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Demise of Arbitration Agreements in Long-Term Care Contracts, The

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NOTES

The Demise of Arbitration Agreements in Long-Term Care Contracts

I. INTRODUCTION

In the past few decades, the use of pre-dispute binding arbitration provisions in a wide array of consumer contracts has increased exponentially.[1] One of the industries that has seen a particularly significant increase in the use of arbitration agreements is the nursing home industry. In fact, individuals entering nursing homes and the families of those individuals will more likely than not come across these clauses when signing contracts of admission with long-term care providers.[2] While the use of arbitration agreements has traditionally been supported by the United States Congress, most state legislatures, and the judiciary, the use of these provisions in the context of nursing home contracts has been the subject of great debate over the past ten years.

The prospect of arbitration is very appealing to those in the nursing home business. Through the eyes of the industry, arbitration is a logical and cost-effective means of resolving future claims between nursing homes and individuals residing in the facilities.[3] By including these clauses in their contracts, nursing home administrators claim that they are avoiding exorbitant damage awards by juries.[4] The facilities are also discouraging future claimants from filing suit against them.[5] However, mandatory pre-dispute arbitration clauses may not be so helpful to nursing home residents. More and

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1. Arbitration is an alternative form of dispute resolution, in which an arbitrator, generally a neutral third party, "conducts an information gathering process, which may include document exchange, briefing and testimony of witnesses" and renders a decision on the issue. STEVEN C. BENNETT, ESQ., ARBITRATION: ESSENTIAL CONCEPTS 4-5 (2002). Additionally, the decision handed down by the arbitrator during an arbitration is "generally binding on the parties . . . ." *Id.* at 5. In effect, a contract that contains a binding arbitration provision prevents potential plaintiffs from having suits heard in a court of law.

2. *See* Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*, WALL ST. J., Apr. 11, 2008, at A1, *available at* http://online.wsj.com/article/SB120786025242805879.html.

3. *See generally* Amy Parise DeLaney, *Maneuvering the Labyrinth of Long-Term Care Admissions Contracts*, 4 NAT'L ACAD. ELDER L. ATTY'S J. 35, 57 (2008).

4. Koppel, *supra* note 2.

5. *Id.*

more frequently, people seeking the assistance and shelter of a long-term care facility are forgoing their rights to have future disputes against care providers heard by a judge or jury, simply because they have no choice. Nursing home admission contracts are offered on a "take-it-or-leave-it" basis, and incoming residents either sign the agreements or are not admitted to the nursing home.[6] This proves to be particularly troubling when one considers the vulnerable condition most people are in when entering nursing homes and signing the agreements.

The decision to enter a long-term care facility is not an easy one for potential residents, nor is it an easy decision for their families. In signing a long-term care admission contract containing a compulsory arbitration provision, people are often unknowingly relinquishing their rights to hold that facility accountable in the unfortunate circumstance that the nursing home fails to provide adequate care for the patient.[7]

This Article argues that pre-dispute compulsory arbitration provisions in nursing home contracts should not be enforced and encourages the elimination of such clauses in long-term care contracts.[8] This Article will lay out the historical background and development of arbitration and then will address the use of arbitration clauses in nursing home admission contracts. Finally, this Article will explore recent developments of arbitration law in long-term care contracts, both federally and in the state of Missouri, with particular attention given to the Supreme Court of Missouri's decision in *Lawrence v. Beverly Manor*.[9]

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6. *Id.*

7. *See generally* DeLaney, *supra* note 3.

8. It should be noted that this Article does not assert that arbitration in and of itself is bad. Quite the contrary, arbitration is a proper and beneficial means of dispute resolution in many circumstances. *See, e.g.*, Robert J. Landry, III & Benjamin Hardy, *Mandatory Pre-Employment Arbitration Agreements: The Scattering, Smothering, and Covering of Employee Rights*, 19 U. FLA. J.L. & PUB. POL'Y 479, 483 (2008) (noting the benefits associated with arbitration provisions in employment contracts). Additionally, many individuals and businesses prefer arbitration because of the privacy affiliated with the process and the technical knowledge of the arbitrators. *See* BENNETT, *supra* note 1, at 6-7. However, arbitration provisions in nursing home admission contracts are not beneficial to incoming nursing home residents, as the provisions normally favor the nursing home entity; they are therefore inappropriate in the nursing home context. *See* discussion *infra* Part IV.

9. 273 S.W.3d 525 (Mo. 2009) (en banc).

II. LEGAL BACKGROUND

A. Historical Background of Arbitration & the Federal Arbitration Act of 1925

Historically, the judiciary was very critical of arbitration agreements.[10] The courts' disfavor of such agreements emanated from English common law and was reflective of the English courts' disapproval of pre-dispute binding arbitration.[11] However, arbitration provisions became increasingly popular in the beginning of the twentieth century,[12] and the United States Congress put an end to the early condemnation of these agreements by adopting the Federal Arbitration Act of 1925 (FAA).[13]

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10. JON O. SHIMABUKURO, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS, CRS REPORT FOR CONGRESS, ORDER CODE RL 30934, *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-3879:1.

11. *Id.*; *see also* David P. Pierce, Comment, *The Federal Arbitration Act: Conflicting Interpretations of Its Scope*, 61 U. CIN. L. REV. 623, 625 (1992).

12. In fact, some have labeled the prominence of arbitration provisions during this era as "in vogue." Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305 (1985). *See also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 15 (1992) ("[A]t the turn of the century, arbitration was neither a new nor an uncommon practice in the United States . . . ."). In the more recent past – particularly during the 1990s – arbitration provisions became increasingly prevalent in a wide array of contracts. *See generally* Preston Douglas Wigner, Comment, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1502 (1995).

13. 9 U.S.C. §§ 1-16 (2006). This piece of legislation was originally entitled the "United States Arbitration Act," but it is more commonly known as the "Federal Arbitration Act" and will be referred to as the FAA for purposes of this Article. As a side note, the FAA has been touted as the "single most important element of modern American arbitration law and policy." BENNETT, *supra* note 1, at 17.

Prior to the enactment of the FAA, federal and state courts did not take a uniform approach with regards to enforcing arbitration. MACNEIL, *supra* note 12, at 21. Instead, arbitration law was a somewhat unorganized compilation of English common law, state case law, and federal case law. *Id.* While some states had statutes on the matter, it seems that the statutes were inapposite to the federal courts and were likewise not uniformly applied in the state court systems. *Id.* It should be noted that the federal law that existed on the subject "was largely in accord with the views commonly prevailing in the state courts and legislatures at the time . . . ." *Id.* at 21-22. Nevertheless, there were still disputes as to whether federal or state law should govern. *Id.* at 22. Consequently, in the early years of the twentieth century, the desire for the creation of a uniform body of law began to emerge. A movement in New York that spanned from 1911 to 1920 sparked the thought of reforming arbitration law at the federal level. *Id.* at 25-28. In 1920, the New York State legislature enacted the 1920 New York Act, which gave New York courts authority to enforce binding pre-dispute arbitration clauses. *Id.* at 34-35. Following the passage of the New York Act, arbitra-

The FAA expressly confirms the binding nature of arbitration agreements[14] and conveys Congress's support of using alternative means of dispute resolution.[15] The pertinent section, 9 U.S.C. § 2, provides,

> 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.[16]

By implementing the FAA, Congress's goal was essentially to give arbitration agreements the same weight as other types of contracts.[17] Additionally, Congress hoped to overcome the longstanding judicial opposition to enforcing arbitration.[18] In looking beyond Congress's intent in implementing the FAA, many courts have interpreted the Act as being "a congressional declaration of a liberal federal policy favoring arbitration agreements."[19] In a practical sense, "[t]he effect of [Section 2] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within

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tion reformers, led by the American Bar Association, lobbied for a federal arbitration statute similar to New York's legislation. *Id.* at 84. Congress responded to these demands in 1925 with the adoption of the Federal Arbitration Act. *Id.* at 100-01.

14. 9 U.S.C. §§ 1-16 (2006).

15. Missouri courts have noted that "[t]he FAA expresses the United States Congress's policy favoring resolution of disputes by enforcement of arbitration agreements, instead of resorting to the judicial system." Kansas City Urology v. United Healthcare Servs., 261 S.W.3d 7, 11 (Mo. App. W.D. 2008).

16. 9 U.S.C. § 2 (2006).

17. SHIMABUKURO, *supra* note 10, at 2.

18. Sue Van Sant Palmer, *Lender Liability and Arbitration: Preserving the Fabric of Relationship*, 42 VAND. L. REV. 947, 952 (1989). In addition, Palmer described Congress's intent by addressing the House Report that provided as follows:

> The need for the law arises from an anachronism of our American law. . . . [B]ecause of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate. . . . This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule . . . .

Id. at 952 n.36 (quoting H.R. Rep. No. 68-96, at 1-2 (1924)).

19. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

the coverage of the Act."[20] The Supreme Court of the United States, in an apparent effort to eliminate any chance that the objective of Congress in adopting the FAA be misconstrued, also has noted that

> [t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[21]

Ultimately, the enactment of the FAA transformed the approach of both the federal and state court systems when addressing controversies involving pre-dispute binding arbitration clauses.[22]

B. Arbitration Law & Long-Term Care Contracts

Many issues arise with respect to arbitration clauses in long-term care contracts, and there are consequently several matters that one should consider when confronted with such provisions. This Section will discuss which laws – federal or state – govern arbitration, the growth of arbitration clauses in nursing home contracts, and challenging the validity of such clauses under both common law and state statutory law.

1. Issue of Preemption: FAA or State Law?

As previously mentioned, no uniform body of law governed arbitration prior to the enactment of the FAA.[23] Different states took various approaches to the matter, and these approaches were rarely consistent with each other.[24] One of the goals of the federal legislation was to remedy these inconsistencies by establishing a uniform law on arbitration.[25] Following the adoption of the FAA, courts had to consider which law to apply to arbitration contests filed in state courts – the existing state statutes or the new federal law. The question therefore became, and still remains, whether the FAA is applicable to arbitration agreement disputes in both the federal and state court systems.

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20. *Id.*

21. *Id.* at 24-25.

22. In reaction to the federal statute, many state legislatures reconsidered existing arbitration laws and revised their legislation. BENNETT, *supra* note 1, at 4-5.

23. *See supra* note 13 and accompanying text.

24. MACNEIL, *supra* note 12, at 25 ("[The laws on arbitration] were hardly in universal harmony, and the law of some states certainly differed in significant respects from the law of other states, even without the intervention of statutes.").

25. *See* discussion *supra* Part II.A.

The FAA was enacted under the authority granted to Congress by the Commerce Clause[26] and is therefore a "body of substantive law [that] is enforceable in both state and federal courts."[27] Preemption thus becomes a major concern to the states enacting their own arbitration statutes,[28] and the FAA has been found to preempt state law in most circumstances.[29] However, the Supreme Court has recognized that a state may implement legislation concerning arbitration agreements that governs general standards of contract law, such as "validity, revocability, and enforceability . . . ."[30] Additionally, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2."[31] State law will therefore apply to arbitration agreements on certain issues. In conjunction with the idea that state law governs cases addressing the violation of the basic principles of contract, there has been a boom in litigation regarding arbitration clauses in state courts over the past decade.[32] This is particularly noticeable in disputes involving long-term care contracts.[33]

Within the past several years, nursing homes have substantially increased their use of arbitration provisions in the contracts provided to residents entering their facilities.[34] The question of whether these arbitration agreements are governed by federal or state law can arise whenever a suit challenging one of these clauses is filed in a state court. The FAA validates any "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction."[35]

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26. U.S. CONST. art. I, § 8, cl. 3.

27. Perry v. Thomas, 482 U.S. 483, 489 (1987) (citing Southland Corp. v. Keating, 465 U.S. 1, 11-12 (1984)).

28. The Supremacy Clause of the Constitution provides that federal law preempts state law. U.S. CONST. art. VI, cl. 2.

29. BENNETT, *supra* note 1, at 18 ("Under the doctrine of 'preemption,' if an arbitration is governed by the FAA (essentially all contracts affecting interstate commerce), state courts must apply the FAA, even when a state statute might otherwise command a different result.").

30. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996) (quoting Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)).

31. *Id.* at 687.

32. F. Paul Bland, Jr. et al., *Selected Arbitration Decisions Since April 2008*, 1728 PRAC. L. INST. CORP. L. PRAC. COURSE HANDBOOK SERIES 839, 841 (2009) (noting that "more than 500 new judicial opinions" on the topic of binding arbitration agreements have been passed down "in the last two years alone").

33. 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, 530 (2008); *see also* DeLaney, *supra* note 3.

34. Scheller, *supra* note 33, at 530. Some have attributed the rise in challenges to arbitration provisions contained in nursing home contracts to the increase in wrongful death suits, which have tripled in the past four years. *Id.*

35. 9 U.S.C. § 2 (2006).

If the FAA is to govern the arbitration agreement, the agreement must involve commerce.[36] That leads to the question of whether a nursing home contract is considered a "transaction involving commerce" so as to be covered by the federal statute. In most situations, the answer is yes. The FAA typically will govern these arbitration agreements, as "courts have generally held nursing home contracts to be transactions involving 'interstate commerce.'"[37] However, if the claim is one involving the violation of general contract principles, the FAA will not govern, and the court will apply state law.[38]

2. Rapid Growth of Arbitration in Nursing Home Contracts

As noted above, binding arbitration has become the norm in long-term care admission contracts.[39] Some believe that there are "substantive advantages" for a nursing home to have cases heard before an arbitrator, as opposed to a judge or jury.[40] Unsurprisingly, one of the advantages cited is the "lack of publicity associated with arbitrated cases."[41] Arbitration is a private proceeding; the process is closed to the public, and the decisions are unpublished and are only given to the parties involved in the dispute.[42] This is beneficial to the nursing home industry because people will not be deterred from entering nursing homes based on the media's reporting of substandard care provided by the facilities. Additional advantages purportedly include the avoidance of litigation costs and large damage awards given by emotional juries.[43] These agreements have also been credited as furthering judicial efficiency because they are removing cases that would typically be heard in a court and putting them before an arbitrator.[44] For many of these reasons, long-term care providers have found safe haven in these proceedings and therefore require entering residents to commit to future arbitration.

3. Challenging the Validity of Mandatory Arbitration – Case Law

When confronted with a dispute involving an arbitration provision in a nursing home contract, the court typically engages in a two-part test to deter-

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36. *Id.*

37. Scheller, *supra* note 33, at 536.

38. *See supra* notes 35-36 and accompanying text.

39. *See supra* Part I.

40. DeLaney, *supra* note 3.

41. *Id.*

42. BENNETT, *supra* note 1, at 6.

43. Koppel, *supra* note 2. It is generally thought that damage awards in arbitration are lower than in litigation because the agreements may include damage limitations.

44. Landry, *supra* note 8.

mine the applicability of the FAA to the particular agreement.[45] First, the court establishes that the arbitration provision is, in and of itself, valid and binding on both parties.[46] Second, the court determines that "the specific dispute falls within the scope of that agreement."[47] The majority of challenges to the enforcement of arbitration agreements falls under the first part of the test.[48] Typically, these claims assert some sort of contract defense as to why the parties should not be bound by the arbitration provisions, such as unconscionability or the signatories' lack of authority.[49]

Since an arbitration provision is part of a contract, typical contract principles govern the agreement, and a person cannot be compelled to arbitrate unless he has consented to do so.[50] However, most people entering nursing homes are not in a condition to understand the terms of a contract, nor are they physically or mentally capable of signing the document. Consequently, nursing homes frequently allow the entering patient's family members to sign these provisions, even if the family members do not have the authority to do so and the resident does not have the capacity to consent to the signing.[51] The signatory's lack of authority may thus be a cause for challenging the arbitration provision. In deciding these types of cases, courts have developed many different reasons as to why arbitration should or should not be enforced.

The United States Court of Appeals for the Fifth Circuit has concluded that a nursing home resident who was a non-signatory to the admission contract may still be bound by the arbitration clause when it is signed by a third party, even if it appears that the third party did not have the legal authority to do so.[52] In *J.P. Morgan & Chase Co. v. Conegie*, the nursing home resident had a disease that caused "severe physical and neurological problems, including dementia psychosis."[53] The resident's mother signed the admission contract on her behalf, but it was not clear that she had the legal authority to do so.[54] In fact, the lower court found that she had no such authority.[55] Howev-

45. Houlihan v. Offerman & Co., Inc., 31 F.3d 692, 694-95 (8th Cir. 1994). If the FAA is not applicable, state law will likely govern the suit. *See* discussion *supra* Part II.B.1.

46. *Houlihan*, 31 F.3d at 694-95.

47. *Id.* at 695.

48. Scheller, *supra* note 33, at 534.

49. This means that state law will typically govern these disputes, and the remainder of this Part will assume that the FAA is inapplicable.

50. W. Todd Harvey, *Arbitration Agreements in Nursing Home Admission Contracts: Are Nursing Home Residents and Their Assignees Bound by Mandatory Arbitration Agreements? Not Necessarily*, 39 J.T.L.A. TRIAL 72, 73 (2003).

51. *Id.*; *see also* ERIC. M. CARLSON, LONG TERM CARE ADVOCACY § 3.06 (2006).

52. JP Morgan & Chase Co. v. Conegie *ex rel.* Lee, 492 F.3d 596, 598, 600 (5th Cir. 2007).

53. *Id.* at 598.

54. *Id.*

er, the appellate court determined that the patient, who ordinarily would lack the capacity to contract based upon her mental condition, was still bound by the arbitration provision in her nursing home admission contract, even though she was not a signatory to the contract, because her mother had signed on her behalf.[56] The majority analyzed the case under both federal and state law, determining that the choice of law was irrelevant because arbitration was commanded under both forms.[57] The court ultimately concluded that arbitration was warranted under state law because, in accordance with the state's family consent statute, the patient lacked the capacity to bind herself to the contract, and her mother could therefore sign on her behalf,[58] or, alternatively, that it was warranted under federal law because the patient had the capacity to consent to her mother's signing of the contract – binding her as an entering resident to the terms of the provision.[59]

Unlike Mississippi, California has no family consent statute and has therefore arrived at a different conclusion. In *Pagarigan v. Libby Care Center, Inc.*, the court concluded that lack of capacity on the part of a nursing home resident to authorize a third party to sign an admission contract vitiated any claim that the resident was bound by the terms signed by the third party.[60] In *Pagarigan*, a nursing home resident's daughter signed the admission contract on her behalf because the resident was not mentally competent at the time she entered the facility and could therefore not sign the agreement herself.[61] The court determined that the nursing home patient "lacked the capacity to authorize [her] daughter to enter into the arbitration agreements on

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55. *Id.* The district court concluded that there was not an "agency relationship" between the mother and patient and therefore determined that the arbitration agreement was unenforceable. *Id.* at 598.

56. The court applied the two-part test referenced above and analyzed the case under both federal law and Mississippi state law. *Id.*

57. *Id.*

58. In arriving at this conclusion, the court applied Mississippi's family consent statute, which provides that a family member "may make a health care decision for a patient who is an adult . . . if the patient has been determined by the primary physician to lack capacity . . . ." *Id.* at 599 (quoting MISS. CODE ANN. § 41-41-211). Under this statute, a parent may make health care decisions for an incapacitated individual. *Id.* As interpreted by this court, this statute includes the decision to enter into a nursing home. *Id.* Statutes such as Mississippi's are known as family consent statutes or "family decisionmaking statutes." *See generally* 2 ALAN MEISEL, THE RIGHT TO DIE 249 (2d ed. 1995). It should be noted that, while many states have implemented similar statutes, not all of them have. *Id.*

59. *Conegie*, 492 F.3d at 599-600. In any event, it is relatively unclear how, under state law, one can be found to lack the capacity to consent to a contract, so as to warrant the finding that a third party can bind another to the agreement, when, in the exact same situation under federal law, a person *has* the capacity to consent to be bound to a contract.

60. 99 Cal. App. 4th 298, 301 (Cal. Ct. App. 2002).

61. *Id.*

her behalf" and that the daughter therefore had no authority to bind the patient to the provisions.[62] Consequently, the arbitration agreements were unenforceable and not binding on the patient.[63] As evidenced by these cases, lack of authority to enter into a contract on behalf of another person is a common defense to arbitration provisions in nursing home contracts. In correlation with a lack of authority, unconscionability is also frequently claimed as a defense.

Unconscionability is one of the most commonly asserted defenses to pre-dispute binding arbitration provisions in long-term care contracts; however, courts have been reluctant to give the claim much credit.[64] In order for an unconscionability argument to stand, the provision must be found to be both procedurally and substantively unconscionable.[65] Procedural unconscionability addresses the "formation of the contract," and some describe it as being "an absence of meaningful choice by one of the parties."[66] Unconscionability in this sense would typically lie when there is some sort of issue with the form of the contract, such as the arbitration provision being buried deep within a document and put in tiny print, so as to render it virtually unnoticeable. As an example, a Florida court noted that an arbitration provision in a nursing home contract was *not* procedurally unconscionable when the clause was "worded clearly, [was] conspicuous, and [was] separate from other [admissions] documents."[67] Additionally, procedural unconscionability has been found where the signatory to the agreement was compelled to sign under a "lack of voluntariness" and with "lack of knowledge" as to the terms that he was signing.[68]

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62. *Id.*

63. *Id.* It should be noted that the nursing home asserted two arguments as to why arbitration should be enforced – that the daughter represented herself as "having the power to bind" her mother to the agreement and, alternatively, that the daughter had the authority to bind the patient "merely by being [the] mother's next of kin." *Id.* at 301-02. The court rejected both of these arguments, emphasizing that the "next of kin" concept applicable in the health care situation did not "confer authority on the next of kin to bind a nursing home resident to an arbitration agreement . . . ." *Id.* at 303.

64. DeLaney, *supra* note 3, at 60.

65. *See, e.g.*, Pleasants v. Am. Express Co., 541 F.3d 853, 857 (8th Cir. 2008); State *ex. rel* Vincent v. Schneider, 194 S.W.3d 853, 858 (Mo. 2006) (en banc) ("Unconscionability has two aspects: procedural unconscionability and substantive unconscionability.").

66. Scheller, *supra* note 33, at 549.

67. Schott v. OP Winter Haven, Inc., 988 So.2d 639, 641-42 (Fla. Dist. Ct. App. 2008).

68. Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507, 517 (Miss. 2005) (en banc). The *Vicksburg* court described the "lack of knowledge" prong as being "demonstrated by a lack of understanding of the contract terms arising from inconspicuous print or the use of complex, legalistic language, disparity in sophistication of parties, and lack of opportunity to study the contract and inquire about contract terms." *Id.* at

Substantive unconscionability, on the other hand, arises when the "terms . . . are unreasonably favorable to one of the parties."[69] Some courts have found substantive unconscionability "when the arbitration agreement is . . . oppressive."[70] This oppression might be demonstrated by one party's "deprivation of all of the benefits of the agreement"[71] or, alternatively, where the terms of the agreement "serve to limit the obligations and liability of the stronger party."[72] In comparison, a Mississippi court concluded that an arbitration provision in a nursing home contract was not substantively unconscionable because it did not "significantly alter [the resident's] legal rights or severely limit the damages available to her."[73] In spite of the popularity of the defense, the claim of unconscionability with respect to arbitration provisions in long-term care contracts is no longer an issue in some states, having been supplanted by a state statute regulating the use of binding pre-dispute arbitration in nursing home admission contracts.

4. Challenging the Validity of Mandatory Arbitration – State Statutory Law

Illinois has enacted the Illinois Nursing Home Care Act ("the Act"), which, among other things, governs contracts between a nursing home and its residents.[74] The Act essentially eliminates all possibility that a resident can be forced to arbitrate claims against the nursing home, even if the resident had the capacity to enter into such an agreement.[75] Additionally, the Act ensures that a party who wishes to file suit against a nursing home has the right to have his claim heard in a court of law before a jury and that "any waiver of the right to trial by jury, whether oral or in writing, prior to the

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517-18. The court explained the second prong, a "lack of voluntariness," as being "demonstrated in contracts of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all." *Id.* at 518.

69. Scheller, *supra* note 33, at 551.

70. Forest Hill Nursing Ctr., Inc. v. McFarlan, 995 So. 2d 775, 785 (Miss. Ct. App. 2008).

71. *Vicksburg*, 911 So.2d at 521 (citing Bank of Ind. v. Holyfield, 476 F. Supp. 104, 110 (S.D. Miss. 1979)).

72. *Id.* (citing Buraczynski v. Eyring, 919 S.W.2d 314, 320 (Tenn. 1996)).

73. *Id.*

74. 210 ILL. COMP. STAT. 45/1-101 to 3A-101 (2008).

75. *See id.* 45/3-606 ("Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect.").

commencement of an action, shall be null and void, and without legal force and effect."[76]

Likewise, Maryland has enacted statutory provisions favorable to entering nursing home residents.[77] The Maryland legislation authorizes the promulgation of regulations governing a patient's rights upon entering an "extended care" facility and helps ensure that a long-term care resident will not be bound by an agreement to which he did not consent.[78] The statute provides that "[a] facility may not require or solicit, as a condition of admission, the signature of another person, other than the applicant, on the application or contract of admission to the facility."[79] The statute establishes two exceptions under which a person other than the resident may sign a contract binding the entering resident to the terms – when the entering resident has been "adjudicated disabled" according to state statute, or where it has been determined by a doctor that he lacks capacity to contract.[80] This requirement essentially eliminates the uncertainty discussed above in Part II.B.3 over whether a signatory lacks authority to sign the agreement.

C. The Progression of Missouri Arbitration Law & Long-Term Care Contracts

1. Missouri's Uniform Arbitration Act

Missouri courts have traditionally disfavored arbitration clauses and have not been apt to compel parties to comply with them.[81] By the middle of the twentieth century, similar sentiments emerged from the state legislature and were brought to the forefront by Missouri's enactment of the Uniform Arbitration Act of 1955 (Missouri's Act).[82] Missouri's Act solidified the

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76. *Id.* 45/3-607.

77. MD. CODE ANN., HEALTH – GEN. § 19-344 (LexisNexis 2008).

78. *Id.*

79. *Id.* § 19-344(b)(1).

80. *Id.* § 19-344(b)(1)(i)-(ii).

81. Keith S. Bozarth, Comment, *The Uniform Arbitration Act in Missouri*, 46 MO. L. REV. 627, 627-28 (1981).

82. MO. REV. STAT. § 435.010 (repealed 1980). The Missouri Act should not be confused with the Uniform Arbitration Act promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). *See generally* UNIFORM ARBITRATION ACT (2000), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm. While Missouri's Act purported to be a uniform law, it was not; this simply was the title adopted by the legislature. Missouri's Act had a completely different purpose than the original Uniform Arbitration Act promulgated by NCCUSL. NCCUSL's goal in promulgating the Uniform Arbitration Act was to "insure the enforceability of agreements to arbitrate in the face of oftentimes hostile state law." *Id.* The Missouri Act was *not* originally supportive of arbitration. *See generally* Bozarth, *supra* note 81, at 627-28.

state's disapproval of binding arbitration provisions, essentially providing that arbitration clauses did not proscribe the signatory to the agreement from filing suit in court.[83] However, over a period of three decades, arbitration evolved into a more acceptable and prominent means of dispute resolution. Consequently, the state legislature reacted by revisiting some outdated statutes.

In 1980, the legislature made an emphatic statement in support of arbitration clauses by adopting the Uniform Arbitration Act (UAA), which was essentially a revised version of the 1955 Missouri Act.[84] The UAA is a fairly expansive law that gives credence to arbitration provisions in the majority of contracts.[85] Logically, this means that fewer cases will be heard in a court of law, as the appropriate setting for challenging a contract containing a compulsory arbitration clause will be before an arbitrator. However, the statute gives the court power to intervene in some situations.[86] Specifically, the statute

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83. *See generally* MO. REV. STAT. § 435.010 (repealed 1980).

84. MO. REV. STAT. § 435.350-.470 (2000). In adopting the UAA, the legislature repealed the previously governing Uniform Arbitration Act of 1955. *Id.* This new version of the UAA essentially aligned the Missouri statute with the original version of the Uniform Arbitration Act as promulgated by NCCUSL in 1956, since the Uniform Arbitration Act as drafted by NCCUSL remained unchanged until 2000. *See* UNIFORM ARBITRATION ACT (2000), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm.

In 2000, NCCUSL made significant revisions to the Uniform Arbitration Law, and these were the first major changes to the Act in more than fifty years. Timothy J. Heinsz, *Arbitration Law: Is There a RUAA in Missouri's Future?*, 57 J. MO. B. 86 (2001), *available at* http://www.mobar.org/journal/2001/marapr/heinsz.htm. These changes were sparked by the boom of the use of arbitration in a variety of contracts and the subsequent growth of litigation surrounding the agreements. *Id.* Missouri has yet to adopt the Revised Uniform Arbitration Act, and it is unclear whether the state plans to do so in the future. *Id.*

85. MO. REV. STAT. § 435.350-.470. The pertinent language of the statute provides that "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract . . . to submit to arbitration any controversy thereafter arising between the parties is valid [and] enforceable . . . ." *Id.* § 435.350. The only arbitration clauses expressly excluded from the statute's protection are ones found in contracts of adhesion and insurance contracts. *Id.* It should be noted that the UAA is similar in many respects to the FAA. Additionally, it is thought that the Missouri legislature's primary goal in enacting the UAA was "to provide expeditious and inexpensive resolution of disputes without judicial involvement." Bozarth, *supra* note 81, at 630. This is one of the same goals that the United States Congress had in 1925 when the FAA was enacted. *See generally* Kansas City Urology, P.A. v. United Healthcare Servs., 261 S.W.3d 7, 11 (Mo. App. W.D. 2008).

86. MO. REV. STAT. § 435.350 ("A written agreement to submit any existing controversy to arbitration or a provision in a written contract . . . to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." (emphasis added)).

will not compel arbitration in circumstances in which the validity of the arbitration clause is in contention, and a court may have the discretion to rule on these provisions in keeping with the traditional laws of contract.[87]

2. Arbitration Provisions in Missouri's Nursing Home Contracts

While challenges to arbitration agreements have exploded nationally within the past several years, the challenge of the enforceability of arbitration provisions in long-term care contracts is a fairly new issue to Missouri courts, and prior to 2009 only two cases had been decided by the appellate courts on the matter.[88] The suits that have been filed have typically arisen in the context of a wrongful death claim,[89] and Missouri courts have seemingly been hesitant to enforce arbitration provisions since hearing the first challenge brought against a long-term care facility.

The first case to be decided in Missouri on the issue was *Finney v. National Healthcare Corp.*[90] The *Finney* court was predominantly concerned

87. *Id.*

88. A survey of the Missouri state court cases challenging mandatory arbitration agreements in nursing home contracts yielded only a few cases. The first case to be heard by the Missouri Court of Appeals on the issue was *Finney v. National Healthcare Corp.*, and the case was only recently decided in 2006. 193 S.W.3d 393 (Mo. App. S.D. 2006).

89. On the other hand, Missouri courts have also addressed the arbitrability of claims of personal injury to nursing home residents against the nursing home facilities. *See* Tallmadge *ex rel.* Tallmadge v. Beverly Enters.-Mo., 202 S.W.3d 47 (Mo. App. E.D. 2006). In *Tallmadge*, the plaintiff entered into a care facility because of health problems. *Id.* at 48. The plaintiff's husband signed the nursing home contract, which included an arbitration agreement, for his wife. *Id.* Several months after the signing of the contract, the plaintiff gave her husband durable power of attorney and made him her "attorney-in-fact." *Id.* Subsequently, the plaintiff received injuries allegedly due to the nursing home's negligence, and the plaintiff filed a lawsuit instead of submitting the case to arbitration as the agreement provided. *Id.* In response, the care facility filed a motion to compel arbitration. *Id.* Ultimately, the court declined to enforce arbitration because the durable power of attorney had not been properly executed prior to the signing of the arbitration agreement, and it was therefore not enforceable. *Id.* at 49.

90. *Finney*, 193 S.W.3d 393. To give a brief factual background of *Finney*, the decedent (the plaintiff's mother) entered into a nursing home and had her granddaughter sign her admission contract (which included a compulsory arbitration provision). *Id.* at 394. The plaintiff, the resident's daughter, did not sign the contract and was not a party to it. *Id.* She filed a wrongful death suit on behalf of her mother against the defendant nursing home. *Id.* The defendant nursing home filed a motion to enforce the arbitration agreement some two years after the lawsuit was commenced. *Id.* The trial court declined to enforce the arbitration provision for three reasons: there was no case law "supporting the proposition the Missouri arbitration statute is preempted by the Federal Act in a tort action created by statute"; the FAA did not preempt the Missouri UAA because the contract did not involve commerce;

with the enforceability of the nursing home contract itself and not the validity of the arbitration provision contained therein.[91] The court ultimately found that, since the plaintiff had not signed the original agreement, she was not "a party to the contract" and therefore was not bound by the terms of the contract – including the arbitration provision.[92]

In the second case addressing the issue, the Missouri Court of Appeals, Southern District, also declined to enforce arbitration provisions in nursing home contracts. *Sennett v. National Healthcare Corp.* involved a wrongful death claim filed by the son of a nursing home resident.[93] In appealing the denial of its motion to compel arbitration, the nursing home asserted that the *Finney* line of reasoning with regard to wrongful death suits was inapplicable and that "wrongful death claims are derivative, and, therefore, are covered by [Patient's] Arbitration Agreement."[94] The court rejected this argument and determined that the approach taken by the *Finney* court governed.[95] The court concluded that, because the plaintiff had not signed the contract in "his individual capacity" and because he had not been appointed as his mother's legal representative or guardian, he was not a party to the arbitration agreement and was therefore not bound by it.[96]

In some respects, these cases illustrate Missouri's reversion back to a pre-1980 and pre-UAA mentality toward arbitration provisions. During the short two-year period in which these disputes were decided, the appellate court made its disfavor of arbitration clauses in nursing home contracts known, at least with respect to wrongful death suits.

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and the arbitration provision did not contain the warning required by statute, making the agreement unenforceable. *Id.* On appeal, the court did not address any of the bases for the trial court's decision. *Id.*

91. *Id.*

92. *Id.* at 397 ("[A] nonparty to the initial agreement containing an arbitration clause, is not bound by the clause in her independent cause of action for the wrongful death.").

93. 272 S.W.3d 237 (Mo. App. S.D. 2008). The plaintiff signed an admission contract including an arbitration agreement on behalf of his mother. *Id.* at 239-40.

94. *Id.* at 242. After determining that federal law was inapplicable, the court turned to the Missouri UAA to resolve the issue. *Id.* at 240. The court used a two-step test to determine whether enforcement of the arbitration provision was warranted under the UAA and asked "whether a valid arbitration agreement exists, and if so, whether the specific dispute falls within the scope of the arbitration agreement." *Id.* (quoting Netco, Inc. v. Dunn, 194 S.W.3d 353, 358 (Mo. 2006) (en banc)).

95. *Id.* at 245.

96. *Id.* at 245-46.

III. RECENT DEVELOPMENTS

A. Currently Pending Federal Legislation: Fairness in Nursing Home Arbitration Act

For the majority of the twentieth century, Congress has favored arbitration as a method of dispute resolution.[97] Arbitration was seen as a means of avoiding the expenses of litigation for all parties involved and as a way to eliminate the possibility of exorbitant damage awards by "runaway juries."[98] In correlation with Congress's support of the provisions, the use of compulsory arbitration in nursing home contracts has dramatically increased and has become practically commonplace.[99] While the use of arbitration provisions in a majority of contracts may accomplish Congress's original goals with regard to its implementation of the FAA, the use of the agreements in nursing home contracts recently has been questioned on the basis of public policy.

The United States Congress is currently reevaluating the approach it took in 1925 when it enacted the FAA and validated all arbitration agreements in contracts involving commerce. Legislation has been proposed before both the House and the Senate that, if passed, would effectively ban predispute binding arbitration provisions in nursing home contracts.[100] The legislation, the Fairness in Nursing Home Arbitration Act of 2009 (FNHAA), was introduced in the House on February 26, 2009.[101] The bill was introduced in the Senate on March 3, 2009.[102]

As proposed, the legislation will amend the arbitration provisions of Title 9 of the United States Code.[103] The suggested amendments involve adding provisions to 9 U.S.C. §§ 2 and 3.[104] Specifically, the most compelling amendment falls under the "Validity and Enforcement" provision of Section 3 and would add the following provisions to the end of the section:

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97. *See supra* Part II.A.

98. Michael J. Lockerby, *'Fairness' Looms in New Congress, The Balance of Power May Shift Between Parties to Arbitration*, NAT'L L. J., Nov. 2008, at 13.

99. Koppel, *supra* note 2 (noting that, in nursing home contracts, "arbitration has quickly become the rule rather than the exception").

100. *See* S. REP. NO. 110-518, at 2 (2008). The Senate Report cites the need for this legislation as stemming in part from the rise in "substandard care" provided to elderly residents of nursing homes and the residents' ignorance of the fact that they have waived their rights to bring claims against said nursing homes in a court until it is too late. *Id.* In addition, the Report notes that arbitration proceedings are "costly and burdensome." *Id.*

101. H.R. 1237, 111th Cong. (2009).

102. S. 512, 111th Cong. (2009).

103. *Id.* The proposal would amend the FAA, codified at 9 U.S.C. §§ 1-16 (2006).

104. *Id.*

> (b) A pre-dispute arbitration agreement between a long-term care facility and a 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) shall not be valid or specifically enforceable.
>
> (c) This section shall apply to any pre-dispute arbitration agreement between a long-term care facility and a resident (or anyone acting on behalf of such a resident), and shall apply to a pre-dispute arbitration agreement entered into either at any time during the admission process or at any time thereafter.
>
> (d) A determination as to whether this chapter applies to an arbitration agreement described in subsection (b) shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of such an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting the arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.[105]

Essentially, this bill proscribes nursing home facilities from including any pre-dispute arbitration agreements in their contracts.[106] If passed, this legislation would be effective "on the date of enactment . . . and shall apply to any dispute or claim that arises on or after such date."[107]

Congress's main goal for the FNHAA is "to protect vulnerable nursing home residents and their families from unwittingly agreeing to pre-dispute mandatory arbitration, thus signing away their right to go to court."[108] Additionally, the Senate Report also reasons that "the ability of residents to hold poorly-performing facilities publicly accountable in court for negligent care is critical because government oversight of nursing facilities does not fully safeguard patient safety."[109] In acknowledgement of the fact that amending the longstanding FAA to prohibit nursing homes from using pre-dispute mandatory arbitration clauses in their contracts may seem like a radical idea, the report addresses several alternatives to the amendments, all of which it finds

105. *Id.*

106. *Id.*

107. *Id.*

108. S. REP. NO. 110-518, at 2 (2008).

109. *Id.* at 3. The Report considers several alternatives to remedying the growing problems that arise with binding arbitration in nursing home contracts. For instance, the Report notes that "regulating arbitration agreements [will] not mitigate the problems with pre-dispute mandatory arbitration in nursing home cases." *Id.* at 14. In addition, "[t]hese [types] of reforms would not be effective." *Id.*

to be inadequate.[110] Additionally, this legislation has the support of numerous organizations and advocates for the rights of nursing home patients, such as the American Association of Retired Persons, the American Medical Association, the American Bar Association, and the American Arbitration Association.[111]

B. Missouri's Approach

Recently, the Supreme Court of Missouri had the opportunity to consider whether pre-dispute binding arbitration clauses found in nursing home contracts are enforceable with regard to wrongful death suits. The result may indicate the revival of the court's disdain for compulsory arbitration agreements in nursing home contracts. The court's decisions in the following companion cases mirror the sentiments expressed by Congress in the aforementioned pending federal legislation.

In *Lawrence v. Beverly Manor*, the court held that plaintiffs in a wrongful death suit filed on behalf of a nursing home resident were not bound by the terms of arbitration clauses in the nursing home contract.[112] In the present case, Mrs. Lawrence was a resident at Beverly Manor, a long-term care facility.[113] Upon entering the facility, and because Mrs. Lawrence was unable to do so on her own, Mrs. Lawrence's daughter, acting under power of attorney, signed a contract on her behalf.[114] The contract contained an arbitration clause, which provided in part that "any and all claims, disputes and controversies . . . arising out of, or in connection with, or relating in any way to the Admission Agreement . . . shall be resolved exclusively by binding arbitration."[115] The agreement further provided that the arbitration provision would bind "all persons whose claim is derived through or on behalf of [Dorothy Lawrence] . . . ."[116] Subsequently, Mrs. Lawrence died, and her son filed a wrongful death suit against Beverly Manor, asserting that his mother's death was caused by the negligence of the facility's staff when one of its members dropped her.[117]

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110. *Id.*

111. *Id.* at 2-3.

112. 273 S.W.3d 525, 529 (Mo. 2009) (en banc).

113. *Id.* at 526.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* The nursing home filed a motion to compel arbitration, but it was overruled by the circuit court. *Id.* The nursing home then appealed the circuit court's decision to the appellate court, and it was transferred to the Supreme Court of Missouri. *Id.*

Interestingly, the Missouri Association for Trial Attorneys filed an Amicus Curiae brief on behalf of Mrs. Lawrence. Brief of Amicus Curiae Missouri Association of Trial Attorneys in Support of Respondent, Lawrence v. Beverly Manor, 273 S.W.3d

The issues that the court addressed were whether an arbitration agreement in a nursing home contract is binding on parties seeking a wrongful death claim and "whether a suit for wrongful death can be considered derivative of any underlying tort claims that could have been brought by the deceased."[118] The majority reasoned that a "wrongful death act creates a *new cause of action*" and that such a cause of action is distinct from any claims that the decedent might have had.[119] Essentially, this means that the wrongful death suit belongs to the family and not to the decedent. Therefore, "[a] claim for wrongful death is not derivative from any claims [that] Dorothy Lawrence might have had."[120] Had the court determined that the wrongful death claim was derivative, the plaintiff would have been bound by the terms of the arbitration agreement.[121] Finally, the court held that arbitration agreements "cannot bind parties to the wrongful death suit."[122]

The concurring judge offered a more radical reason for not enforcing the arbitration agreement – that it was unconscionable.[123] In fact, Special Judge Norton would have held that "provisions requiring a resident and nursing home to arbitrate any personal injury claims, and requiring them to waive their right to have any such claims decided in a court of law, are unenforceable because they are procedurally and substantively unconscionable."[124] Judge Norton further argued that the inequality of bargaining power between the individual and the nursing home, as a "large company," renders the agreement unconscionable.[125] Significantly, this argument is the first to come

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525 (2009) (No. 89291), 2008 WL 3852924. The Amicus Brief notes that "the issues presented by this case are of vital importance and interest to others besides the immediate parties." *Id.* at *4. The brief dramatically adds that "[a]llowing the enforcement of an arbitration clause for the wrongful death of Dorothy Lawrence would strip Missouri citizens . . . of their rights to trial by jury." *Id.*

118. *Lawrence*, 273 S.W.3d at 527.

119. *Id.* The court applied the reasoning established by *Finney v. National Healthcare Corp. Id.* at 528.

120. *Id.* at 529.

121. A cause of action for the wrongful death of a person belongs to the family and not to the decedent. Essentially, if the decedent is the only one who signed the admission contract containing an arbitration provision, or if someone signed on the decedent's behalf, it cannot bind future wrongful death claimants.

122. *Lawrence*, 273 S.W.3d at 529.

123. *Id.* at 530 (Norton, S.J., concurring).

124. *Id.* It should be noted that this concurrence does not set forth controlling precedent on Missouri courts. However, it may be a foreshadowing of the fate of predispute binding arbitration provisions in nursing home contracts in Missouri. Additionally, the concurrence has rattled some Missouri practitioners defending nursing homes in such disputes. *See* Allison Retka, *Missouri Supreme Court Delivers Blow to Arbitration Agreements*, MO. LAW. WKLY., Jan. 19, 2009, *available at* 2009 WLNR 7508522.

125. *Lawrence*, 273 S.W.3d at 532 (Norton, S.J., concurring). Additional reasoning for unconscionability provided in the concurring opinion explained that "the pro-

from the Supreme Court of Missouri to present the notion of the unconscionable nature of arbitration provisions in nursing home contracts.

In a companion case, *Ward v. National Healthcare Corp.*, the court furthered its analysis of pre-dispute binding arbitration in nursing home contracts and reaffirmed the holding from *Lawrence*.[126] The court addressed this case separately from *Lawrence* because of some slight factual differences between the two cases.[127] The *Ward* decision hinged on the issue of the lack of authority of a third-party signatory to bind a nursing home resident to an arbitration agreement in an admission contract.[128] The resident's daughter signed the nursing home contract on her mother's behalf and indicated on the document that she was her mother's "Legal Representative."[129] However, the daughter did not actually have "legally binding" authority to act as her "mother's agent."[130] The court ultimately determined that, since the phrase "legal representative" was included in the arbitration provision that was signed by the nursing home resident's daughter, this indicated that she was actually signing on behalf of her mother and not "in her [own] individual capacity or on her own behalf . . . ."[131] Additionally, the court held that the plaintiff's signature was not legally binding, and, therefore, it did not render

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visions of the arbitration agreement that require the Nursing Home and Resident to arbitrate any personal injury claims, and require the parties to waive their right to have any such claims decided in a court of law, are both procedurally and substantively unconscionable." *Id.*

126. 275 S.W.3d 236 (Mo. 2009) (en banc).

127. *See generally id.* at 237. A brief factual background of *Ward* may be helpful. Similar to the situation in *Lawrence*, the plaintiff's mother was placed in the defendant nursing home. *Id.* at 236. One of her daughters signed the contract admitting the patient into the home, and this contract contained an arbitration agreement. *Id.* Subsequently, the plaintiff filed a suit against the defendant for the wrongful death of her mother. *Id.* As was the situation in *Lawrence*, the nursing home moved to enforce the arbitration, but the trial court declined to do so. *Id.*

On appeal, the nursing home argued that "[t]he plain language of the [arbitration] Agreement states that Respondent's claims . . . are subject to arbitration." Appellants' Brief at *8, Ward v. Nat'l Healthcare Corp., 275 S.W.3d 236 (Mo. 2009) (No. SC 89392), 2007 WL 4723279. Additionally, the defendant asserted that the arbitration provision was not an unconscionable agreement. *Id.* at *11.

The court's analysis in *Ward* is quite succinct and is less than two pages. 237 S.W.3d 236. The court noted that the main difference between the facts in this case and the facts in *Lawrence* is that both the nursing home resident's daughter and the resident signed the admission contract containing the arbitration clause and that "[t]he signature line under [daughter's] name indicates that [she] signed as [her mother's] 'Legal Representative.'" *Id.* at 237.

128. *Id.*

129. *Id.*

130. *Id.* The daughter was "not an attorney, nor was she her mother's guardian, nor had she been given durable power of attorney or any other legally binding status as her mother's agent." *Id.*

131. *Id.*

the arbitration agreement enforceable.[132] This opinion merely reiterated the Missouri court's desire to change its approach to pre-dispute binding arbitration provisions in nursing home contracts and avoid the enforcement of such clauses.

IV. DISCUSSION

For nearly one hundred years, courts treated arbitration provisions with admiration, elevating them to a status that towered over an individual's rights.[133] Both at the state and federal levels, the plain language of an arbitration provision consistently prevailed in the battle between the helpless and injured plaintiff and the corporation seeking to compel arbitration.[134] Such deference has proven to be particularly troublesome in terms of compulsory arbitration agreements in long-term care contracts.

The FNHAA recently introduced in Congress encapsulates much of the country's current disgust with compelling arbitration agreements in cases in which a nursing home resident has been severely harmed by the failure of the facility to provide adequate care.[135] If passed, the FNHAA would be extremely beneficial for entering nursing home residents and would ensure that residents retain their right to be heard in a court of law. Additionally, the decisions delivered by the Supreme Court of Missouri in *Lawrence* and *Ward* are positive departures from the outdated deferential mentality toward the use of arbitration provisions in long-term care contracts.[136] However, while Missouri's newfound approach to mandatory nursing home arbitration is a step in the right direction, Missouri courts have only addressed the validity of arbitration agreements in wrongful death suits.[137] Consequently, the question of the enforceability of a nursing home admission contract's pre-dispute binding arbitration provision in other contexts remains unanswered, leaving a gap for those filing suit against the nursing home for reasons other than wrongful death. Furthermore, the *Lawrence* majority neglected to address many compelling reasons as to why such provisions should be banned from nursing home agreements altogether.

The Supreme Court of Missouri, or, alternatively, the Missouri legislature, needs to reconsider the validity of arbitration provisions in long-term care contracts on a broader level. Missouri should take heed of the nation-

132. *Id.*

133. *See supra* Part II.A.

134. *See supra* Part II.A-C.

135. S. REP. NO. 110-518, at 2-3 (2008).

136. *See generally supra* Part III.B.

137. The court based its holding on the notion that a wrongful death claim is completely separate from and not derivative of any claim that could have potentially been brought by the resident, and, for that reason, arbitration was unenforceable. Lawrence v. Beverly Manor, 273 S.W.3d 525, 529 (Mo. 2009) (en banc). The court did not extend its holding to reach other potential claims of nursing home residents. *See id.*

wide change in attitude toward nursing home arbitration, consider the unconscionability and possible economic illogicality of the provisions, and do away with the use of pre-dispute arbitration clauses in admission contracts altogether. At the national level, Congress also should consider the public policy and economic aspects of arbitration in nursing home admission agreements and pass the Fairness in Nursing Home Arbitration Act.[138]

A. Arbitration Agreements in Nursing Home Admission Contracts Are Unconscionable Contracts of Adhesion & Are Inherently Unfair to Entering Residents

As stated in the concurring opinion in *Lawrence*, "provisions requiring a . . . nursing home to arbitrate any personal injury claims, and requiring them to waive their right to have any such claims decided in a court of law, [should be] unenforceable because they are procedurally and substantively unconscionable."[139] The *Lawrence* majority should have aligned itself with the concurring opinion and held nursing home arbitration agreements to be unenforceable on the basis of unconscionability.

Missouri courts have defined unconscionability as an agreement that "no man in his senses and not under delusion would make, on the one hand, and . . . no honest and fair man would accept on the other."[140] While some courts have been reluctant to invalidate arbitration agreements on the basis of unconscionability,[141] one should give significant weight to the fact that these agreements are, more often than not, procedurally unconscionable. People entering nursing homes often do so under the burden of severe physical or mental afflictions and, unfortunately, may not have family or friends to help them through the admissions process.[142] It is unlikely that these people will be able to fully understand the ramifications of signing a contract containing a binding arbitration provision.[143] This means that they will be inadvertently forgoing their rights to have any future claims against their care providers heard by a jury, and they will remain uninformed of this fact until it is too late. Additionally, it has been noted that "admissions personnel themselves

138. It should be noted that, if the FNHAA were to pass, it would likely preempt all state laws on the issue and thus may eliminate the need for Missouri to amend its laws. However, the likelihood that the FNHAA will pass is relatively unclear. In recognizing the uncertainty accompanying the proposed federal legislation, the remainder of this Article will proceed on the belief that Missouri should adopt an alternative plan to remedy the issues caused by arbitration provisions in long-term care contracts, in the event that the federal legislation is not adopted.

139. *Lawrence*, 273 S.W.3d at 530 (Norton, S.J., concurring).

140. Smith v. Kriska, 113 S.W.3d 293, 298 (Mo. App. E.D. 2003).

141. *See* discussion *supra* Part II.B.3.

142. S. REP. NO. 110-518, at 5-6 (2008).

143. *Id.* at 6.

do not understand or cannot explain the details of arbitration."[144] If these provisions cannot be explained to entering nursing home residents by the people forcing them to sign the agreements, they should not be valid.

Correlating with this notion of unconscionability is the idea of the unequal bargaining power of the parties and the notion that these agreements are contracts of adhesion. This was also mentioned in the *Lawrence* concurrence.[145] Arbitration provisions in nursing home contracts are offered on a "take-it-or-leave-it" basis[146] and are typically part of form contracts.[147] The agreements are entered into under the demands of the nursing home: sign the agreement, or don't stay here. There is therefore "high pressure" on a potential nursing home resident to sign the admission contract immediately, and the terms of the contracts are practically never fully explained to the signatories to the agreement.[148] As such, they are contracts of adhesion – the residents being bound are hardly consenting to the agreements on a voluntary basis.[149] Missouri statutory law specifically provides that arbitration agreements in contracts of adhesion are *not* enforceable.[150] In keeping with the current Missouri law, the *Lawrence* court should have determined that the arbitration provisions were invalid on the basis that they were contracts of adhesion.

Additionally, the arbitration process itself is inherently unfair for the nursing home resident. More often than not, the nursing home selects the arbitrator to rule over the arbitration.[151] Unsurprisingly, rulings in arbitration typically bode well for the business, or nursing home; arbitration typically results in lower damage awards than litigation, and the arbitrator is often very familiar with the business/nursing home, as it is frequently subject to arbitration.[152] This familiarity, known to some as the "repeat-player advantage,"

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144. *Id.*

145. Lawrence v. Beverly Manor, 273 S.W.3d 525, 532 (Mo. 2009) (en banc) (Norton, S.J., concurring).

146. Koppel, *supra* note 2.

147. *See generally Lawrence*, 273 S.W.3d at 532 (Norton, S.J., concurring) (noting that contracts of adhesion "are often form contracts" and that the nursing home contract's "arbitration agreement is a contract of adhesion").

148. DeLaney, *supra* note 3, at 40.

149. *See generally* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1247 (2001).

150. MO. REV. STAT. § 435.350 (2000) ("[A] provision in a written contract, *except* . . . contracts of adhesion, to submit to arbitration any controversy arising thereafter arising between the parties is valid, enforceable and irrevocable . . . .") (emphasis added).

151. *See generally* Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 298 (2004).

152. *Id.*

often results in partiality shown towards the business on the part of the arbitrator[153] and is consequently a disadvantage to the nursing home resident.

B. Economics

The elimination of arbitration clauses in nursing home contracts also makes economic sense. The avoidance of the costs associated with litigation is often credited as one of the main purposes of arbitration;[154] however, this is a misconception with practically no evidentiary basis.[155] In fact, arbitration often is more costly than litigation.[156] There are significant fees that must be paid when parties arbitrate a dispute.[157] For instance, not only will the parties have to pay for the arbitration process, including the filing fee or forum fee, but they also must pay an hourly or daily rate to the arbitrator, resulting oftentimes in "costs in excess of $1,000 a day."[158] This is often an unthinkable amount for those whose resources are already drained from the costs of paying for the nursing home to provide care for the resident in the first place.

C. Proposed Solution

At the national level, Congress should act quickly to pass the Fairness in Nursing Home Arbitration Act. If this legislation were passed, it would solve the problems facing most entering nursing home residents and restore their rights to have any potential claims of inadequate care on the part of their nursing homes heard in a court of law. However, the likelihood that this proposed legislation will pass is unclear. Additionally, it may be a considerable amount of time before Congress provides a definitive answer on the matter. Therefore, it is necessary to take action at the state level to remedy this grave injustice.

Missouri would be wise to resolve the disparity left by the *Lawrence* decision and reconsider the state's current approach to arbitration provisions in nursing home contracts. The Supreme Court of Missouri should take the next opportunity that it gets to invalidate a long-term care contract's arbitration provision on the basis of unconscionability and outlaw the use of such provi-

153. *Id.* It has also been noted that there is an "incentive" for arbitrators to "favor the business entity in their decisions" because they need to preserve the relationship with the business so that they continue to be used to preside over the arbitrations. *Id.*

154. *See* Russel Myles & Kelly Reese, *Arbitration: Avoiding the Runaway Jury*, 23 AM. J. TRIAL ADVOC. 129, 138 (1999) ("Arbitration is cheaper than litigation primarily because it is quicker than litigation.").

155. *See generally* BENNETT, *supra* note 1, at 7 (noting that "there is little hard evidence to prove that arbitration is necessarily faster or cheaper, on average, than litigation").

156. Alderman, *supra* note 149, at 1250.

157. *Id.*

158. *Id.*

sions. Additionally, the Missouri legislature should find a statutory solution by enacting legislation eliminating the use of pre-dispute binding arbitration in nursing home admission contracts altogether.

Missouri should implement legislation similar to the statutes currently in place in Illinois and Maryland.[159] This could be done simply by amending Section 435.350 to provide that arbitration in nursing home contracts is invalid under all circumstances. The legislature could accomplish this by modifying the provision to read as follows: "A written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of insurance, contracts of adhesion, and *nursing home admission contracts*, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable . . . ." If enacted, this provision would render all pre-dispute binding arbitration provisions in nursing home contracts unenforceable, thereby solving the problem plaguing aggrieved nursing home residents and their families and allowing them to bring their claims before a judge and jury.

V. CONCLUSION

As the law currently stands, Congress, many state legislatures, and the judiciary favor nursing homes over the facilities' residents when confronted with challenges to arbitration provisions; however, recent decisions have seemingly tilted the scales of justice rightfully back to the side of the individual adversely affected by a nursing home's inadequate care. Attitudes toward pre-dispute compulsory arbitration in nursing home contracts are changing at the national level, and for those entering a nursing home this will prove to be very beneficial. Congress should act quickly to pass the Fairness in Nursing Home Arbitration Act, as it will restore the rights of people needing the assistance of a long-term care provider to have claims of "substandard care" heard by a court or jury.[160] Additionally, the Supreme Court of Missouri's positions in *Lawrence* and *Ward* serve as a light at the end of the dark and stressful tunnel that Missouri's elderly citizens and their families face when making the decision to enter a nursing home facility. Missouri should, however, go one step further and enact legislation eliminating pre-dispute binding arbitration in nursing home contracts. If these actions were taken, the demise of arbitration agreements in long-term care contracts would clear the way for justice for those harmed by the shortcomings of their nursing homes by giving them a voice in a court of law.

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159. *See* discussion Part II.B.4.

160. S. REP. NO. 110-518, at 2-3 (2008).