# KEEP ARBITRATION ALIVE: WHY THE FAIRNESS IN NURSING HOME ARBITRATION ACT SHOULD NOT BE PASSED

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## I. Fairness of Arbitration Agreements in Consumer Contracts: History of the Debate

Like it or not, arbitration agreements are part of our lives. Most cell phone and credit card companies include arbitration agreements in their customer contracts.[1] Furthermore, many consumer complaints regarding trades through the National Association of Securities Dealers (NASD) are resolved through arbitration.[2] However, despite their pervasiveness, consumers generally remain ignorant of arbitration agreements until a dispute arises,[3] whereupon they discover that they must submit to arbitration proceedings, rather than sue sellers.[4] Often, arbitration carries with it the added disappointment of high fees and perceived arbitrator bias in favor of the business entity.[5] The same is true of a nursing home resident who signs an admissions contract containing a binding pre-dispute arbitration clause.[6] The issue examined in this Note is whether the use of such agreements within the nursing home context is appropriate, necessary, and sustainable on fairness grounds. This Note will argue that such agreements are necessary and appropriate, and can be made fair and sustainable when certain provisions are added to arbitration agreements that provide

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1 Joshua T. Mandelbaum, Note, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 Iowa L. Rev. 1075, 1077 (2009).

2 *See* Donald R. McNeil, *NASD Arbitration of Securities Disputes*, FindLaw for Legal Professionals (Jan. 7, 2004), http://library.findlaw.com/2004/Jan/7/133242.html.

3 *See* Mandelbaum, *supra* note 1, at 1077.

4 *See id.*

5 *Id.*

6 Ann E. Krasuski, Note, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts With Residents*, 8 DePaul J. Health Care L. 263, 264 (2004).

more consumer control and bargaining power, and thereby provide a more level playing field.

Recent controversy over the fairness of pre-dispute binding arbitration clauses in consumer contracts[7] has spurred state representatives to submit bills to Congress that would render such arbitration agreements invalid and unenforceable, both in the context of consumer sales contracts, as well as in the health care arena.[8] With regard to the latter, Senator Mel Martinez of Florida, along with four co-sponsors, introduced a bill entitled "The Fairness in Nursing Home Arbitration Act" to Congress in March of 2009.[9] This bill seeks to amend the Federal Arbitration Act (FAA),[10] which regulates pre-dispute binding arbitration clauses in nursing home and other types of contracts.[11] The Fairness in Nursing Home Arbitration Act would regulate nursing home contracts and render all pre-dispute binding arbitration clauses between a long-term care facility and a resident (or anyone acting on the resident's behalf) invalid or specifically unenforceable.[12] Similarly, Representative Henry Johnson of Georgia introduced House Bill 1020,[13] which would regulate binding arbitration clauses in sales contracts other than nursing home admissions contracts.[14]

The central debate in the nursing home context surrounds the issue of bargaining power.[15] Critics of arbitration agreements in nursing home contracts contend that vulnerable nursing home residents and their family members often do not understand arbitra-

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7 Mandelbaum, *supra* note 1, at 1078.

8 *See, e.g.,* Arbitration Fairness Act, H.R. 1020, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009).

9 *See* Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009).

10 Federal Arbitration Act, 9 U.S.C. § 1 (1925).

11 *See* Fairness in Nursing Home Arbitration Act, *supra* note 9, § 2(b).

12 *See id.*

13 Arbitration Fairness Act, H.R. 1020, 111th Cong. (2009).

14 *Id.* at § 2. Specifically,

> (b) No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise [. . ..] dispute; or
> (2) a dispute arising under any statute intended to protect civil rights. (c) Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by a court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. (d) Nothing in this chapter shall apply to any arbitration provision in a collective bargaining agreement.

*Id.*

15 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, 320 (2003).

tion clauses or are simply not made aware of them when reading the contract.[16] As a result, residents and their families may not understand that by signing the nursing home contract, they are waiving their right to a jury trial should the resident later suffer injury at the hands of the nursing home.[17] As a counterargument, those representing long term care facilities point out that the federal government has long favored arbitration and has consistently honored arbitration agreements signed by both parties to a contract.[18]

To date, the two perspectives on this issue have remained diametrically opposed. Instead of looking for a middle ground, the long term care community holds steadfastly to the notion that reducing the costs of litigation by allowing arbitration is the best solution to the problem of "runaway juries."[19] On the other hand, advocates for nursing home residents want to abolish arbitration and ensure that residents are accorded a right of action against offending facilities as a means of deterring nursing home abuse.[20] Despite the stalwart opposition of both groups to compromise, the answer to this very important health care issue may lie in finding a middle ground between the two arguments.

The first part of this Note will give background case law and history on the arbitration debate generally, as well as specifically, in relation to nursing homes. This Note also examines the arguments for and against using arbitration clauses in nursing home contracts, and will briefly touch on ways in which arbitration agreements can be improved to allow for more equitable bargaining power between parties to nursing home contracts. This Note asserts that passage of the Fairness in Nursing Home Arbitration Act is an overly broad solution to the issues which arise pursuant to arbitration clauses in the nursing home context. Instead, this Note suggests utilizing new forms of dispute resolution in combination with arbitration. Specifically, the Note suggests implementing mandatory mediation proceedings prior to binding arbitration proceedings, and highlights the success of mandatory mediation proceedings in the medical malpractice field. Ultimately, this Note proposes making improvements to the federal long term care ombudsman program so that ombudsmen may be trained and uti-

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16 Krasuski, *supra* note 6, at 263–64.

17 *Id.*

18 *See id.* at 270.

19 *See id.* at 267–68.

20 *See id.* at 301–02.

lized as de facto mediators for mandatory mediation proceedings in the nursing home context.

## II. The Historical Federal Allegiance to Arbitration: Supportive Case Law and Outliers

The Federal Arbitration Act (FAA), enacted in 1925, is a federal statute which validated the use of arbitration as a means of private dispute resolution and as an alternative to litigation.[21] The FAA covers all transactions "involving" interstate commerce pursuant to Congress's Commerce Clause power.[22] The term "involving commerce" has been interpreted broadly, echoing the Supreme Court's tendency to imbue the Commerce Clause power with wide breadth.[23] Most states have companion legislations to the FAA, encouraging the enforcement of arbitration agreements.[24] Faced with the question of whether state or federal law trumps in any particular dispute over arbitration agreements, the Supreme Court has held that the FAA preempts state laws that are stricter than the FAA, but that states may expand upon the boundaries of the FAA.[25] Specifically, the Court has held that states may regulate arbitration agreements under general contract principle defenses, such as "fraud, duress, and unconscionability."[26]

Since 1925, the inclusion of arbitration agreements in contracts has increased,[27] especially within the last thirty years.[28] One of the first cases to address the relatively modern issue of arbitrability of contract disputes was *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*[29] The case involved a dispute between a hospital and a contractor who entered into a contract for construction of additions to the hospital.[30] The contract mandated that initial disputes, with certain exceptions, be first heard by the architect in

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21 Federal Arbitration Act, *supra* note 10, § 1.

22 Suzanne M. Scheller, *Arbitrating Wrongful Death Claims for Nursing Home Patients: What is Wrong With This Picture and How to Make it "More" Right*, 113 Penn. St. L. Rev. 527, 557 (2008); Federal Arbitration Act, *supra* note 10, § 2.

23 Scheller, *supra* note 22, at 532; Federal Arbitration Act, *supra* note 10, § 2.

24 Scheller, *supra* note 22, at 533.

25 *Id.*

26 *Id.*

27 *See* Mandelbaum, *supra* note 1, at 1079.

28 *See id.* at 1077.

29 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

30 *Id.* at 4.

charge of overseeing the project.[31] However, even if the architect could reach a resolution, the parties still had the option of going to arbitration.[32] Similarly, if the architect could not reach a resolution within a specified time period, the dispute could likewise be sent to binding arbitration.[33] The construction company, Mercury, submitted a dispute to the architect for increased construction costs in January 1980.[34] There is a dispute over exactly what followed, but the two parties discussed the issue over several months.[35] Finally, in October 1980, the hospital filed suit in state court alleging that the contracting company waived its right to arbitration based upon its failure to make a timely demand for arbitration, among other reasons.[36] Subsequently, Mercury filed suit in the federal district court[37] based on diversity to compel arbitration.[38] The District Court stayed the action pending resolution of the state-court suit because both suits were based upon the same issue of the arbitrability of respondent's claims.[39] The Court of Appeals, holding that it had jurisdiction under 28 U.S.C. 1291,[40] reversed the District Court's stay order and remanded the case to the lower court for an arbitration order.[41]

This case demonstrated that the FAA governs the issue of the enforceability of arbitration agreements when a dispute arises in both state and federal court and the federal court determines that it has jurisdiction.[42] Specifically, Section 2 of the FAA is the "primary substantive provision[43] of the Act, declaring that a written agreement to arbitrate[44] 'in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[45]

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31 *Id.* at 5.

32 *Id.* at 5.

33 *Id.*

34 *Id.*

35 *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 6.

36 *Id.* at 7.

37 *Id.* at 7.

38 *Id.*

39 *Id.*

40 *Id.* at 8.

41 *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 8 (1983).

42 *See id.*

43 *Id.* at 24.

44 *Id.*

45 Federal Arbitration Act, *supra* note 10, § 2.

Despite the federal government's liberal policy favoring arbitration agreements, the use of such agreements in the employment arena has sparked hot debate.[46] Employees often think they should be able to sue former employers for employment-related discrimination or wrongful termination, despite having signed an arbitration agreement upon accepting the employment.[47] However, in *Gilmer v. Interstate/Johnston Corp.*,[48] the Court ruled that even a claim brought against a former employer under the Age Discrimination in Employment Act of 1967 (ADEA) can be subjected to compulsory arbitration.[49]

Gilmer was an employee of Interstate/Johnston Corp., which required him to register as a securities representative with the New York Stock Exchange (NYSE).[50] Gilmer's registration application with the NYSE included an agreement to arbitrate when required to by NYSE rules.[51] NYSE Rule 347 prescribes arbitration for any dispute arising out of a registered representative's employment or termination.[52] When Interstate/Johnston Corp. terminated Gilmer at age 62, he filed a charge with the Equal Employment Opportunity Commission (EEOC) and brought suit alleging that he had been discharged in violation of the ADEA.[53] Interstate moved to compel arbitration based upon the registration application and the Federal Arbitration Act (FAA).[54] The District Court denied the motion and the Court of Appeals reversed.[55]

The Court of Appeals noted that in light of the liberal federal policy toward arbitration, Gilmer needed to meet the burden of demonstrating that "Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act."[56] The Court noted that Gilmer failed to meet this burden[57] since, "nothing in the text, legislative history, or underlying purposes of the ADEA indi-

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46 Thomas E. Carbonneau, "*Arbitracide": The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT'L ARB., 233, 238–39 (2007).

47 *See* Gilmer v. Interstate/Johnston Corp., 500 U.S. 20 (1991).

48 *Id.*

49 *Id.* at 23.

50 *Id.*

51 *Id.*

52 *Id.* at 23.

53 *Gilmer*, 500 U.S. at 23–24.

54 *Id.* at 24.

55 *Id.*

56 *Id.* at 35.

57 *Id.* at 24.

cat[ed] a congressional intent to preclude enforcement of arbitration agreements."[58]

The Court went on to note that both arbitration and litigation can promote broad public policy and social purposes.[59] Thus, the use of arbitration over litigation did not necessarily contradict public policy goals set down by the ADEA.[60] Furthermore, the Court stated that since the EEOC is permitted by the ADEA to pursue informal dispute resolution methods, allowing arbitration is consistent with the statutory goals of the ADEA.[61]

Faithful to its tendency to favor arbitration agreements, the Court quickly dismissed Gilmer's claims that the arbitral forum was biased and would not retain "competent, conscientious, and impartial arbitrators,"[62] noting that both the NYSE rules and the FAA implement protective provisions designed to preclude biased panels.[63] The Court also dismissed Gilmer's claim that the limited discovery allowed for in arbitration proceedings, as compared to litigation, would make it difficult for him to prove age discrimination since "there has been no showing that the NYSE discovery provisions will prove insufficient to allow him a fair opportunity to prove his claim."[64] Furthermore, the Court rejected Gilmer's claims that the arbitral forum would preclude public knowledge of specific employers' discriminatory practices,[65] or an opportunity for effective appellate review.[66] The Court based these determinations upon the fact that the NYSE rules require arbitration decisions to be made available to the public in writing,[67] and the fact that judicial decisions will be issued for ADEA claimants who have not submitted to arbitration.[68]

The Court also chose to take a case-by-case view of the fairness of employment-related arbitration, noting that the unequal bargaining power between employers and employees was not sufficient to draw the conclusion that arbitration agreements in employment contracts are "never enforceable."[69] In this case, the court

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58 *Id.* at 31.
59 *Gilmer*, 500 U.S. at 28.
60 *See id.* at 28–29.
61 *Id.* at 29.
62 *Id.* at 30.
63 *Id.*
64 *Id.* at 30.
65 *Gilmer*, 500 U.S. at 31.
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.* at 33.

found that there was "no indication that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause."[70]

Similarly, *Dickinson v. Heinold Sec., Inc.*[71] upholds the viability of arbitration in consumer contracts.[72] In that case, the plaintiff was a former client of Heinold's stock options brokerage service.[73] The contract "between the two parties gave Heinold a limited discretionary power to trade plaintiff's account on the Chicago Board Options Exchange (CBOE)."[74] This original agreement along with a subsequent agreement both contained clauses which called for arbitration in the event of a dispute between the parties.[75] Such a dispute did arise and the plaintiff wrote to Heinold threatening a lawsuit, at which time Heinold moved for arbitration of the dispute pursuant to the contract agreements.[76] The court held that even though Count I (of four separate counts) was a non-arbitrable claim, the defendant could compel arbitration on the other three counts, even though engaging in bifurcated adjudications (one judicial and one arbitral) would not promote the economizing principle of trying each issue in one forum.[77] According to the court, "permit[ing] a district court to deny a stay pending arbitration based on such discretionary considerations (of economy) would, in our opinion, frustrate the strong federal policy in favor of arbitration which is expressed in the Federal Arbitration Act."[78] The court further noted that since the agreement stated that "(any) controversy . . . shall be settled by arbitration,"[79] the parties were thereby "bound to arbitrate all matters, not explicitly excluded, that reasonably fit within the language used."[80] Thus, like the aforementioned cases, this court's conclusion adheres to the established federal policy of construing circumstances in the light most favorable to arbitration agreements.[81]

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70 *Id.* at 33.

71 Dickinson v. Heinold Sec., Inc., 661 F.2d 638 (7th Cir. 1981).

72 *See id.*

73 *Id.* at 639.

74 *Id.*

75 *Id.*

76 *Id.* at 640.

77 *Dickinson*, 661 F.2d at 646.

78 *Id.* at 644.

79 *Id.* at 643.

80 United Textile Workers of America v. Newberry Mills, Inc., 315 F.2d 217, 219 (4th Cir. 1963), cert. denied, 375 U.S. 818, 84 S.Ct. 54, 11 L.Ed.2d 53 (1963).

81 *See Dickinson*, 661 F.2d at 646.

Historically, the Seventh Circuit has taken a very strict view of allegiance to arbitration.[82] While courts have provided that an arbitration clause may be rendered unenforceable under contract principles (such as fraud, duress or incapacity),[83] the Seventh Circuit declared contracts of adhesion valid contracts, provided that "each side to the transaction [retained] significant benefits."[84] The effect of this pronouncement "advanced a new perspective on contract formation, one which minimized and superseded the requirement of bilaterality and freely given consent, and focused upon the 'benefits of the bargain.'"[85]

For example, in *Hill v. Gateway*,[86] the United States Court of Appeals for the Seventh Circuit stated that a contract did not have to be read in order to be effective,[87] and therefore that once the plaintiffs started using the computer they purchased, the terms included in a contract agreement found inside the computer's box were binding upon them.[88] The appellate court echoed the decisions of previous courts, noting that under a provision of the FAA,[89] an arbitration agreement is enforceable unless it violates a contract principle, which allows for revocation.[90]

Despite the near ubiquitous enforcement of arbitration clauses by federal courts, California has historically demonstrated a strong opposition to arbitration,[91] focusing instead on "disparate-party" transactions, wherein one party does not possess equal bargaining power with the other.[92] For example, in *Circuit City Stores, Inc. v. Adams*,[93] the court held that the employment contract which required the defendant employee to submit all claims and disputes to binding arbitration was both procedurally[94] and substantively unconscionable.[95] Procedural unconscionability addresses inequitable circumstances arising during the entering of the contract

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82 *See* Carbonneau, *supra* note 46, at 238–39.

83 Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001).

84 Carbonneau, *supra* note 46, at 239.

85 *Id.* at 239.

86 Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir.), cert. denied, 522 U.S. 808 (1997).

87 *Id.* at 1148.

88 *Id.*

89 Federal Arbitration Act, *supra* note 10, § 2.

90 *Hill*, 105 F.3d at 1148.

91 Carbonneau, *supra* note 46, at 238–39.

92 *Id.* at 240.

93 Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002).

94 *Id.* at 893.

95 *Id.* at 893–94.

agreement, thereby resulting in the "absence of a meaningful choice"[96] on the part of one of the parties.[97] Thus, the contract was deemed procedurally unconscionable because the employee was forced to either adhere to the terms without being given a chance to modify them, or to reject the contract altogether[98] (rendering the agreement a standard contract of adhesion).[99] Similarly, the agreement was found to be substantively unconscionable because the employee was forced to arbitrate claims against the employer and the relief available to the employee was limited by the contract.[100] Although the appellate court reversed the order of the district court compelling arbitration, the U.S. Supreme Court reversed the appellate court decision and remanded the case,[101] demonstrating its strict allegiance to the enforceability of arbitration agreements.[102]

Like California, Florida courts have also rejected arbitration clauses based upon contract principles of procedural and substantive unconscionability.[103] Provisions which are generally found to be substantively unconscionable include:

> (1) [P]lacing caps on economic or non-economic damages; (2) waiving punitive damages; (3) granting a unilateral right to reject an arbitrator's decision; (4) allowing litigation for payment disputes while requiring arbitration for all other disputes; (5) requiring the party challenging the arbitration agreement to pay all costs or 'loser-pay' provisions; (6) attempting to shorten the statute of limitations; and (7) forfeiting all claims except those involving willful acts.[104]

For example, in *Powertel, Inc. v. Bexley*,[105] the court ruled that a post-signing modification made to a cell phone service plan contract, which mandated that all disputes be sent to binding arbitration, was unconscionable.[106] Like the *Circuit City Stores* court, the Florida court stated that the contract constituted a contract of adhesion,[107] noting that the customer could not reject any of the

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96 Hornstein, *supra* note 15, at 325.
97 *Id.*
98 *Circuit City Stores, Inc.*, 279 F.3d at 893.
99 *See* BLACK'S LAW DICTIONARY 12 (5th ed. 2003).
100 *Circuit City Stores, Inc.*, 279 F.3d at 893–94.
101 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
102 *See id.*
103 Hornstein, *supra* note 15, at 325.
104 Scheller, *supra* note 22, at 566.
105 Powertel, Inc. v. Bexley, 743 So.2d 570 (Fla. Dist. Ct. App. 1999).
106 *Id.* at 574–75.
107 *Id.* at 574.

terms of the contract, including the arbitration clause, rendering the customer at unequal bargaining power with the Powertel phone company.[108] However, the court reached the opposite conclusion of the *Circuit City Stores* court and held that such a contract of adhesion was procedurally unconscionable.[109] Notwithstanding this conclusion, the court also noted that the fact that a contract is a contract of adhesion does not automatically render the contract unconscionable.[110] However, in this case, the *Powertel* court found that since the arbitration clause compelled the customer to waive his right to certain legal remedies, including punitive damages, and statutory rights under the Florida Deceptive and Unfair Trade Practices Act (FDUPTA), the contract was substantively unconscionable.[111]

## III. Nursing Homes: The New Frontier of Pre-Dispute Binding Arbitration Agreements

Although the courts in many states have not yet had the opportunity to address the issue of enforceability of arbitration clauses in nursing home contracts, the resulting decisions of those states which have ruled on the issue vary.[112] As might be expected, the burden of showing that a valid arbitration agreement exists is on the party seeking to enforce the arbitration clause.[113] In determining whether a nursing home arbitration clause is enforceable, the court must consider the following factors: "the federal government's policy favoring arbitration; whether the admissions contract is valid; whether the admissions contract is signed by a person in authority; and whether the arbitration agreement lacks procedural and substantive unconscionability."[114]

The Supreme Court has not yet ruled on the enforceability of arbitration agreements contained in nursing home contracts, nor has it ruled on the enforceability of such agreements within health care contracts in general.[115] However, given the Court's historical

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108 *Id.* at 575.

109 *Id.*

110 *Id.* at 574.

111 *Powertel, Inc.*, 743 So.2d at 576.

112 Scheller, *supra* note 22, at 531.

113 *E.g.*, Pagarigan v. Libby Care Ctr., Inc., 120 Cal. Rptr. 2d 892, 894 (Cal. Ct. App. 2002); In re Kepka, 178 S.W.3d 279, 286 (Tex. App. 2005).

114 Scheller, *supra* note 22, at 531–32.

115 *Id. at* 532.

allegiance to enforcement of arbitration clauses,[116] and its broad interpretive powers under the Commerce Clause,[117] it seems likely that nursing home contracts would be subject to federal law. This prediction is further bolstered by the fact that the "aggregate economic activity"[118] of nursing homes likely affects interstate commerce, since many nursing home consumers cross state lines seeking nursing home care,[119] and nursing homes often receive supplies from out-of-state vendors and payments from out-of-state insurance carriers.[120]

Despite the lack of a Supreme Court ruling on this topic, several state courts have deemed nursing home contracts to fall under the Commerce Clause in relation to wrongful death claims by residents or their representatives.[121] State courts' rulings on such claims must first decide whether the FAA or a state law governs the issue.[122] Generally, the FAA is held to apply.[123] Courts must then perform a two-part test[124] to decide if the arbitration agreement is valid, and if so, whether the dispute in question falls within the limits of the arbitration clause.[125] *Bruner v. Timberlane Manor, L.P.*,[126] is an example of a case where state law was deemed to preempt the FAA.[127] The plaintiff, a nursing home resident's daughter, signed Timberlane's nursing home contract,[128] which stated in several places that it was governed by Oklahoma state law and included an arbitration clause.[129] When the daughter brought a wrongful death action against the nursing home for her mother's untimely death, the nursing home tried to compel arbitration by presenting evidence that its operations involved interstate com-

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116 *Id.*

117 *Id.*

118 Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56–57 (2003).

119 Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507, 515 (Miss. 2005).

120 *Id.*

121 *See* Scheller, *supra* note 22, at 534–35 (noting that courts in Alabama, Florida, Georgia, Mississippi, Ohio, Tennessee and Texas have decided the issue of enforceability of pre-dispute mandatory arbitration clauses in wrongful death claims of nursing home residents).

122 *Id.* at 535.

123 *E.g.*, *Vicksburg Partners*, 911 So.2d at 515 (representing the general rule that nursing home arbitration agreements affect interstate commerce in the aggregate and holding that the FAA applies).

124 Scheller, *supra* note 22, at 534.

125 *Id.*

126 Bruner v. Timberlane Manor, L.P., 155 P.3d 16, 19 (Okla. 2006).

127 *Id.* at 19.

128 *Id.*

129 *See id.* at 20.

merce.[130] The nursing home cited the fact that it offered federal Medicare and Medicaid services to its residents, thereby arguing that the dispute fell under the jurisdiction of federal law, the FAA, preempting Oklahoma's anti-arbitration statute, the Oklahoma Nursing Home Care Act.[131]

However, the Oklahoma Court noted that neither Congress nor the Supreme Court has stated that the provision of Medicare or Medicaid funding by the federal government to a nursing home renders the operations of the nursing home subject to federal jurisdiction by involving interstate commerce.[132] The Court also noted that the FAA could be preempted by conflicting federal law, and that in this case the Social Security Act (SSA), which regulates Medicaid provisions, preempted the FAA.[133] Thus, pursuant to the SSA, the court allowed state law to apply to judicial review of heath care contracts.[134] Under the Oklahoma Nursing Home Act, the nursing home's provision in the contract that waived the resident's right to a jury trial was null and void.[135] Therefore, Oklahoma state law preempted federal law in this case and the arbitration agreement was found to be unenforceable.[136]

Despite Oklahoma's pronouncement in *Bruner*, at least one Alabama court[137] has found that the provision of Medicare funding did constitute involvement with interstate commerce, and therefore, that nursing homes providing Medicare services were subject to federal law, allowing the FAA to trump conflicting state laws.[138] However, two courts have echoed the *Bruner* court's sentiment that the FAA was not meant to preempt all state law governing arbitration when the contract's terms state that disputes should be governed by state law.[139] Additionally, a South Carolina court has held that the FAA did not trump state law because the admissions

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130 *Id.* at 19.

131 *Id.* at 19–20.

132 *Bruner*, 155 P.3d at 31.

133 *Id.* at 31–32.

134 *See id.* at 32.

135 *Id.* at 25.

136 *Id.* at 32.

137 McGuffey Health and Rehab. Ctr. v. Gibson *ex rel.* Jackson, 864 So.2d 1061, 1063 (Ala. 2003).

138 *Id.*

139 *See* Owens v. Nat'l Health Corp., No. M2005-01272-SC-R11-CV, 2007 WL 3284669, at 4 (Tenn. Nov. 8, 2007) (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)) (stating that parties may stipulate in the agreement that they choose to be governed by state law. In Owens, according to the agreement, Tennessee law applied); Philpot v. Tenn. Health Mgmt., 279 S.W.3d 573 (2007).

agreement itself did not represent a transaction involving interstate commerce, though the nursing home may have engaged in such activities.[140]

With regard to the second part of the state court inquiry, a court must find that a valid contract exists once it has determined the applicable state or federal law governing the arbitration agreement dispute.[141] This inquiry focuses on several key issues, including: "(1) the authority of the signor; (2) procedural unconscionability; (3) substantive unconscionability; (4) and other legal arguments."[142] Analyzing the authority of the signor is one of the most complex of these inquiries, specifically in relation to wrongful death claims. This analysis poses two issues: "(1) whether the person signing the agreement has the authority to act on the patient's behalf and bind the patient to the arbitration agreement; and (2) whether, in turn, the signature also binds third-party beneficiaries of the wrongful death action."[143]

Courts have generally found that those who possess legal authority to make decisions on behalf of the nursing home resident, such as those with a durable power of attorney,[144] can bind the resident to the contract agreement by signing on the resident's behalf, thereby rendering the arbitration clause enforceable.[145] Furthermore, those designated as "personal representative[s]"[146] may also possess the legal authority to bind residents to arbitration agreements depending upon the circumstances of the situation.[147] For example, a mother who possesses legal authority to make decisions for her child may bind her child to the nursing home contract she signs on behalf of her child.[148]

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140 Timms v. Greene, 427 S.E.2d 642, 644 (S.C. 1993).

141 *See, e.g.*, Landers v. Integrated Health Servs. of Shreveport, 903 So.2d 609, 612 (La. Ct. App. 2005) (listing the requirements for formation of a valid contract as "capacity, consent, a certain object, and a lawful cause"); Trinity Mission of Clinton, LLC v. Barber, No. 2005-CA-02199-COA, 2007 WL 2421720, at 2 (Miss. Ct. App. August 28, 2007) (applying "ordinary principles of contract law" to determine the validity of an arbitration provision), cert. granted, 977 So.2d 1144 (Miss. 2008).

142 Scheller, *supra* note 22, at 539.

143 *Id.*

144 *See id.* at 540.

145 *See id*.

146 *See id.* at 541.

147 *See* Christopher B. Hopkins, *The Perils of Enforcing "Favored" Arbitration*, 24 No. 1 TRIAL ADVOC. Q. 30, 37 (2005).

148 Shea v. Global Travel Mktg, Inc., 870 So.2d 20, 24–25 (Fla. Dist. Ct. App. 2003). *See also* MN Medinvest Co., L.P. v. Estate of Nichols, 908 So.2d 1178, 1179 (Fla. App. 2005).

Determining whether health care proxies and medical powers of attorney are able to bind residents to arbitration agreements requires establishing the exact statutory authority granted to such representatives.[149] Health care proxy agents are given authority to make decisions for their wards that are deemed "health care decisions."[150] However, at least one Florida court[151] has held that signing nursing home contracts that contain arbitration clauses does not constitute a health care decision on behalf of an incapacitated or developmentally disabled patient who had given no advanced health care directive.[152] Under Florida Law,[153] the health care proxy is granted authority to make decisions regarding "life-prolonging procedures, application of medical benefits, access to medical records, and anatomical gifts."[154] However, nowhere in the statute is a proxy granted authority to waive fundamental rights, such as the right to a jury trial or common law remedies.[155] Thus, a health care proxy who does not possess power of attorney does not bind a resident to an arbitration clause when signing a nursing home contract.

Similarly, family members and friends of residents who possess a "medical power of attorney" do not necessarily possess sufficient authority to bind the resident to an arbitration clause.[156] In *Texas City View Care Ctr., L.P. v. Fryer*,[157] the court held that the Texas statute in question only gave the medical power of attorney the power to make health care decisions, defined as "consent, refusal to consent, or withdrawal of consent to health care, treatment, service, or a procedure to maintain, diagnose, or treat an individual's physical or mental condition."[158] Like the *Nolan* court, the Texas court found that the medical power of attorney did not give the representative the power to waive the resident's legal right to a jury trial.[159]

Much of the inquiry into the validity of a representative's signature is focused on whether the resident has capacity to make his

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149 Scheller, *supra* note 22, at 542.

150 *Id.*

151 Blankfeld v. Richmond Health Care, Inc., 902 So.2d 296 (Fla. Dist. Ct. App. 2005).

152 *Id.* at 300.

153 FLA. STAT. § 765.401 (2001).

154 Scheller, *supra* note 22, at 542.

155 *Id.*

156 *Id.*

157 Texas City View Care Ctr., L.P. v. Fryer, 227 S.W.3d 345 (Tex. App. 2007).

158 *Id.* at 351 (citing TEX. HEALTH & SAFETY CODE ANN. § 166.002(7) (Vernon 2007)).

159 *Id.* at 352–53.

or her own decisions.[160] Some states allow certain classes of individuals (including spouses, adult children, parents, and siblings) to sign admission contracts on the resident's behalf, even without legal authority.[161] Thus, even if a family member who does not have power of attorney or medical power of attorney signs a contract on the resident's behalf, the arbitration clause may be deemed binding on the resident if he or she is deemed incapacitated by the court.[162]

## IV. Arguments for Banning Arbitration in the Nursing Home Context

Strong arguments can be made to ban pre-dispute binding arbitration agreements both in general consumer contracts and in the nursing home context.[163] More and more, nursing homes are incorporating these agreements into their admission contracts, especially within large nursing home chains.[164] Further exacerbating the unequal bargaining power of nursing home residents is the fact that many of them enter nursing homes at the most critical point in their lives.[165] Nursing home beds are often scarce and residents and their families frequently jump at the chance for admission after waiting considerable periods of time for a bed.[166] Alternatively, their admission may follow a sudden injury such as a stroke or frac-

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160 Scheller, *supra* note 22, at 543.

161 *See* Covenant Health Rehab. of Picayune, L.P. v. Brown, 949 So.2d 732, 736–37 (Miss. 2007) (citing Miss. Code. Ann. § 41-41-211 (West 2005), which reads in pertinent part: (1) a surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by a primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available. (2) An adult or emancipated minor may designate any individual to act as a surrogate by personally informing the supervising health-care provider. In the absence of a designation, or if the designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:

(a) The spouse, unless legally separated;
(b) An adult child;
(c) A parent; or
(d) An adult brother or sister.
(7) A health-care decision made by a surrogate for a patient is effective without judicial approval.).

162 *Covenant Health Rehab of Picayune, L.P.*, 949 So.2d at 736–37.

163 *See* Hornstein, *supra* note 15, at 320.

164 Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 Campbell L. Rev. 157, 161 (2009).

165 *Id.*

166 *See id.*

tured hip.[167] Such residents and their families have little bargaining power because there may not be another nursing home bed nearby available to them.[168]

Like general consumers, residents of nursing homes and their representatives often do not notice or understand the arbitration clauses included within admissions contracts.[169] Furthermore, nursing home representatives are often loath to point out such clauses, especially because in some jurisdictions they are not obligated to disclose or explain arbitration clauses.[170] Compounding the fact that nursing home admissions contracts may constitute contracts of adhesion, nursing home residents and their representatives are even more likely than general consumers to sign unfair contracts because of the heightened level of emotional and physical circumstances that surround their admission.[171] They may not realize that they are waiving their right to a jury trial in the event that a dispute arises, or realize the import of such a waiver.[172]

Critics of arbitration agreements contend that the clauses often name "industry-friendly" arbitration organizations to administer the proceedings, often select locations that are inconvenient to residents (travel for an elderly or disabled nursing home resident may prove particularly taxing), place limits on the length of time provided to file complaints that are less than the time limits provided by state statutes of limitation, and limit awards to residents by capping damages and excluding attorney's fees, for which limits are not placed by applicable statutes.[173]

Like plaintiffs in employment cases, nursing home resident proponents argue that allowing arbitration clauses to remain in force deprives the injured person or his family member from litigating the claim in court, thereby denying that person his constitutional right to a jury trial.[174] Similarly, critics also argue that it is unfair to force such claims to go to arbitration because arbitration is by nature a confidential proceeding;[175] the public at large will not be made aware of the actions of the nursing home, or of the court's

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167 *Id.*

168 *Id.* at 162.

169 *See* Hornstein, *supra* note 15, at 319.

170 *See, e.g.,* Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 987–88 (Ala. 2004).

171 Tripp, *supra* note 164, at 161.

172 Krasuski, *supra* note 6, at 264.

173 *Id.* at 267–68.

174 *See* Mandelbaum, *supra* note 1, at 1087.

175 *See id.* at 1081.

decision in the case.[176] Thus, decisions of the arbitrator will not set a precedent for courts to follow in the future.[177]

## V. Counterarguments to Banning Arbitration Agreements in Nursing Home Contracts

Despite the compelling arguments against arbitration in the nursing home context, the fact is that the nursing home industry, and ultimately society, cannot afford to pay the exorbitant cost of punitive damage awards doled out to victorious nursing home residents and families.[178] The high cost of litigation to nursing homes forces them to cut costs in other areas, often in staff pay, which, in turn, lowers staff morale,[179] thereby potentially increasing the instances of nursing home abuse and subsequent litigation.[180] This process exacerbates the already acute problem of understaffing in nursing homes, almost a quarter of which retain less than optimal staffing levels of their total licensed staff.[181] In addition to being understaffed, nursing homes are often underfunded as well, which inhibits the ability of managers and administrators to adequately train their employees.[182] A lack of training also contributes to higher turnover rates and again increases the potential for abuse and neglect of residents.[183]

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176 *See id.* at 1091.

177 *See id.*

178 *See* Krasuski, *supra* note 6, at 267–68 (2004) (stating that: "Jury awards against nursing homes have increased significantly. Between the years 1987 and 1994, the mean award in a nursing-home negligence case more than doubled from $238,285 to $525,853. Juries have increased compensatory awards fourfold from 1995 to 1998 to an average of $1.3 million. Record awards include $95.1 million—$94.7 million of which represents punitive damages—for abuse, negligence, and fraud when a 66 year old resident fell out of bed and sustained a broken shoulder and hip; $6.3 million to the family of a resident with dementia, who eventually drowned in a pond after leaving the nursing home undetected several times; and a $5.3 million verdict to a resident attacked by fire ants in an Alabama nursing home. One study reported that average settlement and verdict amounts for injuries typical in nursing homes included $973,349.92 for bed sores, $802,061.83 for wandering (death), and $353,983.09 for falls.").

179 Anthony P. Torntore, Note, *". . .And Justice For All:" An Analysis of the Fairness in Nursing Home Arbitration of 2008 and Its Potential Effects on the Long Term Care Industry*, 34 Seton Hall Legis. J. 157, 163 (2009).

180 *See* Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. Times, Sept. 23, 2007, at 34.

181 *Id.*

182 *Id.*

183 *Id.*

This cycle hurts both nursing homes and residents and could lead to the nursing home industry failing altogether. Thus, while there are certain key issues of fairness relevant to pre-dispute binding arbitration clauses contained in nursing home contracts which need to be addressed, rendering all arbitration clauses unenforceable is an overly broad solution to this problem, which will only create further problems and cause serious losses to the nursing home industry.[184]

The fact of the matter is, "justice" may not actually be served by litigating such claims. As noted above, juries notoriously award enormous amounts of money to victims of nursing home negligence,[185] which may far outweigh the value of damage done to victims and their families. While it is hard to place a price tag on the value of human life, awarding such large amounts can never make the families whole for the loss of their loved ones and instead could cause more widespread damage to others, as nursing homes may be forced to increase their rates, in order to compensate victims' families.[186] In turn, the cost of patient insurance rates may increase as the cost of insurance to nursing homes increases.[187] These increases may leave countless other potential nursing home residents without care, as well as cause financial strain on current nursing home residents and their families. Thus, a strong solution to this problem includes mandating nursing homes to improve the contract drafting and signing practices, and encouraging governments to enact arbitration policies that balance the power of the contracting parties. Implementing such practices should be sufficient to protect the interests of consumers, while maintaining arbitration as a legitimate dispute resolution method for nursing homes and their residents.

## VI. Methods to Address Current Issues of Binding Pre-Dispute Arbitration Clauses

Several policies could be implemented in nursing home admissions contracts to ensure that they are fair to consumers, including mandating that consumers are made aware of and clearly understand the nature of the arbitration clause within the contract,

184 *See* Krasuski, *supra* note 6, at 268.
185 *See id.* at 267–68.
186 *See id.* at 266.
187 *See id.*

thereby ensuring informed consent. Federal long term care ombudsmen[188] could also be used in this capacity to explain such clauses to consumers. State and federal laws, which mandate that consumers have a voice in choosing arbitrators and the forum for arbitration, could also be implemented. Furthermore, state and federal governments could attempt to limit the costs of arbitration so that bringing small claims does not become prohibitively expensive for consumers.[189] Some nursing homes actually pay the majority of residents' arbitration fees, presumably because they want to ensure the continued allowance of arbitration and prevention of litigation, which could bankrupt the industry.[190] Perhaps this practice could be encouraged or mandated by federal or state policy, as a means of ensuring that arbitration costs remain low.

## VII. THESIS/PROPOSAL

Instead of rendering all pre-dispute binding arbitration clauses in nursing home contracts unenforceable, these clauses should remain in force but also contain an obligation to submit to mandatory mediation before moving forward with arbitration. Mandating nursing homes to improve the contract drafting and signing practices, and to improve contract negotiations, while also providing consumer choice in arbitral organizations is sufficient to protect the interests of consumers, while maintaining arbitration as a legitimate dispute resolution method for nursing homes and their residents. Thus, including a mandatory mediation step before arbitration serves to minimize costs by providing parties an opportunity to reach agreement prior to arbitration, since mediation is

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188 Long-Term Care Ombudsmen are:

> advocates for residents of nursing homes, board and care homes and assisted living facilities. Ombudsmen provide information about how to find a facility and what to do to get quality care. They are trained to resolve problems. If [a consumer] so desires, the ombudsman can assist [the consumer] with complaints. However, unless [the consumer] gives the ombudsman permission to share [his or her] concerns, these matters are kept confidential. Under the federal Older Americans Act, every state is required to have an Ombudsman Program that addresses complaints and advocates for improvements in the long-term care system.

*About Ombudsman*, The National Long-Term Care Ombudsman Resource Center, http://www.ltcombudsman.org/about-ombudsmen (last visited Jan. 20, 2009).

189 *See* Mandelbaum, *supra* note 1, at 1086.

190 *See* Krasuski, *supra* note 6, at 267.

generally less expensive than arbitration[191] and litigation.[192] Mediation also gives parties an opportunity to discuss their concerns openly face-to-face[193] and to vent their emotional frustration, which provides more emotional closure than other more adversarial fora like arbitration and litigation.[194] Fortunately, the federal Long Term Care Ombudsman program provides a built-in cadre of mediators to facilitate mandatory mediation proceedings.[195]

However, the government needs to strengthen this program and delineate specific roles for the ombudsmen, including a role as mediators, as well as provide uniform training to ombudsmen in mediation practices.[196] The federal government should also implement national standards for this program so that the roles and responsibilities of ombudsmen in each state are consistent.[197] A uniform mechanism for appeal would also improve consistency.[198]

## VIII. Mandatory Mediation and Evidence of its Effectiveness in the Medical Community

Although the legal community has long taken the position that litigation will increase deterrence of future errors,[199] known as the "compensation-deterrence theory of the law of torts,"[200] this assertion has not been backed up by empirical data.[201] At least one study has indicated that litigation actually increases the incidence of medical malpractice.[202] Litigation puts doctors in a defensive position, which not only makes it harder for parties to reach settle-

191 Comparison Guide to Electing Mediation or Arbitration, FINRA, Arbitration and Mediation, http://www.finra.org/ArbitrationMediation/Parties/Overview/ComparisonOfMediation and Arbitration/ (last visited Dec. 3, 2010).

192 *See* Forehand, *infra* note 203, at 909.

193 *See* Yee, *infra* note 199, at 431.

194 *Id.* at 408.

195 *See* Elizabeth B. Herrington, Note, *Strengthening the Older Americans Act's Long-Term Care Protection Provisions: A Call for Further Improvement of Important State Ombudsman Programs*, Elder L.J. 321, 340 (1997).

196 *See id.* at 321–22.

197 *See id.* at 348.

198 *See id.*

199 Florence Yee, Note, *Mandatory Mediation: The Extra Dose Needed to Cure the Medical Malpractice Crisis*, 7 Cardozo J. Conflict Resol. 393, 422 (2007).

200 *Id.* at 422.

201 *Id.*

202 *Id.* at 424.

ment,[203] but also breaks down the doctor-patient relationship.[204] Thus, mediation, which facilitates frank communication and apology,[205] could actually offer greater deterrence than litigation or arbitration, since mediation can reduce the adversarial relationship between the two parties and facilitate negotiation.[206]

In addition to facilitating communication, other benefits of mediation, over litigation, include lower costs,[207] confidential findings,[208] a higher likelihood of emotional fulfillment on the part of the plaintiff,[209] and possibly a greater chance of deterring future misconduct on the part of doctors.[210] Evidence has shown that mediation has proven to be particularly effective in resolving disputes in the medical malpractice context.[211]

The relationship between nursing homes and their residents is similar to the relationship between doctors and their patients. Both the doctors and the nursing homes are sought by the patients and residents to provide healing and care-taking functions. Thus, just as litigation puts doctors on the defensive, and ruins the personal relationship between doctors and patients, it also puts nursing homes in a defensive position, thereby damaging the nursing home's relationship with residents and/or their family members.[212] Furthermore, the effects of reputational damage to nursing homes brought about by litigation may be greater than those felt by doctors, since such damage reaches all of the employees of the nursing home and the nursing home as a business entity, rather than just one individual doctor. Since one of the benefits of mediation is that proceedings are kept confidential,[213] this fact helps to ameliorate the effects of reputational damage.[214] Therefore, nursing homes may be more amenable to settlement in this forum since

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203 *See* Scott Forehand, Note, *Helping the Medicine Go Down: How a Spoonful of Mediation Can Alleviate the Problems of Medical Malpractice Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 907, 909 (1999).

204 *Id.*

205 *See* Yee, *supra* note 199, at 431.

206 *Id.* at 426.

207 Forehand, *supra* note 203, at 909.

208 *Id.* at 914.

209 Yee, *supra* note 199, at 424.

210 Forehand, *supra* note 203, at 910–12.

211 *See* Yee, *supra* note 199, at 422–26.

212 *See id.* at 408.

213 *Id.* at 420.

214 *See id.* at 428.

they will be less afraid that their reputations will be destroyed by the publication of the mediation results.[215]

Similarly, nursing home residents and their families often seek compensation from facilities for the same reasons that patients seek compensation from doctors, including wrongful death or injury.[216] Therefore, just as patients in medical malpractice litigation benefit from apologies,[217] it is likely that nursing home residents and their families would also benefit from apologies on the part of the nursing home.[218] Providing apologies in a mediation context does not foreclose the possibility of monetary settlement awards.[219] Instead, mediation proceedings usually limit non-economic or punitive damages,[220] but allow the complaining party to recover a larger portion of the actual award since they do not have to pay exorbitant attorney's fees.[221]

Given the non-adversarial nature of the mediation forum, it is also more likely that nursing home representatives and residents will communicate openly,[222] which could further influence nursing homes to take more care in the future to avoid acts of negligence that led to the incident in question.[223]

In addition, although it is championed by many legal scholars as the best method of ensuring justice,[224] the adversary system (which includes arbitration) may actually do harm in the case of contractual issues between nursing homes and residents, since many plaintiffs are not able to bring claims due to constraints of time and money.[225] The beauty of mediation is that it seeks to resolve conflict rather than place blame on individuals[226] while also providing a cheaper method of dispute resolution.[227] Furthermore,

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215 *Id.* at 420–21.

216 Scheller, *supra* note 22, at 529.

217 Yee, *supra* note 199, at 421.

218 *See id.*

219 *See id.* at 426.

220 *Id.* at 418–19.

221 *See* Forehand, *supra* note 203, at 919.

222 *See* Yee, *supra* note 199, at 431.

223 *See* Edward A. Dauer et al., *Prometheus and the Litigators: A Mediation Odyssey,* 21 J. LEGAL MED. 159, 302 (2000) (discussing mediation's focus on the correction of negligent conduct in the medical context).

224 *See* Randall R. Bovbjerg, *Medical Malpractice on Trial: Quality of Care is the Important Standard*, 49 LAW & CONTEMP. PROBS. 321, 325 (1986).

225 Yee, *supra* note 199, at 406.

226 Kelly K. Meadows, Note, *Resolving Medical Malpractice Disputes in Massachusetts: Statutory and Judicial Initiatives in Alternative Dispute Resolution,* 4 SUFFOLK J. TRIAL & APP. ADVOC. 165, 176–77 (1999).

227 Yee, *supra* note 199, at 417.

since it is non-binding, the parties may pursue litigation if they fail to resolve their dispute through mediation.[228]

Several states have made efforts in recent decades to combat the medical malpractice "crisis" that plagued the nation in the 1970s and 1980s.[229] For example, New York instituted the use of medical malpractice panels,[230] which were designed to screen medical malpractice claims to eliminate those claims that were non-meritorious.[231] In serving this function, it was thought that the panels would thereby decrease the number of claims brought to trial by encouraging parties to settle out of court and by discouraging parties from pursuing meritless claims.[232]

However, despite the commendable goals of the legislature in implementing the medical malpractice panels,[233] an Ad Hoc Committee on Medical Malpractice Panels in New York found that there was no substantial correlation between panel findings and subsequent settlements[234] and recommended that the panels be abolished,[235] which they ultimately were.[236] Instead of facilitating more efficacious settlement of disputes, the panels consistently caused long delays in the litigation process.[237] This was principally because they were poorly administered by the courts. Furthermore, some experts found that the use of such panels actually increased the number of medical negligence cases that were brought,[238] and settlement rates were found to be very low.[239] Other experts also noted that the use of such panels has actually increased the cost of litigation of medical negligence cases.[240]

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228 Rita Lowery Gitchell & Andrew Plattner, *Mediation: A Viable Alternative to Litigation*, 2 DEPAUL J. HEALTH CARE L. 421, 423 (1999).

229 *See, e.g.*, Betsy A. Rosen, Note, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis With a Prescription for Comprehensive Reform*, 52 BROOK. L. REV. 135, 136 (1986).

230 *Id.* at 161.

231 *Id.*

232 In 1974, the New York Judiciary Law was amended to require the establishment of medical malpractice panels. *See* N.Y. JUD. LAW § 1010 (McKinney 1974) (updated version at N.Y. JUD. LAW § 148-a (McKinney 1982 & Supp. 1986)).

233 *See* Posting of Eric Turkewitz to KevinMD.com medical weblog, http://www.kevinmd.com/blog/2009/11/personal-injury-lawyer-views-medical-malpractice-system.html (Nov. 18, 2009), [hereinafter Posting of Eric Turkewitz].

234 Rosen, *supra* note 229, at 162.

235 *Id.*

236 *See* Posting of Eric Turkewitz, *supra* note 233.

237 Rosen, *supra* note 229, at 162.

238 Yee, *supra* note 199, at 436.

239 *Id.*

240 Rosen, *supra* note 229, at 161.

These panels also faced constitutional challenges on grounds that the panel system was "inequitable" to litigants.[241]

In light of the failure of medical malpractice panels,[242] it is clear that some other method should be instituted to improve tort litigation in the medical context.[243] Mediation could provide a greater possibility of success in limiting costs of medical malpractice insurance,[244] as well as litigation costs to both plaintiffs and defendants.[245] These principles could be applied to the nursing home context, in terms of reduced costs of health insurance and litigation.[246]

## IX. Long Term Care Ombudsman: Seeking a More Efficient Role for Government Mediators

The establishment of the Long Term Care Ombudsman program in the 1970s was designed to address the issue of nursing home abuse and the provision of inadequate care by nursing homes.[247] Each state contains a regional ombudsman's office, which is set up to receive complaints affecting residents in long term care facilities,[248] investigate the complaints,[249] and attempt to resolve the issues.[250] The precursor initiatives to the Long Term Care Ombudsman program were also designed to focus concern specifically on long term care residents, rather than on long term care facilities.[251]

The program first began as a contract between the Department of Health, Education and Welfare (DHEW) and five states to implement investigative units to improve quality of care for nursing home residents.[252] Subsequently, in 1973 the federal Administration on Aging (AOA) took over control of the program due to reorganization of the DHEW,[253] subjecting the program to

241 *Id.*
242 *See* Posting of Eric Turkewitz, *supra* note 233.
243 *See* Yee, *supra* note 199, at 435–36.
244 *See id.* at 418.
245 *See id.*
246 *See id.*
247 *See* Herrington, *supra* note 195, at 323.
248 *Id.* at 332.
249 *Id.*
250 *Id.*
251 *Id.*
252 *Id.*
253 Herrington, *supra* note 195, at 332.

regulation under the Older Americans Act (OAA).[254] Amendments made to the OAA in 1978 mandated that each state establish an ombudsman program.[255] The state-run offices were charged with investigating complaints,[256] training and supervising volunteers,[257] monitoring the development of federal, state and local laws, regulations, and policies,[258] and providing public agencies with information about problems faced by long term care residents.[259] However, because state ombudsman's offices are regulated by the state in which they exist,[260] there is a lack of uniformity in the national context as to how these offices are run.[261] This lack of uniformity is further exacerbated by a lack of sufficient oversight on the part of the federal government,[262] which has allowed each state office to develop differently, and has provided the ombudsmen with varying duties and roles.[263] Furthermore, due to issues of poor staffing and limited authority and autonomy, ombudsmen often do not provide effective services.[264]

Thus, although ombudsmen are meant to provide dispute resolution functions and to address complaints by residents,[265] there appears to be no exact, uniform job description, which accurately and adequately describes their role.[266] Furthermore, while ombudsmen are generally granted authority to resolve disputes, they cannot make, set, or change laws.[267] In addition, they are not vested with the authority to enforce their recommendations.[268]

Currently, ombudsmen generally play three different roles when visiting a nursing home: friend, advocate and mediator.[269] Within the role of mediator, the ombudsman facilitates communication between residents and legal professionals.[270] If the resident

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254 *Id.*
255 *Id.*
256 *Id.*
257 *Id.*
258 *Id.*
259 Herrington, *supra* note 195, at 332.
260 *Id.* at 321.
261 *Id.*
262 *Id.* at 332–33.
263 *Id.*
264 *Id.* at 331.
265 Herrington, *supra* note 195, at 335.
266 *See* Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombudsman Model*, 12 OHIO ST. J. ON DISP. RESOL. 95, 99 (1996).
267 *See* Herrington, *supra* note 195, at 335.
268 *Id.* at 332.
269 *See id.* at 336.
270 *See id.*

and nursing home should later be involved in litigation, the ombudsman is not involved in those proceedings.[271] Studies of the effectiveness of the ombudsmen program indicate that ombudsmen's roles within nursing facilities are often associated with "comfort and friendship to residents rather than actual effectiveness in changing practices by nursing homes."[272]

Given these findings, it appears that the ombudsmen's current role as mediators has not proven to be wholly effective.[273] Thus, instead of confining ombudsmen to mere facilitators of communication between residents and legal authorities,[274] states could more clearly define the role of ombudsmen as that of direct mediators of disputes between nursing homes and residents. Delineating ombudsmen's roles in such a way would help states to establish more effective training programs for ombudsmen, and thereby provide them with the authority and skill to adequately resolve disputes. Once ombudsmen are given more adequate training and autonomy,[275] they could also serve as de facto mediators in mandatory mediation proceedings preceding arbitration and possible litigation of claims between residents and nursing homes. Allowing ombudsmen to serve such direct roles would also legitimate the ombudsman program and the federal funding provided to it by adequately serving the intended purpose of the program.[276]

Furthermore, since the ombudsmen's traditional role has been that of an advocate for residents,[277] they may be uniquely attuned to resident issues. Although this characteristic might be seen as a conflict of interest to their new roles as objective mediators, such a conflict is balanced out by the maintenance of mandatory arbitration in the face of failing mediation, which has traditionally provided a benefit to nursing homes and a disadvantage to resident claimants.[278]

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271 *Id.* at 339.

272 *Id.* at 347.

273 *See* Herrington, *supra* note 195, at 348.

274 *See id.* at 339.

275 *See id.* at 332.

276 *See id.* at 356.

277 *See id.* at 236.

278 Krasuski, *supra* note 6, at 267–68.

## Conclusion

Instead of rendering all mandatory pre-dispute binding arbitration clauses in nursing home contracts unenforceable, Congress should continue to allow the use of such clauses provided that certain changes are made to the admissions process. Furthermore, including mandatory mediation provisions within the clauses will also render the use of arbitration more equitable to both parties.[279] Mandatory mediation has proven to be an effective means of dispute resolution in the medical malpractice context,[280] and since disputes between nursing homes and nursing home residents are analogous to disputes between doctors and patients, it is reasonable to believe that mandatory mediation will prove successful in the nursing home context as well. In addition, the Long Term Care Ombudsmen in each state should be provided with more clearly defined roles and specialized training[281] so that they may serve as default mediators for the aforementioned mandatory mediation sessions. Implementing such policies would preserve arbitration as a valid dispute resolution method for nursing homes, while ensuring that residents receive adequate compensation for any injuries they may suffer during their period of stay at nursing homes.

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279 *See id.*

280 *See* Yee, *supra* note 199, at 425.

281 *See* Herrington, *supra* note 195, at 332.