SOMETHING OLD, SOMETHING NEW: RECENT DEVELOPMENTS IN THE ENFORCEABILITY OF AGREEMENTS TO ARBITRATE DISPUTES BETWEEN NURSING HOMES AND THEIR RESIDENTS

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The inclusion of arbitration clauses in nursing home admission agreements has long been controversial. Given the U.S. Supreme Court's expansive interpretation of the Federal Arbitration Act and its policy favoring arbitration as a mode of dispute resolution, however, arbitration of nursing home-related disputes appears to be here to stay. The question then becomes how the use of arbitration in nursing home cases can be improved to answer the concerns of consumer and elder law advocates without losing the speed and efficiency that attracts businesses to arbitration in the first place. In this Article, the author recounts the history of arbitration in the United States and, in particular, its use in the nursing home context in order to identify the related benefits and challenges. Specifically, he analyzes recent developments in the case law dealing with disputes over the enforceability of nursing home arbitration agreements in an attempt to gauge where this long-running debate may be heading. The author concludes that elder law practitioners, nursing homes, arbitral institutions, and legislatures can all play a role in reforming the use of arbitration in nursing home cases by enhancing procedural protections and providing better information to nursing home patients.

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Over the last century, arbitration has dramatically increased both in its frequency of use and in its popularity as a method of dispute resolution in the United States.[1] In 2012 alone, 4,299 arbitrations were commenced before the Financial Industry Regulatory Authority,[2] and more than 1,500 consumer arbitrations were commenced before the American Arbitration Association.[3] The most recent statistics for the International Chamber of Commerce show that 796 arbitrations were initiated before that body in 2011, up from 529 as recently as 1999.[4] Meanwhile, in a 2005 survey of participants in binding arbitration, 65 percent reported that they were either very or moderately satisfied with the process, while only 15 percent were not satisfied.[5] More than 70 percent of participants reported being very or moderately satisfied with the attentiveness, competence, and impartiality of their arbitrators, without regard to whether they won or lost in the proceeding.[6] A similar percentage expressed satisfaction with the fairness of the process and the outcome.[7] Attorneys took perhaps an even more

1. THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL 1–9 (2d ed. 2009). Carbonneau states that, despite initial judicial hostility towards arbitration, it has become the "primary remedy for the resolution of civil disputes in American society and international commerce." *Id.* at 1.

2. *Dispute Resolution Statistics*, FIN. INDUS. REG. AUTH., http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics (last visited Feb. 19, 2014). FINRA operates the largest dispute resolution forum in the U.S. securities industry; it conducts arbitration and mediation of monetary and business disputes between and among investors, brokerage firms, and individual brokers. *Arbitration & Mediation*, FIN. INDUS. REG. AUTH., http://www.finra.org/ArbitrationAndMediation/index.htm (last visited Mar. 10, 2014).

3. *Consumer Arbitration Statistics,* AM. ARB. ASS'N., http://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat (last visited Mar. 10, 2014). The AAA has a long history of providing arbitration and mediation services for civil disputes in the United States. *About American Arbitration Association,* AM. ARB. ASS'N., http://www.adr.org/aaa/faces/s/about (last visited Mar. 10, 2014).

4. Statistics, INT'L CHAMBER OF COMMERCE, http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ (last visited Mar. 10, 2014). The ICC is one of the principal institutions for the arbitration of disputes involving parties from different nations.

5. HARRIS INTERACTIVE, Arbitration: SIMPLER, CHEAPER, & FASTER THAN LITIGATION 22 (Apr. 2005), http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf. Harris Interactive surveyed 609 adults who had voluntarily participated in a binding arbitration that had reached a resolution. *Id.* at 4. The sampling of error for the survey was +/- four percentage points, at the 95 percent confidence level. *Id*.

6. *Id.* at 23.

7. *Id.* at 24.

favorable view of arbitration in a 2003 survey by the American Bar Association; more than 85 percent of those surveyed opined that arbitration cost the same as or less than litigation, about 78 percent of those surveyed opined that arbitration took less time than litigation, and almost 75 percent stated that the quality of the outcome was as good as or better than that achieved through litigation.[8] Other recent surveys have corroborated this positive outlook, finding, for example, that arbitration is approximately 36 percent faster than a lawsuit and that 93 percent of consumers using arbitration find it to be fair.[9]

At the same time, however, there has been evidence of a growing sense that arbitration is not an appropriate forum for the resolution of all types of cases. For instance, in December 2009, the United States enacted legislation barring government contractors from mandating arbitration of their employees' civil rights, sexual harassment, and sexual assault claims.[10] This new law came on the heels of a highly publicized incident in which a government contractor attempted to require its employee to arbitrate her claim that she was gang raped by fellow employees after requesting and being denied all-female housing.[11] The legislative response stemmed from a sense that judicial proceedings were necessary because arbitration had "no rules" and would merely "sweep cases of sexual assault and harassment under the rug."[12] Similarly, broader legislation that would ban compulsory arbitration of nearly all employment, civil rights, franchise, and consumer matters has been repeatedly introduced in Congress since 2007.[13] As initially introduced, this legislation was premised on express findings that "[m]andatory arbitration undermines the devel-

8. ABA SECTION OF LITIG.: TASK FORCE ON ADR EFFECTIVENESS, SURVEY ON ARBITRATION at 19, 21–24 (Aug. 2003), http://apps.americanbar.org/litigation/taskforces/adr/ surveyreport.pdf. Approximately 700 attorneys took the ABA's online survey. *Id.* at 3.

9. Nat'l Arb. Forum, The Case for Pre-dispute Arbitration Agreements: Effective & Affordable Access to Justice for Consumers; Empirical Studies & Survey Results 1 (2004), http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf (collecting research studies).

10. Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, 123 Stat. 3409, 3454 (2009).

11. Kevin Diaz, *KBR Drops Rape-Case Appeal; Franken Pleased*, STAR TRIB., *available at* http://www.startribune.com/politics/88978347.html (last updated Mar. 23, 2010).

12. *Arbitration Amendment*, AL FRANKEN: U.S. SENATOR FOR MINN., http://www.franken.senate.gov/?p=issue&id=211 (last visited Mar. 10, 2014).

13. *See, e.g.*, Arbitration Fairness Act of 2011, S. 987, 112th Cong. §§ 1–4 (2011); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. §§ 1–5 (2009); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. §§ 1–5 (2007).

opment of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions" and that "[m]andatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent."[14] The debate over arbitration has also recently focused on claims that are generally amenable to class action litigation, in light of the Supreme Court's recent decision upholding arbitration clauses that waive the class action right.[15] Because the amount at stake for any single plaintiff in such an action is generally small, critics have said that forcing arbitration (and foreclosing class actions) will make such suits economically impractical for plaintiffs and reduce any potential deterrent effect to defendants.[16] In short, though acceptance of arbitration has grown, it is by no means universal.

One lower-profile area in which the appropriateness of arbitration has been repeatedly challenged is the resolution of disputes related to care received by elder Americans in nursing homes. During the nursing home admission process, many homes now ask residents to sign agreements requiring the arbitration of any subsequent disputes.[17] Whether those arbitration agreements should be enforced to require arbitration of, for instance, negligence or wrongful death claims brought by residents or their representatives, has been a subject of intense debate.[18] On the one hand, proponents of arbitration point to the Federal Arbitration Act (FAA) and the broad federal policy fa-

14. H.R. 1020 § 2. Other included findings were that "[p]rivate arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business" and that "[m]any corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes." *Id.*

15. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

16. George Padis, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 683 (2013). Padis summarizes many of the concerns opponents of arbitration for certain classes of cases have articulated. *Id.* at 683–89.

17. Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of* AT&T Mobility v. Concepcion, 35 AM. J. TRIAL ADVOC. 87, 96–97 (2011). Tripp obtained admission packets from 204 North Carolina nursing homes and interviewed representatives of another 109 facilities; she found that 43 percent of these homes included arbitration agreements in their admission packets. *Id.* at 95, 105–06.

18. *See* Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 462–79 (2006).

voring arbitration.[19] On the other, nursing home residents and those who advocate for them argue that the nursing home admission process is stressful and confusing and that residents may not even read, much less understand, documents purporting to permanently give up their litigation rights.[20] When faced with legal challenges to the enforceability of arbitration agreements, courts have reached wildly different results, ranging from denying arbitration of any claims, to allowing arbitration of some claims but not others, to compelling arbitration of all claims.[21] The confusion and uncertainty in this area of law appears to be unlikely to end any time soon.[22] In recent decisions, however, several trends have emerged that provide an indication of where the debate over arbitration of nursing home claims—and to a certain extent, the arbitration debate generally—may be headed. Part I of this Article outlines the history of arbitration in the United States and the debate over the enforceability of nursing home arbitration agreements. Part II analyzes the most recent decisions on these agreements and discusses the trends that appear to be emerging in this area. Part III makes recommendations for legislatures, nursing homes, arbitration institutions, and legal practitioners who deal with elder clients.

19. *See* Margaret Baumer, *Keep Arbitration Alive: Why the Fairness in Nursing Home Arbitration Act Should Not Be Passed*, 12 CARDOZO J. CONFLICT RESOL. 155, 157 (2010).

20. David L. McGuffey, Marmet Health Care Center v. Brown: *Nursing Home Arbitration Agreements*, 8 NAT'L ACAD. ELDER L. ATT'YS J. 239, 243 (2012).

21. *See, e.g.*, Mathews v. Life Care Ctrs. of Am., Inc., 177 P.3d 867 (Ariz. Ct. App. 2008) (requiring arbitration of all claims); Carter v. SSC Odin Operating Co., 976 N.E.2d 344 (Ill. 2012) (requiring arbitration of the Nursing Home Care Act claim but not the wrongful death claim); Miller v. Cotter, 863 N.E.2d 537 (Mass. 2007) (holding the same); Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (holding arbitration not required); Texas Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345 (Tex. App. 2007) (holding the same).

22. *See* Reed R. Bates & Stephen W. Still, Jr., *Arbitration in Nursing Home Cases: Trends, Issues, and a Glance Into the Future,* 76 DEF. COUNS. J. 282, 288–97 (2009). Bates and Still illustrate the many differences among states in their approaches to arbitration in nursing home cases, most of which do not appear to have abated today. *Id.*

I. Background

A. Arbitration in the United States: From Widespread Suspicion to Widespread Acceptance

Prior to the enactment of the Federal Arbitration Act in 1925, courts in the United States displayed some degree of hostility towards arbitration as a mode of dispute resolution.[23] Although there is evidence that arbitration was practiced in the colonies as early as the 1600s,[24] by the mid-nineteenth century, English courts had begun displaying "jurisdictional jealousy" towards the efforts of arbitrators, and U.S. courts were following suit.[25] The primary rationale expressed by these courts was a policy concern that parties should not be able to "oust the courts of their jurisdiction" by making a private agreement.[26] As one court put it, "[t]he law and not the contract prescribes the remedy; and the parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law."[27] By divesting courts of jurisdiction, courts reasoned that agreements to arbitrate could impede or interfere with the regular administration of justice.[28] Moreover, some courts at the time viewed arbitration as inferior to court proceedings, noting practical problems with arbitration like the inability of arbitrators to compel the attendance of witnesses or the

23. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (noting "longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts" prior to the FAA).

24. James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 LAW & HIST. REV. 241, 241–242 (2013).

25. *See, e.g.*, Laflin v. Chicago, W. & N. Ry. Co., 34 F. 859, 865 (C.C.E.D. Wis. 1887); Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845); City of St. Louis v. St. Louis Gaslight Co., 70 Mo. 69, 100–15 (1879); Scott v. Avery, (1856) 10 Eng. Rep. 1121, 1137–39 (H.L.) (declining to enforce arbitration agreement). *But see, e.g.*, Alford v. Tiblier, 1 McGl. 151, 152–53 (La. Ct. App. 1881) (holding the arbitration agreement valid, although waived); Monogahela Navigation Co. v. Fenlon, 4 Watts & Serg. 205, 211–12 (Penn. 1842) (enforcing arbitration agreement).

26. Home Ins. Co. of N.Y. v. Morse, 87 U.S. 445, 451 (1874). The court was addressing a state statute that required insurance companies doing business in the state to agree not to remove any lawsuits against them to the federal courts, but gave voice to the general principle that parties could not by their agreement deprive the courts of jurisdiction. *Id.*; *see also Laflin*, 34 F. at 865; Kelly v. Trimont Lodge, 69 S.E. 764, 765–66 (N.C. 1910).

27. Stephenson v. Piscataqua Fire & Marine Ins. Co., 54 Me. 55, 70 (1866).

28. J.T. Williams & Bro. v. Branning Mfg. Co., 70 S.E. 290, 290 (N.C. 1911).

production of documents.[29] This, they concluded, meant that arbitrators "did not possess full, adequate, and complete means . . . to investigate the merits of the case and to administer justice."[30] Courts feared that enforcing arbitration agreements would "refer the decision of difficult legal questions to inexperienced and incompetent persons."[31] As a result, courts declined to enforce these agreements with some regularity, although they continued to enforce actual arbitration awards, on the grounds that the parties in those cases had generally not only agreed to arbitrate but had actually done so.[32]

The legislative history of the Federal Arbitration Act [FAA] shows that Congress was aware of this judicial "jealousy" towards arbitration and believed it to be so "firmly embedded" that legislation was necessary to remove it.[33] To combat this attitude, the FAA expressly stated that arbitration agreements must be considered "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[34] The Act also directed courts to stay litigation and compel arbitration where such an agreement existed.[35] Courts in such cases were limited to considering only whether an agreement to arbitrate had been reached, leaving all other questions to the arbitrators so as to make the transition from litigation to arbitration as quick and easy as possible.[36]

Initially, courts interpreted the FAA rather narrowly. In what appears to be the first case to consider a motion to compel arbitration under the statute, *The Silverbrook,* the U.S. District Court for the Eastern District of Louisiana declined to stay the litigation in favor of arbitration.[37] The court concluded that it did not have the power to compel arbitration in London because 9 U.S.C. § 4 referred to compelling

29. Chicago, M. & St. P. Ry. Co. v. Stewart, 19 F. 5, 11 (C.C.D. Minn. 1883).

30. *Id.*; *see also* Knaus v. Jenkins, 40 N.J.L. 288 (N.J. 1878); Oakwood Retreat Ass'n v. Rathbone, 26 N.W. 742, 745 (Wis. 1886).

31. *Oakwood Retreat Ass'n*, 26 N.W. at 746.

32. *See, e.g.*, Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845); Nelson v. Atl. Coast Line R. Co., 72 S.E. 998, 1000–01 (N.C. 1911).

33. H.R. REP No. 68-96, at 1–2 (1924).

34. Federal Arbitration Act, 9 U.S.C. § 2 (2013).

35. *Id.* §§ 3, 7.

36. MARTIN DOMKE, 1 DOMKE on COMMERCIAL ARBITRATION § 2:9 (Larry E. Edmonson ed., 3d ed. 2012). Domke discusses the history of "judicial as well as professional hostility by lawyers to arbitration" and the forces that led to the enactment of the FAA and the drafting of the Uniform Arbitration Act. *Id.*

37. The Silverbrook, 18 F.2d 144, 147 (E.D. La. 1927).

arbitration "within the [judicial] district."[38] A few years later, the U.S. District Court for the Eastern District of New York similarly declined to enforce an arbitration agreement on the grounds that it did not involve "commerce among the several States or with foreign nations" under 9 U.S.C. § 1.[39] This was despite the fact that the contract was entered into in New York by a New York corporation and a foreign corporation, and involved compensation to be paid to New York shipbrokers; the court focused on the fact that the goods to be delivered under the contract were to go from Cuba to another country without a stop in the United States.[40] Indeed, the first published decision in which a federal court compelled arbitration under the FAA does not seem to have appeared until 1931, approximately six years after the Act's passage.[41]

Application of the FAA was curtailed in some critical respects for decades after its enactment. It was not until 1959 that any court suggested that the FAA applied to require the enforcement of arbitration agreements in state (rather than federal) courts;[42] the U.S. Supreme Court did not conclusively rule to that effect until 1984.[43] Thus, absent a state statute mirroring the FAA's requirements, it was generally understood that state courts did not have to enforce arbitration agreements.[44] Similarly, broad categories of disputes were deemed exempt from arbitration under the FAA for public policy or other reasons. For example, fraud claims under the Securities Exchange Act of

38. *Id.* Courts considering the same issue in later cases reached varying conclusions, with some agreeing with *The Silverbrook*'s analysis, some determining that courts do have the power to compel resident parties to arbitrate outside the judicial district, and some determining that the appropriate course in such circumstances is to require the parties to arbitrate within the judicial district, despite the agreement's preference for another location. *See* R. L. Martyn, Annotation, *Validity & Effect, & Remedy in Respect, of Contractual Stipulation to Submit Disputes to Arbitration in Another Jurisdiction*, 12 A.L.R.3d 892 (2013).

39. The Volsinio, 32 F.2d 357, 358 (E.D.N.Y. 1929).

40. *Id.* at 357–58.

41. Bede Steam Shipping Co. v. N.Y. Trust Co., 54 F.2d 658, 660 (S.D.N.Y. 1931). Of course, it is likely that unreported decisions compelling arbitration predated this case. *Id*.

42. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 407 (2d Cir. 1959).

43. Southland Corp. v. Keating, 465 U.S. 1, 11 (1984).

44. *See, e.g.*, 6 S. WILLISTON & G. THOMPSON, LAW OF CONTRACTS 5368 (rev. ed. 1938) ("[T]he [FAA] applies only to the federal courts."); Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U.L.Q. REV. 428, 459 (1931) (stating that the FAA "does not purport to extend its teeth to state proceedings").

1934 were excluded from arbitration until 1989.[45] Prior to 1991, the Supreme Court had not conclusively stated that employment discrimination claims could be the subject of compelled arbitration under the FAA.[46] Also, antitrust claims were for many years deemed to be unsuitable for arbitration under the FAA.[47]

The general trend, however, was clearly towards more liberal enforcement of arbitration agreements, and that trend has accelerated in recent years. For example, in *Green Tree Financial Corporation v. Randolph,* the Court in 2000 rejected a lower court's conclusion that an arbitration agreement could be rendered unenforceable if it failed to protect a party from potentially steep arbitration costs to vindicate its statutory rights.[48] The Court concluded that invalidating an arbitration agreement on the basis of mere speculation about costs would undermine the "liberal federal policy favoring arbitration agreements."[49] Similarly, in 2012's *CompuCredit Corporation v. Greenwood*, the Court held that a consumer protection statute's silence as to whether claims could be resolved through arbitration should be read to permit arbitration, based on the same general pro-arbitration policy expressed by the FAA.[50] Meanwhile, in *Arthur Andersen LLP v. Carlisle,* the Court in 2009 made it clear that a litigant who was not a party to an arbitration agreement could still seek a stay under the FAA if the relevant state contract law would allow that third party to enforce the agreement.[51] Thus, the Court not only expanded the circumstances under which arbitration could be compelled, but it also expanded the scope of who could potentially compel it. And, in a much-discussed

45. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483 (1989), *overruling* Wilko v. Swan, 346 U.S. 427, 438 (1953).

46. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991). Indeed, decisions prior to *Gilmer* had suggested that arbitration was inferior to the judicial process for deciding statutory claims like those for employment discrimination. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47–50 (1974); *see also* McDonald v. W. Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981).

47. *See* Applied Digital Tech., Inc. v. Cont'l Cas. Co., 576 F.2d 116, 117 (7th Cir. 1978); Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968). The Supreme Court concluded that antitrust claims could properly be determined in an *international* arbitration in 1985, but declined to expressly overrule these circuit authorities. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628–40 (1985).

48. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90–91 (2000).

49. *Id.* (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (2000)).

50. CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 673 (2012).

51. Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 632 (2009).

2011 decision, the Court in *AT&T Mobility v. Concepcion* held that an arbitration agreement could be enforced even if it precluded a litigant from pursuing relief on behalf of a class.[52] Though sometimes controversial, the judicial movement to encourage arbitration has been increasingly clear.

B. Nursing Home Arbitration Agreements and the Challenges to Their Use

1. THE USE OF ARBITRATION AGREEMENTS BY NURSING HOMES IS BELIEVED TO BE WIDESPREAD

There is little information available about how common it is for nursing homes to seek arbitration agreements from their residents. In 2004, confidential interviews conducted with major nursing homes indicated that most of the nation's largest nursing home chains, including Integrated Health Services, Beverly Industries, Kindred Healthcare, and Mariner, included arbitration agreements in their admissions packets.[53] More recently, a 2011 survey of North Carolina nursing homes—many of which were part of national chains—showed that 43 percent used arbitration agreements.[54] That same study also analyzed the content of the arbitration agreements it was able to obtain from nursing homes and found that almost half of them required residents to pay a percentage of the arbitration costs, 13.41 percent of them placed explicit limitations on discovery, and 7.32 percent limited recoverable damages.[55] On the other hand, almost 70 percent of the agreements gave the resident an express right to rescind the arbitration agreement within 30 days of signing, a similar percentage notified residents of their right to seek counsel regarding the agreement, and almost 65 percent contained express language stating that signing the arbitration agreement was not a condition of admission to the nursing home.[56] Half of the agreements designated the institution that would administer the arbitration, with the most popular choices being the National Arbitration Forum (36.59 percent), the American Health Lawyers Association (10.98 percent), and the Ameri-

52. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

53. Ann E. Krasuski, Comment, Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts With Residents, 8 DEPAUL J. HEALTH CARE L. 263, 268 (2004).

54. Tripp, *supra* note 17, at 88.

55. *Id.*

56. *Id.* at 98.

can Arbitration Association (2.44 percent).[57] Thus, what information there is about the use of arbitration agreements in nursing homes suggests that the agreements are fairly common.

2. PUBLIC AND SCHOLARLY CONTROVERSY OVER THE USE OF ARBITRATION AGREEMENTS BY NURSING HOMES

Whatever the extent of their use, however, it is clear that arbitration agreements involving nursing home residents have been controversial. Critics have called these agreements "abusive," and have argued that they are "contracts of adhesion" between parties with unequal bargaining power, often signed under stressful circumstances and without adequate information about their consequences.[58] Arbitration agreements may be inserted among a series of papers to be signed at the time of nursing home admission, say opponents, and residents may not even know what they are signing or whether they are required to sign.[59] Other arguments against these agreements have targeted arbitration generally, asserting that it may actually be more expensive than litigation, that it tends to favor institutional "repeat players" over individuals, and that its limited discovery may lead to inequitable results.[60] On the other hand, proponents of arbitration

57. *Id.* at 97. The National Arbitration Forum agreed to stop arbitrating consumer disputes after the Minnesota Attorney General filed a complaint accusing it of hiding its financial ties to companies for which it handled disputes in violation of fraud, deceptive trade practices, and false advertising laws. *Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. TIMES, July 19, 2009, at B8. The AAA and NHLA have similarly made a decision not to arbitrate health care disputes unless the arbitration agreement was entered into after the dispute arose. Krasuski, *supra* note 53, at 291.

58. *See* Robert Hornstein, *The Fiction of Freedom of Contract—Nursing Home Admission Contract Arbitration Agreements: A Primer on Preserving the Right of Access to Court Under Florida Law*, 16 ST. THOMAS L. REV. 319, 320 (2003); *see also* Suzanne Gallagher, *Mandatory Arbitration Clauses in Nursing Home Admission Agreements: The Rights of Elders*, 3 NAELA J. 187, 188 (2007) (describing how elders sign away their rights to a trial by jury in haste when looking to get into the appropriate facility); Krasuski, *supra* note 53, at 263–64 (detailing reasons why elders and their families often do not read the contents of nursing home contracts that include arbitration clauses); Laura M. Owings & Mark M. Geller, *The Inherent Unfairness of Arbi-Arbitration Agreements in Nursing Home Admission Contracts*, 43 TENN. B. J. 20, 20 (2007) (noting that arbitration clauses are often signed during an exceedingly difficult time in the life of an elder); Rebecca Porter, *Nursing Home Death Shows Need to Ban Mandatory Arbitration*, 44 TRIAL 52, 52 (2008) (telling the story of William Kurth and the consequences of his arbitration agreement clause on the ability to bring an action).

59. Krasuski, *supra* note 53, at 263.

60. Palm, *supra* note 18, at 476–79; *see also* Anthony P. Torntore, Note, *". . . And Justice For All": An Analysis Of The Fairness In Nursing Home Arbitration Act of 2008 And Its Potential Effects On The Long-Term Care Industry*, 34 SETON HALL LEGIS. J.

have argued that the extent of unequal bargaining power in the selection of arbitration as a dispute resolution mechanism is overstated and that arbitration has significant benefits—such as flexibility, efficiency, and speed—for all parties.[61] Moreover, arbitration supporters claim that the litigation costs (including exorbitant punitive damages awards) of resolving nursing home cases in the courts would ultimately cause nursing homes to cut costs elsewhere, leading to understaffing, inferior training, and a lower quality of care.[62]

3. LEGISLATION TARGETING THE USE OF ARBITRATION AGREEMENTS BY NURSING HOMES

The debate over the use of arbitration for nursing home disputes seems to have come to a head with the recent introduction of the Fairness in Nursing Home Arbitration Act, which would have amended the Federal Arbitration Act to render invalid all pre-dispute binding arbitration clauses between long-term care facilities and their residents.[63] Senator Herb Kohl, one of the sponsors of the Senate bill, opined that binding arbitration would cause nursing home residents to "lose their right to hold nursing homes accountable in the event of abuse or neglect."[64] His co-sponsor, Senator Mel Martinez, echoed this sentiment, stating that "[f]orcing a family to choose between quality care and forgoing their rights within the judicial system is unfair and beyond the scope of the intent of arbitration laws" and that his proposed legislation would reinstate "the original intent" of the FAA.[65] Although this legislation did not pass, its very introduction is a sign that there is strong opposition to the arbitration of nursing home-

157, 159 (2009) (asserting that arbitration clauses "have reduced the average cost of payouts to victims of nursing home abuse and neglect from $226,000 per claim in 1999 to $146,000 per claim in 2006"); Jana Pavlic, Note, *Reverse Pre-empting the Federal Arbitration Act: Alleviating the Arbitration Crisis in Nursing Homes*, 22 J.L. & HEALTH 375, 392–94 (arguing that arbitration of nursing home cases creates prohibitive costs and slanted outcomes).

61. Padis, *supra* note 16, at 691–96.

62. Baumer, *supra* note 19, at 172–73; *see also* Palm, *supra* note 18, at 472–76.

63. *See* Fairness in Nursing Home Arbitration Act of 2008, S. 2838, 110th Cong. (2008); Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Cong. (2008).

64. Press Release, Sens. Martinez, Kohl Unveil Fairness in Nursing Home Arbitration Act, U.S. Federal News (Apr. 9, 2008) (on file with Westlaw Newsroom 2008 WLNR 6697068).

65. *Id.*

related claims, and similar legislation has been introduced in subsequent Congresses.[66]

Moreover, some states have enacted their own legislation removing nursing home cases from the purview of arbitration. For example, the Oklahoma Nursing Home Care Act provides that "[a]ny party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect."[67] Similarly, the Illinois Nursing Home Care Act states that "[a]ny waiver by a resident or his legal representative of the right to commence an action under [the state's Nursing Home Care Act], whether oral or in writing, shall be null and void, and without legal force or effect."[68] The West Virginia statute that sets standards for nursing home care likewise creates a private right of action and states that "[a]ny waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy."[69] New Jersey law contains a similar provision.[70] Because state statutes of this type create a flat prohibition of arbitration of a certain type of claim, however, it appears that they are preempted by the FAA and therefore unenforceable.[71] The preemption issue will be discussed in greater detail in Part II of this Article.

4. COURT CHALLENGES TO THE ENFORCEABILITY OF ARBITRATION AGREEMENTS BY NURSING HOMES

The enforceability of nursing home arbitration agreements has also been repeatedly challenged in the courts, where various argu-

66. *See* Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong. (2012); Fairness in Nursing Home Arbitration Act of 2009, S. 512, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. (2009).

67. 63 OKLA. ST. ANN. tit. 1 § 1939 (West 2013).

68. 210 ILL. COMP. STAT. 45/3-606 (2013). Note, however, that the Illinois Supreme Court found that that this provision was preempted by the Federal Arbitration Act. *See* Carter v. SSC Odin Operating Co., 927 N.E.2d 1207, 1220 (Ill. 2010).

69. W. VA. CODE ANN. § 16-5C-15 (West 2013). Again, preemption was an issue, with the West Virginia Supreme Court of Appeals concluding that the provision could be enforced, see Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 282 (W. Va. 2011). Its decision was also vacated by the Supreme Court on FAA preemption grounds, see Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012).

70. N.J. Stat. Ann. § 30:13-8.1 (West 2013).

71. *See Marmet*, 132 S.Ct. at 1204. For another example of a statute addressing this issue, see CAL. HEALTH & SAFETY CODE § 1430, (West 2005).

ments have been raised. A challenge that occurs with some frequency is that the arbitration agreement should not be enforced because it was not signed by the nursing home resident him- or herself, but rather, by a relative or other representative.[72] This argument hinges on the basic principle that a non-signatory to an arbitration agreement generally cannot be bound to arbitrate.[73] This principle is not absolute, however. Non-signatories may be bound to arbitrate if: they have assumed the contract from a signatory; if they are principals of a signatory corporation and the corporate veil can be pierced; if they are alter egos of a signatory; if they are parties to an agreement that incorporates the arbitration agreement by reference; if they are third-party beneficiaries of the arbitration agreement; or based on theories of agency, waiver, or estoppel.[74] Accordingly, many nursing home cases have turned on whether a non-signatory could be bound to arbitrate under one of these exceptions. Exploring the agency exception, for example, some courts have held that a relative who holds a power of attorney, durable power of attorney, or status as a guardian or conservator for a resident also has the authority, under principles of agency, to bind that resident to an arbitration agreement.[75] Other courts, in contrast, have found no actual or apparent authority for a purported agent to enter into an arbitration agreement despite the presence of a power of attorney, generally focusing on the power of attorney's precise language and deeming the arbitration decision to be outside its scope.[76] Similarly, courts have split as to whether a family member has implied authority to agree to arbitration based on representations made by that family member and/or the resident at the

72. *See, e.g.*, GGNSC Omaha Oak Grove, LLC v. Payich, 708 F.3d 1024, 1026 (8th Cir. 2013); Hogsett v. Parkwood Nursing & Rehab. Ctr., Inc., No. 1:12–cv–1399–JEC, 2013 WL 822523, at *3 (N.D. Ga. Mar. 6, 2013); SSC Montgomery Cedar Quest Operating Co., v. Bolding, No. 1120122, 2013 WL 1173975, at *2 (Ala. Mar. 22, 2013); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 588 (Ky. 2012); GGNSC Batesville, LLC v. Johnson, No. 2011–CA–01337–SCT, 2013 WL 1150193, at *1 (Miss. Mar. 21, 2013).

73. 21 RICHARD LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001).

74. *Id.*; *see also* Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009).

75. *See, e.g.*, Moffet v. Life Care Ctrs. of Am., 219 P.3d 1068, 1079 (Colo. 2009); Emeritus Corp. v. Pasquariello, 95 So.3d 1009, 1012 (Fla. Dist. Ct. App. 2012); Barron v. Evangelical Lutheran Good Samaritan Soc'y, 265 P.3d 720, 726 (N.M. Ct. App. 2011).

76. *See, e.g.*, Estate of Irons *ex rel*. Springer v. Arcadia Healthcare, Inc., 66 So. 3d 396, 400 (Fla. Dist. Ct. App. 2011); *Ping*, 376 S.W.3d at 594; Dickerson v. Longoria, 995 A.3d 721, 735 (Md. 2010).

time of signing.[77] The third-party beneficiary exception has also been frequently litigated, with some courts accepting the nursing homes' argument that, because the resident was admitted to the facility and received care as a result of a relative's signing of the arbitration agreement, he or she was a third-party beneficiary of that agreement and, accordingly, bound by it.[78] Other courts have rejected this argument, as well as the similar argument that the non-signatory resident should be estopped from denying his obligation to arbitrate because he received a benefit of the arbitration agreement—continued care.[79] The other exceptions to the rule that non-signatories to an arbitration agreement cannot be bound by it do not appear to have been much litigated in the nursing home context.[80]

A related argument sometimes raised is that certain corporate relatives of the nursing home may not seek to compel arbitration be-

77. *Compare* Ruesga v. Kindred Nursing Ctrs., LLC, 161 P.3d 1253, 1263 (Ariz. Ct. App. 2007) (discussing the history of resident permitting wife to make decisions for him demonstrated implied agency) *with* Ashburn Health Care Ctr., Inc. v. Poole, 648 S.E.2d 430, 433 (Ga. Ct. App. 2007) (stating there is no implied agency because no evidence resident knew of arbitration agreement or permitted anyone to sign on her behalf). Similarly, nursing homes have sometimes argued that a non-signatory is equitably estopped from disputing the validity of the arbitration agreement where he or she misled the home into believing the signatory had the power to bind him or her. *See* THI of N.M. at Hobbs Ctr., LLC v. Patton, No. 11–537 LH/CG, 2012 WL 112216, at *10 (D. N.M. Jan. 3, 2012) (applying equitable estoppel to enforce nursing home arbitration agreement); *Ping*, 376 S.W.3d at 595 (stating there is no equitable estoppel because, even assuming nursing home was misled about signatory's authority, it could not show any detriment where arbitration agreement was expressly not a condition of receipt of care).

78. *See* J.P. Morgan Chase & Co. v. Conegie, 492 F.3d 596, 600 (5th Cir. 2007); Alterra Healthcare Corp. v. Linton, 953 So. 2d 574, 578 (Fla. Dist. Ct. App. 2007); Forest Hill Nursing Ctr., Inc. v. MacFarlan, 995 So. 2d 775, 783 (Miss. App. 2008).

79. *See* Barker v. Evangelical Lutheran Good Samaritan Soc'y, 720 F. Supp. 2d 1263, 1269 (D.N.M. 2010) (stating no evidence of benefit to resident from arbitration agreement itself, as opposed to larger contract for care); *Dickerson*, 995 A.3d at 735 (noting that the relative's lack of authority to sign meant no valid contract, which foreclosed binding resident on third-party beneficiary theory); Adams Cmty. Care Ctr., LLC v. Reed, 37 So. 3d 1155, 1160 (Miss. 2010) (same). The ratification argument appears to have fared worse than the third-party beneficiary argument. *See* AMFM, LLC v. King, 740 S.E.2d 66, 76 (W. Va. 2013) (stating that the resident could not have ratified arbitration agreement due to her incapacity); GGNSC Omaha Oak Grove, LLC v. Payich, No. 4:12CV3040, 2012 WL 2021868, at *6–7 (D. Neb. June 5, 2012) (stating that the resident did not ratify arbitration agreement by accepting care in the absence of any evidence that she knew of the agreement).

80. A number of articles describe how these exceptions work outside the nursing home context. *See, e.g.*, Michael P. Daly, *Come One, Come All: The New & Developing World of Nonsignatory Arbitration & Class Arbitration*, 62 U. MIAMI L. REV. 95 (2007); Dwayne E. Williams, *Binding Nonsignatories to Arbitration Agreements*, 25 FRANCHISE L.J. 175 (2006); Aubrey L. Thomas, Comment, *Nonsignatories in Arbitration: A Good-Faith Analysis*, 14 LEWIS & CLARK L. REV. 953 (2010).

cause they were not themselves parties to the arbitration agreement.[81] The resolution of this issue turns on the same considerations of agency, estoppel, third-party beneficiary status, and the like discussed above.[82] The precise language of the agreement can play a key role as the court attempts to discern whether the parties intended for the corporate relative to have the benefit of the arbitration clause.[83] In the end, though, it may not matter if all of the corporate relatives of a nursing home can compel arbitration or not, so long as one of them can; a court staying part of a lawsuit in favor of arbitration has the discretion to stay the whole case so as to avoid inconsistent outcomes and piecemeal litigation.[84]

Unconscionability is another basis for seeking to invalidate an arbitration agreement that is frequently raised in the nursing home context.[85] It is often described as consisting of two components: procedural and substantive unconscionability.[86] Procedural unconscionability focuses on the circumstances of the signing of the agreement, such as whether the terms were clear or obscured, whether there was negotiation, and the respective bargaining power of the parties.[87] Sub-

81. *See, e.g.*, Fundamental Admin. Servs., LLC v. Patton, Nos. 12-2014 & 12-2065, 2012 WL 5992259 (10th Cir. Dec. 12, 2012); THI of N.M. at Vida Encantada, LLC v. Archuleta, No. Civ. 11-399 LH/ACT, 2013 WL 2387752 (D.N.M Apr. 30, 2013); THI of N.M. at Vida Encantada, LLC v. Lovato, 848 F. Supp. 2d 1309 (D.N.M. 2012).

82. *See Archuleta*, 2013 WL 2387752, at *12–15.

83. *See Patton*, 2012 WL 5992259, at *4–5 (rejecting argument that clause binding "affiliates" was sufficient to allow corporate relatives to enforce arbitration agreement, in the absence of any definition of "affiliates" or specific reference to the corporate relatives in question).

84. Angermann v. Gen. Steel Domestic Sales, LLC, No. 10-cv-00711-REB-MJW, 2010 WL 4628913, at *2 (D. Colo. Nov. 8, 2010); Axa Equitable Life Ins. Co. v. Infinity Fin. Group, LLC, 608 F. Supp. 2d 1330, 1347 (S.D. Fla. 2009); Interplastic Corp. v. Hudson Solid Surfaces Int'l, LLC, No. 09-587, 2009 WL 4038674, at *6 (D. Minn. Nov. 17, 2009).

85. Myers v. GGNSC Holdings, LLC, No. 2:11CV113-B-A, 2013 WL 1913557, at *5 (N.D. Miss. May 8, 2013); *Archuleta*, 2013 WL 2387752, at *15; RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

86. *See, e.g.*, 8 RICHARD LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 2001); *see, e.g.*, Scovill v. WSYX/ABC, 425 F.3d 1012, 1017 (6th Cir. 2005); Navellier v. Sletten, 262 F.3d 923, 940 (9th Cir. 2001).

87. Schnuerle v. Insight Comm'ns Co., L.P., 376 S.W.3d 561, 576 (Ky. 2012) (discussing that procedural unconscionability "pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language"); Dan Ryan Builders, Inc. v. Nelson, 737 S.E.2d 550, 558 (W. Va. 2012) ("Procedural unconscionability arises from inequalities, improprieties, or unfairness in the bargaining process and the formation of the contract, inadequacies that suggest a lack of a real and voluntary meeting of the minds of the parties."); LORD, *supra* note 86, at § 18:10.

stantive unconscionability, in contrast, looks at the actual terms of the contract and whether they are unreasonably favorable to the more powerful party.[88] Many courts require that a litigant show both procedural and substantive unconscionability, although others will accept a compelling showing of just one of the two types, and most acknowledge that a more forceful showing of one lessens the burden as to the other.[89] In nursing home cases, residents have had some success arguing procedural unconscionability where the arbitration clause was part of a form contract that was not explained to the resident or where the resident suffered from diseases that reduced his or her cognitive abilities.[90] Residents have succeeded in arguing substantive unconscionability in nursing home cases where, for instance, the agreement required the resident to arbitrate all claims but did not require the nursing home to do so,[91] or limited discovery and damages in a significant way.[92] But in the reported cases unconscionability arguments appear to fail more than they succeed, likely because a party seeking to invalidate a contract on this basis always bears a "heavy burden."[93] Courts have found that there is no procedural unconscionability merely because the nursing home admission process is emotional and difficult, because the arbitration clause may be part of a large set of documents, or because residents often have significantly

88. Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 58 (Ariz. 1995) ("Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the rights and obligations imposed by the bargain, and significant cost-price disparity."); *Dan Ryan Builders*, 737 S.E.2d at 558 ("Substantive unconscionability involves unfairness in the terms of the contract itself, and arises when a contract is so one-sided that it has an overly harsh effect on the disadvantaged party."). *See* LORD, *supra* note 86, at § 18:10.

89. *See Maxwell*, 907 P.2d at 58 (collecting cases).

90. *See, e.g.*, Wobese v. Health Care & Ret. Corp. of Am., 977 So. 2d 630, 632 (Fla. Ct. App. 2008); Wascovich v. Personacare of Ohio, 943 N.E.2d 1030, 1036 (Ohio Ct. App. 2010); Manley v. Personacare of Ohio, No. 2005-L-174, 2007 WL 210583, at *3 (Ohio Ct. App. 2007).

91. *See, e.g.*, Ruppelt v. Laurel Healthcare Providers, LLC, 293 P.3d 902, 906 (N.M. Ct. App. 2012); McGregor v. Christian Care Ctr. of Springfield, LLC, No. M2009-01008-COA-R3-CV, 2010 WL 1730131, at *6-7 (Tenn. Ct. App. 2010).

92. *See, e.g.*, Estate of Ruszala v. Brookdale Living Cmtys., Inc., 1 A.3d 806, 821 (N.J. Ct. App. 2010).

93. Marzano v. Proficio Mortg. Ventures, LLC, No. 12 C 7696, 2013 WL 1789779, at *12 (N.D. Ill. Apr. 25, 2013); Bralite Holdings, LLC v. Dryfoos Envtl. Consulting, LLC, No. HHDCV116022797S, 2013 WL 1364732, at *3 (Conn. Super. Ct. Mar. 12, 2013); Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc., 285 P.3d 1193, 1203 (Utah 2012).

lower education levels than nursing home management.[94] Similarly, courts have rejected claims of substantive unconscionability premised on generalized allegations that arbitration could potentially be expensive, limit discovery or damages, or be biased.[95] Thus, to avoid arbitration on this basis, a resident normally must show that he had no meaningful choice in signing the agreement and that its terms will effectively prevent him from vindicating his rights.[96]

Another challenge to enforceability that has occasionally arisen in the context of nursing home arbitration agreements is an argument that the resident lacked capacity to agree to arbitrate. As a general rule, a person is presumed to be competent when he or she enters into a contract.[97] But this presumption can be overcome—and the resulting contract rendered void or voidable—through the presentation of evidence that the contracting party suffered from a mental or physical weakness that created an inability to comprehend the effect and nature of the transaction.[98] In nursing home cases, this can take the form of medical records or testimony about the resident's condition at the time he or she signed the agreement.[99] Evidence of dementia, hallucinations, confusion, disorientation, memory loss or Alzheimer's is relevant.[100] Ultimately, however, the party seeking to avoid the agreement must show not just "simple feebleness or mental weakness," but

94. LeMaire v. Beverly Enter. MN, LLC, No. 12-1768, 2013 WL 103919, at *5 (D. Minn. Jan. 9, 2013); THI of N.M. at Vida Encantada, LLC v. Archuleta, No. Civ. 11-399 LH/ACT, 2013 WL 2387752, at *17 (D.N.M. Apr. 30, 2013).

95. *Archuleta*, 2013 WL 2387752, at *15–16; Carraway v. Beverly Enter. Ala., Inc., 978 So. 2d 27, 32–33 (Ala. 2007); FL-Carrolwood Care Ctr., LLC v. Estate of Gordon, 72 So. 3d 162, 167 (Fla. Dist. Ct. App. 2011).

96. *See, e.g.*, Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004); Romano v. Manor Care, Inc., 861 So. 2d 59, 63 (Fla. Ct. App. 2003).

97. *See also* Davis v. Old Dominion Tobacco Co., 755 F. Supp. 2d 682, 696 (E.D. Va. 2010); DuFort v. Aetna Life Ins. Co., 818 F. Supp. 578, 583 (S.D.N.Y. 1993); McKeehan v. McKeehan, 355 S.W.3d 282, 295 (Tex. Ct. App. 2011); LORD, supra 86, at § 10:8.

98. RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981); *see also* Bitler Inv. Venture II, Marathon Ashland Petroleum, LLC, 779 F. Supp. 2d 858, 883 (N.D. Ind. 2011); Rodenhiser v. Duenas, 818 N.W.2d 465, 468 (Mich. Ct. App. 2012); Nelson v. Holland, 776 N.W.2d 446, 450–51 (Minn. Ct. App. 2009).

99. *See, e.g.*, Sherrer v. Covenant Health & Rehab. of Picayune, LLC, No. 1:11-CV-296 LG-RHW, 2012 WL 1067910, at *3–5 (S.D. Miss. Mar. 29, 2012) (listing medical records, affidavit from daughter, and physician testimony); Gilmore v. Life Care Ctrs. of Am., Inc., No. 2:10-cv-99-FtM-29DNF, 2010 WL 3944653, at *3–4 (M.D. Fla. Oct. 7, 2010) (medical records and testimony from son).

100. *Gilmore*, 2010 WL 3944653, at *4; Landers v. Integrated Health Servs. of Shreveport, 903 So.2d 609, 612 (La. Ct. App. 2005); Reagan v. Kindred Healthcare Operating, Inc., No. M2006-02191-COA-R3-CV, 2007 WL 4523092, at *17 (Tenn. Ct. App. Dec. 20, 2007).

cognitive deficits that prevented the resident from understanding the arbitration agreement at the time it was signed.[101] For this reason, an evidentiary hearing may be required so that the court can fully understand the resident's condition at signing.[102]

Arbitration agreements are also challenged on public policy grounds.[103] As a general matter, a contractual provision may be voided on public policy grounds where legislation explicitly provides that it is unenforceable or an otherwise strongly-manifested public policy would be directly and substantially impaired by enforcement.[104] Courts weigh the strength of the public policy involved against the expectations of the parties and consider the relative impairment of each should the challenged agreement be enforced or rejected.[105] In the nursing home context, some residents have argued that all predispute arbitration agreements violate public policy because they require residents to choose between needed health care and their right to a jury trial.[106] Such a categorical argument is unlikely to succeed, however, in light of the Supreme Court's conclusion that the FAA prevents states from prohibiting outright the arbitration of any particular type of claim.[107] Other residents, therefore, have argued that arbitration agreements violate public policy on the narrower grounds that they contain provisions limiting damages in contravention of state statutes favoring claims by nursing home residents; these arguments

101. *See, e.g.*, John Knox Vill. of Tampa Bay, Inc. v. Perry, 94 So. 3d 715, 717 (Fla. Ct. App. 2012); *Reagan*, 2007 WL 4523092, at *17.

102. *See, e.g., John Knox Vill.*, 94 So. 3d at 718; FL-Carrolwood Care Ctr., LLC v. Estate of Gordon, 34 So. 3d 804, 805 (Fla. Ct. App. 2010).

103. *See* Wooten v. Fischer Inv., Inc., 688 F.3d 487, 492 (8th Cir. 2012); Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1210 (11th Cir. 2011); Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 606 S.E.2d 752, 757 (S.C. 2004).

104. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981); *see also* Martello v. Santana, 713 F.3d 309, 313 (6th Cir. 2013); Costello v. Grundon, 651 F.3d 614, 627 (7th Cir. 2011); Picardi v. Eighth Judicial Dist. Court of State, 251 P.3d 723, 727 (Nev. 2011).

105. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). In analyzing the interest in enforcement, the Restatement suggests examining the parties' justified expectations, any forfeiture that would result if enforcement were denied, and any special public interest in enforcement. *Id.* In analyzing the countervailing public policy, the Restatement examines the strength of the policy as manifested by statutes or judicial decisions, the likelihood that refusal to enforce would further the policy, the seriousness of any misconduct involved and the extent to which it was deliberate, and the directness of the connection between that misconduct and the term. *Id.*

106. *See, e.g.*, Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172–73 (N.D. Miss. 2011); Owens v. Nat'l Health Corp., 263 S.W.3d 876, 888 (Tenn. 2007).

107. Marmet Health Care Ctr. v. Brown, 132 S. Ct. 1201, 1203 (2012).

have met with more success.[108] Even in cases where this argument has been successful, courts have debated whether the appropriate result is the invalidation of the entire arbitration agreement or just the severance of the offending limitations on damages, with the overall dispute still being referred to arbitration.[109]

In some cases, the parties recognize the existence of an obligation to arbitrate, but argue that one or more of the claims in the case fall outside that obligation.[110] In resolving such arguments, some courts distinguish between so-called "narrow" arbitration clauses, which only require arbitration of specific enumerated disputes, and "broad" clauses, which require arbitration of all disputes connected with the contract.[111] But regardless, courts are guided by the language of the arbitration clause itself and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[112] In nursing home cases, perhaps the most common scope argument deals with whether wrongful death claims fall within the arbitration agreement signed by a resident or his or her representative.[113] In addressing such

108. *See* Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 471 (Fla. 2011) (holding that the arbitration clause barred punitive damages); Gessa v. Manor Care of Fla., Inc., 86 So. 3d 484, 493 (Fla. 2011) (holding that the arbitration clause barred punitive damages and capped non-economic damages); Alterra Healthcare Corp. v. Bryant, 937 So. 2d 263, 266 (Fl. Dist. Ct. App. 2006); SA-PG-Ocala, LLC v. Stokes, 935 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 2006) (holding that the arbitration clause also required rules that would impose higher burden of proof for punitive damages).

109. *Compare* Estate of Deresch v. FS Tenant Pool III Trust, 95 So. 3d 296, 301 (Fla. Dist. Ct. App. 2012) (affirming order severing limitations on damages but compelling arbitration), *and* Bryant, 937 So. 2d at 270, *with Gessa*, 86 So. 3d at 489–91 (quashing order to arbitrate because limitations on damages not severable), Shotts, 86 So. 3d at 475, Fletcher v. Huntington Place Ltd. P'ship, 952 So. 2d 1225, 1227 (Fla. Dist. Ct. App. 2007) (same), *and Stokes*, 935 So. 2d at 1243.

110. *See* Turi v. Main Street Adoption Servs., LLP, 633 F.3d 496, 507 (6th Cir. 2011); Newmont USA Ltd. v. Ins. Co. of N. Am., 615 F.3d 1268, 1274 (10th Cir. 2010); Century Indem. Corp. v. Certain Underwriters at Lloyd's, London, 584 F.3d 518, 523 (3d Cir. 2009).

111. *See* Jones v. Halliburton Co., 583 F.3d 228, 235 (5th Cir. 2009) (holding that narrow clause only covers disputes "arising out of" contract while broad clause applies to disputes that "relate to" or "are connected with" it); Chelsea Family Pharmacy, PLLC v. Medco Health Solutions, Inc., 567 F.3d 1191, 1196 (10th Cir. 2009) (describing that the narrow clause identifies specific disputes for arbitration while broad clause applies to disputes "arising out of" contract); JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 172 (2d Cir. 2004) (requiring arbitration of "any and all differences and disputes of whatsoever nature arising out of" the agreement).

112. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

113. *See* Entrekin v. Internal Med. Ass'n of Dothan, P.A., 689 F.3d 1248, 1253 (11th Cir. 2012); Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 760 (Fla. 2013);

an argument, courts look not just at the language of the arbitration clause, but also the nature of the state wrongful death claim involved, including when it comes into existence and who is deemed to be the holder of the claim.[114] Other scope issues have arisen in these cases as well, such as whether the arbitration agreement applies to tort claims or only those that sound in contract,[115] whether third-party actions such as contribution and indemnification are covered,[116] and whether the scope of the clause may be limited by the polices of the arbitration association whose rules have been chosen for the dispute.[117]

Finally, a party to an arbitration agreement may argue that the counterparty has waived his or her right to arbitration by acting inconsistently with that right, such as by invoking the litigation process.[118] Courts look at different factors in assessing whether waiver has occurred, but they generally include the extent of the conduct inconsistent with arbitration and the amount of prejudice to the other party.[119] Regardless, given the "strong preference for arbitration in federal courts, waiver is not to be lightly inferred."[120] In nursing home cases, as in other cases, the conduct resulting in waiver frequently takes the form of filing court documents or participating in discovery.[121] Where a waiver defense is rejected in these cases, it is often be-

Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 353 (Ill. 2012); Trinity Mission Health & Rehab. v. Scott, 19 So. 3d 735, 740 (Miss. Ct. App. 2008); Sennett v. Nat'l Health Care Corp., 272 S.W.2d 237, 242 (Mo. Ct. App. 2008).

114. *See, e.g.*, *Carter*, 976 N.E.2d at 353.

115. *See* BKD Twenty-one Mgmt. Co., v. Delsordo, No. 4D12-914, 2012 WL 5349400, at *3 (Fla. Ct. App. Oct. 31, 2012).

116. *See* Concille v. Weingarten, No. 104798/2007, 2010 WL 521122, at *1 (N.Y. Jan. 7, 2010).

117. *See* Oesterle v. Atria Mgmt. Co., LLC, No. 09-4010-JAR, 2009 WL 2043492, at *7 (D. Kan. July 14, 2009).

118. *See In re* Pharmacy Ben. Managers Antitrust Litig., 700 F.3d 109, 117 (3d Cir. 2012); Johnson Assocs. Corp. v. HL Operating Corp., 680 F.3d 713, 717 (6th Cir. 2012); Erdman Co. v. Phoenix Land & Acquisition, LLC, 650 F.3d 1115, 1118 (8th Cir. 2011); La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 626 F.3d 156, 159 (2d Cir. 2010).

119. *See Pharmacy Ben. Managers*, 700 F.3d at 117; *Johnson Assocs.*, 680 F.3d at 717–19; *Erdman*, 650 F.3d at 1118; *La. Stadium*, 626 F.3d at 159.

120. *Pharmacy Ben. Managers*, 700 F.3d at 117; *see also Johnson Assocs.*, 680 F.3d at 717.

121. *See* Estate of Cortez v. Avalon Care Ctr. Tuscon, LLC, 245 P.2d 892, 896 (Ariz. Ct. App. 2010) (listing waiver from filing jury demand, conducting discovery, and participating in comprehensive pretrial conference); Estate of Orlanis v. Oakwood Terrace Skilled Nursing & Rehab. Ctr., 971 So. 2d 811, 812–13 (Fla. Ct. App. 2007) (sending interrogatories, requests for production of documents, and third party requests prior to arbitration demand resulted in waiver); Pine Tree Villa, LLC v. Olson, No. 2008-CA-000622-MR, 2009 WL 723034, at *2 (Ky. Ct. App.

cause the court has concluded that there was an insufficient showing of prejudice from the litigation activity that occurred.[122]

II. Analysis

As this background reflects, nursing home cases involving arbitration agreements have been relatively consistent in the types of arguments raised. Indeed, given the limited range of challenges to arbitration allowed by the Federal Arbitration Act, litigants in these cases have little room to explore new arguments.[123] But as the volume of nursing home cases has increased in recent years,[124] the breadth and depth of the judicial responses to these few familiar arguments has seemingly also increased. And although the differences in state nursing home statutes and state attitudes towards arbitration have led to a certain amount of conflict among the published decisions,[125] some issues do also appear to be the subject of emerging consensus.[126] Thus, it is possible to discern some emerging trends from the cases decided in this area in the past few years; these trends are identified and discussed below.

A. Legality of State Laws Invalidating Arbitration Clauses in Nursing Home Cases in Serious Doubt in Wake of Recent Supreme Court Preemption Ruling

For a time, it appeared as though the concerns of those who opposed mandatory arbitration of disputes between nursing homes and their residents might be decisively addressed through statutes de-

Mar. 20, 2009) (waiver from removal motion, remand, and participation in discovery).

122. Aurora Healthcare, Inc. v. Ramsey, 84 So. 3d 495, 502 (Ala. 2011); Advocat, Inc. v. Heide, 378 S.W.3d 779, 784 (Ark. Ct. App. 2010); Manhattan Nursing & Rehab. Ctr. v. Williams, 14 So. 3d 89, 92 (Miss. 2009).

123. 9 U.S.C. § 2 (2013) (stating arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

124. *See* Suzanne M. Scheller, *Arbitrating Wrongful Death Claims for Nursing Home Patients: What Is Wrong With This Picture And How to Make It "More" Right*, 113 PENN ST. L. REV. 527, 530 (2008).

125. The cases in Part I.B.4 *supra* exploring whether a third party was an agent with authority to bind a resident to arbitrate provide an excellent example; on very similar facts, courts have reached opposite conclusions as to whether arbitration is required.

126. For example, the cases dealing with waiver in Part I.B.4 *supra* all engage in a similar analysis.

claring waivers of court actions void in such cases.[127] Several states passed laws emphasizing the right to a jury trial in such cases and prohibiting the waiver thereof,[128] and federal legislation was proposed as well.[129] But a 2012 Supreme Court decision made clear that these state laws are of a type that prohibit "outright the arbitration of a particular type of claim" and therefore are "displaced by the FAA."[130]

The West Virginia Supreme Court of Appeals in *Brown v. Genesis Healthcare Corp*. was presented with a section of a state nursing home statute providing that "[a]ny waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy."[131] Three different representatives of nursing home residents in consolidated cases sought to invoke this provision so as to avoid arbitration of their negligence and statutory claims.[132] After analyzing the text and history of the FAA, the court concluded that the state provision was preempted because it singled out arbitration agreements for nullification and did not apply to any other types of agreements.[133] At the same time, however, the court criticized the Supreme Court's interpretation of the FAA, asserting that the application of the statute to state courts was based on "tendentious reasoning" and that the severability doctrine was "created from whole cloth."[134] The court then went on to find that:

> Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be governed by the Federal Arbitration Act. We therefore hold that, as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death,

127. *See* Laura K. Bailey, The Demise of Arbitration Agreements in Long-Term Care Contracts, 75 MO. L. REV. 181, 192 (2010).

128. *See, e.g.*, 63 OKLA. STAT. ANN. § 1-1939 (West 2013); 210 ILL. Comp. STAT. 45/3-606 (West 2013); W. VA. CODE § 16-5C-15 (West 2013); N.J.S.A. § 30:13-8.1 (West 2013).

129. *See* Fairness in Nursing Home Arbitration Act of 2009, S. 512, 111th Cong. (2009).

130. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012).

131. Brom v. Genesis Healthcare Corp. 724 S.E.2d 250, 273 (W. Va. 2011) (citing W. VA. CODE § 16-5C-15(c)) (2011), *vacated by* Marmet, 132 S. Ct. 1201.

132. *Id.* at 263.

133. *Id.* at 281–82.

134. *Id.* at 278–79.

> shall not be enforced to compel arbitration of a dispute concerning the negligence.[135]

The court therefore reversed the trial and appellate court decisions ordering arbitration in two of the three cases; the third presented a certified question as to whether arbitration was required, which the court answered in the negative.[136]

The Supreme Court granted certiorari and reversed in a terse per curiam opinion, chastising the West Virginia court for "misreading and disregarding" the Supreme Court's precedents interpreting the FAA.[137] The Court rejected the lower court's conclusion that "Congress did not intend for the FAA to be, in any way, applicable to personal injury and wrongful death suits that only collaterally derive from a written agreement" as "incorrect."[138] Rather, the Court noted, the FAA clearly states that arbitration agreements are enforceable unless one of the grounds that allows for the revocation of any kind of contract exists, and "the statute's text includes no exception for personal-injury or wrongful-death claims."[139] Thus, any categorical rule that prohibits arbitration of a particular type of claim is contrary to the FAA and is accordingly preempted by it.[140] The state public policy against arbitrating nursing home claims that the West Virginia court had identified was just such a categorical rule and was thus unenforceable.[141]

The import of the Supreme Court's ruling is clear: any state law, whether statutory or common law, that categorically prohibits the arbitration of disputes between nursing homes and their residents will be unenforceable. Indeed, *Marmet* is not the only recent ruling of the Supreme Court defending arbitrablity,[142] or even the only recent ruling of the Supreme Court finding a state law limiting arbitration to be preempted.[143] Thus, if arbitration of these types of disputes is to be avoided, it will not be through the creation of state law prohibiting their arbitration.

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135. *Id.* at 292.
136. *Id.*
137. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012).
138. *Id.* at 1203.
139. *Id.*
140. *Id.* at 1203–04.
141. *Id.*
142. *See* Nitro-Lift Tech. v. Howard, 133 S. Ct. 500 (2012); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012); KPMG LLP v. Cocchi, 132 S. Ct. 23 (2011).
143. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

B. Unconscionability Provides Courts with an Avenue to Consider Policy Reasons for Denying Arbitration of Nursing Home Cases

Though the Supreme Court's decision in *Marmet* rejected the West Virginia Supreme Court's conclusion that arbitration of nursing home cases categorically violated state public policy, that was not the end of the story. The West Virginia Supreme Court of Appeals had also held that arbitration of these disputes could be avoided on unconscionability grounds; the Supreme Court remanded to that court to consider "whether, absent that general public policy, the arbitration clauses . . . are unenforceable under state common law principles" of unconscionability.[144] On remand, the West Virginia court then outlined a number of principles it viewed as relevant to the unconscionability determination—including the general inexperience of nursing home residents with commercial transactions involving arbitration and the potential for arbitration to bear high costs that could deter a resident from pursuing a claim—before remanding the cases to the trial courts to develop further evidence on the issue.[145] Thus, despite the Supreme Court's ruling, the state court retained the ability to invalidate the arbitration agreement based on policy considerations that could potentially apply broadly to nursing home cases in general.

Nor was the West Virginia court the only court in recent years to use unconscionability as a vehicle for exploring the policy challenges raised to arbitration of nursing home claims. Indeed, a 2011 decision from the Court of Appeals of New Mexico presented a litany of policy reasons for giving arbitration agreements in nursing home cases extra unconscionability scrutiny.[146] The court first observed that nursing home residents are often physically and/or emotionally vulnerable at the time they are admitted, a condition that it noted can extend to family members as well.[147] Further, the court reasoned that residents are often dealing with grave medical conditions that require

144. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012).

145. Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 227–30 (W. Va. 2012).

146. Strausberg v. Laurel Healthcare Providers, LLC, 269 P.3d 914, 920 (N.M. Ct. App. 2011), *reversed by* Strausberg v. Laurel Healthcare Providers, LLC, 304 P. 3d 409 (N.M. 2013). The appellate court went beyond identifying policy reasons that contracts between nursing homes and their residents are susceptible to unconscionability and created a rule that nursing homes bear the burden of proof to disprove unconscionability where it is raised by residents. *Id.* at 921. It is this aspect of the appellate court's decision that the New Mexico Supreme Court reversed. *Strausberg*, 304 P.3d at 423.

147. *Strausberg*, 269 P.3d at 920.

quick assistance, which "does not usually allow for measured consideration of what nursing homes are available, the terms required for admission, and the like."[148] As a result, residents and their families generally do not have time "to comparison shop or to negotiate the best service and price combination."[149] Finally, the court noted that nursing home residents often face financial limitations and have limited knowledge about their options.[150] Thus, the court concluded that arbitration agreements in the nursing home context must be treated differently from "mere commercial transactions."[151] Similarly, a New Jersey court's recent unconscionability analysis included observations about "certain global characteristics that every potential nursing home resident shares," specifically a greater vulnerability due to poor health and advanced age.[152] The court noted that the state legislature had singled out nursing home residents as a group in need of protection from nursing home operators with greater economic resources.[153] The court concluded that, for unconscionability purposes, "[t]his imbalance of resources invariably creates a relative inferiority in bargaining position for such individuals."[154] And still another court, like the West Virginia court in *Marmet,* considered the potential for high arbitration costs as a factor in its unconscionability analysis, noting that expenses unique to arbitration (as distinguished from litigation) could prevent a nursing home litigant from vindicating his or her rights.[155]

Thus, although the Supreme Court's decision in *Marmet* will likely prevent future courts from invalidating nursing home arbitration agreements on the grounds that they categorically violate state public policy, policy considerations may still play an important role in courts' analyses, particularly of the unconscionability issue.

C. Courts Split over Arbitrability of Wrongful Death Claims

Perhaps the most significant point of disagreement among courts addressing nursing home arbitration agreements in recent

148. *Id.*
149. *Id.* at 921.
150. *Id.*
151. *Id.* at 920.
152. Estate of Ruszala v. Brookdale Living Communities, Inc., 1 A.3d 806, 820–21 (N.J. Super. Ct. App. Div. 2010).
153. *Id.*
154. *Id.*
155. Hill v. NHC Healthcare/Nashville, LLC, No. M2005-01818-COA-R3-CV, 2008 WL 1901198, at *16 (Tenn. Ct. App. Apr. 30, 2008).

years has had to do with whether wrongful death claims are arbitrable under those agreements. The view that these claims are arbitrable is exemplified in the Florida Supreme Court's recent decision in *Laizure v. Avante at Leesburg, Inc.*[156] That case involved Florida's wrongful death statute, which provides that:

> [w]hen the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person . . . and the event would have entitled the person injured to maintain an action and recover damages if the death had not ensued, the person . . . that would have been liable in damages if death had not ensued shall be liable for damages

in an action brought by the personal representative on behalf of the estate.[157] The court recognized that the statute had sometimes been characterized as creating a new right of action distinct from that held by the decedent, but also emphasized that this right was derivative and that "[n]o Florida decision has allowed a survivor to recover under the wrongful death statute where the decedent could not have recovered."[158] For example, the court noted that Florida courts had previously found wrongful death actions to be barred where the decedent could not have brought an action because, for instance, he had already brought an action against the defendant or signed a general release during his lifetime.[159] Thus, the court concluded that the personal representative bringing a wrongful death action on behalf of the estate "stand[s] in the shoes of the decedent" and the claim is within the scope of any arbitration agreement the decedent signed.[160] Other courts have recently reached similar conclusions, including courts in the Eleventh Circuit, Texas, California, and Alabama.[161]

On the other hand, courts like the Supreme Court of Kentucky in *Ping v. Beverly Enters., Inc.* have concluded that their domestic wrongful death claims are not derivative and are thus not subject to an arbitration clause signed by the decedent.[162] The court in *Ping* not-

156. Laizure v. Avante at Lessburg, Inc., No. SC10-2132, 2013 WL 535417 (Fla. 2013).

157. FLA. STAT. §§ 768.19-.20 (West 2013).

158. *Laizure*, 2013 WL 535417, at *6 (April 30, 2008).

159. *Id.* at *6–7 (citing Variety Children's Hosp. v. Perkins, 445 So. 2d 1010, 1011–12 (Fla. 1983) and Warren v. Cohen, 363 So. 2d 129, 131 (Fla. Ct. App. 1978)).

160. *Id.* at *8.

161. Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661, 664 (Ala. 2004); Entrekin v. Internal Med. Assocs. of Dothan, P.A., 689 F.3d 1248, 1259 (11th Cir. 2012); Ruiz v. Podolsky, 237 P.3d 584, 593 (Cal. 2010); *In re* Labatt Food Serv., L.P., 279 S.W.3d 640, 644 (Tex. 2009).

162. Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 598 (Ky. 2012).

ed that the Kentucky Constitution creates the wrongful death cause of action and leaves it to the legislature to provide "how the recovery shall go and to whom it shall belong;" the wrongful death statute in turn provides that the action "shall be for the benefit of and go to the kindred of the deceased."[163] The court also observed that Kentucky has a separate statute providing that the right of action for a personal injury survives the death of the person injured, which the legislature expressly recognized creates a separate and distinct right from the wrongful death statute.[164] Thus, it was clear the wrongful death claim did not derive from any claim held by the decedent and the decedent therefore could not contract away any right to bring that claim in court as opposed to arbitration.[165] Other courts analyzing their own statutes in recent decisions, including those in Missouri, Washington, and Ohio, have similarly concluded that their wrongful death claims are independent and accordingly not subject to a decedent's arbitration agreement.[166]

A recent decision from the Illinois Supreme Court, meanwhile, took yet another approach to the issue, recognizing that wrongful death claims were derivative under state law but declining to find that determinative of their arbitrability.[167] The court noted that although the wrongful death claim stemmed from wrongful acts toward the decedent, it belonged to the surviving spouse and next of kin and did not accrue until the decedent's death.[168] Accordingly, the personal representative was not standing in the decedent's shoes to bring the wrongful death claim, but rather those of the next of kin.[169] Because it was undisputed that the next of kin had never agreed to arbitrate, the personal representative could not be required to do so.[170]

Thus, whether a nursing home resident can sign away the right to bring a court action for his or her own wrongful death currently depends in large part on what state the resident lives in. Further, given that the nature of this issue is based heavily in individual state

163. *Id.* (citing KY. CONST. § 241 and KY. REV. STAT. Ann. § 411.130).
164. *Id.* (citing KRS § 411.130).
165. *Id.* at 599–600.
166. Lawrence v. Beverly Manor, 273 S.W.3d 525, 529 (Mo. 2009); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007); Woodall v. Avalon Care Ctr.-Federal Way, LLC, 231 P.3d 1252, 1258–59 (Wash. Ct. App. 2010).
167. Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 360 (Ill. 2012).
168. *Id*. at 354.
169. *Id.* at 360.
170. *Id.*

statutes, it is unlikely that national uniformity will be achieved any time soon.

D. Courts Split over the Scope of Authorization Necessary to Empower an Agent to Bind a Resident to Arbitration

Another area in which courts have reached contrasting conclusions is in construing what type of authorization is required from a resident to give an agent the power to bind the resident to arbitration. In some cases, the authorization is clear, as where a validly-executed power of attorney gives the agent the power to "make and sign agreements" on the resident's behalf.[171] But courts differ as to whether a power of attorney that merely authorizes the agent to "make health care decisions" includes the power to make the arbitration decision.[172] Some courts have held that this language broadly authorizes the agent to make all manner of decisions necessary to obtain health care, including the arbitration decision that may be part of the nursing home admission process.[173] Other courts have held that deciding whether or not to arbitrate is not a health care decision, especially where the arbitration agreement is an optional rather than mandatory part of the nursing home admission process.[174] Similarly, there has been debate about whether a power of attorney granting authority to "make financial decisions" includes the arbitration decision.[175] Obviously, in all of these cases, the language of the power of attorney itself is highly relevant, such as whether it includes a "catchall" statement broadly describing the powers granted to the attorney, enumerates those powers

171. *See, e.g.*, Oldham v. Extendicare Homes, Inc., No. 5:12-CV-00199, 2013 WL 1878937, at *3 (W.D. Ky. May 3, 2013).

172. *Compare* Hogan v. Country Villa Health Servs., 55 Cal. Rptr. 3d 450, 453 (Cal. Ct. App. 2007) (health care power of attorney gives agent power to execute arbitration agreement unless that power is otherwise restricted by the principal), *with* Life Care Ctrs. of Am. v. Smith, 681 S.E.2d 182, 185 (Ga. Ct. App. 2009) (health care power of attorney does not give agent power to execute arbitration agreement because whether to arbitrate is not a health care decision).

173. *See, e.g., Hogan*, 55 Cal. Rptr. 3d at 453; Garrison v. Superior Court, 33 Cal. Rptr. 3d 350, 360 (Cal. Ct. App. 2005); Owens v. Nat'l Health Corp., 263 S.W.3d 876, 883–84 (Tenn. 2007).

174. *See, e.g.*, Estate of Irons v. Arcadia Healthcare, L.C., 66 So. 3d 396, 400 (Fla. Ct. App. 2011); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 594 (Ky. 2012); Texas Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 352 (Tex. Ct. App. 2007).

175. *Compare* Emeritus Corp. v. Pasquariello, 95 So.3d 1009, 1012 (Fla. Ct. App. 2012) (stating that the financial power of attorney gave agent power to enter into arbitration agreement on resident's behalf), *with Ping*, 376 S.W.3d at 594 (power of attorney granting authority to manage property and finances did not include authority to enter into arbitration agreement).

narrowly, or does both.[176] State statutes, such as those dealing with health care surrogacy, may also define "health care decisions" or "financial decisions" and, therefore, be relevant.[177] Again, due to the involvement of distinct state statutory schemes (not to mention the near-infinite potential for variations in individual powers of attorney), this appears to be an area in which conflict is likely to persist for many years to come.

III. Recommendations

A. Legislation

The debate over the arbitration of claims between nursing homes and their residents most likely will not be resolved through legislation. As discussed in Part II.A. *supra*, any state legislation that aims to block the arbitration of these cases entirely will likely be preempted by the FAA.[178] The proposed federal legislation, which would amend the FAA to exempt nursing home cases, would not face those preemption concerns, but it died in the 112th Congress and seems no more likely to succeed in the future.[179] Moreover, legislation prohibiting the arbitration of all nursing home disputes is a broad remedy that could potentially create economic disincentives for companies to provide nursing care.[180] Thus, state and federal governments alike might do better to focus on more narrowly-tailored approaches that would work to ensure the fairness of nursing home arbitration rather than banning it outright. For example, legislation could be enacted to emulate the approach of courts that have allowed arbitration but invalidated those parts of dispute resolution clauses that impose caps on damages.[181] Barring such caps (in all nursing home cases, whether litigated or arbitrated) could potentially address elder advocates' fairness concerns without targeting arbitration in a way that

176. *See Estate of Irons*, 66 So. 3d at 399.
177. *See Ping*, 376 S.W.3d at 593 n.4 (citing KY. REV. STAT. ANN. § 311.621).
178. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012).
179. *Status: H.R. 6531 (112th): Fairness in Nursing Home Arbitration Act of 2012*, GOVTRACK.US, http://www.govtrack.us/congress/bills/112/hr6351 (last visited Mar. 12, 2014).
180. *See* Baumer, *supra* note 19, at 172-73.
181. *See, e.g.*, Estate of Deresch v. FS Tenant Pool III Trust, 95 So. 2d 396, 301 (Fla. Ct. App. 2012) (stating that limitations on damages in dispute resolution clause must be severed); Alterra Healthcare Corp. v. Bryant, 937 So. 2d 263, 266 (Fla. Ct. App. 2006) (same).

would run afoul of the FAA.[182] Legislation might also potentially address such worrisome practices as altering the burden of proof or unduly limiting discovery.[183] Again, such provisions would not seem to run afoul of *Marmet* so long as they do not target arbitration alone.[184]

Additionally, state legislatures might consider revising their wrongful death statutes to clarify whether the action is derivative of a right of action held by the decedent pre-death, as legislative statements on this issue have played a major role in courts' determinations of whether arbitration of wrongful death claims is required when the decedent has signed an arbitration agreement.[185] Similarly, courts have sometimes found legislative enactments on what constitutes a "health care decision" to be helpful, so any further guidance governments could give on this topic might be useful.[186]

B. Improved Arbitration

Even absent legislative action, however, arbitration institutions and the attorneys who work with them should seek to ensure that the arbitration of nursing home claims is fair and equitable. Opponents of arbitration argue that consumers tend to fare worse in arbitrated disputes than in traditional litigation.[187] They also claim that nursing homes, as repeat players, tend to develop closer relationships with arbitration institutions that may influence the outcome of the proceedings.[188] In these critics' view, the limited discovery and streamlined procedures of arbitration only serve to worsen a plaintiff's chances.[189] Whether these criticisms are accurate or not, it is incumbent upon arbitration institutions to combat them by adopting and enforcing rigorous procedural rules and thereby assiduously guarding against even the appearance of impropriety. For example, the American Arbitration Association (AAA) has adopted a wide array of rules and

182. *See Marmet*, 132 S. Ct. at 1204.
183. *See* Ontiveros v. DHL Exp. (USA), Inc., 79 Cal. Rptr. 3d 471, 486 (Cal. Ct. App. 2008) (describing the clause limiting depositions to experts and one non-expert); SA-PG-Ocala, LLC v. Stokes, 935 So. 2d 1242, 1243 (Fla. Ct. App. 2006) (describing the clause imposing higher burden of proof for punitive damages).
184. *Marmet*, 132 S. Ct. at 1204.
185. *See, e.g.*, Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 598 (Ky. 2012).
186. *See id*. at 593 n.4 (citing KY. REV. STAT. ANN. § 311.621).
187. PUB. CITIZEN, THE COSTS OF ARBITRATION, 2002 PUB. WATCH 1, 68 (April 2002), http://www.citizen.org/documents/acf110A.pdf.
188. Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths & Reality*, 60 L. & CONTEMP. PROBS. 153, 156 (1997).
189. PUB. CITIZEN, *supra* note 187, at 61, 65.

guidelines that govern everything from the appointment of arbitrators (and their potential disqualification), to the submission of evidence, to the issuance of the award.[190] Ideally, the arbitration institutions that handle cases involving nursing homes would adopt specialized rules addressing issues common to those cases, such as the need for discovery of medical records and expert testimony on a standard of care. At the very least, it would behoove these groups to encourage their arbitrators to make procedural orders—with input from the parties—at the outset of their cases that clarify how the proceedings will move forward.

Unfortunately, some of the major arbitration institutions, including the AAA, have made a policy determination that they will not hear disputes involving patients and health care providers unless the arbitration agreement was signed after the dispute had already arisen.[191] Opponents of arbitration of nursing home disputes have seized on this as evidence that pre-dispute arbitration clauses in these cases are illegitimate.[192] But given the Supreme Court's refusal to allow a categorical ban on arbitration of these disputes,[193] it would actually be preferable for opponents and supporters of nursing home arbitration alike to have reputable institutions like the AAA continuing to manage the resolution of these cases. The major arbitration institutions should take the lead in improving the processes for resolving these cases, not simply walk away and leave the entire category to potentially less experienced institutions.

C. Better Information

Of course, the path to improved arbitration begins with an informed decision to sign an arbitration agreement. Critics of the arbitration of disputes between nursing homes and their residents often argue that the arbitration agreement is signed during a confusing, stressful admission process that rarely explains the benefits and det-

190. *Commercial Arbitration Rules,* AM. ARB. ASS'N (July 6, 2013, 3:27 PM), http://www.adr.org (follow "Rules & Procedure," "Rules," and "Commercial Arbitration Rules" hyperlinks).

191. *Healthcare Policy Statement*, AM. ARB. ASS'N, http://www.adr.org (last visited March 12, 2014).

192. Krasuski, *supra* note 53, at 291 (stating that the AAA changes are "significant because they demonstrate that even providers of arbitration recognize pre-dispute arbitration agreements as inherently unfair to healthcare consumers").

193. *See* Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012).

riments of arbitration in full.[194] Indeed, allegations that the arbitration clause was hidden or deemphasized during the admission process are often part of the factual basis for a claim of unconscionability.[195] For this reason, it is in the interests of both the nursing home resident (who wishes to have all of the relevant information) and the nursing home (which wishes to avoid having the agreement invalidated on unconscionability grounds) for the arbitration agreement to be fully and fairly explained as part of this admission process. The nursing home should make sure to include a description of the likely costs of arbitration, including a breakdown of which are upfront costs and which are deferred, any limitations on discovery or the presentation of evidence, and the role of the arbitrator (or arbitrators) as compared to that of a judge or jury. Indeed, one recent commentator made the sensible suggestion that long-term care ombudsmen, the federally-mandated advocates for nursing home residents, could be employed in this process to make sure that residents truly understand what they are signing.[196]

In addition, it is critical for elder law practitioners to work with their clients individually to make sure that they and their representatives are able to anticipate the arbitration issue when completing nursing home admission paperwork. Many nursing homes at least represent that their arbitration clauses are optional rather than mandatory,[197] which leaves the possibility for negotiation. Even if negotiation proves to be impossible, that will serve as additional evidence of a contract of adhesion, which could be helpful for purposes of a later unconscionability argument.[198] Moreover, an attorney can help a client prepare for the arbitration issue by tailoring any power of attorney to expressly deny the client's agent the power to make an arbitration decision on his or her behalf.[199] An experienced elder law attorney could also assist by informing clients and their representatives about the relevant state law on the impact a resident's arbitration agreement can have on a potential wrongful death claim. Of course,

194. Krasuski, *supra* note 53, at 263; McGuffey, *supra* note 20, at 243.

195. *See* LeMaire v. Beverly Enter. MN, LLC, No. 12-1768, 2013 WL 103919, at *5 (D. Minn. Jan. 9, 2013); THI of N.M. at Vida Encantada, LLC v. Archuleta, No. Civ. 11-399 LH/ACT, 2013 WL 2387752, at *17 (D. N.M Apr. 30, 2013).

196. Baumer, *supra* note 19, at 174.

197. Tripp, *supra* note 17, at 105.

198. Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 228 (W. Va. 2012).

199. McGuffey, *supra* note 20, at 249. McGuffey includes a draft limiting clause for a power of attorney. *Id.*

these may be uncomfortable conversations to have, but clients would be infinitely better served by brief social discomfort than by an inadvertent lifetime waiver of legal rights.

IV. Conclusion

Arbitration is becoming more common as a mode of dispute resolution, including in disputes between nursing homes and their residents. The use of arbitration for these disputes has long been challenged by residents, scholars, and lawmakers alike, who highlight the disparity in power between homes and residents, the likely vulnerability of the latter due to age and illness, and the potential drawbacks for residents of foregoing the judicial resolution of their claims. In the courts, residents have raised a variety of challenges to arbitration, including signatory issues, capacity issues, unconscionability, and issues with regard to the agreement's scope. Ultimately, however, it appears that arbitration of these cases is here to stay, as a result of a recent Supreme Court ruling making clear that any state laws prohibiting arbitration of this or any other class of cases as a whole will be deemed invalid under the FAA. And the law applicable to these cases is likely to continue to become more complex, as varied state statutes and individual facts and circumstances of cases lead to conflicting decisions on issues like whether wrongful death claims are arbitrable and what sort of authorization is required to give an agent the power to bind a resident to arbitration. There are no easy answers to the issues presented by the arbitration of nursing home disputes, but modest legislative enactments targeting the fairness of the process of resolving all such disputes—whether arbitrated or litigated—may withstand judicial scrutiny and make a real difference for residents. The major arbitration institutions and those associated with them should also work to develop special rules and processes that safeguard the integrity of the arbitration process for nursing home claims. Additionally, nursing homes and elder law practitioners should work towards a common goal of making sure that residents understand the implications of arbitration during the nursing home admission process. Both sides of this debate can benefit from more informed residents, because in the end it is unfairness—and not arbitration—that everyone really wishes to avoid.