

## **Arbitration Clauses in Nursing Home Admission Agreements: Are They Enforceable?**

Gerald B. Taylor, Jr.  
Kimberly R. Ward  
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.  
Post Office 4160  
Montgomery, Alabama 36103-4160  
(334) 269-2343  
[www.beasleyallen.com](http://www.beasleyallen.com)

Today when a potential nursing home resident or his or her family seeks a nursing facility to provide the resident 24-hour nursing care, the resident or family is faced with more than the question of which facility to choose or how the resident will pay; the resident or family must also make the choice to waive the resident's right to a jury trial arising from any future negligent acts of the nursing home. Faced with the choice between immediate medical care and retaining the resident's right to a jury trial, of course the resident and family are more than eager to do everything necessary to ensure that the resident receives immediate medical care. However, once a resident has been injured by the negligent conduct of a nursing facility, the resident and his or her family are often astonished to find that the clause buried within the resident's admission agreement will forever prevent the resident from seeking redress in a court of law for any claims against the nursing home, including the wrongful death of a resident.

Nursing homes and other healthcare organizations and professionals have begun a nationwide campaign to limit a resident's right to sue nursing facilities through both tort reform legislation and arbitration agreements. For instance, last month, Texas voters approved Proposition 12, a constitutional amendment that would cap medical malpractice awards. Described as the most sweeping change in tort law in more than

100 years, Proposition 12 limits liability for doctors, hospitals, and nursing homes at \$250,000 each and caps total noneconomic damages at \$750,000. Last year supporters of medical malpractice tort reform took the tort reform debate across the country, proposing state-by-state tort reform legislation. Meanwhile, doctors, hospitals, and nursing homes, have begun in large numbers to include arbitration agreements in their admission contracts.<sup>1</sup> Thus, a resident who has been harmed by the negligent acts of a nursing facility, faces two obstacles: arbitration and tort reform legislation. This paper will focus on arbitration and the arguments that a resident can use to invalidate an arbitration clause in an admission agreement.

One of the primary reasons that nursing home consumers should object to arbitration, aside from the costs of the process and the discovery limitations, is the fundamental concept of fairness in any judicial proceeding. During a jury trial, consumers have the benefit of having their claims heard by a neutral body. In the arbitration setting, consumers are faced with the task of arguing their claims before fewer persons, who are industry insiders and not wholly independent from the defendant industry. When damages are awarded, generally those damages are at the lower end of the spectrum. There are exceptions, however, in Black v. Orkin Exterminating Co., a panel of three American Arbitration Association arbitrators entered an award of \$750,000 in compensatory damages and \$2,250,000 in punitive damages

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<sup>1</sup> On August 5, 2003, the Center for Justice & Democracy issued a news release calling on the American Medical Association to demand that Nevada doctors immediately stop coercing patients into signing arbitration agreements. According to recent reports, Nevada doctors had begun compelling patients to sign mandatory binding arbitration agreements as a prerequisite for patients to receive medical treatment. The Center for Justice & Democracy stated that the procedure violated AMA policy, which says that arbitration agreements are fundamentally unfair to patients. Consumer Group Calls On American Medical Association To Stop Doctors' Use of Anti-Patient Arbitration Agreements; Nevada Doctors Are Coercing Patients To Sign Agreements That AMA Considers Fundamentally Unfair, Center For Justice & Democracy, August 15, 2003.

in favor of a homeowner for violations of Florida's Deceptive and Unfair Trade Practices Act.<sup>2</sup> Black is the exception rather than the rule. The rules governing arbitration in both the consumer and healthcare setting are not favorable to plaintiffs; the rules often limit or even prohibit discovery, making it more difficult for plaintiffs to prove crucial elements of the case. Arbitration costs can sometimes exceed \$10,000, while the costs of filing suit in state courts rarely exceed \$300.

#### Federal and state law enforcement of arbitration agreements

The question of whether an arbitration agreement is enforceable, is governed by both federal and state law. Congress enacted the Federal Arbitration Act (FAA) in 1925 to address the perceived disparity in treatment of arbitration agreements.<sup>3</sup> Prior to 1925 courts were very hostile toward arbitration agreements, and rarely enforced them. According to the United States Supreme Court, the FAA was intended to “overcome courts’ refusals to enforce agreements to arbitrate” and to “place such agreements upon the same footing as other contracts.”<sup>4</sup> Section 2 of the FAA provides that “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>5</sup>

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<sup>2</sup> Black v. Orkin Exterminating Co., August 30, 2003, AAA.

<sup>3</sup> 9 U.S.C. § 2.

<sup>4</sup> Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 270-71 (1995).

<sup>5</sup> 9 U.S.C. § 2.

The FAA was enacted pursuant to the power of Congress to regulate interstate commerce. Thus, the FAA preempts any state law regarding the enforcement of an arbitration agreement when interstate commerce is affected, to the extent that state law is inconsistent with the FAA.<sup>6</sup> Although the FAA compels the enforcement of arbitration agreements in the same fashion that other agreements are enforced, the FAA also provides a method to invalidate or rescind an arbitration agreement. Under the FAA, arbitration agreements may be invalidated upon any ground that exists at law or in equity for the revocation of any contract. In determining whether to enforce an arbitration agreement, state and federal courts are free to invalidate an arbitration agreement on any state law ground that exists for the revocation of a contract. The basic premise of the FAA is that courts are not allowed to treat arbitration agreements differently than other contracts when determining whether the agreement is enforceable.

Is the FAA Applicable to Arbitration Clauses Within Nursing Home Contracts?

The FAA is triggered if the transaction, pursuant to which the arbitration agreement was entered into, affects interstate commerce. The U.S. Supreme Court determined in Citizens Bank v. Alafabco, Inc.<sup>7</sup>, that the FAA “encompasses a wider range of transactions than those actually in commerce.” According to the Court, “Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice ...subject to federal control.”<sup>8</sup>

In the nursing home context, factors such as a resident’s qualification and receipt

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<sup>6</sup> Southland Corporation v. Keating, 465 U.S. 1 (1984); Volt Information Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior University, 489 U.S. 468 (1989).

<sup>7</sup> 123 S.Ct. 2037, 2040 (2003).

<sup>8</sup> *Id.*

of Medicaid or Medicare benefits, supplies and pharmaceuticals used in the resident's care shipped from out-of-state, other out-of-state residents in the nursing facility, management of the facility by an out-of-state company, or other out-of-state workers employed by the facility, will likely trigger the FAA when a party seeks to enforce an arbitration clause contained within a nursing home contract. At least one court has determined that a resident's qualification and receipt of Medicare/Medicaid benefits is sufficient to trigger the FAA.<sup>9</sup>

In McGuffey Health Rehabilitation Center v. Gibson, a nursing home resident sued a nursing home after receiving injuries from a fall.<sup>10</sup> Prior to the resident's admission to the nursing home, her responsible party or sponsor signed an admission agreement on the resident's behalf; that agreement included an arbitration clause. The defendant nursing home moved to compel arbitration based upon the clause in the admission agreement. The trial court denied the defendant's motion. The court determined that the transaction did not evidence a transaction that substantially affected interstate commerce so as to require the resident's claims to be arbitrated. The Supreme Court of Alabama disagreed. It held that because two-thirds of all sums received by the nursing home for the resident's care and treatment came from out-of-state, in the form of Medicare funds, and because materials were purchased directly from out-of-state vendors to feed the resident, to provide her bedding, and to keep her and her surroundings clean, the admission agreement had a substantial effect on interstate commerce.<sup>11</sup>

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<sup>9</sup> McGuffey Health and Rehabilitation Center v. Gibson, [Ms. 1020289, May 9, 2003] \_\_\_ So. 2d \_\_\_ (Ala. 2003).

<sup>10</sup> Id.

<sup>11</sup> Id.

Since McGuffey, the United States Supreme Court has made clear that a transaction need not have a substantial effect upon interstate commerce to trigger the FAA.<sup>12</sup> Rather, the transaction need only *affect* interstate commerce. In the nursing home context the result is that most nursing home admission agreements containing an arbitration clause will likely be deemed to affect interstate commerce, thereby triggering the FAA. Once the FAA is triggered the arbitration clause must be enforced *unless*, it can be invalidated on grounds that exist for the revocation of any contract.

### Upon What Grounds May An Arbitration Clause In A Nursing Home Contract Be Invalidated?

#### A. Non-signatory

A basic principle of contract law is that in order for a valid agreement to exist there must have been mutual assent between the parties to enter into that agreement. If there is no proof that parties assented to be bound by an agreement, including an arbitration agreement, courts will not enforce that agreement. Assent is manifested by some act or behavior of the parties. Generally, assent to enter into a contract is manifested through a party's signature on the contract.<sup>13</sup> When there is a written contract and one person who is alleged to be a party to that contract fails to sign the contract, assent is harder to prove. The party who fails to sign the contract is called a non-signatory.

In the nursing home context, the non-signatory argument is one of the best arguments against enforcement of an arbitration agreement. Often when a resident is admitted to a nursing facility, a family member signs the resident's admission

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<sup>12</sup> See Citizens Bank, *supra*.

<sup>13</sup> Ex parte Tony's Towing, 825 So. 2d 96 (Ala. 2002).

agreement. Rarely does the resident sign his or her own admission agreement. If the nursing home intends to bind the resident to an arbitration agreement, that arbitration provision will generally be contained within the admission agreement. The person who signs the agreement admitting the resident to the nursing home also signs the arbitration agreement, waiving the resident's right to a jury trial. Thus, the question arises whether the resident has assented to the arbitration clause when the resident has not in fact signed the agreement.

Courts have generally agreed that a non-signatory to a contract may be bound to that contract if an agent signed the contract on the non-signatory's behalf or if the non-signatory was a third-party beneficiary of the contract. Under the agency theory, a nursing home resident's best argument is that the individual who signed the agreement was not the resident's agent because the resident was incapacitated due to his or her illness, and lacked the ability to control the alleged agent's actions. In order for an agency relationship to exist, the principal, the nursing home resident, must be in control of the agent. If the nursing home resident is incapacitated due to his or her medical condition, the resident is unlikely to have control over the individual signing the agreement.

Further, an agent's authority is usually based upon the conduct of the alleged principal, not that of the agent.<sup>14</sup> "[I]t is based upon the principal's holding the agent out to a third party as having the authority upon which he acts, not upon what one thinks an agent's authority might be or what the agent holds out his authority to be."<sup>15</sup> Where the potential resident is incompetent, nursing home administrators may not observe or talk

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<sup>14</sup> Brannan & Guy, P.C. v. City of Montgomery, 828 So. 2d 914 (Ala. 2002).

<sup>15</sup> Malmberg v. American Honda Motor Co., Inc., 644 So. 2d 888 (Ala. 1994)

with the potential resident prior to the signing of an admission agreement. More often than not, the potential resident is not present when the family member signs the admission agreement on her behalf; thus, it is impossible for the resident to have exhibited any conduct which would lead the nursing home to believe that the resident consented to an agency relationship.

In Pagarigan v. Libby Care Center, the heirs of a deceased woman sued the woman's former nursing home alleging that the facility wrongfully caused her death.<sup>16</sup> The defendant nursing moved to compel arbitration based on two arbitration agreements signed by the resident's daughters after the woman was admitted to the nursing facility. The resident was mentally incompetent at the time she was admitted to the nursing facility, and there was no evidence that she had signed a durable power of attorney. Based upon those facts, the court found that the resident lacked the capacity to authorize either daughter to enter into the arbitration agreements on her behalf.<sup>17</sup> According to the court, "[a] person cannot become the agent of another merely by representing herself as such. To be an agent she must actually be so employed by the principal or the principal intentionally, or by want of ordinary care, caused a third person to believe another to be his agent who is not really employed by him."<sup>18</sup> The court opined that the defendants had failed to produce any evidence that the comatose and mentally incompetent woman did anything which caused them to believe either of her daughters was authorized to act as her agent in any capacity.

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<sup>16</sup> 99 Cal.App.4<sup>th</sup> 298, 120 Cal.Rptr.2d 892.

<sup>17</sup> 99 Cal.App.4<sup>th</sup> at 301-02, 120 Cal.Rptr.2d at 894-95.

<sup>18</sup> Id.

Relying on Pagarigan, a later California court decided that a daughter did not have the authority to bind her father to an arbitration agreement.<sup>19</sup> In Phillips v. Crofton Manor, the plaintiff's father had Alzheimer's disease and was mentally incompetent. The plaintiff arranged for her father to live in a residential care facility. The plaintiff signed all necessary paperwork, including a separate arbitration agreement. When the plaintiff sued the nursing facility after her father fell and broke his hip, the defendants moved to compel arbitration based upon the agreement executed by the plaintiff.<sup>20</sup> In an order denying the defendant's motion to compel arbitration, the court held that, although the plaintiff had stated in the arbitration agreement and other admission agreements that she was her father's "representative," this did not make her his agent for all purposes. Citing Pagarigan, the court stated that "a person cannot become the agent of another merely by representing himself or herself as such."<sup>21</sup> According to the court, the plaintiff's status as her father's daughter allowed her to admit him to the nursing facility, but did not authorize her to sign an arbitration agreement on his behalf. "Because some status greater than next of kin is needed to authorize more significant forms of medical treatment ... it seems unlikely that such 'next of kin' status would be sufficient to authorize her to waive [her] father's rights to jury trial."<sup>22</sup>

Milon v. Duke University, is also informative regarding agency in the medical malpractice setting.<sup>23</sup> In Milon, the plaintiff sued the defendant after suffering an irreversible paralysis as a result of a surgical procedure performed by the defendant.

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<sup>20</sup> 2003 WL 21101478, 2.

<sup>21</sup> 2003 WL 21101478, 4.

<sup>22</sup> Id.

<sup>23</sup> 145 N.C.App. 609, 551 S.E.2d 561, overruled, 355 N.C. 263, 559 S.E.2d 789.

The hospital moved to compel arbitration based upon an arbitration agreement that had been signed by the plaintiff's wife. According to the hospital, the plaintiff's wife acted with apparent authority when she signed her husband's name to the agreement. The Court of Appeals agreed with the hospital, holding that the wife signed her husband's name with apparent authority to do so.<sup>24</sup> On appeal, the Supreme Court of North Carolina reversed the Court of Appeals, agreeing with the dissenting opinion in the Court of Appeals decision.<sup>25</sup>

In Judge Thomas's dissenting opinion, he stated that in determining whether the wife had the apparent authority to bind the plaintiff to the arbitration agreement, "the primary focus should be on the conduct of [the plaintiff]."<sup>26</sup> According to Judge Thomas, there was no evidence indicating that the plaintiff ever permitted his wife to sign his name to any documents. In fact, the plaintiff denied having seen the arbitration agreement and denied allowing his wife to sign it for him. Further, the Court found that there was no evidence that his wife had previously signed her husband's name to other documents in his presence. Based upon the circumstances surrounding the signing of the arbitration agreement, Judge Thomas held, and the Supreme Court of North Carolina agreed, that the defendants failed to prove that the plaintiff's wife had the apparent authority to bind him to an arbitration agreement.<sup>27</sup>

Although arbitration agreements may be invalidated when the resident did not sign the agreement and showed no assent to arbitrate his or her claims, arguments based upon the theory that the nursing home did not manifest assent to be bound by the

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<sup>24</sup> 145 N.C.App. at 616, 551 S.E.2d at 565.

<sup>25</sup> 355 N.C. at 264, 559 S.E.2d at 789.

<sup>26</sup> 145 N.C.App. at 618, 551 S.E.2d at 567.

<sup>27</sup> 145 N.C.App. at 619, 551 S.E.2d at 568.

agreement, because the facility representative failed to sign the agreement, have not fared as well. In Integrated Health Services of Green Briar, Inc. v. Lopez-Silvero<sup>28</sup> and Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus,<sup>29</sup> the courts upheld arbitration agreements that the nursing facility had either failed to sign or signed on an improper line, opining that a contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract. According to the court in both cases, the resident and the nursing facility acted as if they had a valid contract. The nursing facilities performed under the contracts by admitting the resident and providing the resident with nursing home care. In both cases the courts held that the nursing facilities' performance of the contract indicated a clear intent to be bound by the admission contract, which included the arbitration clause.

#### B. Unconscionability

Another contract defense that may be used to invalidate an arbitration provision in a nursing home admission agreement is the theory of unconscionability. Unconscionability can be in the form of substantive unconscionability, which pertains to contract terms that are unreasonably favorable to one side or procedural unconscionability that pertains to the process of contract formation, "encompassing the employment of sharp practices, the use of fine print and convoluted language, lack of understanding, and inequality of bargaining power."<sup>30</sup>

In the nursing home setting procedural unconscionability is almost always a good argument. Often when a family admits a resident to a nursing home, the resident is in

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<sup>28</sup> 827 So. 2d 338 (Fla. Dist. Ct. App. 2002).

<sup>29</sup> [No. 4D03-563, July 30, 2003] \_\_\_ So. 2d \_\_\_ (Fla. Dist. Ct. App. 2003).

<sup>30</sup> Ann H. Nevers, Medical Malpractice Arbitration In The New Millennium: Much Ado About Nothing?, 1 PEPDRLJ 45, 56 (2000).

need of immediate placement. Sometimes families have little choice of placement in a particular facility because either there is no other nursing facility for miles or other nursing facilities have no available bed for the resident.

Moreover, even if a family member sought out other nursing homes for possible placement, it may have been different to find one that did not require the resident or that resident's sponsor to sign an arbitration agreement. Thus, families are faced with the choice of retaining the resident's right to a jury trial versus getting the resident the necessary nursing care that he or she needs. The choice is not really a choice at all for the resident in need of immediate care.

Further, the actual process of admitting a resident to a nursing home often does not provide the kind of informative setting necessary for the resident or the resident's sponsor to consider the pros and cons of arbitration. Arbitration agreements may be in a stand-alone document that the resident or the resident's sponsor is asked to sign. But, more likely than not, the agreement is buried in the middle of the admission contract, making the arbitration clause inconspicuous. Moreover, the arbitration clause may not have bold or italicized language, thus failing to draw the signor's attention to the provision. Nursing home representatives have even been known to hold the agreement in their hand explaining sections of the nursing home admission agreement without mentioning the arbitration clause. Each of these factors makes the case that the arbitration clause is unconscionable and therefore unenforceable.

The Court of Appeals of Tennessee considered the question of whether an arbitration agreement in a nursing home admission contract was unconscionable and

therefore unenforceable in Howell v. NHC Healthcare-Fort Sanders, Inc.<sup>31</sup>. In Howell, the estate of a nursing home resident sued the nursing facility alleging that the facility abused and neglected the resident. The nursing facility moved to compel arbitration based upon an arbitration provision contained within the admission agreement signed by the resident's husband at the time of admission. The trial court conducted an evidentiary hearing on the motion, during which, evidence was admitted indicating that the admitting contract signed by the resident's husband was the only one used by the nursing home at the time, that a patient or the patient's legal representative was required to sign the contract before being admitted to the facility, that the facility representative had purported to read the contract to the resident's husband but failed to read the entire agreement; rather, she paraphrased the agreement and then pushed the agreement in front of the resident's husband to sign, and that the resident's husband was unable to read.<sup>32</sup>

The Court of Appeals found that the arbitration agreement was unenforceable based upon the circumstances under which it was signed. The Court found several factors significant in its determination, including the fact that the admission agreement was eleven pages long and the arbitration provision, rather than being a stand-alone document, was "buried" within the larger document and was written in the same size font as the rest of the agreement; the fact that the resident had to be placed in a nursing home expeditiously, and that the admission agreement had to be signed before this could be accomplished; that the agreement was presented to the husband on a "take-it-

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<sup>31</sup> [Ms. E-2002-01321-COA-R3-CV, February 25, 2003] \_\_\_ S.W.2d \_\_\_, 2003 WL 465775 (Tenn. Ct. App. 2003).

<sup>32</sup> Id. at 1.

or-leave-it” basis; the fact that the nursing home representative took it upon herself to explain the admission agreement, rather than asking the husband to read it and that in her explanation of the arbitration provision she failed to mention that the provision meant that the husband was giving up the resident’s right to a jury trial.<sup>33</sup>

Substantive unconscionability arguments, with regard to arbitration agreements in the nursing home setting, may be made by arguing that it is unconscionable to require a nursing home resident to give up his right to a jury trial in exchange for nursing services. Substantive unconscionability arguments generally do not fare as well as procedural arguments because courts must enforce arbitration agreements in the same manner as other contractual agreements. For instance, in Consolidated Resources Healthcare Fund, I, Ltd., the court rejected the argument that an arbitration provision in a nursing home admission agreement was substantively unconscionable because the agreement required that in order to retain the resident’s right to a jury trial, the resident had to affirmatively indicate so within the admission agreement.<sup>34</sup> The court held that an arbitration clause need not be optional in order to be valid.<sup>35</sup>

### C. Claims of Estate Had Not Arisen

One issue that is currently before the Alabama Supreme Court is whether an arbitration clause within a nursing home admission agreement is invalid against the resident’s estate when the estate brings a wrongful death action because the wrongful death claim is a new, non-derivative cause of action. The Supreme Court of Alabama has interpreted Alabama’s wrongful death statute as creating a new, non-derivative

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<sup>33</sup> Id. at 4.

<sup>34</sup> Consolidated, supra.

<sup>35</sup> Id.

cause of action.<sup>36</sup> According to the Court, the purpose of the wrongful death statute is not to provide recovery for the decedent for the injuries caused by the defendant. Rather, the purpose is to provide a remedy to the family of the decedent whose death was caused by the defendant.<sup>37</sup> The estate of the decedent is not entitled to any compensatory damages to make the decedent whole again under Alabama's wrongful death statute; the estate of a decedent is only entitled to recover punitive damages.<sup>38</sup> The nature of the damages available under Alabama's wrongful death statute implies that wrongful death claims are not derivative of the decedent's injuries, but are a new cause of action. Because the estate is not in existence at the time that the resident or the resident's sponsor signed the arbitration agreement, and because the damages available are not derivative of the decedent's injuries and not intended to compensate the decedent, but are a new cause of action for a wholly different purpose, the argument goes that any arbitration agreement between the resident and the facility are not enforceable against the resident's estate.

Consistent with Alabama, many other state courts have interpreted their wrongful death statutes to create a new and independent cause of action.<sup>39</sup> Thus, the argument

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<sup>36</sup> Breed v. Atlanta, B & C.R. Co., 241 Ala. 640, 4 So. 2d 315 (1941).

<sup>37</sup> Pace v. Armstrong World Industries, Inc., 578 So. 2d 281 (Ala. 1991).

<sup>38</sup> Black Belt Wood Co., Inc. v. Sessions, 514 So. 2d 1249 (Ala. 1986).

<sup>39</sup> See Rodriguez v. Casey, 50 P.3d 323 (Wyo. 2002) (Stating that "the prime difference between survival and wrongful death statutes is that the survival statute merely continues a cause of action in existence. The injured party's claim after death is an asset of the estate while the wrongful death statute creates a new cause of action for the benefit of designated persons who have suffered the loss of a loved one and provider.); Crosby v. Glasscock Trucking Co., 340 S.C. 626, 628, 532 S.E.2d 856 (2000) (Holding that South Carolina's Wrongful Death Statute creates a new cause of action. A wrongful death cause of action does not exist before death and arises only upon the death of the injured person.); Thompson v. Wing, 637 N.E.2d 917, 922 (Ohio 1994) (The wrongful death action is an independent cause of action.) Sullivan v. Carlisle, 851 S.W.2d 510, 516 (Mo. 1993) (A claim for wrongful death "is neither a transmitted right nor a survival right, but is created and vests in the survivors at the moment of death."); Switzer v. Reynolds, 606 P.2d 244, 247 (Utah 1980) (Holding that the Utah Wrongful Death Statute creates a new cause of action which runs directly to the heirs to compensate each for the individual loss suffered by the death.); Partyka v. Yazoo Dev. Corp., 376 So. 2d 646, 650 (Miss. 1979) (Mississippi's wrongful death

that the wrongful death claim is a new and independent cause of action, not subject to arbitration based upon an agreement entered into by the deceased resident may be a viable argument in other states.

#### D. Arbitration Clauses Contained Within Nursing Home Admission Agreements Are Prohibited by Statute, and Therefore Null, Void, And Unenforceable

A novel argument that is beginning to take form across the country is that federal and state Medicare and Medicaid regulations prohibit the inclusion of an arbitration clause in an admission agreement. Because most residents in nursing facilities are eligible for Medicare or Medicaid, this argument is applicable to most residents. The drawback, of course, is that private pay residents cannot invoke this argument.

All licensed nursing facilities in the United States may participate in the Medical Assistance Program, established under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, if the facility meets certain requirements relating to the provision of

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statute creates a new and independent cause of action in favor of those named therein.); Short v. Flynn, 374 A.2d 787 (R.I. 1977) (Holding that the Rhode Island Wrongful Death Statute created an entirely new right of action. The Act was designated to benefit the family members of the deceased who suffered harm as a proximate result of the wrongful death of the decedent.); Gray v. Goodson, 61 Wash. 2d 319, 325, 378 P.2d 413 (1963) (Holding that Washington's Wrongful Death Statute creates a new cause of action for the benefit of specific surviving relatives to compensate for losses caused to them by the decedent's death.); Holmes v. AcandS, Inc., 709 N.E.2d 36, 39 (Ind. App. 1999) (Holding that the purpose of the Wrongful Death Statute is not to compensate for the injury to the decedent, but rather to create a cause of action to provide a means by which the decedent's survivors may be compensated for the loss sustained by reason of such death. Because the wrongful death claim is designed to compensate for the loss to the survivors caused by the decedent's death, and not the underlying injury, the survivor's claim is independent and not derivative.); see also Restatement (Second) of Torts § 899 (1979) (“[a] cause of action for death is complete when death occurs. Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death.”).

But see Lynn v. City of Jackson, 63 S.W.3d 332, 336 (Tenn. 2001) (“Tennessee's Wrongful Death Statute does not create a new cause of action for the beneficiaries but instead preserves the right of action of the decedent. ... [The Wrongful Death Statute] creates one claim or right of action vested in the decedent and the decedent is the sole 'claimant in a wrongful death action.'”); Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345 (Tex. 1992) (Holding that the right to bring a wrongful death claim is derivative of the decedent's right to have sued for his or her own injuries prior to death); Sanderson v. Steve Snyder Enterprises, Inc., 196 Conn. 134, 149, 491 A. 2d 389 (1985) (Connecticut's Wrongful Death Statute does not create a new cause of action. It is a continuation of that which the decedent could have asserted had he lived.)

healthcare services.<sup>40</sup> The Medical Assistance Program provides payments to States for medical assistance furnished by nursing facilities to residents in the facility.<sup>41</sup> Nursing facilities participate in the program by entering into a “Provider Agreement” between the nursing facility and the respective State. The provider agreement generally obligates the nursing facility to comply with all relevant federal and state laws and regulations. Thus, as a participant in the Medical Assistance Program, a nursing facility is subject to the regulations governing the provision of resident services in 42 U.S.C. § 1396r(b).

Within the Social Security Act, resident admission is specifically governed by 42 U.S.C. § 1396r(c)(5). In pertinent part, that section states:

“(5) Admissions policy

“(A) Admission

“With respect to admissions practices, a nursing facility must –

“ ...

“(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>42</sup>

Thus, federal law prohibits a nursing facility from accepting any additional consideration from a Medicare/Medicaid resident, aside from the standard rate paid by Medicare/Medicaid, as a precondition of admission to a nursing facility.

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<sup>40</sup> See 42 U.S.C. § 1396r.

<sup>41</sup> See 42 U.S.C. § 1396 *et seq.*

<sup>42</sup> 42 U.S.C. § 1396r(c)(5)(A)(iii), (emphasis added).

An arbitration agreement, like any other agreement must have consideration to be enforceable. Generally mutuality of promises can be sufficient consideration for an arbitration agreement. In this respect, the argument goes that if mutual promises to submit to arbitration are consideration for the agreement, then the facility has accepted additional consideration aside from the payment by Medicare or Medicaid, making the arbitration agreement invalid because it violates federal law. This argument has yet to be addressed by the judiciary, although it was raised in Howell v. NHC Healthcare-Fort Sanders, Inc.<sup>43</sup> and pretermitted because the arbitration agreement in that case was found invalid on other grounds. At least one administrative agency has released an opinion concluding that federal regulations prohibit any flow of consideration between Medicare/Medicaid program recipients and a nursing home upon admission to the facility for services covered by the Medicare/Medicaid programs, and that potential residents gain nothing in addition to admission for offering the additional consideration of forfeiture of their rights.<sup>44</sup>

#### Grounds Upon Which One Clause Within An Arbitration Agreement May Be Void, But The Arbitration Agreement Itself Still Held Valid

Although courts may choose to invalidate an arbitration agreement upon the state law grounds that exist for revocation of a contract, courts have upheld arbitration agreements, which might be otherwise invalid, by striking an illegal clause within the agreement.<sup>45</sup> In Hadnot v. Bay, Ltd., the plaintiff entered into an employment agreement containing an arbitration provision. The arbitration provision contained a clause restricting the arbitrator's power proscribing an award of exemplary and punitive

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<sup>43</sup> Howell, supra.

<sup>44</sup> In the Matter of Northport Health Services, Inc., Arkansas Department of Human Services.

<sup>45</sup> Hadnot v. Bay, Ltd., et al., [Ms. 03-40325, Sept. 11, 2003] \_\_\_ F.3d \_\_\_ (5<sup>th</sup> Cir. (Tex.) 2003).

damages. Because the plaintiff sued the defendant alleging a Title VII violation, the arbitration's provision banning punitive and exemplary damages was unenforceable.<sup>46</sup> However, rather than void the entire arbitration provision, the court concluded that the illegal provision could be severed from the rest of the agreement, thereby freeing the arbitration provision to fulfill its intended function.<sup>47</sup>

Similarly, in Ex parte Thicklin, the Supreme Court of Alabama concluded that an arbitration clause prohibiting the arbitrator from awarding punitive damages violated public policy and was therefore unconscionable.<sup>48</sup> However, the court determined that the illegal clause did not void the entire arbitration agreement. Instead, the court struck that portion of the clause prohibiting punitive damages, while upholding the validity of the agreement.<sup>49</sup> Thus, one illegal provision within an arbitration agreement may not void the entire agreement when other provisions within the arbitration agreement are enforceable.

#### CMS Administrative Ruling Regarding Arbitration Clauses in Nursing Home Admission Agreements

On January 9, 2003, the Center for Medicare & Medicaid Services released an administrative ruling regarding binding arbitration between nursing homes and prospective or current residents.<sup>50</sup>

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<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> 824 So. 2d 723 (Ala. 2002).

<sup>49</sup> Id.

<sup>50</sup> Binding Arbitration in Nursing Homes, Center for Medicare & Medicaid Services, Ref: S&C-03-10, January 9, 2003.

The CMS memorandum stated that under Medicare, the issue whether to have a binding arbitration agreement is an issue between the resident and the nursing home.<sup>51</sup> However, under Medicaid, CMS stated that it would defer to State law regarding whether such binding arbitration agreements are permitted, subject to its concerns when Federal regulations may be implicated. According to the memorandum, under both programs, there may be consequences for the nursing facility whenever facilities attempt to enforce arbitration agreements in a way that violates Federal requirements.

CMS further opined that a nursing home's discharge or retaliation against an existing resident for failing to sign or comply with a binding arbitration agreement could result in enforcement action based on a violation of the rules governing resident discharge and transfer.<sup>52</sup> Federal regulations limit the circumstances under which a facility may discharge or transfer a resident.<sup>53</sup> Because none of the conditions specified in the regulation permit a facility to discharge or transfer a resident based on his or her failure to comply with the terms of a binding arbitration agreement, CMS concluded that a current resident is not obligated to sign a new admission agreement that contains binding arbitration.<sup>54</sup>

### Conclusion

Both federal and state law governs the enforceability of arbitration clauses in nursing home admission contracts. Since the U.S. Supreme Court's decision in Allied-Bruce Terminix, state courts have become more likely to uphold arbitration agreements.

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<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.; 42 C.F.R. § 483.12(a)(2).

<sup>54</sup> Id.

In order to invalidate an arbitration agreement, nursing home residents must show that there exists some ground for the revocation of the arbitration agreement based upon contract law principles. Enforceability is still largely dependent upon the state in which one brings suit. Some states, such as Tennessee, may be largely open to invalidating an arbitration agreement upon grounds of unconscionability, while other states, like Alabama, very rarely find an arbitration agreement unconscionable. Moreover, the question of whether the arbitration agreement will be enforced is a fact intensive inquiry, and may be dependent upon the moment-to-moment factual circumstances surrounding the signing of the agreement.