

# Arbitration In Nursing Home Cases: Trends, Issues, And A Glance Into The Future

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**A**LTHOUGH COURTS have a long history of addressing arbitration agreements in business and consumer transactions, the concept of arbitration in nursing home cases is a relatively recent development that has become a hotly contested area of law.<sup>1</sup> Unique legal issues are raised by the use of arbitration agreements by long term care providers, and these issues have been increasingly litigated. This article summarizes common arguments raised in opposition to arbitration in nursing home cases and trends among courts throughout the United States with respect to enforcement of arbitration agreements in nursing home cases, considers the impact of FAA Section Four Complaints to Compel Arbitration, and provides a glance into the future of arbitration in nursing home cases, including potential federal legislative changes to curtail arbitration.

## I. Common Arguments Asserted To Avoid Arbitration

A party moving to compel arbitration has the initial burden of establishing (1) the existence of a valid arbitration agreement, (2) involving interstate commerce.<sup>2</sup> After this burden is satisfied by the moving party, the burden shifts to the party opposing arbitration to establish the absence of a valid or enforceable agreement to arbitrate.<sup>3</sup>

Plaintiffs commonly oppose efforts to pursue arbitration in nursing home cases based upon the following grounds:

<sup>1</sup> This article references “nursing homes” and “nursing home cases,” but is intended to encompass all cases in the long term care setting.

<sup>2</sup> See *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983, 986 (Ala. 2004) (quoting *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53 (2003)).

<sup>3</sup> *Id.*



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## A. Signatory Issues

Signatory issues are the most common issues litigated throughout the country. Nursing homes routinely require admission documents, including arbitration agreements, to be signed by a resident or a representative acting on behalf of the resident. Because many residents are elderly and have other individuals acting on their behalf during the admission process, plaintiffs often dispute the enforceability of arbitration agreements executed under these circumstances.

Common signatory issues raised by plaintiffs include (1) the resident did not sign the agreement, (2) the resident lacked capacity to contract, i.e., was not competent to sign the agreement, (3) the representative who signed agreement on behalf of the

resident lacked authority (legal, express, implied, or apparent) to sign on behalf of the resident, and (4) the purported signature of the resident and/or representative was fraudulently executed.

### 1. Capacity Arguments

Defendants frequently respond to claims of capacity by asserting that the resident has never been declared legally incompetent and, therefore, had sufficient mental capacity to contract regardless of whether the resident suffered from any mental deficits. The law in many states supports this argument, providing that a party is presumed sane, fully competent and capable of understanding the nature and effect of his or her contracts.<sup>4</sup> Accordingly, the party seeking to invalidate a contract on grounds of mental incompetence bears the burden of proving the alleged incompetence.

### 2. Authority Arguments

Defendants respond to claims of lack of authority by asserting that the resident's representative had (a) legal and/or express authority to sign the arbitration agreement on behalf of the resident based upon a power of attorney, other legal documents, or certain statutory authorities, or (b) apparent and/or implied authority to execute the agreement on behalf of the resident.

A resident may grant express or actual authority to act on his or her behalf pursuant to verbal express authority, power of attorney ("POA"), durable power of attorney ("DPOA"), or court appointment as guardian or conservator for the resident. Courts have frequently held arbitration agreements enforceable when executed by such individuals acting on behalf of the

resident.<sup>5</sup> However, some courts have held arbitration agreements unenforceable even when executed by the POA or DPOA based upon case specific fact scenarios.<sup>6</sup>

State surrogacy statutes may also grant express or actual authority to certain family members to make health care decisions on behalf of a family member. Courts from certain jurisdictions have held that surrogacy statutes vest a family member with express or actual authority to enter into a binding arbitration agreement on behalf of a resident,<sup>7</sup> but other courts have refused to hold arbitration agreements enforceable on the basis of surrogacy statutes.<sup>8</sup>

Defendants also argue that the individual who executed the arbitration agreement had apparent or implied authority to act on behalf of the resident, evidenced by holding himself or herself out as someone with authority to make health care decisions for the resident. Several courts

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<sup>5</sup> See *Northport Health Services of Arkansas, LLC v. Robinson*, Civil No. 08-5223, 2009 WL 140983 (W.D. Ark. Jan. 12, 2009); *Mitchell v. Kindred Healthcare Operating, Inc.*, No. W2008-00378-COA-R3-CV, 2008 WL 4936505 (Tenn. Ct. App. Nov. 19, 2008); *Jaylene, Inc. v. Moots*, 995 So.2d 566 (Fla. Dist. Ct. App. 2008); *Necessary v. Life Care Ctrs. of America*, No. E2006-00453-COA-R3-CV, 2007 WL 3446636 (Tenn. Ct. App. Nov. 16, 2007); *Smalley v. JHA-Markleysburg, Inc.*, 3 Pa.D. & C.5th 471 (Pa. Ct. Com. Pl. 2007).

<sup>6</sup> See *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Waverly-Arkansas, Inc. v. Keener*, 2008 WL 316149 (Ark. Ct. App. Feb. 6, 2008); *Estate of McKibbin v. Alterra Health Care Corp.*, 977 So.2d 612 (Fla. Dist. Ct. App. 2008); *McNally v. Beverly Enter., Inc.*, 191 P.3d 363 (Kan. 2008); *Hendrix v. Life Care Ctrs. of America, Inc.*, No. E2006-02288-COA-R3-CV, 2007 WL 4523876 (Tenn. Ct. App. Dec. 21, 2007); *Cabany v. Mayfield Rehab. and Special Care Ctr.*, No. M2006-00594-COA-R3-CV, 2007 WL 3445550 (Tenn. Ct. App. Nov. 15, 2007); *Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430 (Ga. App. 2007).

<sup>7</sup> See *Covenant Health & Rehab. of Picayune, LP v. Brown*, 949 So.2d 732, 735 (Miss. 2007); *In re Ledet*, No. 04-04-00411-CV, 2004 WL 2945699 at \*4 (Tex. Ct. App. Dec. 22, 2004).

<sup>8</sup> See *Hendrix*, 2007 WL 4523876 at \*4-\*5; *Cabany*, 2007 WL 3445550 at \*4.

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<sup>4</sup> See, e.g., *Simmons First Nat'l Bank v. Luzader*, 438 S.W.2d 25, 27 (Ark. 1969) (holding "[t]here is a presumption of law that every man is sane, fully competent and capable of understanding the nature and effect of his contracts").

around the country have addressed this issue and have held arbitration agreements enforceable on the basis of apparent/implied authority.<sup>9</sup> Other courts have refused to enforce arbitration agreements on the basis of apparent/implied authority.<sup>10</sup> Courts refusing to apply this doctrine have often done so on grounds that the scope of the alleged apparent authority did not extend to executing arbitration agreements and situations where the resident suffered from severe mental deficits upon admission to the nursing home.<sup>11</sup>

### 3. Other Arguments to Compel Arbitration

Defendants also argue that the resident becomes a third party beneficiary to the agreement signed by the representative on behalf of the resident, and the plaintiff is bound by the arbitration agreement based upon principles of ratification, waiver, and estoppel (e.g., the plaintiff's intentional and voluntary act of asserting a breach of contract claim on behalf of the resident, or the resident's estate, may be construed as waiver of right to deny existence of a valid agreement).

Parties seeking to enforce an arbitration agreement on grounds the resident was a third party beneficiary of the agreement argue that the resident, pursuant to the arbitration agreement/other admission

documents executed as part of the admissions process, enjoyed the benefit of becoming a resident of the facility and is, therefore, a third party beneficiary and bound by the arbitration agreement. Likewise, the resident's personal representative, who stands in the resident's shoes, cannot claim the benefits of the arbitration agreement by suing under it and simultaneously attempt to avoid arbitration of their claims. The third party beneficiary argument is most compelling when the arbitration provision is contained within the admission agreement as opposed to being a "stand alone" arbitration agreement. Courts around the country have enforced arbitration agreements on grounds the resident, a nonsignatory to the arbitration agreement, was an intended third party beneficiary of the agreement.<sup>12</sup>

Estoppel, waiver, and ratification of the arbitration agreement by a resident, resident's family, or resident's "responsible party" may provide additional or alternative grounds to compel arbitration. In this regard, a party may be estopped from simultaneously claiming the benefits of a contract and repudiating the contract's burdens and conditions. Similarly, a non signatory can be estopped from refusing to comply with an arbitration clause if that party received a direct benefit from the contract.<sup>13</sup>

<sup>9</sup> See, e.g., *Trinity Mission Health & Rehab. of Clinton v. Johnson*, No. 2006-CA-01053-COA, 2008 WL 73682 (Miss. App. Jan. 8, 2008); *Carraway v. Beverly Enter. Alabama, Inc.*, 978 So.2d 27, 30-31 (Ala. 2007); *Necessary*, 2007 WL 3446636 at \*5; *Ruesga v. Kindred Nursing Ctr., L.L.C.*, 161 P.3d 1253, 1263 (Ariz. Ct. App. 2007); *Broughsville v. OHECC, LLC*, No. 05CA008672, 2005 WL 3483777 (Ohio Ct. App. Dec. 21, 2005).

<sup>10</sup> See *Poole*, 648 S.E.2d 430 at 433; *McNally*, 191 P.3d 363 at \*3; *Barbee v. Kindred Healthcare Operating, Inc.*, No. W2007-00517-COA-R3-CV, 2008 WL 4615858 at \*6 (Tenn. Ct. App. Oct. 20, 2008); *Giordano ex rel. Estate of Brennan v. Atria Assisted Living, Virginia Beach, L.L.C.*, 429 F.Supp.2d 732, 738-739 (E.D. Va. 2006).

<sup>11</sup> See, e.g., *Barbee*, 2008 WL46185858 at \*5.

<sup>12</sup> See *Johnson*, 2008 WL 73682 at \*3 (daughter of nursing home resident bound by arbitration agreement on grounds resident was third party beneficiary); *Alterra Healthcare Corp. v. Linton*, 953 So.2d 574, 578 (Fla. Dist. Ct. App. 2007) (affirming trial court's granting of nursing home's Motion to Compel Arbitration and finding resident was intended third party beneficiary of arbitration agreement); *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596, 600 (5th Cir. 2007).

<sup>13</sup> See *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000); *Daisy Mfg. Co., Inc. v. NCR Corp.*, 29 F.3d 389, 393 (8th Cir. 1994) (reversing denial of 9 U.S.C. § 4 Complaint to Compel Arbitration on grounds party opposing arbitration, by its conduct, "ratified and accepted" agreement containing arbitration provision and was, therefore, bound by agreement).

## B. Unconscionability

Unconscionability is also a recurring argument asserted by plaintiffs in opposition to arbitration in nursing home cases. Many jurisdictions require a plaintiff to prove both “procedural” and “substantive” unconscionability to establish the defense of unconscionability.<sup>14</sup> In analyzing procedural unconscionability, courts look to the “bargaining power” of the parties.<sup>15</sup> Regarding substantive unconscionability, courts generally look to whether the terms of the agreement are “outrageously unfair.”<sup>16</sup>

When confronted with a challenge to an arbitration agreement based on unconscionability, courts may consider (1) the absence of meaningful choice on one party’s part (e.g., all nursing homes in the same geographic area require arbitration agreements as a condition of admission to facility), (2) contractual terms that are unreasonably favorable to one party, (3) unequal bargaining power, and (4) whether the contract contains oppressive, one sided, or patently unfair terms.

In addressing these factors, the party seeking to enforce the arbitration agreement may assert that (1) alternative nursing homes were available to the resident that did not require arbitration as a condition of admission;<sup>17</sup> (2) the nursing home has

agreed to incur most/all administrative fees and costs associated with arbitration; (3) the nursing home staff closely reviewed and discussed the arbitration agreement with the resident and/or the representative prior to signing of the agreement; (4) the nursing home did not place any time constraints on the resident or the representative for reviewing the agreement prior to execution; (5) the arbitration agreement has a revocation period during which the resident or the representative could have revoked the agreement; (6) a recognized and unbiased arbitration forum is designated as the forum of choice in the agreement; (7) the arbitration agreement is not “hidden” and is conspicuous among admission documents; and (8) references to any other provisions of the agreement or facts and circumstances surrounding execution of the agreement that are indicative of the resident/representative’s meaningful choice, equal bargaining power, and overall “fair” terms of the agreement and circumstances under which the agreement was executed.

Another creative unconscionability argument frequently proffered in opposition to arbitration is that the agreement to arbitrate constitutes “additional consideration” in violation of Medicare and Medicaid regulations. This argument is premised upon certain regulations stating that, when admitting residents entitled to assistance through Medicare or Medicaid, a facility must “not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan...any gift, money donation, or other consideration as a precondition of admitting...the individual to the facility or as a requirement for the individual’s continued stay in the facility.” 42 U.S.C. § 1396r(c)(5)(A)(iii) (2006). The “additional consideration” argument has been rejected by several courts, concluding that arbitration provisions in nursing home agreements do not constitute “additional

<sup>14</sup> See *Shotts v. OP Winter Haven, Inc.*, 988 So.2d 639, 641 (Fla. Dist. Ct. App. 2008) (“[i]n order to succeed on a claim of unconscionability, a party must establish both procedural and substantive unconscionability”).

<sup>15</sup> See *Woebse v. Health Care and Retirement Corp. of America*, 977 So.2d 630, 632 (Fla. Dist. Ct. App. 2008).

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661 (Ala. 2004) (enforcing arbitration agreements in two nursing home admission contracts on grounds, among other things, plaintiffs failed to present legally sufficient evidence that they were unable to acquire alternative nursing home care for residents and holding that “even if there are only two nursing homes in [that county], [plaintiffs] have not asserted that an elderly person...lacks meaningful

options to live in a nursing home in another county or to have in-home care”).

consideration” in violation of Medicare or Medicaid regulations.<sup>18</sup>

### C. Claims in Tort, Not Contract

Plaintiffs opposing arbitration also contend that the arbitration agreement should not be enforced because their claims sound in “tort” as opposed to “contract.” Some courts have been receptive to this argument, while others have not.<sup>19</sup> Defendants should contend the arbitration agreement covers all claims related to the resident irrespective of whether the claims sound in contract or tort and that parties to an arbitration agreement may not evade arbitration through “artful pleading.” Courts evaluating this issue commonly refer to the express language of the arbitration agreement to evaluate the scope of claims covered by the agreement.

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<sup>18</sup> See *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876, 887 (Tenn. 2007); *Broughsville*, 2005 WL 3483777 at \*7-\*8 (examining whether “nursing home admission contracts containing arbitration provisions constitute unauthorized additional consideration from the resident” and holding that “inclusion of an arbitration provision in a nursing home admissions agreement does not constitute additional consideration”); *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983 at 989 (“requiring a nursing-home admittee to sign an arbitration agreement is not charging an additional fee or other consideration as a requirement to admittance”); *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So.2d 278, 288 (Fla. Dist. Ct. App. 2003) (examining argument that “arbitration provision is unenforceable because it is illegal under federal law which prohibits a nursing home from accepting any additional consideration from a Medicare/Medicaid patient” and noting “[w]e have found no authority from any jurisdiction which holds that an arbitration provision constitutes ‘consideration’...nor do we believe that the federal regulation was intended to apply to such a situation”).

<sup>19</sup> See, e.g., *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984) (“[I]t is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract”); *Ex Parte Dyess*, 709 So.2d 447, 454 (Ala. 1997).

### D. Interstate Commerce

Admission agreements frequently include language contractually affirming that the agreement involves or affects interstate commerce or is governed by the FAA. Because courts have routinely held that the interstate commerce requirement can be easily satisfied based upon the United States Supreme Court’s expansive interpretation of the “involving commerce” requirement,<sup>20</sup> arguments that arbitration agreements do not involve interstate commerce are asserted less frequently.

Courts have held the interstate commerce requirement satisfied based upon the following factual scenarios: (1) certain defendants resided outside the state at issue;<sup>21</sup> (2) goods and supplies such as pharmaceuticals, medical supplies, beds, linens, laundry supplies, and cleaning chemicals used by the facility in care and treatment of the resident are brought in from outside the subject state;<sup>22</sup> (3) the resident was a Medicare patient and the resident’s care and treatment would not have been possible without this federal funding;<sup>23</sup> and

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<sup>20</sup> See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (“it is perfectly clear that the FAA encompasses a wider range of transactions than those actually ‘in commerce’ – that is, ‘within the flow of interstate commerce’”).

<sup>21</sup> See *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 515 (Miss. 2005) (nursing home admission agreement affected “interstate commerce” where, among other things, case involved out of state defendants).

<sup>22</sup> See *Stephens*, 911 So.2d at 51 (admission agreement affected “interstate commerce” where nursing home received supplies from out-of-state vendors and payments from out-of-state insurance companies); *Owens v. Coosa County Healthcare, Inc.*, 890 So.2d 983 at 988 (affirming Order compelling arbitration of personal injury and wrongful death claims against nursing home where medical supplies and equipment were purchased from out of state).

<sup>23</sup> See *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (claims against nursing home due to be arbitrated where Medicare funds crossing state lines were “interstate commerce” thereby bringing contract within FAA); *Owens v. Coosa County Healthcare, Inc.*, 890 So.2d at 988;

(4) the facility provides care and treatment for individuals who reside outside of the subject state.<sup>24</sup>

### E. Non-Signatory Defendants

Parties opposing arbitration often argue that certain defendants, such as affiliated entities and individual defendants, are non-signatories to the arbitration agreement and, therefore, cannot enforce the agreement with respect to claims asserted against those defendants. Courts around the country have routinely rejected such arguments based upon evidence that the arbitration agreement was broad enough in scope to encompass all claims against the non-signatories, third party beneficiary theories, and estoppel and intertwining theories. For example, some courts have held that “[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.”<sup>25</sup> In such cases, were the court to allow a plaintiff to bring suit against one defendant, while arbitrating claims against the other, the arbitration proceedings would essentially be rendered meaningless and the public policy favoring arbitration frustrated.<sup>26</sup>

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Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 327-328 (1991) (because defendants received reimbursements through Medicare payments, nexus with interstate commerce was satisfied).

<sup>24</sup> See Owens v. Coosa County Healthcare, Inc., 890 So.2d at 988; Pinhas, 500 U.S. at 328 (because defendants served non-resident patients, nexus with interstate commerce was satisfied).

<sup>25</sup> See Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753, 757 (11th Cir. 1993) (quoting J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-321 (4th Cir. 1988)).

<sup>26</sup> See Sam Reisfeld & Son Import Co. v. S. A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976) (“[I]f the parent company was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted”).

### F. Impact on the Resident’s Estate

Parties opposing arbitration in wrongful death actions may argue that the estate is not bound by the agreement signed by the now deceased resident or another individual acting on behalf of the resident prior to the resident’s death, because the estate cannot be bound by an arbitration agreement executed prior to the resident’s death.

Courts have been inconsistent in addressing this issue. Some courts have held that the estate is bound by the agreement, while others conclude that the estate is not bound by the agreement.<sup>27</sup> How a court rules on this issue may be dictated to a significant degree by the manner in which wrongful death claims are construed under the laws of each specific state.

### G. FAA Preemption

Many states have enacted statutes specifically prohibiting arbitration of health care/tort claims. Where such statutes exist, a party opposing arbitration may contend the case is not subject to arbitration because the FAA does not preempt the statute at issue. Courts around the country have reached different conclusions on this issue.<sup>28</sup>

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<sup>27</sup> Compare, e.g., Ettings v. Regents Park at Aventura, Inc., 891 So.2d 558 (Fla. Dist. Ct. App. 2004) (affirming Order granting Motion to Compel Arbitration of action filed by personal representative of resident’s estate); with Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (affirming trial court’s Order denying Motion to Compel Arbitration on grounds wrongful death claims are new causes of action and not derivative of underlying tort claim).

<sup>28</sup> Compare Rainbow Healthcare Ctr. v. Crutcher, No. 07-CV-194-JHP, 2008 WL 268321 at \*8 (N.D. Okla. Jan. 29, 2008) (FAA preempted Oklahoma’s Nursing Home Care Act prohibition that nursing home resident could not waive right to jury trial in action brought pursuant to that Act); Lewis v. Circuit City Stores, Inc., No. 05-4001-JAR, 2005 WL 2179085 (D. Kan. Sept. 7, 2005) (not reported in F. Supp. 2d) (retaliatory discharge claim may not be independently litigated under state law because

## H. Waiver

Finally, a party seeking to compel arbitration can waive the right to compel arbitration if it “substantially invokes” the litigation process. Because the determination of waiver is generally based on the particular facts of each case, the practitioner must consider waiver before filing any pleadings or motions with the court or otherwise participating in any aspect of discovery.<sup>29</sup>

## II. Trends Among Courts

Courts have addressed arbitration agreements in nursing home cases inconsistently. Some jurisdictions routinely enforce arbitration agreements, while others often refuse to enforce the agreements. In addition, federal courts have often held differently than state courts in a given state. The following is a general analysis of how various states have addressed the issue of enforcing arbitration agreements in nursing home cases.

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FAA does not limit arbitrability of tort claims and preempts state law to the contrary); *In re Conseco Fin. Servicing Corp.*, 19 S.W.3d 562 (Tex. Ct. App. 2000) (FAA compels arbitration of claims for violation of Texas Debt Collection Act and Deceptive Trade Practices Act, even though such claims were statutory causes of action, sounding wholly in intentional tort); *and* *Skewes v. Shearson Lehman Bros.*, 829 P.2d 874 (Kan. 1992) (FAA preempts Kansas Uniform Arbitration Act, which prohibits arbitration of tort claims); *with* *Carter v. SSC Odin Operating Co., LLC*, 885 N.E.2d 1204, 1208-1209 (Ill. Ct. App. 2008) (FAA did not preempt provisions of Nursing Home Care Act invalidating resident’s waiver of right to sue or right to jury trial).

<sup>29</sup> See, e.g., *Roland v. Covenant Care of California, Inc.*, No. C056658, 2008 WL 4817016 (Cal. Ct. App. Nov. 6, 2008) (affirming denial of nursing home’s Motion to Compel Arbitration on grounds nursing home waived such right by participating in litigation).

## Alabama

Alabama Supreme Court has held arbitration agreements enforceable in four primary cases related to this issue, focusing primarily on whether a party signing an arbitration agreement on behalf of a resident had authority to bind the resident to the arbitration agreement.<sup>30</sup> However in a fifth case, *Noland Health Serv., Inc. v. Wright*, a plurality opinion held an arbitration agreement unenforceable based upon the specific facts involved in the case.<sup>31</sup>

## Arizona

Arizona courts have enforced arbitration agreements in two cases against nursing homes, examining whether an arbitration agreement violates Arizona law and whether the individual who executed an arbitration agreement had authority to bind the resident.<sup>32</sup>

## Arkansas

Few Arkansas courts have addressed this issue. In *Waverly-Arkansas, Inc. v. Keener*,<sup>33</sup> the Arkansas Court of Appeals

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<sup>30</sup> See *Carraway v. Beverly Enter. Alabama, Inc.*, 978 So.2d 27 (Ala. 2007); *Owens v. Coosa Valley Healthcare, Inc.*, 890 So.2d 983 (Ala. 2004); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661 (Ala. 2004). See also *McGuffey Health & Rehab. Ctr. v. Gibson*, 864 So.2d 1061 (Ala. 2003) (reversing and remanding denial of Motion to Compel Arbitration where evidence established that transaction involved interstate commerce due to Medicare funds and out of state goods and supplies used in caring for resident).

<sup>31</sup> *Noland Health Serv., Inc. v. Wright*, 971 So.2d 681 (Ala. 2007) (affirming Order denying Motion to Compel Arbitration of wrongful death cause of action brought by administrator of estate of former resident).

<sup>32</sup> See *Mathews v. Life Care Ctrs. of America, Inc.*, 177 P.3d 867 (Ariz. Ct. App. 2008); *Ruesga v. Kindred Nursing Ctr. West, L.L.C.*, 161 P.3d 1253 (Ariz. Ct. App. 2007).

<sup>33</sup> *Waverly-Arkansas, Inc. v. Keener*, No. CA 07-524, 2008 WL 316149 (Ark. Ct. App. Feb. 6, 2008). *Waverly* was not designated for publication.

affirmed the denial of a Motion to Compel Arbitration of an action brought by the wrongful death beneficiaries of a former resident on grounds the resident's daughter, who held a power of attorney, did not have authority to bind the resident to arbitration because, among other things, the resident had previously declined to sign a general power of attorney, the daughter put the pen in her mother's hand and held it as she signed the power of attorney, the daughter did not know whether her mother understood what she was being asked to do or whether she had actually moved the pen, and the resident's son had the power of attorney notarized by someone who was not present when the document was signed. However, in *Northport Health Services of Arkansas, LLC v. Robinson*,<sup>34</sup> the United States District Court for the Western District of Arkansas recently entered an Order compelling the estate of a former nursing home resident to arbitrate its wrongful death claim, rejecting plaintiff's arguments that the arbitration agreement was not enforceable because it was an attempt to contract away the resident's constitutional right to a jury trial, was unconscionable, lacked mutuality, was oppressive, and on grounds that the plaintiff, who signed the agreement on behalf of the resident, lacked authority to execute the agreement.

### California

California courts have split when adjudicating nursing home cases, but have trended recently towards unenforceability, focusing in cases like *Waterman v.*

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Under Arkansas Supreme Court Rule 5-2, therefore, it should not be cited in pleadings or other documents submitted to the court. Practitioners should consult the local rules for each case cited herein to confirm whether such can be cited with authority.

<sup>34</sup> *Northport Health Services of Arkansas, LLC v. Robinson*, Civil No. 8-5223, 2009 WL 140983 at \*3-\*5 (W.D. Ark. Jan. 12, 2009).

*Evergreen at Petaluma, LLC*,<sup>35</sup> on whether the individual who executed an arbitration agreement on behalf of a resident had the authority to do so.<sup>36</sup> However, California courts have held arbitration agreements enforceable in certain nursing home cases, including *Hogan v. County Villa Health Svcs.*<sup>37</sup>

### Colorado

There are few Colorado cases on this issue. In *Moffett v. Life Care Ctrs. of*

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<sup>35</sup> *Waterman v. Evergreen at Petaluma, LLC*, No. A117682, 2008 WL 4359556 (Cal. Ct. App. Sept. 25, 2008).

<sup>36</sup> See, e.g., *Warfield v. Summerville Senior Living, Inc.*, 158 Cal.App.4th 443 (Cal. Ct. App. 2007); *Flores v. Evergreen at San Diego, LLC*, 148 Cal.App.4th 581 (Cal. Ct. App. 2007). See also *Birl v. Heritage Care, LLC*, 172 Cal.App.4th 1313 (Cal. Ct. App. 2009) (affirming denial of nursing home's Motion to Compel Arbitration on grounds claims against other health care providers created possibility of "conflicting rulings"); *Roland v. Covenant Care of California, Inc.*, No. C056658, 2008 WL 4817016 (Cal. Ct. App. Nov. 6, 2008) (affirming denial of Motion to Compel Arbitration on grounds nursing home waived such right by participating in litigation and failing to seek arbitration until trial was imminent); *Swayne v. Torrance Care Ctr. West, Inc.*, 157 Cal.App.4th 172 (Cal. Ct. App. 2007) (affirming denial of Motion to Compel Arbitration on grounds agreement at issue was unenforceable for failure to properly display required disclosures); *Fitzhugh v. Granada Healthcare & Rehab. Ctr.*, 150 Cal.App.4th 469 (Cal. Ct. App. 2007) (affirming denial of Motion to Compel Arbitration, holding claims for violations of Patients' Bill of Rights not subject to arbitration, and holding wrongful death action by husband and children of resident in their individual capacities not subject to arbitration).

<sup>37</sup> See *Hogan v. County Villa Health Svcs.*, 148 Cal.App.4th 259 (Cal. Ct. App. 2007) (reversing trial court's Order denying Motion to Compel Arbitration of claims brought by children of deceased resident); *Garrison v. Super. Ct.*, 132 Cal.App.4th 253 (Cal. Ct. App. 2005) (resident's designation of daughter in durable power of attorney for healthcare authorized daughter to enter into binding arbitration agreement on mother's behalf).

*America*,<sup>38</sup> the Colorado Court of Appeals reversed a trial court's Order denying a Motion to Compel Arbitration of an action brought by the children of a deceased resident and remanded the case for further consideration, holding that the resident's children, holding powers of attorney pursuant to the Colorado Health Care Availability Act, were authorized to execute an arbitration agreement.

### Florida

Florida courts have addressed nursing home cases more frequently than any other courts in the country, with Florida courts focusing on questions of signatory authority and unconscionability in deciding whether to enforce an agreement to arbitrate. Decisions rendered have been based on particular circumstances, and results have been mixed.

Florida courts have held arbitration agreements enforceable in nursing home cases, including *New Port Richey Med. Investors, LLC v. Stern*,<sup>39</sup> *Jaylene, Inc. v. Moots*,<sup>40</sup> *Slusser v. Life Care Ctrs. of America, Inc.*,<sup>41</sup> *Shotts v. OP Winter Haven, Inc.*,<sup>42</sup> *Alterra Healthcare Corp. v. Estate of*

*Linton ex rel. Graham*,<sup>43</sup> *Alterra Healthcare Corp. v. Bryant*,<sup>44</sup> *Bland, ex rel. Coker v. Healthcare and Retirement Corp. of America*,<sup>45</sup> *MN MedInvest Co., L.P. v. Estate of Nichols ex rel. Nichols*,<sup>46</sup> *Estate of Etting ex rel. Etting v. Regents Park at Aventura, Inc.*,<sup>47</sup> *Five Points Health Care, Ltd. v. Alberts*,<sup>48</sup> *Gainesville Health Care Ctr., Inc. v. Weston*,<sup>49</sup> *Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus*,<sup>50</sup> *Integrated Health Svcs. of Green*

<sup>43</sup> *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So.2d 574 (Fla. Dist. Ct. App. 2007) (affirming Order granting Motion to Compel Arbitration of claims by estate of former resident and agreeing that resident was "intended third-party beneficiary" of agreement and thus bound by its terms).

<sup>44</sup> *Alterra Healthcare Corp. v. Bryant*, 937 So.2d 263 (Fla. Dist. Ct. App. 2006) (affirming Order compelling arbitration of resident's claims against two assisted living facilities).

<sup>45</sup> *Bland, ex rel. Coker v. Healthcare and Retirement Corp. of America*, 927 So.2d 252 (Fla. Dist. Ct. App. 2006) (affirming Order compelling arbitration of action filed by daughter on behalf of resident seeking damages for alleged violation of Nursing Home Resident's Rights Act).

<sup>46</sup> *MN MedInvest Co., L.P. v. Estate of Nichols ex rel. Nichols*, 908 So.2d 1178 (Fla. Dist. Ct. App. 2005) (reversing and remanding with instructions to enter Order compelling arbitration of action for wrongful death, negligence, and breach of fiduciary duty).

<sup>47</sup> *Estate of Etting ex rel. Etting v. Regents Park at Aventura, Inc.*, 891 So.2d 558 (Fla. Dist. Ct. App. 2004) (affirming Order granting Motion to Compel Arbitration of action filed by personal representative of resident's estate).

<sup>48</sup> *Five Points Health Care, Ltd. v. Alberts*, 867 So.2d 520 (Fla. Dist. Ct. App. 2004) (reversing Order denying Motion to Compel Arbitration of claims brought by resident under Florida's Resident's Rights Act).

<sup>49</sup> *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So.2d 278 (Fla. Dist. Ct. App. 2003) (reversing and remanding with instructions to enter Order granting defendant's Motion to Compel Arbitration of action filed by personal representative of estate asserting claims based upon negligence, wrongful death, and violation of Nursing Home Resident's Rights Act).

<sup>50</sup> *Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus*, 853 So.2d 500 (Fla. Dist. Ct. App. 2003) (trial court erred in denying defendant's Motion to Compel Arbitration of negligence and

<sup>38</sup> *Moffett v. Life Care Ctrs. of America*, No. 07CA0376, 2008 WL 2053067 (Colo. Ct. App. May 15, 2008).

<sup>39</sup> *New Port Richey Med. Investors, LLC v. Stern*, \_\_\_ So.3d \_\_\_, 2009 WL 1563424 (Fla. Dist. Ct. App. June 5, 2009) (reversing trial court's Order denying nursing home's Motion to Compel Arbitration).

<sup>40</sup> *Jaylene, Inc. v. Moots*, 995 So.2d 566, 569 (Fla. Dist. Ct. App. 2008) (enforcing arbitration agreement signed by decedent's attorney-in-fact under durable power of attorney).

<sup>41</sup> *Slusser v. Life Care Ctrs. of America, Inc.*, 977 So.2d 662 (Fla. Dist. Ct. App. 2008) (affirming Order compelling arbitration of negligence claims and finding arbitration agreement was not unconscionable as violative of Nursing Home Residents Act).

<sup>42</sup> *Shotts v. OP Winter Haven, Inc.*, 988 So.2d 639 (Fla. Dist. Ct. App. 2008) (arbitration agreement not procedurally unconscionable).

*Briar, Inc. v. Lopez- Silvero*,<sup>51</sup> and *Eldridge v. Integrated Health Svcs., Inc.*<sup>52</sup> Florida courts have refused to enforce arbitration agreements in other cases.<sup>53</sup>

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wrongful death claims brought by personal representative of estate).

<sup>51</sup> *Integrated Health Svcs. of Green Briar, Inc. v. Lopez- Silvero*, 827 So.2d 338 (Fla. Dist. Ct. App. 2002) (reversing and remanding with instructions to grant Motion to Compel Arbitration of action alleging improper care).

<sup>52</sup> *Eldridge v. Integrated Health Svcs., Inc.*, 805 So.2d 982 (Fla. Dist. Ct. App. 2001) (affirming Order compelling arbitration of resident's action).

<sup>53</sup> *See, e.g., Woebs v. Health Care and Retirement Corp. of America*, 977 So.2d 630 (Fla. Dist. Ct. App. 2008) (reversing and remanding trial court's grant of Motion to Compel Arbitration of wrongful death claims and claims for violation of Nursing Home Resident's Rights Act on grounds circumstances surrounding execution of agreement were procedurally unconscionable and arbitration provision was substantively unconscionable); *In re Estate of McKibbin v. Alterra Health Care Corp.*, 977 So.2d 612 (Fla. Dist. Ct. App. 2008) (estate was not bound by arbitration provision in nursing home agreement because resident did not sign agreement and son signed pursuant to power of attorney that did not give son authority to enter into arbitration agreement on behalf of resident); *Estate of Orlanis v. Oakwood Terrace Skilled Nursing and Rehab. Ctr.*, 971 So.2d 811 (Fla. Dist. Ct. App. 2007) (reversing and remanding trial court's Order compelling arbitration of action on grounds nursing home waived right to arbitration by availing itself of discovery rules before seeking arbitration); *Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773 (Fla. Dist. Ct. App. 2007) (affirming denial of Motion to Compel Arbitration on grounds agreement violated Nursing Home Resident's Rights Act); *Fletcher v. Huntington Place Ltd. P'ship*, 952 So.2d 1225 (Fla. Dist. Ct. App. 2007) (reversing and remanding trial court's Order compelling arbitration on grounds agreement was unenforceable as it required that arbitration be administered by American Health Lawyers Association and holding fact that daughter of resident signed agreement precluded enforcement of agreement against resident's estate); *SA-PG Ocala, LLC v. Stokes*, 935 So.2d 1242 (Fla. Dist. Ct. App. 2006) (arbitration agreement requiring clear and convincing evidence of intentional or reckless conduct for arbitrator to award compensatory and punitive damages is against public policy and unenforceable).

## Georgia

Georgia courts have been reluctant to compel arbitration in some cases, generally focusing on signatory authority when faced with the decision whether to enforce an arbitration agreement.<sup>54</sup> However, in *Triad Health Mgmt. of Georgia, III, LLC v. Johnson*, the Georgia Court of Appeals recently reversed a trial court's denial of a nursing home's Motion to Compel Arbitration, specifically holding that the FAA applied to the admission agreement at issue, the arbitration agreement signed by the resident's son as fiduciary was valid and enforceable, and the FAA preempted a state arbitration statute.<sup>55</sup>

## Illinois

Illinois courts appear reluctant to enforce arbitration agreements in the nursing home context.<sup>56</sup>

## Indiana

In *Sanford v. Castleton Healthcare Ctr., LLC*,<sup>57</sup> the Indiana Court of Appeals demonstrated the Indiana trend of focusing

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<sup>54</sup> *See Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430 (Ga. Ct. App. 2007) (husband of resident did not act with actual or apparent authority to sign arbitration agreement); *Washburn v. Beverly Enter. – Georgia, Inc.*, No. CV 106 051, 2006 WL 3404804 (S.D. Ga. Nov. 14, 2006) (not reported in F. Supp. 2d) (wrongful death action not due to be arbitrated because arbitration agreement was not signed by representative pursuing wrongful death claim and holding wrongful death claim was "separate, new and distinct cause of action").

<sup>55</sup> *Triad Health Mgmt. of Georgia, III, LLC v. Johnson*, \_\_\_ S.E.2d \_\_\_, 2009 WL 1532509 (Ga. Ct. App. June 3, 2009).

<sup>56</sup> *See Carter v. SSC Odin Operating Co., LLC*, No. 5-07-0392, 2008 WL 943746 (Ill. App. Ct. Apr. 4, 2008) (affirming denial of nursing home's Motion to Compel Arbitration on grounds Nursing Home Care Act, which invalidates a resident's waiver of right to sue or right to jury trial, was not preempted by FAA).

<sup>57</sup> *Sanford v. Castleton Healthcare Ctr., LLC*, 813 N.E.2d 411 (Ind. Ct. App. 2004).

on a variety of issues in deciding whether to enforce an arbitration agreement, including whether the individual who signed the agreement had authority to bind the resident and whether the agreement is unconscionable, ultimately concluding that the trial court properly compelled the estate to arbitrate its survival and wrongful death claims. The Court also concluded that the agreement was not unconscionable, did not violate the FAA, and that the estate was bound to the agreement because all claims arose out of or related to the agreement.

### Kansas

In *McNally v. Beverly Enter., Inc.*,<sup>58</sup> the Court of Appeals of Kansas refused to enforce an arbitration agreement in a wrongful death and survival lawsuit against a nursing home on grounds the resident's wife did not have authority to execute the arbitration agreement on behalf of her husband, noting that the durable power of attorney at issue only gave the wife power to make health care decisions rather than "general" decisions. The Court also concluded that the wife lacked apparent or ostensible authority because there was no evidence that the husband induced or permitted the nursing home to believe his wife was his agent.

### Kentucky

Kentucky courts have refused to enforce arbitration agreements in nursing home cases.<sup>59</sup>

<sup>58</sup> *McNally v. Beverly Enter., Inc.*, 191 P.3d 363 (Kan. App. 2008).

<sup>59</sup> See *Beverly Health & Rehab. Servs. v. Smith*, \_\_\_ S.W.3d \_\_\_, 2009 WL 961056 (Ky. Ct. App. Apr. 20, 2009) (refusing to enforce arbitration agreement signed by daughter of resident, who did not hold power of attorney, on grounds daughter lacked authority to bind resident to arbitration); *Mt. Holly Nursing Ctr. v. Crowds*, 281 S.W.3d 809 (Ky. Ct. App. 2008) (affirming denial of Motion to Compel Arbitration on grounds resident's "friend" who signed agreement did not have authority to bind resident); *Kindred Hospitals Ltd. P'ship v. Luttrell*,

### Louisiana

In *Landers v. Integrated Health Services of Shreveport*,<sup>60</sup> the Court refused to enforce an arbitration agreement, affirming denial of Motion to Compel Arbitration on grounds the resident lacked capacity to contract. *Landers* suggests that Louisiana courts may examine a variety of issues in determining whether to enforce an arbitration agreement, including whether the resident had capacity to contract and whether the agreement complies with Louisiana law.

### Massachusetts

Massachusetts courts appear to focus on whether an arbitration agreement is unconscionable. In *Miller v. Cotter*,<sup>61</sup> the Massachusetts Supreme Court reversed the trial court's Order denying Motion to Compel Arbitration of claims brought by estate of former resident and holding that agreement was not unconscionable.

### Mississippi

Mississippi courts routinely examine a multitude of issues in deciding whether to enforce arbitration agreements, placing particular emphasis on whether the individual who executed the agreement had authority to bind the resident and whether the agreement is unconscionable. Courts have held arbitration agreements enforceable in several nursing home cases.<sup>62</sup>

190 S.W.3d 916 (Ky. Ct. App. 2006) (affirming denial of nursing home's Motion to Compel Arbitration on grounds nursing home failed to show "extraordinary cause" necessary for Court to vacate or modify trial court's interlocutory order).

<sup>60</sup> *Landers v. Integrated Health Services of Shreveport*, 903 So.2d 609 (La. Ct. App. 2005).

<sup>61</sup> *Miller v. Cotter*, 863 N.E.2d 537 (Mass. 2007).

<sup>62</sup> See, e.g., *Covenant Health Rehab. of Picayune, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007) (enforcing arbitration agreement signed on behalf of resident where individual who signed agreement satisfied requirements of Mississippi's healthcare surrogacy statute); *Vicksburg Partners, L.P. v.*

Mississippi courts also have refused to enforce arbitration agreements in other cases.<sup>63</sup>

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Stephens, 911 So.2d 507 (Miss. 2005) (reversing and remanding to trial court with instructions to compel arbitration of wrongful death action); Covenant Health & Rehab of Picayune, LP v. Moulds, \_\_\_ So.2d \_\_\_, 2008 WL 3843820 (Miss. Ct. App. Aug. 19, 2008) (finding that resident's son had authority to bind mother to arbitration under Mississippi Uniform Health-Care Decisions Act); Trinity Mission Health & Rehab. of Clinton v. Johnson, \_\_\_ So.2d \_\_\_, 2008 WL 73682 (Miss. Ct. App. Apr. 15, 2008) (reversing denial of Motion to Compel Arbitration of wrongful death claim brought by daughter of resident); Forest Hill Nursing Ctr., Inc. v. McFarlan, 995 So.2d 775 (Miss. Ct. App. 2008) (finding, inter alia, resident was third party beneficiary of agreement signed by granddaughter); Covenant Health & Rehab. of Picayune, LP v. Lupkin, \_\_\_ So.2d \_\_\_, 2008 WL 306008 (Miss. Ct. App. Feb. 5, 2008) (reversing denial of Motion to Compel Arbitration of personal injury action brought by resident); *Community Care Ctr. of Vicksburg, LLC v. Mason*, 966 So.2d 220 (Miss. Ct. App. 2007) (finding resident signed agreement on her own behalf and holding agreement not unconscionable).

<sup>63</sup> See, e.g., *Trinity Mission Health & Rehab. of Holly Springs LLC v. Lawrence*, No. 07-6050, 2009 WL 331626 (Miss. Feb. 12, 2009) (refusing to enforce arbitration agreement on grounds nursing home failed to prove resident signed agreement at issue or intended to enter into arbitration agreement); *Robbins v. Beverly Enter., Inc.*, Civil Action No. 3:07CV047-B-A, 2008 WL 907465 (N.D. Miss. Mar. 31, 2008) (valid arbitration agreement did not exist where nursing home failed to produce power of attorney, failed to set forth proof that resident gave wife authority to act as his agent, and no statutory authority existed to allow wife to bind husband to arbitration); *Magnolia Healthcare, Inc. v. Barnes*, 994 So.2d 159 (Miss. 2008) (holding arbitration clause in admission agreement unenforceable on grounds it was signed before resident filed lawsuit and arbitration rules incorporated by arbitration clause at issue only permit arbitration agreements if executed after claim arises); *Compere's Nursing Home, Inc. v. Estate of Farish*, 982 So.2d 382 (Miss. 2008) (affirming denial of Motion to Compel Arbitration on grounds resident's nephew lacked apparent authority to bind resident to arbitration agreement and did not meet statutory requirements of Mississippi's Health Care Surrogacy statute); *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So.2d 211 (Miss. 2008)

## Missouri

Missouri courts have refused to enforce arbitration agreements in nursing home cases on several occasions, focusing on whether the individual who signed an arbitration agreement on behalf of a nursing home resident had the authority to bind the resident to arbitration.<sup>64</sup>

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(affirming denial of Motion to Compel Arbitration on grounds, among other things, resident's daughter did not have authority, pursuant to power of attorney, or as resident's health care surrogate, to execute arbitration agreement); *Grenada Living Ctr. v. Coleman*, 961 So.2d 33 (Miss. 2007) (affirming denial of Motion to Compel Arbitration on grounds resident's half-sister was not resident's surrogate and did not bind resident through express authority); *Bedford Care Ctr.-Monroe Hall v. Lewis*, 923 So.2d 998 (Miss. 2006) (affirming denial of Motion to Compel Arbitration on grounds resident made "knowledgeable and express decision not to sign the arbitration provision").

<sup>64</sup> See, e.g., *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009) (affirming trial court's Order denial of Motion to Compel Arbitration on grounds wrongful death claims are new causes of action and not derivative of underlying tort claims); *Ward v. Nat'l Healthcare Corp., et al.*, 275 S.W.3d 236 (Mo. 2009) (affirming trial court's denial of Motion to Compel Arbitration on grounds daughter of resident, who had not been given power of attorney, did not have authority to bind resident or family to arbitration agreement); *Sennett v. Nat'l Healthcare Corp.*, 272 S.W.3d 237 (Mo. Ct. App. 2008) (affirming trial court's Order denying Motion to Compel Arbitration on grounds plaintiff's wrongful death claims were outside scope of arbitration agreement and resident's wrongful death beneficiaries did not sign arbitration agreement in their individual capacity such that they were not bound by agreement); *Tallmadge v. Beverly Enter.-Missouri*, 202 S.W.3d 47 (Mo. Ct. App. 2006) (remanding case and refusing to enforce arbitration agreement signed by resident's attorney-in-fact on grounds resident did not execute durable power of attorney until after her attorney-in-fact executed arbitration agreement); *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393 (Mo. Ct. App. 2006) (affirming denial of Motion to Compel arbitration of wrongful death claim on grounds daughter of deceased resident was not party to arbitration agreement and, therefore, not bound by agreement).

### Nebraska

Although there is little Nebraska law on this issue, a federal court in Nebraska recently held an arbitration agreement enforceable in a wrongful death action against a nursing home.<sup>65</sup>

### North Carolina

North Carolina courts have held arbitration agreements enforceable in nursing home cases on at least one occasion, *Raper v. Oliver House, LLC*.<sup>66</sup>

### Ohio

Ohio courts have both upheld and denied motions to compel arbitration, focusing primarily on whether an arbitration agreement is unconscionable. Courts in Ohio have held arbitration agreements enforceable in some actions, including *Hayes v. Oakridge Home*.<sup>67</sup> In cases like

<sup>65</sup> See *Bales v. Arbor Manor, SSC*, No. 4:08CV3072, 2008 WL 2660366 at \*7 (D. Neb. July 3, 2008).

<sup>66</sup> *Raper v. Oliver House, LLC*, 637 S.E.2d 551 (N.C. Ct. App. 2006) (reversing and remanding for Order granting Motion to Compel Arbitration of action brought by executrix of deceased resident's estate for negligence, wrongful death, and punitive damages).

<sup>67</sup> See *Hayes v. Oakridge Home*, \_\_\_ N.E.2d \_\_\_, 2009 WL 1259379 (Ohio May 7, 2009) (arbitration agreement upheld despite resident's age); *Rinderle v. Whispering Pines Health Care Ctr.*, No. CA2007-12-041, 2008 WL 3823701 (Ohio Ct. App. Aug. 18, 2008) (affirming Order compelling arbitration of medical and nursing home malpractice claims on grounds arbitration agreement was not unconscionable); *Hanson v. Valley View Nursing & Rehab. Ctr.*, No. 23001, 2006 WL 2060575 (Ohio Ct. App. July 26, 2006) (not reported in N.E.2d) (affirming Order compelling arbitration of action filed by executor of estate based on allegations of medical malpractice); *Fortune v. Castle Nursing Homes, Inc.*, 843 N.E.2d 1216 (Ohio Ct. App. 2005) (affirming decision of trial court to stay proceedings pending arbitration and finding arbitration agreement not procedurally unconscionable); *Broughsville v. OHECC, LLC*, No. 05CA008672, 2005 WL 3483777 (Ohio Ct.

*Manley v. Personacare of Ohio*, Ohio courts have refused to enforce arbitration agreements where unconscionability is demonstrated.<sup>68</sup>

### Oklahoma

Oklahoma courts focus on several issues in electing whether to enforce an agreement to arbitrate, with recent consideration given to FAA preemption of state law prohibiting arbitration.<sup>69</sup>

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App. Dec. 21, 2005) (affirming decision staying case pending result of arbitration in negligence action alleging that resident sustained personal injury while under care of facility).

<sup>68</sup> See *Hayes v. Oakridge Home*, 886 N.E.2d 928 (Ohio Ct. App. 2008) (reversing trial court's granting of motion for stay pending arbitration on grounds arbitration agreement was unconscionable); *Manley v. Personacare of Ohio*, No. 2005-L-174, 2007 WL 210583 (Ohio Ct. App. Jan. 26, 2007) (finding arbitration agreement signed by resident unconscionable on grounds resident signed admission agreement one week after being discharged from hospital for treatment for assault); *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19 (Ohio Ct. App. 2004) (reversing trial court's granting of motion to stay and refer matter to arbitration on grounds arbitration provision was unconscionable).

<sup>69</sup> See *Rainbow Health Care Ctrs., Inc. v. Crutcher*, No. 07-CV-194-JHP, 2008 WL 268321 (N.D. Okla. Jan. 29, 2008) (FAA preempts Oklahoma Nursing Home Care Act's prohibition of arbitration agreements in admission agreements). *But see Bruner v. Timberlane Manor Ltd. P'ship*, 155 P.3d 16 (Okla. 2006) (holding arbitration agreement executed by daughter of resident not enforceable in wrongful death action on grounds care did not involve interstate commerce, FAA was not applicable to admission agreement, and arbitration provision was unenforceable under Oklahoma Nursing Home Care Act). See also *Sooner Geriatrics, L.L.C. v. Crutcher*, No. CIV-07-244-M, 2007 WL 2900535 (W.D. Okla. Oct. 3, 2007) (issuing preliminary injunction enjoining Commissioner of Oklahoma Department of Health from enforcing state administrative plans that required two Oklahoma nursing facilities to alter admission agreements to remove arbitration provisions).

### Pennsylvania

*Smalley v. JHA-Markleysburg, Inc.*<sup>70</sup> suggests that Pennsylvania courts focus on the signatory issue in electing whether to enforce an arbitration agreement. *Smalley* affirmed a trial court's Order compelling arbitration of a plaintiff's claims for negligence and wrongful death. The plaintiff, who signed the arbitration agreement on behalf of his father pursuant to a power of attorney, argued that his father lacked mental capacity to know what he was doing prior to signing the power of attorney, so the son lacked authority to execute the arbitration agreement. The Court rejected this argument and required the parties to arbitrate.<sup>71</sup>

### South Carolina

South Carolina courts have refused to enforce arbitration agreements in nursing home cases on two occasions, *Grant v. Magnolia Manor-Greenwood, Inc.*<sup>72</sup> and *Timms v. Greene*.<sup>73</sup>

<sup>70</sup> *Smalley v. JHA-Markleysburg, Inc.*, 3 Pa. D. & C. 5th 471 (Pa. Com. Pl. 2007).

<sup>71</sup> *But see Chighizola v. Beverly Enter. Inc.*, 79 Pa. D. & C.4th 416 (Pa. Com. Pl. 2006) (compelling arbitration of action and holding, among other things, that resident's daughter had authority to bind resident to arbitration); *Mannion v. Manor Care Inc.*, 4 Pa. D.&C. 5th 321 (Pa. Com. Pl. 2006) (compelling arbitration of wrongful death claims and rejecting plaintiff's argument that agreement was unconscionable).

<sup>72</sup> *Grant v. Magnolia Manor-Greenwood, Inc.*, \_\_\_ S.E.2d \_\_\_, 2009 WL 1678204 (S.C. June 15, 2009) (affirming trial court's Order denying nursing home's Motion to Compel Arbitration on grounds the designated arbitrator became unavailable and such unavailability voided the arbitration agreement).

<sup>73</sup> *Timms v. Greene*, 427 S.E.2d 642 (S.C. 1993) (refusing to enforce arbitration agreement and holding FAA not applicable on grounds nexus to interstate commerce was not satisfied).

### Tennessee

This issue has been frequently litigated in Tennessee during the recent years, with courts focusing primarily on the authority to bind the resident by the individual who executed an arbitration agreement. Tennessee courts have enforced arbitration agreements in some cases, most recently *Mitchell v. Kindred Healthcare Operating, Inc.*<sup>74</sup> Tennessee courts have refused to enforce arbitration agreements in other nursing home cases, most recently *Barbee v. Kindred Healthcare Operating, Inc.*<sup>75</sup>

<sup>74</sup> *Mitchell v. Kindred Healthcare Operating, Inc.*, No. W2008-00378-COA-R3-CV, 2008 WL 4936505 (Tenn. Ct. App. Nov. 19, 2008) (reversing denial of Motion to Compel Arbitration and remanding for entry of Order compelling arbitration on grounds agreement at issue was not unconscionable and resident's wife, who executed agreement pursuant to power of attorney, had authority to bind resident); *see also LeShane v. Quince Nursing and Rehab. Ctr., LLC*, No. W2007-01484-COA-R3-CV, 2008 WL 4613585 (Tenn. Ct. App. Oct. 14, 2008) (vacating and remanding denial of Motion to Compel Arbitration for further proceedings on issue of whether resident's daughter had authority to execute agreement on behalf of her mother); *Reagan v. Kindred Healthcare Operating, Inc.*, No. M2006-02191-COA-R3-CV, 2007 WL 4523092 (Tenn. Ct. App. Dec. 20, 2007) (reversing and remanding for entry of Order compelling arbitration of action brought by estate of resident where resident signed arbitration agreement on her own behalf and finding agreement at issue not unconscionable); *Philpot v. Tennessee Health Mgmt., Inc.*, 279 S.W.3d 573 (Tenn. Ct. App. 2007) (reversing denial of Motion to Compel Arbitration of wrongful death claims and remanding for entry of Order compelling arbitration); *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876 (Tenn. 2007) (resident's durable power of attorney for health care gave her agent sufficient authority to enter into arbitration agreement); *Necessary v. Life Care Ctrs. of America*, No. E2006-00453-COA-R3-CV, 2007 WL 3446636 (Tenn. Ct. App. Nov. 16, 2007) (reversing denial of Motion to Compel Arbitration where resident's wife, who signed arbitration agreement on behalf of resident, had oral express authority from husband to sign all paperwork necessary for admission to facility).

<sup>75</sup> *Barbee v. Kindred Healthcare Operating, Inc.*, No. W2007-00517-COA-R3-CV, 2008 WL

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## Texas

4615858 (Tenn. Ct. App. Oct. 20, 2008) (reversing trial court's Order compelling arbitration of action on grounds resident's son who signed arbitration agreement did not have apparent authority and, under Tennessee Health Care Decisions Act, was not his mother's surrogate). *See also* Hearn v. Quince Nursing and Rehab. Ctr., LLC, No. W2007-02563-COA-R3-CV, 2008 WL 4614265 (Tenn. Ct. App. Oct. 16, 2008) (affirming denial of Motion to Compel Arbitration on grounds resident's daughter did not have authority to sign agreement on behalf of her father where, among other things, resident did not give daughter power of attorney and court never appointed daughter as her father's conservator); Jones v. Kindred Healthcare Operating, Inc., No. W2007-02568-COA-R3-CV, 2008 WL 3861980 (Tenn. Ct. App. Aug. 20, 2008) (affirming denial of Motion to Compel Arbitration on grounds resident's daughter, holding general power of attorney, did not have authority to enter into arbitration agreement on behalf of resident); McKey v. Nat'l Health Care Corp., No. M2007-02341-COA-R3-CV, 2008 WL 3833714 (Tenn. Ct. App. Aug. 15, 2008) (refusing to enforce arbitration agreement on grounds resident's daughter/legal representative did not satisfy requirements of Tennessee Health Care Decisions Act); Ricketts v. Christian Care Ctr. of Cheatham County, Inc., No. M2007-02036-COA-R9-CV, 2008 WL 3833660 (Tenn. Ct. App. Aug. 15, 2008) (reversing trial court's ruling enforcing arbitration agreement in wrongful death action against nursing home and finding that resident's daughter did not have authority to act for resident); Thornton v. Allenbrooke Nursing and Rehab. Ctr., LLC, No. W2007-00950-COA-R3-CV, 2008 WL 2687697 (Tenn. Ct. App. July 3, 2008) (affirming denial of Motion to Compel Arbitration of wrongful death claims on grounds resident's daughter lacked authority to waive decedent's "constitutional right to a jury trial"); Heath v. Nat'l Health Corp., 2008 WL 2648926 (Tenn. Ct. App. July 1, 2008) (vacating trial court's Order compelling arbitration and remanding case for discovery on issue of validity and enforceability of arbitration agreement); Hill v. NHC Healthcare, No. M2005-01818-COA-R3-CV, 2008 WL 1901198 (Tenn. Ct. App. April 30 2008) (affirming denial of Motion to Compel Arbitration on grounds agreement was unconscionable); Hendrix v. Lifecare Ctrs. of America, Inc., No. E2006-02288-COA-R3-CV, 2007 WL 4523876 (Tenn. Ct. App. Dec. 21, 2007) (daughter of resident lacked authority to bind mother to arbitration agreement despite mother naming daughter as agent under healthcare power of attorney); Raines v. Nat'l Health Corp., No. M2006-1280-COA-R3-CV, 2007 WL 4322063

Texas courts have been inconsistent in the enforcement of arbitration agreements in nursing home cases, focusing on the signatory issue when examining whether an arbitration agreement is due to be enforced. Texas courts have enforced arbitration agreements in the certain cases.<sup>76</sup> Texas courts refused to enforce arbitration agreements in the following cases: *Patterson v. Nexion Health, Inc.*,<sup>77</sup> *Texas Cityview Care Ctr., L.P. v. Fryer, et al.*,<sup>78</sup>

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(Tenn. Ct. App. Dec. 6, 2007) (reversing trial court's ruling that attorney-in-fact lacked authority to bind resident and remanding for hearing on issue of whether resident was mentally capable to execute power of attorney and whether agreement was unconscionable); *Cabany v. Mayfield Rehab. and Special Care Ctr.*, No. M2006-00594-COA-R3-CV, 2007 WL 3445550 (Tenn. Ct. App. Nov. 15, 2007) (vacating denial of Motion to Compel Arbitration and remanding case for further proceedings on issue of conditions authorizing resident's spouse to act under power of attorney for healthcare when she executed admission agreement).

<sup>76</sup> *See* *Owens v. Nexion Health at Gilmer, Inc.*, No. 2:06 CV 519, 2007 WL 841114 (E.D. Tex. March 19, 2007) (finding valid arbitration agreement existed and requiring arbitration of all claims asserted in negligence action brought after death of resident); *In re Nexion Health at Humble*, 173 S.W.3d 67 (Tex. 2005) (holding enforceable arbitration agreement in action for damages under Texas Wrongful Death Act and Texas Survival Statute and noting that Medicare funds crossing state lines are "sufficient to establish interstate commerce" under FAA); *In re Ledet*, No. 04-04-00411-CV, 2004 WL 2945699 (Tex. Ct. App. Dec. 22, 2004) (incapacitated adult who required long term care was bound by terms of arbitration agreement signed by her son who was not her legally appointed guardian).

<sup>77</sup> *Patterson v. Nexion Health, Inc.*, Civil Action No. 2-06-CV-443, 2007 WL 2021326 (E.D. Tex. July 9, 2007) (refusing to enforce arbitration agreement on grounds agreement violated Texas Civil Practice and Remedies Code and holding that even if agreement did not violate Code, wrongful death claims would not be arbitrable because plaintiffs did not sign agreement).

<sup>78</sup> *Texas Cityview Care Ctr., L.P. v. Fryer, et al.*, 227 S.W.3d 345 (Tex. Ct. App. 2007) (affirming denial of Motion to Compel Arbitration on grounds

*Sikes v. Heritage Oaks West Retirement Village*,<sup>79</sup> and *In re Kepka*.<sup>80</sup>

### Virginia

Virginia courts have refused to enforce arbitration agreements in actions against nursing homes on at least two occasions, *Giordano ex rel. Estate of Brennan v. Atria Assisted Living, Virginia Beach, L.L.C.*<sup>81</sup> and *Bishop v. Med. Facilities of America XLVII(47) Ltd. P'ship*,<sup>82</sup> focusing on whether the individual who executed the arbitration agreement on behalf of a resident had authority to bind the resident.

### III. 9 U.S.C. § 4 Complaints to Compel Arbitration

Given the creative means by which plaintiffs seek to oppose arbitration and the inconsistency of courts addressing arbitration in the nursing home context, it

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resident's daughter, who signed agreement pursuant to medical power of attorney, lacked authority to sign agreement on resident's behalf because power of attorney did not confer authority on daughter until a doctor certified that resident was unable to make health care decisions for herself and no evidence of such was presented, and that medical power of attorney was not intended to confer authority to make legal decisions, such as whether to waive right to jury trial).

<sup>79</sup> *Sikes v. Heritage Oaks West Retirement Village*, 238 S.W.3d 807 (Tex. Ct. App. 2007) (refusing to enforce arbitration agreement signed by wife of resident where plaintiff presented evidence that wife was not husband's guardian, had not been given power of attorney, and husband was not incapacitated and was capable of signing agreement on his own behalf).

<sup>80</sup> *In re Kepka*, 178 S.W.3d 279 (Tex. Ct. App. 2005) (ordering trial court to deny Motion to Compel Arbitration on grounds deceased resident's representative was not party to arbitration agreement in her individual capacity and wrongful death claims were not subject to arbitration).

<sup>81</sup> *Giordano ex rel. Estate of Brennan v. Atria Assisted Living, Virginia Beach, L.L.C.*, 429 F. Supp. 2d 732 (E.D. Va. 2006).

<sup>82</sup> *Bishop v. Med. Facilities of America XLVII(47) Ltd. P'ship*, No. CL04-55, 2004 WL 1858694 (Va. Cir. Ct. June 25, 2004).

would be remiss not to briefly address a statutory vehicle the FAA affords parties seeking to enforce arbitration agreements, albeit one that has not been frequently employed in nursing home cases. In this respect, 9 U.S.C. § 4 provides, in pertinent part, that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction . . ." <sup>83</sup> In short, 9 U.S.C. § 4 affords the aggrieved party an independent cause of action to enforce their arbitration agreement. A Complaint to Compel Arbitration pursuant to 9 U.S.C. § 4 is a federally granted right to file an individual action to compel arbitration.

Ordinarily, the Plaintiff, i.e., the nursing home, has the burden of establishing a proper basis for federal court jurisdiction. The basis for federal court jurisdiction will generally be "diversity" as opposed to "federal question" jurisdiction. Filing the Complaint pursuant to the FAA does not provide an independent basis for federal court jurisdiction. However, as the plaintiff, the party seeking to enforce the arbitration agreement can satisfy the diversity requirement by only naming "diverse" parties in the § 4 Complaint.

A § 4 Complaint can be used under different circumstances in nursing home cases. For example, the § 4 Complaint can be used to enforce an arbitration agreement where an action is remanded from federal court after the party opposing arbitration is allowed to defeat federal court jurisdiction by adding a non-diverse defendant. Likewise, it can be used when suit has already been filed by the nursing home resident in state court against diversity destroying defendants, i.e., the Administrator or Director of Nursing, by omitting the diversity destroying parties in the state court action as parties in the § 4 Complaint subsequently filed in federal

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<sup>83</sup> 9 U.S.C. § 4 (2006).

court. Parties opposing arbitration may move to dismiss the § 4 Complaint for failure to join a purported necessary and indispensable party. Courts around the country have been inconsistent in determining whether a non-diverse party in the underlying state court action is a necessary and indispensable party in a 9 U.S.C. § 4 action.

Additionally, a § 4 Complaint may be beneficial in jurisdictions that do not provide an automatic right of appeal from an Order denying a Motion to Compel Arbitration. Furthermore, a § 4 Complaint may be helpful where a trial court, presumably in an effort to frustrate arbitration, refuses to address or rule on a pending Motion to Compel Arbitration. In this regard, § 4 imposes an affirmative obligation on courts to rule on a § 4 Complaint. This provision of the FAA, therefore, can be relied upon in support of a motion for expedited hearing on the § 4 Complaint.

Section 4 of the FAA demands “an expeditious and summary hearing, with only restricted inquiry into factual issues” necessary for determining the existence and enforceability of an arbitration provision.<sup>84</sup> This is so because under the FAA, Congress intended to “move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.”<sup>85</sup>

Notably, where a parallel action is pending in state court, a § 4 plaintiff may ask that the state court proceedings be stayed pending resolution through the arbitral process, an authority recognized by states throughout the country.<sup>86</sup> In this

regard, pursuant to the All Writs Act,<sup>87</sup> the federal court has the jurisdiction and authority to enjoin the state court proceedings. Notably, in actions involving written arbitration agreements, the FAA requires that such actions be stayed pending resolution of the arbitral process:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit or proceeding is referable to arbitration under such an agreement, **shall** on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.<sup>88</sup>

Parties opposing enforcement of arbitration agreements pursuant to § 4 Complaints may cite a recent United States Supreme Court opinion, *Vaden v. Discover Bank*.<sup>89</sup> In *Vaden*, the Supreme Court stated that a District Court may “look through” a § 4 Complaint to Compel Arbitration to confirm whether it has jurisdiction over the action.<sup>90</sup> Relying on this language, parties opposing arbitration may argue that *Vaden* requires District Courts to “look through” to the underlying state court complaint to determine if diversity or any other basis for federal court jurisdiction exists. For example, a party opposing arbitration may contend that all parties to the underlying state court action must be “diverse” for the

<sup>84</sup> See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., *Green Tree Fin. Corp. v. Vintson*, 753 So.2d 497, 502 (Ala. 1999) (stating “trial courts are required to stay or dismiss proceedings and to compel arbitration when the parties have entered into a valid contract containing an arbitration agreement...”); *Kadow v. A.G. Edward & Son, Inc.*, 721 F.Supp. 201, 203 (W.D. Ark. 1989) (stating “[9 U.S.C.] [s]ection 3 requires a federal

court in which suit has been brought ‘upon any issue referable to arbitration under an agreement in writing for such arbitration’ to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement”).

<sup>87</sup> 28 U.S.C. § 1651 (2006).

<sup>88</sup> 9 U.S.C. § 3 (2006) (emphasis added).

<sup>89</sup> 129 S. Ct. 1262 (Mar. 9, 2009).

<sup>90</sup> *Id.* at 1268.

federal court to have jurisdiction. Parties seeking to enforce arbitration agreements should counter this argument by asserting that *Vaden* is inapplicable to § 4 Complaints based on “diversity” because *Vaden* involved a case of “federal question” jurisdiction pursuant to a “counterclaim.” The manner in which courts apply *Vaden* could significantly affect the ability of parties to enforce arbitration agreements by filing § 4 Complaints.

#### **IV. Future of Arbitration in Nursing Home Cases**

Inconsistent rulings among state courts and the potential of federal legislation cloud the future of arbitration in nursing home cases. Defense lawyers seeking to enforce arbitration agreements in nursing home cases face numerous obstacles, including judicial reluctance towards arbitration agreements in the nursing home setting based primarily on the bases of lack of agency and unconscionability. Even in “friendly” jurisdictions, counsel can expect arguments by plaintiffs that the arbitration agreement at issue should not be enforced by the court.

During the last two Congresses, bills have been introduced that would substantially hinder arbitration in nursing home cases. In this regard, H.R. 1237, the “Fairness in Nursing Home Arbitration Act of 2009,” seeks to amend the FAA with respect to arbitration by prohibiting pre-dispute arbitration agreements in the nursing home context, providing that “a pre-dispute arbitration agreement between a long-term care facility and a resident of such facility (or person acting on behalf of such resident, including a person with financial responsibility for such resident) shall not be valid or specifically enforceable.”<sup>91</sup> A similar bill was approved by the House Judiciary Sub-Committee in 2008, and H.R. 1237 is currently pending in the House. A Senate version of the bill, S. 2838, was also

approved by the Senate Judiciary Sub-Committee in 2008. Based upon the possibility of legislation specifically prohibiting arbitration in nursing home cases, defense counsel should aggressively pursue arbitration where desired before this proposed legislation forecloses the possibility of enforcing arbitration agreements in nursing home cases.

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<sup>91</sup> H.R. 1237, 111<sup>th</sup> Congress (2009).