In 2006, ninety-four-year-old Pauline Virginia Willett of West Virginia entered a hospital for the treatment of multiple illnesses. At that time, Ms. Willett lived with her daughter, Sharon, who was also undergoing her own bouts with medical problems. Believing that she could no longer care properly for her ailing mother, Sharon decided that Ms. Willett should be temporarily admitted to a nursing home upon discharge from the hospital. She found a facility with available bed space and proceeded with the process of admitting her mother.

As part of the admissions process, Sharon signed a seventy-three-page admissions contract on her mother's behalf. Midway through that packet was a two-page arbitration agreement. By signing the admissions contract, Sharon agreed—unknowingly, she later argued—to a clause stating that any personal injury or wrongful death dispute against the nursing home could be brought only in a binding...
arbitration proceeding, not in a court of law. Under the terms of this agreement, Ms. Willett and her "successors and assigns" would be permanently bound by this requirement to arbitrate rather than litigate. Any hearing by the arbitrator would not be open to the public.

Over the next five weeks, Ms. Willett allegedly lost a significant amount of weight, developed several severe infections, and became "withdrawn and lethargic." When the nursing home transferred her to a hospital, the doctors determined that she was badly dehydrated and suffering from pneumonia, renal failure, and a host of other maladies. She died three days later.

Sharon, as administratrix of her mother’s estate, sought to sue the nursing home’s owner, executive director, and other key facility employees, claiming that their negligence caused her mother’s wrongful death. At this point, the nursing home moved to dismiss Sharon’s complaint and compel arbitration proceedings, pointing out that she had signed the admission agreement, including the binding arbitration clause. Thus began yet another round of a battle that has been fought in state courts since 1993: whether to enforce mandatory arbitration clauses in nursing home admissions contracts.

The fundamental argument against enforcing these arbitration

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7 Id. at 266, 293. For the full text of this arbitration agreement, see id. at 298-99.
8 Id. at 298.
10 See Brown, 724 S.E.2d at 266-67.
11 Id. The other illnesses included septicemia, congestive heart failure, and an acute myocardial infarction. Id.
12 Id. at 267.
13 Id.
14 Id.
15 See Beth Davis, Comment, Mandatory Arbitration Agreements in Long-Term Care Contracts: How to Protect the Rights of Seniors in Washington, 35 SEATTLE U. L. REV. 213, 224 (2011) (noting that the first state appellate court to rule on this issue was in South Carolina in 1993).
agreements is one of unconscionability. In some ways, this is not the most potent weapon in the contract law toolkit. In the most general terms, an unconscionable contract is one that should not be enforced because it is blatantly unreasonable, usually because of some gross imbalance or lopsidedness in the deal, or, as the District of Columbia Circuit phrased it in the often-cited case of Williams v. Walker-Thomas Furniture Co., “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”

See William A. Kaplan & Barbara A. Lee, The Law of Higher Education 74 (2007). One of the key problems frequently raised regarding arbitration is the lack of public accountability that results from a confidential arbitration hearing. Id. (referring to the private nature of arbitration as “problematic”). Arbitrators are not bound to follow judicial rules of evidence, nor are they required to follow the same discovery requirements and other procedural boundaries of a court. Id. Appealing arbitration decisions is generally harder than appealing the ruling of a court. See Nan Aron, Leveling the Legal Playing Field: Limit Forced Arbitration, L.A. TIMES, Jan. 14, 2014, available at http://www.latimes.com/opinion/commentary/la-oe-aron-arbitration-contracts-instagram-20140114,0,3972210.story#axzz2r5Jx11

Some might wonder why this question of arbitration versus the judicial system could raise such concerns. This is an issue of great debate among both practitioners and commentators. See William A. Kaplan & Barbara A. Lee, The Law of Higher Education 74 (2007). One of the key problems frequently raised regarding arbitration is the lack of public accountability that results from a confidential arbitration hearing. Id. (referring to the private nature of arbitration as “problematic”). Arbitrators are not bound to follow judicial rules of evidence, nor are they required to follow the same discovery requirements and other procedural boundaries of a court. Id. Appealing arbitration decisions is generally harder than appealing the ruling of a court. See Nan Aron, Leveling the Legal Playing Field: Limit Forced Arbitration, L.A. TIMES, Jan. 14, 2014, available at http://www.latimes.com/opinion/commentary/la-oe-aron-arbitration-contracts-instagram-20140114,0,3972210.story#axzz2r5Jx11

Some studies have found arbitration to be considerably more expensive than litigation for plaintiffs. See, e.g., Ann E. Krasuski, Comment, Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents, 8 DePaul J. Health Care L. 263, 293 (2004). Arbitration agreements often cap the amount that a plaintiff can recover in damages, and even those with no cap tend to result in lower awards than a trial would typically produce. See Jessica Fargen, Nursing Home Residents Often Sign Away Rights to Sue, Bos. Herald, Mar. 8, 2010, http://bostonherald.com/news_opinion/local_coverage/2010/03/nursing_home_residents_often_sign_away_rights_sue (citing data from a 2009 study). However, this Article does not claim that every arbitration agreement in the nursing home context is harmful. Rather, the key negative attribute addressed here is the fact that many signers of arbitration agreements in the nursing home setting lack a meaningful option to refuse. See infra Part IV. This establishes a tremendous advantage in bargaining power for the nursing home. See infra Part IV. Courts must carefully monitor this advantage to prevent exploitation of senior citizens and their family members in these situations. See Brown, 724 S.E.2d at 292.


Beyond this, however, definitions of unconscionability vary widely. Consequently, this principle has been criticized by courts and commentators as “vague,” “amorphous,” “chameleon-like,” and worse. Nevertheless, it is this broad-based legal theory upon which plaintiffs commonly rely when seeking to reach the ears of a judge and common law. See Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1750) (declaring unconscionability to refer to a bargain that “no man in his senses . . . would make on the one hand, and . . . no honest and fair man would accept on the other”). Compare, e.g., Williams, 350 F.2d at 449 (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”), with Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843, 856 (N.J. 1967) (“Grossly unfair contractual obligations resulting from the use of such expertise or control by the one possessing it, which result in assumption by the other contracting party of a burden which is at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable.”), and Chastain v. Koonce, 700 S.W.2d 579, 582 (Tex. 1985) (defining unconscionability as “tak[ing] advantage of the lack of knowledge, ability, or capacity of a person to a grossly unfair degree,” or “a gross disparity between the value received and the consideration paid in a transaction involving the transfer of consideration”).


However, comments regarding unconscionability are far from universally negative. For instance, a great American legal scholar, Karl Llewellyn, called the unconscionability provision in the Uniform Commercial Code “perhaps the most valuable section in the entire Code.” Hearings Before the New York Law Revision Commission on the Uniform Commercial Code 121 (1954). Another renowned contract law scholar, E. Allan Farnsworth, declared that the lack of precise definition for this doctrine is not only a source of ambiguity but also a source of “strength.” See E. AllAn Farnsworth, Contracts § 4.28, at 310 (3d ed. 1999). For other leading defenses of unconscionability’s place in contract law, see Amy J. Schmitz, Embracing Unconscionability’s Safety Net Function, 58 Ala. L. Rev. 73, 74 (2006) (“The history and philosophy underlying the doctrine’s conception show that it serves an important role of protecting humanity’s natural, or innate, sense of ‘fairness’ that defies formulaic definition or intellectualized rigidity.”); Michael M. Greenfield & Linda J. Rusch, Limits on Standard-Form Contracting in Revised Article 2, 32 UCC L.J. 115, 121 (1999) (noting that while unconscionability can be vague, “courts can work with it, and merchants can live with it”).
jury, not an arbitrator.\textsuperscript{24}

Not surprisingly, the results of these disputes have varied widely from state to state, and recent case law from the United States Supreme Court complicates the matter further.\textsuperscript{25} Therefore, it is worthwhile to examine recent activity in this area to determine what criteria may actually exist for finding unconscionability here.\textsuperscript{26} By examining multiple cases from the last two decades, certain trends do emerge.\textsuperscript{27}

This Article surveys the current state of this ongoing dispute, focusing on the doctrine of unconscionability and its application. Part II studies the recent case law from the United States Supreme Court forbidding outright bans on arbitration agreements in the nursing home setting, thus increasing the importance of unconscionability as a defense against enforcing these agreements.\textsuperscript{28} Part III examines some of the common critiques of unconscionability and asserts that if this doctrine has any meaning whatsoever then many cases in this area deserve close examination under its lens.\textsuperscript{29} Lastly, Part IV looks at many common factors that courts highlight when finding a nursing home’s pre-dispute arbitration agreement procedurally and substantively unconscionable, demonstrating that, at least in this particular field of cases, this purportedly “amorphous” doctrine does take on a valuable shape.\textsuperscript{30}

\section*{II. \textbf{THE EXPANDING FEDERAL ARBITRATION ACT: HOW ABSOLUTE BANS AGAINST NURSING HOME PRE-DISPUTE ARBITRATION AGREEMENTS BECAME ABSOLUTELY FORBIDDEN}}

First and foremost, a state cannot categorically ban all arbitration agreements applying to personal injury or wrongful death claims against nursing homes.\textsuperscript{31} For the details, one must return to the

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\textsuperscript{25}See infra Part II (providing a discussion on this line of cases).
\textsuperscript{26}See infra Part II.
\textsuperscript{27}See Davis, supra note 15, at 220-24. Again, two decades represent the period during which state appellate courts have dealt with cases in this specific area. Id.
\textsuperscript{28}See infra Part II.
\textsuperscript{29}See infra Part III.
\textsuperscript{30}See infra Part IV.
case of Ms. Willett, as well as two other West Virginia nursing home residents whose families tried to assert wrongful death claims.\(^{32}\) West Virginia’s Supreme Court of Appeals held that, as a matter of state public policy, any arbitration agreement in a nursing home admission contract regarding potential personal injury or wrongful death claims was unenforceable.\(^{33}\) The United States Supreme Court, however, reversed this holding in *Marmet Health Care Center, Inc. v. Brown*, stating that the public policy declaration from West Virginia’s highest court violated the Federal Arbitration Act (“FAA”).\(^{34}\) In an unsigned opinion, the Court declared that “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”\(^{35}\)

The court in *Brown* drew heavily from the earlier 2011 decision of *AT&T Mobility v. Concepcion*.\(^{36}\) In *Concepcion*, the Court’s 5-4 majority determined that the FAA preempted a California law deeming class action waivers in arbitration agreements unenforceable under certain circumstances.\(^{37}\) The Court drew its key support from § 2 of the FAA, which states that a written provision compelling arbitration “in any maritime transaction or a contract evidencing a transaction involving commerce” is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity” for the revocation.\(^{38}\) The one-two punch of *Concepcion* and *Brown* decisively shows that attempts by a state to forbid nursing home arbitration agreements outright will, at least for now, almost certainly receive a deathblow from at least five Supreme Court Justices.\(^{39}\)

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\(^{32}\) See *supra* notes 1-14 and accompanying text. Ms. Willett’s case was joined with two other disputes involving very similar fact patterns. *Brown*, 724 S.E.2d at 263.

\(^{33}\) *Id.* at 296-97.

\(^{34}\) *Marmet Health Care Ctr.*, 132 S. Ct. at 1203-04.

\(^{35}\) *Id.* at 1203 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)).

\(^{36}\) See *Brown*, 724 S.E.2d at 275-76.

\(^{37}\) *Concepcion*, 131 S. Ct. at 1753.


\(^{39}\) *Concepcion*, 131 S. Ct. at 1748. In *Concepcion*, the five Justices included Chief Justice Roberts, Justice Scalia (writing the majority opinion), Justice Kennedy, Justice Thomas (writing a separate concurring opinion), and Justice Alito. *Id.* at 1744, 1753, 1756.
A. Early History

Interestingly, this result is a rather new—and, arguably, unexpected—line of reasoning from the Court.\textsuperscript{40} Congress passed the FAA in 1925, intending to "reverse the longstanding judicial hostility to arbitration" that dated back to English common law.\textsuperscript{41} Persistent lobbying efforts by multiple business groups, with significant support from the American Bar Association's Committee on Commerce, Trade, and Commercial Law, played a key role in influencing passage of this legislation.\textsuperscript{42} In short, the goal of this new law seemed straightforward: to place arbitration agreements on equal footing with all other contracts, receiving the same protections, and confined by the same margins as other legally enforceable agreements.\textsuperscript{43}

Even after its enactment, however, the FAA served only a minor function for many years.\textsuperscript{44} The Court narrowly interpreted this law for


\textsuperscript{44} See, e.g., Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 200-03 (1956); Wilko v. Swan, 346 U.S. 427, 436-38 (1953). In both cases, the United States Supreme Court refused to grant a stay of the court proceedings despite the presence of an arbitration agreement in the relevant contract. See Bernhardt, 350 U.S. at 203; Wilko, 346 U.S. at 436-37; see also Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 278-79 (1932) (holding that the FAA is a procedural law applying exclusively to the federal
decades, determining that it did not preempt state statutes that made arbitration agreements unenforceable. In addition, the Court firmly held that the FAA applied only in maritime contracts and transactions clearly involving “commerce,” restricting the law’s scope to the precise words of § 2.46

However, this limited interpretation would not last.47 In a flurry of landmark cases during the 1980s, the Supreme Court dramatically reversed course regarding the FAA.48 It began with the case Moses H. Cone Memorial Hospital v. Mercury Construction Corp., in which the Court issued a startling declaration: that under federal law, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”49 Additionally, the Court pronounced that the FAA represented a “congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”50

These statements in Moses H. Cone were merely dicta, and thus not binding legal precedent.51 Yet they revealed the Court’s sudden willingness to grant broader latitude to the FAA than ever before.52 For the first time, the Court had interpreted that federal policy not only placed arbitration agreements on equal footing with other contracts, but actually favored arbitration over litigation as a dispute resolution tool.53

courts). All of these rulings represent a traditional, narrow application of the language of the FAA in general, and § 2 in particular. See Bernhardt, 350 U.S. at 203; Wilko, 346 U.S. at 436-37; Dreyfus, 284 U.S. at 279.
45 See supra note 44 and accompanying text.
46 See Bernhardt, 350 U.S. at 200-03.
49 Moses H. Cone Mem’l Hosp., 460 U.S. at 24-25.
50 Id. at 24 (emphasis added).
53 See id. at 27. For one of many detailed discussions about Moses H. Cone and its
B. Recent Changes

Once Moses H. Cone opened the floodgates, the deluge soon followed.54 In 1984, the Court in Southland Corp. v. Keating held that contrary to previous interpretations, the FAA could strike down state laws that required parties to litigate, rather than arbitrate, certain types of claims.55 This was a watershed moment.56 By this ruling, the Court granted itself jurisdiction to decide whether the FAA preempted state statutes.57 To Chief Justice Warren Burger, writing for the Court’s majority, Congress clearly intended for the FAA to have a broad reach, given that overcoming the “old common law hostility to arbitration” was the purpose behind the law.58 The FAA, under Justice Burger’s rationale, was no mere procedural rule for the federal courts, but a broadly applicable substantive law, fully enforceable at both the state and federal levels under Congress’ power to regulate interstate commerce.59

Despite a strongly worded dissent from Justice Sandra Day O’Connor, one which noted that the implementing provisions in § 3 and


55 Id. at 15-17 (holding that state statutes conflicting with the FAA were invalid under the Supremacy Clause of the Federal Constitution).
57 See Southland, 465 U.S. 1, 16 (1984) (“[By passing the FAA], Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”).
58 Id. at 13-14.
59 See id. at 14-16. The classification of the FAA as a substantive law, rather than a procedural rule, held particular importance here. Dunham, supra note 56, at 345. Under the so-called “Erie Doctrine,” federal courts sitting in diversity—hearing suits between parties domiciled in different states—may use federal procedural rules, but must apply state substantive law to resolve the case. See Erie Railroad Co. v. Tompkins, 304 U.S. 64, 71-80 (1938). Thus, if the FAA were only a federal procedural rule, federal courts could not use the FAA to resolve a diversity suit. See id. at 78-79. State law regarding arbitration would control. See id. at 71, 79. However, now that the Court has classified the FAA as a federal substantive law, a federal court would be able to rely upon the FAA in diversity suits as well. See Southland, 465 U.S. at 15-16.
§ 4 of the FAA “expressly apply only to federal courts,” a new era in American arbitration agreements had begun. With the Court now willing to review and overturn state law prohibitions against arbitration agreements in particular situations, the appeals came quickly. Case by case, the broadening trend continued. In 1985, the Court decided that the FAA applied to antitrust disputes. This overturned federal precedent stating that antitrust cases carried weighty public policy implications and, thus, were fit for a court of law, not an arbitrator, to decide. “Having made the bargain to arbitrate,” the Court held that “the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”

Similar categorical restrictions fell in subsequent years. In 1991, the Court held for the first time that the FAA applied to employment cases. Previously, such disputes were believed to be beyond the purview of the FAA, given the general inequity in bargaining power between employer and employee; but the Court’s decision in Gilmer v. Interstate/Johnson Corp. rejected this notion.

60 Southland, 465 U.S. at 29 (O’Connor, J., dissenting). To Justice O’Connor, the FAA was unequivocally a procedural rule rather than a substantive law and was never meant to preempt state laws. Id. at 25-26 (O’Connor, J., dissenting). “Although arbitration is a worthy alternative to litigation,” Justice O’Connor concluded, “today’s exercise in judicial revisionism goes too far.” Id. at 36 (O’Connor, J., dissenting).

61 Dunham, supra note 56, at 345.


63 See Kenneth F. Dunham, supra note 56, at 349-51.

64 See Mitsubishi, 473 U.S. at 628-29.

65 Id. at 655-57 (Stevens, J., dissenting). This was one of the key points that Justice John Paul Stevens raised in his dissent. See id. at 657 (“Instead of ‘muffling a grievance in the cloakroom of arbitration,’ the public interest in free competitive markets would be better served by having the issues resolved ‘in the light of impartial public court adjudication.’” (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 137 (1973))). Indeed, this is one of the most common arguments advanced against arbitration in general. See supra note 16 and accompanying text.

66 Mitsubishi, 473 U.S. at 628.


68 Id. at 29-30, 35.

69 Id. at 33, 39-40 (stating that Gilmer presented no evidence that he had been “coerced or defrauded” into agreeing to arbitration, and concluding that he therefore
Four years later, in Allied-Bruce Terminix Cos. v. Dobson, the Court issued an expansive ruling that applied the FAA to virtually every imaginable transaction in which commerce was, to any extent, involved or affected—including "consumer v. business" disputes where the transaction at issue was primarily local.\textsuperscript{70} Discrimination suits against an employer did not escape the reach of the FAA either, a decision that the Court's majority adamantly issued in 2001.\textsuperscript{71} Given this consistent expansion in the Court's views about the FAA over the last three decades, it becomes apparent that the recent holdings in Concepcion and Brown were rather predictable before the cases even reached oral argument.\textsuperscript{72}

Arguably, this abrupt interpretive widening stemmed from particular judicial motivations.\textsuperscript{73} In 1976, Chief Justice Burger delivered the keynote address at a conference about the future of the American judiciary.\textsuperscript{74} American courts, he pointed out, were commonly overburdened by massive caseloads, slowing the resolution of disputes.\textsuperscript{75} Greater efficiency, he stated, was essential.\textsuperscript{76} Then he specifically endorsed arbitration as a likely solution: "Lawyers, judges and social scientists of other countries cannot understand our failure to make greater use of the arbitration process to settle disputes," the Chief Justice said.\textsuperscript{77} He further stated, "I submit a reappraisal of the values of

\textsuperscript{70} Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 269-70, 273-74 (1995). The Court determined in this case that § 2 applied to any case where interstate commerce was involved in any way, even if the parties to the bargain never contemplated an interstate transaction. \textit{Id.; see also} Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) ("It is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce . . .'")

\textsuperscript{71} Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123-24 (2001). This decision further hammered home many of the findings in Gilmer. \textit{Id.}

\textsuperscript{72} See \textit{id.} at 131-32 (Stevens, J., concurring).

\textsuperscript{73} See, e.g., Hon. Warren E. Burger, Chief Justice, United States Supreme Court, Keynote Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79, 93-96 (Apr. 7-9, 1976).

\textsuperscript{74} \textit{Id.} at 83.

\textsuperscript{75} \textit{Id.} at 88.

\textsuperscript{76} \textit{Id.} at 92.

\textsuperscript{77} \textit{Id.} at 94.
the arbitration process is in order, to determine whether . . . arbitration can divert litigation to other channels."\(^7\)

Just seven years later, the Court issued its decision in *Moses H. Cone*, beginning the process of vastly expanding its view over the FAA and its applicability.\(^7\) The link between Chief Justice Burger's statements and the degree to which the Court under Burger's leadership ultimately altered the common understanding about the FAA's parameters is too close to ignore.\(^8\) Some commentators go so far as to say that the Court's concern over heavy caseloads and slow resolutions has led to a denial of the judicial process for far too many unwitting individuals.\(^8\) Others, however, argue that the Court's about-face represented a long-overdue shift in interpreting the FAA and that it was the earlier, narrower viewpoint that had misconstrued the law.\(^8\) Even the Court itself has been divided deeply over this issue, with certain justices expressing displeasure over the broadening of the FAA, but reluctantly declining to overrule the bulk of precedent now supporting its expansion.\(^8\)

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\(^7\) Id.
\(^7\) See supra notes 48-54.
\(^8\) See, e.g., Richard C. Reuben, *FAA Law, Without the Activism: What if the Bellwether Cases Were Decided by a Truly Conservative Court?*, 60 Kan. L. Rev. 883, 885 (2012) ("[T]he Court's work in this area has arguably been the Taj Mahal of judicial activism, as the Court has taken a simple statute authorizing federal judicial enforcement of agreements between businesses to arbitrate their disputes and has used it to create its own version of civil justice reform."); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 102-12 (2006) (arguing that the Court has turned a blind eye to the legislative history of the FAA).
\(^8\) See, e.g., Drahozal, supra note 42, at 102-03, 105; (arguing that the *Southland* Court resolved the case correctly by applying the FAA to preempt state law, laying the groundwork for the many wider-interpretation FAA cases to come).
\(^8\) See Peter B. Rutledge, *Arbitration and the Constitution* 84 (2013). Justice Scalia, for instance, has previously said that he is prepared to overrule *Southland*, but he now continues to apply the *Southland* principle of FAA preemption of state law under the principle *stare decisis* (finding that the precedent stands unless there are obvious grounds to strike it down). Id. Justice Thomas has also frequently expressed his dislike for the *Southland* line of cases. Id. Nevertheless, Justice Thomas issued the key concurring opinion in favor of using the FAA to preempt state law in *Concepcion*. See AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1753-56 (2011).
C. Brown and Conception: The Latest Expansion

Regardless of the Court’s motivation and its merits, however, it seems that the Court will apply the FAA broadly for at least the immediate future. Brown represented still another widening of the FAA’s reach, a decision with perhaps even greater consequences than the holding in Conception.

In Conception, Justice Scalia paid significant attention to the terms of the arbitration agreement between AT&T and the customer. The agreement, Justice Scalia determined, established “incentives” by which aggrieved customers would be likely to be “made whole” through arbitration. The agreement required AT&T, not the customer, to pay the expenses of hiring an arbitrator. Even if the consumer lost at arbitration, he or she was not responsible for covering AT&T’s attorney’s fees. If the customer won, then he or she received an automatic minimum payment of $7,500, plus double attorney’s fees, from AT&T.

Whether these terms are truly “incentives” for fair dealing is a debatable point. Yet in Brown, the Court did not even examine whether such incentives existed in the agreement between the nursing home and Ms. Willett’s daughter. Instead, the Court merely issued a per curiam opinion stating that any categorical ban on arbitration agreements violated the FAA, with no meaningful discussion whatsoever about the content of the bargain. Therefore, it appears that the Court’s current stance on the FAA is rather simplistic: any prohibition of arbitration agreements in a particular field, regardless of

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84 See, e.g., Conception, 131 S. Ct. at 1748.
86 See Conception, 131 S. Ct. at 1744.
87 Id. at 1753.
88 Id. at 1744.
89 Id.
90 Id. at 1753.
91 See, e.g., id.
93 Id. at 1203-04.
the details, is instantly preempted by the FAA.94

D. Legislative Roadblocks

Legislative attempts to forbid pre-dispute arbitration clauses in nursing home admissions agreements have also largely failed.95 On the federal level, virtually all attempts to pass a Fairness in Nursing Home Arbitration Act have died in committee, with no proposal to date coming remotely close to enactment.96 States have been more successful in passing legislation prohibiting arbitration agreements in the nursing home admissions setting.97 However, in response to the Court’s wave of wide-application FAA decisions, the state high courts from New Jersey to Illinois have struck down these statutes as contrary to the FAA.98 Even the Oklahoma Supreme Court, which upheld an Oklahoma law disallowing any waiver of a nursing home resident’s right to a jury trial,99 ultimately saw a federal district court subsequently

94 See id.
95 See infra note 96 and accompanying text.
99 Bruner v. Timberlane Manor Ltd. P’ship, 155 P.3d 16, 32 (Okla. 2007). The Supreme Court of Oklahoma focused heavily on the argument that the contract in question did not involve interstate “commerce” within the definition of the FAA. Id. at 21, 22, 30, 32. In particular, the court noted that the parties to the arbitration agreement chose to be bound by state law, not federal law. Id. at 30. Furthermore, the agreement did not mention the FAA at all. Id. Thus, the court ruled that the FAA could not preempt state law in this particular set of circumstances. Id. at 32.
hold that the FAA preempted this state law. In California, a bill preventing these agreements in nursing home admissions did not even make it to a court challenge. Instead, then-Governor Arnold Schwarzenegger vetoed the bill, citing the FAA as a reason for doing so.

Thus, it appears that any blanket ban on enforcing these pre-dispute arbitration clauses against nursing home residents is all but guaranteed to fail. However, the FAA also provides that an arbitration agreement, like any other contract, can be deemed unenforceable under legal or equitable grounds. Plaintiffs seeking to reach the courthouse, therefore, can raise any applicable defense in law or equity against enforcement of the agreement. At times, agency arguments—that the person who signed the nursing home admissions contract lacked actual or apparent authority to bind the plaintiff to the bargain’s terms—prove to be successful in these cases. These issues, however, are beyond the scope of this particular Article. Instead, this Article will focus its attention on the other common defense against enforcing these arbitration agreements: the doctrine of

100 See Rainbow Health Care Ctr., Inc. v. Crutcher, No. 07-CV-194-JHP, 2008 WL 268321, at *7-8 (N.D. Okla. Jan. 29, 2008) (deciding that the FAA preempted terms in Oklahoma’s Nursing Home Care Act that prohibited nursing home residents from waiving their right to a jury trial).


105 See id.


107 Lawrence, 273 S.W.3d at 525, 529, 530.
III. THE UNCONSCIONABILITY DOCTRINE: MANY CRITICS, BUT ALSO HIGH SOCIETAL VALUE

As noted already, the very notion of unconscionability has its share of extremely vocal skeptics. Those detractors maintain that unconscionability is overly elastic, stretched in any direction that a litigant or a judge wishes to pull. They assert that unconscionability evades a clear set of criteria, confusing parties to a case and leaving courts to parrot Justice Potter Stewart’s infamous statement about pornography: “I know it when I see it.” Furthermore, these critics of unconscionability claim that it allows evasion of too many promises between parties, harming marketplace efficiency and preventing “optimal distribution of resources.”

The debate regarding when the law should step in and prevent enforcement of a contract is an old one. Those who argue for strict contract enforcement in all settings purport that the survival of America’s free market system depends on the courts staying out of business dealings among private parties. Allowing the court to interject a fluid concept like unconscionability into the mix and the result could be a neurotic society of parties that are reluctant to enter

108 See infra Part III.
109 See supra notes 20-23 and accompanying text.
110 See supra notes 20-23 and accompanying text.
111 Jacobellis v. Ohio, 378 U.S. 187, 197 (1964) (Stewart, J., concurring). Justice Stewart’s candid expression came from his now-famous concurring opinion. Id.; see, e.g., ANDERSON’S OHIO CONSUMER LAW MANUAL § 2.24 (“Judges tend to ‘know it when they see it’ and the decisions of judges in these cases appear to accord with societal perceptions of fairness.”).
112 Schmitz, supra note 23, at 73.
bargains for fear that the courts might strike them down on a whim.\textsuperscript{115}

On the other hand, those who argue for greater legal policing of dealings among private parties point to the moral foundations on which law is supposed to be grounded.\textsuperscript{116} If an agreement is patently unfair, and one party is blatantly exploiting its position of dominance to take extreme advantage of an obviously weaker party, then the legal system has an obligation to find some remedy against enforcing the deal—even if the required elements of offer, acceptance, and consideration are all present.\textsuperscript{117} Failing to do so could result in a society steeped in suspicion and fear, a jungle in which the strongest members are permitted to prey on the feeble and only the fittest survive.\textsuperscript{118}

This Article does not claim to answer that longstanding question.\textsuperscript{119} However, in the specific context of the nursing home arbitration agreements discussed here, unconscionability—if it has any meaning at all in the American legal framework—deserves a place at the table.\textsuperscript{120} American society has a history of respect for elderly individuals.\textsuperscript{121} Our nation’s legal system is neither immune from, nor

\textsuperscript{115} See Edwards, supra note 114, at 652 (engages in a discussion about this tension of opposites between freedom of contract and ensuring fundamental “fairness”).

\textsuperscript{116} For an in-depth analysis on this concept, see generally HENRY MATHER, CONTRACT LAW AND MORALITY (1999) (concluding that the law of contracts should employ certain moral principles when making decisions about the enforceability of the concepts of offer and acceptance, the remedies that a commercially wronged party should receive, and other cornerstone aspects of this field).

\textsuperscript{117} See Schmitz, supra note 23, at 91-92.

\textsuperscript{118} See, e.g., Erin Ann O’Hara, Trustworthiness and Contract, in MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 183, 188 (Paul J. Zak ed. 2008) (concluding that equitable doctrines, such as unconscionability, play a key role in instilling a certain degree of mutual trust among parties to a bargain, removing some of the fear of exploitation by the other party, and thus leading to less inhibited behavior in the marketplace).

\textsuperscript{119} See id. This Article focuses on the dispute between enforcing arbitration in nursing home contracts and the use of the unconscionability doctrine to combat the enforcement of an arbitration clause within a nursing home contract. See supra Part I.

\textsuperscript{120} See 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, 185-86 (2009).

\textsuperscript{121} See MICHAEL FABER ET AL., INTRODUCTION TO AGING: A POSITIVE, INTERDISCIPLINARY APPROACH 22 (2014). This tradition dates back to America’s
unresponsive to that legacy of respect.\textsuperscript{122} Indeed, the presence of multiple special programs and benefits aimed largely at senior citizens—Social Security, Medicare, the Employee Retirement Income Security Act,\textsuperscript{123} the Older Americans Act,\textsuperscript{124} and many more\textsuperscript{125}—demonstrate that America’s government recognizes that older individuals have earned at least some degree of assistance from their country.\textsuperscript{126} The American legal system, likewise, provides disabled individuals with enhanced protections.\textsuperscript{127} Similarly, the presence of federal and state laws expressly addressing elder abuse prevention shows that guarding senior citizens from physical, mental, emotional, and financial harm and exploitation is a common objective.\textsuperscript{128}

Thus, it would be incongruous to institute all of these programs

\begin{itemize}
\item \textsuperscript{122} See Lawrence A. Frolik, The Developing Field of Elder Law Redux: Ten Years After, 10 ELDER L.J. 1, 2 (2002). This is especially evident in the fact that there is an entire rapidly growing field of law devoted exclusively to the elderly. \textit{Id.} at 4 (explaining the expansion of elder law “including guardianship, elder abuse and neglect, long-term care planning, wills and trusts, pension planning, age discrimination, and quality of care issues in nursing homes”).
\item \textsuperscript{124} 42 U.S.C. §§ 3001-58ff (2012).
\item \textsuperscript{125} \textit{See} RUDOLPH G. PENNER, TAX BENEFITS FOR THE ELDERLY 1 (2000), available at http://www.urban.org/UploadedPDF/retire_5.pdf. For example, many tax benefits are available for elderly Americans. \textit{Id.}
\item \textsuperscript{126} \textit{See id.} at 1 (explaining the amount of money that the government provides to the elderly).
\item \textsuperscript{127} Chief among these safeguards is the groundbreaking Americans with Disabilities Act. \textit{See} 42 U.S.C. §§ 12101-213 (2012).
\item \textsuperscript{128} \textit{See} Memorandum from Kirsten Colello & Lyn Stoesen, Cong. Research Serv., to Ashley Carson, Senate Special Comm. on Aging (Feb. 4, 2010), available at http://www.preventelderabuse.org/about/documents/CRSMemorandum_Compendium_ofElderAbuseActivities_2011.pdf.
\end{itemize}
and policies to help elderly and disabled Americans, and then simultaneously remove contractual safeguards regarding these same classes of people.\textsuperscript{129} In 2013, Congress expressed outrage, and pledged to pursue reform, after a report showed that one in three American nursing homes was cited for abuse of residents over a two-year period.\textsuperscript{130} It would be nonsensical to seek such reform and yet concurrently allow nursing homes to trick or force residents or their loved ones into signing away the right to pursue justice in the courtroom.\textsuperscript{131}

Perhaps it may be somewhat economically inefficient for nursing homes to engage in courtroom litigation over personal injury or wrongful death lawsuits.\textsuperscript{132} However, between this consideration and the need to protect vulnerable senior citizens with disabilities from contracts in which they have no meaningful choice, the historical weight of America’s ideals favors the latter value.\textsuperscript{133}

Furthermore, the argument that unconscionability is a doctrine devoid of reliable criteria loses strength in this context.\textsuperscript{134} A review of many cases from the last twenty years reveals common factors that seem to normally persuade a court that the arbitration agreement is unconscionable.\textsuperscript{135} We now move to an overview of the frequently appearing factors in nursing home cases where courts find unconscionability in the arbitration agreement.\textsuperscript{136}

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See Tripp, supra note 120, at 207.
\item See Katherine Palm, \textit{Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate}, 14 ELDER L.J. 453, 475 (2006).
\item See Palm, supra note 132, at 465.
\item See \textit{infra} Parts IV.A.2, IV.B.2.
\item See \textit{infra} Parts IV.A.1, IV.B.1.
\end{enumerate}
\end{footnotesize}
IV. THE FACTORS: EXAMINING CASE LAW TO GIVE SHAPE TO AN “AMORPHOUS” DOCTRINE

A. Procedural Unconscionability

1. Key factors

Many states require a finding of both procedural unconscionability and substantive unconscionability before holding the contract unenforceable. This Article examines common factors in nursing home cases with elements that courts have deemed procedurally unconscionable or unconscionable based on the conditions of contract formation.

First among these aspects is lack of capacity or competence. The “easier” case involves the individual with a severe cognitive disability—an advanced stage of Alzheimer’s disease, for example—who signs the nursing home admissions package binding himself and his heirs to arbitration. Harder cases arise when the party signing the agreement is not necessarily substantially disabled but still lacks the awareness, education, or ability to comprehend the significance of agreeing to binding arbitration. Frequently, the analyses in these cases raise additional subfactors, such as the overall length of the admissions contract, the size of the font in the arbitration agreement, whether the arbitration agreement is “buried” within a longer contract or

139 Id. at 285.
140 See, e.g., Covenant Health & Rehabilitation of Picayune v. Estate of Lambert, 984 So. 2d 283, 285, 289 (Miss. Ct. App. 2006) (holding that a woman whom nursing home staff determined to have impaired memory, cognitive skill, and vision lacked the capacity to knowingly agree to binding arbitration).
141 See Brown, 724 S.E.2d at 285.
presented as a separate stand-alone agreement, and whether a facility representative attempted to clearly explain the impact of the arbitration agreement to the signer.\textsuperscript{142}

The other major category to which courts look in these cases involves presence or absence of meaningful choice.\textsuperscript{143} Courts are far more likely to find procedural unconscionability in an arbitration agreement presented by a nursing home as the classic "offer you can't refuse."\textsuperscript{144} For example, if the facility requires signing the arbitration agreement as a condition of admission, the court is far more likely to hold the agreement unenforceable.\textsuperscript{145} Likewise, if there are no comparable nursing homes within a reasonable distance, courts tend to find that this might deprive the plaintiff of a meaningful choice about whether to agree to arbitration.\textsuperscript{146}

Courts also often consider the degree of medical urgency for admission to a nursing home.\textsuperscript{147} Situations demanding immediate nursing home supervision and care seem more likely to result in a finding that meaningful choice was not present.\textsuperscript{148} Finally, courts examine the level of pressure employed by the nursing home in the admission process.\textsuperscript{149} Even if agreeing to arbitration is not mandatory for admission, courts may still find procedural unconscionability if facility staff used their positions of authority to essentially force the party into signing.\textsuperscript{150}

\begin{flushleft}
\textsuperscript{142} For examples of these various factors in practice, see infra Part IV.A.2.
\textsuperscript{143} Brown, 724 S.E.2d at 284.
\textsuperscript{144} Id. at 285-86.
\textsuperscript{145} See infra Part IV.A.2.
\textsuperscript{146} See Brown, 724 S.E.2d at 293. Note, however, that certain courts have been extremely stringent—arguably overly so—regarding this requirement. See, e.g., Briarcliff Nursing Home v. Turcotte, 894 So. 2d 661, 666-67 (Ala. 2004) (deciding that the plaintiffs did not demonstrate a lack of meaningful choice because there were two nursing homes in the county with a population of more than 12,000 elderly individuals). However, the hardline reasoning in Turcotte appears to be an exception, not the norm, in these cases. See infra Part IV.A.2.
\textsuperscript{147} Brown, 724 S.E.2d at 268.
\textsuperscript{148} infra Part IV.A.2.
\textsuperscript{149} See Brown, 724 S.E.2d at 268-70.
\end{flushleft}
2. Key cases

Multiple decisions across various states show the practical application of these factors. For instance, consider again the West Virginia Supreme Court of Appeals decision in Brown. The court of appeals noted that the nursing home required that the patient agree to arbitration as a prerequisite for admission. While other nursing homes existed in the general vicinity, there was no evidence that any of these facilities actually had available bed space. Given that the plaintiff's medical situation required immediate and continuous skilled nursing care, the court inferred that signing the agreement was the only real option presented by the nursing home, leaving no choice other than agreeing to arbitration.

Additionally, nobody from the nursing home ever explained the meaning of the arbitration clause. The plaintiff did not have an attorney present, nor did the plaintiff have any sophisticated knowledge regarding contract interpretation. After reviewing "the relative positions of the parties, the adequacy of their bargaining positions, and the manner in which the agreement was adopted," the court found the arbitration agreement to be procedurally unconscionable.

Another good illustration comes from Romano ex rel. Romano v. Manor Care, Inc., where the Supreme Court of Florida considered the case of an elderly husband whose wife needed immediate nursing home care. When Mrs. Romano fell in her home, doctors deemed her a poor candidate for surgery, leaving her husband to find a skilled nursing

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152 Brown, 724 S.E.2d 250.
153 Id. at 294.
154 Id. at 293.
155 See id. at 268-69.
156 Id. at 293.
157 Id.
158 Id.
facility where she could receive rehabilitative treatment.\textsuperscript{160} Their first choice nursing home was unavailable.\textsuperscript{161} Their second choice, Manor Care, brought Mr. Romano eight separate documents on the day after Mrs. Romano was admitted.\textsuperscript{162} One of those documents was a six-page arbitration agreement.\textsuperscript{163} Mr. Romano signed each of the eight documents.\textsuperscript{164}

Mrs. Romano’s physical condition worsened greatly while in the nursing home.\textsuperscript{165} When Mr. Romano tried to sue, the facility moved to compel arbitration.\textsuperscript{166} The trial court granted the motion, and Mr. Romano appealed.\textsuperscript{167} In evaluating the agreement, the Florida District Court of Appeal noted that Mr. Romano was elderly and lacked any legal training or background dealing with contracts.\textsuperscript{168} Even more importantly, the court pointed out that the nursing home representative merely told Mr. Romano to sign all of the documents, neglecting to explain what any of the paperwork actually meant.\textsuperscript{169} The nursing home administrator, who worked with Mr. Romano, conceded to the trial court that she did not actually understand how the arbitration agreement affected the rights of the parties.\textsuperscript{170}

As a result, Mr. Romano believed that if he did not sign the agreement the nursing home would not admit his wife as a resident.\textsuperscript{171} While this was not the facility’s actual policy, the sheer lack of explanation by the facility, coupled with the fact that Mr. Romano was unsophisticated in dealing with complex contracts of this nature, was enough for the court to find procedural unconscionability.\textsuperscript{172}

\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 63.
\textsuperscript{169} Id. at 61.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 63-64.
A similar scenario arose in *High v. Capital Senior Living Properties*. There, the United States District Court for the Eastern District of Michigan, applying Michigan state law, considered an arbitration agreement within a longer contract. The eighty-five-year-old woman seeking admission printed her name at the end of a complex, thirteen-page document with the arbitration agreement contained on the eleventh page of the packet admissions agreement. The Amended Complaint alleged that the facility itself evaluated this individual as possibly suffering from “some dementia,” often confused, and requiring assistance with various activities of daily life. No nursing home representative explained the importance of the arbitration clause to her. Taking these factors together, the court held that the arbitration agreement was unenforceable and that the suit could proceed to court.

The plaintiff also succeeded in proving procedural unconscionability in the Tennessee case of *Howell v. NHC Healthcare-Fort Sanders, Inc.* In this case, the nursing home resident’s husband signed the admission agreement on her behalf. The husband was illiterate. The court found that the nursing home’s verbal explanation of the arbitration agreement was paltry, presented to the husband on a cursory “take-it-or-leave-it” basis that left him little option but to agree—especially since his wife was in urgent need of immediate admission. In addition, the nursing home had “buried” the arbitration agreement.
agreement on the tenth page of an eleven-page document. Not surprisingly, the Tennessee Court of Appeals found this arbitration agreement to be procedurally unconscionable.

Compare these cases with the facts before the Massachusetts Supreme Judicial Court in Miller v. Cotter. In Miller, the plaintiff signed the nursing home’s admission agreement on behalf of his father. The plaintiff also signed a two-page arbitration agreement that the nursing home presented as a separate document. This arbitration agreement stated, in capital letters, that signing was not required for admission to the home. A representative of the home summarized the agreement’s purpose to the plaintiff before the plaintiff signed the agreement. Prior to that moment, the plaintiff had already signed admissions contracts in several other hospitals and nursing homes on his father’s behalf.

When the plaintiff’s father died while a patient at the nursing home, the plaintiff sued the facility, and the facility sought to compel arbitration. On appeal, the Massachusetts Supreme Judicial Court noted that the arbitration agreement was a short, separate document, the plaintiff had signed several previous admissions contracts in other facilities, signing was not mandatory for admission, and a representative summarized the nature of the agreement to the plaintiff before he signed. Additionally, the court stated that the plaintiff had a fundamental knowledge of reading and interpreting contracts through his twenty-seven-year career in the insurance industry. Based on this,

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183 Id. at 734.
184 Id. at 735 (finding that the “appellant has not demonstrated that the parties bargained over the arbitration terms, or that it was within the reasonable expectations of an ordinary person”).
186 Id. at 540.
187 Id.
188 Id.
189 Id. at 541.
190 Id. The plaintiff also did the same for his mother at several prior facilities. Id.
191 Id. at 540.
192 Id. at 540-41.
193 Id. at 541.
the court held that the plaintiff was a sophisticated party with regard to understanding contractual language.\textsuperscript{194} Considering all of these facts, the court held that there was no procedural unconscionability here.\textsuperscript{195}

Perhaps the oddest finding against procedural unconscionability occurred in the Texas case of \textit{In re Ledet}.\textsuperscript{196} In this case, the court looked at an arbitration agreement signed by the nursing home resident’s son.\textsuperscript{197} The son could not read, speak, or understand English, a fact of which the nursing home was aware.\textsuperscript{198} A nursing home employee who spoke Spanish met with the son, explaining several aspects of the admissions process and providing him with the admission contract.\textsuperscript{199} However, the nursing home employee never explained anything to the son about the arbitration agreement.\textsuperscript{200}

Given that the son could not read the arbitration agreement and received no explanation about it from facility personnel, elements of procedural unconscionability certainly appeared to be present.\textsuperscript{201} However, the Texas court upheld the agreement and ordered arbitration.\textsuperscript{202} The fact that the son could not understand English, according to the court, held no bearing on the enforceability of the contract.\textsuperscript{203} Likewise, the lack of explanation about the arbitration agreement

\textsuperscript{194} Id. at 545 ("Miller is an intelligent and educated man whose professional experience gave him sophistication in dealing with contracts.").

\textsuperscript{195} Id. at 545-46; see also Estate of Mooring v. Kindred Nursing Ctrs., No. W2007-02875-COA-R3-CV, 2009 WL 130184, at *5-6 (Tenn. Ct. App. Jan. 20, 2009) (determining that the signer had ample opportunity to review the arbitration agreement, which was optional, was presented as separate from the rest of the admission contract, and the signer had the ability to ask questions about the agreement before signing); Fortune v. Castle Nursing Homes, Inc., No. 07 CA 001, 2007 WL 4227458, at *2-3 (Ohio Ct. App. Nov. 30, 2007) (deciding that the plaintiff failed to meet its burden of showing that the nursing home resident lacked the time and ability to understand the arbitration agreement).


\textsuperscript{197} Id. at *1.

\textsuperscript{198} Id. at *5.

\textsuperscript{199} Id.

\textsuperscript{200} Id.

\textsuperscript{201} See id.

\textsuperscript{202} Id. at *6.

\textsuperscript{203} Id. at *5-6.
clause from the nursing home staff member did not rise to the level of procedural unconscionability. According to the Texas Court of Appeals, the lack of “fraud, misrepresentation, or concealment” in this situation was enough to find the arbitration agreement enforceable.

In light of the previously examined cases, the outcome in Ledet is surprising. Overall, it seems to ignore virtually all of the common factors described above. Fortunately, it also appears to be an outlier in this area of the law. Of the many cases examined in researching this topic, no other decision upheld such an uninformed agreement by the signer. This holding proves that the factors described here are certainly not set in stone and courts may alter the factors at their discretion. However, the consistency with which the other cases, discussed here, examined these factors shows that this list remains a

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204 Id. For a sense of how this case departs from the general trends in this area, compare id., with Howell v. NHC Healthcare-Fort Sanders, Inc., 109 S.W.3d 731, 732, 735 (Tenn. Ct. App. 2003) (while signer’s illiteracy was not enough by itself to find unconscionability, the illiteracy coupled with the nursing home staff member providing a partial explanation but leaving out key information was enough to hold the bargain procedurally unconscionable), and Romano v. Manor Care, 861 So. 2d 59, 63-64 (Fla. Dist. Ct. App. 2003) (lack of explanation by the facility to a clearly unsophisticated party was enough for procedural unconscionability finding).


206 See High v. Capital Senior Living Props. 2-Heatherwood, Inc., 594 F. Supp. 2d 789, 801-02 (E.D. Mich. 2008) (finding unconscionability where the arbitration agreement was hidden inside a thirteen-page contract, the eighty-five-year-old patient suffered from dementia, and the arbitration agreement was not explained to the patient); see also Howell v. NHC Healthcare, 109 S.W.3d 731, 735 (Tenn. Ct. App. 2003) (finding unconscionability where the husband’s illiteracy and a poor explanation of the arbitration clause led to a finding of unconscionability).

207 See Ledet, 2004 WL 2945699, at *5-6 (stating that illiteracy is not a defense and finding no unconscionability where the son who signed for the incapacitated mother was illiterate in English, and did not have the agreement properly explained to him). Compare id., with High, 594 F. Supp. 2d at 801-02, and Howell, 109 S.W.3d at 735.

208 See supra note 204 and accompanying text. This lack of widespread support is similar to another outlier case, the Turcotte decision from Alabama discussed earlier in this Section. Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661, 666-67 (Ala. 2004).


useful guide for determining when courts are likely to find procedural unconscionability in this setting.  

**B. Substantive Unconscionability**

1. Key factors

This Article will now look at the common factors that courts use in these cases for determining substantive unconscionability, or unconscionability within the actual terms of the contract. Certain conditions (or lack thereof) within these arbitration agreements appear more likely to trigger a finding that the contract is unenforceable. Generally speaking, these terms can be divided into two broad classifications.

The first category is terms and conditions that tilt the scales too heavily in favor of the nursing home. Provisions preventing recovery of punitive damages at arbitration, capping the amount of damages recoverable at an unreasonably low total, shortening the relevant statute of limitations below what is required at law, or requiring the losing party to pay for all arbitration costs and fees, have all received significant disfavor from multiple state courts. Another area of analysis examines whether the arbitration agreement is bilateral or unilateral in nature.

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211 See High, 594 F. Supp. 2d at 801-02; see also Howell, 109 S.W.3d at 735.
213 See, e.g., id. at 293-94 (finding that the arbitration agreement was unconscionable where it granted the facility access to the judicial system and denied the same to the plaintiff).
214 See, e.g., id.
215 See, e.g., id.
216 For examples of all of these conditions in the case law, see infra, Part IV.B.2.
217 See, e.g., Ruppelt v. Laurel Healthcare Providers, LLC, 293 P.3d 902, 907-08 (N.M. Ct. App. 2012) ("[A]n arbitration agreement lacks bilaterality where it 'compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger..."
individual and the nursing home to arbitration, then the court is more likely to uphold it.\textsuperscript{218} However, if the contract forces the resident to seek arbitration in all personal injury or wrongful death cases, but allows the nursing home to go to court in litigation against the resident, then the chances for a finding of unconscionability increases.\textsuperscript{219}

The other class focuses on the burden imposed on the individual plaintiff.\textsuperscript{220} If the burden forces the plaintiff to bear unreasonable expenses at arbitration—for instance, a cost of three or four times the individual’s monthly income—then the court will be more likely to find the agreement substantively unconscionable.\textsuperscript{221} Courts seem to study both the filing fees, which can often be far greater than the filing costs in the judicial system, and the average amount of money that the arbitrator would charge for this type of case before making this determination.\textsuperscript{222} If the cost of arbitration compared with the plaintiff’s income is so disproportionate that it would effectively deny the plaintiff any opportunity to seek resolution of disputes, the court will be more likely to find the arbitration agreement substantively unconscionable—especially if other unconscionability factors are present.\textsuperscript{223}

2. Key cases

Again, some of these factors are illustrated in West Virginia’s handling of \textit{Brown}.\textsuperscript{224} In finding substantive unconscionability in this arbitration agreement, the West Virginia Supreme Court of Appeals stated that there was “no modicum of bilaterality” between the plaintiff and the facility.\textsuperscript{225} By signing the arbitration agreement, the plaintiff agreed to bring any future personal injury or wrongful death claims

\textsuperscript{218} \textit{See Brown}, 724 S.E.2d at 293-94 (“[T]he arbitration clause is substantively unconscionable because there is no modicum of bilaterality.”).

\textsuperscript{219} \textit{See id.} at 264, 293-94.

\textsuperscript{220} \textit{See infra} Part IV.B.2.

\textsuperscript{221} \textit{See infra} Part IV.B.2.

\textsuperscript{222} \textit{See infra} Part IV.B.2.

\textsuperscript{223} \textit{See infra} Part IV.B.2.

\textsuperscript{224} \textit{Brown}, 724 S.E.2d at 293-94.

\textsuperscript{225} \textit{Id.}
before an arbitrator.\textsuperscript{226} However, the nursing home reserved the right to bring a case to forcibly discharge the resident or collect overdue payments against the resident in court.\textsuperscript{227}

The West Virginia Supreme Court of Appeals found this arrangement to be grossly lopsided, granting the facility access to the judicial system when it was the plaintiff but denying that same access to the resident.\textsuperscript{228} Furthermore, the court pointed out that the filing fees for arbitration would be at least $830 more than the filing fees for a civil suit in the state.\textsuperscript{229} These facts were enough, the court held, to find the arbitration agreement substantively unconscionable.\textsuperscript{230}

Another notable case regarding bilaterality arose in New Mexico.\textsuperscript{231} In \textit{Ruppelt v. Laurel Healthcare}, the court considered an arbitration agreement that seemed to bind the resident far more than the nursing home.\textsuperscript{232} Under the agreement, any future case by the resident or the resident’s representatives against the facility for personal injury or wrongful death would go to arbitration.\textsuperscript{233} The nursing home could bring any future case for forcible discharge or collection of payments either in arbitration or in court.\textsuperscript{234} Because the nursing home withheld that choice from the resident but reserved it for itself, the New Mexico high court determined that the agreement was substantively unconscionable and unenforceable.\textsuperscript{235}

\textsuperscript{226} See \textit{id.} at 264.
\textsuperscript{227} \textit{id.}
\textsuperscript{228} \textit{id.} at 293-94.
\textsuperscript{229} \textit{id.} at 294. ("We believe that these fees, in the context of an action for negligence by a nursing home, are an unconscionable bar to relief.").
\textsuperscript{230} \textit{id.} at 293-94.
\textsuperscript{232} \textit{id.}
\textsuperscript{233} \textit{id.} at 905.
\textsuperscript{234} \textit{id.}
\textsuperscript{235} \textit{id.} at 907-08. While both parties had a right to bring any claims pertaining to collection of payments or forcible discharge to court, the court stated that "[c]ommon sense dictates that claims relating to collection of fees and discharge of residents are the types of remedies that a nursing home, not its resident, is most likely to pursue." \textit{id.}
Two recent cases out of Florida centered on specific provisions limiting the plaintiff's recovery. One of them, *Shotts v. OP Winter Haven*, involved an arbitration agreement that precluded the plaintiff from ever recovering any punitive damages from the nursing home. The other, *Gessa v. Manor Care of Florida*, looked at an agreement that both prevented recovery of punitive damages and capped noneconomic damages at $250,000. In both cases, the courts found that these limits made the agreements substantively unconscionable.

The *Shotts* court also took the additional step of invalidating the entire contract rather than merely striking out the offending provisions. In *Shotts*, the contract contained a severability clause, stating that the remainder of the contract stayed intact if any provision in the arbitration agreement were deemed unenforceable. Nevertheless, the court overruled the severability clause, determining that these unduly harsh recovery limits effectively barred adequate relief and thus went to the heart of the entire contract.

A different type of limit sparked the controversy in the Ohio case of *Small v. HCF of Perrysburg*. Here, the arbitration clause stated that the losing party had to pay the full arbitration costs for both parties. A nursing home with significant financial resources would have far less to lose under this provision than an individual, particularly a person already paying significant amounts of money for medical expenses. The Ohio high court decided that such an arrangement would likely produce a chilling effect on potential plaintiffs, as many individuals would not want to risk losing at arbitration if it meant

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236 *Shotts v. OP Winter Haven*, Inc., 86 So. 3d 456, 458 (Fla. 2011); *Gessa v. Manor Care of Fla.*, Inc., 86 So. 3d 484, 485 (Fla. 2011).
237 *Shotts*, 86 So. 3d at 458.
238 *Gessa*, 86 So. 3d at 485.
239 *Shotts*, 86 So. 3d at 474; *Gessa*, 86 So. 3d at 493.
240 *Shotts*, 86 So. 3d at 478.
241 *Id.* at 460-61.
242 *Id.* at 478 ("Although the arbitration agreement in this case contains a severability clause, the [damages limitation] provision goes to the very essence of the agreement.").
244 *Id.* at 22.
245 See *id.* at 24.
paying not only their costs but also the nursing home’s costs as well.\textsuperscript{246}

Of the cases where courts have found substantive unconscionability based on disproportionate cost to the plaintiff, one of the hallmark examples comes from Arizona.\textsuperscript{247} In the 2013 case of \textit{Clark v. Renaissance Village West}, the Arizona Court of Appeals examined an arbitration agreement that required the plaintiff to pay half of the arbitrators’ fees.\textsuperscript{248} Experts at trial estimated that the arbitrators’ fees would come to approximately $22,800.\textsuperscript{249} The eighty-eight-year-old resident had a fixed monthly income of just $4,630, consisting of social security benefits, veterans’ benefits, and a small pension.\textsuperscript{250} In addition, the court noted that the agreement did not allow for any reduction of fees based on financial hardship.\textsuperscript{251} Therefore, the court concluded that the arbitration agreement “effectively preclude[ed] [the resident] from obtaining redress for any of his claims.”\textsuperscript{252} On these grounds, the court found the agreement unenforceable.\textsuperscript{253}

C. The List: Common Criteria for Finding Unconscionability

Reviewing the cases and factors described here, a list of common criteria for finding unconscionability in these disputes emerges. The major factors that courts examine when making a finding on unconscionability in nursing home pre-dispute arbitration clauses

\textsuperscript{246} See \textit{id.}; see also Romano v. Manor Care, Inc., 861 So. 2d 59, 63 (Fla. Ct. App. 2003) (declaring the arbitration agreement to be substantively unconscionable based upon provisions banning awards of punitive damages or attorneys’ fees, a limit which, to the court, “does not permit the nursing home resident to vindicate her statutory rights”). Generally speaking, state courts seem to frown upon these limitations of damages awards in arbitration agreements. See, e.g., Trinity Mission of Clinton, L.L.C. v. Barber, 988 So. 2d 910, 922-24 (Miss. Ct. App. 2007) (finding substantively unconscionable a series of terms, including a waiver of punitive damages and a cap on the total amount that a plaintiff could recover).


\textsuperscript{248} \textit{id.}

\textsuperscript{249} \textit{id.} at 80-81. The estimate was based on at least five days of arbitration, with the hearing presided over (per the agreement) by three arbitrators. \textit{id.}

\textsuperscript{250} \textit{id.} at 81.

\textsuperscript{251} \textit{id.}

\textsuperscript{252} \textit{id.} at 82.

\textsuperscript{253} \textit{id.}
include the following:

- Did the signer possess the capacity and competence to reasonably appreciate the significance of the agreement?254

- Was signing the arbitration agreement mandatory for admission to the nursing home?255

- Was the arbitration agreement "buried" within the admissions contract or was it presented as a clearly identifiable entity?256

- How long and complex was the total nursing home admissions contract, and how long and complex was the arbitration agreement itself?257

- Did nursing home personnel make any meaningful effort to explain the meaning of the arbitration agreement before the individual signed the document?258

- Were there viable, reasonable alternatives for the signer, or was this the only nursing home in the area in which this individual could be placed?259

- How urgent was the prospective resident’s need for nursing home admission?260

- Was the arbitration agreement generally bilateral, or was it clearly one-sided in favor of the nursing home?261

- Did the agreement contain terms that significantly

254 See supra Part IV.A.1.
255 See supra Part IV.A.1.
256 See supra Part IV.A.1.
257 See supra Part IV.A.1.
258 See supra Part IV.A.1.
259 See supra Part IV.A.1.
260 See supra Part IV.A.1.
261 See supra Part IV.B.1.
limited the damages that a plaintiff could recover or that imposed significant conditions on the plaintiff that would not be present under the relevant law?  

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- Did the arbitration clause make it cost-prohibitive for the signer to seek redress?  

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Of course, this list is not exhaustive. 264 Nor is this set of criteria binding by law in any way. 265 However, it does demonstrate a meaningful degree of consistency among courts resolving cases in this area. 266 Furthermore, it goes against the claim that unconscionability is a doctrine so fluid that determining a set of common factors is impossible. 267 In this context, courts thus far have appeared to be somewhat predictable in the criteria that they will use to determine whether the arbitration agreement is procedurally and substantively unconscionable. 268

A common public policy thread connects these factors, too. 269 When a nursing home seeks to utilize arbitration as a way to avoid accountability for its actions in causing personal injury or wrongful death—be it through unreasonably limiting the amount that a plaintiff can recover, or through pressuring someone into signing an arbitration agreement during a time of great medical need when no other reasonable option exists—the court is more likely to find the agreement unconscionable. 270 In this way, this often-criticized doctrine serves its intended function: to prevent vulnerable, weaker individuals with no meaningful chance to refuse against exploitation from substantially

262 See supra Part IV.B.1.
263 See supra Part IV.B.1.
265 See id. at 227.
266 See supra Part IV.
267 See supra Part IV.
268 See supra note 23 and accompanying text.
269 See supra Part IV.
270 See supra Part IV.
V. FINAL THOUGHTS

This Article is not meant to be a referendum on unconscionability in all cases, nor is it designed to fully explore the merits and demerits of arbitration. Instead, it holds that unconscionability—if the American legal system takes this doctrine at all seriously—should continue to play a valuable role in stopping nursing homes from forcing residents and their loved ones to unwittingly submit to arbitration.272

It also demonstrates that unconscionability is not necessarily as vague and amorphous as critics claim.273 As shown above, unconscionability cases in the nursing home context reveal a number of common factors, all of them connected by the same fundamental premise: when the facility tries to use arbitration as a way of avoiding accountability, the agreement should be rendered unenforceable.274

Going forward, unconscionability will likely take center stage even more frequently in these cases.275 The United States Supreme Court’s now-expansive interpretation of the FAA essentially prohibits both the federal and state legislatures and the courts from categorically banning pre-dispute arbitration agreements in nursing homes.276 Regardless of whether this broadened view is the proper application of the FAA, this is the reality for the foreseeable future.277 This leaves potential plaintiffs with only a limited array of defenses against

271 See supra notes 116-18 and accompanying text.
272 See supra note 23 and accompanying text.
273 See supra note 23 and accompanying text.
274 See supra Part IV.
276 Marmet Health Care Center v. Brown, 132 S. Ct. 1201, 1203 (2012). The United States Supreme Court’s broadened interpretation applies directly to Congress and the federal court system; however, the Supreme Court’s holdings continue to leave a significant imprint on the individual state legislatures and court systems. See supra Part II.D.
277 See id.
enforcement of these arbitration agreements.\textsuperscript{278} For many of these individuals, arguing that the arbitration agreement is unconscionable will be the only feasible option.\textsuperscript{279}

Given the extreme disparity in bargaining power between a facility and a prospective resident, the stressful and hurried nature of the average nursing home admission process, the typical scarcity of alternate options, and the lack of knowledge that many individuals hold about the impact of agreeing to arbitration, many of these cases epitomize the types of misuse that this doctrine was developed to curb.\textsuperscript{280} Throughout the study of contracts, there is no doubt that the notion of unconscionability remains a controversial point.\textsuperscript{281} Yet in cases surrounding pre-dispute arbitration agreements, this Article shows that unconscionability deserves to remain a viable defense against enforcement, accepted by courts in those perilous situations where nursing homes attempt to seek arbitration over accountability.


\textsuperscript{280} See supra Part IV.

\textsuperscript{281} See supra note 23 and accompanying text.