

# FAIRNESS IN NURSING HOME ARBITRATION ACT OF 2008

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## HEARING BEFORE THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

**H.R. 6126**

JUNE 10, 2008

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## **FAIRNESS IN NURSING HOME ARBITRATION ACT OF 2008**

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**TUESDAY, JUNE 10, 2008**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COMMERCIAL  
AND ADMINISTRATIVE LAW,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:11 p.m., in Room 2141, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Johnson, Lofgren, Cannon, and Feeney.

Staff present: Norberto Salinas, Majority Counsel; Daniel Flores, Minority Counsel; and Adam Russell, Majority Professional Staff Member.

Ms. SÁNCHEZ. This hearing of the Committee of the judiciary Subcommittee on commercial and administrative law will now come to order. Without objection, the Chair will be authorized to declare a recess of the hearing at any time. I will now recognize myself for a short statement.

During this Congress, this Subcommittee has held four hearings on issues and legislation related to the Federal Arbitration Act. We have heard from attorneys, professors, and individuals about unfortunate experiences with the arbitration process.

Erika Rice, a witness from our auto arbitration hearing, described her troubling situation of trying to remedy the purchase of a faulty car from an automobile dealer. Jordan Fogal, a witness from our consumer hearing, thought she had purchased her dream home, which turned out to be a poorly constructed nightmare and a legal headache to repair. And Deborah Williams, a witness from one of our legislative hearings, testified that while she thought she had a bright future after purchasing a Coffee Beanery franchise, the extreme contractual requirements she could not afford to meet resulted in her losing the franchise and landing in financial ruin.

Although Ms. Rice, Ms. Fogal, and Ms. Williams initially experienced emotional distress during their predicaments, it was in seeking a cure to their problems that they experienced financial suffering. Each learned that mandatory arbitration agreements can disadvantage consumers and franchise owners and make their hope of a fair resolution nearly impossible. Sadly, the mandatory arbitration clauses in their contracts prevented them from regaining

their previous financial stability, and with it their emotional security.

Unfortunately, the inclusion of arbitration clauses in long-term care facility contracts is even more emotionally heartbreaking. By 2040, the demand for long-term care services will more than double. The long-term care industry is increasingly including pre-dispute arbitration clauses in its “take it or leave it” admission agreements for prospective residents. And for desperate family members who are unable to provide adequate care in their home setting, the need for an immediate placement for their loved one makes the “take it or leave it” choice really no choice at all.

Families who are in the midst of the heartbreaking decision to place a parent in a nursing home rarely have the time or wherewithal to fully and thoughtfully consider mandatory arbitration clauses. Simply dealing with the emotional and traumatic process of searching for a long-term care facility makes it impossible for residents and their families to worry about the potential loss of their constitutional right to a jury trial. What is real and immediate is not some future dispute, but the proper care of a loved one.

The emotional toll and the sense of vulnerability when moving a loved one into the care of strangers at a nursing home is something that I am all too familiar with. My father, who has been diagnosed with Alzheimer’s, was recently placed into a nursing home, and one of the last things I wanted to worry about when searching for that perfect placement was whether he was foregoing his legal rights. Instead, I wanted to focus solely on the quality and range of services the facility would provide him. As it turned out, my family chose a facility that met our requirements, but also had a mandatory arbitration clause in its contract.

Now, I want to make it clearly known that I am completely supportive of the principles of arbitration and the arbitration process. However, the process should remain fair. Parties to a contract should have the option to choose whether or not they arbitrate their disputes. For these reasons, I introduced H.R. 6126, the Fairness in Nursing Home Arbitration Act of 2008, to make pre-dispute mandatory arbitration clauses in long-term care contracts unenforceable, and to restore to residents and their families their full legal rights. This legislation would allow families and residents to maintain their peace of mind as they look for that perfect long-term care facility.

I am proud to note that H.R. 6126 is supported by several significant groups who advocate on behalf of seniors and consumers, including AARP, which is providing a witness at this afternoon’s hearing, the National Senior Citizens Law Center, the Alzheimer’s Association, and the National Association for Consumer Advocates. Additionally, Senators Mel Martinez and Herb Kohl have introduced a similar bill in the Senate, S. 2838. Accordingly, I look forward to hearing from this afternoon’s witnesses about arbitration agreements in contracts between long-term care facilities and residents, and about their views on H.R. 6126.

[The bill, H.R. 6126, follows:]

110TH CONGRESS  
2D SESSION

# H. R. 6126

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

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## IN THE HOUSE OF REPRESENTATIVES

MAY 22, 2008

Ms. LINDA T. SÁNCHEZ of California (for herself, Ms. ROS-LEHTINEN, Mr. CONYERS, Mr. JOHNSON of Georgia, Mr. KUCINICH, and Mr. DELAHUNT) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

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

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fairness in Nursing  
5 Home Arbitration Act of 2008”.

6 **SEC. 2. AMENDMENTS.**

7 (a) ARBITRATION OF CERTAIN CONTROVERSIES.—  
8 Chapter 1 of title 9, United States Code, is amended by  
9 adding at the end the following:

1 **“§ 17. Validity and enforceability**

2 “(a) DEFINITIONS.—For purposes of this section:

3 “(1) LONG-TERM CARE FACILITY.—The term  
4 ‘long-term care facility’ means—

5 “(A) any skilled nursing facility as defined  
6 in 1819(a) of the Social Security Act;

7 “(B) any nursing facility as defined in  
8 1919(a) of the Social Security Act; or

9 “(C) a public facility, proprietary facility,  
10 or facility of a private nonprofit corporation  
11 that—

12 “(i) makes available to adult residents  
13 supportive services to assist the residents  
14 in carrying out activities such as bathing,  
15 dressing, eating, getting in and out of bed  
16 or chairs, walking, going outdoors, using  
17 the toilet, or obtaining or taking medica-  
18 tion; and

19 “(ii) provides a dwelling place (which  
20 may contain a full kitchen and bathroom)  
21 for residents in order to deliver supportive  
22 services described in clause (i), that in-  
23 cludes common rooms and other facilities  
24 appropriate for the provision of such serv-  
25 ices to residents of the facility;



1 but excludes a facility, or portion of a facility,  
2 that either does not provide the services de-  
3 scribed in clause (i) or has as its primary pur-  
4 pose to educate or to treat substance abuse  
5 problems.

6 “(2) PRE-DISPUTE ARBITRATION AGREE-  
7 MENT.—The term ‘pre-dispute arbitration agree-  
8 ment’ means any agreement to arbitrate a dispute  
9 that arises after such agreement is made.

10 “(b) INVALIDITY OF PRE-DISPUTE ARBITRATION  
11 AGREEMENTS.—A pre-dispute arbitration agreement be-  
12 tween a long-term care facility and a resident of such facil-  
13 ity (or person acting on behalf of such resident, including  
14 a person with financial responsibility for such resident)  
15 shall not be valid or specifically enforceable.

16 “(c) APPLICATION TO AGREEMENTS.—This section  
17 shall apply to any pre-dispute arbitration agreement be-  
18 tween a long-term care facility and a resident of such facil-  
19 ity (or a person acting on behalf of such a resident, includ-  
20 ing a person with financial responsibility for such resi-  
21 dent), and shall apply to a pre-dispute arbitration agree-  
22 ment entered into either at any time during the admission  
23 process or at any time after the admission process.

24 “(d) APPLICATION OF FEDERAL LAW.—A determina-  
25 tion as to whether this chapter applies to an arbitration

1 agreement described in this section shall be determined  
2 under Federal law. Except as otherwise provided in this  
3 chapter, the validity or enforceability of such agreement  
4 shall be determined by the court, rather than the arbi-  
5 trator, irrespective of whether the party opposing arbitra-  
6 tion challenges such agreement specifically or in conjunc-  
7 tion with any other term of the contract containing such  
8 agreement.”.

9 (b) CONFORMING AMENDMENT.—The table of sec-  
10 tions in chapter 1 of title 9, United States Code, is amend-  
11 ed by adding at the end the following:

“17. Validity and enforcement.”.

12 **SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.**

13 (a) EFFECTIVE DATE.—Except as provided in sub-  
14 section (b), this Act and the amendments made by this  
15 Act shall take effect on the date of the enactment of this  
16 Act.

17 (b) APPLICATION OF AMENDMENTS.—The amend-  
18 ments made by this Act shall apply with respect to agree-  
19 ments made, amended, altered, modified, renewed, or ex-  
20 tended on or after the date of the enactment of this Act.

○

Ms. SÁNCHEZ. At this time I will now recognize my colleague, Mr. Cannon, for his opening remarks.

Mr. CANNON. Madam Chair, do you expect other Members of the Committee to make opening statements? I think on our side Mr. Feeney would like to do that.

Ms. SÁNCHEZ. I believe we do have other Members that would like to make opening statements.

Mr. CANNON. Then I ask unanimous consent that they be allowed to make an opening statement. If the Chair is willing, then I would be willing to defer my opening statement block to Mr. Feeney and other Members of—

Ms. SÁNCHEZ. Without objection. Mr. Feeney is recognized for his opening statement.

Mr. FEENEY. Well, thank you. The Ranking Member and the Chair are very kind, and I appreciate that.

Importantly, I want to recognize a good friend here today, my friend Ken Connor. And he is a leader in Florida, both in elder care and compassion, and in a lot of regards, you know, a great friend of Floridians and people throughout the country.

I want to tell you that no State has a greater interest in balancing the needs of the elderly than the State of Florida. We are sort of the demographic bell-weather for the rest of the country in terms of an aging population, and we are going to sometimes do it right and sometimes get some things wrong. And hopefully we can fix it when we get things wrong, but simultaneously the rest of the country can learn from our successes and our failures as well.

The question in today's hearing is not so much about the big picture as to whether or not we ought to essentially prohibit the use of pre-dispute mandatory binding arbitration in nursing homes and assisted living contracts. The Fairness Nursing Home Arbitration Act essentially, as I understand it, would gut the current balance that Congress has tried to put in place between the interests of, on the one hand, providing affordable access to elderly care, and also protecting the rights of victims of abuse, misdeeds, and some malfeasance in homes.

I will tell you that Florida has seen the effects of costly litigation on the one side, and at one point had a crisis of nursing homes going out of business. On the other hand, I think that there is no more eloquent spokesperson than Mr. Connor for what happens when the people that are least able to defend themselves at the last phase of their lives, are abused or neglected. And there is a balance there.

And let me say this, because I do have to go, but I have read the testimony and will be interested in the way this develops. Let me say this about my friend Ken Connor: He sounds simply like Plato when talking about most things, like Austrian economics, for example.

But Plato described great rhetoricians, and he said that there were three parts of any great rhetorical statement. One is the ethos, the second—or the ethics of the speaker and the credibility—second is the pathos, or the emotion that they could solicit, and finally, the logos. I find both on ethos and pathos, we have an absolute all-star today in my friend Ken Connor. We just sometimes

have differences on the logos and the logic of how we are getting to a common goal.

And with that, I am grateful to the Ranking Member, to the Chairman, and again, my friend Ken Connor.

Ms. SÁNCHEZ. The gentleman yields back. And I want to say, Mr. Feeney, somebody who represents the district in Florida, I understand that these issues are probably at the forefront of senior issues in your State, and I appreciate your concern about the bill. I just wanted to make—point out one small point about the bill: The bill does not gut arbitration, it merely gives patients the opportunity to choose whether or not to arbitrate their disputes. We are talking only specifically about pre-dispute mandatory binding arbitration agreements.

I believe Mr. Johnson has an opening statement. Mr. Johnson is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Madam Chair. And again, I would also like to echo what you have said. H.R. 6126, the “Fairness in Nursing Home Arbitration Act of 2008,” would not gut arbitration as an alternative dispute resolution; it would simply bar pre-dispute mandatory arbitration agreements in nursing home agreements.

And I want to thank you, Madam Chairwoman, for holding this hearing today. And throughout this session, the Subcommittee has held several hearings on pre-dispute mandatory binding arbitration agreements. We have explored the use of these agreements in automobile leases and purchases, consumer employment and franchise agreements, and within the NFL’s retirement benefit.

And what has resonated throughout all of these hearings is clear: Pre-dispute mandatory arbitration agreements have been used across the board by businesses to strip individuals of their constitutional right to a jury trial. It is an unequal bargaining relationship that has imposed this pre-dispute mandatory binding arbitration upon those with less power.

Today we will continue to examine who these contracts of adhesion have become ubiquitous in a type of case that is of particular concern to not only you, Madam Chair, but also millions of families across this country who have and will be faced with the difficult and emotional decision to place their loved ones, or loved one, in a nursing home or assisted living facility. Oftentimes, finding the appropriate facility is at the forefront of people’s minds, not the possibility that they may be foregoing their legal rights, in the case of a dispute that may or may not arise.

Yet, as families make these difficult decisions, long-term care facilities have found yet another way to insulate themselves from any possible legal action if a dispute should arise. And we are all aware of the tragic stories of elder care abuse, neglect, and death. But up until recently, families have been able to rely upon our judicial system to secure justice.

As we will hear today from our witness, nursing home facilities have unscrupulously inserted binding pre-dispute mandatory arbitration agreements into their contracts, which allow them to divert victims and their families into a private, for profit judicial system which works mainly for the benefit of the nursing home industry. This is a place where hearings are held in secret, discovery is lim-

ited. The statistics show that most of the time individuals lose, and there is no meaningful right to appeal once they do lose.

What makes this situation even more egregious is that even if misconduct or neglect is found, arbitrators do not have the authority to force facilities to make changes to their policies and practices. And as a result, other lives may be in harm's way as these facilities remain open for business. As admittance into nursing home facilities continues to rise because of the increasing numbers of the elderly, with over 1 million residents in long-term care today, Congress must step in and end this shameful practice.

I want to thank the Chairwoman for holding this hearing, and I look forward to hearing from our witnesses today, and I will yield back.

Ms. SÁNCHEZ. The gentleman yields back.

Mr. Cannon, would you like to make an opening—

I now recognize the Ranking Member of the Subcommittee, Mr. Cannon, for his opening remarks.

Mr. CANNON. Thank you, Madam Chair, and welcome to our witnesses.

This hearing marks the fourth time in this Congress we have met to consider the question of mandatory binding arbitration, but the industry before us today is new. Today we consider the use of mandatory binding arbitration clauses in nursing home and assisted living contracts.

Once again, we find an industry that has promoted the use of mandatory binding arbitration after abusive tort suits and runaway jury awards ran up the costs of goods and services, hurting companies and consumers. Once again, the industry is taking steps to make sure that mandatory binding arbitration is used fairly. In this case, nursing homes often do not use mandatory binding arbitration to resolve quality of care issues.

The American Health Care Association and the National Center for Assisted Living have developed a model arbitration agreement and promoted its use for several years. The model agreement does not alter rights or remedies available under State tort law. The status of an agreement to arbitration is not a condition of admission to a nursing home or an assisted living facility; it also provides a 30-day cooling off period for a resident or representative to reconsider and in writing rescind an arbitration agreement, a cooling off period far longer than found in other sectors.

Other important parts of the picture also have not changed. Our courts are still overburdened, and arbitration is still providing an escape valve for citizens hoping to avoid an unresponsive and drawn out judicial system. We should continue to do everything we can to protect that, not to undermine it.

In addition, the hard, representative, incredible evidence that mandatory binding arbitration is being widely abused is still missing. I expect today that we will hear some testimony about problem incidents. I welcome that. If there are problems, I am happy to hear about them, and with the witnesses' help, I hope that we can understand precisely what they are.

The system may be working well; we all know that no system is perfect. If we know what problems there are, perhaps we can help fix them and avoid attempts to fix things that are not broken.

There are two features of this hearing, though, that are very new. First, proposals to restrict arbitration in nursing home and assisted living sectors point us straight toward another perennial issue: tort reform. Because if tort abuse is what produced mandatory binding arbitration in these sectors, restricting arbitration will only hand the system back over to abusive trial lawyers. Second, proposals to restrict arbitration in these sectors will produce cost increases that will run us straight into what many consider the biggest financial crisis looming over the country's future, and that is exploding Medicare entitlement.

I urge those who seek to restrict arbitration to consider whether, if they drive up the health care cost in the process, will Medicare payouts have to increase, not for the betterment of our seniors, but to pay for trial lawyer pocket-lining, or will nursing homes have to reduce the number of Medicare enrollees because historic benefit levels cannot cover the costs of the care due to abusive lawsuits? Either way, our seniors lose out.

I thank you, Madam Chair, and I yield back.

[The prepared statement of Mr. Cannon follows]:

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Thank you Madam Chair and welcome to our witnesses.

This hearing marks the fourth time this Congress we have met to consider the question of mandatory binding arbitration, but the industry before us is new.

Today, we consider the use of mandatory binding arbitration clauses in nursing home and assisted living contracts.

Once again, we find an industry that has promoted the use of mandatory binding arbitration after abusive tort suits and runaway jury awards ran up the costs of goods and services—hurting companies and customers.

Once again, the industry is taking steps to make sure that mandatory binding arbitration is used fairly. In this case, nursing homes often do not use mandatory binding arbitration to resolve quality-of-care issues.

The American Health Care Association and the National Center for Assisted Living have developed a model arbitration agreement and promoted its use for several years.

The model agreement does not alter rights or remedies available under state tort law. It states that an agreement to arbitration is *not* a condition of admission to a nursing home or an assisted living facility. It also provides a 30-day “cooling off period” for the resident or a representative to reconsider and, in writing, rescind an arbitration agreement—a cooling off period far longer than found in other sectors.

Other important parts of the picture also have not changed. Our courts are still overburdened, and arbitration is still providing an escape valve for citizens hoping to avoid an unresponsive judicial system.

We should continue to do everything we can to protect it—not to undermine it.

In addition, the hard, representative and credible evidence that mandatory binding arbitration is being widely abused is still missing.

I expect today that we will hear some testimony about problem incidents. I welcome that. If there are problems, I am happy to hear about them, and with the witnesses' help I hope that we can understand precisely what they are. This system may be working well, but we all know that no system is perfect. If we know what problems there truly are, perhaps we can help fix them—and avoid attempts to fix instead things that aren't broken.

There are two features of this hearing, though, that are very new.

First, proposals to restrict arbitration in the nursing home and assisted living sectors point us straight toward another perennial issue—tort reform. Because if tort abuse is what produced mandatory binding arbitration in these sectors, restricting arbitration will only hand the system back over to abusive trial lawyers.

Second, proposals to restrict arbitration in these sectors will produce cost increases that will run us straight into what many consider the biggest fiscal crisis looming over this country's future—exploding Medicare entitlements.

I urge those who seek to restrict arbitration to consider whether if they drive up health care costs in the process will Medicare pay outs have to increase not for the betterment of our seniors but to pay for trial lawyer pocket lining, or will nursing homes have to reduce the number of Medicare enrollees because historic benefit levels cannot cover the costs of the care due to abusive lawsuits. Either way our seniors lose out.

I yield back the remainder of my time.

Ms. SÁNCHEZ. The gentleman yields back. Without objection, other Members' opening statements will be included in the record.  
[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The decision to place a loved one in a nursing home is probably one of the most difficult decisions families must face. It's loaded with emotion, not only for the person being admitted into the facility, but also for the family members who have realized that they can no longer adequately care for their loved one by themselves.

When family members put their trust in the hands of the long-term care provider, they should be able to expect that their parent or grandparent will be kept safe and watched carefully by trained staff.

Unfortunately, some facilities have broken that trust, by allowing abusive and neglectful environments that have resulted in harm to many residents, and sadly, even the premature deaths of some.

Although long-term care facilities are subject to both federal and State monitoring, we know that does not necessarily ensure that abuse and neglect in these facilities will not occur. So we must also rely on other means to encourage the corporations that run these facilities to provide truly safe environments.

Already, some individuals and groups are doing this through advocacy, litigation, and by avoiding facilities with records of safety violations. Nonetheless, this is not enough, because some facilities have discovered a way to conceal their poor safety records, while also limiting their legal responsibility.

What some facilities are doing is including a pre-dispute mandatory binding arbitration clause in their contracts with residents. These clauses can strip a resident's constitutional right to a jury trial, and can artificially limit damages obtained in a verdict, and can even discourage plaintiffs from filing a claim.

Furthermore, these clauses often require that any arbitration decision be kept secret, which keeps the incidents of neglect and harm to residents out of the public eye.

Without these restrictive contract clauses, these incidents could be brought to light in a court proceeding, and prospective residents and their families would know better whether the nursing home or facility they are considering does truly provide a safe environment.

To address the concerns from these arbitration clauses in long-term care facility contracts, Chairwoman Sánchez introduced the "Fairness in Nursing Home Arbitration Act of 2008," of which I am proud to be an original cosponsor.

This bipartisan legislation accomplishes the critical goal of effectively prohibiting pre-dispute mandatory binding arbitration agreements in contracts between residents and long-term care facilities in several meaningful respects.

First, this bill will protect residents' constitutional right to a jury trial, and the accompanying fairness in the legal system, which is sometimes not found in arbitration.

Second, this legislation will ensure that nursing homes and assisted living facilities with poor safety records cannot easily hide behind the secrecy of arbitration decisions. Instead, disputes about neglect and abuse by staff may be taken publicly to court.

Third, this legislation will still allow residents and long-term care facilities to opt for arbitration, but will ensure that it is with the free consent of all parties, rather than a requirement imposed by the facility as a pre-condition for admission.

For example, a resident might negotiate that the arbitration decision be made public, so that prospective residents would have a clearer picture of the facility.

I very much look forward to hearing from the witnesses today, and hope that other Members will realize the importance of this legislation.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, SUBCOMMITTEE ON  
COMMERCIAL AND ADMINISTRATIVE LAW

As someone with a loved one who is a resident of a long-term care facility, the issue of dispute arbitration between long-term care facilities and their residents hits close to home for me. As in many other contexts, the bargaining power between the corporate entity, on the one hand, and the individual consumer, on the other, is very unequal. Long-term care facilities should not be permitted to take advantage of these unequal bargaining positions to force residents to enter into mandatory pre-dispute arbitration agreements as a condition of residence. Rather, both parties should be allowed to voluntarily consent to arbitration only after a dispute has arisen between them. That is why I am a cosponsor of H.R. 6126, the "Fairness in Nursing Home Arbitration Act of 2008," which amends the Federal Arbitration Act to make unenforceable mandatory pre-dispute arbitration agreements between long-term care facilities and their residents. I thank Chairwoman Sanchez for her leadership on this issue and urge all of my colleagues on the Subcommittee on Commercial and Administrative Law to support this measure.

Ms. SÁNCHEZ. I am now pleased to introduce the witnesses on our panel for today's hearing. Our first witness is William Hall. Dr. Hall, of Rochester, NY, is a member of the AARP board of directors. Dr. Hall is director of the Center for Healthy Aging and previously served as chief of geriatrics at the University of Rochester School of Medicine, where he is the Paul Fine professor of medicine.

Dr. Hall's career in geriatrics has largely focused on the preventative aspect of medical care for older adults. He has been instrumental in facilitating the development of clinical and education programs in the field of aging that have had a national impact.

Dr. Hall's volunteer experience includes serving as medical director for the AARP Triumph Classic, a program of exercise training, preparing older adults to compete in triathlons. He has extensive experience on numerous professional boards, including the American College of Physicians, and the American Geriatrics Society, and is a past president of the American College of Physicians.

Dr. Hall has testified on numerous health issues before Congress, the Department of Health and Human Services, and the National Institutes of Health.

We welcome you to our panel, Dr. Hall.

Our second witness is Linda Stewart, a Houston, TX resident. Ms. Stewart has been in the nursing profession for 28 years, including 10 years as a captain in the United States Air Force.

Having worked as a critical care and E.R. nurse, Ms. Stewart is now administering exercise programs for senior citizens. An MBA graduate, she is currently working toward another master's degree in nutrition. Ms. Stewart's grandmother, Hattie Miller, was a victim of nursing home negligence.

Welcome, Ms. Stewart.

Our third witness is Gavin Gadberry. Mr. Gadberry is a shareholder of Underwood, Wilson, Berry, Stein, and Johnson, PC, one of Texas' oldest and Amarillo's largest firm, which offers a full service civil practice. He currently serves as general counsel of and issue lobbyist for the Texas Health Care Association.

Mr. Gadberry's primary areas of practice are Government relations, long-term care, and health care law, administrative and regulatory law, and general civil litigation. Mr. Gadberry has been a speaker on numerous occasions at the American Health Lawyers



Association's annual Long-Term Care and the Law seminar. He is a contributing author to the Long-Term Care Handbook: Regulatory, Operational, and Financial Guidepost, Second Edition. Mr. Gadberry received the chair's award at the 2004 Texas Health Care Association Convention for his efforts on tort reform in 2003.

We welcome you this afternoon.

And our final witness is Mr. Ken Connor. Mr. Connor co-founded the Center for a Just Society in 2005, and serves as the organization's chairman and one of its principal spokesmen. Affiliated with the law firm of Wilkes & McHugh, P.A., Mr. Connor recently served as counsel to Governor Jeb Bush in *Bush v. Schiavo*, the matter involving Terry Schiavo and the court order to remove her feeding tube.

Mr. Connor is also an advocate on behalf of nursing home residents and was appointed to Florida's task force on the availability and affordability of long-term care. He has served as the chairman of the State of Florida Commission on Ethics and is a member of the State Constitution Revision Commission. Mr. Connor has previously testified before the Subcommittee on the issue of arbitration.

We welcome you back before the Subcommittee.

I want to thank all of the witnesses for their willingness to participate in today's hearing. Without objection, your written statements will be placed into the record, and we are going to ask that you limit your oral testimony to 5 minutes.

You will note that we have a lighting system that starts with a green light. Four minutes into your testimony you will see a yellow light; that gives you a warning you have about a minute remaining. And then when your time has expired you will see the red light.

We would ask that if you are caught mid-thought or mid-sentence when the light turns red, we will give you an opportunity to finish your final thought before moving on to the next witness. After each witness has presented her or his testimony, Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

And with that I am going to invite Dr. Hall to please give his testimony. And please make sure your microphone is on.

**TESTIMONY OF WILLIAM J. HALL, M.D., AARP,  
WASHINGTON, DC**

Dr. HALL. Chairwoman Sánchez, Ranking Member Cannon, and Members of the Subcommittee, I am William Hall, with the AARP board of directors, and I really thank you very much for the opportunity to testify today.

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 that, in fact, another facility can be found.

When older adults suffer a decline in health or are discharged from the hospital and are unable to care for themselves, these individuals and their families are faced with a very daunting task of finding nursing home care. More often than not, these decisions are

made in an absolute crisis situation. Individuals may be pressured to accept the first available bed without enough time to adequately compare nursing homes.

Moreover, people seeking nursing home admission are among the frailest of Americans. In 2006, nearly half of all nursing home residents were diagnosed with dementia. In 2004, nearly 80 percent of residents needed help in four or five of the customary activities of daily life. Recently, nursing home residents have had higher disease prevalence and multiple chronic conditions, indicating an increasingly sicker population, often on multiple and complex medications.

It is often in this context of crisis and vulnerability that prospective residents and their families face the nursing home admissions process, where they are typically given a lengthy, complicated contract. Many facilities include provisions in these contracts requiring that residents and their families agree to forego the use of the court system to resolve future disputes. Instead, they must agree to submit their cases to arbitration.

The admissions contract typically is presented as a “take it or leave it” situation. When potential residents and their families 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 prospective residents and their families are aware these contracts contain an arbitration provision, they often simply do not understand what it means, nor do they realize the many rights and protections they would forego in arbitration. It places severe restrictions on many of their rights, including the ability to obtain documents and other evidence, making it difficult to prove their case, and the bases of appeal are extremely limited.

Consumers do not have equal bargaining power with facilities, and are virtually powerless to negotiate the arbitration provisions, nor are they likely to gain admission to the facility if they want to delete the provision. 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, H.R. 6216, introduced by Chairwoman Linda Sánchez and Representative Ileana Ros-Lehtinen.

This bill would make pre-dispute arbitration provisions between long-term care facilities and a resident of the facility or a person acting on their behalf unenforceable, ensuring that residents of long-term care facilities and their families are not forced into arbitration. This legislation would provide uniform, nationwide protection against such pre-dispute arbitration provisions.

AARP encourages the Subcommittee to pass this legislation. As you consider it, we would like to work with you to help ensure this bill would apply to all current residents of long-term care facilities, not just those whose pre-dispute arbitration agreements are made, amended, altered, modified, renewed, or extended on or after the date of the enactment of this bill.

Thank you, and we look forward to working with you on this very important issue for current and future long-term care facility residents and their families.

[The prepared statement of Dr. Hall follows:]

PREPARED STATEMENT OF WILLIAM J. HALL



TESTIMONY BEFORE THE  
COMMERCIAL AND ADMINISTRATIVE LAW SUBCOMMITTEE  
OF THE  
HOUSE JUDICIARY COMMITTEE

ON

THE FAIRNESS IN NURSING HOME ARBITRATION ACT OF 2008

June 10, 2008

WASHINGTON, D. C.

WITNESS: WILLIAM J. HALL, MD  
AARP BOARD MEMBER

For further information, contact:  
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Government Relations & Advocacy  
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Chairwoman Sanchez, Ranking Member Cannon, and distinguished members of the Subcommittee, I am William Hall, a member of AARP's Board of Directors. On behalf of AARP's nearly 40 million members, thank you for holding today's hearing on the Fairness in Nursing Home Arbitration Act (H.R. 6126/S. 2838) and pre-dispute arbitration clauses in long-term care facility contracts. I also run a large geriatrics program that provides care for about half of all nursing home residents in the Rochester, New York area. Today I'm speaking 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. My 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 (H.R. 6126/S. 2838).

#### **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 (H.R. 6126/S. 2838) introduced by Chairwoman Linda Sanchez (D-CA) and Representative Ileana Ros-Lehtinen (R-FL) and Senators Mel Martinez (R-FL) and Herb Kohl (D-WI).

H.R. 6126 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 some 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 would like to work with you and the bill's sponsors to help ensure this bill would apply to all current residents

of long-term care facilities, not just those 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 the opportunity to testify and the subcommittee's 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 (H.R. 6126) and expand its scope to include all current long-term care facility residents. 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.

Ms. SÁNCHEZ. Thank you, Dr. Hall. We appreciate your testimony.

Ms. Stewart, I would invite you to give your testimony at this time.

**TESTIMONY OF LINDA STEWART, RN, MBA, HOUSTON, TX**

Ms. STEWART. Chairwoman Sánchez—

Ms. SÁNCHEZ. Is your microphone on?

Ms. STEWART. Testing.

Ms. SÁNCHEZ. Perfect. I think you are ready.

Ms. STEWART. Okay.

Chairwoman Sánchez, Ranking Member Cannon, and distinguished Members of the Subcommittee, thank you for the invitation to testify at this hearing about my experience with mandatory arbitration in nursing homes. I would also like to acknowledge my attorney, Mr. Cunningham, who has accompanied me here today. I am here to testify in strong support of H.R. 6126, the Fairness in Nursing Home Arbitration Act of 2008, a bill that would end mandatory arbitration in nursing home contracts so that no other family has to go through what my family has been through.

I have a master's degree in business and am a registered nurse. I have been in the nursing profession for 28 years, including 10 years as a captain in the United States Air Force. I have worked as a critical care nurse, a emergency room nurse, as well as a nursing director in a nursing home. My professional and personal experience with nursing home care has left me devastated, and my hope is that by telling you my story today, other families will be protected in the future.

At the age of 92, my grandmother, Hattie Miller, lived by herself in Seguin, TX. She was generally very alert and capable, and had control over her own financial affairs. However, after she had a mini-stroke and seemed confused, we decided to put her into a nursing home.

The hospital assigned a social worker to my grandmother who said that the only home near us with beds available was the Guadalupe Valley Nursing Center. After working in a nursing home I can tell you that families have very little or no choice when it comes to where they have their loved ones admitted because space is so limited.

On the afternoon that my grandmother was admitted into Guadalupe Valley, the nursing home called my sister at work. They told her that she needed to rush down to the nursing home to sign paperwork or my grandmother would be moved out of the nursing home. My sister rushed there to sign the paperwork because she didn't want our grandmother to lose her place at the home.

When she got there, she told the nursing home administrators that she didn't want to sign anything financially because she did not have power of attorney over my grandmother's affairs. They told my sister that there was nothing in the documents except standard forms that needed to be signed so that the home could receive my grandmother's Social Security check and to make sure that she received medications that she needed. They never once mentioned that the many documents contained something that would limit our family's legal rights.

About 3 weeks—and I am telling you, 3 weeks—nursing home employees were apparently moving my grandmother from her bed to her wheelchair and her leg was badly injured. No one ever reported the incident to us or anyone else; they simply put her back to bed. After we went to see her and she was complaining of extreme pain in her leg, we brought her to the hospital.

It turns out that my grandmother's leg was broken in two places. One of these was an oblique or spiral fracture that results when the bone is completely twisted. Imagine twisting the cap off of the top of a soda; this is a very similar motion.

The follow-up care she received for her leg at the nursing home was inadequate, and her injuries were so severe that they had to amputate my grandmother's leg a couple of weeks later. We couldn't believe that our grandmother had suffered such a severe injury in the nursing home and it was never reported to us or initially treated by the staff.

After we filed a lawsuit, the nursing home tried to force us into binding arbitration. That was when we learned that buried in the documents that my sister had signed that day was a binding mandatory arbitration clause. My attorney worked hard to have the clause overturned, but the corporation that owned the nursing home told us that they would appeal all the way to the Texas Supreme Court unless we agreed to settle.

We couldn't believe that after the way my grandmother was treated we didn't have the right to try our case to a jury. We also feared that without being able to try our case to a jury, no one would know that this had happened. I wonder how many other incidents there have been like my grandmother's that no one is able to know about because nursing homes are able to hide behind these arbitration contracts.

I have seen the nursing home industry from the perspective of a family member and also as a director of nursing at a nursing home. Knowing about the quality of care—or lack of quality of care—it seems just unimaginable to me that corporations that own these homes are allowed to abuse residents and not be held accountable in a court of law for their actions.

This is unacceptable to the families that I talk to about this, and it should be unacceptable to the Members of this Committee. Hopefully my speaking out will assist the effort to protect nursing home residents and their families in the future.

Thank you for listening to my story.

[The prepared statement of Ms. Stewart follows:]

#### PREPARED STATEMENT OF LINDA STEWART

Chairwoman Sanchez, Ranking Member Cannon and distinguished Members of the Subcommittee, thank you for the invitation to testify at this hearing about my experience with mandatory arbitration in nursing homes. I would also like to acknowledge my attorney, Mr. Cunningham, who has accompanied me here today.

I am here to testify in strong support of H.R.6126, the "Fairness in Nursing Home Arbitration Act of 2008," a bill that would end mandatory arbitration in nursing home contracts so that no other family has to go through what my family has been through.

I have an MBA and am a registered nurse. I have been in the nursing profession for twenty-eight years, including 10 years as a Captain in the United States Air Force. I have worked as a critical care and ER nurse as well as a nursing director in a nursing home. I am now administering exercise programs for senior citizens and am currently working towards another Masters degree in Nutrition.



My professional and personal experience with nursing home care has left me devastated and my hope is that by telling you my story today, other families will be protected in the future.

At the age of 92 my grandmother, Hattie Miller, lived by herself in Seguin, Texas, which is just outside of San Antonio. She was generally very alert and capable, and had control over her own financial affairs. However, after she had a transient ischemic attack, also known as a mini-stroke, and seemed confused, we decided to put her into a nursing home.

The hospital assigned a social worker to my grandmother who said she would help us find a nursing home close by. The social worker called all three homes in the area, but the Guadalupe Valley Nursing Center was the only nursing home that had any open beds. After working in a nursing home I can tell you that generally families have very little or no choice when it comes to where they have their loved ones admitted. Because space is so limited, most families have to take whatever is available at that time and there is no real choice.

On the afternoon that my grandmother was admitted into Guadalupe Valley, the nursing home called my sister at work. They told her that she needed to rush down to the nursing home to sign paperwork or my grandmother would have to move out of the nursing home. My sister rushed there to sign the paperwork because she didn't want our grandmother to lose her place at the home. When she got there, she told the nursing home administrators that she didn't want to sign anything financial because she did not have power of attorney over my grandmother's affairs. They told my sister that there was nothing in the documents except standard forms that they needed signed just so they could receive my grandmother's monthly social security check and to make sure that she received the care and the medicines that she needed. They never once mentioned that the many documents contained something that would limit our family's legal rights. In fact, when the nursing home administrator presented the document that contained the arbitration clause, my sister asked her, "What's this?" The administrator replied, "Oh that's nothing. We just need you to sign all of these documents." At no time did the administrator explain the mandatory arbitration clause. It turns out that the nursing home did not even comply with current Texas law which says that this type of clause has to also be signed by our attorney in order for it to be valid.

After about three weeks, nursing home employees were apparently transporting my grandmother from her bed to her wheelchair and her leg was badly injured somehow. No one ever reported the incident to us or anyone else; they simply put her back in bed.

After we went to see her and she was complaining of extreme pain in her leg, we brought her to the hospital. It turns out that my grandmother's leg was broken in two places. One of these was an oblique or spiral fracture which results when the bone is completely twisted—imagine twisting the cap off a bottle of soda; this is a very similar motion. The follow up care she received for her leg at the nursing home was inadequate, and her injuries were so severe that they had to amputate my grandmother's leg a couple weeks later. We couldn't believe that our grandmother had suffered such a severe injury in the nursing home and it was never reported to us or initially treated by the staff.

After we filed a lawsuit, the nursing home tried to force us into binding arbitration. That was when we learned that buried in the documents my sister had signed that day was a binding mandatory arbitration clause. My attorney worked hard to have the clause overturned by the court, but the corporation that owned the nursing home told us that they would appeal all the way to the Texas Supreme Court unless we agreed to settle. Because the Texas Supreme Court has a history of upholding this kind of mandatory clause, we were practically guaranteed to lose our fight. We were forced to settle the case. We couldn't believe that after the way my grandmother was treated we didn't have the right to try our case to a jury. We also feared that without being able to try our case to a jury, no one would know that this had happened. I wonder now, after having gone through this, how many other incidents there have been like my grandmother's that no one is able to know about because the nursing homes are able to hide behind these arbitration contracts.

I have seen the nursing home industry from the perspective of a family member and also an employee. As I stated earlier, I was the Director of Nursing at a nursing home for one year. I quit my job because of the horrible care I witnessed and the impossible situation nursing home owners and administrators put their staff members in. To put it simply, the quality of care is horrible. For example, in the nursing home where I worked, we would run out of towels for each resident and the owners and administrators refused to purchase more. As a result, there were days when residents went without a bath because there weren't enough towels to go around. The majority of the staff that worked in the home had minimal education and were

barely paid minimum wage. There was very little by way of training, background checks, and employee supervision. To make matters worse, the Administrator of the home that I worked in frequently hired her relatives as employees. They made it impossible for me to do my job and serve my patients. The only way to complain or change things was to go through or around the Administrator, which proved to be an impossible task.

Knowing all of this about the quality of nursing home care in this country, it seems just unimaginable to me that the corporations that own these homes are allowed to abuse residents and not be held accountable in a court of law for their actions. This is unacceptable to the families that I talk to about this, and it should be unacceptable to the members of this Committee. Hopefully my speaking out will assist the effort to protect nursing home residents and their families in the future.

Thank you for listening to my story.

Ms. SÁNCHEZ. Thank you for your testimony, Ms. Stewart. We really appreciate it, and I know that is a difficult subject matter to talk about, but we do appreciate you coming today to testify.

At this time I would invite Mr. Gadberry to please give his testimony.

**TESTIMONY OF GAVIN J. GADBERRY, ESQUIRE, UNDERWOOD, WILSON, BERRY, STEIN AND JOHNSON, PC, AMARILLO, TX**

Mr. GADBERRY. Thank you, Chairwoman Sánchez. Now can you hear me?

Thank you, Chairwoman Sánchez, Ranking Member Cannon, and Members of the Committee. I am grateful for the opportunity to be here with you today, all the way from Amarillo, Texas, and to offer the long-term care profession's perspective on arbitration. My name is Gavin Gadberry, and I am honored to be here today representing the American Health Care Association and the National Center for Assisted Living.

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. When legal concerns arise, we believe that arbitration provides a fair and timely resolution for both the consumer and the long-term care provider.

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 present exceptions instead of the rules in the 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 the demand for care will dramatically increase.

We have been actively engaged in a broad range of activities which seek to enhance the overall performance and excellence of the long-term care sector. As I detailed more fully in my written statement, we have partnered with CMS and others to enhance care through this culture of cooperation. Quality is improving. While keeping patients and their care needs at the center of our collaborative efforts, we continue to challenge ourselves to improve and enhance quality.

And as a side note, I am proud to say in Texas last year the use of restraints was the largest percentage decrease than anywhere in the Nation.

In the late 1990's, however, our profession started having difficulty with increased litigation. Long-term care operators were

forced into making difficult decisions, including potential closures of facilities and corporate restructuring. In addition to pursuing tort reform, the profession sought alternatives to traditional litigation, including use of arbitration.

In 2002, AHCA was in the lead. It went out, and it said, “We need to develop—if our membership wants to use an arbitration provision, we want to go out and develop a reasonable arbitration clause.” The model agreement in no way alters the rights or remedies available to a resident under State tort law. Not whatsoever.

It still has the same causes of action; it still has the same damages. The only thing that is taken away is the right to a jury trial, and it is specifically set out in an agreement. It is one page; it is in simple, plain-to-read English. More importantly, the form provides a 30-day out, so if they sign the agreement and they are pressured into it, they have a 30-day time period in which to rescind the agreement.

Ms. Stewart’s example is unfortunate. I am familiar with the clause that was involved in her case, and it is one page, but there was not an out-clause in it. But the AHCA provision does have that provision.

Also, with regard to Ms. Stewart’s explanation today, I am familiar with the county in which it is located. There are six facilities in that county; it is close to San Antonio, and the population is large. It is not like rural Texas.

We support 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. A recent Aon report found that “arbitration reduces the time to settlement by more than 2 months, on average,” and “very few claims actually go all the way to arbitration,” and as Ms. Stewart’s claim, they are often settled.

We believe that the Fairness in Nursing Home Arbitration Act is a misguided attempt to restrict and weaken the Federal Arbitration Act, a policy of this Nation that has been in place for more than 80 years. We agree that entering into a nursing facility or assisted living residence is often a time of uncertainty and apprehension. The notion that family members are threatened into signing arbitration agreements are simply not true.

As I stated earlier, AHCA developed a policy where they give family members or the patient the opportunity to back out of an arbitration agreement within 30 days. Also, it does not have an effect on whether the person is admitted to the facility.

It is important for this Committee to recognize that the Federal Arbitration Act does not inherently foster or sanction any disregard for traditional notions of fair play. In fact, State courts have done a good job in looking at agreements where they are unreasonable, where there are provisions that limit damages, where there are provisions that require the loser to pay, where there is a venue that is unreasonable or a long ways away from the facility.

This bill needlessly discriminates against long-term care providers, and more importantly, the patients. Pre-dispute arbitration agreements are a viable legal option for long-term care consumers and should not be eliminated.

Public sentiment is opposed to eliminating the use of arbitration to resolve disputes. A U.S. Chamber of Commerce poll, recently conducted, found that given the choice, voters would rather have arbitration.

Like the vast majority of Americans, we believe that legislative proposals to limit arbitration and undermine the Federal Arbitration Act is bad public policy. We strongly support the use of arbitration and the policy that has been in place by this Government since the early 1920's.

Thank you for the opportunity to offer these comments today, and I look forward to responding to your comments.

[The prepared statement of Mr. Gadberry follows:]

#### PREPARED STATEMENT OF GAVIN J. GADBERRY

Thank you Chairwoman Sanchez, Ranking Member Cannon, 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 Gavin Gadberry, and I am honored to be here today representing the American Health Care Association and the National Center for Assisted Living (AHCA/NCAL).

In the increasingly litigious environment, 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.

#### 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<sup>1</sup> 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.

#### 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

<sup>1</sup> **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.

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 it 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.”

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 1 million assisted living residents. We have 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 most frail, elderly and disabled who require long term care services, and 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 Florida, Arkansas, and my home state of Texas, 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.

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 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.

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 to national chain facilities; and for non-profit 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 “cooling off 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, “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.

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 that follow from the high transaction costs of traditional litigation and the resulting financial drain on the system. In fact, Mr. Connor's testimony of October 2007 before this same subcommittee inaccurately portrayed the manner in which arbitration agreements are presented to perspective 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, Mr. Connor's 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.

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 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. I look forward to responding to your questions.

Ms. SÁNCHEZ. Thank you for your testimony, Mr. Gadberry. We appreciate it.

And I would now invite Mr. Connor to please give his testimony.

**TESTIMONY OF KENNETH L. CONNOR, ESQUIRE,  
WILKES & McHUGH, P.A., WASHINGTON, DC**

Mr. CONNOR. Thank you, Madam Chairman and Ranking Member Cannon, Members of the Committee. I appreciate this opportunity to come and share some thoughts with you about this proposed bill.

If you believe that accountability and responsibility run hand-in-hand, you ought to support this bill. If you believe that wrongdoers ought to be held fully accountable for the consequences of their actions and that innocent parties who are the victims of wrongdoing ought to be fully compensated for what they have suffered, then you ought to support this bill.



The sad fact of the matter is that we have a crisis of care in long-term care facilities in this country, notwithstanding what Mr. Gadberry has said. I have seen it up close and personal for almost 25 years. I have represented victims of abuse and neglect from Florida to California.

And Mr. Cannon, I can only say that I would hope that the energy and antipathy that you have for abusive trial lawyers would be redirected to abusive nursing homes.

I have seen pressure ulcers that were completely avoidable, that were as big as pie plates, that went all the way to the bone, that were so putrid and foul-smelling that when you walked down the hall, you could smell the resident before you could see him. I have seen residents who have suffered from malnutrition and dehydration. Their gaunt faces and hollow eyes were testament to the shortages of staff available in a facility because the owners of the facility made the decision to cut labor costs in an attempt to increase profit.

The abuses that we see in long-term care facilities around this country are horrific, and they are only going to grow, due to the demographic and economic and cultural pressures that are coming to bear. The Chair has rightly pointed out that we have got a veritable "senior tsunami" coming with the graying of America and are rapidly approaching mass geriatric society, even as we have a reduced resource base available in the Medicare and Medicaid program, and even as we have shifted from a sanctity of life ethic in this country to a quality of life ethic in this country.

Old people don't typically score very well under quality of life calculus; they don't perform well under functional capacity studies. And they are more and more vulnerable to exploitation, and will suffer as these pressures come to bear in the future.

I think it is important to understand that historically the courts have been one of the key means of holding wrongdoers accountable and ensuring that they were required to compensate innocent victims for the consequences of their wrongdoing. What has happened in the long-term care industry is that having been faced with the high price of that kind of accountability, the long-term care industry has taken advantage of the elderly and their families at perhaps their most vulnerable point in time, which is when they bring their loved one for admission to a long-term care facility.

It is a time that is fraught with tension and anxiety; emotions run high. The prospective resident is fearful of being placed in an institution. The family feels guilt and grief at the fact that they can't meet their needs.

The families and residents are commonly presented with a 50 to 60-page admissions packet. The arbitration agreement—the pre-dispute arbitration agreement—is sandwiched toward the end. It is rarely ever explained, or if explained, is not in terms unlike those Mr. Cannon used; it is to prevent having to involve greedy trial lawyers to save time when in fact, the purpose is to cover the flanks of abusive nursing homes and to limit their liability and minimize their exposure for their wrongdoing against the frailest and most vulnerable members of our society.

I urge you with every fiber of my being to stop this inequitable and unjust practice. There is nothing wrong—in fact, I would en-

courage, as would the Chair, arbitration as an alternative dispute resolution once the dispute arises and the parties know what is at stake.

I, for one, having practiced law for 35 years, and being a conservative Republican, continue to retain confidence in our fellow members of our society. I believe that the good sense and ordinary judgment of common, ordinary people who are members of our society is really quite excellent. They understand when someone has been wronged, and they understand how to assess and value that wrong, and they understand the importance of holding wrongdoers fully accountable for the consequences of their actions.

Thank you, Madam Chair.

[The prepared statement of Mr. Connor follows:]

PREPARED STATEMENT OF KENNETH L. CONNOR

Madam Chairwoman, Ranking Member Cannon, 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 of 2008." 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.

Ms. SÁNCHEZ. Thank you, Mr. Connor.

We appreciate all of your testimony. We are going to begin our round of questioning, and I am going to begin by recognizing myself first for 5 minutes of questions.

Dr. Hall, I would like to start with you. In your written testimony, which I read last night, you discussed a very sad situation involving the death of Ruth Painter soon after she was admitted into a New Mexico nursing home. And based on your experience, I am curious to know, is the example of Ruth Painter common where an arbitration clause is included in the admission documents, the death of the nursing home resident is caused by staff negligence, and the family then successfully appeals to a court to

declare the arbitration clause unenforceable? Is that the typical scenario?

Dr. HALL. Well, I can't say that it is the typical scenario, but it is very clear that there is a great variability in how the courts look at these arbitration agreements, so that there is no uniform national standard. So it varies tremendously. But in point of fact, there is enough precedence to suggest that in many cases, the limitations put on individuals and their families with pre-dispute arbitration agreements severely limits their ability to get any redress whatsoever.

Ms. SÁNCHEZ. Thank you, Dr. Hall.

Ms. Stewart, I really again want to thank you for being here today and telling us your story. We have had other witnesses appear before the Subcommittee to tell us about their horror stories with mandatory binding arbitration, but none of them have had the experience that you have had with the death of a family member because of it, and I really think it shows an incredible degree of strength to come and testify.

Now that you are aware of the arbitration clauses in nursing home contracts generally, have you spoken with other people, other families, and shared similar experiences with those—you know, who have had similar experiences with those types of clauses? Because I believe Mr. Gadberry said that stories like yours are the exception and not the rule. And so I am interested in knowing if you have had contact with other families who have had similar types of situations.

Ms. STEWART. Well, as a matter of fact, I have. There was another patient in this same nursing home that had had some issues and had—the family members wanted to sue, and they found out also, in that same nursing home, that they had signed that same paper. So it does take place probably more frequently than we are willing to admit. And so there are other people, yes, that have had the same experience.

Ms. SÁNCHEZ. Thank you, Ms. Stewart.

Mr. Connor, do you think that stories like Ms. Stewart's are the exception rather than the rule?

Mr. CONNOR. They are not the exception, and they are sadly the rule. And I would like to controvert, if I may, two points that Mr. Gadberry made. First of all, I think it is important to understand Federal Arbitration Act trumps State law. And as a practical matter, the provisions of State law that would provide greater protection for nursing home residents are often preempted by the Federal Arbitration Act and the provisions of the arbitration agreements that are entered into.

Secondly, with respect to the so called "30-day cooling off period," when people have an opportunity to rescind the agreement, the first time that most families learn that they or a member of their family signed an arbitration agreement is after a lawsuit has been filed and a motion to compel arbitration is filed by the defense. They—

Ms. SÁNCHEZ. They don't typically discover it 30 days after signing—

Mr. CONNOR. They do not. And they do not understand what they have signed, and that is by design, in my experience, on the

part of the nursing homes. Again, if they view arbitration as such a great means of alternative dispute resolution, then they should embrace it after the dispute has arisen, not before. It is absolutely unconscionable the way it is handled now.

Ms. SÁNCHEZ. Thank you, Mr. Connor.

Mr. Gadberry, you indicated in your written statement, and also in your oral testimony, that public sentiment is opposed to eliminating the use of arbitration to resolve disputes, and I just want to draw your attention to a poll that the AARP conducted. They conducted a poll of Arkansas residents in January 2007 which found that 85 percent of respondents strongly support the right of nursing home residents and their families to take nursing homes to court for neglecting and abusing nursing home residents. And a more recent May 1, 2008 Peter Hart Research Associates, Incorporated poll revealed that when given neutral information about arbitration, 66 percent of respondents disapproved of mandatory binding arbitration.

So I just want to point that out because I think that, to say generally speaking that public sentiment is opposed to eliminating the use of arbitration, that may have been the results of polling that you did, but with many statistics, the way the questions are framed and the way that information is given to the respondents, I think, affects their response to the polling question. So I just want to again reiterate that when given neutral information about arbitration, 66 percent of respondents disapprove of binding arbitration.

My time has expired, so at this time I will recognize Chris Cannon for 5 minutes of questions.

Mr. CANNON. Thank you, Madam Chair. I appreciate that.

This is a complicated subject, and let me point out, Mr. Connor, that I actually don't have antipathy toward trial lawyers, but I really am concerned about how we use our resources appropriately. The purpose of this hearing is to try and figure out how we can do that, and it is a complicated issue. It is clear that there is much abuse in nursing homes, and you said that it is the rule, in fact, not just the exception.

If that is the case, then our concerns are probably much deeper and greater. And of course you have Ms. Stewart—

In fact, Ms. Stewart, your grandmother suffered this injury and the person who inflicted it upon her wasn't known. I suspect you couldn't even find out who had been the person that did it, right?

Ms. STEWART. They never knew.

Mr. CANNON. And how long after it happened could you tell—obviously you wouldn't know the time it happened or you would know the person, but how long after it happened did your family discover that your grandmother was in pain?

Ms. STEWART. Yes. My grandmother was only in the nursing home approximately 3 weeks when they actually—we discovered that there was something wrong with her leg, so in response to what he said, she didn't even make the 30-day period. She was there 3 weeks when they broke the leg.

Mr. CANNON. Could it have been, like, in the first week and she suffered for 2 weeks?

Ms. STEWART. Oh yes, at least. Because even on the documentation in the nurse's notes, no one, you know, even wrote up an incident that it happened.

Mr. CANNON. She complained to you——

Ms. STEWART. Yes.

Mr. CANNON [continuing]. Or your family, so you knew that she was in pain——

Ms. STEWART. Yes.

Mr. CANNON [continuing]. She had been complaining to the nursing home, and they didn't keep track of her complaints.

Ms. STEWART. Yes. She had already been complaining to the nursing home when we decided that something was wrong and we needed to take her to the hospital. And that is when we discovered it was fractured.

Mr. CANNON. Did you have to work with the nursing home to get her to the hospital?

Ms. STEWART. Oh no. I just told her they were going to take her to the hospital. I am a nurse. I knew she was going to go.

Mr. CANNON. You put her in a wheelchair and just took her out to your car or something?

Ms. STEWART. Oh no, no. I mean, I told the Administration that she needed to go and someone needs to release x-rays to see what was wrong. And that is when we found out it was broken in two places.

Mr. CANNON. Were the x-rays done by the nursing home or were they done at the——

Ms. STEWART. Oh no. At the hospital.

Mr. CANNON. So you got her physically out of the hospital—or out of the nursing home—and took her to a hospital?

Ms. STEWART. To the hospital, and the hospital did the x-ray, and that is when they found it was fractured.

Mr. CANNON. And I take it, Mr. Connor, these are the kinds of—the failure of reporting an injury and letting a patient suffer for maybe two or 3 weeks with a painful injury—are the kinds of things that you are suggesting are the rule at the nursing home?

Mr. CONNOR. I am not saying they are the rule; I am saying that the problems are systemic and pervasive. There are many nursing homes that provide good care, but there are many, many instances all over this country where instances of abuse and reckless conduct occur.

The nursing homes that are providing good care don't need a pre-dispute arbitration agreement. That is inherently a system that is precooked and that is going to weigh favorably in terms of the outcome for the nursing home and against the resident.

What I am suggesting simply is that in those instances, where nursing home residents suffer from abuse and neglect, there ought to be a level playing field through which they can fully recover for the injuries——

Mr. CANNON. I understand that is your position. What I am wondering is if there is not a way that we can do something that creates a system that works better than just either opening the door for every trial lawyer and every minor complaint, but on the other hand closes the door to the kind of injuries that Ms. Stewart's grandmother suffered.

You suggested something that I am actually quite interested in. You said that a quality nursing home doesn't need mandatory arbitration agreement.

Mr. CONNOR. Pre-dispute. Pre-dispute.

Mr. CANNON. Are there nursing homes that hold themselves out as not having, or do you think that the market would encourage people who—nursing homes—to come forward and say, “We take good care of people that come into our care, and therefore we don't need this,” and advertise the fact that they give the kind of quality care that would avoid that?

Mr. CONNOR. Well look, I think nursing homes ought to be willing to trust the members of their community to make judgments about whether or not—

Mr. CANNON. The time is almost up, but I would really like—it seems to me that this would be a great way to get in the business, and that is to say, “We don't do mandatory arbitration because we take good care.

Mr. CONNOR. Well, I would certainly encourage that. But further, for those that wish to use arbitration as an alternative form of dispute resolution, I think it is a viable alternative. It ought to be used in situations after the dispute arises so that people can—

Mr. CANNON. Let me make some sense, because you do alternative dispute resolution—

Mr. CONNOR. Sure.

Mr. CANNON [continuing]. You get the solution much faster. So in the case of Ms. Stewart, her family may have said, “You know, look, Grandma is old, and if she is going to have some benefit we probably ought to do it quickly.”

And what was inflicted upon her is so clear, so you are suggesting that they worked.

Mr. CONNOR. Yes. There are advantages to arbitration. The inequity here is in deceiving the prospective resident and their family about what is at stake at the very beginning, and before a dispute arises.

Mr. CANNON. Madam Chair, if you would indulge me in just one more question, are you aware of any nursing homes that would actually promote the idea of not using pre-dispute mandatory arbitration because they promote quality of care that means it is not necessary?

Mr. CONNOR. I am not aware of any that have that view, and in fact, I think that they feel it is to their economic advantage to continue to use this policy and to fall back on the Federal policy embodied in the Federal Arbitration Act, and to use that to their advantage and to the disadvantage of their frail, vulnerable residents.

Mr. CANNON. Thank you, Madam Chair, for your indulgence, and I yield back.

Ms. SÁNCHEZ. The gentleman yields back. I would recognize the gentleman from Georgia for 5 minutes for his questions.

Mr. JOHNSON. Thank you, Madam Chair.

Ms. Stewart, why did you agree to settle your dispute with the nursing home rather than continue to fight the battle in court?

Ms. STEWART. Well, I stated earlier they said they would take it all the way to the Supreme Court if we didn't settle, so we went back—to dispute, and my attorney—if you would like to ask any

things that are more legal he would answer them for me. But it is because they just refused to negotiate with us.

Mr. JOHNSON. Did it appear to your lawyer that if it went all the way through the court system that you would lose——

Ms. STEWART. Lose.

Mr. JOHNSON [continuing]. If forced into the arbitration process?

Ms. STEWART. Yes. It was pretty much understood that the chances of winning were slim, so that was sort of one of the reasons also.

Mr. JOHNSON. All right. And in your opinion, did you take less in settlement than you felt was fair?

Ms. STEWART. Well yes, because my grandmother was still active. You know, I think sometimes when people say they are 90 years old you think that they are not responsible, but my grandmother was actually still cooking. And so when we took her to the nursing home, and within 3 weeks they took her from a viable adult to amputating her leg. So I think we shouldn't have had a one size fit all sort of litigation here.

Mr. JOHNSON. Okay. Well let me ask Mr. Connor the question this way: How does mandatory dispute resolution and arbitration of these nursing homes—how does that force settlements in terms of what Ms. Stewart went through?

Mr. CONNOR. Mr. Johnson, the reality of pre-dispute binding mandatory arbitration is that the awards are going to come at a tremendous discount to what juries ordinarily would award. Our experience has been, typically, that these awards are about 10 percent of what would be recoverable by a jury. Bringing nursing home cases often can cost several hundreds of thousands of dollars. They are very expensive, they are very complex, and they are often very protracted.

And our experience has been that jurors are mortified and horrified at what these people suffer at the hands of the people that they are supposed to be caring for. And oftentimes they will award punitive damages in an attempt to send a message to the nursing home that it is going to cost more to do business the wrong way than it does to do it the right way. None of that takes place in the arbitration setting.

Mr. JOHNSON. All right. Thank you.

And this arbitration setting, Mr. Gadberry, is pretty much held in private, correct?

Mr. GADBERRY. That is one of the concepts with arbitration, that——

Mr. JOHNSON. It is a secret process?

Mr. GADBERRY. No. It is not a secret process——

Mr. JOHNSON. Well, there are no published calendars so that the public can come in and observe a public trial, if you will.

Mr. GADBERRY. Well, like Mr. Connor, I have tried lawsuits and been involved in litigation, and a lot of times that is the exception that a case goes to trial——

Mr. JOHNSON. Well, no, no, no. I am saying that in an arbitration proceeding there is not going to be a published trial calendar, and the public doesn't have notice that this may be something that I would like to come and take a look at, just to see how the system works.



Mr. GADBERRY. There is not a public docket that would be available. However, nursing homes are one of the most highly regulated professions in the country—

Mr. JOHNSON. And I understand that, and we are talking about, dispute that arises that has to go and be settled, either by judge and jury or by an arbitration panelist or panel. And this arbitrator is pretty much selected by the nursing home industry, correct?

Mr. GADBERRY. In our form, we offered up several different alternatives—

Mr. JOHNSON. And those on your preferred list, or actually your list that limits the arbitration groups that can hear the arbitration case, those groups depend on the nursing home industry for the referrals, and the nursing home industry pays them. Isn't that correct?

Mr. GADBERRY. There are fees associated with arbitration just like anything else.

Mr. JOHNSON. And they are paid by the—

Mr. GADBERRY [continuing]. For the service.

Mr. JOHNSON. They are paid for the service, and they are paid by the nursing homes and they would not have that stream of income were it not for the referrals from the nursing home industry. Isn't that correct?

Mr. GADBERRY. That is a broad brush, because there are a lot of services to choose from, and to use, and—

Mr. JOHNSON. Well, you are typically limited to only two, maybe three forums in the arbitration agreement, correct?

Mr. GADBERRY. They could choose whoever they would like to have—

Mr. JOHNSON. Within the context of the selectees that have already been decided by the nursing home. But now let me ask you something: In these nursing home proceedings, the rules of evidence don't apply, necessarily?

Mr. GADBERRY. It depends on the service that you use. The one we recommend—

Mr. JOHNSON. It is not mandatory.

Mr. GADBERRY. The one we recommend uses—has procedures, has notice provisions, and has evidentiary provisions. There are also rules that go into great detail about discovery—

Mr. JOHNSON. But that is not required—is it?

Mr. GADBERRY. The most important thing about arbitration is that the parties are supposed to cooperate and exchange stock, and then if there is a need—

Mr. JOHNSON. If it doesn't happen and the arbitrator perhaps may not even be an attorney, it certainly has no judicial code of ethics to abide by, does he or she?

Mr. GADBERRY. Most arbitration services require their arbiters to sign an agreement that they will comply with their arbitration rules, but more importantly they have to comply with the party's rules. If, like, the AHCA arbitration provision has language in it that says that the State law—there is no limitation on recovery or the remedies that are available in litigation.

Mr. JOHNSON. And most of the time—

Ms. SÁNCHEZ. The time of the gentleman has expired. I am sorry.

Mr. JOHNSON. Thank you, Madam Chair.

Ms. SÁNCHEZ. Perhaps we will do a second round of questions if there is interest in further questions.

At this time I would like to recognize the gentlewoman from California, Zoe Lofgren, for 5 minutes of questions.

Ms. LOFGREN. Thank you, Madam Chairwoman. I am glad that this hearing is being held; I think it is a very important issue. As America ages, this issue of quality of nursing home care is more and more on the minds of Americans, and I actually hear about it a lot from people who have older parents and who worry about whether they are going to be treated properly or not. And sometimes they are not.

You know, the testimony, Dr. Hall, that you provided to us indicates—on page seven you indicate that decisions and facts about the dispute typically are confidential, an issue that Mr. Gadberry has just given a contrary point of view on. Can you tell me what you base that testimony upon?

Dr. HALL. Well, in the surveys that AARP has done, and speaking as the representative of AARP for our 40 million members, it is pretty clear that all of the data, all of the determinations, all of the rationale is very rarely available to families without recourse to some kind of very expensive legal help, which very, very, very few of them can afford.

Ms. LOFGREN. You know, I think there is value, oftentimes, in having some public information out there, and these—you know, if people know things, they can make decisions accordingly. So I think, you know, that is a serious downside for arbitration. I am not opposed to arbitration in every case. There is a real value sometimes for arbitration quickly getting to a solution, but usually it is the arbitrations where the parties agree to arbitrate.

And I am troubled, and I am glad I am a co-sponsor of the bill, that, you know, to do this, especially for people who are, you know, they wouldn't be going into the facility if they weren't in trouble in some way—there is an inherent power differential there that is disadvantageous to the nursing home resident. And I just think, you know, understanding that there can be value in arbitration, that would be served, you know, if there were an incident.

And I also think, you know, people—it is expensive to bring lawsuits, and if you don't win you have to pay for it. And so there really is a disincentive to proceed in a frivolous manner. And I, you know, I think there are some just built-in protections in our system.

So I think certainly, Mr. Connor, your testimony is riveting. I no longer have either one of my parents, but I was—my father-in-law is 90 years old, and the saying, "It is not how old you are, but how you are old," couldn't be more true about him. I mean, he is just tremendously fit; he works half-time. I mean, he is just awesome.

But, you know, there are many people his age who aren't so fortunate, and to think that you would have that kind of experience is really chilling. And certainly I have had family members in facilities that were excellent, and I don't want to over-par the nursing home industry. I mean, obviously we need that sector of our country to be well run, but I think that for those who would not really adequately care for a vulnerable older person who is so dependant on the care, I mean, there has to be a deterrent from that.

And yes, there are regulations, but, you know, I earlier this year looked at, really, at the request of many of my constituents, some additional nursing home provisions because of problems. And the regulatory scheme, although well intended, in many cases in various States is not working that well.

And I don't know, Mr. Connor, if you would have a comment on that, but in some of the States where we have looked, I mean, it is not really very tight.

Mr. CONNOR. Well in fact, Consumer Reports did a study a couple years ago and reported that since their previous study, they had found that nursing home care declined, that inspections were down, that citations were down, that the gravity of the citations were down, that the survey system was being relaxed for the benefit of the homes, that in many instances this relaxation stemmed from political motivation. And the sad reality is—and I think we have to keep in mind—that human nature is such that if wrongdoers aren't held fully accountable for the consequences of their actions, they are likely to repeat it.

And the problem is that when you start out with somebody who is frail and vulnerable in the beginning, the magnitude of the damages they suffer escalate very, very quickly. And I promise you that if these injuries and damages were to be manifest at places like Guantanamo or Abu Ghraib, there would be no end—

Ms. LOFGREN. Yes.

Mr. CONNOR [continuing]. To the congressional hearings or the headlines that would be covering that.

Ms. LOFGREN. My time has expired. Thank you.

Ms. SÁNCHEZ. The time of the gentlewoman has expired, but I will grant the gentlelady, under unanimous consent, one additional minute for questions if she would be so kind to yield it—

Ms. LOFGREN. Oh no, I am fine. This is very helpful.

I will yield it to you. Yes, I will do that. I was a little slow on the uptake there.

Ms. SÁNCHEZ. Thank you. I just have one final question that I want to close the hearing with, and I am going to pose it to all of our witnesses.

What is so wrong with saying to the consumer or the potential resident or patient, "If you want to choose to arbitrate—if something should happen to you in your care and you should want to choose to arbitrate, you can choose to do that at a later time, but we are not going to force you to arbitrate should something arise regarding your standard of care while you are in the facility"?

Dr. Hall, do you think that that is—

Dr. HALL. Well, we are talking about—

Ms. SÁNCHEZ [continuing]. That that is an unreasonable thing?

Dr. HALL [continuing]. Post-dispute arbitration that is willingly entered into by the patient and the family and the facility. Well, you know, our position there is that if people can become informed and still have not given up the right of legal redress, of course that is an option and it might work in many circumstances. It is really the pre-dispute binding arbitration that bothers us and bothers the organization.

It is indescribable to—the situation that people are in when they make this decision. There are many perversities. The Medicare sys-

tem, in an acute hospital, really insists that people leave the hospital when there is no legitimate acute medical reason why they should be there. This often comes as a surprise to patients, even those who are completely lucid, and often isn't the situation.

And this entire sort of decision has to be made in 24 hours in a situation that none of us would tolerate in any other venue that I am aware of. So that is what makes this special and why, in particular, the pre-dispute arbitration binding clauses really bother us a great deal.

Ms. SÁNCHEZ. Thank you, Dr. Hall.

Ms. Stewart, you were forced into mandatory binding arbitration. Would you have preferred, after a situation arose with your grandmother, to have the choice whether or not you wanted to pursue litigation or arbitration?

Ms. STEWART. Yes, and I think that is the problem I have with it. I mean, I don't think arbitration is wrong. It is just the way of the deception that they put the paper in there and let us sign it, and then didn't tell us.

And I also told the nurse, because I am a nurse, I told the nurse on duty, "You know, this was an accident until they covered it up; then it became a crime." And she looked at me as though she had seen a ghost because, you know, maybe the person that did break her leg didn't mean to do it, but they put her back to bed and did nothing with it, then the crime was committed.

So I have no trouble with the arbitration. It is just that you put papers—we left my grandmother's, she had dentures, two pairs of shoes, three gowns, and then arbitration, in the same list—they were listing her clothes and possessions, and something as important as an arbitration agreement along with it. So I just think that that is more deception which, in the medical community, it just boggles my mind as a nurse that I would give you a medication and deceive you and make you think that it was one medicine, and I was giving you something else. I think the deception is what bothers me.

Ms. SÁNCHEZ. Thank you, Ms. Stewart.

Mr. Gadberry, what is the problem? You are such an ardent supporter of arbitration and it is such a great thing. Why not let residents choose whether or not they want to arbitrate if they think it will save them time and money and effort? Why not let them make an informed choice?

Mr. GADBERRY. They have that opportunity, and if—you know, I can't tell you that all of AHCA's members or all nursing home facilities follow the concept contained in the arbitration provisions that we have developed as a model. But, you know, the Supreme Court, they said, "We agree with Congress, that when they enacted this law, it had the needs of the consumers as well as others in mind." So not just business was intended back in 1924 when the Federal Arbitration Act was created.

What we are doing with this bill is, you are saying that there will be no pre-dispute arbitration—

Ms. SÁNCHEZ. But it doesn't preclude arbitration.

Mr. GADBERRY. There is pre-dispute arbitration in all other consumer contexts—in credit cards, you have had hearings on that, on

mortgage loans, though, on banking agreements you have those type of pre-dispute arbitration agreements in place.

Ms. SÁNCHEZ. But you don't agree with Dr. Hall, that this is perhaps a unique case where you have to make quick decisions or forego the opportunity to have certain, and oftentimes the arbitration agreement—consumers aren't even aware that they are there, and they are worried about their health?

Mr. GADBERRY. Yes. I would love to respond to that.

Chairwoman Sánchez, I have a grandmother in a nursing facility, and my parents went through the process of placing her. And it is a process; it doesn't usually happen overnight. You don't show up to a nursing home like you show up to an emergency room in an ambulance with the siren and the lights flashing. It is a process.

Generally, most nursing facilities will allow you, for coming to visit and looking for a facility, will let you look at the packet and may even give you a copy to take home. So they have the opportunity to look at the packet.

One of the things that was said today is that an admissions packet is about 50 pages long. I want your help. I am asking for your help there. One of the reasons the admissions packet is so long is that the Federal regulations and State regulations require all sorts of disclosures involving Medicare and Medicaid.

And one of the things that is interesting—Medicare and Medicaid are so complex, and I beg for your help there for nursing home residents. Medicare and Medicaid Part A, Part B, Part D—there are all other provisions in there—they have to be explained and signed off by the family, responsible party of the patient, or the patient themselves in that process.

Ms. SÁNCHEZ. Your point is well taken, although I will say, however, there is generally no explanation given of the mandatory binding arbitration agreements that are slipped into these very long contracts, and that being the difference between those two.

Mr. GADBERRY. If I may respond, they are not generally slipped in. In our recommendations to the nursing facilities, to our membership, is that you set up a process and a policy where they are explained to the membership.

Ms. SÁNCHEZ. But the recommendations that you make aren't binding upon your membership. They don't have to follow them. They can throw them out the window if they—

Mr. GADBERRY [continuing]. Of the association are made up of members that are nursing facilities, and that leadership directed us to come up with a reasonable approach, and that is what we did.

Ms. SÁNCHEZ. But they are not bound by the recommended arbitrations clauses.

Mr. GADBERRY. I can give no assurance that they are going to be bound by that—

Ms. SÁNCHEZ. Thank you.

Mr. Connor, what is wrong with allowing the resident to choose whether or not they want to arbitrate if a dispute arises?

Mr. CONNOR. Nothing is wrong with it after the dispute has arisen. Congress passed the Omnibus Budget Reconciliation Act in 1997, and rules were adopted pursuant thereto aimed at protecting residents' rights. Congress recognized that among all of the cohorts

in our society, this one is very vulnerable and is in special need of protection.

In any other setting, if someone were to prey upon a frail, weak, vulnerable person whose eyes were dim and whose hearing was bad, and whose competency was in question, and who might be on medication that impaired their judgment, and deprive them of their money or substantial legal rights, we would be prosecuting. But thanks to the shelter of the Federal Arbitration Act and the case law that has been construing that act, we are allowing nursing homes pre-dispute to take advantage of the frailest and weakest members of our society. It is an outrage, and Congress ought not to permit that practice to exist anymore.

Ms. SANCHEZ. Thank you, Mr. Connor.

I would recognize Chris Cannon for additional questions.

Mr. Cannon?

Mr. CANNON. Thank you, Madam Chair.

This is a complex issue, and I think, Mr. Gadberry, you probably haven't had an opportunity to actually respond to some of the issues that have been thrown in your direction. Would you mind—I know there are some things you would like to talk about—would you also mind talking about Federal preemption and how that works in your contract?

Mr. GADBERRY. Well, the Federal Arbitration Act, that is its full purpose is to seek out or prevent States from enacting laws that discourage arbitration. What the Federal Arbitration Act has done in certain States that have restrictions or provisions that discourage arbitration, it prevents them. Not all States have those.

In fact, most States have a general arbitration provision that is very similar to the Federal Arbitration, which says that an agreement will be construed based on the contract law of that State. And that occurs right now. The Federal Arbitration Act only preempts in situations, laws that States have passed that discourage arbitration.

The States themselves still control what the enforceability of the Arbitration Act. And what we are setting up here is a provision under the Federal Arbitration Act that targets a specific industry and discourages use of pre-dispute arbitration, whenever they are encouraged everywhere else.

That, I think, is one of the main things I wanted to say. Didn't get a correct chance to say it—

Mr. CANNON. Thank you.

Dr. Hall, it would seem to me that AARP has gone through a process, because you talked about the conclusions. In that process, have you considered the costs of litigation, vs. alternative ways of helping take care of the people Mr. Connor calls the most vulnerable in our society?

Dr. HALL. Absolutely. And we are very concerned about it now, and even more concerned for the future. It is one of the important challenges to our generation, to begin to solve this problem for the next 50 years.

We—on the backs of the nursing home residents' families. They shouldn't be victimized. There are other approaches to reducing the cost of long-term care, and it doesn't have to be entirely dependent on pre-dispute arbitration contracts.

Mr. CANNON. Thank you. I know that my staff would like to work with you on those alternatives. This is a serious problem.

Dr. HALL. Yes.

Mr. CANNON. I think the—and maybe, Mr. Connor, you would like to respond to this, which we might have is that you think that lawyers are going to come in and protect the most vulnerable when in fact, what they will do is come in and take the most lucrative cases and that provides a motivation to nursing homes to not allow processes—

But I don't see a system that actually helps nursing homes avoid or develop practices that would eliminate problems that are going to result in lawsuits.

Mr. CONNOR. I think, Congressman Cannon, if you adopt the—arbitration policy, to the extent that there is a benefit to those who suffer—and who have lower case values—

The reality is, lawyers are business people 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.

Now, there would be nothing that would prevent people from being presented in—

Mr. CANNON. Sure, except that what you are going to get is a heavy cost to a system that is going to have to be borne by Dr. Hall's members.

Mr. CONNOR. I don't think the cost—

Mr. CANNON. Pardon me.

Mr. CONNOR. Yes, sir.

Mr. CANNON. Let me just ask Mr. Gadberry, because at this point it seems to me that representing not just as a lawyer here, but representing the industry, there have to be attempts of people looking at ways to help avoid the kind of problems that Ms. Stewart is talking about. That is, you have to have a group of people that are looking at this and saying, "What can we do?"

In the first place, you have got an information system that we didn't have 10 years ago. The Internet provides a great deal of information. Secondly, there are interests that your people have in promoting the understanding of arbitration or dispute resolution, and if that becomes a competitive issue, all the better for people.

In the third place, you know, Ms. Stewart could have, depending upon her grandmother's status, you know, if you have got a robust person, you don't want to be spying on them, but if you have got a person who is incapable of turning herself, you could have a camera in the room and the family could watch. Are you, as an industry, looking at those kinds of issues, that help you guys figure out how to take care of people who range from robust to incapable?

Mr. GADBERRY. Absolutely. The nursing home profession is made up of people. It is not like a production line or anything else where you can go fix something. You have to train people, and you have to count on people. And when people fail, bad things happen. And I can't help but think that if it is as if Ms. Stewart said, then there are multiple failures that occurred.

The regulations already have requirements that you report injuries of unknown occurrence. There regulations are already there, and it should have been reported. If it wasn't, then there was

somewhere along the way a failure—a human failure—to make that report.

Second, there are things that the association has done through—with our governmental partners to try to improve care. Finally, you are right about the information out there and the transparency that is so much better than it was many, many years ago.

In my State, we have what is called a quality reporting system. It is a very detailed reporting system that ranks, it puts up the survey history, not only health, but life, and life safety code history for that facility. It lists whenever ownership changes so you know when there are things going on with the corporate ownership. It also keeps running track of how the performance of the facility has been in the past, and if there has been bad performance in the past it is listed, but it also lists if you have had zero deficiencies.

There is also Nursing Home Compare, which is a Medicare site, and that site is something relatively new in that it lists, similarly, all the deficiencies, the location of the facility. But more importantly, recently they started putting staffing time periods and amount of staffing that is being put in place by the facility. That is one of the most important tools, is how many human beings we have out there taking care of our patients.

And we are so far where we were back before OBR 87 went into effect. And when OBR 87 went into effect it was a whole new ballgame. Things have changed, and things are continuing to improve, and our association is improving and embracing, trying to get to quality profession.

Ms. SÁNCHEZ. The time of the gentleman has expired—

Mr. CANNON. Would the Chair indulge me in one additional question?

Ms. SÁNCHEZ. Very briefly, one additional question.

Mr. CANNON. Thank you.

It just seems to me, Mr. Gadberry and Dr. Hall, that you are the two groups—and doing it outside of the legislative context may actually be much more appropriate. Is that something you have done or would be willing to do, Dr. Hall, and then Mr. Gadberry?

Mr. GADBERRY [continuing]. We work together as much as we can. And there are times when we have to agree to disagree, but they are our friends, and we try to work together for the best interests of the frail and elderly of our Nation.

Dr. HALL. AARP's position is very clear. We are interested in quality care for our members and for all older adults in the United States. When that quality of care is compromised, we all secondarily think that there has to be access to the court system, period. We are always willing and go out of our way to talk to every agency and individual who wants to participate in this dialogue.

Ms. SÁNCHEZ. The time of the gentleman has expired. I will recognize myself for 5 minutes, although I don't expect using the entire 5 minutes.

Just one last question, and this is for Mr. Connor: Supporters of mandatory binding arbitration agreements contend that they are a defense against litigation, and therefore they keep costs down for them, which they ultimately pass down to consumers, and in this case, residents. How neutral are mandatory arbitration agreements if such clauses are seen as a defense to lawsuit?



Mr. CONNOR. Well, I would have to take issue with the premise, which is that arbitration is necessarily cheaper than litigation. The filing fees typically are substantially greater, and Public Citizen has done a fine job in outlining those costs.

The real reason that these are used in lieu of litigation on the part of the nursing home is not to minimize costs. It is to minimize exposure for liability. It is to minimize their accountability. It is to reduce the awards that will be levied against them by a cross-section of the community who hears the evidence.

And as an alternative to that, their preference is to have a go-to service or provider that they provide repeat business to, whom they know is likely to make an award for the same injuries that is dramatically greater than a jury of their peers would. That is what pre—

Ms. SÁNCHEZ. So it is cheaper for the nursing home that has not given the standard of care if the award is, in arbitration, it is a lower amount that is awarded to a family than a comparable court case. Is that correct?

Mr. CONNOR. That is exactly right. It is—

Ms. SÁNCHEZ. When they say it is cheaper, they mean it is cheaper for the person that is doing the wrongdoing.

Mr. CONNOR. That is right, but it is at the cost to the resident who suffers horribly.

Ms. SÁNCHEZ. So you would agree with Dr. Hall's assessment that there needs to be a way to, perhaps, to increase the number of facilities and make it cost effective, but not on the backs of victims, who have suffered at the hands of the people who were—

Mr. CONNOR. There is nothing wrong with making a profit. What is wrong is doing it on the back of innocent victims for whom you are supposed to be caring.

Ms. SÁNCHEZ. Thank you.

And I will yield back the balance of my time. I want to again thank the witnesses for their participation in our hearing today.

Without objection, Members will have 5 legislative days to submit any additional written questions, which we are going to forward to the witnesses and ask that you answer as promptly as you can so that they can be made a part of the record. And without objection, the record will remain open for 5 legislative days for the submission of any additional material.

Again, I want to thank all of our panelists for their time and patience, and this hearing on the Subcommittee on commercial and administrative law is now adjourned.

[Whereupon, at 3:36 p.m., the Subcommittee was adjourned.]



## A P P E N D I X

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### MATERIAL SUBMITTED FOR THE HEARING RECORD

#### PREPARED STATEMENT OF THE AMERICAN ASSOCIATION OF HOMES AND SERVICES FOR THE AGING (AAHSA)

The American Association of Homes and Services for the Aging (AAHSA) appreciates this opportunity to submit a statement for the record on H.R. 6128, 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 H.R. 6126 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 param-

eters 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.



RESPONSE TO POST-HEARING QUESTIONS FROM WILLIAM J. HALL, M.D., AARP,  
WASHINGTON, DC

**QUESTIONS FOR THE RECORD FOR WILLIAM HALL  
HEARING ON H.R. 6126, THE FAIRNESS IN NURSING HOME ARBITRATION  
ACT OF 2008  
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW  
HOUSE JUDICIARY COMMITTEE**

1. Opponents of this legislation may argue that courts already protect residents and their families, by ruling that certain arbitration clauses are unconscionable or the signatures were obtained under duress or by coercion, and therefore this bill is unnecessary. Does AARP suggest that residents and their families rely solely on the courts, or do we need to enact this legislation? Why?

We need to enact the Fairness in Nursing Home Arbitration Act. The legislation will put all residents and their families on an equal playing field, regardless of where they live. In addition, residents and their families would have one statutory standard, and would need to depend less on how the Court in their jurisdiction interprets the issue. There is no guarantee that all courts will find in favor of a nursing home resident or their family, even if the contract was signed under duress or without full knowledge or understanding of the arbitration clause.

2. In Mr. Gadberry's written statement, he refers to a model arbitration agreement to be used in the admission process that the American Health Care Association and the National Center for Assisted Living developed in 2002. Are you aware of this model? If so, how prevalent is it, and does AARP support its use? If not, why?

We are aware that this model exists, but we are not aware of any data on how prevalent it is. Even if the model results in some improvements in arbitration clauses, the model does not change the underlying circumstances. Residents and their families are often asked to sign arbitration clauses when they are in a time of crisis, in a position of unequal bargaining power, and when they may not be fully aware of the legal rights that they would be waiving. The model could still also be presented to residents and their families in a way that is potentially coercive and takes advantage of their unequal bargaining position.

3. How common are pre-dispute binding mandatory arbitration clauses in long-term care contracts? Which way is the trend going?

The trend is that pre-dispute binding mandatory arbitration clauses are being increasingly used by corporate nursing home chains.

4. I imagine that opponents of this legislation will contend that educating prospective residents and their families about the alleged pitfalls of pre-dispute arbitration agreements will be more effective than what Congress can do through legislation. Do you agree that education and outreach will protect all of the long-term care residents? Will that be enough? Can AARP effectively educate all of the prospective residents and their families?

We do not agree that education and outreach are effective tools in alerting prospective residents to the negative repercussions of pre-dispute arbitration agreements. Decisions related to selection and admission into a nursing home or assisted living facility typically are made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the deterioration (or even death) of a spouse or other caregiver. About 40 percent of nursing home admissions are from a hospital and occur after a medical emergency, such as a stroke or broken hip. Individuals may often be pressured to accept the first available bed without any opportunity to evaluate the care provided or consider other possible options. Education would likely be of limited use, especially given the unequal bargaining position of prospective residents and their families with facilities and that all facilities in an area may have arbitration clauses. The circumstances that generally surround a nursing home placement are not conducive to making informed decisions about contract provisions related to one's legal rights.

In addition, individuals have a strong sense of denial about long-term care in general. For example, a significant number of people believe that Medicare covers long-term care, when it only covers very limited services. Given all these dynamics, it would be challenging to educate individuals on this particular issue and reach all residents and their families.

5. In your written statement, you indicate that the protections provided within H.R. 6126 "should be available to all current long-term care facility residents." Please provide a fuller explanation as to why AARP suggests a change in H.R. 6126.

AARP believes a change is necessary in H.R. 6126 to ensure the protection of all residents who signed these arbitration clauses without a full understanding of the rights they waived by doing so, regardless of when they signed the arbitration clause. Residents who are presented with an arbitration clause before or after enactment of H.R. 6126 are in the same position of potentially not being aware of the rights they are waiving, being in a crisis situation, and being in a position of unequal bargaining power. Residents should not be treated differently based on when the bill is signed into law – all residents should receive the protections of this legislation.

6. If there is anything to which you would like to respond or clarify from the hearing, please do so.

**Questions for William J. Hall, M.D., AARP:**

1. The aging of our society, increasing costs of care, and the limits of the Medicare system are driving our country to a massive entitlements crisis. Arbitration can help contain those costs, and it can be structured fairly. Why shouldn't we do more to improve the arbitration system, rather than limit it?

It is skyrocketing costs throughout our health care system that are the biggest driver of cost growth in Medicare and Medicaid. That is why one of AARP's top priorities is working with Congress to enact comprehensive health care reform to lower the costs for families, employers, businesses, and providers. Arbitration does not necessarily contain the costs of care. One of the disadvantages of arbitration for consumers is high upfront costs, typically much higher than for filing a lawsuit. These costs may not be recovered by a consumer who wins in arbitration, as they usually are in litigation. While more can be done to improve arbitration, that does not address the underlying problems with how these contracts are entered into and whether there is a meeting of the minds between the resident in crisis and the facility.

Outside the context of nursing homes or similar facilities, AARP does support testing of tort system alternatives, as suggested by the Institute of Medicine, to determine if there may be more effective and efficient ways to deal with *medical errors*. However, we believe there is a substantial difference between the causes of most medical malpractice cases and the causes of most lawsuits against nursing homes. Medical errors that harm consumers generally involve weaknesses in health care delivery systems. Careful investigation and analysis is usually required to figure out what went wrong and how to prevent it from happening again. Problems in nursing homes that harm consumers do not generally involve medical errors, but rather a failure to provide appropriate custodial care, neglect, or abuse resulting from obvious factors such as not hiring enough staff. Nursing homes can do much to prevent lawsuits in the first place by providing quality care, and states and the federal government should provide stronger monitoring and enforcement of quality standards to prevent neglect and abuse.

2. Your focus is first and foremost on quality of care issues. Wouldn't efforts in other congressional committees to help improve quality of care, coupled with efforts to promote a fairer, more effective arbitration option, be the best way to address quality of care while keeping down costs?

Efforts to improve the quality of care in nursing homes are very important and must continue. It is the facility's responsibility to provide quality of care and quality of life for residents, and lawsuits can be prevented if a facility meets its obligation to provide quality care. But quality improvement efforts are unrelated to whether prospective nursing home residents should be expected to make informed decisions about whether to waive critical rights when they are at the height of a crisis and seeking admission to a nursing home.

1. In your written testimony, you suggest that families often don't have time to fairly obtain information and consider an arbitration clause. Why doesn't the industry's model arbitration clause solve that, especially with its 30-day "cooling-off" provision and its uncoupling of the arbitration clause and the admission decision? If in your view these provisions do not go far enough, would a longer "cooling-off" provision or other measures to improve arbitration help address any shortcomings you perceive?

The cooling off period and the uncoupling of the arbitration clause from the admission agreement do not, by themselves, result in meaningful improvement of the bargaining position of the prospective nursing home resident. Many residents will remain afraid that they will be discharged from the facility if they exercise the cooling off provisions – and in fact they might be. In addition, few people who are recovering from a hip fracture, stroke, etc. or their families who are struggling to ensure their loved one is properly cared for are likely to review the contract once they're admitted to the facility. And given the frequent crisis situation at the time of admission, people may not closely review the contract and be aware of the cooling-off provision. Thus, the presence of the cooling off period is not a meaningful remedy – the default is still arbitration.

3. If the arbitration system can work fairly, it can substantially lower costs of services for nursing home and assisted living residents. It also can avoid runaway tort awards that force providers out of business, lower the number of available beds, and drive up costs. Shouldn't AARP be focusing on how to make the arbitration system fairer and more widely available, so that it can lower costs and increase the number of service providers for its members?

Lawsuits can be prevented or reduced if a facility is providing quality care, and it is the facility's responsibility to provide this quality of care and quality of life for its residents. Arbitration does not necessarily contain the costs of care. And many residents who are injured, abused, or neglected do not sue. More can be done to improve arbitration, but that does not address the problems with how these contracts are entered into and whether there is a meeting of the minds between the resident in crisis and the facility. It is also worth noting that among individuals age fifty and older, 89 percent say they want to remain in their homes for as long as possible.



4. What additional positive measures could be worth the industry's and stakeholder groups' consideration? For example, could more be done with pre-arbitration mediation opportunities? If so, what mediation options might be worth exploring industry-wide? In addition, could market-based solutions of the kind discussed at the hearing, such as those based on increased transparency, information sharing and marketing, help assure better provision of alternative dispute resolution services to consumers and providers in the nursing home and assisted living sectors.

Consumers should have available an array of meaningful, fair, and voluntary options to resolve conflicts, including mediation that is truly voluntary, as well as the right to seek redress in the courts. H.R. 6126 preserves the option of post-dispute arbitration and protects consumers' rights to resolve disputes in court. However, alternative dispute resolution is appropriate only when certain mechanisms are in place to help ensure the fairness of the process.

Nursing homes should be transparent, share information with consumers, and be accurate in their marketing. But this does not change the circumstances under which prospective nursing home residents and their families most often select a facility -- it is often in a crisis situation and the prospective resident and their family are focused on the whether the facility provides quality care and can meet their individual needs. They are often not aware of the arbitration clause or its potential implications for their legal rights. Improvements in alternative dispute resolution or transparency do not negate the need to enact the Fairness in Nursing Home Arbitration Act to ensure that consumers are not forced into arbitration and that their right to seek redress in the courts is protected.



RESPONSE TO POST-HEARING QUESTIONS FROM LINDA STEWART, RN, MBA,  
HOUSTON, TX

Questions from Chairwoman Sanchez:

1. Why do you believe that long-term care facilities insist on including the pre-dispute arbitration clauses in their contracts with residents?

I feel that nursing homes place arbitration clauses in their contracts so that they can control everything from how the case is handled and who makes the decision so that they are guaranteed to win any disputes that arise from their negligence.

2. If there is anything to which you would like to respond or clarify from the hearing, please do so.

I feel strongly that pre-dispute nursing home arbitration contracts unfairly take advantage of patients and their families at a very emotional and vulnerable time. There are few things more gut-wrenching than admitting a loved one into a nursing home. The last thing that a patient or family member should be confronted with on the day of admission to a nursing home is an arbitration contract, which waives the right to trial by jury and essentially absolves a nursing home for their anticipated neglect and abuse of the patient.

Questions from Ranking Member Cannon:

1. Please describe the settlement your family achieved in your grandmother's case. Leaving aside that it was not obtained in a lawsuit, in what ways was it satisfactory, and in what ways was it not?

I am not permitted to describe the settlement because the terms and conditions of the settlement are confidential. I can say that the settlement was much less than it should have been. We were forced to settle because of the nursing home's threat to appeal the issue of the arbitration clause to the Texas Supreme Court. Such an appeal would have been cost-prohibitive.

2. Would it be better to solve quality-of-care problems in the industry by requiring quality-of-care improvements, or to rely just on tort suits to punish those who don't maintain adequate quality of care? Isn't preventive medicine better than punitive medicine?

We should certainly be making quality of care improvement to our nursing homes, however, access to the courts and the ability to hold these corporations accountable for their abusive behavior is an important deterrent. Without accountability, nursing homes have no incentive to increase quality of care. There is no preventative medicine without the threat of punitive medicine.

3. If abusive tort suits raise nursing home costs, couldn't that get in the way of efforts to use the system's limited resources to improve quality of care?

Lawsuits that are filed because a loved one is injured, neglected, or even killed are not abusive, and I take issue with that classification. I also take issue with your characterization that nursing home corporations and/or “the system” have limited resources. The nursing home industry is “Big Business.” The nursing home corporation that I sued in Guadalupe County owned nursing homes all across the country, and was acquired in December 2005 by Onex Corporation in a transaction valued at approximately \$745 million dollars! Nursing home corporations have a lot more money than the people that they injure. If they say that their costs are going up because of lawsuits, that’s just a publicity stunt that isn’t true.

4. Could your family have benefited from the kind of arbitration clause the model arbitration clause discussed at the hearing represents – e.g., one that isn’t a condition of admission, one that gives a 30-day “cooling-off” period in which to reevaluate whether to agree to mandatory, pre-dispute arbitration, and one that preserves state law rights?

No, my family would not have benefitted from the kind of arbitration clause contained in the “model arbitration” contract that was discussed at the hearing. That “model arbitration” contract is flawed, and remains an effort by the nursing home industry to continue to trick unsuspecting consumers into forfeiting their legal rights. The condition of a 30-day “cooling-off” period is meaningless. Most consumers do not even know what the words “binding arbitration” mean. So, they do not know what they have even signed. If a consumer does not know what “arbitration” means and/or the import of what he has signed, then there is nothing to “cool-off” from. Moreover, such a clause would not have helped in my family’s situation because my grandmother’s injury occurred within the first 30 days of her admission. Also, the “model arbitration” contract does nothing to preserve state law rights. To the contrary, it specifically states that the Federal Arbitration Act shall control. My state of Texas has a law that makes any nursing arbitration contract “invalid and of no legal effect” unless it is signed by a lawyer of the patient’s own choosing. But the big nursing home corporation argued in my case that the Federal Arbitration Act trumped Texas state law because Medicare payments were involved. So again, my answer is a resounding NO – absolutely not. This system is intentionally stacked against the nursing home patient.



RESPONSE TO POST-HEARING QUESTIONS FROM GAVIN J. GADBERRY, ESQUIRE,  
UNDERWOOD, WILSON, BERRY, STEIN AND JOHNSON, PC, AMARILLO, TX

**Responses of Gavin J. Gadberry, Esq., the Underwood Law Firm, to  
Questions from Former Chairwoman, Linda Sanchez**

**Question:**

You suggest “that from 1999-2005 there was a nearly 50 percent decrease in the ‘proportion of nursing homes with serious quality problems.’” I applaud the 50 percent decrease from 1999-2005, but the most recent GAO report, from May 2008, reveals that about 20% of nursing homes have serious deficiencies. We should be happy when the GAO reports that no nursing home has a serious deficiency. Until that point, we need to do all that we can to protect the residents of nursing homes. Federal and state governments can conduct oversight. Lawsuits and advocacy groups can reform nursing home environments. Please explain for us how arbitration and the secrecy of arbitration decisions can protect the residents of nursing homes.

**Answer:**

First, allow me to respectfully disagree with your basic premise, i.e., that lawsuits reform nursing home environments. The fact is that all long term care facilities want to avoid any claim that one of its residents suffered an avoidable injury while under its care, whether that claim comes by way of a lawsuit or by way of arbitration. In my experience, litigation is destructive, not constructive. Litigation, even the fear of litigation, drives quality providers to other segments of the healthcare spectrum where costly litigation is not as prevalent. The availability of arbitration as an alternative to costly litigation for the resolution of claims carries the added benefit of hopefully keeping quality providers in the long term care profession.

I further disagree with the premise that arbitration is “secret.” Clearly, the setting for arbitration is different than a courtroom, but nothing prevents a resident from publicizing their complaints, the arbitration, their success or lack thereof. Further, the idea that lawsuits are truly public affairs is a fallacy. In my experience, trials are typically conducted in the presence of only the judge, the jury and interested parties. The notoriety that may follow litigation most often comes from lawyers trumpeting their successes, and again, absolutely nothing keeps a lawyer from trumpeting his or her success in an arbitration proceeding.

More importantly, of all the industries in the United States, the one that has virtually no ability to hide from the eye of the consumer is the long-term care industry. A long-term care facility that fails to provide the care expected of it will have that fact put on view for the public in comparison websites available from a number of sources, not the least of which is Nursing Home Compare, a tool with detailed information about every Medicare and Medicaid-certified nursing home in the country. These tools, adequate funding and this industry’s desire to work with its regulators to achieve consistent quality care for its residents, are what will ultimately provide the best protection for the residents of nursing homes.

**Question:**

If there is anything to which you would like to respond or clarify from the hearing, please do so.

**Answer:**

No. Hopefully, through the opportunity to respond to these questions, as well as the questions posed by the Ranking Member, Christopher B. Cannon, I have been able to clarify some misconceptions about arbitration in the nursing home setting.

**Question:**

You indicate in your written statement that arbitration facilitates settlements, and more quickly. Why is that?

**Answer:**

Settlement is a function of the parties to a dispute reaching a sound understanding of the facts and circumstances underlying the dispute, along with the risks and benefits attendant to putting the resolution of the dispute in the hands of a third party. The fact is that arbitration, while still adversarial in nature, allows this process to move at a faster pace because the parties have more control over the process. As a result, arbitration often enhances communication between the parties about the evidence, their claims and potential settlement. The Harris Interactive Survey (Arbitration: Simpler, Cheaper and Faster Than Litigation, 2005) supports these concepts. Approximately 74% of participants in the survey found the process faster than litigation.

**Question:**

In your written statement, you refer to a model arbitration agreement to be used in the admission process that the American Health Care Association and the National Center for Assisted Living developed in 2002. How prevalent is the model arbitration agreement? Do all long-term care facilities which include arbitration agreements in their admissions packets use the model? Why not?

**Answer:**

Understand that in developing a model agreement, it was not intended that all member facilities use this template without first taking into account their facility-specific circumstances, applicable state laws, the sources of arbitration services in their locale, and the advice of their own counsel. Instead, it was an attempt to provide a working draft of a relatively straight-forward, yet comprehensive, agreement, the core concept of which was to change only the forum for resolving disputes between a resident and a nursing facility, as opposed to altering the rights and remedies available to a resident.

The proposed form was developed as a stand-alone agreement to avoid the possibility that these important provisions would be lost in fine print or buried within an already lengthy admissions document, and to otherwise foster separate consideration of the arbitration proposal.

With that understanding of the purpose of the model agreement, the American Health Care Association and the National Center for Assisted Living ("AHCA/NCAL") have not attempted to gather statistics regarding how many of its nursing facility members use some adaptation of the model arbitration agreement. Nor do we know the answer to the question of why individual members, if any, have chosen not to do so. However, we do know that our members would be well-served to utilize this resource. In this regard, given the positive attributes of the model agreement, by properly using an agreement based on this model, our members can avoid the often wasteful debate about the validity of the agreement and focus instead on the substantive issues concerning the care provided by the facility to the resident.

**Question:**

Your member facilities can alter the model agreement, correct? So they can delete the 30-day period to rescind the arbitration agreement. They can still require that the arbitration agreement be a condition of admission. They can still add other requirements to the arbitration agreement. Simply, AHCA and NCAL can provide a model, but it does not necessarily mean that your member facilities have to follow it, correct?

**Answer:**

Of course, AHCA/NCAL does not have the power to mandate the use of the model agreement; nor would we if we could. As I have explained in my answer to the previous question, the model agreement was developed with the idea that providers adapt it to fit their own circumstances. However, we have tried to make it clear to our members that they would be well served to incorporate the positive aspects of the model agreement so that it could achieve its purpose --- the provision of fast and effective dispute resolution. To that end, AHCA/NCAL would certainly discourage its members from removing provisions (such as the 30 day clause) or adding provisions (such as a limit on available remedies) that would defeat this purpose.

**Question:**

The American Arbitration Association and the American Health Lawyers Association no longer arbitrate disputes regarding long-term care contracts between facilities and residents when the agreement to arbitrate was made before the dispute arose. They have indicated that these types of disputes are too controversial or, as Richard Naimark, the Senior Vice President of the American Arbitration Association, testified before this Subcommittee last year, can involve "matters of life and death." Clearly these two groups see the problems in arbitrating these types of disputes. Why should we not follow the choices made by AAA and AHLA and no longer allow these types of arbitration agreements for these disputes?

**Answer:**

I am not aware of any litmus test which could be applied to the efficacy of alternative dispute resolution, such as arbitration, that would leave “too controversial” disputes to be resolved by the courts only. Nor do I believe there is anything in the subject matter of personal injury that makes it inherently unfit for arbitration. Of course, personal injury matters are frequently resolved in non-jury trials throughout this country. While arbitration may not carry with it all of the trappings of the courtroom, in many ways it is analogous to the nonjury trial. Surely Congress would not presume to deprive judges of the ability to decide a nursing home dispute because it touches upon matters of life and death. Likewise, I do not believe it should presume that arbitrators, many of whom are active or retired judges and lawyers, are not capable of administering justice for such disputes through arbitration.

Perhaps the key word in this question is “choices.” Why not follow the choices that AAA and AHCA have made? Primarily because it deprives others from making the “choice” to provide the arbitration services that AAA and AHCA have chosen not to provide, or the “choice” to utilize a dispute resolution process that has proven to be faster and more efficient than traditional litigation; a “choice” that all other businesses are currently afforded.

**Question:**

Please describe more fully the model arbitration agreement, specifically the 30-day window for residents to rescind the arbitration agreement.

**Answer:**

We have attached a copy of an AHCA/NCAL model arbitration agreement for your information. The 30-day opt-out provision is located immediately below the bold print advisory regarding the waiver of the right to have disputes resolved in a court of law. It is contained within the statement of essential rights of the resident with respect to the arbitration agreement, as follows:

“The Resident understands that (1) he/she has the right to seek legal counsel concerning this agreement, (2) the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice to the Facility from the Resident within 30 days of signature.”

**RESIDENT AND FACILITY ARBITRATION AGREEMENT - READ CAREFULLY**

It is understood and agreed by \_\_\_\_\_ (the "Facility") and \_\_\_\_\_ ("Resident," or "Resident's Authorized Representative", hereinafter collectively the "Resident") that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or relates to the Resident Admission Agreement or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Code of Procedure of the National Arbitration Forum ("NAF") which is hereby incorporated into this agreement,\* and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

This agreement to arbitrate includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Resident Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract. However, this agreement to arbitrate shall not limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.

The parties agree that damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credit against or limitations on, such damages.

It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident, shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or received by the Resident, and is not presented in the arbitration proceeding.

**THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY.**

The Resident understands that (1) he/she has the right to seek legal counsel concerning this agreement, (2) the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice to the Facility from the Resident within 30 days of signature. If not rescinded within 30 days, this Arbitration Agreement shall remain in effect for all care and services subsequently rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

\_\_\_\_\_  
Resident/Representative Signature      Date

\_\_\_\_\_  
Facility's Authorized Agent      Date

\_\_\_\_\_  
Resident/Representative Printed Name

\_\_\_\_\_  
Facility's Authorized Agent Printed Name

\*Information regarding NAF, its arbitration services, fees for services and Code of Procedure is available at: National Arbitration Forum, P.O. Box 50191, Minneapolis, MN 55405, Phone: (800) 474-2371/Fax: (651) 604-6778, [www.arbitration-forum.com](http://www.arbitration-forum.com).



**Responses of Gavin J. Gadberry, Esq., the Underwood Law Firm, to  
Questions from Subcommittee Ranking Member Christopher B. Cannon**

**Question:**

**Please explain to us the tort suit abuse that caused the nursing home and assisted living industry to move towards mandatory binding arbitration.**

**Answer:**

AHCA does not view itself as an advocate “mandatory” arbitration. Its model form is a voluntary agreement which contains a 30 day option to rescind. AHCA adopted this model agreement in response to a trend that began in the 1990’s when nursing and assisted living facilities became a prime target for litigation. Spurring the trend were singular instances of alleged abuse and neglect in nursing homes that resulted in extremely large verdicts against health care corporations who were perceived to have deep pockets and large insurance policies. These cases were highly publicized in legal circles. Plaintiffs’ lawyers began to advertise aggressively for claims against nursing homes, playing on the natural anxieties of people who have faced the difficult decision to seek long term care for their loved ones. Feeding off of the public’s general anxiety about aging and nursing homes, the number of lawsuits against nursing homes grew steadily and yielded some staggering damage awards. For example, in November 1997, a jury in Fort Worth, Texas, awarded \$92.3 million against a nursing home. At about that same time, a Rusk County, Texas nursing home was hit with an \$83 million verdict based on alleged fraud and negligence. In October 1998, a Tarrant County lawsuit resulted in a \$250 million verdict against a nursing home for negligence and wrongful death; the second largest verdict in the entire country in 1998. A corresponding liability insurance crisis arose, leaving many institutions unable to find affordable liability insurance. While tort reform in California, Florida, Texas, and elsewhere, helped stem the tide of these emotion-driven awards, many in the long-term care industry looked to arbitration, as opposed to litigation, to help reduce the costs of resolving these disputes with residents and families.

**Question:**

**If we restrict arbitration rights, can we expect anything other than to deliver this industry back to the vicious spiral of abusive tort suits and rising costs? If not, what tort reforms should go hand-in-hand with any restrictions of arbitration rights? What tort reforms should we be considering regardless of whether arbitration is restricted?**

**Answer:**

Restricting arbitration will not automatically increase the number of claims, because arbitration does not eliminate disputes, it merely provides a different forum for the disputes. AHCA’s model arbitration agreement ensures that residents are able to assert the same causes of action and requests for damages that they are entitled to under state law. However, restrictions on the rights to arbitrate these types of claims will certainly result in higher costs and a more time-consuming process for resolving claims.

Because the same basic law applies in both the arbitration and litigation forums, tort reform should go hand-in-hand with arbitration. Clearly, tort reforms in Texas resulted in lower litigation costs and bringing insurance companies back into Texas to provide professional liability coverage, a development beneficial to residents and facilities alike.

The restriction proposed by HR 6126 unnecessarily targets the nursing and assisted living professions unlike any other industry or profession. No one tort reform measure is likely to provide the same advantages offered by arbitration – lower costs, speedier resolution, etc. – that are equally beneficial for both consumers and the profession. If the Congress considers tort reform measures, the experiences of California and Texas provide guideposts that merit consideration.

**Question:**

**Will rising costs adversely affect the industry's ability to improve quality of care? Will it exacerbate the Medicare entitlements crisis?**

**Answer:**

Litigation costs clearly outpace the cost of resolving disputes through arbitration. HR 6126 will only increase the costs the profession will incur. Increasing the cost of resolving claims will logically hamstring the profession's ability to allocate resources to new initiatives directed at quality care, which is the primary goal of the profession.

**Question:**

**How well is the industry's model arbitration clause working? Overall, how satisfied are the industry's clients with its results?**

**Answer:**

I am not aware of any statistical information regarding utilization of, and satisfaction with, arbitration. However, we believe that the model arbitration agreement is working well where it is used. The opt-out clause reasonably protects the rights of the consumer during the admission process and affords more protection than most arbitration provision in consumer contracts in other contexts.

**Question:**

**What additional positive measures could be worth the industry's and stakeholder groups' consideration? For example, could more be done with pre-arbitration mediation opportunities? If so, what mediation options might be worth exploring industry-wide? In addition, could market-based solutions of the kind discussed at the hearing, such as those based on increased transparency, information sharing and marketing, help assure better provision of alternative dispute resolution services to consumers and providers in the nursing home and assisted living sectors.**

**Answer:**

Mediation is also a useful tool that can already be used in conjunction with, as opposed to in lieu of, arbitration. At present, nothing prevents the consumer and facility from mediating a claim prior to arbitration, or for that matter, prior to traditional litigation. As I observed in my original testimony, most claims are ultimately resolved through settlement. Mediation often provides an impetus to such settlements. AHCA believes the more efficient arbitration process can work well with mediation in fostering early resolution of claims.

The long term care profession is heavily regulated. CMS and the state licensure and Medicaid certification agencies already monitor the performance of facilities nationwide. AHCA has worked with CMS in developing "Nursing Home Compare", a useful consumer tool for evaluating facilities based on regulatory compliance. Many states have similar mechanisms to evaluate facilities. AHCA continues to work with CMS to develop better consumer oriented tools, including the recent Five Star initiative. In fact, litigation provides no similar method for evaluating facilities. Instead, litigation simply provides a snapshot of a single resident's experience, as opposed to the overall performance of a facility.

RESPONSE TO POST-HEARING QUESTIONS FROM KENNETH L. CONNOR, ESQUIRE,  
WILKES & MCHUGH, P.A., WASHINGTON, DC

## QUESTIONS FOR KENNETH CONNOR

From Linda T. Sanchez, Chair

1. **Please explain how the Federal Arbitration Act preempts state laws, especially any state laws that are intended to protect the elderly in long-term care facilities.**

Individual states enacted residents rights acts in the exercise of their police power to protect the particularly vulnerable nursing home resident population from abuse and exploitation. These acts typically limit arbitration as a means of dispute resolution. However, the FAA preempts state laws that act to limit arbitration as a means of dispute resolution. Thus, where a state resident's rights statute (or a state's own uniform arbitration act) precludes agreements requiring arbitration as the means of resolving claims, the state statute is preempted. Hence, a nursing-home operator can require executing an arbitration clause as a condition of admission to the nursing home, even though that requirement violates state law.

2. **If there is anything to which you would like to respond or clarify from the hearing, please do so.**

There is nothing else to which I would like to respond or clarify from the hearing.

**Responses of Kenneth L. Connor  
To Questions for the Record from Ranking Member Chris Cannon  
Subcommittee on Commercial and Administrative Law  
“Hearing on: H.R. 6126, Fairness in Nursing Home Arbitration Act of 2008,”  
June 10, 2008, 2:00 p.m., Room 2141 RHOB**

**Question 1.** How much more can we achieve in what you call the "quality-of-care" crisis by requiring increased Medicare oversight of the nursing home services Medicare pays for, as opposed to paving the way for abusive and punitive tort suits?

**Response.** The single most important factor that can and will improve the quality of nursing home care is the implementation of a nationwide minimum staffing level. Federal rules currently require that facilities have "...sufficient staff to provide nursing and related services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident..." This requirement is admirable, but it is inherently subjective and facilities often use that subjectivity as an excuse to keep staffing at less than optimal levels. Several landmark studies have shown a direct causal link between higher staffing and improved quality of care.

No objective minimum staffing level has yet been imposed by the federal government and resident care would be enhanced by the imposition of such a minimum standard. In the absence of objectively verifiable minimum staffing requirements, nursing homes have engaged in chronic and widespread short-staffing which has directly led to unnecessary suffering and death for large numbers of residents.

A case study of the positive impact of a strong staffing minimum can be seen in the State of Florida, the state with the largest senior population in the country. Prior to 2002,

Florida's minimum staffing standard formerly was 1.7 hours of certified nursing assistant hours per day per resident. In 2002, a new standard mandating a minimum of 2.3 hours per day went into effect. As a result, the number of adverse incidents, resident complaints *and* notices of intent to file lawsuits plummeted. Data tracked by the top regulatory agency in the state show a correlation in the increase in staffing and the decrease in negative and adverse outcomes. The current standard in Florida is above 2.6 hours per day. Federal data shows that *prior* to 2001, Florida led the nation in short-staffing violations as well as deficiencies directly related resident care. Since that time, it has become a national leader in staffing and its declining deficiency ratings are now a matter of pride.

**Question 2.** What were the impacts on nursing home costs of the tort crisis of the 1990's?

**Response.** Respectfully, I take issue with the premise of the question. There was no tort crisis of the 1990's and lawsuits did not materially impact nursing home costs during that decade. The financial woes experienced by the industry during that period were a problem of its own creation.

Nursing home costs skyrocketed in the 1990's in large measure because of fraud and over billing by the industry. In the wake of mounting complaints about over billing and fraud, the General Accounting Office (GAO) undertook an investigation of the billing practices of the nursing home industry. The report, *"Medicare: Tighter Rules Needed to Curtail Overcharges for Therapy in Nursing Homes"* issued in 1995, found

that: (1) nursing homes were taking advantage of ambiguous payment rules and lack of guidelines to bill Medicare at inflated rates for therapy services; (2) billing schemes uncovered in the investigation suggested that the problem was nationwide and growing in magnitude; and (3) convoluted business practices had been designed to generate increased Medicare billings and skirt program controls

With the findings of the GAO as a backdrop, the Congress passed sweeping changes to the Medicare program in the Balanced Budget Act of 1997 (BBA). These changes modernized Medicare's payment system; created tough, new anti-fraud initiatives and slowed the growth of Medicare spending by \$115 billion over 5 years. The BBA fundamentally changed the method by which nursing homes were to be reimbursed by the federal government. Medicare's cost-based reimbursement methodology was replaced with a prospective payment system (PPS), which bundled routine costs, ancillary costs and capital-related costs into a single *per diem* payment based upon the care a particular resident needed.

Many nursing homes referred to the closing of this loophole as a "decrease" in Medicare reimbursement. In fact, it represented an effort to curb the industry's rampant fraud of the American taxpayer. In an interview published in the Washington Post on February 4, 2000, John T. Bentivoglio, special counsel for healthcare fraud, observed, "A number of highflying nursing home chains appear to have incorporated defrauding Medicare as part of their business strategy." He also noted, "The government has made it harder for them to defraud us, and that has resulted in financial strain for certain nursing home chains." (See also, 95 GAO Report, Page 2, Paragraph 1: "We found widespread examples of overcharges to Medicare for therapy services delivered to nursing home

patients"; and 95 GAO Report, Page 4, Paragraph 2: "...the HCFA officials and claims processors we interviewed believe [abusive billing] has reached national proportions, and we found significant indications of providers inflating their charges for therapy services.")

The nursing home industry was not prepared for these changes in the reimbursement system. Counting on a continuation of the government's largesse, many chains aggressively expanded their operations in the 90's, relying on debt to fund their growth. When the reimbursement system changed, they could not continue to service the debt they had incurred and a number of chains went into bankruptcy. By June of 2000, five of the seven largest nursing home corporations in the U.S. were operating under Chapter 11 protection. Press releases issued by the companies blamed cuts in Medicare reimbursement rates, not lawyers, for their financial woes:

"The dramatic impact of the implementation of the 1997 Balanced Budget Act on our revenues and cash severely impacted the company's ability to service our current capital structure."

- *Robert N. Elkins, Integrated Health Services, Chairman and CEO*

"Deep cuts in Medicare reimbursements, which far exceeded all government forecasts coupled with chronic under funding of Medicaid reimbursements, have severely impacted Genesis' ability to service our current capital structure."

- *Michael R. Walker, Genesis Health Ventures, Inc., Chairman and CEO*

"Deep cuts in Medicare reimbursements exceeded all industry expectations."

- *Andrew L. Turner, Sun Healthcare Group Inc., Chairman and CEO*

"The reorganization also was necessary because of the dramatic changes impacting the long-term care industry, most notably decreased Medicare reimbursement."

- *Edward L. Kuntz, Vencor, Inc., Chairman, CEO and President*



Consider, also, these observations by the nation's media made during the time you inquired about:

"After years of reaping generous profits and anticipating more of the same, much of the nursing home industry is now heavily in debt, understaffed and losing money."

- *USA Today*, September, 30, 1999

"IHS and other nursing home chains that were expanding rapidly were leveraged up the gazoo, building up debt to finance their acquisitions."

- *Paul, Willgang, former President (1983-1998) of the American Health Care Association quoted in The Baltimore Sun*, January 13, 2001

"While (residents) suffer, executives treated themselves to corporate jets, private gyms and, in one case, \$40 million to a CEO who was running the company in the ground."

- *Rocky Mountain News*, October 22, 2000

The attempt by the nursing home industry to blame lawyers and frivolous lawsuits for their problems is a disingenuous attempt at revisionist history. It is much easier for the industry to place the blame on trial lawyers than it is to accept the consequences of their own fraudulent and profligate business practices. If it were to acknowledge the reality of its past history, members of Congress and the public would be much less sympathetic to its complaints.

**Question 3.** What, if anything is unreasonable about the nursing home and assisted living industry's model arbitration agreement?

**Response.** The first problem is that the “agreement” requires pre-dispute binding mandatory arbitration. Rarely do consumers understand the magnitude of the rights they are giving up when they enter into such an agreement. This is particularly true of the elderly who often present for admission to the nursing home with infirmities that adversely affect their competency to contract. Beset with advanced age, often under the influence of medication, and suffering from disabilities affecting their reasoning, sight and hearing, the elderly are often incapable of understanding the legal significance of such an agreement.

Furthermore, admission to a nursing home is an emotional and traumatic experience. The elderly person is often overwrought about being placed in an institution and their family is typically guilt-stricken about having made such a decision. The last thing they are expecting when they go to a nursing home is to be asked to waive important legal rights. They are looking for medical help and they are looking for it now! They don’t expect and they are not prepared to be asked to make legal decisions which are best made after consultation with a lawyer.

The terms of the agreement are unconscionable. It requires waiver of one’s constitutionally protected right to trial by jury. It requires use of the National Arbitration Forum (NAF), an arbitral forum which, by reputation, is notoriously industry oriented and hostile to nursing home residents. The rules of the NAF (which consist of dozens of pages) are incorporated by reference in the agreement and are not shown to the resident or their families at the time of admission. Discovery under those rules is dramatically limited compared to discovery that is permissible in connection with a civil trial. The fees associated with the arbitration are typically higher than associated court fees and the

rights of the resident to and on appeal are dramatically curtailed. These deficiencies are not explained to the residents or their families on admission to the nursing home. Indeed, the admitting personnel presenting the documents for signature often do not understand the documents, which are commonly sandwiched in with 50-60 pages of other admission documents, themselves.

**Question 4.** Why isn't the solution to potential arbitration abuse for lawyers, like yourself, to diversify into representing consumers in arbitration? Or for lawyers like yourself to work to create a better, fairer, more effective arbitration system?

**Response.** Lawyers don't typically want to represent clients in a forum where the deck is stacked against their client. Personal injury and wrongful death cases are commonly handled on a contingent fee basis by lawyers who advance the costs of prosecuting the client's case out of their own pocket. If the lawyer doesn't prevail on behalf of a client, typically no fee is owed for their services and, often, costs are not required to be reimbursed. The inherent unfairness of the arbitral forum mandated by the pre-dispute agreement deters injured parties from securing legal representation. The gloomy prospects of making a recovery for the client, or alternatively, the high likelihood that the recovery will be at a significant discount to its real value make it economically unfeasible for most lawyers to represent clients in such venues.

I believe there is a better, fairer, more effective arbitration system already in existence. It is one where the decision to arbitrate is entered into voluntarily by all

parties, after the dispute has arisen, and with full knowledge of the relevant rules and procedures which will be employed.

**Question 5.** Litigation benefits trial lawyers and some families, but it is long, stressful, expensive, and uncertain, and it didn't resolve the quality of care issue in the 1990s. Why shouldn't we look to options outside of the "arbitration vs. lawsuits debate to address quality of care issues?

**Response.** Resolution of quality of care issues is a multi-faceted problem that will require a multi-faceted solution. The primary purpose of resident rights litigation isn't to resolve quality of care issues; rather, it is to compensate residents or their families for the harm and damages they have suffered as a result of a breach of the standard of care or a violation of the resident's rights. A collateral benefit of such litigation, however, is that when nursing homes are held fully accountable for the consequences of their abuse and neglect, they are more likely to avoid such conduct in the future.

There are a variety of ways to improve quality of care in nursing homes. One way is to for the federal government to impose minimum staffing standards throughout the country for nursing homes. Numerous studies demonstrate the correlation between staffing and outcomes in the nursing home in the areas of falls, malnutrition and skin integrity.

Another way to improve the quality of care in nursing homes is to increase the number of inspections by federal and state regulators in nursing homes and to ensure that appropriate sanctions and monetary penalties are levied and collected for violations of

state and federal regulations. A recent report by Consumer reports indicated that the severity of the penalties imposed by regulators has been decreasing and that regulators have been lax in collecting monetary penalties for violations of the regulations. Lax enforcement of regulations intended to protect residents results in harm to residents.

The federal government should consider *requiring* the formation of family councils in nursing homes so families can openly discuss with one another the problems they are having with respect to their loved ones. Currently, such councils are optional. Existing resident councils are inadequate because many residents are incompetent or afraid to speak in the presence of nursing home staff about the indignities they suffer at the hands of their caregivers. Protections against retaliation for remarks at all council should be included in the federal regulations.

The government should also consider requiring nursing homes to use standardized admission agreements. Such agreements should be vetted by industry and consumer groups in advance of their adoption. The agreements should prevent the waiver of constitutional and other legal rights during the admission process.

Installation of “Granny cams” (video surveillance cameras) in resident’s rooms should be tried on a widespread basis. Video surveillance has been used to good advantage in a variety of applications. When nursing home staff know that their actions are under continuous surveillance, they are likely to treat residents with the dignity and respect they deserve and to avoid actions which are tantamount to abuse or neglect.

Finally, the government should consider requiring that nursing home licensees also be the real owners and operators of the facilities under operation. Over the last several years, the nursing home industry has created so called single purpose enterprises

with the goal of reducing accountability and responsibility to residents and regulators. The industry typically names a “shell” enterprise which has limited capital as the licensee in the hopes that if an adverse verdict or administrative ruling is leveled against it, the recovery will be limited. Meanwhile, the key decisions about staffing, budgets and levels of care are being made by other entities (so called parent or management companies) which disclaim liability for their consequences. Those who make operating decisions should be responsible as in the same manner as licensees for their consequences. They should also be required to be named as the licensee of the facility. The failure to secure such a license by such entities should result in criminal penalties.

Respectfully submitted this 22<sup>nd</sup> day of July, 2008 by

Kenneth L. Connor,

In his individual capacity and not on behalf of any organization