

COMMENTS

Mandatory Arbitration Agreements in Long-Term Care Contracts: How to Protect the Rights of Seniors in Washington

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I. INTRODUCTION

In January 2010, the *Seattle Times* began the first comprehensive accounting of adult family homes in Washington State.¹ The six-part series, titled “Seniors for Sale,” reported that “[a]dult family homes in the state are seen as a national model, and in King County alone, they’ve become more plentiful than Starbucks stores. But the explosive growth, fueled by profiteers and a lack of careful state regulation, is leaving thousands of people vulnerable to harm.”² By September, the *Times* reported that it had uncovered at least 236 deaths indicating neglect or abuse.³

Examples of the neglect and abuse uncovered in these homes included the stories of Jean Rudolf and Clarence Yesland, who were eighty-seven and eighty-four years old, respectively.⁴ Jean Rudolph died from an infection caused by seven pressure sores, some of which were so deep that they left bone and muscle exposed.⁵ Doctors revealed that the

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1. Michael Berens, *Special Reports: Seniors for Sale*, SEATTLE TIMES, Jan. 30, 2010, <http://seattletimes.nwsourc.com/html/seniorsforsale/>.

2. Michael Berens, *How the Aged and Frail are Exploited in Washington’s Adult Family Homes*, SEATTLE TIMES, Jan. 30, 2010, http://seattletimes.nwsourc.com/html/seniorsforsale/2010939195_seniors31.html.

3. Michael Berens, *Deaths in Adult Homes Hidden and Ignored*, SEATTLE TIMES, Sept. 11, 2010, http://seattletimes.nwsourc.com/html/localnews/2012856611_seniors12.html.

4. *Id.*

5. *Id.*

wounds had gone untreated for weeks.⁶ Clarence Yesland suffered from a broken hip but was unable to communicate his pain due to dementia.⁷ Narcotics prescribed by Clarence's doctor could have dulled his pain; however, Clarence's caretaker told members of his family that "the drug would hasten his death."⁸ Clarence's caretaker used this lie to cover up her theft of Clarence's pills in order to sell them to a caregiver with a drug problem at a separate adult home.⁹ Without the investigative work of the *Seattle Times*, the public would not have learned of the stories of Jean or Clarence, or of the hundreds of deaths that resulted from similar instances of abuse across the state.¹⁰

The public's ignorance of this abuse is, in part, due to the fact that many of the long-term care (LTC) facilities in Washington have mandatory arbitration agreements in their admission contracts.¹¹ Because arbitration is confidential,¹² if the representatives of neglected seniors wanted to hold these facilities accountable, their stories would be hidden from public view in the arbitration process.¹³

In addition to avoiding reputation-damaging litigation, arbitration agreements offer multiple benefits over litigation for the LTC industry. Consider the example of deceased nursing home patient Henry Woodall.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. See, e.g., Michael Berens, *Neglect and Death, but Adult Family Home Stays Open*, SEATTLE TIMES, Jan. 31, 2010, http://seattletimes.nwsources.com/html/seniorsforsale/2010939358_seniors01.html.

11. Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 268 (2004) (estimating that "most of the nation's largest nursing home chains . . . include arbitration agreements in their admissions packets").

12. AM. ARBITRATION ASS'N, A BEGINNER'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION, <http://www.lectlaw.com/files/adr11.htm> (last visited June 29, 2011) [hereinafter BEGINNER'S GUIDE TO ADR] ("Arbitration, Mediation and other forms of ADR are generally not open to public scrutiny like disputes settled in court. The hearings and awards are kept private and confidential, which helps to preserve positive working relationships.").

13. In the only three reported cases in Washington regarding the enforceability of arbitration agreements in nursing home contracts, the court found that the contract required the claims to be arbitrated. *Estate of Eckstein ex rel. Luckey v. Life Care Ctrs. of Am., Inc.*, 623 F. Supp. 2d 1235 (E.D. Wash. 2009) (holding that the arbitration agreement between a nursing home and a former nursing home resident that was executed by the resident's attorney-in-fact was valid and enforceable under the Federal Arbitration Act (FAA) and the Washington Uniform Arbitration Act); *Nail v. Consol. Health Care Fund I*, 229 P.3d 885, 889 (Wash. Ct. App. 2010) (holding that the arbitration association's policy statement, which provided that the association would no longer accept health care cases involving individual patients without a postdispute agreement to arbitrate, did not preclude the enforcement of a nursing home resident's predispute arbitration agreement); *Woodall v. Avalon Care Ctr.-Federal Way, L.L.C.*, 231 P.3d 1252, 1258 (Wash. Ct. App. 2010) (upholding the arbitration agreement in a nursing home contract as valid and enforceable in a survival action brought by the heirs of a deceased nursing home patient).

In August 2010, the Washington Court of Appeals informed Henry's heirs that Henry's survival claims must be arbitrated under his agreement with the Avalon Care Center in Federal Way.¹⁴ As a result, Henry's heirs must argue his case in front of an arbitration panel, which will likely be selected by the nursing home,¹⁵ rather than before a judge and jury. When Henry signed the arbitration agreement on the date of his admission, he unknowingly waived his constitutional right to a jury.¹⁶ In addition, Henry signed away his right to appeal the outcome of his case, as an arbitrator's decision is almost always binding.¹⁷ Moreover, arbitration agreements often have damage caps, and even if they are not capped, the average damage award in arbitrated cases is 35% less than in nonarbitrated cases.¹⁸ While proponents of arbitration agreements argue that arbitration leads to cost-savings and a quicker judgment,¹⁹ the nursing home industry usually realizes these benefits, not the residents and their families.²⁰

Many advocates for LTC patients have argued that Congress should prohibit the use of mandatory arbitration agreements in LTC contracts.²¹ While a bill that addresses this issue, the Arbitration Fairness Act of 2009, has been introduced into Congress, it is unclear if and when a vote will be held.²² In order to address immediate concerns, a few states, such as Illinois and New Jersey, have enacted state legislation prohibiting mandatory arbitration agreements in nursing home contracts.²³ But courts

14. *Woodall*, 231 P.3d at 1252.

15. Krasuski, *supra* note 11, at 267 (“[B]ecause the arbitration clauses are often drafted by nursing home attorneys, nursing homes have the opportunity to control the terms of the arbitration to favor themselves and disadvantage residents. The agreements may specify an industry-friendly arbitration provider to administer the arbitration proceeding . . .”).

16. *Woodall*, 231 P.3d at 1252 ¶ 73 (There was factual evidence that Henry “was completely deaf” and suffered from dementia and thus could not have understood the agreement.). See Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82, 95 (2007) (“The Seventh Amendment to the U.S. Constitution guarantees that disputants in certain types of situations cannot be denied their right to a civil jury trial, absent their consent.”).

17. Lauren Gaffney, Note, *The Circle of Assent: How “Agreement” Can Save Mandatory Arbitration in Long-Term Care Contracts*, 62 VAND. L. REV. 1017, 1024 (2009) (“The arbitrator’s decision is almost always binding and cannot be appealed in court absent abuse of discretion.”).

18. Jessica Fargen, *Nursing Home Residents Often Sign Away Rights to Sue*, BOS. HERALD, Mar. 8, 2010, <http://www.globalaging.org/elderrights/us/2010/Rights.htm> (citing a study conducted by Aon Corp. for the American Health Care Association in 2009).

19. Russel Myles & Kelly Reese, *Arbitration: Avoiding the Runaway Jury*, 23 AM. J. TRIAL ADVOC. 129, 137–38 (1999).

20. Krasuski, *supra* note 11, at 293 (“Arbitration has been found to be more expensive for consumers than litigation, and its often-prohibitive fees, or forum costs, may serve to bar consumers from pursuing claims at all.”).

21. See, e.g., Laura K. Bailey, Note, *The Demise of Arbitration Agreements in Long-Term Care Contracts*, 75 MO. L. REV. 181, 182 (2010).

22. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (2009).

23. 210 ILL. COMP. STAT. 45/1-101–3A-101 (2008); N.J. STAT. ANN. § 30:13-8.1 (West 2003).

recently struck down both statutes due to incompatibility with the Federal Arbitration Act (FAA).²⁴ The FAA preempts any state law that disfavors the enforcement of arbitration agreements.²⁵ But state laws that merely govern the *procedures* of arbitration are outside the FAA's preemptive scope.²⁶ Thus, while a similar statute has not been enacted in Washington, courts will likely find that the FAA preempts any statute attempting to prohibit rather than regulate arbitration agreements.

This Comment explores the problems associated with the use of mandatory arbitration agreements in LTC contracts and proposes that Washington legislators regulate arbitration procedures in consumer arbitrations in a manner similar to legislation adopted in California. Part II of this Comment provides a brief history of arbitration agreements in the United States. It also discusses the increasing use of mandatory arbitration agreements in the LTC context. Part III examines the current approaches to challenging mandatory arbitration and ultimately concludes that these approaches are inadequate to address the problems presented by mandatory arbitration agreements in LTC contracts. Part IV proposes a new approach to controlling these agreements in LTC contracts in Washington—regulating the procedures of arbitration by requiring arbitration companies to report information about consumer claims they administer.

II. HISTORICAL BACKGROUND

The Supreme Court has taken “a bipolar approach to arbitration” throughout its history.²⁷ Although the Court traditionally rejected the use of arbitration agreements, the current Court is a strong supporter of arbitration, even where it is mandatory.²⁸ As such, mandatory arbitration agreements have become the status quo in a variety of settings, including LTC admission contracts.²⁹

A. History of Arbitration in the United States and Washington

Until 1925, courts generally disfavored the use of predispute mandatory arbitration agreements.³⁰ Many courts found these contract clauses

24. *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1219–20 (Ill. 2010); *Ruszala v. Brookdale Living Cmtys. Inc.*, 1 A.3d 806, 818 (N.J. 2010).

25. 9 U.S.C. § 2 (1947).

26. *See generally id.*

27. Gaffney, *supra* note 17, at 1023.

28. *Id.* at 1024; *see also* *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (validating mandatory arbitration agreements in consumer contracts with class-actions waivers).

29. Gaffney, *supra* note 17, at 1024–25.

30. Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1243 (2001).

unenforceable and considered them revocable at will.³¹ The rejection of arbitration agreements may have been a response to the fact that these agreements would “oust the courts of jurisdiction.”³² In 1925, however, court opinion shifted in favor of arbitration agreements as a result of Congress’s enactment of the FAA.³³ The FAA expressed congressional support of alternative dispute resolution and confirmed the valid and enforceable nature of arbitration agreements.³⁴ Section 2 of the FAA provides in pertinent part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.³⁵

The courts have interpreted the FAA as manifesting a “liberal federal policy favoring arbitration agreements.”³⁶ The Supreme Court determined that Congress enacted the FAA pursuant to its commerce authority and therefore gave courts broad preemptive power over state laws disfavoring arbitration.³⁷ Following the enactment of the FAA, many states consented to the federal government’s endorsement of arbitration.³⁸ For instance, Washington legislators have since adopted their own version of the FAA, known as the Uniform Arbitration Act.³⁹

The Court’s opinion regarding enforcement of arbitration agreements has not always been consistent. In 1953, court opinion shifted away from the liberal enforcement of arbitration agreements when the Supreme Court decided *Wilko v. Swan*.⁴⁰ In *Wilko*, the Court refused to

31. *Id.*

32. Gaffney, *supra* note 17, at 1026 (“Traditional ‘judicial jealousies’ of the arbitral forum led to the rejection of arbitration agreements that would ‘oust the courts of jurisdiction.’”) (quoting Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1, 26–27 (2004)).

33. Alderman, *supra* note 30, at 1243.

34. *See* 9 U.S.C. § 2 (1947).

35. *Id.*

36. Alderman, *supra* note 30, at 1244 (citing *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)).

37. Krasuski, *supra* note 11, at 271–72.

38. Katherine Palm, Note, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 457 (2006).

39. WASH. REV. CODE § 7.04A (2005).

40. *Wilko v. Swan*, 346 U.S. 427, 435 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480–82 (1989).

enforce the arbitration agreement between an investor and a brokerage house, holding that the “Securities Act was drafted with an eye to the disadvantages under which buyers labor.”⁴¹ Moreover, the Court found that it was “inappropriate to find that the customer had knowingly selected arbitration” because the sellers had more information available to them than the buyer.⁴² But in 1989, the Supreme Court changed course one more time and overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express*.⁴³ The Court held that *Wilko* was “incorrectly decided” and was “inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements,” which favors arbitration.⁴⁴ Since its decision in *Rodriguez de Quijas*, the Court has upheld the use of arbitration agreements in a variety of settings, including commercial and employment disputes, as well as claims under the Americans with Disabilities Act.⁴⁵ In a recent decision from April 2011, the Court went so far as to validate arbitration clauses containing class-action waivers in consumer contracts.⁴⁶ This decision may motivate companies to add these clauses to their consumer contracts in order to avoid class actions.

While arbitration and litigation are somewhat similar, there are significant differences that exist between them. First, arbitration agreements often limit the scope of discovery and the rules of evidence.⁴⁷ While it may not always be the case that there is less extensive discovery in arbitration, “it is certainly true that many arbitration clauses on their face either restrict or ban discovery.”⁴⁸ Second, unlike in litigation, where losing parties have a right to appeal the judgment, arbitration decisions are “almost always binding on the parties.”⁴⁹ The losing party cannot appeal the arbitrator’s decision in court unless there is a “gross miscarriage of justice” or “manifest disregard of the law.”⁵⁰ Third, while information about court proceedings and awards is normally available to the

41. *Id.* at 435.

42. *Id.*

43. *Rodriguez de Quijas*, 490 U.S. at 480–82.

44. *Id.* at 484.

45. Palm, *supra* note 38, at 458.

46. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

47. See Stephen Hayford & Ralph Peeples, *Commercial Arbitration: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 370–71 (1995).

48. Palm, *supra* note 38, at 478 n.172.

49. Gaffney, *supra* note 17, at 1026.

50. ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 412 (3d ed. 2005).

public, arbitration hearings are often confidential.⁵¹ Finally, arbitration agreements often cap compensatory and punitive damages.⁵²

Parties to a business-to-business contract may find that arbitration offers a number of benefits over litigation in handling contract disputes. For example, because parties may choose to be bound by limited discovery, arbitration can be less burdensome.⁵³ In addition, the confidentiality of arbitration may protect businesses from negative press attention and preserve the businesses' reputations. Arbitration may also help maintain long-term business relationships because it is often viewed as less adversarial.⁵⁴ Moreover, these agreements are substantively and procedurally fair because both parties generally are equally sophisticated and have an equal amount of bargaining power.⁵⁵

B. Arbitration Agreements in Consumer Contracts

While arbitration agreements are not inherently problematic, many critics argue that arbitration agreements are inherently unfair in consumer contracts.⁵⁶ First, consumer advocates argue that unlike in business-to-business contracts, the consumer has no meaningful choice of whether to arbitrate claims because of the disparate bargaining power between an individual and an organization.⁵⁷ In fact, one senator raised this concern prior to the enactment of the FAA, and proponents answered "that the FAA was not intended to cover arbitration agreements offered on a take-it-or-leave-it basis to captive customers or employees."⁵⁸ Second, critics challenge the assumption that arbitration costs less than litigation.⁵⁹ For example, one study by a consumer lobbying group found that "total forum costs incurred by a plaintiff's use of the American Arbitration Asso-

51. BEGINNER'S GUIDE TO ADR, *supra* note 12 ("Arbitration, Mediation and other forms of ADR are generally not open to public scrutiny like disputes settled in court. The hearings and awards are kept private and confidential, which helps to preserve positive working relationships.").

52. LOWENFELD, *supra* note 50; *see also* Suzanne Gallagher, *Mandatory Arbitration Clauses in Nursing Home Admission Agreements: The Rights of Elders*, 3 NAELA J. 187, 198 (2007).

53. LOWENFELD, *supra* note 50, at 411 ("Indeed it has been suggested that the series of pro-arbitration decisions by the U.S. Supreme Court may be in part attributable to the Court's search for alternatives to a litigation process that has become overwhelmed by discovery.").

54. KATHRYN HELNE NICKERSON, OFFICE OF CHIEF COUNSEL FOR INDUS. & SEC., INTERNATIONAL ARBITRATION (2005), <http://www.osec.doc.gov/ogc/occic/arb-98.html>.

55. *See* Alderman, *supra* note 30, at 1247-48 (quoting *Henningens v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960)) ("The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality.").

56. *See id.* at 1240-42.

57. *Id.* at 1240.

58. Gaffney, *supra* note 17, at 1029 (internal quotation marks and citations omitted).

59. Palm, *supra* note 38, at 476-77 (noting the results of a study suggesting that "in the vast majority of cases, arbitration will necessarily increase the transaction costs of litigation").

ciation in an \$80,000 claim could increase by as much as \$6,650, or 3,009%, as compared with filing in Cook County, Illinois.”⁶⁰ Third, mandatory arbitration agreements can preclude consumers from litigating their claims in a class action.⁶¹ Finally, arbitration eliminates the potential for any favorable precedent or law reform that could otherwise develop through litigation.⁶²

In an attempt to address a number of the problems surrounding mandatory arbitration of consumer contracts, lawmakers introduced the Arbitration Fairness Act into Congress in 2009.⁶³ The Act proposes the following change in the “Validity and Enforcement” provision of Section 3 of the FAA: “No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of—(1) an employment, consumer, or franchise dispute”⁶⁴ While it is difficult to determine the likelihood that the proposed legislation will pass, a similar bill was introduced in 2007 and never became law.⁶⁵ While the proposed legislation marks a significant step in attempting to curb the use of arbitration agreements in consumer contracts, it is unknown how long it will be before Congress provides an answer on the matter.

C. Arbitration Agreements in Long-Term Care Contracts in Washington

Within the last decade, LTC providers have “substantially increased their use of arbitration provisions” in admission contracts with new residents.⁶⁶ While the exact number of nursing homes that use mandatory arbitration agreements is unknown, binding arbitration has seemingly become the norm in LTC admission contracts across the country.⁶⁷ In fact, “most of the nation’s largest nursing home chains” have been found to include arbitration agreements in their admission contracts.⁶⁸

60. *See id.* at 477 (citing the results of a study conducted by Public Citizen, a national nonprofit organization founded by Ralph Nader in the early 1970s that is dedicated to representing consumer interests and rights). *See generally About Public Citizen*, PUBLIC CITIZEN, <http://www.citizen.org/about> (last visited June 29, 2011).

61. *See AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

62. Consumers generally lack the resources or political power to effectively lobby the legislature for meaningful reform. The civil justice system, however, has long been fertile ground for the establishment of consumer rights. Predispute mandatory arbitration, by precluding access to the courts, frustrates the implementation of existing consumer rights and effectively precludes the development of new ones. Alderman, *supra* note 30, at 1263–64.

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

64. *Id.* § 4.

65. Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1782is.txt.pdf.

66. Bailey, *supra* note 21, at 186.

67. *Id.* at 187.

68. Krasuski, *supra* note 11, at 268.

Increased use of the agreements is one of a number of indications that arbitration provides significant benefits to nursing homes. Another indication is that some nursing home chains will even pay residents' arbitration fees.⁶⁹ One particular story of a nursing home chain in Florida further illustrates the eagerness of the LTC industry to obtain the benefits of binding arbitration. According to the attorney for one of the plaintiffs, the nursing home chain devised a plan to sell its twelve homes with the purpose of forcing residents to sign new admission contracts containing arbitration agreements.⁷⁰ Even though the nursing home chain's attorney argued that the sale was intended to lower the value of the assets of the chain and thus decrease the monetary incentive to sue the chain, the sale nonetheless demonstrates that LTC providers are anxious to avoid litigation.⁷¹

One of the benefits that arbitration offers nursing homes is the opportunity to control the terms of arbitration. For this reason, LTC providers or their attorneys often write the arbitration agreements in LTC contracts.⁷² As a result, binding arbitration agreements allow LTC providers to write the terms of arbitration in their favor.⁷³ The arbitration agreement in Henry Woodall's contract with Avalon Care Center in Federal Way⁷⁴ typifies LTC arbitration agreements:

We agree to submit to binding arbitration for all disputes and claims for damages of any kind for injuries and losses arising from the medical care rendered or which should have been rendered after the date of this Agreement. All alleged claims for monetary damages against the facility, its owners, lessees, management organization, or their employees, officers, directors, agents, must be arbitrated including, without limitation, claims for personal injury from alleged negligence, gross negligence, malpractice, or any alleged claims based on any departure from accepted medical or health care or safety standards, emotional distress or punitive damages.

. . . .

We expressly intend that this Agreement shall bind all persons whose alleged claims for injuries or losses arise out of care rendered by the Facility or which should have been rendered by Facility after

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 267.

73. *Id.*

74. *See supra* Part I.

the date of this Agreement, including any spouse, children, or heirs of the Resident or Executor of the Resident's estate.⁷⁵

While the length and content of these agreements vary, this agreement is a fair representation of what standard arbitration agreements look like in an LTC contract.⁷⁶ At a minimum, these agreements generally waive the right to a jury trial.⁷⁷ Some arbitration clauses, like the one quoted above, attempt to limit the LTC provider's liability even further by binding the heirs and assigns of residents to arbitration, precluding wrongful death claims by residents' families. In this particular case, the Washington Court of Appeals held that heirs are not required to arbitrate their wrongful death claims where they were not parties to the agreement to arbitrate.⁷⁸ But alternative state jurisdictions where Avalon's ancillary services are located may find that these agreements are binding and enforceable.⁷⁹ Given that Avalon has ancillary services in Utah, Arizona, California, and Hawaii,⁸⁰ Avalon could insert a clause, as LTC providers have done in other states, "requiring arbitration to take place in a distant state, presenting another barrier to residents and other plaintiffs."⁸¹

Proponents of mandatory arbitration argue that there are a number of policy reasons for favoring arbitration over litigation in the LTC context. First, proponents argue that arbitration is necessary for LTC providers to be able to avoid bankruptcy because nursing homes are facing increasing liability premiums as a result of an increase in litigation and large damage awards.⁸² One study found that since 1996, the "annual rate

75. *Woodall v. Avalon Care Ctr.-Federal Way, L.L.C.*, 231 P.3d 1252, 1254–55 (Wash. Ct. App. 2010).

76. For more examples, see Gaffney, *supra* note 17, at 1025.

77. *Id.*

78. *Woodall*, 231 P.3d at 1254.

79. Different jurisdictions have provided different answers to this question. *See, e.g.*, *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004); *Herbert v. Superior Court*, 215 Cal. Rptr. 477 (1985); *Ballard v. Southwest Detroit Hosp.*, 327 N.W.2d 370 (Mich. 1982) (explaining that a wrongful death action is derivative, and a representative stands in the shoes of the decedent so that the arbitration agreement is binding on the personal representative in a subsequent wrongful death action); *Trinity Mission Health & Rehab. of Clinton v. Estate of Scott ex rel. Johnson*, 19 So. 3d 735 (Miss. Ct. App. 2008) (holding that an arbitration provision, which stated that "[t]he Resident and Responsible Party agree that any and all claims, disputes, and/or controversies between them and the Facility or its owners . . . shall be resolved by binding arbitration," encompassed a wrongful death action brought by the deceased resident's daughter, as the claim arose out of the care that the nursing facility agreed to provide in the contract).

80. "Avalon is a group of related companies that provide health care and ancillary services in Utah, Arizona, California, Washington, and Hawaii." *Corporate Information, AVALON HEALTH CARE GRP.*, http://www.avalonhci.com/corporate_information.html (last visited June 26, 2011).

81. Krasuski, *supra* note 11, at 269 (An Oklahoma nursing home's arbitration agreement requires residents to travel to New Mexico at their own expense for arbitration; a Florida nursing home's arbitration agreement requires that arbitration take place in Alabama.).

82. Palm, *supra* note 38, at 473–75.

of claims against long-term care facilities has more than doubled.”⁸³ Proponents argue that the rise in litigation costs results in a “decrease in the quality of treatment that long-term care providers can afford to offer.”⁸⁴ Second, proarbitration advocates argue the confidential nature of arbitration “is beneficial to the nursing home industry because people will not be deterred from entering nursing homes based on the media’s reporting of substandard care provided by the facilities.”⁸⁵ Finally, the proarbitration perspective maintains that a cheaper and faster forum could make the pursuit of claims more affordable and accessible, potentially reducing “the outcome-determinative quality arising out of the financial disparity between plaintiffs and defendant corporations.”⁸⁶

Conversely, opponents of mandatory arbitration argue that these agreements do not belong in the LTC context. First, they argue that these agreements are unconscionable because long-term care often occurs in response to unexpected and sudden need. As a result, residents and their families are often forced to take the first opening they can find.⁸⁷ Second, critics argue that the confidential nature of arbitration “decreases public awareness” of problems in LTC facilities and weakens “the ability of the citizenry to function as a driving force of public policy change.”⁸⁸ Also, the lack of information weakens the state’s ability to regulate these facilities. Third, opponents dispute that arbitration is cheaper and faster than litigation.⁸⁹ One study suggested that “in the vast majority of cases, arbitration will necessarily increase the transaction costs of litigation.”⁹⁰ Finally, critics of mandatory arbitration argue that arbitration often does not provide for a neutral decision-maker.⁹¹ For example, some arbitration agreements provide that the nursing home is entitled to select the arbitrators.⁹² Thus, LTC providers are in a position to benefit from an industry

83. *Id.* at 474.

84. *Id.*

85. Bailey, *supra* note 21, at 181 (citing Suzanne M. Scheller, *Arbitrating Wrongful Death Claims for Nursing Home Patients: What is Wrong With This Picture and How to Make it “More” Right*, 113 PENN. ST. L. REV. 527, 530 (2008)).

86. Palm, *supra* note 38, at 475.

87. See Gallagher, *supra* note 52, at 188 (citing *Garrison v. Superior Court*, 33 Cal. Rptr. 3d, 350, 356 (Ct. App. 2005)) (To explain why she signed an arbitration clause, plaintiff said the nursing home staff told her that in order for her mother to be admitted, she needed to sign all the paperwork.).

88. Palm, *supra* note 38, at 479.

89. *Id.* at 476–77.

90. *Id.* at 477 (quoting *The Costs of Arbitration*, PUBLIC CITIZEN (Apr. 2002), <http://www.citizen.org/documents/acf110A.pdf>).

91. Krasuski, *supra* note 11, at 267.

92. *Id.*

“repeat-player advantage” because arbitrators have an economic incentive to provide a favorable outcome for the LTC provider.⁹³

III. CURRENT APPROACHES TO CHALLENGING COMPELLED ARBITRATION

Currently, two approaches are being utilized to challenge the use of arbitration agreements in LTC contracts: litigation and legislation. The first approach attempts to identify a remedy under traditional contract theories, and the second focuses on creating a broad remedy by enacting more favorable state laws.⁹⁴ Recent case law illustrates the inadequacies of the first approach in addressing the problems posed by arbitration agreements in LTC contracts.⁹⁵ While the second approach provides the best option for protecting seniors from mandatory arbitration, the most recent legislative attempts to combat compelled arbitration have failed.⁹⁶

A. First Approach: Litigation

Case law regarding arbitration agreements in the LTC context is a fairly new development nationwide. The first case to reach a state appellate court on the issue was in South Carolina in 1993.⁹⁷ In Washington, there are only three reported cases that address the enforceability of arbitration agreements in nursing home contracts. The earliest case is from June 2009, and the other two are from March and May 2010.⁹⁸ But the “sunshine retirement states” like Florida and California, which generate the majority of case law on the issue,⁹⁹ provide a fairly good indication of the approaches utilized by parties challenging compelled arbitration.

Given that courts typically consider nursing home contracts to be “transactions involving ‘interstate commerce,’” the FAA will typically

93. See Alderman, *supra* note 30, at 1257 (noting that while the repeat-player bias is difficult to prove or disprove, the limited data available suggests that the repeat player does fare better in arbitration relating to consumer contracts). For example, “In one of the few instances in which data is available, First USA reported that out of nearly 20,000 arbitrations between the bank and consumers in 1999, First USA prevailed in all but eighty-seven, a success rate of 99.6%.” *Id.*

94. See Palm, *supra* note 38, at 462–79.

95. See, e.g., Etting v. Regents Park at Aventura, Inc., 891 So. 2d 558, 558 (Fla. Dist. Ct. App. 2004) (per curiam); Philpot v. Tenn. Health Mgmt., Inc., No. M2006-01278-COA-R3-CV, 2007 WL 4340874, at *5 (Tenn. Ct. App. Dec. 12, 2007).

96. See Carter v. SSC Odin Operating Co., 927 N.E.2d 1207 (Ill. 2010); Ruzsala v. Brookdale Living Cmtys. Inc., 1 A.3d 806, 818 (N.J. 2010).

97. Gaffney, *supra* note 17, at 1030 (noting that *Timms v. Greene*, 427 S.E.2d 642 (S.C. 1993), was the first such case to reach a state appellate court).

98. Estate of Eckstein *ex rel.* Luckey v. Life Care Ctrs. of Am., Inc., 623 F. Supp. 2d 1235 (E.D. Wash. 2009); Nail v. Consol. Health Care Fund I, 229 P.3d 885, 889 (Wash. Ct. App. 2010); Woodall v. Avalon Care Ctr.-Federal Way, L.L.C., 231 P.3d 1252 (Wash. Ct. App. 2010).

99. Gaffney, *supra* note 17, at 1030.

govern arbitration agreements in nursing home contracts.¹⁰⁰ Although plaintiffs have tried to argue that nursing home admission contracts do not constitute interstate commerce, the argument almost never succeeds.¹⁰¹ Section 2 of the FAA declares that arbitration provisions will be subject to invalidation only for the same grounds applicable to contractual provisions generally.¹⁰² Likewise, under Washington's Uniform Arbitration Act, an agreement to arbitrate is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of [a] contract."¹⁰³ As a result, courts will enforce arbitration agreements in LTC contracts in Washington unless the provision violates state contract law.¹⁰⁴

By far, the most common contract theory utilized to challenge arbitration agreements in LTC contracts is unconscionability.¹⁰⁵ Two plaintiffs in the three Washington cases concerning arbitration agreements in LTC contracts raised the issue of unconscionability.¹⁰⁶ But the party attempting to strike down a mandatory arbitration agreement is required to "present an exceedingly strong factual showing" that the agreement was either procedurally or substantively unfair.¹⁰⁷ In Washington, "[a]n arbitration agreement may be substantively unconscionable if it 'triggers costs effectively depriving a plaintiff of limited pecuniary means of a forum for vindicating claims.'"¹⁰⁸ Additionally, plaintiffs in Washington may prevail under the theory of procedural unconscionability by demonstrating "a lack of meaningful choice."¹⁰⁹ But satisfying the demanding evidentiary standard is a difficult, if not insurmountable, task.

100. Bailey, *supra* note 21, at 186.

101. Gaffney, *supra* note 17, at 1029.

102. Section 2 states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Federal Arbitration Act, 9 U.S.C. § 2 (1947). Section 1-14 was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233).

103. WASH. REV. CODE § 7.04A.060(1).

104. *See, e.g.,* Estate of Eckstein *ex rel.* Luckey v. Life Care Ctrs. of Am., Inc., 623 F. Supp. 2d 1235, 1240 (E.D. Wash. 2009); Woodall v. Avalon Care Ctr.-Federal Way, L.L.C., 231 P.3d 1252 (Wash. Ct. App. 2010); Nail v. Consol. Health Care Fund I, 229 P.3d 885, 889 (Wash. Ct. App. 2010).

105. Bailey, *supra* note 21, at 190; *see also* Amy Parise Delaney, *Maneuvering the Labyrinth of Long-Term Care Admissions Contracts*, 4 NAELA J. 35, 60 (2008).

106. Estate of Eckstein, 623 F. Supp. 2d at 1238; Woodall, 231 P.3d at 1252 ¶¶ 52-67.

107. Gaffney, *supra* note 17, at 1034.

108. Woodall, 231 P.3d at 1252 ¶ 54.

109. *Id.* ¶ 68.

The case of Henry Woodall¹¹⁰ illustrates the difficult task of proving unconscionability.¹¹¹ After rejecting Clifford's (Henry's son) substantive unconscionability claim, the Division I Court of Appeals considered the claim that the mandatory arbitration agreement in Henry Woodall's nursing home contract was procedurally unconscionable. The court explained that in determining whether an agreement is procedurally unconscionable, courts look to the circumstances surrounding the transaction at issue.¹¹² The court said, "The circumstances include the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the terms were hidden in a maze of fine print."¹¹³

First, the court determined that the terms of the contract were not "hidden in a maze of fine print" and found a lack of evidence in the record from anyone with personal knowledge of "the manner in which the contract was entered."¹¹⁴ Next, the court considered the question of whether Henry had a "reasonable opportunity to understand the terms of the contract."¹¹⁵ Clifford's claim was that Henry did not have the capacity to sign the arbitration agreement.¹¹⁶ Clifford presented the court with a declaration that stated that Henry "was completely deaf from a young age until the time of his death and the agreement could not have been explained to him verbally because he could not hear."¹¹⁷ In addition, the declaration stated that Henry "did not have the mental ability to understand anything he read," and that "there is no way that he could have understood a document as complicated as the [arbitration] Agreement on [the date he signed it]."¹¹⁸ Clifford also submitted a statement by Dr. Glass, a physician qualified to diagnose dementia, who said Henry "could not have understood this agreement [It] is beyond [Henry's] level of comprehension."¹¹⁹ The court, however, held "the evidence did not show by clear, cogent, and convincing evidence that Henry lacked the capacity to execute the [arbitration] agreement."¹²⁰ Thus, the court held that Henry's arbitration agreement was valid and enforceable.¹²¹

110. *See supra* Part I.

111. *Woodall*, 231 P.3d at 1252. *Woodall* was only the second reported case in Washington to address the issue of unconscionability in a nursing home contract.

112. *Id.* at 1252 ¶¶ 52–87.

113. *Id.* ¶ 68 (internal quotations and citations omitted).

114. *Id.* ¶ 71.

115. *Id.*

116. *Id.* ¶ 72.

117. *Id.* ¶ 73.

118. *Id.*

119. *Id.* ¶ 74 n.134.

120. *Id.* ¶ 78.

121. *Id.*

Other jurisdictions are also hostile to the doctrine of unconscionability. For example, the Third District Court of Appeals of Florida enforced an arbitration agreement despite the plaintiff's claim that his mother was legally blind when she signed her nursing home contract.¹²² The court held that "[n]o party to a written contract in [Florida] can defend against its enforcement on the sole ground that he signed it without reading it."¹²³ While a few unconscionability challenges across the country have prevailed, "the vast majority have failed."¹²⁴ In any event, "characterizing mandatory arbitration agreements as a destruction of rights seems to be a waste of energy"¹²⁵ in an environment like Washington, where congressional and judicial support for arbitration remains strong. Therefore, because arbitration is still strongly supported in Washington State, litigation is an inadequate tool for combating compelled arbitration in nursing home contracts.

B. Second Approach: Legislation

The legislative approach aims to find a broader remedy for the problem, particularly for individuals who are unable to offer sufficient evidence of unconscionability or succeed on other contract theories. Current legislative approaches have attempted to either enact state laws prohibiting arbitration agreements in LTC contracts or to adopt model or uniform arbitration agreements for LTC providers. But courts have recently rejected such efforts as a violation of the FAA. Thus, these approaches do not offer a viable solution for nursing home residents in Washington.

Illinois attempted to address the problems associated with the use of arbitration agreements in nursing home contracts by enacting a state law that prohibited them. In 1988, Illinois state legislature enacted the Nursing Home Care Act (NHCA).¹²⁶ The NHCA provided that "[a]ny waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect."¹²⁷ In April 2010, however, the Illinois Supreme Court ruled that the NHCA provision is

122. *Etting v. Regents Park at Aventura, Inc.*, 891 So. 2d 558, 558 (Fla. Dist. Ct. App. 2004) (per curiam).

123. *Id.*

124. Gaffney, *supra* note 17, at 1033–34. For examples of cases where an unconscionability argument failed, see *Etting*, 891 So. 2d at 558, and *Philpot v. Tenn. Health Mgmt., Inc.*, No. M2006-01278-COA-R3-CV, 2007 WL 4340874, at *5 (Tenn. Ct. App. Dec. 12, 2007).

125. Palm, *supra* note 38, at 481.

126. 210 ILL. COMP. STAT. 45/1-101–3A-101 (West 2008).

127. *Id.* at 45/3-606.

preempted by the FAA.¹²⁸ The court noted that the FAA states that any arbitration agreement shall be enforced “save upon such grounds as exist at law or in equity for the revocation of any contract.”¹²⁹ Further, the court held that the “public policy behind the antiwaiver provisions of sections 3-606 and 3-607 of the Nursing Home Care Act are not grounds as exist at law or in equity for the revocation of any contract within the meaning of section 2 of the FAA.”¹³⁰

Likewise, in 1976, New Jersey enacted the Nursing Home Responsibilities and Rights of Residents Act. The Act rendered invalid and unenforceable “[a]ny provision or clause waiving or limiting the right to sue . . . between a patient and a nursing home.”¹³¹ But in August 2010, the Superior Court of New Jersey declared the provision invalid.¹³² The court held that “the FAA’s clear authorization nullifies the specific prohibition of arbitration provisions in nursing home or assisted living facilities’ contracts contained in *N.J.S.A.* 30:13-8.1.”¹³³ Additionally, the court stated that “[o]ur State’s prohibition of arbitration agreements in nursing home contracts, designed to protect the elderly, is thus irreconcilable with our national policy favoring arbitration as a forum for dispute resolution.”¹³⁴ Therefore, these examples of failed legislation from Illinois and New Jersey illustrate that Washington courts will likely strike down any statute enacted in Washington purporting to limit the use of arbitration agreements in LTC contracts.

California took an alternative legislative approach to addressing the problems raised from using arbitration agreements in LTC admission contracts. In 2006, California’s Department of Public Health (DPH) established a Standard Admission Agreement that nursing homes were required to use.¹³⁵ Critics of arbitration agreements argue that “standard nursing home admission agreements . . . improve procedural fairness by dictating how such provisions may be presented and ratified.”¹³⁶ But use of the standardized agreement has been suspended since March 2007 due to a court order obtained by nursing home operators who challenged it.¹³⁷

128. *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1219–20 (Ill. 2010).

129. *Id.* at 1212.

130. *Id.* at 1220 (internal quotation marks omitted).

131. N.J. STAT. ANN. § 30:13-1 (1976).

132. *Ruszala v. Brookdale Living Cmty. Inc.*, 1 A.3d 806, 818 (N.J. 2010).

133. *Id.* at 818–19.

134. *Id.*

135. CAL. CODE REGS. tit. 22, § 72516 (2006).

136. Palm, *supra* note 38, at 481.

137. *Nursing Home Admission Agreements*, CAL. ADVOCATES FOR NURSING HOME REFORM, http://canhr.org/factsheets/nh_fs/html/fs_admissionagreement.htm (last visited June 29, 2011) [hereinafter *Nursing Home Admission Agreements*]; CAL. DEPT. OF HEALTH, DPH-05-022 STANDARD

While the DPH announced that it is revising the Standard Admission Agreement to comply with the court order, most nursing homes are likely to use their own admission agreements until the DPH reissues the standard agreement.¹³⁸ Although the viability of standard admission agreements remains unsettled, standardization could potentially be a beneficial option for Washington.

IV. PROPOSED SOLUTION FOR WASHINGTON: REPORTING REQUIREMENTS FOR CONSUMER ARBITRATIONS

The most effective way to address the issues surrounding arbitration agreements in the LTC context in Washington is from a practical, policy-based perspective. Given that arbitration is a likely forum for dispute resolution between elderly residents and LTC providers, reform efforts should be directed toward ensuring that the arbitration forum is more fair and equitable. While it is clear that any state law that disfavors the enforcement of arbitration agreements in nursing home admission contracts will be preempted by the FAA, state laws that govern the procedures of arbitration but do not affect its enforcement are outside the Act's preemptive scope.¹³⁹ Thus, Washington could address a number of the problems posed by arbitration in the nursing home context by implementing government regulation of arbitration procedures.

Washington should consider adopting a statute requiring arbitration companies to report information about consumer claims they administer,¹⁴⁰ which is similar to the law adopted in California. The California law currently serves to address the problems presented by the secrecy of arbitration in the LTC context as well the repeat-player problem.¹⁴¹ These procedures, however, are far from perfect and fail to address other problems, such as the lack of an appeal process and damage caps. Still, they provide for a forum that is less slanted in favor of LTC providers by allowing for public accountability of private arbitrations.¹⁴²

A. California's Reporting Requirements for Consumer Arbitrations

In 2003, California enacted California Code of Civil Procedure Section 1281.96, requiring private arbitration companies to collect and pro-

ADMISSION AGREEMENT, <http://www.cdph.ca.gov/services/DPOPP/regs/Pages/DPH-05-022,StandardAdmissionAgreement.aspx> (last visited June 30, 2011).

138. *Nursing Home Admission Agreements*, *supra* note 137.

139. *See* 9 U.S.C. § 2 (1947).

140. Such a reporting requirement would include claims by families against LTC companies.

141. 2002 Cal. Legis. Serv. ch. 1158 (West).

142. *Id.*

vide specified data regarding the type, quantity, and certain particulars of consumer arbitrations they administer.¹⁴³ The pertinent portion of the statute reads as follows:

[A]ny private arbitration company that administers or is otherwise involved in, a consumer arbitration, shall collect, publish at least quarterly, and make available to the public in a computer-searchable format, which shall be accessible at the Internet Web site of the private arbitration company, if any, and on paper upon request, all of the following information regarding each consumer arbitration within the preceding five years:

(1) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity.

....

(3) Whether the consumer or nonconsumer party was the prevailing party.

(4) On how many occasions, if any, the nonconsumer party has previously been a party in an arbitration or mediation administered by the private arbitration company.

....

(7) The type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing.

(8) The amount of the claim, the amount of the award, and any other relief granted, if any.

(9) The name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party.¹⁴⁴

The legislative history of the statute reveals that one of the arguments asserted by proponents of the law was that it would serve to address the repeat-player problem.¹⁴⁵ Proponents said that "the bill is designed to reduce incentives to favor corporate parties, and to help address mounting public skepticism about the fairness of such arbitrations."¹⁴⁶ The Consumers Union argued:

[This law would] provide greater accountability for arbitration provider organizations by requiring them to plainly disclose to the public information such as the number of arbitrations handled for a par-

143. CAL. CIV. PROC. CODE § 1281.96 (2004).

144. *Id.*

145. 2002 Cal. Legis. Serv. ch. 1158 (West).

146. *Id.*

particular business and the outcome of those arbitrations. Consumers deserve to know how many other cases a private judging company such as the American Arbitration Association [AAA] has handled for a particular business . . . and whether the business or the consumer won most of those cases.¹⁴⁷

Before enacting the statute, California legislators rejected arguments made by the California Dispute Resolution Council that the costs associated with the proposed reporting duty would “impose a hardship on JAMS [Judicial Arbitration Mediation Services] and any community based programs respectively because these providers do not currently collect or collate this information.”¹⁴⁸ Legislators also rejected the argument that “arbitration companies are being required inappropriately to act as public reporting agencies.”¹⁴⁹ Instead, legislators agreed with consumer advocates who argued that “problems of unfair processes are more acute today than ever because mandatory pre-dispute arbitration clauses have proliferated in consumer contracts ranging from credit cards and telephone service to home loans, health care and consumer goods.”¹⁵⁰

B. Effects of Adopting Similar Legislation in Washington

Currently, private arbitration companies like JAMS are able to keep disputes between families and LTC providers in Washington hidden from the public.¹⁵¹ For instance, Washington residents are unable to learn about the injuries suffered by Henry Woodall¹⁵² and about the claim made on behalf of Henry’s estate against the Avalon Care Center of Federal Way (Avalon).¹⁵³ Residents are unable to determine whether the Woodall family was awarded damages and, if so, how much.¹⁵⁴ Assuming JAMS arbitrated the claim, residents are unable to research how

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Statement of Ethical Principles for the American Arbitration Association*, AM. ARB. ASSOC., <http://www.adr.org/sp.asp?id=22036> (last visited July 22, 2011); *Arbitrators Ethics Guidelines*, JUDICIAL ARB. MEDIATION SERVS., <http://www.adr.org/sp.asp?id=22036> (last visited June 29, 2011) [hereinafter *Arbitrator’s Ethical Guidelines*] (“Unless otherwise agreed by the Parties, or required by applicable rules or law, an Arbitrator should keep confidential all matters relating to the Arbitration proceedings and decisions.”); *Arbitration Rules*, WASH. ARB. & MEDIATION SERV. (Jan. 2011), <http://www.usamwa.com/PDF%20files/2011%20WAMS%20ARBITRATION%20RULES.pdf> [hereinafter *WAMS Arbitration Rules*] (“Confidential Proceedings. All arbitration proceedings are confidential to the extent allowed by law.”).

152. *See supra* Parts I, III.

153. *Arbitrator’s Ethical Guidelines*, *supra* note 151; *WAMS Arbitration Rules*, *supra* note 151.

154. *Arbitrator’s Ethical Guidelines*, *supra* note 151; *WAMS Arbitration Rules*, *supra* note 151.

many times Avalon has used JAMS's services in the past or how many times Avalon was successful in those prior arbitrations.¹⁵⁵ Residents are also unable to learn about which arbitrators Avalon used in the Woodall dispute, and how many times Avalon has previously won before those particular arbitrators.¹⁵⁶ By adopting a reporting requirement statute for consumer arbitrations like the one adopted in California, families in Washington would have access to this currently confidential information.¹⁵⁷

Providing Washington residents with this currently confidential information is consistent with public policy and will accomplish two objectives. First, reporting requirements for consumer arbitrations will benefit LTC residents and Washington citizens by increasing public awareness about possible problems with LTC facilities, and will allow for government oversight of LTC facilities.¹⁵⁸ By eliminating the secrecy of consumer arbitrations, the private arbitration process could no longer be used to hide abuse and neglect from the public. The need for public oversight is particularly great in the nursing home context because "[n]ursing homes are largely publicly funded by our tax dollars through Medicare and Medicaid programs and should not be permitted to use arbitration in efforts to curb public scrutiny."¹⁵⁹ Second, enacting a statute similar to California's would improve the chance that the arbitration forum will be more fair and equitable to LTC residents and their families. As the proponents of the California law noted, the reporting requirements are designed to reduce arbitrators' incentives to favor corporate parties by allowing for public accountability.¹⁶⁰

V. CONCLUSION

As aging baby boomers begin planning for long-term care, the issues surrounding the long-term care industry are likely to intensify. All taxpayers will bear the costs of substandard care, as injured residents will likely turn to Medicare and Medicaid to pay for their injuries.¹⁶¹ Thus, it

155. *Arbitrator's Ethical Guidelines*, *supra* note 151.

156. *Id.*

157. See CAL. CIV. PROC. CODE § 1281.96 (2004).

158. Krasuski, *supra* note 11, at 300-01 ("[P]oliticians and government agencies are often moved to act only after a scandal is reported in the media and engenders public outrage, the privacy offered by arbitration works against development of consumer protection policies.").

159. *Id.* at 300.

160. 2002 Cal. Legis. Serv. ch. 1158 (West).

161. LAWRENCE FROLIK & ALISON MCCHRYSTAL BARNES, *ELDER LAW: CASES AND MATERIALS* 280 (4th ed. 2007) (About 60% of nursing home and home care services are paid for by government programs, and in 2002, the amount spent by the government on long-term care was \$86 billion.).

is imperative that Washington takes steps to protect the rights of seniors and ensure that nursing home residents are provided with adequate care.

Mandatory arbitration agreements are against public policy because the confidential nature of arbitration proceedings decreases public awareness and impedes government oversight of abuse and misconduct in nursing homes. The *Seattle Times* special report on abuse in adult family homes illustrated how public awareness about problems with LTC facilities serves as a driving force for public policy change. Following the *Seattle Times* investigative reports, Washington Governor Christine Gregoire ordered DSHS to review its oversight of the adult-home industry.¹⁶² By April 2010, DSHS had “recommended nearly a dozen new laws and launched reforms to rein in the growing industry.”¹⁶³

In addition to being against public policy, mandatory arbitration agreements are unfair to residents and their families. Mandatory arbitration agreements require seniors to give up their right to a jury trial and their right to an appeal. Moreover, arbitration is generally an unfavorable forum for residents and their families because nursing home corporations can draft the terms of arbitration and select arbitrators to benefit themselves. Also, damages are often capped, and even if they are not, they are often significantly lower than at trial.

Congress should act swiftly to prohibit mandatory arbitration agreements in LTC contracts by enacting the Arbitration Fairness Act of 2009.¹⁶⁴ In the meantime, the Washington legislature should consider more immediate solutions to protect the rights of seniors. Approaching the issue from a practical, policy-based perspective is the most effective way to achieve this goal.

Because the FAA will preempt any state law that attempts to prohibit arbitration, arbitration must be accepted as a likely forum for handling disputes between residents and LTC providers. Hence, efforts should be directed toward improving the fairness of this forum. Because the regulation of arbitration procedures is outside the preemptive scope of the FAA, Washington should consider adopting a statute that regulates arbitration by requiring arbitration companies to report information about the consumer claims they administer. While this regulation would not address all of the issues surrounding arbitration, it will protect seniors from poor treatment by increasing public oversight of the LTC industry. Moreover, it will reduce arbitrators’ incentives to favor corporate parties, thereby improving the chance that the arbitration forum will be more fair

162. Michael Berens, *DSHS Seeks Crackdown on Adult Family Homes*, SEATTLE TIMES, Apr. 8, 2010, http://seattletimesnwsourc.com/html/localnews/2011562465_seniors09m.html.

163. *Id.*

164. *See supra* Part II.

and equitable. By enacting these proposed reforms, Washington legislators will ensure that the cries for help from those abused in LTC facilities are not stifled by mandatory arbitration agreements.