Testimony of

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House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law hearing regarding
"Mandatory Binding Arbitration: Is it Fair and Voluntary"

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Chairman Conyers, Chairman Cohen, Ranking Member Franks and members of 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 for long-term care residents, their families, ombudsmen, and consumer advocates, such as the Michigan Campaign for Quality Care which I represent. Thirty years ago, I started my career as an intern at the House Select Committee on Aging. And for the past 24 years, I have been a public interest lawyer 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 admission agreements at times of enormous stress in their lives and when they feel they have very limited options. Seeking admission to a facility is rarely a slow and deliberative process in which consumers carefully evaluate the quality and services at numerous facilities and ponder every page of the often voluminous admissions package to compare it to admission agreements of other nearby facilities. Frequently, the admission occurs after a medical crisis or the loss of a caregiver when the resident needs an immediate placement. Indeed, sixty percent of nursing home admissions are directly from a hospital. The facility to which the applicant is being admitted will often be the only facility that has a bed, will accept the resident, or is close to the resident's family and friends.

Most consumers who sign these contracts are unaware that they include an arbitration clause, and they may not understand the provisions even if they notice them. They don't know that the 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 may not have any other options and they generally sign whatever paperwork is presented to them. Second, no resident or family wants to get off on the wrong foot with a facility that will hold the fragile resident's 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.

[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

Unfortunately, sometimes things do go grievously wrong as they did for 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 who served as a long 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. On a frigid night in February of last 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 contained a mandatory, binding arbitration provision. 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;
- The *provider* would choose the rules (the rules of the American Arbitration Association or of the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure 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 as well as her right to a jury trial in any matter that was litigated in court.

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. When Ms. High's family sought redress for her tragic and preventable death, the facility, relying on the arbitration agreement, moved to dismiss the case. Fortunately, the federal court determined that the contract was unenforceable for a number of reasons including:

- The unequal bargaining power of the parties;
- The lack of discussion of the provision with Ms. High or her family;
- Ms. High's obvious limitations and confusion;
- The unilateral nature of the arbitration provision;
- The fact that the agreement was presented to Ms. High and her family *after* she had already moved into the facility; and
- The context of presenting the agreement in an elder care facility.

The High family was lucky the arbitration agreement was invalidated. Courts routinely enforce onerous arbitration provisions signed under the most coercive conditions. When

arbitration agreements are enforced, harrowing abuse or neglect may never be brought to light and an important incentive for facilities to provide quality care is therefore lost. As Yale Law Professor Judith Resnik notes in a forthcoming book, "[S]ecrecy about both processes and outcomes is often a signature of [arbitration]…."[2] She cites a federal court decision that observes that confidentiality is part of the character of arbitration itself to prevent it from having precedent and gaining the trappings of adjudication.[3] And that secrecy often includes banning disclosures by participants, barring attendance by third party observers, and excluding or limiting the media.[4] As Professor Resnik concludes, "The [Alternative Dispute Resolution] packet…is often a set of procedures without transcripts, public observers, or reported outcomes."[5]

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. According to a Government Accountability Office (GAO) report in 2007, twenty percent of nursing homes have been cited for putting their residents at risk of serious injury or death – a shockingly high figure in an industry that receives more than $75 billion taxpayer dollars through Medicare and Medicaid each year. And the GAO says that state surveys *understate* the actual jeopardy and harm residents are experiencing.

It is true that we have an elaborate nursing home enforcement system. But that enforcement system is, like many nursing homes themselves, seriously understaffed and enormously challenged by its vital responsibilities. In my home state, a shortage of surveyors has meant that complaints take weeks, months, and sometimes as long as a year to investigate. 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 when the neglect or abuse cannot be substantiated, no penalty can be imposed.

Moreover, while surveyors miss a lot at nursing homes, licensed assisted living facilities—which do not have the benefit of federal regulation—are inspected even 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.

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2 *See* Chapter 14 in Judith Resnik and Dennis Curtis, REPRESENTING JUSTICE: THE RISE AND FALL OF ADJUDICATION AS SEEN FROM RENAISSANCE ICONOGRAPHY TO TWENTY-FIRST CENTURY COURTHOUSES (Yale University Press, forthcoming 2010).

3 *Id.* citing Iberia Credit Bureau, Inc. v. Cingular Wireless, 379 F. 3d 159, 175 (2005).

4 *Id.*

5 *Id*

Proponents of forced pre-dispute arbitration agreements 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 – as well as 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. The Government Accountability Office showed that when Congress increased Medicare funding for skilled nursing facilities specifically to improve nurse staffing levels, the amount of nursing care residents received was virtually unchanged. And the Centers for Medicare and Medicaid Services recently reduced Medicare funding to nursing homes because it concluded that much of the therapy Medicare paid for was given by aides, not licensed physical therapists, and that it was often given to residents concurrently in groups while the government was billed for individual treatments. Moreover, as testimony in several 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 that is often caused by corporate greed.

Finally, let me note that we are not anti-arbitration. We are only opposed to pre-dispute, binding, forced 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.