

# COMBATING ABUSIVE ARBITRATION CLAUSES IN NURSING HOME CONTRACTS<sup>1</sup>

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## INTRODUCTION

The decision to move one's self or a loved one into a nursing home is never easy. It is unsurprising, then, that few people at the point of admission into a nursing home are likely to focus on the fine print of the contract. Only after tragic events lead to the filing of a lawsuit do many people discover that the contract contains a binding mandatory arbitration clause requiring claims against the facility – even for cases of abuse or neglect – to be brought before a private arbitration provider chosen by the nursing home. Meanwhile, as nursing homes increasingly adopt arbitration clauses in an attempt to limit their accountability, injured victims and their families are receiving less compensation for their claims – even amid mounting allegations of poor treatment.<sup>3</sup>

Fortunately for residents and their families, mandatory arbitration clauses in nursing home contracts are often drafted or imposed in ways that cause them to be unenforceable. This article addresses some of the factors courts consider when evaluating these clauses and describes proposed legislation that would make them a thing of the past. Because it is impossible to cover every legal theory under which nursing home arbitration clauses have been invalidated, the article focuses on a few approaches that have been well-developed in recent case law.<sup>4</sup>

In general, the law relating to the enforcement of arbitration clauses is no different in the context of nursing home contracts than it is in any other type of contract. The Federal Arbitration Act (“FAA”) provides that normal principles of state contract law govern questions about whether an

agreement to arbitrate has been formed, how its terms should be interpreted, and when it runs afoul of a defense to a contract (such as unconscionability), subject to certain limitations of federal law (such as the rule that the FAA preempts any state law that would treat an arbitration clause less favorably than other contract terms).

Under current law, therefore, arbitration clauses will be enforced in the nursing home setting if an agreement was validly formed between the parties, unless the agreement is so unfair that it runs afoul of some contract law defense such as the prohibition on unconscionable contracts. However, there are certain factual circumstances and legal arguments that tend to arise regularly in the nursing home context that may form the basis of a strong argument against enforcement of the clause.

### Did the plaintiff agree to arbitrate claims against the nursing home?

If no agreement to arbitrate was formed between the resident and the nursing home, the resident, or a plaintiff standing in her shoes, cannot be forced to arbitrate her claims.<sup>5</sup> In the context of nursing home cases, several factors are relevant to whether an agreement was formed. For example, a resident who signed the admission agreement on her own behalf may have lacked the capacity to do so. If the resident's family member signed, she may not have had legal authority to waive her relative's rights. And even if the resident is bound by an arbitration clause, the plaintiff is not necessarily bound. In each of these instances, the burden is on the nursing home to prove the existence of an arbitration agreement.

### 1. Did both parties assent to arbitration?

The first and most basic question is whether there was assent to the arbitration clause. For example, in an Alabama case, a woman was temporarily admitted to a nursing home upon discharge from the hospital but left the facility before she signed any contract. When she sued, alleging negligence and breach of contract, the nursing home moved to compel arbitration arguing that she must be “relying on the contract she *would have been required to sign* had she remained a patient.”<sup>6</sup> While parties generally cannot sue for contract violations while simultaneously avoiding application of terms in that same contract, here the Alabama Supreme Court held that the resident had not manifested assent to the arbitration clause merely by asserting a generic contract claim (that she subsequently dropped).

The Mississippi Supreme Court similarly found that a nursing home resident's conservator did not agree to the arbitration clause in the nursing home contract where the conservator did not sign the clause. The conservator initialed the page containing the arbitration clause indicating that she had read it but did not sign the bottom of the page in the space provided for her signature. The court stated, “[I]t is clear that she did not accept the arbitration provision in the admission agreement, and, therefore, an enforceable arbitration agreement does not exist.”<sup>7</sup>

Additionally, a federal court in Michigan recently held that a nursing home resident did not agree to the nursing home's arbitration clause where she did not sign the admission contract in which the clause was embedded. The last page of the contract contained places for names to

be printed and signature affixed. The resident printed her name in the space so designated but did not sign. The court reasoned that "the absence of a signature deprives the defendant of a presumption it otherwise might enjoy: that one who signs a written agreement is presumed to know the nature of the document and to understand its contents."<sup>8</sup> In the absence of that presumption, the court could not conclude that the resident assented to the arbitration and venue provisions in the contract.

In contrast, courts have enforced arbitration clauses in nursing home admission contracts signed by the resident or her representative but not by the nursing home representative, on grounds that the nursing home indicated its assent by admitting the resident and performing the contract terms.<sup>9</sup> One Mississippi court held that a former resident was bound by an arbitration clause even where she had failed to initial it as the contract

required. The court reasoned that there was another reference to the arbitration clause on the page the resident did sign and that there was no evidence that her failure to initial the clause was intended as a rejection of the arbitration clause.<sup>10</sup>

**2. If the resident signed the agreement on her own behalf, did she have the capacity to do so?**

In cases where the nursing home resident signed the contract herself, courts should look carefully at whether she was competent at the time to waive her legal rights. For example, a Mississippi nursing home attempted to enforce an arbitration clause against an 86-year-old woman with a seventh-grade education, arguing that she was bound by her signature, which appeared on the admissions contract. However, the nursing home's own records showed that their staff had assessed her at the time of admission and determined

that her memory, cognitive skill, and vision were impaired. The court held that a genuine issue of fact existed as to whether the woman had signed the agreement at all and, if so, whether she had done so knowingly and intelligently.<sup>11</sup> Similarly, when a Louisiana nursing home attempted to enforce an arbitration clause signed by a resident, the court held that the clause was not binding on the resident because the nursing home, charged with a duty to conduct a neurological and cognitive assessment of incoming residents, was aware she did not have the capacity to assent.<sup>12</sup>

In contrast, one court enforced an arbitration clause in a nursing home contract even though the resident was legally blind when she signed it. According to the court, because there was no evidence the resident was coerced to sign the nursing home agreement or prevented by the nursing home from knowing its contents, she possessed the capacity

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to assent despite her inability to read the document.<sup>13</sup>

**3. If someone other than the resident signed the contract, did that person sign on behalf of the resident and have authority to bind the resident to arbitration?**

In many instances, a family member rather than the resident herself, signs the nursing home admission agreement. The question for a court then becomes whether the signatory signed on her own behalf or on behalf of the resident – and, if the latter, whether she had the authority to waive the resident's right to a day in court. Family members do not automatically have authority to enter into legal agreements on behalf of their relatives. Rather, proof of a legal source of authority – a legal document such as a durable power of attorney, a statutory directive, or agency – is required. Moreover, even if the family member has this authority in the abstract, it may not have been effective at the time of admission because the resident may have been competent to make her own decisions.

- ▷ Did the signatory sign the agreement on behalf of the resident, versus on her own behalf?

Where the resident did not sign the nursing home agreement herself, courts have recognized that threshold question is whether anyone executed the arbitration agreement *on behalf of the resident*.<sup>14</sup> For example, some nursing home contracts permit a family member to sign as the “responsible party,” which typically entails obligations to honor certain aspects of the agreement, such as making payments. But such a signature cannot obligate a resident, or a plaintiff standing in her shoes,

to an arbitration clause. Thus, in a case where the resident's daughter-in-law signed the nursing home contract as the responsible party, and the administrator of the resident's estate later sued the nursing home, the Alabama Supreme Court rejected the nursing home's attempt to force the estate into arbitration. The court emphasized that the daughter-in-law had not signed on behalf of the resident and that a non-signatory estate administrator could not be forced to arbitrate a medical malpractice claim for the death of a nonsignatory decedent.<sup>15</sup>

Likewise, a Virginia court considered a wrongful death action in which the nursing home contract contained separate signature lines for the resident and the responsible party. The resident's son, who signed the agreement, had an effective power of attorney giving him the authority to sign on his mother's behalf. However, he did not do so. Instead, he signed as the responsible party and the resident signature line was left blank. The court held that the son was a party to the contract in his individual capacity but the resident had not waived her right to litigate disputes.<sup>16</sup>

A related issue arises where non-resident signatories who sign as legal representatives pursue wrongful death claims on their own behalf. In this scenario, some courts recognize that if the signatory did not have authority to act as a legal representative, the signatory herself is not bound by the arbitration clause. For example, one court found that a resident's daughter lacked the

authority to act as her mother's legal representative. Thus, the court held that because the daughter signed in the space allotted for the resident's legal representative, she was not signing in her individual capacity. The court therefore refused to enforce the arbitration clause in the daughter's wrongful death action.<sup>17</sup> Further, another court held that even if a resident's daughter signed an admission contract on the resident's behalf as the resident's “responsible party,” the daughter did not sign the contract in her personal capacity. Thus, the court held that the daughter's wrongful death claim was not bound by the arbitration clause.<sup>18</sup>

- ▷ Did the signatory have express authority via an effective power of attorney or statutory authority as a health care surrogate or proxy?

If the signatory purported to sign the nursing home agreement on the resident's behalf, the court must determine whether the signatory had authority to do so, either pursuant to a power of attorney or under a state law authorizing surrogates to make health care decisions for persons who lack the capacity to make their own decisions. The burden is on the nursing home to prove that the signatory had authority, that the authority was effective at the time of signing, and that the authority included the ability to bind the resident to arbitration.

First, in evaluating the signatory's authority, the court should not compel arbitration on the basis of a power of attorney without an authenticated document in the record.

Thus, the Mississippi Supreme Court refused to enforce an arbitration clause where the nursing home argued that daughter had authority to sign the agreement under a power of attorney but the power of attorney document had not been admitted into evidence.<sup>19</sup> Similarly, the Missouri Supreme Court recently refused to enforce an arbitration agreement in a wrongful death case where the resident's daughter had signed the agreement as the resident's "legal representative." The resident's daughter "[was] not an attorney, nor was she her mother's guardian, nor had she been given durable power of attorney or any other legally binding status as her mother's agent. The phrase 'legal representative,' in the absence of something indicating some status conferred by law or by a court, has no legal meaning."<sup>20</sup>

Second, the court must examine whether the resident was incapable of making her own decisions so that the signatory's authority was effective at the time the contract was formed. For example, a Tennessee court refused to compel arbitration in a wrongful death case where the resident had executed a power of attorney giving her daughter, who had signed the admissions agreement, authority to make medical decisions on her behalf. By its terms, the power of attorney was effective only if she was incapacitated. The court found that, while the mother was physically incapacitated, she was mentally competent and alert at the time of admission — and physical incapacitation was insufficient to trigger the power of attorney. The court emphasized that, while the daughter's actual lack of authority was "undoubtedly frustrating" to the nursing home, the only relevant fact was that no one had validly agreed to arbitration on the resident's behalf.<sup>21</sup> Another Tennessee court refused to bind the administratrix of resident's estate to arbitration even where the resident's daughter, who signed the arbitration clause on behalf of her mother, conceded that her mother was incompetent at the time of admission. The court found that there was nothing in the record to establish the resident's designated physician determined that the resident lacked capacity, as required by statute.<sup>22</sup>

Likewise, a Florida court held that the estate of a former assisted living center resident was not bound by the facility's arbitration clause, which had been signed by the resident's son. The court found that, although the son had power of attorney, his mother had not been incapacitated at the time of admission.<sup>23</sup> Similarly, a Texas court refused to enforce an arbitration agreement signed by a nursing home resident's daughter vested with a medical power of

attorney for her mother. The court held that, in the absence of a doctor's certification that the resident was unable to make health care decisions for herself, there was no evidence the power of attorney ever became effective.<sup>24</sup>

The question of the resident's competence also arises in the context of decisions made by health care surrogates. A Mississippi court applied the state's health care surrogacy law, refusing to compel arbitration of a wrongful death claim against a nursing home where the resident's sister had signed the admissions contract, on grounds that the parties had stipulated the resident was competent at the time of admission.<sup>25</sup> On the other hand, the Fifth Circuit, applying Mississippi law, found that an admission by the surrogate that her daughter was incapacitated with dementia was sufficient to satisfy the incompetence requirement.<sup>26</sup>

Likewise, a Texas court enforced a nursing home arbitration clause where it was signed by the resident's son as the resident's responsible party despite the fact the son didn't speak English, testified that he felt pressured to sign, and lacked the legal authority to bind the resident. The court found that the resident was too ill to sign the admission papers, which contained the arbitration clause, and the son's

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siblings were comfortable with him signing the papers on their mother's behalf. Thus, the court found that the son acted pursuant to statutory authority allowing an adult child of a patient who has the waiver and consent of all other qualified adult children of the patient to act as the sole medical treatment decision-maker.<sup>27</sup>

Third, even if a decision-maker's authority was valid, the court should not compel arbitration unless it determines that the scope of that authority encompasses the ability to bind the resident to an arbitration clause. This determination is typically based on state law, as well as the language of any relevant legal document. For example, a Florida court refused to compel arbitration, where the power of attorney document did not specifically give the son the power to consent to arbitration on behalf of his mother.<sup>28</sup> A Texas court found that nothing in the medical power of attorney indicated it was intended to confer authority on the resident's daughter to make legal, as opposed to health care, decisions for the resident, such as whether to waive the resident's right to a jury trial by agreeing to arbitration of any disputes.<sup>29</sup> In contrast, the Tennessee Supreme Court held that "an attorney-in-fact acting pursuant to a durable power of attorney for health care may sign a nursing home contract that contains an arbitration provision because this action is necessary to consent to health care."<sup>30</sup>

Courts are also split on the scope of health care surrogates' authority. Some have held that a surrogate's statu-

tory authority to make health care decisions does not extend to arbitration. For example, several California courts concluded that, while it was likely the state legislature intended to allow patient's next of kin to sign a nursing home admissions agreement, "the decision whether to agree to an arbitration provision in a nursing home contract is not a necessary decision that must be made to preserve a person's well-being," but rather "pertains to the patient's legal rights."<sup>31</sup> Other California courts, however, have held that statutory health care power of attorney includes "the power to execute applicable admissions forms, including arbitration agreements, unless that power is restricted by the principal."<sup>32</sup> Similarly, interpreting Mississippi's surrogacy law, the Fifth Circuit held that a surrogate's power to contractually bind her daughter in matters of health care included signing an arbitration clause on the daughter's behalf.<sup>33</sup>

The determination of whether the execution of an arbitration clause constitutes a health care decision may depend on whether the resident could have been admitted to the nursing home *without* agreeing to arbitration. Thus, the Mississippi Supreme Court has held that arbitration was an "essential part of the consideration for the receipt of 'health care'" where signing was a condition of admission, but not where it was optional.<sup>34</sup>

▷ Was the signatory acting as the resident's agent?

Where a relative who has signed an arbitration clause on

behalf of a nursing home resident lacks express or statutory authority, courts must be careful to look at the evidence before concluding that the signatory was acting as that person's agent. As one court declared: "A person cannot become the agent of another merely by representing herself as such."<sup>35</sup> More specifically, it is not enough for a family member to *believe* she has agency authorization and act as such, even if the nursing home staff also believes the family member has that authority. Rather, the resident's own conduct must establish an agency relationship. For example, a California court refused to compel a nursing home resident with dementia to arbitrate her claims, where the resident's husband had signed the admissions agreement but the nursing home failed to present any evidence of the resident's conduct that would show she had authorized her husband to act as her agent. The court also emphatically rejected the nursing home's argument that the husband had spousal authority to bind his wife to arbitration, explaining that, "absent a legislative directive, the spousal relationship alone is insufficient to confer authority to agree to an arbitration provision in a nursing home admission contract."<sup>36</sup>

Likewise, a Tennessee court held that a husband lacked authority to sign an arbitration clause on behalf of his wife when she was admitted to a nursing home where the evidence showed the wife was in better mental condition than her husband at the time of admission, and the nursing home inexplicably failed

to seek her assent to the contract.<sup>37</sup>

Similarly, in a California case, the resident's husband signed an arbitration clause under both his name and his wife's name at a time when both spouses were already residents at the nursing home. The court concluded that, while the husband may have intended to act on behalf of his wife, the nursing home failed to present any evidence that the wife consented to her husband acting as her agent.<sup>38</sup>

In contrast, an Arizona court enforced an arbitration clause in a nursing home contract that had been signed by the resident's wife as his "legal representative," despite the fact she had no express or apparent authority to act on his behalf. The court found that, while the resident was non-responsive at the time of admission and could not have authorized his wife to act as his agent at that time, previous medical records revealed the wife had an extensive history of making medical decisions on her husband's behalf with his consent. The court held

that this was sufficient circumstantial evidence of implied agency authority.<sup>39</sup> Relatedly, an Ohio court held that a resident who knowingly permitted her daughter to sign the nursing home admission papers was bound by the arbitration clause therein. The court found that this was "a classic example of apparent authority."<sup>40</sup>

▷ Is the resident a third-party beneficiary of the contract?

Even if a court finds that the signatory lacked authority to sign on behalf of the resident, it may nonetheless conclude that the resident is a beneficiary of the agreement between the nursing home and the signatory. For example, the Mississippi Supreme Court held that where the resident's son entered into an admission agreement on the resident's behalf, the resident was a third-party beneficiary under the contract even though she never signed the contract, and her son lacked authority to sign the agreement as a "responsible party." The court

held that the sole purpose of the contract was to bind the nursing home to provide services to the resident, that the resident received the services detailed in the contract, and that the rights and benefits bestowed upon the resident sprang forth from the terms of the contract.<sup>41</sup>

**Even if the plaintiff is bound, are the specific claims subject to arbitration?**

Even if the plaintiff is bound by an arbitration clause, this does not necessarily make the *claims* subject to arbitration. This is particularly true in the case of wrongful death claims. For example, a Virginia court refused to compel a nursing home resident's estate to arbitrate a wrongful death claim, holding that, even if the resident was a third-party beneficiary of the contract, the plaintiffs were not bound because they were not asserting any claims under the contract.<sup>42</sup> Likewise, the Missouri Supreme Court recently considered a case where the daughter of nursing home resident brought a wrongful death action against the nursing home. The home's arbitration clause had been signed by the decedent's daughter. The court held that, even if the

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daughter's signature had validly bound the resident, the non-signatory son's wrongful death claims were not subject to arbitration, because under Missouri law, the cause of action for wrongful death arises only upon death and belongs to the survivors, not to the decedent.<sup>43</sup>

A federal court construing Georgia law similarly held that a wrongful death claim constitutes a separate, new, and distinct cause of action that does not belong to the decedent or her estate. Thus, though the resident signed an arbitration provision, the resident's daughter was not bound by the agreement in her capacity as a wrongful death beneficiary.<sup>44</sup> And a California court held that even though the daughter of a resident, in her capacity as the resident's "responsible party," entered into an arbitration clause on behalf of the resident, the daughter did not sign in her personal capacity. The court thus held that the daughter's wrongful death claim was not bound by the arbitration clause.<sup>45</sup>

On the other hand, the Alabama Supreme Court held that a wrongful death claim asserted by the executor of an estate was subject to the valid arbitration clause entered into by the nursing home resident before she died. The court stated that, "For the same reason the powers of an executor or an administrator encompasses all of those formerly held by the decedent, those powers must likewise be restricted in the same manner and to the same extent as the powers of the decedent would have been."<sup>46</sup>

### Is the arbitration clause unconscionable?

Even if an agreement was validly formed and the arbitration clause covers the claims at issue, it may nonetheless be unenforceable where it is unconscionable as a matter of state contract law. Unconscionability typically involves two components. While the tests vary by jurisdiction, "procedural unconscionability" relates to how the contract was formed and tends to focus on whether there was inequity in bargaining power between the parties or whether the stronger party imposed a form contract on the weaker party in a way that prevented her from freely choosing. "Substantive unconscionability" relates to the fairness of the terms themselves and focuses on whether they unreasonably favor one party or may prevent a party from vindicating her rights. While some states require at least some showing of both kinds of unconscionability, other states invalidate contract terms on a showing of just one.

#### 1. Procedural Unconscionability


In determining whether an arbitration agreement in a nursing home contract was formed in a procedurally unconscionable manner, courts focus on whether the resident or family member had the ability to review and

understand the terms to which she was agreeing and whether there was pressure to sign.<sup>47</sup>

In addition, the capacity or competence of a resident who signed an admission agreement on her own behalf may be relevant to unconscionability.

For example, a Florida court found an arbitration clause procedurally unconscionable in a deprivation of rights case against a nursing home where the resident's husband, who signed the arbitration clause on his wife's behalf, was elderly, had no legal training to understand the rights he was signing away for his wife, and was being asked to sign the documents including the arbitration clause without being told that his failure to sign them would not affect her care or her ability to stay in the home. While it was true that the arbitration agreement was not "hidden in fine print," it was presented to the husband as simply another document required to be signed as part of the admission process. The court thus held that the required quantum of procedural unconscionability was shown, and because the clause contained egregious substantive unconscionability, the clause was found unconscionable and unenforceable.<sup>48</sup>

In contrast, a Mississippi court held that an arbitration clause in a nursing home contract was not unconscionable despite the resident's failure to initial



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the clause as required by the contract, where there was no evidence the resident was mentally incapacitated at the time of admission and the arbitration clause was referenced in multiple places in the contract and was "clear and conspicuous, with non-legalistic language used." The court held that the nursing home did not have an affirmative obligation to explain the arbitration clause to the resident.<sup>49</sup> An Ohio court also upheld a nursing home contract containing an arbitration clause in the face of an unconscionability defense where the nursing home resident failed to offer any evidence as to her bargaining position at the time of execution. Procedural unconscionability, the court held, requires a quantum of evidence, which the resident failed to provide in this case.<sup>50</sup>

Arbitration clauses in nursing home agreements have also been found to be procedurally unconscionable where a family member signed the contract under circumstances that indicated she had no reasonable op-

portunity to read the contract. Thus, in a wrongful death case, a Florida court found that a nursing home's arbitration clause was procedurally unconscionable where the admissions director met with the decedent's daughter (who signed the admission papers) for only five minutes, did not mention the arbitration agreement, and merely showed the daughter where to sign; the daughter was not given a copy of the agreement she had signed; the arbitration clause was buried in a 37-page contract; and the document had to be signed for the patient to be admitted.<sup>51</sup> Additionally, another Florida court found a nursing home's arbitration clause procedurally unconscionable due to "sufficient irregularity in the circumstances surrounding the execution of the contract" where a nursing home resident's daughter was asked to sign numerous documents to complete the admission process while her father was being transported from a hospital to a nursing home.<sup>52</sup> Similarly, an Ohio court found a

nursing home's arbitration clause procedurally unconscionable where the resident's wife, who signed the arbitration clause on behalf of her husband, was worried about her husband's health. When she arrived at the nursing home to admit her husband, he appeared to be unconscious, and shortly thereafter he was transported by ambulance to the hospital. Only after he was en route to the hospital was she approached by a nursing home employee and asked to sign the agreement, which was not described to her.<sup>53</sup>

*Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004). The court, which also found the arbitration clause substantively unconscionable, stated:

Though we firmly believe that this case demonstrates both substantive and procedural unconscionability, there is a broader reason that arbitration clauses in this type of case must be closely examined.

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Arbitration clauses were first used in business contracts between sophisticated businesspersons as a means to save time and money should a dispute arise. As evidenced by the plethora of recent cases involving the application of arbitration clauses, the clauses are now being used in transactions between large corporations and ordinary consumers, a use that is cause for concern.

A Tennessee court refused to enforce an arbitration clause in an elder abuse case on grounds of procedural unconscionability where the court found that the circumstances of the admission agreement's execution showed arbitration was not within the "reasonable expectations" of the resident's husband, who signed on the resident's behalf. The resident was in urgent need of care, and the home would not admit her until the agreement was signed. The arbitration clause was on the tenth page of an 11-page contract and was buried in fine print. In addition, the husband had "obvious" educational limitations and could neither read nor write, and while the nursing home representative chose to explain certain terms of the agreement, she neglected to mention he would be waiving his wife's right to a jury trial.<sup>54</sup> However, a Texas court upheld an arbitration clause where the resident's son, who signed the nursing home contract containing the clause, did not understand or speak English and was told he would have to sign the contract in order for his mother to be admitted to the nursing home. A Spanish-speaking nursing home employee explained some of the contract to the son, but did not explain the clause. The court held that because there was no allegation of fraud, misrepresentation, or concealment, the contract was valid.<sup>55</sup>

Further, where the nursing home gives residents the option to refuse to

agree to arbitration, or where the party signing is sophisticated, courts have been more reluctant to find procedural unconscionability. For example, courts in Florida and Tennessee have upheld arbitration clauses in nursing home contracts that were in bold print and designated as "optional," and where the resident had the opportunity to review the clauses and ask questions.<sup>56</sup> Likewise, an Ohio court enforced an arbitration clause clearly stating that the resident's agreement to arbitrate disputes was not a condition of admission.<sup>57</sup>

Relatedly, a Florida court enforced an arbitration clause in a wrongful death case, finding that, although the clause was in a pre-printed form contract, the plaintiff failed to demonstrate it had been offered on a take-it-or-leave-it basis. The court noted that the resident's daughter, who had signed the agreement, had had ample opportunity to review it and ask questions, and held that there was not sufficient evidence that she "could not have obtained a satisfactory placement for her mother except by acquiescing" to arbitration.<sup>58</sup> Similarly, the Massachusetts Supreme Judicial Court rejected an unconscionability defense where the adult son who signed the clause was intelligent, educated, and sophisticated about contracts; the clause was *not* a condition of admission; and the son had a unilateral right of rescission.<sup>59</sup>

In addition, the Alabama Supreme Court has recently twice upheld nursing home contracts containing arbitration clauses in the face of procedural unconscionability defenses. In one case, the resident's brother, who signed the nursing home contract, asserted that the contract was procedurally unconscionable because the nursing home withheld material facts from him. The court held that because the brother had significant time to review

the contract, the arbitration clause was expressly not a condition of admission, and the clause could have been rescinded within thirty days, the contract was not procedurally unconscionable.<sup>60</sup> In another consolidated case, the court stated that procedural unconscionability requires a demonstration of a lack of meaningful choice on the part of the nursing home resident or those who sign nursing home contracts on the residents' behalf. The court held that lack of choice was not sufficiently shown by arguing that the nursing home in which residents resided was one of only two nursing homes in the county, which had 12,180 elderly persons.<sup>61</sup>

## 2. Substantive Unconscionability

Courts have not hesitated to strike down arbitration clauses in nursing homes where they would effectively prevent plaintiffs from holding the facilities accountable for wrongdoing. For example, a Florida court struck down a nursing home's arbitration clause that barred the arbitrator from awarding attorneys' fees or punitive damages. The court held that the clause "would specifically deprive the resident of remedies that the legislature felt were important to the reduction of elder abuse in nursing homes."<sup>62</sup> In another Florida case, the court struck an arbitration clause in a nursing home contract where the rules of the designated arbitration provider – which were incorporated by reference into the contract – would have imposed a higher burden of proof for demonstrating intentional or reckless conduct. The court held that this was substantively unconscionable and refused to rewrite the clause by severing the offensive provision.<sup>63</sup>

Several Ohio courts have also held that arbitration clauses in nursing home contracts are substantively unconscionable when they create barriers to plaintiffs' claims, and thus

serve to exculpate the nursing home from liability for wrongdoing. In one case, an arbitration clause was found substantively unconscionable where it contained a "loser pays" provision, required a resident or her representative to sign as a condition for admission into the nursing home, and was formatted and written such that a person executing the document is not placed on notice of the existence and ramifications of the clause.<sup>64</sup> Another Ohio court was similarly troubled by a loser pays provision in a nursing home arbitration clause, describing the deterrent effect it may have on potential resident-plaintiffs who, in addition to paying their attorney and the costs of arbitration, may be saddled with the facility's costs and attorney's fees. "Such a burden is undoubtedly unconscionable."<sup>65</sup>

Likewise, in a series of cases, the Mississippi Supreme Court has established that several terms limiting nursing home liability that frequently appear in nursing home arbitration clauses are substantively unconscionable. These terms include provisions limiting the amount of damages recoverable in arbitration; prohibiting punitive damages in arbitration; requiring the resident to pay all costs for challenging the grievance resolution process or an arbitration award; shortening the applicable statute of limitations; and allowing a nursing home to bring suit in court in matters relating to payment for services, but requiring all disputes brought by residents to be arbitrated.<sup>66</sup>

### 3. Public Policy

An argument that a term in an arbitration clause is unenforceable because it violates state public policy is distinct from, but similar to, an argument that the term is substantively unconscionable. The public policy argument offers one significant advantage. Whereas most states require elements of both procedural and substantive unconscionability to

find that an arbitration provision is unconscionable, one need not allege, let alone prove, procedural unconscionability if a term violates public policy that is not unique to arbitration, but that would apply to any contract. For example, Florida courts have been active in striking terms in nursing home arbitration clauses for violating public policy as encoded in the Nursing Home Residents Act ("NHRA"). As one court explained, "The arbitrability of statutory claims rests on the assumption that the arbitration clause permits relief equivalent to that available via the courts. An arbitration clause is thus unenforceable if its provisions deprive the plaintiff of the ability to obtain meaningful relief for statutory violations." The court thus held a provision eliminating punitive damages and capping noneconomic damages to violate public policy where the state Nursing Home Residents Act ("NHRA") would allow for such damages.<sup>67</sup> Another Florida court held a provision heightening the burden of proof on plaintiffs seeking consequential, exemplary, incidental, punitive, or special damages violated public policy because such a burden would be contrary to the NHRA.<sup>68</sup> Similarly, a provision requiring "clear and convincing evidence of intentional or reckless misconduct" violates the NHRA.<sup>69</sup>

One Florida court, however, has held that the NHRA does not expressly prohibit a contractual waiver or limitation of statutory rights. That court, balancing Florida public policy as expressed in the NHRA with state policy in favor of arbitration, left to the arbitrator the issue of whether the limitations on a resident's remedies pursuant to the arbitration clause should be enforced.<sup>70</sup>

### 4. Severability

It is common for a nursing home that has drafted an unconscionable arbitration clause, or an arbitration

clause that violates public policy, to ask the court to rewrite the arbitration clause so that it will be enforceable. As a rule, courts should not rewrite unconscionable arbitration clauses to give their drafters the benefits they sought. The Supreme Court has said the "primary purpose" of the FAA is to ensure "that private agreements to arbitrate are enforced according to their terms."<sup>71</sup> Thus, if an agreement to arbitrate cannot be enforced according to its terms, a court should refuse to enforce it. When a corporation drafts an unenforceable contract of adhesion, it is not the responsibility of the court to supply the legal acumen to rewrite the contract and thereby find a legal way for the drafter to enjoy the otherwise unobtainable results it sought. As a comment to the Restatement (Second) of Contracts states, "a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable."<sup>72</sup>

Thus, especially where unconscionability or violations of public policy permeate the arbitration clause, or where the unconscionability or violation of public policy goes to the essence of the contract, courts will strike the arbitration clause in its entirety. For instance, one Florida court found an arbitration clause as a whole to be invalid where a series of terms limiting liability violated state public policy and the agreement was titled an "arbitration and limitation of liability agreement." "The title alone," explained the court, "suggests the offensive limitations go to the 'essence' of the contract."<sup>73</sup> Another Florida court similarly struck the entirety of an arbitration clause where the offending provisions were provided by the American Health Lawyers Association ("AHLA") arbi-

tration rules. The rules, which were incorporated into the arbitration agreement by reference, prohibited the award of consequential, incidental, punitive, or special damages absent clear and convincing evidence. When the nursing home sought to have AHHA rules severed so that the remainder of the arbitration clause could be enforced, the court refused. "[T]hese provisions served to taint the entire agreement and rendered the arbitration agreement completely unenforceable."<sup>74</sup>

However, even where terms in an arbitration clause are found unenforceable because they are substantively unconscionable or violate public policy, some courts will continue to enforce the remainder of the arbitration clause by merely striking the offending terms. For example, the Mississippi Supreme Court severed six substantively unconscionable provisions – provisions limiting the nursing home's liability, waiving the resident's ability to seek punitive damages, allowing the nursing home to sue in court for non-payment while prohibiting the resident from suing in court, requiring the resident pay the costs of challenging the grievance resolution process, and shortening the applicable statute of limitations – but still enforced the arbitration clause. The court explained, "Contracts are solemn obligations, and the court must give them effect as written. In light of this duty, it is well-established that when interpreting arbitration agreements, or any contract, if a court strikes a portion of an agreement as being void, the remainder of the contract is binding."<sup>75</sup> Similarly, a Florida court severed provisions stipulating a waiver of punitive damages and a cap on non-economic damages as being void as against public policy but enforced the remainder of the arbitration clause. The court stated, "Generally, contractual provisions are severable, where the illegal provisions do not go

to the contract's essence, and, there remain valid legal obligations with the illegal provisions eliminated."<sup>76</sup>

### **Pending legislation would outlaw arbitration agreements in nursing home contracts**

In February 2009, U.S. Representative Linda Sanchez (D-CA) introduced the "Fairness in Nursing Home Arbitration Act of 2009." Several weeks later, Senator Mel Martinez (R-FL) issued a parallel bill in the Senate.<sup>77</sup> If passed, the Act will bar nursing homes from imposing arbitration as a condition of admission into a facility. Parties will still be free to choose to arbitrate their disputes after the dispute has arisen. The bill's sponsors have stated that the law is a response to the increase in the frequency with which nursing homes require residents and their families to agree to arbitration, and that it is designed to remove the pressure on families to choose between ensuring their loved one receives quality care and waiving their right to a day in court. As of March 9, 2009, none of the members of Montana's congressional delegation have co-sponsored either bill.

### **ENDNOTES**

<sup>1</sup> This article is based on an earlier article published as Leslie A. Bailey and F. Paul Bland, Jr., *Combating Abusive Arbitration Clauses in Nursing Home Contracts*, *Trial Briefs* 30-35 (North Carolina Academy of Trial Lawyers, August 2008). For more complete information on arguments available to fight arbitration clauses, see F. Paul Bland, Jr. et al., *National Consumer Law Center, Consumer Arbitration Agreements: Enforceability and Other Topics* (5th ed. 2007 & Supp. 2008).

<sup>2</sup> Leslie Bailey and Paul Bland are attorneys at Public Justice ([www.publicjustice.net](http://www.publicjustice.net)), a national public interest law firm headquartered in Washington, D.C. Matthew Melamed is the Kazan-Wallace Fellow at Public Justice.

<sup>3</sup> The Wall Street Journal recently reported that [n]ursing homes' average

costs to settle cases have begun dropping, according to an industry study, even as claims of poor treatment are on the rise." Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*, *Wall St. J.*, April 11, 2008, at A1. The article also noted that nursing home contracts that require arbitration are now "the rule rather than the exception."

<sup>4</sup> For other articles concerning binding mandatory arbitration clauses in nursing home contracts, see Donna Ambrogio, *Legal Issues in Nursing Home Admissions Agreements: The Rights of Elders*, 18 *J.L. Med. & Ethics* 254 (2007); Maureen Armour, *A Nursing Home's Good Faith Duty "to" Care: Redefining a Fragile Relationship Using the Law of Contract*, 39 *St. Louis U.L.J.* 217 (1994); Suzanne Gallagher, *Mandatory Arbitration Clauses in Nursing Home Admission Agreements: The Rights of Elders*, 3 *Nat'l Assoc. Elder L. Att'ys J.* 187 (2007); Ari Houser, *Nursing Home Research Report, AARP Public Policy Institute* (Oct. 2007), available at [http://www.aarp.org/research/longtermcare/nursinghomes/fs10r\\_homes.html](http://www.aarp.org/research/longtermcare/nursinghomes/fs10r_homes.html); Marshall B. Kapp, *The "Voluntary" Status of Nursing Home Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 *New Eng. J. on Crim. & Civ. Confinement* 1 (1998); Ann E. Krasunski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 *DePaul J. Health Care L.* 263 (2004); Charles P. Sabatino, *Nursing Home Admission Contracts: Undermining Rights the Old Fashioned Way*, 24 *Clearinghouse Rev.* 553 (1990); Denise Ashbaugh Vlosky, et al., "Say-So" as a Predictor of Nursing Home Readiness, 93 *J. of Fam. & Consumer Sci.* 59 (2001); Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 *J. Mental Health & Aging* 145 (2000).

<sup>5</sup> See, e.g. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("Arbitration is simply a matter of contract between parties; it is a way to resolve disputes – but only those disputes – that the parties have agreed to submit to arbitration; *AT & T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-49 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not so agreed to submit . . . This

axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.”) (internal citation omitted).

<sup>6</sup> Springhill Nursing Homes, Inc. v. McCurdy, 898 So.2d 694, 701 (Ala. 2004) (emphasis added).

<sup>7</sup> Bedford Care Center-Monroe Hall, LLC v. Lewis, 923 So.2d 998, 1001 (Miss. 2006).

<sup>8</sup> High v. Capital Senior Living Properties 2-Heatherwood, Inc., — F. Supp. 2d —, 2008 WL 5411189, at \*6 (E.D. Mich. Dec. 17, 2008).

<sup>9</sup> See, e.g., Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus, 853 So.2d 500, 504 (Fla. Dist. Ct. App. 2003); Integrated Health Services of Green Briar, Inc. v. Lopez-Silvaro, 827 So.2d 338, 339 (Fla. Dist. Ct. App. 2002).

<sup>10</sup> Community Care Ctr. of Vicksburg v. Mason, 966 So.2d 220, 226–27 (Miss. Ct. App. 2007).

<sup>11</sup> Covenant Health & Rehab. of Pica-yune v. Estate of Lambert, 984 So.2d 283, 287–88 (Miss. Ct. App. 2006).

<sup>12</sup> Landers v. Integrated Health Services of Shreveport, 903 So.2d 609, 612 (La. Ct. App. 2005).

<sup>13</sup> Estate of Etting v. Regents Park at Aventura, Inc., 891 So.2d 558, 558–59 (Fla. Ct. App. 2004).

<sup>14</sup> See, e.g., Hatley v. Superior Court (Hanford Nursing & Rehab. Hosp.), No. F052747, 2008 WL 240841, \*4 (Cal. Ct. App. Jan. 30, 2008) (distinguishing this question from the question of whether a plaintiff is bound by a resident’s valid agreement to arbitrate).

<sup>15</sup> Noland Health Services, Inc. v. Wright, 971 So.2d 681, 685–87, 690 (Ala. 2007).

<sup>16</sup> Bishop v. Medical Facilities of America XLVII (47) Ltd. P’ship, 65 Va. Cir. 187, 2004 WL 1858694 at \*3–4 (Va. Cir. Ct. June 25, 2004).

<sup>17</sup> Ward v. Nat’l Healthcare Corp., — S.W.3d —, 2009 WL 77891 (Mo. Jan. 13, 2009).

<sup>18</sup> Goliger v. AMS Props., Inc., 123 Cal. App. 4th 374, 378 (Cal. Ct. App. 2004).

<sup>19</sup> Mississippi Care Ctr. of Greenville, LLC v. Hinyub, 975 So.2d 211, 216 (Miss. 2008); cf. Mariner Healthcare, Inc. v. Green, No. 4:04CV246, 2006

WL 1626581, at \*3 (N.D. Miss. June 7, 2006) (holding that where nursing home fails to provide evidence that resident conveyed any express or implied authority to daughter to sign admission contract, and where resident did not act in a way that could be seen as granting apparent authority, no valid arbitration agreement exists where resident’s daughter signed the arbitration agreement); Trinity Mission of Clinton, LLC v. Barber, 988 So.2d 910, 916 (Miss. 2007) (holding that where the record contains no proof of acts or conduct by resident indicating that her son possessed the authority to bind her to an admissions agreement containing an arbitration clause, no agency relationship was created).

<sup>20</sup> Ward, 2009 WL 77981.

<sup>21</sup> Hendrix v. Life Care Centers of America, Inc. No. E2006-02288-COA-R3-CV, 2007 WL 4523876, at \*7 (Tenn. Ct. App. Dec. 21, 2007).

<sup>22</sup> McKey v. Nat’l Healthcare Corp., No. CC-1972-06, 2008 WL 3833714, at \*3 (Tenn. Ct. App. Aug. 15, 2008)

<sup>23</sup> In re McKibbin, 977 So.2d 612, 613 (Fla. Dist. Ct. App. 2008); see also Barber, 988 So.2d at 917 (Miss. 2007) (holding that proof of resident’s incapacity was insufficient to statutorily authorize surrogate to bind the resident to arbitration; the court, however, did find the resident bound by the arbitration provision because she was an intended third-party beneficiary of the agreement signed by her surrogate).

<sup>24</sup> Texas Citiview Care Ctr. v. Fryer, 227 S.W.3d 345, 352 (Tx. Ct. App. 2007).

<sup>25</sup> Grenada Living Ctr, LLC v. Coleman, 961 So.2d 33, 37–38 (Miss. Ct. App. 2007). The court further held that because the resident’s wrongful death beneficiaries could only be bound by the arbitration agreement to the extent that he himself was bound, the clause could not be enforced against the plaintiffs. See also Robbins v. Beverly Enterprises, Inc., No. 3:07CV047-B-A, 2008 WL 907465, at \*3 (N.D. Miss. Mar. 31, 2008) (refusing to compel arbitration of wrongful death claims where resident was mentally competent but paralyzed at time of admission, and family member who signed admission contract had no express, apparent or agency authority to do so); Hinyub, 975 So.2d at 217–18 (refusing to hold that daughter had

authority as resident’s health care surrogate, where nursing home had not produced a declaration from the resident’s physician that she was not capable of directing her own affairs).

<sup>26</sup> JP Morgan Chase & Co. v. Conegie ex. rel. Lee, 492 F.3d 596, 599 (5th Cir. 2007) (relying on Lambert, 949 So.2d at 736–37).

<sup>27</sup> In re Ledet, No. 04-04-00411-CV, 2004 WL 2945699, at \*3–4 (Tx. Ct. App. 2004).

<sup>28</sup> McKibbin, 977 So.2d at 613.

<sup>29</sup> Fryer, 227 S.W.3d at 352.

<sup>30</sup> Owens v. Nat’l Health Corp., 263 S.W.3d 876, 884 (Tenn. 2007) (internal quotations omitted). The court also held that the nursing home’s arbitration clause does not violate the federal Medicaid Act, which prohibits nursing homes from requiring “consideration” other than payment as a condition to admission or continued care. *Id.* at 886–87. The plaintiffs filed a petition for certiorari on this issue, which was denied. U.S. No. 07-1380, review denied Oct. 6, 2008.

<sup>31</sup> Flores v. Evergreen at San Diego, LLC, 148 Cal. App. 4th 581, 593–94 (Ct. App. 2007); see also Goliger, 123 Cal. App. 4th at 377; Pagarigan v. Libby Care Ctr., Inc., 99 Cal. App. 4th 298, 302 (Ct. App. 2002) (under California law, the authority of a patient’s next-of-kin to make medical treatment decisions does not “translate into authority to sign an arbitration agreement on the patient’s behalf at the request of the nursing home”); Hatley, 2008 WL 240841 at \*8.

<sup>32</sup> Hogan v. Country Villa Health Services, 148 Cal. App. 4th 259, 264 (Cal. Ct. App. 2007); see also Garrison v. Superior Court (City Villa Belmont Heights HealthCenter), 132 Cal. App. 4th 253, 266 (Cal. Ct. App. 2005) (enforcing arbitration agreements executed as part of the health care decision-making process).

<sup>33</sup> Conegie, 492 F.3d at 599.

<sup>34</sup> Hinyub, 975 So.2d at 218.

<sup>35</sup> Pagarigan, 99 Cal. App. 4th at 301.

<sup>36</sup> Flores, 148 Cal. App. 4th at 586–89; see also Pagarigan, 99 Cal. App. 4th at 301.

<sup>37</sup> *Raiteri ex rel Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL

23094413, at \*9 (Tenn.Ct. App. Dec. 30, 2003).

<sup>38</sup> *Warfield v. Summerville Senior Living, Inc.*, 158 Cal. App. 4th 443, 448 (Cal. Ct. App. 2007); see also *Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430, 433 (Ga. Ct. App. 2007) (refusing to enforce arbitration clause in nursing home agreement where the resident was not present when her husband signed the agreement, and the nursing home presented no evidence that she had authorized her husband to act as her agent); *Sikes v. Heritage Oaks West Retirement Village*, 238 S.W.3d 807, 810-11 (Tex. Ct. App. 2007) (refusing to enforce arbitration clause in medical malpractice case against nursing home where there was no proof that wife of decedent had agency authority to sign the arbitration agreement on the resident's behalf). Furthermore, silence by the non-signatory spouse is not sufficient to "ratify" an agency relationship. *Hatley*, 2008 WL 240841 at \*8 n.1.

<sup>39</sup> *Ruesga v. Kindred Nursing Centers West LLC*, 161 P.3d 1253, 1261-63 (Ariz. Ct. App. 2007).

<sup>40</sup> *Broughsville v. OHECC, LLC*, No. 05CA008672, 2005 WL 3483777, at \*2 (Ohio Ct. App. 2005). Though the resident argued that she suffered from mild dementia, she did not argue at trial that she was incompetent when her daughter signed the admission papers. *Id.*

<sup>41</sup> *Barber*, 988 So.2d at 919; see also *Trinity Mission Health & Rehab. of Clinton v. Estate of Scott*, — So.2d —, 2008 WL 73682 at \*3 (Miss. Ct. App. Jan. 8, 2008) But see *Ricketts*, 2008 WL 3833660, at \*4 ("Third party beneficiary concepts should not be used to circumvent the threshold requirement that there be a valid arbitration agreement . . . If [resident's daughter] did not have authority, there is no valid contract. Without a valid contract, there can be no third party beneficiary.").

<sup>42</sup> *Bishop*, 2004 WL 1858694 at \*4-5; see also *Wright*, 971 So.2d at 687-88 (nursing home resident's breach-of-contract claim not subject to arbitration because it was essentially a claim for breach of the standard of medical care that was governed by statute rather than contract).

<sup>43</sup> *Lawrence v. Beverly Manor*, 273

S.W.3d 525, 529 (Mo. 2009); see also *Finney v. National Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. Ct. App. 2006).

<sup>44</sup> *Washburn v. Beverly Enterprises-Georgia, Inc.*, No. CV 206051, 2006 WL 3404804, at \* 4 (S.D. Ga. Nov. 14, 2006).

<sup>45</sup> *Goliger*, 123 Cal. App. 4th at 378.

<sup>46</sup> *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661, 665 (Ala. 2004).<sup>47</sup> In general, it is not enough to show that the resident or family member did not understand the document he or she signed. Signatories to nursing home contracts, just like signatories to contracts in general, are assumed to understand the contents of the contract absent the showing of special circumstances. See, e.g., *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 417-18 (Ind. Ct. App. 2004) (upholding arbitration clause that appeared on page ten of the contract and was in the same size font as the rest of the contract, where the signature line immediately followed the clause, and where signatory was not precluded from reading the contract).

<sup>48</sup> *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62-63 (Fla. Ct. App. 2003).

<sup>49</sup> *Mason*, 966 So.2d at 229-30. The Mississippi Supreme Court has repeatedly upheld arbitration clauses in nursing home contracts against unconscionability challenges, failing to find, in the absence of exigent circumstances, procedural unconscionability where the arbitration agreement was clearly marked, printed in bold-faced type, and featured an all caps bold-faced consent paragraph drawing attention to the parties' voluntary consent to the arbitration provision placed above the signature lines. See *Lambert*, 949 So.2d at 737; *Barber*, 988 So.2d at 921; *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 520 (Miss. 2005).

<sup>50</sup> *Fortune v. Castle Nursing Homes, Inc.*, 843 N.E.2d 1216, 1222 (Ohio Ct. App. 2005).

<sup>51</sup> *Woebse v. Health Care & Retirement Corp. of Am.*, 977 So. 2d 630, 633-34 (Fla. Dist. Ct. App. 2008).

<sup>52</sup> *Prieto v. Healthcare & Retirement Corp. of America*, 919 So.2d 531, 533 (Fla. Dist. Ct. App. 2005). *Id.*

<sup>54</sup> *Howell v. NHC Healthcare-Fort*

*Sanders, Inc.*, 109 S.W.3d 731, 735 (Tenn. Ct. App. 2003); see also *Raiteri*, 2003 WL 2309 4413 at \*8 (finding clause procedurally unconscionable based on similar facts).

<sup>55</sup> *Ledet*, 2004 WL 2945699, at \* 5-6.

<sup>56</sup> *Fenelus*, 853 So. 2d at 502, 505; *Estate of Mooring v. Kindred Nursing Centers*, No. W2007-02875-COA-R3-CV, 2009 WL 130184, at \*5 (Tenn. Ct. App. Jan 20, 2009); see also *Bland ex rel. Coker v. Health Care & Retirement Corp. of America*, 927 So.2d 252, 256 (Fla. Dist. Ct. App. 2006) (upholding an arbitration clause where the resident's stay was not conditioned on agreement to arbitrate, and where resident's daughter, who signed the clause, had a meaningful opportunity to review the document). The *Mooring* court also cited the signatory's ability to ask questions as contributing to procedural unconscionability. *Mooring*, 2009 WL 130184, at \*6; see also *Fortune v. Castle Nursing Homes, Inc.*, No. 07 CA 001, 2007 WL 4227458, at \*2-3 (Ohio. Ct. App. Nov. 30, 2007) (arbitration clause not procedurally unconscionable where plaintiff failed to present evidence that nursing home resident was under stress or lacked the time and ability to understand the clause).

<sup>57</sup> *Broughsville*, 2005 WL 3483777, at \*5. But see *Small*, 823 N.E.2d at 23-24 (despite a clause stating that admission is not conditioned on agreement to arbitrate, the clause is unconscionable because there are no means provided by which resident may reject the arbitration clause).

<sup>58</sup> *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 287-88 (Fla. Dist. Ct. App. 2003).

<sup>59</sup> *Miller v. Cotter*, 863 N.E.2d 537, 545 (Mass. 2007).

<sup>60</sup> *Carraway v. Beverly Enterprises Alabama, Inc.*, 978 So.2d 27, 32-33 (Ala. 2007).

<sup>61</sup> *Turcotte*, 894 So.2d at 666; see also *High*, 2008 WL 5411189, at \*7 (stating that unconscionability applies only where contracts are adhesive, and that "a contract is not one of adhesion where an individual has an option to obtain the desired goods elsewhere").

<sup>62</sup> *Romano*, 861 So. 2d at 62-63.

<sup>63</sup> *Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773, 774-76 (Fla. Ct. App. 2007).

<sup>64</sup> Fortune, 843 N.E.2d at 1221.

<sup>65</sup> Small, 823 N.E.2d at 24.

<sup>66</sup> Lambert, 949 So.2d at 738-40 (limitation on liability, waiver of punitive damages, allowing nursing home to sue in court for non-payment, requiring resident costs of challenging grievance resolution process, statute of limitations, non-mutual waiver of jury trial); Barber, 98 So.2d at 922-23 (allowing nursing home to sue in court for non-payment, limitation on liability, waiver of punitive damages); Stephens, 911 So.2d at 523-24 (limitation of liability and waiver of punitive damages); see also Scott, 2008 WL 73682 at \*4-5 (finding the following terms substantively unconscionable under Mississippi law: waiver of claims except for willful acts, waiver of liability for criminal acts against individuals, limitation on liability, waiver of punitive damages, requirement that residents pay costs of challenging grievance resolution process, statute of limitations).

<sup>67</sup> Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham, 953 So.2d

574, 578 (Fla. Dist. Ct. App. 2007); see also Lacey v. Healthcare & Retirement Corp. of America, 918 So.2d 333, 334 (Fla. Dist. Ct. App. 2005) (same). Another Florida court held that, in addition to the ban on punitive damages and cap on noneconomic damages, the waiver of a right to appeal also violates the NHRA. Alterra Healthcare Corp. v. Bryant, 937 So.2d 263, 267 (Fla. Dist. Ct. App. 2006).

<sup>68</sup> SA-PG-Ocala v. Stokes, 935 So.2d 1242, 1243 (Fla. Dist. Ct. App. 2006).

<sup>69</sup> Blankfeld v. Richmond Health Care, Inc., 902 So.2d 296, 299 (Fla. Dist. Ct. App. 2005).

<sup>70</sup> Bland, 927 So.2d at 258.

<sup>71</sup> Volt Info. Sciences, Inc. v. Bd. of Trustees, 489 U.S. 468, 479 (1989).

<sup>72</sup> Restatement (Second) of Contracts § 184 cmt. b (1981).

<sup>73</sup> Lacey, 918 So.2d at 335.

<sup>74</sup> Stokes, 935 So.2d at 1243.

<sup>75</sup> Covenant Health Rehab of Pica-yune, L.P. v. Brown, 949 So.2d 732, 741 (internal quotation and citation omit-

ted). See also Barber, 988 So.2d at 924 (“We adhere to our practice of striking unconscionable terms and leaving the remainder of the agreement intact.”) (internal quotation and citation omitted); Stephens, 911 So.2d at 525 (“Thus, our action today in finding a portion of the arbitration clause to be unconscionable, but yet enforcing the remainder of the arbitration clause which we find to be conscionable and otherwise enforceable, is consistent with our case law, statute, and basic principles of contract law.”); Broughs-ville, 2005 WL 3483777, at \*7 (applying savings clause allowing for the enforcement of arbitration clause after severance of unconscionable terms).

<sup>76</sup> Bryant, 937 So.2d at 270; see also Estate of Linton, 953 So.2d at 579 (severing limitations on remedies but enforcing the remainder of arbitration clause).

<sup>77</sup> Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Congress (2009); Fairness in Nursing Home Arbitration Act, S. 512, 111th Congress (2009). A prior iteration of this bill expired when the last session of Congress ended. See Fairness in Nursing Home Arbitration Act, S. 2838, 110th Congress (2008). ♦

**2009 Legislative Session** ~ MTLA tracked 210 bills out of the over 2,300 bill requests that were filed. We are fortunate to have three MTLA members in the 61<sup>st</sup> Legislature - Rep. Anders Blewett of Great Falls, Sen. Larry Jent of Bozeman, and Rep. Ken Peterson of Billings - to help articulate our issues. This session had the potential to be one of the worst in the past ten years, but with the support and help of many MTLA members and their clients, civil justice survived. When MTLA put out the call to the membership, you responded – thank you!

The easiest way to find the final status of bills that MTLA followed is to go to the MTLA website – [www.monttla.com](http://www.monttla.com) – and click on the *2009 Legislature* link. You will be prompted for your MTLA Username and Password - if you do not have those yet, go to the Log In on the homepage, enter your email address and click Password, and your info will be emailed to you.

*“Trial by jury must be preserved: not as a mere formality, stripped of its discretion by arbitrary and inflexible rules dictated by the captains of commerce and industry for the furtherance of their own selfish interest, but free to search out and find the truly essential justice of each individual case.”*

*J. Kendall Few, In Defense of Trial by Jury (1992)*