

September 10, 2008

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

Re: July 30, 2008 letter from Keith Nelson, Principal Deputy Assistant Attorney General,  
Department of Justice Office of Legislative Affairs

Dear Mr. Chairman:

We are responding to the July 30, 2008 letter from Keith B. Nelson, Principal Deputy Assistant Attorney General at the U.S. Department of Justice announcing the DOJ's opposition to S. 2838, the Fairness in Nursing Home Arbitration Act of 2008. Mr. Nelson's letter has no basis in law or fact.

In his letter Mr. Nelson states that it is "questionable" whether Congress has the power to pass S. 2838 under the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3, 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." This argument is baseless. Below, we discuss its two most serious flaws.

First, the United States Supreme Court has squarely rejected the DOJ's position. The Court has explained that the proper question in this circumstance is not the extent to which any specific transaction affects interstate commerce, but whether the general business practice being regulated substantially affects interstate commerce. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003) (per curiam) (holding unanimously that the Commerce Clause power supported applying the Federal Arbitration Act to a contract between an Alabama lender and an Alabama construction company); *see also Gonzales v. Raich*, 554 U.S. 1, 17 (2005) (holding that a long line of commerce clause cases "firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."). Therefore, within the class of activities covered by S. 2838—nursing home services—it is improper to inquire whether any particular transaction happens to be purely local.

Moreover, the Supreme Court has held that it need not determine whether a regulated activity "in fact" substantially affects interstate commerce, "but only whether a 'rational basis' exists for so concluding." *Gonzales v. Raich*, 554 U.S. 1, 22 (2005). The Supreme Court has identified multiple types of evidence that indicate a substantial effect on interstate commerce and, considering these types of evidence, Congress has more than a "rational basis" for concluding that nursing homes substantially affect interstate commerce. For example, Congress has power under the Commerce Clause to regulate nursing homes contracts or disputes over nursing home services if it has a rational basis to conclude that a substantial number of nursing homes are owned by out-of-state corporations, serve nonresident patients, receive payments for their

services from out of state or from Medicare, *see Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 327-31 (1991) (holding that both a hospital and its parent company were “unquestionably engaged in interstate commerce”); *see also BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass’n*, 36 F.3d 664, 666 (7th Cir. 1994) (citing *Summit Health*), or “purchas[e] substantial quantities of goods that have moved in interstate commerce.” *Citizens Bank*, 539 U.S. at 57 (citing *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964)). It would be eminently “rational” for Congress to believe any of these things.

Second, if the DOJ’s Commerce Clause argument were valid, it would counsel in favor of S. 2838, not against it. If Congress lacks the power to regulate arbitration agreements between nursing homes and their residents, then the Federal Arbitration Act, (FAA), 9 U.S.C. § 1, *et seq.*, is unconstitutional as applied to nursing homes. In that case, one would expect the DOJ to support a law that would reverse this unconstitutional application of the FAA, not to oppose it on the mysterious ground that Congress lacks the legislative power to undo its own unconstitutional legislation.

As a policy matter, Mr. Nelson points to the potential benefits of arbitration generally, but his arguments are irrelevant to S. 2838 because the legislation does not seek to prohibit arbitration. Rather, the bill seeks to safeguard against likely harm caused by *pre-dispute* arbitration clauses in contracts that consumers must enter into to gain admission into nursing homes or assisted living facilities. The bill will bar these clauses that compel arbitration for disputes even before a dispute arises. The bill does, however, preserve a consumer’s ability to choose arbitration to resolve a dispute after the complaint emerges.

Even if Mr. Nelson’s arguments were applied specifically to pre-dispute arbitration, he provides no support for his contentions. For example, he fails to cite sources in support of his claim that arbitration costs less than civil litigation. Conversely, a 2007 Public Citizen study, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, identifies numerous costs associated with arbitration such as the steep filing fees, the arbitrator’s hourly charges usually required in advance, and the “loser pays” terms where the losing party in the arbitration must pay all related costs. In a 2004 ruling stating that the cost provisions in an employment arbitration agreement were unenforceable, U.S. District Judge Edmund A. Sargus, Jr. observed: “In contrast with the arbitral forum, a litigant never incurs a room rental fee or hourly fee from the judge when litigating.” *Scovill v. WSYX/ABC, Sinclair Broadcast Group, Inc.*, 312 F.Supp.2d 955, 969 (S.D. Ohio 2004), *aff’d in part, rev’d in part*, 425 F.3d 1012 (6th Cir. 2005).

Mr. Nelson also states that arbitration is generally viewed as a system that leads to fair outcomes. On the contrary, inequity is inherent in pre-dispute binding mandatory arbitration clauses that severely curtail or omit many of the safeguards of the civil justice system without the consumer’s consent. The method is patently unjust when businesses are allowed to direct their disputes to arbitration firms to resolve their disputes because the arbitration firms have an incentive to please the businesses that choose them. Fair dispute resolution is also at risk because arbitrators are not bound by any laws and they are not compelled to make public or even provide to the consumer any explanation or record of their rulings.

The essential injustice in current binding mandatory arbitration practice in the nursing home setting is the unequal bargaining power between the consumer and the nursing home corporation. S. 2838 would allow arbitration of nursing home or assisted living complaints, but would ensure that residents or their representatives go to arbitration only if they choose it voluntarily after a complaint arises. The bill would protect elderly Americans and their representatives from harmful forced-arbitration agreements, thereby helping to ensure that allegations of neglect, abuse, and injury in these facilities can be addressed adequately.

Thank you for taking the time to consider the positions of our organizations.

Sincerely,

American Association for Justice  
Consumer Action  
Consumers for Auto Reliability and Safety  
Consumer Federation of America  
Homeowners Against Deficient Dwellings  
NCCNHR: The National Consumer Voice for Quality Long-Term Care  
National Association of Consumer Advocates  
National Consumer Law Center (on behalf of its low income clients)  
National Consumers League  
National Employment Lawyers Association  
National Senior Citizens Law Center  
Public Citizen  
Remar Sutton, Founder, the Give Me Back My Rights Coalition  
U.S. PIRG

cc: The Honorable Arlen Specter  
Ranking Minority Member