TO ARBITRATE OR NOT TO ARBITRATE, THAT IS THE QUESTION

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I. INTRODUCTION

> In Suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved*, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[1]

For many years, the trend by Texas plaintiff lawyers has been to shy away from arbitration and insist on their clients' constitutional right to a jury

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1. U.S. CONST. amend. VII (emphasis added).

trial, preferring to rely on the will of jurors, rather than the whims of professional arbitrators, in the adjudication of health care liability claims.[2] Motions to compel arbitration were defeated by invoking the provisions of § 74.451 of the Texas Civil Practice and Remedies Code (CPRC) in combination with the McCarran-Ferguson Act.[3] Section 74.451 provides that any agreement to arbitrate a health care liability claim must include a clear and conspicuous written notice in 10-point, boldface type that warns the resident that he or she is waiving important legal rights, including the right to a jury, and an attorney representing the resident has to sign the agreement.[4] Because Chapter 74 of the CPRC was enacted for the purpose of directly or indirectly regulating health care provider insurance premiums (according to the legislative history of Chapter 74), plaintiff lawyers successfully argued that the McCarran-Ferguson Act protected § 74.451 from preemption by the Federal Arbitration Act (FAA).[5]

Despite a multitude of statements in opinions by both the Texas Supreme Court and various Texas courts of appeals that Chapter 74 was enacted to address the "medical malpractice insurance crisis" and for the purpose of "reducing the cost of medical-malpractice insurance," and despite amicus briefs filed by the Texas Association of Defense Counsel, the Texas Chapter of the American Board of Trial Advocates, and the Texas Medical Liability Trust and Proassurance Corporation (which argued that Chapter 74 was enacted to directly or indirectly regulate the business of insurance and was, thus, protected from FAA pre-emption by the McCarron-Ferguson Act), the Texas Supreme Court concluded that Chapter 74 was not enacted for the purpose of directly or indirectly regulating the business of insurance.[6]

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2. *See generally* Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148 (5th Cir. 1992).

3. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.451(a) (West 2017).

4. *See id.*

5. *See, e.g.*, Patterson v. Nexion Health, Inc., No. 2-06-CV-443 (TJW), 2007 WL 2021326, at *3 (E.D. Tex. 2007); *In re* Sthran, 327 S.W.3d 839, 845–46 (Tex. App.—Dallas 2010, no pet.). The McCarran-Ferguson Act provides that the regulation of the business of insurance is a matter of state law and that no act of Congress can "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C.A. § 1012(b) (West 2019).

6. Fredericksburg Care Co. v. Perez, 461 S.W.3d 513, 528 (Tex. 2015), *cert. denied*, 136 S. Ct. 798 (2016); Brief of Amicus Curiae Tex-Abota in Support of Respondents' Motion for Rehearing, Fredericksburg Care Co. v. Perez, 461 S.W.3d 513 (Tex. 2015) (No. 13-0573), http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=c3ca5f02-c7e0-418c-9dd1-1e41ddc97d15&coa=cossup&DT=BRIEFS&MediaID=c9514312-b1ea-4cb8-8188-0059131ac293; Brief of Amici Curiae Texas Ass'n of Defense Counsel in Support of Respondents' Motion for Rehearing, Fredericksburg Care Co. v. Perez, 461 S.W.3d 513 (Tex. 2015) (No. 13-0573), http://www. search.txcourts.gov/SearchMedia.aspx?MediaVersionID=619e5a16-f5cc-4bc4-bf1e-40557c96b6eb&coa=cossup&DT=BRIEFS&MediaID=9f092322-6999-47e2-8388-0bdc07bf33dc; Brief of Amici Curiae Texas Medical Liability Trust & Proassurance Corp. in Support of Respondents' Motion for Rehearing, Fredericksburg Care Co. v. Perez, 461 S.W.3d 513 (Tex. 2015) (No. 13-0573), http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=cedf7593-3822-4cd1-98b6-399d5062c38d&coa=cossup&DT=BRIEFS&MediaID=607c2470-725e-4496-b6dd-822915940fff; *see, e.g.*, Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171,

Accordingly, the Court determined that the McCarron-Ferguson Act does not exempt § 74.451 from preemption by the FAA.[7]

While the *Fredericksburg Care Co. v. Perez* opinion is certainly a setback to a medical malpractice victim's right to a jury trial, one should ask the question: Is arbitration really so bad? Serious thought should be given by plaintiff lawyers about taking advantage of arbitration rather than fighting it. A few suggestions in that regard are provided below after a discussion of the law applicable to the enforcement of arbitration agreements.

II. ARBITRATION AGREEMENTS ARE COMMONPLACE IN NURSING HOME ADMISSION DOCUMENTS

Arbitration agreements in the health care liability setting typically show up in nursing home cases.[8] As such, and for purposes of this Article, arbitration agreements are addressed in the context of nursing home litigation. Furthermore, in light of the current state of the law, it is assumed that the arbitration agreement at issue is subject to the FAA.[9]

A. Who Bears the Burden of Establishing the Existence of a Valid Arbitration Agreement?

Although "the law favors arbitration," "arbitration cannot be ordered in the absence of such an agreement."[10] The presumption in favor of arbitration does not go so far as to create an obligation to arbitrate where none exists.[11] Thus, unless a party has agreed to arbitrate, arbitration should not be compelled.[12]

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177 (Tex. 2012); PM Mgmt.-Trinity NC, LLC v. Kumets, 368 S.W.3d 711, 718 (Tex. App.—Austin 2012), *aff'd in part and rev'd in part on other grounds*, 404 S.W.3d 550 (Tex. 2013) (per curiam).

7. *Perez*, 461 S.W.3d at 528.

8. *See, e.g.*, Sikes v. Heritage Oaks W. Ret. Vill., 238 S.W.3d 807 (Tex. App.—Waco 2007, pet. denied).

9. If an uninformed defendant takes the position that the arbitration agreement is strictly governed by Texas law, then § 74.451 will apply. CIV. PRAC. & REM. § 74.451. Assuming the agreement fails to comply with the requirements of § 74.451, the plaintiff can then defeat arbitration by pointing out the arbitration agreement's failure to comply with the requirements of § 74.451. *Id.*

10. Jacquelin F. Drucker, *Ethics in Employment Arbitration: The Arbitrator's Disclosure Obligations and the Parties' Right to an Informed Choice of Decisionmaker*, A.B.A. LAB. & EMP. L. SEC. (2004), http://apps.americanbar.org/labor/lel-aba-annual/papers/2004/drucker.pdf; *see* Freis v. Canales, 877 S.W.2d 283, 284 (Tex. 1994).

11. *See* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] i[s] a matter of consent, not coercion . . . ."); *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 738 (Tex. 2005) ("[T]he FAA generally 'does not require parties to arbitrate when they have not agreed to do so.'") (quoting *Volt*, 489 U.S. at 479); Jenkens & Gilchrist v. Riggs, 87 S.W.3d 198, 201 (Tex. App.—Dallas 2002, no pet.) ("Although arbitration is encouraged, it is a contractual matter and, in the absence of an agreement to arbitrate, a party cannot be forced to forfeit the constitutional protections of the judicial system and submit its dispute to arbitration.").

12. *See Freis*, 877 S.W.2d at 284.

The party seeking to compel arbitration has the burden of proving the existence of an agreement to arbitrate.[13] In determining whether an agreement to arbitrate exists, "courts generally apply ordinary state law principles of contract formation."[14] "When deciding whether the movant met its burden to establish a valid agreement to arbitrate, [the court does] not resolve doubts or indulge a presumption in favor of arbitration."[15] "[T]he presumption [favoring arbitration] arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists."[16] "The party attempting to compel arbitration must show that the arbitration agreement meets all requisite contract elements."[17]

B. Who Decides Whether a Valid Arbitration Agreement Exists?

Whether there is a binding arbitration agreement is a question for the court, unless the parties clearly and unmistakably agreed to submit the question to the arbitrator.[18] However, an unmistakable agreement to arbitrate only applies to signatories.[19] "A contract that is silent on a matter cannot speak to that matter with unmistakable clarity, so an agreement silent about arbitrating claims against non-signatories does not unmistakably mandate arbitration of arbitrability in such cases."[20]

The FAA allows for a jury trial "[i]f the making of the arbitration agreement . . . be in issue."[21] Under those circumstances, "the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose."[22] If the party opposing arbitration can establish a generally applicable contract defense, such as fraud, duress, or unconscionability, then the arbitration clause can be invalidated by a jury.[23] However, the arbitration agreement cannot be invalidated by contract "defenses that apply only to

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13. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003).

14. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter [under the FAA] . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."); *In re Kellogg*, 166 S.W.3d at 738 ("Under the FAA, ordinary principles of state contract law determine whether there is a valid agreement to arbitrate."); Tex. Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 351 (Tex. App.—Fort Worth 2007, pet. dism'd).

15. Young Mens Christian Ass'n of Greater El Paso v. Garcia, 361 S.W.3d 123, 126 (Tex. App.—El Paso 2011, no pet.) (citing *J.M. Davidson, Inc.*, 128 S.W.3d at 227).

16. *J.M. Davidson, Inc.*, 128 S.W.3d at 227.

17. *Garcia*, 361 S.W.3d at 126 (citing *J.M. Davidson, Inc.*, 128 S.W.3d at 228).

18. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002); *In re* Weekley Homes, L.P., 180 S.W.3d 127, 130 (Tex. 2005).

19. Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 632 (Tex. 2018).

20. *Id.*

21. 9 U.S.C.A. § 4 (West 2019).

22. *Id.*

23. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (2011); Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 227 (Tex. 2014).

arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[24] Moreover, the general contract defenses must specifically relate to the arbitration agreement itself, "not the contract as a whole, if they are to defeat arbitration."[25] Finally, "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."[26]

"A party to an arbitration agreement cannot obtain a jury trial merely by demanding one."[27] The party resisting arbitration bears "the burden of showing that he is entitled to a jury trial under § 4 of the Arbitration Act."[28] There must be at least some showing that under prevailing law the party resisting arbitration "would be relieved of his contractual obligation to arbitrate if his allegations proved to be true."[29] To present the issue to a jury, the party resisting arbitration must provide the court with "at least some evidence to substantiate his factual allegations."[30] Thus, if there is evidence that the arbitration agreement is unconscionable, was made under duress, or was the product of fraud, the question of its validity can be submitted to a jury.[31] "If the jury find[s] that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding [seeking to compel arbitration] shall be dismissed."[32]

C. Who Is Bound by an Arbitration Agreement?

In some cases, the arbitration agreement may be signed by the resident, and the nursing home seeks to bind the resident and the resident's non-signatory family members based on that signature.[33] In other instances, the nursing home arbitration agreement is signed by the resident's family member, and the nursing home relies on that signature to bind the non-signatory resident and other family members to the arbitration

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24. *Concepcion*, 563 U.S. at 339.

25. *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 756 (Tex. 2001).

26. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

27. Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1154 (5th Cir. 1992) (quoting Bhatia v. Johnston, 818 F.2d 418, 422 (5th Cir. 1987)).

28. *Id.*

29. *Id.*

30. *Id.*

31. *See* W.D. Williams, Inc. v. Ivey, 777 So. 2d 94, 98–99 (Ala. 2000) (holding the arbitration agreement was procured by fraud); Delfingen US-Tex., L.P. v. Valenzuela, 407 S.W.3d 791, 803 (Tex. App.—El Paso 2013, no pet.) (holding the arbitration agreement was procedurally unconscionable); *In re* RLS Legal Sols., L.L.C., 156 S.W.3d 160, 165 (Tex. App.—Beaumont 2005, no pet.) (holding the arbitration agreement was procured by economic duress).

32. 9 U.S.C.A. § 4 (West 2019); *see W.D. Williams, Inc.*, 777 So. 2d at 98–99 (holding the arbitration agreement was procured by fraud); *Delfingen US-Tex., L.P.*, 407 S.W.3d at 803 (holding the arbitration agreement was procedurally unconscionable); *In re RLS Legal Sols., L.L.C.*, 156 S.W.3d at 165 (holding the arbitration agreement was procured by economic duress).

33. *See In re* Labatt Food Serv., L.P., 279 S.W.3d 640, 645–47 (Tex. 2009).

agreement.[34] The discussion below addresses legal principles applicable in both situations.

1. Was the Resident Mentally Competent to Consent to the Arbitration?

When a nursing home resident enters into an arbitration agreement, the resident not only binds the resident to that agreement but also binds the resident's estate and wrongful death beneficiaries.[35] As such, one of the first issues that necessarily arises in nursing home cases where the arbitration agreement was signed by the resident is whether the resident was competent to execute the document.[36]

The requisite elements of contract formation include a meeting of the minds and each party's consent to the terms.[37] Because they are incapable of consent, contracts with mentally incompetent parties are generally voidable.[38] "The right to disaffirm [the contract] survives the incompetent's death and passes to the incompetent's heirs, devisees, or personal representatives."[39]

Elderly persons, such as nursing home residents, are not presumptively incompetent.[40] Thus, absent proof and determination of mental incapacity, a person who signs a document is presumed to have read and understood the document.[41] As such, in order to avoid an arbitration agreement on mental incapacity grounds, it is the plaintiff's burden to prove that the resident was not competent at the time the arbitration agreement was signed.[42]

To have mental capacity to enter into a contract in Texas, a person must have "appreciated the effect of what he was doing and understood the nature and consequences of his acts and the business he was transacting."[43]

> Mental capacity may be evidenced circumstantially by facts that would show: (1) a person's outward conduct, manifesting an inward and causing condition; (2) pre-existing external circumstances tending to produce a special mental

34. *See* Tex. Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 348–49 (Tex. App.—Fort Worth 2007, pet. dism'd).

35. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d at 645–47 (providing that wrongful death beneficiaries are bound by arbitration agreements executed by decedent); *In re* Jindal Saw Ltd., 264 S.W.3d 755, 766 (Tex. App.—Houston [1st Dist.] 2008), *mand. granted*, 289 S.W.3d 827 (Tex. 2009) (per curiam) (holding that the estate is bound by arbitration agreement executed by decedent).

36. *See, e.g.*, Oak Crest Manor Nursing Home, LLC v. Barba, No. 03-16-00514-CV, 2016 WL 7046844, at *3 (Tex. App.—Austin Dec. 1, 2016, no pet.).

37. 14 TEX. JUR. 3D *Contracts* § 46 (2019) [hereinafter *Contracts*].

38. *Id.* § 40; 49 David R. Dow & Craig Smyser, *Texas Practice Series: Contract Law* § 2.49 (2018).

39. *Contracts*, *supra* note 37, § 44 (footnote omitted).

40. Edward D. Jones & Co. v. Fletcher, 975 S.W.2d 539, 545 (Tex. 1998).

41. *See* Vera v. N. Star Dodge Sales, Inc., 989 S.W.2d 13, 17 (Tex. App.—San Antonio 1998, no pet.); *Contracts*, *supra* note 37, § 42.

42. *See* Swink v. City of Dallas, 36 S.W.2d 222, 224 (Tex. Comm'n App. 1931, holding approved).

43. Bach v. Hudson, 596 S.W.2d 673, 675–76 (Tex. Civ. App.—Corpus Christi 1980, no writ) (citations omitted).

> condition; and (3) prior or subsequent existence of a mental condition from which its existence at the time in question may be inferred.[44]

Where records demonstrate, for instance, that a nursing home was aware of the resident's mental incapacity, the nursing home's ability to argue that avoidance of the agreement would be inequitable is significantly reduced.[45]

2. Are Non-Signatory Residents, Heirs, or Wrongful Death Beneficiaries Bound by the Terms of an Arbitration Agreement?

A second, and more common, issue is whether a nursing home resident is bound by the signature of another to the arbitration agreement. Residents who did not sign a nursing home arbitration agreement can be bound by its terms in six scenarios: (1) agency, (2) equitable estoppel, (3) third-party beneficiary, (4) incorporation by reference, (5) assumption, and (6) alter ego.[46] The most common of these—agency, third-party beneficiary, and equitable estoppel—are addressed below.

a. Agency

Where the arbitration agreement is signed by somebody other than the resident, that person's status as an agent authorized to sign is not presumed under Texas law.[47] Thus, the party seeking to compel arbitration has the burden to prove that the signatory to the arbitration agreement had authority to bind the resident to that agreement.[48] Absent proof that the signatory had actual or apparent authority to act for the resident, his or her signature on the arbitration agreement does not form a binding contract on the resident, and the arbitration agreement is, therefore, invalid and unenforceable.[49]

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44. *Id.* at 676 (citations omitted); *see also* Carr v. Radkey, 393 S.W.2d 806, 813 (Tex. 1965) ("[C]ompetent evidence about [the resident's] mental condition and mental ability or lack of it which does not involve legal definitions, legal tests, or pure questions of law should be admitted.").

45. *See* Smith v. Christley, 755 S.W.2d 525, 532 (Tex. App.—Houston [14th Dist.] 1988, writ denied) ("If the contract is made on fair terms and the other party has no reason to know of the incompetency, performance in whole or in part may so change the situation that the parties cannot be restored to their previous positions or may otherwise render avoidance inequitable.") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. f (AM. LAW. INST. 1981)), *abrogated by* Van Allen v. Blackledge, 35 S.W.3d 61, 65 n.3 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

46. Carrigan v. Live Oak Nursing Ctr., LLC, No. 2:15-CV-319, 2015 WL 6692199, at *4 (S.D. Tex. Nov. 3, 2015); *see also* Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 633 (Tex. 2018) (concluding that no alternative theory required arbitration after first holding that defendant was never a party to an arbitration agreement).

47. Buchoz v. Klein, 184 S.W.2d 271, 271 (Tex. 1944); Tex. Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 352 (Tex. App.—Fort Worth 2007, pet. dism'd); Lifshutz v. Lifshutz, 199 S.W.3d 9, 22 (Tex. App.—San Antonio 2006, pet. denied).

48. *See Fryer*, 227 S.W.3d at 352; *Lifshutz*, 199 S.W.3d at 22.

49. *Fryer*, 227 S.W.3d at 352; *Lifshutz*, 199 S.W.3d at 22.

"Actual authority includes both express and implied authority and usually denotes the authority a principal (1) intentionally confers upon an agent, (2) intentionally allows the agent to believe he possesses, or (3) by want of due care allows the agent to believe he possesses."[50] "Apparent authority arises through acts of participation, knowledge, or acquiescence *by the principal* that clothe the agent with the indicia of apparent authority."[51] There are limitations in determining the existence of apparent authority:

> First, apparent authority is determined by looking to the acts of the principal and ascertaining whether those acts would lead a reasonably prudent person using diligence and discretion to suppose the agent had the authority to act on behalf of the principal. Only the conduct of the principal may be considered; representations made by the agent of her authority have no effect. Second, the principal must either have affirmatively held the agent out as possessing the authority, or the principal must have knowingly and voluntarily permitted the agent to act in an unauthorized manner. Finally, a party dealing with an agent must ascertain both the fact and the scope of the agent's authority, and if the party deals with the agent without having made such a determination, she does so at her own risk.[52]

The fact that the signatory may be the resident's family member does not confer actual authority upon him or her to sign on the resident's behalf.[53]

If no evidence of authority is submitted by the defendant nursing home, the plaintiff has a strong argument that the arbitration agreement signed on the resident's behalf is unenforceable.[54]

b. Third-Party Beneficiary Theory

Defendants often try to escape the consequences of their failure to prove authority of signatories to bind non-signatory nursing home residents by arguing that, even without proof of authority, the residents are subject to the arbitration agreements as third-party beneficiaries.[55] Under the third-party beneficiary theory, a court must look to the intentions of the parties at the

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50. *Fryer*, 227 S.W.3d at 352 (citations omitted).

51. *Id.* at 353; *see Lifshutz*, 199 S.W.3d at 22–23.

52. *Fryer*, 227 S.W.3d at 353 (citing *Lifshutz*, 199 S.W.3d at 22–23; Suarez v. Jordan, 35 S.W.3d 268, 272 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

53. *Cf.* Sikes v. Heritage Oaks W. Ret. Vill., 238 S.W.3d 807, 810 (Tex. App.—Waco 2007, pet. denied) (holding nursing home resident's wife did not have authority to bind the nursing home resident to an arbitration agreement); *Fryer*, 227 S.W.3d at 353 (holding nursing home resident's daughter did not have authority to bind the nursing home resident to an arbitration agreement); *see also* Carrigan v. Live Oak Nursing Ctr., LLC, No. 2:15-CV-319, 2015 WL 6692199, at *6 (S.D. Tex. Nov. 3, 2015) (holding child who signed arbitration agreement for resident was not an agent of resident as there was no evidence that resident was "sufficiently cognizant to intentionally authorize or even attempt to authorize an agent or object to anyone's assumption of agency authority").

54. *See, e.g.*, *Sikes*, 238 S.W.3d at 810.

55. JP Morgan Chase & Co. v. Conegie *ex rel.* Lee, 492 F.3d 596, 600 (5th Cir. 2007).

time the contract was executed.[56] The third-party beneficiary theory will bind a non-signatory to a nursing home agreement with an arbitration clause where the agreement specifically names the non-signatory as a recipient of benefits under the contract.[57]

However, by definition, a third-party beneficiary is not a party to the contract out of which the third-party beneficiary status is alleged to arise.[58] For a resident to be a third-party beneficiary to the arbitration agreement signed by somebody else, the nursing home is obligated to first prove the existence of an enforceable arbitration agreement between the nursing home and the signatory to the arbitration agreement *in his or her individual capacity*.[59] There can be no third-party beneficiary in the absence of a contract.[60]

Many times the arbitration agreement itself will establish that the agreement was signed by a person in a representative capacity, for example "on behalf of [the] resident."[61] With this type of evidence, the signatory generally cannot be held to have entered into the agreement in his or her individual capacity.[62] Texas law is clear that a person signing a contract in a representative capacity for a disclosed principal is not a party to, nor is he or she bound by, the terms of the contract.[63] Thus, in *Sikes v. Heritage Oaks West Retirement Village*, the court concluded that "the arbitration agreement

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56. *Id.*

57. *See id.* (holding that the third-party beneficiary theory bound nursing home resident to arbitration clause in admission agreement signed by resident's mother because the agreement expressly named the patient as the resident receiving care and services from the nursing home); Forest Hill Nursing Ctr., Inc. v. McFarlan, 995 So. 2d 775, 782 (Miss. Ct. App. 2008) (holding resident was third-party beneficiary to admission agreement and bound by arbitration clause in agreement executed by her granddaughter because the agreement specifically named the resident as a beneficiary).

58. *See, e.g.*, *Conegie*, 492 F.3d at 597; *McFarlan*, 995 So. 2d at 779.

59. *See* Young Ref. Corp. v. Pennzoil Co., 46 S.W.3d 380, 387 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) ("A promise creates no duty to a beneficiary *unless a contract is formed between the promisor and the promisee*; and if a contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity.") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 309(1) (AM. LAW. INST. 1981)).

60. *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 cmt. b (stating that for contracts to create rights in third party, "[t]he requirements for formation of a contract must of course be met"); *id.* § 309 cmt. a ("[T]he right of an intended beneficiary is created by contract, and in the absence of contract there is no such right.").

61. *See* Specialty Select Care Ctr. of San Antonio, L.L.C. v. Owen, 499 S.W.3d 37, 45 (Tex. App.—San Antonio 2016, no pet.).

62. *See McFarlan*, 995 So. 2d at 780.

63. Shank, Irwin, Conant & Williamson v. Durant, Mankoff, Davis, Wolens & Francis, 748 S.W.2d 494, 499 (Tex. App.—Dallas 1988, no writ) ("[U]nless the parties have agreed otherwise, a person making a contract with another as an agent for a disclosed principal is *not* a party to the contract and is not obligated on the contract."); Ross F. Meriwether & Assocs., Inc. v. Aulbach, 686 S.W.2d 730, 731 (Tex. App.—San Antonio 1985, no writ) ("An agent is not a party to, nor individually liable on, a contract he enters into on behalf of his principal. It is the principal who enters into the contract.").

is unenforceable against [the family member] in her individual capacity because there is no evidence that she signed in that capacity."[64]

Where there is no evidence of the existence of a binding arbitration agreement between the nursing home and the signatory in his or her individual capacity, there is no basis for application of the third-party beneficiary doctrine. "Put simply, [the residents] cannot be . . . third party beneficiar[ies] to . . . nonexistent contract[s]."[65]

While there are cases applying the third-party beneficiary theory to bind non-signatory nursing home residents to arbitration clauses in admission agreements, a careful reading of those cases reveals that in each and every one of them there was evidence that the signatory signed the agreement or otherwise agreed to be bound by the agreement in his or her individual capacity.[66]

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64. Sikes v. Heritage Oaks W. Ret. Vill., 238 S.W.3d 807, 810 (Tex. App.—Waco 2007, pet. denied); *see* Tex. Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 354 (Tex. App.—Fort Worth 2007, pet. dism'd) (holding that the nursing home arbitration agreement was unenforceable under the FAA against a signatory who signed on behalf of a nursing home resident because "there is no evidence that she signed any of the documents in her individual capacity").

65. Young Ref. Corp. v. Pennzoil Co., 46 S.W.3d 380, 387 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). *Compare* GGNSC Omaha Oak Grove, LLC v. Payich, 708 F.3d 1024, 1027 (8th Cir. 2013) (holding that because there was no evidence of a contract between the nursing home and the nursing home resident's son who signed the arbitration agreement without authority on behalf of the resident, "there is no contract of which [the nursing home] resident could have been a third-party beneficiary"), *with* Progressive Eldercare Servs.-Chicot, Inc. v. Long, 449 S.W.3d 324, 327 (Ark. Ct. App. 2014) (holding third-party beneficiary doctrine did not apply because wife or resident did not sign contract in her individual capacity and did not have authority to sign in representative capacity; as such, there was no valid agreement to which resident could be a third-party beneficiary), McKean v. GGNSC Atlanta, LLC, 765 S.E.2d 681, 686 (Ga. Ct. App. 2014) ("The fact that the [arbitration] agreement fails because [the nursing home resident] never consented to its terms does not promote [the son], who did not sign the agreement in his individual capacity, to the position of being a party to the agreement such that the [nursing home] can argue that his mother was a third-party beneficiary thereto."), Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 596 (Ky. 2012) (holding where a daughter signed an arbitration agreement on behalf of nursing home resident without authority, and there was nothing to show that she signed the agreement "on her own behalf," the daughter did not become a party to the agreement, and "her mother cannot be deemed a third party beneficiary of a non-existent agreement between [her daughter] and [the nursing home]"), Dickerson v. Longoria, 995 A.2d 721, 742 n.21 (Md. 2010) (rejecting a third-party beneficiary argument in connection with a nursing home arbitration agreement because there was "nothing suggesting that [the nursing home] entered into such an agreement with [the resident's purported agent who signed on behalf of the resident without authority]," and concluding that an "inconsistency belies [the nursing home's] arguments" because the nursing home argued that the resident was a third-party beneficiary of an arbitration agreement between the nursing home and the purported agent, while simultaneously arguing that the very same agreement was actually between the nursing home and the resident), *and* Licata v. GGNSC Malden Dexter LLC, 2 N.E.3d 840, 848 (Mass. 2014) (holding the third-party beneficiary doctrine did not apply because the nursing home resident's son "only purported to sign the arbitration agreement as [the resident's] 'Authorized representative,' and [the nursing home] makes no claim that he signed it in a personal capacity"). *See also* GGNSC Batesville, LLC v. Johnson, 109 So. 3d 562, 565–66 (Miss. 2013) (rejecting a third-party beneficiary argument in connection with a nursing home arbitration agreement because there was no evidence that a signatory had authority to bind a resident to the arbitration agreement).

66. *Compare* JP Morgan Chase & Co. v. Conegie *ex rel.* Lee, 492 F.3d 596, 600 (5th Cir. 2007) (holding agreement was "with, or on behalf of, [the resident] and/or her family"), *with McFarlan*, 995 So. 2d at 782 (holding that a valid contract existed between signatory and nursing home).

c. Equitable (Direct Benefits) Estoppel Theory

Another theory that a nursing home will raise to try to escape the consequences of failing to establish authority of the agent to bind the resident to the arbitration agreement is a type of equitable estoppel called "direct benefits" estoppel.[67] Under principles of equitable estoppel, "a litigant who sues based on a contract subjects him or herself to the contract's terms . . . , including the Arbitration Addendum."[68] "This equitable principle applies when a claimant seeks 'direct benefits' under the contract that contains the arbitration agreement."[69] "[T]he substance of the claim, not artful pleading," determines whether a claim seeks a direct benefit from the contract containing the arbitration agreement.[70]

> It is not enough, however, that the party's claim "relates to" the contract that contains the arbitration agreement. Instead, the party must seek "to derive a direct benefit"—that is, a benefit that "stems directly"—from that contract. The claim must "depend on the existence" of the contract, and be unable to "stand independently" without the contract. The alleged liability must "arise[ ] solely from the contract or must be determined by reference to it." But "when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law," rather than from the contract, "direct benefits" estoppel does not apply, even if the claim refers to or relates to the contract.[71]

The court of appeals faced and rejected this direct benefits estoppel theory in *Sikes v. Heritage Oaks West Retirement Village*, a case in which the wife and children of a nursing home resident asserted wrongful death and survival claims against the nursing home.[72] The nursing home argued that the plaintiffs that were equitably estopped from denying their claims were subject to arbitration.[73] Rejecting the nursing home's arguments, the court wrote:

> Heritage relies on arbitration cases stating that in certain circumstances a non-signatory to an arbitration agreement can be equitably estopped from denying that his claims are arbitrable. However, this form of estoppel arises only when the plaintiff seeks "to derive a direct benefit from the contract containing the arbitration provision." Stated another way, "nonparties

67. *See* G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 528 (Tex. 2015).

68. *Id.* at 527 (alteration in original) (quoting *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 755–56 (Tex. 2001)).

69. *Id.* (quoting *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739 (Tex. 2005)).

70. *Id.* (quoting *In re* Weekley Homes, L.P., 180 S.W.3d 127, 131–32 (Tex. 2005)).

71. *Id.* at 527–28 (alteration in original) (citations omitted).

72. Sikes v. Heritage Oaks W. Ret. Vill., 238 S.W.3d 807, 810–11 (Tex. App.—Waco 2007, pet. denied).

73. *Id.* at 810.

> generally must arbitrate claims if liability arises from a contract with an arbitration clause, but not if liability arises from general obligations imposed by law."
>
> Here, the Sikeses do not assert claims arising under Joel's purported arbitration agreement with Heritage. Rather, their malpractice claims "arise[ ] from general obligations imposed by law." Therefore, Heritage's equitable estoppel theory does not excuse Heritage from proving the existence of a valid arbitration agreement.[74]

Plaintiffs should plead their cases in such a way to allow them to argue that, like the plaintiffs in *Sikes*, the claims being asserted do not arise out of the arbitration agreement, the admission agreement, or any other agreement with the nursing home.[75] Rather, the health care liability claims being asserted arise from general obligations imposed by law.[76]

Nursing homes will counter *Sikes* by citing to a series of cases out of the San Antonio Court of Appeals: *Specialty Select Care Center of San Antonio, LLC v. Flores*; *Specialty Select Care Center of San Antonio, L.L.C. v. Owen*; and *Specialty Select Care Center of San Antonio v. Juiel*.[77] In all three cases, the arbitration agreements and admission agreements with the nursing home were signed by the residents' family members on behalf of the residents, without authority.[78] The nursing home argued that direct benefits estoppel prevented the residents and their families from denying the validity of the arbitration agreements.[79] The plaintiffs countered that they were neither seeking to enforce the contracts with the nursing home nor seeking any benefits under the contracts; instead, the personal injury claims sounded in tort and from general obligations imposed by law.[80] In all three cases, the court held that direct benefits estoppel applied, even though the claims sounded in tort, because the residents received health care benefits under the terms of the agreements with the nursing home.[81]

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74. *Id.* (alterations in original) (citations omitted).

75. *Id.*

76. *Id.*

77. Specialty Select Care Ctr. of San Antonio v. Juiel, No. 04-14-00515-CV, 2016 WL 3944834 (Tex. App.—San Antonio July 20, 2016, no pet.); Specialty Select Care Ctr. of San Antonio, L.L.C. v. Owen, 499 S.W.3d 37 (Tex. App.—San Antonio 2016, no pet.); Specialty Select Care Ctr. of San Antonio, LLC v. Flores, No. 04-13-00888-CV, 2015 WL 5157034 (Tex. App.—San Antonio Sept. 2, 2015, no pet.).

78. *See Juiel*, 2016 WL 3944834, at *2; *Owen*, 499 S.W.3d at 41; *Flores*, 2015 WL 5157034, at *3.

79. *Juiel*, 2016 WL 3944834, at *3; *Owen*, 499 S.W.3d at 41–42; *Flores*, 2015 WL 5157034, at *3.

80. *Juiel*, 2016 WL 3944834, at *5. Although not discussed in the court's opinions, the appellees in *Flores* and *Owen* raised the issue in their briefings. *See* Brief of Appellees at 23, Specialty Select Care Ctr. of San Antonio v. Juiel, No. 04-14-00515-CV, 2016 WL 3944834 (Tex. App.—San Antonio July 20, 2016, no pet.) (No. 04-14-00515-CV), http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=a3945930-ffe8-41db-951c-836cee125641&coa=coa04&DT=Brief&MediaID=c8000cff-7666-4397-a7b7-760abc5ec60a; Brief of Appellees at 27, Specialty Select Care Ctr. of San Antonio v. Owen, 499 S.W.3d 37 (Tex. App.—San Antonio 2016, no pet.) (No. 04-15-00561-CV), 2016 WL 155943.

81. *Juiel*, 2016 WL 3944834, at *6; *Owen*, 499 S.W.3d at 46; *Flores*, 2015 WL 5157034, at *5.

Interestingly, none of the opinions of the San Antonio Court of Appeals referenced their conflict with *Sikes*. Furthermore, the perfunctory reasoning utilized by the San Antonio Court of Appeals in *Flores*, *Owen,* and *Juiel* appears not to pass muster in light of the Texas Supreme Court's recent holding in *Jody James Farms, JV v. Altman Group, Inc*.[82] As explained by the Court,

> "[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law," direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen "but for" the contract's existence.[83]

"[D]irect-benefits estoppel does not apply simply because 'the claim *refers* to . . . the contract.' Instead, liability 'must be determined by reference to it.'"[84]

Notably, many boilerplate nursing home arbitration agreements contain specific language that the execution of the arbitration agreement is not a precondition to the provision of services.[85] If such language is present in the arbitration agreement (and even if it is not), the plaintiff should point it out to the court and argue that because the arbitration agreement was not a condition of admission, and because the resident would have been furnished services by the nursing home without the arbitration agreement, the nursing home has failed to demonstrate any sort of detriment that would support direct benefits estoppel.[86]

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82. Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 638–39 (Tex. 2018).

83. *Id.* at 637 (quoting G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 528 (Tex. 2015)).

84. *Id.* at 638 (alteration in original) (quoting *G.T. Leach Builders, LLC*, 458 S.W.3d at 528).

85. *See, e.g.*, Carraway v. Beverly Enters. Ala., Inc., 978 So. 2d 27, 33 (Ala. 2007).

86. *Compare* Washburn v. N. Health Facilities, Inc., 121 A.3d 1008, 1015–16 (Pa. Super. Ct. 2015) (holding equitable estoppel inapplicable because arbitration agreement "was separate from the admission agreement and admission was not conditioned upon agreeing to arbitrate. Thus, the agreement to arbitrate was not part of the contractual quid pro quo for admission to the facility and its attendant benefits"), *with* Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 595 (Ky. 2012) (holding that where the arbitration agreement was not a condition of admission, there was no detriment to the nursing home that would support direct benefits estoppel and the resident's estate was not estopped from disavowing the arbitration agreement), Licata v. GGNSC Malden Dexter LLC, 2 N.E.3d 840, 848–49 (Mass. 2014) (holding that equitable estoppel was inapplicable where nursing home services were provided under admission agreement that was not before the court, and was distinct from separate agreement to arbitrate that was before the court), *and* Barrow v. Dartmouth House Nursing Home, Inc., 14 N.E.3d 318, 324 (Mass. App. Ct. 2014) (holding that equitable estoppel was inapplicable where signing arbitration agreement was not a condition of admission and there was no evidence that the resident would have been treated differently had the agreement not been signed). *Contra Juiel*, 2016 WL 3944834, at *5 (holding that direct benefits estoppel applied, even though execution of arbitration agreement was not a precondition to the provision of services).

D. Can a Non-Signatory to an Arbitration Agreement Compel a Signatory to Arbitrate?

If the court orders arbitration between the resident, or the resident's heirs and wrongful death beneficiaries, and the nursing home, what becomes of the claims against other defendants, such as the physicians or nurse practitioners who negligently cared for the resident? Can those defendants also compel arbitration of the claims against them? Many argue that they can, relying on the "intertwined claims estoppel" doctrine.[87]

The doctrine of intertwined claims estoppel involves "compel[ing] arbitration when a nonsignatory defendant has a 'close relationship' with one of the signatories and the claims are 'intimately founded in and intertwined with the underlying contract obligations.'"[88] The doctrine applies when there is a "tight relatedness of the parties, contracts, and controversies."[89] The Texas Supreme Court described, without applying, the doctrine in *In re Merrill Lynch Trust Co*.[90]

As noted by the Fifth Circuit in *Hays v. HCA Holdings, Inc.*, Texas courts of appeals are split on whether the doctrine applies in Texas.[91] Pending a decision by the Texas Supreme Court regarding the applicability of the intertwined claims theory in Texas, there is no doubt that potentially responsible physicians and nurse practitioners in nursing home cases, who are not signatories to the nursing home's arbitration agreement, may argue that the claims against them should also be arbitrated because of their "close

87. *See, e.g.*, Hays v. HCA Holdings Inc., 838 F.3d 605, 609–10 (5th Cir. 2016).

88. *Id.* at 610 (alteration in original) (quoting *In re* Merrill Lynch Tr. Co. FSB, 235 S.W.3d 185, 193–94 (Tex. 2007)).

89. *Id.* (footnote omitted) (quoting JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 177 (2d Cir. 2004)).

90. *In re Merrill Lynch Tr. Co.*, 235 S.W.3d at 193–94.

91. *See generally Hays*, 838 F.3d 605. *Compare* FD Frontier Drilling (Cyprus), Ltd. v. Didmon, 438 S.W.3d 688, 695 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("If the facts alleged 'touch matters,' have a 'significant relationship' to, are 'inextricably enmeshed' with, or are 'factually intertwined' with the contract containing the arbitration agreement, the claim is arbitrable.") (quoting Cotton Commercial USA, Inc. v. Clear Creek Indep. Sch. Dist., 387 S.W.3d 99, 108 (Tex. App.—Houston [14th Dist.] 2012, no pet.); Pennzoil Co. v. Arnold Oil Co., 30 S.W.3d 494, 498 (Tex. App.—San Antonio 2000, no pet.)), Zars v. Brownlow, No. 07-07-00303-CV, 2013 WL 3355660, at *4 (Tex. App.—Amarillo June 28, 2013, no pet.) (holding the same as *FD Frontier*), *and Cotton Commercial USA, Inc.*, 387 S.W.3d at 105–06 (stating that the Texas Supreme Court in *In re Merrill Lynch Trust Co.* recognized intertwined claims estoppel doctrine), *with* Glassell Producing Co. v. Jared Res., Ltd., 422 S.W.3d 68, 82 (Tex. App.—Texarkana 2014, no pet.) (describing direct benefits estoppel as "the only form of equitable estoppel recognized in Texas"). As of the date of this Article, whether the Texas Supreme Court will hold the doctrine is applicable in Texas remains an open question. *See* Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 639 (Tex. 2018). In fact, as recently as May 2018, the Texas Supreme Court has yet to decide whether the doctrine should apply in Texas. *See id.* ("In *In re Merrill Lynch Trust Co.*, we acknowledged the existence of [the intertwined claims estoppel] theory without deciding its validity in Texas. Since then, the Fifth Circuit Court of Appeals has predicted we would adopt this estoppel formulation. We need not consider the viability of such a theory in this case, because even if we were to embrace it, the Agency has not shown its applicability.").

relationship" with the nursing home and because the claims against them "are intimately founded in and intertwined with the underlying contract obligations" between the nursing home and the resident.[92] In response, plaintiffs in these cases should point out that the Texas Supreme Court has not adopted the doctrine, and in fact, stated in *In re Merrill Lynch Trust Co.* that "the right to a jury trial is not discretionary" and "[i]f the parties have not agreed to arbitration, no trial court has discretion to make them go."[93]

But, does the plaintiff really want to oppose arbitrating the claims against all of the potential defendants if she has to arbitrate the claims against one of them? First, for example, the physician defendant who is not part of the arbitration has a right to request that the litigation against her be stayed until after the arbitration has concluded.[94] This delay can be devastating to the plaintiff's case against the physician.[95] Second, at arbitration the nursing home can blame the physician (who is not present to defend herself), and at trial, the physician can blame the nursing home (which is not present to defend itself).[96] Thus, the plaintiff ends up in a situation where 100% of the responsibility is allocated to the physician in the arbitration against the nursing home, 100% of the fault is allocated to the nursing home in the lawsuit against the physician, and the plaintiff recovers nothing at the end of the day.[97] In light of the foregoing, the plaintiff may not want to oppose a motion by a nonsignatory to participate in the nursing home's arbitration.[98] Furthermore, if the nonsignatory defendant does not move to compel arbitration under the intertwined claims estoppel doctrine, the plaintiff may wish to do so, i.e., file a motion compelling the nonsignatory defendant to participate in the nursing home's arbitration proceeding.[99] Note, however, that such a motion will likely be met with the argument that the nonsignatory did not agree to arbitration; therefore, the court cannot compel the nonsignatory to go to arbitration.[100]

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92. *In re Merrill Lynch Tr. Co.*, 235 S.W.3d at 193–94 (quoting Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995)).

93. *Id.* at 193.

94. *Id.* at 195 ("[W]hen an issue is pending in both arbitration and litigation, the Federal Arbitration Act generally requires the arbitration to go forward first . . . .").

95. *See, e.g.*, *id.*

96. *See id.* at 197 (Hecht, J., concurring in part and dissenting in part).

97. *See id.*

98. *See id.*

99. *See, e.g.*, United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 577 (1960).

100. *See id.* at 582 ("[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

III. REASONS FOR INVOKING ARBITRATION

"If you can't lick 'em, jine [join] 'em."[101]

While there are plenty of reasons to avoid arbitration, there are a number of reasons that a plaintiff may want to invoke arbitration (and conversely, a defendant may not).[102] For example, where the venue options are clearly unfavorable to the plaintiff, the plaintiff may wish to invoke arbitration.[103] Invoking arbitration under these circumstances may allow the plaintiff to not only play a significant role in selecting an arbitrator that will be even-handed but it also allows the plaintiff to play a role in selecting the venue of the arbitration hearing and, concomitantly, of any actions to enforce or vacate the arbitration award.[104]

Other plaintiff lawyers may invoke arbitration agreements in nursing home cases because of the belief that, although the arbitrator may not award a full measure of damages, the arbitrator is more likely to award some damages rather than pouring-out the plaintiff.[105]

Additionally, some arbitration agreements actually provide that the defendant nursing home must pay the majority of the costs and expenses of arbitration, making early resolution of the case attractive to the nursing home and proceeding to arbitration attractive to the plaintiff.[106]

Below are two additional reasons why arbitration may be the route to go for the plaintiff.

A. Avoiding the Damage Caps

As all medical malpractice plaintiff lawyers are painfully aware, Chapter 74 imposes damage caps on noneconomic damages and on all damages in wrongful death and survival cases.[107] Arbitration may serve as a means to avoid those caps given the current state of the law.[108]

While medical malpractice damage caps appear to be sacrosanct under Texas law as a result of the adoption of § 66, Article 3 of the Texas Constitution, there remains a legal basis to challenge the caps under the United States Constitution.[109]

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101. Frank R. Kent, *The Professional Public Servant*, ATLANTIC MONTHLY, Feb. 1932, at 188.

102. *See, e.g.*, *In re* Lopez, 372 S.W.3d 174, 176 (Tex. 2012) (per curiam).

103. *See id.*

104. *See, e.g.*, *id.* (holding that the exclusive venue of an action to vacate an arbitration award is in the county in which arbitration was held).

105. *See, e.g.*, *id.* at 175.

106. *See, e.g.*, ManorCare Health Servs., Inc. v. Stiehl, 22 So. 3d 96, 98 (Fla. Dist. Ct. App. 2009).

107. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.301, .303 (West 2017).

108. *See id.*

109. TEX. CONST. art. III, § 66(b) ("Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health

A number of state supreme courts have determined that medical malpractice damage caps enacted in their states are unconstitutional because they violate the Equal Protection Clause of the state constitution under the rational basis test.[110] Even the Texas Supreme Court in *Lucas v. United States* determined that the Texas Legislature's purpose in enacting the damage caps did not meet the rational basis test: "[W]e hold it is unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded."[111]

Like the state courts that have applied the rational basis test to declare medical malpractice damage caps unconstitutional on state constitution equal protection grounds, the United States Supreme Court employs the rational basis test in analyzing whether a state statute violates the Equal Protection Clause of the United States Constitution.[112] Using the rational basis test, state courts have also held that medical malpractice damage caps violate the Equal Protection Clause of the United States Constitution.[113]

Although the United States Fifth Circuit Court of Appeals has determined that the Texas damage caps survive constitutional scrutiny under the Equal Protection Clause of the United States Constitution, all the cases declaring damage caps unconstitutional on equal protection grounds should be cited to the arbitrator as a basis for holding that the Chapter 74 damage caps are unconstitutional, despite the Fifth Circuit's holding to the contrary.[114] The arbitrator can reasonably and legitimately determine that the Fifth Circuit simply got it wrong, and the defendant nursing home may have no recourse to set aside that legal conclusion.[115] An arbitration award can only be set aside or modified in the very specific circumstances set forth in

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care or safety, however characterized, that is or is claimed to be a cause of, or that contributes or is claimed to contribute to, disease, injury, or death of a person."); *see, e.g.*, Estate of McCall v. United States, 134 So. 3d 894, 901 (Fla. 2014).

110. *See, e.g.*, *Estate of McCall*, 134 So. 3d at 901 (holding that medical malpractice damage caps violated Equal Protection Clause of the Florida Constitution under the rational basis test); Carson v. Maurer, 424 A.2d 825, 836–38 (N.H. 1980), *overruled on other grounds by* Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707, 721 (N.H. 2007) (holding that the medical malpractice damage caps violated equal protection guaranteed by the New Hampshire Constitution under rational basis test); Arneson v. Olson, 270 N.W.2d 125, 135–36 (N.D. 1978) (holding that the medical malpractice damage caps violated Equal Protection Clause of the North Dakota Constitution). On the other hand, a number of state supreme courts have held damage caps in medical malpractice cases have a rational basis and are constitutional. *See, e.g.*, Dodson v. Ferrara, 491 S.W.3d 542, 561 (Mo. 2016) (en banc); Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43, 71 (Neb. 2003); Mayo v. Wis. Injured Patients & Families Comp. Fund, 914 N.W.2d 678, 691 (Wis. 2018).

111. Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988).

112. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

113. *See, e.g.*, *Arneson*, 270 N.W.2d at 136.

114. *See* Lucas v. United States, 807 F.2d 414, 422 (5th Cir. 1986); *infra* notes 118–21 and accompanying text (citing to arbitrator to determine damage caps unconstitutional on due process and other grounds).

115. *See supra* notes 111–13 and accompanying text (declaring the damage caps unconstitutional on due process and other grounds).

9 U.S.C. §§ 10 and 11. As explained by the United States Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."[116]

> Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] . . . powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted"; the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits." Given this emphasis on extreme arbitral conduct, the old rule of *ejusdem generis* has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. "Fraud" and ***a mistake of law*** are ***not cut from the same cloth***.[117]

Moreover, the arbitration agreement cannot broaden the scope of judicial review of the arbitrator's decision to include a mistake of law. Allowing parties to broaden the scope of judicial review of an arbitrator's decision "opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process' and bring arbitration theory to grief in post arbitration process."[118]

While not likely to be an issue in a nursing home case, this author believes that in other health care liability wrongful death claims, where loss of support and services is significant, there is also a sound argument that can be made to the arbitrator that any attempt to cap economic damages under Chapter 74 is unconstitutional because of the adoption of § 66, Article 3 of the Texas Constitution.[119] Of course, for every argument there is a counterargument.[120]

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116. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584 (2008).

117. *Id.* at 586 (alterations in original) (emphasis added) (quoting 9 U.S.C.A. §§ 10, 11 (West 2019)).

118. *Id.* at 588 (alteration in original) (citation omitted) (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003)).

119. *See* Gavin McInnis, *All-Damages Cap on Health Care Liability Wrongful Death and Survival Claims – My View: The Cap Is Unconstitutional*, 79 TEX. B.J. 620, 620–21 (2016).

120. *See* R. Brent Cooper & Diana L. Faust, *All-Damages Cap on Health Care Liability Wrongful Death and Survival Claims – Our View: The Cap Is Constitutional*, 79 TEX. B.J. 622, 622–23 (2016).

B. Avoiding Chapter 74 Expert Reports and, More Importantly, Time Wasting Interlocutory Appeals

When in state trial court, Chapter 74's prohibition against oral depositions of defendants and written discovery seeking information not related to the nursing home resident's health care until after Chapter 74 reports have been served is a significant pain and hindrance.[121] Even more frustrating is the stay on discovery imposed during an interlocutory appeal of a denial of a motion to dismiss based on the failure to serve an adequate expert report.[122] Arbitration can be an effective way of eliminating these obstacles to working up a case.

First, with regard to Chapter 74 reports, a motion should be filed at the inception of the arbitration asking the arbitrator to hold that Chapter 74 reports are strictly procedural and, because arbitration has its own set of procedural rules regarding discovery,[123] Chapter 74 reports are not required in the arbitration.[124]

As for those time and resource wasting interlocutory appeals, they do not exist in arbitration. Except for the limited circumstances set forth in 9 U.S.C. §§ 10 and 11, there is no judicial review of an arbitrator's decision.[125]

IV. CONCLUSION

Although *Fredericksburg Care Company, L.P. v. Perez* has changed the way arbitration agreements are viewed in Texas medical malpractice cases,

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121. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s) (West 2017); *In re* Huag, 175 S.W.3d 449, 456 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that depositions of parties are not permitted until after service of a Chapter 74 expert report).

122. *See In re* Lumsden, 291 S.W.3d 456, 462 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (holding that the trial court abused its discretion by refusing to stay all discovery, except as specifically authorized by Chapter 74, until after adequacy of expert report issue had been resolved on appeal). *See generally* Michelle Cheng & Tom Jacob, *Pre- and Post-Suit Notice: Medical Authorizations & the 120-Day Expert Report*, 51 TEX. TECH L. REV. 765 (2019).

123. *See, e.g.*, *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/Commercial%20Rules.pdf (last visited Apr. 18, 2019); *Comprehensive Arbitration Rules & Procedures*, JAMS, http://www.jamsadr.com/rules-comprehensive-arbitration/ (last visited Apr. 18, 2019); *Rules of Procedure for Arbitration*, AHLA, https://www.healthlawyers.org/dr/Pages/Arbitration-Rules.aspx (last visited Apr. 18, 2019).

124. *Cf.* Passmore v. Baylor Health Care Sys., 823 F.3d 292, 297 (5th Cir. 2016) (holding that the Chapter 74 expert report requirement is a procedural requirement that is not applicable in federal court). *Compare* Garza v. Scott & White Mem'l Hosp., 234 F.R.D. 617, 623 (W.D. Tex. 2005) (holding that Chapter 74 has no application in federal court), *with* Brown v. Brooks Cty. Det. Ctr., No. C.A. C-04-329, C.A. C-04-375, 2005 WL 1515466, at *2 (S.D. Tex. June 23, 2005) (stating that failure to comply with Chapter 74 did not entitle the defendant to dismiss the claim), Nelson v. Myrick, No. Civ.A.3:04-CV-0828-G, 2005 WL 723459, at *4 (N.D. Tex. Mar. 29, 2005) (stating that Chapter 74 does not apply because Federal Rules of Civil Procedure 26 and 37 apply), *and* McDaniel v. United States, No. Civ.A.SA-04-CA-0314-, 2004 WL 2616305, at *10 (W.D. Tex. Nov. 16, 2004) (stating that Federal Rules of Civil Procedure preempt Chapter 74).

125. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584 (2008).

avenues remain for attacking their validity and reach. Additionally, if a plaintiff is unsuccessful in defeating an arbitration agreement, there is no need to despair because arbitration can still provide a way for plaintiffs to receive a measure of justice, although it may be more limited than in the context of a jury trial.