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June 18, 2008

The Honorable Herb Kohl
United State Senate
Washington, DC 50510

RE: Opposition to Senate Bill 2838

Dear Senator Kohl:

The Wisconsin Health Care Association is the state's largest and oldest long term care association. It represents approximately 190 of Wisconsin's for-profit, non-profit, and government owned skilled nursing facilities providers, and a growing number assisted living providers through the development of its Wisconsin Center for Assisted Living (WiCAL) division. WHCA strongly opposes *The Fairness in Nursing Home Arbitration Act* (S. 2838). That opposition is founded on our conclusion the remedy the bill seeks to impose for the alleged unfair practices of a few, creates an unwarranted and unjust result for all.

WHCA/WiCal is committed to ensuring that Wisconsin's long term care facilities remain national leaders in the quality of care and life they provide to the residents they serve. If we believed the arbitration agreements or process unfairly impacted our residents, we would publicly oppose their use by our member facilities. However, we are not aware of any credible evidence that would indicate that, if commonly recognized best practices are followed, arbitration agreements, processes or decisions afford any systemic bias to any party.

Arbitration agreements have not been widely used in Wisconsin nursing homes and assisted living facilities. However, interest in their use is growing. As liability and litigation costs continue to skyrocket, there is a compelling need to explore more cost effective means to resolve legal controversies. Mediation and arbitration have proven to be efficient, fair, and effective forums for resolving such disputes. They are increasingly being viewed as rational and fair alternatives to expensive lawsuits that will better assure facility resources needed to support quality care and improvement are not diverted to fund inherently slow moving and expensive legal proceedings in the state's overburdened court system.

In an April 2008 Press Release, your office announced the introduction of *The Fairness in Nursing Home Arbitration Act*. You asserted nursing home residents "must not lose their

right to hold nursing homes accountable in the event of abuse or neglect.” We agree. The release also advised that S. 2838 protects individuals who unwittingly sign away their constitutional rights to have their case heard by a judge or a jury. We cannot agree with that assessment. We believe the reach and impact of this legislation goes much further than is warranted, feasible, or just. Indeed, the cure the bill offers is wrought with more peril than the problem it seeks to treat.

If best practices are followed, instances in which seniors might unwittingly enter into an arbitration agreement would be non-existent or exceedingly rare. (Moreover, model agreements we are aware of allow an individual an opt out period for any or no reason reason). However, S. 2838 would for all intents and purposes eliminate arbitration under the Federal Arbitration Act (FAA) as an accessible and cost effective option for all long term care facilities and their residents. As a result of this legislation, the remedy to address an unfairness experienced by a few will provide an injustice for all. These two wrongs do not make a right.

In WHCA’s view, the need for this legislation is debatable as well. The FAA and the legal system currently afford individuals protections and the right to challenge the practices with which S.2838 is presumably concerned. Indeed, the FAA does not foster or condone the disruption of any traditional notions of fair play when it comes to entering into arbitration agreements. If an individual believes an arbitration agreement is unfair or was unfairly presented he or she can challenge the validity in court. Similarly, either party can seek judicial review of the fairness of the arbitration proceedings. Courts possess and have exercised authority to refuse to enforce agreements or awards deemed unfair.

WHCA is not aware that the execution of an arbitration agreement is being required as a condition of admission to any long term care facility in Wisconsin. If such a practice is being pursued we would suggest it would taint, if not invalidate, the enforceability of arbitration agreement. Indeed, all arbitration agreements we are cognizant of constitute free standing documents that are separately discussed and executed, so as not to be confused with the provisions of the laborious admission agreements that are mandated under state and federal regulations..

However, if it is established that arbitration agreements are (1) misrepresented or misrepresented by being woven into the fabric of facility admission agreements, or (2) being required as a prerequisite for a resident admissions to a facility, we would support legislation to expressly prohibit those practices and invalidate any agreements signed under such circumstances.

What we cannot support is the remedy S. 2838 has advanced – requiring that agreements to arbitrate disputes be made after a dispute has arisen. The practical effect of this procedural mandate would be to destroy residents’ and facilities’ substantive right to access and utilize the FAA as an effective alternative forum for dispute resolution. Indeed, post-dispute agreements are almost never formed and represent an unfeasible and inferior alternative to pre-dispute arbitration agreements. They are infeasible for a myriad of reasons. The most glaring - when the dispute arises, the strategic balance will have been altered, and one party will have a strong incentive to preserve and perhaps exploit the procedural formalities

associated with a court proceeding. That party will likely believe that traditional litigation will offer some strategic advantage it will not likely want to relinquish. Second, the occurrence of the dispute will most often generate tensions between the parties that will make agreement on an alternative forum difficult, if not impossible.

WHCA submits that post-dispute arbitration agreements are inferior as they diminish the intended benefits of arbitration –both direct and indirect. The maneuvering and legal positioning inherent in pursuit of post-dispute agreements will consume time and generate additional costs that preclude realization of the intended and inherent benefits of arbitration. Just as important, the indirect benefits of arbitration are forfeited as there are no cost benefits to pass on to consumers. It can fairly be assumed any post-dispute agreement likely was preceded by filing of litigation, incurring of costs, and consumption of judicial resources, thereby eliminating any indirect cost saving to the parties or the taxpayers.

WHCA appreciates your offices inquiry and the opportunity to express our views on the S. 2838. But for all the reasons above expressed, we must vehemently oppose that legislation.

Sincerely,

/s/Thomas P. Moore

Thomas P. Moore
Executive Director