

IN THE SUPREME COURT OF ALABAMA

Case Nos. 1012193, 1012195

Briarcliff Nursing Home, Inc., d/b/a Integrated
Health Services, Inc., James Anthony Clements,

Appellants,

v.

David Turcotte, executor of the estate of
Noella Turcotte, deceased,

Appellee.

Briarcliff Nursing Home, Inc., d/b/a Integrated
Health Services, Inc., James Anthony Clements,

Appellants,

v.

Kyra L. Woodman, Administratrix of the estate of
Sarah Carter, deceased,

Appellee.

Appeals from Shelby Circuit Court
Nos. CV-01-1256, CV-01-1304

BRIEF *AMICI CURIAE* OF AARP, THE NATIONAL CITIZENS'
COALITION FOR NURSING HOME REFORM AND THE ALABAMA SILVER
HAired LEGISLATURE IN SUPPORT OF APPELLEES

Russell Jackson Drake (DRA006)
Counsel of Record for *Amici*
Whatley Drake, L.L.C.
2323 2nd Avenue North
Birmingham, Alabama 35203
(205) 328-9576

(Additional Counsel Listed on Inside Cover)

Deborah Zuckerman
Bruce Vignery
Dorothy Siemon
AARP Foundation

Michael Schuster
AARP

601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP

Edward King
National Senior Citizens Law Center

1101 14th Street, N.W.
Suite 400
Washington, DC 20005
(202) 289-6976

Counsel for *Amicus Curiae* NCCNHR

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

ARGUMENT 5

I. UNCONSCIONABLE PROVISIONS IN CONTRACTS OF ADHESION
ARE UNENFORCEABLE 5

 A. Congress Intended the FAA to Apply to
 Voluntary Agreements Between Merchants
 With Equal Bargaining Power 5

 B. The Circumstances That Typically Attend
 the Nursing Home Admissions Process Render
 Admission Contracts Unconscionable Contracts
 of Adhesion 8

 1. People Entering Nursing Homes Have
 Virtually No Bargaining Power 8

 2. The Court Identifies Alternatives to
 Plaintiffs' Nursing Home Placements that
 Were Not Realistic and Did Not Present a
 Meaningful Choice 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

<i>Alabama Catalog Sales v. Harris</i> , 794 So. 2d 312 (Ala. 2000)	2
<i>Community Care of Am. v. Davis</i> , 850 So. 2d 283 (Ala. 2002)	2
<i>Illinois Council for Long-Term Care, Inc. v. Shalala</i> , No. 96C29535278, 1997 WL 158347 (N.D. Ill. Mar. 31, 1997)	4
<i>Michigan Ass'n of Homes and Services for the Aging, Inc. v. Shalala</i> , 931 F. Supp. 1338 (E.D. Mich. 1996)	3
<i>Podolosky v. First Healthcare Corp.</i> , 58 Cal. Rptr. 2d 89 (Ct. App. 1996)	9
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395 (Black, J., dissenting)	6
<i>Smith v. Heckler</i> , 747 F.2d 583 (10th Cir. 1984)	4

STATUTES

Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16	5
Nursing Home Reform Law, 42 U.S.C. § 1395i-3(a)-(h)	3
42 U.S.C. § 1395i-3(b)(2)(B)	16
42 U.S.C. § 1395i-3(c)(1)(A)(vii)	16
42 U.S.C. § 1395i-3(c)(3)	16
42 U.S.C. § 1395x (m)	14
42 U.S.C. § 1395x (m)(1)	14
42 U.S.C. § 1396r(a)-(h)	3
42 U.S.C. § 1396n	14

LEGISLATIVE HISTORY

<i>Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 9 (1923)</i>	6
---	---

MISCELLANEOUS

Donna Ambrogi, <i>Legal Issues in Nursing Home Admissions,</i> 18 <i>Law Med. & Health Care</i> 254 (1990)	9
--	---

Donna Ambrogi & Frances Leonard, <i>The Impact of Nursing Home Admission Agreements on Resident Autonomy,</i> 28 <i>The Gerontologist</i> 82 (1988)	12
---	----

Maureen Armour, <i>A Nursing Home's Good Faith Duty "to" Care: Redefining A Fragile Relationship Using the Law of Contract,</i> 39 <i>St. Louis L.J.</i> 217 (1994)	10
---	----

Rebecca Benson, <i>Check Your Rights at the Door</i> (1997)	11
--	----

California Advocates for Nursing Home Reform, <i>Better Read the Small Print! An Analysis of Admission Agreements in California's Residential Care Facilities for the Elderly</i> (Mar. 2003)	11, 12, 13
--	------------

Mary Jo Gibson, AARP, <i>Beyond 50: A Report to the Nation on Independent Living and Disability</i> (2003), at http://research.aarp.org/il/beyond_50_il.html	13
--	----

Marshall B. Kapp, <i>The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications,</i> 24 N.E. J. on Crim. & Civ. Con. 1 (1998)	9, 10
William J. McAuley & Shirley S. Travis, <i>Factors Influencing Level of Stress During the Nursing Home Decision Process,</i> 6 J. Clinical Geropsychology 269 (2000)	8
Patricia Nemore, <i>Illegal Terms in Nursing Home Admission Contracts,</i> 18 Clearinghouse Rev. 1165 (1985)	11
Charles Sabatino, <i>Nursing Home Admission Contracts: Undermining Rights the Old Fashioned Way,</i> 24 Clearinghouse Rev. 553 (1990)	11
Jean R. Sternlight, <i>Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration,</i> 74 Wash. U. L.Q. 637 (1996)	8
Shirley S. Travis & William J. McAuley, <i>Searches for a Nursing Home: Personal and Situational Factors,</i> 17 J. Applied Gerontology 352 (1998)	8
Denese Vlosky, et al., <i>"Say-So" as a Predictor of Nursing Home Readiness,</i> 93 J. of Family & Consumer Science 59 (2001)	10
Linda S. Whitton, <i>Navigating the Hazards of the Eldercare Continuum,</i> 6 J. Mental Health and Aging 145 (2000)	9, 10, 11

STATEMENT OF INTEREST

AARP, the National Citizens' Coalition for Nursing Home Reform (NCCNHR), and the Alabama Silver Haired Legislature ("*amici*") are organizations that advocate for the rights of older Americans. *Amici* are concerned about the availability of quality long-term care, since advanced age is a key factor leading to physical and/or mental impairments that are likely to necessitate admission to a nursing home or similar health care facility. *Amici* also support laws and policies designed to protect the rights of health care consumers, and to preserve court access for them to seek redress when their rights are violated.

AARP is a non-profit, non-partisan membership organization dedicated to addressing the needs and interests of people aged 50 and older. Approximately 400,000 of AARP's more than 35 million members live in Alabama. As the largest membership organization serving older Americans, AARP is greatly concerned about fraudulent, deceptive and unfair practices in a broad range of consumer transactions because older people are disproportionately affected by many of these practices. An increasing number and range of corporations have, during the last several years, started to impose binding arbitration as a condition of obtaining

products and services. Due to the high costs consumers typically incur when they are forced into arbitration, and the few protections the process affords them, AARP has filed *amicus curiae* briefs in the U.S. Supreme Court, federal appellate courts, and state courts addressing the importance of preserving court access and the full range of redress Congress and state legislatures enacted for their protection. For example, AARP filed an *amicus* brief in *Community Care of Am. v. Davis*, 850 So. 2d 283 (Ala. 2002), an earlier challenge to an arbitration clause in a nursing home admissions contract, and in *Alabama Catalog Sales v. Harris*, 794 So. 2d 312 (Ala. 2000), in which this Court affirmed that arbitration is a matter of contract and held that arbitration provisions in payday loan contracts were unenforceable where substantial evidence established that the underlying contracts were illegal.

The imposition of binding arbitration as a condition for obtaining nursing home care is of particular concern to AARP because of its long history advocating for quality care and adequate consumer protections for nursing home residents who are among the most vulnerable members of our society.

NCCNHR is a national, non-profit membership organization whose members include nursing home residents,

board and care and assisted living residents, residents' families and advocates, statewide nursing home resident advocacy groups, state and local long-term care ombudsman programs, and other groups and individuals dedicated to nursing home reform issues. NCCNHR's sole mission is to promote the interests of nursing home residents, board and care and assisted living residents, and their families and advocates. It is the only national organization dedicated to that unique purpose. Since 1975, NCCNHR has provided assistance to nursing home residents across the country and has represented their interests before federal and state legislative and administrative entities and in federal and state courts. The organization has as its explicit policy goal improving the quality of life for the 1.6 million residents of nursing facilities in the United States.

AARP and NCCNHR strongly supported enactment of the Nursing Home Reform Law in 1987, 42 U.S.C. §§ 1395i-3(a)-(h), 1396r(a)-(h), Medicare and Medicaid respectively and, since the law's enactment, have advocated in the courts, regulatory agencies, and Congress for its vigorous enforcement. NCCNHR filed *amicus* briefs supporting that enforcement system in *Michigan Ass'n of Homes and Services for the Aging, Inc. v. Shalala*, 931 F. Supp. 1338 (E.D.

Mich. 1996), and *Illinois Council for Long-Term Care, Inc. v. Shalala*, No. 96C29535278, 1997 WL 158347 (N.D. Ill. Mar. 31, 1997), as well as in *Smith v. Heckler*, 747 F.2d 583 (10th Cir. 1984), which held that the Secretary of Health and Human Services has a duty to establish a survey process that assures that skilled nursing facilities provide residents with appropriate care.

The Alabama Silver Haired Legislature (ASHL) is a non-partisan, non-profit model legislature of volunteers aged 60 and older elected or appointed by their peers to represent the interests of older Alabamians. It is patterned after the Alabama State Legislature, with members representing each of the 105 state legislative districts. The Alabama legislature established the Silver Haired Legislature on August 8, 1991, by Joint Resolution S.J.R. 101; the Governor signed it into law as PL 91-727. ASHL elections were first held in 1993, and the first ASHL legislative session was held the same year. ASHL's purpose is to educate Alabamians about senior needs and issues of concern to the elderly. These needs are addressed in resolutions provided to the Alabama legislature and the Governor for appropriate action.

While most challenges to arbitration requirements to date have been made in cases involving financial products

and services and employment, these appeals present an important opportunity to examine these issues in a relatively new context. *Amici* believe that the vulnerability of people facing nursing home admission and their families and the difficulties they face in finding an appropriate facility create a need for increased scrutiny of the contracting process to ensure they are not being forced to accede to terms that will have a significant impact on their future rights. These concerns, articulated more fully below, have led *amici* to file this brief respectfully urging the Court to grant rehearing and recognize that the circumstances surrounding most nursing home admissions leave prospective residents with virtually no meaningful choice and create an enormous imbalance in the parties' bargaining power.

ARGUMENT

I. UNCONSCIONABLE PROVISIONS IN CONTRACTS OF ADHESION ARE UNENFORCEABLE.

A. Congress Intended the FAA to Apply to Voluntary Agreements Between Merchants With Equal Bargaining Power

Congress plainly intended the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, to apply to contracts between merchants, not to adhesive consumer contracts. The chair of

the American Bar Association committee that drafted the law stated it was "purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 9 (1923) [hereinafter Senate Hearing]* (statement of W.H. Piatt, Chairman, ABA Committee on Commerce, Trade and Commercial Law). One senator expressed concern about the Act's applicability to contracts of adhesion:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. . . . Either you can make that contract or you can not make any contract. . . . A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court. . . .

See *Senate Hearing, supra*, at 9 (statement of Sen. Walsh).

The Senator "was emphatically assured by supporters of the bill that it was not their intention to cover such cases."

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395,

414 (Black, J., dissenting).

When the parties to a contract are fully informed about its terms and possess equal bargaining power, as typically is the case in commercial transactions, arbitration may be an appropriate method of resolving disputes. And, where the parties have agreed to the terms of an arbitration agreement, courts defer to their judgment due to a strong preference for enforcing the parties' contractual agreement concerning the dispute resolution mechanism. Unlike the parties to most merchant-merchant contracts, however, consumers contracting for goods and services generally do not have equal bargaining power and are not fully informed of all relevant contract clauses. In fact, a marked imbalance in knowledge and power more often characterizes such contracts. When the party with superior knowledge, sophistication, and financial resources inserts a mandatory arbitration clause into a form contract, individuals usually are unaware of and have not consented to these terms. Because consumers typically lose many protections in arbitration, including the right to appeal decisions containing mistakes of fact or law, courts evaluating the enforceability of an arbitration clause should carefully examine the circumstances surrounding the contracting

process. As one leading commentator has stated

When Congress passed the FAA in 1925, it intended only to require federal courts to accept arbitration agreements that had been voluntarily entered into by two parties of relatively equal bargaining power in arms' length transactions. Congress did not intend to enforce arbitration agreements that had been foisted on ignorant consumers, and it did not intend to prevent states from protecting weaker parties.

Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 641 (1996).

B. The Circumstances That Typically Attend the Nursing Home Admissions Process Render Admission Contracts Unconscionable Contracts of Adhesion

1. People Entering Nursing Homes Have Virtually No Bargaining Power

A "nursing home placement is a very complex decision-making process precipitated by diverse triggers and reasons for making the decision to enter a nursing home." Shirley S. Travis & William J. McAuley, *Searches for a Nursing Home: Personal and Situational Factors*, 17 J. Applied Gerontology 352, 352 (1998). See also William J. McAuley & Shirley S. Travis, *Factors Influencing Level of Stress During the Nursing Home Decision Process*, 6 J. Clinical Geropsychology 269 (2000). The initial acceptance of the need for

institutionalization is particularly difficult and stress inducing for older adults because it underscores their dependency and signals the end of their freedom to make many personal choices and decisions. Further, as courts have acknowledged, the choice of a nursing home often is made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a care giver or spouse. See, e.g., *Podolosky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101 (Ct. App. 1996), citing Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 258 (1990).

An older person's move to a nursing home often follows a period of acute hospitalization. Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 N.E. J. on Crim. & Civ. Con. 1, 3 (1998). Many of these admissions occur directly from a hospital's discharge planning process. *Id.* at 2. In the 1980s, the government changed the way hospitals were paid for their Medicare patients; since the change, discharge planning occurs "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health and Aging 145, 150 (2000). The danger of discharging quicker and sicker is that the

hospitalization itself debilitates patients and the assessment of whether they need nursing home placement is made before they have had a chance to fully recover. *Id.* One of the most significant factors leading to post-hospital nursing home placement is the weakened physical and emotional condition of an older person after an acute hospitalization.

Other residents are admitted to a nursing home when their care giving family is unable to adequately manage the demands of home care. Kapp, *supra*, at 3; see also Maureen Armour, *A Nursing Home's Good Faith Duty "to" Care: Redefining A Fragile Relationship Using the Law of Contract*, 39 St. Louis L.J. 217, 222 (1994). These residents, like the ones entering after a hospital stay, also are ill and weak at the time they are seeking nursing home admission.

Because the decision to admit residents occurs after hospitalization or a period of illness in the family's home, the nursing home admission is unplanned; there is little time to investigate options or to wait for an opening at a nursing home of choice. Denese Vlosky, et al., "Say-So" as a Predictor of Nursing Home Readiness, 93 J. of Family & Consumer Science 59 (2001). Research shows that time pressure significantly impairs the ability to seek and

carefully consider alternatives in the hospital discharge planning context. Potential residents and their family members can experience panic when they feel there is insufficient time to consider different facilities, and they may choose a facility they would not have chosen if they had more time to weigh their options. Whitton, *supra*, at 150.

Research also demonstrates that the form and actual process of signing an admissions contract further compromises the ability of potential residents and their families to make informed decisions. In a study evaluating admissions agreements of California residential care facilities for the elderly, researchers found more than 93% of the agreements were out of compliance with current laws and regulations. California Advocates for Nursing Home Reform, *Better Read the Small Print! An Analysis of Admission Agreements in California's Residential Care Facilities for the Elderly* 2 (Mar. 2003). See also Rebecca Benson, *Check Your Rights at the Door* (1997); Patricia Nemore, *Illegal Terms in Nursing Home Admission Contracts*, 18 Clearinghouse Rev. 1165 (1985); Charles Sabatino, *Nursing Home Admission Contracts: Undermining Rights the Old Fashioned Way*, 24 Clearinghouse Rev. 553 (1990). Further, most of the admissions agreements were written in legalese

and presented as standardized form contracts, giving residents no meaningful opportunity to negotiate the terms of the contract. In addition, small font size in some of the admissions agreements made them difficult to read. *Better Read the Small Print, supra*, at 2.

Research shows that many facilities lack a coherent admissions process, adding to the chaos surrounding the admission of a resident. Donna Ambrogi & Frances Leonard, *The Impact of Nursing Home Admission Agreements on Resident Autonomy*, 28 *The Gerontologist* 82, 83-88 (1988). Residents and their family members do not have time to read and deliberate on the terms of the agreement. *Id.* Facilities often present the contract after the person decides to apply for admission, rather than beforehand, when the individual or his or her representative can assess the rights affected by the contract. *Better Read the Small Print, supra*, at 1. Furthermore, there is no time for the resident to sit down with a facility representative who can answer questions and explain the contract's terms. Ambrogi, *supra*, at 83.

Ultimately, unlike the situation that exists when consumers contract for other products and services, older persons entering nursing homes and their families have to sign admissions contracts without time to comparison shop or

to negotiate the best service and price combination. "The pressures of deciding placement at such a time, coupled with physical and/or mental infirmities, financial limitations, and/or lack of knowledge about long-term care options make[s] consumers vulnerable and dependent on full disclosure by facilities." *Better Read the Small Print, supra*, at 2. In such an environment it is unlikely that residents or their family members would know that the contract contained an arbitration clause or comprehend its meaning and consequences for their rights.

2. The Court Identifies Alternatives to Plaintiffs' Nursing Home Placements that Were Not Realistic and Did Not Present a Meaningful Choice

The Court concludes that plaintiffs had not shown that they could not utilize in-home care and that they therefore did not demonstrate a lack of meaningful choice. Home health care is the overwhelming first choice for long-term care among people fifty and older who have disabilities. Mary Jo Gibson, AARP, *Beyond 50: A Report to the Nation on Independent Living and Disability* (2003), at http://research.aarp.org/il/beyond_50_il.html. Yet, such care generally is unavailable for people in need of 24-hour supervision and assistance from skilled care providers due

to costs and restrictive eligibility requirements or public policies that favor institutionalization over in-home care.

The three potential sources of payment for home health care namely, Medicare, Medicaid, and private pay, all contain obstacles for would-be beneficiaries. The Court's opinion indicates that plaintiffs' family members were Medicare beneficiaries. Op. at 15. However, because they required round-the clock nursing care, Medicare home health care was unavailable to them. Medicare law defines home health services as "part-time or intermittent nursing care provided by or under the supervision of a registered professional nurse. . . ." 42 U.S.C. § 1395x (m) (1) (2003).^{1/} Medicaid, the other publicly funded program for home health care, has strict financial eligibility requirements, and even if an individual is impoverished enough to qualify, Medicaid home and community based services are an optional service for which a state can cap or limit the number of persons it will serve. See 42 U.S.C.

^{1/} "For purposes of paragraphs (1) and (4), the term "part-time or intermittent services" means skilled nursing and home health aide services furnished any number of days per week as long as they are furnished (combined) less than 8 hours each day and 28 or fewer hours each week (or, subject to review on a case-by-case basis as the need for care, less than 8 hours each day and 35 or fewer hours per week.)" 42 U.S.C. § 1395x (m).

§ 1396n. The third option, private payment for 24-hour-a-day nursing services, is prohibitively expensive for most persons. An individual in need of 24-hour-a-day nursing care would have to pay for a home health aide around the clock, housekeeping, personal care, nursing services through an RN or LPN, and arrange for meals, doctor visits, and any needed therapists. Simply arranging the services is a near full-time job, let alone having the resources to pay for them.

The Court also finds that plaintiffs had meaningful choice because they could have sought admission to nursing homes without arbitration provisions outside Shelby County. Assuming individuals and their family members can overcome the difficulties inherent in locating an appropriate facility under the circumstances that attend the need for admission discussed above, the resident also may be forced to sacrifice continued support and involvement with their family. The value of family interaction with institutionalized persons cannot be overstated. Residents' family members are rightly presumed to be the most vigilant agents in assuring the receipt of quality care. The Nursing Home Reform Law requires the nursing home to allow residents and their families to participate in care planning,

establishes the right of residents and/or family members to participate in resident and family groups, including the right to organize such groups, and allows virtually unlimited visitation by family members. 42 U.S.C. §§ 1395i-3(b)(2)(B); 1395i-3(c)(1)(A)(vii); 1395i-3(c)(3). The value of active family participation in the life of nursing home residents is placed at risk if the nursing home is not within a reasonable distance of the family's home. Son's and daughters want to be close to their mothers, making facilities in other counties an unreasonable option.

CONCLUSION

This case has far-reaching implications for older persons requiring nursing home admission and their families. *Amici* thus respectfully urge this Court to grant rehearing and analyze the adhesive nature and unconscionability of the arbitration clause in light of the circumstances that exist at the time of most nursing home admissions.

February 26, 2004

Respectfully submitted,

Russell Jackson Drake (DRA006)
Counsel of Record for *Amici*
Whatley Drake, L.L.C.
2323 2nd Avenue North
Birmingham, AL 35202
(205) 328-9576

Deborah Zuckerman
Bruce Vignery
Dorothy Siemon
AARP Foundation

Michael Schuster
AARP

601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

Counsel for AARP

Edward King
National Senior Citizens
Law Center
1101 14th Street, N.W.,
Suite 400
Washington, D.C. 20005
(202) 289-6976

Counsel for NCCNHR

CERTIFICATE OF SERVICE

I hereby certify that a copy of a Motion of AARP, the National Citizens' Coalition For Nursing Home Reform, and the Alabama Silver Haired Legislature for Leave to File Brief *Amici Curiae* in Support of Appellees, the Brief conditionally filed, and a Motion for *Pro Hac Vice* admission were served on counsel of record via Federal Express priority overnight this 26th day of February, 2004, to:

Paul Sizemore
Beasley, Allen, Crow, Methvin,
Portis and Miles, P.C.
105 Tallapoosa Street, 2nd floor
Montgomery, Alabama 36103-4160

J. Mitchell Frost, Jr.
Neal Moore
Ferguson, Frost & Dodson, LLP
2500 Acton Road, suite 200
Birmingham, AL 35243

Stephanie Boyd
AARP Foundation
601 E Street, N.W.
Washington, DC 20049
(202) 434-2060