The Circle of Assent: How "Agreement" Can Save Mandatory Arbitration in Long-Term Care Contracts

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I. INTRODUCTION

On September 28, 1997, a resident at the Comanche Trail Nursing Center physically attacked his eighty-one-year-old roommate, Tranquilino Mendoza.1 As a result of the attack, Mr. Mendoza suffered

a concussion and brain damage. His daughter claimed that her father was never the same after the attack and filed a lawsuit against the long-term care facility alleging negligence. In 2006, a jury awarded Mr. Mendoza $160 million.

Similarly, on April 26, 2003, a resident of the Heritage House Nursing and Rehabilitation Center allegedly attacked Carolyn Mason, another resident at the same facility. Mrs. Mason suffered a broken hip. Like Mr. Mendoza, she filed a lawsuit against the long-term care facility alleging negligence. But instead of proceeding toward trial, Heritage House produced Mrs. Mason's seven-page admission agreement and moved to compel arbitration. Apparently unbeknownst to Mrs. Mason, pages five and six of the admission contract required that "any legal dispute which might arise shall be resolved exclusively by binding arbitration." Four years after the attack, the Mississippi Court of Appeals upheld the arbitration clause, thereby preventing Mrs. Mason from taking her case to trial.

As a result, Mrs. Mason will argue her case in front of an arbitration panel rather than a judge and jury. If Mrs. Mason experienced abuse or neglect at Heritage House, a jury never will hear about it—she waived that right, which otherwise is guaranteed by the Constitution. Additionally, the public never will learn the outcome of

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1. See Jean R. Sternlight, In Defense of Mandatory Binding Arbitration (If Imposed on the Company), 8 NEV. L.J. 82, 95 (2007) (discussing the fact that the Seventh Amendment to the U.S. Constitution guarantees disputants the right to a jury trial in certain situations). Interestingly, the California Supreme Court has responded to this issue by holding that a pre-dispute contractual waiver to a jury trial is not enforceable in a civil action in California. Avoiding a jury trial, however, is still possible through an arbitration agreement with legally enforceable provisions. See, e.g., Grafton v. Superior Court, 116 P.3d 479, 490, 492 (Cal. 2005) (distinguishing pre-dispute contractual waivers of a jury trial and arbitration agreements).
her case because arbitration is generally confidential. Perhaps of greatest importance, Mrs. Mason lost her most valuable tools for negotiating a settlement. Because Heritage House has no reason to fear the unknown factors that play into a jury verdict, any settlement likely will be limited to compensatory damages. Further, damages often are capped contractually in arbitration agreements, and if they are not capped, they are generally very low for the elderly and disabled long-term care population. Finally, there is at least the suspicion that industry-wide arbitration tends to favor the repeat players—here the nursing homes—because arbitrators want future case referrals.

The plight of Mrs. Mason is not uncommon. Mandatory pre-dispute arbitration agreements are the emerging standard in long-term care ("LTC") admission contracts all around the country. The agreements are "mandatory" because arbitration is the only form of dispute resolution available to an aggrieved LTC resident when a claim arises. This form of arbitration agreement is "pre-dispute" because the resident/signer agrees to arbitrate any disputes that may arise between the parties in the future, rather than take those disputes to court. Pre-dispute arbitration agreements differ from post-dispute agreements, in which parties agree to arbitrate a specific

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13. GEORGE W. KUNEY, THE ELEMENTS OF CONTRACT DRAFTING WITH QUESTIONS AND CLAUSES FOR CONSIDERATION 121 (2d ed. 2006). Arbitration is often appealing to long-term care facilities for this exact reason. In fact, arbitration gained momentum in the early 1980s because it was "considered to be beneficial, featuring more privacy, less cost, and more speed than traditional litigation, and eliminating the wildcard decision-maker that is a civil jury." Id.

14. See id.; [T]he mere elimination of the jury is often enough to allow for early settlement of a dispute. Without a jury, the parties are faced with the cold, hard facts of their cases and the legal arguments involved, and have less incentive to roll the dice with a lay jury that may be swayed by theatrics, passion, rhetoric, and prejudice.


16. See David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 WIS. L. REV. 33, 60–62 (noting that "independent arbitration companies have an economic interest in being looked on kindly by large institutional corporate defendants who can bring repeat business"); see also Gillespie & Ulloa, supra note 12, at 2 (noting that courts in Florida are beginning to be "wary of agreements that appear to create a 'stacked deck' by designating a specific arbitrator or a very limited pool of potential arbitrators").
dispute after it has arisen.\textsuperscript{17} This Note refers to mandatory pre-dispute arbitration agreements as “mandatory arbitration agreements.”

As mandatory arbitration agreements are discovered by consumers and claims arise,\textsuperscript{18} questions surrounding the legality and propriety of these agreements emerge. Critics of mandatory arbitration agreements in nursing home contracts urge that these provisions are intrinsically unfair.\textsuperscript{19} Arbitration provisions in nursing home contracts generally deny the elderly and disabled the right to raise any and all claims in court.\textsuperscript{20} Exacerbating this problem is the fact that admission to a nursing home is usually a remarkably stressful event for residents and their families.\textsuperscript{21} Critics worry that families admitting a loved one to a nursing home are not capable of making rational and informed legal decisions.\textsuperscript{22} For example, a typical family may not appreciate the importance of a binding arbitration agreement in an admissions packet that also includes a plethora of technical documents, including Medicare information, patient rights, advance directives, and resident conduct policies.\textsuperscript{23}

Also problematic is the fact that families often must take the first and only bed that becomes available in an LTC facility.\textsuperscript{24} Waiting periods of up to one year for an available bed are common, and because “residents can no longer manage the simple activities of daily

\begin{itemize}
\item \textsuperscript{17} Hereinafter, this Note will refer to mandatory pre-dispute arbitration agreements as “mandatory arbitration agreements.”
\item \textsuperscript{18} In the long-term care context, the arbitration agreement is usually discovered by the elderly, disabled, or their next of kin after a problem has arisen.
\item \textsuperscript{19} See, e.g., Rebecca Porter, \textit{Nursing Home Death Shows Need to Ban Mandatory Arbitration}, TRIAL, Sept. 2008, at 52, 52–53 (describing how one family’s experience with mandatory, pre-dispute arbitration led them to support the Fairness in Nursing Home Arbitration Act of 2008 (S. 2838), which would “ensure that arbitration is voluntary by prohibiting the enforcement of mandatory, predispute arbitration clauses”).
\item \textsuperscript{21} See, e.g., William J. McAuley & Shirley S. Travis, \textit{Factors Influencing Level of Stress During the Nursing Home Decision Process}, 6 J. CLINICAL GEROPSychOL. 269, 269 (2000) (“The decisions and actions leading to nursing home admissions are among the most difficult and least rewarding that caregivers of impaired older people must make. The process of institutionalization is often associated with feelings of separation, abandonment, pain, sorrow, blame, difficulty, guilt, stress, and loss of control,” (citations omitted)).
\item \textsuperscript{22} See \textit{id.} at 276 (suggesting that more time should be given “to complete the complex and arduous process of nursing home decision-making”).
\item \textsuperscript{23} Krasuski, \textit{supra} note 20, at 264.
\end{itemize}
life, and usually have no one willing to care for them, they literally have no other option." Thus, it is possible that some families become so desperate to obtain an available bed that they are simply at the mercy of the LTC facility and its mandatory arbitration agreement. In the most extreme situation, failing to notice a mandatory arbitration agreement or giving in to the need for an available bed (at any cost) is the difference between Mr. Mendoza and Mrs. Mason.

Proponents of mandatory arbitration agreements in LTC contracts, on the other hand, urge that arbitration agreements are necessary to ensure the survival of the industry. Facing the prospect of caring for the seventy-seven million aging Baby Boomers, some industry insiders fear the financial demise of the LTC industry if runaway jury verdicts persist. The LTC industry has found itself in a vicious cycle as it struggles to strike a balance between quality and cost. Cost-saving measures lead to insufficient staffing, which often leads to abuse and neglect. This abuse and neglect may result in large jury verdicts, which strain resources and further perpetuate the cycle. Recently hit with off-the-chart jury awards for negligence, abuse, and neglect, the industry has experienced severe financial...

25. Id.; see also Patricia Nemore, Representing the Elderly Client, Nursing Home Issues, 149 PRAC. L. INST. 59, 102 (1988):
The facts that nursing home contracts are printed on the facility's own form, that the language is all boiler plate except for the resident's name and the rate (for private pay), that the contract is offered on a take-it-or-leave-it basis with no bargaining for any of the terms, that in many places bed shortages leave the applicant or family no choice but to agree to the terms, and that the transaction itself is inherently stressful to the applicant and family all strongly support a finding by a court that the waiver is invalid.


28. See Liza Berger, Playing It Safe, MCKNIGHT'S LONG-TERM CARE NEWS, May 2007, at 40, 41 (discussing arbitration as an alternative to "lawsuits that can end up in the hands of a jury, which can result in a runaway verdict").

29. See Stephen A. Moses, Aging America's Achilles' Heel: Medicaid Long-Term Care, 549 POLY ANALYSIS 1, 1 (2005), available at http://www.cato.org/pubs/pas/pa549.pdf ("Medicaid is the principal payor for long-term care (LTC), especially nursing home care. LTC is an 800-pound gorilla of social problems that lurks just around the bend. If we wait to deal with Medicaid and LTC until after we handle Social Security and Medicare, it will be too late.").

30. See, e.g., Paradez, 267 S.W.3d at 176 (discussing nursing home's marketing plan to increase revenue that included recruiting new patients even though the director repeatedly complained of "insufficient and inadequately trained staff").

31. Jennifer L. Troyer & Herbert G. Thompson, Jr., The Impact of Litigation on Nursing Home Quality, 29 J. HEALTH POL. POLY & L. 11, 12 (2004) (articulating the argument that "litigation against nursing homes causes more resources to be dedicated to legal expenses . . . and fewer resources to be allocated to patient care").

32. Id.
losses. These losses, combined with a perception of dwindling Medicare funding and a growing population, place “greater financial strains on nursing homes” and make it harder to improve quality standards. Proponents urge that imposing mandatory arbitration agreements on residents and families is a simple, low-cost method of reducing the risk of multi-million dollar punitive damage awards, reducing liability insurance premiums, and increasing public confidence in the LTC industry. Proponents also argue that forcing these high-dollar cases into arbitration is the Band-Aid the LTC industry needs to ensure its economic survival.

Arbitration agreements are becoming the status quo in LTC contracts. The arbitration agreement itself generally spells out the exact terms of the arbitration process. Distinctive features of arbitration include the facts that arbitrators often do not consider themselves bound by precedent, discovery is limited in scope, arbitration is generally confidential, and arbitration is almost always binding and not reviewable. It is, however, difficult to generalize about the arbitral experience because the procedure varies greatly from contract to contract.

This Note urges the reexamination of the use of mandatory arbitration agreements in LTC contracts and offers a new approach. Part II of this Note begins by examining and outlining the history of arbitration in America and its eventual rise in popularity. It also


34. See Joseph E. Casson & Julia McMillen, Protecting Nursing Home Companies: Limiting Liability Through Corporate Restructuring, 36 J. HEALTH L. 577, 580 (2003) (explaining that nursing homes are currently facing two substantial risks: (1) “exposure to exclusion from the Medicare and Medicaid programs,” and (2) “exposure to financial liability,” including exposure generated through potential negligence actions); Robert A. Hawks, Note, Grandparent Molesting: Sexual Abuse of Elderly Nursing Home Residents and Its Prevention, 8 MARQ. ELDER’S ADVISOR 159, 186 (2006) (arguing that because jury awards “place greater financial strain on nursing homes,” which worsens “staffing conditions,” the solution “must be found outside civil litigation”); see also Moses, supra note 29, at 1 (noting that, in 2005, Medicare had $60 trillion in “unaccounted for obligations”).


37. LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 507, 613 (3d ed. 2005) (noting that “manifest disregard of law” is considered the “seminal nonstatutory ground for vacatur of commercial arbitration awards”).

38. See id. at 513 (“As with most all of the dimensions of commercial arbitration, it is difficult to generalize as to the extent and nature of pre-hearing discovery.”).
discusses the use of mandatory arbitration agreements in the modern era—including their use in the LTC context.

Part III examines the most common defenses advanced by plaintiffs attempting to defeat a motion to compel arbitration. This Part explores the role of the Federal Arbitration Act\textsuperscript{39} and the most common defenses plaintiffs offer to defeat arbitration agreements, including unconscionability and non-signatory arguments. This Part ultimately concludes that current approaches used to combat motions to compel arbitration are ill-suited to, and often fail in, the LTC context.

Part IV briefly explores the current political climate surrounding the use of these agreements. This Part advocates for a new approach: employing a totality of the circumstances approach to ensure that the consent to arbitrate is truly informed. Borrowing from the Circle of Assent doctrine, a totality of the circumstances test seeks to determine whether the parties actually bargained for and agreed upon the individual terms of the contract and provides relief when a “one-sided” arbitration clause “cannot reasonably be characterized as unconscionable,” but something about the agreement rings unjust.\textsuperscript{40} The totality of the circumstances approach focuses on the following factors: the readability, length, and headings in the agreement; the substantive fairness of the agreement; the sophistication of the consumer; the conditions surrounding consent; and the predictability of the arbitration provision and its terms. This approach would permit the LTC industry to continue using arbitration agreements but would ensure that residents read and understand the terms and consequences of the agreements. Essentially, this approach attempts to ensure that consent is truly informed and that the parties are truly agreeing to the arbitration provision and its terms.

II. THE RISE OF ARBITRATION AGREEMENTS

Throughout its history, the Supreme Court has taken a bipolar approach to arbitration. Traditionally, “judicial jealousies” of the arbitral forum led the Court to reject any arbitration agreement that would “oust” it of jurisdiction.\textsuperscript{41} The modern Court, however, largely

\textsuperscript{41} Amy J. Schmitz, Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law, 9 HARV. NEGOT. L. REV. 1, 26–27 (2004).
supports arbitration, even where it is mandatory. As a result, mandatory arbitration provisions currently are present in many consumer contracts, including LTC admission agreements.

A. The Scope: Framing the Issue of Mandatory Arbitration

Mandatory arbitration agreements have become the status quo in corporate America. The U.S. Supreme Court consistently has expressed support for consumer arbitration. Congress also has backed the use of mandatory arbitration agreements. Throughout the 1990s, corporate giants, including McDonald's, eBay, Gateway, and General Mills, began mandating consumer arbitration by including arbitration agreements in packaging and contest instructions. The new millennium saw an even greater expansion of consumer arbitration with its migration into the field of health care.

Defining the full reach of mandatory arbitration agreements in the LTC industry is a frustrating and difficult task. A close examination of current case law exposes a messy state of affairs, as some courts are upholding mandatory consumer arbitration agreements while others are striking them down. Courts striking down these agreements are doing so on a variety of theories, including Commerce Clause, unconscionability, and non-signatory grounds. Likewise, a review of current legislative proposals highlights a great fragmentation of views within this debate. Over the past decade,

43. See Krasuski, supra note 20, at 271, 273 (noting that arbitration agreements are "pervasive in consumer contracts" and discussing their role in nursing home admissions).
46. Id. at 129.
47. Id. at 127, 129.
48. See discussion infra Part III (summarizing the unpredictable judicial responses to motions to compel arbitration in the LTC context).
49. See id. (examining the common lines of defenses used by plaintiffs to defeat a motion to compel arbitration).
50. For a discussion of various viewpoints on pre-dispute mandatory binding arbitration, see generally Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?, Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 110th Cong. §§ 5–105 (2007); see also Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. §§
however, it has become clear that the use of these agreements in the LTC context is widespread.51 Exactly how many LTC facilities employ these agreements is unknown, but it is estimated that “most of the nation’s largest nursing home chains . . . include arbitration agreements in their admissions packets.”52

LTC facilities or their legal representatives generally write their own arbitration agreements. At a minimum, most arbitration agreements waive the right to a jury trial.53 A typical arbitration agreement used by nursing homes reads:

Pursuant to the Federal Arbitration Act, any action, dispute, claim or controversy of any kind (e.g., whether in contract or in tort, statutory or common law, legal or equitable, or otherwise) now existing or hereafter arising between the parties in any way arising out of, pertaining to or in connection with the provision of health care services, any agreement between the parties, the provision of any other goods or services by the Health Care Center or other transactions, contracts or agreements of any kind whatsoever, any past, present or future incidents, omissions, acts, errors, practices, or occurrence causing injury to either party whereby the other party or its agents, employees or representatives may be liable, in whole or in part, or any other aspect of the past, present or future relationships between the parties shall be resolved by binding arbitration administered by the National Health Lawyers Association (the ‘NHLA').

THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS CONTRACT, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO ALL OF ITS TERMS.54

Some nursing homes use even shorter arbitration agreements similar to the following:

BY AGREEING TO ARBITRATION OF ALL DISPUTES, BOTH PARTIES ARE WAIVING A JURY TRIAL FOR ALL CONTRACT, TORT, STATUTORY, AND OTHER CLAIMS.55

The agreements vary widely in length and in content, and the terms of the arbitration process generally are set out contractually.56 However,


51. A now outdated 1997 study concluded that “contrary to popular belief . . . arbitration agreements are not used widely in the [healthcare] setting.” Elizabeth Rolph, Erik Moller & John E. Rolph, Arbitration Agreements in Health Care: Myths and Reality, 60 LAW & CONTEMP. PROBS. 153, 153 (1997). A decade later, however, it is now clear that the use of these agreements in the LTC context is pervasive. Krasuski, supra note 20, at 268.

52. Krasuski, supra note 20, at 268.


54. Briarcliff, 894 So. 2d at 663–64.

55. Owens, 263 S.W.3d at 880–81.

56. See RISKIN ET AL., supra note 37, at 507 (“Private arbitration is based on contract and the parties may shape the contours of their arbitration agreement to meet their needs.”).
these agreements are fairly representative of what is being used in the standard LTC admission contract.

While arbitration mirrors traditional litigation in some respects, there is generally great divergence between arbitration and litigation in terms of the scope of discovery,\textsuperscript{57} the applicable rules of evidence, and the reviewability of the arbitrator's final decision.\textsuperscript{58} For example, an arbitration agreement can limit the number of witnesses, experts, interrogatories, and length of time allotted for any given arbitration hearing.\textsuperscript{59} Moreover, arbitration hearings typically are confidential, and the arbitrator may or may not issue a written "reasoned decision" with the award of damages.\textsuperscript{60} The arbitrator's decision is almost always binding on the parties and cannot be appealed in court absent abuse of discretion.\textsuperscript{61} Additionally, compensatory and punitive damages often are capped by the arbitration agreement, making meaningful recovery difficult.\textsuperscript{62}

\textit{B. The Federal Arbitration Act}

In the era before the consumer arbitration agreement became the status quo, American jurisprudence exhibited an enduring prejudice against arbitration.\textsuperscript{63} Traditional "judicial jealousies" of the arbitral forum led to the rejection of agreements that would "oust the courts of jurisdiction."\textsuperscript{64} As early as the 1920s, however, the threat of arbitration began to yield to the philosophy that a "strong public policy favoring arbitration over litigation" could produce a "speedy and relatively inexpensive means of dispute resolution" that had the

\begin{itemize}
\item \textsuperscript{58} See \textit{RISKIN ET AL.}, supra note 37, at 507 (discussing finality of the arbitrator's decision); Hayford & Peeples, \textit{supra} note 57, at 370–71 (discussing the role and nature of discovery and the rules of evidence in the arbitration process).
\item \textsuperscript{60} See \textit{RISKIN ET AL.}, supra note 37, at 511 (noting that the inclusion of a "reasoned decision" may depend on the type of case at issue in the arbitration).
\item \textsuperscript{61} Krasuski, \textit{supra} note 20, at 265.
\item \textsuperscript{62} Some arbitration agreements purport to eliminate punitive damages altogether.
\item \textsuperscript{63} See Maureen A. Weston, \textit{Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use}, 8 NEV. L.J. 385, 385 (2007) ("The purpose of the [FAA] was to reverse judicial hostility towards arbitration and to ensure the judicial enforcement of parties' agreements to arbitrate.").
\item \textsuperscript{64} Schmitz, \textit{supra} note 41, at 26–27.
\end{itemize}
potential of easing chronic court congestion. Policy arguments in favor of arbitration gained momentum as the United States became an increasingly industrialized nation of interstate commerce and merchants began to interact at great distances and with more frequency. Responding to the need for an alternative dispute resolution forum, Congress enacted the Uniform Arbitration Act, later renamed the Federal Arbitration Act (“FAA”). The core provision of the FAA, § 2 states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

In subsequent years, the Supreme Court interpreted the FAA as giving courts broad preemptive power over state laws disfavoring arbitration. The Court held that “[i]n enacting § 2 [of the FAA], Congress declared a national policy favoring arbitration and withdrew the States’ power to require a judicial forum for the resolution of claims that contracting parties agreed to resolve by arbitration.” Essentially, if interstate commerce is present, federal law trumps state law, and the FAA rules.

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67. See id. at 216 (describing the modernization of the Uniform Arbitration Act).


69. See Perry v. Thomas, 482 U.S. 483, 491 (1987) (holding that under the Supremacy Clause, the FAA pre-empted California state law); Southland Corp. v. Keating, 465 U.S. 1, 10–12 (1984) (holding that if a state law directly conflicts with the FAA, it violates the Supremacy Clause); RISKIN ET AL., supra note 37, at 516 (“[T]he U.S. Supreme Court has given the FAA broad preemptive effect over related state arbitration law.”).

70. Perry, 482 U.S. at 489.

71. This general rule is not true, however, for insurance contracts. The McCarran-Ferguson Act can reverse-preempt the FAA’s state law anti-arbitration provision. Elizabeth K. Stanley, Parties’ Defenses to Binding Arbitration Agreements in the Health Care Field and the Operation of the McCarran-Ferguson Act, 38 ST. MARY'S L.J. 591, 596–97 (2007).
The roots of mandatory arbitration can be traced back to the security exchanges and brokerage industry in the late nineteenth century. After the New York Stock Exchange required its investors to arbitrate disputes, other brokerages and exchanges quickly followed suit. These agreements were widely enforced, even before the passage of the FAA in 1925. In 1953, however, the Supreme Court executed an about-face, interpreting the Securities Act of 1933 (the “Securities Act”) to prohibit this use of arbitration. In Wilko v. Swan, an investor sued his brokerage house under § 12(2) of the Securities Act, claiming misrepresentation. The defendants moved to compel arbitration “in accordance with the terms” of the margin agreements between the investor and the brokerage house. In a 7-2 vote, the Court refused to enforce the arbitration agreement, holding that the Securities Act “was drafted with an eye to the disadvantages under which buyers labor.” In this instance, the Court found that the sellers had far more information available to them than the buyers and that it was therefore “inappropriate to find that the customer had knowingly selected arbitration.” Wilko had a powerful effect over the next three decades, as businesses grew increasingly hesitant to impose mandatory arbitration on consumers. In yet another jurisprudential shift, this timidity toward mandatory arbitration quickly gave way to a welcoming embrace after the Supreme Court reversed course again.

In 1989, the Supreme Court overruled Wilko and held that mandatory agreements to arbitrate would be enforceable. The Court held in Rodriguez de Quijas v. Shearson/American Express that Wilko was “incorrectly decided” and was “inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions,” which favors arbitration. Corporate America welcomed this change and almost immediately began imposing mandatory arbitration on consumers.

72. Sternlight, supra note 45, at 128.
73. Id.
74. Id.
76. Wilko, 346 U.S. at 429.
77. Sternlight, supra note 45, at 128–29 (quoting Wilko, 346 U.S. at 435).
78. Id. at 129.
79. Rodriguez de Quijas, 490 U.S. at 480–82.
80. Id. at 484.
Rodriguez led to a new era of consumer arbitration that subsequently has been expanded to include LTC facilities. Arbitration now touches the lives of both sophisticated investors and unsophisticated consumers, including the elderly and disabled. One study found that over thirty-five percent of all healthcare contracts entered into by the "average Joe" include arbitration agreements. While the Supreme Court currently favors arbitration, the Court has yet to rule explicitly on whether mandatory arbitration agreements in the LTC context are unique or whether they must be enforced.

Arguably, such consumer "agreements" were outside of the original scope of the FAA. Before the FAA was enacted, a skeptical senator was reassured that the FAA was not intended to cover arbitration agreements "offered on a take-it-or-leave-it basis to captive customers or employees." Nevertheless, given the Supreme Court's most recent precedent, there is a continued reluctance by courts to invalidate arbitration agreements, including mandatory arbitration agreements. The Court has, however, recognized the invalidity of arbitration agreements under the FAA in two circumstances: (1) in cases not involving interstate commerce and (2) "upon such grounds as exist at law or in equity for the revocation of any contract."

Plaintiffs are almost always unsuccessful when arguing that a nursing home admission contract does not constitute interstate commerce and thus does not fall within the purview of § 2 of the FAA. Most plaintiffs arguing against a nursing home's motion to compel arbitration are, by necessity, forced to argue under the second category—state contract law. These cases typically arise after a plaintiff (generally the nursing home resident, a family member, or the estate of the resident) files suit against an LTC facility. In

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83. See, e.g., Bruner v. Timberlane Manor Ltd. P'ship, 155 F.3d 16, 32 (Okla. 2006) (finding an insufficient nexus between the LTC contract and interstate commerce to fall within the purview of the FAA).
85. See discussion infra Part III.A (describing how disputes over LTC contracts easily fall within the purview of interstate commerce).
86. See 9 U.S.C. § 2 ("[U]pon such grounds as exist at law or in equity for the revocation of any contract.").
response, the LTC facility moves to compel arbitration in accordance with the relevant contract, which is usually a clause contained in the admission agreement. In response, many would-be plaintiffs argue that the terms of the contract are procedurally and substantively unconscionable, or that the signer did not have the capacity or authority to sign and bind the resident. 87

Case law regarding LTC arbitration agreements is a fairly new development, as the first case concerning these agreements did not reach the appellate court level until 1993. 88 As of 2008, state courts had decided over one hundred cases regarding this issue, many of which compelled arbitration. 89 While case law remains somewhat scarce and piecemeal, the occurrence of these agreements has become increasingly pervasive. The majority of cases are arising in “sunshine retirement states” where the long-term care industry is thriving: Florida, Alabama, Tennessee, and California. Under every approach mentioned above, however, plaintiffs are largely unsuccessful in combating compelled arbitration.

III. COMBATING COMPELLED ARBITRATION

Parties seeking to defeat a motion to compel arbitration most frequently attempt to escape the purview of the FAA in order to apply more favorable state law, claim unconscionability, or assert non-signatory defenses. Defeating a motion to compel arbitration is difficult, and parties frequently fail on all three grounds. Recent case law illustrates how each of these approaches is ill-suited to deal with a motion to compel arbitration in the long-term care context.

A. The First Line of Defense: Avoiding the FAA

Plaintiffs often seek to avoid FAA coverage because many state laws disfavor arbitration, making it easier to defeat a motion to compel arbitration. To fall within the scope of § 2 of the FAA, the underlying transaction must involve interstate commerce. 90 Because §

87. These arguments are addressed at length below. See discussion infra Parts III.B (unconscionability arguments), III.C (non-signatory arguments).
88. See Krasuski, supra note 20, at 273 (noting that Timms v. Greene, 427 S.E.2d 642 (S.C. 1993), was the first such decision).
89. A Westlaw search conducted on January 10, 2009, reveals that over one hundred state appellate cases have been decided on this issue. As of 2004, state courts had decided roughly thirty cases regarding the issue. Id.
90. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995) (holding that the phrase “a contract evidencing a transaction involving commerce” should be read broadly to extend the FAA to the outer limits of “Congress’ Commerce Clause power”).
2 of the FAA does not define the phrase "involving commerce,"\textsuperscript{91} parties generally must establish the existence of a sufficient nexus between the care provided by the LTC facility and the interstate commerce at issue in order to fall within the purview of that section of the FAA.\textsuperscript{92} Parties seeking to compel arbitration have argued successfully that this nexus is easily satisfied because LTC facilities, being critical to the Medicaid and Medicare regimes, are subject to pervasive federal regulation, have a significant economic impact on interstate commerce, and use a large amount of out-of-state products, such as prescription drugs, food, and equipment.\textsuperscript{93}

The Supreme Court's broad interpretation of "involving commerce" supports this pro-LTC facility analysis of the FAA.\textsuperscript{94} After the Court struck down a narrow interpretation of "involving commerce" in \textit{Allied-Bruce Terminix Companies, Inc., v. Dobson}, the state of Alabama began enforcing motions to compel arbitration under the FAA brought by LTC facilities. In 2004, the Supreme Court of Alabama compelled arbitration after an elderly woman's estate sued her former nursing home for negligence.\textsuperscript{95} Finding that the FAA supplanted anti-arbitration state law, the Alabama court listed several factors it considered, including: that (1) ninety-five percent of medical supplies were purchased from out-of-state suppliers (including such items as nursing home linens); (2) several of the nursing home residents were from out of state; and (3) ninety-five percent of the nursing home income was federally funded by Medicaid (eighty percent) or Medicare (fifteen percent).\textsuperscript{96} The court compelled arbitration under the FAA even though the plaintiff herself was a resident of Alabama and received no Medicaid or Medicare funds to pay for her care.\textsuperscript{97} LTC facilities seeking to compel arbitration under the FAA generally do not have a difficult time establishing a nexus between the underlying action and interstate commerce because the LTC industry is subject to extensive federal regulation.

\begin{itemize}
\item \textsuperscript{91} 9 U.S.C. § 2 (2006).
\item \textsuperscript{92} 1031
\item \textsuperscript{94} \textit{Allied-Bruce Terminix}, 513 U.S. at 268.
\item \textsuperscript{95} \textit{Owens}, 890 So. 2d at 984–86.
\item \textsuperscript{96} \textit{Id.} at 987–88.
\item \textsuperscript{97} \textit{Id.} at 988.
\end{itemize}
Under narrow circumstances, however, escaping the reach of the FAA is still possible with an "involving commerce" argument. In 2006, the Oklahoma Supreme Court in *Bruner v. Timberlane Manor Ltd. Partnership* held that a nursing home admissions contract had an insufficient connection to interstate commerce and that, as a result, the FAA did not preempt state law.98

The *Bruner* court persisted in its refusal to follow other states,99 holding that accepting Medicare and Medicaid payments was insufficient to invoke the FAA under the theory of "interstate commerce."100 The court acknowledged that nursing homes are heavily regulated by a "maze" of federal regulation.101 It also recognized that other state courts have documented a nexus between interstate commerce and have found the distribution of Medicare and Medicaid funding sufficient to trigger the FAA preemption of contrary state arbitration law.102 Refusing to follow such precedent, the Oklahoma Supreme Court held that because the U.S. Supreme Court has not decided whether Medicare or Medicaid funding is "an exercise of Congress' Commerce Clause power," it would refuse to treat federal funding as an "indici[um] of commerce that triggers the FAA."103 Thus far, no other state has followed Oklahoma's interpretation of interstate commerce, and plaintiffs in these cases rarely succeed in avoiding the FAA's reach.104

In contrast, parties occasionally succeed in arguing that they may contract out of the FAA. The *Bruner* court held that the FAA failed to preempt state law because the arbitration agreement in question called for state law to govern.105 Thus, the terms of an arbitration agreement successfully can override the broad reach of § 2 of the FAA.106 Under the FAA, an arbitration agreement must be enforced in accordance with its own terms. Parties are free to structure the contract to meet their needs by specifying whether the

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100. *Bruner*, 155 P.3d at 31.
101. *Id.* at 25.
102. *Id.* at 28–30 (discussing cases from Alabama, Mississippi, and Texas).
103. *Id.* at 29–30.
105. *Bruner*, 155 P.3d at 32.
106. *Id.* at 24 (discussing Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989)).
arbitration should be conducted under federal or state law.\textsuperscript{107} In \textit{Bruner}, the arbitration agreement called for the application of state arbitration law.\textsuperscript{108} The court held that "[b]y permitting the courts to 'rigorously enforce' such agreements according to their terms . . . we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by [sic] the FAA."\textsuperscript{109} Thus, it is always possible that an admission agreement contains some potentially pro-consumer terms.

Similarly, in 2007, the Tennessee Supreme Court held that the parties to an LTC contract containing an arbitration agreement were bound by the terms of their contract.\textsuperscript{110} The court quickly dismissed the defendant’s argument that the FAA should preempt state law, holding that while the FAA would ordinarily govern the agreement, the parties were bound by the terms of the contract.\textsuperscript{111} In the case before the court, the parties provided that the agreement was to be governed by Tennessee’s arbitration act. The court noted, “We need not belabor our analysis on this point because . . . the nursing-home contract[] expressly provides that ‘this agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed.’”\textsuperscript{112}

Allowing parties to contract out of the FAA affords plaintiffs the opportunity to escape pro-arbitration precedent under the FAA. However, LTC residents generally do not take part in drafting the arbitration agreement. LTC facilities are likely to respond to the most recent precedent by adapting the text of their admission contracts to call for explicit coverage under the FAA.

\textbf{B. Unconscionability}

The most common claim advanced by a plaintiff attempting to strike down a mandatory arbitration clause in an LTC contract is, by far, unconscionability.\textsuperscript{113} Although several unconscionability

\begin{itemize}
  \item \textsuperscript{107} \textit{Bruner}, 155 P.3d at 24–25.
  \item \textsuperscript{108} Id. at 25.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Owens v. Nat'l Health Corp., 263 S.W.3d 876, 883 (Tenn. 2007).
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} See Katherine Palm, Note, \textit{Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate}, 14 \textit{ELDER L.J.} 453, 465 (2006) (“The view that an agreement to arbitrate is unconscionable when well supported by the facts, is perhaps the strongest argument to retain the right to a jury trial.”); JANE BELLO BURKE, THE ENFORCEABILITY OF ARBITRATION AGREEMENTS IN LONG-TERM CARE: FEDERAL PREEMPTION AND STATE LAW CHALLENGES 6 (2006), http://www.healthlawyers.org/Members/PracticeGroups/HLL/Toolkits/Documents/E_Enforceabili
challenges have prevailed, the vast majority have failed.\textsuperscript{114} In its purest form, unconscionability is defined as "extreme unfairness."\textsuperscript{115} To prevail under the doctrine of unconscionability, the party challenging the arbitration agreement generally must present an exceedingly strong factual showing that the agreement was both procedurally and substantively unfair.\textsuperscript{118} It is often difficult, however, to prevail under the theory of unconscionability where the state is hostile to the doctrine, which most states are.

Procedural unconscionability requires an objective inquiry into "improprieties" in the formation of the contract.\textsuperscript{117} In the LTC context, improprieties most often arise when a facility fails to inform a resident of the presence of an arbitration clause or of the consequences of the clause, including the waiver of a jury trial. Substantive unconscionability requires inquiry into the actual terms of the contract to determine whether they are "unduly harsh, commercially unreasonable, and grossly unfair" under the particular circumstances.\textsuperscript{118} In the LTC context, the terms of an arbitration agreement are sometimes considered "unduly harsh" when the arbitration process is prohibitively expensive or geographically distant. Finding the perfect storm of procedural and substantive unconscionability, however, is often an insurmountable task for parties seeking to avoid arbitration.

The Third District Court of Appeals of Florida provided an illustrative example of the challenging task of proving unconscionability, especially where the court has a preexisting hostility toward such claims.\textsuperscript{119} In Etting \textit{v. Regents Park at Aventura, Inc.}, the plaintiff (the son of a deceased nursing home resident) argued


\textsuperscript{115} BLACK'S LAW DICTIONARY 1560 (8th ed. 2004).

\textsuperscript{116} See 21 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 57:15 (4th ed. 2001) ("The courts are split on whether a party must show both procedural and substantive unconscionability to establish a valid defense to the attempted enforcement of an arbitration agreement, although most courts require a showing of both.").

\textsuperscript{117} BLACK'S LAW DICTIONARY 1560–61 (8th ed. 2004) (citing E. ALLAN FARNSWORTH, CONTRACTS § 4.28, at 312 (3d ed. 1999)).

\textsuperscript{118} \textit{Id.} at 1561.

\textsuperscript{119} Etting, 891 So. 2d at 558.
that because his mother was legally blind when she signed the arbitration agreement in her nursing home admission’s packet, the clause was invalid.\textsuperscript{120} The court disagreed and compelled arbitration, holding that “[n]o party to a written contract in [Florida] can defend against its enforcement on the sole ground that he signed it without reading it.”\textsuperscript{121} This hard-line approach taken by many states frequently precludes a successful unconscionability argument.

Likewise, Tennessee courts also have rejected unconscionability claims. In \textit{Philpot v. Tennessee Health Management, Inc.}, the LTC defendant admitted that the nursing home admission contract containing the arbitration agreement was a contract of adhesion.\textsuperscript{122} However, a contract of adhesion is not dispositively unconscionable under Tennessee law.\textsuperscript{123} The court held that a contract of adhesion is unconscionable only where the “inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on one hand, and no honest and fair person would accept them on the other.”\textsuperscript{124} This language is markedly similar to that of other U.S. jurisdictions and is difficult to satisfy.\textsuperscript{125}

\textsuperscript{120} Id.

\textsuperscript{121} Id. (quoting Allied Van Lines, Inc. v. Bratton, 351 So. 2d 344, 348 (Fla. 1977)). It is worth noting that the plaintiff’s blindness in this case essentially “ups the ante” by precluding an unconscionability claim not only where the plaintiff \textit{didn’t read} the contract, but where the plaintiff \textit{couldn’t read} the contract. In the absence of coercion, this court and many others are willing to uphold arbitration agreements. \textit{Id.} at 558–59.


\begin{itemize}
  \item a standardized contract form offered to consumers of goods and services on essentially a ‘take it or leave it’ basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract.
\end{itemize}


\textsuperscript{123} See \textit{Hill v. NHC Healthcare/Nashville, LLC}, No. M2005-01818-COA-R3-CV, 2008 WL 1901198, at *8 (Tenn. Ct. App. Apr. 30, 2008) (“The conclusion that the admissions contract herein was an adhesion contract does not, however, end the inquiry. Contracts of adhesion are not favored and must be closely scrutinized to determine if unconscionable or oppressive terms are imposed which prevent enforcement of the agreement.” (relying on the holding in \textit{Buraczynski}, 919 S.W.2d at 316, 320)).


In Philpot, for example, the son of a nursing home resident signed an admissions agreement containing a mandatory arbitration agreement the day his mother was to be released from the hospital. According to the trial court, the son was told that his mother had to take an open spot at the nursing home immediately or someone else would take it. The woman’s son later claimed that this urgency forced him to flip quickly through a large stack of admission documents, sign them without asking questions, and unknowingly waive his mother’s right to a jury trial in the event of a dispute with the LTC facility. The court rejected this line of reasoning, holding that the law imposes “a duty on parties to a contract to learn the contents . . . of a contract before signing it” and that “signing it without learning such information is at the party’s own peril.” The court ultimately rejected the unconscionability claim and compelled arbitration partly because the son was sufficiently educated, rushed to admit his mother, and failed to ask the nursing home any questions.

Despite this precedent, some have suggested that judicial tides are turning, with courts slowly becoming more sympathetic to unconscionability claims. One scholar suggests that the historic judicial disfavor toward the doctrine of unconscionability has yielded to the expanding use of mandatory consumer arbitration and the need for a fairness escape valve. For example, one study shows that, in 2002 and 2003, 68.5 percent of all unconscionability claims involved arbitration agreements. Moreover, courts were increasingly likely to invalidate contracts involving arbitration clauses. The study found 50.3 percent of the arbitration agreements were held to be unconscionable, while only 25.6 percent of other non-arbitration contracts were held to be unconscionable. Unfortunately for

127. Id.
128. Id.
129. Id.
130. Id.
131. See, e.g., Hill v. NHC Healthcare/Nashville, LLC, No. M2005-01818-COA-R3-CV, 2008 WL 1901198, at *17 (Tenn. Ct. App. Apr. 30, 2008) (holding an arbitration agreement unenforceable where “the patient was discharged from the hospital but was not well enough to return home, and her need for nursing home services was immediate,” and where the patient had no family members available to explain the contract terms to her).
133. Id. at 194–96 (comparing to 14.8 percent in 1982 and 1983).
134. Id. (comparing to 12.5 percent of the arbitration agreements and 15.2 percent of the non-arbitration agreements in 1982 and 1983).
plaintiffs in cases against LTC facilities, this general trend has not been fully realized in the LTC context.

Nevertheless, most jurisdictions retain the possibility that a mandatory arbitration agreement in the LTC context could be unconscionable, recognizing that admitting an elderly or disabled person to an LTC facility is often a traumatic experience riddled with individualized and difficult circumstances. In 2003, the Tennessee Court of Appeals in *Raiteri ex rel Cox v. NHC Healthcare/Knoxville, Inc.* invalidated a nursing home arbitration agreement, holding that it was a "classic . . . contract of adhesion." The court held that the elderly man who signed the contract was the weaker party, had no bargaining power, and was offered the contract on a "take-it-or-leave-it basis" under "trying circumstances." While the court discussed the doctrine of unconscionability, it never explicitly held that the contract was unconscionable. As noted above, Tennessee courts frequently have rejected the argument that a contract of adhesion, without evidence of unconscionability, is enough to invalidate an arbitration clause.

At least two Florida cases have found arbitration agreements in the LTC context unconscionable. In *Romano ex rel. Romano v. Manor Care, Inc.*, a Florida trial court found both substantive and procedural unconscionability where the admissions contract was presented to the resident's elderly husband as "simply another document required to be signed as part of the admission process." The court also found evidence of "egregious substantive

135. *See Hill*, 2008 WL 1901198, at *17 (noting that "some of the circumstances relevant to determining whether an agreement is a contract of adhesion are also relevant to the question of whether the agreement was fairly entered into"). Some of the factors courts consider include: (1) whether there were any other nursing homes in the area; (2) who signed the admissions agreement; (3) whether the person signing the admissions agreement was educated; and (4) whether the person signing the admissions agreement was informed by the LTC facility of the existence and terms of the arbitration provision. *E.g., id.* at *9–11.


137. *Id.*

138. *Id.* at *9 (holding instead that the arbitration agreement was unenforceable because of a non-signatory argument).

139. *See Philpot v. Tenn. Health Mgmt., Inc.*, No. M2006-01278-COA-R3-CV, 2007 WL 4340874, at *4 (Tenn. Ct. App. Dec. 12, 2007) (stating that "we must examine the agreement and determine whether it is a contract of adhesion, and if so, whether it contains such terms that render it unconscionable or oppressive").


141. *See Romano*, 861 So. 2d at 63–64 (noting that the husband was asked to sign the admission papers only after his wife was admitted to the LTC facility "without being told that his failure to sign them would not affect her care or her ability to stay in the home").
unconscionability” where the terms of the contract violated state law by severely limiting the recovery of punitive damages and attorneys' fees through an arbitration procedure.142 The court, articulating a common obstacle faced by plaintiffs in these cases, recognized that compensatory damages likely would be small given the advanced age of the plaintiffs.143 Furthermore, it recognized that punitive damages are the most promising, and sometimes the only, source of monetary compensation for this group.144 Thus, compelling arbitration, where punitive damages are generally either barred or capped, would be tantamount to the denial of any meaningful recovery.145 In this particular case, the resident's injuries were particularly troublesome to the court and almost certainly contributed to the finding of unconscionability.146

Similarly, in Prieto v. Healthcare & Retirement Corporation of America, the Florida District Court refused to compel arbitration after finding both procedural and substantive unconscionability in a nursing home admissions contract.147 The court found procedural unconscionability where the daughter of the resident was asked to sign her father's admission papers while he was en route to the nursing home.148 The court suggested that this situation prevented the daughter from meaningfully considering the agreement.149 Perhaps of greatest significance to the court were the actual terms of the arbitration agreement, which, like the Romano agreement, eliminated certain statutory remedies, including punitive damages.150 The agreement also limited the scope of discovery.151 The court relied on Romano to hold the contract terms substantively unconscionable.152 However, neither Romano nor Prieto has been followed subsequently. Unconscionability is an inherently subjective inquiry, and courts generally are unwilling to use it to invalidate arbitration agreements.

142. Id.
143. Id. at 63.
144. Id.
145. Id.
146. Id. (stating that “Josephine was only in the nursing home for thirty days but developed bed sores and received grossly substandard care”).
148. Id. at 533.
149. Id.
150. Id.
151. Id.
152. Id. at 533–34.
C. The Power to Bind: Non-signatory Arguments

The next line of defenses used by plaintiffs to defeat motions to compel arbitration—making non-signatory arguments—is also largely unsuccessful. Non-signatory defenses most often are invoked in the following two situations: (1) when the LTC resident fails to sign the arbitration agreement or (2) when a family member signs the agreement on behalf of the LTC resident. The outcome of these challenges depends largely on state law.

In several cases, plaintiffs have claimed that they cannot be held to the arbitration agreement because they or a representative of the LTC facility failed to sign the arbitration agreement. For example, in *Community Care Center of Vicksburg v. Mason*, the plaintiff failed to initial after the words "PLEASE READ CAREFULLY," which preceded the arbitration agreement. Additionally, she and the nursing home representative both signed the wrong signature lines. When the nursing home filed a motion to compel arbitration, Mrs. Mason argued that the agreement was invalid because she failed to sign and initial the appropriate provisions of the agreement. The court noted that the failure to initial the agreement was not dispositive and ultimately held that Mrs. Mason's failure to initial did not invalidate the contract. Without a claim that Mrs. Mason intentionally left the provision blank in order to reject the agreement, the court was unwilling to hold the agreement invalid.

In contrast, the Mississippi Supreme Court refused to compel arbitration where a nursing home resident initialed the line indicating that she had read the arbitration agreement but failed to sign the arbitration provision. This evidence, combined with the fact that the resident's conservator twice failed to sign the arbitration provision, provided ample evidence for the court to conclude that the resident

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153. See Krasuski, *supra* note 20, at 275–76, for a more expansive list of areas where non-signatory arguments arise.

154. Cmty. Care Ctr. of Vicksburg, LLC v. Mason, 966 So. 2d 220, 222–25 (Miss. Ct. App. 2007). Discussion of Mrs. Mason's case can be found in the introduction, *supra* Part I.

155. *Id.* at 223.

156. *Id.* at 226. However, the agreement shows that the titles under each line, "Facility Representative" and "Resident" had been crossed out and corrected. *Id.*

157. *Id.* at 224.

158. *Id.* at 227–29.

159. *Id.*

160. Bedford Care Ctr.-Monroe Hall, LLC v. Lewis, 923 So. 2d 998, 999–1002 (Miss. 2006). Note that the fact pattern is essentially the inverse of *Community Care Center of Vicksburg v. Mason*, discussed earlier, *supra* Part I.
made a "knowledgeable and express decision not to sign the arbitration provision."\footnote{Id. at 1001.} Arguments challenging the validity of the agreement when the representative of the LTC facility fails to sign the agreement are almost always unsuccessful because, according to the courts, they lack evidence of express disapproval of the agreement.\footnote{See Integrated Health Servs. v. Lopez-Silvero, 827 So. 2d 338, 339 (Fla. Dist. Ct. App. 2002) (noting that the defendant had "clearly" assented to the arbitration clause because both parties acted like there was a contract, the defendant performed under the contract, and the defendant signed other documents in the admissions agreement).}

Likewise, non-signatory defenses often arise when the task of signing the arbitration agreement falls on family or friends of the LTC patient rather than the patient herself. Long-term care facilities frequently provide care to those who suffer from significant disability or diminished capacity.\footnote{See Krasuski, supra note 20, at 276–77 (noting that "not uncommonly, residents have diminished capacity"). Signing the admissions agreement is often impracticable, if not impossible, for the resident, so that task often falls to the family of the resident.} The difficult task, therefore, of admitting a family member or friend to an LTC facility often falls to the family of the resident. Generally, a spouse, parent, or adult child signs the admission papers when the resident is admitted.\footnote{Id.} Only after the family or resident files suit against the LTC facility do the family members realize that they may have inadvertently waived their loved one’s right to a jury trial.\footnote{Id.}

In response to a motion to compel arbitration, the signer of the agreement (usually the spouse, parent, or adult child of the LTC resident) often claims that he or she lacked the authority to sign the arbitration agreement.\footnote{Id.} This argument succeeds when there was no authority, either express or apparent, to sign the arbitration agreement on behalf of the resident. And while courts have attempted to draw a line between medical and legal decisions, doing so has proven to be an elusive goal.\footnote{Id.}

For example, a leading California case held that the daughters of a mentally incompetent woman had no authority to enter into an arbitration agreement on their mother’s behalf.\footnote{Pagarigan v. Libby Care Ctr., Inc., 120 Cal. Rptr. 2d 892, 894 (Cal. Ct. App. 2002).} The court noted that a person “cannot become the agent of another merely by...
representing herself as such." Moreover, state statutes authorizing next-of-kin to make medical decisions for their incompetent mother did not "translate[] into authority to sign an arbitration agreement on the patient's behalf at the request of the nursing home." The court ultimately denied the motion to compel arbitration.

The California Court of Appeals subsequently expanded this line of reasoning in a situation involving a husband who signed an arbitration agreement on behalf of his wife who was suffering from dementia. In this case, the court distinguished between medical and legal decisions, stating that the decision to enter into an arbitration agreement is a legal agreement rather than a "necessary decision that must be made to preserve a person's well-being." Because the arbitration agreement dealt with a patient's legal rights—in particular, the waiver of a jury trial—the court refused to recognize that the authority of the next-of-kin or spouse fell within statutory provisions allowing for surrogate medical decisionmaking. Increasingly, state courts will refuse to compel arbitration absent proof of actual express or apparent authority.

However, the Tennessee Supreme Court recently rejected the legal/healthcare distinction recognized by California and Mississippi. In Owens v. National Health Corporation, the court relied heavily on the language contained within the "Durable Power of Attorney for Health Care" form executed between a nursing home resident and her "designated signors" to compel arbitration. The power of attorney in this case granted the resident's attorney-in-fact the "power and authority to execute... any waiver, release or other document which may be necessary in order to implement the health care decisions that this instrument authorizes my Attorney-in-Fact to

169. Id. The court noted that in order for the daughters to be agents of the mother (the purported principal), the mother must have employed the daughters or caused third-party reliance. The court stated that "[t]his comatose and mentally incompetent woman" did nothing to cause the LTC facility to "believe either of her daughters was authorized to act as her agent in any capacity." Id. at 895.

170. Id. at 895.


172. Id. at 832.

173. Id.

174. See, e.g., Miss. Care Ctr. of Greenville, LLC v. Hinyub, 975 So. 2d 211, 218 (Miss. 2008) (holding that husband as "health care surrogate" did not have authority "to enter into the arbitration provision contained within the admissions agreement"); Hendrix v. Life Care Ctrs. of Am., Inc., No. E2006-02288-COA-R3-CV, 2007 WL 4523876, at *5 (Tenn. Ct. App. Dec. 21, 2007) (refusing to compel arbitration where daughter of nursing home resident had power of attorney effective only after mother was incapacitated—which she was not).


176. Id. at 880.
assist me to make, or to make on my behalf.”177 The court interpreted this language to mean that the attorney-in-fact had the authority to make any health care decision that the resident could make if she were capable of doing so.178 Consequently, the court held that an attorney-in-fact did have the authority to sign a mandatory arbitration agreement because this step was required in order to “consent” to health care.179

The court noted that its holding was based primarily upon the language of the power-of-attorney agreement executed between the resident and her attorney-in-fact. Nevertheless, it suggested a much broader holding through dicta.180 The court dismissed the distinction between medical and legal decisions as little more than a misinformed perception. The court pointed out that every contract signed for a health care service is technically a “legal decision.”181 The court proceeded to make a policy-based argument that the recognition of a medical/legal distinction could make every “contract signed by an attorney-in-fact . . . subject to question as to whether the provision constitutes an authorized ‘health care decision’ or an unauthorized ‘legal decision.’”182 Ultimately, the court worried that holding otherwise would leave a “mentally incapacitated principal” in “legal limbo,” making it difficult to obtain necessary medical services.183

It is unclear how far Owens extends. If courts follow its broad holding and refuse to draw a distinction between a general and healthcare power of attorney, families and residents will be left with very few defenses to escape these mandatory arbitration agreements.

IV. PUTTING AGREEMENT BACK INTO ARBITRATION AGREEMENTS: THE CIRCLE OF ASSENT

Until the Supreme Court184 specifically addresses the enforceability of mandatory arbitration agreements in long-term care contracts, lower courts must continue to wrestle with motions to compel arbitration. As an alternative to current approaches, the Circle of Assent doctrine can be employed to assure arbitration’s best and

177. Id.
178. Id. at 883–85.
179. Id. at 884.
180. Id. at 885.
181. Id. at 884.
182. Id. at 885.
183. Id.
184. Or, in the alternative, until the legislature specifically addresses the enforceability of mandatory arbitration agreements in long-term care contracts.
most efficient use in the LTC industry. Under the Circle of Assent analysis, “the party who signs a printed form furnished by the other party will be bound by the provisions in the form over which the parties actually bargained and other such provisions that are not unreasonable in view of the circumstances surrounding the transaction.”

A. Current State of Affairs

An analogy can be drawn between the use of arbitration agreements and the use of prescription drugs. When arbitration agreements and prescription drugs are used wisely, they can provide great benefits. However, when used incorrectly, or even abused, the results are potentially disastrous. Given the current state of affairs surrounding the use of arbitration agreements in LTC agreements, it is not surprising that calls for reform are arising. These calls for reform are coming not only from trial lawyers, but also from arbitrators and their professional organizations as well. To assure arbitration’s best and most efficient use in the LTC industry, the practice of using mandatory arbitration agreements must be reformed. The current use of mandatory arbitration in LTC contracts is troubling and has recently generated fierce debate in the House Subcommittee on Commercial and Administrative Law. The debate was spurred by lawmakers who believe that “arbitration can be a fair and efficient way to handle disputes, but only when it is entered into knowingly and voluntarily by both parties.” In his testimony before the subcommittee, Richard Naimark, Senior Vice President of the American Arbitration Association, admitted that “the public policy in the United States on consumer... arbitration is something that can use some fixing, some balancing” The fixing and balancing that Mr. Naimark calls for must be done with a realistic perspective on the problem.

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187. Id.


189. Statement of Richard Naimark, supra note 186.
By the early 1990s, many believed that the LTC industry was entrenched in a full-scale crisis. In 2002, William Minnix, President of the American Association of Homes and Services for the Aging, stated that “[i]f substandard nursing homes don’t improve, public pressure will drive them out of business.” In a survey of six states, an average of eight percent of all nursing home residents were reported to suffer from bed sores. With such signs of abuse and neglect, it is no surprise that lawsuits quickly followed. In 1985, a Florida law firm, Wilkes & McHugh, opened for business. Its purpose was to sue nursing home chains for abuse and neglect of the elderly and disabled, originally an insurmountable task because nursing homes were seemingly impenetrable and the plaintiffs were elderly, making any meaningful economic recovery difficult. Wilkes & McHugh easily disproved this theory, and in 2008 they proudly boasted on their website homepage that they had earned over “$300 million in verdicts.” Interestingly, Wilkes & McHugh focused jurors’ attention on returning punitive and pain-and-suffering damages and often succeeded in causing jurors to “see nursing home owners as heartless profiteers.”

During the so-called LTC “crisis,” insurance premiums rose to a level that created an imminent danger of putting many major LTC chains out of business. In response, many nursing homes employed various risk management programs, most incorporating a strong arbitration component. Today, the so-called “premium shave” in insurance costs has “eased” with costs leveling somewhat, but many of the risk management devices persist, including the use of mandatory arbitration agreements. Commenting on the use of arbitration agreements in nursing home admissions packets, one nursing home executive stated that “it takes the ability to inflame a jury out of the

192. See id. (stating that the number of bedsores ranged from four to thirty-seven percent at individual nursing homes in six different states).
193. Baranick, supra note 33.
194. See id. (explaining that “[e]lderly, retired clients don’t suffer as much economic loss as young ones with a bright professional future, so jury awards tended to be small”).
196. Baranick, supra note 33.
198. Id.
199. Id. ("Insurance premiums have actually stabilized for long-term care facilities over the last couple of years. . . .")
He further remarked, "It's harder to inflame a professional arbitrator." LTC facilities, therefore, prefer arbitration over lawsuits "that can end up in the hands of a jury . . . result[ing] in a runaway verdict." Arbitration minimizes the risk of a crippling monetary loss. With the crisis "easing" and leveling somewhat, perhaps the pendulum has swung too far in favor of the LTC industry, necessitating reform to recalibrate the fairness of these "agreements."

The multitude of issues facing the LTC industry has not gone unnoticed by the legislature. Recently, Senator Russ Feingold and U.S. Representative Hank Johnson introduced the bicameral Arbitration Fairness Act of 2007. The Act seeks to amend the Federal Arbitration Act "to make pre-dispute agreements to arbitrate employment, consumer, franchise, or civil rights disputes unenforceable." Various consumer advocate groups support the bill, including the National Consumer Coalition for Nursing Home Reform. It is, perhaps, no surprise that Kenneth L. Connor, an attorney with Wilkes & McHugh, testified before the Subcommittee on Commercial and Administrative Law in defense of this Act. When a court compels arbitration, there is no jury and no large punitive damage award, which results in less lucrative verdicts for plaintiffs' lawyers. Compelled arbitration also results in limited recovery for victims of abuse at the hands of LTC facilities. Striking a balance among all of these factors is a delicate task. Until lawmakers successfully amend the FAA to control the use of mandatory arbitration, state courts can employ an old, yet under-utilized and unique, doctrine to determine whether an arbitration agreement should be enforced.

B. Solution: The Circle of Assent

Courts faced with a motion to compel arbitration should consider the totality of the circumstances when determining whether

200. Id. at 41.
201. Id.
202. Id.
203. Id.
204. Press Release, supra note 188.
205. Id.
206. Id.
208. Id.
209. Id.
210. This Note does not purport to comment on or evaluate the merits of the legislative efforts, including the Arbitration Fairness Act of 2007.
the “consent” was truly informed. Recent case law has proven that unconscionability analysis is ill-suited for the LTC context. In contrast, a totality of the circumstances, informed consent analysis provides relief where a one-sided arbitration clause “cannot reasonably be characterized as unconscionable,” but something about the agreement rings unjust. The Circle of Assent doctrine, most recently adopted in Tennessee, provides a practical and viable starting point for courts.

As was mentioned earlier, the Circle of Assent doctrine holds that “the party who signs a printed form furnished by the other party will be bound by the provisions in the form over which the parties actually bargained and such other provisions that are not unreasonable in view of the circumstances surrounding the transaction.” The distinctions between the Circle of Assent analysis and the doctrine of unconscionability are critical. While the doctrine of unconscionability focuses on the fairness of the terms actually agreed upon, the Circle of Assent inquiry requires a broader examination into whether the parties actually bargained for and agreed upon the individual terms of the contract.

The Circle of Assent analysis is particularly useful in scrutinizing arbitration agreements because it allows state courts to bypass the FAA. As one scholar explains, “Although the Federal Arbitration Act generally preempts state laws and policies regarding arbitration, state contract law controls when the question is whether the parties actually agreed to arbitration.” Once state courts are allowed to make this inquiry, the totality of the circumstances approach must resolve two critical inquiries: (1) “the extent to which the [consumer] should have been aware of the provision” and (2) “the extent to which the provision shifts to the [consumer] a risk the [consumer] was not expecting.” The less the consumer was aware of the provision and the greater the burden of risk shifted onto the consumer, the less likely the court will be to find an enforceable

211. See supra Part III.B (explaining that the vast majority of unconscionability challenges to strike down a mandatory arbitration clause in an LTC contract have failed).
214. Lloyd, supra note 40, at 243.
215. See Sternlight, supra note 45, at 164 (discussing the much accepted argument that the FAA “would seem to exempt arbitration clauses from standard contract law regarding... unconscionability”).
217. Id. at 246.
218. Id.
agreement between the parties. When making this inquiry, courts employ a “sliding scale” in considering the following factors: (1) the readability of the contract provision; (2) the length of the document in which the provision appears; (3) any headings or other indicators of the provision; (4) the sophistication of the signer; (5) the conditions under which the consumer consents to the provision; (6) the substantive fairness of the provision; and (7) whether the provision was expected. This list of factors is in no way exhaustive, and the burden of proof is placed upon the party seeking to enforce the provision. Each factor is analyzed below to determine its potential applicability to arbitration agreements in the LTC context.

1. Readability, Length, Headings

Arbitration agreements that appear in LTC admissions contracts should be short, easy to understand, and have clear headings. Despite the simplicity of this concept, it is critical that courts not take a perfunctory approach to the application of this factor. Nursing homes and other LTC facilities realize that this factor is critical in the typical unconscionability analysis and have used this knowledge to draft technically valid, yet arguably unfair, agreements. To ensure that an arbitration agreement withstands judicial scrutiny, attorneys for LTC facilities advise their clients to use large, bold lettering; clear headings; and concise, easy-to-understand language. For example, a recent trade article advised lawyers that, although courts had not considered the issue yet, courts were likely to compel arbitration where the arbitration agreement sets forth in “bold face or some other prominent or distinct type that the resident is giving up his or her right to a jury trial.” Courts should, however, continue evaluating the readability, length, and headings in these agreements to promote the goal of drafting consumer-friendly agreements.

219. Id. at 247.
220. Id. at 247, 250–57.
221. Id. at 247 (“Tennessee case law places upon the person seeking to enforce a provision the burden of showing the parties actually bargained over the . . . provision or that it was a reasonable term considering the circumstances.”).
222. See, e.g., Gillespie & Ulloa, supra note 12, at 2 (“[T]he agreement to arbitrate must be conspicuous . . . . Burying an arbitration provision in the small print like the excess-mileage charge in an auto lease is a sure way to end up in a courthouse and not in arbitration.”).
223. See id. (“The arbitration provision could be in a bold-faced type and at least two font sizes greater than the language before and after the section on arbitration.”).
2. Consumer Sophistication

Consumer sophistication is another important factor in the Circle of Assent analysis. The nature of the LTC industry presents a unique challenge: who exactly is the ordinary, reasonable signer of an LTC admissions contract? Generally, it is not a healthy, mentally and physically whole, “reasonable” person. Where there is some question surrounding the sophistication of the signer, the party seeking to uphold the arbitration agreement should have the burden of proving that the signer is equally or more sophisticated than “the norm.” Where the signer falls below “the norm,” courts should consider whether the LTC facility knew or should have known about this particular person’s individual situation. This allocation of burden forces LTC facilities to draft arbitration agreements that are comprehensible to their average resident or signer while affording facilities the ability to adopt extra precautions for especially vulnerable residents. If the LTC facility knew or should have known that the particular resident fell below the norm, then the court should take extra care when considering whether the signer was really within the Circle of Assent.

3. Conditions Surrounding Consent

Courts should study the events surrounding the signing of an arbitration agreement to determine whether the agreement is outside of the Circle of Assent. For example, did the resident and her family take the agreement home and have several days to read and think about it, or were they pressured to sign quickly to guarantee an available bed? The more informed the decision, the higher the

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225. A long-time physician I interviewed noted:

I think people would be shocked to see a simple study documenting the comprehension level of the average LTC patient. I can probably count on one hand the number of sophisticated, competent patients I've cared for in the last decade! Oftentimes, the reason they're in the LTC facility is their severely diminished capacity. Someone should do a simple study.

Interview with F. Andrew Gaffney, MD, Professor of Med., Vanderbilt Univ. Sch. of Med., in Nashville, Tenn. (Nov. 14, 2008).

226. Lloyd, supra note 40, at 253.

227. Id.

228. Id.

229. See, e.g., One Stop Supply, Inc. v. Ransdell, No. 01-A-01-9509-CV-00403, 1996 Tenn. App. LEXIS 228, at *9 (Tenn. Ct. App. Apr. 19, 1996) (asking whether the customer had “an ample opportunity to read [the contract] and study its provisions”); Gillespie & Ulloa, supra note 12, at 2 (“Absence of duress or coercion is of tantamount importance as well. If it is the facility's policy that arbitration is non-negotiable, the facility may mute the suggestion of duress and
likelihood that the agreement falls within the Circle of Assent. LTC facilities also can increase the likelihood of falling within the Circle of Assent through resident or signer education. Educating the resident and signer fully and candidly about the content, pros, cons, and potential ramifications of arbitration is one way to "legitimize arbitration agreements" by instilling confidence in them. However, the court should examine the totality of the circumstances carefully to determine whether the LTC facility actually is seeking to educate the patient or simply seeking to pass judicial muster. For example, one LTC trade journal suggests education via a "Resident's Guide to Arbitration," which seeks to explain arbitration "clearly and in big letters." The article goes on to note that "[s]imply handing [a "Resident's Guide to Arbitration"] out at the time of admission is going to go a long way toward having that agreement upheld." This form of mechanical compliance should not be enough to hold that the resident or signer has been educated about the arbitration agreement. This factor is particularly useful because it encourages responsible contract formation while simultaneously forcing both parties to move beyond mere mechanical adherence to "the rules" established by case law.

4. Substantive Fairness

Courts also should examine the substantive fairness of an arbitration agreement in relation to the transaction as a whole. Case law in this area frequently quotes Karl Llewellyn's observation that a party to a standard-form contract "assents not only to the 'dickered terms,' but also to any 'not unreasonable or indecent terms ... which do not alter or eviscerate the reasonable meaning of the dickered terms.' " The Circle of Assent doctrine seems to give the words "reasonable" and "decent" a contextually specific meaning:

coercion by providing the prospective resident a list of comparable, alternative facilities in the area.

231. See Gillespie & Ullon, supra note 12, at 2 ("The intake person supervising the execution of the residency agreement should point out the conspicuous, clear and unambiguous arbitration provision. She or he should be prepared to answer questions regarding the arbitration provision.").
234. Id.
It must be emphasized that the assent analysis is not premised upon the actual assent of the parties. Parties to a contract rarely consciously advert to any number of terms which are binding upon them. If such terms allocate the risks of the bargain in a manner which the parties should have reasonably expected, they are enforceable. . . . The parties will not be found to have agreed to an abnormal allocation of risks if the only evidence thereof is an inconspicuous provision in the boilerplate of the standard form.236

It is almost beyond question that an arbitration agreement in an LTC contract shifts a significant amount of risk to the resident and signor. Arbitration provisions can, for example, cap or eliminate the ability to recover punitive damages.237 The agreements also often give the LTC facility the option of choosing the arbitrator, defining the scope of the discovery, and setting the duration of the hearing ahead of time.238

The Circle of Assent doctrine makes it clear that the shifted risk does not have to be deemed "significant" by the resident at the time the agreement was signed.239 The case law also makes it clear that "when people make contracts, they are seldom thinking about default or disaster."240 Thus, just because a resident does not properly appreciate the risk at the time the resident consents to arbitration does not mean the issue is not ripe for a court's consideration.

This factor, like the others, affords the LTC industry a tremendous opportunity to craft arbitration agreements that a court will enforce but that are also fair to residents. There is some evidence that the industry already has begun balancing the risk between the facility and the resident more evenly.241 For instance, one trade journal suggests the following tips for arbitration provisions: (1) "[m]ake sure the agreement is mutual and covers all disputes"; (2) "[o]ffer all legal remedies"; (3) "[m]ake [arbitration] cost-effective for residents"; and (4) "[c]onsider providing an opt-out provision."242 Arbitration's best and most efficient use involves risk-sharing between the LTC facility and the resident. Otherwise, the provision likely will fall outside of the Circle of Assent.

236. Lloyd, supra note 40, at 255 (quoting Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc., 730 S.W.2d 634, 637 (Tenn. Ct. App. 1987)).
237. Riskin et al., supra note 37, at 619.
238. See id. at 613 (explaining the "manifest disregard of the law" standard).
239. See Lloyd, supra note 40, at 255 ("[T]he risk does not have to be a risk the parties would have considered significant if they had thought about it when they made the contract.").
240. See id. (citing Step-Saver Data Sys., Inc. v. Wyse Tech, 939 F.2d 91, 99 (3d Cir. 1991)).
242. Id. at 42.
5. Predictability of Provision

The final factor allows an LTC facility to bring the resident back into the Circle of Assent by showing that the resident should have expected to consent to an arbitration agreement (and its terms) in the underlying transaction.243 The idea is that even if the resident did not explicitly accept the arbitration clause, “[he or she] still fall[s] within the circle of assent” because the terms of the agreement are “reasonable in view of the circumstances surrounding the transaction.”244 This factor has important educational aspects along with positive policy implications. Future LTC residents and their families can “expect” arbitration provisions (and the terms that accompany these provisions) in LTC admission contracts only when the LTC industry is candid about their use. If the industry wants to continue using mandatory arbitration agreements, it must educate its potential population about their existence and their terms. There is little question that such education will spur debate as to the propriety of mandatory arbitration in the LTC context.245

V. CONCLUSION

The circumstances surrounding mandatory arbitration in LTC contracts are complex. On one side of the debate is the purported economic survival of the LTC industry. On the other side of the debate are the lives and well-being of some of our most vulnerable citizens: the elderly and disabled. The system of imposing mandatory arbitration on LTC residents is currently broken.

The defenses most frequently asserted by plaintiffs include escaping the purview of the FAA in order to apply more favorable anti-arbitration state law, claiming unconscionability, and asserting non-signatory defenses. Unfortunately for plaintiffs, these defenses are ill-suited to fight a motion to compel arbitration. The LTC industry

243. See Lloyd, supra note 40, at 256 (“Even if the provision to the customer shifted a loss that the drafter of the form would have borne under the law's default rule, the provision may be within the 'circle of assent' simply because the customer should have expected such a provision in the contract.”).


245. One trade journal explains that they have suggested to their LTC industry clients making a DVD or videotape explaining “the various subparts of the residency agreement, including the arbitration provision.” Gillespie & Ulloa, supra note 12, at 2. The journal goes on to note, however, that “[w]e have all heard that you can lead a horse to water but you can't make him drink, and it is true . . . . None of our clients has done as we suggested and made the tape or DVD . . . . However, that does not diminish our enthusiasm for this suggestion.” Id.
largely consists of “interstate commerce” in the classic sense, making an argument to escape the FAA impracticable. Additionally, most state courts are loath to apply the disfavored doctrine of unconscionability. State courts also are beginning to draw an arbitrary line between a general and healthcare power of attorney, resulting in inconsistent case law.

The goal of ensuring that consent to arbitrate is truly informed is best achieved by applying the factors found in the Circle of Assent doctrine. This totality of the circumstances analysis is superior to the traditional unconscionability analysis because it escapes the purview of the FAA, broadens the scope of inquiry, and potentially results in positive policy externalities, making the actual provisions substantively fair while educating residents and signers about their legal rights. Promoting arbitration that is fair will promote confidence in the LTC industry and will begin to mend deep-seeded societal mistrust while maintaining the viability of this form of alternative dispute resolution.

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