



**Testimony of
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**Before the Subcommittee on Commercial and Administrative Law,
regarding the Arbitration Fairness Act of 2007, H.R. 3010/S. 1782**

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Mr. Chairman and Members of the Sub Committee:

Thank you for the opportunity to share some thoughts with you about the use of binding mandatory arbitration in the context of nursing home cases. In order to fully appreciate the implications of what is at stake for nursing home residents and their families, some background is in order.

For almost twenty five years I have represented nursing home residents who have suffered abuse and neglect at the hands of their caregivers in long term care institutions. I have been involved in cases from Florida to California and have been exposed to the charts of hundreds of patients in facilities all over the country. I am saddened to tell you that the care and treatment that many of our elders receive in long term care facilities is nothing short of scandalous and is America's shameful and dirty secret. This problem is pervasive and extends to every part of the country.

Daily, I encounter frail elderly adults in nursing homes who have suffered from avoidable pressure ulcers (bed sores) which penetrate all the way to the bone. Some of these wounds are as big as pie plates. Often they are infected and so foul smelling that when you approach their room from down the hall, you can smell the resident before you can see them. The wounds often become infected because residents are left to languish in urine and feces for so long that the feces becomes hardened and stuck to their bodies and the urine dries in tell-tale brown rings on their bed clothes. Residents often suffer from avoidable malnutrition and dehydration and their gaunt bodies, hollow eyes and parched tongues are testimony to the lack of time and attention that overworked and harried staff are able to afford them. Many times these residents suffer from multiple falls and associated fractures resulting from a lack of supervision—that lack resulting from nursing home operators consciously understaffing their facilities seeking to maximize profits by minimizing labor costs. All too often my clients are the victims of rape or sexual assault—sometimes by their caregivers, and sometimes by fellow residents who, because of their diminished capacity and lack of supervision, are allowed to prey on weaker residents.

The results of this abuse and neglect are so horrific that if it were happening to detainees at Guantanamo or Abu Ghraib, there would be no end to the Congressional hearings investigating the problem or to the hue and cry of America's media howling in outrage. Yet, year after year, these problems persist and they are multiplying.

These facts are often suppressed by unscrupulous nursing home operators who falsify records or shred them in an attempt to conceal them from regulators, residents' family members, and their lawyers. These attempts at falsification are often so poorly executed that in my practice I regularly review records that reflect care as having been given on non-existent days (February 30 or 31), on days when the resident was in the hospital rather than in the nursing home, and before the resident was even admitted. Sometimes I find care charted on days that occur long after the resident has been dead and buried. Often, when I compare the care givers' time cards with their charting, I find that the care givers are not even at work when the care was purportedly administered.

In an interview with the Washington Post published February 4, 2000, John T. Bentivoglio, special counsel for health-care fraud at the Department of Justice, said in an interview, "A number of highflying nursing home chains appear to have incorporated defrauding Medicare as part of their business strategy." In my experience, those words are just as true today as they were when they were uttered seven years ago.

It is into this milieu that families bring their precious, elderly loved ones to be cared for by the nursing home industry. Most people seeking care for their loved ones don't have a clue about the scope of problems that exist in the nursing home industry (and, of course, the problems I have outlined above, while pervasive are not universal). They just know that they no longer can provide the care needed by their aging parent or grandparent and their local nursing home has assured them that it can do so. Comforted though they are by those assurances, the admission process is, nevertheless, stressful to say the least.

Few decisions are as difficult or as painful as the decision to surrender one's loved one to be cared for by strangers. Families are often wracked with remorse and guilt at the time of the nursing home admission. The elderly person is often filled with apprehension and fear and worries about being abandoned to the care of strangers. Emotions typically run high. 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 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. Sometimes, the nursing home representative will acknowledge, after the fact, that they, themselves, didn't really understand the significance of the arbitration agreement they were asking the resident or their family member to sign. The goal, however, is to get 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 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. As to the proposed agreement, they 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 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. 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.

The current system of binding mandatory arbitration employed by nursing homes creates a playing field that is tilted in favor of nursing homes and against frail, vulnerable residents who suffer terribly at the hands of their caregivers. Sadly these residents are, all too often, the victims of abuse by their caregivers. They should not be further abused by an arbitration system that dispenses anything but justice.