U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

July 30, 2008

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

Dear Mr. Chairman:

This letter presents the views of the Department of Justice (the Department) on S. 2838, the "Fairness in Nursing Home Arbitration Act of 2008". The Department opposes this bill, which would needlessly invalidate arbitration agreements between long-term care facilities and residents of such facilities.

Arbitration is typically a less expensive and quicker method of resolving disputes than civil litigation, and arbitration is generally viewed as leading to fair outcomes. The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and similar state arbitration acts have long encouraged the use of arbitration instead of litigation. Likewise, the courts have recognized the potential benefits of arbitration over litigation. *See, e.g., Allied-Bruce Terminix Cos v. Dobson*, 513 U.S. 265, 280 (1995). Because the bill would not only prevent nursing homes and their residents from entering into binding pre-dispute arbitration agreements (regardless of the parties' circumstances or the claims at issue) but would retroactively invalidate all such agreements that are already in force, the Department strongly opposes S. 2838.

In any given case, if there are particular facts or circumstances as to why a pre-dispute agreement to arbitrate should not be enforced, that should be decided on a case-by-case basis by the courts applying existing Federal or state arbitration laws. This determination is necessarily fact-specific and should be left to a court based on the facts presented. There should not be a blanket prohibition against enforcing arbitration agreements in all situations, to say nothing of a wholesale vitiation of such agreements that have already been executed.

In addition, the proposed legislation, in its application, may exceed the scope of Congress's regulatory authority under Article I of the Constitution. To pass constitutional muster, S. 2838 must rest on the Congress's authority under the Commerce Clause to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes," U.S. Const. art. I, § 8, cl. 3, or under the Necessary and Proper Clause "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to regulate interstate and foreign commerce, *id.* art. I, § 8, cl. 18. The Supreme Court has made clear that Congress can regulate only three categories of activity with its authority under the Commerce Clause and Necessary and Proper Clause: (1) the channels of interstate commerce; (2) the instrumentalities

of interstate commerce, and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005). It is questionable whether S. 2838 falls within the scope of these categories, 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.

Please do not hesitate to contact this office if we may be of additional assistance. The Office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member