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AGING OUT ARBITRATION FOR WRONGFUL DEATH SUITS IN NURSING HOMES

Courtney Dyer*

I. INTRODUCTION

Nursing homes are viewed as necessary by many people, but it is important to remember that they are like any other care service business: contract-based. Many times, agreements between a nursing home and their residents contain compulsory arbitration clauses that are easily overlooked during the overwhelming process of admitting a resident.¹ The efficiency and confidentiality of arbitration agreements have led to a growing trend among nursing homes to include them in their contracts.² This trend is seen in the current Trump administration's new legislation encouraging the use of arbitration agreements in nursing homes.³ The increasing number of arbitration agreements prevents litigation from family members in the event of their loved one's death at the hands of a negligent nursing home.⁴

Arbitration is in the best interests of the occupants and the nursing homes because it guards against needless litigation costs by creating a faster resolution, thus, saving money.⁵ Furthermore, arbitration ensures effective complaint management.⁶ However, many opponents view arbitration agreements in relation to wrongful death claims in nursing homes as inhumane.⁷ The opposition argues binding arbitration clauses should be abolished in wrongful death claims because it robs the family of justice due to the difficulty to appeal an arbitration decision and ruins further relationships with nursing homes.⁸

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¹ Ann E. Krasuski, *Mandatory Arbitration Agreements do not Belong in Nursing Home Contracts With Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 263-64 (2004).

² Norman Tabler Jr., *Nursing Home Arbitration Agreements Attacked from all Sides*, LAW360 (April 30, 2015), <https://www.law360.com/articles/731269/nursing-home-arbitration-agreements-attacked-from-all-sides>.

³ David Lazarus, *Trump Wants to Deny Nursing-Home Residents and Their Families the Right to sue*, L.A. TIMES (June 13, 2017), <http://www.latimes.com/business/lazarus/la-fi-lazarus-nursing-home-arbitration-20170613-story.html>.

⁴ Tabler, *supra* note 2.

⁵ See generally *id.*

⁶ See generally *id.*

⁷ Wesley R. Bulgarella, *A Better Forum For All: Addressing The Value Of Arbitration Clauses In Nursing Home Contracts*, 86 MISS. L.J. 365, 366-67.

⁸ Bulgarella, *supra* note 7, at 392-93.

The first section of this article will discuss the significance of removing arbitration agreements from wrongful death claims and implementing mediation instead. The second section will detail the background of arbitration clauses in nursing homes. The third section will review state acts that have opposed the use of arbitration agreements for wrongful death claims in nursing homes. The fourth section will analyze cases that have challenged arbitration agreements in nursing homes for wrongful death claims. The fifth section will propose compulsory mediation and multi-tiered dispute resolution clauses as substitutes for arbitration clauses. Finally, the sixth section will consider potential objections facing the implementation of mediation as a substitute for arbitration clauses in wrongful death claims in nursing homes.

II. BACKGROUND & SIGNIFICANCE

The discussion of arbitration agreements in nursing homes for wrongful death claims is significant given the rapidly aging baby boomer generation.⁹ The issue of arbitration clauses in nursing home contracts will affect the increasing number of nursing home admissions as the baby boomer generation continues to age.¹⁰ The rising number of patients means that the number of wrongful death claims may rise as well.¹¹ One article stated that “[s]ince 2013... four [out] of every [ten nursing homes] have been cited at least once for a serious violation.”¹² Many states have attempted to resist binding arbitration agreements, creating special state rulings.¹³ However, the majority of these rulings are preempted by the Federal Arbitration Act (FAA).¹⁴ This is seen in *Kindred*, a recent Supreme Court ruling that preempted a Kentucky state court’s attempt to regulate their arbitration agreements.¹⁵

The FAA forces courts to consider arbitration agreements on the same level as contracts because courts have resisted enforcing arbitration agreements after viewing them as a limit on their power.¹⁶ Under the FAA, an agreement to arbitrate is valid as long as it meets the general requirements of a normal contract.¹⁷ Many

⁹ *Id.* at 367.

¹⁰ *Id.*

¹¹ *Id.*

¹² Jordan Rau, *Trump Administration Eases Nursing Home Fines in Victory of Industry*, N.Y. TIMES (Dec. 24, 2017), <https://www.nytimes.com/2017/12/24/business/trump-administration-nursing-home-penalties.html>.

¹³ Bulgarella, *supra* note 7, at 372-73.

¹⁴ *Id.* at 371-73.

¹⁵ *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1425 (2017).

¹⁶ Federal Arbitration Act, 9 U.S.C. §§ 1 - 16 (1925).

¹⁷ Scott McElhaney, *Enforcing and Avoiding Arbitration Clauses Under Texas Law*, JACKSON WALKER LLP 1, 6 (February 9, 2018), available at <https://www.jw.com/wp-content/uploads/2018/02/Enforcing-and-Avoiding-Arbitration-Clauses-2018.pdf>.

times when new residents are admitted to nursing homes, people rush to sign paperwork; this means the fine print may not be read thoroughly, and sometimes the resident is unable to sign and a family member with the power of attorney signs on their behalf.¹⁸ In one article, Wendy York, an elder law attorney, explained that the admission process to a nursing home is distressing, stating: “[y]ou’re recovering from a major surgery. You’re sick. And you have someone pushing 50 pages in front of you to sign . . . [y]ou just start signing where they tell you to sign it.”¹⁹ Nursing homes are in the “business of care” and in such a business, it is common for mistakes to occur; therefore, nursing homes adopt methods to help reduce their liability.²⁰

Given the tender and delicate nature of the care provided by nursing homes, compelling arbitration in the event of negligence resulting in a death should not be available.²¹ Arbitration satisfies the nursing home’s need to limit liability and cost but ignores the family’s need for validation, which can be essential for family members to move forward.²² Though cost-saving and time efficient, arbitration only benefits one party and ignores the legitimate needs of families.²³ Given the factual nature of arbitration and the strong emotions involved in a wrongful death suit, it is important to find a substitute that benefits both parties while maintaining the benefits of arbitration.²⁴ Even though arbitration offers a prompt resolution, the arbitration agreements found in nursing home contracts tend to favor nursing homes over families.²⁵ This can be seen in arbitration clauses that allow the nursing homes to pick the location and arbitrators of the arbitration, all leading to prompt resolutions that favor nursing homes.²⁶ Therefore, it is important to find a viable alternative to arbitration that would allow for fairer outcomes.

III. STATE OPPOSITION

State opposition against the use of arbitration agreements in nursing homes strongly indicates that agreements to arbitrate are not readily accepted. The flaws with arbitration agreements are highlighted within a caregiving context where a grief-stricken family seeks validation and compensation for the deaths of their loved ones, but instead they are met with one-sided agreements that favor the nursing home

¹⁸ Tabler, *supra* note 2.

¹⁹ Ina Jaffe, *Under Trump Rule, Nursing Home Residents May Not be Able to Sue After Abuse*, NPR (Aug. 21, 2017), <https://www.npr.org/2017/08/21/544973339/trump-rule-could-make-it-harder-for-nursing-home-residents-to-sue-for-abuse>.

²⁰ Tabler, *supra* note 2.

²¹ See generally Jaffe, *supra* note 19. This article uses an example of the level of care that is required for patients in nursing homes that are often experiencing extreme medical issues.

²² See generally Tabler, *supra* note 2.

²³ See generally *id.* Stating that nursing homes generally select the American Health Lawyers Association knowing that they will be more favorable towards the home. Krauski, *supra* note 1, at 269.

²⁴ Bulgarella, *supra* note 7, at 368.

²⁵ Krasuski, *supra* note 1, at 269.

²⁶ *Id.*

due to grossly unequal bargaining power.²⁷ Many states oppose the use of arbitration agreements in the nursing home context due to the strong emotions commonly incited by these types of cases—especially wrongful death cases.²⁸ As such, states have actively resisted the FAA by implementing state laws that discourage the use of arbitration agreements in nursing home contracts.²⁹ Illinois and Texas, discussed below, are prime examples of this endeavor.

A. Illinois

The Illinois Nursing Home Care Act (NHCA) did not prohibit arbitration agreements in contracts, but it voided any agreement that waives the resident's right to a trial by jury for claims against a facility.³⁰ The careful wording in the NHCA indirectly prevented the use of arbitration agreements because an arbitration agreement by its very nature waives the right to a trial by jury against the nursing home.³¹ The NHCA allowed parties to bring a lawsuit against a nursing home in front of a jury for any cause of action, including wrongful death, essentially preventing arbitration practice.³² However, the NHCA directly opposed the FAA by outlawing arbitration agreements in nursing homes by invalidating any agreement that allowed a resident to waive their right to a jury trial.³³

The NHCA's validity came into question in an Illinois Supreme Court case, *Carter v. SSC Odin Operating Co., LLC*, 80, 976 N.E.2d 344, 358 (Ill. 2012).³⁴ This decision forced nursing homes to follow a more general contract requirement when drafting arbitration agreements.³⁵ The decision in *Carter* stated that because the wrongful-death action filed by the plaintiff in this case is not an asset of the deceased's estate, it could not be limited by the arbitration agreement.³⁶ The court further held that "arbitration is a 'creature of contract'. . . only parties to the arbitration contract may compel arbitration or be compelled to arbitrate" connecting this to the case by stating that the arbitration agreement not only bound

²⁷ *Id.* at 297.

²⁸ See generally Nursing Home Care Act, 210 ILL. COMP. STAT. 45/I-III (1979), accessible at <http://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=1225&ChapterID=21>.

²⁹ *Id.*

³⁰ *Id.*

³¹ Edward Clancy, *Arbitration Clauses in Nursing Home Contracts: FAA Preempts Illinois State Law Restrictions*, ILL. ST. B. ASS'N (Dec. 2010),

<https://www.isba.org/sections/healthcare/newsletter/2010/12/arbitrationclausesinnursinghomecontractsfaapreempts>.

³² Laura Bailey, *The Demise of Arbitration Agreements in Long-Term Care Contracts*, MO. L. REV. 181, 191 (2010).

³³ Clancy, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Carter v. SSC Odin Operating Co., LLC*, 80, 976 N.E.2d 344, 358 (Ill. 2012).

the deceased but also included their “successors, assigns, agents, attorneys, insurers, heirs, trustees”³⁷ This decision confirmed the FAA’s potency by allowing arbitration agreements to be binding because the court in *Carter* eliminated any possible arbitration prohibition allowed under the NHCA.³⁸ Ultimately, this decision upheld the use of arbitration agreements in wrongful death actions against nursing homes and preempted the Illinois state law restrictions on arbitration agreements.³⁹ Therefore, NHCA’s anti-waiver provision of the Nursing Home Care Act was invalidated, and it was held that a nursing home arbitration clause must only meet general state contract laws.⁴⁰

B. Texas

Another state that directly opposed the use of arbitration agreements through state law is Texas.⁴¹ Texas passed the Texas Civil Practice and Remedies Act which prohibited arbitration agreements unless the clause conformed to certain requirements—including the type of font used in the contract.⁴² The relevant language reads as follows:

No physician, professional association of physicians, or other health care provider shall request or require a patient or prospective patient to execute an agreement to arbitrate a health care liability claim unless the form of agreement delivered to the patient contains a written notice in 10-point boldface type clearly and conspicuously stating: [“]Under Texas law, this agreement is invalid and of no legal effect unless it is also signed by an attorney of your own choosing. This agreement contains a waiver of important legal rights, including your right to a jury. You should not sign this agreement without first consulting with an attorney.[”]⁴³

However, this provision came under criticism in *Fredericksburg Care Company LP v. Juanita Perez*.⁴⁴ This important court case held that the state arbitration statute located in the Texas Civil Practice and Remedies Act for medical

³⁷ *Carter*, 976 N.E.2d at 359.

³⁸ Bailey, *supra* note 32 at 191-92.

³⁹ Clancy, *supra* note 31.

⁴⁰ *Carter*, 976 N.E.2d at 358; *see also* Clancy, *supra* note 31.

⁴¹ David Walsh, *Texas High Court Augurs Arbitration in Health Care*, LAW 360 (April 30, 2015), <https://www.law360.com/articles/649762/texas-high-court-augurs-arbitration-in-health-care>.

⁴² *Id.*

⁴³ *Fredericksburg Care Co., L.P. v. Perez*, 461 S.W.3d 513, 527 (Tex. 2015).

⁴⁴ *Id.*

malpractice cases was preempted by the FAA.⁴⁵ The Texas Supreme Court held that a motion to compel arbitration of a claim by a deceased resident's beneficiaries, alleging negligent care and wrongful death, should not have been denied.⁴⁶ This decision impacted the Texas Civil Practice and Remedies Act by challenging the use of arbitration agreements in the world of medicine.⁴⁷

This is important to note because at the start of the case it was clear that the FAA, if applicable, invalidated the Texas Civil Practice and Remedies Act section that prohibited the use of arbitration agreements.⁴⁸ However, the question addressed for the Texas Civil Practice and Remedies Act in this case was whether it applied to the wrongful death claims in nursing homes.⁴⁹ This decision confirmed that "evidence of Medicare payments made to a health care provider on a patient's behalf was 'sufficient to establish interstate commerce and the FAA's application.'"⁵⁰ Therefore, the FAA would automatically apply to a situation involving a nursing home because the series of payments would be considered interstate commerce.⁵¹ At the start of the case, the parties agreed that if the FAA applied, the code of the Texas Civil Practice and Remedies Act that applied to arbitration agreements (§74.451) would be otherwise preempted by the FAA and the parties would be compelled to arbitration.⁵²

This decision caused a lot of public policy concerns surrounding the fall of the provision in the Texas Civil Practice and Remedies Act that dealt with arbitration agreements because many felt that it would help the nursing homes avoid the jury system entirely.⁵³ However, one interesting fact is that many healthcare insurers have actually denounced arbitration in Texas because they feel that their odds are much better in an actual trial than in arbitration.⁵⁴ The public policy concerns over arbitration agreements in nursing homes continues to remain a widely debated issue with strong emotions felt on each side.⁵⁵ In many cases, the added costs of arbitration from attorney fees and fees for the arbitrator make claims even more unrealistic.⁵⁶ Many opponents of arbitration agreements argue that the widespread use of arbitration agreements in nursing homes should be seen as coercive given the limited and occasionally rushed circumstances of admitting a relative to the nursing

⁴⁵ Walsh, *supra* note 41; see *Fredericksburg Care Co.*, 461 S.W.3d at 528.

⁴⁶ *Fredericksburg Care Co.*, 461 S.W.3d at 528.

⁴⁷ Walsh, *supra* note 41.

⁴⁸ *Fredericksburg Care Co.*, 461 S.W.3d at 518.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Walsh, *supra* note 41.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

homes.⁵⁷ This paper will discuss these debates, including how different courts have approached these concerns later on.

State legislation described above are perfect examples of when a state act clearly violates the FAA. It is true that whenever a state passed an act that violated normal contract laws in order to allow family members of deceased nursing home residents to seek an alternative to arbitration it was preempted by the FAA.⁵⁸ Many state acts came from a public policy response to people's disapproval over the use of arbitration clauses in nursing home agreements.⁵⁹ State actions that attack any fundamental aspect of contract law are quickly invalidated by lower courts or even the Supreme Court because they violate the FAA—which grounds itself in basic contract law.⁶⁰ However, as will be discussed in the next section, if a state only attacks a categorical aspect unique to arbitration and not a general contract law, then it will most likely be preempted by the FAA.⁶¹

IV. KEY COURT CASES

In addition to various state acts that have opposed the use of arbitration agreements, there have been several important court cases that have centered around the use of arbitration agreements in nursing home contracts for wrongful death claims.⁶² These court cases often have repercussions for arbitration agreements, and many times the courts have sided with the use of arbitration agreements.⁶³ However, there was one case where the Supreme Court of the United States sided against preemption due to the way that state action had addressed specific types of arbitration clauses—such as the type used for nursing home contracts in West Virginia.⁶⁴ First, the Supreme Court decision in *Kindred Nursing Centers, Ltd. Partnership v. Clark* held that a simple waiver of a right to a jury trial will not invalidate an arbitration clause.⁶⁵ Next, *Stephan v. Millennium Nursing & Rehab Center* will illustrate that an arbitration clause may be invalidated if it violates a basic contract principle.⁶⁶ Following a discussion of these cases, this section will consider

⁵⁷ *Id.*

⁵⁸ Clancy, *supra* note 31.

⁵⁹ Walsh, *supra* note 41.

⁶⁰ Clancy, *supra* note 31.

⁶¹ Liz Kramer, *Enforcing Nursing Home Arbitration Agreements Post-Kindred*, ARBITRATION NATION (Oct. 19, 2017), <https://www.arbitrationnation.com/enforcing-nursing-home-arbitration-agreements-post-kindred/>.

⁶² See *Kindred Nursing Ctrs., Ltd. v. Clark*, 137 S. Ct. 1421 (2017); *Stephan v. Millennium Nursing & Rehab Ctr.*, 2018 WL 4846501 (Ala. Oct. 5, 2018); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

⁶³ Liz Kramer, *SCOTUS Reverses KY Nursing Home Arbitration; Refuses to Prioritize Right to Jury Trial*, ARBITRATION NATION (May 15, 2017), <https://www.arbitrationnation.com/scotus-reverses-ky-nursing-home-arbitration-decision-refuses-to-prioritize-right-to-jury-trial/>.

⁶⁴ *Marmet Health Care*, 565 U.S. at 533-34.

⁶⁵ *Kindred*, 137 S. Ct. at 1427.

⁶⁶ *Stephan*, 2018 WL 4846501 at *11.

an important decision in a Minnesota state court that defied the mandatory arbitration agreement by holding the pre-dispute arbitration agreements in the nursing home contract invalid.⁶⁷ Lastly, this section will end with a review of the Supreme Court case *Marmet Health Care Center, Inc. v. Brown*, (decided prior to *Kindred Nursing Centers, Ltd. Partnership v. Clark*) where the Supreme Court held that wrongful death claims are not an exception to the enforcement of arbitration agreements.⁶⁸

A. *Kindred Nursing Centers*

Kindred Nursing Centers, Ltd. Partnership v. Clark is the most recent Supreme Court decision holding that invalidating an arbitration agreement because it bypasses the right to a jury trial is unconstitutional and directly violates the FAA.⁶⁹ *Kindred Nursing* consolidated different Kentucky cases that all challenged the validity of nursing home arbitration clauses for wrongful death suits.⁷⁰ The Kentucky Supreme Court held that the arbitration agreements in the two cases were invalid because neither power of attorney specifically entitled the representatives to enter into an arbitration agreement.⁷¹ The Supreme Court of the United States held that this “clear-statement rule” is preempted by the FAA.⁷² The decision in this case will have massive repercussions for states trying to challenge arbitration clauses in the future.⁷³

This case’s holding illustrates that state challenges to arbitration clauses cannot hinge on a waiver of the right to a jury trial.⁷⁴ The Supreme Court reasoned that states rejecting arbitration agreements for failing to provide the right to a jury trial undercuts the entire purpose the FAA and provides an easy way to attack arbitration agreements, especially in nursing homes.⁷⁵ Another repercussion of this decision is how it affects the lower courts’ attitude towards the enforcement of arbitration agreements in nursing homes.⁷⁶ The Supreme Court’s holding in *Kindred* discourages challenges to arbitration agreements at the state level.⁷⁷ In addition,

⁶⁷ Chris Serres, *Minnesota Family Wins Legal Victory in Battle to Sue a Senior Home*, STAR TRIBUNE (April 11, 2017), <http://www.startribune.com/minnesota-family-wins-legal-victory-in-battle-over-right-to-sue-a-senior-home/419164514/>.

⁶⁸ *Marmet Health Care*, 565 U.S. at 532.

⁶⁹ *Kindred*, 137 S. Ct. at 1429.

⁷⁰ *Id.* at 1425.

⁷¹ *Id.* at 1426.

⁷² *Id.*

⁷³ Kramer, *Enforcing Nursing Home Arbitration Agreements Post-Kindred*, *supra* note 61.

⁷⁴ Kramer, *SCOTUS Reverses KY Nursing Home Arbitration*, *supra* note 63.

⁷⁵ See generally *id.*

⁷⁶ Kramer, *Enforcing Nursing Home Arbitration Agreements Post-Kindred*, *supra* note 61 (writing that the recent decision prompted a Wyoming’s Supreme Court to quickly invalidate an arbitration agreement).

⁷⁷ Kramer, *SCOTUS Reverses KY Nursing Home Arbitration*, *supra* note 62.

Kindred increases the difficulty for states to oppose arbitration agreements in nursing homes.⁷⁸ Shortly after *Kindred*, many states (like Wyoming) were forced to abandon their state-law based reasons for not enforcing arbitration agreements and instead enforce the arbitration agreements.⁷⁹

B. *Stephan v. Millennium Nursing & Rehab Ctr.*

Another key court case illustrating state action against the use of nursing home agreements for wrongful death is *Stephan v. Millennium Nursing & Rehab Center*.⁸⁰ In this case, the court held that the daughter of the decedent was “not personally bound to the arbitration clause . . . because she signed in her capacity as her father’s relative, not in her own capacity.”⁸¹ The decedent’s estate sued the nursing home for wrongful death, and the trial court granted a motion to compel arbitration.⁸² However, the Supreme Court of Alabama, in the wake of *Kindred*, reversed the trial court’s decision because the daughter of the decedent lacked the authority to sign the admission paperwork that agreed to arbitration.⁸³ The key difference in *Stephan* was that the daughter lacked power of attorney while on the other hand, *Kindred* involved the power of attorney.⁸⁴ Therefore, the case rested “on principles that most states would agree with, and would apply generally to contracts of other types.”⁸⁵ *Kindred* varies from *Stephan* in that the decision did not rest on generally applicable contract principles; therefore, the arbitration agreement was upheld.⁸⁶ In contrast, *Stephan* could not be preempted by the FAA because the arbitration clause was invalidated based on general contract principles—the daughter lacked the authority to consent and the decedent lacked the capacity to consent.⁸⁷ These distinctions are important to note when analyzing why the FAA might preempt some lower court rulings and not others.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Liz Kramer, *Alabama Won’t Enforce Arbitration With Nursing Home When Patient had Dementia*, ARB. NATION (Oct. 14, 2018), <https://www.arbitrationnation.com/alabama-wont-enforce-arbitration-nursing-home-patient-dementia/>; see also *Stephan*, 279 So.3d 532 (Ala. 2018), *reh’g* denied (Dec. 14, 2018).

⁸¹ Kramer, *Alabama Won’t Enforce Arbitration With Nursing Home When Patient had Dementia*, *supra* note 80.

⁸² *Stephan*, 279 So.3d at 537; see also Kramer, *Alabama Won’t Enforce Arbitration With Nursing Home When Patient had Dementia*, *supra* note 80.

⁸³ *Stephan*, 279 So.3d at 544; see also Kramer, *Alabama Won’t Enforce Arbitration With Nursing Home When Patient had Dementia*, *supra* note 80.

⁸⁴ *Stephan*, 279 So.3d at 543; see also Kramer, *Alabama Won’t Enforce Arbitration With Nursing Home When Patient had Dementia*, *supra* note 80.

⁸⁵ Kramer, *Alabama Won’t Enforce Arbitration With Nursing Home When Patient had Dementia*, *supra* note 80.

⁸⁶ *Id.*

⁸⁷ *Id.* If the daughter had power of attorney or another type of legal authority to contract, the arbitration agreement would have been valid for all purposes. However, this ruling is not preempted by the FAA because the ruling would generally apply to contracts. *Id.*

C. *Minnesota Case*

In Minnesota, a court upheld the right of the family to sue a nursing home despite a pre-dispute arbitration clause.⁸⁸ This first decision came shortly before the decision in *Kindred* as states continued to defy the FAA.⁸⁹ In this case, a family filed a wrongful death claim against the nursing home for the death of their elderly father.⁹⁰ The nursing home required the family to sign a densely worded contract, which included a private arbitration agreement for any dispute that arose, even wrongful death.⁹¹ When admitting their father into the nursing home initially, the family stated that no one explained the arbitration clause and they were not allowed the time to properly review the documents because of the urgent need to admit their elderly father.⁹² Despite objections from society, arbitration agreements continue to flourish in nursing homes, as one article states: “arbitration agreements . . . are proliferating in the senior care industry . . . [e]ven in cases of extreme neglect and death, nursing homes use the clauses to block residents and their families from pursuing lawsuits.”⁹³

In this case, regardless of the arbitration agreement, the Judge upheld the right of the family to sue the nursing home.⁹⁴ The judge noted that the terms of the contract were reasonable but rejected it for procedural reasons—bypassing the usual preemption by the FAA.⁹⁵ He stated that the process was procedurally unconscionable because the family “had been subjected to a ‘rushed, pressured process’ upon admission [and that] [t]he family was told that the agreement had to be signed that day or the apartment—the only apartment in the facility that accepted Medicaid benefits . . . would no longer be available.”⁹⁶ This type of procedural unconscionability failed to allow time for the family to seek legal counsel in understanding the contract they signed.⁹⁷ This case’s holding will allow families in similar circumstances to challenge the validity of arbitration agreements and bring suit against nursing homes in cases of wrongful death.⁹⁸

⁸⁸ Serres, *Minnesota Family Wins Legal Victory in Battle to Sue a Senior Home*, *supra* note 67.

⁸⁹ *Id.*

⁹⁰ Chris Serres, *Minn. Victims of Nursing Home Abuse Challenges Arbitration Clauses*, STAR TRIB. (Jan. 29, 2017), <http://www.startribune.com/minnesota-victims-of-nursing-home-abuse-and-neglect-fight-back-against-forced-arbitration-clauses/412107723/>.

⁹¹ Serres, *Minn. Victims of Nursing Home Abuse Challenges Arbitration Clauses*, *supra* note 90.

⁹² *Id.*; *see also* Krasuski, *supra* note 1.

⁹³ Serres, *Minn. Victims of Nursing Home Abuse Challenges Arbitration Clauses*, *supra* note 90.

⁹⁴ Serres *Minnesota Family Wins Legal Victory in Battle to Sue a Senior Home*, *supra* note 67.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

This case created an avenue for states to resist arbitration in wrongful death cases.⁹⁹ It shows that there is a continued public debate over whether these agreements are unconscionable in the nursing home setting. Originally, *Kindred*'s decision led to states enforcing arbitration agreements or risk being preempted by the FAA.¹⁰⁰ However, anti-arbitration sentiment continued to persist among states.¹⁰¹ This decision illustrates the complexity of enforcing arbitration agreements in such a sensitive setting and the fact that many state courts are willing to disregard the enforcement of arbitration agreements and pursue a means to meet the emotional validation of affected family members by allowing them to have a voice in wrongful death suits against nursing homes.¹⁰²

D. *Marmet Health Care*

Next, *Marmet Health Care Ctr., Inc. v. Brown* is a key case decided by the Supreme Court in 2012.¹⁰³ In *Marmet Health Care*, the Supreme Court looked at West Virginia's opposition to the use of pre-dispute arbitration agreements for wrongful death claims against nursing homes.¹⁰⁴ The facts of *Marmet Health Care* involve three separate family members signing contracts on behalf of their relatives—each relative required extensive nursing home care and each signed contract containing an arbitration clause.¹⁰⁵ When each relative died from negligent circumstances, the three family members sued for negligence in a wrongful death action.¹⁰⁶ The Supreme Court of West Virginia prohibited pre-dispute arbitration agreements for wrongful death.¹⁰⁷ The state court argued that the necessity of these services made pre-dispute arbitration agreements a direct violation of public policy.¹⁰⁸ The state court's decision determined that the FAA was more limited than what previous precedent had determined; stating that Congress never meant for the FAA to apply to personal injury or wrongful death suits that stem from a service that is seen as a necessity for members of the public.¹⁰⁹

However, in this landmark decision, the Supreme Court of the United States overturned West Virginia's ruling stating that West Virginia's Supreme Court went

⁹⁹ *Id.*

¹⁰⁰ Kramer, *Enforcing Nursing Home Arbitration Agreements Post-Kindred*, *supra* note 61.

¹⁰¹ See generally Serres, *Minnesota Family Wins Legal Victory in Battle to Sue a Senior Home*, *supra* note 67; see also Kramer, *Alabama Won't Enforce Arbitration With Nursing Home When Patient had Dementia*, *supra* note 80.

¹⁰² See generally Serres, *Minn. Victims of Nursing Home Abuse Challenges Arbitration Clauses*, *supra* note 90.

¹⁰³ *Marmet Health Care*, 565 U.S. at 534.

¹⁰⁴ *Id.* at 531.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 532.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

against the United States Supreme Court's precedent.¹¹⁰ The Supreme Court stated that categorically prohibiting arbitration for certain claims directly violates the FAA explaining that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."¹¹¹ The Supreme Court further concluded that the language of the FAA states that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable."¹¹² In addition, the Supreme Court stated that the "statute's text includes no exception for personal-injury or wrongful-death claims;"¹¹³ instead, it is always in favor of arbitration. In order to prohibit an arbitration agreement without violating the FAA, it must be found substantively or procedurally unconscionable.¹¹⁴

In conclusion, most court cases that held arbitration agreements to be unenforceable were preempted by the FAA.¹¹⁵ However, one case illustrated that if the arbitration agreement is unenforceable due to general contract principals, such as lacking legal authority to sign the contract on behalf of someone else, then the FAA cannot apply because the arbitration agreement is per se invalid.¹¹⁶ Arbitration agreements continue to be the desired forum for wrongful death disputes in nursing home contracts when the family members sue; the *Kindred* decision made it evident that many courts are going to be willing to enforce arbitration agreements despite the public's strong opposition towards these agreements.¹¹⁷ However, despite *Kindred*'s support of arbitration, recent state courts have begun to resist enforcing arbitration agreements at the lower court level.¹¹⁸ These court decisions illustrated the substantial need for an alternative to arbitration because the most common outcome in any case is the enforcement of the arbitration agreements.¹¹⁹ When arbitration agreements are enforced, families are subjected to unequal bargaining power and are not able to appeal the decision.¹²⁰ Therefore, by finding a substitute for arbitration, it would allow families to have an alternative, to have better neutrality, and to give

¹¹⁰ *Id.*

¹¹¹ *Id.* at 533 (alteration in original) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011)).

¹¹² *Id.* at 532 (quoting 9 U.S.C. § 2).

¹¹³ *Id.*

¹¹⁴ See generally *Serres Minnesota Family Wins Legal Victory in Battle to Sue a Senior Home*, *supra* note 68. The judge in this case ruled that the arbitration agreement was procedurally unconscionable due to the rushed admittance. *Id.*

¹¹⁵ See *Kindred*, 137 S. Ct., at 1426; *Fredericksburg Care Co.*, 461 S.W.3d at 528.

¹¹⁶ *Stephan*, 279 So.3d at 544; see also *Kramer, Alabama Won't Enforce Arbitration With Nursing Home When Patient had Dementia*, *supra* note 80.

¹¹⁷ See generally *Kindred Nursing Ctrs.*, 137 S. Ct. at 1423.

¹¹⁸ *Serres, Minnesota Family Wins Legal Victory in Battle to Sue a Senior Home*, *supra* note 67.

¹¹⁹ *Id.*

¹²⁰ *Krasuski*, *supra* note 1, at 269.

them an option to challenge the decision.¹²¹ However, if nursing homes were offered a viable alternative to arbitration, there is a strong likelihood that many nursing homes would opt for a different method of alternative dispute resolution.¹²²

V. SOLUTIONS

Given the current prevalence of arbitration agreements in nursing home contracts, it seems nearly impossible that enforcing an arbitration agreement could be avoided.¹²³ Arbitration is a strict and factual process that is conducted confidentially, is extremely hard to appeal, and lacks public accountability.¹²⁴ For a process as traumatic as losing a beloved family member at the hands of negligent workers, the use of arbitration causes more problems than it helps.¹²⁵ The common arbitration agreements used in nursing homes unfairly favor the nursing homes by allowing the homes to decide the location, cap damages, and choose the arbitrators.¹²⁶ In short, arbitration simply does not meet the needs of grieving families.¹²⁷ This is largely because the arbitrator is there to reach an agreement that often favors nursing homes over the resident and their family.¹²⁸ Therefore, this article proposes that pre-dispute arbitration agreements be replaced by compulsory mediation or multi-tiered dispute resolution clauses.

Compulsory mediation in nursing homes for wrongful death claims can be a viable alternative because mediation is tailored to the situation.¹²⁹ Mediation also allows parties a better way to communicate in negligence cases by allowing the families the option to mediate using integrative bargaining; whereas, pre-dispute arbitration binds a family to single resolution.¹³⁰ Compulsory mediation is a fast-growing idea that is readily accepted by many court systems and has proven effective in other areas of law like family law and real estate law.¹³¹ Mediation can utilize

¹²¹ See generally *id.*

¹²² See Serres, *Minn. Victims of Nursing Home Abuse Challenges Arbitration Clauses*, *supra* note 90.

¹²³ Tabler, *supra* note 2.

¹²⁴ Andi Alper, *Seeking Justice for Grandma: Challenging Mandatory Arbitration in Nursing Home Contracts*, 2016 J. DISP. RESOL. 469, 476.

¹²⁵ See generally Krasuski, *supra* note 1, at 269.

¹²⁶ *Id.* Stating that the American Health Lawyers Association is commonly chosen as arbitrators. Residents criticize this choice due to bias because these lawyers represent healthcare companies and are more likely to find in favor of the nursing home. *Id.*

¹²⁷ See *Id.*

¹²⁸ *Id.*

¹²⁹ See generally Naomi Karp & Erica Wood, *Mediating Nursing Home Care Disputes: A Workable Option?*, Sept.–Oct. 1997 A.B.A. 243, 244, https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_artm5200_mdgnhcds_tb.a.uthcheckdam.pdf.

¹³⁰ See generally *id.*; see also DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE & NEUTRAL* 429 (2d ed. 2011).

¹³¹ See generally Kendall D. Isaac, *Pre-Litigation Compulsory Mediation: A Concept Worth Negotiating*, 32 U. LA VERNE L. REV. 165 (2011). The reference to family law is helpful here because it is an area of law that

incentives to encourage both nursing homes and a decedent's family to use mediation.¹³² In addition to compulsory mediation, many areas of law have adopted multi-tiered Dispute Resolution clauses that utilize both mediation and arbitration.¹³³ This article proposes that the use of multi-tiered Dispute Resolution clauses would encourage nursing homes to explore other solutions outside of a standard arbitration clause.

A. *Compulsory Mediation*

The use of compulsory mediation has been effective in other areas of law, such as family law, leading to its widespread use—with some courts even requiring proof of mediation before finalizing divorces.¹³⁴ Requiring compulsory mediation prevents either party from stalling the process.¹³⁵ One benefit to mediation is that both parties bear the cost equally, ensuring mediator neutrality.¹³⁶ One major benefit of requiring compulsory mediation is that it does not force the parties to settle, and instead allows the parties to create their own solutions to the dispute.¹³⁷ Implementing compulsory mediation in nursing homes would be beneficial because it allows all parties control over the settlement and increases both time efficiency and cost savings.¹³⁸ Most importantly, the mediator acts completely neutral and equalizes the bargaining power between the two parties to guarantee fairer results.¹³⁹ Fairer results can also be accomplished by having both parties agree to a mediation panel where they choose the mediators.¹⁴⁰

B. *Multi-Tiered Dispute Resolution Clause*

contains strong emotions and this is similar to wrongful death claims because the families are suffering from the loss of a family member. *See generally Id.*

¹³² *See generally* Deborah Masucci, *How Labor and Management are Using Mediation*, A.B.A., Oct. 2016, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/oct2016/masucci_sing_mediation.authcheckdam.pdf.

¹³³ George V. Vlavianos & Vasilis F L Pappas, *Multi-Tier Dispute Resolution Clauses as Jurisdictional Conditions Precedent to Arbitration*, GLOBAL ARBITRATION REVIEW (Last accessed on Feb. 10, 2019), <https://globalarbitrationreview.com/chapter/1142626/multi-tier-dispute-resolution-clauses-as-jurisdictional-conditions-precedent-to-arbitration>.

¹³⁴ Isaac, *supra* note 131, at 167.

¹³⁵ *See generally id.* at 169.

¹³⁶ Masucci, *supra* note 132.

¹³⁷ Isaac, *supra* note 131, at 178.

¹³⁸ *Id.*

¹³⁹ *Id.* at 178-79.

¹⁴⁰ Masucci, *supra* note 132.

One way to approach the question of compulsory mediation without eliminating arbitration is to create a multi-tiered Dispute Resolution Clause. A multi-tiered clause “require[s] parties to engage in a single step prior to commencing arbitration.”¹⁴¹ These types of clauses offer a variety of benefits including: inexpensive resolution, avoiding delays associated with arbitration proceedings, a “cooling-off period” that can result in better settlement discussions, and narrow the issues to be arbitrated.¹⁴² There is a drawback that failure to comply with the pre-arbitral steps may prevent a tribunal from carrying out the arbitration; however, the United States Supreme Court took a “position that a failure to comply with pre-arbitral steps set out in multi-tier clauses do not deprive an arbitral tribunal of jurisdiction to adjudicate a dispute.”¹⁴³ There are many examples of multi-tiered Dispute Resolution clauses in different contracts and they are commonly found in real estate law.¹⁴⁴ In real estate law disputes parties must mediate their dispute before seeking arbitration of their claims.¹⁴⁵ The result has shown that the majority of parties have resolved their dispute through the use of mediation, reducing the need for arbitration.¹⁴⁶ In fact, the program has been so successful that a number of governmental agencies and courts have followed this method of drafting a multi-tiered dispute resolution clause.¹⁴⁷ This program offers a great alternative to mandatory arbitration clauses in nursing home contracts in the event of a wrongful death suit.¹⁴⁸ Not only may nursing homes avoid the court system by keeping arbitration as a last resort, but it allows for parties to embrace a more fluid alternative dispute resolution that would address both emotional and legal needs.¹⁴⁹

C. Incentives

One of the most important aspects of mediation is the fact that mediation can be personalized to fit a problem on a case-by-case basis by being constructed around the parties involved. This is different from arbitration because arbitration primarily focuses on a fact-finder whereas a mediator may simply facilitate communication between the two parties.¹⁵⁰ One way to both construct and encourage mediation is to

¹⁴¹ Vlavianos & Pappas, *supra* note 133.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Masucci, *supra* note 132.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; see also Golann & Folberg, *supra* note 130, at 429 (stating that if mediation were to fail, the process can become arbitration).

¹⁵⁰ Golann & Folberg, *supra* note 130, at 10-11 (displaying a graph showing that mediation is considered a nonbinding outcome due to the amount of control the parties have whereas arbitration is considered a binding outcome due to the lack of control held by the parties).

offer incentives to encourage nursing homes to use mandatory mediation instead of arbitration.¹⁵¹ Incentives are a viable option for encouraging the use of mediation because they are already used in a number of areas, including real estate law.¹⁵² The list of possible incentives that can be provided to encourage mediation is non-exhaustive and can include anything from paying filing fees to covering attorneys' costs.¹⁵³ The use of incentives to encourage mediation can be traced back to as early as 1988, when Florida created state legislation that allowed judges to refer civil cases to mediation.¹⁵⁴ This use of incentives quickly led to the rapid growth of mediation on a much larger scale.¹⁵⁵ This makes the use of incentives an ideal way to encourage nursing homes and the families of their clients to mediate a wrongful death suit.

VI. OBJECTIONS

The Trump administration is proposing to replace an old Obama-era rule—the rule stating that nursing homes could not enforce mandatory arbitration if they received federal funding—and instead plans to introduce a new rule supporting the use of arbitration agreements in nursing homes.¹⁵⁶ The rule will allow nursing homes to require new residents to agree to arbitration or forego admission altogether—an act that the Minnesota state court had decided was procedurally unconscionable already.¹⁵⁷ This new bill will encourage nursing homes to reinstate and reemphasize pre-dispute arbitration agreements for any potential lawsuit, including wrongful death.¹⁵⁸ One potential benefit that is mentioned in the article is that this rule would require the pre-dispute arbitration agreement to be written in “plain language” and verify with the resident and their family that the agreement is understood.¹⁵⁹

This new legislation is a problem because nursing homes will be less inclined to switch to mediation if pre-dispute arbitration agreements are more

¹⁵¹ Masucci, *supra* note 132.

¹⁵² See generally *Buyer-Seller Dispute Resolution System*, NAT'L ASS'N OF REALTORS (May 2011), [https://www.nar.realtor/mempolweb.nsf/214c1520b27c9ee286256b2600557d81/6b170e08b87308f6862578950078b8c8/\\$FILE/DRS%20Materials%20final.pdf](https://www.nar.realtor/mempolweb.nsf/214c1520b27c9ee286256b2600557d81/6b170e08b87308f6862578950078b8c8/$FILE/DRS%20Materials%20final.pdf); see also Masucci, *supra* note 132, at 2.

¹⁵³ Masucci, *supra* note 132.

¹⁵⁴ Claire Mulder, *Commercial Mediation: The United States and Europe*, AM. B. 10 (2017), https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/fall2017/3_commercial_mediation_the_united_states_and_europe.pdf.

¹⁵⁵ *Id.*

¹⁵⁶ Lazarus, *supra* note 3.

¹⁵⁷ Jaffe, *supra* note 19; see also Serres, *Minnesota Family Wins Legal Victory in Battle to Sue a Senior Home*, *supra* note 67.

¹⁵⁸ Victoria Sackett, *Nursing Home Residents Could Lose Their Day in Court*, AARP (Aug. 15, 2017), <https://www.aarp.org/caregiving/health/info-2017/trump-nursing-home-arbitration-fd.html>.

¹⁵⁹ Jaffe, *supra* note 19.

viable.¹⁶⁰ However, there is some controversy surrounding the bill because many nursing homes find the plain language requirement too vague.¹⁶¹ The vague wording of the bill poses a problem to nursing homes because it creates difficulty in understanding what kind of wording constitutes plain language.¹⁶² This might create difficulty for the nursing homes by allowing state legislatures or lower courts to preempt the arbitration clauses.¹⁶³ This is a major downside of the bill because it puts nursing homes at risk for litigation.¹⁶⁴

The biggest problem facing replacing pre-dispute arbitration agreements with mandatory mediation agreements would be the lack of motivation to switch over due to new support and incentives from the Trump administration.¹⁶⁵ The legislation encourages the use of arbitration agreements and takes away the patient's right to avoid signing one by giving nursing homes the power to deny admittance.¹⁶⁶ Encouraging the use of arbitration agreements would stand as a barrier to implementing a more effective, victim-friendly dispute resolution program such as mandatory mediation.

VII. CONCLUSION

Arbitration agreements are pervasive and have a strong hold on nursing homes because of their cost effectiveness and the protection of the FAA, providing a viable alternative to litigation.¹⁶⁷ State action against mandatory pre-dispute arbitration clauses in nursing home contracts against wrongful death suits illustrates the difficulty in bypassing the FAA.¹⁶⁸ State legislation has been consistently preempted by the FAA.¹⁶⁹ Each preemption creates more reason for nursing homes to continue drafting contracts with pre-dispute arbitration agreements.

Next, state courts encountered little success with their attempts to invalidate pre-dispute arbitration agreements.¹⁷⁰ When a state court attacked the arbitration clause directly, then the FAA quickly preempted the state court's decision.¹⁷¹ However, when a state court refused to compel arbitration based on a basic contract element, it was not preempted by the FAA because the arbitration agreement violated

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See generally id.*

¹⁶⁵ *See generally id.*; *see also* Rau, *supra* note 12.

¹⁶⁶ Jaffe, *supra* note 19.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See generally* Kramer, *SCOTUS Reverses KY Nursing Home Arbitration*, *supra* note 62.

¹⁷¹ *Marmet Health Care*, 565 U.S., at 532.

general contract law.¹⁷² Therefore, when an arbitration agreement violates a basic contract principle, then the FAA does not overturn the court's decision.¹⁷³ Despite the strong likelihood of preemption, state courts (like in Minnesota) have continued to fight against pre-dispute arbitration clauses and rule in favor of the resident's family.¹⁷⁴

Mandatory arbitration stands as a barrier to reaching agreeable settlements for a wrongful death action between grief-stricken families and nursing homes.¹⁷⁵ The main solution to pre-dispute arbitration clauses is to replace them using compulsory mediation and multi-tiered dispute resolution clauses that would allow for incentives and more integrative and creative solutions to be reached among parties.¹⁷⁶ Implementing a multi-tiered dispute resolution clause would continue to save money for both parties.¹⁷⁷ The facilitative atmosphere in mediation should be utilized to protect the decedent's family and create equal bargaining power with the nursing home.¹⁷⁸ Incentives may be used to encourage both parties to use multi-tiered dispute resolution contracts by allowing for parties to save more money.¹⁷⁹

The Trump administration's new legislation encouraging arbitration agreements stands as the main obstacle facing the implementation of either compulsory mediation or multi-tiered dispute resolution clauses.¹⁸⁰ This legislation directly discourages nursing homes from adopting the methods proposed in this article that would utilize a more effective alternative dispute resolution process that is more likely to create a better settlement.¹⁸¹ This article has shown that implementing compulsory mediation by using multi-tiered dispute resolution contracts is the more appropriate clause for nursing home contracts.

¹⁷² *Stephan*, 279 So.3d at 544; *see also Kramer, Alabama Won't Enforce Arbitration With Nursing Home When Patient had Dementia*, *supra* note 80.

¹⁷³ *Stephan*, 279 So.3d at 544; *see also Kramer, Alabama Won't Enforce Arbitration With Nursing Home When Patient had Dementia*, *supra* note 80.

¹⁷⁴ *Serres, Minnesota Family Wins Legal Victory in Battle to Sue a Senior Home*, *supra* note 67.

¹⁷⁵ *See generally Alper*, *supra* note 124, at 469.

¹⁷⁶ *See generally Isaac*, *supra* note 131, at 182.

¹⁷⁷ *Id.* at 183.

¹⁷⁸ *Id.* at 178.

¹⁷⁹ *Masucci*, *supra* note 132.

¹⁸⁰ *Jaffe*, *supra* note 19; *see also Rau*, *supra* note 12.

¹⁸¹ *See CMS Rules Put Patients First Updating Requirements for Arbitration Agreements and New Regulations That Put Patients Over Paperwork*, CMS.GOV (July 16, 2019), <https://www.cms.gov/newsroom/press-releases/cms-rules-put-patients-first-updating-requirements-arbitration-agreements-and-new-regulations-put> (discussing the new legislation).