THE PERILS OF ENFORCING "FAVORED" ARBITRATION

By Christopher B. Hopkins

Editor's Note: [Disputes over the enforceability of arbitration clauses are time-consuming and expensive. In this comprehensive article Christopher Hopkins summarizes the established test for an enforceable agreement to arbitrate; the author also surveys more recent developments in the law of unconscionability, which provides both procedural and substantive avenues for attacking an arbitration clause. A number of arguments against enforcement, and practical responses to those arguments, are summarized as well. Although the article uses nursing home litigation as a model for discussing the legal issues that arise in disputes over arbitration, the discussion will be helpful to anyone who may need to enforce an agreement to arbitrate in a commercial context.]

Despite the fact that public policy favors arbitration, defense counsel who try to enforce an arbitration clause frequently must file motions, set an evidentiary hearing, and contend with an appeal. Lawyers seeking to avoid arbitration have developed a number of strategies to attack the formation, substance, and even type-setting of the arbitration clause. For the last ten years, more than fifty disputes over arbitration have been appealed in Florida *each year*.[1] For a "favored" method of dispute resolutions, the enforcement of arbitration creates a minefield for the unwary defense counsel.

Both the lawyers who write arbitration agreements and those who enforce them need to know the established three-prong test of a valid arbitration clause as well as the emerging law governing unconscionability, which some lawyers contend is their best method of attack.[2] The issue becomes more complicated when the agreement requires arbitration before an industry association, waiver of statutory rights or limitations of liability. Worse still, there are often procedural questions relating to whether the disputing party had a fair chance to read and consider the terms before signing.

Using the "nursing home model," this article will discuss successful strategies for enforcing arbitration as well as prepare defense counsel for the strategies used to avoid enforcement. Because the admission of an elderly person into a nursing home creates a number of procedural questions about the signing of the agreement (*e.g.* capacity, authority, adhesion), those cases best illustrate the arbitration strategies used by plaintiffs and defendants.[3] Moreover, several recent nursing home arbitration decisions have developed Florida law on unconscionability, waiver, and liability caps which will provide instruction to lawyers representing clients in all industries.

I. Nursing Home Model

A typical scenario surrounds the signing of a contract and frequently underlies an arbitration dispute. Two parties, often a corporate representative and an individual, enter into a contract which contains an arbitration clause. Often, at the time of signing, the individual may not read the documents or may claim that there was some emergent circumstance that prevented a complete reading of the contract. Others may claim they did not understand what the terms meant.

The nursing home admission process illustrates a number of procedural concerns for enforcing arbitration: (1) the resident, or the resident's spouse, is likely elderly and may not be able to read or comprehend the contract; (2) the guardian or representative is faced with the admission papers while the resident is being transferred from the hospital; (3) the resident may have been admitted for some time before the admission paperwork arrives and the disruption of moving the patient again is significant.[4] Similar procedural concerns arise in almost all commercial contractual settings (*e.g.*, mortgage lending and car sales) and the successful arguments in the nursing home model can be widely applied.[5]

Several nursing home cases reveal issues which can occur in any arbitration dispute. These include the opportunity to review and understand documents containing arbitration provisions. In *Gainesville Health Care Center, Inc. v. Weston*,[6] the nursing home admission contract was signed by the daughter/power of attorney of the resident. Prior to the admission, the resident had been at another facility but the daughter felt the resident had not been treated properly. Seven weeks after admission, the daughter met with the facility representative and executed all of the admission paperwork

in 15-20 minutes. The daughter was a high school graduate who held a clerical position with a health care provider. She did not read the agreement (the line above the signature block acknowledges the signor read the document) and did not ask questions. The daughter did not request to take home the agreement or have it reviewed by a lawyer.[7]

In assessing the "circumstances surrounding the transaction," the *Weston* court determined that the signor had a "meaningful choice" at the time of execution as evidenced by an opportunity to read, failure to request to take documents home to study or discuss, failure to ask questions, and the absence of action by the facility which "had any impact on her failure to do so."[8] Interestingly, the *Weston* court appeared to take the position that the belated execution of the admission papers (nearly two months into admission) should have heightened the signor's concern to study and discuss the documents or consult a lawyer.[9]

In *Consolidate Resources Healthcare Fund I, Ltd. v. Estate of Spruill*,[10] a similar scenario occurred involving a son admitting his seventy-two year old mother into a nursing home. This time, however, the signor was a health care surrogate (not a power of attorney) and the admission was two days after admission. The signor was fifty years old and admitted his mother to the facility after he concluded he could no longer care for her. Of note, the signor had a college education and had been a teacher for more than a decade. Nonetheless, he asked no questions and did not read the contract he signed.[11]

The *Spruill* plaintiff argued that the signor was "an older man"—despite being fifty years old and without evidence of incapacity.[12] The plaintiff also argued that he had little bargaining power because his mother was already in the facility. Nonetheless, the court held that there was sufficient evidence that there was a "meeting of the minds" because a party is bound by a signed contract and that a lack of bargaining power could not be asserted when the signor admitted he "willingly" signed the agreement.[13]

An opposite result was reached in *Romano v. Manor Care, Inc.*,[14] where the signor of the arbitration agreement was the 79-year old resident's husband, who acknowledged that his wife was competent and that she participated in the decision to enter the nursing home. The "admission packet" included eight documents including a separate arbitration agreement—all of which were presented without explanation by the facility or question by the signor. The facility representative acknowledged she did not really understand "arbitration"; however, no discussion was initiated.[15]

The *Romano* court found that the "arbitration contract in this case is substantively unconscionable to a great degree" and further concluded that there was "some irregularity" in the procedural formation of the contract.[16] Specifically, the contract was presented with other documents without explanation, the signor was elderly and had no legal training, there was no explanation as to the consequence of not signing the agreement, and the signor was asked to sign after his wife was admitted. While other courts have focused attention on the inequities of the parties, the *Romano* court specifically voiced concern about the signor's "lack of legal training" to understand the rights being signed away.[17] Of note, the *Weston* and *Romano* decisions appear to construe differently the impact of the contract being signed after admission to the nursing home.

Other cases have raised issues of incomplete documentation or missing signatures. In *Estate of Blanchard v. Central Park Lodges et al.*,[18] the plaintiff claimed that the contract had terminated upon the resident's death, that pages two, three, and four of the contract offered into evidence did not match and that "something [was] missing." The *Blanchard* court held that the death of a party does not terminate the arbitration agreement and remanded the matter for the trial court to have an evidentiary hearing regarding the authenticity of the contract.[19]

Finally, in *Integrated Health Services v. Lopez-Silvero*,[20] the resident signed the admission agreement and was admitted to the facility; however, the facility representative never signed the agreement. The court held that, despite the fact that one party did not sign the contract, it was still binding where both parties performed.[21]

II. *Seifert + Powertel/Romano* = Arbitration

Under the test set out by the Florida Supreme Court in *Seifert v. U.S. Home Corp.*,[22] there are three elements for courts to consider when ruling on a motion to compel arbitration: (1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration has been waived.

Prong one of the *Seifert* test involves whether the arbitration provision can overcome challenges based upon state law contract principles such as fraud, duress, capacity or unconscionability.[23] An argument can be made that mutual performance is evidence of a valid contract, and at least two courts have acknowledged that theories of estoppel based upon performance may prevent a challenge to the "existence" of a contract.[24] Of note, an arbitration agreement involves "mutual obligation" and does not require separate consideration.[25] Unconscionability will be discussed below.

The second prong in the *Seifert* test addresses whether the arbitration clause is broad enough to include the cause of action. In *Seifert*, the plaintiff claimed

that a wrongful death claim was outside of the ambit of an arbitration clause in a real estate construction contract.[26] Often, the party seeking to avoid arbitration will argue that the claim is statutory and not contractual in nature (see "Statutory Claim Not Arising From Contract" below).

Finally, the third prong involves whether the party seeking to enforce arbitration had acted inconsistently with its desire to compel arbitration.[27] This issue typically arises when a defendant engages in active litigation and attacks the merits of the case before raising the issue of arbitration (see *Waiver of Arbitration*, below).

Unconscionability is an element of arbitration validity. Most Florida courts recognize the definitions and requirements set forth in *Powertel v. Bexley*.[28] To decline to enforce a contract as unconscionable, the contract must be both procedurally and substantively unconscionable.[29] That said, courts have struggled to define "unconscionable," much less its two forms, labeling the term "chameleon-like" and "so vague... that neither the courts, practicing attorneys, nor contract draftsman can determine with any degree of certainty when it will apply in any given situation."[30]

"Procedural unconscionability" refers to the circumstances under which the contract is entered.[31] A court must look to the "circumstances surrounding the transaction" to determine whether the complaining party had a "meaningful choice" without relieving a party merely because of a bad bargain.[32] The *Powertel* court specifically defined:

> The procedural component of unconscionability relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the contract terms. For example, the court might find that a contact is procedurally unconscionable if important terms were hidden in a maze of fine print and minimized by deceptive trade practices.[33]

"Substantive unconscionability" deals with the unreasonableness and unfairness of contractual terms and a determination whether it is "outrageously unfair" as to "shock the conscience."[34] The *Powertel* decision offered the following definition:

> In contrast, the substantive component focuses on the agreement itself. As the court explained in *Kohl v. Bay Colony*, 398 So. 2d 865, 868 (Fla. 4th DCA 1981), a case is made out for substantive unconscionability by showing that the terms of the contract are unreasonable and unfair.[35]

As indicated above, the *Powertel* precedent requires both procedural and substantive unconscionability to defeat an arbitration provision. Taking this a step further in *Romano*, the Fourth District Court of Appeal relied upon several non-Florida cases for its "sliding scale" analysis of the two forms, holding that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable and *vice versa*."[36]

There may be some question whether other Florida courts will embrace the *Romano* "sliding scale" approach to the dual requirement set forth in *Powertel*. In a recent decision upholding arbitration, the Second District Court of Appeal stated, "we note that some courts use a balancing approach to the question—if the contract is substantively unconscionable to a great degree, and some quantum of procedural unconscionability exists, the contract is unenforceable."[37]

Defense counsel seeking to enforce arbitration must develop factual and legal arguments to fulfill the three-prong *Seifert* test. In addressing unconscionability, counsel should seek to eliminate either or both forms of unconscionability under *Powertel*, being mindful that the court may apply the *Romano* "sliding scale" analysis.

What follows is a discussion of the practical steps to seek arbitration upon service of a Complaint and a proposed framework for oral argument to compel arbitration. Further discussion relating to the *Seifert* test and unconscionability follows.

III. Procedure for Seeking Enforcement

Before filing a response to the Complaint, defense counsel must confirm with the client whether there is a contract between the parties. Sometimes a client will not even realize that there is an arbitration clause in the contract. As a last resort, and while the law is not entirely clear, it appears that a motion for extension of time may not waive the right to compel arbitration.[38]

Although sometimes captioned differently, it appears the preferred motion is a Motion to Compel Arbitration and/or Motion to Stay the Proceedings.[39] The Motion should set out that there is an agreement between the parties, that the *Seifert* test has been satisfied, and that the agreement complies with the *Powertel/Romano* analysis of unconscionability. A copy of the arbitration agreement should be attached to the Motion.[40]

At the same time, defense counsel should file a Motion for Protective Order to Limit Discovery to Ar-

bitration Issues. Essentially, in keeping with the "waiver" prong of the *Seifert* test, defense counsel should limit discovery only to arbitration issues and operate under a court order which confirms that there is no waiver (see *Waiver of Arbitration* below). This will also prevent the plaintiff from undertaking broad discovery while the defendant seeks to enforce arbitration.

Typical discovery prior to the evidentiary hearing will include (1) deposing the plaintiff and/or the person who executed the agreement, (2) obtaining copies of any contracts or documents reflecting actual or apparent authority if an agent signed the agreement, and (3) serving interrogatories inquiring as to the basis for avoiding enforcement of the agreement. Counsel should consider subpoenaing medical records if there is a question over competency; in the nursing home model, obtaining other medical records will reveal who signed admission or authorization documents for the resident at other facilities. Requests for Admissions regarding the completeness of the contract, signatures, competency, and date of signing are recommended.

Evidentiary hearings are typically required when there is a dispute over the enforcement of the arbitration agreement. Strictly speaking, such a hearing is only required when a "substantial issue is raised as to the making of the agreement."[41] As a practical matter, disputes over the enforcement of arbitration based upon unconscionability must include a procedural element pursuant to *Powertel*. Unless a stipulation regarding the validity of the contract can be obtained, courts favor a "full evidentiary hearing" regarding the formation of a contract.[42]

IV. Argument at Evidentiary Hearing

The framework of a successful argument at an evidentiary hearing will include the following: (1) the standard of analysis strongly favors arbitration, (2) the *Seifert* three-prong test has been met, and (3) one or both forms of unconscionability do not exist (*Powertel/ Romano*).

1. Standard of Analysis

Counsel should advise the court that the hearing is on a motion to compel arbitration and stay proceedings pursuant to the Florida Arbitration Code, § 682.03(2).

Public policy strongly favors arbitration, both in Florida and federal courts, and any doubt concerning the scope of arbitration should be construed in favor of arbitration.[43] Arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies outside of court.[44] The U.S. Supreme Court has confirmed, for federal cases, its approval for arbitration, even when it is a dispute between a single employee and a national company.[45] There is no "hostility" towards arbitration and such agreements "will be enforced whenever possible."[46]

The burden rests upon the party seeking to avoid arbitration—not the party moving to enforce — to present sufficient evidence of both forms of unconscionability.[47]

2. Application of *Seifert* Test

Depending upon how the court accepts evidence (*e.g.*, live testimony, deposition testimony, documents), defense counsel needs to present the evidence in a manner that confirms with the three prongs test set forth in *Seifert*. It is recommended that every effort be made to have the court specifically rule upon whether this test has been satisfied.

3. Unconscionability (*Powertel/Romano*)

The key to overcoming the unconscionability argument is that the burden rests with the party opposing arbitration, and *both* forms of unconscionability must be established.[48] Eliminating one form of unconscionability will defeat an attack on the arbitration provision.[49] Practically speaking, if the plaintiff has entered a stipulation as to authenticity and validity of the contract, then the plaintiff likely cannot establish procedural unconscionability and the matter should be sent to arbitration. Absent a formal stipulation, it is advisable to bring to the court's attention any testimonial or formal written admissions on procedural issues. If the subject arbitration language has been previously reviewed by an appellate court and deemed to be without substantive unconscionability that may prevent an extensive hearing on whether both forms exist.

4. Strong Arguments

Based upon *Weston, Spruill*, and *Romano*, the following fact patterns appear to strengthen the argument for enforcement of arbitration: (1) the provision is clearly visible and in the same typeface as the rest of the document, (2) the provision is in bold or is located above the signature block, (3) the provision is optional, (4) the provision was explained, or the signor had a chance to ask questions and declined, (5) a rescission period was provided and no objection was timely raised, (6) other courts have upheld same or similar arbitration provisions, and (7) there is no denial of any statutory rights without a knowing waiver.

V. Ten Anticipated Strategies Against Arbitration

What follows are ten common arguments to avoid

arbitration. Identifying the strengths and weakness of the arbitration clause, and how it was executed, should give defense counsel a clear strategy for enforcement.

1. Waiver of Arbitration

Florida courts have held that active participation in litigation may waive the right to invoke arbitration.[50] "Active participation" is generally presumed to be inconsistent with an intent to invoke arbitration.[51] Any doubts concerning waiver should be resolved in favor of arbitration.[52] A split among the appellate courts exists regarding whether there must be an element of prejudice. Until a uniform test emerges, it is advisable that the party seeking arbitration only file the Motion to Compel Arbitration and/or Stay Proceedings and the Motion for Protective Order, as set forth above.

In *Hill v. Ray Carter Auto Sales, Inc.*, the defendant answered the complaint and proceeded with discovery.[53] Two months later, upon discovering the arbitration clause, the defendant filed a motion to compel arbitration and successfully argued that they acted promptly upon discovering the existence of the arbitration clause.[54] Relying upon the precedent favoring arbitration, the appellate court conceded that there was "no compelling substantive evidence" to overcome the trial court's determination that there was no waiver.[55]

Following *Hill*, the Second District Court of Appeal addressed a similar factual situation a year later in *Merrill Lynch v. Adams*, where the defendant had, again, engaged in written discovery.[56] The court questioned whether written discovery was "active participation" since it arguably was not record activity and the same procedure was permitted in arbitration.[57] The court noted, "[w]e have found no case law which would require a denial of appellees' right to arbitration based upon their participation in discovery."[58]

A more finite test of waiver was set forth by the Fourth District Court of Appeal in *Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co.*[59] In that case, the defendant filed a Motion for Extension of Time and then a Motion to Dismiss or Stay based upon an arbitration clause.[60] Several hearings proceeded and, at the rehearing stage, the defendant initiated written discovery.[61] The Fourth District Court of Appeal held that "attacking the merits" was the test for waiver: "It is clear that the prevailing view looks at the defendant's intention in responding. Is the defendant's response to attack the merits? If so, then waiver is acknowledged."[62] Filing an Answer, without an affirmative defense of arbitration, has been deemed a waiver (direct attack on merits by denying liability).[63] Filing an Answer and a Motion for Summary Judgment has also been deemed waiver of arbitration.[64]

A certified conflict exists regarding prejudice as a required element of waiver.[65] The Second, Fourth, and Fifth District Courts of Appeal have held that a showing of prejudice is not required for arbitration to be waived, whereas the First and Third District Courts of Appeal require waiver and prejudice.[66]

2. Wrong Signor or Unsigned Agreement

Parties seeking to avoid arbitration may claim that they are not bound by the terms of the contract because it was signed by a third party or it was not signed at all. The nursing home model best illustrates how a third party might sign a contract, since admission documents are often signed by a spouse, power of attorney, responsible party, family member, guardian, or health care surrogate or proxy.[67] If the signor has patent legal authority to bind the plaintiff (*e.g.*, guardian, power of attorney or health care surrogate) then statutory analysis typically resolves the question of capacity and authority. If the signor's legal authority is in question, then the court will likely have to turn to common law analysis of performance, agency, and third party beneficiary status.

The guardian statute, § 744.441, Florida Statutes, specifically acknowledges the authority of the principal to enter into contracts which are in the best interest of the ward.[68] The authority of a power of attorney is defined by the written durable power of attorney and usually involves the ability to enter contracts; it may also include the authority to make health care decisions.[69] Arguably, a health care surrogate's or proxy's authority to bind the principal to an arbitration provision is less certain than a guardian's. That said, in the course of making decisions involving "any and all health care," the surrogate/proxy is also permitted access to medical records in order to make decisions "involving" health care.[70] Along these lines, the *Fenelus* decision acknowledged that the admission papers were signed by the resident's son/health care surrogate without questioning his authorization.[71]

In the absence of statutory authority, courts may turn to estoppel, performance, agency, ratification, assumption, veil piercing/alter ego and third party beneficiary status to determine whether there is a valid agreement.[72] Both the Fourth and Fifth District Courts of Appeal have held that a party is estopped from arguing the validity of an arbitration clause because the party's actions amounted to an acceptance of benefits of the contract.[73] "Estoppel" involves the notion that a person should not be permitted to unfair assert, assume, or maintain inconsistent positions. In simplest of terms, parties cannot "have their cake and eat it too." Two forms of estoppel, "equitable estoppel" and "procedural estoppel," can be applied to prevent a party from challenging a contract.

"Equitable estoppel" applies where a party attempts to change his position after representing a contrary position to another who, in turn, reasonably re-

lied upon the initial representation, and who would suffer substantial injury if the inconsistent position were permitted.[74] "Procedural estoppel" occurs when a party attempts to repudiate the obligations and validity of a transaction after accepting the benefits of the contract.[75] While estoppel is too broad a topic to cover here, the First District Court has employed a three-prong test to determine when non-signors are bound to a contract under estoppel theories.[76]

Estoppel and performance are useful legal theories in situations where the party seeking to avoid arbitration either denies the party's signature or claims that a third party executed the contract for the party's benefit without authorization. Florida courts have enforced unsigned contracts where both parties performed and acted as if the contract were in effect.[77] Moreover, Florida courts have recognized that the party seeking to enforce arbitration does not have to sign the contract as long as there was performance.[78] In financial transactions, the signature of a broker can bind a client to an arbitration agreement.[79] The existence of "apparent agency" coupled with representation and reasonable reliance can be used to argue enforcement.[80] Some transactions must be reduced to written contract form by operation of law, and it can be argued that the plaintiff was constructively on notice that there had to be a contract.[81] In the nursing home model, the defendant seeking to enforce arbitration should argue that the resident was admitted to the facility and remained in the facility without dispute or question while receiving the benefit of services.[82]

Counsel should monitor the case of *Global Travel Marketing v. Shea*, which is presently pending before the Florida Supreme Court.[83] The Fourth District Court of Appeal certified the question of whether a parent's agreement to binding arbitration on behalf of a minor child is enforceable.[84] In an unusual case which has resulted in numerous appellate decisions, an 11-year old boy was dragged from a tent in Botswana and mauled by hyenas while traveling on a safari. His mother had signed a contract "as parent or legal guardian... on behalf of my child."[85] The appellate court held that a parent, under those circumstances, does not have the authority to bind a minor child to arbitrate potential personal injury claims.[86] The court recognized that it was "impractical" for a parent to get a court order before signing a contract for the minor but indicated that "we cannot accept the notion that parents may, carte blanche, waive the litigation rights of their children in the absence of circumstances supported by public policy."[87] This seems at odds with precedent, since arbitration is favored by public policy and the arbitration clause in question was not seeking to waive rights beyond changing venue; nonetheless, counsel who are frequently involved in disputes over arbitration should watch for a decision in the *Shea* case.

As a final note, counsel seeking to enforce arbitration based upon theories of actual or apparent agency need to ensure that they win at the trial level. The existence of an agency relationship and the extent of the agent's authority is typically a question of fact and the trial court's finding will not be set aside unless "clearly erroneous."[88]

3. Incompetent Signor

Another strategy to avoid arbitration is to claim that the signor was not competent when the contract was formed. While general contract theories apply, there are cases on point involving arbitration where the competency of the signor was raised, yet the contract was enforced. As addressed in the foregoing section, *Wrong Signor or Unsigned Agreement*, the enforcing party should apply theories of estoppel and performance.

In a case involving a dispute over an automobile purchase, the trial court held that the signor, who had a business degree and worked for the Department of Health, was an "unschooled layperson" who was "academically handicapped" because, as the plaintiff argued, she had no significant experience in automobile sales and finance. The appellate court reversed, noting that "we question whether a person with an associate's degree in business could ever be characterized as 'academically handicapped.'"[89]

Counsel seeking to enforce arbitration against parties who are elderly should pay special attention since age has been indirectly equated with infirmity or incompetence in procedural unconscionability analysis.[90] In *Romano*, the court specifically identified the signor as "elderly" and sympathetically described him as lacking "legal training to understand" despite the fact that he "owned his own business."[91] Similarly, in a non-Florida nursing home case, the 75-year old signor's competence was questioned since his family described him as "distraught," "very upset," and "absolutely bawling" over the decision to admit his wife to the nursing home at the time he had to execute the admission agreement.[92] The plaintiff in *Fenelus*, however, failed to convince the court that the signor, who was fifty years old, was an "older man" lacking competence to bargain.[93]

4. Arbitration Provision Not Read or Explained

A repeated strategy to avoid arbitration, which has had some success at the trial level, is to claim that the signor did not read because of the voluminous amount of paperwork and that the representative did not draw attention to the arbitration provision nor explain its full significance. In short, such a strategy is to attempt to shift the signing party's burden to read, question,

and understand a contract to the presenting party based upon a mixed argument of sympathy and procedural unconscionability.

Florida case law, however, has repeatedly established that the burden of reading and comprehension rests with the signor. To hold otherwise, of course, would permit a party to void any contract simply by claiming ignorance or confusion to a written term. In the recent case of *Estate of Etting v. Regents Park at Aventura, Inc.*,[94] the Third District Court of Appeal concluded that a person who was legally blind was still bound to the contract she signed. The *Etting* decision favorably cited a Florida Supreme Court decision, *Allied Van Lines v. Bratton*,[95] which confirmed almost thirty years ago that "no party to a written contract in this state can defend against its enforcement on the sole ground that he signed it without reading it."

A frequently referenced case, *Sabin v. Lowe*, upheld an executed-but-disputed contract and held, "a party has a duty to learn and know the contents of a proposed contract before he signs and delivers it and is presumed to know and understand it contents, terms, and conditions."[96] If the party did not understand what he was signing, the law imposes a duty upon the party to make further inquiry.[97]

In a one page opinion in *Alejano v. Hartford Accident and Indemnity Co.*,[98] the court held that an insurance company has no duty to explain terms in the contract to an insurance applicant unless asked and that the signor cannot "deny [the] contents" of the agreement on the grounds he signed it without reading unless he was prevented from reading it. While this opinion did not involve issues of arbitration, this holding involves applicable general contract law and, in reaching that decision, even cited to a arbitration dispute case.[99]

Arbitration was ordered in the case of *Merrill, Lynch, et al. v. Benton*,[100] in which the plaintiff claimed that her financial accounts were not properly managed by the defendants. The plaintiff had entered into a business relationship with the defendants by executing several "standard form" contractual documents, including an arbitration agreement; however, she did not speak or read English.[101] The *Benton* court held, "[t]he burden is on the person who cannot read to know that he cannot read and, if he desires to have an instrument read and explained to him to select a reliable person to do so before he signs it."[102] The court pointed out that the plaintiff was not prevented from reading it or having another person read it for her.[103] Interestingly, the dissent pointed to the evidence that the defendant representative "well knew [the plaintiff] was at a disadvantage" and that the representative "explained the agreement's meaning but never got into the contents of the paper itself and did not give an explanation regarding arbitration."[104] Nonetheless, the *Benton* court referred the matter to arbitration.

Similarly, in *Tropical Ford, Inc. v. Major*,[105] a dispute arose after a customer purchased a car from an automobile dealer. The sales contract included an arbitration clause. The plaintiff successfully argued at the trial level that "[she] had no choice but to sign the sales agreement if she wished to purchase the defendant's car. The defendant made no effort to point out or explain the arbitration clause to the plaintiff..."[106] The appellate court, relying upon *Weston*, noted that a finding of procedural unconscionability must be supported by "competent substantive evidence" by looking at the circumstances surrounding the transaction to discover whether the complaining party had a meaningful choice at the time the contract was entered (*e.g.*, realistic opportunity to bargain and reasonable opportunity to understand).[107] In *Tropical Ford*, there was no testimony about the execution of the contract—only the evidence of the plaintiff's signature—and there was no "competent substantive evidence" that the plaintiff *had* to sign the contract to buy the car.[108] Interestingly, there was also no discussion about whether the plaintiff would have had a reasonable opportunity to shop for the same or similar vehicle at other local dealerships.

As discussed above, in both *Weston* and *Fenelus*, the representatives of the health care facilities did not explain the terms of the contract and neither the Fourth nor the Fifth District Court of Appeal held that the failure to explain was unconscionable.[109] It is unclear in *Romano* whether, or to what extent, the court was considering the failure to explain as a component of procedural unconscionability. The *Romano* decision references the fact that the arbitration agreement was "presented to [the signor] as simply another document required to be signed as part of the admission process" in the paragraph where the court concluded that there was procedural unconscionability "given the ages of the resident and her husband and the circumstances surrounding signing of the agreement."[110] It is uncertain whether the *Romano* court intended the presentation-without-explanation to be part of the unconscionability determination, particularly since the same court in the subsequent *Fenelus* decision did not consider that a significant issue. If the presentation-without-explanation was considered, it appears that even the *Romano* court acknowledged that there must be other circumstances present as well in order to achieve "some quantum of procedural unconscionability."[111]

What if the party presenting the contract is unaware of the arbitration provision or cannot fully articulate its significance? Plaintiffs' counsel frequently seek to expose the limits of the representative's knowledge about the definition of arbitration, waiver of

rights, procedure, and other facets of arbitration. In *Bill Heard Chevrolet Corp. v. Wilson et al.*,[112] the signor claimed that, while not prevented from doing so, he did not read the sales contract nor did he know of the arbitration clause and would not have agreed if he had known. During deposition, the representative likewise admitted "some confusion as to the procedural niceties and finality of the arbitration procedure."[113]

The Fifth District Court of Appeal held that the contract language was unambiguous, there was no fraud or duress, and the burden was on the signor to read and understand the contract. More importantly, the court discounted the "mutual misunderstanding" argument as well as the plaintiff's self-serving testimony:

> The trial court's reliance on the plaintiff's assertion that they would not have waived a jury trial had they read the important documents they were signing or its reliance on the imperfect understanding of arbitration by one Bill Heard Chevrolet representative is misplaced. It is the intention as expressed by the language employed in the agreements that governs, not the after-the-fact testimony of the parties.[114]

In preparing for deposition, defense counsel should anticipate the representative who presented the contract will be questioned about the definition, procedure, and significance of the arbitration provision—nonetheless, at the hearing to enforce arbitration, defense counsel should be prepared to argue *Wilson* and parole evidence.

Finally, in *Sims v. Clarendon National Insurance Company*,[115] the court compelled arbitration in a first-party insurance dispute even though the plaintiff never even received the complete agreement. The plaintiff apparently signed a certificate of insurance, which generally described the terms of the policy, but did not mention arbitration; the certificate did indicate a recision period running from execution of the certificate and the right to request the full policy.[116] A dispute arose over coverage of medical expenses around the time the plaintiff received a copy of the policy (it is unclear whether it was requested or just sent). The court held that the plaintiff undertook medical care, presuming it was covered under her insurance, before receiving and reviewing the policy and that there was no evidence that she was prevented or delayed in receiving and reviewing the policy.[117] The court specifically considered issues of adhesion, ambiguity, waiver of remedies, typeface, location of the terms within the contract, age, and capacity.[118] The fact that a plaintiff was not provided with the arbitration agreement at the time she executed the contract with the defendant does not require a finding of procedural unconscionability.[119]

In sum, absent fraud or duress, it appears that the most favorable testimony for a party seeking to enforce an arbitration clause is for the opposing party to claim that the signor did not read the agreement. Without reading it, the signor is limited in, if not prevented from, arguing that he or she was prejudiced by ambiguity, adhesion, or the typeface and location of the arbitration provision, since these matters appear to be forfeited by signing without precaution. Whether blind or unable to read English, the presumption is that the signor knew and understood the contents prior to signing the contract. During the deposition of the signor, counsel should inquire whether the signor read the contract, asked questions, and asked to consult a lawyer. Absent fraud or duress, answering "no" to those questions appears to eliminate, or at least significantly reduce, the signor's ability to claim ignorance as a defense. Absent any evidence of some quantum of procedural unconscionability, the Plaintiff cannot avoid arbitration.[120]

5. Substantive Unconscionability

Attacks based upon substantive unconscionability often cite to *Powertel* and involve allegations that the arbitration provision is "unreasonable and unfair."[121] In defending against a charge of substantive unconscionability, counsel should argue that unconscionability is frequently defined as being more than simply "unreasonable" and that courts have cautioned against using unconscionability to merely alleviate one side from a "bad bargain."[122] Recognizing the court must find both types of unconscionability, if there is evidence the signing party did knowingly and voluntarily assent to the "unreasonable" terms, the likelihood of enforcement is stronger.[123]

Numerous Florida court have defined substantive unconscionability employing what appears to be varying degrees of harshness and intensity. In *Steinhardt v. Rudolph*, the court referred to an "outrageous degree of unfairness."[124] In *Belcher v. Kier*, the court sought evidence that a contractual change was "grossly excessive" and noted that there was a distinction between "unreasonable" and "unconscionable."[125] Over 100 years ago, the U.S. Supreme Court held, in 1889, that an unconscionable bargain was defined as one that "no man in his senses and not under delusion would make... and as no honest and fair man would accept..."[126] More recently, the Fourth District Court of Appeal determined that unconscionable amounts to something "shocking to the conscience" and "monstrously harsh."[127]

The *Weston* court emphasized that the concept of unconscionability should be used with great caution:

> "[Unconscionability] does not mean, however, that a court will relieve a party of his obligations under a contract because he has made a bad bargain containing contractual terms which are unreasonable or impose an onerous hardship on him. Indeed the entire law of contracts, as well as the commercial value of contractual arrangements, would be substantively undermined if parties could back out of their contractual obligations on that basis. [... People should] be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity would demand the use of its good offices in the enforcement of such unconscionability."[128]

Counsel seeking to enforce arbitration should argue that the arbitration provisions are not "outrageous" nor "shocking to the conscience." In the event that counsel believes the court may hold the terms to be substantively unconscionable then the recommended strategy is to argue that the signor voluntarily and willingly accepted the agreement.[129]

6. Arbitration Biased or Costly

Concerns about the cost of arbitration or the alleged bias of the arbitration forum are raised as substantive unconscionability arguments.[130] Both federal and Florida law requires that the party seeking to avoid arbitration provide competent substantial evidence that there is a "likelihood" that the party would not be able to pursue the claim and not simply that costs "could" be a prohibition.[131] Conclusory statements by parties seeking to avoid arbitration are insufficient.[132]

In *Brasington v. EMC Corporation*,[133] the plaintiff argued that she was unable to pursue her claim because of the prohibitive costs of paying half of the arbitrator's fee as well as other costs which would not be incurred in litigation. As grounds for enforcing arbitration, the *Brasington* court noted that the plaintiff was not claiming that the fees would prevent her claim. Moreover, if she prevailed she could recover those costs and, if she lost, she could appeal.[134]

Many arbitration provisions call for proceedings before the American Arbitration Association (AAA). In *Sims*, the arbitration provision in the contract made no reference to the cost of arbitration but did refer the matter to AAA; the court held that silence on the subject of costs was insufficient to render it unenforceable.[135] The *Sims* plaintiff submitted an affidavit stating, "the cost of arbitration would be a financial hardship" but, without more than such a conclusory statement, the court held the same to be inadequate absent "evidence that she is unable to pay any arbitration fees... or that she is even likely to bear such fees."[136] The court noted there was no evidence as to the plaintiff's financial situation and that the AAA rules permitted reduction in administrative fees for hardship reasons.[137]

Estimates of costs, even by the arbitration panel, may not be competent substantive evidence of prohibitive expenses. In *Stewart Agency, Inc. v. Robinson*, the court discounted as too speculative the AAA pamphlet which indicated that arbitration costs could exceed $13,000; the court referenced the $500 filing fee and $1,000 advance to the arbitrator but did not specifically indicate whether those figures were prohibitive (like *Sims*, the *Robinson* court noted that AAA has a waiver for hardship).[138]

Finally, it is not unconscionable for a company to refer its arbitration matters to an association of lawyers in that industry. In *Weston*, the nursing home agreement referred its arbitration matters to the National Health Lawyers Association and the plaintiff argued that the group was presumptively biased.[139] The *Weston* court held there was no competent substantial evidence that the plaintiff could not obtain an unbiased arbitrator from the organization.[140] The *Weston* opinion cited to the United States Supreme Court which held that "[w]e decline to indulge in the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators."[141] Similarly, the Supreme Court implicitly improved securities disputes before the National Association of Securities Dealers.[142]

7. Waiver of Rights

Some contracts call for arbitration with limitations on attorney's fees, punitive damages, and class action formation. Florida courts appear to consider waivers of statutory rights in arbitration provisions as part of the substantive unconscionability analysis.[143] While there is a line of cases in Florida and federal court indicating that a party cannot waive remedial statutory provisions, there are cases which appear to hold to the contrary.[144]

Assuming the trial court analyzes waiver of statutory rights as part of unconscionability, then a strong

argument can be made that there was "voluntary and knowing" waiver. Moreover, there is some precedent in recent U.S. Supreme Court cases that waiver of statutory rights should be determined by the arbitration panel.[145] The burden of proving that an arbitration term effectively prevents "meaningful relief" rests on the party seeking to avoid arbitration.[146] Counsel are cautioned that the question of whether a party, in an arbitration provision, is permitted to waive rights which are remedial or favored by public policy remains an unclear area of the law.

In *Romano*, the court determined the arbitration clause to be substantively unconscionable because it capped liability, denied the award of attorney's fees, and prevented punitive exposure, and thus "would not vindicate the resident's statutory rights in any respect."[147] The *Romano* court acknowledged that statutory claims ("even those involving important social issues") could be arbitrated but stated that the process must provide the claimant with a way to vindicate the statutory claim.[148] Relying upon the prior decision of *Flyer Printing Co. v. Hill*, the *Romano* court stated "when an arbitration agreement contains provisions which defeat the remedial provisions of the statute, the agreement is not enforceable."[149]

The *Flyer Printing* case involved the issue of whether a plaintiff, pursuing a claim under Title VII which permitted fees and costs to the prevailing party, was bound by the arbitration terms which required bearing the cost of arbitration.[150] The *Flyer Printing* court did not require a showing that the cost of arbitration was prohibitive but simply stated that the agreement "by its terms" improperly restricted the plaintiff's statutory rights.[151] Interestingly, on this last point, the *Flyer Printing* court relied upon a federal court case which has since been vacated.[152]

In *Brasington v. EMS*,[153] the First District Court of Appeal addressed whether a "fee-splitting provision" for the cost of arbitration was prohibited under a statute which awarded a prevailing party fees and costs. The *Brasington* court determined that a fee-splitting provision does not automatically render an arbitration agreement unenforceable; instead, the party seeking to avoid arbitration has the burden of proving that the obligation and exposure to arbitration fees would "deny remedies available by statute."[154]

The U.S. Supreme Court has likewise held, in *Green Tree Financial Corporation v. Randolph*,[155] that high arbitration costs could prevent a plaintiff from vindicating a statutory right in arbitration but that the plaintiff bears the burden to show the likelihood of incurring such costs to the extent of preventing a remedy.

Using the *Brasington* and *Randolph* analysis, the party seeking to avoid arbitration would have to prove that enforcing the arbitration provision would deny that party the remedies available by statute. Based upon *Brasington* and *Randolph*, it appears the "risk" of being exposed to arbitration fees may not be enough to find the provision unenforceable, particularly when the claimant retains the remedy to appeal.[156] A similar argument may be made regarding punitive damages. If a plaintiff claims arbitration will deny the plaintiff the right to punitive damages, it may be pure speculation, at an early pleading stage, that leave to amend to bring a punitive claim would be permitted if the matter proceeded in court.

The cost of arbitration is not the sole question when courts consider waiver of statutory rights in arbitration. In *Bellsouth v. Christopher*,[157] the Fourth District Court of Appeal held that an arbitration agreement between a telephone provider and customers was substantively unconscionable because an arbitrator could not award punitive damages nor provide class action relief. Consistent with its reasoning in *Romano*, the court determined that an evidentiary hearing was necessary to determine whether the plaintiff "bargained for this provision and knowingly gave up these rights."[158] The implication of both *Christopher* and *Romano* is that a plaintiff can knowingly waive statutory rights in arbitration.

Finally, in *Healthcomp Evaluation Services Corporation v. O'Donnell*,[159] an agreement between the parties held that the arbitrator's decision was final and precluded an appeal. The court noted that this provision conflicted with the Florida Arbitration Code and severed the "offensive" term.

Curiously, there are Florida cases indicating that all kinds of rights can be knowingly and voluntarily waived. Florida law recognizes that a party can waive any right provided by constitution, statute or contract, unless it involves an intentional act by another, as long as it is done "knowingly, voluntarily, and intelligently."[160] In the nursing home context, it is interesting that the controlling Chapter 400 is remedial in nature, as discussed in *Romano*; however, the Florida Supreme Court has previously addressed waiver of the statutory entitlement to fees ("The attorney's fees provision of section 400.023(3) is merely a statutory right to seek fees. Clearly, statutory rights can be waived.").[161]

8. Statutory Claim Not Arising From Contract

The contention that a plaintiff's claim arises from a statute, independent of the contract, has been a repeated argument by parties avoiding arbitration. The theory is that the cause of action exists as a matter of statute and that duty is wholly independent of a contract which contains an arbitration clause. This theory appears to arise from an overly strict reading of the second prong of the *Seifert* test (whether an arbitrable

issue exists).[162]

It is well-settled that statutory claims in Florida are subject to arbitration including Chapter 400 (nursing home), Chapter 501 (Unfair Trade Practice), Chapter 517 (Securities Act), as well as civil rights claims.[163] In the nursing home model, the Fifth District Court of Appeal held that the resident's statutory rights arose as a direct result of admission to the facility because an admission contract was required.[164]

Still, the breadth of the contractual language may require arbitration of statutory claims which do not arise from the contract. It appears that "any and all claims... arising from or relating to" is sufficiently broad language to require arbitration of statutory claims which are independent of a contract.[165] When drafting or enforcing an arbitration agreement, *Seifert* and subsequent case law suggests that the "arising from and relating to" language will require arbitration of contract, related tort, and statutory claims.

9. Federal vs. Florida Arbitration

Florida and federal law both favor arbitration, and the Florida Arbitration Code and the Federal Arbitration Act ("FAA") typically co-exist despite federal preemption.[166] The test for interstate commerce is interpreted broadly and is liberally construed in favor of enforcing arbitration.[167] The transaction needs only to involve interstate commerce, even if the parties did not necessarily contemplate such a connection.[168]

The party drafting an arbitration agreement should consider specifying whether state or federal arbitration provisions apply.[169] If the drafting party invokes the FAA, however, it will be necessary to show evidence of interstate commerce to invoke the federal law. This can be established via affidavit or testimony from a corporate representative who has knowledge about the company's interstate activities. Since Alabama state law does not favor pre-dispute arbitration agreements, some Alabama cases detail successful strategies of invoking the FAA even when state law is hostile to arbitration. Three Alabama decisions provide guidance for the types of evidence which establishes sufficient interstate commerce to invoke the FAA.[170] These non-Florida cases may be helpful for drafting a corporate representative's affidavit if the arbitration clause invokes the FAA.

On a related issue, Florida law does not permit an arbitration clause under Florida Arbitration Code to place venue outside of Florida or apply other state laws unless both parties agree.[171] At least one appellate court has created an exception that Florida courts shall enforce arbitration subject to the FAA in other jurisdictions even if the arbitration agreement is not subject to Florida law.[172] Generally speaking, in drafting and enforcing arbitration provisions, defense counsel should ensure that a clause does not require arbitration in another state or country. Nonetheless, the requirements for exclusive venue clauses are fairly exact and, when faced with a prohibited exclusive venue term, there may be grounds to argue it is a permissive venue clause.[173]

10. Arbitration as a Violation of Federal Regulation

A novel argument against arbitration in the nursing home model is that the inclusion of an arbitration clause is a violation of Medicaid funding regulations. This issue may have broader application since similar arguments may arise in other industries which are heavily regulated or funded by the government (*e.g.*, securities, transportation, communications).

Specifically, plaintiffs have argued that the inclusion of an arbitration clause in an nursing home admission contract amounts to "other consideration as a precondition of admission," which violates Medicaid requirements.[174] Even the federal government, "in response to recent marketplace practices," issued a rather murky policy memorandum on the issue which some arbitration opponents interpreted as a statement of the government's disfavor for arbitration in the long term care context.[175] This argument gained further traction for plaintiffs when a Tennessee court, in an opinion declining to enforce arbitration, claimed the "other consideration" argument was "not without appeal."[176]

Meanwhile, § 400.151(2), Florida Statutes permits the admission contract to include any matters the parties deem appropriate. One strategy to combat the "other consideration" argument (or arguments based upon other regulations) may turn on whether the signor actually read the agreement. As discussed above, frequently the signor does not read the agreement before execution. In such a case, plaintiffs should not be able to claim that they were induced into the contract by "other consideration" when they did not even read the contract.

Fortunately, the "other consideration" argument has been rejected in the First District Court of Appeal: in *Weston*, the court held, "we have found no authority from any jurisdiction which holds that an arbitration provision constitutes 'consideration' in this sense; nor do we believe that the federal regulation was intended to apply to such a situation."[177] Since *Weston*, courts in Alabama and Indiana have addressed the "other consideration" argument, and both jurisdictions reached the same conclusion.[178]

V. Conclusion

The enforcement of "favored" arbitration provisions can be far more complicated than suggested by

the three-prong *Seifert* test and the two-part unconscionability analysis (*Powertel/Romano*). It can require thousands of dollars in legal expenses and the risk, on appeal, that the court might find a company's widely-used arbitration agreement to be substantively unconscionable. That said, parties and counsel seeking to include and enforce an arbitration term might select provisions which have been cited and approved by appellate courts. Once an arbitration language has been "approved," the lack of substantive unconscionability increases the likelihood, under *Powertel*, that arbitration will be ordered in subsequent cases.

1 This is based upon a Westlaw search for "arbitration" in the headnotes in the Florida cases database.
2 *Can't Show Unconscionability? Then You'll Be Arbitrating*, Nursing Home Law & Litig. Rep. 250 (2004).
3 Almost all arbitration disputes involve the defendant seeking to enforce an arbitration provision and the plaintiff seeking to avoid it. As such, references herein to plaintiff and defendant will presume the plaintiff is seeking to avoid the arbitration that the defendant wishes to enforce.
4 Robert Hornstein, *Fiction of Freedom of Contract—Nursing Home Admission Contract Arbitration Agreements: A Primer on Preserving the Right of Access to Court Under Florida Law*, 16 St. Thomas L. Rev. 319 (2003); *Strategies For Avoiding Arbitration*, Nursing Home Law & Litig. Rep. 103–104 (2003); Lawrence A. Frolick, Advising the Elderly or Disabled Client Chapter 15–Nursing Homes (2004)(2001 WL 642726); Katherine Kuhn Galle, *Comment: The Appearance of Impropriety: Making Agreements to Arbitrate in Health Care Contracts More Palatable*, 30 Wm. Mitchell L.Rev. 969 (2004). For an interesting evaluation of arbitration decisions outside of Florida, see *National Trends in Admission Contract Arbitration Agreement Enforcement*, 7 No. 4 Andrews Nursing Home Litig. Rep. 12 (August 20, 2004).
5 Counsel seeking to enforce "pre-injury" arbitration agreements in medical or nursing home negligence cases may want to ensure that, if the agreement requires arbitration before a certain arbitration board, the board is willing to accept the referral of a contested pre-injury arbitration. The American Arbitration Association, American Bar Association, and American Medical Association agreed that [for] "disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises." *See* <http://www.adr.org/upload/livesite/focusArea/Healthcare/healthcare.pdf> (July 27, 1998).
6 *Gainesville Health Care Cntr. v. Weston*, 857 So. 2d 278 (Fla. 1st DCA 2003).
7 *Id.* at 281.
8 *Id.* at 287.
9 *Id.*
10 *Consolidated Resources Healthcare Fund I Ltd. v. Fenelus*, 853 So. 2d 500 (Fla. 4th DCA 2003).
11 *Id.* at 504.
12 *Id.* at 505.
13 *Id.* at 504.
14 *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 61 (Fla. 4th DCA 2003).
15 *Id.* at 61.
16 *Id.* at 62.
17 *Id.* at 63.
18 *Blanchard v. Central Park Lodges*, 805 So. 2d 6, 8 (Fla. 1st DCA 2001).
19 *Id.* at 10.
20 *Integrated Health Services v. Lopez-Silvero*, 927 So. 2d 338 (Fla. 3d DCA 2002).
21 *Id.* at 339-340.
22 *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla.1999).
23 *Gainesville Health Care Ctr.*, 857 So. 2d at 283 (citations omitted).
24 *Head v. Lane*, 495 So. 2d 821 (Fla. 4th DCA 1986); *Florida Power Corp. v. City of Casselberry*, 793 So. 2d 1174 (Fla. 5th DCA 2001).
25 *Avid Engineering, Inc. v. Orlando Marketplace Ltd.*, 809 So. 2d 1, 5 (Fla. 5th DCA 2001) (citations omitted) (stating argument of mutuality of obligation was a "smoke screen").
26 *Seifert*, 750 So. 2d at 635.
27 *Id.*
28 *Powertel v. Bexley*, 743 So. 2d 570 (Fla. 1st DCA 1999), *rev. den.*, 763 So. 2d 1044 (2000).
29 *Id.* at 574 (citations omitted).
30 *Gainesville Health Care Ctr.*, 857 So. 2d at 283, 284 (citations omitted).
31 *Romano*, 861 So. 2d at 62.
32 *See Gainesville Health Care Ctr.*, 857 So. 2d at 287, for a near exhaustive list of the "circumstances surrounding the transaction" to be considered for procedural unconscionability.
33 *Powertel*, 743 So. 2d at 574.
34 *Romano*, 861 So. 2d at 62 (citations omitted); *Gainesville Health Care Ctr.*, 857 So. 2d at 284-285 (citing *Belcher v. Kier*, 558 So. 2d 1039, 1043 (Fla. 2d DCA 1990) and declining to equate unreasonable with unconscionable) (other citations omitted).
35 *Powertel*, 743 So. 2d at 574.
36 *Romano*, 861 So. 2d at 62 (citations omitted).
37 *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 264 (Fla. 2d DCA 2004).
38 *Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co., Inc.*, 824 So. 2d 288, 291 (Fla. 4th DCA 2002).
39 *Blanchard*, 805 So. 2d at 8 (motion to compel arbitration); *Kinder Mobile Home Sales, Inc. v. Clemens*, 794 So. 2d 677, 679 (Fla. 5th DCA 2001) ("[a]lthough appellee is correct that Kinder should have proceeded by a motion to abate or stay the proceeding, instead of by a motion to dismiss, this is not a fatal mistake."); *Miller & Solomon General Contractors, Inc.*, 824 So. 2d at 290 (Fla. 4th DCA 2002) (holding a motion to dismiss predicated on arbitration is in substance a motion to compel arbitration); Fla. R. Civ. Pro. 1.140(b); § 682.03, Fla. Stat.
40 Fla. R. Civ. P. 1.130(a).
41 § 682.03(1), Fla. Stat.; *see also Blanchard*, 805 So. 2d at 9.
42 *Acumen Construction. v. Neher*, 616 So. 2d 98 (Fla. 2d DCA 1993); *Bellsouth Mobility v. Christopher*, 819 So. 2d 171 (Fla. 4th DCA 2002) (holding an evidentiary hearing was required to assess procedural unconscionability upon finding of substantive unconscionability); *Epstein v. Precision Response Corp.*, 59 Fla. L. Weekly D2181 (Fla. 4th DCA September 29, 2004) (holding that an evidentiary hearing on the agency relationship with signor required and specifically disagreeing with trial judge's statement, "a memo of law is just as good as an evidentiary hearing").
43 *Hirshenson v. Spaccio*, 800 So. 2d 670, 674 (Fla. 5th DCA 2001) (citations omitted); *Rath v. Network Marketing, L.C.*, 790 So. 2d 461 (Fla. 4th DCA 2001).
44 *Hirshenson*, 800 So. 2d at 674.
45 *EEOC v. Waffle House*, 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002) ("We have read these provisions to 'manifest a liberal federal policy favoring arbitration.'").
46 *Richmond Healthcare, Inc. v. Estate of Sloane*, 878 So. 2d 388, 390 (Fla. 4th DCA 2004) (extensive federal and Florida citations omitted).
47 *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 91-92, 531 S. Ct. 513, 522, 148 L. Ed. 2d 373 (2000); *Gainesville Health Care Ctr.*, 857 So. 2d at 288 (citations omitted); *Neiman v. Galloway*, 704 So. 2d 1131, 1132 (Fla. 4th DCA 1998).
48 *See supra* n. 39; *Powertel v. Bexley*, 743 So. 2d at 574.
49 *Elderidge v. Integrated Health Services, Inc.*, 805 So. 2d 982 (Fla. 2d DCA 2001) (declining to address substantive unconscionability when procedural claim was not proven); *Brasington v. EMC Corp.*, 855 So. 2d 1212, 1218 (Fla. 1st DCA 2003) ("[b]ecause we conclude that the arbitration agreement is not procedurally unconscionable, we need not consider the arguments the plaintiff has made concerning the substantive component of unconscionability.").
50 *Hill v. Ray Carter Auto Sales, Inc.*, 745 So. 2d 1136, 1138 (Fla. 1st DCA 1999) (extensive citations omitted).
51 *Id.* at 1137.
52 *Prudential Sec. Inc. v. Katz*, 807 So. 2d 173, 174 (Fla. 3d DCA 2002).
53 *Hill v. Ray Carter Auto Sales, Inc.*, 745 So. 2d at 1138.
54 *Id.*
55 *Id.* at 1137.
56 *Merrill Lynch v. Adams*, 791 So. 2d 25 (Fla. 2d DCA 2001).
57 *Id.* at 26.
58 *Id.*
59 *Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co., Inc.*, 824 So. 2d 288 (Fla. 4th DCA 2002).
60 *Id.* at 289-290.
61 *Id.*
62 *Id.* at 290.
63 *Id.* (*citing Breckenridge v. Farber*, 640 So. 2d 208 (Fla. 4th DCA 1994)).
64 *Id.* (*citing Woodall v. Green Tree Financial Services*, 755 So. 2d 681 (Fla. 4th DCA 1999)).
65 *Raymond James Financial Services, Inc. v. Saldukas*, 851 So. 2d 853, 858 (Fla. 2d DCA 2003).
66 *Benedict v. Pensacola Motor Sales, Inc.*, 846 So. 2d 1238 (Fla. 1st DCA

2003) (prejudice required); *Alexander v. Minton*, 855 So. 2d 94 (Fla. 2d DCA 2003) (prejudice not required); *Shoma Dev. Corp. v. Rodriguez*, 730 So. 2d 838 (Fla. 3d DCA 1999) (prejudice required); *Marine Environmental Partners, Inc.*, 863 So. 2d 423 (Fla. 4th DCA 2003) (prejudice not required); *Morrell v. Wayne Frier Manufactured Home Cnt.*, 834 So. 2d 395, 397 (Fla. 5th DCA 2003); *Owens v. Coosa Valley Health Care, Inc.*, 2004 WL 260969 (Ala. Feb. 13, 2004) (daughter signed as guardian); *McGuffey Health and Rehabilitation Cent. v. Gibson*, 864 So. 2d 1061 (Ala. 2003) (authority of "next friend" was not questioned in decision).

67 *Romano*, 861 So. 2d at 61 (spouse signed for competent resident); *Gainesville Health Care Ctr.*, 857 So. 2d at 280 (daughter/power of attorney signed); *Consolidated Resources Healthcare Fund I Ltd. v. Fenelus*, 853 So. 2d at 502 (son signed as health care surrogate); *see also Pagarigan v. Libby Care Ctr.*, 120 Cal. Rptr. 2d 892 (2002) (finding daughters who signed for incompetent resident were not agents despite their representation as such).

68 § 744.441(21), Fla. Stat. (2004).

69 § 709.08(1) and (7), Fla. Stat.

70 § 765.001(5)(a) and (c), Fla. Stat. (2004).

71 *Consolidated Resources Healthcare Fund*, 853 So. 2d at 502.

72 *See Liberty Communication, Inc. v. MCI Telecommunications Corp.*, 733 So. 2d 571 (Fla. 5th DCA 1999); *Frank J. Rooney, Inc. v. Charles W. Ackerman of Florida, Inc.*, 219 So. 2d 110 (Fla. 3d DCA 1969); *Bacchus & Stratton, Inc. v. Mann*, 639 So. 2d 35 (Fla. 4th DCA 1994); *Thompson-CSF, SA v. American Arbitration Ass'n*, 64 F.2d 733, 776 (2d Cir. 1994); *Hirshenson v. Spaccio*, 800 So. 2d at 670 (third party beneficiary) (citations omitted).

73 *See Florida Power Corp. v. City of Casselberry*, 793 So. 2d 1174 (Fla. 5th DCA 2001) (party to franchise agreement could not dispute arbitration provision since they never sought to modify terms of contract); *Head v. Lane*, 495 So. 2d 821 (Fla. 4th DCA 1986)(shareholder in derivative suit estopped from questioning alleged wrongdoing of corporation).

74 *Head v. Lane*, 495 So. 2d at 824 (citations omitted).

75 *Id.* (citations omitted).

76 *See Armas v. Prudential Securities, Inc.*, 842 So. 2d 210 (Fla. 1st DCA 2003).

77 *See Sosa v. Shearform*, 784 So. 2d 609 (Fla. 5th DCA 2001) (parties who do not sign contract may be bound by provisions if evidence shows they acted in accordance with contract); *Gateway Cabe TV v. Vikoa Construction Corp.*, 253 So. 2d (Fla. 1st DCA 1971) (contract may be binding absent signature).

78 *See Integrated Health Services v. Lopez-Silvero*, 927 So. 2d at 338; *Stacy David, Inc. v. Consuegra*, 845 So. 2d at 303.

79 *See Martha A. Gottfried, Inc. v. Paulette Koch Real Estate, Inc.*, 778 So. 2d (Fla. 4th DCA 2001).

80 *See Tampa Sand v. Davis*, 125 So. 2d (Fla. 2d DCA 1960); *Lensa v. Poinciana*, 765 So. 2d 296 (Fla. 4th DCA 2000); *Rushing v. Garrett*, 375 So. 2d 903 (Fla. 1st DCA 1979).

81 *See* § 400.151, Fla. Stat.

82 *Consolidated Resources Healthcare Fund*, 853 So. 2d at 504 n.2 ("we think it highly unlikely that, after performance for that period, appellant would be heard to disavow any obligation under the contract on the grounds that no nursing home representative signed on its behalf."). Similar arguments in other jurisdictions have led to mixed results. In an Alabama nursing home case where the resident's daughters signed the admission agreement, the court noted that there was no evidence the resident had any objection to her daughters acting on her behalf in admitting her. *Owens v. Coosa*, 2004 WL 260969 at 2 (Ala. Feb. 13, 2004) (the *Owens* court had noted that the resident had been transferred to the nursing home after two weeks in the hospital for heart failure but the issue of competency was not addressed in the opinion). On the other hand, a Tennessee court in an unreported decision declined to enforce arbitration provision in a contract signed by the resident's husband because the resident was competent. *Raiteri v. NHC Healthcare/Knoxville, Inc.*, 2003 WL 23094413 (Tenn. Ct. App. 2003). More recently, a California court held that a family member's signature as "responsible party" on the admission agreement (leaving blank the signature lines for "agent" and "resident") was insufficient to force the resident's claim to arbitration; moreover, the family member's standing to make medical decisions under a California statute was not enough to empower the family member with authority to bind the resident to arbitration. *Goliger v. AMS Properties*, 19 Cal. Rptr. 3d 819 (Cal. Ct. App. 2d Dist. Oct. 21, 2004).

83 *See Global Travel Marketing v. Shea*, 870 So. 2d 20 (Fla. 4th DCA 2003), *rev. granted*, 873 So. 2d 1223 (May 3, 2004).

84 *Id.* at 26.

85 *Id.* at 22.

86 *Id.* at 23.

87 *Id.* at 25-26.

88 *Coquina, Ltd. v. Nicholson Cabinet Co.*, 509 So. 2d 1344, 1347 (Fla. 1st DCA 1987) (*citing Financial Fire & Casualty Co. v. Southmost Vegetable Cooperative Ass'n.*, 212 So. 2d 69 (Fla. 3d DCA 1968)).

89 *Stewart Agency, Inc. v. Robinson*, 855 So. 2d 726, 727-728 (Fla. 4th DCA 2003).

90 *Kohl v. Bay Colony Club Condo.*, 398 So. 2d 865, 868 (Fla. 4th DCA 1981)("under the procedural rubric come those factors bearing upon... the real and voluntary meeting of the minds of the contracting parties: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.") (citations omitted).

91 *Romano v. Manor Care, Inc.*, 861 So. 2d at 63-4.

92 *Raiteri v. NHC Healthcare/Knoxville, Inc.*, 2003 WL 23094413 at page 2.

93 *Consolidated Resources Healthcare Fund I Ltd. v. Fenelus*, 853 So. 2d at 505.

94 *Estate of Etting v. Regents Park at Aventura, Inc.*, 29 Fla. L. Weekly D2342 (Fla. 3d DCA October 20, 2004).

95 *Allied Van Lines, Inc. v. Bratton*, 351 So. 2d 344, 347, 348 (Fla.1977).

96 *Sabin v. Lowe*, 404 So. 2d 772 (Fla. 5th DCA 1981).

87 *Ruiz v. Fortune Ins. Co.*, 677 So. 2d 1336 (Fla. 3d DCA 1996).

98 *Alejano v. Hartford Accident and Indemnity Co.*, 378 So. 2d 104 (Fla. 3d DCA 1979).

99 *Id.* at 104 (citing *Allied Van Lines, Inc. v. Bratton*, 351 So. 2d 344 (Fla. 1977)).

100 *Merrill, Lynch v. Benton*, 467 So. 2d 311 (Fla. 5th DCA 1985).

101 *Id.* at 313.

102 *Id.*

103 *Id.* ("There was no allegation or testimony whatsoever that the petitioners prevented respondent from reading the contract or induced her to refrain from reading it or in anyway prevented her from reading it or having it read to her by a reliable person of her choice.").

104 *Id.* at 313-314.

105 *Tropical Ford, Inc. v. Major*, 882 So. 2d 476 (Fla. 5th DCA 2004).

106 *Id.* at 478.

107 *Id.* at 479.

108 *Id.*

109 *Consolidated Resources Healthcare Fund I Ltd. v. Fenelus*, 853 So. 2d at 504 (failure to explain optional arbitration provision not *per se* evidence of procedural unconscionability); *Gainesville Health Care Center, Inc. v. Weston*, 857 So. 2d at 286.

110 *Romano v. Manor Care, Inc.*, 861 So. 2d at 63-4.

111 *Id.*

112 *Bill Heard Chevrolet Corp. v. Wilson et al.*, 877 So. 2d 15, 19 (Fla. 5th DCA 2004).

113 *Bill Heard Chevrolet Corp.*, 877 So. 2d at 18. This issue also arose in *Romano v. Manor Care, Inc.*, where the representative offering the contract "really did not understand what the arbitration agreement meant" and the plaintiff claimed that the representative "simply told him that he had to sign the admission papers." 861 So. 2d at 61.

114 *Bill Heard Chevrolet Corp.*, 877 So. 2d at 19.

115 *Sims v. Clarendon National Insurance Company*, 336 F.Supp. 2d 1311 (S.D. Fla. 2004).

116 *Id.* at 1314-1315.

117 *Id.* at 1325.

118 *Id.*

119 *Id.*; *see also Brasington v. EMC Corp.*, 855 So. 2d 1212 (Fla. 1st DCA 2003).

120 *Romano v. Manor Care, Inc.*, 861 So. 2d at 62; *Bellsouth Mobility LLC v. Christopher*, 819 So.2d 171 (Fla. 4th DCA 2002); *Powertel v. Bexley*, 743 So. 2d 570; *Elderidge v. Integrated Health Services, Inc.*, 805 So. 2d at 982 (declining to address substantive unconscionability when procedural claim was not proven); *Brasington v. EMC Corp.*, 855 So. 2d 1212, 1218 (Fla. 1st DCA 2003)("[b]ecause we conclude that the arbitration agreement is not procedurally unconscionable, we need not consider the arguments the plaintiff has made concerning the substantive component of unconscionability.").

121 *Powertel v. Bexley*, 743 So. 2d at 574.

122 *Gainesville Health Care Center, Inc. v. Weston*, 857 So. 2d at 283-284.

123 *Bellsouth Mobility LLC v. Christopher*, 819 So.2d at 172-173.

124 *See Steinhardt v. Rudolph*, 422 So. 2d 84, 889 (Fla. 3d DCA 1982).

125 *See Belcher v. Kier*, 558 So. 2d 1039, 1044 (Fla. 2d DCA 1990).

126 *Id.* (citing *Hume v. United States*, 132 U.S. 406, 10 S. Ct. 134, 33 L. Ed. 393 (1889)).

[127] *Garrett v. Janiewski*, 480 So. 2d 1324, 1326 (Fla. 4th DCA 1985).
[128] *Gainesville Health Care Center, Inc. v. Weston*, 857 So. 2d at 284 (citations omitted).
[129] *Bellsouth Mobility*, 819 So.2d at 173; *see also Powertel*, 743 So. 2d at 574.
[130] *Stewart Agency, Inc. v. Robinson*, 855 So. 2d at 728.
[131] *Brasington v. EMC Corp.*, 855 So. 2d at 1216; *Gainesville Health Care Ctr., Inc.*, 857 So. 2d at 283 and 285-286; *see Musnick v. King Motor Co. Of Fort Lauderdale*, 325 F.3d 1255 (11th Cir. 2003); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 531 S. Ct. 513, 148 L. Ed. 2d 373 (2000).
[132] *Sims v. Clarendon National Insurance Co.*, 336 F.Supp. 2d at 1323 (citing *Green Tree Financial Corp. v. Randolph*, 531 U.S. at 91).
[133] *Brasington v. EMC Corp.*, 855 So. 2d at 1216-1217.
[134] *Id.*
[135] *Sims*, 336 F.Supp. 2d at 1324 (citations omitted).
[136] *Id.*
[137] *Id.*
[138] *Stewart Agency, Inc. v. Robinson*, 855 So. 2d at 728-729.
[139] *Gainesville Health Care Center, Inc. v. Weston*, 857 So. 2d at 285-286.
[140] *Id.* at 286.
[141] *Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)).
[142] *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002).
[143] *See Powertel v. Bexley*, 743 So. 2d 570; *Romano v. Manor Care, Inc.*, 861 So. 2d 59; *Bellsouth Mobility v. Christopher*, 819 So. 2d 171.
[144] *See Powertel v. Bexley*, 743 So.2d 570, 576; *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000) (citations omitted); *Romano v. Manor Care, Inc.*, 861 So. 2d 59; *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159 (1989).
[145] *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401, 406-407, 123 S. Ct. 1531, 155 L. Ed. 2d 578 (2003) (since the court cannot predict how the arbitrator will construe a remedial measure, the proper course is to compel arbitration) (*citing Vimar Serguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995)).
[146] *Flyer Printing Co., Inc. v. Hill*, 805 So. 2d 829, 832 (Fla. 2d DCA 2001) (*citing Green Tree Financial Corp. v. Randolph*, 531 U.S. 79); *Pacificare Health Systems, Inc. v. Book*, 538 U.S. at 403.
[147] *Romano v. Manor Care, Inc.*, 861 So. 2d at 62-63.
[148] *Id.* at 62.
[149] *Id.*
[150] *Flyer Printing Co., Inc. v. Hill*, 805 So. 2d 829.
[151] *Id.* at 832.
[152] *Id.* at 832-833 (citation omitted); *Brasington v. EMC Corp.*, 855 So. 2d at 1215-1216 ("... the *Flyer Printing* opinion was based upon a federal decision that has now been vacated.").
[153] *See Brasington v. EMC Corp.*, 855 So. 2d 1212.
[154] *Id.* at 1215-1216.
[155] 531 U.S. 79.
[156] *Brasington v. EMC Corp.*, 855 So. 2d at 1215-1216; *see Green Tree Financial Corp. v. Randolph*, 531 U.S. 79.
[157] *See Bellsouth Mobility v. Christopher*, 819 So. 2d 171.
[158] *Bellsouth Mobility v. Christopher*, 819 So. 2d at 173.
[159] *Healthcomp Evaluation Services Corp. v. O'Donnell*, 817 So. 2d 1095, 1097 (Fla. 2d DCA 2002).
[160] *See Vetrick v. Hollander*, 743 So. 2d 1128, 1131 (Fla. 4th DCA 1999); *DeJesus v. State*, 848 So.2d 1276, 1277 (Fla. 2d DCA 2003); *Ruggio v. Vining*, 755 So. 2d 792 (Fla. 2d DCA 2000); *Kellums v. Freight Sales Centers, Inc.*, 467 So. 2d 816 (Fla. 5th DCA 1985).
[161] *Romano v. Manor Care, Inc.*, 861 So. 2d at 62-63; *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d at 161.
[162] *Seifert v. U.S. Home Corp.*, 750 So. 2d at 640 (citations omitted) ("If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract.").
[163] *Five Points Health Care, LTD. v. Alberts*, 867 So. 2d 520, 522 (Fla. 5th DCA 2004) (citations omitted).
[164] *Id.* at 521; *see also* § 400.151, Fla. Stat.
[165] *Seifert v. U.S. Home Corp.*, 750 So. 2d at 637.
[166] § 682.01, Fla. Stat. (2003); 9 U.S.C. § 2.
[167] *See* 9 U.S.C. § 1; *Sims v. Clarendon National Insurance Co.*, 336 F. Supp. 2d 1311, 1316 (S.D. Fla. 2004) (citations omitted). For an interesting analysis of federal arbitration issues (for which litigation is ongoing), see two decisions arising from the same dispute in *Klay, M.D. et al. v. All Defendants*, 2004 WL 2480781 (11th Cir. November 5, 2004) and *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 123 S. Ct. 1531, 155 L. Ed. 2d 578 (2003).
[168] *Sims*, 336 F. Supp. 2d at 1316 (citation omitted).
[169] *See generally Volt Information Sciences, Inc. v. Board of Trustees*, 109 S. Ct. 1248, 489 U.S. 468, 103 L. Ed. 2d 488 (1989) (upholding choice of law term in arbitration agreement).
[170] *Estate of Elma Tucker v. Coosa Valley Health Care, Inc.*, 2004 WL 260969, p. 5 (Ala. February 13, 2004); *see also Potts v. Baptist Health Systems, Inc.*, 853 So. 2d 194, 199 - 204 (Ala.2002); *McGuffey Health and Rehabilitation Ctr. v. Gibson*, 864 So. 2d 1061 (Ala. 2003).
[171] *See* § 682.02, Fla. Stat.; *Northport Health Services, Inc. v. Estate of Raidoja*, 851 So. 2d 234 (Fla. 5th DCA 2003); *West Melbourne Health Care Center v. Durham*, 861 So. 2d 1256 (Fla. 5th DCA 2003); *Eastern Funding, LLC v. Roman*, 882 So.2d 1059, 1060 (Fla. 4th DCA 2004) (citations omitted).
[172] *Eastern Funding LLC v. Roman*, 882 So. 2d at 1060 (citations omitted).
[173] *Granados Quinones v. Swiss Bank Corp.*, 509 So. 2d 273 (Fla. 1987); *Shoppes LP v. Conn.*, 829 So. 2d 356 (Fla. 5th DCA 2002).
[174] 42 C.F.R. §483.12(d)(3).
[175] *Binding Arbitration in Nursing Homes*, Survey and Certification Group, Centers for Medicare and Medicaid Services, Memorandum S&C-03-10 (January 9, 2003) <http://www.cms.hhs.gov/medicaid/survey-cert/sc0310.pdf>. The federal policy did not address optional arbitration or an arbitration agreement wholly separate from the admission agreement. Indeed, strictly construing "other consideration" might even implicate any term in the admission agreement (*e.g.*, any "house rules").
[176] *Est. of Orangie Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 733 (Tenn. Ct. App. 2003).
[177] *Gainesville Health Care Center v. Weston*, 857 So. 2d at 288.
[178] *See Estate of Elma Tucker v. Coosa Valley Health Care, Inc.*, 2004 WL 260969 at p. 5; *see also Estate of Bagley v. Castleton Health Care Ctr., LLC*, 813 N.E. 2d 411 (Ind. Ct. App. 2004).

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