such clauses bar them from bringing a lawsuit in court. After studying arbitration agreements in financial services contracts, the Consumer Financial Protection Bureau concluded that:

> [A]rbitration agreements restrict consumers' relief for disputes with financial services providers by limiting class actions. The report found that, in the consumer finance markets studied, very few consumers seek relief through arbitration or the federal courts, while millions of consumers are eligible for relief each year through class action settlements. The Bureau's report also found that more than 75 percent of consumers surveyed did not know whether they were subject to an arbitration clause in their agreements with financial services providers, and fewer than 7 percent of those covered by arbitration clauses realized that the clauses restricted their ability to sue in court.

CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers, CFPB Press Release (March 10, 2015), *available at* http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/.

It is likely that nursing home residents would be at least as uninformed about the existence and implications of binding pre-dispute arbitration agreements as financial consumers. In some cases, long-term care facility residents even lacked the capacity to contract when they signed these agreements.

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[12] *Id.*

Despite the clear harm to consumers from the increased use of arbitration clauses, recent U.S. Supreme Court rulings repeatedly have affirmed the enforceability of such arbitration clauses regardless of the consequences.[13] This erosion of individuals' rights, separately or collectively, to seek judicial recourse for consumer harms is contrary to the public interest. The aggregation of small consumer claims in the form of private class action lawsuits, or at least class action arbitrations, affords consumers the only practical opportunity to seek relief, due to the expense of individually bringing their own cases or the inability to procure legal representation. Moreover, many of our respective consumer protection laws include private right of action provisions that often are pursued through class actions. Based on our experience, such litigation has the capability of providing real and meaningful benefit to harmed consumers and can result in injunctive relief mandating business reforms that are in the public interest. The consumer relief and injunctive terms afforded through these settlements, and the publicity stemming from them, can stop the unfair or deceptive business practices of the specific defendant, as well as deter others from engaging in similar practices. In addition, State Attorneys General have worked together to ensure that such relief and redress are maximized.[14]

Although the proposed CMS regulation makes a good faith effort to address problems that result in pressure on residents of long-term care facilities to sign contracts that include

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[13] The combined impact of *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *American Express Co., et al. v Italian Colors Restaurant, et al.*, 133 S. Ct. 2304 (2013), the U.S. Supreme Court's most recent holdings on this issue, is that contractual mandatory arbitration clauses containing class action waivers can be enforceable even when they make it impractical for plaintiffs to vindicate their rights or effectively insulate companies from accountability for consumer claims.

[14] Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1711, *et seq.*, each State Attorney General receives notice of proposed class action settlements filed in the federal courts. Working together many State Attorney General offices have reached out informally to class and defense counsel to discuss the settlement terms before deciding as a group whether a formal objection is required or feasible. The collective influence of the States through these informal dialogues has resulted in settlement counsel adjusting settlement terms in order to address our concerns.

binding arbitration clauses, the only way to truly prevent such abuses in this context is to prohibit the use of these clauses. As CMS itself recognizes in its request for comments:

> Alternative dispute resolution (ADR), including binding arbitration, has become increasingly popular in recent years. However, unlike other forms of ADR, binding arbitration requires that both parties waive the right to any type of judicial review or relief. While this can be a valid agreement when entered into by individuals with equal bargaining power, we are concerned that the facilities' superior bargaining power could result in a resident feeling coerced into signing the agreement. Also, if the agreement is not explained to the resident, he or she may be waiving an important right, the right to judicial relief, without fully understanding what he or she is waiving. Also, the increasing prevalence of these agreements could be detrimental to residents' health and safety and may create barriers for surveyors and other responsible parties to obtain information related to serious quality of care issues. This results not only from the residents' waiver of judicial review, but also from the possible inclusion of confidentiality clauses that prohibit the resident and others from discussing any incidents with individuals outside the facility, such as surveyors and representatives of the Office of the State Long-Term Care Ombudsman.

80 Fed. Reg. 136 at 42211.

While arbitration may provide a reasonable mechanism for resolving many disputes, arbitration is a dispute resolution mechanism that should be a meaningful decision freely chosen by long-term care providers and consumers at the time a dispute arises.[15] In contrast, long-term care facility contracts that include pre-dispute arbitration clauses do not allow consumers seeking long-term care to make an informed decision about the best means of addressing the particular dispute that arises during the term of the contract. The worst time for a vulnerable person or his or her family to decide the means to resolve future disputes is when the contract is being presented at the often-urgent time he or she is being admitted to a nursing home, a time of

[15] For example, the Maryland Attorney General's Consumer Protection Division offers a no-cost arbitration program for consumers and businesses to resolve disputes only after mediation efforts have first been attempted.

particular physical and/or emotional stress. Thus, while some State Attorneys General have significant concerns about pre-dispute binding arbitration clauses in contracts involving consumer goods and services,[16] contracts involving long-term care and other health-related services are uniquely unsuited to pre-dispute arbitration agreements. The following real world examples demonstrate the unsuitability of mandatory arbitration in the long-term care setting:

- A Maryland nursing home tried to require arbitration to resolve a claim by a resident that one of the nursing home's employees embroiled the resident in a foreclosure rescue scam that deprived the resident of the equity in her former home. *Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251 (2009).[17]
- A Massachusetts nursing home sought to require arbitration of a claim by the family of a patient who died as the result of injuries sustained when staff members dropped him while using a lift device.[18]
- In a wrongful death case against a nursing home, a New Mexico court invalidated an arbitration clause as procedurally unconscionable where the patient's mental condition had been declining at the time of admission; she had a tenth-grade education; she was taking numerous prescription medications; and she was extremely tired, short of breath, and anxious when she signed the clause. The court further found that the admission contract was confusing, had discrepancies, was in fine print, and that the three-page arbitration clause appeared 30 pages into

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[16] *See* November 19, 2014 letter from 16 Attorneys General to Richard Cordray, Director, Consumer Financial Protection Bureau, regarding Study Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Section 1028(a), Regarding Pre-dispute Arbitration Agreements, appended hereto.
[17] The Court denied the nursing home's attempt to invoke arbitration on procedural grounds.
[18] Michelle Andrews, *Signing a Mandatory Arbitration Agreement with a Nursing Home Can be Troublesome*, Washington Post, September 17, 2012. A judge threw out the arbitration agreement on the grounds that it was "unconscionable." *Id.*

the document. Finally, the court noted that the patient had failed to sign the agreement in several places and had repeatedly misdated the agreement.[19]

- When a 92-year-old resident fell ill for days and became badly dehydrated, her nursing home in Kosciusko, Mississippi would not call an ambulance. Her daughter pushed her mother uphill in a wheelchair to a nearby emergency room. The patient died from heart failure the next day. However, the daughter had signed a contract with binding arbitration when her mother entered the nursing home.[20]

As these examples and the foregoing discussion demonstrate, the fundamental right of consumers entering long-term care facilities to assert their claims in court should not be lost through pre-dispute binding arbitration clauses in long-term care contracts. We urge CMS to include in its final regulation an outright prohibition against such clauses.

If we can provide any further information or assistance related to this matter, please do not hesitate to contact us.

Respectfully submitted,

Brian E. Frosh
Maryland Attorney General

Kamala D. Harris
California Attorney General

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[19] Leslie A. Bailey and F. Paul Bland, Jr., *Combating Abusive Arbitration Clauses in Nursing Home Contracts*, Public Justice, Trial Briefs, August 2008 at p. 33.
[20] Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forego Lawsuits*, The Wall Street Journal, April 11, 2008.

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ATTACHMENT

November 19, 2014 letter from 16 Attorneys General to Richard Cordray, Director, Consumer Financial Protection Bureau

November 19, 2014

Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

RE: **Study Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Section 1028(a) Regarding Pre-dispute Arbitration Agreements.**

Dear Director Cordray:

On behalf of the undersigned State Attorneys General, we write to encourage the Consumer Financial Protection Bureau (the "Bureau") to exercise its specific statutory authority to regulate the use of pre-dispute mandatory arbitration clauses in consumer agreements for financial products or services. As the chief consumer protection officers in each of our respective States,[1] we are concerned about such clauses and the class action prohibitions often associated with them.

The need for regulations to protect the public interest has never been so great. Over the past decade, judicial decisions and business practices have diminished consumers' rights and bargaining power with respect to contracts for financial services. Today, the average consumer nominally assents to all kinds of contracts without any opportunity or bargaining power to negotiate better terms. In such an environment, it is incumbent upon regulators with the power to effect change, such as the Bureau, to ensure that consumers have meaningful avenues for redress against those with whom they contract to provide financial services. Without such protections, one of the only means for consumer redress will be through the enforcement efforts of State Attorneys General and other regulators (including the Bureau).

The Federal Arbitration Act ("FAA") as conceived in 1925 was intended to facilitate arbitration of disputes between commercial entities of similar sophistication and bargaining

[1] The Attorney General of Hawaii is the chief law enforcement officer of the State of Hawaii, has the authority to appear on behalf of the state in all civil and criminal matters, and has concurrent jurisdiction to enforce consumer protection laws with the State of Hawaii Office of Consumer Protection.

power.[2] In recent years, however, this premise has eroded. Companies routinely impose mandatory arbitration in a wide range of consumer contracts where the consumer has little bargaining power. Increasingly, large corporations present consumers with "take it or leave it" fine print contracts containing pre-dispute arbitration clauses in which consumers are required to waive their right to seek judicial resolution of future disputes (and appeal thereof) in federal or state court. Courts have found such language binding on the consumer even if he or she is not aware of the clause, never saw the provision, and had no opportunity to negotiate or reject the clause.[3] Such clauses have become prevalent in contracts for financial products and services.

Mandatory pre-dispute arbitration is procedurally unfair to consumers, and jeopardizes one of the fundamental rights of Americans; the right to be heard and seek judicial redress for our claims. These contractual requirements are neither voluntary nor readily understandable for most consumers. Often consumers do not recognize the significance of these provisions, if they are aware of them at all. Investigative studies have revealed that arbitrators have a powerful incentive to favor the dominant party in the arbitration (i.e., the corporation) that is more likely to send them future cases.[4] This "repeat player bias" is unfair to the consumer, who is bound by

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[2] Congress enacted the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, "to place arbitration agreements upon the same footing as other contracts. Thus, arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2. Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of...overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (internal citation omitted). *See also* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (dissent) ("When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power.").

[3] Such agreements are often found to be procedurally unconscionable when challenged on such grounds. *See, e.g., Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 201 (3rd Cir. 2010) ("We have consistently found that adhesion contracts — that is, contracts prepared by the party with greater bargaining power and presented to the other party for signature on a take-it-or-leave-it basis satisfy the procedural element of the unconscionability analysis.") (internal quotation marks omitted).

[4] For example, in 2009, the Minnesota Attorney General's Office, filed a lawsuit against the National Arbitration Forum – then the largest arbitration company in the country for consumer credit disputes – following a year-long investigation, alleging that it misrepresented its independence and hid its extensive ties to credit card companies, other creditors, and the collection industry from consumers and the public. The litigation resolved with a Consent Judgment, barring the company from the business of arbitrating credit card and other consumer disputes. *See* Complaint, *State of Minnesota by its Attorney General, Lori Swanson v. National Arbitration Forum, Inc., et al.*, Minn. Dist. Ct., Hennepin County (July 14, 2009), *available at* http://www.ag.state.mn.us/pdf/pressreleases/signedfiledcomplaintarbitrationcompany.pdf. *See also* Testimony of Lori Swanson, Minnesota Attorney General, to U.S. Judiciary Committee on October 13, 2011, "Arbitration: Is It Fair When Forced?", *available at* http://www.cpradr.org/Portals/0/Resources/10132011ArbFairnessSenateTestimony/Swanson%20Testimo

the arbitrator's decision, without the option of further appellate review. High arbitration costs[5] and inconvenient venues combined with class action waiver provisions, which prohibit collective arbitration, deter injured individuals from pursuing their rights. Indeed, it is often economically irrational for a consumer to seek redress when the amount at stake is far less than the cost of filing and pursuing a claim through arbitration.

The predictable result of such a situation is not only unfairness to the harmed consumers, but also a systemic failure to hold accountable those companies who abuse the trust placed in them by consumers. The few claims that actually do make it to arbitration are typically only adjudicated as to a single consumer, due to inclusion of class action prohibitions. This means that a decision in favor of the consumer will have no precedential value or binding effect against the company with respect to legal proceedings brought by other consumers. Thus, a corporation's loss in one arbitral proceeding simply becomes a cost of doing business rather than a mandate to change unlawful business practices. Moreover, the prevalence of arbitration lessens the opportunity to develop judicial precedents that can set preventive standards for corporate conduct. As a result, corporations are less likely to be held accountable for wrongdoing.

Despite the clear harm to consumers and the public interest from the increased use of these arbitration clauses, the result of recent U.S. Supreme Court rulings is that arbitration clauses in all forms are virtually impenetrable -- from even state legislation.[6] In some cases, the aggregation of small consumer claims in the form of private class action lawsuits or at least class action arbitrations affords consumers the only opportunity to seek relief, due to the expense of individually bringing their own case or the inability to procure legal representation. Moreover, many of our respective consumer protection laws include private right of action provisions which

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ny.pdf. Anecdotal evidence supporting this "repeat player" bias is also discussed in, Costs of Arbitration Report, Public Citizen's Congress Watch (Apr. 2002), at p.68, *available at* http://www.citizen.org/documents/ACF110A.PDF.

[5] *See, e.g., Costs of Arbitration Report*, Public Citizen's Congress Watch (Apr. 2002), at p.1 ("The cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit. Our comparison of court fees to the fees charged by the three primary arbitration provider organizations demonstrates that *forum costs* -- the costs charged by the tribunal that will decide the dispute—can be up to five thousand percent higher in arbitration than in court litigation. These costs have a deterrent effect, often preventing a claimant from even filing a case."), *available at* http://www.citizen.org/documents/ACF110A.PDF.

[6] The combined impact of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *American Express Co., et al. v. Italian Colors Restaurant et al.*, 133 S. Ct. 2304 (2013), the U.S. Supreme Court's most recent holdings on this issue, is that contractual mandatory arbitration clauses containing class action waivers are enforceable even when they render it functionally impossible for plaintiffs to vindicate their rights or effectively insulate companies from accountability for consumer claims.

are often pursued through class actions.[7] Based on our experience, such litigation has the capability of providing real and meaningful benefit to harmed consumers and can result in injunctive relief mandating business reforms that are in the public interest. Our offices work together to ensure that such relief and redress are maximized.[8]

We are aware that the Bureau has devoted significant time and resources to the extensive study requested by Congress in Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5518(a), and that the Bureau may use the study's findings to inform a decision on, as well as the substance of, rulemaking. As the chief consumer protectors in each of our respective States, we encourage the Bureau to use its statutorily prescribed powers to protect the public interest by imposing prohibitions, conditions, or limitations on the use of pre-dispute arbitration clauses in agreements for consumer financial products or services. While it is true that the issues associated with mandatory arbitration are wide-reaching and that further legislative action is required to fully address the problem, the Bureau has the unique opportunity to do something in the important area of consumer financial products or services. The time is ripe to do so.

The fundamental right of consumers to assert their claims in court should not be eroded through mandatory pre-dispute arbitration clauses included in adhesion contracts. If we can

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[7] California's Unfair Competition Law (UCL), Bus. & Prof.Code, § 17200 *et seq.* is one example. *See In re: Tobacco II Cases*, 46 Cal. 4th 298, 313 (2009), 207 P.3d 20, 30 (Cal. Sup. Ct. 2009) (stating that the UCL class action "is a procedural device that enforces substantive law by aggregating many individual claims into a single claim"); *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 126 (2000), 99 P.2d 718 (Cal. Sup. Ct. 2000) ("Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation and thereby encourage attorneys to undertake private enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts."), *modified by statute on other grounds as stated in Arias v. Superior* Court, 46 Cal.4th 969, 977-78, 209 P.3d 923, 928 (Cal. Sup. Ct. 2009).

[8] Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1711, *et seq.*, each state Attorney General receives notice of proposed class action settlements filed in the federal courts. Together, through the National Association of Attorneys General ("NAAG"), we evaluate the substantive provisions of the settlements on a monthly basis and, in appropriate circumstances, our offices will reach out informally to class and defense counsel to discuss the settlement terms before deciding as a group whether a formal objection is required or feasible. As is often the case, the collective influence of the States through informal dialogue can lead settlement counsel to adjust the settlement terms in order to address our concerns. The consumer relief and injunctive terms afforded through these settlements, and the publicity stemming from them, can serve as a deterrent to the specific defendant as well as the greater business community or industry to combat otherwise unchecked unfair or deceptive business practices.

provide any further information or assistance related to the Bureau's study, or any other of our common objectives, please do not hesitate to contact us.

Respectfully Submitted,

Joseph R. Biden, III
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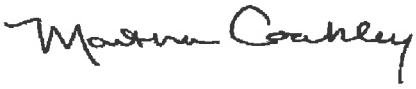
Jack Conway
Kentucky Attorney General



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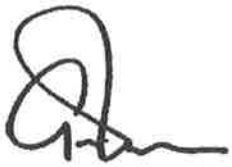

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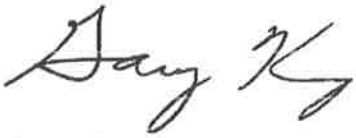

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