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

October 25, 2007

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 hears 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.

Responses of Kenneth L. Connor
To Questions for the Record from Linda T. Sanchez, Chair
Subcommittee on Commercial and Administrative Law
"Hearing on: H.R. 3010, The Arbitration Fairness Act of 2007,"
October 25, 2007, 2:00 p.m., Room 2141 RHOB

Question 1. Do arbitration clauses in nursing home contracts affect the quality of care in nursing homes?

Response. I believe that arbitration clauses in nursing home contracts adversely affect the quality of care in nursing homes.

Common sense and human experience tell us that accountability and responsibility run hand in hand. When wrongdoers are not held fully accountable for the consequences of their misconduct, their wrongdoing multiplies. Pre-dispute binding mandatory agreements are designed to minimize accountability by nursing homes for their wrongdoing. Such agreements often impose limitations on discovery, caps on damages, waiver of punitive damages and attorney fees, and other provisions that limit the accountability of nursing homes that have abused or neglected their residents. Additionally, the arbitral forum required by the agreements is often industry friendly and adverse to residents. The industry gets a "repeat player" advantage by using the same arbitrators over and over. The net result is that awards arising out of these arbitral forums are dramatically lower than those that are awarded by juries in civil trials. This means that, by requiring pre-suit binding mandatory arbitration, nursing homes avoid full accountability for the harms they inflict on innocent residents and they are more likely to repeat their wrongdoing.

When nursing homes are held fully accountable for the harms and damages they cause, they are less likely to repeat the behavior that gave rise to the accounting. Misconduct is less likely to occur when nursing homes realize that it costs more to do business the wrong way than it does the right way.

Question 2. Do arbitration clauses in nursing home contracts impact the public's ability to learn about any problems in certain nursing homes?

Response. Yes, and in a negative way. Arbitration proceedings, unlike jury trials, are typically conducted in a setting that is not open to the public. Additionally, unlike civil trials, these proceedings are not typically a matter of public record. Consequently, the public is much less likely to learn of problems that exist in nursing homes whose liability is determined by arbitration rather than in a trial.

When it comes to selecting a nursing home, knowledge is power. Jury verdicts, in contrast to arbitration awards, are often publicized in newspapers or on television, thus giving the public additional means of learning about problems that exist in nursing homes in their communities. The knowledge acquired enables the members of the public to make a more informed judgment about the nursing home the will select for their loved one.

Question 3. How do arbitration agreements affect your ability to conduct discovery in nursing home cases?

Response. In a civil case filed in court, parties are typically entitled to obtain discovery of any information relevant to the subject matter of the action and which is not otherwise privileged from disclosure. Discovery is typically much more limited in arbitration settings. Frequently, the rules of the arbitral forum will limit discovery. Often there are draconian limits on the number of witnesses who can be deposed and the number of documents which will be required to be produced. Sometimes, discovery is limited just to matters involving the care and treatment of the resident whose claim is being arbitrated. Such limitations prevent residents from learning that the problems they suffered from were problems which were pervasive throughout the facility and ones the nursing home had notice of. This kind of information is highly relevant to proving liability of the nursing home. Further, these discovery limitations often prevent the resident from finding out who was really in charge of operation and managing the nursing home during their residency. The effect will be that the real culprits will often escape liability and accountability for their actions.

Question 4. How important are the use of experts in the type of cases you litigate? How does mandatory binding arbitration affect that?

Response. Experts are critical in proving liability in nursing home cases. Often, state law requires expert testimony as a condition of proving liability in a nursing home case. Many times, a variety of medical and financial experts are required to meet the plaintiff's burden of proof. In an arbitration setting, the rules often limit the number of experts may

call, thereby prejudicing the ability of a resident to prove his or her case against the facility.

Respectfully submitted this 22nd day of July, 2008 by

Kenneth L. Connor,

In his individual capacity and not on behalf of any organization

Responses of Kenneth L. Connor
To Questions for the Record from Ranking Member Chris Cannon
Subcommittee on Commercial and Administrative Law
"Hearing on: H.R. 3010, The Arbitration Fairness Act of 2007,"
October 25, 2007, 2:00 p.m., Room 2141 RHOB

Question 1. Why isn't outreach, education, and continuing improvement of arbitration options the right course here, rather than removing whole fields of arbitration from the economy and sacrificing consumers, franchisees, and employees to trial lawyers?

Response. Education, outreach and continuing improvement of arbitration options all have merit. Fundamentally, however, the problem with pre-dispute binding mandatory arbitration in nursing home cases (the area I was asked to testify about) is that it is unconscionable for residents from both a procedural and substantive point of view.

When the frail elderly present for admission at a nursing home, the last thing they are expecting is to be confronted with a document that asks them to waive important legal rights. These people typically suffer from a variety of problems associated with advanced age. They often are incompetent or of questionable competence. They usually are on multiple medications which may impair their judgment and they commonly suffer from deficits of hearing and vision. The agreement for pre-dispute binding mandatory arbitration is often sandwiched toward the end of a 50-60 page admission agreement. The admissions coordinator charged with the responsibility of explaining the agreement frequently don't understand it themselves. Very often, the elderly person, who is already terrified about being left in the care of an institution but who is in desperate need of nursing care, is told that if they don't sign the agreement, admission will denied. This only ratchets up the anxiety for the prospective resident since the next available nursing

home may be miles away from their family. Under these circumstances, there can be little doubt as to why the elderly person signs the agreement.

There is no parity of bargaining power between the facility and the resident who is being pressured into waiving important legal rights which may include substantial sums of money if they suffer abuse or neglect at the hands of the nursing home. In virtually any other setting, people who preyed on an elderly person and conned them out of important legal rights would be prosecuted. The only satisfactory solution is to prohibit this insidious practice which preys on the weakest and most vulnerable of our citizens.

By the way, I can't help but notice, Mr. Cannon, that the premise of your question shows great antipathy toward America's trial lawyers. You may not be aware that some of America's greatest leaders were trial lawyers, including John Adams, John Quincy Adams and Abraham Lincoln. I don't know what the origin of your hard feelings are, but I would respectfully suggest that it would be more helpful if you directed your energies toward reining in nursing homes that are abusing America's frail elderly rather than disparaging the members of the legal profession who are trying to protect them.

Question 2. Are you aware that many franchisors are small, inventive intellectual property owners, with few resources, time-limited patents, and licenses with large companies as the way their inventions get to market? These franchisors gain an immense amount of parity by insisting that their disputes with major corporations go to mandatory, binding arbitration. Would it be just to take that option away from them?

Response. This question should be directed to another member of the panel. I was asked to address pre-dispute binding mandatory arbitration in the context of nursing home cases.

Question 3. Would it be just to allow unions to continue to insist on mandatory arbitration in disputes between them and their members, but not anyone else?

Response. This question should be directed to another member of the panel. I was asked to address pre-dispute binding mandatory arbitration in the context of nursing home cases.

Question 4. Would it be just to treat union members and non-union members equally in this bill?

Response. This question should be directed to another member of the panel. I was asked to address pre-dispute binding mandatory arbitration in the context of nursing home cases.

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