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Director
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AMERICAN BAR ASSOCIATION
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February 23, 2009

The Honorable Herb Kohl, Chair
Special Committee on Aging
United States Senate
Washington, DC 20510

The Honorable Mel Martinez, Ranking Member
Special Committee on Aging
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Ranking Member Martinez:

On behalf of the American Bar Association, I write to express support for legislation similar to S. 2838, the Fairness in Nursing Home Arbitration Act, that you introduced in the last Congress. The ABA policy in support of the goals of the legislation-- adopted by the ABA House of Delegates on February 16, 2009-- is enclosed.

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 S. 2838. In addition, Chapter 1 has been intact and construed consistently by the courts for more than 80 years.

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We urge you to reintroduce a version of S. 2838 that does not amend Chapter 1 of the FAA. We appreciate your leadership on this important issue. We look forward to working with you toward enactment of nursing home arbitration legislation in the 111th Congress.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

cc: The Honorable Russ Feingold
The Honorable Patrick Leahy
The Honorable Richard Durbin

Enclosure

**RESOLUTION ADOPTED BY THE
AMERICAN BAR ASSOCIATION
FEBRUARY 2009**

RESOLVED, That the American Bar Association opposes the use of mandatory, binding, pre-dispute arbitration agreements between a long-term care facility and a resident of such facility or person acting on behalf of such resident.

FURTHER RESOLVED, That the American Bar Association supports enactment of federal, state, and territorial legislation and regulations that would invalidate such arbitration agreements and opposes federal, state, and territorial legislation and regulations that would authorize, encourage, or enforce such agreements.

FURTHER RESOLVED, That the American Bar Association supports additional refinements to such legislation and regulations that would accomplish these objectives through a method other than amendment to Chapter 1 of the Federal Arbitration Act; and if practicable, would narrow the scope of the arbitration prohibition to disputes relating to the resident's health care and supportive services.