

BACK IN MY DAY, WE HAD RIGHTS: THE MED-ARB SOLUTION TO MANDATORY ARBITRATION CLAUSES IN INDIANA NURSING HOME ADMISSIONS CONTRACTS

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INTRODUCTION

“There are many pleasant fictions of the law in constant operation, but there is not one so pleasant or practically humorous as that which supposes every man to be of equal value in its impartial eye, and the benefits of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets.”

— Charles Dickens, *The Life and Adventures of Nicholas Nickleby*

After 60 years of service to the Catholic Church, Sister Irene Morissette, an 87-year-old nun suffering from dementia, admitted herself into an Alabama-based assisted-living facility to receive help completing her day-to-day tasks and activities.¹ She typically locked her door in the evenings because she did not want anyone entering her living quarters while she slept.² Unfortunately, though, this did not stop her assailant from accessing her bedroom, pinning her five-foot-two body against her bed by her shoulders, and raping her.³ Morissette suffered multiple abrasions during the attack; however, she did not call for help afterward because she feared that her assailant would be the one to respond to her call.⁴ After police failed to identify the attacker, Morissette’s sister filed a lawsuit against the nursing home for failing to maintain a safe living environment for its residents.⁵

Despite Morissette having suffered a traumatizing battery, the court quickly stayed her sister’s lawsuit.⁶ Unbeknownst to her at the time of her admission, Morissette signed an admissions contract containing a pre-dispute arbitration clause.⁷ Specifically, the arbitration clause contractually bound Morissette to

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1. Levin & Perconti, *\$275 Billion Nursing Home Industry Prevents Elderly Nun from Suing for Rape*, LEVIN & PERCONTI ATTORNEYS AT LAW: ILL. NURSING HOME ABUSE BLOG (Nov. 17, 2017), <https://blog.levinperconti.com/275-billion-nursing-home-industry-prevents-elderly-nun-suing-rape/> [https://perma.cc/3NFV-T28H].

2. Haley S. Edwards, *An 87-Year-Old Nun Said She Was Raped in Her Nursing Home. Here’s Why She Couldn’t Sue*, TIME (Nov. 16, 2017), <http://time.com/5027063/87-year-old-nun-said-she-was-raped-in-her-nursing-home/> [https://perma.cc/9NPX-UD9R].

3. *Id.*

4. *Id.*

5. Levin & Perconti, *supra* note 1.

6. *Id.*

7. Edwards, *supra* note 2.

settle all disputes relating to her residency through arbitration.⁸ By signing the agreement, Morissette waived her Seventh Amendment rights and barred her own access to relief through the courts.⁹ Though terribly frustrated, Morissette and her family proceeded into the arbitral process and asked for \$5 million in damages, all of which Morissette planned to donate to the Catholic Church.¹⁰ Nevertheless, the nursing home's hand-picked arbitrator found that the nursing home was not liable for Morissette's injuries and did not award Morissette any damages.¹¹ In fact, Morissette lost money by bringing her case, as the nursing home sent her a \$3,000 invoice to cover all of the arbitration costs.¹²

Long-term care facilities play a vital part in caring for society's aging generation.¹³ In 2014 alone, nearly 67,000 long-term care providers served about nine million people nationally.¹⁴ Additionally, Indiana housed 39,000 long-term care patients in 2016, making it home to one of the largest nursing home resident populations in the country.¹⁵ Therefore, as our elderly population dramatically expands in the coming years,¹⁶ it is highly likely that access to long-term care services will grow higher in demand.¹⁷ However, accompanying the long-term care industry's growing presence is its preference for keeping disputes out of the traditional, adversarial system.¹⁸ Sister Morissette's story is an unfortunately common depiction of a problem affecting elderly Americans in long-term care facilities across the country, as many nursing homes now use mandatory alternative dispute resolution to resolve conflicts.¹⁹ Some elder law

8. Levin & Perconti, *supra* note 1.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 2016-1422, LONG-TERM CARE PROVIDERS AND SERVICES USERS IN THE UNITED STATES: DATA FROM THE NATIONAL STUDY OF LONG-TERM CARE PROVIDERS, 2013-2014 (2016).

14. *Id.* With this number projected to rise to 27 million by 2050, the need for such care will only increase.

15. *Total Number of Residents in Certified Nursing Facilities*, KAISER FAM. FOUND. (2016), <https://www.kff.org/other/state-indicator/number-of-nursing-facility-residents/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/T8W4-SBML>].

16. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 13. The number of Americans over age sixty-five will likely double from 40.2 million in 2010 to 88.5 million by 2050. Statistics further demonstrate that, among people who reach the age of sixty-five, over two-thirds of them will require long-term care services at some point in their life.

17. James R. Knickman & Emily K. Snell, *The 2030 Problem: Caring for Aging Baby Boomers*, 37 HEALTH SERVS. RES. 849, 850-51 (2002).

18. See Levin & Perconti, *supra* note 1.

19. See Levin & Perconti, *supra* note 1. For example, experts estimate that nearly 1 million nursing home residents to date have signed an arbitration agreement during their facility admissions process.

advocates even report that as many as 90 percent of large nursing-home chains in the United States now include some type of arbitration clause in their admission agreements.²⁰

Although various state courts have sought to render mandatory arbitration clauses unenforceable on state law grounds,²¹ the Supreme Court put an end to such efforts with its decision in *Kindred Nursing Centers Ltd. Partnership v. Clark*.²² In *Kindred*, the Court reviewed Kentucky's "clear-statement rule," a statute requiring that patient powers of attorney must explicitly authorize their agents to enter into nursing home arbitration agreements for such agreements to be enforceable.²³ Ultimately, the Court held that the statute violated the Federal Arbitration Act (the "FAA"), a law meant to enforce arbitration agreements between parties at both the state and federal level.²⁴ Though *Kindred* was an issue of first impression for the Court, the Supreme Court's long track record of supporting the FAA's preemptive powers made the *Kindred* decision largely predictable.²⁵ However, the Supreme Court is not the only court to support the enforcement of arbitration; Indiana state courts²⁶ and the Seventh Circuit²⁷ regularly do so as well. Even governmental agencies follow the pro-arbitration pattern, as many of their attempts to ban mandatory arbitration are usually withdrawn and replaced before even going into effect.²⁸

But despite its overwhelming support in both state and federal judiciaries, long-term care consumers continue to brand the process as inherently unfair.²⁹

20. Edwards, *supra* note 2.

21. Lou Adolfsen, *The Supreme Court and President Trump Agree – Nursing Homes Plaintiffs May Be Required to Arbitrate*, MELITO & ADOLFSEN P.C. (June 19, 2017), <https://www.melitoadolfsen.com/blog/2017/06/nursing-home-plaintiffs-may-be-required-to-arbitrate-first-the-supreme-courts-say-so-and-so-does-pre.shtml> [<https://perma.cc/L3DJ-G2P2>].

22. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017).

23. *Id.*

24. 9 U.S.C. § 2 (2019).

25. See, e.g., *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Perry v. Thomas*, 482 U.S. 483, 489-91 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984).

26. See *Theising v. ISP.com, LLC*, 805 N.E.2d 778 (Ind. 2004); *Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 1000 (Ind. Ct. App. 2005); *Nw. Mut. Life Ins. Co. v. Stinnett*, 698 N.E.2d 339, 343 (Ind. Ct. App. 1998).

27. See *IBEW, Local 21 v. Ill. Bell Tel. Co.*, 491 F.3d 685, 691 (7th Cir. 2007); *James v. McDonald's Corp.*, 417 F.3d 672, 681 (7th Cir. 2005); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 366 (7th Cir. 1999).

28. See Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. 26649 (proposed June 8, 2017) (to be codified at 42 C.F.R. pt. 483).

29. *Prohibit Pre-Dispute Arbitration Agreements in Long-Term Care Facility Admission Contracts*, NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE (last visited Mar. 28, 2020) <https://theconsumervoice.org/uploads/files/issues/CVArbitrationIssueBrief.pdf> [<https://perma.cc/7X6T-3GJN>].

Specifically, critics claim that mandatory arbitration places consumers at a great disadvantage, arguing that arbitration clauses are commonly buried within the fine print of the hefty stack of paperwork a patient completes during the admissions process.³⁰ Critics also complain that arbitration strips consumers of both their constitutional right to a jury trial and the benefits a court of law provides.³¹ Other complaints, such as cost, award amount, biased arbitrators, and lack of ability to challenge the decision, are also inherent in the nursing home arbitration debate.³² Therefore, if these grievances are so common within the long-term care industry, why have they remained unsolved? Perhaps a realistic solution to these ethical concerns is one that operates outside the traditional canons of contract law. Instead, the answer may lie in redefining the law's definition of procedural justice to fit what long-term care consumers *think* it means.

Though mandatory arbitration is lawful in Indiana nursing home admissions contracts, it is far from just. Elderly residents—many of which have cognitive disabilities—are expected to read, comprehend, and assent to partialized agreements under highly emotional and stressful circumstances.³³ Consequently, a legislative change would help ensure that elderly Hoosiers of all awareness levels would be placed on the same footing as the nursing facility early in the dispute resolution process. Therefore, this Note argues that the Indiana General Assembly should amend Title 34, Article 57 of the Indiana Code to include a Long-Term Care Admissions Arbitration chapter that requires Indiana nursing home admission contracts containing arbitration clauses to include language obligating all parties to first participate in mediation before arbitration. Part I explains the historical background of arbitration, its dense support in both the Indiana and federal court systems, and how it operates within the scope of long-term care facility admissions contracts. Part II addresses both the concerns patients commonly raise regarding mandatory arbitration and the ways the courts respond to those concerns. Part III discusses the Mediation-Arbitration model in detail, focusing on its mechanics and benefits; how it fits within the FAA; other industries' success in using both it and similar models; and how Indiana can merge such a model into the Hoosier state's long-term care industry.

I. NURSING HOME ARBITRATION

A. *What Exactly Is Arbitration?*

Arbitration is an out-of-court form of dispute resolution between parties to

30. *Id.*

31. *Id.*

32. *Id.*

33. Erica F. Wood, *Should CMS Prohibit Arbitration in Nursing Home Admission Contracts?*, A.B.A. (July 29, 2019) https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_36/issue_6_august2015/cms_binding_arbitration_comments/ [https://perma.cc/33QL-SVKF].

a contract.³⁴ It is the most traditional form of alternative dispute resolution and is typically binding.³⁵ Like many other alternative dispute resolution models, arbitration is premised in consent; parties only resolve disputes using arbitration if both parties agree to use it.³⁶ Such an agreement typically takes the form of a contract containing some type of pre-dispute clause.³⁷ At first glimpse, arbitration appears similar to the adversarial process because it, too, involves parties making opening statements and presenting evidence to a neutral third party.³⁸ However, despite these similarities, the arbitration process differs from a classic trial in numerous ways.

First, arbitration is unique in that its parties generally have complete control in choosing their arbitrator.³⁹ The arbitrator, an impartial third party, has a role similar to that of a judge.⁴⁰ In Indiana, both parties to a controversy must mutually choose an arbitrator.⁴¹ Further, the arbitrator has a duty to “faithfully and fairly: (1) hear and examine the controversy matters; and (2) make a just award according to the best of the arbitrator’s understanding.”⁴² Though the statute attempts to prevent arbitrator partiality, it cannot completely guarantee an unbiased proceeding. For example, parties may choose an arbitrator based on his or her expertise in a particular field, which could potentially lead to an inherent preference for the party who aligns most with the arbitrator’s professional views.⁴³ This is problematic, especially considering that parties have little opportunity to challenge an arbitrator’s final and binding solution.⁴⁴

Additionally, though an arbitrator has a quasi-judicial role in the process, arbitration is typically less formal than traditional litigation.⁴⁵ Though the process

34. *What We Do*, AM. ARBITRATION ASS’N, <https://www.adr.org/Arbitration> [<https://perma.cc/8D94-X9C4>] (last visited Mar. 29, 2020) [hereinafter *What We Do*].

35. *Arbitration Defined: What is Arbitration?*, JAMS, <https://www.jamsadr.com/arbitration-defined/> [<https://perma.cc/R42W-GP65>] (last visited Mar. 29, 2020).

36. Aceris Law, LLC, *Definition of Arbitration*, INT’L ARBITRATION INFO. (Feb. 18, 2018), <https://www.international-arbitration-attorney.com/definition-of-arbitration/> [<https://perma.cc/8WBA-QETY>].

37. *Id.*

38. *Arbitration*, A.B.A. (Oct. 11, 2018), https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/ [<https://perma.cc/9A4M-5QMA>] [hereinafter *Arbitration*].

39. Staff2, *How Are Arbitrators Chosen?*, U. MO. SCH. L.: ARB. INFO. (Oct. 15, 2018), <http://law.missouri.edu/arbitrationinfo/2015/10/14/how-are-arbitrators-chosen/> [<https://perma.cc/84YS-DVZ3>].

40. *What We Do*, *supra* note 34.

41. IND. CODE § 34-57-1-4 (2018).

42. IND. CODE § 34-57-1-8 (2018).

43. *What is Arbitration?*, CIARB, <https://www.ciarb.org/disputes/dispute-appointment-service/arbitration/> (last visited Mar. 27, 2020) [<https://perma.cc/7UVX-QB6D>] [hereinafter CIARB].

44. Aceris Law LLC, *supra* note 36.

45. CIARB, *supra* note 43.

commonly resembles a trial, complete with opening statements and presentations of evidence,⁴⁶ the rules of discovery may be vague or non-existent in an arbitral setting.⁴⁷ For example, parties often create their own discovery rules, such as placing a limit on the number of depositions and interrogatories each party may serve.⁴⁸ The rules of evidence are also up to interpretation in the arbitral process, as parties may offer “relevant and material evidence” to support their arguments.⁴⁹ Moreover, the arbitrator has the power “to determine what evidence will be admitted, what evidence is relevant, and what evidence is material to the case.”⁵⁰ This may, and often does, involve “any evidence the arbitrator decides is necessary to understand and decide the dispute.”⁵¹ On the contrary, the arbitrator also has the authority to “exclude evidence that [he or she] decides is cumulative or irrelevant.”⁵² Therefore, arbitration takes a much more relaxed approach to its proceedings than that of a typical court.

Yet another difference between arbitration and trial is that arbitration moves faster than standard litigation.⁵³ Additionally, some also believe that arbitration is more cost-effective than litigation.⁵⁴ Between 2003 and 2007, the American Arbitration Association reported that the median award amount for nearly 1,200 employment arbitrations was only \$109,858 per case.⁵⁵ In comparison, federal employment discrimination cases between 1991 and 2000 awarded on average around \$890,000 per case.⁵⁶

In summation, arbitration’s flexibility, coupled with its forgiving procedural process, makes it the ideal candidate for long-term care facilities who wish to

46. *Arbitration*, *supra* note 38.

47. Miriam Smolen, Associate General Counsel, Fannie Mae, Webcast Presentation of Arbitration vs. Litigation: “Weighing the Pros and Cons of Each Form of Dispute Resolution” and “Global Litigation Concerns: Location, Location, Location” 4 (2009) (transcript available at <https://www.acc.com/education/webcasts/upload/12-10-09-Webcast-transcript.pdf> [<https://perma.cc/QPY4-J5XV>]).

48. *Id.*

49. *Consumer Arbitration Rules*, AM. ARB. ASS’N 25 (Sept. 1, 2018), https://www.adr.org/sites/default/files/Consumer_Rules_Web_0.pdf [<https://perma.cc/WQ7G-U3P4>].

50. *Id.*

51. *Id.*

52. *Id.*

53. *Measuring the Costs of Delays in Dispute Resolution*, AM. ARBITRATION ASS’N, <http://go.adr.org/impactsofdelay.html> [<https://perma.cc/F22L-DMAU>] (last visited Mar. 29, 2020). For example, an American Arbitration Association study found that United States District Court cases undergoing arbitration, on average, take just over eleven months to reach settlement. This is much shorter than the twenty-four months it takes litigation on average in United States District Courts to move from filing to trial.

54. Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 99 (2015).

55. *Id.*

56. *Id.*

avoid the restraints of ordinary litigation.

B. The Courts' Support of Arbitration

Similar to long-term care facilities, modern-day courts also heavily support the arbitral process.⁵⁷ Historians have traced arbitration's existence all the way back to the 1600s, Colonial America, and even George Washington's own will.⁵⁸ However, courts have not always approved of this popular pre-dispute model.⁵⁹ For example, when arbitration first began to gain traction in the 1800s, courts outright refused to engage in such "ouster of jurisdiction."⁶⁰ They felt doing so interfered with their jurisdiction to decide disputes.⁶¹ Judges also feared that allowing parties to arbitrate outside of court would impede on party rights to a fair and equitable hearing.⁶² The Supreme Court's holding in *Home Insurance Co. of New York v. Morse* made such feelings explicitly clear, holding that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."⁶³

However, as the country progressed into the twentieth century, commercial entities began losing trust in the United States legal system.⁶⁴ Increased industrialization led to a climbing number of labor and employment disputes between employers and employees.⁶⁵ This in turn increased the demand for quick, efficient ways to resolve disagreements.⁶⁶ Businessmen began to take matters into their own hands through arbitration, a process viewed by many at the time as a "sensible answer to the expense and delay of litigation."⁶⁷ However, because the courts disfavored arbitration, businessmen knew that they would have trouble convincing a judge to enforce their privately-made agreements to arbitrate.⁶⁸ After months of lobbying and convening with legal experts, the business community found the legislation it was looking for with the passing of the 1920 New York Arbitration Act.⁶⁹ This act made pre-dispute agreements to arbitrate enforceable

57. Lauren Gaffney, *The Circle of Assent: How "Agreement" Can Save Mandatory Arbitration in Long-Term Care Contracts*, 62 VAND. L. REV. 1017, 1023-24 (2009).

58. WILLIAM J. BARRY, APPROPRIATE DISPUTE RESOLUTION 111 (Wolters Kluwer Law & Business 2017).

59. James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 L. & HIST. REV. 241, 241 (2013).

60. BARRY, *supra* note 58, at 111.

61. *Id.*

62. *Id.*

63. *Home Ins. Co. of N.Y. v. Morse*, 87 U.S. 445, 451 (1874).

64. BARRY, *supra* note 58, at 112.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

when mutually agreed to by parties.⁷⁰ Four years later, the United States Supreme Court finally followed New York's lead and abandoned its intense objections against pre-dispute arbitration in *Red Cross Line v. Atlantic Fruit Co.*⁷¹ In *Red Cross Line*, the Court upheld its first mandatory arbitration clause, finding arbitration agreements in maritime contracts to be "valid, enforceable, and irrevocable."⁷²

After the *Red Cross Line* decision, arbitration buried its way even further into federal law with Congress's passing of the FAA in 1925.⁷³ In creating the FAA, New York's arbitration movement yet again led the way, as its newly-created arbitration act served as the model for the FAA proposed to Congress.⁷⁴ By enacting the FAA, Congress officially adopted a "national policy favoring arbitration."⁷⁵ Specifically, the FAA's purpose is to "require[] courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."⁷⁶ The FAA generally aims to make arbitration agreements "valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract."⁷⁷ Such grounds include generally applicable contract defenses like fraud or unconscionability.⁷⁸ Since the FAA's debut, the Supreme Court,⁷⁹ Indiana state courts,⁸⁰ and the Seventh Circuit⁸¹ all have heavily supported arbitration clauses in many areas and industries.

70. *Id.*

71. Wesley A. Sturges & Irving Olds Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 L. & CONTEMP. PROBS. 580, 603 (1952).

72. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 118 (1924) (internal quotations omitted).

73. BARRY, *supra* note 58, at 112.

74. Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 173-74 (2008).

75. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

76. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989).

77. 9 U.S.C. § 2 (2019).

78. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

79. *See, e.g., id.* at 1421 (reviewing waiver of Sixth Amendment rights in nursing home contracts); *Volt Info. Scis.*, 489 U.S. at 491 (determining whether the FAA preempts state law permitting courts to stay arbitration of an agreement between university and contractor); *Perry v. Thomas*, 482 U.S. 483, 489-91 (1987) (reviewing California law that permitted employees to sue for unpaid wages); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (holding that the district court erred in refusing motion to compel arbitration between investor and securities broker-dealer).

80. *See, e.g., Theising v. ISP.com*, 805 N.E.2d 778, 780 (Ind. 2004); *Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 1000 (Ind. Ct. App. 2005); *Nw. Mut. Life Ins. Co. v. Stinnett*, 698 N.E.2d 339, 343 (Ind. Ct. App. 1998).

81. *See, e.g., IBEW, Local 21 v. Ill. Bell Tel. Co.*, 491 F.3d 685, 691 (7th Cir. 2007); *James v. McDonald's Corp.*, 417 F.3d 672, 681 (7th Cir. 2005); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 366 (7th Cir. 1999).

Despite common misunderstanding, the FAA's arms reach to commercial contracts at both the state and federal levels unless the contract explicitly states otherwise.⁸² Consequently, the FAA has the power to preempt any state rule that facially or implicitly discriminates against arbitration.⁸³ Courts generally view arbitration as a settled, procedural choice that parties have agreed to in advance, such as a special kind of forum-selection clause.⁸⁴ Therefore, state statutes are prohibited from carving out areas in which arbitration is thought to be inappropriate or in need of special regulation.⁸⁵

To conclude, arbitration has bloomed into a popular practice across the United States. Despite its checkered history, arbitration has earned vast approval from many levels of industry and continues to impact the ways in which parties write contracts, judges decide cases, and legislators create law.

C. Arbitration in Long-Term Care Facilities

As previously illustrated, the use of mandatory arbitration clauses has increased greatly in a wide array of consumer contracts.⁸⁶ One of the lesser-known areas that uses the arbitral process is tort law, as arbitration is commonly used to compel settlements related to personal injury claims between contracting parties.⁸⁷ Like general personal injury claims, claims against long-term care facilities are also settled by arbitration.⁸⁸ In fact, experts estimate that nearly 2.5 million Americans in nursing homes today are likely bound by an arbitration agreement.⁸⁹

The manner in which nursing homes bind patients to such arbitration agreements is both a hurried and unexplained process.⁹⁰ Residents usually enter into this process unexpectedly, such as after they fall ill or become dependent due to their age.⁹¹ Moreover, becoming a nursing home patient involves losing a

82. Terry L. Trantina, *What Law Applies to an Agreement to Arbitrate?*, DISP. RESOL. MAG., Fall 2015, at 29.

83. *Kindred Nursing Ctrs. Ltd. P'ship*, 137 S. Ct. at 1426.

84. *See Schrek v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

85. Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 L. & CONTEMP. PROBS. 253, 253 (2004).

86. Laura K. Bailey, *The Demise of Arbitration Agreements in Long-Term Care Contracts*, 75 MO. L. REV. 181 (2010).

87. Thornburg, *supra* note 85, at 254.

88. Bailey, *supra* note 86, at 181.

89. Ray Mullman, *Nun Raped At Nursing Home Can't Sue*, S.C. NURSING HOME L. BLOG (Dec. 12, 2017), <https://scnursinghomelaw.com/category/arbitration-2/> [<https://perma.cc/EZC4-P5AS>].

90. *See* Jana Paylic, *Reverse Pre-Emptying the Federal Arbitration Act: Alleviating the Arbitration Crisis in Nursing Homes*, 22 J.L. & HEALTH 375, 389-90 (2009).

91. Stephen Pokiniewski, Jr. & Anapol Weiss, *Arbitration Agreements in Nursing Home Cases*, THE LEGAL INTELLIGENCER (Apr. 6, 2018), <https://www.law.com/thelegalintelligencer/2018/04/06/arbitration-agreements-in-nursing-home-cases/> [<https://perma.cc/25FZ-JHLX>].

certain amount of autonomy during admission.⁹² For instance, the selection of the facility is often made under crisis circumstances.⁹³ Additionally, geographic considerations may severely limit facility options, as patients living in rural areas may lack choice in comparison to those who live in the city.⁹⁴ Despite the patient's non-involvement in the selection process, a choice in a long-term care facility is usually one of finality.⁹⁵

At the time of admission, patients are commonly asked to sign some sort of admissions agreement.⁹⁶ However, institutions frequently presume that patients lack capacity to do so from the start.⁹⁷ Consequently, they often rely on the signature from a family member or other "responsible" party.⁹⁸ Moreover, the standard long-term care admissions process takes only three hours or less,⁹⁹ so patients have a limited amount of time to sift through all given admissions documentation and paperwork. Therefore, patients often overlook the part of the agreement that includes an arbitration clause.¹⁰⁰ These clauses typically require both parties to resolve any disputes arising from the patient's care with a designated dispute resolution entity.¹⁰¹ By signing the agreement, patients relinquish their rights to sue in a court of law.¹⁰² However, most families are unaware that these clauses exist.¹⁰³

Regardless of the ethical concerns such a practice poses, including arbitration provisions in nursing home admissions contracts is lawful.¹⁰⁴ In fact, binding arbitration agreements in such contracts are becoming increasingly common.¹⁰⁵ For example, experts estimate that around 50 percent to 60 percent of today's

92. Deon C. Hayley et al., *Ethical and Legal Issues in Nursing Home Care*, 156 ARCH. INTERN. MED. 249, 249 (1996).

93. *Id.* at 250. "Crisis circumstances" include caretaker illness, death, or rapid health deterioration of a patient.

94. *Id.*

95. *Id.* Nearly one-third of new patients stay in nursing homes for more than one year. Unfortunately, statistics suggest that these patients have a high likelihood of dying in these facilities as well.

96. Pokiniewski, Jr. & Weiss, *supra* note 91.

97. Hayley et al., *supra* note 92, at 250.

98. *Id.*

99. *Id.*

100. Pokiniewski & Weiss, *supra* note 91.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See, e.g.,* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1429 (2017); Marmot Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532 (2012); Tender Loving Care Mgmt., Inc. v. Sherls, 14 N.E.3d 67, 73 (Ind. Ct. App. 2014); Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 417 (Ind. Ct. App. 2004).

105. Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 CAMPBELL L. REV. 157, 161 (2009).

nursing home residents across the United States sign arbitration agreements.¹⁰⁶ Most large-chain nursing homes in the United States, such as Integrated Health Services, Beverly Industries, Kindred Healthcare, and Mariner, all include arbitration clauses in their admissions agreements.¹⁰⁷ Though size and readability can vary, an enforceable arbitration clause in a nursing home admissions agreement might closely resemble the following:

The Parties expressly agree that the Arbitrator shall have exclusive authority to resolve any disputes related to the existence and/or enforceability of this Resolution of Legal Disputes provision, including but not limited to any claim that all or any part of this Resolution of Legal Disputes provision is void or voidable.¹⁰⁸

However, *Kindred* is not the first time the Supreme Court faced nursing home arbitration and upheld its enforceability.¹⁰⁹ In 2012, the Court held in *Marmot Health Care v. Brown* that West Virginia's practice of prohibiting pre-dispute arbitration in wrongful death nursing home claims for public policy reasons violated the FAA.¹¹⁰ Indiana state courts also repeatedly support the use of mandatory arbitration clauses in nursing home admission contracts by holding that parties are assumed to understand the terms of the agreements they assent to.¹¹¹

Furthermore, even governmental bodies fail to promulgate and enact rules that adequately challenge nursing home arbitration.¹¹² For example, government agencies have rolled back attempts to ban nursing home arbitration.¹¹³ The Centers for Medicare and Medicaid Services ("CMS") issued the Reform of Requirements in Long Term Care Facilities Final Rule in October 2016, which banned pre-dispute binding arbitration agreements in long-term care facility

106. Lisa Schencker, *An End to Mandatory Arbitration Agreements in Nursing Homes?*, MODERN HEALTHCARE (July 17, 2015), <http://www.modernhealthcare.com/article/20150717/NEWS/150719913> [https://perma.cc/AJ72-SQLT].

107. Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 268 (2004).

108. *Roth v. Evangelical Lutheran Good Samaritan Soc'y*, 147 F. Supp. 3d 806, 809 (N.D. Iowa 2015).

109. *See Marmot Health Care Ctr., Inc.*, 565 U.S. at 532.

110. *Id.*

111. *See, e.g., Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 73 (Ind. Ct. App. 2014) (holding that, by signing the admissions contract, the patient waived her right to a jury trial); *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 417 (Ind. Ct. App. 2004) (holding that the nursing home's admissions contract containing an arbitration clause was not unconscionable).

112. *See Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements*, 82 Fed. Reg. 26649 (proposed June 8, 2017) (to be codified at 42 C.F.R. pt. 483).

113. *Id.* (emphasizing that the Center for Medicare & Medicaid Services withdrew 81 Fed. Reg. 68688, which banned nursing homes from using pre-dispute arbitration, two months before its effective date).

contracts.¹¹⁴ However, less than nine months after making the decision, the CMS issued a proposed rule lifting this ban.¹¹⁵ This new rule restored long-term care facilities' freedom to include such provisions in their admissions contracts, so long as the facilities remained transparent with patients about the arbitral process.¹¹⁶ Another example comes from Congress, which twice attempted to limit mandatory arbitration through its proposed Fairness in Nursing Home Arbitration Acts.¹¹⁷ However, unsurprisingly, both bills died in committee.¹¹⁸

In summary, the United States' wide-spread preference for arbitration has begun to reach parts of the healthcare sector, including the long-term care industry. Administrative, legislative, and precedential history all illustrate attempts to limit its existence in the nursing home arena, with most, if not all, attempts proving fruitless.

II. FAIRNESS CONCERNS AND PARTY PERSPECTIVES

An admissions contract containing an arbitration clause is just one of many forms patients receive, overlook, and sign when being admitted into a long-term care facility.¹¹⁹ At the time of admission, nursing home residents are often overwhelmed, arguably leading them to execute agreements at a time when they are not able to comprehend the impact of the contract's provisions.¹²⁰ Consequently, patients and their families often oppose the enforcement of the arbitration clauses and commonly rely on the following defenses to challenge their enforceability.¹²¹ However, regardless of whether the patient or his or her

114. *CMS Issues Proposed Revision Requirements for Long-Term Care Facilities' Arbitration Agreements*, CMS.GOV: NEWSROOM (June 5, 2017), <https://www.cms.gov/newsroom/factsheets/cms-issues-proposed-revision-requirements-long-term-care-facilities-arbitration-agreements> [https://perma.cc/9SUC-LYRF].

115. Nancy Halstead & Kelly Hibbert, *CMS Reverses Course in Pre-Dispute Arbitration Agreement Ban*, REED SMITH LLP: HEALTH INDUSTRY WASHINGTON WATCH (June 13, 2017), <https://www.healthindustrywashingtonwatch.com/2017/06/articles/regulatory-developments/medicare-medicaid-services-regulations/cms-reverses-course-in-pre-dispute-arbitration-agreement-ban/> [https://perma.cc/CR8M-9YJQ].

116. *Legal Alert: Centers for Medicare and Medicaid Services (CMS) Reverses Arbitration Ban*, WEINBERG WHEELER HUDGINS GUNN & DIAL (June 9, 2017), <https://www.wwhgd.com/newsroom-news-legal-alert-cms-reverses-arbitration-ban.html> [https://perma.cc/Y43P-AGEK].

117. S. 512, 111th Cong. (2009); H.R. 6351, 112th Cong. (2012).

118. *See* S. 512, 111th Cong. (2009) (emphasizing the bill's failure to pass in the 111th Congress); H.R. 6351, 112th Cong. (2012) (emphasizing the bill's failure to pass in the 112th Congress).

119. Charles P. Sabatino, *Nursing Home Admission Contracts: Undermining Rights the Old-Fashioned Way*, 24 CLEARINGHOUSE REV. 553 (1990).

120. Kelly Bagby & Samantha Souza, *Ending Unfair Arbitration: Fighting against the Enforcement of Arbitration Agreements in Long-Term Care Contracts*, 29 J. CONTEMP. HEALTH L. & POL'Y 183, 186-87 (2013).

121. Reed R. Bates & Stephen W. Still, Jr., *Arbitration in Nursing Home Cases: Trends,*

power of attorney signs the agreement, the estate is still usually bound by the contract's terms – even if those terms require arbitration.¹²²

A. Contract of Adhesion and Unconscionability

As the Indiana Court of Appeals highlighted in *Progressive v. Indiana & Michigan Electric Co.*, to be unconscionable, “[a] contract must be ‘such as no sensible man but under delusion, duress or in distress would make, and such as no honest and fair man would accept.’”¹²³ Patients and their families often rely on this argument when challenging an arbitration clause's enforceability, claiming that either the arbitration clause itself or the circumstances under which patients signed the contract are inherently unfair.¹²⁴ Time pressures also impair the ability of families to seek and consider alternative nursing home locations.¹²⁵ This forces patients to either take or leave the care that they are being offered.¹²⁶ Therefore, because some families become so desperate to obtain an available bed, many feel as though they are simply at the mercy of a long-term care facility and its mandatory arbitration agreement.¹²⁷ This leaves patients and families feeling that their dire circumstances leave them with no meaningful choice.¹²⁸

Families further argue that the large disparity in bargaining power between the nursing facility and the resident gives the nursing facility an unjust advantage.¹²⁹ This belief is well-supported, as data show that even the average citizen who enters into an arbitration agreement often does not read or fully understand the contract's terms.¹³⁰ Therefore, if general consumers lack

Issues, and a Glance Into the Future, 76 DEF. COUNS. J. 282 (2009).

122. Brett Herbert, *Be Careful with that Power of Attorney! Arbitration Clauses and Nursing Home Lawsuits*, GORDON & REES: ESTATE CONFLICTS (June 12, 2017), <https://estateconflicts.com/be-careful-with-that-power-of-attorney-arbitration-clauses-and-nursing-home-lawsuits/> [<https://perma.cc/CD57-YN2D>].

123. *Progressive Constr. & Eng'g Co. v. Ind. & Mich. Elec. Co.*, 533 N.E.2d 1279, 1286 (Ind. Ct. App. 1989) (citing *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129, 131 (Ind. Ct. App. 1980)).

124. Bagby & Souza, *supra* note 120, at 185 (“Decisions regarding admission into a nursing facility are often ‘emotionally-charged, stress-laden event[s]’ that typically are made in the midst of a crisis brought on by an abrupt increase in disability level, precipitous deterioration in health, or the deterioration in health (or death) of a spouse or caregiver.”)

125. *Id.* at 187.

126. Krasuski, *supra* note 107, at 281.

127. Gaffney, *supra* note 57, at 1021.

128. Krasuski, *supra* note 107, at 273.

129. Bagby & Souza, *supra* note 120, at 187.

130. Paul F. Kirgis et al., “*Whimsy Little Contracts*” with *Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 55-56 (2015). When researchers presented a group of survey recipients with a sample credit card consumer contract containing an arbitration clause, only 6 percent of all participants who signed it reported that they both read and understood the agreement. Additionally, despite the contract's

awareness and understanding of arbitration agreements,¹³¹ the nation's sickest and weakest population undoubtedly do as well.¹³² A party's familiarity with the contract may also provide key advantages to winning either part or all of an arbitration award.¹³³ In the employment law context, research shows that an employer has a higher chance of winning if it drafted the contract.¹³⁴ Therefore, because nursing homes generally write their arbitration agreements without negotiating the terms with their residents, they likely have an advantage over their residents in regard to contractual comprehension from the start.¹³⁵

Nevertheless, though data appear to support this argument of unconscionability, the law does not.¹³⁶ In Indiana, the courts follow a strong arbitration enforcement policy.¹³⁷ Specifically, Indiana has made clear that nursing home admission agreements containing arbitration clauses, absent some contractual defense, are not "unconscionable adhesion contract[s]."¹³⁸ In fact, Indiana courts will only recognize a contract as being unconscionable if "a great disparity in bargaining power exists between the parties which leads the weaker to sign a contract unwillingly or without being aware of the terms."¹³⁹ This creates a potential loophole; however, courts presume that a person understood and assented to the terms of the contract if he or she signed it.¹⁴⁰ This is especially problematic when the arbitration provision is particularly conspicuous, as it is much more difficult in these cases to show that the patient truly did not understand the terms he or she assented to.¹⁴¹

Additionally, Indiana courts have held that a contract is not unenforceable

language and the researchers telling them so, more than 90 percent of participants did not know the contract contained an arbitration clause and did not believe that the clause barred them from bringing their disputes in court. The majority of participants also were not convinced that, if the parties did have to participate in arbitration, the arbitrator's decision would be final.

131. *Id.*

132. Tripp, *supra* note 105, at 161.

133. Gough, *supra* note 54, at 98.

134. *Id.* at 97-98. A 2015 study found that employee complainants won only 21 percent of the time in arbitration when the employer alone wrote the agreement and inserted it into the employee's handbook. In contrast, employee complainants won nearly 69 percent of the time in arbitration when they had some opportunity to negotiate their contracts with their employer. These results demonstrate the direct relationship that exists between a party's level of awareness of contractual terms and its likelihood of later winning in arbitration when those terms are at issue.

135. Gaffney, *supra* note 57, at 1025.

136. *See* Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 417 (Ind. Ct. App. 2004); *Nw. Mut. Life Ins. Co. v. Stinnett*, 698 N.E.2d 339, 343 (Ind. Ct. App. 1998).

137. *Nw. Mut. Life Ins. Co.*, 698 N.E.2d at 343.

138. Sanford, 813 N.E.2d at 417.

139. *White River Conservancy Dist. v. Commonwealth Eng'rs, Inc.*, 575 N.E.2d 1011, 1017 (Ind. App. 1991).

140. *See* Buschman v. ADS Corp., 782 N.E.2d 423, 428 (Ind. Ct. App. 2003).

141. *See* Sanford, 813 N.E.2d at 417 (highlighting the court's emphasis on the plain-view placement and text size of the arbitration clause in the contract).

merely because one party enjoys advantages over another.¹⁴² Though the courts generally refuse to lend themselves to the enforcement of a “bargain” in which one party has unjustly taken advantage of the other,¹⁴³ they also recognize that parties are free to enter into contracts.¹⁴⁴ As the courts have explicitly stated, “It is not the policy of the law to restrict business dealings or to relieve a party of his own mistakes of judgment.”¹⁴⁵ Furthermore, just because a contract resembles a standardized form contract drafted by a “superior party” does not mean that a court will hold its provisions unenforceable.¹⁴⁶ Courts presume that such contracts represent the parties’ freely bargained agreements.¹⁴⁷

In conclusion, despite the belief that arbitration clauses in long-term care facility contracts appear unconscionable, courts have continually relied upon the basic tenets of contract law to uphold their enforceability.

B. Capacity and Consent

As mentioned, many residents admitted into nursing homes have some type of diminished capacity.¹⁴⁸ While these illnesses are often somatic or socioemotional in nature, many of these disorders have especially debilitating characteristics that can impact a person’s ability to function.¹⁴⁹ Moreover, the nursing home population is predominately poor, elderly, and physically or mentally disabled.¹⁵⁰ In fact, nearly half of all chronic medical conditions associated with nursing home admissions are mental disorders like dementia.¹⁵¹ Furthermore, 63 percent of nursing home residents have some type of cognitive impairment, a condition that may affect their ability to participate in making their own healthcare decisions.¹⁵² In light of these issues, families often claim that patients are unable to partake in the admissions process¹⁵³ and lack the ability to understand what they are agreeing to.¹⁵⁴

Nursing home residents also may lack capacity due to their unique style of

142. *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129, 131 (Ind. Ct. App. 1980) (holding that a standardized contract, which, imposed and drafted by the party of superior bargaining strength, is not per se unconscionable).

143. *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971).

144. *Grott v. Jim Barna Log Systems-Midwest, Inc.*, 794 N.E.2d 1098, 1102 (Ind. Ct. App. 2003)

145. *Stiefler v. McCullough*, 174 N.E. 823, 826 (Ind. Ct. App. 1931).

146. *Grott*, 794 N.E.2d at 1102.

147. *Id.* at 1103.

148. Krasuski, *supra* note 107, at 276.

149. Gilberte Van Rensbergen & Tim Nawrot, *Medical Conditions of Nursing Home Admissions*, 10 BMC GERIATRICS 1, 8 (2010).

150. Hayley et al., *supra* note 92, at 249.

151. Rensbergen & Nawrot, *supra* note 149, at 1.

152. Hayley et al., *supra* note 92, at 249.

153. Krasuski, *supra* note 107, at 276.

154. *Id.*

cognitive decision-making.¹⁵⁵ For example, older adults tend to exhibit more “satisficing” tendencies than younger adults.¹⁵⁶ One reason the elderly engage in this heuristic form of decision-making is to decrease the amount of effort they exert in accomplishing a task involving elaborate forms of cognitive processing.¹⁵⁷ This form of cognitive processing proves adaptive in situations where the elderly may want to save energy on performing their daily activities, such as picking between two items at the grocery store.¹⁵⁸ However, the process can serve as an extreme detriment for this population when they are forced to instead measure more critical information, such as decisions involving their healthcare or personal finances.¹⁵⁹ Due to this characteristic, the elderly likely do not have the cognitive ability to weigh the impact of signing life-altering contracts, such as a nursing home admissions agreement.¹⁶⁰

Unfortunately, for elderly people unaware of the consequences of an arbitration clause, the standard to consent to one’s own healthcare in Indiana is quite low.¹⁶¹ In Indiana, “competent adults [are given] the utmost liberty in entering into contracts that, when entered into freely and voluntarily, will be enforced by the courts.”¹⁶² In fact, unless the individual is incapable of doing so under section 16-36-1-4 of the Indiana Code, the only thing a patient must show in order to consent to his or her own healthcare is that the patient is an adult.¹⁶³ In response, patients and their families may exercise two defenses in an attempt to show that the patient lacked the capacity to consent when he or she assented to healthcare treatment: Patients may either (a) present an opinion of an attending physician, which states that the patient lacked capacity to make such a choice,¹⁶⁴ or (b) attempt to show that the individual lacked mental capacity when he or she entered into the contract to begin with.¹⁶⁵

If neither of these defenses works and the patient’s capacity argument does

155. Stephanie M. Carpenter & Carolyn Yoon, *Aging and Consumer Decision Making*, 1235 ANN. N.Y. ACAD. SCI. 1, 2 (2011).

156. *Id.* Unlike younger adults who analyze potential options in order to make a *maximum* satisfactory decision, older adults examine options just long enough to reach an *adequately* satisfactory decision.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See* IND. CODE § 16-36-1-3 (2019).

162. *Zollman v. Geneva Leasing Assocs., Inc.*, 780 N.E.2d 387, 392 (Ind. Ct. App. 2002) (citing *Candelight Props., LLC v. MHC Operating Ltd. P’ship*, 750 N.E.2d 1, 10 (Ind. Ct. App. 2001); *Peoples Bank & Trust Co. v. Price*, 714 N.E. 2d 712, 716 (Ind. Ct. App. 1999)).

163. *See* IND. CODE § 16-36-1-3(a)(1) (2019).

164. IND. CODE § 16-36-1-4(a) (2019).

165. *Wilcox Mfg. Grp., Inc. v. Mktg. Servs. of Ind., Inc.*, 832 N.E.2d 559, 562 (Ind. Ct. App. 2005) (noting that the standard to determine contractual mental capacity “is whether the person was able to understand in a reasonable manner the nature and effect of his act” on the date of the agreement).

not pass muster, his or her family may try to argue that the arbitration provision is unenforceable if the agreement was signed by a third party.¹⁶⁶ For practical reasons, it is common for a family member to sign the admissions contract as power of attorney for a patient.¹⁶⁷ Moreover, because this has become such an everyday practice, the care facility often does not inquire into whether the patient actually gave the family member permission to sign for him or her or not.¹⁶⁸ Therefore, patients and their families attempt to challenge arbitration enforcement on ineligible third-party grounds, arguing that the family member who signed the contract lacked the authority to do so.¹⁶⁹

Unfortunately, though, this argument also commonly falls short. Indiana approves of certain individuals¹⁷⁰ consenting to health care for a patient if (1) the patient is “incapable of making a decision concerning the proposed health care” and (2) the patient “has not appointed a health care representative pursuant to Indiana Code section 16-36-1-7.”¹⁷¹ In fact, Indiana courts have even upheld third-party consent power in scenarios where the third party is not even the patient’s legal guardian or power of attorney at all.¹⁷² Therefore, if courts allow these types of unofficial representatives to consent for a patient’s health care, it comes as no surprise that they also allow and enforce a specifically-appointed representative’s choice to do the same.¹⁷³

In sum, an elderly individual’s diminished ability to consent does not prevent courts from enforcing his or her signing of an arbitration agreement. And, even if the patient does not sign an arbitration agreement himself, his power of attorney’s signing of the agreement will likely be enforced, too.

C. Repeat-Player Effect

Patients and their families face concerns with nursing home repeat-player advantages, or the expression of arbitrator bias toward a particular party who regularly uses that arbitrator.¹⁷⁴ Because nursing homes make more frequent

166. Krasuski, *supra* note 107, at 277.

167. *Id.* at 276.

168. *Id.*

169. *Id.* at 277.

170. See IND. CODE § 16-36-1-5(a) (2018).

171. *Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 73 (Ind. Ct. App. 2014).

172. See, e.g., *id.* at 74 (finding that a patient’s son had the authority to contract for the patient’s health care services despite not being the patient’s legal representative or court-appointed guardian).

173. See *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 420 (Ind. Ct. App. 2004) (holding that the patient’s legal representative’s signing of an admissions contract bound her to arbitration); *Heritage Dev. Of Ind., Inc. v. Opportunity Options, Inc.*, 773 N.E.2d 881, 888 (Ind. Ct. App. 2002) (holding that a principal will be bound by a contract signed by an agent if the principal expressly authorized the agent to enter into the contract on the principal’s behalf).

174. Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Reality*, 60 L. & CONTEMP. PROBS. 153, 156 (1997).

appearances in arbitration, as opposed to a first-time patient, nursing homes have far more opportunity to develop relationships with the third-party neutrals they use.¹⁷⁵ Moreover, because particular arbitrators are selected by nursing homes ahead of time in the admissions contract, the arbitrator often relies on the institution for income and future business.¹⁷⁶ Unsurprisingly, this could incentivize the arbitrator to inadvertently resolve the dispute in the institution's favor.¹⁷⁷ Families therefore often feel that nursing homes are unable to provide neutral decision-makers in arbitration proceedings.¹⁷⁸ Though scarce, data support this fear, as research shows that companies who participate in arbitration more often than those who do not have a higher likelihood of winning some type of arbitration award.¹⁷⁹

The FAA attempts to protect parties from this bias, as 9 U.S.C. § 10(a)(2) permits federal courts to vacate arbitral awards "where there was evident partiality or corruption in the arbitrators."¹⁸⁰ The Supreme Court also has established its own impartiality standards.¹⁸¹ Additionally, Indiana's Alternative Dispute Resolution rules provide similar protections.¹⁸² For instance, an Indiana arbitrator may not be partial, may not be a former relative or employee of any party, and may not have an interest in the outcome of the dispute.¹⁸³ Further, if any one or more of these conditions occur, an Indiana court reserves the right to vacate the award.¹⁸⁴

Regrettably, though, the repeat-player effect is incredibly difficult to prove or disprove.¹⁸⁵ Justice Scalia put it best: "While computers function solely on logic, human beings do not. All sorts of extraneous factors – emotions, biases, preferences – can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are)."¹⁸⁶ For example,

175. *Id.*

176. Krasuski, *supra* note 107, at 298.

177. *Id.*

178. Beth Davis, *Mandatory Arbitration Agreements in Long-Term Care Contracts: How to Protect the Rights of Seniors in Washington*, 35 SEATTLE U. L. REV. 213, 223 (2011).

179. See Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1257 (2001) (noting that, out of nearly 20,000 arbitrations between First USA bank and their customers in 1999, First USA won 99.6 percent of the time, prevailing in all but eighty-seven cases); Ramona L. Lampley, "Underdog" Arbitration: A Plan for Transparency, 90 WASH. L. REV. 1727, 1750 n. 105 (2015) (noting that employees arbitrating against one-shot employers won 32 percent of the time, employees arbitrating against repeat-player employers won nearly 14 percent of the time, and pro se employees arbitrating against repeat-player employers using a repeat arbitrator won 2 percent of the time).

180. 9 U.S.C. § 10(a)(2) (2019).

181. See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149-50 (1968).

182. See IND. ALT. DISP. RESOL. CT. R. 7.4 (2019).

183. *Id.*

184. IND. CODE § 34-57-2-13(a)(2) (2019).

185. Alderman, *supra* note 179, at 1257.

186. Antonin Scalia, *Introduction* to ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR

the Indiana Court of Appeals reviews arbitrator impartiality accusations solely by considering whether the proceedings were “fundamentally unfair.”¹⁸⁷ Additionally, when a party fails to raise “specific allegations of bias,” neither the size of the arbitration award nor the “arbitrator’s consistent reliance on one party’s evidence and interpretation of the law” will raise an inference of arbitrator partiality.¹⁸⁸ These hurdles make it extremely difficult to vacate an arbitration award in both Indiana courts and the Seventh Circuit.¹⁸⁹

In sum, long-term care facilities’ recurrent involvement in arbitration proceedings provides them with a substantial opportunity to befriend and influence their arbitrator of choice. Moreover, it is incredibly difficult to vacate an arbitral award, as courts commonly use subjective and deferential standards in reviewing an arbitrator’s decision.

D. Loss of Due Process Rights

Many families and patients also attempt to challenge nursing home arbitration clauses on the grounds that they are unknowingly being stripped of their constitutional rights.¹⁹⁰ This forces patients to choose either between much-needed health care or their right to a trial by jury.¹⁹¹ At the federal level, the Seventh Amendment guarantees a right to a trial by jury in civil cases with values in controversy that exceed twenty dollars.¹⁹² Indiana’s Constitution similarly protects the right to a trial by jury in civil cases.¹⁹³

However, courts routinely hold that by signing an arbitration agreement,

CASE: THE ART OF PERSUADING JUDGES xxiii (1st ed., Thomson West 2008).

187. Bopp v. Brames, 677 N.E.2d 629, 633 (Ind. Ct. App. 1997).

188. MSP Collaborative Developers v. Fid. & Deposit Co. of Md., 596 F.2d 247, 251 (7th Cir. 1979) (citing Sweet v. Steve’s Cartage Co., 365 N.E. 2d 1110, 1111 (Ill. App. Ct. 1977); Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, UAW, 500 F.2d 921, 923 (2d Cir. 1974)).

189. See, e.g., Sphere Drake Ins. v. All Am. Life Ins. Co., 307 F.3d 617, 623 (7th Cir. 2002) (holding that the arbitrator’s failure to disclose his prior relationship with and representation of reinsurer in another arbitration proceeding did not justify setting aside the award); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 683 (7th Cir. 1983) (holding that the failure of the arbitrator to disclose a prior business relationship with a principal of one of the parties did not justify setting aside the award); Bopp, 677 N.E.2d at 633.

190. Krasuski, *supra* note 107, at 292.

191. John R. Schleppenbach, *Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and their Residents*, 22 ELDER L.J. 141, 159 (2014).

192. U.S. CONST. amend. VII (“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 the United States, than according to the rules of the common law.”).

193. IND. CONST. art. 1, § 20 (“In all civil cases, the right of trial by jury shall remain inviolate.”).

parties voluntarily chose to waive these rights.¹⁹⁴ For example, the Supreme Court reiterated this opinion again recently in *Kindred*, holding that parties voluntarily waive their Seventh Amendment rights when they choose to sign an arbitration agreement.¹⁹⁵ Indiana also acknowledges and supports the relinquishment effect arbitration clauses have on parties' due process rights.¹⁹⁶ Even the Indiana Trial Rules¹⁹⁷ recognize a "very strong presumption of enforceability of contracts that represent the freely bargained agreement of the parties."¹⁹⁸ Through these examples, our courts and legislatures have therefore made clear that Constitutional rights are not absolute and may be waived.¹⁹⁹

To conclude, patients and their families are likely to lose when bringing a claim that nursing home patients were unlawfully stripped of their right to a jury trial. Though both the United States Constitution and the Indiana Constitution provide such rights, courts consider them waived upon both parties signing a contract containing an arbitration clause.

III. THE BEST OF BOTH WORLDS: MEDIATION-ARBITRATION

Considering the precedent, the dicta, and the legislative history at both federal and state levels, arbitration will likely continue well into the foreseeable future.²⁰⁰ Despite vocal opposition against it, arbitration provides many benefits that traditional litigation cannot match.²⁰¹ However, this is not to say that patient and family concerns related to arbitration's pitfalls are ill-founded. Indeed, binding nursing home admission contracts often thrive on the power of well-educated, well-represented industries and prey on the ignorance of consumers in emotionally-charged circumstances.²⁰² To correct this, and in order to restore patient autonomy and procedural justice, the long-term health industry needs a new form of alternative dispute resolution. Therefore, Mediation-Arbitration

194. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017); *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 420 (Ind. Ct. App. 2004).

195. *Kindred Nursing Ctrs. Ltd. P'ship*, 137 S. Ct. at 1429.

196. *See Tender Loving Care Mgmt., Inc. v. Sheris*, 14 N.E.3d 67, 74 (Ind. Ct. App. 2014) (holding that a patient's son waived the patient's right to a jury trial by signing an arbitration agreement); *Sanford*, 813 N.E.2d at 420 (holding that by signing a contract containing an arbitration clause for the patient, the patient's legal representative waived the patient's right to a trial by jury).

197. IND. T. R. 38(E) (emphasizing that "nothing in these rules shall deny the parties the right by contract or agreement to submit or to agree to submit controversies to arbitration made before or after commencement of an action").

198. *Tender Loving Care Mgmt., Inc.*, 14 N.E.3d at 74 (quoting *Sanford*, 813 N.E.2d at 420).

199. *Id.* at 73.

200. *See Edna Sussman & John Wilkinson, Benefits of Arbitration for Commercial Disputes*, A.B.A. 1 (last visited Apr. 1, 2020), https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf [<https://perma.cc/29CG-S74F>].

201. *Id.*

202. Tripp, *supra* note 105, at 161.

(“med-arb”), a hybrid model combining the benefits of both mediation and arbitration, should replace sole arbitration and become the new standard of dispute resolution for nursing home admission contracts.

A. The Benefits of Mediation-Arbitration

Though arbitration has developed into the dispute resolution model of choice for the long-term care industry, patients and nursing homes could greatly benefit from using the combined model of med-arb. “Med-arb is the melding of two well-established processes for conflict resolution into one hybrid process.”²⁰³ More specifically, “[m]ediation and [a]rbitration are used in conjunction with one another” during this alternative dispute resolution process.²⁰⁴ The process uses a single third-party neutral for both stages, beginning as a mediator and switching to an arbitrator if the parties are unable to reach an agreement during the mediation portion.²⁰⁵

As courts are often under pressure to find more expedient alternatives for resolving disputes, so is the alternative dispute resolution industry.²⁰⁶ Notwithstanding that litigation has experienced a downward trend in recent years, both consumers and businesses felt far from satisfied with their out-of-court alternatives.²⁰⁷ Discontent with arbitration has been at an all-time high for a number of reasons, including its uncanny resemblance to a typical court proceeding.²⁰⁸ In turn, arbitration’s litigious framework turned many displeased parties towards mediation, a process that many consider much more customizable and transformative than arbitration.²⁰⁹ However, as mediation gained popularity, it, too, became ridden with attorneys attempting to turn it into a restrictive, legalized proceeding.²¹⁰ The med-arb model grew out of these problems that stemmed from mediation and arbitration.²¹¹ Particularly, by combining the two processes together, parties finally found a compromise between “arbitration’s lack of flexibility and the increasingly legalized version of mediation.”²¹²

Because med-arb possesses characteristics of both mediation and arbitration,

203. Mark B. Baril & Donald Dickey, *Med-Arb: The Best of Both Worlds or Just a Limited ADR Option?*, MEDIATE.COM 1 (2009), <https://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf> [https://perma.cc/ZX94-8GFH].

204. *Id.*

205. *Id.*

206. *Id.* at 3.

207. Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157, 161 (2015).

208. *Id.* at 161-62.

209. *Id.* at 162-63.

210. *Id.* at 165.

211. *Id.* at 166.

212. *Id.*

it gives parties the best of both worlds.²¹³ For example, the mediation portion of the process gives parties the opportunity to first discuss their concerns and find a resolution together without exercising the decision-making authority of a third party.²¹⁴ The third-party neutral simply facilitates dialogue between the parties in the mediation stage; specifically, his or her only responsibilities are to empower the parties' voices and to help them craft their own customized solution.²¹⁵ However, med-arb also embraces arbitration's principle of finality.²¹⁶ Therefore, even if parties are unable to reach a mutually beneficial decision in the mediation stage, the hybrid model warrants a settlement in the arbitration stage at the very least.²¹⁷ This provides parties with comfort and the guarantee of knowing that their dispute will reach a final decision at some point in the proceedings.²¹⁸

Med-arb is also efficient. Precisely, the mediation phase usually allows parties to narrow the core of their issues, many of which are simplistic and have little to do with money or the law.²¹⁹ Studies also show that a physician's willingness to apologize for any adverse medical events the patient experienced while under the physician's care may also factor into a patient's decision to bring a medical malpractice suit against a health care provider.²²⁰ Like other states, Indiana has even gone so far as to codify this principle into law.²²¹ These "apology laws," which render physician apologies inadmissible in court, have resulted in the greatest reduction in average settlement size and time in cases involving severe outcomes.²²² Collectively, this information demonstrates that while some parties do seek large, expensive settlements, many are simply searching for an open conversation with their health care provider.²²³ Arbitration on its own does not embrace this type of constructive dialogue between parties.

213. Martin C. Weisman, *Med-Arb: The Best of Both Worlds*, DISP. RESOL. MAG., Spring 2013, at 40.

214. *Id.*

215. Katherine Triantafillou, *The Art of Conversation and the Future of Mediation*, MEDIATE.COM (Feb. 2015), <https://www.mediate.com/articles/TriantafillouFutures.cfm> [<https://perma.cc/GKA4-XMRK>].

216. Baril & Dickey, *supra* note 201, at 4.

217. *Id.*

218. *Id.*

219. See Natasha C. Meruelo, *Meditation and Medical Malpractice: The Need to Understand Why Patients Sue and a Proposal for a Specific Model of Mediation*, 29 J. LEGAL MED. 285-306 (2008) (studies show that patients in medical malpractice cases most frequently sue in five situations: (1) when patients and physicians suffer a communication breakdown; (2) when the patient feels ignored; (3) when the patient feels that their complaints or questions go unanswered; (4) when physicians fail to express any genuine concern for the patient's welfare; or (5) when the patient simply feels angry.)

220. Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141, 142 (2011).

221. See IND. CODE § 34-43.5-1 (2018).

222. Ho & Liu, *supra* note 220, at 141.

223. *Id.* at 141-42.

On the other hand, med-arb allows parties to reach the heart of the conflict through open-ended conversation, which potentially leads to much lower awards and financial payouts than originally anticipated.

Moreover, med-arb may also be more procedurally cost-effective than arbitration. In fact, arbitration is not as cost-effective as one might think.²²⁴ Conversely, med-arb's flexibility allows parties to structure their process in a way that best fits their dispute, which could lead to a reduction in the amount of time it takes parties to settle.²²⁵ For example, parties can save money by either solving their disputes completely in the mediation stage or sorting through their disputes in a lesser amount of time in the arbitration stage.²²⁶ In fact, studies show that patients *prefer* mediation over other dispute resolution models,²²⁷ as mediation provides parties with a sense of control over (1) the likelihood of the parties reaching a mutually-satisfactory outcome and (2) the manner in which their side of the story is told.²²⁸

In sum, med-arb embraces the benefits of both mediation and arbitration while still removing many of each's shortcomings. The inherent structure of med-arb, coupled with its time-saving ability, provides parties with much more flexibility than traditional arbitration.

B. Med-Arb Laws and the FAA

Med-arb offers many unique advantages that would serve long-term care facilities and their patients well. Yet, as powerful as this hybrid model might be, it serves no benefit if it is not an enforceable arbitral procedure under the FAA.²²⁹ Without such backing by the FAA, Indiana cannot mandate all state nursing homes to use the hybrid model.²³⁰ Therefore, this Section advocates why med-arb does in fact fit within the term "arbitration" for purposes of the FAA.

224. *Arbitration: Not Necessarily A Better Option than Litigation*, BUS. & TECH. L. GRP.: BUS. L. ARTICLES ARCHIVE (2016), http://www.btlg.us/News_and_Press/articles/arbitration.html [<https://perma.cc/AUK3-BAKC>] (noting that where a one-time court filing fee ranges from \$100 to \$200, arbitration filing fees could cost upwards of \$750 or more, excluding ongoing administrative costs, the hourly rate of an arbitrator, legal counsel, expert witnesses, and discovery costs).

225. Baril & Dickey, *supra* note 203, at 4.

226. *Id.*

227. David H. Sohn & B. Sonny Bal, *Medical Malpractice Reform: The Role of Alternative Dispute Resolution*, 470 CLINICAL ORTHOP. & RELATED RES. 1370, 1370 (2012) (emphasizing that mediation boasts 75 to 90 percent success in avoiding litigation, saves nearly \$50,000 per claim, and presents 90-percent satisfaction rates amongst both plaintiffs and defendants).

228. Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL., PUB. POL'Y, & L. 211, 211 (2004).

229. David J. McLean & Sean-Patrick Wilson, *FAA Applicability to Med-Arb Agreements*, N.Y. L. J.: OUTSIDE COUNS., July 11, 2008, <https://m.lw.com/thoughtLeadership/faa-applicability-to-med-arb-agreements> [<https://perma.cc/4SMX-TA5N>].

230. *See generally id.*

Congress did not specify what constitutes arbitration under the FAA,²³¹ leaving it up to other state and federal courts to interpret.²³² The Supreme Court, the Seventh Circuit, and Indiana state courts all have yet to interpret the definition of “arbitration” for purposes of the FAA.²³³ Other circuits have made the attempt but are split as to its meaning.²³⁴ Some jurisdictions have already begun to focus in on the definition’s details, such as progressively deciding that med-arb agreements do constitute “arbitration” for purposes of the FAA.²³⁵

Under federal law, the FAA preempts any state law that discriminates against arbitration on its face or covertly accomplishes the same objective by “disfavoring contracts that have the defining features of arbitration agreements.”²³⁶ Therefore, if a state law or decision attempts to invalidate a contract containing an arbitration clause, it will likely violate the FAA and will be met with heavy skepticism.²³⁷ Though the Supreme Court has not spoken on the issue, the med-arb model likely fits within the FAA’s definition of “arbitration” for two important reasons.

First, med-arb does not discriminate against arbitral processes or their purposes. Rather, med-arb facilitates the arbitral process and improves the way in which it functions.²³⁸ By providing a mediation stepping stone before the arbitral phase, med-arb allows parties to discover the heart of their

231. 9 U.S.C. § 2 (2019) (emphasizing that the statute provides no guidance on what constitutes “arbitration”).

232. McLean & Wilson, *supra* note 229.

233. *See generally id.*

234. *Compare* Advanced Bodycare Sols., LLC v. Thione Int’l, Inc., 524 F.3d 1235, 1240 (11th Cir. 2008) (holding that mediation alone is not within the FAA’s scope), *with* Salt Lake Tribune Publ’g Co., LLC v. Mgmt. Planning, Inc., 390 F.3d 684, 689 (10th Cir. 2004) (holding that the correct standard to determine what constitutes “arbitration” under the FAA is whether the process at issue sufficiently resembles class arbitration, in that the disputants empowered a third party to render a final and binding decision), *and* Fit Tech, Inc. v. Bally Total Fitness Holding Corp., 374 F.3d 1, 7 (1st Cir. 2004) (holding that the true test for deciding whether a dispute resolution model applies under the FAA is to look for the four “common incidents” of classic arbitration), *and* Harrison v. Nissan Motor Corp., 111 F.3d 343, 350 (3d Cir. 1997) (holding that arbitration constitutes a clear agreement to submit a dispute for a final and binding decision by a third party), *and* Hartford Lloyd’s Ins. Co. v. Teachworth, 898 F.2d 1058, 1062-64 (5th Cir. 1990) (holding that because appraisals were not within the definition of “arbitration” under Texas law, the FAA did not apply), *and* Wasy, Inc. v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir. 1987) (holding that state law determines the definition of “arbitration” for FAA purposes).

235. *See, e.g.,* Design Benefit Plans, Inc. v. Enright, 940 F. Supp. 200, 206 (N.D. Ill. 1996).

236. Kindred Nursing Ctrs. Ltd. P’ship v. Clark, 137 S. Ct. 1421, 1423 (2017).

237. Jonathan W. Garlough, *U.S. Supreme Court Says: We Mean It – You Can’t Single Out Arbitration Agreements for Disfavored Treatment*, FOLEY & LARDNER LLP (May 22, 2017), <https://www.foley.com/us-supreme-court-says-we-mean-it--you-cant-single-out-arbitration-agreements-for-disfavored-treatment-05-22-2017/> [<https://perma.cc/HQC4-3P94>].

238. *See generally* Sarah Benzidi, *Med-Arb: Hot to Mitigate the Risk of Setting Aside or Refusal of Recognition and Enforcement of a Med-Arb Award*, 10 AM. J. MEDIATION 1, 25 (2017).

disagreement autonomously.²³⁹ This in turn prepares them for the arbitration portion and expedites the process should they need it, as the parties' proactive reflection on the issues better allows the arbitrator to sort through the disagreement and make a clear, equitable decision.²⁴⁰ Additionally, the FAA appears to allow for some flexibility anyways, as the law does not prevent "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself."²⁴¹ Therefore, the law appears to be at least somewhat open to dispute resolution models that do not perfectly conform to traditional arbitral standards.²⁴²

Second, much like classic arbitration agreements, "[m]ed-arb agreements rely on arbitration as the final stage of dispute resolution."²⁴³ Specifically, the arbitration stage is an inherent part of the arbitral process in med-arb, guaranteeing finality while also giving each party the opportunity to negotiate and discuss their true needs.²⁴⁴ Med-arb does not alter the substantive objectives of arbitration. Med-arb also does not provide parties an opportunity to escape their contractual commitment to a binding process; it simply specifies the procedural manner in which an arbitration-styled proceeding will be conducted.²⁴⁵ Put simply, "[r]egardless of whether the final product of a med-arb results entirely from mediation or both mediation and arbitration, it becomes the entire [arbitral] settlement, which is binding and enforceable."²⁴⁶

In conclusion, med-arb does not attempt to lessen or overtake the impact of traditional arbitration; it merely provides a modernized, procedurally just way of enforcing it. Because med-arb does not discriminate against arbitration, it likely falls within the FAA's definition of "arbitration" and can probably be statutorily mandated in states like Indiana.

C. Amending Title 34, Article 57 of the Indiana Code

With its characteristics of flexibility, efficiency, and party empowerment, med-arb has the potential to fill many of the voids in the current nursing home arbitration framework. Therefore, this Note argues that Title 34, Article 57 of the Indiana Code should be amended to include a Long-Term Care Admissions Arbitration chapter. Title 34 covers Indiana Civil Law and Procedure, while Article 57 specifically houses laws for Arbitration and Alternative Dispute

239. *Id.*

240. *Id.* at 9.

241. *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989).

242. *See id.*

243. McLean & Wilson, *supra* note 229.

244. Bruce A. Edwards, *Using a Hybrid Mediation/Arbitration Approach – Its Benefits and Risks*, EDWARDS MEDIATION ACADEMY (Aug. 5, 2016), <https://edwardsmediationacademy.com/using-hybrid-mediationarbitration-approach-benefits-risks/> [<https://perma.cc/S8AW-X4E4>].

245. *Id.*

246. John T. Blankenship, *Developing your ADR Attitude: Med-Arb, a Template for Adaptive ADR*, 42 TENN. B. J. 28, 35 (2006).

Resolution.²⁴⁷ Within Article 57 lies a chapter specifically designated for Family Law Arbitration.²⁴⁸ The General Assembly should add a chapter addressing Long-Term Care Admissions Arbitration immediately underneath this family law chapter.

This new chapter should provide that, if an Indiana nursing home, in its admissions agreement, elects to bind its patients to mandatory arbitration, the nursing home must include contractual language in the agreement obligating parties to first engage in mediation before progressing to the arbitration stage. Along with this requirement, the chapter should provide general arbitration guidelines for parties to follow if and when a dispute arises similar to those codified in the Family Law Arbitration chapter.²⁴⁹

Specifically, the Family Law Arbitration chapter provides multiple sections of procedural guidance to parties who wish to settle their family law dispute with arbitration.²⁵⁰ The statute further provides rules pertaining to who is allowed to arbitrate,²⁵¹ the duties of the arbitrator,²⁵² and the amount of time in which an arbitrator has to render a final, binding decision.²⁵³ Though the Family Law Arbitration chapter may not cover all of the same concerns surrounding nursing home arbitration, it nonetheless serves as an informative template from which to build. Creating such a chapter for nursing home arbitration would be incredibly practical; it could outline the basics as to who can participate in med-arb, how the med-arb process must generally operate, and when the neutral third-party is obligated to switch from the mediation stage to the arbitration stage.

Most importantly, the nursing home arbitration chapter should specify what language a nursing home must include in its contract in order to ensure med-arb is used over sole arbitration. Specifically, the chapter should make it clear that if a nursing home wishes to engage its residents in arbitration to settle disputes, it must first require both parties to participate in mandatory mediation. Such a rule would essentially force nursing homes to provide desperately-needed protections to their residents from the beginning of their stay. As this Note has previously demonstrated, the elderly and their families often fail to understand all of the terms provided in their admissions agreements.²⁵⁴ Changes in cognitive processing, high amounts of stress and paperwork during admission, and general unfamiliarity with legal terminology are all contributing factors as to why nursing home residents are unlikely to fully read or comprehend the admissions contracts they sign.²⁵⁵ Therefore, the General Assembly must protect this vulnerable population by requiring nursing homes to implement such ethical safeguards

247. *See generally* IND. CODE § 34-57 (2019).

248. *See generally* IND. CODE § 34-57-5 (2019).

249. *See id.*

250. *See generally* *Id.*

251. IND. CODE § 34-57-5-2 (2019).

252. IND. CODE § 34-57-5-5 (2019).

253. IND. CODE § 34-57-5-7 (2019).

254. *See supra* Part II.

255. *See supra* Part II.

before a dispute later arises.

Some nursing homes might argue that such a statutory mandate violates their right to freedom of contract. However, as a general matter, the “freedom of contract” is frequently overridden by the demands of state statutes.²⁵⁶ For example, legislatures frequently provide mandatory terms that private parties must incorporate into their contracts to be enforceable.²⁵⁷ An example of this lies in the Uniform Commercial Code,²⁵⁸ where certain consumer credit contracts are obligated to include language preserving a consumer’s defenses against assignees of the contract.²⁵⁹ Moreover, many industries have enacted statutes mandating that their members participate in various forms of alternative dispute resolution.²⁶⁰ In fact, evidence suggests that mandatory med-arb-styled dispute resolution has already become mandated by law in some federal industries.²⁶¹

Outside of statutory enforcement, many of the familiar, everyday areas of the law use med-arb to solve problems; disagreements involving “commercial disputes, community disputes, intergroup conflict, [and] collective bargaining between employers and unions,” for example, commonly rely on the med-arb process to reach solutions in both high-stakes and emotional settings.²⁶² Furthermore, med-arb is also gaining traction on an international scale.²⁶³ Countries like China and Germany incorporate mediation and settlement agreements into their arbitration proceedings.²⁶⁴ China, Singapore, and Japan all use hybrid resolution processes in resolving many of their commonplace disputes, as well.²⁶⁵ Australia has even taken it one step further by imposing its own statutory safeguards to protect its med-arb practices.²⁶⁶

To conclude, adding a section to the Indiana Code requiring nursing homes

256. See generally David Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51 (2013).

257. See generally U.C.C. § 3 (LEGAL INFO. INST. 2002).

258. See *id.*

259. See *id.* at § 3-203.

260. See, e.g., 29 U.S.C. § 172 (2019) (Department of Labor’s Labor Management Relations Act); 7 C.F.R. § 1946 (2019) (Agricultural Mediation Program).

261. See 49 U.S.C. § 40122 (2018).

262. Allan Barsky, “Med-Arb”: Behind the Closed Doors of a Hybrid Process, 51 FAM. CT. REV. 637, 639 (2013).

263. Brian Kelso, *Drawing Outside the Lines: Utilizing International Approaches to Resolve Due Process Concerns in Med-Arb*, A.B.A. 1, 10-20 (2015), https://www.americanbar.org/content/dam/aba/events/dispute_resolution/lawschool/boskey_essay_contest/2015/Drawing_Outside_the_Lines_Utilizing_International_Approaches_to_Resolve_Due%20Process_Concerns_in_MedArb.pdf [<https://perma.cc/7CXG-K3KB>].

264. *Id.* at 11-17.

265. *Id.* at 15.

266. Julian Bailey et al., *Med-Arb: NSW Case Highlights the Importance of Strict Compliance with the Relevant Legislation*, WHITE & CASE: PUBL’NS & EVENTS (June 29, 2018), <https://www.whitecase.com/publications/alert/med-arb-nsw-case-highlights-importance-strict-compliance-relevant-legislation> [<https://perma.cc/6DYZ-B7AL>].

to use med-arb if they choose to invoke arbitration would ensure that patients' interests remain protected. Many industries both inside and outside the United States embrace hybrid dispute resolution as part of their reality.²⁶⁷ It is time that Indiana's long-term care industry do the same.

CONCLUSION

In *Kindred Nursing Centers Ltd. Partnership v. Clark*, the Supreme Court did not just reaffirm its strong support of general mandatory arbitration clause enforcement under the FAA; it backed the enforceability of such clauses in nursing home admission contracts, while also restricting a state's ability to enact statutes limiting them.²⁶⁸ By holding that Kentucky's "clear-statement rule," which required arbitration agreements to be executed only by individuals with explicit authority to do so, violated the FAA,²⁶⁹ the nation's highest court effectively put its seal of approval on binding, contractual dispute resolution in the long-term care industry. This decision will likely have a far-reaching impact on parties already grappling with the difficult choice of putting their loved one in a nursing home, forcing families to decide whether stripping their loved one of their rights is worth getting them the health care they desperately need.

This Note has argued that Indiana should enact a Long-Term Care Admissions Arbitration chapter under Title 34, Article 57 of the Indiana Code, obligating nursing homes that choose to contractually bind their patients to mandatory arbitration to first require a mediation phase before the binding arbitral phase. This conclusion is supported by the wide array of research gathered addressing patient reasoning for filing lawsuits, patient preferences in the dispute resolution process, and the power of the med-arb process to seize the benefits both arbitration and mediation cannot offer individually. Med-arb provides the potential to restore patient empowerment and procedural justice without sacrificing practicality and finality. By implementing this effective and innovative model, Indiana can take meaningful first steps in protecting the rights and interests of its most vulnerable Hoosiers.

267. See generally Kelso, *supra* note 263, at 10-20.

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

269. *Id.* at 1423.