



TESTIMONY BEFORE THE  
COMMERCIAL AND ADMINISTRATIVE LAW SUBCOMMITTEE  
OF THE  
HOUSE JUDICIARY COMMITTEE

ON

THE FAIRNESS IN NURSING HOME ARBITRATION ACT OF 2008

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Chairwoman Sanchez, Ranking Member Cannon, and distinguished members of the Subcommittee, I am William Hall, a member of AARP's Board of Directors. On behalf of AARP's nearly 40 million members, thank you for holding today's hearing on the Fairness in Nursing Home Arbitration Act (H.R. 6126/S. 2838) and pre-dispute arbitration clauses in long-term care facility contracts. I also run a large geriatrics program that provides care for about half of all nursing home residents in the Rochester, New York area. Today I'm speaking on behalf of AARP's members and those who are current or future residents of long-term care facilities and their families.

Pre-dispute arbitration clauses in long-term care facility contracts are harmful to residents and their families. These arbitration clauses force a Hobson's choice -- waive the right to seek redress in the courts or get care in another facility, assuming there is one in their area without an arbitration clause. My testimony focuses on the situations that individuals and their families face as they enter long-term care facilities, the harmful impact of pre-dispute arbitration clauses, and AARP's support for the Fairness in Nursing Home Arbitration Act (H.R. 6126/S. 2838).

### **Quality in Long-Term Care Facilities**

Long-term care facilities include an array of providers such as nursing homes, assisted living facilities, and other residential care facilities that provide a home to

residents and supportive services to assist them with daily activities, such as eating, dressing, and bathing. Such facilities may also provide services such as nursing care, rehabilitation, or therapy. Approximately 16,000 nursing homes in this country provide care to about 1.5 million of our most vulnerable residents. Including individuals who use nursing homes for short-term rehabilitation, about three million people use nursing homes each year. And about one million Americans live in assisted living facilities.

Quality of care and quality of life for residents in long-term care facilities can vary greatly. And, while the quality of care in our nation's nursing homes has improved over the last 21 years since the enactment of federal nursing home quality standards in the Omnibus Budget Reconciliation Act of 1987 (OBRA '87), much more needs to be done. Many facilities do provide high quality care, but there are also too many facilities that show significant quality deficiencies that can cause harm to residents on their annual inspections.

The Government Accountability Office (GAO) has found that a small but significant share of nursing homes continue to experience quality of care problems. Two years ago, one in five nursing homes in this country were cited for serious deficiencies – deficiencies that cause actual harm or place residents in immediate jeopardy. GAO has also noted variations among states in citing such deficiencies, and that deficiencies are understated when found in federal comparative surveys but not in corresponding state surveys. In addition, some

facilities consistently provide poor quality care or are “yo-yo” facilities that go in and out of compliance with quality standards. Almost half the nursing homes reviewed by GAO for a March 2007 report – homes with prior serious quality problems – cycled in and out of compliance over five years and harmed residents. Quality also varies greatly in other types of long-term care facilities, such as assisted living, which are regulated at the state level.

### **Long-Term Care Facilities and Arbitration Clauses**

When older adults suffer a decline in health or are discharged from the hospital and are unable to care for themselves, these individuals, their families, or other caregivers are often faced with the daunting task of finding nursing home care. Often these decisions are made in a crisis situation and individuals may be pressured to accept the first available bed, without enough time to adequately compare nursing homes in order to find the one that offers the best quality of care or to consider other options. Thus, they may select a facility they would not have otherwise chosen if they had the luxury of shopping around and comparing facilities.

People seeking nursing home admission are among the frailest Americans. In 2006, nearly half (45 percent) of all residents had dementia and more than half depended on a chair for mobility or were unable to walk without extensive or constant support from others. In 2004, nearly 80 percent of residents needed

help with four or five activities of daily living (bed mobility, transferring, dressing, eating and toileting). Most nursing home residents are elderly: 88 percent are 65 or older and 45 percent are 85 or older. About 75 percent of nursing home residents age 65 and older are women, and at the time of admission, over half of nursing home residents are widowed. Nursing home residents in recent years have had higher disease prevalence and multiple conditions are more common, indicating an increasingly sicker population, according to a Kaiser Family Foundation analysis. Nursing home residents are also often on multiple medications that must be managed and coordinated to prevent adverse reactions.

Prospective assisted living residents can be similar to prospective nursing home residents. Assisted living facilities also may provide care to frail residents who could be cared for in a nursing home or whose care would have, until recently, been provided in a nursing home.

It is often in this context of crisis and vulnerability that prospective nursing home residents and their families face the nursing home admissions process. People seeking nursing home admission or someone acting on their behalf are typically given a lengthy, complicated contract. Many facilities, such as nursing homes and assisted living facilities, include provisions in their admissions contracts requiring that residents and their families agree to forego the use of the court system to resolve a wide range of future disputes. Instead, they must agree to

submit their cases which may involve abuse, assault, malnutrition, neglect, and even death to arbitration. The admissions contract typically is presented on a “take it or leave it” basis, with no room for the resident to negotiate the terms.

Clearly, most people seeking nursing home admission are focusing on the quality and range of services available, and are not thinking about possible future disputes. When they are presented with admissions contracts, they often do not know that an arbitration requirement is buried in the fine print of the multi-page document. In the rare instance in which they are aware of the clause, they often cannot understand its technical language or its significant implications for their rights.

In most instances, facilities present the contract after the person decides to apply for admission, rather than beforehand, when the individual or his or her representative would have more time to assess the contract provisions and how they affect their rights. And there may not be sufficient time for the resident or his or her representative to sit down with a nursing home representative or a trusted advisor who can answer questions and explain the terms of the contract and the arbitration provision. In addition, even if there is time for a conversation with the facility representative, that person is not always adequately informed about the details of the arbitration provisions or able to answer questions from

the perspective of the resident or family, especially about the important legal rights involved.

Even if prospective residents and their families are aware that the admissions contract contains an arbitration provision, they often do not understand what it means. Nor do they realize the many rights and protections they would forego in arbitration. Arbitration usually is extremely expensive for consumers and places severe restrictions on many of their rights, including their ability to obtain documents and other evidence which makes it difficult for them to prove their case and gives the facility a considerable advantage.

In addition, unlike judges and juries, arbitrators do not have to follow prior court or arbitral decisions; their decisions and the facts about the dispute typically are confidential, so no one else can learn about them; and the bases for appealing an arbitrator's decision are extremely limited; misinterpretation or misapplication of the law is not a basis for appeal. Arbitrators usually do not need to issue written decisions, making appeals even more difficult. Consumers usually have limited, if any, knowledge on which to base their choice of an arbitrator – if they have a choice - and arbitrators may have a bias toward “repeat players” – to get a company's future business, an arbitrator may not want to rule against such a party too often or order them to pay large awards to other parties, even when such awards are justified. Finally, these disadvantages to consumers from the

arbitration process itself are all in addition to the fact that the consumers have waived their basic right of access to the courts and a jury.

However, consumers strongly support maintaining the right of nursing home residents and their families to take nursing homes to court in cases of neglect and abuse. For example, an AARP poll of Arkansas residents age 40 and older released in January 2007 found that 85 percent of respondents strongly support maintaining the right of nursing home residents and their families to take nursing homes to court for neglecting and abusing nursing home residents. Another one in ten somewhat support this action.

Potential residents and their families also do not have equal bargaining power with the facility and are virtually powerless to negotiate the arbitration provision or to gain admission to the facility without it, assuming they are aware of it.

Potential residents and their families must often make quick decisions in stressful situations and deal with an immediate need for services – foregoing the care and services is not an option. If other nursing homes also have arbitration clauses in their admissions contracts, the individual effectively has no choice among facilities. Individuals and their families also deal with potential financial limitations and stress and anxiety from having to give up independence and leave one's home to enter a nursing home. Arbitration was designed to provide a mechanism for two parties with equal bargaining power to resolve a dispute.



Potential residents of long-term care facilities, such as nursing homes and assisted living facilities, do not have equal bargaining power with the facilities.

A court case from New Mexico provides a good example of the unequal bargaining power between potential nursing home residents, their families and the facility, and the circumstances that frequently exist at the time of admission. New Mexico's court of appeals ruled that the arbitration clause in a nursing home contract was unenforceable so that the family of a woman, Ruth Painter, who died three days after entering the home can pursue their case in court alleging inadequate care. The court agreed with the family and an *amicus* brief filed by AARP and NCCNHR: The National Consumer Voice for Quality Long-Term Care that the heavily medicated, seriously ill woman could not be expected to understand the fine print in her contract that limited her legal rights.

Ruth Painter was 57 years old, suffered from several serious health conditions (including heart disease, chronic obstructive pulmonary disease, and atrial fibrillation), and was taking numerous prescription medications when she was taken by emergency transport to a medical center. When she was discharged more than a week later, she was physically unable to care for herself and she and her family decided she needed to move to a nursing home. She and her son visited a nursing home and she and her daughter returned the next day so she could be admitted.

While she was being admitted, Ms. Painter became short of breath and was literally propped up in bed receiving oxygen during the admissions process. Three days after admission, her health seriously deteriorated and she was taken by ambulance to a hospital where she died. Her family sued the facility, alleging negligent care and breach of contract. The facility moved to dismiss the suit based on a clause in the admissions contract that required that all disputes be resolved in arbitration.

A trial court declared the arbitration clause unconscionable and unenforceable based on its findings that: Ruth Painter had a 10th-grade education; for more than a year prior to her death her mental condition seemed to decline and her son had assumed responsibility for her finances; and the admissions agreement was 41 pages long and contained various other documents, including several contractual agreements, health directives, questionnaires and facility policies. According to the court, "Much of the [Arbitration] Agreement is in small print, and [the admissions director] admitted it was often inconsistent and could be confusing." Ultimately, the trial court ruled that "[r]equiring a heavily medicated, seriously ill individual, such as Ruth Painter, who had limited education and comprehension to sign an Arbitration Agreement that was hidden away in the middle of a confusing and complicated Admission Agreement, would be unconscionable."

## **Fairness in Nursing Home Arbitration Act**

AARP believes that it is essential for vulnerable residents to have access to the courts when they are injured, neglected, or abused. AARP thus supports the bipartisan Fairness in Nursing Home Arbitration Act (H.R. 6126/S. 2838) introduced by Chairwoman Linda Sanchez (D-CA) and Representative Ileana Ros-Lehtinen (R-FL) and Senators Mel Martinez (R-FL) and Herb Kohl (D-WI).

H.R. 6126 would make pre-dispute arbitration provisions between long-term care facilities and a resident of the facility or a person acting on behalf of the resident unenforceable, ensuring that future and some current residents of long-term care facilities and their families are not forced into arbitration or terms that may have a substantial adverse impact on their rights. This legislation is also important because it would provide uniform, nationwide protection against such pre-dispute arbitration provisions. While some states have taken action to address this important issue, consumers, regardless of the state in which they live, should not be forced to give up their rights to seek redress through the courts to resolve cases of injury, neglect, and abuse. This bill would protect this essential right of older adults, individuals with disabilities, and their families, including some of the most vulnerable Americans.

As the Subcommittee considers this legislation, we would like to work with you and the bill's sponsors to help ensure this bill would apply to all current residents

of long-term care facilities, not just those whose pre-dispute arbitration agreements are made, amended, altered, modified, renewed or extended on or after the date of enactment of the bill. The protections provided under this legislation should be available to all current long-term care facility residents. Some may argue that arbitration clauses in long-term care facility admission contracts are needed to limit costly lawsuits against facilities. But the answer to this concern is not to limit an individual's legal rights and protections, and require that they waive their right to resolve disputes in court. The answer is to improve the underlying care and services provided by facilities to decrease the likelihood of disputes that need to be resolved in court. This would help residents, their families, and the facilities themselves.

## **Conclusion**

We appreciate the opportunity to testify and the subcommittee's work on the important issue of pre-dispute arbitration clauses and their adverse impact on current and future long-term care facility residents and their families. AARP encourages the subcommittee to pass the Fairness in Nursing Home Arbitration Act (H.R. 6126) and expand its scope to include all current long-term care facility residents. We look forward to working with you and your colleagues on both sides of the aisle to protect the rights of current and future long-term care facility residents and their families.