". . . AND JUSTICE FOR ALL": AN ANALYSIS OF THE FAIRNESS IN NURSING HOME ARBITRATION ACT OF 2008 AND ITS POTENTIAL EFFECTS ON THE LONG-TERM CARE INDUSTRY†

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I. INTRODUCTION

On May 10, 2007, George Rowe made one of the most difficult decisions of his life when he checked his wife of over sixty years into the Evergreen Health and Rehabilitation Center in Bozeman, Montana.[1]

† No action was taken on the subject of this note, the Fairness in Nursing Home Arbitration Act, as of October 1, 2008. However, on February 26, 2009, Senator Linda Sanchez of California re-introduced the bill as the Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. (2009). The views set forth in this note apply equally to this new bill as they did to its predecessor.

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[1] Jessica Mayrer, *Family Sues Nursing Home over Death*, BOZEMAN DAILY CHRON., Aug. 17, 2008, *available at*

Doris Rowe, who was eighty-seven years old at the time of her admission, was a former substitute teacher, a devoted wife, and the mother of three children.[2] George intended Doris' stay at the Bozeman Evergreen to be both rehabilitative and short.[3] However, on June 13, 2007, just thirty-five days after her admission to the facility, nursing home staff found Doris unconscious and bleeding from her head.[4] A day later, Doris died from a cerebral hemorrhage, presumably from the fourth documented fall she suffered during her brief stay at the home.[5]

On July 23, 2008, the Rowe family filed a civil lawsuit against Evergreen, complaining that Doris' death had resulted from inadequate staffing levels and untrained personnel.[6] The family claimed that, on several occasions, the nursing home staff failed to respond to Doris' calls for assistance in getting to the bathroom, causing Doris—who suffered from stroke, diabetes, and osteoporosis —to attempt to use the toilet by herself.[7] Furthermore, staff members reportedly dropped Doris twice during her brief stay at the home and George Rowe, who also checked into Evergreen on May 18, 2007, recalled that he once waited two days for a glass of water.[8]

In their complaint, the Rowe family requested a jury trial and an undisclosed amount of damages.[9] However, representatives of Evergreen responded that the family was not entitled to a jury trial based on a pre-dispute arbitration clause that George Rowe had unknowingly signed during the process of admitting Doris to the facility's care.[10]

Pre-dispute mandatory arbitration clauses, typically found in nursing home admissions applications, are a growing trend in the long-term care industry.[11] Nursing homes use pre-dispute arbitration clauses

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http://www.bozemandailychronicle.com/articles/2008/08/17/news/000death.txt.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] After Rowe's death, the Health and Human Services department acknowledged that Rowe hit her head three times after falls while in the facility's care. *Id.*

[6] *Id.*

[7] Mayrer, *supra* note 1.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Donna S. Harkness, *Grounds for Challenging Enforceability of Nursing Home Arbitration Agreements:* Lacey v. Healthcare and Retirement Corp. of America and Bedford Care Center-Monroe Hall, LLC v. Lewis, LEXISNEXIS EXPERT COMMENTARY ¶ 1 (2008).

in the admissions process in order to make it less likely that a victim of abuse or neglect will receive a large amount of damages, and to prevent such victims from pursuing their rights in court.[12] Indeed, such clauses have reduced the average cost of payouts to victims of nursing home abuse and neglect from $226,000 per claim in 1999 to $146,000 per claim in 2006.[13]

However, for those like the Rowe family, help appears to be on the way. On April 9, 2008, United States Senators Mel Martinez and Herb Kohl set out to put an end to pre-dispute arbitration agreements in the long-term care industry through the introduction of the Fairness in Nursing Home Arbitration Act ("FNHAA" or the "Act").[14] The Act, if passed, will invalidate all pre-dispute arbitration agreements in long-term care facility settings, enabling victims of neglect and various forms of abuse to decide on a desired forum, whether it be an arbitration board or a court of law, after an incident occurs.[15]

This Note will analyze the Fairness in Nursing Home Arbitration Act and its potential effect on the long-term care industry and the victims of nursing home abuse and neglect, an increasingly prevalent issue in today's society. First, this Note will discuss the problem of nursing home abuse and neglect in America through the use of data compiled by both private and government organizations. This Note will then analyze how the FNHAA purports to alter the Federal Arbitration Act. Next, this Note will discuss the debate over the FNHAA and the various arguments for and against its approval. In addition, this Note will analyze relevant case law regarding pre-dispute mandatory arbitration agreements in the nursing home context. Lastly, this Note will argue that the FNHAA will result in positive changes in the nursing home industry despite potential flaws.

See, e.g., WHCA Letter, *infra* note 85 ("Arbitration agreements have not been widely used in Wisconsin nursing homes and assisted living facilities. However, interest in their use is growing. As liability and litigation costs continue to skyrocket, there is a compelling need to explore more cost effective means to resolve legal controversies."); *FNHAA Hearing*, Rice-Schild Testimony, *infra* note 74 ("Over the course of the past ten years arbitration has become a more widely used alternative in long term care.").

[12] Debra Cassens Weiss, *Some ADR Firms, Plaintiffs Lawyers Shun Nursing Home Arbitration*, A.B.A J. ¶ 4 (2008), *available at* http://abajournal.com/news/some_adr_firms_plaintiffs_lawyers_shun_nursing_home_arbitration/.

[13] *Id.* at ¶ 3.

[14] Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. (2008) [hereinafter FNHAA].

[15] *Id.*

II. THE PROBLEM

The Fairness in Nursing Home Arbitration Act is, in part, a product of the pervasiveness of nursing home abuse and neglect in America. Today, approximately 1.5 million people reside in the 17,000 nursing homes throughout the country.[16] The prevalence of elder abuse and neglect that occurs in these homes has caused some to refer to nursing home patients as "one of the nation's most vulnerable populations."[17] In 2002, Professor Catherine Hawes, of Texas A & M University, testified before the United States Senate Committee on Finance regarding the susceptibility of nursing home residents to abuse and neglect.[18] Hawes noted that most residents struggle with physical impairments and diseases that often lead to a dependence on nursing home staff for daily functions such as "bathing, dressing, eating and using the toilet."[19] Further, approximately two-thirds of residents suffer from cognitive impairment, placing them at greater risk of both physical and sexual abuse.[20] Lastly, Hawes noted that only twelve to thirteen percent of nursing home residents have spouses and many do not have family members that live close to their facility, leaving them particularly vulnerable.[21]

Reliable data regarding precise percentages of nursing home residents subjected to abuse and neglect are largely non-existent, leading some to refer to the problem as an "unacknowledged crisis of care."[22] A 2003 study by the United States Administration on Aging estimated that over 20,000 cases of abuse were reported nationwide.[23] This statistic, coupled with the fact that four out of every five cases of

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[16] Nursing Home Abuse Resource Center, http://www.nursinghomeabuseresourcecenter.com/facts (last visited Sept. 25, 2008) [hereinafter NHARC].

[17] Robert Pear, *U.S. May Ease Regulation of Nursing Home Industry*, N.Y. TIMES, Sept. 7, 2001.

[18] *Elder Abuse In Residential Long-Term Care Facilities: What Is Known About Prevalence, Causes, and Prevention*: *Hearing Before the S. Comm. on Finance*, 107th Cong. (2002) [hereinafter Hawes Testimony] (statement of Catherine Hawes, Ph.D., Professor, Texas A & M University).

[19] *Id.* at 1.

[20] *Id.* at 2.

[21] *Id.*

[22] *Hearing on S. 2838/ H.R. 6126 Before the Subcomm. on Antitrust, Competition and Consumer Rights and the Spec. Comm. on Aging* (June 18, 2008) [hereinafter *FNHAA Hearing,* Connor Testimony] (testimony of Kenneth L. Connor, Attorney at Law).

[23] DEP'T OF HEALTH & HUMAN SERV., U.S. ADMIN. ON AGING, NAT'L OMBUDSMAN REPORTING SYSTEM DATA TABLES, TABLE A-1 (2008).

elder abuse, neglect, or exploitation go unreported, gives researchers and policymakers cause for concern.[24] However, once considered an "unacknowledged crisis," the various types of abuse and neglect[25] that occur in these homes is at the forefront and is now receiving greater attention.

In May 2008, the United States Government Accountability Office ("GAO") issued a report regarding the "understatement of serious care problems" and the considerable oversight weaknesses that have played a substantial role in the growth of such understatements.[26] The GAO conducted the report in order to investigate the findings of state surveyors, who evaluate and report on nursing home quality for the Centers for Medicare & Medicaid Services ("CMS").[27] Even taking the alleged understating into account, the GAO study found that CMS surveyors still reported that one in five nursing homes throughout the United States were cited for "deficiencies," such as poor quality of care and potential for more than minimal harm.[28] The GAO study ultimately concluded that serious care problems were, in fact, being understated by the CMS surveyors in a significant way.[29]

The understating of nursing home deficiencies by CMS surveyors

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[24] Elder Abuse Foundation, http://www.elder-abuse-foundation.com (last visited Oct. 25, 2008).

[25] All too often, the story is the same: avoidable pressure ulcers (bed sores) penetrating to the bone; wounds with dirty bandages that are infected and foul smelling; patients languishing in urine and feces for hours on end; hollow-eyed residents suffering from avoidable malnutrition, unable to ask for help because their tongues are parched and swollen from preventable dehydration; dirty catheters clogged with crystalline sediment and yellow-green urine in the bag; residents who are victims of sexual and physical abuse from caregivers; short-handed staff who are harried and overworked because their employers decided to increase profits by decreasing labor costs . . . .

FNHAA Hearing, Connor Testimony, *supra* note 22, at 1.

[26] U.S. GOV. ACCOUNTABILITY OFFICE, GAO-08-517, NURSING HOMES: FEDERAL MONITORING SURVEYS DEMONSTRATE CONTINUED UNDERSTATEMENT OF SERIOUS CARE PROBLEMS AND CMS OVERSIGHT WEAKNESSES (2008).

[27] *Id.* at 2.

[28] *Id.* at 1.

[29] Overall, in nine states federal surveyors identified missed serious deficiencies on 25% or more of comparative surveys, but in seven states they identified no missed serious deficiencies. During the same period, missed deficiencies at the potential for more than minimal harm level were more widespread: nationwide, approximately 70% of federal comparative surveys identified state surveys missing at least one deficiency at the potential for more than minimal harm level, and in all but five states the number of state surveys with such missed deficiencies was greater than 40%.

Id. at 5.

presents a number of issues. First, if problems go unreported, nursing homes cannot be held accountable and will never fix the internal deficiencies that lead to abuse and neglect.[30] Second, and perhaps more importantly, understating deficiencies undermines our ability to accurately assess the seriousness of a significant issue and, in the process, misinforms the public as to how the nursing home system is operating. Consequently, persons seeking admission to nursing homes are less knowledgeable about the prevalence of abuse and are therefore less skeptical of signing an agreement containing a pre-dispute arbitration clause.[31]

Perhaps the most noteworthy and regularly cited deficiency of nursing homes is understaffing. Nursing homes that receive federal funds to operate are required by federal and state statutes to employ sufficient staff and develop plans of care.[32] However, due to understaffing, many homes fail to meet these legal requirements.[33] In fact, fifty-four percent of the nation's nursing homes are currently below the minimum staffing levels for nurse's aides and close to a third, thirty-one percent, are below required staffing levels for registered nurses.[34] The latter statistic is perhaps more worrisome given that the minimum staffing level imposed by the federal government for such nurses is just twelve minutes a day per patient, a trivial amount of time to devote to one patient over a twenty-four hour period.[35] Overall, twenty-three percent of nursing homes are below staffing levels for total licensed staff.[36]

Understaffing has several detrimental effects on the way in which nursing homes operate, which inevitably results in greater incidents of abuse and neglect. As noted previously, a majority of nursing home residents depend on nursing home staff for help in performing many of

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[30] *Id.*

[31] Those who question arbitration clauses typically argue that the agreement is a violation of both the due process and equal protection clauses under the Fourteenth Amendment of the United States Constitution. U.S. CONST. amend. XIV. It is also argued that the clauses violate the patients' and their families' Seventh Amendment right to a trial by a jury of their peers. U.S. CONST. amend. VII.

[32] Nursing Home Abuse Resource Center, http://www.nursinghomeabuseresourcecenter.com/understaffing (last visited Sept. 25, 2008).

[33] NHARC, *supra* note 16.

[34] *Id.*

[35] *Id.*

[36] *Id.*

their daily activities.[37] When homes are understaffed, simple functions such as feeding a patient or repositioning an immobile patient often go unperformed, leading to malnutrition and bedsores.[38] Understaffing can also affect staff morale, making it less likely that residents will be treated with patience and respect.[39] A 2003 New York Times article discussed the effect of understaffing on staff morale and described nurses as "overwhelmed."[40] The article outlined a study done by the CMS that indicated "potentially dangerous" staffing levels in close to twenty-five percent of New York nursing homes.[41] The article also quoted several New York City licensed nurses, one of which described staffing levels as "unsafe" and admitted that she was often the only nurse working on a particular floor.[42]

The issue of understaffing is even more troubling due to the substantial increase in the elderly population. Sometimes referred to as a "veritable Senior Tsunami,"[43] Americans aged eighty-five and older are "the fastest growing age group in America."[44] Notably, every eight seconds an American baby boomer turns fifty years old, and by the year 2030, one in every five Americans will be a senior citizen.[45] Thus, while understaffing is currently a significant problem in nursing homes, the problem is bound to exacerbate in the near future.

Understaffing is often linked to yet another problem nursing homes face: underfunding. A study released in 2004 reported that states are "underfunding nursing home care by at least $4.1 billion annually."[46]

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[37] Hawes, *supra* note 18, at 1.

[38] ElderAbuseInformation.com, Nursing Home Abuse: Why Does it Exist?, http://www.elder-abuse-information.com/abuse/abuse_causes.htm#staffing (last visited Oct. 27, 2008). *See also* NHARC, *supra* note 16 (noting that, "[d]ue to understaffing, many nursing homes . . . cannot provide all of the care listed on the [required plan of care]. As a result, residents may not be fed properly . . . given sufficient fluids . . . may be over- or under-medicated . . . permitted to develop pressure sores . . . left in bed all day to lay in their own feces and urine . . . .").

[39] *Id.*

[40] Richard Perez-Pena, *Overwhelmed and Understaffed, Nursing Home Workers Vent Anger*, N.Y. TIMES, June 8, 2003, at 43, *available at* http://www.nytimes.com/2003/06/08/nyregion/08NURS.html?ex=1225598400&en=d0ec322bfd37a132&ei=5070.

[41] *Id.*

[42] *Id.*

[43] *FNHAA Hearing*, Connor Testimony, *supra* note 22, at 1.

[44] *Id.*

[45] NHARC, *supra* note 16.

[46] *Study Shows Nursing Homes Care Underfunded by $4.1 Billion*, CONTEMP. LONG TERM CARE, Mar. 1, 2004, *available at*

Naturally, those underfunded homes are ill-equipped to properly train their personnel or adequately staff their facilities. Indeed, researchers have found that low wages paid to nurses and nurses' assistants make it extremely difficult to retain quality staff.[47] According to the same researchers, this can result in a high job turnover rate as well as demoralization associated with the inability to provide every patient with proper care.[48] This, in turn, leads to greater incidents of abuse and neglect.[49] Regardless, based on the current state of the economy, funding for nursing homes and other long-term care facilities is unlikely to increase and these same issues are likely to continue into the future.

Although understaffing and underfunding are just two of the many issues plaguing long-term care facilities, they represent what has become a systemic failure of our nation to administer proper care to its elderly. The Fairness in Nursing Home Arbitration Act of 2008, while not immediately curative, could potentially have a positive effect on several of these issues by forcing nursing homes to spend money on hiring additional staff members, training current staff properly, and generally providing a higher quality of care. Thus, the FNHAA is a valuable piece of legislation that has given hope to the many victims of abuse and neglect.

III. THE FAIRNESS IN NURSING HOME ARBITRATION ACT

The Fairness in Nursing Home Arbitration Act seeks to invalidate all pre-dispute arbitration agreements entered into "either at any time during the admission process or at any time thereafter."[50] The Act will amend Section 2, Title 9 of the United States Code ("Code"), which currently states that all written arbitration provisions appearing in contracts and transactions are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[51] Amended, Section 2 of the Code will allow for exceptions to be made to this general rule.

The FNHAA then proposes to add the following exception: "[a] pre-dispute arbitration agreement between a long-term care facility and

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http://www.accessmylibrary.com/coms2/summary_0286-963648_ITM?.

[47] Hawes, *supra* note 18, at 8.

[48] *Id.*

[49] *Id.*

[50] FNHAA, *supra* note 14, § 3.

[51] The United States Arbitration Act, 9 U.S.C. § 2 (2008).

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."[52] The Act maintains that the exception will apply to "any pre-dispute arbitration agreement between a long-term care facility and a resident (or anyone acting on behalf of such a resident) . . . ."[53] Anticipating interpretive issues with the above clauses, the FNHAA defines "long-term care facility" expansively, which will likely lead to little speculation as to its scope and application.[54] Furthermore, the Act characterizes pre-dispute arbitration as "any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement."[55] Moreover, the Act ensures that a court, rather than an arbitrator, will be responsible for determining the enforceability of an arbitration agreement that is entered into in accordance with the revised Federal Arbitration Act.[56]

Lastly, it should be noted that the FNHAA does not propose to eliminate all forms of arbitration in the long-term care setting. Rather, the Act seeks only to invalidate arbitration agreements that are entered into prior to an incident's occurrence. Parties are therefore free to arbitrate disputes as long as the decision is made after the dispute arises and the parties negotiate on an equal bargaining ground.[57]

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[52] *Id.*

[53] *Id.* (emphasis added).

[54] The FNHAA defines long term-care facility as:

> (A) any skilled nursing facility, as defined in 1819(a) of the Social Security Act; (B) any nursing facility, as defined in 1919(a) of the Social Security Act; or (C) 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, obtaining or taking medication, and which may make available to residents home health care services, such as nursing and therapy; and (ii) provides a dwelling place for residents in order to deliver such supportive services referred to in clause (i), each of which may contain a full kitchen and bathroom, and which includes common rooms and other facilities appropriate for the provision of supportive services to the residents of the facility.

FNHAA, *supra* note 14.

[55] *Id.*

[56] *Id.*

[57] Parker Waichman Alonso LLP, *Fairness in Nursing Home Act Approved*, July 17, 2008, http://www.yourlayer.com/artciles/read/14774.

IV. THE DEBATE

Arbitration is hardly a novel concept.[58] However, it was not until the passing of the Federal Arbitration Act ("FAA") in 1925 that the practice of arbitrating disputes received its full endorsement from the United States government.[59] Prior to then, "American courts viewed arbitration with 'judicial hostility.'"[60] However, with the advent of industrialization and an overwhelming amount of litigation flooding the courts, decisions regarding arbitration began to change[61] and Congress subsequently acted with the passage of the FAA.[62] Today, American courts continue to be receptive to the use of arbitration in dispute resolution. In fact, in March 2008, United States Supreme Court Justice David Souter repeated the government's reasoning from 1925, reciting a "national policy favoring [arbitration]."[63] New Jersey courts have also reiterated this sentiment, citing that it is a "fundamental principle"[64] that "New Jersey adheres to a general policy favoring the arbitration of disputes over traditional litigation."[65]

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[58] The use of arbitration to resolve disputes has been traced as far back as 337 B.C. Robert V. Massey, Jr., *History of Arbitration and Grievance Arbitration in the United States*, http://www.wvu.edu/~exten/depts/ilsr/arbitration_history.pdf. The concept was employed by Philip the Second and King Solomon and was the "preferred method" of dispute resolution in ancient Rome. *Id.* With respect to American history, historians have discovered that George Washington had an arbitration clause within his living will in the event that there was a debate over how to interpret the document. *Id.*

[59] CRS Report, *The Federal Arbitration Act: Background and Recent Developments* (2003) [hereinafter CRS Report].

[60] *Id.* (citing H.R. REP. No. 96, 68th Cong., 1st Sess., 2 (1924)).

[61] In 1924, the United States Supreme Court decided the case of *Red Cross Line v. Atlantic Fruit Co.*, in which it upheld the validity of a New York law requiring arbitration for maritime disputes. 264 U.S. 109 (1924). The case "opened the door for Congress to pass legislation that recognized the validity of arbitration agreements." CRS Report, *supra* note 59.

[62] Congress stated its rationale for passing the FAA as a desire to place agreements to arbitrate "upon that same footing as other contracts." H.R. REP. No. 96, *supra* note 60, at 2. Congress further noted that "[i]t is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." *Id.* at 2-3. "The enactment of [the FAA] 'declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" CRS Report, *supra* note 59 (quoting Southland Corp. v. Keating, 465 U.S. 1, 2 (1984)).

[63] Hall Street Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1402 (2008) (noting Congress' intent in the enactment of the Federal Arbitration Act in 1925).

[64] New Jersey Tpk. Auth. v. Local 196, L.F.P.T.E., 190 N.J. 283, 291 (2007).

[65] Davis v. Dell, No. 07-630-RBK-AMD, 2007 U.S. Dist. LEXIS 94767, at *9 (D.N.J.

A. *Opponents of the FNHAA*

With courts throughout the country expressing an overwhelming national policy supporting arbitration, it is not surprising that there has been opposition to banning pre-dispute arbitration in long-term care settings. Keith B. Nelson, a representative of the United States Department of Justice opposing the FNHAA, noted that "[a]rbitration is typically a less expensive and quicker method of resolving disputes than civil litigation, and arbitration is generally viewed as leading to fair outcomes."[66] Nelson further argued that the validity of pre-dispute arbitration agreements is largely fact specific and therefore should be dealt with on a case-by-case basis.[67]

In a similar letter, a coalition of senior, caregiver, and taxpayer advocacy groups[68] shared and expanded upon the arguments put forth by Nelson, claiming that, in addition to being less time-consuming and expensive than traditional litigation, arbitration allows "[r]esources that would otherwise be devoted to expensive litigation [to] be appropriately directed toward patient and resident care."[69] A study performed by the National Arbitration Forum ("NAF") elaborated on the general arguments with respect to the benefits of arbitration through the use of empirical data.[70]

Dec. 28, 2007), *aff'd*, No. 07-630, 2008 U.S. Dist. LEXIS 62490 (D.N.J. Aug. 15, 2008).

[66] Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Senator Patrick J. Leahy, Chairman of the U.S. Senate Comm. on the Judiciary (July 30, 2008) [hereinafter Nelson Letter], http://blog.wired.com/27bstroke6/files/doj-letter-20080923.pdf.

[67] *Id.*

[68] The following groups participated in the coalition: Alliance for Quality Nursing Home Care, American Assisted Living Nurses Association, American Association for Long Term Care Nursing, American Association of Nurse Assessment Coordinators, American Association of Nurse Executives, American College of Health Care Administrators, American Health Care Association, The American Insurance Association, American Seniors Housing Association, Assisted Living Federation of America, Evangelical Lutheran Good Samaritan Society, National Association of Health Care Assistants, National Association for the Support of Long Term Care, National Center for Assisted Living, National Taxpayers Union, The U.S. Chamber of Commerce, and The U.S. Chamber Institute for Legal Reform [hereinafter Healthcare Coalition]. *Id.*

[69] Letter from Healthcare Coalition in Opposition to S. 2838, to The Honorable Patrick J. Leahy, Chairman of the U.S. Senate Comm. on the Judiciary and Arlen Specter, Ranking Member of the U.S. Senate Comm. on the Judiciary (Sept. 10, 2008) [hereinafter Healthcare Coalition Letter],
http://www.instituteforlegalreform.com/media/pressreleases/20080910.cfm.

[70] The National Arbitration Forum, *The Case for Pre-Dispute Arbitration Agreements: Effective and Affordable Access to Justice for Consumers, Empirical Studies & Survey Results*, at 1 (2004) [hereinafter NAF Study],

Opposition to the FNHAA centers on the proposition that the Act will ultimately cause serious harm to taxpayers. Pete Sepp, the National Taxpayer Union's Vice President of Communications, explained that the reason for this is, "[o]ur civil justice system costs taxpayers billions to administer, and costs the economy much more in deadweight losses."[71] Stated differently, when fewer cases are arbitrated, more money must be spent on courtroom litigation. According to Sepp and those sharing his views, this will inevitably cost taxpayers money that could be better used to enhance the quality of care in nursing homes and to ensure that such incidents do not continue to occur with the same frequency and prevalence in the future.[72] Similarly, if more cases go to trial, presumably costing nursing homes more money, fewer businesses will opt to invest in long-term care facilities because of the risk of loss or liability.[73]

Kelley Rice-Schild, a member of the Board of Governors of the American Health Care Association, as well as a small business owner and nursing home administrator, has spoken out against the FNHAA.[74] As the sole owner of a Florida nursing home, Rice-Schild has claimed that she is "one jury verdict, or negotiated settlement" away from losing her business.[75] Thus, while many long-term care facilities are parts of corporate chains that can afford to take out large insurance policies that will lessen the impact of a substantial jury verdict, several nursing homes are owned and operated independently and cannot afford for disputes to be resolved outside of arbitration.

Furthermore, opponents of the FNHAA have argued that the Act will essentially "gut" arbitration because, without pre-dispute agreements, arbitration rarely, if ever, occurs.[76] The NAF supported this

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http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf.

[71] Healthcare Coalition Letter, *supra* note 69.

[72] *Id.*

[73] Letter from Rebecca Adelman and Chase Pittman to Laura Owings and Mark Geller, 43 TENN. B.J. 4 (Apr. 2007) [hereinafter Adelman and Pittman Letter] (responding to Laura Owings and Mark Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, 43 TENN. B.J. 20 (2007), *infra* note 113).

[74] *The Fairness in Nursing Home Arbitration Act of 2008: Hearing on S. 2838 Before the Subcomm. on Antitrust, Competition and Consumer Rights and the Spec. Comm. on Aging*, 110th Cong. (2008) [hereinafter *FNHAA Hearing*, Rice-Schild Testimony] (statement of Kelley Rice-Schild on behalf of the American Health Care Association and the National Center for Assisted Living).

[75] *Id.*

[76] *The Fairness in Nursing Home Arbitration Act of 2008: Hearing on S. 2838 Before*

position in a 2004 study that concluded that "the benefits of arbitration for consumers are completely lost when parties may only agree to arbitrate after a legal dispute arises."[77] According to the NAF, this is largely due to the rarity of parties choosing arbitration once an incident has occurred and the fact that victims often struggle to retain an attorney if their suit is not likely to secure a large monetary award.[78] In fact, the NAF found that up to ninety-five percent of plaintiffs will be denied access to justice after a decision to litigate in court because of an inability to retain an attorney.[79] Moreover, opponents have argued that the pre-dispute arbitration can actually work in the favor of victims in cases where the long-term care facility would prefer litigation.[80] This is because "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."[81]

In a similar argument, opponents of the FNHAA contend that the Act will effectively prevent residents who would prefer to enter into a pre-dispute arbitration clause from doing so.[82] This, opponents argue, undermines the residents' freedom to contract.[83] Pre-dispute arbitration supporters find that it is not uncommon for the families of those admitted to nursing homes to find "comfort" in having the security of a timely dispute resolution method because families prefer to see the resolution of the dispute in their loved one's lifetime.[84]

In a letter to Senator Herb Kohl, the Wisconsin Healthcare Association ("WHCA") spoke out against the Act, declaring that "the remedy the bill seeks to impose for the alleged unfair practices of a few [] creates an unwarranted and unjust result for all."[85] Rather than wiping

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the Subcomm. on Antitrust, Competition and Consumer Rights and the Spec. Comm. on Aging, 110th Cong. (2008) [hereinafter *FNHAA Hearing,* Ware Testimony] (statement of Stephen J. Ware, Professor of Law, University of Kansas).

[77] NAF Study, *supra* note 70.

[78] *Id.*

[79] *Id.*

[80] *FNHAA Hearing,* Rice-Schild Testimony, *supra* note 74, at 6.

[81] *Id.*

[82] *Id.* at 7 ("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.").

[83] *Id.*

[84] *Id.* at 6.

[85] Letter from Wisconsin Healthcare Ass'n ("WHCA") to Sen. Herb Kohl (June 18, 2008) [hereinafter WHCA Letter], *available at* http://www.whca.com/mediaroom/docs/062408Bdoc.pdf.

out pre-dispute arbitration across the board, the WHCA argued that long-term care facilities should simply be made to follow "best practices," noting that if they are followed, "instances in which seniors might unwittingly enter into an arbitration agreement would be non-existent or exceedingly rare."[86] Thus, some opponents believe that greater energy must be directed towards fixing the practices of nursing homes that improperly obtain residents' consent to mandatory arbitration rather than instituting sweeping legislation such as the FNHAA.[87] In fact, the WHCA went as far as to state that it would support legislation that would invalidate pre-dispute arbitration agreements if it could be established that there was a misrepresentation or that the agreement was made a pre-requisite for admission to a facility.[88]

Opponents also argue that Congress should simply trust our current system, where there are laws that protect against unfair agreements, rather than attempting to fix something that is not yet broken.[89] Groups such as the American Association of Homes and Services for the Aging ("AAHSA") have also weighed in on this argument, declaring the Act "unnecessary."[90] Thus, opponents maintain that, rather than invalidating pre-dispute arbitration clauses across the board, the agreements should be accepted by federal and state governments through the use of "model nursing home agreements" and other such legislative measures that will presumably ensure the fairness of both the substantive and procedural aspects of contracting.[91]

Lastly, those who support pre-dispute arbitration clauses in nursing home contracts have voiced concern over the legitimacy of jury awards in nursing home abuse and neglect cases.[92] This argument essentially states that juries in cases challenging nursing home abuse tend to render verdicts "emotionally," rather than objectively analyzing the evidence

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[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *FNHAA Hearing,* Ware Testimony, *supra* note 76.

[90] *The Fairness in Nursing Home Arbitration Act of 2008, Hearing on S. 2838 Before the Subcomm. on Antitrust, Competition and Consumer Rights and the Spec. Comm. on Aging*, 110th Cong. (2008) [hereinafter *FNHAA Hearing,* AAHSA Testimony] (statement of the American Association of Homes and Services for the Aging), *available at* http://*www.aahsa.org/WorkArea/showcontent.aspx?id=1278.*

[91] Katherine Palm , *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 481-82 (2006).

[92] Adelman and Pittman Letter, *supra* note 73.

presented.[93] Juries can often be "inflamed by graphic photographs and testimony by experts who make a business of testifying, not treating patients."[94] Thus, lawyers will often expound on the fears of death and dying that jurors have and that are "placed in [them] from the moment the trial attorneys begin voir dire."[95] Therefore, viewed as yet another benefit of arbitration, opponents of the FNHAA have argued that arbitrators are better suited to decide these cases because of their "experience" in the field and their ability to adjudicate cases "objectively."[96]

B. Proponents of the FNHAA

While opponents of the FNHAA have argued vehemently against its passing, the Act's supporters have been equally adamant in its favor. On June 18, 2008, Alison E. Hirschel, President of the National Consumer Voice for Quality Long Term Care, testified before the Senate Committee on the Judiciary with respect to the FNHAA.[97] Hirschel pointed to several arguments often made by supporters of the FNHAA and the unenforceability of pre-dispute arbitration clauses generally. First, Hirschel noted that the circumstances surrounding the signing of an admissions agreement are often extremely stressful and rushed, leading many to overlook several of the provisions, including arbitration clauses, that are contained within the agreement.[98] Further, Hirschel maintained that, even if those seeking admission to a nursing home are aware of the arbitration clause, "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."[99] Lastly, Hirschel pointed out that consumers very often underestimate the cost of arbitration and that awards in arbitration proceedings are, generally, significantly lower than jury awards.[100]

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[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *The Fairness in Nursing Home Arbitration Act of 2008, Hearing on S. 2838/ H.R. 6126 Before the Subcomm. on Antitrust, Competition and Consumer Rights and the Spec. Comm. on Aging*, 110th Cong, (2008) [hereinafter *FNHAA Hearing,* Hirschel Testimony] (testimony of Alison E. Hirschel, President, The National Consumer Voice for Quality Long Term Care).

[98] *Id.*

[99] *FNHAA Hearing,* Hirschel Testimony, *supra* note 97.

[100] *Id.*

Hirschel claims that this is because "the last thing on most consumers' minds at the time of admission is how they will seek a remedy if something goes wrong . . . [patients] enter a long term care facility looking for care and compassion, not litigation or arbitration."[101]

Hirschel went on to assert that, although opponents of the Act argue that the invalidation of pre-dispute arbitration will cost taxpayers money, "what really costs taxpayers unfathomable sums of money is poor care itself."[102] In essence, Hirschel opined that poor care leads to more frequent hospitalization, surgeries, specialist consultations, and other similar expenses, all of which are funded by taxpayer dollars.[103] Thus, it is believed that the FNHAA will force long-term care facilities to enhance the quality of care provided to their patients because they will not have a pre-dispute arbitration clause as a proverbial ace-in-the-hole in the event that a dispute arises.

Lastly, Hirschel questioned the motives of long-term care providers by suggesting that in the event that such organizations save money by forcing arbitration, rather than expending greater funds for litigation and insurance premiums, there is no guarantee that these savings will be reinvested in the facility in order to increase the quality of life for patients.[104] Hirschel's argument is put in context by the fact that sixty-six percent of nursing homes are operated for a profit and over half are part of a chain of long-term care facilities.[105] Thus, Hirschel essentially posits that any alleged money saved will be returned to investors, rather than used to hire more nurses, to fund better training programs for staff, or to raise nurses' salaries and attract better qualified employees.[106]

The admissions process, described by Hirschel as a stressful and rushed procedure, is a common source of attack for proponents of the invalidation of pre-dispute arbitration.[107] This concern is evidenced quite clearly by the fact that the American Arbitration Association ("AAA")—the self-proclaimed "world's largest provider of alternative dispute resolution services"[108]—announced in 2002 that it would "no

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101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 NHARC, *supra* note 16.
106 *FNHAA Hearing*, Hirschel Testimony, *supra* note 97.
107 *Id. See also FNHAA Hearing,* Connor Testimony, *supra* note 22, at 2.
108 American Arbitration Association, http://www.adr.org/drs (Oct. 24, 2008)

longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate."[109] A letter written by a coalition of groups supporting the FNHAA expressed similar concerns, noting that "[f]orty percent of nursing home admissions are from a hospital and occur after a medical emergency . . . [and] [i]ndividuals are often pressured to accept the first available bed without any opportunity to evaluate the care provided or consider other possible options."[110]

The arguments surrounding the admissions process and pre-dispute arbitration clauses are based largely in contract theory. Many proponents for invalidation of pre-dispute arbitration clauses stress that such clauses are both unconscionable and against public policy.[111] In addition, they contend that pre-dispute arbitration agreements are voidable as contracts of adhesion due to lack of negotiating power by the signing party.[112] In an article entitled "The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts," Laura M. Owings and Mark N. Geller concluded that "arbitration agreements are unconscionable because they are normally hidden in an admission contract without any opportunity to bargain over the provisions."[113]

Other proponents of the FNHAA have attacked the arbitration process itself. A group of organizations supporting the Act noted that it is often the long-term care facility that chooses which arbitration firm to use.[114] According to Specter, this is "patently unjust" because it creates an incentive for the arbitration firm to decide in favor of the facility that chose them to resolve the dispute.[115] Specter further commented

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[hereinafter AAA].

[109] AAA, Healthcare Policy Statement, http://www.adr.org/sp.asp?id=32192 (Oct. 24, 2008).

[110] Letter from Coalition in Support of S. 2838, to Senator Patrick J. Leahy, Chairman of the U.S. Senate Comm. on the Judiciary and Senator Arlen Specter, Ranking Member of the U.S. Senate Comm. on the Judiciary (Sept. 10, 2008) [hereinafter Coalition Letter Supporting S.2838], *available at* http://www.nsclc.org/areas/long-term-care/Nursing-Facilities/area_folder.2008-07-03.5899827150/letter-of-support-of-the-fairness-in-nursing-home-arbitration-act/at_download/attachment.

[111] Harkness, *supra* note 11.

[112] *Id.*

[113] Laura Owings & Mark Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, 43 TENN. B.J. 20, 24 (2007).

[114] Letter from American Association of Justice, et. al., to Senator Patrick J. Leahy, Chairman of the U.S. Senate Comm. on the Judiciary (Sept. 10, 2008), *available at* http://www.citizen.org/documents/DOJ%20response%20letter.pdf (responding to Nelson Letter, *supra* note 66).

[115] *Id.*

that arbitrators are not "bound by any laws" and thus they are not required to make their decisions available to the public or give an explanation for their decision to the aggrieved party.[116]

Yet another argument of pre-dispute arbitration opponents is raised in *Howell v. NHC Healthcare-Fort Sanders, Inc.*[117] The case dealt with a federal statute that prohibited nursing homes from accepting any additional consideration from a patient covered by Medicare or Medicaid other than the standard payment.[118] The plaintiff in *Howell* argued that because "mutuality of promises can be a sufficient consideration" for an arbitration agreement, nursing homes routinely violate the statute because they accept both Medicare and Medicaid payments, as well as the mutual promise to arbitrate as consideration.[119] The *Howell* court did not reach the issue, but another court, hearing a very similar argument, rejected it, finding that a mutual agreement to arbitrate a potential dispute did not rise to the level of an "additional fee" or "other consideration" as contemplated by the statute.[120]

V. THE COURTS

An important argument that many opponents of the FNHAA raise is that the system already works. Essentially, opponents argue, courts will analyze agreements in the context in which they were signed and make a determination based on contract theory as to whether the agreement is enforceable. However, as evidenced by the many cases bearing on this issue that have been heard by courts across the country, there is no discernible test for which factors should be given the greatest weight in determining if an agreement is unenforceable. Thus, in applying the fundamental tenets of contract law to nursing home agreements, courts have come out on both sides of the issue, leaving uncertainty, for both the resident and the nursing home, as to how a court will decide a particular case.

In *Miller v. Cotter*, Plaintiff Miller's father died under the care of a Massachusetts nursing home.[121] After Miller filed a civil lawsuit regarding the death, the nursing home answered that Miller should not

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116 *Id.*

117 109 S.W.3d 731 (Tenn. Ct. App. 2003).

118 42 U.S.C.A. § 1396r(c)(5)(A)(ii)(West 2009).

119 *Howell*, 109 S.W.3d at 733.

120 Owens v. Coosa Valley Health Care, 890 So. 2d 983, 989 (Ala. 2004).

121 Miller v. Cotter, 863 N.E.2d 537, 540 (Mass. 2007).

have been allowed to file the complaint due to an arbitration agreement signed during the admissions process.[122] The lower court subsequently denied the nursing home's request to invoke the arbitration clause and the facility appealed that judgment.[123]

On appeal, Miller challenged the validity of the agreement in court.[124] In response to Miller's argument, the court first stressed the language of both the Federal Arbitration Act and the similarly worded Massachusetts Arbitration Act, which both express a "strong public policy favoring arbitration as an expeditious alternative to litigation for settling commercial disputes."[125] The court then noted that aggrieved parties could use only general contract defenses such as "fraud, duress, or unconscionability," to invalidate arbitration provisions or agreements contemplated under the Federal Act.[126] Finding the doctrine of unconscionability to be the only issue present, the court dictated that such claims must be viewed in light of the contract's "setting, purpose, and effect."[127] In upholding the agreement, the court rested on several factors that weighed against unconscionability. For example, the arbitration agreement was not included within the admission agreement, but rather was presented to Miller as a separate form.[128] Further, the court made reference to Miller's education and background as evidence of his ability to understand the agreement.[129] Lastly, the court rejected Miller's public policy and contract of adhesion arguments.[130]

By contrast, the court in *Small v. HCF of Perrysburg* reached the opposite conclusion, striking down the arbitration agreement signed by

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[122] *Id.*

[123] *Id.*

[124] *Id.* at 543

[125] *Id.*

[126] *Id.*

[127] *Miller*, 863 N.E.2d at 545.

[128] *Id.* at 546.

[129] *Id.* at 545.

[130] The *Miller* court, in rejecting Miller's public policy argument, noted that "[t]he grounds for a public policy exception must be clear in the acts of the Legislature or the decisions of the court." *Id.* at 547. Due to the fact that the Massachusetts legislature and this court had expressed a "clear policy . . . favoring arbitration," the court refused to invalidate the arbitration agreement. *Id.* Further, the court rejected Miller's contract of adhesion argument, noting that "contracts of adhesion are enforceable unless they are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances." *Id.* Thus, while the court conceded that the terms of the contract were supplied solely by the nursing home and were not subject to negotiation, Miller's argument was nevertheless deemed to be without merit. *Id.*

the plaintiff.[131] In that case, Plaintiff Small admitted her husband to a nursing home in Perrysburg, Ohio in 2002.[132] At the time of admission, Small's husband was semi-conscious and Small signed an agreement containing a pre-dispute arbitration clause.[133] Two weeks later, under the home's care, Small's husband died after a fall.[134] The nursing home sought to compel arbitration based on the agreement signed by Small at the time of her husband's admission.[135] The court, in holding the arbitration agreement unenforceable, focused on several aspects of the agreement, as well as the admissions process itself.[136]

With respect to the agreement, the court expressed concern with several provisions that seemed to heavily favor the nursing home, including a provision that allowed the nursing home to bring resident non-payment claims to court instead of via forced arbitration.[137] Furthermore, the court indicated concern that the agreement required an arbitrator, as opposed to a court, to determine whether a plaintiff's claim would be subject to arbitration.[138] Additionally, the agreement stated that the arbitration process must occur within the facility, with the prevailing party being responsible for their own attorney fees—both factors largely favoring the home.[139] According to the court,

> [T]hough the prevailing party may be the resident or representative, individuals may be discouraged from pursuing claims because, in addition to paying their attorney, and, pursuant to the arbitration clause, the costs of the arbitration, they may be saddled with the facility's costs and attorney fees. Such a burden is undoubtedly unconscionable.[140]

With respect to the admissions process, the court noted that the contract was signed under "considerable stress."[141] Indeed, Small testified that when admitting her husband, the home did not explain the agreement to her and she was too concerned about her husband to

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131 823 N.E.2d 19, 25 (Ohio Ct. App. 2004).
132 *Id.* at 20.
133 *Id.* at 21.
134 *Id.*
135 *Id.*
136 *Small*, 823 N.E.2d at 23-24.
137 *Id.* at 23.
138 *Id.*
139 *Id.*
140 *Id.* at 24.
141 *Id.*

properly review the document.[142] The court also noted that the entire admissions process took only a half hour, clearly not enough time to explain the lengthy and legally complicated document that essentially stripped Small of her rights.[143] Lastly, the *Small* court looked at Small's ability to comprehend the arbitration agreement. According to the court, Small "did not have any particularized legal expertise and was sixty-nine years old on the date the agreement was signed," and therefore could not be expected to understand a complex agreement that effectively deprived her of a fundamental right to have her case heard before a court of law.[144] Thus, unlike in *Miller*, the *Small* court ruled against enforcement of the arbitration provision.[145]

Both *Miller* and *Small* demonstrate that the enforceability of pre-dispute arbitration agreements in the long-term care industry is largely a factual determination. Courts often consider such factors as the education and background of the complaining party, as well as whether the long-term care facility explained the agreement to the potential resident. Courts also contemplate whether the drafter buried the arbitration provision within a lengthy admissions packet, or presented the provision as a separate document.

VI. ANALYSIS

Although the arguments against passing the Fairness in Nursing Home Arbitration Act are not entirely meritless, the bill should nonetheless pass for several reasons. First, long-term care facilities must have an incentive to provide quality care. With most facilities operating for a profit,[146] owners of nursing homes are constantly looking for ways to cut costs. This inevitably leads to unacceptably low staff levels with access to little or no training.[147] Moreover, as noted previously, nursing home staffs are underpaid, which leads to low morale and poor job performance, and in extreme cases, physical and sexual abuse due to the unqualified nature of the employees.[148] The

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[142] *Small*, 823 N.E.2d at 24 (Small stated in an affidavit that she was concerned about her husband's health when they arrived at the nursing home because he "appeared to be unconscious.").

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] NHARC, *supra* note 16.

[147] *Id.*

[148] Hawes Testimony, *supra* note 18.

FNHAA will, in effect, take away the protection of mandatory arbitration that long-term care facilities have enjoyed for so many years. Without arbitration to shield them from liability, facilities will have an incentive to reinvest profits in the business and allocate such funds towards raising wages, hiring more staff, and implementing better training to ensure the qualifications of new hires.

It is particularly important that long-term care facilities have such incentives, in light of the general futility of governmental regulation of homes that fail to meet statutory requirements for the standard of care. Supporters of the FNHAA have stressed this issue, noting that "state regulators . . . still levy fines that are little more than the cost of doing business . . . and allow facilities to operate year-after-year with serious, repeat problems."[149] This fear was partially realized in 2001, when the federal Centers for Medicare and Medicaid Services announced that it wanted to "ease regulatory requirements on nursing homes, reducing the frequency of inspections and lessening or eliminating some penalties."[150] As reported by the United States Government Accountability Office, current nursing home inspections are generally ineffective.[151] Thus, any deregulation of the nursing home industry would only have continued adverse effects on what many already view as a broken system.

Notably, arbitration can be very beneficial to a system overwhelmed by the disputes of an increasingly litigious society. The efficiency with which the arbitration system can dispose of cases is undoubtedly of some value to the civil courts. Nonetheless, contracting parties should employ arbitration only in limited contexts. As noted by the court in *Small v. HCF of Perrysburg*, arbitration is appropriate in business-to-business disputes, in which pre-dispute agreements to arbitrate were made amongst professional and knowledgeable persons who fully understood the ramifications of contracting.[152] However, there is a fundamental flaw in allowing pre-dispute arbitration agreements between a large corporation, presumably holding all bargaining power, and an unassuming layperson, with no practical business or legal experience. Thus, although courts may not discover unconscionability

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[149] *FNHAA Hearing,* Hirschel Testimony, *supra* note 97.

[150] Robert Pear, *U.S. May Ease Rein on Nursing Homes*, N.Y. TIMES, Sept. 7, 2001, at A1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C02E3D71039F934A3575AC0A9679C8B63.

[151] U.S. GOV. ACCOUNTABILITY OFFICE, *supra* note 26.

[152] Small v. HCF of Perrysburg, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004).

within the agreement or even in the process itself, there exists a "broader reason" for the invalidation of such agreements.[153]

Similarly, most disputes arising out of nursing homes and other long-term care facilities are based on negligence and, therefore, better suited to civil litigation.[154] This is because the discovery process in civil proceedings is much more in depth than what arbitration can accomplish.[155] This is also because negligence cases require a determination of the reasonableness of the actions of the responding party.[156] The issue of reasonableness is normally decided by juries, not small panels of arbitrators who may not share the same perspectives as a group of average citizens.[157]

Nevertheless, the FNHAA is not without flaws. The Act would perhaps be more effective if nursing home residents, or their representatives, were allowed to contract for pre-dispute arbitration clauses in limited circumstances, such as when a patient specifically requests an arbitration clause. The freedom to contract is an important right and, in that respect, the FNHAA may overstep its bounds.[158] However, although this is a valid argument, and one that has been made by many opponents of the FNHAA, the fact remains that disputes would continue to arise over whether the party contracting away their constitutional right to a jury trial truly understood what they were contracting for.[159] Indeed, the Small court, in noting that the plaintiff did not have any "particularized legal expertise," hinted that perhaps the plaintiff must have more than a general understanding of business and legal agreements in order for a pre-dispute arbitration agreement to be valid.[160]

Many opponents of the Act assert that responsible nursing homes, those that practice quality health care and actively avoid citations for deficiencies, should not be punished for the illegal actions of other long-term care facilities.[161] What these opponents fail to realize is that

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153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *See* Lochner v. New York, 198 U.S. 45 (1905) (holding that the right to free contract was included under the due process clause of the Fourteenth Amendment).

159 U.S. CONST. amend. VII.

160 Small v. HCF of Perrysburg, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004).

161 WHCA Letter, *supra* note 85.

arbitration in the long-term care setting is simply not appropriate. The FNHAA should pass not only because there is a crisis in America regarding the quality of long-term care, but also because there is a fundamental unfairness in allowing a corporation and an average citizen to make a non-negotiated agreement.

Thus, although it may not be a perfect solution to the wealth of problems facing the long-term care industry, the FNHAA is one that has considerable potential and could have a true and positive effect on many issues. More importantly, the Act could potentially result in better quality healthcare for the ever-growing senior population.

VII. CONCLUSION

Doris Rowe's death was both senseless and avoidable and her family deserves to have their story heard in the forum of their choice. As it stands today, the Rowe family may just get their wish. After hearing arguments on behalf of both the Rowes and the Bozeman Evergreen facility, a federal district court judge has allowed the case to proceed to trial.[162] However, while this is undoubtedly a significant victory for the Rowe family, Doris' case is simply another disheartening chapter in the history of a broken system in which our nation's elderly are the constant victims.

The need for the Fairness in Nursing Home Arbitration Act is indicative of a failed system in desperate need of reform; and to a certain extent, that is what the FNHAA is: an impetus of reform. While its immediate effect will simply be to invalidate all mandatory pre-dispute arbitration clauses in nursing home contracts, the long-term effect will ideally spark a decreasing trend in nursing home abuse and neglect. With the challenges of an elderly population boom facing our nursing homes, and to a greater extent our nation, it is vital that action be taken now to secure a safe and healthy prospect for all those who will inevitably rely on long-term care.

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[162] Mayrer, *supra* note 1.