Typical Complications

Enforcing Arbitration Agreements in Long-Term Care Litigation

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Public policy considerations, resident status as third-party beneficiary, and FAA application are a few of the legal arguments available to compel arbitration.

Although courts in many jurisdictions will enforce valid and binding agreements to arbitrate between nursing homes and their residents, it has become increasingly difficult to enforce an arbitration agreement when a contract was signed by someone other than the resident. An arbitration agreement's enforceability is often complicated by the typical admissions process story. A family member is riddled with guilt and anxiety about leaving a loved one in a nursing home. The admission paperwork is complicated and tedious, and the family member is distracted by concern for the resident who is confused by new surroundings and the blaring television of a new roommate. After an hour spent signing financial documents, the admission coordinator pushes an arbitration agreement across the table and explains that the optional agreement constitutes a waiver of the right to a jury trial. Not wanting to offend the nursing home's staff, the family member signs the agreement to avoid the embarrassment of asking the meaning of the word "arbitration."

Six years later, the nursing home's defense lawyer must petition a court to enforce the arbitration agreement. However, at this time, the defense lawyer discovers that the signing party did not have power of attorney over the resident, no court authorized the signing party to act on behalf of the resident, no physician determined that the resident lacked the capacity to sign the agreement, and the forum specified in the arbitration agreement is no longer arbitrating malpractice claims. Although this scenario may result in a fast track to a trial by jury, the defense attorney can make some practical arguments that may increase the likelihood that a court will enforce the agreement and compel arbitration.

The Legal Framework for Enforcing Arbitration Agreements

Before examining the practical arguments that may increase the likelihood that a court will enforce an arbitration agreement, it is important to understand the general framework for enforcing arbitration agreements. Because arbitration provisions are contrac-

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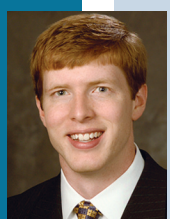

tual in nature their construction is a matter of contract interpretation. *See*, *e.g.*, *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999). In many jurisdictions, to determine the validity of a motion to compel arbitration, a court will analyze the facts to determine whether (1) a valid arbitration agreement exists between the parties, (2) the parties' dispute is within the scope of the arbitration agreement, and (3) the party seeking to enforce an arbitration agreement has waived the right to arbitrate. *See*, *e.g.*, *Cmty. Care Ctr. of Vicksburg v. Mason*, 966 So. 2d 220, 225 (Miss. Ct. App. 2007); *Bland ex rel. Coker v. Health Care & Retirement Corp. of America*, 927 So. 2d 252, 255 (Fla. Dist. Ct. App. 2006).

When determining if a valid arbitration agreement exists, courts will consider ordinary principles of contract law to analyze whether legal constraints external to the parties' agreement foreclose arbitration of those claims. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005). In this analysis, generally applicable contract defenses, such as fraud, duress, and unconscionability, are frequently used to invalidate an arbitration agreement. *See*, *e.g.*, *Hill v. NHC Healthcare/Nashville, LLC*, 2008 WL 1901198, at *6 (Tenn. Ct. App. 2008).

Additionally, whether a particular dispute falls within the scope of an arbitration agreement depends wholly on the terms of the contract. Although courts will consider the intent of the parties as manifested by the terms of the contract and construe arbitration agreements as broadly as the parties obviously intended, they will likewise deny a request for arbitration if the dispute is not contemplated by the terms of the agreement. *Constantino v. Frechette*, 897 N.E. 2d 1262, 1265 (Mass. App. Ct. 2008).

Finally, courts will consider whether a nursing home has waived its right to arbitrate by failing to move timely to compel arbitration or by actively participating in the litigation process. *See Pine Tree Villa, LLC v. Olson*, 2009 WL 723034, at *2 (Ky. Ct. App. 2009). In this analysis, courts will focus on a nursing home's conduct before filing its motion to compel to determine whether its actions, such as serving discovery or filing motions without raising the right to arbitrate, are inconsistent with arbitration. *See Algayer v. Health Ctr. of Panama City*, 866 So. 2d 75, 77 (Fla. Dist. Ct. App. 2003).

Framing the Public Policy Argument

To properly frame an argument in support of arbitration, remember that public policy favors arbitration as a means of dispute resolution. In fact, when analyzing arbitration agreements between nursing homes and residents, courts routinely cite the Federal Arbitration Act (FAA) and the public policy favoring arbitration. *See*, *e.g.*, *Vicksburg Partners, LP v. Stephens*, 911 So. 2d 507, 515 (Miss. 2005), *overruled on other grounds by Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009).

The FAA provides that "[a] written provision in… a contract or transaction… to settle by arbitration a controversy thereafter arising out of such contract… shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (2006). In enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Because Congress derived its power to enact the FAA from the Commerce Clause of the Constitution, the underlying admissions agreement at issue must involve interstate commerce for the FAA to apply. *See Terminix Int'l, Inc. v. Rice*, 904 So. 2d 1051, 1054 (Miss. 2004). In many jurisdictions, it is settled that a nursing home admissions agreement affects interstate commerce. *See McGuffey Health & Rehab. Ctr. v. Gibson*, 864 So. 2d 1061, 1063 (Ala. 2003) (holding that "the [nursing home] admission[s] agreement had a substantial effect on interstate commerce"); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) ("because 'commerce' is broadly construed, the evidence of Medicare payments [to the facility on the patient's behalf] is sufficient to establish interstate commerce and the FAA's application in this case"). In other jurisdictions, however, courts require an affidavit or witness testimony demonstrating that the underlying transaction for nursing home care between a nursing home and a resident involved interstate commerce. This evidence may include the fact that medical supplies are purchased out-of-state, nursing home equipment is purchased from out-of-state suppliers, residents are from other states, nursing homes are almost completely controlled by federal regulations, and revenue comes from federally funded Medicaid or Medicare. *See*, *e.g.*, *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987–88 (Ala. 2004).

Regardless of the necessary proof, it is advisable to establish that the FAA governs the admissions agreement at issue to benefit from the clear, statutory pronouncement favoring arbitration. In fact, the FAA has been used successfully by defense attorneys to preempt state statutes that invalidate arbitration provisions in nursing home admission agreements. *See*, *e.g.*, *Fosler v. Midwest Care Center II, Inc.*, N.E.2d, 2010 WL 1286880, at *8 (Ill. App. Ct. 2010).

Furthermore, many jurisdictions have recognized that policy has favored arbitration and firmly embedded arbitration in both federal and state law. After all, arbitration provides parties with an expeditious and economical means of resolving a dispute while, at the same time, unburdening crowded court dockets. In light of the strong presumption favoring arbitration, many courts have held that "all doubts should be resolved in its favor." *Hayes v. Oakridge Home*, 908 N.E. 2d 408, 412 (Ohio 2009). Therefore, when arguing in favor of an arbitration agreement, a defense attorney should emphasize the policy favoring arbitration and ask a court to "apply the policy of the FAA to 'rigorously enforce agreements to arbitrate.'" *Forest Hill Nursing Ctr., Inc. v. McFarlan*, 995 So. 2d 775, 779 (Miss. Ct. App. 2008).

The Resident as Third-party Beneficiary

Frequently, family members admit their loved ones to nursing homes and sign admission documents on behalf of the residents who benefit from the nursing homes' services. Acknowledging this reality, courts in some jurisdictions have enforced arbitration agreements against non-signatories by determining that residents were third-party beneficiaries of the arbitration agreements. *See*, *e.g.*, *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 579 (Fla. Dist. Ct. App. 2007).

For example, in *Forest Hill Nursing Center, Inc. v. McFarlan*, 995 So. 2d 775, 779 (Miss. Ct. App. 2008), the plaintiff's grand-

daughter, as the "responsible party," signed the necessary paperwork to admit the plaintiff to a nursing home, including an admission agreement, which contained an arbitration provision. The appellate court specifically held that an agency relationship had not existed between the plaintiff and her granddaughter, which would have bound the plaintiff to the terms of the admission agreement. However, the court determined that the arbitration provision was enforceable because the plaintiff was the third-party beneficiary of the agreement. The admission agreement contained the plaintiff's name at the top of the agreement as the resident admitted to the nursing home. Additionally, the language of the admission agreement referred to the rights and responsibilities of both the resident and the responsible party. Finally, the court recognized that the benefits of residing in the nursing home flowed directly to the plaintiff as a result of the admission agreement. Based on these facts, the court held that the plaintiff was "an intended third-party beneficiary of the agreement between [the nursing home] and [the plaintiff's granddaughter]; thus, [the plaintiff] is bound by the terms of the contract, including the agreement to arbitrate any legal disputes related to the contract." *Id*. at 783.

In the nursing home context, a defense attorney can easily establish that an admission agreement was executed for the resident's benefit. However, if an arbitration agreement is separate and distinct from the admission agreement or if executing an arbitration provision has not been a precondition to admission, courts have been less likely to require arbitration under the third-party beneficiary theory. According to some courts, if executing an arbitration agreement is not required as part of the consideration for a resident to receive services from a nursing home, the resident would not benefit from it, and the resident would not be deemed a third party beneficiary of the agreement. *Monticello Cmty. Care Ctr., LLC v. Estate of Martin ex rel. Peyton*, 17 So. 3d 172, 179 (Miss. Ct. App. 2009). *See also Beverly Health & Rehab. Servs., Inc. v. Smith*, ___ S.W.3d ___, 2009 WL 961056, at *3 (Ky. Ct. App. 2009) (holding that an arbitration agreement was not enforceable because it was not a precondition to the admission of the resident and, therefore, the resident "derived no benefit from the arbitration agreement").

The Family Member as Health Care Surrogate

Nine states have passed the Uniform Health-Care Decisions Act (UHCDA), which was introduced by the National Conference of Commissioners on Uniform State Laws in 1993. *See A Few Facts About the Uniform Health-Care Decisions Act*, http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-uhcda.asp. Although a number of those states modified this uniform act before adopting it, the majority of the statutes contain language stating that a surrogate may make health care decisions on behalf of an incapacitated nursing home resident: "A surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available." Unif. Health-Care Decisions Act §5 (1993). Further, among states that did not adopt the uniform act, most have passed legislation similarly vesting surrogate authority in certain persons if a resident is incapacitated. *See*, *e.g.*, Ariz. Rev. Stat. §36-3231; Cal. Health & Safety Code §1418.8; Colo. Rev. Stat. §15-18.5-103, 104; Fla. Stat. Ann. §765.401; Idaho Code §39-4504; 755 Ill. Comp. Stat. 40/25; Ind. Code §16-36-1-5; La. Rev. Stat. Ann. §40:1299.53; S.C. Code Ann. §44-66-30; Tenn. Code Ann. §68-11-1801, *et seq.*; Tex. Health & Safety Code Ann. §313.004. As a result, in some jurisdictions, defense attorneys may use surrogacy statutes to enforce arbitration agreements signed on behalf of incapacitated nursing home residents.

However, the ability of health care surrogates, as defined by the UHCDA, to bind nursing home residents to arbitration agreements has been successfully attacked due to two factors. First, courts have classified arbitration agreements as something other than health care related decisions. *See*, *e.g.*, *Covenant Health & Rehab. of Picayune, L.P. v. Lambert*, 984 So. 2d 283, 287 (Miss. Ct. App. 2006); *Lujan v. Life Care Centers of Am.*, 222 P.3d 970, 975 (Colo. Ct. App. 2009); *In re Ledet*, 2004 WL 2945699, at *4 (Tex. Civ. App. 2004). Second, in some cases nursing homes did not have evidence that nursing home residents lacks capacity. *See Grenada Living Ctr., LLC v. Coleman*, 961 So. 2d 33 (Miss. 2007); *Barbee v. Kindred Healthcare Operating, Inc.*, 2008 WL 4615858, at *12 (Tenn. Ct. App. 2008).

Unfortunately, courts have inconsistently classified arbitration agreements as "health-care decisions." For instance, a California court held that signing an arbitration agreement while admitting a family member to a nursing home was not a health care decision under a California statute authorizing a family member to make health care decisions for incapacitated patients. *Flores v. Evergreen at San Diego, LLC*, 55 Cal. Rptr. 3d 823, 832 (Cal. Ct. App. 2007). In contrast, Mississippi law holds that the act of executing an arbitration agreement is a "health-care decision" if "the arbitration provision was an essential part of the consideration for the receipt of 'health care.'" *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 218 (Miss. 2008). Stated differently, if executing an arbitration agreement is a precondition to admission, the courts of Mississippi will consider it a health care decision. However, if a health care surrogate is not required to sign an arbitration agreement to admit a resident to a nursing home, the agreement to arbitrate is not a "healthcare decision." *Id.* Of course, this "take it or leave it" arbitration agreement is a contract of adhesion, and a nursing home must take special precautions to avoid a finding from a court of procedural unconscionability.

In addition a resident's mental capacity at the time of admission is critical to establishing a health care surrogate's authority. Under the UHCDA, a resident cannot have a health care surrogate unless he or she is "determined by the primary physician to lack capacity." *See* Unif. Health Care Decisions Act §5(a) (1993). *See also* Alaska Stat. §13.52.030; Del. Code Ann. tit. 16, §2507; Me. Rev. Stat. Ann. tit. 18-A, §5-805; Miss. Code Ann. §41-41-211; N.M. Stat. Ann. §24-7A-5, 11; Wyo. Stat. Ann. §35-22-406. "Capacity" is defined as "an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health care decision." *See* Unif. Health-Care Decisions Act §1(3) (1993). As a result, some courts have denied enforcement of arbitration agreements if a family

member signed the agreement on behalf of a resident if the resident's primary physician failed to determine the resident's capacity. *Hinyub*, 975 So. 2d at 218. *See also Forest Hill Nursing Ctr., Inc. v. McFarlan*, 995 So. 2d 775, 780 (Miss. Ct. App. 2008) (holding that the Unif. Health Care Decisions Act may not be used to bind a nursing home resident to an arbitration agreement without evidence that a physician had determined that the resident was incapacitated); *Barbee*, 2008 WL 4615858, at *12 (same).

Finally, to enforce an arbitration agreement through the UHCDA, the appropriate family member must have signed the agreement to arbitrate. According to the uniform act, a resident may "designate any individual to act as a surrogate by personally informing the supervising health care provider." *See* Unif. Health Care Decisions Act §5(a) (1993). Absent a designation, or if a designee is not reasonably available, "any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate: (a) the spouse, unless legally separated; (b) an adult child; (c) a parent; or (d) an adult brother or sister." *Id.* at §5(b). If none of these individuals is "reasonably available," then "an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available may act as surrogate." *Id.* Based on these requirements, if a spouse, adult child, parent, or adult sibling is unavailable to sign an arbitration agreement as an incapacitated resident's surrogate, a nursing home must document the relationship of the person signing the arbitration agreement on behalf of the resident. Otherwise, courts generally will not enforce the agreement. *See Compere's Nursing Home, Inc. v. Estate of Farish ex rel. Lewis*, 982 So. 2d 382, 384 (Miss. 2008) (holding that a resident's nephew did not meet the statutory requirements of a health care surrogate because no evidence had been presented that he exhibited special care and concern for the resident or that he was familiar with the resident's personal values).

Dealing with Unavailable Designated Forums

Many arbitration agreements include provisions designating a particular organization, such as the National Arbitration Forum (NAF) or the American Arbitration Association (AAA), as the requisite forum for arbitration proceeding. However, the NAF announced in July 2009 that it would no longer administer these arbitrations. *See National Arbitration Forum to Cease Administering All Consumer Arbitrations in Response to Mounting Legal and Legislative Challenges*, National Arbitration Forum, July 19, 2009, http://www.adrforum.com/newsroom.aspx?itemID=1528. Likewise, the AAA no longer administers arbitration proceedings involving disputes between nursing homes and their residents. *See Healthcare Policy Statement*, American Arbitration Association, http://www.adr.org/sp.asp?id=32192.

Even so, some courts have enforced arbitration agreements that require using forums that are no longer available. In those cases, courts sometimes will enforce arbitration agreements after using boilerplate, severability clauses frequently included in arbitration agreements to sever particular, contractually required forums from the agreements. *Fellerman v. Am. Retirement Corp.*, 2010 WL 1780406, at *5 (E.D. Va. 2010); *Broughsville v. OHECC, LLC*, 2005 WL 3483777, at *7 (Ohio Ct. App. 2005). In other cases, courts have invoked provisions of the FAA to substitute arbitrators named in agreements. More specifically, 9 U.S.C. §5 allows courts to appoint substitute arbitrators if "for any [] reason there shall be a lapse in the naming of an arbitrator…." In accordance with that statutory provision, courts have ordered parties to arbitrate disputes after appointing substitute arbitrators. *See Jones v. GGNSC Pierre, LLC*, 2010 WL 427648, at **5–6 (D. S.D. 2010); *Jones Estate of Eckstein v. Life Care Centers of Am., Inc.*, 623 F. Supp. 2d 1235, 1238 (E.D. Wash. 2009).

In contrast, some courts have invalidated arbitration agreements outright because they required that either the NAF or AAA serve as the administrators. *See Ranzy v. Extra Cash of Tex.*, 2010 WL 936471, at *5 (S.D. Tex. 2010) (refusing to enforce an arbitration agreement requiring the use of the NAF); *Covenant Health & Rehab. of Picayune, LP v. Moulds*, 14 So. 3d 695, 708 (Miss. 2009) (holding that an arbitration agreement was unenforceable because it required use of the AAA to administrator the arbitration proceedings). In those decisions, courts determined that the choice of a forum was an integral part of the agreement and that the unavailability of the forum frustrated the purpose of the arbitration contract.

Preparing for a Claim of Unconscionability

In an effort to avoid arbitration agreements, plaintiffs frequently raise unconscionability as a defense. Although courts often recognize that arbitration agreements are not *per se* unconscionable, a court may find unconscionability under general contract principles, invalidating an arbitration agreement without offending the FAA. For that reason, a defense attorney must prepare to address both procedural and substantive unconscionability when moving to enforce an arbitration agreement.

Procedural Unconscionability

With an arbitration agreement, a plaintiff's counsel may prove procedural unconscionability by demonstrating that the family member who signed the arbitration agreement lacked knowledge or voluntariness. In analyzing this defense, courts consider whether an arbitration provision was presented in inconspicuous print and whether an agreement was drafted in complex or legalistic terms that are difficult for a lay person to understand. *See*, *e.g.*, *Shotts v. OP Winter Haven, Inc.*, 988 So. 2d 639, 641–42 (Fla. Dist. Ct. App. 2008) (finding an arbitration provision valid when it has been worded clearly and separated and conspicuous from other admission documents). Courts also consider whether a disparity exists in the sophistication or bargaining power of the parties and whether the individual signing the agreement lacked opportunity to study the contract and inquire about its terms. *See Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 63–64 (Fla. Dist. Ct. App. 2003) (finding an arbitration provision invalid since both the husband and resident were elderly and the defense failed to show that the husband had the legal training to understand agreement); *c.f. Hayes v. Oakridge Home*, 908 N.E.2d 408, 413–14 (Ohio 2009) (finding an arbitration agreement was not procedurally unconscionable solely because the resident was 95 years old). Addition-

ally, courts frequently consider whether the family member executing the agreement was granted the opportunity to seek legal counsel, whether signing the agreement was a precondition to admission, and whether the contract could be rescinded. *See*, *e.g.*, *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004) (finding an agreement invalid when the wife executed it without an attorney present); *Prieto v. Healthcare and Retirement Corp. of America*, 919 So. 2d 531, 533 (Fla. Dist. Ct. App. 2005) (finding an agreement procedurally unconscionable when a signature was required to complete admission process); *Miller v. Cotter*, 863 N.E.2d 537, 546–47 (Mass. 2007) (finding an agreement enforceable when it explicitly was not a condition of admission); *see Estate of Mooring v. Kindred Nursing Ctrs.*, 2009 WL 130184, at *4 (Tenn. Ct. App. 2009) (finding that an arbitration agreement was not a contract of adhesion when it provided a thirty-day rescission period).

Procedural unconscionability is most apparent in contracts of adhesion when an admission agreement containing an arbitration provision is presented on a "take it or leave it" basis. However, an arbitration agreement that is included in a contract of adhesion should not, by itself, render the agreement procedurally unconscionable. Before invalidating a non-negotiable arbitration agreement, a court must find that the weaker party, frequently the family member, was prevented by market factors, timing, or other pressures from contracting with another nursing home on more favorable terms.

At the same time, a court may have qualms about enforcing an arbitration agreement signed by a family member on behalf of a resident if the arbitration provision is *not* a precondition to admission. Importantly, therefore, make an arbitration provision easy to understand and print the arbitration provision in bold, large, typeface so it is easily discernable. Additionally, because most family members feel pressure when admitting a resident to a long-term care facility, a nursing home should consider adding language to an arbitration agreement that, if a resident or a family member does not agree to arbitrate, the facility will assist the resident with finding alternate placement. In this manner, the nursing home can defend itself against a claim that the arbitration provision was included in a contract of adhesion at a time when the resident or his or her family was prevented from negotiating better terms with another provider due to market pressures.

Substantive Unconscionability

Plaintiffs' counsel often attempt to prove substantive unconscionability by arguing that the terms of an arbitration agreement are unfair or oppressive. Primary indicators of substantive unconscionability include contract terms that limit damages or eligible claims and terms that waive liability. *See Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds, ex rel Braddock*, 14 So. 3d 695, 702 (Miss. 2009) (finding an arbitration agreement substantively unconscionable when the provision awarded all costs to the other party if one party failed to comply with arbitration procedures); *Fortune v. Castle Nursing Homes, Inc.*, 843 N.E.2d 1216, 1220–21 (Ohio Ct. App. 2005) (invalidating as substantively unconscionable a loser-pays provision since it would have a stifling effect).

When reviewing a contract for substantive unconscionability, courts examine the agreement to determine whether abusive terms exist that violate the expectations of, or cause gross disparity between, the contracting parties. Courts generally find substantive unconscionability when an agreement provides an award of attorney fees to the prevailing party or limits or bars certain damages. *See Prieto*, 919 So. 2d at 533 (finding substantively unconscionable an agreement limiting non-economic damages and barring punitive damages and attorneys' fees); *But see Hayes*, 908 N.E. 2d at 415 (enforcing an agreement in which a punitive damage waiver applied to a resident since the nursing home also waived a statutory right to seek costs and attorneys' fees and seek dismissal). If abusive or restrictive terms exist in an arbitration agreement, a practitioner should argue that the court may sever these provisions from the agreement so that the overall purpose of the contract—arbitrating a resident's claims against a nursing home—may be effectuated.

Conclusion

It is becoming increasingly difficult for nursing homes to enforce arbitration agreements that are signed by someone other than a competent resident. However, courts have enforced these agreements based on a range of legal arguments, including that public policy favors arbitration, the Federal Arbitration Act applies, a resident benefits from an agreement as a third party, and a surrogacy statute supports arbitration. A prudent practitioner will raise as many of the applicable arguments as possible when moving to enforce an arbitration agreement that was never signed by a nursing home resident to assist a nursing home to reap the benefits of arbitration and avoid the risk associated with a jury trial.