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NOTES

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NOTES

NURSING HOMES AND MANDATORY ARBITRATION CLAUSES

*Amy Mathieu**

I. INTRODUCTION AND BRIEF HISTORY OF NURSING HOMES

In the early 20th century the burden of caring for elderly Americans typically fell upon the family. If the family was unable to care for the elderly, these individuals usually had to live in an almshouse, or typically referred to as a poorhouse, which were publically run.¹ These structures had a stigma attached to them and were often seen as a last resort for the elderly and disabled. However, with the passage of the Social Security Act of 1935, there was much more financial aid available to the elderly.² This sparked the interest of the private sector in building facilities to care for elderly persons, who now had a steady flow of income from Social Security and the assistance of Medicare and, sometimes, Medicaid.³ Congress passed the Hill-Burton Act in 1946 that provided funding for the construction of hospital and nursing home facilities and in exchange these facilities had to provide care for a reasonable number of persons in the area that could not afford the care.⁴ Additionally, most residents of nursing homes rely upon

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¹ David Wagner, *Poor Relief and the Almshouse*, DISABILITY HISTORY MUSEUM, <http://www.disabilitymuseum.org/dhm/edu/essay.html?id=60>.

² *Id.*

³ *Id.*

⁴ U.S. Dep't of Health & Human Serv., *Hill-Burton Free and Reduced-Cost Health Care*, HEALTH RES. & SERV. ADMIN., <http://www.hrsa.gov/gethealthcare/affordable/hillburton>.

Medicaid and to a lesser extent, Medicare, to pay for their nursing home costs.⁵

Government regulations and social services led to a large growth in the amount of nursing homes and assisted living facilities in the United States.⁶ In turn, this led to a need for more regulation from the government to hold these facilities accountable and require a certain minimum standard of care for the elderly and disabled.⁷ Both state and federal laws exist in order to protect residents from abuse, fraud and poor standards of care.⁸ State regulations provide the first line of defense against inadequate care facilities by denying state licenses to those facilities that do not meet the standards required by individual states.⁹ A facility cannot legally operate without a license, so the states hold great power in the ability to regulate these licenses; additionally states have the ability to pass state regulations pertaining to the care provided by nursing homes.¹⁰ For example, in Pennsylvania, the Department of Health: Division of Nursing Care Facilities is responsible for the oversight of the state's nursing care facilities and conducts about 5,000 inspections a year that include licensure and certification surveys, follow-up surveys and complaint investigations.¹¹

In addition to state oversight, the federal government has passed legislation to require a certain level of care from facilities in order to ensure the facility receive Medicaid or Medicare reimbursements and also impose requirements on state responsibilities in the maintenance of facilities.¹² The most influential of this legislation is the Federal Nursing Home Reform Act (NHRA) passed in 1987.¹³ NHRA created a minimum set of standards for nursing homes to abide by and changed the way that inspectors did their job

⁵ LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* 166 (6th ed. 1995).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ FROLIK, *supra* note 5, at 167.

¹⁰ *Id.*

¹¹ Pa. Dep't of Health, *Nursing Home Care* (2016), http://www.portal.state.pa.us/portal/server.pt/community/nursing_home_care/14152.

¹² FROLIK, *supra* note 5, at 167.

¹³ Hollis Turnham, *Federal Nursing Home Reform Act from the Omnibus Budget Reconciliation Act of 1987 or Simply OBRA '87 SUMMARY*, ALLIANCE FOR HEALTH REFORM, <http://www.allhealth.org/briefingmaterials/obra87summary-984.pdf>.

when visiting these facilities to make the inspections more random and detailed.¹⁴

The focus of the act was on the standard of living provided to residents of these facilities and included provisions such as: a resident's right to remain in the nursing home absent non-payment, dangerous behavior, or significant changes in a resident's medical condition, resident's right to safely maintain bank funds with the nursing home, resident's right to organize and participate in family council, prohibitions on turning to family members to pay for Medicare and Medicaid services, provided uniform certification standards for Medicare and Medicaid homes, and provided new remedies to be applied to nursing homes that fail to meet minimum federal standards.¹⁵

Additionally, state inspectors are now required to conduct surveys of patients at nursing homes without prior notice to the facility, at least once every fifteen months.¹⁶ If the survey reveals that the nursing home is not meeting the required minimum standard, sanctions may be imposed, depending on the severity of the offense.¹⁷ Possible remedies include: directed training of staff, state monitoring, monetary penalties, temporary management, and denial of Medicare and Medicaid payments.¹⁸ The federal government wields great power in its requirements of nursing homes with its ability to restrict Medicare and Medicaid funding, because, according to AARP, the federal government accounts for 58% of nursing home income through the two social programs.¹⁹ Many states have adopted some, or all, of the Act into state legislation and licensure requirements.²⁰

Even with state oversight and federal regulations mandating minimum standards for the maintenance of nursing homes, issues still arise pertaining to the standard of care provided to residents. There are still instances of abuse of residents, neglect of residents, and in turn breach of contract with

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Martin Klauber & Bernadette Wright, *The 1987 Nursing Home Reform Act*, AARP PUB. POLICY INST. (2001), http://www.aarp.org/home-garden/livable-communities/info-2001/the_1987_nursing_home_reform_act.html.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Turnham, *supra* note 13.

residents. One of the most troublesome problems with nursing homes is that, at times, residents lack the ability to bring a civil suit when any of these grievances occur due to mandatory arbitration clauses contained within admissions contracts.

This note will first discuss nursing home contracts and arbitration, generally. The fourth section will discuss mandatory arbitration clauses, while the fifth section will discuss the prevalence of nursing home abuse. The note will then explain why mandatory arbitration clauses cause problems in the context of nursing home contracts and will also elaborate on the specific problem of unconscionability found in many of these clauses. Finally, the note will address a few possible solutions to mandatory arbitration clauses found in nursing home contracts.

II. NURSING HOME CONTRACTS

Many, if not all, nursing homes require a contractual relationship with individuals before they can become residents.²¹ Many terms of a nursing home contract are standard, including: identification of parties, the promise to pay, billing and changes in rates, notice about leaving the facility, a resident's right to stay in the facility, terms of management of a resident's funds, medical treatment plans, visitor policies, release of medical information, etc.²² The contracts may also include information about federal regulations pertaining to nursing homes, applicable state policies, the particular facility's policies, and information about Medicare eligibility and payment plans.²³ However, there are some clauses in nursing home contracts that are a bit more troubling than those listed above. One such worrisome clause is a third-party guarantee of payment clause.

Congress has made it clear that nursing homes shall "not require a third party guarantee of payment to the facility as a condition of admission to, or continued stay in, the facility."²⁴ Despite the mandate of the federal statute, some facilities still require a third party to agree to be personally

²¹ *Nursing Home Admission Agreements*, CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, http://canhr.org/factsheets/nh_fs/html/fs_admissionagreement.htm.

²² *Model Nursing Home Agreement*, UNIV. OF MASS., BOSTON, http://www.umb.edu/editor_uploads/images/centers_institutes/institute_gerontology/Model_nursing.pdf.

²³ *Id.*

²⁴ 42 U.S.C.S. § 1396r(c)(5)(A)(ii) (LexisNexis 2015).

liable if the patient becomes unable to provide payment for his or her care.²⁵ While this is not the topic of this paper, it is important for two reasons: (1) it shows that nursing homes include clauses in contracts that they know to be prohibited and (2) it shows that people do not fully understand and consider clauses within these contracts before signing them. If individuals researched the legality of these clauses, they would likely realize that the nursing home could not reject their elderly relative without a third-party guarantee. As a result, many people would most likely not sign such a contract.

III. ARBITRATION, GENERALLY

While the third-party payer clauses are troublesome, they may not create as many problems as the mandatory arbitration clauses. In order to fully understand the role mandatory arbitration clauses play in nursing home facilities, one must first understand arbitration in a more general sense. Generally speaking, arbitration is, “An alternative dispute resolution method with one or more persons hearing a dispute and rendering a binding decision.”²⁶ Arbitration can potentially save costs by keeping the dispute out of court and by resolving the issue much faster than what might have been accomplished in court.²⁷ However, there are major issues with arbitration as well. The outcome of the arbitration greatly depends upon the arbitrator(s), especially when only one arbitrator is hearing the case.²⁸ An arbitrator to a specific case is obligated to disclose personal or professional information that might create a biased attitude.²⁹ However, even if the arbitrator fails to disclose his or her connection with a party or a preconceived biased attitude, this does not always mean that the award will

²⁵ FROLIK, *supra* note 5, at 169.

²⁶ Cornell University Law School, *Arbitration*, LEGAL INFO. INST. (Jan. 28, 2016, 3:15 PM), <https://www.law.cornell.edu/wex/arbitration>.

²⁷ AMERICAN ARBITRATION ASSOCIATION, *Arbitration*, https://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration.jsessionid=ALvhd-LJe80JUSMzp1KoBx-QF-zMe06lm5HHzRct2qPVBS_dMcbfl-327060311?_afLoop=122386677585832&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D122386677585832%26_afWindowMode%3D0%26_adf.ctrl-state%3Dmtu78zi6_4.

²⁸ Jennifer C. Bailey, *The Search to Clarify an Elusive Standard: What Relationships Between Arbitrator and Party Demonstrate Evident Partiality?*, 2000 J. DISP. RESOL. 153, 160 (2000).

²⁹ *Id.* at 155.

be vacated after the resolution has been reached.³⁰ In order for a party to get an award vacated because of an arbitrator's bias, the party must show that the arbitrator conveyed "an appearance or impression of bias" during the proceedings.³¹ In order for an arbitration case to run smoothly and reach the correct outcome, the arbitrator must be genuinely neutral.³² It is hard to fathom that non-neutral arbitrators would recuse themselves from cases regularly when it is so hard for a party to prove the arbitrators were biased during the negotiation.³³ There is obviously an incentive for arbitrators to keep cases, despite bias, so they make a profit. Furthermore, arbitrators may be influenced by the desire to be hired again by the nursing home in future arbitration proceedings, and thus may make the arbitrator impartial toward the defendant facility.³⁴ It seems there is little incentive for an arbitrator to recuse himself. However, there is a substantial incentive for an arbitrator to keep a case, despite any bias he or she has, and to decide for the defendant corporation that has the potential of re-hiring the arbitrator for future proceedings.

Neutrality of arbitrators is only one problem with the alternative dispute resolution method. Another issue is that the decision of an arbitrator is more final than that of a trial court.³⁵ The Federal Arbitration Act (FAA) dictates the standard courts must use when considering final decisions of an arbitrator, among other things.³⁶ The FAA states that a court may only vacate the award

where the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators, or either of them; where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or where the arbitrators exceeded their

³⁰ *Id.*

³¹ *Id.* at 155–56.

³² *Id.*

³³ *Id.*

³⁴ Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of AT&T Mobility v. Concepcion*, 35 AM. J. TRIAL ADVOC. 87, 90 (2011).

³⁵ AMERICAN ARBITRATION ASSOCIATION, *supra* note 27.

³⁶ 9 U.S.C.S. § 10(a).

powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.³⁷

This standard makes it much more difficult for a complaining party to succeed on appeal than in an appellate court setting. Even if the court disagrees with the arbitrator's factual findings and legal conclusions, it must abide by the arbitrator's ruling absent one of the extreme reasons listed above.³⁸

IV. MANDATORY ARBITRATION CLAUSES

Normally, residents would have the option to bring a claim in court pertaining to tort law or contract law.³⁹ But there are two situations that parties can agree to arbitration to avoid court: the parties can decide after the cause of action has arisen to proceed with an arbitrator, or the parties can decide to enter into a contractual relationship with a mandatory arbitration clause before any cause of action has arisen.⁴⁰ Nursing home litigation is concerned with the latter of the two since residents sign a contract when entering the facility and these contracts usually contain these mandatory arbitration clauses. There are numerous issues with these clauses in the context of nursing homes, which will be discussed throughout this section.

The first concern with these mandatory arbitration clauses is that the Supreme Court has already ruled that states cannot restrict enforceability of arbitration clauses in the nursing home context.⁴¹ In *Marmet Health Care Center, Inc. v. Brown*, the family members of deceased, former nursing home patients brought a suit alleging that the nursing home's negligence caused injuries or harm that resulted in the patients' deaths.⁴² The patients and/or relatives had signed the residents into the nursing home, and their contracts contained mandatory arbitration clauses.⁴³ The West Virginia Supreme Court held that mandatory arbitration clauses in the context of

³⁷ *Id.*

³⁸ *Id.*

³⁹ FROLIK, *supra* note 5, at 181.

⁴⁰ *Id.*

⁴¹ *Marmet Health Care Center, Inc. et al. v. Brown*, 132 U.S. 1201, 1203 (2012).

⁴² *Id.*

⁴³ *Id.*

personal injury and wrongful death claims against nursing homes were unenforceable as a matter of public policy.⁴⁴ However, the Supreme Court granted certiorari and held that West Virginia's rule against the enforceability of arbitration clauses was pre-empted by the FAA and therefore vacated its ruling.⁴⁵ The West Virginia Supreme Court reasoned that these particular types of arbitration clauses were unconscionable and therefore unenforceable in West Virginia courts, but the Supreme Court found that, "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."⁴⁶ As a result, the Court held, "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 of the FAA."⁴⁷

Because the FAA is a federal statute that Congress enacted under the Commerce Clause, it preempts any state law prohibiting arbitration clauses, categorically, that are covered by the FAA.⁴⁸ Since the FAA covers all agreements concerning "commerce," paired with the Supreme Court's consistently broad definition of commerce, it seems as if the FAA would govern most, if not all, arbitration agreements. Additionally, the FAA defines commerce as, "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation"⁴⁹ Under this extraordinarily broad definition of commerce, and the Supreme Court's acceptance of such broad coverage, it is likely that the states lack any capacity to limit the use of arbitration clauses in contracts, as most contracts concern some type of commerce.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1203.

⁴⁷ *Id.* at 1204.

⁴⁸ Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards A Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. U. L. REV. 131 (2012).

⁴⁹ 9 U.S.C. § 1.

In 2000, the Supreme Court expanded the scope of the reach of the FAA in *Circuit City Stores, Inc. v. Adams*.⁵⁰ The plaintiff attempted to sue his employer for discrimination but had signed a mandatory arbitration clause as a condition of his employment.⁵¹ The Ninth Circuit held that all employment contracts were beyond the reach of the FAA, but the Supreme Court reversed.⁵² The Court found that § 2 of the FAA compels judicial enforcement of arbitration clauses “in any . . . contact evidencing a transaction involving commerce.”⁵³ The Court rejected the argument that the FAA only extends to commercial contracts, which is why the FAA’s scope reaches nursing home contracts as well.⁵⁴ Dissenters of the opinion, as well as many scholars now, believe that the FAA was only intended to govern commercial contracts between two entities with equal bargaining power at the time of its inception (e.g., a merger between two large corporations).⁵⁵ However, with this decision, the Court expanded the reach of the FAA to govern all mandatory arbitration clauses.

V. NURSING HOME ABUSE

This paper has already explored general problems with mandatory arbitration clauses—bias among arbitrators, the finality of such judgments, and the inability of state legislatures to restrict the use of such clauses in wrongful death and personal injury causes of actions. There are more specific problems with these clauses when examining them in the marketplace of nursing home facilities, though. First, we must understand what type of behavior and circumstances lead to these causes of action. These are typically problems pertaining to the standard of care that nursing home facilities and staff provide residents. It may be the resident that complains about the environment or a particular staff member, or perhaps even their medication and rehabilitation regimen. However, more often than not, a resident’s family is the one bringing a lawsuit on behalf of the resident. This may be because the lawsuit is a wrongful death, so a third

⁵⁰ *Circuit City Stores, Inc. v. Adams*, 121 U.S. 1302, 1306 (2000).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1304.

⁵⁴ *Id.*

⁵⁵ *Id.*

party must bring the suit for the deceased, or because the resident has a condition like dementia that would affect their ability to bring the lawsuit.

If a resident can bring a claim in court (if he is a resident of a nursing home without a mandatory arbitration clause) the nursing home is usually liable for intentional and unintentional torts.⁵⁶ If the action taken to cause the harm was intentional, it will be referred to as abuse.⁵⁷ Whereas if the action, or lack of action, occurring to cause the harm was unintentional and due to lack of due care, it will be referred to as negligence.⁵⁸ According to a 2000 study by the National Center on Elder Abuse (NCEA), 44% of nursing home residents interviewed reported that they had been abused, and 95% reported to have been neglected or had witnessed another resident be neglected.⁵⁹ NCEA also reported, in 2012, that 33% of nursing homes were cited for violations of federal standards from 1999–2001.⁶⁰ Also in 2010, NCEA reported that over 50% of nursing home staff admitted to mistreating older patients in the preceding year.⁶¹ Considering this number was self-reported, the actual number of occurrences is probably greater. The types of abuse considered in the study include: physical abuse (29%), resident to resident abuse (22%), psychological abuse (21%), gross neglect (14%), financial exploitation (7%), and sexual abuse (7%).⁶²

These statistics seem fairly alarming. These facilities are designed to protect and take care of the elderly population and the numbers suggest that some facilities do more harm than good. If the statistics were only coming from the NCEA, they may appear skewed. However, the Special Investigations Division of the House Government Reform Committee reported that 30% of nursing homes in the United States were cited for around 9,000 incidents of abuse between 1999 and 2001.⁶³ The most common citations included untreated bedsores, inadequate medical care, malnutrition, dehydration, inadequate sanitation and hygiene, and

⁵⁶ FROLIK, *supra* note 5, at 181.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Dep't of Health & Human Serv. Nat. Center on Elder Abuse: Abuse of Residents of Long Term Care Facilities (2013), http://www.ncea.aoa.gov/Resources/Publication/docs/NCEA_LTCF_Research_Brief_2013.pdf.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ David Ruppe, *Elderly Abused at 1 in 3 Nursing Homes: Report*, ABC NEWS (2014).

preventable accidents.⁶⁴ According to the report, the number of nursing home abuse incidents has increased every year since 1996.⁶⁵ Of the 9,000 incidents found in those two years, 1,601 cases of the abuse violations were serious enough to cause actual harm to residents or place the residents in immediate danger of death or serious injury.⁶⁶

The amount of abuse in nursing homes in the United States goes largely unnoticed, and arbitration clauses contribute to that oversight. “Because arbitration is confidential, if the representatives of neglected seniors wanted to hold these facilities accountable, their stories would be hidden from public view in the arbitration process.”⁶⁷ This obviously helps the facilities by effectively shielding them from negative publicity. In turn, it may also prevent individuals and their families from choosing the right nursing home. Not only are these nursing homes saving on cost through arbitration, these facilities also do not experience free market, consumer-choice consequences of abuse because it is so secretive.⁶⁸ There could be an extraordinarily high amount of neglect or abuse in a given nursing home, but the individual or family choosing a facility may have no knowledge of such due to confidential arbitration tactics. This keeps the public in the dark about what is happening behind closed doors of these facilities. Furthermore, if an individual chooses the “wrong” facility based on lack of information, and then experiences abuse, they are then forced into arbitration as well. This creates a cycle of ignorance and abuse that protects the nursing homes, not the elderly.

VI. PROBLEMS WITH ARBITRATION CLAUSES IN THE CONTEXT OF NURSING HOMES

There are many problems with having these arbitration agreements as requirements for individuals to become residents. The first is that often individuals do not read, or at least thoroughly read, the paperwork

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Beth Davis, *Mandatory Arbitration Agreements in Long-Term Care Contracts: How to Protect the Rights of Seniors in Washington*, 35 SEATTLE U. L. REV. 213, 214 (2011).

⁶⁸ *Id.*

presented to them upon entering a nursing home.⁶⁹ This could occur for multiple reasons. Many times, an individual enters a nursing home under less than ideal circumstances. The individual's health has declined rapidly and he or she needs much more care than in the past, so he or she enters the nursing home in a somewhat state of emergency. In such cases, the individual may not have the opportunity to thoroughly read the contractual obligations before signing.⁷⁰ Furthermore, the day that the individual's children takes their elderly, often sick, parent to a nursing home may be an emotional day for everyone, which may lead to the individual and his or her children to not read every term of the contract with due diligence.⁷¹ As evident, there are emotional aspects of entering an individual into a nursing home that do not accompany many other contractual relationships that make the parties less likely to fully read and comprehend the terms of the contract.

This is not the only problem with the enforcement of these contracts, though. Generally speaking, the common law of contracts demands that parties to a contract do not possess unequal bargaining power.⁷² If one party has a much greater amount of power than the other, it often leads to a lopsided contract, favoring the party with the upper hand.⁷³ Courts can void a contract, or a term of a contract, based upon unequal bargaining power between the two contracting parties.⁷⁴ In the case of nursing homes, it seems clear that many times the nursing home has more bargaining power than the resident. As previously discussed, many times these individuals are becoming residents under unfortunate circumstances. Therefore, these residents and their families may not have time to "shop around" for the right facility. They may feel pressured to get the individual into a facility that can treat them as soon as possible. Under this duress, it seems unlikely that an individual would try to negotiate the terms of the contract with the nursing home. Obviously the resident always has the ability to turn down

⁶⁹ Katherine Palm, Note, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 459 (2006).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Daniel D. Barnhizer, *Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract*, 2006 MICH. ST. L. REV. 841 (2006).

⁷³ *Id.*

⁷⁴ *Id.*

the contract and find a new facility, but because of geographical and time restraints, this might not be feasible for all potential residents. Therefore, it seems as though residents often have unequal, if not nonexistent bargaining power when entering into these arbitration agreements.

Aside from parties simply not reading the terms of the contract before signing, there are other problematic considerations with these mandatory arbitration clauses. One of the main issues with these contractual waivers of an individual's right to bring a lawsuit in court is that not every individual entering a nursing home has the capacity to contract.⁷⁵ Elderly individuals usually do not have a very strong desire to reside in a nursing home. Many elderly individuals would likely prefer to stay in their home and have home care, if necessary, or live with and be taken care of by a family member. Therefore, for many, becoming a resident in a nursing home is a last resort. Usually, it has come to the point where an individual simply cannot safely live at home due to a new or worsening medical condition, and his or her family members are unable or simply unwilling to be the caregivers to the elderly relative. Therefore, when an individual enters a nursing home, it is likely that he or she has an injury or medical condition requiring daily care.⁷⁶

Many of these individuals have a condition affecting their mental capacity. Alzheimer's Association reported that in 2014, one in nine individuals older than 65 had Alzheimer's disease.⁷⁷ The report projects that even more individuals in that age range have dementia and have gone undiagnosed.⁷⁸ This leads to the question of whether these individuals, signing themselves into nursing homes, really possess the capacity to contract away an inherent right. It follows that these individuals enter the nursing home with the inherent right to sue the facility or the staff of the facility, so they must possess the capacity to form a legal, binding, enforceable contract in order to surrender that right. It is possible for an individual, or more likely their family or power of attorney, to prove that

⁷⁵ *Education Materials*, THE ELDER & DISABILITY LAW CENTER, <http://www.edlc.com/Education-Materials/Capacity.shtml>.

⁷⁶ *Selected Long-Term Care Statistics*, FAMILY CAREGIVER ALLIANCE, <https://www.caregiver.org/selected-long-term-care-statistics>.

⁷⁷ Alzheimer's Ass'n, *Alzheimer's Disease Facts and Figures* (2014), http://www.alz.org/downloads/Facts_Figures_2014.pdf.

⁷⁸ *Id.*

the individual lacked capacity to contract at the time of contracting. In this case, the contract would become void and the mandatory arbitration clause would no longer require the parties to settle the tort action in arbitration instead of court. However, there are obstacles to proving an individual lacked the capacity to contract. First, one who enters a contract is assumed to have capacity to do so, so the burden is entirely on the plaintiff.⁷⁹ In order to overcome such a presumption of capacity, the plaintiff must show that at the time of the contracting, the contracting party suffered from a mental or physical illness that created an inability to comprehend the effect or nature of the transaction.⁸⁰ In cases concerning nursing home residents, this may be done through medical records or personal testimony about the resident's state of mind at the time.⁸¹ However, the standard is not low or consumer-oriented; rather, in order to succeed in showing the resident lacked capacity, the plaintiff must show beyond simple feebleness or mental weakness, but "cognitive deficits that prevented the resident from understanding the arbitration agreement at the time it was signed."⁸² Usually an evidentiary hearing will be held in order to determine the party's ability to enter a legally binding contract and thus surrender his or her right to bring a lawsuit concerning a tort occurring at the facility.⁸³ There are many issues with this type of hearing, though. Those testifying are most likely relatives and probably consist of children or spouses that have a personal stake in the outcome of the hearing. Therefore, the presiding judge may think that the personal testimony is biased, perhaps even subconsciously biased, and take such testimony with a grain of salt. Furthermore, the timing might present a problem. After the resident has entered the nursing home there is much more monitoring and medical attention. It might be easy to show that the resident suffered from a mental disease after he or she entered the nursing home and received medical attention, but the plaintiffs may have less evidence of the resident's mental state just before entering the nursing home.

⁷⁹ John R. Schleppebach, *Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and their Residents*, 22 ELDER L.J. 141, 158 (2014).

⁸⁰ *Id.* at 159.

⁸¹ *Id.* at 158.

⁸² *Id.* at 158–59.

⁸³ *Id.*

Sometimes residents do not sign themselves into nursing homes. This could be because the nursing home “requires” a third-party payer guarantee as discussed above or because the resident lacks the capacity to sign. No matter the reasoning, many times children or relatives actually sign the paperwork for the new resident of the nursing home. When this happens, it seems unlikely that the resident actually signed away his or her right to bring suit against the facility in the future. Even if the third party signing the documents has the authority to admit the resident, they may not have the authority to sign the mandatory arbitration clause without the resident’s understanding and consent. This is another instance where there is little chance that the resident even read the agreement, let alone understood the terms and affirmatively agreed to them. The third party 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.”⁸⁴ The question as to whether the third party actually has the authority and acted in accordance with the resident’s manifestations is a fact-intensive inquiry, and once again, may require an evidentiary hearing.⁸⁵ It is possible that the resident understood the terms of the contract, and was content with consenting to mandatory arbitration in the event of abuse or neglect. It seems more likely though, in the case of a third party signing the contract, that the resident did not read, understand, or consent to specific terms in the contract like the mandatory arbitration clause.

Again, in these cases, the plaintiff may argue that the resident is not bound by the contract’s mandatory arbitration clause because he or she did not physically sign the contract, and there might be a lack of evidence to support that he or she desired to consent to such terms. If the resident never conferred proper legal authority to the signer, then the resident may not be bound to the contract.⁸⁶ “State courts that have considered the issue have

⁸⁴ Kelly Bagby & Samantha Souza, *Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts*, 29 J. CONTEMP. HEALTH L. & POL’Y 183, 189 (2013).

⁸⁵ *Id.* at 190.

⁸⁶ Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 276 (2004).

generally held that family members who have not been granted explicit authority by the resident to enter into a binding contract cannot hold the resident or others to the contract.⁸⁷ Therefore, if a third party signs the contract for the resident, without a legal power to do so, there is a compelling argument for the plaintiff that he or she should not be bound by the terms of the contract. This is consistent with contract common law. It seems inherently wrong to bind an individual by a contract's terms that he or she has never seen, read, comprehended, or consented to, simply because a family member or friend signed them into a nursing home.

Surprisingly, the same argument can be made when the resident lacks capacity and has a power of attorney present to sign the contract. One who holds a power of attorney has a greater ability to make decisions for the elderly than a random family member or friend that accompanies the individual into the nursing home. However, courts still refuse to enforce some arbitration clauses when the power of attorney is the individual that signs for the resident.⁸⁸ The reasoning behind this refusal is that the power of attorney has been delegated the power to make "medical decisions" and the decision to waive one's right to bring a lawsuit in court, and thus bind them to arbitration, is not a medical decision.⁸⁹ Other courts held that powers' of attorney authority does not take effect until the resident has lost the capacity to make his or her own decisions.⁹⁰ Therefore, if a resident has the capacity to contract and a power of attorney signs for the individual, then the resident had the capacity to consent and did not. This would render the contract void.⁹¹

One solution to consider would be establishing a clearly legal relationship between the resident and a power of attorney or family member signing the resident into the nursing facility. In order to avoid being bound by the mandatory arbitration agreement, the resident could specify, through a contract, that these individuals lack the ability to sign away his right to sue. Residents would have to have the foresight to know that his or her power of attorney may sign them into a facility and that facility may have a

⁸⁷ *Id.* at 277.

⁸⁸ Paul Bland, *Fighting Mandatory Arbitration Clauses*, 48 TRIAL 22 (Oct. 2012).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

mandatory arbitration agreement in their contract. However, if the resident made it clear, through writing, that no other individual has the authority to sign away his or her right to bring a lawsuit in court, he or she may be able to void any contract to the contrary.

VII. UNCONSCIONABILITY

The last problem this note will discuss is the unconscionability of these contracts. Another way that courts find these contracts and arbitration clauses void is if the court finds that the contract or the term of the contract is unconscionable.⁹² “Applying the FAA language and U.S. Supreme Court decisions, we have held that applicable contract defenses under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the [FAA].”⁹³ This can either be accomplished by procedural unconscionability or substantive unconscionability, but the burden to prove that the arbitration agreement is unconscionable is on the plaintiff because it serves as an affirmative defense to the enforcement of the contract.⁹⁴ Courts sometimes find the arbitration agreement procedurally unconscionable if the terms of the agreement are not clearly marked or buried within a large amount of nursing facility admission documents.⁹⁵ The court is more willing to find the terms unconscionable if the nursing home did not explain the terms, if the resident did not have adequate opportunity to read the agreement, or the situation is highly stressful and the signing is not optional.⁹⁶ However, if the arbitration agreement is clearly marked, easily understandable, and the resident is given time to read and comprehend the agreement, the court will most likely uphold the contract.⁹⁷

Woebse v. Health Care and Retirement Corp. of America provides an example of a plaintiff succeeding on a procedurally unconscionable affirmative defense to the enforcement of a nursing home arbitration

⁹² *Doctor’s Assoc. v. Casarotto*, 517 U.S. 681 (1996).

⁹³ *Id.*

⁹⁴ *Strausberg v. Laurel Healthcare Providers, LLC*, 304 P.3d 409, 412 (N.M. 2013).

⁹⁵ *Bagby*, *supra* note 84, at 195.

⁹⁶ *Id.* at 195–96.

⁹⁷ *Id.* at 196.

agreement.⁹⁸ The Supreme Court of Mississippi found that the arbitration agreement was procedurally unconscionable for a number of reasons.⁹⁹ The court found that the meeting between the resident's daughter and the representative of the facility lasted only five minutes and the agreement was thirty-seven pages long.¹⁰⁰ Additionally, the representative made no attempt to inform the plaintiff of the existence of the arbitration clause, much less explain the agreement and the rights that she would be waiving on behalf of her father.¹⁰¹ Additionally, the court found that the parties displayed unequal bargaining power because the plaintiff was never informed that she did not have to sign the arbitration agreement in order for her father to be admitted to the facility.¹⁰² This set of facts seems like a common practice for nursing homes. However, many courts would have looked at the exact same, or very similar, facts and found that the contract was enforceable.

In *Hayes v. Oakridge Home*, the Ohio Supreme Court found that the contract was not unconscionable when a ninety-five-year-old woman signed a contract.¹⁰³ The dissent found that the plaintiff lacked any business experience and that no one explained the buried arbitration agreement to her.¹⁰⁴ The court upheld the clause and contract as a whole, arguing that there is a strong presumption favoring arbitration.¹⁰⁵ Evidently, it is unclear what exact criteria a court will identify as unconscionable, as two different courts could look at a similar scenario and land on opposite sides on the issue. Therefore, the success of this route for a plaintiff greatly depends on the court hearing the case.

Alternatively, the court could find the arbitration agreement to be substantively unconscionable. A court usually applies the "shock the conscience" test in order to do so.¹⁰⁶ For example, the Supreme Court of Mississippi stated that, "when reviewing a contract for substantive unconscionability, we look within the four corners of an agreement in order

⁹⁸ *Woebsse v. Health Care and Ret. Corp. of America*, 977 So. 2d 630, 633 (Fla. Dist. Ct. App. 2008).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 634.

¹⁰³ *Hayes v. Oakridge Home*, 122 Ohio St. 3d 63 (Ohio 2009).

¹⁰⁴ *Id.* at 79.

¹⁰⁵ *Id.* at 66.

¹⁰⁶ *Bagby*, *supra* note 84, at 197.

to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between, contracting parties.”¹⁰⁷ A normal arbitration agreement within the nursing home contract will most likely not be found to be unconscionable. The agreement would have to, on its face, unfairly prejudice one party (i.e., the facility could bring suit in court, but the resident is bound by arbitration).¹⁰⁸ Although state courts may find that mandatory arbitration clauses in the context of nursing home facilities are inherently and categorically substantively unconscionable, the court is bound by the FAA to uphold these clauses withstanding any other problems.

VIII. POSSIBLE SOLUTIONS

It is clear, through the Supreme Court’s holding in *Marmet Health Care Center, Inc.*, that states lack the ability to restrict the use of these mandatory arbitration clauses in nursing home contracts due to the preemption clause, combined with the FAA. Therefore, proponents of such legislation are now asking for Congress to take action. Many advocates have urged Congress to prohibit the use of these clauses altogether in the context of long-term care contracts.¹⁰⁹ The Mandatory Arbitration Fairness Act of 2013 was introduced to Congress and would greatly limit the scope of FAA to govern disputes between commercial entities with greater bargaining power, not consumers.¹¹⁰ The bill was assigned to a congressional committee as of May 7, 2013, but has not progressed since.¹¹¹ A few states passed legislation like West Virginia’s that prohibited the use of arbitration agreements in nursing homes, but courts have since struck them down under the FAA.¹¹² Therefore, Congress must take action to protect the elderly from surrendering their right to bring a suit, without comprehending such terms. This would create a more transparent marketplace for nursing home facilities, and would deter abuse and neglect in such contexts.

¹⁰⁷ *Id.* at 196.

¹⁰⁸ *Id.* at 197.

¹⁰⁹ Davis, *supra* note 67, at 215.

¹¹⁰ Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013).

¹¹¹ *Id.*

¹¹² Davis, *supra* note 67.