

**"FEDERAL ARBITRATION ACT ('FAA')
PREEMPTION OF STATE LAW"**

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FEDERAL ARBITRATION ACT ("FAA") PREEMPTION OF STATE LAW

I. INTRODUCTION

Two years ago we authored the original version of this article concerning the place of arbitration in an increasingly hostile legal environment for the long-term care provider. Since that time, various states have passed legislation aimed at reigning in the high cost of healthcare litigation and the corresponding crisis in the availability of liability insurance.¹ While these changes on the legislative front are welcome, they are not a panacea for the high potential costs of traditional litigation before anxiety-ridden juries troubled by the prospects of long term care for their loved ones. Part of the solution still lies in arbitration, as opposed to litigation.

Unfortunately, arbitration continues to be the focus of organized opposition, as evidenced by the joint filing of an *amicus curiae* brief by the National Citizens' Coalition for Nursing Home Reform, AARP, and the Alabama Silver-Haired Legislature urging the Supreme Court of Alabama to rehear two recent cases in which it upheld mandatory arbitration clauses in admissions contracts.² In addition, state legislatures continue to struggle with the use of arbitration as an alternative to traditional litigation.³ Further, as noted by the Supreme Court in *Allied-Bruce Terminex Cos., Inc. v. Dobson*, 513 U.S. 265 (1995), some courts have also balked at enforcing arbitration. Nevertheless, a carefully crafted resident arbitration agreement that fits

¹ According to the Health Policy Tracking Service (HPTS), as of October 2003, more than 40 states introduced over 200 bills with a potential impact on nursing home liability insurance. Of these, 20 states - Alabama, Arizona, Arkansas, California, Florida, Hawaii, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Texas, Virginia and Washington – actually enacted remedial legislation, most of which addressed tort reform. HPTS Issue Brief, Nursing Home Liability Insurance (10/01/2003), at <http://www.ncsl.org/programs/health/hpts/longterm.htm> (last visited Apr. 30, 2004) (on file with author).

² See e.g., *Briarcliff Nursing Home, Inc. v. Turcotte*, __ So. 2d __, 2004 WL 226087, (Ala. 2004).

³ See California AB 1448, introduced in 2003, which sought to prohibit nursing homes from including binding arbitration clauses in admission agreements and Amy Joi Bryson, *Compromise Makes Arbitration Voluntary*, Deseret Morning News, (February 7, 2004), which discusses the changes to State of Utah healthcare arbitration legislation passed in the prior legislative session. Available at <http://deseretnews.com/dn/view10.1249.590041589.00.html> (last visited April 30, 2004) (on file with author).

under the umbrella of the Federal Arbitration Act will provide a viable option to the long-term care provider for resolving legal disputes.

II. THE FEDERAL ARBITRATION ACT (“FAA”)

The Federal Arbitration Act (the “FAA” or the “Act”) provides that written arbitration agreements are “valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (1999). The basic purpose of the Act is “to overcome courts’ refusals to enforce agreements to arbitrate”. *Allied-Bruce*, 513 U.S. at 270. In passing the Act, Congress was “motivated first and foremost by a desire to change this [trend], ...to enforce [arbitration] agreements into which parties had entered, and to place such agreements 'upon the same footing as other contracts.’” *Id.* at 270-71 (citations omitted) (second alteration in original).

To fulfill the purpose, Congress established a broad principal of enforceability within the provisions of the FAA. *Doctor’s Assoc. v. Casarotto*, 517 U.S. 681, 685 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984)). The Supreme Court has determined that “Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases.” *Allied-Bruce*, 513 U.S. at 72, citing *Southland Corp.*, 465 U.S. at 15-16. Accordingly, “the Court also concluded that the Federal Arbitration Act preempts state law; and it held that state courts cannot apply state statutes that invalidate arbitration agreements.” *Id.*

Following the lead of the FAA, states have adopted their own arbitration statutes, many of them modeled after the Uniform Arbitration Act.⁴ Much like the FAA, the Uniform Arbitration Act generally provides for the validity of written agreements to arbitrate. *Nevers*,

⁴For an extensive list of General Arbitration Statutes for all states see, Ann. H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 PEPP.DISP.RES. L.J. 45, 66 n.157 (2000).

supra, at 66. In addition, some states have enacted statutes that address arbitration agreements in the specific context of medical services to patients. See Utah Code Ann. § 78-14-17 (2003). However, as set forth by the Court in *Southland Corp.* and *Allied-Bruce*, the FAA limits the extent to which state law and state courts can circumvent the stated purpose of the Act and restrict the rights of parties who have entered into arbitration agreements.

III. FAA PREEMPTION

A. Establishing the Scope of FAA Preemption.

There are two types of federal preemption of state law: complete preemption and conflict preemption. Where Congress has evidenced its intent to occupy a given field, any state law falling within that field will be completely preempted. *Pac. Gas & Elec., Co. v. State Energy Res. Conservator Dev. Comm'n*, 461 U.S. 190 (1983). On the other hand, conflict preemption occurs when compliance with both federal and state law is not literally possible or, “where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The Supreme Court has recognized that the FAA generates conflict preemption, inasmuch as it “contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1988). In fact, the FAA neither creates required arbitration procedures, nor confers jurisdiction on any particular court.⁵ Rather, the FAA, “simply requires [all] courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.” *Id.* at 478; *Perry v. Thomas*, 482 U.S. 483, 490-91

⁵ “The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 (1976 ed., Supp. IV) or otherwise.” *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 26 n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Nevertheless, the underlying issue of arbitrability under the Act is a question of substantive federal law that the Act governs in either state or federal court. *Southland Corp.*, 465 U.S. at 12 (citing *Moses H. Cone*, 460 U.S. at 24).

(1987). A state’s arbitration statute is only “preempted to the extent that it actually conflicts with federal law – that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.” *Id.* at 477, quoting *Hines v. Davidowitz*, 312 U.S. at 67. Therefore, where parties agree to abide by a state’s procedural rules for arbitration, the enforcement of those rules, as required by the terms of the parties’ agreement, is fully consistent with the FAA. *Volt Info. Sciences, Inc.*, 489 U.S. at 478-79.

B. Developing the Framework for FAA Preemption.

The purpose of the FAA is to compel courts to honor contractual covenants to arbitrate disputes, even in the face of state legislative efforts to restrict the enforceability of arbitration agreements. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987). The preemptive powers of the FAA are found in Section 2, which states:

A written provision in . . . 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.

9 U.S.C. § 2 (1999).

From the language of this provision, courts have developed a basic framework to determine whether the FAA compels the enforcement of the arbitration agreement in the face of state law: 1) is the agreement in writing; 2) does it involve interstate commerce, and 3) can it withstand scrutiny under traditional defenses to contracts (i.e., defenses of general application such as fraud, duress, unconscionability or lack of consideration). A second level of inquiry asks whether state law affects the enforceability of the parties’ arbitration agreement, or does it merely put in place procedural “hoops” through which a party must jump to enforce the arbitration agreement? FAA preemption of state law is determined by answering these questions.

1. Does the FAA Apply?

a) *Is the Arbitration Agreement In Writing?*

As noted above, the FAA is not self-executing. It does not define or specify the controversies that are subject to arbitration, it does not prescribe any mandatory procedures for arbitration, nor does it confer jurisdiction on any particular court to enforce its purpose. In short, the groundwork for arbitration must be found in the agreement of the parties, and by virtue of the express language of the FAA, the agreement to arbitrate must be in writing. 9 U.S.C. § 2 (1999); *see Comm. Metals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 264, 266 (5th Cir. 1978) (if a contract does not expressly provide for arbitration, then federal law does not require arbitration). In the absence of a written agreement the parties must look to state law to find the avenues available, if any, for arbitration.

b) *Does the Agreement of the Parties Involve Interstate Commerce?*

Section 2 of the FAA contains a second prerequisite to the application of the FAA to an arbitration agreement—a link to interstate commerce. Specifically, the Act only applies to [a] “written provision in . . . a contract evidencing a transaction involving commerce” 9 U.S.C. § 2 (1999). In the absence of an interstate commerce connection, the parties will again be relegated to the applicable state law on arbitration.

When considering whether a transaction is sufficiently connected to interstate commerce to trigger the FAA, the case of *Allied-Bruce, supra*, provides the blueprint. In *Allied-Bruce*, the Supreme Court specifically articulated its reasoning for construing the FAA to extend as far as the Commerce Clause of the United States Constitution will reach. *Allied-Bruce*, 513 U.S. at 273-74. In this case, the Supreme Court overruled an Alabama Supreme Court decision invalidating an arbitration agreement based on an Alabama statute. The Alabama court found that the FAA did not apply to preempt the Alabama Arbitration Statute because the connection

between the parties' contract and interstate commerce was too slight. *Id.* at 269. The Alabama Supreme Court reasoned that the FAA applies to contracts only if, "at the time [the parties entered into the contract] and accepted the arbitration clause, they *contemplated* substantial interstate activity." *Id.* (emphasis in original).

In overruling the Alabama Supreme Court, the United States Supreme Court broadly interpreted Section 2 of the FAA to apply to any contract evidencing a transaction that merely affects interstate commerce. *Id.* at 273-74. The transaction need only "involve" interstate commerce, even if the parties to the contract did not contemplate an interstate commerce connection. *Id.* at 281. The Supreme Court concluded the termite extermination contract involved interstate commerce. Among the factors mentioned by the Court were the multi-state nature of the franchiser and franchisee defendants, and the importation from out of state of the termite treating and house repair materials used by the franchisee defendant to carry out the terms of the contract. *Id.* at 282. Finding that the FAA did apply, the Supreme Court reversed the Supreme Court of Alabama and held that the Alabama arbitration statute was preempted. *Id.*

The more recent case of *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S.Ct. 2037 (2003) bolsters the broad sweep of *Allied-Bruce*. In *Alafabco*, the U.S. Supreme Court noted that it had previously "interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'--words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Id.* at 2040. Not only did the Court determine that the FAA "encompasses a wider range of transactions than those actually 'in commerce,'" it further held that the FAA applies to an individual transaction even if it does not have a substantial effect on interstate commerce, so long as, "in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.'" *Id.* (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

Based on the broad interpretation of the FAA in *Allied-Bruce* and *Alafabco*, nursing facility admission agreements are likely to “involve” interstate commerce as well. The recent opinion of the Supreme Court of Alabama in the case of *McGuffey Health and Rehab. Center v. Gibson*, 864 So.2d 1061 (Ala. 2003) is illustrative. In *McGuffey*, the sole issue was whether the admission agreement signed on behalf of the resident sufficiently affected interstate commerce so as to require the corresponding malpractice claim to be arbitrated in accordance with the arbitration provision in the admission agreement. *Id.* at 1061-62. In answering this question, the Alabama Supreme Court noted that various items used in providing care to the resident, including wheelchairs, hospital beds, cleaning supplies, laundry chemicals and food, moved in interstate commerce. *Id.* at 1062. In addition, the Court noted that Medicare funds that originated with the federal government flowed in interstate commerce before being paid to the facility for the services provided to the resident. *Id.* at 1063. The Court considered these factors sufficient under the FAA to require the parties to submit their dispute to arbitration. *See also Briarcliff Nursing Home, Inc. v. Turcotte*, 2004 WL 226087 *1, *5 (Ala. 2004) (finding the requisite effect on interstate commerce was established by the facility’s out-of-state corporate offices; residents from other states; supplies and medications shipped from other states; and the fact that the care of the two residents was reimbursed through the Medicare program).⁶ Accordingly, virtually all nursing home arbitration contracts should meet the "involving-interstate-commerce" test to trigger FAA preemption.

⁶ Note that any accreditation or certification for nursing homes by a national association or the federal government would also support the interstate commerce connection and the applicability of the FAA. *See In Re Mgt. Corp.*, 14 S.W.3d 418, 423-24 (Tex. Educ. App.—Houston [14th Dist.] 2000, no pet.) (holding that a school’s enrollment agreement involved interstate commerce where, among other things, the school was accredited through out-of-state agencies).

c) ***Is the Agreement to Arbitrate Vulnerable to Attack Under General State Contract Law?***

The most fertile ground for defeating the broad scope of the FAA is found in the last clause of Section 2, wherein the Act allows for the possibility that an arbitration agreement may be invalidated for those reasons that “exist at law or in equity for the revocation of any contract”, generally. 9 U.S.C. § 2 (1999). That is to say, general contract defenses, such as fraud, duress or unconscionability can be applied by courts to invalidate arbitration agreements without conflicting with Section 2 of the FAA. *Doctor’s Assoc. v. Casarotto*, 517 U.S. 681, 687 (1996). However, state laws will be preempted if they apply to only arbitration provisions. The practical effect of Section 2 of the FAA is to preclude states from singling out arbitration provisions and placing them on a different footing than other contracts. *Id.*

(1) The Existence of an Agreement to Arbitrate

Notwithstanding the FAA's underlying policy favoring arbitration, it is important to understand that the policy does not override the fundamental determination of whether there is a valid agreement to arbitrate in the first instance. *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003).

"Because the FAA is at bottom a policy guaranteeing the enforcement of private contractual arrangements, we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement." In determining whether an agreement to arbitrate exists, we apply "ordinary contract principles."

Id. (citations omitted). In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), the Supreme Court reiterated the principal that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (quoting *Steelworkers v. Werner & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). This "gateway" inquiry as to whether the parties are bound by a given arbitration clause raises the "question of arbitrability," which is an issue for the court, not the arbitrator, to decide. *Samson*, 352 F.3d at 217 (citing

Howsam, 537 U.S. at 84 (stating that the "question of arbitrability" is an issue for judicial determination unless the parties clearly provide otherwise)). In short, when there is a dispute as to the very existence of an agreement that contains an arbitration provision, such as where a party contends an agreement was not signed, or the signature was forged, or that an agent lacked authority to bind a principal, the court must resolve at the outset whether an agreement was reached between the parties by applying state law principles of contract. *Samson*, 352 F.3d at 218-19.

(2) The Separability Doctrine

When the debate turns not on whether the parties entered an agreement, but on whether the agreement, or parts thereof, including the arbitration clause, are void or voidable based on general contract law defenses such as fraud, duress or unconscionability, the Separability Doctrine comes into play. See David Zukher, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 162 (1998). The Separability Doctrine is a legal fiction which assumes that the creation of a contract containing an arbitration clause actually constitutes the formation of two separate agreements: the principal agreement and a fictional contract consisting of just the arbitration clause. *Id.* (citations omitted). By virtue of the Separability Doctrine, a party's challenge to the principal contract does not equate to a challenge of the fictional arbitration clause. *Id.* To the contrary, a general common law contract defense, such as lack of consideration, that attacks the validity of the principle agreement will be decided by applying the fictional arbitration clause; that is, by submitting enforceability of the principal agreement to arbitration. *Id.*; see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967). On the other hand, the Separability Doctrine dictates that a, "court may hear an unconscionability challenge if that challenge is directed to the arbitration clause only, and to no

other provisions of the principal agreement or the principal agreement generally.” *Prima Paint Corp.*, 388 U.S. at 402. In this way, an arbitration agreement is subject to state contract defenses such as fraud, duress or unconscionability, without contravening the FAA. *Id.* (*citations omitted*).

The Separability Doctrine is best explained by example. Suppose a resident signed an admission contract containing an arbitration agreement for the provision of long term care services by a nursing home. The resident lives in the home for several months, but eventually stops paying because he is unhappy with the care provided. The home, trying to resolve the matter quickly, notifies the resident that it is invoking the arbitration provision. In response, the resident files a lawsuit to rescind the admission contract, alleging it is void because the home fraudulently represented that it would deliver services that it knew it could not provide; but in so doing, the resident does not assert any separate basis to invalidate the arbitration provision. Under these circumstances the Separability Doctrine dictates that the resident’s contract defense of fraud in the inducement is to be decided in the arbitration. *See id.* at 403-04; *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002). On the other hand, had the resident asserted that the arbitration provision itself was invalid on the basis of unconscionability (or some other common law contract defense), the court would determine whether the arbitration agreement was enforceable. If the arbitration agreement was indeed unconscionable, the resident’s suit could proceed.

(3) The Non-Signatory Resident – A Common Potential Problem.

Under basic contract law, mutual assent between the parties as to essential terms is a requisite of a valid agreement. As alluded to above, challenging this essential element to the formation of a contract based on the lack of the authority of an agent to act for a principal is one avenue to by-pass potential FAA preemption issues, and one that is particularly noteworthy in the nursing home context. Often when a resident is admitted to a nursing facility, a spouse or

other family member signs the resident's admission documents that contain the arbitration agreement. Thus, the question arises as to whether the resident has agreed to arbitrate disputes through an agreement the resident did not sign.

In a number of recent cases, courts have declined to require arbitration because the admission agreement was not actually signed by the resident. In one such case, *Pagarigan v. Libby Care Ctr., Inc.*, 99 Cal.App.4th 298, 300, 120 Cal.Rptr.2d 892 (2002), the heirs of a deceased resident, who was comatose at the time she was admitted to the nursing facility, sued the facility for her wrongful death. The facility sought to compel arbitration based on arbitration agreements signed by the resident's daughters after the woman was admitted to the nursing facility. *Id.* The trial denied the facility's request for arbitration. On appeal, the appellate court affirmed the trial court's ruling because the facility had "failed to produce any evidence [the daughters] had authority to enter into an arbitration contract on behalf of their mother." *Id.* at 300-301. According to this California Court,

[a] person cannot become the agent of another merely by representing herself as such. To be an agent she must actually be so employed by the principal or "the *principal* intentionally, or by want of ordinary care, [has caused] a third person to believe another to be his agent who is not really employed by him."

Id. at 301-02 (emphasis added by *Pagarigan* Court) (quoting CAL. CIV. CODE § 2300 (2002)). In *Pagarigan*, there was not evidence that the resident had signed a durable power of attorney, and the facility could not otherwise meet its burden to show the daughters had been given the authority to legally bind the resident to the agreement. *Id.* at 302 The court also rejected the facility's argument that California statutes that gave an incompetent resident's next of kin the authority to consent to medical procedures and to enforce the nursing home's bill of rights, were also sufficient legal authority to establish the right of the next of kin to sign an arbitration agreement on behalf of the resident at the request of the nursing home. *Id.*

The same result was reached in the subsequent case of *Phillips v. Crofton Manor Inn*, 2003 WL 21101478, Cal.App. 2 Dist. - May 15, 2003 (unpublished opinion) wherein the appellate court accepted the reasoning of the court in *Pagarigan* to reject the facility's bid for arbitration. In addition, the *Phillips* Court rejected the facility's argument that the next of kin's durable power of attorney for health care decisions granted sufficient legal authority to enter a binding arbitration agreement on the resident's behalf, given that it was "a limited power of attorney, and that [the daughter had] made only health care decisions pursuant to such authority." *Id.* at *5.

Likewise, the recent case of *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, 2003 WL 23094413 (Tenn.Ct.App. – Dec. 30, 2003), placed the burden on the facility to establish the clear legal authority of a person signing an arbitration agreement to bind the resident. In *Raiteri*, the admission agreement was signed by the resident's husband, "even though [the resident] had not been diagnosed or adjudicated as mentally incompetent," *Id.* at *1, and there was undisputed testimony that she was "fine mentally" and "very competent." *Id.* at *2. As a result, the appellate court held that the arbitration agreement was not enforceable because the resident's husband "did not have the actual or apparent authority to bind [his wife] to the alternative dispute resolution provisions in the admission agreement." *Id.* at *9. *See also* *Milon v. Duke Univ.*, 559 S.E.2d 789 (2002) (wherein the North Carolina Supreme Court reversed the Court of Appeals because the facility had failed to prove that the plaintiff's wife had the apparent authority to bind him to an arbitration agreement). It is important to note that the resident in *Raiteri* was undisputedly competent and able to make her own decisions. The court seemed to leave the door open for the signature of an agent in the case of a patient who could not make his or her own decisions.

In the very recent case of *Briarcliff Nursing Home, Inc. v. Turcotte*, *supra*, the Alabama Supreme Court walked through a different door in ruling that the estates of two deceased nursing

facility residents were obligated to arbitrate their wrongful death claims against the facility. In *Turcotte*, the plaintiffs brought statutory wrongful death claims in the names of the deceased residents based on alleged breaches of the duties owed to the residents by the nursing home. *Turcotte*, 2004 WL 226087 *1, *1 (Ala. 2004). Briarcliff moved to compel binding arbitration on the ground that the agreements containing the arbitration provision were signed by the residents' agents as "Fiduciary Party" and "Attorney-in-Fact." *Id.* at *1. Plaintiffs opposed the motions on the grounds that at the time they signed the agreements as "fiduciary parties," they could not contractually affect wrongful-death claims that had not yet accrued. *Id.* However, the majority ruled that the agreements were binding on the wrongful death claims since, under the state's wrongful death statute, a wrongful death claim could be brought only if the deceased "could have commenced an action for such wrongful act, omission, or negligence if it had not caused death." *Id.* at *3. The Court also pointed out that the estates, by alleging a breach of duty by the nursing facility, were seeking to enforce a duty established by the admission agreement.

Based on this recent trend to scrutinize the authority of an agent to sign agreements for a resident, if a nursing home expects to enforce its arbitration agreement, it must be diligent about getting the agreement signed by the resident, if competent to do so, or by an agent fully authorized under the relevant state law to make such agreements for the resident.⁷ Having done so, the nursing home should be able to enforce the arbitration agreement as to all claims of the resident and any other claimant whose claims arise through the resident.

(4) Contract of Adhesion and Unconscionability.

The starting point for many direct challenges of an arbitration agreement is that it constitutes a contract of adhesion. A contract of adhesion is generally identified as a standardized

⁷ "[A] nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principals of contract and agency." *Wash. Mut. Fin. Group, LCC v. Bailey*, 2004 WL 541837 *1, *5 (5th Cir. 2004).

contract form, offered to a consumer on a take it or leave it basis without affording the consumer a realistic opportunity to bargain so that the consumer does not have the choice to accept or refuse it. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. d (1981). Contracts between patients and medical services providers tend to fit this general description. It can be argued that, because a resident seeking admission to a nursing home typically is not seeking urgent or emergency care, and thus, has greater inherent ability to shop for long term care services, the nursing home admission agreement is less suited for the adhesion contract label. *See Sanchez v. Sirmons*, 467 N.Y.S. 2d 757, 759 (1983) (finding that an arbitration agreement did not constitute a contract of adhesion where the patient was “not confronted with a medical emergency [and] could have obtained the elective abortion elsewhere”). *But see Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 735 (Tenn. App. 2003) (wherein the Court considered the fact that the resident had to be admitted "expeditiously" as one factor militating against enforcement). Nevertheless, a facility including an arbitration clause in a nursing home admission contract should certainly anticipate an allegation that it constitutes a contract of adhesion. The real issue is whether the arbitration agreement is “unconscionable” under state contract law of general application as applied to the specific circumstances of the agreement in question.

Some courts have broken the subject of unconscionability into two parts: procedural unconscionability (which overlaps the adhesion contract concept) and substantive unconscionability. *Consol. Res. v. Fenelus*, 853 So.2d 500, 504-05 (Fla. Distr. Ct. App. 2003); *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So.2d 59, 62 (Fla. Dist. Ct. App. 2003). “Procedural unconscionability relates to the manner in which the contract was entered, including issues such as relative bargaining power and the parties' ability to understand the disputed terms, while substantive unconscionability refers to the fairness of the terms of the agreement itself.” *Fenelus*, 853 So.2d at 504-05. “Most courts take a 'balancing approach' to the unconscionability

question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability.” *Manor Care, Inc.*, 861 So.2d at 62.

But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.

Id. (citing 15 WILLISTON ON CONTRACTS § 1763A, pp. 226-227 (3d ed. 1972)).

The courts clearly deal with the subject of “unconscionability” on a case-by-case basis, but there are identifiable trends in what factors courts use to validate or invalidate an arbitration agreement. In the healthcare context, the case of *In Obstetrics & Gynecologists Wixted v. Pepper*, 693 P.2d 1259 (Nev. 1985), provides one of the first examples of the approach courts take in answering the question of unconscionability. In *Pepper*, the Nevada Supreme Court upheld a trial court ruling that invalidated a physician-patient arbitration agreement on common-law grounds applicable to contracts in general, albeit not in the context of possible FAA preemption. In *Pepper*, the patient, in accordance with the standard procedures of the clinic, signed an arbitration agreement and completed two other forms prior to receiving a medical examination. *Id.* at 1260. The clinic staff would answer questions, but the patient did not recall anyone explaining the arbitration agreement to her. *Id.* The Court found significance in the fact that the arbitration agreement provided no opportunity for the patient to reflect upon and revoke her consent, thereby forever giving up her right to a jury trial once the agreement was executed. *Id.* The Court viewed the arbitration agreement as an adhesion contract, and upheld the lower court’s order invalidating the arbitration agreement because the patient was not alerted to the

agreement or its consequences, so that her informed consent was not offered and no meeting of the minds occurred. *Id.* at 1261.

In *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013 (Az. 1992), the Arizona Supreme Court followed the lead of the Nevada Supreme Court in *Pepper, supra*, in considering the enforceability of a physician-patient arbitration agreement. In making its determination, the Arizona Supreme Court specifically declined to issue a “bright-line” rule regarding the enforceability of all arbitration agreements. Instead, this court looked to the undisputed facts of the particular case before it. *Id.* at 1015. Although the court found the agreement to be an adhesion contract, it noted this was “not, of itself, determinative of its enforceability.” *Id.* at 1016. Instead, the court looked to two judicially imposed and related limitations on adhesion contracts: whether the agreement exceeds the reasonable expectations of the parties; and, whether it is unconscionable. *Id.* Applying this test to the facts presented, the Arizona Supreme Court held the arbitration agreement was not valid because it exceeded Broemmer’s reasonable expectations. *Id.* at 1017.

In its analysis, the *Broemmer* court recited a number of factors it viewed as supporting its conclusion. The plaintiff was given three separate forms to complete and return before undergoing an abortion procedure (including the agreement to arbitrate any dispute arising out of treatment), which she returned in less than five minutes. *Id.* at 1014-15. The agreement required any arbitrators be licensed medical doctors specializing in obstetrics/gynecology. *Id.* at 1014. Plaintiff did not receive any guidance from the clinic staff on what the arbitration clause meant, whether it was required for treatment, or any notice that an arbitration agreement even existed. *Id.* at 1017. The court also noted that the plaintiff was under a great deal of emotional stress, had only a high school education, and was not experienced in commercial matters. *Id.* Under these

specific circumstances, the court concluded that the arbitration agreement fell outside the plaintiff's reasonable expectations and was unenforceable. *Id.*

Of course, not all Courts have found such arbitration agreements to be unconscionable and unenforceable. An important case in this regard is *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996), wherein the Tennessee Supreme Court upheld the enforceability of arbitration agreements between physicians and patients under Tennessee's version of the Uniform Arbitration Act, the enforcement provision of which parallels Section 2 of the FAA.⁸ *Buraczynski* is important in at least two respects. First, the court rejected the notion that physician-patient arbitration agreements are *per se* violative of public policy.⁹ In doing so, the court pointed to the state arbitration act itself as evidence of the legislative policy favoring enforcement of such agreements. *Id.* at 318-19. The court also opined that "arbitration is as advantageous in [the unique physician-patient] relationship as in any other." *Id.* at 319.

Second, the *Buraczynski* court reinforced the view that an arbitration contract is enforceable, even if it is deemed a contract of adhesion, so long as its terms do not exceed "the reasonable expectations of an ordinary person, [and are not] oppressive or unconscionable." *Id.* at 320 (citing *Broemmer*, 840 P.2d at 1026). In distinguishing the agreements before it from the agreements before other courts, such as the *Broemmer* court that had refused to enforce arbitration, the *Buraczynski* court catalogued those features that may separate enforceable arbitration agreements from unenforceable ones.

The Tennessee court identified common themes in those cases striking down physician-patient arbitration agreements, noting that courts are reluctant to enforce such agreements when

⁸Specifically, the Tennessee statute provided that "a written agreement ... 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.**" TENN. CODE ANN. § 29-5-302(a), (emphasis added).

⁹*See Cons. Res. v. Fenelus*, 853 So.2d 500, 505 (Fla. Dist. Ct. App. 2003) (unconscionability is not established by mere act of including an arbitration clause in nursing home admission paperwork).

they are hidden within other provisions and do not afford the patients an opportunity to question the terms or purpose of the agreements. *Buraczynski*, 919 S.W.2d at 321. “This is so particularly when the agreements require the patient to choose between forever waiving the right to a trial by jury or forgoing necessary medical treatment, and when the agreements give the health care provider an unequal advantage in the arbitration process itself.”¹⁰ *Id.*

The *Buraczynski* court then listed a number of aspects of the agreement before it that, in the court’s view, established the arbitration agreement was not “unconscionable, oppressive, or outside the reasonable expectations of the parties.” Some of these are as follows:

- (1) The agreements were not contained within a clinic or hospital admission contract, but were separate, one page documents;
- (2) A short explanation was attached to each document which encouraged the patient to discuss questions about the agreements;
- (3) The arbitration procedure specified by the agreements did not favor the provider;
- (4) The patient was clearly informed of the provision in ten-point capital letter red type, directly above the signature line, that “by signing this contract you are giving up your right to a jury or court trial” on any medical malpractice claim;
- (5) The agreements contain no buried terms;
- (6) Patients signing these agreements could revoke the agreements for any reason within thirty days of its execution; and
- (7) Finally, and perhaps most importantly, the agreements did not change the doctor’s duty to use reasonable care in treating patients, nor limit liability for breach of that duty, but merely shifted the disputes to a different forum.

Id. Finally, the court also found in the mutual promises of the parties, adequate consideration to support the agreements. *Id.* at 321, n.6.

¹⁰Examples to which the *Buraczynski* court had previously pointed in this regard included the unilateral right to reject the arbitrator’s decision, *Beynon v. Garden Grove Medical Group*, 100 Cal. App. 3d 698 (Cal. App 1980), and the requirement that all arbitrators be physicians specializing in the same practice area. *Broemmer*, 840 P.2d at 1014.

If the *Buraczynski* list serves as a road map for successfully drafting and presenting an arbitration agreement to a resident or her representative, two subsequent Tennessee appellate cases shed some additional light on the opposite path in the context of nursing home arbitration agreements. In *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731 (Tenn. Ct. App. 2003), the court found that a number of facts and circumstances surrounding the execution of the agreement demonstrated that the parties had neither bargained for the arbitration terms nor had they been *within the reasonable expectations of an ordinary person*. *Id.* at 735. The more recent case of *Raiteri v. NHC Healthcare/Knoxville, Inc.*, 2003 WL 23094413 (Tenn. Ct. App. – Dec. 30, 2003), relied on *Howell* in refusing to enforce a nursing home arbitration agreement, and cataloged the *Howell* factors as follows:

- (1) the agreement was eleven pages long and the mediation and arbitration provisions were on page ten;
- (2) the arbitration and mediation provisions were " 'buried' " in the larger admission agreement, "[r]ather than being a stand-alone document";
- (3) the arbitration and mediation provisions were printed in the same font size as the other text in the agreement;
- (4) "the arbitration paragraph does not adequately explain how the arbitration procedure would work, except as who would administer it";
- (5) the patient had to be admitted in a nursing home "expeditiously" and the admission agreement had to be signed first;
- (6) the admission agreement was presented to the patient's husband on a "take-it-or-leave-it" basis;
- (7) the patient's husband "had no real bargaining power"; and

- (8) the patient's husband could not read and the nursing home representative did not "adequately" explain the provision that waived the patient's right to a jury trial.¹¹

Id. at *7 (citing *Howell*, 109 S.W.3d at 734-35).

Additional factors that have influenced courts with respect to unconscionability include the location specified by the agreement for the arbitration and the limitation of the remedies provided by the arbitration agreement versus those available by statute. In this regard, in the case of *Northport Health Servs. v. Raidoja*, 851 So.2d 234 (Fla. Dist. Ct. App. 2003), the court held that an arbitration clause that calls for arbitration to take place in a foreign jurisdiction is not enforceable. In *Romano Ex. Rel. Romano v. Manor Care, Inc.*, 861 So.2d 59 (Fla. Ct. App. 2003) the court focused on the “substantive” inequity between the rights afforded a nursing home resident under then-existing Florida statutory law, and the limited remedies provided via the arbitration agreement, particularly with respect to attorney’s fees and punitive damages. Because the “arbitration agreement would not vindicate the resident's statutory rights in any respect,” *Manor Care, Inc.*, 861 So.2d at 63, the court found the agreement to be substantively unconscionable. In view of these decisions, whether or not they are totally justified in terms of potential FAA preemption, nursing homes should make an effort to avoid these pitfalls in drafting their own agreements.

Finally, it is important to understand that the list of factors the *Buraczynski* court cited as favoring the arbitration agreement was **not** presented by the court as the minimum criteria for an enforceable arbitration agreement under Tennessee's version of the Uniform Arbitration Act. It is merely a recitation of factors that satisfied the court that the arbitration agreement before it

¹¹Note that while the court criticizes the approach taken by the home’s representative in explaining the agreement to the husband, it also expressly stated that the fact the husband could not read did not excuse him from the contract. *Howell*, 109 S.W.3d at 735. *See also, Wash. Mut. Finance Group, LLC v. Bailey*, 2004 WL 541837 at *3 (under Mississippi law, the inability to read and understand the arbitration agreement does not render the agreement unconscionable or otherwise unenforceable); *Consol. Res. Healthcare Fund I, Ltd. V. Fenelus*, 853 So.2d 500, 504 (Fla. Ct. App. 2003) (a party is bound by the nursing home admission agreement he signs unless he was prevented from reading it or induced by the nursing home to refrain from reading it).

passed muster with respect to applicable contract rules. Clearly, some of the listed elements would be subject to preemption by the FAA because they are not required to enforce contract provisions in general. However, as a practical matter, the more obvious and even-handed an arbitration provision appears to a reviewing court, the less likely a court may be tempted to search for reasons under “general contract law” to avoid preemption.

2. Does the State Statutory Law Frustrate the FAA’s Purpose?

As discussed above, the FAA casts a wide net in the arbitration arena, limiting the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration. *Doctor’s Assoc. v. Casarotto*, 517 U.S. 681, 684 (1996). State law, whether legislative or judicial in origin, is applicable if that law arose to govern issues concerning the validity, revocability and enforceability of all contracts generally. *See* 9 U.S.C. § 2 (1999). However, a state law that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with the text of Section 2 of the FAA. *Doctor’s Assoc.*, 517 U.S. at 685. Therefore, courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions. *Id.* at 687. States may not decide that a contract is fair enough to enforce all its basic terms, for example price, service and credit, but not fair enough to enforce its arbitration clause. The FAA makes any such state policy unlawful because, contrary to the FAA’s language and Congress’ intent, that kind of policy would place arbitration clauses on an unequal footing. *Id.* at 686.

This distinction is best illustrated by comparing two United States Supreme Court cases; *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford, Jr. Univ.*, 489 U.S. 468 (1988), and *Doctor’s Assoc. v. Casarotto*, 517 U.S. 681 (1996). *Volt Info.* involved an arbitration agreement that incorporated state procedural rules that allowed an arbitration to be stayed pending the

resolution of a related judicial proceeding; compared with *Doctor's Assoc.* wherein the issue focused on a Montana arbitration statute that would invalidate the parties arbitration agreement.

In *Volt Info.*, Stanford University (“Stanford”) entered a contract with Volt Information Sciences, Inc. (“Volt”) under which Volt was to install electrical conduit on the Stanford campus. *Volt Info.*, 489 U.S. at 470. The construction contract contained an arbitration agreement that imposed California state law, including California’s arbitration statute. *Id.* After a dispute arose between these parties, Volt made a demand for arbitration. *Id.* Stanford responded by filing an action against Volt in California state court. *Id.* at 470-71. In this same action, Stanford also sought indemnity from two other parties who were not a party to the Stanford/Volt construction contract. *Id.* at 471. Volt petitioned the state court to compel arbitration. Stanford then sought to stay arbitration under California’s arbitration statute. The statute in question permitted arbitrations to be stayed pending the resolution of related state court actions. *Id.* The state court sided with Stanford, and stayed arbitration. *Id.*

The Supreme Court determined that the FAA does not prevent the enforcement of arbitration agreements under different rules than those set forth in the Act itself. *Volt Info.*, 489 U.S. at 479. The FAA permits parties to structure their arbitration agreements as they see fit, just as they can limit other issues in a contract. *Id.* It follows that the parties may specify by contract the rules by which an arbitration will be conducted, and in *Volt Info.*, the parties agreed to abide by the California Rules of Arbitration. The California rule that stayed arbitration pending the disposition of the related judicial proceedings did not affect the enforceability of the arbitration agreement itself. Accordingly, the *Volt Info.* decision ensured that the parties’ private agreement regarding arbitration was enforced according to its terms. Therefore, the Court in *Volt Info.* found that the FAA did not preempt California’s arbitration statute. *Volt Info.*, 489 U.S. at 478.

The other guiding case, *Doctor's Assoc.*, addressed whether the FAA preempted a Montana statute that required a notice that a contract is subject to arbitration be typed in underlined capital letters on the contract's first page for the contract to be subject to arbitration. *Doctor's Assoc.*, 517 U.S. at 684. The Supreme Court noted that the application of the Montana statute would not facilitate the arbitration clause between the parties to the contract; to the contrary, the statute would invalidate the clause. Since the Montana statute placed arbitration agreements in a class apart from "any contract" and singularly limited the validity of arbitration agreements, the Court held that Montana's statute was inconsistent with and therefore preempted by the FAA. *Id.* at 688.

Although subtle, the lesson to be learned by comparing these two cases is simply that a state arbitration statute that merely establishes the rules under which a party's agreement to arbitrate is to proceed, even if it will delay an arbitration, does not run afoul of the FAA's purpose. However, those state arbitration statutes, that place arbitration clauses on "unequal footing" by subjecting such clauses to requirements not applied to contracts in general contravene the Act's language and Congress' intent, and are subject to FAA preemption.

3. Applying the FAA to a State Medical Liability Arbitration Statute

A case that specifically addresses FAA preemption of a state's special medical liability arbitration statute is *Morrison v. Colo. Permanente Med. Group*, 983 F. Supp. 937 (D. Colo. 1997). In *Morrison*, the plaintiffs brought fifteen claims against the medical providers relating to the treatment of the plaintiffs' deceased relative. *Id.* at 939. The defendants moved to dismiss plaintiffs' state claims for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). *Id.* In support of this contention, the defendants relied upon an arbitration provision contained in the group health plan in which the decedent was enrolled at all times relevant to the action. The defendants contended that the arbitration provision in the group plan

was a bar to the court's jurisdiction. *Id.* at 942. The plaintiffs responded that the arbitration clause was invalid under the Colorado Health Care Availability Act, Section 13-64-403 ("CHCAA"), thereby conferring the court with subject matter jurisdiction. *Id.*

The Colorado statute in question required specific statutory language be printed in every arbitration agreement in at least ten-point bold type. *Id.* It was undisputed that the arbitration provision of the plan did not contain the statutorily required language. *Id.* at 943. The Colorado Federal District Court noted that the Colorado Supreme Court had already found the arbitration provision in question to be void and unenforceable as a matter of law because it did not comply with the CHCAA. *Id.* (citing *Colo. Permanente Med. Group, P.C. v. Evans*, 926 P.2d 1218 (Colo. 1996)). However, the issue of FAA preemption was neither raised, nor addressed by the Colorado Supreme Court in *Evans*.

The defendants argued that the hospital service agreement constituted a "transaction involving commerce" because the agreement provided for medical services to its members in states other than Colorado. Additionally, the performance of the agreement involved the purchase and shipment of medications and supplies, the acquisition of building materials and the performance of laboratory tests, along with the recruitment of physicians, all of which involved out of state sources. *Id.* Accordingly, defendants argued the FAA would apply to preempt the state statute that invalidated the parties' arbitration provision. *Id.*

The district court noted that Colorado's Uniform Arbitration Act placed no text or form limitations on generic arbitration agreements. However, the CHCAA placed arbitration clauses in medical service agreements in a class apart, not only from any "contract," but also from all other arbitration agreements. *Id.* The practical effect was that the CHCAA "singularly limits their validity," and is therefore inconsistent with and preempted by the FAA. In reaching this

determination, the Colorado District Court relied heavily on the United States Supreme Court case of *Doctor's Assoc., supra*.

Another case that provides some guidance, although not directly on point, is *Erickson v. Aetna Health Plans of Cal., Inc.* 71 Cal. App. 4th 646 (Cal. App. 1999), which addressed the issue of FAA preemption in a health insurance contract. In *Erickson*, defendant Aetna offered a replacement to Medicare called “Senior Choice” pursuant to an agreement it had with the Federal Health Care Financing Administration. *Id.* at 649. The plaintiff, Mr. Erickson, was enrolled in Senior Choice. When a dispute arose over coverage, Erickson brought suit against Aetna, to which Aetna responded by moving to compel arbitration under an arbitration provision contained in the Senior Choice handbook. *Id.* at 649. The trial court found that the arbitration clause was ambiguous under California law and failed to comply with the disclosure requirements of California Health and Safety Code Section 1363.1. Accordingly, the trial court denied Aetna’s motion to compel arbitration. *Id.* at 650.¹²

It was undisputed that Aetna’s arbitration clause did not comply with the specific disclosure requirements of Section 1363.1. It would therefore be invalid unless Section 1363.1 was preempted by the FAA. *Id.* at 650. To resolve this issue, the Court turned first to the issue of whether the Senior Choice Plan involved sufficient interstate commerce to effectuate the FAA. The Court focused on the fact that coverage under the Aetna plan was available to only Medicare patients pursuant to a contract with the federal government and that the patients pay for the coverage through Social Security deductions or payments to Medicare. *Id.* at 651. This court recognized that “in an analogous context, it has been held that a health care provider’s treatment of Medicare patients, receipt of reimbursement from Medicare, and purchase of out-of-state

¹²California Health and Safety Code Section 1363.1 states that an arbitration clause in a health care service plan must incorporate various disclosures, including a clear statement of “whether the subscriber or enrollee is waiving his or her right to a jury trial” *Erickson* 71 Cal. App. 4th at 650.

medicines and supplies constitutes being engaged in interstate commerce for purposes of the Sherman Act.” *Id.* (citations omitted). Accordingly, the court concluded that Aetna’s plan involved interstate commerce.

Relying on the United States Supreme Court’s analysis in *Doctor’s Assoc. supra*, the California Court of Appeals next determined that Section 1363.1 imposes special notice requirements on arbitration clauses and health care plans that are not applicable to contracts generally. *Id.* at 652. That is “health care arbitration clauses [under Section 1363.1] must satisfy special requirements as to form and content which are not imposed on contracts generally, . . . thus Section 1363.1 ‘takes its meaning precisely from the fact that a contract to arbitrate is at issue . . . ,’” and therefore it conflicts with Section 2 of the FAA. *Id.* (citing *Doctor’s Assoc.* 517 U.S. at 685). There being no state law contract defense that would invalidate the arbitration clause in the Senior Choice Plan, Section 1363.1 was preempted by the FAA and it was improper for the trial court to deny Aetna’s motion to compel arbitration. *Id.* at 659.¹³

C. The FAA and Medicare/Medicaid Funding Statutes and Regulations.

The final issue that was addressed in our first look at the FAA was the possibility that arbitration agreements run afoul of the terms of the relevant Resident Rights and Admission statutes and regulations for long term care facilities.

The Resident Rights provision at 42 C.F.R. 483.10(c)(8)(iii)(B) (2003), states that a “facility must not require a resident (or his or her representative) to request any item or service as a condition of admission or continued stay.” In addition, the Admission regulations at 42 C.F.R. 483.12 (d)(3) (2003), provide that,

¹³ However, California Courts have since concluded that the McCarran-Ferguson Act (15 U.S.C. § 1011 et seq.) operates to prevent the FAA from preempting application of Section 1363.1 to preclude enforcement of a health care plan arbitration provision. *Zolezzi v. PacifiCare of Cal.*, 129 Cal.Rptr.2d 526, 539 (Cal. Ct. App. 2003).

in the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any . . . other consideration as a precondition of admission, expedited admission or continued stay in the facility.

These regulations do not stand as an impediment to an arbitration agreement, so long as admission to a facility is not conditioned upon the signing of such an agreement.

On January 9, 2003, the Department of Health & Human Services, Centers for Medicare & Medicaid Services issued S&C-03-10 to the State Survey Agency Directors to address the subject of binding arbitration in nursing homes. The letter states as follows:

Under Medicare, whether to have a binding arbitration agreement is an issue between the resident and the nursing home. Under Medicaid, we will defer to State law as to whether or not such binding arbitration agreements are permitted subject to the concerns we have where Federal regulations may be implicated.

A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. §483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident. None of the conditions specified in the regulation permit a facility to discharge or transfer a resident based on his or her failure to comply with the terms of a binding arbitration agreement. Additionally, a facility that retaliates against a resident who fails to sign or comply with the agreement is subject to an enforcement response based on its failure to comply with the obligation to furnish an abuse free environment under 42 C.F.R. §483.13(b) or other requirements bearing on the facility's obligation to provide quality care to all residents. The existence of a binding arbitration agreement does not in any way affect the ability of the State survey agency or CMS to assess citations for violations of certain regulatory requirements, including those for Quality of Care.

Dept. of Health & Human Servs. Ctrs. For Medicare & Medicaid Servs., S & C-03-10, available at www.cms.hhs.gov/medicaid/survey-cert/sc0310.pdf (last visited May 3, 2004) (on file with author). Accordingly, if a long-term care facility avoids making the arbitration agreement a condition of admission, it should also avoid any possible conflict with the above Medicare/Medicaid statutes and regulations.

CONCLUSION

The wholesale use of arbitration provisions in admission contracts is destined to draw the attention of and the wrath of those intent on using litigation to profit from the patient care challenges facing the long term care profession. The FAA offers reasonable hope that individual facilities can implement reasonable arbitration provisions despite the anticipated protests. Further, it is clear that attempts to legislatively or judicially bar the use of such agreements, should be preempted by the FAA.

Common law contract principals for each respective state will determine if arbitration agreements are enforceable generally. Accordingly, a facility should seek to minimize the possibility of having a court circumvent the FAA and its arbitration agreements, by incorporating as many of the practices cited with approval by the *Buraczynski* court, *supra*, as is reasonably possible. Doing so will establish that a resident's consent to pre-dispute arbitration was informed and voluntary, and thus, avoid the potential roadblock presented by a court's use of contract defenses of general application to avoid FAA preemption.

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