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October 2015

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### Recommended Citation

Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong In Nursing Home Contracts With Residents*, 8 DePaul J. Health Care L. 263 (2004)

Available at: <https://via.library.depaul.edu/jhcl/vol8/iss1/7>

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# MANDATORY ARBITRATION AGREEMENTS DO NOT BELONG IN NURSING HOME CONTRACTS WITH RESIDENTS

*Ann E. Krasuski\**

## I. INTRODUCTION

The Supreme Court endorses them. Businesses, lending institutions, and health care providers often rely on them. Employers impose them on their employees.<sup>1</sup> State legislatures curb their use.<sup>2</sup> Arbitration providers themselves refuse to enforce them in certain disputes,<sup>3</sup> and consumer advocates typically oppose them.<sup>4</sup> Originally intended for arm's length transactions between parties in relatively equal bargaining positions,<sup>5</sup> arbitration agreements are appearing with greater frequency in contracts of all varieties.<sup>6</sup> They have become a staple in consumer contracts, and have even been spotted on a box of Cheerios.<sup>7</sup> Recently, seeing an opportunity to avoid costly and reputation-breaking litigation, nursing homes have begun to incorporate them in admission agreements with residents. These arbitration agreements may be good for nursing homes, but they are expensive proceedings in a forum generally unfavorable to consumers.<sup>8</sup>

Many residents and their families do not read carefully - if at all- the admission materials they are given and asked to sign upon

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<sup>1</sup> Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference For Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996).

<sup>2</sup> See, e.g., ARK CODE ANN. § 16-108-201 (2001) (exempting personal injury and tort matters from enforcement of arbitration agreements); KAN. STAT. ANN. 5-401(c)(3) (1991) (exempting tort claims); MONT. CODE ANN. 27-5-114(2)(a) (1995) (exempting personal injury claims).

<sup>3</sup> See Kersten Norlin, *AAA Announces Change in Health Care Policy*, AM. ARB. ASS'N (2002), at <http://www.adr.org>.

<sup>4</sup> See PUBLIC CITIZEN, *THE COSTS OF ARBITRATION* (2002), at <http://www.citizen.org/documents/ACF110A.PDF>.

<sup>5</sup> Sternlight, *supra* note 1, at 641.

<sup>6</sup> See Jane Spencer, *Signing Away Your Right to Sue*, WALL ST. J., Oct. 1, 2003, at D1.

<sup>7</sup> Ellie Winninghoff, *A fair fight? Arbitration may not always be in your best interest*, CHI. TRIB., Nov. 24, 1994, at C1.

<sup>8</sup> See discussion *infra* Part IV.A.

admission, an exceedingly stressful time for most families.<sup>9</sup> Often the need for nursing home care arises unexpectedly, and families have little time to investigate their options or become informed consumers.<sup>10</sup> Once at the nursing home, they are handed an admissions packet containing numerous documents that detail, among other things,<sup>11</sup> services available in the facility, charges for the services, Medicare and Medicaid eligibility, resident rights, advance directives, the bed-hold policy, and policies governing resident conduct.<sup>12</sup> Often inserted among these papers is an arbitration agreement that might read something like this:

Pursuant to the Federal Arbitration Act, any action, dispute, claim or controversy of any kind (e.g., whether in contract or in tort, statutory or common law, legal or equitable, or otherwise) now existing or hereafter arising between the parties in any way arising out of, pertaining to or in connection with the provision of health care services, any agreement between the parties, the provision of any other goods or services by the Health Care Center or other transactions, contracts or agreements of any kind whatsoever, any past, present or future incidents, omissions, acts, errors, practices, or occurrence causing injury to either party whereby the other party or its agents, employees or representatives may be liable, in whole or in part, or any other aspect of the past, present or future relationships between the parties shall be resolved by binding arbitration administered by the National Health Lawyers Association (the 'NHLA').<sup>13</sup>

Even if the resident or her family read the arbitration agreement, they might not understand it, or realize that by signing it, they are forgoing the ability to bring claims against the facility in court.<sup>14</sup> In other words, they may not understand that they are waiving their right to a jury trial by agreeing to binding arbitration. Moreover, at

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<sup>9</sup> See *Howell v. NHC Healthcare-Fort Sanders*, 109 S.W.3d 731 (Tenn. Ct. App. 2003); *Raiteri ex rel Cox v. NHC Healthcare/Knoxville*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003).

<sup>10</sup> Denese A. Vlosky, "Say-so" as a predictor of nursing home readiness, 93 J. FAM. CONSUMER SCI. 59 (2001).

<sup>11</sup> 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, 225 (describing an admissions packet that contains fifty-one separate items).

<sup>12</sup> 42 C.F.R. § 483.10 (2004).

<sup>13</sup> *Briarcliff Nursing Home v. Turcotte*, 2004 WL 1418698, Nos. 1012193, 1012195, at \*1 (Ala. June 25, 2004).

<sup>14</sup> *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 61 (Fla. App. 2003), *reh'g denied*,

*Manor Care, Inc. v. Romano*, 874 So.2d 1192 (Fla. 2004) (the nursing home administrator herself did not understand the meaning of the arbitration agreement).

admission the focus is on obtaining needed care, and families do not anticipate that their loved one will be harmed or abused, precipitating the decision to take action against the nursing home.

In arbitration, a privately retained arbitrator or arbitration panel renders a decision instead of a judge or jury. The arbitrator's decision is generally binding and cannot be appealed in court. Perceived benefits of cost-savings, accelerated judgment and potential capacity to preserve long-term relationships are touted by advocates of arbitration,<sup>15</sup> yet these benefits are often illusory for nursing home residents and other consumers.

Nevertheless, the Supreme Court has accorded favored status to arbitration agreements,<sup>16</sup> and many states have adopted this preference for arbitration over litigation as well.<sup>17</sup> Consequently, residents and their families face enormous hurdles in the courts when attempting to defeat arbitration agreements employed by nursing homes. But the Centers for Medicare and Medicaid Services, whose regulations govern the vast majority of the nation's nursing homes, has forgone the opportunity to make arbitration agreements in nursing homes unenforceable.<sup>18</sup> In light of these trends, Congress should amend the Federal Nursing Home Reform Law<sup>19</sup> to offer uniform protection to nursing home residents from involuntary arbitration agreements. Doing so would recognize the public policy that nursing home residents warrant special protection in addition to that afforded by regulatory oversight.<sup>20</sup>

This article explores the increasing use of arbitration agreements in nursing homes by examining case law and related developments. Part Two describes arbitration agreements and the nursing home industry's motivations for including them in admission contracts. Part Three discusses the Federal Arbitration Act, its interpretation by the Supreme Court and surveys nursing home arbitration case law. Part Four discusses why these agreements should

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<sup>15</sup> Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Reality*, 60 L. & CONTEMP. PROBS. 153, 155 (1997).

<sup>16</sup> *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983).

<sup>17</sup> *See, e.g.*, *Ericksen v. 100 Oak Street*, 673 P.2d 251, 257 (Cal. 1983); *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1245 (Ohio 1992); *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999); *Sanford v. Castleton Health Care Ctr., L.L.C.*, 813 N.E.2d 411, 416 (Ind. Ct. App. 2004), *reh'g denied* (citing *Northwestern Mut. Life Ins. Co. v. Stinnett*, 698 N.E.2d 339, 343 (Ind. Ct. App. 1998)).

<sup>18</sup> *See infra* notes 182-85 and accompanying text.

<sup>19</sup> Pub. Law No. 100-203, §§ 4201-4218 (1987) (codified at 42 U.S.C. §§ 1395i-3, 1396r).

<sup>20</sup> *See* discussion *infra* Part IV.B.2.

be barred in nursing homes and Part Five concludes that Congress should prohibit their use by the nursing home industry.

## II. MANDATORY ARBITRATION CLAUSES IN NURSING HOME ADMISSION CONTRACTS

### A. The Appeal of Arbitration to the Nursing Home Industry

Hit with attention-grabbing jury awards, forced to pay larger settlements, and faced with rapidly increasing liability insurance premiums,<sup>21</sup> nursing homes are continually looking for ways to reduce their liability exposure.<sup>22</sup> Imposing mandatory arbitration agreements on residents and their families is a relatively easy and cost-effective method to achieve this goal.

Until recently, attorneys were reluctant to take on cases against nursing homes.<sup>23</sup> Nursing home residents are generally elderly, have pre-existing medical problems, and are not likely to have potential lost earnings, factors that limit the opportunity for damages.<sup>24</sup> But as juries have awarded increased compensatory and punitive damages, nursing home litigation has become a burgeoning area of litigation for trial attorneys.<sup>25</sup>

Jury awards against nursing homes have increased significantly. Between the years 1987 and 1994 the mean award in a nursing-home negligence case more than doubled from \$238,285 to \$525,853.<sup>26</sup> Juries have increased compensatory awards fourfold from 1995 to 1998 to an average of \$1.3 million.<sup>27</sup> Record awards include \$95.1 million -- \$94.7 million of which represents punitive damages-- for abuse, negligence and fraud when a 66-year old resident fell out of bed and

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<sup>21</sup> See Mary Flood, *Nursing Homes Are Hit by Rise in Big Verdicts*, WALL ST. J., (TEX. J.), July 1, 1998, at T1; Edward Felsenthal, *Jury Awards Rise for Improper Care of Elderly*, WALL ST. J., Sept. 5, 1995, at B1.; Michael Moss, *Nursing Homes Get Punished Byirate Jurors*, WALL ST. J., Mar. 6, 1998, at B1.

<sup>22</sup> See Kathleen Vickery, *Building a Foundation of Trust*, PROVIDER, JULY 2003, at 26 (2003); Mike Cason, *Nursing Homes Try Lawsuit Stoppers*, MONTGOMERY ADVERTISER, Sept. 22, 2002, at 01.

<sup>23</sup> Patricia S. Harris, *Defense Perspective Litigating Nursing Home Cases*, 36 ARK. LAW 15 (2001).

<sup>24</sup> *Id.*; See also Flood, *supra* note 21 at T1.

<sup>25</sup> See Amy J. Conner & Bill Ibelle, *Nursing Home Plaintiffs Targeted By Tort 'Reform,'* LAW. WKLY. USA, Sept. 1, 2003, at [http://www.slackdavis.com/news\\_article.php/news\\_id/argval/251/argname/back\\_link/argval/index](http://www.slackdavis.com/news_article.php/news_id/argval/251/argname/back_link/argval/index).

<sup>26</sup> See Felsenthal, *supra* note 21.

<sup>27</sup> See Moss, *supra* note 21.

sustained a broken shoulder and hip;<sup>28</sup> \$6.3 million to the family of a resident with dementia, who eventually drowned in a pond after leaving the nursing home undetected several times;<sup>29</sup> and a \$5.3 million verdict to a resident attacked by fire ants in an Alabama nursing home.<sup>30</sup> One study reported that average settlement and verdict amounts for injuries typical in nursing homes included, \$973,349.92 for bed sores, \$802,061.83 for wandering (death), and \$353,983.09 for falls.<sup>31</sup>

In an effort to insulate themselves from litigation and what defendants often characterize as the “runaway jury,”<sup>32</sup> nursing homes have increasingly turned to arbitration.<sup>33</sup> Arbitration offers nursing homes a number of advantages over litigation. Arbitrators tend to issue lower awards than juries.<sup>34</sup> Thus, by effectively capping damages, arbitration acts as a type of private tort reform. Additionally, because the arbitration clauses are drafted by nursing-home attorneys, nursing homes have the opportunity to control the terms of the arbitration to favor themselves and disadvantage residents. The agreements may specify an industry-friendly arbitration provider to administer the arbitration proceeding,<sup>35</sup> select a location inconvenient to residents for the arbitration, place time limits on filing of complaints less than that

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<sup>28</sup> *Id.* The award was later reduced to about \$3.1 million. *Id.* The large jury award was likely based on the exceptionally egregious behavior of the nursing home administration in refusing to address understaffing, which contributed to the residents’ injury. See *In re Conservatorship of Gregory*, 80 Cal. App. 4th 514 (Cal. Ct. App. 2000).

<sup>29</sup> Moss, *supra* note 21.

<sup>30</sup> Conner, *supra* note 25.

<sup>31</sup> NEIL SUGARMAN ET. AL., ASS’N TRIAL LAW. AM, MEDICAL ERRORS FROM WHICH THE ELDERLY ARE AT RISK AND THE USE OF LITIGATION TO PROTECT THE ELDERLY FROM SUCH ERRORS 2627 (2000).

<sup>32</sup> See Conner, *supra* note 25.

<sup>33</sup> See CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, ARBITRATION AGREEMENTS: WHY THEY SHOULD BE PROHIBITED IN ADMISSION AGREEMENTS (2004), *available at* [http://www.canhr.org/publications/newsletters/advocate/adv\\_0903.htm](http://www.canhr.org/publications/newsletters/advocate/adv_0903.htm) (quoting a nursing home industry attorney: “The greatest appeal of arbitration for the provider is that this process takes the case out of the hands of the jury (whose biases we are all too familiar with) and entrusts it to a neutral arbitrator”); Cason, *supra* note 22.

<sup>34</sup> Alan Bloom et. al., *Alternative Dispute Resolution in Health Care*, 16 WHITTIER L. REV. 61, 76 (1995).

<sup>35</sup> Briarcliff Nursing Home v. Turcotte, 2004 WL 1418698, Nos. 1012193, 1012195, at \*3 (Ala. June 25, 2004). See also Bloom, *supra* note 34, at 63, 84 (stating that in a survey conducted by the National Health Lawyers Association the most important factor that would encourage the health care industry to use alternative dispute resolution was the assurance that the arbitrator or mediator had health industry experience, and “The key in arbitration is three things: 1) selection of the arbitrator, 2) selection of the arbitrator, and 3) selection of the arbitrator”).

provided by the statute of limitations,<sup>36</sup> and limit awards by capping damages and excluding attorneys' fees in contravention of statutes that provide for them.<sup>37</sup>

The benefits of arbitration to nursing homes must be significant. Some nursing home chains even pay the majority of the residents' arbitration fees, a practice that can add up to thousands of dollars.<sup>38</sup> Arbitration is so attractive to the industry that, according to one plaintiff's attorney, a nursing home chain in Florida orchestrated a sale of its twelve facilities in order to force all the residents to sign new admission agreements containing arbitration agreements.<sup>39</sup> The attorney for the nursing home chain contends the reason for the sale was that it would lower the assets of the chain and would give plaintiff attorneys less incentive to sue the nursing homes and thereby decrease its insurance premiums.<sup>40</sup> Whatever the true motivation, the sale illustrates how anxious the nursing home industry is to avoid litigation. Mandatory arbitration agreements provide a relatively simple method of doing so.

### B. Use of the Agreements

It is unknown how widespread the use of mandatory arbitration agreements is among members of the nursing home industry. Even if the nursing home industry tracks this information, it does not publish it or otherwise share it. However, most of the nation's largest nursing home chains, including Integrated Health Services, Beverly Industries, Kindred Healthcare, and Mariner, include arbitration agreements in their admissions packets.<sup>41</sup>

The mandatory arbitration agreements generally provide that all disputes arising under the admission agreement are subject to arbitration, and thus require both the nursing home and residents to forgo litigation. Some agreements, however, are explicitly one-sided and exclude from arbitration claims that a nursing home would bring,

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<sup>36</sup> Ziva Branstetter, *Nursing Home Policy Challenged*, TULSA WORLD, March 4, 2002, at 1.

<sup>37</sup> See Romano *ex rel.* Romano v. Manor Care, Inc., 861 So. 2d 59, 63 (Fla. App. 2003), *reh'g denied*, Manor Care, Inc. v. Romano, 874 So.2d 1192 (Fla. 2004)

<sup>38</sup> Cason, *supra* note 22; Algayer v. Health Ctr. of Panama City, Inc., 866 So. 2d 75, 76 (Fla. Dist. Ct. App. 2003), *reh'g denied*, Feb. 20, 2004.

<sup>39</sup> Cary Davis, *Lawsuit Challenges Nursing Home Deal*, ST. PETERSBURG TIMES, Nov. 8, 2000, at 8.

<sup>40</sup> *Id.*

<sup>41</sup> See Beverly Seeks To Reduce Future Patient Liability Costs, 2 MEALEY'S LITIG. REP.: NURSING HOMES 12 (2002); Telephone Interview with an industry representative, who requested anonymity (April 9, 2004) (notes on file with author) [hereinafter Conversation].

such as claims for payment and collections.<sup>42</sup> Even when the agreements do not so blatantly favor nursing homes, they are nevertheless inherently one-sided. They benefit nursing homes because they typically would only sue residents over nonpayment, generally a straightforward issue that, unlike negligence claims, may be appropriate for arbitration.

Some contracts are further skewed against residents. They cap damages and require the parties to pay their own attorney fees, even when these terms contravene state statutes governing nursing home litigation.<sup>43</sup> Some agreements have required that the arbitration take place in a distant state, presenting another barrier to residents and other plaintiffs.<sup>44</sup> Many of the arbitration agreements specify the arbitration provider.<sup>45</sup> Nursing homes frequently select the American Health Lawyers Association (AHLA) as their arbitration provider,<sup>46</sup> a practice criticized by resident advocates, who claim that the AHLA consists of lawyers who typically represent health care providers and thus are more likely to rule in favor of nursing homes.<sup>47</sup> Additionally, in an attempt to limit their liability by precluding wrongful death claims by residents' families, the agreements commonly purport to bind heirs, the estate and assigns of residents in addition to the residents themselves.<sup>48</sup>

In order to avoid being bound by state arbitration laws that impose specific requirements on the format, language or terms of arbitration clauses, nursing home arbitration agreements typically invoke the Federal Arbitration Act, which preempts arbitration-specific

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<sup>42</sup> See NATIONAL SENIOR CITIZENS LAW CENTER, ARK. DHS FINDS THAT NURSING FACILITY'S MANDATORY ARBITRATION AGREEMENT VIOLATES FEDERAL AND STATE NURSING FACILITY LAW (2003), at [http://www.nslc.org/news/03/03/arkansas\\_mandatory\\_arbitration.htm](http://www.nslc.org/news/03/03/arkansas_mandatory_arbitration.htm).

<sup>43</sup> See *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 63 (Fla. App. 2003), *reh'g denied*, *Manor Care, Inc. v. Romano*, 874 So.2d 1192 (Fla. 2004).

<sup>44</sup> *Branstetter*, *supra* note 36, at 1 (an Oklahoma nursing home's arbitration agreement requires residents to travel to New Mexico at their own expense for arbitration); *Northport Health Serv. v. Raidoja*, 851 So. 2d 234, 235 (Fla. App. 2003) (a provision in a Florida nursing home's arbitration agreement requires that arbitration take place in Alabama).

<sup>45</sup> See, e.g., *Briarcliff*, 2004 WL 226087 at \*1; *Sanford v. Castleton Health Care Ctr., L.L.C.*, 813 N.E.2d 411, 415 (Ind. Ct. App. 2004); *Raiteri ex rel Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at \*9 (Tenn. Ct. App. Dec. 30, 2003); *Algayer v. Health Ctr. of Panama City, Inc.*, 866 So. 2d 75, 76 (Fla. Dist. Ct. App. 2003), *reh'g denied*, Feb. 20, 2004.

<sup>46</sup> See, e.g., *Briarcliff*, 2004 WL 226087 at \*1; *Sanford*, 813 N.E.2d at 415; *Raiteri*, 2003 WL 23094413 at \*9; *Algayer*, 866 So.2d at 76.

<sup>47</sup> See *Briarcliff*, 2004 WL 226087 at \*3. See also <http://www.ahla.org/adr/>.

<sup>48</sup> *Flaum v. Super. Ct. of Los Angeles Cty.*, No. B157317, 2002 WL 31852905 at \*6 (Cal. Ct. App. Dec 20, 2002).



state laws.<sup>49</sup> This practice also permits nursing home chains with facilities in several states to use uniform contracts.<sup>50</sup>

### III. CASE LAW

#### A. Background

The adoption of arbitration agreements by the nursing home industry has been fueled not only by its effort to minimize damages awarded against nursing homes, but has occurred in light of the national policy favoring arbitration set forth by the Supreme Court in construing the Federal Arbitration Act.

Although the purpose and scope of the FAA was limited when it was enacted in 1925, today its influence is far-reaching, presenting a formidable hurdle for consumers who challenge arbitration clauses. When Congress enacted the FAA,<sup>51</sup> its purpose was twofold: to reverse the longstanding judicial hostility toward arbitration agreements and to place arbitration agreements on equal footing with other contracts.<sup>52</sup> Prior to the passage of the Act, federal courts did not consider agreements to arbitrate disputes binding, and they routinely disregarded them.<sup>53</sup> As contemporaneous legislative materials indicate, Congress intended the Act to apply only to disputes brought in federal courts.<sup>54</sup> Thus, the Act was not designed as a substantive law that would

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<sup>49</sup> *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

<sup>50</sup> Some attorneys, however, suggest drafting arbitration agreements to comply with state arbitration law, presumably in case state courts find the FAA inapplicable. ARIC D. MARTIN, OHIO HEALTH CARE ASS'N, REVISITING ARBITRATION: ALTERNATIVE DISPUTE RESOLUTION IN THE ADMISSION PROCESS (2003), at <http://www.rolfgoffman.com/OHCA%20Arbitration%202003.pdf>.

<sup>51</sup> See generally Federal Arbitration Act, 9 U.S.C. §§ 1-37 (2000). The Act was originally passed as the United States Arbitration Act. Section 2, the key provision of the Act, provides, "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

<sup>52</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Volt Info. Sci., Inc. v. Board of Trustees of LeLand Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

<sup>53</sup> Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270 (1926).

<sup>54</sup> See *Id.* at 265, 267; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 417-418 (1967) (Black, J., dissenting) (arguing that the FAA applies only in federal courts).

preempt state laws, but was to serve only as a procedural and remedial statute.<sup>55</sup> Additionally, Congress intended the Act to govern contracts between merchants with relatively equal bargaining power who voluntarily entered arbitration agreements, whereas today arbitration agreements are pervasive in consumer contracts.<sup>56</sup>

Contrary to the intended purpose of the Federal Arbitration Act, the Supreme Court has steadily expanded the scope of the FAA since the 1980's.<sup>57</sup> The Court's expansive view is grounded primarily in its own characterization of the FAA as a reflection of the national policy favoring arbitration, first articulated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*:

[t]he courts of appeals have ... consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act established that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.<sup>58</sup>

With this opinion, the Court went beyond the intended purpose of the FAA to place arbitration agreements on equal footing with other contracts and signaled a preference for arbitration over litigation. One commentator argues that this "federal policy favoring arbitration" is nothing more than a "myth," noting that the court did not provide a basis for this policy, but merely relied on lower court cases similarly devoid of supporting rationale.<sup>59</sup> Nevertheless, this policy has been the source of the Court's generous interpretation of the FAA in subsequent cases.

The Supreme Court significantly expanded the scope of the FAA when it determined the Act to be substantive law, enacted

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<sup>55</sup> An article written by the drafters of the FAA states, "The statute as drawn establishes a procedure in the federal courts for the enforcement of certain arbitration agreements. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure, whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made." Cohen, *supra* note 53, at 276.

<sup>56</sup> *Sternlight*, *supra* note 1, at 647; Cohen, *supra* note 53, at 281; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting).

<sup>57</sup> *Sternlight*, *supra* note 1, at 660.

<sup>58</sup> *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983).

<sup>59</sup> *Id.*

pursuant to Congress' commerce authority.<sup>60</sup> The Court reasoned that the FAA is applicable in state courts and preempts state laws as long as the contract at issue evidences a transaction involving interstate commerce.<sup>61</sup> The Court has thus undermined state statutes designed to protect consumers and others who lack meaningful bargaining power when entering contracts.<sup>62</sup>

Further limiting the ability of consumers to invalidate mandatory arbitration clauses, the Court has adopted an exceedingly broad construction of what constitutes interstate commerce. The Court engaged in extensive analysis of the FAA's "involving commerce" language, reasoning that the word "involving" evidenced Congress' intent to exercise its commerce power to the full, thus calling for an expansive interpretation.<sup>63</sup> Accordingly, it enforced an arbitration agreement between a homeowner and termite control company, finding the interstate commerce requirement satisfied merely because the company had offices in other states and because the materials and equipment it used came from out of state.<sup>64</sup> In a recent decision, the Court further expanded the reach of the FAA when it held that a bank loan to a developer represented an action involving interstate commerce because the developer would use portions of the loan to conduct business out of state, and the loan was secured by assets consisting of inventory assembled from raw materials from out of state.<sup>65</sup>

Given the Supreme Court's reluctance to invalidate arbitration agreements, there are few methods to defeat mandatory arbitration agreements. The Court has discerned only two exceptions to the enforceability of arbitration agreements under the FAA: first, in cases that do not involve interstate commerce, and second, as provided in the Act, "upon such grounds as exist at law or in equity for the revocation

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<sup>60</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (Black, J., dissenting).

<sup>61</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>62</sup> *Id.* (enforcing an arbitration agreement between a franchiser and franchisees even though the state statute at issue required judicial consideration of disputes, reasoning that the state law was in conflict with the FAA and thus in violation of the supremacy clause); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (finding the FAA preempts a state law that requires notice of an arbitration clause to appear on the first page of the contract); *Allied-Bruce Terminex Co. v. Dobson*, 513 U.S. 265 (1995) (enforcing an arbitration agreement between a homeowner and termite company despite a state statute making all pre-dispute arbitration agreements unenforceable).

<sup>63</sup> *Allied-Bruce Terminex Co.*, 513 U.S. at 277.

<sup>64</sup> *Id.* at 282.

<sup>65</sup> *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).

of any contract,” i.e. traditional contract defenses such as fraud, duress and unconscionability.<sup>66</sup>

Plaintiffs commonly rely on contract defenses when arguing against nursing home motions to compel arbitration, and depending on the state, have had some success defeating arbitration with these arguments. However, under the Supreme Court’s expansive interpretation of interstate commerce, few arbitration agreements are immune from the FAA, and plaintiffs rarely prevail when they argue that the admission agreement does not evidence a transaction involving interstate commerce. As an Alabama Supreme Court opinion noted, “it would be difficult indeed to give an example of an economic or commercial activity that one could, with any confidence, declare beyond the reach of ... the FAA.”<sup>67</sup>

### B. Nursing Home Arbitration Case Law

Case law about nursing home arbitration agreements has developed fairly recently.<sup>68</sup> Although the first case to reach a state appellate court was decided in 1993,<sup>69</sup> the majority of cases have been heard since 1999.<sup>70</sup> Altogether, state courts have decided approximately thirty cases at the time of this writing.

The cases arise when plaintiffs, typically spouses, children, or the estate of the resident, bring suit against the nursing home and, in response, the facility files a motion to compel arbitration. To defeat arbitration agreements, plaintiffs argue that the terms of the agreement are unconscionable, that they signed the agreement under circumstances that make it procedurally unconscionable, or that they did not sign or did not have authority to sign the agreement on behalf of the resident, who did not have the capacity or was otherwise unable to sign the agreement herself. Additionally, some plaintiffs attempt to demonstrate that the agreement is not subject to the FAA because it does not involve interstate commerce, but rather is governed by a state law that invalidates the arbitration agreement. Other plaintiffs have

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<sup>66</sup> *Southland Corp.*, 465 U.S at 10-11.

<sup>67</sup> *Service Corp. Int’l. v. Fulmer*, 883 So. 2d 621, 629 (Ala. 2003).

<sup>68</sup> Interestingly, an article published in 1985 advocated the use of binding arbitration in nursing home contracts. See Harold L. Hirsh, *Voluntary Binding Arbitration*, 34 NURSING HOMES 12 (1985).

<sup>69</sup> *Timms v. Greene*, 427 S.E.2d 642 (S.C. 1993).

<sup>70</sup> An explanation for this recent trend is the Supreme Court’s expansion of what constitutes interstate commerce in *Allied-Bruce Terminex Co.*, cited for making arbitration agreements a staple in consumer contracts. W. Todd Harvey, *Arbitration Agreements in Nursing Home Admission Contracts: Are Nursing Home Residents and Their Assignees Bound by Mandatory Arbitration Agreements? Not Necessarily*, 39 J.T.L.A TRIAL 72, 72 (May 2003).

advanced a creative, though consistently unsuccessful, argument that contends the agreements violate provisions of Medicare and Medicaid statutes. How courts rule on these arguments varies, depending on state law.

### *1. Interstate Commerce*

Because of the national policy favoring arbitration, courts will enforce contracts subject to the FAA. Thus, plaintiffs have argued that the arbitration agreement they signed does not evidence a transaction involving interstate commerce and therefore is not governed by the FAA. To date, there only a few cases that consider the issue.

In an early case decided before the Supreme Court defined what constitutes interstate commerce for purposes of the FAA, the Supreme Court of South Carolina held that a state statute prohibiting arbitration of personal injury cases was not preempted by the FAA because the interstate commerce requirement was not satisfied.<sup>71</sup> The nursing home contended that it engaged in interstate commerce by marketing its services, hiring employees, and purchasing equipment from out of state, by being a division of a Delaware partnership and by accepting federal funds from Medicare and Medicaid.<sup>72</sup> Although the court agreed “these factors could evidence the [facility’s] involvement in interstate commerce,” it held that “their relationship to the agreement between the Center and the respondent is insufficient to form the basis of the contract between the parties.”<sup>73</sup> In other words, the admissions agreement itself did not represent a transaction involving commerce, even though the nursing home’s business practices and transactions might.

Since the South Carolina case, however, plaintiffs have been unsuccessful in defeating mandatory arbitration clauses by arguing that they do not involve interstate commerce. A Texas court summarily rejected the plaintiff’s contention that the FAA did not apply for lack of a connection to interstate commerce because the contract expressly invoked the FAA.<sup>74</sup> The Alabama Supreme Court has also enforced

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<sup>71</sup> *Timms*, 427 S.E.2d at 643-44.

<sup>72</sup> *Id.* at 644.

<sup>73</sup> *Id.* In refusing to enforce the arbitration agreement, the court also relied on other considerations, including the fact that the arbitration agreement provided for arbitration pursuant to the state arbitration act. *Id.* at 643.

<sup>74</sup> *In re Ledet*, No.2003-CVT-001366-D3, 2004 WL 2945699 (Tex. App. Dec. 22, 2004). According to Texas case law, a contract need not invoke the FAA when the defendant can demonstrate that the contract involves interstate commerce, but when the parties agree that the FAA governs, Texas courts will not require proof of a connection to interstate commerce. *Id.* at \*2.

arbitration agreements, but only after considering specific evidence of interstate commerce. It assessed whether the nursing home's provision of care to the resident had a "substantial effect" on interstate commerce.<sup>75</sup> The court held that this test was satisfied because the nursing home received reimbursement from Medicare, i.e., federal funds that come from out of state, for a large portion of the resident's care and purchased materials used to feed her, to provide her bedding and to keep her clean from out of state.<sup>76</sup> The "substantial effects" test was later explicitly overruled by the Supreme Court when it adopted a looser standard for determining interstate commerce, making it even harder for plaintiffs to defeat arbitration agreements.<sup>77</sup> Accordingly, the Alabama Supreme Court has continued to view that nursing home arbitration agreements involve interstate commerce.<sup>78</sup>

## 2. *Unauthorized Signors*

Questioning the authority of the party who signs the admissions agreement to bind plaintiffs to the contract is a method that has met with some success in the courts. However, the outcome of this argument depends on state law and whether the signor is a third party, usually a spouse or adult child, or the resident. There are generally four situations where plaintiffs have raised signor issues to attack nursing home motions to compel. First, family members who signed the

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<sup>75</sup> *McGuffey Health and Rehab. Ctr. v. Gibson ex rel. Jackson*, 864 So. 2d 1061, 1063 (Ala. 2003).

<sup>76</sup> *Id. But see Community Care of Alabama, Inc. v. Davis*, 850 So. 2d 283 (Ala. 2002). The court held the FAA was inapplicable under the particular circumstances of this case. When the resident signed the arbitration agreement the nursing home's license to conduct business in the state had been revoked. Thus, under state law, the nursing home was not authorized to conduct business in Alabama, and any contracts it entered in Alabama would be held void. However, the state law would be inapplicable if the court found the primary purpose of the nursing home's business was interstate in nature because then the Commerce Clause of the U.S. Constitution would trump the state law. Applying this narrower primary purpose test, the court found that the operation of the nursing home constituted a localized business activity and that the contract between the nursing home and the resident was based in labor, a primarily intrastate activity. *Id.* at 286-89.

<sup>77</sup> The Court held, "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.'" *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

<sup>78</sup> *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987-88 (Ala. 2004), *reh'g denied*, *Owens v. Coosa Valley Health Care, Inc.*, 2004 Ala. LEXIS 302 (Ala. Apr. 16, 2004); *See also Briarcliff*, 2004 WL 1418698, at \*5.

admissions agreement on behalf of the resident have argued that the resident did not confer proper legal authority on them to bind the resident to a contract. Second, when the resident signed the admissions agreement, family member plaintiffs have argued that the resident could not bind family members who did not sign the contract. Third, family members have contended that they are not bound by the arbitration agreement because they signed it as their parent's fiduciaries, but are suing in their capacities as executors of their parent's estates. And finally, plaintiffs have questioned whether the nursing home can rely on the arbitration agreement when its representative has not signed the agreement.

### 3. *Family Members*

Not uncommonly, residents have diminished capacity, or are admitted to nursing homes from hospitals while suffering from debilitating conditions and cannot reasonably be expected to participate in the admissions process, much less to fully comprehend admissions agreements. Consequently, nursing home admissions staff regularly ask that family members sign admissions agreements on behalf of residents. This practice is not only universal for practical reasons, but some state statutes authorize the resident's representative or next of kin to admit residents to nursing facilities.<sup>79</sup> Although residents often do not sign the admissions agreement,<sup>80</sup> nursing home staff seldom inquire or even consider whether the resident has capacity to sign the agreement herself or whether the signor has authority to admit the resident into the nursing home or to bind the resident to a contract.<sup>81</sup>

Generally, this oversight is not much cause for controversy.<sup>82</sup> However, when a resident or her family member sues a nursing home

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<sup>79</sup> See CAL. HEALTH & SAFETY CODE § 1599.65(a) (2000) (requiring a nursing home to explain its admission agreement to a prospective resident and to obtain the resident's signature unless the resident is unable to understand or sign the contract because of his or her medical condition, but noting, "This provision does not preclude the facility from obtaining the signature of an agent, responsible party, or a legal representative, if applicable").

<sup>80</sup> Gerald B. Taylor, Jr. & Kimberly R. Ward, *Arbitration Clauses in Nursing Home Admission Agreements: Are They Enforceable?* (2004), at [http://www.beasleyallen.com/publications/gbt/arbitration\\_in\\_nh\\_admission\\_agreement.pdf](http://www.beasleyallen.com/publications/gbt/arbitration_in_nh_admission_agreement.pdf).

<sup>81</sup> See W. Todd Harvey, *supra* note 70, at 73; 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, 10 (1998).

<sup>82</sup> *But see* Katherine C. Pearson, *Traps for the Unwary in Nursing Home Admission Agreements-Guarantor, Agent or Separate Promisor?* 74 PA. B.A.S.S'N. Q. 139 (2003).

for negligence or wrongful death, and the nursing home moves to compel arbitration, lack of authority of the family member to sign the agreement becomes a strong argument for its nullification.

State courts that have considered the issue have generally held that family members who have not been granted explicit authority by the resident to enter into a binding contract cannot hold the resident or others to the contract.<sup>83</sup> For instance, when the daughters of a deceased resident sued as her successors-in-interest, a California court found the resident lacked capacity to authorize her daughters to sign the arbitration agreement.<sup>84</sup> The court rejected the nursing home's analogy to state statutes that authorize a responsible party or family members to sign admission agreements, to make medical decisions, and to enforce residents' rights on behalf of residents.<sup>85</sup> The court reasoned that because these laws do not include arbitration agreements among the rights conferred to family members, the facility could not bind the family to the agreement absent evidence the resident's children had authority to sign the agreement.<sup>86</sup> To hold otherwise, the court concluded, would be "counterintuitive and contrary to legislative intent."<sup>87</sup>

The court was also unpersuaded by the nursing home's contention that, by signing the admissions agreement, the resident's children represented they had authority to bind their mother to the agreement.<sup>88</sup> The court observed, "a person cannot become the agent of another merely by representing herself as such," but must be an actual agent or represented as one by the resident.<sup>89</sup>

Another California court reached the same outcome even when the resident had conferred legal authority to her daughter as durable power of attorney for health care decisions.<sup>90</sup> The court held the authority of the resident's daughter was limited to making medical decisions, and did not extend to binding her mother or her siblings, who

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<sup>83</sup> See *Pagarigan v. Libby Care Ctr., Inc.*, 99 Cal.App.4th 298, 300-301 (Cal. Dist. Ct. App. 2002); *Raiteri ex rel Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at \*9 (Tenn. Ct. App. Dec. 30, 2003); *Phillips v. Crofton Manor Inn*, No. B156570, 2003 WL 21101478, at \*4 (Cal. Dist. Ct. App. May 15, 2003).

<sup>84</sup> *Pagarigan*, 99 Cal.App.4th at 302.

<sup>85</sup> *Id.* (defendant citing California Health and Safety Code §§ 1599.65 and 1418.8 and California Administrative Code, Title 22 § 7257).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Pagarigan*, 99 Cal.App.4th at 301.

<sup>89</sup> *Id.*

<sup>90</sup> *Phillips v. Crofton Manor Inn*, 2003 WL 21101478 (Cal.App. May 15, 2003).



brought a wrongful death claim, to the arbitration agreement she had signed.<sup>91</sup>

A Tennessee court similarly held the husband of a resident was not authorized to bind his wife to the arbitration agreement.<sup>92</sup> Paradoxically, according to the court, the resident was “sharper” than her husband, but the facility had not even approached the resident.<sup>93</sup> The court found there was no evidence that the husband had actual or apparent authority to sign for his wife and waive her “very valuable” right to a jury trial.<sup>94</sup>

Unlike the Tennessee and California courts, which examined whether signors had express authority from residents to sign contracts on their behalf, the Alabama Supreme Court ascertained only whether the resident had any objection to her daughter admitting her to the nursing home.<sup>95</sup> Finding no such evidence, the court held the arbitration contract was binding upon the resident.<sup>96</sup>

#### 4. *Estates*

In a consolidated Alabama case, the adult children of two residents who died in the same facility argued that the arbitration agreement they had signed for their parents was not binding on them and thus did not subject their wrongful death claims to arbitration.<sup>97</sup> The plaintiffs contended that they signed the admissions agreement as fiduciary parties, but raised wrongful death claims in their capacities as executor and administratrix of their parents’ estates.<sup>98</sup> They argued, in other words, that signing as fiduciary parties for the residents while they were alive could not bind them to their then non-existent wrongful death claims.<sup>99</sup> The court rejected this argument because the state’s

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<sup>91</sup> *Id.* The court additionally noted that the daughter did not believe her status under the durable power of attorney allowed her to make legal decisions, as evidenced by the fact that she had sought appointment as a guardian ad litem for purposes of the litigation. *Id.* at \*5.

<sup>92</sup> *Raiteri ex rel Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at \*8 (Tenn. Ct. App. Dec. 30, 2003).

<sup>93</sup> *Id.* at \*9.

<sup>94</sup> *Id.*

<sup>95</sup> The daughter had signed the admissions agreement on the line for guardian or sponsor, though it does not appear from the case that she was her mother’s legal guardian. *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987 (Ala. 2004), *reh’g denied*, *Owens v. Coosa Valley Health Care, Inc.*, 2004 Ala. LEXIS 302 (Ala. Apr. 16, 2004).

<sup>96</sup> *Id.*

<sup>97</sup> *Briarcliff Nursing Home v. Turcotte*, 2004 WL 1418698, Nos. 1012193, 1012195, at \*2-3 (Ala. June 25, 2004).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

wrongful death statute provides that a personal representative may sue for wrongful death provided the testator or intestate could have commenced the action had the defendant's act or omission not caused death.<sup>100</sup> Accordingly, the court reasoned that the residents could not have sued the nursing home in court because they had agreed to arbitrate their claims and therefore their executor and administratrix were also precluded from litigating in court.<sup>101</sup>

### *5. Residents*

Many nursing home arbitration agreements explicitly purport to bind third parties as well as the resident. For example, an agreement used by a California nursing home contained a provision binding "the heirs, representatives, executors, administrators, successors, and assigns" of the resident.<sup>102</sup> However, in a rare case where the resident signed the admission agreement, the court was skeptical that this provision was binding on the resident's daughter, who sued the nursing home for negligence as executor of her father's estate and for wrongful death on her own behalf.<sup>103</sup> In light of a case that held an arbitration agreement cannot bind the heirs of a signor if they themselves did not sign the agreement, the court remanded the issue of whether the claims the daughter brought on her own behalf could be subject to arbitration.<sup>104</sup>

### *6. Nursing Home Staff*

In a few cases, plaintiffs have attempted to overcome arbitration agreements by arguing that the contract was not binding on them for failure of a nursing home representative to sign it or sign it properly. This argument has rarely proved successful for plaintiffs.

In two Florida cases, plaintiffs contended they could not be held to the arbitration agreements they signed because nursing home staff failed to sign the agreement, or they signed it on the wrong line.<sup>105</sup> The courts nevertheless granted the facilities' motions to compel arbitration, reasoning that mutuality of assent can be demonstrated in ways other

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<sup>100</sup> *Id.* citing ALA. CODE § 6-5-410(a) (1993).

<sup>101</sup> *Id.* at \*2-3; Wrongful death claims may have more success in other states, where case law and wrongful death statutes create a new cause of action that arises only upon the death of the injured person. *See Taylor, supra* note 80, at 14-16.

<sup>102</sup> *Flaum v. Superior Ct. of Los Angeles Cty.*, No. B157317, 2002 WL 31852905, at \*6 (Cal. Ct. App. Dec 20, 2002).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* citing *Bruckner v. Tamarin*, 98 Cal.App.4th 140 (2002).

<sup>105</sup> *Integrated Health Servs. of Green Briar, Inc. v. Lopez-Silvero*, 827 So. 2d 338, 339 (Fla. Dist. Ct. App. 2002); *Consol. Res. Healthcare Fund I, Ltd., v. Fenelus*, 853 So. 2d 500, 503 (Fla. Dist. Ct. App. 2003).

than a signature, and that the nursing homes had shown their assent by performing under the contract and providing care to the residents.<sup>106</sup>

Some plaintiffs who included the nursing homes' corporate owners as defendants in their negligence suits, argued that the owners could not rely on the arbitration agreements to compel arbitration because the owners were not parties to their contracts with the nursing homes.<sup>107</sup> Thus, even if the nursing home succeeded in binding the plaintiffs to the arbitration agreements, they would still be able to sue the owners in court. A California court held the corporate defendants were entitled to invoke the arbitration agreement because the plaintiffs alleged in their complaint that they were the owners, operators and managers of the nursing home,<sup>108</sup> and as such were parties to the contract. A Florida court, asked to decide a similar claim, remanded it for a determination whether the corporate defendant was a party, or in the alternative, a third-party beneficiary of the agreement, allowing it to invoke the agreement.<sup>109</sup>

### 7. *Unconscionability and Contracts of Adhesion*

Along with signor issues, one of the most common methods used by plaintiffs in arguing against arbitration is attempting to demonstrate that the arbitration agreement is a contract of adhesion or that its terms or the circumstances in which it was executed are unconscionable.<sup>110</sup> Admitting a loved one to a nursing home is an overwhelming and stressful undertaking for families, whom are often fraught with guilt over the decision to place their family members in nursing homes, which are frequent subjects of negative press and public perception.<sup>111</sup> If families give any thought to the admissions agreement they are signing, they probably do not consider whether it contains a mandatory arbitration agreement. Moreover, facility staff are not required to point out the arbitration clause or explain the ramifications of mandatory arbitration. Given such circumstances, plaintiffs frequently argue that the agreements are procedurally unconscionable.

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<sup>106</sup> *Id.*

<sup>107</sup> *Flaum*, 2002 WL 31852905, at \*6; *Estate of Blanchard v. Central Park Lodges, Inc.*, 805 So. 2d 6, 9 (Fla. Dist. Ct. App. 2001).

<sup>108</sup> *Flaum*, 2002 WL 31852905, at \*6.

<sup>109</sup> *Blanchard*, 805 So.2d at 9.

<sup>110</sup> *See, e.g. Raiteri ex rel Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at \*8 (Tenn. Ct. App. Dec. 30, 2003); *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 734 (Tenn. Ct. App. 2003); *Briarcliff*, 2004 WL 1418698, at \*4.

<sup>111</sup> *See Vickery, supra* note 22, at 29.

These arguments are intensely fact-specific, and courts consider factors such as the signor's educational and professional background and the adequacy of the nursing home staff's explanation of the arbitration clause. Whether plaintiffs prevail depends not only on these facts, but also on state law and the willingness of courts to overcome arbitration clauses.<sup>112</sup> For example, the Alabama Supreme court is generally hostile to these arguments, as it is to most claims against arbitration, while Tennessee courts have uniformly found the agreements to be unenforceable. Florida courts generally tend to reject allegations of unconscionability.

The Tennessee Court of Appeals, in two cases, considered whether the arbitration agreements constituted contracts of adhesion.<sup>113</sup> In one case, the court held the arbitration agreement was unenforceable because the nursing home could not demonstrate that the nursing home and resident's husband, who signed the agreement, "actually bargained over the arbitration provision or that it was a reasonable term considering the circumstances."<sup>114</sup> The court found the husband did not have meaningful bargaining power because, as is often the case, he had to place his wife expeditiously, and the contract, presented on a take-it-or-leave-it basis, had to be signed as a condition of admission.<sup>115</sup> Additionally, because the husband could not read or write, the nursing home representative explained the contract to him, but did not explain that by signing it he was waiving his wife's right to a jury trial.<sup>116</sup>

The court also considered the contract itself, and found it should not be enforced because the arbitration clause was "buried" on the next to the last page of the contract, was written in the same size font as the rest of the contract, and did not adequately explain how the arbitration procedure would work, except as to who would administer it.<sup>117</sup>

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<sup>112</sup> Harvey, *supra* note 70, at 72.

<sup>113</sup> *Raiteri*, 2003 WL 23094413; *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731. The court defined a contract of adhesion as a "standardized contract form offered to consumers ... on essentially "a take it or leave it basis," without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Raiteri*, 2003 WL 23094413, at \*5 (quoting *Buraczynski v. Eyring*, 919 S.W.2d 314, 316 (Tenn. 1996)).

<sup>114</sup> *Howell*, 109 S.W.3d 731, 735 quoting *Brown v. Karemor Int'l, Inc.*, 1999 WL 221799 (Tenn. App. April 19, 1999).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (noting that the fact that the husband could not read in itself does not excuse him from a contract he voluntarily signed).

<sup>117</sup> *Id.*

The other Tennessee case had similar facts and resulted in a similar outcome.<sup>118</sup> The resident's husband was given a form contract under very trying circumstances, when he needed to quickly find care for his ailing wife.<sup>119</sup> The court observed that he had only two options: to sign the contract as presented and have his wife admitted, or refuse to sign it and to try to make other arrangements for his wife's care.<sup>120</sup> The husband was distraught over not being able to care for his wife himself and having to admit her to a nursing home.<sup>121</sup> His children testified that he was very agitated, confused and was crying after he admitted his wife.<sup>122</sup> The court found this to be "a classic case of a contract of adhesion."<sup>123</sup>

The Alabama Supreme Court has not been as sympathetic to plaintiffs alleging unconscionability. To date, the court has not been persuaded by an unconscionability defense.<sup>124</sup>

In Alabama, plaintiffs must demonstrate two factors to prove unconscionability: that the terms of the contract were grossly favorable to one party and that one of the parties had overwhelming bargaining power.<sup>125</sup> To satisfy this test, the plaintiffs in one case first contended the terms were unfair because the arbitration provider specified in the arbitration agreement, the American Health Lawyers Association (AHLA), is a "puppet for the health care and long term care industries."<sup>126</sup> Second, they argued that the facility had overwhelming bargaining power because their county only has two nursing homes, precluding meaningful choice of provider.<sup>127</sup> The court rejected both arguments for lack of evidence that the AHLA is actually biased and that nursing home care is unavailable without agreeing to arbitration.<sup>128</sup>

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<sup>118</sup> *Raiteri*, 2003 WL 23094413, at \*8.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at \*2.

<sup>122</sup> *Id.*

<sup>123</sup> *Raiteri*, 2003 WL 23094413, at \*8.

<sup>124</sup> See *Briarcliff Nursing Home, Inc. v. Turcotte*, Nos. 1012193, and 1012195, 2004 WL 226087 (Ala. Feb. 6, 2004); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004), *reh'g denied*, *Owens v. Coosa Valley Health Care, Inc.*, 2004 Ala. LEXIS 302 (Ala. Apr. 16, 2004);

<sup>125</sup> *Briarcliff Nursing Home v. Turcotte*, 2004 WL 1418698, Nos. 1012193, 1012195, at \*3 (Ala. June 25, 2004).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at \*4.

<sup>128</sup> *Id.*

In another case, the court readily rejected a daughter's assertion that the contract was unconscionable because she was unaware it contained an arbitration provision and signed it as her "elderly and ill" mother was being admitted from the hospital.<sup>129</sup> The court, almost angrily, characterized her argument as a request for the court to adopt a per se rule that any arbitration agreement between a nursing home and elderly resident in poor health is unconscionable.<sup>130</sup>

Like the Alabama Supreme Court, Florida courts have not generally ruled in favor of plaintiffs who raise defenses of unconscionability. As in other cases, plaintiffs argued they did not understand the arbitration provision, that nobody explained they were giving up their right to a jury trial by signing it, and that the arbitration agreement was essentially hidden by other paperwork they had to sign to admit the resident.<sup>131</sup> But unlike the Tennessee courts that were persuaded by similar arguments, Florida courts have rejected these claims, reasoning that the plaintiffs had ample opportunity to read the agreements regardless of whether they actually read them.<sup>132</sup> Further, one court suggested that if plaintiffs were uncomfortable with the agreements, they could have had them reviewed by family members or an attorney.<sup>133</sup>

However, in one Florida case, the court refused to enforce an arbitration agreement, finding it unconscionable because of its unfair terms and because of "some irregularity" surrounding the circumstances under which it was signed.<sup>134</sup> The court held the terms to be egregiously unconscionable for violating state remedial law.<sup>135</sup> The statute at issue, the Florida Nursing Home Resident's Rights Act, provides for a private cause of action, attorney's fees and punitive damages for violations of residents' rights.<sup>136</sup> The arbitration agreement directly contravened the statute by capping punitive damages and excluding attorney's fees. Although the agreement included a notice on the first page warning that it requires waiver of statutory rights, the court found this notice deficient because it did not inform the resident

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<sup>129</sup> *Owens*, 890 So.2d at 988-89.

<sup>130</sup> *Id.* at 989.

<sup>131</sup> *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 282 (Fla. Dist. Ct. App. 2003); *Consol. Res. Healthcare Fund I, Ltd., v. Fenelus*, 853 So. 2d 500, 504 (Fla. Dist. Ct. App. 2003).

<sup>132</sup> *Fenelus*, 853 So.2d at 504; *Gainesville*, 857 So. 2d at 281.

<sup>133</sup> *Gainesville*, 857 So. 2d at 282.

<sup>134</sup> *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. App. 2003), *reh'g denied*, *Manor Care, Inc. v. Romano*, 874 So.2d 1192 (Fla. 2004).

<sup>135</sup> *Id.* at 62-63.

<sup>136</sup> *Id.* at 63.

that she had a statutory right to punitive damages.<sup>137</sup> The court invalidated the agreement, holding that “[a]lthough parties may agree to arbitrate statutory claims, even ones involving important social policies, arbitration must provide the prospective litigant with an effective way to vindicate his or her statutory cause of action in the arbitral forum.”<sup>138</sup>

In addition to being substantively unconscionable, the court found the circumstances surrounding the signing of the agreement irregular.<sup>139</sup> The resident’s elderly husband was given the admission documents, including a six-page arbitration agreement, the day after his wife was admitted.<sup>140</sup> The court noted that he was not informed nor did the agreement indicate that his wife would *not* be ousted from the nursing home for failure to sign.<sup>141</sup> Instead, the administrator simply told him that he had to sign the documents.<sup>142</sup> The administrator later admitted that she herself did not understand the arbitration agreement.<sup>143</sup> Although the court found only “some quantum of procedural unconscionability” in the admissions process, the court explained that the more substantively oppressive the terms, the less evidence of procedural unconscionability is required to render the contract unenforceable.<sup>144</sup> Having found the terms to be egregious, the court was satisfied that the contract was unenforceable.<sup>145</sup>

### ***8. State Statutory and Constitutional Rights***

Plaintiffs have also tried to defeat mandatory arbitration agreements by arguing that they do not comply with state law. These arguments have taken three forms: Plaintiffs have contended that the agreements are inconsistent with the state nursing home code, that they violate state arbitration law, or that they take away their right to a jury trial as guaranteed by the state constitution. With the exception of the

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<sup>137</sup> *Id.* at 61.

<sup>138</sup> *Id.* at 62 *citing* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000) (finding that arbitration provides an alternative forum for vindication of statutory rights).

<sup>139</sup> *Romano*, 861 So. 2d at 62

<sup>140</sup> *Id.* at 61.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* If a trained professional charged with managing the daily operations of a nursing home cannot understand the agreement, it is not clear how residents or families are expected to understand it, especially during the overwhelming event of nursing home admission.

<sup>144</sup> *Romano*, 861 So. 2d at 61-62.

<sup>145</sup> *Id.* at 64.

constitutional claim, plaintiffs have raised these arguments when the agreements invoke state law rather than the FAA.<sup>146</sup>

In addition to arguing that the arbitration agreement is unconscionable because it contravenes the state nursing home code, as in the Florida case described above, Florida plaintiffs have also relied on state law directly in asserting that the agreement is unenforceable. In one case, the arbitration agreement specified that the arbitration proceeding would be administered by the National Health Lawyers Association (NHLA) using its rules of procedure.<sup>147</sup> The plaintiff argued that the agreement should not be enforced because the NHLA's discovery and evidence rules conflict with the remedies provided in the state's nursing home code.<sup>148</sup> The court disagreed, reasoning that common law does not preclude enforcement of contracts that waive statutory rights and remedies.<sup>149</sup> The court further observed that it could find no provisions of the nursing home code that explicitly limit enforcement of arbitration agreements.<sup>150</sup> However, the court recognized that arbitration agreements that contravene statutory rights may be unconscionable and thus remanded the case on this point.<sup>151</sup>

In another Florida case, the trial court denied the facility's motion to compel arbitration, holding that the plaintiff's claim did not arise from the arbitration agreement at all, but was instead predicated on the nursing home code as indicated in the complaint.<sup>152</sup> The trial court found the resident's injury resulted from a breach of duties imposed by the state nursing home code, and thus determined that his claim was "wholly independent" of the admissions agreement.<sup>153</sup> However, the appellate court reversed, finding the resident's claim arose directly from the agreement because his admission to the facility triggered the facility's statutory duties.<sup>154</sup> Moreover, the court noted that other statutory claims are regularly subject to arbitration in Florida, and thus it would not invalidate the agreement because of its statutory claim.<sup>155</sup> Although the plaintiff did not rely on unconscionability as a

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<sup>146</sup> See *Conversation*, *supra* note 41 (suggesting that referencing state law is a precaution in the event that state courts determine the FAA is not controlling).

<sup>147</sup> *Richmond Healthcare, Inc. v. Digati*, 878 So. 2d 388, 389 (Fla. Dist. Ct. App. 2004).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 390.

<sup>150</sup> *Id.* at 391.

<sup>151</sup> *Id.* at 392.

<sup>152</sup> See *Five Points Health Care, Ltd. v. Alberts*, 867 So. 2d 520, 522 (Fla. Dist. Ct. App. 2004).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 521.

<sup>155</sup> *Id.* at 522.



defense, the court further stated, "...the agreement here would not be found substantively unconscionable merely because it requires arbitration of a statutory claim."<sup>156</sup> It is unclear from the case, however, whether the terms of the agreement limited remedies afforded by the statute, such as attorney's fees and damages, as in the Florida case described earlier.<sup>157</sup>

Another way that a plaintiff sought to invalidate a mandatory arbitration clause was by relying on the state arbitration law. A California plaintiff challenged the arbitration agreement she had signed because it was contained on page nine of the contract, rather than being the first article as required, and because it did not use the language prescribed by the California arbitration statute.<sup>158</sup> The court found her arguments without merit, pointing out that the agreement was a separate one-page document that was referenced at page nine, and that its divergence from the statutory language was merely stylistic.<sup>159</sup> Even though the plaintiff did not prevail on these particular facts, this case illustrates that other plaintiffs might have success in circumventing arbitration if the agreement they signed does not comply with requirements provided by state arbitration laws. On the other hand, this offers little recourse to plaintiffs as it is unlikely that agreements will not comply with the state law that they specifically invoke.

An Indiana case illustrates another argument that relies on state law to avoid arbitration. In the case, the estate of the resident maintained the arbitration agreement was unenforceable because it unconstitutionally deprived it of a jury trial.<sup>160</sup> The plaintiff-estate relied on the Indiana constitution, which provides, "In all civil cases, the right of trial by jury shall remain inviolate."<sup>161</sup> Despite this constitutional guarantee, the court held the resident's estate was bound by the arbitration agreement signed by the resident's daughter.<sup>162</sup> In so holding, the court noted that under Indiana law constitutional rights may be waived and that the daughter's waiver was knowing and voluntary, even though she was rushed and distracted when admitting

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<sup>156</sup> *Id.*

<sup>157</sup> *See Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 63 (Fla. App. 2003), *reh'g denied*, *Manor Care, Inc. v. Romano*, 874 So.2d 1192 (Fla. 2004).

<sup>158</sup> *Flaum v. Super. Ct. of Los Angeles Cty.*, No. B157317, 2002 WL 31852905 at \*4 (Cal. Ct. App. Dec 20, 2002).

<sup>159</sup> *Id.*

<sup>160</sup> *Sanford v. Castleton Health Care Ctr., L.L.C.*, 813 N.E.2d 411 (Ind. Ct. App. 2004).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

her mother to the facility.<sup>163</sup> Her mother was yelling and behaving aggressively and her children, whom she had with her, needed her attention.<sup>164</sup>

### 9. Medicare and Medicaid Statutes

Advocates for nursing home residents contend that the Medicare and Medicaid statutes preclude arbitration agreements in nursing homes that are certified by Medicare and/or Medicaid.<sup>165</sup> Medicare-certified facilities must accept Medicare, including co-payments and deductibles, as payment in full.<sup>166</sup> Similarly, Medicaid-certified facilities must abide by regulations that prohibit them from charging, soliciting, accepting, or receiving “in addition to any amount otherwise required to be paid under the [Medicaid Program], any gift, money, donation, or other consideration” as a precondition of admission, expedited admission or continued stay in the facility.<sup>167</sup> Advocates urge that asking residents to sign an arbitration agreement and waive their right to a jury trial constitutes additional consideration in violation of the Medicare and Medicaid statutes.<sup>168</sup> Because 75% of nursing home residents are covered by Medicare and/or Medicaid,<sup>169</sup> this argument has potential to be a broadly sweeping method to curtail the increasing use of mandatory arbitration agreements in the nursing home industry. Thus far, however, courts have not been persuaded that an arbitration agreement constitutes additional consideration.<sup>170</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* The court additionally looked to a state trial rule in support of its holding. The rule provides that nothing in the trial rules shall deny parties the right to agree to submit their dispute to arbitration or to deny the courts power to enforce arbitration agreements. The court construed the rule as evidence of a “a very strong presumption of enforceability of contracts that represent the freely bargained agreement of the parties.” *Sanford*, 813 N.E.2d at 420 *quoting* *Ransburg v. Richards*, 770 N.E.2d 393, 395 (Ind. Ct. App. 2002).

<sup>165</sup> See NATIONAL SENIOR CITIZENS LAW CENTER, MANDATORY ARBITRATION FORBIDDEN FOR NURSING FACILITY RESIDENTS REIMBURSED THROUGH MEDICARE OR MEDICAID (2003), at [http://www.nslc.org/news/03/10/nfarbitration\\_carlson.htm](http://www.nslc.org/news/03/10/nfarbitration_carlson.htm).

<sup>166</sup> 42 U.S.C. § 1396r(c)(5)(A)(iii) (2000); 42 C.F.R. § 489.30 (2004).

<sup>167</sup> 42 C.F.R. § 483.12(d)(3) (2004)

<sup>168</sup> See NATIONAL SENIOR CITIZENS LAW CENTER, *supra* note 165.

<sup>169</sup> CENTER FOR DISEASE CONTROL, THE NATIONAL NURSING HOME SURVEY: THE 1999 SUMMARY (2002), at [www.cdc.gov/nchs/data/series/sr\\_13/sr13\\_152.pdf](http://www.cdc.gov/nchs/data/series/sr_13/sr13_152.pdf).

<sup>170</sup> See *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 288 (Fla. Dist. Ct. App. 2003); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 989 (Ala. 2004), *reh'g denied*, *Owens v. Coosa Valley Health Care, Inc.*, 2004 Ala. LEXIS 302 (Ala. Apr. 16, 2004); *Sanford v. Castleton Health Care Ctr., L.L.C.*, 813 N.E.2d 411, 418-19 (Ind. Ct. App. 2004); *But see* *Howell v. NHC Healthcare-Fort Sanders*, 109

A Florida court expressed that it did not believe that the Medicaid provision prohibiting additional consideration was intended to apply to arbitration agreements.<sup>171</sup> The Alabama Supreme Court similarly refused to invalidate an arbitration agreement, reasoning that it merely sets an alternative forum for dispute resolution and binds both parties, who both receive the benefits and detriments of arbitration.<sup>172</sup> The court worried that if it agreed with the plaintiff, any contract term she did not like could be construed as requiring additional consideration for admission into the nursing home.<sup>173</sup>

The Court of Appeals of Indiana came to the same conclusion as the Florida and Alabama courts, but only after engaging in an exercise of statutory construction.<sup>174</sup> The court analyzed the words, “gift, money, donation, or other consideration,” in the Medicaid statute.<sup>175</sup> Applying the doctrine of *ejusdem generis* --which holds that when a general phrase follows specific terms, the general phrase will be interpreted to include only things in the same class as the specific terms-- the court determined that “other consideration” cannot include an arbitration agreement.<sup>176</sup> It reasoned that “requiring a [resident] to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admission.”<sup>177</sup>

Interestingly, in a footnote, the court warned that by entering arbitration agreements nursing homes may forgo protections afforded by the state’s Medical Malpractice Act, which limits the provider’s liability and requires review of claims by a medical panel.<sup>178</sup>

## C. Related Developments

### 1. Nursing Home Regulators

The Centers for Medicare and Medicaid Services (CMS) administers the federal programs that reimburse nursing homes for care of residents who are Medicare and/or Medicaid recipients.<sup>179</sup> Because so few residents can afford to pay privately for nursing home care, most

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S.W.3d 731, 733 (Tenn. Ct. App. 2003 (pretermitted consideration of this argument, but noting that it has some appeal).

<sup>171</sup> *Gainesville*, 857 So. 2d at 288.

<sup>172</sup> *Owens*, 890 So. 2d at 989.

<sup>173</sup> *Id.*

<sup>174</sup> *Sanford*, 813 N.E.2d at 419.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 419.

<sup>179</sup> See CTRS. FOR MEDICARE & MEDICAID SERVS., ABOUT THE CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS), at <http://www.cms.hhs.gov/about/>.

nursing homes are dependent on these federal funds.<sup>180</sup> As a condition of participation in the programs, nursing homes must comply with the Federal Nursing Home Care Act and similar state statutes.<sup>181</sup>

In response to the increasing use of arbitration agreements by nursing homes, CMS issued a brief memorandum to state surveyor agencies, which monitor nursing home compliance with federal and state laws, offering guidance on how they should respond to binding arbitration in nursing homes.<sup>182</sup> The memo, characterized as evasive and equivocating by some, does not take a firm position.<sup>183</sup> It states:

Under Medicare, whether to have a binding arbitration agreement is an issue to be decided between the resident and the nursing home. Under Medicaid, we will defer to State law as to whether or not such binding arbitration agreements are permitted subject to the concerns we have where Federal regulations may be implicated. Under both programs, however, there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates Federal requirements.<sup>184</sup>

The memo notes that a facility may subject itself to an enforcement action if it retaliates against or discharges residents for refusing to sign an arbitration agreement, actions that clearly violate the regulations.<sup>185</sup> The memo essentially maintains the status quo; it affirms that surveyors will cite facilities that violate regulations, but will not cite them for using arbitration agreements, leaving the question of whether mandatory arbitration agreements are permissible to be determined on a case-by-case basis by the courts.

In contrast to the neutral position taken by CMS, The Arkansas Department of Human Services, charged with enforcing federal and state nursing home regulations in the state, took a strong stance against an arbitration agreement used by Northport Health Services, a chain of

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<sup>180</sup> CENTER FOR DISEASE CONTROL, *supra* note 169, at 4.

<sup>181</sup> See 42 U.S.C.A. § 1395i(3)(d)(4)(A) (2004).

<sup>182</sup> Memorandum from the Centers for Medicare & Medicaid Services, to the Survey and Certification Group Regional Office Management (G-5) State Survey Agency Directors

(Jan. 9, 2003), at <http://www.nslc.org/news/03/02/s&c0103.htm> [hereinafter CMS Memorandum].

<sup>183</sup> See ELDER LAW ANSWERS, CMS EQUIVOCATES ON BINDING ARBITRATION AGREEMENTS (2003), at <http://www.elderlawanswers.com>; NATIONAL SENIOR CITIZENS LAW CENTER, CMS PASSES ON BINDING ARBITRATION ISSUE (2003), at <http://www.nslc.org/news/03/02/cmsbindingarb.htm>.

<sup>184</sup> CMS Memorandum, *supra* note 182, at 1.

<sup>185</sup> *Id.* at 2.

nursing homes in Arkansas.<sup>186</sup> In a declaratory order issued in July 2002, the Department found Northport's arbitration agreement to be "distinctly one-sided," evidencing "a gross inequality of bargaining power" to the disadvantage of residents.<sup>187</sup> In considering the provision of the Medicaid statute that prohibits additional consideration as a condition of admission, it stated plainly, "[residents] gain nothing—except admission to the [nursing home]—in return for forfeiting their resident rights."<sup>188</sup> Yet in return for residents' waiver of rights, the nursing homes do not accept lower Medicaid payments.<sup>189</sup>

The declaratory order also questions the arbitration agreement's invocation of the FAA and its declaration that Northport nursing homes regularly engage in interstate commerce.<sup>190</sup> As the FAA preempts state law, this provision is designed to circumvent the state's arbitration statute, which prohibits arbitration of personal injury and tort claims.<sup>191</sup> But the Department expressed skepticism that the operations of a nursing home actually involve interstate commerce, a requirement for application of the FAA.<sup>192</sup> It noted that the purpose of the nursing homes was to serve the local population, and that "[e]ach Agreement is executed between an Arkansas resident and an Arkansas [nursing home] for care to be delivered in Arkansas by Arkansans."<sup>193</sup> Accordingly, the Department concluded that the arbitration agreements are subject to the state law and thus inapplicable to tort and personal

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<sup>186</sup> Declaratory Order In the Matter of Northport Health Servs., 14 (2002), [www.nslc.org/news/03/03/northportdecor1.pdf](http://www.nslc.org/news/03/03/northportdecor1.pdf).

<sup>187</sup> *Id.* at 3-4. As summarized by the Department, the agreement specifies that:

"(1) Northport is bound only as to disputes with the resident; however, the resident and the resident's representatives are bound in disputes with Northport, Northport's parent or subsidiary companies, facility officers, directors, managers, employers, agents, and *any other person*. Furthermore, § 16 F. of the Agreement goes on to expressly bind family members, advocates, and ombudsmen.

(3) All disputes of \$25,000 or more must be resolved by binding arbitration;

(4) The arbitrator has exclusive authority to decide if the Agreement is valid;

(5) Alabama law governs the arbitration procedures, and the Alabama Medical Liability Act limits the facility's exposure to damages;

(6) The right to a jury trial is waived;

(7) The parties acknowledge that Northport regularly engages in transactions involving interstate commerce, that the services provided by Northport involve interstate commerce, and that the Federal Arbitration Act governs all arbitrations." *Id.*

<sup>188</sup> *Id.* at 4.

<sup>189</sup> *Id.* at 5.

<sup>190</sup> *Id.* at 12.

<sup>191</sup> Northport Health Servs., *supra* note 186, at 12.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 13.

injury claims.<sup>194</sup> In effect, then, the Department invalidated their use in nursing homes. However, as the Department issued the order prior to the Supreme Court's expansive interpretation of interstate commerce in *Alafabco*, it is unlikely that a court would find that the FAA does not preempt the Arkansas statute.<sup>195</sup> Even if a court were to so rule, the Department observed that the FAA would not bar the Department from terminating state Medicaid contracts with Northport and other nursing homes who include unlawful terms in their arbitration agreements.<sup>196</sup>

## 2. Arbitration Providers

The American Health Lawyers Association, commonly referenced in nursing home arbitration agreements, and the American Arbitration Association (AAA), the nation's largest arbitration provider, have both recently implemented policies whereby they will no longer administer consumer health care liability claims unless the agreement to arbitrate was entered into by the parties after the alleged injury occurred.<sup>197</sup> A senior vice president of the AAA succinctly explained the reasoning behind the new policy: "It's not fair to ask a person who's going in for medical treatment to sign an arbitration agreement...we're talking about things that affect your life and your health."<sup>198</sup>

While the new policies of the AAA and the AHLA may not have much impact on the use of arbitration agreement by nursing homes—since there are several other providers to choose from—they are nevertheless significant because they demonstrate that even providers of arbitration recognize pre-dispute arbitration agreements as inherently unfair to healthcare consumers.

## IV. ARGUMENTS AGAINST ARBITRATION

Mandatory, pre-dispute arbitration agreements are widely viewed as unfair to consumers.<sup>199</sup> Yet they are even more unfair to nursing home

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<sup>194</sup> *Id.*

<sup>195</sup> See *supra* text accompanying notes 65 & 77.

<sup>196</sup> Northport Health Servs., *supra* note 186, at 14.

<sup>197</sup> See AM. ARB. ASS'N, AAA ANNOUNCES CHANGE IN HEALTH CARE POLICY, at <http://www.adr.org/index2.1.jsp?JSPssid=15780&JSPsrc=upload\LIVESITE\Aboutw hatsnew\Health%20Care%20Policy.htm> (last visited June 13, 2002); AM. HEALTH LAW. ASS'N, IMPORTANT ANNOUNCEMENT RELATED TO HEALTH LAWYERS' ADR SERVICE (2003), at <http://www.healthlawyers.org/adr/announcement.cfm>.

<sup>198</sup> Joelle Babula, *Valley Health Care: Group won't arbitrate medical cases*, LAS VEGAS REV. J., Aug. 7, 2003, at 1-B.

<sup>199</sup> See generally PUBLIC CITIZEN, *supra* note 4; *Your Money. The Arbitration trap: How consumers pay for 'low-cost' justice*, 64 CONSUMER REPS. 64 (1999); *Winninghoff*, *supra* note 7.

residents. The agreements are typically presented on a take-it-or-leave-it basis during the stressful admissions process, when residents and their families are more focused on coping with the usually unwelcome event of a move to a nursing home.<sup>200</sup> Unlike consumer arbitration agreements that preclude litigation of contract claims, arbitration agreements in nursing homes deny vulnerable individuals who have been neglected or abused by their caregivers the opportunity to raise tort claims in court. Many states have recognized that mandating arbitration in any tort or personal injury cases, and specifically in cases of nursing home or elder abuse, is contrary to the public interest and have enacted laws to bar arbitration in these cases.<sup>201</sup> Arbitration agreements especially do not belong in contracts between residents and nursing homes because they permit nursing homes, which are largely publicly funded, to circumvent public policy by attempting to keep instances of substandard care from the public view.

Arguments regularly advanced in favor of arbitration posit that arbitration is less expensive than litigation, provides faster resolution, is administered by a neutral decision maker knowledgeable in the field subject to the dispute, protects confidentiality, and is a less formal and less adversarial process that maintains on-going relationships.<sup>202</sup> Yet these benefits, if applicable at all in the nursing home context, primarily favor health care providers while limiting the due process of consumers who waive their right to a jury trial and the opportunity to appeal an adverse decision.

### A. Costs

Cost savings of arbitration are regularly touted as one of the advantages of arbitration.<sup>203</sup> However, not only is there an absence of evidence to support this conclusion,<sup>204</sup> any perceived cost savings ultimately benefit

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<sup>200</sup> See *Raiteri ex rel Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at \*2 (Tenn. Ct. App. Dec. 30, 2003).

<sup>201</sup> See, e.g., ARK CODE ANN. § 16-108-201 (2001) (exempting personal injury and tort matters from enforcement of arbitration agreements); KAN. STAT. ANN. § 5-401(c)(3) (1991) (exempting tort claims); MONT. CODE ANN. § 27-5-114(2)(a) (1995) (exempting personal injury claims); See *infra* note 270 for statutes that protect the right of nursing home residents to commence an action in court.

<sup>202</sup> See *Rolph*, *supra* note 15, at 155; Thomas B. Metzloff, *Business Law Symposium, Commercial Arbitration: A Discussion of Recent Developments and Trends, The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 208 (1996).

<sup>203</sup> Russel Myles and Kelly Reese, *Arbitration: Avoiding the Runaway Jury*, 23 AM. J. TRIAL ADVOC. 129, 137-38 (1999).

<sup>204</sup> THE COSTS OF ARBITRATION, *supra* note 4, at 51 (contending that the National Arbitration Forum's claim that "[a]rbitration can save parties 70-80% of the cost of

corporations rather than consumers.<sup>205</sup> Arbitration has been found to be more expensive for consumers than litigation, and its often-prohibitive fees, or forum costs, may serve to bar consumers from pursuing claims at all.<sup>206</sup> Even though some arbitration providers have recently adopted consumer-friendly measures, defendants still benefit from arbitration because awards issued by arbitrators tend to be lower than jury awards.<sup>207</sup>

The forum costs of arbitration are generally determined by the filing and administrative fees charged by the arbitration provider and by the arbitrator's hourly or daily rate.<sup>208</sup> Fees vary depending on the arbitration provider, the nature of the case, and the amount of the claim.<sup>209</sup> In some cases, the filing fee may be as high as \$2,000,<sup>210</sup> and arbitrators may charge as much as \$600 per hour of their time.<sup>211</sup> One arbitration provider charges additional fees for subpoenas, motions, discovery requests and written findings, which otherwise are not produced.<sup>212</sup> Generally, arbitration rules provide that some of these forum costs will be divided evenly between the parties, and may be allocated to one party in the award at the discretion of the arbitrator.<sup>213</sup> Nevertheless, even when arbitration rules contain fee-splitting provisions, arbitration may remain cost prohibitive for consumers.<sup>214</sup>

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litigating [employment discrimination] cases" is false; *See also* Rolph, *supra* note 15, at 156-57; Marcus Nieto & Margaret Hosel, *Arbitration in California Managed Health Care Systems*, CAL. RES. BUREAU, Dec. 2000, at 24.

<sup>205</sup> Myles, *supra* note 203, at 137-38 (citing a Cornell University survey of ADR use among 1,000 of the nation's largest corporations, which found that saving money is an important reason why they use arbitration).

<sup>206</sup> THE COSTS OF ARBITRATION, *supra* note 4, at 52. California's independent auditor also suggests that the cost of pursuing arbitration may prevent consumers from filing claims. Nieto, *supra* note 204, at 25.

<sup>207</sup> *See* Bloom, *supra* note 34, at 76.

<sup>208</sup> Richard M. Alderman, *Pre-Dispute Mandatory Arbitration In Consumer Contracts: A Call For Reform*, 38 HOUS. L. REV. 1237, 1250 (2001).

<sup>209</sup> THE COSTS OF ARBITRATION, *supra* note 4, at 42 (finding that forum costs range from \$700 to nearly \$8,000 depending on the amount of the claim).

<sup>210</sup> *See* Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 603 (2002).

<sup>211</sup> *See* Margaret Jacobs, *Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 26, 1996, at A1.

<sup>212</sup> THE COSTS OF ARBITRATION, *supra* note 4, at 43.

<sup>213</sup> *See* AM. HEALTH LAW. ASS'N ALTERNATIVE DISPUTE RESOLUTION SERV., CODE OF ETHICS FOR ARBITRATORS (2003), *available at* [http://www.healthlawyers.org/adr/adr\\_manual\\_arb\\_rev0312.pdf](http://www.healthlawyers.org/adr/adr_manual_arb_rev0312.pdf).

<sup>214</sup> *See* Morrison v. Circuit City Stores Inc. and Shankle v. Pep Boys, 317 F.3d 646 (Tenn. Ct. App. 2003) (consolidated for en banc review) (holding that if a cost-splitting provision would still deter a substantial number of litigants, the court should refuse to enforce the provision).



Courts have been responsive to arguments that arbitration clauses are not enforceable because the costs of arbitration deter consumers from bringing their claims.<sup>215</sup> This argument is sometimes referred to as the “prohibitive cost defense.”<sup>216</sup> The defense has emerged following the Supreme Court’s recognition that “the existence of large arbitration costs could preclude a litigant... from effectively vindicating her federal statutory rights in the arbitral forum.”<sup>217</sup> It is not clear, however, whether this defense extends to claims that do not assert federal statutory rights.<sup>218</sup> Thus, the availability of this defense to nursing home residents and their families, who more often rely on state tort law, is unknown and thus far untested. Although courts in Florida have rejected statutory claims as a means to defeat nursing home motions to compel arbitration,<sup>219</sup> plaintiffs might prevail using this defense in other states that afford statutory remedies against nursing homes.<sup>220</sup> Even if courts continue to view that arbitration merely provides another forum for resolution of statutory claims,<sup>221</sup> plaintiffs can demonstrate that the cost of arbitration precludes them from bringing a claim in any forum. Additionally, courts may choose to extend the prohibitive cost defense to common law claims.<sup>222</sup>

In addition to courts, some arbitration providers have also recognized that arbitration costs can present a bar to consumer claims,

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<sup>215</sup> See *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 603-04 (2002) (discussing cases that held arbitration clauses unenforceable because of the prohibitive costs of arbitration for consumers, and similarly ruling in favor of consumer); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (finding the plaintiff’s argument too speculative, but noting that plaintiffs can assert the prohibitive cost argument if they develop a factual record to support it).

<sup>216</sup> *Mendez*, 45 P.3d at 603.

<sup>217</sup> *Green Tree Fin.*, 531 U.S. at 90.

<sup>218</sup> One commentator notes that the opinion in *Green Tree Fin.*, can be read in three ways. First, it could be limited to claims raised under the Truth in Lending Act, the statute at issue in the case. Second, it could be read broadly to include all or most federal statutory claims. Third, it could be “misconstrued” as a federal common law of unconscionability that arguably preempts relevant state law. See David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 84 (2003).

<sup>219</sup> See *Richmond Healthcare, Inc. v. Digati*, 878 So. 2d 388, 389 (Fla. Dist. Ct. App. 2004); See *Five Points Health Care, Ltd. v. Alberts*, 867 So. 2d 520, 522 (Fla. Dist. Ct. App. 2004).

<sup>220</sup> See *infra* note 270.

<sup>221</sup> See, e.g. *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987-88 (Ala. 2004), *reh’g denied*, Apr. 16, 2004.

<sup>222</sup> See, e.g., *Murphy v. Mid-West Nat’l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003) (holding that the prohibitive costs of arbitration rendered arbitration clause unenforceable in a claim for insurance benefits).

leading them to establish special consumer rates.<sup>223</sup> For example, JAMS, a major arbitration provider, has adopted minimum standards of fairness designed to afford consumers protections against business entities that employ mandatory, pre-dispute arbitration clauses.<sup>224</sup> Under one provision of its new rules consumers will incur fees “approximately equivalent” to court filing fees.<sup>225</sup> Yet the American Arbitration Association, another arbitration provider that offers consumer rates, leaves the decision about whether to apply the capped fees to its own discretion.<sup>226</sup>

The steps taken by arbitration providers to lower consumer costs recognize that non-discounted arbitration fees are unfair to consumers. And while they might remove some obstacles for consumers whose cases are heard by these providers, the purported cost-savings of arbitration nevertheless often remain illusory for other consumers who are not offered reduced rates. Any cost savings associated with faster resolution in arbitration do not affect the high forum costs that deter consumers from raising their claims in the first place. Moreover, even when the forum costs do not bar consumer claims, defendants benefit because damages awarded to consumers by

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<sup>223</sup> Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen’s Jeremiad on the “Costs of Arbitration,”* 57 DISP. RESOL. J. 8, 11-12 (2003); The AAA has since instituted procedures for consumer-related disputes that limit the arbitrator’s fees for consumers to \$375 for claims over \$10,000 and lower than \$75,000. However, if the claim exceeds \$75,000 consumers must pay an “Administrative Fee” based on the AAA’s commercial fee schedule, and must also pay the arbitrator’s fees as individually determined by the arbitrator. See AM. ARB. ASS’N., SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES (2003), at <http://www.adr.org/RulesProcedures>; Moreover, whether to apply the consumer rules is up to the discretion of the arbitrator. AM. ARB. ASS’N., COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2003), at <http://www.adr.org/RulesProcedures>. In addition to caps on fees voluntarily established by arbitration providers, state statutes may provide that consumers with limited resources are entitled to a waiver of arbitration fees and costs. For example, a California statute provides that consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs. However, this waiver does not apply to arbitrator fees, which may comprise the bulk of the forum costs, so it is unclear how much protection California’s statute offers consumers. See CAL. CIV. PRO. CODE § 1284.3(b)1 (2004).

<sup>224</sup> See JUDICIAL ARB. & MEDIATION SERV., JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES - MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2005), at [http://www.jamsadr.com/rules/consumer\\_min\\_std.asp](http://www.jamsadr.com/rules/consumer_min_std.asp).

<sup>225</sup> *Id.*

<sup>226</sup> AM. ARB. ASS’N., *supra* note 223, at section R-7.

arbitrators tend to be lower than awards in litigation.<sup>227</sup> Indeed, lower awards and avoiding juries angered by nursing home neglect have been cited by representatives of the nursing home industry as incentive to impose arbitration on residents.<sup>228</sup> Defense attorneys realize that they are much more likely to come out ahead in arbitration, even if, as they claim, they lose more often in arbitration because the arbitrators are more conservative than juries in awarding damages.<sup>229</sup>

Smaller awards not only benefit defendants directly, but may also work to deter plaintiffs attorneys from representing claimants in arbitration, further insulating defendants from liability. Plaintiffs attorneys have acknowledged that they are reluctant to take on medical malpractice arbitration cases when potential monetary awards are limited.<sup>230</sup> In fact, a much larger percentage of patients went through arbitration without legal representation against a large managed health plan in California than in medical malpractice claims raised in court - nearly 25% did not have legal counsel in arbitration compared to 1% to 4% who litigated their claims in court.<sup>231</sup> Other sources report that most attorneys would not accept a case worth less than \$20,000;<sup>232</sup> that attorneys who regularly handle employment discrimination cases on average require provable damages of \$60,000 to \$65,000.<sup>233</sup> Paradoxically, proponents of arbitration cite these figures in support of arbitration.<sup>234</sup> They assert that without arbitration many individuals

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<sup>227</sup> Bloom, *supra* note 34, at 76. "If an attorney has an employer-employee dispute, a personal injury dispute, or a medical malpractice dispute, and he or she is representing the defense, this attorney will almost always want to be in arbitration. The reason for this is that although you are statistically much more likely to lose in arbitration as opposed to a court trial, you are also much more likely to come out ahead in terms of total dollars invested; that is, the plaintiff's recovery in arbitration of any of the above types of disputes, is going to be so small compared to the likely recovery in court if the plaintiff wins, that the defense attorney will almost always be better off in arbitration." *Id.*

<sup>228</sup> Conversation, *supra* note 41.

<sup>229</sup> Bloom, *supra* note 34, at 76.

<sup>230</sup> Daniel Costello, *After reform, Kaiser still in spotlight; Other insurers move toward the company's arbitration model even as critics say its changes haven't gone far enough*, L.A. TIMES, June 30, 2003, at F1.

<sup>231</sup> *Id.*

<sup>232</sup> Keith Maurer, *Enforcing Consumers' and Employees' Legal Rights, The Truth About Arbitration*, 82 MICH. B.J. 20, 21 (2003) (citing Jill S. Chanen, *Pumping Up Small Claims*, A.B.A. J. 18 (1998)).

<sup>233</sup> See AM. ARB. ASS'N, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION (2003), at <http://www.adr.org> (on file with author).

<sup>234</sup> See Maurer, *supra* note 232 (the author works for the National Arbitration Forum, one of the major arbitration providers).

would have no “access to justice.”<sup>235</sup> However, they fail to acknowledge that smaller awards in arbitration make it even harder to find attorneys, and that claimants still need legal representation in arbitration.<sup>236</sup>

Rather than representing cost savings then, arbitration is usually not only more expensive than litigation for consumers, but may be so expensive that it effectively bars consumers from seeking redress for their injuries, a deterrent acknowledged by the Supreme Court.<sup>237</sup> Even though arbitration is generally faster than litigation and thus lowers certain costs such as attorney’s fees,<sup>238</sup> the expense may nevertheless be prohibitive for consumers, thereby precluding any redress at all, given that they have waived the right to bring their claims in court. For defendants, conversely, the cost savings and lower awards of arbitration represent a definite incentive to arbitrate.<sup>239</sup>

### B. Expert Arbitrators

In addition to its purported cost-savings, proponents of arbitration argue that arbitration is superior to litigation because parties have the benefit of having their dispute heard by objective experts, knowledgeable about the subject area of the dispute, and prone to render fair judgments in emotionally charged, heart rending cases, which would otherwise be heard in the “theatrical forum” of the courtroom.<sup>240</sup> This asserted benefit appears to be no more than a reference to the smaller awards that arbitrators tend to issue.<sup>241</sup> The nursing home industry readily admits that the main reason it imposes arbitration is to avoid high jury awards.<sup>242</sup>

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<sup>235</sup> FAIR PLAY, *supra* note 233, at 4.

<sup>236</sup> Costello, *supra* note 230 (the article reports that 70% of cases that were summarily dismissed in arbitration involving Kaiser Permanente, a managed health plan, were pro se cases. The article also quotes a paralegal, who was overwhelmed when representing himself in arbitration because he couldn’t find an attorney to represent him initially, “I have a graduate degree and 20 years of legal experience. If I have a problem with this, imagine how bad it is for other people”).

<sup>237</sup> Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90 (2000).

<sup>238</sup> Myles, *supra* note 203, at 138.

<sup>239</sup> Bloom, *supra* note 34, at 76.

<sup>240</sup> Robert Kotler, *Arbitrate More, Give in to Greed Less*, WALL ST. J., Oct. 13, 2003, at A19 (stating, “arbitration provides a less theatrical forum than the courtroom,” and “... arbitrators are, by education and experience, better equipped to dispassionately analyze the often complex scientific and technical issues”); Rolph, *supra* note 15, at 155.

<sup>241</sup> See Bloom, *supra* note 34, at 76.

<sup>242</sup> See Conversation, *supra* note 41.

While arbitrators may favor limited awards, this does not necessarily mean that their judgments are more accurate because they are experts in the subject of the arbitration. Instead, critics note that arbitrators favor lower awards, or exhibit bias toward the business entity, because of the repeat-player advantage.<sup>243</sup> This advantage stems from the more frequent appearances by the business or institutional entity, placing it in a position to develop a relationship with the arbitrator.<sup>244</sup> Additionally, because the arbitration provider is typically selected by the institutional entity, arbitrators depend on it for future business.<sup>245</sup> To protect this beneficial relationship, their incentive is to favor the business entity in their decisions.<sup>246</sup> A report by California's independent auditor about arbitration in managed health care systems found that of the few arbitrators who awarded patients over \$1 million, none was selected to arbitrate a second case.<sup>247</sup>

Moreover, the consumer group Public Citizen makes the point that determinations of negligence do not require special expertise, but rather are subject to the "reasonable person" standard, typically the province of jurors.<sup>248</sup> One commentator asks, "How many truck drivers, postal workers, housewives, or other working men and women are certified arbitrators," suggesting that consumers fare worse in arbitration than in litigation.<sup>249</sup>

Thus, the claim that arbitrators are objective experts uninfluenced by emotional pitfalls that so plague juries appears to be code for the lower damage awards commonly handed out by arbitrators. Like cost savings, this asserted advantage of arbitration benefits the institutional party rather than the consumer.

### C. Informal Process

A professed benefit of health care arbitration is that it represents an informal process that is less adversarial than litigation and therefore

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<sup>243</sup> Rolph, *supra* note 15, at 156.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Nieto, *supra* note 204, at 2. The auditors also found that 30% of Kaiser Permanente's arbitration claims were handled by eight repeat arbitrators and that six of these eight arbitrators ruled in favor of the defense in four-fifths of the cases. However, the report also notes that overall, plaintiffs had a 26% chance of winning with a repeat arbitrator, compared to 30% chance of winning with a non-repeat arbitrator. *Id.* at 22.

<sup>248</sup> THE COSTS OF ARBITRATION, *supra* note 4, at 60.

<sup>249</sup> David G. Wirtes, *Suggestions For Defeating Arbitration*, 24 AM. J. TRIAL ADVOC. 111, 115 (2000).

protects on-going relationships.<sup>250</sup> Although the resident-provider relationship is central to the quality of the resident's nursing home experience, it is questionable whether maintaining relationships is relevant once the resident or her family has decided to bring a claim against the nursing home, particularly when families so often sue for wrongful death. As one industry attorney notes, by the time residents file lawsuits, they are "pissed."<sup>251</sup> It is doubtful that arbitration can salvage an already broken relationship, especially when plaintiffs' anger may be compounded by learning for the first time that they signed an arbitration agreement once they try to file suit. Additionally, arbitration is not much less adversarial than litigation since lawyers often represent parties to the arbitration.<sup>252</sup>

Advocates of arbitration are correct, however, when they say that arbitration is less formal than litigation. Yet, by informality they mean limited discovery and optional adherence to the law and legal precedent - factors that primarily favor defendants.<sup>253</sup> Limiting discovery benefits defendants because the information plaintiffs need to prove their case is mainly in the defendant's possession.<sup>254</sup>

In addition, arbitrators are not bound by rules of evidence, civil procedure, or professional conduct.<sup>255</sup> Thus, hearings are less predictable for claimants, whereas the repeat-players are more likely to know what to expect from arbitrators and thus gain a strategic advantage.<sup>256</sup> Although flexible interpretation of the rules of evidence might benefit plaintiffs because they may succeed in getting more evidence admitted than in court, the limited scope of discovery counteracts this benefit.<sup>257</sup> Additionally, some arbitrators limit the number of witnesses who testify, a practice that also makes it harder for plaintiffs to prove their cases.<sup>258</sup> Rules governing proceedings in court are designed to strike an adversarial balance between the parties in the

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<sup>250</sup> Rolph, *supra* note 15, at 155.

<sup>251</sup> Conversation, *supra* note 41; See Larry Reibstein & Ana Figueroa, *Nursing-Home Verdicts: There's Guilt All Round*, NEWSWEEK, July 27, 1998, at 34.

<sup>252</sup> Myles, *supra* note 203, at 131.

<sup>253</sup> Wirtes, *supra* note 249, at 114-16.

<sup>254</sup> *Your Money. The Arbitration trap: How consumers pay for 'low-cost' justice*, 64 CONSUMER REPS. 64 (1999).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Myles, *supra* note 203, at 135-36, 139-40 (noting that plaintiffs benefit from the lack of strict evidentiary rules and that limited discovery benefits corporate defendants).

<sup>258</sup> Conversation, *supra* note 41.

interest of fairness, whereas arbitrators are not obligated to conform to this underlying public policy.<sup>259</sup>

## D. Arbitration Agreements in the Nursing Home Context Are Against Public Interest

### 1. *Privacy*

Arbitration is conducted in a forum closed to the public and produces no public record of the proceeding.<sup>260</sup> In contrast, when cases are filed in court, the media has access to and regularly reports on cases of public interest.<sup>261</sup> While conceivably some nursing home plaintiffs might prefer to keep their personal tragedies out of public view, the secrecy of arbitration disempowers consumers and benefits defendants, particularly health care providers, who prefer to keep allegations and accounts of negligence private.<sup>262</sup> The nursing home industry is especially sensitive to negative publicity, as it is frequently the subject of exposes and government reports that highlight egregiously poor care and other serious shortcomings.<sup>263</sup>

The secrecy of arbitration is detrimental to members of the public because they will not be able to learn from others' experiences to become informed and empowered consumers.<sup>264</sup> The lack of information also mitigates the opportunity of the public to use information brought out in lawsuits in efforts to push for change in public policy. Similarly, as politicians and government agencies are often moved to act only after a scandal is reported in the media and engenders public outrage, the privacy offered by arbitration works against development of consumer protection policies.

These considerations are especially relevant with regard to nursing homes. Nursing homes are largely publicly funded by our tax dollars through the Medicare and Medicaid programs and should not be permitted to use arbitration in efforts to curb public scrutiny. While

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<sup>259</sup> David H. Taylor & Sara M. Cliff, *Civil Procedure By Contract: A Convoluting Confluence of Contract and Public Procedure In Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1090 (2002).

<sup>260</sup> Myles, *supra* note 203, at 141.

<sup>261</sup> *Id.* at 140-41.

<sup>262</sup> Rolph, *supra* note 15, at 155.

<sup>263</sup> See e.g., *The Nursing-Home Scandal*, NEWSWEEK, Feb. 3, 1975, at 23; Mark Thompson, *Fatal Neglect; In possibly thousands of cases, nursing-home residents are dying from a lack of food and water and the most basic level of hygiene*, TIME, Oct. 27, 1997, at 34; Eric Bates, *The Shame of Our Nursing Homes*, 268 THE NATION 11 (1999); Christopher H. Schmitt, *The New Math of Old Age; Why the nursing home industry's cries of poverty don't add up*, 133 U.S. NEWS & WORLD REP. 67 (2002).

<sup>264</sup> Sternlight, *supra* note 1, at 695.

limited information about violations of minimum standards is accessible to the public in annual inspection reports, the reality is that based on their track record, nursing homes need more checks and balances, not fewer.

## 2. *Public Policy and Statutory Rights*

Although nursing homes are governed by the standards and resident protections of the Nursing Home Reform Act (NHRA)<sup>265</sup> and similar state statutes, and are subject to federal and state enforcement mechanisms, it is widely recognized that government oversight of nursing homes is inadequate.<sup>266</sup> Having litigation as an alternative avenue to compel nursing homes to comply with standards of good care and with regulations protective of resident rights is consistent with public policy.

Although the NHRA itself does not grant a private right of action to nursing home residents,<sup>267</sup> it explicitly states that any state or federal administrative remedies “shall not be construed as limiting such other remedies, including any remedy available to an individual at common law.”<sup>268</sup> In passing the NHRA, Congress recognized the benefit of private action, and noted that the Act was not meant “to limit remedies available to residents at common law, including private rights of action to enforce compliance with requirements for nursing

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<sup>265</sup> Pub. Law No. 100-203, §§ 4201-4218 (1987) (codified at 42 U.S.C. § 1395i-3, 1396r).

<sup>266</sup> See U.S. GEN. ACCOUNTING OFFICE, CALIFORNIA NURSING HOMES: CARE PROBLEMS PERSIST DESPITE FEDERAL AND STATE OVERSIGHT (1998), *available at* <http://www.gao.gov>; U.S. GEN. ACCOUNTING OFFICE, NURSING HOMES: COMPLAINT INVESTIGATION PROCESSES OFTEN INADEQUATE TO PROTECT RESIDENTS (1999), *available at* <http://www.gao.gov>; U.S. GEN. ACCOUNTING OFFICE, NURSING HOMES: ADDITIONAL STEPS NEEDED TO STRENGTHEN ENFORCEMENT OF FEDERAL QUALITY STANDARDS (1999), *available at* <http://www.gao.gov>; U.S. GEN. ACCOUNTING OFFICE, NURSING HOME QUALITY: PREVALENCE OF SERIOUS PROBLEMS, WHILE DECLINING, REINFORCES IMPORTANCE OF ENHANCED OVERSIGHT (2003), *available at* <http://www.gao.gov>; U.S. GEN. ACCOUNTING OFFICE, NURSING HOMES: PREVALENCE OF SERIOUS PROBLEMS REMAINS UNACCEPTABLY HIGH, DESPITE SOME DECLINE (2003), *available at* <http://www.gao.gov>; U.S. GEN. ACCOUNTING OFFICE, NURSING HOMES: MORE CAN BE DONE TO PROTECT RESIDENTS FROM ABUSE (2002), *available at* <http://www.gao.gov>; U.S. GEN. ACCOUNTING OFFICE, NURSING HOMES: MANY SHORTCOMINGS EXIST IN EFFORTS TO PROTECT RESIDENTS FROM ABUSE (2002), *available at* <http://www.gao.gov>.

<sup>267</sup> See *Brogdon ex rel. Cline v. Nat'l Healthcare Corp.*, 103 F.Supp.2d 1322, 1330 (N.D.Ga. 2000); *Tinder v. Lewis County Nursing Home Dist.*, 207 F.Supp.2d 951, 957 (E.D. Mo. 2001).

<sup>268</sup> 42 U.S.C. § 1396r(h)(8) (Supp. V. 1993).



facilities.”<sup>269</sup> Several state statutes recognize private rights of actions for violation of residents’ rights and elder abuse statutes.<sup>270</sup> These laws reflect the public policy that nursing home residents warrant protection in addition to that offered by government oversight. For instance, in enacting Illinois Nursing Home Act, a member of the General Assembly observed that residents and their families have a role to play in guarding against substandard care and abuse because they are in a better position than the regulatory agency to know of and seek redress for abuses.<sup>271</sup> To provide an incentive for residents to bring claims, the General Assembly provided that the nursing home shall pay costs and attorney’s fees to residents whose rights they have violated.<sup>272</sup> Further recognizing the importance of litigation, some states have amended their nursing home codes to protect residents’ right to a jury trial. The laws provide that waiver of the private cause of action and of the right to a jury trial shall be null and void.<sup>273</sup> In light of the public policy that encourages private action in addition to regulatory oversight, nursing homes that accept government funding should remain accountable in public courts.

## V. CONCLUSION

Admission to a nursing home is typically an unexpected, unwelcome and overwhelming event in a family’s life. Not only are residents and their families faced with an emotionally challenging situation, but they must also attend to the admissions process. It is unfair to bind them to arbitration agreements that they inadvertently enter upon admission, when they have little opportunity to carefully examine all of the documents they are given and asked to sign. Arbitration, moreover, is generally a forum unfavorable to consumers because of prohibitive costs, procedural limitations and the fact that business entities can draft

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<sup>269</sup> H.R. REP. No. 100-391(I), at 472 (1987).

<sup>270</sup> See CAL. WELF. & INST. CODE §15657 (West 2005); CONN., GEN. STAT. ANN. §19a-550(e) (West 2005); FLA. STAT. ANN. §400.023 (West 2005); GA. CODE ANN. §31-8-126(a) (West 2005); 210 ILL. COMP. STAT. 45/3-601 (West 2005); MASS. GEN. LAWS ANN. Ch. 111 § 70E (West 2005); MICH. COMP. LAWS §333.21772 (West 2005); MO. REV. STAT. §198.093 (West 2005); N.H. REV. STAT. ANN. §151:30 (West 2004); N.J. STAT. ANN. §30:13-8 (West 2005); OHIO REV. CODE. ANN. § 3721.17(1) (West 2005); OKL. ST. ANN. §1-939 (West 2005); W.VA. CODE §16-5C-15 (West 2005); WIS. STAT. ANN. §50.10, 50.11 (West 2005).

<sup>271</sup> *Harris v. Manor Health Care Corp.*, 489 N.E.2d 1374, 1377-78 (Ill. 1986).

<sup>272</sup> 210 ILL. COMP. STAT. § 45/3-602 (1993).

<sup>273</sup> 210 ILL. COMP. STAT. § 45/3-606, 607 (West 2005); N.J. STAT. ANN. § 30:13-8.1 (West 2005); 63 OKL. ST. ANN. § 1-939 (West 2005); W.VA. CODE § 16-5C-15 (West 2005).

the terms of arbitration clauses and select the arbitrators to benefit themselves. In addition to these concerns, nursing home arbitration with residents is contrary to public policy because of the public nature of nursing homes, which are largely funded by the Medicare and Medicaid programs.

Nevertheless, the Centers for Medicare and Medicaid Services has demonstrated it will not take a position protective of residents' right to a jury trial. While state agencies, like the Arkansas Department of Health, may advise nursing home operators in their states that they risk losing certification if they insist upon imposing unfair mandatory arbitration agreements on residents, not all states can be counted on to assume a similar position. Further, the cases with favorable outcomes for residents and family members offer only patchwork protection. Nursing homes can easily draft the agreements to correct most deficiencies that have made them unenforceable. For instance, the agreements can be drafted to subject all claims to arbitration, including claims that a nursing home would bring, such as collections claims. Additionally, the terms can be revised to state that admission is not conditioned on the resident's agreement to arbitration or to clarify that arbitration requires waiver of the right to a jury trial.

Therefore, in order to protect residents and their families from arbitration agreements imposed on them by nursing homes, Congress should adhere to public polices enunciated by federal and state laws and amend the Federal Nursing Home Reform Act to prohibit arbitration agreements in nursing homes.

