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Seeking Justice for Grandma: Challenging Mandatory Arbitration in Nursing Home Contracts

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COMMENTS

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I. INTRODUCTION

Mandatory arbitration provisions in nursing home admission contracts have become rather ubiquitous,[1] but there are a variety of legal arguments to refute enforcement of these provisions.[2] Arbitration provisions in nursing home admission contracts can be biased in favor of the nursing home and limit available remedies to plaintiffs.[3] Even though nursing homes may benefit from arbitration, it can be damaging to nursing home residents and their families when residents have been injured or killed as a result of the nursing home's actions or inaction.

This Comment advocates against the use of mandatory arbitration in nursing home admission contracts and discusses various legal theories available to refute such clauses. Part II discusses mandatory arbitration in general and its use in nursing home admission contracts. Part III summarizes some of the common arguments made in favor of and against arbitration in nursing home admission contracts. Finally, Part IV addresses how courts analyze these agreements and possible approaches to avoid arbitration of disputes arising out of the nursing home contract.

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1. *See infra* note 22 and accompanying text.
2. *See infra* notes 103-289 and accompanying text.
3. *See infra* notes 66-89 and accompanying text.

II. OVERVIEW OF MANDATORY ARBITRATION AND NURSING HOME CONTRACTS

A. Origins of Mandatory Arbitration: The Federal Arbitration Act

During the nineteenth and early twentieth centuries, courts viewed arbitration[4] with hostility and disapproval.[5] In 1925, Congress enacted the United States Arbitration Act,[6] codified in 1947 as the Federal Arbitration Act (FAA).[7] The FAA evidenced an attempt to alleviate years of judicial hostility towards arbitration.[8] The FAA governs the enforcement of agreements to arbitrate disputes in maritime transactions or any contracts involving interstate commerce.[9] Section 2 of the FAA, the "primary substantive provision of the Act,"[10] makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[11] Under the FAA, arbitration allows parties to enter into contracts specifying issues that they have agreed to submit to arbitration.[12] In theory, mandatory arbitration[13] under the FAA improves efficiency within the justice system by decreasing the number of claims brought in court as well as decreasing the time and costs necessary to resolve disputes.[14]

Despite the codification of the FAA in 1947, the U.S. Supreme Court did not interpret the FAA favorably until the 1980s.[15] In 1983, the Court endorsed Section

4. Arbitration is defined as "A dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute." BLACK'S LAW DICTIONARY (10th ed. 2014).

5. *See* Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 476; Alison Brooke Overby, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1139 (1986); Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers From Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 668 (2013); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 98 (2012).

6. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925).

7. Federal Arbitration Act, ch. 392, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C. §§ 1-16 (2012)).

8. *See* Southland Corp. v. Keating, 465 U.S. 1, 13 (1984); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008). Both the House Report and Senate Report accompanying this legislation identified judicial hostility as the impetus for the legislation. H.R. REP. NO. 68-96, at 1-2 (1924) (discussing the jurisdictional "jealousy" of the courts and the resulting refusal to enforce arbitration agreements, necessitating legislative action). The Senate Report reflects the same sentiment. S. REP. NO. 68-536, at 2-3 (1924) (discussing resistance to enforcing arbitration agreements and the reasons for that resistance).

9. 9 U.S.C. § 2 (2012). Since the FAA applies to arbitration required by contractual agreements, it is considered "mandatory arbitration." BLACK'S LAW DICTIONARY (10th ed. 2014). This Article will use the terms "arbitration," "binding arbitration," and "mandatory arbitration" interchangeably, but all refer to any arbitration required by a contractual agreement.

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

11. 9 U.S.C. § 2.

12. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

13. Arbitration required by contractual agreements, like arbitration covered under the FAA, is defined as "mandatory arbitration." BLACK'S LAW DICTIONARY (10th ed. 2014). This Article will use the terms "arbitration" and "mandatory arbitration" interchangeably, but both refer to any arbitration contained in a contract.

14. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

15. Burton, *supra* note 5, at 476-77 (discussing three cases in the 1980s epitomizing the Supreme Court's federal policy favoring arbitration); Wilson, *supra* note 5, at 102-06 (discussing the evolution of the Supreme Court's attitude towards arbitration from the 1960s to the 1980s).

2 of the FAA as "liberal federal policy favoring arbitration agreements."[16] The Court declared that Section 2 "create[d] a body of federal substantive law of arbitrability"[17] that is "applicable in state and federal courts."[18] As such, state courts may regulate contracts and any arbitration clauses "under general contract law principles";[19] they may invalidate an arbitration clause using general contract defenses "such as fraud, duress, or unconscionability" without conflicting with the FAA.[20] However, state courts cannot invalidate arbitration agreements solely based on laws specific to arbitration or laws that undermine the strong federal policy favoring arbitration.[21] Because of this policy and the encouragement of the Supreme Court, mandatory arbitration agreements have become common in various types of consumer contracts,[22] especially in nursing home[23] admission contracts.[24]

B. Use of Mandatory Arbitration in Nursing Home Admission Contracts

Admitting a loved one into a nursing home is an emotional and exhausting process that often takes place under emergent circumstances.[25] Typically, a worried child or spouse must find a safe refuge that can provide the immediately necessary care for a physically or mentally frail family member.[26] The decision to admit a loved one is a stressful one, whether it is temporary or permanent.[27] Since the need

16. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.").

17. *Moses*, 460 U.S. at 24.

18. Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

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

20. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

21. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 343 (2011) (holding that the FAA does not preserve state laws that contradict the purpose of the FAA).

22. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631 (2005).

23. "Nursing home," as defined under the Social Security Act, 42 U.S.C. § 1396g(e)(1) (2012), includes "any institution or facility defined as such for licensing purposes under State law, or, if State law does not employ the term nursing home, the equivalent term or terms as determined by the Secretary, but does not include a religious nonmedical health care institution."

24. Nora Lockwood Tooher, *Arbitration Agreements in Nursing Home Admissions Becoming Widespread*, LAWYERS WEEKLY USA (Sept. 27, 2004). In the late 1990s, a number of juries awarded exorbitantly high damages to nursing home residents in personal injuries suits, so many nursing homes responded by including binding arbitration agreements in their admission contracts. 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), http://online.wsj.com/article/SB120786025242805879.html.

25. *See* Cynthia L. Barrett, *Dealing With Facility Admissions Agreements*, SL071 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 231, 238 (2006); Amy Parise DeLaney, *Maneuvering the Labyrinth of Long-Term Care Admissions Contracts*, 4 NAT'L ACAD. ELDER L. ATTY'S J. 35, 37 (2008) ("Contracts between seniors needing care and facilities providing care are often presented at difficult and inopportune times, fraught with significant emotion, stress, and often, guilt."); Denese Ashbaugh Vlosky et al., *"Say-so"As a Predictor of Nursing Home Readiness*, 93 J. FAM. & CONSUMER SCIS. 59, 59 (2001) ("Nursing home placement often follows a major health crisis when decisions have to be made quickly.").

26. Barrett, *supra* note 25.

27. Maureen Armour, *A Nursing Home's Good Faith Duty "To" Care: Redefining A Fragile Relationship Using the Law of Contract*, 39 ST. LOUIS U. L.J. 217, 225 (1994); Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Resident*s, 8

for nursing home care often arises unexpectedly,[28] many new residents and their families do not read the admission contract carefully,[29] nor do they possess adequate business acumen to understand the arbitration agreement or the rights they may be signing away.[30] Moreover, these complicated legal agreements often comprise just one of many documents in many nursing home admission packages[31] that must be signed prior to or immediately upon admission.[32]

Nursing homes routinely include arbitration provisions in their admission contracts.[33] In fact, "most of the nation's largest nursing home chains, including Integrated Health Services, Beverly Industries, Kindred Healthcare, and Mariner, include arbitration agreements in their admissions packets."[34] Mandatory arbitration agreements in nursing home admission contracts received national attention in *Marmet Health Care Center, Inc. v. Brown*,[35] in which the U.S. Supreme Court determined that the FAA preempted any state law or public policy limiting arbitration, with no exception for claims of personal injury or wrongful death.[36] The decision illustrated the Court's "emphatic federal policy in favor of arbitral dispute resolution."[37] Notwithstanding the Court's Decision in *Marmet*, mandatory arbitration in nursing home admission contracts has become a highly contested area of law,[38] and state courts have reached widely different results when faced with the enforceability of arbitration agreements in nursing home admission contracts.[39]

DEPAUL J. HEALTH CARE L. 263-64 (2004) (noting that admission into nursing homes is a time of extreme stress for admittees and their families).

28. Krasuski, *supra* note 27, at 302.

29. Krasuski, *supra* note 27, at 263-64.

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

31. Armour, *supra* note 27, at 225 n.35 (describing an admissions packet that contains fifty-one separate items).

32. Michelle Andrews, *You Don't Have to Sign Away Your Right to Take a Nursing Home to Court*, WASH. POST (Sept. 18, 2012), http://search.proquest.com/docview/1040744968?accountid=14576; 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, 185-86 (2013).

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

34. Krasuski, *supra* note 27, at 268.

35. Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012) (per curiam).

36. *Id.* at 1203. However, the Supreme Court remanded the case for consideration of whether, absent the public policy rationale against arbitration agreements in nursing home contracts, the arbitration clauses at issue "are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Id.* at 1204.

37. *Marmet Health Care Ctr., Inc.*, 565 U.S. at 533 (quoting KPMG LLP v. Cocchi, 132 S. Ct. 23, 25 (2011) (per curiam)).

38. *See* Reed R. Bates & Stephen W. Still, Jr., *Arbitration in Nursing Home Cases: Trends, Issues, and A Glance into the Future*, 76 DEF. COUNS. J. 282, 282 (2009); Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L. J. 453, 453 (2006).

39. *See, e.g.*, Mathews v. Life Care Ctrs. of Am., Inc., 177 P.3d 867, 871 (Ariz. Ct. App. 2008) (requiring arbitration of all claims); Carter v. SSC Odin Operating Co., 976 N.E.2d 344, 360 (Ill. 2012) (requiring arbitration of the Nursing Home Care Act claim but not the wrongful death claim); Miller v. Cotter, 863 N.E.2d 537, 540 (Mass. 2007) (holding the same); Lawrence v. Beverly Manor, 273 S.W.3d 525, 529, 530 (Mo. 2009) (en banc) (holding arbitration not required); Texas Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 354 (Tex. App. 2007) (holding arbitration not required).

III. DEBATING MANDATORY ARBITRATION IN NURSING HOME ADMISSION CONTRACTS

A. Policy Arguments in Favor of Mandatory Arbitration

Proponents of mandatory arbitration believe the agreements are a cost-effective and time-efficient tool.[40] Arbitration is more informal than litigation,[41] "reducing the cost and increasing the speed of dispute resolution."[42] The informality of arbitration "enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution."[43] A 2015 study on liability claim costs in the long term care profession in the United States reveals that "claims resolved under arbitration agreements have a lower cost and settle more quickly."[44]

Moreover, arbitration enhances party autonomy because parties can design the dispute resolution process and tailor the arbitration to the needs of their case.[45] Specifically, "[a]rbitration eases the burden on clogged court dockets; it offers parties an opportunity to submit disputes to one experienced in that field of business."[46] The U.S. Supreme Court also believes that the "discretion in designing arbitration processes . . . allow[s] for efficient, streamlined procedures tailored to the type of dispute," which reduces the cost and time of resolving disputes.[47] As such, arbitration improves efficiency by sending disputes to the appropriate forum "for proactive treatment and resolution."[48]

In the health care context, nursing homes favor arbitration over litigation because arbitrators often grant lower awards than juries.[49] Juries notoriously award exorbitantly high damages to victims of nursing home negligence.[50] For example, in a negligence suit against a nursing home, a resident died "from dehydration as a

40. Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Senator Patrick J. Leahy, Chairman of the U.S. Senate Comm. on the Judiciary (July 30, 2008), http://www.citizen.org/documents/DOJ%20-%2007-30-08%20Ltr.pdf.

41. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974) ("The record of the arbitration proceeding is not as complete [as judicial proceedings]; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.").

42. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011). *See also* Birkey Design Grp., Inc. v. Egle Nursing Home, Inc., 687 A.2d 256, 258 (Md. Ct. Spec. App. 1997) ("Arbitration is an informal, expeditious, and inexpensive alternative to conventional litigation."); Burton, *supra* note 5, at 481 (Arbitration is "quicker and cheaper for the parties than litigation, even after the costs and fees are taken into account.").

43. *Alexander*, 415 U.S. at 58.

44. AON GLOBAL RISK CONSULTING, LONG TERM CARE GENERAL LIABILITY AND PROFESSIONAL LIABILITY ACTUARIAL ANALYSIS 3 (2015), https://www.ahcancal.org/research_data/liability/Documents/2015%20General%20Liability%20and%20Professional%20Liability%20Actuarial%20Analysis%20Report.pdf.

45. Burton, *supra* note 5, at 479.

46. *Birkey Design Grp., Inc.*, 687 A.2d at 258.

47. *AT&T Mobility LLC*, 563 U.S. at 344-45; *see also Alexander*, 415 U.S. at 58 ("Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.").

48. Karen Ignagni, *Liability and Health Care: Time for a Fresh Approach*, 10 METRO. CORP. COUNS. 34, 34 (2004).

49. Alan Bloom et al., *Alternative Dispute Resolution in Health Care*, 16 WHITTIER L. REV. 61, 76 (1995).

50. *See* Krasuski, *supra* note 27, at 266-67. From 1995 to 1998, jury awards of compensatory damages have increased four times to an average of $1.3 million. *Id.* at 266.

consequence of neglect that resulted from the understaffing of [the nursing home]."[51] The jury awarded the plaintiff "$11.5 million in compensatory damages and $80 million in punitive damages."[52] On appeal, the court reduced damages to just under $4.6 million in compensatory damages and almost $32 million in punitive damages.[53]

Proponents believe that reducing the costs of litigation through arbitration is the best solution to exorbitant jury awards.[54] High jury awards cause nursing homes to increase their rates, which leads to higher costs for patients and their families and may leave potential nursing home residents without care.[55] High jury awards also result in increasing costs of insurance to nursing homes, consequently increasing rates for patient insurance.[56] By lowering awards, arbitration helps nursing homes combat the increasing cost of insurance.[57] Finally, lower awards allow nursing homes to focus financial resources on patients' care rather than litigation.[58] Specifically, by allocating money towards hiring more nursing home employees, arbitration helps combat understaffing, which "jeopardize[s] the health and safety of [nursing home] residents."[59]

Arbitration is also gaining public support. One survey indicates that from 1999 to 2003, the number of Americans who preferred arbitration over a lawsuit for monetary damages increased by 5 percent from 59 percent to 64 percent.[60] Supporters of arbitration point to the national policy favoring arbitration and recommend that state governments should enact arbitration policies that balance the power of the contracting parties to protect patient interests, thus legitimizing arbitration as a dispute resolution method for nursing homes and their residents.[61]

B. Policy Arguments Against Mandatory Arbitration

Despite the frequency of arbitration provisions in nursing home admission contracts, mandatory arbitration agreements in nursing home admission contracts face intense opposition.[62] Opponents of mandatory arbitration agreements in nursing home admission contracts include congressional representatives[63] and the American

51. Manor Care, Inc. v. Douglas, 763 S.E.2d 73, 106-07 (W. Va. 2014).

52. *Id.* at 80.

53. *Id.* at 94 (reducing compensatory damages to $4,594,615.22 and punitive damages to $31,978,521.93).

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

55. Baumer, *supra* note 54, at 173.

56. Baumer, *supra* note 54, at 173.

57. Krasuski, *supra* note 27, at 266; Andrews, *supra* note 32.

58. Koppel, *supra* note 24.

59. Manor Care, Inc. v. Douglas, 763 S.E.2d 73, 96 (W. Va. 2014).

60. NAT'L ARBITRATION FORUM, THE CASE FOR PRE-DISPUTE ARBITRATION AGREEMENTS: EFFECTIVE AND AFFORDABLE ACCESS TO JUSTICE FOR CONSUMERS EMPIRICAL STUDIES AND SURVEY RESULTS 9 (2004), http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf.

61. Baumer, *supra* note 54, at 173.

62. Palm, *supra* note 38, at 454.

63. Letter from Senators to Andy Slavitt, Acting Administrator, Centers for Medicare and Medicaid Services (Sept. 23, 2015), https://www.franken.senate.gov/files/documents/150923CMSArbitration.pdf (requesting a prohibition of binding pre-dispute arbitration clauses in long-term care facility contracts). In 2009, Senators tried but failed to pass "The Fairness in Nursing Home Arbitration Act," which would amend the FAA to make "pre-dispute arbitration agreement between a long-term care facility and a

Arbitration Association,[64] the largest arbitration provider worldwide.[65] The American Arbitration Association believes that many nursing home residents are not in the appropriate state of mind to evaluate arbitration agreements.[66] While consumer arbitration agreements preclude the litigation of *contract* claims, arbitration agreements in nursing home contracts prevent residents from trying any tort claims, such as negligence or abuse, before a jury.[67]

Moreover, nursing homes and residents have inherently and grossly unequal bargaining power[68] because nursing homes draft admission contracts and can tailor terms to their advantage.[69] Such terms are typically nonnegotiable.[70] As a result, critics argue that almost all nursing home admission agreements are adhesion contracts[71] that are "drafted and 'imposed' by a strong party on another with less bargaining power."[72] In July 2015, the Centers for Medicare & Medicaid Services proposed changes for binding arbitration agreements for long-term care facilities such as nursing homes[73] because of their concern "that the facilities' superior bargaining power could result in a resident feeling coerced into signing the agreement."[74] Although contracts of adhesion "are not automatically void,"[75] they make it easier to argue that the agreement is substantively unconscionable.[76]

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resident of a long-term care facility (or anyone acting on behalf of such a resident, including a person with financial responsibility for that resident)" invalid and unenforceable. Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009).

64. Koppel, *supra* note 24 (writing that the American Arbitration Association disapproves of mandatory arbitration in disputes over nursing-home care and generally refuses such cases).

65. AM. ARBITRATION ASS'N, *Dispute Resolution Services*, https://www.adr.org/aaa/faces/services/disputeresolutionservices (last visited Nov. 20, 2015).

66. Koppel, *supra* note 24.

67. Krasuski, *supra* note 27, at 292 ("[A]rbitration agreements in nursing homes deny vulnerable individuals who have been neglected or abused by their caregivers the opportunity to raise tort claims in court.").

68. Bagby & Souza, *supra* note 32, at 187.

69. Krasuski, *supra* note 27, at 267; Paul Bland, *Fighting Mandatory Arbitration Clauses*, 48 TRIAL 22, 24 (OCT. 2012).

70. *See* Miller v. Cotter, 863 N.E.2d 537, 548 n.16 (Mass. 2007) (finding a contract of adhesion because the nursing home provided the terms of the contract and the contract was not the subject of active negotiation); Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds *ex rel*. Braddock, 14 So. 3d 695, 701 (Miss. 2009) (citation omitted) (holding that nursing home admission contracts were contracts of adhesion when the contracts were "drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms.").

71. GEORGE J. AGICH, DEPENDENCE AND AUTONOMY IN OLD AGE 26 (2003); Suzanne Gallagher, *Mandatory Arbitration Clauses in Nursing Admission Agreements: The Rights of Elders*, 3 NAELA J. 187, 188 (2007).

72. Burton, *supra* note 5, at 479. *See also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 600 (1991) (defining adhesion contracts as "form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power.").

73. Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42168, 42211 (proposed July 16, 2015). The proposed rule requires facilities to explain arbitration agreements to residents and select a neutral arbitrator in a venue convenient to both parties. The rule also requires that binding arbitration agreements be entered into voluntarily, not as a condition of admission. Finally, arbitration agreements should be completely separate agreements, not included in "any other agreement or paperwork addressing any other issues." *Id.*

74. *Id.* The proposed rule also suggests that "the increasing prevalence of these agreements could be detrimental to residents' health and safety." *Id.*

75. E. Ford, Inc. v. Taylor, 826 So. 2d 709, 716 (Miss. 2002); Hughes Training, Inc. v. Cook, 254 F.3d 588, 593 (5th Cir. 2001).

76. Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds, 14 So. 3d 695, 701 (Miss. 2009). *See* discussion *infra* Part IV, Sec. 4.

In addition, mandatory arbitration agreements in nursing home admission contracts may identify "industry-friendly" arbitrators or hold proceedings at locations inconvenient for residents.[77] Nursing homes can also avoid plaintiff-friendly statutes by requiring a shorter length of time to file complaints than state statutes of limitation and limiting damages by instituting caps below statutory caps or excluding attorney's fees, which do not have statutory limits.[78]

Additionally, the unique nature of the typical nursing home admission experience likely puts elderly residents at a severe bargaining disadvantage.[79] Admittance into a nursing home is an emotional experience occurring in a tense and unfamiliar setting,[80] often in response to an urgent and sudden need.[81] As a result, the admittee may not have the opportunity to read carefully the admission contracts or have time to seek and carefully consider alternative facilities.[82] Therefore, critics believe it is disingenuous for nursing homes to claim later that the resident or the resident's family member "consciously, knowingly and deliberately accepted an arbitration clause in the contract" that would preclude them from having a jury decide whether a nursing home negligently injured or killed the resident.[83] These notable aspects of the nursing home admission process make mandatory arbitration agreements in admission contracts more harmful than arbitration agreements in other situations.[84]

The nature of arbitration itself may disadvantage nursing home residents and their families. For example, arbitration lacks public accountability since arbitration hearings are confidential.[85] Additionally, it is more difficult to appeal arbitration than a court ruling.[86] Arbitration agreements often cap the amount that a plaintiff can recover in damages, and even those with no cap tend to result in lower awards than a trial would typically produce.[87] Finally, by compelling plaintiffs to argue their claims in arbitration rather than court, nursing homes make it more difficult for such claimants to obtain attorneys.[88] Attorneys who take cases on contingent fees may refuse to arbitrate claims because the likely lower recovery in arbitration will not be adequate compensation for the case.[89]

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77. Baumer, *supra* note 54, at 171.

78. Baumer, *supra* note 54, at 171.

79. Krasuski, *supra* note 27, at 263-64 (noting that the need for nursing care often arises unexpectedly and that admission is a time of extreme stress for residents and their families, during which they sign arbitration agreements as one of a number of documents given to them at the same time).

80. Richard Dollinger, *New Battle Over the Future of Elder Care: Arbitration vs. Litigation*, N.Y. L.J. (July 2, 2013), http://www.newyorklawjournal.com/id=1202609219115&New_Battle_Over_the_Future_of_Elder_Care_Arbitration_vs_Litigation.

81. Krasuski, *supra* note 27, at 264.

82. Bagby & Souza, *supra* note 32, at 187; Palm, *supra* note 38, at 459.

83. Dollinger, *supra* note 80.

84. Palm, *supra* note 38, at 459.

85. WILLIAM A. KAPLAN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 74 (2007).

86. *See* Nan Aron, *Leveling the Legal Playing Field: Limit Forced Arbitration*, L.A. TIMES (Jan. 14, 2014), http://www.latimes.com/opinion/commentary/la-oe-aron-arbitration-contracts-instagram-20140114,0,397221 0.story#axzz2r5Jx 11 MO.

87. *See* Jessica Fargen, *Nursing Home Residents Often Sign Away Rights to Sue*, BOS. HERALD (Mar. 8, 2010), http://www.bostonherald.com/news_opinion/local_coverage/2010/03/nursing_home_residents_often_sign_away_rights_sue.

88. Sternlight, *supra* note 22, at 1654.

89. Sternlight, *supra* note 22, at 1654. The average recovery in arbitration is lower than the average recovery in litigation. *See, e.g.*, Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 114-15 (2003).

Notwithstanding the justifications for and against arbitration in nursing home contracts, a court must determine the applicable law, if a valid agreement to arbitrate exists, "and whether the specific dispute falls within the scope of that agreement."[90]

IV. CHALLENGING MANDATORY ARBITRATION IN NURSING HOME ADMISSION CONTRACTS

A. Applicable Law and Contract Validity

As a preliminary matter, courts must determine what federal or state law governs the arbitration agreement.[91] The FAA only applies to arbitration agreements involving interstate commerce,[92] and the Supreme Court has interpreted "interstate commerce" broadly.[93] The underlying admissions agreement at issue must involve interstate commerce for the FAA to apply.[94] Therefore, a nursing home's interstate activities determine whether the FAA governs arbitration agreements between nursing homes and residents.[95]

Courts have considered the receipt of materials from other states, treatment of patients from other states, any out-of-state offices, and the receipt of Medicare funds in determining whether the agreement involved "interstate commerce."[96] In *Dean v. Heritage Healthcare of Ridgeway, LLC*, the Supreme Court of South Carolina held that the nursing home residency contract implicated the FAA because "nursing home residency contracts usually entail providing residents with meals and medical

90. Houlihan v. Offerman & Co., 31 F.3d 692, 694-95 (8th Cir. 1994).

91. Suzanne M. Scheller, *Arbitrating Wrongful Death Claims for Nursing Home Patients: What Is Wrong with This Picture and How to Make It "More" Right*, 113 PENN ST. L. REV. 527, 536 (2008).

92. 9 U.S.C. § 2.

93. Paetzold v. Am. Sterling Corp., 247 S.W.3d 69, 72 (Mo. App. W.D. 2008) (describing "interstate commerce" as functionally equivalent to "affecting commerce"); *see also* Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 589 (Ky. 2012) ("Congress's commerce power is interpreted broadly.").

94. *See* Terminix Int'l, Inc. v. Rice, 904 So. 2d 1051, 1054 (Miss. 2004) (applying the FAA to arbitration provisions in contracts involving commerce); Transouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). ("The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce.").

95. *See* Cmty. Care of Am. of Ala., Inc. v. Davis, 850 So. 2d 283, 288–89 (Ala. 2002) (finding the FAA did not apply because the nursing home's activities were primarily intrastate, not interstate); McGuffey Health & Rehab. Ctr. v. Jackson, 864 So. 2d 1061, 1063 (Ala. 2003) (considered Medicare funds moving across state lines to determine if an agreement substantially affects interstate commerce).

96. *See also* Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 329 (1991) (holding that purchase of out-of-state medicines and acceptance of out-of-state insurance established interstate commerce); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661, 668 (Ala. 2004) (finding nursing home admission contract substantially affected interstate commerce because owner of nursing home had regional office in Florida, headquarters in Maryland, provided services to several patients from outside of Alabama, and received regular shipments of supplies from other states); Triad Health Mgmt. of Ga., III, LLC v. Johnson, 679 S.E.2d 785, 787–88 (Ga. Ct. App. 2009) (applying FAA to nursing home admission contract because facility purchased supplies from out-of-state vendors, treated out-of-state patients, and had patients insured through Medicaid and Medicare); Covenant Health & Rehab. of Picayune, LP v. Lumpkin *ex rel.* Lumpkin, 23 So. 3d 1092, 1095 (Miss. Ct. App. 2009) (holding FAA governed nursing home admissions agreement because agreement evidenced economic activity affecting interstate commerce in the aggregate); McIntosh v. Tenet Health Sys. Hosps., Inc., 48 S.W.3d 85, 88 (Mo. Ct. App. 2001) (finding arbitration agreement subject to FAA because employer treated out-of-state patients, received goods and services from out-of-state vendors, and received reimbursement from out-of-state and multi-state insurers, and employee's position as drug counselor facilitated and affected employer's business activities).

supplies that are inevitably shipped across state lines from out-of-state vendors."[97] Additionally, since the U.S. Supreme Court has held that health care is "a form of economic activity involving interstate commerce, state and federal courts across the country . . . have recognized that nursing home admission contracts are subject to the FAA."[98]

Since arbitration agreements are contracts,[99] valid arbitration agreements "must conform to the rules governing contracts."[100] Therefore, courts must first determine whether a valid contract exists before assessing the validity of the arbitration provision.[101] In fact, the FAA requires the "party seeking to compel arbitration . . . [to prove] the existence of a valid agreement to arbitrate."[102] To prove a valid agreement to arbitrate existed, there must be proof of a valid contract.[103]

State laws governing contract formation determine whether a valid contract exists.[104] Generally, valid contracts require "(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation."[105] Importantly, valid contracts require complete and voluntary assent to the contract terms by parties with the capacity to enter into a contract.[106]

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97. Dean v. Heritage Healthcare of Ridgeway, LLC, 759 S.E.2d 727, 732 (2014).

98. Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 338 (Ky. 2015), *as corrected* (Oct. 9, 2015), *reh'g denied* (Feb. 18, 2016), *cert. granted sub nom.* Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 368 (2016). *See, e.g.*, Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1166 (N.D. Miss. 2011); Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204, ¶ 16; Barker v. Evangelical Lutheran Good Samaritan Soc'y, 720 F. Supp. 2d 1263, 1266 (D.N.M. 2010); Estate of Eckstein *ex rel.* Luckey v. Life Care Ctrs. of Am., Inc., 623 F. Supp. 2d 1235, 1240 (E.D. Wash. 2009); Triad Health Mgmt. of Ga., III, LLC v. Johnson, 679 S.E.2d 785, 788 (Ga. Ct. App. 2009). *See also* Owens v. Coosa Valley Health Care, Inc., 890 So. 2d 983, 988 (Ala. 2004) (holding that a contract for nursing home services involved interstate commerce); McGuffey Health & Rehab. Ctr. v. Gibson *ex rel*. Jackson, 864 So. 2d 1061, 1063 (Ala. 2003) (holding that a nursing home admissions agreement had a substantial effect on interstate commerce because most of money and materials used to treat and care for a resident came out-of-state sources and vendors). *But see* Bruner v. Timberlane Manor Ltd. P'ship, 2006 OK 90, ¶ 42, 155 P.3d 16, 30-31 (holding a nursing home contract did not constitute interstate commerce because the transactions involved, despite being economic activities, did not substantially impact interstate commerce when viewed in the aggregate, since the resident was from Oklahoma and the nursing home was located in and licensed by Oklahoma).

99. Hogsett v. Parkwood Nursing & Rehab. Ctr., Inc., 997 F. Supp. 2d 1318, 1323 (N.D. Ga. 2014) (finding that "an arbitration agreement is still a contract").

100. State *ex rel.* AMFM, LLC v. King, 740 S.E.2d 66, 73 (W. Va. 2013).

101. TranSouth Fin. Corp. v. Rooks, 604 S.E.2d 562, 564 (Ga. Ct. App. 2004).

102. Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 590 (Ky. 2012).

103. *See* Byrd v. Simmons, 5 So. 3d 384, 388 (Miss. 2009) (citing Grenada Living Ctr., LLC, v. Coleman, 961 So. 2d 33, 36-37 (Miss. 2007)).

104. *Ping*, 376 S.W.3d at 590.

105. Grenada Living Ctr., LLC v. Coleman, 961 So. 2d 33, 37 (Miss. 2007); GGNSC Batesville, LLC v. Johnson, 109 So. 3d 562, 565 (Miss. 2013) (quoting Adams Cmty. Care Ctr. , LLC v. Reed, 37 So. 3d 1155, 1158 (Miss. 2010)). *See also* Wallace v. Shreve Mem'l Library, 79 F.3d 427, 430 n.4 (5th Cir. 1996) ("Four elements are required for a valid contract: (1) the parties must possess the capacity to contract; (2) the parties' mutual consent must be freely given; (3) there must be a certain object for the contract; and (4) the contract must have a lawful purpose."); *State ex rel. AMFM, LLC*, 740 S.E.2d at 73 ("Accordingly, to be valid, the subject Arbitration Agreement must have (1) competent parties; (2) legal subject matter; (3) valuable consideration; and (4) mutual assent.").

106. Conners v. Eble, 269 S.W.2d 716, 717-18 (Ky. 1954).

B. Challenges to Arbitration Agreements in Nursing Home Contracts

Courts that refused to enforce mandatory arbitration clauses in nursing home admission contracts have relied on standard contract defenses to invalidate the agreement, thus still complying with the FAA.[107] The most common challenges to an arbitration agreement in a nursing home admission contract include signatory issues, such as claims "that a signatory lacked the authority to commit his principal [the resident], or that the signor lacked the mental capacity to assent."[108] Additionally, parties often argue that arbitration agreements in nursing home contracts are unconscionable and therefore unenforceable.[109]

1. Lack of Capacity

Courts review arbitration agreements based on the applicable state law on contract formation.[110] Since arbitration is a matter of a contract,[111] valid arbitration agreements require mutual assent by competent parties with "capacity to contract."[112] Lack of capacity is a "general defense to any contract formation," so the laws of the state governing the contract will determine the availability of this defense.[113]

Generally, a party lacks capacity to contract if he or she lacks "sufficient mental capacity to understand the nature and effect of the particular transaction."[114] A party has capacity to contract if he or she has the "ability to understand in a meaningful

107. Bagby & Souza, *supra* note 32, at 188.
108. Wiand v. Schneiderman, 778 F.3d 917, 924 (11th Cir. 2015).
109. Bates & Still, Jr., *supra* note 38, at 285; Gallagher, *supra* note 71, at 194.
110. Seawright v. Am. Gen. Fin. Servs., Inc., 507 F.3d 967, 972 (6th Cir. 2007).
111. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).
112. Conners v. Eble, 269 S.W.2d 716, 717-18 (Ky. 1954). *See also* Farrar v. United States, 30 U.S. 373, 378 (1831) ("To make a valid contract, the party must not only have a capacity to contract, but the means of exercising that capacity by expressing their assent to its stipulations."); Wallace v. Shreve Mem'l Library, 79 F.3d 427, 430 n.4 (5th Cir. 1996) (applying Louisiana law, valid contracts require "(1) the parties must possess the capacity to contract; (2) the parties' mutual consent must be freely given; (3) there must be a certain object for the contract; and (4) the contract must have a lawful purpose."); Wilkerson *ex rel*. Estate of Wilkerson v. Nelson, 395 F. Supp. 2d 281, 286 (M.D.N.C. 2005) (applying North Carolina law, a valid contract "requires offer, acceptance, consideration, mutual assent, and the presence of no valid defenses for contract formation."); Pine Hills Health & Rehab., LLC v. Matthews, 431 S.W.3d 910, 915 (Ark. 2014) ("The essential elements of a contract are competent parties, subject matter, legal consideration, mutual agreement, and mutual obligations."); Grenada Living Ctr., LLC v. Coleman, 961 So. 2d 33, 37 (Miss. 2007) (applying Mississippi law, valid contracts require mutual assent between two or more parties with the legal capacity to make contracts).
113. Rowan v. Brookdale Senior Living Cmtys., Inc., No. 1:13-CV-1261, 2015 WL 9906264, at *4 (W.D. Mich. June 1, 2015). *See infra* notes 101-23 and accompanying text.
114. McElroy v. Mathews, 263 S.W.2d 1, 10 (Mo. 1953). *See also* Ortelere v. Teachers' Ret. Bd., 250 N.E.2d 460, 464 (N.Y. 1969) (finding incapacity to contract when a party is "wholly and absolutely incompetent to comprehend and understand the nature of the transaction.") (quoting Aldrich v. Bailey, 30 N.E. 264, 265 (N.Y. 1892)); Shippers Exp. v. Chapman, 364 So. 2d 1097, 1100 (Miss. 1978) (applying Mississippi law, the test for mental competency is whether, at the time of contract execution, a party's "mind [is] so unsound, or . . . so weak in mind, or so imbecile, no matter from what cause, that he cannot manage the ordinary affairs of life.").

way, at the time the contract is executed, the nature, scope and effect of the contract."[115]

However, parties to a contract are presumed competent and capable of understanding the nature and effect of his or her actions.[116] A party arguing "that an entire contract containing an arbitration provision is unenforceable because [the signor] lacked the mental capacity to enter into the contract"[117] bears the burden of proving incapacity.[118] Proof of incapacity depends on the facts regarding a party's mental condition at the time he or she executed the contract.[119]

In *Landers v. Integrated Health Services of Shreveport*, a Louisiana court held that the nursing home resident lacked capacity at the time she signed the arbitration agreement since the resident's nursing home medical records demonstrated that the resident required 24-hour professional nursing supervision and was forgetful, depressed, and suffering from schizophrenia.[120] The court refused to enforce the arbitration agreement because the nursing home knew about the resident's lack of capacity at the time she signed the arbitration agreement because the nursing home had a duty to conduct neurological and cognitive assessment when she was admitted.[121]

Similarly, a Mississippi district court concluded that a nursing home resident lacked mental capacity to enter into an arbitration agreement.[122] Applying Mississippi law, the court determined that at the time the resident signed the agreement, he lacked the capacity to "manage the ordinary affairs of life," such as making coherent decisions regarding "important personal, business, and life" matters.[123] Spe-

115. Gaddy v. Douglass, 597 S.E.2d 12, 20 (S.C. Ct. App. 2004). *See also Ortelere*, 250 N.E.2d at 464 (defining capacity to contract as the ability to make "a rational judgment concerning the particular transaction."); Cundick v. Broadbent, 383 F.2d 157, 160 (10th Cir. 1967) ("[M]ental capacity to contract depends upon whether the allegedly disabled person possessed sufficient reason to enable him to understand the nature and effect of the act in issue."); Bitler Inv. Venture II, LLC v. Marathon Ashland Petro., LLC, 779 F. Supp. 2d 858, 883 (N.D. Ind. 2011) (holding that capacity to contract requires a person to understand the nature and effect of his or her act on the date of the agreement).

116. *See, e.g.*, Simmons First Nat'l Bank v. Luzader, 438 S.W.2d 25, 27 (Ark. 1969) ("There is a presumption of law that every man is sane, fully competent and capable of understanding the nature and effect of his contracts."); Feiden v. Feiden, 542 N.Y.S.2d 860, 862 (N.Y. App. Div. 1989) ("A party's competence is presumed and the party asserting incapacity bears the burden of proving incompetence.").

117. Spahr v. Secco, 330 F.3d 1266, 1273 (10th Cir. 2003).

118. *See Feiden*, 542 N.Y.S.2d at 862 ("[T]he party asserting incapacity bears the burden of proving incompetence."); Dalon v. Ruleville Nursing & Rehab. Ctr., LLC, No. 415CV00086DMBJMV, 2016 WL 498432, at *5 (N.D. Miss. Feb. 8, 2016) (holding that party asserting mental incapacity must prove incapacity by a "preponderance of proof"); Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291, 297 (Tenn. Ct. App. 2001) ("[P]ersons seeking to invalidate a contract for mental incapacity have the burden of proving that one or both of the contracting parties were mentally incompetent when the contract was formed.").

119. *Bitler Inv. Venture II, LLC*, 779 F. Supp. 2d at 883 (holding that capacity to enter into a contract requires a person to understand the nature and effect of his or her act on the date of the agreement). *See also* Cmty. Care Ctr. of Vicksburg, LLC v. Mason, 966 So. 2d 220, 230-31 (Miss. Ct. App. 2007) (finding a valid arbitration agreement existed because no evidence suggested resident lacked capacity to enter into a contract at the time she signed the arbitration clause); Brown v. United Mo. Bank, N.A., 78 F.3d 382, 386 (8th Cir. 1996) ("Evidence of the person's mental condition before and after execution can be sufficient if it provides a reasonable inference of incompetency at the time of execution.").

120. Landers v. Integrated Health Servs. of Shreveport, 39,739, p. 3-4 (La. App. 2 Cir. 5/11/05), 903 So. 2d 609, 612.

121. *Id.*

122. Liberty Health & Rehab of Indianola, LLC v. Howarth, 11 F. Supp. 3d 684, 688 (N.D. Miss. 2014).

123. *Id.* at 687.

cifically, testimony that the resident "was unable, on the date he signed the arbitration agreement, to state what year it was, within five years" evidenced "a profound diminishment of mental capacity and a significant disconnect from reality."[124] As a result, the court denied the motion to compel arbitration because of the resident's lack of competency.[125]

In contrast, a Mississippi state court held that a resident with schizophrenia had the necessary legal capacity to contract because he had a wife and children and managed his own money, hired an attorney to file lawsuits, and testified "coherently and competently at his discovery depositions."[126] In *Estate of Etting v. Regents Park at Aventura, Inc.,* the District Court of Appeals of Florida found that a nursing home resident's legal blindness at the time she signed the agreement did not render her incapable of assenting to the agreement.[127]

When a resident signs a nursing home admission contract containing an arbitration provision, raising an incapacity defense may prevent arbitration of any later claims.[128] A district court in Florida denied a motion to compel arbitration because the decedent did not understand the contracts she signed during the admission process into a nursing facility.[129] The decedent was Vera Gilmore, an 87-year old woman with Alzheimer's-related dementia, confusion, and delusions.[130] Ms. Gilmore signed an agreement to arbitrate included in the admission paperwork upon her arrival at a nursing home.[131] Given Ms. Gilmore's "age, physical ailments, history of dementia, confusion and disorientation, as well as her consistent use of antipsychotic medication," the court held that she lacked the mental capacity to understand the nature and effect of the contracts she signed.[132] As a result, the arbitration agreement was unenforceable.[133]

Like Ms. Gilmore, many nursing home residents suffer from some kind of physical or mental impairments that prevent them from actually understanding and assenting to the terms of an admission contract or arbitration agreement.[134] However, neither Alzheimer's nor dementia establishes a presumption of incompetency.[135] Rather, "the person with the burden of proof must establish, in light of all the surrounding facts and circumstances, that the cognitive impairment or disease rendered the contracting party incompetent to engage in the transaction at issue . . .

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124. *Id.*
125. *Id.* at 688.
126. Brumfield v. Lowe, 744 So. 2d 383, 387 (Miss. Ct. App. 1999).
127. Estate of Etting v. Regents Part at Aventura, Inc., 891 So. 2d 558, 558 (Fla. Dist. Ct. App. 2004).
128. *See infra* notes 128-132 and accompanying text.
129. Gilmore v. Life Care Ctrs. of Am., No. 2:10–cv–99–FtM–29DNF, 2010 WL 3944653, at *4 (M.D. Fla. Oct. 7, 2010). The court applied the FAA because the case involved an arbitration agreement contained in the admission contract of a nursing home located in Florida but was owned and operated by a Tennessee company, the issue involved commerce "within the meaning of 9 U.S.C. § 2." *Id.* at *2.
130. *Id.* at *1.
131. *Id.* The decedent's son had power of attorney for his mother but did not "participate in the intake process" at the nursing facility. *Id.*
132. *Id.* at *4.
133. *Id.*
134. Bagby & Souza, *supra* note 32, at 189. *See also* Kaleb v. Modern Woodmen of Am., 64 P.2d 605, 607 (Wyo. 1937).
135. *In re* Mildred M.J., 844 N.Y.S.2d 539, 541 (App. Div. 2007) (quoting Gala v. Magarinos, 665 N.Y.S.2d 95, 96 (App. Div. 1997)). *See also* Hanks v. McNeil Coal Corp., 168 P.2d 256, 260 (Colo. 1946) (holding that senile dementia is not conclusive of lack of capacity to contract); *Kaleb*, 64 P.2d at 607 ("A condition which may be described by a physician as senile dementia may not be insanity in a legal sense.").

."[136] Nevertheless, a resident's dementia or Alzheimer's disease may be severe enough to render an individual incapable of possessing contractual capacity, especially if they are "chronic and progressive in nature."[137] Many nursing home residents suffer from physical or mental limitations, or both, because of old age and disease.[138] As such, whenever a resident signs a nursing home admission contract on his or her own behalf, courts should be aware that lack of capacity is a common defense to motions to compel arbitration.

2. Lack of Authority

Valid arbitration agreements require assent by competent parties.[139] Without assent by competent parties in arbitration agreements, "courts have no authority to mandate that [parties arbitrate disputes]."[140] Parties signing an arbitration agreement are "competent" if they have the authority to do so.[141] Additionally, "[a]ssent to be bound by the terms of an agreement must be expressed."[142] One way to express assent to an arbitration provision is through a signature by the parties.[143]

However, if a resident lacks mental capacity to enter into a contract[144] or is otherwise unable to sign the arbitration agreement, a friend, family member, or personal representative of the resident may sign the agreement on the resident's behalf.[145] In such circumstances, a common challenge to enforcement of arbitration "is that the arbitration agreement should not be enforced because it was not signed by the nursing home resident him- or herself, but rather, by a relative or other representative."[146]

If the resident does not sign the arbitration agreement, principles of agency and contract law may force the resident to arbitrate future claims against the nursing home.[147] "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests

136. Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291, 297 (Tenn. Ct. App. 2001) (footnotes omitted).
137. *See* Gaddy v. Douglass, 597 S.E.2d 12, 21 (S.C. Ct. App. 2004).
138. *Kaleb*, 64 P.2d at 607.
139. State *ex rel*. AMFM, LLC v. King, 740 S.E.2d 66, 73 (W. Va. 2013).
140. Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995).
141. *State ex rel. AMFM, LLC*, 740 S.E.2d at 73.
142. Ally Cat, LLC v. Chauvin, 274 S.W.3d 451, 456 (Ky. 2009).
143. *See* McInnis v. Se. Automatic Sprinkler Co., 233 So. 2d 219, 221 (Miss. 1970) ("The object of a signature is to show mutuality or assent . . . ."). *See also* Small v. HCF of Perrysburg, Inc., 159 Ohio App. 3d 66, 72, 2004-Ohio-5757, 823 N.E.2d 19, at ¶ 25 (6th Dist.) ("[B]y signing the agreement, the parties agree to arbitrate their disputes and that the parties agree to the terms of the agreement.").
144. *See supra* notes 103-30 and accompanying text.
145. Bagby & Souza, *supra* note 32, at 189. *See also* Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 226 (W. Va. 2012) ("Many contracts for admission are signed by a . . . family member in a tense and bewildering setting.").
146. John R. Schleppenbach, *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, 154 (2014).
147. Bouriez v. Carnegie Mellon Univ., 359 F.3d 292, 294 (3d Cir. 2004) ("A party, however, can be compelled to arbitrate under an agreement, even if he or she did not sign that agreement, if common law principles of agency and contract support such an obligation on his or her part."); Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 777 (2d Cir. 1995) ("Traditional principles of agency law may bind a nonsignatory to an arbitration agreement.").

assent or otherwise consents so to act."[148] The party claiming agency must prove the existence and scope of the agency relationship.[149] Proving an agency relationship exists requires extrinsic evidence because courts typically do not infer an agency relationship between family members or whenever one person acts on behalf of another.[150]

In an agency relationship, the agent's actions legally bind the principal[151] only if the agent's actions are within the scope of his or her authority.[152] Principals are responsible for their agent's acts and agreements that are within the scope of the agent's authority.[153] Statements made by an agent bind the principal if the statement falls within the scope of the agent's authority.[154] "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."[155] The resident's agent must have either actual authority, which may be express or implied, or apparent authority to sign the arbitration agreement on behalf of the resident.[156]

i. Actual Authority

Actual authority exists "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."[157] Actual authority occurs when the principal expressly or implicitly gives an agent authority.[158]

Evidence of actual authority requires proof that the principal has specifically granted the agent the power to bind the principal.[159] Proof of actual authority stems

148. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW. INST. 2006).
149. Bluehaven Funding, LLC v. First Am. Title Ins. Co., 594 F.3d 1055, 1059 (8th Cir. 2010); Tex. Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 352 (Tex. App. 2007).
150. Wisler v. Manor Care of Lancaster PA, LLC, 2015 PA Super 189, 124 A.3d 317, 323 (Pa. 2015).
151. Dickerson v. Longoria, 995 A.2d 721, 735 (Md. 2010).
152. Peninsula Land Co. v. Howard, 6 So. 2d 384, 388 (Fla. 1941); *see also* Stalley v. Transitional Hosps. Corp. of Tampa, Inc., 44 So. 3d 627, 630 (Fla. Dist. Ct. App. 2010) ("[T]he scope of the agent's authority is limited to what the principal has authorized the agent to do."); *Bluehaven*, 594 F.3d at 1058 ("A principal is responsible for its agents' acts and agreements that are within the agent's authority, whether the authority is actual or apparent.") (quoting Motorsport Mktg., Inc. v. Wiedmaier, Inc., 195 S.W.3d 492, 498 (Mo. Ct. App. 2006)).
153. Nichols v. Prudential Ins. Co. of Am., 851 S.W.2d 657, 661 (Mo. Ct. App. 1993).
154. P. Flanigan & Sons v. Childs, 248 A.2d 473, 477 (Md. 1968) ("[A] statement made by an agent will not bind his principal until an agency is established and then only if the statement is within the scope of the agency . . . .").
155. RESTATEMENT (SECOND) OF AGENCY § 7 (AM. LAW. INST. 1957).
156. AgriStor Leasing v. Farrow, 826 F.2d 732, 737 (8th Cir. 1987) ("An agent whose authority has been granted either expressly or by implication possesses actual authority to act on behalf of the principal."). Thomas v. INS, 35 F.3d 1332, 1338 (9th Cir. 1994) ("[A]ctual authority takes two forms: (1) express authority, and (2) authority that is implied or incidental to a grant of express authority."); Lind v. Schenley Indus., Inc., 278 F.2d 79, 84 (3d Cir. 1960); ("The term 'implied authority' is often seen but most authorities consider 'implied authority' to be merely a sub-group of 'actual' authority."); Curto v. Illini Manors, Inc., 940 N.E.2d 229, 233, 235 (Ill. App. Ct. 2010); Bates & Still, Jr., *supra* note 38, at 283.
157. RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).
158. Lind v. Schenley Indus., Inc., 278 F.2d 79, 85 (3d Cir. 1960).
159. *See* U.S. v. Schaltenbrand, 930 F.2d 1554, 1560-61 (11th Cir. 1991).

from "the principal's manifestations to the agent."[160] It is the principal's words or conduct, not the agent's, which establish actual authority.[161] Also, the principal's knowing acquiescence to the agent's actions may establish actual authority.[162]

However, a mere familial relationship between the resident and the signor does not create an agency relationship.[163] Absent extrinsic evidence, "a spouse or other family member [does] not have actual authority to sign an arbitration agreement on the resident's behalf."[164]

There are two kinds of actual authority: express and implied. The first kind of actual authority is express authority.[165] Express authority exists "when the principal explicitly tells the agent what to do."[166] The principal's conduct or words, written or spoken, creates express authority.[167] The scope of express authority "extends only to the powers the principal confers upon the agent."[168]

A written contract, power of attorney,[169] or court-ordered guardianship[170] may establish express authority. "Powers of attorney are strictly construed."[171] As such, powers of attorneys grant only the explicit powers specified that the principal intended to convey.[172] In other words, "an agent's authority under a power of attorney is to be construed with reference to the types of transaction expressly authorized in the document and subject always to the agent's duty to act with the 'utmost good faith.'"[173]

Additionally, a "durable power of attorney constitutes a grant of express authority per its terms."[174] A durable power of attorney creates an agency relationship

160. Nichols v. Prudential Ins. Co. of Am., 851 S.W.2d 657, 661-62 (Mo. Ct. App. 1993); *see also AgriStor*, 826 F.2d at 737 ("A determination of an express or implied agency focuses on communications and contacts between the principal and the agent.").

161. Opp v. Wheaton Van Lines, Inc., 231 F.3d 1060, 1064 (7th Cir. 2000). *See also* Schaffart v. ONEOK, Inc., 686 F.3d 461, 471 (8th Cir. 2012) ("Whether express or implied, actual authority requires action by the principal.").

162. Essco Geometric v. Harvard Indus., 46 F.3d 718, 723 (8th Cir. 1995); Anderson v. Gen. Cas., 935 A.2d 746, 752 (Md. 2007).

163. Wisler v. Manor Care of Lancaster PA, LLC, 2015 PA Super 189, 124 A.3d 317, 323 (Pa. 2015) ("Agency cannot be inferred from mere relationships or family ties, and we do not assume agency merely because one person acts on behalf of another.").

164. Curto v. Illini Manors, Inc., 940 N.E.2d 229, 234 (Ill. App. Ct. 2010).

165. *See* Nichols v. Prudential Ins. Co. of Am., 851 S.W.2d 657, 661 (Mo. Ct. App. 1993) ("Actual authority may be express or implied.").

166. *Id.* at 661; Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co., 376 F.3d 664, 672 (7th Cir. 2004).

167. Harris v. Ark. State Highway & Transp. Dep't, 437 F.3d 749, 751 (8th Cir. 2006) (quoting Turner v. Burlington N. R. Co., 771 F.2d 341, 345 (8th Cir. 1985)).

168. *Curto*. 940 N.E.2d at 233.

169. Moffett v. Life Care Ctrs. of Am., 187 P.3d 1140, 1144 (Colo. App. 2008) ("[T]he execution of a power of attorney creates a principal-agent relationship."), *aff'd*, 219 P.3d 1068 (Colo. 2009); Matter of Trust of Franzen, 955 P.2d 1018, 1021 (Colo. 1998) ("A power of attorney is an instrument by which a principal confers express authority on an agent to perform certain acts or kinds of acts on the principal's behalf."); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 591 (Ky. 2012) ("A power of attorney is a written, often formally acknowledged, manifestation of the principal's intent to enter into such a relationship with a designated agent.").

170. *Curto*. 940 N.E.2d at 233; *see also* Bates & Still, Jr., *supra* note 38, at 283 ("A resident may grant express or actual authority to act on his or her behalf pursuant to verbal express authority, power of attorney ("POA"), durable power of attorney ("DPOA"), or court appointment as guardian or conservator for the resident.").

171. Kotsch v. Kotsch, 608 So. 2d 879, 880 (Fla. Dist. Ct. App. 1992).

172. *Id.*

173. *Ping*, 376 S.W.3d at 592.

174. Wisler v. Manor Care of Lancaster PA, LLC, 124 A.3d 317, 323-24 (Pa. Super. Ct. 2015).

"that would continue beyond the principal's incapacity."[175] Every state has adopted legislation allowing for durable powers of attorney.[176]

However, power of attorney to make medical or health care decisions grants authority to admit principals into a nursing home but not authority to sign an arbitration agreement on the principal's behalf.[177] For example, "the intermediate appellate courts in Colorado, Florida, Georgia, and Texas have concluded that the authority to make health care decisions on another's behalf does not constitute authority to sign an arbitration agreement on that person's behalf."[178]

In addition, other courts "have recently concluded that the decision to sign an arbitration agreement was not a health care decision, and they based that decision on the fact that signing the arbitration agreement was not a prerequisite to admission to a health care facility."[179] Specifically, the Mississippi Supreme Court held that a nursing home could not compel arbitration against the daughter of a resident, individually or as personal representative of resident's estate, because "signing the arbitration provision was not a part of the consideration necessary for . . . admission to [the nursing home]," and because the daughter "did not have the authority . . . to enter into the arbitration provision contained within the admissions agreement."[180]

Moreover, the Nebraska Supreme Court held that a nursing home resident's son had actual authority "to sign the required admission papers."[181] However, the son did not have actual authority to sign an arbitration agreement "that would waive [the resident's] right of access to the courts and to trial by jury" because the arbitration agreement "was optional and was not required for [the resident] to remain at the facility."[182]

In another case, a Maryland court refused to enforce an arbitration agreement signed by an agent of the resident; even though the signor of the admission agreement was the resident's agent for purposes of making financial and health care decisions. The court held that the scope of that agency relationship did not include the authority to bind the principal to the arbitration agreement.[183]

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175. *Ping*, 376 S.W.3d at 591.

176. Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7 (2007).

177. *See* Dickerson v. Longoria, 995 A.2d 721, 736-38 (Md. 2010). *See also* Curto v. Illini Manors, Inc., 940 N.E.2d 229, 233 (Ill. App. Ct. 2010) ("[A] health care power of attorney granted for medical decisions does not confer authority to sign an arbitration agreement waiving legal rights."); Life Care Ctrs. of Am. v. Smith, 681 S.E.2d 182 (Ga. Ct. App. 2009) (power of attorney granted to daughter for medical decisions did not grant authority to waive legal rights under arbitration agreement); Lujan v. Life Care Ctrs. of Am., 222 P.3d 970, 973-76 (Colo. App. 2009) (agreeing with other jurisdictions that have concluded that "a health care proxy's decision to agree to arbitrate is [not] a medical treatment decision"); Tex. Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 352-53 (Tex. App. 2007) ("[N]othing in the medical power of attorney indicates that it was intended to confer authority . . . to make legal, as opposed to health care, decisions . . . such as whether to waive [the] right to a jury trial by agreeing to arbitration of any disputes."); Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296, 301 (Fla. Dist. Ct. App. 2005) ("There is nothing in the [health care proxy] statute to indicate legislative intent that such a proxy can enter into contracts which agree to things not strictly related to health care decisions. In our opinion, a proxy is not authorized to waive the right to trial by jury. . . .").

178. Dickerson v. Longoria, 995 A.2d 721, 737 (Md. 2010). *See supra* note 172 and accompanying text.

179. *Dickerson*, 995 A.2d at 738.

180. Miss. Care Ctr. of Greenville, LLC v. Hinyub, 975 So. 2d 211, 218 (Miss. 2008).

181. Koricic v. Beverly Enters.—Neb., Inc., 773 N.W.2d 145, 151 (Neb. 2009).

182. *Id.*; Forest Hill Nursing Ctr., Inc. v. McFarlan, 995 So. 2d 775, 786-87 (Miss. Ct. App. 2008).

183. *Dickerson*, 995 A.2d at 735.

In contrast, an appellate court in New Mexico held that the granddaughter of a nursing home resident had actual and apparent authority to complete the admission paperwork on the resident's behalf. The court stated that the granddaughter had the authority to sign the optional arbitration agreement contained in the admission paperwork because the arbitration agreement was "considered an admission document and that accepting or rejecting arbitration [was] part of the admission process."[184]

On the other hand, several courts have held that a health-care power of attorney includes the authority to enter into an arbitration agreement. The Tennessee Supreme Court held that "an attorney-in-fact acting pursuant to a durable power of attorney for health care may sign a nursing-home contract that contains an arbitration provision because this action is necessary to 'consent to health care.'"[185] Similarly, a Georgia appellate court found a valid and enforceable arbitration provision in a nursing home admission contract signed by the resident's son who had express authority to act on his father's behalf because of a general power of attorney.[186]

The second kind of actual authority is implied authority, or "actual authority circumstantially proved."[187] Implied authority exists when the principal's conduct, reasonably interpreted, leads the agent to believe that the principal wants the agent to act on his or her behalf.[188] Implied authority is authority "intended by the principal, or would be if the principal thought about it."[189] It comes from "powers incidental and necessary to carry out the express authority."[190] Implied authority includes authority "either to (1) do what is necessary to accomplish the agent's express responsibilities or (2) act in a manner that the agent reasonably believes the principal wishes the agent to act, in light of the principal's objectives and manifestations."[191]

Proof of implied authority may come "from the circumstances of a case based on prior course of dealing of a similar nature between the alleged agent and principal or from a previous agency relationship."[192] Additionally, implied authority may be proven by the facts and circumstances of a particular case, as well as both parties' words and conduct.[193] An Illinois court found no evidence of implied authority to bind the resident when the agent signed the arbitration agreement in the admissions contract because the resident was absent when the agent signed the arbitration agreement and did not direct the agent to sign the agreement as the resident's representative.[194] Additionally, there was no evidence that the resident knew that the

184. Barron v. Evangelical Lutheran Good Samaritan Soc'y, 265 P.3d 720, 726 (N.M. Ct. App. 2011).
185. Owens v. Nat'l Health Corp., 263 S.W.3d 876, 884 (Tenn. 2007) (quoting TENN. CODE ANN. § 34-6-201(3) (West 2015)).
186. Triad Health Mgmt. of Ga., III, LLC v. Johnson, 679 S.E.2d 785, 789 (Ga. Ct. App. 2009) (power of attorney gave resident's son "full power and authority to do and perform all and every act . . . necessary, requisite or proper to be done, as fully . . . as I might or could do if personally present," without specific limitations).
187. Curto v. Illini Manors, Inc., 940 N.E.2d 229, 233 (Ill. App. Ct. 2010).
188. *Id.*; Forest Hill Nursing Ctr., Inc. v. McFarlan, 995 So. 2d 775, 781 (Miss. Ct. App. 2008).
189. Thomas v. INS, 35 F.3d 1332, 1339 (9th Cir. 1994).
190. Nichols v. Prudential Ins. Co. of Am., 851 S.W.2d 657, 661 (Mo. Ct. App. 1993); Essco Geometric v. Harvard Indus., 46 F.3d 718, 724 (8th Cir. 1995).
191. Koricic v. Beverly Enters.—Neb., Inc., 773 N.W.2d 145, 150 (Neb. 2009).
192. Curto v. Illini Manors, Inc., 940 N.E.2d 229, 233 (Ill. App. Ct. 2010). *See also Essco*, 46 F.3d at 724 ("Missouri case law suggests that custom and the relations of the parties establish the parameters of implied actual authority.").
193. Forest Hill Nursing Ctr., Inc. v. McFarlan, 995 So. 2d 775, 781 (Miss. Ct. App. 2008).
194. *Curto*, 940 N.E.2d at 233.

agent signed the arbitration agreement and agreed to or adopted her signature as his own.[195]

ii. Apparent Authority

Absent actual authority, an agent can bind a principal if the agent has apparent authority.[196] Apparent authority "is the power held by an agent or other actor to affect a principal's legal relations with third parties 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."[197] Apparent authority exists when the principal's actions "convey the impression to a third party that an agent has certain powers which he may or may not actually possess."[198] Apparent authority is authority that "has been knowingly permitted by the principal or which the principal holds the agent out as possessing."[199]

To establish apparent authority, there must be "evidence that a principal has communicated directly with the third party or has knowingly permitted its agent to exercise authority."[200] It exists when "certain acts or manifestations by the alleged principal to a third party lead[] the third party to believe that an agent had authority to act."[201] The three-pronged test for recovery under apparent authority "requires a showing of (1) acts or conduct of the principal indicating the agent's authority, (2) reasonable reliance upon those acts by a third person, and (3) a detrimental change in position by the third person as a result of that reliance."[202] "[D]irect communication from the principal to a third party causing that third party to reasonably believe that a person has authority to act for the principal" creates apparent authority.[203] The communication can be nonverbal, such as through "a combination of actions by the principal, or manifestations that the principal allows to be made without objection.[204] Finally, there must be proof that the apparent agent acted within the scope of his or her authority, since "an apparent principal is bound by an apparent agent's acts only if that agent is acting within the scope of his apparent authority."[205]

A New Mexico court found an agent had apparent authority to bind a principal to an arbitration agreement.[206] In that case, a nursing home resident, gave her granddaughter permission to complete admission paperwork on her behalf, including an arbitration agreement.[207] The court looked to the reasonableness of the nursing home's reliance on the granddaughter's representation of authority in considering

195. *Id.*
196. Dickerson v. Longoria, 995 A.2d 721, 735 (Md. 2010).
197. RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. LAW INST. 2006).
198. Lind v. Schenley Indus., Inc., 278 F.2d 79, 85 (3d Cir. 1960).
199. Agristor Leasing v. Farrow, 826 F.2d 732, 737 (8th Cir. 1987).
200. Nichols v. Prudential Ins. Co. of Am., 851 S.W.2d 657, 661 (Mo. Ct. App. 1993).
201. Klein v. Weiss, 395 A.2d 126, 140 (Md. 1978).
202. Eaton v. Porter, 645 So. 2d 1323, 1325 (Miss. 1994); *see also* Alexander v. Chandler, 179 S.W.3d 385, 389 (Mo. Ct. App. 2005) ("The three elements required to make a prima facie showing of apparent authority stated above can be reduced to: (1) consent by the principal to the exercise of the authority; (2) good faith reliance by a third party; and (3) damage sustained.").
203. *Alexander*, 179 S.W.3d at 388.
204. *Id.*
205. Gentry v. Beverly Enters.-Ga., Inc., 714 F. Supp. 2d 1225, 1230 (S.D. Ga. 2009).
206. Barron v. Evangelical Lutheran Good Samaritan Soc'y, 265 P.3d 720, 726 (N.M. Ct. App. 2011).
207. *Id.* at 722.

the scope of the granddaughter's apparent authority.[208] The court concluded that the granddaughter had apparent authority to bind the grandmother to the arbitration provision because the grandmother had communicated the granddaughter's authority to the social services director who handled admissions.[209]

An Alabama court took a more relaxed approach to apparent authority, finding apparent authority "where the principal passively permits the agent to appear to a third person to have the authority to act on [her] behalf."[210] The brother of a resident signed the admission contract and arbitration agreement on his sister's behalf as an "authorized representative."[211] Although the power of attorney did not exist when the brother signed the arbitration provision, the court still found a valid arbitration agreement existed because there was "no evidence indicating that [the resident] had any objection to [her brother's] acting on her behalf in admitting [the resident] to the nursing home. On the contrary, the evidence suggests that [the resident] approved of her brother's acting on her behalf."[212] In fact, a few weeks into the resident's stay at the nursing home, she executed a power of attorney, giving her brother authority to act on her behalf.[213]

On the other hand, a Texas court found that a nursing home resident's wife lacked apparent authority to sign an arbitration agreement on the resident's behalf.[214] The court noted the lack of evidence that the resident acted "to induce the belief that [his wife] was his agent. In fact, there is no evidence he was even present when the form was signed."[215] The court found that the nursing home resident was not bound by the arbitration agreement because the wife lacked apparent authority to sign on her husband's behalf, rendering the agreement invalid.[216]

Similarly, a California court found that two daughters who signed an arbitration agreement on behalf of their comatose and mentally incompetent mother lacked apparent authority to bind their mother to the agreement.[217] The court reasoned that even though the daughters signed the agreement, there was no apparent authority because there was no "evidence [that the] comatose and mentally incompetent woman did anything which caused [the nursing home] to believe either of her daughters was authorized to act as her agent in any capacity."[218] Importantly, the court noted that "[a] person cannot become the agent of another merely by representing herself as such."[219] Rather, agency requires the principal to cause a third party to believe someone was his or her agent, even if the principal does not employ the agent expressly.[220]

Generally, most courts reject apparent authority theories to bind signors of arbitration agreements in nursing home admission contracts.[221] Courts in California, Texas, Mississippi, and Georgia have all refused to find to apparent authority even

208. *Id.* at 725.
209. *Id.* at 726. *See supra* note 198 and accompanying text.
210. Treadwell Ford, Inc. v. Courtesy Auto Brokers, Inc., 426 So. 2d 859, 861 (Ala. Civ. App. 1983).
211. Carraway v. Beverly Enters. Ala., Inc., 978 So. 2d 27, 30 (Ala. 2007).
212. *Id.* at 31.
213. *Id.*
214. Sikes v. Heritage Oaks W. Ret. Vill., 238 S.W.3d 807, 810 (Tex. App. 2007).
215. *Id.*
216. *Id.*
217. Pagarigan v. Libby Care Ctr., Inc. 120 Cal. Rptr. 2d 892, 894-96 (Cal. Ct. App. 2002).
218. *Id.* at 895.
219. *Id.* at 894.
220. *Id.*
221. *See supra* notes 214-16 and accompanying text.

when the signor was a relative of the resident.[222] When attempting to dispute the validity or enforceability of an arbitration agreement in a nursing home contract, a claim of apparent authority may be easily refuted by the evidence and requires an intense investigation of the facts.[223]

1. Third-Party Beneficiary

Third-party beneficiary theory is an exception to the general rule of contract law that only parties (signatories) to a contract are bound by or may enforce its provisions.[224] Nonsignatories are bound by an arbitration agreement in a contract if they are third-party beneficiaries.[225] A third-party beneficiary is someone that the parties to the contract intended to benefit.[226] If performance of the contract directly results in a benefit to a nonsignatory and such benefit was "within the contemplation of the parties as shown by its terms," the nonsignatory is a third-party beneficiary.[227] Thus, the intent of the parties at the time of contract execution and the terms of the contract determine if a third-party beneficiary exists.[228] Specifically, the contract must evince "the express or implied intention to benefit the party, [and also] an intention to benefit the party directly."[229] However, if the contract terms lack an express statement of the intent to benefit a third party, "there is a strong presumption that the third party is not a beneficiary and that the parties contracted to benefit only

222. *See, e.g.*, Trinity Mission of Clinton, LLC v. Barber, 2005-CA-02199-COA (¶ 13) (Miss. Ct. App. 2007) (noting that even though nursing home resident's son acted as if he had the authority to bind his mother, the principal's acts or conduct must prove the agent's authority); Ashburn Health Care Ctr., Inc. v. Poole, 648 S.E.2d 430, 432-33 (Ga. Ct. App. 2007) (finding that the nursing home resident did not authorize her husband to act as her agent when he signed the arbitration agreement in an admission contract because the resident's son had durable power of attorney for his mother but he did not sign the agreement, despite being present during the signing); Tex. Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 353-54 (Tex. Ct. App. 2007) (noting that what matters is the actions of the principal, not the agent, and that the principal was not even present when her daughter signed the admissions agreement).

223. Bagby & Souza, *supra* note 32, at 190.

224. Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 595 (Ky. 2012). "For a third-party beneficiary to exist, there must first exist a valid contract executed by one with 'legal capacity' to enter the contract." Adams Cmty. Care Ctr., LLC v. Reed, 2009-CA-00730-SCT (¶ 16) (Miss. 2010).

225. Grenada Living Ctr., LLC v. Coleman, 2006–CA–00169–SCT (¶ 16) (Miss. 2007); Alterra Healthcare Corp. v. Estate of Linton *ex re*l. Graham, 953 So. 2d 574, 579 (Fla. Dist. Ct. App. 2007).

226. Dickerson v. Longoria, 995 A.2d 721, 741-42 (Md. 2010) (quoting Shillman v. Hobstetter, 241 A.2d 570, 575 (Md. 1968) ("An individual is a third-party beneficiary to a contract if 'the contract was intended for his [or her] benefit' and 'it . . . clearly appear[s] that the parties intended to recognize him [or her] as the primary party in interest and as privy to the promise.'")).

227. Burns v. Wash. Sav., 171 So. 2d 322, 325 (Miss. 1965). The promisee must have a duty or legal obligation to the third party that connects the third party to the contract. *Id.*

228. Burns v. Wash. Sav., 171 So. 2d 322, 325 (Miss. 1965).

229. Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001). *See* JP Morgan Chase & Co. v. Conegie *ex rel*. Lee, 492 F.3d 596, 600 (5th Cir. 2007). *See also* McCarthy v. Azure, 22 F.3d 351, 362 (1st Cir. 1994) (citation omitted) ("Because third-party beneficiary status constitutes an exception to the general rule that a contract does not grant enforceable rights to nonsignatories, a person aspiring to such status must show with special clarity that the contracting parties intended to confer a benefit on him."); Nitro Distrib., Inc. v. Dunn, 194 S.W.3d 339, 345 (Mo. 2006), *as modified on denial of reh'g* (June 30, 2006) ("To be bound as a third-party beneficiary, the terms of the contract must clearly express intent to benefit that party or an identifiable class of which the party is a member.").

themselves."[230] An incidental benefit to a third party does not create a third-party beneficiary.[231]

If the resident does not sign the arbitration agreement, states differ in determining whether the resident is an intended third-party beneficiary. For example, when a nursing home resident's wife signed an arbitration agreement in representative capacity, a Pennsylvania court held that the "resident could not be an intended third-party beneficiary to a contract to which he was ostensibly a party."[232] Similarly, the District Court of New Mexico noted that a nursing home resident was not a third-party beneficiary of the arbitration provision.[233] Although the resident was a third-party beneficiary of the admission contract, the court reasoned that the resident's "consent to arbitrate was not required for admission," and the arbitration agreement was not intended to benefit the resident."[234]

In contrast, the Fifth Circuit Court of Appeals held that a nursing home resident was bound by an arbitration provision in a nursing home admission contract as non-signatory third-party beneficiary of agreement.[235] Although the resident's mother signed the contract on the resident's behalf, the contract intended to benefit the resident since it named him "as the resident receiving care and services from the nursing home."[236] As a result, the court found that contract expresses clearly the parties' intent to make the resident a beneficiary of the contract.[237]

Moreover, courts are split regarding the binding effect of arbitration provisions on the resident's wrongful-death heirs or representatives.[238] In states where the wrongful death statute "is wholly derivative of and dependent on" claims that the decedent could have brought,[239] courts are more likely to consider the wrongful death plaintiffs – the decedent's heirs – as third-party beneficiaries bound by the arbitration provision in the contract.[240] For instance, the Alabama Supreme Court

230. *Nitro Distrib., Inc.*, 194 S.W.3d at 345.

231. *Id.* *See also* E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 196 (3d Cir. 2001) ("Thus, if it was not the promisee's intention to confer direct benefits upon a third party, but rather such third party happens to benefit from the performance of the promise either coincidentally or indirectly, then the third party will have no enforceable rights under the contract.").

232. Washburn v. N. Health Facilities, Inc., 2015 PA Super 168, 121 A.3d 1008, 1016.

233. Barker v. Evangelical Lutheran Good Samaritan Soc'y, 720 F. Supp. 2d 1263, 1268-69 (D.N.M. 2010).

234. *Id.* at 1269.

235. JP Morgan Chase & Co. v. Conegie *ex rel*. Lee, 492 F.3d 596, 600 (5th Cir. 2007).

236. *Id.*

237. *Id.*

238. THI of N.M. at Hobbs Ctr., LLC v. Spradlin, 532 F. App'x 813, 817-18 (10th Cir. 2013); Scheller, *supra* note 91, at 546.

239. Bybee v. Abdulla, 2008 UT 35, ¶ 23, 189 P.3d 40.

240. *Spradlin*, 532 F. App'x at 817 (quoting Trinity Mission of Clinton, LLC v. Barber, 2005–CA–02199–COA (¶ 27) (Miss. Ct. App. 2007)) ("We conclude that in New Mexico, a wrongful-death claim derives directly from the claim possessed by the decedent, had he or she lived. . . . a 'wrongful-death suit is a derivative action by the beneficiaries, and those beneficiaries, therefore, stand in the position of their decedent.'"); Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 761–62 (Fla. 2013) ("[T]he nature of a wrongful death cause of action in Florida is derivative in the context of determining whether a decedent's estate and heirs are bound by the decedent's agreement to arbitrate. The estate and heirs stand in the shoes of the decedent for purposes of whether the defendant is liable and are bound by the decedent's actions and contracts with respect to defenses and releases."); *In re* Labatt Food Serv., LP, 279 S.W.3d 640, 646 (Tex. 2009) ("[R]egardless of the fact that [decedent's] beneficiaries are seeking compensation for their own personal loss, they still stand in [decedent's] legal shoes and are bound by his agreement."); *Barber*, 2005–CA–02199–COA (¶ 27) ("Because Ms. Barber's claims would have

held that personal representatives (an executor and an administratrix) of nursing home residents' estates were bound by the arbitration agreement entered into by the decedent.[241] An executor and administratix have all the same powers and limitations of the decedent, so by bringing wrongful death claims on behalf of the decedents, they were bound by the arbitration provisions contained in the admission contract just as the decedents would have been.[242]

When the wrongful death cause of action is new or independent from any causes of action that the decedent could bring, courts are more likely to hold that heirs to the decedent's estate are not third-party beneficiaries and therefore are not bound to the arbitration agreement.[243] For example, the Utah Supreme Court held that "a decedent does not have the power to contract away the wrongful death action of his heirs."[244] In Utah, "a wrongful death cause of action, while derivative in the sense that it will not lie without a viable underlying personal injury claim, is a separate claim."[245] Since the wrongful death plaintiff was not an intended beneficiary of the admission contract, she was not a third-party beneficiary and could not be bound by the arbitration agreement.[246]

Similarly, in a Pennsylvania case, a resident's contractual agreement with a nursing home to arbitrate all claims was not binding on the nonsignatory wrongful death claimants because the wrongful death cause of action was an independent

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been subject to arbitration, the claims of her wrongful death beneficiaries are likewise subject the arbitration provision."); Ballard v. Sw. Detroit Hosp., 327 N.W.2d 370, 371–72 (Mich. 1982) ("[A]lthough the Michigan wrongful death act provides for additional damages benefitting the decedent's next of kin for loss of society and companionship, it does not create a separate cause of action independent of the underlying rights of the decedent. Rather, the cause of action is expressly made derivative of the decedent's rights.").

241. Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661, 665 (Ala. 2004).

242. *Id.* at 664-65.

243. Estate of Decamacho *ex rel*. Guthrie v. La Solana Care & Rehab, Inc., 316 P.3d 607, 614 (Ariz. Ct. App. 2014) ("[A] wrongful death claim is independently held by the decedent's statutory beneficiaries. . . . [T]he wrongful death claim . . . is not subject to the terms of the admission agreement's arbitration clause."); Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204, ¶ 57 (citation omitted) ("[A] wrongful-death action does not accrue until death and is not brought for the benefit of the decedent's estate, but for the next of kin who are the true parties in interest. Plaintiff, as [decedent's] personal representative in the wrongful-death action, is merely a nominal party, effectively filing suit as a statutory trustee on behalf of the next of kin. Plaintiff is not prosecuting the wrongful-death claim on behalf of [decedent], and thus plaintiff is not bound by [decedent's] agreement to arbitrate for purposes of this cause of action."); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599 (Ky. 2012) ("Because under our law the wrongful death claim is not derived through or on behalf of the resident, but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss, we agree with the Courts cited above which have held that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim."); Lawrence v. Beverly Manor, 273 S.W.3d 525, 529 (Mo. 2009) ("[Decedent] could not be a party to the wrongful death suit resulting from her death. A claim for wrongful death is not derivative from any claims [the decedent] might have had, and the damages are not awarded to the wrongful death plaintiffs on [the decedent's] behalf. . . . [Decedent's son], as the plaintiff in the wrongful death action, is not bound by the arbitration agreement signed by [decedent]."); Peters v. Columbus Steel Castings Co., 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, at ¶ 19 ("Thus, a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims."). *But see* Allen v. Pacheco, 71 P.3d 375, 379 (Colo. 2003) (applying arbitration agreement to wrongful death plaintiffs by looking at the contracting parties' intent and the terms of the contract even though "a wrongful death claim is separate and distinct from a cause of action the deceased could have maintained had he survived.").

244. Bybee v. Abdulla, 2008 UT 35, ¶ 40, 189 P.3d 40.

245. *Id.* at ¶ 23.

246. *Id.* at ¶¶ 36-37.

action.[247] The court noted that "wrongful death actions are derivative of decedents' injuries but are not derivative of decedents' rights."[248] Finally, an Oklahoma court also "held that a decedent cannot bind the beneficiaries to arbitrate their wrongful death claim."[249] The state's wrongful death statute created a "new cause of action" that allows the surviving spouse, children, or next of kin of the decedent to seek compensation for their losses.[250] As such, the Oklahoma court found no error in the trial court's decision to deny the nursing home's motion to compel arbitration of the wrongful death claim.[251]

One person signing an arbitration agreement cannot typically bind another person unless they are that person's agent. However, the nursing home context complicates the issue because arbitration agreements in admission contracts are signed by individuals acting on the resident's behalf or the now deceased resident. Additionally, many parties disputing motions to compel arbitration are nonsignatories to the original contract, either the resident who had an agent sign on his or her behalf or the deceased resident's estate or heir. Since courts across the country vary in their approaches, it is hard to predict whether a court will find a third-party beneficiary. In the end, the terms of the contract, the intent of the contracting parties, the signor of the contract, the party bringing the claim against the nursing home, and whether the arbitration provision is contained within the admission contract will affect whether a court will find someone a third-party beneficiary. For wrongful death claims, the outcome will largely depend on the court's interpretation of the state's wrongful death statute.

2. Unconscionability

The FAA allows a court to apply state laws "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."[252] Thus, "traditional state law defenses to contract formation such as unconscionability"[253] can invalidate arbitration agreements without violating section 2 of the FAA.[254]

Unconscionability is a defense to contract formation "which serves to relieve a party from an unfair contract or from an unfair portion of a contract."[255] Unconscionability can invalidate contracts when there is an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[256] However, absence of meaningful choice is not determinative of unconscionability, especially if there is grossly unequal bargaining

247. Pisano v. Extendicare Homes, Inc., 2013 PA Super 232, 77 A.3d 651, 663.
248. *Id.* at 660. *See also* N. Health Facilities v. Batz, 993 F. Supp. 2d 485, 496 (M.D. Pa. 2014) ("[A] review of Pennsylvania Supreme Court case law discloses that, over the past half century, it has consistently treated wrongful death claims as independent claims derived from the rights of a different plaintiff than the decedent.").
249. Boler v. Sec. Health Care, L.L.C., 2014 OK 80, ¶ 26, 336 P.3d 468, 477.
250. *Id.* at ¶ 27.
251. *Id.* at ¶¶ 26-27.
252. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987). The court went on to state that state laws that derive meaning from the fact that a contract to arbitrate is at issue does not comply with §2 of the FAA. *Id.*
253. Brewer v. Mo. Title Loans, 364 S.W.3d 486, 488-89 (Mo. 2012) (en banc).
254. Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996).
255. Germantown Mfg. Co. v. Rawlinson, 491 A.2d 138, 145 (Pa. Super. Ct. 1985).
256. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

power.[257] Yet inequality in bargaining power, in and of itself, will usually not invalidate a contract.[258] Rather, the defense of unconscionability is meant to prevent sophisticated parties with more bargaining power from taking advantage of less sophisticated parties.[259]

Unconscionability "guard[s] against one-sided contracts, oppression and unfair surprise."[260] Unconscionability is "linked inextricably with the process of contract formation" even though "[o]ppression and unfair surprise can occur during the bargaining process or . . . become evidence later, when a dispute or other circumstances invoke the objectively unreasonable terms."[261] All of the circumstances surrounding contract formation, including the setting, purpose, and the effect of a contract, help determine whether it is unconscionable.[262]

Courts typically "look at both the procedural and substantive aspects of a contract to determine whether, considered together, they make the agreement or provision in question unconscionable."[263] In general, unconscionability has two elements: "procedural unconscionability, i.e., the formalities of making the contract, and substantive unconscionability, i.e., the terms set forth in the contract."[264] The procedural component involves the circumstances surrounding the entering of the contract; thus, the court focuses on whether the parties had a reasonable opportunity to understand the terms of the contract and had a meaningful choice in accepting it.[265]

One critical question to ask regarding unconscionability is whether "each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?"[266] Unconscionability is critical defense to contract formation because "when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."[267] In that case, "the court should consider whether the terms of the contract are so unfair that enforcement should be withheld."[268]

The unique nature of nursing home admission contracts, and the arbitration agreements contained therein, places them at more of a risk of unconscionability. For example, in *Small v. HCF of Perrysburg, Inc.*, the Ohio Court of Appeals found an arbitration clause unconscionable when signed by the spouse of a nursing home

257. *See id.* ("In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.").
258. Harris v. Green Tree Fin. Corp., 183 F.3d 173, 183 (3d Cir. 1999).
259. United States v. Martinez, 151 F.3d 68, 74 (2d Cir. 1998).
260. Brewer v. Mo. Title Loans, 364 S.W.3d 486, 492-93 (Mo. 2012) (en banc).
261. *Id.* at 493.
262. Miller v. Cotter, 863 N.E.2d 537, 545 (Mass. 2007); *Walker-Thomas Furniture Co.*, 350 F.2d at 449.
263. Eaton v. CMH Homes, Inc., 461 S.W.3d 426, 433 (Mo. 2015). *See* Prieto v. Healthcare & Ret. Corp. of Am., 919 So. 2d 531, 532-33 (Fla. Dist. Ct. App. 2005).
264. Torres v. Simpatico, Inc., 781 F.3d 963, 968 (8th Cir. 2015). *Accord* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (2011); State *ex rel*. Vincent v. Schneider, 194 S.W.3d 853, 858 (Mo. 2006).
265. *Prieto*, 919 So. 2d at 533.
266. *Walker-Thomas Furniture Co.*, 350 F.2d at 449.
267. *Id.*
268. *Id.* at 450.

admittee because the spouse "at the time she signed the document, was concerned about the immediate health of her husband and was in no position to review and fully appreciate the terms of the agreement."[269] Mrs. Small's experience is common among family members and the elderly who sign contracts upon admission into a nursing home under similar conditions.[270]

In most cases, a contract must be both procedurally and substantively unconscionable to be invalid.[271] Procedural and substantive unconscionability guard against "one-sided contracts, oppression and unfair surprise."[272]

i. Procedural Unconscionability

Procedural unconscionability deals with the process and circumstances surrounding contract formation and the form of the contract.[273] The existence of "inequities, improprieties, or unfairness in the bargaining process and formation of the contract" evidence procedural unconscionability.[274] Inadequacies regarding the age, sophistication, or knowledge of a party may result in a lack of voluntary consent or a lack of knowledge opportunity to understand or negotiate contract terms support a finding of procedural unconscionability.[275]

Procedural unconscionability also exists when there is unfair surprise.[276] Unfair surprise "involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them."[277] The use of fine print and convoluted or unduly complex language can cause unfair surprise.[278]

Procedural unconscionability often stems from contracts of adhesion.[279] A contract of adhesion is a contract drafted by a party of superior bargaining power and imposed on a weaker party who must accept or reject the contract as it is rather than

269. Small v. HCF of Perrysburg, Inc., 159 Ohio App. 3d 66, 72, 2004-Ohio-5757, 823 N.E.2d 19, at ¶ 9 (6th Dist.).

270. *See supra* notes 22-29 and accompanying text.

271. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (2011) (stating that unconscionability requires both a procedural and substantive element); Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 227 (W. Va. 2012); Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002). Traditionally, Missouri courts "viewed unconscionability in the context of procedural unconscionability, i.e., the formalities of making the contract, and substantive unconscionability, i.e., the terms set forth in the contract." Torres v. Simpatico, Inc., 781 F.3d 963, 968-69 (8th Cir. 2015). However, Missouri courts now "shall limit review of the defense of unconscionability to the context of its relevance to contract formation." Brewer v. Mo. Title Loans, 364 S.W.3d 486, 492 n.3 (Mo. 2012).

272. *Brewer*, 364 S.W.3d at 492-93.

273. *See* Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999); Repair Masters Constr., Inc. v. Gary, 277 S.W.3d 854, 857 (Mo. Ct. App. 2009); Romano *ex rel.* Romano v. Manor Care, Inc., 861 So. 2d 59, 62 (Fla. Dist. Ct. App. 2003); Gainsville Health Care Ctr. v. Weston, 857 So. 2d 278, 284 (Fla. Dist. Ct. App. 2003); Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507, 517 (Miss. 2005) *overruled by* Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds *ex rel*. Braddock, 14 So. 3d 695 (Miss. 2009).

274. *Brown*, 729 S.E.2d at 227.

275. *Id. See* Covenant Health Rehab of Picayune, L.P. v. Brown, 949 So. 2d 732, 737 (Miss. 2007) *overruled by* Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds *ex rel*. Braddock, 14 So. 3d 695 (Miss. 2009); *Gainsville*, 857 So. 2d at 284.

276. *Harris*, 183 F.3d at 181.

277. *See* Flores v. Transamerica HomeFirst, Inc., 113 Cal. Rptr. 2d 376, 381 (2001).

278. *Harris*, 183 F.3d at 181; Brown v. Genesis Healthcare, 729 S.E.2d 217, 227 (W. Va. 2012).

279. *Brown*, 729 S.E.2d at 228 ("Procedural unconscionability often begins with a contract of adhesion.").

negotiate the terms.[280] Contracts of adhesion offered on this "take-it-or-leave-it basis"[281] are not per se unconscionable.[282] Nevertheless, a contract of adhesion strongly suggests a contract is procedurally unconscionable since contracts of adhesion suggest a lack of "meaningful choice" by the parties.[283] Still, a contract of adhesion by itself does not always require a finding of procedural unconscionability.[284] Rather, contracts of adhesion require further analysis to determine whether they should be enforced.[285]

ii. Substantive Unconscionability

Courts assess substantive unconscionability by looking at the contract terms themselves and determining "whether the terms of the agreement are commercially reasonable, fair, and consistent with public policy."[286] Contract terms that are unduly harsh and one-sided,[287] or so "outrageously unfair as to shock the judicial conscience"[288] suggest that a contract is substantively unconscionable. Oppressive contract terms also evidence substantive unconscionability; oppression exists when unequal bargaining power "results in no real negotiation and an absence of meaningful choice."[289] Substantively unconscionable contracts may include oppressive terms that deprive one party of all the benefits of the contract or leave one party without a remedy for the other party's breach or nonperformance.[290] Contracts of adhesion, or contracts and drafted by the dominant party – usually on printed forms – and presented on a "take-it-or-leave-it" basis to the other party who has no real chance

280. *Id.*
281. State *ex rel*. King v. B & B Inv. Grp., Inc., 329 P.3d 658, 669 (N.M. 2014).
282. *See In re* Lyon Fin. Servs., Inc., 257 S.W.3d 228 (Tex. 2008); Taylor Bldg. Corp. of Am. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 50.
283. Gainesville Health Care Ctr., Inc. v. Weston, 857 So. 2d 278, 285 (Fla. Dist. Ct. App. 2003) (quoting Powertel, Inc. v. Bexley, 743 So. 2d 570, 575 (Fla. Dist. Ct. App. 1999)).
284. VoiceStream Wireless Corp. v. U.S. Commc'ns, Inc., 912 So. 2d 34, 40 (Fla. Dist. Ct. App. 2005).
285. Am. Food Mgmt., Inc. v. Henson, 434 N.E.2d 59, 63 (Ill. App. Ct. 1982) ("Finding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not.").
286. Strausberg v. Laurel Healthcare Providers, LLC, 304 P.3d 409, 417-18 (N.M. 2013); Repair Masters Const., Inc. v. Gary, 277 S.W.3d 854, 858 (Mo. Ct. App. 2009); Prieto v. Healthcare & Ret. Corp. of Am., 919 So. 2d 531, 533 (Fla. Dist. Ct. App. 2005).
287. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (2011); State *ex rel*. Vincent v. Schneider, 194 S.W.3d 853, 858 (Mo. 2006); Funding Sys. Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624, 634 (Mo. Ct. App. 1979).
288. *Prieto*, 919 So. 2d at 533.
289. *Flores*, 113 Cal. Rptr. 2d at 381; *Funding*, 597 S.W.2d at 634; People by Abrams v. Two Wheel Corp., 525 N.E.2d 692, 695 (1988); State *ex rel*. Vincent v. Schneider, 194 S.W.3d 853, 858 (Mo. 2006) (en banc); *Brewer*, 364 S.W.3d at 492-93.
290. *See* Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds *ex rel*. Braddock, 14 So. 3d 695, 699-700 (Miss. 2009). An example of an unconscionable one-sided agreement would be one that allows one party to go to sue in court, but restricts the other to arbitration. *See* Pridgen v. Green Tree Fin. Servicing Corp., 88 F. Supp. 2d 655, 658 (S.D. Miss. 2000). *See also* McFarland v. Wells Fargo Bank, N.A., 810 F.3d 273, 279 (4th Cir. 2016) ("A contract term is substantively unconscionable only if it is both 'one-sided' and 'overly harsh' as to the disadvantaged party."); Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999) ("Substantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent.").

to negotiate the terms,[291] are not automatically substantively unconscionable but they do make it easier to prove that the contract is substantively unconscionable.[292]

V. CONCLUSION

Despite the Supreme Court's holding in *Marmet v. Health Care Center, Inc. v. Brown* that states cannot prohibit pre-dispute arbitration agreements of personal injury or wrongful death claims against nursing homes because it would be a "categorical rule" that is "contrary to the terms and coverage of the FAA,"[293] arbitration in nursing home contracts continues to be challenged.[294] Unconscionability, signatory issues, and applicability to third-parties constitute the more successful defenses raised against enforcing arbitration agreements in nursing home contracts. Since total prohibition of such agreements contradicts the Supreme Court's holding, a better solution includes educating potential residents and attorneys about the implications of these agreements and the strategies to combat enforcement. Specifically, attorneys should work to prevent enforcement of unfair arbitration agreements against vulnerable nursing home residents and their families by relying on defenses discussed in this article.[295] Discussing and educating the public, community leaders, state employees, elder law attorneys, and healthcare workers about the risks of mandatory arbitration in nursing home admission contracts can help mitigate the risks involved in signing these provisions.

Another option is to eliminate wrongful death actions from mandatory arbitration agreements in nursing home contracts. Such action would only change the forum for resolving their disputes rather than sacrificing plaintiffs' rights in the admissions process.[296] In wrongful death actions, beneficiaries should have the ability to choose the forum for seeking justice for the negligence that lead to the death of a friend or family member.[297]

There are other ways to ensure fairness in both the arbitration agreement and the admission process besides excluding wrongful death actions from nursing home arbitration agreements.[298] The use of fair and unambiguous model arbitration agreements in nursing home admission contracts could help remedy the problem. The American Healthcare Association, the largest association of long term care providers in the country,[299] has suggested "best practices" for arbitration in nursing home admission contracts, "recommending voluntary agreements that are set apart from the admission document and that include rescission language."[300] Such "best practices" would allow nursing homes to enjoy the cost-saving benefits of arbitration

291. E. Ford, Inc. v. Taylor, 826 So. 2d 709, 716 (Miss. 2002).
292. *Moulds*, 14 So. 3d at 701.
293. Marmet Health Care Ctr, Inc. v. Brown, 565 U.S. 530, 532-33 (2012) (per curiam).
294. *See supra* notes 59-62 and accompanying text.
295. *See supra* notes 103-289 and accompanying text.
296. Scheller, *supra* note 91, at 572.
297. Scheller, *supra* note 91, at 572.
298. *See* Scheller, *supra* note 91, at 572 ("Courts should clarify . . . who has authority to bind the party to arbitration upon signing the agreement. Legislatures could . . . [define] whether 'health care decisions' include agreements to arbitrate.").
299. Am. Health Care Ass'n, *Who We Are*, AHCA HOME, https://www.ahcancal.org/about_ahca/Pages/Who-We-Are.aspx (last visited April 1, 2016).
300. AON GLOBAL RISK CONSULTING, *supra* note 44, at 2-3.

without compromising the treatment and quality of care of nursing home residents.[301]

Since many adults will either enter nursing homes themselves or arrange such care for a loved one, and all taxpayers will have to bear the increasing costs of healthcare, the problems associated with mandatory arbitration agreements in nursing home admission contracts have the potential to affect the entire country. Such high stakes require careful, pragmatic, and balanced approaches to addressing arbitration in nursing home contracts will help ensure that nursing homes can provide adequate care to residents and that plaintiffs can find adequate resolution of disputes through the legal system.

301. Palm, *supra* note 38, at 483.