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June 22, 2010

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

On behalf of the American Bar Association, I write to you regarding H.R. 1237, the Fairness in Nursing Home Arbitration Act that you plan to mark up tomorrow. The ABA supports the goals of the legislation, although we urge you to take a different approach rather than amending Chapter 1 of the Federal Arbitration Act (FAA) to accomplish the goals.

Congress should take action on this issue because of the unfair disadvantage most residents and families face during the time of admission to a nursing home. These admissions typically involve an older person with multiple chronic conditions just discharged from a hospital. Families are under enormous pressure to get their loved one out of the hospital. There are few options and little time to weigh these options or review reams of admission paperwork or consult with counsel. The sole focus is to get one's loved one into a safe and caring place. Even in the best of circumstances, leaving one's familiar surrounding for a nursing home is a traumatic experience for the individual and family. The patient, and the family of the patient, is simply not in a position to comprehend or appreciate an arbitration agreement in these circumstances. To let nursing homes use the time of admission as a decision point to waive rights of legal redress in the courts is not good public policy.

While the ABA supports efforts to invalidate mandatory pre-dispute arbitration agreements in long-term care admissions agreements, we urge that the legislation be enacted as a new Chapter 4 of the Federal Arbitration Act (FAA) or as a separate statute outside of the FAA altogether. Such legislative implementation would have the benefit of avoiding unintended consequences caused by any confusion and uncertainty resulting from amendments to Chapter 1 of the FAA. ABA policy includes a proviso that the objectives of this legislation should be accomplished through methods other than amendment to Chapter 1 of the FAA, which has an extremely broad application to a range of domestic and international disputes that far exceeds

the scope of arbitration agreements affected by H.R. 1237. In addition, Chapter 1 has been intact and construed consistently by the courts for more than 80 years.

Thank you for considering the views of the ABA on this important legislation.

Sincerely,

A handwritten signature in black ink, reading "Thomas M. Susman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Thomas M. Susman

cc: Members, Committee on the Judiciary