

REVERSE PRE-EMPTING<sup>1</sup> THE FEDERAL ARBITRATION ACT:  
ALLEVIATING THE ARBITRATION CRISIS IN NURSING  
HOMES

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I.	INTRODUCTION .....	375
II.	HISTORY & LEGISLATION .....	378
III.	SUPREME COURT DECISIONS INTERPRETING THE FAA .....	381
IV.	THE AFTERMATH OF PREEMPTION: UNREGULATED ARBITRATION IN NURSING HOMES .....	384
	A. <i>Unregulated Arbitration in Nursing Homes Creates a Multifaceted System of Deterrence</i> .....	384
	1. Procedural Unconscionability .....	384
	2. Substantive Unconscionability .....	387
	3. Prohibitive Costs .....	392
	4. Slanted Outcomes .....	393
	B. <i>The Deterrent Effects of Arbitration are Magnified in Nursing Homes</i> .....	394
	1. The Typical Claimant .....	394
	2. The Typical Claim .....	395
V.	THE FUTURE PLIGHT OF NURSING HOME RESIDENTS .....	395
VI.	PROPOSED LEGISLATION: A PARALLEL TO THE MCCARRAN ACT .....	397
	A. <i>Congress Should Consent to State Regulation</i> .....	397
VII.	PROPOSED GUIDELINES FOR STATES .....	400
VIII.	CONCLUSION .....	402

I. INTRODUCTION

In 1925, Congress enacted the Federal Arbitration Act (FAA),<sup>2</sup> which codified the enforceability of arbitration agreements<sup>3</sup> in expansive, wholesale language.<sup>4</sup>

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\*The author would like to thank her husband for his unconditional support and her mother for her tireless encouragement.

<sup>1</sup> In re Kepka, 178 S.W.3d 279, 288 (Tex. Ct. App. 2005). This case essentially determined that the McCarran Act “reverse pre-empted” the Federal Arbitration Act so that the states could effectively regulate the business of insurance independently. In other words, arbitration notice requirements are not preempted by the Federal Arbitration Act if they are enacted regarding the business of insurance.

<sup>2</sup> 9 U.S.C.A. § 1 (West 2008).

“The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause.”<sup>5</sup> The FAA provides that “a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>6</sup> In a series of later cases, the United States Supreme Court interpreted the FAA’s broad rule of enforceability as applying to both consumers and merchants in federal and state courts.<sup>7</sup> Most recently in *Doctor’s Associates, Inc. v. Casarotto*,<sup>8</sup> the Court held that states were preempted from enacting substantive legislation regarding arbitration, and that even legislation concerning a simple notice requirement<sup>9</sup> would be invalidated as conflicting with the “goals and policies” of the FAA.<sup>10</sup>

By preempting the states from regulating certain aspects of arbitration, specifically the process associated with agreeing to arbitration, the Court has left a gaping hole of unregulated territory in this alternative adjudicatory forum.<sup>11</sup> The Court’s acquiescence and restrictions on state legislation, although once intended to “make arbitration agreements as enforceable as other contracts,”<sup>12</sup> has “elevate[d] arbitration provisions [to a standing] above all other contractual provisions.”<sup>13</sup> The

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<sup>3</sup> The definition of an arbitration agreement is “a contractual provision mandating arbitration – and thereby avoiding litigation – of disputes about the contracting parties’ rights, duties and liabilities.” BLACK’S LAW DICTIONARY 113 (8<sup>th</sup> ed. 1999).

<sup>4</sup> 9 U.S.C.A. § 2 (West 2008).

<sup>5</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

<sup>6</sup> *Id.* at 1-2 (quoting 9 U.S.C. § 2). When Congress and the Supreme Court say that states are only entitled to revoke an arbitration agreement on grounds as exist “at law or in equity for the revocation of any contract [they are referring to] traditional contract defenses such as fraud, duress and unconscionability.” Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 272-73 (2004).

<sup>7</sup> See *Keating*, 465 U.S. at 11-14 (noting that the Court’s language in *Prima Paint* (that Congress draws its authority for the FAA from the Commerce Clause) indicates that the FAA was intended to apply in federal as well as in state courts) ; see also *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 684-85 (1996); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-05 (1967).

<sup>8</sup> *Casarotto*, 517 U.S. at 681.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 688.

<sup>11</sup> Arbitration is defined as “a method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding.” BLACK’S LAW DICTIONARY 112 (8<sup>th</sup> ed. 1999).

<sup>12</sup> See *Prima Paint*, 388 U.S. at 404 n.12.

<sup>13</sup> See *Prima Paint*, 388 U.S. at 411 (Black, J., dissenting). Justice Black’s concerns that the majority’s holding would have the eventual effect of raising arbitration agreements to a position above ordinary contracts is exemplified in the detrimental effects (such as forcing nursing home residents that unknowingly enter into arbitration agreements to keep the

consequence is that state legislatures are foreclosed from enacting even minimal safeguards to protect unwary consumers, and courts can only cure unconscionable arbitration agreements on a case-by-case basis.

In nursing homes, preemption has created an arbitration crisis,<sup>14</sup> whereby potential residents are passively compelled to sign contracts that contain binding, pre-dispute arbitration clauses as a condition of being admitted to the facility. This unregulated process is wrought with insurmountable obstacles<sup>15</sup> which collectively deter residents from obtaining redress in either a court of law or the arbitral forum.<sup>16</sup> Federal legislation is essential to restore fundamental principles of contract law<sup>17</sup> and

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agreement to arbitrate) that the FAA's general rule of enforceability has had in the context of nursing homes.

<sup>14</sup> See *Small v. HCF of Perrysburg, Inc.*, 159 Ohio App. 3d 66, 823 N.E.2d 19 (Ohio Ct. App. 2004) (involving an arbitration agreement that contained a loser pays provision that was presented to the spouse of the future resident in a frantic admissions process and was determined to rise to the level of procedural unconscionability); see also *Fortune v. Castle Nursing Homes Inc.*, 843 N.E.2d 1216 (Ohio Ct. App. 2004) (involving a nursing home arbitration agreement that contained a loser pays provision that the Court held was substantively unconscionable because it required the nursing home resident to pay the nursing home's attorney fees if the resident did not prevail at the arbitration hearing); see also Plaintiff's Brief in Opposition to Defendant's Motion for Judgment on the Pleadings and Alternative Motion to Refer to Binding Arbitration at 3, *Day v. Waterford Commons*, No. 05994 (Court Sept. 29, 2006) [hereinafter Brief for the Plaintiff] (involving a nursing home admission agreement that contained an arbitration clause on the twelfth page of a fourteen page contract as well as a loser pays provision requiring Day to pay Waterford Commons' costs and attorney fees if she lost at the arbitral hearing).

<sup>15</sup> The process of arbitration entails several obstacles that make it extremely difficult to obtain redress. These obstacles are especially problematic in nursing homes. Some of the obstacles facing residents in nursing homes that wish to obtain redress for injuries include one-sided terms (such as when the nursing home maintains the right to go to court and dispute unpaid fees), "loser pays provisions" (which require the resident loser of an arbitration hearing to pay the nursing home facilities costs), prohibitive costs and outcomes that are statistically slanted in favor of businesses. These obstacles are worsened by the fact that the typical claimant in a nursing home is elderly and possibly unable to physically endure the process of arbitration. These obstacles are also worsened by the typical claim in a nursing home, which generally involves negligence, which is not well suited to the process of arbitration because of the lengthy fact-finding procedures involved in that type of claim.

<sup>16</sup> Residents are deterred from obtaining redress in a court of law because nursing home arbitration clauses forfeit the resident's statutorily defined right to a hearing before a jury. Residents are deterred from obtaining redress in the arbitral forum because of the obstacles which make obtaining redress difficult such as prohibitive costs, one-sided terms, "loser pays provisions," and slanted outcomes. Moreover, "these arbitration agreements may be good for nursing homes, but they are expensive proceedings in a forum generally unfavorable to consumers." Krasuski, *supra* note 6, at 273.

<sup>17</sup> See generally *Prima Paint*, 388 U.S. at 411 (Black, J., dissenting) (arguing that the majority's holding in *Prima Paint*, that the FAA was generally enforceable upon the states, violated basic principles of contract law, mainly, to honor the intent of the parties at the time the contract was formed; implying that the general enforceability of the FAA could work to enforce an arbitration agreement that was unknowingly entered into).

fairness to nursing home admission agreements which, due to the lack of regulation, have been abandoned in favor of “administrative convenience.”<sup>18</sup>

Section II provides a brief history of arbitration in consumer contracts, and the development of federal and state legislation condoning the practice of arbitrating consumer disputes. Section III analyzes United States Supreme Court decisions that have interpreted the FAA to preempt state legislation regarding arbitration. Section IV discusses the aftermath of preemption and unregulated arbitration in nursing homes. Section V considers the future plight of nursing home residents if the system is permitted to continue without regulation. Section VI of this Note proposes a solution to alleviate the arbitration crisis in nursing homes that will maintain the viability of arbitration as an alternative to litigation. Finally, section VII suggests state guidelines to regulate the process of agreeing to arbitrate in nursing homes that will protect the interests of both nursing home facilities and residents, while more adequately fulfilling the original intent of Congress when it enacted the FAA.

## II. HISTORY & LEGISLATION

Historically, arbitration agreements between merchants were utilized to ensure an efficient forum for dispute resolution<sup>19</sup> regarding recurrent business issues.<sup>20</sup> Common law courts were hesitant, however, to permit pre-dispute arbitration agreements to infiltrate the business dealings of merchants and consumers.<sup>21</sup> The common law courts distrusted arbitration agreements between merchants and consumers because it “meant [a] loss of the right to litigate.”<sup>22</sup> Moreover, “courts were worried that a stronger party might take advantage of a weaker party by forcing the latter to agree to arbitration instead of litigation.”<sup>23</sup>

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<sup>18</sup> See *Cramer v. Auglaize Acres*, 113 Ohio St. 3d 266, 268, 865 N.E.2d 9, 12 (2007) (quoting Note, *H.B. 600: Ohio's Bill of Rights for Nursing Home Patients*, 5 U. DAYTON L. REV. 507, 508-509 (1980)).

<sup>19</sup> *Small*, 823 N.E.2d at 24 (discussing the courts concern that the initial reasons that arbitration agreements were enforced is inapplicable to some consumer disputes).

<sup>20</sup> At common law, arbitration agreements were utilized between merchants that wanted to quickly resolve disputes arising under a contract and then summarily remain *in* the contract after disposition of the issue. This is much different than the use of arbitration today. Arbitration hearings today between merchants and consumers, generally surround a dispute regarding the enforceability of the arbitration clause itself, and/or one party's desire to *end* the contractual relationship subsequent to the arbitration hearing as opposed to remaining in it and continuing the contractual relationship.

<sup>21</sup> See JIANG ZHAODONG, *FEDERAL ARBITRATION LAW: A STUDY OF FEDERAL-STATE RELATIONS IN THE ENFORCEMENT OF ARBITRATION AGREEMENTS* 12-13 (U.M.I. Dissertation Services) (1993).

<sup>22</sup> *Id.* at 12. Common law courts were concerned about the loss of the right to litigate because by agreeing to an arbitration clause, an individual typically forfeits his or her right to obtain redress in a court of law. Today, common law concerns have become a reality in that courts are routinely determining the conscionability of contracts that contain arbitration clauses. Generally, consumers claim that they did not know about, did not understand, or that they were not thoroughly explained what the agreement entailed at the formation of the contract and should therefore not be bound to arbitration.

<sup>23</sup> *Id.* at 12-13.

Despite these concerns, modern arbitration steadily progressed and in 1925 the FAA codified the enforceability of arbitration agreements in expansive terms.<sup>24</sup> The FAA was enacted to guarantee that courts would enforce arbitration agreements.<sup>25</sup> Critics argue that when Congress enacted the FAA, it “did not intend to enforce arbitration agreements that had been foisted [upon] ignorant consumers, and it did not intend to prevent states from protecting weaker parties.”<sup>26</sup> Therefore, although the FAA was originally “intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power, a series of United States Supreme Court decisions changed the meaning of the Act.”<sup>27</sup>

Today,<sup>28</sup> the FAA has been interpreted by the Supreme Court to “extend to disputes between parties of greatly disparate economic power.”<sup>29</sup> Moreover, Supreme Court decisions have forced states to enact compliant legislation regarding arbitration in consumer contracts as opposed to carving out exceptions to effectively protect consumers from certain types of contracts.<sup>30</sup> Critics argue that these consequences are not an accurate representation of Congress’ initial intent when it enacted the FAA.<sup>31</sup>

The Ohio Arbitration Act (Act)<sup>32</sup> is one example of a compliant state statute modeled after the provisions of the FAA. The language of the Act is representative of other state arbitration statutes<sup>33</sup> and is indistinguishable from that of the FAA.<sup>34</sup>

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<sup>24</sup> 9 U.S.C.A. § 2 (West 2008).

<sup>25</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (citing *Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989)).

<sup>26</sup> Robert Hornstein, *The Fiction of Freedom of Contract - - Nursing Home Admission Contract Arbitration Agreements: A Primer on Preserving the Right of Access to Court Under Florida Law*, 16 ST. THOMAS L. REV. 319, 323 (2003). Whatever Congress’ initial intent was, the practical implication of the FAA is that a general, uniform rule of enforceability has been adopted and maintained as opposed to a more equitable subjective application that would enable the states to restrict unconscionable practices.

<sup>27</sup> The Arbitration Fairness Act of 2007, S. 1782, 110<sup>th</sup> Cong. § 1(2), 2(2) (2007).

<sup>28</sup> “In an effort to insulate themselves from litigation and what defendants often characterize as the ‘run away jury,’ nursing homes have increasingly turned to arbitration. [M]ost of the nation’s largest nursing home chains, including Integrated Health Services, Beverly Industries, and Mariner, include arbitration agreements in their admissions packets.” Krasuski, *supra* note 6, at 267-68.

<sup>29</sup> The Arbitration Fairness Act of 2007, S. 1782, 110<sup>th</sup> Cong. § 2(2) (2007).

<sup>30</sup> *See generally Casarotto*, 517 U.S. at 681-88 (invalidating a very minimal guideline imposed by the Montana legislature requiring notice of the arbitration agreement “typed in underlined capital letters on the first page of the contract,” as contradictory to the purposes of the FAA).

<sup>31</sup> *See generally* The Arbitration Fairness Act of 2007, S. 1782, 110<sup>th</sup> Cong. § 2(2) (2007).

<sup>32</sup> OHIO REV. CODE ANN. §§ 2711.01-.24 (West 2008).

<sup>33</sup> *See generally* National Center for State Courts, *Arbitration Contracts and Procedures*, <http://www.ncsconline.org/WC/CourTopics/StateLinks.asp?id=9#> (last visited Dec. 1, 2008) (listing the different state statutes that represent each states comparable arbitration legislation).

However, history<sup>35</sup> and recent case law suggest that state compliance with the FAA's broad enforceability rule is not at will.<sup>36</sup> Recognizing the inequity of pre-dispute arbitration agreements in nursing homes, states have enacted nursing home bills of rights which generally provide residents with a statutory civil cause of action against violations of a multitude of enumerated residents' rights.<sup>37</sup> Nursing homes, however, have circumvented this protection by requiring residents to waive these causes of action in the admissions agreement.<sup>38</sup> Moreover, state statutes that have attempted to codify exceptions to protect the weaker party in transactions have been invalidated<sup>39</sup> by a string of Supreme Court decisions interpreting the FAA to preempt any substantive state legislation in this field.<sup>40</sup>

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<sup>34</sup> The Ohio Arbitration Act applies to written contracts and expressly declares them "valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." § 2711(A). This language is exactly the same as the language in the FAA. *See* 9 U.S.C.A. § 2 (West 2008). The Ohio Arbitration Act has similarly been interpreted to create a presumption of validity regarding the enforceability of written contracts containing arbitration agreements. OHCONSL § 21:3.

<sup>35</sup> *See generally Keating*, 465 U.S. at 14 (discussing reasons why Congress might have enacted the FAA, such as "old common law hostility toward arbitration and the failure of state arbitration statutes to mandate enforcement of arbitration agreements").

<sup>36</sup> *See Casarotto*, 517 U.S. at 681 (invalidating a Montana statute that required minimal notice requirements in contracts containing arbitration clauses on the first page of the document to ensure that certain contracts were entered into knowingly); *see also Keating*, 465 U.S. at 14 (evinced a history of dissatisfaction with arbitration agreements in consumer contracts among the states).

<sup>37</sup> *See Casarotto*, 517 U.S. at 681 (regarding a Montana state law requiring minimal notice requirements in contracts containing arbitration clauses that was struck down as violating the "goals and policies" of the FAA as interpreted by the Supreme Court).

<sup>38</sup> *See generally Small*, 823 N.E.2d at 22 (providing that "the parties understand that by signing this agreement that they are agreeing to waive their rights to sue in a court of law and are agreeing to arbitrate disputes"); *see generally* Brief for the Plaintiff, *supra* note 14, at 4 (providing the arbitration clause used by Waterford Commons nursing home which generally forfeits the resident's right to obtain relief in a court of law upon agreeing to the terms of the arbitration clause)

<sup>39</sup> *See Casarotto*, 517 U.S. at 688 (holding that the Montana state law requiring minimal notice requirements for the use of arbitration agreements was preempted by the FAA).

<sup>40</sup> *See Casarotto*, 517 U.S. at 688 (holding that the FAA preempted the Montana state law requiring minimal notice of an arbitration clause in certain types of contracts); *see also Dobson*, 513 U.S. at 272-74 (concluding that the FAA does not use language that would allow states to create exceptions to the general enforceability of arbitration agreements); *see also Volt Info, Scis., Inc.*, 489 U.S. at 478-79 (adopting the Court's language in *Keating* and again endorsing the general enforceability of arbitration agreements under the FAA); *see also Perry v. Thomas*, 482 U.S. 483, 492 (1987) (holding that the FAA preempted a California law regarding arbitration); *see also Keating*, 465 U.S. at 10-14 (stating that the FAA is applicable to consumers in federal and state court under Congress' Commerce Clause authority); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26 (1983) (reaffirming the notion that the FAA creates federal substantive law "establishing a duty to honor an agreement to arbitrate," but also noting that the FAA is "an anomaly in the field of federal-court jurisdiction"); *see also Prima Paint*, 388 U.S. at 403-06 (establishing the bedrock principle relied upon in subsequent opinions that the FAA creates substantive law binding on

### III. SUPREME COURT DECISIONS INTERPRETING THE FAA

The first significant Supreme Court decision interpreting the FAA as preempting state legislation arose in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>41</sup> where the parties to a dispute, challenging the validity of an arbitration agreement, arrived in federal court upon diversity jurisdiction. In *Prima Paint*,

one party . . . alleged that the other had committed fraud in the inducement of the contract, although not of [the] arbitration clause in particular, and sought to have the claim of fraud adjudicated in federal court. The Court held that, notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract 'is for the arbitrators and not for the courts.'<sup>42</sup>

The Supreme Court also held that "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate,"<sup>43</sup> thus prohibiting federal courts from considering the merits. Essentially, the Court declared that the FAA "creates federal *substantive* law requiring the parties to honor arbitration agreements,"<sup>44</sup> and that this law is "applicable in *state and federal court*."<sup>45</sup> Additionally, the majority emphasized that "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so,"<sup>46</sup> and to provide a "speedy [forum] . . . not subject to delay and obstruction in the courts."<sup>47</sup>

Justice Black, writing for the dissent in *Prima Paint*, argued that the majority's position "approve[d] a rule which is not only contrary to state law, but contrary to the intention of the parties and to accepted principles of contract law - a rule which . . . *elevates arbitration provisions above all other contractual provisions*."<sup>48</sup> Justice Black's dissent in *Prima Paint* accurately predicted the future impact of a federal statute broadly endorsing arbitration and preempting states from narrowing the force of that breadth. Justice Black's concerns are embodied in the obstacles that nursing home residents face today in obtaining redress as a result of unregulated pre-dispute arbitration agreements.<sup>49</sup>

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both federal and state courts under Congress' Commerce Clause authority that effectively preempts any substantive state legislation regarding arbitration agreements individually).

<sup>41</sup> *Prima Paint*, 388 U.S. at 395.

<sup>42</sup> *Keating*, 465 U.S. at 11 (quoting *Prima Paint*, 388 U.S. at 400).

<sup>43</sup> *Prima Paint*, 388 U.S. at 404.

<sup>44</sup> *Keating*, 465 U.S. at 16 n.9 (interpreting and reinstating the holding in *Prima Paint* that the FAA is substantive legislation preempting state legislation) (emphasis added).

<sup>45</sup> *Id.* at 12 (emphasis added).

<sup>46</sup> *Prima Paint*, 388 U.S. at 404 n.12 (emphasis added).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 411 (Black, J., dissenting) (emphasis added).

<sup>49</sup> Nursing home residents that agree to pre-dispute arbitration clauses in their admission agreement will face many obstacles to obtaining redress that would not be encountered if a similar case was litigated in a court of law. Examples of these obstacles (which are discussed

The second landmark Supreme Court decision interpreting the FAA occurred in *Southland Corp. v. Keating*,<sup>50</sup> in which the Court spoke more specifically about the issue of explicitly preempting state legislation. In *Keating*, franchisees brought an action against the franchisor “alleging . . . fraud, breach of contract and violation of disclosure requirements.”<sup>51</sup> The Court held that section 2 of the FAA “withdraws 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>52</sup> Moreover, the Court noted that “Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements,”<sup>53</sup> and “provided for revocation of arbitration agreements only upon grounds as exist at law or in equity for the revocation of any contract.”<sup>54</sup>

In *Keating*, Justice O’Connor’s dissenting opinion argued that when the FAA was enacted, Congress only intended to “create uniform law binding . . . in the federal courts.”<sup>55</sup> Moreover, Justice O’Connor noted that “although arbitration is a worthy alternative to litigation, [the majority’s] exercise in judicial revisionism [went] too far.”<sup>56</sup> Similar to Justice Black’s dissenting opinion in *Prima Paint*, Justice O’Connor’s predictions regarding the impact of the broad enforceability of arbitration are exemplified by the arbitration crisis in nursing homes occurring as a direct result of an unregulated system. Justice O’Connor’s dissent supports the proposition that although arbitration may operate as an efficient alternative to litigation in some commercial settings,<sup>57</sup> it can amount to a severely inadequate system of dispute resolution in certain contexts;<sup>58</sup> the FAA, however, makes no exceptions.

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later in this paper) include one-sided terms, loser pays provisions, adhesion contracts, prohibitive costs and slanted outcomes in the arbitral forum.

<sup>50</sup> *Keating*, 465 U.S. at 1.

<sup>51</sup> *Id.* at 1, syllabus.

<sup>52</sup> *Casarotto*, 517 U.S. at 684 (quoting *Keating*, 465 U.S. at 10).

<sup>53</sup> *Keating*, 465 U.S. at 16.

<sup>54</sup> *Casarotto*, 517 U.S. at 685 (quoting 9 U.S.C. § 2).

<sup>55</sup> *Keating*, 465 U.S. at 35 (O’Connor, J., dissenting) (emphasis added).

<sup>56</sup> *Id.* at 36.

<sup>57</sup> See generally Ernst & Young, L.L.P., *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases 1* (2004) [hereinafter Ernst & Young]. Critics argue that the benefits of arbitration that are possibly realized in commercial settings cannot be imputed to consumer disputes. This study, along with many other studies attempting to show the “merit of consumer disputes,” has been regarded as of “questionable value.” The Ernst & Young study has been predominantly criticized because it claims to “examine the merits of arbitration as compared to litigation, [however] the study does not [actually] examine outcomes for comparable cases in litigation.” F. PAUL BLAND, JR., MICHAEL J. QUIRK, LESLIE A. BAILEY, RICHARD H. FRANKEL & JONATHAN SHELDON, *CONSUMER ARBITRATION AGREEMENTS 2* (4<sup>TH</sup> ed. 2006).

<sup>58</sup> See *Small*, 823 N.E.2d at 24 (holding that it was procedurally unconscionable to require Mrs. Small to dispute her claims in the arbitral forum because of the circumstances surrounding the formation of the contract, i.e., that she was under a great deal of stress, that she was over 69 years of age, that she had no particular legal experience and was not

Finally, in 1996, the Supreme Court decided *Doctor's Associates, Inc. v. Casarotto*,<sup>59</sup> in which the Court's language, while merely reaffirming its holdings in *Prima Paint* and *Keating*, went much further than its previous decisions. In *Casarotto*, Montana's state legislature had enacted a "first-page notice requirement which govern[ed] . . . contracts subject to arbitration." The notice provision stated that:

notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.<sup>60</sup>

The Montana provision was enacted to alleviate concerns<sup>61</sup> associated with individuals that unknowingly enter into adhesion contracts subject to binding arbitration.<sup>62</sup> The provision's central agenda was to ensure that a true meeting of the minds was reached during the formation of contracts containing arbitration clauses.<sup>63</sup>

In *Casarotto*, the Court invalidated Montana's first-page notice requirement on the grounds that it displaced the purpose of the FAA – specifically, the "goals and policies of the FAA."<sup>64</sup> Essentially, the Court in *Casarotto* provided that state courts may invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," but that state legislatures are not entitled to

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accompanied by counsel, and that the terms of the agreement were not explained to her); see also *Fortune* 843 N.E.2d at 1221 (holding that the agreement to arbitrate was substantively unconscionable because it would force Fortune to pay the nursing home's attorney fees and costs if she lost at the arbitration hearing, and also noting that these types of provisions could deter residents from pursuing claims).

<sup>59</sup> *Casarotto*, 517 U.S. at 681.

<sup>60</sup> *Id.* (citing Mont.Code Ann. § 27-5-114(4)). The Montana statute was enacted in the process of amending legislation to conform with the FAA. Concern was expressed by the legislature that a general rule of enforceability, without guidelines on the utilization of arbitration clauses, would unknowingly submit some individuals, especially elderly individuals, to the process of obtaining redress only in the arbitral forum. The legislature's primary concern was on the impact of the FAA's general enforceability concerning contracts of adhesion.

<sup>61</sup> "During the consideration of Montana's Uniform Arbitration Act, the testimony and legislative statements focused on the positive aspects of arbitration. Concerns were raised, however, about adhesion contracts. For example, Senator Tom Towe told the Committee about Nannabelle Nickleberry, an elderly woman who signed a home improvement contract which required that disputes be arbitrated in New York. In response to such concerns, the legislation was amended to include the provision at issue in this case." See United States Supreme Court Brief for Respondent at 4, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (No. 95-559) [hereinafter *Casarotto* Brief].

<sup>62</sup> See *Casarotto* Brief, *supra* note 61, at 4.

<sup>63</sup> In enacting its minimal notice requirement, the Montana legislature sought to do little more than enforce a basic principle of contract law – that the parties to an agreement entered into it knowingly and that a true "meeting of the minds" was reached in regard to all of the terms of the contract, particularly the arbitration agreement.

<sup>64</sup> *Casarotto*, 517 U.S. at 688.

codify the rules repeatedly enunciated in those decisions.<sup>65</sup> Moreover, the Court opines that any substantive state legislation on the topic of arbitration is contrary to the goals and policies of the FAA – even if such legislation is wholly consistent with the goals and policies of well established principles of contract law.<sup>66</sup> In so deciding, the Court has limited alleviation from unconscionable arbitration agreements to piecemeal assessment by the courts – a process which has little, if any, deterrent effect on the unconscionable practices utilized by nursing homes to the detriment of residents.

#### IV. THE AFTERMATH OF PREEMPTION: UNREGULATED ARBITRATION IN NURSING HOMES

##### A. *Unregulated Arbitration in Nursing Homes Creates a Multifaceted System of Deterrence*<sup>67</sup>

Procedural and substantive unconscionability, prohibitive costs, and slanted outcomes constitute a few of the deterrents associated with pre-dispute arbitration clauses in nursing home admission agreements. These deficiencies are the product of an unregulated system, and are magnified by the unique claim and claimant in the nursing home environment that are particularly vulnerable to the obstacles of arbitration. In addition to producing the collective effect of deterring residents' claims, this system of deterrence also filters claimants according to the extent and availability of their resources as opposed to the merit of their claims.

##### 1. Procedural Unconscionability

The first aspect of arbitration that serves as an impediment to potential nursing home litigants seeking redress is procedural. Procedural unconscionability looks to the circumstances surrounding the formation of the contract and

involves those factors bearing on the relative bargaining position of the contracting parties, e.g., age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether

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<sup>65</sup> Section 2 of the FAA and the United States Supreme Court have repeatedly said that courts can invalidate agreements to arbitrate on grounds that exist “at law or in equity,” but that the state legislature is not so similarly situated. What this essentially means for example, is that Montana courts could repeatedly invalidate nursing home contracts which exhibit insufficient or even unconscionable notice procedures, but the legislature cannot codify the decisions that the courts continually enunciate concerning the same recurring practices by nursing homes. Under these circumstances it is apparent that court decisions are not deterring nursing homes from their unconscionable practices because it’s almost worth it for the nursing home to take its chances with the residents that will challenge the validity of the agreement.

<sup>66</sup> See *Prima Paint*, 388 U.S. at 411 (Black, J., dissenting) (arguing that the majority’s general enforceability rule violates (among other things) basic principles of contract law, i.e., that a meeting of the minds must be established before a contract will be enforced).

<sup>67</sup> This Note proposes that the obstacles associated with obtaining redress for nursing home residents who are constrained to an arbitration clause, i.e., unconscionability, prohibitive costs, “loser pays provisions,” one-sided terms, and slanted outcomes, which are magnified by the typical claim and claimant in the nursing home environment – create a multifaceted system of deterrence that works to impede nursing home residents from obtaining redress.

the terms were explained to the weaker party, whether alternatives in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question.<sup>68</sup>

In nursing homes, procedural unconscionability generally concerns the facility's inherently superior bargaining power in comparison to the potential residents' which is fundamentally weaker.

Intrinsically, contracting for placement in a nursing home suggests that the future resident seeking care will be of progressed age,<sup>69</sup> possibly diminished capacity,<sup>70</sup> that the agreement will be drafted by the nursing home, and that the business acumen of the resident will be inadequate to protect the rights extinguished by the arbitration agreement. The typical nursing home resident is aged 85 or older,<sup>71</sup> and many times the process of admission is undergone in a stressful, emergency-type situation.<sup>72</sup> Taking these factors into consideration, as well as the fact that arbitration clauses typically involve forfeiting an individual's civil cause of action,<sup>73</sup> it is difficult to imagine a nursing home admission agreement, mandating that disputes be submitted to arbitration that would not entail procedural unconscionability.

In sum, procedural unconscionability prevents residents from pursuing claims in a court of law by sacrificing their civil cause of action in an arbitration clause reached through unethical bargaining practices.<sup>74</sup> Subsequently, residents deterred from litigating and faced with the unfamiliar arbitral forum,<sup>75</sup> may be discouraged enough to forego their claims entirely. The lack of arbitration regulation in nursing homes, and the resultant procedural unconscionability generally associated with the

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<sup>68</sup> *Small*, 823 N.E.2d at 23.

<sup>69</sup> Robin P. Bravchok, *Nursing Home Tort Reform and Ohio House Bill 412: Why Have We Abandoned Our Neglected and Abused Elderly Population?*, 50 CLEV. ST. L. REV. 645, 648 (2002-2003) (citing Frank B. Hobbs & Bonnie L. Damon, 65+ in the U.S., U.S. Bureau of Census, Current Population Reports, Special Studies, 23-190 (Apr. 1996), available at <http://www.census.gov/prod/1/pop/p23-190/p23-190.pdf.html> (last visited Aug. 8, 2003)).

<sup>70</sup> Krasuski, *supra* note 6, at 263-64.

<sup>71</sup> Robin P. Bravchok, *Nursing Home Tort Reform and Ohio House Bill 412: Why Have We Abandoned Our Neglected and Abused Elderly Population?*, 50 CLEV. ST. L. REV. 645, 648 (2002-2003) (citing Frank B. Hobbs & Bonnie L. Damon, 65+ in the U.S., U.S. Bureau of Census, Current Population Reports, Special Studies, 23-190 (Apr. 1996), available at <http://www.census.gov/prod/1/pop/p23-190/p23-190.pdf.html> (last visited Aug. 8, 2003)).

<sup>72</sup> See generally *Small*, 823 N.E.2d at 24 (stating that the stressful and hectic circumstances surrounding the admissions process whereby Mrs. Small signed her husband's admission agreement that contained an arbitration clause contributed to the court's finding of procedural unconscionability).

<sup>73</sup> See ZHAODONG, *supra* note 21, at 12.

<sup>74</sup> See generally *Small*, 823 N.E.2d at 21 (concerning a procedurally unconscionable admission agreement that was presented to Mrs. Small during a frantic admissions process).

<sup>75</sup> See generally *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1167 (suggesting that while arbitration may be a feasible dispute resolution forum for businesses interacting with one another, consumers fair poorly for several reasons - one of which is the unfamiliar nature of the system itself).

formation of these contracts, is further demonstrated by *Small v. HCF of Perrysburg*.<sup>76</sup>

In *Small*, Mrs. Small unknowingly signed an admission agreement containing a binding arbitration clause in the midst of a frantic admissions process.<sup>77</sup> When Mrs. Small arrived at HCF of Perrysburg to admit her husband, he was unconscious and had to be immediately transported to a hospital.<sup>78</sup> During this hectic experience, HCF of Perrysburg presented Mrs. Small with an admission agreement which she signed – unaware that it contained a legally-binding arbitration clause.<sup>79</sup> Subsequent to this incident, “while being transported, unrestrained, by wheelchair,”<sup>80</sup> at HCF of Perrysburg, Mr. Small “fell and sustained injuries”<sup>81</sup> and died approximately nine days later.<sup>82</sup> Mr. Small’s death prompted Mrs. Small to file a complaint alleging negligence on the part of HCF of Perrysburg which subsequently led to the discovery of the binding arbitration clause contained within her husband’s admissions agreement.<sup>83</sup>

In *Small*, the Sixth District Court of Appeals held that the arbitration clause was procedurally unconscionable.<sup>84</sup> The fact that “[w]hen Mrs. Small signed the agreement she was under a great amount of stress; [the agreement was not explained to her; she did not have an attorney present; [she] did not have any particularized legal experience[;] and [she] was 69 years old on the date the agreement was signed”<sup>85</sup> contributed to the court’s finding of procedural unconscionability. The court further noted that the arbitration clause was troubling because it provided that “the prevailing party [was] entitled to attorney fees,”<sup>86</sup> which the court noted could essentially discourage individuals from pursuing claims.<sup>87</sup> Finally, the court expressed overarching concerns regarding the use of arbitration as a method of dispute resolution in negligence actions between individuals and businesses, and warned that cases that entail agreements with similar stipulations require a close judicial examination.<sup>88</sup>

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<sup>76</sup> *Small*, 823 N.E.2d at 19.

<sup>77</sup> *Id.* at 24.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 21

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 21 (Ohio Ct. App. 2004).

<sup>84</sup> *Id.* at 24.

<sup>85</sup> *Fortune*, 843 N.E.2d at 1222 (citing *Small*, 823 N.E.2d at 24).

<sup>86</sup> *Small*, 823 N.E.2d at 24.

<sup>87</sup> *See id.*

<sup>88</sup> *See Small*, 823 N.E.2d at 24-25. The court’s concern regarding arbitrating negligence actions suggests that Ohio courts are not entirely satisfied with the general enforceability of arbitration agreements in cases that involve allegations of negligence.

In *Small*, Mrs. Small was able to obtain redress for her husband's injuries in a court of law because the arbitration clause was void for unconscionability. Mrs. Small's situation is therefore a fortunate example of piecemeal protectionism by state courts.<sup>89</sup> The number of nursing home residents in a similar situation that would be unable to obtain such favorable results (for example, those without a spouse to protect their interests) is unknown.<sup>90</sup>

## 2. Substantive Unconscionability

Another multifaceted aspect of arbitration that serves as an impediment to potential nursing home litigants' ability to obtain redress is substantive. "Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable."<sup>91</sup> In nursing home admission agreements, substantive unconscionability concerns: a) "loser pays" provisions; b) the inability to modify terms or opt-out of provisions; c) inconspicuous clauses; and d) the nursing home's retained ability to go to court. Courts tend to declare arbitration clauses in nursing home admission agreements substantively unconscionable when the nursing home retains the right to go to court<sup>92</sup> while the resident is forced to arbitrate, and when the contract contains a "loser pays" provision.<sup>93</sup>

a. Standard "loser pays" provisions provide that if a resident proceeds with an arbitral hearing and loses, the resident is responsible for the costs and attorney fees expended by the nursing home in defending itself against the resident's claim.<sup>94</sup> These types of cost-shifting provisions are the most influential of the nursing home's

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<sup>89</sup> The situation in *Small* represents a fortunate example of piecemeal protectionism by the courts because this case involved a nursing home resident with a competent spouse to dispute the resident's interests in a court of law. Other situations may not entail a similarly equitable outcome.

<sup>90</sup> Although it is probably impossible to calculate how many nursing home residents in a similar situation to Mr. Small would not obtain such a favorable court holding, it is possible to speculate as to the lack of resources, and ability that would contribute to an extremely high number of residents that would not be able to dispute the arbitration agreement.

<sup>91</sup> Brief for the Plaintiff, *supra* note 14, at 7.

<sup>92</sup> Although nursing homes require residents to waive their right to go to trial after signing the admission agreement containing an arbitration clause, nursing homes generally maintain the right to go to court to litigate issues such as fees that they have not received from the residents. It is intrinsically unfair for nursing homes to maintain the right to litigate issues when they force residents to submit disputes to arbitration. This caveat also draws into question the equity of the arbitral forum in general because, if it is as cost efficient, time efficient and equitable as businesses insist that it is, why wouldn't nursing homes seek a judgment for the payment of fees owed in the adjudicatory forum?

<sup>93</sup> See generally *Small*, 823 N.E.2d at 23-25 (holding (among other things) that the arbitration clause in the nursing home admission agreement which contained a loser pays provision requiring the resident to pay the facility's attorney fees, and allowed the nursing home to go to court to dispute fees while the resident was forced to submit all future dispute to arbitration was substantively unconscionable).

<sup>94</sup> See generally Brief for the Plaintiff, *supra* note 14, at 4 (describing the general structure and applicability of loser pays provisions in arbitration agreements).

deterrents and are thus exceedingly prevalent.<sup>95</sup> Moreover, loser pays provisions potentially filter the most substantial amount of residents from pursuing redress in the arbitral forum because a resident fears “that he or she will be saddled with the facility’s costs and attorney’s fees clearly [ ] discourage the filing of a claim except in the most *obvious* cases of negligence.”<sup>96</sup> Additionally, “loser pays” provisions are particularly controversial because in a court of law, generally “attorney’s fees are not awarded to the prevailing party in a civil action unless *ordered by the court*.”<sup>97</sup>

In *Fortune v. Castle Nursing Homes*,<sup>98</sup> the concept of loser pays provisions is exemplified. In *Fortune*, the residency agreement’s arbitration clause was not discovered until *Fortune* attempted to seek redress.<sup>99</sup> *Fortune* “filed a lawsuit against Castle alleging nursing home negligence after an aide, while assisting *Fortune* in the shower room, allowed her to fall to the floor, causing injury to her leg.”<sup>100</sup> In *Fortune*, similar to *Small*, the arbitration clause was buried within the admissions agreement and contained a “loser pays” provision<sup>101</sup> requiring *Fortune* to pay Castle’s costs and attorney fees if she lost at the arbitral hearing.

The Fifth District Court of Appeals held that the arbitration clause was substantively unconscionable.<sup>102</sup> Critical to the court’s finding was the fact that the agreement contained a loser pays provision which this court also noted would have a “stifling effect on the filing of claims.”<sup>103</sup> Finally, the court adopted the *Small* opinion’s cautionary language regarding the use of arbitration in cases involving fact-intensive negligence claims and similarly noted its disapproval of the arbitral forum for such disputes.<sup>104</sup> *Fortune* epitomizes the problem of unregulated arbitration in nursing homes and the inadequacy of piecemeal protectionism because despite this and other similar cases, loser pays provisions are frequently utilized by nursing homes.<sup>105</sup>

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<sup>95</sup> See *Small*, 823 N.E.2d at 23-24; see also *Fortune*, 843 N.E.2d at 1220-21; see also Brief for the Plaintiff, *supra* note 14, at 4.

<sup>96</sup> *Fortune*, 843 N.E.2d at 1220-21 (emphasis added).

<sup>97</sup> *Small*, 823 N.E.2d at 24 (emphasis added).

<sup>98</sup> *Fortune*, 843 N.E.2d at 1217.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1220.

<sup>102</sup> *Id.* at 1221.

<sup>103</sup> *Id.*

<sup>104</sup> See *Fortune v. Castle Nursing Homes, Inc.*, 843 N.E.2d 1216, 1221 (Ohio Ct. App. 2004).

<sup>105</sup> See *id.* “Loser pays” provisions are clauses typically included in an arbitration agreement that force the nursing home resident to agree that if they initiate the process of arbitration and lose at the hearing, the resident is solely responsible for paying the costs and fees that the nursing home expended in defending itself. Loser pays provisions are a particularly fierce deterrent because 1) residents who seek redress for their injuries will first be discouraged upon realizing that they cannot have a jury trial and must instead argue their case in arbitration; and 2) residents will then have to weigh the pros and cons of proceeding and

b. During the admissions process, residents are generally prohibited from modifying undesirable terms or opting-out of specific provisions in the contract.<sup>106</sup> These “take it or leave it” terms signify that the “arbitration clause . . . embodies characteristics of adhesion,”<sup>107</sup> which are denounced by courts and legislatures alike. In addressing this specific issue, the Supreme Court of Ohio has recently stated that:

[T]he presumption in favor of arbitration should be *substantially weaker* in a case . . . when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.<sup>108</sup>

Nursing home admission agreements that resemble adhesion contracts have the ability to deter individuals from pursuing claims because potential nursing home residents faced with a “take it or leave it” option will generally be forced to take it.<sup>109</sup> This “non-decision”<sup>110</sup> forfeits a resident’s civil cause of action - consequently deterring the benefits of litigation and subjecting residents to the obstacles of arbitration which collectively hinder the attainment of redress.<sup>111</sup>

c. Closely related to the principle of adhesion is the concept of “meaningful choice,” which “refers to the absence of a meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to one party.”<sup>112</sup> Whether individuals are compelled to enter a nursing home, or choose to enter a nursing home because of health complications, the decision rests almost entirely on geographic location, bed availability and cost.<sup>113</sup> The luxury of shopping for a contract that contains the most favorable terms or the most equitable dispute

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possibly having to pay for the costs of the nursing homes defense if they are not successful at the hearing.

<sup>106</sup> See *Small*, 823 N.E.2d at 24. See generally Brief for the Plaintiff, *supra* note 14, at 14 (arguing that the arbitration agreement which did not allow for Day to opt-out of provisions should be declared substantively unconscionable).

<sup>107</sup> *Eagle*, 809 N.E.2d at 1179.

<sup>108</sup> Brief for the Plaintiff, *supra* note 14, at 11 (emphasis added) (citing *Williams v. Aetna Fin. Co.* 700 N.E.2d 859, 473 (Ohio App. 1998)). The crux of this Note is that, in nursing homes, there will very rarely, if ever, be a “true agreement” among the parties – primarily because of the inherent nature of the environment, but secondarily because of the lack of regulation that nursing home facilities have exploited through the utilization of unconscionable practices such as hidden agreements, unexplained terms, loser pays provisions, prohibitive costs, and adhesive terms.

<sup>109</sup> See *infra* notes 110-11.

<sup>110</sup> See Brief for the Plaintiff, *supra* note 14, at 16.

<sup>111</sup> In addition to deterring residents from the courts, adhesive terms may filter a number of residents from the arbitral forum as well. This is because residents could believe that they entered into a legitimate agreement with the nursing home facility that unfortunately binds them to a less favorable forum but that they are not willing to undertake.

<sup>112</sup> Brief for the Plaintiff, *supra* note 14, at 5.

<sup>113</sup> See generally *Krasuski*, *supra* note 6, at 263-64.

resolution clause is rarely one enjoyed by individuals in need of a nursing home.<sup>114</sup> Therefore, individuals seeking a nursing home facility to care for them, “in the throes of what may be the biggest crisis of their lives,”<sup>115</sup> inherently exercise no meaningful choice in regards to whether or not to accept the terms of the contract accompanying the desperately needed health care that they are seeking.

*d.* Frequently, arbitration clauses are inconspicuously buried within the general text of admission agreements and lack formatting distinctions to set them apart from the rest of the document.<sup>116</sup> In a currently pending case, *Day v. Waterford Commons*,<sup>117</sup> not only was the clause buried on page twelve of a fourteen-page document,<sup>118</sup> but the facility utilized a checklist of issues to discuss with new residents that explicitly excluded the arbitration clause.<sup>119</sup> In *Day*, modifications to the terms of the agreement were not permitted, *Day* was not accompanied by legal counsel during the admissions process, and the details of the agreement were not fully explained.<sup>120</sup>

While no decision has been rendered in this case to date, it represents the recurring practices of nursing homes regarding admissions contracts containing agreements that bind unknowing residents to the process of arbitrating future disputes. *Day* illustrates the “bad faith” practices employed by nursing homes to keep residents from litigating by intentionally concealing clauses and taking affirmative steps to ensure that they are not detected.<sup>121</sup> These deceptive practices

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<sup>114</sup> The lack of “meaningful choice” that individuals searching for an adequate nursing home enjoy is exemplified by a comparison to the very meaningful choice exercised by individuals in the employment context. Arbitration agreements in employment contracts are litigated just as frequently as arbitration agreements in nursing home admission agreements so it is a parallel comparison. In the employment scenario, potential employees (theoretically at least) are able to job hunt. Individuals searching for a job are free to bypass a company with an employment contract containing unfavorable terms such as a clause requiring employees to submit future disputes to binding arbitration, and continue searching until a more desirable employment contract can be located. In the employment context therefore, the true sense of “meaningful choice” is exemplified. In comparison, potential nursing home residents seeking medical care are not similarly capable of searching for the right contract until they find one that they are willing to accept.

<sup>115</sup> Hornstein, *supra* note 26, at 338.

<sup>116</sup> See generally Brief for the Plaintiff, *supra* note 14, at 3 (explaining that the arbitration clause in *Day* was located on page twelve of a fourteen page document and not distinguished by a different formatting style to set it apart from the rest of the document).

<sup>117</sup> Brief for the Plaintiff, *supra* note 14, at 3.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 5.

<sup>120</sup> *Id.* at 5.

<sup>121</sup> It is alarming that a nursing home facility would take affirmative steps to conceal an arbitration agreement when the arbitral forum is supposedly 1) quick; 2) easy; 3) affordable; 4) fair; and 5) just as good for consumers as litigating a similar claim in a court of law. *Waterford Commons*' affirmative steps to conceal the clause (by excluding it from an explicit list of things to discuss with future residents) and including it on the twelfth page of a fourteen-page admissions agreement lends credence to endless allegations that the arbitral forum produces disparate results for consumers.

effectively filter a number of residents that will not notice the clause or challenge its validity, but will instead passively accept his or her inability to litigate.

e. Although arbitration clauses in nursing home admission agreements typically force residents to waive their civil cause of action,<sup>122</sup> the nursing home generally retains the right (often explicitly) to go to court.<sup>123</sup> The one-sided nature of this type of clause is a classic example of the unfair terms<sup>124</sup> that define the concept of substantive unconscionability. In *Small*, the court held that this type of clause - which allowed the nursing home, but not the resident to go to court - was substantively unconscionable.<sup>125</sup>

Collectively, these various types of provisions define substantive unconscionability and reinforce a power structure that has the potential of intimidating residents and sustaining a perpetual system of deterrence. *Small*, *Day* and *Fortune* involve issues of substantive and procedural unconscionability, cost shifting, and bad faith that are permitted to persist because of a lack of arbitration regulation in this environment.<sup>126</sup> These cases illustrate only some of the problems that saturate the process of nursing home residents contracting with nursing homes and unknowingly agreeing to submit future claims to the process of arbitration. In addition to procedural and substantive unconscionability, the exorbitant fees<sup>127</sup> associated with consumers seeking redress through arbitration, and the statistically slanted outcomes<sup>128</sup> resulting from arbitration hearings, contributes to a system that collectively works to deter potential nursing home litigants from pursuing legitimate claims.

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<sup>122</sup> See ZHAODONG, *supra* note 21, at 12.

<sup>123</sup> See *Small*, N.E.2d at 24-25; see generally Brief for the Plaintiff, *supra* note 14, at 3-4 (arguing that it is substantively unconscionable for nursing homes to deny residents the right to a jury trial meanwhile explicitly retaining the right to go to court to pursue their own redress).

<sup>124</sup> *Small*, 823 N.E.2d at 23.

<sup>125</sup> See *Id.* at 23-24.

<sup>126</sup> Because agreeing to a pre-dispute arbitration clause in nursing homes is not regulated by the states, and because piecemeal protectionism in the courts is insufficient to deter nursing home facilities from utilizing unconscionable practices, nursing homes continue to utilize procedures such as burying clauses in the general text of a contract, providing minimal if any explanation regarding the terms of the contract, prohibiting residents from opting-out or modifying the terms of the contract, utilizing "loser pays provisions," and scheduling arbitration hearings in distant locations that may be difficult if not impossible for the typical nursing home resident to get to. See Krasuski, *supra* note 6, at 269 (stating that "[s]ome [arbitration] agreements have required that the arbitration take place in a distant state...").

<sup>127</sup> See *infra* notes 129, 134. "Arbitration has been found to be more expensive for consumers than litigation, and its often-prohibitive fees, or forum costs, may serve to bar consumers from pursuing claims at all. Even though some arbitration providers have recently adopted consumer-friendly measures, defendants still benefit from arbitration because awards issued by arbitrators tend to be lower than jury awards." Krasuski, *supra* note 6, at 292-93.

<sup>128</sup> See Krasuski, *supra* note 6, at 263.

### 3. Prohibitive Costs

The costs of arbitration, which are considerably greater for consumers than a comparable case litigated in a court of law,<sup>129</sup> comprise another aspect of arbitration that serves as an impediment to potential nursing home litigants seeking redress. “[T]he potential costs of arbitrating . . . [a] dispute easily reach thousands, if not tens of thousands, of dollars, far exceeding the costs that a plaintiff would incur in court.”<sup>130</sup> This cost disparity is due, in part, to the fact that although “[c]ourts charge plaintiffs initial filing fees, . . . they do not charge extra for in-person hearings, discovery requests, routine motions, or written decisions - costs that are all common in the world of private arbitrators.”<sup>131</sup>

Recently, the Kaiser Family Foundation<sup>132</sup> conducted a study that profiled nursing home residents on Medicaid,<sup>133</sup> finding that “the average cost of a private nursing home bed in the U.S. was just over \$6,000 a month in 2005.”<sup>134</sup> The already limited financial resources of elderly individuals,<sup>135</sup> combined with the costs associated with living in a nursing home,<sup>136</sup> render it unlikely that many residents could afford to pursue a claim in arbitration that may result in costs upwards of “tens of thousands[] of dollars.”<sup>137</sup> Despite the fact that these substantial costs are generally not fully explained to residents, courts have held that prohibitive costs alone are not enough to declare a contract substantively unconscionable.<sup>138</sup>

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<sup>129</sup> See *Morrison v. Circuit City Stores*, 317 F.3d 646, 669 (6th Cir. 2003); see generally *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (noting that the average daily expense of employing an arbitrator is approximately \$700) [hereinafter *Green Tree*].

<sup>130</sup> *Morrison*, 317 F.3d at 669.

<sup>131</sup> *Id.*

<sup>132</sup> “The Kaiser Family Foundation is a non-profit, private operating foundation focusing on the major health care issues facing the U.S., with a growing role in global health. Unlike grant-making foundations, Kaiser develops and runs its own research and communications programs, sometimes in partnership with other non-profit research organizations or major media companies.” *Kaiser Family Foundation* (2008), <http://www.kff.org/about/index2.cfm>.

<sup>133</sup> CLAUDIA WILLIAMS, JAMES ROSEN & KELLY O’MALLEY, PROFILES OF NURSING HOME RESIDENTS ON MEDICAID (2006), <http://www.kff.org/medicaid/upload/7510.pdf>.

<sup>134</sup> *Id.* at 1. The study noted that the “high cost makes nursing home services affordable for only the wealthiest Americans or those with private long-term care insurance. . . . [while] Medicaid . . . covers nursing home care for low-income elderly or disabled individuals who meet income and asset standards.” *Id.* at 1.

<sup>135</sup> “The average income of an elderly individual (age 65 or older) in the United States in 2000 was \$20,851, up from \$12,239 in 1974, based on Employee Benefit Research Institute (EBRI) tabulations of data from the March 2001 Current Population Survey (CPS). Average income consists of the following sources: Social Security, pensions and annuities, assets, earnings, and other.” FACTS FROM EBRI – INCOME OF THE ELDERLY, (2002), <http://www.ebri.org/pdf/publications/facts/0602fact.pdf>.

<sup>136</sup> See WILLIAMS ET AL., *supra* note 133, at 1.

<sup>137</sup> See *Morrison v. Circuit City Stores*, 317 F.3d 646, 669 (6th Cir. 2003) (discussing the average costs associated with obtaining care in a nursing home).

<sup>138</sup> See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 81 (2000).

However, while prohibitive costs alone may not meet the standard for substantive unconscionability, they are surely sufficient to effectively impede residents from pursuing claims,<sup>139</sup> especially those involving allegations of negligence.<sup>140</sup>

#### 4. Slanted Outcomes

The rate at which individuals prevail in arbitration constitutes yet another aspect of arbitration that serves to impede potential nursing home litigants from filing claims. The outcomes of arbitration hearings are statistically less favorable for consumers<sup>141</sup> than businesses. This disparity may be exacerbated in nursing homes which retain skilled arbitrators that are accustomed to defending the facility. Residents that are aware of the rate at which consumers lose in arbitration may be deterred from pursuing uncertain claims.<sup>142</sup>

The American Arbitration Association (AAA)<sup>143</sup> reports statistics and up-to-date information regarding a multitude of issues surrounding the process of arbitration.<sup>144</sup> According to AAA reports based on consumer cases awarded between January 2007 and August 2007, 48 percent of consumers prevailed in cases in which they were the claimant while 74 percent of businesses prevailed in cases in which they were the claimant.<sup>145</sup> These statistics unveil additional evidence that arbitration is not working

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<sup>139</sup> See *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1177 (Ohio Ct. App. 2004).

<sup>140</sup> Residents will be especially deterred from pursuing redress in the arbitral forum for a negligence claim because negligence claims are fact intensive and thus consist of substantial amounts of discovery and hearings. Because arbitration charges individuals on an “al a carte” basis, separately for different procedures (such as hearings, motions and written opinions) residents could be deterred from incurring these costs and thus forgo their negligence claims altogether.

<sup>141</sup> See Krasuski, *supra* note 6, at 263.

<sup>142</sup> See *infra* note 145.

<sup>143</sup> The American Arbitration Association (AAA), with its long history and experience in the field of alternative dispute resolution, provides services to individuals and organizations who wish to resolve conflicts out of court. The AAA role in the dispute resolution process is to administer cases, from filing to closing. The AAA provides administrative services in the U.S., as well as abroad through its International Centre for Dispute Resolution (ICDR). The AAA's and ICDR's administrative services include assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation. Ultimately, the AAA aims to move cases through arbitration or mediation in a fair and impartial manner until completion. Additional AAA services include the design and development of alternative dispute resolution (ADR) systems for corporations, unions, government agencies, law firms, and the courts. The Association also provides elections services as well as education, training, and publications for those seeking a broader or deeper understanding of alternative dispute resolution. *American Arbitration Association, About Us*, <http://www.adr.org/about>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*; see also JOHN O'DONNELL, THE ARBITRATION TRAP, HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), [http://www.citizen.org/documents/final\\_wcover.pdf](http://www.citizen.org/documents/final_wcover.pdf) (discussing an NAF study that reported that 95% of the time arbitration ends in favor of the business in credit card disputes).

for consumers in that they statistically end up on the losing end of arbitration awards whether they initiate the legal process, or have it initiated against them.

The deterrent effects of procedural and substantive unconscionability, prohibitive costs, and slanted outcomes cannot be considered in isolation, however. These deterrents must be assessed in light of the typical claim<sup>146</sup> brought by the typical claimant<sup>147</sup> in a nursing home. These factors magnify the impact of the aforementioned deterrents as well as bolster further support for congressional amendment to allow regulation of arbitration in nursing homes.

*B. The Deterrent Effects of Arbitration are Magnified in Nursing Homes*

1. The Typical Claimant

The demographic profile of the typical claimant in the nursing home environment magnifies the impact that procedurally and substantively unconscionable practices, combined with prohibitive costs and slanted outcomes, have on deterring nursing home residents from pursuing claims. The average age and physical and mental condition of the typical nursing home resident plays a significant role in their ability to adequately understand and effectively participate in the process of arbitration. Relevant data demonstrates that:

[a]ccording to the 1997 National Nursing Home Survey, there were 1,465,000 residents age 65 and older in nursing homes (about 4.3 percent of the U.S. population age 65 and older in 1997). Nearly three-fourths of these residents were women, and about one-half were age 85 and older. In 1997, about 75 percent of all nursing home residents 65 and older required assistance in three or more activities of daily living, including bathing, dressing, eating, transferring from bed to chair, and using the toilet. About 42 percent of nursing home residents were *diagnosed with dementia, and 12 percent had other psychiatric conditions, such as schizophrenia and mood disorders*.<sup>148</sup>

It seems self evident that if an individual is unable to feed, dress, or bathe without considerable assistance from nursing home staff, or is suffering from a psychological condition such as dementia, that that individual is similarly unable to form a valid agreement to submit future disputes to arbitration, successfully navigate the process of arbitration, or obtain adequate redress in that system.<sup>149</sup>

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<sup>146</sup> The typical claim brought by a nursing home resident is for negligence, usually involving the resident falling and sustaining injuries as a result.

<sup>147</sup> See *infra* note 148.

<sup>148</sup> Sheel Pandya, *Nursing Homes*, Feb. 2001, <http://www.aarp.org/research/longtermcare/nursinghomes/research-import-669-FS10R.html> (emphasis added).

<sup>149</sup> "Not uncommonly, residents have diminished capacity, or are admitted to nursing homes from hospitals while suffering from debilitating conditions and cannot reasonably be expected to participate in the admissions process, much less to fully comprehend admissions agreements." Krasuski, *supra* note 6, at 276.

## 2. The Typical Claim

The nature of the typical claim brought by nursing home residents also magnifies the impact of procedural and substantive unconscionability, prohibitive costs, and slanted outcomes. “The majority of cases which have been brought by nursing home residents have been based in negligence, usually involving a fall.”<sup>150</sup> Negligence claims are especially vulnerable to arbitration because they typically require lengthy fact finding procedures<sup>151</sup> which are neither practically nor economically amenable to the process of arbitration. Arbitration hearings are additionally problematic because “determinations of negligence . . . are subject to the ‘reasonable person’ standard, [which is] typically the province of jurors.”<sup>152</sup>

Although arbitration is generally encouraged as a “method to settle disputes,”<sup>153</sup> “courts [do] tend . . . to view agreements to arbitrate negligence actions more cautiously.”<sup>154</sup> This judicial caution may be in response to the fact that many potential nursing home litigants, faced with the reality that conducting a meaningful hearing for a negligence claim could cost tens of thousands of dollars,<sup>155</sup> will unquestionably be deterred from proceeding. The problems associated with initiating a negligence action in the arbitral forum are compounded if the arbitration agreement contains a loser pays provision, thus putting the resident in a “catch 22” - type of cost/benefit analysis.<sup>156</sup> The effect of this misfortune is that claimants with expendable finances, resources and endurance will be able to successfully navigate the process of arbitration, while more meritorious claims may be lost in the journey. The prohibitive costs of arbitration, unregulated by the states, thus function as a filtering device working to the advantage of nursing homes and the detriment of residents.

## V. THE FUTURE PLIGHT OF NURSING HOME RESIDENTS

“In 2003, 1.5 million people 65 and older lived in nursing homes[;] [i]f the current rates continue, by 2030 this number will rise to about 3 million.”<sup>157</sup> As the

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<sup>150</sup> Charles A. Lattanzi, *Nursing Home Contracts: Is it Time for Bad Faith to Come out of Retirement?*, 6 J.L. & HEALTH 61, 70 (1991-1992).

<sup>151</sup> See *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004).

<sup>152</sup> Krasuski, *supra* note 6, at 298 (citing PUBLIC CITIZEN, THE COSTS OF ARBITRATION (2002), <http://www.citizen.org/documents/ACF110A.pdf>).

<sup>153</sup> *Eagle*, 809 N.E.2d at 1167.

<sup>154</sup> Brief for the Plaintiff, *supra* note 14, at 6 (citing *Small*, 823 N.E.2d at 29).

<sup>155</sup> *Morrison v. Circuit City Stores*, 317 F.3d 646, 669 (6th Cir. 2003).

<sup>156</sup> For example, if the resident puts forth a genuine attempt to succeed at the arbitral hearing (with all the bells and whistles of a true negligence hearing), the resident is more likely to prevail but will incur *extensive* costs in doing so. On the other hand, if the resident skimps at the hearing in an attempt to save money, he or she is faced with the possibility of losing and then subsequently the possibility of being subjected to a loser pays provision. Either option available to residents therefore results in expending a considerable amount of money and effort to obtain what will probably amount to inadequate redress.

<sup>157</sup> *Falls in Nursing Homes*, <http://www.cdc.gov/ncipc/factsheets/nursing.htm> (last visited Dec. 1, 2008).

number of residents in nursing homes escalates, so too will the incentives for facilities to maximize the administrative conveniences at their disposal. Therefore, procedurally and substantively unconscionable practices will naturally increase as the number of residents (and thus the number of potential litigants) increases.

Moreover, in August 2007, “Bush administration officials sa[id] that Medicare will no longer pay the extra costs of treating preventable errors, injuries and infections that occur in hospitals.”<sup>158</sup> Essentially, Medicare decided not to pay for treatment related to “conditions that could reasonably have been prevented.”<sup>159</sup> “Among the conditions that will be affected [by the new policy] are bedsores[;] or pressure ulcers, and *injuries caused by falls*.”<sup>160</sup> Following suit are private insurers which are expected to adopt similar coverage policies in the near future.<sup>161</sup>

The new Medicare policy focuses on conditions acquired after an individual is admitted to a hospital that could have been reasonably prevented – specifically hospital acquired infections.<sup>162</sup> The Center for Disease Control and Prevention<sup>163</sup> approximates that hospital-acquired infections are responsible for 1.7 million infections developed by patients in hospitals each year.<sup>164</sup> Contributing to the death of approximately 270 persons a day,<sup>165</sup> hospital-acquired infections represent a liability in hospitals comparable to that of injuries sustained from negligently incurred falls in nursing homes. It is estimated that “each year, a typical nursing home with 100 beds reports 100 to 200 falls,”<sup>166</sup> with many more unreported.<sup>167</sup>

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<sup>158</sup> Robert Pear, *Medicare Says It Won't Cover Hospital Errors*, N.Y. TIMES, Aug. 19, 2007, at A1 (discussing the newly adopted Medicare policies).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> The “CDC is the nation's premiere health promotion, prevention, and preparedness agency and a global leader in public health. It remains at the forefront of public health efforts to prevent and control infectious and chronic diseases, injuries, workplace hazards, disabilities, and environmental health threats. CDC is globally recognized for conducting research and investigations and for its action-oriented approach. CDC applies research and findings to improve people's daily lives and responds to health emergencies—something that distinguishes CDC from its peer agencies. CDC works with states and other partners to provide a system of health surveillance to monitor and prevent disease outbreaks (including bioterrorism), implement disease prevention strategies, and maintain national health statistics. CDC also guards against international disease transmission, with personnel stationed in more than 25 foreign countries. CDC is now focusing on achieving the four overarching Health Protection Goals to become a more performance-based agency focusing on healthy people, healthy places, preparedness, and global health. CDS is one of the 13 major operating components of the Department of Health and Human Services (HHS).” Centers for Disease Control and Prevention, Present and Future, <http://www.cdc.gov/about/history/ourstory.htm>.

<sup>164</sup> Centers for Disease Control and Prevention, Antimicrobial Resistance in Healthcare Settings, <http://www.cdc.gov/ncidod/dhqp/ar.html>.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

Considering the new coverage policies developed by Medicare applicable to hospitals, it could be a natural progression for Medicare to develop similar policies applicable to nursing homes and residents that sustain preventable injuries while under the care of the facility. Applying this policy to nursing homes would result in Medicare refusing to pay for new conditions developed by residents after being admitted to a nursing home, such as falls, that could have been reasonably prevented. The implications of Medicare (and possibly private insurers as well) refusing to cover these types of conditions would be devastating for nursing home residents. Residents that sustain preventable injuries such as falls at a nursing home, that are bound by an admission agreement to submit disputes to the process of arbitration (wrought with the various aforementioned obstacles and deficiencies), will be without a remedy if their injuries are not covered by either the arbitral award, Medicare, or their private insurer. The very real possibility of this dilemma suggests that the already inequitable system of agreeing to arbitration in nursing homes is set to worsen in the near future, thus mandating legislative amendment.

## VI. PROPOSED LEGISLATION: A PARALLEL TO THE MCCARRAN ACT<sup>168</sup>

### A. Congress Should Consent to State Regulation

Two public policy rationales are typically advanced to explain legislative endorsement of arbitration as an adequate alternative to litigation.<sup>169</sup> First, it is argued that arbitration has the potential to “ease court caseloads and contribute to a better allocation of judicial resources.”<sup>170</sup> Second, it is argued that “arbitration would confer a number of advantages upon the contracting parties, such as providing a quicker, less expensive and more flexible mode of adjudication than litigation.”<sup>171</sup> These objectives constitute the social underpinnings of the Federal Arbitration Act as well as its judicial endorsement. The potential benefits of arbitration however, if realized at all,<sup>172</sup> are substantially outweighed by the inequity of forcing nursing home residents to adhere to the fine print of an inherently unconscionable agreement.

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<sup>168</sup> 15 U.S.C. § 1012 (2008) (providing that “a) the business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business[; and] b) no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, that after June 30, 1948, the Act of July 2, 1809, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended . . . , shall be applicable. The business of insurance to the extent that such business is not regulated by State law”).

<sup>169</sup> ZHAODONG, *supra* note 21, at 13.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Whether similar advantages are achieved when consumers agree to arbitrate claims with businesses is a relentlessly disputed issue among commentators. *See* Ernst & Young, *supra* note 57, at 2. Despite corporate attempts to legitimate the practice of arbitrating consumer claims, studies have failed to sufficiently verify allegations that the process is as equitable for consumers as a comparable case litigated before a jury. *See generally* F. PAUL

Enacting legislation similar to the McCarran Act, which declares “that the continued regulation . . . by the [s]everal states of the business of *insurance* is in the public interest,”<sup>173</sup> essentially “assures continued state authority over insurance,”<sup>174</sup> and “exempt[s] the insurance industry from Commerce Clause constrictions.”<sup>175</sup> The McCarran Act has enabled states to regulate insurance since 1945 and the utilization of arbitration as an adjudicatory alternative to litigation has not declined. In fact, since the McCarran Act’s passage, the use of arbitration has increased.<sup>176</sup> This piece of legislation proves that it is within Congress’ capacity to exempt nursing home regulation from the strictures of the FAA without diminishing the statute’s purpose.

In the context of nursing homes, enacting parallel legislation to that of the McCarran Act would alleviate the crisis triggered by the enforceability of pre-dispute arbitration agreements. The pertinent doctrine established by the McCarran Act provides that:

it will prevent a federal statute from preempting a state statute if (1) the federal statute does not specifically relate to the business of insurance, (2) the state law was enacted for the purpose of regulating the business of insurance, and (3) the federal statute operates to invalidate, impair, or supersede the state law.<sup>177</sup>

A comparable piece of legislation for nursing homes would prevent a federal statute (such as the FAA) from preempting a state statute if: 1) the federal statute does not specifically relate to the business of nursing homes (which the FAA does not, it specifically relates to arbitration); 2) the state law was enacted for the purpose of regulating the business of nursing homes (which regulations surrounding the

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BLAND, JR., MICHAEL J. QUIRK, LESLIE A. BAILEY, RICHARD H. FRANKEL & JONATHAN SHELDON, CONSUMER ARBITRATION AGREEMENTS 2 (4<sup>TH</sup> ed. 2006). To the contrary, statistics show that arbitration is often less flexible and more expensive for individuals than litigation. *See generally* Morrison v. Circuit City Stores, 317 F.3d 669, 669-70 (6th Cir. 2003) (noting that arbitration can be nearly *fifty* times more expensive for consumers than a comparable case in litigation) (citing Public Citizen, *The Costs of Arbitration* 40-42 (2002)). *See generally* Eagle v. Fred Martin Motor Co., 809 N.E.2d 1177, 1178-84 (Ohio App. Div. 2004) (discussing the exorbitant costs of arbitration compared to litigation for consumers, the effect of costs and arbitration generally on indigent claimants, and the adhesive nature of admission agreements that contain arbitration clauses).

<sup>173</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW, 237 (Robert C. Clark, et al., ed., Thomson West 2007) (1937) (emphasis added) (citing 15 U.S.C. § 1012 (2008)).

<sup>174</sup> SULLIVAN & GUNTHER, *supra* note 173, at 238.

<sup>175</sup> *Id.* at 238-39.

<sup>176</sup> “Between 1996 and 2002 [especially], total arbitration filings reported by the American Arbitration Association (AAA) more than doubled.” Katherine Benesch, *The Increasing Use of Arbitration and Mediation in Adjudicating Health Care Cases*, 245 APR N.J. LAW. 28, 28 (2007) (discussing the rate at which the use of arbitration has increased and contributory reasons).

<sup>177</sup> *In re Kepka*, 178 S.W.3d at 279, 288.

admission process would qualify as);<sup>178</sup> and 3) the federal statute operates to invalidate, impair, or supersede the state law (which the FAA has historically done and will continue to do without legislation exempting nursing homes). Moreover, in enacting the McCarran Act, Congress expressed a rationale that permitting states to maintain close control of the business of insurance was “in the public interest.”<sup>179</sup> Surely, if the business of insurance is in the public interest, the business of nursing homes aptly qualifies and should be entitled to similar “reverse pre-empt[ive]”<sup>180</sup> treatment.

Additional support for enacting parallel legislation to the McCarran Act that would enable states to regulate nursing homes is found in *In re Kepka*.<sup>181</sup> That case involved an insurance regulation that required arbitration clauses in nursing home agreements to meet certain specified standards of conspicuity. The Texas Court of Appeals held that the McCarran Act “prevents the FAA from pre-empting . . . [the insurance regulation’s] notice requirements.”<sup>182</sup>

A federal scheme that permits insurance regulations to mandate notice requirements in nursing home admission agreements,<sup>183</sup> while simultaneously denying that authority to the legislature generally, is illogical. This caveat brings Justice Black’s assertions in *Prima Paint* that the FAA’s general enforceability “elevates arbitration provisions above all other contractual provisions” to fruition, proffering exceeding support for congressional consent to state regulation.

## VII. PROPOSED GUIDELINES FOR STATES

Delineating stringent guidelines for the use of pre-dispute arbitration clauses in nursing home admission agreements could serve the policy goals of arbitration<sup>184</sup> more effectively than the current piecemeal interpretation being utilized by courts. For instance, a rigid set of guidelines could make it quicker and easier for courts to eliminate appropriate cases in the summary judgment phase<sup>185</sup> as well as enable

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<sup>178</sup> Recognizing that pre-dispute arbitration agreements in contexts other than nursing homes (for example, employment contexts or credit card agreements) may exhibit similar deficiencies and inequities, the scope of this Note suggests only that states should be exempted in terms of regulating the process of agreeing to arbitrate future claims in nursing home admission agreements.

<sup>179</sup> SULLIVAN & GUNTHER, *supra* note 173, at 237 (discussing the history and enactment of the McCarran Act as well as Congressional intent).

<sup>180</sup> *In re Kepka*, 178 S.W.3d at 288.

<sup>181</sup> *Id.* (discussing the circumstances under which the FAA does not preempt arbitration notice requirements in light of the McCarran Act).

<sup>182</sup> *Id.*

<sup>183</sup> The ability of arbitration notice requirements to be implemented through the insurance industry by states is misleading – in all regards the goals and policies of regulating contracts in the insurance industry are significantly different than the goals and policies of regulating contracts in the nursing home industry.

<sup>184</sup> *See* Ernst & Young, *supra* note 57, at 4.

<sup>185</sup> If the nursing home violates an explicitly enumerated rule, it would be easy to determine that a trial was the appropriate adjudicatory forum. Conversely, if no rule has been

nursing homes to conform to rules that would help to minimize the expense of litigating the validity of the arbitration clause.<sup>186</sup> Strict guidelines would also help ensure that nursing home residents are protected from unconscionable procedures that extinguish their ability to obtain redress in a court of law. Finally, narrowly tailored guidelines for the use of pre-dispute arbitration clauses in nursing home admission agreements would ensure that the legislation exempting nursing home regulation from the FAA was confined explicitly to the context of nursing homes, thus sustaining the viability of arbitration and the FAA. The ideal guidelines would include some combination of the following seven components.

First, the ideal guidelines would require administrators to thoroughly explain arbitration clauses to a competent person, either the future resident or the future resident's guardian, in a consistent manner.<sup>187</sup> Ensuring that every resident is genuinely informed of what the agreement entails will protect residents from the deceptive practices associated with nursing home admission agreements. Additionally, instituting this guideline could reduce claims regarding inconspicuous clauses and bad faith inducements to agree to submitting future disputes to arbitration.

Second, ideal guidelines would enable residents to modify terms of the agreement as well as opt-out of specific provisions. Allowing residents to alter terms and provisions will eliminate the adhesive nature of typical nursing home admission agreements.<sup>188</sup> Additionally, this guideline would help ensure that a genuine meeting of the minds was reached – that a “true agreement existed to submit disputes to

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violated, arbitration could proceed. Discerning whether a rule was violated would be easier to assess because of a clearly defined standard enunciated by the state legislature.

<sup>186</sup> The expense of defending against suits surrounding the validity of the arbitration clause itself could be substantially minimized by a set of detailed guidelines because whether the nursing home violated the law would be easily ascertainable by a simple assessment of their standard contract language. Instead of having an entire hearing on whether the arbitration agreement was conscionable, its validity could be easily determined at the summary judgment phase. Moreover, nursing homes could easily conform their conduct to the standards if courts weren't continuously deciding cases inconsistently as to the conspicuity of arbitration agreements. As the situation currently stands, it *could be* legitimately difficult for nursing homes to conform to a standard since a clear one has not been delineated by the courts.

<sup>187</sup> This requirement could be easily and uniformly fulfilled by administering an educational video on the details of agreeing to a pre-dispute arbitration agreement and surrendering the right to litigate in a court of law. The video could be administered during the process of admission and the person would then sign off that they had viewed tape and understand the material.

<sup>188</sup> Allowing residents to modify the terms of this type of agreement is critical - it is not unreasonable to allow residents to modify terms in the contract that concerns the health care that could possibly take them through the remainder of their life. However, this right should consist of additional guidelines for nursing homes to follow because enabling residents to modify terms or opt-out of provisions might motivate nursing homes to barter with clauses, terms and services, again reinforcing a skewed power structure to the detriment of residents. States should require nursing homes to allow residents to modify terms or opt-out of provisions and similarly ensure that nursing homes do not attempt to fix a “price” to be paid by nursing home residents that in fact do choose to modify the terms of the agreement.

arbitration,”<sup>189</sup> which will in turn reduce litigation surrounding the validity of the arbitration agreement.

Third, ideal guidelines would prohibit fee shifting to residents that do not prevail at the arbitral hearing. In litigation, it is the court’s province to make determinations regarding whether the losing party should pay the victor’s attorney’s fees and costs.<sup>190</sup> Furthermore, the court’s determination is not an arbitrary decision, but is reached through thoughtful analysis, channeled by pertinent statutory law. Therefore, it is intrinsically inequitable to allow a partial party to an arbitration hearing to determine the circumstances and allocation of costs and attorney’s fees in a pre-dispute arbitration agreement.<sup>191</sup>

Fourth, ideal regulations would require that the arbitration agreement be presented to the resident in a document completely separate from the rest of the admission agreement. This guideline will provide additional safeguards for residents and nursing homes alike because physically separating the documents will minimize, if not entirely eliminate suits claiming that the arbitration clause was buried in the agreement or inconspicuous in nature. Additionally, this guideline will protect nursing homes from conflicting interpretations regarding what constitutes an inconspicuous clause.<sup>192</sup> Furthermore, drawing special attention to the arbitration agreement will help guarantee that residents appreciate the importance of the document and take time to review it carefully before signing.

Fifth, ideal regulations would establish guidelines for the costs associated with arbitration. Regulating the exorbitant costs of arbitration for consumers so that the expense of proceeding in this forum is as cost efficient as proceeding in a court of law could significantly diminish the deterrent effects that the prohibitive costs of arbitration entail. Furthermore, regulating the costs to more closely resemble the costs of litigation in a court of law would put the parties to the arbitration hearing on a more level playing field for purposes of endurance and financial capability to initiate claims and endure the process of arbitration.

Sixth, the ideal regulation would require arbitration firms to “reveal [ ] information . . . about their use of arbitration and the win-lose rate of corporations

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<sup>189</sup> Brief for the Plaintiff, *supra* note 14, at 11 (citing *Williams v. Aetna Fin. Co.* 700 N.E.2d 859, 473 (Ohio App. 1998)).

<sup>190</sup> *See Small v. HCF of Perrysburg*, 823 N.E.2d 19, 24 (Ohio App. Div. 2004).

<sup>191</sup> In a court of law, an impartial fact finder determines whether a party is or should be entitled to having the other party pay their court costs and/or attorney fees. In the arbitral forum, to allow parties to determine who will pay costs before a hearing is held, or what’s more, before a dispute arises is a wholly inequitable system to impose on consumers. Worse, however, is when this type of provision is imposed on nursing home residents that were not aware that they had agreed to submit future disputes to arbitration in their admissions agreement in the first place.

<sup>192</sup> When deciding cases of unconscionability in nursing home admission agreements containing pre-dispute arbitration clauses, courts routinely decide cases based on the facts of the case before them. This system, while it affords the parties to the case some measure of relief, does not provide an objective standard for nursing homes to model their agreements after. Proposing guidelines will eliminate this ambiguity and allow nursing home residents exactly what constitutes an unconscionable provision and similarly, exactly what constitutes adequate notice in the nursing home context.

and consumers.”<sup>193</sup> Currently, California is the only state that requires arbitration firms to reveal their practices<sup>194</sup> and even California’s policy is lacking in that it does not regulate the manner in which this information must be revealed. State legislatures should require arbitration firms to report this information so that an accurate assessment of consumer arbitration can be established for purposes of regulating this process.

Finally, the ideal regulation would require a rescission period of at least 30 days before the agreement could be deemed valid.<sup>195</sup> Including a rescission period affords residents a chance to change their mind or consult with legal counsel.<sup>196</sup> Conversely, the rescission period would essentially provide nursing homes with an affirmative defense that the resident agreed to arbitration, had an opportunity to rescind and did not, again minimizing litigation surrounding the enforceability of the agreement.

### VIII. CONCLUSION

In *Casarotto*, the Supreme Court enunciated that Montana’s notice requirement conflicted with the “goals and policies of the FAA.”<sup>197</sup> The inequities associated with the process of pre-dispute arbitration agreements in nursing homes, however, confirm that the FAA’s “goals and policies”<sup>198</sup> conflict with “accepted principles of contract law”<sup>199</sup> in this context. Long standing principles of contract law that pre-date the FAA, as well as basic human morality, should supersede the interests of efficiency and convenience purportedly served by the general enforceability of the statute.

State case law as well as attempted state legislation already evince an underlying public policy to protect nursing home residents from the harsh effects of

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<sup>193</sup> O’Donnell, *supra* note 145, at 5

<sup>194</sup> *Id.* at 5-6.

<sup>195</sup> See generally *Buraczynski v. Eyring*, 919 S.W.2d 314, 317 (Tenn. 1996) (describing an arbitration agreement with a thirty (30) day rescission period that the court approved). Persons faced with the life changing moment and perhaps dire necessity of being admitted to a nursing home facility to care for them should be afforded the opportunity to ponder the new and unfamiliar process, secure legal consultation, and then subsequently change their mind, if necessary, to avoid unconscionability.

<sup>196</sup> Allowing time for a rescission period would be especially beneficial in circumstances where individuals were forced to hurriedly proceed with admission and could not thoroughly assess the agreement or consult with an attorney (similar to *Small*).

<sup>197</sup> See *Doctor’s Assoc. v. Casarotto*, 517 U.S. 681, 688 (1996) (holding that Montana’s state statute regulating the notice requirements of arbitration agreements, as well as any legislation that would single out arbitration agreements for special treatment aside from that given generally to contracts, was invalid as conflicting with the goals and policies of the FAA to put arbitration on the same footing as other contracts).

<sup>198</sup> See *Id.*

<sup>199</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 411 (1967) (Black, J., dissenting) (arguing that the majority’s holding in *Prima Paint* that the FAA was intended to broadly enforce arbitration agreements violated accepted principles of contract law – meaning that the broad rule could potentially enforce agreements in which no true “meeting of the minds was reached”).

unconscionable arbitration agreements.<sup>200</sup> Despite court decisions declaring certain practices unconscionable,<sup>201</sup> however, nursing homes continue to employ these procedures.<sup>202</sup> It is therefore Congress' obligation to recognize this impropriety and grant relief – possibly in the form of legislation similar to the McCarran Act that would essentially consent to state regulation of nursing home admission agreements. Moreover, legislative relief would serve policy interests by providing an efficient, inexpensive, and fair forum for dispute resolution; pursue the goals of states by protecting residents; and open the door of redress that had previously been closed or impossible to reach for many nursing home residents. This legislation is vital to nursing home residents because whatever Congress meant when it sought to make arbitration agreements as enforceable as other contracts,<sup>203</sup> and whatever the Supreme Court meant when it interpreted the FAA to apply to consumer disputes in federal *and state court*,<sup>204</sup> surely – it did not mean this.<sup>205</sup>

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<sup>200</sup> See *Fortune v. Castle Nursing Homes*, 843 N.E.2d 1216, 1221 (Ohio App. Div. 2005) (holding that a nursing home arbitration agreement that contained a loser pays provision requiring the nursing home resident to pay the nursing home's attorney fees if the resident did not prevail at the arbitration hearing was substantively); see also *Small v. HCF of Perrysburg*, 823 N.E.2d 19, 24 (Ohio App. Div. 2004) (holding that an arbitration agreement that contained a loser pays provision, was presented to the spouse of the future resident in a frantic admissions process and was not explained to the spouse was procedurally unconscionable); see also *Casarotto*, 517 U.S. 681 (concerning a Montana state statute that attempted to require certain notice requirements in conjunction with arbitration agreements to attempt to protect consumers that did not knowingly agree to the pre-dispute arbitration clause).

<sup>201</sup> See *Fortune*, 842 N.E.2d at 1221 (discussing the unconscionability of loser pays provisions); see also *Small*, 823 N.E.2d at 24 (discussing the unconscionability of the process of nursing homes admissions when the person signing the contract is under a great amount of stress; the agreement is not adequately explained (or explained at all), the person is not accompanied by legal counsel, the person does not possess any legal experience, and the person is of progressed age).

<sup>202</sup> See Brief for the Plaintiff, *supra* note 14, at 11. In *Day*, this currently pending case represents that despite court decisions that continually invalidate arbitration agreements that contain "loser pays provisions," nursing home facilities continue to utilize them as a part of their residency contracts. This anomaly proves the point that inconsistent court opinions and a lack of state regulation in this field produce a substantially negative impact for nursing home residents. This case also proves the point that piecemeal protectionism by the state court decisions is insufficient to adequately protect nursing home residents from the many unconscionable practices of nursing home facilities.

<sup>203</sup> See generally 9 U.S.C.A. § 2 (West 2008), (stating that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall *be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract") (emphasis added).

<sup>204</sup> See generally *Doctor's Assoc. v. Casarotto*, 517 U.S. 681, 688 (1996) (reaffirming the rule in *Prima Paint* that Congress intended the FAA to apply broadly and bring arbitration agreements to the same level as contracts); see also *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 272-74 (1995) (reaffirming the general enforceability rule of the FAA established in *Prima Paint*); see also *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Jr.*

Univ., 489 U.S. 468, 478-79 (1989) (adopting the Court's language in *Keating* and again endorsing the general enforceability of arbitration agreements under the FAA as established in *Prima Paint*); see also *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (holding that the FAA's generally enforceability preempted a California law regarding arbitration); *Southland Corp. v. Keating*, 465 U.S. at 10-14 (1984) (stating that the FAA is applicable to consumers in federal and state court pursuant to the general enforceability of the FAA under Congress' Commerce Clause authority); see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 25-26 (1983) (reaffirming the idea that the general enforceability of the FAA creates federal substantive law establishing a "duty to honor an agreement to arbitrate."); see also *Prima Paint*, 388 U.S. at 403-406 (establishing the bedrock principle relied upon in subsequent opinions that the FAA creates substantive law binding on both federal and state courts under Congress' Commerce Clause authority and that Congress intended to make arbitration agreements as enforceable as regular contracts when it enacted the FAA).

<sup>205</sup> See generally *Waverly-Arkansas, Inc. v. Keener*, No. CA-07-524, slip op. at 1 (Ark. Ct. App. Feb. 6, 2008) (holding that "the arbitration agreement was invalid . . . [and] that the arbitration agreement was a contract of adhesion and that the circumstances surrounding its execution rendered it unconscionable"); *Covenant Health & Rehabilitation of Picayune v. Lumpkin*, No. 2007-CA-00449, slip op. at 2 (Miss. Ct. App. Feb. 5, 2008) ("finding that Lumpkin's daughter possessed the capacity to bind her mother to arbitration, that there existed sufficient consideration to support the creation of the arbitration clause, that Lumpkin's daughter was not fraudulently induced into signing the admissions agreement, and that the admissions agreement was and the arbitration clause are substantively conscionable"); *Cnty Care Ctr of Vicksburg v. Mason*, No. 2006-CA-00599, slip op. at 222-225 (Miss. Ct. App. Oct. 9, 2007) (enforcing a nursing home admissions agreement that contained a pre-dispute arbitration agreement and forcing Mrs. Mason to seek redress in the arbitral forum for injuries sustained after being physically attacked by another resident at the nursing home, even though she had entered the home with several significant health problems and after having recently lost her husband); Brief for the Plaintiff, *supra* note 14, at 3-5 (regarding a nursing home admissions process that included a list of things for the nursing home administrator to discuss with potential residents, but explicitly excluded mentioning the arbitration clause); *Fortune*, 843 N.E.2d 1216 (regarding a nursing home resident that unknowingly agreed to a pre-dispute arbitration agreement in her nursing home resident contract that required her to reimburse the nursing home's attorney fees and costs if she lost her case at the arbitration hearing); *Sloan v. Nat'l Healthcorp.*, No. M2005-01273-COA-R3-CV, slip op. at 1 (Tenn. Ct. App. Aug. 30, 2006) (holding that even "after engaging in four months of discovery," the defendant nursing home could file a motion to compel arbitration, and "that a defendant may assert that a dispute must be arbitrated and, in the alternative, demand a jury, without losing its right to arbitration"); *Cleveland v. Mann*, No. 2005-CA-00924, slip op. at 111 (Miss. Nov. 30, 2006) (holding that an arbitration agreement was not substantively unconscionable, was not procedurally unconscionable, was subject to the Federal Arbitration Act, and was binding on the patient's beneficiaries even though he signed after undergoing a substantial surgery and was not represented by legal counsel during the course of the agreement); *Small*, 823 N.E.2d 19 (regarding a 69 year old woman who was rushed into unknowingly signing a nursing home admission agreement for her husband that contained a binding pre-dispute arbitration clause, requiring Mrs. Small to reimburse the nursing home's attorney fees and costs if she lost at the arbitration hearing). These cases represent only a small portion of current cases surrounding the enforceability or unconscionability of nursing home arbitration agreements. These cases also represent the inconsistencies that are produced as a result of a lack of regulation in this environment. Although some courts afford residents relief from the arbitration agreement, others do not. No clear standard of notice or unconscionability can be discerned from these cases. These cases proffer further evidence that new legislation is needed, specifically regarding pre-dispute arbitration agreements in nursing homes, specifically provided by the state legislatures.