

Calendar No. 1109

110TH CONGRESS } 2d Session }	SENATE	{ REPORT 110-518
----------------------------------	--------	------------------------

FAIRNESS IN NURSING HOME ARBITRATION ACT

OCTOBER 1 (legislative day, SEPTEMBER 17), 2008.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 2838]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 2838) to amend chapter 1 of title 9 of United States Code with respect to arbitration, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

CONTENTS

	Page
I. Background and Purpose of the Fairness in Nursing Home Arbitration Act	2
II. History of the Bill and Committee Consideration	16
III. Section-by-Section Summary of the Bill	16
IV. Congressional Budget Office Cost Estimate	17
V. Regulatory Impact Evaluation	18
VI. Conclusion	18
VII. Minority Views of Senators Kyl, Sessions and Coburn	19
VIII. Changes to Existing Law Made by the Bill, as Reported	28

I. BACKGROUND AND PURPOSE OF THE FAIRNESS IN NURSING HOME ARBITRATION ACT

A. SUMMARY

The purpose of S. 2838, the Fairness in Nursing Home Arbitration Act, is to protect vulnerable nursing home residents and their families from unwittingly agreeing to pre-dispute mandatory arbitration, thus signing away their right to go to court.

The bill would invalidate pre-dispute mandatory arbitration agreements in long-term care facility contracts. It does so by prohibiting the enforcement of arbitration agreements in cases between residents and long-term care facilities when the agreement to arbitrate was entered into prior to the dispute.

The Fairness in Nursing Home Arbitration Act has the support of numerous advocacy groups including: the American Association of Retired Persons (AARP); the Alzheimer's Foundation of America; Consumer Action; Consumers Union; the Center for Medicare Advocacy; the National Association of Local Long-Term Care Ombudsman Programs; the National Association of Social Workers; the National Senior Citizens Law Center; NCCNHR: The National Consumer Voice for Quality Long Term Care; the Service Employees International Union; Public Citizen; Public Justice Center; U.S. Public Interest Research Group; and the United Food and Commercial Workers International Union. Many state organizations that advocate on behalf of senior citizens, nursing home residents, consumers, and families also believe that this is a critical issue, and they support the legislation.

This legislation is prospective. It will take effect on the date of enactment and will apply only to a dispute or claim that arises on or after such date.

B. NEED FOR LEGISLATION

1. *Background*

Millions of Americans turn to professional long-term care facilities when faced with the difficult decision of how best to care for loved ones who can no longer care for themselves. They do so expecting that nursing homes will provide adequate care and a safe environment. Sadly, however, some elderly nursing home residents suffer serious injuries as a result of substandard care. It is not until such injuries occur, and the injured residents attempt to hold a facility accountable in court, that they realize they signed mandatory arbitration agreements along with the admissions documents.

Many long-term care facilities use admissions contracts that include pre-dispute mandatory arbitration agreements.¹ By signing an arbitration agreement, residents and their families agree to give up the ability to choose a venue for resolving any future dispute with the facility. Instead, the agreement requires that all disputes be resolved in a costly and burdensome private arbitration pro-

¹ The American Health Care Association, representing more than 10,000 long-term care facility members, provides a "model arbitration agreement" to its members. The agreement is a pre-dispute binding mandatory arbitration provision which, when used, is signed at the time of admission. Fairness in Nursing Home Arbitration Act: Hearing on S. 2838 Before Subcomm. on Antitrust, Competition Policy and Consumer Rights of S. Comm. on the Judiciary and S. Special Comm. on Aging, 110th Cong. 4 (2008) [hereinafter "Joint Hearing" (statement of Kelly Rice-Schild)].

ceeding. Thus, residents must give up their right to seek redress in court before an impartial judge or jury.

The nursing home admission process is emotional and traumatic for prospective residents and their families. The decision to enter a facility is made either immediately after a medical emergency, when an elderly person is no longer able to care for himself or herself, or when a family reluctantly acknowledges that they are no longer able to provide the level of care that their loved one needs. During the admissions process, residents or their caretakers face a blizzard of forms that must be signed in order to gain admission. Prospective residents that suffer from cognitive or physical impairments may have limited ability to read or understand arbitration agreements, much less the significant consequences that those agreements may have in the future. Family members admitting a loved one are focused solely on finding the best possible care, and not on the legal technicalities of arbitration.

Due to the nature of the admissions process, prospective residents and their families cannot make, and should not have to make, a decision about whether to forego their right to hold the facility accountable in court for negligent care. This principal is supported by the Commission on Health Care Resolution, which consists of members of the American Medical Association, the American Bar Association, and the American Arbitration Association. These preeminent doctors, lawyers and arbitrators unanimously agreed that “in disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.”²

The ability of residents to hold poorly-performing facilities publicly accountable in court for negligent care is critical because government oversight of nursing facilities does not fully safeguard patient safety. That is why S. 2838 is necessary to protect residents and their families from being forced to make a critical decision about their legal rights during the stressful and emotional process of admission into a nursing facility. By preserving the residents’ option of pursuing claims in court for negligent or abusive care, not only will the public be able to make more informed choices of nursing homes, but poorly-performing facilities will have a greater incentive to prevent injuries and death. Importantly, S. 2838 does not preclude the use of arbitration if it is agreed to after the dispute occurs. Parties are also free to use other forms of alternative dispute resolution, such as mediation.

At a joint hearing of the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights and the Special Committee on Aging, David Kurth shared a tragic story about his father that demonstrates the problem that S. 2838 will solve—nursing home residents and their families unknowingly agreeing to give up their right to take a facility to court for egregious injuries caused by negligent care.³

At age 84, William Kurth, a World War II veteran, died as a result of the poor care he received while he was a resident at Mount

²American Arbitration Association, American Bar Association and the American Medical Association, Due Process Protocol for Resolution of Health Care Disputes 28 (1998) available at <http://www.ama-assn.org/ama1/pub/upload/mm/395/healthcare.pdf>. (last accessed Sept. 18, 2008).

³Joint Hearing (statement of David Kurth).

Carmel Medical and Rehabilitation Center, a Kindred Healthcare Inc., facility in Burlington, Wisconsin. His family is trying to hold the facility accountable in court, but a nursing home arbitration agreement is standing in their way.

When Mr. Kurth's wife of 63 years, Elaine Kurth, realized that she could no longer care for her husband at their home, she and her family made the difficult decision to admit him into a nursing home. Mount Carmel was the only nursing home in town and the only option that would permit Mrs. Kurth to visit her husband on a daily basis, since she was unable to drive. When Mr. Kurth sought admission, there were no available beds, so he was placed on the waiting list. Mr. Kurth was placed in another nursing home 20 miles away from his wife because of his pressing medical needs. Not long after, a space opened up for Mr. Kurth at Mount Carmel.

On October 29, 2004, Mrs. Kurth went to Mount Carmel to help her husband with the admission process. When she arrived, Mr. Kurth had not yet arrived at Mount Carmel from his previous nursing facility. The admissions coordinator did not wait for Mr. Kurth to arrive and began the admissions process. The coordinator sped through about 50 pages of documents in one hour. Instead of giving Mrs. Kurth time to read the numerous pages of text herself, the admissions coordinator attempted to explain the contract terms to her. At the end of the 50-page admissions document, there was a mandatory binding arbitration agreement, which the coordinator said was a necessary condition of Mr. Kurth's admittance into the nursing home. Mrs. Kurth, anxious to complete the admissions process and ensure a bed for her husband, signed the agreement without understanding its significance or why it was necessary.

Not long after entering Mount Carmel, Mr. Kurth broke his hip and was hospitalized for surgery. When he returned to the facility he was virtually immobile, putting him at risk for pressure ulcers. The facility staff failed to update or change Mr. Kurth's care plan, even though they knew that immobility put him at high risk for additional complications, including preventable pressure ulcers. As a result of their inaction, Mr. Kurth lost a substantial amount of weight and developed 13 stage four pressure ulcers. The nursing home staff failed to prevent and treat the ulcers, which were so severe that they exposed his bone and organs.

Unknown to the Kurths, around this time, Mount Carmel's corporate owner, Kindred Healthcare Inc., had reduced the wound care team from multiple caretakers to a single wound care nurse, responsible for the wound care of all 155 residents at the facility. This nurse failed to treat any of Mr. Kurth's pressure ulcers. Mr. Kurth suffered from untreated pressure ulcers, dehydration, and malnutrition, all of which led to his death because the nursing facility failed to supervise and train a sufficient number of staff.

It was not until after the family filed a claim in Racine County Circuit Court against Kindred that the nursing home presented a copy of the arbitration agreement. This was the first time Mrs. Kurth remembered hearing about arbitration or the agreement. The nursing home moved to dismiss the lawsuit and force the family into binding mandatory arbitration. Relying on the signed arbitration agreement, the judge ruled that the case must be arbitrated under the terms that Kindred put in its contract. The Kurth family is currently appealing this decision.

2. Nursing home residents unknowingly or unwillingly sign away their right to go to court

Most nursing home residents and their families are completely unaware that they have signed away their right to sue a facility for substandard care. More than 40 percent of nursing home residents are admitted to a nursing home because they need immediate care following a medical emergency.⁴ Often, a nursing home choice is no choice at all, because there is only one nearby facility with an open bed when the resident is discharged from the hospital. Residents and their families are solely focused on obtaining the care their loved one needs so urgently, not on the many pages of documents they need to sign to complete the admissions process, much less the legal technicalities of an arbitration agreement.⁵

Nursing home residents have challenged arbitration agreements in hundreds of cases.⁶ These cases describe the difficulty residents and their families face during the admissions process and how they are unaware that they had given up their rights to go to court. For example, Linda Stewart testified before the House Judiciary Committee Subcommittee on Administrative and Commercial Law about her grandmother's admission to a nursing home following an unexpected medical emergency. She testified that her sister was rushed through pages and pages of admissions forms when she sought to find care from the only facility with a bed for her mother. The admissions personnel made no mention of arbitration or giving up her right to go to court. It was not until her grandmother suffered serious, and ultimately fatal, injuries due to poor care that she learned about the arbitration agreement.⁷ At the joint Senate Judiciary Subcommittee and Aging Committee hearing, even Senator Mel Martinez admitted that after hearing the witnesses' testimony, he wondered whether he had agreed to mandatory arbitration when he signed a thick stack of papers during his father's admissions to a Florida nursing facility.⁸

Not only does the need for care distract from consideration of an arbitration agreement, nursing home residents and their families do not adequately understand the far-reaching ramifications of a pre-dispute mandatory arbitration agreement. The effects of the emotional strain, in addition to pre-existing cognitive or physical impairments, make it unlikely that a nursing home resident will comprehend the meaning of an arbitration agreement. The Alzheimer's Association estimates that 69 percent of long-term care and 50 percent of assisted living residents have some type of cognitive impairment.⁹ Sadly, many elderly people enter nursing facili-

⁴National Center for Health Statistics 2004 National Nursing Home Survey, Current Nursing Home Residents, Table 4. Number of nursing home residents by age, sex, race, and other selected resident characteristics: United States, 2004. http://www.cdc.gov/nchs/data/nnhsd/Estimates/nnhs/Estimates_Demographics_Tables.pdf#Table04 (last accessed Sept. 18, 2008).

⁵Joint Hearing (statements of Alison Hirschel and Ken Connor).

⁶Lexis and Westlaw queries for challenges to nursing home arbitration agreements reveal approximately 300 and 120 cases, respectively. This search is limited to only published opinions. Presumably many more challenges fail without opinion and without an appeal.

⁷Fairness in Nursing Home Arbitration Act of 2008: Hearing on: H.R. 6126 Before Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. 2–3 (2008) (statement of Linda Stewart).

⁸Joint Hearing.

⁹Joint Hearing. (statement of the Alzheimer's Association) The Alzheimer's Association also notes that caregivers for people with dementia, who sometimes sign admissions documents, have

ties with no one to assist them in signing the admissions documents.

Nursing home residents, or their families, usually come face-to-face with a contract for admissions after they have decided to apply to a particular facility, and then, only at the time of admission. As a result, they will not be familiar with mandatory arbitration agreements, much less the arbitration process and its legal consequences. This, on top of the likelihood that admissions personnel themselves do not understand or cannot explain the details of arbitration, makes it unconscionable to require residents to decide whether to sign a pre-dispute mandatory arbitration agreement prior to admission. Finally, since nursing home admissions contracts are take-it-or-leave-it contracts of adhesion, residents and their families do not have the ability to negotiate the terms of the agreement.¹⁰

In the rare instances where an arbitration agreement is explained and prospective residents have the opportunity to read it, it is very unlikely that they understand the meaning of the agreement and the consequences of giving up their right to pursue a claim through the civil justice system.¹¹ As evidenced by public opinion for arbitration, when people learn about the details of how disputes are resolved in arbitration, they do not support mandatory arbitration. After learning that binding pre-dispute arbitration agreements deny residents the right to litigate even after serious injury, respondents in a recent poll overwhelmingly disapproved of pre-dispute binding arbitration agreements.¹²

Even in cases where residents or their caregivers do not want to agree to mandatory arbitration, they have little choice but to sign the agreements. When nursing home residents and their families come upon an arbitration agreement in the admissions contract, they are often at the only facility that offers the level of care needed with an open bed, or the only facility that is close to their family. Thus, the resident faces a Hobson's choice—waive your legal right to go to court in the event of a terrible injury or refuse to sign and risk not getting the urgent care you need. As a result, most residents will sign the agreement out of fear that the facility will find a way to deny them admission without attributing it to their refusal to agree to mandatory arbitration.

The American Health Care Association, representing 11,000 member long-term care facilities, says that under their model arbitration agreement, nursing home admission is not conditional on agreement to mandatory arbitration.¹³ While it may not be an explicit condition for admission, it is clear from those who advocate on the behalf of America's senior citizens and nursing home resi-

a high rate of emotional stress and may not fully comprehend the ramifications of agreeing to mandatory arbitration.

¹⁰Joint Hearing (statement of AARP).

¹¹*Id.*

¹²Press Release, American Association for Justice, New Poll: Americans Say "No Thanks" to Binding Arbitration (May 19, 2008) available at <http://www.justice.org/PressRoom/PressReleases/2008/may19.aspx>, citing a survey by Peter D. Hart Research Associates, Inc., "Legal Arbitration and the Arbitration Fairness Act Poll," May 1, 2008 (Peter D. Hart Research Associates is an independent research firm that since 1971 has been providing polling for a wide range of clients from NBC to the Wall Street Journal to the Bill and Melinda Gates Foundation. The poll indicated that when given accurate and comprehensive information about the arbitration system, 81 percent of the respondents disapproved of pre-dispute binding arbitration agreements.).

¹³Joint Hearing (statement of Kelly Rice-Schild).

dents, that residents and their families do not feel free to refuse an arbitration agreement. Residents and their families do not want to risk being denied admission or being perceived as troublemakers for not signing documents that they think will never affect them. No one wants to consider that the home they have chosen for their mother, father, aunt or uncle is going to provide substandard care.¹⁴

Written testimony from Linda Tripp, an Assistant Professor at John Marshall Law School and a former attorney in the Office of the General Counsel at the U.S. Department of Health and Human Services, about an industry presentation on arbitration agreements, suggests that nursing home admission is conditional on signing a pre-dispute mandatory arbitration agreement. In January of 2006, she attended a conference sponsored by the Georgia Health Care Association, a group that represents many Georgia nursing homes. At a presentation on arbitration agreements, conducted by industry lawyers, an audience member asked what they should do if a prospective resident did not want to sign the arbitration agreement. The lawyer responded with brazen advice—people who did not agree to arbitration are troublemakers and should not be admitted. Ironically, he went on to chastise a mandatory arbitration agreement presented to him by a car dealer, which he refused to sign.¹⁵ Although nursing homes have emphasized to Congress that pre-dispute mandatory arbitration agreements are not required for admission to a facility,¹⁶ this incident raises concerns about the potential for coercion.

As the National Senior Citizens Law Center, a non-partisan organization that has been working with and for nursing home residents for more than 30 years, wrote to Senators Martinez and Kohl, “arbitration agreements are being signed at the time of admission only because the resident or family member does not even notice or understand the arbitration clause, or signs the arbitration clause out of fear that otherwise the admission will be jeopardized.”¹⁷

3. Pre-dispute mandatory arbitration of nursing home cases is unfair

Arbitration has been a cornerstone of dispute resolution, as an alternative to courts, since the enactment of the Federal Arbitration Act (FAA) in 1925. However, a decision to arbitrate a nursing home dispute should be made only after a dispute occurs so that both parties can properly evaluate the ramifications of choosing arbitration versus the public court system. When they are forced to decide whether to agree to mandatory arbitration at the time of admission to a nursing facility, prospective residents and their families do not know the details of the arbitration process, or how the process will impact their particular dispute, should one arise. They likely do not know that by choosing arbitration they will have to pay high upfront costs, give up rights and protections that would otherwise be provided in a court proceeding, or that their cases

¹⁴ Joint Hearing (statement of Alison Hirschel).

¹⁵ Joint Hearing (statement of Linda Tripp).

¹⁶ Joint Hearing (statement of Kelly Rice-Schild).

¹⁷ Joint Hearing (letter from the National Senior Citizens Law Center).

may be decided by an arbitrator who is repeatedly hired by nursing homes and who depends on repeat business.

a. Cost

Arbitration of a nursing home case may be significantly more costly than bringing the claim in court. Pursuing a claim in arbitration may be cost prohibitive for many nursing home residents and their families. As a result, they will either be forced to drop their claims altogether or settle their cases for significantly less than the amount they need for medical care and other expenses.¹⁸

When nursing home residents sign arbitration agreements, the agreements do not disclose the high fees they will have to pay in order to file and adjudicate their claims. In addition to a filing fee, arbitrators charge fees for every additional process required, from hearings to discovery requests to document review to subpoenas to written decisions.¹⁹ Typical nursing home arbitration costs thousands of dollars. For example, an Indiana family was forced into arbitration against Beverly Healthcare in a negligent death case. In doing so, they had to pay extensive arbitration fees totaling about \$7,550 just to have their claims heard by an arbitrator. In contrast, bringing a civil claim in Indiana costs less than \$150.²⁰

The American Health Care Association's (ACHA) model arbitration agreement requires the use of the National Arbitration Forum (NAF) as the arbitration provider.²¹ The NAF is one of the few providers that continues to hear pre-dispute mandatory arbitration in nursing home cases, and its fees are prohibitively costly. Public Citizen found that a consumer claim for \$80,000 filed in Illinois' Cook County circuit court would cost a consumer \$221, but if arbitrated by NAF, the same claim would cost \$11,625, 5,260 percent more expensive than court.

Under NAF's fee schedule, to simply file a claim for less than \$75,000, a nursing home resident would have to pay approximately \$250.²² Then, NAF charges additional fees for a variety of procedural tasks, such as discovery requests, subpoenas, hearings, writing findings, and written decisions. These are all items for which courts do not charge.²³ To file a claim for \$75,000 or more, which would include most of the wrongful death and negligent injury claims brought by nursing home residents, the claimant must pay a filing fee ranging from \$300 to \$1,750, depending on the amount of the claim.²⁴ Thus, the more seriously injured a nursing home resident is, the more money he or she will be required to pay up front to arbitrate their claim. On top of filing fees, fees for procedural tasks range from \$500 to \$1,500 each, and arbitrators bill their time at an hourly rate.²⁵

b. Unfair procedures

The procedural rules of arbitration are often unfair to nursing home residents. Arbitrators, unlike judges and juries, do not have

¹⁸ Joint Hearing (statement of Ken Connor).

¹⁹ Public Citizen, Pub. No. B9028, *The Cost of Arbitration* 43 (2002), at 4–5.

²⁰ Interview with George Gray, attorney for the plaintiff (Sept. 18, 2008).

²¹ "Resident and Facility Arbitration Agreement," model agreement provided to Subcommittee staff by the American Health Care Association.

²² Public Citizen, *supra* n. 18, at 1–2.

²³ *Id.* at 2–5.

²⁴ *Id.* at 6.

²⁵ *Id.* at 6–8.

to follow prior court or arbitral decisions.²⁶ They are also not bound by statutory rules of evidence or procedure.²⁷ Most providers have some form of procedural rules, but they are not mandatory and they are not reviewable by a judge. Judges, on the other hand, must follow statutory court rules and risk being overturned on appeal if they fail to apply them properly. This accountability, unavailable in arbitration, is critical to ensuring a predictable legal system to prove complex negligence and wrongful death cases. In addition, arbitrators and arbitration rules have been known to limit the discovery process by limiting the number of witness depositions, experts and subpoenas. These restrictions significantly inhibit the ability of nursing home residents to obtain information that is necessary for presenting and proving their case.²⁸

c. Arbitrator bias

The NAF has been criticized recently for the disproportionate number of business wins in the arbitration cases it oversees. Serious concerns have been raised about arbitrators' ties to the industry that they service.²⁹ Most arbitration agreements specify which provider of arbitration must be used. As mentioned above, AHCA's model agreement requires the use of NAF. Arbitrators who work for NAF have a personal financial incentive to favor nursing facilities because the facility chooses NAF as the provider and the individual arbitrators for each case. If NAF's arbitrators are not favorable, the facility will either stop using a particular arbitrator or find another arbitration provider.

Lawmakers, former arbitrators and advocates for nursing home residents have expressed concerns about how the NAF's procedures and rules create a bias in favor of large corporations. Elizabeth Bartholet, a Harvard Law Professor and former NAF arbitrator, testified at a Senate Judiciary Committee hearing about her employment at NAF. In 17 of the 18 consumer cases in which she served as an arbitrator, she ruled in favor of the corporate party. In her eighteenth and final case, she awarded \$48,000 in damages to a consumer. After that decision, Dr. Bartholet was removed from the 11 other pending cases that she was scheduled to arbitrate.³⁰

Dr. Bartholet believes that because NAF and its arbitrators depend on repeat business, the system is skewed in favor of the corporations. She testified that "there is a very real risk that the NAF pool of arbitrators is overwhelmingly stacked against the consumer, with arbitrators either being removed as I was because they have decided a case for the consumer, or arbitrators being pressured into always ruling for the repeat player companies out of fear of being removed from cases." In fact, she confronted two NAF administrators about her suspicion that she was removed because of her one

²⁶ Joint Hearing (statement of AARP).

²⁷ "The Arbitrator shall determine the admissibility and weight of evidence and shall not be bound by rules of evidence." NAF Code of Procedure, available at <http://www.adrforum.com/users/naf/resources/20070801CodeOfProcedure.pdf>; Peter B. Rutledge, Toward a Contractual Approach for Arbitral Immunity, 39 GA. L. Rev. 151, 167 (2004).

²⁸ Joint Hearing (statement of Ken Connor).

²⁹ Joint Hearing (statements of Ken Connor, Alison Hirschel and AARP).

³⁰ Robert Berner, Brian Grow & Susann Rutledge, Banks vs. Consumers (Guess Who Wins), Business Week, Jun. 16, 2008, at 72.

ruling in favor of a consumer and neither denied it.³¹ Other former arbitrators, including former West Virginia State Supreme Court Justice Richard Neely, have criticized the NAF for lack of impartiality.³²

Nursing home arbitration agreements that permit the claimant to choose one of the arbitrators does not solve the problem. Nursing homes have an inherent advantage in choosing a favorable arbitrator because they are repeat players and have access to insider information about arbitrators they have used in previous cases. In contrast, residents have no prior experience with any particular arbitrators and they cannot access any of the arbitrators' decisions because they are not made public. Therefore, the resident has little chance of uncovering an arbitrator's potential bias.

d. Unfairness inhibits access to justice

The inherent unfairness in nursing home arbitration ultimately results in preventing access to justice for one of our most vulnerable populations. With its high costs, lack of rules of evidence and procedure, and biased arbitrators, nursing home residents' cases that are subject to mandatory arbitration are doomed from the start. Residents and their families will either not be able to afford the high cost of pursuing arbitration on their own, or they will not be able to find an attorney willing to take a chance on a process that they know is substantially skewed against them, in favor of nursing homes. Because of arbitration's inherent bias against nursing home residents, lawyers feel that the deck is so stacked against them that they turn down meritorious cases because they are subject to arbitration.³³

4. Importance of the civil justice system to nursing home reform

Many long-term care facilities provide high quality care, but there are also too many facilities that cause harm to patients because of serious quality problems. While state and Federal regulatory agencies work hard to oversee facilities, enforce standards of care, and penalize for deficiencies, it is impossible for them to investigate adequately every case involving injury and death related to substandard care.³⁴ Often, by the time a government entity is involved in an instance of injury or death, they are unable to collect information and evidence they need to reach a conclusion on the cause. Thus, many incidents of abuse, neglect and harm go unpunished.³⁵

As Senator Martinez pointed out at the joint hearing: "[T]he prospects of patients and their families being able to file a complaint in the civil justice system may be the only way of holding nursing homes accountable. . . . [I]t is a way of forcing the indus-

³¹ *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations Before S. Comm. on the Judiciary, 110th Cong. 5* (2008) (statement of Elizabeth Bartholet).

³² *Id.*

³³ A plaintiff's lawyer, A. Lance Reins, represented the estate of a woman who had died a day after her daughter took her to a hospital because the nursing home refused to call an ambulance. Arbitration awarded \$90,000 to the family, but Mr. Reins' expenses outweighed costs he spent working on the case. Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*, *Wall Street Journal*, Apr. 11, 2008, p. 1; Joint Hearing (statement and response to followup questions of Ken Connor).

³⁴ Joint Hearing (statements of Alison Hirschel and AARP).

³⁵ Joint Hearing (statement of Alison Hirschel).

try to regulate itself because we do know that the civil justice system complements the public regulatory system in its efforts to improve the quality of care for all residents.”³⁶ The civil justice system provides an important incentive for nursing homes without burdening the state and Federal oversight agencies, funded by taxpayer dollars, with fact intensive and time consuming investigations that are required for complicated cases alleging negligent care.

Litigation in the civil justice system can lead to significant changes in facilities’ care practices and can remove owners and managers that refuse to provide good care. Ken Connor, an attorney who represents nursing home residents, believes: “[N]ursing homes are not likely to modify their wrongful behaviors until they learn that it costs them more to do business the wrong way than to do it the right way. . . . Consequently, court awards are more likely to have a deterrent impact on nursing home misconduct than awards in settings dictated in an agreement for pre-dispute binding mandatory arbitration.”³⁷

Some attorneys have used the civil justice system to ensure permanent changes in facilities’ practices in order to benefit existing and future residents.³⁸ For example, in a Texas case, a resident died in a nursing facility when she was strangled after being pinned between her bed and bedrail. Settlement of the wrongful death case against the facility included a lengthy written agreement requiring the facility to establish extensive new policies and procedures to reduce its use of physical restraints.³⁹ The facility reduced its use of restraints by more than 90 percent. Accountability in the civil justice system would prompt improvement at nursing facilities that consistently provide poor quality of care, or facilities that go in and out of compliance with quality standards from year-to-year.⁴⁰

Finally, the civil justice system provides the public with information about the performance of nursing homes. This is critical in helping the public make informed decisions when choosing a facility. Arbitration, in contrast, takes place in a private setting with all documents and proceedings closed to the public. No data is released or published about the nursing home cases that have been arbitrated or settled.⁴¹ This lack of transparency is particularly troubling since most of the claims for abuse, neglect, and substandard care are occurring at facilities that collectively receive billions of taxpayer dollars. Almost 90 percent of all nursing homes receive funding from Medicare and Medicaid. It is simply bad public policy to allow these claims to disappear from the courts and the public scrutiny they provide.

³⁶ Joint Hearing.

³⁷ Joint Hearing (answers to followup questions of Ken Connor).

³⁸ Joint Hearing (statement of Center for Medicare Advocacy).

³⁹ *Trew v. Smith and Davis Manufacturing Co., Inc.*, No. SF 95-354C (N.M. Dist. Ct. Jul. 1996).

⁴⁰ Joint Hearing (statement of Center for Medicare Advocacy).

⁴¹ Joint Hearing (statement of Linda Tripp); S. 1782, the Arbitration Fairness Act of 2007, Hearing Before Subcomm. on the Constitution of the H. Comm. on the Judiciary, 110th Cong. (2008) (statement of Paul Bland).

5. *Judicial review does not adequately protect nursing home residents from unfair predispute mandatory arbitration agreements*

Nursing home residents and their families should not bear the burden of mounting costly and time consuming challenges to unfair agreements. A bright line rule that prohibits pre-dispute mandatory arbitration agreements would fully protect one of the Nation's most vulnerable populations.

Both State and Federal law provide a mechanism to invalidate an unfair arbitration agreement. However, the law requires nursing home residents to overcome a very high legal threshold which limits the ability of judges to invalidate unfair arbitration agreements. Numerous cases demonstrate that even in the most egregious cases where nursing home residents or their families were forced, either directly or indirectly, to sign an agreement, the law is not on their side.

In most jurisdictions, judges must enforce an arbitration agreement unless the nursing home resident makes a valid contract defense. Victims of nursing home abuse usually challenge an arbitration agreement on the basis that the agreement is unconscionable. The elements of an unconscionability defense vary slightly from state to state, but they generally require a showing of both procedural and substantive unconscionability. Procedural unconscionability is generally defined as an absence of meaningful choice on the part of one of the parties.⁴² Substantive unconscionability exists when the contract provisions unreasonably favor one party over the other.⁴³

The standards for invalidating arbitration set a very high bar for nursing home residents. For example, if a court does not find both procedural and substantive elements of unconscionability, then injured nursing home residents will lose. This means that even when the circumstances surrounding the agreement process were unfair, unless the terms of the agreement are unreasonably one-sided, the court must compel arbitration. Furthermore, an arbitration agreement must be enforced even when provisions of the arbitration agreement favor one party. It is only if the agreement unreasonably favors one party or if it is so one-sided that a judge may invalidate it, presuming there was also sufficient procedural unconscionability. Thus, an agreement entered into under unfair procedures can pass legal muster even when it is unfavorable to a nursing home resident or one-sided in favor of the nursing home.

Nursing home residents have challenged unfair arbitration agreements, only to run into law that favors enforcement of arbitration. Although some courts have invalidated nursing home arbitration agreements, in many of the most egregious cases, judges have been obligated by the law and legal precedent to enforce arbitration agreements.

In an Ohio case, a court enforced an arbitration agreement even though it had serious concerns about the procedural fairness of the agreement. The court found that when the nursing home resident entered the facility directly from the hospital she was emotionally stressed and cognitively impaired. At the time she signed the

⁴²*Raper v. Oliver House, LLC*, 637 S.E.2d 551, 555 (N.C. Ct. App. 2006) (citing *Martin v. Sheffer*, 403 S.E.2d 555, 557 (N.C. Ct. App. 1991)).

⁴³*Hill v. NHC HealthCare/Nashville, LLC*, 2008 WL 1901198, 6 (Tenn. Ct. App. 2008), quoting *Brenner v. Little Red Sch. House, Ltd.*, 274 S.E.2d 206, 210 (N.C. 1981).

agreement, she suffered from bouts of confusion and had no family, friends or counsel helping her through the admissions process. The court found that she had extreme physical difficulty signing the documents, suggesting an inability to fully read and understand the contract.⁴⁴ The court recognized that: “[F]or many individuals . . . admission to a nursing home is the final step in the road of life . . . In most circumstances, it will be difficult to conclude that such an individual has equal bargaining power with a corporation.” Despite these serious reservations, the court compelled arbitration because the agreement was not substantively unfair.⁴⁵ This means that as long as a facility can draft an iron clad agreement that will pass the substantive unconscionability test, it can coerce an unknowing nursing home resident to sign the agreement and still get the court’s blessing.

In some cases, courts will not even consider the substance of an agreement if it does not find any procedural unconscionability. In a Florida case, a court held that an arbitration clause was not procedurally unconscionable, despite the resident’s daughter’s contention that no one explained to her what she was signing or what arbitration meant. The court said that because both procedural and substantive unconscionability would be required to find the agreement unenforceable, the court declined to address the issue of substantive unconscionability.⁴⁶

Even in the most egregious cases of procedural unconscionability, courts have still enforced arbitration. In Texas, a court enforced an arbitration agreement signed by the resident’s son who could not read or write in English. The agreement was not fully explained to him and he was told that in order to admit his mother into the facility, he must sign the arbitration agreement.⁴⁷ In another case, a court compelled arbitration against the estate of a woman who died in a nursing home. Although the woman was legally blind and could not understand the contents of the papers she signed, the court said that no one can argue against the enforcement of a contract just because they signed it without reading it.⁴⁸

Several states have recognized the vulnerability of elderly people during the nursing home admissions process and the significance of foregoing the right to go to court by agreeing to pre-dispute mandatory arbitration. States have enacted legislation to limit or void the enforceability of pre-dispute mandatory arbitration agreements in nursing home cases.⁴⁹ However, these attempts to protect nursing home residents have been thwarted by the Federal Arbitration Act (FAA).⁵⁰ For example, in Georgia, a Federal district court held that nursing homes in the aggregate involve sufficient levels of interstate commerce for the FAA to preempt a Georgia law.⁵¹ Thus, the court upheld a pre-dispute arbitration agreement between a

⁴⁴ *Manley v. Personacare*, 2007 WL 210583 ¶ 14 (Ohio Ct. App. 2007).

⁴⁵ *Id.* at ¶ 42.

⁴⁶ *Raper v. Oliver House, LLC*, 637 S.E.2d 551, 555 (N.C. Ct. App. 2006).

⁴⁷ *In re Ledet*, 2004 WL 2945699 (Tex. App. 2004).

⁴⁸ *Estate of Etting v. Regent’s Park at Aventura, Inc.*, 891 So.2d 558 (Fla. Dist. Ct. App. 2004).

⁴⁹ Ga. Code Ann. § 9-9-62 (West 2007); 210 Ill Comp. Stat. Ann. 45/3-601, 06-07 (West 2008); Okla Stat. tit. 63, § 1-1939 (West 2008).

⁵⁰ See *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983 (Ala. 2004); *Washburn v. Beverly Enters.-Ga., Inc.*, 2006 WL 3404804 (S.D. Ga. 2006); Federal Arbitration Act, 9 U.S.C.A. § 1-2 (West 2008).

⁵¹ *Washburn*, 2006 WL 3404804.

nursing home and a resident while noting that the agreement would be invalid under Georgia law.⁵²

6. Regulating arbitration agreements does not mitigate the problems with pre-dispute mandatory arbitration in nursing home cases

Efforts to remedy an inherently unfair system of pre-dispute mandatory arbitration agreements in nursing home admissions with regulation and reform do not address the inherent unfairness of such arbitration. Critics of this bill have proposed reforms such as printing the agreement in larger or bolder print, or creating requirements for certain explanations. These reforms would not be effective. Altering the agreement's format or presentation will not change the fact that it involves dozens of pages of technical legalese, or that the admissions process is emotional, stressful, and often involving people with compromised cognitive or physical abilities.⁵³ Additionally, even with reforms, residents and their families are concerned about being denied admission and they do not want to be viewed as troublemakers.⁵⁴

A proposal to require that the arbitration agreement have a 30-day "cooling off" period after signing, during which a resident may revoke the agreement, will not help injured residents. Kenneth L. Connor, who has represented many victims of nursing home abuse, testified that most residents or families only learn of the arbitration agreement after an injury has occurred.⁵⁵ Unless an incident occurred within the first 30 days, residents or their families would have little reason to consult a lawyer regarding a contract that had already been signed.⁵⁶

C. EFFECT OF THE LEGISLATION

By prohibiting pre-dispute mandatory arbitration agreements in nursing home contracts, S. 2838 will preserve the right of residents and their families to hold facilities accountable in court for neglect, abuse, and substandard care. Restoring accountability for nursing homes will encourage poorly-performing facilities to improve systematically care and save taxpayers from the extra expense of medical care for injuries caused by negligent or abusive care.⁵⁷

Post-dispute arbitration will remain an option for dispute resolution because the bill only prohibits pre-dispute mandatory nursing home arbitration agreements. If both parties, the resident and facility, mutually and voluntarily agree to proceed with arbitration after the dispute occurs, they will be free to do so. However, post-dispute arbitration will likely only be an option if the parties believe that the system is fair. If the process is fair, residents and their lawyers will view it as a viable alternative to court that is indeed more timely, cost effective and less adversarial.

Critics of the bill argue that eliminating pre-dispute mandatory arbitration agreements in nursing home contracts will effectively eliminate all nursing home arbitration.⁵⁸ This suggests that the process is not as fair as its proponents claim. If that is the case,

⁵² Id.

⁵³ Joint Hearing (responses of Alison E. Hirschel to questions from Sen. Kohl).

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Joint Hearing (statement of the Center for Medicare Advocacy).

⁵⁸ Joint Hearing (statement of Stephen Ware).

then nursing facilities that want to resolve disputes through arbitration will have an incentive to use arbitration providers that will attract voluntary, post-dispute agreements to arbitration. In turn, arbitration providers will have an incentive to create a process that is a cost effective and fair alternative to the court system for both parties. If this occurs, then both parties will at least consider, and many may choose, arbitration.

Concerns have been raised about whether S. 2838 will have a financial impact on nursing homes and their ability to stay in business by making it more likely that cases against nursing homes will be heard in court, rather than resolved through private arbitration. Ms. Hirschel, an advocate for the elderly and nursing home patients, responded directly to the concern of how facilities will deal with cost: “The first thing is [facilities] can provide good care. There is no evidence of a spate of frivolous lawsuits. In fact, the Harvard study in 2003 showed that in more than half the cases that were filed against nursing homes, the resident died. So these are not—even defense lawyers for the industry have acknowledged that these cases are not frivolous. If you provide good care, you do not get sued for those very expensive, egregious cases.”⁵⁹

Ms. Hirschel’s comment underscores data that show serious quality of care problems in nursing facilities and the need for greater accountability. A recent Department of Health and Human Services report by the Department’s inspector general found that in 2007, 90 percent of nursing homes were cited for violations of federal health and safety standards and 17 percent of nursing homes were found to have deficiencies that caused “actual harm or immediate jeopardy” to patients.⁶⁰ These deficiencies included infected bedsores, medication mix-ups, poor nutrition, and abuse and neglect of patients. Meanwhile, evidence suggests that this poor care is the result of understaffing that has come in the wake of large private investment groups buying major nursing home chains and making large profits, which are hidden from public scrutiny. According to data from the Centers for Medicare and Medicaid Services, 60 percent of homes bought by large private equity groups from 2000 to 2006 have cut the number of clinical registered nurses, in some cases to below legal staffing requirements.⁶¹

Finally, the cost of hospitalization and medical care for nursing home residents injured by negligent care strains the Medicare system. Taxpayers pay for the costs of additional patient care needed as a result of avoidable injuries due to nursing home negligence. From 2004 to 2006, preventable injuries and deaths in long-term care facilities cost the Medicare program \$8.8 billion.⁶² Since 2001, re-hospitalization of Medicare residents for conditions related to “worsening quality” of care has increased 9 percent.⁶³ By holding facilities more accountable for their poor care, facilities will have

⁵⁹ Joint Hearing. (testimony of Alison Hirschel), citing David G. Stevenson and David M. Studdert, *The Rise Of Nursing Home Litigation: Findings From A National Surveys Of Attorneys*, *Health Affairs*, Vol. 22, No. 2, 219, 222 (March 2003).

⁶⁰ Robert Pear, *Violations Reported at 94% of Nursing Homes*, *New York Times*, Sept. 29, 2008, A17.

⁶¹ Charles Duigg, “At Many Homes, More Profit and Less Nursing,” *New York Times*, September 23, 2007.

⁶² HealthGrades Annual Patient Safety in American Hospitals Study, <http://www.healthgrades.com/media/DMS/pdf/HealthGradesPatientSafetyRelease2008.pdf> (last accessed Oct. 1, 2008).

⁶³ MedPAC, *Report to the Congress: Medicare Payment Policy*, Chapter 2D, March 2008.

a greater incentive to improve care. Improving care will benefit Medicare and Medicaid by reducing costs.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

A. INTRODUCTION OF THE BILL

The Fairness in Nursing Home Arbitration Act was introduced on April 9, 2008 by Senators Mel Martinez (R-FL) and Herb Kohl (D-WI). On June 18, 2008, the Subcommittee on Antitrust, Competition Policy, and Consumer Rights held a joint hearing with the Special Committee on Aging, “S. 2838, the Fairness in Nursing Home Arbitration Act.” Five witnesses testified at the hearing: Mr. David Kurth, Ms. Alison Hirschel, Ms. Kelly Rice-Schild, Mr. Ken Connor and Mr. Stephen Ware.

B. COMMITTEE CONSIDERATION

On September 11, 2008, the Judiciary Committee met in executive session to consider S. 2838. No amendments were offered and the committee approved the bill by voice vote. Senators Coburn and Sessions were recorded as having voted “no”, and Senator Grassley requested to be recorded as voting “present”.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Short title

This section provides that the legislation may be cited as the “Fairness in Nursing Home Arbitration Act.”

Section 2. Definitions

This section amends section 1 of the Federal Arbitration Act (9 U.S.C. § 1) to include a specific definition of “long-term care facility.” A “long-term care facility” is defined as any skilled nursing facility, as defined in 1819(a) of the Social Security Act;⁶⁴ any nursing facility as defined in 1919(a) of the Social Security Act;⁶⁵ or any public facility, proprietary facility, or facility of a private non-profit corporation that makes certain supportive services available to adult residents who live on the premises. The definition specifies that institutions whose primary purpose is educational or drug treatment are not covered by the Act.

Section 3. Validity and enforceability

This section amends section 2 of the FAA (9 U.S.C. § 2) to ban enforcement of pre-dispute arbitration agreements between long-term care facilities and residents, or anyone acting on behalf of the resident. This section also states that disputes as to whether the Act applies shall be resolved by the court, rather than through arbitration.

Section 4. Effective date

This section provides that the Act shall apply to claims and disputes arising on or after the date of enactment.

⁶⁴ 42 U.S.C. 1395i-3 (2006).

⁶⁵ 42 U.S.C. 1396r (2006).

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 2838, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

SEPTEMBER 19, 2008.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2838, the Fairness in Nursing Home Arbitration Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 2838—Fairness in Nursing Home Arbitration Act

S. 2838 would make certain pre-dispute arbitration agreements between the operators of long-term care facilities and their residents not valid or enforceable. In a pre-dispute arbitration agreement, the parties agree to arbitrate a potential dispute rather than seek redress through the courts. The bill would apply to any dispute or claim arising on or after the date of the bill's enactment. Under current law, the operators of long-term care facilities can include clauses in contracts with residents that provide for mandatory arbitration if a dispute should arise.

Under the bill, CBO expects that the majority of disputes that could arise between a resident and a facility operator would be litigated in state courts and, therefore, would not substantially affect the caseload of the federal court system. Cases challenging the nullification of a particular arbitration agreement would be addressed in a federal court, but CBO expects that any such cases would have an insignificant effect on the overall workload of the courts. Therefore, CBO estimates that implementing S. 2838 would have no significant cost over the next five years. Enacting the bill would have no effect on direct spending or revenues.

By restricting the provisions that could be included in contracts between long-term care facilities and residents of such facilities (or their representatives), S. 2838 would impose an intergovernmental and private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA). Based on information from industry sources, CBO estimates that the direct cost to comply with the mandate to state, local, and tribal governments and the private sector would fall below the annual thresholds established in UMRA for intergovernmental and private-sector mandates (\$68 million and \$136 million, respectively, in 2008, adjusted annually for inflation).

On September 2, 2008, CBO transmitted a cost estimate for H.R. 6126, the Fairness in Nursing Home Arbitration Act of 2008, as ordered reported by the House Committee on the Judiciary on July 30, 2008. The two versions of the legislation are similar, and CBO's estimate of the federal costs are the same. In addition, both H.R.

6126 and S. 2838 contain a mandate by invalidating clauses in agreements made or amended after the date of enactment. However, the mandate in S. 2838 would also apply to existing agreements. The direct cost to comply with the mandates in both bills would fall below the annual thresholds established in UMRA.

The CBO staff contacts for this estimate are Leigh Angres (for federal costs), Melissa Merrell (for the state and local impact), and Paige Piper/Bach (for the private-sector impact). This estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 2838.

VI. CONCLUSION

The Fairness in Nursing Home Arbitration Act, S. 2838, is a bipartisan, narrowly targeted measure, that will ensure nursing home residents and their families are not forced unknowingly into arbitration when serious injuries or death result at the hands of poor nursing home care.

VII. MINORITY VIEWS

MINORITY VIEWS FROM SENATORS KYL, SESSIONS AND COBURN

This bill is the second item that is straight from the trial bar's legislative agenda that this committee has dutifully reported to the full Senate this Congress. Last year, the Judiciary Committee voted to gut arbitration contracts for livestock and poultry growers. *See* S. Rep. 110–190, pp. 11–13 (Minority Views). Piece by piece, ATLA and its allies in the Senate are dismantling the alternatives to litigation that have sheltered many important American industries from a rapacious trial bar, out-of-control jury awards, and a system that delivers *most* of the proceeds of litigation to the trial lawyers. This is the trial-lawyer agenda at work. The majority even goes so far as to cite, as evidence that the American people *want* to be relieved of the right to enter into arbitration agreements—what else?—why, an ATLA press release!¹

This month, the Judiciary Committee is going after nursing home operators. The bill that it has reported would subject nursing homes to a litigation environment of trial-lawyer-driven class actions and extreme jury awards, where a single verdict could cripple a nursing home, or even a chain of businesses. In many places, no liability insurer would even offer coverage to nursing homes were this bill to be enacted. Indeed, it is very likely that in several states, the consequences of this bill would be that nursing-home chains would withdraw from the state, and that some nursing homes would simply shut their doors. Elderly people whose families can no longer attend to their medical needs would have nowhere to go to receive the care that they need. Some may find that their only option is a nursing home in another state, far from their family and loved ones.

One might think that a congressional committee charged with oversight of judiciary matters might balk at a request from the trial bar to pass legislation that will reduce the quality and availability of nursing-home care, all so that trial lawyers can collect more fees. But not in this Congress.² The trial lawyers are calling the shots, and they are getting what they want.

¹ See footnote 12 of the draft majority committee report, citing “Press Release, American Association for Justice, New Poll: Americans Say “No Thanks” to Binding Arbitration” (May 19, 2008). “American Association of Justice” is the latest name used by ATLA, the Association of Trial Lawyers of America.

² Lest any one suggest that S. 2838's fig leaf of Republican sponsorship somehow makes it a bipartisan project in any meaningful sense of the word, it should be noted that of the 29 sponsors of this bill and H.R. 6126, its House companion, 27 are Democrats.

The 1990s litigation explosion and the need for arbitration

Shortly after this bill was first noticed for mark up, Senator Kyl received a letter from Norman Estes, the operator of NHS nursing homes, a chain of nursing homes in the Southeast.³ The letter describes the litigation environment that nursing homes began to encounter in the 1990s. It cites jury awards, driven by passion rather than reason, that repeatedly reached into the tens of millions of dollars, and one that reached \$78 million:

In the early 90's, several states became venues for extremely aggressive personal injury litigation against nursing homes. Particular states saw drastic increases in the number of lawsuits against nursing homes along with extreme jury verdicts reaching tens of millions of dollars. In the late 1990's and early part of this decade, one law firm won a series of jury verdicts in Florida ranging from \$10 million to \$20 million. In 2001, the same law firm received a jury verdict of \$78 million from an Arkansas jury. Increased litigation in these states had less to do with the quality of care provided than with the extremely emotionally charged cases and dominant legal and political standing of some extremely talented plaintiff's attorneys.

Mr. Estes's account is confirmed by that of Kelley Rice-Schild, the owner and manager of a small nursing home in Miami, Florida that has been operated by her family for four generations. Ms. Rice-Schild's testimony before this committee, on June 18, 2008, also described a surge in litigation against nursing homes that occurred in the 1990s:

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. . . . This trend was especially true in states such as Arkansas, Texas, and my home state of Florida, where state laws fostered an exponential growth in the number of claims filed against long term care providers—even those with a history of providing the highest quality care.

Mr. Estes and Ms. Rice-Schild described how the trial bar's targeting of nursing homes led liability insurers to stop offering insurance to nursing homes in some states. Ms. Rice-Schild also noted in her committee testimony that insurers began to charge her more for her policy than the policy itself would cover:

[T]here was an explosion in the cost of obtaining insurance to protect operators from the risks associated with a tort environment that often encouraged unsubstantiated claims against long term care providers. This trend included significant advertising—including highway billboards—to encourage consumers to sue their long term

³The full letter from Mr. Estes is included as an attachment to this statement.

care provider. Even following the passage of tort reform legislation in Florida in 2001, insurance is not widely available and for most operators unaffordable, which forced several companies to no longer provide care and services to the frail elderly in my home-state. Today, my facility is covered by a \$25,000 General and Professional Liability policy—for which we pay \$37,000 annually. To carry more insurance, even if I could afford to do so, simply makes my facility a target for litigation—despite our over-60 year history of providing nothing but the highest level of quality care.

Similarly, Mr. Estes, in his August 20 letter, notes that:

In Alabama, Arkansas, Florida and Missouri, where our facilities are located, many insurance underwriters simply stopped offering liability insurance for nursing homes. In Florida, there have been periods of time when traditional liability insurance for nursing homes was not available at all, from any company, at any price. Throughout the industry, liability insurance became so expensive that many nursing home operators simply could not afford it.

Mr. Estes also describes the impact that a litigation-driven absence of insurance has on both nursing homes and patients. A lack of insurance not only threatens the viability of the nursing home, it also means that patients who are negligently injured will not receive compensation:

Insurance approaches that left nursing homes underinsured or with practically no insurance fostered an environment where one large claim was enough to force a nursing home to cease operating. That same environment also all but guaranteed that patients with legitimate claims that should be covered by insurance were left with little financial compensation, or even none at all.

S. 2838 would retroactively gut state and federal arbitration agreements

The majority defensively insists that “[t]his legislation is prospective.” Not so. The bill clearly applies retroactively—it not only prevents parties from entering into enforceable arbitration agreements in the future, it also voids arbitration agreements that were made years before this legislation was even proposed. It simply takes pre-existing contracts and tears them up.

Moreover, the bill’s violence against private contracts is not limited to agreements that are enforceable under federal law. The bill also reaches into state jurisdiction, vitiating contracts that were voluntarily entered into between parties who reside in the same state and whose agreements would be enforceable in state courts as a matter of state law. S. 2838 overrides the laws of all 50 states, preventing any state from preserving enforceable arbitration as an alternative to courtroom litigation.

The majority insists that S. 2838 would not gut arbitration, because parties would still agree to arbitration after a dispute arose. Stephen Ware, a professor of law at the University of Kansas, put

the lie to these claims in his June 18, 2008 testimony before the committee. He noted the obvious—that “S. 2838 would ‘gut’ arbitration of nursing-home disputes,” and that “enactment of this bill would largely end arbitration of disputes between” nursing homes and their residents. As Professor Ware explained, “arbitration almost never occurs except as a result of pre-dispute agreements.” He went on to describe how once a dispute has arisen, either one side or another is likely to reject arbitration for tactical reasons:

Once a dispute arises, parties are unlikely to contract out of the default process because of one party’s self interest in whatever tactical advantages it can gain from litigation, whether from an easily-impassioned jury or expensive and time-consuming pre-trial discovery and post-trial appeals. *Only a naively simplistic view would deny that disputing parties and their lawyers assess the case before them and try to maneuver into a process that is expected to advantage their side.* That sort of self-interested maneuvering is inherent in the adversary system and lawyers might not be fully serving their clients if they did not engage in it. (Emphasis added.)

Professor Ware also debunked the majority’s repeated characterization of arbitration agreements as “mandatory arbitration.” As he noted, “arbitration is not ‘mandatory’ but litigation is.” Parties can refuse to agree to arbitration, but they cannot refuse to agree to litigation once they have been sued. He concluded that “[t]o call arbitration arising out of form contracts mandatory’ is inaccurate rhetoric.”

There is no hiding what this bill would do. It would eliminate arbitration for the nursing-home industry. It would carve an exception into the Federal Arbitration Act of 1925, repealing part of a law that has been in place for over 80 years. It would retroactively void existing contracts. And it would prevent even the states from enforcing arbitration agreements between their own residents as a matter of state law. This is an extreme bill that will do serious violence to an established part of the American legal system. It will gut a law that for many nursing homes in America has made the difference between being able to continue to serve their residents, and being driven out of business by trial-lawyer greed.

The majority presents no competent evidence that the arbitration system is unfair

Surely, one would suppose, that before this committee embarked on a path of voiding thousands of private contracts, driving nursing homes out of business, and making nursing-home care inaccessible to thousands of Americans, the committee would have amassed some evidence that this course of action is necessary. It would be a reasonable supposition. But it would be wrong.

Section 3 of the majority report devotes several pages to “proving” that nursing-home arbitration is unfair. The majority first argues that arbitration is too expensive. Its first two pieces of “evidence” of the costs of arbitration come from: A trial lawyer who sues nursing homes and Public Citizen, a fringe group that is financed by trial lawyers. Only as its third piece of evidence does the

majority finally cite the actual fee schedule that is published by the National Arbitration Forum, the arbitrator of choice of the American Health Care Association. As the majority notes, this fee schedule dictates that for filing a small-to-medium arbitration claim the fee should be—brace yourselves!—\$250. The majority also notes that for higher claims, the fee first goes up to \$300 and can be as much as \$1750 for the highest claims.

As Professor Stephen Ware notes in his written testimony to this committee, in the analogous context of employment lawsuits, trial lawyers typically demand retainers of \$3,000 to \$3,600. Professor Ware also notes that these lawyers usually won't even consider a case unless the damages amount to at least \$60,000 to \$65,000. In other words, even for the most expensive cases, the arbitration filing fee is less than half of what a lawyer would charge as his initial retainer. But at least for low-value cases, one could argue that S. 2838 would reduce the up-front fees that an injured nursing-home resident seeking redress will end up paying: Such a claimant will pay zero, because he will be unable to find any lawyer at all to take his case.

The next point in the majority's brief against arbitration is that, under most arbitration procedures, discovery is more limited than it is in judicial proceedings—arbitration allows fewer depositions, subpoenas, and interrogatories. Well, yes. The whole point of arbitration is to have a proceeding that can resolve the case more quickly and with less expense to the parties. And limiting discovery, by far the most expensive element of most litigation, is an integral part of this alternative. If the majority presented an argument that the discovery limits typically imposed in arbitration prevent claimants from being able to present their case—if it could present at least *one* example of such a result—then it would at least have some potential problem to address. But the majority cites nothing. Nada. Zip. It simply notes that discovery is more limited in arbitration. In effect, the majority argues that arbitration is a faster, more efficient, and less expensive means of resolving disputes.

The ultimate guarantee that the arbitration system will generally be fair to claimants is the judicial review of arbitration agreements. As Professor Ware noted in his committee testimony:

The Federal Arbitration Act allows courts to invalidate unconscionable arbitration agreements. And this is not just a theoretical protection. Each year, there are many cases in which courts hold particular arbitration agreements unconscionable. Among these are cases involving nursing homes.⁴

And what evidence does the majority cite to show that the courts have abdicated their duty to supervise arbitration agreements, and that they are allowing enforcement of agreements that are unreasonable? Section 5 of the majority report notes, in italicized outrage, that the courts have said that they will only in-

⁴In a footnote to this last sentence, Professor Ware cites the following cases: *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So.2d 59 (Fla. Ct. App. 4 Dist. 2003); *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731 (Tenn. Ct. App. 2003); *Woebse v. Health Care & Ret. Corp. of Am.*, No. 2D06-720, 2008 Fla. App. LEXIS 1446 (Fla. Dist. Ct. App. Feb. 6, 2008).

validate an arbitration agreement “if the agreement *unreasonably* favors one party.”

In other words, the courts themselves, to whom the majority would consign all nursing-home injury claims, cannot be trusted to preclude enforcement of unreasonable arbitration agreements because they will only intervene if the agreement is unreasonable. But what’s so unreasonable about that?

The majority’s next example of justice laid waste is an Ohio case in which a court enforced a nursing-home arbitration agreement. And what outrageous standard did the court apply in order to reach such a result? Well, in the majority report’s words, “the court compelled arbitration because the agreement was not substantively unfair.” Can you imagine that? How could anyone oppose S. 2838 when, in the very heart of this country, courts are enforcing arbitration agreements that “[are] not substantively unfair?”

The majority also cites two other cases, one from Texas and another from Florida, but makes no effort to show that the arbitration system at issue in either of those cases was unfair.

It would be a rare system of adjudication for which, after a period of review and analysis, one could not find some room for improvement. We would be surprised if there were not at least a few arbitration systems that are being used somewhere in this country that have rules that are unfair, but that have nevertheless been upheld by a court or have so far escaped judicial review. Had this committee made an effort to review nursing-home arbitration systems used across the United States, we are certain that it would have found ways to improve some of the systems that are in use.

But that is not the course upon which this committee has embarked. S. 2838 is not an effort to fix arbitration, or to improve the system of adjudication used by nursing homes and their residents. This bill is designed to gut arbitration. And it does so in the complete absence of any legislative record that nursing-home arbitration procedures, arbitration outcomes, or the judicial policing of the system are inadequate or unfair.

This bill is a trial-lawyer sell out, plain and simple. It is designed to enrich the trial bar—which collects more than half of the value of all nursing-home-litigation awards—at the expense of the public in general and nursing homes and their residents in particular. It would subject nursing homes in many states to an extortionate and out-of-control litigation system that would destroy family businesses that have been built up over generations. It would make it impossible for nursing homes to obtain liability insurance, forcing many to operate without insurance and leaving injured claimants with no compensation. And it would inevitably reduce the availability of nursing home care across this country, leaving many elderly people who need nursing-home care with no option other than to go to a nursing home that is far from their family and friends. This bill is a travesty. We hope that it never sees the light of day.

JON KYL.
JEFF SESSIONS.
TOM COBURN.

[Attachment]

AUGUST 20, 2008.

Hon. JON KYL,
U.S. Senate, Hart Senate Office Building,
Washington, DC.

DEAR SENATOR KYL: I am respectfully writing to ask for your serious consideration of the negative implications of proposed legislation on the quality, accessibility, and even viability of long-term care in America. The Senate is expected to mark up S. 2838, the "Fairness in Nursing Home Arbitration Act" in September. If nursing homes are denied the ability to include pre-dispute arbitration agreements in admission contracts, many of America's largest skilled nursing care providers could be forced to cease operation in various areas throughout the nation.

First, let me say, by way of introduction, that my family has been in the nursing home business for three generations. Today, we operate 41 facilities in four states, where we care for 5,000 residents and employ 6,000 caregivers. We are still a family owned enterprise committed to serving the local communities we call home.

With this as a brief introduction, I want to relate to you how our experience has convinced me that without the ability to utilize arbitration as a form of dispute resolution, our residents and the industry as a whole will suffer.

Let me begin by recounting for you how arbitration agreements came to be used in nursing home admission contracts. In the early 90's, several states became venues for extremely aggressive personal injury litigation against nursing homes. Particular states saw drastic increases in the number of lawsuits against nursing homes along with extreme jury verdicts reaching tens of millions of dollars. In the late 1990's and early part of this decade, one law firm won a series of jury verdicts in Florida ranging from \$10 million to \$20 million. In 2001, the same law firm received a jury verdict of \$78 million from an Arkansas jury. Increased litigation in these states had less to do with the quality of care provided than with the extremely emotionally charged cases and dominant legal and political standing of some extremely talented plaintiff's attorneys.

The leaders of the skilled nursing care profession do not, and never will, condone the actions of those who do not strive for the highest standards of care. Bad actions should be punished. But during the 1990's, a feeding frenzy erupted that changed the nursing home business forever.

In Alabama, Arkansas, Florida and Missouri, where our facilities are located, many insurance underwriters simply stopped offering liability insurance for nursing homes. In Florida, there have been periods of time when traditional liability insurance for nursing homes was not available at all, from any company, at any price. Throughout the industry, liability insurance became so expensive that many nursing home operators simply could not afford it.

As insurance became either unavailable or unaffordable, nursing home operators began restructuring and reorganizing their businesses in an effort to keep the doors open and to continue serving the elderly and infirmed in their care. Some owners resorted to self-insurance programs that were little more than cash accounts

set aside to pay litigation claims if they occurred. Other owners took steps to segment their business operations so that a multi-million dollar claim, while potentially fatal for the operation of one facility, did not result in a catastrophic impact on other facilities, displacing hundreds of residents, many of whom did not have a similar facility in close proximity to their homes or that of their families. These problems were faced by the entire nursing home industry, regardless of the ownership structure. Single facility family-owned operations as well as large corporate operators faced the same issues.

A number of states took action to stem the rising cost of litigation by passing tort reform measures to curtail multi-million dollar jury verdicts. But for states where tort reform has not been a political possibility, the use of arbitration agreements has been the only tool available to help nursing homes manage what had clearly become an impossible situation.

The rising cost of insurance and litigation had a direct and lasting impact on the quality of care in nursing homes. Hundreds of millions of dollars that could have been spent on salaries for caregivers, modernization of aging buildings, technological improvements, and enhanced programming to provide a better quality of life for our patients was instead spent on incredibly high insurance programs or in paying the cost of record setting jury awards.

Under these conditions, both nursing home operators and those for whom we care lacked the necessary protection insurance is supposed to offer. Insurance approaches that left nursing homes underinsured or with practically no insurance fostered an environment where one large claim was enough to force a nursing home to cease operating. That same environment also all but guaranteed that patients with legitimate claims that should be covered by insurance were left with little financial compensation, or even none at all.

In the face of what was becoming a national crisis, some nursing homes opted to simply shut their doors in those states where they could no longer afford to operate. Others, like myself, who wanted to continue serving the residents of these communities, turned to the use of pre-dispute arbitration agreements as a levy against the rising tide of insurance and litigation costs. Since the institution of arbitration agreements, states that were experiencing the highest frequency of litigation and the greatest financial losses have seen an incredible turn around. According to AON's 2008 study, loss costs in Florida have decreased from \$9,090 per bed in 1997 to \$1,680 per bed in 2007. Although loss costs in Florida have dramatically decreased the frequency of lawsuits filed continues to prohibit insurance providers from completely re-entering the market with affordable traditional liability coverage.

Arbitration has provided a critical tool for nursing home operators resulting in better care for patients, because now the hundreds of millions of dollars being siphoned off by litigation can be redirected to improved patient care. Arbitration provided this financial benefit without forfeiting the protections guaranteed to our patients by law. As recently as this year the United States Supreme Court made it clear that entering into an arbitration agreement cannot alter any protections or remedies granted to consumers

under the law. Arbitration agreements only change the venue in which disputes about these protections are heard.

Arbitration has ended the days of jackpot justice lottery awards and replaced them with a system of fair judicial findings for all concerned. In our company's personal experience, we have never won (had a defense verdict) in an arbitration dispute. However, since the institution of arbitration resolution procedures, the costs of dispute resolution in the State of Florida have decreased drastically. This has resulted in more dollars being available and used for the care of residents. And while the frequency of claims in Florida has decreased by 44% since 2000, the cost of claims has decreased by 79%. This decrease does not mean patients with legitimate claims are being denied. It does, however, reflect the fact that most of the exorbitant jury awards have been eliminated; total costs of dispute resolution have been decreased; and fees to attorneys on both sides have gone down.

Senator, at a time when the rising cost of healthcare is having a staggering affect on our economy, national policy makers should look closely at the impact of nursing home litigation on American taxpayers. Eighty-four percent of all nursing home beds are funded by Medicaid and Medicare. AON actuarial consultants estimate that 2.7% of all Medicaid payments to nursing homes are used to cover the cost of litigation. That means taxpayers are paying about \$1.3 billion a year to cover the cost of nursing home litigation. AON also estimates that 52% of all litigation cost(s) are paid to lawyers. That means American taxpayers are devoting \$675 million a year to attorney's fees.

I am tremendously concerned about what will happen if Congress turns back the clock to the 1990s and eliminates arbitration as a means of dispute resolution. My experience convinces me we must expect the worst. In states where there is still a litigious climate, the frequency of lawsuits will increase, just as they did then, and the jury verdicts in the tens of millions of dollars will again make headlines. As in the past, liability insurance will be either impossible to get or too expensive for nursing homes to afford. Hundreds of millions of dollars that should be spent on patient care will be siphoned off to quench a renewed feeding frenzy of lawsuits. And in the end, the American taxpayer will be faced with a bill that reaches into the billions as state and federal Medicaid budgets pick up their share of the tab.

Senator Kyl, three generations of my family have dedicated their lives to the nursing home business. I have witnessed first-hand some of the most radical changes in the history of American healthcare. Some of these changes have made the quality of life better for millions of Americans, while other changes have threatened the quality of care that all Americans deserve. I hope you'll work with your colleagues on the Committee and in the Senate to preserve arbitration as a means of dispute resolution in nursing homes. While well-intentioned, passage of S. 2838 will reduce access to the kind of quality care our nation's elderly deserve.

Thank you.

Sincerely,

J. NORMAN ESTES,
President and CEO, NHS Management, LLC.

VIII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2838, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 9—ARBITRATION

§ 1. [**“Maritime transactions” and “commerce” defined; exceptions to operation of title**] *Definitions*

(a) *As used in this chapter the term—*

(1) **“*Maritime*”** *maritime transactions*, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty [*jurisdiction*]; *jurisdiction*;

(2) “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce[.];

(3) *“long term care facility” means—*

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

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

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

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

(ii) *provides a dwelling place for residents in order to deliver such supportive services referred to in clause (i), each of which may contain a full kitchen and bathroom, and which includes common rooms and other facilities appropriate for the provision of supportive services to the residents of the facility; and*

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

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

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

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

SEC. 2. VALIDITY, IRREVOCABILITY, AND ENFORCEMENT OF AGREEMENTS TO ARBITRATE

SEC. 2. VALIDITY AND ENFORCEABILITY

[A written]*(a) A Written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable***], save upon such grounds as exist at law or in equity for the revocation of any contract** *to the same extent as contracts generally, except as otherwise provided in this title.*

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

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

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