ANDREWS LITIGATION REPORTER

THOMSON WEST

Nursing Home

COMMENTARY

REPRINTED FROM VOLUME 11, ISSUE 6 / SEPTEMBER 12, 2008

Bill Would Alter Legal Landscape for Nursing Home Arbitration Agreements

By Lori C. Ferguson, Esq.

Anti-arbitration legislation aimed directly at nursing homes and other long-term-care providers is working its way through Congress. The Fairness in Nursing Home Arbitration Act of 2008, H.B. 6126 and S. 2838, would make pre-dispute arbitration agreements between nursing homes and their residents unenforceable.[1] The plaintiffs' bar and consumer and elder advocacy groups are lobbying vigorously in support of this bill, while the long-term-care industry opposes it. This article discusses the impact the FNHAA would have on arbitration law and the arguments for and against the legislation.

Current Law Favors Arbitration

Currently, arbitration is a favored means of dispute resolution.[2] Under federal law, both pre-dispute and post-dispute written arbitration agreements regarding transactions that involve interstate commerce are enforceable as any other contract under state law.[3] The Federal Arbitration Act provides:

> A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[4]

The Federal Arbitration Act, passed in 1925, "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution."[5] The FAA preempts state laws that would hold arbitration agreements to a higher standard or impose additional requirements not applicable to other contracts.[6]

The U.S. Supreme Court has "interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce' — words of art that ordinarily signal the broadest permissible exercise of Congress' commerce clause power."[7]

Pre-dispute arbitration agreements would become invalid and unenforceable, even if entered into by the most sophisticated parties.

To "affect commerce," "only the general practice need bear on interstate commerce in a substantial way."[8] Therefore, the threshold for qualifying as a "transaction involving commerce" has not been difficult for nursing homes and other long-term-care providers to meet.

Nursing homes that participate in the Medicare or Medicaid programs can easily show that their business involves interstate commerce.[9] Other factors also evidence transactions in interstate commerce, such as purchasing food, supplies, medical forms and equipment from out of state; accepting payments from out-of-state private insurers; admitting residents from other states; and hiring contractors from out-of-state companies.[10]

Arbitration agreements themselves may specify in a choice-of-law provision that the FAA governs.[11]

Relying on the enforceability and favored status of arbitration agreements under federal law, in recent years many nursing homes and other long-term-care facilities

have entered into pre-dispute arbitration agreements with residents at or near the time of admission.

FNHAA Makes Pre-Dispute Arbitration Agreements Unenforceable

If enacted, the Fairness in Nursing Home Arbitration Act would result in a complete reversal of federal arbitration law as it applies to long-term-care facilities. Current law favors pre-dispute arbitration agreements and holds them to the same scrutiny as any other contract under state law. The FNHAA would make such agreements between long-term-care facilities and their residents unenforceable.

Currently, the key provision of the House version of the FNHAA states as follows:

> A pre-dispute arbitration agreement between a long-term-care facility and a resident of such facility (or person acting on behalf of such resident, including a person with financial responsibility for such resident) shall not be valid or specifically enforceable.[12]

Under the FNHAA, a "pre-dispute arbitration agreement" means an agreement to arbitrate a dispute that arises after the agreement to arbitrate is made.[13] The law would apply to a pre-dispute arbitration agreement entered into at any time during or after the admission process.[14]

Despite the legislation's title, the FNHAA would affect more than just nursing homes. The legislation broadly defines "long-term-care facility." In addition to "skilled nursing facilities" and "nursing facilities" as defined under Sections 1819(a) and 1919(a), respectively, of the Social Security Act, the House version of the bill defines a "long-term-care facility" to include:

> [A] public facility, proprietary facility or facility of a private nonprofit corporation that—
>
> (i) makes available to adult residents supportive services to assist the residents in carrying out activities such as bathing, dressing, eating, getting in and out of bed or chairs, walking, going outdoors, using the toilet, or obtaining or taking medication; and
>
> (ii) provides a dwelling place (which may contain a full kitchen and bathroom) for residents in order to deliver supportive services described in clause (i), that includes common rooms and other facilities appropriate for the provision of such services to residents of the facility.[15]

The Senate version of the FNHAA contains similar language and also includes facilities that "may make available to residents home health care services, such as nursing and therapy."[16] Facilities or portions of facilities that have as their "primary purpose to educate or to treat substance abuse problems" are excluded from the definition of long-term-care facilities.[17]

The FNHAA therefore would govern a broad range of care facilities, including assisted-living facilities, group homes, sub-acute hospitals and arguably even acute-care hospitals.

The law would apply prospectively only.[18] However, pursuant to the House bill, any amendment, alteration, modification, renewal or extension of an existing arbitration agreement would trigger the application of the FNHAA.[19]

If enacted as currently drafted, the FNHAA would breed numerous legal disputes regarding its application. Under the terms of the legislation, such questions would be determined under federal law and by the courts, not an arbitrator.[20]

The FNHAA's proponents say residents and their families must "check their rights at the door" when they seek admission to a long-term-care facility.

Questions surely will arise as to whether a particular agreement is subject to the FNHAA. For example, was the agreement entered into prior to rather than during or after the admissions process? Was an agreement that pre-dated the enactment of the FNHAA amended, altered, modified, renewed or extended after its enactment? Is one of the contracting parties a "long-term-care facility" as defined by the FNHAA?

Questions may even arise, given the right parties and facts (perhaps a privately funded group home), as to whether the FNHAA exceeds the reach of the commerce clause insofar as it purports to apply to all long-term-care facilities under its broad definition.

The FNHAA, if enacted, would significantly alter the legal landscape with respect to arbitration agreements between long-term-care providers and their residents. Pre-dispute arbitration agreements, previously favored and enforceable under federal law, would become invalid and unenforceable, even if entered into by the most sophisticated parties.

Arguments in Favor of FNHAA

The FNHAA is one of several anti-arbitration bills before Congress.[21] Consumer advocate groups and attorneys

who represent them back these bills.[22] Constituencies that favor restrictions on the enforceability of arbitration, particularly in the long-term-care setting, do so based on perceived unfairness in the way pre-dispute arbitration agreements are created, inequity in the arbitration process, and costs to the resident in terms of fees and reduced arbitration awards.

The main focus of the arguments in support of the FNHAA is fairness for vulnerable individuals who are presented take-it-or-leave-it arbitration agreements upon admission to nursing homes, resulting in the coerced or unknowing waiver of their constitutional right to have an impartial judge or jury adjudicate their claims.

Supporters of the FNHAA often relate anecdotes that involve long-term-care residents who have themselves or through representatives unwittingly entered into arbitration agreements and learn after they are grievously injured that they have no recourse to the courts.[23] The stories often involve an arbitration agreement that is an actual or perceived prerequisite to admission to the long-term-care facility and that contains limits on recoverable damages.[24]

Armed with these sympathetic anecdotes, proponents of restrictions on pre-dispute arbitration agreements argue that the process in which nursing homes and other long-term-care facilities enter into arbitration agreements unfairly takes advantage of the vulnerability of the residents and their families.[25]

They emphasize that residents and their family members often are under a great deal of emotional stress when contracting for a nursing home admission.[26] Nursing home admissions often occur after an acute illness or injury or under other time-pressured scenarios, and residents and their families are not afforded the luxury of comparison shopping and detailed examinations of the admissions package.[27]

Backers of the FNHAA further argue that long-term-care providers do not adequately disclose the arbitration provisions and their terms to new residents.[28] Admissions paperwork is often voluminous, and arbitration provisions may be contained deep within the admissions agreement or "hidden" among the paperwork.[29]

The FNHAA supporters further argue that even when the admissions coordinator does point out and explain the arbitration provision, residents and their families do not understand the implications and are reluctant to refuse to sign what they perceive to be required admissions paperwork.[30]

According to proponents of the FNHAA, an inequality of bargaining power between long-term-care facilities and residents makes any meaningful negotiation regarding arbitration clauses virtually nonexistent.[31]

Members of the pro-FNHAA camp, particularly attorneys who represent residents and their families in lawsuits against long-term-care facilities, often point out what they perceive to be inadequacies of the arbitration process as well.

They argue that in arbitration discovery is "emasculated" and that arbitration agreements often impose "draconian limits" on the number of witnesses who can be deposed or called at the arbitration, the number of experts who can be called, and the length of time to be allotted for the arbitration hearing.[32]

The parties have the same causes of action, defenses and potential remedies available in arbitration as would be available in a court.

Some criticize the perceived lack of transparency in the arbitration decision-making process and the lack of appellate remedies.[33]

Another purported downside of the arbitration process is "repeat player" bias. Proponents of the FNHAA argue that because the arbitral forum typically is selected by the nursing home, which often provides repeat business to that forum, there is a bias in favor of the nursing home in arbitrations.[34] Arbitration foes blame this perceived repeat-player bias for lower awards that result from arbitrations compared to jury verdicts.[35]

The cost of arbitration versus traditional litigation, particularly in light of reduced awards, is another factor supporters of the FNHAA cite in support of the bill. Attorney Kenneth Connor testified before a House subcommittee that:

> The reality of pre-dispute binding mandatory arbitration is that the awards are going to come at a tremendous discount to what juries ordinarily would award. Our experience has been, typically, that these awards are about 10 percent of what would be recoverable by a jury. Bringing nursing home cases often can cost several hundreds of thousands of dollars. They are very expensive, they are very complex and they are often very protracted.[36]

Connor further noted that the emotional response of jurors that often leads to punitive damages awards against nursing homes is absent in arbitrations.[37] The financial incen-

tive for plaintiffs and their attorneys to pursue nursing home liability cases is significantly reduced in arbitration.

In response to the long-term-care industry's argument that forbidding pre-dispute arbitration agreements would result in more litigation costs at the expense of resident care, proponents of the FNHAA cast doubt that any cost-savings will be invested in resident care. Rather, they surmise that any cost savings will help to inflate the companies' bottom lines.[38]

In short, the FNHAA's proponents argue that the current state of affairs often requires long-term-care residents and their families to "check their rights at the door" when they seek admission to a long-term-care facility.[39] Making pre-dispute arbitration agreements between long-term-care facilities and their residents invalid and unenforceable through the FNHAA "will prevent a nursing home corporation with greater bargaining power from forcing residents and their families into arbitration through a non-negotiable contract entered into prior to the dispute."[40]

Arguments Against the FNHAA

The long-term-care industry opposes the FNHAA's wholesale restriction of facilities' rights to enter into pre-dispute arbitration agreements with residents.[41]

Arguments opposing the legislation emphasize that arbitration is a fair, lawful, expedient and efficient means of dispute resolution; that courts can and do invalidate unconscionable arbitration agreements; and that indiscriminate invalidation of pre-dispute arbitration agreements is unnecessary, unfair and, ultimately, costly.

The American Health Care Association together with its National Center for Assisted Living, a national association of nursing homes and assisted-living facilities, has staunchly opposed the FNHAA, which it views as a "misguided attempt to restrict and weaken the Federal Arbitration Act."[42]

In testimony before a Senate subcommittee regarding the legislation, Kelly Rice-Schild, a member of the AHCA's board of governors, said that in response to excessive liability costs and a litigious environment in the late 1990s, the long-term-care industry undertook various initiatives to enable facilities to continue to operate.[43] In addition to advocating for state and national tort reform legislation, the industry pursued arbitration as an alternative to traditional litigation.[44]

Rice-Schild said the AHCA "supports the use of arbitration clauses as a viable option for long-term-care providers to resolve legal disputes" and believes that "fair and timely resolution — the kind that is often the product of arbitration — is in the best interest of both the consumers and their care providers."[45]

The long-term-care industry and supporters of alternative dispute resolution argue that arbitration is a fair, accessible, expedient and efficient means of resolving disputes for both parties.[46] They note that arbitrators are neutral and procedures fair and balanced.

In response to the "repeat player" argument, arbitration supporters challenge the validity of data supporting any such bias and explain that any tendency of arbitrators to find in favor of businesses can be explained otherwise.[47] For example, a company may be adept at settling meritorious cases, so the majority of cases that reach the award stage in arbitration favor the company.

Arbitration functions as an alternate venue for litigating disputes, and the parties have the same causes of action, defenses and potential remedies available in arbitration as they would in a trial court.[48]

In response to arguments about arbitration filing fees and arbitrator fees, arbitration proponents note that arbitration contracts often provide that the company will absorb the arbitrator's fees and that the overall cost of submitting a claim to arbitration is less than if the claim were filed in court.

To counter FNHAA proponents' anecdotes about residents being pressured or duped into signing arbitration agreements, opponents of the legislation focus on the fair and forthright manner in which many long-term-care facilities present the agreements.

Many agreements contain prominent language advising residents that they are waiving their right to a jury trial. Residents can and have refused to sign pre-dispute arbitration agreements with long-term-care facilities. The AHCA has touted its model arbitration agreement form that does not require agreement to arbitration as a condition of admission and provides a 30-day rescission period for the resident.[49]

Opponents of arbitration restrictions like those in the FNHAA also have cited studies that indicate arbitration is fair to consumers and businesses alike.[50] For example, noting that most disputes, whether pursued through the courts or arbitration, are resolved through settlement, the AHCA has cited a risk management firm's conclusion that "arbitration reduces the time to settlement by more than two months on average."[51]

The U.S. Chamber Institute for Legal Reform sponsored a study that showed consumers defending against debt

collection cases in California fared better in arbitration than in court.[52] Other proponents of arbitration have cited surveys and studies showing consumers prefer arbitration to litigation in court and obtain better results.[53]

Opponents of the FNHAA note that current law protects against unfair arbitration agreements.[54] Under the Federal Arbitration Act, arbitration agreements, just like any other contract, may be invalidated if they are found to be unconscionable.[55] The courts, therefore, provide protection against unconscionable agreements on a case-by-case basis. The courts are well-equipped to handle this role, and wholesale invalidation of pre-dispute arbitration agreements between long-term-care facilities and their residents is overkill.

Supporters of arbitration also argue that arbitration reduces the costs involved in litigating disputes.[56] This may allow residents and their families to retain a greater proportion of any financial settlement.[57]

Opponents of the FNHAA have testified in Congress that since more than half the total amount of financial settlements are going directly to attorneys rather than to the residents and family members, arbitration's decreased costs means more of the financial award will go to the resident instead of the attorneys.[58]

The wholesale invalidation of pre-dispute arbitration agreements is overkill.

The reduced cost of dispute resolution through arbitration also benefits long-term-care providers and their residents, according to FNHAA opponents. Citing increased costs of litigation, they contend that nursing homes and other long-term-care facilities would have to devote more dollars to litigation rather than patient care if they lose the right to enter into pre-dispute arbitration agreements.[59]

The president of the California Assisted Living Association recently commented that "efforts to weaken the ability to arbitrate disputes, as attempted by H.R. 6126 and S. 2838, will ultimately lead to more litigation and increased costs of care."[60]

Another argument against the FNHAA is that its passage would result in even more crowded court dockets since disputes that are currently resolved privately through arbitration would end up in the courts. Therefore, resolution of disputes through private arbitration also results in reduced costs to taxpayers.[61]

While it is true that the FNHAA does not affect the enforceability of arbitration agreements entered into after disputes arise, the likelihood of parties agreeing to arbitration after a dispute arises is much less than prior to a dispute.[62] The FNHAA basically removes arbitration as a viable option for alternative dispute resolution because, once a dispute arises, parties are unlikely to contract out of the right to litigate in court because of tactical advantages that each party may perceive from litigation.[63] It is only before a dispute arises that both parties have an incentive to choose the forum for dispute resolution that reduces costs by agreeing to arbitration.[64]

In short, the long-term-care industry and others who oppose the FNHAA want to preserve their right to enter into pre-dispute arbitration agreements. Isolated incidents of unfair contracting can be addressed on a case-by-case basis rather than through the wholesale invalidation of pre-dispute arbitration agreements.

Opponents of the FNHAA maintain that preserving both the facilities' and the residents' rights to enter into enforceable pre-dispute arbitration agreements promotes use of a fair, efficient and expedient means of alternative dispute resolution that ultimately results in lower costs to the parties and to taxpayers.

Conclusion

For long-term-care providers and residents, the FNHAA would eviscerate the favored status pre-dispute arbitration agreements have held under the Federal Arbitration Act. Future pre-dispute arbitration agreements between long-term-care facilities and their residents would, under most circumstances, be invalid and unenforceable. The FNHAA is an important bill to watch for the long-term-care industry and for attorneys on both sides of disputes involving long-term care.

Notes

[1] H.R. 6126, 110th Cong. (2008); S. 2838, 110th Cong. (2008).

[2] *Volt Info. Scis. v. Bd. of Trustees*, 489 U.S. 468, 476 (1989).

[3] *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

[4] 9 U.S.C. § 2.

[5] *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008).

[6] *Doctor's Assocs.*, 517 U.S. at 687-88.

[7] *Citizens Bank v. Alafabco Inc.*, 539 U.S. 52, 56 (2003).

[8] *Id.* at 57.

[9] *See, e.g., In re Nexion Health at Humble Inc.*, 173 S.W. 3d 67, 69 (Tex. 2005).

[10] *See, e.g., Vicksburg Partners v. Stephens*, 911 So. 2d 507, 515 (Miss.

2005); *Owens v. Coosa Valley Health Care*, 890 So. 2d 983, 988 (Ala. 2004).

[11] *See Lewis v. Circuit City Stores*, 500 F.3d 1140, 1145 (10th Cir. 2007).

[12] H.R. 6126, § 2(a); *see also* S. 2838, § 3(4) (containing nearly identical language, as follows: "A pre-dispute arbitration agreement between a long-term-care facility and a resident of a long-term-care facility [or anyone acting on behalf of such a resident, including a person with financial responsibility for that resident] shall not be valid or specifically enforceable.").

[13] H.R. 6126, § 2(a); *see also* S. 2838, § 2(5).

[14] H.R. 6126, § 2(a); S. 2838, § 3(4).

[15] H.R. 6126, § 2(a).

[16] S. 2838, § (2)(5).

[17] H.R. 6126, § 2(a); S. 2838, § (2)(5).

[18] H.R. 6126, § 3(a); S. 2838, § 4.

[19] H.R. 6126, § 3(b).

[20] H.R. 2636, § 2(a); S. 2838, § (3)(4).

[21] Others include the far-reaching Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007), H.R. 3010, 110th Cong. (2007), which would prohibit pre-dispute arbitration agreements in consumer, employment and franchise contracts and under civil rights statutes, and other bills that affect pre-dispute arbitration agreements in particular settings, such as homebuilding contracts (American Homebuyers Protection Act, H.R. 1519) and automobile purchase agreements (Automobile Arbitration Fairness Act, H.R. 5312). The Food, Conservation and Energy Act of 2008, which became law on June 18, contains limits on pre-dispute arbitration agreements in livestock and poultry contracts. Pub. L. No. 110-246, § 11005.

[22] The American Association for Justice (formerly the Association of Trial Lawyers of America), for example, has devoted an undisclosed portion of its $1.7 million in lobbying dollars for the second quarter of 2008 in support of the anti-arbitration bills before Congress, including the House and Senate versions of the FNHAA. *See* Lobbying Report of American Association for Justice, at 5-6 (July 8, 2008), *available at* http://disclosures.house.gov/ld/pdfform.aspx?id=300061572.

[23] The Fairness in Nursing Home Arbitration Act: Hearing Before the Subcomm. on Antitrust Competition and Consumer Rights of the S. Comm. on the Judiciary and the Special Comm. on Aging, 110th Cong. (June 18, 2008) (statement of David W. Kurth), available at http://aging.senate.gov/events/hr196dk.pdf; The Fairness in Nursing Home Arbitration Act: Hearing Before the Subcomm. on Antitrust Competition and Consumer Rights of the S. Comm. on the Judiciary and the Special Comm. on Aging, 110th Cong. (June 18, 2008) (statement of Allison E. Hirschel, President, National Consumer Voice for Quality Long Term Care), available at http://aging.senate.gov/events/hr196ah.pdf; The Fairness in Nursing Home Arbitration Act of 2008: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. (June 10, 2008) (statement of Linda Stewart, R.N.), available at http://judiciary.house.gov/judiciary/hearings/pdf/Stewart080610.pdf; see also 154 Cong. Rec. S 2819, 2820 (Apr. 9, 2008) (statement of U.S. Sen. Herb Kohl).

[24] *See*, *e.g.*, Hirschel statement, *supra* note 23.

[25] *See, e.g.,* The Fairness in Nursing Home Arbitration Act of 2008: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. 5-7 (June 10, 2008) (statement of William J. Hall, M.D., AARP), available at http://judiciary.house.gov/hearings/pdf/Hall080610.pdf.

[26] *See*, *e.g.*, Hirschel statement, *supra* note 23.

[27] *See id.*

[28] *See* Hirschel statement, *supra* note 23; The Fairness in Nursing Home Arbitration Act: Hearing Before the Subcomm. on Antitrust Competition and Consumer Rights of the S. Comm. on the Judiciary and the Special Comm. on Aging, 110th Cong. (June 18, 2008) (statement of Kenneth L. Connor, Wilkes & McHugh P.A.), available at http://aging.senate.gov/events/hr196kc.pdf.

[29] *See* Connor statement, *supra* note 28; Press Release, AARP, Nursing Home Arbitration Bill Needed to Protect Our Most Vulnerable (July 30, 2008), *available at* http://www.aarp.org/research/press-center/presscurrentnews/aarp_nursing_home_arbitration_bill_needed_to_prote.html.

[30] *See* Hirschel statement, *supra* note 23; Connor statement, *supra* note 28.

[31] *See* Connor statement, *supra* note 28.

[32] *Id.*

[33] *See, e.g.*, Hall statement, *supra* note 25, at 7.

[34] *See* Connor statement, *supra* note 28.

[35] *Id.*

[36] Rep. Linda T. Sanchez Holds A Hearing on Nursing Home Arbitration, Political Transcript Wire, June 12, 2008.

[37] *Id.*

[38] *See, e.g.*, Hirschel statement, *supra* note 23.

[39] Connor statement, *supra* note 28.

[40] Press Release, U.S. Sen. Herb Kohl, Sens. Martinez, Kohl Unveil Fairness in Nursing Home Arbitration Act (Apr. 9, 2008), *available at* http://kohl.senate.gov/~kohl/press/08/04/2008409A55.html.

[41] See Press Release, American Health Care Association/National Center for Assisted Living, AHCA/NCAL Oppose House Bill Prohibiting Pre-Dispute Agreements in Long Term Care Settings (July 30, 2008), *available at* http://www.ahcancal.org/News/news_releases/Pages/30Jul2008.aspx.

[42] The Fairness in Nursing Home Arbitration Act: Hearing Before the Subcomm. on Antitrust Competition and Consumer Rights of the S. Comm. on the Judiciary and the Special Comm. on Aging, 110th Cong. 6 (June 18, 2008) (statement of Kelly Rice-Schild, AHCA/NCAL), available at http://www.ahcancal.org/advocacy/testimonies/Testimony/AHCA_NCAL_StatementofKRSonArbitration.pdf.

[43] *Id.* at 5.

[44] *Id.*

[45] *Id.* at 6.

[46] *See, e.g.,* Kirk Knutson, *Anti-Arbitration Bills Imperil The Universal Benefits of Consumer Arbitration*, Metro. Corporate Counsel, August 2008, at 5, 14, *available at* http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=August&artYear=2008&EntryNo=8608; *The Fairness in Nursing Home Arbitration Act of 2008: Hearing*

Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. (June 10, 2008) (statement of Gavin Gadberry, Underwood, Wilson, Berry, Stein & Johnson), *available at* http://judiciary.house.gov/hearings/pdf/Gadberry080610.pdf.

[47] Peter B. Rutledge, U.S. Chamber Inst. for Legal Reform, Arbitration – A Good Deal for Consumers 19-21 (April 2008), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091.

[48] *See* Gadberry statement, *supra* note 46, at 5.

[49] *Id.* at 6.

[50] For a rebuttal of recent such studies, *see* Taylor Lincoln & David Arkush, Pub. Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration (July 2008), *available at* http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf.

[51] Gadberry statement, *supra* note 46, at 6, *citing* Aon Global Risk Consulting, The Long Term Care 2008 General Liability and Professional Liability Actuarial Analysis (May 2008).

[52] Press Release, U.S. Chamber of Commerce, Arbitration Better Than Court for Consumer Debtors, Study Shows (July 15, 2008), *available at* http://www.uschamber.com/press/releases/2008/july/080715_arbitration.htm.

[53] *See, e.g.*, Christine Varney, *Arbitration Works Better Than Lawsuits*, Wall St. J., July 17, 2008, at A17 (citing American Arbitration Association study showing consumers prevailed in about 80 percent of arbitrations they initiated, either through a win or voluntary settlements, and 2004 report by National Workrights Institute showing employees prevailed in 63 percent of cases brought in arbitration versus 43 percent tried in court).

[54] *See, e.g.,* The Fairness in Nursing Home Arbitration Act: Hearing Before the Subcomm. on Antitrust Competition and Consumer Rights of the S. Comm. on the Judiciary and the Special Comm. on Aging, 110th Cong. 4 (June 18, 2008) (Statement of Stephen J. Ware, Professor of Law, University of Kansas), available at http://aging.senate.gov/events/hr196sw.pdf.

[55] *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *see, e.g., Armendariz v. Found. Health Psychcare Servs.*, 24 Cal. 4th 83, 124 (Cal. 2000) (refusing to enforce unconscionable arbitration agreement); *Powertel Inc. v. Bexley*, 743 So. 2d 570 (Fla. 1st Dist. Ct. App. 1999) (refusing to enforce arbitration clause under FAA because the agreement was procedurally and substantively unconscionable); *Howell v. NHC Healthcare-Fort Sanders*, 109 S.W.3d 731 (Tenn. Ct. App. 2003) (refusing to enforce arbitration agreement between nursing home and resident because manner in which it was presented was unconscionable).

[56] *See, e.g.*, Varney, *supra* note 53.

[57] *See* Ware statement, *supra* note 54, at 2-3.

[58] *See* Rice-Schild statement, *supra* note 42, at 6; Gadberry statement, *supra* note 46, at 6.

[59] Press Release, American Health Care Association/National Center for Assisted Living, AHCA/NCAL Oppose Subcommittee Passage of Bill Prohibiting Pre-Dispute Agreements in Long Term Care Settings (July 15, 2008), *available at* http://www.ahcancal.org/News/news_releases/Pages/15Jul2008.aspx ("[P]re-admission arbitration clauses not only allow facility staff to better concentrate time and effort on their job of caring for patients and residents, but also better ensures scarce Medicaid resources go towards improving patient care — not diverted to pay the escalating costs associated with lawsuits.").

[60] E-mail from Sally Michael, President, California Assisted Living Association, to Lori C. Ferguson (Aug. 20, 2008) (on file with author).

[61] See *Knutson*, *supra* note 46, at 14.

[62] Ware statement, *supra* note 54, at 1-4.

[63] *See id.*

[64] *Id.* at 3.

Lori C. Ferguson, *senior counsel with* ***Hanson Bridgett LLP*** *in Sacramento, Calif., has represented long-term-care facilities and other health care providers in neglect and abuse litigation since 1997. She is a graduate of the University of Virginia School of Law and licensed to practice in California and Texas. She can be reached at lferguson@hansonbridgett.com.*