



**STATEMENT  
Of  
Gavin Gadberry**

***On Behalf Of The*  
AMERICAN HEALTH CARE ASSOCIATION  
&  
NATIONAL CENTER FOR ASSISTED LIVING**

***Before The***

**House Judiciary Subcommittee on Commercial & Administrative Law  
*Hearing On*  
The “Fairness in Nursing Home Arbitration Act of 2008”**

**June 10, 2008**

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Thank you Chairwoman Sanchez, Ranking Member Cannon, and members of the Committee. I am grateful for the opportunity to be with you here today – and to offer the long term care profession’s perspective on arbitration. My name is Gavin Gadberry, and I am honored to be here today representing the American Health Care Association and the National Center for Assisted Living (AHCA/NCAL).

In the increasingly litigious environment, a growing number of health care and long term care providers – including nursing facilities and assisted living residences – have incorporated arbitration clauses into their admissions materials given to residents when being admitted to the facility or residence. AHCA/NCAL supports the use of arbitration agreements as a viable option for long term care providers and their residents to resolve legal disputes. Arbitration is less adversarial than traditional litigation, produces quicker results and has been determined to be both fair and appropriate by our courts.

AHCA/NCAL and our members are committed to ensuring that long term care facilities place paramount importance on the delivery of high quality care and provide a safe and secure environment for the millions of Americans residing in our nation’s nursing facilities and assisted living residences. When legal concerns arise, we believe that arbitration provides a fair and timely resolution for both the consumer and long term care provider.

On behalf of the profession responsible for caring for our nation’s most vulnerable citizens, I am proud of the advances we have made in delivering high quality long term care services and we remain committed

to sustaining these gains in the years and decades ahead – when, as we all know, demand for long term care will by all accounts dramatically increase.

Americans are living longer and our nation’s aging population is growing – many of whom have significant medical or cognitive conditions which require care in a nursing facility. Currently more than three million Americans rely on the care and services delivered in one of the nation’s nearly 16,000 nursing facilities each year, and the demand for such services is going to increase dramatically every year. A March 2008 report from the National Investment Center for the Seniors Housing & Care Industry (NIC) indicates that the demand for long term care services will more than double by 2040.

The efforts and initiatives advanced by the association that I represent today seek to enhance and improve quality of care and services provided in our nation’s nursing facilities and assisted living residences each day.

### **Quality – AHCA’s First Priority**

Before I address the benefits of arbitration as an alternative to litigation in resolving disputes, allow me to take a moment to assure the Committee that the troubling anecdotes presented today represent the exception instead of the rule within the long term care community. Long before the words quality and transparency were the catch words of the federal government and their oversight of healthcare, they were truly the compass for AHCA/NCAL and its member facilities.

Our association’s long-held mission clearly states, “our goal is to provide a spectrum of patient/resident-centered care and services which nurture not only the individual’s health, but their lives as well, by preserving their connections with extended family and friends, and promoting their dignity, respect, independence, and choice.”

AHCA/NCAL has been working diligently to change the debate regarding long term care to focus on quality – quality of life for patients, residents and staff; and quality of care for the millions of frail, elderly and disabled individuals who require our services. We have been actively engaged in a broad range of activities which seek to enhance the overall performance and excellence of the entire long term care sector. While keeping patients and their care needs at the center of our collective efforts, we continue to challenge ourselves to improve, and enhance quality.

### **The Facts Speak for Themselves – Quality & Outcomes Are Improving**

The Online Survey, Certification and Reporting (OSCAR) data tracked by the Centers for Medicare and Medicaid Services (CMS) clearly point to improvements in patient outcomes, increases in overall direct care staffing levels, and significant decreases in quality of care survey deficiencies in our nation’s skilled nursing facilities.

A few examples which highlight some of the positive trends in nursing facility care according to data tracked by CMS:

- Nationally, direct care staffing levels (which include all levels of nursing care: Registered Nurses (RNs), Licensed Practical Nurses (LPNs) and Certified Nursing Assistants (CNAs)) have increased 8.7 percent between 2000 and 2007 – from 3.12 hours per patient day in 2000 to 3.39 hours in 2007;

- The Quality Measure<sup>1</sup> tracking pain for long term stay residents vastly improved from a rate of 10.7 percent in 2002 to 4.6 percent in 2007 – more than a 50 percent decrease;
- The Quality Measure tracking the use of physical restraints for long stay residents dropped from 9.7 percent in 2002 to 5.6 percent in 2007;
- The Quality Measure tracking pressure ulcers for post-acute skilled nursing facility patients (many of whom are admitted to the nursing facility with a pre-existing pressure ulcer) improved by 23 percent over the course of four years, from 20.4 percent in 2003 to 15.8 percent in 2007; and
- Substandard Quality of Care Citations as tracked by CMS surveys were reduced by 30 percent in five years – from 4.4 percent in 2001 to 3.1 percent in 2006.
- In January 2006, the Government Accountability Office stated that from 1999-2005 there was a nearly 50 percent decrease in the “proportion of nursing homes with serious quality problems.”

Satisfaction of patients and family members is a critical measure of quality. AHCA has recognized this vital link between satisfaction and performance, and has urged facilities to conduct such assessments for more than a decade. In recent years, we have encouraged assisted living and nursing facilities to use a nationally-recognized company, *My InnerView*, to conduct consumer and staff satisfaction surveys to establish a national database for benchmarking and trend analysis. The most recent independent survey of nursing home patients and their families released a few weeks ago indicates that a vast majority (82%) of consumers nationwide are very satisfied with the care provided at our nation’s nursing homes and would rate the care as either good or excellent.

We remain committed to sustaining – and building upon – these quality improvements for the future.

### **Culture of Cooperation – Leading to Continued Improvement**

Positive trends related to quality are also evidenced by profession-based initiatives including *Quality First* and the *Advancing Excellence in America’s Nursing Homes* campaign – both of which are having a significant impact on the quality of care and quality of life for the frail, elderly and disabled citizens who require nursing facility care.

*Quality First*, which was established in 2002, set forth seven core principles that reflect long term care providers’ commitment to continuous quality improvement, leadership and transparency. This profession-based initiative led not only to improvements in care and processes, but to the development of the National Commission for Quality Long-Term Care. In December 2007, the Commission released its final report which addressed four critical components of long term care – quality, workforce, information technology & financing. We encourage Congress to take the recommendations of this commission under consideration – and further investigate their feasibility.

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<sup>1</sup> **Quality Measures** track nursing facility residents who have and are at risk for specific functional problems needing further evaluation. Improvements in these measures indicate positive trends in patient outcomes, but it is important to clarify that the quality measures do not reflect a percentage of the entire population, rather the percentage of those who are at risk and have the condition.

*Quality First* and other initiatives have been commended by former Secretary of Health & Human Services Tommy Thompson, by former Administrator of CMS Dr. Mark McClellan, and by former CMS Acting Administrator Leslie Norwalk. Last year Ms. Norwalk stated in a column she wrote for *Provider* magazine: “Nursing home providers have been on the leading edge of this quality movement. Long before hospitals, doctors, home health providers, pharmacies, dialysis facilities and others came to the table, the nursing home industry was out front with *Quality First* – a volunteer effort to elevate quality and accountability...Quality measurement has worked in nursing homes....Collaborating to measure quality of long-term care, report it, support it, and improve it – that’s the best path to a high-quality, patient-centered, provider-friendly system that everyone can afford.”

AHCA is a founding partner of the *Advancing Excellence in America’s Nursing Homes* campaign – a coordinated initiative among providers, caregivers, consumers, government and others that promote quality around eight measurable goals. This campaign takes a step further than previous initiatives. It not only measures outcomes, but it establishes numerical targets and benchmarks. It also promotes best practices and evidence-based processes that have been proven to enhance patient care and quality of life.

This voluntary initiative is working – and outcomes and processes are improving in the nearly 7,000 participating facilities. In December 2007, the campaign announced that for the first three-quarters of the campaign, there was progress in reducing the incidence of pressure ulcers in nursing homes, reducing the use of physical restraints, managing pain for long term nursing home residents, and managing pain for short stay, post-acute nursing home residents. Our association is diligently working to increase the number of facilities that actively participate in this program and embrace the concepts embodied in the *Advancing Excellence in America’s Nursing Homes* campaign.

In his November 2007 testimony before the U.S. Senate Special Committee on Aging, Acting CMS Administrator Kerry Weems praised the *Advancing Excellence in America’s Nursing Homes* campaign, stating, “This campaign is an exceptional collaboration among government agencies, advocacy organizations, nursing home associations, foundations, and many others to improve the quality of nursing homes across the country.”

Further, in the CMS 2008 Action Plan for (Further Improvement of) Nursing Home Quality, the agency states that it “plan[s] to strengthen our partnerships with non-governmental organizations who are also committed to quality improvement in nursing homes...The unprecedented, collaborative [*Advancing Excellence in America’s Nursing Homes*] campaign seeks to better define quantitative goals in nursing home quality improvement. The purpose of this campaign is to align the strategies of the many partners who have expressed their commitment to excellent nursing home quality.”

We applaud CMS for their commitment to further enhance care quality and outcomes through this partnership of stakeholders. The effort truly embodies the culture of cooperation which is critical in effectively enhancing care and sustaining quality improvements.

NCAL also is committed to quality care and services for nearly 1 million assisted living residents. We have developed Guiding Principles on Quality which serve as a roadmap for our members to ensure quality, resident-focused care delivery.

In total, the increased focus on resident-centered care, actual care outcomes, increased transparency and public disclosure, enhanced stakeholder collaboration and the dissemination of best practices models of care delivery is working. AHCA/NCAL remains committed to its long-standing practices and programs which seek to improve the quality of care for our nation's most frail, elderly and disabled who require long term care services, and enhance the quality of life for patients and caregivers alike.

### **Arbitration – A Fair & Efficient Alternative**

In the late 1990's, the long term care profession was subject to excessive liability costs, which were exacerbated by an increasingly litigious environment. As a result, operators of nursing facilities and assisted living residences were forced into making difficult decisions including potential closure or divestiture of facilities, and corporate restructuring. In addition to pursuing state and national tort reform legislative initiatives to enable facilities to continue to operate and provide essential long term care services in a difficult environment, the profession sought alternatives to traditional litigation including arbitration. This trend was especially true in states such as Florida, Arkansas, and my home state of Texas, where state laws fostered an exponential growth in the number of claims filed against long term care providers – even those with a history of providing the highest quality care.

Arbitration is a legal process where the parties enter into an agreement to resolve disputes by an unbiased, unrelated third party. AHCA/NCAL represents the vast majority of our nation's nursing facilities and assisted living residences and supports the use of arbitration clauses as a viable option for long term care providers to resolve legal disputes. When legal concerns arise, we believe 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.

Over the course of the past ten years arbitration has become a more widely used alternative in long term care. This growth has been across the board for long term care providers – from single owner facilities to national chain facilities; and for non-proprietary and for-profit organizations. As a service to our member facilities and the residents they serve, in 2002 AHCA/NCAL developed a model arbitration agreement form for possible use in the admission process.

This model agreement in no way alters the rights or remedies available to a resident under state tort law. It states in plain English that entering into the arbitration agreement is not a condition of admission into the facility. Further, the model form provides a 30-day window for the resident or their representative to reconsider and, in writing, rescind the arbitration agreement. This 30-day “cooling off period” far exceeds the period of time found on most arbitration clauses.

AHCA/NCAL supports the use of arbitration because unlike traditional litigation, our members have experienced that arbitration is more efficient, less adversarial, and has a reduced time to settlement. As this Committee is no doubt aware, most cases are resolved through settlement. Arbitration facilitates that process. As a recent Aon Global Risk Consulting report entitled “Long Term Care – 2008 General Liability and Professional Liability Actuarial Analysis” found, “Arbitration reduces the time to settlement by more than two months on average.” It further found that “very few claims actually go all the way to arbitration [as] most claims are settled in advance.”

Timely resolution of disputes is of unique importance to residents of long term care facilities and their families. Often the individuals are very frail elderly in their twilight years and it is a comfort for families to reach a settlement during their loved one's lifetime.

In addition, because it vastly reduces transaction costs, arbitration may also enable patients and their families to retain a greater proportion of any financial settlement than with traditional litigation. The same report found that "currently, 55.2% of the total amount of claims costs paid for GL/PL claims in the long term care industry is going directly to attorneys. This means that less than half of the dollars spent on liability is actually going to the patients and their families." The decreased transaction costs associated with arbitration means more of any award received goes to the party whom is most deserving – the patient or resident, not their legal representative.

### **"Fairness in Nursing Home Arbitration Act of 2008" – An Unfair & Inappropriate Bill**

We believe that the recently introduced *Fairness in Nursing Home Arbitration Act of 2008* (H.R. 6126 and S. 2838) is a misguided attempt to restrict and weaken the Federal Arbitration Act (FAA), which has been in place for more than 80 years. The FAA appropriately recognizes the strong national interest in disputes being resolved in a forum other than the courts when both parties agree to do so. We firmly believe that this legislation and other efforts to undermine the FAA is bad public policy and a step in the wrong direction.

Unfortunately, this debate is colored by anecdotes and misinformation perpetuated by high-profile trial attorneys who traditionally oppose any effort to bring balance to the personal injury playing field, and who give too little consideration to the harmful consequences on the long term care industry that follow from the high transaction costs of traditional litigation and the resulting financial drain on the system. In fact, Mr. Connor's testimony of October 2007 before this same subcommittee inaccurately portrayed the manner in which arbitration agreements are presented to perspective residents and their families upon admission to the facility. While we agree that entering into a nursing facility or assisted living residence often is a time of uncertainty and apprehension, Mr. Connor's notion that family members are threatened into signing the arbitration agreement is simply untrue. As I stated earlier, AHCA/NCAL developed a model arbitration agreement that was provided to members which clearly states that there is a 30-day "out clause" and that declining to sign the form will not have an affect on admission to the facility.

It is important for this Committee to recognize that the FAA does not inherently foster or sanction any disregard for traditional notions of fair play when it comes to entering an arbitration contract. The FAA simply requires that an arbitration agreement be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." Numerous courts across this nation have not hesitated to invalidate nursing home arbitration agreements when they have found that a representative lacked authority to act for the resident, a resident lacked the capacity to enter the agreement, or that an arbitration agreement was otherwise unconscionable, either in the substance of its terms or in the way it was presented to and signed by the resident or the resident's representative.

The *Fairness in Nursing Home Arbitration Act of 2008* needlessly discriminates against long term care providers and more importantly the patients and residents in our nation's nursing facilities and assisted living residences by eliminating their federal right to agree to arbitrate future disputes. Pre-dispute arbitration agreements are a viable legal option for long term care consumers and providers, and their use should not be eliminated by misguided policies – nor should the consumer's choice to agree to arbitrate

pre-dispute be denied as is the legislation would do. It is clear that if the legislation were to become law, even residents who voluntarily chose to submit to pre-dispute arbitration would have that right to choose denied, a right that is not denied in any other consumer transaction.

A May 1, 2008, letter to Congress signed by twenty business organizations including the Business RoundTable and the U.S. Chamber of Commerce echoes our concerns with this bill – and other legislative efforts to limit the use of arbitration. The letter states, “Even though arbitration has been used to amicably resolve disputes for more than 80 years, those who wish to dismantle the arbitration system are attempting to effectively abolish all pre-dispute arbitration by using anecdotes and a handful of poorly designed or inaccurate studies to validate their unfounded claim that the system is broken.”

Public sentiment is also opposed to eliminating the use of arbitration to resolve disputes. In fact, the U.S. Chamber of Commerce’s Institute for Legal Reform recently conducted a national poll which found that “given the choice, voters strongly prefer [82%] arbitration over litigation to resolve any serious dispute with a company.” The bipartisan survey, which was released in April 2008, also concluded that “voters strongly believe Congress should NOT remove arbitration agreements from the contracts consumers sign with companies providing goods and services (71%).”

Like the vast majority of Americans, AHCA/NCAL believes that legislative proposals to limit arbitration and undermine the FAA is bad public policy. We strongly support the use of arbitration as a reasonable, intelligent option for both patients and providers to help assist in the resolution of legal disputes, and aggressively oppose efforts to diminish the use of arbitration by American businesses, especially those unfairly targeting long term care consumers and providers.

Thank you for the opportunity to offer these comments on behalf of millions of professional, compassionate long term caregivers and the millions of frail, elderly, and disabled Americans they serve each day. I look forward to responding to your questions.

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