MEMORANDUM

TO: **Members, Committee on the Judiciary**

FROM: **John Conyers, Jr.**
Chairman

DATE: **June 22, 2010**

RE: **Full Committee Markup**

The Committee on the Judiciary will meet to markup H.R. 5503, the "Securing Protections for the Injured from Limitations on Liability Act"; a Motion to authorize issuance of subpoenas to BP America for documents regarding its claims process relating to the Gulf oil spill; H. Res. 1455, Directing the Attorney General to transmit to the House of Representatives copies of certain communications relating to certain recommendations regarding administration appointments; H.R. 5281, the "Removal Clarification Act of 2010"; H.R. 5566, the "Prohibiting Interstate Commerce in Crush Videos Act of 2010"; H.R. 1020, the "Arbitration Fairness Act of 2009"; and H.R. 1237, the "Fairness in Nursing Home Arbitration Act of 2009" The markup will take place on Wednesday, June 23, 2010, at 10:15 a.m., in room 2141 of the Rayburn House Office Building.

I. H.R. 5503, the "Securing Protections for the Injured from Limitations on Liability Act"

A. Background

On April 20, 2010, there was an explosion on the Deepwater Horizon oil drilling platform that ultimately engulfed the vessel in flames, sank it, and caused a massive oil spill in the Gulf of

Mexico that is spreading throughout the Gulf Coast and perhaps beyond. Of the 126 crew members, 11 were killed, and at least 17 men were injured.[1]

The Deepwater Horizon (DWH), which was leased to BP, was owned by Transocean, Ltd., a leading offshore drilling contractor with more than 18,000 employees worldwide. British Petroleum (BP) is a global energy company (including BP America), and was the operator and principal developer of the oil field on which the Deepwater Horizon oil drilling platform was located. Haliburton, a global oil field services company with over 50,000 employees worldwide, was the cement contractor aboard the vessel. Cameron International is a global provider of pressure control, processing, flow control, and compression systems, and was the manufacturer of the blowout preventer aboard the oil vessel.

BP's partners in the DWH drilling project were Anadarko Petroleum Corporation and Mitsui Oil Exploration. Anadarko was a non-operating investor with a 25 % stake in the project, and had no employees stationed on the rig. Mitsui, which specializes in natural gas, had a 10% investment in the well. There have been no published reports about whether Mitsui had any employees on board the rig on the day of the explosion. M-I SWACO was subcontracted as the DWH's mud engineer. Weatherford International Ltd., was the casing subcontractor. Finally, Schlumberger Ltd., was contracted by BP to conduct wireline services. Schlumberger had a crew on board the DWH, but according to company officials, they left the rig just hours before the fire and explosion.

Each of these companies has been implicated in the events leading up to the explosion and the continuing oil spillage, and each may bear some legal responsibility for the resulting harm, either by direct payment as a defendant, joint and several responsibility, or contribution.

Although the matter is complex and ongoing, there are at least several general categories of responsibility. First, there is the responsibility of the companies for the dead and injured workers resulting from the April 20 explosion. (It is difficult to estimate the potential costs here, but the 2005 refinery exploding in Texas, killing 15 and injuring scores more reportedly resulted in a settlement of some $1.6 billion, albeit under a different applicable liability scheme.)[2] The

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[1] The 126 member crew reportedly consisted of 41 contract workers, including four Haliburton employees and five M-I SWACO employees; six or seven BP employees; and 79 Transocean employees, including the rig commander, Captain Curt Kuchta. Of the 11 fatalities, 9 of the men were employed by Transocean and 2 by M-I SWACO.

[2] Stephanie Mencimer, "Screwed if By Sea," Slate, June 16, 2010.

current statutory regime surrounding liability for the Gulf Coast oil disaster is exceedingly complex and outdated, in some instances relying on laws written in the mid-19th century to protect American merchant shipowners. In addition to general maritime law, at least two federal statutes – the Death on the High Seas Act (DOHSA) and the Jones Act – will likely govern the extent to which injured workers and dependent family members of deceased or injured workers can recover damages. In addition, for its part, Transocean filed suit in Houston, Texas, on May 13, 2010 under another statute that may be relevant to further proceedings. That statute, passed in 1851, is designed to limit rather than facilitate recovery. The Limitation of Liability Act (LOLA) permits a vessel owner to limit his liability for all personal injury claims that may be brought against him to the value of the vessel and the cargo. With its "vessel" on the Gulf floor, Transocean has estimated that amount in this case to be just shy of $27 million

Second, there is responsibility for economic damages due resulting from the spill, under the Oil Pollution Act of 1990 (OPA). Passed in the aftermath of the *Exxon Valdez* oil spill in Prince William Sound, OPA establishes a framework for those harmed by the offshore discharge of oil to recover for specified damages. Under OPA, the "responsible party" is strictly liable for all economic damages as well as cleanup and removal costs associated with a discharge of oil into the waters of the United States. The "responsible party" is the owner or operator of the vessel from which the oil is discharged. [3] As the owner of the DWH, BP is responsible for the economic damages associated with the spill. As of June 222, 2010, BP has stated that it had paid out $118,044,258 to Gulf Coast claimants, but the ultimate responsibility will be far more. For example on June 2, Credit Suisse estimated that these economic damages would total $14 billion.

OPA caps the economic damages, beyond the direct cost of cleanup, at $75 million per incident from the responsible party (as defined by the Act) for the oil spill. This liability cap does not apply if BP or any of its contractors violated any federal or State safety regulations or acted with gross negligence. The damages expressly recoverable under OPA are limited to 1) property damage; 2) subsistence loss; 3) net lost government revenue; 4) net lost profits or earning capacity; 5) cost of increased public services; and 6) damage to natural resources. OPA does not apply to personal injury or wrongful death. However, for its part, BP has testified that it would not subject itself to the cap and that it would pay "all legitimate claims," though it has not defined legitimate nor has it formally agreed to extend its liability.

Third, is the responsibility for clean up costs relating to the oil spill. The responsible party is obligated to pay all cleanup cost under OPA, although it may seek contribution or subrogation from other parties.[4] . As of June 21, 2010, BP had reportedly spent approximately $2 billion in cleanup and containment efforts,[5] but a recent estimate by *The New York Times*

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[3] 33 U.S.C. 2701(32).

[4]33 U.S.C. 2715.

[5] See, BP has spent $2 billion on Oil Spill cleanup: Company Says it has paid out $105 Million to Victims; Overall Cleanup Cost Expected to Continue Rising, June 21, 2010, http://www.cbsnews.com/stories/2010/06/21/national/main6602994.shtml

approximated clean up costs of perhaps as high as $14 billion. If BP is unwilling or unable to pay the cleanup costs, the Oil Spill Liability Trust Fund (OSLTF) provides a backstop for relief. The OSLTF was established by Congress in 1986 to create a pool of readily available funds for oil spill response needs.[6] The Fund is primarily used to finance the costs incurred by federal and State agencies for prompt oil spill removal and to reimburse federal, State and Indian tribe trustees for recoverable costs associated with oil spills, e.g., cleanup costs, natural resource damages.[7] The maximum amount of money that may be withdrawn from the OSLTF is $1 billion per incident (as defined by OPA).[8] The money is dispersed when a responsible party does not or cannot pay the cost of removal or a claim for economic damages.

OPA was designed to encourage administrative resolution of claims directly with the responsible party. Therefore, a government claimant seeking reimbursement for removal or cleanup costs, or any claimant seeking economic damages must first present the claim to the responsible party. If the responsible party denies the claim or does not settle the claim within 90 days, a claimant may seek funds from the OSLTF or initiate action in a court of law. No money has been withdrawn from the fund in connection with the Gulf spill cleanup.

In regard to these general categories of responsibility, BP announced that it will establish a $20 billion escrow account – a claims fund – as urged by President Obama, which adds another layer of complexity to the evaluation and resolution of claims. The fund will be set aside as part of the "Independent Claims Facility" (ICF), which will be managed by Ken Feinberg. The fund will be built up over a three and a half year period and be available "to satisfy legitimate claims including natural resource damages and state and local response costs." The fund will not pay out fines or penalties, but will honor claims that are adjudicated, whether by the ICF or by a court, or as agreed to by BP. The fund is not intended to represent a cap on BP liabilities, and will proceed on parallel tracks with other efforts by claimants to obtain redress for harms caused by the spill. Claimants apparently may choose to pursue their claims wherever they wish, and do not seem to be precluded from accessing multiple forums.

Fourth are the fines due under the Clean Water Act and related statutes. It has been estimated by some that the civil fines due under this statute could be as high as $22 billion, and a private lawsuit has recently been filed seeking a similar amount. It has also been asserted that BP will be responsible for royalties to the federal government for each barrel of oil lost, which could cost large additional amounts. A further factor is the criminal probe that Attorney General Eric Holder announced on June 1, 2010, along with the Justice Department's civil investigation. The threshold for a criminal investigation has "certainly been passed," Holder said, although he would not disclose the exact targets of the probe. Prosecutors are reportedly looking at possible violations of the Clean Water Act, the Migratory Bird Treaty Act, the Endangered Species Act,

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[6] However, Congress did not authorize its use or provide its funding until after the *Exxon Valdez* incident. In 1990, OPA provided the statutory authorization necessary to put the fund into effect. The OSLTF was initially funded by a five-cent-per-barrel tax on the oil industry. It is administered by the U.S. Coast Guard.

[7] "Could BP's Money Stop Flowing," NY Times, June 18, 2010, B2.

[8] 26 U.S.C. 9509 (c) (2) (A).

and the Oil Pollution Act. In addition, lawsuits have been filed or are contemplated by the attorneys general of the affected States.

Many of the general areas of liability present overlapping and interrelated issues. As of June 11, 2010, more than160 cases are going forward as class actions.[9] BP has already filed a motion to consolidate the cases before one multi-district litigation court, and the Judicial Panel for Multidistrict Litigation is scheduled to hold a hearing on July 29 in Boise, Idaho. In addition, personal injury claims stemming from the spill and cleanup have been submitted to BP or are being pursued in the courts under various theories of relief. It is unclear to what extent these type claims are candidates for resolution by the ICF.

B. Committee Hearing

On May 27, 2010, the full Committee held a hearing to examine the liability issues stemming from the explosion on the Deepwater Horizon and the resulting oil spill. The witnesses who testified before the Committee were Keith D. Jones, Esq., father of Gordon Jones, who died while working on the Deepwater Horizon; Douglas Harold Brown, a Transocean, Ltd. employee and survivor of Deepwater Horizon explosion; Stephen Stone, a Transocean, Ltd. employee and survivor of Deepwater Horizon explosion; Bryan Encalade, President, Louisiana Oysters Association; Jim Hood, Attorney General for the State of Mississippi; Daryl Willis, Vice President, Resources, BP America; Rachel Clingman, Acting General Counsel, Transocean, Ltd.; James W. Ferguson, Vice President and Deputy General Counsel, Haliburton; William C. Lemmer, General Counsel, Cameron International Corporation; Vincent J. Foley, Partner, Holland & Knight; and Thomas C. Galligan, Jr., President and Professor, Colby-Sawyer College.

Prior to the hearing, the Committee requested that Haliburton, BP, Transocean and Cameron produce documents that would help the Committee better understand what happened on the oil rig on April 20th, what steps were taken in the aftermath of the disaster, and what role and responsibility each company may have for the damages. For example, the Committee requested witness statements, safety policies, insurance and indemnity coverage, and records of work performed on the well in the days leading up to the explosion. The Committee has also sought, with limited success, detailed information on the BP claims process.

C. Legislation

To address some of the issues surrounding liability for the Gulf Coast oil spill, Mr. Conyers introduced H.R. 5503, the "Securing Protections for the Injured from Limitations on Liability (SPILL) Act", described below. I expect to circulate a proposed manager's amendment later, setting forth additional changes.

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[9] "Lawyers file class action suits against BP," by Anna Fifield, June 11, 2010, Financial Times, FT.com.

Sec. 1 – Short title. Section 1 sets forth the short title as the "Securing Protections for the Injured from Limitations on Liability (SPILL) Act of 2010."

Sec. 2 – Amendments to Death on the High Seas Act (DOHSA). The Death on the High Seas Act (dating from 1920) gives the personal representative of anyone[10] killed by "wrongful act, neglect, or default occurring on the high seas"[11] (defined generally in the Act as more than three nautical miles from the shore of the U.S.)[12] – whether or not aboard a vessel – a right of action for wrongful death. Recovery under DOHSA is currently restricted to only pecuniary loss to the surviving family – such as loss of the decedent's income, and funeral expenses.[13] Since the Deepwater Horizon oil rig was stationed almost 50 miles off the coast of Louisiana, DOHSA would apply for the families of the 11 men killed – but not for anyone whose injury did not result in death. This limitation to pecuniary damages would mean, for example, that if, as has been reported, one of the workers died single and childless, his family's damages could be limited to their funeral expenses.[14]

Section 2 makes several changes to DOSHA. First, it permits recovery of non-pecuniary damages as available under traditional tort and maritime law, such as the decedent's pain and suffering, and loss of care, comfort, and companionship to the surviving family. Second, it standardizes the geographical threshold at 12 nautical miles, as established under the 1982 United Nations Convention on the Law of the Sea, and as already set for commercial aviation accidents under a 2000 amendment to DOHSA, by removing the outdated threshold of three nautical miles that currently remains in effect for other DOHSA cases.[15] And third, it allows suit to be brought under law as well as admiralty (thus providing a right to jury trial).

Sec. 3 – Amendments to Jones Act. The Jones Act (also dating from 1920), among other things, gives "seamen"[16] (in the event of personal injury) or the personal representative of surviving families (in the event of wrongful death) " a right of action against their employer for negligence, unseaworthiness, or failure to provide adequate medical care.[17] The Jones Act

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[10] This would include seamen as well as other workers, passengers, or anyone else.
[11] "Wrongful act, neglect, or default" includes both negligence of a person and unseaworthiness of a vessel.
[12] As discussed below, a different threshold, at 12 nautical miles, applies for deaths on commercial aircraft.
[13] Some non-pecuniary losses *can* be recovered under the special DOHSA commercial aircraft provision – loss of care, comfort, and companionship.
[14] Stephanie Mencimer, "Screwed if By Sea," Slate, June 16, 2010.
[15] The effect of extending DOSHA to death occurring beyond 12 nautical miles is to permit general maritime law, as well as applicable State law, to apply up to 12 nautical miles out.
[16] For purposes of the Jones Act, "seamen" are defined to include all employees whose contribution to the function or mission of a particular vessel or group of vessels is significant in duration and nature. Chandris, Inc. v. Latsis, 515 U.S. 347 (1995). The primary factors for determining "seaman" status for purposes of the Jones Act are a strong connection to a particular vessel or group of vessels; the vessel, even if not actively navigating waters, was permitted to navigate waters; and if the vessel was undergoing repairs, the repairs were not so significant as to preclude its navigation for an extended period of time.
[17] The Jones Act includes a carve out for foreign oil workers if the accident occurs in the territorial waters of another country, even if a legal action could otherwise be brought in a United States court.

applies to a seaman employed in a "vessel"[18] in any navigable waterway in the course and scope of his or her employment. DOHSA and the Jones Act overlap in some respects, as the surviving family of a seamen who dies on the high seas could recover under either law.

But for wrongful death not on the high seas, or in cases of injury not resulting in death, only the Jones Act is applicable. Since the Deepwater Horizon is considered a vessel, the Jones Act would appear to apply to the families of the 11 men killed, as well as to the at least 17 men injured,[19] assuming they qualify as seamen.

Although the Jones Act permits the full range of compensatory damages in cases of personal injury (including non-pecuniary damages), in cases of wrongful death it does not permit recovery of post-death non-pecuniary losses suffered by the family. Section 3 corrects this disparity by amending the Jones Act to add non-pecuniary loss to the list of damages recoverable in wrongful death actions.

Sec. 4 – Repeal of Limitation of Liability Act (LOLA). The Limitation of Liability Act (dating from 1851) is the third federal law which could operate to arbitrarily limit the liability owed to dead and injured workers who were serving on the Deepwater Horizon. LOLA was conceived as a way of protecting owners of merchant sailing ships from uncertainty during extended periods when their ships were far away and out of their control, by limiting their liability to the value of the vessel and its cargo, unless the shipowner had "privity or knowledge" of the acts causing the injury, or if the vessel was unseaworthy. LOLA generally applies to all claims against the vessel owner, but has previously been held to not limit damages due under the Oil Pollution Act.[20]

Transocean has sought to use LOLA to limit its liability to essentially the discounted salvage value of the rig, estimated at $27 million.[21] Section 4 repeals this antiquated law, which has little relevance in our age of instant global communication and makes little sense at a time when there are precious few U.S. flagged ships who could even benefit from the liability limitations.

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[18] A "vessel" includes a structure or vehicle with "transportation function" – that is, its purpose and business must be, to some reasonable degree, the transportation of cargo, passengers, or equipment across navigable waters with the attendant risks therein, which has been held to include moveable drilling platforms. Wilkerson v. Teledyne Movible Offshore, 496 F.Supp. 1279 (D.C.Tex. 1980).

[19] Of the 11 workers aboard the DWH, nine were Transocean employees and two were employees of the contractor M-I SWACO. The two M-I SWACO employees were permanently assigned to the DWH and were thus considered "seaman." Even though M-I SWACO was not the owner of the vessel, they would be considered a land-based employer for purposes of the Jones Act.

[20] See e.g. Complaint of Metlife Captial Corp., 132 F.3d 818, 822 (1st Cir. 1997).

[21] Complaint and Petition for Exoneration from or Limitation of Liability, In re the complaint and petition of Triton Asset Leasing GmbH, Transocean Holdings LLC, Transocean Offshore Deepwater Drilling Inc., and Transocean Deepwater Inc., as owner, managing owners, owners pro-hoc vice, and/or Operators of the MODU Deepwater Horizon, in a Cause for Exoneration From or Limitation of Liability, Complaint and Petition No. 4:10-cv-01721 (S.D.Tex. May 13, 2010).

Sec. 5 – Amendments to the Class Action Fairness Act (CAFA). The Class Action Fairness Act (CAFA) (enacted in 2005), was designed to facilitate the transfer, or "removal," of class actions from state to federal court. Some courts have interpreted CAFA to limit the rights of States to bring actions in State courts on behalf of their own citizens.[22] Mississippi, one of the coastal States most impacted by the Deepwater Horizon incident, has expressed concern about the effect of CAFA on their ability to expeditiously pursue State law claims in State courts, which have more experience with State law.[23] Section 5 provides that CAFA does not apply to such actions.

Sec. 6 – Unenforceability of Spill-Related Secrecy Agreements. BP is reported to have attempted to require, as a condition for assistance, employment, or access to the affected area, an agreement not to provide information to the news media, investigators, or others regarding the oil spill, the clean-up and containment efforts, or the public health implications.[24] Section 6 specifies that agreements or directives of this nature are unenforceable, as they interfere with the public's right to be informed. There is an exception for court orders or government agency directives when there is a determination that the dissemination of information could endanger public health or safety.

Sec. 7 – Amendments to the Bankruptcy Code. Concerns have been raised regarding the potential for companies with widespread liability from offshore oil disasters to attempt to use a corporate bankruptcy filing to remove viable assets from the company, while leaving vast numbers of oil disaster victims with little recourse.[25] Section 7 amends the Bankruptcy Code to ensure that a purchaser of significant assets from a bankrupt company liable for claims arising from such a disaster will pay these claims if the bankrupt company fails to do so.

Sec. 8 – Effective Date. Section 8 specifies that the various statutory changes set forth above apply to pending and future cases. This is consistent with a number of statutory changes to liability law enacted in recent years.

II. Motion to authorize issuance of subpoenas to BP America for documents regarding its claims process relating to the Gulf oil spill

In order to follow up on the Committee's hearing on "Liability Issues Surrounding the Gulf Coast Oil Disaster," Chairman Conyers sent a letter on May 28, 2010 to Daryl Willis, BP's witness at the hearing and the head of BP's claims process, requesting that BP provide particular data regarding its claims process (letter and response attached). The primary objective of the request was to make the claims process more transparent to Congress and the public. While BP

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[22] See e.g., Louisiana ex rel. Caldwell v. Allstate Insurance Co., 536 F.3d 418 (5th Cir. 2008)

[23] See e.g., Testimony of Mississippi Attorney General Jim Hood, House Judiciary Committee Hearing on Liability Issues Surrounding the Gulf Coast Oil Disaster, 111th Congress.

[24] CNN Wirestaff, " Is BP Ordering Workers to Keep Silent?" CNN, June 10, 2010, available at http://www.cnn.com/video/?/video/us/2010/06/10/acosta.oil.bird.rescue.cnn.

[25] *See e.g.*, Andrew Ross Sorkin, "Imagining the Worst in BP's Future," NY Times, June 8, 2010.

has begun providing the Committee on a daily basis the information compiled for the U.S. Coast Guard, which shows in some level of detail the amounts they have paid out to claimants, they have not provided any information concerning unpaid claims. After unsuccessfully attempting to secure this broader set of data in conversations with BP representatives, Chairman Conyers sent another letter on June 16, 2010 to Mr. Willis reiterating the request to have BP, at a minimum, produce data on the overall amount of claims requested (letter attached). While discussions with BP are continuing, BP has not to date satisfactorily responded the Committee's short term request for this information on the aggregate amount of claims requested.

III. H. Res. 1455, Directing the Attorney General to transmit to the House of Representatives copies of certain communications relating to certain recommendations regarding administration appointments

The Committee will next consider H. Res. 1455, a resolution of inquiry introduced by Ranking Member Lamar Smith on June 17, 2010. This resolution is co-sponsored by the ranking member of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Mr. Sensenbrenner.

H. Res. 1455 directs the Attorney General to transmit to the House of Representatives:

> copies of any document, record, memo, correspondence, or other communication of the Department of Justice, including the Office of the Solicitor General, or any portion of any such communication, that refers or relates to--
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> (1) any guidance or recommendations made by the Department since January 20, 2009, regarding discussions of administration appointments by White House staff, or persons acting on behalf of White House staff, with any candidate for public office in exchange for such candidate's withdrawal from any election; or
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> (2) any inquiry, investigation, or review by the Department, including appointment of a Special Counsel, regarding such discussions.

A. What is a Resolution of Inquiry

Under the rules and precedents of the House of Representatives, a resolution of inquiry is a tool that can be used to seek information from the executive branch.[26] It "is a simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the

[26] Christopher Davis, *House Resolutions of Inquiry*, CRS Report, November 25, 2008, at 1 (quoting U.S. Congress, House, *Deschler's Precedents of the United States House of Representatives*, H. Doc. 94-661, 94th Cong., 2nd sess., vol. 7, ch. 24, § 8.

executive branch."[27] The typical practice has been to use the verbs "request" when asking for information from the President and "direct" when addressing executive department heads. Clause 7 of Rule XIII of the Rules of the House of Representatives provides that if the Committee to which the resolution is referred does not act on it within 14 legislative days, a privileged motion to discharge the resolution from the Committee is in order on the House Floor.

B. H. Res. 1455

H. Res. 1455 seeks documents regarding any guidance or recommendations by the Justice Department relating to "discussions of Administration appointments by any White House staff, or persons acting on behalf of White House staff, with any candidate for public office in exchange for such candidate's withdrawal from any election. It further seeks documents relating to "any inquiry, investigation, or review by the Department" regarding such discussions. The request is limited to documents generated during the current Administration, seeking only information regarding discussions that occurred "since January 20, 2009."

While the resolution does not mention any particular candidates for public office, it appears to relate to two current candidates for the United States Senate - Pennsylvania Representative Joe Sestak, and former Colorado state Senator Andrew Romanoff – as the resolution follows a series of letters related to those candidates between Congress and the executive branch over the past two months.[28] Representative Issa questioned the Attorney General about the Sestak matter at the Committee's May 13, 2010, oversight hearing, and the White House released a memorandum with respect to Congressman Sestak on May 28, 2010.

IV. H.R. 5281, the "Removal Clarification Act of 2010"

A. Relevant Statutory Background

1. Federal Officer Removal

Under the federal officer removal statute, 28 U.S.C. §1442(a), "any officer (or person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office" may remove the case to federal district court. The purpose of this statute is to allow federal officials, when acting "under color" of their office to remove a case out of State court and into federal court. The federal officer removal statute's basic purpose is to protect the federal government from interference with its operations.[29] It reflects Congress' view that federal officials be granted a federal forum to present federal defenses on the grounds that federal courts are better equipped to handle such matters.

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[27] *Id.*

[28] These include letters dated April 21, May 21, May 26, May 28, June 2, June 8, June 14, and June 15, 2010.

[29] *Watson v. Philip Morris Co, Inc.*, 551 U.S. 142, 148 (2007) ("This initial removal statute was '[o]bviously . . . an attempt to protect federal officers from interference by hostile State courts" (*citation omitted*)).

2. Procedure After Removal

If the federal court finds that the case is not properly removable and remands it to the State court, under 28 U.S.C. §1447(d) the remand order is not appealable. §1447(d) states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[30] The intention of §1447(d) is to prevent "prolonged litigation of questions of jurisdiction of the district court to which the causes is removed."[31]

B. Current Case Law on Removal

There are two uncertainties in the case law that the legislation is designed to address. First, the legislation will make clear that the federal removal statute applies to all State judicial proceedings in which a legal demand is made for a federal officer's testimony or documents. Second, it will make clear that the federal officer need not wait until actually subject to contempt in order to seek removal.

1. Pre-Suit Discovery

More than 40 States have procedures for pre-suit discovery that allow individuals to be deposed and required to produce documents even though they have not yet been sued.[32] The rationale behind allowing broad pre-suit discovery rules at the State level is that "prohibitions or severe restrictions on a private party's ability to undertake pre-suit discovery are inconsistent with pleading and certification requirements and other front-end obligations imposed on plaintiffs in civil litigation."[33]

While differing in scope and application, these States allow plaintiffs to use pre-suit discovery to confirm they are suing the proper defendant, identify unknown defendants, verify

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[30]The an exception to this restriction is that "an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." Section 1443 claims are civil rights claims. However, this exception is not relevant for purposes of clarifying the ability of an officer to remove under pre-suit discovery.

[31]*Osborn v. Haley*, 549 U.S. 225, 243 (2007) (citing *United States v. Rice*, 327 U.S. 742, 751 (1946)). The Supreme Court has held that 28 U.S.C. 1447(d) only applies to remands that are "based on a ground specified in [28 U.S.C.] 1447(c)," the only two of which are lack of subject matter jurisdiction and a defect in removal procedure. *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976).

[32]*See generally*, Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. Mich. J.L. Reform 217 (2007).

[33]*Id.* at 24.

factual allegations, and investigate potential claims.[34] Some allow only preservation of testimony; some allow both preservation of testimony and investigation of potential claims.[35]

2. Contempt Proceedings

Some courts have required that contempt or similar proceedings already have been initiated against the federal officer in order for §1442 to apply.[36] Not all courts are consistent on this issue. The court in *Louisiana v. Sparks* permitted removal without initiation of contempt proceedings, but did so based on a "peculiarity of Louisiana law."[37] Under Louisiana law, there was no meaningful period between refusing to comply with a subpoena and holding the non-compliant individual in contempt – that is, there was no contempt proceeding or order to show cause that could be removed to a federal forum.[38] The *Sparks* Court held that, under these circumstances, the mere issuance of the subpoena triggered §1442(a)(1).[39]

3. Application of Federal or State Law Upon Removal

The Rules of Decision Act provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases

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[34]"Liberalizing Rule 27 in the Twombly/Iqbal Era," James J. Pizzerias, November 11, 2009, *available at*: http://www.hausfeldllp.com/pages/articles/355/liberalizing-rule-27-in-the-twombly-iqbal-era.

[35] Federal officers also face similar issues in administrative proceedings. *See Kolibash v. Committee on Legal Ethics of West Virginia Bar*, 872 F.2d 571 (4th Cir. 1989) (allowing removal of State disciplinary action against United States Attorney); U.S. v. Pennsylvania Environmental Hearing Bd., 377 F. Supp. 545 (M.D. Pa. 1974) (noting in dicta that it is unclear whether defendant federal officials may remove State administrative proceedings). *But see also Matter of Gorence*, 810 F. Supp. 1234 (D.N.M. 1992) (an attorney disciplinary action against an Assistant United States Attorney is neither civil nor criminal in nature and therefore is not removable under 28 U.S.C.A. § 1442(b); *Matter of Doe*, 801 F. Supp. 478 (D.N.M. 1992) (State bar attorney disciplinary proceeding was not "criminal prosecution" nor "civil action" so as to be removable under § 1442).

[36] *Stallworth v. Hollinger*, 489 F.Supp.2d 1305, 1307 (S.D. Al. 2007) ("the appropriate time to invoke federal jurisdiction under 1442(a)(1) is the point at which contempt proceedings are initiated against the federal employee by the State court"); *Dunne v. Hunt*, 2006 WL 1371445 (N.D. Ill.) ("an action is commenced for purpose of 1442(a) once a federal official declines to comply with a subpoena and the subpoenaing party requests judicial intervention from the State court to enforce the subpoena"); *Hoste v. Shanty Creek Management, Inc.*, 246 F.Supp.2d 776, 782 (W.D.Mich.,2002) (initiation of contempt proceedings against federal officer based on failure to comply with State court order qualifies as State court "action" for purposes of federal removal statute.)

[37]978 F.2d 226 (5th Cir. 1992).

[38]*Id.* at 231-32.

[39]*Id.* at 232.

where they apply."[40] The Supreme Court in *Erie Co. v. Tompkins* held that federal courts sitting in diversity cases, when deciding questions of substantive law, are bound by State court decisions as well as State statutes.[41] *Erie* was therefore consistent with the Enabling Act in that the federal courts are to apply State substantive law and federal procedural law. Furthermore, under *Erie*, State law as announced by the highest court of the State is to be followed.[42] There is no federal common law and Congress has no power to declare that substantive rules of common law are applicable in a State proceeding.[43] However, federal courts continue to be free to use federal procedural law.[44]

Under Rule 27 of the Federal Rules of Civil Procedure, a plaintiff can file a petition to take depositions to "perpetuate testimony" before the action is filed.[45] Under Rule 27(a), a petitioner must show that: (1) it "expects to be a party to an action cognizable in a court of the United States, but is presently unable to bring it or cause it to be brought,"; and (2) allowing the deposition "may prevent a failure or delay of justice."[46] The majority of courts have rejected the view that Rule 27 can be used to assist a plaintiff in framing a complaint.[47]

Instead, most courts have limited Rule 27 to be used only for the "perpetuation of evidence" where pre-suit discovery is allowed only when testimony might be lost unless taken immediately.[48]

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[40] 28 U.S.C., §1652.

[41] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

[42] *Id.* at 78.

[43] *Id.*

[44] The Supreme Court held in *Hanna v. Plumer* that federal procedural rules trump State procedural rules if the source of the federal rule is the Federal Rules of Civil Procedure or another rule promulgate under the Rules Enabling Act. In addition, the federal rule at issue must be a constitutional rule or procedure within the scope of the Rules Enabling Act and there must be a conflict between the federal and State rules. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965).

[45] Fed. R. Civ. P. 27(a)(1).

[46] Fed. R. Civ. P. 27(a)(1)(3).

[47] Pizzerias, *supra* note 6. Pizzurusso notes that, in drafting Rule 27, the Advisory Committee did not specifically permit pre-suit discovery under Rule 27 because "'under the Federal Rules the method of pleading has been so simplified that there are few situations wherein a prospective litigant, who has a meritorious cause of action, would not be possession of sufficient facts upon which to frame a complaint.'"

[48] *See generally, Penn. Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1374-75 (D.C.Cir.1995) (Rule 27 requires a showing that there is "an immediate need to perpetuate testimony" and that "petitioner must establish danger that testimony may be lost); *In re Hopson Marine Transportation, Inc.*, 1996 WL 547467 (E.D.La. Sept.24, 1996) ("The rule was intended to apply to situations in which testimony might be lost to a prospective litigant unless taken immediately, without having to wait for a lawsuit or other legal proceeding to commence."); *Ash v. Cort*, 512 F.2d

Rule 27 creates an *Erie* issue because under *Erie* and the case law following *Erie*, the federal court will apply State substantive rules but federal procedural rules. This issue has yet to be litigated as to State pre-suit discovery rules.[49] However, if upon removal the Federal Rule controls, the petitioner may lose since Rule 27 does not generally permit the petitioner to use discovery to frame their complaint.

C. Changes to the Federal Office Removal Process

H.R. 5281 will make several changes to the federal officer removal process.

1. Allowing Federal Officials to Remove to Federal Court

The proposed legislation will address both the problem of when removal is proper in pre-suit discovery and contempt proceedings by codifying the approach taken in *Brown & Williamson Tobacco Corp. v. Williams*[50] and other cases. In *Brown & Williamson*, subpoenas were issued to two Members of Congress at the request of the tobacco company. The Members removed the matter to federal court under §1442(a)(1) and moved to quash the subpoenas. The D.C. Circuit held that the Members were entitled to remove the subpoena enforcement proceedings to federal court, even though they were not parties to the State court case and were not yet subject to contempt proceedings.[51]

While *Brown & Williamson* involved subpoenas issued in connection with an ongoing State court case, its rationale – that federal officials, including Members of Congress, need the right to removal in order to ensure that their ability to duly exercise their official authority under federal law cannot be impeded in the State courts – applies equally to pre-suit discovery.[52]

909, 911 (3d Cir.1975) (Rule 27 only applies "in that special category of cases where it is necessary to prevent testimony from being lost). *But see also*,*In re Bay County Middlegrounds Landfill Site*, 171 F.3d 1044, 1047 (6th Cir. 1999) (courts should allow Rule 27 pre-suit discovery when it may "prevent a failure of justice . . . and [is] likely to provide material distinctly useful to a finder of fact.")

[49]This issue has been raised before the federal courts before. *See* Letter from Irvin B. Nathan, General Counsel, U.S. House of Representatives to Charles R. Fulbruge III, Clerk, U.S. Court of Appeals for Fifth Circuit (January 11, 2010) (Document: 00 511000571 for Case: 09-10389)**,** ("federal courts have repeatedly exercise jurisdiction . . . over proceedings instigated pursuant to Rule 27 to perpetuate testimony from federal officials prior to a contemplated lawsuit. Notably, such a petition has been entertain *specifically* against Members of Congress and their aides" (*citations omitted*)).

[50]62 F.3d 408 (D.C. Cir. 1995).

[51]*Id.* at 414.

[52]*See generally Willingham v. Morgan*, 395 U.S. 402, 405 (1969); *North Carolina v. Carr*, 386 F.2d 129, 131 (4th Cir. 1967); *Tennessee v. Davis*, 100 U.S. 257, 262 (1879).

2. Procedure After Removal Under 28 U.S.C. §1447(d)

Currently, appellate review of a district court's remand to the state courts of an action against a federal official is not reviewable. H.R. 5281 amends 28 U.S.C. §1447(d) to provide that there can be an appeal to the federal circuit court if the federal district court rejects a §1442 removal and remands the matter to the State court.

3. No Changes to the Well-Established Limitations on Removal Under §1442(a)(1)

Federal courts are courts of limited jurisdiction. They can only adjudicate those cases which the Constitution and Congress authorize them to adjudicate. Cases that fall within this category are those involving diversity of citizenship or those involving a federal question. Federal question jurisdiction refers to claims "arising under" the U.S. Constitution, treaties, federal statutes, administrative regulations or common law.[53] The purpose of the "federal question" restriction is threefold: (1) elimination of possible bias in State courts; (2) uniform interpretation of federal law; and (3) greater expertise of federal judges on federal law.[54]

If claims do not arise under federal law, diversity jurisdiction is the only alternative means to get into the federal courts. Diversity jurisdiction can be established if at the time the lawsuit is filed potential defendants are of diverse citizenship, and the matter in controversy exceeds a value of $75,000.[55] Diversity jurisdiction exists to provide a neutral forum in cases where one or more of the parties are citizens of another State or country;[56] and to protect against local prejudice in State courts.

The proposed legislation will not alter the well-settled requirement that removal under section 1442(a)(1) must be predicated on the availability of a federal defense.[57] Nor will it result in removal of cases that belong in State court. Only the part of the case involving the

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[53] U.S. Const. Art. III, § 2.

[54] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 321 (2005).

[55] The diversity jurisdiction statute provides: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, and is between: (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign State; (3) citizens of different States and in which citizens or subjects of a foreign State are additional parties; and (4) a foreign State, defined in section 1603(a) of this title, as plaintiff, and citizens of a State or of different States." (28 USC § 1332(a)).

[56] *Dresser Industries, Inc. v. Underwriters at Lloyd's of London*, 106 F3d 494, 499 (3rd Cir. 1997); *J.A. Olson Co. v. Winona*, 818 F2d 401, 404 (5th Cir. 1987).

[57] *Mesa v. California*, 489 U.S. 121, 133-134 (1989) ("In sum, an unbroken line of this Court's decisions extending back nearly a century and a quarter have understood all the various incarnations of the federal officer removal statute to require the averment of a federal defense.")

federal officer is removed under 1442(a)(1). If that part is an ancillary proceeding, only the ancillary proceeding is removed, and the rest of the case remains in State court.[58]

[58]*See, e.g., State v. Rodarte*, 2010 WL 924099 (D. Colo. 2010) (removal jurisdiction limited to whether the State court was empowered to enforce the subpoena); *In re Subpoena In Collins*, 524 F.3d 249 (D.C. Cir. 2008); *Pollock v. Barbosa Group, Inc.*, 478 F.Supp.2d 410, 413 (W.D.N.Y. 2007).

C. Section-by-Section Analysis

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "Removal Clarification Act of 2010"

Sec. 2. Removal of Certain Litigation to Federal Courts. Subsection (a) defines the terms "civil action" and "criminal prosecution" to include any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued. This will include pre-suit discovery proceedings, and will also clarify that the federal officer need not wait until he or she is the subject of State court contempt proceedings to seek removal.

Subsection (a) also makes clear that the term "against" includes "directed to." This will allow federal officials to remove when they receive a judicial order even when the action is not directly against them.

Subsection (b) makes conforming amendments including inserting "capacity, for or relating to" and striking "sued."

Subsection (c) provides that, under 28 U.S.C. 1447(d), a decision by a federal district court to remand the proceeding to State court may be appealed.

V. H.R. 5566, the "Prohibiting Interstate Commerce in Crush Videos Act of 2010"

A. Background

The Supreme Court's decision in *U.S. v. Stevens* struck down 18 U.S.C. § 48, the federal prohibition on the creation, sale, and possession of "depictions of animal cruelty." Although the Court conceded that Congress had passed the 1999 law to stop interstate trafficking in so-called "crush videos," which show the killing small animals by stomping or other extremely cruel methods, the resulting law itself reached far more than that type of portrayal. As written, the Court said, the law "creates a criminal prohibition of alarming breadth."

In an 8-to-1 opinion, Chief Justice John G. Roberts wrote that "depictions of animal cruelty should not be added to the list" of the "few historic categories" of speech outside the scope of the First Amendment. Analyzing the law under traditional First Amendment principles, the Court found that it could not be enforced because of its "overbreadth"—i.e., the 1999 law was so broadly worded that its enforcement could reach portrayals of conduct that did not involve either cruelty or underlying illegal behavior.

The Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the "The Supreme Court's Decision Invalidating the Crush Video Statute" on May 26, 2010. According to expert testimony at that hearing, the Court appears to have left the door open for Congress to write a new, narrowly-tailored prohibition on the sale of crush videos.

B. Section-by-Section Analysis

Sec. 1. Short title. The act is the "Prevention of Interstate Commerce in Animal Crush Videos Act of 2010."

Sec. 2. Findings. Although the Committee generally prefers to pass legislation without Congressional findings, it is important to build a comprehensive legislative record for the Court when drafting a law in direct response to a recent decision. The findings in this bill demonstrate that Congress has carefully considered *Stevens* and lay a predicate for the bill to withstand First Amendment scrutiny. The findings include:

- The Federal Government and the several States have a compelling interest in preventing animal cruelty.
- Each of the Several States and the District of Columbia criminalize intentional acts of animal cruelty.
- The clandestine nature of certain acts of animal cruelty allows the perpetrators of such crimes to remain anonymous, thus frustrating the ability of Federal and State authorities to enforce the criminal statutes prohibiting such behavior.
- These criminal acts constitute an integral part of the production and market for so-called crush videos and other depictions of animal cruelty.
- The creation and sale of crush videos provide an economic incentive for, and are intrinsically related to, the underlying acts of criminal conduct.
- The United States has a long history of prohibiting the interstate sale of obscene and illegal materials.
- Animal crush videos appeal to the prurient interest and are obscene.

Sec. 3. Animal Crush Videos. Section 3 includes the following substantive provisions:

Prohibition. The bill would prohibit the sale or distribution of animal crush videos in interstate or foreign commerce. Unlike the statute struck down by the Court for overbreadth, this bill does not punish the creation or mere possession of depictions of animal cruelty.

Rule of Construction. As part of its overbreadth analysis, the Court noted that the original statute arguably reached the sale of hunting videos—which depict conduct that may not be cruel or illegal. This bill explicitly exempts depictions of hunting, trapping, fishing, and "customary and normal" veterinary or agricultural practices.

Definitions. Because animal crush videos are patently obscene, they are not entitled to protection under the First Amendment. Even after *Stevens*, Congress may prohibit their sale with a narrowly-tailored statute. Under this legislation, an "animal crush video" must:

- Be "obscene" (i.e., when taken as a whole and applying community standards, the depiction is patently offensive and appeals to the prurient interest, and contains no serious literary, educational, journalistic, scientific, or artistic value);

- Contain a visual depiction of actual conduct (not a simulation) in which an animal is intentionally crushed, burned, drowned, suffocated, or impaled; *and*

- Contain a visual depiction of actual conduct that violates a criminal prohibition on animal cruelty under federal law or the law of the state in which the video is created, sold, or otherwise distributed.

We believe that this narrow definition of the term will help the bill survive a traditional First Amendment analysis.

VI. H.R. 1020, the "Arbitration Fairness Act of 2009" and H.R. 1237, the "Fairness in Nursing Home Arbitration Act of 2009"

A. Background

1. The Spirit of Arbitration

Arbitration has been used as a means of dispute resolution for thousands of years.[59] It offers benefits over the traditional litigation process. When the subject matter of a dispute is highly technical, the parties to the dispute may choose an arbitrator with relevant expertise in the area. Because the arbitrator does not need to learn a new subject area, the arbitration hearing may be held sooner than a trial in court. The agreed upon arbitration process offers flexibility for the parties and the arbitrator. The entire arbitration process can result in a swifter outcome than litigation in the traditional court system, and therefore, may cost less. Further, because there are fewer avenues to appeal or delay an arbitration decision, a party to the dispute can enforce a decision quickly.

2. The Federal Arbitration Act

On February 12, 1925, Congress codified the use of arbitration through the Federal Arbitration Act.[60] Title 9 was adopted as a means to put arbitration agreements in commercial

[59]Jean R. Sternlight, Creeping Mandatory Arbitration: Is it Just?, 57 Stan. L. Rev. 1631, 1635 (Apr. 2005).

[60]9 U.S.C. § 1 et seq. For an analysis of the legislative history of the Federal Arbitration Act, see Margaret L. Moses, Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress, 34 Fla. St. U.L. Rev. 99, 101-114 (Fall 2006).

and admiralty contracts[61] on the same footing as other contracts, and as a way to avoid the costly and time consuming litigation process.[62] Arbitration law establishes alternative dispute resolution procedures for certain types of disputes[63] with an eye towards keeping those disputes out of court, thereby facilitating efficient adjudication.[64] The Supreme Court has interpreted the Act to supersede all state laws that conflict with the spirit of the Act.[65] In order to facilitate settlements by arbitration, Title 9 provides a strong presumption that courts will enforce determinations arrived at under this process.[66] Though avenues for judicial review of arbitration determinations exist and have been utilized by parties, the title itself has rarely been amended. The Supreme Court has upheld arbitration clauses in a wide array of contracts by recognizing Congress' expansive powers under the Commerce Clause.[67]

B. Mandatory Binding Arbitration Generally

As explained above, arbitration offers several benefits. With the expanding inclusion of arbitration agreements in consumer and employment contracts, for example, the benefits of arbitration would seemingly be enjoyed by several more individuals and groups. However, the drafting of arbitration agreements and the inherent qualities of arbitration have frequently benefited only one party to a dispute: the drafters of the arbitration agreement.[68]

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[61]As Representative Graham noted in the House floor debate in 1924, "[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts-an agreement to arbitrate, when voluntarily placed in the document by the parties to it." 65 Cong. Rec. 1931 (1924).

[62]See H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).

[63]Legislative history reveals that Congress intended the Federal Arbitration Act to cover disputes between merchants of approximately equal strength, Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary, 68th Cong. 10 (1924), but not involving disputes with workers, Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9, 14 (1923), or disputes where the arbitration agreement could be considered an adhesion contract, Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary, 68th Cong. 15 (1924).

[64]Matthew Parrott, Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution, 75 Fordham L. Rev. 2685, 2692. (Apr. 2007).

[65]Preston v. Ferrer, 128 S. Ct. 978, 987 (2008) ("When parties agree to arbitrate all questions arising under a contract, the [Federal Arbitration Act] supersedes state laws. . .").

[66]See 65 Cong. Rec. 1931 (1924).

[67] See, e.g., Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[68]See e.g., Ann E. Krasuski, Comment, Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents, 8 DePaul J. Health Care L. 263, 267 (2004).

Arbitration does not have a fixed set of rules or structure. Therefore, the parties to an arbitration agreement may create the applicable rules and structure. Usually though, the parties to a consumer or employment contract do not negotiate the arbitration agreement. Instead, the service provider, manufacturer, or employer drafts the arbitration agreement, and may manipulate the arbitration in its favor. For example, because arbitration avoids the public court system, the drafter may limit processes and rights associated with traditional litigation.[69] These lost benefits and rights include lower initial financial hurdles,[70] pretrial discovery,[71] proximity to the resolution forum,[72] formal civil procedure rules, access to counsel,[73] class action options,[74] and fairness.[75] Mandatory binding arbitration clauses may even negate the protection of some federal statutes.[76] The drafter of the arbitration clause may choose a favored arbitrator or

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[69]See John O'Donnell, Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers 10 (2007).

[70]Arbitration clauses may impose high costs on consumers such as requiring travel to a distant forum or selection of a high-fee arbitrator, possible expenses which a plaintiff filing in a local court would not have to incur. See Lisa B. Bingham, Control over Dispute-System Design and Mandatory Commercial Arbitration, Law & Contemp. Probs., Winter/Spring 2004, 221.

[71]See Katherine Palm, Note, Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate, 14 Elder L.J. 453, 478 n.172 (2006). But see Peter B. Rutledge, Chamber of Commerce Institute for Legal Reform, Arbitration - A Good Deal for Consumers: A Response to Public Citizen 26-27 (April 2008).

[72]See Ziva Branstetter, Nursing Home Policy Challenged, Tulsa World, March 4, 2002, at 1 (Oklahoma nursing home's arbitration clause requires residents to travel to New Mexico at their own expense for arbitration proceeding).

[73]The lower probability of victory and legal fees may discourage some attorneys from representing individuals in arbitration proceedings. See Donna Harris, Hudson: Arbitration defuses lawsuits; We can work it out - or not, Automotive News, Feb. 6, 2006, at 56. ("arbitration provisions in consumer contracts keep some plaintiffs' lawyers at bay."). See also Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761, 783-784 (2002).

[74]Arbitration clauses may bar individuals from joining with others to form a class action, which has been a means by which plaintiffs have been able to pool resources to spread out the costs in time, attorney fees, and expenses. See Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 Wm. & Mary L. Rev. 1 (2000).

[75]Arbitration has introduced the "repeat provider" phenomenon. Advocates posit that arbitration organizations favor ruling on behalf of businesses because of the financial incentive to ensure that businesses are pleased with the results of the arbitration and thus hire the arbitration organization repeatedly. See Carrie Menkel-Meadow, Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR, 15 OHIO ST. J. ON DISP. RESOL. 19, 35-37 (1999). See also Stephen Landsman, ADR and the Cost of Compulsion, 57 STAN. L. REV. 1593, 1614-1615 (Apr. 2005).

[76]See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89-92 (2000) (where court held that a right guaranteed by the Truth in Lending Act was prevented by an adhesion arbitration clause). See also Garrett v. Circuit City

arbitration provider.[77] Most importantly, arbitration decisions may be kept confidential without any public records, and thus may provide no precedent for future parties to understand.[78]

In addition to drafting favorable arbitration clauses, a manufacturer or service provider may require that the user agree to the arbitration agreement. Some consumers have unknowingly agreed to arbitration clauses simply by receiving them in envelope inserts[79] or in product boxes,[80] or using a credit card.[81] A consumer may be bound by an arbitration clause he or she may not have received[82] or even known about it.[83] If an individual even becomes aware of the imposed arbitration clause, he or she may reject the clause, but by doing so, usually severs the entire relationship. For instance, if a credit card user rejects a newly imposed arbitration agreement, the account is usually closed and the balance may become due. Especially in this economy, the credit card user may choose to agree to arbitrate over having to repay the balance immediately. Thus, for some, arbitration is no longer voluntary, but effectively becomes mandatory.[84]

Stores, Inc., 449 F.3d 672, 677 (5th Cir. 2006) (where court held that USERRA does not preempt the terms of an employment agreement containing an arbitration clause).

[77]The major arbitration providers include the American Arbitration Association, Forthright (formerly the National Arbitration Forum), and JAMS, which set their own procedures, contract with agencies and companies to arbitrate future disputes, and provide arbitrators and panels to hear disputes. However, reports have concluded that some companies use particular arbitration providers because they virtually always rule on behalf of the company. See John O'Donnell, Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers (2007). But see Peter B. Rutledge, Chamber of Commerce Institute for Legal Reform, Arbitration - A Good Deal for Consumers: A Response to Public Citizen (April 2008).

[78]Russel Myles and Kelly Reese, Arbitration: Avoiding the Runaway Jury, 23 Am. J. Trial Advoc. 129, 141 (1999). See also John O'Donnell, Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers 7 (2007).

[79]See Ting v. AT&T, 319 F.3d 1126, 1134 (9th Cir. 2003).

[80]See Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7h Cir. 1997).

[81]Credit Card Practices: Fees, Interest Rates, and Grace Periods: Hearing Before the Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs, 110th Cong. (2007) (prepared statement of Alys Cohen, Staff Attorney, National Consumer Law Center).

[82]See Marsh v. First USA Bank, 103 F. Supp. 2d 909, 916-918 (N.D. Tex. 2000).

[83]See Washington Mut. Fin. Group v. Bailey, 364 F.3d 260, 264-66 (5th Cir. 2004) (holding that an arbitration agreement was enforceable against illiterate consumers, even though they had no knowledge of the arbitration requirement); Am. Gen. Fin. Servs., Inc. v. Griffin, 327 F. Supp. 2d 678, 683 (N.D. Miss. 2004) (upholding arbitration agreement even though blind consumer had no knowledge of agreement).

[84]Critics of arbitration label it "mandatory," "compelled," or even "cram down" arbitration. See, e.g., Carrie Menkel-Meadow, Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR, 15 Ohio St. J. on Disp. Resol. 19, 39 (1999); David S. Schwartz, Enforcing Small Print to Protect Big Business:

Proponents of mandatory arbitration remind opponents of the freedom to contract[85] and contend that a consumer may choose not to use the service or product. An employee may also choose to find other employment. Arbitration agreements, however, are not usually negotiated outside of a business-to-business context and the ubiquity of arbitration agreements leaves consumers and employees no choice but to accept such agreements.[86] Further, by imposing contracts on a "take-it-or-leave-it" basis, businesses are creating an alternative legal environment which arguably may not be fair or voluntary and instead runs counter to the congressional intent of the Federal Arbitration Act.[87]

C. Legislative History

1. 111th Congressional Hearings

On May 5, 2009, the CAL Subcommittee held a hearing on the credit card industry's use of arbitration.[88] The witnesses included Professor Christopher R. Drahozal, the Chair of the Consumer Arbitration Task Force of the Searle Civil Justice Institute; David Arkush, an attorney with Public Citizen; Michael Donovan, an attorney who spoke on behalf of the National Association of Consumer Advocates; and Professor Richard Frankel of the Drexel University School of Law.

Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L. Rev. 33; Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L.Q. 637, 638 (1996). In contrast, proponents of arbitration suggest "mandatory" is unfair because consumers always have the option to refuse the services or products connected to binding arbitration. See, e.g., Elizabeth Hill, Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association, 18 Ohio St. J. on Disp. Resol. 777, 780 (2003); Stephen J. Ware, Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen), 29 McGeorge L. Rev. 195, 201 (1998) ("The consumer is free to put the pen down without signing the form. There is no duress in the typical 'adhesion' contract. A consumer who contracts in such circumstances does so voluntarily.").

[85]Arguably, arbitration agreements may be different than contracts generally because such agreements may not only affect substantive rights but also affect the procedure by which those rights are vindicated. See William W. Park, Symposium: International Commercial Arbitration: The Specificity of International Arbitration: The Case for FAA Reform, 36 VAND. J. TRANSNAT'L L. 1241, 1289 (Oct. 2003).

[86]See Mandatory Binding Arbitration Agreements: Are They Fair for Consumers: Hearing Before the Subcom. on Comm. and Admin. Law, 110th Cong. (2007) (prepared statement of F. Paul Bland, Jr., Staff Attorney, Public Justice).

[87]During the passing of the Federal Arbitration Act, Congress did not intend to allow binding arbitration agreements on individuals if the contracts were between parties of unequal bargaining power, such as is the case here. Prima Paint Corp. V. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967) (Black, J. dissenting) (citing Hearing on S. 4213 and S. 4214 Before the Subcom. of the S. Com. on the Judiciary, 67th Cong., 9-11 (1923)).

[88]The Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?: Hearing Before the Subcomm. on Comm. and Admin. Law, 111th Cong. (2009).

On September 15, 2009, the CAL Subcommittee held a hearing titled, "Mandatory Binding Arbitration: Is It Fair and Voluntary?"[89] The first panel of witnesses included Representative Linda Sánchez (CA-39) and Representative Hank Johnson (GA-4) who discussed their respective legislation amending the Federal Arbitration Act. The second panel of witnesses included Alison Hirschel, a professor at the University of Michigan Law School and who testified on behalf of NCCNHR: The National Consumer Voice for Long-Term Care; Cliff Palefsky, a principal with McGuinn, Hillsman & Palefsky, P.C., and who spoke on behalf of the National Employment Lawyers Association; Stuart Rossman, an attorney with the National Consumer Law Center; and Stephen Ware, a professor at the University of Kansas School of Law.

2. 110th Congressional Action

During the 110th Congress, the CAL Subcommittee held several hearings and markups of legislation regarding the Federal Arbitration Act.

On June 12, 2007, the CAL Subcommittee held an oversight hearing on "Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?"[90] The witnesses included F. Paul Bland, Jr., an attorney at Public Justice; David S. Schwartz, a professor at the University of Wisconsin Law School; Jordan Fogal, a writer from Texas; and Mark Levin, a partner at Ballard Spahr Andrews & Ingersoll, LLP.

On October 25, 2007, the CAL Subcommittee held a legislative hearing on H.R. 3010, the "Arbitration Fairness Act of 2007".[91] The witnesses included Laura MacCleery, Director of Public Citizen's Congress Watch Division; Richard Naimark, Senior Vice President of the American Arbitration Association; the Honorable Roy E. Barnes, of the The Barnes Law Group, LLC; Ken Connor, an attorney with Wilkes & McHugh, P.A.; Deborah Williams, a franchisee from Maryland; Cathy Ventrell-Monsees, an attorney with the Law Offices of Cathy Ventrell-Monsees, on behalf of the National Employment Lawyers Association; Professor Peter Rutledge, of the Catholic University of America, Columbus School of Law; and Theodore G. Eppenstein, Esq., an attorney with Eppenstein and Eppenstein.

[89]Mandatory Binding Arbitration: Is it Fair and Voluntary?: Hearing Before the Subcom. on Comm. and Admin. Law, 111th Cong. (2009).

[90]Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?: Hearing Before the Subcom. on Comm. and Admin. Law of the H. Com. on the Judiciary, 110th Cong. (2007).

[91]The Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcom. on Comm. and Admin. Law of the H. Com. on the Judiciary, 110th Cong. (2007).

On March 6, 2008, the CAL Subcommittee held a legislative hearing on H.R. 5312, the "Automobile Arbitration Fairness Act of 2008".[92] The witnesses included Rosemary Shahan, President of Consumers for Automobile Reliability and Safety; Erika Rice, a consumer from Ohio; Richard Naimark, Senior Vice President of the American Arbitration Association; and Hallen Rosner, Esq., an attorney with Rosner & Mansfield, LLP.

On June 10, 2008, the CAL Subcommittee held a legislative hearing on H.R. 6126, the "Fairness in Nursing Home Arbitration Act of 2008".[93] The witnesses for the hearing included William J. Hall, MD, on behalf of the AARP; Linda Stewart, RN, a nurse from Texas; Gavin J. Gadberry, Esq., an attorney with Underwood, Wilson, Berry, Stein and Johnson, PC; and Ken Connor, an attorney with Wilkes & McHugh, P.A.

On June 15, 2008, the CAL Subcommittee held a markup session at which it ordered H.R. 3010, H.R. 5312, and H.R. 6126 favorably reported, without amendment.

On July 30, 2008, the Committee met in open session and ordered the bill H.R. 6126 favorably reported without amendment, by a roll call vote of 17 to 10, a quorum being present.

D. H.R. 1020, the "Arbitration Fairness Act of 2009"

In response to many of the concerns expressed regarding the widespread use of pre-dispute, mandatory arbitration agreements in consumer, employment, and franchise contracts, on February 12, 2009, Representative Hank Johnson introduced H.R. 1020, the "Arbitration Fairness Act of 2009".[94] The legislation currently has 114 co-sponsors. In summary, H.R. 1020 would amend the Federal Arbitration Act to require that agreements to arbitrate employment, consumer, franchise, or civil rights disputes may be valid and enforceable only if they were made voluntarily and after the dispute had arisen. The legislation would address many of the concerns mentioned above. Supporters of the legislation contend that the imposition of pre-dispute mandatory arbitration agreements has effectively eliminated rights to jury trials, discouraged plaintiffs from filing claims, and secured advantages for those who draft the arbitration clauses. Opponents of the legislation contend that arbitration is faster, less costly and more efficient than litigation, and some empirical studies reveal that arbitration is fair. A section-by-section analysis of H.R. 1020 follows:

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "Arbitration Fairness Act of 2009".

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[92]The Automobile Arbitration Fairness Act of 2008: Hearing on H.R. 5312 Before the Subcom. on Comm. and Admin. Law of the H. Com. on the Judiciary, 110th Cong. (2008).

[93]The Fairness in Nursing Home Arbitration Act of 2008: Hearing on H.R. 6126 Before the Subcom. on Comm. and Admin. Law of the H. Com. on the Judiciary, 110th Cong. (2008).

[94]H.R. 1020 is nearly identical to the bill, H.R. 3010, which the CAL Subcommittee marked up in the 110th Congress.

Sec. 2. Findings. Section 2 describes how Supreme Court decisions have changed the original intent of the FAA to expose growing numbers of individual consumers and employees to binding mandatory arbitration agreements. It also describes how mandatory binding arbitration favors corporate repeat players at the expense of individuals.

Sec. 3. Definitions. Section 3 amends section 1 of the FAA (9 U.S.C. § 1). It expands exemptions from the FAA to include "employment dispute", "consumer dispute", and "franchise dispute". Section 3 defines those terms and "pre-dispute arbitration agreement". An employment dispute means any dispute between an employer and employee arising out of the relationship as defined by the Fair Labor Standards Act. A consumer dispute means any dispute between an individual person who seeks or acquires property, services, money, or credit for non-business purposes and the seller or provider of those goods or services. A franchise dispute means any dispute between a franchisor and franchisee arising out of or relating to the contract establishing the franchise. A pre-dispute arbitration agreement means any agreement to arbitrate a dispute before the dispute arises.

Sec. 4. Validity and Enforceability. Section 4 amends section 2 of the FAA (9 U.S.C. § 2). Section 4 establishes that agreements to arbitrate employment, consumer, or franchise disputes will not be enforceable if they are entered before the actual dispute arises. The legislation also covers disputes arising under civil rights statutes and statutes regulating contracts. Section 4 requires a court rather than an arbitrator to decide whether the FAA applies to disputes over contracts which include arbitration clauses. Section 4 reinforces that the FAA does not apply to collective bargaining agreements.

Sec. 5. Effective Date. Section 5 provides that the legislation shall apply to claims and disputes arising on or after the date of enactment of the legislation.

E. H.R. 1237, the "Fairness in Nursing Home Arbitration Act of 2009"

In addition to the concerns expressed above, arbitration is conducted in a secretive setting in which no public records are produced.[95] The secrecy of arbitration may keep harmful material out of the view of individuals who may make choices of services based on safety records. Specifically, prospective residents of long-term care facilities would benefit from the transparency of the history of safe treatment of residents of long-term care facilities.[96]

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[95]Russel Myles and Kelly Reese, Arbitration: Avoiding the Runaway Jury, 23 Am. J. Trial Advoc. 129, 141 (1999).

[96]Available statistics reveal that from 1999 until February 2005, 15.5% to 29.3% of nursing homes were cited by the Centers for Medicare and Medicaid Services - the Federal agency which oversees compliance with federal nursing home standards - for actual harm or immediate jeopardy. U.S Gov. Accountability Off., Nursing Homes: Despite Increased Oversight, Challenges Remain in Ensuring High-Quality Care and Resident Safety, GAO-06-117 (Dec. 2005). The most recent report reveals that about 1 in 5 nursing homes have serious deficiencies. U.S Gov. Accountability Off., Nursing Homes: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses, GAO-08-517 (May 2008). Although this information is

Arbitration affords the long-term care industry secrecy, and this secrecy is significant in light of the frequent media exposés and government reports which highlight egregiously poor care of residents.[97]

With the disadvantages written in arbitration agreements in many admission contracts, the free market would seem to eliminate such agreements if residents could choose to live in long-term care facilities that do not impose mandatory binding arbitration agreements. However, residents and their families often do not have much time to conduct a thorough investigation of each facility in the vicinity or to compare contracts.[98] Instead, the resident's and his or her family's focus is on the quality and assortment of provided services. When residents are being admitted, many do not read carefully the admission materials, which often contain mandatory binding arbitration clauses, nor do their family members who are exceedingly stressed during the process.[99] If a resident even becomes aware of the imposed mandatory arbitration clause, he or she may not understand the clause[100] or may even reject the clause, but by doing so, the resident forgoes the opportunity to be admitted into the long-term care facility. Thus, arbitration no longer becomes voluntary, but becomes mandatory and individuals have little choice but to accept the arbitration clause.

In fact, the controversies surrounding arbitrating personal injury disputes involving residents and nursing homes or assisted living facilities has caused some arbitration providers to

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generally available, these numbers reflect responses to sporadic surveys, which may not include all relevant information.

[97]Krasuski, at 300 nn.262-263.

[98]See Denese A. Vlosky, "Say-so" as a Predictor of Nursing Home Readiness, 93 J. Fam. Consumer Sci. 59 (2001).

[99]See Howell v. NHC Healthcare-Fort Sanders, 109 S.W.3d 731 (Tenn Ct. App. 2003); Raiteri ex rel Cox v. NHC Healthcare/Knoxville, Inc., No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at 2 (Tenn. Ct. App. Dec. 30, 2003). See also Robert Hornstein, The Fiction of Freedom of Contract - Nursing Home Admission Contract Arbitration Agreements: A Primer on Preserving the Right of Access to Court Under Florida Law, 16 St. Thomas L. Rev. 319, 320 (2003); Maureen Armour, A Nursing Home's Good Faith Duty to Care: Redefining a Fragile Relationship Using the Law of Contract, 39 St. Louis U. L.J. 217, 226 n.37 (1994).

[100]See Romano ex rel. Romano v. Manor Care, Inc., 861 So.2d 59, 61 (Fla. App. 2003), reh'g denied, Manor Care, Inc. v. Romano, 874 So.2d 1192 (Fla. 2004) (where the nursing home administrator also did not understand the meaning of the arbitration clause).

refuse to arbitrate such disputes unless ordered by a court to do so.[101] These arbitration providers include the American Arbitration Association and the American Health Lawyers Association.[102]

In response to the concerns particular to nursing home and other long-term care facility contracts, on February 26, 2009, Representative Linda Sánchez introduced H.R. 1237, the "Fairness in Nursing Home Arbitration Act of 2009".[103] The legislation currently has 29 co-sponsors. In summary, H.R. 1237 amends the Federal Arbitration Act to make unenforceable agreements to arbitrate disputes arising out of a contract between a long-term care facility and a resident, if that agreement was made before the dispute arose. The legislation would address many of the concerns regarding the use of pre-dispute mandatory arbitration agreements in nursing home contracts. A section-by-section analysis of H.R. 1237 follows:

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "Fairness in Nursing Home Arbitration Act of 2009."

Sec. 2. Amendments. Section 2 amends the Federal Arbitration Act by adding a new section, Section 17, to the Act. Section 2 defines a "long-term care facility" to include any facility which is reimbursed for services by Medicare or Medicaid, or is an assisted living facility, or is an adult foster care facility, but excludes adult day care facilities. Section 2 also states that pre-dispute arbitration agreements between a long-term care facility and a resident of such a facility are invalid or unenforceable, whether they were entered into at any time during or after the admission process.

Sec. 3. Effective Date; Application of Amendments. Section 3 provides that the amendments made by this legislation will apply only to contracts made, amended, altered, modified, renewed, or extended on or after the enactment of this legislation.

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[101]See "Healthcare Due Process Protocol," American Arbitration Association/American Bar Association/American Medical Association Commission on Healthcare Dispute Resolution, Final Report, July 27, 1998, available at http://www.adr.org/sp.asp?id=28633; Elise Dunitz Brennan, Commentary, Board Modification to the Rules of the Alternative Dispute Resolution Service of American Health Lawyers Association, Health Lawyers News, Jan. 2004, at 21-22.

[102]The Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary, 110th Cong. (2007) (response by Richard Naimark, Senior Vice President of the American Arbitration Association, to a question posed by Rep. Linda T. Sánchez, on why AAA no longer arbitrates health care disputes); see also Joelle Babula, Valley Health Care: Group Won't Arbitrate Medical Cases, Las Vegas Rev. J., Aug. 7, 2003, at 1-B.

[103]H.R. 1237 is identical to the bill, H.R. 6126, which the Committee on the Judiciary reported favorably, without amendment, during the 100th Congress.