Testimony of

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Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights, and the Special Committee on Aging
on S. 2838, the Fairness in Nursing Home Arbitration Act

June 18, 2008

Chairman Kohl, Ranking Members Smith and Hatch, and members of the Special Committee and the Subcommittee:

Thank you for inviting me to speak on behalf of NCCNHR: The National Consumer Voice for Quality Long Term Care.[1] For more than 30 years, NCCNHR has provided a national voice in Washington for long-term care residents, their families, ombudsmen, and citizen advocates, such as the Michigan Campaign for Quality Care which I represent. Twenty-nine years ago, I started my career as an intern at the House Select Committee on Aging. And for the past 23 years, I have been representing long term care consumers on issues ranging from their initial admissions to facilities to their sometimes tragic experiences of abuse or neglect in those facilities.

Residents and families often sign admissions agreements at times of enormous stress in their lives. Admissions following a hospital discharge or sudden crisis such as the loss of a caregiver occur in a rush because the applicant needs care immediately. Seeking admission to a facility is not a slow and deliberative process in which consumers carefully consider every page of the admissions package and compare it to admissions agreements of other nearby facilities.

Most consumers are unaware that the contract includes an arbitration clause, and they may not understand the provisions even if they notice them. They don't know that the facility chooses the arbitrator and that arbitrators are often health care industry lawyers who have an incentive to find for the facility and limit awards so that they will be hired by the provider for future disputes. They don't understand that arbitration can be very costly for the consumer, that arbitration awards are generally significantly lower than jury awards, and that there is no real ability to appeal. Moreover, the last thing on most consumers' minds at the time of admission is how they will seek a remedy if something goes wrong. They enter a long term care facility looking for care and compassion, not litigation or arbitration.

Even if the long term care facility explains the binding arbitration clause, most consumers will not challenge it. First, nothing about the long term care admissions process is like a negotiation between two equal parties. Consumers sign whatever is presented to them as required paperwork. Second, no resident or family wants to get off on the wrong foot with a facility that will hold the fragile resident's very life in its hands. No one wants to be marked a troublemaker before the resident has even entered the facility, especially about a legal provision applicants do not expect to ever affect them.

Of course, sometimes, things do go grievously wrong as in the case of Vunies B. High, a 92 year old Detroit area resident with dementia. She was the sister of the legendary boxer Joe Louis, a graduate of Howard University, an accomplished woman and a long

[1] NCCNHR (formerly the National Citizens' Coalition for Nursing Home Reform) is a nonprofit membership organization founded in 1975 by Elma L. Holder to protect the rights, safety and dignity of America's long-term care residents

time English teacher and counselor in Detroit public schools. Ms. High's family placed her in an assisted living facility because they thought she would be safe there. They did not realize it was an unlicensed facility. On a frigid night in February of this year, staff of the facility failed to notice when Ms. High wandered out of that facility wearing only her pajamas. She froze to death. Her family then discovered that the admissions agreement they signed contained a mandatory, binding arbitration provision on page 11. It, like many mandatory arbitration clauses, stated that in the case of any dispute:

- The *provider* had the sole and unfettered option to choose to resolve the dispute in binding arbitration;

- The *provider* would choose the location for the arbitration (and presumably the arbitrator);

- The *provider* would choose the rules (the American Arbitration Association of the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedures for Arbitration);

- And the *provider* retained *its* right to institute any action against Ms. High in any court of competent jurisdiction, though Ms. High was required to forego that option.

In addition, the agreement contained a limitation of only $100,000 in damages in addition to medical costs incurred, a provision Ms. High's family also did not recall signing. Because of this agreement, Ms. High's family may not have an opportunity to seek redress in the courts for her tragic and preventable death. That is particularly troubling because the potential for litigation provides an important incentive for facilities to provide better care, a way for individuals who have been wronged in sometimes harrowing ways to hold negligent providers accountable, and a method for ensuring, in contrast to arbitration, that these abuses are brought to light. Family members tell me and tell NCCNHR that they utilize lawsuits as a last resort when the system has failed them and their loved one, so that other residents will not suffer the same fate.

At the same time we are seeing a dramatic rise in the number of mandatory arbitration clauses, government studies continue to provide disturbing evidence of serious neglect and avoidable injuries and deaths in nursing homes and systemic failure among regulators to cite or remedy the problems. According to a Government Accountability Office report to you, Senator Kohl, and Senator Grassley last month, twenty percent of nursing homes have been cited for putting their residents at risk of serious injury or death – a shockingly high figure that GAO says understates the actual jeopardy and harm residents are experiencing.

It is true that we have an elaborate nursing home enforcement system. But as Senator Grassley remarked in 2007, that enforcement system is broken. In my home state, a shortage of surveyors means that complaints take an average of more than 90 days to investigate — and sometimes as long as a year. In that period, records are lost or altered,

witnesses and evidence disappear, and surveyors are no longer able to substantiate even extremely serious and legitimate complaints. And if the problem cannot be substantiated, no penalty can be imposed.

Moreover, while surveyors miss a lot at nursing homes, licensed assisted living facilities are inspected much less often and less rigorously, and regulators in my state have few remedies if problems are discovered. And there is no enforcement in unlicensed facilities like the one in which Ms. High resided. Thus, an overburdened enforcement system in nursing homes, a limited system in licensed assisted living, and a nonexistent enforcement system in unlicensed homes cannot be an adequate substitute for litigation in egregious cases.

Opponents of this bill lament that funds that should be spent on resident care are allegedly diverted to pay for litigation and liability insurance. But I want to be clear about two points: First, what really costs taxpayers unfathomable sums of money is poor care itself. Poor care leads to unnecessary and frequent hospitalization for conditions that never should have arisen, and to surgery, specialists' visits, medications, and durable medical equipment to address ills that never should have been suffered. When a Wisconsin nursing home ignored for more than five days Glen Macaux's doctor's orders to inspect and assess his surgical site, the resulting infection caused septic shock, excruciating pain, severe depression, and total disability – and hospital bills of almost $200,000.

Second, even if providers were spared the expense of litigation and increased insurance premiums—by tipping the playing field very much in their own favor—there is no guarantee that savings will be invested in adequate staffing, training, supplies, or in creating safe and appealing environments. Nothing prevents providers from using those funds to increase investors' returns instead of improving residents' care and lives. In fact, as testimony in several recent Congressional hearings has disclosed, nursing home corporations are setting up complex operating and financing structures that hide ownership, bleed funding out of the facilities for corporate profits, limit accountability, and reduce nursing staff and quality of care. We should be concerned about corporate abuse of public funds, not with residents seeking justice in the courts when they become victims of neglect and abuse caused by corporate greed.

Finally, let me note that we are not anti-arbitration. We are only opposed to pre-dispute, binding, mandatory arbitration. Arbitration was not intended as an end run around justice or a way to keep wrongdoing out of the public eye. In cases in which consumers have already suffered grievous harm, Congress should not permit long term care facilities to add the bitter burden of denial of the fundamental right of access to the courts.

Thank you.