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ENDING UNFAIR ARBITRATION: FIGHTING AGAINST THE ENFORCEMENT OF ARBITRATION AGREEMENTS IN LONG-TERM CARE CONTRACTS*

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INTRODUCTION

Although provisions requiring nursing facility residents to agree to mandatory pre-dispute arbitration are now ubiquitous, many courts have refused to enforce these provisions and have adopted a variety of legal arguments to do so. Arbitration can be expensive and biased in favor of the nursing facility. It limits access to courts, discovery, available remedies and precedential value of decisions. Oftentimes, only after a nursing facility's negligence has caused a resident severe injury or death, does the resident or family member discover that, upon admission to the nursing facility or during their stay, the resident became bound to settle disputes in arbitration, ostensibly giving up the resident's constitutional right to a jury trial. While arbitration clearly benefits the corporation operating the nursing facility, mandatory pre-dispute arbitration can be detrimental to a nursing facility resident who has been harmed by the actions or inactions of the facility.

This Article will discuss the many tools litigators have to challenge the enforcement of arbitration agreements for nursing facility clients. Additionally, this article will examine proactive ways elder law attorneys can help clients avoid the enforcement of pre-dispute arbitration in the first place. Part I will provide the legal context for arbitration agreements. Part II will address the different strategies litigators have to challenge enforcement of binding arbitration agreements.

* The opinions expressed in this article are those of the authors and do not reflect the official positions of AARP or AARP Foundation.

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I. THE LEGAL CONTEXT OF ARBITRATION AGREEMENTS

The Federal Arbitration Act of 1925 (“FAA”)¹ is the key federal law regarding arbitration agreements, including those related to nursing facilities. The FAA states that

[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²

Historically, the United States Supreme Court interpreted the FAA narrowly, only applying it to interstate commercial transactions among merchants, thus protecting consumers from binding arbitration. The Court initially interpreted the FAA as a federal procedural rule inapplicable in state court; however, the Court’s interpretation of the FAA has shifted over time. In 1995, in *Allied-Bruce Terminix Cos. v. Dobson*, the Court expanded its reading of the FAA and ruled that the statute extends to the limits of Congress’s Commerce Clause powers, by applying to agreements that *in fact* have an effect on interstate commerce and preempting state anti-arbitration statutes.³

For instance, the Court recently struck down a state court’s decision categorically invalidating nursing facility arbitration agreements as a matter of state public policy. In *Marmet Health Care Center v. Brown*, the United States Supreme Court vacated the West Virginia Supreme Court’s judgment that, “as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence.”⁴ The Supreme Court found that “West Virginia’s prohibition against pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a *categorical rule prohibiting arbitration of a particular type of claim*, and that rule is contrary to the terms and coverage

1. 9 U.S.C. §§ 1, et seq (2006).

2. 9 U.S.C. § 2 (2006).

3. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

4. *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201, 1203 (quoting *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011), *vacated by Marmet*, 132 S. Ct. 1201 (2012)) (internal quotation marks omitted).

of the FAA.”⁵ The Court in *Marmet* went on to find that while the FAA preempts West Virginia’s categorical policy stance, the state court on remand must consider whether the challenged arbitration clauses are otherwise invalid, revocable, and unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract,” as required by the statute.⁶

Although the Supreme Court admonished the *Marmet* court for ignoring the FAA, other courts around the country have invalidated nursing facility arbitration agreements without running afoul of the FAA, provided the grounds relied upon were consistent with standard contract defenses.

II. MANDATORY PRE-DISPUTE ARBITRATION FOR NURSING FACILITY RESIDENTS IS FUNDAMENTALLY UNFAIR BECAUSE OF THE IMBALANCE IN BARGAINING POWER

Decisions regarding admission into a nursing facility are “emotionally-charged, stress-laden event[s],” typically made in the midst of a crisis brought on by an abrupt increase in disability level, precipitous deterioration in health, or the deterioration in health (or death) of a spouse or caregiver.⁷

Intrinsically, contracting for placement in a nursing home suggests that the future resident seeking care will be of progressed age, possibly diminished capacity, that the agreement will be drafted by the nursing home, and that the business acumen of the resident will be inadequate to protect the rights extinguished by the arbitration agreement.⁸

New nursing facility residents and their families, urgent to get help for themselves or their loved ones, routinely sign arbitration agreements as a precondition for admission, only to learn later that the contract includes

5. *Id.* at 1203-04 (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)) (emphasis added).

6. 9 U.S.C. § 2 (2006); *Marmet*, 132 S. Ct. at 1204.

7. See *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101 (Ct. App. 1996); Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 LAW MED. & HEALTH CARE 254, 255 (1990); Marshall B. Kapp, *The “Voluntary” Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 NEW ENG. J. CRIM. & CIV. CONFINEMENT 1, 3 (1998) (explaining that an older person’s move to a nursing facility often follows a period of acute hospitalization when she or her family cannot manage home care demands).

8. Jana Pavlic, *Reverse Pre-empting the Federal Arbitration Act: Alleviating the Arbitration Crisis in Nursing Homes*, 22 J.L. & HEALTH 375, 385 (2009).

provisions requiring the resident and family to forego the use of courts to resolve a wide range of future disputes that, all too often, involve abuse, assault, malnutrition, neglect, or even death.⁹ People seeking admission to a long-term care facility are focusing on the quality and range of services available, and perhaps the costs, but are not thinking about possible future disputes.¹⁰

The arbitration agreements that result from these inherently and grossly unequal bargains are having a dramatic effect on the rights of nursing facility residents. Including, as the *Wall Street Journal* noted, decreasing restitution for an increasing number of reported abuses:

Nursing-home patients and their families are increasingly giving up their right to sue over disputes about care, including those involving deaths, as the homes write binding arbitration into their standard contracts. The clause can have profound implications. Nursing homes' average costs to settle cases have begun dropping, according to an industry study, even as claims of poor treatment are on the rise.¹¹

Thus, the crisis that precipitates nursing facility admission often overwhelms new residents, leading them to execute agreements relinquishing their right to a jury trial at a time when they are not in the right

9. Laura M. Owings & Mark N. Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, 43 TENN. B.J. 20, 20 (2007).

10. See Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 280 (2004) (“Admitting a loved one to a nursing home is an overwhelming and stressful undertaking for families If families give any thought to the admissions agreement they are signing, they probably do not consider whether it contains a mandatory arbitration agreement.”).

11. Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits—Big Payouts Fade As Arbitration Rises; Ms. Hight Falls Ill*, WALL ST. J., Apr. 11, 2008, at A1. The article quotes former Sen. Mel Martinez, “[i]t is an unfair practice given the unequal bargaining position between someone desperate to find a place for their loved ones and a large corporate entity like a nursing home.” *Id.* Moreover, the article notes that “[t]he biggest arbitration provider, the American Arbitration Association, frowns on agreements requiring arbitration in disputes over nursing-home care and generally refuses such cases. Some patients ‘really are not in an appropriate state of mind to evaluate an agreement like an arbitration clause,’ says Eric Tuchmann, the association’s general counsel. A second group, the American Health Lawyers Association, also avoids them.” *Id.*

frame of mind to contemplate properly the impact of such provisions. As one court put it:

The fact that a resident is signing an arbitration agreement contemporaneously with being admitted into a nursing home is troubling. By definition, an individual being admitted into a nursing home has a physical or mental detriment that requires them to need the assistance of a nursing home. Further, the reality is that, for many individuals, their admission to a nursing home is the final step in the road of life. As such, this is an extremely stressful time for elderly persons of diminished health. In most circumstances, it will be difficult to conclude that such an individual has equal bargaining power with a corporation that, through corporate counsel, drafted the form contract at issue.¹²

Given the disparity in bargaining power and knowledge between the nursing facility and the resident during the admission process, it is important to ensure that the agreements between the nursing facility and its residents are not unconscionable. It is difficult for residents and their families, faced with the crises accompanying admission to a nursing facility, to make informed decisions about the numerous provisions contained in an admissions contract—especially provisions requiring nursing facility residents to waive the right to access the courts and to a trial by jury for future disputes.

The need to find a long-term care placement arises quickly and is often unplanned, leaving little time to investigate options or to wait for an opening at a facility of one's choice.¹³ Time pressure significantly impairs the ability to seek and carefully consider alternatives, and the critical need for services almost always overshadows any other consideration. In the 1980s, the federal government changed the way hospitals are paid for their Medicare patients, and since that change, hospital discharge planning occurs "quicker and sicker."¹⁴ Hospitalization itself can be quite debilitating and the

12. *Manley v. Personacare*, 2007 Ohio 343, ¶ 29 (Ohio Ct. App. Jan. 26, 2007) (quoting Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 CAMPBELL L. REV. 157, 172 (2009)).

13. Denese A. Vlosky et al., "Say-so" as a Predictor of Nursing Home Readiness, 93 J. FAM. & CONSUMER SCI. 59 (2001).

14. Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. MENTAL HEALTH & AGING 145, 148 (2000) (internal quotation marks omitted). Recent studies indicate that the proportion of elderly long-term nursing facility residents has decreased over the last two decades. JUDITH KASPER, ET AL., CHANGES IN CHARACTERISTICS, NEEDS, AND PAYMENT FOR CARE OF ELDERLY: NURSING HOME

assessment of the type of long-term care they need after discharge is made before they have fully recovered and are able to make informed decisions on these critical issues.¹⁵ Consequently, the hospital patient is often unable to review the contract and contemplate the meaning and ramifications of its provisions, particularly those that have nothing to do with care and related services and costs.¹⁶

III. SUCCESSFUL STRATEGIES FOR CHALLENGING ENFORCEMENT OF ARBITRATION AGREEMENTS

In recent years, an increasing number of courts have refused to enforce provisions of agreements that mandate arbitration against nursing facility residents. These courts have generally struck down the arbitration provisions for one of the following reasons: (1) lack of capacity of the nursing facility resident to make a contract; (2) lack of authority of the person signing the agreement on behalf of the nursing facility resident; (3) inapplicability of the agreement to third parties; and (4) unconscionability of the agreement.

RESIDENTS: 1999 TO 2004, 1 (2007). Specifically in the past five years, elderly long-stay nursing facility residents, those staying for 90 days or more, has declined from 1.21 million to 1.06 million. *Id.* However, even though the number of residents staying in nursing facilities for long periods has gone down, the population appears to be sicker. *Id.* In 1999, 63% of recently admitted elderly residents, residents for 30 days or less, had one or more of the five recognized physical diagnoses and 27% had one or more mental or cognitive impairments, compared with 69% and 34% in 2004, respectively. *Id.* at 9 (identifying the five physical diagnoses as Chronic Obstructive Pulmonary Disease (COPD), stroke, diabetes, heart disease, or hip fracture and categorizing the mental disorders into dementia, depression, schizophrenia, and affective and other serious disorders). Additionally, 16% had both physical and mental diagnoses in 1999, while 24% suffered from both in 2004. *Id.* Further, in 1999, 23% of recently admitted residents received help in the 5 Activities of Daily Living (ADLs), while that number increased to 27% in 2004. *Id.* at 12.

15. Whitton, *supra* note 14, at 150-51. Potential residents and their family members panic when they feel there is insufficient time to consider different facilities and they may choose a facility they would not have chosen if they had more time to weigh their options. *Id.* at 150.

16. *See id.*; *see also* Owings & Geller, *supra* note 9, at 22-23.

A. Lack of Capacity of Resident to Assent to the Agreement

When a person is admitted to a nursing facility, they may be in a condition which limits their ability to appreciate the terms of an arbitration agreement. Formation of a valid contract requires a meeting of the minds, and because of the resident's condition, the resident may lack the capacity to actually assent to the terms of the agreement they have signed. In *Landers v. Integrated Health Services of Shreveport*, the Louisiana Court of Appeals upheld the trial court's determination that a nursing facility resident who "required 24 hour professional nursing supervision and maximum assistance with her daily needs" and who "was noted to be forgetful, depressed, and suffering from schizophrenia and paralysis from a cerebrovascular accident" lacked the capacity to assent to an arbitration agreement.¹⁷ By contrast, in *Estate of Etting v. Regents Park at Aventura, Inc.*, the District Court of Appeal of Florida found that a nursing facility resident's legal blindness at the time she signed the agreement was insufficient to render her incapable of assenting to the agreement.¹⁸

Evaluating whether a nursing facility resident had the legal capacity to understand and appreciate the terms of the arbitration provisions in the contract he or she signed upon admission and not simply the provisions governing payment, visiting hours, or facility rules, is the vital first step to deciding whether the contract itself is valid.

B. Lack of Authority to Bind Resident to Agreement

Often it is not the resident themselves who signs the arbitration agreement, but a friend or family member who is helping the resident get admitted to the nursing facility. In such cases, many courts have separated the authority to admit the ill person to the facility from the decision to sign a mandatory pre-dispute arbitration agreement contained within the admission papers. A person can have actual authority to bind the nursing facility resident "when, at the time of taking action that has legal consequences for the principal, *the agent* reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."¹⁹ Whereas, the person signing on behalf of the nursing facility

17. *Landers v. Integrated Health Servs. of Shreveport*, 903 So. 2d 609, 612 (La. Ct. App. 2005).

18. *Estate of Etting v. Regents Park at Aventura, Inc.*, 891 So. 2d 558, 558 (Fla. Dist. Ct. App. 2004).

19. RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006) (emphasis added).

resident only has apparent authority “when a *third party* reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.”²⁰ Whether an agent has actual or apparent authority to bind the resident is often a fact intensive inquiry.

1. Durable Powers of Attorney and Health Care Proxies

Traditionally, the power of the agent to bind the principal terminated with the principal’s loss of capacity.²¹ However, a “durable power of attorney” is an agency relationship that remains valid even when the principal is incapacitated.²² A durable power of attorney is a statutory creation defined by state law.²³ Generally,

to create a durable power of attorney . . . the principal must be competent at the time the durable power of attorney is created, the durable power of attorney must be in writing and signed by the principal, and the principal must express the intention that the power be durable.²⁴

The principal has the power to define the scope of the power of attorney, which can be general—allowing the agent to act to the full extent permitted by statute—or narrow—limiting the agent to bind the principal only with respect to specific actions.²⁵ The power of attorney can be immediate, applying at the time of the agreement, or “springing,” applying only when the principal loses capacity.²⁶

An issue that arises with health care proxies and durable powers of attorney is whether the principal was in fact incapacitated when the agent acted on her behalf, as to give the agent authority to bind the nursing facility resident. For instance, *In re Estate of McKibbin* held that a resident whose

20. *Id.* at § 2.03 (emphasis added).

21. Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 *ELDER L.J.* 165, 170 (2009).

22. *Id.* at 170-71.

23. See Catherine Seal, *Power of Attorney: Convenient Contract or Dangerous Document?*, 11 *MARQ. ELDER’S ADVISOR* 307, 309-12 (2010).

24. Rhein, *supra* note 21, at 171.

25. *Id.* at 171-72.

26. *Id.*

son presented a durable power of attorney was not bound by the son's signing of an arbitration agreement because the resident had not been declared incapacitated nor was there evidence that she was incapacitated and nothing in the agreement gave the son power to enter into arbitration agreements on her behalf.²⁷ Some states, however, find that one who signs the agreement as a guardian of the person will bind the resident even in the absence of express authority to do so.²⁸

Therefore, when advocating on behalf of a party attempting to invalidate an arbitration agreement signed by an agent given authority through a durable power of attorney or a health care proxy, an advocate should evaluate whether the nursing facility documented the principal's incapacitation at the time that the agent acted on their behalf. Furthermore, elder law attorneys that draft powers of attorney should be careful to expressly prohibit a health care decision maker from binding the client to mandatory pre-dispute arbitration of disputes in long-term care settings.

2. The Authority to Make Health Care Decisions Generally Will Not Be Sufficient to Authorize the Execution of an Arbitration Agreement.

Courts throughout the country are virtually unanimous in declining to enforce arbitration agreements against an incapacitated nursing facility resident if the agreement was signed by a person (e.g. family member or friend) who does not have express authority to make such an agreement.²⁹

27. *In re Estate of McKibbin*, 977 So. 2d 612, 613 (Fla. Dist. Ct. App. 2008).

28. *See, e.g., Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983, 987 (Ala. 2004) (holding that a resident's daughter, despite not having express power of attorney, had authority to bind the resident where the daughter signed the agreement as guardian and sponsor and "[t]here [wa]s no evidence indicating that Tucker had any objection to Owens's acting on her behalf in admitting Tucker to the nursing home.").

29. *E.g., Dickerson v. Longoria*, 995 A.2d 721, 737 (Md. 2010) (stating that the decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement"); *Lujan v. Life Care Ctrs. of Am.*, 222 P.3d 970, 978 (Colo. App. 2009) ("the power to make life and death decisions is clearly within the statutory authority provided to a health care proxy . . . [but] the decision to enter in an arbitration agreement is not"); *Life Care Ctrs. of Am. v. Smith*, 681 S.E.2d 182 (Ga. Ct. App. 2009); *McNally v. Beverly Enters.*, 191 P.3d 363 (Kan. App. 2008) (finding that a durable power of attorney for health care did not confer authority to sign arbitration agreement); *Tex. Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345, 352 (Tex. App. 2007) (concluding that holder of medical power of attorney lacked authority to sign arbitration agreement because nothing in medical power of attorney indicated it was intended to confer authority to make legal rather than health care

One particularly illuminating Georgia Court of Appeals case that demonstrates the separation of health care decisions versus the decision to waive constitutionally protected rights pursuant to an arbitration agreement was *Life Care Centers of America v. Smith*. That court held that a daughter who was duly appointed as a health care agent lacked the power to agree to arbitration.³⁰ The court acknowledged that the health care proxy expressly gave the daughter very broad authority, “so that [the] agent will have authority to make any decision [the principal] could make to obtain or terminate any type of health care.”³¹ Nevertheless, the court found that this authority was not so broad as to authorize the daughter to sign away her mother’s right to a jury trial.³² Two rare exceptions to this nationwide trend appear in California decisions, which are difficult to reconcile.³³

C. Arbitration Agreement Does Not Bind Third Parties

A related issue is who may be bound by a resident or their agent signing an arbitration agreement in a long-term care contract. There are two separate issues: whether, when the resident themselves sign the arbitration

decisions); *Koricic v. Beverly Enter.s–Neb., Inc.*, 773 N.W.2d 145, 148 (Neb. 2009) (refusing to compel arbitration because son who signed nursing facility admission documents on his mother’s behalf lacked express authority to agree to arbitrate); *Blankfeld v. Richmond Health Care*, 902 So.2d 296, 300-01 (Fla. Dist. Ct. App. 2005) (finding that holder of health care proxy did not have authority to bind nursing facility patient to an arbitration agreement); *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So.2d 211, 218 (Miss. 2008) (holding that an arbitration agreement that was not required as a condition of admission could not be considered a health care decision by health care surrogate); *but see Owens v. Nat’l Health Corp.*, 263 S.W.3d 876, 884 (Tenn. 2007) (holding that where arbitration agreement was required as a condition of admission to the facility, health care agent had authority to sign).

30. *Life Care Ctrs. of Am. v. Smith*, 681 S.E.2d 182 (Ga. Ct. App. 2009).

31. *Id.* at 185.

32. *Id.* at 186.

33. *Compare, e.g., Garrison v. Superior Court*, 33 Cal. Rptr. 3d 350 (Cal. Ct. App. 2005) (finding that holder of a health care power of attorney had the power to agree to arbitration) *with Flores v. Evergreen at San Diego*, 55 Cal. Rptr. 3d 823, 829 (Cal. App. 4th 2007) (holding that principal could not be compelled to arbitrate because the legislature had not specifically conveyed authority over arbitration decisions in health care proxy legislation).

agreement, their family members are also bound by that agreement and whether, when an agent binds the resident, they also bind themselves.

Generally, a person cannot bind another to an arbitration agreement.³⁴ However, there are three exceptions to this rule: agents can bind their principals so long as there is express authority, spouses can bind one another as long as there is express authority to do so, and parents can bind their minor children.³⁵ Therefore, with the possible exception of when a family member sues as a successor in interest to a deceased nursing facility resident's cause of action instead of in their own cause of action,³⁶ the resident cannot bind anyone else to the agreement absent the three above-mentioned circumstances.³⁷

Critically, when an agent binds the principal to the agreement, courts have typically found that the agent was not acting, and is therefore not bound, in their personal capacity. For instance, in *Goliger v. AMS Properties, Inc.*, the court held that because the resident's daughter "was not acting in her personal capacity when she signed the arbitration agreements, but instead in her representative capacity as her mother's responsible party . . . no waiver of [the daughter]'s personal right to a jury trial can be inferred."³⁸ Thus, the daughter was not bound to the arbitration agreement she signed for her mother as an agent in her own wrongful death suit.³⁹

The situation may be quite different in states that consider wrongful death suits entirely derivative of the decedent's own claims. In *Sanford v. Castleton Health Care Center, LLC*, the Indiana Court of Appeals held that under Indiana law "the only claims that survive a decedent's death are those that the decedent would have been entitled to bring, or liable to defend against, during his or her lifetime" and the decedent was bound by an

34. See *Buckner v. Tamarin*, 119 Cal. Rptr. 2d 489, 490–91 (Cal. Ct. App. 2002).

35. See *id.* at 491; see also *Bolanos v. Khalatian*, 283 Cal. Rptr. 209, 211–12 (Cal. Ct. App. 1991) (holding a patient could bind her unborn child and husband to an arbitration agreement).

36. See *Pagarigan v. Libby Care Ctr., Inc.*, 120 Cal. Rptr. 2d 892, 894 n.1 (Cal. Ct. App. 2002) ("The rule may be different, however, when the adult children sue not on their own cause of action but as successors in interest to the deceased parent's causes of action.").

37. See *Buckner*, 119 Cal. Rptr. 2d at 490–91.

38. *Goliger v. AMS Prop., Inc.*, 19 Cal Rptr. 3d 819, 821 (Cal. Ct. App. 2004).

39. See *id.*

arbitration agreement with respect to the relevant claims, “regardless of whether these claims were asserted by [the decedent], while alive, or the Estate, upon her death, they are not justiciable in a court of law, except as a review of an arbitral award.”⁴⁰

Similarly, the Supreme Court of Texas reasoned that “[w]hile it is true that damages for a wrongful death action are for the exclusive benefit of the beneficiaries and are meant to compensate them for their own personal loss, the cause of action is still entirely derivative of the decedent’s rights,” and held that a decedent’s successor is bound by the decedent’s arbitration agreement in the successor’s wrongful death suit.⁴¹

Thus, a resident signing an arbitration agreement cannot typically bind another person unless they are that person’s spouse, parent (if the other person is a minor), or agent. Additionally, if a person signs an arbitration agreement as the resident’s agent, the signor is not personally bound. However, in states where wrongful death suits are considered entirely derivative of the decedent’s own claims, the decedent’s survivor may be bound by the resident’s assent to the arbitration agreement, assuming that agreement is valid, whether the resident signed the agreement or the survivor signed it as the resident’s agent.

D. Unconscionable Agreements

Even where a long-term care contract was signed that contained an arbitration agreement that covers the claim at issue, that agreement may not be enforceable if it is unconscionable. Unconscionability typically involves two elements: procedural unconscionability and substantive unconscionability. Procedural unconscionability concerns the formation of the contract, with courts often focusing on the relative bargaining powers of the parties and their ability to understand the terms of the agreement. Substantive unconscionability relates to the terms of the contract itself and

40. *Sanford v. Castleton Health Care Ctr.*, 813 N.E.2d 411, 421–22 (Ind. Ct. App. 2004).

41. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (2009). This case disapproved of a lower court case that held wrongful death beneficiaries are not bound by a decedent’s arbitration agreement. *Id.* at 647 (referencing disapprovingly *In re Kepka*, 178 S.W.3d 279, 288 (Tex. Ct. App. 2005)). Additionally, the court, reviewing the cases of the different states, wrote: “[C]ourts in states where wrongful death actions are recognized as independent and separate causes of action are more likely to hold that the beneficiaries are not bound by a decedent’s agreement to arbitrate . . . while beneficiaries in states where wrongful death actions are wholly derivative in nature are generally held to be bound by a decedent’s arbitration agreement.” *Id.* (internal citations omitted).

whether they are unreasonably one-sided. Courts often apply a “shocks the conscious” test, finding contracts substantively unconscionable if they are so unfair as to shock the conscious. In applying this test, courts usually require at least some showing of both procedural and substantive unconscionability to find a contract is unconscionable. However, the two elements are often set on a sliding scale relative to each other—the more unconscionable the procedure, the less unconscionable the substance needs to be and the more unconscionable the terms of the agreement are, the less of a showing of procedural unconscionability is needed.⁴²

1. Procedural Unconscionability

Courts appear to be more willing to find the procedure for contract execution unconscionable where the terms of the arbitration agreement are not clearly marked or buried within the nursing facility admission documents, the signor is not given adequate opportunity to read the agreement, and no attempt is made to explain the terms of the arbitration agreement.⁴³ Additionally, where the signor lacks knowledge, is illiterate, suffers cognitive impairment, or the situation is either highly stressful or the nursing facility does not make signing the agreement optional (i.e., it is presented on a take-it or leave-it basis or as a contract of adhesion), courts are more likely to find the procedure unconscionable.⁴⁴

42. *See, e.g.,* *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (“[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”).

43. *See* *Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630, 632-33 (Fla. Dist. Ct. App. 2008) (holding procedure unconscionable where arbitration agreement contained within thirty-seven page document, no attempt to explain or point out arbitration agreement was made, no opportunity to read before signing was given, and no copy of the agreement was provided); *Prieto v. Healthcare & Ret. Corp. of Am.*, 919 So. 2d 531, 532-33 (Fla. Dist. Ct. App. 2005) (holding procedure unconscionable where resident’s daughter was given package including arbitration agreement while resident was on the way from hospital to nursing facility, daughter was told to sign before arrival to have father admitted, and documents were not explained, even where arbitration agreement was printed in bold and capital letters and daughter was provided three-day period to review documents and rescind).

44. *See* *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004) (holding procedure unconscionable where resident’s sixty-nine-year-old wife with no legal expertise signed unexplained agreement “under a great amount of stress” without attorney present as husband taken to hospital); *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 734-35 (Tenn. Ct. App. 2003) (holding procedure unconscionable

On the other hand, where the arbitration provision is clearly marked, not in legalese, not a precondition for admission, and the signer is given a period to rescind the agreement, courts have been less likely to refuse to enforce a contract on the basis of unconscionability alone without other contract defenses.⁴⁵ Factors such as a lack of exigent circumstances,⁴⁶ familiarity with the nursing facility admission process,⁴⁷ sophistication of the signer,⁴⁸ and adequate attempts by the staff to explain the agreement⁴⁹ may also weigh against a court finding the procedure unconscionable.

2. *Substantive Unconscionability*

As noted above, typically an agreement, even if procedurally unconscionable, will not be found unconscionable unless the terms of that agreement are themselves unconscionable. In determining substantive

where arbitration clause on tenth page of eleven page agreement in same font as rest of document that did not adequately explain arbitration procedure presented on a take-it or leave-it basis to resident's husband who could not read or write even though employee attempted to explain agreement but did not explain that husband was waiving right to a jury trial); *see also* Romano *ex rel.* Romano v. Manor Care, Inc., 861 So. 2d 59, 63 (Fla. Dist. Ct. App. 2003) (holding procedure unconscionable in light of significant substantive unconscionability even though arbitration agreement "not 'hidden in fine print'" where resident's signing husband was elderly, had no legal training, and arbitration agreement not pointed out or explained).

45. *See* Forest Hill Nursing Ctr., Inc. v. McFarlan, 995 So. 2d 775, 785 (Miss Ct. App. 2008) (finding the procedure not unconscionable where arbitration clause on fifth of eight pages was not written in legalese, had section heading in bold and all capital letters, and used bold-faced lettering for the paragraph relinquishing jury trial, signing the agreement was not a precondition for admission, party had right to seek counsel, and contract could be rescinded within thirty days).

46. *See* Bland, *ex rel.* Coker v. Health Care & Ret. Corp of Am., 927 So. 2d 252, 256 (Fla. Dist. Ct. App. 2006) (ample time to review).

47. *See* Miller v. Cotter, 863 N.E.2d 537, 545 (Mass. 2007) (stating that the process of admitting father to nursing facilities "not new" to signer).

48. *See id.*

49. *See* Estate of Mooring v. Kindred Nursing Ctrs., No. W2007-02875-COA-R3-CV, 2009 WL 130184, at *6 (Tenn. Ct. App. 2009) (employee who testified always informed signer that the arbitration agreement was optional and revocable within thirty days).

unconscionability, courts often apply some variation of the “shocks the conscience” test. For instance, the Supreme Court of Mississippi has stated that “[w]hen reviewing a contract for substantive unconscionability, we look within the four corners of an agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between, contracting parties.”⁵⁰

For long-term care agreements, factors favoring a finding of substantive unconscionability include terms waiving a considerable legal remedy or procedure, limiting damages, or limiting nursing-facility-specific, state-created rights.⁵¹ A finding of substantive unconscionability is also more likely where the agreement requires the resident to submit to arbitration while the facility is free to go to court,⁵² requires the resident to pay costs if the resident attempts to avoid or challenge the arbitration process,⁵³ or unreasonably limits the resident’s discovery.⁵⁴ Simple waiver of a jury trial

50. *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 521 (Miss. 2005); *see also* *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 23 (Ohio Ct. App. 2004) (“[C]ourts examining whether a particular limitations clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability.”).

51. *See* *Woebse v. Health Care and Ret. Corp of Am.*, 977 So. 2d 630, 634-35 (Fla. Dist. Ct. App. 2008) (citing *Romano v. Manor Care, Inc.*, 861 So. 2d 59 (Fla. Dist. Ct. App. 2003)) (holding as substantively unconscionable an agreement that did “not vindicate a nursing home resident’s statutory rights” because the agreement would not allow an award of punitive damages); *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 738-9 (Miss. 2007) (holding as substantively unconscionable an agreement capping damages at \$50,000, waiving punitive damages, mandating a one-year filing limitation regardless of state statute of limitations, waiving facility’s criminal liability, requiring unsuccessful plaintiff to pay facility’s costs and attorney’s fees, and requiring forfeiture of all claims except willful acts); *Prieto v. Healthcare & Ret. Corp. of Am.*, 919 So. 2d 531, 532 (Fla. Dist. Ct. App. 2005) (holding as substantively unconscionable an agreement limiting noneconomic damages to \$250,000, barring recovery of punitive damages, attorney’s fees, and costs, and imposing discovery limits).

52. *See* *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695, 702 (Miss. 2009).

53. *See* *Covenant Health & Rehab. of Picayune, LP v. Lumpkin ex rel. Lumpkin*, 23 So. 3d 1092, 1099 (Miss. 2009).

54. *See* *Prieto*, 919 So. 2d at 532.

in favor of arbitration, however, is typically not sufficient to find substantive unconscionability.⁵⁵

E. Agreement Violates Public Policy

Where terms of an arbitration agreement contravene a legislative remedy, a court may find that those terms are void as contrary to public policy. Such actions have been particularly effective in Florida, where the state's Nursing Home Resident's Rights Act (NHRRA)⁵⁶ provides specific statutory remedies, and the courts have been loath to allow the NHRRA's remedies to be contracted away. Florida courts reason that, while parties can typically contract around a state or federal law, they cannot do so where contracting around NHRRA's remedies contravenes the public policy behind the statute.⁵⁷ For instance, in *Blankfeld v. Richmond Health Care, Inc.*, an agreement required that arbitration be "administered by the National Health Lawyers Association" (NHLA).⁵⁸ The court held that because "residents had to arbitrate under the NHLA rules, some of the remedies provided in the legislation for negligence would be substantially affected and even eliminated. The provision requiring arbitration under those rules is accordingly contrary to the public policy behind the statute and therefore void."⁵⁹

F. Agreement Fraudulently Induced

A resident may be able bring fraudulent inducement as a defense to the enforcement of the agreement if the resident can show that the long-term

55. See, e.g., *Slusser ex rel. Slusser v. Life Care Ctrs. of Am., Inc.*, 977 So. 2d 662, 663 (Fla. Dist. Ct. App. 2008) (holding "an agreement that provides for arbitration of claims brought under the Nursing Home Residents Act . . . is not unconscionable simply because it waives access to the courts to resolve claims arising under the Act."). But see *High v. Capital Senior Living Props. 2-Heatherwood, Inc.*, 594 F. Supp. 2d 789 (E.D. Mich. 2008) (holding a waiver of right to a jury trial in a long-term care agreement unenforceable largely because there was an absence of proof that the resident surrendered her right to a jury trial).

56. FLA. STAT. ANN. § 400.022 (West 2007).

57. See, e.g., *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 298–99 (Fla. Dist. Ct. App. 2005).

58. *Id.* at 297.

59. *Id.* at 298.

care facility, knowingly or with utter disregard, misrepresented or omitted a material fact intending to induce reliance by the resident and the resident justifiably relied on the misrepresentation.⁶⁰ In one case, the Fifth Circuit, applying Mississippi law, held that a material issue of fact existed as to whether a nursing facility “engaged in fraud-in-the-inducement by having [an illiterate resident] sign the agreement without properly explaining it to him.”⁶¹ However, other courts have held that where the arbitration agreement merely contained terms which the signor could have altered had they bargained to do so, but did not contain any false terms, fraud in the inducement is not shown.⁶²

G. Courts Can Find the FAA Is Not Applicable In Some Circumstances

While the Supreme Court has found that the FAA is applicable in state court and extends to the limits of Congress’s Commerce Clause powers, there are still cases where the FAA is not applicable, meaning the state’s laws are not preempted. For instance, in *Bruner v. Timberlane Manor Limited Partnership*, the Supreme Court of Oklahoma held that the state’s Nursing Home Care Act, which invalidated any waiver of a right to commence an action against a nursing facility, was not preempted by the FAA.⁶³ The Court laid out a three-part test for the applicability of the FAA: “The FAA reaches arbitration agreements in contracts evidencing a transaction that is 1) economic activity; 2) which in aggregate is a general practice subject to control under the Commerce Clause; and 3) which in aggregate has a substantial impact on interstate commerce.”⁶⁴ The court then concluded that the FAA was inapplicable because, despite the fact that nursing facility care for a fee was an economic activity, it failed the second and third prong.⁶⁵ Even though the nursing facility bought supplies from out-of-state vendors, used the Internet and long-distance phones, and

60. See 37 C.J.S. Fraud § 13 (2011).

61. *Beverly Enters.-Miss. Inc. v. Powell*, 244 F. App’x. 577, 577, 579–80 (5th Cir. 2007).

62. See, e.g., *Covenant Health & Rehab. of Picayune, LP v. Lumpkin ex rel. Lumpkin*, 23 So. 3d 1092, 1098 (Miss. Ct. App. 2009).

63. *Bruner v. Timberlane Manor Ltd. P’ship*, 155 P.3d 16, 25 (Okla. 2006).

64. *Id.* at 31.

65. *Brunner*, 155 P.3d at 31.

received Medicare and Medicaid payments, it was a local activity that was not in the aggregate subject to regulation under the Commerce Clause powers of Congress and did not have a substantial impact on interstate commerce.⁶⁶

Further, in *Community Care of America of Alabama v. Davis*, the court found that because providing care to patients was a localized intrastate business activity and the facility was not certified to do business in the state (and thus, by law, could not force an Alabama court to enforce a contract in the state), the court would not enforce the agreement.⁶⁷

CONCLUSION

Several courts have acknowledged the need for both judicial and legislative intervention to address the problems created by arbitration agreements in the nursing facility context. As one Florida court found, “[a]rbitration was intended to create a speedy and economically efficient dispute resolution process for the residents of nursing homes; instead, it has tended to create a round of time-consuming, expensive litigation prior to whatever dispute resolution method ultimately resolves the case.”⁶⁸ The court continued by stating “[t]he judiciary is ill-equipped to provide that protection, but the Legislature could do so with ease.”⁶⁹

The need for legislative action notwithstanding, courts continue to refuse to enforce mandatory pre-dispute arbitration agreements against nursing facility residents throughout the country for a wide variety of reasons. Advocates should work diligently to protect their clients from these agreements and strongly urge them to refuse to sign such agreements upon admission to a nursing or other long-term care facility.

66. *Id.*

67. *Comm. Care of Am. of Alabama v. Davis*, 850 So. 2d 283, 286–89 (Ala. 2002).

68. *ManorCare Health Servs. v. Stiehl*, 22 So. 3d 96, 105 (Fla. Dist. Ct. App. 2009).

69. *Id.*