

Nursing Home Arbitration Agreements

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Introduction

So imagine a bad day, when you are finalizing what may be a permanent stay in a nursing home for yourself or someone you love. It's an emotional time and the paperwork seems endless.

One of the documents states that you agree to arbitration, should you have a legal dispute with the facility. You sign, thinking you have promised to try to settle your differences with the nursing home before you head to court.

But what you've done is waive your rights to be heard by a jury if the home seriously neglects or mistreats you or your family member, and you later decide to sue.²

“Arbitration is a dispute resolution process in which parties present evidence and argument to an arbitrator or panel of arbitrators rather than to a judge and jury.”³ Arbitration can be expensive for consumers and does not provide many procedural and substantive protections that are available in court. Consumers forced to arbitrate their claims have only limited access to evidence and they have very limited rights to appeal a decision against them, even if the arbitrator does not apply the law properly. In addition, arbitrators often do not have the power to order companies to stop their wrongdoing, so that each person who is harmed must bring a separate case, even when all are challenging the same policy or practice.⁴

Increasingly, nursing home admission contracts include language requiring binding arbitration.⁵ The effect, however, is reminiscent of a contest held in the fictional town of Redemption. It was in *The Quick and the Dead* (Columbia/Tristar Studios, directed by Sam Raimi, 1995). There, Herod (played by Gene Hackman, who fills the role of the nursing facility in our own drama) hosted a quick draw (gun-fight) contest overseen by

² D. Lade & H. Cruz, *Nursing Home Arbitration May Limit Legal Alternatives: Know the Difference Between Arbitration and Mediation* (Sun Sentinel, November 24, 2003), at <http://www.judicialaccountability.org/articles/mediationarbitration.htm>.

³ W.T. Harvey, *Arbitration Agreements in Nursing Home Admissions Contracts* (available through ATLA Exchange) (reviewing, among other things, the history of arbitration and the development of the Federal Arbitration Act). Republished in TRIAL (ATLA May, 2003).

⁴ See Academy of Florida Trial Lawyers, *Mandatory Arbitration In Health Insurance, Nursing Home and HMO Contracts*, http://www.aftl.org/legislativeUpdates_positionPapers_detail.asp?ID=9.

⁵ Although one could legitimately argue with whether “voluntary” really means voluntary, Beverly posts the following on its website: “In addition, voluntary agreements to use arbitration to resolve patient-care issues that might otherwise lead to lawsuits were implemented in October 2002. The arbitration option currently is being accepted by approximately 75 percent of newly admitted patients.” http://www.beverlycares.com/beverly_internet/investor/corporate_info/investor_news/february_20_2003_earnings.html.

his henchmen at rifle point. The playing field was anything but fair. One day, Ellen, an unknown lady (played by Sharon Stone, who might be the surviving family member of a deceased nursing home resident) steps into the fray to avenge her father. She is up against Herod. Before the clock strikes, signaling that it's time to draw, another gun-fighter, Cort (played by Russell Crowe, who occupies the role of Plaintiff's attorney) steps in and levels the playing field by eliminating Hackman's henchman, thus ensuring that the fight is fair. The arbitration scheme presented by the nursing facilities is similarly a "fixed" fight where the deck is stacked in the nursing home's favor. A fair fight is the result after the motion to compel arbitration is defeated.⁶

Arbitration agreements are seldom if ever negotiated at arm's length. Instead, they are presented in a "take-it-or-leave-it" fashion. The effect is to deprive the resident of any meaningful recourse if injury occurs or rights are violated. Nursing homes do this by limiting the time for response, selecting partial, rather than impartial decision-makers, limiting discovery, and limiting statutory remedies including damages.⁷ In effect, they stack the deck in their favor. What can be done to level the playing field?

While some courts have addressed these issues, answers to the questions posed wait, in many jurisdictions, for Elder advocates who will step to the plate and take action to hold nursing homes accountable. This area of law is still expanding. This article, therefore, is a review of literature and cases more so than a "final answer" on these issues. Our task should not be to eliminate nursing homes; they are necessary; instead, our task is to hold nursing homes accountable in a way that enhances the quality of care for nursing home residents.

It should be noted, however, that there is a divergence of opinion regarding whether litigation does, in fact, enhance the quality of nursing care or hold nursing homes

⁶ To be fair, there is an opposing version of this account. One organization words it thusly: Arbitration is the ideal forum in which to decide legal disputes concerning long term care. Through a pre-dispute arbitration agreement, patients and providers can agree to shift future legal disputes out of the lawsuit system, with its downside risk and expense, and into a fair, inexpensive, and efficient forum - arbitration. Arbitration does not limit a party's right to seek redress but simply shifts the resolution of the dispute from the court system to an arbitration forum. (See, for example, the *National Arbitration Forum Code of Procedure*, Rule 20D: Arbitrators may grant any remedy or relief allowed by applicable substantive law). Arbitration is good for both organizations and individuals. In the 1995 *Allied-Bruce Terminix* case, the U.S. Supreme Court noted arbitration's benefits compared to litigation, including less expense, simpler procedural and evidentiary rules, less hostility between parties, less disruption of ongoing and future dealings among the parties, and more flexible scheduling of times and places for hearings and discovery. See http://www.arb-forum.com/articles/whitepapers/LTC_full.pdf.

⁷ "A representative of AARP testified that a significant number of nursing home residents who have been negligently injured will never be compensated because they have no meaningful remedy through the courts due to low value "wasting" or compliance policies as the insurance vehicle of choice or necessity for many nursing homes. Many nursing home agreements include binding arbitration clauses with very low caps on damages which must be signed as a prerequisite to admission." *Report of the Joint Select Committee on Nursing Homes March 1, 2004*, at <http://www.fhca.org/fhca/news/2004jscnh.pdf>. (Emphasis added). Interesting, the Texas Attorney General's office boasts that, in 2003, it "Obtained the largest - ever arbitration award in a nursing home case in October 2003 - more than \$258,000." See http://www.oag.state.tx.us/AG_Publications/pdfs/2003progressrpt.pdf. Whether this is an adequate measure of justice is a subject of debate.

accountable. In *The Rise Of Nursing Home Litigation: Findings From A National Survey Of Attorneys*, the authors write: “Our findings about the rates and outcomes of nursing home litigation highlight persistent questions about quality of care in this sector. We can only speculate about the mix of salutary and damaging effects on care generated by the body of claims we identified, since we did not measure litigation performance directly— in particular, the extent to which the litigation reliably tracks negligence, deters substandard care, and compensates worthy claimants. Yet the overall scale of the litigation is extremely sobering. In states with a high volume of litigation, the diversion of substantial resources now required to defend and pay nursing home lawsuits is likely to have an independent, negative impact on quality.” See D. Stevenson & D. Studdert, *The Rise Of Nursing Home Litigation: Findings From A National Survey Of Attorneys*, 22 *Health Affairs* 219, 226 (March/April 2003). The writer’s conclusions are, in part, based on the observation the quality of the underlying claims and litigation itself is subjective and therefore difficult to evaluate. *Health Affairs* is a respected public policy periodical and its findings merit consideration. This should serve as an additional wake-up call and should remind the bar to police itself and refrain from filing cases where the merits are questionable.

Exemplar Arbitration Clauses

Numerous defense firms have assisted nursing homes in drafting arbitration clauses for inclusion in arbitration agreements. Roff & Goffman, for example, has posted one on its website.⁸ Two others are included here to provide readers with an example of what they will be facing.

Exemplar One

BINDING ARBITRATION: Any claim, controversy, dispute or disagreement initiated by either party prior to written notice of mediation, shall be resolved by binding arbitration administered by the American Arbitration Association (AAA) or by such other service as mutually agreed, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

- a) Claims less than \$10,000: The parties hereby agree that either may initiate a claim against the other pursuant to AAA “Rules for the Resolution of Consumer-Related Disputes”, a copy of which is available at Center’s Business Office or at AAA website www.adr.org. This is an arbitration based upon written documents produced by either or both parties and decided within 45 days of the initial submission.

⁸ <http://www.rolfgoffman.com/ArbitrationClause2000.pdf>.

- b) All other disputes shall be arbitrated in accordance with the AAA “Commercial Dispute Resolution Procedures”, available at the Center’s Business Office or at AAA website www.adr.org.

The arbitrator shall be selected using the AAA selection procedure or the procedure established by another mutually agreeable service. The place of arbitration (if a hearing occurs) shall be where the Center is located, or if that is not practical, the as close to the Center as practical. This agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed. The award shall be made within four months of notice or demand of intent to arbitrate and the arbitrators shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of all the parties if it is absolutely necessary, but not to exceed an additional three months. The arbitrator may award compensatory and punitive damages, and with respect to punitive damages arising under State statutes, shall comply with the provisions of State statute.

By agreeing to arbitration of all disputes, both parties are waiving a jury trial for all contract, tort and other claims. The parties agree that this Agreement to Arbitrate shall survive and not otherwise be revoked by the death or incompetency of Patient. The award of costs of the arbitration shall be determined by the arbitrator in accordance with state law. The Administrative Fee and Arbitrator’s compensation shall be initially advanced by the party requesting arbitration, but shall be allocated on the ratio of final award to each party over the total award in the final Arbitration Order.

I am in total agreement with the arbitration procedures described above.

Exemplar Two

“Except as prohibited by applicable law, pursuant to the Federal Arbitration Act, any action, dispute, claim, or controversy of any kind (e.g., whether in contract or in tort, statutory or common law, legal or equitable, or otherwise) now existing or hereafter arising between the parties in any way arising out of, pertaining to or in connection with the provision of health care services, any agreement between the parties, the provision of any other goods or services by the health care center or other transactions, contracts or agreements of any kind whatsoever, any past, present or future incidents, omissions, acts, errors, practices or occurrence causing

injury to either party whereby the other party or its agents, employees or representatives may be liable, in whole or in part, or any other aspect of the past, present, or future relationships between the parties shall be resolved by binding arbitration administered by the National Health Lawyers Association (the “NHLA”).

Summary of Major Arguments Against Binding Arbitration

They are Contracts of Adhesion

In *Briarcliff Nursing Home v. Turcotte*, 2004 Ala. Lexis 171 (June 25, 2004), a Brief Amici Curiae was presented by the AARP, the National Citizen’s Coalition for Nursing Home Reform and the Alabama Silver Haired Legislature in support of the resident, against binding arbitration.⁹ The Brief argues that nursing home admission contracts, particularly those with binding arbitration clauses, are contracts of adhesion and that the parties do not stand on equal footing when negotiating the terms. “A nursing home placement is a very complex decision-making process precipitated by diverse triggers and reasons for making the decision to enter a nursing home.”¹⁰ “Because the decision to admit residents occurs after hospitalization or a period of illness in the family’s home, the nursing home admission is unplanned; there is little time to investigate options or to wait for an opening at a nursing home of choice.”¹¹ The Brief recites additional issues complicating the process of signing an admissions contract: (1) 93% of California nursing home agreements were out of compliance with current laws and regulations; (2) they are written in legalese; (3) they are presented in standardized form contracts, giving residents no meaningful opportunity to negotiate terms; (4) the font size is often small and difficult to read; (5) often there is no “coherent” admissions process, which leads to confusion; and (6) residents and family members often do not have, or are not given, time to read and deliberate over the terms (sometimes because the contract is not made available until the time of admission). “The pressures of deciding placements and/or mental infirmities, financial limitations, and/or lack of knowledge about long-term care options makes consumers vulnerable and dependent on full disclosure by facilities.”¹² Ultimately, the positions in the Amici Brief were rejected; however, for decisions striking arbitration clauses on these grounds, *see Raiteri and Howell, infra*.

The concepts of “adhesion” and unconscionability are related. However, because they are separately addressed by various courts, we discuss them independently. A succinct

⁹ See http://www.nslc.org/news/04/mar/briarcliff_amicus.pdf. This issue was also briefed in *Howell, infra*.

¹⁰ Citing S. Travis & W. McAuley, *Searches for a Nursing Home: Personal and Situational Factors*, 17 J. Applied Gerontology 352, 352 (1998); and W. McAuley & S. Travis, *Factors Influencing Level of Stress During the Nursing Home Decision Process*, 6 J. Clinical Gerontology 269 (2000).

¹¹ Citing D. Vlosky, “Say-So” as a Predictor of Nursing Home Readiness, 93 J. of Family & Consumer Science 59 (2001).

¹² Citing California Advocates for Nursing Home Reform, *Better Read the Small Print! An Analysis of Admission Agreements in California’s Residential Care Facilities for the Elderly* (Mar. 2003).

discussion of both concepts appears in Comment 7 to Section 6 of the *Uniform Arbitration Act*, cited below, as follows:

Contracts of adhesion and unconscionability: Unequal bargaining power often affects contracts containing arbitration provisions involving employers and employees, sellers and consumers, health maintenance organizations and patients, franchisors and franchisees, and others.

Despite some recent developments to the contrary, courts do not often find contracts unenforceable for unconscionability. To determine whether to void a contract on this ground, courts examine a number of factors. These factors include: unequal bargaining power, whether the weaker party may opt out of arbitration, the clarity and conspicuousness of the arbitration clause, whether an unfair advantage is obtained, whether the arbitration clause is negotiable, whether the arbitration provision is boilerplate, whether the aggrieved party had a meaningful choice or was compelled to accept arbitration, whether the arbitration agreement is within the reasonable expectations of the weaker party, and whether the stronger party used deceptive tactics. See, e.g., *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838 (7th Cir. 1999); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999); *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013 (1992); *Chor v. Piper, Jaffray & Hopwood, Inc.*, 261 Mont. 143, 862 P.2d 26 (1993); *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Powers v. Dickson, Carlson & Campillo*, 54 Cal. App. 4th 1102, 63 Cal. Rptr. 2d 261 (1997); *Beldon Roofing & Remodeling Co. v. Tanner*, 1997 WL 280482 (Tex. Ct. App. May 28, 1997).

Despite these many factors, courts have been reluctant to find arbitration agreements unconscionable. II Macneil Treatise § 19.3; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33 (1997); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Cassarotto*, 31 Wake Forest L. Rev. 1001 (1996). However, in the last few years, some cases have gone the other way and courts have begun to scrutinize more closely the enforceability of arbitration agreements. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (stating that one-sided arbitration agreement that takes away numerous substantive rights and remedies of employee under Title VII is so egregious as to constitute a complete default of employer's contractual obligation to draft arbitration rules in good faith); *Shankle v. B-G Maint. Mgt., Inc.*, 163 F.3d 1230 (10th Cir. 1999) (finding that an arbitration clause does not apply to employee's discrimination claims where employee is required to pay portion of arbitrator's fee that is a prohibitive cost for him so as to substantially limit his use of arbitral forum); *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir. 1999), cert. granted, 120 S.Ct. 1552, 146 L.Ed. 2d 458 (2000) (holding that consumer not required to arbitrate where arbitration clause is silent on subject of arbitration fees and costs due to risk that imposition of large fees and costs on consumer may defeat remedial purposes of Truth in Lending Act) [*but cf. Dobbins v. Hawk's Enter.*, 198 F.3d 715 (8th Cir. 1999) (finding that before court can determine if administrative costs make arbitration clause unconscionable, purchasers must explore whether arbitration organization will waive or diminish its fees or whether seller will offer to pay the fees)]; *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998) (employee not required to arbitrate Title VII claim where the contract limits damages below that allowed by the statute); *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, *supra* (stating that arbitration agreement unenforceable because it required a patient to arbitrate a malpractice claim and to waive the right to jury trial and was beyond the patient's reasonable expectations where drafter inserted potentially advantageous term requiring arbitrator of malpractice claims to be a licensed medical doctor); *Armendariz v. Foundation Health Psychcare Serv. Inc.*, 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000) (concluding that clause in arbitration agreement

limiting employee's remedies in state anti-discrimination claims is cause to void arbitration agreement on grounds of unconscionability); *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 988 P.2d 67, 90 Cal. Rptr. 2d 334 (1999); (finding although consumer's claim for damages under consumer protection statute is arbitrable, claim for injunctive relief is not because of the public benefit for the injunctive remedy and the advantages of a judicial forum for such relief); *Engalla v. Permanente Med. Grp.*, 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr. 2d 843 (1997) (stating that health maintenance organization may not compel arbitration where it fraudulently induced participant to agree to the arbitration of disputes, fraudulently misrepresented speed of arbitration selection process and forced delays so as to waive the right of arbitration); *Gonzalez v. Hughes Aircraft Employees Fed. Credit Union*, 70 Cal. App.4th 468, 82 Cal. Rptr. 2d 526 (1999) (holding that arbitration agreement which has unfair time limits for employees to file claims, requires employees to arbitrate virtually all claims but allows employer to obtain judicial relief in virtually all employment matters, and severely limits employees' discovery rights is both procedurally and substantively unconscionable); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997) (ruling that one-sided compulsory arbitration clause which reserved litigation rights to the employer only and denied employees rights to exemplary damages, equitable relief, attorney fees, costs, and a shorter statute of limitations unconscionable); *Rembert v. Ryan's Family Steak House*, 235 Mich.App. 118, 596 N.W.2d 208 (1999) (concluding that a predispute agreement to arbitrate statutory employment discrimination claims was valid only as long as employee did not waive any rights or remedies under the statute and arbitral process was fair); *Alamo Rent A Car, Inc. v. Galarza*, 306 N.J. Super. 384, 703 A.2d 961 (1997) (finding that an arbitration clause that does not clearly and unmistakably include claims of employment discrimination fails to waive employee's statutory rights and remedies); *Arnold v. United Co. Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998) (holding that an arbitration clause in consumer loan transaction that contained waiver of the consumer's rights to access to the courts, while reserving practically all of the lender's right to a judicial forum found unconscionable).

As a result of concerns over fairness in arbitration involving those with unequal bargaining power, organizations and individuals involved in employment, consumer, and health-care arbitration have determined common standards for arbitration in these fields. In 1995, a broad-based coalition representing interests of employers, employees, arbitrators and arbitration organizations agreed upon a *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*; see also *National Academy of Arbitrators, Guidelines on Arbitration of Statutory Claims under Employer-Promulgated Systems* (May 21, 1997). In 1998, a similar group representing the views of consumers, industry, arbitrators, and arbitration organizations formed the National Consumer Disputes Advisory Committee under the auspices of the American Arbitration Association and adopted a *Due Process Protocol for Mediation and Arbitration of Consumer Disputes*. Also in 1998 the Commission on Health Care Dispute Resolution, comprised of representatives from the American Arbitration Association, the American Bar Association and the American Medical Association endorsed a *Due Process Protocol for Mediation and Arbitration of Health Care Disputes*.¹³ The purpose of these protocols is to ensure both procedural and substantive fairness in arbitrations involving employees, consumers and patients. The arbitration of employment, consumer and health-care disputes in accordance with these standards will be a legitimate and meaningful alternative to litigation. See, e.g., *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997) (referring specifically to the due process protocol in the employment relationship in a case involving the arbitration of an employee's rights under Title VII).

¹³ <http://www.adr.org/upload/livesite/focusArea/Healthcare/healthcare.pdf>.

The Drafting Committee determined to leave the issue of adhesion contracts and unconscionability to developing law because (1) the doctrine of unconscionability reflects so much the substantive law of the States and not just arbitration, (2) the case law, statutes, and arbitration standards are rapidly changing, and (3) treating arbitration clauses differently from other contract provisions would raise significant preemption issues under the *Federal Arbitration Act*. However, it should be pointed out that a primary purpose of Section 4, which provides that some sections of the RUAA are not waivable, is to address the problem of contracts of adhesion in the statute while taking into account the limitations caused by federal preemption.

Because an arbitration agreement effectively waives a party's right to a jury trial, courts should ensure the fairness of an agreement to arbitrate, particularly in instances involving statutory rights that provide claimants with important remedies. Courts should determine that an arbitration process is adequate to protect important rights. Without these safeguards, arbitration loses credibility as an appropriate alternative to litigation.

Of note, an arbitration clause, such as the exemplar which appears above, is unconscionable under the standards approved by the American Arbitration Association ("AAA"). On July 27, 1998, the National Commission on Health Care Dispute Resolution (referenced in the material cited in the preceding paragraph), adopted a Health Care Due Process Protocol which unanimously recommended that disputes involving patients should not be subject to forms of dispute resolution unless the parties agree to do so after the dispute arises.¹⁴ The Commission also recognized that any agreement to arbitrate should be knowing and voluntary, which assumes full and accurate disclosure of the consequences (loss of the right to trial by jury) is provided. The Commission rejected the notion that participation in a binding alternative dispute resolution or arbitration could be a requirement for receiving care.

The Arbitration Agreement is Unenforceable Because There Was No Valid Contract Underlying It

In *Raiteri v. NHC Healthcare/Knoxville, Inc.*, 2003 Tenn. App. LEXIS 957 (Tenn. Ct. App. 2003), the facility's motion to compel arbitration was denied because there was no valid contract underlying the arbitration agreement. In short, the person signing the agreement did not have authority to bind the resident. *See also Phillips v. Crofton Manor Inn*, discussed *infra*; W.T. Harvey, *Arbitration Agreements in Nursing Home Admissions Contracts*, p. 5 (a party cannot be required to submit to arbitration where there was no agreement to do so).

¹⁴ The precise language reads as follows: "The agreement to use ADR should be knowing and voluntary. Consent to use an ADR process should not be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises." *See Commission on Health Dispute Resolution*, p. 15 (July 27, 1998), at <http://www.adr.org/upload/livesite/focusArea/Healthcare/healthcare.pdf>. It is noteworthy that the American Health Lawyer's Association recently "amended its rules for cases filed with the Service after January 1, 2004. The Service will only administer consumer health care liability claims if an agreement to arbitrate was entered into by the parties in writing after the alleged injury occurred." *See* <http://www.healthlawyers.org/adr/announcement.cfm>. (Emphasis added).

Litigants should also be aware of the defense authorizing revocation of the contract. In many jurisdictions, issues that may authorize revocation include unconscionability, adhesion, public policy, fraud, absence of mutuality of assent, and incapacity. *Harvey, supra*, p. 6. Thus, with many of the issues described herein, not only should the litigant argue that public policy, for example, precludes enforcement of the agreement, but also that it authorizes revocation of the agreement.

It should be noted, however, that findings relating to the contract as a whole is invalid may not provide a defense to the arbitration agreement. In *Gainesville Health Care Ctr., Inc. v. Weston*, discussed below, the Court stated the following: "there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) [**8] (citing *Terminix Int'l Co. v. Ponzio*, 693 So. 2d 104, 106 (Fla. 5th DCA 1997)). *Accord John B. Goodman Ltd. P'ship v. THF Constr., Inc.*, 321 F.3d 1094 (11th Cir. 2003). **Pursuant to the first element for consideration, it is relatively clear that the issue is "whether a valid written agreement to arbitrate exists," not whether a valid written contract containing an arbitration provision exists.** *Seifert*, 750 So. 2d at 636; *John B. Goodman Ltd. P'ship*, 321 F.3d at 1095-98. This focus on the validity of the arbitration provision, rather than of the contract containing the provision, is the result of the holding by the United States Supreme Court in a case construing the *Federal Arbitration Act* "that[,] in passing upon an . . . application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967). [*283] It has become known as the "separability" doctrine. *John B. Goodman Ltd. P'ship*, 321 F.3d at 1095. [**9] *See also Ronbeck Constr. Co. v. Savanna Club Corp.*, 592 So. 2d 344, 347 (Fla. 4th DCA 1992) (discussing "separability" pursuant to section 682.03 of the Florida Arbitration Code)." (Emphasis added).

For additional case law and discussion regarding the separability doctrine, see Comment 4 to Section 6 of the *Uniform Arbitration Act*, discussed below.

The Arbitration Agreements violate Medicare/Medicaid Law By Requiring Additional Consideration

Most nursing home residents rely on public funding to pay for their care. They are financially vulnerable, as well as physically and psychologically vulnerable. Since 1990, national expenditures for nursing home care have almost doubled, climbing from \$53 billion to \$92 billion in 2000. *Nursing Home Expenditures and Quality*, GAO-02-431R, report released (G.A.O., June 13, 2002). An increasing amount of that spending has been financed with public monies. *Id.* Under the Medicare and Medicaid programs, the federal government financed thirty-nine percent of the nation's nursing home spending in 2000, up from twenty-eight percent in 1990. *Id.*

Arguably, mandatory arbitration clauses in nursing home admission contracts violate federal law. They do so by requiring additional consideration from the resident in exchange for admission to the nursing home. 42 U.S.C. § 1396r(c)(5)(A)(iii) provides that in the case of an individual who is entitled to medical assistance for nursing facility services a nursing facility must

not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

Further, federal regulations provide:

In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3).

Plaintiffs, in an Amended Brief of Appellant, in *Algayer v. Health Center of Panama City, Inc.*, Case No. 1D03-425 (Fla. 1st DCA),¹⁵ made this argument. They contended that both the Medicare and Medicaid programs mandate that participating facilities must accept program payments as "full payment." 42 U.S.C. § 1395r(c)(5)(A)(iii). Because the resident would ordinarily have a right to a jury trial, requiring the resident to sign the agreement, giving up that right, is an unauthorized additional consideration.

The Tennessee Trial Lawyers Association, in their Amici Brief,¹⁶ made a similar argument was made in *Howell v. NHC*, discussed *infra*. Citing the same statute and 42 C.F.R. § 483.12(d)(3), they argued that arbitration agreements violate federal law because resident lose valuable procedural and substantive protections which would otherwise be available to them.

In a January, 2003 memorandum, the Centers for Medicare & Medicaid Services (CMS) addressed the agency's position on binding arbitration. CMS seems to be taking a hands-off approach to the issue, unless a facility attempts to enforce the clause.¹⁷ On this point, CMS states "Under both programs, however, there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates Federal requirements." CMS offered guidance to State Survey Agency Directors -- that if a facility either retaliates against or discharges a resident due to the resident's failure to agree to or comply with a binding arbitration clause, then the state and region may start an enforcement action against the facility.

¹⁵ NHLG Document Bank No. 001720.

¹⁶ NHLG Document Bank No. 001721.

¹⁷ <http://www.cms.hhs.gov/medicaid/survey-cert/sc0310.pdf>.

Of note, an Alabama Court rejected this argument in *Owens v. Coosa Valley Health Care, Inc.*, discussed *infra*; see also *Gainesville Health Care Ctr., Inc. v. Weston*, discussed *infra* (“We have found no authority from any jurisdiction which holds that an arbitration provision constitutes "consideration" in this sense; nor do we believe that the federal regulation was intended to apply to such a situation.”).

The enforcement action would be based on a violation of the rules covering residents’ transfers and discharges. The Memorandum notes that none of the conditions in the regulations allow a facility to discharge or transfer a resident due to her failure to comply with an arbitration clause. Further, if a facility were to retaliate against that resident, the facility is subject to enforcement for failing to comply with the requirement to provide an environment that is abuse-free. See <http://cms.hhs.gov/medicaid/lcsp/sc0310.pdf>.

There is No Valid Consideration for the Arbitration Agreement

A similar, but distinct argument is that no consideration is present. Black letter law provides that an enforceable contract requires consideration and that a contract without consideration is unenforceable. Further, a promise to do something that the law already requires does not furnish consideration. *International Shoe Company v. Carmichael*, 114 So.2d 436 (Fla. 1st DCA 1959). Thus, because the nursing home is already obligated, under Federal and State law, to provide quality care, it fails to provide any consideration for the arbitration agreement when it promises to provide nursing care.

They Violate Consumer Protection Laws

Eric Carlson writes, in *Long Term Care Advocacy* (Lexis Publishing, Looseleaf): “Some states prohibit nursing facilities from having residents waive the right to a jury trial, and other states have laws that regulate, but do not prohibit, the use of arbitration agreements in nursing facilities.” *Id.*, at § 10.13[4]. See also § 10.06[h] (discussing violations of Consumer Protection Statutes). See also National Consumer Law Center, *When You Can’t Go Home Again: Using Consumer Law to Protect Nursing Facility Residents*, discussed at http://www.consumerlaw.org/initiatives/seniors_initiative/topics_care.shtml, and available at: http://www.consumerlaw.org/initiatives/seniors_initiative/content/order_nursing_facility.pdf.

Injunctive Relief Cannot be Subjected to Arbitration

This issue is identified, but will not be discussed at length since most nursing home litigants seek damages rather than injunctive relief. The issue was briefed in *Timmis v. Kaiser Permanente*, Superior Court of California, Alameda County, Case No. 833871-7, see Plaintiff’s Opposition to Petition to Compel Arbitration and Stay Action; Memorandum of Points and Authorities (filed July 26, 2001), available at <http://www.tlpj.org/briefs/104-Timmis.pdf>.

The Designated Arbitrator No Longer Exists or No Longer Accepts Consumer Cases

Some older arbitration agreements designate either the National Health Lawyers Association (NHLA) or the American Health Lawyers Association (AHLA) as the arbitrator. The NHLA ceased to exist when it merged into the AHLA in 1997. As argued in *Perkins v. IHS of Florida No. 10, Inc.*, “[a] party acting unilaterally is not authorized to remake an arbitration agreement.”¹⁸ Citing *Flyer Printing Co. v. Hill*, 805 So.2d 829, 833 (Fla. 2d DCA 2001). Therefore, these agreements should be unenforceable. For similar reasons, agreements designating AHLA as arbitrator should be unenforceable if the contract was signed prior to injury. The AHLA “amended its rules for cases filed with the Service after January 1, 2004. The Service will only administer consumer health care liability claims if an agreement to arbitrate was entered into by the parties in writing after the alleged injury occurred.”¹⁹

The Arbitration Agreement Improperly Limits Statutory Remedies

In the *Perkins* Brief, *supra*, Plaintiffs argued that the arbitration clause improperly limited statutory remedies.²⁰ Specifically, the agreement heightened the standard necessary to prove consequential, incidental and special damages, heightened the standard for proving punitive damages, and, notwithstanding a statute requiring payment of attorney’s fees, denied them absent “good cause to be proven.” The Plaintiffs argued that the arbitration agreement defeated the purpose of remedial statutes designed to protect nursing home residents. In support, Plaintiff’s cited *Miller v. Richmond Healthcare, Inc.*, Case Number 01-17261 (14) (Seventeenth Judicial Circuit, Florida, March 12, 2002), an unpublished decision holding that arbitration clauses which limit statutory remedies are unenforceable.

This argument was expressly rejected in *Richmond Healthcare, Inc. v. Digati*, discussed *infra* (“there is no common law basis to refuse to enforce valid agreements to arbitrate by competent parties merely because they involve a waiver of statutory rights and remedies”).

The Agreements are Procedurally and Substantively Unconscionable

In the *Perkins* Brief, the Plaintiffs argued that Florida law provides a framework for establishing and enforcing standards for the care and treatment of nursing home residents.²¹ Further, it was Florida’s intention to hold nursing homes accountable for

¹⁸ See Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Stay Action and Motion to Compel Arbitration. (NHLG Document Bank No. NH000955).

¹⁹ See <http://www.healthlawyers.org/adr/announcement.cfm>. (Emphasis added).

²⁰ This issue was also argued in Amended Brief of Appellant, in *Algayer v. Health Center of Panama City, Inc.*, Case No. 1D03-425 (Fla. 1st DCA) (NHLG Document Bank).

²¹ This issue was also argued in Amended Brief of Appellant, in *Algayer v. Health Center of Panama City, Inc.*, Case No. 1D03-425 (Fla. 1st DCA) (NHLG Document Bank). In *Algayer*, Plaintiffs cite to *Franck v. P’ng*, 2003 WL 1230898 (N.C. App. March 12, 2003), as an instance where court intervention was necessary because AHLA demonstrated “a decided prejudice against a plaintiff in a tort action.”

violations of resident rights by providing a private right of action. Citing *Powertel v. Bexley*, 743 So.2d 570 (Fla. 1st DCA 1999), they argued “procedural unconscionability refers to the circumstances surrounding the entering of the agreement that add up to an absence of meaningful choice on the part of one of the parties as to the terms therein.” “Substantive unconscionability focuses on the fairness of the contract terms at issue to the same contracting party.” Because many of the facts underlying this argument are similar to those relating to contracts of adhesion, addressed above, this issue is identified but not discussed at length. One issue worth noting, however, is the argument in *Perkins* that the nursing home owes a special duty to the nursing home resident. In some jurisdictions, this relationship might heighten the nursing home’s duty to fully disclose the terms and explain their meaning.

Arbitration agreements, while generally favored, will not be enforced where they affect an individual’s substantive rights. *Cooper v. MRM Investment Co.*, 199 F.Supp.2d 771 (M.D. Tenn. 2002), citing *Gilmer Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). For example, requiring the plaintiff to pay to vindicate federal substantive rights would amount to an insurmountable obstacle. *Cooper*, at 775, citing *Paladino v. Avenet Computer Tech, Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Shankle v. B-G Maint. Mgmt of Colo., Inc.*, 163 F.3d 1320 (10th Cir. 1999); *Cole v. Burns In’t Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F3d 549, 556 (4th Cir. 2001); *Manuel v. Honda R&D Americas, Inc.*, 175 F.Supp. 2d 987 (S.D. Ohio 2001).

The Agreement Violates “Sunshine” Legislation Designed to Make Litigation Public Where it Concerns a Public Hazard

The Plaintiffs in *Perkins* cited Section 69.081, Fla. Stat., which provides:

“Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard or any information which may be useful to members of the public in protecting themselves from the public hazard is void, contrary to public policy, and may not be enforced.” The statute further defines a ‘public hazard’ as “an instrumentality, including but not limited to any device, instrument, person, procedure or product, that has caused or is likely to cause injury.”

The Plaintiffs argued that this legislation applies to nursing home litigation because, almost without exception, (1) they concern threats to the health and safety of residents and (2) arbitration proceedings are confidential (secret).

The Agreement Contravenes Public Policy

Public policy is often defined by statute or caselaw. For example, in *Perkins*, the Plaintiffs cited *Harris v. Gonzalez*, 789 So.2d 405, 409 (Fla. 4th DCA 2001), where the

There, AHLA refused to accommodate the Plaintiff’s specific request for the option of selecting a North Carolina arbitrator and required the Plaintiff to escrow \$24,500 toward AHLA’s arbitration fee before proceeding.

court defined it as community common sense and common sense extended and applied throughout the state to matters of public morals, health, safety and welfare. The argument here is that public policy demands protection of nursing home residents who, but for frailty and infirmity, would not have been admitted to the nursing home in the first place. Arbitration decisions fail to do this because they deny statutory protection to residents, because they are private and because the decisions are seldom explained, meaning that no guidance is provided for the future.

Arbitration is Waived If the Litigation Proceeds

It is well established that a party who engages in conduct inconsistent with a demand for arbitration prior to making that demand is deemed to have waived that right. See Amended Brief of Appellant, in *Algayer v. Health Center of Panama City, Inc.*, Case No. 1D03-425 (Fla. 1st DCA).²² See also *King v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc.*, 352 So.2d 1235 (Fla. 4th DCA 1977); *Bared & Co., Inc. v. Specialty Maintenance and Construction, Inc.*, 610 So.2d 1 (Fla. 2^d DCA 1992); *R.W. Roberts Const. Co., Inc. v. Masters & Co., Inc.*, 403 So.2d 1114 (Fla. 5th DCA 1981); *Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co., Inc.*, 824 So.2d 288, 290-291 (Fla. 4th DCA 2002). A party's conduct subsequent to requesting arbitration may also be the basis of a waiver. *Klosters Rederi v. Arison Shipping Co.*, 280 So.2d 678 (Fla. 1973). Waiver consists of two elements: (1) knowledge of the right to arbitrate and (2) active participation in litigation or other acts inconsistent with that right. *Breckenridge v. Farber*, 640 So.2d 208, 211 (Fla. 4th DCA 1994).

Comment 5 to Section 6 of the *Uniform Arbitration Act* provides as follows: "Waiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause. However, because of the public policy favoring arbitration, a court normally will only find a waiver of a right to arbitrate where a party claiming waiver meets the burden of proving that the waiver has caused prejudice. *Sedillo v. Campbell*, 5 S.W.3d 824 (Tex. Ct. App. 1999). For instance, where a plaintiff brings an action against a defendant in court, engages in extensive discovery and then attempts to dismiss the lawsuit on the grounds of an arbitration clause, a defendant might challenge the dismissal on the grounds that the plaintiff has waived any right to use of the arbitration clause. *S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80 (2^d Cir. 1998). Allowing the court to decide this issue of arbitrability comports with the separability doctrine because in most instances waiver concerns only the arbitration clause itself and not an attack on the underlying contract. It is also a matter of judicial economy to require that a party, who pursues an action in a court proceeding but later claims arbitrability, be held to a decision of the court on waiver."

The Arbitration Agreement Does Not Apply to Non-Parties to the Agreement

²² NHLG Document Bank, No. NH001720.

In *Flaum*, an unpublished decision discussed *infra*, the Court cited remanded the case for decision concerning whether the arbitration clause binds persons bringing survival claims.

With respect to non-signing ‘defendants,’ the issue is less clear. For example, in *Flaum*, *infra*, the Court stated the following: “Flaum claims the defendants other than RGR cannot invoke the arbitration agreement because they were not parties to the agreement. The complaint, however, alleges that these defendants “were the owners, operators, managing agents, and/or [*17] managers of” RGR. As such, these defendants were entitled to invoke the arbitration agreement. (See *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 418, 220 Cal. Rptr. 807, 709 P.2d 826; *Valley Casework, Inc. v. Comfort Construction, Inc.* (1999) 76 Cal. App. 4th 1013, 1021-1022; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal. App. 4th 1199, 1210.)”

Cases: 2004

Thus far, 2004 has not been a good year for the plaintiff’s bar or for plaintiffs. The cases reviewed below, for the most part, uphold and enforce arbitration agreements.

Briarcliff Nursing Home v. Turcotte, 2004 Ala. Lexis 171 (June 25, 2004).²³ The facility appealed the denial of its motion to compel and the Alabama Supreme Court reversed. The Plaintiffs contended that the arbitration agreement was a contract of adhesion. The Court, responding, found: “In determining whether a contract is unconscionable, courts look to four factors: ‘(1) whether there was an absence of meaningful choice on one party’s part, (2) whether the contractual terms are unreasonably favorable to one party, (3) whether there was unequal bargaining power among the parties, and (4) whether there was oppressive, one-sided or patently unfair terms in the contract. ... For ease of discussion, we can reduce the *Layne v. Garner* test further to one comprised of two essential elements: (1) terms that are grossly favorable to a party that has (2) overwhelming bargaining power.” The Plaintiffs argued that the arbitrator, the AHLA, is the puppet of defendants and therefore, the terms grossly favor the facility. The only evidence offered was a history of the AHLA. The Court rejected that evidence as proof that the AHLA favors defendants. The Plaintiffs, in arguing “overwhelming bargaining power, alleged that there were only two nursing homes in the resident’s community and therefore, there was no meaningful choice in selecting a nursing home. The Court found “[i]n the present case, Turcotte and Woodman have not shown that nursing home care is unavailable without agreeing to arbitration. Therefore, Turcotte and Woodman did not demonstrate “an absence of a meaningful choice. ... Because Turcotte and Woodman have not demonstrated that Noella and Sarah did not have a “meaningful choice” when deciding on nursing-home care, we conclude that Turcotte and Woodman failed to establish that the contract before us is one of adhesion.” The Plaintiffs next argued that the agreement should not be enforced because it affects intrastate, not interstate commerce. The court rejected that argument after finding that the nursing facility’s business, generally, affects interstate commerce.

²³ The Court withdrew a prior opinion published at *Briarcliff Nursing Home, Inc. v. Turcotte*, 2004 Ala. LEXIS 20 (February 6, 2004).

Birmingham News Co. v. Horn, 2004 Ala. LEXIS 152 (Alabama, June 11, 2004): While this is not a nursing home case, it discusses the standard of review applicable for arbitration awards. Internal citations are included for reference:

Like the federal courts of appeals discussed earlier, many state appellate courts have elected to adopt the manifest-disregard-of-the-law as a legitimate standard for review of arbitration awards. See, e.g., *Saturn Constr. Co. v. Premier Roofing Co.*, 238 Conn. 293, 680 A.2d 1274 (1996); *Amerispec Franchise v. Cross*, 215 Ga. App. 669, 452 S.E.2d 188 (1994); *Hecla Mining Co. v. Bunker Hill Co.*, 101 Idaho 557, 617 P.2d 861 (1980); *Welch v. A.G. Edwards & Sons, Inc.*, 677 So. 2d 520, 524 (La. Ct. App. 4th Cir. 1996) ("The doctrine implies that the arbitrator appreciates the existence of clearly governing legal principle but decides to ignore or pay no attention to it.") *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788 (Mo. Ct. App. 1998); *Geissler v. Sanem*, 285 Mont. 411, 949 P.2d 234 (1997); *Graber v. Comstock Bank*, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995) (ground established when arbitrators "appreciate the significance of clearly governing legal principles but decide to ignore or pay no attention to those principles. The governing law alleged to have been ignored [*64] must be well-defined, explicit, and clearly applicable." (Citations omitted.)) *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 754 N.Y.S.2d 264 (2003); *Altieri v. Liberty Mut. Ins. Co.*, 697 A.2d 1104 (R.I. 1997); *City of Madison v. Madison Prof. Police Officers Ass'n*, 144 Wis. 2d 576, 425 N.W.2d 8 (1988); and *Employers Ins. of Wausau v. Certain Underwriters at Lloyd's London*, 202 Wis. 2d 673, 202 Wis. 2d 674, 689, 552 N.W.2d 420, 426 (Wis. Ct. App. 1996) ("our supreme court noted that [the Wisconsin statutory counterpart to FAA § 10] echoes the common law standards, implying that if an arbitrator manifestly disregarded the law, the arbitrator exceeded the scope of his powers, requiring vacatur under [that counterpart]." See also *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 951 (Utah 1996) (discussing nature of doctrine of manifest disregard of the law, and opining that "if arbitrators manifestly disregard the law in making their award, they can be said to have exceeded their authority," but reserving the issue whether the ground was recognized in Utah because there was no evidence indicating [*65] that the arbitration panel manifestly disregarded any aspect of the law). ... This Court joins the majority of other state appellate courts that have considered the matter in now recognizing "**manifest disregard of the law**" as a ground available for reviewing an arbitration award. As have all other courts, state and federal, that have recognized this ground, however, we emphasize that judicial review under it is severely limited and that the party challenging an award on this ground bears a heavy burden. *GMS Group, LLC v. Benderson*, *supra*; *Prestrige Ford v. Ford Dealer Computer Servs., Inc.*, *supra*; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995); *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 461 (8th Cir. 2001); *Montes v. Shearson Lehman Bros.*, *supra*; *Edward D. Jones v. Schwartz*, *supra*. Although there are variations of the standard as formulated by the various courts, those formulations share the commonality that an arbitration award should be vacated only if the arbitrators knew of a well-defined and explicit governing legal principle, clearly applicable [*66] to the circumstances at hand, yet chose to ignore that principle or refused to apply it. (Emphasis added).

Owens v. Coosa Valley Health Care, Inc., 2004 Ala. LEXIS 28 (Alabama, February 13, 2004). The nursing home's motion to compel arbitration was reviewed de novo. "Initially, the party seeking to compel arbitration must prove 1) the existence of a contract calling for arbitration, and 2) that the contract is a contract evidencing a transaction involving commerce" within the meaning of the Federal Arbitration Act (FAA)." The court found that the nursing home met its burden reference authority to contract because the guardian signed the admission agreement and the resident did not

object. Regarding interstate commerce, the court found that the contract involved interstate commerce based on the following: "In support of its motion to compel arbitration, Coosa Valley submitted the testimony of Ted Cook, the major stockholder and incorporator of Coosa Valley; Cook's testimony indicated (1) that approximately [*10] 90% of the medical supplies were purchased for use at the nursing home from an out-of-state supplier; (2) that "nursing-home equipment" and all linens provided to patients at the nursing home were purchased directly from out-of-state suppliers in Missouri, New York, and Wisconsin; (3) that all of the medical forms used by the nursing home were purchased in Iowa and that maintenance on the "nursing-home equipment" was performed by a company from California; (4) that supplies were ordered from out of state by mail, telephone, and facsimile transmissions and were shipped to Coosa Valley over various state lines; (5) that several of the patients at the nursing home are from other states; (6) that the nursing home was almost completely controlled by federal regulations and that 95% of the income received by Coosa Valley for providing nursing-home services is in federally funded Medicaid (80%) or Medicare (15%); (7) that the supplies and equipment procured from out of state were made available to Tucker pursuant to her admission agreement; and (8) that without these out-of-state supplies and equipment and federal funds, the nursing home could not have provided nursing-home services to [*11] Tucker. These undisputed facts demonstrate that the underlying transaction in this case -- Coosa Valley's providing nursing-home care to Tucker -- involves interstate commerce under the FAA. *See McGuffey Health & Rehab. Ctr. v. Gibson*, [Ms. 1020289, May 9, 2003] ___ So. 2d ___, 2003 Ala. LEXIS 145 (Ala. 2003) (holding in a similar context that a contract for nursing-home services involved interstate commerce under the FAA even under the now abrogated but much more stringent standard set forth in *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759 (Ala. 2000)). Furthermore, if there were any doubt as to whether providing nursing-home services to Tucker involved interstate commerce, that doubt would be put to rest by the fact that the transaction is unquestionably economic in nature, and therefore the question whether the transaction involves interstate commerce can be analyzed by examining the aggregate ... involved interstate commerce, Coosa Valley has met its burden." Further, the court rejected both the argument that contract was one of adhesion and that it violated Medicaid law. On this later issue, the court stated: "First, Owens admits that there is no evidence indicating that any of [*16] Tucker's fees for nursing-home care were paid through Medicare or Medicaid. If none of Tucker's fees were paid by Medicare or Medicaid, the statute would not apply to Tucker. Second, requiring a nursing-home admittee to sign an arbitration agreement is not charging an additional fee or other consideration as a requirement to admittance. Rather, an arbitration agreement sets a forum for future disputes; both parties are bound to it and both receive whatever benefits and detriments accompany the arbitral forum. If we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring "other consideration" in order to gain admittance to the nursing home and thus be disallowed by the statute. Owens's argument based on 42 U.S.C. § 1396r(c)(5)(A)(iii) is without merit."

Richmond Healthcare v. Digati, 2004 Fla. App. LEXIS 7738; 29 Fla. L. Weekly D 1324 (Fla. 4th DCA June 2, 2004): Decision upholds (enforces) arbitration agreement

holding as follows: Among the issues presented was that the agreement foreclosed certain statutory remedies. The court expressly held that such language does not make the agreement invalid. "Clearly nothing in this statute purports to regulate how arbitration provisions shall be done in admission contracts. We are therefore unable to find any statutory authority allowing judges to refuse to enforce valid arbitration provisions in nursing home admission contracts of competent parties, for reasons other than unconscionability." In footnote 3, the Court held out a single olive branch to the Plaintiffs as follows: "We do not decide whether the contract in this case was made by competent parties, or that any person involved in the making of the contract was authorized to do so, as that issue has not yet been litigated or decided by the trial court."

Five Points Health Care, Ltd. v. Alberts, 867 So. 2d 520 (Fla. 1st DCA, February 26, 2004). The Court reversed the trial court's order refusing to compel arbitration. Initially, the court held that the language of the arbitration agreement was broad enough to capture the controversy. As stated by the court, "[t]he remaining issue is whether, as the trial court's order contends, the fact that the complaint seeks recovery for duties imposed by law and in recognition of public policy thwarts the contractual right to arbitration. Under *Seifert* [**5], a court must consider three elements before ruling on a motion to compel arbitration: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration [*522] was waived. 750 So. 2d at 636. In the present case, the only issue raised by appellee in opposition to the motion to compel arbitration concerned the second *Seifert* prong -- whether an arbitrable issue exists. As noted above, the trial court felt that the complaint did not arise out of the Agreement because it did not require construction of the Agreement. The trial court went further, however, and recited its conclusion that the duties alleged to have been breached are wholly independent from the Agreement because these duties are imposed by law in recognition of the public policy of this state. Having veered down this path, the trial court concluded that the second *Seifert* prong had not been met and that arbitration would not be appropriate." The appellate court disagreed, noting that many statutory claims are subject to arbitration and, therefore, an arbitration agreement unenforceable, per se. Finally, the Court noted that, although the issue of substantive unconscionability was not raised, the admission agreement would not have been found unconscionable simply because it included an arbitration clause.

Articles: 2004

California Advocates for Nursing Home Reform, Arbitration Agreements: Why They Should Be Prohibited in Admission Agreements (undated web article), at http://www.canhr.org/publications/newsletters/advocate/adv_0903.htm.

K. Galle, Comment: The Appearance of Impropriety: Making Agreements to Arbitration Health Care Contracts More Palatable, 30 Wm. Mitchell L. Rev. 969 (2004).

T. McDonald, *Recent Developments in Long-Term Care Law: Trends, Legislation, Verdicts and Decisions* (DRI Nursing Home/ALF Litigation Seminar, September 9-10,

2004). "What are the recent developments, litigation trends, notable legislative changes and important verdicts in nursing home litigation? Mr. McDonald will discuss recent developments, the implementation of HIPAA and the effectiveness of arbitration provisions in resident Admission Agreements."²⁴

Cases: 2003

Howell v. NHC Healthcare-Fort Sanders, Inc., 109 S.W.3d 731 (Tenn. Ct. App. 2003); discretionary appeal not allowed by *Howell v. NHC Healthcare-Fort Sanders*, 2003 Tenn. LEXIS 632 (Tenn., June 30, 2003).²⁵ The court refused to enforce an arbitration agreement buried in a lengthy admissions agreement. In doing so, it held as follows: The Agreement is eleven pages long, and the arbitration provision is on page ten. Rather than being a stand-alone document, it is "buried" within the larger document. It is written in the same size font as the rest of the agreement, [**11] and the arbitration paragraph does not adequately explain how the arbitration procedure would work, except as who would administer it. [*735] The facts surrounding the execution of the agreement militate against enforcement. The Trial Court found Ms. Howell had to be placed in a nursing home expeditiously, and that the admission agreement had to be signed before this could be accomplished. The agreement was presented to Mr. Howell on a "take-it-or-leave-it" basis. Moreover, Mr. Howell had no real bargaining power. Howell's educational limitations were obvious, and the agreement was not adequately explained regarding the jury trial waiver. The fact that Howell cannot read does not excuse him from a contract he voluntarily signed. *See Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 359 (Tenn. Ct. App. 2001). But the circumstances here demonstrate that Larkin [the admissions coordinator] took it upon herself to explain the contract, rather than asking him to read it, and that her explanation did not mention, much less explain, that he was waiving a right to a jury trial if a claim was brought against the nursing home. As we have observed, the defendant who is seeking to enforce the arbitration provision [**12] has the burden of showing the parties "actually bargained over the arbitration provision or that it was a reasonable term considering the circumstances." *Brown*. Given the circumstances surrounding the execution of this agreement, and the terms of the agreement itself, appellant has not demonstrated that the parties bargained over the arbitration terms, or that it was within the reasonable expectations of an ordinary person.

Raiteri v. NHC Healthcare/Knoxville, Inc., 2003 Tenn. App. LEXIS 957 (Tenn. Ct. App. No. No. 2-791-01, December 30, 2003).²⁶ Lynn Raiteri, as the daughter and next friend of the late Mary Helen Cox ("Mrs. Cox"), sued NHC Healthcare/Knoxville, Inc. ("the defendant"), as well as others, for the wrongful death of Mrs. Cox, whose death allegedly resulted from improper care at the defendant's nursing home. We granted the plaintiff's Tenn. R. App. P. 9 application for an interlocutory appeal in order

²⁴ http://www.dri.org/dri/cle-seminars/pdf/2004_nursehome_brochure.pdf.

²⁵ Cited in *Cooper v. MRM Inv. Co.*, 367 F.3d 493 (6th Cir. May 3, 2004) (the arbitration clause was "buried" inconspicuously on page ten of eleven-page agreement).

²⁶ Also at <http://www.tsc.state.tn.us/opinions/tca/PDF/034/raiteril.pdf>.

to review the trial court's order granting the defendant's motion to compel mediation and arbitration pursuant to the dispute resolution procedures [*2] contained in the defendant's nursing home admission agreement. We reverse. ... Mrs. Cox, age 77, was admitted to St. Mary's Hospital with chest pains and other symptoms. Her husband, Charles E. Cox ("Mr. Cox"), age 75, anticipated that his wife would receive physical therapy at St. Mary's so she could regain some or all of her mobility; but apparently the hospital was not prepared to render these services to her. Since Mr. Cox was physically unable to lift and otherwise [*3] care for his wife at home, he made arrangements to admit her to the defendant's nursing home. On December 20, 2000, Mr. Cox met at the nursing home with the defendant's admissions coordinator. Mrs. Cox was not present at the meeting. The admissions coordinator asked Mr. Cox to sign the nursing home's "Admission and Financial Contract" ("the admission agreement") on his wife's behalf, even though Mrs. Cox had not been diagnosed or adjudicated as mentally incompetent. He complied with her request. It was the intention of the parties that Mrs. Cox would receive physical therapy and vocational rehabilitation services at the nursing home. ... It is undisputed that Mr. Cox can read. Although the admission agreement specifically defines the term "legal representative" as "anyone authorized by the [patient] to act on the [patient's] behalf," the admissions coordinator admitted that she did not receive any indication from either of the Coxes that Mr. Cox was authorized to sign on Mrs. Cox's behalf. She stated that she did not know if Mr. Cox had his wife's authorization to act on her behalf. She testified that she allowed him to sign the admission agreement simply because he was Mrs. Cox's husband. The admissions coordinator went on to testify that she believed Mrs. Cox was competent when Mr. Cox signed the admission agreement. Despite Mrs. Cox's unquestioned mental capacity, the admissions coordinator did not discuss the admission agreement with her; furthermore, she did not give Mrs. Cox a copy of that document. She stated that she did not know whether Mrs. Cox was ever made aware of the terms and conditions of the admission agreement. Significantly, the admissions coordinator acknowledged that Mrs. Cox "was capable of understanding it," i.e. [*6] , the admission agreement. One of her children described her as "fine mentally" and "very competent." The admissions coordinator confirmed that Mrs. Cox would not have been admitted if Mr. Cox had refused to sign the admission agreement or had refused to assent to the terms of the dispute resolution procedures in the agreement, which provisions included one waiving Mrs. Cox's right to a jury trial."

We hold that the admission agreement in the instant case is a contract of adhesion because the admissions coordinator offered it to Mr. Cox on a take-it-or-leave-it basis, i.e., Mr. Cox had to sign the agreement as written or his wife would not be admitted. *See Eyring*, 919 S.W.2d at 320. [*26] Mr. Cox, as the weaker party, was not afforded an opportunity to bargain over the terms of the agreement. He certainly had no opportunity to bargain over the mediation and arbitration provisions. He was handed a form contract, under, what was for him, very trying circumstances, i.e., his need to quickly find accommodations for his ailing wife. It is clear he had two options: sign the form contract as presented to him by the defendant, thereby clearing the way for his wife's admission to the defendant's facility or refuse to sign the contract and thereafter try to make arrangements for his wife's shelter and related accommodations. This is a classic case of a contract of adhesion.

As a stand-alone basis for our decision, we conclude that the evidence before us preponderates against the trial court's implicit decision that Mr. Cox had authority to sign the admission agreement on behalf of his wife. There is absolutely no evidence that he had her express authority to sign for her. We also hold that the defendant cannot rely upon the concept of apparent authority. The evidence reflects that Mrs. Cox had her mental faculties, [*28] was "sharper" than her husband, and was otherwise in a position to indicate whether she assented to the terms of these significant contract provisions. The record is also devoid of any exigent circumstances that would clothe Mr. Cox with apparent authority to bind his wife to the admission agreement, particularly the alternative dispute resolution provisions. We certainly find nothing in the record before us, either factually or legally, warranting a holding that Mr. Cox had the right to waive his wife's very valuable constitutional right to a jury trial to adjudicate her rights in this matter. As the admissions coordinator acknowledged, Mrs. Cox "was capable of understanding" the admission agreement. The admissions coordinator did not adequately explain why she did not insist upon Mrs. Cox signing the admission agreement, or, at a minimum, why she did not ask Mrs. Cox to ratify what her husband had purported to do on her behalf.

"In summary, we hold that Mr. Cox did not have the actual or apparent authority to bind Mrs. Cox to the alternative dispute resolution provisions in the admission agreement. Furthermore, these provisions, especially the waiver of the right to a jury trial, are outside the reasonable expectations of a reasonable consumer, and, hence, unenforceable. Following *Eyring* and *Howell*, we hold that the trial court erred when it decreed that the mediation and arbitration terms were enforceable. Therefore, we conclude that the judgment below must be reversed."

Romano v. Manor Care, Inc., 861 So. 2d 59; 2003 Fla. App. LEXIS 14809; 28 Fla. L. Weekly D 2268 (Fla. Dist. Ct. App. Oct. 1, 2003).²⁷ The husband and guardian of a nursing home resident filed a claim against Manor Care, the nursing home, for deprivation of the resident's rights as set forth in sections 400.022 and 400.023, Florida Statutes (2001). The Court refused to uphold arbitration agreement on substantive and procedural unconscionable. Regarding the first, whether the agreement was substantively unconscionable, the court found: "This arbitration agreement would not vindicate the resident's statutory rights in any respect. In fact, the agreement would specifically deprive the resident of remedies that the legislature felt were important to the reduction of elder abuse in nursing homes. While it was the intent of the remedial policies of the legislation to permit the award of punitive damages for certain conduct, the agreement prevented the arbiters from awarding such damages. Nor could the arbiters award attorney's fees to the successful resident even though the ability to make such an award was intended by the legislature. For instance, according to [**10] the allegations of the complaint, Josephine was only in the nursing home for thirty days but developed bed sores and received grossly substandard care. Given her advanced age, compensatory damages may be small. Under the arbitration agreement, in order to

²⁷ <http://www.4dca.org/Oct2003/10-01-03/4D02-3852.pdf>.

vindicate her rights, she would have to pay for an attorney herself, the cost of which may prevent her from pursuing a rightful claim. Because the arbitration agreement fails to allow the arbiter to award either attorney's fees or punitive damages, it does not permit the nursing home resident to vindicate her statutory rights. Therefore, the agreement is unenforceable. *See Flyer Printing*, 805 So. 2d at 831. Because of the limitations contained in the arbitration agreement, it takes away any effective enforcement of the statutory rights of the resident.”

As to procedural unconscionability, it is true that the arbitration agreement was not 'hidden in the fine print.' It was presented to Lawrence as simply another document required to be signed as part of the admission process. Both Lawrence and his wife are elderly, and while Lawrence owned his own business, there was no showing that he had legal training to understand the rights he was signing away for his wife. Moreover, he was being asked to sign these documents after his wife was already admitted to the nursing home without being told that his failure to sign them would not affect her care or her ability to stay in the home. Given the ages of the resident [79 years old] and her husband and the circumstances surrounding signing of the agreement, we conclude that some quantum of procedural unconscionability is shown. Because of the egregious substantive unconscionability of the terms of the agreement, the test of *Kohl* and *Powertel* is met, the agreement is unconscionable and thus unenforceable.²⁸

McGuffey Health & Rehab. Ctr. v. Gibson, 864 So. 2d 1061 (Alabama, May 9, 2003). The court framed the issue as follows: “This medical-malpractice action involves only one issue: Whether the trial court erred in holding that an admission agreement signed on behalf of Zadie Gibson by Dorothy Jackson with McGuffey Health and Rehabilitation Center (“McGuffey”) did not evidence a transaction that substantially affected interstate [*1062] commerce so as to require Gibson's medical-malpractice action against McGuffey to be arbitrated in accordance with the arbitration provision in the admission agreement.” “This Court, in *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759, 761-62 (Ala. 2000), stated that a party seeking to compel arbitration must prove that the transaction had a “substantial effect” on interstate commerce before [**3] the party can compel another party to resolve their differences by arbitration. *Sisters of the Visitation*, which involved a construction contract, listed five factors to evaluate in determining whether a transaction has a substantial effect on interstate commerce: 1) the citizenship of the parties; 2) whether the tools and equipment moved in interstate commerce; 3) the allocation of the cost of services and materials; 4) whether the object of the contract is capable of subsequent movement across state lines; and 5) the degree of separability from other contracts. 775 So. 2d at 765-66.” “We hold that Medicare funds should be considered in determining whether the admission agreement had a substantial effect on interstate commerce. Because two-thirds of all sums received by McGuffey for the care and treatment of Gibson came from out of state, and because materials were purchased directly from out-of-state vendors to feed Gibson, to provide her bedding, and to keep her and her surroundings clean, we

²⁸ See also http://www.healthlawyers.org/hlw/issues/031017/031017_04_arb_Romano.cfm, discussing *Romano*.

hold that the admissions agreement had a substantial effect on interstate commerce, without considering the items listed in footnote one; therefore, we reverse the judgment of the trial court and remand the case for proceedings consistent with this opinion.”

Algayer v. Health Ctr. of Pan. City, Inc., 866 So. 2d 75 (Fla. 1st DCA 2003). Court reverses trial court order compelling arbitration. Appellant's husband, age 83, was transferred from a hospital to Appellee's nursing home. Upon his arrival, he signed and initialed the admission documents, which contained a clause requiring arbitration in the event of disagreements. The following day, Appellant arrived at St. Andrews to see her husband. She alleges that she was asked to sign paperwork, that she informed the staff that her husband was legally incompetent, and that she thereafter signed the admission paperwork as his attorney-in-fact, but that she asked to read the documents [**2] and was not allowed to do so; rather, Appellee's employee read the documents to Appellant. Appellant signed the document and initialed certain pages, but did not sign or initial the page containing provisions on mediation and arbitration. Appellant alleges that she was unaware of the paragraphs in the contract entitled "Mediation" and "Arbitration" until her attorney in this case sent her a copy of it. Appellant's husband had initialed both provisions. Appellant's husband stayed at St. Andrews for one month, then was discharged; he died on May 1, 2001. After Appellant's husband died, a notice of suit was sent to defendant and there was no response. Suit was filed, the complaint was answered without any reference to arbitration. Discovery ensued. Six months later, the defendants amended their answer, seeking to compel arbitration. The trial court granted the motion and plaintiff/appellant appealed. “Appellant raises four issues on appeal. We affirm two of those issues without further discussion. However, we reverse as to the remaining issues. They are: (1) whether the trial court erred in ruling that St. Andrews had not waived its right to rely on the arbitration provision, and (2) whether the trial court erred in failing to address whether the arbitration provision is unconscionable.” The case was reversed and remanded with instruction that the trial court consider and rule on these issues.

Gainesville Health Care Ctr., Inc. v. Weston, 857 So. 2d 278 (Fla. 1st DCA 2003). The trial court found that the nursing home arbitration agreement was procedurally conscionable. The appellate court reversed, finding that holding to be without merit. The court described the facts surrounding execution of the agreement as follows: “The meeting between Ms. West and Ms. Miller took place during the former's lunch break. It probably lasted 15 to 20 minutes. During that meeting, Ms. West told Ms. Miller that she possessed a power of attorney on behalf of her mother, and executed several documents in that capacity. One of those documents was the Admission Contract. No substantive discussion occurred regarding that document. Ms. West (who is a high school graduate and, at the time, held a clerical/administrative position with a major healthcare provider) asked no questions about it; nor did she indicate that she had not read and understood it, as the acknowledgment immediately preceding the signature [**5] line recited (although she now claims that she did not read it before she executed it). Ms. West did not ask to be permitted to take the documents with her, so that she might study them or seek the advice of a lawyer or other more knowledgeable person before signing. Had she done so, that would have been permitted. It is clear that

any haste associated with reviewing and signing the documents was self-imposed by Ms. West. There is no suggestion that the Admission Contract was presented on a "take-it-or-leave-it" basis; nothing to suggest that, had Ms. West requested to amend that document in some material respect, such a request would have been denied; and no evidence that Ms. West could not have obtained a satisfactory placement for her mother except by acquiescing to the terms of the contract."

"Before a court may hold a contract unconscionable, it must find that it is both procedurally and substantively unconscionable. *E.g.*, *Bellsouth Mobility LLC v. Christopher*, 819 So. 2d 171, 173 (Fla. 4th DCA 2002); *Powertel*, 743 So. 2d at 574; *Complete Interiors, Inc. v. Behan*, 558 So. 2d 48, 52 (Fla. 5th DCA 1990); *Steinhardt*, 422 So. 2d at 889; *Kohl*, 398 So. 2d at 867. To determine whether a contract is procedurally unconscionable, a court must look to the "circumstances surrounding the transaction" to determine whether the complaining party had a "meaningful choice" at the time the contract was entered. *Williams*, 350 F.2d at 449. *Accord Steinhardt*, 422 So. 2d at 889; *Kohl*, 398 So. 2d at 869. Among the factors to be considered are whether the complaining party had a realistic opportunity to bargain regarding the terms of the contract, or whether the terms were merely presented on a "take-it-or-leave-it" basis; and whether he or she [**15] had a reasonable opportunity to understand the terms of the contract. As one Florida court has noted, while this may "require[] an examination into a myriad of details including [the complaining party's] experience and education and the sales practices that were employed by the [other party] . . . , **the basic concept is 'an absence of meaningful choice.'**" *Kohl*, 398 So. 2d at 869. To determine whether a contract is substantively unconscionable, a court must look to the terms of the contract, itself, and determine [*285] whether they are so "outrageously unfair" as to "shock the judicial conscience." *See, e.g., Belcher v. Kier*, 558 So. 2d 1039, 1043 (Fla. 2d DCA 1990) (declining to equate "unconscionability" with mere "unreasonableness"); *Free Unitholders of Outdoor Resorts at Orlando, Inc. v. Outdoor Resorts of Am., Inc.*, 460 So. 2d 382, 383 (Fla. 2d DCA 1984); *Steinhardt*, 422 So. 2d at 889. (Emphasis added). "It appears that the Admission Contract was pre-printed. However, there is no evidence to support a finding that it was offered to Ms. West (or anybody else) on a "take-it-or-leave-it" basis. More particularly, there is nothing to suggest that, had Ms. West so requested, the arbitration provision would not have been deleted. There is also no evidence that Ms. West could not have obtained a satisfactory placement for her mother except by acquiescing to the terms as written. Certainly, nothing on the face of the Admission Contract permits such findings." "There is no evidence to support the determination that appellee's choice of arbitrators would be limited to a group likely to be biased in favor of appellant. The evidence regarding the organization from which the arbitrators must be chosen according to the arbitration provision was limited to a stipulation." "There is, likewise, no evidence to support the determination that appellee's burden of persuasion would be greater in arbitration than it would in a court on any of the claims raised in the complaint." "There is competent, substantial evidence to support the trial court's findings that nobody associated with appellant explained the terms of the arbitration provision to Ms. West, and that Ms. West did not understand the arbitration provision. However, these are only two of the "circumstances surrounding the transaction." To determine whether Ms. West had a "meaningful

choice" at the time she executed the Admission Contract, all of the circumstances must be considered. Although the trial court noted that Ms. West had had "ample opportunity" to read the documents before she executed them and that, had she been uncomfortable with them, she might have taken them home to study or discuss "with other family members[,] . . . trusted friends or advisers" or a lawyer, it does not [**24] seem to have given these facts any weight. Among the other circumstances which the trial court does not appear to have given any weight are the facts that Ms. West asked no questions about the arbitration provision and said or did nothing to indicate she had not read and understood that provision before she executed the contract (as the acknowledgment immediately above the signature lines recited); there is nothing to suggest that the contract was presented on a "take-it-or-leave-it" basis, or that, had Ms. West requested that the arbitration provision be deleted, it would not have been; there is no evidence that Ms. West could not have obtained a satisfactory placement for her mother except by acquiescing to the terms of the contract; and that, to the extent Ms. West did not, in fact, read the arbitration provision, nothing appellant did or said had any impact on her failure to do [*288] so. In short, if one looks to all of the "circumstances surrounding the transaction," it is simply not reasonably possible to reach the conclusion that Ms. West had no "meaningful choice" at the time she executed the Admission Contract."

Consol. Res. Healthcare Fund I, Ltd. v. Fenelus, 853 So. 2d 500 (Fla. 4th DCA 2003). The trial court found the agreement invalid because it had not been signed by a representative of the nursing home and was "boiler plate." The court of appeals reversed. In its order denying the motion, the trial court stated its grounds: that no valid contract existed because the nursing home representative signed the agreement only as a witness and not in her capacity as the nursing home representative; that this case is distinguishable from the case on which appellant relied, *Integrated Health Services of Green Briar, Inc. v. Lopez-Silvero*, 827 So. 2d 338 (Fla. 3d DCA 2002), because in that case there was no place for the nursing home representative to sign, whereas in this case there was; and, furthermore, that a valid contract did not exist because the subject contract was a "boiler plate contract." We disagree that this case is distinguishable from *Lopez-Silvero* in any meaningful respect. In that case, as in this one, a suit was brought against a nursing home alleging improper care and the nursing home sought to compel arbitration pursuant to its admission contract. The Third District reversed the trial court's denial of the motion, concluding that even though the nursing home did not sign the contract at all, the contract was still binding: A contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract. See *Gateway Cable T.V., Inc. v. Vikoa Construction [sic] Corp.*, 253 So. 2d 461 (Fla. 1st DCA 1971). As noted in *Gateway Cable T.V., Inc. v. Vikoa Construction [sic] Corp.*, 253 So. 2d at 463, "A contract may be binding on a party despite the absence of a party's signature. The object of a signature [**7] is to show mutuality or assent, but these facts may be shown in other ways, for example, by the acts or conduct of the parties." See also *Sosa v. Shearform Mfg.*, 784 So. 2d 609 (Fla. 5th DCA 2001) (parties may be bound to the provisions of an unsigned contract if they acted as though the provisions of the contract were in force.) Here, both the resident and IHS acted as if they had a valid contract. ... The trial court also found the agreement to be invalid because it

was a "boiler plate contract". Taken literally, such a finding would be of no consequence, since the mere fact that a contract includes boiler plate language is not sufficient to invalidate it. However, we believe, as appellee has suggested in her brief, the trial court intended its use of "boiler plate" as shorthand for a finding that the arbitration [**10] clause was unconscionable. ... [A]s we have discussed above, Eugene conceded he willingly signed the agreement, Taylor testified he had the opportunity to read it and ask questions before signing it, and the arbitration clause not only did not appear in small print, but it was titled in boldface and could have been refused by "X"ing it out. We hold that appellee did not demonstrate procedural unconscionability by the mere act of appellant's [**12] including the arbitration clause in question (and an optional one at that) within the paperwork that Eugene had to sign to admit his mother to the nursing home. ... With respect to the substantive prong, appellee argues that the clause would not have been substantively unconscionable had Eugene been given the choice of affirmatively giving up his right to trial, but instead he was deprived of a fundamental right unless he affirmatively indicated otherwise. However, as appellant argues, an arbitration clause need not even be optional in order to be valid; that was just additional evidence that it was fair. We hold there has been no showing of unconscionability sufficient to invalidate the arbitration clause in question.

Northport Health Servs. v. Estate of Raidoja, 851 So. 2d 234 (Fla. 5th DCA 2003). The court of appeals affirmed an order denying the nursing home's motion to compel arbitration. "Although public policy favors the enforcement of arbitration agreements, this one is fatally flawed. Another paragraph of the same Admission Agreement states that the laws of the state of Alabama shall control interpretation, construction, and enforcement of the contract, and that venue shall be proper exclusively in Tuscaloosa County, Alabama. If an arbitration clause, such as this [**2] one, calls for arbitration that is to take place in a foreign jurisdiction, Florida courts cannot, over objection, compel arbitration. *Post Tensioned Engineering Corp. v. Fairways Plaza Associates*, 412 So. 2d 871 (Fla. 3d DCA 1982), *see also Damora v. Stresscon Intl., Inc.*, 324 So. 2d 80 (Fla. 1976)."

Rego Park Nursing Home v. Kraughto, 302 A.D.2d 269; 755 N.Y.S.2d 386; 2003 N.Y. App. Div. LEXIS 1545 (App. Div., 1st Dept. 2003). This case concerns an appeal by the nursing home of an arbitrator's award relating to nursing home charges. It is included to demonstrate how arbitration awards are (or are not) judicially reviewed: "With respect to interest, any arbitrator error is not judicially reviewable since the purported limitation on the arbitrator's authority is not contained in the arbitration clause itself (*see Matter of Silverman Benmor Coats*, 61 N.Y.2d 299, 308, 461 N.E.2d 1261, 473 N.Y.S.2d 774). With respect to costs, petitioner does not claim that the question was not submitted to the arbitrator (*see id.*, at 309), and we reject petitioner's argument that the arbitrator's resolution on costs was totally irrational. Indeed, as the IAS [***3] court explained, assuming the arbitrator erred by ordering the parties to share costs, the attempt to do justice was manifestly reasonable in view of the finding that petitioner's billing practices were arbitrary (*see id.* at 308)."

Phillips v. Crofton Manor Inn, 2003 Cal. App. Unpub. LEXIS 4770 (2nd App. Dist., Div. One, May 15, 2003).²⁹ This decision is unpublished. Judith Phillips arranged for Father to live at the Crofton Manor residential care facility for the elderly. In connection with that arrangement, on July 31, 1999, Judith signed a rental agreement. The rental agreement provided for many services, such as three meals a day and snacks, maid services, transportation services, planned activities, notification to family members and other appropriate persons or entities of the resident's needs, the scheduling of medical appointments, and "regular observation of resident's physical and mental condition." When Judith signed it, she noted that her relationship to father was "daughter." She also signed lines on the rental form designated as being for the resident or the resident's "authorized representative." She held a durable power of attorney for health care. ... Defendants, ... point to the DPAHCD held by Judith as a sufficient basis for authorization to waive Father's rights redress in the legal system. However, [*16] Judith's reference to that power of attorney indicates that it is a limited power of attorney, and that she has made only health care decisions pursuant to such authority. Notably, despite holding the DPAHCD, Judith sought appointment as Father's guardian ad litem, from which it can be inferred that she did not believe that her authority under such power of attorney authorized her to make legal decisions for Father. (*See County of Los Angeles v. Superior Court* (2001) 91 Cal.App.4th 1303, 1311, [guardian may make tactical and even fundamental decisions affecting litigation, but always with the interest of the guardian's charge in mind].) The best evidence of what Judith was authorized to do under the DPAHCD, of course, would be the language of the DPAHCD itself. However, although defendants refer to such document as a basis for arguing that Judith's signature bound Father, herself, and her siblings to arbitrate any claims, they failed to include a copy of it in the Appellants' Transcript, although it was apparently part of the record below. Accordingly, there is no basis, either statutory or contractual, for concluding that Judith was authorized to waive Father's, [*17] let alone her siblings, rights to pursue a legal action rather than to submit to arbitration. Consequently, no valid arbitration contract exists. (*Pagarigan, supra*, 99 Cal.App.4th at pp. 301-303.) And, even assuming that by signing the agreement Judith agreed to arbitrate her claims, if any, the trial court acted well within its discretion by refusing to compel her to arbitrate them, given that Code of Civil Procedure section 1281.2 allowed it to refuse to enforce the arbitration agreement against Judith when Father's estate and her siblings would be engaged in litigating claims against defendants based on the same transaction, so that there was a possibility of conflicting rulings on a common question of law or fact. (Code Civ. Proc., § 1281.2, subd. (c).)

Articles: 2003

²⁹ Cited in K. Pearson, *The Responsible Thing to do about 'Responsible Party' Provisions in Nursing Home Agreements: A Proposal for Change on Three Fronts*, 37 U. Mich. J.L. Ref. 757 fn. 171 (Spring 2004), for the proposition that nursing homes now routinely include arbitration clauses in admissions agreements. Presumably, "nursing homes hope that this will encourage insurers to lower their liability insurance premiums." P. Mellette, E. Towey, J. Hunt, *Health Care Law*, 37 U. Rich. L. Rev. 199, 233 (2002).

E. Carlson, Mandatory Arbitration Forbidden for Nursing Facility Residents Reimbursed Through Medicare or Medicaid (National Senior Citizens Law Center October 14, 2003), at http://www.nslc.org/news/03/10/nfarbitration_carlson.htm.

Carlson writes that “Federal Medicare and Medicaid law provide a simple but powerful weapon against mandatory nursing facility arbitration agreements. A nursing facility must accept Medicare and Medicaid, plus appropriate co-payments and deductibles, as payment in full. Therefore, it is illegal for a facility to require, as a condition of admission or continued stay, that a resident forego his or her right to a jury trial, if the resident's care is reimbursed through Medicare or Medicaid.”

Carlson cites 42 C.F.R. § 489.30, which requires that any Medicare-certified provider accept Medicare (including patient-paid co-payments and deductibles) as payment in full. See also 42 C.F.R. § 447.15; and see 42 U.S.C. § 1396r(c)(5)(A)(iii); 42 C.F.R. § 483.12(d)(3).

R. 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 (2003).

G. Taylor & K. Ward, Arbitration Clauses in Nursing Home Admission Agreements: Are They Enforceable? (undated, but citing 2003 cases) (Alabama Law), available at http://www.beasleyallen.com/publications/gbt/arbitration_in_nh_admission_agreement.pdf.

National Citizen's Coalition for Nursing Home Reform, Resolution on Tort Reform, at http://nccnhr.newc.com/public/50_876_4203.cfm. This resolution opposes any legislation that would have the effect of limiting nursing home accountability.

M. Infante, & K. Lovitch, *Arbitration Agreements: Keeping It Out of the Courtroom* (American Health Lawyers Association 2003), available for \$40 (non-member price), <http://www.healthlawyers.org/Ecommerce/ProductDisplay.cfm?ProductID=38333>. Addresses the inclusion of arbitration agreements (intended as a risk-management tool) in the nursing home admissions process. Discusses the practical matters regarding drafting, implementation, and enforceability of these agreements. Attachments include redacted complaint and associated documentation of arbitration process; January 9, 2003, CMS memo regarding binding arbitration in nursing homes, accompanied by associated Arkansas memorandum; and court order denying a motion to stay and compel arbitration in the case of *Estate of Mary Chapman v. Gainesville Health Care Center, Inc.*

Cases: 2002

Pagarigan v. Libby Care Center, Inc., 99 Cal. App. 4th 298 (Calif. App., June 12, 2002).³⁰ The nursing home's motion to compel arbitration was denied. That decision was affirmed on appeal. "Defendants bore the burden of establishing a valid agreement to arbitrate. Defendants admit Johnnie Pagarigan did not sign either arbitration agreement. They further admit Ms. Pagarigan was mentally incompetent at the time she was admitted to Magnolia Gardens and at the time her daughters signed the arbitration agreements approximately a week later. There was no evidence Ms. Pagarigan had signed a durable power of attorney. It necessarily follows Ms. Pagarigan lacked the capacity to authorize either daughter to enter into the arbitration agreements on her behalf. Consequently no valid arbitration contract exists." The nursing home argued that the nursing home's personal representative held herself out as having authority to bind the resident. That argument was rejected. "A person cannot become the agent of another merely by representing herself as such. To be an agent she must actually be so employed by the principal or 'the principal intentionally, or by want of ordinary care, [has caused] a third person to believe another to be [*302] his agent who is not really employed by him.'"

Community Care of America of Alabama, Inc., v. Davis, Ala. Supreme Ct., Sept. 13, 2002, <http://www.wallacejordan.com/decisions/Opinions2002/1010454.htm>. The Alabama Supreme Court affirmed, but on different grounds, determining that the Federal Arbitration Act did not apply because, although the nursing home's parent company operates in interstate commerce, the actual operation of the "labor-intensive" nursing home business is primarily a local enterprise.

In re Northport Health Care Services, Arkansas Department of Human Services (July 2002), at <http://www.nslc.org/news/03/03/northportdecoder1.pdf>.

In *Northport*, the facility sought a declaratory order after an OLTC attorney "opined that Northport's "Dispute Resolution Program, Arbitration Agreement, and Waiver of Jury Trial" runs afoul of Ark. Code Ann. § 20-10-1003(b) and 42 C.F.R. § 483.420 (a)(3)." In analyzing the agreement, the Department began by reviewing the terms: (1) Northport is bound only as to disputes with the resident; however, the resident and the resident's representatives are bound in disputes with Northport, Northport's parent or subsidiary companies, facility officers, directors, managers, employers, agents, and any other person. Furthermore, § 16 F. of the Agreement goes on to expressly bind family members, advocates, and ombudsmen; (2) [appears to be redacted]; (3) All disputes of \$25,000 or more must be resolved by binding arbitration; (4) The arbitrator has exclusive authority to decide if the Agreement is valid; (5) Alabama law governs the arbitration procedures, and the Alabama Medical Liability Act limits the facility's exposure to damages; (6) The right to a jury trial is waived; (7) The parties acknowledge that Northport regularly engages in transactions involving interstate commerce, that the services provided by Northport involve interstate commerce, and that the Federal Arbitration Act governs all arbitrations."

³⁰ <http://www.courtinfo.ca.gov/opinions/documents/B152764.PDF>.

The Department next examined consideration. No view was expressed regarding private pay residents. However, with respect to Medicare and Medicaid beneficiaries, the Department found "Program recipients are entitled to nursing care as set out in state and federal laws. They gain nothing -- except admission to the particular Northport facility -- in return for forfeiting their resident rights. In fact, federal regulations prohibit any flow of consideration between residents and Northport for covered services. Northport may not "charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the [Program], any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility." 42 C.F.R. § 482.12 (d)(3)."

The Department found an absence of mutuality. While residents are prohibited from seeking judicial relief, the facility is free to do so. "[I]t is clear that residents are compelled to forego significant substantive rights, but Northport is not."

The Department found that the agreement was unconscionable. Persons entering nursing homes are in the throes of what may be the biggest crisis of their lives. Most are significantly impaired and in need of immediate assistance and care. These circumstances naturally result in a high level of facility control and relative helplessness of residents.

The abuses to which nursing home operations and their residents are susceptible are well known and documented. "Nursing home patients present particular problems because of several factors: (1) their advanced age (average 82); (2) their failing health (average four disabilities); (3) their mental disabilities (55 percent are mentally impaired); (4) their reduced mobility (less than half can walk); (5) their sensory impairment (loss of hearing, vision, or smell); (6) their reduced tolerance to heat, smoke and gasses; and (7) their greater susceptibility to shock." Nursing Home care in the United States: Failure in Public Policy, Supporting Paper No. 7, Report of the Subcommittee on Long-Term Care of the Special Committee on Aging, United States Senate, 94th Congress, 2d Session, xx (1976), as quoted in *Friedman v. Division of Health*, 537 S.W.2d 547, 548-49 Mo. banc 1976); See, also, F. Moss & V. Halamandaris, *Too Old, Too Sick, Too Bad: Nursing Homes in America* (1977); M Mendelsohn, *Tender Loving Greed* (1974); C. Townsend, *Old Age: The Last Segregation* (1971). Only four to nineteen percent of those entering a nursing home depart alive. *Nursing Home Access: Making the Patient Bill of Rights Work*, 54 J.Urb.L. 474, 474 (1977).

Stiffelman v. Abrams, 655 S.W.2d 522, 529 (Mo. banc 1983). What's more, the contract appears to be an adhesion contract. It necessarily follows that there is a gross inequality of bargaining power, all to the considerable disadvantage of residents. ... Not all adhesion contracts are unconscionable per se, but at a minimum such contracts must be clear and must contain ample notice of the contract's consequences. The Agreement is neither clear nor does it put applicants on notice of important consequences. That is because the Agreement affects rights that are not explicitly mentioned, such as the right to bring a wrongful death action.

The Department next considered federal and state law, finding that the facility has a duty to protect and support the resident's rights, including the right to redress in the

courts. “Considering that the right to a civil jury trial is a fundamental constitutional right enjoyed by every U.S. citizen, Northport’s Agreement eliminating that right plainly violates both the positive and negative aspects of residents’ rights. That is, the Agreement not only fails to encourage the exercise of fundamental rights, but also unabashedly calls for a forfeiture of rights, including the right to a jury trial and the Congressionally established right to the protections afforded by a federal ombudsman.”³¹

The Department found that the Federal Arbitration Act is inapplicable because nursing facility use is driven by local population needs, which is intrastate, not interstate, commerce. Similarly, state court actions involve intrastate matters.

The Department concluded by ordering “that the Agreement is a violation of residents’ rights. Accordingly, if Northport uses the Agreement, OLTC will consider terminating Northport’s Program provider agreements. In addition, OLTC will consider terminating the Program provider agreement of any long-term care provider that employs terms substantially similar to the offending terms found in the Agreement.”

Peak Med. Okla. No. 5 v. Collins, 237 F. Supp. 2d 1287 (N.D. Okla. 2002).

Following a head injury, her guardian “admitted Hart into the Mayfair Nursing Center (the “Mayfair”), a licensed nursing facility owned and operated by the plaintiff, Peak Medical Oklahoma No. [**2] 5, Inc. (“Peak Medical”), in Tulsa, Oklahoma. At the time of Hart’s admission, Peak Medical and Collins entered into an admission agreement (the “Admission Agreement”), which contained a provision in which the parties agreed to resolve any disputes arising out of or relating to the provision of services at the Mayfair through mediation or arbitration, and not by a lawsuit filed in court (the “Arbitration Clause”).” After the resident was sexually battered, suit followed and the nursing home filed a “Petition to Stay State Court Action and to Enforce Arbitration.” The court found that the Federal Arbitration Act does not create an independent federal cause of action, that diversity was not complete and dismissed the action on jurisdictional grounds.

Community Care of America v. Alabama, Inc. d/b/a IHS of Southgate f/k/a Southgate Village v. Davis, 850 So. 2d 283 (Ala. Sept. 13, 2002). The nursing home’s motion to compel arbitration was denied and that ruling was affirmed on appeal. The nursing home failed to qualify to business in Alabama. For that reason, the court held the nursing home was barred from enforcing the agreement.

Integrated Health Services of Green Briar, Inc. v. Lopez-Silvero, 827 So.2d 338 (Fla. DCA 2002). A Florida intermediate appellate court reversed an order denying a facility’s motion to compel arbitration, and remanded, directing the trial court to grant the motion. Only the resident signed the admissions contract (there was no signature line for the facility). Both the resident and the facility signed other documents and the facility performed under the contract. The court determined the contract was binding because both parties acted as though there was a valid contract.

³¹ This issue was also argued in the *Perkins* Brief, at pages 7-9, *supra*.

Flaum v. Superior Court of Los Angeles County, 2002 Cal. App. Unpub. LEXIS 11848 (2nd App. Div., December 20, 2002). "Petitioner Gail Flaum filed this action against a nursing home and related persons and entities following the death of her father, a former resident of the nursing home. Flaum filed some causes of action on her own behalf and some as the executor of her late father's estate. The defendants petitioned to compel arbitration pursuant to an arbitration agreement signed by Flaum's father when he first entered the nursing home. The trial [*2] court granted the defendants' petition. Flaum petitions this court for writ relief from the trial court's order. Shortly after Flaum filed her petition, we issued our opinion in *Buckner v. Tamarin*, 98 Cal.App.4th 140 (2002), in which we held that an arbitration agreement cannot bind adult heirs of a signatory to the agreement where the heirs were not themselves parties to the agreement. In light of this opinion, it is questionable whether the causes of action brought by Flaum on her own behalf are subject to arbitration. We therefore grant the petition in part and remand to the trial court so it can reconsider its decision in light of *Buckner*."

Cases: Prior Years

Milon v. Duke University, 551 S.E.2d 561 (N.C. Ct. App. 2001), reversed 559 S.E.2d 79 (N.C. 2002). The North Carolina Court of Appeals reversed a trial court decision denying Defendant's motion to compel arbitration. The North Carolina Supreme Court reversed that decision finding that Mrs. Milton did not have apparent authority to bond her husband to an arbitration agreement because (1) there was no evidence that she was authorized to sign his name to the agreement, (2) there was no document giving her legal authority to act as agent, and (3) the resident denied having seen the arbitration agreement or seeing his wife sign it.

Woodcrest Nursing Home v. Local 144, Hotel, Hosp., Nursing Home &..., 788 F.2d 894

Buraczynski v. Eyring, 919 S.W.2d 314 (Tenn. 1996). The Supreme Court held that arbitration agreements between physicians and their patients are "not void as against public policy, and are therefore enforceable under the Tennessee Arbitration Act." The Court pointed out that "under the terms of the [Tennessee Arbitration Act], arbitration agreements generally are enforceable unless grounds for their revocation exist in equity or in contract law." The court noted a word of caution that such agreements may constitute contracts of adhesion which must be closely scrutinized to determine if unconscionable or oppressive terms are imposed upon the patient which prevent enforcement of the agreement. The case was cited in both *Howell* and *Raiteri*, discussed *supra*.

Blanchard v. Central Park Lodges, Inc., d/b/a IHS of Tarpon Springs, 805 So.2d 6 (Fla. 2nd DCA 2001). The Second DCA reversed a trial court order granting a motion to compel arbitration in a nursing home negligence and wrongful death action, also involving an IHS admission agreement. The Second DCA reversed the trial court

decision compelling arbitration and remanded the case for a full evidentiary hearing on all factual issues relating to the arbitration agreement, including the authenticity of the document, whether the agreement was properly executed and agreed to by Plaintiff, Plaintiff's capacity to enter into the agreement, and whether the admission contract was procedurally and substantively unconscionable.

Specific Efforts to Limit Abusive Admission Agreements

California

The California Advocates for Nursing Home Reform published a brochure titled *Nursing Home Admission Agreements*, available at http://www.canhr.org/pdfs/PDF_FactSheets/FS_AdmissionAgreement200402.pdf. Through consumer education, the group is attempting to help residents and family members understand what they are signing.³² The brochure includes the following specific advice regarding admission agreements:

To prevent residents from being able to sue for abuse or neglect, many nursing homes are asking new and current residents to sign admission agreements that include binding arbitration provisions. It is not wise to sign such an agreement.

By signing a binding arbitration agreement, you give up your constitutional right to go to court if a dispute arises in the facility, even if it involves abuse and neglect. There is no right to appeal a decision made through binding arbitration. An arbitration agreement should be signed voluntarily and without coercion only after you have had an opportunity to seek and consider legal advice about how to handle a dispute.

Nursing homes cannot require you to sign an arbitration agreement. Any arbitration clause must be on a form separate from the admission agreement and require separate signatures for approval.

Recently, California has adopted new regulations designed to standardize nursing home admission agreements. See *Regulation Title (R-5-01) California Standard Admission Agreement for Skilled Nursing and Intermediate Care Facilities*, available at <http://www.applications.dhs.ca.gov/regulations/searchRegulation.asp?REGID=R-5-01&submit1=Submit>. Comments on those regulations, dated July 9, 2004, are available at <http://www.canhr.org/pdfs/AdmissionAgreements200407.pdf>, and at <http://www.canhr.org/news/AdmissionAgreements200407.html>.

Michigan

In Michigan, a group of Elder Law Attorneys have joined together to draft a "model" admission agreement. The project is still underway. Contact Jim Schuster, CELA (Southfield, Michigan; (248) 356-3500) for more information on the status of those efforts.

³² An interesting example in this regard is a "summary" of arguments against mandatory arbitration at <http://www.harp.org/mandarb.htm>; and at <http://www.harp.org/arbit.htm>.

Other Issues and Materials You Should Know About

Federal Arbitration Act. “The purpose of the FAA was to reverse judicial hostility to arbitration agreements and to place arbitration agreements on equal footing with other contracts. *Keymer v. Management Recruiters Int’l, Inc.*, 169 F.3d 501, 504 (8th Cir. 1999) (emphasis added); see *Equal Employment Opportunity Comm’n v. Waffle House, Inc.*, 534 U.S. 279, 151 L. Ed. 2d 755, 122 S. Ct. 754, ___, 534 U.S. 279, 122 S. Ct. 754, 764, 151 L. Ed. 2d 755 (2002). Under the ‘savings clause’ of § 2, “state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.” *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987), *quoted in Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 685, 134 L. Ed. 2d 902, 116 S. Ct. 1652 (1996).” *Cnty. Care of Am. of Ala. v. Davis, supra*.

Uniform Arbitration Act. Portions of the Uniform Arbitration Act have been adopted in Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia and Wyoming.³³ Prefatory notes to the UAA state “Forty-nine jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation. ... The UAA did not address many issues which arise in modern arbitration cases. The statute provided no guidance as to (1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue provisional remedies; (3) how a party can initiate an arbitration proceeding; (4) whether arbitration proceedings may be consolidated; (5) whether arbitrators are required to disclose facts reasonably likely to affect impartiality; (6) what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences and otherwise manage the arbitration process; (9) when a court may enforce a preaward ruling by an arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney’s fees, punitive damages or other exemplary relief; (11) when a court can award attorney’s fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney’s fees and costs to a prevailing party in an appeal of an arbitrator’s award; and (13) which sections of the UAA would not be waivable, an important matter to insure fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another; and (14) the use of electronic information and other modern means of technology in the arbitration process. The Revised Uniform Arbitration Act (RUAA) examines all of these issues and provides state legislatures with a more up-to-date statute to resolve disputes through arbitration.”

³³ See <http://www.law.cornell.edu/uniform/vol7.html#arbit>.

The text of the act appears at <http://www.law.cornell.edu/uniform/vol7.html#arbit>.

Louisiana: La. R.S. 9:4230-4236 (1983) provides for voluntary arbitration agreements between a supplier of medical, dental or nursing home services and the patient, and contains a sample arbitration agreement which, when executed, is irrevocable and enforceable, except as is provided in the statute. The arbitration proceedings are governed by the provisions of the Louisiana Arbitration Law (La. R.S. 9:4201 et seq.).

South Carolina: A bill is currently pending, S. 1209, which provides: "A residency agreement between a nursing home and a resident of the nursing home. Notwithstanding another provision of law, the contracting parties may not agree that the residency contract is subject to arbitration and a provision to the contrary is null and void. For purposes of this item 'nursing home' has the meaning provided in Section 40-35-20(7)."³⁴

Texas: It is worth noting that some legislation (pending, proposed or enacted) authorizes arbitration, but places restrictions on how the form is presented.³⁵ For example, a bill introduced in the Texas legislature provides as follows:

If a contract subject to this section contains an agreement to arbitrate a dispute relating to a health care liability claim, the agreement to arbitrate must be the first article of the contract. The agreement must state: "A dispute between the parties to this contract relating to a health care liability claim, including any claim for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety, will be determined by arbitration. A party to this contract may not bring a suit against another party to this contract relating to a health care liability claim, except as Texas law provides for requiring arbitration or judicial review of arbitration proceedings. A party to this contract, by entering into this contract, is giving up the Constitutional right to have the dispute decided in a court of law before a jury, and instead is accepting the use of arbitration."

J. Casson & J. McMillen, Protecting Nursing Home Companies: Limiting Liability Through Corporate Restructuring (Electronic), Article from the Journal of Health Law, Volume 36, Number 4 (Fall 2003), available for purchase (\$30.00) at <http://www.healthlawyers.org/Ecommerce/ProductDisplay.cfm?ProductID=55273>.

Lessons That Can Be Drawn From The Cases and Suggestions

The pattern from the cases discussed above indicates that nursing home arbitration agreements will be reviewed on a case-by-case basis. The courts have largely ignored arguments regarding the nature of the nursing home admissions process, generally. Instead, they have focused on particular circumstances, such as whether the alleged

³⁴ http://www.scstatehouse.net/sess115_2003-2004/bills/1209.htm.

³⁵ <http://www.capitol.state.tx.us/tlo/78R/billtext/SB01671I.HTM>.

agent signing the agreement had authority to do so and whether the process in individual cases was unconscionable.

One suggestion, which involves speaking with lawyers who draft powers of attorney, was voiced by Larry Frolik, speaking during the closing session for the *National Academy of Elder Law Attorneys* (Dallas, November 2003). Frolik suggested restricting powers of attorney so they expressly withhold power to agree to binding arbitration. If done, then agents would not have authority to enter into arbitration agreements in the first place. This, however, requires communication of trial lawyer concerns to a different segment of the bar *before* the nursing home admission occurs.

Legislation, such as South Carolina's Senate Bill 1209 should be proposed.³⁶ However, advocates should keep in mind that the proposal will fall on deaf ears if presented by trial lawyers. Advocacy groups for the elderly should be educated concerning what nursing home litigation does to improve quality and accountability and should be assisted in presenting this type of legislation themselves where appropriate.

³⁶ For example, see <http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=9619>.