S. HRG. 110–618

S. 2838, THE FAIRNESS IN NURSING HOME ARBITRATION ACT

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

AND

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

JUNE 18, 2008

Serial No. J–110–101

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
44–741 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

PATRICK J. LEAHY, Vermont, *Chairman*

EDWARD M. KENNEDY, Massachusetts	ARLEN SPECTER, Pennsylvania
JOSEPH R. BIDEN, JR., Delaware	ORRIN G. HATCH, Utah
HERB KOHL, Wisconsin	CHARLES E. GRASSLEY, Iowa
DIANNE FEINSTEIN, California	JON KYL, Arizona
RUSSELL D. FEINGOLD, Wisconsin	JEFF SESSIONS, Alabama
CHARLES E. SCHUMER, New York	LINDSEY O. GRAHAM, South Carolina
RICHARD J. DURBIN, Illinois	JOHN CORNYN, Texas
BENJAMIN L. CARDIN, Maryland	SAM BROWNBACK, Kansas
SHELDON WHITEHOUSE, Rhode Island	TOM COBURN, Oklahoma

BRUCE A. COHEN, *Chief Counsel and Staff Director*
STEPHANIE A. MIDDLETON, *Republican Staff Director*
NICHOLAS A. ROSSI, *Republican Chief Counsel*

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

HERB KOHL, Wisconsin, *Chairman*

PATRICK J. LEAHY, Vermont	ORRIN G. HATCH, Utah
JOSEPH R. BIDEN, JR., Delaware	ARLEN SPECTER, Pennsylvania
RUSSELL D. FEINGOLD, Wisconsin	CHARLES E. GRASSLEY, Iowa
CHARLES E. SCHUMER, New York	SAM BROWNBACK, Kansas
BENJAMIN L. CARDIN, Maryland	TOM COBURN, Oklahoma

JEFFREY MILLER, *Chief Counsel*
WILLIAM CASTLE, *Republican Chief Counsel*

SPECIAL COMMITTEE ON AGING

HERB KOHL, Wisconsin, *Chairman*

RON WYDEN, Oregon	GORDON H. SMITH, Oregon
BLANCHE L. LINCOLN, Arkansas	RICHARD C. SHELBY, Alabama
EVAN BAYH, Indiana	SUSAN M. COLLINS, Maine
THOMAS R. CARPER, Delaware	MEL MARTINEZ, Florida
BILL NELSON, Florida	LARRY E. CRAIG, Idaho
HILLARY RODHAM CLINTON, New York	ELIZABETH DOLE, North Carolina
KEN SALAZAR, Colorado	NORM COLEMAN, Minnesota
ROBERT P. CASEY, JR., Pennsylvania	DAVID VITTER, Louisiana
CLAIRE MCCASKILL, Missouri	BOB CORKER, Tennessee
SHELDON WHITEHOUSE, Rhode Island	ARLEN SPECTER, Pennsylvania

DEBRA WHITMAN, *Staff Director*
CATHERINE FINLEY, *Republican Staff Director*

CONTENTS

STATEMENTS OF MEMBERS OF THE COMMITTEES

WITNESSES

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

S. 2838, THE FAIRNESS IN NURSING HOME ARBITRATION ACT

WEDNESDAY, JUNE 18, 2008

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS, OF THE COMMITTEE ON THE JUDICIARY,
AND THE SPECIAL COMMITTEE ON AGING,
Washington, D.C.

The Subcommittees met, pursuant to notice, at 10:30 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Present: Senators Kohl, Feingold, Salazar, Hatch, and Martinez.

OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman KOHL. We will call this hearing to order and proceed. Today we are here to examine arbitration agreements in nursing home admissions contracts. We are conducting a joint hearing with both the Judiciary and the Aging Committees because the issue involves access to justice as it relates to the 1.5 million Americans currently in long-term care facilities and all those who may someday need this kind of care.

Over the past several years, more and more long-term facilities have required incoming residents to sign mandatory arbitration agreements. By signing these agreements, residents give up their right to go to court. It is important to note that we believe the vast majority of nursing homes are doing a very good job and working hard to deliver quality care. But we must protect the rights of those who receive inadequate care to hold poor-performing facilities publicly accountable.

As we will hear today, Mr. Kurth and his family want to protect others from the tragedy they have suffered and to send a strong message to underperforming facilities that harmful care is not acceptable. The experience of placing a family member in a long-term care facility is very emotional. Often the decision is the last resort after a medical emergency or when a family acknowledges that they cannot provide the level of care their loved one needs.

The family's sole focus is on finding the best facility, not studying technical legal clauses buried in the document. Many incoming residents lack the capacity to make even simple decisions, much less judge the legal significance of an arbitration agreement. Most are unaware that they are signing away their right to go to court. Typically, admissions agreements are presented on a take-it-or-

leave-it basis. Residents have few choices because they require immediate admission or because there are no other facilities in the area. And as a result, whether or not they understand the arbitration provision, they all feel compelled to sign in order to ensure that their loved one will be admitted.

In response to these concerns, Senator Martinez and I have introduced a narrowly targeted bill which would invalidate mandatory arbitration agreements in long-term care facility contracts. It is important to note that our bill does not preclude arbitration as an option for resolving disputes.

As proponents of arbitration emphasize and with whom I agree, arbitration can be a timely, efficient, and less adversarial option for resolving disputes and going to court. However, it is critical that the decision to use arbitration be made voluntarily by both parties and only after a dispute occurs. It is only fair that families and residents have the opportunity to make an informed decision based on the facts of their particular case. After the dispute, if both parties feel that arbitration will truly offer a fair shake, as its proponents argue, then they should be free to agree to it at that time.

[The prepared statement of Senator Kohl appears as a submission for the record.]

We will now turn to the Ranking Member of the Subcommittee, Senator Hatch, for any comments he may have.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman. It is always a pleasure to be with you, and I appreciate the important work that you, Mr. Chairman, and Senator Martinez have dedicated to this issue. Your intentions are noble, and I agree that it is vital that we ensure that our Nation's seniors receive proper medical and nursing home care. Unfortunately, I do not believe that S. 2838 meets our common goal of controlling costs which is required to sustain an appropriate and professional level of nursing home care for our growing senior population.

Mr. Chairman, as you well know, our Nation faces a crisis. Out-of-control health care costs are the single most significant fiscal issue facing our Nation. In fact, I consider four major issues—Medicaid, Medicare, Social Security, and energy—to be the issues of the next 5 to 10 years that are going to make or break our Nation, and we have got to solve these problems. We have to eliminate waste and needless costs whenever possible.

The numbers confronting us are truly staggering. The Department of Health and Human Services' Centers for Medicare and Medicaid Services estimate that as a percentage of gross domestic product, health care spending will increase from 16.3 percent in 2007 to 19.5 percent in 2017. In other words, in the next 10 years, health care costs will increase faster than our Nation's GDP by at least 1.9 percent a year. That means by 2017 our Nation will spend $4.3 trillion a year on health care. To place this sum in the proper context, $4.3 trillion was the approximate size of Japan's entire economy in 2007. To me, the bottom line is this: If we do not curtail costs, we could very well bankrupt our Nation. And given this historic challenge, we should take care before advancing any legis-

lation that would unduly increase costs and undermine access to affordable care. Unfortunately, I believe that will be the unexpected consequence of this legislation. But I have got an open mind, and I am certainly going to listen.

Arbitration clauses were not capriciously added to nursing home contracts. According to a report by Aon Global Risk Consulting titled "Long Term Care 2008 General Liability and Professional Liability," nursing home liability costs exploded in the late 1990s. In those States that enacted tort reform, long-term care liability costs plummeted. Regrettably, most States have not enacted these reforms. Yet the report also concludes long-term health costs have begun to "level" in non-reforming States, in part because of arbitration clauses.

Now, this is a promising development. I believe that S. 2838 will relinquish these initial gains, and I fear that small business owners will be unable to afford or obtain additional liability insurance. As a result, many of them will be forced out of business.

I also have trepidation that it will be the less-well-off seniors who will be unable to afford the resulting increases in nursing care prices, and as a consequence, their care will needlessly suffer. Both of these avoidable prospects will be caused by the elimination of arbitration clauses, in my opinion.

Let me be clear. I am deeply concerned about nursing home abuse. The violation of a patient's trust just cannot be tolerated. I have read the Government Accountability Office report that you requested, Mr. Chairman, and I was struck by its conclusions. This report stated that there are serious deficiencies in nursing home care which are not being adequately reported to the Federal agencies responsible for monitoring Medicare and Medicaid patient care. And while I agree that these problems need to be addressed, I believe we should also acknowledge the important initiatives launched by the nursing home industry. These initiatives have made great strides in ensuring that a professional level of care is maintained at all nursing homes.

Now, Mr. Chairman, as I stated at the beginning of my remarks, I deeply appreciate the leadership that you and Senator Martinez have shown on this issue. However, I must admit that I have serious concerns with this legislation due to my belief that it will not achieve our common goal of controlling costs that will enable us to sustain an appropriate level of nursing home care for our growing senior population. And these are matters that we just have to work through and hopefully resolve, and hopefully I can be of assistance to you in getting it resolved in the right way, because I have—I think we have the same goals in mind. We have the same hopes that we can get this system so it works better than it does today.

I appreciate you doing this, and as usual, it is always a pleasure to work with you.

Chairman KOHL. Thank you very much, Senator Hatch.

Senator Martinez?

STATEMENT OF HON. MEL MARTINEZ, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator MARTINEZ. Thank you very much, Mr. Chairman. I am delighted to be here with you this morning. I thank you for calling

this important hearing, and we are here today to consider whether nursing homes should be able to require their patients to sign away their right to a jury trial as a condition of admittance to a facility. And while I believe arbitration is a valid way to settle business and financial disputes, it should be a completely voluntary process where both parties have a reasonable opportunity to understand the benefits and the consequences of agreeing to arbitrate future disputes.

As a practicing attorney for many years, I had the opportunity on many occasions to participate in arbitration proceedings. And like the Chairman, I believe that alternative dispute resolution is a very legitimate way to resolve disputes, but it particularly should be limited and should apply in the intent of what the Arbitration Act was intended to do, which is with people in similar positions when they are entering into the decision to arbitrate. It is clear to me, however, that prospective nursing home residents, one of our Nation's most vulnerable populations, should not be forced to decide the forum for resolving their potential claims as a condition of admittance to a nursing home. Allowing pre-dispute arbitration agreements for resolving future nursing home disputes forces patients and their families to choose between quality care and foregoing their rights within the judicial system. That is hardly a free and voluntary choice, and it is well beyond the original intent of our arbitration laws.

The Federal Arbitration Act of 1925 was originally enacted to provide parties an alternative forum for voluntarily and efficiently resolving potential business disputes. But more and more frequently, nursing homes are requiring patients to agree to arbitration as the sole vehicle for dispute resolution before patients actually take residence in the facility. I believe this is an unwarranted expansion of binding arbitration, and if after a dispute or claim arises both the patient and the nursing home freely were to decide to arbitrate their case, then this legislation would allow that as well. So that decision to arbitrate is clearly voluntary and may be the best way to resolve a particular dispute.

Some in the arbitration industry themselves feel that included in this is the American Arbitration Association, one of the country's largest forums, generally refused cases over nursing home care where the patient was forced to sign a pre-dispute arbitration agreement prior to admittance. They recognize the vulnerability of nursing home residents and their families at the time of admission when they are most vulnerable, when they are most distraught, when they are most concerned, and that is not a time when we should be asking them to make a legal decision that they would knowingly make at that time to bind themselves to only arbitration as their sole remedy.

Nursing home disputes often involve allegations of neglect and of abuse, and, unfortunately, the prospects of patients and their families being able to file a complaint in the civil justice system may be the only way of holding nursing homes accountable. I believe it is a way of forcing the industry to regulate itself because we do know that their care falls in too many instances below the level of care that we would all want to see in that industry. So the fact of the matter is what we are doing here is removing the one incentive

that the industry has to self-regulate and to police itself and to provide a level of care that I believe is what all of us would like to see for this very vulnerable group of American citizens.

What Senator Kohl and I have proposed in our legislation is to restore the Federal Arbitration Act to its original intent by requiring that agreements to arbitrate nursing home disputes be made after the dispute has actually arisen. S. 2838, the Fairness in Nursing Home Arbitration Act of 2008, will help to ensure that arbitration is a voluntary process for both parties involved and not a coerced forum to resolve disputes. Every American deserves equal protection under the law and the right to seek legal recourse when they are harmed by others, and I really do believe that this bill goes a long way in helping to maintain that balance between the vulnerable population of nursing home patients and the big businesses that run the nursing homes.

Thank you, Mr. Chairman.

Chairman KOHL. Thank you, Senator Martinez.

We turn now to our panel of witnesses. Our first witness will be David Kurth. Mr. Kurth is from Burlington, Wisconsin, and is an engineering project manager at MedPlast in Elkhorn, Wisconsin. Mr. Kurth is here to discuss his family's experience with nursing home arbitration agreements.

Our next witness will be Alison Hirschel. Ms. Hirschel is the President of the National Consumer Voice for Quality Long-Term Care, a grass-roots advocacy group. Ms. Hirschel is also the elder law attorney at the Michigan Poverty Law Program.

Next we will be hearing from Kelley Rice-Schild. Ms. Rice-Schild is the owner and executive director of Floridean Nursing Home in Miami, Florida. Floridean is a family-owned long-term care facility with 60 residents. Ms. Rice-Schild is here representing the American Health Care Association and the National Center for Assisted Living.

Our next witness will be Kenneth Connor. Mr. Connor is an attorney at Wilkes & McHugh, a civil litigation law firm where he specializes in cases involving nursing home abuse and neglect.

The final witness will be Stephen Ware. Mr. Ware is a professor at the University of Kansas Law School where he specializes in arbitration.

We thank you all for appearing at our Subcommittee's hearing today, and if you will all now stand and raise your right hand and take the oath. Do you affirm that the testimony you are about to give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KURTH. I do.

Ms. HIRSCHEL. I do.

Ms. RICE-SCHILD. I do.

Mr. CONNOR. I do.

Mr. WARE. I do.

Chairman KOHL. Thank you so much.

Mr. Kurth, we will take your testimony.

STATEMENT OF DAVID W. KURTH, BURLINGTON, WISCONSIN

Mr. KURTH. Chairman Kohl, Ranking Member Hatch, and distinguished members of the Committees, thank you for the invitation

to speak to you today. I would also like to acknowledge my sister, Kim, and my mother, Elaine, who are both accompanying me here today.

I am here to express my family's support of S. 2838, the Fairness in Nursing Home Arbitration Act, and I would like to thank Senators Martinez and Kohl for introducing this bill.

My name is David William Kurth, and my father's name was William Frederick Kurth. He loved our country and served many years as an officer in both the United States Army and the Wisconsin National Guard. My father was an Eagle Scout, a Boy Scout leader, and served as a volunteer fireman for more than 25 years in our community.

My father entered Mount Carmel Nursing Home in October of 2004. In February, he fell and broke his hip and had to spend several days in the Burlington Hospital having his hip repaired. Shortly after returning to Mount Carmel Nursing Home, his left leg was broken again during physical therapy that was improperly applied. My mother said that the therapist insisted that my father's leg must be fully straightened. My mother said also that my father was screaming in pain and trying his best to resist their efforts. Yet they did not listen, and as a result, they broke his leg.

It was at this same time he contracted MRSA infection. Also during this time, his health care coverage was changed from Medicare to Medicaid. The very day his coverage changed, he was moved from his private room in the Medicare wing to a shared room in the Medicaid wing of the nursing facility. His new room was filthy and smelled of feces. The bed he was placed in was coated with dirt. My wife and I had to clean his room and his bed. The bathroom he shared with three other men had not been properly cleaned in weeks, possibly months.

On one occasion, I found the room to reek of feces. There was a rag with feces next to my father's face on his feeding table. His clean clothes were on the floor intermingled with several changes of soiled sheets. Even though my father had contracted the MRSA infection, the staff made no attempt to protect his roommates, his visitors, or even their own staff from contracting this very communicable disease.

In April, Dr. Ryan found two or three small bedsores on my father's backside and instructed the wound care nursing team to give special attention to these wounds. What we did not know was that around this same time the management of the facility had made a cost-cutting move and disbanded the wound care team. What this meant was that the wound care for over 150 patients that had previously been done by a team of people was now to be attended by only one nurse. Records show that this sole wound care nurse never attended to my father's wounds during the months of April or May, even after it was brought to her attention by the visiting doctor.

After examining my father again prior to Memorial Day, the doctor immediately rushed my father to the emergency room. The doctor told us how shocked he was at the poor care my father had received. He had also told us that my father was terminally ill and that he did not have much chance of surviving his infections. My father died on June 25, 2005, from sepsis of the blood due to infec-

tions caused by approximately 13 bedsores. Most of these bedsores ran deep into the bones of his hips and pelvis. The infections were caused by the excrement and urine that was not properly cleansed from the wounds for days at a time. The bedsores were caused by neglect.

The wound care nurse that was responsible for caring for my father has been charged and found guilty of criminal neglect by the State of Wisconsin for her actions.

On the day of my father's memorial service, a Kindred representative contacted me to express her concerns for the way my father suffered and said they felt responsible and wanted to pay for my father's funeral expenses. I declined her offer.

To make matters worse, the parent corporation of the nursing home is hiding behind a mandatory arbitration clause to prevent the light of truth from being shed on their corrupt management policies.

How can anyone in good conscience argue that it should be perfectly legal to trick frail, elderly, infirm senior citizens during the most stressful time in their lives into waiving their legal rights?

My sister and I and my mother are here today to plead with you to help right a great wrong that is being perpetrated on the elderly of America. It is by God Almighty's hand that you have come to your position this day for such a time as this. Please do not let my father's story be allowed to happen to another innocent American.

Thank you for your time.

[The prepared statement of Mr. Kurth appears as a submission for the record.]

Chairman KOHL. Thank you very much, Mr. Kurth.

Ms. Alison Hirschel.

STATEMENT OF ALISON E. HIRSCHEL, PRESIDENT, NATIONAL CONSUMER VOICE FOR QUALITY LONG TERM CARE, EAST LANSING, MICHIGAN

Ms. HIRSCHEL. Good morning, Chairman Kohl, Ranking Member Hatch, and Senators Martinez and Feingold. Thank you very much for inviting me to speak on behalf of NCCNHR, the National Consumer Voice for Quality Long Term Care, and thank you, Senators Kohl and Martinez, for introducing this important legislation. I am delighted to note that Lynn Miller, a nursing home resident who is on the NCCNHR Board, is with us today here in the front row.

For the past 23 years, I have advised long-term care consumers about their rights and options, and I know that residents and families often sign admissions agreements at a time of great stress in their lives, and they do when decisions need to be made in a hurry. Most consumers do not notice that there is a mandatory arbitration provision in the contract they are signing, and if they do, they might not understand them. They probably do not know that under these provisions, the facility chooses the arbitrator. They do not understand that arbitration can be very costly for consumers, that arbitration awards are generally significantly lower than jury awards, and that there is no appeal. And the last thing on most consumers' minds is how they will seek a remedy if something goes wrong. They enter a long-term care facility seeking care and compassion, not litigation or arbitration.

Even if consumers understand the arbitration clause, they will not challenge it. First, this is not a negotiation between two equal parties. Consumers sign whatever they need to sign to get their family member into a facility. Second, nobody wants to be considered a troublemaker before they have even entered the facility, and to put the life of a vulnerable resident in the hands of someone who might already be annoyed at them. And they especially do not want to be a troublemaker about a clause in the contract that they do not think will ever affect them.

But, of course, sometimes things do go grievously wrong. For example, Vunies B. High was a 92-year-old Detroit area resident with dementia. She happened to be the sister of the legendary boxer Joe Louis. She was a graduate of Howard University and a very accomplished woman and a long-time teacher. Ms. High's family placed her in an assisted living facility because they thought that she would be safe there. On a frigid night this past February. the staff failed to notice when Ms. High wandered out of the facility wearing only her pajamas. She froze to death right outside her door. Her family then discovered that the admissions agreement they signed contained a mandatory, binding arbitration provision that stated that the provider had the sole and unfettered option to choose to resolve the dispute in arbitration; the provider would choose the location, and presumably the arbitrator; the provider would choose the rules; and the provider retained its right to go to court if it had any dispute against Ms. High, though Ms. High was required to give up her right to go to court if she had a dispute against them.

Because of this agreement, Ms. High's family may not have an opportunity to seek redress in the courts for her tragic and preventable death. This is troubling because the potential for litigation provides an important incentive for facilities to provide better care. It is a way for individuals who really have been wronged in sometimes harrowing ways to hold providers accountable. And it is a method for ensuring, in contrast to arbitration, that these abuses are brought to light.

At the same time we are seeing more mandatory arbitration clauses, Government studies continue to provide disturbing evidence that our enforcement system is not working well. As Senator Grassley remarked in 2007, "The enforcement system is broken." In my own State, complaints take an average of 90 days to investigate, and sometimes as long as a year. In that time, all evidence disappears, and it is impossible to substantiate even the most serious and legitimate complaints. And if you cannot substantiate them, you cannot impose a penalty.

Licensed assisted living facilities in my State are inspected less often, less rigorously, and inspectors have even fewer tools if problems are discovered. And there is no enforcement at all in unlicensed facilities like the one in which Ms. High's family unwittingly placed her. So enforcement cannot be an adequate substitute for litigation in really egregious cases.

I know that opponents of this bill lament that funds that should be spent on resident care are diverted to pay for litigation and liability insurance. But I want to be clear about three important points:

First, what really costs taxpayers unfathomable amounts of money is poor care itself. For example, when a Wisconsin nursing home ignored for more than 5 days Glen Macaux's doctor's orders to inspect his surgical site, the resulting infection caused septic shock, excruciating pain, severe depression, and total disability, and hospital bills of almost $200,000. And this is replicated over and over across the country.

Second, even if providers were spared the expense of litigation and high insurance premiums, there is no guarantee that they would put that money into improving residents' lives.

And, finally, I want to note that anti-arbitration. We are only opposed to pre-dispute, binding, mandatory arbitration. Arbitration was not intended as an end run around justice or a way to keep wrongdoing out of the public eye. In cases in which consumers have already suffered grievous harm, Congress should not permit long-term care facilities to add the bitter burden of denying individuals their fundamental right of access to the courts.

Thank you.

[The prepared statement of Ms. Hirschel appears as a submission for the record.]

Chairman KOHL. Thank you, Ms. Hirschel.

Ms. Rice-Schild.

STATEMENT OF KELLEY C. RICE-SCHILD, EXECUTIVE DIRECTOR, FLORIDEAN NURSING AND REHABILITATION CENTER, MIAMI, FLORIDA

Ms. RICE-SCHILD. Thank you, Chairman Kohl, Ranking Member Hatch, and members of the Committee. I am grateful to have the opportunity to be with you here today and to offer the long-term care profession's perspective on arbitration. My name is Kelley Rice-Schild, and I am here today on behalf of American Health Care Association and the National Center for Assisted Living.

In addition to representing the long-term care industry, I am also here as an owner, operator, small businesswoman, and nursing home administrator. The Floridean in Miami was founded by my great-grandmother, Florence Dean, in 1944 and is a high-quality nursing facility that has been operated by a member of my family ever since. The Floridean is the oldest nursing home in Miami and serves as many as 60 South Floridians every day. Our mission is to meet and exceed the expectations of our patients and their families by providing the highest-quality care possible.

Before I address the benefits of arbitration as an alternative to litigation, allow me to take a moment to assure the Committee that the troubling anecdotes presented today represent the exception rather than the rule within our long-term care community.

I am proud of the advances our profession has made in delivering high-quality care, and we remain committed to sustaining these gains in the future when demand for care will dramatically increase.

Data tracked by CMS clearly illustrates improvements in patient outcomes, increases in overall direct care staffing levels, and significant decreases in quality of care survey deficiencies in our Nation's skilled nursing facilities. We remain committed to building upon these quality improvements for the future.

In the late 1990s, our profession was subject to an increasingly difficult legal environment. Long-term care operators were forced into making difficult decisions, including potential closure of facilities and corporate restructuring. In addition to pursuing tort reform, we sought alternatives to traditional litigation, including arbitration. This trend was especially true in States such as Texas, Arkansas, and my home State of Florida, where State laws fostered an exponential growth in the number of claims filed against long-term care providers, even those like mine with a history of providing the highest-quality care.

This led to an explosion in the cost of maintaining insurance to protect operators from the risks associated with a tort environment that often encouraged unsubstantiated claims, featuring highway billboards and other advertising encouraging consumers to sue their long-term care provider.

In 2001, tort reform legislation passed in Florida. Unfortunately, insurance is still not widely available and is unaffordable for most operators. Today in my facility, I am covered by a $25,000 general and professional liability policy for which I pay $37,000 a year. To carry more insurance would simply make my facility a target for litigation, despite our over 60-year history of providing nothing but the highest level quality of care.

In order to serve the good steward of my family's long-time business and to continue to operate in such an environment, I turned to arbitration. I was not alone. In 2002, American Health Care developed a model arbitration agreement form for possible use in admission process as a service to our member facilities and the residents they serve. This model agreement in no way alters the rights of remedies available to the resident under State tort law. It states that entering into an arbitration agreement is not a condition of admission to the facility. It is clearly free and voluntary. The form also provides a 30-day window for the resident or their representative to reconsider and rescind the arbitration agreement.

We support the use of arbitration because, unlike traditional litigation, our experience is arbitration is more efficient, less adversarial, and has a reduced time to settlement. A recent Aon report found arbitration reduces the time to settlement by more than 2 months, on average, and that very few claims actually go all the way to arbitration, as most claims are settled in advance.

The Aon report also finds that 55 percent of the total amount of claims costs paid by the long-term profession is going to directly to attorneys. It is unfortunate to sensationalize this debate with anecdotes and misinformation perpetuated by high-profile trial attorneys who are the primary beneficiaries of eliminating arbitration and long-term care. In fact, Mr. Connor's testimony last week before the House Judiciary Subcommittee inaccurately portrayed the manner in which arbitration agreements are presented to residents and their families upon admission.

We believe that legislative proposals to limit arbitration and undermine the FAA is bad public policy. We strongly support the use of arbitration as a reasonable option to resolve legal disputes and aggressively oppose efforts to diminish the use of arbitration.

Thank you for this opportunity to offer comments today. I look forward to your questions.

[The prepared statement of Ms. Rice-Schild appears as a submission for the record.]

Chairman KOHL. Thank you, Ms. Rice-Schild.

Mr. Connor?

STATEMENT OF KENNETH L. CONNOR, ESQ., WILKES & MCHUGH, PA, WASHINGTON, D.C.

Mr. CONNOR. Thank you, Senator Kohl, Ranking Member Hatch, Senator Martinez. I would like to thank you, Senator Kohl, and you, Senator Martinez, for your sponsorship of this very important legislation.

Senator Hatch has rightly outlined, I think, some of the major crises that are facing our country. I would submit to you that we also have an unacknowledged crisis of care with respect to our elderly and long-term care facilities in this country. I know because I have seen it firsthand. I have tried cases involving abuse and neglect of nursing home residents from Florida to California. I have seen nursing home residents who had pressure ulcers as big as pie plates. Their wounds oftentimes were so putrid and foul-smelling that you could smell the resident walking down the hall before you ever entered their room and saw them. I have seen them with gaunt faces and hollow eyes, suffering from avoidable malnutrition, their tongues too parched and swollen to speak because they are suffering from preventable dehydration. Sometimes they are victims of sexual abuse by their caregivers or physical abuse by other demented patients who are not properly supervised. And most of the times, these problems are rooted in the failure of nursing homes to maintain sufficient staff to take care of their residents. And the reason that is the case is that labor costs are the biggest single item in a nursing home budget. And when you are dealing with a capitated system where they are paid a flat fee for the care of residents, the way you increase profits is by reducing costs. And so they short the staff, and then in our experience often falsify the records to reflect a false and inaccurate picture of the care that is being given in the nursing home.

Now, historically, the means of redress for these kinds of injuries has been to resort to the courts—that is, the right to a jury trial that was so cherished by our forefathers that many refused to sign the Constitution until they agreed to secure it in the Seventh Amendment.

I can tell you as a practical matter, these problems are only going to get worse with time. We have got an enormous age wave coming. We have a veritable senior tsunami on the horizon. Dr. Leon Kass has rightly said that we are rapidly becoming a mass geriatric society, even as we are facing the pressures that you, Senator Hatch, have identified in terms of the crisis in our Medicare and Medicaid systems. And at the same time, we are experiencing a shift in the cultural consensus about the way we view the elderly and handicapped especially. We are moving away from a sanctity-of-life ethic to a quality-of-life ethic, and old people suffering from dementia in the nursing home do not score well using quality-of-life calculus. They do not perform well on functional capacity studies, and they cost more to maintain than they produce, and they are often the victims of abuse and neglect in nursing homes.

And I respectfully dispute what Ms. Rice-Schild has said. All you have to do is look at the briefs and memos that our office has filed on multiple occasions in court, along with that of others.

You know, in any other setting if you took advantage of an elderly person whose eyes were dim and whose hearing was dull and who lacked mental capacity or perhaps is on medication that impaired their mental faculties, and you talk them into forfeiting important legal rights or forfeiting the important right to recover money for their damages, in almost any other setting, the perpetrators of that kind of conduct would be prosecuted. Yet it is an approved process in nursing homes. Nursing homes take advantage of frail, vulnerable residents who are mortified and terrified that they are about to be left by their families in an institution. The families themselves are stricken with grief and guilt over the fact that they cannot care for their loved one anymore and they have to turn them over.

The last thing on their mind when they come to the nursing home is that they are going to be required to forfeit their legal rights. All they are concerned about is getting care for their mother or grandmother whom they know they cannot care for any longer.

These agreements are often sandwiched at the end of a 50- or 60-page admitting packet. They are rarely ever explained. Oftentimes we find that people who explain them do not even know or understand the consequences.

If arbitration is such a good remedy—and I would submit to you that arbitration can be an appropriate means of alternative dispute resolution, then let's foster it after the dispute arises, not before the dispute arises, when the victims of abuse and neglect and their families do not have a clue about what they are suffering. If your goal is to hold wrongdoers fully accountable for the consequences of their wrongdoing and to see to it that innocent victims of wrongdoing are compensated fairly for what they have suffered, I would suggest to you you ought to support this important legislation.

Thank you.

[The prepared statement of Mr. Connor appears as a submission for the record.]

Chairman KOHL. Thank you, Mr. Connor.

Mr. Ware.

STATEMENT OF STEPHEN J. WARE, PROFESSOR OF LAW, UNIVERSITY OF KANSAS, LAWRENCE, KANSAS

Mr. WARE. Chairman Kohl, Ranking Member Hatch, Senator Martinez, members of the Committees. Thank you for having me here today. My name is Stephen Ware. I am a professor of law at the University of Kansas. I speak to you today not on behalf of my university, but as an individual scholar who specializes in arbitration law. I have written two books on the subject and 20 arbitration articles in scholarly journals. Within my field of arbitration law, I have focused on the arbitration of disputes involving ordinary individuals, and it is safe to say that for the last 15 years, the bulk of my professional life has been devoted to studying the law, economics, and policy of such arbitrations. It is based on this experience that I oppose S. 2838 because I believe it will tend to

harm those it aims to protect, that is, nursing home residents and their families.

I have three points I want to make about arbitration. The first point, which Senator Kohl alluded to, is that to the extent we have reliable empirical evidence comparing arbitration and litigation, arbitration does tend to be a quicker, cheaper method of dispute resolution. So the savings that Senator Hatch alluded to are backed up by empirical data.

That leads me to my second point, which is that advocates of this bill often praise arbitration and allude to those benefits of arbitration and say that while we are going to keep arbitration, we like arbitration, all this bill will do is ban pre-dispute arbitration agreements. That, however, sets up a false choice. If you ban pre-dispute arbitration agreements, you effectively end virtually all arbitration of this sort of dispute, and that is because parties rarely enter into post-dispute arbitration agreements. The vast majority of arbitration arises out of pre-dispute arbitration agreements.

The fact that parties rarely enter into post-dispute arbitration agreements does not reflect badly on arbitration. What it reflects is the perspective the disputing parties have after a dispute arises. At that time, parties and their lawyers can assess a case, and they try to maneuver into a forum that advances the self-interest of that side of the case. In other words, one party may be attracted to litigation precisely because it is not as fast or as cheap as arbitration. That can give a strategic advantage to that side. So we rarely see post-dispute arbitration agreements. Enacting a bill like this, I expect, will virtually eliminate arbitration of these sorts of disputes.

That then brings me to my third point, which is the fairness of arbitration. I think it is important to avoid generalizing here because there are a wide variety of arbitration agreements out there and a wide variety of things happening in arbitration. And here is where I really believe we have a sensible system under the Federal Arbitration Act as it stands now, with courts refusing to enforce arbitration agreements that are unfair, that would lead to an unfair arbitration process. So as Senator Martinez says, we all want to hold nursing homes accountable for their negligence. Certainly the sort of atrocious care Mr. Kurth described, we all want to hold nursing homes accountable for that sort of care. The question is: Will arbitration do that? And sometimes the answer is yes, sometimes the answer is no. It depends on the particular arbitration agreement, the particular arbitrators involved.

So what we have now is a very sensible system in the law where courts decide on a case-by-case basis which arbitration agreements to enforce and which ones are unfair and should not be enforced. I think that is a better system, case-by-case adjudication of these fact-intensive issues, than legislation which would pain with a broad brush and would be overinclusive.

Thank you very much.

[The prepared statement of Mr. Ware appears as a submission for the record.]

Chairman KOHL. Thank you, Mr. Ware.

A question for you, Mr. Connor. Ms. Rice-Schild says that Mr. Kurth's case, as we heard about it today, is "the exception and not the rule." I would ask you how prevalent are arbitration agree-

ments in admissions contracts and how common are stories like Mr. Kurth's that we heard today.

Mr. CONNOR. Mr. Kurth's story is all too common. There are many nursing homes in this country that give high-quality care, but Mr. Kurth's story and the story that was outlined by Ms. Hirschel are very, very common. I have reviewed hundreds and hundreds of charts from nursing homes all over the country and see these systemic problems. These are not isolated problems. They are systemic. And we also see systemic fraud in the industry. In fact, in 2000, the DOJ commented at one of these hearings that fraud had been built into the business model of the nursing home industry. And I can tell you that in the ensuing time since that statement was made, it has been validated time and time again in the cases that I have been involved in where nursing homes try to conceal the true staffing picture and the true nature of the care that is being given.

We encounter these nursing home pre-dispute arbitration agreements, I would estimate, in 60 to 70 percent of our cases, and that percentage is rising over time, because it is a tremendous advantage to the nursing home to enter into these agreements. These proceedings are often secret. They are not exposed to public opprobrium like they would be in a public trial or in the case of a public jury verdict. They often are able to shift the costs of arbitrating to the plaintiffs in this case. It often is cheaper for the defendant nursing homes. But at bottom, I would suggest to you, the inherent unfairness that arises from taking advantage of a frail, elderly person to get them to forfeit important legal rights before a dispute arises is just simply unconscionable and ought not to be sanctioned by this Congress.

Chairman KOHL. Thank you.

Ms. Hirschel, long-term care facilities claim that without arbitration, their costs would increase and access to quality care will decrease. I am concerned about our seniors having access to quality long-term care, as we all are. Will this bill, as they say, result in fewer facilities to care for our aging population?

Ms. HIRSCHEL. Senator Kohl, I do not think so, and I would like to caution us not to equate the legitimate issue that Senator Hatch raised of rising health care costs across the board with the specific issue of consumers' rights to go to court in truly egregious cases. There are lots of other ways that facilities can control costs and keep their doors open and provide access.

The first thing is they can provide good care. There is no evidence of a spate of frivolous lawsuits. In fact, the Harvard study in 2003 showed that in more than half the cases that were filed against nursing homes, the resident died. So these are not—even defense lawyers for the industry have acknowledged that these cases are not frivolous. If you provide good care, you do not get sued for those very expensive, egregious cases.

The second thing I think would be very interesting is to look at how the insurance industry sets its rates for nursing home liability insurance. The Center for Medicare Advocacy did a study that showed that those rates increase exponentially and not directly related to civil litigation costs, but to a host of other factors. And I think we really need to see whether those rates are truly based on

rising litigation or on other factors that are not legitimate, and whether the insurance companies, in fact, are bleeding profits out of nursing homes that should be spent on care.

And, finally, I think we need to look at the private equity firms, which I know that you and Senator Grassley have looked at very carefully. They are bleeding resources out of facilities and putting profits over residents. If we ensured that the funds that should be spent on resident care stayed in the facility instead of in the private equity investors' pockets, that would also allow facilities to continue providing quality care and keeping their doors open.

So, in sum, I would just say that nursing homes can keep their doors open if they provide good care, if they have responsible corporate policies, and if we ensure that liability insurance rates are fair and reasonable. Thank you.

Chairman KOHL. Thank you.

Senator Martinez?

Senator MARTINEZ. Thank you, Mr. Chairman.

I want to thank all the witnesses for very compelling testimony. The fact is that these are difficult issues. We are talking about issues that are really at the heart of a cycle of life where we need to show the kind of care and concern that I know all of you passionately care about.

Ms. Rice-Schild, I also want you to know that I am certain your establishment gives quality care. I am sure there are places where quality care happens. I also have faith in the judicial system to ferret out the frivolous from the legitimate. And I think at the end of the day, while a lawsuit might be filed, before a lawsuit ultimately comes to being a collectible verdict, that there needs to be a process in place that is fair to all concerned.

I was intrigued by something you said, and I want to clarify it. You mentioned that in Florida we had tort reform, and I believe you said in 2001, I believe. But yet your insurance rates did not drop significantly. Is that right?

Ms. RICE-SCHILD. No, Senator. The insurance companies, the major carriers, are not writing medical malpractice insurance in Florida.

Senator MARTINEZ. But that was in spite of tort reform, so tort reform really did not alter the insurance situation.

Ms. RICE-SCHILD. I think there needs to be a track record before the insurance companies will come back to the State, and slowly but surely we are all hoping that will happen and it will be affordable.

Senator MARTINEZ. But at this current time, you do not find that there is affordable insurance in Florida?

Ms. RICE-SCHILD. No, Senator. It is almost dollar for dollar. The last time that I was able to get real medical malpractice insurance was 1999. I had $1 million/$3 million coverage, and I paid $24,000. I have an almost pristine record. Then after the bottom dropped out, I was reduced to having to get a $25,000. Now if I wanted to get $1 million/$3 million—I spoke to an insurance agent just recently on my renewal—it would be close to $800,000.

Senator MARTINEZ. So essentially tort reform did not alter the equation in terms of—

Ms. RICE-SCHILD. Not yet, Senator. We are hoping that it will.

Senator MARTINEZ. Okay. And it is almost a decade, so I am wondering what it really is the solution that it is held out to be. I am sure when you were advocating for tort reform in Florida, you were assured that this would drop your rates, and you were probably telling legislators at the time that that would happen. And, unfortunately, it happens, and that is my point.

Ms. Hirschel, in the limited time I have, let me move along. Folks who come into a situation and they are presented an arbitration agreement, do they get a discount? Do they pay less in any way?

Ms. HIRSCHEL. No, sir, they do not.

Senator MARTINEZ. And is it your experience—

Ms. HIRSCHEL. Not in my experience. I am sorry to interrupt, but certainly not in my experience. I have not heard that.

Senator MARTINEZ. And do you believe that people are in anyway informed at the time of signing of that contract as to what they are doing in terms of giving up their legal rights? Mr. Connor mentioned that sometimes these might be sandwiched in the back of a package. I took my dad to a nursing home and grabbed him out of there in about a week because I was appalled myself. That is just my own little experience. But, anyway, I remember signing a lot of stuff. And, frankly, as I have sat here, I wondered if I signed an arbitration agreement as part of that. I do not know.

Ms. HIRSCHEL. Well, my sense is that different facilities have very different practices. Some do explain the process, and I know that some defense attorneys for nursing homes suggest that their facilities have a video that explains the entire process, although the defense lawyer whose paper I read said that none of his clients have chosen to do that.

So some do and some do not. I have certainly seen the admissions contracts where those arbitration clauses are absolutely buried and use very difficult legal language. But as I said in my testimony, even in the cases where clients, where applicants understand that there is an arbitration agreement, they are afraid to ask to have that removed. They just want to get their family member in, and they do not think it is going to apply to them.

Senator MARTINEZ. Mr. Ware, I was intrigued by your faith in a two-proceeding system. I understand that alternative dispute resolution is a very progressive way of resolving legal disputes, and I have participated in them on many occasions in different settings. And I think that they are appropriate. However, when you recommend that essentially there be an arbitration process and then it be taken before a court so that on a case-by-case basis a court can then decide if it was fairly entered into? I am not sure I understand that.

Mr. WARE. No, Senator. I recommend the law as it is right now, the current law, which is when people agree to arbitrate, if they choose to arbitrate, they just go ahead and arbitrate. If one of the parties wants to get out of the arbitration agreement, they can go to court and a court assesses whether the agreement should be enforced or not.

Senator MARTINEZ. But then that forces them into litigation.

Mr. WARE. Certainly, right. The choice to try to back out of one's arbitration agreement gives you the alternative of a court to back you up on that and let you out of the arbitration agreement.

Senator MARTINEZ. But do you find that when people enter into these arbitration agreements, particularly in nursing home settings, that they are aware of the legal rights that they are giving up and that they in any way have any sort of an equal bargaining position? I mentioned in my opening statement about my belief that arbitration really has its fruits in resolving business disputes where there is some sort of an equilibrium, if you will, in the bargaining position of the respective parties.

Do you think that exists in this situation? And does that concern you?

Mr. WARE. Well, that is, again, where I would hesitate to generalize. I mean, part of my job as a law professor is to imagine extreme cases on either side. So I can imagine extreme cases where people would say, yes, this arbitration agreement was fairly, voluntarily entered into, and ought to be enforced, just like I can imagine extreme cases on the other side. And then there is a lot of gray area in the middle where reasonable people can disagree. And that, again, is why I believe we have got such fact-intensive, case-by-case, issues arising here, so rather than the broad brush of litigation, this is better resolved case by case by courts looking at individual facts.

Senator MARTINEZ. Thank you, Mr. Chairman. My time is up.

Chairman KOHL. Thank you, Senator Martinez.

Senator Feingold?

STATEMENT OF RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Well, thank you, Mr. Chairman, for holding this hearing and for your leadership on this issue.

I want to first welcome Mr. Kurth from Burlington, Wisconsin, and his family members, and express my deepest sympathy for the loss of your father and the ordeal you and your family have undergone. That was very powerful and, frankly, very disturbing testimony. Thanks for coming here to tell your story and to try to help other families.

One of the most fundamental principles of our justice system is the right to take a dispute to court. I have been concerned for many years that mandatory arbitration clauses in all sorts of contracts that consumers and employees must sign are slowly eroding the legal protections that should be available to all Americans. I have introduced legislation to make these provisions unenforceable basically in all contexts because I believe they are inherently unfair, other than some of the commercial situations that Senator Martinez was just referring to.

Arbitration is an important form of alternative dispute resolution, but it should never be forced on someone, particularly not on someone with unequal bargaining power before a dispute even arises. People who sign contracts to go into a long-term care facility are among the most vulnerable of our citizens, whether they are seniors or their families. They sign papers that are handed to them in often very difficult and emotional circumstances. They are not

represented by lawyers to review the fine print. As we have heard from the witnesses today, residents and their families typically have no opportunity to negotiate the terms of the contracts they sign. Often they believe or they are told the contracts are take-it-or-leave-it propositions. In some cases, the facility, but not the resident, retains the right to modify the contract and even to pursue a collection action in court. If the dispute goes to arbitration, the secret proceedings often severely restrict discovery and impose limits on witnesses, experts, and information sharing.

So I am pleased to cosponsor the Nursing Home Contract Arbitration Fairness Act introduced by Senator Martinez and my senior colleague from Wisconsin Senator Kohl. The bill will restore access to the courts for nursing home residents who have suffered abuse and neglect. That access in the end helps improve the quality of care for our seniors. Mr. Chairman, the rule of law means little if the only forum available to those who believe that they have been wronged is an alternative unaccountable system that they have not chosen voluntarily when the laws do not necessarily apply. This legislation protects seniors from exploitation while still allowing alternative methods of dispute resolution to be chosen by the parties. I applaud you, Senator Kohl and Senator Martinez, for introducing the bill, and I hope this hearing will move us closer to enacting it.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Mr. Kurth, thank you again for coming and testifying. One thing you talk about in your testimony is how the secrecy of arbitration is used as a shield for corporations to hide behind. Is one of the reasons that you wanted to have a real trial in court that you wanted to help educate the public and talk about what your family has been through in an open proceeding?

Mr. KURTH. Yes, sir. We live in a small community, and what we saw was that even though this happened, this terrible thing happened, nobody knew about it unless they knew our family. Yet other members of the community were continuing to enter the facility; they had no idea what they were getting into or what they were being asked.

When I was there, in one of the other rooms was somebody that taught us biology in high school. This is all about public safety and public awareness and fairness as well. We just want to make sure that this does not happen to other people from our community.

Senator FEINGOLD. Thank you.

Mr. Connor, in Ms. Rice-Schild's testimony she claims that you misrepresented how arbitration agreements are presented to potential residents. She also claims that potential residents at her facility are not required to sign the arbitration agreement and that several have chosen not to do so.

In your 25 years representing residents and nursing homes, have you found that residents are generally told that they do not have to sign the arbitration clause?

Mr. CONNOR. No, that would be in my experience the exception rather than the rule, and, in fact, as Ms. Hirschel has pointed out, oftentimes residents and their families are reluctant at the very outset to buck the system and to buck the proposals. They do not want to be deemed to be problem oriented. But in any number of

instances, residents have been told that if they do not sign the agreement, then they will not be permitted to gain admission to the facility. And this is simply not acceptable in many instances because it may be many miles to the next nearest facility, and they will not have an opportunity to visit their loved ones as they otherwise would.

These agreements are often sugar-coated in very soothing tones and vague terms. They are told if there is a dispute, we will be able to quickly resolve it at minimal expense.

Well, the extent of the rights that one is giving up are dramatic, and the minimization and expense is to the nursing home. It is not to the resident. Oftentimes, the filing fees alone in arbitration cases run into the thousands and thousands of dollars. That is not true with filing fees for a court, plain and simple.

Senator FEINGOLD. Ms. Hirschel, just following up on something Senator Martinez was talking about, Mr. Ware argues that the bill we are discussing today is unnecessary because courts can still find an arbitration agreement unconscionable if it is blatantly unfair to one of the parties. Now, that, of course, requires a lawsuit to be filed, which I thought arbitration was supposed to avoid. But leaving that aside, do you think that the fact that courts can theoretically find an agreement unconscionable is enough protection for vulnerable citizens in this situation?

Ms. HIRSCHEL. Well, first, Senator Feingold, I think that in my understanding of these arbitration agreements, they are unfair because the nursing home picks the arbitrator and because the arbitrator is often a health care industry lawyer who has an interest in finding for the facility and having low awards so that they will get repeat business from that long-term care facility. The facility picks the location. There are costs, as Mr. Connor was just referring to, that do not occur in litigation. So I think that these agreements just are unfair, especially when you think about the very vulnerable people who are asked to sign them.

Second, as you suggested, I think it is really very cumbersome, very costly, and perhaps unrealistic to suggest that every time a family finds themselves in a situation like the Kurths or in the situation of Joe Louis' sister that they would first go through a court proceeding and then, if they lose, have to go through arbitration as well.

Senator FEINGOLD. Mr. Connor, do you want to comment on that?

Mr. CONNOR. Yes, Senator Feingold. I should point out that increasingly we are seeing provisions in the arbitration agreement that indicate that if there is a dispute about the appropriateness or propriety of the arbitration, that will be resolved by the arbitrator as well. There just—I think it is just important to understand the reality of the situation. These are agreements that are tilted against the resident and in favor of the nursing home. The business is provided to the arbitrators that are involved. They typically are health care lawyers who have a very cozy and close relationship with the defendant nursing homes.

Now, if you had a judge who was hawking his venue as a business-friendly environment and whose fees and salary were being paid by the defendants in that case, you would say he has a conflict

of interest or she has a conflict of interest, and they are not qualified to serve. This is an unlevel playing field that results in the abuse of nursing home victims who already have been abused and neglected by their caregivers.

Senator FEINGOLD. Thank you, Mr. Connor.

Thank you, Mr. Chairman.

Chairman KOHL. Thank you, Senator Feingold.

Senator Salazar?

Senator SALAZAR. Thank you very much, Chairman Kohl, for holding this hearing on this very important issue, and to you, Mr. Kurth, I give you my condolences for the loss of your family member.

I have a general question, and that is—and maybe you can answer this. My sense is that when people go into a nursing home, they sign a whole set of documents, kind of like a house closing where you have a number of maybe 10, 15, 30 pages that you are signing. And my question to you is: How knowingly are people about the arbitration provisions and the agreement at the time that they are actually signing it? Is it something that you believe they actually focus on and they know that they are signing an agreement that says if there is a dispute with the nursing home, it is going to go to arbitration? Or do you think this is part of the boilerplate that they end up signing? Who wants to take that question? Kelley? Ms. Rice-Schild?

Ms. RICE-SCHILD. I will take the question since I probably have the most experience explaining admission to residents. The residents, when they are admitted—and I will speak for my facility. Many times it is not on the day of admission, and I know that a lot of my peers, it is not on the day of admission, because it is a hectic and emotional day. And in our case, the arbitration agreement needs to be initialed and explained. So before the patient or representative initials that section, you explain to them exactly what it means. And it is also voluntary, just like admission to the facility is voluntary. You do not have to—you are not forced to stay in the facility if you experience bad care. You are not forced to sign the arbitration agreement. It is 100 percent voluntary, and you can cross it out if you wish, and it makes no difference.

Senator SALAZAR. And how many of the patients that you admit actually cross it out?

Ms. RICE-SCHILD. I have had about four or five cross it out.

Senator SALAZAR. Four or five out of—

Ms. RICE-SCHILD. Four or five since we have started using arbitration clauses in admission agreements. I know for other facilities it is about 90 percent that do sign the arbitration agreement, 10 percent that do not.

Senator SALAZAR. So most people will go ahead and sign it.

Ms. Hirschel?

Ms. HIRSCHEL. Yes, Senator, I think it was really telling that Senator Martinez himself said that he really did not know if the admissions paper he signed for his family member included a mandatory arbitration provision. And I know absolutely that if I were to poll all of the clients I have had in the last few years about what the—not just whether there was arbitration, but what most of the provisions in the admissions contract were, my clients would not be

able to tell me that. And certainly not all facilities have the practices that Ms. Rice-Schild has described.

So I think that the combination of the fact that these are sometimes varied, they are in legalese in many cases, and there is just too much going on means that families simple do not understand them.

Senator SALAZAR. Let me ask another question related to arbitration. You know, as a lawyer practicing in the private sector for a long time, I often would talk to my own clients about looking at less expensive ways of being able to resolve disputes by going through mediation and going through arbitration and avoiding the high costs of a full-blown court dispute. It seems to me that since the Federal Arbitration Act was passed for nursing homes in 1925, a lot has happened. And I would ask the question whether we just need to reform the mediation, arbitration, dispute resolution provisions of the law, or do you think we just need to throw them all out? Who wants to take that one? Yes, at the very end, Professor?

Mr. WARE. Senator Salazar, I think you raise an important question because the Federal Arbitration Act has been serving this Nation for 80-some-odd years now. And I think part of the genius of this act is that it does give the courts on a case-by-case basis the power to decide the variety of issues that have been raised by the witnesses here.

For example, Ms. Hirschel refers to arbitration agreements that allow the facility to choose the arbitrator. That is something I have never seen, and occasionally I have seen outside of the nursing home context an agreement allowing the party that drafted the arbitration agreement to choose the arbitrator, and courts, I have seen—every time I have seen this—hold that unconscionable, unenforceable. Some of the other clauses the witnesses have mentioned also, courts frequently hold unconscionable, such as overly high fees for the consumer or one-way arbitration that Senator Feingold referred to where only one party is bound to arbitrate.

In other words, these are the sorts of extreme clauses that are one-way, that are favorable to one side. The law is working in that courts do refuse to enforce them.

Senator SALAZAR. Let me just ask a question of all of you and just ask you to raise your hands. I will give you three options. If you were Queen for the Day and you had to choose between three options—one, throwing out the Federal Arbitration Act, leaving it silent; two, reforming it to take care of some of the abuses that people have talked about; or, three, just keeping it the same, keeping it as it is.

So throw it out, how many would just throw it out? Raise your hand if you would just throw it out.

Okay. How many of you—you might want to throw it out, you might want to think about it.

How about reform? How many of you would want to reform it and it needs change? So three of you.

And how many of you would say keep it as it is? Okay. Thank you very much.

Thank you, Mr. Chairman.

Chairman KOHL. Thank you, Senator Salazar.

VerDate Aug 31 2005 11:01 Nov 26, 2008 Jkt 044741 PO 00000 Frm 00025 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44741.TXT SJUD1 PsN: CMORC

Ms. Rice-Schild, according to stats that I have seen, close to 70 percent, 65 to 70 percent of people admitted to long-term care facilities have some form of dementia or serious mental impairment. Under what conditions could we imagine that they are qualified to make the kind of a judgment that we are talking about here at this hearing?

Ms. RICE-SCHILD. Chairman Kohl, if a patient has dementia or is unable to sign for themselves, then in Florida there is a State law that requires a health care proxy. The person that has been designated to make health care decisions on behalf of the person because they are not mentally capable to would be responsible for all health care facilities, including signing the admission contract.

Chairman KOHL. But isn't it true that when you are dealing with a class of people, the ones that we are primarily focusing on, when you are dealing with people who have such impairments, it is not possible for them to be making these kinds of decisions that we are talking about right now.

Ms. RICE-SCHILD. Yes, that is correct, Senator. That is why somebody has been appointed to make those decisions for them.

Chairman KOHL. I want to ask this question: In our bill, we are suggesting that the decision as to whether or not we engage in arbitration or go to court should be made after a dispute arises. That presupposes that both parties will decide, and, you know, they will figure out what they believe to be the most appropriate way. Whether they have their day in court, which is, you know, part of the American basic fabric of justice, or whether they choose to go to arbitration, now we are making a judgment here. I mean, you know, obviously things are not—but isn't that the most reasonable way to litigate? Decide what is going to be done in the event that an issue arises, that after the issue arises, the party has a right to go to arbitration, or the party has a right to go to court? If as you say, Mr. Ware, they will always decide to go to court, well, not necessarily. But if they would, that is the American way. So what is the issue, Mr. Ware?

Mr. WARE. Well, the issue is whether people should have the option to agree at the pre-dispute stage to bind themselves to this contract.

Chairman KOHL. Well, why should they do that? I mean, why don't we just abolish court proceedings altogether in everything and just say the American way from now on is arbitration, we do not go to court, we do not deal with juries, we do not deal with that whole process? What is so different about long-term care facilities that it should be accepted as the common way in which we handle disputes in our society?

Mr. WARE. Well, Senator Kohl, as even Senator Feingold alluded to earlier, there are cases where everyone agrees arbitration is desirable, and an agreement of parties to use it should be enforced, whether it is a business-to-business case or whatever. And my point, again, is there is lots of gray area. There are lots of intermediate cases between the extremes on one side, where nobody would want the agreement enforced, and extremes on the other side, where everybody would. And the question again is: Should you resolve that through legislation, which paints with a very

broad brush? Or should you leave it to the courts assessing the nuances of each case on a fact-intensive basis?

Chairman KOHL. I am not sure I understand that.

Mr. Connor?

Mr. CONNOR. Senator Kohl, I think it speaks volumes that Professor Ware says that given the option about whether to choose arbitration or litigation after the dispute has arisen speaks volumes about the perceived fairness of the remedy at issue. He is concerned that if you pass this, nobody will pick it. Well, why won't they pick it? Because they are getting the shaft in the current system.

But I can tell you, for instance, there might very well be instances involving post-dispute arbitration where a nursing home resident who is still alive, who was not killed by the abuse or neglect, would prefer to have the case arbitrated and brought to a quicker resolution so that they could get the benefit of the monies to be awarded to augment the care that they would receive going forward into the future.

But I just think it speaks volumes about the fairness, or lack thereof, of this kind of decisionmaking when the professor, who studied this for 15 years says, you know, if you give a person a shot at it after the dispute arises, they are not going to take it, and it is going to gut pre-dispute arbitration.

Mr. WARE. Senator Kohl, the reason parties do not agree to post-dispute arbitration very often is because it takes two to tango. It takes two to form an arbitration agreement. If either side of the dispute thinks litigation is more favorable to them than arbitration, then there is no post-dispute arbitration agreement. They end up litigating. Sometimes it is the plaintiff who says I have got a strategic advantage here from litigation; it enables me to do something to club this defendant that arbitration does not enable me to do. Sometimes it is the defendant who says litigation gives me a strategic advantage; it allows me to do something to club the plaintiff that arbitration does not allow me to do.

In other words, the burdensome procedures of litigation, the elaborate pleadings and discovery and motion practice and all, sometimes that is a tool the plaintiffs can use; sometimes that is a tool defendants can use. Arbitration's a quicker, cheaper process, gives both sides fewer of those clubs to hit the other side with.

Mr. CONNOR. All of which, Senator, I would suggest speaks to the fact that people are not making an informed judgment. They are not giving informed consent on the front end when they enter into these agreements.

Chairman KOHL. Ms. Rice-Schild?

Ms. RICE-SCHILD. It just seems to me that doing it post would be similar to closing the barn door after the horse is gone. It is a very emotional time. It is an adversarial time. And if you are going to be clear-headed, I think it needs to be done prior to any incidents that would arise.

Chairman KOHL. Yes, Ms. Hirschel?

Ms. HIRSCHEL. Thank you, Senator. I want to say that I really share your confusion about why these cases would be considered different and why, if the arguments here apply, we would not just throw out our whole civil justice system altogether. And I think

that neither our civil justice system nor families like the Kurths should be vilified. If there are costs to litigation, I want to note that there are also extraordinary benefits to that litigation, including the public disclosure of wrongdoing, appropriate penalties for facilities that really have done something terribly wrong; and also, the fact that through allowing civil litigation, we do promote citizens' belief that the system is just, and that is important, too.

Chairman KOHL. That is a very important point, and I would like to ask you that, Ms. Rice-Schild. One of the things that keep our society honest is that, you know, people are exposed for wrongdoing in addition to being condemned and fined. Why should your industry be any different?

Ms. RICE-SCHILD. I do not in any way support poor care, and I apologize also to Mr. Kurth because I feel it is deplorable that conditions should arise like that. I am not here today to support any poor-performing facility. I am here really to say that we need to have some protection so that the good facilities, like my facility, will not go bankrupt with one lawsuit. And that could very easily happen. After 60 years, four generations, one lawsuit, because I cannot afford insurance because in Florida it is not written, my facility could be gone. So we do not need to throw the baby out with the bath water.

Chairman KOHL. Again, I want to make the point or ask the question. One of the purposes of the system, whether it be in your industry or any other industry, is that exposure to wrongdoing if convicted, you know, has an adverse impact on future business opportunity. Now, why should your industry be excepted from that?

Ms. RICE-SCHILD. It seems that we currently are included with all other businesses in the Arbitration Act, and we are being singled out in this bill. I do not know that I can answer your question because I feel like skilled nursing facilities and, from my experience, 25 years of trying to in joint partnership provide very quality care with my patients and families, are being singled out.

Chairman KOHL. You know, one of the things that we are working on in our Committee—and we have succeeded in getting it—is a public rating of all facilities so that people who are thinking about placing a loved one into a facility can look on the website and see what the rating is, one star, two, three, four, five stars. Transparency, in other words, which is really important. I am sure you understand when people choose where to enter themselves or enter a loved one in terms of a long-term care facility, it is very helpful to know which ones have great records and which ones have blemished records.

Now, this process tends to obscure that, and we are looking for transparency. The process that we are discussing today and your advocacy of it, Mr. Ware, obscures that. Now, that is pretty important, isn't it, Mr. Ware?

Mr. WARE. Yes. I think it is important to remember that the public accountability we all want for negligent nursing homes can come through arbitration just as through litigation. People have used the word "secret" to describe arbitration. But, again, that gets to the rare arbitration clause that requires parties to the dispute to keep the dispute confidential, and courts tend not to enforce those. That is another one of those red buttons where courts find unconscion-

able such agreements. So parties to arbitration who want to expose to the public the negligence are free to do so.

Chairman KOHL. Yes, but that is a voluntary thing. When you go to court, it is not voluntary.

Mr. WARE. Well, that is certainly true that the public, members of the public, can walk into a courtroom uninvited and typically cannot do that in arbitration. That is right. But the people who have an incentive to make publicly known negligence or a dispute in arbitration, the parties and their lawyers are free to do so.

Chairman KOHL. Yes, but they could be paid, as so often occurs in other situations, a certain amount of money to keep it confidential.

Mr. WARE. Oh, yes, Senator. But when you come to a settlement agreement that has a confidentiality clause, that is an important issue that I know you have worked on. But it is an important issue in arbitration and in litigation equally. That concern of settlement secrecy is not something particular to arbitration.

Chairman KOHL. Yes, but when you go to court and have a jury trial, that is public, isn't it, Mr. Connor?

Mr. CONNOR. It is, and I would submit, Senator Kohl, that sunshine is one of the best disinfectants for the industry.

Just to give you an example, I recently tried a case in Santa Ana, California, where a woman died from horrific Stage IV pressure ulcers to the bone on both heels. In the aftermath of that trial, there was a television news clip that ran on the news for 2 days that referenced the facility, Sunrise Senior Living of Laguna Hills, California. And it referenced it about four times in the news clip.

Now, I am sure that the owners of Sunrise Senior Living were mortified about it, but the public benefit to be derived from the public learning about what went on in that facility was tremendous. And I guarantee you many more people learned of the poor quality of care in that facility than they would have picked up from an Internet site that had some rating system.

Chairman KOHL. Anybody else have comments to make on this hearing, any issues, implications, inferences, something we have not covered that you think needs to be discussed, mentioned?

[No response.]

Chairman KOHL. Well, I want to thank you all for being here today. I think that we have fairly brought to the surface all the different issues, the angles, and the implications of what we are talking about. And, without objection, letters of support for the bill or against the bill from anybody—AARP, the Alzheimer's Association, numerous consumer groups, as well as any other group—will be included in the record. The record will remain open for a week for additional statements, comments, questions, and we thank you again for being here.

This hearing is adjourned.

[Whereupon, at 11:53 a.m., the Subcommittees were adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of Kenneth L. Connor
To Questions for the Record from Senators Kohl and Feingold
U.S. Senate Judiciary Committee and Special Committee on Aging
Joint Hearing on: S. 2838, the Fairness in Nursing Home Arbitration Act
June 18, 2008

From Senator Kohl

Question 1. Why is it so important for residents and their families to be able to hold long-term care facilities accountable in court? Don't residents have the opportunity to hold facilities accountable for their actions in arbitration?

Response. Common sense and human experience demonstrate that if wrongdoers aren't held fully accountable for the consequences of their wrongdoing, their misconduct will multiply.

As presently configured, agreements for pre-dispute binding mandatory arbitration in nursing home settings do not hold nursing homes fully accountable for their wrongdoing toward residents. These "agreements" are tailored to tilt the playing field in favor of the nursing homes and against the resident. Very often these agreements also require residents to accept artificial "caps" on compensatory damages, and to waive rights to punitive damages and attorney's fees. Further, residents are required to accept arbitral forums that are friendly to the nursing home industry and hostile to residents. The rules of these forums place draconian limits on discovery which inhibit residents from learning important information about the liability issues in their cases. These same rules also often limit the number of witnesses, including experts, who can be called, thus making it difficult for injured residents to prove their case. As a result of all of this,

experience has shown that awards in these arbitral forums are substantially lower than jury verdicts in similar cases.

Because nursing homes aren't held fully accountable for the consequences of their abuse and neglect in these arbitral forums, they are more likely to repeat such misconduct. The sad fact is nursing homes are not likely to modify their wrongful behaviors until they learn that it costs them more to do business the wrong way than to do it the right way. In court, the resident has a much better opportunity to hold homes fully accountable for their abuse or neglect. Consequently, court awards are more likely have a deterrent impact on nursing home misconduct than awards in settings dictated in an agreement for pre-dispute binding mandatory arbitration.

Question 2. Mr. Ware argues that by eliminating pre-dispute arbitration, our bill effectively eliminates post-dispute arbitration because lawyers like you will prefer court. How do you respond?

Response. By such an argument, Mr. Ware concedes the inherent unfairness of agreements for pre-dispute arbitration. Effectively, what he is saying is that the terms of agreements for pre-dispute arbitration are so inherently unfair that no nursing home resident in his right mind would accept them, given an alternative. I, however, can envision instances where residents would agree to post-dispute arbitration, assuming that the rules and forums are fair to both sides. For example, where a nursing home resident is still alive and arbitration can provide an expedited and fair result, the resident has every

incentive to resolve the case in such a forum. In such a circumstance, the resident can use the proceeds awarded by the arbitrators to improve their care or quality of life.

Question 3. Critics of our bill claim that without arbitration they will be overburdened by litigation costs and we sympathize with Ms. Rice-Schild's experience as an upstanding family-owned facility. How do you respond to this?

Response. The fact is that the fees associated with arbitration are typically dramatically higher for the injured party who brings the claim than are court fees. (The actual costs can be verified by examining the fee schedules for the various arbitral forums and comparing them to court costs.) Advocates for pre-dispute arbitration ignore these higher fees and tout "lower overall costs" for arbitration. What they really mean is that the awards by industry friendly arbitrators industry are generally much lower for nursing home victims than court awards in comparable cases (because of the reasons indicated in the Response to Question 1 above), and thus, arbitration is cheaper for nursing homes than going to court.

Question 4. Professor Ware argues that rather than legislate, we should let the courts decide when arbitration agreements are unconscionable or shouldn't be enforced. Is this sufficient to address the concerns about pre-dispute mandatory arbitration in the long-term care facility contracts?

Response. This is a policy making decision that the Congress, not the courts, should make. By the passage of Omnibus Budget Reconciliation Act of 1987 (OBRA '87), Congress recognized that America's frail elderly residing in nursing homes deserved to have their rights protected. Resident rights became enacted into law. But a right without a remedy is no right at all. The remedies that nursing home residents have for violation of their rights are being emasculated through the use of "agreements" for pre-dispute mandatory binding arbitration which are being foisted upon nursing home residents and their families at the time of admission to the nursing home.

When an elderly person presents to a nursing home for admission, the last thing on their mind is that they will be asked to waive important legal rights. They need nursing care and they need it now! Many of these people have diminished capacity because of illness or the medications that they are on. Frequently their sight and hearing are diminished. Often the person presenting the "agreement" for the nursing home doesn't understand its legal significance themselves. It is sandwiched in an admissions packet that is 50-60 pages long and there is little or no time to review and digest it. To top it off, many facilities present the so-called agreement on a "take it or leave it" basis, indicating that if the prospective resident or their family won't sign off on it, the resident won't be admitted. That is unacceptable to most prospective residents because, often the next nearest nursing home is miles away from their families.

The agreements themselves are unfavorable to the resident and favorable to the nursing home. There is no equality of bargaining power between the resident and the nursing home and, not surprisingly, the nursing home secures the mark or signature of the resident on the agreement.

In any other setting, one taking advantage of an elderly person under such circumstances would be prosecuted. Congress should put a stop to this process which preys on our frail elderly and substantially immunizes wrongdoers from the consequences of their misconduct.

From Senator Feingold

Question 1. In her testimony, Kelley Rice-Schild talks about an "increasingly litigious environment" in the 1990"s and the difficulty of obtaining economical insurance for long-term care facilities even after tort reform measures were passed in many states. She testified that this environment led her to turn to arbitration. Do you believe arbitration is being used to cut down on awards to residents and their families who have been injured? How does that square with Prof. Stephen Ware's apparent position that the arbitration process is fair to both sides and is just a good way to lower process costs?

Response. I do believe that agree that "agreements" for pre-dispute binding mandatory arbitration are tools used by the nursing home industry to reduce awards to injured nursing home residents and their families. Our experience and the experience of others bear that out.

These so-called agreements usually specify the appointment of an arbitral forum that is friendly to the nursing home industry and hostile to residents and their families. The same arbitrators are used over and over by the industry. A large proportion of their income comes from the nursing home industry and the industry gets a "repeat player"

advantage. The rules of the arbitral forum typically impose draconian limits on discovery, the number of witnesses who can be called and the number of experts that can be used. These limitations inhibit the ability of the residents to fairly present their case. The awards to residents are, in our experience, a fraction of what comparable awards would be by civil juries.

Professor Ware's position that pre-suit binding mandatory arbitration is fair to both sides just does not square with the facts. The process is terribly one-sided and favors the nursing home industry. A review of the fee schedules for the arbitral forums selected by the industry demonstrates that the fees to the injured party bringing the claim are higher than comparable court costs. This unfair process, however, does lower costs to the industry in that the awards to residents are usually substantially lower than jury awards in comparable cases. Such awards are just another indication of how the process favors the industry to the detriment of residents and their families.

Question 2. In the model arbitration agreement that Ms. Rice-Schild mentioned in her testimony, there is a 30-day "opt out clause" and another clause that says that the resident has a right to consult a lawyer regarding the agreement. Under the stressful circumstances when family members have made the difficult decision to put one of their loved ones in a nursing home, how likely is it that they will consult a lawyer about the agreement within the first 30 days after signing the contract?

Response. Our experience indicates that the first time most residents or their families learn that there is an agreement to require arbitration is when the defendant in the civil suit moves to compel arbitration and to dismiss the suit.

Residents and their families rarely appreciate the significance of signing an "agreement" for pre-dispute arbitration during the admissions process. The admissions process is inherently stressful. The resident is mortified that they are going to be admitted to a nursing home and the family is guilt stricken over the fact that they can no longer provide the necessary care for their loved one. The admissions packet is often 50-60 pages long and the "agreement" is usually sandwiched toward the end. The resident is often of questionable competence because of dementia or the adverse effects of medication. The agreement is typically poorly explained by an admissions coordinator who often doesn't even understand its terms. In all events, the agreement is usually "low-keyed" because the goal is to get the resident's signature or mark on the document. Everything about this process minimizes the attention that gets paid to the document and its significance. Hence, after the initial admission the document is usually never reviewed again until the motion to compel arbitration if served.

Question 3. According to Prof. Ware's testimony, Sen. Kohl's bill will "gut" arbitration because no one will agree to resolve a dispute through arbitration after the dispute arises. What does that day about whether the arbitration process is truly fair to both sides?

Response. By such an argument, Mr. Ware concedes the inherent unfairness of agreements for pre-dispute arbitration. Effectively, what he is saying is that the terms of

agreements for pre-dispute arbitration are so inherently unfair that no nursing home resident in his right mind would accept them, given an alternative.

Respectfully submitted this 22nd day of July, 2008

By Kenneth L. Connor,
In his individual capacity and not on behalf of any organization

Follow Up Questions for Alison Hirschel from Hearing Entitled "S. 2838, the Fairness in Nursing Home Arbitration Act"

From Senator Kohl

1. Is there anything we can do to ensure that residents and their families understand the ramifications of arbitration agreements? Would larger and bolder print and more detailed explanations help? Does a 30 day "cooling off period," during which residents can rescind the agreement, help?

While I appreciate the desire to ensure consumers understand the arbitration agreements they are asked to sign, larger or bolder print or more detailed explanations will not be sufficient to level the playing field between providers and consumers. First, consumers receive so many pages of documents when they seek admission to a facility that even bold type and lengthy explanations are not likely to be carefully considered in the stress and rush of the admission process. (Indeed, 40% of nursing home admissions are directly from a hospital, thus increasing the urgency of the admissions process.) Also, as I mentioned in my testimony, most consumers will not object to a mandatory arbitration clause even if they understand it; they are unwilling to be perceived as troublemakers by questioning a provision they don't anticipate will ever affect them. Finally, there are subtleties of the arbitration process in these cases—such as the incentive for the arbitrator to find in favor of the facility to encourage future business from the facility and the high costs consumers will likely incur if they pursue arbitration—that are unlikely to be explained in any text included in a model admissions agreement.

I also am not persuaded that a 30 day "cooling off period" is a sufficient remedy. It is quite unlikely that a resident will be seriously harmed, have an opportunity to consult an attorney, and consider pursuing litigation regarding that injury within 30 days of admission. In all other cases, the resident or family would be unlikely to review and understand the implications of the arbitration clause and take advantage of their opportunity to rescind their agreement.

2. We received testimony from a law professor who is researching this issue. She described her experience at a long-term care facility industry conference where a defense lawyer advised facility administrators and staff to not admit anyone who refused to sign an arbitration agreement. Do you think this is typical? Doesn't the industry's model arbitration agreement expressly say that agreeing to arbitration should not be a condition for admission?

I do not know whether facilities typically deny admission to applicants who refuse to sign an arbitration agreement; I do know that many facilities fail to utilize the model arbitration agreement since doing so is entirely voluntary. For the reasons set forth above and in my testimony, I suspect very few applicants object to the clauses at the time of admission even if they understand that they may do so.

3. While the vast majority of facilities use arbitration clauses, I understand that the Wisconsin Association of Homes and Services for the Aging, the not-for-profit facility association, recommends that their members not include arbitration agreements in their admissions materials. Does this suggest that they are unnecessary?

I commend the Wisconsin Association of Homes and Services for the Aging for recommending against including arbitration agreements in admissions materials in their more than 400 member facilities. I am sure that WAHSA is appropriately concerned about the economic viability of these several hundred facilities. If WAHSA does not believe mandatory arbitration agreements are appropriate or necessary for the economic well-being of their member facilities, I question why other providers assert these agreements are essential.

From Senator Feingold

1. In her testimony, Kelley Rice-Schild talks about "an increasingly litigious environment" in the 1990s and the difficulty of obtaining economical insurance for long-term care facilities even after tort reform measures were passed in many states. She testified that this environment led her to turn to arbitration. Do you believe arbitration is being used to cut down on awards to residents and their families who have been injured? How does that square with Prof. Stephen Ware's apparent position that the arbitration process is fair to both sides and is just a good way to lower process costs?

I believe that Ms. Rice-Schild highlighted a problem that bears further investigation: why have insurance rates failed to respond to apparently decreased litigation expenses following tort reform efforts in Florida and other states? Why have liability insurance rates increased in a fairly uniform manner in states across the country regardless of whether there is an aggressive nursing home tort bar and a history of significant awards in that state? Rather than limiting vulnerable citizens' rights to pursue remedies in court after a grievous injury—and a Harvard study revealed that at least half of all nursing home tort cases involved a resident's death—I suggest we examine how liability insurance rates are set for long term care facilities. Are insurance companies profiting unfairly at the expense of resident care, rights, and quality of life?

I do think that arbitration has resulted in reduced awards to injured residents and their families. First, I understand that the limited data available demonstrates arbitration typically results in lower awards than claims in court Second, many residents with legitimate claims may not be able to pursue them in arbitration either because they cannot find a lawyer who can afford to pursue the case if there is likely to be a lower award or a built-in disadvantage for plaintiffs or because they cannot afford the substantial up-front costs of arbitration.

I understood Professor Ware to suggest that one of the reasons to permit mandatory pre-dispute arbitration is that few people would pursue arbitration in long term care tort cases if it were not mandatory. Plaintiffs with strong cases would be advised they had a better chance for a significant award in court and plaintiffs with weaker (but legitimate) cases might be unable to find a lawyer willing to pursue the case in arbitration due to the likely lower awards and costs and challenges plaintiffs face in arbitration. Moreover, Prof. Ware admitted that arbitration might be disadvantageous to plaintiffs like the Kurth family. This analysis does not suggest to me that Prof. Ware thinks that arbitration is fair to both sides. Moreover, I do not recall that Prof. Ware responded to most of the specific concerns we raised about the playing field not being level when families are forced to arbitrate.

2. In the model arbitration agreement that Ms. Rice-Schild mentions in her testimony, there is a 30-day "opt out clause" and another clause that says that the resident has a right to consult a lawyer regarding the agreement. Under the stressful circumstances when family members have made the difficult decision to put one of their loved ones in a nursing home, how likely is it that they will consult a lawyer about the agreement within the first 30 days after signing the contract?

As noted above, unless a serious incident occurs within the first thirty days of the resident's stay, it is unlikely a family will consult a lawyer regarding the arbitration agreement. Families are unlikely to pay for advice on a clause they do not think will apply to them or that they do not realize is included in the documents they have already signed.

3. According to the Prof. Ware's testimony, Sen. Kohl's bill will "gut" arbitration because no one will agree to resolve a dispute through arbitration after the dispute arises. What does that say about whether the arbitration process is truly fair to both sides?

As I note in my answer to your first question above, Prof. Ware's analysis of how this bill will "gut" arbitration does not suggest that arbitration is fair to both sides.

Follow Up Questions for Kelley Rice-Schild from Hearing Entitled "S. 2838, the Fairness in Nursing Home Arbitration Act"

From Senator Kohl

1. In response to my question that the vast majority of long-term care residents have some type of cognitive impairment, ranging from mild cognitive impairment to dementia or Alzheimer's, you responded that these people are protected by Health Care "proxies" or "surrogates" who are deemed competent to sign an admissions agreement. However, Florida courts have held that a health care surrogate does not have the authority to bind the resident with an arbitration clause, *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 2005 Fla. App. LEXIS 7962, 30 Fla. L. Weekly D 1325 (Fla. Dist. Ct. App. 4th Dist. 2005), *review denied by* 917 So. 2d 195, 2005 Fla. LEXIS 2421 (Fla. 2005).

   - Again, how do you ensure that residents who sign arbitration agreements – as they, not their health care surrogate, must do – fully understand the consequences of agreeing to pre-dispute mandatory arbitration?

   - What about residents that may have sufficient capacity to admit themselves to a long-term care facility, and therefore do not require a power of attorney, but have trouble understanding the ramifications and consequences of agreement to arbitration

   ANSWER: All residents and/or their surrogates who sign the admission documentation are free to consult with family members and/or an attorney if they do not fully understand any document they may or may not sign. AHCA supports the use of a 30-day window in which the resident may opt-out of an arbitration agreement, which should be sufficient time to become aware of the purpose and consequence of such a document. It is also important to note that the industry advocates that arbitration agreements in a long term care setting are separate, distinct documents and not buried in the fine print of a complicated contract.

2. You testified say that about 90 percent of your residents sign the pre-dispute mandatory arbitration agreements that are included in your admissions documents. Do you think they would sign such agreements if they knew that the American Arbitration Association, the American Medical Association and the American Bar Association oppose long-term care facility arbitration between a resident and a facility when the arbitration agreement was entered into before the dispute occurred?

   ANSWER: The choice to sign the arbitration document is a personal choice. Many factors may play a role in an individual's decision to sign such an agreement – including the knowledge that should a future dispute arise, arbitration offers a less costly remedy and in most cases a quicker resolution

to the dispute. We also believe that where there is a question of "unequal bargaining" the courts have intervened and that this is the proper forum for such a decision.

3. You testify about the importance your organization places on quality and transparency, yet the arbitration proceedings are closed to the public and complaints and other decisions are not published. In keeping with this goal of transparency, should there be a mechanism for publicizing long term care facility arbitration complaints and decisions so that like court documents they are accessible to the public?

   ANSWER: The quality of care provided by a skilled nursing facility can be ascertained by examining information that is consistently available to the public. The CMS website, nursinghomecompare.gov, and state licensing agencies, such as those in my own state of Florida, provide detailed information that may be useful to consumers, including complaints filed.

4. In your written testimony you claim that public sentiment favors arbitration. Yet a recent national poll by survey firm Peter D. Hart Research Associates Inc. indicates that when consumers learn that the company picks the arbitrator, that they give up their right to take the case to court and that binding arbitration applies even if they are seriously injured, 81% disapprove. This research suggests public sentiment, while it may favor arbitration in some settings, opposes arbitration for long-term care facility disputes involving injuries. How do you respond?

   ANSWER: We believe that arbitration offers a quicker settlement of disputes, and at a lower cost to the consumer. Consumers should not have their choice to arbitrate limited by Congress.

From Senator Feingold

1. Your testimony discussed a model arbitration form that states that opting out of arbitration will not have an effect on facility admission.

   a. Is there any legal requirement that nursing facilities use this form?
      ANSWER: No.
   b. What percentage of facilities are now using this form?
      ANSWER: We are unaware of the percentage who use this form or some variation of the form AHCA/NCAL has developed.
   c. Do you disagree that in some cases residents believe they must sign all the papers given to them or they won't be allowed to come to the facility?
      ANSWER: As I stated above, if a resident is unclear of any of the consequences of the documents they sign upon admission to a nursing home, they are free to consult with family members and/or legal counsel.

Replies by Professor Stephen Ware to Follow Up Questions from Hearing Entitled "S. 2838, the Fairness in Nursing Home Arbitration Act"

September 26, 2008

From Senator Kohl

1. You testified that eliminating pre-dispute mandatory arbitration would "gut" all arbitration. As you know, the American Arbitration Association, the American Bar Association and the American Medical Association, experts in their fields and generally supporters of alternative dispute resolution, jointly developed the "Due Process Protocol for Resolution of Health Care Disputes." The protocols say that binding forms of dispute resolution – such as arbitration – should be used only where the parties agree to do so after a dispute arises.

   - Do you think that the protocols intended to eliminate all – pre and post-dispute – long-term care facility arbitration?

   - Do these protocols suggest that this is one of the clear areas where arbitration should be decided post-dispute?

As stated in my written and oral testimony, I believe that barring pre-dispute arbitration clauses in nursing home agreements will "gut" such arbitration. Arbitration rarely occurs except as a result of pre-dispute agreements.

I do not think those who drafted the protocols intended to eliminate all, or even any, post-dispute arbitration. As Senator Kohl's question notes, that is the sort of arbitration blessed by the protocols.

By contrast, the drafters of the protocols were apparently uncomfortable with pre-dispute arbitration of certain health-care disputes. However, it is important to remember that they were not drafting law. They were not drafting a legally-binding rule to govern all parties in the wide variety of cases that might occur. If the American Arbitration Association, for example, wants to adopt a policy that it will not to administer pre-dispute arbitration of certain health-care disputes, then it should be free to adopt such a policy. Whether federal law should impose such a policy on other arbitration organizations and the parties who use them is a very different question.

2. The American Health Care Association provides their members with a model arbitration agreement (attached). This agreement requires the use of the National Arbitration Forum (NAF) as the arbitrator.

   - Does the designation of NAF as a provider of arbitration represent the industry's choice of a pool of arbitrators?

- How do you respond to the contention that there are possible conflicts of interest because the long-term care facility industry requires the use of NAF and would represent a significant stream of business for NAF?

- NAF requires upfront filing fees by the claimant, administration costs, hearings fees, and other fees. For example, it charges $250 for each request for a discovery order. These can mean thousands of dollars for a resident wishing to bring a claim against a long-term care facility. Additionally, because arbitration will usually require the expertise of a lawyer, the parties will often choose to be represented by a lawyer and therefore incur the "process costs" that you attribute to litigation. Might these high fees discourage or even prohibit a resident from bringing their claim?

I am not speaking on behalf of the American Health Care Association and was not involved in the development of the model arbitration agreement. I do not know how many long-term care facilities, if any, use this model arbitration agreement.

As I noted in my testimony, current law does not require courts to enforce all arbitration agreements. The Federal Arbitration Act allows courts to invalidate unconscionable arbitration agreements. Under current law, courts determine which arbitration agreements should not be enforced, and which provide for a fair process and thus should be enforced. Courts have struck down arbitration agreements when dissatisfied with the agreement's method of selecting an arbitrator.[1] Whether a particular agreement should be struck down on this ground strikes me as exactly the sort of fact-intensive determination that should be made by courts, on a case-by-case basis, rather than by legislation, which necessarily paints with a broad brush.

The third bullet point of Senator Kohl's question looks at one cost of arbitration in isolation, rather than considering the total costs of arbitration as a whole. The one cost of arbitration getting more attention than it deserves is the forum fee, that is, the cost of paying the arbitrator and the arbitration organization. Rather than looking at forum fees in isolation, Congress should consider the plaintiff's total cost of pursuing the claim in arbitration as compared to litigation. The plaintiff's total cost includes such things as fees charged by the plaintiff's lawyer and expert witnesses, the time the plaintiff devotes to the case, and the cost of delay in receiving a remedy. There should not be a cost-based concern about arbitration unless the total cost the plaintiff faces in arbitration significantly exceeds the total cost the plaintiff would face in litigation.

This is not likely to be common. More likely, the total cost the plaintiff faces in arbitration will be *lower* than the total cost the plaintiff would face in litigation. As noted in my testimony, the empirical evidence indicates that there generally are process-cost savings derived from arbitration.[2] And this stands to reason when one compares the procedural rules of arbitration with those of litigation. When compared with litigation, most arbitration proceedings streamline the entire process: pleadings, discovery, motion practice, trial or hearing, and appeal. This

---

[1] *See, e.g.*, STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 2.36(a)(3) (2d ed. 2007)(citing cases).

[2] *See* Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 753-55 (2001) (citing and summarizing studies); Peter B. Rutledge, *Whither Arbitration?* 6 GEO. J. L. PUB. POL'Y 549, 576-79 (2008).

streamlined process results in less lawyer time spent on a case and thus lower legal fees. The savings of time and money produced by streamlined discovery alone may more than offset the higher forum fees in arbitration. Also, the time between the commencement of a case and its disposition is generally lower in arbitration than litigation. This means plaintiffs get their recoveries sooner, a pro-plaintiff feature of arbitration.

In any event, to the extent that a plaintiff believes that forum fees would prohibit him or her from bringing a claim, the law is clear that a plaintiff is entitled to demonstrate to a court that the fees are in fact cost-prohibitive. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

3. You testified that if facilities use unconscionable arbitration agreements, residents can go to court to have the court invalidate it. Thus, we should let the courts decide when agreements are unfair on a "case-by-case basis."

   - You say that arbitration of long-term care facility disputes is more timely, cost efficient and less adversarial. Is fact intensive, case-by-case litigation about the validity of an agreement cost efficient and timely?

   - Isn't it unfair to place the burden of challenging an unfair agreement, one that is often cost prohibitive for any attorney to take on, with the resident?

   - Will long-term care facility residents who believe they agreed to an unfair arbitration agreement be able to find lawyers who are willing to invest significant time and resources into challenging an arbitration agreement before ever getting to the merits of the case?

It is appropriate to place the burden of challenging an allegedly unconscionable agreement on the party who claims that it is unconscionable. This is what contract law routinely does with respect to all allegedly unconscionable terms, not just allegedly unconscionable arbitration clauses.

We should keep in mind the procedural context in which a challenge to an allegedly unconscionable arbitration agreement generally occurs: a nursing-home resident (or member of the resident's family) signs an arbitration agreement and then has a claim against the nursing home. If the plaintiff (resident or family member) chooses to bring that claim in arbitration then both parties can realize the benefits of arbitration's generally quicker and cheaper process. By contrast, if the plaintiff chooses to bring the claim in court -- to sue -- then it is the plaintiff's choice that is preventing both parties from realizing the benefits of arbitration's generally quicker and cheaper process. In these circumstances, the plaintiff has asked a court to resolve the merits of the case despite the plaintiff's contract to have the merits resolved in arbitration so, yes, the defendant deserves a chance to make its argument that the arbitration agreement is fair and deserves enforcement.

Moreover, courts generally resolve arbitration motions quickly, and the factual inquiry is usually narrow. The minor inconvenience of this threshold inquiry, which is small in comparison to the extensive discovery and other pre-trial costs of litigation, is unlikely to deter a plaintiffs' lawyer who expects that the court will hold the arbitration agreement is unconscionable.

Importantly, when courts strike down arbitration agreements as unconscionable, they typically identify the objectionable terms that made the agreements unconscionable. This alerts companies to the likelihood that certain disfavored provisions are unlikely to withstand court scrutiny, giving companies a powerful incentive to improve their arbitration agreements over time by omitting such terms. This increased clarity reduces the need to litigate the enforceability of arbitration agreements in the first place.

4. You suggested that rather than legislation, we should trust the courts to decide on a case-by-case basis when arbitration agreements in long-term care facilities is unfair. As you know, in most jurisdictions, to invalidate an agreement for unconscionability, courts must find *both* substantive and procedural unconscionability. That means that even when the court finds procedural unconscionability, such as overwhelmingly unequal bargaining power, as long as the agreement is not grossly unfair to one party, it must be enforced. Similarly, if the arbitration agreement is grossly unfair to one party, if the court does not find that there was overwhelmingly unequal bargaining power between the parties, then the arbitration agreement must be enforced. *See Manley v. Personacare*, 2007 WL 210583. How can courts adequately protect one of our nation's most vulnerable populations given the serious constraints in the law discussed above?

While many jurisdictions require courts to find both substantive and procedural unconscionability in order to invalidate an agreement on unconscionability grounds, courts generally find the procedural element satisfied in situations like the ones that this bill seeks to address, that is, cases involving "adhesion" contracts.[3] In short, procedural unconscionability is generally not a difficult hurdle in contexts like nursing home admissions if a "take-it-or-leave-it" form contract is used.

The judicial inquiry into substantive unconscionability involves consideration of the same concerns that have been mentioned in connection with this bill. For example, courts have found agreements unconscionable where they impose excessive fees, require confidentiality or severely limit remedies.[4] In short, courts have long been considering the same concerns that members of Congress are now considering. What enactment of this bill would do is substitute the judgment of Congress about all nursing-home agreements lumped together for the judgment of judges who hear evidence about the particular agreement at issue in each particular case. Passage of this bill would amount to Congress' decree that all pre-dispute nursing-home arbitration agreements are,

---

[3] *See, e.g., Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002)("The [Agreement] is procedurally unconscionable because it is a contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely."); *Ostroff v. Alterra Healthcare Corp.*, 433 F.Supp.2d 538, 544 (E.D. Pa. 2006) ("[T]he element of procedural unconscionability is "generally satisfied" by a contract of adhesion . . . ."); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087, 1100 (W.D. Mich. 2000) ("Where a contract is prepared by one party and offered for rejection or acceptance without opportunity for bargaining under circumstances in which the party cannot obtain the desired product or service except by acquiescing in the form agreement, Michigan courts will conclude that the contract is adhesive and therefore procedurally unconscionable.").

[4] *See, e.g.*, STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 2.25(a) (2d ed. 2007)(citing cases).

by definition, unconscionable so no judge may -- regardless of the evidence in a particular case -- ever find that any such agreement should be enforced.

5. You stated that arbitration is not a secretive practice, yet, you acknowledged that often they are settled on the condition of anonymity. As we know, confidentiality agreements are also common in litigated cases that settled. However, in litigation, there is a public record with complaints that name the facility, its location and the alleged wrongdoing. Does arbitration provide this kind of public record accessible by the government, media and patient advocacy groups? Would you support a mechanism for publicizing long term care facility arbitration complaints and decisions so that, like court documents, they are accessible to the public?

I am not aware of confidentiality requirements in nursing-home arbitration agreements and if a particular agreement had such a requirement, I would not expect a court to enforce it if doing so would prevent a resident, resident's family, or plaintiff's lawyer from publicizing complaints to the government, media and patient advocacy groups. I do not see the need for a formal mechanism that would automatically make all nursing-home arbitration complaints public. In fact, I can envision cases in which the resident and resident's family would want the complaint and arbitration proceeding to remain confidential so an automatic-publicity requirement would be positively harmful to them.

6. We received written testimony from a law professor who is researching this issue. She described her experience at a long-term care facility industry conference where a defense lawyer advised facility administrators and staff to not admit anyone who refused to sign an arbitration agreement.

   - Your theory of mandatory arbitration seems to be predicated on the idea that the persons signing these contracts are exercising free choice. Does this account concern you?

   - Would agreements that state in print that they were not a condition for admission but that were forced upon residents *implicitly* as a condition of admissions be found unconscionable by the courts?

   - Would it be difficult for a resident to prove to a court that despite the fact the agreement says in print that it is not a condition for admission, that they felt compelled to sign? Wouldn't your solution for dealing with unfair arbitration agreements come down to "he said" "she said" regarding what occurred in the admissions process?

The "he-said, she-said" issue is much bigger than arbitration or nursing homes because it can come up in just about any kind of contract case. In countless cases involving a wide variety of contracts, parties claim that the written contract differs from oral statements allegedly made prior

to or contemporaneous with the adoption of the writing.[5] These claims raise difficult issues because memories fade and some litigants tend to "remember" only what helps, not hurts, their case in court. To deal with these difficult issues, courts have developed what is known as the parol evidence rule. This rule reflects the accumulated wisdom of thousands of courts over many generations and I do not see why courts should apply it differently to nursing-home arbitration cases than to any other kind of case. In other words, Congress should leave the "he-said, she-said" issue to courts.

As to a nursing home that requires residents (or their families) to sign an arbitration agreement as a condition of admission, I see no reason why the arbitration clause should be treated differently from any other contractual provision that the facility makes a condition of admission. If Congress believes that nursing-home admissions are inherently "involuntary" then why not completely reject the notion that an admissions document signed by the facility and resident is an enforceable bargain? Instead of allowing nursing home facilities to draft admissions forms, Congress (or a regulatory agency) should draft the form and require all nursing homes to use it. By contrast, if Congress believes that a contract between the facility and resident is a presumptively-enforceable bargain then let its arbitration clause, like its other terms, stand or fall in the courts based on the doctrines (like unconscionability) that courts use for contracts generally.

From Senator Feingold

1. In your testimony, you state that "there are many cases in which courts hold particular arbitration agreements unconscionable." In support of that statement you cite your casebook in which you present "representative cases." Please provide any data available on what percentage of arbitration agreements are found to be unconscionable.

Some surveys show that courts find arbitration agreements unconscionable, in whole or in part, in a majority of cases in which they are challenged—far more often than other types of contracts. *See* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 48 (2006) (finding that unconscionability challenges to arbitration agreements in California succeeded in whole or in part in approximately 58% of cases, compared to only 11% in the non-arbitration context); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004) (finding that arbitration agreements were found unconscionable in 50.3% of cases in 2002-2003, as opposed to 25.6% for other types of contracts). Additional studies may be warranted, but these data indicate that courts are not shy about finding arbitration agreements unenforceable. To be sure, one should *not* conclude that these studies show that 50 percent of arbitration agreements are unconscionable. If an arbitration provision is fair, it is far less likely to be challenged in court.

[5] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 209, 213.

2. You also cite three cases in which arbitration agreements involving nursing homes were found to be unconscionable.
    a. Are there any other cases of which you are aware in which arbitration agreements involving nursing homes were found to be unconscionable?
    b. Please estimate the percentage of arbitration agreements involving nursing homes that are ultimately found to be (1) unconscionable; or (2) unenforceable for any other reason?

The three cases I cited include *Romano v. Manor Care, Inc.,* 861 So.2d 59 (Fla. Ct. App. 2004); *Howell v. NHC Healthcare-Fort Sanders, Inc.,* supra, 109 S.W.3d 731 (Tenn. Ct. App. 2003); *Woebse v. Health Care & Ret. Corp. of Am.,* No. 2D06-720, 2008 Fla. Appx LEXIS 1446 (Fla. Ct. App. Feb. 6, 2008). One additional case for the record is *Prieto v. Healthcare and Retirement Corp. of America*, 919 So.2d 531, 533 (Fla. Ct. App. 2005).

I am not aware of any other such cases or of reliable data that would estimate the percentage of arbitration agreements involving nursing homes that are ultimately found to be unconscionable or unenforceable for any other reason.

3. In a footnote in your testimony, you state that "a separate question is whether the outcomes of arbitration (who wins, how often and how much) are systematically different from the outcomes of litigation."

    a. Do you believe that the outcomes are systematically different?
    b. If not, on what data do you base that conclusion?
    c. If you are not sure, how can you conclude that the elimination of binding pre-dispute arbitration agreements "would tend to harm those it aims to help?"
    d. Do you agree that if the outcomes of arbitration are systematically more likely to favor nursing homes, the elimination of these agreements will help nursing home residents?
    e. Do you agree that unless it is clear that the outcomes of arbitration are not more likely to favor nursing homes, the elimination of these agreements might help nursing home residents?

It would be helpful if empirical studies could definitively determine whether the outcomes of arbitration are systematically different from the outcomes of litigation. Unfortunately, this is not possible. Empirical studies can tell us the win rates and amounts of awards in arbitration and litigation, but that does not mean they can tell us the win rates and amounts of awards in arbitration and litigation *in comparable cases*. The probative value we give to empirical studies should turn on our level of confidence that the studied cases going to arbitration are comparable to the studied cases going to litigation. And nobody can know whether the cases going to arbitration are, in fact, comparable to the cases going to litigation.

In other areas of study, a scholar can (to a great extent) overcome this methodological problem. Suppose, for example, that a court requires mediation of all cases with odd docket numbers, but not of cases with even docket numbers. A scholar could then compare the results of the odd cases to the results of the even cases and attribute any differences to the rule requiring mediation. With

a sufficiently large sample size, we would be quite confident that the odd cases are comparable to the even cases. That is because the odd and even docket numbers are completely unrelated to anything that might plausibly affect the results of the cases.

In contrast, the selection of cases between arbitration and litigation is very different. Cases go to arbitration when, and only when, there is an arbitration agreement. The parties that use arbitration agreements may be systematically different from the parties that do not use arbitration agreements. In sum, empirical studies are vulnerable to the possibility that the studied cases going to arbitration are systematically different from the studied cases going to litigation. Therefore, in comparing arbitration and litigation, we must be cautious about how much weight we give empirical studies.

That said, the empirical evidence supports the hypotheses that (1) reduced process costs are a significant source of the cost-savings businesses derive from arbitration,[6] and (2) that arbitration tends to result in lower awards for some types of cases but higher awards in other types of cases.[7] The empirical studies, which have been in the area of employment arbitration, indicate that employees win a higher percentage of their claims in arbitration than in litigation but employees who win in litigation win more money than employees who win arbitration. The anecdotes I have heard from practicing lawyers suggest similar results in consumer arbitration: claims that would result in big-dollar jury awards tend to see lower awards in arbitration, but smaller-yet-meritorious claims, some of which might not be cost-effective pursue at all in litigation, tend to see higher awards in arbitration.

If this empirical/anecdotal picture is accurate then adhesive arbitration agreements give consumers and employees (1) better prices or wages[8] and (2) extra leverage in small-yet-meritorious cases, but (3) reduced leverage in cases that could lead to a big-dollar jury award. For the vast majority of consumers and employees, the benefits of outcomes 1 and 2 outweigh the costs of outcome 3 because it is the rare consumer or employee who actually has a claim that could lead to a big-dollar jury award. If such a dispute has already arisen, however, the price that particular consumer or employee will charge for giving up outcome 3 increases dramatically. In other words, it is entirely rational for a consumer or employee or other adhering party to prefer, at the time of contracting, that an arbitration clause be in the contract even if, at the time of a particular dispute, the adhering party prefers that an arbitration clause not be in the contract.

---

[6] *See* supra note 2.

[7] Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 753-55 (2001)(citing and summarizing studies). *See also* Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 44; Peter B. Rutledge, *Whither Arbitration?* 6 GEO. J. L. PUB. POL'Y 549, 560 (2008)(concluding that "most measures—raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed—do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation.").

[8] Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements - with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-57 (2006).

4. In response to a hearing question, Ken Connor stated that arbitrations fees can amount to thousands of dollars—much more than court filing fees. You state in your testimony that "we have reliable empirical evidence comparing arbitration and litigation" and "arbitration tends to have lower process costs than litigation." Please provide your data in support of this claim.

Respectfully, it is essential to look at my statement in full. In fact, I said that "*to the extent* we have reliable empirical evidence comparing arbitration and litigation, arbitration does tend to be a quicker, cheaper method of dispute resolution." The words I have emphasized -- "to the extent" -- are important for the reasons given at the start of my answer to the previous question. Empirical evidence on arbitration's lower process costs is cited in footnote 2, above.

5. In response to a question from Senator Kohl, you mentioned that courts do not enforce clauses in arbitration agreements that require the parties to keep the dispute confidential. In what percentage of arbitration cases are confidentiality clauses challenged, and in what percentage of those cases are they actually struck down?

I wish to clarify one thing: I did not make a categorical statement that all courts always decline to enforce confidentiality requirements in arbitration agreements. Instead, I noted that "courts tend not to enforce those" provisions. The word "tend" is important: although most of the cases I have read on the issue do not enforce confidentiality requirements in arbitration clauses, one can occasionally find counter-examples. For cases holding unconscionable arbitration clauses that require the arbitration to be confidential, *see e.g.,* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 2.25(a) n.285 (2d ed. 2007) (citing cases). I am not aware of any systematic attempt to determine the percentage of arbitration cases in which confidentiality clauses are challenged or the percentage of such cases in which they are actually struck down.

SUBMISSIONS FOR THE RECORD

aahsa
creating the future of aging services

Statement for the Record
Fairness in Nursing Home Arbitration Act

The American Association of Homes and Services for the Aging (AAHSA) appreciates this opportunity to submit a statement for the record on S. 2838, which would prohibit nursing homes and assisted living facilities from asking residents to sign a pre-dispute arbitration agreement, even if the arbitration agreement is not required for admission.

AAHSA members help millions of individuals and their families every day through mission-driven, not-for-profit organizations dedicated to providing the services that people need, when they need them, in the place they call home. Our 5,800 member organizations, many of which have served their communities for generations, offer the continuum of aging services: adult day services, home health, community services, senior housing, assisted living residences, continuing care retirement communities and nursing homes. AAHSA's commitment is to create the future of aging services through quality people can trust.

Unfortunately, high quality services do not protect even the best long-term care providers from lawsuits that may have little merit. Litigation against long-term care providers has become a lucrative sub-specialty among some in the legal profession. Arbitration provides a timely and cost-effective alternative for both providers and consumers to resolve differences in a fair, reasonable and expeditious manner.

AAHSA opposes S. 2838 because a prohibition on pre-dispute arbitration agreements is unnecessary to protect consumers from unfair coercion. It is not unusual for not-for-profit nursing homes, assisted living, and continuing care retirement communities to use arbitration agreements, in accordance with the Federal Arbitration Act and the laws of the states in which facilities are located. Properly structured, these agreements can give both providers and consumers an expeditious alternative to long and costly lawsuits. Federal legislation invalidating pre-dispute arbitration agreements in long-term care facilities is unnecessary because the states have already developed common-sense protections. These protections form the basis of recommendations AAHSA has made to its own members.

First, we recommend to our members that signing an arbitration agreement should not be a condition of admission to a nursing home or other long-term care facility. State courts have often found arbitration agreements to be unconscionable if admission to a facility was predicated on signing an agreement. It should be noted, however, that the Centers for Medicare and Medicaid Services (CMS) do not prohibit arbitration agreements as a condition of admission for Medicare patients. CMS leaves it up to the states to determine if they will accept mandatory arbitration in Medicaid admissions. We believe most of our members do not require arbitration agreements as a condition of admission.

In addition, many agreements have a rescission period, another practice AAHSA recommends to its members. This clause gives consumers a chance to reconsider and cancel their agreement to arbitrate.

We also recommend to our members, based on case law, that arbitration agreements should not limit a resident's rights and remedies under law, other than to specify the forum and procedures for dispute resolution. Most if not all states that have addressed this issue have found limitations on rights and remedies to be a trigger for determining an arbitration agreement was unconscionable. The more onerous the contract, the less likely it has been to be enforced under existing law and practice. Consequently, most long-term care providers do not draw up arbitration agreements that conflict with consumers' rights.

We do not see a need for legislation specifically targeting long term care. The high rate of litigation over arbitration agreements in this field means acceptable parameters defining substantive and procedural requirements for valid arbitration agreements are more clearly defined in long-term care than in other areas. Residents or their representatives have had significant success in state courts and this success is visible in the way providers draft their agreements. Among AAHSA's membership, most but not all residents sign arbitration agreements that are offered at the time of admission, and most disputes are settled regardless of whether there is an arbitration requirement or not.

Quality of care is not determined by the forum chosen for resolution of whatever disputes may arise between providers and consumers. On behalf of both our members and the residents they serve, we urge the Senate not to foreclose recourse to agreements that can expedite the resolution of disputes for all parties and prevent unnecessary expense that takes resources away from resident services.

AARP

STATEMENT FOR THE RECORD

SUBMITTED TO THE

SENATE JUDICIARY SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS

AND THE

SENATE SPECIAL COMMITTEE ON AGING

ON

THE FAIRNESS IN NURSING HOME ARBITRATION ACT OF 2008

June 18, 2008

AARP
601 E Street, NW
WASHINGTON, DC 20049

For further information, contact:
Rhonda Richards
Government Relations & Advocacy
(202) 434-3770

On behalf of AARP's nearly 40 million members, thank you for holding today's hearing on the Fairness in Nursing Home Arbitration Act (S. 2838/H.R. 6126) and pre-dispute arbitration clauses in long-term care facility contracts. This testimony is on behalf of AARP's members and those who are current or future residents of long-term care facilities and their families.

Pre-dispute arbitration clauses in long-term care facility contracts are harmful to residents and their families. These arbitration clauses force a Hobson's choice -- waive the right to seek redress in the courts or get care in another facility, assuming there is one in their area without an arbitration clause. This testimony focuses on the situations that individuals and their families face as they enter long-term care facilities, the harmful impact of pre-dispute arbitration clauses, and AARP's support for the Fairness in Nursing Home Arbitration Act (S. 2838/H.R. 6126).

Quality in Long-Term Care Facilities

Long-term care facilities include an array of providers such as nursing homes, assisted living facilities, and other residential care facilities that provide a home to residents and supportive services to assist them with daily activities, such as eating, dressing, and bathing. Such facilities may also provide services such as nursing care, rehabilitation, or therapy. Approximately 16,000 nursing homes in this country provide care to about 1.5 million of our most vulnerable residents.

Including individuals who use nursing homes for short-term rehabilitation, about three million people use nursing homes each year. And about one million Americans live in assisted living facilities.

Quality of care and quality of life for residents in long-term care facilities can vary greatly. And, while the quality of care in our nation's nursing homes has improved over the last 21 years since the enactment of federal nursing home quality standards in the Omnibus Budget Reconciliation Act of 1987 (OBRA '87), much more needs to be done. Many facilities do provide high quality care, but there are also too many facilities that show significant quality deficiencies that can cause harm to residents on their annual inspections.

The Government Accountability Office (GAO) has found that a small but significant share of nursing homes continue to experience quality of care problems. Two years ago, one in five nursing homes in this country were cited for serious deficiencies – deficiencies that cause actual harm or place residents in immediate jeopardy. GAO has also noted variations among states in citing such deficiencies, and that deficiencies are understated when found in federal comparative surveys but not in corresponding state surveys. In addition, some facilities consistently provide poor quality care or are "yo-yo" facilities that go in and out of compliance with quality standards. Almost half the nursing homes reviewed by GAO for a March 2007 report – homes with prior serious quality problems – cycled in and out of compliance over five years and harmed

residents. Quality also varies greatly in other types of long-term care facilities, such as assisted living, which are regulated at the state level.

Long-Term Care Facilities and Arbitration Clauses

When older adults suffer a decline in health or are discharged from the hospital and are unable to care for themselves, these individuals, their families, or other caregivers are often faced with the daunting task of finding nursing home care. Often these decisions are made in a crisis situation and individuals may be pressured to accept the first available bed, without enough time to adequately compare nursing homes in order to find the one that offers the best quality of care or to consider other options. Thus, they may select a facility they would not have otherwise chosen if they had the luxury of shopping around and comparing facilities.

People seeking nursing home admission are among the frailest Americans. In 2006, nearly half (45 percent) of all residents had dementia and more than half depended on a chair for mobility or were unable to walk without extensive or constant support from others. In 2004, nearly 80 percent of residents needed help with four or five activities of daily living (bed mobility, transferring, dressing, eating and toileting). Most nursing home residents are elderly: 88 percent are 65 or older and 45 percent are 85 or older. About 75 percent of nursing home residents age 65 and older are women, and at the time of admission, over half of

nursing home residents are widowed. Nursing home residents in recent years have had higher disease prevalence and multiple conditions are more common, indicating an increasingly sicker population, according to a Kaiser Family Foundation analysis. Nursing home residents are also often on multiple medications that must be managed and coordinated to prevent adverse reactions.

Prospective assisted living residents can be similar to prospective nursing home residents. Assisted living facilities also may provide care to frail residents who could be cared for in a nursing home or whose care would have, until recently, been provided in a nursing home.

It is often in this context of crisis and vulnerability that prospective nursing home residents and their families face the nursing home admissions process. People seeking nursing home admission or someone acting on their behalf are typically given a lengthy, complicated contract. Many facilities, such as nursing homes and assisted living facilities, include provisions in their admissions contracts requiring that residents and their families agree to forego the use of the court system to resolve a wide range of future disputes. Instead, they must agree to submit their cases which may involve abuse, assault, malnutrition, neglect, and even death to arbitration. The admissions contract typically is presented on a "take it or leave it" basis, with no room for the resident to negotiate the terms.

Clearly, most people seeking nursing home admission are focusing on the quality and range of services available, and are not thinking about possible future disputes. When they are presented with admissions contracts, they often do not know that an arbitration requirement is buried in the fine print of the multi-page document. In the rare instance in which they are aware of the clause, they often cannot understand its technical language or its significant implications for their rights.

In most instances, facilities present the contract after the person decides to apply for admission, rather than beforehand, when the individual or his or her representative would have more time to assess the contract provisions and how they affect their rights. And there may not be sufficient time for the resident or his or her representative to sit down with a nursing home representative or a trusted advisor who can answer questions and explain the terms of the contract and the arbitration provision. In addition, even if there is time for a conversation with the facility representative, that person is not always adequately informed about the details of the arbitration provisions or able to answer questions from the perspective of the resident or family, especially about the important legal rights involved.

Even if prospective residents and their families are aware that the admissions contract contains an arbitration provision, they often do not understand what it

means. Nor do they realize the many rights and protections they would forego in arbitration. Arbitration usually is extremely expensive for consumers and places severe restrictions on many of their rights, including their ability to obtain documents and other evidence which makes it difficult for them to prove their case and gives the facility a considerable advantage.

In addition, unlike judges and juries, arbitrators do not have to follow prior court or arbitral decisions; their decisions and the facts about the dispute typically are confidential, so no one else can learn about them; and the bases for appealing an arbitrator's decision are extremely limited; misinterpretation or misapplication of the law is not a basis for appeal. Arbitrators usually do not need to issue written decisions, making appeals even more difficult. Consumers usually have limited, if any, knowledge on which to base their choice of an arbitrator – if they have a choice - and arbitrators may have a bias toward "repeat players" – to get a company's future business, an arbitrator may not want to rule against such a party too often or order them to pay large awards to other parties, even when such awards are justified. Finally, these disadvantages to consumers from the arbitration process itself are all in addition to the fact that the consumers have waived their basic right of access to the courts and a jury.

However, consumers strongly support maintaining the right of nursing home residents and their families to take nursing homes to court in cases of neglect

and abuse. For example, an AARP poll of Arkansas residents age 40 and older released in January 2007 found that 85 percent of respondents strongly support maintaining the right of nursing home residents and their families to take nursing homes to court for neglecting and abusing nursing home residents. Another one in ten somewhat support this action.

Potential residents and their families also do not have equal bargaining power with the facility and are virtually powerless to negotiate the arbitration provision or to gain admission to the facility without it, assuming they are aware of it. Potential residents and their families must often make quick decisions in stressful situations and deal with an immediate need for services – foregoing the care and services is not an option. If other nursing homes also have arbitration clauses in their admissions contracts, the individual effectively has no choice among facilities. Individuals and their families also deal with potential financial limitations and stress and anxiety from having to give up independence and leave one's home to enter a nursing home. Arbitration was designed to provide a mechanism for two parties with equal bargaining power to resolve a dispute. Potential residents of long-term care facilities, such as nursing homes and assisted living facilities, do not have equal bargaining power with the facilities.

A court case from New Mexico provides a good example of the unequal bargaining power between potential nursing home residents, their families and the facility, and the circumstances that frequently exist at the time of admission.

New Mexico's court of appeals ruled that the arbitration clause in a nursing home contract was unenforceable so that the family of a woman, Ruth Painter, who died three days after entering the home can pursue their case in court alleging inadequate care. The court agreed with the family and an *amicus* brief filed by AARP and NCCNHR: The National Consumer Voice for Quality Long-Term Care that the heavily medicated, seriously ill woman could not be expected to understand the fine print in her contract that limited her legal rights.

Ruth Painter was 57 years old, suffered from several serious health conditions (including heart disease, chronic obstructive pulmonary disease, and atrial fibrillation), and was taking numerous prescription medications when she was taken by emergency transport to a medical center. When she was discharged more than a week later, she was physically unable to care for herself and she and her family decided she needed to move to a nursing home. She and her son visited a nursing home and she and her daughter returned the next day so she could be admitted.

While she was being admitted, Ms. Painter became short of breath and was literally propped up in bed receiving oxygen during the admissions process. Three days after admission, her health seriously deteriorated and she was taken by ambulance to a hospital where she died. Her family sued the facility, alleging negligent care and breach of contract. The facility moved to dismiss the suit

based on a clause in the admissions contract that required that all disputes be resolved in arbitration.

A trial court declared the arbitration clause unconscionable and unenforceable based on its findings that: Ruth Painter had a 10th-grade education; for more than a year prior to her death her mental condition seemed to decline and her son had assumed responsibility for her finances; and the admissions agreement was 41 pages long and contained various other documents, including several contractual agreements, health directives, questionnaires and facility policies. According to the court, "Much of the [Arbitration] Agreement is in small print, and [the admissions director] admitted it was often inconsistent and could be confusing." Ultimately, the trial court ruled that "[r]equiring a heavily medicated, seriously ill individual, such as Ruth Painter, who had limited education and comprehension to sign an Arbitration Agreement that was hidden away in the middle of a confusing and complicated Admission Agreement, would be unconscionable."

Fairness in Nursing Home Arbitration Act

AARP believes that it is essential for vulnerable residents to have access to the courts when they are injured, neglected, or abused. AARP thus supports the bipartisan Fairness in Nursing Home Arbitration Act (S. 2838/H.R. 6126)

introduced by Senators Mel Martinez (R-FL) and Herb Kohl (D-WI) and Representatives Linda Sanchez (D-CA) and Ileana Ros-Lehtinen (R-FL).

S. 2838 would make pre-dispute arbitration provisions between long-term care facilities and a resident of the facility or a person acting on behalf of the resident unenforceable, ensuring that future and current residents of long-term care facilities and their families are not forced into arbitration or terms that may have a substantial adverse impact on their rights. This legislation is also important because it would provide uniform, nationwide protection against such pre-dispute arbitration provisions. While some states have taken action to address this important issue, consumers, regardless of the state in which they live, should not be forced to give up their rights to seek redress through the courts to resolve cases of injury, neglect, and abuse. This bill would protect this essential right of older adults, individuals with disabilities, and their families, including some of the most vulnerable Americans.

As the Subcommittee considers this legislation, we encourage you to retain the language in S. 2838 regarding the effective date, so that the bill's protections would be provided to all current and future long-term care facility residents. H.R. 6126 would apply to future long-term care facility residents, but only current residents of long-term care facilities whose pre-dispute arbitration agreements are made, amended, altered, modified, renewed or extended on or after the date

of enactment of the bill. The protections provided under this legislation should be available to all current long-term care facility residents.

Some may argue that arbitration clauses in long-term care facility admission contracts are needed to limit costly lawsuits against facilities. But the answer to this concern is not to limit an individual's legal rights and protections, and require that they waive their right to resolve disputes in court. The answer is to improve the underlying care and services provided by facilities to decrease the likelihood of disputes that need to be resolved in court. This would help residents, their families, and the facilities themselves.

Conclusion

We appreciate your work on the important issue of pre-dispute arbitration clauses and their adverse impact on current and future long-term care facility residents and their families. AARP encourages the subcommittee to pass the Fairness in Nursing Home Arbitration Act (S. 2838). We look forward to working with you and your colleagues on both sides of the aisle to protect the rights of current and future long-term care facility residents and their families.

April 30, 2008

The Honorable Herbert H. Kohl
United States Senate
330 Hart Senate Office Building
Washington, DC 20510

Dear Senator Kohl:

AARP is pleased to support the bipartisan Fairness in Nursing Home Arbitration Act (S. 2838) that you and Senator Martinez have introduced. We appreciate your leadership on this important issue.

When older loved ones suffer a decline in health or are discharged from the hospital unable to care for themselves, family or other caregivers are often faced with the daunting task of finding nursing home care. Often these decisions are made in a crisis situation when there is not enough time to adequately compare nursing homes in order to find the one that offers the best quality of care.

People seeking nursing home admission or someone acting on their behalf typically are given a lengthy, complicated contract. Many facilities include provisions in the contract requiring that residents and their families resolve a wide range of future disputes with the facility in arbitration. In fact, many individuals who are in the vulnerable position of needing immediate nursing home care find that they are faced with a Sophie's choice – sign a pre-dispute arbitration provision as part of their nursing home contract and waive their rights to seek redress in the courts – even in cases of abuse or neglect – or find another nursing home.

In addition, most people seeking nursing home admission are focusing on the quality and range of services available, and are not thinking about possible future disputes that might arise. When they are presented with admissions contracts, they often do not know that an arbitration requirement is buried in the fine print of the multi-page document. Even if they are aware of its inclusion, they do not understand what it means and the many rights and protections they would have in court that do not apply in arbitration. Potential residents and their families do not have equal bargaining power with the facility and are virtually powerless to negotiate about the provision or to gain admission to the facility if they want to delete it.

AARP supports your legislation because we believe that it is essential for vulnerable residents to have access to the courts when they are injured,

neglected, or abused. Your bill would make pre-dispute arbitration agreements unenforceable, ensuring that residents of long-term care facilities and their families are not forced into arbitration or terms that may have a substantial adverse impact on their rights. This legislation is also important because it would provide uniform, nationwide protection against pre-dispute arbitration agreements.

Thank you again for your strong leadership and advocacy on behalf of nursing home residents and their families. We look forward to continuing to work with you and your colleagues on both sides of the aisle to advance this critical legislation. If you have any questions, please feel free to call me or have your staff contact Rhonda Richards of our Government Relations and Advocacy staff at (202) 434-3770.

Sincerely,

David P. Sloane
Senior Vice President
Government Relations and Advocacy

May 22, 2008

The Honorable Mel Martinez
United States Senate
Washington, DC 20510

The Honorable Herb Kohl
United States Senate
Washington, DC 20510

Dear Senator Martinez and Senator Kohl:

Binding mandatory arbitration clauses are forcing the elderly and those with disabilities and their families to waive their constitutional right to seek redress in the courts when a nursing home resident suffers harm. These clauses are typically buried in contracts signed by families during one of the most stressful events in their lives – entrusting the care of a vulnerable loved one to strangers – and the clauses effectively compel family members to consent that they will waive the legal rights of a loved one if she or he is injured or dies from neglect or physical abuse while in the facility. The contracts are presented on a take-it-or-leave-it basis, and leave families in the impossible situation of having to sign a contract or forgo nursing home care altogether, a decision that most families are not in the position to make. The undersigned organizations strongly support your bill, S. 2838, the Fairness in Nursing Home Arbitration Act, which would invalidate pre-dispute mandatory arbitration provisions in nursing home, assisted living, and other long-term care facility contracts.

Almost two-thirds of nursing home admissions are from a hospital and occur after a medical emergency, such as a stroke or broken hip. Individuals are often pressured to accept the first available bed without any opportunity to evaluate the care provided or consider other possible options, and research conducted at Brown University shows that hospitals are more likely to place African Americans in the worst nursing homes. When they unknowingly sign away their right to sue the facility, most families have had no experience with the severity of injuries their loved one could suffer if the facility neglects its responsibility to protect them – such as pressure sores that lead to infection and amputation of limbs; suffocation on bedrails and other restraining devices; physical and sexual assault; renal failure from dehydration; malnutrition; and death from fires in unsprinklered buildings. Some courts have even enforced arbitration clauses included in contracts signed by nursing home residents who were illiterate or had advanced dementia.

Countless government studies show that in spite of improvements in nursing home regulation and enforcement, state regulators still under-cite the seriousness of deficiencies in which residents are harmed; levy fines that are little more than the cost of doing business; and allow facilities to operate year-after-year with serious, repeat problems. Assisted living is poorly regulated in most states, although assisted living residents often have physical and mental disabilities similar to those of nursing home residents. Mandatory arbitration clauses only further this crisis by serving to protect providers from accountability for bad care. By allowing the provider to pick the arbitration company

with which it routinely does business and the rules of the arbitration, the system is set up to heavily favor the provider and leave the family with little or no hope of obtaining justice for their loved one.

No family should be required to sign a contract containing a pre-dispute mandatory arbitration clause as a condition of admission nor participate in an arbitration process that they have little or no control over, especially when the dispute involves the suffering and death of their parents and other loved ones. The Fairness in Nursing Home Arbitration Act would end the practice that forces many to do so.

Sincerely,

AARP
Alliance for Retired Americans
American Association for Justice
American Federation of State, County and Municipal Employees
Alzheimer's Foundation of America
Center for Medicare Advocacy, Inc.
Consumer Action
Consumer Federation of America
Consumers Union
Homeowners Against Deficient Dwellings
Home Owners for Better Building
National Association of Consumer Advocates
National Association of Social Workers
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Employment Lawyers Association
National Senior Citizens Law Center
NCCNHR: The National Consumer Voice for Quality Long-Term Care
U.S. Public Interest Research Group

www.alz.org Public Policy Office 202 393 7737 p
1319 F Street, NW, Suite 500 866 865 0270 f
Washington, DC 20004-1106

alzheimer's association

Statement for the Record

The Fairness in Nursing Home Arbitration Act (S. 2838/H.R. 6126)
Joint Hearing of the Judiciary Subcommittee on Antitrust, Competition and Consumer Rights and the Special Committee on Aging
June 18, 2008

The Alzheimer's Association supports the *Fairness in Nursing Home Arbitration Act* (S. 2838/H.R. 6126) introduced by Senators Herb Kohl (D-WI) and Mel Martinez (R-FL) and Representatives Linda Sánchez (D-CA) and Ileana Ros-Lehtinen (R-FL) because it aims to protect frail Americans who are seeking nursing home admission. Specifically, this legislation invalidates pre-dispute arbitration provisions between long-term care facilities and residents and the caregivers representing them. At many facilities, these agreements are presented as an "all or nothing" proposition -- either sign a mandatory arbitration contract and agree not to sue for negligent care or risk losing your placement in the facility. Individuals and their families may feel pressure to accept the first available bed without any opportunity to evaluate the care provided.

Signing mandatory arbitration agreements can be especially problematic for people with Alzheimer's disease considering the high proportion of people with dementia requiring long-term care assistance. An estimated 69 percent of nursing home residents and 50 percent of assisted living facility residents[1] have some type of cognitive impairment and may fail to understand the repercussions of signing a pre-dispute agreement. Many individuals in advanced stages of Alzheimer's disease are unable to speak for themselves or understand what they are signing. Some courts have upheld arbitration agreements even when they were signed by nursing home residents who were illiterate or had advanced dementia. Problems like this are likely to occur more frequently as the number of people with Alzheimer's disease will increase in the future. Today, an estimated 5.2 million Americans of all ages have Alzheimer's disease. By 2030, the number of people age 65 and over with Alzheimer's diseases is estimated to reach 7.7 million, a greater than 50 percent increase from the number of people age 65 and over currently affected.[2]

Caregiver stress may also lead to signing mandatory binding arbitration agreements without fully comprehending the consequences. Research indicates that caregiver stress, especially stress related to a person's behavioral symptoms, is associated with nursing home placement. In fact, 40 percent of caregivers rate the stress of caring for those with Alzheimer's and other dementias as high or very high.[3] While families often strive to keep their loved ones in the community, as the symptoms of dementia progress, caregivers must make the difficult decision of placing a family member in a long-term care facility. As caregivers search for potential facilities, they may discover that choices are scarce and could require long waiting periods. Options are even fewer for those who depend on Medicaid. As a result, there can be little choice in the matter; they must sign a mandatory arbitration agreement, not fully comprehending or recognizing the possible consequences of such a waiver, or risk losing a place in a nursing home for their loved one.

The Alzheimer's Association appreciates the efforts made by the long-term care community to improve the quality of care for people with dementia and supports the *Fairness in Nursing Home Arbitration Act* (S. 2838/H.R. 6126) because it aims to further protect vulnerable Americans and their caregivers. The

[1] 2008 Alzheimer's Disease Facts and Figures, page 25
[2] 2008 Alzheimer's Disease Facts and Figures, pages 9, 12
[3] 2008 Alzheimer's Disease Facts and Figures, page 17

Association looks forward to working with the Senate Judiciary Committee and the Special Committee on Aging on long-term care issues affecting people with Alzheimer's disease and their caregivers.

For more information, please contact Toni Williams at the Alzheimer's Association at Toni.Williams @alz.org or at (202) 638-8666.

www.alz.org

Washington
Public Policy Office
1319 F Street N.W., Suite 500
Washington, D.C. 20004-1106

202 393 7737 p
866 865 0270 f

alzheimer's association®

The Honorable Herbert Kohl
Chairman, Special Committee on Aging
United States Senate
Washington, D.C. 20510

May 21, 2008

Dear Chairman Kohl,

As the leading research and advocacy organization for Alzheimer's disease in the United States, the Alzheimer's Association appreciates your dedication to improving the quality of care for individuals residing in nursing homes and other long-term care facilities. The Fairness in Nursing Home Arbitration Act, S. 2838, which you recently introduced, demonstrates your leadership in this area.

The Alzheimer's Association supports S. 2838 because it aims to protect frail Americans by invalidating pre-dispute mandatory arbitration agreements in nursing homes, assisted living, and other long-term care facilities. At many facilities, these contracts are presented as an "all or nothing" proposition – either sign a mandatory arbitration contract and agree not to sue for negligent care or risk losing your placement in the facility. Individuals or their families may feel pressured to accept the first available bed without any opportunity to evaluate the care provided.

Signing mandatory arbitration agreements can be especially problematic for people with dementia and their caregivers. Many individuals in advanced stages of Alzheimer's disease are unable to speak for themselves or understand what they are signing. Some courts have upheld arbitration agreements even when they were signed by nursing home residents who were illiterate or had advanced dementia. In addition, caregivers for people with dementia have a high rate of emotional stress, thus may not fully comprehend the possible consequences of signing a mandatory arbitration agreement. Research indicates that caregiver stress, especially stress related to a person's behavioral symptoms, is associated with nursing home placement.

Given that a majority of long-term care residents have some type of cognitive impairment, 69 percent of nursing home residents and about 50 percent of assisted living facility residents, the Alzheimer's Association is concerned that mandatory arbitration agreements can be detrimental to people with dementia and their caregivers. We appreciate your commitment to this issue and look forward to working with you to improve the quality of dementia care for residents in long-term care facilities. If you have any questions, please contact Brenda Sulick at the Alzheimer's Association at Brenda.Sulick@alz.org or (202) 638-8672.

Sincerely,

Stephen McConnell, Ph.D.
Vice President, Advocacy and Public Policy

the compassion to care, the leadership to conquer

110TH CONGRESS
2D SESSION

S. _____

To amend chapter 1 of title 9 of United States Code with respect to arbitration.

IN THE SENATE OF THE UNITED STATES

Mr. MARTINEZ (for himself and Mr. KOHL) introduced the following bill; which was read twice and referred to the Committee on

---

A BILL

To amend chapter 1 of title 9 of United States Code with respect to arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fairness in Nursing Home Arbitration Act".

SEC. 2. DEFINITIONS.

Section 1 of title 9, United States Code, is amended—

(1) by striking the section heading and inserting the following:

"§ 1. Definitions";

(2) by inserting before the first beginning quotation mark, the following: "(a) As used in this chapter, the term (1)";

(3) by striking "Maritime" and inserting "maritime";

(4) by striking "jurisdiction;" and inserting "jurisdiction; (2)"; and

(5) by striking the period and inserting the following: "; (3) 'long-term care facility' means—

"(A) any skilled nursing facility, as defined in 1819(a) of the Social Security Act;

"(B) any nursing facility as defined in 1919(a) of the Social Security Act; or

"(C) a public facility, proprietary facility, or facility of a private nonprofit corporation that—

"(i) makes available to adult residents supportive services to assist the residents in carrying out activities such as bathing, dressing, eating, getting in and out of bed or chairs, walking, going outdoors, using the toilet, obtaining or taking medication, and which may make available to residents home health care services, such as nursing and therapy; and

"(ii) provides a dwelling place for residents in order to deliver such supportive services re-

ferred to in clause (i), each of which may contain a full kitchen and bathroom, and which includes common rooms and other facilities appropriate for the provision of supportive services to the residents of the facility; and

"(4) 'pre-dispute arbitration agreement' means any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement.

"(b) The definition of 'long term care facility' in subsection (a)(3) shall not apply to any facility or portion of facility that—

"(1) does not provide the services described in subsection (a)(3)(C)(i); or

"(2) has as its primary purpose, to educate or to treat substance abuse problems.".

SEC. 3. VALIDITY AND ENFORCEMENT.

Section 2 of title 9, United States Code, is amended—

(1) by striking the section heading and inserting the following:

"§ 2. Validity and enforceability";

(2) by striking "A written" and inserting "(a) A Written";

(3) by striking ", save" and all that follows through "contract", and inserting "to the same ex-

tent as contracts generally, except as otherwise provided in this title"; and

(4) by adding at the end the following:

"(b) A pre-dispute arbitration agreement between a long-term care facility and a resident of a long-term care facility (or anyone acting on behalf of such a resident, including a person with financial responsibility for that resident) shall not be valid or specifically enforceable.

"(c) This section shall apply to any pre-dispute arbitration agreement between a long-term care facility and a resident (or anyone acting on behalf of such a resident), and shall apply to a pre-dispute arbitration agreement entered into either at any time during the admission process or at any time thereafter.

"(d) A determination as to whether this chapter applies to an arbitration agreement described in subsection (b) shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of such an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting the arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.".

SEC. 4. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of the enactment of this Act and shall apply with respect to any dispute or claim that arises on or after such date.

Senator Robert P. Casey, Jr. Statement for 6/18/2008 Joint Judiciary Subcommittee on Antitrust, Competition and Consumer Rights and Aging Committee Hearing on S. 2838, the Fairness in Nursing Home Arbitration Act

Mr. Chairman, thank you for scheduling this hearing to examine S. 2838, the Fairness in Nursing Home Arbitration Act. This is a critical issue that directly affects the well being of older citizens in long term care across the country.

Pre-dispute mandatory arbitration clauses are becoming more common in long term care facility contracts. These clauses are legally binding in disputes that can arise between the nursing home and older citizens, binding them to arbitration for the resolution of disputes and eliminating the option of litigation. When older citizens are being admitted to nursing care facilities, they can easily sign contracts containing these clauses without complete or even minimal understanding of what they mean. It is often only when older individuals have suffered mistreatment at these facilities that their families discover the details.

Older citizens facing the daunting paperwork of admission to a nursing facility may be on medication that impacts their clarity and judgment and they do not always have the ability to read through all the papers they are signing. They may simply want to sign the papers as quickly as possible so they can rest. Sometimes they are accompanied by family members or friends who are able to assist them and read through the documentation, but that is not always the case. In either case, it is difficult for the average person to understand the implications of mandatory arbitration clauses buried in 40 of 50 pages of admissions documents. Even when a friend or family member is there, their focus is often on the services a nursing home offers and getting their

parent, spouse or friend settled. They are not necessarily thinking about future disagreements they might have with the nursing home.

These pre-dispute mandatory arbitration clauses are so suspect that the American Arbitration Association does not support agreements requiring arbitration in disputes over nursing-home care and has a specific prohibition against arbitrating a case based upon a pre-dispute mandatory arbitration clause in a health care or long term care contract.

There have been over 100 cases reported in which nursing home residents have challenged arbitration agreements, citing negligent or abusive care by the facility. Courts are often unable to give residents satisfactory redress, even in cases when the resident lacked the mental or physical ability to understand what they were signing.

The incidence of pre-dispute mandatory arbitration clauses in nursing homes is rising. Arbitration serves a valuable role in resolving disputes but not when it robs vulnerable older individuals, without their legitimate consent, of appropriate legal redress against wrongdoing. We must work to ensure our older citizens and their families have appropriate remedies to address any mistreatment that might occur in long term care facilities.

In closing, Mr. Chairman, I again want to thank you for your continued attention to our older citizens. We must keep working to ensure they receive high quality care in nursing homes and other long-term care facilities and help them find appropriate recourse when that does not happen.

www.medicareadvocacy.org

S.2838, THE FAIRNESS IN NURSING HOME ARBITRATION ACT

Hearing before the Subcommittee on
Antitrust, Competition Policy and Consumer Rights
Senate Judiciary Committee

June 18, 2008

Toby S. Edelman
Senior Policy Attorney
Center for Medicare Advocacy
Statement for the Record
Submitted June 24, 2008

National Office: PO Box 350, Willimantic, Connecticut 06226 • (860) 456-7790 • Fax (860) 456-2614
Washington, DC Office: 1025 Connecticut Ave., NW, Suite 709, Washington, DC 20036 • (202) 293-5760 • Fax (202) 293-5764

Advancing Fair Access to Medicare and Health Care

INTRODUCTION

The Center for Medicare Advocacy (the Center) is a non-partisan, non-profit organization that works to ensure fair access to quality health care. The Center supports S.2838, the Fairness in Nursing Home Arbitration Act, which would prohibit nursing facilities and other long-term care facilities from using pre-dispute arbitration clauses in their admissions contracts or as part of their admissions processes.

Pre-dispute arbitration clauses prevent residents and their families from filing wrongful death or personal injury litigation against the facility when a dispute arises. Witnesses before the Committee on June 18 provided compelling testimony that such contracts are contracts of adhesion, written by facilities for their own benefit and generally signed by residents and their families who do not understand what they are agreeing to do or who are not able to oppose the terms if they understand them. The Center endorses the June 18th testimony of David Kurth, Alison Hirschel, and Kenneth L. Connor. In addition, the Center opposes pre-dispute arbitration clauses because civil justice litigation not only compensates residents (or their estates) when residents are killed or injured but also serves an important public policy purpose that is lost if private litigation cannot be pursued.

The civil justice system compensates victims of grossly inadequate care or gross failures of care. When nursing home care leads to the death or serious injury of a vulnerable resident, tort litigation may be necessary to hold facilities accountable for the harm they have caused. The civil justice system complements the public regulatory system in its efforts to improve the quality of care for all residents. Litigation in the civil justice system can lead to significant changes in facilities' care practices and can remove owners and managers that refuse to provide good care.

THE CENTER FOR MEDICARE ADVOCACY'S 2003 STUDY OF TORT REFORM AND NURSING HOMES DISPELLED COMMON MYTHS ABOUT THE CIVIL JUSTICE SYSTEM

In 2003, the Center for Medicare Advocacy (the Center) completed a study of tort reform and nursing homes that dispelled common myths that pervade the nursing home industry's discussion of tort litigation.[1]

First, the Center found that cases are not frivolous. They represent situations where residents have been seriously injured and died. Cases involve deaths by strangulation on bedrails or other physical restraints, pressure sores, malnutrition, and dehydration.

The Center's findings on this point were consistent with the findings of others who have looked at civil justice litigation against nursing homes. The Florida Task Force on the Availability and Affordability of Long-Term Care reported in December 2000, "the lawsuits are fundamentally about pressure sores, falls, dehydration, and malnutrition or weight loss, and none of these

[1] Center for Medicare Advocacy, *Tort Reform and Nursing Homes* (March 2003).

conditions or incidents is a minor matter in this population, or any other."[2] A Harvard study reported in *Health Affairs* (March 2003) similarly documented that more than half the cases in civil justice litigation against nursing homes involved residents' deaths.[3]

The Center's study also deflated other industry myths about civil litigation against nursing homes. It demonstrated that actual settlements and pay-outs are considerably lower than the reports of large jury verdicts and that there has not been an explosion in tort litigation. Compared to the amount of abuse, neglect, and grossly poor care suffered by residents each day, as repeatedly documented by the Government Accountability Office and others, the number of cases filed against nursing homes in fact remains small.

The Center's study demonstrated that tort litigation is not the cause of rising liability insurance premiums. Various analyses identify multiple causes for increased rates that include, but go far beyond, tort litigation:

- The profit-motivated insurance industry, which has minimal experience with nursing homes and little competition for business;
- The insurance industry's unregulated status with respect to pricing nursing home liability policies;
- The insurance industry's not finding in nursing homes the types of risk management programs that are standard in other health care settings;
- Poor quality nursing home care;
- Insurance companies' raising premiums based on national, rather than state-specific, nursing home pay-out experience (so that states without significant tort litigation nevertheless experience significant rate increases);
- Rising commercial insurance rates, as a general matter; and
- The cyclical pattern in the insurance industry, so that insurance companies raise premiums based on financial matters unrelated to claims (e.g., (1) insurance industry invests premiums in the stock market to generate revenues; declining stock prices affect insurance companies' profitability; (2) insurance companies had substantial payouts as a result of September 11, 2001).

Finally, the Center found that litigation against nursing homes supplements, supports, and complements the regulatory system, both as a general matter and in specific cases. The Center's report made the following observations:

THE SAME FACILITIES OFTEN HAVE LARGE NUMBERS OF VERDICTS/SETTLEMENTS AND PUBLIC ENFORCEMENT ACTIONS TAKEN AGAINST THEM

Facilities with the largest number of verdicts/settlements or with cases involving the largest dollar values, or both, are frequently the same facilities that state survey agencies have identified and cited with large numbers of deficiencies. Poor performing facilities are subject to both

[2] Florida Task Force on the Availability and Affordability of Long-Term Care (Dec. 16, 2000, Second Draft Report).

[3] David G. Stevenson and David M. Studdert, "The Rise Of Nursing Home Litigation: Findings From A National Surveys Of Attorneys," *Health Affairs*, Vol. 22, No. 2, 219, 222 (March 2003).

private litigation in the civil justice system and public enforcement actions. The two legal systems are separate and have different functions, but complement each other.

The *Sun-Sentinel* and *Orlando Sentinel* in Florida evaluated tort litigation filed in the state between 1996 and 2000 and compared the results with the state agency's survey findings. They reported a "commonality . . . among infrequently sued homes:" "they had few violations on their inspections reports," while facilities with "many violations were three times more likely to be sued."[4] Between 1996 and 2000, the 10 facilities (out of 143 in South Florida) that had 15 or more lawsuits filed against them had an average of 48.7 deficiencies during the period (ranging from 24 to 72). During the same five-year period, the 25 facilities with zero lawsuits had an average of 20 deficiencies (ranging from 1 to 44).

Similar correlations of extensive deficiencies (or other civil or criminal litigation, or both) and large tort recoveries are found in other states. A Denver, Colorado facility that had been the subject of two multi-plaintiff tort cases was also the subject of significant deficiencies and state enforcement actions.[5] A former employee of a Missouri facility pleaded guilty to elder abuse, and was sentenced to 15 years in prison, the month before the facility settled cases with six families for nearly $2.5 million.[6] A Beverly Enterprises facility in California was sued 15 times by residents' families at the same time the state Department of Justice was opening a criminal investigation.[7] Beverly Enterprises pleaded guilty to felony elder abuse in 2002 in a case that also resolved civil claims against the corporation for its operation of 60 facilities in California.[8]

TORT LITIGATION MAY BRING ABOUT QUASI-REGULATORY RESULTS IN SPECIFIC FACILITIES

Large tort recoveries can also lead to change of ownership of a facility, a quasi-regulatory result that survey agencies are often unable to achieve directly on their own.

The Florida Task Force reported that the three facilities in Hillsborough County that had been sued most frequently (more than 20 times each) "have subsequently undergone transformation: two properties have changed ownership and the third has permanently closed."[9] Litigation in the civil justice system may have helped play an important public role in bringing about critical changes in ownership or management of nursing facilities that provided exceptionally poor care to a large number of residents.

---

[4] Diane C. Lade, "Some well-kept nursing homes have never been sued," *Sun-Sentinel* (Mar. 5, 2001).

[5] Ann Imse, "A question of care: Denver nursing home group runs into repeated problems with regulators," (Nov. 3, 2001).

[6] Michele Munz, "American Healthcare Management sells local nursing homes," *St. Louis Post-Dispatch* (Jul. 11, 2001).

[7] Joshua Molina, "Family's suit: Patient died of neglect," *News-Press* (Jun. 29, 2001).

[8] *California v. Beverly Enterprises, Inc.*, Case No. 01096941 (Cal. Super. Ct., Santa Barbara Co., Jul. 31, 2001); "Attorney General Lockyer, Santa Barbara D.A. Sneddon Announce Major Enforcement Action Against Nation's Largest Nursing Home Chain" (Attorney General Lockyer, News Release, Aug. 1, 2002).

[9] Florida Task Force on the Availability and Affordability of Long-Term Care 350 (Dec. 16, 2000, Second Draft Report).

American Healthcare Management of Chesterfield sold 11 of its 12 St. Louis, Missouri facilities, with 1500 beds, following seven lawsuits in three years that alleged wrongful death and neglect of 11 residents, settlement with six families for nearly $2.5 million, state regulatory enforcement actions, and the no-contest plea to criminal elder abuse by a former employee.[10]

TORT LITIGATION CAN ALSO RESULT IN PERMANENT CHANGES TO FACILITY PRACTICES THAT IMPROVE CARE FOR RESIDENTS

Although litigation in the civil justice system has financial compensation for individuals as its primary focus, some attorneys have also used the vehicle of a settlement to bring about permanent changes in facility practices in order to benefit future residents. The private litigation may change facility practices through quasi-injunctive relief.

In a Texas case, a resident died in a nursing facility when she strangled after being pinned between her bed and the bedrail. Settlement of the wrongful death case against the facility included a lengthy written agreement requiring the facility to establish extensive new policies and procedures to reduce its use of physical restraints.[11] The facility reduced its use of restraints by more than 90%. A separate tort action against the parent corporation of the bedrail manufacturer led to payment of $3 million to the family and the corporation's sending a *Safety Alert Concerning Entrapment Hazards with Bed Side Rails* to all of its customers. The *Alert* described proper use of the bedrail and attached a copy of the Food and Drug Administration's 1995 Safety Alert, *Entrapment Hazards with Hospital Bed Side Rails*.[12]

Tort litigation serves an important public role of identifying dangerous products and practices in ways that lead to changes that benefit the public at large.[13]

CONCLUSION

The Center for Medicare Advocacy endorses S.2838 and its prohibition against the use of pre-dispute arbitration agreements by nursing homes and other long-term care facilities.

---

[10] Michele Munz, "American Healthcare Management sells local nursing homes," *St. Louis Post-Dispatch* (Jul. 11, 2001).

[11] *Trew v. Smith and Davis Manufacturing Co., Inc.*, No. SF 95-354(C) (N.M. Dist. Ct. Jul. 1996).

[12] Telephone conversation with plaintiffs' attorney, Jeff Rusk, Austin, TX, Mar. 12, 1997.

[13] The Center for Justice and Democracy, *Lifesavers* (Feb. 2001) (compilation of tort cases leading to reform in the areas of aircraft, consumer and household products, crimes, drugs and medical devices, environmental hazards, firearms, hospital and medical procedures, public spaces, toys and recreational products vehicles, and work-related injuries). *See also* American Association for Justice, *Cases That Made Us Safer, Improved Lives*, <www.atlanet.org/pressroom/kofscampaign/caseindex.aspx> (site visited June 24, 2008) (describing removal from sale of faulty surgical ventilators and flammable children's pajamas, recall of the Dalkon Shield IUD, among other changes resulting from tort litigation).

Testimony of

Kenneth L. Connor

Attorney at Law

Before the Subcommittee on Antitrust, Competition and Consumer Rights and the Special Committee on Aging, regarding the Fairness in Nursing Home Arbitration Act, S. 2838/ H.R. 6126

June 18, 2008

Chairman Kohl, Ranking Member Hatch, and Members of the Subcommittee:

I want to express my appreciation to you and to your colleagues and to Senator Martinez for taking the lead in sponsoring the "Fairness in Nursing Home Arbitration Act." This legislation is vitally important to protect the rights of frail, vulnerable nursing home residents who have suffered abuse or neglect at the hands of their caregivers. The current system which allows for pre-dispute mandatory binding arbitration results in a gross miscarriage of justice to victims and their families and promotes irresponsible and reckless conduct on the part of providers who are not held fully accountable for the consequences of their wrongdoing.

We have an unacknowledged crisis of care in this country when it comes to the institutionalized elderly. I know this because I have seen it first hand. For almost 25 years, I have represented victims of abuse and neglect in long term care institutions across America. All too often, the story is the same: avoidable pressure ulcers (bed sores) penetrating to the bone; wounds with dirty bandages that are infected and foul smelling; patients languishing in urine and feces for hours on end; hollow-eyed residents suffering from avoidable malnutrition, unable to ask for help because their tongues are parched and swollen from preventable dehydration; dirty catheters clogged with crystalline sediment and yellow-green urine in the bag; residents who are victims of sexual and physical abuse from caregivers; short-handed staff who are harried and overworked because their employers decided to increase profits by decreasing labor costs; "charting parties" where these same staff "doctor" charts to make it appear that care was given even though there was no time to give it; "ghost aids" or "dummy aids" who were never on the floor, but whose names appear on assignment sheets just in case state inspectors ask to see staffing records.

These problems are not isolated. They are systemic and they are going to get worse. We are on the threshold of a veritable "Senior Tsunami." America is graying and as Dr. Leon Kass has said, we are rapidly becoming a "mass geriatric society." The over 85 age group is the fastest growing age group in America. Millions of Americans will need long term care, even as our Medicare and Medicaid resources are shrinking. Our society is rapidly embracing a "quality of life" ethic in the place of a sanctity of life ethic. But, old people do not score well using quality of life calculus and they perform poorly on

functional capacity studies. They cost more to maintain than they produce and they are vulnerable to abuse and neglect by unscrupulous nursing home operators who are willing to put profits over people.

Historically, victims of nursing home abuse and their families have been able to resort to the courts to secure justice. In recent years, however, nursing home operators have bypassed the courts and cleverly limited their liability for wrongdoing by requiring nursing home residents or their families to sign their rights away through the execution of agreements requiring pre-dispute binding mandatory arbitration. An admissions packet of 50-60 pages is often presented for review by the patient or their family. The briefest of explanations is offered and the patient or their representative is asked to sign on multiple pages. The agreement for pre-dispute binding mandatory arbitration is commonly sandwiched toward the end of the documents and is explained, if at all, in the briefest of terms and in the most soothing of tones. Prospective new residents frequently suffer from dementia, or are on medication, or are otherwise mentally compromised. Often they suffer from poor vision or illiteracy. Rarely do they have the capacity to understand the significant and complex documentation with which they are presented. Many times, the nursing home representative doesn't even understand the significance of the arbitration agreement they are asking the resident or their family member to sign. That, however, is inconsequential. The goal is to get the patient's or family member's signature or mark on the document. If the family balks, they are told that admission will be denied. That is not acceptable to most family members since the next nearest available nursing home is often miles away and it will be extremely difficult to visit their loved one on a regular basis. Equality of bargaining position between the nursing home and the resident or their family does not exist.

The admissions process is stressful for the resident and their family. They don't have a clue about the problems that persist in the nursing home industry. Protecting their legal rights is the last thing on their radar screen. No lawyer is present to advise them. They don't expect to be confronted with a waiver of their legal rights. They just know that the family can no longer provide the care needed by their aging parent or grandparent and their local nursing home has assured them that it can do so. They need the nursing home's help and they need it now.

The terms of the binding mandatory arbitration agreement are often as unconscionable as the circumstances under which the agreement is executed. There is no mutuality. The residents and their families typically aren't afforded an opportunity to negotiate the terms. The agreements are drawn by the nursing home's attorneys who craft the terms so as to favor the nursing home and disadvantage the residents. As to the proposed agreement, the resident or their family must "take or leave it." The nursing home often retains the right to modify the contract, but that same right is not afforded to the resident or her family. The nursing home reserves the right to pursue a collection action in the courts against the resident or their family, but the resident is usually left with only the right to pursue any claims against the facility through arbitration.

Discovery pursuant to the agreement is emasculated. The agreement typically imposes draconian limits on (1) the number of witnesses who can be deposed or called at the arbitration, (2) the number of experts who can be called, (3) the number of interrogatories, requests for admission and requests for production that can be filed, and (4) the length of time to be allotted for the arbitration hearing. These limitations do not permit the claimants to adequately present their case. The arbitrator or arbitral forum is typically selected by the nursing home and often the home (or the chain of which it is a part) provides repeat business for the decision maker. This is a process which hardly leads to a fair and just result for the resident who is a victim of abuse and neglect in a nursing home. Not surprisingly, therefore, arbitration awards are usually substantially lower than court awarded jury verdicts.

Nursing home residents should not be required to check their rights at the door of the nursing home. Nevertheless, that is exactly what pre-dispute binding mandatory arbitration agreements do. By their terms, the residents and their families are typically required to waive their right to a jury trial, their right to attorney fees, their right to the full measure of their compensatory damages, and their right to punitive damages. The net effect is that residents are short-changed by the agreement and their caregivers are relieved of the consequences of their wrongdoing.

In a just society, wrongdoers are held fully accountable for their conduct and innocent victims are compensated for the full measure of their loss. The failure to require such an accounting or to punish wrongdoers for their reckless conduct means that the wrongful conduct will multiply in the future. Congress should act swiftly and decisively to outlaw pre-dispute binding mandatory agreements in nursing home settings. Their continued use and approval means that victims of abuse and neglect in nursing homes will be abused yet again by the very people who were supposed to take care of them.

News From:

U.S. Senator
Russ Feingold

506 Hart Senate Office Building
Washington, D.C. 20510-4904
(202) 224-5323

http://www.senate.gov/~feingold

FOR IMMEDIATE RELEASE – June 18, 2008
Contact: Zach Lowe & Katie Rowley - (202) 224-5323

Opening Statement of U.S. Senator Russ Feingold

Hearing on "Fairness in Nursing Home Arbitration Act"
Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights

As Prepared For Delivery

"One of the most fundamental principles of our justice system is the right to take a dispute to court. I have been concerned for many years that mandatory arbitration clauses in all sorts of contracts that consumers and employees must sign are slowly eroding the legal protections that should be available to all Americans. I have introduced legislation to make these provisions unenforceable because I believe they are inherently unfair. Arbitration is an important form of alternative dispute resolution. But it should never be forced on someone, particularly not on someone with unequal bargaining power before a dispute even arises.

"People who sign contracts to go into a long term care facility are among the most vulnerable of our citizens, whether they are seniors or their families. They sign papers that are handed to them in often very difficult and emotional circumstances. They aren't represented by lawyers to review the fine print. As we have heard from the witnesses today, residents and their families typically have no opportunity to negotiate the terms of the contracts they sign. Often, they believe, or are told, that the contracts are 'take or leave it' propositions. In some cases, the facility, but not the resident, retains the right to modify the contract, and even to pursue a collection action in court. If a dispute goes to arbitration, the secret proceedings often severely restrict discovery and impose limits on witnesses, experts, and information sharing.

"I am pleased to cosponsor the Nursing Home Contract Arbitration Fairness Act, introduced by Senators Martinez and Kohl. The bill will restore access to the courts for nursing home residents who have suffered abuse and neglect. That access in the end helps improve the quality of care for our seniors.

"Mr. Chairman, the rule of law means little if the only forum available to those who believe they have been wronged is an alternative, unaccountable system they have not chosen voluntarily and where the laws do not necessarily apply. This legislation protects seniors from exploitation while still allowing alternative methods of dispute resolution to be chosen by the parties. I applaud you and Senator Martinez for introducing the bill, and I hope this hearing will move us closer to enacting it."

1600 Aspen Commons
Middleton, WI 53562
(608) 828-1200

517 E. Wisconsin Ave.
Milwaukee, WI 53202
(414) 276-7282

First Star Plaza
401 5th St., Room 410
Wausau, WI 54403
(715) 848-5660

425 State St., Room 225
La Crosse, WI 54601
(608) 782-5585

1640 Main Street
Green Bay, WI 54302
(920) 465-7508

Testimony of

Alison E. Hirschel
President
NCCNHR: The National Consumer Voice for Quality Long Term Care
1828 L Street, N.W., Suite 801
Washington DC 20036
202/332-2275
www.nccnhr.org

Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights, and the Special Committee on Aging
on S. 2838, the Fairness in Nursing Home Arbitration Act

June 18, 2008

Chairman Kohl, Ranking Members Smith and Hatch, and members of the Special Committee and the Subcommittee:

Thank you for inviting me to speak on behalf of NCCNHR: The National Consumer Voice for Quality Long Term Care.[1] For more than 30 years, NCCNHR has provided a national voice in Washington for long-term care residents, their families, ombudsmen, and citizen advocates, such as the Michigan Campaign for Quality Care which I represent. Twenty-nine years ago, I started my career as an intern at the House Select Committee on Aging. And for the past 23 years, I have been representing long term care consumers on issues ranging from their initial admissions to facilities to their sometimes tragic experiences of abuse or neglect in those facilities.

Residents and families often sign admissions agreements at times of enormous stress in their lives. Admissions following a hospital discharge or sudden crisis such as the loss of a caregiver occur in a rush because the applicant needs care immediately. Seeking admission to a facility is not a slow and deliberative process in which consumers carefully consider every page of the admissions package and compare it to admissions agreements of other nearby facilities.

Most consumers are unaware that the contract includes an arbitration clause, and they may not understand the provisions even if they notice them. They don't know that the facility chooses the arbitrator and that arbitrators are often health care industry lawyers who have an incentive to find for the facility and limit awards so that they will be hired by the provider for future disputes. They don't understand that arbitration can be very costly for the consumer, that arbitration awards are generally significantly lower than jury awards, and that there is no real ability to appeal. Moreover, the last thing on most consumers' minds at the time of admission is how they will seek a remedy if something goes wrong. They enter a long term care facility looking for care and compassion, not litigation or arbitration.

Even if the long term care facility explains the binding arbitration clause, most consumers will not challenge it. First, nothing about the long term care admissions process is like a negotiation between two equal parties. Consumers sign whatever is presented to them as required paperwork. Second, no resident or family wants to get off on the wrong foot with a facility that will hold the fragile resident's very life in its hands. No one wants to be marked a troublemaker before the resident has even entered the facility, especially about a legal provision applicants do not expect to ever affect them.

Of course, sometimes, things do go grievously wrong as in the case of Vunies B. High, a 92 year old Detroit area resident with dementia. She was the sister of the legendary boxer Joe Louis, a graduate of Howard University, an accomplished woman and a long

[1] NCCNHR (formerly the National Citizens' Coalition for Nursing Home Reform) is a nonprofit membership organization founded in 1975 by Elma L. Holder to protect the rights, safety and dignity of America's long-term care residents

time English teacher and counselor in Detroit public schools. Ms. High's family placed her in an assisted living facility because they thought she would be safe there. They did not realize it was an unlicensed facility. On a frigid night in February of this year, staff of the facility failed to notice when Ms. High wandered out of that facility wearing only her pajamas. She froze to death. Her family then discovered that the admissions agreement they signed contained a mandatory, binding arbitration provision on page 11. It, like many mandatory arbitration clauses, stated that in the case of any dispute:

- The *provider* had the sole and unfettered option to choose to resolve the dispute in binding arbitration;
- The *provider* would choose the location for the arbitration (and presumably the arbitrator);
- The *provider* would choose the rules (the American Arbitration Association of the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedures for Arbitration);
- And the *provider* retained *its* right to institute any action against Ms. High in any court of competent jurisdiction, though Ms. High was required to forego that option.

In addition, the agreement contained a limitation of only $100,000 in damages in addition to medical costs incurred, a provision Ms. High's family also did not recall signing. Because of this agreement, Ms. High's family may not have an opportunity to seek redress in the courts for her tragic and preventable death. That is particularly troubling because the potential for litigation provides an important incentive for facilities to provide better care, a way for individuals who have been wronged in sometimes harrowing ways to hold negligent providers accountable, and a method for ensuring, in contrast to arbitration, that these abuses are brought to light. Family members tell me and tell NCCNHR that they utilize lawsuits as a last resort when the system has failed them and their loved one, so that other residents will not suffer the same fate.

At the same time we are seeing a dramatic rise in the number of mandatory arbitration clauses, government studies continue to provide disturbing evidence of serious neglect and avoidable injuries and deaths in nursing homes and systemic failure among regulators to cite or remedy the problems. According to a Government Accountability Office report to you, Senator Kohl, and Senator Grassley last month, twenty percent of nursing homes have been cited for putting their residents at risk of serious injury or death – a shockingly high figure that GAO says understates the actual jeopardy and harm residents are experiencing.

It is true that we have an elaborate nursing home enforcement system. But as Senator Grassley remarked in 2007, that enforcement system is broken. In my home state, a shortage of surveyors means that complaints take an average of more than 90 days to investigate — and sometimes as long as a year. In that period, records are lost or altered,

witnesses and evidence disappear, and surveyors are no longer able to substantiate even extremely serious and legitimate complaints. And if the problem cannot be substantiated, no penalty can be imposed.

Moreover, while surveyors miss a lot at nursing homes, licensed assisted living facilities are inspected much less often and less rigorously, and regulators in my state have few remedies if problems are discovered. And there is no enforcement in unlicensed facilities like the one in which Ms. High resided. Thus, an overburdened enforcement system in nursing homes, a limited system in licensed assisted living, and a nonexistent enforcement system in unlicensed homes cannot be an adequate substitute for litigation in egregious cases.

Opponents of this bill lament that funds that should be spent on resident care are allegedly diverted to pay for litigation and liability insurance. But I want to be clear about two points: First, what really costs taxpayers unfathomable sums of money is poor care itself. Poor care leads to unnecessary and frequent hospitalization for conditions that never should have arisen, and to surgery, specialists' visits, medications, and durable medical equipment to address ills that never should have been suffered. When a Wisconsin nursing home ignored for more than five days Glen Macaux's doctor's orders to inspect and assess his surgical site, the resulting infection caused septic shock, excruciating pain, severe depression, and total disability -- and hospital bills of almost $200,000.

Second, even if providers were spared the expense of litigation and increased insurance premiums—by tipping the playing field very much in their own favor—there is no guarantee that savings will be invested in adequate staffing, training, supplies, or in creating safe and appealing environments. Nothing prevents providers from using those funds to increase investors' returns instead of improving residents' care and lives. In fact, as testimony in several recent Congressional hearings has disclosed, nursing home corporations are setting up complex operating and financing structures that hide ownership, bleed funding out of the facilities for corporate profits, limit accountability, and reduce nursing staff and quality of care. We should be concerned about corporate abuse of public funds, not with residents seeking justice in the courts when they become victims of neglect and abuse caused by corporate greed.

Finally, let me note that we are not anti-arbitration. We are only opposed to pre-dispute, binding, mandatory arbitration. Arbitration was not intended as an end run around justice or a way to keep wrongdoing out of the public eye. In cases in which consumers have already suffered grievous harm, Congress should not permit long term care facilities to add the bitter burden of denial of the fundamental right of access to the courts.

Thank you.

NCCNHR The national consumer voice for quality long-term care

1828 L Street, NW, Suite 801
Washington, DC 20036
202 332-2275 Fax 202 332-2949
www.nccnhr.org

Alison Hirschel, President
Alice H. Hedt, Executive Director

April 9, 2008

The Honorable Mel Martinez
United States Senate
Washington, DC 20510

The Honorable Herb Kohl
United States Senate
Washington, DC 20510

Dear Senator Martinez and Senator Kohl:

NCCNHR would like to thank you for introducing the Fairness in Nursing Home Arbitration Act. In 2002 and 2005, NCCNHR members voted overwhelmingly to approve resolutions asking the federal government to prohibit long-term care facilities from including mandatory arbitration clauses in their admissions agreements, and we want to assure you of our support in helping the bill to become law.

For families with aging parents, mandatory pre-dispute arbitration agreements compel them to agree that they will arbitrate the value of their mothers or fathers' lives if they are seriously injured or die from neglect or physical abuse. Nursing home admissions often occur after medical emergencies and under pressure from hospital discharge planners, so that families have little choice and must accept the provider's terms. Most families have had no experience with how badly care can go wrong or how much suffering their parent or other loved one may experience.

The NCCNHR resolutions stemmed from concern among consumer advocates that long-term care facilities in most states can neglect and even abuse residents with impunity if residents and their families are unable to take them to court. Countless government studies show that in spite of improvements in nursing home regulation and enforcement, state regulators still under-cite the seriousness of deficiencies in which residents are harmed; levy fines that are little more than the cost of doing business for profitable corporations; and allow facilities to operate year-after-year with serious, repeat problems. Mandatory arbitration agreements become mechanisms to protect nursing homes from juries, who are less lenient that regulators when presented with evidence that vulnerable elders were victims of avoidable neglect and preventable abuse.

Few American families would voluntarily arbitrate the suffering and death of their mother or father. The Fairness in Nursing Home Arbitration Act would end the practice that forces many to do so.

Sincerely,

Alice H. Hedt

NCCNHR (formerly the National Citizens' Coalition for Nursing Home Reform) is a nonprofit membership organization founded in 1975 by Elma L. Holder to protect the rights, safety, and dignity of America's long-term care residents.

Statement of Senator Herb Kohl
Fairness in Nursing Home Arbitration Act Hearing

Good morning. I would like to welcome our witnesses and thank them for their participation. I would also like to thank our Ranking Member, Senator Hatch, for joining us today, and Senator Martinez for his leadership on this important issue. We are here today to examine arbitration agreements in nursing home admissions contracts. We are conducting a joint hearing with both the Judiciary and Aging committees because the issue involves access to justice as it relates to the 1.5 million Americans currently in long term care facilities and all those who may someday need this kind of care.

Over the past several years, more and more long-term care facilities have required incoming residents to sign mandatory arbitration agreements. By signing these agreements, residents give up their right to go to court.

It is important to note that we believe the vast majority of nursing homes are doing a good job and working hard to deliver quality care. But, we must protect the right of those who receive inadequate care to hold poor-performing facilities publicly accountable. As we will hear today, Mr. Kurth and his family want to protect others from the tragedy they have suffered and to send a strong message to underperforming facilities that harmful care is unacceptable.

The experience of placing a family member into a long-term care facility is very emotional. Often, the decision is a last resort after a medical emergency or when a family acknowledges that they cannot provide the level of care their loved one needs. The family's sole focus is on finding the best facility, not studying technical legal clauses buried in the document. Many incoming residents lack the capacity to make even simple decisions, much less judge the legal significance of an arbitration agreement. Most are unaware that they are signing away their right to go to court.

Typically, admissions agreements are presented on a take-it-or-leave-it basis. Residents have few choices because they require immediate admission or because there are no other facilities in the area. As a result, whether or not they understand the arbitration provision, they often feel compelled to sign in order to ensure that their loved one will be admitted.

In response to these concerns, Senator Martinez and I have introduced a narrowly targeted bill which would invalidate mandatory arbitration agreements in long-term care facility contracts. It is important to note that our bill does not preclude arbitration as an option for resolving disputes. As proponents of arbitration emphasize – and with whom I agree – arbitration can be a timely, efficient and less adversarial option for resolving disputes than going to court.

However, it is critical that the decision to use arbitration be made voluntarily by both parties and only after a dispute occurs. It is only fair that families and residents have the opportunity to make an informed decision based on the facts of their particular case. After the dispute, if both parties feel that arbitration will truly offer a fair shake – as its proponents argue – then they should be free to agree to it at that time.

Some critics of our bill have suggested that rather than legislation, we should leave it up to the courts to decide on a case-by-case basis when arbitration agreements in long-term care facility contracts are unfair. However, in many jurisdictions, the courts are significantly constrained by the law. To hold an arbitration agreement unenforceable, most courts must find both substantive and procedural unconscionability. This means that even when the court finds that an arbitration agreement was unfairly entered into, the court must enforce it as long as the agreement is not grossly unfair to one party. Sometimes the courts will not even consider procedural unconscionability if the agreement is not substantively unfair. Without objection, we will include in the record several examples of cases where courts have not protected vulnerable long-term care facility residents who unwittingly signed away their ability to go to court.

I look forward to hearing our witness's testimony so that we can better understand this important issue.

Testimony of David W. Kurth
of Burlington, Wisconsin
On the Fairness in Nursing Home Arbitration Act of 2008
(S. 2838)
Before the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition and Consumer Rights and the
Special Committee on Aging
United States Senate
June 18, 2008

Chairman Kohl, Ranking Members Hatch and Smith, and distinguished Members of the committees, thank you for the invitation to speak to you today about my family's experiences with nursing home care and mandatory arbitration. I would also like to acknowledge my sister Kim and my mother Elaine, who have both accompanied me here today.

I would like to express my family's strong support of S.2838, the "Fairness in Nursing Home Arbitration Act," a bill that would stop nursing homes from using mandatory predispute arbitration clauses in their contracts. I would also like to thank Senators Martinez and Kohl for introducing the bill.

My name is David William Kurth. My family and I have lived in Burlington, Wisconsin for more than 50 years. My mother has recently moved to Haines City, Florida to live with and be cared for by my sister Kim and her husband John. I am an Engineering Project Manager and employed by MedPlast, at their facility in Elkhorn, Wisconsin.

My father's name was William F. Kurth. He loved our country and served many years as an officer in both the United States Army and Wisconsin National Guard. He prepared on two different occasions to fight and give his life to protect this country. My father was an Eagle Scout, and a Boy Scout Leader. He served as a volunteer Fireman for our community for more than 25 years. He taught his children and many others to love and serve this country as well. He taught us to obey its laws, respect its traditions, and to uphold the rights of others. He was an honest man who taught us never to lie, neither by omission nor by commission. He was a mentor to many people. He was a good man. He served his country and its people in his work all the days of his life.

My father entered Mount Carmel Nursing Home in Burlington, Wisconsin in October 2004. One Saturday morning in February 2005, he fell and complained that his hip hurt. He complained about the pain in his hip throughout the day. Late Saturday evening, someone from the staff thought it might be a good idea to perform an x-ray to investigate the cause of the pain. It was then that they found he had broken his left hip. He spent several days in the Burlington Hospital having his hip repaired.

Shortly after returning to Mount Carmel Nursing Home, his left leg was broken again during physical therapy that was improperly applied. My mother said that during this

session of therapy, the therapist insisted that my father's leg must be fully straightened. My mother said that my father was screaming in pain and trying his best to resist their efforts. Yet they didn't listen and as a result they broke his leg halfway between the hip and knee. It was at this time he contracted MRSA infection. During this same time his healthcare coverage was changed from Medicare to Medicaid. The very day his coverage changed, he was moved from his private room in the Medicare wing to a shared room in the Medicaid wing of the nursing facility. The staff did not perform any cleaning to his new room prior to his arrival. His new room was filthy and smelled of feces. The bed he was placed in was coated with dirt. My wife and I had to clean his room and bed the Sunday after he was transferred to the Medicaid wing. His room never was properly cleaned throughout the duration of his stay in the Medicaid wing. The bathroom he shared with three other men had not been properly cleaned in weeks, possibly months. On one occasion upon entering my father's room, I found the room to reek of feces. There was a rag with feces, next to my father's face, on his feeding table. His clean clothes were on the floor intermingled with several changes of soiled bed sheets.

Even though my father had contracted the MRSA infection, the staff at the nursing home made no attempt to protect his roommates, his visitors, or even their own staff from contracting this very communicable disease. The nursing home staff never alerted anyone to the dangers of contracting MRSA. The staff members that worked with my father very seldom wore protective apparel or gloves. Our family members never saw any staff members wash their hands before or after handling my father's wounds or undergarments.

In late April 2005, Dr. Rein, a doctor who examines patients once every 30 days, found 2 or 3 small bedsores on my father's backside and instructed the Wound Care Nursing Team to give special attention to these wounds.

What we didn't was that around this same time the management of the nursing home had made a cost-cutting move and disbanded the five-member team assigned to all wound care for the facility. This team was replaced with two nurses dedicated to wound care. However, one of these two nurses was also several months pregnant and within days of her reassignment she went on maternity leave. What this meant was that the wound care for several hundred aged and infirm patients that had previously been done by a team of five people was now to be attended by only one person. Court records show that the nursing home administrator did little more than ask this last remaining Nurse to let her know if she was having any trouble, or getting behind on her workload. It is inconceivable to us now that anyone in administrative authority could possibly think that one person could replace the effort of five people working as a team with internal oversight.

The court records and testimony show that this sole wound care nurse never attended my father's wounds during the months of April and May 2005, even after it was brought to her attention by the visiting doctor in late April. My father never complained of pain because he spent the majority of the time sleeping due to the heavy sedation that he was under. None of us had any idea that he was in such poor condition.

The visiting Doctor examined my father again on the Thursday prior to Memorial Day. At that time, upon seeing the progression of my father's illness, the Doctor had my father rushed by ambulance to the emergency room at Burlington Hospital. My father was admitted to the hospital that very morning. The following morning my mother and I had a chance to discuss my father's condition with the doctor. He told us how shocked he was at the poor care my father had received at the nursing facility. The doctor expressed how disappointed he was that the nursing staff could let someone deteriorate to such an extent. It was also at this time that the doctor told us that my father was terminally ill and that he did not have much chance of surviving his infections. My father was admitted to the hospice section of the hospital and a few days later he was transferred to a special Hospice in Wauwatosa, Wisconsin. During this time my father was given excellent care.

He died on June 25th, 2005 from sepsis of the blood due to infections caused by 13 bedsores. Most of these bedsores ran deep into the bones of his hips and pelvis. The infections were caused by the excrement and urine that was not cleansed from the wounds for days at a time. The bedsores were caused by neglect. The wound care nurse that was responsible for caring for my father has been charged and found guilty of criminal neglect by the State of Wisconsin for her actions. Further investigation on our part has revealed scores of other accounts of neglect at this same home.

During the months of April and May my father was not provided proper food or even water for days at a time. However, the nursing home's own records document that they were aware enough of my father's illnesses and debilitation to bill Medicaid for the extra care and services required to address the increased needs of these very afflictions. How is it that no one on the entire nursing staff could see or treat my father's bedsores, yet they could be aware enough of them to bill Medicaid for their treatment? And how does a nursing home get away with billing for these services while never actually providing the services? As of the time I submitted my statement to the committee we are unaware of any investigation for any of the fraudulent claims made and paid to Mount Carmel Nursing Home.

On the day of my father's memorial service, a woman representing Kindredcare, the corporation that owns Mount Carmel, contacted me to express her concerns for my family and for the way my father suffered and died. She said that they at Kindredcare felt responsible for all that had happened and wanted to express their regrets by paying for my father's funeral expenses. I told her thank you but no thank you; I said if she truly wanted to express the regrets of the corporation that they should write my mother a letter stating what she had just said. She told me she would get back to me on that. I never heard from her again.

As revolting as all of these ordeals for my father and mother sound, this is not the most shocking part of their tale. My father's ordeal is being hidden from the light of day by an arbitration clause which he himself never signed. My mother was instructed to sign it by the Admission Clerk at the Nursing Home. The parent corporation of the nursing home,

"Kindredcare" is hiding behind this document to prevent the light of truth from being shed on their corrupt management policies for nursing homes.

How ironic is it that William Kurth, a Captain in the United States Army, who had prepared to serve his country to the death, died of infections due to neglect caused by the unscrupulous cost cutting measures of a large nursing home corporation that has been cited for neglect many times over the last several years? How disgusting is it that the very system of justice and laws my father fought to protect are now acting to prevent our family from having our day in court?

Distinguished Senators, my father's story is not an isolated case. You can bet that it's probably happening at the majority of Kindredcare's facilities across America. This is because Kindredcare can hide behind these arbitration clauses by coercing the unknowing elderly who apply for care to sign these documents without explaining to them, or to anyone else, what they actually mean.

How can anyone in good conscience argue that it should be perfectly legal to trick frail, elderly, infirm senior citizens experiencing the most stressful time in their lives into waiving their legal rights? This practice of coercing our senior citizens who enter nursing homes to sign binding mandatory arbitration clauses has allowed nursing home corporations to minimize the level of care they provide. It also allows them to do so without anyone finding out about it.

The care that our family witnessed was disturbing. In the case of Mount Carmel, it seemed to us that all levels of care were understaffed. Patients would often wait for 30 to 45 minutes to be helped to and from the toilet and the nurses often complained of working 60 hour work weeks. The food appeared to be atrocious.

What was once was intended as an alternative dispute resolution process for business to business disagreements has become a shield for these large corporations to hide behind and decrease the quality of care. In the case of Kindredcare, it is economically more profitable to let people like my father suffer than to provide proper care. And now that our family is trying to hold the nursing home corporation accountable for its actions, Kindredcare is trying to bury our case by forcing us into a mandatory, secret, and binding arbitration process that they chose!

Ladies and Gentlemen of the Senate, my mother and sister and I are here today to plead with you to help right a great wrong that is being perpetrated on the elderly and infirm of America. If you, in your wisdom, can see fit to ban the use and practice of these arbitration clauses upon the elderly entering nursing homes you will be helping to prevent and expose the mismanagement of their care. Without these contracts to hide behind, nursing homes will have a greater incentive to provide the quality of care that families and legislators expect from them. The entire industry will have to reassess their poor practices and actually provide the care they are paid to give.

This country was built upon the retired and infirm who now reside in these nursing homes. The Veterans who fought for us, the teachers that provided us knowledge, the carpenters that built our homes and businesses, the little old ladies that taught us Sunday school, live in these nursing homes. Why should they have to forgo their legal rights in order to receive care? They took care of us, and now it time we took care of them in a manner that is worthy of the sacrifices they have made.

I know that Washington is a very busy place and that you are all very busy people. But I am encouraged that you found it in your hearts to make this cause worthy of your time and commitment. It is by God Almighty's Hand that you have come to your position this day for such a time as this. You are a light on a hill. Please let that light shine on those who must be protected. Please don't let my father's story be allowed to happen to another innocent American.

Thank you for your time.

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy, Chairman
Senate Judiciary Committee
"S. 2838, the Fairness in Nursing Home Arbitration Act"
June 18, 2008

I am pleased that Senator Kohl has called this joint hearing of the Judiciary and Aging Committees to examine the consequences of mandatory arbitration clauses in nursing home contracts.

The increasing prevalence of binding mandatory arbitration clauses in all manner of contracts for consumer goods and services is of great concern. The right of all Americans to access their judicial systems and their Seventh Amendment rights should not be summarily removed, yet that is what many companies are requiring their customers to do. In transactions as basic as mobile phone service or opening a brokerage account, companies are demanding that American consumers sign away their rights or forgo the goods and services. American citizens should be greatly concerned about what they are being forced to give up in their day-to-day transactions.

In the context of ordinary consumer disputes, binding mandatory arbitration clauses tilt an already uneven playing field in favor of the corporations that insist upon them. While arbitration can serve goals of efficiency and economy where parties are on equal footing, consumers should not be compelled to give up their rights to a transparent, objective process in front of neutral judge, and their rights to appeal, in order to purchase a product or service. Where the disparity in resources is so great between the average consumer and corporate America, retaining the option of a hearing before a neutral judge in a transparent court setting is crucial.

For example, a recent lawsuit brought by the City of San Francisco against the National Arbitration Forum raises serious questions about the fairness of these proceedings, and whether consumers forced into these proceedings can actually get a fair hearing. It is also unclear whether the average consumer can afford to pay for the mandatory arbitration costs that do not exist in the civil justice system. Where uncertainties like these persist, consumers should have the choice of whether to submit to binding arbitration after the dispute arises.

Preserving this choice is especially important for our elderly citizens, many of whom place enormous trust in the healthcare facilities that provide elder care. The legislation the subcommittee examines today would be a strong first step toward returning meaningful choice to the hands of consumers. That is why I have cosponsored this important bill.

senator_leahy@leahy.senate.gov
http://leahy.senate.gov/

When families and individuals are in the process of making the difficult choices for themselves and their loved ones, the last thing they deserve is to be forced into giving up their rights. I commend Senators Kohl and Martinez for leading this effort and I look forward to a meaningful discussion about this legislation.

####

National Senior Citizens Law Center
3435 Wilshire Blvd., Suite 2860 • Los Angeles, CA 90010 • 213-639-0930 • Fax: 213-639-0934 • www.nsclc.org

June 24, 2008

Honorable Herb Kohl, Chairman
Subcommittee on Antitrust, Competition and Consumer Rights
Senate Judiciary Committee
Washington, D.C.

Re: Support for S. 2838, Fairness in Nursing Home Arbitration Act

Dear Senator Kohl:

We write with our strong support for S. 2838, the Fairness in Nursing Home Arbitration Act.

Our support is based on our work with and for nursing home residents for the past 30-plus years. Admission to a nursing home almost always is a time of great trauma and confusion, both for the entering resident and the resident's family. Neither resident nor family realistically can make informed choices about arbitration at that time. Currently, arbitration agreements are being signed at the time of admission only because the resident or family member does not even notice or understand the arbitration clause, or signs the arbitration clause out of fear that otherwise the admission will be jeopardized.

There is no conceivable reason why any resident or family member would want to enter into a binding arbitration agreement at the time of admission. The Act properly prohibits pre-dispute arbitration agreements, because before the dispute arises, the resident or family cannot understand what is at stake. On the other hand, the Act allows for post-dispute agreements, since then the resident and family member can make a knowledgeable decision.

We recently conducted a study of nursing home admission agreements that revealed that the admission agreements frequent contain illegal and improper clauses. *Think Twice Before Signing: Improper and Unfair Provisions in Missouri Nursing Home Admission Agreements.* We know from the study, and from our decades of assisting nursing home residents, that as a practical matter consumers do not knowingly assent to such clauses, and that the clauses result in residents receiving inadequate care or being deprived of rights.

S. 2838 is an important step forward for nursing home residents. We urge its enactment.

Sincerely,

Eric M. Carlson
Director, Long-Term Care Project

Oakland, CA: 1330 Broadway, Suite 525 • Oakland, CA 94612 • 510-663-1055 • Fax: 510-663-1051
Washington, DC: 1444 Eye St., NW, Suite 1100 • Washington, DC 20005 • 202-289-6976 • Fax: 202-289-7224

Auto Safety Group • Congress Watch • Energy Program • Global Trade Watch • Health Research Group • Litigation Group

The Honorable Patrick J. Leahy, Chairman, Senate Judiciary Committee
The Honorable Herbert H. Kohl, Chairman, Subcommittee on Antitrust, Competition Policy and Consumer Protection
The Honorable Arlen Specter, Ranking Member, Senate Judiciary Committee
The Honorable Orrin G. Hatch, Ranking Member, Subcommittee on Antitrust, Competition Policy and Consumer Protection

June 16, 2008

Dear Chairman Leahy, Chairman Kohl, Ranking Member Specter and Ranking Member Hatch:

Public Citizen is a national non-profit organization that represents the interests of consumers and the public in matters before state legislatures, the courts, executive branch agencies, and Congress. We strongly support the Fairness in Nursing Home Arbitration Act, S. 2838, which makes pre-dispute binding mandatory arbitration clauses in nursing home admission contracts unenforceable.

Businesses place arbitration clauses in contracts for employment and for a wide range of services, including cellular phones, cable television, automobile loans, and credit cards. These provisions are grossly unfair to consumers and employees, who typically are unaware of them and cannot negotiate their terms. Arbitration clauses strip individuals of the right to hold wrongdoers accountable in court, forcing them to take disputes to a biased, private forum chosen by the business. Denying nursing home residents the ability to hold their facilities accountable for neglect and mistreatment is particularly egregious because it harms some of our nation's most vulnerable citizens. This bill would remedy that injustice.

Unlike judges, the arbitrators foisted on consumers have little incentive to follow applicable law. When parties resolve a case in civil court, there is a public decision and a record preserved for appeal. In arbitration there are no such requirements. Arbitration firms discourage the parties from requesting a written decision by charging fees for written findings of fact, conclusions of law, and reasons for an award. Moreover, the grounds on which courts may reverse arbitration awards are so limited that arbitrators are not required to employ accurate law, facts, or even valid reasoning in reaching their decisions.

Arbitration lacks transparency, a bedrock principle of civil courts since the nation's founding. California and the District of Columbia are the only jurisdictions that require public disclosure of arbitration outcomes. Individuals are often bound to secrecy as to the outcome of their cases. As a result, empirical research on consumer arbitrations is limited, hindering the public's ability to scrutinize arbitration and check abuses. Confidentiality also gives rise to a "repeat player" bias: the public has no access to prior arbitration decisions, but

215 Pennsylvania Ave SE • Washington, DC 20003-1155 • (202) 588-1000 • www.citizen.org

each business accumulates a wealth of knowledge on how to win disputes in the forum it chooses, over a contract it writes.

Arbitration is systematically biased against consumers and lacks important protections available in court. Courts are required to follow rules of civil procedure and evidence developed to ensure fundamental procedural fairness, but arbitration is not subject to these requirements. An arbitrator may fail to ensure that parties have adequate notice and opportunity to be heard, fail to provide adequate discovery, consider evidence that would be inadmissible in court, or deny the introduction of evidence that would be admissible in court. This lack of basic protections is made more troubling by arbitration companies' skewed incentives. Arbitration firms compete to be chosen by corporate parties who appear before them.[1] This gives them a strong incentive to rule on behalf of business parties. Indeed, a 2007 Public Citizen study of consumer arbitrations in California found that companies prevailed in 94 percent of cases, compared to only 4 percent of cases won by consumers,[2] and *Business Week* reported recently that one major arbitration provider, the National Arbitration Forum (NAF), even markets itself behind closed doors as providing higher recovery rates than courts.

The nursing home industry touts pre-dispute binding mandatory arbitration as a method for reducing its costs. But if arbitration reduces costs for business, it does so only by shifting these costs to the rest of society and exacting others in addition. The exorbitant payment and fee structure burdens nursing home patients because they lose the majority of arbitrations and arbitrators have broad discretion to award costs and fees as they see fit. Binding mandatory arbitration shifts medical costs to injured nursing home residents, their families, and government-provided health programs like Medicare. It also prevents victims and families from being made whole by limiting their ability to recover damages.

Industry argues that arbitration protects businesses from frivolous litigation and that it provides patients and their families the opportunity to bring claims when they could not otherwise afford representation. But consumers are free to choose alternative dispute resolution in any case, and this legislation would not change this. It would require only that companies who desire to use arbitration offer consumers a forum that they would actually *choose* instead of one that must be forced on consumers because it is biased against them. Moreover, it is contradictory to assert both that frivolous lawsuits threaten the economic viability of the nursing home industry and that patients cannot find attorneys to represent them in meritorious cases. If attorneys will not bring meritorious cases when the claims are too small, they certainly will not bring frivolous cases, in which the claims are entirely worthless. For this reason, plaintiffs' attorneys often serve as gatekeepers who prevent frivolous claims from moving forward. Nursing home trade associations have presented no evidence that frivolous litigation presents a real concern for nursing homes or taxpayers.

---

[1] See generally Robert Berner & Brian Grow, Banks vs. Consumers (Guess Who Wins), BUS. WK., June 5, 2008.

[2] PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 13–15 (2007).

The best way for long-term health care providers to avoid liability is to provide their residents with proper care. Ensuring that residents can hold nursing homes accountable for mistreatment would give nursing homes the incentive to do just that. The industry's desire to shield itself from liability through arbitration should not supersede nursing home residents' need to deter potential abuse and to obtain compensation for injuries.

As this letter makes clear, pre-dispute binding mandatory arbitration is unfair to consumers in several important ways. We oppose it in all consumer contexts, including in nursing home contracts. We strongly urge Congress to pass the Fairness in Nursing Home Arbitration Act, S. 2838.

We request that this letter be included in the record of the Committee's hearings on this legislation. Thank you for your time and consideration of our views.

Sincerely,

David J. Arkush, Director
Public Citizen's Congress Watch division

STATEMENT
Of
Kelley Rice-Schild

On Behalf Of The
AMERICAN HEALTH CARE ASSOCIATION
&
NATIONAL CENTER FOR ASSISTED LIVING

Before The

Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights
Hearing On
S. 2838, The "Fairness in Nursing Home Arbitration Act of 2008"

June 18, 2008

Thank you Chairman Kohl, Ranking Member Hatch and members of the Committee. I am grateful for the opportunity to be with you here today – and to offer the long term care profession's perspective on arbitration. My name is Kelley Rice-Schild, and I am honored to be here today representing the American Health Care Association and the National Center for Assisted Living (AHCA/NCAL).

While I am here representing the long term care industry as a member of the Board of Governors of AHCA, I am also here as an owner, operator, small businesswoman and nursing home administrator. I serve in those capacities at The Floridean Nursing and Rehabilitation Center in Miami, FL. The Floridean was founded by my great-grandmother Florence "Flori" Dean in 1944 and has been operated by a member of my family ever since. The Floridean is the oldest nursing home in Miami and serves as many as 60 South Floridians every day.

Our mission is to meet and exceed the expectations of our residents and their families by providing the highest quality care possible. Our facility is their home and we help our residents achieve and maintain their optimal levels of physical and mental health. For many of the residents, we are their family, and we hope to offer the emotional and spiritual support that is vital to their lives, as well as provide the best medical and rehabilitative care.

American Health Care Association ♦ National Center for Assisted Living
1201 L Street NW, Washington DC, 20005

In an increasingly litigious environment, my facility, along with a growing number of health care and long term care providers – including nursing facilities and assisted living residences – have incorporated arbitration clauses into their admissions materials given to residents when being admitted to the facility or residence. AHCA/NCAL supports the use of arbitration agreements as a viable option for long term care providers and their residents to resolve legal disputes. Arbitration is less adversarial than traditional litigation, produces quicker results and has been determined to be both fair and appropriate by our courts. AHCA/NCAL and our members are committed to ensuring that long term care facilities place paramount importance on the delivery of high quality care and provide a safe and secure environment for the millions of Americans residing in our nation's nursing facilities and assisted living residences. When legal concerns arise, we believe that arbitration provides a fair and timely resolution for both the consumer and long term care provider.

On behalf of the profession responsible for caring for our nation's most vulnerable citizens, I am proud of the advances we have made in delivering high quality long term care services and we remain committed to sustaining these gains in the years and decades ahead – when, as we all know, demand for long term care will by all accounts dramatically increase.

Americans are living longer and our nation's aging population is growing – many of whom have significant medical or cognitive conditions which require care in a nursing facility. Currently more than three million Americans rely on the care and services delivered in one of the nation's nearly 16,000 nursing facilities each year, and the demand for such services is going to increase dramatically every year. A March 2008 report from the National Investment Center for the Seniors Housing & Care Industry (NIC) indicates that the demand for long term care services will more than double by 2040.

The efforts and initiatives advanced by the association that I represent today seek to enhance and improve quality of care and services provided in our nation's nursing facilities and assisted living residences each day.

Quality – AHCA's First Priority

Before I address the benefits of arbitration as an alternative to litigation in resolving disputes, allow me to take a moment to assure the Committee that the troubling anecdotes presented today represent the exception, instead of the rule, within the long term care community. Long before the words quality and transparency were the catch words of the federal government and their oversight of healthcare, they were truly the compass for AHCA/NCAL and its member facilities.

Our association's long-held mission clearly states, "our goal is to provide a spectrum of patient/resident-centered care and services which nurture not only the individual's health, but their lives as well, by preserving their connections with extended family and friends, and promoting their dignity, respect, independence, and choice."

AHCA/NCAL has been working diligently to change the debate regarding long term care to focus on quality – quality of life for patients, residents and staff and quality of care for the millions of frail, elderly and disabled individuals who require our services. We have been actively engaged in a broad range of activities which seek to enhance the overall performance and excellence of the entire long term care sector. While keeping patients and their care needs at the center of our collective efforts, we continue to challenge ourselves to improve and enhance quality.

American Health Care Association ♦ National Center for Assisted Living
1201 L Street NW, Washington DC, 20005

The Facts Speak for Themselves – Quality & Outcomes Are Improving

The Online Survey, Certification and Reporting (OSCAR) data tracked by the Centers for Medicare and Medicaid Services (CMS) clearly point to improvements in patient outcomes, increases in overall direct care staffing levels, and significant decreases in quality of care survey deficiencies in our nation's skilled nursing facilities.

A few examples which highlight some of the positive trends in nursing facility care according to data tracked by CMS:

- Nationally, direct care staffing levels (which include all levels of nursing care: Registered Nurses (RNs), Licensed Practical Nurses (LPNs) and Certified Nursing Assistants (CNAs)) have increased 8.7 percent between 2000 and 2007 – from 3.12 hours per patient day in 2000 to 3.39 hours in 2007;

- The Quality Measure[1] tracking pain for long term stay residents vastly improved from a rate of 10.7 percent in 2002 to 4.6 percent in 2007 – more than a 50 percent decrease;

- The Quality Measure tracking the use of physical restraints for long stay residents dropped from 9.7 percent in 2002 to 5.6 percent in 2007;

- The Quality Measure tracking pressure ulcers for post-acute skilled nursing facility patients (many of whom are admitted to the nursing facility with a pre-existing pressure ulcer) improved by 23 percent over the course of four years, from 20.4 percent in 2003 to 15.8 percent in 2007; and

- Substandard Quality of Care Citations as tracked by CMS surveys were reduced by 30 percent in five years – from 4.4 percent in 2001 to 3.1 percent in 2006.

- In January 2006, the Government Accountability Office stated that from 1999-2005 there was a nearly 50 percent decrease in the "proportion of nursing homes with serious quality problems."

Satisfaction of patients and family members is a critical measure of quality. AHCA has recognized this vital link between satisfaction and performance, and has urged facilities to conduct such assessments for more than a decade. In recent years, we have encouraged assisted living and nursing facilities to use a nationally-recognized company, *My InnerView*, to conduct consumer and staff satisfaction surveys to establish a national database for benchmarking and trend analysis. The most recent independent survey of nursing home patients and their families released a few weeks ago indicates that a vast majority (82%) of consumers nationwide are very satisfied with the care provided at our nation's nursing homes and would rate the care as either good or excellent.

We remain committed to sustaining – and building upon – these quality improvements for the future.

---

[1] **Quality Measures** track nursing facility residents who have and are at risk for specific functional problems needing further evaluation. Improvements in these measures indicate positive trends in patient outcomes, but it is important to clarify that the quality measures do not reflect a percentage of the entire population, rather the percentage of those who are at risk and have the condition.

Culture of Cooperation Leading to Continued Improvement

Positive trends related to quality are also evidenced by profession-based initiatives including *Quality First* and the *Advancing Excellence in America's Nursing Homes* campaign – both of which are having a significant impact on the quality of care and quality of life for the frail, elderly and disabled citizens who require nursing facility care.

Quality First, which was established in 2002, set forth seven core principles that reflect long term care providers' commitment to continuous quality improvement, leadership and transparency. This profession-based initiative led not only to improvements in care and processes, but to the development of the National Commission for Quality Long-Term Care. In December 2007, the Commission released its final report which addressed four critical components of long term care – quality, workforce, information technology & financing. We encourage Congress to take the recommendations of this commission under consideration and further investigate their feasibility.

Quality First and other initiatives have been commended by former Secretary of Health & Human Services Tommy Thompson, by former Administrator of CMS Dr. Mark McClellan, and by former CMS Acting Administrator Leslie Norwalk. Last year Ms. Norwalk stated in a column she wrote for *Provider* magazine: "Nursing home providers have been on the leading edge of this quality movement. Long before hospitals, doctors, home health providers, pharmacies, dialysis facilities and others came to the table, the nursing home industry was out front with *Quality First* – a volunteer effort to elevate quality and accountability…Quality measurement has worked in nursing homes….Collaborating to measure quality of long-term care, report it, support it, and improve it – that's the best path to a high-quality, patient-centered, provider-friendly system that everyone can afford."

AHCA is a founding partner of the *Advancing Excellence in America's Nursing Homes* campaign – a coordinated initiative among providers, caregivers, consumers, government and others that promote quality around eight measurable goals. This campaign takes a step further than previous initiatives. It not only measures outcomes, but establishes numerical targets and benchmarks. It also promotes best practices and evidence-based processes that have been proven to enhance patient care and quality of life.

This voluntary initiative is working – and outcomes and processes are improving in the nearly 7,000 participating facilities. In December 2007, the campaign announced that for the first three-quarters of the campaign, there was progress in reducing the incidence of pressure ulcers in nursing homes, reducing the use of physical restraints, managing pain for long term nursing home residents, and managing pain for short stay, post-acute nursing home residents. Our association is diligently working to increase the number of facilities that actively participate in this program and embrace the concepts embodied in the *Advancing Excellence in America's Nursing Homes* campaign.

In his November 2007 testimony before the U.S. Senate Special Committee on Aging, Acting CMS Administrator Kerry Weems praised the *Advancing Excellence in America's Nursing Homes* campaign, stating, "This campaign is an exceptional collaboration among government agencies, advocacy organizations, nursing home associations, foundations, and many others to improve the quality of nursing homes across the country."

American Health Care Association ♦ National Center for Assisted Living
1201 L Street NW, Washington DC, 20005

Further, in the CMS *2008 Action Plan for (Further Improvement of) Nursing Home Quality*, the agency states that it "plan[s] to strengthen our partnerships with non-governmental organizations who are also committed to quality improvement in nursing homes...The unprecedented, collaborative [*Advancing Excellence in America's Nursing Homes]* campaign seeks to better define quantitative goals in nursing home quality improvement. The purpose of this campaign is to align the strategies of the many partners who have expressed their commitment to excellent nursing home quality."

We applaud CMS for their commitment to further enhance care quality and outcomes through this partnership of stakeholders. The effort truly embodies the culture of cooperation which is critical in effectively enhancing care and sustaining quality improvements.

NCAL also is committed to quality care and services for nearly one million assisted living residents and has developed "Guiding Principles on Quality" which serve as a roadmap for our members to ensure quality, resident-focused care delivery.

In total, the increased focus on resident-centered care, actual care outcomes, increased transparency and public disclosure, enhanced stakeholder collaboration and the dissemination of best practices models of care delivery is working. AHCA/NCAL remains committed to its long-standing practices and programs which seek to improve the quality of care for our nation's frail, elderly and disabled who require long term care services, and to enhance the quality of life for patients and caregivers alike.

Arbitration – A Fair & Efficient Alternative

In the late 1990's, the long term care profession was subject to excessive liability costs, which were exacerbated by an increasingly litigious environment. As a result, operators of nursing facilities and assisted living residences were forced into making difficult decisions including potential closure or divestiture of facilities, and corporate restructuring. In addition to pursuing state and national tort reform legislative initiatives to enable facilities to continue to operate and provide essential long term care services in a difficult environment, the profession sought alternatives to traditional litigation including arbitration. This trend was especially true in states such as Arkansas, Texas, and my home state of Florida, where state laws fostered an exponential growth in the number of claims filed against long term care providers – even those with a history of providing the highest quality care.

As a result, there was an explosion in the cost of obtaining insurance to protect operators from the risks associated with a tort environment that often encouraged unsubstantiated claims against long term care providers. This trend included significant advertising – including highway billboards – to encourage consumers to sue their long term care provider. Even following the passage of tort reform legislation in Florida in 2001, insurance is not widely available and for most operators unaffordable, which forced several companies to no longer provide care and services to the frail elderly in my home-state. Today, my facility is covered by a $25,000 General and Professional Liability policy – for which we pay $37,000 annually. To carry more insurance, even if I could afford to do so, simply makes my facility a target for litigation – despite our over-60 year history of providing nothing but the highest level of quality care.

In order to serve as a good steward of my family's business and to continue to operate in such an environment, I turned to arbitration. Arbitration is a legal process where the parties enter into an agreement to resolve disputes by an unbiased, unrelated third party. AHCA/NCAL represents the vast majority of our nation's nursing facilities and assisted living residences and supports the use of arbitration

American Health Care Association ♦ National Center for Assisted Living
1201 L Street NW, Washington DC, 20005

clauses as a viable option for long term care providers to resolve legal disputes. When legal concerns arise, we believe that fair and timely resolution – the kind that is often the product of arbitration – is in the best interest of both the consumers and their care providers. Without arbitration as an alternative dispute resolution process, I am afraid that I am only one jury verdict, or negotiated settlement from having to close the doors of The Floridean for good.

Over the course of the past ten years arbitration has become a more widely used alternative in long term care. This growth has been across the board for long term care providers – from single owner facilities like myself to national chain facilities; and for non-proprietary and for-profit organizations. As a service to our member facilities and the residents they serve, in 2002 AHCA/NCAL developed a model arbitration agreement form for possible use in the admission process.

This model agreement in no way alters the rights or remedies available to a resident under state tort law. It states in plain English that entering into the arbitration agreement is not a condition of admission into the facility. Further, the model form provides a 30-day window for the resident or their representative to reconsider and, in writing, rescind the arbitration agreement. This 30-day "review period" far exceeds the period of time found on most arbitration clauses.

AHCA/NCAL supports the use of arbitration because unlike traditional litigation, our members have experienced that arbitration is more efficient, less adversarial, and has a reduced time to settlement. As this Committee is no doubt aware, most cases are resolved through settlement. Arbitration facilitates that process. As a recent Aon Global Risk Consulting report entitled "Long Term Care – 2008 General Liability and Professional Liability Actuarial Analysis" found that, "Arbitration reduces the time to settlement by more than two months on average." It further found that "very few claims actually go all the way to arbitration [as] most claims are settled in advance."

Timely resolution of disputes is of unique importance to residents of long term care facilities and their families. Often the individuals are very frail elderly in their twilight years and it is a comfort for families to reach a settlement during their loved one's lifetime.

In addition, because it vastly reduces transaction costs, arbitration may also enable patients and their families to retain a greater proportion of any financial settlement than with traditional litigation. The same report found that "currently, 55.2% of the total amount of claims costs paid for GL/PL claims in the long term care industry is going directly to attorneys. This means that less than half of the dollars spent on liability is actually going to the patients and their families." The decreased transaction costs associated with arbitration means more of any award received goes to the party whom is most deserving – the patient or resident, not their legal representative.

"Fairness in Nursing Home Arbitration Act of 2008" – An Unfair & Inappropriate Bill

We believe that the recently introduced *Fairness in Nursing Home Arbitration Act of 2008* (H.R. 6126 and S. 2838) is a misguided attempt to restrict and weaken the Federal Arbitration Act (FAA), which has been in place for more than 80 years. The FAA appropriately recognizes the strong national interest in disputes being resolved in a forum other than the courts when both parties agree to do so. We firmly believe that this legislation and other efforts to undermine the FAA is bad public policy and a step in the wrong direction.

American Health Care Association ♦ National Center for Assisted Living
1201 L Street NW, Washington DC, 20005

Unfortunately, this debate is colored by anecdotes and misinformation perpetuated by high-profile trial attorneys who traditionally oppose any effort to bring balance to the personal injury playing field, and who give too little consideration to the harmful consequences on the long term care industry – especially to small business owners like myself - that follow from the high transaction costs of traditional litigation and the resulting financial drain on the system. In fact, in his testimony just last week before a House Judiciary subcommittee, Ken Connor, a trial attorney and witness at this morning's hearing inaccurately portrayed the manner in which arbitration agreements are presented to prospective residents and their families upon admission to the facility. While we agree that entering into a nursing facility or assisted living residence often is a time of uncertainty and apprehension, the notion that family members are threatened into signing the arbitration agreement is simply untrue. As I stated earlier, AHCA/NCAL developed a model arbitration agreement that was provided to members which clearly states that there is a 30-day "out clause" and that declining to sign the form will not have an affect on admission to the facility. At my own facility, we walk through the complicated admission process with each and every one of our residents so that they understand the many forms that they are required to sign, many of which are required by laws that this Congress has passed for their own protection. And on several occasions, potential residents of my facility or their family members have opted not to sign the arbitration agreement.

It is important for this Committee to recognize that the FAA does not inherently foster or sanction any disregard for traditional notions of fair play when it comes to entering an arbitration contract. The FAA simply requires that an arbitration agreement be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." Numerous courts across this nation have not hesitated to invalidate nursing home arbitration agreements when they have found that a representative lacked authority to act for the resident, a resident lacked the capacity to enter the agreement, or that an arbitration agreement was otherwise unconscionable, either in the substance of its terms or in the way it was presented to and signed by the resident or the resident's representative.

The *Fairness in Nursing Home Arbitration Act of 2008* needlessly discriminates against long term care providers and more importantly the patients and residents in our nation's nursing facilities and assisted living residences by eliminating their federal right to agree to arbitrate future disputes. Pre-dispute arbitration agreements are a viable legal option for long term care consumers and providers, and their use should not be eliminated by misguided policies – nor should the consumer's choice to agree to arbitrate pre-dispute be denied as is the legislation would do. It is clear that if the legislation were to become law, even residents who voluntarily chose to submit to pre-dispute arbitration would have that right to choose denied, a right that is not denied in any other consumer transaction.

A May 1, 2008, letter to Congress signed by twenty business organizations including the Business RoundTable and the U.S. Chamber of Commerce echoes our concerns with this bill – and other legislative efforts to limit the use of arbitration. The letter states, "Even though arbitration has been used to amicably resolve disputes for more than 80 years, those who wish to dismantle the arbitration system are attempting to effectively abolish all pre-dispute arbitration by using anecdotes and a handful of poorly designed or inaccurate studies to validate their unfounded claim that the system is broken."

Public sentiment is also opposed to eliminating the use of arbitration to resolve disputes. In fact, the U.S. Chamber of Commerce's Institute for Legal Reform recently conducted a national poll which found that "given the choice, voters strongly prefer [82%] arbitration over litigation to resolve any serious dispute with a company." The bipartisan survey, which was released in April 2008, also concluded that "voters

American Health Care Association ♦ National Center for Assisted Living
1201 L Street NW, Washington DC, 20005

strongly believe Congress should NOT remove arbitration agreements from the contracts consumers sign with companies providing goods and services (71%)."

Like the vast majority of Americans, AHCA/NCAL believes that legislative proposals to limit arbitration and undermine the FAA is bad public policy. We strongly support the use of arbitration as a reasonable, intelligent option for both patients and providers to help assist in the resolution of legal disputes, and aggressively oppose efforts to diminish the use of arbitration by American businesses, especially those unfairly targeting long term care consumers and providers.

Thank you for the opportunity to offer these comments on behalf of millions of professional, compassionate long term caregivers and the millions of frail, elderly, and disabled Americans they serve each day – as well as the 100 employees and 60 residents of The Floridean. I look forward to responding to your questions.

###

American Health Care Association ♦ National Center for Assisted Living
1201 L Street NW, Washington DC, 20005

STATEMENT OF RANKING MEMBER GORDON H. SMITH

Joint Hearing of the Judiciary Subcommittee on Antitrust, Competition, and Consumer Rights and the Special Committee on Aging
"S. 2838, the Fairness in Nursing Home Arbitration Act"
June 18, 2008

I want to thank Senator Kohl for holding this important hearing today and for calling together these two Committees. I also am happy to be here with my friend and colleague Senator Hatch and applaud him for his work on behalf of seniors not only in this Committee, but also as a member of the Finance Committee on which we serve together.

Nursing home quality and patient safety, as well as ensuring vulnerable groups have appropriate redress of their grievances, have long been important issues to me. I thank the panelists for being here today to discuss these critical topics. The essential work that each of our panelists does helps so many of our elderly family members age with dignity —whether that work is monitoring the care of a loved one, advocating for nursing home residents or working to ensure justice on behalf of those who have been injured.

The Federal Arbitration Act was enacted in 1925 as a means to ensure a framework for the enforcement and to determine the validity of arbitration agreements. Like our judicial system, no process is without its flaws. Therefore, since its enactment, improvements have been made to the Act to ensure the rights of citizens are protected and that they are able to fairly gain redress of their grievances.

Today, however, we are talking about a particularly vulnerable population. And when we talk about such populations, we must ensure an additional level of scrutiny to guarantee that their rights are protected, as they may not be in a position to protect themselves. I am hopeful that today's discussion will be informative for all members as we work to ensure quality care, the protection of rights and reasonable health care costs for our seniors and persons with disabilities that find care in a nursing home.

Ensuring patient safety and fair outcomes for residents and family members is a responsibility that rests with no one party or entity. It is shared by the federal and state governments, law enforcement agents, local agencies, community advocates and family members. It is a responsibility that I take very seriously, as I know my colleagues do. I believe that more must be done on the front end for all stakeholders to work more collaboratively to curb the incidence of elder abuse. We must stop abuse and neglect before it happens. We owe that to the millions of seniors who have placed their trust in our nation's long-term care system.

I would like to applaud the work Senator Kohl has done in this area, especially in regard to helping nursing homes and other facilities better identify potential bad actors in the workforce and to ensure fair treatment of individuals looking to address their grievances. It has been a pleasure to work with him on the Special Committee on Aging to explore different ways that we can combat elder abuse and improve patient quality.

In the many hearings that we have held on nursing home quality we have learned that it is essential that we find more effective ways to help poorly performing facilities operate at a much higher level of care and, if they cannot improve, consider ways that they can be phased out of the system. We cannot let the inappropriate actions of a few to undermine the trust our nation's seniors have placed in the judicial system.

I am confident that the fine panel of experts Senator Kohl has assembled today will be able to provide a fresh insight on the work that is being done in our legal system to ensure justice for our seniors and those who love them.

Thank you.

Testimony of
Lisa C. Tripp
Assistant Professor

John Marshall Law School

Atlanta, Georgia

Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights and the Special Committee on Aging

on

"S. 2838, the Fairness in Nursing Home Arbitration Act"

Wednesday, June 18, 2008

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to provide written testimony about pre-dispute binding arbitration agreements in nursing home admission contracts. I am honored to have the opportunity to explain why I believe these agreements are bad public policy and should be prohibited by Congress.

I am currently an Assistant Professor at John Marshall Law School in Atlanta, Georgia. For the six years preceding my appointment at John Marshall, I was an attorney in the Office of General Counsel for the U.S. Department of Health and Human Services (HHS). My primary duty at HHS was to try cases against nursing homes that violated the health and safety protections for nursing home residents passed as part of the landmark Omnibus Budget Reconciliation Act of 1987 (OBRA '87).

Many of our nation's nursing homes are good facilities staffed by caring, decent people and owned by parties genuinely interested in the well-being of residents. Far too many, however, are not. The danger of abuse, neglect and dangerously substandard care is particularly acute in these facilities. There is little protection for helpless residents of these facilities; they are so physically and mentally compromised that they cannot advocate for better treatment or protect themselves from harm. Many who are physically and mentally competent suffer silently. They have no where else to go and are afraid that if they speak out about deplorable conditions or treatment they will suffer the consequences.

There is an elaborate regulatory system enacted pursuant to OBRA '87 to protect residents from abuse, neglect and substandard care. Unfortunately, it has not achieved the desired ends and its shortcomings are well-documented. Abuse, neglect and substandard care still occur at alarming rates and too many facilities receive a mere slap on the wrist for egregious regulatory violations.

I am personally familiar with the shortcomings of the regulatory system. For example, I handled a case where

a sexual predator came into a facility to visit someone and sexually assaulted another resident while she sat in her wheelchair in the hallway. The facility staff discovered him doing this, chased him off, but did nothing else. The staff did not call the police or notify the state, and they did not call the resident's husband to tell him that his wife had been forced to fondle a stranger in the hallway of the facility.

Two weeks later the predator came back and victimized the same resident again. This time he took this resident into an empty room and forced her to fondle him again. He was caught before the assault could progress. The facility called the police after this incident and notified the state. For failing to call the police after an observed sexual assault, which probably allowed the second sexual assault to occur, the facility was fined just $6,000 by the Centers for Medicare & Medicaid Services (CMS).

The government's response in this case illustrates the failings of the regulatory system to adequately protect nursing home residents. Such failings have been identified by the Government Accountability Office (GAO) in its December 2005 report to Congress and by nursing home advocates.

Against this backdrop of federal regulatory ineffectiveness, the individual's ability to seek redress for harm caused by poor care becomes all the more pressing. Requiring nursing home residents to submit their claims for abuse, neglect and negligent care to arbitration does not provide them with a reasonable alternative to the American civil justice system. Arbitration does more than just change the forum for claim resolution. It imposes procedural and substantive limits on the rights of nursing home residents. Case law and the published literature suggest that it is not uncommon for pre-dispute binding arbitration agreements to impose caps on damages in excess of state law; limit discovery; require confidentiality; prohibit punitive damages, or impose heightened proof requirements on nursing home residents.

Many pre-dispute binding arbitration agreements also require residents to have their claim decided by an arbitrator selected from the American Health Lawyers Association (AHLA). Thus, instead of a jury of twelve citizens, or an impartial judge, the nursing home resident will have to pay to have her claim decided by a lawyer who very likely used to work for the nursing home industry and/or whose current income depends in part on a stream of business provided by the nursing home industry. The conflict of interest is so obvious that it requires no explication.

Some may claim that AHLA arbitrators are just as fair as judges and juries, but this claim merely points out another troubling aspect of arbitration: it is a virtual black hole. Because arbitrations are private, confidential proceedings, the public has no way of knowing whether they are conducted in a procedurally fair manner or whether the claims reach a just outcome. This lack of transparency is particularly troubling since most of the claims for abuse, neglect, and substandard care are occurring at facilities that collectively receive billions of taxpayer dollars. Almost 90% of all nursing homes in this country receive funding from Medicare and Medicaid. It is simply bad public policy to allow these claims to disappear from the courts and the public scrutiny they provide when the federal government's own regulatory oversight mechanism is so flawed and the federal enforcement hearings are closed to the public.

Advocates for pre-dispute binding arbitration frequently claim arbitration is necessary because the nursing home industry is battered by unscrupulous plaintiffs' attorneys who file frivolous claims and extort money from helpless nursing home operators. That claim was recently refuted by an unlikely source: a nursing home industry defense lawyer. In 2007, John Gillespie, who at the time was a partner at Broad and Cassel (a nursing home defense firm in Florida), wrote a telling article about the true state of nursing home litigation

and the real purpose of pre-dispute binding arbitration. He stated that tort reform legislation in Florida had caused a significant reduction in nursing home litigation in that state. He noted that "lawsuits in 2003 were down 17% compared to 2000, and in five studied central Florida counties, lawsuits in 2003 were at a four-year low." He also expressly rejected the notion that the suits filed were frivolous, stating, "[n]one of this is to suggest that the cases brought did not have merit or were frivolous. President Bush speaks of 'junk lawsuits' but the empirical data to support that charge in the nursing home context is lacking."

Mr. Gillespie went on with surprising candor to admit that pre-dispute binding arbitration agreements in nursing home admission contracts are helpful to the industry because they are "clubs" that nursing homes can use in their fight against plaintiffs' lawyers. A copy of Mr. Gillespie's article is attached as Exhibit A to my testimony. The last thing already vulnerable and violated senior citizens need is a legal "club" precluding a pursuit of their rights.

Before I close, I would like to explain how I became interested in this issue. In January 2006, I attended a Georgia Health Care Association conference where lawyers for the nursing home industry were giving a presentation on arbitration agreements. In response to a question about what to do if someone did not want to sign an arbitration agreement, a lawyer told the crowd that people who did not want to sign these agreements were troublemakers who should not be admitted to their facilities.

Moments later the same lawyer went on to explain how ubiquitous arbitration agreements were and how he had indignantly refused to purchase a car until the automobile dealer agreed to strike the binding arbitration provision from the financing documents. I was taken aback by this lawyer's callous approach to the admission of the elderly to nursing homes in juxtaposition with his disdain of arbitration agreements when they applied to him.

During the question and answer period I asked this lawyer why he would advise excluding elderly people who needed nursing care from a facility because they refused to sign away their right to trial when he was so offended when asked to do the same thing when purchasing a car. He expressed annoyance at the question but never answered it.

Considering that I was the only government lawyer in an audience of nursing home industry workers, I expected a negative response to my question afterward. Instead, several nursing home employees came up to me and said they were glad I spoke up and said what I did. One in particular told me that part of her job was to admit new residents to her facility. She said that the day that people admit their parent or loved one to a nursing home is often filled with overwhelming sadness. Many times the entire family is crying. She told me she felt terrible, on a day like that, asking people to sign arbitration agreements.

Her words stayed with me and I could not agree more with what she said. To make such a demand of people who in many ways are at their physically and mentally weakest, enduring the emotional turmoil that surrounds admission to a nursing home, is at best coercive; at worst, predatory. Allowing these agreements is inconsistent with the life- and dignity-affirming federal nursing home reform laws passed as part of OBRA '87, and inconsistent with any society that values its elderly and protects them from exploitation.

THE NUTS AND BOLTS OF NURSING HOME ARBITRATION AGREEMENTS

By John R. Gillespie, Jr.
with assistance from AndrewUlloa

Imagine finding yourself in the position of responding to a substantial litigation judgment or spending limited resources on patient care. Nursing home administrators have increasingly been forced into that conundrum, making the impossible choice between meeting legal obligations and judgments and providing for those entrusted to their care. During the decade of the 90's and beyond, nursing home operators were too often forced to divert precious operating capital to satisfy judgments which sometimes seem to be detached from reality. Stories of jury manipulation are legendary and frequently based on reality. During one 12-month period in 2003 and 2004, one Florida firm that calls itself a pioneer in nursing home litigation racked up $64 million in jury verdicts. This litigious climate has caused operators and industry representatives to call for legislative change and, in some cases, those calls have been answered. But too often, nursing home operators feel the proverbial target on their backs compounded by an inability to secure meaningful liability insurance.

This gloomy climate has caused the nursing home industry to look for relief outside of the state capitols as well. One approach is to limit access by aggrieved residents and their survivors to overly sympathetic juries with no knowledge of the challenges faced by facilities in balancing care needs and budgetary constraints. In Florida, the most successful approach to allowing resident claims to be handled in a reasonable businesslike forum is the use of arbitration.

This article focuses on the use of arbitration by Florida nursing homes and, in particular, the arbitration clauses which facilitate the arbitration alternative to traditional jury trial litigation. Because your authors practice in Florida, the focus of this article will be Florida law. However,

FTL1\HEALTH\211334.1
8/22/2007 10:59 AM

if you are operating in another state, we are hopeful that the general principles discussed here will at least give you some food for thought and perhaps stimulate some discussion of arbitration as a viable alternative to address what the industry has identified as its most immediate crisis.

Let us begin by discussing what we know and what we do not know. We know that awards in nursing home negligence cases have risen dramatically. In 1987, the mean award in a nursing home negligence case was $238,285. By 1998 that number was up to $1.3 million. A 2003 study conducted by researchers at Harvard University's School of Public Health estimated that compensation settlements and judgments against Florida nursing homes amounted to $1.1 billion in 2001. Another Florida study by Aon Risk Consultants estimated that the annual cost per occupied bed related to litigation costs and payments was $10,480.

Since legislative reform effective in late 2001, the news is not quite so bad. Studies have shown that lawsuits in 2003 were down 17% compared to 2000, and in five studied central Florida counties, lawsuits in 2003 were at a four-year low. None of this is to suggest that the cases brought did not have merit or were frivolous. President Bush speaks of "junk lawsuits" but the empirical data to support that charge in the nursing home context is lacking. However, just as highly specialized and skilled plaintiff's lawyers use the legal resources available to them, the adversary system requires their targets, the nursing home facilities and their operators, to use all the legal clubs in their bag as well. One such club is arbitration.

All of the evidence supporting the use of arbitration as an alternative to traditional litigation in the nursing home context is anecdotal. As a general proposition, attorneys frequently representing facilities prefer arbitration to jury trials. We can also draw a similar conclusion from the fact that the same highly specialized plaintiff's lawyers fight arbitration tooth and nail. One of the well known advantages of arbitration, confidentiality of the

proceedings and results, also makes it impossible to track statistical results so that studies such as the Harvard School of Public Health described above are difficult, if not impossible. But until someone proves the proposition, operators are better off in arbitration, and defendants can and probably should look to routing claims out of court and to arbitration.

The genesis of arbitration is the agreement to arbitrate. The arbitration agreement may be incorporated into a more general residency agreement or may be a stand-alone contract. But in either event the agreement to arbitrate must be conspicuous. Burying an arbitration provision in the small print like the excess mileage charge in an auto lease is a sure way to end up in a courthouse and not in arbitration. We recommend to our clients that the arbitration provision be in a bold-faced type, at least two font sizes greater than the language before and after the section on arbitration.

It is not enough that an agreement to arbitrate be conspicuous if it is not clear and unambiguous. In other words, no matter how conspicuous, a poorly written provision, which despite its size and bold-faced presentation, does not adequately communicate the significance of the resident's waiver of his or her right to jury trial, and is going to be unenforceable. To be clear and unambiguous, the arbitration provision must communicate that the signing resident is giving up or waiving the right to trial by jury and the right to institute a case for damages in the appropriate court. Rather, any action for damages relating to care or treatment or any other matter relating to the residency agreement or the residents' residency at the facility will be resolved by arbitration. The agreement should also emphasize that the results of arbitration are binding. These concepts are key to an enforceable arbitration provision.

The presentation of the arbitration concept and this particular provision is also important. The conspicuous, clear and unambiguous arbitration provision should be pointed out by the

intake person supervising the execution of the residency agreement. She or he should be prepared to answer questions regarding the arbitration provision, perhaps using a Frequently Asked Questions script or FAQ. As an alternative, we have suggested to clients that they create a videotape or DVD explaining the various subparts of the residency agreement, including the arbitration provision. We believe this would be effective evidence against a claim that the provision was buried in the text or that the executing resident or guardian was told not to worry about the arbitration clause. We have all heard, "You can lead a horse to water but you can't make him drink," and it is true. None of our clients have done as we suggested and made the tape or DVD so we do not have any hard evidence but that does not diminish our enthusiasm for this suggestion. It is also crucial that the executing individual be given time and a reasonable opportunity to read, study and consider the residency agreement and arbitration provision.[1]

Absence of duress or coercion is of tantamount importance as well. If it is the policy of the facility that arbitration is non-negotiable, then while that may be communicated to the prospective resident, the suggestion of duress and coercion is muted by providing a list of comparable, alternative facilities in the area. Thus, some of the pressure to agree "or else" is eliminated when the contracting individual is presented with potential options. It is less "take it or leave it" than "you have a choice."

As for the arbitration provision itself, if it is found to be unconscionable or unreasonable it will not be enforced. For example, if the arbitration clause calls for the arbitration hearing to take place in a foreign jurisdiction it will be deemed unenforceable.[2] Courts will not enforce a contract that is so difficult or frustrating that it effectively eliminates a plaintiff's ability to seek a legal remedy.

Courts are likewise wary of agreements that, by the designation of a specific arbitrator or very limited pool of potential arbitrators, appear to create a stacked deck. In Florida, the American Health Lawyers Association (AHLA), a commonly designated pool for arbitrators has come under criticism as a "puppet for the health care and long term care industries," more likely than not to rule in favor of the nursing home.[3] Although it is not necessarily unreasonable for a facility to designate in its arbitration provision a limited pool of potential arbitrators, it must do so carefully because the larger the pool, the less likely that the agreement will be deemed unconscionable.

Some arbitration provisions define a different standard of proof than is required by state law. For example, while the general law of the state may provide for proof of fault by a preponderance of the evidence, the agreement could call for proof by clear and convincing evidence. This is dangerous and not recommended. Arbitration provisions should not attempt to abrogate existing state law or risk being deemed unenforceable.[4]

Also dangerous territory is any effort to limit damages otherwise provided by law. Clauses purporting to limit non-economic damages, waive the right to exemplary or punitive damages, or even disallow claims for attorney's fees otherwise provided for by statute have all been found to be unenforceable.[5 6] Because the limiting language of arbitration provisions has so often been found to void the entire agreement to arbitrate and waiver of jury trial, it is advisable to provide for severability. Simply put, this means that by the contractual language, in the event some provision of the agreement is rendered unenforceable for any reason, the balance of the agreement survives.[7] In practical terms, a nursing home facility or its attorney would be wise to number or bullet the provisions of the arbitration agreement, and separate different elements of the contract into easy to read and understandable sections. If a court is to find that some part of

the contract is null and void, it will do so while leaving the balance of the arbitration provision intact.

While challenging, an enforceable arbitration agreement can be crafted by a skilled and fair-minded draftsman who resists the temptation to overreach. Otherwise, overreaching or attempting to deny fundamental rights of recovery under any guise will be an exercise fraught with danger and, more than likely, doomed to ultimate futility.

Now that the facility has carefully drafted its arbitration provision and is prepared to explain it during the admission process, another question often arises. Who may sign the agreement - whether the arbitration agreement is incorporated into the larger residency agreement or is a stand alone document? Until there is further clarification by the Courts, this is an uncertain area.

In Florida, an individual may delegate certain care decisions to a healthcare surrogate. It was generally assumed in the industry that the healthcare surrogate had the statutory authority to execute an admission contract which included an arbitration provision. However, at least one Florida intermediate appellate court has held to the contrary. Finding that healthcare decisions and a decision to waive the constitutional right to trial by jury are fundamentally different, the Court held that a properly designated healthcare surrogate does not have the actual or implied authority at agree to an arbitration provision.[8] In another case exploring a similar issue, the same Florida appellate court held that under the broad language of a power of attorney, a husband has the requisite authority to enter into an arbitration agreement on behalf of his wife. However, the Court was careful to point out that its decision was based on the particular language of the power of attorney which specifically provided for the ability to enter into arbitration agreements.[9] Whether a spouse acting as a "natural guardian" could effectively enter into an arbitration

agreement for an incapacitated prospective resident seems to be an open question under Florida law, the Courts have held that in some instances, a parent can enter into a binding arbitration agreement on behalf of a child.[10]

Thus, the authority of a third party to execute an arbitration provision on behalf of a prospective resident is subject to a case-by-case analysis. On the State of Florida law, as of this writing, it appears that absent specific power of attorney language, appointment of a guardian for the incapacitated prospective resident, while unpleasant and impractical, may be the approach with the highest likelihood of eventual success.

On a related note, it is also important that an otherwise authorized individual signing the contract on behalf of the incapacitated prospective resident sign in his or her representative capacity. For example, a guardian should execute the document "as guardian for" and, when signing under a power of attorney, "as attorney-in-fact."[11] It is also sensible to address this potential in the agreement itself with an express provision warranting that the individual executing the agreement has the capacity to do so. As with everything else in the residency agreement, this provision must be clear and understandable.

Sometimes a question arises about implementing an arbitration provision and whether a facility can effectively bind existing residents. This is a difficult issue because it involves all of the considerations applicable to a new resident - clarity, accurate information, freedom of choice and so forth, but the element of duress is more difficult and there is the added element of new consideration.

As for duress, it would seem that a strong argument could be advanced that an existing resident was coerced into the arbitration agreement when faced with having to move, leaving behind familiar surroundings, known caregivers, friends and acquaintances for the uncertainties

of a new facility. However, until these issues are litigated and appealed, there are no clear cut answers.

It is clear, however, that any new agreement to arbitrate must be accompanied by new consideration. A modification to an existing contract, whether a contract to mow the lawn or to provide nursing home residency and services must be supported by mutual consideration. In non-legal terms, both parties to the new agreement or modification must get something out of it. The facility obviously gets what it wants, the agreement to arbitrate. But what about the consenting resident? Surely an argument can be made that continued residency is a benefit that might be supporting consideration but where exceptions are made, that argument loses its luster.

Finally, what must be done to protect the integrity of an otherwise enforceable arbitration agreement? Like any of the rights and benefits of any contract, they can be waived. The most common path leading to a waiver of arbitration is action by the defendant which is inconsistent with the right to insist on arbitration. Generally speaking, any actions which indicate the defendant's intent to proceed with traditional litigation as opposed to arbitration will foreclose a later motion to move the case to arbitration.[12] Such an inconsistent action can be as simple as filing a defensive motion without addressing arbitration, or serving an answer before moving to compel arbitration. A good rule of thumb is to raise arbitration at the earliest possible opportunity and seek a court order to arbitrate without delay.[13] Otherwise, all of the efforts to prepare an enforceable agreement, to provide fairness in its execution and uniformity in its application, will be for naught.

In conclusion, we know empirically that nursing home resident claims have been on the rise for the last two decades. Some states, notably Florida, have fashioned legislative relief for overburdened facilities, but the problem of liability suits and, more particularly, the financial

ability to respond continue to challenge and threaten the nursing home industry. There are several approaches that have been tried in efforts to protect facilities and their owners - corporate restructuring and insulation, asset protection schemes and alternative dispute resolution such as arbitration.

Agreements to arbitrate necessarily carry with them a waiver of the rights of generalized access to the courts and trial by jury. Thus, such agreements will receive a high level of scrutiny and may, in some courts, be met with skepticism. However, properly drafted, executed and implemented, an agreement to arbitrate is enforceable under Florida law and the laws of most other states.[14] Designing an arbitration approach to resident dispute resolution requires thoughtful work and diligent implementation but it can be done and, if the anecdotal evidence is a fair indicator, it is worth the effort.

John Gillespie is a partner in the Fort Lauderdale office of the Florida law firm, Broad and Cassel, which has about 180 lawyers in eight offices across the state. A member of the Firm's Commercial Litigation Practice Group, he has more than 30 years of trial experience, frequently representing CCRCs and skilled nursing facilities in various types of litigation. He can be reached at 954.764.7060 or jgillespie@broadandcassel.com.

Andrew Ulloa is a third-year law student at the University of Notre Dame Law School, and served as a law clerk for Broad and Cassel.

---

[1] *See Bland ex rel. Coker v. Healthcare and Retirement Corp. of America*, 927 So.2d 252 (Fla. App. 2 Dist., 2006).
[2] *See Northport Health Services v. Raidoja*, 851 So.2d 234 (Fla. App. 5 Dist., 2003).
[3] *See Briarcliff Nursing Home v. Turcotte*, 2004 WL 1418698 (Ala., 2004)
[4] *See Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773 (Fla. App. 4 Dist., 2007) (An arbitration agreement designated arbitration by the AHLA, which requires a "clear and convince evidence" standard. However, the Florida Statutes called for a "preponderance of evidence," and thus the court found the arbitration agreement to be unenforceable.).
[5] *See Romano v. Manor Care, Inc.*, 861 So.2d 59 (Fla. App. 4 Dist., 2004) ("The agreement would specifically deprive the resident of remedies that the legislature felt were important to the reduction of elder abuse in nursing homes."). *See also Lacey v. Healthcare and Retirement Corp. of America*, 918 So.2d 333 (Fla. App. 4 Dist., 2005). *See also SA-PG-Ocala v. Stokes*, 935 So.2d 1242 (Fla. App. 5 Dist., 2006).
[6] *See Prieto v. Healthcare and Retirement Corp. of America*, 919 So.2d 531 (Fla. App. 3 Dist., 2005) (An arbitration agreement may not limit discovery by the plaintiffs.).
[7] *See Alterra Healthcare Corp. v. Linton ex rel. Graham*, 953 So.2d 574 (Fla. App. 4 Dist., 2007) (An arbitration agreement was deemed invalid because the clause limiting damages was indistinguishable from the remainder of the contract, and thus necessitated the dissolution of the entire contract.).

[8] *See Blankfield v. Richmond Health Care Inc.*, 902 So.2d 296 (Fla. App. 4 Dist., 2005).
[9] *See Alterra Healthcare Corp. v. Bryant ex rel. Bryant*, 937 So.2d 263 (Fla. App. 4 Dist., 2006).
[10] *See Global Travel Marketing, Inc. v. Shea*, 908 So.2d 393 (Fla. 2005).
[11] *See Fletcher v. Huntington Place*, 952 So.2d 1225 (Fla. App. 5 Dist., 2007).
[12] *See Williams ex rel. Williams v. Manor Care Inc.*, 923 So.2d 615 (Fla. App. 2 Dist., 2006).
[13] *See Bonati v. Clark*, 2007 WL 865828 (Fla. App. 2 Dist., 2007).
[14] *See* Binding Arbitration Clauses in Nursing Home Admissions Agreements: Framing the Debate, 14 Elder L.J. 453 (2007).

Testimony of Stephen J. Ware
Professor of Law
University of Kansas
June 18, 2008

Joint Hearing on "S.2838, the Fairness in Nursing Home Arbitration Act"

Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition and Consumer Rights
And
Senate Special Committee on Aging

Chairman Kohl, Ranking Member Hatch, Ranking Member Smith and Members of the Judiciary and Aging Committees. Thank you for inviting me to testify. My name is Stephen Ware, and I am a Professor of Law at the University of Kansas. I speak to you today, not on behalf of my university, but as an individual scholar who specializes in arbitration law.

I have written two books on arbitration and 20 arbitration articles in scholarly journals, as well as several arbitration-related articles in non-academic publications. Within the field of arbitration law, I have devoted special attention to the arbitration of disputes involving consumers and other ordinary individuals. In fact, I have devoted much of the last 15 years of my professional life to researching the law, economics and policy of such arbitration. Based on this experience, I oppose S. 2838 because I believe it would tend to harm those its aims to help, that is, nursing-home residents and their families.

The Fairness in Nursing Home Arbitration Act (S. 2838) would prevent courts from enforcing pre-dispute arbitration agreements between a long-term care facility (such as a nursing home) and a resident of a long-term care facility or anyone acting on behalf of such a resident. I expect that enactment of this bill would largely end arbitration of disputes between such parties.

S. 2838 Would "Gut" Arbitration of Nursing-Home Disputes

During a recent hearing on the House version of The Fairness in Nursing Home Arbitration Act (H. R. 6126) Representative Hank Johnson stated that the bill "would not gut arbitration as an alternative dispute resolution; it would simply bar pre-dispute mandatory arbitration agreements in nursing home agreements."[1] This sets up a false choice. In fact, the most likely result of barring pre-dispute arbitration agreements is to "gut" arbitration. That is because arbitration almost never occurs except as a result of pre-dispute agreements. If those agreements are gone, then so is nearly all arbitration. To understand why, requires stepping back to see the big picture.

[1] *Hearing on H.R. 6126, the "Fairness in Nursing Home Arbitration Act of 2008" Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2008) (statement of Rep. Hank Johnson), *transcript available at* 2008 WL 2381657.

Litigation in the court system is the default process of dispute resolution. Parties can contract into alternative processes of dispute resolution, but if they do not do so then each party retains the right to have the dispute resolved in litigation. By contrast, a dispute does not go to arbitration unless the parties have contracted to have an arbitrator resolve that dispute.[2] In other words, arbitration binds only those who contracted for it.[3]

A contract for binding arbitration can be made before or after a dispute arises. In rare instances, parties agree to arbitrate a dispute that has already arisen between them. Far more commonly, the agreement to arbitrate is formed prior to any dispute. Contracts of all kinds include clauses obligating the parties to arbitrate, rather than litigate, disputes arising out of or relating to the contract. These are pre-dispute arbitration agreements.

Critics of pre-dispute arbitration agreements involving ordinary individuals (such as nursing home residents and their families) argue that arbitration must be bad for such individuals if businesses (such as nursing homes) obtain individuals' consent to arbitration through pre-dispute form contracts in which the arbitration clause is unlikely to be the focus of attention.[4] The argument continues by suggesting that if arbitration really was good for them, individuals would choose it post-dispute, when they have had time to consider (perhaps in consultation with a lawyer) the pros and cons of arbitration versus litigation. According to this view, only post-dispute arbitration agreements should be enforced. As explained below, this view is simplistic and erroneous.

Arbitration's Lower Process Costs Benefit All Concerned (Except Lawyers)

Available empirical data indicates that arbitration tends to have lower process costs than litigation.[5] By "process costs," I refer to the time and legal fees spent on

---

[2] Here, I am speaking of the contractual, binding arbitration at issue in the nursing-home context. By contrast, non-binding, court-annexed arbitration is an entirely different animal. *See* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 339-41 (2d ed. 2007).

[3] In this important sense, arbitration is not "mandatory" but litigation is. Parties who never contracted to be bound by the results of litigation may be lawfully subjected to binding litigation. By contrast, parties who never contracted to be bound by the results of arbitration may not be lawfully subjected to binding arbitration. To call arbitration arising out of form contracts "mandatory" is inaccurate rhetoric. *See* Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 40-44 (2003); IAN R. MACNEIL, RICHARD E. SPEIDEL, THOMAS J. STIPANOWICH, G. RICHARD SHELL, FEDERAL ARBITRATION LAW § 2:36 n.5 (1995) (using the term "mandatory" to describe arbitration resulting from pre-dispute agreements "is extremely confusing language because it ignores altogether the consensual element in contracts . . . . [I]ts usage resolves linguistically the issues of the reality of consent and the effect to be given to consent by fiat, rather than by analysis revealing the nature of the issues.")

[4] *See* Stephen J. Ware *The Case for Enforcing Adhesive Arbitration Agreements - with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 262 n.21 (2006) (citing those who make this argument).

[5] *See* Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 753-55 (2001) (citing and summarizing studies); Peter B. Rutledge, *Arbitration – A Good Deal for Consumers: A Response to Public Citizen* 22-24 (2008) (refuting Public Citizen's charge that "Arbitration often costs consumers more than court.") By contrast, Dr. Hall provided no empirical data to support the dubious assertion that "[a]rbitration usually is extremely

pleadings, discovery, motions, trial or hearing, and appeal.[6] Lower process costs obviously benefit a nursing home resident and the resident's family to the extent they (or their lawyer) bear those costs. Lower costs to plaintiffs increase access to justice, especially in smaller cases for which it can be difficult to attract a lawyer.[7] In addition, lower process costs paid by nursing homes also benefit others to the extent that nursing-home costs are ultimately paid for by residents and their families or by the taxpayers through the Medicare and Medicaid programs. The only harm from process-cost savings comes to those (like lawyers) who sell process, but even this is part of the overall social benefit from reducing the costs of processing cases.[8]

Limiting arbitration so that only post-dispute agreements are enforced would fail to produce all the social gains produced by enforcing pre-dispute arbitration agreements. That is because arbitration will not occur nearly as often if an enforceable arbitration agreement can only be made after a dispute arises. Neither party is likely to agree, post-dispute, to arbitrate claims for which arbitration is expected to be less favorable to that party than litigation would be.[9] Thus post-dispute arbitration agreements are unlikely to occur even if both parties and their lawyers expect that the process costs (for both sides) are lower in arbitration than litigation. By contrast, pre-dispute agreements are formed at a time when both parties are uncertain about whether there will be a dispute and, if so, what sort of dispute it will be.[10] That is the time when both sides have an incentive to choose the forum that reduces process costs.

---

expensive for consumers." *Hearing on H.R. 6126, the "Fairness in Nursing Home Arbitration Act of 2008" Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2008) (statement of William J. Hall, Board Member, AARP), *available at* 2008 WL 2359190.

[6] A separate question is whether the outcomes of arbitration (who wins, how often and how much) are systematically different from the outcomes of litigation.

[7] As plaintiffs' attorney Kenneth L. Connor acknowledged during the subcommittee hearing on H.R. 6126, "lawyers are businesspeople too, and they simply, from an economic feasibility standpoint, can't handle a case that is not likely to yield back a return to the client and to the lawyer who represents him." *Hearing on H.R. 6126, the "Fairness in Nursing Home Arbitration Act of 2008" Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2008) (response of Ken Connor to question from Ranking Member Chris Cannon), *transcript available at* 2008 WL 2381657. Available research bears this out. *See, e.g.,* William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 44 (reporting, based on survey of employment lawyers, that before accepting a case lawyers required, on average, minimum provable damages of $60,000 to $65,000 and a retainer of $3,000 to $3,600).

[8] "To the extent that the costs of adjudication are reduced, disputes can be resolved more efficiently, *i.e.*, fewer resources need to be devoted to adjudication. Some bright young people who would have become trial lawyers enter other fields instead. Whatever those people produce is a gain to society from the cost savings of arbitration." Stephen J. Ware, *Arbitration under Assault: Trial Lawyers Lead the Charge*, CATO Institute Policy Analysis no. 433, April 18, 2002, at 9, http://www.cato.org/pubs/pas/pa-433es.html.

[9] Several commentators have made this point with respect to employment arbitration. *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567-68 (2001); David Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 57 (2003); Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 314 (2003) .

[10] Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 746 (2001).

This point about arbitration generally also applies to arbitration of nursing-home disputes in particular. After a dispute arises, the nursing home can consult its lawyers to assess whether arbitration or litigation will be more favorable to its side of the case. If litigation is more favorable than arbitration for the nursing home then the nursing home will not agree to arbitration if proposed by the nursing-home resident (or resident's family) post-dispute. Conversely, after a dispute arises, the resident and/or resident's family can similarly consult one or more lawyers to assess whether arbitration or litigation will be more favorable to their side of the case. If litigation is more favorable than arbitration to them then they will not agree to arbitration if proposed by the nursing home post-dispute.

Enforcement of Pre-Dispute Arbitration Agreements is Good Policy

To reiterate, post-dispute agreements to arbitrate nursing home disputes are unlikely to be more than rare events. This rarity is not due to any fault of arbitration. This rarity is due to litigation's status as the default process of dispute resolution. Once a dispute arises, parties are unlikely to contract out of the default process because of one party's self interest in whatever tactical advantages it can gain from litigation, whether from an easily-impassioned jury or expensive and time-consuming pre-trial discovery and post-trial appeals. Only a naively simplistic view would deny that disputing parties and their lawyers assess the case before them and try to maneuver into a process that is expected to advantage their side. That sort of self-interested maneuvering is inherent in the adversary system and lawyers might not be fully serving their clients if they did not engage in it.

In sum, the enforcement of pre-dispute agreements to arbitrate is needed to produce most of the social benefits resulting from arbitration's lower process costs. Enforcement of these agreements allows nursing-home residents and their families to compel arbitration of disputes when, post-dispute, the nursing home would prefer litigation. Similarly, it allows nursing homes to compel arbitration of disputes when, post-dispute, the resident (or resident's family) would prefer litigation. Allowing each side to compel the other to perform the contract is good policy for the same reason that enforcing contracts generally is good policy. Enforcing contracts constrains opportunistic behavior and allows people to rely on each other's promises. These policies are especially important with respect to contracts in which parties promise to use a relatively quick and efficient dispute-resolution process like arbitration.

Current Law Protects Against Unfair Arbitration Agreements

Finally, I note that current law does not require courts to enforce all arbitration agreements. The Federal Arbitration Act allows courts to invalidate unconscionable arbitration agreements.[11] And this is not just a theoretical protection. Each year, there

[11] 9 U.S.C. § 2 (arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.")

are many cases in which courts hold particular arbitration agreements unconscionable.[12] Among these are cases involving nursing homes.[13] So we currently have a very sensible system in which courts determine, case by case, which arbitration agreements should not be enforced and which provide for a fair process and so should be enforced. As every case is different and arbitration agreements can be written in a wide variety of ways, I believe these issues are better handled on a case-by-case basis in the courts, rather than with the overly broad brush of legislation. In short, I recommend that you allow arbitration law to continue to develop in the courts, rather than enact a statute such as S. 2838.

Thank you very much for your time and attention. I would be happy to answer any questions that you may have.

Stephen J. Ware
1535 West 15th Street
Lawrence, KS 66045
785-864-9209
ware@ku.edu

[12] *See* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 61-65 (2d ed. 2007) (collecting representative cases).
[13] *See* Romano ex rel. Romano v. Manor Care, Inc., 861 So.2d 59 (Fla. Ct. App. 4 Dist. 2003); Howell v. NHC Healthcare-Fort Sanders, Inc., 109 S.W.3d 731 (Tenn. Ct. App. 2003); Woebse v. Health Care & Ret. Corp. of Am., No. 2D06-720, 2008 Fla. App. LEXIS 1446 (Fla. Dist. Ct. App. Feb. 6, 2008).

Lake Terrace Office Building
121 East Wilson Street, Suite L200
Madison, WI 53703
608-257-0125 FAX: 608-257-0025

WHCA
Wisconsin Health Care Association

June 18, 2008

The Honorable Herb Kohl
United State Senate
Washington, DC 50510

RE: Opposition to Senate Bill 2838

Dear Senator Kohl:

The Wisconsin Health Care Association is the state's largest and oldest long term care association. It represents approximately 190 of Wisconsin's for-profit, non-profit, and government owned skilled nursing facilities providers, and a growing number assisted living providers through the development of its Wisconsin Center for Assisted Living (WiCAL) division. WHCA strongly opposes *The Fairness in Nursing Home Arbitration Act (S. 2838).* That opposition is founded on our conclusion the remedy the bill seeks to impose for the alleged unfair practices of a few, creates an unwarranted and unjust result for all.

WHCA/WiCal is committed to ensuring that Wisconsin's long term care facilities remain national leaders in the quality of care and life they provide to the residents they serve. If we believed the arbitration agreements or process unfairly impacted our residents, we would publicly oppose their use by our member facilities. However, we are not aware of any credible evidence that would indicate that, if commonly recognized best practices are followed, arbitration agreements, processes or decisions afford any systemic bias to any party.

Arbitration agreements have not been widely used in Wisconsin nursing homes and assisted living facilities. However, interest in their use is growing. As liability and litigation costs continue to skyrocket, there is a compelling need to explore more cost effective means to resolve legal controversies. Mediation and arbitration have proven to be efficient, fair, and effective forums for resolving such disputes. They are increasingly being viewed as rational and fair alternatives to expensive lawsuits that will better assure facility resources needed to support quality care and improvement are not diverted to fund inherently slow moving and expensive legal proceedings in the state's overburdened court system.

In an April 2008 Press Release, your office announced the introduction of *The Fairness in Nursing Home Arbitration Act.* You asserted nursing home residents "must not lose their

right to hold nursing homes accountable in the event of abuse or neglect." We agree. The release also advised that S. 2838 protects individuals who unwittingly sign away their constitutional rights to have their case heard by a judge or a jury. We cannot agree with that assessment. We believe the reach and impact of this legislation goes much further than is warranted, feasible, or just. Indeed, the cure the bill offers is wrought with more peril than the problem it seeks to treat.

If best practices are followed, instances in which seniors might unwittingly enter into an arbitration agreement would be non-existent or exceedingly rare. (Moreover, model agreements we are aware of allow an individual an opt out period for any or no reason reason). However, S. 2838 would for all intents and purposes eliminate arbitration under the Federal Arbitration Act (FAA) as an accessible and cost effective option for all long term care facilities and their residents. As a result of this legislation, the remedy to address an unfairness experienced by a few will provide an injustice for all. These two wrongs do not make a right.

In WHCA's view, the need for this legislation is debatable as well. The FAA and the legal system currently afford individuals protections and the right to challenge the practices with which S.2838 is presumably concerned. Indeed, the FAA does not foster or condone the disruption of any traditional notions of fair play when it comes to entering into arbitration agreements. If an individual believes an arbitration agreement is unfair or was unfairly presented he or she can challenge the validity in court. Similarly, either party can seek judicial review of the fairness of the arbitration proceedings. Courts possess and have exercised authority to refuse to enforce agreements or awards deemed unfair.

WHCA is not aware that the execution of an arbitration agreement is being required as a condition of admission to any long term care facility in Wisconsin. If such a practice is being pursued we would suggest it would taint, if not invalidate, the enforceability of arbitration agreement. Indeed, all arbitration agreements we are cognizant of constitute free standing documents that are separately discussed and executed, so as not to be confused with the provisions of the laborious admission agreements that are mandated under state and federal regulations..

However, if it is established that arbitration agreements are (1) misrepresented or mis-presented by being woven into the fabric of facility admission agreements, or (2) being required as a prerequisite for a resident admissions to a facility, we would support legislation to expressly prohibit those practices and invalidate any agreements signed under such circumstances.

What we cannot support is the remedy S. 2838 has advanced – requiring that agreements to arbitrate disputes be made after a dispute has arisen. The practical effect of this procedural mandate would be to destroy residents' and facilities' substantive right to access and utilize the FAA as an effective alternative forum for dispute resolution. Indeed, post-dispute agreements are almost never formed and represent and unfeasible and inferior alternative to pre-dispute arbitration agreements. They are infeasible for a myriad of reasons. The most glaring - when the dispute arises, the strategic balance will have been altered, and one party

will have a strong incentive to preserve and perhaps exploit the procedural formalities associated with a court proceeding. That party will likely believe that traditional litigation will offer some strategic advantage it will not likely want to relinquish. Second, the occurrence of the dispute will most often generate tensions between the parties that will make agreement on an alternative forum difficult, if not impossible.

WHCA submits that post-dispute arbitration agreements are inferior as they diminish the intended benefits of arbitration –both direct and indirect. The maneuvering and legal positioning inherent in pursuit of post-dispute agreements will consume time and generate additional costs that preclude realization of the intended and inherent benefits of arbitration. Just as important, the indirect benefits of arbitration are forfeited as there are no cost benefits to pass on to consumers. It can fairly be assumed any post-dispute agreement likely was preceded by filing of litigation, incurring of costs, and consumption of judicial resources, thereby eliminating any indirect cost saving to the parties or the taxpayers.

WHCA appreciates your offices inquiry and the opportunity to express our views on the S. 2838. But for all the reasons above expressed, we must vehemently oppose that legislation.

Sincerely,

/s/Thomas P. Moore

Thomas P. Moore
Executive Director

Examples of Pre-dispute Nursing Home Arbitration Agreements Upheld

Manley v. Personacare, 2007 WL 210583 (Ohio Ct. App. 2007).

The court held that the arbitration agreement was valid, even though it was procedurally unconscionable, because it was not substantively unconscionable. The court found that the agreement was procedurally unconscionability because the nursing home resident was emotionally stressed and possibly cognitively impaired when signing the agreement. She entered the nursing home directly from the hospital and had no family, friends or counsel helping her though the admissions process. The patient suffered from bouts of confusion and numerous physical problems, including two ailments which could have contributed to her cognitive impairment. The court found that she had extreme difficulty physically signing the documents which suggested an inability to meticulously read the contract. The court took judicial notice of the stress involved in nursing home admissions and the fact that in most circumstances there is an imbalance in bargaining power. However, it declined to void the arbitration agreement because it was not substantively unconscionable. The document was separate from the admissions contract, contained conspicuous warnings about the resident's rights, provided 30-days after signing to rescind, and did not make admission to the home conditional on its signing.

Reagan v. Kindred Healthcare Operating, Inc., slip op, 2007 WL 4523092 (Tenn. Ct. App. 2007).

The court enforced an arbitration agreement because it was not unconscionable. The nursing home resident, was transported to the facility directly from the hospital by ambulance. She had limited vision and was unable to wear glasses or contacts due to her diabetes, so she asked her son to sign her admissions forms. After her family left, the nursing home brought more paperwork for Ms. Rayborn to sign, including the arbitration agreement. The nursing home employee who presented the agreement to the patient testified that she usually explains parts of the arbitration agreement, but when asked in court she was unable to answer questions regarding details of the arbitration forum.

Philpot v. Tenn. Health Mgmt., Inc., slip op, 2007 WL 4340874 (Tenn. Ct. App. 2007).

The court enforced an arbitration agreement in a wrongful death case despite the fact the signer was under pressure to admit his mother and was told that if he did not sign, the available bed would be filled by someone else. The fact that the arbitration agreement was a contract of adhesion, part of a complex admission contract, and a condition for admission, did not make the arbitration agreement unenforceable. The court held that there was not sufficient evidence to show that in this case the cost of arbitration would be prohibitive.

In re Ledet, 2004 WL 2945699 (Tex. App. 2004).

The court enforced an arbitration agreement in a negligence suit brought on behalf of an elderly woman with Alzheimer's disease. The resident's son, who signed an arbitration agreement on her behalf at the time of admission, could neither read nor write, in English. The agreement was not fully explained to the resident's son, and he was told he must sign the agreement for his mother to be admitted to the facility. The court held that the agreement was not unconscionable because no evidence suggested that the nursing home hid the terms of the contract.

Westlaw.
Slip Copy
Slip Copy, 2007 WL 210583 (Ohio App. 11 Dist.), 2007 -Ohio- 343
(Cite as: 2007 WL 210583 (Ohio App. 11 Dist.))

CManley v. Personacare
Ohio App. 11 Dist.,2007.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,Eleventh District, Lake County.
Cynthia MANLEY as the Personal Representative of the Estate of Patricia Manley (Deceased), Plaintiff-Appellant,
v.
PERSONACARE of Ohio, d.b.a. Lake Med Nursing and Rehabilitation Center, et al., Defendant-Appellee.
No. 2005-L-174.

Decided Jan. 26, 2007.

Civil Appeal from the Court of Common Pleas, Case No. 05 CV 000876.

M. David Smith and Blake A. Dickson, Cleveland, OH, for plaintiff-appellant.
Paul W. McCartney and James J. Englert, Cincinnati, OH, for defendant-appellee.
WILLIAM M. O'NEILL, J.
***1** {¶ 1} In this accelerated calendar case, appellant, Cynthia Manley, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court granted a motion to stay the proceedings pending arbitration filed by appellee, Personacare of Ohio, d.b.a. Lake Med Nursing Home and Rehabilitation Center ("Personacare").

{¶ 2} On April 8, 2004, appellant's mother, Patricia Manley, went to the emergency room at Lake West Hospital. Patricia Manley was admitted to the hospital and stayed there until April 15, 2004. On that date, she was released from the hospital and went to Lake Med Nursing Home ("Lake Med").

{¶ 3} Upon her arrival at Lake Med, Patricia Manley met with Kathy Large, the Admissions Director of Lake Med. Patricia Manley signed a document entitled "resident admission agreement." In addition, she signed a document entitled "alternative dispute resolution agreement between resident and facility."

{¶ 4} According to appellant's complaint, Patricia Manley fell several times after being admitted to Lake Med, she was permitted to become sick, and she eventually died as a result of the treatment she received at Lake Med.

{¶ 5} Appellant, as the personal representative of Patricia Manley, filed this lawsuit against Personacare, alleging that Personacare was responsible for Patricia Manley's death. In response to the complaint, Personacare, pursuant to R.C. 2711.02, filed a motion to stay the proceedings and have the matter referred to arbitration. Personacare claimed the subject matter of the complaint was subject to an arbitration agreement between itself and Patricia Manley. Appellant filed a brief in opposition to Personacare's motion to stay. Thereafter, Personacare filed a reply memorandum in support of its motion. In addition, Personacare filed Kathy Large's affidavit. Attached to Large's affidavit were several documents, including: (1) a competency evaluation from Dr. Bahman Sharif, dated April 12, 2004, which was provided to Kathy Large prior to the admissions process; (2) a copy of the resident admission agreement; (3) a copy of the alternative dispute resolution agreement between resident and facility; and (4) a copy of a pamphlet regarding alternative dispute resolution.

{¶ 6} The trial court granted Personacare's motion to stay the proceedings.

{¶ 7} Appellant has timely appealed the trial court's judgment entry to this court. We note that a judgment granting a motion to stay proceedings pending arbitration is a final, appealable order.[FN1] Thus, we have jurisdiction to consider this appeal.

FN1. R.C. 2711.02(C).

{¶ 8} Manley raises the following assignment of error:

{¶ 9} "The trial court erred when it granted Defendant Personacare of Ohio, Inc. d.b.a. Lake Med

Nursing and Rehabilitation Center's motion to stay proceedings pursuant to O.R.C. 2711.02."

{¶ 10} Generally, the standard of review of review for a decision regarding a motion to stay the proceedings pending arbitration is abuse of discretion.[FN2]" 'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " [FN3] However, "[u]nconscionability is a question of law." [FN4]Therefore, we will apply a de novo standard of review to this matter.[FN5]

FN2.*Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 410.

FN3. (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

FN4.*Jeffrey Mining Prod., L.P. v. Left Fork Mining Co.* (2001), 143 Ohio App.3d 708, 718, citing *Ins. Co. of N. Am. v. Automatic Sprinkler Corp.* (1981), 67 Ohio St.2d 91.

FN5.*Fortune v. Castle Nursing Homes, Inc.*, 164 Ohio App.3d 689, 2005-Ohio-6195, at ¶ 7-10.

***2** {¶ 11} We note that public policy in Ohio favors the resolution of disputes through arbitration.[FN6]Further, "[a]rbitration is encouraged as a method of dispute resolution, and a presumption favoring arbitration arises when the claim in dispute falls within the arbitration provision."[FN7]However, even with the presumption in favor of arbitration, an arbitration clause may be held unenforceable for several reasons, including that the clause is unconscionable.[FN8]

FN6.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, at ¶ 10-11, citing R.C. 2711.01(A). See, also, *Broughsville v. OHECC, LLC*, 9th Dist. No. 05CA008672, 2005-Ohio-6733, at ¶ 17, citing *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 711-712,*Porpora v. Gatliff Bldg. Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, at ¶ 6, and *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, at ¶ 14.

FN7.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, at ¶ 10, citing *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471.

FN8. (Citations omitted.) *Broughsville v. OHECC, LLC*, 2005-Ohio-6733, at ¶ 17.

{¶ 12} We note that public policy in Ohio favors the resolution of The fundamental question in this matter is whether the arbitration clause is unconscionable. Regarding unconscionability, this court has held:

{¶ 13} We note that public policy in Ohio favors the resolution of "Under Ohio law, a contract clause is unconscionable where one party has been misled as to its meaning, where a severe imbalance of bargaining power exists, or where the specific contractual clause is outrageous.[FN9] Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party.[FN10]"[FN11]

FN9.*Orlett v. Suburban Propane* (1989), 54 Ohio App.3d 127, 129.

FN10.*Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834.

FN11.*Cross v. Carnes* (1998), 132 Ohio App.3d 157, 169-170.

{¶ 14} There are two prongs that must be met for a successful claim of unconscionability, substantive unconscionability and procedural unconscionability.[FN12]A substantive unconscionability analysis considers whether the actual terms of the contract are commercially reasonable.[FN13]"Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible."[FN14]

FN12.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, at ¶ 29.See, also, *Broughsville v. OHECC, LLC*, 2005-Ohio-6733, at ¶ 17.

FN13.*Jeffrey Mining Prod., L.P. v. Left Fork Mining Co.*, 143 Ohio App.3d at 718, citing *Dorsey v. Contemporary Obstetrics & Gynecology, Inc.* (1996), 113 Ohio App.3d 75, 80.

FN14.*Cross v. Carnes*, 132 Ohio App.3d at 170, citing *Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d at 834.

{¶ 15} We will first address whether the arbitration agreement was procedurally unconscionable.

{¶ 16} There are two recent appellate cases that address the issue of procedure unconscionability as it relates to arbitration clauses in a nursing home setting. In *Small v. HCF of Perrysburg, Inc.*, the Sixth Appellate District found the arbitration clause procedurally unconscionable.[FN15]In *Broughsville v. OHECC, LLC*, the Ninth Appellate District found an arbitration provision not to be procedurally unconscionable.[FN16]

FN15.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, at ¶ 28.

FN16.*Broughsville v. OHECC, LLC*, 2005-Ohio-6733, at ¶ 25.

{¶ 17} There are some factors in this matter that weigh against a finding of procedural unconscionability. Kathy Large stated in her deposition that Patricia Manley was alert, asked questions, and appeared to understand what was happening. Further, Kathy Large stated that she explained the arbitration procedure to Patricia Manley by using a hypothetical situation-if a nurse spilled soup on Patricia Manley, she would not be able to sue Personacare in court.

{¶ 18} Kathy Large also stated that she provided Patricia Manley with a pamphlet explaining the arbitration agreement. This pamphlet is written without excessive legal terms, and it describes the mediation and arbitration processes and some of the benefits associated with the program.

***3** {¶ 19} While there are some factors that weigh against a finding of procedural unconscionability, these factors are outweighed by the factors supporting such a finding.

{¶ 20} In *Small v. HCF of Perrysburg, Inc.*, the Sixth District noted that the agreement was signed under considerable stress. The patient's wife signed the document on his behalf. However, the patient appeared to be unconscious at that time and was in the process of being transferred to a hospital.[FN17]In *Broughsville v. OHECC, LLC*, the situation was not nearly as stressful. The patient's daughter signed the agreement on her behalf. There was no "apparent emergency or need for an expeditious admission."[FN18]Finally, the patient had previously been admitted to that exact nursing home, and signed an identical agreement.[FN19]

FN17.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, at ¶ 27.

FN18.*Broughsville v. OHECC, LLC*, 2005-Ohio-6733, at ¶ 21.

FN19.*Id.* at ¶ 23.

{¶ 21} In the case sub judice, stress was a factor. Patricia Manley was in a hospital the week prior to her admission. She was transferred directly from the hospital to the nursing home. Unlike the situation in *Broughsville v. OHECC, LLC*, she did not have a friend or family member with her during the admissions process. Further, Dr. Sharif's report indicates that Patricia Manley was assaulted one week prior to her admission to the hospital. She told Dr. Sharif that she was "quite frightened" due to the assault.

{¶ 22} We next look to the age of the patient. In this matter, Patricia Manley was 66 years old. The signer in *Small v. HCF of Perrysburg, Inc.* was 69 years old.[FN20]Finally, the patient in *Broughsville v. OHECC, LLC* was 85 years old; however, her daughter, who actually signed the contract, was 54 years old.[FN21]In this matter, Patricia Manley's age weighs, albeit minimally, in favor of finding the

arbitration agreement procedurally unconscionable.

FN20.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, at ¶ 28.

FN21.*Broughsville v. OHECC, LLC*, 2005-Ohio-6733, at ¶ 21.

{¶ 23} In the instant matter, there was no evidence that Patricia Manley had any legal expertise, however, she was college-educated. The signer in *Small v. HCF of Perrysburg, Inc.* had no legal expertise.[FN22] In *Broughsville v. OHECC, LLC*, the signer was college-educated and a registered nurse.[FN23] In all of these instances, the signer of the contract had no formal legal experience.[FN24] Further, in all three instances, the signer did not have an attorney present. While these factors do not, per se, make the contract procedurally unconscionable, they weigh in that direction.

FN22.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, at ¶ 28.

FN23.*Broughsville v. OHECC, LLC*, 2005-Ohio-6733, at ¶ 21.

FN24. See *Small v. HCF of Perrysburg, Inc.*, at ¶ 28;*Broughsville v. OHECC, LLC*, ¶ 23.

{¶ 24} We next look to the evidence that was submitted regarding Patricia Manley's cognitive abilities. Dr. Sharif concluded that Patricia Manley was competent. However, he also determined that she had a "very mild cognitive impairment." As an example, Dr. Sharif noted that she could not remember what month or year she retired, but she knew it was shortly after her husband died. Dr. Sharif also noted that Patricia Manley had two different medical conditions, either of which could cause her confusion. Finally, Dr. Sharif documented numerous medical aliments of Patricia Manley.

***4** {¶ 25} The evidence before the trial court was that Patricia Manley was competent. However, the relevant issue is not whether Patricia Manley was competent or had the contractual capacity to enter into a contract. The undisputed evidence demonstrates that she d5id. Rather, the relevant inquiry is her bargaining power in relation to Personacare. The fact that Patricia Manley had numerous physical ailments, bouts of confusion, and a mild cognitive impairment weighs in favor of a conclusion that the arbitration agreement is procedurally unconscionable.

{¶ 26} In addition, we note the quality of Patricia Manley signatures on the documents she signed during the admissions process, including the arbitration agreement. None of the signatures are entirely on the designated line. Her signature on the arbitration agreement is entirely below the designated line. On other documents, her signatures are significantly above the designated line. The fact that Patricia Manley had extreme difficulty signing her name on the day in question suggests that she did not have the ability to meticulously read the provisions of the contracts presented to her.

{¶ 27} Finally, we examine the underlying purpose of arbitration agreements. As stated by the Sixth District:

{¶ 28} "Arbitration clauses were first used in business contracts between sophisticated businesspersons as a means to save time and money should a dispute arise. As evidenced by the plethora of recent cases involving the applicability of arbitration clauses, the clauses are now being used in transactions between large corporations and ordinary consumers, a use that is cause for concern. Particularly problematic in this case, however, is the fact that the clause at issue had potential application in a negligence action. Such cases are typically fact-driven and benefit from the discovery process afforded in a civil action. Further, negligence cases often hinge on the reasonableness of a particular action or inaction. Such a subjective analysis is often best left to a jury acting as the fact finder. Theses observations are not intended to prevent the application of arbitration clauses in tort cases; we merely state that these additional facts should be considered in determining the parties' intentions."[FN25]

FN25.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, at ¶ 29.

{¶ 29} The fact that a resident is signing an arbitration agreement contemporaneously with being admitted into a nursing home is troubling. By

definition, an individual being admitted into a nursing home has a physical or mental detriment that requires them to need the assistance of a nursing home. Further, the reality is that, for many individuals, their admission to a nursing home is the final step in the road of life. As such, this is an extremely stressful time for elderly persons of diminished health. In most circumstances, it will be difficult to conclude that such an individual has equal bargaining power with a corporation that, through corporate counsel, drafted the form contract at issue.

***5** {¶ 30} In the case at bar, Patricia Manley was 66 years old, entering a nursing home directly from a hospital, without an attorney, friend, or family member to assist her in the process. She had fears due to a recent assault, had no legal expertise, had numerous physical problems, had a mild cognitive impairment, and had bouts of confusion. In light of these factors, we conclude her bargaining power was substantially outweighed by the relative bargaining power of Personacare.

{¶ 31} The arbitration agreement is procedurally unconscionable.

{¶ 32} We will now address whether the arbitration agreement was substantively unconscionable. The Fifth and Sixth Appellate Districts have recently addressed the issue of an arbitration clause being substantively unconscionable in relation to a nursing home contract.[FN26]In *Small v. HCF of Perrysburg, Inc* ., the Sixth District found the arbitration clause substantively unconscionable.[FN27]Similarly, in *Fortune v. Castle Nursing Homes, Inc.,* the Fifth District concluded that an arbitration clause was substantively unconscionable.[FN28]The Fifth District offered the following characteristics of an arbitration clause that would hypothetically pass the substantive unconscionability test:

FN26.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757;*Fortune v. Castle Nursing Homes, Inc.*, 2005-Ohio-6195.

FN27.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, at ¶ 26.

FN28.*Fortune v. Castle Nursing Homes, Inc.*, 2005-Ohio-6195, at ¶ 34.

{¶ 33} "An example of an arbitration agreement in a medical setting that a court found not to be oppressive or unconscionable had the following features: (1) it was a stand-alone, one-page contract; (2) the contract contained an explanation of its purpose that encouraged the patient to ask questions; (3) the contract contained a ten-point capital-letter red type directly above the signature line that stated, '(B)y signing this contract you are giving up your right to a jury or court trial'; (4) the contract also provided that it could be revoked by the patient within 30 days."[FN29]

FN29.*Fortune v. Castle Nursing Homes, Inc.*, 2005-Ohio-6195, at ¶ 33, citing *Buraczynski v. Eyring* (Tenn.1996), 919 S.W.2d 314.

{¶ 34} In this matter, the arbitration agreement contained the following warnings, which were printed in bold type:

{¶ 35} "*Understanding of the Resident.*By signing this agreement, the Resident is acknowledging that he/she understands the following: (1) he/she has the right to seek legal counsel concerning this Agreement; (2) the execution of this Agreement is not a precondition of admission or to the furnishing of services to the Resident by Facility, and the decision of whether to sign the Agreement is solely a matter for the Resident's determination without any influence; (3) this Agreement may not even be submitted to Resident when Resident's condition prevents him/her from making a rational decision whether to agree; (4) nothing in this Agreement shall prevent Resident or any other person from reporting alleged violations of law to the Facility, or the appropriate administrative, regulatory or law enforcement agency; (5) the ADR process adopted by this Agreement contains provisions for both mediation and binding arbitration, and if the parties are unable to reach settlement informally, or through mediation, the dispute shall proceed to binding arbitration; and (6) agreeing to the ADR process in this agreement means that the parties are waiving their right to a trial in court, including their right to a jury trial, their right to a trial by judge, and their right to appeal the decision of the arbitrator(s) in a court of law."

*6 {¶ 36} In *Small v. HCF of Perrysburg, Inc.* and *Fortune v. Castle Nursing Homes, Inc.*, the arbitration agreement was included in the admission contract to the nursing home.[FN30]In this case, the arbitration agreement was a separate, stand-alone document. The fact that the arbitration agreement was not part of the admissions contract is indicative of the fact that signing the arbitration agreement was not contingent upon admission to the nursing home.[FN31]

FN30.*Small v. HCF of Perrysburg, Inc.*, at ¶ 13-17;*Fortune v. Castle Nursing Homes, Inc.*, at ¶ 31.

FN31. See *Small v. HCF of Perrysburg, Inc.*, at ¶ 25.

{¶ 37} In this matter, the arbitration agreement contained a specific statement that admission to the nursing home was not contingent upon agreeing to the arbitration agreement. The inclusion of this statement is not, by itself, determinative of the substantive unconscionability issue. In *Small v. HCF of Perrysburg, Inc.*, the Sixth District concluded that the statement did not overcome the underlying fact that admission to the nursing home was contingent upon agreeing to the arbitration clause, due, in part, to the inclusion of the arbitration clause in the admission contract.[FN32]In the case sub judice, however, the fact that this statement was written in bold type in the arbitration agreement, which was a separate agreement, strongly suggests that admission to the facility was not contingent upon signing the arbitration agreement.

FN32.*Id.*

{¶ 38} The arbitration agreement in this matter contained a warning that the resident was giving up his or her right to a jury trial by signing the agreement. In *Fortune v. Castle Nursing Homes, Inc.*, the Fifth District noted the absence of this type of language in the arbitration clause in that case.[FN33]This warning weighs against a finding that the arbitration agreement is unconscionable. It clearly puts the resident on notice that she will be unable to seek a legal remedy against Personacare in a court of law.

FN33.*Fortune v. Castle Nursing Homes, Inc.*, at ¶ 31.

{¶ 39} Further, the arbitration agreement in the case at bar provided the resident 30 days to reject the agreement. This provision was not present in the arbitration clauses at issue in *Small v. HCF of Perrysburg, Inc.* and *Fortune v. Castle Nursing Homes, Inc.*[FN34] The ability to reject the arbitration clause at a later time also weighs in favor of upholding the arbitration agreement. The resident was given an opportunity to think about his or her decision and, if unhappy with the agreement, the opportunity to reject the agreement. This 30-day period also provided the resident with an opportunity to discuss the matter with a family member or an attorney.

FN34.*Small v. HCF of Perrysburg, Inc.*, at ¶ 25.*Fortune v. Castle Nursing Homes, Inc.*, at ¶ 33-34.

{¶ 40} Finally, we address the issue of the payment of costs and attorney fees. The Fifth and Sixth Appellate Districts were strongly critical of the language in the arbitration clauses that the prevailing party was entitled to attorney fees.[FN35]The courts observed that the inclusion of language requiring the losing party to pay the costs of the arbitration and/or the other party's attorney fees had a deterrent effect on a resident advancing a claim against the nursing home.[FN36]The arbitration agreement in this matter provided that each party would be responsible for their own attorney fees. Further, the agreement provided that Personacare would be responsible for the entire cost of the mediation process and the costs of arbitration for the first five days. If the arbitration lasted longer than five days, the arbitration costs would be split between the parties. These provisions did not have a deterrent effect on a resident's decision to bring a claim against Personacare.

FN35.*Small v. HCF of Perrysburg, Inc.*, at ¶ 26.*Fortune v. Castle Nursing Homes, Inc.*, at ¶ 29-30.

FN36.*Id.*

*7 {¶ 41} We do not find the arbitration agreement to be substantively unconscionable. As noted above, there are stark differences between the arbitration agreement in this matter and the arbitration clauses found to be substantively unconscionable by the Fifth

and Sixth Appellate Districts.[FN37] The terms of the agreement are commercially reasonable and, unlike those provisions in *Small v. HCF of Perrysburg, Inc.* and *Fortune v. Castle Nursing Homes, Inc.*, are not inherently unfair to the resident.

FN37. See *Small v. HCF of Perrysburg, Inc.* and *Fortune v. Castle Nursing Homes, Inc.*, supra.

{¶ 42} We have determined that the arbitration agreement is procedurally unconscionable, but not substantively unconscionable. For a contract to be unenforceable due to unconscionability, it must be both procedurally unconscionable and substantively unconscionable.[FN38]Since the contract is not substantively unconscionable, we will not disturb the trial court's decision that it should be enforced.

FN38.*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, at ¶ 23.See, also, *Broughsville v. OHECC, LLC*, 2005-Ohio-6733, at ¶ 17.

{¶ 43} Next, appellant argues that there was no consideration, because Patricia Manley did not receive anything in exchange for giving up her right to a jury trial. We disagree.

{¶ 44} As with any contract, a valid arbitration agreement requires consideration.[FN39]

FN39.*Dantz v. Apple Am. Group, LLC* (N.D.Ohio 2003), 277 F.Supp.2d 794, 801.

{¶ 45} "Consideration may consist of either a detriment to the promisee or a benefit to the promisor.[FN40] A benefit may consist of some right, interest, or profit accruing to the promisor, while a detriment may consist of some forbearance, loss, or responsibility given, suffered, or undertaken by the promisee.[FN41]"[FN42]

FN40.*Irwin v. Lombard Univ.* (1897), 56 Ohio St. 9, 19.

FN41. (Secondary citations omitted.) *Id.* at 20.

FN42.*Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, at ¶ 16.

{¶ 46} Patricia Manley received the opportunity to have future legal disputes resolved through arbitration, a less-costly alternative to a jury trial. Also, the arbitration process would be less time-consuming than a traditional court proceeding. These were potential benefits to Patricia Manley. Finally, both sides were bound by the arbitration agreement. Thus, if Personacare sought legal recourse from Patricia Manley, it too would be bound by the arbitration agreement. This is a potential detriment to Personacare.

{¶ 47} There was sufficient consideration in the arbitration agreement.

{¶ 48} Appellant also argues that the arbitration agreement violated federal law. Specifically, she argues that Personacare received additional consideration, i.e. Patricia Manley giving up her right to a jury trial, in violation of the following provision of the Code of Federal Regulations:

{¶ 49} "In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility."[FN43]

FN43.Section 483.12(d)(3), Title 42, C.F.R.

{¶ 50} We have previously determined that the arbitration agreement was not a precondition of admission. Therefore, any consideration given or received by Personacare in relation to the arbitration agreement was separate from the admission contract. Further, the Ninth District has specifically rejected an identical argument.[FN44]The Ninth District noted that the First District Court of Appeals of Florida and Supreme Court of Alabama have both held that an arbitration agreement is not the type of "consideration" discussed in the Code of Federal Regulations.[FN45]

FN44.*Broughsville v. OHECC, LLC*, 2005-Ohio-6733, at ¶ 35-36.

FN45.*Id.* at 35, quoting *Gainesville Health Care Center, Inc. v. Weston* (Fla.App.2003), 857 So.2d 278, 288, and *Owens v. Coosa Valley Health Care, Inc.* (Ala.2004), 890 So.2d 983, 989.

***8** {¶ 51} Manley's assignment of error is without merit.

{¶ 52} The judgment of the trial court is affirmed.

DIANE V. GRENDELL, J., concurs in judgment only.
COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.
COLLEEN MARY O'TOOLE, dissents with Dissenting Opinion.
{¶ 53} I respectfully dissent.

{¶ 54} The majority fails to apply the proper analysis regarding unconscionability. Furthermore, the majority does not distinguish between a consumer contract and a commercial contract. Courts should scrutinize consumer contracts more closely for unconscionability, especially regarding the parties' ability to deal at arm's length, and their relative bargaining power. Commercial reasonability is not the only consideration when analyzing the substantive unconscionability of a contract.

{¶ 55} The majority finds procedural unconscionability in this contract, yet sidesteps its obligation to conduct a substantive analysis. When done, this analysis shows the subject arbitration provision is substantively unconscionable. As the majority acknowledges, the analysis of unconscionability and arbitration clauses by the Sixth Appellate District in *Small* is revealing and relevant.

{¶ 56} "Unconscionability refers to the absence of a meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to one party."*Small,* at ¶ 20."Accordingly, unconscionability consists of two separate concepts: (1) substantive unconscionability, which refers to the commercial reasonableness of the contract terms themselves and (2) procedural unconscionability, which refers to the bargaining positions of the parties."*Id.*

{¶ 57} " 'Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular limitations clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability.' " *Small* at ¶ 21, quoting *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834.Courts of this state will not enforce unconscionable arbitration clauses. *Small* at ¶ 20.

{¶ 58} The arbitration provisions of the contract at issue are inherently unequal and unfair. The nursing home representative explained the rights Manley waived under these provisions in minimalist, simplistic terms, such as the inability to sue Personacare in court if soup were to be spilled on her. An example such as that hardly conveys the truth-that Manley might be waiving the right to discovery and jury trial even if she was *killed* by Personacare's negligence.

***9** {¶ 59} All of the arbitration rights in the contract inured to the benefit of Personacare, none to the benefit of Manley. In this arbitration clause, each party is responsible for its own costs and fees. Personacare pays for the first five days of the arbitration costs, which may bias the arbitrators. The location is non-neutral. The arbitration provisions are buried near the end of the extremely long admission contract, and are presented to the resident at the time of admission. Thus, a resident is required to make his or her decision regarding this vital issue at a time when, typically, they are sick, and in need of care. There is a grace period-although it is unclear whether residents such as Patricia Manley would ever be in any better condition to make a more well-informed decision.

{¶ 60} This contract gives potential residents a choice between being out on the street with no medical care, or accepting the first available bed. The

choice of a nursing home is not like booking a hotel room for vacation.

{¶ 61} The arbitration provision is not in compliance with industry standards. Contract provisions of the type at issue are disfavored by the American Arbitration Association, the American Bar Association, and the American Medical Association. Binding arbitration should not be used between patients and commercial healthcare providers unless the parties agree to it *after* the dispute arises. This is the only way a consumer/patient entering a nursing or healthcare facility in an ailing and diminished capacity can stand on equal footing with a large corporate entity. This would promote meaningful dispute resolution and allow both sides to enter into this agreement voluntarily and knowingly. The law favors arbitration: it abhors contracts of adhesion.

{¶ 62} The third factor of substantive unconscionability deals with the ability to properly determine future liability. It is clear that neither party to this contract could accurately predict the extent of future liability. The negligence had not occurred at the time of the signing of the contract. It was impossible to determine if Ms. Manley, at the time of admission, could be waiving her right to a wrongful death lawsuit. Certainly when she went into the nursing home she was anticipating her release.

{¶ 63} Based upon the evidence, we know that each party to this contract anticipated that if soup was spilled on Manley, she waived her right to sue Personacare. Otherwise, the arbitration clause is overly broad and vague. There is no evidence either party anticipated not suing if there was medical negligence that caused death. Indeed, it is unreasonable to assume that this vague clause would include such an eventuality. There is no evidence that a meeting of the minds occurred as to (for instance) liability for wrongful death. There is no guarantee that an arbitration panel would afford less than a jury. The clause cannot reasonably be held to limit future liability, nor can the waiver be seen as voluntary or knowing.

***10** {¶ 64} Legal definitions aside, I suggest a truer measure of "unconscionability" regarding this contract. Would a responsible adult want their sick grandparent to be treated in the way the majority interprets it? If the answer is "no," then the contract is unconscionable.

{¶ 65} I respectfully dissent and would reverse the judgment.

Ohio App. 11 Dist.,2007.
Manley v. Personacare
Slip Copy, 2007 WL 210583 (Ohio App. 11 Dist.), 2007 -Ohio- 343

END OF DOCUMENT

Westlaw.
Slip Copy
Slip Copy, 2007 WL 4523092 (Tenn.Ct.App.)
(Cite as: 2007 WL 4523092 (Tenn.Ct.App.))

▷Reagan v. Kindred Healthcare Operating, Inc.
Tenn.Ct.App.,2007.
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Ira Lynn REAGAN, As Conservator of the property and person of Hazel Rayborn, an incapacitated person
v.
KINDRED HEALTHCARE OPERATING, INC., et al.
No. M2006-02191-COA-R3-CV.

May 31, 2007 Session.
Dec. 20, 2007.

Direct Appeal from the Circuit Court for Putnam County, No. 04J0446;John Turnbull, Judge.

F. Laurens Brock, David J. Ward, Jacob Parker, Chattanooga, TN, for Appellants.
Richard E. Circeo, Deborah Truby Riordan, Nashville, TN, for Appellee.

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and DONALD P.HARRIS, Senior Judge., joined.

OPINION

ALAN E. HIGHERS, P.J., W.S.
***1** This appeal involves an arbitration agreement that was executed by a nursing home resident when she was admitted to the nursing home. The resident's estate has filed an action against the nursing home in circuit court and demanded a trial by jury on all issues. The defendants filed a motion to compel arbitration. The administrator of the resident's estate argued that (i) the arbitration agreement was incapable of performance for failure of an essential term; (ii) the nursing home breached fiduciary duties it owed to the resident by obtaining her signature on the agreement; (iii) the agreement was an unconscionable contract of adhesion; and (iv) the resident was unable to knowingly agree to arbitrate disputes, thereby waiving her right to a jury trial. The trial court dismissed the motion to compel arbitration without making any findings of fact or conclusions of law. The defendants appeal. For the following reasons, we reverse and remand for entry of an order compelling arbitration.

I. FACTS & PROCEDURAL HISTORY

In October of 2003, Ms. Hazel Rayborn fell and broke her leg. She was admitted to Cookeville Regional Medical Center ("the hospital") for treatment, where she remained for four to five days. Her physician recommended that she enter a nursing home upon her release from the hospital in order to receive rehabilitation and treatment, and because she was catheterized. Ms. Rayborn had previously lived in a house with her son, Ira Lynn Reagan, and her daughter-in-law, Crystal Reagan. Mr. Reagan disagreed with Ms. Rayborn's decision to enter the nursing home, but Ms. Rayborn weighed her options and felt that it would be in her best interest.

Ms. Rayborn was admitted to Masters Health Care Center ("Masters") on October 14, 2003.[FN1] An ambulance transported her from the hospital to the Masters facility. Once Ms. Rayborn was settled into her room, Mr. and Mrs. Reagan came in to visit her, and two Masters employees came in to discuss Ms. Rayborn's admission and insurance. One of the employees was Melinda Bilbrey, the Admissions Coordinator at Masters, and the identity of the other employee is unknown. Ms. Bilbrey explained the rehabilitation treatment that Ms. Rayborn would receive and discussed Medicare and insurance issues. Ms. Bilbrey and Mr. Reagan then explained to Ms. Rayborn the purpose and meaning of several documents that needed to be signed.

> FN1. Masters is owned, operated, and managed by the various defendants.

According to Mr. Reagan, when it came time for Ms. Rayborn to actually sign those documents, Ms. Rayborn stated that it was difficult for her to see the signature line because of her limited vision, and she asked if it was okay for Mr. Reagan to sign it for her.

Mr. Reagan claims that Ms. Rayborn gave him this authorization to sign for her in the presence of Masters' employees. According to Mrs. Reagan, however, this conversation took place when they were still at the hospital discussing the nursing home with Ms. Rayborn's physician. Mrs. Reagan explained that Mr. Reagan asked his mother "if she wanted him to sign the papers or if she wanted to," and Ms. Rayborn instructed Mr. Reagan "to go ahead and sign them."

***2** In any event, Mr. and Mrs. Reagan accompanied another unidentified employee to an office where Mr. Reagan signed some documents. According to Mr. Reagan, this took approximately three to five minutes. Mr. Reagan signed a "Resident Admission Agreement" and "Resident Admission Contract" on the lines designated for the resident's "Financial Agent." There were separate signature lines for the "Resident or Conservator or Legal Guardian," the "Power of Attorney," and the "Agent," which were left blank. A "Financial Agent" was defined on a separate sheet as "the individual or organization who personally assumes financial responsibility for any part of the Resident's share of costs or liability. The 'Financial Agent' is a third party guarantor of payment."Mr. Reagan also signed a "Record of Admission" authorizing the release of information to Medicare and requesting payment of Medicare and insurance benefits. In the area provided for signatures, this form stated: "The above resident is unable to sign this document for the following medical reason and I hereby sign on his/her behalf...." No medical reason was listed, but Mr. Reagan signed on the line designated "authorized representative" and listed "son" beside his name. Mr. Reagan also signed an "Assignment of Benefits" form regarding insurance payments. This form stated, in part:

> **If resident is physically or mentally unable to transact business,** an individual may sign on behalf of the resident. (Note: the individual that may sign may be a representative payee, legal representative, relative, friend, representative of an institution providing the enrollee care or support, or a governmental agency providing him/her assistance)....

Mr. Reagan signed below this paragraph on the signature line for the "Individual Signing on Behalf of Resident."Mr. Reagan later stated that he did not remember the language about the resident being physically or mentally unable to sign. Mr. Reagan stated that he had the opportunity to read these documents, but he did not read them "perfectly" and did not understand all of the information. He explained that these documents were the same ones that were explained in Ms. Rayborn's room, and he was simply told to sign "here, here, and here," so he did. Each of the documents was either directly related to Medicare and insurance or signed in the capacity of "Financial Agent." Mr. Reagan assumed that he was signing to admit Ms. Rayborn to Masters so that she could receive care. Mr. Reagan only remembered signing "an admission paper and two or three other papers that [were] stated to [him] as insurance forms or paperwork that [was] needed to assign for insurance claims."Mrs. Reagan also recalled the discussions being limited to insurance matters.

Mr. Reagan never told anyone at Masters that he was acting as his mother's legal representative, and he was not appointed as her conservator or given power of attorney to act on her behalf. He only had her verbal permission to sign documents on her behalf.

***3** After signing these documents, Mr. and Mrs. Reagan returned to Ms. Rayborn's room for approximately forty-five minutes to an hour, then went home. When they returned the next day, Ms. Rayborn told them that after they had left, a Masters employee brought in some more admission paperwork during the afternoon that she needed to sign "to finish up her admission." Ms. Rayborn told her son that these were documents that he didn't sign, that she needed to sign. Mr. Reagan later explained that this did not upset him, but he was curious as to why more papers were signed later. Ms. Rayborn never told him what specific documents she signed. According to Mr. Reagan, he had not received a copy of any of the admissions paperwork, despite being told that copies would be provided.[FN2]Mr. Reagan claims that he asked for copies of the admissions paperwork several times, but it appears that the copies were not provided until just before Ms. Rayborn left Masters.[FN3]

> FN2. Mr. Reagan had to sign one additional document when he returned the day after Ms. Rayborn was admitted, which was a "Confidential Application" listing his

financial resources that were available to pay for Ms. Rayborn's care.

FN3. At times, Mr. Reagan said that he never received any copies, but at one point in his deposition he stated that he did not receive copies until after the "situation" arose that led him to remove Ms. Rayborn from Masters' facility.

Ms. Rayborn was discharged from Masters on January 13, 2004. On August 26, 2004, Mr. Reagan was appointed conservator of the property and person of Ms. Rayborn. On October 13, 2004, Mr. Reagan, acting as conservator of Ms. Rayborn, filed this lawsuit against Kindred Healthcare Operating, Inc.; Kindred Healthcare, Inc.; Ventas, Inc.; Kindred Nursing Centers, Limited Partnership d/b/a Masters Health Care Center; and Sylvia Burton, in her capacity as Administrator of Masters Health Care Center (collectively, "the defendants"). The complaint alleges that Ms. Rayborn suffered injuries while residing at Masters as the result of the acts or omissions of the defendants. The complaint asserts causes of action for negligence; gross negligence, wilful, wanton, reckless, malicious and/or intentional conduct; medical malpractice; violations of the Tennessee Adult Protection Act, Tennessee Code Annotated sections 71-6-101, *et seq.*; and breach of contractual duties owed to a third-party beneficiary based upon the defendants' corporate integrity agreement. The complaint seeks an unspecified amount of compensatory and punitive damages, and it "demands a trial by jury on all issues herein set forth."

The defendants filed a "Motion to Dismiss or in the Alternative for Summary Judgment," contending that the claims are barred by an Alternative Dispute Resolution Agreement that Ms. Rayborn signed. The style of this motion was later amended to read: "Motion to Dismiss Plaintiffs' Complaint and/or to Compel Arbitration."The parties engaged in discovery limited to issues regarding the formation of the arbitration agreement. Ms. Rayborn passed away while the case was pending in the trial court. She was never deposed, and she never discussed signing the arbitration agreement with Mr. and Mrs. Reagan. The record before us includes the depositions of Mr. and Mrs. Reagan, Melinda Bilbrey, and Sue Gibbons (another Masters employee), along with various admissions documents and a physician's affidavit. There is an eight-page, stand-alone document entitled, "**ALTERNATIVE DISPUTE RESOLUTION AGREEMENT BETWEEN RESIDENT AND FACILITY**," signed by Ms. Rayborn on October 14, 2003, the day she was admitted to Masters. The ADR Agreement provides that any and all claims or controversies arising out of or in any way relating to Ms. Rayborn's stay at Masters shall be submitted to alternative dispute resolution. The first page of the agreement further states, in bold print, "**Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s).**" The Agreement goes on to state that the Tennessee Uniform Arbitration Act, Tenn.Code Ann. § 29-5-301, *et seq.*, shall govern the arbitration, and it further sets forth various specific rules governing the ADR process. The Agreement provides that Masters will be responsible for the mediator's fees, arbitrator's fees, and other reasonable costs, excluding Ms. Rayborn's attorney's fees. The final page of the ADR Agreement contains a single paragraph entitled, "***RESIDENT'S UNDERSTANDING OF AGREEMENT,***" which provides:

> ***4** The Resident understands that (A) he/she has the right to seek legal counsel concerning this Agreement, (B) the execution of this Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (C) this Arbitration Agreement may be revoked by written notice to the Facility from the Resident within thirty (30) days of signature.... The Resident, or his or her designated legal representative, also had the opportunity to consult with the Facility representative regarding such explanations or clarification.

Ms. Rayborn printed and signed her name at the bottom of the final page on the lines labeled for the "Resident/Legal Representative."

Ms. Sue Gibbons is the employee who admitted Ms. Rayborn to Masters and obtained Ms. Rayborn's signature on the admissions documents, including the ADR Agreement.[FN4]There are approximately sixty pages of admissions documents and brochures that are presented when a resident is admitted to Masters,

and the presentation and explanation generally takes about two hours. When explaining the ADR Agreement, Ms. Gibbons stated that she generally tells a resident that if the resident or his or her family does not like the care or services at Masters, they can settle a dispute through mediation and arbitration instead of a jury trial. She explains that it is a voluntary agreement, the resident can go over it, and she will make copies of it for him or her. She also tells the resident that it can be revoked within thirty days. During her deposition, Ms. Gibbons was unable to answer some questions about the various technical rules governing the ADR process, but she stated that if a resident had questions that she could not answer, she would consult with Ms. Bilbrey. Ms. Gibbons stated that no one had ever asked her questions regarding the ADR Agreement, but she had encountered at least one resident who did not want to sign it, and she simply wrote "Refuse to Sign" on the Agreement. Ms. Gibbons said that once a resident is admitted, Masters employees make copies of all the admissions paperwork and give the copies to the resident, along with the ten to twelve brochures that have been explained.

> FN4. Ms. Gibbons is a Social Service Assistant and Physical Therapy Aide at Masters. Ms. Melinda Bilbrey is the Admissions Coordinator at Masters, and she usually completes the admissions paperwork. However, when Ms. Bilbrey is unavailable for whatever reason, another social worker or Ms. Gibbons will admit residents. To prepare her for such situations, Ms. Bilbrey has explained the various admissions documents and pamphlets to Ms. Gibbons. At her deposition, Ms. Gibbons stated that she had worked in the social services department for five years, but she had only admitted two to three residents.

Ms. Gibbons stated that she specifically remembered admitting Ms. Rayborn to Masters. Each of the forms that Mr. Reagan had signed, Ms. Rayborn signed as well. For instance, the forms stating, "resident is unable to sign" beside Mr. Reagan's signature were nevertheless signed by Ms. Rayborn. However, other forms had not been presented to Mr. Reagan and contained only Ms. Rayborn's signature. Ms. Gibbons testified about the process of admitting Ms. Rayborn:

Q. Can you describe her state of mind at that time?

[By the defendants' attorney]: Object to the form.

A. No.

Q. Was she confused at all?

A. I don't know.

...

Q. Had any paperwork been signed prior to her arrival?

A. I don't know.

Q. You don't know? Do you recall going through the entire admissions process with Ms. Rayborn, what you described to me earlier: the pamphlets, the admissions paperwork and the arbitration agreement?

***5** A. Yes.

Q. You do. How long did that take?

A. A couple of hours.

...

Q. Was she having any problems with confusion?

[By the defendants' attorney]: Object to the form.

A. No.

Q. Did she ask you any questions?

A. No.

...

Q. Do you specifically recall Ms. Rayborn signing all of these documents?

A. Yes.

...

Q. What specifically did you tell Ms. Rayborn about the arbitration clause in particular, if you specifically recall?

A. I don't know.

Q. You don't recall?

A. Well, what I've already told you.

Q. Tell it to me one more time just so we have it down.

A. If you don't like your care or your family doesn't like your care here, we can settle this dispute through mediation and arbitration instead of a jury trial. I can give you a copy of this. Your family can look over it. It's voluntary to sign it, and you have 30 days to revoke it. That's it.

...

Q. How was Ms. Rayborn dressed at the time you presented the documents to her?

A. She was in bed in a gown.

Q. Okay. What, if anything, did she say about the arbitration clause itself?

A. Nothing.

...

Q. Did she seem to understand it?

A. I don't know.

Q. You don't know. Did she seem to understand the other paperwork?

A. I don't know.

Q. Did she have any questions about any of the process?

A. No.

...

Q. Did she say anything to you during the admissions process?

A. No.

...

Q. And I know I asked this over and over, but can you recall any reaction at all that she had, anything she said, anything she did during the time that you presented those documents to her?

A. She just signed it. No, no.

...

Q. Do you recall whether this resident was either physically or mentally able to transact business at the time she was admitted?

A. I don't know.

Ms. Gibbons later reiterated that she specifically remembered telling Ms. Rayborn that if she chose to sign the ADR Agreement, she would be waiving the right to a jury trial, and she remembered telling Ms. Rayborn that she could revoke the agreement within thirty days. Ms. Gibbons also recalled that no one was with Ms. Rayborn when she admitted her, and Ms. Rayborn did not tell Ms. Gibbons who her family members were.[FN5] Ms. Gibbons did not remember whether she personally made a copy of the ADR Agreement that Ms. Rayborn signed.

> FN5. Ms. Gibbons said that she had never met Mr. Reagan, but Ms. Gibbons' signature appears on the line beside Mr. Reagan's signature as a "witness" on some of the documents. Ms. Gibbons stated that she did not know when his signature was placed on the documents. At Mr. Reagan's deposition, he stated that he did not know any of the employees' names besides Melinda Bilbrey. When asked if he recognized the name Sue Gibbons, he stated that she may have been the employee who first met them in the

> room with Melinda Bilbrey. He also said, though, that he never saw that lady again after that meeting, and he was introduced to a different employee in the office when he went to sign the documents. He did not remember Sue Gibbons' name being on the documents when he signed them.

Ms. Rayborn had not been diagnosed with Alzheimer's Disease or any form of dementia, and she had never been diagnosed or adjudicated as mentally incompetent. She had completed the eighth grade and received some homeschooling. Mr. Reagan did not think that Ms. Rayborn had a high school diploma, but Ms. Rayborn could read. Prior to being admitted to the hospital for her broken leg, Ms. Rayborn and Mr. and Mrs. Reagan lived together so that they could care for one another.[FN6]Ms. Rayborn had physical problems requiring her to walk with a cane or walker, but she was mentally capable of handling her own financial affairs. According to Mr. Reagan, Ms. Rayborn also had limited vision and was unable to wear glasses or contacts because of her diabetes. Mr. Reagan said he personally felt that Ms. Rayborn should not have been making important decisions for at least a year prior to her breaking her leg. However, he said that she did continue to sign agreements and contracts on her own. Mr. Reagan was aware that "things could be done" to allow him to make legal decisions for her, but he did not pursue those options because of his financial situation and his uncertainty.

FN6. Mr. Reagan is legally disabled.

***6** When Ms. Rayborn broke her leg, she was prescribed a Duragesic Patch to be applied every three days for chronic pain management, and she was also prescribed a five to ten milligram dose of Oxycodone (the active ingredient in Percocet and Tylox) to be administered every four to six hours as needed for acute pain management. The hospital administered Tylox to Ms. Rayborn at 8:40 a.m. on the day of her admission to Masters, and Masters personnel administered another dose at 1:00 p.m. The defendants submitted the affidavit of Karl Miller, M.D., a professor at the University of Tennessee College of Medicine and Board Certified Diplomat of the American Board of Family Medicine, who had reviewed Ms. Rayborn's medical records from the hospital and from Masters. According to Dr. Miller, the records reflected that Ms. Rayborn was alert and oriented, and "no physician or nurse documented a change in her cognition."Dr. Miller opined, to a reasonable degree of medical certainty, that a five to ten milligram dose of Oxycodone, administered every four to six hours, "does not impair an individual's cognitive ability to the point of preventing them from reading or understanding documents."Dr. Miller further opined, to a reasonable degree of medical certainty, that "Hazel Rayborn was not cognitively impaired on October 14, 2003, to prevent her knowing and voluntary execution of the Alternative Dispute Resolution Agreement Between Resident and Facility."

A "Nursing Assessment" was performed on the day that Ms. Rayborn was admitted to Masters, and a copy of the assessment is included in the record before us. Ms. Rayborn's verbal responses were described as oriented, appropriate, and not confused. She was also described as alert and not lethargic, and her mental status was listed as "Not disoriented." Ms. Rayborn's hearing and vision were both given the highest rating, which was "Adequate." Ms. Rayborn was also given a "Mini-Mental State Exam," during which she was asked various questions and scored based on her responses. Ms. Rayborn scored a 24 out of a possible score of 27, only losing points when she was asked to spell a word backwards.

On October 19, 2003, five days after Ms. Rayborn was admitted to Masters, she was re-admitted to Cookeville Regional Medical Center. Three days later, she was discharged back to Masters, and her discharge summary reads as follows:

DISCHARGE DIAGNOSIS:

1. Confusion secondary to medication effect plus anemia

2. Iron deficient anemia

3. Left upper lobe pneumonia

4. Diabetes mellitus

5. Right tibial fracture

...

HISTORY: Ms. Hazel Rayborn is a 67-year-old white female recently admitted with a right tibial fracture. She had been discharged to Master's Nursing Home for rehabilitation. It was noted that she became quite confused and was transported to the emergency department. She was evaluated and found to have a left upper lobe pneumonia. It was also noted that she was on several medications which could have been contributing to her confusion. She was also found to be anemic.... Her mental status revived quickly with cessation of several of her medications....

*7 At his deposition, Mr. Reagan was questioned by his attorney about Ms. Rayborn's confusion as follows:

Q. Okay. Now, your mom was on some medication when she came from the hospital to Masters there that first time, right?

A. During October 14th?

Q. Right.

A. Yes, she was on medication.

Q. Those medications subsequently caused her some problems with cognition and understanding; is that right?

...

A. Based on what I seen, I would assume that the medication had some altering effect.

Q. She had some confusion?

A. Uh-huh.

Q. At some point after, she had left Masters and she went back to the hospital four or five days later, right?

A. Yes.

Q. Do you recall when that confusion, in your view, started or was it there when she left the hospital?

A. Honestly, I felt like it was somewhat there when she left the hospital, not as bad as a couple of days later. It seemed like it just kept progressing more and more.

...

Q. So it was there when she got to Masters and it just got worse, in your view?

A. Yes. I know that after she was in there for about three or four days it got to the point that she was, in a way, hallucinogenic or something. She would see things that's not there.

Mr. Reagan stated at his deposition that he did not know whether Ms. Rayborn read any of the documents she signed. He also stated that because of Ms. Rayborn's limited eyesight, "it would be hard for her to see that or even read that, the agreement itself, without someone actually reading it to her."Mr. Reagan said that she would have been relying on what she was told.

Upon the completion of discovery, the plaintiff, Mr. Reagan, acting as Administrator of Ms. Rayborn's estate, filed a response to the defendants' motion to compel arbitration, contending that the ADR Agreement was unenforceable because: (i) Ms. Rayborn did not knowingly and voluntarily waive her rights; (ii) the arbitration agreement is unconscionable; (iii) the agreement is unenforceable by its terms because the entity that was designated to administer the agreement, ADR Associates, LLC, has merged with another entity and can no longer arbitrate the action; and (iv) the defendants breached their fiduciary duty to Ms. Rayborn by enticing her to waive her constitutional rights in order to receive medical care.

The trial court did not hold an evidentiary hearing. The court simply entered an order denying the defendants' motion to compel arbitration, which stated, in part: "The Court has considered the Motion, responses, and the record as a whole, and finds that the Motion is not well-taken and should be DENIED."Unfortunately, the trial court did not specify why it found the ADR Agreement unenforceable and did not include any findings of

fact or conclusions of law in its order. The defendants filed a timely notice of appeal to this Court. [FN7]

FN7.Tennessee Code Annotated section 29-5-319 provides that an appeal may be taken from an order denying an application to compel arbitration, although no final judgment has been entered, "in the manner and to the same extent as from orders or judgments in a civil action."Tenn.Code Ann. § 29-5-319 (2000).

II. ISSUES PRESENTED

The defendants present the following issues for review, which we slightly restate:

***8** 1. Whether the circuit court, making no findings regarding Ms. Rayborn's mental competency to execute the ADR Agreement, erred in denying Appellants' motion to compel arbitration.

2. Whether the circuit court erred by announcing that *Owens v. National Health Corporation*, 2006 Tenn.App. LEXIS 448, 2006 WL 1865009 (June 30, 2006), compelled a grant of Appellants' motion to compel arbitration, yet nonetheless denying the Motion.[FN8]

FN8. According to the appellants' reply brief, this statement was made by the judge during a conference call with the parties' attorneys. The judge apparently called the attorneys to inform them that he was summarily dismissing the motion to compel arbitration, and that a hearing on the motion was not necessary. There is no transcript of any hearing on the motion to compel arbitration in the record before us. Appellants' brief states that the trial court ruled without the benefit of an evidentiary hearing.

Additionally, Appellee presents the following issues for review, we which also restate:

3. Whether Tennessee law applies to the interpretation and enforcement of this arbitration agreement.

4. Whether the trial court correctly determined that the arbitration agreement is unenforceable, because (i) the arbitration agreement was not the product of a knowing and voluntary waiver; (ii) the agreement, as presented to Ms. Rayborn, is unconscionable; (iii) the failure of an essential term, the designation of the arbitral forum, prevents the arbitration agreement from being enforced; and/or (iv) the defendants breached their fiduciary duty to Ms. Rayborn.

For the following reasons, we reverse the decision of the circuit court and remand for entry of an order compelling arbitration.

III. STANDARD OF REVIEW

On appeal, this Court reviews a grant or denial of a motion to compel arbitration under the same standards that apply to bench trials. *Hubert v. Turnberry Homes, LLC*, No. M2005-00955-COA-R3-CV, 2006 WL 2843449, at *2 (Tenn.Ct.App. Oct.4, 2006) (citing *Spann v. Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698, 706-707 (Tenn.Ct.App.2006)). When the trial judge has failed to make specific findings of fact, we will review the record to determine where the preponderance of the evidence lies, without employing a presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn.1997); *Hardcastle v. Harris*, 170 S.W.3d 67, 78-79 (Tenn.Ct.App.2004). In other words, we must weigh the evidence to determine in which party's favor the weight of the aggregated evidence falls. *Parks Properties v. Maury County*, 70 S.W.3d 735, 741 (Tenn.Ct.App.2001) (citing *Coles v. Wrecker*, 2 Tenn. Cas. (Shannon) 341, 342 (1877); *Hohenberg Bros. Co. v. Missouri Pac. R.R.*, 586 S.W.2d 117, 119 (Tenn.Ct.App.1979))."There is a 'reasonable probability' that a proposition is true when there is more evidence in its favor than there is against it."*Id.* (citing *Chapman v. McAdams*, 69 Tenn. 500, 506 (1878); 2 McCormick on Evidence § 339, at 439 (John W. Strong ed., 4th Practitioner's ed.1992)). The prevailing party is the one in whose favor the evidentiary scale tips, no matter how slightly. *Id.* (citations omitted). We review a trial court's resolution of legal issues without a presumption of correctness and reach our own independent conclusions regarding these issues.*Id.* (citing *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn.2001); *Patterson v. Tennessee Dept. of Labor*

& Workforce Dev., 60 S.W.3d 60, 62 (Tenn.2001); *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 367 (Tenn.1998); *Hicks v. Cox*, 978 S.W.2d 544, 547 (Tenn.Ct.App.1998)).

IV. DISCUSSION

***9** First of all, we must address Mr. Reagan's issue regarding whether Tennessee law applies to the interpretation and enforcement of the arbitration agreement. The question of whether the contract is governed by the state or federal arbitration act must be resolved in order to determine whether certain issues concerning the arbitration agreement will be decided by an arbitrator or by a court. *Owens v. Nat'l Health Corp.*, --- S.W.3d ----, 2007 WL 3284669, at *5 (Tenn. Nov.8, 2007). Tennessee law contemplates judicial resolution of contract formation issues. *Frizzell Constr. Co., Inc. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn.1999). If the Tennessee act applies, contract formation questions will be decided by the court, not by an arbitrator. *Owens*, 2007 WL 3284669, at *5.

Parties to an arbitration agreement may choose the terms under which they will arbitrate, and a contract may provide that it will be governed by a particular state's arbitration act. *Owens*, 2007 WL 3284669, at *4. In this case, there appears to be no dispute between the parties that Tennessee law applies. The ADR Agreement expressly provides that the provisions of the Tennessee Uniform Arbitration Act, Tenn.Code Ann. § 29-5-301 *et seq.*, shall govern the arbitration. Accordingly, we will look to Tennessee law to determine whether the arbitration agreement is enforceable.

Arbitration agreements in contracts are favored in Tennessee both by statute and existing case law. *Benton v. Vanderbilt University*, 137 S.W.3d 614, 617 (Tenn.2004). The Tennessee Legislature, by enacting the Uniform Arbitration Act, embraced a legislative policy favoring enforcement of agreements to arbitrate.[FN9] *Buraczynski v. Eyring*, 919 S.W.2d 314, 317 (Tenn.1996). Under the Tennessee act, "a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract...." Tenn.Code Ann. § 29-5-302(a) (2000). "Accordingly, under the terms of the statute, arbitration agreements generally are enforceable unless grounds for their revocation exist in equity or in contract law." *Buraczynski*, 919 S.W.2d at 318. In determining whether there is a valid agreement to arbitrate, courts should apply ordinary state-law principles that govern formation of contracts. *Taylor v. Butler*, 142 S.W.3d 277, 284 (Tenn.2004).

> FN9. In *Buraczynski*, the Supreme Court acknowledged the opinion held by some scholars that public policy favors alternative dispute resolution because it is quicker, less expensive, and relieves court congestion. 919 S.W.2d at 318 (citing Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 Va. L.Rev. 947, 949 (1972)). "[T]he same advantages to arbitration have been cited in the health provider-patient context, namely speed, lack of expense, finality of decisions and informality of procedure and rules, and some argue that arbitration actually favors the injured patient." *Id.* at 318, n. 3.

A. Impossibility of Performance

Mr. Reagan contends that the ADR Agreement is unenforceable because a material term of the agreement is incapable of performance. Mr. Reagan refers to the following provisions of the ADR Agreement:

> A. Any and all claims or controversies arising out of or in any way relating to this ADR Agreement ("Agreement") or the Resident's stay at the Facility ... shall be submitted to alternative dispute resolution as described in the Dispute Resolution Process for Consumer Healthcare Disputes, Rules of Procedure ("the Dispute Resolution Process") which are incorporated herein by reference.
>
> ***10** ...
>
> D. Any mediation or arbitration conducted pursuant to this Agreement shall be administered by, and according to the rules and procedures of an independent impartial entity that is regularly engaged in providing mediation and arbitration services. The Demand shall be made in writing and

> may be submitted to ADR Associates, LLC, 1666 Connecticut Avenue, NW, Suite 500, Washington, D.C. 20009 (the "Administrator"), by regular mail, certified mail, or overnight delivery. If the parties choose not to select ADR Associates, LLC or if ADR Associates, LLC is unwilling or unable to serve as the Administrator, the parties shall select another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator.

Mr. Reagan contends that "ADR Associates, LLC has merged into and become a part of JAMS," so that ADR Associates, LLC, is "no longer an entity available to administer the ADR Agreement."Mr. Reagan acknowledges the ADR Agreement's provision stating that the parties will select another entity if the named entity is unable to serve as the Administrator, but he claims that this is merely a "contract to make a contract" giving rise to no legal obligation. He also claims that the parties' choice of this particular arbitrator and its procedures was a term so material to the contract that failure of this term voids the agreement.

This same issue was recently addressed by our Supreme Court in *Owens*, 2007 WL 3284669. In that case, the plaintiff contended that the two arbitration organizations named in the arbitration agreement at issue were unavailable to conduct the arbitration, and therefore, the agreement was unenforceable. *Id.* at *7. The plaintiff further argued, as in this case, that the specification of those two arbitrators was such a material term of the contract that the contract itself must fail if neither of the named organizations would conduct the arbitration. *Id.* The Supreme Court rejected these arguments, recognizing that Tennessee Code Annotated section 29-5-304"provides for the very contingency illustrated by the facts of this case."*Id.* at *8. The statute provides:

> If the arbitration agreement provided a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and a successor has not been duly appointed, the court on application of a party shall appoint one (1) or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

Tenn.Code Ann. § 29-5-304 (2000). The Court found no factual basis for the plaintiff's assertion that the specification of those two organizations was so material to the contract that it must fail if they were unavailable. *Owens*, 2007 WL 3284669, at *8.

Likewise, in the case at bar, there is simply no evidence to support Mr. Reagan's contention that the entire ADR Agreement must fail if ADR Associates, LLC, is unavailable to serve as the Administrator. In fact, the ADR Agreement expressly recognized that ADR Associates, LLC, might become unwilling or unable to serve as the Administrator, and it provided that the parties would select "another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator."Even assuming that the agreed-upon arbitrator is unavailable,[FN10] and that the parties are unable or simply unwilling to agree on another, as the ADR Agreement provided, the court may appoint one or more arbitrators to conduct the arbitration pursuant to Tennessee Code Annotated section 29-5-304. The terms of the ADR Agreement are not unenforceable or impossible to perform.

> FN10. The record contains no information about ADR Associates, LLC, to indicate whether or not it is actually unable to administer the ADR Agreement. Mr. Reagan simply contends that the entity has merged and become unavailable for arbitration. The defendants' reply brief also states that ADR Associates, LLC, has merged with another entity.

B. Breach of Fiduciary Duty

***11** Next, we will address Mr. Reagan's argument that the defendants had a fiduciary and confidential relationship with Ms. Rayborn that "created an affirmative duty on [the defendants] to place Ms. Rayborn's interests above its own and to refrain from enticing her to waive her constitutional rights" by signing the ADR Agreement. In support of his fiduciary duty argument, Mr. Reagan refers to the trust and confidence needed between a patient and his or her physician, and he cites cases from various jurisdictions recognizing a fiduciary relationship between long-term facilities and residents.

This issue was also addressed by our Supreme Court in *Owens*, 2007 WL 3284669, at *12, where the plaintiff argued that the defendants breached fiduciary duties they owed to the patient in obtaining her signature on the arbitration agreement. The Court explained that such a breach-of-fiduciary-duty theory is based upon the implied premise that a nursing home owes a resident a fiduciary duty *prior to* the time he or she signs the contract for admission to a nursing home. *Id.*

> Assuming solely for the purpose of argument that a fiduciary duty *might* arise following a patient's admission to a nursing home, the plaintiff has cited no authority for the finding that a fiduciary duty is owed to a *potential* patient of a nursing home. The record discloses no facts supporting a fiduciary relationship, contractual or otherwise, between [the patient] and the nursing home prior to the time [the patient], through [the power of attorney], signed the nursing-home contract. We therefore agree with the intermediate appellate court that the arbitration agreement is not unenforceable on the breach-of-fiduciary-duty ground asserted by the plaintiff. Given our holding that this issue is without merit, any discovery allowed by the trial court on remand should not include discovery on the breach-of-fiduciary-duty issue.

Id.

We note that in *Owens*, the nursing home contract itself contained the arbitration provision. Here, the arbitration agreement was a separate, stand-alone document. Still, the ADR Agreement was presented along with the admissions contract, in the same stack of documents, during the same presentation and process of admitting Ms. Rayborn to Masters. Even assuming *arguendo* that a fiduciary duty might have arisen once Ms. Rayborn was admitted to Masters, we find that no such relationship existed during the admissions process. Thus, the ADR Agreement is not unenforceable on the ground that Masters breached a purported fiduciary duty owed to Ms. Rayborn by presenting it for her acceptance.

C. Unconscionability

Next, Mr. Reagan contends that the arbitration agreement was a contract of adhesion, and that the circumstances surrounding the signing of the arbitration agreement render it procedurally unconscionable.

The question of whether a contract or a provision thereof is unconscionable is a question of law. *Taylor v. Butler*, 142 S.W.3d 277, 284-85 (Tenn.2004)."Unconscionability may arise from a lack of a meaningful choice on the part of one party (procedural unconscionability) or from contract terms that are unreasonably harsh (substantive unconscionability)."*Trinity Industries, Inc. v. McKinnon Bridge Co., Inc.*, 77 S.W.3d 159, 170 (Tenn.Ct.App.2001) (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C.Cir.1965)). In Tennessee, we have tended to lump the two together and speak of unconscionability resulting "when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on one hand, and no honest and fair person would accept them on the other."*Id.* (quoting *Haun v. King*, 690 S.W.2d 869, 872 (Tenn.Ct.App.1984)). The determination of whether a contract or term is or is not unconscionable is to be made in light of its setting, purpose and effect. *Taylor*, 142 S.W.3d at 285 (citing Restatement (Second) of Contract § 208, cmt. a (1981)). Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes. *Id.*

***12** A "contract of adhesion" has been defined as "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract."*Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn.1996) (quoting Black's Law Dictionary 40 (6th ed.1990)). Even a contract of adhesion, though, is not automatically unenforceable. The enforceability of contracts of adhesion generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable. *Taylor*, 142 S.W.3d at 285. Contracts of adhesion must be closely scrutinized to determine if unconscionable or oppressive terms are imposed which prevent

enforcement of the agreement. *Buraczynski*, 919 S.W.2d at 316. In determining whether a contract is unconscionable and unenforceable, courts must consider all the facts and circumstances of the case. *Owens*, 2007 WL 3284669, at *11.

In *Buraczynski v. Eyring*, 919 S.W.2d 314, 316 (Tenn.1996), the Supreme Court considered the enforceability of arbitration agreements between physicians and patients. The Court first determined that "arbitration agreements between physicians and patients are not per se void as against public policy."*Id.* at 319.The arbitration agreements executed by the patients were found to be contracts of adhesion because the patients had to sign the agreements in order to continue receiving medical care. *Id.* at 320.However, that fact was not determinative of the arbitration agreement's enforceability. The Court explained various considerations relevant to its analysis:

> [I]n general, courts are reluctant to enforce arbitration agreements between patients and health care providers when the agreements are hidden within other types of contracts and do not afford the patients an opportunity to question the terms or purpose of the agreement. This is so particularly when the agreements require the patient to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment, and when the agreements give the health care provider an unequal advantage in the arbitration process itself.

Id. at 321.When applying these principles to the case before it, the Court concluded that the arbitration agreements were not unconscionable or unenforceable. The arbitration agreements were not hidden within a clinic or hospital admission contract, but were separate, one-page documents each entitled "Physician-Patient Arbitration Agreement." *Id.* Also, a short explanation was attached to the document which encouraged the patient to discuss questions about the agreement with the physician. *Id.* Neither party was given an unfair advantage in the arbitration process, and both parties were bound by the arbitrator's decision. *Id.* Furthermore, the patient was "clearly informed by a provision in ten-point capital letter red type, directly above the signature line, that 'by signing this contract you are giving up your right to a jury or court trial' on any medical malpractice claim."*Id.* There were no buried terms, as all terms were laid out clearly in the agreement.*Id.* Also, the agreement could be revoked for any reason within thirty days.*Id.*"Finally, and perhaps most importantly, the agreements did not change the doctor's duty to use reasonable care in treating patients, nor limit liability for breach of that duty, but merely shifted the disputes to a different forum."*Id.* The Court therefore determined that the arbitration agreements, though contracts of adhesion, were enforceable. *Id.*

***13** The Eastern Section of this Court applied the *Buraczynski* factors to arbitration agreements included in nursing home contracts in *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731 (Tenn.Ct.App.2003), and in *Raiteri v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413 (Tenn.Ct.App. Dec.30, 2003), and held that the arbitration agreements in those cases were unconscionable. Both agreements were contracts of adhesion, offered on a take-it-or-leave-it basis, as the patients had to sign the agreements in order to be admitted to the nursing homes. *Raiteri*, 2003 WL 23094413, at *8;*Howell*, 109 S.W.3d at 735. Also, the arbitration provisions were part of a larger contract dealing with many issues, rather than being set forth in a separate, stand-alone document. *Raiteri*, 2003 WL 23094413, at *8;*Howell*, 109 S.W.3d at 734. The provisions waiving the patients' right to a jury trial were buried and in no way highlighted or bolded, there was no explanation addressing how mediation and arbitration worked, and only the nursing home was responsible for choosing the arbitrator.*Raiteri*, 2003 WL 23094413, at *8;*Howell*, 109 S.W.3d at 734-35. Additionally, in *Howell*, the patient was unable to read. The Court stated that "the fact that Howell cannot read does not excuse him from a contract he voluntarily signed."*Id.* at 735 (citing *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 359 (Tenn.Ct.App.2001)). However, a nursing home employee did not ask him to read it, but took it upon herself to explain the document, and she failed to mention that he was waiving the right to a jury trial if he brought a claim against the nursing home. *Id.* Given all these circumstances, the Court held that the nursing home failed to demonstrate that the parties bargained over the arbitration agreements' terms or that the provision was within the reasonable expectations of an ordinary person.[FN11]*Id.*

FN11. Mr. Reagan cites *Howell* for his argument that "[a]ny defendant seeking enforcement of an arbitration provision must prove that the parties 'actually bargained over the arbitration provision or that it was a reasonable term under the circumstances.' " However, according to *Diagnostic Center v. Steven B. Stubblefield, M.D., P.C.*, 215 S.W.3d 843, 847 (Tenn.Ct.App.2006), such proof has only been required in cases dealing with contracts of adhesion. The Court explained that under the Tennessee Uniform Arbitration Act, a "written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* (quoting Tenn.Code Ann. § 29-5-302).

In the case before us, Mr. Reagan claims that the circumstances surrounding Ms. Rayborn's execution of the ADR Agreement shock the conscience, rendering the agreement unconscionable under the circumstances. He points to the fact that Ms. Rayborn had a limited education and limited vision, and that she had authorized her son to execute the admissions documents for her. Mr. Reagan accuses the defendants of cornering and ambushing Ms. Rayborn in order to secure her signature. He also claims that the defendants refused to provide him with a copy of the agreement, effectively precluding the exercise of Ms. Rayborn's right to revoke the agreement.

Although there are some factors in this case that weigh in favor of a finding of procedural unconscionability, we believe they are outweighed by the factors that do not support such a finding. Mr. Reagan did testify that Ms. Rayborn had only completed the eighth grade and some homeschooling, and he did not think she had a high school diploma. He also testified that she could not see well, [FN12] and he did not know whether or not she was able to read the admissions documents that she signed. However, Mr. Reagan acknowledged Ms. Rayborn's ability to understand the documents if they were explained to her. Mr. Reagan testified that when the first insurance documents were presented in Ms. Rayborn's room, "the situation was explained to me what each paperwork was about, as well as with my mother."Mr. Reagan explained that it would be hard for his mother to read documents "without someone actually reading it to her."Mr. Reagan said that he generally explained some of the documents to her, but not in depth. Mr. Reagan did not voice any concerns he had about his mother's ability to sign documents to any Masters employees, and he apparently expected her to sign the documents herself during these initial discussions with Masters employees.

FN12. The only evidence to suggest that Ms. Rayborn had poor eyesight is Mr. Reagan's testimony. The "Nursing Assessment" performed when Ms. Rayborn was admitted to Masters described her vision as "Adequate," the highest rating available, for both the right and left eyes.

***14** Mr. Reagan also claims that the agreement is unconscionable and unenforceable because Ms. Rayborn gave him authority or permission to execute all of the admissions documents. It is not clear from the record whether any Masters employees knew that Ms. Rayborn gave such permission to Mr. Reagan. The Masters employees who were deposed were not asked about Mr. Reagan's authority to sign for Ms. Rayborn. Mr. Reagan testified that Masters' employees heard Ms. Rayborn tell him to sign for her when they were in her room at Masters. Mrs. Reagan, however, testified that Ms. Rayborn had told him to sign the papers when they were still at the hospital. According to Mrs. Reagan, Mr. Reagan simply asked Ms. Rayborn "if she wanted him to sign the papers or if she wanted to, and she told him to go ahead and sign them."Even assuming that Ms. Rayborn did give Mr. Reagan permission to sign, and Masters employees heard her, we see no reason why Ms. Rayborn would have thereby deprived herself of authority to also sign documents. As previously discussed, Mr. Reagan never told anyone at Masters that he was acting as Ms. Rayborn's legal representative. Furthermore, when Ms. Gibbons was explaining the admissions paperwork, Ms. Rayborn never told her about her son. Mr. Reagan admits that he had no legal authority to prevent Ms. Rayborn from signing the arbitration agreement. Ms. Rayborn had never been diagnosed or adjudicated mentally incompetent, and no one had been appointed as her conservator or executed a power of attorney. Indeed,

in most of the recent Tennessee cases involving the enforceability of arbitration agreements in nursing home contracts, someone other than the resident has signed an arbitration agreement, and the plaintiff argued that the third person was not authorized to sign the agreement or waive the resident's rights. *See, e.g., Owens v. Nat'l Health Corp.*, --- S.W.3d ----, 2007 WL 3284669, at *5-7 (Tenn. Nov.8, 2007) (considering an arbitration agreement signed by an attorney-in-fact pursuant to power of attorney); *Raines v. Nat'l Health Corp.*, No. M2006-1280-COA-R3-CV, slip op. at 2, (Tenn.Ct.App. Dec.6, 2007) (same); *Necessary v. Life Care Centers of America, Inc.*, No. E2006-00453-COA-R3-CV, 2007 WL 3446636, at *2-3 (Tenn.Ct.App. Nov.16, 2007) (considering an agreement signed by the resident's husband who had her oral permission to sign); *Cabany v. Mayfield Rehab. & Special Care Ctr.*, No. M2006-00594-COA-R3-CV, 2007 WL 3445550, at *1 (Tenn.Ct.App. Nov.15, 2007) (considering an agreement signed by a spouse who had executed a power of attorney for healthcare); *Raiteri v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at *9 (Tenn.Ct.App. Dec.30, 2003) (considering an agreement signed by the resident's husband); *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 733 (Tenn.Ct.App.2003) (same). Here, the resident, Ms. Rayborn, signed the ADR Agreement herself, and it was proper for her to do so. In short, even if Mr. Reagan had oral express authority from Ms. Rayborn to sign documents on her behalf, we see no reason why Ms. Rayborn thereby became unable to contract.

***15** The ADR Agreement was not a contract of adhesion. Ms. Rayborn could have been admitted to Masters even if she refused to sign it. The signature page clearly provides that execution of the Agreement is "not a precondition to the furnishing of services to the Resident by the Facility."Assuming that Ms. Rayborn did not read the ADR Agreement, Ms. Gibbons explained to her that it was voluntary for her to sign. Ms. Rayborn was not forced to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment. As in *Buraczynski*, 919 S.W.2d at 316, the Agreement was not contained within an admission contract or hidden among terms unrelated to arbitration, but was a separate, stand-alone document entitled "**ALTERNATIVE DISPUTE RESOLUTION AGREEMENT BETWEEN RESIDENT AND FACILITY.**"The Agreement provided on the last page that the resident had the right to seek legal counsel, and Ms. Gibbons also told Ms. Rayborn that her family could look over the Agreement if she wished. The Agreement explains the details of mediation and arbitration. Mr. Reagan does not contend that the procedures set forth in the Agreement give any unfair advantage to the defendants, and we see no unfair advantage in the Agreement. The first page of the Agreement states, in bold print, "**Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s).**" Again, assuming that Ms. Rayborn did not read the Agreement, Ms. Gibbons told Ms. Rayborn that by signing the document, a dispute regarding her care at Masters would be settled through mediation and arbitration instead of a jury trial. The Agreement provides, and Ms. Gibbons explained, that a resident may revoke the Agreement within thirty days. However, Mr. Reagan claims that he asked a nurse for a copy of all the admissions paperwork several times, although it is not clear when, and he claims that he did not receive copies in a timely manner. Ms. Gibbons stated that it was Masters' policy to provide copies to the residents upon completion of the admissions paperwork, but she did not remember personally making copies of the ADR Agreement that Ms. Rayborn signed. Finally, as noted in *Buraczynski*, 919 S.W.2d at 316, the ADR Agreement did not change the defendants' duty to use reasonable care in treating Ms. Rayborn, nor limit liability for breach of that duty, but merely shifted disputes to a different forum.

There is nothing in the record to suggest that Ms. Rayborn was coerced into signing the ADR Agreement, or that she was denied an opportunity for a meaningful choice. There is similarly nothing to indicate that Ms. Rayborn felt uncomfortable signing the admissions documents as Ms. Gibbons explained them to her. Ms. Rayborn simply mentioned to her son that she had signed more admissions documents after he left, that he had not signed, without further elaboration. Mr. Reagan stated that he was not upset when he learned that Ms. Rayborn had signed the admissions documents, implicitly recognizing her authority to do so. The ADR Agreement is not a contract of adhesion, and Mr. Reagan does not contend that the substantive terms of the agreement are unreasonably harsh. Again, there are facts in this case to support both parties' arguments regarding

procedural unconscionability; however, we disagree with Mr. Reagan's assertion that the defendants' conduct shocks the conscience. Considering all the facts and circumstances of this case, we conclude that the ADR Agreement is not unconscionable, oppressive, or unenforceable.

D. Ms. Rayborn's Knowledge and Waiver of Rights

***16** Finally, Mr. Reagan contends that Ms. Rayborn did not knowingly and voluntarily waive her right of access to the courts and a jury trial by signing the arbitration agreement. Mr. Reagan first argues that in the nursing home context, one cannot comprehend the significance of an arbitration agreement when admitting a family member because the facility makes assurances that the resident will be taken care of, and the resident cannot foresee the mistreatment or abuse that may occur. In *Owens*, 2007 WL 3284669, at *10, the plaintiff similarly argued that several of the *Buraczynski* factors regarding unconscionability are implicated in every nursing home contract containing an arbitration clause, and asked the Court to hold that arbitration agreements in nursing home contracts violate public policy. The Supreme Court refused to read a public policy "exception" into the Tennessee Uniform Arbitration Act and held that pre-dispute arbitration agreements in nursing home contracts do not violate public policy and are not *per se* invalid. *Id.* To the extent that Mr. Reagan suggests that it is impossible to knowingly and freely agree to arbitrate disputes "in the nursing home context," we find his argument to be without merit.

Mr. Reagan also claims that Ms. Rayborn's execution of the ADR Agreement was not knowing and voluntary because of her limited education, her medications, and Ms. Gibbons' inability to testify as to Ms. Rayborn's mental state. The defendants argue that Mr. Reagan is unable to establish that Ms. Rayborn was incompetent to engage in the transaction at issue.

The degree of mental capacity required to enter into a contract is a question of law. *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 297 (Tenn.Ct.App.2001). All adults are presumed to be competent enough to enter into contracts, *id.*, and an individual is presumed to have capacity to make a health care decision.[FN13] Tenn.Code. Ann. § 68-11-1812(b) (2006).

> FN13. There are a variety of tools available allowing individuals to exercise control over their lives and property by making decisions prior to the time when their capacity becomes impaired. *See Cabany v. Mayfield Rehab. & Special Care Ctr.*, No. M2006-00594-COA-R3-CV, 2007 WL 3445550, at *5 (Tenn.Ct.App. Nov.15, 2007) (referring to statutes authorizing durable powers of attorney, living wills, advanced directives, and durable powers of attorney for healthcare).

Because of the importance of autonomy, it is well-settled that the law presumes that adult persons are sane, rather than insane, and capable, rather than incapable, to direct their personal affairs until satisfactory evidence to the contrary is presented. Mental or physical impairment should never be presumed. The force of these presumptions does not wane as a person ages.

In re Conservatorship of Groves, 109 S.W.3d 317, 329-30 (Tenn.Ct.App.2003) (footnotes and citations omitted). The party attempting to invalidate a contract based on the theory of mental incapacity bears the burden of proving that one or both of the contracting parties were mentally incompetent when the contract was formed. *Rawlings*, 78 S.W.3d at 297 (citing *Knight v. Lancaster*, 988 S.W.2d 172, 177-78 (Tenn.Ct.App.1998); *Williamson v. Upchurch*, 768 S.W.2d 265, 269 (Tenn.Ct.App.1988)).

Persons will be excused from their contractual obligations on the ground of incompetency only when (1) they are unable to understand in a reasonable manner the nature and consequences of the transaction or (2) when they are unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of their condition.

***17** *Id.* (citing Restatement (Second) of Contracts § 15(1) (1981)). It is not enough to prove that a person was depressed or had senile dementia; rather, to prove mental incapacity, the person with the burden of proof must establish, in light of all the surrounding facts and circumstances, that the cognitive impairment or disease rendered the

> contracting party incompetent to engage in the transaction at issue according to the standards set forth above.*Id.* (footnotes and citations omitted).

As proof of Ms. Rayborn's alleged inability to agree to arbitrate disputes, Mr. Reagan first refers to Ms. Gibbons' deposition testimony regarding the execution of the agreement. Ms. Gibbons testified that she spent a couple of hours with Ms. Rayborn going over the entire admissions process and explaining the paperwork and pamphlets. Ms. Gibbons was asked if she recalled whether Ms. Rayborn was "physically or mentally able to transact business" when she was admitted, and Ms. Gibbons said she did not know. She testified that she could not describe Ms. Rayborn's state of mind at the time that she executed the arbitration agreement, and when asked whether Ms. Rayborn was confused at all, Ms. Gibbons stated that she didn't know. Ms. Gibbons then said that Ms. Rayborn was not having any problems with confusion. Ms. Gibbons said that Ms. Rayborn did not ask her any questions about the ADR Agreement or the other documents, she simply signed them without saying anything. The next day, Ms. Gibbons mentioned to her son that she had signed documents "to finish up her admission," but she did not go into detail about what exactly she signed. Ms. Rayborn simply told him that they were admissions documents that Mr. Reagan did not sign, that she needed to sign.

Mr. Reagan further submits that the medication Ms. Rayborn was taking at the time of her admission prevents any finding that she knowingly entered into the agreement to arbitrate. Mr. Reagan claims that Oxycodone/Percocet is "commonly acknowledged to affect a person's mental alertness."However, Dr. Miller opined, to a reasonable degree of medical certainty, that Ms. Rayborn's prescribed dose of Oxycodone"does not impair an individual's cognitive ability to the point of preventing them from reading or understanding documents."Dr. Miller further opined, to a reasonable degree of medical certainty, that "Hazel Rayborn was not cognitively impaired on October 14, 2003, to prevent her knowing and voluntary execution of the Alternative Dispute Resolution Agreement Between Resident and Facility."

Mr. Reagan also points to the fact that Ms. Rayborn was re-admitted to the hospital five days after her admission to Masters due to confusion. According to the hospital discharge summary, "[i]t was noted that she became quite confused and was transported to the emergency department."Ms. Rayborn was found to have pneumonia and anemia, and "[i]t was also noted that she was on *several medications* which could have been contributing to her confusion."(emphasis added). Ms. Rayborn's mental status revived quickly "with cessation of several of her medications."It is not clear from the record whether Ms. Rayborn was prescribed additional medications after her admission to Masters besides the Oxycodone. Nonetheless, the fact that Ms. Rayborn became confused five days after being admitted to Masters does not demonstrate that she was incompetent on October 14, 2003, when she was admitted. Ms. Bilbrey testified that Ms. Rayborn seemed oriented, that she knew who she was and where she was, and she recalled being a former employee of Masters.[FN14]According to the Nursing Assessment performed when Ms. Rayborn was admitted, her verbal responses were oriented, appropriate, and not confused. She was also described as alert and not lethargic, and her mental status was listed as "Not disoriented ." Ms. Rayborn only missed one question on the mental state exam that she was given. Mr. Reagan testified that he "felt like [the confusion] was somewhat there when she left the hospital, not as bad as a couple of days later. It seemed like it just kept progressing more and more."However, Ms. Rayborn made the decision herself to enter Masters for treatment, as Mr. Reagan explained:

> FN14. Ms. Rayborn had worked in the laundry department at Masters during the early 1990's.

***18** A. When her physician had suggested for her to be put into a nursing home for rehab, I was the first to disagree with that move, but my mother felt like it might be in her best interest.

Q. What caused your mom, if you know, to seek admission to Masters following her stay at Cookeville Regional?... Why did your mom elect to go to Masters instead of back home, if you know?

A. Based on Dr. Austin's recommendation of

having rehab.

Q. Do you know whether your mother could have elected to receive home physical therapy as opposed to being admitted to Masters?

A. She looked at the different options that she had and she felt like it would be much less of a burden, as she would call it, on myself and my wife to provide care for her. So she elected to take the recommendation of her physician.

Q. Just so we're clear, your mother made her own decision to go to Masters upon the advice of Dr. Austin; is that correct?

A. Yes.

Obviously, Mr. Reagan and Ms. Rayborn felt that she was capable of making this important decision on her own, against the advice of her son, on the day that she was discharged from the hospital. By Mr. Reagan's own account, Ms. Rayborn was able to weigh her options and determine which course of action she felt would be in her best interest, also taking into account the consequences that other options would have on her family. That same afternoon, Ms. Gibbons explained to Ms. Rayborn that by choosing to execute the ADR Agreement, any disputes about the care she received at Masters would be settled through mediation and arbitration rather than by a jury trial. Ms. Rayborn signed the agreement, and Mr. Reagan now says, "I do not think that she was fully capable of making, you know, a real good choice.... I don't know if she was fully mentally competent."However, Mr. Reagan never told anyone at Masters of concerns about her competency.

From our careful review of the record, considering all the facts and circumstances of this case, we find Mr. Reagan has failed to demonstrate that Ms. Rayborn was unable to understand, in a reasonable manner, the nature and consequences of executing the ADR Agreement or unable to act in a reasonable manner in relation to the transaction. Keeping in mind that adults are presumed competent to enter contracts and make health care decisions, we do not find sufficient evidence indicating that Ms. Rayborn was incapable of agreeing to arbitrate disputes, thereby waiving her right to a jury trial.

V. CONCLUSION

Finding no grounds for revocation of the arbitration agreement in equity or in contract law, we reverse the decision of the circuit court and remand for the entry of an order compelling arbitration. Costs of this appeal are taxed to the appellee, Ira Lynn Reagan, as Administrator of the Estate of Hazel Rayborn, for which execution may issue if necessary.

Tenn.Ct.App.,2007.
Reagan v. Kindred Healthcare Operating, Inc.
Slip Copy, 2007 WL 4523092 (Tenn.Ct.App.)

END OF DOCUMENT

Westlaw.
Slip Copy
Slip Copy, 2007 WL 4340874 (Tenn.Ct.App.)
(Cite as: 2007 WL 4340874 (Tenn.Ct.App.))

Philpot v. Tennessee Health Management, Inc.
Tenn.Ct.App.,2007.
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Gary PHILPOT
v.
TENNESSEE HEALTH MANAGEMENT, INC., et al.
No. M2006-01278-COA-R3-CV.

May 11, 2007 Session.
Dec. 12, 2007.

Appeal from the Circuit Court for Davidson County, No. 05C2209; Walter C. Kurtz, Judge.

John B. Curtis, Jr., and Bruce D. Gill, Chattanooga, Tennessee, for the appellants, Tennessee Health Management, Inc., AmericanHealth Centers, Inc., Rehab America, Inc., AMPHRAM, Inc.; Rivergate Manor, Inc., d/b/a Vanco Manor Nursing Center; NHC Healthcare/Hendersonville, LLC d/b/a NHC Healthcare, Hendersonville; National Healthcare Corporation; NHC/OP, LP; and NHC/Delaware, Inc.
Lisa E. Circeo and Deborah Truby Riordan, Nashville, Tennessee, and Brian G. Brooks, Greenbrier, Arkansas, for the appellee, Gary Philpot, as Administrator of the Estate of Virginia Miller.

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and DONALD P. HARRIS, SR. J., joined.

OPINION

FRANK G. CLEMENT, JR., J.
***1** In this wrongful death action, five defendants contest the trial court's denial of their Motion to Compel Arbitration and Stay Proceedings. At issue on appeal is the validity of the arbitration agreement signed by the plaintiff on behalf of his mother, the deceased, on the day of her admission to the defendants' nursing home. The trial court denied the defendants' Motion to Compel Arbitration and Stay Proceedings finding "the agreement to arbitrate unenforceable as it is one of adhesion, oppressive, and unconscionable."We have determined that, based on the evidence in the record, the arbitration agreement is enforceable. Therefore, we reverse the decision of the trial court and remand to the trial court for the entry of an order compelling arbitration.

Prior to January 6, 2005, Virginia Miller had been a resident of Vanco Manor Nursing Center in Goodlettsville, Tennessee. She had resided at Vanco Manor since July of 2004. On January 6, 2005, following Ms. Miller's brief stay in a hospital, Ms. Miller's son, Gary Philpot (the "plaintiff"), sought to admit his mother to a different residential facility. It was on this day the plaintiff visited NHC Healthcare, Hendersonville. Acting in his legal capacity as Ms. Miller's attorney-in-fact pursuant to a Durable Power of Attorney for Health Care and a general and durable power of attorney [FN1], the plaintiff executed an Admission and Financial Contract with NHC Healthcare, Hendersonville.

> FN1. In 2004, Virginia Miller executed Durable Power of Attorney for Health Care and a general and durable power of attorney. In each document she named her son, Gary Philpot, as her attorney-in-fact. In pertinent part, the Durable Power of Attorney for Health Care provided: "To ensure that decisions about my medical care are made consistent with these wishes and my personal values, I appoint [Gary Philpot] my attorney-in-fact to make health care decisions for me whenever I am unable to do so...."

As part of the NHC admission contract, the plaintiff signed a document titled in large bold letters at the top of the page: "**JURY TRIAL WAIVER AND DISPUTE RESOLUTION PROCEDURE.**"The two-page document contains four parts. The parts most relevant to this appeal pertain to the waiver of the right to a jury trial and the agreement to binding arbitration. The relevant parts read as follows:

> 2. DISPUTE RESOLUTION: In order to minimize the time and costs of resolving all

disputes, **BOTH PARTIES HEREBY WAIVE A JURY TRIAL FOR ALL DISPUTES AND CLAIMS BETWEEN THE PARTIES INCLUDING, BUT NOT LIMITED TO, THOSE ARISING FROM CONTRACT, TORT, OR STATUTORY LAW.**[FN2]Both parties agree, depending on the amount in dispute, to either (a) submit the dispute to this state's Small Claims Court judicial proceeding, or (b) if the amount in dispute exceeds the Small Claims Court statutory limits, then submit the dispute to binding arbitration....

FN2. We have not emphasized the sentence. The sentence appears in the contract documents as shown here, in bold and all capital letters.

3. **BINDING ARBITRATION**: [FN3] As stated above, for administrative expedience, any claim, controversy, dispute or disagreement initiated by either party that exceeds the statutory jurisdiction of the local Small Claims Court as listed above ... shall be resolved by binding arbitration administered by a neutral, experienced and disinterested arbitrator. The party initiating arbitration shall serve upon the other party via certified mail a demand for arbitration, which should include a brief description of the party's claim(s), the relief sought, and a proposed arbitrator who must be neutral, experienced and disinterested.

FN3. We have not emphasized the phrase BINDING ARBITRATION. It appears in the document as shown here, in bold and all capital letters.

....

***2** (c) AWARD: ... The costs of arbitration, including the administrative fee and arbitrator's compensation and expenses, shall initially be advanced by the party requesting arbitration, but shall be awarded by the arbitrator in accordance with applicable law.

....

(e) GOVERNING LAW: This agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed.

BY AGREEING TO RESOLUTION OF ALL DISPUTES AND CLAIMS BY SMALL CLAIMS COURT JUDICIAL PROCEEDINGS OR BINDING ARBITRATION, BOTH PARTIES ARE WAIVING THEIR RIGHTS TO A JURY TRIAL. THIS WAIVER ALSO APPLIES TO ALL APPEALS FROM SMALL CLAIMS COURT JUDGMENTS.[FN4]

FN4. We have not emphasized the paragraph. The paragraph appears in the contract documents as shown here, in bold and all capital letters.

The parties agree that this Jury Trial Waiver and Dispute Resolution Procedure shall survive and not otherwise be revoked by the death or incompetence of Patient.

....

4. **REVOCATION OF ARBITRATION PROVISION**: [FN5] All parties acknowledge the right of each to revoke the above arbitration provision if the original below is signed during normal business office hours within ten (10) business days.

FN5. We have not emphasized the subtitle. It appears in the document as shown here, in bold and all capital letters.

....

Within the arbitration agreement, there was a separate acknowledgment concerning the jury trial waiver and dispute resolution procedure that was signed by the plaintiff as the legal representative for Ms. Miller. The acknowledgment, which was set forth in bold font in a "box," provided:

I hereby agree to the Jury Trial Waiver and Dispute Resolution Procedure described above and its intent to provide administrative expedience. Its provisions have been explained to me and I have

been provided the opportunity to ask questions about these provisions prior to my signature below. I understand that I waive my right to trial by jury. I also acknowledge my right to revoke the agreement to arbitrate as set forth in provisions (2) and (3) above, by completing the bottom portion of this page during normal business office hours within ten (10) business days of the date below.

Date

Patient's Signature: _____

Legal Representative's Signature: *Gary Philpot POA 1/6/05*

Additional Signature: _____

The document appears in the record as shown above with the plaintiff having signed and dated the acknowledgment: "Gary Philpot POA 1/6/05."[FN6]

FN6. We have not emphasized the paragraph. It appears in the contract as shown, in bold letters within a box.

Ms. Miller died on March 24, 2005, while a resident of the NHC Hendersonville facility. Four months later, the plaintiff commenced this action against several defendants, including NHC Healthcare/Hendersonville, LLC d/b/a NHC Healthcare, Hendersonville; National Healthcare Corporation; NHC/OP, L.P; NHC Delaware Inc.; Tennessee Health Management, Inc.; American Health Centers, Inc.; Rehab America, Inc.; AMPHARM, Inc.; and Rivergate Manor, Inc. d/b/a Vanco Manor Nursing Center. The plaintiff asserted numerous claims [FN7] against all of the defendants, including a wrongful death claim against the various NHC defendants as the owners or operators of the NHC Healthcare, Hendersonville nursing home.[FN8]

FN7. The plaintiff's causes of action against all of the defendants included negligence, gross negligence, willful, wanton, reckless, malicious, and/or intentional conduct, medical malpractice, and violation of the Tennessee Adult Protection Act.

FN8. The five NHC defendants, specifically, are NHC Healthcare/Hendersonville, LLC d/b/a NHC Healthcare, Hendersonville; National Healthcare Corporation; NHC/OP, LP; and NHC Delaware Inc.

***3** In response to the complaint, the NHC defendants filed a Motion to Compel Arbitration and Stay Proceedings [FN9] in compliance with the admission contract and arbitration agreement. The plaintiff responded to the motion and argued the arbitration agreement was unenforceable for a variety of reasons. On October 21, 2005, following a hearing, the trial court ordered further discovery regarding the motion of the NHC defendants.

FN9. The other defendants filed a similar motion, relying on the NHC arbitration agreement, but the trial court denied that motion and no appeal was taken.

On June 9, 2006, following discovery and a second hearing,[FN10] the trial court denied the NHC defendants' Motion to Compel Arbitration. In its order, the trial court found "the agreement to arbitrate unenforceable as it is one of adhesion, oppressive, and unconscionable."The trial court further explained that "[t]he agreement in this case is oppressive and unconscionable for three reasons: lack of mutuality, the fees, and the revocation clause."This appeal followed.

FN10. The parties agreed that the arbitration dispute should be resolved on the pleadings, depositions, and affidavits. Therefore, no evidentiary hearing was held.

STANDARD OF REVIEW

The issues before us are questions of law. Therefore, we will review the issues *de novo* and reach our own independent conclusions. *Reno v. Suntrust, Inc.*, No. E2006-01641-COA-R3-CV, 2007 WL 907256, at *****2 (Tenn.Ct.App. March 26, 2007) (no Tenn. R.App. P. 11 application filed). On appeal, the central issue presented is whether the trial court erred in denying the NHC defendants' motion to compel arbitration. Although an appeal as of right must originate from a trial court's final judgment, *see*Tenn. R.App. P. 3(a),

this appeal is before us as of right because under the Tennessee Uniform Arbitration Act an appeal may be taken from an order denying an application to compel arbitration. Tenn.Code Ann. § 29-5-319; *see also T.R. Mills Contractors, Inc. v. WRH Enters., LLC*, 93 S.W.3d 861, 864-65 (Tenn.Ct.App.2002).

ANALYSIS

FEDERAL OR STATE LAW

As a preliminary matter, we must first address whether this case is governed by the Federal Arbitration Act (FAA) or the Tennessee Uniform Arbitration Act (TUAA). The trial court did not determine the applicable law, but it does not appear that the trial court's decision turned on the application of the FAA or the TUAA. However, for purposes of clarity, we find it proper to note the applicable law.

The Supreme Court recently addressed this issue in *Owens v. National Health Corp.*, No. M2005-01272-SC-R11-CV, 2007 WL 3284669, at *4-5 (Tenn. Nov. 8, 2007). In explaining whether the FAA or the TUAA applied, the Court stated:

> We need not belabor our analysis on this point because Section H(3), the arbitration provision within the nursing-home contract, expressly provides that "this agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed."It is undisputed that NHC Healthcare, Murfreesboro is licensed in Tennessee. Therefore, that language does not merely provide that issues of substantive law are to be determined by reference to Tennessee law; it clearly provides that the arbitration agreement itself "shall be governed by and interpreted" in accordance with the laws of Tennessee. Applying *Volt [Info. Scis., Inc. v. Bd. or Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989)], we must conclude that this case is governed by the Tennessee Uniform Arbitration Act and not the Federal Arbitration Act.

*4*Owens*, 2007 WL 3284669, at *5. The governing law provision of the arbitration agreement in the present case contains language identical to that cited by the court in *Owens*.Therefore, we conclude that this arbitration agreement, too, should be governed by the TUAA.

PUBLIC POLICY CONSIDERATIONS

The plaintiff originally argued on appeal that we should hold, as a matter of Tennessee law, that pre-dispute arbitration agreements executed upon a resident's admission to a nursing home violate public policy and are, therefore, invalid. Fortunately, the Supreme Court has subsequently addressed this issue in *Owens*, and therefore, we need not belabor the issue. In *Owens*, the Supreme Court "reject[ed] the plaintiff's assertion that pre-dispute arbitration agreements in nursing-home contracts are per se invalid because they violate public policy."*Owens*, 2007 WL 3284669, at *11.Based on this holding, we reject the plaintiff's argument and reiterate that arbitration agreements such as the one in the instant case are not per se invalid.

ENFORCEABILITY OF THIS ARBITRATION AGREEMENT

Because the arbitration agreement is not per se invalid as against public policy, we must next determine whether the parties' agreement is enforceable. To conduct that analysis, we must examine the agreement and determine whether it is a contract of adhesion, and if so, whether it contains such terms that render it unconscionable or oppressive. *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn.1996). The defendants concede that the arbitration agreement is a contract of adhesion. However, it is well established that concluding a contract is a contract of adhesion is not determinative of the contract's enforceability. *Id.* To the contrary, a contract's enforceability generally "depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable."*Buraczynski*, 919 S.W.2d at 320.Adhesion contracts that are oppressive to the weaker party or limit the obligations and liability of the stronger party will not be enforced by the courts. *Id.* Likewise, "[a] contract may be unconscionable if the provisions are so one-sided that the contracting party is denied an opportunity for a meaningful choice."*Owens*, 2007 WL 3284669, at *11 (citing *Haun v. King*, 690 S.W.2d 869, 872 (Tenn.Ct.App.1984)).

A contract will be found to be unconscionable only

when the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on one hand, and no honest and fair person would accept them on the other."*Taylor v. Butler*, 142 S.W.3d 277, 285 (Tenn.2004) (quoting *Haun*, 690 S.W .2d at 872). The unconscionability analysis can be broken down into two component parts: (1) procedural unconscionability, which is an absence of the meaningful choice on the part of one of the parties and (2) substantive unconscionability, which refers to contract terms which are unreasonably favorable to the other party. *Elliott v. Elliott*, No. 87-276-II, 1988 WL 34094 at *4 (Tenn. Ct.App. April 13, 1988).

***5** The Tennessee Supreme Court, in *Buraczynski*, examined physician-patient arbitration agreements for enforceability and set forth the relevant factors. In that decision, the Supreme Court noted that "in the context of arbitration agreements between patients and health care providers, courts have refused to enforce an arbitration agreement which was contained within a clinic admission form and which gave the patient no option to revoke the agreement and regain the right to a jury trial."*Buraczynski*, 919 S.W.2d at 320 (citing *Obstetrics and Gynecologists William G. Wixted, M.D., Patrick M. Flanagan, M.D., William F. Robinson, M.D. Ltd. v. Pepper*, 693 P.2d 1259, 1260 (Nev.1985)). Further, "in general, courts are reluctant to enforce arbitration agreements between patients and health care providers when the agreements are hidden within other types of contracts and do not afford the patients an opportunity to question the terms or purpose of the agreement."*Buraczynski*, 919 S.W.2d at 321.

In determining that the arbitration agreements at issue in *Buraczynski* were enforceable, the court found the following:

> The agreements were not contained within a clinic or hospital admission contract, but are separate, one page documents each entitled "Physician-Patient Arbitration Agreement." A short explanation was attached to each document which encouraged the patient to discuss questions about the agreement with [the physician]. The arbitration procedure specified by the agreements gives no unfair advantage to [the physician]. Each side chooses an arbitrator, and the two arbitrators chosen appoint the third arbitrator.... The patient is clearly informed by a provision in ten-point capital letter red type, directly above the signature line, that "by signing this contract you are giving up your right to a jury or court trial" on any malpractice claim. The agreements contain no buried terms. All terms are laid out clearly.... Patients signing these agreements did not immediately relinquish access to the courts, but could revoke the agreements for any reason within thirty days of its execution and regain that right. Finally, and perhaps most importantly, the agreements did not change the doctor's duty to use reasonable care in treating patients, nor limit liability for breach of that duty, but merely shifted the disputes to a different forum.

Id. Based on this analysis, the court concluded that none of these arbitration agreement provisions could be "construed as unconscionable, oppressive, or outside the reasonable expectations of the parties," and, therefore, the agreements were enforceable even though contracts of adhesion.*Id.*

In making the determination of whether the arbitration agreement in the case before us is an enforceable contract of adhesion, we "must consider all the facts and circumstances of [the] particular case."*Owens*, 2007 WL 3284669, at *11.Based on our examination of the arbitration agreement in the present case, we do not find the provisions or circumstances to be oppressive or unconscionable.

***6** The plaintiff asserts multiple challenges to the enforceability of the arbitration agreement. He argues that the circumstances surrounding the signing of the arbitration agreement render it unconscionable. He contends he was presented with a complex admissions packet containing numerous documents and did not realize he was giving up the right to a jury trial. He also contends the arbitration agreement lacks mutuality, that it only requires the plaintiff to arbitrate, not the NHC defendants. Next he contends the agreement is oppressive and unconscionable due to the fact the arbitration procedure specified in the agreement would be cost prohibitive. And finally, he contends the revocation provision in the agreement is of no consequence and, thus, does not relieve the agreement of its oppressive and unconscionable nature. We will discuss each of these matters in turn.

The plaintiff contends the circumstances surrounding the signing of the agreement render it unconscionable due to what he characterizes as an urgency to find a facility for his mother. As the trial court recognized in its order, the arbitration agreement was signed by the plaintiff on the day Ms. Miller was to be released from the hospital, and the record indicates the plaintiff was told that he had to decide whether to take the open spot at the NHC facility or the bed would be filled by someone else. The record, however, reflects the fact the NHC facility was not the only nursing home facility in the area, and that the plaintiff knew that there was another facility. Moreover, the record reflects the "urgency" was due in principal part to the plaintiff's desire to attend to this matter during his lunch break.[FN11]

> FN11. The record reflects the plaintiff went to the NHC facility during his lunch break from work and desired to complete the task of placing her in a facility other than Vanco Manor during his lunch break.

The plaintiff argues that he was presented with an admissions packet containing a number of lengthy documents and the NHC staffer "quickly flipped through the pages," essentially summarized the contents, and did not explain that signing the arbitration agreement meant that the plaintiff was giving up his right to a jury trial. The affidavit of the NHC staffer, however, contradicted the plaintiff's testimony.

A party is presumed to know the contents of a contract he has signed. *Giles v. Allstate Ins. Co., Inc.*, 871 S.W.2d 154, 157 (Tenn.Ct.App.1993); *Reno v. SunTrust, Inc.*, No. E2006-01641-COA-R3CV, 2007 WL 907256 at *3 (Tenn.Ct.App. March 26, 2007) (no Tenn. R.App. P. 11 application filed). The law imparts a duty on parties to a contract to learn the contents and stipulations of a contract before signing it, and signing it without learning such information is at the party's own peril. *Id.* Nothing in the record suggests that the plaintiff's educational background or abilities prohibited him from comprehending the agreement he signed. Moreover, the plaintiff does not argue that the agreement is unclear, nor does he argue that he requested additional time to read the agreement, nor did he ask questions.

The agreement reveals that the arbitration provision and the jury trial waiver were not hidden in the contract. To the contrary, they were prominently disclosed in the contract documents in several places. On its face, the agreement states, in bold all capital letters, that the document is a jury trial waiver and dispute resolution procedure and that both parties are waiving the right to a jury trial for all disputes and claims between the parties. In addition, the relevant provisions were set apart from the rest of the admission documents and clearly labeled "Arbitration Agreement" on a separate cover sheet, followed by a two-page document clearly stating that this agreement contained a "Jury Trial Waiver." The acknowledgment and signature block was also set apart, which emphasized that by signing the agreement, the plaintiff was agreeing to the Jury Trial Waiver and Dispute Resolution Procedure, that the provisions had been explained and he had been provided the opportunity to ask questions, and that, explicitly, the plaintiff was waiving his right to trial by jury. Thus, the plaintiff was clearly informed of the terms of the agreement and the waiving of the jury trial right.

*7 The plaintiff contends the arbitration agreement lacks mutuality, that it only requires the plaintiff to arbitrate, not the NHC defendants, which was one of the reasons stated by the trial court for finding the arbitration agreement unenforceable. We, however, are unable to reach the same conclusion as the trial court.

The arbitration agreement expressly states that *the parties* mutually waive the right to a jury trial for all disputes and claims between the parties. The agreement also provides that all disputes shall be submitted to binding arbitration with the exception of claims not exceeding the jurisdictional limit of the general sessions court.[FN12] Thus, the parties could file suit in general sessions court, without going to arbitration, provided the amount in controversy was within the jurisdictional limits of that court.[FN13]

> FN12. At the time the parties entered into the arbitration agreement, the general sessions jurisdictional limit was $15,000; however, as of September 1, 2006, the general sessions jurisdictional limit has extended to the sum of $25,000. Tenn.Code Ann. § 16-15-501.

FN13. The agreement also provided that all appeals from general sessions court judgments, whether by the plaintiff or the defendants, were subject to arbitration.

The agreement clearly provides that the general sessions exception applies to the defendants as well as the plaintiff. Thus, the provision is mutual. This fact notwithstanding, the plaintiff contends that the practical effect of the foregoing provisions prohibits the plaintiff, but not the defendants, from seeking judicial remedies. This contention is based on the premise by the plaintiff that he would never have a claim against the defendants as small as the jurisdictional limit and that the defendants' claims against the plaintiff would always be within the general sessions jurisdiction. We, however, find no factual or legal basis for either contention. The parties mutually agreed to arbitrate all claims that exceeded the statutory limit of general sessions court, and each party has the contractual right to file suit against the other in general sessions court provided the claims at issue are within the jurisdiction of the court.

The plaintiff contends the arbitration procedure specified in the agreement would be cost prohibitive. The trial court agreed with the plaintiff on this point and made a finding to that effect. We, however, have determined that the evidence in the record is insufficient to support this finding.

When a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, the burden of showing the likelihood of incurring prohibitively expensive costs is on that party. *Pyburn v. Bill Heard Chevrolet,* 63 S.W.3d 351, 363 (Tenn.Ct.App.2001) (quoting *Alabama v. Randolph,* 531 U.S. 79 (2000)). Thus the burden was on the plaintiff to show the costs would be prohibitively expensive. The only evidence the plaintiff provided pertains to a fee schedule of the American Arbitration Association; however, the agreement does not require the services of the AAA to arbitrate the parties' disputes and the parties were free to select any arbitrator they agree upon. The agreement merely provides that the arbitrator selected by the parties shall use the procedures of the AAA as guidelines *in the event* the parties cannot agree upon the governing rules and procedures to arbitrate their dispute.[FN14] Moreover, the transcript reflects the acknowledgment of the trial court that the AAA "will not honor these types of pre-dispute arbitration agreements in the context of the medical services contract."[FN15] Accordingly, because the AAA would not agree to arbitrate a dispute among the parties, its fee schedule is not material.

FN14. The agreement provides that the arbitrator shall use "the American Arbitration Association's Commercial Dispute Resolution procedures and Supplementary Procedures for Consumer-Related Disputes as a guideline for conducting the arbitration...."

FN15. This was stated to the trial court in the hearing on the motion, to which the court replied, "Right."

***8** The final issue to address is the plaintiff's challenge to the revocation provision, which affords the plaintiff the right to revoke the arbitration provisions within ten business days of signing the agreement. The trial court found the revocation procedure "problematic" and expressed concern it would lead to the discharge of the resident from the nursing facility if the right were exercised. Although revocation of the agreement by a resident following admission to a nursing facility may be problematic, as the trial court noted, our Supreme Court in *Buraczynski* considered a revocation provision indicative of the reasonableness of the agreement. After acknowledging that the agreement was offered to the patient on a "take it or leave it" basis in *Buraczynski,* and had the patient refused to sign the agreement the physician "would not have continued rendering medical care," thereby terminating the physician-patient relationship and interrupting the course of the patient's treatment, the court stated, "in the context of arbitration agreements between patients and health care providers, courts have refused to enforce an arbitration agreement which was contained within a clinic admission form and *which gave the patient no option to revoke the agreement and regain the right to a jury trial.*" *Buraczynski,* 919 S.W.2d at 320 (citing *Pepper,* 693 P.2d at 1260) (emphasis added). The Court went on to note that:

> in general, courts are reluctant to enforce arbitration agreements between patients and

> health care providers when the agreements are hidden within other types of contracts and do not afford the patients an opportunity to question the terms or purpose of the agreement. *This is so particularly when the agreements require the patient to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment,* and when the agreements give the health care provider an unequal advantage in the arbitration process itself.

Id. at 321.Following its examination of the arbitration agreements at issue in *Buraczynski,* the Court determined the agreement did not contain any oppressive provisions, and further noted the patients signing these agreements "did not immediately relinquish access to the courts, but could revoke the agreements for any reason within thirty days of its execution and regain that right ."*Id.*

Back to the case at bar, had the plaintiff invoked his right to revoke the arbitration provision, he and his mother may have been presented with the adverse circumstance contemplated by the trial court. That circumstance, however, would be no more problematic than the termination of the physician-patient relationship and interruption of the course of the patient's treatment contemplated in *Buraczynski.*With the Supreme Court having found the revocation provision in the arbitration and waiver of jury trial agreement enforceable in *Buraczynski,* which is substantially similar to the agreement at issue here, we find no basis upon which to rule otherwise.

IN CONCLUSION

***9** Having determined the arbitration and jury trial waiver provisions of the agreement at issue are valid and enforceable, we respectfully reverse the decision of the trial court and remand with instructions to enter an order compelling arbitration pursuant to the parties' agreement. Costs of appeal are assessed against the plaintiff.

Tenn.Ct.App.,2007.
Philpot v. Tennessee Health Management, Inc.
Slip Copy, 2007 WL 4340874 (Tenn.Ct.App.)

END OF DOCUMENT

Westlaw.
Not Reported in S.W.3d
Not Reported in S.W.3d, 2004 WL 2945699 (Tex.App.-San Antonio)
(Cite as: Not Reported in S.W.3d, 2004 WL 2945699 (Tex.App.-San Antonio))

C In re Ledet
Tex.App.-San Antonio,2004.
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,San Antonio.
In re Dan LEDET and Living Centers of Texas, Inc. d/b/a Retama Manor Nursing Center Laredo South.
No. 04-04-00411-CV.

Dec. 22, 2004.

Original Mandamus Proceeding.[FN1]

FN1. This proceeding arises out of Cause No.2003-CVT-001366-D3, styled *Ana Bustamante, Individually and as Next Friend of Anselma Garza (non compos mentis) v. Dan Ledet and Living Centers of Texas, Inc. d/b/a Retama Manor Nursing Center Laredo South,* pending in the 341st Judicial District Court, Webb County, Texas, the Honorable Elma Salinas Ender presiding.

W. Wendell Hall, Blanca P. Galo, Charles A. Deacon, Rosemarie Kanusky, Lori C. Ferguson, Fulbright & Jaworski L.L.P., San Antonio, for appellant.
Molly Higgins Santos, Law Office of Molly Higgins Santos, Laredo, for appellee.

Sitting: ALMA L. LÓPEZ, Chief Justice, CATHERINE STONE, Justice, KAREN ANGELINI, Justice.

MEMORANDUM OPINION

Opinion by KAREN ANGELINI, Justice.

***1** This mandamus proceeding arises out of a personal injury action filed by Ana Bustamante, individually and as next friend of her mentally incapacitated mother, Anselma Garza, against Dan Ledet and Living Centers of Texas, Inc. d/b/a Retama Manor Nursing Center Laredo South ("Retama"). Relators Ledet and Retama seek a writ of mandamus ordering respondent, the Honorable Elma Salinas Ender, to vacate her order of April 26, 2004, denying relators' motion to compel arbitration and enter an order dismissing the underlying cause or staying the underlying case pending arbitration. Because we conclude that relators are entitled to the relief sought, we conditionally grant the writ.

BACKGROUND

Anselma Garza is an elderly lady suffering from Alzheimer's disease. On October 10, 2002, she was admitted to Retama Manor Nursing Center. Her son, Alejandro Garza, signed the admittance papers as the "responsible party." He also signed an arbitration agreement as her "legal representative." On May 28, 2003, during the evening shift, Anselma Garza was found lying naked on the floor of her room. She had fallen out of bed. The fall caused multiple fractures to Anselma's face and body. On August 28, 2003, Anselma's daughter, Ana Bustamante, brought suit individually and as next friend of Anselma Garza against Retama and Dan Ledet, Retama's administrator, for negligence.

On January 5, 2004, Retama and Ledet ("relators") filed a "Motion to Compel Arbitration and Dismiss, or, in the Alternative, Stay Proceedings."After a hearing, the trial court denied their motion to compel. Relators filed a motion to reconsider, which was also denied.

STANDARD OF REVIEW

When a trial court erroneously denies a party's motion to compel arbitration under the FAA, the movant has no adequate remedy at law and is entitled to a writ of mandamus. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex.2001) (orig.proceeding). A party seeking to compel arbitration by mandamus must first establish the existence of an arbitration agreement subject to the FAA. *Id.* Once the movant establishes an agreement, the court must then determine whether the arbitration agreement covers the nonmovant's claims.*Id.* Because state and federal policies continue to favor arbitration, a presumption exists favoring agreements to arbitrate under the

FAA, and courts must resolve any doubts about an arbitration agreement's scope in favor of arbitration. *Id.* Once the trial court concludes that the arbitration agreement encompasses the claims, and that the party opposing arbitration has failed to prove its defenses, the trial court has no discretion but to compel arbitration and stay its own proceedings. *Id.* at 753-54.

DISCUSSION

According to Ana Bustamante, the arbitration agreement is not enforceable because (1) the arbitration agreement is not a contract evidencing a transaction involving interstate commerce, and as such, the Federal Arbitration Act does not apply, (2) no valid and enforceable arbitration agreement exists, and (3) the arbitration agreement is procedurally unconscionable. The trial court did not give any reasons why it denied the motion to compel arbitration.

A. Does the Federal Arbitration Act apply?

***2** According to Ana Bustamante, because the arbitration agreement at issue does not involve interstate commerce,[FN2] it is not governed by the Federal Arbitration Act ("FAA"). The arbitration agreement, however, expressly provides for application of the FAA: "Intending to be legally bound, the parties expressly agree that this Agreement will be governed by the Federal Arbitration Act, 9 U.S.C. § 1-16."When there is no express agreement to arbitrate under the FAA, a party may establish the applicability of the FAA by showing that the transaction affects or involves interstate commerce. *In re Kellogg Brown & Root,* 80 S.W.3d 611, 617 (Tex.App.-Houston [1st Dist.] 2002, orig. proceeding). However, where there is an express agreement to arbitrate under the FAA, courts have upheld such choice-of-law provisions. *Id.; see Volt Info. Sciences, Inv. v. Bd. of Trs.,* 489 U.S. 468, 478-79, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (upholding choice of California law to govern arbitration although interstate commerce involved because applying federal law would have forced parties to arbitrate in manner contrary to their agreement); *In re Alamo Lumber Co.,* 23 S.W.3d 577, 579 (Tex.App.-San Antonio 2000, orig. proceeding [leave denied]) (applying FAA because agreement expressly invokes FAA). Thus, when "the parties agree to arbitrate under the FAA, they are not required to establish that the transaction at issue involves or affects interstate commerce."*In re Kellogg Brown & Root,* 80 S.W.3d at 617. Accordingly, we need not consider Bustamante's argument that the agreement does not involve interstate commerce and as such, the FAA does not apply.

> FN2. The Federal Arbitration Act applies to contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2.

Having determined that the FAA applies because the agreement expressly provides as such, we need not consider Bustamante's argument that the agreement violates the Texas Arbitration Act ("TAA"). Under the Supremacy Clause of the United States Constitution, the FAA preempts otherwise applicable state laws, including the TAA. *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 271 (Tex.1992); *see In re Media Arts Group, Inc.,* 116 S.W.3d 900, 906 (Tex.App.-Houston [14th Dist.] 2003, orig. proceeding [leave denied]) ("FAA preempts application of state law that would render an existing arbitration agreement unenforceable ...). As such, whether the agreement violates the TAA is not an issue here.

B. Was there an enforceable arbitration agreement?

According to Bustamante, relators did not prove that an enforceable arbitration agreement exists because (1) the agreement does not identify her mother, Anselma Garza, and (2) both Bustamante and Garza are non-signatories to the agreement. We disagree.

Bustamante correctly states that the arbitration agreement does not mention her mother by name. Bustamante's brother, Alejandro Garza, signed the arbitration agreement as the resident's legal representative. The agreement does not identify the "resident." Instead, the blank on the agreement was left blank. Despite the "resident" not being identified, the agreement is still enforceable.

***3** Traditional principles of contract law apply to arbitration agreements; an arbitration agreement is, after all, a contract between two parties to arbitrate. *See J.M. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 227 (Tex.2003) ("Arbitration agreements are

interpreted under traditional contract principles."). One traditional principle of contract law is that if a contract is ambiguous, parol evidence is admissible. *See Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex.1995). Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered. *Id.* Only where a contract is first determined to be ambiguous may the courts consider the parties' interpretation and admit extraneous evidence to determine the true meaning of the instrument. *Id.*

An ambiguity in a contract may be said to be "patent" or "latent." *Id.* A patent ambiguity is evident on the face of the contract. *Id.* A latent ambiguity arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter. *Id.* Here, we have a patent ambiguity; because the "resident" was not identified, the arbitration agreement does not clearly identify the parties to the agreement. Thus, in determining who are the parties to the agreement, parol evidence is admissible. *Id.; see also Jordan v. Rule*, 520 S.W.2d 463, 465 (Tex.Civ.App.-Houston [1st Dist.] 1975, no writ) ("Where the names of the contracting parties are not clearly indicated upon the face of the writing itself, parol testimony is generally admissible to show their identity and their agreed relationship to each other."). [FN3]

> FN3. Bustamante attempts in her response to distinguish *Jordan* by emphasizing factual differences between *Jordan* and those presented in this case. She does not, however, explain why general principles of contract law would not apply here.

Here, Alejandro Garza testified unequivocally that he signed the arbitration agreement, as well as the admission agreement, on his mother's behalf as her responsible party. Bustamante does not contest this fact, and there is no evidence to the contrary. Thus, the undisputed evidence shows that the arbitration agreement was between Retama and Alejandro Garza on behalf of his mother, Anselma Garza.

Bustamante also argues that the arbitration agreement is not enforceable because neither she nor her mother, Anselma Garza, signed it and because Alejandro Garza did not have the legal authority to bind her mother or her. It is undisputed that Anselma Garza was incapacitated at the time of her admission into the nursing home due to Alzheimer's disease. Alejandro Garza testified that he signed the admittance papers and the arbitration agreement on his mother's behalf because she was too ill to do so. According to Alejandro, his siblings were satisfied with him taking on this role. And, his mother did not object to him signing on her behalf because "she was already ill."

Although Alejandro was not legally appointed as his mother's guardian, there is legal support for him acting on her behalf. Section 19.420 of the Texas Administrative Code, entitled "Documentation for the Delegation of Long-Term Care Resident's Rights," provides,

***4** (a) The delegation of resident rights may occur in three cases:

(1) when a competent individual chooses to allow another to act for him, such as with a Durable Power of Attorney;

(2) when the resident has been adjudicated to be incompetent by a court of law and a guardian has been appointed; or

(3) when the physician has determined that, for medical reasons, the resident is incapable of understanding and exercising such rights. The Health and Safety Code, Chapter 313, Consent to Medical Treatment, provides guidance under certain circumstances when a resident is comatose, incapacitated, or otherwise mentally or physically incapable of communication.

In turn, chapter 313 of the Texas Health and Safety Code, the Consent to Medical Treatment Act, defines a "surrogate decision-maker" as an "individual with decision-making capacity who is identified as the person who has authority to consent to medical treatment [FN4] on behalf of an incapacitated patient in need of medical treatment."TEX. HEALTH & SAFETY CODE ANN. § 313.002(10) (Vernon 2001). Section 313.004, "Consent for Medical Treatment," provides,

FN4. "Medical treatment" is defined as "a health care treatment, service, or procedure designed to maintain or treat a patient's physical or mental condition, as well as preventative care."TEX. HEALTH & SAFETY CODE ANN. § 313.002(6) (Vernon 2001).

(a) If an adult patient in a hospital or nursing home is comatose, incapacitated, or otherwise mentally or physically incapable of communication, an adult surrogate from the following list, in order of priority, who has decision-making capacity, is available after a reasonably diligent inquiry, and is willing to consent to medical treatment on behalf of the patient may consent to medical treatment on behalf of the patient:

(1) the patient's spouse;

(2) *an adult child of the patient who has the waiver and consent of all other qualified adult children of the patient to act as the sole decision-maker;*

(3) a majority of the patient's reasonably available adult children

(4) the patient's parents; or

(5) the individual clearly identified to act for the patient by the patient before the patient became incapacitated, the patient's nearest living relative, or a member of the clergy.

(b) Any dispute as to the right of a party to act as a surrogate decision-maker may be resolved only by a court of record having jurisdiction under Chapter V, Texas Probate Code.

Id. § 313.004(a), (b).

It is undisputed that Anselma Garza was incapacitated. Alejandro Garza testified that his siblings were comfortable with him signing the admittance papers and arbitration agreement on behalf of Anselma. According to Alejandro, he signed other documents on behalf of his mother, including documents relating to her Medicaid. Given Alejandro Garza's testimony and the statutory authority, Alejandro Garza had actual authority to sign the arbitration agreement on his mother's behalf.[FN5] And, because Bustamante is suing as "next friend," she is also bound by the arbitration agreement. *See Gracia v. RC Cola-7-Up Bottling Co.*, 667 S.W.2d 517, 519 (Tex.1984). Further, the arbitration agreement, itself, binds Retama's and Anselma's successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives.

FN5. In her response, Bustamante has not briefed in any manner whether this statutory authority would give Alejandro Garza authority to sign the arbitration agreement on his mother's behalf. However, citing *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir.2002), she does argue that the agreement should not bind her mother because her mother did not sign the agreement, Alejandro did. *Fleetwood Enterprises*, 280 F.2d at 1074-75, held that an arbitration agreement signed by parents did not bind their children. *Fleetwood Enterprises*, however, is distinguishable. In that case, there was no provision in the agreement expressly stating that the parents, on behalf of their children, agreed to submit the children's claims to arbitration. *Id.* at 1074.Here, however, Alejandro Garza, "on behalf of Resident," signed the agreement as the "legal representative." And, the agreement itself expressly states that all claims arising from the resident's stay and care provided at Retama will be settled through arbitration.

C. Procedurally Unconscionable?

***5** According to Bustamante, the arbitration agreement is not enforceable because it is procedurally unconscionable. The FAA declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."9 U.S.C. § 2; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)."Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" the FAA. *Casarotto*, 517 U.S. at 687.

Unconscionability includes two aspects: (1)

procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself. *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex.2002) (orig.proceeding). Courts may consider both procedural and substantive unconscionability of an arbitration clause in evaluating the validity of an arbitration provision. *Id.* at 572.And, the burden of proving unconscionability is on the party opposing arbitration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex.2001).

Here, Bustamante argues that the arbitration agreement is procedurally unconscionable because Alejandro Garza does not understand, speak, or read English, no one explained the agreement to him, and he felt pressured to sign the arbitration agreement. According to Alejandro, he felt pressured to sign the agreement because he was told that he would have to sign it for his mother to be admitted. However, he also testified that the Retama employee spoke Spanish with him and "explained some things but not everything."According to Alejandro he signed the agreement because the Retama personnel "didn't explain everything to me as it should be."However, Alejandro also admitted that he did not ask questions about the agreement or seek an explanation of the agreement.

Whether a party is illiterate or incapable of understanding English is not a defense to a contract. In *Vera v. N. Star Dodge Sales, Inc.*, 989 S.W.2d 13, 17-18 (Tex.App.-San Antonio 1998, no pet.), we held that illiteracy is not a defense to contract formation.[FN6]In *Vera*, the appellant argued that because he was illiterate, he did not know what he was signing when he endorsed the check containing the release language. *Id.* at 17.As such, appellant argued that there was no meeting of the minds and no valid contract for release. *Id.* We, however, held that absent proof of mental incapacity, a person who signs a contract is presumed to have read and understood the contract, unless he was prevented from doing so by trick or artifice. *Id.* We noted that this was true even in cases in which a party to the contract is illiterate. *Id.*

FN6. Bustamante attempts to distinguish this case by arguing that *Vera* did not involve an arbitration agreement. However, as noted previously, contract principles apply to arbitration agreements. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex.2003). Bustamante also argues that *Vera* is distinguishable because the plaintiffs in that case brought suit for breach of contract and were, thus, enforcing the agreement. We see no reason whether a party is seeking to enforce the contract would make *Vera* distinguishable. Finally, Bustamante argues that *Vera* is distinguishable because her "tort claims" do not "rely in any manner on the arbitration agreement, which is contractual."The arbitration agreement, however, clearly encompasses the tort claims brought by Bustamante and her mother:

> The parties agree that they shall submit to binding arbitration *all disputes* against each other and their representatives, affiliates, governing bodies, agents and employees *arising out of or in any way related or connected to the Admission Agreement and all matters related thereto including matters involving the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care including allegations of medical malpractice; any disputes concerning whether any statutory provisions relating to the Resident's rights under Texas law were violated;* any disputes relating to the payment or non-payment for the Resident's care and stay at the Facility; and *any other dispute under state or Federal law based on contract, tort, statute (including any deceptive trade practices and consumer protection statutes), warranty or any alleged breach, default, negligence, wantonness, fraud, misrepresentation or suppression of fact or inducement.*
>
> (emphasis added).

It is well settled that illiteracy will not relieve a party of the consequences of a contract. Every person who has the capacity to enter into a contract, in the

absence of fraud, misrepresentation, or concealment, is held to know what words were used in the contract, to know their meaning, and to understand their legal effect. Therefore, if a party is unable to read the contract, he must have it read to him.
6Id.* (citations omitted). We then held that because the appellant had not raised an issue regarding his mental competency or regarding fraud, misrepresentation, or concealment in the procurement of the release, the contract was valid and binding. *Id.* at 17-18.

Additionally, in *Nguyen Ngoc Giao v. Smith & Lamm, P.C.*, 714 S.W.2d 144, 146 (Tex.App.-Houston [1st Dist.] 1986, no writ), the appellant argued that he could not read, write, or speak English and that he understood the contract to provide for a contingent fee. The court noted that "[i]t is well settled that illiteracy will not relieve a party of the consequences of his contract."*Id.* The court then stated the general rule that "every person having the capacity to enter into contracts, in the absence of fraud, misrepresentation, or concealment, must be held to have known what words were used in the contract and to have known their meaning, and he must be held to have known and fully comprehended the legal effect of the contract."*Id.* Therefore, if a person is unable to read the contract, he must have it read to him. *Id.*

Here, there is no allegation of fraud, misrepresentation, or concealment. That Alejandro Garza did not speak English and therefore could not read the contract does not affect the validity of the contract.

We recognize that Bustamante relies on *In re Turner Brothers Trucking Co.*, 8 S.W.3d 370, 377 (Tex.App.-Texarkana 1999, orig. proceeding [leave denied]), which held that an arbitration agreement was procedurally unconscionable. There, the trial court made the following findings of fact: (1) the employees who presented the agreement to the relator did not understand the agreement themselves; (2) the relator had no one to explain the document to him and did not understand it; and (3) testing by a licensed psychologist showed that the relator was functionally illiterate and had a reading disorder. *Id.* Under those facts, the court held that the arbitration agreement was unconscionable.*Id.* Our facts are distinguishable. Here, there is no evidence that the Retama personnel did not understand the agreement. And, Alejandro admitted that he did not ask any questions or seek an explanation of the agreement. Moreover, *Turner* is in direct conflict with our holding in *Vera* that illiteracy is not a defense to contract formation. Finally, *Turner* is only persuasive authority, and we are not bound to follow it.

CONCLUSION

We hold that the arbitration agreement is enforceable. As such, the trial court had no discretion but to compel arbitration and stay its own proceedings. Accordingly, we conditionally grant relators' petition for writ of mandamus and direct respondent (1) to withdraw her order denying relators' motion to compel arbitration and (2) to enter an order dismissing or staying the underlying cause pending arbitration. Only if the Honorable Elma Salinas Ender fails to comply will we issue the writ.

Tex.App.-San Antonio,2004.
In re Ledet
Not Reported in S.W.3d, 2004 WL 2945699 (Tex.App.-San Antonio)

END OF DOCUMENT