IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
No. 62 MAP 2014

EVONNE K. WERT, Executrix of the ESTATE of ANNA E. KEPNER, Deceased,

v.

MANORCARE OF CARLISLE PA, LLC, d/b/a MANORCARE HEALTH SERVICES–CARLISLE; HCR MANORCARE, INC.; MANORCARE, INC.; HCR HEALTHCARE, LLC; HCR II HEALTHCARE, LLC; HCR III HEALTHCARE, LLC; HCR IV HEALTHCARE, LLC; GGNSC GETTYSBURG LP, d/b/a GOLDEN LIVING CENTER GETTYSBURG; GGNSC GETTYSBURG GP, LLC; GGNSC HOLDINGS, LLC; GOLDEN GATE NATIONAL SENIOR CARE, LLC; GGNSC EQUITY HOLDINGS, LLC; and GGNSC ADMINISTRATIVE SERVICES, LLC

Appeal of GGNSC Gettysburg LP, d/b/a Golden Living Center Gettysburg; GGNSC Gettysburg GP, LLC; GGNSC Holdings, LLC; Golden Gate National Senior Care, LLC; GGNSC Equity Holdings, LLC; and GGNSC Administrative Services, LLC

BRIEF OF AARP IN SUPPORT OF APPELLEE EVONNE K. WERT

Appeal from the Opinion and Order of the Superior Court of Pennsylvania entered December 19, 2013, at No. 1746 MDA 2012, affirming the Order of Court entered in this matter on September 13, 2012, overruling Defendants' Preliminary Objections seeking to compel arbitration in the Court of Common Pleas of Cumberland County, Pennsylvania, Civil Division, at No. 12165 – CIVIL.

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STATEMENT OF INTEREST

AARP is a nonpartisan, nonprofit organization with a membership dedicated to addressing the needs and interests of people age fifty and older. Through education, advocacy, and service, AARP seeks to enhance the quality of life for all by promoting independence, dignity, and purpose. AARP advocates for access to affordable healthcare and for controlling costs without compromising quality. AARP supports the establishment and enforcement of laws and policies designed to protect the rights of nursing facility residents to obtain redress when they have been victims of neglect or abuse.

AARP has filed *amicus* briefs in numerous federal and state cases around the country pertaining to the enforceability of arbitration clauses in long-term care and other consumer and employment contracts. These briefs have addressed 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.

SUMMARY OF ARGUMENT

The abject neglect and abuse of nursing facility residents is an all-too common occurrence that has not been adequately addressed by regulatory enforcement. Nursing facilities frequently fail to comply with regulatory and statutory obligations setting minimum standards for resident care. When

noncompliance is detected, it is often the case that regulatory authorities fail to vigorously enforce these minimum standards of care and, thus, fail to adequately protect nursing facility resident rights. In this context, preventing improper waiver of the opportunity to vindicate those rights in court is essential.

Elderly people seeking admission into a nursing facility are in the midst of a medical crisis caused by a precipitous decline in health, rapid increase in disability, or the death or illness of a caregiver. Nursing facilities, in contrast, have dramatically superior bargaining power and unilaterally draft admission contracts suited to their specific needs and which patients and family members are asked to sign without a meaningful opportunity to review or negotiate. Appellants, a nursing facility and related legal entities, ask this Court to tip the scales further in their favor by ignoring the plain language that they inserted into the arbitration provision in the facility's admission agreement.

The arbitration provision specifically designated the National Arbitration Forum (NAF) as the arbitrator, an arbitral forum which has been unavailable since July 2009 pursuant to a consent decree. Answer of Appellees to Pet. for Allowance of Appeal, *Wert v. Manorcare of Carlisle*, No. 62 MAP 2014, 8 (Pa. Feb. 20, 2014). The weight of authority provides that if an arbitration clause designates an arbitral forum that is unavailable and that designation is integral, then the entire provision will be unenforceable. The Superior Court followed this

rule in holding that this case is not distinguishable from *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215 (Pa. Super. Ct. 2010), a case in which the same arbitration clause was deemed unenforceable. Moreover, the *Stewart* holding is in harmony with federal law regarding the enforceability of arbitration agreements because it is based on general principles of contract law that apply equally to any other contract. The *Stewart* rule protects resident rights in a manner consistent with the Federal Arbitration Act (FAA) because it does not categorically deny nursing facilities the right to enter into or enforce arbitration agreements with residents, but simply puts the burden on nursing facilities to adhere to general principles of contract law. Amicus asks this Court to apply the legal standard in *Stewart* and enforce the contract terms fairly so that Evonne K. Wert, on behalf of her deceased mother Anna E. Kepner, may avail herself of an important enforcement mechanism to seek damages so as to deter neglect and abuse in nursing facilities.

ARGUMENT

I. Because Regulatory Enforcement Processes Fail to Adequately Protect Nursing Facility Residents, It Is Vitally Important That Victims of Abuse and Neglect Do Not Improperly Forfeit the Right to Have Their Claims Heard in Court.

As a consequence of their vulnerabilities and isolation, residents often fall prey to abuse and neglect while in the care of nursing facilities. Because of the prevalence of such abuse and neglect and the failure of regulatory enforcement to

effectively detect and remedy this problem, it is imperative that all avenues to deter bad conduct be fully utilized—particularly when the bad conduct results in the suffering and death of a vulnerable person.

A. Elderly, Vulnerable Nursing Facility Residents Are Frequent Victims of Abuse and Neglect.

Nursing facility residents are more vulnerable to abuse and neglect due to their isolation from social networks; their congregate living setting; their dependence on others to perform activities of daily living such as eating, bathing, dressing, and toileting; and their cognitive impairments. *See* Panel to Review Risk and Prevalence of Elder Abuse and Neglect, National Research Council, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, 91-100 (Richard J. Bonnie & Robert B. Wallace, eds., 2003) (reviewing studies on risk factors for abuse in different settings) [hereinafter *Elder Mistreatment*]. In 2012, more than 1.4 million Americans lived in 15,652 nursing homes certified to participate in the Medicaid and/or Medicare health insurance programs. Ctrs. for Medicare and Medicaid Servs., U.S. Dep't of Health and Human Servs., *Nursing Home Data Compendium 2013 Edition*, 5, 11 (2013) [hereinafter *2013 Compendium*], *available at* http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/downloads/nursinghomedata compendium_508.pdf. Of these nursing facility residents, 85% were 65 years of

age or older, 62% had functional impairments in four or more activities of daily living, and 63% had moderate or severe cognitive impairments. *Id.* at 178, 180.

The available empirical data suggests that nursing facility residents are frequent victims of abuse and neglect. In one study conducted in 2000, 44% of the nursing facility residents interviewed said they had been abused and 95% said they had been neglected or seen another resident neglected. *See Elder Mistreatment*, at 453 (citing K. Broyles, *The Silenced Voice Speaks Out: A Study of Abuse and Neglect of Nursing Home Residents* (2000) (Report from the Atlanta Long-Term Care Ombudsman Program and Atlanta Legal Aid Society to the National Citizens Coalition for Nursing Home Reform)). In another study, over 50% of nursing facility staff admitted to subjecting older patients to physical violence, mental abuse, or neglect within the prior year. *See* Merav Ben Natan & Ariela Lowenstein, *Study of Factors That Affect Abuse of Older People in Nursing Homes*, 17 Nursing Home Management 20, 20-24 (2010).

National databases also provide evidence of the significant levels of abuse and neglect in nursing facilities. An estimated 7% of all complaints to the long-term care ombudsmen regarding nursing facilities were complaints of abuse, gross neglect, or exploitation. *See* Admin. on Aging, U.S. Dep't of Health and Human Servs., *2012 National Ombudsman Reporting System Data Tables*, tbl. B-2, tab A (2012), http://www.aoa.acl.gov/AoA_Programs/Elder_Rights/

Ombudsman/National_State_Data/2012/Index.aspx (last visited Nov. 4, 2014). In 2012, state surveys (inspections used to determine whether facilities are in compliance) revealed that 12% of the facilities surveyed had been cited for causing actual harm to residents or putting them in immediate jeopardy, 3.1% for substandard care, 5.6% for use of restraints, and 13.9% for failure to prevent or treat bedsores. *2013 Compendium*, at 51, 114, 126, 138. The complex challenges of collecting accurate data on the prevalence of abuse in nursing facilities means that these numbers, though unacceptably high, are a mere sampling of a problem that is largely under-detected and under-reported. *See Elder Mistreatment*, at 102.

B. Federal and State Enforcement Efforts Have Failed to Effectively Address Abuse and Neglect in Nursing Facilities.

Nursing facilities are regulated on the state and federal level in order to ensure quality care. In particular, nursing facilities that receive federal funding[1] must comply with the 1987 Omnibus Budget Reconciliation Act (OBRA) and its implementing regulations, which set forth minimum standards of care for long-term care facilities. *See* 42 U.S.C. §§ 1395i-3, 1396r (2012); 42 C.F.R. § 483.1-.75 (2011). Nonetheless, the majority of facilities fail to comply. In 2010, for example, more than 93% of nursing facilities in the country were cited for

[1] The national expenditure on nursing facilities and continuing care retirement communities is projected to be $170.2 billion in 2015—$90.8 billion of which will be covered by Medicaid and Medicare. Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., *National Health Expenditure Projections 2013-2023*, tbl. 13, http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsProjected.html (last visited Nov. 4, 2014).

violations of federal health and safety standards. *See* Charlene Harrington et al., *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2005 Through 2010*, 79 (Dep't of Soc. & Behavioral Scis., Univ. of Cal. San Francisco, 2011). An average of 23.36% of all facilities surveyed in 2010 were cited for one or more deficiencies that caused harm or immediate jeopardy to residents and 7.18% were cited for substandard care. *Id.* at 80, 82.

Federal and state regulatory enforcement efforts are inadequate to remedy the problem, as demonstrated by the fact that many nursing facilities cited for abuse and neglect continue the practices that harm and sometimes kill residents. *See* U.S. Gov't Accountability Office, GAO-07-241, *Nursing Homes: Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents*, 68 (2007) [hereinafter *GAO Nursing Home Federal Enforcement Report*], *available at* http://www.gao.gov/new.items/d07241.pdf. In 2007, the GAO found that about 17% of nursing homes had deficiencies that caused "actual harm or immediate jeopardy" to patients. *Id*. at 65. In another study four years later, the GAO found that the number of nursing facilities cited for the most serious deficiencies, referred to as "immediate jeopardy," had increased over the previous several years, particularly in for-profit and multi-facility chains. U.S. Gov't Accountability Office, GAO-11-571, *Nursing Homes: Private Investment Homes Sometimes Differed from Others in Deficiencies, Staffing, and*

Financial Performance, at Highlights (2011), *available at* http://www.gao.gov/assets/ 330/321067.pdf.

The Director of Health Care for the United States Government Accountability Office (GAO) has testified before Congress that "[a] small but significant proportion of nursing homes nationwide continue to experience quality-of-care problems – as evidenced by the almost 1 in 5 nursing homes nationwide that were cited for serious deficiencies in 2006. . . ." U.S. Gov't Accountability Office, GAO-07-794T, *Nursing Home Reform: Continued Attention Is Needed to Improve Quality of Care in Small but Significant Share of Homes*, 9 (2007), *available at* http://www.gao.gov/new.items/d07794t.pdf. These are "deficiencies that cause actual harm or place residents in immediate jeopardy." *Id.* at 3. In addition, "[d]espite CMS's efforts to strengthen federal enforcement policy, it has not deterred some homes from repeatedly harming residents . . . . [S]anctions may have induced only temporary compliance in these homes because surveyors found that many of the homes with implemented sanctions were again out of compliance on subsequent surveys." *Id.* at 15-16. The 2007 GAO report on federal enforcement efforts states, "almost half of the homes we reviewed – homes with prior serious quality problems – continued to cycle in and out of compliance, continuing to harm residents." *GAO Nursing Home Federal Enforcement Report*, at 26. The types of deficiencies found in the facilities that cycled in and out of

compliance included inadequate treatment or prevention of pressure sores, resident abuse, medication errors, and employing convicted abusers. *See id.* at 68. The scope of the problem is greater than these federal reports show, as state surveys of compliance with federal quality standards repeatedly understate serious care problems. U.S. Gov't Accountability Office, GAO-08-517, *Nursing Homes: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, 11 (2008), *available at* http://www.gao.gov/new.items/d08517.pdf (noting that "[f]rom fiscal year 2002 through 2007, about 15 percent of federal comparative surveys nationwide identified state surveys that failed to cite at least one deficiency at the most serious levels of noncompliance – the actual harm and immediate jeopardy levels").

If left unaddressed, the problem of abuse and neglect in nursing facilities will only get worse as America's population is aging rapidly, will be in need of long-term care services, and will have less family care givers to provide such care. People age 65 and older comprise 13% of the total population (40.3 million)—the greatest number and proportion of the population that has ever been recorded for this age group. U.S. Census Bureau, U.S. Dep't of Commerce, C2010BR-09, *The Older Population: 2010*, 3 (2011), *available at* http://www.census.gov/prod/cen 2010/briefs/c2010br-09.pdf. By 2050, the number of adults over age 65 is projected to be 88.5 million—more than double the number in 2010—and 19

million of these adults will be over the age of 85. U.S. Census Bureau, U.S. Dep't of Commerce, P25-1138, *The Next Four Decades: The Older Population in the United States: 2010 to 2050*, 1, 3 (2010), *available at* http://www.census.gov/prod/2010pubs/p25-1138.pdf (noting that much of this trend is influenced by aging baby boomers).

Family caregivers are key resources who make it possible for older adults to remain in their homes and communities as they age. Because there will be less family caregivers available to give needed care, it can be expected that many more older adults will seek care in institutional settings like nursing facilities as we move toward the 2050 elder boom. *See* Donald Redfoot et al., AARP Pub. Policy Inst., *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family Caregivers*, 2-3 (2013). In 2010, the ratio of family caregivers to persons 80 and older needing long-term care was 7 to 1, but is projected to decrease to 4 to 1 in 2030 and less than 3 to 1 in 2050. *Id.* Given these trends—aging and caregiver demographics, continued high rates of abuse in nursing facilities, and the failure of regulatory enforcement to protect residents—it is imperative that nursing facility residents be able to redress rights violations through all available avenues.

II. Nursing Facilities Have Grossly Superior Bargaining Power and Complete Control of the Contract's Formation, Making Fair Enforcement of Agreements to Arbitrate Future Disputes Essential.

The nursing facility admission process is an "emotionally-charged, stress-laden event," in which the potential resident is in the midst of a crisis brought on by an abrupt increase in disability level, precipitous deterioration in health, or the deterioration in health (or death) of a spouse or caregiver. *See Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (citing Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 255, 258 (1990)). This inherently stressful admissions process involves many decisions and considerations, including but not limited to: who is financially responsible for costs; whether the individual's primary care doctor will continue to treat the individual in the facility; the rules of the facility; visiting hours; available rehabilitation services; transportation for appointments; whether laundry services are covered; and a myriad of other important aspects of daily life for the residents and their families. Potential residents and their family members are focused on these critical issues, as well as their own health or the health of their loved one, when they are asked to sign admission agreements containing pre-dispute arbitration provisions.

A. Nursing Facilities Have Grossly Superior Bargaining Power, Knowledge, and Control Over the Contract's Formation.

Nursing facilities have grossly superior bargaining power, knowledge, and control over the contract's formation. Nursing facilities enter into contracts to admit residents to their facilities on a regular basis. In 2013, Pennsylvania's 713 nursing facilities had 88,203 available beds which were occupied at a rate of 91% throughout the year. *See* Penn. Dep't of Health, Bureau of Health Statistics & Research, *Long Term Care Facilities Questionnaire, Report 1: Utilization Data by Facility, Jan. 1, 2013 – Dec. 31, 2013*, *available at* http://www.portal.state.pa.us/portal/server.pt?open=514&objID=596753&mode=2. In addition to the frequency with which they enter into admission agreements, nursing facilities have the advantage of drafting these agreements with the expert advice of professionals who have a sophisticated understanding of each term in the agreement and its implications for their clients, the nursing facilities. *See The Fairness in Nursing Home Arbitration Act: Hearing on S. 2838 Before the S. Subcomm. on Antitrust Competition and Consumer Rights of the S. Comm. on the Judiciary and the Special Comm. on Aging*, 110th Cong. 6 (2008) (statement of Kelly Rice-Schild, AHCA/NCAL), *available at* http://www.ahcancal.org/advocacy/testimonies/Testimony/AHCA_NCAL_StatementofKRSonArbitration.pdf [hereinafter *Statement of Kelly Rice-Schild*] (noting that the American Health Care Association and the National Center for Assisted Living, organizations

representing long-term care providers, created a model arbitration agreement for their members to use in the admission process). Professionals in the long-term care industry routinely advise nursing facilities to include mandatory pre-dispute arbitration provisions in admission agreements in order to reduce the cost of litigation and overall exposure to legal liability. *See Statement of Kelly Rice-Schild*, at 2, 5; Aon Risk Solutions, *2012 Long Term Care: General Liability and Professional Liability Actuarial Analysis*, 14 (2012) *available at* http://www.ahcancal.org/research_data/liability/Documents/2012_LongTermCare_Report_full.pdf [hereinafter *AON Risk Report*] (concluding that study results consistently show that claims settled with arbitration agreements in place were 21% less costly than other claims).

B. Prospective Nursing Facility Residents Are Presented with Arbitration Agreements in a Time of Crisis, When They Are Without Resources Needed to Make Free and Informed Decisions.

People seeking admission to nursing facilities, their families, and their representatives have probably never before seen a nursing facility contract, let alone read the arbitration provisions contained therein. *See* S. Rep. No. 110-518, pt. I.B. (2008) [hereinafter "S. Rep. 110-518"], *available at* http://www.gpo.gov/fdsys/pkg/CRPT-110srpt518/html/CRPT-110srpt518.htm. Moreover, they do not have an attorney present during the admission process to explain the terms of the agreement, advise on whether to accept the terms, and help

negotiate different terms. *Id*. Importantly, this means that prospective residents and their family members have no one present during the admission process who can tell them that they can decline to agree to pre-dispute arbitration and that the facility may not deny admission based on refusal to accept this term.

Time pressure brought on by a recent hospitalization or a precipitous decline in health significantly impairs the potential resident and family member or representative's ability to seek and carefully consider long-term care alternatives. An older person's move to a nursing facility often follows a period of acute hospitalization, after which the patient and family cannot manage home care demands. *See* Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 New Eng. J. Crim. & Civ. Confinement 1, 3 (1998). 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, 148 (2000) (internal quotation marks omitted). One danger is that the hospitalization itself debilitates patients and the assessment of the type of care and facility they need after discharge is made before they have fully recovered and are able to make informed decisions on these critical issues. *Id.* at 150-51. Consequently, the patient is unable to review the contract and contemplate the

meaning and ramifications of its provisions, particularly those that have nothing to do with care and related services and costs. *See id.; see also* Laura M. Owings & Mark N. Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, 43 Tenn. B.J. 20, 22-23 (2007). Family members having to make these decisions for their loved ones fare no better simply because they themselves are not sick or debilitated, because the need to find a long-term care placement arises quickly and often is unplanned, leaving little time to investigate options or to wait for an opening at a facility of one's choice. *See* Denese A. Vlosky et al., *"Say-so" As a Predictor of Nursing Home Readiness*, 93 J. Fam. & Consumer Sci. 59 (2001).

Prospective residents and their family members/representatives are presented with stacks of documents during a time of crisis with no meaningful opportunity to read, ask questions, or get advice about the terms. Often, the only guidance available in this process is from nursing facility staff, who may give no, little, or inaccurate information about the arbitration provision. *See* S. Rep. 110-518. Under these circumstances, it is difficult for potential residents and their families, faced with the crises accompanying admission to a nursing facility, to make informed decisions about the numerous provisions contained in an admissions contract—especially provisions requiring nursing facility residents to waive the right to access the courts and to a trial by jury for future disputes. And, especially

when, as happened here, the nursing facility's sales representative misrepresents the legal import of the arbitration agreement by telling the Plaintiff that if she and her family "were not satisfied [with the arbitration process], they did have a right to trial." *See* Answer of Appellees, at 4 (citing to R. 563a (at 61)). In this case, based on the statements of the nursing facility's sales representative and on the desire to get her mother much needed care, Ms. Wert signed all the admission documents without questioning them. *Id.* at 5 (citing R. 542a (at 86) (noting Ms. Wert's deposition testimony that she "just wanted her [mother] better"). Given the gross disparity in bargaining power and knowledge during the admission process, it is vitally important to ensure that agreements to arbitrate future disputes between nursing facilities and residents are enforced fairly so that residents can avail themselves of all available avenues of redress for abuse and neglect.

III. The Integral Term Rule Applied in *Stewart* and in This Case Ensures the Fair Enforcement of Arbitration Agreements and Is in Harmony with the Federal Arbitration Act.

The integral term rule applied in *Stewart* and in this case promotes the fair enforcement of pre-dispute arbitration agreements and the non-discrimination purpose of the FAA. Appellants contend that the challenged arbitration clause in the nursing home admission agreement should be enforced, *despite* the unavailability of the exclusive arbitral rules and forum designated in the plain language of the agreement—a designation deemed by the court to be integral to the

agreement to arbitrate. Appellants cite both the severability clause in the admission agreement and Section 5 of the FAA as authority permitting the court to change the terms of the contract. However, the court in *Stewart* and the Superior Court in this case correctly adhered to the prevailing rule used by courts in the application of Section 5 of the FAA—that a designated arbitrator provision may be replaced/severed by the court only if the designation was not an integral part of the agreement to arbitrate (hereinafter referred to as the "integral term rule"). These decisions are well supported by federal arbitration law, general principles of contract law, and principles of fairness.

A. Section 5 of the FAA Is Limited in Scope.

Appellants argue that the Superior Court should have ignored Pennsylvania law regarding contract interpretation to reach the conclusion that the NAF designation was non-integral and that it should have used Section 5 of the FAA to name another arbitral forum. However, the purpose of the FAA, the legislative history of Section 5, and the way in which Section 5 has been applied make clear that it does not have the broad reach that Appellants suggest.

Enacted in 1925, the FAA was intended to stem perceived judicial hostility to enforcing valid arbitration agreements between consenting parties and to put arbitration agreements on an equal footing with other agreements. In the House

Judiciary Committee Report for the FAA, Congress articulated the simple intent of the law:

> Arbitration agreements are purely matters of contract, and *the effect of the bill is simply to make the contracting party live up to his agreement*. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the *same footing as other contracts*, where it belongs. H.R. Rep. No. 68-96, at 1(1924) (emphases added).

Similarly, congressional debate over the bill form of the FAA continually emphasized the law's simple nondiscrimination principle. For example, Representative Graham of Pennsylvania advocated for passage of the bill by stating that:

> This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to *give enforcement to that which they have already agreed to*. 65 Cong. Rec. 1,931 (1924) (statement of Rep. Graham) (emphasis added).

The limited scope of the FAA, as expressed in the *Congressional Record*, suggests that Section 5 should similarly be given limited effect.

Nowhere in the *Congressional Record* does a member or testifying party state that Section 5 would apply to save arbitration clauses in the event of a failed named-arbitral forum provision. Nor should that result be implied in a situation such as this one where facility representatives drafted the arbitration clause and

had the power to amend the contract, as it was signed *after* the arbitral forum was made unavailable. *See* Answer of Appellees, at 14 (noting that this agreement was signed *after* the NAF became unavailable and that the agreement in *Stewart* was signed *before* the NAF became unavailable).

B. Section 5 of the FAA Does Not Preempt Well-Established Pennsylvania Common Law Principles of Contract Interpretation.

The text and legislative history of Section 5 of the FAA make clear that it is neither a rule of contract interpretation nor one that allows for wholesale modification of the terms of an arbitration agreement, but rather an administrative mechanism to facilitate the naming of an arbitrator when one has not been named. In this context, it is plain to see why most jurisdictions dealing with the unavailability of a designated arbitral forum have applied the integral term rule—a rule of contract interpretation. *See Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 220 (Pa. Super. Ct. 2010) (applying the integral term rule); *accord Smith v. ComputerTraining.com*, 531 F. App'x. 713, 716-17 (6th Cir. 2013); *Khan v. Dell Inc.*, 669 F.3d 350, 354 (3d Cir. 2012); *Ranzy v. Tijerina*, 393 F. App'x. 174, 176 (5th Cir. 2010); *Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006); *Brown v. ITT Consumer Fin. Corp*., 211 F.3d 1217, 1222 (11th Cir. 2000); *but see Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013) (finding that the arbitration agreement did not designate a specific arbitral forum, but

criticizing the integral term rule in dictum).[2] Like other states, Pennsylvania courts must apply state law contract interpretation principles to determine whether it was the intent of the parties that the arbitral forum designation be an integral part of the agreement to arbitrate. *See Gaffer Insurance Co. v. Discovery Reinsurance Co.*, 936 A.2d 1109, 1114 (Pa. Super. Ct. 2007) (giving due consideration to the policy favoring arbitration, courts must apply state law principles that govern contract formation). This is precisely what the courts in this case and in *Stewart* did—apply the well-established principle of Pennsylvania law requiring courts to determine the intent of the parties to a written contract by looking to the plain language of the contract itself and not to parole evidence. *See Stewart*, 9 A.3d at 221-22 (citing *Giant Food Stores, LLC v. THF Silver Spring Dev., L.P.*, 959 A.2d 438, 448 (Pa. Super. Ct. 2008)). State contract interpretation principles such as these are not preempted by the FAA. *See Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 661 (Pa. Super. Ct. 2013) (noting that the FAA does not preempt all state law related to arbitration).

[2] Some courts have opted to not apply the integral term rule. *See, e.g., In re Salomon Inc. Shareholders' Derivative Litig.*, 68 F. 3d 554 (2d Cir. 1995). In these cases, however, courts have held that the unavailability of a designated arbitral forum *always* renders an arbitration agreement unenforceable. *See id.* at 560-61.

C. The Integral Term Rule as Applied in *Stewart* and in This Case Is in Harmony with the Federal Arbitration Act.

The FAA embodies a principle of nondiscrimination toward arbitration agreements and does not preempt all laws that impede arbitration. "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. §2 (2012) (emphasis added); *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 1204 (2012) (remanding for consideration of whether the arbitration provisions at issue "are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA"); *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1745 (2011) (holding that "courts must place arbitration agreements on an equal footing with other contracts"). Consistent with the FAA's nondiscrimination principle, Pennsylvania courts have cautioned that a liberal policy favoring arbitration does not require that courts "rubber stamp" all arbitration agreements or make them more enforceable than any other contract. *See Pisano*, 77 A.3d at 661. Because the principles of contract interpretation applied in *Stewart* and in this case apply equally to all contracts—and not just to agreements to arbitrate—they are in harmony with the FAA.

CONCLUSION

Abuse and neglect of vulnerable nursing facility residents is an all-too-common occurrence that is not effectively remedied or deterred through regulatory enforcement efforts. This problem is more prevalent in for-profit nursing facilities that actively try to limit their liability (and increase their profits) by including pre-dispute arbitration provisions in resident admission agreements. *See Statement of Kelly Rice-Schild*; *AON Risk Report*. Given their grossly superior bargaining power and control over contract formation, nursing facilities should have the burden of ensuring that these arbitration clauses do not run afoul of the applicable contract law; and when those provisions do run afoul, courts must not enforce them. In this way, arbitration agreements are not given better treatment than any other contracts and the Federal Arbitration Act's nondiscrimination principle is most faithfully enforced.

Date: November 6, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that (2) copies of the Amicus Brief of AARP in Support of Appellee Evonne K. Wert were served on this 6th day of November, 2014, by first class mail next day service, upon each of the following, which service satisfies the requirements of Pa.R.A.P. 121:

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