Testimony of

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Attorney at Law

June 18, 2008

Before the Subcommittee on Antitrust, Competition and Consumer Rights and the Special Committee on Aging, regarding the Fairness in Nursing Home Arbitration Act

S. 2838/ H.R. 6126

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

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

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

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

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

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

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

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

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

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

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