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When American Exceptionalism Isn't Exceptional: Consumer Arbitration in the United States

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The United States takes a unique position in allowing binding pre-dispute arbitration clauses in consumer contracts. This article uses the failure to regulate or prohibit the use of pre-dispute arbitration provisions in nursing home agreements as a means of understanding the current state of pre-dispute arbitration clauses in consumer contracts in the United States. State laws or judicial rules that regulate arbitration clauses in nursing home contracts are routinely blocked by federal courts. Efforts in the U.S. Congress to prohibit such clauses in nursing home contracts have been unsuccessful.

Keywords: consumer law, arbitration, unconscionability, federalism.

Content

Introduction

This article uses the failure to regulate or prohibit the use of pre-dispute arbitration provisions in nursing home agreements as a means of understanding the current state of pre-dispute arbitration clauses in consumer contracts in

the United States.[1] There is not a consistent American policy on whether such provisions should be enforceable. The debate over arbitration generally is drawn along partisan lines, and the debate over nursing home arbitration generally follows the same lines. Republicans generally favor pre-dispute arbitration agreements while Democrats generally oppose such agreements.[2] There has been inaction in Congress, where several Fairness in Nursing Home Arbitration bills have languished. There has been some executive action during the Obama administration. The executive branch attempts of this kind are already being overturned under the Trump administration.[3] This was to be expected, as Donald Trump both shares Republican pro-business ideology and seemingly has practiced consumer fraud as a business model before becoming a president.[4] There have been attempts to regulate arbitration agreements by state legislatures. Under American federalism, these laws are only enforceable when federal law does not apply. Because most nursing home lawsuits involve interstate commerce, these state laws have been regularly blocked by both state and federal courts. And, most importantly, the United States Supreme Court has been hostile to such attempts to regulate arbitration.

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[1] *See, e.g., Bailey, L. A.* et al. Combating Abusive Arbitration Clauses in Nursing Home Contracts. *Trial Trends*, 2009, p. 18.; *Bagby, K. & Souza, S.* Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts. *Journal of Contemporary Health Law & Policy,* 2013, 29(2), p. 183; *Krasuki, A. E.* Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents. *DePaul Journal of Health Care Law,* 2004, 8(1), p. 263; *Palm, K.* Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate. *Elder Law Journal*, 2006, 14(2), p. 453; *Pavlic, J.* Reverse Pre-Empting the Federal Arbitration Act: Alleviating the Arbitration Crisis in Nursing Homes. *Journal of Law & Health,* 2009, 22(2), p. 375; *Pomerance, B.* Arbitration Over Accountability? The State of Mandatory Arbitration Clauses in Nursing Home Admission Contracts. *Florida Coastal Law Review,* 2015, 16(2), p. 153; *Schleppenbach, J. R.* Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes between Nursing Homes and their Residents. *Elder Law Journal*, 2014, 22(1), p. 141; *Tripp, L.* A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts. *Campbell Law Review,* 2009, 31(2), p. 157; *Tripp, L.* Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of *AT&T Mobility v. Concepcion. American Journal of Trial Advocacy,* 2011, 35(1), p. 87.

[2] The Democratic Party Platform for 2016 states:
The Democratic Party believes consumers, workers, students, retirees, and investors who have been mistreated should never be denied their right to fight for fair treatment under the law. That is why we will support efforts to limit the use of forced arbitration clauses in employment and service contracts, which unfairly strip consumers, workers, students, retirees, and investors of their right to their day in court.
2016 Democratic Party Platform, 21 July 2016. Available at http://www.presidency.ucsb.edu/papers_pdf/117717.pdf [last viewed 05.08.2017].
The 2008 Republican Platform criticized attempts by trial lawyers and their "Democratic donees" to "weaken lower-cost dispute resolution alternatives such as mediation and arbitration in order to put more cases into court."
2008 Republican Party Platform, 1 Sept. 2008. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=78545 [last viewed 05.08.2017].

[3] *Lazarus, D.* Trump wants to deny nursing-home residents and their families the right to sue, *Los Angeles Times*, 13 June 2017. Available at http://www.latimes.com/business/lazarus/la-fi-lazarus-nursing-home-arbitration-20170613-story.html [last viewed 05.08.2017]; see also *Cooper, P.* Arbitration Update: CFPB Rule Uncertain, Mixed Fates for Others, Bloomberg BNA, 1 June 2017. Available at https://www.bna.com/arbitration-update-cfpb-n73014451803/ [last viewed 05.08.2017].

[4] *Eder, S. and Medina J.* Trump University Suit Settlement Approved by Judge, *New York Times*, 31 March 2017. Available at https://www.nytimes.com/2017/03/31/us/trump-university-settlement.html [last viewed 05.08.2017]; *Barbaro, M. and Eder S.* Former Trump University Workers Call the School a 'Lie' and a 'Scheme' in Testimony, *New York Times,* 31 May 2016. Available at https://www.nytimes.com/2016/06/01/us/politics/donald-trump-university.html [last viewed 05.08.2017].

Lawsuits often are brought against nursing homes by nursing home residents for personal injuries, or by their surviving children for wrongful death. Such lawsuits are essential as the enforcement mechanism for consumer protection as the United States relies upon *ex post* law enforcement (in contrast to the European *ex ante* regulatory approach).[5] The defendant nursing homes invariably file motions to compel arbitration.

Arbitration clauses in nursing home contracts have become "the rule rather than the exception."[6] A New York Times investigation found that between 2010 and 2014, "more than 100 cases against nursing homes for wrongful death, medical malpractice, and elder abuse were pushed into arbitration." Nursing homes use arbitration agreements to shield or immunize nursing homes by denying access to courts. They also use them to mitigate their damages: the average indemnity payment associated with an arbitrated outcome is about $90 000, which, according to an American Health Care Association study, is "about 35% less than the average indemnity payment associated with a non-arbitrated outcome of about $138 000."[7] [8]

1. Pre-dispute Arbitration Provisions in Consumer Contracts in the EU

Unlike the United States, European policy toward pre-dispute arbitration clauses in consumer contracts is relatively clear.[9] In 1993, the Council of the European Communities issued a Directive on unfair terms in consumer contracts. The Directive declared that boilerplate terms in contracts "shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." An Annex contained a list of terms that "may be regarded as unfair." Among the listed unfair terms are terms that have the effect of "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions."[10] The European Court of Justice noted that the Unfair Terms Directive was "based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge."[11]

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[5] *Sternlight, J. R.* Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims. *Southwestern Law Review,* 2012, 42(1), p. 87.

[6] *Koppel, N.* Nursing Homes, in Bid to Cut Costs, Prod Patients to Forego Lawsuits, *Wall Street Journal*, 11 April 2008, at A1.

[7] American Health Care Association, Special Study on Arbitration in the Long Term Care Industry 4, 7, 16 June 2009.

[8] *Silver-Greenburg, J. and Corkery M.* In Arbitration, a "Privatization of the Justice System," *New York Times*, 1 Nov. 2015. Available at https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [last viewed 05.08.2017].

[9] For useful comparative scholarship on consumer arbitration in the United States and Europe, *see Drahozal, C. R. and Friel, R.* Consumer Arbitration in the European Union and the United States. *North Carolina Journal of International Law and Commercial Regulation*, 2003, 28(2), p. 357; *Schmitz, A. J.* American Exceptionalism in Consumer Arbitration. *Loyola University Chicago International Law Review*, 2013, 10(1), p. 81; *Sternlight, J. R.* Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World. *University of Miami Law Review,* 2002, 56(4), p. 831.

[10] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *Official Journal of the European Communities* L 195/29, 21.4.93, pp. 31, 33.

[11] Judgment of 26 Oct. 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, para. 25.

European countries took different approaches to pre-dispute arbitration clauses in consumer contracts. One approach declared such provisions null and void. The other approach allowed presumed such a clause was abusive unless the pre-dispute arbitration provision was "individually negotiated and subscribed." The arbitration agreement would have to separate from the main contract.[12]

The 2013 Directive on Consumer ADR will make this field even simpler. It says that a pre-dispute agreement between a consumer and a trader to submit complaints to ADR should not be binding on the consumer "if it has the effect of depriving the consumer of his right to bring an action before the courts."[13] The portion of the Directive on Consumer ADR on pre-dispute arbitration clauses reflects a 1998 Recommendation of the Commission of the European Communities on out-of-court settlement of consumer disputes. One of the principles was that a "consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute."[14]

2. Pre-dispute Arbitration Provisions in Consumer Contracts in the United States

A series of United States Supreme Court decisions dramatically expanded the Federal Arbitration Act's scope. Section 2 of the FAA – described by the Supreme Court as "the primary substantive provision of the Act" – states that a written agreement to arbitrate "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."[15] The FAA's legislative history suggests that Congress intended the law to overcome judicial resistance by federal judges to arbitration in order to permit private dispute resolution of commercial – not consumer – disputes.[16] Before the FAA, American courts followed the English rule that arbitration agreements were

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[12] Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies Policy Department C, European Parliament, Legal Instruments and Practice of Arbitration in the EU 53, 2014.

[13] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, Official Journal of the European Communities L 165/63, 18.06.2013, p. 67. For an example of the transposition of this Directive, see Patērētāju ārpustiesas strīdu risinātāju likums. Available at https://likumi.lv/doc.php?id=275063[last viewed 05.08.2017]. The Latvian law declares, "Vienošanās par strīda nodošanu ārpustiesas strīdu risinātājam nav saistoša patērētājam, ja tā noslēgta pirms strīda rašanās un patērētājam ir liegtas tiesības vērsties tiesā savu tiesību aizstāvībai."

[14] Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, *Official Journal of the European Communities* L 115/31, 17.4.1998, p. 34.

[15] *Moses H. C. Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24, 1983; 9 U. S. C. § 2.

[16] See generally *Leslie, C. R.* The Arbitration Bootstrap. *Texas Law Review*, 2015, 94(2), p. 265; *Moses, M. L.* Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress. *Florida State University Law Review,* 2006, 34(1), p. 99; *Szalai, I.* Outsourcing Justice: The Rise of Modern Arbitration Laws in America. Durham, N.C.: Carolina Academic Press, 2013; *Szalai, I. S.* Exploring the Federal Arbitration Act through the Lens of History. *Journal of Dispute Resolution,* 2016, (1), p. 115.

unenforceable because they "ousted" courts of their jurisdiction.[17] Imre Szalai has concluded that the FAA "was enacted to cover privately-negotiated arbitration agreements between merchants in order to facilitate the resolution of contractual disputes, through minimal procedures applicable solely in federal court."[18]

The Supreme Court's interpretation of the FAA no longer puts arbitration clauses on an "equal footing" with other contracts; according to Richard Frankel, the court places them on a pedestal. Frankel argues that the court has created special interpretive rules for arbitration clauses that do not apply to other contracts; arbitration clauses are now "super contracts." One example will suffice: courts interpret ambiguous arbitration contracts in favor of arbitration instead of using the traditional contract rule of interpreting ambiguities against the drafter.[19]

The Supreme Court in 1983 transformed the FAA from a procedural rule that applied only in federal court to a substantive rule that applied in both state and federal court. Justice William Brennan concluded that "section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[20] The court subsequently decided that the FAA preempted state laws that regulated arbitration.[21] Justice O'Connor warned that the court's "broad formulation" of the FAA would result in displacing "many state statutes carefully calibrated to protect consumers" and "state procedural requirements aimed at ensuring knowing and voluntary consent."[22] That's exactly what happened. Justice Ruth Ginsburg lamented in 2015 that the court's decisions "have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws."[23]

According to the logic of these Supreme Court arbitration opinions, few, if any, claims subject to an arbitration clause belong in court instead of arbitration. Federal statutory claims for age, sex, or racial discrimination have been shunted into the private world of arbitration.[24] Simple consumer transactions are subject to arbitration.[25] The Supreme Court has sanctioned the use of class-action waivers in arbitration clauses that permit corporations to avoid class-action lawsuits.[26] Even wrongful death claims have been held to be arbitrable.[27]

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17 *Leslie, C. R.* The Arbitration Bootstrap, 94 *Texas Law Review*, pp. 300–301.

18 *Szalai, I. S.* Exploring the Federal Arbitration Act through the Lens of History, 2016 *Journal of Dispute Resolution*, p. 118.

19 *Frankel, R.* The Arbitration Clause as Super Contract. *Washington University Law Review,* 2014, 91(3), p. 531.

20 *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1 at 24–25.

21 *Southland Corp. v. Keating*, 465 U.S. 1, 1984; *Perry v. Thomas*, 482 U.S. 483, 1987.

22 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283, 1995, (O'Connor, J., concurring).

23 *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 477, 2015 (Ginsburg, J., dissenting).

24 *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 1991. See also *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 1989 (Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 1987 (Racketeer Influenced and Corrupt Organizations Act).

25 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 1995.

26 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 2011.

27 *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 2012. The lower courts have been more receptive to keeping wrongful death claims from arbitration. See, e.g., *Richmond Health Facilities v. Nichols*, 811 F.3d 192, 6th Cir. 2016; *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695, Miss. 2009; *Lawrence v. Beverly Manor*, 273 S.W.3d 525, Mo. 2009.

The transformative impact of the Supreme Court arbitration jurisprudence is sometimes overlooked. Jean R. Sternlight, the leading scholar on pre-dispute arbitration clauses, has written with great prescience about arbitration in America. She noted in 1996 that the Supreme Court instead of protecting consumers was "itself leading the revolutionary transition from litigation to mandatory binding private arbitration."[28] With each pro-arbitration opinion issued by the Supreme Court in the 1970s and 1980s, businesses "jumped on the opportunity to compel arbitration in contexts where they previously thought arbitration agreements would not be enforced."[29] Pre-dispute arbitration clauses have became ubiquitous in consumer transactions and employment contracts.[30]

3. Nursing Home Litigation

If a party files a lawsuit against a nursing home and there is an underlying agreement that contains an arbitration clause, the nursing home can file a motion to compel arbitration. In cases governed by the Federal Arbitration Act, the party resisting enforcement of the arbitration clause has limited grounds. The FAA only allows challenges that "exist a law or in equity for the revocation of any such contract."[31] Common challenges to arbitration clauses in nursing home litigation are unconscionability and lack of capacity.[32] Most courts have been unreceptive to challenges to arbitration clauses based upon unconscionability.[33]

The common-law doctrine of unconscionability has two aspects: procedural unconscionability and substantive unconscionability. Procedural unconscionability refers to the circumstances surrounding the adoption of the arbitration clause. Substantive unconscionability refers to the fairness of the arbitration provision itself.[34] Substantive unconscionability exists when the arbitration clauses creates barriers to the consumers pursuing their claims in arbitration. The United Stated Supreme Court in 2000 addressed the issue of whether an arbitration agreement is unenforceable if it says nothing about the costs of arbitration, thus failing to provide protection the consumer from "potentially substantial costs." The court held that the mere "risks" of large arbitration costs "is too speculative to justify the invalidation of an arbitration agreement."[35] Courts have since routinely rejected challenges to arbitration based on speculative costs.[36] Occasionally, the party resisting arbitration is able to provide sufficient proof that "the cost of the proposed arbitration was so prohibitive as to render the arbitration agreement substantively unconscionable."[37]

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[28] *Sternlight, J. R.* Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration. *Washington University Law Quarterly,* 1996, 74(3), p. 637. The supreme court's arbitration jurisprudence is part of a larger trend to make citizens' access to courts more difficult. See *Chemerinsky, E.* Closing the Courthouse Door: How Your Constitutional Rights Became Unenforceable. New Haven, CN: Yale University Press, 2017.

[29] *Sternlight, J. R.* Creeping Mandatory Arbitration: Is It Just?. *Stanford Law Review*, 2005, 57(5), p. 1631.

[30] *Leslie, C. R.* The Arbitration Bootstrap, *Texas Law Review*, 94, pp. 269–270.

[31] 9 U.S.C. § 2.

[32] *Bailey, L. A.* et al. Combating Abusive Arbitration Clauses in Nursing Home Contracts, *Trial Trends* p. 18.

[33] *Schmitz, A.* American Exceptionalism in Consumer Arbitration, *Loyola University Chicago International Law Review*, 10, pp. 93–94.

[34] *In re Halliburton Company*, 80 S.W.3d 566, 571, Tex. 2002.

[35] *Green Tree Financial Corp.- Alabama v. Randolph,* 531 U.S. 79, 2000.

[36] *See, e.g., In re Olshan Foundation Repair Company, LLC,* 328 S.W.3d 883, Tex. 2010; *In re FirstMerit Bank,* 52 S.W.3d 749, Tex. 2001.

[37] *Olshan Foundation Repair Company v. Ayala,* 180 S.W.3d 212, Tex. App. – San Antonio 2005.

Lack of capacity is another common defense to the enforceability of arbitration clauses often found in nursing home cases. At the time of the signing of the admission documents containing an arbitration agreement, the future nursing home resident is of advanced age and likely diminished capacity.[38] The Centers for Disease Control and Prevention recently estimated that over a half of nursing home residents suffer from Alzheimer's disease or other dementias.[39] The ability to understand the significance of the contract generally or the arbitration clause specifically is almost invariably in question. But a threshold issue exists: does the court or does the arbitrator decide the lack of capacity issue? This question has not been addressed by the United States Supreme Court, and there is a split in the federal courts of appeals.[40]

In 1967, the United States Supreme Court addressed the issue whether the court or arbitrator should resolve a claim of fraud in the inducement of the contract. The Supreme Court held that the arbitrator, not the trial judge, should resolve a claim that the contract was induced by fraud. Section 4 of the FAA limits a court's review to those matters concerning "the making of the arbitration agreement."[41] A claim that the arbitration clause itself was induced by fraud would be decided by the court.[42] The arbitration clause is considered "separable" from the rest of the contract.

When faced with a challenge to the enforceability of an arbitration clause, courts would determine whether the party was challenging the validity of the contract as a whole, which would be decided by the arbitrator, or was challenging the validity of the arbitration clause itself, which would be decided by the court.[43] In 2006, the United States Supreme Court held that a challenge to a motion to compel arbitration that was based upon the illegality of the contract would be for the arbitrator to decide.[44] The Supreme Court reaffirmed the rule that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." However, in a footnote, the court reserved the question of whether the trial court or the arbitrator would decide a challenge based upon whether any agreement was ever concluded in the first place. The court gave three examples of contract formation issues: whether the obligor ever signed the contract; whether the signer lacked authority to bind the principal; and "whether the signer lacked the mental capacity to assent." As the Texas Supreme Court has noted, "Several courts have read *Buckeye* to add a third discrete category to the *Prima Paint* analysis." The third category includes "a challenge to whether any agreement was ever

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[38] *Bagby, K. & Souza, S.* Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts. *Journal of Contemporary Health Law & Policy,* 2013, 29(2), p. 183.

[39] Long-Term Care Providers and Services Users in the United States: Data from the National Study of Long-Term Care Providers, 2013–2014, In: 40, *Vital and Health Statistics*, Series 3, No. 38, Feb. 2016, National Center for Health Statistics, Centers for Disease Control and Prevention, U. S. Dep't of Health and Human Services.

[40] *Smith, A*. You Can't Judge Me: Mental Capacity Challenges to Arbitration Provisions. *Baylor Law Review*, 2004, 56(3), p. 1051.

[41] 9 U.S.C. §4.

[42] *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 1967.

[43] *Egle, A. V*. Back to *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*.: To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement. *Washington Law Review,* 2003, 78(1), 199.; *see also In re Morgan Stanley & Co., Inc.* 293 S.W.3d 182, 187, Tex. 2009.

[44] *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 2006.

concluded."[45] The majority of courts have decided that this is a threshold issue for the court.[46]

A good example of a nursing home case involving lack of capacity is *Rowan v. Brookdale Senior Living Communities, Inc.* There, the plaintiff Rowan was injured when he wandered away from an assisted living facility. He sued the facility for gross negligence and fraud. The facility moved to compel arbitration, and Rowan's lawyers argued that he lacked capacity when he signed the residency agreement the day he moved into the facility. The court noted that under Michigan law, contracts were presumed to be legal, valid, and enforceable and this presumption included "the assumption that the individuals signing a contract were mentally competent at the time of signing. "moreover, the party resisting enforcement of the contract bears the burden of proving he or she lacked the legal capacity to contract. The court ruled that Rowan was unable to show that he lacked capacity to enter into the contract.[47]

Other cases involve instances where the arbitration agreement eliminates the remedies available to consumers or awards attorney fees to the prevailing parties (very few American laws allow such fee-shifting "loser pays" provisions).[48] These provisions would be considered substantively unconscionable. According to Article 2 of the Uniform Commercial Code, when any clause has been found to be unconscionable, the court "may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."[49] In the arbitration setting, the trend appears to be for courts to strike the offending provision and compel arbitration rather than hold that the arbitration agreement is wholly unenforceable.[50]

In *Covenant Health Rehab of Picayune, L.P. v. Brown*, the Supreme Court of Mississippi reversed the trial court's determination that an arbitration provision was substantively unconscionable. The plaintiffs had filed a wrongful death lawsuit against a convalescent center. The defendants filed a motion to compel arbitration; the plaintiffs then filed a motion seeking a declaration that the admissions agreement was unconscionable and void. The trial court struck clauses that limited liability and punitive damages, waived liability for criminal acts of individuals, required that resident to forfeit all claims except for willful acts, and stipulated that the resident pay for all costs of enforcing the agreement if the resident challenged either the grievance resolution process or an award resulting from that process. The supreme court affirmed the trial court's determination that these provisions were unconscionable; however, it reversed the trial court's finding that the arbitration provision was unenforceable because of these provisions. The supreme court instead chose to enforce "the remainder of the contract without the unconscionable clause."

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[45] *In re Morgan Stanley & Co.,* 293 S.W.3d 182, 187, Tex. 2009.

[46] *See, e.g.*, *In re Morgan Stanley & Co.,* 293 S.W.3d 182, 187, Tex. 2009; *Spahr v. Secco*, 330 F.3d 1266, 10th Cir. 2003; *Rowan v. Brookdale Lining Communities, Inc.* No. 1:13-cv-1261, W. D. Mich., 1 June 2015; *Amirmotazedi v. Viacom, Inc*., 768 F. Supp. 2d 256, D. D. C. 20111; but see *Primerica Life Insurance Co. v. Brown*, 304 F.3d 469, 472, 5th Cir. 2002.

[47] *Rowan v. Brookdale Senior Living Communities, Inc*., No. 1:13-cv-1261, W. D. Mich., 1 June 2015.

[48] *Bailey*, et al. Combating Abusive Arbitration Clauses in Nursing Home Contracts, *Trial Trend*, pp. 27–28.

[49] Uniform Commercial Code §2-302.

[50] *See, e.g., In re Poly-America*, *L.P.*, 262 S.W.3d 337, Tex. 2008; *Venture Cotton Cooperative v. Freeman*, 435 S.W. 3d 222, Tex. 2014.

Under Mississippi law, if a court struck part of an agreement as void, the rest of the contract remained enforceable.[51]

4. Federal Preemption

With the proliferation of arbitration clauses in the 1980s, state legislatures have taken steps to regulate the use of arbitration clauses.[52] The states have used two different approaches. Some states generally regulated arbitration clauses, typically by mandating notice requirements. Nebraska, for example, required certain language to appear in contracts with an arbitration clause:

> *"The following statement shall appear in capitalized, underlined type adjoining the signature block of any standardized agreement in which binding arbitration is the sole remedy for dispute resolution: THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."*[53]

Vermont required an "acknowledgment of arbitration" that each party must sign, acknowledging that the party will not be able to bring a lawsuit over any disputes covered by the arbitration provision.[54] Rhode Island required the arbitration provision be placed "immediately before the testimonium clause or the signature of the parties."[55] Montana similarly mandated "notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration."[56] Texas created a "consumer exception" that exempted from arbitration agreements involving "the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than $50 000," unless "the agreement is signed by each party and each party's attorney."[57] Tennessee required that the arbitration clause be "additionally signed or initialed by the parties" in contracts relating to farm property or residential property.[58]

The second approach was to proscribe arbitration in specific situations such as nursing home agreements. This approach was taken by state legislatures in California, Illinois, Oklahoma, and West Virginia. For example, a provision in the California Long-Term Care, Health, Safety, and Security Act provides, "An agreement by a resident or patient of a skilled nursing facility or intermediate care facility to waive his or her rights to sue pursuant to this subdivision shall be void as contrary to public policy."[59]

These state attempts at regulating arbitration clauses in nursing home contracts must pass muster under the "Supremacy clause" of the United States Constitution. The Constitution declares that the Constitution and "the Laws of the United States"

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[51] *Covenant Health & Rehabilitation of Picayune, LP v. Brown*, 949 So. 2d 732, pp. 740–741, Miss. 2007.

[52] *Schleppenbach, J. R.* Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes between Nursing Homes and their Residents. *Elder Law Journal*, 2014, 22(1), p. 141.

[53] Nebraska Revised Statutes § 25-2602.02.

[54] Vermont Statutes § 5652.

[55] Rhode Island Statutes § 10-3-2.

[56] Montana Code Annotated § 27-5-114(4), 1995. This provision was repealed in 1997.

[57] Texas Civil Practice & Remedies Code § 171.002 (a), (c).

[58] Tennessee Code Ann. § 29-5-302.

[59] California Health & Safety Code § 1430.

are "the Supreme Law of the Land."[60] Consequently, state laws may be preempted by federal ones. In *Southland Corp. v. Keating*, the United Sates Supreme Court held that section 2 of the FAA applied to state courts.[61] The California Supreme Court had interpreted the California Franchise Investment law to require courts, not arbitrators, to consider claims brought under that statute and refused to enforce the parties' pre-dispute arbitration agreement. The United States Supreme Court reversed the California Supreme Court, holding that the California law "so interpreted" directly conflicted with the FAA and violated the Supremacy Clause. This 1984 decision has had a far-reaching impact, causing a "seismic shift from the FAA as a simple procedural statute for enforcing arbitration agreements in federal court to a major intrusion upon the police powers of the states."[62] As Sarah Rudolph Cole has explained, the Supreme Court has "developed a preemption doctrine that effectively precludes states from regulating arbitration because the Court nullifies state laws or judicial decisions that are inconsistent with either the policy underlying or the language" of the FAA.[63] A number of state statutes are now subject to preemption if the FAA applies.[64] The FAA typically will apply when interstate commerce is involved, and nursing home litigation usually involves interstate commerce.[65] State legislature's attempts to regulate arbitration clauses generally or nursing home arbitration clauses specifically have run afoul of the Supremacy Clause. Courts routinely strike down such laws under the preemption doctrine.[66]

The United States Supreme Court has held that such state statutes were preempted by the FAA. Montana law declared that arbitration clauses were unenforceable unless notice that the contract was subject to arbitration was "typed in underlined capital letters on the first page of the contract."[67] The Montana Supreme Court refused to enforce an arbitration clause in a franchise agreement

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60 U.S. Constitution art. VI, Cl. 2.

61 *Southland Corp. v. Keating,* 465 U.S. 1, 1984.

62 *Moses, M. L.* Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress. *Florida State University Law Review,* 2006, 34(1), p. 99.

63 *Cole, S. R.* The Federalization of Consumer Arbitration: Possible Solutions. *University of Chicago Legal Forum,* 2013, p. 271.

64 *Ware, S. J.*, Arbitration and Unconscionability after *Doctor's Associates, Inc. v. Casarotto*. *Wake Forest Law Review*, 1996, 31(4), p. 1011 n. 72. Ware lists statutes from 22 states imperiled by the United States Supreme Court decisions on the FAA and preemption.

65 As the Kentucky Supreme Court has noted in a nursing home case:
The Federal Act applies to arbitration provisions in contracts "evidencing a transaction involving [interstate] commerce," 9 U.S.C. § 2, and almost certainly applies here. Congress's commerce power is interpreted broadly, and "may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice [...] subject to federal control." *Citizens Bank v. Alafabco, Inc.,* 539 U.S. pp. 52, 56–57, 2003. The Supreme Court has held that health care is one such activity. *Summit Health, Ltd. v. Pinhas,* 500 U.S. 322, 1991 (hospital's purchase of out-of-State medicines and acceptance of out-of-State insurance establish interstate commerce). Several courts, moreover, have applied the FAA to arbitration provisions in nursing home admission contracts. See, e.g., *Cook v. GGNSC Ripley*, LLC, 786 F.Supp.2d 1166, N.D. Miss. 2011; *Carter v. SSC Odin Operating Company*, LLC, 353 Ill. Dec. 422, 955 N.E.2d 1233, 2011; Barker v. Evangelical Lutheran Good Samaritan Society, 720 F.Supp.2d 1263, D.N.M. 2010; *Estate of Eckstein v. Life Care Centers of America, Inc.*, 623 F.Supp.2d 1235, E.D. Wash. 2009; *Triad Health Management of Ga., III, LLC v. Johnson*, 298 Ga. App. 204, 679 S.E.2d 785, 2009. *Ping v. Beverly Enterprises, Inc*., 376 S.W. 3d 581, pp. 589–590, Ky. 2012; see also *In re Nexion Health at Humble*, *Inc*., 173 S.W.3d 67, 69, Tex. 2005 (Medicare funds crossing state lines constitute interstate commerce).

66 Moses, Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress, *Florida State University Law Review*, 34, pp. 132–138.

67 Montana Code Annotated § 27-5-114(4), 1995.

because the agreement lacked the required notice[68] The United State Supreme Court reversed. The Supreme Court held that arbitration agreements may not be invalidated "under state laws applicable only to arbitration provision." The court noted that section 2 of the FAA only permits "generally applicable contract defenses, such as fraud, duress, or unconscionability" to be applied to invalidate arbitration agreements.[69]

Lower federal courts and state appellate courts also have held that the FAA preempts state statutes. The Texas legislature has passed two statutes that regulate arbitration agreements; the Texas Supreme Court has held that both statutes are preempted by the FAA. The Texas Arbitration Act does not allow arbitration clauses to be enforceable in personal injury claims unless "the agreement is signed by each party and each party's attorney."[70] The Texas Supreme Court held that FAA (when applicable) preempts the Texas law because it "interferes with the enforceability of the arbitration agreement by adding an additional requirement – the signature of a party's counsel – to arbitration agreements in personal injury cases."[71]

In a wrongful death lawsuit against a nursing home, the Texas Supreme Court held that the FAA preempted the Texas Medical Liability Act's provisions on arbitration. The TMLA requires an agreement to arbitrate a healthcare liability claim contain a written notice in bold-type, ten-point font that stated the agreement contains a waiver of important legal rights, including the right to a jury, and the patient should not sign the agreement without first consulting an attorney.[72] The Texas Supreme Court held that the FAA preempted this provision because the underlying patient-provider transaction involved interstate commerce.[73]

The Nebraska Supreme Court also held that the FAA preempted a Nebraska statute that required a notice about arbitration above the signature line in any agreement. The court concluded that it had "to yield to the precedent set by the Court's holding in *Doctor's Associates, Inc*. We hold that the FAA preempts § 25-2602.02 for the contract."[74] The Illinois Supreme Court reached the same conclusion about the Illinois Nursing Home Care Act: "the antiwaiver provisions of the Nursing Home Care Act relied upon by the plaintiff are legally indistinguishable from the provisions struck down by the [United States] Supreme Court."[75]

The United States Supreme Court also has struck down state common-law rules because of the FAA's preemptive effect. While the FAA provides for the revocation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," the Supreme Court has nonetheless held that judge-made rules "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[76] In *AT&T Mobility LLC v. Concepcion*, the Supreme Court addressed a California Supreme Court rule establishing an arbitration-specific framework for analyzing unconscionability. The "*Discover*

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[68] *Burnham, S. J*. The War Against Arbitration in Montana. *Montana Law Review,* 2005, 66(1), p. 139.
[69] *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 1996.
[70] Texas Civil Practice & Remedies Code §171.002 (c).
[71] *In re Nexion Health at Humble*, *Inc*., 173 S.W.3d 67, Tex. 2005.
[72] Texas Civil Practice & Remedies Code § 74.451.
[73] *The Fredericksburg Care Company, L.P. v. Perez,* 461 S.W.3d 513, Tex. 2015.
[74] *Aramark Uniform & Career Apparel, Inc. v. Hunan, Inc*., 757 N.W.2d 205, 212, Nebraska, 2008; see also *Affiliated Foods Midwest Coop., Inc. v. Integrated Distribution Solutions*, 460 F. Supp. 2d 1068, D. Nebraska, 2006.
[75] *Carter v. SSC Odin Operating Co*., *LLC*, 927 N.E. 2d 1207, 1218, Ill. 2010.
[76] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 2011.

Bank Rule" rendered class-action waivers in arbitration clauses unenforceable, where a "consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[77] Justice Scalia, for the majority, held that the *Discover Bank* rule was displaced by the FAA, because California courts were applying the rule "in a fashion that disfavors arbitration." While the FAA's saving clause "preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's obstacles."[78]

The United States Supreme Court also has rejected the West Virginia Supreme Court of Appeals' common-law rule that, as a matter of public policy, all pre-dispute arbitration agreements that apply to personal injury or wrongful death claims against nursing homes were unenforceable. Interestingly, the West Virginia high court held that the state statute that prohibited arbitration in nursing home agreements was indeed preempted. However, the court asserted that its common-law rule was not affected by preemption because of the FAA's savings clause.[79] In a *per curiam* opinion, the United States Supreme Court vacated the West Virginia opinion. Relying upon *Concepcion*, the Supreme Court rejected West Virginia court's "categorical rule prohibiting arbitration of a particular type of claim."[80]

This term, the United States Supreme Court again addressed the issue whether a common-law rule is preempted by the FAA in an appeal involving nursing homes. The Kentucky Supreme Court held in 2012 that an agent appointed by a power of attorney cannot bind his or her principal to an arbitration agreement unless the power of attorney expressly authorized such authority. General provisions regarding management of property and financial affairs and decisions about health care do not encompass an agreement to arbitrate.[81] In 2015, the Kentucky high court reiterated its holding in three consolidated appeals involving wrongful death claims against nursing homes. The court held that a power of attorney required a "clear and convincing manifestation" of the principal's intent to delegate the authority to waive the right to trial by jury.[82]

The Supreme Court reversed, because the Kentucky clear-statement rule violated the FAA by singling out arbitration agreements for "disfavored treatment." Citing *Concepcion*, Justice Kagan noted that "a court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" The FAA preempts "any state rule discriminating on its face against arbitration." The Kentucky rule failed "to put arbitration agreements on an equal plane with other contracts." Instead the Kentucky Supreme Court directed the clear-statement rule to safeguard the "divine God-given right" of trial by jury. The rule was "too

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77 *Discover Bank v. Superior Court*, 113 P.3d 1100, Cal. 2005.

78 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 2011.

79 *Brown v. Genesis Healthcare Corp.*, 724 S.E. 2d 250, 282, W. Va. 2011, *vacated sub nom. Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 2012.

80 *Marmet Health Center Inc. v. Brown*, 132 S. Ct. 1201, 1203, 2012.

81 *Ping v. Beverly Enter., Inc.*, 376 S.W. 3d 581, Ky. 2012.

82 *Extendicare Homes, Inc. v. Whisman*, 478 S.W. 3d 306, Ky. 2015; *judgment rev'd in part, vacated in part sub nom. Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 2017.

tailor-made to arbitration agreements" to survive the proscription "against singling out those contracts for disfavored treatment."[83]

The court also rebuffed the respondents' attempt to create a distinction between contract formation and contract enforcement. The respondents argued, in vain, that states had free rein to decide whether are validly created in the first place. The court concluded, "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made."[84]

All was not lost for one of the respondents. For one of the respondents, the matter was over: their power of attorney was sufficiently broad to cover executing an arbitration agreement. However, the Kentucky Supreme Court had said that the other respondents' power of attorney was insufficiently broad to execute an arbitration agreement. That left open the possibility that the arbitration clause was not enforceable regardless of the Supreme Court's opinion. The Court reasoned that if the Kentucky's court was "wholly independent of the court's clear-statement rule, then nothing we have said disturbs it."[85]

5. Nursing Home Arbitration Clauses and the U. S. Congress

After the passage of the FAA in 1925, the United States Congress paid relatively little attention to arbitration until 2002. A special-interest group, the National Automobile Dealers Association, was responsible for the passage of a law that year that shielded care dealerships from arbitration agreements with automobile manufacturers. This "special-interest exemption" reflected the "considerable political clout of the motor vehicle lobby."[86]

Other federal laws belie a strong federal policy in favor of arbitration. The Talent-Nelson Military Lending Act, enacted in 2006, prohibited arbitration clauses in "consumer credit" agreements extended to service members and their dependents.[87] In a final rule issued on July 22, 2015, the Defense Department broadened the range of applicable credit products that were prohibited from requiring arbitration or imposing "other onerous legal notice provisions in the case of a dispute."[88] The Defense Department in 2010 also prohibited military contractors from requiring its employees or independent contractors to arbitrate civil rights violations or "any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention."[89] The Dodd-Frank Wall Street Reform and

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[83] *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S.Ct. 1421, 1425, 1427, 2017.

[84] Ibid. at 1428.

[85] Ibid. at 1429.

[86] *Chiappa, C. J., Stoelting, D.* Tip of the Iceberg? New Law Exempts Car Dealers from Federal Arbitration Act. *Franchise Law Journal*, 2003, 22(4), p. 219.

[87] 10 U.S.C. § 987 9(f)(4). The law provides, "Notwithstanding section 2 of title 9[FAA], or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made."

[88] Defense Department, Limitations on Terms of Consumer Credit Extended to Service Members and Dependents: Final Rule, Federal Register 43559, 43599, 43611, 22 July 2015.

[89] 48 C.F.R. 252.222-7006.

Consumer Protection Act of 2010 amended the Truth in Lending Act by prohibiting mandatory arbitration clauses from residential mortgage loans.[90]

More comprehensive reform of arbitration law has not been forthcoming. Although Democrats tend to oppose mandatory pre-dispute arbitration clauses in consumer or employment contracts, the failure of Democratic-controlled Congresses to pass arbitration legislation may indicate that Jean R. Sternlight accurately described how the American approach to arbitration "represents the unusual ability of United States corporate interests to control public policy in our country."[91]

In the 110th Congress, identical "arbitration fairness" bills were introduced by Democratic legislators in the House and Senate.[92] The stated purpose of the bills was to amend the Federal Arbitration Act because of the U.S. Supreme Court decisions that "changed the meaning of the act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes." The bills contained "findings" that explained the underlying rationale of the proposed legislation. Each bill stated:

> "*(1) The Federal Arbitration Act [...] was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.*
>
> *(2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.*
>
> *(3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.*
>
> *(4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.*
>
> *(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review*

[90] 15 U.S.C. § 1639c(e).

[91] *Sternlight, J. R.* Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World. *University of Miami Law Review,* 2002, 56(4), p. 831.

[92] Arbitration Fairness Act of 2007, H.R. 3010, 110th Congress, 2007; Arbitration Fairness Act of 2007, S. 1782, 110th Congress, 2007; see generally, *Alderman, Richard.* Why We Really Need the Arbitration Fairness Act: It's About Separation of Powers. *Journal of Consumer & Commercial Law*, 2009, 12(3), p. 151.

of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.

(6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.

(7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals."[93]

The bills were unsuccessful, despite Democrats having control of both the Senate and House.

After the 2008 election, when Barack Obama was elected president and Democrats gained seats in both houses, many observers predicted changes to the FAA that would reverse the Supreme Court's pro-business expansion of the FAA.[94] That change failed to come in the 110th Congress. "Arbitration Fairness" bills filed in the 111th Congress did not do any better. That was the last, best hope of amending the FAA as Democrats lost their majority in the House of Representative in the "Tea Party" wave of 2010. Democrats continued to file "Arbitration Fairness" bills in the 112th, 113th, 114th, and 115th Congresses.[95] In 2017, Democratic Senator Patrick J. Leahy introduced his bill "to restore statutory rights to the people of the United States from forced arbitration."[96] But none of these bills have yet to reach a vote in either the House or Senate. The furthest any bill has reached was Democratic Senator Al Franken holding a hearing on his version of the "Arbitration Fairness" bill in the 112th Congress.[97]

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[93] Arbitration Fairness Act of 2007, H.R. 3010, 110th Congress, 2007; Arbitration Fairness Act of 2007, S. 1782, 110th Congress, 2007.

[94] *See, e.g., Knapp, C. L.* Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device, *San Diego Law Review,* 46, pp. 618–619; *Tripp, L.* A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts, *Campbell Law Review*, 31, pp. 166–167.

[95] Arbitration Fairness Act of 2017, H.R. 1374, 115th Congress, 2017; Arbitration Fairness Act of 2017, S. 537, 115th Congress, 2017; Arbitration Fairness Act of 2015, H.R. 2087, 114th Congress, 2015; Arbitration Fairness Act of 2015, S. 1133, 114th Congress, 2015; Arbitration Fairness Act of 2013, H.R. 1844, 113th Congress, 2013; Arbitration Fairness Act of 2013, S. 878, 113th Congress, 2013; Arbitration Fairness Act of 2011, H.R. 1873, 112th Congress, 2011; Arbitration Fairness Act of 2011, S. 987, 112th Congress, 2011.

[96] Bill to restore statutory rights to the people of the United States from forced arbitration, S. 550, 115th Congress, 2017.

[97] The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses? Hearing Before the Committee on the Judiciary, United States Senate, 113th Congress, 17 Dec. 2013, Serial No. J–113–44.

The 110th Congress also saw the introduction of bills that specifically addressed nursing home arbitration clauses.[98] Representative Linda Sanchez, a Democrat from California, introduced the "Fairness in Nursing Home Arbitration Act" in the House of Representatives. The bill had 23 cosponsors, all but one were Democrats. The Senate version of the bill had some bipartisan support – the bill was introduced by Mel Martinez, a Republican from Florida, and Herb Kohl, a Democrat from Wisconsin. Martinez represented a state with a large number of retirees (Florida is commonly known as "God's waiting room"). The only Republican cosponsor in the House was also from Florida.

Senators Martinez and Kohl gave statements on the floor of the Senate when they introduced the bill. Martinez noted an unsettling trend among nursing homes of "an unwarranted intrusion into a vulnerable population's right to access the civil justice system." Martinez wanted to prohibit any arbitration agreement that was made before the dispute arose. Senator Kohl pointed out how the proposed law was a "narrowly targeted measure that protects nursing home residents, one of our Nation's most vulnerable populations." Kohl stressed how the nursing home admissions process was a "stressful and emotional event" where "prospective residents and their families were given little choice other than to accept the terms of the admission agreement with no ability to negotiate."[99] Both House and Senate bills declared "pre-dispute arbitration agreements" in nursing home contracts to be invalid and unenforceable.

Hearings were held in both the House and Senate. The subsequent Senate and House reports sounded nearly identical themes. The Senate Report announced the purpose of the bill as protecting "vulnerable nursing home residents and their families from unwittingly agreeing to pre-dispute mandatory arbitration, thus signing away their right to go to court." The report also detailed the circumstances surrounding nursing home admissions.

> "*The nursing home admission process is emotional and traumatic for prospective residents and their families. The decision to enter a facility is made either immediately after a medical emergency, when an elderly person is no longer able to care for himself or herself, or when a family reluctantly acknowledges that they are no longer able to provide the level of care that their loved one needs. During the admissions process, residents or their caretakers face a blizzard of forms that must be signed in order to gain admission. Prospective residents that suffer from cognitive or physical impairments may have limited ability to read or understand arbitration agreements, much less the significant consequences that those agreements may have in the future. Family members admitting a loved one are focused solely on finding the best possible care, and not on the legal technicalities of arbitration.*"[100]

The report also contained "Minority Views" from Republican Senators Jon Kyl (Arizona), Jeff Sessions (Mississippi), and Tom Coburn (Oklahoma). These senators expressed standard Republican fare. They attacked the bill as coming "straight from the trial bar's legislative agenda." The proposed bill, if passed, would subject nursing homes "to a litigation environment of trial-lawyer-driven class actions and

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[98] Fairness in Nursing Home Arbitration Act of 2008, S. 2838, 110th Congress, 2008; Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Congress, 2008.

[99] Congressional Record Senate, 9 April 2008, S2819–S2820.

[100] Senate Report 110–518, at 2–3, 110th Congress.

extreme jury awards."[101] (Republicans for all their fealty to the Constitution are very suspicious of jury trials, a right guaranteed in the Constitution.) The House Report expressed the same partisan points of view: the majority, composed of Democrats, extolled the virtues of the proposed legislation while the minority, composed of Republicans, warned of its dangers.[102] These minority views in the respective committees prevailed in Congress. Neither bill was even voted on in either chamber.

The bills were introduced again in the 111th Congress. They fared no better the second time around despite the gains made by the Democratic Party in the 2008 elections. Representative Sanchez's bill gained an additional eight cosponsors. But neither bill made it out of committee. In the following session of Congress, in which Tea Party Republicans gained control of the House by picking up 63 seats, Representative Sanchez was joined by only three cosponsors after having 31 cosponsors two years before. No Senate bill was introduced.[103]

6. Nursing Home Arbitration Clauses and Administrative Regulation

The different approaches to arbitration by Democrats and Republicans are reflected in executive orders and administrative regulations promulgated during the Obama Administration and actions already taken by the Trump administration to undo those efforts. For example, President Obama issued an executive order in 2014 that, among other things, declared agreements to arbitrate civil rights or certain tort claims involving companies with procurement contracts exceeding $1 000 000 USD could "only be made with the voluntary consent of employees or independent contractors after such disputes arise."[104] The Department of Defense, General Services Administration, and NASA then issued new rules amending federal procurement regulations to implement the executive order in August 2016.[105] The 115th Congress, now aggressively using the Congressional Review Act, acted to overturn the new regulations.[106] The regulations that were disapproved by Congressional resolution addressed more than arbitration clauses. Interestingly, only Democrats mentioned how the resolution affected the regulations concerning arbitration. For example, Representative Suzanne Bonamici decried how the resolution "would also remove critical protections for workers that allow them to access our judicial system. [...]Workers deserve the opportunity to have their day in court to seek justice for their sexual assault and discrimination claims." Representative Hank Johnson argued, "[T]he Fair Pay and Safe Workplaces executive order required Federal contractors to give employees their day in court. By doing away with this order, the new administration is subjecting workers to forced arbitration, which is a private and fundamentally unfair process.[...] Equal access

[101] Senate Report 110–518, at 19–24, 110th Congress.

[102] House Report 110–894, at 2–6, 19–27, 110th Congress.

[103] Fairness in Nursing Home Arbitration Act of 2009, S. 512, 111th Congress, 2009; Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Congress, 2009; Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Congress, 2012.

[104] Executive Order – Fair Pay and Safe Workplaces. 31 July 2014. Available at https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces [last viewed 14.08.2017].

[105] Department of Defense, General Services Administration, National Aeronautics and Space Administration, Federal Acquisition Regulation, 81 Federal Register 58562, 25 Aug. 2016.

[106] Congressional Review Act, 5 United States Code § 801 et seq.; House Joint Resolution 37, 115th Congress, 131 Statutes at Large 75, 2017.

to justice for all should not be an aspiration but a guarantee for all Americans."[107] The Republicans in Congress prevailed, and President Trump also issued an executive order that revoked President Obama's executive order on fair pay and safe workplaces.[108]

The Obama administration also issued regulations prompted by explicit delegation by Congress. The Department of Education issued a final rule in November 2016 that prohibited schools to participate in the direct loan program from using pre-dispute arbitration agreements for claims by borrowers against the schools.[109] The effective date of that rule, along with others protecting borrowers, has been postponed by the new administration.[110] The only Obama administration regulation on arbitration that has not been upended or delayed by the Trump administration is the Department of Labor rule issued in April 2016 that prohibited financial advisors from using class-action waivers in arbitration clauses.[111]

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 directed the newly-formed Consumer Financial Protection Bureau to study "the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services" and gave the Bureau the authority to "prohibit or impose conditions or limitation" on the use of such arbitration clauses.[112] The CFPB issued a preliminary report on arbitration three years later. It found that arbitration clauses are commonly used by large banks in credit card and checking account agreements. It also found that roughly 9 out 10 clauses allow banks to prevent consumers from participating in class actions.[113] The CFPB issued a final report in 2015.[114] In 2016, the CFPB issued a proposed rule that would prohibit arbitration clauses in covered agreements from containing class-action waivers. The proposed rule would require language that stated, "We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it."[115]

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[107] 163 Congressional Record H907, H911, H913, daily edition 2 Feb. 2017.

[108] Executive Order – Revocation of Federal Contracting Executive Orders, 27 March 2017. Available at https://www.whitehouse.gov/the-press-office/2017/03/27/presidential-executive-order-revocation-federal-contracting-executive [last viewed 05.08.2017].

[109] Department of Education, William D. Ford Federal Direct Loan Program: Final Rule, 81 Federal Register 75926–75927, 76021–76031, 76088, 1 Nov. 2016.

[110] Department of Education, Student Assistance General Provisions: Final Rule; Notification of Partial Delay of Effective Dates, 82 Federal Register 27621, 16 June 2017.

[111] Department of Labor, Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, 81 Federal Register 21089, 21116–21119, 21135–21136, 8 April 2016.

[112] Pub. L. 111–203, 124 Statutes at Large 1376, 2010, §1028.

[113] Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 12–15 (12 Dec. 2013). Available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [last viewed 05.08.2017].

[114] Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), March 2015. Available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [last viewed 05.08.2017].

[115] Consumer Financial Protection Bureau, Proposed Rule on Arbitration Agreements, 81 Federal Register 32829, May 24, 2016. Available at http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf [last viewed 05.08.2017].

The failure of the various Fairness in Nursing Home Arbitration bills to advance in Congress led some advocates to urge an "executive branch solution."[116] The Obama Administration attempted such a solution in 2016. The Centers for Medicare & Medicaid Services in the Department of Health and Human Services promulgated a final rule on 4 October 2016 that included a prohibition on the use of pre-dispute arbitration agreements for any long-term care facility participating in Medicare and Medicaid programs.[117] The rule would have a far-reaching effect: 94% of American Nursing Homes are certified to participate in both Medicare and Medicaid programs.[118] Initially, CMS in its proposed rule merely required facilities to meet certain criteria when asking residents to resolve disputes by binding arbitration, including requiring the facility to inform the resident that the resident would be waiving his or her right to judicial relief for any potential cause of action. But CMS also solicited comments on whether binding pre-dispute arbitration agreements should be prohibited altogether.[119] When CMS promulgated its final rule, it banned the use of pre-dispute arbitration agreements for long-term care facilities. CMS concluded that "it is unconscionable for LTC facilities to demand, as a condition of admission" that residents sign such agreements. CMS explained:

> "*[W]e are convinced that requiring residents to sign pre-dispute arbitration agreements is fundamentally unfair because, among other things, it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen*."[120]

The final rule stated that long-term facilities that participate in Medicare or Medicaid "must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative not require that a resident sign an arbitration agreement as a condition of admission to the LTC facility."[121]

The final rule, which was to go into effect on 28 November 2016, was enjoined by a federal district court on 7 November 2016. The court appeared sympathetic to purpose of the rule, noting that the case "places this court in the undesirable position of preliminary enjoining a rule which it believes to be based upon sound public policy."[122] The court, in fact, began its decision disagreeing with the plaintiff's argument that "nursing home arbitration is a fast and efficient process." The court described "the one intractable problem affecting nursing home arbitration, and no others form of arbitration, namely mental competency." In the court's experience, many nursing homes obtain signatures from resident "in spite of grave doubt about their mental competency."[123]

Despite the court's misgivings, it granted the preliminary injunction because CMS "will ultimately be held to have presented insufficient justification for banning nursing home arbitration," even assuming CMS had the authority to take its action. The court also had "considerable skepticism" of the action taken by CMS. While

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[116] *Tripp, L.* A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts, *Campbell Law Review,* 2009, 31(2), p. 157.

[117] Centers for Medicare & Medicaid Servs., Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Federal Register 68688, 68790–68793, 4 Oct. 2016.

[118] *Tripp*, *L.* A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts, *Campbell Law Review* , 2009, 31(2), p. 161.

[119] 81 Federal Register at 68790.

[120] Ibid. at 68792.

[121] 42 C.F.R. § 483.70 (n) (i).

[122] *American Health Care Association v. Burwell*, No. 3-16-cv-00233, N.D. Miss., 7 Nov. 2016.

[123] Ibid.

Congress had expressly granted certain federal agencies the authority to regulate or prohibit the use of arbitration agreements, it had not done so here. The court noted that CMS's statement that it had received a letter from 34 Senators urging the agency act to prohibit pre-dispute arbitration agreements raised concerns that "they were attempting to accomplish by agency *fiat* what they could not accomplish through the legislative process."[124] In December, CMS instructed State Survey Agency Directors to not enforce the prohibition of pre-dispute arbitration clauses while the court-ordered injunction was in place.[125]

The outcome of this litigation became moot when CMS issued a proposed rule in June 2017 that would remove both the requirement precluding facilities from entering into pre-dispute arbitration agreements and the prohibition against facilities requiring residents to sign arbitration agreements as a condition of admission. CMS made its priorities clear: "[A] ban on pre-dispute arbitration agreements would likely impose unnecessary or excessive costs *on providers*."[126] CMS did not leave the transaction between the facility and the resident entirely unregulated. The proposed regulation would require that the agreement be explained to the resident or representative in a manner that the resident understands the agreement. The proposed regulation also would require the arbitration provision be in "plain writing." Facilities also would be required to post a notice that describes its policies on using agreements with binding arbitration "in an area that is visible to residents and visitors."[127] Consumer groups have banded together to form an umbrella organization called the Fair Arbitration Now Coalition that will to try to stop the Trump Administration's plan to roll back the Obama Administration rule. Thirty-one Senators also called upon the Trump Administration to not abandon the CMS rule.[128]

Conclusions

In the United States, nursing home residents are a particularly vulnerable population. They are not helped by the pervasive use of pre-dispute binding arbitration clauses in nursing home agreements. Efforts to either effectively regulate or completely prohibit such clauses in nursing home agreements are doomed to failure until Congress legislatively overturns the Supreme Court's erroneous arbitration jurisprudence and restores the Federal Arbitration Act to its originally intended scope, which would not encompass such agreements. That is not happening anytime soon.

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[124] *American Health Care Association v. Burwell*, No. 3-16-cv-00233, N.D. Miss., 7 Nov. 2016.

[125] Centers for Medicare & Medicaid Servs., Center for Clinical Standards and Quality /Survey & Certification Group, Memorandum to State Survey Agency Directors, S & C: 17-12-NH. 9 Dec. 2016. Available at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-12.pdf [last viewed 05.08.2017].

[126] Centers for Medicare & Medicaid Services, Proposed Rule, Medicare and Medicaid Programs: Long Term Care Facilities: Arbitration Agreements, 82 Federal Register 26649, 26650, 8 June 2017 (emphasis added).

[127] Ibid. at 26651.

[128] *Morran, C.* 31 Senators Ask Trump Administration to Not Strip Nursing Home Residents, Families of Their Legal Rights. *Consumerist*, 7 Aug. 7, 2017. Available at https://consumerist.com/2017/08/07/31-senators-ask-trump-administration-to-not-strip-nursing-home-residents-families-of-their-legal-rights/ [last viewed 16.08.2017]; *Wheeler, L.* Fight over right to sue nursing homes heats up. *The Hill*, 6 Aug. 2017. Available at http://thehill.com/regulation/healthcare/345411-fight-over-right-to-sue-nursing-homes-heats-up [last viewed 16.08.2017].

This use of pre-dispute arbitration clauses in consumer contracts is an example of American exceptionalism. American exceptionalism is a firmly held belief that America is an example for the world to follow. Ronald Reagan encapsulated this concept as America as a "shining city on a hill."[129] Reagan was referencing the Pilgrim settler John Winthrop. Winthrop believed that the Massachusetts Colony would be a city upon a hill. But Winthrop did not have Reagan's sunny optimism. Winthrop, instead, was full of dread over the prospect that "the eyes of all people" would be upon the Pilgrims. The city on the hill could be a warning, not a promise.[130] In the use of pre-dispute consumer arbitration clauses, American practice is unique. It is a path the rest of the world should shun.

A Note on United States Sources

Obtaining free access to American legal materials can be a laborious, and sometimes fruitless, task. American case law cited in this article is available through Google Scholar, <https://scholar.google.com/>. Federal legislative materials are available at <https://www.congress.gov/>. All law journal articles that are posted at SSRN, <https://www.ssrn.com/en/>, are marked by an asterisk.

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