

Statement of

The Honorable Herb Kohl

United States Senator

Wisconsin

June 18, 2008

Statement of Senator Herb Kohl

Fairness in Nursing Home Arbitration Act Hearing

Good morning. I would like to welcome our witnesses and thank them for their participation. I would also like to thank our Ranking Member, Senator Hatch, for joining us today, and Senator Martinez for his leadership on this important issue. We are here today to examine arbitration agreements in nursing home admissions contracts. We are conducting a joint hearing with both the Judiciary and Aging committees because the issue involves access to justice as it relates to the 1.5 million Americans currently in long term care facilities and all those who may someday need this kind of care.

Over the past several years, more and more long-term care facilities have required incoming residents to sign mandatory arbitration agreements. By signing these agreements, residents give up their right to go to court.

It is important to note that we believe the vast majority of nursing homes are doing a good job and working hard to deliver quality care. But, we must protect the right of those who receive inadequate care to hold poor-performing facilities publicly accountable. As we will hear today, Mr. Kurth and his family want to protect others from the tragedy they have suffered and to send a strong message to underperforming facilities that harmful care is unacceptable.

The experience of placing a family member into a long-term care facility is very emotional. Often, the decision is a last resort after a medical emergency or when a family acknowledges that they cannot provide the level of care their loved one needs. The family's sole focus is on finding the best facility, not studying technical legal clauses buried in the document. Many incoming residents lack the capacity to make even simple decisions, much less judge the legal significance of an arbitration agreement. Most are unaware that they are signing away their right to go to court.

Typically, admissions agreements are presented on a take-it-or-leave-it basis. Residents have few choices because they require immediate admission or because there are no other facilities in the area. As a result, whether or not they understand the arbitration provision, they often feel compelled to sign in order to ensure that their loved one will be admitted.

In response to these concerns, Senator Martinez and I have introduced a narrowly targeted bill which would invalidate mandatory arbitration agreements in long-term care facility contracts. It is important to note that our bill does not preclude arbitration as an option for resolving disputes. As proponents of arbitration emphasize - and with whom I agree - arbitration can be a timely, efficient and less adversarial option for resolving disputes than going to court.

However, it is critical that the decision to use arbitration be made voluntarily by both parties and only after a dispute occurs. It is only fair that families and residents have the opportunity to make an informed decision based on the facts of their particular case. After the dispute, if both parties feel that arbitration will truly offer a fair shake - as its proponents argue - then they should be free to agree to it at that time.

Some critics of our bill have suggested that rather than legislation, we should leave it up to the courts to decide on a case-by-case basis when arbitration agreements in long-term care facility contracts are unfair. However, in many jurisdictions, the courts are significantly constrained by the law. To hold an arbitration agreement unenforceable, most courts must find both substantive and procedural unconscionability. This means that even when the court finds that an arbitration agreement was unfairly entered into, the court must enforce it as long as the agreement is not grossly unfair to one party. Sometimes the courts will not even consider procedural unconscionability if the agreement is not substantively unfair. Without objection, we will include in the record several examples of cases where courts have not protected vulnerable long-term care facility residents who unwittingly signed away their ability to go to court.

I look forward to hearing our witness's testimony so that we can better understand this important issue.