

**ARBITRATION CLAUSES IN NURSING  
HOME ADMISSION AGREEMENTS:  
FRAMING THE DEBATE**

*Katherine Palm*

*The use of mandatory arbitration clauses is common and has generally been deemed permissible. Mandatory arbitration clauses have been endorsed by Congress and the Supreme Court of the United States. However, there is vigorous debate over the legality and prudence of using mandatory arbitration clauses in the context of nursing home admission agreements. In this note, Katherine Palm frames the debate surrounding the use of mandatory arbitration clauses in nursing homes. She first observes that both proponents and opponents of arbitration clauses in nursing home agreements tend to frame the issue in one of two ways: rights-based or policy-based. After exploring the arguments, Ms. Palm concludes that the use of mandatory arbitration clauses should be embraced. Specifically, she asserts that time and energy are best spent improving the state of arbitration clauses and forums, especially through the use of model nursing home agreements.*

**I. Introduction**

When Cheryl Sanford checked her mother into a new nursing home after the Alzheimer's unit of her former long-term care facility closed, she could not have expected that her mother

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Katherine Palm is Associate Editor 2006–2007, Member 2005–2006, *The Elder Law Journal*; J.D. 2007, University of Illinois, Urbana-Champaign; B.A. 2001, Williams College.

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would die within three weeks following surgery to try to repair the damage from two falls.<sup>1</sup> After filing a wrongful death claim, and in the midst of the commotion surrounding her mother's transfer, Ms. Sanford learned that she had committed herself to binding arbitration of all future claims against the facility.<sup>2</sup> The courthouse door was permanently shut when Ms. Sanford's challenge to the arbitration agreement was rejected a few years later.<sup>3</sup> One zealous advocate for the low-income elderly harshly characterized such mandatory arbitration as "something that's designed specifically by the nursing facilities to take options away from residents and their family members."<sup>4</sup>

In the health care context, the enforceability of predispute agreements to arbitrate<sup>5</sup> instead of litigate any future claims that may arise out of a contractual relationship is the subject of vigorous debate.<sup>6</sup> A particular point of contention is whether mandatory arbitration clauses are appropriate in nursing home admission agreements. Critics of arbitration argue that the set of events constituting the typical admission experience is a perfect storm of elements likely to put the elderly admittee at a bargaining disadvantage.<sup>7</sup> Despite the clear

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1. See Nora Lockwood Tooher, *Nursing Home Arbitration Grows*, MO. MED. L. REP., Dec. 2004, at 12, 12.

2. *Id.*

3. *Sanford v. Castleton Health Care Ctr.*, 813 N.E.2d 411 (Ind. Ct. App. 2004).

4. Tooher, *supra* note 1, at 13 (quoting Eric M. Carlson, Attorney, National Senior Citizens Law Center).

5. Arbitration is defined as "a method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding." BLACK'S LAW DICTIONARY 112 (8th ed. 2004).

6. Critics of predispute, mandatory arbitration provisions, such as prominent advocate Eric M. Carlson, continue to voice their disapproval of the use of such terms in nursing home admission agreements. Tooher, *supra* note 1, at 13 ("There's no rational reason why any individual entering a nursing home would sign such an [arbitration] agreement[.]"). Those on the other side of the debate are no less unequivocal in their belief in the appropriateness of alternative dispute resolution in the health care industry. See, e.g., Karen Ignagni, *Liability and Health Care: Time for a Fresh Approach*, 10 METRO. CORP. COUNSEL 34, 34 (2004) ("Our entire health care system would be healthier if we could screen disputes and send them to the proper clinic for proactive treatment and resolution. That is the promise of alternative dispute resolution in health care. It is a goal that we should be pursuing without reservation and without delay.").

7. Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 263-64 (2004) (noting that the need for nursing care often arises unexpectedly and, further, that admission is a time of extreme stress for admittees and their families, during which they sign arbitration agreements that are usually only one of a number of documents given to them at once).

government policy of promoting arbitration<sup>8</sup> and in the face of growing endorsement by the public, lobbies push for legislation limiting or disallowing the use of such mandatory arbitration clauses in nursing home admission agreements.<sup>9</sup>

At the root of the controversy over using compulsory arbitration in the nursing home setting, there is tension between two approaches to improve long-term care. One approach suggests reducing the costs of dispute resolution by circumventing traditional litigation and freeing funds to improve provision of services. The other approach advocates focusing on achieving high-quality care by ensuring that the rights of nursing home residents are prosecuted to the fullest extent possible under the law. The stakes are high in endorsing either of these respectively pro- or anti-arbitration positions, as the demographic shift caused by aging baby boomers<sup>10</sup> will likely result in an even greater number of Americans residing in long-term care facilities within a few decades. Because there does not appear to be a concurrent decline or stabilization in the number of incidents leading to litigation, it seems likely that the regulation of arbitration in the nursing home context will take on even greater importance.<sup>11</sup> As one well-known advocate for the reform of long-term care noted, "LTC [long-term care] is an 800-pound gorilla of social problems that lurks just around the bend."<sup>12</sup>

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8. The Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006), was enacted with the purpose of defeating "long-standing judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

9. The number of Americans who would pick arbitration over a lawsuit for monetary damages increased by 5% over a period of four years to 64% in 2003. NAT'L ARBITRATION FORUM, THE CASE FOR PRE-DISPUTE ARBITRATION AGREEMENTS 9 (2004), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf>.

10. Nearly 20% of the American population is projected to be age sixty-five or older by the year 2030. U.S. CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN tbl.2a (2004), available at <http://www.census.gov/ipc/www/usinterimproj/natprojtab02a.pdf>.

11. For example, in Texas, 86% of its nursing homes failed to comply fully with federal health standards, and more than one-third of the facilities had "violations that caused actual harm to residents or placed them at risk of death or serious injury." STAFF OF H.R. COMM. ON GOV'T REFORM, 107TH CONG., NURSING HOME CONDITIONS IN TEXAS: MANY NURSING HOMES FAIL TO MEET FEDERAL STANDARDS FOR ADEQUATE CARE 1 (Comm. Print 2002), available at <http://www.democrats.reform.house.gov/Documents/20040830114327-83314.pdf>.

12. Stephen A. Moses, *Aging America's Achilles' Heel: Medicaid Long-Term Care*, 549 POL'Y ANALYSIS 1, 1 (2005), available at <http://www.cato.org/pubs/pas/pa549.pdf>.

This note explores the controversy surrounding the use of mandatory arbitration provisions in nursing home admission agreements by reviewing case law and policy critiques. Part II places the debate over the extrajudicial resolution of long-term care disputes into the larger context of general arbitration use in the United States. Part III reviews current approaches to protecting the interests of long-term care residents, either by the support of or attempt to abolish compulsory arbitration in the nursing home context. Part IV advocates for the government to take a proactive approach to structuring the role that compulsory, predispute arbitration clauses play in the disposition of injured nursing home residents' claims and in the shaping of the provision of long-term care services.

## II. The Arbitration Debate in Perspective

### A. The Historical Treatment of Arbitration

Arbitration was not always an accepted form of dispute resolution, and American distrust of compulsory arbitration persisted into the twentieth century.<sup>13</sup> This widespread rejection of nonreviewable mandatory arbitration was a form of “jurisdictional jealousy”<sup>14</sup> that was a vestige of inherited English common law.<sup>15</sup> Thus, in 1874, the Supreme Court declared that a man cannot “bind himself in advance by an agreement, which may be specifically enforced . . . [A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”<sup>16</sup>

This historical enmity towards arbitration on the part of U.S. courts began to fade in the twentieth century, and by the early 1920s, the movement to sanction and bolster support for fully binding arbitration gained steam. One explanation for the move toward making arbitration clauses irrevocable is based on the rise of the railroads and

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13. See *supra* note 8 and accompanying text.

14. In the nineteenth-century English case of *Scott v. Avery*, (1856) 10 Eng. Rep. 1121 (H.L.), Lord Campbell articulated what has been called his doctrine of “judicial jealousy,” as an explanation of historical common-law hostility to arbitration. In his view, such doctrinal hostility “probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would deprive one of them of jurisdiction.” Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 210–11 (2004).

15. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

16. *Home Ins. Co. of N.Y. v. Morse*, 87 U.S. 445, 451 (1874).

the increase in long-distance trade between merchants.<sup>17</sup> Trade associations were established to mediate commercial disputes, and irrevocable arbitration clauses kept a distant merchant “from resorting to his own hometown forum.”<sup>18</sup> In 1925, Congress endorsed arbitration by passing the Federal Arbitration Act (FAA).<sup>19</sup>

## B. Current Regulatory Environment

### 1. ARBITRATION IN GENERAL

As the primary regulation governing arbitration disputes, the FAA expressly places agreements to arbitrate on the same footing<sup>20</sup> as ordinary contracts, providing that they “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>21</sup> In *Allied-Bruce Terminix Cos. v. Dobson*,<sup>22</sup> the Supreme Court held the Act applicable under Congress’ constitutional Commerce Clause power.<sup>23</sup> Thus, federal law preempts state anti-arbitration statutes that conflict with the FAA in seeking to override agreements to submit claims to arbitration.<sup>24</sup> The states, however, have largely gone along with the federal government’s endorsement of arbitration, adopting the Uniform Arbitration Act (UAA)<sup>25</sup> in droves.<sup>26</sup>

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17. See Carrington & Castle, *supra* note 14, at 215.

18. *Id.*

19. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

20. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (“[The FAA’s] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”).

21. 9 U.S.C. § 2.

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

23. *Id.* at 268 (noting that a broad reading of § 2, “a contract evidencing a transaction involving commerce,” is correct); see U.S. CONST. art. I, § 8, cl. 3.

24. See *Southland Corp. v. Keating*, 465 U.S. 1, 10–12 (1984) (noting that in passing the FAA, Congress mandated the enforcement of arbitration agreements).

25. UNIF. ARBITRATION ACT §§ 4–21, 7 U.L.A. 17–72 (2005). The 1955 UAA was recently expanded and updated in 2000. The revised UAA (RUAA) takes up certain issues not dealt with formerly such as:

(1) provisional remedies (RUAA § 8), (2) how a party can initiate an arbitration proceeding (RUAA § 9), (3) consolidation of arbitration proceedings (RUAA § 10), (4) arbitrators’ disclosure of facts likely to affect impartiality (RUAA § 12), (5) arbitrators’ immunity from civil actions (RUAA § 14), (6) whether arbitrators may be required to testify in other proceedings (RUAA § 14), (7) judicial enforcement of pre-award rulings by arbitrators (RUAA § 18), (8) remedies, such as attorney fees and punitive damages, arbitrators may award (RUAA § 19).

The Supreme Court has since upheld the use of compulsory arbitration provisions in a number of settings.<sup>27</sup> For example, *Circuit City Stores, Inc. v. Adams*<sup>28</sup> held that the FAA's exemption of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"<sup>29</sup> applies only to employment contracts of transportation workers, rather than all employment contracts.<sup>30</sup> The Court has widely enforced arbitration clauses, not only in commercial and employment disputes, but also finding that claims under the Americans with Disabilities Act<sup>31</sup> are subject to compulsory arbitration pursuant to agreement in a securities registration application under the FAA.<sup>32</sup> The Court generally analyzes agreements to arbitrate future claims under standard contract principles.<sup>33</sup>

## 2. ARBITRATION IN THE LONG TERM

In the context of health care, critics argue against a model that mandates arbitrating any future claims arising out of the very contrac-

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(9) judicial awards of attorney fees and costs to arbitrators and to prevailing parties in appeals (RUAA § 21), and (10) which sections of the Act are nonwaivable (RUAA § 4).

4 AM. JUR. 2D *Alternative Dispute Resolution* § 28 (1995 & Supp. 2006).

26. "The states have generally followed the federal government's example in permitting and even favoring arbitration, most notably through almost universal enactment of the 1955 Uniform Arbitration Act. The Uniform Arbitration Act has been adopted by thirty-five states. Fourteen states have adopted substantially similar legislation, for a total of forty-nine states." Susan Randall, *Judicial Attitudes Towards Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 185 n.4 (2004) (citation omitted). Tennessee's incorporation of the UAA is typical, providing, in relevant part, that "a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract." TENN. CODE ANN. § 29-5-302(a) (2000 & Supp. 2006).

27. In the past, arbitration was primarily supported in two types of disputes: conflicts between or among businesses, and conflicts involving labor in unionized places of work. Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, 433 POL'Y ANALYSIS 4, 5 (2002), available at <http://www.cato.org/pubs/pas/pa433.pdf>.

28. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

29. 9 U.S.C. § 1 (2006).

30. *Circuit City*, 532 U.S. at 119.

31. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990).

32. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

33. See, e.g., Kathrine Kuhn Galle, *The Appearance of Impropriety: Making Agreements to Arbitrate in Health Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 976 (2004).

tual relationship requiring such an agreement,<sup>34</sup> because entry into long-term care often occurs in response to an urgent and sudden need.<sup>35</sup> In such cases, the admittee may not have the opportunity to carefully read the requisite admission contracts. Further, the transition from independent living to a nursing home residence is an emotional experience<sup>36</sup> that often causes greater degrees of distraction and anxiety than, for example, signing an employment agreement. Such distinguishing features characteristic of the nursing home admission process<sup>37</sup> may render mandatory arbitration agreements more harmful than in some other contexts.

The Supreme Court has interpreted the FAA to be constitutional,<sup>38</sup> but it has not directly considered whether predispute, mandatory arbitration clauses in nursing home agreements are inherently against public policy. The agreements are presumed valid, save for defects that void ordinary contracts. It is worth noting that the current interpretation of the FAA as a congressional sanction of predispute mandatory arbitration agreements is not as long-standing as may have been implied in some Supreme Court decisions.<sup>39</sup> Nonetheless, it seems that the potential difficulties associated with their use in the context of admission into long-term care facilities are still most likely to be addressed by legislative, and not judicial, intervention.<sup>40</sup>

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34. See Krasuski, *supra* note 7, at 292 (“Unlike consumer arbitration agreements that preclude litigation of contract claims, arbitration agreements in nursing homes deny vulnerable individuals who have been neglected or abused by their caregivers the opportunity to raise tort claims in court.”); *infra* Part III.

35. Krasuski, *supra* note 7, at 264.

36. Mayo Clinic Staff, Long Term Care for Your Parents: Plan Ahead, Jan. 13, 2006, <http://www.mayoclinic.com/health/long-term-care/HA00054>.

37. See generally Krasuski, *supra* note 7 (stating that nursing home patients are often admitted in response to urgent need and that time is not always available for a thorough understanding of the process).

38. Some observers argue, in fact, that the Supreme Court went beyond mere endorsement of the legislation, which Congress intended to equalize acceptance of the arbitration and judicial forums. One such critic has opined that “the Court went beyond the intended purpose of the FAA to place arbitration agreements on equal footing with other contracts and signaled a preference for arbitration over litigation.” *Id.* at 271.

39. “The language of the Court’s then recent decisions implie[d] that Congress mandated a preference for arbitration over litigation many years ago, and that the Court has subsequently enforced that preference consistently. However . . . this preference for arbitration is a myth that has no historical basis.” Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 641, 644–64 (1996) (footnote omitted).

40. See Krasuski, *supra* note 7, at 263–65 (noting that litigants “face enormous hurdles in the courts when attempting to defeat arbitration agreements,” but that “[s]tate legislatures curb their use”).

Long-term care facilities are regulated on a more comprehensive level by the Nursing Home Reform Act (NHRA).<sup>41</sup> Passed by Congress in 1987, the NHRA was designed to address concerns raised by a report finding widespread incidence of inadequate care and treatment in nursing homes.<sup>42</sup> Under the NHRA, to accept residents enrolled in Medicare<sup>43</sup> or Medicaid,<sup>44</sup> nursing homes<sup>45</sup> must meet federal certification requirements.<sup>46</sup> Because more than half of nursing home care is paid for by Medicare and Medicaid, the NHRA subjects a large number of long-term facilities to federal review.<sup>47</sup> An agency under the umbrella of the Department of Health and Human Services (HHS) known as the Centers for Medicare & Medicaid Services (CMS) enforces these federal regulations by certifying nursing homes that pass

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41. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 4201-4218, 101 Stat. 1330 (codified as amended in scattered sections of 42 U.S.C.).

42. See, e.g., Martin Klauber & Bernadette Wright, AARP Pub. Policy Inst., *The 1987 Nursing Home Reform Act: Fact Sheet* (2001), <http://www.aarp.org/research/legis-polit/legislation/aresearch-import-687-FS84.html>.

43. See generally The Henry J. Kaiser Family Found., *Medicare: A Timeline of Key Developments*, <http://www.kff.org/medicare/medicaretimeline.cfm> (providing helpful timelines outlining important dates in the development of the Medicare system) (last visited Aug. 28, 2006).

44. See generally The Henry J. Kaiser Family Found., *Medicaid: A Timeline of Key Developments*, [http://www.kff.org/medicaid/medicaid\\_timeline.cfm](http://www.kff.org/medicaid/medicaid_timeline.cfm) (providing helpful timelines outlining important dates in the development of the Medicaid system) (last visited Aug. 28, 2006).

45. The terms “nursing home” and “long-term care facility” are used interchangeably in this context.

46. Agency for Healthcare Research & Quality, U.S. Dep’t of Health & Human Servs., *Nursing Home Staffing and Quality Improved After Passage of the Nursing Home Reform Act*, 286 RES. ACTIVITIES 1, 17 (2004), available at <http://www.ahrq.gov/research/jun04/0604RA23.htm>.

47. In 2000, Medicare and Medicaid funds accounted for 58% of the total payment for freestanding nursing home care. CTRS. FOR MEDICARE & MEDICAID SERVS., PROGRAM INFO. ON MEDICARE, MEDICAID, SCHIP, AND OTHER PROGRAMS OF THE CENTERS FOR MEDICARE & MEDICAID SERVICES 19 (2002), available at [http://new.cms.hhs.gov/TheChartSeries/downloads/sec1\\_p.pdf](http://new.cms.hhs.gov/TheChartSeries/downloads/sec1_p.pdf). In 1997, more than three-quarters of the nation’s nursing homes were certified by Medicare and Medicaid, with only 4% of the facilities lacking any kind of certification. CELIA S. GABREL, NAT’L CTR. FOR HEALTH STATISTICS, AN OVERVIEW OF NURSING HOME FACILITIES: DATA FROM THE 1997 NATIONAL NURSING HOME SURVEY 2 (2000), available at <http://www.cdc.gov/nchs/data/ad/ad311.pdf>.

periodically conducted surveys<sup>48</sup> and imposing fines and other penalties for violations.<sup>49</sup>

### C. Is Arbitration Still an Issue for Debate?

A potentially curious feature of the debate about the use of mandatory arbitration clauses in nursing home admission agreements is that the issue could be characterized, from a somewhat credulous perspective, as dead.<sup>50</sup> After all, arbitration has enjoyed the endorsement of the Supreme Court and Congress for more than eighty years. More recently, arbitration clauses have begun to appear in a growing variety of disputes, as a “renewed emphasis on freedom of contract” has taken hold.<sup>51</sup> Mandatory arbitration clauses govern an astounding number of legal relationships.<sup>52</sup> As a result, a casual observer may conclude that these clauses are a generally accepted feature of contractual relationships.

Nevertheless, the debate endures, largely because of the number of people the issue touches, including future nursing home admittees, families of admittees, and nursing staff.<sup>53</sup> The sheer incidence of resi-

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48. Under the regulations, states must carry out surveys on irregularly spaced occasions at least once every fifteen months, with a required twelve-month state-wide average and without prior notice, to assess residents' quality of life and compliance at nursing homes receiving Medicare or Medicaid funding. Klauber & Wright, *supra* note 42.

49. Sanctions imposed upon long-term care facilities found to be in violation of the regulations include: “[d]irected in-service training of staff; [d]irected plan of correction; [s]tate monitoring; [c]ivil monetary penalties; [d]enial of payment for all new Medicare or Medicaid admissions; [d]enial of payment for all Medicaid or Medicare patients; [t]emporary management; and [t]ermination of the provider agreement.” *Id.*

50. This view would be supported by pointing to (1) the strong legislative commitment to arbitration as an alternative form of dispute resolution evidenced by the enactment of the FAA in 1925, (2) the incorporation of the UAA into most states' law, and (3) subsequent Supreme Court decisions enforcing agreements to arbitrate. However, the wisdom of facilitating the use of binding predispute arbitration provisions is regularly questioned. See *supra* note 6 and accompanying text.

51. Ware, *supra* note 27, at 1.

52. “[Arbitration clauses,] which traditionally were utilized almost exclusively in the securities industry and arm's-length commercial transactions, are now prevalent in a variety of other areas, including employment, insurance policies, nursing home admissions, automobile purchases, and manufactured-home purchases.” Birmingham News Co. v. Horn, 901 So. 2d 27, 49 (Ala. 2004).

53. In 1999, there were an estimated 1.5 million full-time (or the equivalent) employees performing health care related services and roughly 1.6 million elderly citizens residing in nursing homes across the country. ADRIENNE JONES, NAT'L CTR. FOR HEALTH CARE STATISTICS, THE NATIONAL NURSING HOME SURVEY: 1999 SUMMARY, 152 VITAL AND HEALTH STATISTICS 2 (2002). Additionally, as “[t]he

dents who have been harmed while under the care of nursing home caregivers indicates that all is not well in the long-term care industry.<sup>54</sup> Serious disputes between injured residents and nursing homes arise from instances of alleged negligence or mistreatment. With strong interests at stake in resolving such disputes, parties are also likely to be concerned about choice of forum and fair adjudication.

### III. Current Approaches to Framing the Debate

Proponents and critics of arbitration clauses in nursing home admission contracts frame the issue in either one of two interrelated yet distinct ways. One approach tends to frame the arbitration question as an issue of fair adjudication, focusing on the individual's legal rights and proper remedial action, with the purpose of making victims of nursing home negligence whole to the utmost degree possible under the law. The other way to think about the problem is to frame it more directly as a policy issue.

#### A. The Rights-Based Approach

Lobbyists for the elderly primarily frame the issue as rights-based,<sup>55</sup> arguing that elderly nursing home residents who are harmed due to the negligence of a long-term care facility need to be made whole. The nursing home industry needs incentives to prevent future harm to its residents, and preserving injured residents' access to jury trials creates such incentives. Disputes surrounding the use of man-

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number of persons requiring formal care . . . will rise sharply even if the share of persons at each age remains unchanged" by 2030, the way in which claims against long-term care providers are decided will affect greater numbers of people. JACOB SIEGEL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *AGING INTO THE 21ST CENTURY* (1996), [http://www.aoa.gov/prof/Statistics/future\\_growth/aging21/summary.asp](http://www.aoa.gov/prof/Statistics/future_growth/aging21/summary.asp).

54. From 1999 until the end of January 2005, the percentage of nursing homes cited for actual harm or immediate jeopardy in the United States ranged from 15.5% to 29.3%. GEN. ACCOUNTING OFFICE, *NURSING HOMES: DESPITE INCREASED OVERSIGHT, CHALLENGES REMAIN IN ENSURING HIGH-QUALITY CARE AND RESIDENT SAFETY* 60 tbl.11 (2005), available at [www.gao.gov/new.items/d06117.pdf](http://www.gao.gov/new.items/d06117.pdf) (noting, however, that the most recent survey of 16,463 homes during 2003–2005 indicated that the percentage had dropped to 15.5%).

55. See, e.g., AARP, *THE POLICY BOOK: AARP PUBLIC POLICIES 2005*, at 7–52, available at [http://assets.aarp.org/www.aarp.org\\_/articles/legpolicy/7\\_ltc05.pdf](http://assets.aarp.org/www.aarp.org_/articles/legpolicy/7_ltc05.pdf) (noting that states should “guarantee and protect the rights of residents, including the right to pursue a private right of action in court when facilities violate state laws” and “prohibit facilities’ use of binding arbitration and dispute resolution agreements as a condition of admission or continued stay”).

andatory arbitration clauses must generally be handled on a case-by-case basis and are subject to fact-intensive contract law analysis.<sup>56</sup> Except in the case of class actions, this approach generally provides redress only to individual victims who choose to file lawsuits.

Elder law attorneys also tend to support this rights-based response to mandated arbitration, given that long-term care is a sector in which negligent behavior is not exceptional<sup>57</sup> and predispute compulsory arbitration agreements deprive their clients of a constitutionally provided right to a court trial.<sup>58</sup> Some practitioner groups have joined with advocates to lobby against binding arbitration in all consumer agreements.<sup>59</sup>

## B. Success of the Rights-Based Approach in Court

Representatives of elderly people allegedly harmed by the negligence of their long-term care providers have used a variety of rights-based legal arguments to bring actions seeking to bypass compulsory arbitration. This section describes and analyzes seven of these legal arguments.

### 1. A PREDISPUTE AGREEMENT TO ARBITRATE ALL FUTURE CLAIMS IS A CONTRACT OF ADHESION

An important rights-based argument is that predispute, binding agreements to arbitrate all future claims are contracts of adhesion.<sup>60</sup> From a public policy perspective, this argument has weight in that contracts of adhesion are inherently unfair because they destroy a consumer's ability to bargain for terms. In 2004, the Alabama Supreme Court addressed and rejected this argument in *Briarcliff Nurs-*

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56. See, e.g., Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 868 (2004) (noting the continuing applicability of "generally applicable contract law").

57. See AARP, *supra* note 55, at 7-48, 49.

58. See Tooher, *supra* note 1, at 13 (quoting elder law attorney H. Kennard Bennett: "We're going down a very perilous road toward people not having their rights protected"); David L. McGuffey, Address at Teleconference Sponsored by ATLA Nursing Home Litigation Group, Nursing Home Arbitration Agreements 3 (Aug. 23, 2004), available at <http://www.mcguffey.net/nharb082604.pdf>.

59. See Ware, *supra* note 27, at 5 (describing the efforts of various groups of trial lawyers to alter the use of mandatory arbitration provisions via lobbying efforts).

60. A contract of adhesion is "[a] standard-form contract prepared by one party, to be signed by the party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms." BLACK'S LAW DICTIONARY, *supra* note 5, at 342.

*ing Home, Inc. v. Turcotte*.<sup>61</sup> The court found that the plaintiffs in the two consolidated wrongful death actions had failed to demonstrate that the decedents, who were residents of the defendant's long-term care facility, had lacked "meaningful choice" when they signed the preadmission arbitration agreement.<sup>62</sup> Despite plaintiffs' evidence that only two nursing homes were available in their county and that the county's population of 12,180 elderly persons further deprived them of meaningful choice, the court rejected the adhesion contract argument, noting that the plaintiffs had "not shown that nursing home care is unavailable without agreeing to arbitration."<sup>63</sup> However, the court implied that affidavits showing that other providers also required arbitration would be probative evidence.<sup>64</sup> On the other hand, in *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*,<sup>65</sup> a Tennessee appellate court found a nursing home admission agreement invalid as a "classic case of a contract of adhesion."<sup>66</sup> The court determined that the agreement was offered under stressful and trying conditions, on a "take it or leave it" basis,<sup>67</sup> and without any opportunity to bargain over specific provisions.<sup>68</sup> The focus of the analysis, however, must remain on the validity of the arbitration provision itself and not on the larger contract containing it.<sup>69</sup> In this case, the arbitration provision did not constitute a stand-alone agreement, key terms were buried within it, and the text itself was in no way distinguished or highlighted by the use of boldface or enlarged font.<sup>70</sup>

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61. *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004).

62. *Id.* at 667. Importantly, the court noted that prior case law established that the burden of proving unconscionability rests with the party challenging the agreement to arbitrate. *Id.* at 665; *see also* *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 735 (Tenn. Ct. App. 2003).

63. *Briarcliff*, 894 So. 2d at 666.

64. *Id.*

65. *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 Tenn. App. LEXIS 957 (Tenn. Ct. App. Dec. 30, 2003).

66. *Id.* at \*26.

67. The admissions coordinator testified that if the agreement had not been signed, the woman seeking entry into the facility would not have been admitted. *Id.* at \*6.

68. *Id.* at \*26. In addition, the court's decision was buttressed by its finding that the decedent's husband lacked actual or apparent authority to bind his wife to the agreement to arbitrate. *Id.* at \*27-28.

69. *See McGuffey*, *supra* note 58, at 11 (pointing out that the separability doctrine, derived from a case construing the FAA, means that "findings relating to the contract as a whole [a]s invalid may not provide a defense to the arbitration agreement").

70. Thus, in this case, determinations made as to the contract as a whole would not have been easily separable from the arbitration provision.

## 2. A PREDISPUTE AGREEMENT TO ARBITRATE IS UNCONSCIONABLE

The view that an agreement to arbitrate is unconscionable when well supported by the facts, is perhaps the strongest argument to retain the right to a jury trial.<sup>71</sup> Analysis of unconscionability overlaps with adhesion contract arguments to a degree.<sup>72</sup> Unconscionability has been characterized as “chameleon-like,”<sup>73</sup> “a safety valve in our law of contracts,”<sup>74</sup> and as “so vague . . . that neither the courts, practicing attorneys, nor contract draftsmen can determine with any degree of certainty . . . when it will apply in any given situation.”<sup>75</sup> Nonetheless, the concept of unconscionability has defeated the existence of contracts in instances in which enforcement would lead to great injustice.<sup>76</sup>

When voiding a contract under this theory, courts generally require elements of both procedural<sup>77</sup> and substantive<sup>78</sup> unconscionability in the agreement.<sup>79</sup> However, the doctrine can be applied somewhat flexibly, as courts do not require these elements to be present in equal strength.<sup>80</sup> Thus, *Romano v. Manor Care, Inc.*<sup>81</sup> voided an arbitra-

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71. This is, in part, because unconscionability is a corrective doctrine that is compatible with “the libertarian philosophy underlying contract law” that echoes in some of the Supreme Court’s language in its arbitration decisions. *Ware, supra* note 27, at 5.

72. For example, both arguments were raised by the plaintiffs in *Briarcliffe Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 663 (Ala. 2004), and rejected by the court. Under Alabama law, a court must find, essentially, that a contract contains “(1) terms that are grossly favorable to a party that has (2) overwhelming bargaining power” in order to void it as unconscionable. *Id.* at 665 (restating the *Layne v. Garner* test in a simpler form [(citation omitted)]). The fact that the plaintiffs did not demonstrate a lack of meaningful choice was noted in the rejection of both arguments. *Id.* at 666–67.

73. *Gainesville Health Ctr., Inc. v. Weston*, 857 So. 2d 278, 283 (Fla. Dist. Ct. App. 2003) (quoting *Steinhardt v. Rudolph*, 422 So. 2d 884, 890 (Fla. Dist. Ct. App. 1982)).

74. *Id.*

75. *Id.* (quoting 15 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1763A (3d ed. 1972)).

76. See *Gainesville Health Ctr.*, 857 So. 2d at 284.

77. Procedural unconscionability is “unconscionability resulting from improprieties in contract formation . . . rather than from the terms of the contract itself.” BLACK’S LAW DICTIONARY, *supra* note 5, at 1561.

78. Substantive unconscionability is defined as “resulting from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances.” *Id.*

79. See, e.g., *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. Dist. Ct. App. 2003) (“To decline to enforce a contract as unconscionable, the contract must be both procedurally unconscionable and substantively unconscionable.”).

80. Although both procedural and substantive unconscionability need to be present, courts do not seek an exact quantum of each element. See *id.* Instead a court may utilize a “sliding scale,” which “disregards the regularity of the proce-

tion agreement primarily on the strength of a finding of substantive unconscionability<sup>82</sup> and without some of the typical indicators of procedural unconscionability.<sup>83</sup>

3. **A PREDISPUTE AGREEMENT TO ARBITRATE IS INAPPLICABLE TO NONPARTIES**

Another fairly successful argument against forced arbitration is that the litigant resisting arbitration was not properly made a party to the admission agreement.<sup>84</sup> For example, in *Raiteri*, the court found that the signature of an admittee's husband, absent a valid power of attorney, was insufficient to bind the admittee to arbitration and was an independent ground on which to void the admission agreement entirely.<sup>85</sup> Similarly, the signatures of two adult children on agreements for the admission of their comatose mother, without further evidence of their authority, were insufficient to hold the children to arbitration in a subsequent wrongful death claim.<sup>86</sup> In another instance, however, a nursing home representative's failure to sign an admission agreement in her official capacity was not sufficient to de-

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dural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." *Id.* (quoting 15 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1763A (3d ed. 1972)).

81. *Id.*

82. *Id.* at 63–64 (“[W]e conclude that some quantum of procedural unconscionability is shown. Because of the egregious substantive unconscionability of the terms of the agreement the test . . . is met, the agreement is unconscionable and thus unenforceable.”).

83. For example, the arbitration provisions were contained in a stand-alone agreement, and the terms were not hidden away in fine print. *Id.* at 1.

84. Contracts, by their very nature, are a set of binding commitments between two or more parties, and thus this is a defense that can be applied universally in contract disputes. A contract can be described as “[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” BLACK’S LAW DICTIONARY, *supra* note 5, at 341.

85. The court noted that the decedent’s husband lacked express authority as well as apparent authority in that the evidence demonstrated that the decedent visibly had her wits about her and was “in a position to indicate whether she assented to the terms.” *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 Tex. App. LEXIS 957, at \*28 (Tenn. Ct. App. Dec. 30, 2003). Further, there was a lack of other exigent circumstances warranting the attachment of apparent authority: “We certainly find nothing in the record before us, either factually or legally, warranting a holding that Mr. Cox had the right to waive his wife’s very valuable constitutional right to a jury trial to adjudicate her rights.” *Id.*

86. *Pagarigan v. Libby Care Ctr., Inc.*, 99 Cal. App. 4th 298, 300–02 (Ct. App. 2002). The court summarily rejected arguments to the effect that the children had the power to bind their mother by way of an agency relationship or in light of their status as next of kin. *Id.*

feat the admission agreement.<sup>87</sup> As is the case in general contract law, an agreement can be binding, despite such formal flaws, when both parties perform under the contract and there is no unconscionability.<sup>88</sup> Even in the absence of a signature representing a long-term care facility, if both parties sign a number of other documents on the same occasion agreeing to the provision of nursing home services and each party subsequently performs, a valid agreement to arbitrate exists.<sup>89</sup> Thus, this argument is most successful in instances where an admittee or a legally authorized representative fails to sign an admission agreement.<sup>90</sup> Such instances implicate the admittee's contract rights, thus relieving the court from ruling on policy grounds relating directly to the conditions of entry into long-term care.<sup>91</sup>

#### 4. A PREDISPUTE AGREEMENT TO ARBITRATE CONTAINS IMPERMISSIBLE TERMS

In some states, an agreement that requires arbitration to occur in another state is enough to keep courts from compelling arbitration of a claim.<sup>92</sup> The designation of a particular set of arbitration rules, other than the code of a state, does not necessarily void an arbitration provision.<sup>93</sup> However, if the arbitration organization stipulated in the admission agreement conducts only postdispute consumer health care arbitrations, but a predispute mandatory arbitration provision is at issue, a court may be more likely to deny compulsory arbitration.<sup>94</sup>

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87. *Consol. Res. Healthcare Fund I, Ltd. v. Fenelus*, 853 So. 2d 500, 502–05 (Fla. Dist. Ct. App. 2003) (rejecting lower court's finding, on appeal from an order denying a motion to compel arbitration, that no contract existed because the nursing home representative signed as a witness).

88. *See id.* at 504–05.

89. *Integrated Health Servs. of Green Briar, Inc. v. Lopez-Silvero*, 827 So. 2d 338, 338–39 (Fla. Dist. Ct. App. 2002).

90. *See, e.g., supra* notes 85–86 and accompanying text.

91. *See id.*

92. *Northport Health Servs. v. Estate of Baidoja*, 851 So. 2d 234, 235 (Fla. Dist. Ct. App. 2003) (“If an arbitration clause, such as this one, calls for arbitration that is to take place in a foreign jurisdiction, Florida courts cannot, over objection, compel arbitration.”).

93. *See, e.g., Sun City Diner v. Century Fin. Advisors*, 662 So. 2d 967, 967 (Fla. Dist. Ct. App. 1995) (citing precedent for the reasoning that “an arbitration clause providing that arbitration shall be conducted pursuant to the rules of the American Arbitration Association merely expresses the *method* to be followed, not a choice to arbitrate in a foreign jurisdiction.”).

94. Jennifer VanHoose et al., *Mandatory Arbitration Provisions in Nursing Home and Health Care Litigation*, 501 AFTL WOMEN'S CAUCUS J. 1 (2005), available at <http://www.aftl.org/images/uploads/1124707062WC501.pdf> (“Specifically, the AHLA [American Health Lawyers Association] and the AAA [American Arbitra-

The general argument has limited applicability, however, because a stipulation that one will arbitrate any future claims is not in itself an impermissible term.<sup>95</sup>

**5. A PREDISPUTE AGREEMENT TO ARBITRATE IS WAIVED IF LITIGATION PROCEEDS**

Participation in a lawsuit, at least intuitively, weakens any insistence upon arbitration, as it is a concession of forum to some degree and can constitute a waiver of the right to a jury trial.<sup>96</sup> Initiation of litigation by a party without first attempting to enforce an agreement to arbitrate a claim is reasonably clear evidence of the intent necessary to waive compulsion of the arbitration forum.<sup>97</sup> However, the courts have made clear that mere participation or response in a litigation action is not tantamount to waiving a right to arbitration.<sup>98</sup> In light of the strong policy preference for the enforceability of agreements to arbitrate claims, courts have said that waiving the right to arbitration cannot occur unless the actions said to be inconsistent with the right are shown to have significantly prejudiced and disadvantaged the other party.<sup>99</sup>

**6. A PREDISPUTE AGREEMENT TO ARBITRATE IMPROPERLY LIMITS STATE STATUTORY REMEDIES**

Sometimes state consumer protection statutes form the basis for arguments to invalidate compulsory arbitration provisions in nursing home admission contracts.<sup>100</sup> For example, in *Cruz v. PacifiCare Health Systems, Inc.*,<sup>101</sup> the California Supreme Court held that under the

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tion Association] will no longer administer arbitrations involving patient health care disputes unless both parties enter into a *post dispute agreement* to arbitrate.”)

95. For example, the reviewing court in *Sun City Diner* explicitly rejected the trial court’s finding that the required use of American Arbitration Association’s rules made the Florida Arbitration Code inapplicable under the prevailing common-law tenet that “an agreement to arbitrate future controversies is contrary to public policy and unenforceable.” *Sun City Diner*, 662 So. 2d at 968.

96. See *Bodine v. United Aircraft Corp.*, 52 Cal. App. 3d 940, 945 (Ct. App. 1975).

97. See *id.*; 4 AM. JUR. 2D *Alternative Dispute Resolution* § 130.

98. See *Bodine*, 52 Cal. App. 3d at 945.

99. See, e.g., *St. Mary’s Med. Ctr., Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 588 (7th Cir. 1992).

100. McGuffey, *supra* note 58, at 13.

101. In *Cruz*, an enrollee of a health plan sued the participating health care companies, alleging that they had fraudulently induced him to join by representing their primary commitment as being the maintenance and improvement of the

state's Consumer Legal Remedies Act,<sup>102</sup> a plaintiff's action to enjoin the defendant health care plan's "alleged deceptive business practices [wa]s undertaken for the public benefit" and that he had been improperly required to submit his claim to arbitration.<sup>103</sup> The case qualified for a judicially created exemption under which "requests for injunctive relief designed to benefit the public [provide] a narrow exception to the rule that the FAA requires state courts to honor arbitration agreements."<sup>104</sup> The court, however, expressly limited use of the state's consumer protection law to defend against compulsory arbitration in this fashion to injunctive relief.<sup>105</sup> Further, as the dissent in *Cruz* points out, subsequent Supreme Court decisions may invalidate this "inherent conflict" exception.<sup>106</sup>

In Alabama, Linda Owens had an experience more typical of plaintiffs asserting their rights under state consumer protection law.<sup>107</sup> Arguing that her arbitration agreement had not sufficiently implicated interstate commerce to invoke the FAA, she sought to rely on section 8-1-41 of the Alabama Code, which provides that "an agreement to submit a controversy to arbitration" cannot be "specifically enforced."<sup>108</sup> Such claims usually fail, however, because it is relatively

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health care they provided. *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303 (2003).

102. Specifically, the plaintiff sought relief under CAL. CIV. CODE § 1770 and CAL. BUS. & PROF. CODE §§ 17500, 17200 (West 2006) (making it unlawful for individuals or companies to engage in false advertising or unfair competition practices). *Cruz*, 30 Cal. 4th at 303–41.

103. *Cruz*, 30 Cal. 4th at 316. In a different case concerning the practice of "pill splitting" in a long-term care facility, the plaintiffs also raised the argument that some of the various forms of relief they were seeking could not be subjected to arbitration under a state "public interest statute." Brief of Appellant at 2, *Timmis v. Kaiser Permanente*, No. 833971-7, 2004 Cal. App. LEXIS 11553 (Ct. App. 2004).

104. *Cruz*, 30 Cal. 4th at 312 (citing *Broughton v. Cigna HealthPlans*, 21 Cal. 4th 1066 (1999)).

105. See generally *Broughton*, 21 Cal. 4th at 1084–86 (explaining that an action under the Consumer Legal Remedies Act is not necessarily inarbitrable); *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.*, 83 Cal. App. 4th 677 (Ct. App. 2000) (finding that a claim for injunctive relief under a state unfair competition law could not be subjected to compelled arbitration).

106. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (articulating the "inherent conflict" exception to the arbitrability of federal statutory claims); *Cruz*, 30 Cal. 4th at 324–27 (Chin, J., concurring and dissenting) (citing *Broughton*, 21 Cal. 4th at 1066).

107. *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004).

108. ALA. CODE § 8-1-41(3) (2006).

easy for courts to find that transactions involve interstate commerce.<sup>109</sup> When courts take into account the flow of out-of-state Medicare funds in applying the interstate commerce “substantial effect” test,<sup>110</sup> the FAA’s reach is virtually a foregone conclusion.<sup>111</sup> Also, arguments that arbitration agreements can be invalidated because they foreclose the right to statutory remedies have been generally unsuccessful.<sup>112</sup>

Nonetheless, in *Blankfeld v. Richmond Health Care, Inc.*,<sup>113</sup> a Florida state court found that a nursing home admission agreement was void as contrary to public policy, based on the prescribed arbitration procedure’s limit of statutory remedies.<sup>114</sup> The rules of the dispute resolution organization stipulated that the arbitrator:

may not award consequential, exemplary, incidental, punitive, or special damages against a party unless the arbitrator determines, based on the record, that there is clear and convincing evidence that the party against whom such damages are awarded is guilty of conduct evincing an intentional or reckless disregard for the rights of another party or fraud, actual or presumed.<sup>115</sup>

The court noted that such a provision would effectively eliminate remedies provided for negligence in Florida’s Nursing Home Residents Act (NHRA).<sup>116</sup> As the NHRA is a remedial statute, restricting its statutory remedies contradicts public policy.<sup>117</sup> Although the court

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109. For example, in *Owens* the court found it probative that, among other factors, most of the medical supplies, equipment, linens, and forms used in the nursing home were purchases from out-of-state suppliers. *Owens*, 890 So. 2d at 986–88.

110. See *United States v. Darby*, 312 U.S. 100, 119 (1941) (allowing that Congress, through appropriate legislation, could “regulate intrastate activities where they have a substantial effect on interstate commerce”).

111. See, e.g., *McGuffey Health & Rehabilitation Ctr. v. Gibson*, 864 So. 2d 1061, 1063 (Ala. 2003).

112. See *Richmond Healthcare, Inc. v. Digati*, 878 So. 2d 388, 390–91 (Fla. Dist. Ct. App. 2004) (“[T]here is no common law basis to refuse to enforce valid agreements by competent parties merely because they involve a waiver of statutory rights and remedies . . . [and] limitations and conditions on the enforcement of arbitration agreements are appropriate only where the legislature has by statute plainly imposed them.”); *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 288 (Fla. Dist. Ct. App. 2003) (“We have found no authority from any jurisdiction which holds that an arbitration provision constitutes ‘consideration’ in this sense; nor do we believe that the federal regulation was intended to apply to such a situation.”).

113. *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. Dist. Ct. App. 2005).

114. *Id.* at 297.

115. *Id.* at 298 (quoting RULES OF PROCEDURE FOR ARBITRATION § 6.06) (Am. Health Lawyers Ass’n Alternative Dispute Resolution Serv. 2006)).

116. Nursing Home Residents Act, FLA. STAT. ANN. § 400.023(1) (West 2006).

117. *Blankfeld*, 902 So. 2d at 298. For a discussion of the proper place of the remedial canon in Florida law and alternative routes to the holding, see *id.* at 303–08 (Farmer, C.J., concurring).

had engaged in unconscionability analyses in prior cases involving remedial statutes,<sup>118</sup> it clarified that “holding a contractual provision unenforceable because it defeats the remedial provisions of a statute, and is thus contrary to public policy, is distinct from finding unconscionability.”<sup>119</sup> Thus, *Blankfeld* opened another potential exit from compulsory arbitration in Florida.<sup>120</sup>

**7. A PREDISPUTE AGREEMENT TO ARBITRATE IMPERMISSIBLY REQUIRES ADDITIONAL CONSIDERATION**

Perhaps one of the most interesting arguments against compulsory arbitration rests upon a creative construction of “other consideration” in title XIX of the Social Security Act to include mandatory arbitration.<sup>121</sup> Title XIX provides:

(5) Admissions policy.

(A) Admissions. With respect to admissions practices, a nursing facility must—

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(iii) in the case of an individual who is entitled to medical assistance for nursing facility services, not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter any gift, money, donation, or *other consideration* as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual’s continued stay in the facility.<sup>122</sup>

In *Owens v. Coosa Valley Health Care, Inc.*,<sup>123</sup> the plaintiff argued that requiring nursing home admittees whose fees are paid by Medicare or Medicaid to relinquish their right to a jury trial was a form of additional consideration that violated Title XIX.<sup>124</sup> The court rejected the

118. *Richmond Healthcare, Inc. v. Digati*, 878 So. 2d 388, 390 (Fla. Dist. Ct. App. 2004); *Romano v. Manor Care*, 861 So. 2d 59, 62 (Fla. Dist. Ct. App. 2003); *Chapman v. King Motor Co. of S. Fla.*, 833 So. 2d 820, 821 (Fla. Dist. Ct. App. 2002); *Bellsouth Mobility, LLC v. Christopher*, 819 So. 2d 171, 173 (Fla. Dist. Ct. App. 2002).

119. *Blankfeld*, 902 So. 2d at 299.

120. Practitioners have taken note of this potential argument. VanHoose, *supra* note 94 (noting that “new policies and procedures may provide our clients relief from arbitration provisions that name the AHLA or the AAA as the arbitrator” in light of *Blankfeld*).

121. Gerald B. Taylor, Sr. & Kimberly R. Ward, *Arbitration Clauses in Nursing Home Agreements: Are They Enforceable?* 17, [http://www.beasleyallen.com/publications/gbt/arbitration\\_in\\_nh\\_admission\\_agreement.pdf](http://www.beasleyallen.com/publications/gbt/arbitration_in_nh_admission_agreement.pdf) (last visited Aug. 28, 2006).

122. 42 U.S.C. § 1396r(c)(5)(A)(iii) (2006) (emphasis added).

123. 890 So. 2d 983, 989 (Ala. 2004).

124. *Id.*

argument, finding that “an arbitration agreement sets a forum for future disputes,” and requiring a nursing home admittee to sign one is not tantamount to “charging an additional fee or other consideration.”<sup>125</sup> The court pointed out that the plaintiff’s reasoning could arguably dispose of almost any term in the admission contract.<sup>126</sup> Courts in other states have also rejected this argument.<sup>127</sup>

CMS has released guidance on the issue of whether requiring assent to binding arbitration in the event of a dispute is permitted under the Medicare and Medicaid programs.<sup>128</sup> In the memorandum, CMS emphasizes its belief that the agency’s “primary focus should be on the quality of care actually received by nursing home residents that may be compromised by [binding arbitration] agreements.”<sup>129</sup> CMS is more definite, however, in giving concrete direction as to the enforcement actions that may be initiated upon the discharge of or in retaliation against any existing nursing home resident’s refusal to sign or comply with a compulsory arbitration agreement.<sup>130</sup>

### C. The Policy-Based Approach in Favor of Mandatory Arbitration

In opposition to the rights-based approach, the policy-based approach frames the issue of mandatory arbitration in nursing home disputes in the context of its relationship to the general quality of care nursing homes provide to their residents. From this point of view, mandatory arbitration provisions such as those that appear in nursing

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125. *Id.*

126. *Id.* *But see* *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.2d 731, 733 (Tenn. Ct. App. 2003) (deeming the arbitration provision of the nursing home admission agreement unenforceable on other grounds, but describing the Medicare and Medicaid consideration argument as “not without appeal”).

127. *See generally* Krasuski, *supra* note 7, at 288 (describing decisions reached in Alabama, Florida, and Indiana).

128. Memorandum from Steven A. Pelovitz, Dir., Survey & Certification Group, Ctr. for Medicare & Medicaid Servs., Dep’t of Health & Human Servs., to Survey & Certification Group Reg’l Office Mgmt. State Survey Agency Dirs. (Jan. 9, 2003), <http://www.nslc.org/news/03/02/s&c0103.htm> [hereinafter Pelovitz Memorandum]. The federal agency looked into the issue after determining that a growing number of nursing homes were utilizing mandatory arbitration agreements upon admission. Mike Cason, *Nursing Homes Try Lawsuit Stoppers*, MONTGOMERY ADVERTISER, Sept. 22, 2002, at A1 (quoting Peter Ashkenaz, CMS spokesman).

129. Pelovitz Memorandum, *supra* note 128.

130. *Id.* Beyond this explicit direction, the memorandum takes a neutral position on the issue of the general use of such provisions and merely “maintains the status quo.” Krasuski, *supra* note 7, at 289.

home admission agreements are either defensible or vulnerable based upon their actual—or alleged—effects on residents' lives.

Advocates of the policy-based approach argue that the economic efficiency of arbitration is both necessary for long-term care providers to stay in the black<sup>131</sup> and beneficial to society as a whole.<sup>132</sup>

The primary problem plaguing the nursing home industry, at least from its own perspective, is the recent rise in litigation.<sup>133</sup> Historically, the nursing home industry's primary external concern was keeping up with state and federal government regulations.<sup>134</sup> However, according to a Harvard University survey, "attorneys reported substantial increases over the past five years in both the number of nursing home claims they handled and the average size of recoveries."<sup>135</sup> One study found that the annual rate of claims against long-

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131. Organizations associated with the nursing home industry emphasize the claim that litigation costs jeopardize the already shaky financial health of many long-term care facilities. See, e.g., Florida Health Care Ass'n, *Nursing Home Litigation Reform Will End the Crisis that Threatens Florida's Elderly* (2001) (on file with The Elder Law Journal). One Alabamian owner of nursing homes who instituted the use of mandatory arbitration provisions in his admission agreements noted that his "concern is [that if] we don't come up with a more efficient way to resolve these disputes, [then] we won't have insurance." Cason, *supra* note 128, at A1 (quoting Norman Estes, Owner, Northport Health Servs., which runs thirty-seven nursing homes in Alabama, Florida, Missouri, and Arkansas).

132. See, e.g., Ware, *supra* note 27, at 9 (discussing economic benefits of arbitration generally).

133. See AM. HEALTH CARE ASS'N, ISSUE BRIEF: MEDICAL LIABILITY REFORM (2003), available at [www.ahca.org/brief/ib\\_tort\\_reform.pdf](http://www.ahca.org/brief/ib_tort_reform.pdf) (lamenting that "[t]he long term care community is facing a litigation assault that threatens the very foundation of the health care system for our nation's most frail elderly . . . [as] [f]unds that go to patient care are diverted to pay for expensive liability insurance coverage"). The American Health Care Association points to a three-fold increase in lawsuits filed against nursing homes from 1992 to 2003 as evidence of this "assault." *Id.*

134. David G. Stevenson & David M. Studdert, *The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys*, 22 HEALTH AFF. 219, 219 (2003), available at <http://content.healthaffairs.org/cgi/content/abstract/22/2/219> (noting that "[t]he legal system's traditional response to concerns about the quality of long-term care has been regulation, rendering nursing homes among the most highly regulated entities in American health care").

135. *Id.* at 223 ("On a five-point Likert scale (1 = decreased substantially; 3 = stayed the same; 5 = increased substantially), the average score for trends in claims volume was 4.2 . . . With respect to damages payments, the average score was 4.0, and a little more than 40 percent of attorneys selected the highest possible response category."). From 1987 to 1994, average jury awards in nursing home lawsuits grew 120%, from \$238,285 to \$525,853. Larry Polivka et al., *The Nursing Home Problem in Florida*, 43 GERONTOLOGIST 7, 12 (2003) (on file with The Elder Law Journal).

term care facilities has more than doubled since 1996.<sup>136</sup> Other data suggest that many attorneys moved into specialized nursing home litigation practices in the mid-1990s.<sup>137</sup> There is still no conclusive explanation for the root cause of this jump in litigation, nor is there proof of a causal link between poor nursing home care and the increase.<sup>138</sup>

Concomitant with this rise in litigation is a decrease in the quality of treatment that long-term care providers can afford to offer. “[S]carce resources . . . [are] siphoned out of the eldercare system at the expense of improved quality, staffing and clinical care.”<sup>139</sup> There is evidence to back up this claim, at least with regard to an increasing proportion of long-term care facilities’ budgets being soaked up by litigation costs.<sup>140</sup> According to a recent study, “[i]t is estimated that 49% of the total amount of claim costs paid for [general liability and professional liability] claims of the long term care industry are covering litigation costs.”<sup>141</sup> Researchers have further noted that such “general liability” and “professional liability” costs<sup>142</sup> are projected to “ab-

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136. AON RISK CONSULTANTS, LONG TERM CARE: 2005 GENERAL LIABILITY AND PROFESSIONAL LIABILITY BENCHMARK ANALYSIS 5 (2005), available at [http://www.ahca.org/brief/aon\\_ltcanalysis2005.pdf](http://www.ahca.org/brief/aon_ltcanalysis2005.pdf) (noting that the 1996 rate was 6.2 claims per 1000 skilled nursing care beds, as compared with 2005, when the rate rose to 13.1 per 1000 beds).

137. This conclusion was based on the fact that the average respondent attorney had practiced law for seventeen years but had been participating in nursing home litigation for only eight years. Stevenson & Studdert, *supra* note 134, at 224.

138. Polivka et al., *supra* note 135 (“Some point to poor quality of treatment and care of elderly nursing home residents . . . and yet medical malpractice research does not support this hypothesis.”). Another possible explanation for the rise in nursing home litigation is that juries awarding higher compensatory and punitive damages spurred interest in the area on the part of trial attorneys. Krasuski, *supra* note 7, at 266 (noting further that “[u]ntil recently, attorneys were reluctant to take on cases against nursing homes . . . [as] residents are generally elderly, have pre-existing medical problems, and are not likely to have potential lost earnings, factors that limit the opportunity for damages”); see also Stevenson & Studdert, *supra* note 134, at 225.

139. AM. HEALTH CARE ASS’N, *supra* note 133.

140. AON RISK CONSULTANTS, *supra* note 136, at 4 (noting as much in an actuarial analysis report prepared for American Health Care Association).

141. *Id.* at 12.

142. “General liability exposure generally relates to those sums an entity becomes legally obligated to pay as damages because of a bodily injury (typically including personal and advertising injury) or property damage.” *Id.* at 70. “Professional liability exposure relates to those sums an entity becomes legally obligated to pay as damages and associated claims and defense expenses because of a negligent act, error or omission in the rendering or failure to render professional services.” *Id.* at 72.

sorb 5% of the countrywide average Medicaid reimbursement rate for long term care providers.”<sup>143</sup>

In light of the financial demands of litigation, long-term care providers argue that mandating arbitration is an effective step toward the goal of reducing health care costs.<sup>144</sup> Alternative dispute resolution organizations and other pro-arbitration advocates offer evidence that arbitration is a cheaper and faster forum than traditional litigation.<sup>145</sup> They argue that according to basic economics, a reduction in business costs will lead to lower costs to consumers or to increased funds for improving the quality of care in nursing homes, whether or not consumers fully comprehend the agreements they sign.<sup>146</sup> For example, streamlining the dispute resolution process by restricting discovery, could reduce overall costs.<sup>147</sup> These cost savings could be significant: according to one estimate, the cost of discovery is 80% of the cost of a fully litigated case.<sup>148</sup>

A cheaper, more efficient forum could potentially reduce the outcome-determinative quality arising out of the financial disparity between plaintiffs and defendant corporations by making the pursuit of claims more affordable and accessible.<sup>149</sup> In the language of eco-

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143. In fact, “[t]his ratio is notably higher for many of the states . . . including Arkansas (47%), Mississippi (24%), Florida (15%), [and] California (9%). *Id.* at 4.

144. *See, e.g.,* Tooher, *supra* note 1 (quoting AHCA representative).

145. One study has found arbitration to be 36% faster than traditional litigation. NAT’L ARBITRATION FORUM, *supra* note 9, at 1; *see also* Ware, *supra* note 27, at 9. Meanwhile, 78% of trial attorneys find arbitration to be faster than lawsuits. NAT’L ARBITRATION FORUM, *supra* note 9, at 2.

146. Ware, *supra* note 27, at 9 (likening arbitration’s reduction of costs as similar to those caused by technological advancements or other improvements, and noting that economics “does not assume that consumers understand, or even read, the contracts that they sign . . . [A]rbitration clauses give consumers lower prices regardless of how many consumers are aware of the arbitration clause in their contracts.”).

147. *Id.* at 3 (noting that this is “certainly the received wisdom”).

148. *Id.* These cost savings seem to be more likely to occur in high-stakes cases. Public Citizen, *The Costs of Arbitration*, 2002 PUBLIC WATCH 1, 64, available at <http://www.citizen.org/documents/acf110A.pdf> [hereinafter *Costs of Arbitration*] (“At the 95th percentile of federal cases, where \$5 million is at stake, discovery costs can amount to \$150,000 per party. Here, AAA arbitration, with an \$11,000 filing fee, could indeed result in cost savings if a 50% cut in discovery expenses can be realized.”).

149. For example, a study of *employment* arbitration found that 72% of employees were of low to middle income and, while they could not afford to litigate their claims, arbitration was within their means. Elizabeth Hill & Theodore Eisenberg, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003).

nomics, “binding arbitration is ‘Pareto optimal’<sup>150</sup> as compared to litigation, meaning that all parties are better off in binding arbitration and none are worse off.”<sup>151</sup> Some critics reject this framing and argue that a preference for binding arbitration is not defensible on the grounds that it may be better for all parties to the transaction.<sup>152</sup> In any event, arbitration advocates view enforcement of predispute arbitration provisions as essential because “[s]ocially beneficial exchange will not occur nearly as often if it can occur only postdispute.”<sup>153</sup> Proponents of mandatory arbitration augment their economic efficiency argument with further assertions that an arbitration forum can offer a greater degree of confidentiality because its activities are not automatically made part of the public record.<sup>154</sup>

#### D. Policy-Based Arguments Against Mandatory Arbitration Agreements

Public policy analysis also buttresses a number of the arguments against the use of mandatory arbitration clauses in nursing home admission agreements. Some critics dispute the facts underlying the central tenet of the nursing home industry’s public policy argument:<sup>155</sup> that arbitration is cheaper and faster than litigation and thus has a positive effect on residents’ quality of life.<sup>156</sup> One consumer lobbying group<sup>157</sup> strongly disputes the claim that arbitration is less expensive

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150. The concept of “Pareto optimality” comes from the work of Vilfredo Pareto, an Italian sociologist and economist active in the late nineteenth and early twentieth centuries. BLACK’S LAW DICTIONARY, *supra* note 5, at 1147.

151. Sternlight, *supra* note 39, at 677.

152. See, e.g., *id.* at 677–80 (citing the lack of empirical evidence to show that all parties are better off and none worse off in binding arbitration as one weakness to the argument).

153. Ware, *supra* note 27, at 9.

154. The AAA, for example, cites this as an advantage of arbitration. Am. Arbitration Ass’n, A Beginner’s Guide to Alternative Dispute Resolution, <http://www.lectlaw.com/files/adr11.htm> (last visited Aug. 28, 2006) (“Arbitration, Mediation and other forms of ADR are generally not open to public scrutiny like disputes settled in court. The hearings and awards are kept private and confidential, which helps to preserve positive working relationships.”).

155. See, e.g., Krasuski, *supra* note 7, at 292–97.

156. See *supra* notes 145–49 and accompanying text.

157. Public Citizen is a national, nonprofit organization founded by Ralph Nader in the early 1970s that is dedicated to representing consumer interests and rights. See generally Public Citizen, About Public Citizen, <http://www.citizen.org/about/> (last visited Aug. 28, 2006).

than litigation.<sup>158</sup> Results of its study<sup>159</sup> suggest that “in the vast majority of cases, arbitration will necessarily *increase* the transaction costs of litigation.”<sup>160</sup> For example, the study found that total forum costs<sup>161</sup> incurred by a plaintiff’s use of the American Arbitration Association in an \$80,000 claim could increase by as much as \$6650, or 3009%, as compared with filing in Cook County, Illinois.<sup>162</sup> Arbitration may thus be unaffordable for the average consumer, despite the savings that result from lower attorneys’ fees due to faster dispute resolution.<sup>163</sup> Even beyond the cost differential, detractors of the mandatory arbitration provision argue that lower awards could also cause consumers to fare worse than in a traditional litigation forum.<sup>164</sup>

Opponents of mandatory arbitration also argue that the system generally favors long-term care providers.<sup>165</sup> Long-term care providers are in a position to benefit from a “repeat player advantage” because they are likely to need the services of arbitrators repeatedly and

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158. *Costs of Arbitration*, *supra* note 148, at 5 (“Arbitration was conceived as an expedited process that would reduce the costs of attorney fees and litigation expenses, more than offsetting the increased forum costs . . . [however,] [a]s this report demonstrates, net cost savings will not materialize in the vast majority of consumer and employee claims.”).

159. Public Citizen describes the undertaking as “the first comprehensive collection of information on arbitration costs.” *Id.* at 1.

160. *Id.* at 3.

161. *Id.* at 40 (“By forum costs, we mean only the fees the plaintiff must pay to the court or arbitration providers.”). This calculation took into account the potential fees for filing, administrative case management, the hearing and arbitrator, the room, the subpoena, the discovery request, the motion, the continuance, the posthearing memorandum, and written findings. *Id.*

162. *Id.* at 42.

163. Krasuski, *supra* note 7, at 297.

164. A comparison of court awards with awards in medical malpractice disputes issued by a California arbitration program found that arbitrators granted awards that are “on average between 20 and 50 percent of the median awards rendered in court.” *Costs of Arbitration*, *supra* note 148, at 68. *But cf.* Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, 6 A.B.A. LITIG. SEC. CONFLICT MGMT. 10 tbl.3 (2003) (noting that in arbitration of employment disputes, claimants’ win rates were 12% higher, median awards were \$4446 higher, and median time from filing to judgment was 8.5 months shorter than in litigation). As a general proposition, when comparing median awards garnered in an arbitration setting with awards given in court, some emphasize that considering the costs incurred in bringing the action is relevant. *See* Ware, *supra* note 27, at 7 (“[A]ny comparison of awards in litigation and arbitration would be misleading if it did not compare the cost of pursuing a case to decision, including the costs of legal fees, discovery, and delay.”).

165. *See* Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Reality*, 60 LAW & CONTEMP. PROBS. 153, 156 (1997), available at [http://www.law.duke.edu/shell/cite.pl?60+Law+&+Contemp.+Probs.+153+\(Winter+1997\)](http://www.law.duke.edu/shell/cite.pl?60+Law+&+Contemp.+Probs.+153+(Winter+1997)).

thus to develop closer relationships with these neutral parties than plaintiffs who use their services only on one occasion.<sup>166</sup> The concern is that an arbitrator's desire to secure future business may influence the outcome of the proceeding.<sup>167</sup> Another possible systemic bias may exist where arbitration panels consist primarily of individuals connected to the industry in which the dispute arises.<sup>168</sup> Finally, even when arbitrators are truly neutral, inequity may nonetheless exist because the problem of the "Solomon effect" can arise. A potential cause of the lower awards received in arbitration, this biblically allusive phrase describes the "tendency of arbitrators to split the difference in rendering awards," a phenomenon that tends to benefit defendants.<sup>169</sup> General familiarity with the process of arbitration may also give nursing home defendants a psychological advantage.<sup>170</sup>

The pro-arbitration argument that speed and efficiency<sup>171</sup> benefit the public is also countered by critics who point to the abbreviated or insufficient discovery common to arbitration proceedings<sup>172</sup> as a significant price<sup>173</sup> for the quicker pace<sup>174</sup> and informal process.<sup>175</sup> Lim-

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166. *Id.* Public Citizen has also noted that there is "anecdotal evidence" supporting this effect "in which there is a systematic bias in favor of a party that is a future source of fees to the arbitrator." *Costs of Arbitration*, *supra* note 148, at 68.

167. Rolph et al., *supra* note 165.

168. *Costs of Arbitration*, *supra* note 148, at 68–69.

169. *Id.* at 69. This effect is also sometimes referred to as "splitting the baby." *See, e.g.*, Rolph, *supra* note 165, at 155.

170. However, there may also be a potential psychological benefit for harmed plaintiffs in the use of arbitration. Rolph, *supra* note 165, at 155 ("Proponents contend, because a dispute is more likely to go to a hearing if it is an arbitration case, claimants are more likely to have the satisfaction of a 'day in court' under an arbitration agreement. Thus, arbitration better meets the psychological needs of claimants.").

171. *See supra* notes 145–49 and accompanying text.

172. *Cf. Costs of Arbitration*, *supra* note 148, at 63 ("Some attorneys would quarrel with the assertion that there is always less extensive discovery in arbitration. However, it is certainly true that many arbitration clauses on their face either restrict or ban discovery.").

173. *See supra* note 148 and accompanying text.

174. However, developments in court processes, it has been argued, mean that "speedy disposition of cases is no longer uncommon in our court system." *Costs of Arbitration*, *supra* note 148, at 60–61 (noting that court delays are "not a universal problem," that "new techniques" have been adopted by courts to speed up proceedings, and that plaintiffs may save up to an estimated 40% of their time by opting for a bench trial). Nonetheless, speed is still cited as a primary benefit of arbitration in which "[t]he only elements governing speed are the eagerness of the parties to end the dispute and the complexity of the cases to be resolved." AM. ARBITRATION ASS'N, AN INTRODUCTORY GUIDE TO AAA MEDIATION AND ARBITRATION #3, <http://www.adr.org/sp.asp?id=2216> (last visited Aug. 28, 2006).

175. *Cf. Krasuski*, *supra* note 7, at 299 (pointing out that the touted benefit of less formality in arbitration means, among other things, limited discovery).

ited discovery is a factor that primarily favors defendants,<sup>176</sup> as plaintiffs may not obtain access to the information they need to prove their case.<sup>177</sup> This kind of restriction weakens the claim that arbitration is beneficial to society if it extinguishes otherwise meritorious actions. In the context of nursing homes, skepticism also surrounds the idea that the informality and privacy of arbitration creates a congenial atmosphere conducive to dispute resolution that benefits both parties.<sup>178</sup> This kind of privacy may give nursing homes a systemic advantage, as it encourages an asymmetry of opportunity to become experienced and familiar with arbitration processes.<sup>179</sup> Unlike long-term care providers, who must arbitrate or litigate claims regularly, individuals are not likely to be acquainted with the way arbitration proceedings work. They also may not be able “to learn from others’ experiences to become informed and empowered consumers”<sup>180</sup> because arbitration is a private matter that does not become part of the public record. Moreover, the “secrecy of arbitration” decreases public awareness about possible problems or issues with long-term care facilities, weakening the ability of the citizenry to function as a driving force of public policy change.<sup>181</sup>

#### E. Implications of the Approaches and Possible Solutions

The dominant feature of a rights-based approach to the problems underlying the arbitration debate in the context of long-term care for the elderly is that it is a winner-take-all proposition that allows for no common ground with the opposing viewpoint.<sup>182</sup> Both supporters

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176. *Id.*

177. This can be especially damaging, as the need for information is often asymmetric, with the plaintiff or claimant more likely to require information obtainable only through discovery. *Costs of Arbitration*, *supra* note 148, at 65.

178. See, e.g., *id.* at 61 (“Individuals have different needs than businesses with regard to confidentiality . . . [that] often [have] been met by public courts. . . . It is also unclear how the informality of an arbitration setting is useful outside the traditional commercial setting. Because a consumer and business are unlikely to have a ‘continuing business relationship,’ the ‘friendly tribunal’ envisioned by AAA is not as likely to materialize.”).

179. See Sternlight, *supra* note 39, at 695.

180. Krasuski, *supra* note 7, at 300.

181. *Id.* at 300–01 (noting further that “as politicians and government agencies are often moved to act only after a scandal is reported in the media and engenders public outrage, the privacy offered by arbitration works against development of consumer protection policies”).

182. For example, one way of “meeting halfway” on the issue would be to allow the use of mandatory arbitration agreements under specific circumstances and

and detractors of mandated alternative dispute resolution in the nursing home industry need to achieve total acceptance or rejection of arbitration to vindicate their respective positions and follow them to their logical conclusions. Further, a complete denunciation of mandatory arbitration in the nursing home context is highly unlikely in light of the Supreme Court's broad reading of the FAA and its unwillingness to treat mandatory arbitration in a particular setting differently from that of other settings.<sup>183</sup>

The use of policy arguments seems to hold somewhat greater promise for effectively addressing the root issues underlying the debate over the increasing use of compulsory arbitration clauses in the nursing home admission context.<sup>184</sup> The policy-based approach, while not especially effective as a tool to win individual cases for plaintiffs in the courtroom, nonetheless provides great flexibility in the solutions its arguments may yield, including the possible acceptability of arbitration agreements that are substantively and procedurally conscionable and have a beneficial effect on the quality of care that nursing homes are able to provide.<sup>185</sup>

A proposed solution to mediate between the concerns of the anti- and pro-arbitration camps is to enforce only optional arbitration clauses in nursing home admission agreements.<sup>186</sup> One national organization has recommended using dispute resolution only if the parties agree to it *after* the dispute arises.<sup>187</sup> Arbitration advocates, however, have argued that postdispute arbitration theory lacks practical value,<sup>188</sup> and the option seems unlikely to take hold as it would likely

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when presented in a prescribed form. *See infra* Part IV.A–B. One totally opposed to the use of such agreements based on their effects, but using a rights-based argument, would still be logically bound to resist their use even if their negative effects were largely ameliorated.

183. *See Galle, supra* note 33, at 984–85 (noting that the Court has looked at arbitration clauses deferentially and has not distinguished “between patients as consumers of health care and other kinds of consumers”).

184. Such root issues include the ultimate problem of nursing home residents being injured or dying due to failings on the part of their long-term care providers, as well as the related problem of ensuring that private providers can remain solvent while maintaining an acceptable level of care.

185. Nursing homes and long-term care providers have asserted that litigation and its effect on their liability insurance premiums divert significant resources from their primary business of caring for residents. *See supra* Part III.C.

186. McGuffey, *supra* note 58, at 10 (referencing a protocol issued by the National Commission on Health Care Dispute Resolution).

187. *Id.*

188. *See NAT'L ARBITRATION FORUM, supra* note 9, at 2 (asserting that “[a]ll the experts have concluded that the benefits of arbitration for consumers are com-

not result in the kind of savings to providers that they expect from predispute agreements.<sup>189</sup>

#### **IV. A Pragmatic Proposal Bolstered by Government Regulation**

##### **A. A Helpful Lens Through Which to View the Problem**

Perhaps the most effective way to view the issues surrounding mandated arbitration in the nursing home context is from a pragmatic, policy-based perspective. The rights-based approach can lead to impasses that are obstacles to reaching the ultimate goal of a higher baseline quality of care for nursing home residents in long-term care. Insisting upon characterizing mandatory arbitration agreements as a destruction of rights seems to be a waste of energy in an environment where congressional support for arbitration remains strong and the Supreme Court shows little sign of making an exception for one area of the health care sector. Even if evidence of long-term care providers' precarious financial situation is substantially accurate, the rights-based approach will, at best, deal only with the symptoms of the underlying problem.<sup>190</sup>

##### **B. Accepting and Improving the Forum**

Arbitration should be accepted as a potential forum for resolving claims arising out of long-term care relationships between elderly admittees and nursing homes, and reform energy should be directed toward the goal of improving arbitration standards and protocols.

Adopting standard nursing home admission agreements can close the gaps in possible procedural unfairness more effectively than litigation by a fraction of residents exposed to procedurally unconscionable agreements. Further, it is important to make the arbitration forum as substantively fair as possible without regulating it so much that the alternative forum begins to mirror the regular court system and replicate its great costs.

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pletely lost when parties may only agree to arbitration after a legal dispute arises").

189. See Ware, *supra* note 27, at 8–9.

190. Under similar reasoning, the rights-based position that a litigation forum is essential to deter poor care relies on the viability of the continued operation of nursing homes in the face of large insurance premiums and continued litigation.

States should devote further legislative attention to the underlying problems of mandatory arbitration in long-term care agreements by providing guidance to ensure that the arbitration forum is as predictable, fair, and equitable as possible. In response to public pressure, states have drafted standard nursing home admission agreements to improve procedural fairness by dictating how such provisions may be presented and ratified. For example, California recently adopted a standard admission agreement that nursing homes must use.<sup>191</sup> Nursing homes may not alter the agreement without direction to do so by the California Department of Health Services.<sup>192</sup> Regulations relating to the standard agreement require procedural safeguards to help ensure that entrants knowingly contract for the arbitration forum.<sup>193</sup> Additionally, a group of elder law practitioners in Michigan have been working on drafting a model admission agreement for use in the state's long-term care facilities.<sup>194</sup>

The use of model admission agreements would also reduce the likelihood of nursing home residents becoming bound by unconscionable agreements and contracts of adhesion. Because a form provision is consistent in major terms and appearance, consumer education about arbitration agreements would be more effective, and it would be easier for consumers to recognize and accept arbitration agreements.

## V. Conclusion

The appropriateness of predispute, compulsory arbitration provisions and the form that they take in long-term care admission agreements are important issues, and the related problems plaguing nursing homes across the country have the potential to affect all of us. Most adult Americans will eventually have to either arrange long-

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191. CAL. CODE REGS. tit. 22, § 72516 (2006); *see also* Cal. Advocates for Nursing Home Reform, California Adopts Standard Admission Agreement for Nursing Homes, <http://www.canhr.org/news/AdmissionAgreement200507.html> (last visited Aug. 28, 2006).

192. CAL. HEALTH & SAFETY CODE § 1599.61 (2005). For a study of California nursing home admission agreements that prompted the lobbying leading to the adoption of the model admission agreement, see CAL. ADVOCATES FOR NURSING HOME REFORM, BETTER READ THE SMALL PRINT: AN ANALYSIS OF ADMISSION AGREEMENTS IN CALIFORNIA'S RESIDENTIAL CARE FACILITIES FOR THE ELDERLY (2003), available at [http://www.canhr.org/pdfs/RCFE\\_Report\\_0303.pdf](http://www.canhr.org/pdfs/RCFE_Report_0303.pdf).

193. *See* CAL. CODE REGS. tit. 22, §§ 72516, 73518 (2006).

194. McGuffey, *supra* note 58, at 35.

term health care for loved ones or for themselves. Further, all taxpayers will bear the increasing costs of government nursing home industry subsidization by way of Medicare and Medicaid as aging baby boomers begin to put stress on the system. With stakes so high, it is essential to provide nursing home residents with adequate care and dignity. Approaching the issue of mandated arbitration with pragmatism and an eye toward the overall problem is the most effective way to further this goal. Model nursing home admission agreements represent one way for the government to take advantage of the potential cost-saving benefits of alternative dispute resolution without encouraging poor treatment of nursing home residents.