# THE FATAL FIALA FLAW: Hey! Why Not Just Make Arbitration Agreements Mandatory?

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*This Article discusses the ability of healthcare agents to bind their principals with arbitration agreements when admitting their principals to nursing homes. A recent Illinois appellate court decision had the unfortunate effect of allowing nursing homes to expand the authority of healthcare agents to encompass arbitration agreements by simply making such agreements a requirement for admission. Although this ruling has the potential to further disadvantage people who are already unable to care for themselves, this Article will discuss approaches that can be used to correct the misstep.*

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## I. INTRODUCTION

According to the Centers for Disease Control and Prevention, in 2013 there were 1.4 million nursing home residents in the United States, and as the baby boomer generation ages, this number is expected to skyrocket.[1] Moving a parent or loved one into a nursing home is often one of the most painful and difficult decisions that a person will have to make, and the law in Illinois is now making the decision-making process even more worrisome.[2] Generally, healthcare proxies are selected when a person becomes unable to properly make their own healthcare decisions. A person usually selects his or her loved ones to act as healthcare proxies, and naturally those loved ones care deeply about their principals.[3] This makes the decision to place a person in a nursing home extremely difficult because it corresponds with deterioration in health, a fall, or some other difficulty.[4] The admission process into a nursing home is difficult for both the soon-to-be resident and their loved ones, and both will struggle with these dramatic changes. While their principals are in an emotionally weakened state, these healthcare proxies are called upon to make difficult decisions about how their loved one will be cared for.[5] Families often disagree about the course of treatment to be taken, which facility should be used, and any number of other issues; this strife further adds to the complexity of the decision making process.[6] Once a care facility is selected, a stack of paperwork is brought out for the proxies to read and fill out, and unsurprisingly, proxies often overlook some details in the mountain of paperwork.[7] Arbitration agreements are one such component in the admission packet that is often overlooked and frequently misunderstood.[8] These arbitration agreements are generally forgotten until the woeful day when

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1. CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/fastats/nursing-home-care.htm (last visited Dec. 23, 2015).

2. Sarah Baldauf, *Step 1: Decide if a Nursing Home is Necessary*, U.S. NEWS & WORLD REP. HEALTH (Mar. 11, 2009, 3:00 PM), http://health.usnews.com/health-news/best-nursing-homes/articles/2009/03/11/figure-out-whether-a-nursing-home-is-needed.

3. *Giving Someone a Power of Attorney for Your Health-Care*, AM. BAR ASS'N iii (2011), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/2011_aging_hcdec_univhcpaform_4_2012_v2.authcheckdam.pdf [hereinafter *Giving Someone a Power of Attorney for Your Health-Care*].

4. Baldauf, *supra* note 2.

5. Lisa Schencker, *Nursing Homes' Use of Binding Arbitration Comes Under Fire*, MOD. HEALTHCARE (Aug. 8, 2015), http://www.modernhealthcare.com/article/20150808/MAGAZINE/308089979.

6. *Giving Someone a Power of Attorney for Your Health-Care*, *supra* note 3.

7. *See* Schencker, *supra* note 5.

8. Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42168, 42211 (proposed July 16, 2015) (codified November 2016 as 42 C.F.R. § 483.70(n)).

something goes terribly wrong for the resident.[9] Then, when the resident seeks to bring suit against the nursing home, the healthcare provider moves to compel arbitration, and a legal battle ensues.[10] There has been significant disagreement about the use of arbitration agreements in nursing home contexts, but the Federal Arbitration Act preempts most state legislation that has sought to categorically exclude such provisions.[11] Recently, Illinois, among other states, has exacerbated the issue by holding that healthcare agents' authority to bind their principals to arbitration could be expanded by healthcare providers.[12] The recent ruling expanded the authority of healthcare proxies to bind their principals to agreements that are not well understood and are highly controversial. The authority of healthcare proxies is generally limited to healthcare decisions, but in some contexts the line between what is considered a healthcare decision and what is not becomes unclear.[13] The Second District Appellate Court in Illinois ruled that when arbitration agreements were required for admission to a healthcare facility the healthcare agent could bind the principal to arbitration even though the agent would not have had the authority if the agreement were not a requirement.[14] This ruling gives nursing home facilities the proverbial nod to require arbitration agreements in all of their admission packets, which is exactly what state legislatures and the Center for Medicare & Medicaid Services (CMS) has sought to prevent.[15]

This Comment will discuss the basics of healthcare proxies, and then provide an analysis of *Fiala v. Bickford Senior Living Group*, which is the seminal Illinois case regarding the expansion of healthcare proxy authority.[16] This analysis will be followed by general background information regarding the authority of healthcare agents and nursing home arbitration agreements. Next, there will be an analysis on the three major schools of thought across the country regarding the authority of healthcare agents. These three schools of thought will be referred to as the "Broad-scope," "Narrow-scope," and "Conscionable" groups. Then, this Comment will analyze some potential approaches Illinois can and should implement in order to improve Illinois law. Lastly, this Comment will take a look at how recent rules proposed by the CMS might affect the issue of whether and when healthcare agents have the authority to bind their principals to arbitration.

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9. Schencker, *supra* note 5.
10. Schencker, *supra* note 5.
11. *See* Carter v. SSC Odin Operating Co., 927 N.E.2d 1207, 1215 (Ill. 2010).
12. Fiala v. Bickford Senior Living Grp., 32 N.E.3d 80, 93 (Ill. App. Ct. 2015).
13. Hogan v. Country Villa Health Servs., 55 Cal. Rptr. 3d 450, 454-55 (Cal. Ct. App. 2007).
14. *Fiala*, 32 N.E.3d at 93.
15. Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42211 (proposed July 16, 2015) (to be codified at 42 C.F.R. § 483.70(n)).
16. *Fiala*, 32 N.E.3d at 80.

## II. BACKGROUND

### A. HEALTHCARE PROXIES

As people become unable to take care of themselves someone else is often appointed to make healthcare decisions for them; this relationship is known as a healthcare proxy.[17] There are three types of relationships associated with healthcare proxies: agents, surrogates, and guardians.[18] This article will be focusing on healthcare agents and surrogates, because these agency relationships are the most common with nursing home residents.

A healthcare agent can also be known as a "durable power of attorney for healthcare."[19] The difference is solely based on what a particular state chooses to refer to the relationship as, and is known as a "healthcare agent" in Illinois.[20] Illinois healthcare agencies are controlled by statute[21] where a healthcare agent is defined as, "an agency governing any type of healthcare, anatomical gift, autopsy or disposition of remains for and on behalf of a patient and refers to the power of attorney or other written instrument defining the agency or the agency, itself, as appropriate to the context."[22] These agents are granted power through an advanced directive which legally names them as the other person's decision maker.[23] The decision maker is known as the agent, and is authorized to make decisions on behalf of the principal—which in this case would be the person the treatment is on the behalf of.

Healthcare surrogates differ from healthcare agents because there is generally no formal document stating that the surrogate has control over healthcare decisions.[24] This role is usually filled out of necessity by family members or even close friends.[25] These proxies are required because of an absence of a formal agency relationship, and accordingly have less decision

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17. *Making Medical Decisions for Someone Else: A How-To Guide*, AM. BAR ASS'N 1 (2009), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_bk_proxy_guide_gen.authcheckdam.pdf [hereinafter *Making Medical Decisions for Someone Else*].

18. *Id.*

19. *Id.*

20. *Fiala*, 32 N.E.3d at 93.

21. 755 ILL. COMP. STAT. ANN. 45/4-4 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.).

22. 755 ILL. COMP. STAT. ANN. 45/4-4(c) (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.).

23. *Making Medical Decisions for Someone Else*, *supra* note 17.

24. *Making Medical Decisions for Someone Else*, *supra* note 17.

25. *Making Medical Decisions for Someone Else*, *supra* note 17.

making authority.[26] In Illinois, healthcare surrogates are controlled by the Health Care Surrogate Act.[27]

When selecting a healthcare proxy, people are recommended to select someone who they are able to talk to about their wishes, that lives fairly close, that they trust, that can handle conflicting opinions, and who will be a strong advocate if the healthcare provider is unresponsive.[28] Naturally, the choice for such an appointment is someone who is extremely close with the resident, and as such the person probably cares deeply for the resident.[29] However, the people selected to be healthcare agents rarely have any legal training and can quickly become overwhelmed by the experience.[30] Arbitration agreements are frequently buried in stacks of papers that the agents are supposed to thoroughly read and then sign, but nonetheless, these provisions often go unnoticed, are not understood, or are thought to be required—even when they are not.[31] Disputes about the enforceability of arbitration agreements arise when grievances are brought before the court by a resident, or on the behalf of a resident, against the healthcare provider.[32] The residents, or their agents, then seek to have these agreements set aside on the grounds that the proxy did not have the authority to bind the principal to arbitration.[33]

## B. AUTHORITY AS A HEALTHCARE AGENT

A healthcare power of attorney creates a fiduciary relationship between agents and their principals.[34] These agents are limited to matters involving healthcare, and should have no authority to manage or control a principal's affairs outside the scope of healthcare decisions unless expressly provided in the directive that gave the agent authority.[35] An agent may have actual or apparent authority to act on behalf of the principal, and actual authority may be expressed or implied.[36] Most cases where a healthcare agent's authority to bind the principal to an arbitration agreement is called into question hinges on whether the agent had actual authority.[37] Actual authority tends to be the

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26. *Making Medical Decisions for Someone Else*, *supra* note 17.
27. 755 ILL. COMP. STAT. ANN. 40/5 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.).
28. *Giving Someone a Power of Attorney for Your Health-Care*, *supra* note 3.
29. *Giving Someone a Power of Attorney for Your Health-Care*, *supra* note 3.
30. *See* Schencker, *supra* note 5.
31. *See* Schencker, *supra* note 5.
32. *See* Schencker, *supra* note 5.
33. Fiala v. Bickford Senior Living Grp., 32 N.E.3d 80, 91 (Ill. App. Ct. 2015).
34. *In re* Estate of Stahling, 987 N.E.2d 1033, 1040 (Ill. App. Ct. 2013).
35. *Id.* at 1040.
36. Patrick Eng'g, Inc. v. Naperville, 976 N.E.2d 318, 329 (Ill. 2012).
37. *E.g.*, Dickerson v. Longoria, 995 A.2d 721, 731 (Md. 2010); Curto v. Illini Manors, Inc., 940 N.E.2d 229, 232 (Ill. App. Ct. 2010).

crux of the issue because the actual language of an agency agreement sets limitations on the agent's authority.[38] This is true for durable power of attorneys, healthcare surrogates, and healthcare proxies.[39] Express authority is "actual authority that a principal has stated in very specific or detailed language."[40] Implied authority is actual authority to do what is necessary to perform an agent's expressed responsibilities or to act in a manner that the agent reasonably believes is in keeping with the principal's objectives based on his manifestations.[41] If a principal's instructions or grant of authority leaves room for the agent to exercise discretion regarding the limits of his or her authority then the agent should look at the potential consequences that the actions may create for the principal.[42] If the consequences are particularly serious then the agent's authority to perform such acts should be questioned.[43] Some situations where reasonable agents should understand that that their actions would be outside of the scope of authority that the principal intended to authorize are instances where the act "create[s] no prospect of economic advantage for [the] principal" or where the act would "create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal."[44]

## C. ARBITRATION

Arbitration is defined as:

> A dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute. The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party.[45]

38. *See Fiala*, 32 N.E.3d at 89-90.
39. *See id.*
40. RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. b (AM. LAW INST. 2006).
41. *Id.*
42. RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. c (AM. LAW INST. 2006).
43. RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h (AM. LAW INST. 2006).
44. *Id.*
45. *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Despite significant litigation and numerous struggles to avoid arbitration, there are in fact some benefits to arbitration in particular circumstances.[46] Arbitration can benefit parties by being faster and more cost effective than a trial.[47] It can be more economical due to lower discovery costs and fewer pre-trial motions.[48] Arbitration can also, arguably, speed along the recovery process.[49] But, arbitration is a "creature of contract," and so it is the wording and language of each particular provision that determines the scope and enforceability of an arbitration provision.[50]

Arbitration was originally intended for transactions between parties with relatively equal bargaining power, but these provisions are now sprinkled throughout even the most unassuming consumer transactions.[51] Nursing homes view arbitration agreements as a chance to avoid costly litigation and to limit the damage to their reputations, and so these agreements have become extremely prevalent despite how unfavorable they can be for the residents.[52] The problem is that many of the residents and their family members, who generally become their healthcare agents, do not read these documents before they sign them, and these agreements are never explained to them.[53] Even those that do read the documents often do not understand what an arbitration agreement is.[54] Furthermore, the experience of admitting a loved one into a nursing home can already be a difficult and stressful time for family members, and the emotional toll adds on to the whirlwind of change and confusion that arises during the search for an acceptable facility, getting their loved one admitted, and then trying to get him or her situated.[55] Unfortunately, many nursing home facilities use this general state of upheaval for their own nefarious gain. As the masters of the arbitration contracts, these facilities are able to significantly mitigate their own risk and exposure while substantially burdening residents and capping any potential ability to recover against them.[56]

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46. *See* Paul J. Masinter & Nicholas J. Wehlen, *Arbitration: The Good, the Bad, and the Ugly*, AM. BAR 1, http://apps.americanbar.org/buslaw/newsletter/0038/materials/pp8.pdf (last visited Sept. 30, 2016).

47. *Id.*

48. *Id.* at 2.

49. *Id.* at 4.

50. *Id.* at 3.

51. Anne E. Krasuski*, Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 263 (2004) [hereinafter Krasuski].

52. *Id.*

53. *Id.*

54. *Id.* at 264.

55. *See id.* at 263-64.

56. Krasuski, *supra* note 51, at 267-68.

All the while, the residents and their families are completely oblivious until it is too late.[57]

When nursing homes side step the court system through arbitration there are dramatic repercussions for residents, because arbitration can be prohibitively expensive, the informal nature reduces the availability of discovery, and the private nature of arbitration prevents potential residents from learning about issues that may have deterred them from a particular facility.[58] Even though one of the primary reasons for using arbitration is to save money, the savings are not passed along to the residents and the arbitration costs can be prohibitively expensive.[59]

Arbitration costs can be extremely high, and even cost splitting provisions often leave potential litigants unable to afford to bring the suit.[60] Furthermore, there are generally lower awards returned for claims decided by arbitration rather than litigation. Statistics show that residents get different results when they are heard in court versus arbitration.[61] Out of 1,794 claims filed between 2004 and 2013, residents were 33% *less likely to receive any payment* when using arbitration. Residents were 10% *less likely* to receive an award between $1 - $250,000 when going through arbitration, 15% *less likely* to receive an award between $250,000 - $1,000,000, and 68.4% *less likely* to receive an award greater than a million dollars.[62] These statistics show that nursing home residents are *significantly disadvantaged* by seeking recovery through arbitration in lieu of the courts.[63]

Would-be plaintiffs are severely disadvantaged by the limited discovery, because nearly all the evidence of a facility's wrongdoing is in the facility's possession.[64] Arbitrators are not bound by the rules of evidence, and so it is difficult to predict how they might decide.[65] Even though it is possible that arbitrators could show leniency for the resident, the odds are still stacked in the defendant's favor because he or she is the party that is the most likely to have had an opportunity to see how the arbitrators tend to rule and will have acted accordingly.[66]

The private nature of arbitration is against the interest of the public and residents, because if cases were brought publicly in court, the news and media would have the opportunity to recognize trends and increase public

57. *See* Schencker, *supra* note 5.
58. Krasuski, *supra* note 51, at 265-68.
59. Krasuski, *supra* note 51, 292-93.
60. *See* Krasuski, *supra* note 51, at 293.
61. *See* Schencker, *supra* note 5.
62. *See* Schencker, *supra* note 5.
63. *See* Schencker, *supra* note 5.
64. Krasuski, *supra* note 51, at 299.
65. Krasuski, *supra* note 51, at 299.
66. Krasuski, *supra* note 51, at 299.

awareness.[67] When instances of nursing home negligence or lack of care are kept private by arbitration the public is deprived of the opportunity to see the "egregiously poor care" that is provided, which causes society to lose its opportunity to act as a vehicle for change.[68]

## III. *FIALA V. BICKFORD SENIOR LIVING GROUP*

In *Fiala v. Bickford Senior Living Group*,[69] Edward Fiala, a resident of Bickford Senior Living Group, sued the facility for violating the Nursing Home Care Act[70] as well as other tortious behavior.[71] The facility moved to dismiss Mr. Fiala's claim in order to pursue arbitration based on the agreement that his daughter, acting as attorney in fact, had signed, but the trial court denied the motion.[72] The arbitration provision stated that:

> Any controversy, claim or dispute arising out of or relating to this Establishment Contract or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its rules and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The award of the arbitrator(s) shall be final and binding upon the parties without the right of appeal to the courts. The arbitrators will have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of the Contract. The parties shall each bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration.[73]

The trial court reasoned that although his daughter, acting as a healthcare power of attorney, had the authority to sign the documents admit-

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67. Krasuski, *supra* note 51, at 300.
68. Krasuski, *supra* note 51, at 300.
69. Fiala v. Bickford Senior Living Grp., 32 N.E.3d 80 (Ill. App. Ct. 2015).
70. 210 ILL. COMP. STAT. ANN. 45/1-101 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.).
71. *Fiala*, 32 N.E.3d at 83.
72. *Id.*
73. *Id.* at 84.

ting Mr. Fiala to the facility, she "did not have the authority to agree to arbitrate any other matters related to finances or property rights of [Mr. Fiala]."[74] The facility appealed arguing that Mr. Fiala's daughter, as the healthcare power of attorney, had the authority to bind Mr. Fiala to arbitration.[75]

The facility's argument on appeal was that because a healthcare power of attorney is statutorily able to sign an admission contract, which included the arbitration provision, Mr. Fiala was validly bound by it.[76] Based on the Powers of Attorney for Health Care law[77] a person is allowed the right to:

> [C]ontrol all aspects of his or her personal care and medical treatment, including the right to decline medical treatment or to direct that it be withdrawn, even if death ensues. The right of the individual to decide about personal care overrides the obligation of the physician and other health care providers to render care or to preserve life and health.
>
> However, if the individual becomes a person with a disability, her or his right to control treatment may be denied unless the individual, as principal, can delegate the decision making power to a trusted agent and be sure that the agent's power to make personal and health care decisions for the principal will be effective to the same extent as though made by the principal.[78]

This law lets a person choose an agent to make health care decisions for himself as though he were making his own decisions.[79] The facility further argued that Mr. Fiala had used the statutory short form power of attorney for health care, which, in the pertinent sections, expressly allows:[80]

> (2) The agent is authorized to admit the principal to or discharge the principal from any and all types of hospitals, institutions, homes, residential or nursing facilities, treatment centers and other health care institutions providing personal care or treatment for any type of physical or mental condition. . . .

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74. *Id.* at 85.
75. *Id.* at 85-86.
76. *Fiala*, 32 N.E.3d at 88.
77. 755 ILL. COMP. STAT. ANN. 45/4-1 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.).
78. *Id.*
79. *Fiala*, 32 N.E.3d at 89.
80. *Id.*

> (3) The agent is authorized to contract for any and all types of health care services and facilities in the name of and on behalf of the principal and to bind the principal to pay for all such services and facilities, and to have and exercise those powers over the principal's property as are authorized under the statutory property power, to the extent the agent deems necessary to pay health care costs; and the agent shall not be personally liable for any services or care contracted for on behalf of the principal.[81]

The importance of this language is that it allows the power of attorney to sign all the documents needed to enter into healthcare decisions.[82]

On appeal, the appellate court reversed the lower court's determination and found that Mr. Fiala's daughter had the authority to bind him to arbitration.[83] The court concluded that when she signed the contract, which contained the arbitration provision, she had the authority to bind her father because it was reasonably necessary to procure Mr. Fiala's needed healthcare.[84] The court then distinguished Mr. Fiala's case from the general limitations on the scope of a healthcare power of attorney—which normally provides no authority over property or financial matters.[85]

The appellate court stated that, "health-care decisions, such as placement in an assisted-living facility, are not so cut and dried."[86] Several recent cases from neighboring states trended towards allowing healthcare decision makers to decide "collateral issues."[87] These collateral issues refer to areas that are outside the scope of authority of what a reasonable agent would believe their principal intended.[88] The court held that an arbitration clause was one of those collateral issues.[89] Arbitration agreements are considered collateral issues because they are signed by healthcare agents while they are arguably fulfilling their responsibilities. The court determined that the crux of the issue is whether the arbitration provision was a standalone agreement that

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81. 755 ILL. COMP. STAT. ANN. 45/4-10(c) (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.).

82. *Fiala*, 32 N.E.3d at 90.

83. *Id.* at 83.

84. *Id.* at 91.

85. *Id.*

86. *Id.*

87. *E.g.*, Dickerson v. Longoria, 995 A.2d 721, 738-39 (Md. 2010); Koricic v. Beverly Enters., 773 N.W.2d 145, 151 (Neb. 2009).

88. *See* RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. c (AM. LAW INST. 2006).

89. *Fiala*, 32 N.E.3d at 91; *accord* Ping v. Beverly Enters., 376 S.W.3d 581, 600 (Ky. 2012); *Dickerson*, 995 A.2d at 739; Life Care Ctrs. of Am. v. Smith, 681 S.E.2d 182, 185 (Ga. Ct. App. 2009); *Koricic*, 773 N.W.2d at 151.

had no bearing on the admission of the resident, or whether the resident's admission was contingent on the arbitration agreement.[90] If the arbitration agreement was in addition to the required admission documents, then it would be considered a "collateral issue," and a healthcare agent would not have the authority to bind the principal to the arbitration agreement.[91] But, where the agreement is required for admission, the healthcare agent has the power to bind the principal to arbitration.[92] The appellate court did not address the issue of whether the arbitration provision was unconscionable.

## IV. THREE-WAY SPLIT

States that have addressed the issue of whether healthcare power of attorneys are authorized to bind their principals to arbitration have arrived at very different conclusions.[93] The states' rulings concerning whether and how healthcare power of attorneys can bind their principals to arbitration provisions in nursing home agreements are roughly arranged into three viewpoints, these views will be referred to as the "Broad-scope group," the "Narrow-scope group," and the "Conscionable group." The first group exists primarily in the courts of California, and somewhat in Massachusetts, where they have held that healthcare agents have general authority to bind their principals even where the arbitration provisions are not required.[94] This school of thought will be referred to as the "Broad-scope group." The second group, which Illinois now falls into, gives agents the power to bind their principals only where the arbitration agreement is required in order to admit the resident.[95] This group will be referred to as the "Narrow-scope group." Additional states in this second category include Kentucky, Nebraska, Maryland, Georgia and West Virginia.[96] The last group of states' analyses are similar to the second—narrow—group's, but takes the analysis one step further. This group will be referred to as the "Conscionable group." Under this group's rationale, an agent's authority to sign an arbitration agreement is

90. *Fiala*, 32 N.E.3d at 92.

91. *Id.*

92. *Id.* at 92-93.

93. *E.g.*, Carraway v. Beverly Enters. Ala., 978 So. 2d 27 (Ala. 2007); Hogan v. Country Villa Health Servs., 55 Cal. Rptr. 3d 450 (Cal. App. Ct. 2007); *Koricic*, 773 N.W.2d at 145.

94. Miller v. Cotter, 863 N.E.2d 537, 545 (Mass. 2007); *Hogan*, 55 Cal. Rptr. 3d at 455; Garrison v. Super. Ct., 33 Cal. Rptr. 3d 350, 360 (Cal. Ct. App. 2005).

95. Fiala v. Bickford Senior Living Grp., 32 N.E.3d 80, 92 (Ill. App. Ct. 2015).

96. State *ex rel* AMFM, LLC v. King, 740 S.E.2d 66, 75 (W. Va. 2013); Ping v. Beverly Enters., 376 S.W.3d 581, 593 (Ky. 2012); Dickerson v. Longoria, 995 A.2d 721, 728-29 (Md. 2010); Life Care Ctrs. of Am. v. Smith, 681 S.E.2d 182, 186 (Ga. Ct. App. 2009); Koricic v. Beverly Enters., 773 N.W.2d 145, 151 (Neb. 2009).

fairly liberally construed, but then an analysis of whether the arbitration provision is unconscionable is performed.[97] This third group consists of Florida, Ohio, Tennessee, Alabama, and New Mexico.[98]

Additionally, it is worth noting that Colorado actually has a statute, Colorado Revised Statutes Annotated §13-64-403,[99] that explicitly forbids healthcare providers from refusing medical care services solely because the patient refused to sign an arbitration agreement.[100] Although the statute requires arbitration provisions to be printed in bold-faced font immediately preceding the signature line of arbitration agreements, the statute is not preempted by the FAA because of what is known as "reverse-preemption."[101] Reverse preemption arises in McCarran – Ferguson Act and federally protects states' rights to control the business of insurance.[102]

## A. AGENTS HAVE GENERAL POWER (BROAD-SCOPE GROUP)

The first group that will be discussed holds that healthcare agents have broad decision making powers that encompass non-restricted powers that arise during a healthcare decision.[103] The Broad-scope group's main proponent is California, which holds that healthcare agents' powers are broadly construed so as to allow the greatest amount of power for the agents.[104] California reasons that these healthcare power of attorneys are granted so that the agents are able to choose how their principals will be cared for.[105] One of the decisions that these agents need to be able to make is what facilities are best for their principals.[106] In making these decisions, California reasons that these savvy agents are able to choose between facilities that require arbitration agreements, have optional arbitration agreements, or do not have arbitration agreements.[107] California reasons that because these agents were able

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97. *See* Owens v. Nat'l Health Corp., 263 S.W.3d 876, 888-89 (Tenn. 2007).

98. Barron v. Evangelical Lutheran Good Samaritan Soc'y, 265 P.3d 720, 732-33 (N.M. Ct. App. 2011); *Owens*, 263 S.W.3d at 888-89; *Carraway*, 978 So. 2d at 31-32; Prieto v. Healthcare & Ret. Corp. of Am., 919 So. 2d 531, 532-33 (Fla. Dist. Ct. App. 2005); Small v. HCF of Perrysburg, Inc., 823 N.E.2d 19, 23-24 (Ohio Ct. App. 2004); Howell v. NHC Healthcare Inc., 109 S.W.3d 731, 734 (Tenn. Ct. App. 2003).

99. COLO. REV. STAT. ANN. § 13-64-403(7) (West, Westlaw through the 2d Reg. Sess. of the 70th Gen. Assemb. 2016).

100. *Id.*

101. COLO. REV. STAT. ANN. § 13-64-403(4) (West, Westlaw through the 2d Reg. Sess. of the 70th Gen. Assemb. 2016).

102. Allen v. Pacheco, 71 P.3d 375, 382-84 (Colo. 2003).

103. Garrison v. Super. Ct., 33 Cal. Rptr. 3d 350, 360 (Cal. Ct. App. 2005).

104. *E.g.*, Hogan v. Country Villa Health Servs., 55 Cal. Rptr. 3d 450, 455 (Cal. Ct. App. 2007); *Garrison*, 33 Cal. Rptr. 3d at 360.

105. *See Garrison*, 33 Cal. Rptr. 3d at 359-60.

106. *Id.* at 360.

107. *Id.*

to make the initial decision about where to house the resident they should then retain the ability to sign any of the following arbitration agreements even though it is not strictly a healthcare decision.[108]

Although this approach's simplicity has some appeal, the problem is that it allows far too broad of a swathe of authority for healthcare agents. As the Narrow-scope group will discuss, these agents should have very limited powers, and these limitations should not be exceeded.[109] The authority under an agency agreement should be limited to the plain language of the agreement, and additional authority should not be assumed.[110] An arbitration agreement is a waiver of the principal's legal rights and not a healthcare decision.[111] So, unless the agency agreement specifically enumerates the authority to waive legal rights, or even more specifically to sign arbitration agreements, then the healthcare agent should not have the authority to bind the principal to arbitration.[112] Furthermore, the Restatement (Third) of Agency warns that acts which do not provide the principal an economic advantage or that create legal consequences for the principal should not be considered reasonable without specific communication.[113] Based on this warning, arbitration agreements that are signed by healthcare agents should be scrutinized to determine whether the agent was truly authorized to sign such an agreement.[114]

Healthcare agents should not be reasonably able to bind their principals to arbitration agreements that are not specifically authorized, because it would create significant legal consequences for the principal and would provide little to no economic value. Arbitration agreements are, in essence, a waiver of the principal's right to access the courts and to be heard by a jury.[115] Waiving the right to access the court and a jury has a serious legal consequence, and the importance of this right is demonstrated through the Seventh Amendment.[116] The Seventh Amendment simply states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of

108. *Hogan*, 55 Cal.Rptr.3d at 454.
109. *See* Ping v. Beverly Enters., 376 S.W.3d 581, 593 (Ky. 2012).
110. *Id.* at 592.
111. Dickerson v. Longoria, 995 A.2d 721, 737 (Md. 2010).
112. *Id.* at 737-38.
113. *See* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h (AM. LAW. INST. 2006).
114. *See Ping*, 376 S.W.3d at 592.
115. *Dickerson*, 995 A.2d at 737.
116. U.S. CONST. amend VII.

> the United States, than according to the rules of the common law.[117]

This simple, but crucial, right heralds back all the way to the Magna Carta which was issued by the King of England and established that everyone is subject to the law. This was one of the fundamental rights that the founding fathers also believed that all men should have, and so they saw fit to include it in the United States Constitution. This right was created so that every person would have the right to seek the protection of the courts and to be heard by a jury of their peers.[118] As such, this right should not be given away lightly, and so healthcare agents should not be able to sign away their principals' rights unless specifically authorized to do so.

Furthermore, when healthcare power of attorneys sign arbitration agreements on behalf of their principals, it often gives up the principals' rights without any economic advantage. In cases where an arbitration agreement is not required for admission, the right to access the courts is literally being given up for nothing.[119] Although some would argue that an arbitration agreement itself provides an economic advantage, this is rarely true in the case of consumer disputes or nursing home litigation.[120] In fact, residents are actually less likely to receive any recovery at all, and statistics show that any amount they do receive is likely to be significantly less than it would have been in court.[121]

The authority of the healthcare agents should not be expanded when it has significant legal consequences for the principal or does not provide any economic advantage for the principal.[122] Arbitration agreements are prime examples of where the scope of authority should not be expanded. First, arbitration agreements create significant legal consequences by stripping the principals of their fundamental right to jury trials.[123] Second, these arbitration agreements are being foisted upon the residents while providing no economic advantage.[124] These are two of the three example situations provided by the Restatement (Third) of Agency where the agent's scope of authority should be questioned.[125] Despite the simplicity of the rule employed by the Broad-scope group, courts should be extremely leery of expanding the authority of

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117. *Id.*
118. Galloway v. United States, 319 U.S. 372, 392 (1943).
119. Schencker, *supra* note 5.
120. Schencker, *supra* note 5.
121. Schencker, *supra* note 5.
122. RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h (AM. LAW INST. 2006).
123. *See generally* Ping v. Beverly Enters., 376 S.W.3d 581 (Ky. 2012).
124. *See, e.g.*, *id.*
125. *See* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h (AM. LAW INST. 2006).

healthcare agents, especially when running against the very situations warned about by the Restatement.[126]

## B. ARBITRATION AGREEMENTS MUST BE REQUIRED FOR THE PRINCIPAL TO BE BOUND (NARROW-SCOPE GROUP)

The Narrow-scope group of states holds that arbitration agreements and provisions must be required for admission, and then it becomes "part and parcel of the healthcare decision to admit the patient to the facility."[127] Courts that apply this reasoning have concluded that healthcare powers of attorneys are able to sign arbitration provisions as long as they are "part and parcel" with the admission agreement.[128] This reasoning is employed by states such as Kentucky, Nebraska, Maryland, Georgia and West Virginia, and now Illinois.[129] Unlike the Broad-scope group, the reasoning of these states is largely in line with the Restatement (Third) of Agency, because it only expands healthcare agents' authority to bind their principals to arbitration provisions when the provisions are "necessary to gain admission" to the care facility.[130] These courts rightly limit the scope of authority that healthcare agents have to bind their principals to only those limited areas that are necessary to carry out an agent's healthcare decisions and responsibilities.[131] The Supreme Court of Kentucky quoted the Restatement (Third) of Agency § 2.02 comment h in support of this reasoning.[132] The court reasoned that the ability to authorize the resolution of disputes and to waive the principal's rights should not be inferred lightly.[133]

As previously explained, it is important to protect principals from unforeseen ramifications by not allowing the authority of healthcare agents to be broadened beyond the areas that are expressly authorized.[134] Unfortunately, this properly narrow interpretation has placed these states, and Illinois, in an awkward policy position. By saying that healthcare agents are only able to bind their principals to arbitration agreements when the agreement is required for admission, nursing home facilities are essentially being told, "Hey! Why not just make arbitration agreements mandatory?" This can and

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126. *Id.*
127. Fiala v. Bickford Senior Living Grp., 32 N.E.3d 80, 92 (Ill. App. Ct. 2015).
128. *Id.*
129. State *ex rel.* AMFM, LLC v. King, 740 S.E.2d 66, 75 (W. Va. 2013); Ping v. Beverly Enters., 376 S.W.3d 581, 593 (Ky. 2012); Dickerson v. Longoria, 995 A.2d 721, 728-29 (Md. 2010); Life Care Ctrs. of Am. v. Smith, 681 S.E.2d 182, 186 (Ga. Ct. App. 2009); Koricic v. Beverly Enters., 773 N.W.2d 145, 151 (Neb. 2009).
130. *Fiala*, 32 N.E.3d at 92.
131. *Ping*, 376 S.W.3d at 593.
132. *Id.*
133. *Id.*
134. *Id.*

will produce many dire and unwanted consequences if allowed, and is the very problem that other states and agencies are concerned with preventing.[135] Illinois case law is currently only halfway to producing the appropriate ruling on the dilemma of healthcare agent authority.

## C. BROAD ABILITY TO BIND, BUT UNCONSCIONABILITY MUST BE ADDRESSED (CONSCIONABLE GROUP)

The Conscionable group also allows healthcare agents a fairly broad ability to bind their principals to arbitration agreements, but then the court should address the issue of whether the arbitration contract or provision is unenforceable based on unconscionability.[136] This Conscionable group consists of Florida, Ohio, Tennessee, Alabama, and New Mexico.[137] These states reason that trying to split hairs between what constitutes a "healthcare decision" and what constitutes a "legal decision" would be nearly impossible.[138] This would cause healthcare contracts to be too uncertain which would have significant negative effects for the principal.[139]

> For example, a mentally incapacitated principal could be caught in "legal limbo." The principal would not have the capacity to enter into a contract, and the attorney-in-fact would not be authorized to do so. Such a result would defeat the very purpose of a durable power of attorney for health care.[140]

While there is obviously a strong need to protect the power of healthcare agents to procure care for their principals, there is also a need to protect these same residents from arbitration agreements that are too overreaching and become unconscionable contracts.[141]

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135. Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42168, 42242 (July 16, 2015) (to be codified at 42 C.F.R. § 483.70(n)).

136. Owens v. Nat'l Health Corp., 263 S.W.3d 876, 890 (Tenn. 2007).

137. Barron v. Evangelical Lutheran Good Samaritan Soc'y, 265 P.3d 720, 726-27 (N.M. Ct. App. 2011); *Owens*, 263 S.W.3d at 885; Carraway v. Beverly Enters., 978 So. 2d 27, 30-31 (Ala. 2007); Prieto v. Healthcare and Ret. Corp. of Am., 919 So. 2d 531, 532 (Fla. Dist. Ct. App. 2005); Small v. HCF of Perrysburg, Inc., 823 N.E.2d 19, 21 (Ohio Ct. App. 2004); Howell v. NHC Healthcare Inc., 109 S.W.3d 731, 734 (Tenn. Ct. App. 2003).

138. *Owens*, 263 S.W.3d at 884-85.

139. *Id.*

140. *Id.* at 885.

141. *Id.* at 890.

### *1. TENNESSEE*

There are a few different tests that the Conscionable group of states use to determine the enforceability of an arbitration provision or contract.[142] In Tennessee, the first element these courts look at to determine the enforceability of an arbitration agreement is whether the contract is offered on a "take it or leave it" basis, and whether there was unequal bargaining power—this is known as a "contract of adhesion."[143] Contracts of adhesion are not favored, but simply being a contract of adhesion is insufficient to immediately render a contract unenforceable.[144] Tennessee courts then look at "whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable" to the weaker party.[145] Some examples of where arbitration agreements are oppressive or unconscionable to the weaker party include provisions where there is no option to revoke the agreement to regain the right to a jury trial, where the provision is hidden, where there is no opportunity to question the terms or purpose of the agreement, or when there is a choice between the right of a trial by jury or foregoing necessary medical treatment.[146] *Buraczynski v. Eyring* contains a good example of an arbitration agreement that was neither oppressive nor unconscionable.[147]

> [The arbitration agreement] was not oppressive or unconscionable because it was a stand-alone, one page contract, with an attached explanation of its purpose that encouraged the patient to ask questions, and which contained a "ten-point capital letter red type, directly above the signature line that 'by signing this contract you are giving up your right to a jury or court trial' on any medical malpractice claim."[148]

The agreement also provided that it could be revoked by the patient within thirty days.[149] Conversely, an arbitration provision was held unenforceable

142. *E.g.*, *Howell*, 109 S.W.3d at 734; Romano *ex rel*. Romano v. Manor Care, Inc., 861 So. 2d 59, 62 (Fla. Dist. Ct. App. 2003).
143. *Howell*, 109 S.W.3d at 734.
144. *Id.*
145. *Id.*
146. *Id.*
147. *See, e.g.*, Buraczynski v. Eyring, 919 S.W.2d 314 (Tenn. 1996).
148. *Howell*, 109 S.W.3d at 734.
149. *Id.*

where it was poorly explained, in the same font as the rest of the document, buried on page ten, and presented on a "take it or leave it basis."[150]

### 2. FLORIDA

In Florida, to deny the enforcement of an arbitration agreement "the contract must be both procedurally unconscionable and substantively unconscionable."[151] Procedural unconscionability refers to the circumstances under which the contract was entered, while substantive unconscionability pertains to the unfairness of the terms of the specific contract.[152] Florida courts do not have any precise requirement for how much of each type of unconscionability is required, and simply apply a "balancing approach" to the question of unconscionability by determining if there is a quantum existence of each.[153] Where an agreement is particularly unconscionable in one area it is able to offset an only slight amount of unconscionability in the other.[154]

## V. So What Should Illinois and Undecided States Do?

Unfortunately, Illinois appears to have missed the proverbial boat in its *Fiala* holding, because the court answered the question of whether the healthcare agent had the authority to bind Mr. Fiala to arbitration, but did not address the issue of whether the arbitration provision may have been unconscionable.[155] As the court in *Fiala* points out, the Federal Arbitration Act (FAA) disallows simply forbidding arbitration agreements, and requires that arbitration agreements be held on the same level as other contracts.[156] Laws that seek to flat out disallow arbitration agreements tend to be struck down as preempted by the FAA, and so arbitration agreements may only be determined as invalid when they are revoked based on grounds that exist under law or equity for the revocation of any other contract.[157] The Illinois Nursing Home Care Act[158] was one such statute that was struck down for trying to protect residents from arbitration agreements and the devastating effects that

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150. *Id.* at 734-35.

151. Romano *ex rel.* Romano v. Manor Care, Inc., 861 So. 2d 59, 62 (Fla. Dist. Ct. App. 2003).

152. *Id.*

153. *Id.*

154. *Id.*

155. *See* Fiala v. Bickford Senior Living Grp., 32 N.E.3d 80, 94 (Ill. App. Ct. 2015).

156. *Id.*

157. *Id.*

158. 210 ILL. COMP. STAT. ANN. 45/3-606 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.) (*preempted by* Carter v. SSC Odin Operating Co., 927 N.E.2d 1207, 1215 (Ill. 2010)).

they can so often have on this class of people.[159] The statute specifically precluded the ability for a resident to waive the right to commence an action, and so it was ruled as preempted.

> Any 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.[160]
>
> Any party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.[161]

The clear purpose of this statute was to protect nursing home residents because they are so often unable to protect themselves.[162] Although the FAA requires that arbitration agreements be placed on equal footing with other agreements, it does not mean that agreements that are unconscionable must be left to fester and harm those inflicted by them.[163] A contract that is unconscionable can still be found unenforceable even if it has an arbitration agreement within it, because the FAA does not preempt finding arbitration agreements invalid "upon such grounds as exist at law or in equity" that would revoke any other contract.[164] Arbitration agreements are in most nursing home admission agreements already, but residents still need to be protected. This is why unconscionability checks are so important.

The court in *Fiala* should have addressed the conscionability of the arbitration agreement, because even if that particular clause was not unconscionable it would have set Illinois precedent on a course that is aligned with better public policy. In Illinois, a contractual clause may be found unconscionable either "procedurally," "substantively," or both.[165] When terms of a

159. *See Fiala*, 32 N.E.3d at 94.

160. 210 ILL. COMP. STAT. ANN. 45/3-606 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.) (*preempted by* Carter v. SSC Odin Operating Co., 927 N.E.2d 1207, 1215 (Ill. 2010)).

161. 210 ILL. COMP. STAT. ANN. 45/3-607 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.) (*preempted by* Carter v. SSC Odin Operating Co., 927 N.E.2d 1207, 1215 (Ill. 2010)).

162. *See id.*

163. 9 U.S.C. § 2 (2016) (arbitration agreements can still be unenforceable for any reason another contract may be deemed unenforceable in law or equity).

164. Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 261 (Ill. 2006).

165. Wigginton v. Dell, Inc., 890 N.E.2d 541, 547 (Ill. App. Ct. 2008).

contract are deemed unconscionable, those terms will be removed, and when possible, the remainder will be enforced.[166] Procedural unconscionability, in this context, "refers to a situation where a term is so difficult to find, read, or understand that the [party] cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power."[167] Substantive unconscionability occurs when the terms of the provision "are inordinately one-sided in one party's favor."[168]

Procedural unconscionability occurs when the terms are so difficult to find, read, or understand that it keeps the non-drafting party from being able to sufficiently be aware of the terms.[169] Contracts of adhesion occur when parties have unequal bargaining power and the party with the superior bargaining position presents the terms of the contract on a take it or leave it basis.[170] Although the finding that an agreement is a contract of adhesion is insufficient to invalidate the agreement, it can be a determining factor.[171] Factors of procedural unconscionability can involve impropriety during the formation of the contract.[172] The circumstances surrounding the formation of the contract are important for determining whether each party had a reasonable opportunity to understand the terms, how conspicuous important factors are, and whether the terms were negotiated for.[173] These factors are all important but not individually conclusive in determining unconscionability.[174]

Substantive unconscionability occurs when the terms of the contract are inordinately skewed in one party's favor or overly harsh.[175] The common reasons why arbitration agreements are determined unconscionable in Illinois are because they call for biased arbitrators, are prohibitively costly, difficult to use, contain option clauses, or lack consideration.[176]

Where arbitration agreements call for arbitrators with a clear pre-existing bias, it will be determined unconscionable even if it is only a slight bias.[177] This can occur where an institution is known to regularly draft arbitration agreements, because by doing so these institutions regularly create

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166. Razor v. Hyundai Motor Am., 854 N.E.2d 607, 622 (Ill. 2006).
167. *Id.*
168. *Id.*
169. *Id.*
170. Wigginton v. Dell, Inc., 890 N.E.2d 541, 546 (Ill. App. Ct. 2008).
171. *See id.*
172. Frank's Maint. & Eng'g, Inc. v. C. A. Roberts Co., 408 N.E.2d 403, 410 (Ill. App. Ct. 1980).
173. *Id.* at 411.
174. *Id.*
175. Razor v. Hyundai Motor Am., 854 N.E.2d 607, 622 (Ill. 2006).
176. Edward Clancy, *Arbitration Clauses in Nursing Home Contracts: FAA Preempts Illinois State Law Restrictions*, ILL. STATE BAR ASS'N (Dec. 2010), https://www.isba.org/sections/healthcare/newsletter/2010/12/arbitrationclausesinnursinghomecontractsfaapreempts.
177. Giddens v. Board of Educ. of Chi., 75 N.E.2d 286, 291 (Ill. 1947).

business for the arbitrators and may carry additional favor from them because of it.[178] Bias can also be found where the arbitrator and one of the parties meet separately concerning a different matter, especially if this other matter is not disclosed.[179]

Arbitration clauses that unduly burden parties with prohibitive costs or unreasonable venues are substantively unconscionable.[180] When arbitration provisions require residents to pay some or all of the administrative costs of arbitration, the clause can be considered as discouraging dispute resolution and therefore unconscionable, but agreements are generally upheld that allocate equal shares of the expenses divided amongst the parties.[181] A party that seeks to invalidate an arbitration agreement as being prohibitively expensive bears the burden of proving the prohibitive costs.[182] Also, venues that are deemed unreasonably inconvenient for non-drafting parties are generally considered unenforceable.[183]

Option clauses can also be considered unconscionable when they do not provide consideration for the non-drafting parties.[184] Option contracts occur when non-drafting parties are bound to arbitration, but the drafting party either has a choice whether to bring a claim in court or to arbitration.[185] Although the agreements do not need to be identical, both parties must be reasonably bound or have options that provide both parties some form of consideration for relinquishing their right to access the courts.[186]

## VI. BACK TO THE LEGISLATIVE DRAWING BOARD

Although the Nursing Home Care Act's provision that limited nursing home arbitration agreements in Illinois was preempted by the FAA, there is still more that can be done.[187] Ideally, Illinois could pass a statute similar to Colorado's that would prevent healthcare facilities from requiring arbitration agreements to be admitted into the facility, but first Illinois needs to determine what makes Colorado's §13-64-403 so different from Illinois Nursing Home Care Act Statute.[188] Like Illinois's preempted statute, Colorado's §13-

178. Clancy, *supra* note 176.
179. Drinane v. State Farm Mut. Auto. Ins. Co., 606 N.E.2d 1181, 1185 (Ill. 1992).
180. Clancy, *supra* note 176.
181. Clancy, *supra* note 176.
182. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 92 (2000).
183. Clancy, *supra* note 176.
184. Clancy, *supra* note 176.
185. Clancy, *supra* note 176.
186. *See* Clancy, *supra* note 176.
187. Carter v. SSC Odin Operating Co., 927 N.E.2d 1207, 1215 (Ill. 2010).
188. *Compare* 210 ILL. COMP. STAT. ANN. 45/3-607 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess. 2016) (*preempted by* Carter v. SSC Odin Operating Co., 927

64-403[189] precludes arbitration agreements from being required by nursing homes, but Colorado actually goes one step further by explicitly stating that care cannot be withheld for refusing to sign an arbitration agreement. The Colorado statute requires the following language to be printed immediately before the signature line as bold-faced with a minimum of ten-point font.[190]

> NO HEALTH CARE PROVIDER SHALL WITHHOLD THE PROVISION OF EMERGENCY MEDICAL SERVICES TO ANY PERSON BECAUSE OF THAT PERSON'S FAILURE OR REFUSAL TO SIGN AN AGREEMENT CONTAINING A PROVISION FOR BINDING ARBITRATION OF ANY DISPUTE ARISING AS TO PROFESSIONAL NEGLIGENCE OF THE PROVIDER.
>
> NO HEALTH CARE PROVIDER SHALL REFUSE TO PROVIDE MEDICAL CARE SERVICES TO ANY PATIENT SOLELY BECAUSE SUCH PATIENT REFUSED TO SIGN SUCH AN AGREEMENT OR EXERCISED THE NINETY-DAY RIGHT OF RESCISSION.[191]

The Nursing Home Care Act provisions were found to be preempted by the FAA because it treated arbitration agreements different than other contracts.[192] The general rule is that when a statute is not of general applicability to contracts and specifically restricts arbitration agreements then it is preempted by the FAA.[193] Although this is true, there is another fascinating twist, or loophole, to muddy the waters.[194] The McCarran – Ferguson Act[195] (MFA) states that:

> (a) State regulation

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N.E.2d 1207, 1215 (Ill. 2010)), *with* COLO. REV. ANN. § 13-64-403 (West, Westlaw through the 2d Reg. Sess. of the 70th Gen. Assemb. 2016).

189. COLO. REV. STAT. ANN. § 13-64-403 (West, Westlaw through the 2d Reg. Sess. of the 70th Gen. Assemb. 2016).

190. COLO. REV. STAT. ANN. § 13-64-403(4) (West, Westlaw through the 2d Reg. Sess. of the 70th Gen. Assemb. 2016).

191. *Id.*

192. *Carter*, 927 N.E.2d at 1215.

193. Allen v. Pacheco, 71 P.3d 375, 381 (Colo. 2003).

194. *See id.* at 382.

195. 15 U.S.C. § 1012 (2015).

> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C.A. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.[196]

This statute is applicable, because §13-64-403[197] in its first subpart states:

> (1) It is the intent of the general assembly that an arbitration agreement be a voluntary agreement between a patient and a health care provider and no medical malpractice insurer shall require a health care provider to utilize arbitration agreements as a condition of providing medical malpractice insurance to such health care provider. Making the use of arbitration agreements a condition to the provision of medical malpractice insurance shall constitute an unfair insurance practice and shall be subject to the provisions, remedies, and penalties prescribed in part 11 of article 3 of title 10, C.R.S.[198]

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196. *Id.*

197. COLO. REV. STAT. ANN. §13-64-403(7) (West, Westlaw through the 2d Reg. Sess. of the 70th Gen. Assemb. 2016).

198. COLO. REV. STAT. ANN. §13-64-403(1) (West, Westlaw through the 2d Reg. Sess. of the 70th Gen. Assemb. 2016).

Because the first part of the statute explicitly applies to the relationship between insurance providers and the insured, it triggers the MFA.[199] Although the FAA would generally preempt the statute because it targets arbitration agreements, it cannot do so in this specific instance because the MFA "reverse-preempts" the FAA's preemption of Colorado's arbitration regulations.[200]

The Colorado Supreme Court ruled that, because the purpose of § 13-64-403[201] was to regulate insurance relationships, "it is irrelevant that other sections . . . address . . . issues not involving the relationship between an insurer and insured."[202] The Supreme Court has held that statutes under the MFA are "enacted for the purpose of regulating the business of insurance" even though they also regulate policy holders.[203]

Although the Supreme Court has not directly ruled on the question of whether and how such reverse-preemption applies to the FAA, there has already been some disagreement with Colorado's holding.[204] Other courts, such as the Texas Supreme Court, believe that a broader view still needs to be taken when deciding issues under the MFA.[205] The court in *Fredericksburg Care Co. v. Perez*,[206] stressed that the MFA "exempts from preemption 'any law enacted by any State for the *purpose* of regulating the business of insurance.'"[207] The Supreme Court's ruling in *U.S. Dept. of Treasury v. Fabe*,[208] exempted an Ohio statute from preemption under the MFA, but the extent to which the exemption can be applied to statutes that purposefully target arbitration agreements between healthcare providers and patients is unclear.[209]

## VII. OTHER POTENTIAL REGULATORY STEPS

On Thursday, July 16, 2015, CMS proposed changes to require nursing homes to fully explain arbitration agreements to residents and their agents, and that the agreements must be entered into voluntarily.[210] This proposal

199. Allen v. Pacheco, 71 P.3d 375, 381 (Colo. 2003).
200. *Id.*
201. COLO. REV. STAT. ANN. §13-64-403(7) (West, Westlaw through the 2d Reg. Sess. of the 70th Gen. Assemb. 2016).
202. *Allen,* 71 P.3d at 383.
203. U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 508 (1993).
204. *See* Fredericksburg Care Co. v. Perez, 461 S.W.3d 513, 525 (Tex. 2015).
205. *Id.* at 521.
206. *Id.*
207. *Id.* at 520.
208. *Fabe*, 508 U.S. at 491.
209. Munich Am. Reinsurance Co., v. Crawford, 141 F.3d 585, 592 (5th Cir. 1998).
210. Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42168, 42172 (July 16, 2015) (to be codified at 42 C.F.R. § 483.70(n)).

was due to concerns that facilities would use their superior bargaining power to coerce the residents into waiving their rights.[211] The proposed rule would also prevent arbitration agreements from being placed with any other paperwork in order to draw additional attention to those specific provisions.[212] There was even discussion that arbitration agreements should be altogether banned from being used with nursing home residents.[213] All of these changes were proposed because of concerns voiced to CMS that residents were being taken advantage of by the facilities.[214] These proposals show that there is an ongoing concern that nursing home residents are being made to waive their rights without even knowing what they are giving up.[215] This is especially true where treatment decisions must be made quickly because the residents or their proxies may not have time to analyze the potential effects that signing an arbitration agreement might have.[216] The reality is that people are not always provided the time and opportunity with which they can adequately research all the elements that should be considered when selecting a nursing home, and so there is a growing concern that these residents need additional protection from the facilities that they are already so dependent on.[217] The proposed rule would be 42 C.F.R. §483.70(n):

> Binding arbitration agreements. If the facility enters into an agreement for binding arbitration with its residents: (1) The facility must ensure that: (i) The agreement is explained to the resident in a form and manner that he or she understands, including in a language the resident understands, and (ii) The resident acknowledges that he or she understands the agreement. (2) The agreement must: (i) Be entered into by the resident voluntarily; (ii) Provide for the selection of a neutral arbiter; (iii) Provide for selection of a venue convenient to both parties. (3) Admission to the facility must not be contingent upon the resident or the resident representative signing a binding arbitration agreement. (4) The agreement must not contain any language that prohibits or discourages the resident or anyone else from com-

211. *Id.* at 42211.
212. *Id.*
213. *Id.*
214. *Id.*
215. Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42168, 42242 (July 16, 2015) (to be codified at 42 C.F.R. § 483.70(n)).
216. *Id.*
217. *Id.*

> municating with Federal, State, or local officials, including but not limited to, Federal and State surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman, in accordance with § 483.11(i). (5) The agreement may be signed by another individual if: (i) Allowed by state law; (ii) All of the requirements in this section are met; and (iii) That individual has no interest in the facility.[218]

Thankfully, this proposed rule was accepted in September 2016, and was codified November, 2016 as 42 C.F.R. § 483.70(n).[219] This rule should steer Illinois case law back on track, but the rule will meet stiff opposition from nursing homes.[220]

## VIII. CONCLUSION

Nursing home residents do not choose to live there because they are vigorous and strong, but because they lack to ability to fulfill at least some of their basic living needs. As these residents become further unable to care for themselves they must rely on their loved ones for even their most crucial decisions.[221] These loved ones fill out the various forms as healthcare proxies and take on the crucial role of deciding healthcare treatment decisions.[222] The problem is that these healthcare proxies are not selected because they are savvy healthcare consumers, but because they are loved and trusted by the residents.[223] Although love and trust are essential components of the healthcare proxy relationship these elements can act as blinders during some of the most crucial healthcare decisions.

When residents are admitted into healthcare facilities their healthcare proxies are called upon to fulfill their duties to make the best possible decisions, but this can be extremely difficult to do when these proxies are caught up with the pain and suffering that their loved one is going through. The difficult process often causes important aspects of admittance to be overlooked,

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218. *Id.* at 264-65.

219. 42 C.F.R. § 483.70(n) (2016).

220. Rebecca Hersher, *New Rule Preserves Patients' Rights to Sue Nursing Homes In Court*, NAT'L PUB. RADIO (Sept. 29, 2016, 2:25 PM), http://www.npr.org/sections/thetwo-way/2016/09/29/495918132/new-rule-preserves-patients-rights-to-sue-nursing-homes-in-court.

221. *Giving Someone a Power of Attorney for Your Health-Care*, *supra* note 3.

222. *Making Medical Decisions for Someone Else*, *supra* note 17.

223. *Giving Someone a Power of Attorney for Your Health-Care*, *supra* note 3.

and one such aspect is frequently the existence and meaning of arbitration agreements.[224] These arbitration agreements can be outside the scope of the healthcare proxy's authority, and so courts are often forced to resolve how and when a principal can be bound to arbitration.[225] States have been creating conflicting rulings concerning the authority of healthcare agents, but it is crucial to keep important societal goals in view when deciding such cases.[226] The important societal goal here is protecting nursing home residents who already must rely on others for so much.[227] These people are less able to protect themselves and so the responsibility must lie with others. State legislatures and Federal agencies have both recognized the issues with arbitration provisions in nursing home contracts, but many changes have failed to gain support or have been deemed as preempted for targeting arbitration agreements.[228] Despite these setbacks, there are still protections that can be set in place by enacting statutes such as Colorado's that can reverse-preempt the FAA in order to protect nursing home residents from arbitration.[229] Courts can also follow the Conscionable group's precedent which requires an analysis of conscionability after determining that the healthcare proxy did in fact have the authority to bind the principal.[230] Through these methods we may be able protect our parents, friends, and eventually even ourselves.

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224. Medicare and Medicaid Programs; Reform of Requirement for Long-Term Care Facilities, 80 Fed. Reg. 42168, 42211 (proposed July 16, 2015) (to be codified at 42 C.F.R. § 483.70(n)).

225. *In re* Estate of Stahling, 987 N.E.2d 1033, 1040 (Ill. App. Ct. 2013).

226. *See* Reform of Requirement for Long-Term Care Facilities, 80 Fed. Reg. 42211 (proposed July 16, 2015) (to be codified at 42 C.F.R. § 483.70(n)).

227. *Id.*

228. *See* 210 ILL. COMP. STAT. ANN. 45/1-101 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.); Reform of Requirement for Long-Term Care Facilities, 80 Fed. Reg. 42211 (proposed July 16, 2015) (to be codified at 42 C.F.R. § 483.70(n)).

229. *See* Allen v. Pacheco, 71 P.3d 375, 382 (Colo. 2003).

230. *See* Owens v. Nat'l Health Corp., 263 S.W.3d 876, 888-89 (Tenn. 2007).