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## Keeping the Elderly Quiet: The Trump Administration and the Reincarnation of Mandatory Arbitration in Nursing Home Contracts

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# Keeping the Elderly Quiet: The Trump Administration and the Reincarnation of Mandatory Arbitration in Nursing Home Contracts

Katey Peters\*

## I. INTRODUCTION

Mandatory arbitration provisions are the current standard in nursing home admission contracts,<sup>1</sup> but the legal arguments surrounding their enforcement raise questions concerning the validity of these standard provisions.<sup>2</sup> Arbitration provisions allow nursing homes to limit the transparency into their operations and keep victims, and their families, quiet and out of the public eye.<sup>3</sup> This, in turn, limits the understanding of the shortcoming of current regulations and where new regulations may help.<sup>4</sup> The current Coronavirus Disease 2019 (“COVID-19”) pandemic has brought to light some of these otherwise hidden regulatory issues surrounding nursing homes.<sup>5</sup> As a result, several states have tried to continue to keep these hidden regulatory issues secret by preventing COVID-19 related lawsuits.<sup>6</sup>

This Note argues that nursing home arbitration agreements should be disfavored and discontinued through a number of mechanisms—as a condition for reimbursement under Medicaid and Medicare, as a judicial construction, and as a matter of state licensing policy. This is relevant because this year follows a pivotal election year, but also because of the current COVID-19 issues particularly effecting nursing

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1. William Smith III & Robert Schenk II, *A Brief History of Mandatory Arbitration Clauses in Nursing Homes and the Current State of Law*, THE CONSUMER VOICE (2016), [https://theconsumerveoice.org/uploads/files/general/Arbitration\\_Clauses\\_in\\_Nursing\\_Home\\_Admission\\_Contracts.pdf](https://theconsumerveoice.org/uploads/files/general/Arbitration_Clauses_in_Nursing_Home_Admission_Contracts.pdf).

2. *Id.*

3. S. Rep. No. 110-518 (2008).

4. Toby Edelman, *Deregulating Nursing Homes*, 39 ABA, 31, 31 (2018), [https://www.americanbar.org/content/dam/aba/publications/bifocal/final-bifocal\\_39\\_3.pdf](https://www.americanbar.org/content/dam/aba/publications/bifocal/final-bifocal_39_3.pdf).

5. MaryBeth Musumeci & Priya Chidambaram, *Key Questions About Nursing Home Regulation and Oversight in the Wake of COVID-19*, KAISER FAMILY FOUNDATION (Aug. 3, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/key-questions-about-nursing-home-regulation-and-oversight-in-the-wake-of-covid-19/>.

6. Jessica Glenza, *COVID-19: Nursing Homes Account for ‘Staggering’ Share of US Deaths, Data Shows*, THE GUARDIAN (May 11, 2020), <https://www.theguardian.com/us-news/2020/may/11/nursing-homes-us-data-coronavirus>.

homes around the United States.<sup>7</sup> This Note advocates against the use of mandatory arbitration provisions in nursing home contracts because their burdens outweigh their benefits.<sup>8</sup> Furthermore, this Note advocates against the use of mandatory arbitration provisions in nursing home contracts because current legal theories on admission contracts refute the enforcement of such provisions.<sup>9</sup>

Part II of this Note discusses the history of mandatory arbitration provisions in nursing home contracts, up to and including changes that occurred during the Trump administration. Part III analyzes the current arguments in favor, and in opposition, of mandatory arbitration provisions in nursing home contracts. Part IV analyzes current legal theories that outline how these arbitration agreements are unenforceable and whether U.S. courts are applying these theories when interpreting nursing home arbitration agreements.

## II. HISTORY OF MANDATORY ARBITRATION IN NURSING HOME CONTRACTS

Arbitration is defined by the American Bar Association as “a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments.”<sup>10</sup> Arbitration may be preferential to traditional adjudication because the arbitrator is able to make a decision and issue an award quicker and less formalistic than a court.<sup>11</sup> Arbitration provisions are the most commonly used provision in healthcare provider contracts because they decrease the likelihood of medical malpractice litigation.<sup>12</sup> While a brief history of arbitration provisions will reveal their development and usage over time, the most recent developments have come under the Trump administration and in the current COVID-19 pandemic.

### A. *The Use of Mandatory Arbitration Provisions in Nursing Home Contracts Prior to the Trump Administration*

The Federal Arbitration Act (“FAA”),<sup>13</sup> enacted in 1925,<sup>14</sup> made arbitration decisions enforceable in the United States.<sup>15</sup> Prior to the FAA, arbitration was

7. Nina A. Kohn, *Coronavirus isolated nursing home residents. Now it might keep them from voting*, THE WASHINGTON POST (Oct. 14, 2020), <https://www.washingtonpost.com/outlook/2020/10/14/nursing-homes-voting-covid-discrimination/>.

8. See generally, Gerald Taylor, Jr. & Kimberly Ward, *Arbitration Clauses in Nursing Home Admission Agreements: Are They Enforceable?*, THE CONSUMER VOICE, [https://theconsumervoice.org/uploads/files/issues/Gerald\\_Taylor.pdf](https://theconsumervoice.org/uploads/files/issues/Gerald_Taylor.pdf) (last visited May 10, 2021).

9. *Id.*

10. *Arbitration*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/arbitration/](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/) (last visited May 10, 2021).

11. *Id.*

12. Michael Sacopulos & Jeffrey Segal, *Limiting exposure to medical malpractice claims and defamatory cyber postings via patient contracts.*, 467(2) CLIN. ORTHOP. RELAT. RES. 427 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628519/>.

13. See generally, 9 U.S.C. §§ 1-16, 201-208, 301-307 (2018).

14. Jon Shimabukuro & Jennifer Staman, *Mandatory Arbitration and the Federal Arbitration Act*, CONGRESSIONAL RESEARCH SERVICE (2017), <https://fas.org/spp/crs/misc/R44960.pdf>.

15. Daniel Kessler, *Evaluating the medical malpractice system and options for reform*. 25(2) J. ECON. PERSPECT. 93 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3195420/>.

generally met with hostility within the judicial system.<sup>16</sup> The FAA withdrew the states' powers to require a judicial forum, although there was split enforcement among the courts until 1995.<sup>17</sup> In 1995, the Supreme Court of the United States determined in *Allied-Bruce Terminix Companies, Inc. v. Dobson* that the phrase "involving commerce" was intended to be interpreted broadly to include not only "the actual physical interstate shipment of goods" but also "contracts relating to the shipment of commerce."<sup>18</sup> The Supreme Court made this interpretation to further the primary purpose of the FAA, which was to help parties avoid litigation.<sup>19</sup> Many courts ruled that the FAA applied only to "only those contracts where the parties 'contemplated' an interstate commerce connection."<sup>20</sup> A 2001 decision by the United States Supreme Court in *Circuit City Stores, Inc. v. Adams* applied a narrow construction of the FAA's exemption clause.<sup>21</sup> This decision set a precedent for the interpretation of other contracts that were seemingly unrelated to the Commerce Clause based on the broad interpretation of section one of the FAA's meaning of "engaged in commerce."<sup>22</sup> The Court interpreted "engaged in commerce" to apply to employment contracts except those that were exempted in the FAA.<sup>23</sup> The *Adams* decision showed just how broad the Court was willing to construe the FAA, but it was not until 2012 that the Supreme Court explicitly applied the FAA to the nursing home context.<sup>24</sup>

The 2012 Supreme Court decision in *Marmet Health Care Ctr., Inc. v. Brown*, directly challenged mandatory arbitration provisions in nursing home contracts. In *Marmet Health Care*, the Court held that the FAA preempted any laws within the state from limiting arbitration.<sup>25</sup> The Court also held that there is no exception for personal injury or wrongful death, which are the type of claims most often brought in nursing home litigation.<sup>26</sup> While this ruling did not allow states to *prohibit* mandatory arbitration provisions, it did allow states to author unique decisions regarding the enforcement of arbitration agreements in nursing home contracts between residents and their families.<sup>27</sup>

The most significant legal movement in terms of limiting mandatory arbitration provisions in nursing home contracts did not take place until the Centers for Medicare and Medicaid Services ("CMS") stepped into the enforcement picture.<sup>28</sup> In 2016, prior to the change in presidential administrations, CMS proposed a ban on pre-dispute arbitration agreements in nursing home contracts for facilities that

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16. Jon Shimabukuro & Jennifer Staman, *Mandatory Arbitration and the Federal Arbitration Act*, CONGRESSIONAL RESEARCH SERVICE (2017), <https://fas.org/sgp/crs/misc/R44960.pdf>.

17. *Id.* at 3.

18. *Id.*

19. *Id.* at 4.

20. *Id.* at 6.

21. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 106 (2001).

22. *Id.* at 118.

23. *Id.* at 105.

24. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012).

25. *Id.* at 530.

26. *Id.* at 534.

27. Andi Alper, *Seeking Justice for Grandma: Challenging Mandatory Arbitration in Nursing Home Contracts*, 2 J. DISP. RESOL. 469 (2016).

28. See William Smith III & Robert Schenk, *A Brief History of Mandatory Arbitration Clauses in Nursing Homes and the Current State of Law*, THE CONSUMER VOICE (2018), [https://theconsumerveoice.org/uploads/files/general/Arbitration\\_Clauses\\_in\\_Nursing\\_Home\\_Admission\\_Contracts.pdf](https://theconsumerveoice.org/uploads/files/general/Arbitration_Clauses_in_Nursing_Home_Admission_Contracts.pdf).

receive federal funding through Medicare and Medicaid.<sup>29</sup> For the first time in over two decades, the Federal Register was updated to include a final rule on “Reform of Requirements for Long-Term Care Facilities,” which amended 42 CFR § 483.70(n) to prohibit pre-dispute arbitration agreements as a condition for admission to a long-term care facility.<sup>30</sup> This proposed rule was part of a three-phase process to change the law surrounding arbitration agreements in nursing home contracts.<sup>31</sup> Initially, CMS planned to create several new requirements for pre-dispute arbitration agreements: requiring an explanation of the agreement;<sup>32</sup> having the resident acknowledge their understanding of the agreement;<sup>33</sup> removing language discouraging the resident from speaking with outside officials;<sup>34</sup> informing the resident of their waiver of their right to judicial relief;<sup>35</sup> expressly mandating that the arbitration agreement could only be entered into voluntarily;<sup>36</sup> and requiring a neutral arbitrator during arbitration.<sup>37</sup>

In response to this proposed change, thirty-four senators, one representative, and sixteen state attorney generals signed a letter pushing for an outright ban on mandatory arbitration agreements.<sup>38</sup> In response, a final rule was adopted by CMS in September 2016.<sup>39</sup> This rule required that long term care facilities “that participate in Medicare or Medicaid ‘must not enter into a pre dispute agreement for binding arbitration with any resident or resident’s representative nor require that a resident sign an arbitration agreement as a condition of admission to the LTC facility.’”<sup>40</sup> This new rule did not, however, prohibit post-dispute arbitration.<sup>41</sup>

In response to this new rule, the Chief Executive Officer and President of American Health Care Association (“AHCA”), the largest long-term care provider in the U.S., denied the necessity of the rule and claimed that the new rule exceeded CMS’s statutory authority.<sup>42</sup> AHCA’s CEO, along with several other care facilities, filed a preliminary injunction in the United States District Court in for the Northern District of Mississippi, Oxford Division in October 2016 to prevent the enforcement of the new rule.<sup>43</sup> However, before the United States Court of Appeals could rule on the lower court’s decision, the Obama administration was replaced by the Trump administration in January 2017.<sup>44</sup> As a result of a change in administrations, the Secretary of Health and Human Services that appealed the injunction was replaced.<sup>45</sup> The new secretary under the Trump Administration filed and was granted a motion to dismiss the appeal.<sup>46</sup>

29. *Id.* at 8.

30. Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 84 Fed. Reg. 34718-01 (Sep. 16, 2019) (to be codified 42 C.F.R. 483).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Medicare and Medicaid Programs, 84 Fed. Reg. at 34718-01.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Medicare and Medicaid Programs, 84 Fed. Reg. at 34718-01.

43. *Id.*

44. *Id.*

45. *Id.*

46. Medicare and Medicaid Programs, 84 Fed. Reg. at 34718-01.

*B. The Reincarnation of Mandatory Arbitration Provisions in Nursing Home Contracts from the Trump Administration*

During the Trump administration, many changes made to nursing home arbitration provisions by the Obama administration were reversed.<sup>47</sup> In 2017, the Trump administration permitted the use of mandatory arbitration provisions in nursing home contracts.<sup>48</sup> This decision was made in response to the Obama administration's rule that prohibited facilities from entering contracts with those provisions to receive Medicare and Medicaid benefits.<sup>49</sup> The most recent rule of the Trump administration, issued in July 2019,<sup>50</sup> retained the 2017 proposed removal of the "core prohibition on pre-dispute arbitration agreements for long-term healthcare facilities."<sup>51</sup> Despite this, it did maintain an important provision from the Obama administration rule in 2016.<sup>52</sup> The new rule banned "facilities from requiring that residents sign arbitration agreements as a condition of admission to a facility."<sup>53</sup> While facilities cannot require residents to sign an arbitration agreement to be admitted to the facility, these provisions continue to be in many nursing homes contracts so long as it doesn't prevent residents from being admitted or continuing to receive care.<sup>54</sup>

In addition to the reinstatement of arbitration provisions, the 2019 rule<sup>55</sup> included some limitations and transparency requirements for nursing homes, some of which were included in the original 2017 proposal.<sup>56</sup> First, the resident must understand and acknowledge their understanding of the agreement.<sup>57</sup> Second, the agreement must specify the selection of a neutral arbitrator and a venue that is convenient for both sides.<sup>58</sup> Third, the resident must be given the right to rescind the agreement within thirty days of signing.<sup>59</sup> Lastly, the facility must maintain a copy of the arbitration agreement for five years and have it available for CMS inspection.<sup>60</sup>

With the recent election of Joe Biden, it is likely that more changes will be made to the healthcare system, but it is unclear how much focus will be placed on the elderly or nursing homes. Such changes were not a focal point of either the Republican or Democrat campaign platforms.<sup>61</sup> Both parties have discussed

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47. *Id.*

48. Mark Kantor et al., *CMS Issues New Arbitration Rule for Nursing Homes*, A.B.A. (Feb. 20, 2020), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/cms-issues-new-arbitration-rule-for-nursing-homes/>.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Mark Kantor et al., *supra* note 49.

55. Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 84 Fed. Reg. 34718-01 (July 18, 2019) (codified at 42 C.F.R. § 483.70(n)).

56. *Id.*

57. *Id.* at 34719.

58. *Id.* at 34718.

59. *Id.* at 34719.

60. *Id.*

61. See Sarah O'Brien, *Trump vs Biden on Medicare: How each wants to modify the insurance program*, CNBC (Oct. 19, 2020), <https://www.cnbc.com/2020/10/19/trump-vs-biden-on-medicare-how-each-wants-to-change-it.html>.

provisions of Medicare they desire to change regarding drug prices or accessibility,<sup>62</sup> so, at the very least, long-term care is a topic of discussion as the United States' population continues to increase in age.

### C. COVID-19 and the Recent Election's Role in Nursing Home Legislation

The current pandemic and the recent election have revealed regulatory concerns with nursing homes that mandatory arbitration provisions have hidden. One of these regulatory concerns recently brought to light is a concern with resource allocation.<sup>63</sup> In June 2020, in the midst of the pandemic, nearly one-third of nursing homes in the United States reported either a staffing shortage, a personal protective equipment shortage, or both.<sup>64</sup>

To address the staffing issue, the CMS waived the 75-hour training requirement for nursing aids and, in its place, implemented a free eight-hour online course.<sup>65</sup> While this may help eliminate the staffing shortage, the lack of training and influx of new employees likely resulted in an increase of neglect and abuse in nursing facilities.<sup>66</sup> In response, COVID-19 has not only increased the number of reported complaints with nursing homes but has also resulted in a decrease in nursing home liability.<sup>67</sup> Over twenty-six states have instituted various barriers or even provided immunity to nursing homes, shielding them from lawsuits that may arise as a result of the nursing home's approach to COVID-19.<sup>68</sup> The concern is the length of time that immunity shields will be in place and if these shields will continue to reduce accountability for negligent care even after the pandemic ends.<sup>69</sup>

COVID-19 has taken a significant toll on nursing homes.<sup>70</sup> As of January 24, 2021, there have been 611,805 confirmed COVID-19 cases among nursing home residents around the United States and 121,772 deaths.<sup>71</sup> Among staff members, there have been 525,400 confirmed cases and 1,499 deaths.<sup>72</sup> In addition, COVID-19 has exacerbated some of the pre-COVID-19 issues with nursing home regulation.<sup>73</sup> There has been a strong correlation found between "facilities with a history

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62. *Id.*

63. Priya Chidambaram, *Rising Cases in Long-term Care Facilities Are Cause for Concern*, KAISER FAM. FOUND. (Jul. 21, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/rising-cases-in-long-term-care-facilities-are-cause-for-concern/>.

64. *Id.*

65. Abigail Hauslohner & Maria Sacchetti, *Nursing homes turn to quick fix training to meet pandemic staffing needs*, WASH. POST (May 28, 2020), [https://www.washingtonpost.com/national/nursing-homes-turn-to-quick-fix-training-to-meet-pandemic-staffing-needs/2020/05/28/418c3802-a020-11ea-9590-1858a893bd59\\_story.html](https://www.washingtonpost.com/national/nursing-homes-turn-to-quick-fix-training-to-meet-pandemic-staffing-needs/2020/05/28/418c3802-a020-11ea-9590-1858a893bd59_story.html).

66. *Id.*

67. Tara Sklar & Nicolas P. Terry, *States are making it harder to sue nursing homes over COVID-19: Why immunity from lawsuits is a problem*, THE CONVERSATION (June 9, 2020), <https://theconversation.com/states-are-making-it-harder-to-sue-nursing-homes-over-covid-19-why-immunity-from-lawsuits-is-a-problem-139820>.

68. Samuel Brooks et al., *States Move to Shield LTC Facilities from Civil Liability*, A.B.A. (July 23, 2020), [https://www.americanbar.org/groups/law\\_aging/publications/bifocal/vol-41/vol-41--issue-no-6-july-august-2020-/states-move-to-shield-ltc-facilities-from-liability/](https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-41/vol-41--issue-no-6-july-august-2020-/states-move-to-shield-ltc-facilities-from-liability/).

69. *Id.*

70. See, e.g., *COVID-19 Nursing Home Data*, CENTERS FOR MEDICAID & MEDICARE SERVS. (Mar. 14, 2021), <https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg/>.

71. *Id.*

72. *Id.*

73. See Brooks, *supra* note 69.

of poor quality of care and infection control procedures and COVID-19 outbreaks.”<sup>74</sup>

The recent campaign for president, which focused significantly on COVID-19, increased attention on the actions each presidential candidate would take for long-term care. As previously mentioned, Donald Trump reinstated arbitration provisions in nursing home contracts.<sup>75</sup> And Joe Biden did not make any statements during the campaign that revealed his view on arbitration provisions, although his campaign did create a task force that proposed “expand[ing] home and community based care under Medicaid and support[ing] both family and paid caregivers.”<sup>76</sup> This may support alternatives for those who previously only had the option of placing their loved ones in a nursing home. Joe Biden’s actions as president over the next four years will reveal whether he intends to fulfill his campaign promise.

The liability shields that have been established during COVID-19 hide the regulatory issues of nursing homes.<sup>77</sup> Similarly, mandatory arbitration agreements keep the regulatory issues with nursing homes hidden from the general public.<sup>78</sup> While the states are taking actions to prohibit civil litigation against nursing homes, courts have routinely held that the FAA supersedes any state prohibition on arbitration for a particular claim.<sup>79</sup> The future prevention of these state actions by the federal government make the recent election even more important for the future of long-term care litigation against nursing homes as a result of COVID-19 care.

### III. THE ADVANTAGES AND DISADVANTAGES OF MANDATORY ARBITRATION PROVISIONS IN NURSING HOME CONTRACTS

Nursing home mandatory arbitration provisions have advantages and disadvantages compared to traditional court-based dispute resolution. The use of arbitration as the main forum of dispute resolution depends on the interests of the nursing home residents and the nursing homes, as shown through an analysis of the advantages and disadvantages of mandatory arbitration provisions in nursing home contracts.

#### A. *The Advantages of Mandatory Arbitration Provisions in Nursing Home Contracts*

Arbitration provisions in nursing home contracts can offer some specific advantages over traditional adjudication. These advantages are from the perspective of the nursing home resident and their family, rather than from the nursing home’s

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74. *Id.*

75. *See id.* at 49.

76. Howard Gleckman, *Joe Biden Is Slowly Acknowledging The Nation’s Need To Reform Long-Term Care*, FORBES (July 17, 2020), <https://www.forbes.com/sites/howardgleckman/2020/07/17/joe-biden-is-slowly-acknowledging-the-nations-need-to-reform-long-term-care/?sh=2707989e4d18#7bf024b34d18>.

77. *See* Brooks et al., *supra* note 69.

78. *See* S. Rep. No. 110-518, *supra* note 4, at 3 (2008) (“By preserving the residents’ option of pursuing claims in court for negligent or abusive care, not only will the public be able to make more informed choices of nursing homes, but poorly-performing facilities will have a greater incentive to prevent injuries and death.”).

79. *See Mandatory Arbitration and the Federal Arbitration Act*, [https://www.everycrsreport.com/reports/R44960.html#\\_Toc493837805](https://www.everycrsreport.com/reports/R44960.html#_Toc493837805) (“In these cases, the Court has routinely held that the FAA supersedes state requirements that restrain the enforceability of mandatory arbitration agreements.”).



perspective, but many are applicable to both parties. Overall, arbitration is faster,<sup>80</sup> less expensive,<sup>81</sup> less emotional,<sup>82</sup> and more flexible than pursuing litigation.<sup>83</sup>

The speed of arbitration usually contributes to a lower cost as compared to litigation.<sup>84</sup> Arbitration typically results in a decision more quickly than litigation, which results in a decrease in attorney fees for both the resident and the nursing home.<sup>85</sup> In addition to a decrease in fees, arbitration increases the likelihood of a payout to the plaintiff rather than a finding of no fault on the part of the defendant in a jury trial.<sup>86</sup> Contributing to the payout is the use of a knowledgeable arbitrator rather than a jury that may not comprehend the complex issues.<sup>87</sup> This results in a more knowledgeable trier of fact, ideally resulting in a more fair outcome based on the facts presented.<sup>88</sup> Arbitration also typically does not have as much discovery as compared to litigation.<sup>89</sup> Written discovery requests and many witness depositions are not necessary in arbitration,<sup>90</sup> again contributing to an increase in speed and a decrease in cost as compared to litigation.<sup>91</sup>

Arbitration also has decreased emotions<sup>92</sup> and increased flexibility compared to trials.<sup>93</sup> Trials are often more hostile whereas arbitration tends to decrease the hostility by encouraging the parties to work together to reach an agreement<sup>94</sup> and

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80. See Sacopulos & Segal, *supra* note 13, (“Arbitration provides a faster, less emotional, and more predictable alternative to the traditional jury trial.”).

81. *Id.*

82. *Id.*

83. See Clifton Brinson, *Tips for Maximizing the Benefits of Arbitration*, AM. BAR ASS’N (Mar. 27, 2017), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2017/tips-for-maximizing-the-benefits-of-arbitration/> (“Flexibility. An arbitrator can generally order whatever relief he or she thinks is right, regardless of whether such relief would be available in a court of law.”).

84. Sacopulos & Segal, *supra* note 13.

85. Michelle Andrews, *Signing a Mandatory Arbitration Agreement with a Nursing Home Can Be Troublesome*, THE WASH. POST (Sept. 17, 2012), [https://www.washingtonpost.com/national/health-science/signing-a-mandatory-arbitration-agreement-with-a-nursing-home-can-be-troublesome/2012/09/16/ccf851ba-6a2c-11e1-acc6-32f6c7ccd67\\_story.html](https://www.washingtonpost.com/national/health-science/signing-a-mandatory-arbitration-agreement-with-a-nursing-home-can-be-troublesome/2012/09/16/ccf851ba-6a2c-11e1-acc6-32f6c7ccd67_story.html).

86. See David Sohn & B. Sonny Bal, *Medical Malpractice Reform: The Role of Alternative Dispute Resolution*, 470(5) CLINICAL ORTHOP. RELAT. RES. 1370 (May 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3314770/> (“Nonetheless, the basic principles that early disclosure and apology reduce both the number of claims and ultimate payouts have been validated elsewhere.”).

87. See *id.* (“[Arbitration] is popular therefore among parties who fear the capricious nature of jury verdicts and is seen as a means of risk management.”).

88. *Id.*

89. See David Evans & India Johnson, *The top 10 ways to make arbitration faster and more cost effective*, AM. ARBITRATION ASS’N, [https://www.adr.org/sites/default/files/document\\_repository/The%20Top%20Ten%20Ways%20to%20Make%20Arbitration%20Faster%20and%20More%20Cost%20Effective.pdf](https://www.adr.org/sites/default/files/document_repository/The%20Top%20Ten%20Ways%20to%20Make%20Arbitration%20Faster%20and%20More%20Cost%20Effective.pdf) (“[A]rbitration should not be burdened with full blown litigation discovery.”).

90. *Id.*

91. See Sacopulos & Segal, *supra* note 13.

92. See Barbara Repa, *Arbitration Pros and Cons*, NOLO, <https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html> (“Because the parties in arbitration are usually encouraged to participate fully and sometimes even to help structure the resolution, they are often more likely to work together peacefully rather than escalate their angst and hostility toward one another, as is often the case in litigation.”).

93. See Brinson, *supra* note 84 (“Flexibility. An arbitrator can generally order whatever relief he or she thinks is right, regardless of whether such relief would be available in a court of law.”).

94. Repa, *supra* note 93.

facilitates more participation from both parties.<sup>95</sup> Arbitrators have the flexibility to grant relief that may or may not be available at trial.<sup>96</sup> Arbitration is also flexible for both parties in scheduling the actual arbitration.<sup>97</sup> Whereas litigation is often scheduled months or years after the initial filing date due to busy court dockets,<sup>98</sup> formal discovery,<sup>99</sup> and the court and judge's availability,<sup>100</sup> arbitration scheduling will typically take into account the availability of the parties in the near future after a shorter, more simple discovery period has passed.<sup>101</sup>

Because the arbitrator determines both the facts and the applicable laws, and has specialized knowledge of the subject matter that is being arbitrated, the arbitrator may more readily admit or exclude evidence.<sup>102</sup> An arbitrator is also in a better position to give the evidence the weight it deserves, unlike a jury, which may, in fact, become confused by such evidence and without specialized knowledge be rendered unable to fairly weigh or balance the same.<sup>103</sup> Overall, the advantages of arbitration for a nursing home resident and their family is that the process is usually quicker,<sup>104</sup> less expensive,<sup>105</sup> involves less emotional strain,<sup>106</sup> and is typically more flexible compared to litigation.<sup>107</sup> Despite the many advantages of arbitration provisions for both parties, the disadvantages outweigh the benefits.

### *B. The Disadvantages of Mandatory Arbitration Provisions in Nursing Home Contracts*

Arbitration provisions in nursing home contracts also offer specific disadvantages compared to traditional litigation. The disadvantages of arbitration for the nursing home resident include: no right to a trial by a jury;<sup>108</sup> lack of publicity;<sup>109</sup> decision making by a potentially biased arbitrator;<sup>110</sup> inability to create precedent;<sup>111</sup> a lack of alternatives to, or appeals from, the arbitrator's decision;<sup>112</sup> decreased evidentiary requirement;<sup>113</sup> and often decreased compensation compared to litigation.<sup>114</sup>

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95. *Id.*

96. Brinson, *supra* note 84.

97. Repa, *supra* note 93.

98. *Id.*

99. *Id.*

100. *See id.* ("Unlike trials, which must be worked into overcrowded court calendars, arbitration hearings can usually be scheduled around the needs and availabilities of those involved, including weekends and evenings.")

101. *Id.*

102. *Id.*

103. William Turner, *A Brief Overview of the Use of Evidence in Arbitration*, NEV. LAWYER (Oct. 2010), [https://www.nvbar.org/nvlawmag-archive-957232/Oct\\_2010\\_Evidence\\_Arbitration.pdf](https://www.nvbar.org/nvlawmag-archive-957232/Oct_2010_Evidence_Arbitration.pdf).

104. Sacopulos & Segal, *supra* note 13.

105. *Id.*

106. *Id.*

107. Brinson, *supra* note 84.

108. Lauren Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9-2 HARV. L. & POL. REV. 329 (2015).

109. Andrews, *supra* note 86.

110. Senate Rep. No. 110-518 (2008).

111. Andrews, *supra* note 86.

112. Senate Rep. No. 110-518 (2008).

113. *Id.*

114. Andrews, *supra* note 86.

The first disadvantage of requiring arbitration, rather than permitting litigation, is the removal of the right to a trial by a jury. The Seventh Amendment of the United States Constitution guarantees the right to a trial by jury where the value in controversy exceeds twenty dollars.<sup>115</sup> Arbitration provisions take away the resident's right to a trial by jury given in the Seventh Amendment.<sup>116</sup> By placing the resident and their family in a take-it-or-leave-it situation, mandatory arbitration provisions effectively strip nursing home residents of the right to be heard by a jury in a situation where few alternatives to signing the provision exist.<sup>117</sup>

The second issue with arbitration is the lack of publicity for both the proceedings and the results. With arbitration proceedings, there is no judge, jury, or public audience to hear the resident's case.<sup>118</sup> The proceedings are conducted in private, and the results and materials are also often protected by confidentiality rules.<sup>119</sup> The federal government also permits the results of arbitration to go unreported.<sup>120</sup>

The third issue with arbitration is the possibility that a biased arbitrator will be making the decision. The final rule set in 2019 mandates a neutral arbitrator between the nursing home and the resident.<sup>121</sup> While the arbitrator is technically agreed upon by both parties, the nursing home is in a much better position to select an arbitrator based on previous arbitrations and the repeat-player effect.<sup>122</sup> While the arbitrator may appear neutral, the individual may be ultimately chosen by the nursing facility and may be inclined to favor a provider to ensure future business,<sup>123</sup> and the arbitration decision is likely to not appealable.<sup>124</sup>

The fourth issue is the inability to set precedent for future claims through arbitration. Nursing homes are unlikely to change because arbitrations do not set binding precedent for future arbitrations, unlike the way courts operate.<sup>125</sup> In addition to a lack of precedent being set, arbitration does not require an admission of fault by the nursing home.<sup>126</sup> This may be detrimental to both parties as it decreases the recovery for the plaintiff, but it also does not completely clear the nursing home's name when there may have been no negligence at all.<sup>127</sup> Arbitrators tend to award a more modest award than sympathetic juries based on their specialized expertise and experience, but plaintiffs are more likely to receive some monetary award in

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115. U.S. Const. amend. VII.

116. *Id.*

117. Lauren Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9-2 HARV. L. & POL. REV. 329 (2015).

118. Andrews, *supra* note 110.

119. *Id.*

120. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, THE NEW YORK TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

121. *Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements*, 84 FR 34718 (Jul. 18, 2019).

122. *Id.*

123. *Forced Arbitration Agreements in Long-Term Care Facility Admission Contracts*, THE CONSUMER VOICE (2021), [https://theconsumervoice.org/issues/issue\\_details/arbitration](https://theconsumervoice.org/issues/issue_details/arbitration).

124. *Id.*

125. Gregory Brown, *How Arbitration Clauses Effect Nursing Home Abuse Cases*, BROWN & CHARBONNEAU LLP: LEGAL BLOGS (2016), <https://www.bc-llp.com/arbitration-clauses-affect-nursing-home-abuse-cases/>.

126. *See* Sohn & Bal, *supra* note 87, at 1372.

127. *Id.*

arbitration where there was no negligence by the nursing home.<sup>128</sup> Traditional adjudication will require a finding of fault by one party whereas arbitration does not.

The fifth issue is the ways in which a court may overturn an arbitration award differ considerably from the ways an appellate court may overturn a trial court's decision.<sup>129</sup> The grounds for overturning an arbitration award include: if the award was procured by fraud,<sup>130</sup> if there was evident corruption or partiality among the arbitrators,<sup>131</sup> if the arbitrators acted in a way that prejudiced the rights of any party,<sup>132</sup> or if the arbitrators exceeded their powers or "imperfectly executed them" so a final award was not made.<sup>133</sup> An error in the application of law is not included in the FAA as a grounds for vacating an award from arbitration.<sup>134</sup> If the decision is binding, it can only be appealed on narrow grounds:<sup>135</sup> neglect,<sup>136</sup> procedural bias,<sup>137</sup> error,<sup>138</sup> or fraud.<sup>139</sup> This issue makes overturning an arbitration decision much more difficult than appealing traditional adjudication.

The sixth issue with arbitration is the informal evidentiary process. The requirements for discovery in an arbitration are usually set by the arbitrator<sup>140</sup> and are often far more relaxed than the rules of evidence and procedure used by courts.<sup>141</sup> The lack of discovery will favor defendants because the information needed for plaintiffs is commonly in the defendant's possession.<sup>142</sup> Evidence permitted or excluded in arbitration will not be reviewed by the court unless the arbitrator was found to have committed misconduct by refusing to permit material evidence.<sup>143</sup>

The seventh issue with arbitration is that it often results in lower awards for the plaintiff compared to litigation. Arbitration awards have been found to be 35% lower than if the nursing home residents or their family had pursued their claim through the courts.<sup>144</sup> One of the contributing factors to a lower arbitral award compared to an award for damages in court may be the role of the arbitrator.<sup>145</sup> With the arbitrator making the final decision, they may feel pressured to provide some

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128. *Id.*

129. See generally, American Arbitration Ass'n, *Challenges to an Arbitration Award*, AMERICAN ARBITRATION ASS'N, [https://www.adr.org/sites/default/files/document\\_repository/challenges-to-an-arbitration-award.pdf](https://www.adr.org/sites/default/files/document_repository/challenges-to-an-arbitration-award.pdf) (last visited May 10, 2021).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Stephen Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 ARBITRATION L. REV. 56 (2014).

135. *Id.*

136. 9 U.S.C. § 4 (2018).

137. Sohn & Bal, *supra* note 87, at 1374.

138. *Id.*

139. *Id.*

140. Nan Aron, *Leveling the legal playing field: Limit forced arbitration*, L.A. TIMES (Jan. 14, 2014), <https://www.latimes.com/opinion/op-ed/la-oe-aron-arbitration-contracts-instagram-20140114-story.html>.

141. William Turner, *A Brief Overview of the Use of Evidence in Arbitration*, NEVADA LAWYER (Oct. 2010), [https://www.nvbar.org/nvlawmag-archive-957232/Oct\\_2010\\_Evidence\\_Arbitration.pdf](https://www.nvbar.org/nvlawmag-archive-957232/Oct_2010_Evidence_Arbitration.pdf).

142. Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 299 (2004).

143. Ware, *supra* note 135, at 70.

144. William Smith III & Robert Schenk, *A Brief History of Mandatory Arbitration Clauses in Nursing Homes and the Current State of Law*, THE CONSUMER VOICE (2018), [https://theconsumervoice.org/uploads/files/general/Arbitration\\_Clauses\\_in\\_Nursing\\_Home\\_Admission\\_Contracts.pdf](https://theconsumervoice.org/uploads/files/general/Arbitration_Clauses_in_Nursing_Home_Admission_Contracts.pdf).

145. Sohn & Bal, *supra* note 87, at 1376.

sort of compromise on behalf of both parties.<sup>146</sup> Arbitrators are also more specialized and experienced in their role than juries who may be swayed and sympathetic to victims of nursing homes.<sup>147</sup>

Regardless of the amount that the arbitrator awards, these awards are extremely difficult to appeal as compared to results in litigation.<sup>148</sup> The parties will usually decide if the decision will be binding or nonbinding/advisory.<sup>149</sup> Arbitration provisions are a part of the nursing home contract and claims against the provisions may be brought by the victim for the contract itself.

#### IV. CONTRACT DEFENSES TO MANDATORY ARBITRATION PROVISIONS

Mandatory pre-dispute arbitration provisions are often a portion of a nursing home admission contract.<sup>150</sup> By raising contract defenses, a nursing home resident can bring a claim that the nursing home contract itself was invalid based on some common contract defenses. Contract defenses are one of the main defenses to mandatory arbitration provisions found in nursing home admission contracts.<sup>151</sup> The elements of a contract are: “(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation.”<sup>152</sup> While mandatory arbitration provisions have been found to be enforceable per the FAA,<sup>153</sup> the provisions in nursing home admission contracts have often raised questions as to their enforceability due to the lack of capacity of the nursing home residents and their families at the time they enter the contract.<sup>154</sup> Furthermore, the authority the nursing home possesses over the resident at the time they enter the contract raises a question as to whether the “mutual assent” element of a contract has been met.<sup>155</sup>

The lack of capacity by nursing home residents and their families derives from a lack of information about the arbitration process and the necessity of admission to the nursing facility. In order to assent to a contract, both parties must first have the capacity to enter into a contract.<sup>156</sup> “The test of legal capacity to contract is the ability to understand and appreciate the consequences of the particular transaction.”<sup>157</sup>

In *Landers v. Integrated Health Services of Shreveport*, the nursing home resident signed a contract with an arbitration provision, but the court ruled that Landers

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146. *Id.*

147. *Id.*

148. See *generally Arbitration*, AMERICAN BAR ASS'N, [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/arbitration/](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/).

149. *Id.*

150. Krasuki, *supra* note 143, at 268.

151. *Id.* at 273.

152. *Adams Cmty. Care Ctr., LLC v. Reed*, 37 So. 3d 1155, 1158 (Miss. 2010) (quoting *Grenada Living Ctr., LLC v. Coleman*, 961 So. 2d 33, 36–37 (Miss. 2007)).

153. See *generally* 9 U.S.C. §§ 1-16, 201-208, 301-307 (2018).

154. Krasuki, *supra* note 143, at 276.

155. Jessica Fargen, *Nursing home residents often sign away rights to sue*, BOSTON HERALD (Mar. 8, 2010), <https://www.bostonherald.com/2010/03/08/nursing-home-residents-often-sign-away-rights-to-sue/>.

156. *Conners v. Eble*, 269 S.W.2d 716, 717 (Ky. 1954).

157. *Id.* at 718.

lacked capacity due to her forgetfulness, depression, and schizophrenia.<sup>158</sup> The court found the nursing home was aware that Landers lacked capacity and had a duty to conduct a neuro/cognitive assessment.<sup>159</sup> The court held that there was no evidence to show that Landers understood the implication of the arbitration agreement.<sup>160</sup>

Similar to *Landers*, in *Liberty Health & Rehab of Indianola, L.L.C. v. Howarth*, the court held that the decedent lacked mental capacity to assent to the agreement because of a lack of capacity to “make coherent decisions regarding important matters.”<sup>161</sup> There was also no evidence that the nursing home’s employees assisted the decedent with the meaning of the agreement.<sup>162</sup> While *Liberty Health & Rehab of Indianola* was focused on mental capacity rather than the capacity to understand by a layperson in a high stakes situation, both *Landers* and *Liberty Health & Rehab of Indianola* required an understanding on the part of the resident as to the terms of the agreement through an explanation of their rights from the nursing home.<sup>163</sup> The court noted that the arbitration provisions are also placed in a complex admission package given to families during an emotional and overwhelming time of change, resulting in information being easily misunderstood when not explained to the parties to the contract.<sup>164</sup>

The authority that the nursing facility possesses in relation to the nursing home residents and their families may result in the families mistakenly believing that they do not have a choice other than to sign the contract.<sup>165</sup> “The usual term to describe the unenforceable adhesion contract is ‘unconscionable.’”<sup>166</sup> A contract must be both substantively and procedurally conscionable.<sup>167</sup> To determine if a contract is procedurally unconscionable, a court will look at the circumstances of how the contract came about, including equality of bargaining strength, situation of either party, and feeling of ability to accept or decline the demanded terms.<sup>168</sup>

In *Hayes v. The Oakridge Home*, the court held that the arbitration provision could not be procedurally unconscionable solely based on the resident’s age.<sup>169</sup> In addition to *Hayes*, in *Prieto v. Healthcare & Retirement Corporation of America*, the arbitration agreement was held to be procedurally unconscionable based on the fact that the resident’s daughter was asked to sign a packet of documents, which included the arbitration agreement, while the resident was on his way to the nursing home, without the terms being explained to her.<sup>170</sup> Similarly, in *Wascovich v. Presonacare of Ohio, Inc.*, the resident was transferred from the hospital to the nursing home, did not have anyone accompanying her, and did not have any legal

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

159. *Id.* at 4.

160. *Id.* at 4.

161. *Liberty Health & Rehab of Indianola, LLC v. Howarth*, 11 F. Supp. 3d 684, 687 (N.D. Miss. 2014).

162. *Id.* at 688.

163. *Landers v. Integrated Health Servs. of Shreveport*, 903 So. 2d at 612; *Liberty Health & Rehab of Indianola, LLC v. Howarth*, 11 F. Supp. at 684.

164. Fargen, *supra* note 156.

165. *Id.*

166. Michael Sacppulos & Jeffrey Segal, *Limiting Exposure to Medical Malpractice Claims and Defamatory Cyber Postings via Patient Contracts*, 467(2) CLIN. ORTHOP. RELAT. RES. 427, 429 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628519/>.

167. *See* *Strausberg v. Laurel Healthcare Providers, LLC*, 304 P.3d 409, 418 (N.M. 2013).

168. *Id.*

169. *Hayes v. Oakridge Home*, 908 N.E.2d 408, 414 (Ohio 2009).

170. *Prieto v. Healthcare & Ret. Corp. of Am.*, 919 So. 2d 531, 533 (Fla. Dist. Ct. App. 2005).

expertise.<sup>171</sup> The court held that these circumstances constituted procedural unconscionability with the resident's cognitive abilities only being weighed minimally due to the lack of evidence produced as to her cognitive impairment.<sup>172</sup>

Procedural unconscionability is determined based on a variety of factors that ultimately determine the bargaining power or lack thereof.<sup>173</sup> To determine the bargaining power of a party to a contract, the court may look at the party's age, education, intelligence, experience with similar transactions, who was the drafter to the contract, and if the terms of the contract were explained to the party with less bargaining power.<sup>174</sup>

While many nursing home residents may suffer from cognitive impairment which would result in procedural unconscionability under *Wascovich*, there are also many instances when residents are rushed into a facility, their family is handed a stack of forms to fill out, and the family has little to no alternatives to signing all of the paperwork without an informed understanding of the forms as was the case in *Prieto*. Based on the previous cases, these circumstances should render the nursing home contract procedurally unconscionable and therefore unenforceable. With both the current pandemic that is ravaging nursing homes and the immunity shields that were put in place by the Trump Administration, contract defenses may be important to permit residents to have their day in court despite the mandatory arbitration provision.

## V. CONCLUSION

Mandatory arbitration provisions are not a recently disputed issue, but the past two administrations have enacted differing rules regarding these agreements. The Obama Administration attempted to dissolve the use of pre-dispute arbitration agreements while the Trump Administration reversed the complete prohibition and instead permitted the provisions so long as the provision being signed by the resident was not a condition for admission to the facility. COVID-19, the recent election, and the United States' aging population are bringing attention to many of the regulatory issues in nursing homes with mandatory arbitration provisions being one of the key reasons many issues have remained hidden as a result of arbitration provisions in nursing home contracts.

Mandatory arbitration provisions admittedly do have some benefits to residents and their families. This includes lower cost, increased efficiency, less hostility, and greater flexibility than what is seen through litigation. The benefits are likely outweighed by the costs of keeping residents and their families out of court. The costs of arbitration provisions include the lack of publicity of the decision and case, the potential for the case to be determined by a biased arbitrator, the inability for a precedent to be established for future claims, a decrease in the average results achieved, and the decrease in the evidence required and therefore turned over the defendant to prove the claim.

If the Biden administration does not make a change to the Trump Administration's 2017 rules, nursing home residents may continue to face arbitration

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171. *Wascovich v. Personacare of Ohio*, 943 N.E.2d 1030, 1037 (Ohio 2010).

172. *Id.* at 629.

173. *Id.*

174. *Id.*

provisions in their nursing home contracts. If one is faced with an arbitration provision, a possible defense to the provision is rooted in contract law. It may be in a plaintiff's interest to argue that the resident or their family lacked the capacity at the time of the contract formation to enter into a valid contract and therefore it is unenforceable. It may also be beneficial to argue that the circumstances surrounding the contract formation render the contract procedurally unconscionable and therefore unenforceable.

In the Biden Administration's first few weeks in office, they have not addressed nursing home regulation or the liability of nursing homes.<sup>175</sup> This may be surprising when considering the changes the Trump Administration made as a result of COVID-19,<sup>176</sup> the high number of executive orders signed by President Biden in his first 30 days,<sup>177</sup> and the current vaccination rate of nursing home staff and residents.<sup>178</sup> It can be predicted that the Biden Administration will likely address the Trump Administration's changes as more nursing home residents, nursing home staff, and United States citizens are vaccinated and able to safely reenter nursing homes.

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175. See Meredith Deliso, *All of Biden's executive orders, and other notable actions, so far*, ABC NEWS (Feb. 11, 2021), <https://abcnews.go.com/Politics/bidens-executive-orders-notable-actions/story?id=75500311>.

176. Sklar & Terry, *supra* note 68.

177. Tamara Keith, *With 28 Executive Orders Signed, President Biden is Off to a Record Start*, NP (Feb. 3, 2021), <https://www.npr.org/2021/02/03/963380189/with-28-executive-orders-signed-president-biden-is-off-to-a-record-start>.

178. Matthew Conlen, Sarah Mervosh & Danielle Ivory, *Nursing Homes, Once Hotspots, Far Outpace U.S. in Covid Declines*, THE NEW YORK TIMES (Feb. 25, 2021), <https://www.nytimes.com/interactive/2021/02/25/us/nursing-home-covid-vaccine.html>.