Testimony of

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Attorney at Law

June 10, 2008

Before the Subcommittee on Commercial and Administrative Law,
regarding the Fairness in Nursing Home Arbitration Act of 2008

H.R. 6126/S. 2838

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Madam Chairwoman, Ranking Member Cannon, and Members of the Subcommittee:

I want to express my appreciation to you and to your colleagues and to Senator Martinez for taking the lead in sponsoring the "Fairness in Nursing Home Arbitration Act of 2008." This legislation is vitally important to protect the rights of frail, vulnerable nursing home residents who have suffered abuse or neglect at the hands of their caregivers. The current system which allows for pre-dispute mandatory binding arbitration results in a gross miscarriage of justice to victims and their families and promotes irresponsible and reckless conduct on the part of providers who are not held fully accountable for the consequences of their wrongdoing.

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

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

vulnerable to abuse and neglect by unscrupulous nursing home operators who are willing to put profits over people.

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

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

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

Discovery pursuant to the agreement is emasculated. The agreement typically imposes draconian limits on (1) the number of witnesses who can be deposed or called at the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "The dramatic impact of the implementation of the 1997 Balanced Budget Act on our revenues and cash severely impacted the company's ability to service our current capital structure."
>
> *- Robert N. Elkins, Integrated Health Services, Chairman and CEO*
>
> "Deep cuts in Medicare reimbursements, which far exceeded all government forecasts coupled with chronic under funding of Medicaid reimbursements, have severely impacted Genesis' ability to service our current capital structure."
>
> *- Michael R. Walker, Genesis Health Ventures, Inc., Chairman and CEO*
>
> "Deep cuts in Medicare reimbursements exceeded all industry expectations."
>
> *- Andrew L. Turner, Sun Healthcare Group Inc., Chairman and CEO*
>
> "The reorganization also was necessary because of the dramatic changes impacting the long-term care industry, most notably decreased Medicare reimbursement."
>
> *- Edward L. Kuntz, Vencor, Inc., Chairman, CEO and President*

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

> "After years of reaping generous profits and anticipating more of the same, much of the nursing home industry is now heavily in debt, understaffed and losing money."
>
> - *USA Today, September, 30, 1999*
>
> "IHS and other nursing home chains that were expanding rapidly were leveraged up the gazoo, building up debt to finance their acquisitions."
>
> - *Paul, Willgang, former President (1983-1998) of the American Health Care Association quoted in The Baltimore Sun, January 13, 2001*
>
> "While (residents) suffer, executives treated themselves to corporate jets, private gyms and, in one case, $40 million to a CEO who was running the company in the ground."
>
> - *Rocky Mountain News, October 22, 2000*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted this 22nd day of July, 2008 by

Kenneth L. Connor,

In his individual capacity and not on behalf of any organization

From: Salinas, Norberto
To: Kenneth Connor
Subject: Nursing Home Arbitration Hearing, June 10, 2008

Questions for Kenneth L. Connor from Chairwoman Sanchez:

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

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

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

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

Respectfully, submitted.

Kenneth L. Connor, Individually, and not on behalf of any organization