



Leadership Council of Aging Organizations

September 10, 2008

Judiciary Committee
United States Senate
Washington, DC 20510

Dear Senator:

The undersigned members of the Leadership Council of Aging Organizations urge you to support the Fairness in Nursing Home Arbitration Act (S. 2838), legislation that would invalidate pre-dispute arbitration clauses contained in contracts that families are often forced to sign when they admit a loved one to a nursing home or an assisted living or other long-term care facility. Arbitration clauses are typically buried in lengthy admissions contracts that consumers sign during one of the most emotional and stressful events in their family's life, when many are under pressure from hospitals to accept the first available bed so their loved one can be discharged. Under these circumstances, families are necessarily focused on finding the best care for their loved one and are not thinking about possible future disputes. Most families are not even aware that the admissions contract contains an arbitration clause and, in the rare instance that they are aware of it, they typically do not understand its technical language or its significant implications for their rights. The Fairness in Nursing Home Arbitration Act would not ban arbitration, but it would put consumers on a fair footing with providers in allowing them to decide after a dispute has arisen, whether to arbitrate a case or have it decided in court.

Arbitration was intended as a means to resolve disputes between commercial parties with equal sophistication and bargaining power. It was never envisioned as a process to resolve the kinds of problems that lead to civil litigation against long-term care facilities – problems such as abuse, neglect, malnutrition, or assault. Many facilities do provide high quality care, but the Government Accountability Office has found that one in five nursing homes in this country has been cited for serious deficiencies that harmed residents or placed them at risk of death or serious injury. In some instances, courts may be the only entity that will hold a facility accountable – a May 2008 GAO report showed the failure of state regulatory agencies to cite deficiencies. Quality of care problems also can occur in assisted living and board and care homes, where there is little federal regulation and often weak or no state regulation.

There are numerous reasons why the Fairness in Nursing Home Arbitration Act should be passed to ensure that older Americans and their families have the right to seek redress in the courts, including:

- **The contractual process is one-sided – the consumer does not have equal bargaining power.** About two-thirds of nursing home admissions are from hospitals, and consumers often have little choice but to accept the provider's terms. Even if the facility does not actually require the applicant to sign the arbitration agreement, he or she may be too intimidated and under too much pressure to find

an available bed to refuse to sign the arbitration provision. Some courts have upheld arbitration contracts signed by residents themselves who were illiterate or suffering from severe dementia.

- **The arbitration process can be one-sided and expensive for consumers.** The facility often chooses the arbitrator (who may have an incentive to find for the facility because it can provide ongoing business) and the location of the arbitration, which may be inconvenient for residents and their families. Moreover, the consumer often has to pay substantial, even prohibitive, filing fees and other costs (e.g., room rental; hourly fee of the arbitrator or panel) to have his or her case heard, costs they would not have to pay upfront to have their case heard in court.
- **Arbitration removes one of the most valuable aspects of civil litigation—the discovery process.** Civil lawsuits provide a discovery process that provides access to documents and other information that can reveal not only what injuries occurred but *why* they occurred. Arbitration places severe limits on discovery, which puts residents and their families at a serious disadvantage because they cannot obtain critical information possessed by the facility and its employees.

The LCAO is a coalition of 56 organizations that represent millions of older Americans. America’s frail older adults and persons with disabilities should not be denied the right to seek redress in the courts when they are injured, neglected, or abused. Therefore, we strongly urge you to support the Fairness in Nursing Home Arbitration Act to address this important issue.

Sincerely,

AARP
AFL-CIO
AFSCME Retirees
Alliance for Retired Americans
American Federation of Teachers Program on Retirement and Retirees
American Postal Workers Union Retirees
American Society on Aging
Easter Seals
Families USA
Gray Panthers
Military Officers Association of America
National Academy of Elder Law Attorneys
National Association of Professional Geriatric Care Managers
National Association Of Retired And Senior Volunteer Program Directors, Inc.
National Association of Social Workers
National Association of State Long-Term Care Ombudsman Programs
National Council on Aging
National Hispanic Council on Aging
National Indian Council on Aging
National Senior Citizens Law Center
NCCNHR: The National Consumer Voice for Quality Long-Term Care
OWL, The Voice of Midlife and Older Women
Service Employees International Union