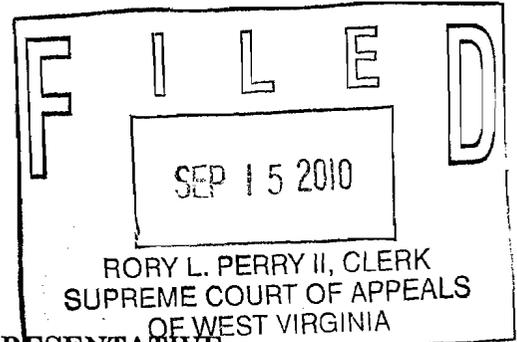


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35546



**JEFFREY TAYLOR, PERSONAL REPRESENTATIVE
OF THE ESTATE OF LEO TAYLOR,
PLAINTIFF-BELOW, APPELLANT**

v.

**MHCC, INC. F/K/A MARMET HEALTH CARE CENTER, ET AL.,
DEFENDANTS-BELOW, APPELLEES**

Appeal from the Circuit Court of Kanawha County
Honorable James C. Stucky, Judge
Civil Action No. 09-C-128

**BRIEF OF THE WEST VIRGINIA HEALTH CARE
ASSOCIATION AS AMICUS CURIAE**

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I. INTRODUCTION

The amicus curiae, the West Virginia Health Care Association [WVHCA], is a trade association for extended care providers of health care in West Virginia. It is a state affiliate of the American Health Care Association and the National Center for Assisted Living.

The WVHCA has more than 130 member facilities that include nursing homes, assisted living communities, and hospital based skilled nursing facilities. The WVHCA also has an associate membership category for suppliers of goods and services to its members.

In 1976, WVHCA was incorporated as a not-for-profit organization for licensed facilities to gain information, representation, education, and services for the common goal of providing quality care in safe surroundings for fair payment. The members consist of proprietary (73%) and nonproprietary facilities (27%) for a total of more than 11,000 beds. A majority of the facilities (66%) exceed 90 beds in capacity, while 34% have less than 90 beds.

In 1986, the WVHCA established the West Virginia Long Term Care Service Corporation, a for-profit subsidiary of the WVHCA. Through the Service Corporation, the WVHCA provides a discounted purchasing program, an endorsement of a retirement plan for member employees through The Variable Annuity Life Insurance Company, and a term life insurance policy for member employees through Reliance Standard Life Insurance Company.

Member assisted living facilities include Autumn Acres in Berkeley Springs; Broadmore Assisted Living in Hurricane; Cedar Grove Personal Care in Parkersburg; Elmhurst The House of Friendship, Inc., in Wheeling; GlenWood Park Retirement Village in Princeton; Grant County Nursing Home in Petersburg; Golden Circle at Droppleman Place in Stonewood; Midland Meadows Senior Living in Ona; Mound View Health Care, Inc., in Moundsville; Mullens Manor Assisted Living in Pineville; Pepperberry Suites in Chester; Quarry Manor in Charleston; Regency Place in Scott Depot; Serra Manor in Weirton; Suites at Heritage Point in Morgantown; SweetBriar in Dunbar; The Caring Place in Ripley; The Maples in Bluefield; The Meadows at Maplewood in Bridgeport; The Ridgemont at Edgewood Summit in Charleston; The Seasons in Lewisburg; The Summit at Hidden Valley in Oak Hill; Willow Tree Manor in Charles Town; and Windy Hill Village in Kingwood.

Associate members include American Medical Technologies; Arbor Rehabilitation and Healthcare Services; Arnett & Foster, PLLC; B&B Medical Supply, LLC; Broughton Foods, LLC; Capital Source; Colonial Equipment Company; Commercial Insurance Services, Inc.; Delta Dental; Dinex International; Dixon Hughes, PLLC; Druzak Medical, Inc.; EnduraCare Therapy Management; Encore Pharmacy; E-Z Medical, Inc.; Flaherty, Sensabaugh & Bonasso, PLLC; Gordon Food Service; Grandview Medical Resources; Hamilton Insurance Agency; Health Consultants Plus, Inc.; Healthcare Services Group, Inc.; Healthcare System Connections; Horizon Healthcare Management; Hospice Care Corporation; Hospice of Southern West Virginia; HPSI Purchasing Services; Image by Design, LC;

Innovatix; Integrated Employee Benefit Solutions LLC; Kay Casto & Chaney PLLC; Keegan & Associates, Inc.; LeaderStat; Legacy Consulting Pharmacy; LTC Stylists; Marden Rehabilitation; McKesson Medical-Surgical; Medline Industries, Inc.; Medical Claims Recovery & Denial Solutions; Millennium Pharmacy Systems, Inc.; Mountain State University; Neace Lukens; Omnicare of West Virginia; Pack Lambert & Burdette PLLC; Paramedical Consultants, LLC; PeopleFirst Rehabilitation; Quality Mobile Imaging; Ramsey Insurance Agency; Red Capital Group; Resor Financial Group; Respiratory Health Services; RLH Consulting; SBG, LLC; Scentair; Select Medical Rehabilitation Services; Seneca Medical, Inc.; Senior Healthcare Associates; SCA Personal Care; Silverstein & Maddox Insurance, Inc.; Standard Exterminating; Steptoe & Johnson PLLC; Sysco Food Services of Virginia; TIS Insurance; Todd Schmidgall, DPM; Trustpoint Insurance; U.S. Foodservice - West Virginia Division; Village Long Term Care Services; Wells Fargo Disability Management; Wells Fargo Insurance Services of WV; West Virginia Activity Professionals Association; West Virginia Home Health Services/Amedisys; West Virginia Medicaid Advisors; West Virginia Medical Institute; Wetzel County Hospital; and WV Therapy Services LLC.

Through publications, seminars, and its website, WVHCA provides members, associate members, and consumers with useful information, including a Consumer Guide: Helping Families Make Informed Choices About Care, which covers programs and services administered by the West Virginia Bureau of Senior Services; a summary of the basic services provided in the two different care settings

- assisted living communities and nursing facilities; and a list of useful organizations and agencies for consumers.

Through its government affairs division, WVHCA represents the interests of members, associate members, and consumers before the executive, legislative, and judicial branches of both federal and state government. WVHCA has filed amicus briefs in this Court in the previous cases of *Boggs v. Camden-Clark Memorial Hospital Corporation*, 216 W. Va. 656, 609 S.E.2d 917 (2004) and *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001), where the interests of West Virginia assisted living providers and consumers were at stake. Likewise, in this case, where the issue concerns alternative dispute resolution, the interests of West Virginia assisted living providers and consumers are at stake.

II. STATEMENT OF FACTS

In this case and the companion case of *Brown v. Genesis Healthcare Corporation*, No. 35494, the circuit courts enforced the clear provisions of contracts between providers and consumers providing for alternative dispute resolution.

In this case, the contract between the provider and the resident stated:

MANDATORY ARBITRATION . . . all disputes and disagreements between Facility and Resident . . . related hereto or the services provided by Facility hereunder including, without limitation, allegations by Resident of neglect, abuse or negligence which the Resident and Facility are unable to resolve between themselves shall be submitted to binding arbitration The arbitrator's decision shall be binding on the parties and conclusive as to the issues addressed

Petition for Appeal at 5. In the *Brown* case, the contract between the provider and the resident similarly stated, “any legal dispute, controversy, demand or claim . . . that arises out of or relates to . . . any service or health care provided by the Facility to the Resident . . . shall be resolved exclusively by binding arbitration . . . and not by a lawsuit . . .” *Brown* Order, November 7, 2007, at 3.

These arbitration provisions are clear and the circuit courts were correct in their enforcement as none of the defenses raised – illegality and unconscionability – have any merit. Other courts, in similar cases, have rejected unconscionability and illegality challenges to arbitration provisions in nursing home and assisted living contracts. Likewise, in this case and the companion case of *Brown*, WVHCA respectfully submits that the circuit court rulings upholding the validity and enforceability of the mandatory arbitration provisions involved should be affirmed.

II. DISCUSSION OF LAW

A. STANDARD OF REVIEW.

With respect to standard of review, this Court recently held in *Ruckdeschel v. Falcon Drilling Co.*, 225 W. Va. 450, 454, 693 S.E.2d 815, 819 (2010), involving a similar dismissal of claims based upon a finding of arbitrability: “The Court reviews a circuit court’s order granting a motion to dismiss a complaint under a de novo standard.” (Citations omitted).

As this Court recently reiterated in Syllabus Point 2 of *Ruckdeschel*, there is a presumption that alternative dispute resolution provisions are valid:

“It is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract; however, where a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.’ Syllabus Point 3, *Board of Education of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977).” Syl. Pt. 3, *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 685 S.E.2d 693 (2009).

As this Court also recently reiterated in Syllabus Point 3 of *Ruckdeschel*, there is a presumption that alternative dispute resolution provisions are exclusive:

“A contract providing a procedure for arbitration of disputes, and providing that: (1) all claims, disputes or other matters in question arising out of, or relating to the contract shall be decided by arbitration, unless the parties mutually agree otherwise; (2) the arbitration agreement shall be specifically enforceable under the prevailing arbitration law; (3) the arbitration award shall be final; and (4) the judgment may be entered upon the award in accordance with applicable law in any court having jurisdiction thereof, creates a condition precedent to any right of action arising under the contract.” Syl. Pt. 2, *Bd. of Educ. v. W. Harley Miller, Inc.*, 159 W. Va. 120, 221 S.E.2d 882 (1975).

Moreover, as the Court held in Syllabus Point 4 of *Ruckdeschel*, the scope of a circuit court’s review of alternative dispute resolution provisions is limited:

“When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1)

whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.” Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc., v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010).

Finally, in Syllabus Point 4 of *McGraw v. American Tobacco Company*, 224 W. Va. 211, 681 S.E.2d 96 (2009), this Court held:

This Court will preclude enforcement of a circuit court’s order compelling arbitration only after a de novo review of the circuit court’s legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court’s order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate.

Here, the circuit courts carefully examined the contracts, the parties, and the nature of the undertakings covered by the contracts, and correctly determined that the parties had agreed that all disputes arising from their relationship would be subject to alternative dispute resolution; that the alternative dispute resolution provisions were enforceable; and that the suits involved fall within the substantive scope of those alternative dispute resolution provisions.

Accordingly, WVHCA submits this Court cannot reach “the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court’s order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate” and, consequently, those rulings should be affirmed.

B. THE NURSING HOME STATUTE PROVIDES CONSUMERS WITH A CAUSE OF ACTION, BUT DOES NOT PROHIBIT AGREEMENTS PROVIDING FOR ALTERNATIVE DISPUTE RESOLUTION OF THOSE CAUSES OF ACTION AND IT IS WELL-SETTLED THAT PARTIES MAY AGREE TO ARBITRATE STATUTORY CAUSES OF ACTION AND THAT THE FEDERAL ARBITRATION ACT SUPERSEDES STATE STATUTES LODGING PRIMARY JURISDICTION IN ANOTHER FORUM.¹

In 1977, the Legislature enacted a statute governing nursing homes. 1977 W. Va. Acts ch. 102. The purpose of the statute is “to encourage and promote the development and utilization of resources to ensure the effective and financially efficient care and treatment of persons who are convalescing or whose physical or mental condition requires them to receive a degree of nursing or related health care greater than that necessary for well individuals.”²

Pursuant to the statute, nursing home facilities are regulated by the Department of Health and Human Resources.³ Administrative oversight includes

¹ A good deal of appellant’s brief is devoted to complaining about an allegedly late filed reply brief and the trial court’s entry of an order prepared by appellees’ counsel, but R. Civ. P. 6 only provides deadlines for motions and responses, not for replies, and responses can be filed as late as two days prior to a hearing if served by hand-deliver or fax, R. Civ. P. 6(d)(2)(B), and “a court speaks only through its orders,” *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 671, 535 S.E.2d 727, 736 (2000) (citations omitted), and it has commonplace for decades for the prevailing party to be asked to prepare draft orders for review and entry by the presiding judge, *Bank of Gauley v. Osenton*, 92 W. Va. 1, 114 S.E. 435, 437 (1922)(“We know that it is common practice even in hotly contested cases, either at law or in equity, when a final order or decree is to be prepared, for the court to direct the attorney of the prevailing party to prepare the order.”), and this Court has codified the practice in Tr. Ct. Rule 24.01. Here, as acknowledged in appellant’s brief, Appellant’s Brief at 2-3, the presiding judge afforded an opportunity to both sides to submit proposed orders and merely because the judge entered appellees’ order does not make that order somehow defective.

² W. Va. Code § 16-5C-1.

³ W. Va. Code §§ 16-5C-2 and 3.

the promulgation of minimum standards for nursing home facilities,⁴ and the licensing of nursing home facilities.⁵ Administrative oversight also includes the power to investigate complaints; conduct unannounced inspections; require remedial measures, and impose penalties upon nursing homes in noncompliance, including fines; the limitation, suspension, and revocation of licenses; and closure of facilities.⁶

In addition to this administrative oversight, the Legislature has created a private cause of action:

Any nursing home that deprives a resident of any right or benefit created or established for the well-being of this resident by the terms of any contract, by any state statute or rule, or by any applicable federal statute or regulation, shall be liable to the resident for injuries suffered as a result of such deprivation. Upon a finding that a resident has been deprived of such a right or benefit, and that the resident has been injured as a result of such deprivation, and unless there is a finding that the nursing home exercised all care reasonably necessary to prevent and limit the deprivation and injury to the resident, compensatory damages shall be assessed in an amount sufficient to compensate the resident for such injury. In addition, where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident, punitive damages may be assessed. A resident may also maintain an action pursuant to this section for any other type of relief, including injunctive and declaratory relief, permitted by law. Exhaustion of any available

⁴ W. Va. Code § 16-5C-5.

⁵ W. Va. Code § 16-5C-6.

⁶ W. Va. Code §§ 16-5C-8, 9, 10, and 11.

administrative remedies may not be required prior to commencement of suit hereunder.⁷

1. Private Statutory Causes of Action Are Subject to Alternative Dispute Resolution Agreements.

Obviously, private statutory causes of action are subject to alternative dispute resolution agreements and there is nothing in the nursing home statute prohibiting such agreements.

As the United States Supreme Court observed in *Green Tree Financial Corp.*

– *Alabama v. Randolph*, 531 U.S. 79, 90 (2000):

We now turn to the question whether Randolph’s agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum. Section 2 of the FAA provides that “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. In considering whether respondent’s agreement to arbitrate is unenforceable, we are mindful of the FAA’s purpose “to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).

In light of that purpose, we have recognized that *federal statutory claims can be appropriately resolved through arbitration, and we have enforced agreements to arbitrate that involve such claims.* See, e.g., *Rodriguez de Quijas v. Shearson/American*

⁷ W. Va. Code § 16-5C-15(c).

Express, Inc., 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (Sherman Act). We have likewise rejected generalized attacks on arbitration that rest on “suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.” *Rodriguez de Quijas, supra*, at 481, 109 S. Ct. 1917. These cases demonstrate that *even claims arising under a statute designed to further important social policies may be arbitrated* because “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,” the statute serves its functions. See *Gilmer, supra*, at 28, 111 S. Ct. 1647 (quoting *Mitsubishi, supra*, at 637, 105 S. Ct. 3346).

(emphasis supplied). Therefore, the argument that claims under the nursing home statute are somehow exempt from arbitration provisions in nursing home services agreements simply has no merit.

This Court has also rejected the argument statutory and/or public policy claims are somehow exempt from arbitration provisions.

In *State ex rel. Wells v. Matish*, 215 W. Va. 686, 600 S.E.2d 583 (2004), for example a television news anchor sued his employer after he was placed on an unpaid leave of absence during the campaign of his wife, who was also a television news anchor, for Secretary of State. Rejecting the anchor’s argument that his public policy violation claims were not subject to arbitration, this Court observed:

Essentially, Mr. Wells argues that only elected judges are capable of determining whether a termination of

employment runs afoul of substantial public policy. However, he provides no authority to support in his contention. To the contrary, WBOY-TV points out that in *Eastern Associated Coal Corp. v. Munson*, 266 F. Supp. 2d 479 (N.D. W. Va. 2003), the Court found that a *Harless* claim was subject to arbitration. That decision was based upon the express language of the arbitration provision. 266 F. Supp. 2d at 488.

The arbitration provision at issue here says that “any dispute” that arises between the parties as a result of the employment contract or Mr. Wells’ employment with WBOY-TV is subject to “the sole and exclusive remedy of binding arbitration.” In *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L.Ed.2d 765, 785 (1983), the United States Supreme Court declared that “[t]he [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]” Accordingly, we find no merit to Mr. Wells’ contention that his public policy violation claims cannot be arbitrated. We would note that pursuant to Rule 11 of AAA’s National Rules, “Arbitrators . . . shall be experienced in the field of employment law.” Also, Rule 34 of AAA’s National Rules provides that “[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court.” ***Consequently, as the circuit court noted in its order, Mr. Wells “will not forgo any substantive rights afforded him under either statutory or common law” simply because his claim is arbitrated.***

Id. at 693-94, 600 S.E.2d at 590-91 (emphasis supplied and footnotes omitted).

Similarly, in *McGraw*, *supra* at 227, 681 S.E.2d at 112, this Court rejected plaintiffs’ arguments that their statutory claims should not be subjected to mandatory arbitration as follows:

The plain and unambiguous terms and structure of the Master Settlement Agreement provide for arbitration of a diligent enforcement determination in a single, unitary proceeding involving all participants to the Master Settlement Agreement having an interest in the resolution of the issue. Therefore, the Circuit Court of Kanawha County did not err in ordering that the “dispute concerning the 2003 NPM Adjustment, including the State’s defense that it diligently enforced its “Qualifying Statute” and is therefore exempt from the NPM Adjustment, must be arbitrated under the MSA’s plain language before one nationwide arbitration panel of three former federal judges.”

Other courts have rejected the argument that the private causes of action under state nursing home statutes may not be subject to arbitration provisions in services agreement.

In *Slusser ex rel. Slusser v. Life Care Centers of America, Inc.*, 977 So. 2d 662, 663 (Fla. Ct. App. 2008), for example, the court noted, “By way of background, Slusser checked herself into a nursing home owned by Life Care. During the admission process, Slusser executed an agreement to arbitrate all disputes and claims between the parties. While at the nursing home, Slusser was injured and sued Life Care in the circuit court for negligence. Life Care timely moved the trial court for an order compelling arbitration under the terms of the arbitration agreement. The trial court granted Life Care’s motion.” Rejecting plaintiff’s argument that the arbitration agreement was invalid because it waived her right of access to the courts to litigate her private cause of action under Florida’s nursing home statute, the court held:

In *Digati*, we held that a court does not have the power to decline to enforce an arbitration agreement simply because it waives access to the courts to resolve claims arising under Act. *Digati*, 878 So.2d at 390. Notwithstanding our holding in *Digati*, Appellant argues that, because the Act was passed as a valid exercise of the legislature's police power, access to the courts cannot be waived. Appellant cites as authority only the concurring opinion in *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296, 301 (Fla. 4th DCA 2005) (en banc) (Farmer, J., concurring). We do not agree with that argument.

Had the legislature intended to stop parties from arbitrating their claims under the Act, it would have created an express prohibition. It did not do so. *We therefore conclude that a voluntary waiver of access to the courts to resolve claims arising under the Nursing Home Residents Act is valid. Digati*, 878 So.2d at 390.

Id. at 663-64 (emphasis supplied).

In *Bland v. Health Care and Retirement Corporation of America*, 927 So. 2d 252, 258 (Fla. Ct. App. 2006), the court likewise rejected the argument that an arbitration agreement was invalid because it waived claims under Florida's nursing home statute:

Nothing in the Nursing Home Residents' Rights Act reflects a legislative hostility to arbitration. Moreover, as a general proposition, a party may waive statutory rights. *Unicare Health Facilities, Inc. v. Mort*, 553 So.2d 159, 161 (Fla. 1989); see also *Kaplan v. Kimball Hill Homes Fla., Inc.*, 915 So.2d 755 (Fla. 2d DCA 2005). The Nursing Home Residents' Rights Act does not expressly prohibit a contractual waiver or limitation of statutory rights. Cf. *Holt v. O'Brien Imports of Fort Myers, Inc.*, 862 So.2d 87, 90 (Fla. 2d DCA 2003) (noting statute prohibited fee waiver). *The legislature could have included such a restriction in the Nursing Home Residents' Rights Act. Petsch*, 872 So.2d at 261; see, e.g., § 769.06

(prohibiting contracts limiting liability in context of fellow servant act as illegal and void). Accordingly, a compelling argument can be made that, *absent a legislative restriction, the courts should honor a party's decision to contract away statutory protections*. See § 400.151(2) (stating that nursing home contract shall include "any other matters which the parties deem appropriate").

Despite these competing, and compelling, arguments, once the trial court completes its three-prong task under Seifert, 750 So.2d at 636, *we see no reason why the arbitrator, in the first instance, cannot decide whether to enforce the remedial limitations*. Kaplan, 915 So.2d at 761; Petsch, 872 So.2d at 264; Rollins, Inc. v. Lighthouse Bay Holdings, Ltd., 898 So.2d 86 (Fla. 2d DCA) (noting that arbitrator should in first instance decide validity of remedial restrictions in arbitration provision), review denied, 908 So.2d 1057 (Fla.2005). Such a determination is well within the arbitrator's ken. *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, ----, 126 S. Ct. 1204, 1210, 163 L. Ed. 2d 1038 (2006) (holding that regardless of whether challenge is brought in federal or state court, challenge to validity of contract as whole, and not specifically to arbitration clause, must go to arbitrator).

The arbitrator can assess the public policy concerns in the context of a fully developed factual record. Conceivably, the evidence presented in arbitration could render these concerns moot. For example, a factual finding that noneconomic losses did not exceed \$250,000 would render the contractual limitation irrelevant. Similarly, a finding that the evidence did not justify an award of punitive damages would eliminate the need to address the validity of a punitive damages bar.

(emphasis supplied).

In *Mathews ex rel. Mathews v. Life Care Centers of America, Inc.*, 217 Ariz. 606, 610-11, 177 P.3d 867, 871-72 (Ariz. Ct. App. 2008), the court similarly rejected

the argument that the arbitration provisions of a nursing home admissions agreement were invalid because they conflicted with Arizona's Adult Protective Services Act:

[W]e find that the legislature did not intend to prevent parties from enforcing such voluntary arbitration agreements. The Agreement in this case clearly states that the arbitrator "shall apply the substantive law of Arizona." This statement demonstrates that an arbitrator would have the power to apply APSA in resolving the case. See *Hembree v. Broadway Realty & Trust Co., Inc.*, 151 Ariz. 418, 419, 728 P.2d 288, 289 (App. 1986) ("An arbitrator's powers are defined by the agreement of the parties."); *Verdex Steel and Constr. Co. v. Bd. of Supervisors*, 19 Ariz. App. 547, 551, 509 P.2d 240, 244 (1973) (Arbitrators are empowered to decide both questions of fact and law.). Thus, *a victim of elder abuse pursuant to APSA would not be deprived of the remedies specified by the legislature simply because the case is resolved using arbitration.*

(emphasis supplied).

Finally, in *Northport Health Services of Arkansas, LLC v. Robinson*, 2009 WL 140983 at *3 (W.D. Ark.), the court rejected a similar argument that the arbitration provisions of a nursing home admissions agreement were unenforceable because they conflicted with the provisions of an Arkansas statute providing standards of care for nursing home residents stating as follows:

Robinson's contention that the Arbitration Agreement is an attempt contract away Snow's constitutional right to a jury is without merit. Robinson contends that the Arbitration Agreement is an attempt "to illegally contract away the very responsibility the government requires" of nursing facilities, citing A.C.A. § 20-10-1209(a)(3). This statute provides that a resident of a longterm care facility "may bring a cause of action against any licensee

responsible” for deprivation of enumerated rights, and that such action “may be brought in any court of competent jurisdiction in the county in which the injury occurred or where the licensee is located.” One enumerated right, under A.C.A. § 20-10-1204(a)(8), is the right to receive “adequate and appropriate health care.”

Plaintiff acknowledges that the foregoing provisions do not “expressly preclude arbitration,” but contends that § 20-10-1204 “proclaim[s] a public policy of protecting all of a residents’ [sic] very valuable constitutional rights, one of which is a right to trial by jury.”

The statute in question does protect a number of patient rights, but the Court finds nothing therein which would preclude an agreement to arbitrate disputes. Nor does the United States Constitution itself preclude arbitration: the right to trial by jury may be waived. In addition, while Arkansas law provides that an agreement to arbitrate has “no application to personal injury or tort matters,” A.C.A. § 16-108-201(b)(2), the United States Supreme Court has determined that the FAA pre-empts state law which would invalidate an otherwise valid agreement to arbitrate. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). Thus, *while Robinson is correct that the Arbitration Agreement contracts away her right to a jury trial on the underlying issues in the Circuit Court Case, she is incorrect in her contention that this invalidates the Arbitration Agreement.*

(emphasis supplied).

Likewise, in the instant case, there is nothing in West Virginia’s nursing home statute prohibiting agreements to resolve claims under the statute through alternative dispute resolution procedures, and the arbitrator will be free to hear and decide Mr. Taylor’s claims under the West Virginia nursing home statute in the same manner as a civil judge and jury.

Parties who agree, in advance, to arbitrate legal disputes, whether they are constitutional, statutory, regulatory, common law, or contractual, are bound by their agreements in the absence of illegality or unconscionability, neither of which are present in this case. There is nothing in the nursing home statute which indicates that the Legislature intended to exempt private causes of action provided therein from alternative dispute resolution provisions in nursing home services agreement. And, the fact that plaintiff might have a private cause of action under the nursing home statute is inconsequential as neither he nor other consumers will forgo any substantive rights afforded them under the statute simply because their claims against nursing home and assisted living providers will be subject to alternative dispute resolution.

2. The Federal Arbitration Act Supersedes State Statutes Lodging Primary Jurisdiction of a Particular Dispute in Another Forum.

In addition to the fact that the United States Supreme Court and this Court have recognized that agreements to arbitrate statutory causes of action are valid and enforceable, the United States Supreme Court has held that the Federal Arbitration Act supersedes state statutes lodging primary jurisdiction of a particular dispute in another forum.

In *Preston v. Ferrer*, 552 U.S. 346 (2008), an attorney instituted an arbitration proceeding against a television performer seeking to recover fees to which the attorney alleged an entitlement under contract. Rejecting the performer's argument that the arbitration should have been deferred pending

proceedings before a state labor commissioner pursuant to state statute, the Court held:

Finally, it bears repeating that Preston's petition presents precisely and only a question concerning the forum in which the parties' dispute will be heard. See *supra*, at 983. "***By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum.***" *Mitsubishi Motors Corp.*, 473 U.S., at 628, 105 S. Ct. 3346. So here, Ferrer relinquishes no substantive rights the TAA or other California law may accord him. But under the contract he signed, he cannot escape resolution of those rights in an arbitral forum.

In sum, we disapprove the distinction between judicial and administrative proceedings drawn by Ferrer and adopted by the appeals court. ***When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.***

Id. at 359 (emphasis supplied).

Likewise, in the instant case, Mr. Taylor does not forego any of his statutory rights by enforcement of the arbitration provision; rather, it merely changes the forum in which those rights will be litigated. In this case, it is clear that his state court statutory claims are within the scope of the arbitration provision and, thus, the Federal Arbitration Act supersedes the nursing home statute, even to the extent that it otherwise might lodge primary jurisdiction in the state's court system.⁸

⁸ Indeed, even if the West Virginia nursing home statute expressly prohibited waiver of the right to jury trial for the private cause of action provided therein, it would be preempted by the Federal Arbitration Act. In *Rainbow Health Care Center, Inc. v. Crutcher*, 2008 WL 268321 at *8 (N.D. Okla.), for example, the court held:

C. ALTERNATIVE DISPUTE RESOLUTION PROVISIONS IN CONTRACTS BETWEEN NURSING HOME OR ASSISTED LIVING PROVIDERS AND CONSUMERS ARE NOT UNCONSCIONABLE.

There is a misconception that merely because a contract or the alternative dispute resolution provisions of a contract are not actively negotiated or even adhesive in nature and because alternative dispute resolution costs and procedures are different than litigation costs and provisions, those provisions are not enforceable. To the contrary, merely because the terms of contract containing an alternative dispute resolution provision were not negotiated, but were contained in a standard form contract, the alternative dispute resolution provision is not unconscionable. Moreover, merely because alternative dispute resolution costs and

Despite the myriad of arguments presented by the parties in their cross-motions, this case can be resolved with the resolution of two issues: (1) whether Rainbow's admission agreement evidences a transaction involving interstate commerce, and (2) if so, whether Congress has enacted any laws withdrawing Rainbow's admission agreement from the FAA's coverage. Having determined Rainbow's admission agreement evidences a transaction involving interstate commerce, and having determined that Congress has not withdrawn Rainbow's admission agreement from the FAA's coverage, the *Court must conclude that Okla. Stat. tit. 63, § 1-1939(E)'s prohibition of arbitration agreements in nursing home admission agreements is preempted by the FAA. In enacting the FAA, Congress expressed a national policy favoring enforcement of arbitration agreements, and there is nothing to suggest that Congress ever intended to carve out an exception to that broad policy allowing the state of Oklahoma to disfavor arbitration agreements in nursing home admission agreements.*

(emphasis supplied); see also *Carter v. SSC Odin Operating Company*, 237 Ill.2d 30, 2010 WL 1493626 (Ill.). Indeed, WVHCA is perplexed as to the continued reliance on *Carter v. SSC Odin Operating Co., LLC*, 885 N.E.2d 1204 (Ill. Ct. App. 2008), *cert. denied*, 129 S. Ct. 2734 (2009), by some of the opponents of nursing home arbitration provisions in light of this subsequent decision by Illinois Supreme Court in 2010. Likewise, reliance upon other decisions which rely upon the Illinois Court of Appeals' 2008 decision in *Carter* is misplaced. Clearly, the FAA preempts any state statute which precludes enforcement of an otherwise valid arbitration provision.

procedures are different than litigation costs and procedures, contracts providing for alternative dispute resolution are not unconscionable. Finally, merely because certain claims are exempted from application of the alternative dispute resolution provisions of a contract does not render the contract unconscionable.

1. **As this Court Has Recognized, the Bulk of Contracts are Adhesive in Nature, and Adhesion Contracts that are not Otherwise Illegal or Unconscionable Are Valid and Enforceable.**

In *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 306-07, 685 S.E.2d 693, 700-701 (2009), this Court recently observed:

[T]he fact that the Agreement is a contract of adhesion does not necessarily mean that it is also invalid, and to determine its validity we look to other factors. See *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 557, 567 S.E.2d 265, 273 (2002), citing *American Food Management, Inc. v. Henson*, 105 Ill. App. 3d 141, 61 Ill. Dec. 122, 434 N.E.2d 59, 62-63 (1982), where we noted that:

“Adhesion contracts” include all “form contracts” submitted by one party on the basis of this or nothing[.] Since the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable. Instead courts engage in a process of judicial review[.] Finding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not.

Having determined that the Agreement is a contract of adhesion, we turn to the issue of whether the Agreement

is “unconscionable or was thrust upon [the Petitioner] because [she] was unwary and taken advantage of[.]” Syllabus Point 3, in part, *Board of Education of the County of Berkeley v. W. Harley Miller, Inc.* We have previously held that “A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and ‘the existence of unfair terms in the contract.’” Syllabus Point 4, *Art’s Flower Shop, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, Inc.*, 186 W. Va. 613, 413 S.E.2d 670 (1991). . . .

Having fully considered the record, we do not find the Agreement to be unconscionable. The Agreement requires arbitration in Morgantown, West Virginia-the place of the Petitioner’s employment-and not Denver, Colorado, as the Petitioner has argued. The Petitioner also has not argued that the Agreement was unconscionable because the arbitrator would be selected from Denver, Colorado. Further, there is no proof in the record before us that the Petitioner is exposed to exorbitant costs as a result of the Agreement as TeleTech is paying all costs associated with the Arbitration in excess of what the Petitioner would have been required to pay to maintain her civil action in the circuit court.

(footnotes omitted).

Thus, the arguments in this case that the alternative dispute resolution provisions of the nursing home services agreement are invalid because the agreement is an “adhesion contract;” because Ms. Taylor is not an attorney; because Ms. Taylor was unaccompanied by an attorney when she admitted her husband for care; because the alternative dispute resolution provision uses the term “MANDATORY ARBITRATION;” because she was not verbally advised of the provisions like Miranda warnings; because the agreement was presented and signed

as a "routine" matter; because certain provisions of the agreement related to resident care were the subject to a checklist, but the arbitration provisions were not; because the agreement was allegedly written in "legalese;" because Ms. Taylor was not afforded an "opportunity to question or reflect upon any of the provisions contained within the preprinted form contract;" and because the agreement contained "preprinted, non-negotiated, take-it-or-leave-it language without any option for the resident to refuse an offensive provision,"⁹ have no merit because, as this Court correctly observed in *Clites, supra* at 306, 685 S.E.2d at 700, "a rule automatically invalidating adhesion contracts would be completely unworkable." (citation omitted).

Indeed, this case is no different, in terms of bargaining position and contract terms, than in *Clites*, where the alternative dispute resolution provisions were contained in an employment contract between a telemarketing company and a customer service representative. Accordingly, this Court should reject the

⁹ Appellant's "take it or leave it" arguments notwithstanding, he acknowledges that the admission agreement contained "blank spaces to fill in the parties' names or to check specific options." Appellant's Brief at 4. Obviously, if the applicant was permitted to "check specific options," the agreement was not "take it or leave it." Moreover, appellant's argument that "the title of the provision itself - MANDATORY ARBITRATION" made "the signing of the provision . . . a prerequisite to admission," Appellant's Brief at 5, is incorrect. The word "mandatory" modifies "arbitration," not the agreement itself as its absence would surely have prompted appellant to argue that an ambiguity was created regarding whether any arbitration provided therein was, indeed, "mandatory." The argument that the absence of "opt-out language" in the agreement is without merit as the ability to "opt-out," either by refusing to execute the agreement with an objectionable provision or the striking out and initialing of an objectionable provision is inherent in all contracts. Finally, the argument that there was a checklist for certain provisions of the agreement which did not include the arbitration provision is weak as some of the items covered on the checklist are outside the terms of the agreement, while all of the mandatory arbitration terms are contained within the agreement.

argument here that merely because the agreements were adhesive in nature, their arbitration provisions are unconscionable and should be invalidated.

2. The Very Modest Differences Between Arbitration Fees and Court Fees Do Not Render All Alternative Dispute Resolution Provisions Unconscionable and, the Parties May Elect or Even Be Required to Use Private Arbitration and, Thus, the Fee Schedule Would Not Apply.

Initially, Mr. Taylor presented no evidence regarding differences in filing fees between arbitration and court proceedings. Only after the order enforcing the arbitration provision did Mr. Taylor submit the Standard Fee Schedule of the American Arbitration Association under the applicable Commercial Arbitration Rules and Mediation. See Plaintiff's Motion for Reconsideration, Exhibit E. The differences in fees, however, are modest and certainly do not support a finding of unconscionability and, if they did, then all arbitration agreements subject to the Standard Fee Schedule would likewise be unconscionable.

As Mr. Taylor notes, the filing fees for civil actions in West Virginia are \$260. Under the current Standard Fee Schedule, the filing fee for a \$10,000 claim is only \$775, which is only 7.75% of the claim, and for a \$1 million claim is \$6,200, which is only 0.06% of the claim. Certainly, if a claimant believes his or her claim is worth \$1 million, an arbitration filing fee of \$6,200, which is less than 1% of the amount in dispute cannot be said to be unconscionable.

Mr. Taylor also fails to discuss the Refund Schedule for Standard Fee Schedule which provides as follows:

The AAA offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to \$75,000, a minimum filing fee of \$350 will not be refunded. For all other cases, a minimum fee of \$600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.

50% of the filing fee, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.

25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

Thus, for example, if Mr. Taylor's case is settled for \$75,000 within 30 days of filing for arbitration, his net filing fee would be only \$487.50 if she had filed a \$75,000 claim.

As Mr. Taylor also notes, under the current Standard Fee Schedule, a "Final Fee," which is paid prior to hearing, a fee of \$200 is imposed for \$10,000 claims, and a fee of \$2,500 is imposed for \$1 million claims, but unlike civil suits, "This fee will be refunded at the conclusion of the case if no hearings have occurred." Thus, for example, if Mr. Taylor's claims are settled in arbitration for \$75,000 prior to any hearings, he would be refunded his entire "Final Fee" of \$300 if he had filed a \$75,000 claim.

Mr. Taylor also fails to mention AAA's Flexible Fee Schedule which has lower fees (only \$400 for a \$10,000 claim and only \$2,500 for a \$1 million claim), which

would further lower the cost of arbitration, but would make the filing fee refund provisions inapplicable. Certainly, Mr. Taylor cannot seriously contend, for example, that if he were making a claim for \$1 million, a filing fee of \$2,500, which is only 0.025% of the amount claimed, is “unconscionable.”

Finally, if Mr. Taylor prevails, which he presumably must believe is the correct result or he would not have filed suit, then “The arbitrator or arbitrators shall be entitled to award recovery of the arbitration fees, attorney’s fees and out-of-pocket expenses incurred up to a maximum award of \$5000,” which if Mr. Taylor chose the Standard Fee Schedule, would result in a full award of his \$2,800 initial filing fee and his \$1,280 final fee if he made a \$300,000 claim.¹⁰

In *Estate of Eckstein ex rel. Luckey v. Life Care Centers of America, Inc.*, 623 F. Supp. 2d 1235, 1236 (E.D. Wash. 2009), the court noted, “On or about November 12, 2004, Decedent Margarete Eckstein (‘Eckstein’) was admitted as a resident of Defendant Life Care Center of Kennewick, Washington (‘LLC Kennewick’). Complaint, ¶ 3.1. Gene Kinsey (‘Kinsey’) served as Eckstein’s attorney in fact and legal representative throughout the admission process. Moffat Decl., Exh. A. Kinsey executed a ‘Voluntary Agreement for Arbitration’ dated November 12, 2004 (the ‘Agreement’) on Eckstein’s behalf.” Rejecting the argument that the cost of arbitration rendered the agreement unconscionable, the court held, “The Court agrees with Defendants in that it appears liability for arbitration fees and costs is

¹⁰ Moreover, the arbitration agreement provides only that AAA procedures are to be used, not that AAA arbitrators are to be used and, thus, the parties are free to use private arbitrators with different fee requirements should they mutually choose to do so.

entirely speculative at this juncture, an issue reserved for the arbitrators. Plaintiff cannot meet her burden of showing the likelihood of incurring the high costs anticipated by Plaintiff. As such, Plaintiff's theory is insufficient to establish unconscionability." *Id.* at 1238-39.

Mr. Taylor cites no cases in which any court has held that the differences in fees render arbitration provisions unconscionable and, as can be seen from the AAA fee structure and provisions that would be applicable to his arbitration claim,¹¹ they are not unconscionable.¹²

¹¹ Likewise, in the instant cases, there is no inherent unfairness in the terms of the alternative dispute resolution provisions which are closely analogous to traditional dispute resolution in the context of civil litigation. Indeed, retired state court judges often serve as arbitrators. See *Crihfield v. Brown*, 224 W. Va. 407, 409, 686 S.E.2d 58, 60 (2009)(retired Judge James O. Holliday serving as arbitrator).

¹²Indeed, as this Court observed in *Wells, supra* at 692-93, 600 S.E.2d at 589-90, some aspects of arbitration are less expensive than litigation:

We also find no merit to Mr. Wells' claim that the arbitration agreement should be set aside because WBOY-TV misrepresented the costs of arbitration during his contract negotiations. In that regard, Mr. Wells says that WBOY-TV told him that arbitration was cheaper than litigation in an effort to induce him to accept this term of the contract. He reasons that WBOY-TV should not be "rewarded" for "duping him" into believing that it is less costly to resolve any dispute via arbitration.

We reject Mr. Wells' argument because several courts, including the United States Supreme Court, have made express findings regarding the benefits and financial savings associated with the arbitration of employment disputes. In *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 123, 121 S. Ct. 1302, 1313, 149 L.Ed.2d 234, 252 (2001), the Court observed that, "**Arbitration agreements allow parties to avoid the costs of litigation**, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." Similarly, the United States Court of Appeals for the Fourth Circuit, has stated that "**[t]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances**. By one estimate, litigating a typical employment dispute costs

3. The Reservation of Certain Claims from an Alternative Dispute Resolution Provision of a Contract Does Not Render the Contract Unconscionable.

Mr. Taylor's claim that the arbitration provisions reserving collection and eviction actions render the agreement unconscionable is without merit.

First, one cannot seriously equate a wrongful death action in which Mr. Taylor is seeking substantial economic damages with a routine collection and eviction action in which the facility is seeking to get paid for providing services or, in the alternative, evict the resident.

Second, Mr. Taylor references no protection or benefit that the decedent would have received in arbitrating a collection and eviction action that he would not also have received in a civil action for collection and eviction.

Finally, as this Court has observed, a court's first obligation is to determine whether the parties agreed that the subject dispute would be subjected to arbitration, which presupposes that there are disputes that arise between parties that have agreed to arbitration that are not within the terms of that agreement.

Mr. Taylor cites no authority for the proposition that because certain claims are reserved from an alternative dispute resolution agreement, it is unconscionable

at least \$50,000 and takes two and one-half years to resolve." *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 552 (4th Cir.2001) (internal citation omitted). In light of these pronouncements, we are unable to find any merit to Mr. Wells' argument that the costs of arbitration as compared to litigation were misrepresented by WBOY-TV.

(emphasis supplied).

to enforce that agreement with respect to claims that are within the scope of the agreement. Therefore, his argument has no merit and should be rejected.

4. Other Courts Have Enforced Alternative Dispute Resolution Agreements in Similar Circumstances and Have Rejected Arguments Similar to Those Advanced by Mr. Taylor and in the Companion Case.

Other courts have enforced alternative dispute resolution agreements in circumstances similar to those presented in this case, rejecting the various and sundry arguments advanced by Mr. Taylor and in the companion case.

In *Mariner Health Care, Inc. v. Weeks*, 2006 WL 2056588 at *1 (N.D. Miss.), the court noted, “It is undisputed that at the time of Dan Weeks’s admission to the Greenwood Health and Rehabilitation Center nursing home, Murry W. Weeks entered into a contract on behalf of Dan Weeks with Greenwood Health & Rehabilitation Center, including an ‘Arbitration Agreement.’” Rejecting the argument that the arbitration provision was unenforceable because, in that case, the resident’s representative who signed the agreement allegedly did not read the arbitration provision, the court held, “a person is bound by the contents of a contract he signs, whether he reads it or not.” *Id.* at *1.

In *Estate of Etting v. Regents Park at Aventura, Inc.*, 891 So. 2d 558, 558 (Fla. Ct. App. 2004), the court held, “The plaintiff argues that since the decedent, his mother, was legally blind at the time that she signed the agreement with the nursing home, that the agreement and its arbitration clause are invalid. We disagree. ‘It has long been held in Florida that one is bound by his contract. Unless

one can show facts and circumstances to demonstrate that he was prevented from reading the contract, or that he was induced by statements of the other party to refrain from reading the contract it is binding. No party to a written contract in this state can defend against its enforcement on the sole ground that he signed it without reading it.” (citation omitted).

In *Fortune v. Castle Nursing Homes, Inc.*, 2007 WL 4227458 at *2 (Ohio. Ct. App.), the court held, “At the time of the hearing, appellant was unable to testify on her own behalf. Instead, appellant’s son testified to the best of his recollection. He could not testify with certainty that an employee of Castle did not discuss the agreement further with appellant. T. at 22. There was no evidence appellant was under stress or did not have time to review and comprehend the agreement. Given these facts, we find that appellant was unable to establish procedural unconscionability.”

In *Community Care Center of Vicksburg, LLC v. Mason*, 966 So. 2d 220, 223 (Miss. Ct. App. 2007), the court noted, “On the day of her admission of April 18, 2003, Mrs. Mason signed numerous admission documents in her room. One such document was an admission agreement, which contained an arbitration provision.”

Rejecting her claim of procedural unconscionability, the court held:

The basis of Mrs. Mason’s argument concerning procedural unconscionability is that she did not willingly, knowingly, and voluntarily entered into the arbitration provision. See *Vicksburg Partners*, 911 So.2d at 525-26(¶ 49). However, Mrs. Mason concedes the separate, but related contractual defenses of duress and fraud are not present. Seemingly, this would lead only one remaining

aspect-lack of knowledge-to procedural unconscionability, which has already been at least partially discussed in relation to finding a valid arbitration agreement. Since we are reversing the trial court's decision, though, we shall discuss all possible elements of procedural unconscionability.

[A]s far as the format, we find the layout of the arbitration agreement to be clear and conspicuous, with non-legalistic language used. Further, Mrs. Mason was familiar with the admissions process, as she had admitted herself and her husband to another nursing home previously and approved of the arbitration agreement in that admission agreement.

[T]he argument that Mrs. Mason did not know or understand what she was signing at the time is untenable. Her failure to initial that she carefully read the arbitration section does not establish a lack of knowledge. If Mrs. Mason had read what she signed, which she had a duty to do, there was sufficient evidence of notice of intent to arbitrate within the contract. Heritage House did not have the duty to explain every term of the admission agreement to Mrs. Mason.

Id. at 230. Rejecting her claim of substantive unconscionability, the court held:

We do not find the terms of the arbitration provision oppressive. Each party had the right to demand and enforce the same remedy of arbitration. Either party could terminate the entire contract upon thirty days' written notice. Furthermore, the resident could rescind the arbitration agreement within thirty days of execution. The arbitration provision specifically states Mrs. Mason had the right to seek legal counsel concerning the agreement, but she chose not to and did not have the documents sent to an attorney for review. We find no evidence Mrs. Mason was deprived of any benefits without a remedy or that Heritage House had an advantage over Mrs. Mason because of the language in the arbitration provision.

[R]egarding contracts containing arbitration provisions, the supreme court stated “[a]rbitration is about choice of forum-period.” *Vicksburg Partners*, 911 So.2d at 525(¶ 49). Arbitration merely means both parties have a mutually agreed upon forum through which to pursue their claims. Thus, we find no substantive unconscionability within the terms of the arbitration provision.

Id. at 231.

In *Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus*, 853 So. 2d 500, 505 (Fla. Ct. App. 2003), the court rejecting claims of both procedural and substantive unconscionability of the arbitration provisions of a “boiler plate” nursing home admissions agreement, stated as follows:

We hold that appellee did not demonstrate procedural unconscionability by the mere act of appellant’s including the arbitration clause in question (and an optional one at that) within the paperwork that Eugene had to sign to admit his mother to the nursing home.

With respect to the substantive prong, appellee argues that the clause would not have been substantively unconscionable had Eugene been given the choice of affirmatively giving up his right to trial, but instead he was deprived of a fundamental right unless he affirmatively indicated otherwise. However, as appellant argues, an arbitration clause need not even be optional in order to be valid; that was just additional evidence that it was fair. We hold there has been no showing of unconscionability sufficient to invalidate the arbitration clause in question.

(footnote omitted).

In *Hogan v. Country Villa Health Services*, 148 Cal. App. 4th 259, 263, 55 Cal. Rptr. 3d 450, 452 (2007), the court stated, “At the time of admission, Barbara signed two arbitration agreements—one manifesting an agreement to arbitrate any

medical malpractice claims and one manifesting an agreement to arbitrate any other type of claim against the facility.” Rejecting arguments that enforcing the arbitration agreement in a wrongful death proceeding violated public policy principles embodied in the state constitution and nursing home statute, the court held:

As the California Supreme Court said in *Madden v. Kaiser Foundation Hospitals, supra*, 17 Cal. 3d 699, 131 Cal. Rptr. 882, 552 P.2d 1178, “it has always been understood without question that parties could eschew jury trial either by settling the underlying controversy, or by agreeing to a method of resolving that controversy, such as arbitration, which does not invoke a judicial forum.” (*Id.* at p. 713, 131 Cal. Rptr. 882, 552 P.2d 1178.) The court concluded: “We shall reject . . . plaintiff’s contention that the arbitration provision violates constitutional and statutory provisions protecting the right to trial by jury. **Persons entering into arbitration agreements know and intend that disputes arising under such agreements will be resolved by arbitration, not by juries . . .**” (*Id.* at p. 703, 131 Cal. Rptr. 882, 552 P.2d 1178.) It follows that an agent under a health care power of attorney such as the one before us is empowered to execute arbitration agreements, as part of a long-term health care facility’s admissions package, without violating the principal’s constitutional right to a jury trial. (Cf. *id.* at pp. 703, 706, 709, 131 Cal. Rptr. 882, 552 P.2d 1178.)

Next, the Hogans assert that to compel them to arbitrate their elder abuse claim would be to thwart the purposes and goals of the Elder Abuse and Dependent Adult Civil Protection Act. . . .

This notwithstanding, we observe that the two cases the Hogans cite, *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal. 4th 771, 11 Cal. Rptr. 3d 222, 86 P.3d 290 and *Delaney v. Baker* (1999) 20 Cal. 4th 23, 82 Cal. Rptr. 2d 610, 971 P.2d 986, contain background information on the

history of the Elder Abuse and Dependent Adult Civil Protection Act. However, *they do not address the propriety of arbitration for the resolution of elder abuse disputes or give any indication that the policies favoring the enforcement of arbitration agreements* (*Madden v. Kaiser Foundation Hospitals, supra*, 17 Cal. 3d at p. 706, 131 Cal. Rptr. 882, 552 P.2d 1178) *conflict with the policies aimed at “protect[ing] a particularly vulnerable portion of the population from gross mistreatment in the form of [elder] abuse and custodial neglect”* (*Delaney v. Baker, supra*, 20 Cal. 4th at p. 33, 82 Cal. Rptr. 2d 610, 971 P.2d 986). In short, the Hogans have not proved their point even were we to entertain it.

Id. at 268-69, 55 Cal. Rptr. 3d at 456 (emphasis supplied).

In *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 984 (Ala. 2004), the court noted, “Elma Tucker was admitted to the Coosa Valley Health Care Nursing Home (‘the nursing home’), which is owned and operated by Coosa Valley, following her two-week hospitalization for heart failure. She was to undergo 21 days of rehabilitation at the nursing home. Tucker signed no admission papers; rather, Tucker’s admission to the nursing home was handled by her daughter, Linda Owens, who signed the relevant admission documents as Tucker’s guardian and sponsor. One of those documents was the following arbitration agreement” Rejecting the argument that the nursing home did not adequately explain the arbitration agreement, the court held:

Owens’s third argument is that the arbitration agreement is unconscionable because it was “signed by [the] daughter of [an] aged widow who had no knowledge of [the] arbitration agreement when her aged and ill mother was admitted to [the] nursing home after medical treatment.” However, Owens’s basis for her claim of

unconscionability is simply wrong on its face. The fact that she did not explain the arbitration agreement to Tucker, or that Coosa Valley did not independently bypass Owens and explain the arbitration agreement to Tucker-an odd act that Coosa Valley would have been under no duty to perform, see *Johnnie's Homes, Inc. v. Holt*, 790 So.2d 956, 960 (Ala.2001) (*one who offers a product or a service "is under no duty to disclose, or explain, an arbitration clause to a buyer"*)-is simply not relevant to whether the arbitration agreement was unconscionable. While the parties disagree as to whether arbitration as a means of resolving disputes between the parties was specifically discussed during the process of admitting Tucker to the nursing home, it is undisputed that the details of the arbitration agreement (a freestanding document) were not in any way hidden from Owens. It is true that Tucker was in poor health when she was admitted to the nursing home. However, Tucker did not handle the admission papers; Owens handled the admission papers on Tucker's behalf, and Owens provides no basis on which to find that the agreement contained "terms that are grossly favorable to [Coosa Valley]" or that Coosa Valley had "overwhelming bargaining power"-the essential elements of unconscionability as summarized by this Court in *American General Finance, Inc. v. Branch*, 793 So.2d 738, 748 (Ala.2000).

Id. at 988-89 (emphasis supplied).

In *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 667 (Ala. 2004), the court rejected the argument that the arbitration provisions of an admissions contract with a nursing home were unconscionable because of their adhesive nature stating as follows:

Turcotte and Woodman argue also that the admission contract is a contract of adhesion. A contract of adhesion is "one that is offered on a "take it or leave it" basis to a consumer who has no meaningful choice in the acquisition of the goods or services." *Gadsden Budweiser Distrib. Co. v. Holland*, 807 So.2d 528, 533 (Ala. 2001) (*quoting Ex*

parte McNaughton, 728 So.2d 592, 599 (Ala. 1998) (Almon, J., dissenting)). ***Because Turcotte and Woodman have not demonstrated that Noella and Sarah did not have a “meaningful choice” when deciding on nursing-home care, we conclude that Turcotte and Woodman failed to establish that the contract before us is one of adhesion.***

(emphasis supplied).

In *Mannion v. Manor Care, Inc.*, 2006 WL 6012873 at *333 (Pa. Cmmw.), the court enforced the arbitration provisions of a nursing home services agreement, stating as follows:

A contract of adhesion is not ipso facto unenforceable. It is unenforceable only to the extent that it is found to be unconscionable. *Lytle v. Citifinancial Services Inc.*, 810 A.2d 643 (Pa. Super. 2002). . . .

A contract term is unconscionable if (1) the party challenging it had no reasonable choice in accepting it, as in the case of a contract of adhesion, and (2) the provision unreasonably favors the other party. *Huegel*, 796 A.2d at 357 (holding that an arbitration clause was not unconscionable because it did not unreasonably favor the defendants). Although we have found the agreement to be a contract of adhesion, we do not believe that the provision for arbitration unreasonably favors either party. . . .

The damages sought by the plaintiff on her claims include economic and noneconomic damages and punitive damages. ***Section B of the agreement requires the plaintiff to credit the amount of collateral source payments against any economic damage claim, limits the recovery of noneconomic damages to \$250,000, and prohibits completely the recovery of punitive damages. However, although these limitations unreasonably favor the defendants and hence are unenforceable in a contract of adhesion, they do not invalidate the arbitration provision.*** . . .

(emphasis supplied).

In *Sanford v. Castleton Health Care Center, LLC*, 813 N.E.2d 411, 417-18 (Ind. Ct. App. 2004), the court rejected the argument that arbitration provisions in a nursing home services contract were unconscionable because they were adhesive in nature, stating as follows:

Initially, and assuming arguendo that the Contract is one of adhesion, we observe that an adhesion contract-i.e., “*a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it*”-is not per se unconscionable. *Pigman v. Ameritech Pub., Inc.*, 641 N.E.2d 1026, 1035 (Ind. Ct. App.1994) (citing 17 C.J.S. *Contracts* § 10), overruled on other grounds, *Trimble v. Ameritech Pub., Inc.*, 700 N.E.2d 1128 (Ind.1998). Rather, a contract is unconscionable if a great disparity in bargaining power exists between the parties, such that the weaker party is made to sign a contract unwillingly or without being aware of its terms. *White River Conservancy Dist. v. Commonwealth Eng’rs, Inc.*, 575 N.E.2d 1011, 1017 (Ind. App. 1991), reh’g denied, trans. denied. *To be unconscionable, “[t]he contract must be ‘such as no sensible man not under delusion, duress or in distress would make, and such as no honest and fair man would accept.’”* *Progressive Constr. & Eng’g Co. v. Ind. & Mich. Elec. Co.*, 533 N.E.2d 1279, 1286 (Ind. Ct .App. 1989). *A contract is not unenforceable merely because one party enjoys advantages over another.* *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129, 131 (Ind. Ct. App. 1980), trans. denied.

Here, Sanford argues that the Contract is unconscionable because the arbitration clause at issue is buried within the Contract “in the same size font as the rest of the agreement.” Appellant’s Br. at 9. However, *the arbitration clause is not buried or hidden in the*

Contract. Rather, it appears on page ten of the Contract with the following heading: “3. ARBITRATION.” Appellant’s App. at 25 (emphasis and capitalization in original). Even more compelling for purposes of our analysis, the arbitration clause is immediately followed by a signature line, which bears Sanford’s signature. Under Indiana law, a person is presumed to understand and assent to the terms of the contracts he or she signs. *Buschman v. ADS Corp.*, 782 N.E.2d 423, 428 (Ind. Ct. App. 2003). Accordingly, because Sanford as Bagley’s legal representative executed the arbitration clause, we will presume that she read it and understood its contents.

Sanford also asserts that the Contract is unconscionable because, while it required the nursing home admittee to accept the arbitration clause on a take-it-or-leave-it basis, it did not delineate to unsuspecting admittees the process of arbitration. *We have not found any case precedent supporting the proposition that arbitration agreements are only binding and enforceable when they describe in detail the process of arbitration.* In addition, we note that, in this case, *Sanford was not precluded from asking questions regarding the process of arbitration.* The record demonstrates that if a patient asked about arbitration, Philpot would inform him or her that “in the event of a dispute by the arbitration, . . . there would be no trial by jury.” Appellant’s App. at 31.

In addition, Sanford testified that, although she felt “rushed” by the unfortunate circumstances of admitting her mother to Castleton Center-i.e., during the admission process, Bagley was yelling and behaving very aggressively and, at times, Sanford had to attend to her children-no one at Castleton Center urged her to hurry or told her not to read the Contract. *Id.* at 8. Indeed, *Sanford acknowledged that, although she did not read the entire Contract including the arbitration provision containing her signature, she was not precluded from doing so.* Sanford further testified that she worked with Philpot during the admission process and found her to be “friendly.” Appellant’s App. at 6. Thus, on appeal, the Estate has failed to show that

Sanford signed the Contract containing the arbitration clause unwillingly and without being legally aware of its terms. Consequently, the trial court did not err by compelling the Estate to arbitrate the survival and wrongful death claims.

Further, the amici curiae caution that the potential for abuse surrounding the inclusion of arbitration clauses in nursing home admission contracts, such as the one at issue, is great because admittees are typically older, suffer diminished physical and/or mental health, and enjoy reduced mobility. In addition, in most cases, the family members have resorted to seeking admission to the nursing home because they are no longer able to care for their loved ones. *We are mindful that the decision to place a family member or loved one in a nursing home is a difficult one. We note, however, that the arbitration clause at issue does not limit the Estate, in any way, from seeking to recover for the alleged negligent acts of Castleton Center. Moreover, the arbitration agreement does not prevent admittees from challenging the validity of any of the remaining contractual provisions. Rather, the only limitation imposed on an admittee by virtue of the arbitration clause is the forums wherein the issues may be raised, i.e., mediation followed by arbitration, if necessary.*

(emphasis supplied).

In *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 420, 637 S.E.2d 551, 555 (2006), the court enforced the arbitration provisions contained in a residential assisted living services agreement, rejecting the plaintiffs claims of unconscionability, and noting that by including the arbitration provision in the agreement, the facility was conditioning its agreement to provide services upon those provisions:

A party may condition its willingness to enter into a contract with another party upon the agreement to resolve any dispute arising from their contractual relationship through arbitration. In the absence of any evidence of bad faith, inequality, or lack of mutuality described above, the inclusion of an agreement to arbitrate is neither procedurally or substantively unconscionable. *Id.*; see *Setzer v. Insurance Co.*, 257 N.C. 396, 401, 126 S.E.2d 135, 139 (1962) (“[W]here no trick or device had prevented a person from reading the paper which he has signed or has accepted as the contract prepared by the other party, his failure to read when he had the opportunity to do so will bar his right to reformation.”). ***A party may refuse to enter into a contract containing a provision or condition to arbitrate any disputes arising therefrom.*** See *Biesecker v. Biesecker*, 62 N.C.App. 282, 285, 302 S.E.2d 826, 828-29 (1983) (“[A] person signing a written instrument is under a duty to read it for his own protection, and ordinarily is charged with knowledge of its contents. Nor may he predicate an action for fraud on his ignorance of the legal effect of its terms.”).

(emphasis supplied). Likewise, in the instant case, the facility conditioned its agreement to provide services to Mr. Taylor’s decedent upon an agreement that any dispute arising from services provided under that agreement would be submitted to arbitration. If Mr. Taylor’s decedent or her representative did not want to agree to arbitration, they were free to refuse to sign the agreement and find another facility to provide those services.

In *Fellerman v. American Retirement Corporation*, 2010 WL 1780406 at *5 (E.D. Va.), the court recently enforced the arbitration provisions of a nursing home agreement and rejected the argument that merely because AAA has ceased

arbitrating disputes involving individual patients without a post-dispute agreement to arbitrate, those provisions were unenforceable:

Fellerman further asserts that the distinction between arbitration clauses calling for parties to be bound by AAA rules versus those calling for AAA administration is immaterial. AAA Rule R-2 states that when parties agree to arbitrate “under these rules ... they thereby authorize the AAA to administer the arbitration” (Fellerman’s Reply in Supp. Demand for Jury Trial, Ex. 4). This argument is unavailing. First, *authorization to administer does not rise to the level of contractual assent to have the matter administered exclusively before that forum*. Regardless, *under the federal substantive law of arbitrability, the interpretation and enforcement of AAA rules is a matter of procedural arbitrability properly settled by the arbitrator, not the court*. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).

Several other jurisdictions have weighed in on whether an arbitration clause binding the parties to AAA rules is integral. As ARCIP points out, *courts tend to enforce arbitration agreements whose terms specify that the parties be bound only by the rules of the AAA*. *Mathews v. Life Care Ctrs. of Am., Inc.*, 217 Ariz. 606, 177 P.3d 867, 868 (2008) (enforced agreement that required AAA arbitrators, but not AAA administration); *Blue Cross Blue Shield v. Rigas*, 923 So.2d 1077,1093 (Ala. 2005) (enforced agreement that required AAA rules, but not AAA administration); *Estate of Eckstein v. Life Care Ctrs. of Am., Inc.*, 623 F. Supp .2d 1235, 1238 (E.D. Wash. 2009) (same); *Oesterle v. Atria Mgmt. Co., LLC*, No. 09-4010-JAR, 2009 U.S. Dist. LEXIS 60057, at *26, 2009 WL 2492697 (D. Kan. 2009)(“[T]he appropriate way to construe the arbitration provision is to read it as simply requiring arbitration in accordance with AAA rules and not AAA policy. Thus, the AAA provision covers the rules to abide by when conducting the arbitration, while AAA policy on the types of arbitrable claims is simply just that-AAA’s policy.”). The arbitration agreement in this action, unlike that at issue in *Moulds*, specifies only that

arbitration proceed in accordance with AAA rules (ARCIP Mem. in Supp. Mot. to Compel Arbitration, Ex. 1). This interpretation is most consistent with the strong federal presumption favoring arbitration. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

Furthermore, the arbitration agreement contains a savings clause which provides that any clause rendered invalid or unenforceable shall not affect the remainder of the agreement. Thus, even if this Court were to find those provisions relating to the AAA invalid, the agreement to arbitrate generally is enforceable under 9 U.S.C. § 5 (permitting the court to appoint an arbitrator if the agreement does not specify one with particularity).

(emphasis supplied). Likewise, in the instant case and in *Brown*, where the pertinent language provides that any dispute “shall be submitted to binding arbitration in accordance with the *Commercial Arbitration Rules* of the American Arbitration Association then in effect,” it is unnecessary for AAA to actually conduct the arbitration, as private arbitrators can be used merely applying the procedures to which the parties agreed, i.e., “the *Commercial Arbitration Rules* of the American Arbitration Association then in effect.” Accordingly, as in *Fellerman*, any declination by AAA to conduct arbitration of this dispute or the *Brown* dispute is not fatal.

In *Philpot v. Tennessee Health Management, Inc.*, 279 S.W.3d 573 (Tenn. Ct. App. 2007), the court rejected challenges to the arbitration provisions of a nursing home agreement executed by the resident’s son. First, rejecting the argument, made in this case, that because some claims were exempted from arbitration, the entire agreement was invalid, the court reasoned:

The agreement clearly provides that the general sessions exception applies to the defendants as well as the plaintiff. Thus, the provision is mutual. This fact notwithstanding, the plaintiff contends that the practical effect of the foregoing provisions prohibits the plaintiff, but not the defendants, from seeking judicial remedies. This contention is based on the premise by the plaintiff that he would never have a claim against the defendants as small as the jurisdictional limit and that the defendants' claims against the plaintiff would always be within the general sessions jurisdiction. We, however, find no factual or legal basis for either contention. *The parties mutually agreed to arbitrate all claims that exceeded the statutory limit of general sessions court, and each party has the contractual right to file suit against the other in general sessions court provided the claims at issue are within the jurisdiction of the court.*

Id. at 582 (emphasis supplied). Second, rejecting the argument, made in this case, that because arbitration fees are higher than court fees, the arbitration agreement was invalid, the court reasoned:

The only evidence the plaintiff provided pertains to a fee schedule of the American Arbitration Association; however, *the agreement does not require the services of the AAA to arbitrate the parties' disputes and the parties were free to select any arbitrator they agree upon. The agreement merely provides that the arbitrator selected by the parties shall use the procedures of the AAA as guidelines in the event the parties cannot agree upon the governing rules and procedures to arbitrate their dispute. Moreover, the transcript reflects the acknowledgment of the trial court that the AAA "will not honor these types of pre-dispute arbitration agreements in the context of the medical services contract." Accordingly, because the AAA would not agree to arbitrate a dispute among the parties, its fee schedule is not material.*

Id. at 582-83 (emphasis supplied and footnotes omitted).

In *Estate of Eckstein*, supra at 1238, the court enforced the arbitration provisions of a nursing home agreement, rejecting the claim that the unavailability of AAA to arbitrate the dispute invalidated the arbitration provisions, the court stated:

Defendants conclude that the Court can simply appoint an alternate forum. Besides, Defendants assert, Plaintiff has presented no evidence or argument why AAA would even be preferable to another arbitration venue. This Court agrees with Defendants in that *the unavailability of AAA to hear this case does not render the Agreement unenforceable based on the FAA, the WAA, and the Agreement itself. Plaintiff has not convinced the Court that the designation of AAA as arbitrator was a material term.*

(emphasis supplied).

IV. CONCLUSION

The majority of courts that have considered the various objections to alternative dispute resolution provisions in nursing home services contracts have rejected those objections and have held that they are valid and enforceable. They have rejected the argument that alternative dispute resolution provisions are invalid if they conflict with state nursing home statutes, with many holding that even where state statutes, unlike West Virginia's, expressly prohibit arbitration provisions, such statutes are preempted. They have rejected the argument that because nursing home services contracts are adhesive in nature, their arbitration provisions are unconscionable. They have rejected the argument that the unequal bargaining positions of the parties render arbitration provisions unconscionable.

They have rejected the argument that differences in filing fees between the AAA and courts render arbitration provisions unconscionable. They have rejected the argument that language referencing AAA procedural rules render arbitration provisions unenforceable if AAA arbitrators are unavailable. They have rejected the argument that the FAA does not apply because nursing homes are not engaged in interstate commerce. They have rejected the argument that if the arbitration agreement is signed in a representative capacity, it is invalid as to the resident. They have rejected the argument that it is a violation of fiduciary duty for a nursing home to present a services agreement to a new or existing resident if it contains an arbitration provision. They have rejected the argument that reserving certain claims from arbitration renders the entire arbitration agreement unconscionable. They have rejected the argument that the failure to read, understand, or have the arbitration provisions explained to the resident or the resident's representative renders those provisions unconscionable or unenforceable. They have rejected the argument that additional consideration is needed when a new services agreement is executed by an existing resident or arbitration provisions are either unconscionable or unenforceable. They have acknowledged that being admitted or having one's loved one admitted to a nursing home or similar facility can be physically, mentally, or emotionally challenging, but have rejected arguments for the unconscionability or unenforceability of alternative dispute resolution provisions of nursing home agreements based upon that reality.

Enforceable arbitration agreements are important in disputes in many industries. These agreements are especially important in disputes between nursing homes and their residents. As a long-time nursing home provider recently explained to Congress:

[A]rbitration is more efficient, less adversarial and has a reduced time to settlement. . . . Timely resolution of disputes is of unique importance to residents of long term care facilities. . . . In addition, because it vastly reduces transaction costs, arbitration may also enable patients and their families to retain a greater proportion of any financial settlement than with traditional litigation.

Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Judiciary Comm., (June 18, 2008) (statement of Kelley Rice-Schild, Executive Director, Floridean Nursing and Rehabilitation Center), *available at* <http://aging.senate.gov/events/hr196kr.pdf>.

As the United States Supreme Court and this Court have recognized, there are strong judicial and legislative policies favoring arbitration. Moreover, the Federal Arbitration Act limits the ability of the states to place undue restrictions on the validity and enforceability of arbitration agreements. When Mr. Taylor and her representative came to the facility for services, the facility was permitted under both federal and state law to condition its agreement to provide those services upon Mr. Taylor's agreement that any dispute arising from those services would be arbitrated not litigated. If either Mr. Taylor or her representative had refused to agree to arbitration, the facility was free, under federal or state law, to decline to

provide the services requested. Thus, the arbitration provisions were material to the contractual relationship between the facility and Mr. Taylor.

Because of the material nature of arbitration agreements, the United States Supreme Court and this Court have held they are presumed to be valid and this Court has held that because unconscionability and illegality are affirmative defenses, it is the opponent who has the burden of proof. Here, for the reasons set forth in the cases cited herein, Mr. Taylor failed to satisfy that burden of proof.

WHEREFORE, the amicus curiae, West Virginia Health Care Association, respectfully requests that the judgment of the Circuit Court of Kanawha County in this case, and the judgment of the Circuit Court of Kanawha County in the companion case be affirmed.

**WEST VIRGINIA HEALTH CARE
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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on September 16, 2010, I served the foregoing "BRIEF OF THE WEST VIRGINIA HEALTH CARE ASSOCIATION AS AMICUS CURIAE" by depositing a true copy thereof, in the United States mail, postage prepaid, addressed as follows:

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