

**Contesting & Upholding Nursing  
Home Arbitration Agreements  
By  
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**“Mediation & Arbitration in 2009  
Finding the Hidden Gems”**

**Palm Beach County Bar Association  
Alternative Dispute Resolution Committee**

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# I. The Problem We Face Now and in the Future.

As we Baby Boomers grow older and live longer because of advances in medical technology and treatment, the percentage of people 65 and older is going to continue to increase. Dr. Tim of Chapin presented statistics at a conference in West Palm Beach on July 28, 2008 that highlights this trend:

## Elderly Population (Percent 65 years of age or older)

	Census 2000	Projection 2015	Projection 2030
United States	12.4%	14.5%	19.7%
Florida	17.6%	19.5%	27.1% <sup>1</sup>

Another Florida demographic summary notes:

“The population aged 85 and older was one of the fastest growing age segments during the 1980’s, increasing by 75.1 percent. This group grew by 61.2 percent during the 90’s more than twice the rate of growth for the state and is forecast to expand by 55.8 percent between 2000 and 2010.”<sup>2</sup>

The AARP reported in 2001 that there were 1,465,000 residents who were 65 or older, residing in nursing homes in the United States and 75% of those people required assistance in 3 or more activities of daily living. Forty-two percent of these nursing home residents had dementia.<sup>3</sup>

O’Hare and Beam also state that the segment of the population 85 years of age and older is the fastest growing segment of the senior population and by 2050, when the baby-boomer retirement is fully felt, this category will equal 21 million people, which will represent 5% of the entire population of then nearly 420 million people.<sup>4</sup>

Beth Baker notes in her recently published book on nursing homes, that as of 2006 there were 17,000 nursing homes in the United States versus only 12,468 McDonald restaurants. By 2006, 1.6 millions residents lived in nursing homes and another 900,000

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<sup>1</sup> Chapin, Tim, “Florida’s Demographic Trends...Present and Future,” (I am going to use abbreviated footnotes. Full reference can be found in Bibliography)

<sup>2</sup> “Florida Demographic Summary,”

<sup>3</sup> Pandya, Sheel, “Nursing Homes: Fact Sheet,”

<sup>4</sup> O’Hare, Thomas P. and Burton T. Beam, Jr., Individual Health Insurance Planning: Medical, Disability, Income and Long-Term Care at p. 16.24.

lived in assisted living facilities and these mostly, elderly people were cared for by more than 2.7 million employees—more employees than work for Wal-Mart.<sup>5</sup>

Baker than writes:

“In general, nursing home residents are older and sicker than were nursing home residents in the past. On average, they are eighty-five or older, with three or more admitting diagnoses, the most common being cardiovascular disease and dementia. Other mental disorders, such as depression and anxiety are common. People in nursing homes require some level of medical care, such as medication management or physical therapy, and many need help with everyday activities, such as bathing or eating. Most use wheelchairs.”<sup>6</sup>

## **II. Nursing Home Litigation and Arbitration Clauses**

By way of disclaimer, this presentation is neither advocating for nor against arbitration clauses in nursing home admission agreements, but is simply trying to present the current state of the law in Florida, as it may be impacted by event taking place in the Federal government.

### **Typical Arbitration Clause in Admission Agreement**

W. Todd Harvey state in his article in Trial:

“The typical arbitration clause for long-term care facilities states:

Pursuant to the Federal Arbitration Act, any action, dispute, claim, or controversy of any kind (e.g., whether in contract or in tort, statutory or common law, legal or equitable, or otherwise) now existing or hereafter arising between the parties in any way arising out of, pertaining to, or in connection with the provision of health care services, any agreement between the parties, the provision of any other goods or services by the Health Care Center, or other transactions, contracts, or agreements of any kind whatsoever, and past, present, or future incidents, omissions, acts, errors, practices, or occurrence causing injury to either party whereby the other party or its agents, employees, or representatives may be liable, in whole or in part, or any other aspect of the past, present, or future relationships between the parties shall be resolved by binding arbitration administered by the American Health Lawyers Association.”<sup>7</sup>

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<sup>5</sup> Baker, Beth, Old Age in a New Age: The Promise of Transformative Nursing Homes, pp. 7-8.

<sup>6</sup> Baker, *supra*. at p. 8.

<sup>7</sup> Harvey, W. Todd, “Arbitration agreements in nursing home admission contracts:” See generally, American Health Lawyers Association, AHLA Guide to Healthcare Legal Forms for such agreements

## Federal Legislation

In 1925 Congress adopted the Federal Arbitration Act and significantly amended it in 1947. The principal sections of the F.A.A., which is found in Title 9, Chapter 1 of the United States Code provide in part:

Sec. 1. Defines ‘**Maritime transactions**’ and ‘**Commerce.**’

Sec. 2.” **Validity, irrevocability, and enforcement of agreements to arbitrate.** Written provision of maritime transaction or contract involving commerce calling for arbitration “shall be valid, irrevocable and enforceable.”

Sec. 3. “**Stay of proceedings where issue therein referable to arbitration.** 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...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...”

Sec. 4. “**Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration;** 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...for an order directing that such arbitration proceed in the manner provided for in such agreement...The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement...”

Sec. 5. “**Appointment of arbitrators or umpire.** If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require...”

Sec. 9. “**Award of arbitrators; confirmation; jurisdiction; procedure.** If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such

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and clauses.

application may be made to the United States court in and for the district within which such award was made...”<sup>8</sup>

In deciding that the Federal Arbitration Act, as the Supreme Law of the Land takes precedence over the California Franchise Investment Law, Chief Justice Burger, in writing for the United States Supreme Court in Southland Corporation v. Keating states:

“In enacting §2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration<sup>9</sup>.

“The problems Congress faced were therefore twofold: the old common law hostility towards arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements.”<sup>10</sup>

“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. We hold that § 31512 of the California Franchise Investment Law violates the Supremacy Clause.”<sup>11</sup>

More recently, in Buckeye Check Cashing, Inc. v. Cardegna,<sup>12</sup> 546 U.S. 440 (2006), the United States Supreme Court reversed the Supreme Court of Florida and notes:

“We reaffirm today that regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”

Here the Plaintiff had asserted that the personal check cashing transaction was highly usurious and therefore criminal and thus *void ab initio*.

Justice Scalia, writing for the majority states earlier in the opinions:

“The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, (citation omitted) whether the signor lacked authority to commit the alleged principal, (citation omitted), and whether the signor lacked the mental capacity to assent, (citation omitted)”<sup>13</sup>

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<sup>8</sup> Title 9, Chapter 1 of United States Code—the Federal Arbitration Act.

<sup>9</sup> Southland Corporation v. Keating, 465 U.S.1, 9 (1984).

<sup>10</sup> Id. at 14.

<sup>11</sup> Id. at 16

<sup>12</sup> Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448 (2006).

<sup>13</sup> Id. at 44.

Thus, it is clear that the United States Supreme Court has generally come down on the side of the enforceability of arbitration agreements under the Federal Arbitration Act, whether in a Federal Court context or a State Court context.<sup>14</sup>

## **Florida Legislation**

In 1957, the Florida Legislature first promulgated Chapter 682, Florida Statutes.<sup>15</sup> This particular statute is the one that applies when parties have agreed pursuant to an arbitration in their original contract.<sup>16</sup> The two primary sections of this Statute state in part:

### **Florida Statute Sec. 682.02 Arbitration agreements made valid, irrevocable, and enforceable; scope:**

“Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof... Such agreement or provision shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy; provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder.”<sup>17</sup>

### **Florida Statute Sec. 682.03. Proceedings to compel and to stay arbitration:**

“(1) A party to an agreement or provision for arbitration subject to this law claiming the neglect or refusal of another party thereto to comply therewith may make application to the court for an order directing the parties to proceed with arbitration in accordance with the terms thereof. If the court is satisfied that no substantial issue exists as to the making of the agreement or provision, it shall grant the application. If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application...

(3) Any action or proceeding involving an issue subject to arbitration under this law shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only.

(4) On application the court may stay an arbitration proceeding commenced or about to be commenced, if it shall find that no agreement or provision for arbitration subject to this law exists between the party making the application and the party causing the arbitration to be had. The court shall summarily hear and determine the issue of the

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<sup>14</sup> See, Stinson, Steven A., “Everything You Wanted to Know About Arbitration,” for other United States Supreme Court cases up-holding arbitration agreements in either the Federal or state context.

<sup>15</sup> See generally, Stinson, *supra* for other arbitration statutes in Florida.

<sup>16</sup> *Johnson v. Levine*, 736 So. 2d 1235 (Fla. App., 4<sup>th</sup> D.C.A., 1999).

<sup>17</sup> Florida Statutes § 682.02.

making of the agreement or provision and, according to its determination, shall grant or deny the application.”<sup>18</sup>

Other Sections in Chapter 682 are: (Sec. 682.04) Appointment of arbitrators by court; (Sec. 682.05) Majority action by arbitrators; (Sec. 682.06) Hearing; (Sec. 682.08) Witnesses, subpoenas, depositions; (Sec. 682.09) Award; (Sec. 682.10:) Change of award by arbitrators; (Sec. 682.11:) Fees and expenses of arbitration; (Sec. 682.12:) Confirmation of an award; (Sec. 682.13:) Vacating an award; (682.14:) Modification or correction of award; (Sec. 682.15:) Judgment or decree on award;(682.20:)Appeals.<sup>19</sup>

In 1980, after a very critical report by the Dade County Grand Jury on the condition of nursing homes in that County, the Florida Legislature passed the Nursing Home Residents Act, as a remedial statute.<sup>20</sup> In 1993, the Legislature amended the Act by enacting Florida Statute § 400.023, which section provides civil remedies for violation of the Nursing Home Residents Act.<sup>21</sup>

Florida Statute § 400.022 provides for 22 specific rights, including by example: “a) right to civil and religious liberties; b) right to private and uncensored communications; d) the right to present grievances on behalf of themselves and others; j) the right to be adequately informed of his or her medical condition and proposed treatment; l) the right to receive adequate and appropriate health care and protective and supportive services.”<sup>22</sup>

Florida Statute § 400.023 provides in part:

1) “Any resident whose rights as specified in this part are violated shall have a cause of action.” It goes on to state that a guardian may bring the cause of action and a personal representative may bring a wrongful death action.

2) The next sub-section of this section provides that the claimant shall have the burden of proving by a preponderance of the evidence the same elements that have to be proved in a negligence action. Strict liability is not created by the statute. This is not a medical malpractice act.<sup>23</sup>

Other sections in the Nursing Home Resident Rights Act are: (Sec.400.0233) Presuit notice; investigation; notification of violation of resident’s rights, etc.: (Sec. 400.0234) Availability of facility records for investigation of resident’s rights violation; (Sec. 400.0235) Certain provisions not applicable (not medical malpractice action); (Sec. 400.0236) Statute of limitations; (Sec. 400.0237) Punitive damages; pleadings; burden of proof; (Sec. 400.0238) Punitive damages; limitations.<sup>24</sup>

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<sup>18</sup> Florida Statutes § 682.03.

<sup>19</sup> Florida Statutes §§ 682.04 thru 682.20 minus those indicated hereinabove.

<sup>20</sup> Florida Statute §§ 400.022 et. seq. See, Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296 (Fla. App., 4<sup>th</sup> D.C.A., 2005 for a history.

<sup>21</sup> Florida Statute §§ 400.023. Blankfeld, supra.

<sup>22</sup> Florida Statute §§ 400.023 (sub-sections indicated).

<sup>23</sup> Florida Statute §400.023 (1) and (2).

<sup>24</sup> Florida Statute §§400.0233 thru 400.0238.

There is a very similar, if not identical set of statutes for assisted living facilities residents.<sup>25</sup>

Additionally, it should be noted that the Federal Government passed the 1987 Nursing Home Reform Act, which Act is spread throughout 42 U.S.C.A. § 1390, with much of it being found at 42 U.S.C.A. § 1396r, which 27 page section includes all types of standards, audits, and inspections, as well as a Patient's Bill of Rights, which is quite similar to Florida, with the exception that it does not provide for a private cause of action. However, with Medicare and Medicaid funding representing such a large portion of many nursing homes' income, that is the club that the Federal Government uses<sup>26</sup>.

## **Fairness in Nursing Home Arbitration Act**

It should be noted that there has been an effort in both the House and Senate to pass a statute that would amend the Federal Arbitration Act. This proposed statute is the "Fairness in Nursing Home Arbitration Act." It was introduced as H.R. 6126 and S 2838 in the Second session of the 110<sup>th</sup> Congress. Senator Martinez was one of the sponsors.

Besides grammatical changes to the Section 2 of the Federal Arbitration Act, the Law would read as follows at its end, if passed in its present form:

"(b) A pre-dispute arbitration agreement between a long-term care facility and a resident of a long-term care facility (or anyone acting on behalf of such a resident, including a person with financial responsibility for that resident) shall not be valid or specifically enforceable.

(c) This section shall apply to any pre-dispute arbitration agreement between a long-term care facility and a resident (or anyone acting on behalf of such a resident), and shall apply to a pre-dispute arbitration agreement entered into either at any time during the admission process or at any time thereafter.

(d) A determination as to whether this chapter applies to an arbitration agreement described in subsection (b) shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of such an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting the arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement..<sup>27</sup>

Given the prior decisions of the United States Supreme Court, and the applicability of the Federal Arbitration Act to the states, if this is ever passed, it will do away with pre-dispute arbitration agreements in long term care facilities and make the

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<sup>25</sup> Florida Statutes §§ 429.28 thru 429.298.

<sup>26</sup> 42 U.S.C.A. § 1396r.

<sup>27</sup> Fairness in Nursing Home Arbitration Act, as reported in the Senate on April 9, 2008, S. 2838. See also, Senate Report 110-518 dated October 1, (legislative day September 17,) 2008 on the Fairness in Nursing Home Arbitration Act. It gives a comprehensive overview of the problem.

rest of this presentation moot. Given the make-up of the Congress, it is quite possible this will happen this year.<sup>28</sup>

## Very Brief Review of the Legal Literature

Even though I listed quite a few law review articles in the accompanying Bibliography, I am only going to comment on a handful of these articles.<sup>29</sup>

Katherine Palm, writing in the Elder Law Journal in 2006 lists the following seven arguments that can be used against arbitration clauses in long term care agreements:

1. A predispute agreement to arbitrate all future claims is a contract of adhesion.
2. A predispute agreement to arbitrate is unconscionable.
3. A predispute agreement to arbitrate is inapplicable to non-parties
4. A predispute agreement to arbitrate contains impermissible terms.
5. A predispute agreement to arbitrate is waived if litigation proceeds.
6. A predispute agreement to arbitrate improperly limits statutory remedies.
7. A predispute agreement to arbitrate impermissibly requires additional consideration.<sup>30</sup>

Ann E. Krasuski, writing in the DePaul Journal of Health Care Law in 2004<sup>31</sup>, also looks at this issue from a national perspective and suggests the following arguments to use against such arbitration agreements:

1. Does not involve Interstate Commerce and thus F.A.A. does not apply.
2. Unauthorized signatories to contract and who is bound or not bound by the agreement.
3. Unconscionability and/or contracts of adhesion.
4. State statutory and constitutional rights.
5. Medicaid and Medicare statutes, if payments made by either or both programs and/or regulation by Centers for Medicare and Medicaid Services.
6. Arbitration providers are biased.
7. Although it is argued to be less expensive, in fact, arbitration is more expensive.

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<sup>28</sup> Given the same make-up, it is probably highly unlikely that a Republican sponsored bill, H.R. 7080, titled Stop Trial Lawyers Pork Act will see the light of day this Session.

<sup>29</sup> Not all the articles dealt with arbitration and nursing homes, but they may provide background on the topic or further enlighten you on issues involving nursing homes and their patients. I would also like to thank Christopher B. Hopkins, Esq., who is on the ADR Committee and who directed me to his Webpage: [www.FloridaArbitrationLaw.com](http://www.FloridaArbitrationLaw.com). I I have cited a number of his articles and all of them can be found at this website.

<sup>30</sup> Palm, Katherine, "Arbitration Clauses in Nursing Home Admission Agreements: at various pages throughout.

<sup>31</sup> She also points out that the first case to reach a state appellate court dealing with such arbitration clauses occurred only in 1993 and the great majority of cases arise after 1999. Krasuski, Ann. E., "Comment: Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents," p. 273.

8. Claim that arbitrators have expertise, which may not be true or is not needed.
9. Arbitration is less formal than court case, which may be a two-edged sword.
10. Privacy, which likewise may be a two-edged sword. No public scrutiny.
11. Public policy and statutory rights argument.<sup>32</sup>

Robert Hornstein, writing in the St. Thomas Law Review, and primarily examining Florida law, on the other hand only lists four arguments to make in opposing such an arbitration agreement:

1. Unconscionability
2. Unfair and Deceptive Practices
3. Requiring a knowing and voluntary waiver of the resident's right of access to the courts and Chapter 400 rights.
4. Repugnancy.
5. He also mentions ambiguity as a quasi-fifth argument.

After listing these several defenses to the arbitration agreement, he then explains in detail what each attorney should do to support his or her position:

“The **attorney representing a nursing home resident** should propound written discovery that is directed at obtaining: (1) nursing home documents showing whether the resident was actually explained the meaning and legal significance of arbitration;<sup>n107</sup> (2) nursing home policies on the admission process, including those that relate to the process concerning the actual execution of the contract; (3) names of any residents (current and former) who refused to agree to arbitration; (4) testimonial or written discovery admissions from nursing home staff that residents have no choice but to accept arbitration; (5) internal rules, policies, and handbooks on how to comply with Chapter 400; (6) memos, policies, correspondence, and operation manuals pertaining to admission and the charging and processing of Medicaid and Medicare eligible residents; (7) payment records showing receipt of Medicaid and Medicare funds.

The **focus of the defense** should be on the precise circumstances surrounding admission. Was the admission of an emergent nature? Who was actually present? Was the resident competent at the time of admission or was there a family member or person acting under a power of attorney present? How was the admission contract actually executed? Did a nursing home staff member simply ask the resident or their representative to sign without explaining the presence or purpose of an arbitration clause? Did the nursing home staff explain to the resident how the arbitration process worked, including who would administer the process? Did the nursing home staff explain to the resident the fees and costs associated with accessing an arbitral forum? In this regard, information can be obtained not only from the resident or their representative (if the nursing home resident was incapable of communicating at the time of admission) but also from nursing home staff.”<sup>33</sup>

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<sup>32</sup> Krasuski, Ann. E., *Supra* throughout the article.

<sup>33</sup> Hornstein, Robert, “The Fiction of Freedom of Contract-Nursing Home Admission Contract Arbitration Agreements: p.p. 335-336.

Christopher B. Hopkins, writing in the Winter 2005 Trial Advocate Quarterly discusses both discovery and arguments that the defense attorney should make and the ten arguments that can be anticipated from the plaintiff's attorney. With respect to the limited discovery that should be requested, which discovery should only relate to the arbitration issue, Hopkins states:

“Typical discovery prior to the evidentiary hearing will include (1) deposing the plaintiff and/or the person who executed the agreement, (2) obtaining copies of any contracts or documents reflecting actual or apparent authority if an agent signed the agreement, and (3) serving interrogatories inquiring as to the basis for avoiding enforcement of the agreement. Counsel should consider subpoenaing medical records if there is a question over competency; in the nursing home model, obtaining other medical records will reveal who signed admission or authorization documents for the resident at other facilities. Requests for Admissions regarding the completeness of the contract, signatures, competency, and date of signing are recommended.”<sup>34</sup>

Hopkins then goes on to discuss the arguments that should be made by the defense attorney for the nursing home and in favor of the arbitration agreement:

1. He or she must first of all present all favorable evidence to support the three prong test of Seifert v. U. S. Home Corp.,<sup>35</sup> namely 1) that a valid agreement to arbitrate exists, 2) that an arbitrable issue exists and 3) there has been no waiver to the right to arbitrate.
2. Argument that under Powertel<sup>36</sup> and Romano,<sup>37</sup> the Plaintiff must establish that both procedural and substantive unconscionability exists and if only one is proven, then arbitration must proceed.
3. “Based upon Weston<sup>38</sup>, Spruill,<sup>39</sup> and Romano,<sup>40</sup> the following fact patterns appear to strengthen the argument for enforcement of arbitration: (1) the provision is clearly visible and in the same typeface as the rest of the document, (2) the provision is in bold or is located above the signature block, (3) the provision is optional, (4) the provision was explained, or the signor had a chance to ask questions and declined, (5) a rescission period was provided and no objection was timely raised, (6) other courts have upheld same or similar

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<sup>34</sup> Hopkins, Christopher B., “The Perils of Enforcing ‘Favored’ Arbitration,” 24 Trial Advocate Q. 32 (2005), p. 35.

<sup>35</sup> Seifert v. U. S. Home Corp., 750 So. 2d 633 (Fla., 1999).

<sup>36</sup> Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. App., 1<sup>st</sup> D.C.A., 1991)

<sup>37</sup> Romano v. Manor Care Inc., et.al., 861 So. 2d 59 (Fla. App., 2003).

<sup>38</sup> Gainesville Health Care Center, Inc. v. Weston, 857 So. 2d 278 (Fla. App., 1<sup>st</sup> D.C.A., 2003).

<sup>39</sup> Consolidated Resources Healthcare Fund I, Ltd. d/b/a Lakeside Health Center v. Fenelus, 853 So. 2d 500, (Fla. App., 4<sup>th</sup> D.C.A., 2003).

<sup>40</sup> Romano v. Manor Care Inc., et.al., 861 So. 2d 59 (Fla. App., 2003).

arbitration provisions, and (7) there is no denial of any statutory rights without a knowing waiver.”<sup>41</sup>

Hopkins goes on to list the ten arguments that he anticipates the nursing home resident’s attorney to make in challenging the arbitration agreement, namely:

1. Waiver of arbitration, by some type of active participation in the litigation process before challenging the same and moving to force arbitration.
2. Wrong signer or unsigned arbitration agreement.
3. Incompetent signor.
4. Arbitration agreement was not read or explained before it was signed.
5. Substantive unconscionability.
6. Arbitration is biased or costly.
7. Waiver of such rights as punitive damages, attorney’s fees or class action formation.
8. Statutory claim not arising from contract and therefore not subject to arbitration agreement.
9. Not interstate commerce and therefore not subject to Federal Arbitration Act.
10. Arbitration is a violation of Federal Regulation because of Medicare or Medicaid.<sup>42</sup>

## **Florida Case Law**

Elimination of duplicates from the above articles produces a list of the following arguments:

### **Whether Valid Arbitration Agreement**

Blanchard v. Central Park Lodge, 805 So. 2d 6 (Fla. App., 2d D.C.A., 2001) was a wrongful death case and violation of Nursing Home Residents Rights case. Lower court compelled arbitration. Second District Court of Appeals notes that the issues under Seifert,<sup>43</sup> are as follows: “In ruling on a motion to compel arbitration, "a court is limited to considering (1) whether the parties have entered into a valid arbitration agreement, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration has been waived.”<sup>44</sup> Court remands the case for the Circuit court to determine authenticity of contract and whether the Court has the entire contract and to determine the issue of unconscionability.

### **Contract of Adhesion**

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<sup>41</sup> Hopkins, Supra FN34 at p. 35.

<sup>42</sup> Hopkins, Supra at pp. 36-42. See also, Hopkins, Christopher B., “Guide to Enforcement of Arbitration in 2006,” and Hopkins, Christopher B., “Enforcing and Defeating Arbitration Clauses in Nursing Home Admission Agreements.

<sup>43</sup> Seifert v. U. S. Home Corp., 750 So. 2d 633 (Fla., 1999).

<sup>44</sup> Blanchard v. Central Park Lodge, 805 So. 2d 6, 8 (Fla. App., 2d D.C.A., 2001)

Pasteur Health Plan, Inc. v. Salazar, 658 So. 2d 543 (Fla. App., 3d D.C.A., 1995), although not a nursing home case, discusses contracts of adhesion. Here an HMO tried to deny medical care to an insured that had been injured in an ATC (All Terrain Cycle) accident, based upon the following ambiguous policy language: "Care for injuries or conditions that result from motor vehicle accidents, regardless of whether the member is the driver, passenger, or a pedestrian and regardless of whether the member has paid a fare, and boating accidents."<sup>45</sup> The Third District Court of Appeals then defines and explains a contract of adhesion and the effect of such a determination. "This contract also bears the hallmark of a contract of adhesion. Pasteur was in a strong bargaining position and Mrs. Salazar was only in a position to "take-it-or-leave-it. Such insurance policies are known in law as 'contracts of adhesion,' meaning 'a standardized contract, which, imposed and drafted by the party of superior bargaining strength [insurer], relegates to the subscribing party [insured] only the opportunity to *adhere* to the contract or *reject* it.'" Further, "Florida courts have long held that all ambiguities in insurance contracts, as contracts of adhesion, should be construed in the light most favorable to the insured."<sup>46</sup>

## Unconscionability

Steinhardt v. Goldman, 422 So. 2d 884 (Fla. App., 3d D.C.A., 1982) involves a 99 year ground lease and escalator clauses in a condominium document. Its importance to the current topic is its discussion of unconscionability. The Third District Court of Appeals first notes: "The law in Florida is clear that an unconscionable contract or an unconscionable term therein will not be enforced by a court of equity."<sup>47</sup> The opinion then goes on to describe the difference between procedural unconscionability and substantive unconscionability. "Procedural unconscionability focuses on those factors surrounding the entering of the contract which add up to an absence of meaningful choice on the part of one of the parties to the contract as to the terms therein; substantive unconscionability, on the other hand, focuses directly on those terms of the contract itself which amount to an outrageous degree of unfairness to the same contracting party."<sup>48</sup> The basis for procedural unconscionability was explained as follows: "The factors indicating procedural unconscionability in this case are manifest based on the record before us. The individual condominium unit owners had, in our view, no real meaningful choice in accepting the double escalation of rent clause or, indeed, any other clause contained in the subject ground lease."<sup>49</sup> The substantive unconscionability was even clearer: "The substantive unconscionability factors in this case are even more abundant when one focuses on the actual terms in the subject lease, including the double escalation of rent clause. This lease was, without doubt, a one-sided developer's lease containing exceptionally onerous terms for the individual unit owners."<sup>50</sup>

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<sup>45</sup> Pasteur Health Plan, Inc. v. Salazar, 658 So. 2d 543, 544 (Fla. App., 3d D.C.A., 1995)

<sup>46</sup> Id. at pp. 544-545.

<sup>47</sup> Steinhardt v. Goldman, 422 So. 2d 884, 889 (Fla. App., 3d D.C.A., 1982)

<sup>48</sup> Id. at p. 889..

<sup>49</sup> Id. at p. 892.

<sup>50</sup> Id. at p. 893.

Gainesville Health Care Center, Inc. v. Weston, 857 So. 2d 278 (Fla. App., 1<sup>st</sup> D.C.A., 2003) reversed Circuit Court's finding of procedural unconscionability. The following language was prominently displayed on the admission agreement:

THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS CONTRACT, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO ALL OF ITS TERMS.

At the time the Daughter admitted her Mother, her Mother had already been at the nursing home for several weeks. Daughter took 15-20 minutes during her lunch break and hurriedly signed all the many documents, but there was no testimony that she could not have taken the documents home with her overnight to read the same or to consult an attorney before signing.

The First District Court of Appeals states:

"Before a court may hold a contract unconscionable, it must find that it is *both* procedurally and substantively unconscionable. (Cites omitted) To determine whether a contract is procedurally unconscionable, a court must look to the "circumstances surrounding the transaction" to determine whether the complaining party had a "meaningful choice" at the time the contract was entered." Among the factors to be considered are whether the complaining party had a realistic opportunity to bargain regarding the terms of the contract, or whether the terms were merely presented on a "take-it-or-leave-it" basis; and whether he or she [\*\*15] had a reasonable opportunity to understand the terms of the contract. As one Florida court has noted, while this may "require[] an examination into a myriad of details including [the complaining party's] experience and education and the sales practices that were employed by the [other party] . . . , the basic concept is 'an absence of meaningful choice.'"<sup>51</sup>

The Court notes the above and said there was nothing to indicate that she had to sign the contract on a take it or leave it basis.

Romano v. Manor Care Inc., et.al., 861 So. 2d 59 (Fla. App., 2003). Wife admitted to nursing home and deteriorated rapidly over one month and left. She then filed suit. The day after she was admitted, the 79 year old husband was presented with eight separate documents that he was told he had to sign. Fourth District Court of Appeals reverses order enforcing arbitration. Judge Warner, writing for the majority states:

"The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." (Cites omitted) In other words, the more substantively oppressive the contract term, the less

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<sup>51</sup> Gainesville Health Care Center, Inc. v. Weston, 857 So. 2d 278, 284 (Fla. App., 1<sup>st</sup> D.C.A., 2003)

evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa”<sup>52</sup>.

Lacey v. Healthcare and Retirement Corporation of America, et.al., 918 So. 2d 333 (Fla. App., 4<sup>th</sup> D.C.A., 2005). Relies on Romano, *Supra*.<sup>53</sup>

Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. App., 1<sup>st</sup> D.C.A., 1991)<sup>54</sup>. Court determines that an arbitration clause that was simply included as part of a customer’s phone bill was both procedurally and substantively unconscionable.

Alterra Healthcare Corp. v. Linton, 953 So. 2d 574 (Fla. App., 1<sup>st</sup> D.C.A., 2007). Court determines that there was both procedural and substantive unconscionability and arbitration agreement was thus void.

### **Signatory Problems**

Technical Aid Corporation v. Tomaso and Airetel Staffing, Inc., 814 So. 2d 1259 (Fla. App., 5<sup>th</sup> D.C.A., 2002) is not a nursing home case. The question is whether a non party to a contract is bound by the arbitration provision. “Courts must consider three elements in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. Ordinary contract principles determine who is bound by an arbitration agreement.”<sup>55</sup> The Fifth District Court of Appeals determines that the third party non-signatory is not bound by the arbitration agreement.

Integrated Health Services of Green Briar, Inc. v. Lopez-Silvero, 827 So. 2d 338 (Fla. App., 3<sup>rd</sup> D.C.A., 2002). Six documents were signed at once and nursing home personnel forgot to sign one of them. Resident claimed that nursing home’s failure precluded arbitration, but the Third District Court of Appeal disagreed and compelled arbitration.<sup>56</sup>

Germann v. Age Institute of Florida, et.al. 912 So. 2d 590 (Fla. App. 2d D.C.A., 2005). Wife Estate not bound to arbitrate since wife did not sign and she was not an intended beneficiary.<sup>57</sup>

Consolidated Resources Healthcare Fund I, Ltd. d/b/a Lakeside Health Center v. Fenelus, 853 So. 2d 500, (Fla. App., 4<sup>th</sup> D.C.A., 2003). Nursing home representative

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<sup>52</sup> Romano v. Manor Care Inc., et.al., 861 So. 2d 59, 62 (Fla. App., 2003)

<sup>53</sup> Lacey v. Healthcare and Retirement Corporation of America, et.al., 918 So. 2d 333 (Fla. App., 4<sup>th</sup> D.C.A., 2005).

<sup>54</sup> Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. App., 1<sup>st</sup> D.C.A., 1991).

<sup>55</sup> Technical Aid Corporation v. Tomaso and Airetel Staffing, Inc., 814 So. 2d 1259, 1261 (Fla. App., 5<sup>th</sup> D.C.A., 2002)

<sup>56</sup> Integrated Health Services of Green Briar, Inc. v. Lopez-Silvero, 827 So. 2d 338 (Fla. App., 3<sup>rd</sup> D.C.A., 2002).

<sup>57</sup> Germann v. Age Institute of Florida, et.al. 912 So. 2d 590 (Fla. App. 2d D.C.A., 2005).

signed as a witness and not in the place for the nursing home. Both acting as if bound and not a fatal flaw.<sup>58</sup>

## **Impermissible Terms**

Northport Health Services, v. Estate of Verbil M. Raidoja, 851 So. 2d 234 (Fla. App., 5<sup>th</sup> D.C.A., 2003). Florida nursing home arbitration agreement provided that the arbitration would be determined by Alabama law and that the arbitration would take place in Tuscaloosa, Alabama. Over objection, such arbitration cannot be compelled.<sup>59</sup>

## **Waiver**

Gilman v. Butzloff, 22 So. 2d 263 (Fla. S.Ct. 1945) is a seminal case on waiver.

"We have held that 'Waiver is the intentional relinquishment of a known right,' that it does not arise from forbearance for a reasonable time, but that it may be inferred from conduct or acts putting one off his guard and leading him to believe that a right has been waived.... A party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution."<sup>60</sup>

## **Resident's Bill of Rights or other statutory rights limited**

Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296 (Fla. App. 4<sup>th</sup> D.C.A., 2005) involves an admission arbitration agreement that was signed by the resident's son under a health care proxy under F.S. A. 765.401. Arbitration agreement provided for binding arbitration by the National Health Lawyers Association. Court decides that Nursing Home Residents Act is a remedial statute and the arbitration agreement is contrary to the public policy behind that statute. "There is nothing in the statute to indicate legislative intent that such a proxy can enter into contracts which agree to things not strictly related to health care decisions. In our opinion, a proxy is not authorized to waive the right to trial by jury, to waive common law remedies, or to agree to modify statutory duties applicable generally to all persons receiving health care services."<sup>61</sup>

Richmond Healthcare, Inc. v. Digati, 878 So. 2d 388 (Fla. App., 4<sup>th</sup> D.C.A., 2004). Here the plaintiff's attorney argued that the discovery and evidence rules of the National Health Lawyers association conflict with the civil remedies under the Nursing Home Residents Rights Act. Court examines and cites numerous United States Supreme Court cases generally upholding arbitration under the F.A.A. Court also notes that at this time unconscionability is not at issue, which issue needs to be determined by the Circuit Court after and evidentiary hearing. "Instead the issue here is whether a court has the power --

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<sup>58</sup> Consolidated Resources Healthcare Fund I, Ltd. d/b/a Lakeside Health Center v. Fenelus, 853 So. 2d 500, (Fla. App., 4<sup>th</sup> D.C.A., 2003).

<sup>59</sup> Northport Health Services, v. Estate of Verbil M. Raidoja, 851 So. 2d 234 (Fla. App., 5<sup>th</sup> D.C.A., 2003).

<sup>60</sup> Gilman v. Butzloff, 22 So. 2d 263, 265 (Fla. S.Ct. 1945)

<sup>61</sup> Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296, 301 (Fla. App. 4<sup>th</sup> D.C.A., 2005)

either generally or specifically under statute -- to decline to enforce an arbitration agreement simply because it waives the judicial remedy of access to a court to resolve claims arising under statutory rights. Generally speaking, there is no common law basis to refuse to enforce valid agreements to arbitrate by competent parties merely because they involve a waiver of statutory rights and remedies.”<sup>62</sup>

SA-PG-Ocala, LLC v. Stokes, 935 So. 2d 1242 (Fla. App., 5<sup>th</sup> D.C.A., 2006) determines that the AHLA (f/n/a NHLA) arbitration agreement substantially limits rights under Nursing Home Residents Rights Act and therefore not enforceable.<sup>63</sup>

Five Points Health Care Ltd. d/b/a Park Ridge Nursing Center, v. Alberts, 867 So. 2d 520 (Fla. App., 1<sup>st</sup> D.C.A., 2004) reverses lower court order denying arbitration and in doing so, states:

“Statutory claims in Florida are subject to arbitration in numerous instances. A claim brought under the *Florida Deceptive and Unfair Trade Practice Act*, Chapter 501, Part II, Florida Statutes, is subject to arbitration. This is true even though a claim under the *Deceptive and Unfair Trade Practice Act* "does not arise out of the contract, nor does it exist solely for the benefit of the parties to the contract.”<sup>64</sup>

Knowles v. Beverly Enterprises-Florida, 898 So. 2d 1 (Fla., 2004). Supreme determines that a Personal Representative may not bring a claim under the Nursing Home Patient’s Bill of Rights when the wrongful death was not related to a violation of said statute.<sup>65</sup>

## Conclusion

If the nursing home representative carefully explains the contractual provisions to the in-coming resident or his/her representative and clearly documents this and if certain limiting provisions are not placed in the arbitration agreement, it may very likely be upheld by the courts. If there is no such supporting documentation or if there are severe limitations which are contrary to the Nursing Home Residents Bill of Rights, it very likely may not be upheld. If the Fairness in Nursing Home Arbitration Act is passed in its current form in the 111<sup>th</sup> Congress and signed into law by President Obama, then predispute nursing home arbitration agreements will be invalid in most instances.

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<sup>62</sup> Richmond Healthcare, Inc. v. Digati, 878 So. 2d 388, 390 (Fla. App., 4<sup>th</sup> D.C.A., 2004)

<sup>63</sup> SA-PG-Ocala, LLC v. Stokes, 935 So. 2d 1242 (Fla. App., 5<sup>th</sup> D.C.A., 2006)

<sup>64</sup> Five Points Health Care Ltd. d/b/a Park Ridge Nursing Center, v. Alberts, 867 So. 2d 520, 522 (Fla. App., 1<sup>st</sup> D.C.A., 2004)

<sup>65</sup> Knowles v. Beverly Enterprises-Florida, 898 So. 2d 1 (Fla., 2004)

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