

**THE ENFORCEABILITY OF
ARBITRATION AGREEMENTS IN LONG-TERM CARE:
FEDERAL PREEMPTION AND STATE LAW CHALLENGES**

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THE ENFORCEABILITY OF ARBITRATION AGREEMENTS IN LONG-TERM CARE: FEDERAL PREEMPTION AND STATE LAW CHALLENGES

Jane Bello Burke

I. ARBITRATION AGREEMENTS IN LONG-TERM CARE

A. Arbitration Generally

1. An arbitration agreement, as used in the long-term care context, requires disputes between a resident and the nursing home to be resolved through binding arbitration.
2. The arbitration agreement does not deprive the parties of a process, but instead designates a forum that is alternative to and independent of the judicial forum.

B. Advantages of Arbitration

1. Arbitration is a speedy and relatively inexpensive means of dispute resolution which eases court congestion. *See Gross v. Recabaren*, 206 Cal. App. 3d 771 (Cal. Ct. App. 1988). Courts favor and encourage arbitration “as a means of conserving the time and resources of the courts and the contracting parties.” *See, e.g., Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39 (N.Y. 1997).
2. Arbitration does not prevent parties from obtaining compensation for civil wrongs, but simply provides a different (and some would argue more accessible) forum for dispute resolution.
3. In specialized subject areas, the institutional knowledge of the arbitral forum can result in greater efficiency in resolving disputes.

C. Obstacles to Arbitration

1. Early English common law courts, out of “jealousy . . . for their own jurisdiction,” refused to enforce arbitration agreements. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984) (citing H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).
2. Courts in some states continue to disfavor arbitration. *See McGuinness & Karr*, “California’s ‘Unique’ Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act,” 2005 J. DISP. RESOL. 61 (2005). Typically, as discussed below, these courts couch their judicial hostility in terms of “unconscionability,” lack of authority, and public policy objections. This can

result in threshold litigation, even before the arbitration begins, on the issue of arbitrability, increasing the expense and length of the process.

3. Individuals may fear arbitration, largely because it is unknown and unfamiliar. They may assume that arbitration provides a less-than-adequate substitute for a jury trial or fear that the arbitration will benefit the corporate defendant at the expense of the “little guy” seeking compensation for an injury. In the nursing home context, where the focus is on admitting the resident to obtain needed care, there may be a concern that residents and their family members do not understand the arbitration agreement or realize that it means waiving the right to a jury trial.

II. FEDERAL PREEMPTION OF STATE ANTI-ARBITRATION LAWS

A. The Federal Arbitration Act

1. The central provision of the FAA, section 2, states: “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.
 - a. Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).
 - b. Congress not only declared a national policy favoring arbitration, but also “withdrew the States’ power to require a judicial forum for the resolution of claims that contracting parties agreed to resolve by arbitration.” *Perry v. Thomas*, 482 U.S. 483 (1987).
 - c. Doubts about whether an agreement to arbitrate applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).
2. Congress enacted the FAA in 1925 to reverse longstanding judicial hostility toward arbitration agreements; and to place arbitration agreements on equal footing with other contracts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468 (1989).
 - a. “Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.” *Perry v. Thomas*, 482 U.S. 483, 489-90 (1987).

- b. The FAA preempts state laws and policies that disfavor arbitration agreements, *see Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984), but generally applicable principles of state contract law govern in determining whether the arbitration clause itself was validly obtained. *Doctor's Assocs, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

B. The Broad Construction of the FAA

1. In *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the United States Supreme Court considered whether it was proper for a federal court to stay an arbitration compelled pursuant to the FAA on the ground that a parallel action was taking place in state court. The Court held that the FAA embodies a “liberal federal policy favoring arbitration agreements” and established “a body of federal substantive law of arbitrability,” which governs the issue of arbitrability in either state or federal court. Thus, “[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* at 24-25.
2. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Supreme Court struck down, on FAA preemption grounds, a state franchise investment statute invalidating any “condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder.” The Court held that the FAA is substantive law, enacted pursuant to Congress’ commerce clause authority. Thus, it is applicable in state courts and preempts state laws, so long the contract at issue evidences a transaction involving interstate commerce.
3. In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), the Supreme Court analyzed the FAA’s “involving commerce” language, reasoning that the word “involving” evidenced Congress’ intent to exercise its commerce power to the full, thus calling for an expansive interpretation. Thus, it enforced an arbitration agreement between a homeowner and a termite company, notwithstanding a state statute making pre-dispute arbitration agreements unenforceable, finding the interstate commerce requirement satisfied because the company had offices in other states and because the materials and equipment it used came from out of state.
4. Most recently, in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), the Supreme Court held that the test for whether a contract evidences a transaction involving commerce is whether “in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal control.’”
 - a. Under this formulation it is not essential that the agreements at issue in and of themselves have a “substantial effect on interstate commerce.”

Instead, “[o]nly that general practice need bear on interstate commerce in a substantial way.” *Id.* at 57.

- b. The restructured loan agreements at issue in that case satisfied this test for three reasons: (i) the construction company had used funds from the restructured loans in construction projects throughout the southeastern U.S.; (ii) the company had secured the restructured debt with all of its assets, including out-of-state inventory; (iii) the “general practice” of commercial lending has a broad impact on the national economy and thereby invokes Congress’ regulatory power under the Commerce Clause.

C. The Application of the FAA to Nursing Home Admission Agreements

1. A number of factors support the argument that the business of operating a nursing home represents a general practice subject to federal control to which the FAA applies. *See* Burke, “The Use of Pre-Dispute Arbitration Clauses in New York Nursing Home Agreements,” 11 NYSBA HEALTH L.J. 26 (Winter 2006).
 - a. Nursing homes are subject to pervasive federal regulation:
 - (i) Federal law establishes the minimum requirements for nursing home participation in the Medicare and Medicaid programs. *See* 42 U.S.C. § 1395i-3; 42 U.S.C. § 1396r.
 - (ii) The federal Centers for Medicare and Medicaid Services (CMS) have promulgated regulations and standards based upon the statutory requirements. *See* 42 C.F.R. Part 483, Subpart B (Requirements for Long Term Care Facilities). The federal statutes establish a survey and certification process to assess compliance with the federal requirements, and nursing homes are subject to federal statutory sanctions for noncompliance.
 - b. Nursing homes in the aggregate exert a substantial economic impact on interstate commerce:
 - (i) The Medicare and Medicaid programs cover much of the cost of nursing homes, and payments to nursing homes under these programs consume a significant portion of the federal budget.
 - (ii) Since 1998, Medicare’s reimbursement system for skilled nursing facility care has been a prospective payment system, which includes an adjustment based on the Resource Utilization Groups to which Medicare residents are assigned. The federal government’s involvement in nursing home rate-setting activity reflects a significant federal interest in and control over the nursing home industry. *See generally Citizens Bank*, 539 U.S. at 58 (“general practice” of

commercial lending, which has broad impact on national economy, held sufficient to invoke FAA).

- c. Nursing homes make extensive use of equipment, products and materials that come from outside of a state and pass through interstate commerce, including construction supplies; moveable inventory; medical diagnostic equipment; food; prescription drugs; and cleaning supplies, among many other items. *See generally Allied-Bruce Terminix*, 513 U.S. at 282 (party's use of out-of-state products to carry out contract supported conclusion that contract "evidenced" a "transaction" involving interstate commerce within scope of FAA).
2. State courts considering the issue have held that the FAA applies to nursing homes and preempts state statutes disfavoring or prohibiting binding arbitration agreements between a nursing home and its residents.
 - a. In Alabama, the court in *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004), *reh'g denied*, 2004 Ala. LEXIS 302 (Ala. Apr. 16, 2004), and *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004), held that the activities of nursing homes substantially affected interstate commerce within the scope of the FAA.
 - (i) In *Owens*, the nursing home purchased its equipment and supplies from out-of-state suppliers, had patients from other states, was governed by federal regulations, and received 95% of its income from the Medicaid and Medicare programs.
 - (ii) In *Briarcliff*, the nursing home's regional office was in Florida, its headquarters were in Maryland, several patients were from other states, it received regular shipments of supplies and purchased medicine from out-of-state suppliers, and the patient whose care was at issue was a Medicare recipient.
 - (iii) *See also McGuffey Health & Rehab. Ctr. v. Gibson*, 864 So. 2d 1061 (Ala. 2003), a pre-*Alafabro* case, in which the Alabama supreme court held that an arbitration clause in a nursing home admission agreement "evidenced a transaction that substantially affected interstate commerce" because 2/3 of the sums received for the resident's care came from out of state and that the nursing home purchased materials from out-of-state vendors to feed the resident, to provide her bedding, and to keep her and her surroundings clean. *But see Community Care of America of Alabama, Inc. v. Davis*, 850 So. 2d 283 (Ala. 2002) (nursing home had nexus with interstate commerce, but could not enforce arbitration clause because it did not possess a valid certificate of authority).

3. The Texas supreme court, in *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005), held that evidence of Medicare payments to the nursing home on the patient's behalf was sufficient to establish interstate commerce within the scope of the FAA. Additionally, the FAA preempted the Texas Arbitration Act, which added an additional requirement -- the signature of a party's counsel -- to arbitration agreements in personal injury cases and thereby interfered with the enforceability of arbitration agreements with respect to that class of transactions. *See also In re Ledet*, 2004 Tex. App. LEXIS 11474 (Tex. App. 2004) (FAA applied to nursing home arbitration agreement expressly providing that FAA applied, without need to consider nexus with interstate commerce).
4. In *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005), the Mississippi supreme court concluded that "singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce" and thus fall within the purview of the FAA. Nursing homes, through general practice including "basic daily activities like receiving supplies from out-of-state vendors and payments from out-of-state insurance companies or the federal Medicare program," have an effect on interstate commerce. Additionally, the defendants, which included out-of-state corporations, collectively contributed to the operation of the nursing home, which received goods and services from out-of-state, took in out-of-state residents, and received payments from out-of-state insurance carriers, including Medicare and Medicaid.

III. STATE LAW CHALLENGES TO ARBITRATION AGREEMENTS

A. Unconscionability

1. The most common basis for invalidating arbitration clauses in the nursing home context has been the doctrine of unconscionability. Although the formulation differs from state to state, in general an agreement is "unconscionable" if it so grossly favors a party with overwhelming bargaining power as to make it unfair to enforce it against the other party in accordance with its literal terms.
 - a. A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made, *i.e.*, some showing of: (i) an absence of meaningful choice on the part of one of the parties; and (ii) contract terms that unreasonably favor the other party.
 - (i) In assessing procedural unconscionability, courts consider the circumstances surrounding the transaction to determine whether the complaining party had a meaningful choice, including such factors as: the use of high pressure or deceptive tactics; the use of fine print in the

contract; the experience and education of the party claiming unconscionability; and extreme disparity in bargaining power.

- (ii) In considering substantive unconscionability, courts look to the terms of the contract to determine whether they are so outrageously unfair as to shock the judicial conscience, including such factors as: lack of mutuality, *see, e.g., Baldeo v. Darden Restaurants, Inc.*, 2005 U.S. Dist. LEXIS 289 (S.D.N.Y. Jan. 11, 2005); and terms that unreasonably favor the stronger party.
- b. In the context of arbitration agreements, the determination will depend not only on these factors, but also on state law and the willingness of courts to overcome arbitration clauses.
- (i) The concept of unconscionability is “chameleon-like,” and as so vague that neither the courts, nor practicing attorneys, nor contract draftsmen can determine with any degree of certainty when it will apply in any given situation. *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278 (Fla. Dist. Ct. App. 2003), *reh’g denied*, 2003 Fla. App. LEXIS 17916 (Fla. Dist. Ct. App. Oct. 23, 2003) (quotations and citations omitted). It is a “safety valve” in contract law that permits courts to refuse to enforce a contract when to do so would not be in keeping with the administration of justice. *Id.*
 - (ii) It has been suggested that some judges, retaining a measure of long-standing judicial hostility toward arbitration, have expanded the doctrine of unconscionability beyond its typical uses to revoke arbitration agreements and permit litigation of claims by parties subject to arbitration agreements. *See* Randall, “Judicial Attitudes toward Arbitration and the Resurgence of Unconscionability,” 52 BUFFALO L. REV. 185 (Winter 2004).
2. The Alabama supreme court has generally been unsympathetic to plaintiffs alleging unconscionability. The plaintiff asserting unconscionability in Alabama must demonstrate (i) terms that are grossly favorable to a party that has (ii) overwhelming bargaining power.
- a. In *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004), plaintiffs argued that the arbitration clause was oppressive and one-sided in specifying the NHLA as the arbitral forum and that residents lacked meaningful choice due to the lack of nursing home options in the county. The court rejected the argument that NHLA was a “puppet for the health care and long term care industries,” finding no evidence that NHLA was biased in conducting arbitration proceedings. It also rejected the argument that the residents lack meaningful choice, because plaintiffs did not show that nursing home care is unavailable without agreeing to arbitration.

- d. In *Romano v. Manor Care, Inc.*, 861 So. 2d 59 (Fla. Dist. Ct. App. 2003), *reh'g denied*, 2004 Fla. App. LEXIS 344 (Fla. Dist. Ct. App.), *and rev. dismissed*, 874 So. 2d 1192 (Fla. 2004), however, the court refused to enforce an arbitration agreement, finding it unconscionable, primarily because the limitations on damages in the agreement deprived the resident of an effective way to vindicate her statutory cause of action.
 - (i) The court adopted a “sliding scale” approach, in which the more substantively oppressive the contract term, the less evidence of procedural irregularity is required to demonstrate unconscionability.
 - (ii) The Nursing Home Resident’s Rights Act established the rights of nursing home residents, granted residents a private right of enforcement, and allowed for attorney’s fees and punitive damages. The arbitration clause, however, capped punitive damages and excluded attorney’s fees, without explicitly informing the resident of the statutory right to punitive damages.
 - (iii) In addition, the court also found “some quantum” of procedural unconscionability because the nursing home asked the husband to sign the documents the day after it admitted his wife, without telling her that if he did not sign them it would not affect her care or her ability to stay in the home.
4. In Ohio, courts have expressed concern about the use of arbitration agreements in the long-term care context. Nevertheless, recent cases have enforced arbitration clauses against charges of unconscionability.
 - a. In *Small v. HCF Perrysburg, Inc.*, 159 Ohio App. 3d 66 (Ohio Ct. App. 2004), the court found “cause for concern” that arbitration agreements, first used in business contracts between sophisticated businesspersons as a means to save time and money if a dispute were to arise, are now being used in transactions between large corporations and ordinary consumers. The court found the arbitration agreement at issue to be substantively unconscionable because the resident had no practical choice but to accept it as a condition of admission, and because the prevailing party in the arbitration would be entitled to attorney fees. It found the agreement to be procedurally unconscionable because the spouse who signed the agreement was under stress, she did not have an attorney present, she had no particularized legal expertise, and she was 69 years old when she signed the agreement.
 - b. In *Fortune v. Castle Nursing Homes, Inc.*, 2005 Ohio 6195, 2005 Ohio App. LEXIS 5587 (Ohio Ct. App., Holmes County Nov. 22, 2005), the court also found the “loser pays” provision to be troublesome; that, together with the fact that the format did not put the resident on notice of the significance of the arbitration clause, provided a basis for a finding of

substantive unconscionability. Nevertheless, because there was no evidence as to the resident's bargaining position at the time of the agreement, the court found no procedural unconscionability and therefore refused to invalidate the arbitration clause.

- c. Likewise, in *Broughsville v. OHECC, LLC*, 2005 Ohio 6733, 2005 Ohio App. LEXIS 6070 (Ohio Ct. App. Dec. 21, 2005), the court enforced an arbitration agreement over a charges of procedural and substantive unconscionability. The factors were relevant to the determination that the agreement was not procedurally unconscionable included: (a) the resident was admitted for respite care, under non-emergency conditions, and there was no pressure to review and sign quickly; (b) although she was elderly, there was no evidence of dementia or confusion, and her daughter who signed the agreement was competent, 54 years old, college educated and a registered nurse; (c) the provision was in plain language, in the same size as the rest of the agreement, with the bold, capitalized heading "Resolution of Disputes," and divided into four categories, each with a bold and underlined descriptive title; (d) the agreement clearly stated that any dispute based on an alleged violation of a resident's rights would be settled by binding arbitration; (e) although the term "arbitration" may have been foreign to her, the resident could have asked questions; (f) the resident had signed an identical arbitration clause for a prior admission; and (g) the agreement to arbitrate was not a condition of admission.
5. In Indiana, the court in *Sanford v. Castleton Health Care Center, LLC*, 813 N.E.2d 411 (Ind. Ct. App. 2004), *reh'g denied*, 2004 Ind. App. LEXIS 2080 (Ind. Ct. App. Oct. 20, 2004), rejected the argument that an arbitration clause was unconscionable because it was "buried" within the contract and required the admittee to accept it on a take-it-or-leave-it basis, without delineating the arbitration process. The clause was not buried, the court held, but appeared on page 10, with a capitalized heading, and the resident's daughter could have asked questions about the arbitration process. Moreover, while the decision to place a family member in a nursing home is a difficult one, the court pointed out that the arbitration clause did not limit the recovery for negligence, but only the forums in which the issue could be raised.
6. In Mississippi, the court in *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005), held that while the admission agreement was a "contract of adhesion," drafted unilaterally by the dominant party and then presented on a "take it or leave it" basis to the weaker party who had no real opportunity to bargain about its terms, the facts and circumstances did not support a finding of procedural unconscionability concerning the overall contract or the arbitration clause contained within it. The agreement was not procedurally unconscionable because, among other things, there were no circumstances of exigency; the arbitration clause was on the last page of a six-page agreement; the clause was easily identifiable, because it followed a clearly marked heading printed in all caps, with bold-faced type; the clause itself was printed

in bold-faced type; and, appearing between the arbitration clause and the signature lines was an all caps bold-faced consent paragraph drawing special attention to the parties' voluntary consent to the arbitration provision contained in the admissions agreement. It was not substantively unconscionable because it was a typical clause which provided the resident with a fair process in which to pursue her claims and bore "some relationship to the risks and needs of the business."

7. The Tennessee supreme court has cautioned in the health care context that arbitration agreements "may constitute contracts of adhesion which must be closely scrutinized to determine if unconscionable or oppressive terms are imposed upon the patient which prevent enforcement of the agreement." *Buraczynski v. Eyring*, 919 S.W.2d 314, 316 (Tenn. 1996).
 - a. In *Buraczynski*, the court upheld the agreements at issue because, while they were contracts of adhesion, they did not contain oppressive or unconscionable features. The court found the following factors significant: (i) the agreements were not contained within another type of agreement, but were separate, one page documents each entitled "Physician-Patient Arbitration Agreement"; (ii) a short explanation attached to each document encouraged the patient to ask questions about the agreement; (iii) the arbitration procedure did not give an unfair advantage to the physician: each side was to choose an arbitrator, and the two arbitrators chosen would appoint the third arbitrator; (iv) the physician was bound by the arbitrators' decision, and any claim he has for payment of fees would be subject to arbitration at the time the malpractice action was asserted; (v) the agreement clearly informed the patient, 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; (vi) there were no "buried terms," but instead all terms were laid out clearly; (vii) the retroactive effect of the agreements was addressed in a distinct clause and required the patient to separately initial it, making it more obvious than other portions of the agreement; (viii) patients did not immediately relinquish access to the courts, but could revoke the agreements for any reason within 30 days of execution and regain the right to sue in court; and (ix) the agreements did not change the doctor's duty to use reasonable care or limit liability for breach of that duty, but merely shifted the disputes to a different forum.
 - b. In contrast, in *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, 2003 Tenn. App. LEXIS 957 (Tenn. Ct. App. Dec. 30, 2003), a Tennessee court refused to enforce an arbitration clause on the ground that they were "outside the reasonable expectations of a reasonable consumer." In reaching this conclusion, the court found the following factors significant: (i) the agreements were included in an 11-page contract dealing with many issues (e.g., financial agreements and consent to care) rather than in separate, stand-alone documents; (ii) there was no "short explanation"

attached to the arbitration provisions encouraging residents to ask questions; (iii) essential terms -- including the provision waiving a patient's right to a jury trial -- were buried and not laid out clearly or highlighted; (iv) the dispute resolution procedures, including the provision waiving a jury trial, were printed in the same font size, type, and color as the rest of the agreement; and (v) there were no provisions addressing how mediation and arbitration work.

- c. In *Howell v. NHC Healthcare-Fort Sanders*, 109 S.W.3d 731 (Tenn. Ct. App. 2003), the court similarly refused to enforce a nursing home arbitration agreement because the facility failed to show that the parties had bargained over the provision or that the clause was within the reasonable expectation of the ordinary person under the circumstances. The court found the following factors significant: (i) the agreement was 11 pages long, with the arbitration clause "buried" on page 10, printed in the same size font as the rest of the document; (ii) the arbitration paragraph did not adequately explain how the arbitration procedure would work, except for who would administer it; (iii) the resident's representative (her husband) could not read or write, and the facility's representative, who described the agreement to him, explained mediation and arbitration but did not explain that he was giving up the right to a jury trial.
8. In *In re Ledet*, 2004 Tex. App. LEXIS 11474 (Tex. App. 2004), an appellate court in Texas rejected the argument that the arbitration agreement was procedurally unconscionable because the resident's son, who signed the admittance papers as the responsible party, did not understand, speak, or read English, no one explained the agreement to him, and he felt pressured to sign the arbitration agreement because he was told that he would have to sign it for his mother to be admitted. "Whether a party is illiterate or incapable of understanding English is not a defense to a contract."

B. Lack of Authority to Agree

1. In a number of cases, residents and their family members have challenged the authority of the person who signed the agreement to bind the plaintiff to arbitration. The outcomes of challenges based on authority to agree vary based upon state law and the identity of the persons who signed the agreement and who subsequently seek to assert the right to a jury trial.
2. In some cases, the **family member** who signed the agreement argues that he or she lacked actual authority to bind the **resident** to arbitration and to waive the constitutional right to a jury trial.
 - a. In Alabama, the court in *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004), *reh'g denied*, 2004 Ala. LEXIS 302 (Ala. Apr. 16, 2004), held that a resident's daughter, who signed the admission papers as her mother's guardian and sponsor, had authority to enter into the

arbitration agreement for the mother. The court did not inquire into whether the daughter, who had signed the agreement on the line for resident's guardian or sponsor, was actually the mother's legal guardian.

- b. In California, a representative party or next-of-kin cannot bind a resident to arbitration, unless the representative has express authority from the resident to enter into a binding contract.
- (i) The leading case in California is *Pagarigan v. Libby Care Ctr., Inc.*, 99 Cal. App. 4th 298, 120 Cal. Rptr. 2d 892 (Cal. Ct. App. 2002). There, the court held that a resident, who was incompetent at the time of admission and did not sign the arbitration agreements, lacked capacity to authorize her daughter to sign the agreements. Although next-of-kin status had empowered the children to make medical decisions for the mother, it did not confer the power to waive the resident's right to a jury trial. As there was no durable power of attorney, the Medicare health care service plan could not enforce an arbitration provision against the Medicare recipient.
 - (ii) In *Goliger v. AMS Properties, Inc.*, 19 Cal. Rptr. 3d 819, 123 Cal. App. 4th 374 (Cal. Ct. App. 2004), the court held that a daughter who signed the arbitration agreement as her mother's "responsible party," but left blank the line to sign as "agent": (i) did not have authority to agree to arbitrate the mother's personal injury claims, and (ii) was not acting in her personal capacity to waive her right to a jury trial of her own wrongful death claim against the facility.
 - (iii) In contrast, in *Garrison v. Superior Court*, 132 Cal. App. 4th 253, 33 Cal. Rptr. 3d 350 (Cal. Ct. App. 2005), *rev. denied*, 2005 Cal. LEXIS 13078 (Cal. Nov. 16, 2005), the resident had designated her daughter as attorney in fact under a durable power of attorney. The court held that the durable power of attorney gave the daughter actual authority to enter into the two binding arbitration agreements, and it enforced the arbitration agreements. *But see Phillips v. Crofton Manor Inn*, 2003 Cal. App. Unpub. Lexis 4770 (Cal. May 15, 2003), *modified*, 2003 Cal. App. Unpub. LEXIS 5795 (Cal. June 13, 2003) (denying arbitration on ground that facility had not established valid agreement to arbitrate, because limited power of attorney authorizing daughter to make health care decisions was not part of the record before the court).
- c. In Ohio, the court in *Broughsville v. OHECC, LLC*, 2005 Ohio 6733, 2005 Ohio App. LEXIS 6070 (Ohio Ct. App. Dec. 21, 2005), held that the daughter had apparent authority to bind the resident to arbitration because the resident, who was competent, held her out as possessing sufficient authority to enter into an agreement on her behalf, and the facility had reason to believe and did believe that the agent possessed the necessary authority. The court distinguished *Pagarigan* and *Phillips* on the ground

that the residents in those cases were incompetent and could not hold out, or knowingly permit the agent to act in such a way, in satisfaction of the first element of the doctrine of apparent authority.

- d. In Tennessee, the court *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, 2003 Tenn. App. LEXIS 957 (Tenn. Ct. App. Dec. 30, 2003), held that a nursing home cannot rely upon a spouse's "apparent authority" to bind the resident spouse to an arbitration agreement. In *Raiteri*, the husband had signed the admission agreement in the wife's absence and, although the wife was mentally competent, the facility had never approached her to "ratify" the husband's agreement.
 - e. In Texas, the court in *In re Ledet*, 2004 Tex. App. LEXIS 11474 (Tex. App. 2004), held that the resident's son, although not legally appointed to act as his mother's guardian, had actual authority under the Texas Consent to Medical Treatment Act to make medical decisions on her behalf, which the court construed as authorizing him to sign the arbitration agreement on his mother's behalf.
 - f. In *Bishop v. Medical Facilities of Am.*, 65 Va. Cir. 187, 2004 Va. Cir. LEXIS 227 (Va. Cir. Ct. June 25, 2004), the court held that a contract between the facility and the resident's son did not bind the resident, because she was not a party to it and the son had not signed it on her behalf.
3. In other cases, family members have argued that the **resident** who signed the arbitration agreement did not have authority to bind their **adult family members** (*i.e.*, the resident's "heirs, representatives, executors, administrators, successors, and assigns") to arbitration.
 - a. In California, the general rule is that an adult patient who has agency relationship with other adults cannot sign away the other adults' right to a jury trial. The California courts have recognized at least three exceptions to this rule: (i) an agent can bind a principal; (ii) spouses can bind each other; and (iii) a parent can bind a minor child.
 - (i) In *Buckner v. Tamarin*, 119 Cal. Rptr. 2d 489, 98 Cal. App. 4th 140 (Cal. Ct. App. 2002), the court held that the patient, who signed the arbitration agreement, did not bind his adult daughters to arbitrate their claims against the physician for wrongful death, because they were not parties to the arbitration agreement, and their father had no authority to waive their right to sue.¹ See also *Flaum v. Superior Court*, 2002 Cal. App. Unpub. LEXIS 11848 (Cal Ct. App. Dec. 20, 2002) (remanding for consideration, in light of *Buckner*, whether resident's agreement to

¹ In *Pagarigan v. Libby Care Ctr., Inc.*, 99 Cal. App. 4th 298, 120 Cal. Rptr. 2d 892 (Cal. Ct. App. 2002), the court noted in a footnote that the rule may be different when the adult children sue as successors in interest to the deceased parent's causes of action, rather than on their own cause of action. *Id.* at 301 n.1.

arbitrate could bind his adult daughter to arbitrate her claim for wrongful death against the nursing home).

(ii) In *Bolanos v. Khalatian*, 231 Cal. App. 3d 1586, 283 Cal. Rptr. 209 (Cal. Ct. App. 1991), the court held that the patient, a pregnant mother, could bind her infant and husband to the terms of an arbitration agreement. Although the patient had only a fifth grade education, did not read English and read only limited Spanish, the court noted that the doctor had provided a Spanish version of the agreement, and there was no evidence of coercion or trickery. See also *Mormile v. Sinclair*, 26 Cal. Rptr. 2d 725, 21 Cal. App. 4th 1508 (Cal. Ct. App. 1994) (patient's agreement to arbitrate claims arising out of a physician-patient relationship can bind his or her non-signatory spouse to arbitrate a loss of consortium claim against the health care provider); *Gross v. Recabaren*, 206 Cal. App. 3d 771 (Cal. Ct. App. 1988) (arbitration agreement encompasses services provided during entire course of doctor-patient relationship and applied to loss of consortium claim of wife, who was not a signatory to the contract).

4. In still other cases, the **family members** who signed the arbitration agreement as the resident's fiduciary have argued that they are not bound in their **personal capacities**, or in their capacity as **executor** of the resident's estate, with respect to their own (or the estate's) claims against the facility.
 - a. In *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004), the court held that the plaintiffs, who had signed the admission agreements as agents for their parents, were bound to the arbitration provisions for the wrongful-death claims of the estates. Under Alabama law, the administrator stands in the shoes of the decedent and must abide by the terms of any valid agreement, including an arbitration agreement, entered into by the decedent. See also *Sanford v. Castleton Health Care Center, LLC*, 813 N.E.2d 411 (Ind. Ct. App. 2004), *reh'g denied*, 2004 Ind. App. LEXIS 2080 (Ind. Ct. App. Oct. 20, 2004) (under Indiana law, the only claims that survive decedent's death are those that decedent would have been entitled to bring during lifetime); *In re Ledet*, 2004 Tex. App. LEXIS 11474 (Tex. App. 2004) (resident's daughter, suing as resident's "next friend," was bound by resident's son's agreement to arbitration on resident's behalf).
 - b. In *Goliger v. AMS Properties, Inc.*, 19 Cal. Rptr. 3d 819, 123 Cal. App. 4th 374 (Cal. Ct. App. 2004), however, the court held that the resident's daughter was not acting in her personal capacity to waive her right to a jury trial on her own claims against the facility, when she signed the arbitration agreement as her mother's responsible party.
 - c. In *In re Kepka*, 178 S.W.3d 279 (Tex. App. 2005), the court held that when the resident's wife signed the arbitration agreement in her

representative capacity, she signed as her husband's agent, nothing more. In Texas, wrongful death claims are personal to the statutory beneficiaries who assert the claims, and recovery for those claims does not benefit the estate. Because the wife did not sign in her individual capacity, and she necessarily brought her wrongful-death claim in her individual capacity for damages personal to her, the facility could not require her to arbitrate the wrongful death claim.

- d. In *Bishop v. Medical Facilities of Am.*, 65 Va. Cir. 187; 2004 Va. Cir. LEXIS 227 (Va. Cir. Ct. June 25, 2004), the court held that a contract between the facility and the resident's son did not bind the resident, who was not a party to it, or her representatives, successors or assigns, and thus the facility could not compel the executor to arbitrate the estate's wrongful death action against the facility.
5. In a few cases, plaintiffs challenged whether the **facility or its owner** properly **executed** the arbitration agreement so as to be entitled to invoke it.
 - a. In some of these cases, plaintiffs questioned whether the nursing home can rely on the arbitration agreement, when its representative has not signed it.
 - (i) In *Integrated Health Servs. of Green Briar, Inc. v. Lopez-Silvero*, 827 So. 2d 338, 339 (Fla. Dist. Ct. App. 2002), the court compelled arbitration, although the nursing home had not signed the admission agreement, because it had manifested its assent by performance under the contract by admitting the resident and providing services to him.
 - (ii) Likewise, in *Consolidated Res. Healthcare Fund I, Ltd., v. Fenelus*, 853 So. 2d 500 (Fla. Dist. Ct. App. 2003), the court enforced arbitration, even though the facility's representative had signed on the line for the "witness" rather than the facility's representative, because the facility had demonstrated assent by performance.
 - b. In others, plaintiffs have joined the facility's corporate owners as defendants in their negligence actions and then argued that the owners could not compel arbitration because they were not parties to the arbitration agreements with the facilities.
 - (i) In California, the court in *Flaum v. Superior Court*, 2002 Cal. App. Unpub. LEXIS 11848 (Cal Ct. App. Dec. 20, 2002), rejected this argument, holding that the facility's owners, operators, managing agents, and/or managers were entitled to invoke the arbitration agreement.
 - (ii) In Florida, the court in *Estate of Blanchard v. Central Park Lodges, Inc.*, 805 So. 2d 6 (Fla. Dist. Ct. App. 2001), remanded to the trial court to conduct an evidentiary hearing to address whether the

corporate defendant was a party or a third-party beneficiary to the arbitration agreement.

6. In *Springhill Nursing Homes, Inc. v. McCurdy*, 898 So. 2d 694 (Ala. 2004), the resident left the nursing home before actually completing the admission process, and then sued the nursing home for negligence. When she later amended the complaint to assert a claim for breach of contract, the nursing home sought to compel arbitration under the agreement she would have had to sign to become a resident. The court held that the defendants did not meet their burden of proving the existence of a contract calling for arbitration and refused to compel arbitration.

C. Limitations on Punitive Damages

1. In several cases, the plaintiffs have challenged arbitration agreements on the ground that they interfere with the effective vindication of statutory claims. The U.S. Supreme Court has made clear that the party resisting arbitration on the ground that the agreement interferes with the effective vindication of statutory rights bears the burden of showing the likelihood of such interference and that the party cannot meet this burden by “mere speculation” about how an arbitrator “might” interpret or apply the agreement.
 - a. The claimant in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), argued that she could not be compelled to arbitrate her claim under the Truth in Lending Act because the agreement was silent on the subject of fees and costs, and the risk that she might have to pay prohibitive arbitration costs would interfere with the vindication of her claim in the arbitral forum. The Supreme Court recognized that large arbitration costs could preclude a litigant from effectively vindicating a statutory claim in the arbitral forum, but that the agreement’s “silence” on the issue is, without more, insufficient to render the agreement unenforceable. The Court held that the party seeking to invalidate an arbitration agreement on the ground that the arbitration would be too expensive bears the burden of showing the likelihood of incurring such costs.
 - b. In *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), the Court considered an argument that a claim under RICO, 18 U.S.C. §§ 1961, *et seq.*, could not be subjected to arbitration, because the arbitration agreement precluded punitive damages while RICO allows treble damages. The Supreme Court compelled arbitration, and left it for the arbitrator to decide in the first instance whether the agreement barred treble damages under RICO: “we should not, on the basis of ‘mere speculation’ that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved.” *Id.* at 406-07.

2. In Florida, the courts addressing this issue, rather than adopting the Supreme Court's analysis, have typically addressed the issue in terms of substantive unconscionability.
 - a. In *Five Points Health Care, Ltd. v. Alberts*, 867 S. 2d 520 (Fla. Ct. App. 2004), an appellate court in Florida recognized that the mere fact that an agreement requires arbitration of a statutory claim under the Florida Nursing Home Residents Act does not render it substantively unconscionable. Similarly, in *Richmond Healthcare, Inc. v. Digati*, 878 So. 2d 388 (Fla. Ct. App. 2004), *reh'g denied*, 2004 Fla. App. LEXIS 13139 (Fla. Ct. App. Aug. 19, 2004), the court held that there is no basis, under common law or statute, to refuse to enforce a valid arbitration agreement merely because it involves a waiver of statutory rights and remedies. Nevertheless, it returned the case to the trial court for determination, after receiving evidence, on the validity of the plaintiff's unconscionability claim.
 - b. In *Romano v. Manor Care, Inc.*, 861 So. 2d 59 (Fla. Dist. Ct. App. 4th Dist. 2003), *reh. denied*, 2004 Fla. App. LEXIS 344 (Fla. Dist. Ct. App. 4th Dist.), *rev. dismissed*, 874 So. 2d 1192 (Fla. 2004), a Florida court held that an arbitration agreement in a nursing home contract, which limited non-economic damages to \$250,000, and excluded punitive damages, was unenforceable as a matter of law, because it defeated the remedial provisions of the statute "that the legislature felt were important to the reduction of elder abuse in nursing homes." *See also Prieto v. Healthcare & Ret. Corp. of Am.*, 2005 Fla. App. LEXIS 20058 (Fla. Dist. Ct. App. Dec. 21, 2005); *Lacey v. Healthcare & Ret. Corp.*, 30 Fla. L. Weekly 2681, 2005 Fla. App. LEXIS 18807 (Fla. Dist. Ct. App. Nov. 30, 2005).
 - c. In *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. Dist. Ct. App. 2005), *rev. denied*, 2005 Fla. LEXIS 2421 (Fla. Nov. 16, 2005), the court held that the arbitration provision in a nursing home admission agreement, which adopted the NHLA rules of procedure, was void as against public policy. NHLA's rules limited the arbitrator from awarding consequential, exemplary, incidental, punitive or special damages unless the claimant established, by clear and convincing evidence, that a party was "guilty of conduct evincing an intentional or reckless disregard for the rights of another party or fraud, actual, or presumed." The court stated: "If nursing home residents had to arbitrate under the NHLA rules, some of the remedies provided in the legislation for negligence would be substantially affected and, for all intents and purposes, eliminated."
 - d. In contrast, in *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 S. 2d 86 (Fla. Ct. App. 2005), *rev. denied*, 908 So. 2d. 1057 (Fla. 2005), a non-nursing home case, the court held that the arbitrator should decide, in the

first instance, the validity of the remedial restrictions in the arbitration provision.

3. In Mississippi, the court in *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005), held that the portions of an arbitration clause that limited the resident to the recovery of actual damages not to exceed \$50,000 and precluded punitive damages, were oppressive and thus substantively unconscionable. Rather than invalidate the entire arbitration clause, however, it severed this provision from the contract and enforced the remainder of the otherwise valid arbitration agreement.

D. Unavailability of Arbitral Forum

1. The AHLA, commonly referenced in nursing home arbitration agreements, and the American Arbitration Association, the nation's largest arbitration provider, announced effective January 1, 2004 and January 1, 2003, respectively, that they will no longer administer consumer health care liability claims unless the agreement to arbitrate was entered into by the parties after the alleged injury occurred.
2. In *Broughsville v. OHECC, LLC*, 2005 Ohio 6733, 2005 Ohio App. LEXIS 6070 (Ohio Ct. App. Dec. 21, 2005), the resident argued that the arbitration provision was unenforceable because AHLA was no longer available to administer the claim. The court concluded that the parties' intent, as evidenced by a signed arbitration agreement with a severability clause, was to arbitrate disputes, not specifically to have AHLA arbitrate disputes. It severed the unenforceable provision and required the parties to arbitrate the dispute.

IV. OTHER CHALLENGES TO ARBITRATION AGREEMENTS

A. Medicare/Medicaid Requirements

1. Arbitration as "Additional Consideration"

- a. In several cases, plaintiffs have argued that federal Medicare and Medicaid laws and regulations prohibit the inclusion of arbitration provisions in admission agreements.
 - (i) Medicare requires facilities to accept Medicare, including co-payments and deductibles, as payment in full. 42 U.S.C. 1396r(c)(5)(A)(iii); 42 C.F.R. 489.30.
 - (ii) Similarly, Medicaid regulations prohibits facilities from charging, soliciting, accepting, or receiving "in addition to any amount otherwise required to be paid under the [Medicaid Program], any gift, money, donation, or other consideration" as a precondition of admission, expedited admission or continued stay in the facility. 42 C.F.R. 483.12(d)(3).

- b. Plaintiffs have argued that the requirement that a resident waive a right to a trial by jury as a condition to admission to the facility constitutes unauthorized additional consideration from the resident. Thus far, however, the argument has not garnered much judicial support.
- (i) In *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278 (Fla. Dist. Ct. App. 2003), *reh'g denied*, 2003 Fla. App. LEXIS 17916 (Fla. Dist. Ct. App. Oct. 23, 2003), the court rejected this argument, stating, “[w]e have found no authority from any jurisdiction which holds that an arbitration provision constitutes “consideration” in this sense; nor do we believe that the federal regulation was intended to apply to such a situation.”
 - (ii) Similarly, in *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004), *reh'g denied*, 2004 Ala. LEXIS 302 (Ala. Apr. 16, 2004), the court concluded that requiring a nursing-home resident to sign an arbitration agreement is not tantamount to charging an additional fee or other consideration as a requirement to admittance. “Rather, an arbitration agreement sets a forum for future disputes; both parties are bound to it and both receive whatever benefits and detriments accompany the arbitral forum.” If the court accepted this argument, then plaintiffs could construe almost any contract term as requiring “other consideration” to gain admittance to the nursing home.
 - (iii) In *Sanford v. Castleton Health Care Center, LLC*, 813 N.E.2d 411 (Ind. Ct. App. 2004), *reh'g denied*, 2004 Ind. App. LEXIS 2080 (Ind. Ct. App. Oct. 20, 2004), the court likewise rejected the argument that an arbitration clause constitutes “other consideration.” Applying the doctrine of *ejusdem generis* (when a general phrase follows specific terms, the general is construed to include only those things that are similar to the specific), the court stated that the general phrase “other consideration,” when followed by a specific enumeration of the terms gift, money, or donation, does not encompass an arbitration agreement, which is not similar to an additional fee, but merely establishes a forum for future disputes.
 - (iv) In *Broughsville v. OHECC, LLC*, 2005 Ohio 6733, 2005 Ohio App. LEXIS 6070 (Ohio Ct. App. Dec. 21, 2005), the court aligned itself with other jurisdictions in holding that the inclusion of an arbitration provision in a nursing home admissions agreement does not constitute “additional consideration” in violation of Medicare/Medicaid requirements.
 - (v) See also *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, 2003 Tenn. App. LEXIS 957 (Tenn. Ct. App. Dec. 30, 2003) (declining to reach issue in light of determination that arbitration agreement was unenforceable); *Howell v. NHC Healthcare-Fort Sanders*, 109 S.W.3d

731 (Tenn. Ct. App. 2003) (pretermitted consideration of this argument, but noting that it is “not without appeal”).

2. CMS Survey and Certification Guidance

- a. CMS has adopted a hands-off approach to the use of binding arbitration to resolve disputes between a resident and the nursing home.
- b. Specifically, according to a memorandum dated January 9, 2003 (available at <http://www.cms.hhs.gov/medicaid/survey-cert/sc0310.pdf>), CMS views the issue of arbitration is a matter between the resident and the nursing home.
 - (i) “Under Medicare, whether to have a binding arbitration agreement is an issue between the resident and the nursing home.”
 - (ii) “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.”
- c. At the same time, CMS cautions that there may be consequences if the nursing home tries to enforce the arbitration agreement in a way that violates federal law, including the rules governing resident discharge and transfer, the obligation to furnish an abuse free environment, and other requirements bearing on the facility’s obligation to provide quality care to all residents.
 - (i) For example, a nursing home cannot require a current resident to sign a new admission agreement with a binding arbitration clause. It cannot discharge or retaliate against a resident for failing to sign or to comply with a binding arbitration agreement.
 - (ii) If it does, according to CMS, the state or regional offices may commence an enforcement action under the rules governing program participation for long-term care facilities.
 - (iii) Additionally, Medicare and Medicaid are not bound by the arbitration agreement.

B. Reverse Preemption under the McCarran-Ferguson Act

1. Recently, plaintiffs have advanced the argument that the McCarran-Ferguson Act “reverse preempts” the FAA.
2. The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), states that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance,

or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance”

- a. Under the McCarran-Ferguson Act, a federal statute will not preempt a state statute if: (i) the federal statute does not specifically relate to the “business of insurance”; (ii) the state statute was enacted for the “purpose of regulating the business of insurance”; and (iii) the federal statute operates to “invalidate, impair or supersede” the state law.
 - b. If the McCarran-Ferguson Act applies, then it prevents the federal statute from preempting the state statute regulating the business of insurance, and the state law applies.
3. In *In re Kepka*, 178 S.W.3d 279 (Tex. App. 2005), the plaintiff challenged an arbitration agreement on the ground that it did not comply with a Texas statute requiring, in arbitration agreements between health care providers and patients, a conspicuous boldface notice warning the patient against signing the agreement until after consultation with an attorney and invalidating the agreement unless the patient’s attorney also signed it.
- a. The facility argued that the FAA, which does not contain this same requirement, preempted the Texas law, thus rendering the arbitration agreement enforceable notwithstanding noncompliance with state law.
 - b. Plaintiff argued, and the court agreed, that the purpose of the entire Texas (of which the arbitration provision was a part) was to regulate “the business of insurance,” by controlling the escalating costs of professional medical liability insurance.
 - c. Therefore, the statute was a law enacted for the purpose of regulating the business of insurance, and the McCarran Ferguson Act applied, thus preventing the FAA from preempting the Texas statute.
4. In *In re Nexion Health at Humble, Inc.*, 49 Tex. Sup. J. 43, 2005 Tex. LEXIS 769 (Tex. Oct. 14, 2005), the resident’s wife raised, for the first time on a motion for rehearing, the argument that the McCarran Ferguson Act “reverse preempted” the FAA, citing the decision in *In re Kepka*. Because the courts below had not reviewed the issue, the Texas supreme court declined to reach it and expressed no opinion as to the merits.