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A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts

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INTRODUCTION

On July 19, 1998, Margaretha Sauer died at the Mena Medical Center following a five and one-half year stay at Rich Mountain [Nursing and Rehabilitation Center]. She was 93 years old. Mrs. Sauer's discharge summary revealed that the cause of her death was severe electrolyte abnormalities, with contributing factors of "Alzheimer's type, dementia[.]" and protein calorie malnutrition.

....

Mrs. Sauer's physical condition at time of death was gleaned from nursing notes. She had lost fifteen pounds in the last month and was in need of a feeding tube. There were signs of bedsores on her body, stemming from lying in urine and excrement. She suffered from contractures from Alzheimer's Disease, which involved contraction of her limbs into her sockets. She also had a urinary infection and had been experiencing a foul vaginal discharge

....

... There was evidence presented that she was found at times with dried feces under her fingernails from scratching herself while lying in her own excrement. At other times, she was not "gotten up" out of her bed as she should have been. Often times, Mrs. Sauer's food tray was found in her room, untouched because there was no staff member at the nursing home available to feed her. She was not provided with

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“range of motion” assistance when the facility was short of staff. On one occasion, her son complained to staff that he had found his mother at 3:00 p.m., still in her gown, wet with urine, disturbed, and upset.

Testimony further revealed that at times, there was not enough hot water with which patients could shower. Mrs. Sauer was often times found wet without being changed in four hours. She had pressure sores on her back, lower buttock, and arms on days she was found sitting in urine and excrement. A former staff member remembered seeing Mrs. Sauer at one time with a pressure sore the size of a softball, which was open. Her sores and blisters became infected. She was frequently double-padded, and even triple-padded, rather than single-padded for her incontinence problems. At times, she had no water pitcher in her room; nor did she receive a bath for a week or longer, due to there not being enough staff at the facility. She was described as “always thirsty” and her nursing notes indicated that she was heard moaning and crying. At the time she was hospitalized prior to her death, she had a severe vaginal infection. When she was in the geriatric chair, she was not “let loose” every two hours, as required by law. Finally, Mrs. Sauer was found to suffer from poor oral hygiene with caked food and debris in her mouth.

. . . There was ample testimony and evidence presented to demonstrate that Mrs. Sauer suffered considerably and was not properly cared for, that Rich Mountain was short-staffed, and that the appellants tried to cover this up by “false-charting” and by bringing in additional “employees” on state-inspection days. Mr. Hemingway[,] [a former regional vice president,] testified that these deficiencies were due to a shift in corporate philosophy that placed profits over proper patient care. All of this serves to support the Sauer Estate’s case that the nursing home, under the auspices of the appellants, knew it had staffing problems and committed negligence as to Mrs. Sauer, because it was short-staffed due to cutbacks.¹

The jury awarded the Sauer estate and family over \$78 million, which was reduced to \$26 million by the Arkansas Supreme Court.² The nursing home appealed to the U.S. Supreme Court, but the Court declined to hear the case.³

We know about the *Sauer* case and the deplorable mistreatment of Mrs. Sauer only because the facility did not include a pre-dispute binding arbitration agreement in its admission contract;⁴ but imagine if it had. The suit never would have been filed in a public court. It would

1. *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 350-54 (Ark. 2003).

2. *Id.* at 351, 369.

3. *Advocat, Inc. v. Sauer*, 540 U.S. 1012 (2003).

4. *See Advocat, Inc.*, 111 S.W.3d 346.

have been handled privately and confidentially in arbitration. The chilling description of a helpless elderly woman forced to sit in urine and excrement for hours, covered in pressure sores, unbathed for days, moaning and crying, malnourished and always thirsty, would have disappeared from the public consciousness.⁵

The citizens of Mena, Arkansas would not have learned about the suffering of their neighbor or the fact that it was caused by a shift in corporate philosophy that put profits first over patient care—the cause expounded by the company’s own regional vice president.⁶ The citizens of Mena would have had no opportunity to express their outrage at neglect so despicable that it almost certainly could have been considered criminal. The Sauer estate and family would have recovered a fraction of what the jury awarded, and may even have had their non-economic damages capped at \$250,000 and punitive damages denied altogether, depending on the particulars of the arbitration provision.⁷ In short, even though the public would have paid for much of the “care” given at this facility via the Medicare and Medicaid programs, the facility would have been able to hide its wrongdoing behind an arbitration agreement that Mrs. Sauer almost certainly would have had no real opportunity to contest, and the cost of abusing and neglecting the elderly would go way down. This is simply unacceptable.

Many scholars have written forceful condemnations of pre-dispute binding arbitration agreements in consumer contracts in general,⁸ and

5. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 764-65 (2002) (expressing concern that arbitration has resulted in “a removal of important aspects of civic life from the public realm to a realm in which economic and social power are even more likely to play a significant role”).

6. *See Advocat, Inc.*, 111 S.W.3d at 354.

7. *See Bland ex rel. Coker v. Health Care & Ret. Corp. of Am.*, 927 So. 2d 252, 255-58 (Fla. Dist. Ct. App. 2006) (refusing to strike provisions in arbitration agreement that would limit discovery for the plaintiff, cap non-economic damages at \$250,000, and prohibit punitive damages, despite the fact that these provisions conflict with Florida’s Nursing Home Resident’s Rights Act, *FLA. STAT.* §§ 400.022-.023 (2004)); *see also* 1 JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGES TREATISE* § 4:22 (3d ed. 2008) (explaining that the Federal Arbitration Act commands courts to give effect to the terms of pre-dispute arbitration agreements—including disallowance of punitive damages). *But see Lacey v. Healthcare & Ret. Corp. of Am.*, 918 So. 2d 333, 334 (Fla. Dist. Ct. App. 2005) (striking caps on non-economic damages and prohibition of punitive damages because they conflict with Florida’s Nursing Home Resident’s Rights Act).

8. *See, e.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 *HOUS. L. REV.* 1237 (2001); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 *LAW & CONTEMP. PROBS.* 133 (2004); Jean

some have focused on nursing home admission contracts specifically.⁹ They focus on the failure of the courts to adequately police these agreements for unconscionability,¹⁰ the expansive interpretation of the Federal Arbitration Act (FAA) by the U.S. Supreme Court,¹¹ and the failure of Congress to amend the FAA.¹² While touching on these issues, this Article charts a different course.

In this Article, I move beyond the deserved and already well-articulated castigation of the courts and Congress in favor of an approach that could, if followed, have an almost immediate impact. I argue that the Secretary of the U.S. Department of Health and Human

R. Sternlight, *In Defense of Mandatory Binding Arbitration (if Imposed on the Company)*, 8 NEV. L.J. 82 (2007).

9. See Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263 (2004); Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453 (2006).

10. See, e.g., Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925, 927 (2006) (“Those who apply contract rules such as unconscionability often fail to adequately embrace the normative implications of power in bargaining relationships, particularly when confronted with the determination of whether a bargain or its terms are unconscionable.”).

11. Stephanie R. Lamb, *Pigs Do Fly: A New Test Limiting the Scope of Arbitration Clauses in South Carolina*, 59 S.C. L. REV. 513, 515 (2008) (“Congress did not envision the FAA sweeping as broadly as it currently does.”); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 156 (2006) (“Despite concerns expressed by members of the 1925 Congress that arbitration not be imposed in a ‘take-it-or-leave-it’ context, the Supreme Court since the 1980s has created a statute which permits businesses to do exactly that.”); Richard C. Rueben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271, 309 (2007) (“[R]ather than enacting band-aid solutions to deal with the wounds caused by the Supreme Court’s improper exploitation of the FAA, Congress should deal with the underlying problem of mandatory arbitration”); Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 403-04 (2008) (“Like other critics, I remain dismayed by the Court’s textually myopic contract formalism, arbitral infatuation, underappreciation of consent issues, and Pollyannaish view of arbitration, particularly the Court’s uncritical view that mass arbitration is freely chosen and almost irrefutably presumed to have quality equivalent to adjudication. . . . The Supreme Court’s excessively pro-arbitration jurisprudence appears to be wrong in its construction of the FAA, wrong about the realities of coercion and consent in the world of mass standardized contracts, wrong about the proper allocation of interpretative power between arbitrator and judge, and wrong about the posited benefits of arbitration.”).

12. See, e.g., Budnitz, *supra* note 8, at 134; Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 99-103 (2004).

Services (HHS or the Secretary) should declare these agreements unconscionable and prohibit federal funding of nursing homes that use them. This approach is consistent with the FAA because the FAA does not protect unconscionable agreements to arbitrate, and it would invalidate almost all of these agreements in one fell swoop because 94% of nursing homes in the United States are dually certified to participate in the Medicare and Medicaid programs.¹³

Binding arbitration agreements in nursing home admission contracts are becoming more and more common.¹⁴ Although the exact number of nursing homes that use these agreements is unknown, most of the large nursing home chains incorporate them into their admission contracts.¹⁵ Pre-dispute binding arbitration agreements in nursing home admission contracts exploit our most vulnerable senior citizens at one of the weakest times in their lives. People generally enter nursing homes because they are too sick or debilitated to take care of themselves and no one else is willing or able to provide for them. To make matters worse, this moment often comes with little time to prepare. They have had a stroke, broken a hip, or are so demented that they are a danger to themselves. Their husband, wife, or partner has died and there is no one left to take care of them.¹⁶

It is at this most susceptible moment that many of our nation's sickest and weakest, and their guilt-ridden families, are presented with an adhesion contract containing a pre-dispute binding arbitration provision.¹⁷ Frequently, they are not informed about the arbitration provision and sign it without realizing they have done so until they file suit and the nursing home moves to compel arbitration.¹⁸ If they have

13. CHARLENE HARRINGTON, HELEN CARRILLO & BRANDEE WOLESAGLE BLANK, UNIV. OF CAL., SAN FRANCISCO, DEP'T OF SOC. & BEHAVIORAL SCI., NURSING FACILITIES, STAFFING, RESIDENTS AND FACILITY DEFICIENCIES, 2000 THROUGH 2006, at 17 tbl.5 (2007), available at <http://www.pascenter.org/documents/OSCAR2006.pdf>.

14. *Fairness in Nursing Home Arbitration Act of 2008: Hearing on H.R. 6126 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter *House Hearing*] (testimony of Sen. Patrick Leahy), available at http://judiciary.house.gov/hearings/hear_061008_2.html.

15. See Krasuski, *supra* note 9, at 268.

16. *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (citing Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 LAW MED. & HEALTH CARE 254, 255, 258 (1990)).

17. *Manley v. Personacare*, No. 2005-L-174, 2007 WL 210583, at *4 (Ohio Ct. App. Jan. 26, 2007).

18. Robert Hornstein, *The Fiction of Freedom of Contract—Nursing Home Admission Contract Arbitration Agreements: A Primer on Preserving the Right of Access to Court Under Florida Law*, 16 ST. THOMAS L. REV. 319 (2003) (arguing that the admissions agreements are adhesion contracts and that the process by which the agreements are

been told about the arbitration provision during the admission process they often do not understand what they are signing. Often, staff members do not explain it to them.¹⁹ In any event, they are in no position to argue. They have to sign the agreement or oftentimes have no where else to go.

Thus far, opponents of these agreements have made their cases to the courts with mixed results. Some courts are receptive to challenges to these agreements while many others are not.²⁰ Congress has recently taken an interest in this issue. Two bills are pending in Congress that would outlaw these agreements.²¹ The likelihood of their passage, however, is uncertain.

There is no reason to wait for Congress to explicitly prohibit these agreements. The Secretary is given extremely broad authority in the Medicare²² and Medicaid²³ Acts to take those actions believed to be necessary to protect the health and safety of nursing home residents. For the reasons discussed in this Article, the Secretary's authority includes the power to prohibit pre-dispute binding arbitration agreements because they are unconscionable.

A declaration by the Secretary that these agreements are unconscionable is warranted for many reasons. The gross disparity in bargaining power, the vulnerability of the population, the emotionally charged circumstances that surround being admitted to a nursing home, the significance of the rights being given up, and the type of harm to which nursing home residents are exposed (serious injury or death from negligent care or abuse) all justify a finding of unconscionability. The executive branch is also institutionally better suited than

signed are routinely abused, leaving patients and family members unaware of the existence of an arbitration provision).

19. See, e.g., *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987-88 (Ala. 2004).

20. See *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731 (Tenn. Ct. App. 2003). But see *Manley v. Personacare*, No. 2005-L-174, 2007 WL 210583 (Ohio Ct. App. Jan. 26, 2007).

21. The Fairness in Nursing Home Arbitration Act of 2009 is currently pending in both the House and the Senate. H.R. 1237, 111th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill=H111-1237>; S.512, 111th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill=S111-512>. The Arbitration Fairness Act of 2009 is pending before the House, but no comparable bill is currently in the Senate. H.R. 1020, 111th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill+H111-1020>.

22. See, e.g., *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96 (1995) (recognizing the broad authority given to the Secretary in the Medicare program).

23. See, e.g., *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002); *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981).

the judiciary to declare these agreements unconscionable. The executive branch has superior resources to investigate these issues and can fashion a remedy—blanket prohibition of these agreements—that is superior to case-by-case adjudication by the courts.

Proposing a rule of law that prohibits binding arbitration agreements requires one to be mindful of the FAA. According to the U.S. Supreme Court, the FAA established a national policy in favor of arbitration.²⁴ If the Secretary were to prohibit these agreements without a finding of unconscionability, the FAA would almost certainly preempt the Secretary's action. This is because the FAA preempts laws that prohibit binding arbitration unless the binding arbitration agreement is the product of fraud, duress, or unconscionability. Thus, it is imperative that the Secretary's finding of unconscionability be well-founded.

In addition to protecting nursing home residents, there are significant public policy benefits to prohibiting pre-dispute binding arbitration agreements. The Secretary's declaring these agreements unconscionable recognizes the unique vulnerability of this population and is entirely in keeping with the landmark nursing home reforms passed as part of the Nursing Home Reform Act (NHRA).²⁵ Disallowing pre-dispute binding arbitration agreements also has the benefit of keeping this litigation in the public domain—which is critical for the public to be able to keep themselves informed about what is happening at their local nursing home.

Some courts and arbitration advocates suggest that nursing home residents should simply do a better job of bargaining if they do not want to be bound by agreements to arbitrate. For most people, this is functionally impossible.²⁶ Most residents are discharged from hospitals to the nursing home and never see the admission agreements until the day they are sent to the facility.²⁷ They have no reason to expect a pre-dispute binding arbitration agreement will be a part of their admission contract. Like most consumers who sign adhesion contracts, they do not have the power or the resources to argue over the terms.

Even if residents and their families had time to review the agreement post-admission and could afford a lawyer, they are hardly able to

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

25. 42 U.S.C. §§ 1395i-3(b)(4), 1396r(b)(4) (2000).

26. See Hornstein, *supra* note 18.

27. See, e.g., *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 988 (Ala. 2004); *Miller v. Cotter*, 863 N.E.2d 537, 540-41 (Mass. 2007); *Manley v. Personacare*, No. 2005-L-174, 2007 WL 210583, at *1 (Ohio Ct. App. Jan. 26, 2007); *Barbee v. Kindred Healthcare Operating, Inc.*, No. W2007-00517-COA-R3-CV, 2008 WL 4615858, at *1 (Tenn. Ct. App. Oct. 20, 2008).

argue over its terms. Residents of nursing homes are frail and elderly people who are completely dependent on the facility and its employees for their safety and health. Thus, many residents and their families would not oppose the arbitration provision because they are fearful of antagonizing the facility.²⁸

Other proponents of pre-dispute binding arbitration agreements insist that nursing homes cannot stay in business when runaway juries find them liable for millions in damages.²⁹ In making such arguments, these proponents point to jury verdicts such as the one in *Sauer*, a wrongful death action in which punitive damages were awarded.³⁰ Rich Mountain, the facility in which Mrs. Sauer resided prior to her death, was owned by Advocat, Inc. (Advocat), a company based in Franklin, Tennessee.³¹ Advocat is a sophisticated corporate conglomerate. At the time of the trial, Advocat operated eighty-six health care facilities with close to 11,000 beds in Canada and the United States and was listed on the New York Stock Exchange.³²

Did the large punitive damages verdict put Advocat out of business? Hardly. According to Advocat's press release announcing its 2008 first quarter earnings, "[r]evenues increased to \$71.5 million in 2008 from \$54.6 million in 2007, an increase of \$16.9 million, or 30.9%."³³ Also noted in the press release, Advocat is in the process of acquiring new facilities in Texas and West Virginia.³⁴ According to CEO William R. Council, III, "The first quarter of 2008 was another eventful and productive period for the Company. We are pleased with our financial performance, which we believe reflects our continued success in generating operating results at our facilities through a combination of census mix and rate increases."³⁵

Part I of this Article begins with my central thesis: the Secretary can and should declare pre-dispute binding arbitration agreements unconscionable pursuant to the extraordinarily broad authority given

28. *Fairness in Nursing Home Arbitration Act of 2008: Hearing on S. 2838 Before the Subcomm. on Antitrust, Competition and Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter *Senate Hearing*] (testimony of Alison E. Hirschel), available at <http://aging.senate.gov/events/hr196ah.pdf>

29. See, e.g., *id.* (testimony of Kelley Rice-Schild), available at <http://aging.senate.gov/events/hr196kr.pdf>.

30. *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 357 (Ark. 2003).

31. *Id.* at 350-51, 359.

32. *Id.* at 359.

33. Advocat Inc., *Advocat Announces 2008 First Quarter Results* (May 7, 2008), <http://www.irinfo.com/avc/html/1q08.html>.

34. *Id.*

35. *Id.*

the Secretary in the Medicare and Medicaid statutes. Part II of this Article discusses why the courts should defer to the Secretary and uphold the prohibition of pre-dispute binding arbitration agreements in nursing home admission contracts. Part III discusses in detail why the FAA does not preempt the Secretary from taking this action. Part IV explains how this proposal comports with Congress's efforts to protect senior citizens in the NHRA, and Part V discusses how nursing home residents and the public would benefit if the Secretary prohibits these agreements.

I. THE SECRETARY SHOULD DECLARE PRE-DISPUTE BINDING
ARBITRATION PROVISIONS UNCONSCIONABLE

A. *Motor Vehicle Dealers: 1 Everyone Else: 0*

The most obvious way to prohibit pre-dispute binding arbitration agreements in nursing home admission contracts is for Congress to amend the FAA. Amending the FAA has proven easier said than done. Since the FAA was passed in 1925, the Act has been "amended"³⁶ only once, for the protection of automobile dealers.³⁷ The Motor Vehicle Franchise Contract Arbitration Act, signed into law by President Bush on November 02, 2002, makes pre-dispute binding arbitration agreements in motor vehicle franchise contracts unenforceable.³⁸

There is currently a bill pending that would prohibit pre-dispute binding arbitration agreements in long-term care admission contracts. The Fairness in Nursing Home Arbitration Act was introduced in the House of Representatives on February 26, 2009 by Representative Linda Sanchez (D-CA) and in the Senate by Mel Martinez (R-FL) on March 3, 2009.³⁹ The Act would make certain pre-dispute binding arbitration agreements unenforceable.⁴⁰ The Act applies to all pre-dispute binding arbitration agreements entered into during the admission process, or at any time preceding the dispute giving rise to a claim

36. Carl J. Chiappa & David Stoelting, *Tip of the Iceberg? New Law Exempts Car Dealers from Federal Arbitration Act*, 22 FRANCHISE L.J. 219, 220 n.2 (2003) (noting that many refer to the Motor Vehicle Franchise Contract Fairness in Arbitration Act as amending the FAA, and accurately stating that the legislation is actually within the Automobile Dealers' Day in Court Act, not the FAA).

37. 15 U.S.C. § 1226(a)(2) (2006).

38. Chiappa & Stoelting, *supra* note 36, at 219.

39. Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill=H111-1237>; Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=S111-512>.

40. *Id.*

against the nursing home.⁴¹ The Act also states that decisions about the applicability of the Act are to be made by courts, not arbitrators, and decided using federal law.⁴² Although the Fairness in Nursing Home Arbitration Act has bipartisan support,⁴³ its chance of passage remains unclear.

The Fairness in Nursing Home Arbitration Act is not the only legislation pending that would make pre-dispute binding arbitration agreements unenforceable. On February 12, 2009, Representative Henry Johnson (D-GA) introduced legislation titled the Arbitration Fairness Act of 2009.⁴⁴ The Arbitration Fairness Act of 2009 provides that “[n]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of . . . (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights.”⁴⁵ Arbitration agreements that result from collective bargaining are still enforceable.⁴⁶

Although the Arbitration Fairness Act of 2009 does not expressly reference pre-dispute binding arbitration agreements in the nursing home context, the language of the Act is broad enough to cover binding arbitration agreements used by nursing homes.⁴⁷

Whether either of these bills will become law is an open question. It was widely believed that earlier versions of these bills did not have a chance of passage during the Bush administration.⁴⁸ It would certainly seem that these bills have a much better chance of passage now that the Obama administration is in office and the Democrats have made substantial gains in both the House of Representatives and the

41. *Id.*

42. *Id.*

43. As of April 17, 2009, Representative Steven LaTourette (R-OH) is co-sponsoring H.R. 1237 and Senator Mel Martinez is co-sponsoring S. 512.

44. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong, available at <http://www.govtrack.us/congress/bill.xpd?bill=H111-1020>.

45. *Id.*

46. *Id.*

47. The National Citizens' Coalition for Nursing Home Reform (NCCNHR) is a supporter of the Arbitration Fairness Act of 2009. *See id.* Nursing home residents are consumers of long term care services, and thus qualify under section 2(b)(1) of the Arbitration Fairness Act of 2009, and suits are often brought against nursing homes pursuant to statutes that protect civil rights, *see, e.g.*, Nursing Home Resident's Rights Act, FLA. STAT. §§ 400.022-.023 (2004), therefore qualifying under section 2(b)(2).

48. Ohio Employer's Law Blog, <http://ohioemploymentlaw.blogspot.com/2007/08/arbitration-fairness-act-would-ban.html> (Aug. 7, 2007); Storm's California Employment Law, <http://calemploymentlaw.blogs.com/clel/2007/08/editorial-the-a.html> (Aug. 10, 2007, 09:14 PST).

Senate as of the 2008 elections.⁴⁹ Passage of either of these bills would be a welcome development. If, however, federal legislation is not passed, then the only realistic means of addressing this problem is through administrative action.⁵⁰

The Secretary should prohibit binding arbitration provisions on the grounds that they are unconscionable.⁵¹ There are many reasons why an administrative agency is superior to the courts in deciding that pre-dispute binding arbitration agreements are unconscionable. The most obvious reason is that the courts have largely abdicated their role in policing these agreements. Even if they were actively scrutinizing these agreements, the litigation model of determining unconscionability is inherently ill-suited to the task. An administrative agency has superior resources to bring to bear in deciding if a particular type of contractual provision is unconscionable and can provide a remedy—a blanket prohibition—that is far better than the case-by-case adjudication offered by the courts.

49. All but one of the bill's forty-three co-sponsors are Democrats. OpenCongress, U.S. Congress—H.R. 1020: Arbitration Fairness Act of 2009, <http://www.opencongress.org/bill/111-h1020/show> (last visited Apr. 17, 2009).

50. The Centers for Medicare & Medicaid Services (CMS) addressed the issue of binding arbitration provisions in nursing home agreements once. On January 9, 2003, Steven A. Pelovitz, Director of the Survey and Certification Group, issued a memorandum to federal and state agencies outlining CMS's position on the issue of binding arbitration provisions in nursing home admission agreements. Memorandum from Steven A. Pelovitz, Dir., Survey & Certification Group, CMS Center for Medicaid & State Operations, to Survey & Certification Group Reg'l Office Mgmt. (G-5) and State Survey Agency Dirs. (Jan. 9, 2003), [hereinafter Pelovitz Memorandum], *available at* <http://www.cms.hhs.gov/SurveyCertificationGenInfo/downloads/SCLetter03-10.pdf>. Because the survey and certification process for nursing homes is so comprehensive and intricate, CMS frequently sends memoranda to federal and state agency managers providing them with clarification of regulatory requirements and guidance on how to evaluate regulatory compliance. Representatives of the nursing home industry also read and rely on these memoranda. In the Pelovitz Memorandum, CMS essentially ducked the issue:

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

Id.

51. The Secretary delegated rulemaking power to the Health Care Financing Administration (HCFA), *see* Statement of Organization, Functions, and Delegations of Authority, 59 Fed. Reg. 14,628 (March 29, 1994), which was subsequently renamed CMS, *see* Centers for Medicare and Medicaid Services, 66 Fed. Reg. 35,437 (July 5, 2001). I will, however, refer to the Secretary throughout this Article as the entity empowered with rulemaking power.

B. *The Courts Are Not Seriously Scrutinizing Pre-Dispute Binding Arbitration Agreements for Unconscionability*

The doctrine of unconscionability serves a quality control function.⁵² When parties create contractual relationships that fall below minimum thresholds of socially acceptable behavior, the doctrine of unconscionability allows substitution of government regulation for regulation by private parties.⁵³

The idea that some agreements are unconscionable and should not be enforceable as a matter of public policy has ancient roots.⁵⁴ The doctrine's roots are seen in the Code of Justinian and ancient Jewish law.⁵⁵ Every jurisdiction in the United States appears to accept the doctrine.⁵⁶ An ancient pedigree and widespread acceptance, however, do not guarantee respect. According to Professor Jeffery Stempel, the doctrine of unconscionability has been ravaged by a plethora of forces, including an "academic assault" on the doctrine because of its perceived arbitrariness in the litigation context.⁵⁷ At the same time that the doctrine of unconscionability was in decline, judicial zeal for arbitration was at its zenith. The convergence of these trends has impacted how trial and appellate courts have responded to pre-dispute binding arbitration provisions. According to Professor Stempel,

[t]hese two strands of jurisprudential development—unconscionability's fall from grace and arbitration's ascendance—combined to produce a law of arbitrability that was both substantively supportive of

52. See Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 350 (1970) [hereinafter Leff, *Unconscionability and the Crowd*].

53. *Id.* at 352.

54. Jacob Dolinger, *Introduction to Unconscionability Around the World: Seven Perspectives on the Contractual Doctrine*, 14 LOY. L.A. INT'L & COMP. L. REV. 435, 436-37 (1992). But see Shahar Lifshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 N.C. L. REV. 315, 329 (2008) (describing the doctrine of unconscionability as "relatively new" in American jurisprudence).

55. Dolinger, *supra* note 54, at 436-37.

56. Jeffery W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 763 (2004) [hereinafter Stempel, *Equilibrium*].

57. *Id.* at 813 ("Five intellectual and social developments worked to place the unconscionability norm out of judicial favor. First is the academic assault on unconscionability led by Professor Arthur Leff. Second is the reascendancy of a textualist, formalist version of classical contract interpretation. Third is the rise of the law and economics movement. Fourth is the upsurge in political and social opposition to any perceived increase in judicial power and discretion. Fifth is a general turn against legal regulation and perceived excessive litigation in favor of a more laissez-faire approach to commercial activity.").

arbitration and reluctant to reign in arguable excesses of arbitration. As a result, much of modern arbitration law has possessed a formalist, wooden, result-oriented quality that has made it the subject of considerable criticism. Although lower courts have always had—at least in theory—the power to police arbitration agreements on the basis of ordinary contract law—this power was rarely used until recently. Even the limited unconscionability-based regulation of arbitration agreements seen during the past five years has arguably been halting and truncated.⁵⁸

Although it seems clear that “unconscionability principles are implicated . . . where patients in need of medical care are asked to waive their rights to a jury trial,”⁵⁹ over-burdened courts often seem unconcerned about the inherent coerciveness in asking someone to give up their right to trial on the day they enter a nursing home.⁶⁰ “Many courts continue to give unconscionability concerns the judicial equivalent of the cold shoulder and are unmoved by arguments that an arbitration clause lacks minimal fairness.”⁶¹

This is evident in the nursing home context as courts routinely ignore or give insufficient legal significance to agreements that reasonably could be viewed as unconscionable.⁶² For example, in *Hare v.*

58. *Id.* at 764.

59. Michelle M. Mello et al., *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, 45 HARV. J. ON LEGIS. 59, 97 (2008); see Richard Epstein, *The Uneasy Marriage of Utilitarian and Libertarian Thought*, 19 QUINNIPIAC L. REV. 783, 798 (2000) (“[F]raud or duress cannot be lightly dismissed in medical contexts, especially since people are forced to make their most difficult life-and-death choices when ill-health and financial pressures leave them vulnerable and compromised.”).

60. See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 669-70 (2001).

61. Stempel, *Equilibrium*, *supra* note 56, at 765; see *Stanford v. Castleton Health Care Ctr.*, 813 N.E.2d 411, 418 (Ind. Ct. App. 2004) (finding no undue pressure where mother with Alzheimer’s disease is “yelling and behaving very aggressively” during the admission process to the nursing home, and where the daughter who is admitting her is also attending to her own children); see also *Morant*, *supra* note 10, at 927 (“Those who apply contract rules such as unconscionability often fail to adequately embrace the normative implications of power in bargaining relationships, particularly when confronted with the determination of whether a bargain or its terms are unconscionable.”).

62. Some courts decide unconscionability issues with little or no analysis. See *Slusser ex rel. Slusser v. Life Care Ctrs. of Am., Inc.*, 977 So. 2d 662, 663 (Fla. Dist. Ct. App. 2008) (no analysis); *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 579 (Fla. Dist. Ct. App. 2007) (little analysis). Moreover, some courts refuse to authorize discovery even when the resident did not sign the agreement. *Forest Hill Nursing Ctr., Inc. v. McFarlan*, 995 So. 2d 775, 781-85 (Miss. Ct. App.

Beverly Enterprises Alabama, Inc.,⁶³ a circuit court in Alabama had to decide whether to compel arbitration in a case involving a resident, Dollar Hair, who was *108 years old* at the time he signed two arbitration agreements. According to one of the plaintiff's pleadings, the "only purported signature of Dollar Hair in the entire [a]dmissions packet[] appears on the arbitration provision."⁶⁴ The plaintiff disputed that Mr. Hair ever signed the agreement and his family denied that the signature on the arbitration agreement looked like his usual signature.⁶⁵ The plaintiff also argued that Mr. Hair was unable to knowingly waive his right to trial because he was mentally incapacitated at the time he allegedly signed.⁶⁶ Medical records from Carraway Methodist Medical Center show that shortly after Mr. Hair purportedly signed the arbitration agreement he could "provide no history," was "very difficult to understand," and did "not ambulate or communicate."⁶⁷ The plaintiff also claimed that the initials and signatures by Mr. Hair's children (some or all of whom were over eighty years old) could not bind Mr. Hair because they were not his actual or apparent agents. A request for discovery and an evidentiary hearing regarding the circumstances surrounding the signing of the arbitration agreements were not granted by the court.

The court's entire analysis of the enforceability of the agreement consists of the following:

The September 22, 2003[] agreement shows it to be signed Dollar Hair YH DD which the Defendants state to be York Hare, his son, and DeVelma Dixie, his daughter. The December 22, 2003[] arbitration agreement was allegedly signed by York Hare IWW as the designated representative. IWW is said to be Inez Webb, York Hare's step-daughter.

2008) (finding, under an intended third-party beneficiary theory, that a competent resident was obligated to arbitrate her personal injury claims, even though the resident did not sign the agreement and there was no real or apparent agency between the signor and the resident, and refusing to allow discovery on the unconscionability issue). Other times, courts have ignored substantive unconscionability concerns entirely because they find no procedural unconscionability. See *Shotts v. OP Winter Haven, Inc.*, 988 So. 2d 639, 641-42 (Fla. Dist. Ct. App. 2008).

63. *Hare v. Beverly Enters. Ala., Inc.*, No. CV 05-0849 TMS, 2006 WL 4661418 (Ala. Cir. Ct. June 27, 2006).

64. Plaintiff's Second Memorandum of Law in Opposition to Defendants' Brief in Support of Their Motion to Compel Arbitration, *Hare*, No. CV 05-0849 TMS, 2006 WL 4661418.

65. *Id.*

66. *Id.*

67. *Id.*

The Plaintiffs deny that they executed either arbitration provision, that the family members could not legally sign for Dollar Hair[,] and that the contract is one of adhesion. The Plaintiff states that Dollar Hair was over 100 years of age and that his son, York Hare[,] who was in his eighties, had “swimming in his head[.]” Dollar Hair was not only aged but infirm of health[,] and it was argued that neither he nor his son, York, had the capacity to understand the contract. Dollar Hair was old and sick.

The Defendants have demonstrated that under the prevailing standards the contract involves interstate commerce. The cases of *Owens v. Coosa Valley Health Care, Inc.* . . . and *Briarcliff Nursing Home, Inc. v. Woodman* . . . are controlling, and the Plaintiff is bound by the arbitration agreement with the Birmingham East Defendants.

Upon Consideration of the voluminous submissions of the parties, the Beverly Defendants’ Motion to Compel Arbitration and Stay Proceedings is denied [because the arbitration agreements were signed after the Beverly Defendants sold their interest in the facility], and that portion of the case which happened prior to August 1, 2003[] is set for trial on May 14, 2007. For that portion of the case as to Aurora Cares, LLC, Birmingham Nursing and Rehabilitation Center East, LLC, their employees and assigns, their Motion [t]o Compel Arbitration and Stay Proceedings is granted. Such portion of this case is stayed until April 1, 2007, pending arbitration of the Plaintiff’s claims.⁶⁸

It is hard to imagine a case where unconscionability concerns are more obvious than the *Hare* case. The extraordinary age and infirmity of Mr. Hair, the age and infirmity of his son, Mr. Hair’s irregular signature, and the disputes about agency all point to a real concern that it is unconscionable to enforce the arbitration agreements. Yet, Mr. Hair wasn’t allowed discovery and didn’t get an evidentiary hearing on the matter.⁶⁹ The court simply noted Mr. Hair was “old and sick,” mentioned the age and infirmity of his son, and compelled arbitration without any meaningful inquiry or unconscionability analysis.

Even when courts do a thorough job of analyzing the circumstances surrounding admission to a nursing home and find procedural unconscionability, state law may still require the court to compel arbitration. An egregious example of this occurred in *Manley v. Personacare*.⁷⁰ Patricia Manley was sixty-six years old when she entered the nursing home directly from a hospital.⁷¹ She had been assaulted just before she was hospitalized and continued to be frightened by the

68. *Hare*, No. CV 05-0849 TMS, 2006 WL 4661418.

69. *See id.*

70. No. 2005-L-174, 2007 WL 210583 (Ohio Ct. App. Jan. 26, 2007).

71. *Id.* at *3.

assault.⁷² She “had numerous physical ailments, bouts of confusion, and a mild cognitive impairment”⁷³ “[S]he could not remember what month or year she retired.”⁷⁴ Although she was deemed competent by her doctor, she was unable to sign her name within the lines on the admission agreements, including the binding arbitration agreement.⁷⁵ In some places she signed considerably above the line; in other places she signed below the line.⁷⁶ She was alone when she signed these documents; she had no friends, family, or lawyer present to assist her in reading or signing the documents.⁷⁷ She obviously was in no position to bargain with the nursing home over the terms of the admission contract.

The court was troubled by the fact that she signed the agreement contemporaneously with her admission.⁷⁸ The court stated:

The fact that a resident is signing an arbitration agreement contemporaneously with being admitted into a nursing home is troubling. By definition, an individual being admitted into a nursing home has a physical or mental detriment that requires them to need the assistance of a nursing home. Further, the reality is that, for many individuals, their admission to a nursing home is the final step in the road of life. As such, this is an extremely stressful time for elderly persons of diminished health. In most circumstances, it will be difficult to conclude that such an individual has equal bargaining power with a corporation that, through corporate counsel, drafted the form contract at issue.⁷⁹

The court concluded that the agreement was procedurally unconscionable.⁸⁰ However, this did not affect its enforceability because the court held that the agreement was not substantively unconscionable and, under Ohio law, courts must find both procedural and substantive unconscionability before a contractual provision can be considered unconscionable.⁸¹ Therefore, the court rejected the challenge to the agreement and compelled arbitration.⁸²

72. *Id.* It is unclear whether the assault was sexual in nature or whether it was the reason for her hospitalization. *See id.*

73. *Id.* at *4.

74. *Id.* at *3.

75. *Id.* at *4.

76. *Id.*

77. *Id.* at *5.

78. *Id.* at *4.

79. *Id.*

80. *Id.* at *2.

81. *Id.* at *7.

82. *Id.*

The *Owens* case illustrates the courts' tendency to resist delving too deeply into the circumstances surrounding the execution of a pre-dispute binding arbitration agreement. Although courts have an obligation to closely scrutinize these transactions due to the nature of the rights being waived, the hesitancy on the part of the courts to do so is at least understandable, if not defensible, in light of the enormous caseload with which many courts struggle. The *Manley* decision illustrates a very different problem. Courts that are concerned about these agreements and do scrutinize them carefully are hamstrung by decisional or statutory law that was established well before anyone could imagine that elderly people could be forced to give up their rights to a trial in exchange for admission into a nursing home. Combined, these cases demonstrate the reason why the judiciary cannot provide a solution to the problem of pre-dispute binding arbitration agreements in nursing home admission contracts.

C. *Administrative Agencies Are Better Suited than Courts for Deciding Unconscionability*

In contrast to the judiciary, there are decided advantages to an executive agency determining that pre-dispute binding arbitration agreements are unconscionable.⁸³ The advantages of an administrative agency determination of unconscionability were forcefully articulated

83. See William R. Andersen, *Against Chevron—A Modest Proposal*, 56 ADMIN. L. REV. 957, 962 (2004) (“[A] legislative solution has extraordinary advantages over continued refinement in judicial opinions. . . . Rulemaking, we regularly teach, provides broader fact-finding capacity unhindered by rules of evidence and other limits. It provides more open access and wider input from those affected. It allows more general and comprehensive solutions as distinguished from piecemeal fixes or solutions affected by and limited to the peculiar facts of a given case. Rulemaking’s explicit focus on policy, rather than logic and precedent, its prospective operation, and its relative ease of comprehensive change when a rule needs adjustment, all give rulemaking significant advantages over adjudication as a tool for changing policy. The legislative solution proposed here intends to capture exactly those kinds of benefits.”); Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of the Judicial Role*, 5 CONN. INS. L.J. 181, 259 (1998) (“Even in the non-insurance atmosphere, the government (legislatures and executive agencies in addition to courts) is widely regarded as having the power to void or refuse to enforce contract provisions that are illegal, unconscionable, or otherwise at odds with public policy.”). *But see* Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years after Doctor’s Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249, 251-52 (2006) (contending that common law courts are well-suited to deciding unconscionability issues).

by Professor Arthur Leff almost forty years ago.⁸⁴ Professor Leff is perhaps best known for dividing unconscionability into two concepts—procedural unconscionability (“bargaining naughtiness”), which focuses on the circumstances surrounding the making of the contract, and substantive unconscionability (“evils in the resulting contract”), which focuses on the terms of the agreement itself.⁸⁵ Professor Leff and other distinguished members of the Academy debated⁸⁶ the doctrine of unconscionability in the aftermath of the inclusion of section 2-302—the unconscionability provision—in the Uniform Commercial Code (UCC).⁸⁷ Professor Leff was critical of the drafting of section 2-302, the cases interpreting it, and the academic response to it.⁸⁸

Professor Leff’s primary criticism of section 2-302, however, was that it put the judicial branch of government in charge of determining unconscionability.⁸⁹ He illustrated his point by hypothesizing judicial unconscionability analysis of cross collateralization clauses.⁹⁰ Professor Leff imagined a series of lawsuits where the seller loses each time—the cross collateralization agreements are unconscionable—but continues to modify the clause to make it slightly less onerous (as dictated by the outcome of the previous lawsuit) and therefore gets to keep cross-collateralization clauses in his contracts. Even if almost every conceivable version of the cross-collateralization clause is declared unconscionable, the seller can still use it knowing that it will cow those buyers who lack the financial wherewithal and inclination to engage in

84. Leff, *Unconscionability and the Crowd*, *supra* note 52, at 357 n.33.

85. Arthur Allen Leff, *Unconscionability and the Code—the Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967) [hereinafter Leff, *Unconscionability and the Code*].

86. *See generally* Leff, *Unconscionability and the Code*, 115 U. PA. L. REV. 485.

87. U.C.C. § 2-302 (2007), which was enacted in 1962 and amended most recently in 2004, provides:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Id.

88. *See generally* Leff, *Unconscionability and the Code*, *supra* note 85.

89. *Id.* at 353-54.

90. *Id.* at 353-56.

costly and lengthy litigation, and that the seller can simply settle with other, more aggressive buyers.⁹¹

Obviously this approach results in enormous transaction costs and generates significant uncertainty. Because each lawsuit is decided on the totality of the circumstances in a single jurisdiction, the outcome of one case does not portend the outcome of another in another jurisdiction. Despite all this cost and uncertainty, the litigation approach does not even necessarily eliminate the offending clause from use. An exasperated Professor Leff remarked that “[o]ne cannot think of a more expensive and frustrating course than to seek to regulate goods or ‘contract’ quality through repeated lawsuits against inventive ‘wrongdoers.’”⁹²

Rather than embrace such a “frustrating course,” Professor Leff argued that the legislative or administrative branches of government would be far more effective at deciding which contractual arrangements are unconscionable. “Wouldn’t it be easier and far more effective, *if* one finds these cross-collateral clauses or some others, offensive in consumer transactions just to face one’s conclusion and regulate them out of existence, in a manner no lawyer could conscientiously avoid?”⁹³ Of course it would.

An administrative agency is also institutionally better suited for this kind of work. In contrast to the courts—which have no investigative powers, no subject matter expertise, and are under no command from Congress to protect and care for nursing home residents—the Secretary has all of these attributes and is in an ideal position to evaluate the unique circumstances surrounding the admission to a nursing home. The Secretary’s agents, and the state survey agencies with whom the Secretary contracts to oversee nursing home care, are in

91. See *Covenant Health & Rehab. of Picayune, LP v. Lumpkin ex rel. Lumpkin*, No. 2007-CA-00449-COA, 2008 WL 306008, at *5 (Miss. Ct. App. Feb. 5, 2008) (discussing the fact that facilities continue to use arbitration clauses that have been previously found to contain unconscionable provisions, such as limitations on damages and shortened statutes of limitations); *Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910, 922-24 (Miss. Ct. App. 2007) (noting that the facility was using some of the same clauses (for example, limiting the facility’s total liability to a maximum of \$50,000) that the state supreme court had repeatedly declared unconscionable); Leff, *Unconscionability and the Crowd*, *supra* note 52, at 356; see also Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 472 (2008).

92. Leff, *Unconscionability and the Crowd*, *supra* note 52, at 356.

93. *Id.* at 356-57.

nursing homes all across the country on a daily basis.⁹⁴ This type of close contact with nursing homes gives the Secretary a much deeper knowledge of the vulnerability associated with being so sick or infirmed that one has to give up living alone or with family and go into a nursing home.

While it is likely that there are times when parties are in a position to freely bargain over the terms of the admission agreements and are able to reject the binding arbitration provision without duress, there is no evidence to suggest that these scenarios predominate. The anecdotal evidence suggests quite the contrary.⁹⁵

D. Pre-Dispute Binding Arbitration Agreements in Nursing Home Admission Contracts Are Unconscionable

Courts have always policed contracts for unfairness.⁹⁶ Prior to the adoption of section 2-302, much of the policing was done surreptitiously, often resorting to torturous reading of contract terms and misusing such concepts as lack of mutuality and failure of consideration.⁹⁷ One of the great benefits of section 2-302 was supposed to be that it would make what were essentially de facto unconscionability decisions de jure—bringing what was done in the dark out into the light.⁹⁸

Unfortunately, by almost all accounts, section 2-302 has disappointed.⁹⁹ The drafters of the section neither defined unconscionability nor provided any analytical framework to determine its existence.¹⁰⁰ While some commentators have defended the vagueness of the concept as a necessary evil of sorts,¹⁰¹ others have not been so

94. Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities, 57 Fed. Reg. 39,278-01 (proposed Aug. 28, 1992) (to be codified at 42 C.F.R. pts. 431, 442, 488-89).

95. See *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1014-16 (1992) (finding an arbitration agreement that was not negotiated or properly disclosed unenforceable in a medical malpractice suit); see also Hornstein, *supra* note 18 (arguing that the admissions agreements are adhesion contracts and that the process by which the agreements are signed are routinely abused, leaving patients and family members unaware of the existence of an arbitration provision).

96. See John A. Spanogle Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 934 (1969).

97. See *id.*

98. See *id.*

99. See *id.* at 945.

100. *Id.* at 945-48; Stempel, *Equilibrium*, *supra* note 56, at 793-94.

101. See M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 760 (1969).

kind.¹⁰² Professor Leff quite famously called section 2-302 nothing more than “an emotionally satisfying incantation” that proved “it is easy to say nothing with words.”¹⁰³

Whether it is inherent in the nature of a concept as abstract as unconscionability or whether it is a function of the decision of the drafters of section 2-302 to not provide a definition or analytic approach, the result is that unconscionability today is an undeniably ephemeral standard that can often lead to disparate outcomes on the same or similar set of facts.

Unsurprisingly, courts have developed different approaches to unconscionability. The most common approach is taken from Professor Leff’s critique of section 2-302.¹⁰⁴ This approach requires a showing of both procedural unconscionability and substantive unconscionability.¹⁰⁵ Many courts requiring both procedural and substantive unconscionability do so on a sliding scale; the more procedurally unconscionable the bargaining process, the less substantively unconscionable the resulting terms need to be to satisfy the unconscionability test.¹⁰⁶ A minority of courts require that either procedural or substantive unconscionability be present, but not both.¹⁰⁷

If the Secretary is going to prohibit pre-dispute binding arbitration agreements on the grounds that they are unconscionable, the Secretary must, of course, articulate a rational basis for that decision.¹⁰⁸ The Secretary is not, however, wedded to any particular definition of

102. Stempel, *Equilibrium*, *supra* note 56, at 793-94.

103. Leff, *Unconscionability and the Code*, *supra* note 85, at 558-59.

104. *See id.*; Warkentine, *supra* note 91, at 481.

105. Leff, *Unconscionability and the Code*, *supra* note 85, at 511-12.

106. *See* Frederic L. Kirgis, *Fuzzy Logic and the Sliding Scale Theorem*, 53 ALA. L. REV. 421, 432 (2002) (“[A] sliding scale has been used between procedural and substantive unconscionability, particularly when the abuse in one category—procedural or (especially) substantive—is pronounced.”); Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 153 (2008) (“In determining whether a contract is unconscionable, courts often employ a sliding scale analysis with regard to the presence of the procedural and substantive components of unconscionability—that is, the more significant one is, the less significant the other need be.”); Warkentine, *supra* note 91, at 481-84.

107. Robyn L. Meadows, *Unconscionability as a Contract Policing Device for the Elder Client: How Useful Is It?*, 38 AKRON L. REV. 741, 744 (noting that some courts require both substantive and procedural unconscionability); Warkentine, *supra* note 91, at 481-84.

108. *See* *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (“[W]ell-reasoned views of the agencies implementing a statute ‘constitute a body of experience and informal judgment to which courts and litigants may properly resort for guidance.’” (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

unconscionability or any particular jurisdiction's test for unconscionability. It is impossible to predict what circumstances might necessitate a finding of unconscionability in the future; therefore, it would be unwise for the Secretary to adopt a "one size fits all" definition of unconscionability. As long as the Secretary's decision is reasonable, reviewing courts should give it due deference and uphold the determination.¹⁰⁹

The best argument for a blanket determination of unconscionability is that these agreements are procedurally unconscionable. Substantive unconscionability is less availing because pre-dispute binding arbitration provisions vary considerably in nursing home admission agreements. Therefore, it might be challenging for the Secretary to make industry-wide evaluations when there is so much variance present. Procedural unconscionability makes more sense because, although the circumstances under which people enter a nursing home vary in their particulars, there is a great deal of uniformity in nursing home admissions. People entering a nursing home are overwhelmingly elderly and very ill, they almost always sign the agreements the day they enter the facility, and the circumstances surrounding the signing of the admission agreements are similar.

Although most courts require both substantive and procedural unconscionability before they will consider a contract unconscionable, there is no logical requirement that it be so.¹¹⁰ Professor Stempel makes a compelling argument that procedural unconscionability implicates the consent norm in contract law and therefore even substantively fair agreements are ill-gotten gains that should not be upheld if the circumstances surrounding the execution of the agreement are egregious.¹¹¹

The error in requiring both procedural and substantive unconscionability is evident in *Manley v. Personacare*,¹¹² discussed in Part

109. James W. Fox, Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 61 (2003) ("[E]ven if we concede that the decision about substantive unconscionability should lie with the court, the court should still be expected to rely on democratically based means of determining substantive unconscionability: statute and administrative regulation. Where the particular term is made unlawful by the legislature or administrative agency, the court has an obvious statement of unconscionability to follow.").

110. Stempel, *Equilibrium*, *supra* note 56, at 795-96; *see also* Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 2-3 (1981) (rejecting the division between procedural and substantive unconscionability).

111. Stempel, *Equilibrium*, *supra* note 56, at 796, 847-48.

112. No. 2005-L-174, 2007 WL 210583 (Ohio Ct. App. Jan. 26, 2007).

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I.B. Patricia Manley was sixty-six years old and was entering a nursing home directly from a hospital without anyone to assist her in the process.¹¹³ Additionally, “[s]he had fears due to a recent assault, had no legal expertise, had numerous physical problems, had a mild cognitive impairment, and had bouts of confusion.”¹¹⁴ Manley signed all of the admission documents including the arbitration agreement on the day she was admitted.¹¹⁵ The court noted that

[n]one of [her] signatures are entirely on the designated line [for any of the agreements]. Her signature on the arbitration agreement is entirely below the designated line. On other documents, her signatures are significantly above the designated line. The fact that Patricia Manley had extreme difficulty signing her name on the day in question suggests that she did not have the ability to meticulously read the provisions of the contracts presented to her.¹¹⁶

Despite the fact that Ms. Manley was confused, fearful, cognitively impaired, had physical problems, and could not even sign the agreements correctly, the Ohio court still compelled arbitration because it found only procedural unconscionability and no substantive unconscionability.¹¹⁷

As previously discussed, a majority of courts would come to the same conclusion. However, as the *Manley* case shows, enforcing such a bargain in the nursing home context could lead to unfair or even absurd results. Imagine, for example, if Manley was assaulted in the parking lot of the nursing home (through no fault of the facility) right before her admittance, or she was in a car accident on her way to the nursing home, but did not require hospitalization and was still minimally competent for contract-executing purposes. Although she would be upset, in pain, and fearful, with presumably nowhere else to go, the court would conclude that it was only procedurally unconscionable to have her sign away her constitutional right to trial. Because the agreement she signed was not substantively unconscionable in and of itself, the court would still hold her to her “bargain” and compel arbitration.

As pointed out by Professor Stempel and the vigorous dissent in the *Manley* case,¹¹⁸ there is no requirement that unconscionability be conceived in such a formalistic, stilted manner. Procedural unconscionability is sufficient to sustain a finding of unconscionability because

113. *Id.* at *5.

114. *Id.*

115. *Id.* at *1.

116. *Id.* at *4.

117. *Id.* at *4-6.

118. *Id.* at *8-10.

it recognizes that there are particular circumstances where an absence of true consent should be fatal to an agreement.

Deciding whether procedural unconscionability exists generally requires an evaluation of the “degree of compulsion being exerted, how much pressure was brought to bear on the less powerful party, and the process that led to the agreement.”¹¹⁹ There is no commonly accepted definition of unconscionability but a variety of sources have provided factors that may be helpful in its determination. The Restatement (Second) of Contracts list of factors includes: (1) “knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract;” and (2) “knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.”¹²⁰

Courts examine whether a party was: (1) “deprived of a meaningful choice as to whether to enter into the contract;” (2) “compelled to accept the terms of the contract;” (3) whether “there [was] an opportunity for a meaningful negotiation;” (4) whether “there [was] a great inequality of bargaining power;” (5) “whether one party [was] subject to deception;” and (6) whether the “party [was] surprised by fine print or concealed terms.”¹²¹ Courts also consider age, absence of explanation of terms, atmosphere of haste, pressure, and one-sided terms in their procedural unconscionability analysis.¹²²

Scholars have advanced criteria for evaluating procedural unconscionability in the arbitration arena.¹²³ These factors include:

119. Candace Zierdt & Ellen Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 Ky. L.J. 1, 32 (2007).

120. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

121. *Svalina v. Split Rock Land & Cattle Co.*, 816 P.2d 878, 882 (Wyo. 1991).

122. Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and “Merchant/Consumers” Through Default Provisions*, 30 J. MARSHALL L. REV. 39, 54-55 (1996) (discussing factors courts utilize in merchant to merchant cases); see also Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 456-57 (2002) (“Procedural unconscionability consists either of infirmities approaching duress, undue influence, misrepresentation, or of sneaky drafting strategies, such as hiding offensive terms in fine print, contradictory provisions, or incomprehensible terms. In searching out procedural unconscionability, courts examine the transaction to ascertain whether businesses have taken undue advantage of the rational and social factors that hamper consumers from identifying the meaning of terms contained in the boilerplate.”).

123. Stempel, *Equilibrium*, *supra* note 56, at 849-50.

- Blameless ignorance as to the existence or effect of arbitration provisions, a consideration likely to apply in many cases since arbitration terms are not salient to most consumers;
- Inability to escape from adhesive terms because of their widespread, close-to-uniform use by vendors;
- Defective agency, in which an arbitration provision is negotiated by or adhered to without authorization[;]
-
- The degree to which terms of the transaction require consumers to waive legal rights;
- The competence of the adhering party and the presence of legal advice;
- The value of consideration received in return for adhering to the contract term at issue.¹²⁴

While these factors can be helpful and many are present in the nursing home context, as discussed in subsequent sections of this Article, the Secretary is certainly not bound by them. If a court is “left with the overall impression that an arbitration term was unfairly achieved [then] the arbitration clause is inconsistently volitional and should not be enforced because of the consent norm in contract law.”¹²⁵

E. Newly Admitted Nursing Home Residents: Old, Frail, and Getting Sicker

Any effort to establish the unconscionability of pre-dispute binding arbitration agreements in nursing home admission contracts must begin with a discussion of this unique population. There is no doubt that this population is one of the most vulnerable segments of our society because of its extremely poor physical or mental health or because it lacks a sufficient support system.

Not surprisingly, most newly admitted nursing home residents are older than sixty-five years of age.¹²⁶ Of the total population of newly admitted nursing home residents in 2004, 41% were eighty-five

124. *Id.* (internal quotation marks and footnotes omitted).

125. *Id.* at 847-48.

126. See JUDITH KASPER & MOLLY O'MALLEY, KAISER COMMISSION ON MEDICAID AND THE UNINSURED: CHANGES IN CHARACTERISTICS, NEEDS, AND PAYMENT FOR CARE OF ELDERLY NURSING HOME RESIDENTS: 1999-2004, at 4, 7, available at <http://www.kff.org/medicaid/upload/7663.pdf>. Data for the Kaiser report were obtained from the National Nursing Home Survey, which is conducted on a recurring basis by the National Center for Health Statistics. The most recent National Nursing Home Survey was completed in 2004. The 1999 study consisted of a representative sample of 7383 residents and the 2004 study consisted of a representative sample of 11,939 residents. See *id.* at 7.

or older and almost 85% were seventy-five or older.¹²⁷ Most newly admitted nursing home residents were women (66%) who were widowed (53%) and were admitted to the nursing home directly from a hospital (62%).¹²⁸

Recent studies suggest that although the proportion of the elderly institutionalized in long-term care facilities is down, the population of newly admitted nursing home residents is sicker than just five years ago.¹²⁹ According to the 2007 Kaiser Commission report, health quality indicators have declined considerably for new nursing home residents since 1999.¹³⁰ In 2004, 69% of newly admitted residents had one or more of five serious physical impairments (Chronic Obstructive Pulmonary Disorder (COPD), stroke, diabetes, heart disease, hip fracture), compared to 63% in 1999.¹³¹ More newly admitted residents in 2004 had suffered strokes or had heart disease than in 1999 (stroke: 22% in 2004, 16% in 1999; heart disease: 39% in 2004, 32% in 1999).¹³²

The increase in mental/cognitive impairments was even more pronounced. In 2004, 34% of newly admitted nursing home residents were diagnosed with one or more mental or cognitive diagnoses (dementia, depression, schizophrenia, affective and other serious disorders)¹³³ compared to 27% in 1999.¹³⁴ Rates of depression were also significantly higher in 2004 (19% in 2004, 12% in 1999), as were diagnoses of affective disorder and other serious disorders (11% in 2004 versus 6% in 1999).¹³⁵ The most profound change between 1999 and 2004 occurred in residents who had serious physical and mental diagnoses. Between 1999 and 2004 the number of residents who had both physical and mental/cognitive impairments increased 50%.¹³⁶ In 1999, 16% of newly admitted residents had serious physical and mental impairments, and in 2004 that figure was 24%.¹³⁷

127. *Id.* at 8 tbl.1.

128. *Id.*

129. *Id.* at 10 tbl.2.

130. *See id.* (discussing diagnoses among elderly residents).

131. *Id.*

132. *Id.*

133. *Id.* (describing affective disorders as “bipolar and unipolar affective disorders”). “Other serious mental disorders includes personality disorders, anxiety disorders, other psychotic and other serious mental disorders.” *See id.* at 10 n.3.

134. *Id.* at 10 tbl.2.

135. *Id.*

136. *Id.*

137. *Id.*

There is some encouraging news from the National Nursing Home Survey. The number of elderly institutionalized in nursing homes has dropped over the last twenty years.¹³⁸ Data from the Kaiser report suggest the elderly are in better health overall, and elderly who are not severely disabled have other alternatives to help them cope with their health problems without resorting to nursing home care.¹³⁹ While this is certainly good news, it points out the need for regulators to take into account that newly admitted nursing home residents are in even worse health than in previous years. In short, the nursing home population is shrinking, but getting sicker.

When nursing home residents are admitted to a facility they are usually required to sign all of the necessary agreements, including the pre-dispute binding arbitration agreement.¹⁴⁰ It is not uncommon for the admission packet to be twenty to thirty pages or longer.¹⁴¹ It is also not uncommon for the pre-dispute binding arbitration provision to be buried in the middle or back of the admission packet.¹⁴² Frequently, residents and their loved ones do not even know that the arbitration agreement exists when they are executing the admission documents.¹⁴³ According to a long-time nursing home advocate:

[E]ven if the long term care facility explains the binding arbitration clause, most consumers will not challenge it. First, nothing about the long term care admissions process is like a negotiation between two equal parties. Consumers sign whatever is presented to them as required paperwork. Second, no resident or family wants to get off on the wrong foot with a facility that will hold the fragile resident's very life in its hands. No one wants to be marked a troublemaker before the resident has even entered the facility, especially about a legal provision applicants do not expect to ever affect them.¹⁴⁴

Thus, nursing home residents do not have, nor do they expect they should need, lawyers present at the time of admission.¹⁴⁵

138. *Id.* at 1.

139. *See id.* at 1, 20.

140. *See Palm, supra* note 9, at 454.

141. I have on file hundreds of long-term care admission packets from the state of North Carolina. The analysis comes from these agreements.

142. *House Hearing, supra* note 14 (testimony of Kenneth L. Connor), available at <http://judiciary.house.gov/hearings/pdf/Connor080610.pdf>.

143. *See Senate Hearing, supra* note 28 (testimony of Alison E. Hirschel), available at <http://aging.senate.gov/events/hr196ah.pdf>; *see also Patients Sign Away Right to Sue Nursing Homes*, MSNBC, June 17, 2008, <http://www.msnbc.msn.com/id/25217455>.

144. *Senate Hearing, supra* note 28 (testimony of Alison E. Hirschel), available at <http://aging.senate.gov/events/hr196ah.pdf>.

145. *House Hearing, supra* note 14 (testimony of Kenneth L. Connor), available at <http://judiciary.house.gov/hearings/pdf/Connor080610.pdf>.

Admitting a loved one, or being admitted to a nursing home, is often an emotionally devastating experience—something even nursing home industry officials admit.¹⁴⁶ The reason it is so upsetting is quite obvious—nursing home residents and their families realize that for most of them, they are entering the final phase of their lives and what time they have left will be spent not in their home or surrounded by family, but in an institution with all the loss of privacy and personal control that entails. Family members often feel tremendous guilt about putting their loved ones in a nursing home and not caring for them themselves.¹⁴⁷

F. *Nursing Home Residents Give Up Significant Rights When They Sign Pre-Dispute Arbitration Agreements*

The significance of the rights being given up also bears on the procedural unconscionability analysis¹⁴⁸—and the rights at stake are significant. Pre-dispute binding arbitration agreements strip people of fundamental rights, such as the right to trial by a jury of their peers in a public court presided over by a judge whose decision can be reviewed by appellate courts and scrutinized by the press. Although the American civil justice system has come under considerable criticism in recent decades,¹⁴⁹ the right to a trial by jury¹⁵⁰ is still a cornerstone of our democracy and not to be discarded lightly.

The significance of the harm that nursing home residents seek redress for is also a relevant consideration.¹⁵¹ Normally, people are asked to sign pre-dispute binding arbitration agreements in a commer-

146. *Senate Hearing*, *supra* note 28 (testimony of Kelley Rice-Schild), available at <http://aging.senate.gov/events/hr196kr.pdf>.

147. *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at *2 (Tenn. Ct. App. Dec. 30, 2003) (describing an admission process where the husband “was very upset,” “distraught,” and “was just absolutely bawling” because he was “upset about his inability to care for his wife and the necessity for admitting her to a nursing home”).

148. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981) (“The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect.”); see also Stempel, *Equilibrium*, *supra* n.56, at 850.

149. Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT’L L. 211, 307-12 & n.510 (2005).

150. See Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1389 (1996) (explaining that the Seventh Amendment to the United States Constitution provides a right to a jury trial for actions at law).

151. See *Bruner v. Timberlane Manor Ltd. P’ship*, 155 P.3d 16, 20 (Okla. 2006) (considering a claim of wrongful death in deciding to uphold the district court’s decision not to compel arbitration).

cial transaction (purchase of a car, home, stock) so the potential harm they suffer is almost exclusively financial.¹⁵² Not so for nursing home residents. They have been subject to violence, physical and sexual abuse, intimidation, neglect, and negligence that results in serious physical harm and even death.¹⁵³

As this discussion indicates, many of the factors considered indicative of procedural unconscionability discussed previously are present in the nursing home context. Nursing home operators are much more powerful than the infirm elderly who need their services, and they are certainly aware that pre-dispute binding arbitration provisions benefit the facility at the expense of the resident.¹⁵⁴ Facility operators are also obviously aware of the physical and mental infirmities of their incoming residents; they know incoming residents do not have access to legal advice when they sign these agreements on the day they are admitted. Facility operators understand that the pre-dispute binding arbitration agreements mean residents are waiving their right to trial even if the resident is abused, neglected, or is seriously injured because of the facility's negligence. It also strains credulity to suggest that they do not know their many infirmities hamper the residents' ability to protect their self-interests. That these infirmities and the emotionally difficult circumstance of being institutionalized put an inordinate amount of pressure on residents to accept whatever the facilities put in front of them seems almost too obvious to debate. Considering the gross disparity in bargaining power, the vulnerability of the population, the emotionally charged circumstances that surround being admitted to a nursing home, the significance of the rights being given up, and the type of harm that nursing home residents are exposed to—abuse, neglect, serious injury, or death from negligent care—the Secre-

152. Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 956 (1999) (“[A]rbitration clauses are ubiquitous in consumer transactions today.”).

153. *House Hearing*, *supra* note 14 (testimony of Kenneth L. Connor), available at <http://judiciary.house.gov/hearings/pdf/Connor080610.pdf>; Bradley J.B. Toben & Mathew C. Cordon, *Legislative Stasis: The Failures of Legislation and Legislative Proposals Permitting the Use of Electronic Monitoring Devices in Nursing Homes*, 59 BAYLOR L. REV. 675, 677-78 (2007) (describing the vicious beating and death of an eighty-one year old nursing home resident allegedly committed by two nursing home employees and the resulting failure to pass legislation in Arkansas permitting families to install cameras in their loved ones' nursing home rooms).

154. John R. Gillespie, Jr., *The Nuts and Bolts of Nursing Home Arbitration Agreements* (Aug. 22, 2007), <http://www.broadandcassel.com/articles/SFLGillespie.pdf> (describing arbitration as a “legal club” nursing homes can use against plaintiffs' lawyers).

tary could easily conclude that pre-dispute binding arbitration agreements are unconscionable. A decision to protect our most vulnerable senior citizens in this way affirms what Congress,¹⁵⁵ state legislatures,¹⁵⁶ courts,¹⁵⁷ and scholars¹⁵⁸ have recognized: our nation's sick and infirm elderly are a vulnerable group in need of special protection.

155. Nursing Home Reform Act, 42 U.S.C. §§ 1395i-3(b)(4), 1396r(b)(4) (2000).

156. Legislation that protects the elderly specifically or that is enacted in part out of a concern for the protection of the elderly is becoming increasingly more common. A discussion of elder protection measures passed or being considered by the states can be found at Nat'l Conference of State Legislatures, States Take Aim to Protect the Elderly (Aug. 6, 2007), <http://www.ncsl.org/programs/health/shn/2007/sn497c.htm>. For example, the state of Georgia passed a consumer protection bill regarding payday lenders, in part because it was concerned about unconscionable practices of payday lenders that were exploiting the elderly in 2007. GA. CODE ANN. § 16-17-1 (2007) (regulating payday lending because such loans are "having an unreasonable impact upon the elderly," among others, and describing as unconscionable choice of law and forum clauses that attempt to avoid Georgia laws protecting the elderly). In 2006, the state of Colorado passed a home foreclosure protection bill in part because corporations were targeting the elderly. COLO. REV. STAT. § 6-1-1102 (2008) (regulating home foreclosures to protect the elderly and others from exploitation and unconscionable practices, and establishing minimum statutory contractual protections). In 2007, California passed two bills designed to protect the elderly from fraud, abuse, and unscrupulous conduct in commercial transactions. CAL WELF. & INST. CODE § 15657.01 (West Supp. 2009) allows, under limited circumstances, for attachment of defendant's property in claims of financial abuse against an elder or dependent adult. CAL GOV'T CODE § 7480 (West Supp. 2009) allows county adult protective services and a long-term care ombudsman to obtain financial records of elders and dependent adults when investigating claims of abuse.

157. Courts have also specifically singled out the elderly for protection. In *Currie v. Three Guys Pizzeria, Inc.*, 615 N.Y.S.2d 494 (N.Y. App. Div. 1994), the court recognized that a lease might be unconscionable because it was executed by a landlord who was elderly and infirm and dependent on the tenant for assistance. In *Bennett v. Bailey*, 597 S.W.2d 532, 535 (Tex. Civ. App. 1980), a Texas court found a contract for dancing lessons was unconscionable in part because the elderly widow who signed the agreement was lonely and unable to withstand the defendants' efforts to exploit her through high pressure sales tactics and false flattery. In *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 859-62 (W. Va. 1998), the West Virginia Supreme Court found an agreement between a lender and an elderly, unsophisticated consumer unconscionable because the agreement required the elderly consumer to arbitrate claims but preserved access to the courts for the lender. In *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62-64 (Fla. Dist. Ct. App. 2003), a Florida court refused to enforce a pre-dispute binding arbitration agreement in a nursing home admission contract, in part because the resident and his wife were elderly. *But see* *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 989 (Ala. 2004) (finding that the mandatory arbitration agreement covered the claims asserted); *Mathews v. Life Care Ctrs. of Am., Inc.*, 177 P.3d 867, 869-70 (Ariz. 2008) (acknowledging that the remedies available to elderly who are abused by nursing home staff have been increased, while refusing to allow extra protections to elderly in admission

II. COURTS SHOULD UPHOLD THE SECRETARY'S PROHIBITION OF
PRE-DISPUTE BINDING ARBITRATION AGREEMENTS IN NURSING HOME
ADMISSION CONTRACTS NO MATTER WHAT LEVEL OF
DEFERENCE THE COURTS APPLY

If the Secretary acts to prohibit binding arbitration, the manner in which he or she acts will affect the deference the decision receives.¹⁵⁹ Courts will generally defer to an administrative agency's interpretation of a statute the agency administers. The extent of that deference depends, however, on the manner in which the agency acted. As a general matter, courts will apply *Chevron*-style deference when an agency's interpretation has the force of law¹⁶⁰ or when the agency uses formal processes.¹⁶¹ Generally, courts will afford less deference, as

agreements); *In re Ledet*, No. 04-04-00411-CV, 2004 WL 2945699, at *1, 6 (Tex. App. Dec. 22, 2004) (granting a motion to compel compliance with mandatory arbitration provision in admission agreement signed by son who did not have power of attorney over his mother, who suffered from Alzheimer's).

158. Patrick Emery Longan, *Middle-Class Lawyering in the Age of Alzheimer's: The Lawyer's Duties in Representing a Fiduciary*, 70 *FORDHAM L. REV.* 901, 904 (2001) ("[E]lderly wards might need special protection"); Diego Rodriguez-Pinzón & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 *A. U. INT'L L. REV.* 916, 862 (2003) ("[W]hile adequate care is necessary for all, the elderly should be given special protection because it is more important in their case.").

159. *Newton v. FAA*, 457 F.3d 1133, 1136 (10th Cir. 2006) ("Different types of agency pronouncements are entitled to different degrees of deference.").

160. A leading administrative law scholar, Professor Cass Sunstein, described "force of law" as follows:

The Court has not explained what it means by the "force of law." There seem to be two possible interpretations. First, an agency decision may have the "force of law" when and because it receives *Chevron* deference. On this view, the "force of law" test is no test at all; it is a circle, not an analytical tool. All of the relevant work is being done by an inquiry into congressional intentions, which are typically elicited by an examination of whether the agency has been given the authority to use certain procedures. Second, an agency decision may be taken to have the "force of law" when it is binding on private parties in the sense that those who act in violation of the decision face immediate sanctions. On this view, *Chevron* deference is inferred from the grant of power to make decisions that people violate at their peril. Perhaps we could supplement this definition by adding that a decision has the "force of law" if the agency is legally bound by it as well. This interpretation has the advantage of avoiding any circularity, and it is for that reason the most plausible reading of the Court's approach in *Mead*.

Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 222 (2006) (footnotes omitted).

161. *Id.* at 247-48 ("If the agency action has the force of law, *Chevron* applies, and agency decisions that result from formal procedures are taken to have the force of law."); see also Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine*:

noted in the *Skidmore v. Swift & Co.*¹⁶² line of cases, when agencies act more informally or when their acts do not have the force of law.¹⁶³ Either way, courts should uphold the Secretary's decision to prohibit pre-dispute binding arbitration in nursing home admission contracts.

Deciphering when agency action warrants *Chevron* deference, the so-called "*Chevron* Step Zero" question, is easy on the margins (regulations that clearly require *Chevron* deference) but can be quite difficult in the main. Should the Secretary promulgate a regulation prohibiting pre-dispute binding arbitration agreements in long-term care admission contracts, *Chevron* deference would apply, and the regulation would be valid so long as Congress has not "directly spoken to the precise question at issue" and the regulation is a permissible construction of the statute.¹⁶⁴ The Medicare and Medicaid statutes say nothing about pre-dispute binding arbitration clauses, and therefore Congress has not addressed the issue.¹⁶⁵ The next question is whether Congress has expressly or impliedly delegated power to the agency to fill gaps in the statute.¹⁶⁶ Agency rules made pursuant to an express grant of authority are to be upheld unless they are arbitrary, capricious, or manifestly contrary to the statute.¹⁶⁷ If the agency acts pursuant to an implied grant of authority, courts will uphold the decision so long as the Secretary's construction of the statute is reasonable.

The Secretary would most likely draw this grant of authority from the provisions in the Medicare statute that require "skilled nursing facilit[ies] . . . meet such other requirements relating to the health,

Congressional Intent, Judicial Judgment, and Administrative Autonomy, 59 ADMIN. L. REV. 783, 808 (2007) ("Rather, Sunstein would have the courts defer to agency interpretations under the *Chevron* rubric whenever they carry the force of law—understood in the Austinian sense—or are the result of notice-and-comment or trial-type procedures.").

162. 323 U.S. 134 (1944).

163. Sunstein, *supra* note 160, at 225-26 ("By contrast, informal processes—certainly of the sort that result in thousands of classifications per year—are unlikely to promote values of participation and deliberation. On this view, *Mead* puts agencies to a salutary choice; it essentially says, 'Pay me now or pay me later.' Under *Mead*, agencies may proceed expeditiously and informally, in which case they can invoke *Skidmore* but not *Chevron*, or they may act more formally, in which case *Chevron* applies." (emphasis added)).

164. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

165. See 42 U.S.C. §§ 1395-1395iii, 1396-1396w-2 (2007).

166. *Chevron*, 467 U.S. at 843-44.

167. *Id.*; see, e.g., *United States v. Morton*, 467 U.S. 822, 834 (1984); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Batterton v. Francis*, 432 U.S. 416, 424-26 (1977); *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232, 235-37 (1936).

safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary” and the Medicaid statute that requires nursing homes to abide by any “requirements relating to the health and safety of residents . . . as the Secretary may find necessary.”¹⁶⁸

These provisions are unmistakably express grants of power to the Secretary. Congress gave the Secretary extremely broad power to do anything the Secretary feels necessary to promote or protect the health, safety, and well-being of nursing home residents.¹⁶⁹ The fact that it is such a broad grant of power does not make it any less express. It simply demonstrates that Congress recognized that the agency administering this statute is in the best position to protect this uniquely vulnerable population. Therefore, if the Secretary should find pre-dispute binding arbitration agreements unconscionable because they “relate to” the health, safety (and well-being in the case of Medicare) of residents, a reviewing court could only invalidate the regulation if it were arbitrary, capricious, or manifestly contrary to the statute.

How does prohibiting pre-dispute binding arbitration agreements “relate to” the “health, safety and well-being” of residents? The keys are staffing and incentives. Good care requires significant numbers of high quality staff.¹⁷⁰ Significant numbers of high quality staff are expensive. Nursing homes facing the threat of substantial jury verdicts for poor care have an incentive to maintain staffing levels and quality; nursing homes that have eliminated the threat of substantial jury verdicts through pre-dispute binding arbitration agreements have an incentive to cut the number and quality of staff.¹⁷¹ Thus, the Secretary could reasonably conclude that nursing homes that have limited their liability for poor care through pre-dispute arbitration agreements will

168. The Medicare statute is located at 42 U.S.C. § 1395i-3(d)(4)(B), and the Medicaid statute is at *id.* § 1396r(d)(4)(B). The Secretary has yet to utilize these provisions.

169. The Supreme Court has noted Congress’s extremely broad delegation of regulatory power to the Secretary in the Medicaid statute on numerous occasions. See *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002); *Schweiker*, 453 U.S. at 43; *Batterton*, 432 U.S. at 425; see also *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 96 (1995) (finding Congress delegated broad regulatory power to the Secretary in the Medicare statute).

170. CAL. HEALTHCARE FOUND., *SNAPSHOT—CALIFORNIA’S FRAGILE NURSING HOME INDUSTRY* (2005), available at <http://www.chcf.org/documents/hospitals/FragileNursingHomeIndustrySnapshot2005.pdf>; Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. TIMES, Sept. 23, 2007, at 6.

171. *Senate Hearing*, *supra* note 28 (testimony of Alison E. Hirschel), available at <http://aging.senate.gov/events/hr196ah.pdf>; Duhigg, *supra* note 170.

respond by cutting staff, which will have an adverse effect on nursing home residents.

There is empirical evidence supporting the cause and effect relationship between limiting financial liability and profit-maximizing behavior that takes the form of staffing cuts. A study by the Service Employees International Union and a *The New York Times* exposé showed that when private equity firms bought nursing home chains they immediately cut staff—in numerous cases below state-law mandated minimums.¹⁷² Not surprisingly, quality of care declined in many of the nursing homes that experienced staff cuts.¹⁷³ This is what happened at Habana Health Care Center:

Habana Health Care Center, a 150-bed nursing home in Tampa, Fla., was struggling when a group of large private investment firms purchased it and 48 other nursing homes in 2002. The facility's managers quickly cut costs. Within months, the number of clinical registered nurses at the home was half what it had been a year earlier, records collected by the Centers for Medicare and Medicaid Services indicate. Budgets for nursing supplies, resident activities and other services also fell, according to Florida's Agency for Health Care Administration. The investors and operators were soon earning millions of dollars a year from their 49 homes. Residents fared less well. Over three years, 15 at Habana died from what their families contend was negligent care in lawsuits filed in state court. Regulators repeatedly warned the home that staff levels were below mandatory minimums. When regulators visited, they found malfunctioning fire doors, unhygienic kitchens and a resident using a leg brace that was broken. "They've created a hellhole," said Vivian Hewitt, who sued Habana in 2004 when her mother died after a large bedsore became infected by feces.¹⁷⁴

Why would nursing home operators cut staff so precipitously when it was obvious that the cuts were hurting residents? They did it because they knew they had virtually eliminated their liability. The owners of the facility known as the Habana Health Care Center "spread [ownership and control] of [the facility] among 15 companies and five layers of firms," making it virtually impossible for plaintiffs' lawyers and regulators to ferret out which entity was responsible for negligent care at Habana.¹⁷⁵ Hewitt's attorney wasted three years and \$30,000 attempting to ascertain which corporate entity was responsi-

172. Duhigg, *supra* note 170.

173. *Id.*

174. *Id.*

175. *Id.*

ble for causing Hewitt's mother to die from a feces-infected pressure ulcer.¹⁷⁶

The previously mentioned *Times* article provides evidence of similarly poor conditions at other such nursing homes:

Habana is one of thousands of nursing homes across the nation that large Wall Street investment companies have bought or agreed to acquire in recent years.

Those investors include prominent private equity firms like Warburg Pincus and the Carlyle Group, better known for buying companies like Dunkin' Donuts.

As such investors have acquired nursing homes, they have often reduced costs, increased profits and quickly resold facilities for significant gains.

But by many regulatory benchmarks, residents at those nursing homes are worse off, on average, than they were under previous owners, according to an analysis by The New York Times of data collected by government agencies from 2000 to 2006.

The *Times* analysis shows that, as at Habana, managers at many other nursing homes acquired by large private investors have cut expenses and staff, sometimes below minimum legal requirements.

Regulators say residents at these homes have suffered. At facilities owned by private investment firms, residents on average have fared more poorly than occupants of other homes in common problems like depression, loss of mobility and loss of ability to dress and bathe themselves, according to data collected by the Centers for Medicare and Medicaid Services.¹⁷⁷

Thus, what happened at Habana is not an isolated event. When private equity groups limit their liability through byzantine corporate structuring, "[t]he first thing owners do is lay off nurses and other staff that are essential to keeping patients safe."¹⁷⁸ This is a profitable strategy. Formation Properties, the private equity firm that purchased Habana from Beverly Enterprises, Inc., "sold Habana and 185 other facilities to General Electric for \$1.4 billion."¹⁷⁹ According to well-known nursing home industry analyst Steve Monroe, "Formation's and its co-investors' gains from that sale were more than \$500 million in just four years."¹⁸⁰

While the act of limiting liability through arbitration is obviously not identical to making a company judgment-proof through corporate

176. *Id.*

177. *Id.*

178. *Id.* (quoting Professor Charlene Harrington).

179. *Id.*

180. *Id.*

manipulation, the same principle underlies both actions; it is rational for profit-maximizing actors in human capital-intensive firms like nursing homes to boost the bottom line by cutting staff when their liability for negligence is limited.¹⁸¹ The Secretary could reasonably conclude that prohibiting pre-dispute binding arbitration agreements “relates to” the “health, safety and well-being of residents” because such a prohibition keeps pressure on nursing home operators to provide quality care through the threat of full civil liability for the failure to do so. Therefore, such a regulation would almost certainly withstand judicial scrutiny under *Chevron*.¹⁸²

The Secretary could also issue a survey and certification letter changing his or her position from “neutral,” as it was in 2003,¹⁸³ to prohibiting pre-dispute binding arbitration provisions. Whether such a letter would be entitled to *Chevron* deference is unclear.¹⁸⁴ The U.S. Supreme Court’s guidance on when *Chevron* deference is due is not a model of clarity.¹⁸⁵ While it is clear that regulations promulgated through notice and comment rule-making are entitled to *Chevron* deference, it is unclear how less formal agency actions will fare.

Survey and certification letters provide guidance to state survey agencies on program requirements. They represent the considered

181. The problems of corporate manipulation and judgment-proof nursing home operators identified in the article from *The New York Times* were the subject of several Congressional hearings after the publication of the *Times* exposé in September, 2007. *Nursing Home Transparency and Improvement: Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 398 (2007).

182. Even if this regulation were evaluated using a reasonableness standard it is very likely that it would be upheld since all it has to do is “relate to” the health and safety of nursing home residents. See 42 U.S.C. §§ 1395i-3(d)(4)(B), 1396r(d)(4)(B) (2000).

183. Pelovitz Memorandum, *supra* note 50.

184. A brief discussion of judicial deference to the agency action contemplated by this Article is necessary. However, an in-depth critique of *Chevron* is beyond the scope of this Article and hardly necessary given the exhaustive scholarly treatment the doctrine has received.

185. See, e.g., Ann Graham, *Searching For Chevron in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 271 (2008) (“[C]lassic *Chevron* analysis is dead.”); Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 781 (2007) (“Far from the simple, two-step test many originally envisioned, *Chevron* has been transformed into a three-step test that no one, not even the Justices of the Supreme Court, completely understands.”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 848 (2001) (finding 14 major unanswered questions raised by *Chevron*, and pointing out that *Chevron* and its progeny have generated substantial confusion about when it should apply); Sunstein, *supra* note 160, at 193 (arguing that the Court’s *Chevron* progeny has introduced too much complexity in the analysis and uncertainty for lower courts “without promoting important countervailing values”).

judgment of the agency and they apply nation-wide. Supreme Court precedent and lower court cases suggest that, while perhaps not according *Chevron* deference, a reviewing court would accord the Secretary's decision "respectful consideration" or deference consistent with the Court's pre-*Chevron* model of judicial deference to agency decision-making under *Skidmore*.¹⁸⁶ In practical terms, the type of deference accorded to the Secretary will not matter because "*Chevron* and *Skidmore* are not radically different in practice; in most cases, either approach will lead to the same result."¹⁸⁷

III. THE FEDERAL ARBITRATION ACT WOULD NOT PREEMPT THE SECRETARY'S PROHIBITION OF PRE-DISPUTE BINDING ARBITRATION AGREEMENTS IN NURSING HOME ADMISSION CONTRACTS

The FAA, enacted in 1925, provides that a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy

186. Numerous cases suggest that less formal agency actions receive less than *Chevron* deference. See, e.g., *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002) (giving "respectful consideration" to agency letters to state Medicaid directors expressing the Secretary's interpretation that the Medicaid Act permitted an "income-first" methodology for determining Medicaid eligibility (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001))); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 590 n.6 (5th Cir. 2004) ("Although not entitled to *Chevron* deference, relatively informal CMS interpretations of the Medicaid Act, such as the State Medicaid Manual, are entitled to respectful consideration in light of the agency's significant expertise, the technical complexity of the Medicaid program, and the exceptionally broad authority conferred upon the Secretary under the Act."); *Cnty. Health Ctr., Inc. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002); *Landers v. Leavitt*, No. 3:04-cv-1988 (JCH), 2006 WL 2560297, at *6 (D. Conn. Sept. 1, 2006). But see *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 452-53 (1999) (affording *Chevron* deference to Medicare Provider Reimbursement Manual); *Smiley v. Citibank, N.A.*, 517 U.S. 735, 740-43 (1996) (giving *Chevron* deference to a proposed agency rule adopted after the initiation of litigation). The pre-*Chevron* test, articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), was substantially similar to the "respectful consideration" test currently used for less formal agency actions:

[R]ulings, interpretations and opinions of the Administrator . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140.

187. Sunstein, *supra* note 160, at 229.

thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹⁸⁸

The FAA was enacted at a time when courts were hostile to merchants' attempts to privately resolve their own disputes using industry norms.¹⁸⁹ Courts regularly invalidated pre-dispute binding arbitration agreements negotiated by commercial entities with approximate bargaining power who actually desired a private forum for dispute resolutions and subject-matter expert arbitrators rather than being forced to go to court in front of lay judges and juries.¹⁹⁰ The courts' refusal to honor these agreements was simply a function of judicial animus to them.¹⁹¹ The FAA was passed to rectify this problem.¹⁹²

To the consternation of many critics,¹⁹³ the U.S. Supreme Court has interpreted the FAA much more broadly than its legislative history might suggest.¹⁹⁴ The Court's jurisprudence on arbitration and the FAA has evolved considerably since 1925.¹⁹⁵ It initially appeared that

188. 9 U.S.C. § 1 (2007).

189. See Gavin, *supra* note 83, at 253.

190. See *id.* at 251-52.

191. Carroll S. Neeseemann, *Montana Court Continues Its Hostility to Mandatory Arbitration*, 58 DISP. RESOL. J. 22, 25 (2003) ("It was a garden-variety brokerage contract, containing a garden-variety arbitration clause. Thus, the court's animus seems to have been directed at arbitration in general.").

192. Kenyon D. Harbison, *Are Contingent-Fee Attorneys Deterred? How Courts Can More Effectively Police Adhesive Arbitration Agreements*, 7 APPALACHIAN J.L. 207, 209 (2008); Stanley A. Leasure, *Arbitration of Nursing Home Claims: Oklahoma Goes Its Own Way*, 60 OKLA. L. REV. 737, 748 (2007); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 647 (1996); Recent Proposed Legislation, *Arbitration Fairness Act of 2007*, S. 1782, 110th Cong. (2007), 121 HARV. L. REV. 2262, 2262-63 (2008).

193. See Lamb, *supra* note 11, at 515; Moses, *supra* note 11, at 156; Rueben, *supra* note 11, at 309; Stempel, *supra* note 11, at 403-04.

194. Harbison, *supra* note 192, at 210 ("As a general rule, the Court has broadly and consistently construed the FAA . . ."); Stempel, *Equilibrium*, *supra* note 56, at 771 ("Viewed as a whole and in light of its limited but clear legislative history and political background, it is clear that the [FAA] was designed largely to ensure that written arbitration clauses contained in commercial contracts between merchants were enforced."); see also Sternlight, *supra* note 192, at 664 ("The Supreme Court dramatically increased the scope of the FAA during this third period by expounding the dual myths that the FAA applies to actions brought in state court and that the FAA prohibits states from enacting legislation hostile to arbitration.").

195. Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 63-77 (1997) (discussing the evolution of arbitration under the FAA); Kenneth F. Dunham, *Binding Arbitration and Specific Performance Under the FAA: Will This Marriage of Convenience Survive?*, 3 J. AM. ARB.

the Court would give the FAA a narrow interpretation,¹⁹⁶ and that the FAA was a procedural law that would only apply in federal courts.¹⁹⁷ In the early cases, beginning in 1953 with *Wilko v. Swan*, the Court was concerned with whether the parties actually consented to arbitration of their claims.¹⁹⁸ In the late 1960s and 1970s, the Court shifted from focusing on whether the parties had actually agreed to arbitrate the claims at issue to focusing on individual interests and the extent to which arbitration advanced certain social policies.¹⁹⁹ In 1983, the Court decided the first case, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, which reflected the beginnings of what would become a virtually unbridled zeal for pre-dispute binding arbitration clauses.²⁰⁰ In *Moses H. Cone*—a case involving a construction contract dispute—the Court announced that the FAA embodied a “federal policy favoring arbitration” and “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”²⁰¹

The Court further expanded the reach of the FAA in *Southland Corp. v. Keating*²⁰² and *Allied-Bruce Terminix Cos. v. Dobson*.²⁰³ In *Keating*, the Court held for the first time that the FAA applied in state courts and that state laws excluding certain types of claims from arbitration were preempted by the FAA.²⁰⁴ In *Allied-Bruce Terminix*, the Court struck down an Alabama statute prohibiting arbitration and read the phrase “evidencing a transaction involving commerce” to give the FAA reach that is coextensive with Congress’s power to regulate under the Commerce Clause.²⁰⁵ According to one commentator:

187, 212 (2004) (“Thus, case law has evolved from treating arbitration agreements as totally unenforceable in the cases decided prior to the FAA, to completely enforceable in most cases decided since the mid-1980s.”); Braine F. Pagel, Jr., *Sounding the Death Knell of Forced Consumer Arbitration*, 79 Wis. Law. 13, 13 (2006) (“Over time, the FAA evolved from what arguably was intended as a procedural statute into a statute that grants a substantive right.”).

196. See *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (refusing to compel arbitration of a claim for damages under § 12(2) of the Securities Act of 1933 because the intent of Congress in enacting the Securities Act was better served by invalidating the arbitration agreement).

197. Sternlight, *supra* note 192, at 647.

198. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200-05 (1956); *Wilko*, 346 U.S. at 435-38.

199. Sternlight, *supra* note 192, at 647.

200. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

201. *Id.* at 24-25.

202. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

203. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

204. *Keating*, 465 U.S. at 16.

205. *Allied-Bruce Terminix*, 513 U.S. at 273.

[A]s a result of judicial construction, the [FAA] reaches much further and imposes itself on a far greater proportion of our citizens than was ever envisioned in 1925. The FAA as interpreted affects statutory rights, consumer rights, and employee rights, as well as state police powers to protect those rights. Today's statute—which has been construed to preempt state law, eliminate the requirement of consent to arbitration, permit arbitration of statutory rights, and remove the jury trial right from citizens without their knowledge or consent—is a statute that would not likely have commanded a single vote in the 1925 Congress.²⁰⁶

Withering criticism notwithstanding, the FAA still applies to nursing home arbitration agreements because they affect interstate commerce,²⁰⁷ so we must analyze whether the FAA would preempt the Secretary from prohibiting pre-dispute binding arbitration provisions on the grounds that they are unconscionable.

The Court has never been reluctant to find that the FAA preempts state laws that prohibit or regulate pre-dispute binding arbitration agreements.²⁰⁸ These cases, while establishing the phenomenal power and reach of the FAA, are inapposite because they do not involve federal action limiting arbitration, and they do not consider the issue of unconscionability.

206. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 99-100 (2006).

207. Because nursing homes receive out-of-state payments through the Medicare program and supplies from out of state, almost every court that has addressed the issue has decided that the FAA applies to nursing home arbitration agreements. See *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004); *McGuffey Health & Rehab. Ctr. v. Gibson ex rel. Jackson*, 864 So. 2d 1061 (Ala. 2003); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005). *But see Bruner v. Timberlane Manor Ltd. P'ship*, 155 P.3d 16 (Okla. 2006).

208. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 314 (2002) (“[T]he [FAA] applies even to state-law claims in state court and pre-empts all contrary state statutes.”); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (preempting state law notice statute that required conspicuous notice of arbitration agreement on first page of contract); *Allied-Bruce Terminix*, 513 U.S. at 281 (preempting Alabama statute that prohibited enforcement of all pre-dispute arbitration agreements); *Volt Info. Sci., Inc. v. Bd. of Trs. of the Leland Stanford Univ.*, 489 U.S. 468, 472 (1989) (“[T]he FAA therefore pre-empts application of state laws which render arbitration agreements unenforceable”); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (preempting state law that prohibited arbitration of claims arising under the California Labor Code); *Keating*, 465 U.S. at 16 (preempting state law that prohibited arbitration of California Franchise Investment Law claims).

The FAA does not protect unconscionable agreements to arbitrate and no court has ever compelled arbitration in the face of a finding of unconscionability, as that term is defined in a given jurisdiction.²⁰⁹ Therefore, unless a court was to find that the Secretary's finding of unconscionability was really a pretext²¹⁰ for general hostility to arbitration—something clearly not permitted by the FAA—then a reviewing court should give the Secretary due deference and uphold the ruling.

Certainly the proposal advanced in this Article is not pretextual, and it does not advocate that HHS endorse some public policy against arbitration. Instead, this proposal goes straight to the heart of the FAA's insistence that unconscionable agreements to arbitrate cannot be enforced. As discussed previously, the lack of bargaining power, the advanced age of nursing home residents, their poor mental and physical health, and all of the other circumstances surrounding entry to a nursing home demonstrate that there is a legitimate basis, deeply rooted in the law of unconscionability, that supports a decision to declare pre-dispute binding arbitration agreements unconscionable in nursing home admission contracts.²¹¹ Thus, the FAA should not preempt this action.

IV. FINDING PRE-DISPUTE BINDING ARBITRATION AGREEMENTS IN NURSING HOME ADMISSION CONTRACTS UNCONSCIONABLE IS CONSISTENT WITH CONGRESS'S PAST EFFORTS TO PROTECT THE ELDERLY

If the Secretary prohibits pre-dispute binding arbitration agreements for nursing homes receiving federal funds, it would hardly be the first governmental foray into regulating the affairs of the nursing home industry. In 1987, the federal government drastically changed the requirements by which nursing homes participating in the Medicare and Medicaid programs had to abide in order to receive federal funds.²¹² Equally drastic were the changes to the way the government oversaw these providers.²¹³ On December 22, 1987, the Omnibus

209. "Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" the FAA. *Doctor's Assocs.*, 517 U.S. at 687.

210. See Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1016 (1996).

211. See *supra* Part I.

212. Medicare and Medicaid Programs; Health Care Financing Research and Demonstration Cooperative Agreements and Grants; Amendment, 51 Fed. Reg. 36,856-02 (Oct. 16, 1986).

213. *Id.*

Budget Reconciliation Act of 1987 (OBRA '87) was enacted.²¹⁴ Part of OBRA '87, the Nursing Home Reform Act (NHRA),²¹⁵ amended the Social Security Act and provided for a new survey and enforcement process, which allowed state and federal agencies to cooperatively enforce a new and expansive set of health and safety regulations for nursing homes.²¹⁶ Prior to the NHRA, nursing homes were subject to only fifteen statutory requirements in order to be eligible for Medicare participation,²¹⁷ and the remedies available for non-compliance were extremely limited.²¹⁸ Moreover, the focus of the pre-NHRA requirements was not on the quality of care being given by the facilities.²¹⁹ After the passage of the NHRA, nursing homes became subject to more than 100 statutory requirements, many related to quality of care, which had to be substantially complied with in order to participate in Medicare and Medicaid programs.²²⁰

The NHRA is striking in both its breadth and specificity. It states that facilities "must care for [their] residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident."²²¹ To facilitate this broad directive, the statute imposes very specific care-related requirements on nursing homes. The statute requires facilities to maintain a quality "assessment and assurance committee" that meets at least quarterly, and it requires the committee to be comprised of the director of nursing, a physician, and at least 3 other staff members.²²² The statute requires facilities to assess residents upon admission, quarterly, and at any time the resident has experienced a significant change in his or her

214. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 4101, 101 Stat. 1330, 1330-1400.

215. Nursing Home Reform Act, 42 U.S.C. §§ 1395i-3(b)(4), 1396r(b)(4) (2000).

216. Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities, 57 Fed. Reg. 39,278-01 (proposed Aug. 28, 1992) (to be codified at 42 C.F.R. pts. 431, 442, 488-89).

217. *Id.*

218. Prior to OBRA '87, the only sanctions provided for by statute for noncompliance with requirements for participation were "termination, nonrenewal, or automatic cancellation of provider agreements; denial of participation for prospective facilities; and denial of payment for new admissions in lieu of termination when the facilities . . . did not pose an immediate and serious threat to the health and safety of residents." *Id.*

219. INST. OF MED., IMPROVING THE QUALITY OF LONG-TERM CARE 5 (Gooloo S. Wunderlich & Peter O. Kohler eds., 2001).

220. Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities, 57 Fed. Reg. 39,278-01.

221. 42 U.S.C. § 1396r(b)(1)(A) (2000).

222. *Id.* § 1396r(b)(1)(B).

physical or mental condition.²²³ The statutory requirements for the assessment are very detailed. Nursing homes receiving federal funds must

conduct a comprehensive, accurate, standardized, reproducible assessment of each resident's functional capacity, which assessment—

- (i) describes the resident's capability to perform daily life functions and significant impairments in functional capacity;
- (ii) is based on a uniform minimum data set specified by the Secretary under subsection (f)(6)(A) of this section;
- (iii) uses an instrument which is specified by the State under subsection (e)(5) of this section; and
- (iv) includes the identification of medical problems.²²⁴

The NHRA also requires that facilities have a very detailed written plan of care for each resident. That statute requires nursing homes to:

provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident in accordance with a written plan of care which—

- (A) describes the medical, nursing, and psychosocial needs of the resident and how such needs will be met;
- (B) is initially prepared, with the participation to the extent practicable of the resident or the resident's family or legal representative, by a team which includes the resident's attending physician and a registered professional nurse with responsibility for the resident; and
- (C) is periodically reviewed and revised by such team after each assessment under paragraph (3).²²⁵

The NHRA also requires nursing homes to provide a plethora of services to meet the needs of the resident as identified in the comprehensive plan of care. Nursing homes must provide necessary rehabilitative services, social services, pharmaceutical services, dietary services, an activities program, routine and emergency dental services, and treatments required for the mentally ill and mentally retarded.²²⁶

One of the most impressive aspects of the NHRA is that it provides not only a comprehensive list of duties for nursing homes, but it also provides nursing home residents with an extensive list of rights.²²⁷ Nursing homes must promote and protect each resident's right to free choice,²²⁸ right to the freedom from restraints,²²⁹ privacy,²³⁰ confiden-

223. *Id.* § 1396r(b)(3)(C)(i)-(ii).

224. *Id.* § 1396r(b)(3)(A).

225. *Id.* § 1396r(b)(2).

226. *Id.* § 1396r(b)(4)(A).

227. *Id.* § 1396r(c)(1).

228. *Id.* § 1396r(c)(1)(A)(i). The right to free choice is described as:

tiality,²³¹ right to the accommodation of needs,²³² right to air grievances,²³³ right to participate in resident and family groups,²³⁴ right to

The right to choose a personal attending physician, to be fully informed in advance about care and treatment, to be fully informed in advance of any changes in care or treatment that may affect the resident's well-being, and (except with respect to a resident adjudged incompetent) to participate in planning care and treatment or changes in care and treatment.

Id.

229. *Id.* § 1396r(c)(1)(A)(ii). The right to be free from restraints is described as:

The right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms. Restraints may only be imposed—

- (I) to ensure the physical safety of the resident or other residents, and
- (II) only upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used (except in emergency circumstances specified by the Secretary until such an order could reasonably be obtained).

Id.

230. *Id.* § 1396r(c)(1)(A)(iii). The right to privacy is described as: "The right to privacy with regard to accommodations, medical treatment, written and telephonic communications, visits, and meetings of family and of resident groups." *Id.* The right to privacy does not require the facility to provide a private room. *Id.*

231. *Id.* § 1396r(c)(1)(A)(iv). The right of confidentiality is described as: "The right to confidentiality of personal and clinical records and to access current clinical records of the resident upon request by the resident or the resident's legal representative, within 24 hours (excluding hours occurring during a weekend or holiday) after making such a request." *Id.*

232. *Id.* § 1396r(c)(1)(A)(v). The right to accommodation of needs is described as:

The right—

- (I) to reside and receive services with reasonable accommodation of individual needs and preferences, except where the health or safety of the individual or other residents would be endangered, and
- (II) to receive notice before the room or roommate of the resident in the facility is changed.

Id.

233. *Id.* § 1396r(c)(1)(A)(vi). The right to air grievances is described as:

The right to voice grievances with respect to treatment or care that is (or fails to be) furnished, without discrimination or reprisal for voicing the grievances and the right to prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents.

Id.

234. *Id.* § 1395i-3(c)(1)(A)(vii). The right to participate in resident and family groups is described as: "The right of the resident to organize and participate in resident groups in the facility and the right of the resident's family to meet in the facility with the families of other residents in the facility." *Id.*

participate in other activities,²³⁵ right to examine survey results,²³⁶ and right to refuse certain transfers.²³⁷

The enforcement system also changed dramatically. The enforcement of federal regulations governing nursing homes is done through a partnership between state survey agencies and Centers for Medicare and Medicaid Services (CMS).²³⁸ Under OBRA '87, facilities must be surveyed at least once every 15 months.²³⁹ Surveys are performed by multi-disciplinary teams of CMS-trained and certified health professionals.²⁴⁰ All survey teams must have at least one registered nurse.²⁴¹ Survey teams investigate whether facilities are in substantial compliance with program requirements.²⁴² The surveyors review facility and resident records, interview staff, residents, and family members, and observe care directly.²⁴³ The purpose of these surveys is to genuinely assess the quality of the care the nursing home residents are receiving, rather than the very limited "paper" review that was conducted prior to the enactment of OBRA '87.²⁴⁴

Also, the NHRA greatly expanded the type of sanctions that the government may impose for regulatory violations so that the government can exert more pressure on facilities to attain compliance

235. *Id.* § 1395i-3(c)(1)(A)(viii). The right to participate in other activities is described as: "The right of the resident to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility." *Id.*

236. *Id.* § 1395i-3(c)(1)(A)(ix). The right to examine survey results is described as: "The right to examine, upon reasonable request, the results of the most recent survey of the facility conducted by the Secretary or a State with respect to the facility and any plan of correction in effect with respect to the facility." *Id.*

237. *Id.* § 1395i-3(c)(1)(A)(x). The right to refuse certain transfers is described as:

The right to refuse a transfer to another room within the facility, if a purpose of the transfer is to relocate the resident from a portion of the facility that is a skilled nursing facility (for purposes of this subchapter) to a portion of the facility that is not such a skilled nursing facility.

Id.

238. Robert Fabrikant & Glenn E. Solomon, *Application of the Federal False Claims Act to Regulatory Compliance Issues in the Health Care Industry*, 51 ALA. L. REV. 105, 118 (1999); see also Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities, 57 Fed. Reg. 39,278-01 (proposed Aug. 28, 1992) (to be codified at 42 C.F.R. pts. 431, 442, 488-89).

239. 42 U.S.C. § 1396r(g)(2)(A)(iii)(I).

240. *Id.* § 1396r(g)(2)(E)(i).

241. *Id.*

242. *Id.* § 1396r(h)(4).

243. 42 C.F.R. § 488.110 (2007).

244. *Id.*

quickly.²⁴⁵ Before the passage of OBRA '87, the only sanctions that the Secretary imposed were termination from participation in the Medicare and Medicaid programs (which was very rare) and in limited circumstances denial of payment (from Medicare and Medicaid) for new admissions.²⁴⁶ After the passage of OBRA '87, the government was authorized to impose civil money penalties of anywhere between \$50 and \$10,000 per day, or up to \$10,000 per instance, for facilities failing to maintain substantial compliance with federal regulations.²⁴⁷ The per day penalties in particular were intended to provide the facilities with an incentive to address problems identified in a survey quickly or face the prospect of mounting fines.²⁴⁸ OBRA '87 also authorized the appointment of a substitute manager by the state survey agency,²⁴⁹ empowered the Secretary to direct facilities to provide in-service training of staff regarding deficient areas identified during a survey,²⁵⁰ and directed facilities to develop plans of correction for cited deficiencies.²⁵¹ The statute also allowed for the placement of a state monitor in the nursing facility²⁵² and the transfer of residents and closure of the facility.²⁵³

It is difficult to overstate the degree to which the character of federal and state oversight of long-term care facilities changed with the passage of OBRA '87. In a very real sense, the federal government has dictated to nursing home operators how they must run their business if they want access to federal taxpayer dollars.²⁵⁴ The magnitude of these changes can be seen in the response to the regulations implementing the statute. On August 28, 1992, the Health Care Financing Administration (HCFA)—which was subsequently renamed CMS in 2003²⁵⁵—issued a proposed rule implementing the statutory require-

245. Jennifer Gimler Brady, *Long-Term Care Under Fire: A Case for Rational Enforcement*, 18 J. CONTEMP. HEALTH L. & POL'Y 1, 16 (2001); see also COMM. ON NURSING HOME REGULATION, INST. OF MED., *IMPROVING THE QUALITY OF CARE IN NURSING HOMES* 241 (1986).

246. Brady, *supra* note 245, at 15.

247. 42 C.F.R. §§ 488.406(a)(3), .408.

248. Brady, *supra* note 245, at 16.

249. 42 C.F.R. § 488.406(a)(1).

250. *Id.* § 488.406(a)(8).

251. *Id.* § 488.406(a)(7).

252. *Id.* § 488.406(a)(4).

253. *Id.* § 488.406(a)(5)-(6).

254. See 42 U.S.C. § 1396r (2000).

255. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 900(e), 117 Stat. 2066, 2370-74 (codified as amended in scattered sections of 10, 26, and 42 U.S.C.).

ments of the NHRA.²⁵⁶ HCFA received more than 27,000 letters in response to the proposed regulations.²⁵⁷ HCFA also made the effective date of the rule approximately eight months after publication in the Federal Register, rather than the normal thirty to sixty day period.²⁵⁸

The purpose of reviewing this extraordinary legislation is to expose the degree to which Congress felt it was necessary to regulate the nursing home industry to protect our nation's elderly. Congress clearly believed that this industry must be very closely regulated in order to protect senior citizens who need nursing home placement.²⁵⁹ A decision by the Secretary to prohibit pre-dispute binding arbitration agreements because they likely have an adverse effect on care, is entirely consistent with the expansive reach of the NHRA.²⁶⁰

V. THE SECRETARY SHOULD USE HIS OR HER AUTHORITY TO PROHIBIT
NURSING HOMES FROM INCLUDING BINDING ARBITRATION
AGREEMENTS IN ADMISSION CONTRACTS

A. *Nursing Home Residents Would Benefit from Prohibiting Binding
Arbitration Agreements in Nursing Home Admission Contracts*

While it is certainly worthwhile to note how prohibiting pre-dispute binding arbitration agreements would be consistent with the goals of the NHRA, it is also important to focus on the fact that prohibiting these agreements would help nursing home residents. Case law and the published literature suggest that it is not uncommon for binding arbitration agreements to be presented on a take-it-or-leave-it basis,²⁶¹ forbid any meaningful judicial review of the arbitrator's deci-

256. Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities, 57 Fed. Reg. 39,278-01 (proposed Aug. 28, 1992) (to be codified at 42 C.F.R. pts. 431, 442, 488-89).

257. Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities, 59 Fed. Reg. 56,116-01, 56,127-01 (proposed Nov. 10, 1994) (to be codified at 42 C.F.R. pts. 401, 431, 435, 440-42, 447, 483, 488-89, 498).

258. Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities, 57 Fed. Reg. 39,278-01.

259. See 42 U.S.C. § 1396r.

260. *Id.*

261. *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 520 (Miss. 2005) ("The contract at issue was 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. As stated by the circuit judge, the evidence before the court established that 'had Mr. Taylor not signed the admissions agreement, he would not have been accepted into the nursing home.'"); *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at *2 (Tenn. Ct.

sion,²⁶² impose caps on damages,²⁶³ limit discovery,²⁶⁴ require confi-

App. Dec. 30, 2003) (“The admissions coordinator confirmed that Mrs. Cox would not have been admitted if Mr. Cox had refused to sign the admission agreement or had refused to assent to the terms of the dispute resolution procedures in the agreement, which provisions included one waiving Mrs. Cox’s right to a jury trial.”).

262. Arbitration agreements often contain language limiting judicial review of arbitrators’ decisions. The FAA also precludes any meaningful review. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (“[C]ourts may overturn arbitration decisions ‘[w]here there was evident partiality or corruption in the arbitrators.’” (quoting the Federal Arbitration Act, 9 U.S.C. § 10(b) (1988))); *Sec. & Inv. Planning Co. v. J.P.C. Contracting Co.*, No. 231/04, 2004 WL 2715323, at *4 (N.Y. Sup. Ct. Oct. 7, 2004) (forbidding judicial review of arbitrator’s decision); J. Maria Grover, *Become Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1743 (2006) (“Other procedural aspects of mandatory arbitration have also generated criticism. For example, arbitration does not typically provide a right to appeal, and review of arbitral awards by courts is limited under the FAA to grounds of corruption, fraud, ‘evident partiality,’ misconduct, and actions that are *ultra vires*.”); Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 61 DISP. RESOL. J. 16, 18 (2006) (“Section 10(a) of the FAA vests courts with jurisdiction to review an arbitration award only where the process has been ‘tainted in certain specific ways.’ This provision is the source of authority for most judicial review of arbitration awards.” (quoting *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990))). According to 9 U.S.C. § 10(a) (2000), a court may vacate an arbitration award only in the following circumstances:

- (1) Where the award was procured by corruption, fraud, or undue means;
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.

263. *Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910, 922 (Miss. Ct. App. 2007) (striking from an admissions agreement “a limitation on the amount of damages that may be recovered in a dispute between the nursing home and the resident or responsible party”).

264. *Prieto v. Healthcare & Ret. Corp. of Am.*, 919 So. 2d 531, 532 (Fla. Dist. Ct. App. 2005) (reversing an order compelling arbitration based on admission agreement that included limitations on discovery).

dentiality,²⁶⁵ and not require the arbitrator to articulate the bases for the decision in writing.²⁶⁶ The U.S. Supreme Court has noted that

the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.²⁶⁷

Many binding arbitration agreements also require the resident to have his or her claim decided by an arbitrator selected from a pool of former nursing home industry lawyers.²⁶⁸ Thus, instead of a jury of twelve citizens, or an impartial judge, the nursing home resident will have his or her claim decided by someone who has likely been an agent for nursing facilities in the past.²⁶⁹

While it is usually true that the terms in an arbitration agreement apply equally to both sides, nursing home residents are still prejudiced by these agreements.²⁷⁰ The reason for this centers on the types of cases nursing homes bring against residents compared to the types of cases residents bring against nursing homes.²⁷¹

Nursing homes typically sue for nonpayment.²⁷² Residents typically sue for neglect, abuse, or negligent care.²⁷³ The stakes are, therefore, much higher for the resident because damages associated with a resident's tort-like claims are going to be much higher than damages

265. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1369, 1378-79 (11th Cir. 2005) (analyzing an arbitration clause that required confidentiality in a class action suit).

266. *Buchignani v. Vining-Sparks IBG*, No. 98-6692, 2000 WL 263344, at *1 (6th Cir. Mar. 2, 2000) (discussing arbitration decision that did "not provide findings of fact or conclusions of law, nor did it otherwise state any specific bases for its decision").

267. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58-59 (1974) (citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956)); *accord Wilko v. Swan*, 346 U.S. 427, 435-37 (1953); *see also United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award.").

268. *Krasuski*, *supra* note 9, at 269 ("Nursing homes frequently select the American Health Lawyers Association ([the] AHLA) as their arbitration provider, a practice criticized by resident advocates, who claim that the AHLA consists of lawyers who typically represent health care providers and thus are more likely to rule in favor of nursing homes.").

269. *Id.*

270. *Id.* at 268-69.

271. *Id.*

272. *Id.* at 269.

273. *Id.*

associated with the nursing home's breach of contract action. Assuming that arbitration typically results in a lower dollar award than a jury trial,²⁷⁴ an adverse ruling from an arbitrator could result in a loss in the millions of dollars to the resident, while an adverse ruling in a breach of contract action brought by the nursing home would certainly be a small fraction of that.

Caps on damages also appear to be fair because they apply to both parties. However, for the same reasons discussed above, a damages cap would only serve to reduce an award for a resident but would not similarly limit the nursing home's chance of recovery in a suit against a resident. Limits on discovery would also be likely to disproportionately harm residents because the nursing home controls virtually all the information that would be relevant to a resident's tort-like claim.

Arbitration can also be more costly than traditional litigation for nursing home residents. Filing a case in a state or federal court costs a few hundred dollars.²⁷⁵ There is no cost for the judge hearing the case because our public courts are taxpayer financed. In contrast, arbitration services like the American Arbitration Association, the National Arbitration Forum, the American Health Lawyers, etc., charge thousands of dollars to handle complex medical cases.²⁷⁶ These costs are independent of the arbitrators' fees, which are frequently thousands of dollars for these types of cases.²⁷⁷

Nursing home residents are also likely to get a substantially lower recovery from arbitrators than they would a jury. A 2000 study of Kaiser Permanente's arbitration system in California revealed that Kaiser arbitrators' median medical malpractice awards were \$102,740, whereas jury verdict median awards were between \$200,000 and \$500,000, depending on the data source analyzed.²⁷⁸

A comparison of a hypothetical arbitration award and jury award illustrates how disadvantaged nursing home residents can be by arbitration. Assuming a median award of \$102,740, a nursing home resident who had to pay a one-third contingency fee (\$ 33,904) to his or her lawyer, expert witness fees of \$10,000, and half the arbitration forum and arbitrators' fees (\$10,000 total, so resident pays \$5,000) would recover just \$53,836. Using the \$200,000 median jury award

274. *Id.* at 267 (citing Alan Bloom et al., *Alternative Dispute Resolution in Health Care*, 16 WHITTIER L. REV. 61 (1995)).

275. PUB. CITIZEN'S CONG. WATCH, *THE COSTS OF ARBITRATION* 42 (2002), available at <http://www.citizen.org/documents/ACF110A.PDF>.

276. Budnitz, *supra* note 8, at 136-37.

277. PUB. CITIZEN'S CONG. WATCH, *supra* note 275, at 44-45.

278. *Id.* at 68.

figure and a thirty-three percent contingency fee, plus \$10,000 in expert witness fees, that same resident would recover \$124,000.

The Kaiser data are supported by a recent study that illustrates that arbitration is substantially cutting the cost of medical malpractice claims for nursing homes.²⁷⁹ According to a study by the Aon Global Risk Consulting, the cost per claim for medical malpractice in nursing homes declined from over \$200,000 per claim to under \$150,000 per claim from 2000 to 2006.²⁸⁰

In addition to these reasons, there is something heavy-handed about forcing a frail, elderly person to sign away access to the civil justice system as a condition of being allowed to live in a nursing home. It is exploitive to make such a demand of people who in many ways are at their physically (and perhaps mentally) weakest point in life and enduring the emotional turmoil that surrounds admission to a nursing home. Such a requirement is inconsistent with the life and dignity affirmed by federal nursing home reform laws.²⁸¹

B. *The Public Would Benefit if the Secretary Prohibited Nursing Homes from Including Binding Arbitration Agreements in Admission Contracts*

There are broader public policy concerns that should also be taken into account. Health care is provided to nursing home residents through an interrelated public/private system where the government serves primarily as the party paying for the services, and private actors are primarily responsible for delivering the services.²⁸² The provision of care in a nursing home context is governed by the statutory require-

279. Posting of Jacob Goldstein to Health Blog—WSJ, <http://blogs.wsj.com/health/2008/04/11/nursing-homes-push-arbitration-reduce-lawsuits/?mod=WSJBlog> (Apr. 11, 2008, 13:27 EST).

280. *Id.* Of course industry supporters view diminished recovery for claims as an indication that arbitration is working, not that it is functioning improperly.

281. *See, e.g.*, 42 C.F.R. § 483.25 (2005).

282. The nursing home regulatory framework is indicative of the modern regulatory state, which is increasingly dominated by arrangements where public and private entities jointly perform administrative functions. *See* Jody Freeman, *Private Parties, Public Functions, and the New Administrative Law*, 52 ADMIN. L. REV. 813, 816 (2000). This point was articulated very well by Professor Jeffrey S. Lubbers:

Of course there is something else going on in our regulatory state that Professor Freeman recognizes. The federal government workforce is shrinking. It is at the lowest level since the Eisenhower Administration. But the demands of the modern regulatory state are not shrinking; in fact they are growing. This requires alternative techniques for achieving regulatory goals. One way is for the government to depend more on the so-called “shadow government”—the world of government contractors.

ments of the NHRA,²⁸³ the regulations implementing the NHRA,²⁸⁴ and the requirements of state law.²⁸⁵ The statutory and regulatory framework in which nursing home care occurs is one of the most elaborate ever devised.²⁸⁶ Despite the existence of such an elaborate regulatory system, nurses, nurse aides, physicians, administrators, and many others exercise a tremendous amount of discretion in providing this care.

Care of the elderly is custodial, long-term, and encompasses every conceivable aspect of living.²⁸⁷ Many elderly people cannot attend to the activities of daily living (putting on clothes, brushing teeth, combing hair); many are incontinent of bowel, bladder, or both; and many lack the mental capacity to make even the simplest decisions (what to eat, what to wear) on their own.²⁸⁸ Consequently, the degree to which private parties such as nursing home staff and administration exercise control and discretion over the care of government beneficiaries is remarkable.

Clearly, contracting out this kind of care to private entities is a delegation of power from the governmental agency responsible for ensuring that beneficiaries receive quality care to entities in the private sector that have no accountability to the electorate and that operate, for the most part, for profit.²⁸⁹ Traditionally, administrative law scholarship has ignored the role that private actors play in governance, and focused instead on the legitimacy of agency authority and the role of the judiciary in reviewing agency action.²⁹⁰ To the extent that admin-

Jeffrey S. Lubbers, *Approaches to Regulatory Reform in the United States: A Response to the Remarks of Professors Levin and Freeman*, 83 WASH. U. L.Q. 1893, 1902 (2005).

283. 42 U.S.C. § 1396r (2000).

284. See, e.g., 42 C.F.R. § 483.25.

285. See, e.g., N.C. GEN. STAT. § 131-D2 (2007).

286. See, e.g., 42 C.F.R. § 483.25.

287. 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, 228 (1994).

288. See KASPER & O'MALLEY, *supra* note 126, at 9.

289. See Shin-Yi Chou, *Asymmetric Information, Ownership and Quality of Care: An Empirical Analysis of Nursing Homes*, 21 J. HEALTH ECON. 293, 294 (2002) (discussing study that found non-profit nursing homes provide better care than for-profit nursing homes).

290. Professor Freeman uses the term "legitimacy" to encompass several complaints about administrative power, including agencies' lack of direct political accountability and incompatibility with separation of law principles. Further, she notes that the concern about legitimacy also takes the form of administrative law scholars' calls for the elimination of certain agencies, "revival of the nondelegation doctrine," and debates over the proper standard of judicial review of agency action. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 555-57 (2000).

istrative law scholars have focused on the private role in governance, their response has been to view private actors as dangerous.²⁹¹

Recognizing the apparent permanence and pervasiveness of public/private partnerships, administrative law scholars, led by Professor Jody Freeman, are beginning to explore these relationships in a different light.²⁹² In this new mode of analysis, administrative law should focus not on the purely public versus the purely private realm (for those distinctions are illusory), but should instead focus on the critical unit of observation in administrative law—"the set of negotiated relationships between the public and the private."²⁹³ This presents real opportunity: It allows administrative law to conceive of alternative accountability mechanisms that might facilitate private entities' promotion of public goals while still retaining the flexibility to achieve desired outcomes efficiently.²⁹⁴

One alternative means of promoting accountability is through contract.²⁹⁵ Agencies can insist on terms in contracts with private agencies that promote democratic ideals such as accountability, due process, rationality, and equality in exchange for contracting out the work.²⁹⁶ In this scenario, privatization would not result in a loss of public values, as critics of privatization fear, but could lead to their expansion among private sector operators.²⁹⁷ Agencies can also use their rule-making power to ensure that privatization does not result in the loss of public values.

This analysis has particular force in the nursing home context. The fact that private parties exercise so much control over Medicare and Medicaid beneficiaries is an inevitable consequence of the manner in which government-subsidized care is structured. So long as the majority of health care providers are private entities, the government's

291. *Id.* at 558.

292. "The traditional emphasis on agency action and the theoretical defensiveness toward private activity make it difficult for administrative law to explore how administration really works." *Id.* at 564. Thus, according to Professor Freeman, "[a]dministrative law, a field motivated by the need to legitimize the exercise of governmental authority, must now reckon with private power, or risk irrelevance as a discipline." *Id.* at 545.

293. *Id.* at 548.

294. *Id.* at 549.

295. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003).

296. *Id.*

297. Professor Freeman describes this as "publicization," meaning a process "through which private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state." *Id.*

ability to directly oversee the care provided by those private entities is limited. Therefore, government must utilize other methods to ensure accountability for the private actors who exercise so much discretion over the care of beneficiaries.

The survey and enforcement system is the principle means by which the government exercises oversight in this arena. There is abundant data indicating that the survey and enforcement process has yet to be an effective method of ensuring that private actors are providing the quality of care necessary to meet the congressional mandate that nursing home residents receive the care necessary to attain and maintain their “highest practicable physical, mental and psychosocial well-being.”²⁹⁸

Against this backdrop of federal and state ineffectiveness, the resident’s ability to seek redress for harm caused by poor care becomes all the more pressing. Because the nursing home staff and administration are not considered state actors, residents cannot avail themselves of constitutional due process protections based on failure to provide quality care as required by the NHRA.²⁹⁹ This situation generally leaves residents with state common law and statutory causes of action.

In the absence of an arbitration agreement, nursing home residents can bring a civil suit in the public court system. This public exposure is critical to accountability. It allows members of the local community to keep track of what is happening in nursing homes in their community.

Access to courts also allows nursing home advocates the opportunity to collect valuable information about how nursing home residents are being treated. In 2006, the National Citizens’ Coalition for Nursing Home Reform (NCCNHR) published *The Faces of Neglect: Behind the*

298. U.S. GEN. ACCOUNTING OFFICE, NURSING HOME QUALITY: PREVALENCE OF SERIOUS PROBLEMS, WHILE DECLINING, REINFORCES IMPORTANCE OF ENHANCED OVERSIGHT, S. Doc. No. GAO-03-561, at 46 n.56 (2003) (internal quotation marks omitted), *available at* <http://www.gao.gov/new.items/d03561.pdf>; *see also* KATHRYN G. ALLEN, U.S. GOV’T ACCOUNTABILITY OFFICE, NURSING HOME REFORM: CONTINUED ATTENTION IS NEEDED TO IMPROVE QUALITY OF CARE IN SMALL BUT SIGNIFICANT SHARE OF HOMES, S. Doc. No. GAO-07-794T (2007), *available at* <http://www.gao.gov/new.items/d07794t.pdf>; U.S. GOV’T ACCOUNTABILITY OFFICE, NURSING HOMES: DESPITE INCREASED OVERSIGHT, CHALLENGES REMAIN IN ENSURING HIGH-QUALITY CARE AND RESIDENT SAFETY, S. Doc. No. GAO-06-117 (2005), *available at* <http://www.gao.gov/new.items/d06117.pdf>.

299. “State actors are subject to the full panoply of congressional, executive and judicial oversight mechanisms. They must comply with all constitutional requirements, including procedural due process, and unless Congress provides otherwise, the procedural demands of the APA. Private actors, by contrast, remain relatively unregulated by procedural norms” Freeman, *supra* note 274, at 842-43 (footnote omitted).

Closed Doors of Nursing Homes.³⁰⁰ This publication documented terrible incidents of abuse and neglect of thirty-six nursing home residents in ten states.³⁰¹ NCCNHR was only able to put these case studies together because these cases had been litigated in the public court system.³⁰² NCCNHR used this book to lobby Congress on behalf of nursing home residents.³⁰³ On April 28, 2006, Representative Henry Waxman, who sponsored the Nursing Home Staffing Act of 2005,³⁰⁴ drafted and disseminated a letter that urged his House colleagues to read the NCCNHR publication and to support this legislation.³⁰⁵

Keeping nursing home cases in the public domain allots the public and advocates an ability to assess whether the partnership between CMS and the nursing home industry is achieving the results demanded by the public. It helps hold the nursing home industry accountable.

If private suits are required to be arbitrated, there is virtually no public forum in which nursing home cases will be litigated.³⁰⁶ This lack of transparency is worsened because federal hearings resulting from long-term care enforcement actions are not open to the public. It seems fundamentally inconsistent with democratic values to have litigation about care that is publicly funded be held in secret. For these reasons, the Secretary can and should prohibit the inclusion of binding arbitration agreements in long-term care admission contracts of providers receiving federal funds.³⁰⁷

CONCLUSION

The nursing home context deserves different treatment from other consumer transactions because it is so different. There are very few, if

300. NAT'L CITIZENS' COAL. FOR NURSING HOME REFORM, *THE FACES OF NEGLECT: BEHIND THE CLOSED DOORS OF NURSING HOMES* (2006).

301. Memorandum from NCCNHR to the Subcomm. on Commercial & Admin. Law, Comm. on the Judiciary 2 (June 12, 2007), available at <http://www.nccnhr.org/uploads/NCCNHRStatementforJune12HearingonArbitration.pdf>.

302. *Id.*

303. *Id.* at 3.

304. Nursing Home Staffing Act of 2005, H.R. 4293, 109th Cong.

305. Letter from Henry A. Waxman, Congressman, House of Representatives, to Comm. on Gov't Reform (Apr. 28, 2006), available at <http://www.nccnhr.org/uploads/WaxmancolleagueLtr.pdf>.

306. State agencies can hold public hearings when revoking a nursing home's state license. However, such licensure revocation actions are exceedingly rare. See, e.g., W. Andrew Arnold & Brian E. Arnold, *Helping Society's Most Vulnerable: Nursing Home Litigation*, 14 S.C. LAW., Mar. 2003, at 28.

307. The APA does not apply to agency contracts. 5 U.S.C. § 553(a)(2) (2000).

any, “consumer” transactions that remotely resemble nursing home placement in terms of loss of privacy, autonomy, and vulnerability. These factors expose nursing home residents to an extraordinary array of harms. In his testimony to the Senate Judiciary Committee, Ken Conner described the conditions many nursing home residents endure:

All too often, the story is the same: avoidable pressure ulcers (bed sores) penetrating to the bone; wounds with dirty bandages that are infected and foul smelling; patients languishing in urine and feces for hours on end; hollow-eyed residents suffering from avoidable malnutrition, unable to ask for help because their tongues are parched and swollen from preventable dehydration; dirty catheters clogged with crystalline sediment and yellow-green urine in the bag; residents who are victims of sexual and physical abuse from caregivers; [and] short-handed staff . . . harried and overworked because their employers decided to increase profits by decreasing labor costs³⁰⁸

Sometimes society is better served through certain “overbroad prophylactic rules” than “case-by-case adjudication after the fact.”³⁰⁹ This is one of those cases. The fact that this prohibition may reach too far in impeding the freedom to contract—in the sense that it will prohibit binding arbitration under circumstances where the risk of procedural unconscionability is very low³¹⁰—is of less compelling concern in this context. Nursing home operators enter into this business with the full knowledge that it is a heavily federally funded and regulated industry. In fact, the large government subsidy most certainly attracts many operators into the businesses. Thus, there is the expectation that the government will impose restrictions on many aspects of the manner in which business is conducted—including restrictions on the terms that nursing home operators can impose on nursing home residents in their admission contracts.³¹¹

308. *House Hearing*, *supra* note 14 (testimony of Kenneth L. Connor), *available at* <http://judiciary.house.gov/hearings/pdf/Connor080610.pdf>.

309. Epstein, *supra* note 59, at 795 (“I am quite happy to recognize—indeed, to insist upon—limitations of freedom of contract[,] [such as the Statute of Frauds,] that take into account the vulnerable status of certain groups (infants, insane people, some elderly) . . .”).

310. Imagine a lucid corporate lawyer who enters a nursing home and actively bargains with the nursing home operators because he or she has a choice of quality nursing homes available to him or her that do not require binding arbitration.

311. Medicare and Medicaid prohibit facilities from requiring “a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility.” 42 U.S.C. §§ 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii) (2000).

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Would it be better if Congress were to act to prohibit these agreements? Certainly it would, and with any luck Congress may eventually do that. But it is important to remember that Congress has already acted. Congress passed the Medicare and Medicaid statutes and gave the Secretary the power to protect nursing home residents by prohibiting pre-dispute binding arbitration agreements. The Secretary should use the power Congress provided.

