IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SHERRY CORUM, as Personal Representative of the Wrongful Death Beneficiaries of MARY JO HEBERT, deceased,

Plaintiff/Appellee,

v.

Ct. App. No. 28,314
Dist Ct. No. D101-CV-2007-01307

ROSWELL SENIOR LIVING, LLC, D/B/A ROSWELL SENIOR LIVING COMMUNITY a/k/a LA VILLA, SUNSET MANAGEMENT, INC., et al.,

Defendants/Appellants.

On appeal from the First Judicial District Court
Santa Fe County, New Mexico
The Honorable James Hall, Presiding

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PLAINTIFF-APPELLEE

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STATEMENT OF INTEREST

AARP is a nonpartisan, nonprofit membership organization dedicated to representing the needs and interests of people 50 and older. AARP's 40 million members include residents of nursing homes and other long-term care facilities, their spouses, and other relatives, and approximately 265,000 members live in New Mexico. Access to quality long-term care is a high priority for AARP, and the organization advocates for increased availability of such care. AARP also supports laws and policies designed to protect the rights of health care consumers, including long-term care facility residents, and to preserve their right to go to court to seek redress when their rights are violated.

The imposition of binding arbitration as a condition for obtaining long-term care is of particular concern to AARP because of its longstanding advocacy for quality care and adequate protection of the rights of residents who are among the most vulnerable members of our society. This concern led AARP to testify in support of The Fairness in Nursing Home Arbitration Act of 2008 (H.R. 6126/S. 2838), which would make pre-dispute arbitration clauses in contracts between a long-term care facility and a resident (or anyone acting on behalf of such a resident)

invalid and unenforceable. As the testimony stated, "Pre-dispute arbitration clauses in long-term care facility contracts are harmful to residents and their families. . . . AARP believes that it is essential for vulnerable residents to have access to the courts when they are injured, neglected or abused," and this bill would protect that right. Hearing Before the Commercial and Admin. Law Subcomm. of the House Judiciary Comm., June 10, 2008 (testimony of AARP Board Member William J. Hall, M.D.) [hereinafter "Nursing Home Arbitration Act testimony"]. *See also* AARP letter to Sens. Mel Martinez and Herbert Kohl, co-sponsors of S. 2838 (Apr. 30, 2008) (stating "AARP supports your legislation because we believe that it is essential for vulnerable residents to have access to the courts when they are injured, neglected, or abused. Your bill would make pre-dispute arbitration agreements unenforceable, ensuring that residents of long-term care facilities and their families are not forced into arbitration or terms that may have a substantial adverse impact on their rights."); and AARP letters to Sens. Patrick Leahy and Arlen Specter, Chair and Ranking Member of Senate Judiciary Comm. (Sept. 8, 2008) (same, urging Committee members to vote in favor of the bill). AARP also has filed *amicus* briefs in numerous federal and state cases around the country challenging the enforceability of arbitration clauses in long-term care and other consumer and employment contracts, including in *Cordova v. World Fin. Corp. of New Mexico*, No. 30, 536 (N.M. br. filed Jan. 31, 2008) and *Adkins v. Laurel Healthcare of Clovis LLC*, No. 26, 759 (N.M. Ct. App. Dec. 19, 2007), *cert. denied*, 143 N.M. 665, 180 P.2d 672 (N.M. Feb. 1, 2008) . These briefs address the importance of maintaining access to the civil justice system and ensuring that consumers can avail themselves of the full range of enforcement mechanisms that Congress and state legislatures enacted for their benefit. *See 14 Penn Plaza LLC v. Pyett*, No. 07-581 (U.S. brief filed July 21, 2008); *Doctor's Assocs.,*

Inc. v. Casarotto, 517 U.S. 938 (1996); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004); *Community Care of Am., Inc. v. Davis*, 850 So. 2d 283 (Ala. 2002); *Sanford v. Castleton Health Care Center, LLC*, 813 N.E.2d 411 (Ind. Ct. App. 2004); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940 (Or. Ct. App 2007).

AARP is filing this brief to apprise the Court of the particularly difficult circumstances that typically exist when older persons face admission to a long-term care facility, making it extremely unlikely they or their family members will focus on the fine-print provisions in admissions contracts or their implications. The parties making these decisions usually have to act quickly, in the midst of a crisis, with limited choice among facilities. They don't have the luxury of "shopping around" and, instead, are lucky to find a facility they believe will provide quality care and thus have little, if any, alternative but to accept the contracts presented to them. It is only when tragedy befalls the resident, and she or her survivors file suit, that they learn the admissions contract contained an arbitration clause that bars the courthouse door.

The nature of the admissions process, combined with the important rights prospective residents and their families are unwittingly waiving, have led courts around the country to closely examine the language of arbitration clauses in long-term care contracts and the circumstances under which admissions contracts were signed in determining the enforceability of the clauses. AARP believes such scrutiny is necessary to ensure that residents and their families are not deprived of a judicial forum in which to seek relief when they are harmed by poor care or other wrongful acts. The trial court's analysis of the critical rights defendants sought to take away from Mrs. Hebert and her survivors when her husband signed the admissions contract as

her health care surrogate is similar to the scrutiny applied in other jurisdictions, and its refusal to compel arbitration should be upheld.

SUMMARY OF ARGUMENT

The determinative factor in this case is that a valid arbitration agreement did not exist between Mrs. Hebert and the Roswell Senior Living, LLC or any of its related entities. The trial court found that Mrs. Hebert's husband, while acting as health care surrogate under the New Mexico Uniform Health Care Decisions Act (NMUHCDA), did not have authority to bind her to the terms of the arbitration provisions contained in the facility's admissions contract. In so finding, the court relied on two things: (1) the language of the NMUHCDA does not permit a surrogate decision-maker to enter into an arbitration agreement; and (2) the need to narrowly construe a surrogate decision-maker's authority when considering whether it includes the power to waive another person's right to a jury trial.

Even if the court had improperly found that Mr. Hebert had the authority to bind his wife to the terms of the arbitration clause, the court certainly would have found the clause unenforceable for a variety of reasons. Arbitration provisions are as enforceable as other contract terms, but not more so, and are subject to general contract defenses such as fraud, duress, and unconscionability. *See* 9 U.S.C. § 2; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). Numerous courts have applied basic state law contract principles to find arbitration clauses unconscionable and unenforceable based on, among other factors, the parties' relative levels of sophistication and bargaining power, the way in which the clauses were presented, and the terms of the clauses themselves. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 540 U.S. 811

(2003); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007); *West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859 (Ohio 1998). It is worth noting that most of these cases involved fairly routine products and services, not situations fraught with the emotion and urgency that typically exist when long-term care is needed. It is not surprising, therefore, in light of the increased attention being paid to conditions in long-term care facilities and the vulnerability of older Americans needing such care, that courts are more closely scrutinizing arbitration provisions in facility admissions contracts.

Under New Mexico law, contract provisions are unconscionable and unenforceable when they are imposed upon assisted living facility residents in circumstances such as those faced by Mr. and Mrs. Hebert. Assisted living facilities possess greater knowledge, sophistication, and financial resources, all of which give them significantly superior bargaining power as compared to prospective residents and their families facing the crisis of finding a long term care placement. Residents and their families typically agree to the terms in the admissions documents placed in front of them with no meaningful choice or opportunity to negotiate those terms. Prospective residents often are not aware of important contract terms or their implications and, due to their physical and mental conditions (often the very reason they need admission), are in no position to make an informed decision and consent to the terms.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT NO VALID ARBITRATION AGREEMENT EXISTED.

Before the lower court could determine whether to compel arbitration, it first had to determine whether a valid arbitration agreement existed between Mrs. Hebert and Roswell

Senior Living. The Court evaluated whether all essential elements to a contracted existed -- offer, acceptance, consideration, and mutual assent -- and determined that Mr. Hebert lacked the authority to enter into the arbitration agreement so that mutual assent was missing. The court thus did not have to consider alternative bases for refusing to compel arbitration, such as whether the contract was unconscionable.

Given that this is a case of first impression in New Mexico, the trial court relied on the approach taken by California courts, particularly *Pagarigan v. Libby Care Center*, 120 Cal. Rptr. 2d 892 (Ct. App. 2002). In *Pagarigan*, the family of a deceased woman sued her former nursing home alleging that the facility wrongfully caused her death. The defendant nursing facility moved to compel arbitration, relying on two arbitration agreements signed by the resident's daughters after she was admitted to the facility. Although the woman lacked capacity to make her own health care decisions, she had not signed a durable power of attorney authorizing her daughters to act on her behalf. The court found that the resident lacked the capacity to authorize either daughter to enter into the arbitration agreements on her behalf. According to the court,

> [a] person cannot become the agent of another merely by representing herself as such. To be an agent she must actually be so employed by the principal or the principal intentionally, or by want of ordinary care, caused a third person to believe another to be his agent who is not really employed by him.

Id. at 894-95.

Other California courts have followed and expanded upon the reasoning of *Pagarigan.* For example, in *Flores v. Evergreen*, the court found that a husband who had signed both a nursing home admissions agreement and a separate arbitration agreement on behalf of his wife did not have authority to bind her to the arbitration agreement. The court, citing *Pagarigan,*

found that the spousal relationship alone was insufficient to confer that authority on the husband. 55 Cal. Rptr. 3d 823, 827 (Ct. App. 2007).

The *Flores* court noted that "as a matter of practical necessity," certain decisions must be made for a long-term care resident who lacks capacity to consent for herself, even when there is no formal representative. *Id.* at 832. The court pointed out that the California Legislature recognized this reality when it specified next of kin as among those who could make medical decisions on behalf of the incapacitated person. The *Flores* court found, however, as did the court in the instant case, that the authority granted to a surrogate health care decision-maker was limited to decisions regarding admitting a mentally incompetent relative to the facility, even if the family member did not qualify as an agent, legal representative, or responsible party.

> Unlike admission decisions and medical care decisions, the decision whether to agree to an arbitration provision in a nursing home contract is not a necessary decision that must be made to preserve a person's well-being. Rather, an arbitration agreement pertains to the patient's legal rights, and results in a waiver of the right to a jury trial.

Id. at 832. *See also Pagarigan*, 120 Cal. Rptr. 2d at 892; *Hatley v. Superior Court of Kings County*, No. F 052747, 2008 WL 240841 (Cal. Ct. App. Jan. 30, 2008).

II. THE ARBITRATION PROVISION ALSO IS UNENFORCEABLE BECAUSE IT IS UNCONSCIONABLE.

A. Older Persons and Family Members Assisting Them in Entering Long-Term Care Facilities Have Virtually No Bargaining Power or Choice.

The decisions related to selection and admission into a nursing home or assisted living facility often are made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the deterioration (or even death) of a spouse or other caregiver. *See,*

e.g., *Podolsky 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)); *see also* Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 New Eng. J. on Crim. & Civ. Confinement 1, 3 (1998) (stating that an older person's move to a nursing home often follows a period of acute hospitalization, when his/her care-giving family is unable to adequately manage the demands of home care). The need to find a placement arises quickly[1] and often is unplanned; there is little time to investigate options or to wait for an opening at a facility of choice. Denese Ashbaugh Vlosky, et al., *"Say-So" as a Predictor of Nursing Home Readiness*, 93 J. of Fam. & Consumer Sci. 59 (2001). Time pressure significantly impairs the ability to seek and carefully consider alternatives.[2] Even in the absence of time pressure, the decision to admit a loved one to a long-term care facility typically is laden with stress and feelings of guilt. Consequently, both the resident and his/her family members may fail to carefully examine the contract and contemplate the meaning and ramifications of its provisions. Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DePaul J. Health Care L. 263, 280 (2004).

[1/] In the 1980s, the federal government changed the way hospitals are paid for their Medicare patients; since that change, hospital discharge planning occurs "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health & 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.*; Kapp, *supra*, at 3-4; *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 U.L.J. 217, 222 (1994).

[2/] 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.

Moreover, 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.*; *see also Better Read the Small Print!*, *supra*, at 2[WILL ADD FULL CITE]. Even the most well-informed and sophisticated consumer is ill-equipped to effectively manage the admissions process. Benson, *supra*, at 3 [DITTO].

Ultimately, older persons entering long-term care facilities 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 provisions that go far beyond the care and other services the facility promises to provide and that have serious implications for their legal rights. Rather, they routinely sign the documents placed in front of them. Long-term care facilities are aware of that and often include illegal terms in their contracts.[4] The admissions

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[4] A study of nursing home admissions documents from Los Angeles County found that a significant percentage of facilities ignored or misrepresented the law. For example 91.9 % of facilities which listed reasons for discharge included a reason not allowed by federal requirements. Bet Tzedek Legal Servs., *"If Only I Had Known": Misrepresentations by Nursing Homes Which Deprive Residents of Legal Protection* 11 (1998). 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. *Better Read the Small Print!*, *supra*, at 2; *see* Benson, *supra*, at 13; Patricia Nemore, *Illegal*

process hardly produces an agreement voluntarily entered into by two parties of near or equal bargaining power in an arms-length transaction, as contemplated by the Federal Arbitration Act.

Yet, as in this case, most admission contracts include provisions requiring that residents and their families forego the use of the court system to resolve a wide range of future disputes. Instead, they will have to submit their disputes, which may involve abuse, assault, malnutrition, neglect, and even death, to arbitration. Admissions contracts typically are presented on a "take it or leave it" basis, with no room for the residents or their family members to negotiate the terms. Most people seeking admission to a long-term care facility are focusing on the quality and range of services available, and are not thinking about possible future disputes. When they are presented with admissions contracts, they often do not know that an arbitration requirement is buried in the fine print of the multi-page document. In the rare instance in which prospective residents or their families are aware that the admissions contract contains an arbitration provision, they typically do not understand what it means and the many rights and protections they will lose in arbitration. Arbitration usually is extremely expensive for consumers and places severe restrictions on many of the rights they would have in court, including their ability to obtain documents and other evidence which makes it difficult for them to prove their case and gives the facility a considerable advantage. In addition, unlike judges and juries, arbitrators do not have to follow prior court or arbitral decisions; their decisions and the facts about the dispute typically are confidential, so no one else can learn about them; and the bases for appealing an arbitrator's decision are extremely limited -- misinterpretation or misapplication of the law is not

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Terms in Nursing Home Admission Contracts, 18 Clearinghouse Rev. 1165 (1985); Sabatino, *supra*, at 553.

a basis for appeal. Arbitrators usually do not need to issue written decisions, making appeals even more difficult. Consumers usually have limited, if any, knowledge on which to base their choice of an arbitrator – if they have a choice - and arbitrators may have a bias toward "repeat players" – to get a company's future business, an arbitrator may not want to rule against such a party too often or order them to pay large awards, even when such awards are justified. Finally, these disadvantages to consumers are all in addition to the fact that the consumers have waived their basic right of access to the courts and a jury.

B. Courts Around the Country Have Applied Generally Applicable Contract Law to Find Arbitration Clauses in Long-Term Care Contracts Unconscionable and Unenforceable.

In situations typical of the long-term care facility admissions process courts, including this Court, have refused to enforce arbitration clauses. In *Adkins v. Laurel Healthcare of Clovis LLC*, No. 26, 759 (N.M. Ct. App. Dec. 19, 2007), *cert. denied*, 143 N.M. 665, 180 P.2d 672 (N.M. Feb. 1, 2008), this Court affirmed an unconscionability ruling based, in part, on the fact that the three-page arbitration provision was found thirty pages within the contract, which contained a series of agreements, notices, and other information, including health care directives, patient information, questionnaires, form documents, and facility policies. The trial court had found that, as is typical, the admissions agreement contained small print and was "inherently confusing, inconsistent, and difficult to understand." Slip Op. at 6. The Court affirmed the trial court's findings that the parties had disparate bargaining power and that, "as a practical matter, [the resident] had no meaningful choice when she signed the agreement." *Id.* at 7, 14.

Courts in other states have made similar rulings. For example, Tennessee courts have refused to enforce such clauses, following guidance provided by that state's highest court in a

case challenging an arbitration clause in a contract between a doctor and a patient. While the court upheld that clause, it noted that "[c]ourts will not enforce adhesion contracts which are oppressive to the weaker party or which serve to limit the obligations and liability of the stronger party." *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996). The court upheld the arbitration provision based on its finding that particular features of the clause were present, specifically noting it was a stand-alone, one-page contract, had an attached explanation of its purpose that encouraged the patient to ask questions, and clearly indicated in a different typeface and font that by signing the contract the patient would be giving up her right to a jury or court trial. In addition, the patient could revoke the agreement within thirty days. *Id.*

Subsequently, the Tennessee Court of Appeals refused to enforce arbitration clauses in nursing home contracts based on the facts surrounding the residents' admissions and the content and presentation of the clauses. *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731 (Tenn. Ct. App. 2003); *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003).

In *Howell*, the court described the admissions process, noting that Mrs. Howell "had to be placed in a nursing home expeditiously, and that the admissions agreement had to be signed before this could be accomplished." *Id.* "Given the circumstances surrounding the execution of this agreement, and the terms of the agreement itself, [the nursing home] has not demonstrated that the parties bargained over the arbitration terms, or that it was within the reasonable expectations of an ordinary person." 2003 WL 23094413, at *2. In finding the arbitration provisions unenforceable, the court held that Mr. Cox,

> the weaker party, was not afforded an opportunity to bargain over the terms of the agreement. . . . He was handed a form contract,

> under, what was for him, very trying circumstances, *i.e.*, his need to quickly find accommodations for his ailing wife. It is clear he had two options: sign the form contract as presented to him by the defendant, thereby clearing the way for his wife's admission to the defendant's facility or refuse to sign the contract and thereafter try to make arrangements for his wife's shelter and related accommodations. This is a classic case of a contract of adhesion.

Id. at *8.

While not all adhesive contracts are unconscionable, the court examined the particular way in which the arbitration clause was included in the overall contract and the way it was presented to Mr. Cox and found it unconscionable and unenforceable. Specifically, the court noted

> the dispute resolution procedures in this case are a part of an eleven page contract dealing with many issues, including financial arrangements and consent to care, rather than being set forth in a separate stand-alone document; the dispute resolution procedures do not contain any type of "short explanation" encouraging patients to ask questions; essential terms . . . are "buried" and not clearly "laid out"; there are no provisions addressing how . . . arbitration work[s] . . . .

Fortune v. Castle Nursing Homes, Inc., 843 N.E.2d 1216, 1221 (Ohio Ct. App. 2005); *See also Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004) (finding nursing home's arbitration clause was unconscionable based on, among other things, the fact that at the time the resident's wife signed it she was "under a great amount of stress" as she was concerned about her husband's health because he appeared unconscious and was about to be taken to the hospital, the agreement was not explained to her, she did not have any particularized legal expertise); *Prieto v. Healthcare and Retirement Corp. of Am.*, 919 So. 2d 531, 533 (Fla. Dist. Ct. App. 2005) (refusing to enforce nursing home's arbitration provisions due to, among other things, "irregularity in the circumstances surrounding the execution of the contract . . . The

arbitration agreement was included in a package of numerous documents which Ms. Prieto was asked to sign in order to complete the admission process while her father was on route to the nursing home."); and *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 63 (Fla. Dist. Ct. App. 2003) (finding procedural unconscionability "[g]iven the ages of the resident and her husband and the circumstances surrounding signing of the agreement," including the fact that the husband had to sign the admissions contract after she had been admitted "without being told that his failure to sign them would not affect her care or her ability to stay in the home."). Courts that have enforced arbitration provisions in nursing home contracts have done so where the circumstances surrounding the resident's admission and the contracting process differed from those found by the trial court in this case. *See, e.g., Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 520 (Miss. 2005) (enforcing nursing home's arbitration clause finding patient and his daughter, both of whom signed the agreement, were competent and "there were no circumstances of exigency"); *Broughsville v. OHECC, LLC*, No. 05CA008672, 2005 WL 3483777, at *5 (Ohio Ct. App. Dec. 21, 2005) (rejecting procedural unconscionability claim where "[t]here was no apparent emergency or need for an expeditious admission. . . . nor was haste imposed in reviewing and signing the Agreement. Furthermore . . . the record does not indicate that [the resident] was suffering from dementia or confusion at the time . . . .").

In addition to courts, at least one state regulatory agency that oversees nursing homes stepped in to protect residents after recognizing the inherent, gross inequality in bargaining power between the parties during the admissions process. The Arkansas Department of Human Services found that a nursing home's mandatory arbitration provisions violated patients' rights, noting that "[p]ersons entering nursing homes are in the throes of what may be the biggest crisis

of their lives. Most are significantly impaired and in need of immediate assistance and care. These circumstances naturally result in a high level of facility control and relative helplessness of residents. . . . It necessarily follows that there is a gross inequality of bargaining power, all to the considerable disadvantage of residents." *In re Northport Health Servs., Inc.* Dec. Order 5, 7 (July 2002), www.nsclc.org/news/03/03/northportdecorder1.pdf. [NO LONGER AVAILABLE. NEED TO DOUBLE CHECK] *See also* Krasuski, *supra*, at 289-91.

CONCLUSION

This case has far-reaching implications for older persons requiring admission to a long-term care facilities and their families. Mr. Hebert lacked the authority to bind his wife to the arbitration requirement and, therefore, no valid agreement existed. Even if the Court determines that the trial Court erred in this finding, the circumstances surrounding Mrs. Hebert's admission, like most admissions to long-term care facilities, support affirmance on the independent basis that the arbitration provision is unconscionable and unenforceable.

September 21, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion for Leave to File Brief *Amicus Curiae* of AARP in Support of Plaintiff-Appellee, the Brief, and an Affidavit of Compliance with N.M.R.A. 24-106, were served on this ____ day of September 2008, by Federal Express overnight, to the following:

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