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110TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
110–894

FAIRNESS IN NURSING HOME ARBITRATION ACT OF 2008

SEPTEMBER 26, 2008.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 6126]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 6126) to amend chapter 1 of title 9 of United States Code with respect to arbitration, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

	Page
Purpose and Summary	2
Background and Need for the Legislation	2
Hearings	6
Committee Consideration	6
Committee Votes	6
Committee Oversight Findings	10
New Budget Authority and Tax Expenditures	11
Congressional Budget Office Cost Estimate	11
Performance Goals and Objectives	12
Constitutional Authority Statement	12
Advisory on Earmarks	12
Section-by-Section Analysis	12
Agency Views	13
Changes in Existing Law Made by the Bill, as Reported	17
Minority Views	19

69–006

PURPOSE AND SUMMARY

H.R. 6126 amends the Federal Arbitration Act to make unenforceable any agreement to arbitrate a dispute arising out of a contract between a long-term care facility and a resident, if the agreement was made before the dispute arose.

BACKGROUND AND NEED FOR THE LEGISLATION

Arbitration has been used as a means of dispute resolution for thousands of years.[1] It may offer benefits over the traditional litigation process. For example, the agreed upon arbitration process can offer the parties flexibility in the discovery process and the scheduling of the hearing. Further, when the subject matter of a dispute is highly technical, the parties to that dispute may choose an arbitrator with relevant expertise in the area. Because the arbitrator does not need to learn a new subject area, the arbitration hearing may be held sooner than a trial in court. Additionally, because there are less avenues to appeal or delay an arbitration decision, a party to the dispute can enforce a decision much quicker. Thus, the entire arbitration process can result in a swifter and, therefore, less costly resolution than traditional litigation in the courts.

On February 12, 1925, Congress codified the use of arbitration through the Federal Arbitration Act.[2] Title 9 was adopted as a means to put arbitration agreements on the same footing as other contracts, and as a way to avoid the sometimes costly and time consuming litigation process.[3] Arbitration law establishes alternative dispute resolution procedures for certain types of disputes with an eye towards helping parties who so desire keep those disputes out of court, thereby facilitating efficient resolution.[4] The Act supersedes all State laws in conflict with the Act.[5] In order to encourage the use of arbitration, Title 9 provides a strong presumption that courts will enforce arbitration decisions. The grounds for seeking judicial review of arbitration determinations are limited, and seldom have parties been successful in overturning such determinations. The Supreme Court has upheld arbitration clauses in a wide array of contracts by recognizing Congress' expansive powers under the Commerce Clause.[6]

Notwithstanding the benefits arbitration can provide to the parties of a dispute, a party with overwhelming negotiating leverage can unfairly advantage itself by imposing arbitration clauses as a condition of doing business.[7] For example, in a business-consumer

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[1] Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?,* 57 STAN. L. REV. 1631, 1635 (Apr. 2005).

[2] 9 U.S.C. § 1 *et seq.*

[3] *See* H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).

[4] *See* Matthew Parrott, *Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution,* 75 FORDHAM L. REV. 2685, 2692. (Apr. 2007).

[5] Preston v. Ferrer, 128 S. Ct. 978, 987 (2008) ("When parties agree to arbitrate all questions arising under a contract, the [Federal Arbitration Act] supersedes state laws . . .").

[6] *See, e.g.,* Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[7] *See, e.g.,* Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents,* 8 DEPAUL J. HEALTH CARE L. 263, 267 (2004); Harry Stoffer, *Ban is "Bittersweet" for 2 Dealers; Survivors of Mandatory Binding Arbitration are Happy That Colleagues Will Be Spared Ordeal,* AUTOMOTIVE NEWS, Jan. 27, 2003, at 14i. ("Arbitration can be a good thing, . . . [but it's] the 'mandatory' and the 'binding,' hanging together that make it objectionable.")

relationship, the business can impose a mandatory arbitration clause on the consumer, who likely is not in a strong negotiating position.

Businesses have imposed these clauses in a variety of standard-form consumer contracts, such as through inserts with a billing statement,[8] in credit card agreements,[9] in long-term care admission agreements,[10] and in contracts to purchase a house.[11] Virtually all securities firms require investors to agree to arbitration.[12] An employer may impose an arbitration clause on its employees by inserting it in its employee handbooks or by including it in its employment applications.[13] Similarly, franchisors may require disputes to be resolved through arbitration by including arbitration clauses in their franchise agreements.[14]

If an individual even becomes aware of and understands the mandatory arbitration clause within the contract, he or she may reject the clause. However, the business usually then severs the current or anticipated relationship: a credit card company may cancel the consumer's credit card; a nursing home may not admit the prospective resident; or the employer may fire the employee. Thus, individuals have little practical choice but to accept a mandated arbitration clause. By imposing on consumers, employees, and franchisees contracts on a "take-it-or-leave-it" basis,[15] businesses and employers are bypassing the congenial nature of a fair and voluntary alternative dispute resolution technique that Congress intended.[16]

Because arbitration avoids the public court system in favor of a private industry of arbitration groups,[17] individuals lose some of the benefits and constitutional rights associated with traditional

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[8] *See* Ting v. AT&T, 319 F.3d 1126, 1134 (9th Cir. 2003).

[9] *See Credit Card Practices: Fees, Interest Rates, and Grace Periods: Hearing Before the Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs,* 110th Cong. (2007) (prepared statement of Alys Cohen, Staff Attorney, National Consumer Law Center).

[10] *See* Krasuski, 8 DEPAUL J. HEALTH CARE L. at 268 n.41.

[11] *See* Cyrus Dugger and Jordan Fogal, *Why an Ultra-Conservative Texas Grandmother Hates the GOP,* May 15, 2007. Available at http://www.alternet.org/rights/51885.

[12] Edward S. O'Neal and Daniel R. Solin, *Mandatory Arbitration of Securities Disputes: A Statistical Analysis of How Claimants Fare,* June 2007. A copy of the report is available at http://www.slcg.com.

[13] *See* Circuit City v. Adams, 532 U.S. 105, 109–110, 113 (2001).

[14] *See* Nagrampa v. Mailcoups, Inc., 469 F.3d 1257 (9th Cir. 2006); Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court of San Diego County, 133 Cal. App. 4th 396 (2005).

[15] Critics of arbitration label it "mandatory," "compelled," or even "cram down" arbitration. *See, e.g.,* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR,* 15 OHIO ST. J. ON DISP. RESOL. 19, 39 (1999); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 WIS. L. REV. 33; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration,* 74 WASH. U. L.Q. 637, 638 (1996). In contrast, proponents of arbitration suggest "mandatory" is unfair because consumers always have the option to refuse the services or products connected to binding arbitration. *See, e.g.,* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association,* 18 OHIO ST. J. ON DI SP. RESOL. 777, 780 (2003); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen),* 29 MCGEORGE L. REV. 195, 201 (1998) ("The consumer is free to put the pen down without signing the form. There is no duress in the typical 'adhesion' contract. A consumer who contracts in such circumstances does so voluntarily.").

[16] During the passage of the Federal Arbitration Act, Congress did not even intend to allow individuals to be bound by arbitration agreements if the contracts were between parties of unequal bargaining power. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967) (Black, J. dissenting) (citing Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary, 67th Cong., 9–11 (1923)).

[17] These groups include the American Arbitration Association, the National Arbitration Forum, and JAMS, which set their own procedures, contract with agencies and companies to arbitrate future disputes, and provide arbitrators and panels to hear disputes.

litigation.[18] These benefits and rights include lower initial financial hurdles,[19] pretrial discovery,[20] formal civil procedure rules,[21] proximity to the resolution forum,[22] access to counsel,[23] class action options,[24] and fairness.[25] Mandatory binding arbitration clauses may even negate the protection of some Federal statutes.[26]

Mandatory arbitration clauses, especially in consumer contracts, are becoming ubiquitous. Approximately one-third of important consumer transactions may be covered by arbitration clauses.[27] Some consumers have agreed to mandatory arbitration clauses simply by receiving them in envelope inserts[28] and in product boxes.[29] A consumer may even be bound by an arbitration clause he or she may not have ever received.[30] An employee may be similarly bound.[31] Some companies have utilized mandatory binding arbitration to obtain default judgments against consumers.[32]

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[18] Unfortunately, proponents of pre-dispute mandatory arbitration may view these losses as necessary to minimize frivolous lawsuits. *See* David Sherwyn, *Arbitration of Employment-Discrimination Lawsuits: Legalities, Practicalities, and Realities,* CORNELL HOTEL & REST. ADMIN. Q. (Dec. 2002).

[19] Arbitration clauses often impose high costs on consumers such as requiring travel to a distant forum or selection of a high-fee arbitrator, possible expenses which a plaintiff filing in a local court would not have to incur. *See* Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration,* LAW & CONTEMP. PROBS., Winter/Spring 2004, 221. Nonetheless, proponents of pre-dispute mandatory arbitration contend that arbitration keeps costs lower for the parties, although businesses alone are the likely recipients of those savings. *See* http://www.arbitrationfaq.com/.

[20] *See* Katherine Palm, Note, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate,* 14 ELDER L.J. 453, 478 n.172 (2006).

[21] *See* Ziva Branstetter, *Nursing Home Policy Challenged,* TULSA WORLD, *March 4, 2002, at 1 (Oklahoma nursing home's arbitration clause requires residents to travel to New Mexico at their own expense for arbitration proceedings).*

[22] *See id.*

[23] The lower probability of victory and legal fees may discourage some attorneys from representing individuals in arbitration proceedings. *See* Donna Harris, *Hudson: Arbitration defuses lawsuits; We can work it out—or not,* AUTOMOTIVE NEWS, Feb. 6, 2006, at 56. ("arbitration provisions in consumer contracts keep some plaintiffs' lawyers at bay."). *See also* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law,* 71 FORDHAM L. REV. 761, 783–784 (2002).

[24] Arbitration clauses may bar individuals from joining with others to form a class action, which has been a means by which plaintiffs have been able to pool resources to spread out the costs in time, attorney fees, and expenses. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?,* 42 WM. & MARY L. REV. 1 (2000). A recent study concludes that the increase in mandatory binding arbitration clauses in consumer contracts is part of a broader initiative by businesses to limit class action litigation. Theodore Eisenberg, et al, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts,* 41 U. MICH. J.L. REFORM 871, 895 (2008).

[25] Arbitration has introduced the "repeat provider" phenomenon. Advocates posit that arbitration organizations favor ruling on behalf of businesses because of the financial incentive to ensure that businesses are pleased with the results of the arbitration and thus hire the arbitration organization repeatedly. *See* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR,* 15 OHIO ST. J. ON DISP. RESOL. 19, 35–37 (1999). *See also* Stephen Landsman, *ADR and the Cost of Compulsion,* 57 STAN. L. REV. 1593, 1614–1615 (Apr. 2005).

[26] *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89–92 (2000) (where court held that a right guaranteed by the Truth in Lending Act was prevented by an adhesion arbitration clause). *See also* Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 677 (5th Cir. 2006) (where court held that USERRA does not preempt the terms of an employment agreement containing an arbitration clause).

[27] Linda J. Demaine and Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience,* LAW & CONTEMP. PROBS., Winter/Spring 2004, 55. "Important" consumer transactions include automobile purchases, telephone services, and health care coverages.

[28] *See* Ting, 319 F.3d at 1134.

[29] *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

[30] *See* Marsh v. First USA Bank, 103 F. Supp. 2d 909, 916–918 (N.D. Tex. 2000).

[31] *See* Tinder v. Pinker Security, 305 F.3d 728, 730–733 (7th Cir. 2002).

[32] *See* National Consumer Law Center Inc., *New Trap Door for Consumers: Card Issuers Use Rubber-Stamp Arbitration to Rush Debts into Default Judgments,* Feb. 17, 2005. Available at http://www.consumerlaw.org/initiatives/model/content/ArbitrationNAF.pdf. *Also see The Arbitration Trap: How Credit Card Companies Ensnare Consumers,* Public Citizen, September 2007. Available at http://www.citizen.org/documents/Final__wcover.pdf.

Another concern is that arbitration is conducted in a secretive setting in which no public records are produced.[33] The secrecy of arbitration may keep important information out of the view of individuals who would use it to make informed choices based on safety records.[34] For example, prospective residents of long-term care facilities would benefit from knowing the history of safe treatment of residents at the facilities they are considering.[35] Arbitration enables the long-term care industry to keep more of this information secret, avoiding media exposure and hampering government oversight.[36]

Although informed consumers might theoretically be expected to reject one-sided arbitration clauses by opting for long-term care at facilities that do not impose them, residents and their families often do not have much time, as a practical matter, to conduct a thorough examination to compare contracts at each facility in their vicinity.[37] The resident's and his or her family's focus is understandably on the quality and assortment of provided services offered. When residents are being admitted, they and their families are typically under a lot of stress, and few are in a state of mind to give much thought to the fine print in the admission materials.[38] If a resident even becomes aware of the mandatory arbitration clause, he or she may not understand the clause.[39] And even the relatively few who might see it and understand it are forced to accept it anyway or be denied admission into the long-term care facility.

In these conditions, arbitration is no longer voluntary; it is mandatory. Individuals are left with little choice but to accept arbitration to resolve future disputes.

In fact, the controversy surrounding arbitrating personal injury disputes involving residents and long-term care facilities has caused some arbitration providers to refuse to arbitrate such dis-

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[33] *See* Russel Myles and Kelly Reese, *Arbitration: Avoiding the Runaway Jury,* 23 AM. J. TRIAL ADVOC. 129, 141 (1999).

[34] The secrecy may also detract from the development of law, see Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform,* 38 HOUS. L. REV. 1237, 1246–49 (2001), or be incompatible with democracy, see Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration,* 67 LAW & CONTEMP. PROBS. 279, 298–303 (2004).

[35] From 1999 until February 2005, the Centers for Medicare and Medicaid Services—the Federal agency which oversees compliance with Federal nursing home standards—cited 15.5% to 29.3% of nursing homes for actual harm or immediate jeopardy to their residents. U.S Gov. Accountability Off., NURSING HOMES: DESPITE INCREASED OVERSIGHT, CHALLENGES REMAIN IN ENSURING HIGH-QUALITY CARE AND RESIDENT SAFETY, GAO-06-117 (Dec. 2005). The most recent report reveals that about 1 in 5 nursing homes have serious deficiencies. U.S Gov. Accountability Off., NURSING HOMES: FEDERAL MONITORING SURVEYS DEMONSTRATE CONTINUED UNDERSTATEMENT OF SERIOUS CARE PROBLEMS AND CMS OVERSIGHT WEAKNESSES, GAO-08-517 (May 2008). Although this information is generally available, these numbers reflect responses to sporadic surveys, which likely do not include all relevant information.

[36] *See* Krasuski, at 300 nn.262–263.

[37] *See* Denese A. Vlosky, *"Say-so" as a Predictor of Nursing Home Readiness,* 93 J. FAM. CONSUMER SCI. 59 (2001).

[38] *See* Howell v. NHC Healthcare-Fort Sanders, 109 S.W.3d 731 (Tenn Ct. App. 2003); Raiteri ex rel Cox v. NHC Healthcare/Knoxville, Inc., No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at 2 (Tenn. Ct. App. Dec. 30, 2003). *See also* Robert Hornstein, *The Fiction of Freedom of Contract—Nursing Home Admission Contract Arbitration Agreements: A Primer on Preserving the Right of Access to Court Under Florida Law,* 16 ST. THOMAS L. REV. 319, 320 (2003); Maureen Armour, *A Nursing Home's Good Faith Duty to Care: Redefining a Fragile Relationship Using the Law of Contract,* 39 ST. LOUIS U. L.J. 217, 226 n.37 (1994).

[39] *See* Romano ex rel. Romano v. Manor Care, Inc., 861 So.2d 59, 61 (Fla. App. 2003), *reh'g denied,* Manor Care, Inc. v. Romano, 874 So.2d 1192 (Fla. 2004) (where even the nursing home administrator did not understand the meaning of the arbitration clause).

putes unless ordered by a court to do so.[40] These arbitration providers include the American Arbitration Association and the American Health Lawyers Association.[41]

H.R. 6126 amends the Federal Arbitration Act to make mandatory arbitration clauses in contracts between long-term care facilities and residents except when they are agreed to after the dispute involved has arisen. H.R. 6126 simply gives back to residents and their families their legal options on how to resolve disputes should they arise.

HEARINGS

The Committee on the Judiciary Committee's Subcommittee on Commercial and Administrative Law held a hearing on H.R. 6126 on June 10, 2008. Testimony was received from William J. Hall, MD, who appeared on behalf of AARP; Linda Stewart, RN, a nurse from Texas; Gavin J. Gadberry, Esq., an attorney with Underwood, Wilson, Berry, Stein and Johnson, PC, who appeared on behalf of the American Health Care Association and the National Center for Assisted Living; and Ken Connor, an attorney with Wilkes & McHugh, P.A.

COMMITTEE CONSIDERATION

On June 15, 2008, the Subcommittee on Commercial and Administrative Law met in open session and ordered the bill H.R. 6126 favorably reported, without amendment, by a vote of 5 to 4, a quorum being present. On July 30, 2008, the Committee met in open session and ordered the bill H.R. 6126 favorably reported without amendment, by a rollcall vote of 17 to 10, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 6126:

1. An amendment offered by Mr. Feeney to cap and limit attorneys fees paid to attorneys representing plaintiffs. The amendment would also require the Comptroller General to conduct a study of the average hourly fees paid to plaintiffs' lead counsel in all class action cases. The amendment failed by a vote of 11 to 15.

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[40] *See* "Healthcare Due Process Protocol," AMERICAN ARBITRATION ASSOCIATION/AMERICAN BAR ASSOCIATION/AMERICAN MEDICAL ASSOCIATION COMMISSION ON HEALTHCARE DISPUTE RESOLUTION, FINAL REPORT, JULY 27, 1998, *available at* http://www.adr.org/sp.asp?id=28633; Elise Dunitz Brennan, Commentary, *Board Modification to the Rules of the Alternative Dispute Resolution Service of American Health Lawyers Association,* HEALTH LAWYERS NEWS, Jan. 2004, at 21–22.

[41] *The Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (response by Richard Naimark, Senior Vice President of the American Arbitration Association, to a question posed by Rep. Linda T. Sánchez, on why AAA no longer arbitrates health care disputes). *See also* Joelle Babula, *Valley Health Care: Group Won't Arbitrate Medical Cases,* LAS VEGAS REV. J., Aug. 7, 2003, at 1-B.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman			
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Delahunt			
Mr. Wexler		X	
Ms. Sánchez		X	
Mr. Cohen		X	
Mr. Johnson		X	
Ms. Sutton		X	
Mr. Gutierrez			
Mr. Sherman		X	
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Mr. Davis			
Ms. Wasserman Schultz		X	
Mr. Ellison		X	
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.			
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Chabot			
Mr. Lungren			
Mr. Cannon	X		
Mr. Keller			
Mr. Issa	X		
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Feeney	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Total	11	15	

2. An amendment offered by Mr. Cannon to exclude from the Act pre-dispute arbitration agreements which do not condition admission based on such agreements, provide at least a 30-day opt-out provision of such agreements, and preserve state laws regulating such agreements. The amendment failed by a vote of 9 to 14.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman			
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Delahunt			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Wexler		X	
Ms. Sánchez		X	
Mr. Cohen			
Mr. Johnson		X	
Ms. Sutton		X	
Mr. Gutierrez			
Mr. Sherman		X	
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Mr. Davis			
Ms. Wasserman Schultz		X	
Mr. Ellison			
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.			
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Chabot			
Mr. Lungren			
Mr. Cannon	X		
Mr. Keller			
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Feeney	X		
Mr. Franks			
Mr. Gohmert	X		
Mr. Jordan	X		
Total	9	14	

3. An amendment offered by Mr. Cannon to exclude from the Act any pre-dispute arbitration agreements which cover services provided essentially by medical and health-related employees of the long-term care facility. The amendment failed by a vote of 10 to 14.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Delahunt			
Mr. Wexler			
Ms. Sánchez		X	
Mr. Cohen		X	
Mr. Johnson		X	
Ms. Sutton		X	
Mr. Gutierrez			
Mr. Sherman		X	
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Mr. Davis			
Ms. Wasserman Schultz		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Ellison			
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.			
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Lungren			
Mr. Cannon	X		
Mr. Keller			
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Feeney	X		
Mr. Franks			
Mr. Gohmert	X		
Mr. Jordan	X		
Total	10	14	

4. A vote on the question of the motion to report H.R. 6126 favorably was approved 17 to 4.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler	X		
Ms. Sánchez	X		
Mr. Cohen			
Mr. Johnson			
Ms. Sutton	X		
Mr. Gutierrez			
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Mr. Davis			
Ms. Wasserman Schultz	X		
Mr. Ellison	X		
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte			
Mr. Chabot			
Mr. Lungren			
Mr. Cannon			
Mr. Keller		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes			
Mr. King			

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Feeney			
Mr. Franks			
Mr. Gohmert			
Mr. Jordan			
Total	17	4	

5. Noting the apparent absence of a quorum, the Chair called for a quorum. The vote to report H.R. 6126 favorably was retaken, and was approved 17 to 10.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt	X		
Mr. Wexler	X		
Ms. Sánchez	X		
Mr. Cohen			
Mr. Johnson	X		
Ms. Sutton	X		
Mr. Gutierrez			
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Mr. Davis			
Ms. Wasserman Schultz	X		
Mr. Ellison	X		
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Chabot			
Mr. Lungren		X	
Mr. Cannon			
Mr. Keller		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks			
Mr. Gohmert			
Mr. Jordan		X	
Total	17	10	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activi-

ties under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 6126, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 2, 2008.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 6126, the Fairness in Nursing Home Arbitration Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres, who can be reached at 226–2860.

Sincerely,

PETER R. ORSZAG,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 6126—Fairness in Nursing Home Arbitration Act of 2008.

H.R. 6126 would make certain pre-dispute arbitration agreements between the operators of long-term care facilities and their residents invalid or unenforceable. In a pre-dispute arbitration agreement, the parties agree to arbitrate a potential dispute rather than seek redress through the courts. The bill would apply to agreements entered into or modified on or after the date of the bill's enactment. Under current law, the operators of long-term care facilities can include clauses in contracts with residents that provide for mandatory arbitration if a dispute should arise.

Under the bill, CBO expects that the majority of disputes that could arise between a resident and a facility operator would be litigated in State courts and, therefore, would not substantially affect the caseload of the Federal court system. Cases challenging the nullification of a particular arbitration agreement would be addressed in a Federal court, but CBO expects that any such cases would have an insignificant effect on the overall workload of the courts. Therefore, CBO estimates that implementing H.R. 6126

would have no significant cost over the next 5 years. Enacting the bill would have no effect on direct spending or revenues.

By restricting the provisions that could be included in contracts between long-term care facilities and residents of such facilities (or their representatives), H.R. 6126 would impose an intergovernmental and private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA). Based on information from industry sources, CBO estimates that the direct cost to comply with the mandate to State, local, and tribal governments and the private sector would fall below the annual thresholds established in UMRA for intergovernmental and private-sector mandates ($68 million and $136 million, respectively, in 2008, adjusted annually for inflation).

The CBO staff contacts for this estimate are Leigh Angres (for Federal costs), who can be reached at 226–2860, Melissa Merrell (for the State and local impact), who can be reached at 225–3220, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940. This estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 6126 amends the Federal Arbitration Act to make unenforceable agreements to arbitrate disputes arising out of a contract between a long-term care facility and a resident, if that agreement was made before the dispute arose.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 6126 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "Fairness in Nursing Home Arbitration Act of 2008."

Sec. 2. Amendments. Section 2 amends the Federal Arbitration Act by adding a new section, Section 17, to the Act. Section 2 defines a "long-term care facility" to include any facility which is reimbursed for services by Medicare or Medicaid, or is an assisted living facility, or is an adult foster care facility, but excludes adult day care facilities. Section 2 also states that pre-dispute arbitration agreements between a long-term care facility and a resident of such a facility are invalid or unenforceable, whether they were entered into at any time during or after the admission process.

Sec. 3. Effective Date; Application of Amendments. Section 3 provides that the amendments made by this legislation will apply only to contracts made, amended, altered, modified, renewed, or extended on or after the enactment of this legislation.

AGENCY VIEWS

A July 29, 2008 letter from the Department of Health and Human Services on H.R. 6126 is set forth below. In his letter Secretary Leavitt asserts incorrectly that H.R. 6126 would "deprive patients and providers of the opportunity to agree voluntarily to resolve their disputes through arbitration." H.R. 6126 would only make unenforceable *pre-dispute* mandatory arbitration agreements.

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

JUL 29 2008

The Honorable John Conyers, Jr.
United States House of Representatives
Committee on the Judiciary
Washington, D.C. 20515

Dear Mr. Chairman:

I write to express my serious concerns about H.R. 6126, the "Fairness in Nursing Home Arbitration Act of 2008", introduced in the House on May 22, 2008. While the Administration appreciates the Committee's concern regarding the cost and quality of long-term care, it cannot support this bill, which would deprive patients and providers of the opportunity to agree voluntarily to resolve their disputes through arbitration. Because arbitration is often a more cost-effective and efficient means of resolving disputes, precluding patients' and providers' reliance on it will only increase the costs of long term care.

Pre-dispute arbitration agreements are an excellent way for patients and providers to control costs, resolve disputes, and speed resolution of conflicts. For these reasons, we encourage potential residents and nursing homes to consider adopting such agreements to fairly resolve disputes while reducing costs for both parties. Such agreements are generally permitted under state and federal law and do not hinder the Administration's ability to take enforcement action against nursing homes providing poor quality care.

For the past eighty years, the federal government has consistently found that arbitration may be a favorable method of resolving disputes and, in some instances, may be preferable to litigation. In enacting the Federal Arbitration Act (FAA) in 1925, Congress stated a clear preference for arbitration in resolving controversies arising out of contracts or transactions involving interstate commerce. The United States Supreme Court has also noted the benefits of arbitration, including:

arbitration is typically less expensive and faster than litigation; arbitration may have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties than litigation; and it is often more flexible in terms of discovery and scheduling times and places for hearings *See Allied-Bruce Terminix Cos v. Dobson*, 513 U.S. 265, 280 (1995).

This bill deprives potential nursing home residents of an important option and threatens to increase the costs of long-term care for all patients as well as for the Medicare and Medicaid programs. Recent studies show that arbitration is fair to consumers and is more prompt and less expensive than litigation. For example, the American Arbitration Association's 2007 summary of consumer arbitration cases showed that approximately 60% of its consumer arbitration cases were settled by mutual agreement. Based on an analysis of 310 awards in consumer arbitration cases rendered between January and August 2007, consumers prevailed approximately half the time when they were proceeding as claimants. A case reached final disposition in approximately 4-6 months (depending on whether the case required an in-person hearing).

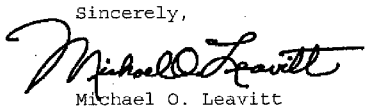
Federal law provides ample safeguards to ensure that nursing home residents are protected from harm. For example, under 42 C.F.R. § 483.12(a)(2) and 42 C.F.R. § 483.13(b), nursing homes may not discharge or retaliate against residents for disagreements based solely on binding arbitration agreements. This requirement is enforced both by State governments and the Centers for Medicare & Medicaid Services (CMS). Furthermore, the existence of a binding arbitration agreement does not in any way affect the ability of a State survey agency or CMS to cite facilities for violations of certain regulatory requirements, including those for quality of care. Federal sanctions for such violations include civil money penalties, denial of payment for new or all admissions, temporary management, and termination of the facility's provider agreement, among others. In addition to Federal sanctions, States may impose additional sanctions under their State licensure authority. Also, the Medicaid appeal procedures at 42 C.F.R. § 431.200 et seq. apply to discharges or disputes of eligibility between the

resident and the State Medicaid Agency and are not affected by a binding arbitration agreement.

Arbitration agreements can help nursing home residents get speedy, fair compensation following incidents. A ban on these agreements would increase litigation costs and insurance costs, imposing new burdens on the Medicare and Medicaid programs and on State health care budgets. For these reasons, the Administration strongly opposes H.R. 6126.

The Office of Management and Budget has advised that there is no objection to the presentation of these views from the standpoint of the Administration's program.

Sincerely,



Michael O. Leavitt

cc: The Honorable Lamar S. Smith, Ranking Member,
House Committee on the Judiciary

A July 30, 2008 letter from the Office of Legislative Affairs of the Department of Justice on S. 2838, a similar but not identical bill to H.R. 6126, is set forth below. Principal Deputy Assistant Attorney General Nelson asserts incorrectly that the bill would provide "a blanket prohibition against enforcing arbitration agreements in all situations." H.R. 6126 would only make unenforceable *pre-dispute* mandatory arbitration agreements.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General — *Washington, D.C. 20530*

July 30, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice (the Department) on S. 2838, the "Fairness in Nursing Home Arbitration Act of 2008". The Department opposes this bill, which would needlessly invalidate arbitration agreements between long-term care facilities and residents of such facilities.

Arbitration is typically a less expensive and quicker method of resolving disputes than civil litigation, and arbitration is generally viewed as leading to fair outcomes. The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and similar state arbitration acts have long encouraged the use of arbitration instead of litigation. Likewise, the courts have recognized the potential benefits of arbitration over litigation. *See, e.g., Allied-Bruce Terminix Cos v. Dobson*, 513 U.S. 265, 280 (1995). Because the bill would not only prevent nursing homes and their residents from entering into binding pre-dispute arbitration agreements (regardless of the parties' circumstances or the claims at issue) but would retroactively invalidate all such agreements that are already in force, the Department strongly opposes S. 2838.

In any given case, if there are particular facts or circumstances as to why a pre-dispute agreement to arbitrate should not be enforced, that should be decided on a case-by-case basis by the courts applying existing Federal or state arbitration laws. This determination is necessarily fact-specific and should be left to a court based on the facts presented. There should not be a blanket prohibition against enforcing arbitration agreements in all situations, to say nothing of a wholesale vitiation of such agreements that have already been executed.

In addition, the proposed legislation, in its application, may exceed the scope of Congress's regulatory authority under Article I of the Constitution. To pass constitutional muster, S. 2838 must rest on the Congress's authority under the Commerce Clause to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes," U.S. Const. art. I, § 8, cl. 3, or under the Necessary and Proper Clause "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to regulate interstate and foreign commerce, *id.* art. I, § 8, cl. 18. The Supreme Court has made clear that Congress can regulate only three categories of activity with its authority under the Commerce Clause and Necessary and Proper Clause: (1) the channels of interstate commerce; (2) the instrumentalities

of interstate commerce, and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005). It is questionable whether S. 2838 falls within the scope of these categories, particularly insofar as it would extend to agreements between a long-term care facility based and operated entirely within a state and a resident of that state.

Please do not hesitate to contact this office if we may be of additional assistance. The Office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 9, UNITED STATES CODE

* * * * * * *

CHAPTER 1—GENERAL PROVISIONS

Sec.
1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.
* * * * * * *
17. Validity and enforcement.

* * * * * * *

§ 17. Validity and enforceability

(a) DEFINITIONS.—For purposes of this section:

(1) LONG-TERM CARE FACILITY.—The term "long-term care facility" means—

(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, 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;

but excludes a facility, or portion of a facility, that either does not provide the services described in clause (i) or has as its primary purpose to educate or to treat substance abuse problems.

(2) PRE-DISPUTE ARBITRATION AGREEMENT.—The term "pre-dispute arbitration agreement" means any agreement to arbitrate a dispute that arises after such agreement is made.

(b) INVALIDITY OF PRE-DISPUTE ARBITRATION AGREEMENTS.—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.

(c) APPLICATION TO AGREEMENTS.—This section shall apply to any pre-dispute arbitration agreement between a long-term care facility and a resident of such facility (or a person acting on behalf of such a resident, including a person with financial responsibility for such resident), and shall apply to a pre-dispute arbitration agreement entered into either at any time during the admission process or at any time after the admission process.

(d) APPLICATION OF FEDERAL LAW.—A determination as to whether this chapter applies to an arbitration agreement described in this section shall be determined under Federal law. Except as otherwise provided in this chapter, the validity or enforceability of

such agreement shall be determined by the court, rather than the arbitrator, irrespective of whether the party opposing arbitration challenges such agreement specifically or in conjunction with any other term of the contract containing such agreement.

* * * * * * *

MINORITY VIEWS

I. INTRODUCTION

Mandatory, pre-dispute arbitration in the nursing home and assisted living sectors grew out of run-away litigation abuse in the 1990s. Hand in hand with tort reform, the use of mandatory arbitration effectively brought litigation costs back under control. As a result, service providers that might otherwise have been forced to raise fees for services or close their doors were able to continue to provide affordable services. Their sustained ability to do so is imperative as our country's elderly and fixed-income population explodes, creating ever-higher demand for nursing home and assisted living services at sustainable costs.

H.R. 6126 imprudently seeks to turn back the clock on arbitration practices in these sectors. It will render thousands upon thousands of arbitration agreements void and unenforceable, and it will prohibit the negotiation of such agreements in the future. No record has been established demonstrating that mandatory binding arbitration is unfair to nursing home and assisted living residents and their families. No record has been made that, if there is any unfairness, a solution cannot be found in reforming mandatory arbitration procedures or improving the voluntary arbitration system. And, perhaps most important, no record has been made demonstrating that the inexorable results of H.R. 6126 will *not* be abusive lawsuits, rising costs and closing facility doors. Those rising costs, moreover, surely will one day be placed at the door of the Medicare system, which already is destined for a fiscal crisis of epic proportions if it is not reformed.

H.R. 6126 also is proposed precisely at the time that the key alternative to arbitration—the class action lawsuit—is under greater suspicion than ever. Some of the most prominent plaintiffs' class action lawyers in the country stand convicted of massive fraud based on the purchase and use of fabricated evidence. There is strong evidence, moreover, that such abuse is standard class-action industry practice. At the same time, moreover, there is potent evidence that class action awards frequently produce only pittances for individual members of plaintiff classes, while their class action lawyers harvest from them millions upon millions of dollars in fees. Congress' investigation of this scandal has just begun, and it should be concluded before we pass any legislation sacrificing arbitration to the interests of the plaintiffs trial bar.

For all of these reasons, we strongly urge the rejection of H.R. 6126. The bill will surely bring profits to the plaintiffs' trial bar. It will surely harm, however, the nursing home and assisted living system and those who depend upon it for vital services.

II. BACKGROUND

A. Increased Use of Mandatory Binding Arbitration Clauses in Response to Exploding Nursing Home Tort Liability in the *1990s*

Arbitration is the classic means of alternative dispute resolution available to those wishing not to bring their disputes before federal or state courts. The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.,* is the principal federal law affecting arbitration. H.R. 6126 would amend the FAA.

The thrust of the law, including federal law, has for some time been to encourage the use of arbitration and other alternative dispute resolution mechanisms that are speedier, less expensive and more flexible than litigation. In the landmark case of *Southland v. Keating,* 465 U.S. 1 (1984), the Supreme Court went so far as to declare that "[i]n enacting § 2 of the [Federal Arbitration] Act, Congress declared a national policy of 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." *Id.* at 10 (emphasis added).

H.R. 6126 flies in the face of this consistent and important federal policy. It is therefore imperative to consider whether there is any evidence compelling a departure from this policy in the nursing home and assisted living sectors.

The stage for H.R. 6126 was set, first and foremost, by increases in tort liability in the nursing home sector in the 1990s. This trend may have been most pronounced in Florida, Texas and Arkansas. As the Wall Street Journal reported:

> The industry was alarmed in the late 1990s by a rash of huge jury awards. In one case, $83 million was awarded in the death of a Texas woman with infected bedsores; $95 million went to a California woman who fractured her hip and shoulder when she allegedly was dropped by nursing-home staff. Both awards were knocked down by the trial judges: the Texas judgment to $56 million, and the California award down to $3.6 million. But plaintiffs' lawyers were newly drawn to nursing-home suits by the big awards.[1]

According to the plaintiffs' lawyer in that same California case, "Every joker and their brother got into the nursing-home area[.]"[2]

In response to this trend, the nursing home sector increasingly turned to the use of mandatory binding arbitration clauses in the contracts they signed with residents or their families.[3] In some states, these clauses were struck down by state courts.[4] Often, they were struck down on the ground that they were signed under duress.[5] Other times they were struck down as too unfavorable to plaintiffs or because they were not adequately explained when they were bargained for.[6]

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[1] Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forego Lawsuits,* Wall Street Journal, p. A1 (April 11, 2008) ("Koppel, *Nursing Homes*").

[2] *Id.*

[3] *See, e.g.,* AON Global, *Long Term Care: 2008 General Liability and Professional Liability Actuarial Analysis* at 4, 8 (May 12, 2008) *("Long Term Care").*

[4] Koppel, *Nursing Homes.*

[5] *Id.*

[6] *Id.*

In other states, however, the courts upheld the use of mandatory binding arbitration clauses.[7] In Ohio, for example, a court upheld in 2007 an agreement with a mandatory binding arbitration clause that was entered into by "a woman who had entered a home from a hospital and was suffering bouts of confusion."[8] Although the court considered the nursing home's use of the clause "troubling," and that the clause had been offered during "an extremely stressful time for elderly persons of diminished health," it found the contract fair and upheld it.[9]

According to a 2007 study performed for the nursing home industry, the move to arbitration is beginning to curb awards effectively. As reported in the Wall Street Journal, the study found that "after years of rising, average payouts per claim began to edge down for nursing-home cases resolved in 2004 and 2005, in part due to the rise of arbitration and tort-reform measures."[10] Looking to the future, the study estimates that "with legal fees included, homes' average costs per claim will drop to about $146,000 for incidents that took place in 2006, from about $226,000 for 1999 incidents."[11] According to one of the authors of the study, "we are seeing the elimination of large runaway awards" in a number of states.[12]

Two clear effects should result from these developments. First, the return to more reasonable awards will help assure that runaway awards do not force providers out of business. For example, Skilled Healthcare Group, Inc., a company operating 75 nursing homes in six states, filed for bankruptcy in 2001, in part because of a $6 million judgment against the company.[13] The company survived bankruptcy, and by 2007 had "significantly reduced [its] liability exposure" through the use of arbitration clauses.[14] According to the company's general counsel, as a result of the company's use of mandatory arbitration, it has found in virtually every case that it can come to a reasonable settlement, because both sides understand that "the possibility of a highly emotionally driven verdict is unlikely."[15]

Second, and in a similar way, arbitration in the same way helps companies to lower costs. This is, of course, beneficial to consumers, many of whom must sign up for long-term care at nursing homes. This also promises to be beneficial to the Medicare system, which often pays for nursing home services. The increased use of arbitration thus stands to benefit not only the family fisc, but the federal fisc, and with it every taxpayer. This is no small thing, considering the looming Medicare funding crisis fueled by exploding health care costs for an increasingly aging society.

We acknowledge that there may be occasional cases in which the arbitration system may produce unsatisfactory results. Much the same can be said, however, of the court system. The question, therefore, is whether the arbitration system on the whole is functioning well, when compared to the litigation system. We also acknowledge that there will be cases in which a resident may suffer

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.; see also Long Term Care* at 4–6, 13–19, 23–25.
[11] Koppel, Nursing Home.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

illness, injury or, in the extreme case, death, from poor quality nursing home or assisted living care, and in which that resident may not have fully appreciated that his or her contract would prevent the case from going to a jury trial. But the question remains the same—does the arbitration system nevertheless generally produce satisfactory results, when compared to litigation?

In the evidence brought to the Committee in hearings on H.R. 6126, we saw no proof that the arbitration system is commonly failing. Accordingly, far more important than protecting against the occasional arbitration misfire or a small subset of patients' access to jury trials is the need to keep awards and the overall costs of services within reasonable limits. This will benefit both the increasingly strained Medicare system and the increasingly tight average family budget. Moreover, we are acutely aware of information showing that awards in class action lawsuits too often pay pennies on the dollar to plaintiffs, while generating multi-million-dollar fee awards for the plaintiffs' lawyers. These litigation horror stories surely offset the anecdotal evidence we have heard about alleged failures in individual arbitration cases.[16]

B. Trends in the Evolution of Arbitration Clauses In *Nursing Home and Assisted Living Contracts*

Adding to the above factors, the nursing home and assisted living sectors have been moving toward extremely fair arbitration clause practices. According to Gavin Gadberry, the drafter of these sectors' model arbitration clause and a witness at the legislative hearing on H.R. 6126:

> Over the course of the past ten years arbitration has became 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 [the American Health Care Association and the National Center for Assisted Living] 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.[17]

With this type of model practice taking firm hold, we are of the view that Congress's goal should be to support the continued use

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[16] It has been reported, for example, that in class action litigation over exploding tires and rollovers associated with the Ford Explorer, class members recovered only a $500 certificate towards the purchase of a new Ford Explorer or a $300 certificate towards the purchase of any other Ford, Mercury or Lincoln vehicle. Both certificates were good for just 12 months. The plaintiff class's lawyers, meanwhile, obtained $25 million in fees. Similarly, in a class action consumer suit against Sears over charges for wheel alignments, the individual consumers recovered less than $6.50 each, while their class action lawyers recovered $1.1 million in fees. Those fees represented 99.8 percent of the total settlement of $1,102,402.

[17] Statement of Gavin Gadberry on behalf of the American Health Care Association and National Center for Assisted Living.

of mandatory binding arbitration in the nursing home and assisted living sectors, not to wipe it out.

C. *Larger Trends in Consumer Arbitration Contracts*

H.R. 6126, of course, also is proposed against the backdrop of general trends in the use of arbitration. In addition, it is proposed as the leading edge of a number of trial-lawyer-backed proposals to erode arbitration. It is therefore worth considering general trends in arbitration as well. These trends point strongly to the conclusion that arbitration generally benefits consumers.

1. Arbitration Generally

As discussed at the outset, arbitration is the classic means of alternative dispute resolution, and federal law has strongly promoted it for decades. One would particularly expect the accessibility and relative efficiency of arbitration to be useful in the many areas of consumer contracts. Consumers, on the one hand, stand to benefit from this quicker, less cumbersome and less expensive way of bringing often smaller-scale disputes to resolution. In fact, it is often arbitration that levels the playing field between consumers and companies.[18] Providers of goods and services, meanwhile, stand to benefit from these same advantages. Indeed, they benefit all the more because these claims can be fairly repetitive and may be large in number. In the end, both consumers and providers stand to benefit from decreases in the costs of goods and services that can stem from the use of arbitration.

The recent rise of mandatory binding arbitration clauses, however, seems to stem less from these general factors than from one particular factor. That factor is abuse of a competing, judicial form of consumer dispute resolution—the tort suit, particularly the class action tort suit. Particularly in response to the actual or perceived abuse of class action tort cases and class action lending disclosure suits, and due to the web of inconsistent substantive law and civil procedure in competing jurisdictions entertaining such suits, companies in numerous sectors of our economy have more and more resorted to the use of mandatory binding arbitration clauses. In this way, companies have sought to introduce a more orderly, less expensive, and more consistent set of rules for the resolution of their disputes with their customers. The movement to mandatory binding arbitration in the nursing home and assisted living sectors is just one part of this larger trend.

2. Theories of Advocates for and Against Mandatory, Binding *Arbitration Clauses*

Some consumer advocates suggest that consumers often lack the sophistication or bargaining power to understand and negotiate away from contracts containing mandatory binding arbitration clauses. These advocates also suggest that mandatory binding arbitration may be unfair in other ways, including: allegedly higher costs to consumers of initiating arbitration rather than litigation; companies' alleged use of initial arbitration costs as a barrier to consumer-initiated disputes; arbitrators' alleged tendency to favor

[18] *See, e.g.,* Christine Varney, *Arbitration Works Better than Lawsuits,* Wall Street Journal (July 14, 2008).

businesses over consumers in their rulings; and businesses' alleged tendency to require arbitration predominantly for those claims in which arbitration is more likely to benefit them.

Based on these and other arguments, consumer advocates claim that the use of mandatory binding arbitration clauses should be curtailed. They also claim that mandatory binding arbitration clauses unfairly curtail consumer access to class actions.

Those who support the use of mandatory binding arbitration, by contrast, argue that its elimination could leave small claimants with no effective legal recourse, and that strong institutional and market forces bearing on the use of arbitration in consumer contracts help to assure that consumers are fairly treated.[19] For example, companies in competitive market sectors have interests in offering clauses that are framed in terms fair to consumers, in order to out-compete their rivals. Consumers, meanwhile, have incentives to seek out more favorable contract language offered by competing providers.

Members of the arbitration sector, whose services will be used in disputes arising under arbitration clauses, likewise have competitive interests in offering services that are structured and delivered fairly to all participants, including consumers. This is particularly true in light of the ability of consumers to initiate arbitration.

Courts, meanwhile, also place healthy pressures on the arbitration system. The courts review mandatory binding arbitration clauses for their validity and enforceability, and they can throw out clauses that violate contract and arbitration law. Courts have strong interests, moreover, in assuring that arbitration proceedings that will occur under the authority of their decisions are fair and capable of delivering just results for all concerned.

Finally, the Federal Arbitration Act provides a statutory framework in which arbitration will take place. As a result, the arbitration system operates under a constant threat of congressional correction of abuses. This threat, of course, helps to curb the potential for abuse in the first place.

3. The General Evidence for Mandatory Binding Arbitration *Clauses*

The debate between proponents of these competing views is vigorous. Given the many strong forces acting to assure that mandatory binding arbitration clauses and the arbitrations pursuant to them are fair, however, it is perhaps not surprising that recent and growing evidence bears out the theory of those supporting the use of mandatory binding arbitration.

Consumer-oriented companies, for example, have increasingly fostered consumer protection by offering so-called "fair clauses." In these clauses, the rules of mandatory binding arbitration are fashioned so as to prevent undue advantages to companies. Such clauses increasingly are crafted to include provisions that: comply

[19] *See, e.g.,* Testimony of Stephen J. Ware, Professor of Law, Joint Hearing on "S.2838, the Fairness in Nursing Home Arbitration Act," Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights and Senate Special Committee on Aging at 1–4 (June 18, 2008); Alan S. Kaplinsky and Mark J. Levin, *Consumer Arbitration: If the FAA "Ain't Broke," Don't Fix It,"* The Business Lawyer, Vol. 63, No. 3 (May 2008); Testimony of Mark J. Levin, Esq., "Hearing on Mandatory Binding Arbitration Agreements: Are They Fair for Consumers," Subcommittee on Commercial and Administrative Law, House Judiciary Committee (June 12, 2007) ("Levin Testimony").

with the consumer "due process" procedures of the major arbitrating services; allow either party to invoke arbitration; provide for the payment of the difference between court and arbitration fees; allow for fee-shifting to losing companies; permit requests from indigent consumers that companies pay the costs of arbitration, win or lose; and furnish off-ramps to small claims court for claims that would qualify for those fora.[20] In addition, consumer contracts increasingly include opt-out clauses that allow consumers, for a time after entering into a contract, to opt-out of mandatory binding arbitration clauses while preserving the rest of the bargain represented in their contract. The nursing home and assisted living sectors' model clause provides a good example of this, as it gives a generous, 30-day opt-out period.

Evidence from empirical studies also points to the conclusion that institutional and market forces are adequately assuring fairness to consumers. A study by Navigant Consulting published in 2008, for example, found that arbitration provides a substantial advantage to consumers. Analyzing results in California debt collection cases, the study found that consumers were four times more likely to *lose* in court than in arbitration.[21] Our attention also has been drawn to a study by the California Dispute Resolution Institute, which is part of the University of San Francisco's Leo T. McCarthy Center for Public Service and the Common Good. This study found that arbitration produces a win for consumers *more than 70 percent* of the time. The study also found that arbitration resolved disputes in an average of 100 days, while litigation, by contrast, averaged two years.[22]

Consistent with this evidence, the National Arbitration Forum recently published a synopsis of independent studies and surveys concerning the benefits of consumer arbitration. The results of these studies, as concerns consumer interests, can be summarized as follows:

- Individuals prevail more often in arbitration than in court;
- Consumers, more specifically, prevail 20% more often in arbitration than in court;
- Monetary relief for individuals is higher in arbitration than in lawsuits;
- Individuals receive a greater percentage of the relief requested in arbitration;
- Arbitration is approximately 36% faster than litigation;
- Sixty-four percent of American consumers would choose arbitration over a lawsuit for monetary damages; and
- Ninety-three percent of consumers using arbitration find it to be fair.[23]

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[20] *See, e.g.,* Levin Testimony at 11–14.

[21] Navigant Consulting, Memorandum re: National Arbitration Forum: California Consumer Arbitration Data at 1–4 (available at http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1212); U.S. Institute for Legal Reform, U.S. Chamber of Commerce, *Arbitration Better than Court for Consumer Debtors, Study Shows* at 1–2 (July 15, 2008).

[22] Letter from American Health Care Association, et al. to Reps. Linda Sánchez and Chris Cannon at 1 (July 14, 2008); Letter from U.S. Chamber of Commerce to Reps. Linda Sánchez and Chris Cannon at 1 (July 14, 2008).

[23] National Arbitration Forum, *The Case for Pre-Dispute Arbitration Agreements: Effective and Affordable Access to Justice for Consumers: Empirical Studies & Survey Result*s (2004).

The results of these studies for business were similarly positive. For example, the NAF reported that 78% of business attorneys find that arbitration provides faster recovery than lawsuits, and 83% of business attorneys find arbitration to be as fair as or fairer than lawsuits.[24]

Separately, in December 2004, Ernst & Young issued a study of the outcomes of contractual arbitration in consumer-initiated, lending-related cases. The results of this study were as follows:

- Consumers prevailed in 55% of cases that went to an arbitration hearing—the same win-rate that consumers obtain in state court;
- Consumers obtained favorable results (via arbitration decision or settlement) in 79% of the cases that were reviewed;
- 40% of consumers who brought arbitration claims actually got their "day in court," while only 2.8% of cases in state court ever reached trial;
- 69% of consumers surveyed indicated that they were very satisfied with the arbitration process.[25]

In April 2005, Harris Interactive released the results of an extensive survey of arbitration participants sponsored by the Institute for Legal Reform at the U.S. Chamber of Commerce. Prominent among this study's findings were that:

- Arbitration was widely seen as faster (74%), simpler (63%), and cheaper (51%) than going to court;
- Two-thirds (66%) of participants said they would be likely to use arbitration again, with nearly half (48%) saying they were extremely likely to do so;
- Even among those who lost, one-third said they were at least somewhat likely to use arbitration again;
- Most participants were very satisfied with the arbitrator's performance, the confidentiality of the process, and the length of the process;
- Perhaps predictably, winners found the process and outcome very fair and losers found the outcome much less fair. Forty percent of those who lost, however, remained moderately to highly satisfied with the fairness of the process, and 21% were moderately to highly satisfied with the outcome.[26]

In short, the weight of evidence suggests that mandatory binding arbitration does not result in unfairness to consumers. If anything were likely to injure the interests that would be affected by H.R. 6126 or other, similar proposals, it would be the limitation of the availability of arbitration to consumers seeking to resolve their disputes. Simple, bedrock principles of economics tell us that when fewer services are available with less competition (e.g., only litigation, only in the courts) that inevitably prejudices the consumer. Similarly, as one expert who testified before us has noted, if the restriction of arbitration introduces an economic drag on the econ-

[24] *Id.* at 2.

[25] Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2004).

[26] U.S. Chamber Institute for Legal Reform, *Arbitration: Simple, Cheaper and Faster than Litigation: A Harris Interactive Study* (2005).

omy, it will do so at a most inopportune time, given the economy's current state.[27]

D. *The Unfolding Class-Action Scandal*

Lastly, we must bear in mind that it is largely to the class-action lawsuit industry that H.R. 6126 could send nursing home and assisted living residents and their families. That industry, however, is currently being rocked by a major scandal. This scandal involves, among other things, fabricated testimony, bought and sold to support false claims. Multiple renowned class action lawyers have been exposed and convicted in the scandal. One of them, William Lerach of Milberg Weiss, told the press that illegal kickbacks to people recruited to file class action lawsuits is an "industry practice."[28] He and fellow trial lawyer Melvin Weiss engineered a $250 million criminal scheme to pay people to sue companies and are now federal prisoners.[29] Another of America's most prominent trial lawyers, Richard Scruggs of Mississippi, pled guilty earlier this year to bribing a state judge to obtain more legal fees.[30]

In light of the developing scandal, there has been a call for "a sober discussion about how best to achieve a fairer, more balanced legal system through comprehensive tort reform."[31] On May 2, 2008, Minority Leader John Boehner and House Judiciary Committee Ranking Member Lamar Smith called on House Judiciary Committee Chairman John Conyers to schedule swift hearings on these confirmed abuses within the legal system.[32] The response from the majority, however, has been slow in coming. Currently, a forum on this issue is planned for sometime in September 2008, but the majority has not enabled hearings.

When the heads of corrupt companies such as Enron were exposed, concerned Republicans and Democrats alike called for bipartisan hearings into the accounting industry. By contrast, when the heads of the class-action lawsuit industry are exposed, the result from Democrats is not congressional investigation. It is bills such as H.R. 6126 that would wipe out important parts of the arbitration system and generate still more lawsuit business for trial lawyers. We firmly believe that to be the wrong response. Bills such as H.R. 6126 should, at a minimum, wait until Congress has fully plumbed the class action scandal.

III. LEGISLATIVE CONSIDERATION

A. *Hearings*

The Subcommittee on Commercial and Administrative Law held two legislative hearings relevant to H.R. 6126. First, on June 12, 2007, the Subcommittee held a general oversight hearing on man-

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[27] Letter from Professor Peter B. Rutledge to the Honorable John Conyers and the Honorable Lamar Smith at 1–2 (July 14, 2008).

[28] *See, e.g.,* Peter Lattman, *Closing Argument: Mr. Lerach Mulls Life Behind Bars—Guilty but Defiant, the Plaintiffs' Lawyer Kicks Back in La Jolla,* Wall Street Journal at A1 (Feb. 12, 2008); Jonathan D. Glater, *Big Penalty Set for Law Firm, but not a Trial,* New York Times (June 17, 2008).

[29] *See, e.g.,* Nathan Koppel, *Milberg Is Expected To Admit Wrongdoing in Settlement,* Wall Street Journal at A4 (June 14, 2008).

[30] *See, e.g.,* Nathan Koppel, *Class-Action Law Firm Close to a Settlement,* Wall Street Journal at A1 (June 2, 2008).

[31] "A Fall and a Lesson," The Washington Post (April 9, 2008) (editorial).

[32] Minority Leader Boehner's and Ranking Member Smith's letter is available online at http://republicanleader.house.gov/News/DocumentSingle.aspx?DocumentID=90345.

datory arbitration in consumer settings. This hearing focused on more typical consumer claims, such as credit-cards claims, but it offered strong evidence that arbitration generally works better and faster for consumers than does litigation. Much of this evidence is discussed above.[33]

Second, on June 10, 2008, the Subcommittee held a legislative hearing on H.R. 6126 itself. This hearing failed to show that there is any widespread abuse of arbitration in the nursing home and assisted living sectors. For example, while witnesses appearing on behalf of the trial bar and the American Association of Retired Persons alleged that there are quality-of-care shortcomings in nursing homes and assisted living facilities, they failed to demonstrate that the arbitration system is producing unfair results in these sectors. Indeed, their evidence consisted largely of sweeping generalities and opinions, unsupported by hard, empirical evidence. In addition, they erroneously premised their testimony on the view that arbitration agreements are generally foisted on residents and their families as a condition of admission, under conditions of duress. This obviously ignores the widespread model arbitration practices in the sectors, which do not make admission contingent on agreement to mandatory arbitration, and which allow for a 30-day opt-out period so that final agreements on arbitration can be made upon unhurried reflection. For all of these reasons, their evidence largely missed the point. Finally, the remaining proponent of the bill, an individual witness who appeared to discuss her specific case, could not identify any unfair feature of the arbitration award rendered in that proceeding.

In fact, quite contrary to showing a need to restrict mandatory binding arbitration, the June 2008 hearing showed that the model arbitration clause used in the nursing home and assisted living sectors is quite fair; that arbitration has gone a long way to control the spiraling, lawsuit-driven costs of operation that threatened to shutter many facilities in the 1990s; and that, if any reforms are needed in this area, they should be found in efforts to make arbitration agreements and their negotiation still more transparent and thus better informed. Certainly, we should not be enacting legislation flying in the face of the long-standing federal promotion of arbitration—and nullifying the contracting rights of parties to thousands upon thousands of existing arbitration agreements—without a much more substantial showing that there is a systemic problem that we need to solve.

B. *Subcommittee Mark-up*

At subcommittee mark-up, Republicans offered several amendments to H.R. 6126. The first of these attempted to make the bill's provisions strictly prospective. The second carved out claims against doctors and other highly trained health professionals, while allowing the bill's provisions to apply to claims against facilities. Republicans also proposed to delay the bill's effective date until the GAO could determine whether the bill would drive up Medicare entitlement costs. Republicans' final amendment proposed to suspend the bill's provisions if a study of average-time-to-litigate showed

[33] *See supra* at 6–10.

that claims involving personal injuries were taking more than six months on average to work their way through the courts.

Together, these amendments would have ameliorated a number of the bill's significant adverse effects. None was supported by the majority, however. The health professionals carve-out, for example, was rejected on a 6–4 party line vote, although the purported reasons for the bill concern disputes between residents and facilities, not residents and health care professionals. Republicans' Medicare amendment was not even granted a vote. Notwithstanding the fundamental importance of preventing undue increases in Medicare costs, the majority ruled Republicans' Medicare amendment nongermane. The Republican "speedy judgments" amendment was voted down, despite its particular importance to (1) speeding effective relief for Americans in their twilight years and (2) keeping down litigation costs for elderly, fixed-income residents. With regard to retroactivity, Subcommittee Chairwoman Sánchez, the bill's lead sponsor, did clarify that the bill was intended only to be prospective; the amendment was thus subsequently withdrawn.

C. *Full Committee Mark-up*

Again at full committee mark-up, Republicans offered a series of amendments aimed at preventing the bill's adverse effects. Again, Democrats opposed these amendments.

Two of the Republican amendments honed in on the bill's sacrifice of the interests of residents and the health care system to the interests of the plaintiffs trial bar. Both allowed residents, at their option, to continue to arbitration their disputes. The first also limited attorneys' fees to a maximum of $1,000 per hour when residents chose to litigate; further limited fees to what lawyers would have charged for arbitration, when they did no better in litigation than they would have done in arbitration; and required the GAO to study hourly fees charged in class actions. The second amendment would have strongly policed the use of bought, sold and fake class-action evidence in lawsuits brought in the wake of the bill. It would have done this by exposing class action lawyers and their firms to liability for treble damages for fees and judgments purloined on the basis of fake, purchased evidence.

Both of these amendments were voted down by Democrats. Thus, the majority opted not only to favor the interests of trial lawyers over the interests of residents, but to ignore entirely the issues brought front and center by the burgeoning class action scandal. Remarkably, Democrats even opposed these amendments as one of their members explicitly acknowledged that lawyers would not take residents' cases that did not promise big returns for lawyers—leaving hordes of small claimants out in the cold.[34]

As at subcommittee mark-up, Republicans also offered an amendment to delay the bill's effective date until the GAO can determine

[34] Stakeholders weighing in on H.R. 6126 also pointed us to the bill's potential to leave small claimants without effective recourse. *See, e.g.,* Letter from American Health Care Association, et al. to Reps. Linda Sánchez and Chris Cannon at 2 (July 14, 2008) ("According to one survey, plaintiffs' employment lawyers said they would not take a case unless it was worth at least $60,000, on average. Therefore, without the option of arbitration, consumers would be faced with two choices-to try to navigate the legal system on their own, or to abandon their claim."); Letter from U.S. Chamber of Commerce to Reps. Linda Sánchez and Chris Cannon at 2 (July 14, 2008) (same). Professor Stephen Ware of the University of Kansas School of Law submitted similar testimony to the Senate as it considered H.R. 6126's companion legislation in that chamber. *See* Ware Testimony at 1–4.

whether the bill will drive up Medicare entitlement costs. Again, Democrats shuffled this issue off the table, ruling the amendment non-germane. Republicans also offered their amendment to carve out disputes between residents and health care professionals. Again, Democrats voted the amendment down, although their purported focus was on eliminating arbitration between residents and facilities.

Finally, Republicans offered an amendment to preserve arbitration agreements that follow the remarkably fair, leading edge model arbitration agreement used in the nursing home and assisted living sectors. Democrats claimed through the bill to want to restore fairness to arbitration; had they supported this amendment, they would have advanced both fairness and arbitration. They voted against the amendment, however, and thus set both causes back.

IV. CONCLUSION

As the above reflects, no compelling case has been made that mandatory arbitration is generally failing to bring fair and effective dispute resolution to nursing home and assisted living residents and their families. On the contrary, arbitration in these sectors is characterized by extremely fair model practices and has a record of effectively controlling costs for residents and facilities. What is needed is to encourage arbitration, not to wipe it out. That is particularly so when we know that the litigation alternative—including class-action litigation—has a record of abuse, is sure to produce a vicious cycle of escalating costs, and is mired in scandal. For these and all of the above reasons, we oppose H.R. 6126.

LAMAR SMITH.
CHRIS CANNON.
JIM JORDAN.

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