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January 16, 2017

TO: The Honorable Representative Jinkins, Chair; and Honorable Representative Kilduf, Vice-Chair; Honorable Representative Muri, Ranking Minority Leader; and Honorable members of the House Committee on Judiciary

RE: HB 1128, Mandatory Arbitration Limits – NAMIC's opposition to proposed legislation

Dear Honorable members of the House Committee on Judiciary:

Thank you for providing the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony in opposition to HB 1128.

The National Association of Mutual Insurance Companies (NAMIC) is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC members represent 40 percent of the total property/casualty insurance market, serve more than 170 million policyholders, and write nearly $225 billion in annual premiums. NAMIC has 138 members who write property/casualty in the State of Washington, which represents 48% of the insurance marketplace.

As we all know from our own experiences in life, many well-intended proposals sound good at a conceptual level, but ultimate do more harm than good as a result of the practical realities of the situation. This is the case with this mandatory arbitration proposal. Expanding its jurisdictional scope *sounds* like a good idea at first-blush, but once all of the public policy consideration, legal implications, and business ramifications are considered, it is an idea that is seriously flawed, which is why various past versions of this proposed legislation have repeatedly been rejected by the Washington State Legislature over the years.

Specifically, NAMIC is opposed to HB 1128 for the following public policy reasons:

1) The proposed expansion of mandatory arbitration is unnecessary – There is no evidence to suggest that the trial courts in the State of Washington are failing to adjudicate civil actions in a fair, timely, and efficient manner for the benefit of civil litigants. Therefore, what is the public policy rationale for increasing the number of cases where litigants are required to first submit their legal claim to mandatory arbitration?

2) HB 1128 will adversely impact a litigant's right to personally select the trier of fact (judge, jury, or arbiter) they want ruling on their civil dispute - By doubling the monetary threshold from $50,000 to $100,000, the state legislature will be subjecting more citizens to the mandatory arbitration requirement; thereby, denying more litigants, those with large claims (up to $100,000) the right to have their case decided by way of a traditional civil trial. Shouldn't litigants with fairly large monetary claims at interest have the right to develop their own litigation strategy?

As a practical matter, the particular facts of a case and/or the complexity of law at issue may reasonably lead a litigant to decide that a trial court proceeding with full discovery and a standard trial court proceeding is better for the adjudication of their case. Why should this right be taken away from the individual, especially in cases where the monetary stakes of the case are sizeable?

3) Increasing the monetary jurisdiction of mandatory arbitration (MAR) is inconsistent with the very purpose and intent of alternative dispute resolution (ADR)- To make MAR work as intended, the rules of civil procedure are relaxed, and discovery and presentation of witnesses and evidence is limited in order to complete a case presentation quickly. In essence, the litigation process is restricted to promote a speedy resolution of the case. In legally and factually straightforward cases, with small monetary damages at interest, arbitration may be reasonable and appropriate. However, in cases with convoluted facts, complicated liability determinations, and complex damages calculations at issue (like what one frequently sees in high-dollar lawsuits and tort claims), a party may be adversely impacted by being forced into Mandatory ADR.

Additionally, Arbitration, by design, has abbreviated pre-hearing timelines. Consequently, litigants are often unable to obtain sufficient medical records and information/evidence pertinent to prove or contest liability and damages. This is acutely a concern for defendants, especially insurance companies, who may be adversely impacted by being forced to defend their policyholder without the full scope of discovery typically needed to develop and present a thorough and comprehensive defense.

Since the insurance defense provision (duty to defend clause) in an insuring agreement is a very important and valuable part of the legal consideration provided by the insurer to the policyholder, why should an insurer be forced to deny their policyholder the right to have what the insurer and policyholder believe is the best defense and litigation strategy (a trial court defense) for the policyholder?

4) The truth of the matter is that plaintiff attorneys see the expansion of MAR as a tactical victory for them – First of all, plaintiffs generally benefit from having a process that procedurally hinders a defendant from being able to fully develop its case. Limiting a defendant's ability to engage in the level of discovery the defendant deems necessary and restricting the defendant's ability to present its case, provides plaintiffs with an unfair tactical advantage, which they can use to try and secure an inflated damages settlement that exceeds the actual damages of the plaintiff.

Why should the defendant be required to "fight with one hand tied behind his back"?

Moreover, since MAR is focused upon speedy resolutions as opposed to procedurally structured and evidence intensive adjudication, there is a general and well-established inclination for arbiters to "split the difference" on contested damages. In fact, one could argue that "splitting the difference" is something people generally accept and expect when they are in a non-adjudicatory dispute resolution process.

This "split the difference" approach to handling contested damages works in favor of plaintiffs and incentivizes the filing of over-inflated damages claims by plaintiff attorneys, so that they can end up a larger settlement when the contested damages difference between the defendant's settlement offer (which has to be legitimate and reasonable in the first place pursuant to state insurance law and) and the plaintiff's settlement demand (which can be unreasonably excessive, especially as it relates to general damages like pain and suffering, loss of enjoyment of life, etc. that are subjective in nature).

NAMIC is concerned that mandatory arbitration, which is plagued by this "splitting the difference" approach to dispute resolution, leads to increased damages awards that are an insurance rate cost-driver. Since insurers strive to reasonably contain costs so as not to adversely impact affordability of insurance for consumers, HB 1128 is quite concerning.

5) The proposed legislation is also rife with unintended public policy problems –

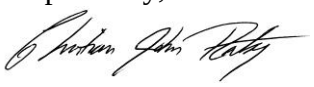
a) Detrimental impact on defendants of limited financial means - Washington requires drivers to have automobile liability insurance with *minimum* limit of liability at $25,000 per person. The current MAR monetary jurisdictional limit exposes those who are only able to afford the legally required minimum insurance coverage to personal "out of pocket" liability exposure that is $75,000 over the mandated auto insurance coverage limits. For insurance consumers with the financial resources to purchase maximum liability coverage limits, the prospect of higher MAR damages awards does not pose the same level of financial concern as it does for minimum liability insurance coverage limits consumers. By increasing the MAR monetary jurisdiction level, the state legislature will be increasing an individual's personally liable exposure for the portion of the MAR damages award that exceeds their insurance coverage. From a public policy standpoint, why should plaintiffs be unjustly enriched with higher MAR damages awards to the detriment of defendants of limited financial means?

b) By increasing the monetary jurisdiction of MAR, there will be more lawsuits directed to MAR, which will start to congest arbitration dockets; thereby, reducing the intended speed of the process. MAR was designed to resolve legal disputes quickly. As the volume of cases sent to arbitration increases and the complexity of the arbitration legal claims increase, as a result of the higher monetary jurisdiction, the MAR process and timeline for arbitration rulings will start to be more in-line with those of trial courts. In effect, by increasing the monetary jurisdiction of MAR, the state legislature will be exposing the arbitration process to the legal complexity that it was designed and intended to bypass as a form of expedited dispute resolution.

For the aforementioned reasons, NAMIC respectfully requests that the House Committee on Judiciary **VOTE NO on HB 1128,** so that MAR is allowed to maintain its identity, integrity, and vitality as an expedited dispute resolution process for smaller damages cases with less legally complex issues.

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you would like to discuss NAMIC's written testimony.

Respectfully,



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